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Judges and Hunters: Law and Economic Conflict in the English Countryside, 1800–60

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In the nineteenth century the common law courts had to struggle with a conundrum presented by enclosure and the ensuing capitalisation of land ownership and agriculture. If enclosure by law destroyed the common rights of the peasantry, did it also destroy the seigneurial hunting rights of the lords? Was capitalist enclosure a revolution exercised always in the interests of lordship; or sometimes against those interests? How did judges deal with noble rather than middling or proletarian hunters? The problems of hunting law tested some of the fundamental principles of the common law property system, throwing into relief judical attitudes to the politics of landownership.

The rights of hunting tested the categories of the common law, for those rights fell uneasily across the boundaries of lordship, ownership and prerogative. Classical Roman law stated that wild animals were *res nullius*, unowned goods that fell into ownership through natural acquisition, upon appropriation by capture. Rights in wild animals were thus independent of landownership or other legal status.[1] Against this doctrine, the Norman kings asserted that the right to chase game was firmly within the prerogative of the crown, confronting Anglo-Saxon liberty with French seigneurial custom. Only those persons granted the privilege of hunting by the crown could legally hunt, even over their own closes.[2] The franchises of hunting were a blend of public jurisdiction and private right, and therein lay many of the difficulties in the development of hunting law in later times.

The splitting of public and private spheres – of government and society – is often seen as a hallmark of modernity;[3] but English common law long

[1] *Justinian's Institutes*, 2.1.12. to 2.1.16. For help with this essay, I wish to thank Chris Brooks, John Cairns, Roy Foster, Andrew Hildreth, Jeremy Horder, Joanna Innes, Nicola Lacey, Michael Lobban, Andrea Loux, Avner Offer, David Omissi, Alain Pottage, Bernard Rudden, Mary Sokol and Lucia Zedner.

[2] C. R. Young, *The Royal Forests of Medieval England* (Leicester, 1979), p. 11. On the medieval French hunting laws, see Alexis De Tocqueville, *The Old Régime and the French Revolution* (1856; trans. S. Gilbert, New York, 1955), p. 296.

[3] Cf. *Justinian's Institutes*, 1.1.4.

refused to make this distinction. Public law involved the rights of the person of the crown.[4] Private rights such as property were defined in the context of feudalism: to 'own' was to hold land under the jurisdiction of an overlord, and correspondingly to exercise jurisdiction over tenants lower down the feudal ladder; thus 'land is government'.[5] As Maitland explained, 'medieval law was not prepared to draw the hard line that we draw between ownership and rulership, between private right and public power'. Landownership could be viewed simultaneously from a seigneurial or a proprietary standpoint; it was anachronistic to 'sharply distinguish between the governmental powers of a sovereign state on the one hand, and the proprietary rights of a supreme landlord on the other'.[6] The dual quality of ownership as lordship meant that a well-to-do landholder high on the feudal ladder held his land as lord of a manor or feudal territorial unit, enjoying jurisdiction over the tenants of the manorial lands.[7] Indeed, in gentle society until the later seventeenth century, to be fully 'free' might mean not only to have free status and to own freehold land, but also to hold one's own court, to possess judicial and prerogative power over others.[8]

The never-clear distinction of lordship and ownership was further confused by the laws of prerogative, franchises and liberties. The king's prerogative was that area of special power, typically military and executive, which he enjoyed as an inherent attribute of his regality. The common law defined the extent of the royal prerogative and prevented the king from arrogating new powers to the crown; but within the recognised boundaries of the prerogative the powers of the king were large. Moreover, the crown always had discretion to delegate parts of the prerogative to subjects, constituting them as agents with an autonomous discretion and freehold right to their power (as opposed to royal officials who exercised kingly power at the will of the monarch). Hale spoke of 'the king's voluntary jurisdiction in creating and transferring regalities', going on to distinguish between transfers of prerogative power inherent in or annexed to the crown, and the constitution of 'liberties' (franchises, jurisdictions, exemptions) and 'preeminences' (dignities and honours) created by the crown specifically for vesting in subjects.

[4] Cf. F. Pollock and F. W. Maitland, *The History of English Law* (2nd edn, Cambridge, 1898; reissued 1968) i, pp. 511–26; F. W. Maitland, 'The Crown as Corporation', in *Collected Papers*, ed. H. A. L. Fisher (3 vols, Cambridge, 1911), iii, pp. 244–70.

[5] S. F. C. Milsom, *Historical Foundations of the Common Law* (2nd edn, London, 1981), pp. 99–101; cf. S. Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford, 1994); J. Hudson, *Land, Law and Lordship in Anglo-Norman England* (Oxford, 1994), pp. 253–81.

[6] Pollock and Maitland, *History of English Law*, ii, pp. 1–3.

[7] Ibid., i, bk 2, ch. 1; bk 2, ch. 3, ss. 5–7.

[8] For a telling example: James VI and I, *The Trew Law of Free Monarchies* (1st edn, Edinburgh, 1598; reprinted London, 1616). The freedom propounded by King James is that of the monarch, not of his subjects; cf. C. Hill, *The Century of Revolution* (2nd edn, Wokingham, 1980), pp. 50–57.

Liberties and franchises were essential to the delegated structure of high medieval government. Franchises intersected with the common law of property which constituted tenures, estates and manorial jurisdiction: it was therefore hard sometimes to distinguish a feudal seigniory from a franchise.[9] The hundreds and other franchises resembled feudal jurisdictions, as the alienability and succession of granted liberties came to be indistingushable from common law forms of heritable property.[10] Special rules applied, however, to the franchises of hunting, generally because of rival doctrines coming from Roman and English property law.

Bracton in the early thirteenth century, melded the Roman and Norman legal regimes together. *De legibus* follows the Romanist position faithfully and states that wild beasts, birds and fish are *res nullius*, of which *dominium* is acquired by possession or capture; but makes an exception for those *res nullius* which 'now belong to the king by the civil law, no longer being common as before'. Bracton outlined the Roman rules of acquisition by capture, and then added that these rules applied 'unless custom rules to the contrary or the king's privilege'.[11] The Roman *res nullius* doctrine still often fed into common law reasoning, as in *Bowlston* v. *Hardy*.[12] There it was held that destruction to a plaintiff's cornfields caused by conies escaping from the defendant's well-stocked burrows could not attract a nuisance remedy through action on the case for indirect damage without cause; for the defendant did not have property in the conies nor control their actions. Walmsley J specifed the nature of wild animals as property at common law:

> For the property of the conies is not in any, nor can any man so keep them, but that they will break out of themselves; which is reason that none can have them in his own land, unless by grant from the King, or by prescription: if otherwise, he is punishable in a *quo warranto*; for the Queen hath the royalty in such things whereof none can have any property.

Wild animals were thus compared to goods *in bono vacantia* such as treasure – not *res nullius* available for capture by any, but rather unappropriated goods reserved to the sovereign. This argument transformed the Roman doctrine of *ferae naturae* in the context of English feudalism.

In *Keble* v. *Hickringill*,[13] the defendant maliciously let off guns to scare away ducks gathered at his neighbour's decoy. This, the court held, was not

[9] See Sir Matthew Hale, *The Prerogatives of the King*, ed. D. E. C. Yale, Selden Society, 92 (1976) p. 201; Pollock and Maitland, *History of English Law*, i, pp. 527ff; D. W. Sutherland, *Quo Warranto Proceedings in the Reign of Edward I, 1278–1294* (Oxford, 1963), pp. 1–15 ('Franchises and Legal Theory').

[10] Milsom, *Historical Foundations of the Common Law*, p. 16.

[11] [Henry de Bracton], *De legibus et consuetudinibus Angliae*, ed. G. E. Woodbine, trans. S. E. Thorne (Cambridge, MA, 1977), ii, pp. 41–42.

[12] (1596) Cro. Eliz. 547; 78 E.R. 794 (K.B.) [citations to named law reporters are elaborated in Donald Raistrick, *Index to Legal Citations and Abbreviations* (2nd edn, London, 1993)].

[13] (1706) 11 Mod. 73; 88 E.R. 898 (K.B.); (1707) 11 Mod. 130; 88 E.R. 945 (K.B.).

a legitimate competition with the plaintiff's trade, but rather a prevention of him exercising his trade, and therefore a remediable nuisance.[14] In the first hearing, Powell J suggested that by attracting the ducks to the decoy on his land, the plaintiff had laid some claim to them as property.

> Every one has a property of things *ferae naturae ratione soli*. A man may have a free warren in another man's soil, which he has *ratione privilegii*, and not *soli*, for one man may have a privilege in another man's freehold. A man may have such a property in hares, as if he put it up in his ground, and course and kill it in another man's ground, still the original property is in him, and the coursing is a continuance of this property ... [T]he defendant has done an injury to the plaintiff's property; for by frightening them away you have destroyed his property.[15]

Holt CJ and Powell J expressly denied that the lord of a manor could shoot game over any lands in his manor, including over tenants' freeholds, 'unless he had some special privilege'.[16] Roman doctrine and franchise law can here be seen to restrain seigneurial power to hunt within the manor at the expense of tenants in possession; for a lord to hunt throughout his manor, the privilege had to be expressly granted in those terms, to the detriment of tenants off the demesne.[17]

Royal hunting privileges, the delegation of the crown's right to hunt and take wild animals, were typically granted in four forms: forest, park, chase and warren. The forms overlapped, both in legal theory and in practice. A forest was defined by Manwood as 'a certain territory of woody grounds and fruitful pastures, privileged for wild beasts and fowles of forest, chase and warren, to rest and abide in, in the safe protection of the king, for his princely delight and pleasure'. The beasts of the forest were hart, hind, hare, boar and wolf; but because a forest was the larger jurisdiction comprising the smaller, it also embraced all beasts of venery belonging to chase, park or warren. Forests were regulated by elaborate courts and officers of the forest, with complex customary laws governing the status, rights and duties of all who owned land or were tenants within the forest bounds. A chase was similar to a forest save that it lacked the apparatus of special forest courts, officers and laws. A grant of royal forest privileges without

[14] (1707) 11 Mod. 130; 88 E.R. 945 (K.B.), judgment of the court delivered by Holt CJ; S.C. *Keeble* v. *Hickeringhall* (1706) 3 Salk. 9; 91 E.R. 659 (K.B.); and see S.C. Holt K.B. 14, 19–20; 90 E.R. 906, 908–9 per Holt CJ. See A. W. B. Simpson, 'The Timeless Principles of the Common Law: *Keeble* v. *Hickeringill* (1707)', in Simpson, *Leading Cases in the Common Law* (Oxford, 1995), pp. 45–75.

[15] (1706) 11 Mod. 73, 75; 88 E.R. 898 (K.B.).

[16] Holt K.B. 14; 90 E.R. 906; and see *Sutton* v. *Moody* (1702) 1 Ld. Raym. 250; 91 E.R. 1063 (K.B.) per Holt CJ.

[17] For a dictum to that effect, see *Heighman* v. *Best* (1593) Cro. Eliz. 462, 463; 78 E.R. 715, 716 per Popham CJ (K.B.).

specifying rights of court bestowed a chase at common law. Beasts of chase comprised buck, doe, fox, martin and roe. A park was an enclosed or walled chase wholly on the grounds of the grantee. A free warren was like a park, save that only certain wild animals and birds known as game, namely hares and rabbits, pheasants and partridges, were given over into the exclusive property of the owner, again by royal grant or prescriptive practice in lieu of grant. The usual form of grant of warren was as follows:

> That he and his heirs for ever shall have free warren, in all his demesne lands ... provided that those lands be not within the bounds of our forests, so that no one should enter such lands to hunt in them, or to take any thing which belongs to warren, without the licence and consent of the said grantee or his heirs, under forfeiture of ten pounds.[18]

The grantee of free warren generally received an incorporeal hereditament attached to his land, which brought with it concomitant rights: to appoint a warrener or game-keeper; to chase game beyond the bounds of the land into other closes in order to consummate capture; and to exclude all others from the warren and bring trespass actions against any who interfered with the game.

Free warren as a legal right was commonly secured to estates by prescription. The law readily implied grant of hunting rights to owners through long enjoyment evidencing a presumed grant, in the absence of express royal licence, so much so that enclosed freehold land almost automatically came to attract the franchised privilege of warren by prescription if the lord was used to hunt on his lands. This may have been the import of the *Case of Monopolies*, where Coke stated:

> that none can make a park, chase or warren, without the king's licence; for that is *quodam modo* to appropriate those creatures, which are truly *ferae naturae et nullius in bonis*, and to restrain them of their natural liberty, which he cannot do without the king's licence; but for hawking, hunting, &c., which are matters of pastime, pleasure and recreation, there needs no licence; but every one may, in his own land, use them at his pleasure, without any restraint to be made, unless by parliament.[19]

Coke elsewhere urged that the hunting privileges of park and warren could be acquired simply by long enjoyment: 'a man may make a title by usage and prescription only, without any matter of record'.[20] The difference between these two positions was slight in practice. Through liberal interpretation of

[18] J. Manwood, *Treatise and Discourse of the Lawes of the Forest* (London, 1598), cited in J. Williams, *Rights of Common and Other Prescriptive Rights* (London, 1880), pp. 228–38.

[19] (1601) 11 Co. Rep. 84b, 87b; 77 E.R. 1260, 1264 (K.B.)

[20] Prescription against the crown by a subject was jurisprudentially problematic, but this did not prevent Coke and the common lawyers using the language of prescription freely in this context: see generally J. W. Salmond, 'The History of the Law of Prescription', in Salmond, *Essays in Jurisprudence and Legal History* (London, 1891), pp. 73–120.

the prescription requirements, hunting rights were annexed to countless estates across England. Thus the franchise privilege merged into the overall manorial and territorial rights of the free tenant at common law; free warren became an adjunct to the conventional or natural rights of seisin accorded to the freeholder. Blackstone was still claiming as late as the 1760s that some type of royal franchise must lie at the root of any legal hunting right in England – possession of land by itself could confer no right because of the doctrine that the king held all wild animals in the kingdom by virtue of his prerogative.[21] Edward Christian in his annotations to Blackstone's *Commentaries* in the 1809 edition by contrast insisted that hunting rights should be seen as a natural extension of seisin and possession of land, independent of grant.[22] Both views can be supported from the franchise authorities; and much ink was spilt in the nineteenth century debating the point to and fro.[23]

A second remarkable feature of the franchise of free warren flowed from its nature as a servitude by grant or prescription, an incorporeal hereditament annexed to, but separate from, the land. A grantee could in the limited case of hot pursuit legally go a-hunting over another person's adjoining lands. But if the lands of a free warren were sold, the alienee could retain the rights of free warren, and thus create a warren in gross, affording him a personal – and alienable – property right to hunt on another's land and to sue in trespass to prevent others so hunting.[24] Although English law was eventually to deny the existence of easements in gross taking effect as proprietary licences not annexed to a dominant tenement,[25] free warren franchises survived as a special case. One seam of case-law recognised some warrens in gross as taking effect as a type of profit à prendre;[26] other cases described as a type of non-assignable personal licence for pleasure.[27] The constitution of the warren in gross taking effect as a profit had to be by separate deed; it could not be by reservation from grant, for hunting rights

[21] W. Blackstone, *Commentaries on the Law of England* (4 vols, 1st edn, Oxford, 1765–69; ed. E. Christian, 15th edn, Oxford, 1809), ii, pp. 410–19.

[22] Blackstone, *Commentaries* (ed. E. Christian), ii, notes at pp. 410–19. Christian elaborated his views in his *Treatise on the Game Laws: In which it is Fully Proved, that Game is Now, and Has Always Been, by the Law of England, the Property of the Occupier of the Land upon which it is Found and Taken* (London, 1817).

[23] Some sense of the scale of interest in hunting law is conveyed by the bibliographical statistics. There are fifty-eight seventeenth- and eighteenth-century volumes dealing mainly with the game laws in the British Library, and 143 such volumes for the nineteenth century; to which must be added numerous more general common-law treatises devoting sizeable sections or chapters to the subject. There was sufficient energy in this legal debate for an Anti-Game Law Prize Essay competition to be run in 1847, the prize going to one John Shelley, Bart.

[24] See *Earl of Beauchamp* v. *Winn* (1873) L.R. 6 H.L. 223.

[25] *Hill* v. *Tupper* (1863) 2 H. & C. 121; 159 E.R. 51 (Ex.); M. F. Sturley, 'Easements in Gross', *Law Quarterly Review*, 96 (1980), pp. 557–68.

[26] See *Bird* v. *Higginson* (1837) 6 Ad. & E. 824; 112 E.R. 316 (K.B.); *Wickham* v. *Hawker* (1840) 7 M. & W. 63; 151 E.R. 679 (Exch.).

[27] *Wickham* v. *Hawker* (1840) 7 M. & W. 63; 151 E.R. 679 (Exch.), discussed below.

generally were not seen as an inherent attribute of seisin and hence could not be reserved from a grant of seisin.[28] If a lord separately reserved free warren to himself in making a grant to a tenant, then the lord retained the sole right to hunt over the tenant's close; there rarely appears a concurrent right for both lord and tenant to hunt.[29] This sole right of free warren in the lord became a common feature of conveyances as demesnes were replaced by tenant farming over the centuries. Only if there was no reservation was a tenant immune to the hunting claims of his lord.[30] Where there was reservation, the actual consent of tenants to hunting over their soil could be dispensed with. This undercut the fair-sounding common law doctrine that hunting over land against the consent of the occupier was a trespass.[31]

Later courts insisted that free warren was not presumed to attach to a grant of manor, but could only take effect by grant from the crown as a special franchise that maintained its existence as separate from the grant of the land itself. Only prescription could otherwise annex the franchise to the land. The doctrine meant that where a grantee of free warren later conveyed his manor 'with all rights, profits, royalties, franchises, &c. belonging or appertaining to the manor', these words were ineffective to pass the free warren with the land; only a prescriptive warren was ever annexed to the land and passed with it.[32]

Westbury LC summed up the basic doctrines of the common law regarding hunting and free warren in a much-cited decision of 1865:

> When it is said by writers in the common law, that there is a qualified or special right of property in game, that is, in animals *ferae naturae* which are fit for the food of man, the word 'property' can mean no more than the exclusive right to catch and appropriate such animals, which is called by the law a reduction into possession. This right is said in law to exist *ratione soli* or *ratione privilegii*. Property *ratione soli* is the common law right which every owner of land has to take all such animals *ferae naturae* as may from time to time be found on his land; and as soon as this right is exercised the animal

[28] See *Moore* v. *Lord Plymouth* (1817) 7 Taunt. 614, 626; 129 E.R. 245, 250 (C.P.); *Wickham* v. *Hawker* (1840) 7 M. & W.63; 151 E.R. 679 (Exch.); *Doe d. Douglas* v. *Lock* (1835) 2 Ad. & El. 705, 742; 111 E.R. 271, 286 (K.B.); *Pannell* v. *Mill* (1846) 3 C.B. 625; 136 E.R. 250 (C.P.); S. M. Leake, *A Digest of the Law of Uses and Profits of Land* (London, 1888), pp. 78–79.

[29] The sole example I can find is *Davies' Case* (1688) 3 Mod. 246; 87 E.R. 161 (K.B.), where a prescription for the lord of the manor, his tenants and farmers to fowl in the warren of another, was held good on a demurrer. The rarity of the case shows that this concurrent right was uncommon; and note that the right was a warren in gross, to hunt in another manor; the lord and his tenants were not sharing hunting rights in the lord's manor.

[30] *Bowlston* v. *Hardy* (1596) Cro. Eliz. 547; 78 E.R. 794 (K.B.); *Heighman* v. *Best* (1593) Cro. Eliz. 462; 78 E.R. 715 (K.B.). See further *Paul* v. *Summerhayes* (1878) L.R.4 Q.B.D.9, which reviews the earlier authorities extensively.

[31] *Paul* v. *Summerhayes* (1878) L.R.4 Q.B.D.9.

[32] See e.g. *Lord Dacre* v. *Tebb* (1776) 2 W. Bl. 1151; 96 E.R. 678 (K.B.); *Pickering* v. *Noyes* (1825) 4 B. & C. 639; 107 E.R. 1198 (K.B.); *A.G.* v. *Parsons* (1832) 2 Cr. & J. 279, 302; 149 E.R. 120, 129–30 (Ex.); *Morris* v. *Dimes* (1834) 1 Ad. & E. 654; 110 E.R. 1357 (Q.B.).

> so caught becomes the absolute property of the owner of the soil. Property *ratione privilegii* is the right which by a peculiar franchise anciently granted by the Crown, by virtue of prerogative, one man may have of taking animals *ferae naturae* on the land of another; and in like manner the game when taken by virtue of the privilege becomes the absolute property of the owner of the franchise.[33]

Through the operation of prescription and the rules of reservation a net of free warren rights spread across the land of England. Hunting rights were claimed not only over the manorial demesne, the land that the lord physically occupied and enjoyed within the manor, but also over the common lands of the manor and over tenants' and alienees' closes. The right of hunting as an important public attribute of seigneurship and status was guarded far more jealously than the rights of court. On top of this common law regime came the Game Laws, the statutory hunting regime that imposed harsh punishments and legalised private armies of gamekeepers in an attempt to exclude completely the landless and the poor from the pleasures and profits of hunting.

A starting-place for a sketch-history of the game laws is the time of Magna Carta, when the Norman kings' exclusive claim to all game in the realm was still asserted as a strong and jealously guarded royal privilege, and one strongly resented by the barons. They imposed the Charter of the Forest on the king in 1217 in the wake of Magna Carta, restricting the royal hunting grounds, diminishing recent accessions to the royal forests, and refusing physical punishment of those caught poaching against royal right.[34] In 1389 a royal decree was passed in the reaction following the Peasants' Revolt, strictly reserving hunting rights for those persons 'qualified' by a certain level of land ownership, namely 40s. per annum.[35] But this restrictive legislation flew in the face of entrenched social practice. From the time of bastard feudalism through to the Tudors, poaching in defiance of forest law was a supremely popular activity, and it was also a relatively classless one: Robin Hood after all was a nobleman, and Queen Elizabeth herself sometimes took armies of hunters on what were effectively poaching expeditions through her dukes' private parks and chases. Illegal hunting was practised by rich and poor alike through to the end of the seventeenth century and beyond; or, to put it another way, different groups of hunters had different notions of the legitimacy and legality of hunting.[36]

[33] *Blades* v. *Higgs* (1865) 11 H.L.C. 6 21, 631; 11 E.R. 1474, 1478–79 (H.L.).

[34] R. B. Manning, *Hunters and Poachers: A Social and Cultural History of Unlawful Hunting in England, 1485–1640* (Oxford, 1993), pp. 58–59; H. Hopkins, *The Long Affray: The Poaching Wars in Britain, 1760–1914* (London, 1985), pp. 121–27.

[35] 13 Richard II, s. 1, c. 13 (1389).

[36] E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London, 1975; reprinted Harmondsworth, 1990); Manning, *Hunters and Poachers*, pp. 57–82 and passim; S. Schama, *Landscape and Memory* (London, 1995), pp. 37–184.

In more modern times hunting rights came to be infected with a new strain of class consciousness. From 1603 only those being the son of a knight or lord, or the son or heir of an esquire, or owning a £40 freehold of landed property could legally hunt; and the sale of game was outlawed by statute to protect further the upper-class monopoly over hunting against the depredations of the poor. The property qualification was soon raised to £40 freehold or £80 copyhold, thus confining legal hunting to an elite of English society.[37] According to James I, in a provocative speech to parliament in 1610, 'it is not fit that clowns should have these sports'.[38] Other game statutes were explicitly aimed not at clowns but at the conservation of game stock, for example forbidding all (including the nobility) from hunting with nets and traps, or destroying eggs and young.[39] The modern Game Laws were born after the Restoration in 1671,[40] when Charles II created a strict 'game privilege' based on three categories: a high land qualification of £100 freehold or £150 life or leasehold; being the 'son and heir apparent of an esquire, or of other person of higher degree'; and persons qualified by franchise. The Act then recognised a special fourth category of hunter, according lords of manors of the degree of esquire or higher the exclusive right to appoint gamekeepers, who could seize hunting equipment and arrest poachers.[41]

The intersections of the four categories set out by the Act caused a number of headaches for the courts: in 1783 the court of King's Bench implied that under the wording of the Act an esquire without the necessary land would be unqualified, though the unlanded son and heir of an esquire would be.[42] In 1785 a majority of the same court affirmed that curious construction, on the basis that the 1671 Act had intended to remove rank in itself as a qualification, allowing the son and heir to an esquire to be qualified on the assumption that an esquire would usually be landed and hence qualified under the main limb of the Act. His eldest son should be indulged with a like qualification as he owned the expectancy of the necessary land. A landless person of high degree, such as a doctor of an ancient university, was not qualified, nor his son and heir.[43]

Occasionally a judicial voice was raised against this policy; for example, Willes J held that the natural meaning of the statute accorded the hunting qualification to all persons of respectable degree without land, including professionals and their sons. He argued that the policy of the Game Laws

[37] 1 James I, c. 27 (1603); 3 James I, c. 13 (1605); 7 James I, c. 11 (1609).

[38] Quoted by Manning, *Hunters and Poachers*, p. 65.

[39] Ibid., pp. 64–66, 78–79.

[40] 22 & 23 Charles II, c. 25 (1671).

[41] For a nineteenth-century case dealing with this law, see *Bird* v. *Dale* (1817) 7 Taunt. 560; 129 E.R. 223 (C. P.).

[42] *R* v. *Utley* (1784) 3 Dougl. 355; 99 E.R. 693 (K.B.).

[43] *Jones* v. *Smart* (1785) 1 T.R. 44, 51–3; 99 E.R. 963, 967 (K.B.) per Buller J. Cf. *Earl Ferrers* v. *Henton* (1800) 8 T.R. 506; 101 E.R. 1515 (K.B.).

was 'pointed chiefly against persons of low degree; to prevent mechanics from leaving their lawful trades and employments to kill and destroy the game, to the prejudice of noblemen, gentlemen, lords of manors, and others. For these reasons, I think gentlemen ... ought not to be deprived of their amusements'. His wished to narrow the impact of a set of laws he believed to be 'productive of tyranny', for 'nothing can be more oppressive that the present system of the game laws'.[44] Eminent jurists such as William Blackstone and his later editor, the Downing Professor, Edward Christian, wrote elaborate attacks on the Game Laws and their surrounding case law, arguing that these contradicted the liberties and assumptions of the common law. For Blackstone, the Game Laws were a crude attempt to enslave the poor and to impose the outdated practices of Norman military feudalism on modern England, 'but with this difference: that the forest laws established only one mighty hunter in the land, the game laws have raised a little Nimrod in every manor'.[45]

Despite such sharp criticisms, the Game Laws continued to be harshly enforced by the courts through to the twentieth century. Late Victorian and Edwardian society was particularly obsessed with hunting: it has been estimated that in 1901 landowners kept an army of over 17,000 gamekeepers, an army whose numbers increased until the outbreak of war.[46] Edward VII himself set the pace for sporting life; he loved exterminating birds with guns as much as he loved any of his debauches. Lord Lincolnshire recorded good witness in his diary after a successful hunting party at Sandringham: 'seven guns in four days killed ten thousand head. The king one day fired 1700 cartridges and killed one thousand pheasants. Can this terrific slaughter last much longer?'[47]

Although the common law distinguished wildfowl, hares and rabbits, foxes, boar and deer, when speaking of game, the game statutes tended to lump all types of edible living creatures in the wild as 'game'; and we may use this generic term when discussing this body of law without courting too much inaccuracy. The focus of aristocratic hunting rites, if not rights, were deer (and, in earlier times, wild boar); only as a secondary activity came wildfowl captured by hawking, falconry and later by shooting. Hares, rabbits and fish rated even lower on the hunter's totem, valued merely as 'practise' sport for the noble or gentle hunter, substitutes for the real thing – for the

[44] *Jones* v. *Smart*, at 49–50; 965–66.

[45] Blackstone, *Commentaries*, ii, pp. 14, 395, 403, 410–19; iv, pp. 174–75, 410–19; Christian, *Treatise*.

[46] See Hopkins, *The Long Affray*, p. 307. The popularity of fox-hunting among the English and Protestant gentry in Ireland was a major cause of the Land War of 1879–82 – although the lines of nationality, class and religion were not always clear-cut: see L. P. Curtis, Jr, 'Stopping the Hunt, 1881–1882: An Aspect of the Irish Land War', in C. H. E. Philpin, ed., *Nationalism and Popular Protest in Ireland* (Cambridge, 1987), pp. 349–402.

[47] Diary of December 1912, quoted in D. Cannadine, *The Pleasures of the Past* (London, 1989), p. 234.

deer.[48] Foxes graduated from their earlier status as vermin to become the focus of high hunting in the early nineteenth century, as the more valued varieties of game became scarce.[49]

The Game Laws did not focus on the type of game taken by illegal hunters; instead, a myriad of circumstances in which animals might be captured by the unqualified hunter were redefined by statute as crimes and trespasses, in derogation of the common law. The year 1723 saw the terroristic Black Act created, with its string of over 200 capital offences;[50] and further repressive legislation was passed in 1770, 1800, 1803, 1816, 1818 and again in 1828. Liberalisation of the laws began in 1831 with the abolition of the land qualification and the institution of a system of licensing of hunters by game certificates. However, lords rather than freeholders or tenant-occupiers retained a qualified property in game on manorial lands, and often maintained their right to enter all manorial holdings in pursuit of game. The 1831 Act only marginally tilted the balance of hunting powers away from landlords. The 1837 Game Act restricted the seasons in which hunting of any sort could be pursued, a regulation aimed at preserving the land from damage as well as maintaining game numbers by throwing protection around the breeding period.[51]

After a number of select parliamentary inquiries into the social and economic damage wrought by the Game Laws, fundamental reform came at last in 1880 with Gladstone's Ground Game Act. This legislation gave tenant farmers an 'inalienable and concurrent right' with the landlord to shoot the hares and rabbits consuming their crops. The new law broke the class monopoly of game which had been guarded so jealously by the landed caste, and it was regarded, correctly, as a radical liberal assault on landed privilege. The House of Lords tried to block the statute, and its legal effects were commonly excluded in tenancy agreements between lords and tenant-farmers.[52] None the less the act marks the beginning of the end of the old Game Laws.

We turn next to examine the impact of enclosure on hunting rights. Like the law of hunting itself, the legal history of enclosure spans many centuries.[53]

[48] Manning, *Hunters and Poachers*, pp. 4–8.

[49] F. M. L. Thompson, *English Landed Society in the Nineteenth Century* (London, 1963), pp. 145–50.

[50] E. P. Thompson, *Whigs and Hunters*.

[51] P. B. Munsche, *Gentlemen and Poachers: The English Game Laws, 1671–1831* (Cambridge, 1981), pp. 106–58.

[52] On the Ground Game Act 1880 (43 & 44 Victoria, c. 47), see *An Abstract of the Ground Game Act, 1880, by a Solicitor* (Rugeley, 1883).

[53] See *Cooke On Inclosures: With a Treatise on the Law of Rights of Common* (3rd edn, London, 1856); T. E. Scrutton, *Commons and Common Fields or the History and Policy of the Laws Relating to Commons and Enclosure in England* (Cambridge, 1887); H. W. Woolrych, *A Treatise on the Law of Rights of Common* (London, 1824; 2nd edn 1850).

Much enclosure of communal lands took place in late medieval and early modern times, by the act of lords who could revoke copyholds or tenancies-at-will or impose impossible entry fines in order to clear all occupants from their manors. The creation of extensive hunting parks was a common cause of eviction and enclosure in the high middle ages, together with the desire to dedicate land to the church; these motives were more important than any drive for agricultural efficiency.[54] By contrast, the later Hanoverian enclosures were avowedly launched in order to destroy the old system of agriculture involving partition of farmed land between manorial demesne, commons, open fields and strips, and allotments. The system of open fields and commons was held to be less efficient than a pure system of individual private property. The capitalistic 'improvement' of agriculture, according to propagandists for enclosure such as Arthur Young, demanded a concentration of ownership rights in individual holdings, together with an ending of commons where many persons promiscuously enjoyed access to the same land.[55] By dividing the manorial lands and commons into individual allotments, the individual owners, it was believed, would be given positive incentives to invest in and work their private land to the limit of its productivity. Moreover, smaller owners would lose the disincentive of common rights, which were portrayed as a debilitating form of welfare-insurance removing discipline, stifling enterprise and wasting land. These beliefs were argued vehemently by political economists, politicians and pamphleteers, and even spelt out in the preambles of Enclosure Acts.[56]

Much of enclosure in Hanoverian England took the form of private grants and redistributions of title between lords and free and copyhold landowners within a manor, carving up the common into individual closes by consent of all affected parties, without necessitating recourse to a parliamentary act.[57] This practice produced much legal dispute over the status of hunting rights following the private reallocation. The reported litigation only begins some thirty years or more after the height of the enclosure movement, perhaps because the hunting obsession of the gentry only waxed to intolerable extremes from the 1820s and 1830s; and perhaps because it took time for

[54] Pollock and Maitland, *History of English Law*, i, p. 379. Maitland describes how the king would sell franchises to landowners offering them a relaxation of royal controls over sporting on their estates, ibid., p. 575.

[55] A. Young, *Political Arithmetic* (London, 1774), pp. 787–88.

[56] For recent debate over the social and economic impact of enclosure, see R. A. C. Allen, *Enclosure and the Yeoman* (Oxford, 1992); G. Clark, 'Agriculture and the Industrial Revolution 1700–1850', in J. Mokyr, ed., *The British Industrial Revolution: An Economic Perspective* (Boulder, CO, 1993), pp. 227–66; M. Turner, *English Parliamentary Enclosure* (Folkestone, 1980). Much can be still be learnt from K. Marx, *Capital*, i (trans. B Fowkes, Harmondsworth, Middlesex, 1976), pp. 883–91.

[57] D. Brown and F. A. Sharman, 'Enclosure: Agreements and Acts', *Journal of Legal History*, 15 (1994), pp. 269–86.

the smaller freeholders' spirits and resources to rise to the challenging of their lords after the great wave of late eighteenth-century enclosures.

In the case of *Pickering* v. *Noyes* in 1825,[58] Bayley J of King's Bench ruled that, following distribution of a common by indentured deeds in 1736, the lord of the manor could not legally enter that land to hunt unless he could prove a free warren or a grant of some other proprietary right to sport, such right being expressly reserved at the time when the common was vested in the other landowners. A clause reserving all royalties to the lord was not effective to create any new right of free warren.[59] Moreover, the factual existence of a custom 'of the country' at the time of action, to allow the lord a non-exclusive licence to hunt over the manorial lands was no proof of any existing proprietary sporting right. Bayley J made the following argument: 'We all know that a very mistaken notion long prevailed that the lord of a manor had a right to go not only over his own lands, but over the lands of others within his manor.'[60] By insisting on strict proof of a free warren or proprietary licence, the lord's informal right to control hunting in his manor was stripped from him. Nor could any prescriptive grant of free warren be recognised from long usage, for the use must be *nec vi clam aut precario*, or without force, secrecy or toleration; and since the lord and commoners believed there was at least an informal license to so hunt, the hunting use was not adverse to the commoners' rights and therefore could be no evidence of an adverse prescriptive right.

In *Morris* v. *Dimes* in 1834,[61] the owner of a manor sued in trespass to prevent the defendant entering his close and pursuing and taking game. The defendant pleaded his free warren, descending to him through grant of a copyhold estate with all its royalties, franchises and other appurtenances, including a franchise of free warren over the plaintiff's lands. The defendant proved that the earl of Pembroke had received the original free warren from the crown in 1628 by letters patent, the grant being to his heirs and successors 'for ever', and likewise binding the king's heirs and successors. The crown at that time was seised in fee of the lands in which the warren lay. A title in the said warren could be deduced down to 1818, when the owner transferred the right by deed to three new copyhold owners, by the mechanism of a lease and release. The defendant took his title in 1828 from those three owners. The court of King's Bench had to decide whether the free warren was made appurtenant to the copyhold manor and could so descend with the land to subsequent owners; or whether the franchise took effect only as a warren in gross, in which case a grant of the manor together with full royalties and franchises would be inadequate to convey such a hunting right.

[58] (1825) 4 B. & C. 639; 107 E.R. 1198 (K.B.).
[59] The doctrine of *Bowlston* v. *Hardy*, above.
[60] (1825) 4 B. & C. 639, 648; 107 E.R. 1198, 1201–02.
[61] (1834) 1 Ad. & E. 654; 110 E.R. 1357 (Q.B.).

The court reviewed the earlier authorities exhaustively, and applied the old precedent of *Bowlston* v. *Hardy* to hold that no free warren had expressly been passed to the defendant and he was therefore guilty of trespass.[62] The earlier case had decided on a demurrer plea that a grant of free warren in another's manor was a warren in gross, and that such a right 'is not conveyed unto him [the successor in title to the lands of the grantee of the warren] by bargain and sale; for a warren is not parcel nor any member of a manor; but it may be appertaining, but that is by prescription'. Taunton J in *Morris* v. *Dimes* criticised counsel, dryly observing that 'the law respecting free warren was more frequently discussed, and better understood ... in the reign of Queen Elizabeth than now'.[63] In 1835, in the case of *Doe d. Douglas* v. *Lock*, the historical authorities were carefully reviewed in the context of the constitution of a lease purporting to save hunting rights to the landlord. Lord Denman CJ held that 'the privilege of hawking, hunting, fishing, and fowling is not either a reservation or an exception in point of law; it is only a privilege or right granted to the lessor, though words of reservation and exception are used'.[64]

In the 1840 court of Exchequer case of *Wickham* v. *Hawker*,[65] Parke B further investigated the nature of proprietary rights of hunting created contractually, by grant or prescription conveying the right, and independent of any warren. The case involved a transfer of land from a grantor to the defendant, where the grantor reserved hunting rights over the land for himself and for a non-landed third party also. It was held that the reservation was effective not as a saving of rights from the major grant, but rather as a fresh contractual grant of a profit à prendre, a licence of profit. By insisting on the characterisation of reservations of hunting rights in conveyances as fresh proprietary grants, the court was in effect defining such rights as property created by contract and conveyance – not as reservations of seigneurial or manorial privileges. This extended and generalised the point made earlier in *Doe d. Douglas* v. *Lock*. In the present case the third party named in the deed of grant together with his 'heirs and assigns' was allowed to claim a proprietary licence or fully assignable economic right to take profits from the land, a right enjoyed in another's land and existing independently of any interest in the licensee's own land. Such a profit gave a right to enter the other's land to hunt, to assign or delegate the right to servants or companions, and to take any animals captured. The hunting profit given to an individual and his 'heirs and assigns' was contrasted with a mere personal licence to hunt for pleasure: this was only a contractual, non-assignable and revocable right granted to the individual without giving

[62] (1596) Cro. Eliz. 547; 78 E.R. 794 (K.B.).

[63] (1834) 1 Ad. & E. 654, 666; 110 E.R. 1357, 1361.

[64] (1835) 2 Ad. & El. 705, 743; 111 E.R. 271, 287 (K.B.) per Denman CJ, following *Co. Litt.*, 47a.

[65] (1840) 7 M. & W. 63; 151 E.R. 679 (Exch.).

property in the game, and without allowing him to take the game away after the kill.[66] Parke B's decision authoritatively settled that hunting rights outside free warren strictly proved were not reserved fractions of tenure, estate or seisin, but were a species of profit in land – a proprietary interest constituted by contract.[67]

In *Pannell* v. *Mill*,[68] the doctrine of *Bowlston* v. *Hardy* was again followed, and a grant of lands 'except, and always reserved, all royalties, &c.', was held to be inadequate to retain a free warren over land. Nor could the words of reservation be reinterpreted to make them a fresh grant of a hunting licence, as occurred in *Wickham* v. *Hawker*: in that earlier case a far stronger intention to create some kind of hunting interest could be discerned, whilst here there was only a general intention to reserve appurtenancies which was insufficient to create a liberty of hunting.[69] In all of these cases of consensual enclosure the courts can be seen using discretion as to whether particular grants or reservations were apt to save or transfer a warren; or to create a proprietary or personal licence in its place; or (as was often the case) to exclude the lord's sporting right completely.

Statutory enclosures raised a different set of problems to enclosure by deed. The modern Enclosure Acts took the form of private parliamentary Bills, given standardised form by public legislation in 1800, 1837 and 1846. The public Enclosure Acts foreshadowed the permissive legislation for promotion of utilities and municipal enterprise of a later period.[70] Private Enclosure Bills, by contrast, were usually conceived as a type of network contract, or a set of mutual grants made by and between landowners and then passed into law. The contracts were ingrossed and presented to parliament for ratification for four major purposes: in order to provide an official record of the rearrangement of titles; to identify and create specific titles substituting for the customary and common law web of interests and estates binding the enclosed territory; to create a mechanism for arbitrating the reallocation of rights through the appointment of enclosure commissioners; and, finally, to coerce resisters of enclosure awards by the delegation of parliamentary authority to the enclosers. The legal quality of a parliamentary enclosure was perceived by contemporaries to partake of a private,

[66] Following *Duchess of Norfolk* v. *Wiseman* Y. B. 12 Hen. 7, 25 (1491) and 13 Hen. 7, 13, pl. 2 (1492).

[67] Followed in *Musgrave* v. *Foster* (1871) L.R. 6 Q.B. 592; *Duke of Sutherland* v. *Heathcote* (1892) 1 Ch. 475; *Ecroyd* v. *Coulthard* (1897) 2 Ch. 554; *Reynolds* v. *Moore* (1898) 2 Ir. R. 641; *Sowerby* v. *Smith* (1873) L.R. 8 C.P. 514 (C.P.); (1874) L.R. 9 C.P. 524 (Ex. Ch.); *Allgood* v. *Gibson* (1876) 34 L.T. 883; *Goodman* v. *Mayor of Saltash* (1882) 7 A.C. 654; *Thellusson* v. *Liddard* (1900) 2 Ch. 645.

[68] (1846) 3 C.B. 625; 136 E.R. 250 (C.P.).

[69] (1846) 3 C.B. 625, 636–39; 136 E.R. 250, 254–64 per Coltman J, Maule and Cresswell JJ conc. (C. P.).

[70] F. Clifford, *A History of Private Bill Legislation* (2 vols, London, 1885–87), i, pp. 1–12, 33–42, 249–55; ii, pp. 36–198.

consensual treaty to be interpreted according to the supposed intentions of the enclosing parties. Enclosure statutes were not regarded as an expression of legislative will redistributing private property rights by public power.[71]

Enclosure statutes and awards extinguished the feudal or customary rights of both landlord and tenants in the manorial commons, and allocated plots of land to the villagers and to the lord of the manor in proportion to the estimated economic value of old property rights lost. Many customary rights were deemed to be indefinite or unreasonable and were expropriated without compensation. Pursuing this line of reasoning, the political-economy imperatives of 'improvement' ought to have demanded that all rights of common over manorial lands, of whatever type, be ended in order to advance the march of private property and efficiency. Hence we might expect that seignorial hunting rights and other such feudal rights in manorial lands ought to have perished together with villagers' humbler rights of pasture, turbary, estovers and the rest. However, this was not what happened: the vested property of the landlords commonly prevailed against the prescriptions of political economy. The Enclosure Acts explicitly took away the lord's rights in the soil of the manorial lands, that is his economic rights to cultivate or derive revenue from the produce of the manor. Compensation was given by allotment of land substituting for this loss. However, enclosure legislation generally saved or preserved the full panoply of other seigneurial rights over the manor, including hunting privileges.

Greathead v. *Morley*, a case in the court of Common Pleas of 1841, was the first major decision examining the effect of a hunting reservation clause in an enclosure statute.[72] An enclosure of 1811 followed the general form of enclosure set out in 1800.[73] The Act awarded to the lord 'one eighteenth part, in value, of the [common], in full compensation for his right to the soil of the [common] except as thereinafter was reserved to him ...' The Act then divided the common between the other tenants of the manor in proportion to their customary rights, and then added a reservation to the lord and his heirs of 'the seigniory and royalties, incident and belonging to the manor' including 'all courts, &c., fairs, markets, tolls, stallages, rights, royalties, with free warren, and liberty of hunting, hawking, fishing, and fowling, &c.', to be enjoyed 'as if that act had not been made'. The present owner of the manor now attempted to go hunting with his servants over the enclosed manorial lands, being then sued by the plaintiff, a freeholder, for trespass. The manorial owner's defence was 'that under the saving clause in favour of the lord's manerial [sic] rights, the liberty of hunting and fowling over the plaintiff's close exists in the lord, notwithstanding the inclosure of

[71] See G. Bramwell, *The Manner of Proceeding on Bills in the House of Commons* (London, 1833); *Townley* v. *Gibson* (1788) 2 T.R. 701; 100 E.R. 377 (K.B.); *Doe d. Lawes* v. *Davidson* (1813) 2 Maule & Selw. 1175; 105 E.R. 348 (K.B.).

[72] (1841) 3 Man. & Gr. 139; 133 E.R. 1090 (C. P.).

[73] 41 George III, c. 109 (1800).

the waste'. The defendant further claimed that the plaintiff's pleadings only made a bare assertion of exclusive possession under an enclosure award; and that this had failed to establish any legal seisin or legally protected possession at common law as a necessary element for grounding a trespass action protecting possession. The demurrer was rejected by the court, holding that even if the legal seisin of the whole of the manor remained in the lord after its partition by enclosure, the statutory exclusive possession given to tenants supported a right to bring trespass. The discussion of this point suggested that the lord's ultimate possessory right of seisin in the manor formally survived at common law, notwithstanding statutory reallocation of the manorial lands and commons.

As to the principal issue of the survival after enclosure of seigneurial rights including hunting privileges, the court read down the legislative saving of manorial rights by making a distinction between a lord's rights over a manor as owner and his rights in his capacity as lord. Tindal CJ stated:

> We are of opinion that the right of hunting or fowling over the allotments of the moor or common is not reserved to the lord of the manor by the saving clause of the inclosure act ... It is the manifest object of that clause to save to the lord all those manerial rights which he possessed before the inclosure as lord of the manor, other and except the right to the soil. The saving clause gives no new royalty or manerial right to the lord which he did not possess before: it only reserves such as he was before entitled to ... So, if before the act passed, he had no liberty of hunting ... over the moor or common ... he acquires no such right under the clause in question. Now, it would be against all legal construction to hold that the power of the lord of the manor to hunt or shoot over a waste or uninclosed common within his own manor, was merely a 'license or liberty' incident to him as lord: it is a mode of direct enjoyment of his own property. The statute, if it had intended to grant the new lord a liberty or license of this nature, after the soil had become the property of those to whom it was allotted, would have employed proper words to create such new liberty or easement, as ... it has done ... for the purpose of giving the right of exclusively winning and working minerals under the new allotments ... the statute further proceeds to give compensation to the owners of the allotments for the damage done to the soil [by mining]; which it probably would have done for the exercise of the right of hunting and fowling, if it had been intended to grant a new liberty of that description.[74]

The court's reluctance to allow preservation of manorial privileges was strongly motivated by fear of the disutility of such rights for agriculture. The policy core of Tindal CJ's judgment was a decision that parliament must explicitly state its wish to preserve such damaging and inefficient

[74] *Greathead* v. *Morley* (1841) 3 Man. & G. 139, 154–57; 133 E.R. 1096–997, per Tindal CJ (C.P.).

landlord privileges, and preferably do so with compensation for the occupying tenant farmers, as was already the practice in the instance of mining privileges. There was good earlier authority for such a view; for example in 1788, Lord Kenyon CJ had stated that an enclosure statute reserving 'rents' to the lord after transfer of the 'soil' to tenants did not reserve mineral royalties.[75]

The confident approach of the court of Common Pleas was undermined in the extraordinary case of *Ewart* v. *Graham*. The case began in 1855 at jury trial, was referred to the court of Exchequer on a point of law, and went on to the Exchequer Chamber, which decided most appeals of law at this time. Then the case was heard before a special conference of all the common law judges, and finally went before the judges of the House of Lords in 1859.[76] Very few nineteenth-century cases were so rigorously scrutinised by the courts; almost every judge of this classical period of the common law sat at some stage of the litigation.

Ewart v. *Graham* concerned an enclosure of 1800 by Sir James Graham, in which a stinted pasture was allotted among the tenants and the lord of the manor as 'freehold to all intents and purposes'. Again, there was saving clause in the Enclosure Act, reserving to the lord 'all right of hunting, shooting, fishing and fowling, on, through, and over the said stinted pasture, and every part and allotment thereof, and all other seigneuries, royalties and privileges to the lord of the said manor ... in as full manner as if this Act had not been passed'. The plaintiff, who owned premises within the manor, argued that this clause was of the same effect as that in *Greathead* v. *Morley* and section 40 of the General Inclosure Act of 1800, extinguishing the lord's proprietary right to hunt over closes within the old manor and creating no new seigneurial hunting right. This interpretation was accepted by Martin B and the court of Exchequer, and by Erle J and the majority of the Exchequer Chamber.[77] Erle J, with Willes J, gave a strong leading judgment in Exchequer Chamber, condemning the idea that rights to hunt over farmers' land could be reserved by a mere formulary saving of manorial rights. Erle held that such rights were so destructive of farmers' interests that a clear legislative intention would have been required to save them.[78]

Erle J's judgement was reversed by the special conference of appellate judges. The panel of judges included Willes J, but also a clutch of lesser

[75] *Townley* v. *Gibson* (1788) 2 T.R. 701, 705–6; 100 E.R. 377, 379 (K.B.); for later authorities see *Doe d. Douglas* v. *Lock* (1835) 2 Ad. & El. 705; 111 E.R. 271 (K.B.).

[76] *Graham* v. *Ewart* (1855) 11 Exch. Rep. 326; 156 E.R. 854 (Ex.); (1856) 1 Hurl. & Norm. 550; 156 E.R. 1320 (Ex. Ch.); *Ewart* v. *Graham* (1859) 7 H. L. C. 331; 11 E.R. 132 (H.L.).

[77] Coleridge J in Exchequer Chamber dissented and found for the defendant lord: *Graham* v. *Ewart* (1856) 1 Hurl. & Norm. 550, 559–64; 156 E.R. 1320, 1324–26.

[78] *Graham* v. *Ewart* (1856) 1 Hurl. & Norm. 550, 554–59; 156 E.R. 1320, 1323–24. When Erle J retired from the bench to enjoy the life of a country gentleman he seems to have taken his distaste for sport with him, for he banned all hunting on his estate: A. W. B. Simpson, ed., *A Biographical Dictionary of the Common Law* (London, 1984), p. 166.

lights from the courts of King's Bench and Common Pleas. Wightman J delivered the majority opinion. He accepted that the manorial hunting right was a property right in the soil and not a right of lordship; and hence was usually ended by enclosure and compensation for loss of the lord's common rights. However, even if the lord's liberty of hunting was strictly proprietary rather than seigneurial, the wording of the saving clause in this particular statute was held to preserve the right 'in whatever character he exercised the right'. To quote the judge again, it was 'the clear intention of the Legislature that it should continue to be enjoyed'.[79] Wightman J sidestepped the contrary authority of *Greathead* v. *Morley* by holding it to be either inapplicable or wrong. Willes J alone dissented, affirming the Exchequer Chamber opinion that 'the intention of the saving clause was to preserve seigneurial, not territorial rights'.[80]

In the House of Lords appeal, Lord Campbell LC described the Enclosure Act as 'substantially [a] bargain between [the lord being the owner in fee simple of the estate] and those who were to become the allottees of the fee ... that this right [of hunting], which he had, should be reserved to him when the land was allotted to them under the Act of Parliament'.[81] The contractual intention 'to preserve this exclusive right of hunting' was 'clearly expressed' in the Act, just as the non-manorial right of the lord to minerals was preserved. Lord Cranworth stated that generally hunting rights were proprietary rather than seigneurial, and hence extinguished by enclosure; but that in this case 'we are giving effect to the real intentions of the parties, and to the true construction of the Act, by holding, that what was meant to be given or reserved to [the lord] was the *de facto* right of sporting which he enjoyed, from whatever source that right arose'.[82] Lords Campbell and Brougham held that the contrary authority of *Greathead* v. *Morley* should be overruled if it could not be distinguished. Lord Campbell added:

> I say nothing about the supposed odiousness of this right [saved to the lord of the manor], because that cannot at all influence our decision. We have only to see what the Legislature has enacted, and I do not know that there would be anything at all discreditable in a person wishing to continue to enjoy that which he believed belonged to him as the owner of the soil.[83]

Lord Campbell thus held that the lord of the manor's enclosure contract should be upheld in his favour, on the terms as the lord understood them;

[79] *Ewart* v. *Graham* (1859) 7 H.L.C. 331, 342–44; 11 E.R. 132, 137–38.

[80] Ibid., 344; 138.

[81] Ibid., 345–46; 138–39.

[82] Ibid., 348; 140. The other judges of the Lords appeal were Lords Brougham and Wensleydale (the ennobled Parke B). Coleridge J's dissent in Exchequer Chamber was to the same effect, but was reasoned far more carefully through close interpretation of the words and context of the enclosure act: *Graham* v. *Ewart* (1856) 1 Hurl. & Norm. 550, 559–64; 156 E.R. 1320, 1324–26.

[83] *Ewart* v. *Graham*, 7 H.L.C. 331, 346; 11 E.R. 132, 139.

that the lord's intention to maintain his rights against opposition was creditable; and that no attention should be given to the opposing contractual belief of the allottees, which was that enclosure would unburden their lands of ancient property rights and free them of the lord's hunting parties. Lord Brougham participated in the majority decision. He seems to have excluded his moral and political hostility to hunting from his law-making. In 1828 he had stated that: 'There is not a worse constituted tribunal on the face of the earth, not even the Turkish cadi, than that at which summary conviction on the Game Laws constantly take place; I mean a bench or a brace of sporting justices'.[84] Now thirty years later he was voting as a Lord of Appeal for the entrenchment of hunting rights in the hands of the gentry.

The fate of the controversial majority doctrine in *Ewart* v. *Graham* was perhaps predictable: judges who disliked the decision distinguished it where possible and applied *Greathead* v. *Morley*; while those who favoured lords' hunting rights upheld *Ewart* and held *Greathead* to be wrong. The major 1856 case of *Earl of Lonsdale* v. *Rigg* is representative.[85] The lord of an enclosed manor sued to prevent tenants shooting grouse over the manorial lands. The tenants pleaded customary estates of cattlegate, or possessory rights to stinted pasture land including rights to hunt grouse. The lord based his claim not on free warren but his right as the continuing territorial owner of the soil. The cattlegate owners had only an incorporeal right akin to common, not any type of ownership of the soil bringing rights of sport. Moreover, the lord and his predecessors had always maintained their practice of exclusive hunting and had conceded no prescriptive right.[86] The court of Exchequer split two-two over the lord's claims. Platt and Martin BB found for the lord. They based their decision on the doctrine of Lord Holt in *Sutton* v. *Moody*,[87] which Platt B summarised as follows:

> Where a man pursues game in B.'s land and kills it in B.'s land, the bird or the deer that is killed is the property of B., since he has a possessory though not an absolute right in it while it is upon his domain.

The cattlegates as incorporeal rights did not involve seisin or possession of the soil – that remained in the lord. Hence it followed the lord owned any grouse shot in the manor as an incident of his possession.[88] Platt B held that the 1831 Game Act had reinforced the landlord's common-law rights. The Act had declared grouse as well as hares as included in the designation

[84] Speech on law reform, 7 February 1828, quoted in Munsche, *Gentlemen and Poachers*, p. 76.

[85] (1856) 11 Exch. 654; 156 E.R. 992 (Ex.); (1857) 1 H. & N. 923; 156 E.R. 1475 (Ex. Ch.); and to like effect, see *Askew* v. *Wilkinson* (1832) 3 B. & Ad. 152; 110 E.R. 56 (K.B.).

[86] For a variant situation, where the lord could prove that his own commoner's rights were distinct from his territorial ownership and hence separately compensable, see *Arundell* v. *Lord Falmouth* (1814) 2 M. & S. 440; 105 E.R. 444 (K.B.); *Lloyd* v. *Earl Powis* (1855) 4 E. & B. 485; 119 E.R. 177 (K.B.).

[87] (1702) 1 Ld. Raym. 250; 91 E.R. 1063 (K.B.).

[88] Following *Co. Litt.*, 4b, 58b.

of game; and section 7 of the Act had declared that 'in all cases where any person shall occupy any land under any lease or agreement ... the lessor or landlord shall have the right of entering upon such land ... for the purpose of killing or taking the game'. Moreover section 10 of the Act had expressly stated that holders of cattlegates or rights of common should take no extra rights to hunt than existed at common law, and in particular that the rights of lords of manors to hunt over all the manorial lands should not be diminished in any way. Parliament seemed to have expressly intended that freeholders, commoners and leasehold tenants should have no hunting rights based on their occupancy; and likewise no power to prevent lords hunting over manor lands by virtue of their legal possession.[89] Platt B concluded that 'the tenant must submit to the landlord's entry by himself or his gamekeepers for the purpose of killing the game, unless it is specifically granted to the tenant by the terms of his lease'.

Alderson B (joined by Pollock CB) found for the tenants. He found authorities describing cattlegates as tenements, and therefore copyhold estates, granting some type of exclusive possessory right to the tenant. Their true nature was elusive:

> Then what are they? In one sense, no doubt they are not the land, for they are only a part of it, like the mines or any other part of it. But they are a part of the land, and consist of the exclusive right to that part of it which consists of the whole surface or vesture of the land; and the owners have the right of excluding every other person from intruding thereon.[90]

Finally, the lord's practice of controlling shooting in the manor could not confer an exclusive proprietary licence by prescription. His own right to shoot was referable to his own holding of cattlegates giving him a territorial right, no different to that of his his tenants. The fact that tenants occasionally asked his permission to shoot was neither here nor there:

> There is no suggestion that any owner of cattlegates has ever been prevented by the lord from shooting. Probably, no one has ever wished to do so. The universal tradition in these districts, and almost throughout all England was, that lords of the manor could shoot everywhere, over wastes and copyholds alike; and the nature of the distinction between wastes and stinted pastures, the rights of the commoners in the one being an easement, the soil remaining in the lord, and those of owners of cattlegates being tenements held of the lord, including a limited ownership of a part of the soil itself, is so fine, that any usage on the part of the lord, such as this, is not of the least weight at all.

The language of the 1831 Game Act stressing the hunting rights of lords over commoners was not referred to in Alderson B's judgment. Instead he

[89] *Earl of Lonsdale* v. *Rigg* (1856) 11 Exch. 654, 676–80; 156 E.R. 992, 1002–3.
[90] Ibid., 680–81; 1004.

concluded with some critical comments on the nature of aristocratic power in the countryside:

> If we add that the power of this plaintiff [the earl of Londsdale] and his ancestors is well known by all to have been almost unlimited, we shall, I think, be not much disposed to treat this usage [of leave to shoot] as worthy of the slightest attention. I think the case entirely depends on the nature of the property itself, and that the decision [of fact as to the nature of the customary interests in that locale] ... I am confident would be the opinion of any twelve men selected indifferently from either Westmoreland or Cumberland, without a moment's doubt.[91]

Whether the judge suspected the earl of having bullied local witnesses and juries to legitimise his rights does not appear from the record of the case.

The earl survived the sharp judicial hostility expressed to him in the lower court, and won his appeal in the court of Exchequer Chamber.[92] Coleridge J in a brief judgment emphasised as decisive the evidence of witnesses stating that, in the locality, cattlegates were regarded as non-tenurial incorporeal hereditaments, easements bringing no right of control over the soil. Beyond this finding of fact, Coleridge J asserted blankly that 'the grouse shot [i.e. shot by the defendant as a wrongdoer] on the lands of the Plaintiff, belonged to him [the Plaintiff] according to all the authorities'.[93]

The earlier authorities were far from clear that wild animals and birds killed on the land of an owner naturally became that owner's property.[94] That position seemed to conflict head-on with the Roman doctrine of *ferae naturae*; yet in *Blades* v. *Higgs* in 1865, Lord Westbury in the House of Lords asserted the superior right of the landlord as a firm common law orthodoxy:[95]

> When it is said by writers on the Common Law of England that there is a qualified or special right of property in game, that is in animals *ferae naturae* which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word 'property' can mean no more than the exclusive right to catch, kill and appropriate such animals ...

This rule applied both to property in animals *ratione soli* and *ratione privilegii*, but in the latter case the landowner and franchise-holder was always the owner of captured animals. In the former case,

[91] Ibid., 682–83; 1004–5.

[92] (1857) 1 H. & N. 923; 156 E.R. 1475 (Ex. Ch.) per Coleridge J, Wightman, Cresswell, Erle, Crompton and Crowder JJ conc.; approved *Blades* v. *Higgs* (1865) 11 H. L. C. 621; 11 E.R. 1474 (H. L.); *R.* v. *Townley* (1871) L.R. 1 C.C. 315.

[93] (1857) 1 H. & N. 923, 937; 156 E.R. 1475, 1481.

[94] See e.g. *Co. Litt.*, 4b; *Sutton* v. *Moody* (1702) 1 Ld. Raym. 250; 91 E.R. 1063 and 2 Salk. 556; 91 E.R. 470 (K.B.) per Holt CJ; *Churchward* v. *Studdy* (1811) 14 East 249; 104 E.R. 596; and see authorities reviewed by counsel in *Blades* v. *Higgs* (1865) 11 H.L.C. 621, 623–31; 11 E.R. 1474, 1475–78 (H.L.).

[95] (1865) 11 H.L.C. 621; 11 E.R. 1474, affirming the decision of the Exchequer Chamber and overruling the Court of Common Pleas.

> If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act, for it would be unreasonable to hold that the act of the trespasser, that is of a wrongdoer, should divest the owner of the soil of his qualified property in the game, and give the wrong doer an absolute right of property to the exclusion of the rightful owner.[96]

Only where animals were hunted from or to the territory of another's land was this rule displaced. The special nature of the qualified property of the landowner meant that a trespasser-hunter was not guilty of larceny, as wild animals were in no one's possession; but nor could the trespasser assert a claim to own any animals won by trespass.[97]

The effect of this judgment, and of *Lonsdale* v. *Rigg* before it, was to augment landlord power against tenants attempting to kill or appropriate animals on their lands. But not all cases went the landlord's way. In *Bruce* v. *Helliwell* in 1860,[98] the issue arose as to whether enclosure in 1815 of the lands of a manor embracing the township of Stansfield preserved exclusive hunting rights to the lord of the manor after enclosure. The statute stated that nothing in the Enclosure Act should defeat the right of the lord to the 'liberty of hawking, hunting, fowling (etc.) ... within and throughout the said township ... and manor'. It was agreed that the lord had no hunting franchise, but he none the less claimed that the statute had created a hunting right by carving it out of his extant territorial and seigneurial rights as owner in fee of the manor. It was as if the statute was a conveyance lifting a proprietary licence out of the transferred common under the enclosure and vesting it in the lord of the manor, independently of any prior hunting claims or liberties he may have had. A strong court of Exchequer rejected the lord's argument. Pollock CB held that the enclosure, following the general statutory form of enclosure, had expressly compensated the lord for loss of all rights in the soil of the manor which he may have had when the manor was divided into individual allotments. It was too much to read the statutory reservation of rights as a secondary bestowal of fresh rights in the manorial soil when he had already been compensated for any such rights. All ordinary rights over soil were expropriated with compensation by the Enclosure Act. Any belief prevalent in the environs of West Yorkshire that 'lords of manors have a right and liberty of hawking, hunting [etc.] analogous to that of free warren or free chase' was simply erroneous, and such an informal belief could not be translated by the reservation clause of the enclosure statute into a legal right.[99] The *Ewart* doctrine was held to be inapplicable.[100]

96 Ibid., at 631–32; 1478–79.

97 Per Lord Chelmsford, ibid., at 637–41; 1481–82; affirmed in *R* v. *Townley* (1871) L.R.1 C.C.315.

98 (1860) 5 H. & N. 609; 157 E.R. 1323 (Ex.).

99 Ibid., 615–20; 1326–27.

100 Bramwell and Wilde BB held similarly.

Martin B joined the majority, but was more troubled by the *Ewart* doctrine in which he had participated, and by the approach to hunting rights taken in *Earl of Lonsdale* v. *Rigg*. He managed to distinguish those cases as specifically dealing with the reallocation of rights in a stinted pasture; they could therefore be quarantined into a separate legal category but not extended to all examples of reservation of hunting rights by statutory enclosures. Martin B none the less offered a curious sub-argument:

> Prima facie 'the soil' means all the soil and everything connected to the soil. The case states that, as owner of the soil of the said commons, the lord of the manor had an exclusive right and liberty for himself and friends to shoot. But that was by virtue of his dominion over the soil as owner, not as a separate franchise.

Tindal CJ's judgment in *Greathead* had clearly rejected this position; ownership of the soil of a manor brought no automatic liberty to hunt, separate from the usual rights over the soil of any kind of owner in possession. Martin B's wavering demonstrated there was no consensus over the fundamental principles of hunting law.

The issues were rehearsed again in the 1866 case of *Robinson* v. *Wray*.[101] This case concerned an enclosure that had converted the manorial common into a stinted pasture, with the lord and other claimants being allotted varying sheep-gates and cattle-gates or rights of access to the pasture. A clause reserved to the lord all other rights and privileges over the common except the right to the soil itself. His heir claimed an exclusive right of shooting over the pasture under the reservation clause. Byles J and the court of Common Pleas rejected the claim as shooting rights could here only arise from ownership of the soil, and that ownership had been terminated by the statute. Byles J summarised the court's policy: 'In almost all inclosure acts, one main object is to put an end to the ownership of the soil in the lord ... The lord is to be compensated for all his interest [by the allotments at time of enclosure].'[102]

In the 1867 case of *Lord Leconfield* v. *Dixon* judicial opinions were more sharply divided.[103] In this case, an Act of 1808 had enclosed the 6000-acre estate of Great Coglin in Cumberland. The Act had allotted a certain proportion of the waste lands of a manor to the earl of Egremont, the manorial lord, 'as a full compensation for the right and interest of the [lord] in and to the residue of the said open commons and waste grounds, and his right over the same'. An exception saved from all prejudice the right of the lord to 'seignories or royalties, franchises and liberties ... hunting, hawking, fowling, and all beasts and birds considered as game'. The plaintiff now claimed an exclusive right of shooting over all the lands within the old

[101] L.R.1 C.P.490 (C.P.).
[102] Ibid., at 498; Erle CJ, Keating and Montague Smith JJ to similar effect.
[103] (1867) L.R.2 Ex. 202 (Ex.); L.R.3 Ex. 30 (Ex. Ch.).

manor under the terms of the enclosure statute, and sued to prevent a local landowner from hunting or stopping the lord from so doing. Lush J found for the lord at trial; but on appeal a strong court of Exchequer threw out the claim without qualm.[104] Bramwell B gave the judgment of the court, and began with a forceful statement of modern judicial policy regarding the interpretation of enclosure settlements:

> In considering the [enclosure] statute ... it is not to be treated as one which is for the benefit of the commoners only, nor as one which takes from the lord only ... it takes indeed from him, so it does from them, and it gives to both ... The right now claimed by the [lord] is inconsistent with the useful design of the statute; which was that the lands affected should be held in severalty, with a plenary proprietorship, unfettered by the rights of others over them. There is no doubt that this is most for the public interest.[105]

Bramwell B argued that if the lord's claim was upheld, 'there is no use to which the defendant can put his lands without their being subject to that claim'. Such hunting rights were inimical to a modern conception of landed property as a sole sovereignty or *dominium* over the soil. To hold otherwise would mean that the owner of lands within old manors 'could not build a house and have a garden or lawn without the privacy of the occupier being liable to invasion by the plaintiff in search of game'. The enclosure statutes should not be allowed to save such destructive rights to the lord. The Enclosure Acts were in the nature of bargains between the affected landowners ratified by parliament, and the principles of freedom of contract demanded that the terms of the bargain be upheld. For Bramwell B freedom of contract and the actual intentions of the parties had to be read in the light of the courts' sense of discretionary justice. In the present case, if hunting rights had been intended to be allotted to the lord under the original bargain, it could be assumed that the lord 'would get less land allotted to him, and the commoners more, on account of the diminished value of their allotments due to this burthen'. If the parties had not intended the bargain to reserve hunting rights to the lord, then to find such a reservation in the wording of the statute against the expectations of the parties would be to work an injustice. *Ewart* could be distinguished because there the statute had expressly reserved rights to specified allotments. In any case that decision, though binding, was problematic; Bramwell B preferred the reasoning of *Greathead*.

The Court of Exchequer Chamber reversed Bramwell B's decision. Bovill CJ agreed that enclosure statutes were to be interpreted as contracts;[106] but he found that a fair interpretation of the wording and intention of the Act

[104] Kelly CB, Bramwell, Channell and Pigott BB.

[105] L.R. 2 Ex. 202, 205.

[106] (1867) L.R. 3 Ex. 30 (Ex. Ch.), with Blackburn, Mellor, Shee and Montagu Smith JJ concurring; Willes J *dubitante*.

was to save the hunting right of the lord as if the Act had not been passed, 'although it was a right arising from his ownership of the soil, and not in the nature of a seignorial right'. Not much by way of reasoning was given for this interpretation. According to Bovill CJ there was simply 'little doubt' that the lord was always intended to keep his full manorial rights of hunting over his ex-tenants' soil. *Ewart* was held to be directly in point, and Bramwell B's objections were ignored.[107] Willes J reluctantly joined this decision, but added: 'If the decision of the case depended upon reason, I should have agreed with the court of Exchequer; but I am constrained by superior authority not to express my dissent from the opinion of the majority of this court'.[108]

Another pro-landlord decision came in 1871 with *Musgrave* v. *Forster*.[109] The case dealt with an enclosure award of 1852 which allotted a one-sixteenth share of a common to the lord of the manor in full compensation for the rights to the soil, 'exclusively of his right and interest in the game'. Also reserved was the right to enter onto the land in pursuit of game. Blackburn J followed the principle of *Ewart* to hold that the hunting rights over the manor survived enclosure. He adapted the doctrine of *Wickham* v. *Hawker*: that hunting rights could be the subject of a proprietary licence annexed to the soil and were not seigneurial rights – to hold that the lord could therefore be granted hunting rights through enclosure as a type of fresh statutory easement, independent of the lost ownership of the soil. The fact that *Greathead* and the enclosure-by-deed cases had explicitly rejected that analysis was not mentioned. The plaintiff must have been emboldened by this favourable decision, for in 1874 he fought and won another case, again before Blackburn J, this time saving the seigneurial right of pasturage from the enclosure. Musgrave had now augmented his one-sixteenth share of the common with additional pasturage, mineral and hunting rights over the whole of the manorial commons, in effect hollowing out the freehold rights awarded to others under the original enclosure order.[110]

Sowerby v. *Smith*,[111] in 1873–74, was the last great litigation in this series of cases. It was here that the tide finally turned against the *Ewart* doctrine. A 1798 statute enclosed a 5000-acre common, allotting one-twentieth of the common made to the lord in fee, in full bar of of further claims to the soil, saving all the usual manorial rights including hunting rights. The lord of the manor continued to control all hunting on the enclosed lands until 1806, apparently with the acquiescence of his neighbour-commoners. The lady of the manor now brought an action in trespass against the defendant for hunting on the old common, claiming a proprietary profit à prendre created

[107] Ibid., at 33–34.
[108] Ibid., at 34.
[109] L.R. 6 Q.B. 590.
[110] *Musgrave* v. *The Inclosure Commissioners* (1874) L.R. 9 Q.B. 162.
[111] (1873) L.R. 8 C.P. 514 (C.P.); (1874) L.R. 9 C.P. 524 (Ex. Ch.).

by the saving clause of the statute. Keating and Grove JJ in the court of Common Pleas followed *Bruce* v. *Helliwell* in preference to *Ewart*, on the basis that the reservation clause only saved hunting rights that were also manorial rights, and did not save or invent hunting rights that could be traced back only to territorial rights or ownership of the soil. Honyman J reached the opposite conclusion, and found that *de facto* hunting rights, even if derived from territorial rights only, were intended to be saved by the statute.

On appeal in the court of Exchequer Chamber, the plaintiff argued that an equitable interpretation of the statute would find for her a shooting right:

> The date of the Act is 1798, and it must be consulted with reference to the ideas prevailing at that time. It was very generally supposed then that the lord of the manor had as such a right of shooting over the manor, and no accurate distinction was drawn between territorial and manorial rights ... It was clearly the intention of the Act to preserve the substance of all ancient rights, and among them the right of shooting, which the lord had de facto enjoyed.[112]

The judges interjected that if no manorial right to hunt could be found, then the statute should not be bent to create new rights, especially 'a right of an odious nature that never existed before'.[113] Counsel replied: 'the right may be a new one technically, but in substance it was always enjoyed ... The Act ought to be construed according to the intention of the parties, not according to technical law. A private Act is in the nature of a bargain between the parties.'[114] Cockburn CJ (Mellor and Amphlett BB concurring) refused to make such an 'equitable' interpretation of the enclosure in favour of the lord: since the hunting rights claimed derogated from the freeholds in severalty awarded to commoners by agreement, the Act had to be construed strictly against claimants of joint rights detracting from those estates. The intention of the Act was to preserve manorial rights only; namely those rights 'in the lord qua lord of the manor, and not as owner of the soil of the wastes'. In *Ewart*, by contrast, the saving clause expressly reserved all existing hunting rights pertaining to the stinted pasture to the lord – not manorial hunting rights *simpliciter*. The older 'general notion that the lord of a manor had the right of sporting over all lands within the manor, whether freehold or otherwise', and 'quite independently of any right of free warren' had no foundation in law and was not asserted in *Ewart*; and it could not influence contemporary statutory interpretation. Cockburn CJ agreed with Professor Christian's view that the error of according lords territorial rights of sport over their manors had arose from the Game Acts, which had licensed lords to keep gamekeepers and confiscate hunting equipment from

[112] L.R. 9 C.P. 524, 525 (Field Q.C.).
[113] Ibid., at 526 per Bramwell B.
[114] Ibid., at 526, 528.

unqualified persons upon their manors.[115] As to the conflict of authorities, he expressed his concurrence with the opinion of Tindal CJ in *Greathead* in preference to *Ewart*. Tindal CJ's doctrine was now to be revived, particularly because it supported the great policy of enclosure legislation, namely 'to cause the reclaiming of waste lands, and the making them available to the purposes to which landed property is capable of being applied'.[116] Here Cockburn CJ overtly adopted Bramwell B's enclosure policy outlined in *Lord Leconfield* v. *Dixon*.

Bramwell B spoke to similar effect, but enlarged on the dangers of subverting public enclosure policy by tenderness to lords' private hunting interests:

> The intention [of inclosure] was to allot the land in severalty, free from rights interfering with its use in such way as the owner thought most beneficial. But, according to the argument of the defendant, this intention was only partially carried into execution, for a right of sporting was given to the lord over every allotment. The freeholder is not at a liberty to sport on his own land, nor to destroy hares or rabbits, however mischievous or however inconsistent with the most profitable use of it, but is subject to the right, well called odious, of having his freehold invaded by the lord or those whom he may license with any number of beaters and helpers.

Bramwell B would not have protected tenant farmers from hunting intrusions: they were subject to a lease contract on terms and could take or leave the landlord's offer. But freeholders were different: the lord's hunting parties would interfere with allottees' rights to 'build a house, or erect a brick wall, or lock a gate to his freehold ... The right claimed is ... injurious and objectionable, and consequently not one likely to have been conferred by the legislature'.[117]

Cleasby B (Pollock CB concurring) frontally opposed the majority view. He was prepared to find that there was an inherent right in a manorial lord to hunt over the lands of the common, and that enclosure acts therefore reserved such rights to the lord in the absence of free warren. He relied on an obscure decision of Kenyon CJ in *Calcraft* v. *Gibbs*,[118] which held that the Game Laws gave lords a right to maintain gamekeepers and control hunting on their manors because 'such a power is a mere emanation of the manor and inseparable from it'. The understanding of the parties at the time of the enclosure was paramount, and they had all expected lord's hunting rights to continue; that expectation was decisive, not any latter-day policy of political economy.[119]

[115] Blackstone, *Commentaries*, ii, p. 418.
[116] L.R. 9 C.P. 524, at 532–38.
[117] Ibid., at 539–40.
[118] (1792) 5 T.R. 19, 20; 101 E.R. 11, 12 (K.B.).
[119] L.R. 9 C.P. 524, 542–50.

The future lay with the majority view in *Sowerby* – the view that lords' hunting was inimical to the great project of enclosure. Cockburn CJ's approach was expressly adopted in the court of Appeal in *Duke of Devonshire* v. *O'Connor* in 1890;[120] and rival authorities such as *Ewart* and *Lord Leconfield* v. *Dixon* were held to turn on the wide language of the hunting reservations in those instances, and were not to be applied to future cases. Esher MR noted that in enclosure statutes it was often ambiguous whether saving clauses pertained to the claims of the lord as territorial owner of the soil or as holder of manorial rights. Where there was such ambiguity, there was no necessary implication of a saving of the lord's pre-enclosure rights. The court in any case ought to lean against the lord's interest: 'the right given to the allottee is an absolutely unqualified right to hold his allotment as a freeholder, with all the consequences of such a right'.[121] This was the sole, rather coy, reference to enclosure policy made in Esher MR's judgment, which was otherwise impeccably cast in terms of close formal interpretation of the statutory wording and analysis of preceding authority.[122] But the policy direction of the court of Appeal's judgment were clear enough: the new modern orthodoxy was to be Bramwellian, favouring the absolute rights of freeholders against those of hunting lords. *Ewart* was all but dead and lords' hunting rights were now to be curtailed.

Both sides of the courtroom debate over hunting rights under enclosure found that they could hammer the ancient hunting precedents into any shape they pleased. It is therefore impossible to exclude the crucial part played by policy discretion in this area of judge-made law. But it is another matter to claim that strong ideological patterns emerged from this judicial debate. It is sometimes claimed that in Victorian times the court of Common Pleas, the court of property, was a bench of high Tory conservatives, whilst King's (or Queen's) Bench were liberal modernisers, and the court of Exchequer were the libertarian individualists of the law.[123] The case law examined only roughly confirms these generalisations; the ideological lines were not clearly drawn. Benthamite radicals such as Lord Brougham voted for traditional property rights in *Ewart*, supporting the lord's absolute rights of hunting against freehold and leasehold occupiers. Blackburn J of the Queen's Bench, as tough-minded and rational a judge as any, was fiercely pro-landlord. Meanwhile judicial 'conservatives' such as Tindal CJ and Byles J in the Common Pleas argued for a social, utilitarian concept of property, and sought to restrain manorial lords from insisting on absolute property rights in game at the expense of other freeholders. Bramwell B in the court of Exchequer was consistently in favour of modern property conceptions,

[120] (1890) 24 Q.B.D. 479 (C.A.).
[121] Ibid., at 478–79.
[122] Fry and Bowen LJJ to similar effect.
[123] See e.g. P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979), pp. 359–97.

but he was an exceptionally politicised and ideological judge, and his brethren of the court showed no such consistency. Even Bramwell B saw no way to protect the leaseholder from lords' hunting rights maintained in lease agreements: freedom of contract must prevail over freedom of property.

Perhaps we can make sense of this ideological confusion if we acknowledge that a strong protection of property, even if it be the old property of the landed elites, was loosely compatible with the liberal capitalist business ethic of the nineteenth century. Some of the political economists of that age (Bentham, Smith, Ricardo, Mill) with their pure utilitarian doctrines were hostile to traditional landed property; but others (including Malthus and Marx) believed that landed property was the crown of the capitalist order, and argued that landed property with its feudal ramparts could not be reformed without calling the wider system of property and contract into doubt. Whether Victorian judges were versed in the theoretical niceties of political economy or not (Bramwell B being a notable exception), they might well sense that settled proprietary expectations, enshrined in the solemn consensual pacts of the enclosure statutes, ought to be respected – even if a thorough revision of property rights reducing the power of the great landowners would benefit society the more. None the less, it remains an enigma that modernising judges in the mid nineteenth century, who sometimes demonstrated the most utilitarian calculation in their decision-making,[124] could still strain their fine legal minds in order to defend and maintain the seigneurial hunting rights of the landowner against the powerful claims of other rural interests. Further inquiry may reveal if this particular peculiarity of the English is a sign of some deeper hostility to modernity enshrined in the culture of hunting. It is a commonplace that legal values lag behind the rest of society. Perhaps only as late as the 1870s did English judges finally embrace capitalist visions of landed property, and lose their tenderness for the rival claims of the hunting seigneur.[125]

[124] See e.g. *Deane* v. *Clayton* (1817) 7 Taunt. 489; 129 E.R. 196 (C.P.); B. Rudden, 'Consequences', *Juridical Review*, 24 (N.S.) (1979) 193–201.

[125] Cf. M. J. Wiener, *English Culture and the Decline of the Industrial Spirit, 1850–1980* (London, 1985).