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the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[42] † J.M.V.

TORTS—LIABILITY OF A LAND OWNER TO INADVERTENT TRESPASSERS IN MARYLAND—OWNERS OF A WATCHDOG HELD NOT LIABLE FOR DAMAGES TO TRESPASSERS. *BRAMBLE V. THOMPSON*, 264 Md. 518, 287 A.2d 265 (1972).

In *Bramble v. Thompson*,[1] adults (plaintiffs) were boating in the daytime when they tied up at the defendants' pier. After the plaintiffs disembarked, they were attacked by a German shepherd dog, which defendants kept for the purpose of protecting their business property, including the pier.

Although the owners knew of the dog's vicious propensities, the court of appeals held that demurrers in favor of the defendants were properly sustained[2] because the plaintiffs ". . . failed to allege that a relationship existed between the parties which imposed a duty upon [defendants] to prevent their dog from injuring [the plaintiffs]."[3] In Maryland no duty is owed by a property owner to a trespasser,[4] and

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42. *Id.* at 635.

† The Court of Appeal of Florida, after holding that the seizure of heroin was lawful as a search incident to a valid arrest, cited "Cf. Cobb v. State, Fla. App. 1968, 213 So.2d 492." That case holds that the grounds of a building, even within the curtilage, are *not* protected by the fourth amendment, and evidence secured therefrom by a trespassing police officer *is* admissible. Thus, by justifying the search herein, the court apparently is eager to avoid reliance on *Cobb*. This casenote of necessity assumes that a backyard *is* protected by the fourth amendment.

A petition for a Writ of Habeas Corpus was brought in the federal district court and denied: Fixel v. Wainwright, No. 72-922-CIV-JE (S.D. Fla., filed Oct. 25, 1972). That court's opinion was based on the open-view doctrine, and it also failed to address itself to the threshold question presented by *Cobb*. The situation is further complicated by the fact, brought out for the first time by this court, that Fixel was a mere tenant, and that the backyard was held by the trial court to be a "common area."

Further, it deserves mention that in discussing the open view doctrine, the district court alluded to the inadvertency requirement set forth in Coolidge v. New Hampshire, 403 U.S. 443 (1971), but made no attempt to apply that requirement to the facts of this case. The undisputed facts of the case indicate that the surveillance in question was planned, and not in the least inadvertent. There also appears to be serious question as to whether the police were lawfully in the position from which the "open view" was made (a shed within the hedged curtilage).

1. 264 Md. 518, 287 A.2d 265 (1972).
2. At the trial court a demurrer was sustained for the defendants, and the plaintiffs were given leave to amend their pleading. When the plaintiffs failed to amend within the alloted time, the trial court entered a judgement of *non pros*. The plaintiffs then initiated another suit alleging that they were only "inadvertent trepassers." A demurrer to this second action was sustained by the trial court, without leave to amend, on the basis that the plaintiffs failed to allege the breach of any duty owed them. Appeals from both judgments were consolidated and were before the Court of Appeals in the instant case.
3. Bramble v. Thompson, 265 Md. 518, 521, 287 A.2d 265, 267 (1972).
4. "[T]he owner of land owes no duty to a trepasser or licensee, even one of tender years, except to abstain from willful or wanton misconduct and entrapment." Fopma v.

the *Bramble* court saw no reason for distinguishing an "inadvertent trespasser" from an intentional trespasser, observing that:

> It would be ludicrous to hold that someone is liable because his watchdog failed to discriminate between an inadvertent trespasser on the property and one who is there bent on criminal activity.[5]

The *Bramble* court addressed for the first time in Maryland the question of ". . .whether the owner of an animal known by him to be vicious can incur liability when that animal attacks and injures a trespasser on the owner's property."[6] To resolve this issue, the court looked to the Restatement of Torts, citing sections 509 and 511.[7] However, the court's conclusion in finding that no liability exists on the part of a landowner whose vicious dog attacks an inadvertent trespasser does not appear to be supported by the Restatement of Torts.

Comment *f.* (not utilized by the *Bramble* court) of the Restatement of Torts, section 509, reads in pertinent part:[8]

> As to the privilege to use dogs to protect property from intrustion, *see* § 516. As to the liability of trespassers generally, *see* § 511.

The Restatement of Torts, section 516 reads:[9]

> 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. (emphasis added).

The Restatement of Torts, section 511 reads:[10]

> *Except as stated in* § § *512 and 516*, a possessor of land is not liable to a trespasser thereon for harm done to him by a wild animal or an abnormally dangerous domestic animal . . . . (emphasis added).

It is clear that section 511 must be read in conjunction with section 516. The *Bramble* court referred to section 509, but apparently ignored

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Board of County Comm'rs, 254 Md. 232, 234, 254 A.2d 351, 352 (1969). Fopma and the following cases involving trespassers who are minors emphasize the absence of any duty owed to a trespasser: Mondshour v. Moore, 256 Md. 617, 261 A.2d 482 (1970) (six-year-old boy crushed by the wheels of a bus); Herring v. Christensen, 252 Md. 240, 249 A.2d 718 (1969) (three-year-old severely burned by a neighbor's trash fire).

5. 264 Md. at 522, 287 A.2d at 268.
6. *Id.* at 519, 287 A.2d at 266.
7. *Id.* at 525, 287 A.2d at 269.
8. RESTATEMENT OF TORTS § 509. Comment *f* at 21-22 (1934).
9. *Id.* § 516 (1934).
10. *Id.* § 511 (1934).

the guidelines of section 516. The court, in holding that a vicious dog does not come in the purview of section 516, cited a New York case, *Woodbridge v. Marks*,[11] which held that a watchdog, no matter how vicious, is better than a spring gun, on the theory that a spring gun is certain to fire in every situation, while a mere dog may miss its mark.

In arriving at its decision, the court made little use of the arguments presented by either the plaintiffs or the defendants on appeal. The plaintiffs argued that they were entitled to recover damages as "unwitting trespassers" by any of three theories:[12] the imposition of strict liability for the keeping of an animal with known vicious propensities;[13] the distinction between a trespasser who is on the premises for an unlawful purpose and one who is an unintentional trespasser;[14] and the refusal to label a mere trespasser contributorily negligent, which would bar recovery.[15] At the end of their argument, the plaintiffs cited sections 512 and 516 of the Restatement of Torts, and they drew the conclusion:[16]

> It is apparent . . . that the [defendants] are liable to an ordinary trespasser who is not a burglar or a criminal, and that they cannot keep a known vicious dog without liability as against ordinary trespassers, or trespassers by mistake.

In their argument[17] the defendants did not rebut plaintiffs' use of the Restatement of Torts at all; instead they relied on *Hensley v. Henkel*[18] to support their contention that ". . . a land owner owes no duty to a trespasser except to refrain from willful or wanton misconduct and entrapment."[19] Thus, the court's interpretation of the Restatement of Torts certainly seems to be unwarranted so far as argument made by both counsel are concerned, in that counsel did not make use of the unusual interpretation given by the court to the use of a mechanical device described in section 516.

The comments accompanying section 516 serve to make more emphatic its possible application in the present case:[20]

> (*a*) . . . Like the privilege to use a mechanical protective device the privilege to use a watchdog for the purpose of protection

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11. 17 App. Div. 139, 45 N.Y.S. 156 (1897).
12. Brief for Plaintiff, Bramble v. Thompson, 264 Md. 518, 287 A.2d 265 (1972).
13. For the theory of strict liability, the Plaintiff relies primarily on Twigg v. Ryland, 62 Md. 380, 50 Am. R. 226 (1884).
14. Plaintiff relies on Carrow v. Haney, 203 Mo. App. 485, 219 S.W. 710 (1920); Brewer v. Furtwangler, 171 Wash. 617, 18 P.2d 837 (1933).
15. Plaintiff relies on Eberling v. Mutillod, 90 N.J.L. 478, 101 A. 519 (1917).
16. Brief for Appellant at 10, Bramble v. Thompson, 264 Md. 518, 287 A.2d 265 (1972).
17. Brief for Appellee, Bramble v. Thompson, 264 Md. 518, 287 A.2d 265 (1972).
18. 258 Md. 397, 265 A.2d 897 (1970).
19. *Id.* at 398, 265 A.2d at 898.
20. RESTATEMENT OF TORTS § 516, Comments *a–b* at 34-36 (1934).

> depends upon the harm which the dog is likely to do to the intruder as compared to the character of the intrusion which it is designed to prevent.
>
> (*b*) *Rationale.* The rule stated in this section is an application to a particular type of case of the privilege to protect one's land against deliberate intruders who are trespassers. The purpose of the privilege is to enable the actor to prevent such intrusions rather than to enable him to inflict harm upon a trespasser. . . . The privilege here stated does not protect the possessor of a watchdog, known by him to be vicious, from liability for harm caused to his licensees, or to persons upon other land, including adjacent land or public highways. . . . Thus, while the actor is privileged to terminate a burglarious intrusion by shooting the burglar or setting a ferocious police dog upon him, he may not set spring guns *or let loose a ferocious police dog against ordinary trespassers.* (emphasis added).

The facts in *Bramble* appear to fall within circumstances covered by the above sections of the Restatement. The plaintiffs were boating upon a public waterway when they docked at the defendants' pier. So far as the court's opinion indicates, there were no signs posted to warn trespassers about the dog. The act of docking is analogous to persons inadvertently intruding upon land adjacent to a public highway, a situation provided for in section 516, comment (b).[21] As the plaintiffs were denied an opportunity to present any evidence, it is unclear to what extent the owners of the pier (defendants) contributed to its mistaken use as a public place. Several courts have held that where the owner of property contributes to its mistaken use by an intruder, such owner is under the same duty of care toward the trespasser as though the misleading representations were true.[22]

Although the owner of property has no affirmative duty to make it safe for mere licensees or trespassers, it has been held that he is under a duty to refrain from willfully or intentionally injuring such persons, as by setting spring guns or other dangerous devices.[23] In *Racine v. Morris*[24], for example, a New York court stated that the placing of a

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21. *Id.* § 516, Comment *b* at 35-36 (1934).
22. Sweeny v. Old Colony & N. Ry., 10 Allen (Mass.) 368, 87 Am. Dec. 644 (1865) (no sign on the property); Phillips v. Library Co., 55 N.J.L. 307, 27 A. 478 (1893). *See also* Crogan v. Schiele, 53 Conn. 186, 1 A. 899 (1885) (land adjacent to a public way giving implied invitation to the public); Williamson v. Southern Ry., 42 Ga. App. 9, 155 S.E. 113 (1930); Brewer v. Furtwangler, 171 Wash. 617, 18 P.2d 837 (1933).
23. Erie R. R. v. Hilt, 247 U.S. 97 (1918) (dictum); Ciarmataro v. Adams, 275 Mass. 521, 176 N.E. 610 (1931) (recognizing the rule, but denying liability on the theory that a spring gun was set by servant without authority); Gramlich v. Wurst, 86 Pa. 74, 27 Am. R.684 (1878) (dictum). *But see* Crown Cork and Seal Co. v. Kane, 213 Md. 152, 157, 131 A.2d 470, 472 (1957), stating: "an owner or occupier owes a duty to avoid negligent injuries to a trespasser or licensee whose presence is known. . . ."
24. 136 App. Div. 467, 121 N.Y.S. 146 (1910), *aff'd* 201 N.Y. 240, 94 N.E. 864 (1911) (dictum).

spring gun or mantrap on property by the owner contemplates the presence of a trespasser and the intent to injure him. The Supreme Court of the United States, in *United Zinc & Chemical Co. v. Britt*,[25] held that liability for setting spring guns or traps arises from the fact that an owner of property has expected the trespasser and has prepared an injury that is no more justified than if the owner had held a gun and fired it.

Maryland,[26] along with a bare majority of other jurisdictions,[27] allows the defense of contributory negligence in strict liability actions based on scienter. Accordingly, in *Twigg v. Ryland*,[28] judgement in favor of the dog owner was affirmed where the injured person knew of the dog's propensities and ". . . encouraged the dog to be about her premises."[29] In *Bramble*, of course, such a defense would be inapplicable as the trespassers were not aware of the dog's nature.

The court in *Bramble* had a dual opportunity to modernize Maryland's position on a land owner's liability for injury to an inadvertent trespasser by a dog whose vicious propensities are known to the owner of the property. The court easily could have used the analogy of land near a public way, or of a dangerous device of entrapment. Instead, the *Bramble* court chose to overlook these sound positions, as supported by the Restatement of Torts, and rely instead on a position supported by a seventy-five year-old New York case and on a common law principle of questionable validity today. The Maryland court of appeals is regrettably paying homage to the rights of the long-dead feudal lords of England who were preoccupied with protecting their manors, in preference to establishing a judicial rule for the protection of society and human life. D.H. & F.S.L.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT, EQUAL PROTECTION CLAUSE—AD VALOREM PROPERTY TAXATION FOR PUBLIC SCHOOLS FINANCING VIOLATES CONSTITUTION. *RODRIGUEZ V. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT*, 337 F. Supp. 280 (W.D. Tex. 1971).

In *Rodriguez v. San Antonio Independent School District*,[1] the three-judge District Court in a *per curiam* opinion ruled that the financing of public education through an ad valorem property tax by that district[2]

25. 258 U.S. 268 (1922).
26. Twigg v. Ryland, 62 Md. 380, 50 Am. R. 226 (1884).
27. *See e.g.*, Melsheimer v. Sullivan, 1 Colo. App. 22, 27 P. 17 (1891); Ryan v. Marren, 216 Mass. 556, 104 N.E. 353 (1914).
28. 62 Md. 380, 50 Am. R. 226 (1884).
29. *Id.* at 389.
1. Rodriguez v. San Antonio Independent School Dist., 337 F. Supp. 280 (W.D. Tex. 1971); *appeal filed*, 40 U.S.L.W. 3551 (U.S. May 16, 1972); *prob. juris. noted*, 40 U.S.L.W. 3576 (U.S. June 6, 1972); *appeal docketed*, 41 U.S.L.W. 3041 (U.S. July 11, 1972).
2. Forty-nine of the fifty states use some form of ad valorem property taxation as the means