

REPORTS.

Heiskell.....	Vol. 7—54th Tenn.
Heiskell.....	" 8—55th "
Heiskell.....	" 9—56th "
Heiskell.....	" 10—57th "
Heiskell.....	" 11—58th "
Heiskell.....	" 12—59th "
Baxter.....	" 1—60th "
Baxter.....	" 2—61st "
Baxter.....	" 3—62nd "
Baxter.....	" 4—63rd "
Baxter.....	" 5—64th "
Baxter.....	" 6—65th "
Baxter.....	" 7—66th "
Baxter.....	" 8—67th "
Baxter.....	" 9—68th "
Lea.....	" 1—69th "
Lea.....	" 2—70th "
Lea.....	" 3—71st "
Lea.....	" 4—72nd "
Lea.....	" 5—73rd "
Lea.....	" 6—74th "
Lea.....	" 7—75th "
Lea.....	" 8—76th "
Lea.....	" 9—77th "
Lea.....	" 10—78th "
Lea.....	" 11—79th "
Lea.....	" 12—80th "
Lea.....	" 13—81st "
Lea.....	" 14—82nd "
Lea.....	" 15—83rd "
Lea.....	" 16—84th "
Pickle.....	" 1—85th "
Pickle.....	" 2—86th "
Pickle.....	" 3—87th "
Pickle.....	" 4—88th "
Pickle.....	" 5—89th "
Pickle.....	" 6—90th "
Pickle.....	" 7—91st "
Pickle.....	" 8—92nd "
Pickle.....	" 9—93rd "
Pickle.....	" 10—94th "
Pickle.....	" 11—95th "
Pickle.....	" 12—96th "
Pickle.....	" 13—97th "
Pickle.....	" 14—98th "
Pickle.....	" 15—99th "
Pickle.....	" 16—100th "
Pickle.....	" 17—101st "
Pickle.....	" 18—102nd "
Pickle.....	" 19—103rd "
Pickle.....	" 20—104th "
Pickle.....	" 21—105th "

North Carolina Reports.

TENNESSEE. SUPREME COURT.

REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

WESTERN DIVISION,

April Term, 1881,

AND FOR THE

EASTERN DIVISION,

September Term, 1881.

BENJAMIN F. LEA,
ATTORNEY-GENERAL AND REPORTER.

VOLUME VII.

14403

A NEW EDITION, WITH SUBSEQUENT CITATIONS,

BY

ROBERT T. SHANNON,
OF THE NASHVILLE BAR.

LOUISVILLE, KY.:
FETTER LAW BOOK COMPANY.
1902

HASTINGS LAW COLLEGE LIBRARY

The State v. Burgoyne.

n) was unanimous in opinion
inhibitions of the article of the
if allowed to operate, suspende
that, therefore, it conferred no
any courts intended to be emb
e under it were void. This ho
tion to rehear. We still thin
in that case sound.

depends the general law in pro-
viding that is merely proposed
depends or repeals the general
law, fixing of termini and giv-
ing the power of subscription
in commission without the
providing in terms that the com-
missioners have no power of re-
ference or delay, to levy an
assessment on the property;
and in providing, in
all [172] other respects, ex-
cepted, the capital stock of the
company shall be governed by the
laws of the State."

the statement of the laws and
the act of 1867.

ferred upon the railroad com-
mode pointed out by a statu-
ers the voice, by election, given
law repealing the general law
the last, and suspending a ge-
individuals composing the com-
y court the power of ordering
desires to subscribe to the en-
rough the county court in the

... & N. R. R. Co. v. Davidson Co.
authority upon the question here
questions were as to the constitutionality

the general improvement act of 1851-2, under which the proceedings in the case arose, and whether a railroad was a county purpose.

The repugnancy of the late to the general law is plain. That repugnancy is violative of the Constitution, and, as we think, makes the act of 1867 void.

DEADERICK, C. J.:

I concur in the foregoing opinion.

THE STATE v. J. R. BURGOYNE.

1. **CONSTITUTIONAL LAW.** *Police power of the State. Act March 17, 1878, to prevent sale of pistols, construed.* It is competent for the Legislature, in virtue of the police power of the State, to pass a law that may in the future interfere with rights that once existed under a license that has expired before the law goes into effect.
2. **SAME.** *Privilege license.* The grant of a privilege license, being a governmental power, may be withdrawn at the discretion of the Legislature.
3. **CASE IN JUDGMENT.** A merchant under his license purchased a stock of pistols for sale, which had not been exhausted at the expiration of his license, and was indicted and convicted, under this act, for offering to sell the same. The trial court arrested the judgment upon the ground that the act in question was, as to his remaining stock, in conflict with sec. 8, art. 1, of the Constitution of this State, and also with the fourteenth amendment to the Federal Constitution, which protect every man in the right of property, and the State appealed. *Held, erroneous.*

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B.
MORRIGAN, J.

The State v. Burgoyne.

Attorney-General LEA for the State.

GANTT & PATTERSON for Burgoyne.

TURNER, J., delivered the opinion of the court.

The act of the General Assembly of the State, March 14, and approved March 17, 1879, entitled "An act to prevent the sale of pistols," provides:

"Sec. 1. That it shall be a misdemeanor for any person to sell, or offer to sell, or to bring into the State for the purpose of selling, giving away, or otherwise disposing of, any belt or pocket pistols, or revolvers, or any other kind of arms, except army or navy pistols; provided, that this act shall not be enforced against any persons now having license to sell such articles until the expiration of such present license."

"Sec. 2. That any person guilty of a violation of this act, shall be subject to presentment or indictment, and on conviction shall pay a fine of not less than twenty-five dollars, nor more than one hundred dollars, and be imprisoned at the discretion of the court."

Burgoyne is a merchant in the city of Memphis. Before the passage of the act quoted he brought to his business pistols of several kinds. His merchant's license had not expired at the time of importation. Subsequent to the passage of March, 1879, and after the expiration of the license under which he was operating at the date of the importation of the pistols, but while he was exercising merchant's privileges under a second license, he sold to customers pistols other than army or navy. He was convicted and judgment arrested. The State appeals.

The judge trying the cause below holds the statute invalid as to the sale or giving away of pistols that were owned by the defendant at and before the passage of the act; that such were a part of his stock in merchandise before the act became a law; that the act can only apply to pistols brought into or manufactured in the State after the passage of the law.

The act takes effect. And as we have seen, it constitutes an offense.

The question is, whether the act in the future intends to give a license that has been granted.

If the Legislature intended the sale of article to cause a man six months imprisonment with such a result that so much of his stock, good law, he may continue to sell, no matter how long the duration of the new sales of the prohibited articles continue for an indefinite period.

The restriction by the Legislature and used for police purposes.

The clause uses the word *presently*, as his honor holds that the effect that the sale at that time was a revocable right to sell so long as the law was in force.

The law under which prohibiting the sale has been held by the court that no constitutionality is involved.

So, the whole power of the Legislature is involved.

The purpose of the act is to destroy the vicious habit of an almost universal.

SON:

Burgoyne.

ate.

ne.

a of the court.

assembly of the State
17, 1879, entitled "A
des:

misdemeanor for any
to bring into the State
, or otherwise dispose
, or any other kind of
vided, that this act shall
s not having license
of such present license
guilty of a violation
ment or indictment,
not less than twenty
and be imprisoned

the city of Memphis
d he brought to his
merchant's license had
n. Subsequent to the
piration of the license
te of the importation
ag merchant's privilege
customers pistols other
ed and judgment arrived

below holds the statute
of pistols that were owned
the passage of the act;
merchandise before the
ly apply to pistols brought
after the passage of the law

APRIL TERM, 1881.

174-176

The State v. Burgoyne.

The act takes effect "from and after its passage." [175]
And as we have seen, provides, that to sell or offer to sell,
constitutes an offense.

The question is, can the Legislature pass a law that may
in the future interfere with rights that once existed under
a license that has expired before the law goes into effect?

If the Legislature may not to-day pass a law to prohibit
the sale of articles contraband of peace and good morals, be-
cause a man six months ago, under a different law, supplied
himself with such articles for the purposes of sale and profit,
it results that so long as the merchant may have, as a part
of his stock, goods purchased before the passage of the new
law, he may continue to operate under the old or repealed
law, no matter how long the time may be between the intro-
duction of the new law and the completion of the closing out
sales of the prohibited articles. Thus the right to sell will
continue for an indefinite period of time.

The restrictive, or rather prohibitory power exercised
by the Legislature in this instance is a governmental one,
and used for police purposes.

The clause under which the defendant is convicted oper-
ates in *presenti*, and creates a distinct offense to those to which
his honor holds the law to apply. In fact, the holding is to
the effect that the purchase under a license authorizing a
sale at that time vests the merchant purchaser with the irre-
vocable right to sell at any and for all time and at his discre-
tion so long as the stock holds out.

The law under consideration is in aid of the law [176]
prohibiting the wearing of pistols. The latter has repeatedly
been holden by this court to be constitutional. It follows
that no constitutional objection can be offered to this statute.

So, the whole matter resolves itself into a question of the
power of the Legislature to make police regulations.

The purpose of the lawmakers was to put down the per-
nicious habit of going armed,—a habit that had grown into
an almost universal custom, and one that could not be broken

up so long as a traffic in the weapons was lawful. The late law naturally sprung from the former. Both "look to the regulation of relative rights, privileges and duties as between individuals, to the conservation of order in the political society, to the encouragement of industry and the discouragement of pernicious employments."

"Legislation for these purposes it would seem proper to look upon as being made in the exercise of that authority inherent in every sovereignty, to make all such rules and regulations as are needful to secure and preserve the public order and to protect each individual in the enjoyment of his own rights and privileges, by requiring the observance of rules of order, fairness and good neighborhood by all around him. This manifestation of the sovereign authority is usually spoken of as the police power." Cooley on Taxation, 396.

The principles of this rule extend to the conference of the power of prohibition when, in the opinion of the Legislature, prohibition is necessary to the attainment of its ends.

[177] Mr. Sedgwick, in his work "On the Construction of Statutory and Constitutional Law," pp. 435-6, says: "It has always been held that the Legislature may make police regulations, although they may interfere with the full enjoyment of private property and though no compensation is given."

The private interests of the few must yield to the welfare of the many and good order in society.

The grant of a privilege license being a governmental power, may be withdrawn at the discretion of the Legislature.

Since writing the conclusions announced above, we have been furnished briefs by the counsel of the accused, in which it is insisted the act in question is repugnant to sec. 8, art. 1, of the Constitution of the State—"That no man shall be * * * deprived of his life, liberty or property but by the judgment of his peers or the law of the land." And to the 14th amendment to the Federal Constitution—"Nor shall

any State deprive out due process

It is argued that property in police are referred to Justice Miller in saying that no statute prevent State in the traffic tion. That exception [178] on proposition to amount to deny

Judge Brainerd legislature may be injurious to the statute with vested right the way of public pensionation to the

Judge Field State to regulate regulation does injury in them. the power to sell and enjoy it.

neither sell it : fiscates it and process of law. Against the 14th amendment

If we admit power, does the pistol deprived act declare the nor use and enjoyment him of his property

We think it plete answer to e

weapons was lawful. The former. Both "look at the privileges and duties as a part of order in the police of industry and the discipline."

It would seem proper to propose it would seem proper to the exercise of that authority to make all such rules and to preserve the public in the enjoyment of the right of the observance of the neighborhood by all around the authority is

Cooley on Taxation, the extend to the conferment, in the opinion of the court, to the attainment of its purpose. His work "On the Constitutional Law," pp. 435-6, says: "The Legislature may make any interference with the full enjoyment though no compensation

the few must yield to the order in society.

The license being a government, the discretion of the Legislature, as announced above, was the counsel of the accused, in the opinion is repugnant to sec. 2.

State—"That no man shall be deprived of liberty or property but by the law of the land." And to the Federal Constitution—"Nor shall

any State deprive any person of life, liberty or property without due process of law."

It is argued that the enactment destroys the right of property in pocket pistols, and in support of this theory we are referred to *Bartemeyer v. Iowa*, 18 Wall., 129, in which Justice Miller says: "The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly [178] on property in existence at the passage of the act as to amount to depriving the owner of his property."

Judge Bradley says: "No one has ever doubted that a legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property. Where such rights stand in the way of public good, they can be removed by awarding compensation to the owner."

Judge Field says: "I have no doubt of the power of a State to regulate the sale of intoxicating liquors when such regulation does not amount to destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it and deprives him of his property without due process of law. Against such arbitrariness by any State, the 14th amendment affords protection."

If we admit these rulings to be restrictive of legislative power, does the case fall within them? Is the owner of the pistol deprived of the right of property therein? Does the act declare the owner shall neither sell nor dispose of them, nor use and enjoy them? Does it confiscate them and deprive him of his property without due process of law?

We think the proviso to the statute is a full and complete answer to every objection suggested by the several ques-

tions. It is: "Provided, that this act [179] shall not be enforced against any person now having license to sell articles, until the expiration of such present license." This, in our opinion, preserves the right of property in its use, and enjoyment. All rights existing under a license had at the passage of the law are expressly reserved to the merchant. We must presume the time allowed was ample, as the aggregate of facts makes no question upon it.

The brief makes three concessions, the third of which is: "The Legislature may enact laws to regulate property, to restrain and direct the use of it, in the exercise of the police power, as the public welfare may require it." This, we conceive, is as far as the Legislature has gone by the statute before us. It has given to the owner of property the right to sell, within a sufficient time, that property which the public welfare requires shall not be sold at all. The law does not operate so rigidly on property in existence at the passage of the act as to amount to depriving the owner of his property. The vested rights of property in the articles deemed injurious to the safety of society stood in the way of the public good; such rights have been compensated for and protected by the proviso. The regulation of the sale of the articles does not amount to destruction of the right of property in them.

The judgment of arrest is reversed. The judgment assessing a fine is affirmed, and the cause remanded for its execution.

KELLY & McCADEN v.

1. CONSTITUTIONAL LAW. *Merchandise.* Provisions of the Constitution of the State do not authorize the legislature to classify merchants for purpose of imposing a license or privilege tax on property on that point in the purchase of merchandise sent beyond the State, but may license a liquor dealer shall be deemed to have obtained a license, and the payment of other taxes imposed upon such dealer.
2. MERCHANT'S TAX. *Privilege.* A tax as such, add to the occurrence, which is additionally to not exempt him from the payment of the same.
3. SAME. *Merchant who sells.* A merchant who keeps spirituous liquors at wholesale, is liable to pay, in addition to the tax on other goods, a privilege tax in gross imposed upon him.
4. SAME. *License.* Not a contract. A license system is not a contract, and the obligation pending the period for which it is granted, must pay taxes according to the law.

[Cited in: 10 Lea, 164; 13 Lea,

FROM:

Appeal in error from the Circuit Court of the State of New York, in and for the County of New York, in the case of Kelly & McCaden v. The State, docketed for the term ending at the City of New York, on the 1st day of April, 1879.