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TORTS-ASSAULT AND BATTERY-USE OF TRAPS TO PROTECT PROPERTY FROM FELONIOUS TAKING

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TORTS—ASSAULT AND BATTERY—USE OF TRAPS TO PROTECT PROPERTY FROM FELONIOUS TAKING[1]—Plaintiff brought an action for personal injuries. Defendant planted two sticks of dynamite in the floor beneath the door of his mining warehouse in order to prevent repeated thefts of personal property from the building. The dynamite was rigged to explode when the door was opened. Plaintiff, with the intent of stealing whatever he could, broke the lock, opened the door, and from the ensuing explosion received leg and foot injuries. Plaintiff's act was a statutory felony.[2] Defendant testified that he in good faith thought that the amount of dynamite used would merely frighten the plaintiff. Trial court held the defendant liable as a matter of law. On motion to certify the record, *held,* reversed and remanded with direction for the jury to determine whether defendant used more force than reasonably necessary to repel and prevent the felony and to ascertain the good faith of the defendant in the measures he took for such prevention. Taft, J., dissented. *Allison v. Fiscus,* 156 Ohio St. 120, 100 N.E. (2d) 237 (1951).

The court in substance held that a property owner is privileged to use dynamite, a deadly force,[3] with intent to injure when reasonably necessary to prevent the felonious taking of personal property from a warehouse. If the defendant did believe in good faith that the amount of dynamite used would only frighten the intruder, the plaintiff's action would fail for lack of intent to batter. Judge Taft, dissenting, felt that the evidence showed as a matter of law that the defendant intended to wound the plaintiff, and that the force used was unnecessary.[4] There would appear to be considerable merit in this position. Assuming that the plaintiff can establish the necessary intent to touch and that the defendant satisfies the jury that the force used was necessary to protect the property in his absence, is the rule of law pronounced by the court sound? It is conceded by all courts that an individual may protect his property indirectly by means of traps only if he would have been justified in using the same force had he been present.[5] It is a general rule that one is not

[1] For general discussion see Bohlen and Burns, "Privilege to Protect Property by Dangerous Barriers and Mechanical Devices," 35 YALE L.J. 525 (1926).

[2] Ohio Gen. Code Ann. (Page, 1939) §12442.

[3] Majority opinion admits that dynamite is "inherently a dangerous substance." Principal case at 127.

[4] Principal case at 134: ". . . not being present, the defendant could not have even believed in good faith that the force which he used in the instant case was necessary. . . . He could not have known what force, if any, was so necessary. Furthermore, the plaintiff being unarmed, the use of dynamite by the defendant to repel him represented more than repelling force by force." Principal case at 141: "He [defendant] could hardly have made it more certain that what the majority opinion concedes 'is inherently a dangerous substance' would cause injury to anyone who opened the door."

[5] State v. Childers, 133 Ohio St. 508, 14 N.E. (2d) 767 (1938). The use of traps is not per se illegal: State v. Moore, 31 Conn. 479 (1863). In a few states use of deadly force to prevent statutory burglary, including breaking and entering a warehouse, is permitted by statute. See N.J. Rev. Stat., tit. 2, c. 138, §6 (1937).

privileged to use deadly force to expel trespassers,[6] or to prevent misdemeanors.[7] Most authorities likewise agree that one cannot use deadly force solely for the protection of property.[8] The rule, however, that one may kill if necessary to prevent the commission of a felony is a general maxim of law.[9] Since the common law felonies were capital offenses and many of them atrocious crimes threatening personal safety, there was general justification for this doctrine.[10] It is questionable, though, whether even the old common law rule covered secret felonies.[11] Today many criminal acts of a less heinous nature than the common law felony have been made felonious by statute, and capital punishment, where used, is reserved for a few serious crimes. This development gives rise to the conflict between the prevention of a felony rule and the protection of property doctrine involved in this case. Several cases have held that spring guns may be used where only a property interest is threatened. In two of these cases[12] the buildings involved, a poultry house and a warehouse, were considered to be "dwellings" with the result that the entrance thereof was treated the same as common law burglary. Granting that one has the right to kill if necessary to prevent burglary or to protect his dwelling, it is questionable whether the concept of "dwelling" should be thus expanded since there appeared to be no danger of personal injury in either case. Another case,[13] which held that there is no liability for using a spring gun which killed a slave who was wrongfully entering a warehouse, may well be of questionable validity because of its age and the fact that slaves were at that time considered personalty. On the other hand, logic, public policy, and authority[14] commend the dissenting view that one may never use deadly force solely to protect property, even if the wrongful act is a felony. This view is consistent with the protection of

[6] State v. Green, 118 S.C. 279, 110 S.E. 145 (1921).

[7] See note 5.

[8] PROSSER, TORTS 133 (1941). Situations involving the use of deadly force solely for protection of property must be distinguished from cases which, although involving property, turn on the right of self-defense. See Parrish v. Commonwealth, 81 Va. 1 (1884).

[9] MILLER, CRIMINAL LAW 258 (1934). See also dictum in State v. Moore, supra note 5.

[10] State v. Barr, 11 Wash. 481, 39 P. 1080 (1895).

[11] Dictum in United States v. Gilliam, 25 Fed. Cas. 1319 (1882) states that the rule would not apply to secret larceny because no personal danger is involved.

[12] United States v. Gilliam, supra note 11 (no criminal liability for killing chicken thief by means of spring gun set in poultry house because structure was within the curtilage); Scheuerman v. Scharfenberg, 163 Ala. 337, 50 S. 335 (1909) (no civil liability for plaintiff's injuries received from spring gun while breaking into a warehouse, the court saying at p. 343: "A man's place of business is *pro haec vice* his dwelling . . ."). The court in the principal case purported not to follow this decision.

[13] Gray v. Combs, (Ky. 1832) 7 Marsh 478. See also dictum in State v. Moore, supra note 5, to the effect that since valuable goods are now kept in shops, one may use traps to prevent felonious takings therefrom.

[14] The authority is largely dicta from cases involving misdemeanors or trespass. See State v. Barr, supra note 10; State v. Green, supra note 6. TORTS RESTATEMENT §143, comment B, 1st caveat (1934), expresses no opinion as to this problem.

property rule. Because of the absence of personal danger or a capital penalty, the prevention of a felony doctrine logically does not apply. Under the majority decision the defendant may now in absentia use deadly force when necessary to protect his property without having to show that had he been present use of the same force would be necessary.[15] The proposition that recovery by the plaintiff will encourage crime is a possible reason for denying relief, but it would seem that prevention of crime should be the concern of criminal courts rather than a determinant of civil liability.[16] Thus, from any standpoint, there seems to be little justification for the majority rule.

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[15] State v. Childers, supra note 5.

[16] This reasoning is used by Ohio courts in regard to consent to an illegal act. See Milliken v. Heddesheimer, 110 Ohio St. 381, 144 N.E. 264 (1924).