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- NOTES -

**THE RIGHT TO KILL WILD ANIMALS IN DEFENSE OF PERSON OR PROPERTY**

According to the philosophy of natural rights espoused by Locke and Montesquieu, every man has certain inalienable rights which are fundamental to his nature. One of the most important of these inchoate rights is the right to defend one's person and property.<sup>1</sup> Does this right extend to the killing of wild animals in defense of person or property?

A wild animal for the purposes of the present discussion is defined as an animal that is protected by state or federal game laws. The subsequent discussion deals primarily with the killing of wild animals in defense of one's property. Although there is no case involving the killing of wild animals in defense of one's person, the right should exist with the same elements and requirements discussed below in relation to property. Most statutes contain an exception for wild animals endangering life.<sup>2</sup> It seems highly unlikely that an individual protecting himself will be prosecuted for killing a protected animal. There may be a problem when this defense is used as a shield by a poacher, but the burden of establishing the requirements for the utilization of the defense is upon such individual.

*BASIS FOR THE RIGHT*

The theoretical basis for the right to kill wild animals in defense of person or property is derived from the corresponding right or privilege to kill a fellow human being in self-defense or in defense of property. In the leading case on the subject, *State v. Rathbone*,<sup>3</sup> the Montana court stated:

If one may kill a human being or attack him in defense of his property, it would be an unreasonable doctrine to hold that the right of defense of property as justification for the killing of wild beasts of the field and forest does not exist.<sup>4</sup>

The Montana Constitution like most states has an express provision guaranteeing the right to defend person and property and the use of

<sup>1</sup>Blackstone states: "Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society."

<sup>2</sup>3 BLACKSTONE, COMMENTARIES 4.

<sup>3</sup>For example, REVISED CODES OF MONTANA § 26-135 (1947) (hereinafter referred to as RCM) states: "Provided further, no ferocious animal damaging property or endangering life shall be covered by this act."

<sup>4</sup>110 Mont. 225, 100 P.2d 86 (1940).

<sup>5</sup>*State v. Rathbone*, *supra* at 91. *Accord*, *State v. Ward*, 170 Iowa 185, 152 N.W. 501, 502 (1915).

arms in such defense.<sup>5</sup> In states where there is no express constitutional provision relating to the defense of property, the justification of killing wild animals in defense of property has been held to exist based upon the guarantee of due process provided by state constitutional provisions. To force a person to passively allow his land to be destroyed by wild animals which are protected by legislative actions constitutes a deprivation of property without due process.<sup>6</sup> Most legislation extending protection to wild animals is cognizant of this inchoate right of defense of property and person when it expressly exempts from its provisions ferocious animals that endanger life and property.<sup>7</sup>

This "self-evident" natural right to kill wild animals in defense of property may traditionally and historically be considered "... implicit in the concept of ordered liberty"<sup>8</sup> and together with the Fourth Amendment of the Bill of Rights may even give rise to a federal constitutional right.

#### AVAILABILITY OF THE RIGHT

Since the right to protect person and property is inherent, it extends to all persons who can classify as owners of property. By applying the theoretical basis for the existence of the right, it should extend to persons who are non-owners of land since there is the analogous right to kill in defense of another in criminal law.<sup>9</sup> The case law treating this aspect tends to narrowly restrict the breadth and availability of this right to non-owners.

In *State v. Mohler*,<sup>10</sup> the defendant landowner and a compatriot who supplied the hunting dog were convicted of hunting rabbits out of season. The rabbits were destroying the defendant's apple orchard. The state statute allowed the killing of protected animals if they were destroying property. The court reversed the conviction of the defendant, but affirmed the conviction of his compatriot on the grounds that he was participating in the hunt. The justification of defense of another's property apparently was not applicable.<sup>11</sup>

<sup>5</sup>ART. III § 3 of the Montana Constitution provides: "All persons are born equally free, and have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives, liberties, of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness in lawful ways." ART. III § 12 provides: "The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons." See also RCM 64-210: "Any necessary force may be used to protect from wrongful injury the person or property of one's self, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master or guest."

<sup>6</sup>*State v. Burk*, 114 Wash. 370, 195 P. 16, 18 (1921); *Cross v. State*, 370 P.2d 371, 377 (Wyo. 1962).

<sup>7</sup>For example RCM § 26-135 *supra* note 2.

<sup>8</sup>*Palko v. Connecticut*, 302 U. S. 319 (1937).

<sup>9</sup>ROLLIN M. PERKINS, CRIMINAL LAW 909 (1957).

<sup>10</sup>44 Ohio App. 52, 184 N.E. 298 (1932).

In *State v. Whitehead*,<sup>12</sup> deer were damaging crops of the owner. A friend and next door neighbor killed three deer illegally, apparently at the request of the owner. A state statute allowed a landowner himself to kill deer which are substantially damaging crops, or to authorize a member of the family or a person employed by him to kill such deer. The court held that there was no establishment of an employee-employer relationship, and precluded the defendant from asserting the justification.<sup>13</sup>

There is a statutory basis for the extension of the right to kill wild animals in defense of person or property to members of one's family, guests, and those in an employee-employer relationship.<sup>14</sup>

The reason for the hesitancy to expand the availability of the right to non-owners is that it will provide a simple means for over-enthusiastic hunters and poachers to circumvent the game laws. It must be remembered that the poacher who interposes such a defense is not automatically absolved of the charge. He has the heavy burden of proving sufficient facts and circumstances to justify the defense. It is submitted that the right to kill wild animals in defense of another's property should be available as a legal justification.

#### NECESSARY REQUIREMENTS OF THE DEFENSE

A person seeking to invoke the legal justification of defense of property must fulfill the following requirements:

- 1) he must have exhausted all other remedies provided by law;
- 2) the use of such force must be reasonably necessary and suitable to protect his property; and
- 3) he must use only such force and means as a reasonably prudent man would use under like circumstances.<sup>15</sup>

#### *Exhaustion of All Other Legal Remedies*

The only legal remedy available in most states to a landowner whose property is being destroyed by wild animals is found in the statutory power granted the fish and game commission to open a special hunting season, destroy the animals, or grant the landowner a special permit to kill the animals.<sup>16</sup> Most statutes of this type merely clothe the agency with a discretionary power to exercise any of the above mentioned methods. Since a person attempting to obtain relief under this statute cannot

<sup>12</sup>151 Me. 135, 116 A.2d 618 (1955).

<sup>13</sup>*Id.* at 623.

<sup>14</sup>RCM § 64-210 *supra* at note 5.

<sup>15</sup>*State v. Rathbone*, *supra* at 93.

<sup>16</sup>RCM § 26-135 provides that after a complaint has been made: "The department *may* then decide to open a special season on said game, or if the special season method be not feasible, then the department *may* destroy the animals causing the damage. Provided, further that the fish and game department *may* authorize and grant the holders of said property permission to kill or destroy a specified number of the animals causing the damage." (emphasis provided)

compel such agency to exercise its discretion by means of a writ of mandamus,<sup>17</sup> all legal remedies are exhausted once the complaint to the local agency is made and subsequently denied. Since the title to wild animals is in the state, it is doubtful whether a landowner could enjoin the state from allowing the animals to run loose. Sovereign immunity precludes the landowner from bringing suit against the state for damages.<sup>18</sup>

*Force Reasonably Necessary and Suitable for Protection of Property*

The general rule is that the justification cannot be based upon a mere trespass. There must be substantial damage.<sup>19</sup> The common law surrounded the right to kill a human in defense of property with strict, rigid, formal, technical rules and distinctions.<sup>20</sup> The first American decision dealing with the right to kill wild animals in defense of property held that these technical rules were not applicable to the killing of wild animals.<sup>21</sup> In a definitive, rambling analysis of the common law in typical 19th Century style, the New Hampshire court intimated that killing of wild animals for a mere trespass might be allowable, and based this reasoning upon the common law evaluation of animals.<sup>22</sup>

This reasoning and rationale sounds valid when the actual value of wild animals to man is considered. But very early the New York court recognized that the state has interest in the intellectual and aesthetic needs of the individual and that in protecting wild animals for the benefit of the whole populace, certain incidental damages or injuries must be absorbed by the individual.<sup>23</sup> The Montana court has charged the landowner with notice of the presence of wild animals and their peculiar habits and that some injury will be suffered for which there will be no redress.<sup>24</sup>

<sup>17</sup>State v. State Fish and Game Commission, 151 Mont. 45, 438 P.2d 663, 666 (1968); State v. Rathbone, *supra* at 95.

<sup>18</sup>See Barrett v. State, 220 N.Y. 423, 116 N.E. 99 (1917) (owner of wooded building sites was not able to collect from the state for damages done to trees by protected beavers); Cook v. State, 192 Wash. 602, 74 P.2d 199 (1937) (owners of ice skating rink were not able to collect from the state for loss of business due to destruction of rink by beavers).

<sup>19</sup>Barrett v. State, *supra* at 100; State v. Urban, 60 S.D. 614, 245 N.W. 474, 476 (1932); State v. Mohler, *supra* at 299; Cook v. State, *supra* at 202; State v. Rathbone, *supra* at 92; State v. State Fish and Game Commission, *supra* at 667.

<sup>20</sup>Defense of property was predicated upon rules such as the difference between property in general and property used for habitation. Whether the trespasser was intending to commit a felony or inflict personal harm upon the dweller or some other person within the house was important. There was conflict over the retreat and the no-retreat rule. The doctrine of *molliter manus imposuit* applied to the defense of property since the common law valued human life more than property. See PERKINS, CRIMINAL LAW 913-919.

<sup>21</sup>Aldrich v. Wright, 53 New Hampshire Reports 398, 403 (1873).

<sup>22</sup>"Human life of inestimable value; domesticated animals, valuable for food or for practical use, far less worthy than the human species; domesticated vermin less worthy still; mischievous wild vermin, a public nuisance—such is the common law appraisal . . . the legal inferiority of vermin life in its wild state, to base to be admitted to the lowest rank of property, is a sufficient reason for holding it reasonably necessary that an owner of property should prevent a trespass by the prompt destruction of such life." *Id.* at 418-419.

<sup>23</sup>Barrett v. State, *supra* at 100.

<sup>24</sup>State v. Rathbone, *supra* at 92.

What kind and how much damage is necessary in order to constitute substantial damage is a question of fact that depends on the circumstances of each case. The mere eating of a few tufts of grass in a swampy area by elk does not constitute substantial damage.<sup>25</sup> But continual destruction and eating of crops or feed by deer or elk curtailing production of hay, trampling valuable grazing land, and interfering with normal ranching operations provides more than substantial damage.<sup>26</sup>

It is generally held that there must be an imminent danger or destruction by the animal, or it must be in the act of actual destruction before the right can be invoked.<sup>27</sup> The past history and migratory habits of wild animals in relation to past damages is relevant in order to show the animal's future destructive capability.<sup>28</sup> One court has imposed a further qualification upon the admission of such evidence with the requirement that the animal killed must be identified as being a member of the herd that caused the previous damage.<sup>29</sup> Similarly, where the animal is not in the act of actual destruction of property when it is killed, the requirements for the availability of the defense are not met.<sup>30</sup>

Before the owner can exercise his right to kill wild animals in defense of property, other reasonable alternatives must be utilized.<sup>31</sup> When the erection of elk and deer-proof fences, constant vigilance and the driving off of the animals exceeds the standard of reasonableness in terms of prohibitive costs, time and practicality, the right to kill is justified.<sup>32</sup>

#### *Force and Means that a Reasonably Prudent Man Would Use*

This third element for the justification of killing wild animals basically involves the application of a reasonable man standard. The determination of whether the force and means employed measures up to the standard of a reasonable man is a question for the jury.<sup>33</sup> As stated above, this is basically a question of proving to the jury that there was sufficient damage to justify the killing of the wild animal in defense of property.

<sup>25</sup>State v. State Fish and Game Commission, *supra* at 667.

<sup>26</sup>State v. Rathbone, *supra*; Cross v. State, *supra*.

<sup>27</sup>Aldrich v. Wright, *supra* at 403.

<sup>28</sup>State v. Rathbone, *supra* at 95; State v. Burk, *supra* at 19.

<sup>29</sup>State v. Burk, *supra* at 19.

<sup>30</sup>State v. Urban, *supra* at 476; State v. Burk, *supra* at 19; State v. Whitehead, *supra* at 623.

<sup>31</sup>See Aldrich v. Wright, *supra*; State v. Rathbone, *supra*.

<sup>32</sup>See State v. Rathbone, *supra* (impractical to build fence due to size of ranch, almost impossible to build an elk proof fence, driving off of elk is ineffective due to their nocturnal feeding habits); Cross v. State, *supra* (use of cherry bombs as driving off device ineffective as well as airplane); Commonwealth v. Gilbert, 5 Pa. D. & C. 443 (1924) (exorbitant cost of building fence to keep out deer constituted an "unjust discrimination and one that the law would not sanction").

<sup>33</sup>Cotton v. State, 31 Ala. App. 399, 17 So.2d 590, 591 (1944); State v. Rathbone, *supra*

### CONCLUSION

The right to kill wild animals in defense of person and property is available wherever it is reasonably necessary to do so in order to protect such person or property. In relation to defense of property, the right is available only to landowners or where provided by statute to members of the family or employees. What facts and circumstances justify the exercise of the right depend upon each individual case and is for the jury to determine. With the present age of environmentalists and conservationists this right to destroy wild animals may be challenged and examined. Notwithstanding this consideration, the right to kill wild animals in defense of person and property should be maintained since it plays a vital part in the right to maintain and own private property and the utilization of the right to kill wild animals is an extraordinary and abnormal event.

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