appraisal if the purpose of the amendment is to change the *express* terms and provisions of any of the outstanding shares having preference in dividend, redemption price, or liquidation price over any other class of shares and implied that the express terms had been varied so as to warrant appraisal under said section.

It is submitted that the court was inconsistent in holding that the stockholders might both retain the stock upon the same terms or consider the express terms varied by the amendment so as to justify an appraisal. Having cautiously maneuvered the amendment through the labyrinth of the provisions pertinent to the preferred stock as heretofore set out, the court left little doubt as to the fact that no vested interest, preferences, or other rights of the dissenting prefered stockholders had been violated. Thus it would seem that *ipso facto* no express terms could have been varied. It is submitted that section 72 should not have been held applicable. Perhaps the court was straining the point in order to avert the possibility of future litigation in deference to Professor Dodd, *supra*, who suggested that a literal construction of "express terms" as defined in section 4 of the Ohio General Corporation Act would narrow the rights of appraisal and result in much litigation. See Senate Bill 47 section 8623 (8) which reads: "The term 'express terms and provisions' with reference to a class of shares means only the statements expressed in the articles with respect thereto."

In conclusion it is significant to note that the Ohio State Bar Association Committee on Corporation Law in its December 26, 1938 report on proposed amendments to the General Corporation Act deemed it necessary to include provisions specifically providing for the power to eliminate accrued, undeclared, cumulative dividends and also for the right of appraisal of shares where the accrued dividends on preferred shares are eliminated by such amendment to the articles. (See Senate Bill No. 47, 93rd General Assembly, Regular Session, 1939-1940).

ARTHUR E. ORLEAN

CRIMINAL LAW

CRIMINAL LAW — SPRING GUN, LIABILITY FOR USE OF

To prevent repetition of a destructive forage on his melon patch, defendant concealed two spring guns on his land, one at each end of the patch. One Wagoner, attempting to repeat a prior sortie, touched a wire and received numerous body wounds. An indictment under Section 12420 of the Ohio General Code, shooting with intent to wound,

followed. Defendant claimed that two large signs, posted one at each end of the field, gave adequate warning and negatived intent. Speaking through Judge Gorman, the court said that the foreseeable consequences and obvious intent shown by the contrivance were to injure anyone coming on the land. Therefore, if the proof adduced brings the act of defendant within the statute, no specific enactment prohibiting the use of a spring gun to defend land is necessary. *Childers* v. *State*, 133 Ohio St. 508, 14 N.E. (2d) 767 (1938).

Neither criminal nor tort liability for using a spring gun to repel a trespass was recognized by the English common law. In 1827 Parliament enacted a statute which made it a misdemeanor to use a spring gun except from sunset to sunrise in defense of a dwelling. (7 & 8 Geo. IV, c. 18, repealed and substantially re-enacted in 1861, 24 & 25 Vict., c. 95, sec. 1, & c. 100, sec. 31). No American court has ever approved or followed the view of the English common law in so far as it permitted the use of a spring gun to protect land or its growing product or to prevent or repel a misdeed less than a felony. One state, Wisconsin, has adopted a statute forbidding the employment of a spring gun for any purpose. *Schmidt* v. *The State*, 159 Wis. 15, 149 N.W. 388 (1914). Only one court has ever intimated that setting up a loaded spring gun may be *per se* unlawful as a nuisance. *State* v. *Moore*, 31 Conn. 479, 83 Am. Dec. 159 (1863). Perhaps the reason for this may well be that it is the only case ever to reach a court after a spring gun had been set up but before injury had resulted. In all others, there being an injury, the court either justified the use or upheld a lower court conviction without pausing to discuss this point. However, in so far as spring guns are employed for the purpose of protecting land, in the light of the uniform refusal to uphold their use, it would seem that no statute should be necessary to classify them as nuisances.

Except for one court, *supra*, bound by a statute, the authorities uniformly agree that spring guns may be utilized only when the owner of property, were he present in person, would be justified in employing force sufficient to maim or kill. There is a conflict among the courts as to when such a situation arises. Some have adopted the view that force might be used to prevent the commission of arson, rape, robbery, burglary, and homicide, stating that at early common law this was the test for permissible use of destructive force. *State* v. *Marfaudille*, 48 Wash. 117, 92 Pac. 939 (1907). This view of the common law is questionable. Thus, a spring gun may be used to protect a farm store room from being broken and entered, *Gray* v. *Coombs*, 30 Ky. 478, 23 Am. Dec. 431 (1832); again, to guard a chicken coop and its inmates, with the

added requirement that notice be given, *U. S.* v. *Gilliam*, 25 Fed. Cas. 1319, 1 Hayw. & H. 109 (1882); so, too, to prevent a felonious entry of a public store, *Schuerman* v. *Sharfenberg*, 163 Ala. 337, 50 So. 335 (1909). Others limit the use of such force to the defense of a dwelling. *Hooker* v. *Miller*, 37 Iowa 613, 18 Am. Rep. 18 (1873), *dictum*; *Simpson* v. *The State*, 59 Ala. 1, 31 Am. Rep. 1 (1877). So in *State* v. *Beckham*, 306 Mo. 566, 267 S.W. 817 (1924), the owner of a store who placed a spring gun there to prevent all too frequent burglaries, with the resultant death of a felonious intruder, was held guilty of manslaughter. In *Pierce* v. *Commonwealth*, 135 Va. 635, 115 S.E. 686 (1923), a conviction of murder in the second degree, where death resulted from a spring gun to one who broke into a building not a private dwelling, was upheld. However, "dwelling" has been interpreted to mean more than a house wherein people live. Thus, it has been held that a man's place of business is, to him, the same as his home and a killing there of a burglar would be justified. *Schuerman* v. *Sharfenberg*, *supra*, *dictum*, in refusing recovery for injuries received by a felonious intruder from a spring gun. A chicken coop situated sixty feet from the place of residence was held to be part of the dwelling. *U. S.* v. *Gilliam*, *supra*. Two courts have said that the use of a deadly force, in each case a spring gun, was not justified in defense of any property, even a dwelling, unless occupied. This right can be exercised only if, in the eyes of a reasonable man, danger is imminent to the life or limb of the owner of the dwelling or to any of its occupants. *State* v. *Green*, 118 S. Car. 279, 110 S.E. 145 (1921); *State* v. *Barr*, 11 Wash. 481, 39 Pac. 1080 (1895), overruled by *State* v. *Marfaudille*, *supra*.

In recent years courts have displayed a tendency to consider the preservation of human life as of greater importance than that of property. Therefore, though conflict exists in the reported cases, it is not felt that the question of the use of spring guns is a settled one even in those states whose courts have had occasion to pass on it. For no one court has decided a sufficient number of cases to be able to say that the question is too well settled to bear re-examination. Further, no decision of the last two and one-half decades has condoned the employment of a spring gun for the purpose of preventing or repelling a felonious intrusion in defense of any property other than a dwelling house.

DAVID GUBERMAN