Supplementary Material

Chapter 7: The Republican Era—Individual Rights/Guns

State v. Kerner, 181 N.C. 574 (1921)

O.W. Kerner, after being accosted by "one Matthews," went to his office to get a pistol. When Kerner returned, he was arrested for violating a local law prohibiting persons from carrying weapons outside of their premises without a license. The trial court directed a not-guilty verdict, on the ground that the local law violated the state constitutional right to bear arms. North Carolina appealed that decision to the Supreme Court of North Carolina.

The Supreme Court of North Carolina declared the gun control law unconstitutional. Chief Justice Clark ruled that persons had a state constitutional right to carry unconcealed ordinary weapons. How did Clark distinguish reasonable regulations from unreasonable regulations? Compare this decision to Lochner v. United States *(1905). Was the same or a similar reasonableness test being used?*

CHIEF JUSTICE CLARK

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[2] The Constitution of this state, section 24, art. 1, which is entitled, "Declaration of Rights," provides, "The right of the people to keep and bear arms shall not be infringed," adding, "nothing herein contained shall justify the practice of carrying concealed weapons or prevent the Legislature from enacting penal statutes against said practice." This exception indicates the extent to which the right of the people to bear arms can be restricted; that is, the Legislature can prohibit the carrying of concealed weapons but no further. This constitutional guaranty [recognizes the] distinction . . . between the "right to keep and bear arms" and the "practice of carrying concealed weapons." The former is a sacred right based upon the experience of the ages in order that the people may be accustomed to bear arms and ready to use them for the protection of their liberties or their country when occasion serves. The provision against carrying them concealed was to prevent assassinations or advantages taken by the lawless; i. e., against the abuse of the privilege.

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The other weapons recited in section 1 of this act, besides "pistol," are "bowie knife, dirk, dagger, slung-shot, loaded cane, brass, iron or metallic knucks or razor or other deadly weapon of like kind." None of these except "pistol" can be construed as coming within the meaning of the word "arms" used in the constitutional guaranty of the right to bear arms. We are of the opinion, however, that "pistol" ex vi termini is properly included within the word "arms," and that the right to bear such arms cannot be infringed. The historical use of pistols as "arms" of offense and defense is beyond controversy.

It is true that the invention of guns with a carrying range of probably 100 miles, submarines, deadly gases, and of airplanes carrying bombs and other modern devices, have much reduced the importance of the pistol in warfare except at close range. But the ordinary private citizen, whose right to carry arms cannot be infringed upon, is not likely to purchase these expensive and most modern devices just named. To him the rifle, the musket, the shotgun, and the pistol are about the only arms which he could be expected to "bear," and his right to do this is that which is guaranteed by the Constitution. To deprive him of bearing any of these arms is to infringe upon the right guaranteed to him by the Constitution.

. . .

The maintenance of the right to bear arms is a most essential one to every free people and should not be whittled down by technical constructions. It should be construed to include all "arms" as were in common use, and borne by the people as such when this provision was adopted. It does not guarantee on the one hand that the people have the futile right to use submarines and cannon of 100 miles range nor airplanes dropping deadly bombs, nor the use of poisonous gases, nor on the other hand does it embrace dirks, daggers, slung-shots and brass knuckles, which may be weapons but are not strictly speaking "arms" borne by the people at large, and which are generally carried concealed. The practical and safe construction is that which must have been in the minds of those who framed our organic law. The intention was to embrace the "arms," an acquaintance with whose use was necessary for their protection against the usurpation of illegal power—such as rifles, muskets, shotguns, swords, and pistols. These are now but little used in war; still they are such weapons that they or their like can still be considered as "arms," which they have a right to "bear."

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It would also be a reasonable regulation and not an infringement of the right to bear arms to prohibit the carrying of deadly weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror, which was forbidden at common law. These from a practical standpoint are mere regulations and would not infringe upon the object of the constitutional guaranty which is to preserve to the people the right to acquire and retain a practical knowledge of the use of fire arms.

It is also but a reasonable regulation, and one which has been adopted in some of the states, to require that a pistol shall not be under a certain length, which if reasonable will prevent the use of pistols of small size which are not borne as arms but which are easily and ordinarily carried concealed. To exclude all pistols, however, is not a regulation, but a prohibition, of arms which come under the designation of "arms" which the people are entitled to bear. This is not an idle or an obsolete guaranty, for there are still localities, not necessary to mention, where great corporations, under the guise of detective agents or private police, terrorize their employees by armed force. If the people are forbidden to carry the only arms within their means, among them pistols, they will be completely at the mercy of these great plutocratic organizations. Should there be a mob, is it possible that law-abiding citizens could not assemble with their pistols carried openly and protect their persons and their property from unlawful violence without going before an official and obtaining license and giving bond?

The usual method when a country is overborne by force is to "disarm" the people. It is to prevent the above and similar exercises of arbitrary power that the people, in creating this government "of the people, by the people and for the people," reserved to themselves the right to "bear arms," that, accustomed to their use, they might be ready to meet illegal force with legal force by adequate and just defense of their persons, their property, and their liberties, whenever necessary. We should be slow indeed to construe such guaranty into a mere academic expression which has become obsolete.

We can have no knowledge of the future except by the past, or, as Patrick Henry said, "The only light by which our feet are guided is the lamp of experience." The constitutional provision which forbids any prohibition upon the people to bear arms and use them effectively by being accustomed to their use should be strictly and stoutly maintained, for we know not when the occasion may again require the assertion of that doctrine which was once familiar throughout this country that "resistance to tyranny is obedience to God," or for the defense of person and property against mobs and violence.

The statute in this case . . . is especially objectionable in that it requires . . . that in order to carry a pistol off his own premises, even openly, and for a lawful purpose, the citizen must make application to the municipal court, if a resident of a town; or to the superior court, if not residing in town, describing the weapon and giving the time and purpose for which it may be carried off his premises and must pay to the clerk of the court the sum of $5 for each permit and must file a bond in the penalty of $500 that he will not carry the weapon except as so authorized. In the case of a riot or mob violence, or other emergency requiring the defense of public order, this would place law-abiding citizens entirely at the mercy of the lawless element. As a regulation even this is void because an unreasonable regulation, and, besides, it

would be void because for all practical purposes it is prohibition of the constitutional right to bear arms. There would be no time or opportunity to get such permit and to give such bonds on an emergency.

On this occasion, the defendant threatened with violence was forced to abandon his property. He went to his place of business where he had the right to keep his pistol, "being on his own premises," and returned with it unconcealed. He was acting in self-defense of his person and in defense of his property. The court below most properly adjudged upon the special verdict that he was not guilty.

JUSTICE WALKER, concurring in result.

JUSTICE ALLEN (concurring)

The right to bear arms, which is protected and safeguarded by the federal and state Constitutions, is subject to the authority of the General Assembly, in the exercise of the police power, to regulate; but the regulation must be reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.

This is, I think, the correct principle, and it appears to me the constitutional privilege is infringed by the act under which the defendant is indicted, as it makes one guilty of a violation of law who carries a pistol off his own premises openly and for a lawful purpose without a permit, and he is required to pay $5 and to give a bond in the sum of $500 before the permit can issue.

No provision is made for an emergency, and no exception in favor of one who carries a pistol off his premises openly, in the necessary defense of his person or property, when he has had no opportunity to secure a permit.

JUSTICE STACY concurs in this opinion.