lessee a party to the foreclosure proceedings, since such application again involves employing a rule which has its basis in the protection of the rights of the party against whose interest it is utilized. Hardship might be worked against the lessee as in the case of *Metropolitan Life Insurance Company* v. *Childs*[19] where the lessee, in reliance upon a foreclosure proceeding to which he was made a party, vacated the premises, only to find later that the mortgagee had withdrawn his name as a party to the foreclosure shortly before the actual sale.

In *Curry* v. *Bacharach Quality Shops Inc.*,[20] the Supreme Court of Pennsylvania held that by force of the operation of a statute[21] of that state, the purchaser at a mortgage foreclosure had the option of affirming or disaffirming a subsequent lease, but, having once affirmed the lease he stood in the position of assignee of the reversion and could not subsequently disavow the lease. By statute[22] the interests of the lessee are also protected so that he cannot be dispossessed unless the mortgagee-purchaser makes him a party to the foreclosure (*scire facias* in Pennsylvania).[23] The Pennsylvania solution appears to the writer to be a happy one. It is definite in that it confers upon one party, the purchaser, the right and obligation of determining whether or not the lease shall continue in effect; and at the same time it protects the lessee from eviction where he has not been notified of the disaffirmance of the lease.

D. A. W.

TORTS

Torts — Forms of Action — Trespass — Battery or Negligence

A sheriff was pursuing an escaping misdemeanant who had previously been arrested by him. While engaged in the pursuit the sheriff fired several shots intending to frighten the misdemeanant into stopping; one of the bullets struck the plaintiff, a bystander in the public street. The Court of Appeals for the Third District held the sheriff liable to such person saying that the sheriff "commits an act of trespass against the person so injured."[1]

At early common law an action in trespass could be maintained whenever the injury was direct and with force. Hence, an action could be maintained in trespass if the plaintiff could prove that the defendant

[19] *Supra*, note 5.
[20] 271 Pa. 364, 117 Atl. 435 (1921).
[21] 12 P.S., Sec. 2611 (1836).
[22] 12 P.S., Sec. 309 (1901).
[23] *Nevil* v. *Heinke*, 22 Pa. Super. 614 (1903).
[1] *Young* v. *Kelly*, 60 Ohio App. 382, 21 N.E. (2d) 602 (1938).

hit him.[2] After the decision in *Brown* v. *Kendall*,[3] however, the courts have generally agreed that, in addition to showing the act and the injury, the plaintiff must show either a wrongful intent[4] or a lack of due care.[5] In other words the problem would seem to be clarified by saying that the plaintiff must establish a battery or make out a cause of action in negligence.

In order to establish a battery the plaintiff must show a wrongful intent which may be shown by proving that the intended act was without justification.[6] If the sheriff had been attempting to retake an escaping felon the shooting would have been justified and the plaintiff could not have maintained a battery.[7] But where, as in the principal case, the individual attempting to escape was merely a misdemeanant, the courts generally agree that the sheriff is not authorized to shoot.[8] Therefore, had the sheriff shot the misdemeanant it would have been battery as to him because the intended act was unlawful, thus fulfilling the requirement of wrongful intent. And if he aimed at the misdemeanant and hit the plaintiff, a bystander, the law is clear that this would constitute a battery as to the plaintiff.[9] But the defendant in the principal case claimed that he did not intend to hit the misdemeanant, urging that officers often shoot into the air to compel fugitives to stop. If this were a lawful practice no action could be maintained for a battery, and no action at all could be maintained if the defendant was in the exercise of due care.[10] However, the courts generally agree that this practice is unlawful and that there is no justification for shooting at all in such a case.[11] Accordingly, if the sheriff fires intending merely to frighten the

[2] *Weaver* v. *Ward*, K.B. 1616, Hobart 134; *Murphy* v. *Wilson*, 44 Mo. 313, 100 Am. Dec. Rep. 290 (1869).

[3] 60 Mass. 292 (1850).

[4] *Mohr* v. *Williams*, 95 Minn. 261, 104 N.W. 12 (1905); *Vosburg* v. *Pitney*, 80 Wis. 523, 50 N.W. 403, 14 L.R.A. 226, 27 Am. St. Rep. 47 (1891).

[5] *Welch* v. *Durand*, 36 Conn. 182, 4 Am. Rep. 55 (1869); *Shaw* v. *Lord*, 41 Okla. 347, 137 Pac. 885 (1914).

[6] *Vosburg* v. *Pitney*, *supra*, note 4; *Booher* v. *Trainer*, 172 Mo. App. 376, 157 S.W. 848 (1913).

[7] *Askay* v. *Maloney*, 92 Or. 566, 179 Pac. 899 (1919); *Cook* v. *Hunt*, 178 Okla. 477, 63 P. (2d) 693 (1936).

[8] "After the arrest has been made, if the misdemeanant breaks away and flees, the rule is the same as in case of flight before arrest, that the officer may not shoot or kill to stop the flight." 3 A.L.R. 1174. Accord: *Risher* v. *Meeham*, 11 Ohio C.C. 403, 5 Ohio C.D. 416 (1896) (concedes); *Anderson* v. *Commonwealth*, 232 Ky. 159, 22 S.W. (2d) 599 (1930); *Lane* v. *Butler*, 225 Ill. App. 382 (1922); *Conrrady* v. *People*, 5 Park. Crim. Rep. 234 (N. Y., 1862); *Commonwealth* v. *Loughhead*, 218 Pa. 429, 120 Am. St. Rep. 896, 67 Atl. 747 (1907).

[9] *Talmadge* v. *Smith*, 101 Mich. 370, 59 N.W. 656, 45 Am. St. Rep. 414 (1894); *Bannister* v. *Mitchell*, 127 Va. 578, 104 S.E. 800 (1920).

[10] *Shaw* v. *Lord*, *supra*, note 5; *Welch* v. *Durand*, *supra*, note 5.

[11] A custom of police officers to fire as a ruse to frighten fugitives into stopping is a reckless use of firearms, and is heartily condemned. *State* v. *Cunningham*, 107 Miss. 140, 65 So. 115 (1914). *Accord: Mangino* v. *Todd, et al.*, 19 Ala. App. 486, 98 So. 323

fugitive, it would constitute a battery as to the fugitive if he were hit, and if a bystander were hit it would be a battery as to him.[12]

The result in the principal case would seem to be justified also upon the ground of negligence. Firearms are recognized by the courts as dangerous instruments,[13] and it has been generally agreed that a high standard of care should be required of anyone using them.[14] That standard has been determined by some courts to be a "great" degree of care[15] and by others a "high" degree of care.[16] Shooting a firearm in a public street is obviously an act likely to produce injury. In *Conradt* v. *Clauve*[17] the court held the defendant negligent where he permitted a target range to be operated on a fairgrounds. In *Combs* v. *Thompson*[18] the court declared that the discharge of a toy cannon in the street of the most populous city in the state was a reckless act. In *Askay* v. *Maloney*,[19] where the officer was lawfully engaged in pursuing a felon, the court said that he was under a duty to use care commensurate with the danger involved, in discharging firearms in a public street, but that whether such degree of care was exercised or not was a question for the jury to decide. Where, as in the principal case, the shooting was wrongful in itself, it would seem that the defendant was obviously negligent in shooting in a public street for no better reason than to frighten an escaping misdemeanant. F. A. R.

Torts — Negligence — Liability for Fright

Plaintiff, a woman about fifty years old, was a passenger on defendant's bus. When leaving the bus, the folding doors at the rear closed and caught her, holding her for from thirty seconds to two minutes. She was not bruised and suffered no apparent physical injury. Plaintiff introduced evidence to show fright and shock resulting in mental and

(1923); *People* v. *Kline*, 305 Ill. 141, 137 N.E. 145 (1922); *Pales* v. *Paoli*, 5 F. (2d) 280 (1st. Cir. Ct. App. 1925).

[12] *Supra*, note 9.

[13] *American Railway Express Co.* v. *Tait*, 211 Ala. 348, 100 So. 328 (1924); *Szasz* v. *Joyland Co.*, 84 Cal. App. 259, 257 Pac. 871 (1927); *Corn* v. *Shepard*, 179 Minn. 490, 229 N.W. 869 (1930); *Gibson* v. *Payne*, 79 Or. 101, 154 Pac. 422 (1916).

[14] Cooley on Torts, (3d ed., 1906) p. 1232; *State* v. *Cunningham*, *supra*, note 11; *Moebus* v. *Becker*, 46 N. J. Law 41 (1884); *Loreno* v. *Ross*, 222 Ala. 567, 133 So. 251 (1931).

[15] Great Care, *Szasz* v. *Joyland Co.*, *supra*, note 13; Utmost Caution, *Brittingham* v. *Stadiem*, 151 N. C. 299, 66 S.E. 128 (1909).

[16] *McLaughlin* v. *Marlatt*, 296 Mo. 656, 246 S.W. 548 (1922); *Atchison* v. *Procise*, — Mo. App. —, 24 S.W. (2d) 187 (1930); *Lindh* v. *Protective Motor Service Co.*, 310 Pa. 1, 164 Atl. 605 (1933).

[17] 93 Ind. 476, 47 Am. Rep. 388 (1883).

[18] 68 Kan. 277, 74 Pac. 1127 (1904).

[19] 92 Or. 566, 179 Pac. 899 (1919).