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ARREST WITH AND WITHOUT A WARRANT*

The following article is in substance the brief on the questions discussed in the commentaries prepared by the author and printed by the American Law Institute for the use of its members and the profession generally in considering the tentative drafts of that part of the Restatement of the Law known as Torts Restatement No. 3.

This article deals with a number of problems, more or less disconnected, which arise in determining the circumstances under which either a private person or a peace officer is privileged to use force to arrest without a warrant, and the amount of force which may be used to effect an arrest either with or without a warrant.

I.

THE PRIVILEGE TO ARREST WITHOUT A WARRANT FOR A MISDEMEANOR OTHER THAN A BREACH OF THE PEACE.

Until the case of *Carroll v. U. S.*,¹ the statements both of judicial decisions and textbooks were substantially unanimous to the effect that there was no privilege to arrest without a warrant for a misdemeanor other than a breach of the peace, except in the case of a few misdemeanors such as "night walking" and "riding armed" for which authority to arrest without a warrant had been given by statutes so ancient that the statutory origin

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¹267 U. S. 137 (1925).

of the privilege had been forgotten and the privilege regarded as substantially one at common law.

It is usually said that not even a peace officer is privileged to make an arrest without a warrant for a misdemeanor which does not amount to a breach of the peace² and there are many cases which expressly deny the privilege to arrest for such a misdemeanor.³

It has been said that seven states grant to peace officers, though not to private persons, a privilege to arrest without a warrant for any misdemeanor committed in their presence. *State v. Dietz*⁴ is the only case which actually so decides. In none of the other cases is there more than language which scarcely reaches the dignity of a dictum. In some of them the offense for which the arrest was made was a breach of the peace.⁵ In others the arrest was for a misdemeanor not committed in the presence of the officer making the arrest.⁶ In none of them

² I CHITTY, CRIMINAL LAW *15; CROCKER, DUTIES OF SHERIFFS (3d ed. 1890) §§ 48, 53; 9 HALSBURY, LAWS OF ENGLAND 612; HAWLEY, LAW OF ARREST (3d ed. 1919) § 51; VOORHEES, ARREST (1904) § 131; 1 WEARTON, CRIMINAL PROCEDURE (10th ed. 1918) § 35; WILGUS, *Arrest Without Warrant*, 22 MICH. L. REV. at 703 (1923); Monographic Note in 84 Am. St. Rep. 679 at 688; 2 A. & E. ENC. L. 879; 5 A. & E. ENC. L. 476; 5 C. J. 401; 2 R. C. L. 446. But see 1 COOLEY, TORTS (3d ed. 1906) 306-308, *203, 204.

³ The following cases expressly held that an arrest without a warrant for any misdemeanor other than a breach of the peace was not privilege even though the misdemeanor was committed in the officer's presence. *Roberson v. State*, 42 Fla. 223, 28 So. 427 (1900); (but FLA. REV. GEN. STAT. (1920) § 6029 enacts the contrary rule); *Commonwealth v. O'Connor*, 7 Allen 583 (Mass. 1863); *Commonwealth v. Wright*, 158 Mass. 149, 33 N. E. 82 (1893); *Robinson v. Miner*, 68 Mich. 549, 37 N. W. 21 (1888) (holding a statute conferring the privilege to be unconstitutional); *Butolph v. Blust*, 5 Lans., 84 (N. Y. 1871), (this has been changed by statute; see GILBERT, N. Y. CR. CODE (8th ed. 1925) § 177); *Commonwealth v. Krubeck*, 8 Pa. D. R. 521 (1899); *Mundine v. State*, 37 Tex. Cr. App. 5, 385 S. W. 619 (1897); *M. K. & T. Ry. v. Warner*, 19 Tex. Civ. App. 463, 495 S. W. 254 (1898); *Lee v. State*, 45 Tex. Cr. App. 94, 74 S. W. 28 (1903). The following cases contain dicta to the same effect, *Staker v. U. S.*, 5 F.(2d) 312, 314 (C. C. A. 6th, 1925); *Franklin v. Amereson*, 118 Ga. 860, 861, 45 S. E. 698 (1903) (the Ga. Code provides a different rule); *King v. Poe*, 15 L. T. R. (N. S.) 37 (1866); *Philadelphia v. Campbell*, 11 Phila. 163 (1876); *State v. Byrd*, 72 S. C. 104, 51 S. E. 542 (1905) (but rule in South Carolina is *contra* by statute).

⁴ 136 Wash. 228, 239 Pac. 386 (1925), quoting, *inter alia*, the dictum of Taft, C. J., in *Carroll v. U. S.*, as to which see *infra*.

⁵ *State v. Mills*, 6 Pennw. 497 (Del. 1908); *Taaf v. Slevin*, 11 Mo. App. 507 (1882).

⁶ *State v. Dietz*, 59 Kan. 576, 53 Pac. 820 (1898); *Webb v. State*, 51 N. J. L. 189, 17 Atl. 113 (1889); *Rarick v. McManoman*, 17 Pa. Super. 154 (1901); *Musco v. Comm.*, 86 Va. 443, 10 S. E. 534 (1890). In *Webb v. State*

was there any reason for the court to distinguish between breaches of the peace and other misdemeanors and the word "misdemeanor" was used as a generic term and not as a term of precision.

Some little doubt has been caused by the opinion of Chief Justice Taft in *Carroll v. U. S.*, *supra*. Prohibition officers stopped and searched the defendant's automobile and, finding liquor therein, seized the liquor and arrested the defendant. The liquor so seized was admitted in evidence in a prosecution for violation of the Volstead Act. The admission of this liquor was alleged to be error on the ground that it was procured by an illegal search, it being further argued that the search was illegal because it was part of an illegal arrest. Thus the question before the court was whether or not the *search* was illegal.

The majority of the court, in an exhaustive opinion on searches and seizures by Chief Justice Taft, decide *at the outset* that the *National Prohibition Act* gives officers power to make searches of automobiles upon probable cause without warrant. That, it would seem, determined the legality of search. All else is dicta.

The defendant had also argued that a search without a warrant must be limited, as an arrest for a misdemeanor without warrant, to cases where the offense is committed in the officer's presence. Chief Justice Taft answers that, under a proper construction of the *Prohibition Act*, the officer does not have to be aware *by his senses* of the commission of the offense, but that it is enough if he "*discovers*" it in any manner, as upon reliable information.

It is evident that here the principal question was as to the *presence* of the officer. For this question no distinction is neces-

the court says that "it has always been the common-law view that the constable or peace officer in case of mere misdemeanor cannot take the offender unless, *in some instances*, where the offense has been committed in his presence." The phrase, *in some instances*, in all probability refers to the arrest of those found "night walking" and "riding armed," for which, though misdemeanors, a privilege to arrest was given by statutes so early as to have become part and parcel of the common law, and to the arrest of "notorious cheats going about the country with false dice," for which the privilege probably has a similar origin, 2 HALE, P. C., chap. 12 § 20. Indeed, "*in some instances*" may be intended to refer to breaches of the peace, which are a form of misdemeanor.

sary or ever taken between misdemeanors which are and those which are not breaches of the peace. Therefore, it is natural for one to speak generally of misdemeanors and not make distinctions where the distinctions make no difference.

It was in this connection that Chief Justice Taft said that "a police officer . . . may arrest without warrant one guilty of a misdemeanor only if *committed in his presence*." Three things are to be noted: (1) The chief thing in Chief Justice Taft's mind, and the chief point in the argument, was the question of *presence*, as pointed out above. (The same is true in the dissenting opinion of Justice McReynolds.) (2) As support for the above quotation, Chief Justice Taft cites an extract from Halsbury's Laws of England, which clearly makes the distinction between misdemeanors which are and those which are not breaches of the peace. He also cites two Supreme Court dicta in which the commission of the offense in the actor's presence was the sole question.⁷ (3) In further elaboration, Chief Justice Taft says: "The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace." It follows that where the misdemeanor is *not* a breach of the peace, the reason for an arrest without a warrant fails. And, by the old maxim, the reason for the rule failing, the rule fails too.

It is difficult to see how the *Carroll* case can be taken as authority for the proposition that an arrest can be made by a peace officer without warrant for a misdemeanor less than a breach of the peace. Yet the case has been taken to stand for that proposition by some Federal courts and as so understood, has been followed⁸ and is cited in dicta where the issue was as to the officer's presence.⁹

The possession, or sale, or manufacture of intoxicating

⁷ Justice McReynolds, who states the privilege of arrest in substantially the same terms as Chief Justice Taft, in support thereof cites cases which distinguish between breaches of the peace and other misdemeanors.

⁸ *Vaught v. U. S.*, 7 F.(2d) 371 (C. C. A. 9th, 1925); *U. S. v. Lindsly*, 7 F. (2d) 247 (E. D. La. 1925); *Bell v. U. S.*, 9 F. (2d) 820 (C. C. A. 9th, 1925).

⁹ *People v. Hutchinson*, 9 F. (2d) 275 (C. C. A. 8th, 1925); *Peru v. U. S.*, 4 F.(2d) 881 (C. C. A. 8th, 1925).

liquor is a misdemeanor by federal law. Even before the *Carroll* case, several federal courts held that an officer might arrest one who, in the officer's presence, possesses, sells or manufactures liquor.¹⁰

The authority of these cases as stating the common law is shaken by holdings in some late federal cases that the power to make arrests without warrant under the above circumstances is to be derived *not from the common law*, but from a proper construction of the *National Prohibition Act*, even as intimated in the *Carroll* case.¹¹

In *Rouda v. U. S.*,¹² Learned Hand, J., writing for the court, derived the above power from the *Prohibition Act* after a close examination of the various provisions of the Act. In the course of the opinion, Judge Hand said: "While a peace officer might at common law arrest without warrant for a misdemeanor committed in his presence, which was a breach of the peace, *his power to do so in other cases is at best most uncertain.*" Were it not for the Washington case and the federal cases which construe the language used by Chief Justice Taft in *Carroll v. U. S.* as stating his opinion that a peace officer may arrest without a warrant for any misdemeanor committed in his presence, it would be possible to say that the common law has never recognized any such privilege.

It may, however, be suggested that while the construction put by the courts upon *Carroll v. U. S.* is in conflict with the common law of England and with even the majority of American states, it may be a wise and sound piece of judicial legislation. In support of this it may be urged that a great majority of the states have enacted statutes which give peace officers a

¹⁰ *Vachina v. U. S.*, 283 Fed. 35 (C. C. A. 9th, 1922); *McBride v. U. S.*, 284 Fed. 416 (C. C. A. 5th, 1922); *Cabbitt v. Potter*, 293 Fed. 54 (D. C. Mass. 1923); *U. S. v. Stafford*, 286 Fed. 702 (E. D. Ky. 1923); *U. S. v. Seltzer*, 5 F.(2d) 364 (D. C. Mass. 1925).

¹¹ In *Altshuler v. U. S.*, 3 F.(2d) 791 (C. C. A., 3d, 1925), and *Marson v. U. S.*, 8 F.(2d) 251 (C. C. A. 9th, 1925), such was the holding without extended argument.

¹² 10 F.(2d) 916 (C. C. A. 2d, 1926).

¹³ *Gidden v. State*, 154 Ga. 54, 113 S. E. 386 (1922); *People v. McLean*, 68 Mich. 480, 36 N. W. 231 (1888); *People v. Shanley*, 40 Hun 477 (N. Y. 1886).

privilege as broad or broader. Many of these statutes, however, confer this privilege upon only certain classes of peace officers and the recognition of a common law privilege to arrest for any misdemeanor committed in the presence of an officer, would very considerably add to the number of officers privileged to make such arrests. The mere fact that legislatures have adopted such a course does not necessarily prove its wisdom; it certainly does not prove that it is wise to extend the policy underlying such statutes further than the legislatures have chosen to go. After all, we should not in our desire to punish crime, overlook the interests of individuals. Indeed, the interest of the citizen in not being arrested unnecessarily is the inspiration for the tendency of modern criminal laws to provide that the alleged offender shall be brought into court by a summons and not by arrest. The privilege to arrest without a warrant will undoubtedly lead to officers taking into custody persons for offenses which, though actually committed and in the presence of the officer, are subsequently deemed too insignificant to warrant prosecution. Unless there is some reason to suppose that the offender will escape unless he is immediately arrested, the delay incident to obtaining a warrant will not injure the interest of the state in punishing him.

The common law privilege to arrest for a breach of the peace was not given as a thing in itself. As Chief Justice Taft himself points out in *Carroll v. U. S.*, it was part and parcel of the privilege to preserve the public peace by preventing breaches thereof. As such it was a privilege which the peace officer shared with the private person. It was only when the offense was a felony that the privilege to arrest without warrant was given for the sole purpose of securing the apprehension of a criminal. Indeed, if, as is suggested, the only reason for permitting the arrest of a mere misdemeanor, who commits his offenses in the presence of a peace officer, is danger that the delay incident to obtaining the warrant will allow him to escape, there is no reason to confine the privilege to arrest for such offenses to misdemeanors committed in the officer's presence. It should apply equally, as does the privilege to arrest for felony,

to a misdemeanor whose offense is complete and over before the officer arrives on the scene. The passion of modern legislatures for the regulation of the most intimate concerns of everyday life is notorious. The legislative mill turns out a steady addition to the list of misdemeanors. These are oppressive enough if administered with the deliberation inherent in the requirement of a warrant or summons. They become doubly intolerable if every over-zealous peace officer, actuated by a lofty but inconvenient crusading spirit, is permitted to take up, on sight, every person whom he detects in the act of committing a misdemeanor. If legislatures choose to go so far, there is perhaps no remedy for their desire to sacrifice the reasonable convenience of their citizens on the altar of supposed public need. But it would be a grave error to adopt any such privilege into the common law. If a particular misdemeanor is of such a character and the punishment thereof so great that there is real danger of the escape of the criminal unless he is immediately arrested, an emergency arises similar to that which exists in the case of a felony. Intelligent legislation can provide an exceptional privilege for such an exceptional case. To give a common law privilege to arrest for all misdemeanors, because some few of them are of this character, is like killing all the cattle in a state because a few are suspected of having foot-and-mouth disease.

At least let us be thankful that Chief Justice Taft does not suggest a common law privilege to arrest on sight for any public offense. This would include breaches of municipal ordinances as well as statutory misdemeanors. Everything that has been said as to the unnecessary annoyance caused by arrest without warrant for minor misdemeanors is doubly pertinent to arrest for the breach of an ordinance. People no longer live their whole lives in the village in which they were born. They pass freely from place to place, and in transit go through innumerable towns and villages. The risk of being arrested on sight, because one's conduct contravenes some regulation which the wisdom of the local Solons deems necessary, is appalling to any thinking person. It would be impossible to know at what moment one might become amenable to arrest. Even that out-

worn and discredited fiction that every man knows the law has never been pushed to such an extreme as to justify imposing such consequences upon an ignorance of the local ordinances of the myriads of small communities through which modern men constantly pass.

II.

ARREST UNDER A WARRANT WHICH IS NOT IN THE ACTOR'S POSSESSION AT THE TIME OF ARREST.

If the offense charged in the warrant is a breach of the peace or other misdemeanor, a person arresting or attempting to arrest another under the authority of the warrant but not having the warrant in his possession is not so far privileged as to make the other's resistance to the arrest unprivileged.¹³

In *Codd v. Cabe*,¹⁴ a warrant was addressed to all constables. The chief constable retained the warrant and instructed his under-constables to make the arrest. The defendant was held privileged to resist an attempt by one of the under-constables to make the arrest. In *Adams v. State*,¹⁵ the defendants were held not guilty of a rescue under similar circumstances. In *Webb v. State*,¹⁶ an officer was held guilty of assault in arresting a third party assisting another in resisting such an arrest. In such a case it is immaterial that the person arrested did not request to see the warrant or that he knew or did not know that the warrant had been issued. It is directly ruled in the following cases, as well as stated in the opinions of those above cited, that a person so arresting another is liable for false imprisonment.¹⁷ The arrest is treated as though it were made without a warrant, and the decisions are based on the ground that an arrest cannot be made without a warrant for a misdemeanor not committed in the presence of the officer, if it can be made at all, and the argument that there is a warrant outstanding is met by an insistence

¹³ 1 Ex. D. 352 (1876).

¹⁴ 121 Ga. 163, 48 S. E. 910 (1904).

¹⁵ 51 N. J. L. 189, 17 Atl. 113 (1889).

¹⁶ *McCullough v. Greenfield*, 133 Mich. 463, 95 N. W. 532 (1903); *Kratzer v. Matthews*, 233 Mich. 452, 206 N. W. 982 (1926); *Smith v. Clark*, 53 N. J. L. 197, 21 Atl. 491 (1891).

upon the requirement that one arresting under a warrant must show it if requested to do so, which is manifestly impossible unless he has the warrant in his possession.

The only case which expresses a contrary opinion is *Cabell v. Arnold*,¹⁸ in which, overruling the decision of the Court of Civil Appeals,¹⁹ the court holds that, although one whose arrest is so attempted is privileged to resist, the officer so making the arrest is not liable. The authority of this case is weakened by the fact that, although the language of the court is general and therefore applicable both to arrests for misdemeanor and for felony, the crime for which the arrest was made was a felony, and it is universally held that a peace officer may arrest for a felony without a warrant and therefore may arrest when a warrant has been issued without having it in his possession, the issuance of the warrant being sufficient grounds for his reasonable suspicion both that a felony has been committed and that the person named in the warrant is guilty thereof.²⁰

It is necessary here to distinguish between cases where the arrest is made under the command of a person holding the warrant and in the presence of such person, and cases in which it is made by such command but not in such person's presence. In *Coyle v. Hurtin*,²¹ a sheriff held a warrant charging a breach of the peace. He took his posse with him to serve the warrant. Being unable to overcome the resistance of those charged in the warrant, he left several of his posse on the spot to prevent the escape of these persons and to arrest them if possible, while he, still holding the warrant, went to a neighboring town for further assistance. It was held that the men left upon the spot might make the arrest in the sheriff's absence. This case may be sustained on the ground that, while the sheriff was not actually present, he was at the time engaged in acts which, in his opinion at least, were necessary to effect the arrest. This distinction might be thus phrased: One who at the command of a third

¹⁸ 86 Tex. 102, 23 S. W. 645 (1893).

¹⁹ 22 S. W. 62 (1893).

²⁰ See *Codd v. Cabe*, *supra* note 14, and cases cited *supra* note 13.

²¹ 10 Johns. 85 (N. Y. 1813).

person and in his absence arrests another under the authority of a warrant not in his possession, although in the possession of the third person, is not privileged if such third person has merely delegated the service of the warrant to him and is himself not doing anything at the time to secure the particular arrest in which the actor is assisting; on the other hand, if the third person continues to be engaged in effecting that arrest, the actor who has been assisting him in his efforts may, during the third person's temporary absence, continue his assistance, and therefore is privileged to arrest, even though the third person having the warrant is temporarily absent from the place of arrest. Since the actor is only protected if he is assisting the third person in the very arrest which the third person is seeking to accomplish, this would not cover a case in which the third person was seeking to arrest the criminal at one point and had sent his subordinates without warrants to arrest at other points. If this distinction is sound, it is only needed, and is, therefore, only applicable, to a breach of the peace or other misdemeanor.

III.

THE PRIVILEGE TO USE DEADLY FORCE TO EFFECT AN ARREST WITH OR WITHOUT A WARRANT.

It is well settled that an officer attempting to make a privileged arrest of another with or without a warrant, for a breach of the peace or other misdemeanor or for the violation of a municipal ordinance, is not privileged to use force intended or likely to cause death or serious bodily injury, although it is impossible otherwise to effect the arrest. On the other hand, it is often broadly stated that an officer attempting to arrest, with or without a warrant, another charged with, or suspected of, felony, is privileged to use deadly force, if it is absolutely necessary to do so in order to effect the other's arrest, and that the officer, having lawfully arrested another for a felony, is privileged to take the other's life, if his escape cannot otherwise be prevented.

Two problems arise, first: May deadly force be used if

necessary to effect a privileged arrest for any felony, or is the use of such force restricted only to certain felonies? Second: Should any distinction be drawn between the use of such force, (a) to effect an arrest by preventing flight and (b) to effect such an arrest by overcoming resistance interposed by either the person sought to be arrested or a third person, the person seeking the arrest having no reason to believe that the force used in resistance is likely to cause death or serious bodily injury to him or any third person?

I.

At a time when all felonies were punishable by death, it is not unnatural that the killing of an actual or suspected felon should be regarded as preferable to his escape from arrest. The felon's life was forfeit. His killing was at best an extra-judicial and premature execution of a penalty which he had already incurred by his felony. It was the actual felon, and not the innocent man suspected of felony, who usually fled from or resisted arrest. But the severity of criminal law has been universally relaxed by removing the death penalty from less serious felonies and in some jurisdictions by removing the death penalty even from those of an exceedingly grave character. In addition, it is common experience that legislatures often make conduct a felony, either by so declaring it or by attaching to it a penalty which automatically makes it a felony, although such conduct involves as little, or less, serious consequences and which shows as little, or less depravity of character than offenses which are made misdemeanors. This tendency is exhibited in practically every criminal code of the individual states and is even more marked when the codes of the various states are compared with one another. It is therefore not surprising that there is no American case which actually sustains the privilege to use deadly force for the sole purpose of effecting an arrest for an offense merely because the offense is a felony at common law or is made such by statute, and that there are a number of dicta which doubt the applicability of so broad a privilege to modern conditions and its consonance with modern public opinion.

Thus in *U. S. v. Clark*,²² Brown, J., afterwards of the Supreme Court of the United States, said as to this broad statement:

"I doubt, however, whether this law would be directly applicable to the present day. Suppose for example, a person were arrested for petit larceny, which is a felony at common law, might an officer under any circumstances be justified in killing him? I think not. The punishment is naturally too disproportionate to the magnitude of the offense."

In *State v. Bryant*,²³ Reade, J., says:

"It must be, however, that the powers of arresting and the means used must be enlarged or modified by the character of the felony. The importance to society of having felons arrested in cases of capital felonies—such as murder and rape—must be greater than in cases of inferior felonies such as larceny. . . . Extreme measures, therefore, which might be resorted to in capital felonies would shock us if resorted to in inferior felonies."

In *Renau v. State*,²⁴ McFarland, J., says:

"And we may add that it may be a question worthy of consideration whether the law ought not to be modified in respect to the lower grade of felonies, especially in view of the large number of crimes of this character created by comparatively recent legislation, whether as to these even escape would not be better than to take life."

In view of the lack of authority upon the extent of the privilege to use deadly force to effect arrest for felony, it is necessary to turn to the many decisions upon the closely related subject of the privilege to kill to prevent the commission of a felony. The two subjects are not only in their nature closely similar, but an attempt to prevent a felony is exceedingly likely to be followed up by the arrest or an attempted arrest of the felon.

So long as a felon's goods were forfeitable to the crown, the crown had the peculiar interest in the conviction, and there-

²² 31 Fed. 710 (C. C. Mich. 1887).

²³ 65 N. C. 327 at 328 (1871).

²⁴ 2 Lea 720 (Tenn. 1879).

fore in the apprehension of a felon, which was different in kind and far more personal than the interest which it had in securing the good order of the realm in the prevention of felonies. But today the interest of the state in preventing crime is as great as, if not greater than, the interest of the state in its punishment. The privilege to use deadly force to arrest a felon should not exist unless the felony is at the least of such a character that the use of such force would be privileged for the purpose of preventing it.

The history of the privilege to use deadly force to prevent crime shows a constant restriction of the privilege. Originally it would seem that the privilege to kill to prevent crime was exceedingly broad. Lord Coke says that it is permissible to kill to prevent the commission of a felony even though the felony could have been prevented by milder means.²⁵ Even in Blackstone's time the privilege seems to have been much restricted. He says that: "Where a crime itself capital is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting."²⁶ Certainly no American court recognizes a privilege to kill to prevent the most heinous of felonies, punishable by death, unless there appears at least reasonable doubt of a possibility of otherwise preventing its commission. But even the privilege stated by Blackstone was still further limited by the relaxation of the severity of the punishment imposed for felonies. The abolition of the death penalty for all but a few felonies, destroyed the reason for holding that, while it was not permissible to kill to prevent the commission of a misdemeanor, it was permissible to kill to prevent any felony. Many cases, both English and American, have held that there is no privilege to kill to prevent larcenies which were felonies both at common law and by statute.²⁷ If the mere fact that a particu-

²³ Co. Inst. *56.

²⁴ 4 BL. COMM. *181.

²⁷ *Rex v. Scully*, C. & P. 317 (1824) (defendant shot the man who got into his master's yard to steal chickens from the hen roost). The court charged that the defendant had no right to shoot the deceased unless he considered his life in danger. *Reg. v. Murphy*, 1 *Craw. & D.* 18 (1839), (defendant shot a person caught in the act of carrying away timber stolen from the premises of the defendant's master). In this case the court held that the use of deadly force was privileged to prevent only such felonies as are punishable by death.

lar offense is a felony at common law is not enough to confer the privilege, *a fortiori* there is even greater reason to hold that the fact that a particular offense is made a felony by the statute which makes it a crime is not enough to confer a privilege to use such force to prevent its commission.

But it does not follow that the mere fact that a particular offense is a felony by statute rather than by common law should preclude a privilege to use deadly force to prevent its commission. It is the nature of the offense, the serious consequences which it threatens and the depraved and desperate character of its perpetrators which should determine the extent to which force should be used, and not its origin on the common law or the statute.²⁸

With one exception to be noted hereafter, the privilege to use deadly force, either to prevent a felony or to effect the arrest of one guilty or suspected thereof, has been confined to felonies which not only are committed by violence but also involve a danger to life and female honor.²⁹

Such felonies are usually committed by persons of moral depravity and desperate character. It is true that lesser offenses may also involve moral depravity and may often be committed by men of desperate character. This of itself is not enough to justify the killing or wounding of such lesser criminals to prevent such crimes or to secure the arrest of persons guilty thereof. But it is a factor which increases enormously the chance of dangerously violent resistance to arrest and so, if the crime is a violent felony, involving danger to human life or female honor,

Storey v. State, 71 Ala. 329 (1882) (horse stealing). Carmouche v. Bouis, 6 La. Ann. 95, 97 (1851) (pocket picking); Gardiner v. Thibodeau, 14 La. Ann. 732 (1859), and McClellan v. Kay, 14 B. Monroe 103 (Ky. 1853) (the owner of a slave killed while stealing chickens, was held entitled to recover for the value of the slave).

²⁸ In the case of Smith v. State, 127 Iowa 534, 103 N. W. 944 (1905), this element is perhaps least marked. In that case the offense was the rescue of a prisoner, which was by statute made a felony. A rescue, however, is exceedingly apt to be accompanied by or lead to a deadly affray, and the danger to life, though not as marked as in the case of highway robbery or burglary, is none the less clearly present, and see Oliver v. State, 17 Ala. 587 (1850); Carroll v. State, 23 Ala. 28 (1853); Dill v. State, 25 Ala. 15 (1854).

²⁹ In THOMPSON, CASES ON SELF-DEFENSE 901 and in Storey v. State, 71 Ala. 329 at 339, 340 (1882), it is pointed out that text-writers since Blackstone, with the exception of Bishop, all state the law to be that fatal force may only be used to prevent "forcible" and "violent" felonies.

gives an additional reason for permitting the use of deadly force to effect the arrest of the actual or supposed felon. Indeed, the fact that these felonies carry with them the most extreme punishment is likely to lead those engaged therein to go to extreme lengths to prevent their arrest. Perhaps these factors should more legitimately be considered in determining whether an officer is acting in privileged self-defense if he uses deadly force to effect the arrest of such a felon. It is quite clear that under such circumstances the slightest indication of an intention to use deadly force to prevent the arrest would be sufficient to justify the officer in believing his life imperiled, while similar conduct on the part of a person sought to be arrested for a minor misdemeanor, or a breach of an ordinance carrying a small penalty, might not be sufficient so to do. These factors may, however, have a legitimate importance in determining whether the officer may not even in advance of any actual demonstration by such a suspected felon use deadly force to effect his arrest. It may well be considered that an officer should not be put to the peril of waiting until the suspected felon commits some overt act manifesting even to the most suspicious mind an intention to use deadly force. For the protection of the officer, he may legitimately be permitted to forestall the deadly resistance which such a felon is extremely likely to interpose.

There is a tendency to regard the breaking and entering of a building in which property of value is kept or stored, if made a felony by statute, as similar in character and therefore in all its legal consequences to the nocturnal breaking and entering of a dwelling-place. This is so irrespective of the presence or absence of any watchman whose life may be imperiled. This tendency seems to be substantially unanimous in one class of cases dealing with the protection of real property from felonious entry. There are a number of cases in which it has been held proper to use spring guns and other forms of protection, both intended and likely to cause death or serious bodily injury, to protect from nocturnal felonious entry, places which while not in use as residences, are used for the keeping or storing of property.³⁰ If the

³⁰ See Bohlen and Burns, *Privilege to Protect Property, etc.*, 35 YALE L. J. 527 (1926) nn. 39-48.

analogy between prevention and arrest suggested above is pertinent, it would seem that courts should not distinguish between these two classes of buildings in determining whether deadly force can be used in arresting one guilty or suspected of a felonious entry thereon. Such crimes have been brought prominently to public attention by their great frequency. They are normally committed by a class substantially as desperate and depraved as those who commit common law burglaries. There is the same reason therefore to permit officers to forestall dangerous resistance in the one case as in the other.

In the interest of certainty and consistency, it is to be hoped that courts will continue to restrict within the limits indicated, the privilege to use deadly force to prevent felonies or to effect arrest therefor. It is, however, possible that a settled and persistent course of opinion in some particular locality may regard certain offenses, which are constantly committed in that locality, as being equally heinous in character as those above mentioned. If so, the courts of such localities will probably and perhaps properly hold that there is a privilege to use deadly force to prevent the commission of such offenses or to arrest persons guilty or suspected thereof. In determining this, some weight is to be given to the punishment imposed by statute. Such a sentiment is apt to be aroused where particular forms of offenses, generally depredations against property, are constantly committed, and the severe penalties of the statutes are designed to deter from repetition.

It would seem, however, that if public opinion in a particular state regards a particular offense as more heinous than it is elsewhere regarded, and therefore believes that its commission should carry all the penalties elsewhere attached to felonies universally regarded as particularly grave, the statute which attaches the severe penalty to its commission should also expressly provide that killing is justified if necessary to prevent it or arrest one guilty or suspected thereof.

Thus the prevalence of chicken stealing and the impossibility of preventing it by trial and punishment of those guilty thereof, has led Texas to pass an act to justify killing when neces-

sary to prevent it.³¹ The statute is silent as to the privilege to kill to secure the apprehension of persons guilty or suspected of chicken stealing, but it is at least arguable that the legislature, by giving the privilege to prevent an offense, has marked it as sufficiently serious to justify killing to arrest the person guilty or suspected thereof.

The cases are unanimous to the effect that no one, even an officer, may kill or inflict serious wounds to prevent a person whom he is attempting to arrest for a misdemeanor, either with or without a warrant, from escaping by flight from arrest or from his custody after arrest.³²

On the other hand, in at least two states it is held that an officer who is attempting to arrest a person for a misdemeanor, either with or without a warrant, may kill or seriously wound such person if it is necessary to do so in order to overcome resistance which such person actively interposes to the arrest, although his resistance is not such as to threaten death or serious bodily injury to the officer.³³

³¹ See *Grant v. Hess*, 31 Tex. Civ. App. 688 (1903).

³² See 1 EAST P. C. 302 (1803); 2 BISHOP, CRIMINAL LAW (9th ed. 1913), §§ 647-50; U. S. v. Clark, 31 Fed. 710, 713 (C. C. Mich. 1887); *Thomas v. Kinkead*, 55 Ark. 502, 17 S. W. 854 (1892); *Head v. Martin*, 85 Ky. 481, 3 S. W. 520 (1890); *People v. Kline*, 305 Ill. 141, 137 N. E. 145 (1923); *Brown v. Weaver*, 76 Miss. 7, 15, 23 So. 388 (1898); *State v. Cunningham*, 107 Miss. 140, 65 So. 115 (1914); *State v. Sigman*, 106 N. C. 728, 11 S. E. 520 (1890); *Reneau v. State*, 2 Lea 720 (Tenn. 1879).

³³ *Missouri*, *State v. MacNally*, 87 Mo. 644, 653, 656 (1885); *State v. Dierburger*, 96 Mo. 666, 10 S. W. 168 (1888); *North Carolina*, *State v. Garrett*, 60 N. C. 144 (1863); *State v. Deering*, 177 N. C. 559, 98 S. E. 530 (1919).

Bishop states the law to the same effect. His statement in 1 CRIMINAL PROCEDURE (4th ed. 1895) § 161, is based on two Texas cases, in neither of which is there so much as a dictum supporting his view. See *Thomas v. Kinkead*, 55 Ark. 502, 18 S. W. 854 (1892) for a valuable criticism of Bishop's statements. In 2 CRIMINAL LAW (9th ed. 1923) § 650, he cites 2 HALE P. C. 117 (1847), and quotes substantially the following extract from 1 EAST P. C. 302 (1803), "but as in the case of a felon, so here (where the one sought to be arrested for a misdemeanor resists the officer) if the officer meet with resistance and kill the offender in the struggle, he will be justified." The privilege is here stated very broadly and it would seem to indicate that the officer is privileged to kill, not so much for the purpose of effecting the arrest, as for the purpose of defending himself. The only apposite authority cited is 2 HALE P. C. 117 (1847), in which it is said: "But if A, either upon the attempt to arrest, or after the arrest, assault the minister that hath the warrant to arrest him, to the intent to make his escape from him, and the minister standing upon his guard kills him, this is no felony, for being by law authorized to arrest him, he is not bound to go back to the wall, as in common cases of *se defendendo* for the law is his protection. And, therefore, as on the one

In *Terrell v. Comm.*,³⁴ there is a dictum which at first glance may appear capable of a construction favorable to this view. But the language is exceedingly vague and such a construction would be directly contra to earlier cases.³⁵

The reason given in the head-note to *State v. Garrett*,³⁶ is that "the principle of self-defense does not apply to one who puts himself in the posture of armed resistance to the process of the state." This head-note is misleading, as the defendant was not a person resisting the arrest, but an officer overcoming such a person's resistance by deadly weapons. In the same case Chief Justice Pierson makes the equally misleading statement that "When a man puts himself in a state of resistance and openly defies the officer of the law, he is not allowed, if his life is thereby imperiled, to set up the excuse of self-defense." One who attempts to avoid the service of a lawful warrant seems also to put himself in opposition to the will of the state. The actual fact is that a man flees if he has the opportunity and resists only where flight is impossible. Certainly a man defies an officer of the law as much by fleeing as by resisting and clearly the defiance of the law is far more marked where a third party attempts the forcible rescue of a person. Yet even here it is held in *Smith v. State*³⁷ that, in the absence of a statute making the rescue a felony, the officer is not justified in killing to prevent even a forcible rescue.

side if *A* kills him it is murder, so on the other side, if upon this assault by *A* the minister kills him, it is no felony, the necessity excuseth him, if he cannot otherwise save himself and perform his duty." This goes no farther than the accepted view that an officer is not bound to retreat or desist from his effort to make the arrest before defending himself against deadly or serious bodily injury by means likely to cause the same result to his assailant. The charge of Holroyd, J., in Forster's case in 1 Lewin C. C. 187 (1825), is as follows: "An officer may not kill for an escape where the party is in custody for a misdemeanor, but if the prisoner (the officer) had reasonable grounds in believing himself to be imperiled of his own life or of bodily harm and no other weapons at hand to make use of, thus he was justified" in shooting his prisoner. Obviously Justice Holroyd did not believe that the privilege to kill one arrested for misdemeanor went beyond legitimate self-defense.

³⁴ 194 Ky. 608, 616, 240 S. W. 88 (1922).

³⁵ *Stephens v. Comm.*, 20 Ky. L. 544, 47 S. W. 229 (1898); *Dilger v. Comm.*, 88 Ky. 550, 560, 11 S. W. 651 (1889); *Donehy v. Comm.*, 170 Ky. 474, 186 S. W. 161 (1916), none of which are mentioned in *Terrell v. Comm.*

³⁶ *Supra* note 33.

³⁷ 101 N. W. 110 (Iowa 1904).

In *Stephens v. Comm.*,³⁸ the defendant took hold of a man named Miller, a member of a group who the officer believed were breaking the peace, for the purpose of arresting him. Miller pulled away from the defendant, who testified that the crowd "rushed on him," and, to save himself from imminent peril, he shot Miller. The court said that "there was scarcely a shadow of proof to show that the officer was in any danger" and held that the trial judge had erroneously instructed the jury that the defendant had the right to use such force as was necessary to arrest Miller, since "the force to be used in making an arrest (for a breach of the peace) "must at least stop short with that which would result in a loss of human life," citing *Dilger v. Comm.*³⁹ In the latter case, the defendant attempted to justify a killing of an officer as being in self-defense against excessive force used by the officer in attempting to effect the defendant's arrest. This brought up directly the question as to whether the officer was privileged to use deadly weapons to effect the arrest of the defendant for a misdemeanor. The court said "in a case of a felon, the officer may use such force as is necessary to capture the felon, even to kill to prevent flight. Where it is a misdemeanor, however, the rule is otherwise. It is his duty to make the arrest, but, unless the offender is resisting to such an extent as to place the officer in danger of loss of life or bodily harm, the officer cannot kill him."

In *State v. Smith*,⁴⁰ the court approved of a charge that an officer has no right to take the life "of a misdemeanor whom he is seeking to arrest" or to inflict on him a great bodily harm." In a former opinion of the same case,⁴¹ the court held that an officer has no right to kill one who was attempting the forcible rescue of his prisoner. This opinion was withdrawn, apparently because the court for the first time realized that Section 4896 of the Iowa Code had made it a felony to aid an arrested person in escaping. In addition to this, a later Iowa case,

³⁸ *Supra* note 35.

³⁹ *Ibid.*

⁴⁰ 127 Iowa 534, 103 N. W. 944 (1905).

⁴¹ *Supra* note 37.

State v. Towne,⁴² holds that a private person attempting to make a lawful arrest of another for a breach of the peace was not privileged to use deadly force for the purpose of overcoming the other's resistance. While the precise point does not seem to have come before any court for decision in other jurisdictions, there are a quantity of dicta supporting the view expressed in the instruction approved in *State v. Smith*.⁴³

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⁴² 180 Iowa 339, 160 N. W. 10 (1917).

⁴³ Bert v. State, 156 Ala. 29, 46 So. 858 (1908); Holland v. State, 162 Ala. 5, 50 So. 215 (1909); Loveless v. Hardy, 201 Ala. 605, 79 So. 37 (1918); Thomas v. Kinkead, 55 Ark. 502, 509, 18 S. W. 854 (1892); State v. Smith, 59 Ark. 132, 139, 26 S. W. 712 (1894); Brown v. Weaver, 76 Minn. 715, 23 So. 388 (1898); Pamplin v. State, 205 Pac. 521 (Okla. Cr. App. 1922); KERR, HOMICIDE (1891) 187, 2 A. & E. ENC. L. (2d ed. 1898) 849, and 5 C. J. 426, state the law to the same effect, as do also the notes to Brown v. Weaver, 71 Am. St. Rep. 519, and Petri v. Cartwright, 102 Am. St. Rep. 278.