Supplementary Material

Chapter 7: The Republican Era—Individual Rights/Guns

City of Salina v. Blaksley, 72 Kan. 230 (1905)

James Blaksley was convicted by a trial court in Kansas of carrying a revolver when intoxicated. Blaksley appealed that decision to the Supreme Court of Kansas. He claimed the town law declaring that "the council may prohibit and punish the carrying of fire arms or other deadly weapons, concealed or otherwise," violated the state constitutional right to bear arms.

The Supreme Court of Kansas unanimously rejected Blaksley's appeal. Justice Greene's opinion maintained that the right to bear arms in the state constitution was connected to service in the state militia. What constitutional reason did he give for insisting that no one had a right to bear arms who was not associated with the militia? Is that reasoning sound? An increasing number of state courts in the Republican Era connected the right to bear arms with service in the state militia. What explains that constitutional development?

JUSTICE GREENE

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. . . The power of the Legislature to prohibit or regulate the carrying of deadly weapons has been the subject of much dispute in the courts. The views expressed in the decisions are not uniform, and the reasonings of the different courts vary. It has, however, been generally held that the Legislatures can regulate the mode of carrying deadly weapons, provided they are not such as are ordinarily used in civilized warfare. To this view, there is a notable exception in the early case of *Bliss v. Commonwealth* (1822), where it was held, under a constitutional provision similar to ours, that the act of the Legislature prohibiting the carrying of concealed deadly weapons was void, and that the right of the citizen to own and carry arms was protected by the Constitution, and could not be taken away or regulated. While this decision has frequently been referred to by the courts of other states, it has never been followed. . . . In view of the disagreements in the reasonings of the different courts by which they reached conflicting conclusions, we prefer to treat the question as an original one.

The provision in section 4 of the Bill of Rights "that the people have the right to bear arms for their defense and security" refers to the people as a collective body. It was the safety and security of society that was being considered when this provision was put into our Constitution. It is followed immediately by the declaration that standing armies in time of peace are dangerous to liberty and should not be tolerated, and that "the military shall be in strict subordination to the civil power." It deals exclusively with the military. Individual rights are not considered in this section. The manner in which the people shall exercise this right of bearing arms for the defense and security of the people is found in article 8 of the Constitution, which authorizes the organizing, equipping, and disciplining of the militia, which shall be composed of "able-bodied male citizens between the ages of twenty-one and forty-five years. . . . The militia is essentially the people's army, and their defense and security in time of peace. There are no other provisions made for the military protection and security of the people in time of peace. In the absence of constitutional or legislative authority, no person has the right to assume such duty. In some of the states where it has been held, under similar provisions, that the citizen has the right preserved by the Constitution to carry such arms as are ordinarily used in civilized warfare, it is placed on the ground that it was intended that the people would thereby become accustomed to handling and

using such arms, so that in case of an emergency they would be more or less prepared for the duties of a soldier. The weakness of this argument lies in the fact that in nearly every state in the Union there are provisions for organizing and drilling state militia in sufficient numbers to meet any such emergency.

That the provision in question applies only to the right to bear arms as a member of the state militia, or some other military organization provided for by law, is also apparent from the second amendment to the federal Constitution, which says: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Here, also, the right of the people to keep and bear arms for their security is preserved, and the manner of bearing them for such purpose is clearly indicated to be as a member of a well-regulated militia, or some other military organization provided for by law. Mr. Bishop, in his work on *Statutory Crimes*, in treating of this provision, which is found in almost every state Constitution, says, in section 793: "In reason, the keeping and bearing of arms has reference only to war and possibly also to insurrections wherein the forms of war are, as far as practicable observed." . . .