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Tort Law--Use of Mechanical Devices in the Defense of Property

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TORT LAW—USE OF MECHANICAL DEVICES IN THE DEFENSE OF PROPERTY*

****the law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels, unless there is also such a threat to the defendant's personal safety as to justify a self-defense.*** spring guns and other man-killing devices are not justifiable against a mere trespasser, or even a petty thief. They are privileged only against those upon whom the landowner, if he were present in person, would be free to inflict injury of the same kind.*[1]

I. INTRODUCTION

The recent decision of *Katko v. Briney*[2] has reintroduced the issue of the amount of force one may use to protect and defend his property and the manner in which the possessor may use this force. The issue deals with the privilege of inflicting some degree of harm on another for the purpose of preventing or terminating his intrusion and interference in the owner's right of possession of land or chattels.

In general, the amount of force which a possessor has the privilege to intentionally inflict depends on the nature of the intrusion and the reaction of the intruder to the possessor's initial use of force.[3] The possessor is entitled to use only a reasonable amount of force which he believes is necessary to prevent or terminate the other's intrusion. A force may become excessive if a reasonable man under similar circumstances would realize that the harm likely to result is in excess of that amount which the possessor is privileged to inflict.[4] As in self defense, the privilege to use force is limited to the amount which reasonably appears necessary to prevent the intrusion.

As a general rule, it is a question of fact for the jury to decide if the possessor of land uses reasonable force in the defense of his property. However, this rule is subject to the

*Katko v. Briney, 183 N.W. 2d 657 (Iowa 1971).

1. Katko v. Briney, 183 N.W.2d 657, 660 (Iowa 1971), *quoting from* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §21 (3d ed. 1964).

2. 183 N.W.2d 657 (Iowa 1971).

3. Bohlen and Burns, *The Privilege to Protect Property By Dangerous Barriers and Mechanical Devices*, 35 YALE L.J. 525 (1926).

4. RESTATEMENT (SECOND) OF TORTS §81(1) (1965).

qualification that no serious bodily injury has been inflicted on the intruder. If the trespasser is killed or seriously injured by a death trap such as a spring gun or by the possessor of the land, the only defense the person setting the trap or doing the killing can assert is that the injury was inflicted in defense of person. Homicide or serious injury is clearly excessive and therefore, neither is justified in defense of property.[5]

If it reasonably appears to the possessor that the intruder threatens neither bodily harm to the possessor or those privileged to use the land, nor physical harm to the property, then the possessor is entitled to use only the minimum amount of force required to eject the intruder or prevent his entrance to the land. When the intrusion is wrongful, an "assault" on the intruder is privileged only when the actor uses reasonable means after he has unsuccessfully requested the intruder to desist from the intrusion, when such a request would be useless or dangerous, or when substantial harm would be done before the request could be made.[6]

II. TYPES OF MECHANICAL DEVICES USED IN THE DEFENSE OF PROPERTY

A possessor of land cannot be expected to be present at all times to guard his property against intruders. Consequently, means other than human guards have been employed to protect property—these means include mechanical devices such as barbed wire, spiked walls, spring guns, and watchdogs.

The types of mechanical devices used in defense of property can be divided into two main groups—those which do not threaten death or serious bodily harm and those likely to cause death or serious bodily harm.[7]

5. 1 T. COOLEY, TORTS, 343-344 (4th ed. 1932).

6. RESTATEMENT (SECOND) OF TORTS §77 (1965); 6 AM. JUR. 2d *Assault and Battery* §167 (1963).

7. Bohlen and Burns, *supra* note 3, at 528; RESTATEMENT (SECOND) OF TORTS §84 and §85 (1965).

In Hart, *Injuries to Trespassers*, 47 L.Q. REV. 92, 102-103 (1926), the author found this type of division inadequate as serious injury may result to a trespasser from barbed wire, broken glass, or spiked walls. At the same time a dilemma appears in the Restatement classification if one accepts the principle that it is equally unlawful to do indirectly that which it is unlawful to do di-

Common examples of the first type include barbed wire and spiked walls.[8] Since walls and fences are generally insufficient barriers against intruders, additional protection in the form of spikes or railings, broken glass cemented on top of walls, barbed wire fences or barbed wire strung along the top of fences, is needed to impede a determined intruder. These devices carry their own warning that prevent them from operating as dangerous traps in the day time, while at night, such devices are justified by rationalizing that where their use is

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rectly. It is lawful for an owner to use spikes and glass on a wall "and yet, if I were to see a trespasser coming down my area, or getting over the garden wall, I could not drive the spike into his hand, or cut him with the glass." Therefore this source sees the only acceptable division of mechanical devices used for the protection of property as between "deterrent" and "retributive" forces. The "deterrent" class of danger includes barbed wire, broken glass, and spiked walls because they are obvious. The theory behind any deterrent force is that the force is known to the intruder. Therefore, barbed wire or spiked glass cannot be hidden behind hedges. The "retributive" dangers cover all forces created to injure the trespasser. The dangers are not obvious but are concealed, *i.e.* spring guns. The only time a "retributive" force could be justified would be if the injury were allowed while the owner was present and directly injured the intruder. Thus spring guns cannot be used deterrently and may be used only when the owner would have been justified in personally firing the shot.

8. Skaling v. Sheedy, 101 Conn. 545, 126 A. 721 (1924); Quigley v. Clough, 173 Mass. 429, 53 N.E. 884 (1899).

The RESTATEMENT (SECOND) OF TORTS §84 (1965) takes the view that a mechanical device not threatening death or serious bodily harm used for the purpose of protecting land or chattels from intrusion is privileged if:

> a) the use of such a device is reasonably necessary to protect the land or chattels from intrusion, and
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> b) the use of the particular device is reasonable under the circumstances, and
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> c) the device is one customarily used for such a purpose, or reasonable care is taken to make its use known to probable intruders.

In the comments following §84, the American Law Institute stresses the reasonableness of the device. In determining whether the device is a reasonable means of protection, the jury must consider 1) the probability that the device will inflict any harm on the intruder, 2) the amount of harm the device is likely to inflict, 3) the impracticality of protecting the land by more discriminating means, and 4) the location of land in which there is adequate or inadequate police protection.

common, the trespasser is said to know or should know of their existence.[9]

This article puts more emphasis on this second type of mechanical device which is considered dangerous enough to cause great bodily harm. Although the common law allows an owner to use reasonable force in protecting his property, the overwhelming weight of authority holds that a possessor of property is not privileged to set man traps[10] in protecting his property unless, as a matter of law, he would have been justi-

9. RESTATEMENT (SECOND) OF TORTS §84, comment f at 153. The Restatement stresses the point that for such devices to be privileged, they must not be concealed from possible intruders or used in such a way as would be reasonably unlikely to be known by them. Thus they cannot be concealed by trees or hedges. *See also* Rosenburg v. Tennant, 68 Colo. 80, 189 P. 25 (1920). This was an action for injuries sustained by an automobile driver when his car collided with a barbed wire fence across a corner of defendant's lot that had been used as a short cut between streets. The defendant had put up a notice on the lot that it was not to be used and also put up a note on a post when he built the fence. The accident occurred the evening of the day the fence was built. The court said:

> If the defendant was guilty of actionable negligence, it must have been due to his failure to give such notice of the obstruction across the way as was reasonable under the circumstances . . . the amount of travel over the cut off, the length of time it had been used, (and the fact that persons thereon were trespassers) were matters to be considered in determining the question of negligence.

10. "Man Traps" are devices likely to cause serious bodily injury that are employed to catch trespassers. The most common examples are:

(1) spring guns — Hooker v. Miller, 37 Iowa 613 (1873); State v. Green, 118 S.C. 279, 110 S.E. 145 (1921); Pierce v. Commonwealth, 135 Va. 635, 115 S.E. 686 (1923).

(2) digging pits across pathways—Dobbins v. M.K.&T. R.R., 91 Tex. 60, 41 S.W. 62 (1897).

(3) concealed bombs or dynamite—Phelps v. Hamlett, 207 S.W. 425 (Tex. Civ. App. 1918); Allison v. Fiscus, 156 Ohio 120, 100 N.E.2d 237 (1951).

(4) electricity — Territory v. Warren, 119 F. 2d 936 (9th Cir. 1941).

See also Craig v. Kentucky Util. Co., 183 Ky. 274, 209 S.W. 33, (1919). Employees of an electric company connected a live wire to a stockpile of wire with the avowed intention of injuring thieves who were meddling with the stockpile. A trespasser on the company's right of way seeking refuge in a storm came in contact with the stored wire and was electrocuted. The court held that the spring gun theory applied, and that if the employees had been working within the scope of their employment, the company would have been liable.

fied had he been personally present and inflicted the injury.[11] Today the common law justifies the use of deadly force in the defense of property only when the defense of habitation[12] is concerned.[13] However, the rationale underlying this privilege varies among jurisdictions, most of which base this privilege not on a defense of property theory, but on a defense of the owner and those within the household. Therefore, the use of dangerous instrumentalities is privileged in these jurisdictions only when the actor reasonably believes that the intru-

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11. United States v. Gilliam, 1 Hayw. & H. 109, 25 Fed. Cas. 1319 (No. 15205a) (D.C. 1882) (spring gun set in goose house); Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1 (1877) (spring gun set in garden); Hooker v. Miller, 37 Iowa 613, (1873) (spring gun set in orchard); State v. Beckman, 306 Mo. 566, 267 S.W. 817 (1924) (spring gun in food stand); Allison v. Fiscus, 156 Ohio St. 120, 100 N.E.2d 237 (1951) (dynamite trap in warehouse); Weis v. Allen, 147 Ore. 670, 35 P.2d 478 (1934) (spring gun in junkyard); Grant v. Hass, 31 Tex. Civ. App. 688, 75 S.W. 342 (1903) (spring gun in melon patch); Pierce v. Commonwealth, 135 Va. 635, 115 S.E. 686 (1923) (spring gun in store); State v. Marfaudille, 48 Wash. 117, 92 P. 939 (1907) (spring gun in trunk); State v. Barr, 11 Wash. 481, 39 P. 1080 (1895) (spring gun in cabin).

See also RESTATEMENT (SECOND) OF TORTS §85 (1965) concerning the use of mechanical devices threatening death or serious bodily injury. The Restatement provides:

> The actor is so far privileged to use a device intended or likely to cause serious harm or death for the purpose of protecting his land or chattels from intrusion that he is not liable for the serious bodily harm or death thereby caused to an intruder whose intrusion is, in fact, such that the actor were he present, would be privileged to prevent or terminate it by the intentional infliction of such harm.

12. Liberal definitions of the words "habitation" and "dwelling" have been used to relieve property owners from liability. Today it is doubtful whether a court would construe these words as liberally as was once done to circumvent the spring gun theory.

In *Scheuerman v. Scharfenberg*, 163 Ala. 337, 50 So. 335 (1909), an intruder was injured by a spring gun while attempting to burglarize a store. The court concluded that: "A man's place of business (such as the defendant's store in this case) is *pro hac vice* his dwelling, and he has the same right to defend it against intrusion, such as burglary, as he has to protect his dwelling."

In *United States v. Gilliam*, 1 Hayw. & H. 109, 25 Fed. Cas. 1319 (No. 15205a) (D.C. 1882), the court justified the killing by a spring gun of an intruder entering defendant's goose house with intent to steal by holding that the goose house was within the "curtilage" of the dwelling house.

13. Comment, *The Use of Deadly Force in The Protection of Property Under The Model Penal Code*, 59 COLUM. L. REV. 1212, 1214-16 (1959).

sion threatens a member of the household.[14] Other jurisdictions do not require such an apprehension but emphasize the protection of the habitation as property.[15]

It should be noted that some courts have indicated that the absence of notice of the dangerous mechanical device has had a bearing on the outcome of the litigation.[16] Thus, in *Starkey v. Dameron*,[17] the court said:

> . . . the setting of spring guns . . . not within the privilege of the domicil, *without notice*, would not justify or excuse the homicide which

14. *See, e.g.*, Carroll v. State, 23 Ala. 28 (1853); Fore v. Commonwealth, 291 Ky. 34, 38, 163 S.W.2d 48, 50 (1942) (dictum); Wooten v. State, 171 Tenn. 362, 103 S.W.2d 324 (1937); State v. Patterson, 45 Vt. 308, 320-21 (1873) (dictum); State v. Barr, 11 Wash. 481, 39 P. 1080 (1893); and *see* Stat. 7 & 8 Geo. IV, c. 18 (1827); 14 & 15 Vict. ch. 19, sec. 4 (reenacted substantially in 1851), and 54 & 55 Vict. ch.69, sec.1 (1891) which makes setting of spring guns a criminal offense except at night in a dwelling house.

See also RESTATEMENT (SECOND OF TORTS §79 (1965). The only time the Restatement permits an actor to use a dangerous mechanical device likely to cause death or serious bodily injury would be to repel an intruder who was in fact threatening the owner or those under his protection. *See* RESTATEMENT (SECOND) OF TORTS §85 (1965) *supra* note 11.

The Restatement lists in RESTATEMENT (SECOND) §143 comment on subsection 2 and RESTATEMENT §142(2) what crimes the intruder must in fact be committing or threatening to commit in order for the owner to be absolved from liability as a result of death or serious bodily injury to the intruder by a mechanical device. Among these crimes are riot which threatens death or serious harm, murder, voluntary manslaughter, mayhem, robbery, commonlaw rape, kidnapping, and burglary.

Thus, when the actor is present, all that is needed to allow him to use deadly force is a *reasonable belief* that the intruder threatens serious harm to the actor or to those whom the actor is privileged to protect. However, when an actor sets a mechanical device likely to cause great harm (i.e. spring gun), the intruder must in fact be involved in an act that threatens serious harm to the actor or those he is privileged to protect. An intruder who is not involved in a crime of this nature is entitled to safety arising from the presence of a human being capable of judging the character of the crime.

15. *See, e.g.*, State v. Bradley, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923). In this case, the dicta seemed to support this property theory allowing the owner to use deadly force in preventing a mere-forcible entry. *See also* Hall v. State, 113 Ark. 454, 168 S.W. 1122 (1914); *but see*, State v. Green, 118 S.C. 279, 110 S.E. 145 (1921), which stressed the protection of person instead of property in a case involving defense of habitation.

16. Scheuerman v. Sharfenberg, 163 Ala. 337, 50 So. 335 (1909); Starkey v. Dameron, 92 Colo. 420, 21 P.2d 1112, 22 P.2d 640 (1933); Wilder v. Gardner, 39 Ga. App. 608, 147 S.E. 911 (1929).

17. 92 Colo. 420, 21 P.2d 1112, 22 P.2d 640 (1933).

might ensue, but the party setting them would be criminally responsible for the consequences of his act.[18]

However, the authors of the Restatement[19] assert that notice is immaterial and that the owner is still liable. This argument is based on the theory that a possessor of land cannot use deadly force to prevent an intrusion that does not threaten the possessor or those privileged to use the land; this is true even if the possessor has personally warned the intruder that deadly force will be used against him if he does not desist. The same can be said of man traps. Even if the owner has in some way warned the intruder, the owner will still be liable since he cannot do indirectly that which, were he present, he could not do in person. This view also seems to be the modern trend in criminal courts.[20]

Although this comment is restricted to a discussion of dangerous mechanical devices used in the defense of property, very brief mention will be made of an increasingly popular method utilized today in protecting property—dangerous animals[21] such as watchdogs. Liability for bodily harm caused

18. *Id.* at 421, 21 P.2d at 1113.

19. RESTATEMENT (SECOND) OF TORTS §85, comment a (1965). *See also* Johnson v. Patterson, 14 Conn. 1, 35 Am. Dec. 96 (1840); Bruister v. Haney, 233 Miss. 527, 102 So.2d 806 (1958). In the latter case, defendant land owner placed poisoned food on his premises intending to injure or kill the plaintiff's trespassing cattle. The land owner was held liable for the injury to or loss of such animals poisoned by eating the food although he notified the owner of the cattle of his intentions.

20. State v. Plumlee, 177 La. 689, 149 So. 425 (1933); State v. Childers, 133 Ohio St. 508, 14 N.E.2d. 767 (1938); State v. Marfaudille, 48 Wash. 117, 92 P. 939 (1907); State v. Barr, 11 Wash. 481, 39 P. 1080 (1895).

In *State v. Green*, 118 S.C. 279, 110 S.E. 145 (1921), the deceased was warned by his brother of rumors that a particular house had been dynamited. The deceased entered the house and was killed by a spring gun. The court did not deal with the question of notice but apparently concluded that such notice did not justify the killing, and the manslaughter conviction was upheld.

21. "Dangerous animal" depends on the character of the animal and the probability of its doing extreme injury. In *Gerulis v. Lunecki*, 284 Ill. App. 44, 1 N.E.2d 440 (1936), the court said that when watch dogs are kept for protection, the dangerous character and knowledge thereof may be inferred from their size, their actual conduct, the admitted purpose for which they are kept, and the care exercised in their custody. Where it appears that it is the custom to chain up the dogs every morning and loosen them only at night—this action was held to establish the scienter. Also, where a dog is kept chained it can be presumed that the dog is vicious, unruly, and not safe to be permitted to go free.

by watchdogs is somewhat complicated by various statutes,[22] and the common law rule that the owner of an animal known to have vicious propensities is strictly liable for the harm caused by that animal.[23] The usual rule concerning dangerous animals and trespassers is that such animals must be bound to protect even trespassers on the owner's premises; and therefore the owner is not privileged to use the commission of a trespass as a defense.[24] Although this rule is always applied

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S.C. CODE ANN. §6-151 (1962) defines a vicious dog as:

> . . . any dog evidencing characteristics usually associated with a dog abnormally inclined to attack or attempt to attack other animals or persons without provocation by such other animal or person.

22. S.C. CODE ANN. §6-152 (1962) reads:

> It shall be unlawful to own or keep a vicious dog within the confines of Aiken, Anderson, Beaufort, Clarendon, Greenwood, Newberry, Oconee or Richland Counties unless such vicious dog be securely muzzled or securely confined within such owner's or keeper's private premises.

CALIF. CIVIL CODE §3342 (1962) reads in part:

> The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness. . . .

23. W. PROSSER, HANDBOOK OF THE LAW OF TORTS §21 (4th ed. 1971). An example of the confusion is seen in *Warner v. Wolfe,* 176 Ohio St. 389, 199 N.E.2d 860 (1964). Here the Ohio Supreme Court held that a statute exempting the owner of a dog from liability where the dog had injured a trespasser on the owner's land, did not abrogate the common law right of action for damages due to harboring vicious dogs. The court reversed the lower appellate court which had held that the statute suspended this common law action.

24. 4 AM. JUR. 2d *Animals* §105 (1962); Loomis v. Terry, 17 Wend. N.Y., 496 (1837); Conway v. Grant, 88 Ga. 40, 13 S.E. 803 (1891); Gerulis v. Lunecki, 284 Ill. App. 44, 1 N.E.2d 440 (1936); Brewer v. Furtwangler, 171 Wash. 617, 18 P.2d 837 (1933).

In *Brewer v. Furtwangler,* an unintentional trespasser was injured by the defendant's dog that was known to the defendant-owner to be vicious. Defendant had posted signs warning would-be trespassers against the dog. The plaintiff testified that he did not see the signs. In this case liability was for the act of knowingly keeping a vicious dog and not the negligence in the manner of keeping the dog. The court said that contributory negligence was no defense to the action.

See also Sanders v. O'Callaghan, 111 Iowa 574, 82 N.W. 969 (1900); Sherfey v. Bartley 36 Tenn. (4 Sneed) 58, 67 Am. Dec. 597 (1856).

cf. Melcheimer v. Sullivan, 1 Colo. App. 22, 27 P. 17 (1891); Eberling v.

to technical or unintentional trespassers, one still cannot use unreasonable force even against criminal trespassers.[25]

The rules applied to vicious dogs kept by the owners to defend his property from intruders are analogous to the rules governing the use of mechanical devices in the protection of property.[26] The safety of human life cannot be unnecessarily endangered to protect property. The privilege of using watch-dogs is to deter deliberate intrusions rather than inflict injury on the trespasser. This kind of protection can be compared to the deterrent force of mechanical devices used in the defense of property that do not cause serious bodily injury to the intruder. If the animal does not have vicious propensities, it can be used to prevent trespassing, provided that reasonable care has been taken to warn intruders of the dog's presence or provided that keeping such dogs is customary within the community.[27]

III. KATKO V. BRINEY

In *Katko v. Briney*[28] the Iowa Supreme Court held that the owners of an uninhabited farm house were liable for the injuries of a trespasser who broke and entered setting off a spring gun. The *Katko* court affirmed the lower court's instructions stating the general rules pertaining to the defense of property (see Introduction):

Mutillod, 90 N.J.L. 478, 101 A. 519 (1917); Spellman v. Dyer, 186 Mass. 176, 71 N.E. 295 (1904).

Although the owner of a vicious dog is liable for injuries inflicted by it even in his own premises, some old courts have relieved the owner of liability where one has come onto the owner's property at night either while trespassing or incautiously coming on the owner's property. *See* Montgomery v. Koester, 35 La. Ann., 1091 (1883); Loomis v. Terry, 17 Wend. (N.Y.) 496 (1837); McCaskill v. Elliot, 36 S.C.L. (5 Strobh) 196 (1850).

25. Brewer v. Furtwangler, 171 Wash. 617, 18 P.2d 837 (1933). *See also* Introduction, *supra.*

26. W. PROSSER, TORT §21 (4th ed. 1971); 1 F. HARPER AND F. JAMES, THE LAW OF TORTS §3.13 (1956); RESTATEMENT OF TORTS §516 (1938) reads:

> A possessor of land or chattels is privileged to employ a dog or other animal, for the purpose of protecting his possession of land or chattels from intrusion, to the same extent that he is privileged to use a mechanical protective device for such purposes.

27. 1 F. HARPER AND F. JAMES, THE LAW OF TORTS §3.13 (1956). *See* RESTATEMENT OF TORTS §516, comment *b* (1938). *See also* note 9 *supra.*

28. 183 N.W.2d 657 (Iowa 1971).

> Instruction 5 provides—You are hereby instructed that one may use reasonable force in the protection of his property, but such right is subject to the qualification that one may not use such means of force as will take human life or inflict great bodily injury. Such is the rule even though the injured party is a trespasser and is in violation of the law himself.
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> Instruction 6—An owner of premises is prohibited from willfully or intentionally injuring a trespasser by means of force that either takes life or inflicts great bodily injury; and therefore a person owning a premise is prohibited from setting out 'spring guns' and like dangerous devices which will likely take life or inflict great bodily injury, for the purpose of harming trespassers. The fact that the trespasser may be acting in violation of the law does not change the rule. The only time when such conduct of setting a 'spring gun' or a like dangerous device is justified would be when the trespasser was committing a felony of violence or a felony punishable by death, or where the trespasser was endangering human life by his act.[29]

The theory behind the liability of those setting spring guns rests on the assumption that the owner expects a trespasser and has prepared a trap which the owner of the property knows or should know could inflict serious bodily harm.[30] A defendant is no more justified in using a gun as a trap than if he had personally fired the gun. As the instruction states above, the only instance in which he is privileged to fire the gun is if he reasonably believes he, or those under his protection, is in serious danger of bodily harm. Consideration for humanity precludes him from setting dangerous traps for those whose appearances may be reasonably anticipated.[31]

The *Katko* court is supported by a line of civil and criminal cases which have held the owner liable for harm caused to a trespasser or petty thief by a spring gun.[32] England has a statute expressly prohibiting spring guns and other man traps except by night and for the protection of a dwelling-house.[33]

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29. *Id.* at 659.

30. United Zinc & Chem. Co. v. Britt, 258 U.S. 268, 275 (1921).

31. Phelps v. Hamlett, 207 S.W. 425 (Tex. Civ. App. 1918). This case is discussed in note 46 *infra*.

32. Starkey v. Dameron, 96 Colo. 459, 21 P.2d 1112, 22 P.2d 640 (1933); Hooker v. Miller, 37 Iowa 613 (1873); State v. Plumlee, 177 La. 687, 149 So. 425 (1933); State v. Beckham, 306 Mo. 566, 267 S.W. 817 (1924); State v. Childers, 133 Ohio St. 508, 14 N.E.2d 767 (1938); Weis v. Allen, 147 Or. 670, 35 P.2d 478 (1934); State v. Green, 118 S.C. 279, 110 S.E. 145 (1921).

33. Stat. 7 & 8 Geo. IV, ch. 18 (1827); 14 & 15 Vict. ch. 19, sec. 4 (reenacted substantially in 1851) and 54 & 55 Vict. ch. 69, sec. 1 (1891).

The Restatement of Torts takes a similar view prohibiting the use of mechanical devices threatening serious bodily harm except to prevent such harm.[34] South Carolina is one of the few states which prohibit spring guns by statute.[35]

In *Katko,* the plaintiff-trespasser was committing a larceny at the time the spring gun discharged.[36] Defendants Briney and his wife were the owners of an uninhabited house on an 80-acre tract of land. During the ten years prior to the shooting, there occurred a series of break-ins with resultant loss of household items. In an attempt to stop the break-ins, defendant boarded up the windows, posted "no trespass" signs, and complained to the sheriff on numerous occasions; the vandalism continued.[37] Finally defendants set up "a shotgun trap" inside the house. At first the gun was pointed to hit the intruder in the stomach, but later the gun was lowered so that it was aimed to hit the legs. No warnings were posted concerning the trap, and the gun could not be seen from the outside. Before the trap was set the injured plaintiff had been to the house and had long considered it abandoned. On entering the house, he opened the bedroom door discharging the shot gun. Plaintiff's right leg was severely injured. Plaintiff pleaded guilty to larceny in the nighttime, was fined and paroled.[38]

The defendants contended that the law permits spring guns in houses or warehouses to prevent the unlawful entry of a burglar or thief and took exception to the instructions noted above in addition to instructions stating that the law prohibits the setting of spring guns except to prevent felonies of violence, and when human life is in danger. The lower court stated that breaking and entering in this instance was not a felony of violence. The Iowa Supreme Court upheld the lower court instructions in affirming the decision for the trespassing plaintiff.[39] The court cited a previous Iowa decision on the

34. *See* note 11 *supra.*

35. S.C. CODE ANN. §16-143 (1962) reads in part:
> It shall be unlawful for any person to construct, set or place a loaded trap gun, spring gun or any like device in any manner in any building or in any place within this state, and any violation of the provisions of this section shall constitute a misdemeanor. . . .

36. 183 N.W.2d 657, 659 (Iowa 1971).

37. *Id.* at 664.

38. *Id.* at 658-659.

39. *Id.* at 662.

same subject, *Hooker v. Miller*,[40] in which the Iowa Supreme Court found the owner of a vineyard liable to a trespasser who set off a spring gun at night while stealing grapes. That court said: "[T]respassers and other inconsiderable violators of the law are not to be visited by barbarious punishments or prevented by inhuman infliction of bodily injuries."[41]

In *Allison v. Fiscus*,[42] the Ohio Supreme Court recognized that a property owner is not justified in inflicting serious bodily harm on a trespasser by traps, spring guns, or other dangerous mechanical devices unless, as a matter of law, he would have been justified in doing the same thing if he had been present. However, this court reversed and remanded the case in order for the jury to decide whether the trap used by the owner was a force reasonably necessary to protect his property against a trespasser who intended to feloniously steal the owner's chattels. The dissent in *Katko* agreed with the Ohio court that concluded:

> [T]he court had no right to hold as a matter of law that defendant was liable to plaintiff, as the defendant's *good faith* in using the force which he did to protect his building and the *good faith* of his belief as to the nature of the force he was using were questions for the jury to determine under proper instruction. (Emphasis supplied.)[43]

The *Katko* dissent argued that the jury must find intent on the part of the possessor to seriously injure or to kill the trespasser with the spring gun as well as the use of unreasonable force by the possessor. The dissenting judge believed that the mere setting of such a device with a resultant serious injury should not, as a matter of law, have established liability.[44]

The dissent agreed with the defendant that the lower court confused the issue of intent in its instructions by implying that there is absolute liability when spring guns are used except in protecting human life from serious injury. This assertion is correct if the instructions are taken as a whole. The lower court's additional instructions to the jury stated that in order for plaintiff to recover, the jury must find by a preponderance of the evidence the following:

40. 37 Iowa 613, (1813).
41. *Id.* at 617.
42. 156 Ohio St. 120, 100 N.E.2d 237 (1951).
43. *Id.* at 124, 100 N.E.2d at 241.
44. Katko v. Briney, 183 N.W.2d 657, 662, 667 (Iowa 1971).

1. That defendants erected a shotgun trap in a vacant house on land owned by defendant . . . to protect household goods from trespassers and thieves.
2. That the force used by defendants was in excess of that force reasonably necessary and which persons are entitled to use in the protection of their property.
3. That plaintiff was injured and damaged. . . .
4. That plaintiff's injuries and damages resulted directly from the discharge of the shotgun trap which was set and used by defendants.[45]

There was really no question of fact in *Katko* other than damages since there was no conflicting testimony. The court in instruction six had already stated emphatically that the only time setting up a spring gun was justified would be if the trespasser was committing a crime of violence (which the court said the plaintiff was not) or when the trespasser was endangering human life. The dissent is correct in asserting that the majority is in fact setting up an absolute liability theory for spring guns, a theory in which intent (whether to frighten or seriously injure) is immaterial to the question of liability.

It should be noted that there are a few courts which have also stated that the use of spring guns—except in defense of a dwelling house—is excessive, unreasonable, and unjustifiable as a matter of law.[46]

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45. *Id.* at 659-660.

46. Starkey v. Dameron, 92 Colo. 420, 21 P.2d 1112, 22 P.2d 640 (1933). In this case, a spring gun had been concealed in an automatic gasoline pump at a filling station. The trap injured a person alleged to have been trying to break into the pump. The court upheld a lower court instruction which stated that the owner of the pump was liable to the alleged intruder, and that the only question for the jury concerned the amount of damages to be awarded.

Hooker v. Miller, 37 Iowa 613 (1873). This court stated that the use of a deadly weapon such as a spring gun could not be justified in the defense of property. Thus it seems that the *Katko* court followed the *Hooker v. Miller* precedent while the *Katko* dissent intrepreted the case in a narrow sense by proclaiming that the *Hooker* court held that spring guns could not be used to injure a mere trespasser in a vineyard. The dissent believes that a distinction must be made between a vineyard and an unoccupied dwelling.

Phelps v. Hamlett, 207 S.W. 425 (Tex. Civ. App. 1918). In this case, the court reversed a decision for a defendant who placed a bomb near the entrance of an open air theater so that it would be set off by someone opening the door. The court said the defendant was liable for injuries to a child caused by the explosion of the bomb, although the child was a trespasser.

The reasoning behind these decisions is made clear by the dissenting opinion in *Allison v. Fiscus,* 156 Ohio 120, 100 N.E. 237 (1951). There, the dissent points out that the defendant, not being present, could not have been in

IV. CRIMINAL LIABILITY

Although the *Katko* decision is a civil case, it should be noted that where a homicide results from the use of spring guns, the persons responsible for setting such a trap may be indicted for murder or manslaughter. In the South Carolina case of *State v. Green,*[47] the defendant owner set a spring gun in his house which he frequently used during the year. Thefts from the home while he was away prompted the owner to lock the gate surrounding the house, as well as the front door, and to place two locks on the door of the room in which the spring gun was placed. The intruder, who was killed by the trap, had even heard that the house had been dynamited. The court in upholding a manslaughter conviction said that if the defendant owner had been present and had killed the intruder, it would have been necessary to show by way of defense that the circumstances were not only sufficient to justify a person of ordinary firmness and reason in believing that he was in danger of losing his life, or suffering serious bodily harm, but that he himself had so believed. The court said that with defendant not present, it was impossible for him at the time of the killing, to comply with those requirements.[48]

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danger of death or great bodily harm, and could have had no reasonable grounds for the belief that he was. Not being present, the defendant could not have believed in good faith that the force which he used was necessary to compel the plaintiff to desist from his purpose of stealing the defendant's property. He could not have known what force, if any, was so necessary.

The court in *Grant v. Hass,* 31 Tex. Civ App. 688, 75 S.W. 342 (1903) faced a situation in which a spring gun shot an innocent person. The court commented on the issue of intent by saying that every man is held to the necessary, natural, and probable consequences of his act, the contemplation of which the law presumes, whether or not he does so in fact. The same reasoning can be used in understanding the *Katko* decision in that even if the spring gun was set to scare or frighten away the intruder, the persons responsible for setting the trap undertook by that means to put into motion a deadly weapon that the defendants should have known could inflict serious bodily injury.

47. 118 S.C. 279, 110 S.E. 145 (1921).

48. *Id.* at 290, 110 S.E. at 148. This reasoning is in keeping with the trend of modern authorities which follow the general rule that one may not use man traps for the sole purpose of protecting property. *See, e.g.,* State v. Beckham, 306 Mo. 566, 267 S.W. 817 (1924). The deceased was armed with a gun and had burglary tools in his possession when a spring gun went off while deceased was breaking into defendant's food stand. Defendant store owner was convicted of manslaughter. *State v. Childers,* 133 Ohio St. 508, 14 N.E.2d 797

This South Carolina case cited the ruling of *State v. Barr*[49] which stressed the point that except during the burglary of a dwelling house when occupied by the owner or some member of his family, there is no greater reason for using extreme means such as spring guns and other dangerous devices in preventing burglary of an unoccupied dwelling than in preventing other felonies not involving danger to humans.[50]

V. CONCLUSION

The law has always placed a higher value on human safety than upon mere property rights.[51] The *Katko* decision supports this rule by stressing that the issue presented was whether deadly force could be used in the protection of property—safety for the land owners was not a factor in this case. The court said:

> The primary issue . . . is whether an owner may protect personal property in a boarded-up farm house against trespassers and thieves by a spring gun capable of inflicting death or serious bodily injury.
>
> We are not here concerned with a man's right to protect his home and members of his family. . . .[52]

(1938). In this case, the owner of a melon patch set six spring guns in his patch. Owner was convicted of unlawfully shooting with intent to wound a 14 year old boy who was attempting to steal watermelons.

Pierce v. Commonwealth, 135 Va. 635, 115 S.E. 686 (1923). A merchant whose store had been burglarized previously, set a spring gun to guard his store against further break-ins. Although the court reversed this case on technical grounds, the court said that the store owner could be found guilty of such wanton and reckless disregard for the safety of others and that he could be convicted of second degree murder. In this case, a policeman was killed by the gun while in the performance of his duty in attempting to test the door to the store.

State v. Barr, 11 Wash. 481, 39 P. 1080 (1895). The deceased, in attempting to enter a boarded-up cabin in the woods was killed by a spring gun set by the defendant. In upholding a second degree murder conviction, the court said that the lower court was warranted in instructing that the defendant had no right to use such a dangerous device to protect his property.

See also cases on spring guns collected in 19 A.L.R. 1437 (1922), 28 A.L.R. 873 (1924), 37 A.L.R. 1100 (1925), 44 A.L.R.2d 383 (1955). *See generally* Comment, *The Use of Deadly Force in the Protection of Property under the Model Penal Code*, 59 COLUM. L.R. 1212 (1959).

49. 11 Wash. 481, 39 P. 1080 (1895).

50. *Id.* at 483, 39 P. at 1082.

51. *See* note 1 *supra.*

52. Katko v. Briney, 183 N.W.2d 657 (Iowa 1971).

This case received national attention in newspapers[53] and on national news programs. A prowler, who is fined $50 for larceny and paroled, collects $30,000 from a farm couple who sought to protect household items in their abandoned farm house. Although the items Katko sought to steal amounted to old bottles and fruit jars,[54] the same rule applied to this decision would apply to a store owner who seeks to protect valuable goods. As *Katko v. Briney*[55] shows, the trend is still strong in supporting the belief that where property alone is to be protected, care must be taken to use only so much force as is reasonably necessary for the protection of property and no more. An owner who employs a mechanical device in defending his property against unprivileged intrusions must use one which would deter a would-be intruder and only slightly injure the determined intruder. Any force calculated to inflict an injury considered serious would be held unreasonable and excessive, and the owner responsible for such a dangerous force could be held criminally, as well as civilly liable for the damage inflicted.

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53. *See, e.g.*, Chicago Tribune, Feb. 10, 1971, at 1A-7, col. 5-7; New York Times, Feb. 10, 1971, at 32, col. 1.

54. Katko v. Briney, 183 N.W.2d 657, 658 (Iowa 1971).

55. *Id.*