

The Humble Response of the Hired Lackey — A Reply to Hoyle

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THE purpose of this brief note is to reply to R W Hoyle's 'reservations' on my earlier article, 'Rental Policy on the Estates of the English Peerage, 1649–60'.¹ As is usual in such cases, Hoyle has made a number of valuable criticisms which I can only concede, most especially on the particular nature of the Percy estates during the sixteenth and seventeenth centuries. Unfortunately these are complemented by number of misreadings, incorrect statements, and more than a few glimpses of the obvious. Most annoying of all, for all of us, I suspect, is his failure to present any sort of coherent alternative thesis.²

In an effort to systematically reply to Hoyle's points, I shall take the King of Hearts advice, by beginning at the beginning, going on to the end, and then stopping. I am not quite sure whether Hoyle's opening joust, 'it is none too clear what the article is about' qualifies as deeply penetrating or just one of the silly comments. All I can do is suggest he reads the title again. I can only assume that the 'hired lackey' metaphor is some sort of attempt at wry humour. With regard to 'peasant proprietorship', of course it is a potential factor, but unfortunately what there was of it during the 1650s, and the evidence is slight, was of marginal importance in comparison with the prime and well established dynamic of aristocratic estate control.³ I

must concede that there would have been a virtue in considering economic retrenchment, and it was a mistake not to stress its importance. However, in mitigation, there is a limit to what can reasonably be tackled in any one article, and the line must be drawn somewhere. Perhaps I drew it too sharply.⁴ Finally, at least with regard to the first paragraph, to suggest that my overall conclusion is at variance with my own finding regarding the Seymour estates is the first of the glimpses of the obvious. It was I who pointed out the exception.

The fact that copyholds could be distinguished between those for lives and those of inheritance, is not a great discovery. In fact it is about the first thing that any student of property law learns; the second thing is that there are in fact more than the two distinctions. The more eager student will have already read Simpson's comments on copyhold and

Landowners from the 15th to the 17th centuries', in Goody, Thirk and Thompson, *Family and Inheritance*, Cambridge, 1976, pp 192–237, and also his tentative support for Thompson central assertion that the emergence of leasehold in place of copyhold in the seventeenth century was a key stage in the consolidation of landownership, in 'The Social Distribution of Land and Men in England 1436–1700', in Cooper, *Land, Men and Beliefs*, 1983, pp 17–42, particularly 35–36. Lloyd Bonfield, 'Marriage Settlements and the Rise of the Great Estates', *Econ Hist Rev*, 2nd ser, xxxii, 1979, pp 483–493, and 'Marriage Settlements and the Rise of Great Estates: a rejoinder', *Econ Hist Rev*, 2nd ser, xxxiii, 1980, pp 559–563, the central assertion of which, being the power of the strict settlement in entrenching aristocratic control of land, is strongly reaffirmed in *Marriage Settlements 1601–1740, the Adoption of the Strict Settlement*, Cambridge, 1983. Most famous of all perhaps, is Lawrence Stone, *Crisis of the Aristocracy 1558–1641*, Oxford, 1965, 273–334, who emphasized the instrumental importance of the landowning aristocracy during the sixteenth and seventeenth centuries. More recently the central importance of the aristocracy, politically, socially and economically, has been asserted by John Adamson. See his 'The Baronial Context of the English Civil War', *TRHS*, 5th ser, xl, 1990, 93–120, taken from his unpublished Cambridge PhD dissertation, 'The Peerage in Politics 1645–1649'. Legal historians have been long aware of the reality of aristocratic control. See, most obviously, John Baker, *An Introduction to Legal History*, 1990, particularly pp 318–316, and A W B Simpson, *A History of the Land Law*, Oxford, 1986, pp 270–291, suggesting that if the landowners had not succeeded so strikingly in maintaining the dominance over land and forms of land use, then it begged the question of why during the nineteenth and early twentieth centuries, so many people should have been so sure of the need to reform it.

⁴ The extent of aristocratic retrenchment is considered in chapter 9 of my thesis, 'The English Peerage 1649–1660: Government, Authority and Estates', unpublished PhD, University of Cambridge, 1989.

¹ *Ag Hist Rev*, 40, 1, 1992, 23–37.

² In his own published work he presents, by his own admission, very little alternative. See Hoyle, 'Tenure and the land Market in early modern England: or a late contribution to the Brenner debate', *Econ Hist Rev*, 2nd ser, XLIII, 1990, 1–19. Having read Hoyle's own article with his comments that market forces were more in favour of leasehold and landowning control from 1650 onward, I am left even more bemused, and cannot help feeling a certain irony at his accusatory question with regard to what my article is supposed to be about. Curiouser and curiouser?

³ Given the obvious extent of our differences with regard to the perceived dynamics of property control in the seventeenth century, it is I think important to stress precisely the extent to which Hoyle is writing against established scholarship. See most famously John Habakkuk's articles, 'English Landownership 1680–1740', *Econ Hist Rev*, x, 1940, pp 2–17, 'Marriage Settlements in the 18th Century', *TRHS*, 4th ser, xxxii, 1950, particularly pp 15–17, 'Landowners and the English Civil War', *Econ Hist Rev*, 2nd ser, xviii 1965, pp 130–150, and 'The Rise and Fall of English Landed Families', *TRHS*, 5th ser, xxix, 1979, pp 187–207. See also F M L Thompson, 'Social Distribution of Landed Property in England since the Sixteenth Century', *Econ Hist Rev*, 2nd ser, xix, 1966, 505–17, and John Cooper, 'Patterns of Inheritance and Settlement by Great

the myriad of variants which beset medieval tenure, and taken on board his observations that although the legal niceties might keep generations of legal historians in employment, in practice these mattered little, as neither contemporary commentators or, very often, the judiciary itself, either understood or applied the appropriate distinctions.⁵ Presumably neither did our peasant proprietors, unless they were peculiarly well schooled. Even more disturbing perhaps is Hoyle's understanding of the practicalities of Chancery. 'Equity's darling', might have been originally designed, to promote the ideals of substantive justice. But in reality, to use an equally revered metaphor of Trust law, she was very much 'money's mistress'.⁶ If Chancery was such a saviour for the beleaguered peasant proprietor and such a blight on the wicked landlord, it does rather beg the question of quite why the latter were so eager to go to it.⁷ The Earl of Northumberland's own legal adviser, Sir Orlando Bridgeman, built his fortune around reorienting aristocratic litigation from the common law to Chancery. If this was a mistake, then the £20 which the Earl expended for Bridgeman's advice, often more than dozen times a year, was something of a poor investment.⁸ The power of Chancery as

a bulwark to aristocratic fortunes was appreciated by a number of commentators during the 1650s, most famously, James Harrington. Cromwell crushed the proposed reforms of Chancery precisely because he wished to stabilize property within the control of the landowning classes, and thereby promote his much treasured ambition of a 'healed and settled' commonwealth.⁹

Moving on to the next paragraph. First, I never suggested that copyholds could be converted to leaseholds 'at whim', and I never intended to give that impression. The conversion were almost invariably made on abeyance of tenure. With regard to the wider issue, the fact that the overriding tendency in the early modern period was to replace tenure by contract, is however, another of the points that the eager property law student learns in the first few weeks.¹⁰ With regard to why the peerage had not attempted to make the switch earlier, well, that is history – everything starts sometime, as indeed the King of Hearts reminded Alice. There are a number of possibilities. First, Chancery was still only emerging from its tussles with the common law during the reigns of James I and Charles I. Secondly, the appreciation of this fact itself would take time to be realized, even by such as Bridgeman. Thirdly, during the 1640s, many of these peers had been perhaps understandably somewhat preoccupied. Fourthly, the economic difficulties experienced by the peerage were particularly acute during the 1650s, which as estate correspondence suggests, certainly served to concentrate the minds of a number of peers. And fifthly, as a final point, it is important to note the complementary developments in property and trust law, including the barring of the entail in the strict settlement, which, together with Chancery's increasing willingness to further protect landowners by extending the doctrine of equitable redemption, could only have added to the impetus to restructure estates.¹¹ If there was ever a time to do so, it was quite clearly in the mid- and late seventeenth century.

⁵ See Simpson, *Land Law*, 160–172 repeatedly stressing the complexities and judicial determination from the early seventeenth century onwards to rationalize the situation by, wherever necessary, dismissing the particularities of various customs and types of copyhold tenure.

⁶ This might be the right place to consider Hoyle's rather curious suggestion, in his essay 'Tenure and the land Market', that if it had wanted to the 'state' would have been able to 'legislate copyhold out of existence', and the fact that it did not suggested that it permitted copyhold to remain as a gesture of human kindness towards peasant proprietors. Apart from the fact that the concept of 'state' enjoyed no economic-legal meaning for another two centuries, until Marx defined one, it might be suggested that the 'state' did not bother because there was no need to legislate away something that was under judicial pressure anyway. The 'state' still has not legislated copyhold away. Certain forms of copyhold, such as mineral copyhold, still remain, after the 1925 legislation. But no one really believes that it enjoys any real market force. The instances of such things being just 'legislated away' are few and far between, and to suggest that such was a real alternative in the legal and political maelstrom of early and mid seventeenth century England is to entirely misunderstand the nature of government during that period.

⁷ Both the records of Chancery and Exchequer for the mid-seventeenth century reveal a staggering number of actions taken by landlord peers in an effort to litigate defensively through the prerogative courts. Between 1649 and 1660 there were 365 such defensive actions in Chancery plus a further 67 in Exchequer. The number of actions taken in Chancery against landowning peers is considerably less. Collectors of curiosities, calculators at hand, can check these figures in Appendix 4 of Ward, 'The English Peerage'.

⁸ See W Sussex RO, Petworth House Archives, Percy MSS, 5832, 5841, 5858, 5867, 5879, 5888, 5908 and 5836. Presumably, the Marquis of Hertford who also employed Bridgeman, and the Earl of Bridgewater, whose lawyer, Halsey, also urged his employer to litigate in Chancery to circumvent the rigours of the tenure in common law, were also misadvised. For the Bridgewater-Day-Halsey correspondence see, Hertfordshire RO, Ashridge MSS,

1030–1065, and also Huntingdon Library, San Merino, Ellesmere MSS, 8059–8069 and 8276. The most striking evidence of a peer, on legal advice, seeking to use Chancery to out-litigate tenants, who wished to preserve an entitlement to a copyhold tenure, is to be found in Longleat, Seymour MSS, vol 7, fols 42, 48, 64, 66 and 68.

⁹ See Cooper, 'Patterns of Inheritance', 195. For a more general commentary on Cromwell's determination to prevent any radical assault on Chancery, see A Woolrych, *Commonwealth to Protectorate*, Oxford, 1982, 295–298.

¹⁰ The classic statement here remains Atiyah's, in *The Rise and Fall of Freedom of Contract*, Oxford, 1979.

¹¹ For the extent to which these reforms in property law complemented the re-structuring of the income side of estates, see my 'Settlements, Mortgages and Aristocratic Estates', *Journal of Legal History*, 12, 1, 1991, 20–35.

In the second part of his critique, Hoyle moves on to make a number of specific points regarding the Percy estates, many of which are valuable. Unfortunately one or two debatable assertions are elevated from guesses to gospel. Nowhere more so than in note 5. I was perfectly aware of the 1596 dispute, but that does not mean that the 1659 disputes listed in Chancery records did not exist. Of course, the endorsement 1659 might mean 1596, but there again it 'might mean' just about anything, and as the Close Rolls reveal that the Earl was immersed in a number of disputes with his Petworth tenants during this period, it seems only reasonable to assume that 1659 means 1659. With regard to it being a subsequent endorsement, it might equally have been an endorsement 1659 made in the 1672 review of the estates. Leconfield in his study of the Petworth estates also seems to prefer this approach.¹² I am afraid that this is a canard which must, for the present, be returned to ground.

Hoyle also suggests that rental figures used to gauge the development of the Percy estates cannot be used if they include arrears. If that is the case then we really may as well pack up and go home. The number of accounts across all estates during the period that do not include some arrears is too negligible to afford such a luxury. It is suggested that caution, not abandonment, is the order of the day. In the specific case of the Percy estates, the fact that the arrears regularly operated just the one year behind can afford to make us even more confident of their use. The idea that the considerable and largely uniform increases in rental return can be ascribed to demsesnes, parks, mines and so on stretches the imagination. With regard to the issue of custom and copyhold, first, custom by its very definition did indeed vary considerably from one estate to another, and so the suggestion that the Cumberland estates were unusual in their manner of custom is again something of a glimpse of the obvious. Moreover precisely because of the peculiarities of custom, the courts had increasingly established regulating principles at common law by which custom could be treated in line with the principles of copyhold tenure. Importantly, as the seventeenth century progressed they found less and less favour in courts precisely because of this irregularity, so the nature of custom in sixteenth-century Cumberland is of only collateral interest.¹³

Moving on to the analysis of table 4, Hoyle and any other of his fellow 'collectors of curiosities' might wish to take note that the table was specifically described as an account of total receipt, part of which, but not all of which is rental receipt. If

it had been meant to be rental receipt it would have been called such, as indeed two of the other tables were. As such it was never my intention to try and cunningly pull the wool over the readers' eyes by suggesting that, for example, 8 plus 208 plus 148 plus 125 plus 73, might somehow equal 3456. With regard to the 1654 receipt, if these figures were for Lady Day only, it is shame that the manuscript does not reassure us of this. Moreover, if these figures were for Lady Day only then they were astonishingly high. I might be prepared to concede that the Tynemouth returns could be explained by heavy repayment of arrears. However, Hoyle makes no effort to authenticate his alternative thesis, and moreover, it rather ignores the documentary evidence provided by the Earl's steward.¹⁴

Finally we come to Hoyle's parting shots. The discretion on the part of the peers may well be 'improbable', but it is documented in correspondence between, not only Northumberland and his stewards, but perhaps most strikingly between Dorset and his, Bridgwater and his, and Hertford and his. In fact of the five case studies I undertook, the only estate papers that did not reveal such an explicit interest in the running of estates, and the burning need to improve rental returns, were those of the Earl of Northampton, and that is probably simply because the remaining manuscript evidence is so intermittent (and also quite possibly because the Earl was generally thought to be simple-minded). With regard to the 'restraints' on lords, I think that we need to know what they are, and quite why the lords themselves seemed so oblivious to them. I can only conclude this reply by suggesting that, although I never intended to suggest that everything happened in the 1650s, the decade did present a window of opportunity, not least following the calamitous events of the previous decade, but also because of the fundamental changes in property and trust law during that time – most spectacularly the barring of settlement entails, equitable redemption, and the emergence of contract as a force to be accommodated in estate tenure.¹⁵ If the peers did not in fact take the opportunity, not just during the 1650s but also in the decades immediately following, then they, and their lawyers, were guilty of the most crass negligence, and moreover, in the absence of any substantive alternative thesis, we are left wondering precisely what did happen. For the present at least, in the absence of such a thesis, the humble 'lackey' remains unrepentent.

¹⁴ BL micro. 386, Alnwick Castle Archives, Percy MSS, RX, 11, 3 a and m.

¹⁵ For the rapidly emerging force of contract and its effect on land tenure, again the authority is still Atiyah. See also C Clay, 'Lifeleasehold in the Western Counties of England 1650–1750', *Ag Hist Rev*, 29, 2, 1981, 83–96.

¹² See Leconfield, *Petworth Manor in the Seventeenth Century*, 1954, 5–10.

¹³ See Simpson, *Land Law*, 160–172.