No. 12-1437

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RAYMOND WOOLLARD, et al.,
Plaintiffs-Appellees
v.
DENIS GALLAGHER, et al.,
Defendants-Appellants

BRIEF AMICUS CURIAE OF PROFESSORS OF LAW, HISTORY, POLITICS, AND GOVERNMENT IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

Appeal from the United States District Court
for the District of Maryland

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RULE 26.1 CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* make the following disclosure statement:

1. Are the *amici* publicly held corporations or other publicly held entities? No, *amici* are individuals.

2. Do the *amici* have any parent corporations? No.

3. Is 10% or more of the stock of any *amici* owned by a publicly held corporation or other publicly held entity? No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation due to the participation of the *amici*.

5. Does this case arise out of a bankruptcy proceeding? No.

/s_____
David T. Hardy
Attorney for Amici

RULE 29 CERTIFICATION

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, *amici* received consent from all parties to file this brief. Pursuant to Rule 29(c)(5), counsel for *amici* state that no party's counsel authored this brief in whole or in part, that the NRA Civil Rights Defense Fund gave financial assistance for the preparation of this brief, and that apart from this no other party, party's counsel, or person other than *amici*, its members, or its counsel, contributed money intended to fund preparation of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions and Statutes

Treatises and Articles

INTRODUCTION

Amici submit this brief in order to place, in full historical context, the authorities invoked in the Brief of *Amici* Legal Historians In support of Appellants and Reversal [hereinafter "Historians Supporting Reversal," or HSR], which contends that carrying of arms outside the home was never meant to be constitutionally protected.

The signatories to HSR stress their credentials as professional historians. But it must be stressed that legal and constitutional history have, unfortunately, for decades been neglected fields by the historical profession and by history departments. In modern universities work in constitutional history is far more likely to be done in law schools than in history departments. And in those colleges and universities where constitutional history is being taught and written about in Colleges of Arts and Sciences it is at least as likely to be done by scholars trained in political science as history. A Ph.D. in history is good training for a potential scholar in constitutional history. It is by no means the only vehicle for developing an ability to do serious and important scholarship in the field. Our understanding of the history of the Constitution and the development of constitutional jurisprudence have been greatly enhanced by the works of scholars whose primary post-graduate training has been in law or political science and not history. Michael Kent Curtis, whose post-graduate training consisted of a law degree at the University of

North Carolina, fundamentally recast the incorporation debate through his meticulous research into the history of the fourteenth amendment and the Reconstruction era.[1] Akhil Amar, whose post-graduate work earned him the J.D. at Yale, has provided a history of the Bill of Rights that asks creative and important questions concerning the linkages between the Bill of Rights originally adopted in 1791 and the Reconstruction Amendments, particularly the 14th adopted in 1868.[2] Mark Graber, who earned a law degree at Columbia University and a Ph.D. in Political Science at Yale, provided a compelling and disturbing look at the *Dred Scott* case.[3] One does not necessarily have to agree with all of the points made in these studies or to argue that they are flawless, to recognize that these are important works in constitutional history written by serious scholars with post-graduate training in fields other than history. These works are only a very small part of the important work in constitutional and legal history that have been done scholars trained outside of history departments.

We also find perturbing the condescending tones with which the "Historians Supporting Reversal" treat those academics who differ with their point of view. It

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[1] Michael Kent Curtis, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986)

[2] Akhil Reed Amar, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998)

[3] Mark A. Graber, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006)

is a tone that is disappointing and quite frankly unworthy of scholars of their stature. A particular target is Prof. Eugene Volokh, of UCLA School of Law, author of three textbooks and seventy law review articles, six of them cited by the United States Supreme Court. Volokh is dismissed as "a legal scholar, not a historian," who presses "historical mythology" to present a "gun rights view of history." HSR" Brief at 15. More broadly, they warn that "reliance on legal scholars over historians can result in inaccurate historical conclusions – a "lawyer's history," rather than a historian's," whereas those "amici offer a historian's expert perspective…" HSR Brief at 3. Historians should be above such condescension.

It appears that "lawyer's history" and "law office history" are being used (much like the term "judicial activism") to identify "those who disagree with me." The lead signatory of the HSR Brief has hurled that slur at a number of historians – even the late Leonard Levy, considered the dean of American constitutional history: "much of the later writings of Leonard Levy show that historians are just as tempted to write law office history as lawyers."[1]

Nevermind that William and Mary's Omohundro Institute of Early American History and Culture called Professor Levy "one of the greatest

[1] http://www.thefacultylounge.org/2012/03/cornell-guest-post-the-coming-fall-of-the-new-originalism.html (second comment).

constitutional historians of the twentieth century,"[2] that History News Network termed him "one of the nation's leading constitutional historians"[3] or that his ORIGINS OF THE FIFTH AMENDMENT won the Pulitzer Prize for history. He is a mere writer of "law office history," because in his ORIGINS OF THE BILL OF RIGHTS (2001) he concluded that the Second Amendment was an individual, not militia, right. *Id.* at 133-49.

Interests of the Amici

Robert J. Cottrol is Professor of Law, of History, and of Sociology at George Washinton University; he holds the Harold Paul Green Research Professorship in Law. He has a Ph.D. in American Studies from Yale, and a J.D. from Georgetown. Among his books are: THE AFRO-YANKEES: PROVIDENCE'S BLACK COMMUNITY IN THE ANTEBELLUM ERA (selected by Choice as an outstanding academic book for 1983), and editor of GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT (Book of the Month selection by the History Book Club), and BROWN V. BOARD OF EDUCATION: CASTE, CULTURE AND THE CONSTITUTION (2003), which won the Langum Project Prize for Historical Literature and was a book of the month selection of the History Book Club.

[2] http://oieahc.wm.edu/uncommon/124/levy.cfm.
[3] http://hnn.us/blogs/entries/29603.html.

Professor Cottrol's writings have been cited by the Supreme Court in *McDonald v. Chicago*, by Justice Thomas' concurrence in *Printz v. United States*, 521 U.S. 898 (1997), and by the Third, Fifth, Ninth, and D.C. Circuits.

Joyce Lee Malcolm holds a doctorate in history and is Professor of Law at George Mason University School of Law. She is the author of seven books and numerous articles that have appeared in legal and historical journals and the popular press. Her book, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT, published by Harvard University Press, was cited three times by the Supreme Court majority in *District of Columbia v. Heller* and once by the plurality in *McDonald v. Chicago*. GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE, also published by Harvard University Press, tracks English laws on self-defense and firearms and their impact on crime in England.

Professor Malcolm is a Fellow of the British Royal Historical Society, and of Robinson College, Cambridge University, and was selected to spend a year at Princeton University as a fellow of the James Madison Program in American Ideals and Institutions.

Alan Charles Kors earned his Ph.D. at Harvard and is the Henry Charles Lea Professor of History at the University of Pennsylvania. He specializes in 17th- and 18th-century European history. He has published several books and many articles on early-modern history, articles on the history of liberal thought, and was

co-author of a work on academic freedom. He was editor-in-chief of the ENCYCLOPEDIA OF THE ENLIGHTENMENT (4 volumes, Oxford University Press, 2002). After Senate confirmation, he served for six years on the National Council for the Humanities, and he has received fellowships from the American Council for Learned Societies, the Smith-Richardson Foundation, and the Davis Center for Historical Studies at Princeton University .

In 2005, at the White House, he received the National Humanities Medal, for "his study of European intellectual thought and his dedication to the study of the humanities." He has served on the Board of Governors of The Historical Society and on the Executive Committee of the American Society for Eighteenth-Century Studies.

Paul A. Rahe is Professor of History at Hillsdale College and is the author of numerous books, including REPUBLICS ANCIENT AND MODERN: CLASSICAL REPUBLICANISM AND THE AMERICAN REVOLUTION (1992), AGAINST THRONE AND ALTAR: MACHIAVELLI AND POLITICAL THEORY UNDER THE ENGLISH REPUBLIC (2008), and MONTESQUIEU AND THE LOGIC OF LIBERTY (2009). He received a Rhodes Scholarship, earned a B.A. from Oxford and a Ph.D. in History from Yale.

Richard E. Morgan is the William Nelson Cromwell Professor of Constitutional and International Law and Government at Bowdoin College, where he teaches constitutional law. He earned a Ph.D. from Columbia University, and

was awarded a Fellowship in Law and Government at the Harvard Law School. He has written a number of books, including THE POLITICS OF RELIGIOUS CONFLICT, THE SUPREME COURT AND RELIGION, DOMESTIC INTELLIGENCE: MONITORING DISSENT IN AMERICA, and DISABLING AMERICA: THE RIGHTS INDUSTRY IN OUR TIME. He has published essays in *Commentary* and served as Contributing Editor to the *City Journal.* He writes regularly on constitutional law for the *Claremont Review of Books*.

Ronald J. Pestritto is Graduate Dean and Professor of Politics at Hillsdale College, where he teaches political philosophy, American political thought, and American politics, and holds the Charles and Lucia Shipley Chair in the American Constitution. He serves as a Senior Fellow of the College's Kirby Center for Constitutional Studies and Citizenship. He is also a Senior Fellow of the Claremont Institute for the Study of Statesmanship and Political Philosophy, and an Academic Fellow of the Foundation for Defense of Democracies. He earned his Ph.D. at Claremont Graduate University. He has published seven books, including WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM, and AMERICAN PROGRESSIVISM.

David Raney is an associate professor of history at Hillsdale College. He received his Ph.D. in history from the University of Illinois. His dissertation, guided by noted historian and biographer Robert W. Johannsen, explores the

activities of the United States Christian Commission, a benevolent association that operated during the American Civil War. Dr. Raney's fields in graduate school included Early America, the United States since 1815, and Britain since 1688.

Jeremy Rabkin is a Professor of Law at George Mason University, where he teaches American constitutional history and international law. He received his Ph.D. in government from Harvard, and was a Professor of Government at Cornell for 24 years. He was recently reconfirmed by the Senate as a Director of the United States Institute of Peace. He is the author of four books, and recently edited JEAN BODIN'S SIX BOOKS OF THE REPUBLIC, which when published will be the first full English edition of that work since 1606.

Mickey Craig chairs Hilsdales's Department of Politics, and holds the William and Berniece Grewcock chair in Politics. He earned a Ph.D. from Claremont. Professor Craig teaches courses in Political Philosophy and American Political Thought, and serves as a Fellow of the John M. Ashbrook Center in Ashland, Ohio.

SUMMARY OF ARGUMENT

The HSR Brief contends that carrying of arms outside the home was never meant to be constitutionally protected.

That is an extraordinary contention. It runs in the face of the clearest evidence of intent, the face of the Second Amendment, which guarantees "the right

of the people to keep *and bear arms*…." It would require this Court to overrule the Supreme Court, which has noted that "At the time of the founding, as now, to 'bear' meant to 'carry.' . . . [T]he carrying of the weapon is for the purpose of 'offensive or defensive action.'" *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008). As we shall demonstrate, the position taken by the "Historians Supporting Reversal" brief is not supported by the historical authorities and events it invokes.

ARGUMENT

I. THE SCOPE OF THE RIGHT TO ARMS IN THE FRAMING ERA

A. There Was Strong Support in the Framing Era(s) for a Right to Carry Arms off One's Real Property.

Considerable support can be found for a right to bear/carry arms off one's own property, both in the period of the framing of the Second Amendment, and in the period of the framing of the Fourteenth Amendment.

1. The Framing of the Second Amendment

The simplest indicator here is the language of the amendment itself, which refers to the right of the people to "keep *and bear* arms." If the framing generation thought only in terms of possession in one's house, they would have been content with guaranteeing the right of the people "to keep arms." As the Supreme Court noted in *Heller*:

> At the time of the founding, as now, "bear" meant to "carry." When used with "arms," however, the term has a meaning the refers to carrying for a particular purpose – confrontation…. From our review of found-era sources,

> we conclude that this natural meaning was also the meaning that "bear arms" had in the 18th century. In numerous instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia. Nine state constitutional provisions written in the 18th century or the first two decades of the 19th enshrined a right of citizens to "bear arms in defense of themselves and the state," or "bear arms in defense of himself and the state. It is clear from those formulations that "bear arms" did not refer only to carrying a weapon in an organized military unit.

554 U.S. at 584 (Authorities omitted).

It is noteworthy that earlier proposals for a right to arms guarantee dealt specifically with bearing arms – a right to keep them presumably being encompassed without mention within that guarantee. Pennsylvania's 1776 Declaration of Rights will be discussed below: it guaranteed "That the people have a right to bear arms for the defence of themselves and the state…." The minority report of the Pennsylvania Federal ratifying convention called for a guarantee "the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game…." J. MCMASTER & F. STONE, EDS., PENNSYLVANIA AND THE FEDERAL CONSTITUTION 422 (1888).

2. The Framing of the Fourteenth Amendment

There are even clearer indicia of intent in connection with the drafting and ratification of the Fourteenth Amendment. *McDonald v. Chicago*, 130 S.Ct. 3020 (2010), recognized the importance of the Second Freedmen's Bureau Act as an antecedent to that Amendment, 130 S.Ct. at 3041, and that Act guaranteed equality of legal rights, "including the constitutional right to bear arms…." 14 Stat. at 176.

The *New York Times* likely invoked that Act when it cited the case of "discharged United States colored soldiers, who had been arrested for carrying arms in violation of State laws, although a law of Congress allows them to do so." *New York Times*, Oct. 26, 1868. An article in the *Chicago Tribune*, December 26, 1866, reported that under South Carolina statutes, "The whites have monopolized all the rights of citizenship, of owning or leasing land, bearing arms for self-defense…." *Id.* at 2. *See also McDonald v. Chicago*, 130 S.Ct. at 3041 (citing Sen. Pomeroy's reference to "the right to bear arms for defense of himself and family and his homestead.").

Justice Thomas' concurrence documented additional references to the Fourteenth Amendment as protecting a right to "bear arms,"[4] to the Slave Codes and Black Codes that took "vicious aim at the rights of free blacks and slaves to speak or to keep and bear arms for their defense," 130 S.Ct. at 3081, and to references to the "right to own and carry fire arms." *Id.* at 3082-83.

B. The Contention that there Was No Framing-Era Support for a Right to Bear Arms Off One's Property Is Untenable.

HSR's argument here is weak at best. There were several Framing era events which are relevant to interpreting the American right to arms. Historians Supporting Reversal examine only the two events that can be made to appear to

[4] 130 S.Ct. at 3075 (Congressional statement that the Amendment would guarantee to a freedman "a defined *status* ... a right to defend himself and his wife and children; a right to bear arms"")

offer support for their desired conclusion. One of the two is a proposal that was never adopted, and the second involves taking a statement out of its historical context. We will deal with the major relevant events in chronological order.

1. Jefferson's Proposal for a Virginia Constitution, and His Proposed Punishment for Poaching.

As Historians Supporting Reversal agree, Thomas Jefferson's proposal was passed over in favor of one drafted by George Mason. HSR Brief at 5. What we really know of Jefferson's thinking is simply this:

- His first draft read "No freeman shall ever be debarred the use of arms." 1 JULIAN P. BOYD, *ET AL.*, THE PAPERS OF THOMAS JEFFERSON 344 (1950).
- His second and third drafts read: "No freeman shall be debarred the use of arms [within his own lands or tenements]." *Id.* at 353, 363.

Jefferson left nothing to describe the significance of the brackets. As we shall see, like many a member of the gentry, he was concerned about poaching and trespassing. But we have no way to tell whether the brackets reflect that he was debating the inclusion of the bracketed language, or was holding it out to readers of his proposal as an option to be taken or passed over, or whether he had some other purpose. Julian Boyd, editor of his papers, describes it as "Jefferson used brackets to indicate that the contents thereof were optional or open to question." *Id*. at 347.

Historians Supporting Reversal next discusses some legislation which Jefferson drafted, describing it in these terms:

> Elsewhere Jefferson evidenced his view that firearms rights did not extend beyond one's property. In a bill he wrote to deal with poaching, Jefferson included a provision restricting the ability to travel armed with a musket outside of the context of militia activity. The proposed law penalized any individual who "bear[s] a gun out of his enclosed ground, unless whilst performing military duty."

HSR Brief at 6.This *seriously* mischaracterizes the bill, which emphatically did not "penalize any individual who 'bear[s] a gun…." The bill prescribed a closed hunting season for deer (with exceptions for, *inter alia,* deer found within enclosed lamd). It prescribed as a *penalty* for *convicted poachers*:

> Whoever shall offend against this act shall forfeit and pay, for every deer by him unlawfully killed, twenty shillings … and moreover shall be bound to their good behavior; and if, within twelve months after the date of the recognizance, he shall bear a gun out of his enclosed ground, unless whilst performing military duty, it shall be deemed a breach of the recognizance….

2 JULIAN P. BOYD, *ET AL.*, THE PAPERS OF THOMAS JEFFERSON 443-44 (1950) [copy attached as App. 3-4]. This was not a definition of a citizen's right to bear arms; it was a punishment, a manner of early condition of probation. It did not apply on the defendant's enclosed land precisely because the deer season it was meant to enforce did not apply there, either. If anything, it is noteworthy because it uses "bear arms" in the context of non-military use, specifically hunting.

2. The Pennsylvania Declaration of Rights of 1776.

While Jefferson's proposal for a constitution did not meet with success, a few months later Pennsylvania adopted a declaration of rights that guaranteed:

> That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

Pennsylvania Declaration of Rights §13 (1776). The Pennsylvania formulation was an early but direct ancestor of the Second Amendment, recognizing a "right of the people" to "bear arms," and for self-defense. The Historians Supporting Reversal Brief does not mention it.

3. The Massachusetts Declaration of Rights of 1780.

The Massachusetts Declaration of Rights recognized that "The People have a right to keep and bear arms for the common defense." Massachusetts Declaration of Rights, §17 (1780). These words reflect two additions to the Pennsylvania model. First, "bear" was expanded to "keep and bear," a measure which would be retained in the Second Amendment. Second, "for the common defense" was added; it bears mention that the first U.S. Senate rejected a similar addition to the Second Amendment.[5]

The Historians Supporting Reversal brief treats the Massachusetts experience as "Massachusetts: No Right To Travel Armed Recognized." This seems remarkable, since the Massachusetts Constitution expressly recognized a

[5] "On motion to amend article the fifth, by inserting these words: 'for the common defense' next to the words 'to bear arms': it passed in the negative." JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (1820). The HSR brief also attempts to construe "keep" as a militia-related, or even militia-limited, term, *contra* both to common usage and to *Heller*. At that, it must concede that militia dragoons and cavalry carried pistols. HSR Brief at 7.

right to "bear arms." The sole evidence cited for this contention is that the town of Williamburgh objected to the "common defense" provision, allegedly "proposed" an "alternative," and the alternative supposedly sought to protect the keeping of (emphasis original in HSR Brief) "Arms **in our houses**." HSR brief, at 8.

None of these conclusions can be justified. Let us place the Williamsburgh document in context, italicizing the portions omitted in the HSR brief:

> *Upon reading the 17th Article in the Bill of Rights. Voted that these words their Own be inserted which makes it read thus; that the people have a right to keep and bear arms for their Own and the Common defense. Voted Nemine Contradic. Our reasons gentlemen for making this Addition are these.*
>
> 1st. that we esteem it an essential privilege to keep Arms in our houses for Our Own Defense and while we Continue honest and Lawfull Subjects of Government we Ought Never to be deprived of them.
>
> *Reas. 2 That the legislature in some future period may Confine all the fire Arms to some publick magazine and thereby deprive the people of the benefit of the use of them.*

OSCAR & MARY HANDLIN, EDS., POPULAR SOURCES OF POLITICAL AUTHORITY 624 (1966). [Copy attached as App. 6] Placed in context, several things become apparent:

- First, the language cited in the HSR brief is *not* the proposed alteration, which had been a change to "for our own as well as the common defense." It is instead an argument supporting that alteration.

- Second, the reference to keeping arms "in our houses" is not expressed as a limitation; rather it is part of an explanation. The town is concerned that if the right to arms is "for the common defense," the government could require all arms to be stored in government arsenals, whereas the people should be able to keep them in their homes. The town of Northampton expressed the same concern regarding "for the common defense," and advanced a similar proposal, seeking "the people have a right to keep and bear arms as well for their own as the common defense." *Id.* at 574. [Copy attached as App. 7].

Placed in context, the Williamsburgh objection undercuts rather than supports the HSR Brief's thesis. The Williamsburgh residents were arguing for a right to keep and, NB, to "bear" arms for "our own defense" as well as for the common defense. The mention of houses comes in the context of the right to keep arms, rather than to bear them, and is a counterpoint to their concern that the legislature might require arms to be stored in its arsenals. It takes extreme editing to convert this into a "limited formulation of the right." HSR Brief at 8.

II. THE HISTORIANS SUPPORTING REVERSAL BRIEF MISCHARACTERIZES THE RIGHT TO BEAR ARMS IN 19TH CENTURY CASE LAW.

The HSR brief suggests that Prof. Eugene Volokh's view that pre-Civil War case law treated open carrying of firearms as constitutionally protected is mere "historical mythology." HSR brief at 15. It cites *State v. Buzzard*, 4 Ark. 18 (1842) as "the orthodox view" and *Bliss v. Commonwealth*, 12 Ky. 90 (1822) as the "outlier," when in fact both cases were outliers; *Buzzard* just happens to be the outlier that HSR prefer.

Bliss held that a concealed weapons ban was unconstitutional since *any* restriction or limitation upon the right to bear arms was impermissible. It generated no additional case law and was eventually overridden by a constitutional amendment.

Buzzard construed a State constitution that guaranteed a right to arms "for the common defense." *See* ARK. CONST.. of 1836, art. II, § 21, as applied to a concealed weapons ban. The court's three judges gave three opinions *seriatim*, of which two hold that the right is guaranteed to the militia, albeit using the traditional definition of the militia as virtually all male citizens, and the third sees the right to arms as including personal defense.[6] It is not surprising that so

[6] One of the better treatments of *Buzzard* is as yet unpublished. *See* Robert Leider, *Our Nonoriginalist Right To Bear Arms*, online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2084805.

fractured an opinion generated almost no case law; after *Heller* and *McDonald* rejected its reasoning, it is unlikely to do so in the future, either.

So what was the "orthodox" antebellum position? It is as Prof. Volokh describes: bans on concealed carry are permissible, because open carry (if anything, a preferred method for the law-abiding) remain unrestricted. Typical of this approach are:

> *State v. Chandler*, 5 La. Ann. 489, 52 Am. Dec. 599 (1850), which upheld Louisiana's ban on concealed carry, noting that a requirement to carry openly "interferes with no man's right to carry arms (to use its words) 'in full open view,' which places men upon an equality. This is a right guaranteed by the Constitution of the United States ...."
>
> *State v. Reid*, 1 Ala. 612 (1840), which uphold Alabama's ban on concealed carry, but added "the legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purpose

---

"Treating *Buzzard* as a collective rights decision overreads the opinions, in my view. Both majority opinions treat "militia" as synonymous with the "able-bodied free white men"; neither suggests that the right to bear arms is limited to only those citizens who are currently enrolled in highly regulated, constantly drilling militia units (i.e., "select militia"). Indeed, Justice Dickerson says that the "militia" is "*necessarily* composed of the people"; unlike the collective rights view, he does not suggest that the "militia" includes only that subset of people whom the government chooses to enroll for military service. And Justice Dickerson's opinion does reject the "states' rights" theory of the Second Amendment, when he writes, "It is not contended that the General Assembly of this State could interfere with any regulations made by Congress, as to the organizing, arming, or disciplining the militia, or in the manner in which that militia are either to keep or bear their arms." Justice Lacy, in dissent, takes a libertarian view of the right to bear arms: he recognizes only the power of the state to regulate the dangerous *use* of weapons."

of defending himself and the state, and it is only when carried openly that they can be effectively used for defense."

Nunn v. State, 1 Ga. 243 (1846), which *did* deal with a handgun ban, of all but the larger handguns, and held it violated the Second Amendment:[7] "The right of the whole people, old and young, men, women, and boys, and not militia only, to keep and bear arms of every description, and not merely such as are used by the militia, shall not be infringed…" The *Nunn* court concluded: "so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*...."

It is noteworthy that *Nunn* and *Chandler* were cited with approval in *Heller*, 554 U.S. at 586 n. 9.

To be sure, there was another view, a decided minority in the antebellum period, but a current of the mainstream in the later 19th century. This originated with *Aymette v. State*, 21 Tenn. (2 Humph.) 154 (1840), which held that the arms

[7] Georgia then had no State right to arms provision. It may be more exact to say that *Nunn* treated the Second Amendment as guaranteeing, rather than creating, a right, and reasoned that the underlying, unwritten, right was equally applicable to a State.

protected by the "bear arms" clause were those "usually employed in civilized warfare," 21 Tenn. at 156-67, "bear" being seen as having military connotations, which allowed bans on carrying daggers, bowie knives, and other nonmilitary arms. (*Aymette's* holding was largely nullified by *Andrews v. State*, 50 Tenn. 141 (1871), which expansively read the broader right to "keep" arms to cover most forms of carrying). *See generally* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 52 TENN. L. REV. 461, 500-504 (1995). *Andrews* was likewise cited with approval in *Heller*, while the Supreme Court described *Aymette* as "an odd reading of the right," which is not "the one we adopt." 554 U.S. at 613.

This approach was popular over the period 1870-1900; we need not devote much space to it since (1) it largely faded out in the 20th century and (2) the approach is inconsistent with the teachings of *Heller* and its focus upon individual self-defense rather than militia functions.

The brief of Historians Supporting Reversal then undertakes to explore arms restrictions in the 19th century Northeast and West, a subject which it suggests has been hitherto neglected. What follows is a *remarkable* display of historical sleight of hand.

- In these regions, this Court is told, "the model of regulation that emerged and gained widespread acceptance allowed for banning the open and concealed carry for handguns and other weapons, as long as one allowed an

exception for cases in which an individual had a reasonable fear of violence." HSR Brief at 19-20.

- An 1836 Massachusetts statute is cited, followed by a "grand jury charge that drew praise in the contemporary press." The grand jury charge stated "In our own Commonwealth, no person may go armed with a dirk, dagger, sword pistol or other offenses weapon, without reasonable cause to apprehend an assault or violence…." HSR Brief at 20.
- The brief argues that "According to this view, the state may ban all carrying of firearms so long as it acknowledged a legal exception where there was a clear and tangible danger…." HSR Brief at 21.
- The HSR brief then lists a number of States which adopted similar statutes. Each statute is quoted as to what action it seemingly forbids, while omitting the context. HSR Brief at 21-22 & n. 38.

The Massachusetts statute and samples of other enactments are attached as App. 18-23. The reason we term this portion of the HSR brief "sleight of hand" is readily apparent. **None of the laws ban or limit the peaceful carrying of weapons**. These are "surety to keep the peace" statutes. If a person carries the listed weapons *and* gives another citizen "reasonable cause to fear an injury, or breach of the peace," that citizen may require him post a bond that he will keep the peace for six months. The statute does not restrict any person unless he creates a

reasonable fear of harm to others. Even if a person does create such a fear, he need not stop carrying arms, he need only avoid creating a breach of the peace.

Arms carrying was nearly universal in early America. *See* CLAYTON E. CRAMER, ARMED AMERICA 201-35(2006). One amusing illustration of this comes from an 1858 article regarding San Francisco. There, theater-goers were expected to "check" their weapons. "If any man declared that he had no weapon, the statement was so incredible that he had to submit to be searched…."[8]

III. THE HISTORICAL REALITIES OF ARMS-BEARING.

A. Alleged Prohibitions on Bearing Arms While Traveling to Militia Musters.

The Historians in Support of Reversal brief asserts that

> However, while Judge Niemeyer extrapolated a right to carry firearms from an unquestioned historical assumption about the way the militia functioned, in fact, states regulated the exercise of this right in a robust manner, including prohibiting militiamen from traveling with an armed weapon to muster or parade. These types of regulations were an uncontroversial exercise of the state's police powers.

HSR Brief at 9. It cites the militia statutes of New Jersey and of New Hampshire. An examination of those statutes shows, however, that they do not restrict traveling to the muster with a loaded (we assume this is the meaning of "armed) firearm. Rather, they regulate how militia function *upon arriving at the muster*, presumably

[8] 2 Hutchins' Illustrated California Magazine 171-72 (1858). Online at http://books.google.com/books?pg=PA171&dq=Bowie+knife&ei=FJkdT4SBCOnPiAKP8JGwCA&id=Y2cdAQAAIAAJ#v=onepage&q=Bowie%20knife&f=false

as a safety measure. See App. 8-11. New Jersey forbade the loading of a firearm at muster, or its discharge within a mile of muster, except upon officers' orders. More narrowly, New Hampshire forbade soldiers and noncoms to appear on parade with a loaded gun. Both are safety precautions while at muster, not restrictions on how one travels to the muster.

B. Militia Arms as Exempt from Civil Execution.

HSR's Brief then notes that militia firearms were frequently exempt from civil execution. This a matter of common sense. Militia laws generally ordered those subject to militia duty to own a firearm. *See, e.g.,* Militia Act of 1792, 1 Stat. 424. Failure to produce it at muster was a court-martial offense. CLAYTON E. CRAMER, ARMED AMERICA 171 (2006) (Georgia "Militiamen could be fined five shillings for failure to be armed at a general muster, or two shillings, six pence at an ordinary muster.") Allowing a creditor to seize a militiaman's militia arm, and render him subject to court-martial, would make little sense.

C. The Statute of Northampton and "Dangerous and Unusual Weapons."

The HSR brief then discusses the 1328 Statute of Northampton, which generally forbade subjects to

> come before the King's Justices, or others of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by day nor by night, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere….

2 Edw. III c. 3. "In no part elsewhere" could not have been literally applied. Tournaments were a major sport for the nobility, and archery with the deadly longbow virtually *the* sport for commoners. Indeed, statutes and proclamations commanded longbow practice, and forbade other sports, so as to leave commoners with no other amusement. A 1511 statute, for example, commanded most men under the age of 40 to "use and exercise shooting in longbows," and to train their sons in such shooting beginning at age 7. It added "that all Statutes heretofore made against them that use unlawful games be put into execution and punishment." *An Act concerning shooting in Longe Bowes*, 3 Hen. VIII c. 3.[9] A later statute extended the maximum age to 60, and specifically outlawed the games of "bowlinge, Coytinge, Cloyshe, Cayles, half bowle, Tennys, Dysing Table or Cardinge." *An Acte for Maytenance of Artyllares and debarringe of unlawful Games,* 33 Hen. VIII c. 9 (1541).

With archery the only allowable outdoor sport, a significant part of the English population (down to seven year olds!) must have spent its spare time traveling while armed. In the colonies, literal application would have been impossible, since colonial governments often *commanded* that their citizens travel armed. 1632 Virginia statutes, for example, commanded that Noe man shall goe or send abroade without a sufficient party well armed," and "Noe man shall goe to

[9] Spelling largely modernized.

work in the grounds without their armes, and centinell upon them." 1 HENING'S VIRGINIA STATUTES AT LARGE 173. A 1639 Newport law was more specific: "noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and none shall come to any public Meeting without his weapon." JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS; THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 139 (1994).[10]

It may be significant that the first recorded enforcement of the Statute of Northamption came three centuries after its enactment, when James II tried to use against a rather quarrelsome gadfly named Sir John Knight,[11] for having walked the streets while armed and having brought guns into a church. This resulted in two rulings from King's Bench. In the first the Chief Justice noted "tho' this statute be almost gone in desuetudinem, yet where the crime shall appear to be malo animo, it will come within the Act (tho' now there by a general connivance to gentlemen to ride armed for their security…."[12] Knight was acquitted, the Chief Justice

[10] The relevance of the Statute of Northampton to the American right to arms is doubtful. *See Simpson v. State*, 13 Tenn. 356, 359-60 (1833) ("But suppose it to be assumed on any ground, that our ancestors adopted and brought over with them this English statute, or portion of the common law, our constitution has completely abrogated it; it says, "that the freemen of this state have a right to keep and to bear arms for their common defence." Article 11, sec. 26. It is submitted, that this clause of our constitution fully meets and opposes the passage or clause in Hawkins, of "a man's arming himself with dangerous and unusual weapons…'"

[11] As distinct from Mr. John Knight, his cousin, whom he caused to be imprisoned. Sir John did not play well with others.

[12] *Rex v. Sir John Knight*, 90 Eng. Rep. 330 (1686).

having ruled that intent to terrify was required: "the meaning of the statute of 2 Edw. 3, c. 3, was to punish people who go armed to terrify the King's subjects."[13] [Copies attached as App. 12-13].

Several things are noteworthy about these rulings:

1. King's Bench notes the statute was "almost gone" in desuetude;[14] enforcement, if it ever existed, must have ceased long before 1686.
2. It notes a "general connivance" (the word then retaining its original Latin meaning, to wink at) for gentlemen riding armed, reinforcing the idea that the statute is hopelessly out of date in the late 17th century.
3. It construed the statute to require an intent to terrify. This seems a commonsense restriction. By 1686, a sword was part of every well-dressed gentleman's suit, and without such a limitation a large part of the population, commoners as well as nobles, would have been in continual violation.

The ruling in *Knight's Case* was invoked in HAWKINS' PLEAS OF THE CROWN to explain the Statute of Northampton. Hawkins first points out that while mere words cannot constitute the crime of affray, "there may be an affray where there is no actual violence, as when a man arms himself with dangerous and

[13] *Sir John Knight's Case*, 87 Eng. Rep., 75 (K.B. 1686).

[14] Desuetude was a civil law concept, its core being that a statute might "fade away," because of long continued nonenforcement. The term is "applied to obsolete practices and statutes." BLACK'S LAW DICTIONARY 449 (6th ed. 1990).

unusual weapons, in such a manner as well naturally cause a terror to the people…." 1 WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 488 (8th ed. 1824) [Copy attached as App. 16]. He then notes that one cannot "excuse the wearing of such armor in public, by alleging that such a one threatened him…." *Id.* at 489. He then observes,

> Fifthly, That no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against this statute by wearing common weapons, or having their usual number of attendants with them for their ornament or defence…. And from the same ground it also follows, that person armed with privy coats of mail, to the intent to defend themselves against their adversaries, are not within the meaning of the statute, because they do nothing *in terrorem populi*.

Id; App. 17. Hawkins' work repeatedly notes that terrifying the people is a required element of the offense, and notes by way of assurance that this protects "persons of quality" (a much broader term than the nobility)[15] who carry common weapons.

CONCLUSION

The Supreme Court in *Heller* accepted that the carrying or bearing of arms

[15] George Washington's Book of Etiquette uses "person of quality" as distinct from the vulgar. "Associate yourself with Men of good Quality if you Esteem your own Reputation," "Speak not in an unknown Tongue in Company but in your own Language and that as those of Quality do and not as the Vulgar," "If a Person of Quality comes in while your Conversing it's handsome to Repeat what was said before." See http://www.pbs.org/georgewashington/milestones/index3.html

was constitutionally protected. The very face of the Second Amendment – "keep and bear arms" – makes this apparent. As *Heller* ably documents, the bearing or carrying of arms was recognized as constitutionally protected in the early Republic, and was valued by the framing generations of Americans. The authorities and events cited by the brief of the Historians Supporting Reversal, when placed in their true context, do not argue otherwise. Early 19th century case law allowed regulation of concealed carry, but only because open carry was unregulated, so that the regulations affected only one manner of carry for self-defense. Thomas Jefferson did *not* propose to outlaw carrying of firearms off one's own land; he proposed that only as a penalty for convicted poachers. State law did *not* regulate carrying loaded firearms while traveling to a militia muster, but only while at the muster. The State laws cited as supposedly forbidding carry of firearms do nothing of the sort, and only allow a person reasonably fearing attack to require the carrier to post a peace bond. *Amici* believe that both *Heller* and a fair reading of history support affirmance.

Respectfully submitted this 6th day of August, 2012

s/_____
David T. Hardy
Counsel for the Amici

Certificate of Compliance With Fed. R. App. P. 32(a)(7)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A) and (B) because it contains 6.956 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word in Times New Roman 14 point type.

s/_____
David T. Hardy
Dated: August 6, 2012

Certificate of Service

I hereby certify that I have filed the foregoing electronically this 6th day of August, 2012, using the Court's CM/ECF system, which will automatically provide service to counsel for all parties.

/s/_____
David T. Hardy

APPENDIX

THE PAPERS OF

Thomas Jefferson

Volume 2 · 1777 to 18 June 1779

Including the Revisal of the Laws, 1776-1786

JULIAN P. BOYD, EDITOR

LYMAN H. BUTTERFIELD AND MINA R. BRYAN,

ASSOCIATE EDITORS

PRINCETON, NEW JERSEY

PRINCETON UNIVERSITY PRESS

1950

) time, writs of restitution

sed save as indicated below.

Act adds: "or from any person
g through or making a tempo-
within the same."
Act includes a final clause put-
ito effect 1 Jan. 1787.

of the Horned Cattle

that the driving of cattle
any part thereof, if it be
to another of the same
leemed a nuisance, unless
of a county, wherein the
bill of health, signed by
ining the number of the
their sexes, flesh marks
hem to be free from dis-
luce such bill of health,
at the like requisition, if
a Justice, that he hath
listempered. Such bill of
before two disinterested
stice, shall have viewed
distemper. A freeholder
nerced.[1] If the cattle ap-
he owner may impound
ffer them to escape from
tified that they may be
e Justice, or some other,
fact, shall, by his order,
cases, with the hides on,
empted to take them up
p. Those who shall be
eceive five shillings for
county wherein it shall
der who shall refuse or
ery one shall so restrain
r his care, as that they
they belong; and when

they die shall bury them with their hides in manner aforesaid, and knowingly offending in either of those instances shall be amerced.[3]

Report, p. 31. MS (ViU); clerk's copy. Text of the Act as adopted is in Hening, XII, 171-2.

Bill presented by Madison 31 Oct. 1785, passed by House 30 Nov., amended by Senate 7 Dec., and amendment accepted by House the next day (JHD, Oct. 1785, 1828 edn., p. 12-15, 51, 65, 75, 76, 133). Act as adopted agrees with Bill as proposed save for differences indicated below. See Act of 1766 for preserving the breed of cattle (Hening, VIII, 245-50).

[1] The Act adds: "by the justice granting such warrant, in any sum not exceeding twenty five shillings."

[2] The Act adds: "in the sum of five shillings for every head so ordered to be buried."

[3] The Act adds: "in the sum of twenty shillings for every head they shall neglect so to bury." The Act has an additional clause putting it into effect 1 Jan. 1787.

42. A Bill for Improving the Breed of Horses

Be it enacted by the General Assembly, that no person shall suffer a stoned horse, of the age of two years, whereof he is owner, or hath the keeping, to run at large, out of the inclosed ground of the owner or keeper; and whosoever shall wilfully or negligently do so, after having been admonished to confine such horse, shall forfeit and pay five pounds, to him who will sue for it, and double that sum for any such transgression after one conviction; and if, after a second conviction, the same horse be found so running at large, it shall be lawful for the person who will take him up to retain him to his own use.

Report, p. 31. MS (ViU); clerk's copy. Text of Act as adopted is in Hening, XII, 172.

Bill presented by Madison 31 Oct. 1785, passed by House 29 Nov., and approved by Senate 3 Dec. (JHD, Oct. 1785, 1828 edn., p. 12-15, 51, 62, 70, 132). Act as adopted agrees with Bill as proposed save in the addition of a clause putting it into effect 1 Jan. 1787. This Bill is a revision of the 1748 Act to restrain the keeping too great a number of horses and mares, and for amending the breed (Hening, VI, 118-20). The preamble of the Act of 1748 stated that "the keeping too many horses or mares, by persons who have no freehold . . . and suffer the same to run at large upon the lands of other persons, is not only prejudicial to the breed of horses, but also to the stocks of cattle, and sheep, of the freeholders of this colony."

43. A Bill for Preservation of Deer

Be it enacted by the General Assembly, that it shall not be lawful for any person to kill, hunt, or course any wild deer whatever, not being more than twelve months old, or in any year called bissextile or leap year; or to kill, hunt or course in any other year, a wild buck, after the first day of December, and before the first day of August, or a wild doe, between the first day of January, and the first day

of October following, unless such deer, at the time, be found within the inclosed land of such person, or be wanted for food, on the westside of the Alleghany ridge of mountains. Whosoever shall offend against this act, shall forfeit and pay, for every deer by him unlawfully killed, twenty shillings, one half thereof to the use of the commonwealth, and the other half to the informer; and moreover, shall be bound to their good behaviour; and, if, within twelve months after the date of the recognizance he shall bear a gun out of his inclosed ground, unless whilst performing military duty, it shall be deemed a breach of the recognizance, and be good cause to bind him a new, and every such bearing of a gun shall be a breach of the new recognizance and cause to bind him again.

Report, p. 32. MS (ViU); clerk's copy.

Bill was presented by Madison on 31 Oct. 1785, read twice, and committed to whole House, but no further action was taken on it (JHD, Oct. 1785, 1828 edn., p. 12-15). See the Act of 1738 on this subject and its amending Act of 1772 (Hening, v, 60-3; VIII, 591-4). These early conservation measures were made necessary, as stated in the preamble to the amending Act of 1772, by reason of "many idle people making a practice, in severe frozen weather, and deep snows, to destroy deer, in great numbers, with dogs, so that the whole breed is likely to be destroyed in the inhabited parts of the colony." This Act forbade the killing of any deer from 1772 to 1 Aug. 1776 and provided severe penalties for violations, including fines and whippings.

44. A Bill for Preventing Frauds by the Dealers in Flour, Beef, Pork, Tar, Pitch and Turpentine

Be it enacted by the General Assembly, that flour, beef, pork, tar, pitch and turpentine, before they be shipped for exportation, or sold, or bartered, shall be inspected, and the vessels containing them shall be stamped, in the manner herein after directed, by one of the persons whom the county courts shall appoint, residing in their respective counties, and not being owners of merchant mills, or employed in them, nor dealing in any of the commodities subject to their examination; which appointment shall be made, with open doors, in August or September, annually, or at such other time as it may be necessarily required. The inspector, having in the court of his county given assurance of his fidelity to the commonwealth, and taken an oath to execute his office faithfully and impartially, shall attend at such time and place as the owner of the commodity shall appoint; such place, if the commodity be brought from any other state, being a public landing; and the inspector, if he judge the commodity inspected to be of such quality, and it be packed, or filled, preserved, and secured, in such manner as are herein after

THE POPULAR SOURCES OF POLITICAL AUTHORITY

DOCUMENTS ON
THE MASSACHUSETTS CONSTITUTION
of
1780

EDITED WITH AN INTRODUCTION
by
OSCAR AND MARY HANDLIN

THE BELKNAP PRESS OF
HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts
1966

the Welfare of Generations Yet unborn—We further Considered the Religious Qualification and propose that Wherever the Christian Religion is Mentioned in this Constitution the word Protestant be substituted in the room of Christian,—We also propose that the Alarm List, and Train Band above Sixteen years of age chuse Captains and Subalterns——

After the Consideration of the above Objections the Question was put Whether the Town will accept of the Constitution with the above Alterations——

In the Affirmative 40
Negative 13

Honored Sir,—We have Stated our Objections and given our Reasons, on the Whole it appears to us that the Constitution in the Present form is Rather too Arbitrary the People are now Contending for Freedom—and we heartily wish they might not only Obtain it—but keep it in their own Hands.——

Wilbraham June 7th 1780

John Hitchcock
James Warrinner Selectmen of Wilbraham

Williamsburg (276/73)

The Town of Williamsburgh begs leave to make the following Alterations in the Constitution published for the Approbation of the inhabitants of this State.——

May 8th 1780

at A Town Meeting legally warned and met According to adjournment present Sixty five Voters. Upon reading the 17th Article in the Bill of Rights. Voted that these words their Own be inserted which makes it read thus; that the people have a right to keep and to bear Arms for their Own and the Common defence.

Voted Nemine Contradic.——

Our reasons gentleman for making this Addition Are these.

1st that we esteem it an essential priviledge to keep Arms in Our houses for Our Own Defence and while we Continue honest and Lawfull Subjects of Government we Ought Never to be deprived of them.

Reas. 2 That the legislature in some future period may Confine all the fire Arms to some publick Magazine and thereby deprive the people of the benefit of the use of them

and will leave it in the power of the ordinary legislature to take away the sacred right of the subject to trial by jury in more instances than they would venture to do, if the whole fifteenth article should be dropt, and wholly expunged from the constitution As it is therefore subject to great and various exceptions we shall not presume to propose any correction to that article, but submit it to the wisdom of the full convention to provide a much better security to the subjects of this state, of their invaluable right and privilege of a trial by a jury of the vicinage, in all their controversies and suits concerning property real and personal than can be secured to them by that article in its present dress.

We also judge that the people's right to keep and bear arms, declared in the seventeenth article of the same declaration is not expressed with that ample and manly openness and latitude which the importance of the right merits; and therefore propose that it should run in this or some such like manner, to wit, The people have a right to keep and bear arms as well for their own as the common defence. Which mode of expression we are of opinion would harmonize much better with the first article than the form of expression used in the said seventeenth article.

We except to the first article of the chapter intitled the Senate, as setting the number of that branch too low. We conceive that forty men after nine or seven shall be detached from them to constitute a Council for the Governor, will not be a sufficient ballance for the house of Representatives; a small number of men altho in no wise dependant are exposed to be borne down or worried out by a great body of men such as the house of Representatives will and ought to be. We therefore propose that the Senate consist of the number of Sixty at the least before the said draught of Counsellors. No one need be apprehensive of any great charges being caused by an augmentation of the number, for they will rarely perhaps never sit but when the whole General Assembly will be sitting. And we see no reason why the pay of a Senator ought to be more than that of a representative, they are not to come in the place of the hebdomadal council of quondam Governors. It was their sittings which created an enormous expence to the Government. We have fresh in mind that the Commons in the long parliament bore down the house of Lords chiefly by reason of the Lord's being much inferior in number to the Commons. Much might be said in favour even of a greater number than sixty in case the Council are to be drafted from that number; but we forbear lest we should be tedious.

STATUTES

OF THE

STATE OF NEW JERSEY.

REVISED AND PUBLISHED

Under the authority of the Legislature.

TRENTON:

PRINTED BY PHILLIPS & BOSWELL.

1847.

battalion, or squadron to which such company or troop may belong, for such neglect or refusal he shall be cashiered, or fined, at the discretion of a general court martial, in any sum not exceeding one hundred dollars.

Desertion.

43. *And be it enacted*, That if any militiaman shall desert while he is on a tour of duty, he shall be fined in any sum, not exceeding one hundred dollars, for every such offence, or may be imprisoned for any term, not exceeding two months, at the discretion of a regimental court martial; and if a noncommissioned officer, he shall also be degraded and placed in the ranks.

Loaded guns prohibited.

44. *And be it enacted*, That it shall not be lawful for any noncommissioned officer or private to come on parade with a loaded or charged musket, gun, rifle, fusee, or pistol, nor to discharge any firearms within one mile of the place of parade, on any day that they shall be ordered out for improvement or inspection, without an order or permission from a commissioned officer; and if any noncommissioned officer or private shall so load or charge, or fire or discharge, any firearms without such order or permission, he shall forfeit one dollar for every offence, and the orderly sergeant of the company is hereby directed to read this section immediately after calling the roll of the company; and the commissioned officers are hereby enjoined to cause the names of the persons who shall offend to be returned to the regimental court martial.

Time of military discipline.

45. *And be it enacted*, That the militia of this state shall be considered to be under military discipline from the rising until the setting sun of the same day that they shall be ordered out for improvement or inspection, and that no officer, noncommissioned officer, or private, belonging to the same, during the time aforesaid, shall be subject to be arrested on any civil process.

Time of exercise.

46. *And be it enacted*, That the militia, on the days of exercise, may be detained under arms on duty in the field six hours; *provided*, they are not kept above three hours under arms at any one time, without allowing them a proper time to refresh themselves.

Spirits prohibited.

47. *And be it enacted*, That any person who shall bring any kind of spirituous liquors to the place of exercise, or within one mile thereof, for the purpose of retailing, shall forfeit such liquors for the use of the poor belonging to the city or township where such exercise is had, and the commanding officer of the regiment, battalion, squadron, or company, is charged with the execution of this article.

Rules of discipline.

48. *And be it enacted*, That the rules of discipline for the militia of this state, shall be the same at all times as those established by congress for disciplining the regular troops of the United States.

To be published.

49. *And be it enacted*, That the commander-in-chief be, and he

REVISED STATUTES

OF THE

STATE OF NEW HAMPSHIRE,

Laws, Statutes, etc.

PASSED DECEMBER 23, 1842.

TO WHICH ARE PREFIXED

THE CONSTITUTIONS

OF THE UNITED STATES AND OF THE STATE OF NEW HAMPSHIRE.

NEW EDITION.

COMPRISING ALL THE LAWS PASSED TO JUNE, 1850.

CONCORD:

PUBLISHED BY JOHN F. BROWN.

1851.

CHAPTER 80.

OF FINES FOR NON-APPEARANCE AND DEFICIENCIES OF EQUIPMENT.

SECTION 1. If any non-commissioned officer or private after due notice shall unnecessarily neglect to appear at any training, inspection or review, or shall be at any time absent from his guard, platoon or company without leave from the captain before such company shall be dismissed, he shall pay a fine of three dollars at each regimental muster and two dollars at each company inspection or training.

SEC. 2. If any non-commissioned officer or private of cavalry, artillery, light infantry, grenadiers or riflemen shall after due notice appear at any training, inspection or review without the uniform of his company, he shall pay a fine of three dollars at each regimental muster and two dollars at each company inspection or training.

SEC. 3. Every non-commissioned officer and private who shall appear on parade not completely equipped according to law, shall pay the following fines for the equipments with which he shall not be provided, to wit: a gun, eighty cents; iron or steel ramrod, twenty cents; bayonet, scabbard and belt, twenty-five cents; rifle, one dollar; pistol, forty cents; sword, forty cents; two spare flints, ten cents; one box containing not less than twenty-five percussion caps, ten cents; priming wire and brush, ten cents; cartridge box, twenty-five cents; knapsack, twenty cents; canteen, ten cents; valise, twenty cents; holsters, twenty cents; powder flask or bullet pouch, twenty-five cents.

SEC. 4. No non-commissioned officer or private shall be deemed legally provided with any article of equipment, if the same shall be of bad quality, unserviceable or not such as the law requires, and the rejection of any such article by the inspecting officer shall be evidence of deficiency of the same.

SEC. 5. If any non-commissioned officer or private shall neglect to have his gun and bayonet, or rifle or pistols clean and in good order, he shall pay a fine of fifty cents.

SEC. 6. If any non-commissioned officer or private shall come on parade with his musket, rifle or pistol loaded with powder and ball, slugs or shot, he shall pay a fine of two dollars.

REX versus SIR JOHN KNIGHT. Post, p. 40.

Information for going to church armed.

Information for going to church with pistols, &c. contra stat. 2 Ed. 3, of Northampton.

Winnington pro defendente. This statute was made to prevent the people's being oppressed by great men; but this is a private matter, and not within the statute. Vide stat. 20 R. 2.

C. J. This offence had been much greater, and farther laid at common law. But tho' this statute be almost gone in desue-[39]tudinem, yet where the crime shall appear to be malo animo, it will come within the Act (tho' now there be a general connivance to gentlemen to ride armed for their security); but afterwards he was found, non guilty.

ROBINSON AND STROUD. Ante p. 15.

Nolle prosequi.

Hollis. This case differs from *Heydon's* case; for here the jury have gone contrary to evidence. 3 Cro. 260, *Miles's* case.

Saint. 157, and Cro. , *Wake and Bishop* come not up to our case, which is on a nolle prosequi.

Pollexfen contra. Cited *Twhaytes and Greenway's* case in B. R. and that it is in the plaintiff's power to help it by nolle prosequi.

Rall. Error, 784, 785. Vide two cases there in an ejectment for a term, and a fishery. So in an action for words, if some are incertain, a nolle prosequi will help the other.

C. J. This differs from *Heydon's* case; where several damages are given by several juries, there the release of the one, and election of the better damage, is good. But where one jury assess several damages, the verdict is bad.

An insufficient verdict is not curable; and the cases cited are not in point; for in them the fault is in the declaration; but here the declaration is good, and the fault in the verdict.

Wythens, Holloway, and Wright contra pro quer'.

Judgment pro quer'.

Order to provide for a bastard-child: exception was taken, that is doth not appear in the order, that he is chargeable to the parish, or likely to be so. 1 Cro. 36. Sid. 222, quash'd.

REX *versus* DAVIES.

Felonica interfectio implies murder in a pardon. Q.

Indicted of felony and murder, and pray'd to have his pardon allow'd.

Per Wythens and Holloway. Felonica interfectio is well enough, tho' murdrum be omitted.

C. J. contra. Manslaughter is felonica interfectio, but at another day (the Chief Justice being absent) it was allowed.

Comparuit ad diem pleaded. Clark of the rules gives a day by rule.

Per Aston and other clerks, A default de record cannot be entred without a rule given, and notice; the like in bail.

[40] Per C. J. An attaint lieth against a jury for giving excessive damages.

This term a new order was made per Cur', that all orders to be spoke to, shall be put in the paper and copies given, and not to be spoke to the two last days of the term.

C. J. When a man proceeds both criminally and civilly upon the same cause of

An *information* lies, both at common law and on the ſtatute 2. *Edw.* 3. c. 3. for going armed, to the terror of the public.

AN INFORMATION was exhibited againſt him by THE ATTORNEY GENERAL, upon the ſtatute of 2. *Edw.* 3. c. 3. which prohibits "all perſons from coming with force and arms "before the king's juſtices, &c. and from going or riding armed "in affray of peace, on pain to forfeit his armour, and ſuffer im-"priſonment at the king's pleaſure." This ſtatute is confirmed by that of 20. *Rich.* 2. c. 1. with an addition of a farther puniſhment, which is to make a fine to the king.

S C Comb. 38. 40. Dalt. 130. F. N. B. 249. 2. Bulſt. 330. Cromp. 64. Fitzg. 47. 65. 10. Mod. 121. 337. 358. 409. 1. Ld. Ray. 347. 682. 2. Ld. Ray. 1039. 2. Stra. 828. 1. Hawk. P. C. 267. 2. Hawk. P. C. 369.

The

Michaelmas Term, 2. Jac. 2. In B. R.

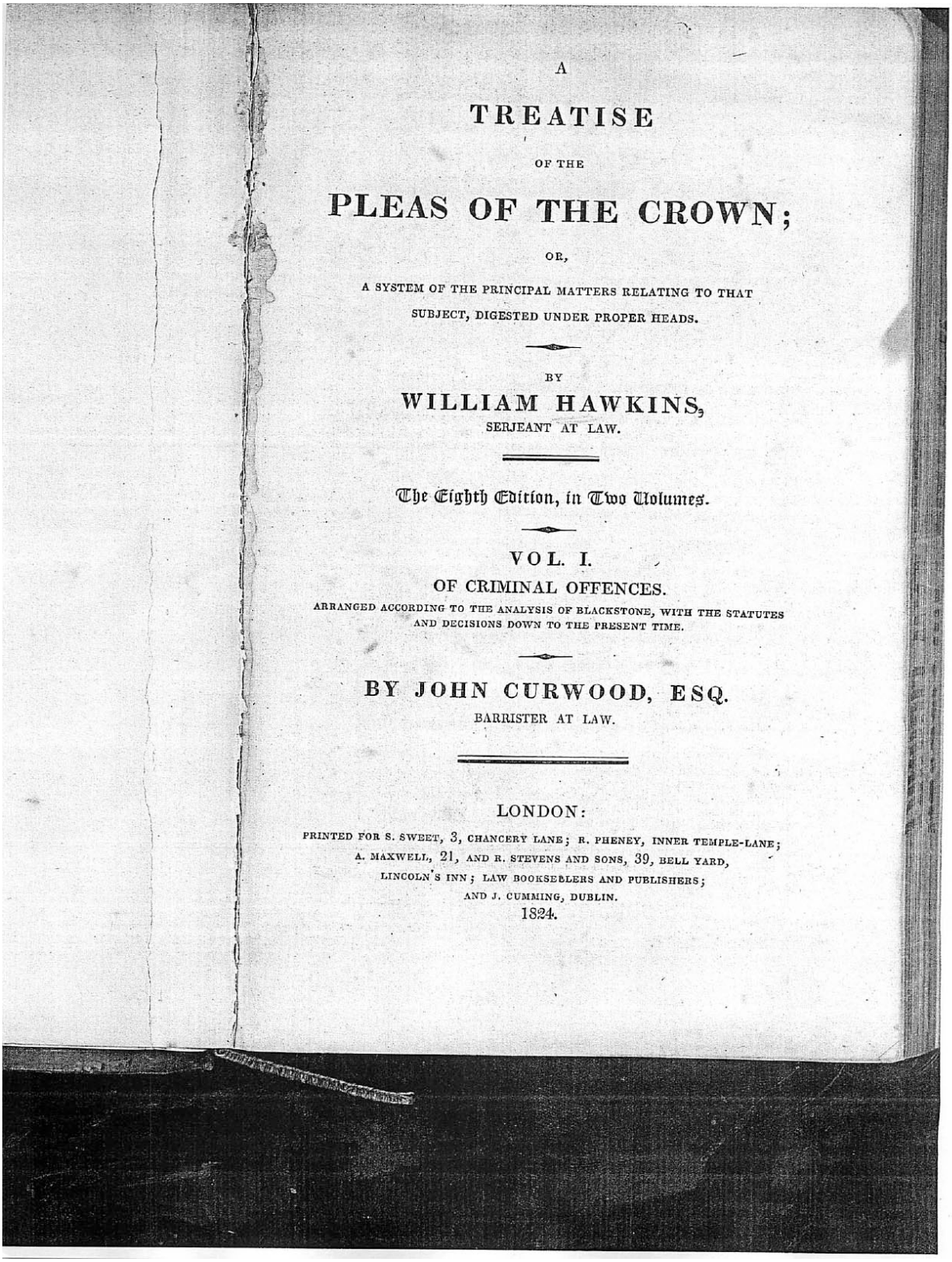
SIR JOHN KNIGHT'S CASE.

The information ſets forth, that the defendant did walk about the ſtreets armed with guns, and that he went into the church of *St. Michael*, in *Briſtol*, in the time of divine ſervice, with a gun, to terrify the king's ſubjects, *contra formam ſtatuti.*

This caſe was tried at the bar, and the defendant was acquitted (*a*).

* THE CHIEF JUSTICE ſaid, that the meaning of the ſtatute of 2. *Edw.* 3. c. 3. was to puniſh people who go armed to terrify the king's ſubjects. It is likewiſe a great offence at the *common law*, as if the king were not able or willing to protect his ſubjects; and therefore this act is but an affirmance of that law; and it having appointed a penalty, this Court can inflict no other puniſhment than what is therein directed.

* [118]



A

TREATISE

OF THE

PLEAS OF THE CROWN;

OR,

A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS.

BY

WILLIAM HAWKINS,
SERJEANT AT LAW.

The Eighth Edition, in Two Volumes.

VOL. I.

OF CRIMINAL OFFENCES.

ARRANGED ACCORDING TO THE ANALYSIS OF BLACKSTONE, WITH THE STATUTES AND DECISIONS DOWN TO THE PRESENT TIME.

BY JOHN CURWOOD, ESQ.

BARRISTER AT LAW.

LONDON:

PRINTED FOR S. SWEET, 3, CHANCERY LANE; R. PHENEY, INNER TEMPLE-LANE; A. MAXWELL, 21, AND R. STEVENS AND SONS, 39, BELL YARD, LINCOLN'S INN; LAW BOOKSELLERS AND PUBLISHERS; AND J. CUMMING, DUBLIN.

1824.

Sect. 6. However, it seems that such a recognizance shall not only be forfeited for such actual breaches of the peace, for which a recognizance for the peace may be forfeited, but also for some others, for which such a recognizance cannot be forfeited; as for going armed with great numbers to the terror of the people, or speaking words tending to sedition, &c. and also for all such actual misbehaviours which are intended to be prevented by such a recognizance, but not for barely giving cause of suspicion of what perhaps may never actually happen.

2 H. 7. 2. C. Eliz. 86. Moor, 249. 2 Roll. 228. 150. 199. C. Car. 499. 2 Leo. 160. Godb. 622. 22. Lamb. 116. 118. C. Jac. 412.

It may be discharged on motion on producing prosecutor's consent, verified by affidavit. Hardwicke's cases, 58. Or consenting by Counsel. 1 Burr. 703.

2. *Affrays.*

In treating of affrays, I shall consider,

1. What shall be said to be an affray.
2. How far it may be suppressed by a private person.
3. How far by a constable.
4. How far by a justice of peace.
5. In what manner the several kinds of affrays may be punished.

As to the First Point, *viz.* What shall be said to be an affray.

Sect. 1. It is said, that the word "affray" is derived from the French word *effraier*, to terrify, and that, in a legal sense, it is taken for a public offence to the terror of the people. From this definition it seems clearly to follow, that there may be an assault which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned; in which case it cannot be said to be to the terror of the people; and for this cause such a private assault seems not to be inquirable in a court leet, as all affrays certainly are, as being common nuisances.

3 Inst. 158. Dalt. c. 8. Lamb. 125, 126. 4 H. 6. 10. 3 Ed. 4. 5.

Sect. 2. Also it is said, that no quarrelsome or threatening words whatsoever shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth, that the constable may, at the request of the party threatened, carry the person, who threatens to beat him, before a justice, in order to find sureties.

23 Ed. 4. 45. Dalt. c. 8. Lamb. Constable, 14.

Sect. 3. Also it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight, &c. (1)

Popham, 158. 3 Inst. 158. 1 Sid. 186. 1 Keb. 694. Hob. 120. 215. 2 R. Abr. 78. 1 Burr. 316. Carr & Hankey.

Sect.

(1) Challenging another to fight on account of money won by gaming is, by st. 9 Anne, c. 14. made a forfeiture of all the personal estate and imprisonment for two years: vide ante, p. 116.

Lamb. 126. 3 Inst. 160. 76. 2 R. Abr. 78. Summary, 137.

Sect. 4. But granting that no bare words, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain, that in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is strictly prohibited by many statutes.

By 2 Edw. 3. it is enacted, "That no man, great nor small, "of what condition soever he be, except the king's servants in "his presence, and his ministers in executing of the king's pre- "cepts, or of their office, and such as be in their company assist- "ing them, and also upon a cry made for arms to keep the peace, "and the same in such places where such acts happen, be so "hardy to come before the king's justices, or other of the king's "ministers doing their office, with force and arms, nor bring no "force of affray of peace, nor to go nor ride armed by night nor "by day, in fairs, markets, nor in the presence of the justices or "other ministers, nor in no part elsewhere, upon pain to forfeit "their armour to the king, and their bodies to prison, at the "king's pleasure. And that the king's justices in their presence, "sheriffs, and other ministers in their bailiwicks, lords of fran- "chises, and their bailiffs in the same, and mayors and bailiffs of "cities and boroughs, within the same cities and boroughs, and "borough-holders, constables and wardens of the peace within "their wards, shall have power to execute this act: and that the "justices assigned, at their coming down into the country, shall "have power to inquire how such officers and lords have exer- "cised their offices in this case, and to punish them whom they "find that have not done that which pertained to their offices;" and this statute is further enforced by 7 Rich. 2. c. 13. and 20. Rich. 2. c. 1.

And in the exposition of it the following points have been holden:

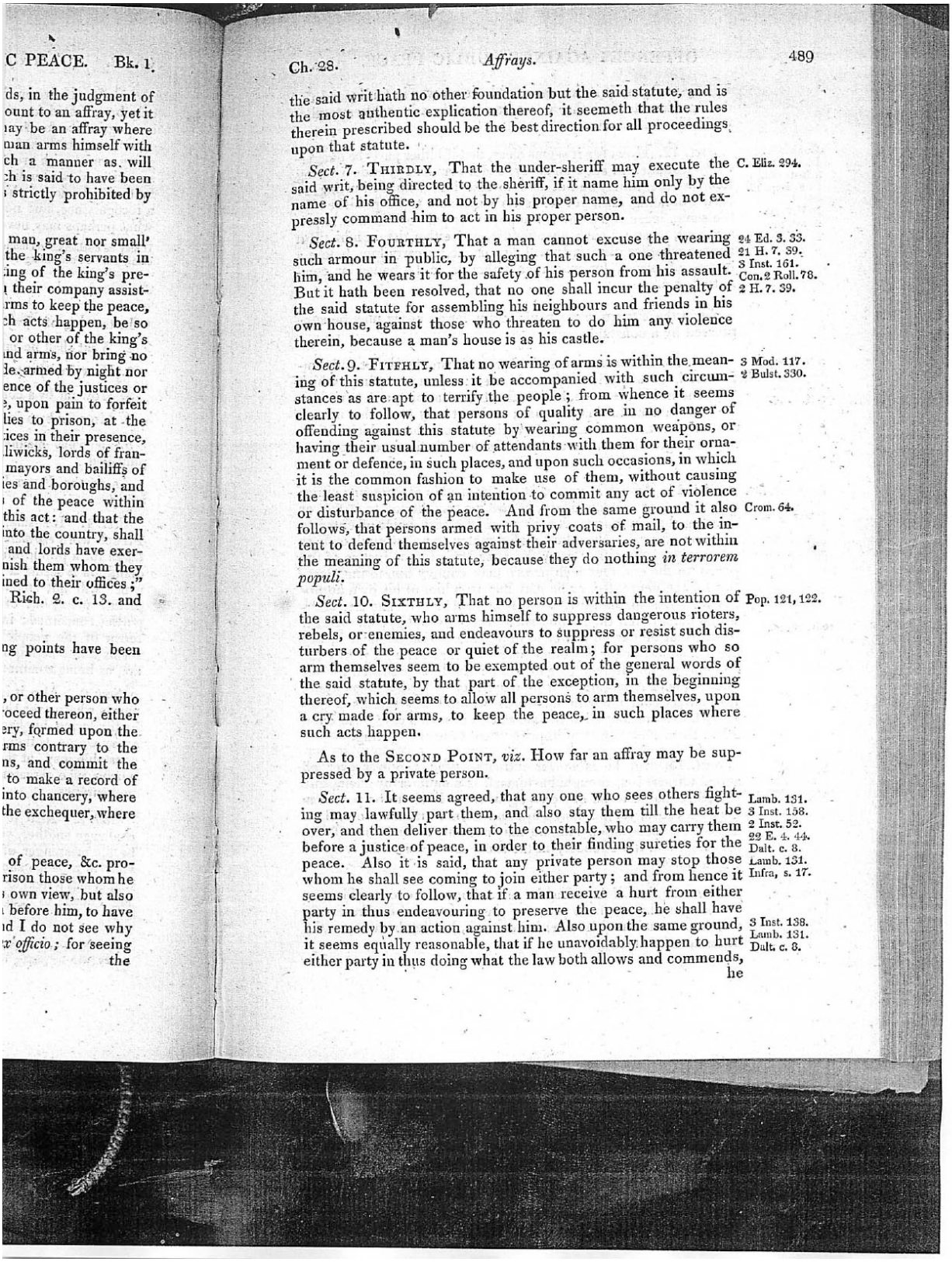
F. N. B. 249.

3 Inst. 161. Dalt. c. 22. Lamb. 168, &c. Dalis. 23. 2 Buls. 330.

Sect. 5. First, That any justice of peace, or other person who is empowered to execute this statute, may proceed thereon, either *ex officio*, or by force of a writ out of chancery, formed upon the statute, and that if he find any person in arms contrary to the form of the statute, he may seize the arms, and commit the offender to prison; and that he ought also to make a record of his whole proceeding, and certify the same into chancery, where he proceeds by force of the said writ, or into the exchequer, where he proceeds *ex officio*.

C. Eliz. 294. Con. Lamb. 170.

Sect. 6. Secondly, That where a justice of peace, &c. proceeds upon the said writ, he may not only imprison those whom he shall find offending against the statute in his own view, but also those who shall be found, by an inquest taken before him, to have offended in such manner in his absence. And I do not see why he may not do the same where he proceeds *ex officio*; for seeing the



C PEACE. Bk. 1.

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the said writ hath no other foundation but the said statute, and is the most authentic explication thereof, it seemeth that the rules therein prescribed should be the best direction for all proceedings upon that statute.

Sect. 7. THIRDLY, That the under-sheriff may execute the said writ, being directed to the sheriff, if it name him only by the name of his office, and not by his proper name, and do not expressly command him to act in his proper person. C. Eliz. 294.

Sect. 8. FOURTHLY, That a man cannot excuse the wearing such armour in public, by alleging that such a one threatened him, and he wears it for the safety of his person from his assault. But it hath been resolved, that no one shall incur the penalty of the said statute for assembling his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man's house is as his castle. 24 Ed. 3. 33. 21 H. 7. 39. 3 Inst. 161. Con. 2 Roll. 78. 2 H. 7. 39.

Sect. 9. FIFTHLY, That no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against this statute by wearing common weapons, or having their usual number of attendants with them for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence or disturbance of the peace. And from the same ground it also follows, that persons armed with privy coats of mail, to the intent to defend themselves against their adversaries, are not within the meaning of this statute, because they do nothing *in terrorem populi*. 3 Mod. 117. 2 Bulst. 330. Crom. 64.

Sect. 10. SIXTHLY, That no person is within the intention of the said statute, who arms himself to suppress dangerous rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace or quiet of the realm; for persons who so arm themselves seem to be exempted out of the general words of the said statute, by that part of the exception, in the beginning thereof, which seems to allow all persons to arm themselves, upon a cry made for arms, to keep the peace, in such places where such acts happen. Pop. 121, 122.

As to the SECOND POINT, *viz.* How far an affray may be suppressed by a private person.

Sect. 11. It seems agreed, that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of peace, in order to their finding sureties for the peace. Also it is said, that any private person may stop those whom he shall see coming to join either party; and from hence it seems clearly to follow, that if a man receive a hurt from either party in thus endeavouring to preserve the peace, he shall have his remedy by an action against him. Also upon the same ground, it seems equally reasonable, that if he unavoidably happen to hurt either party in thus doing what the law both allows and commends, he Lamb. 131. 3 Inst. 158. 2 Inst. 52. 22 E. 4. 44. Dalt. c. 8. Lamb. 131. Infra, s. 17. 3 Inst. 138. Lamb. 131. Dalt. c. 8.

REVISED STATUTES

OF THE

Commonwealth of Massachusetts,

PASSED NOVEMBER 4, 1835;

TO WHICH ARE SUBJOINED,

AN ACT IN AMENDMENT THEREOF, AND AN ACT EXPRESSLY TO REPEAL THE ACTS WHICH ARE CONSOLIDATED THEREIN,

BOTH PASSED IN FEBRUARY 1836;

AND TO WHICH ARE PREFIXED,

THE CONSTITUTIONS

OF THE

United States and of the Commonwealth of Massachusetts.

PRINTED AND PUBLISHED, BY VIRTUE OF A RESOLVE OF NOV. 3, 1835;

UNDER THE SUPERVISION AND DIRECTION OF

THERON METCALF AND HORACE MANN.

Boston:
PUBLISHED BY DUTTON & WENTWORTH, STATE PRINTERS.
Nos. 10 & 12 Exchange Street.

1836.

said, may, on giving the security required, appeal to the court of common pleas, next to be held in the same county, or, in the city of Boston, to the municipal court.

On appeal, witnesses to recognize.

SECT. 10. The magistrate, from whose order an appeal is so taken, shall require such witnesses, as he may think necessary to support the complaint, to recognize for their appearance at the court to which the appeal is made.

Proceedings on appeal.

SECT. 11. The court, before which such appeal is prosecuted, may affirm the order of the justice, or discharge the appellant, or may require the appellant to enter into a new recognizance, with sufficient sureties, in such sum, and for such time, as the court shall think proper, and may also make such order, in relation to the costs of prosecution, as may be deemed just and reasonable.

Recognizance, when to remain in force.

SECT. 12. If any party appealing shall fail to prosecute his appeal, his recognizance shall remain in full force and effect, as to any breach of the condition, without an affirmation of the judgment or order of the magistrate, and shall also stand as a security for any costs, which shall be ordered, by the court appealed to, to be paid by the appellant.

Persons committed for not recognizing, how discharged.

SECT. 13. Any person, committed for not finding sureties, or refusing to recognize, as required by the court or magistrate, may be discharged by any judge or justice of the peace, on giving such security as was required.

Recognizances to be transmitted to the court.

SECT. 14. Every recognizance, taken pursuant to the foregoing provisions, shall be transmitted by the magistrate to the court of common pleas for the county, or, in the city of Boston, to the municipal court, on or before the first day of the next term, and shall be there filed of record by the clerk.

— when to be required on view of the court or magistrate.

SECT. 15. Every person who shall, in the presence of any magistrate mentioned in the first section of this chapter, or before any court of record, make an affray, or threaten to kill or beat another, or to commit any violence or outrage against his person or property, and every person, who in the presence of such court or magistrate, shall contend with hot and angry words, to the disturbance of the peace, may be ordered, without process or any other proof, to recognize for keeping the peace, or being of good behavior, for a term not exceeding three months, and in case of refusal, may be committed, as before directed.

Persons who go armed may be required to find sureties for the peace, &c. 1794, 26, § 2.

SECT. 16. If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assualt or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.

Court may remit part of penalty. 7 Mass. 397. 1810, 80.

SECT. 17. Whenever, upon a suit brought on any such recognizance, the penalty thereof shall be adjudged forfeited, the court may remit such portion of the penalty, on the petition of any defendant, as the circumstances of the case shall render just and reasonable.

Surety may surrender his

SECT. 18. Any surety in a recognizance to keep the peace, or for good behavior, or both, shall have the same authority and right

THE

PUBLIC STATUTES

OF THE

STATE OF MINNESOTA.

(1849—1858.)

COMPILED BY

MOSES SHERBURNE and WILLIAM HOLLINSHEAD, Esqrs.,

COMMISSIONERS.

PUBLISHED BY STATE AUTHORITY.

SAINT PAUL:

THE PIONEER PRINTING COMPANY.

1859.

to recognize without warrant.

record make an affray, or threaten to kill or beat another, or to commit any violence or outrage against his person or property, and every person, who, in the presence of such court or magistrate, shall contend with hot and angry words, to the disturbance of the peace, may be ordered without process or any other proof, to recognize for keeping the peace, and being of good behavior, for a term not exceeding six months, and in case of a refusal, may be committed as before directed.

Persons carrying offensive weapons, how punished.

(18.) SEC. XVIII. If any person shall go armed with a dirk, dagger, sword, pistol or pistols, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his person, or to his family or property, he may, on complaint of any other person having reasonable cause to fear an injury or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.

Suit brought on recognizance.

(19.) SEC. XIX. Whenever upon a suit brought on any such recognizances, the penalty thereof shall be adjudged forfeited, the court may remit such portion of the penalty, on the petition of any defendant, as the circumstances of the case shall render just and reasonable.

Surety may take and surrender principal in recognizance.

(20.) SEC. XX. Any surety in a recognizance to keep the peace, or for good behavior, or both, shall have the same authority and right to take and surrender his principal, as if he had been bail for him in a civil case, and upon such surrender, shall be discharged and exempt from all liability for any act of the principal, subsequent to such surrender, which would be a breach of the condition of the recognizance; and the person so surrendered may recognize anew, with sufficient sureties, before any justice of the peace for the residue of the term, and thereupon shall be discharged.

CHAPTER 102.

ARRESTS.

SECTION
1. Arrest defined.
2. Arrest how and by whom made.
3. Every person must aid officer in making arrest.
4. Arrest for felony or misdemeanor, how made.
5. Arrest for felony or misdemeanor, how made.
6. Defendant how to be restrained.
7. Officer must inform defendant that he acts under authority.
8. Officer may use necessary force.
9. Officer may break outer door to make arrest.
10. Officer may break outer door to make arrest.
11. When officer may arrest person without warrant.
12. Officer may break open door.
13. Arrest may be made at night.
14. Officer must inform person of the cause of arrest.
15. Person breaking peace to be taken before justice.
16. Offenses in presence of magistrate.
17. When private person may arrest person.
18. Must inform person of cause of arrest.
19. Person making such arrest may break open door.
20. Person arrested must be taken before magistrate.
21. Defendant may be retaken if he escape.
22. Person pursuing may break open door, &c.

[*Chapter* 113, *Revised Statutes.*]

Arrest defined.

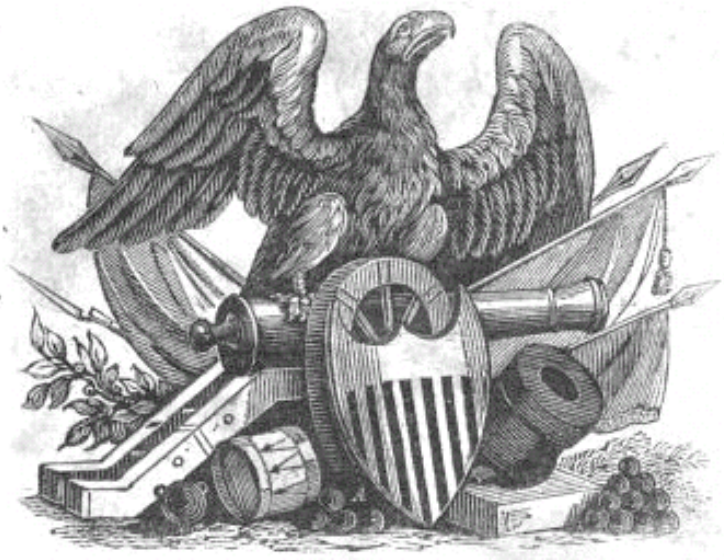
(1.) SEC. I. Arrest is the taking of a person into custody, that he may be held to answer for a public offense.

STATUTES

OF THE

TERRITORY OF WISCONSIN,

PASSED BY THE LEGISLATIVE ASSEMBLY THEREOF, AT A SESSION COMMENCING IN NOVEMBER 1838, AND AT AN ADJOURNED SESSION COMMENCING IN JANUARY, 1839.



PUBLISHED BY AUTHORITY OF THE LEGISLATIVE ASSEMBLY.

the condition, without an affirmation of the judgment or order of the magistrate, and shall also stand as a security for any costs which shall be ordered by the court appealed to, to be paid by the appellant.

Not recognizing, how discharged.

§ 13. Any person committed for not finding sureties, or refusing to recognize as required by the court or magistrate, may be discharged by any judge or justice of the peace on giving such security as was required.

Recognizances transmitted to court.

§ 14. Every recognizance taken in pursuance of the foregoing provisions shall be transmitted by the magistrate to the district court for the county on or before the first day of the next term, and shall be there filed of record by the clerk.

When required on view of court, &c.

§ 15. Any person who shall, in the presence of any magistrate mentioned in the first section of this statute, or before any court of record, make an affray, or threaten to kill or beat another, or to commit any violence or outrage against his person or property, and every person who, in the presence of such court or magistrate, shall contend, with hot and angry words, to the disturbance of the peace, may be ordered, without process or any other proof, to recognize for keeping the peace and being of good behavior, for a term not exceeding six months, and in case of refusal may be committed as before directed.

Persons going armed to give security, &c.

§ 16. If any person shall go armed with a dirk, dagger, sword, pistol or pistols, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family, or property, he may, on complaint of any other person having reasonable cause to fear an injury or breach of the peace, be required to find sureties for keeping the peace for a term not exceeding six months, with the right of appealing as before provided.

Part of penalty remitted.

§ 17. Whenever, upon a suit brought on any such recognizance, the penalty thereof shall be adjudged forfeited, the court may remit such portion of the penalty on the petition of any defendant, as the circumstances of the case shall render just and reasonable.

Surety may surrender principal.

§ 18. Any surety in a recognizance to keep the peace or for good behavior or both, shall have the same authority and right to take and surrender his principal as if he had been bail for him in a civil cause, and upon such surrender shall be discharged and exempt from all liability for any act of the principal subsequent to such surrender, which would be a breach of the condition of the recognizance; and the person so surrendered may recognize anew, with sufficient sureties, before any justice of the peace for the residue of the term, and thereupon shall be discharged.