

SPRING GUNS (E.REVIEW, 1821)

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WHEN Lord Dacre (then Mr. Brand) brought into the House of Commons his bill for the amendment of the Game Laws, a system of greater mercy and humanity was in vain recommended to that popular branch of the legislature. The interests of humanity, and the interests of the lord of the manor, were not, however, opposed to each other; nor any attempt made to deny the superior importance of the last. No such bold or alarming topics were agitated; but it was contended that if laws were less ferocious there would be more partridges; if the lower orders of mankind were not torn from their families and banished to Botany Bay, hares and pheasants would be increased in number, or, at least, not diminished. It is not however till after long experience that mankind ever think of recurring to humane experiments for effecting their objects. The rulers who ride the people never think of coaxing and patting till they have worn out the lashes of their whips and broken the rowels of their spurs. The legislators of the trigger replied, that two laws had lately passed which would answer their purpose of preserving game: the one an act for transporting men found with arms in their hands for the purposes of killing game in the night, the other an act for rendering the buyers of the game equally guilty with the seller and for involving both in the same penalty. Three seasons have elapsed since the last of these laws was passed; and we appeal to the experience of all the great towns in England whether the difficulty of procuring game is in the slightest degree increased? -whether hares partridges, and pheasants are not purchased with as much facility as before the passing of this act?-whether the price of such unlawful commodities is even in the slightest degree increased? Let the Assize and Sessions' Calendars bear witness whether the law for transporting poachers has not had the most direct tendency to encourage brutal assaults and ferocious murders. There is hardly now a jail-delivery in which some gamekeeper has not murdered a poacher, or some poacher a gamekeeper.

If the question concerned the payment of five pounds, a poacher would hardly risk his life rather than be taken; but when he is to go to Botany Bay for seven years, he summons together his brother poachers— they get brave from rum, numbers, and despair—and a bloody battle ensues.

Another method by which it is attempted to defeat the depredations of the poacher is by setting spring guns to murder any person who comes within their reach; and it is to this last new feature in the supposed Game Laws, to which, on the present occasion, we intend principally to confine our notice.

We utterly disclaim all hostility to the Game Laws in general. Game ought to belong to those who feed it. All the landowners in England are fairly entitled to all the game in England. These laws are constructed upon a basis of substantial justice; but there is a great deal of absurdity and tyranny mingled with them, and a perpetual and vehement desire on the part of the country gentlemen to push the provisions of these laws up to the highest point of tyrannical severity.

'Is it lawful to put to death by a spring gun, or any other machine, an unqualified person trespassing upon your woods or fields in pursuit of game, and who has received due notice of your intention, and of the risk to which he is exposed?' This, we think, is stating the question as fairly as can be stated. We purposely exclude gardens, orchards, and all contiguity to the dwelling-house. We exclude, also, all felonious intention on the part of the deceased. The object of his expedition shall be proved to be game, and the notice he received of his danger shall be allowed to be as complete as possible. It must also be part of the case, that the spring gun was placed there for the express purpose of defending the game, by killing or wounding the poacher, or spreading terror, or doing anything that a reasonable man ought to know would happen from such a proceeding.

Suppose any gentleman were to give notice that all other persons must abstain from his manors; that he himself and his servants paraded the woods and fields with loaded pistols and blunderbusses and would shoot anybody who fired at a partridge; and suppose he were to keep his word, and shoot through the head some rash trespasser who defied this bravado and was determined to have his sport:—is there any doubt that he would be guilty of murder? We suppose no resistance on the part of the trespasser, but that, the moment he passes the line of demarcation with his dogs and gun, he is shot dead by the proprietor of the land from behind a tree. If this is not murder, what is murder? We will make the case a little better for the homicide squire. It shall be night; the poacher, an unqualified person, steps over the line of demarcation with his nets and snares, and is instantly shot through the head by the pistol of the proprietor. We have no doubt that this would be murder—that it ought to be considered as murder and punished as murder. We think this so clear that it would be a waste of time to argue it. There is no kind of resistance on the part of the deceased; no attempt to run away; he is not even challenged: but instantly shot dead by the proprietor of the wood, for no other crime than the intention of killing game unlawfully. We do not suppose that any man possessed of the elements of law and common sense would deny this to be a case of murder, let the previous notice to the deceased have been as perfect as it could be. It is true, a trespasser in a park may be killed; but then it is when he will not render himself to the keepers, upon a hue and cry to stand to the king's peace. But deer are property, game is not; and this power of slaying deer-stealers is by the 21st Edward I., *de Malefactoribus in Parcibus*, and by 3rd and 4th William and Mary, c. 10. So rioters may be killed, house-burners, ravishers, felons refusing to be arrested, felons escaping, felons breaking gaol, men resisting a civil process—may all be put to death. All these cases of justifiable homicide are laid down and admitted in our books. But who ever heard that to pistol a poacher was justifiable homicide? It has long been decided that it is unlawful to kill a dog who is pursuing game in a manor. 'To decide the contrary,' says Lord Ellenborough, 'would outrage reason and sense.' (*Vere v. Lord Cawdor and King*, n East, 386.) Pointers have always been treated by the

legislature with great delicacy and consideration. To '*wish to be a dog and to bay the moon*' is not quite so mad a wish as the poet thought it.

If these things are so, what is the difference between the act of firing yourself, and placing an engine which does the same thing? In the one case, your hand pulls the trigger; in the other, it places the wire which communicates with the trigger and causes the death of the trespasser. There is the same intention of slaying in both cases; there is precisely the same human agency in both cases; only the steps are rather more numerous in the latter case. As to the bad effects of allowing proprietors of game to put trespassers to death at once, or to set guns that will do it, we can have no hesitation in saying that the first method, of giving the power of life and death to esquires, would be by far the most humane. For as we have observed in a previous Essay on the Game Laws, a live armigeral spring gun would distinguish an accidental trespasser from a real poacher—a woman or a boy from a man—perhaps might spare a friend or an acquaintance—or a father of a family with ten children—or a small freeholder who voted for Administration. But this new rural artillery must destroy, without mercy and selection, every one who approaches it.

In the case of *Ilot versus Wilks Esq.*, the four judges, Abbot, Bailey, Holroyd, and Best, gave their opinions seriatim on points connected with this question. In this case, as reported in Chetwynd's edition of Burn's Justice, 1820, vol. ii. p. 500, Abbot C. J. observes as follows:

'I cannot say that repeated and increasing acts of aggression may not reasonably call for increased means of defence and protection. I believe that many of the persons who cause engines of this description to be placed in their grounds, do not do so with an intention to injure any person, but really believe that the publication of notices will prevent any person from sustaining an injury; and that no person having the notice given him will be weak and foolish enough to expose himself to the perilous consequences of his trespass. Many persons who place such engines in their grounds, do so for the purpose of preventing, by means of terror, injury to their property, rather than from any motive of doing malicious injury.'

'Increased means of defence and protection,' but increased (his Lordship should remember) from the payment of five pounds to instant death—and instant death inflicted, not by the arm of the law but by the arm of the proprietor;—could the Lord Chief Justice of the King's Bench intend to say, that the impossibility of putting an end to poaching by other means would justify the infliction of death upon the offender? Is he so ignorant of the philosophy of punishing as to imagine he has nothing to do but to give ten stripes instead of two, a hundred instead of ten, and a thousand if a hundred will not do? to substitute the prison for pecuniary fines and the gallows instead of the gaol? It is impossible so enlightened a Judge can forget that the sympathies of mankind must be consulted, that it would be wrong to break a person upon the wheel for stealing a penny loaf, and that gradations in punishments must be carefully accommodated to gradations in crime; that if poaching is punished more than mankind in general think it ought to be punished, the fault will either escape with impunity, or the delinquent be driven to desperation; that if poaching and murder are punished equally, every poacher will be an assassin. Besides, too, if the principle is right in the unlimited and unqualified manner in which the Chief Justice puts it—if defence goes on increasing with aggression, the Legislature at least must determine upon their equal pace. If an act of Parliament made it a capital offence to poach upon a manor, as it is to commit a burglary in a dwelling-house, it might then be as lawful to shoot a person for trespassing upon your manor as it is to kill a thief for breaking into your house. But the real question is—and so in sound reasoning his Lordship should have put it—'If the law at this moment determines the aggression to be in such a state that it merits only a pecuniary fine after summons and proof, has any sporadic squire the right to say that it shall be punished with death, before any summons and without any proof?'

It appears to us, too, very singular, to say, that many persons who cause engines of 'this description to be placed in their ground do not do so with an intention of injuring any person, but really believe that the publication of notices will prevent any person from sustaining an injury, and that no person, having the notice given him, will be weak and foolish enough to expose himself to the perilous consequences of his trespass. But if this is the real belief of the engineer, if he thinks the mere notice will keep people away, then he must think it a mere inutility that the guns should be placed at all: if he thinks that many will be deterred, and a few come, then he must mean to shoot those few. He who believes his gun will never be called upon to do its duty need set no gun, and trust to rumour of their being set, or being loaded, for his protection. Against the gun and the powder we have no complaint; they are perfectly fair and admissible: our quarrel is with the bullets. He who sets a loaded gun means it should go off when it is touched. But what signifies the mere empty wish that there may be no mischief, when I perform an action which my common sense tells me may produce the worst mischief? If I hear a great noise in the street, and fire a bullet to keep people quiet, I may not perhaps have intended to kill; I may have wished to have produced quiet by mere terror, and I may have expressed a strong hope that my object has been effected without the destruction of human life. Still I have done that which every man of sound intellect knows is likely to kill; and if any one falls from my act, I am guilty of murder. 'Further' (says Lord Coke), 'if there be an evil intent, though that intent extendeth not to death, it is murder. Thus, if a man, knowing that many people are in the street, throw a stone over the wall, intending only to frighten them, or to give them a little hurt, and thereupon one is killed—this is murder for he had an ill intent; though that intent extended not to death, and though he knew not the party slain.' (3 Inst. 57.) If a man is not mad, he must be presumed to foresee common consequences if he puts a bullet into a spring gun—he must be supposed to foresee that it will kill any poacher who touches the wire—and to that consequence he must stand. We do not suppose all preservers of game to be so bloodily inclined that they would prefer the death of a poacher to his staying away. Their object is to preserve game; they have no objection to preserve the lives of their fellow-creatures also, if both can exist at the same time; if not, the least worthy of God's creatures must fall — the rustic without a soul,—not the Christian partridge—not the immortal pheasant—not the rational woodcock, or the accountable hare.

The Chief Justice quotes the instance of glass and spikes fixed upon walls. He cannot mean to infer from this, because the law connives at the infliction of such small punishments for the protection of property, that it does allow, or ought to allow, proprietors to proceed to the punishment of death. Small means of annoying trespassers may be consistently admitted by the law, though more severe ones are forbidden and ought to be forbidden; unless it follows that what is good in any degree is good in the highest degree. You may correct a servant boy with a switch, but if you bruise him sorely you are liable to be indicted—if you kill him you are hanged. A blacksmith corrected his servant with a bar of iron: the boy died, and the blacksmith was executed. (Grey's Case, *Kel.* 64, 65.) A woman kicked and stamped on the belly of her child—she was found guilty of murder, (*i East*, P.C. 261.) *Si immoderate suo jure utatur, tunc reus homicidii sit.* There is, besides, this additional difference in the two cases put by the Chief Justice, that no publication of notices can be so plain, in the case of the guns, as the sight of the glass or the spikes; for a trespasser may not believe in the notice which he receives, or he may think he shall see the gun and so avoid it, or that he may have the good luck to avoid it if he does not see it; whereas, of the presence of the glass or the spikes he can have no doubt, and he has no hope of placing his hand in any spot where they are not. In the one case he cuts his fingers upon full and perfect notice, the notice of his own senses; in the other case, he loses his life after a notice which he may disbelieve, and by an engine which he may hope to escape.

Mr. Justice Bailey observes, in the same case, that it is not an indictable offence to set spring guns. Perhaps not; it is not an indictable offence to go about with a loaded pistol,

intending to shoot anybody who grins at you; but if you do it you are hanged. Many inchoate acts are innocent, the consummation of which is a capital offence.

This is not a case where the motto applies of *Volenti non fit injuria*. The man does not will to be hurt, but he wills to get the game, and with that rash confidence natural to many characters believes he shall avoid the evil and gain the good. On the contrary, it is a case which exactly arranges itself under the maxim, *Quando aliquid prohibetur ex directo, prohibetur et per obliquum*. Give what notice he may, the proprietor cannot lawfully shoot a trespasser (who neither runs nor resists) with a loaded pistol. He cannot do it *ex directo*; how then can he do it *per obliquum*, by arranging on the ground the pistol which commits the murder?

Mr. Justice Best delivers the following opinion. His Lordship concluded as follows:

‘This case has been discussed at the bar, as if these engines were exclusively resorted to for the protection of game; but I consider them as lawfully applicable to the protection of every species of property against unlawful trespassers. But if even they might not lawfully be used for the protection of game, I, for one, should be extremely glad to adopt such means, if they were found sufficient for that purpose; because I think it a great object that gentlemen should have a temptation to reside in the country, amongst their neighbours and tenantry, whose interests must be materially advanced by such a circumstance. The links of society are thereby better preserved, and the mutual advantage and dependence of the higher and lower classes of society, existing between each other, more beneficially maintained. We have seen, in a neighbouring country, the baneful consequences of the non-residence of the landed gentry; and in an ingenious work, lately published by a foreigner, we learn the fatal effects of a like system on the Continent. By preserving game, gentlemen are tempted to reside in the country; and, considering that the diversion of the field is the only one of which they can partake on their estates, I am of opinion that, for the purpose I have stated, it is of essential importance that this species of property should be inviolably protected.’

If this speech of Mr. Justice Best is correctly reported, it follows that a man may put his fellow-creatures to death for any infringement of his property—for picking the sloes and blackberries off his hedges—for breaking a few dead sticks out of them by night or by day, with resistance or without resistance, with warning or without warning;—a strange method this of keeping up the links of society and maintaining the dependence of the lower upon the higher classes. It certainly is of importance that gentlemen should reside on their estates in the country, but not that gentlemen with such opinions as these should reside. The more they are absent from the country the less strain will there be upon those links to which the learned Judge alludes, the more firm that dependence upon which he places so just a value. In the case of *Dean versus Clayton, Bart.*, the Court of Common Pleas were equally divided upon the lawfulness of killing a dog coursing a hare by means of a concealed dog-spear. We confess that we cannot see the least difference between transfixing with a spear, or placing a spear so that it will transfix; and therefore if *Vere versus Lord Cawdor and King* is good law the action could have been maintained in *Dean versus Clayton*; but the solemn consideration concerning the life of the pointer is highly creditable to all the judges. They none of them say that it is lawful to put a trespassing pointer to death under any circumstances, or that they themselves would be glad to do it; they all seem duly impressed with the recollection that they are deciding the fate of an animal faithfully ministerial to the pleasures of the upper classes of society: there is an awful desire to do their duty, and a dread of any rash and intemperate decision. Seriously speaking, we can hardly believe this report of Mr. Justice Best's speech to be correct; yet we take it from a book which guides the practice of nine tenths of all the magistrates of England. Does a Judge—a cool, calm man, in whose hands are the issue: of life and death, from whom so many miserable trembling human beings await their destiny—does he tell us, and tell us in a court of justice, that he places such little value on the life of man that he himself would plot the destruction of his fellow-creatures for the preservation of a few hares and partridges? ‘Nothing which falls from me’ (says Mr. Justice

Bailey) ‘shall have a tendency to encourage the practice.’—‘I consider them’ (says Mr. Justice Best) ‘as lawfully applicable to the protection of every species of property; but even if they might not lawfully be used for the protection of game, *I for one should be extremely glad to adopt them*, if they were found sufficient for that purpose.’ Can any man doubt to which of these two magistrates he would rather entrust a decision on his life, his liberty, and his possessions? We should be very sorry to misrepresent Mr. Justice Best, and will give to his disavowal of such sentiments, if he does disavow them, all the publicity in our power; but we have cited his very words conscientiously and correctly, as they are given in the Law Report. We have no doubt he meant to do his duty; we blame not his motives, but his feelings and his reasoning.

Let it be observed that, in the whole of this case, we have put every circumstance in favour of the murderer. We have supposed it to be in the night-time; but a man may be shot in the day* by a spring gun. We have supposed the deceased to be a poacher; but he may be a very innocent man, who has missed his way— an unfortunate botanist, or a lover. We have supposed notice; but it is a very possible event that the dead man may have been utterly ignorant of the notice. This instrument, so highly approved of by Mr. Justice Best—this knitter together of the different orders of society—is levelled promiscuously against the guilty or the innocent, the ignorant and the informed. No man who sets such an infernal machine believes that it can reason or discriminate; it is made to murder all alike, and it does murder all alike.

Blackstone says that the law of England, like that of every other well-regulated community, is tender of the public peace and careful of the lives of the subjects; ‘that it will not suffer with impunity any crime to be prevented by death, *unless the same, if committed, would also be punished by death*’. (*Commentaries*, vol. iv, p. 182.) ‘The law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command, or express permission of the law.’—“And as to the necessity which excuses a man who kills another *se defendendo*. Lord Bacon calls even that *necessitas culpabilis*.” (*Commentaries*, vol. iv, p. 187.) So far this Luminary of the law.—But the very amusements of the rich are, in the estimation of Mr. Justice Best, of so great importance, that the poor are to be exposed to sudden death who interfere with them. There are other persons of the same opinion with this magistrate respecting the pleasures of the rich. In the last Session of Parliament a bill was passed, entitled ‘An Act for the summary Punishment, in certain Cases, of Persons wilfully or maliciously damaging, or committing Trespasses on, public or private Property.’ *Anno primo*—(a bad specimen of what is to happen)— *Georgii IV. Regis*, cap. 56. In this act it is provided, that ‘if any person shall wilfully, *or* maliciously, commit any damage, injury or spoil, upon any building, fence, hedge, gate, stile, guide-post, mile-stone, tree, wood, underwood, orchard, garden, nursery-ground, crops, vegetables, plants, land, or other matter or thing growing or being thereon, or to or upon real or personal property of any nature or kind soever, he may be immediately seized by anybody, without a warrant, taken before a magistrate, and fined (according to the mischief he has done) to the extent of *5l*; or, in default of payment, may be committed to the jail for three months’. And at the end comes a clause, exempting from the operation of this act *all mischief done in hunting, and by shooters who are qualified*. This is surely the most impudent piece of legislation that ever crept into the statute-book; and, coupled with Mr. Justice Best’s declaration, constitutes the following affectionate relation between the different orders of society. Says the higher link to the lower, ‘If you meddle with my game, I will immediately murder you;—if you commit the slightest injury upon my real or personal property, I will take you before a magistrate, and fine you five pounds. I am in Parliament, and you are not; and I have just brought in an act of Parliament for that purpose. But so important is it to you that my pleasures should not be interrupted, that I have exempted myself and friends from the operation of this act; and we claim the right (without allowing you any such summary remedy) of riding over your fences, hedges, gates, stiles, guide-posts, mile-stones, woods, underwoods, orchards, gardens, nursery-grounds, crops, vegetables, plants,

lands, or other matters or things growing or being thereupon— including your children and yourselves, if you do not get out of the way.’ Is there, upon earth, such a mockery of justice as an act of Parliament, pretending to protect property, sending a poor hedge-breaker to gaol, and specially exempting from its operation the accusing and the judging squire, who, at the tail of the hounds, have that morning, perhaps, ruined as much wheat and seeds as would purchase fuel a whole year for a whole village?

It cannot be urged, in extenuation of such a murder as we have described, that the artificer of death had no particular malice against the deceased; that his object was general, and his indignation levelled against offenders in the aggregate. Every body knows that there is a malice by implication of law.

‘In general, any formal design of doing mischief may be called malice ; and therefore, not such killing only as proceeds from premeditated hatred and revenge against the person killed, but also, in many other cases, such as is accompanied with those circumstances that show the heart to be perversely wicked, is adjudged to be of malice prepense.’ — 2 *Haw.* c. 31.’

‘For, where the law makes use of the term, malice aforethought, as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense in which the modern use of the word malice is apt to lead one a principle of malevolence to particulars; for the law by the term malice, malitia, in this instance, meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked hearty regardless of social duty, and fatally bent upon mischief. — *Fost.* 256, 257.

Ferocity is the natural weapon of the common people. If gentlemen of education and property contend with them at this sort of warfare, they will probably be defeated in the end. If spring guns are generally set—if the common people are murdered by them, and the Legislature does not interfere, the posts of gamekeeper and lord of the manor will soon be posts of honour and danger. The greatest curse under heaven (witness Ireland) is a peasantry demoralised by the barbarity and injustice of their rulers.

It is expected by some persons that the severe operation of these engines will put an end to the trade of a poacher. This has always been predicated of every fresh operation of severity, that it was to put an end to poaching. But if this argument is good for one thing, it is good for another. Let the first pickpocket who is taken be hung alive by the ribs, and let him be a fortnight in wasting to death. Let us seize a little grammar boy who is robbing orchards, tie his arms and legs, throw over him a delicate puff-paste, and bake him in a bun-pan in an oven. If poaching can be extirpated by intensity of punishment, why not all other crimes? If racks and gibbets and tenterhooks are the best method of bringing back the golden age, why do we refrain from so easy a receipt for abolishing every species of wickedness? The best way of answering a bad argument is not to stop it, but to let it go on in its course till it leaps over the boundaries of common sense. There is a little book called *Beccaria on Crimes and Punishments*, which we strongly recommend to the attention of Mr. Justice Best. He who has not read it is neither fit to make laws nor to administer them when made.

As to the idea of abolishing poaching altogether, we will believe that poaching is abolished when it is found impossible to buy game; or when they have risen so greatly in price that none but people of fortune can buy them. But we are convinced this never can and never will happen. All the traps and guns in the world will never prevent the wealth of the merchant and manufacturer from commanding the game of the landed gentleman. You may in the pursuit of this visionary purpose, render the common people savage, ferocious, and vindictive; you may disgrace your laws by enormous punishments, and the national character by these new secret assassinations; but you will never separate the wealthy glutton from his pheasant. The best way is, to take what you want, and to sell the rest fairly and openly. This is

the real spring gun and steel trap which will annihilate, not the unlawful trader, but the unlawful trade.

There is a sort of horror in thinking of a whole land filled with lurking engines of death—machinations against human life under every green tree—traps and guns in every dusky dell and bosky bourn—the *feræ naturâ*, the lords of manors eyeing their peasantry as so many butts and marks, and panting to hear the click of the trap, and to see the flash of the gun. How any human being educated in liberal knowledge and Christian feeling can doom to certain destruction a poor wretch tempted by the sight of animals that naturally appear to him to belong to one person as well as another, we are at a loss to conceive. We cannot imagine how he could live in the same village, and see the widows and orphans of the man whose blood he had shed for such a trifle. We consider a person who could do this to be deficient in the very elements of morals—to want that sacred regard to human life which is one of the cornerstones of civil society. If he sacrifices the life of man for his mere pleasures he would do so, if he dared, for the lowest and least of his passions. He may be defended, perhaps, by the abominable injustice of the Game Laws, though we think and hope he is not. But there rests upon his head, and there is marked in his account, the deep and indelible sin of *blood-guiltiness*.

Sydney's note, see asterisk on p.5.

Large damages have been given for wounds inflicted by spring guns set in a garden in the day-time, where the party wounded had no notice.