

Primogeniture and Entail in England

Primogeniture and Entail in England:
A Survey of Their History and Representation
in Literature

By

Zouheir Jamoussi

**CAMBRIDGE
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P U B L I S H I N G

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*For my wife Souad, the inspirer, counsellor
and indefatigable reader*

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INTRODUCTION

My interest in primogeniture, which some of my friends have, with unshakeable confidence, traced back to my “traumatic experience” as a younger son in my family, rather originated, I believe, in an absurd yet irrepressible tendency to imagine myself in the position of an 18th-century English country gentleman. But that seems to be part of a syndrome commonly observed among inveterate researchers in the fields of British social history and literature, regardless of their ethnic and cultural backgrounds. More directly and specifically, my actual involvement in the study of primogeniture can be ascribed to the almost fortuitous realization of the central issue of entail and primogeniture underlying Jane Austen’s six novels and some of her minor works. However, as things indeed seldom happen quite fortuitously, I must give my friends the benefit of the doubt, and be ready to admit that there may have been, in my psychological make-up, something which predisposed me to such a realization.

Frank Sulloway’s book, *Born to Rebel* (1996), a psychological approach to birth order, has given more weight to my friends’ early diagnosis and afforded me a deeper insight into the mysteries of my childhood. Moreover, Sulloway’s study helps me situate and define my own concern in the present book. From the outset, Sulloway focuses on the effects of birth order, irrespective of inheritance customs. He dissociates birth order effects from modes of inheritance like primogeniture. His study deals with the universality and permanence of the birth order impact on sibling relationships by postulating the permanence of the family institution. Conversely, the present study is a historical-literary approach to a phenomenon which has indeed left a deep imprint on English culture but has ceased to produce those very effects to which it mainly owes its notoriety.

Referring to the abolition of primogeniture in most European countries in the wake of the French Revolution, Sulloway writes: “This change in inheritance practice has had no measurable influence on the size of birth order effects.”¹ This observation is a confirmation as well as an implicit explanation: primogeniture is an artificial social rule imposed on the

¹ Frank J. Sulloway, *Born to Rebel* (New York: Vintage Books, 1997), 46.

family, whereas birth order effects are a “natural” characteristic of it. In other words, an approach to birth order effects necessarily starts from their basic psychological impact on sibling relations, which may condition the economic, social, and political future of the individuals involved. Conversely, an approach to primogeniture must start from the social/historical circumstances, which will produce a whole range of effects including the psychological ones. Primogeniture at once aggravates the effects of birth order by conferring unnatural socio-economic privilege and power on the first-born, and disturbs the natural process of sibling adaptation to conditions resulting from that birth order.

Primogeniture has always been denounced by its enemies as “unnatural” and combated on moral as well as on social, economic and political grounds. While various counter-arguments were put forward by its defenders, no adequate response to the moral objections was ever convincingly formulated. However, there must have been enough weight in the social, economic and political arguments to counterbalance that drawback and explain why primogeniture continued to dominate the system of inheritance of nobility and gentry estates for a little under a millennium, from the Norman Conquest to the Settled Land Act of 1925.

Before the impassioned debate about primogeniture came to include issues of national economic, social and political importance, it bore insistently on its detrimental consequences for intra-family relations and for traditional family values. A custom which allowed the elder son to inherit the whole family estate, to the exclusion of the other children, did affect brother-brother and father-son relations. It disturbed emotional and authority relationships within the family. Enmity between brothers, rivalry between father and elder son, family injustice and disharmony and the sad fate of younger sons and daughters, were among the adverse effects blamed on primogeniture. But, however much harm it did to the nuclear or conjugal family, primogeniture was thought, with good reason, to be necessary for ensuring the continuity of the patrilineal family on which rested the whole English political system throughout those centuries.

The present book will focus on the various arguments for and against primogeniture. These will be developed with particular emphasis in the section devoted to the ideological debate. However, though unavoidable in a study of this kind, politics, in the institutional sense, will not be the main concern. Except where necessary, primogeniture is not examined in relation to the monarchy or even to the nobility as a political body, but rather to land and the evolution of land-ownership as well as to the changing relations between the individual, the family and society. The focus is deliberately laid on the country gentry among whom the effects

were most acutely felt in this regard. Perhaps I have been conditioned in that by the obvious trends which have marked not only the ideological debate on, but also the literary representation of, primogeniture, with the genre almost always in the foreground.

The double historical and literary perspective adopted for this book appeared necessary if the objective set for it were to be achieved, namely attempting to embrace most of the aspects of primogeniture as a cultural phenomenon.² Of course, the choice of the double perspective has much to do with the intellectual path followed. The initial realization of the importance of primogeniture and entail in Jane Austen's works was experienced as a mild cultural shock, and this was the incentive behind the whole undertaking.

Subsequent research in the field of English literature confirmed me in my belief that, for centuries, primogeniture was perceived by playwrights and novelists as a major cultural phenomenon and treated as such. But judging from the rarity of modern critical material dealing with it, the phenomenon has, it seems, ceased to be perceived as such.

At the same time an excursion into history proved necessary to investigate the origins and the functioning of primogeniture. In the process, there was a gradual awakening to the reality of an uninterrupted ideological debate about primogeniture, running through the whole period under examination, from as far back as the time when written material in modern English became available, and no doubt far beyond. Accessible records of this long debate include autobiographies, essays, pamphlets, papers, and periodicals, and develop arguments varying in emphasis and character according to the social, economic and political priorities of the periods concerned.

In the global presentation of primogeniture as a cultural phenomenon, the debate appeared to me from the outset as a possible mediator between the historical and the literary parts. Indeed the ideological debate is still mentally conceived as a distinct third part situated between history and literature. In fact, the actual structure of the book includes four almost equal chapters: history, ideological debate, drama, and novel.

The part devoted to history reflects, but does not attempt to remove, the many uncertainties still impeding a clear understanding of the origins, development and effects of primogeniture. One of the main problems facing a researcher in this area of social history is determining not so much

² Some of the broad lines developed in this book were sketched out in an article I wrote five years ago, entitled "Primogeniture in England: Tradition and Representation", in *Things English*, edited by H. Ajroud. Tunis: Publications de la Faculté des Lettres de La Manouba, 1994.

the *nature* as the *extent* of the effects of the phenomenon. This has been all the more frustrating to me as both the ideological debate and the literary representation have much to do with the extent of those effects. This deficiency has forced me into a prudent, even suspicious, attitude towards over-generalizations and assumptions in these two areas. For instance, while it is indubitable that younger sons suffered under primogeniture as a result of their being usually ejected from the paternal mansion, and forced to fend for themselves, and that they were not only downwardly mobile but became agents of social mobility, there are uncertainties about the proportion of younger sons involved in these processes. That is one example in an area of social history which is in bad need of statistical material. It should be pointed out at this stage, however, that the present book is concerned as much with the historical facts as with the way in which those facts were perceived, experienced, and reflected, a way which may mark a departure from historical truth, yet receives some kind of validation and sanction from its tangibility.

If the history part of the book has any merit, it is not in removing those uncertainties, again, but in establishing links between primogeniture and the historical mutations which marked the period roughly covered by the study: the 17th, 18th and 19th centuries. These include the evolution of land-ownership and of the status of land, as well as the emergence of the middle class and of the moneyed interest as a new socio-economic reality with important cultural and political consequences. They naturally also include the transition of England from semi-feudalism to capitalism, from royal absolutism to constitutional monarchy, from a political system based on land possession to a more liberal, more “democratic” one, and from protectionism to free trade. Indeed there is not one major economic, social and political event throughout this period to which primogeniture does not directly or indirectly relate.

The survey of the primogeniture-related ideological debate, though far from exhaustive, is, to the best of my knowledge, an unprecedented attempt. In fact, it brings out only the broad lines of a continuous movement of ideas which deserves more space and attention than it actually receives in this book. In the approach to the debate, the emphasis has been laid on philosophers, thinkers, observers and journalists, rather than on politicians. In this regard no parliamentary debates have been included. Comments by elder sons like James Boswell, Edward Gibbon and Sir Egerton Brydges, as well as by younger sons like Thomas Wilson, John ApRobert, and John Trelawny have been included as a valuable first-hand contribution to the debate.

The case of a writer like Daniel Defoe, who took part in both the ideological debate through his non-fictional work and in the literary representation of primogeniture through his novels, has emboldened me to regard the debate as a possible transition from history into literature. Edward Gibbon's autobiographical approach to primogeniture from the point of view of the historian he primarily was, as well as Samuel Taylor Coleridge's excursions into social history from his position as a man of letters, further confirmed me in this view. Some methodological difficulties arose, however, in the process of making history and literature constantly interact, without too many mutual encroachments on their respective territories.

While the section dealing with the origins, the functioning and the evolution of primogeniture may read like history, the rest of the historical part focusing on its effects may seem more heterogeneous on account of a wealth of examples, including a good proportion of them derived from literature, even though for a merely illustrative purpose. There, the Defoean distinction between "history" and "story" will be somewhat blurred. Conversely, the literary part constantly refers back to the historical past or across to contemporary life.

In every part of the book, the chronological order has been preferred but, paradoxically, it has been found to fit more conveniently into the survey of the debate and of the literary representation than into the historical part, particularly when the survey deals with the effects of primogeniture. The debate section covers relevant currents of ideas in chronological order from the early 17th to the last decades of the 19th centuries.

In the drama section the twelve comedies included in the survey are examined in almost strict chronological order. This is also true of the novel section, only with some imbalance, this time, in the attention and space reserved for the various novelists dealt with. Thus Richardson and Austen get the lion's share in the part of the survey devoted to the novel. But their works are bases from which excursions into other fictional works have been conducted.

It is surprising how little attention has been given not only to the ideological debate which primogeniture gave rise to and caused to go on for centuries, but to the question of its literary representation. Modern literary criticism cannot yet be said to have woken up to a sense of the importance of this aspect of English social history and of its impact on the literature of the 17th-19th centuries. L. A. Montrose, the author of a ground-breaking article on the representation of primogeniture in Shakespeare's *As You Like It*, points to the fact that "primogeniture is rarely mentioned in modern commentaries on *As You Like It*, despite its obvious prominence in the text

and in the action.”³ In fact the “prominence” of primogeniture is, as this survey will show, “obvious” in the works of a great number of literary authors from Shakespeare to George Eliot and beyond.

³ Louis Adrian Montrose, “‘The Place of a Brother’ in *As You Like It*: Social Process and Comic Form,” *Shakespeare Quarterly* 32 (1981): 33.

PART ONE:

PRIMOGENITURE IN HISTORY

CHAPTER ONE

INTRODUCING PRIMOGENITURE

HISTORICAL FACTS

Definition and Functioning

Primogeniture as a rule of inheritance is defined in *The Shorter Oxford English Dictionary* as:

The right of succession or inheritance belonging to the first-born, the principle, custom or law by which the property or title descends to the eldest son (or eldest child); *spec.* The feudal rule of inheritance by which the whole of the real estate of an intestate passes to the eldest son.¹

This definition includes some words or pairs of words which may serve as a basis for an elucidation of the meaning and functioning of primogeniture: “custom” as distinct from “law”, “child” as a possible substitute for “son” and the words “real”, “intestate” and “feudal”. While “feudal” suggests a long history, which will be the focus of the next part, the other words are particularly relevant to the object of this opening chapter.

When primogeniture is referred to as “custom”, “principle”, “right” or “rule”, its social significance is linked to the legal framework of an entail or a settlement within which it operates, as will be shown below. When primogeniture is referred to as “law” and enforced as such, it concerns intestacy, or cases in which the father or head of the family dies intestate, that is without leaving a will. In fact the word “rule” in the above dictionary definition could very well have been replaced by “law”, as this is precisely the only case in which it is appropriate to refer to “the law of primogeniture.”

¹ *The Shorter Oxford English Dictionary*, revised and edited by C. T. Onions, third edition, (Oxford: The Clarendon Press, 1964).

The Law of Primogeniture

The distinction between the *custom* and the *law* of primogeniture is clearly made in P. M. Laurence's following definition:

To put the matter concisely, by the custom of primogeniture is meant the practice of entailing land on the eldest son born of the anticipated marriage of some living person, in such a manner that, should he survive his father, it will be impossible to prevent such son from succeeding to the inheritance. The law of Primogeniture, in the stricter sense of the former word, is the rule by which, on an individual dying intestate, all his real estate devolves on his eldest son or heir-at-law, as determined by the canons of descent.²

In their book about the strict settlement, Barbara English and John Saville specifically refer to the *law* of primogeniture when they write:

If a man died without making any arrangements for the inheritance of his real property—that is intestate—by English law the eldest son succeeded to everything, to the exclusion of the younger children, and even of the widow. If there were no sons, the real estate was divided equally among the daughters.³

Primogeniture operating as a *law* of inheritance in the case of intestacy applied in fact to all real property, however humble. Movables and personal property in this context were subject to equal division, the elder son inheriting all the real property as well as his share of personal property.

At this stage two observations can be made: the first is that primogeniture as applying to intestacy potentially concerned a wider range of landed property than primogeniture operating as a rule within the legal frameworks of entails and settlements of the nobility and gentry. Indeed, as already pointed out, the *law* of primogeniture governed inheritance of even small landed property. The second observation is that, in intestate succession to real property, primogeniture applied only to male descendants, unlike primogeniture as a rule of inheritance in entails and settlements, under which women were often but not always excluded. Indeed the history of opposition to primogeniture in England shows that attacks on the *custom* of primogeniture and the *law* of primogeniture corresponded to two distinct battles in the same war. Attitudes to

² P. M. Laurence, *The Law and Custom of Primogeniture* (Cambridge: J. Hall & Son, 1878), 133.

³ Barbara English and John Saville, *Strict Settlement: A Guide for Historians* (Hull: University of Hull Press, 1983), 24.

primogeniture are shown to vary significantly according to its distinct functions as *custom* or as *law*.

As cases of intestacy were almost certainly more frequent among the smaller freeholders and their consequences obviously more disastrous for their younger children than for those of the more substantial landowners, it may be assumed that opposition to the *law* of primogeniture was more determined among the lower propertied strata. In 1634 John ApRobert denounced the *law* in unequivocal terms:

For how farre is it from the Law of Nature, and from the practice of Paternal Piety, the Father dying intestate, the Eldest sonne to become Lord Paramount of all his Fathers Lands, and not to be bound by Law to provide for Brother or Sister, but at his own good liking.⁴

There were grounds for opposition and contention in such harsh provisions, and it is little wonder that they should have been the target of advocates of land law reform. However, attacks on the *law* of primogeniture continued throughout the 17th, 18th and 19th centuries with little success. A historian of primogeniture points out how it came under attack again as late as the 1890s in Parliament and how attempts to do away with it were resisted and foiled.⁵

The perseverance of the adversaries of the *law* of primogeniture and the steadfastness and even fierceness of the resistance, however, cannot be explained merely by the detrimental effects of that *law* on the children of the landowners. C. S. Kenny, a historian of primogeniture, goes even so far as to say that “it is not a frequent thing for the owner of real property to die intestate.”⁶ Perhaps attacks on the *law* of primogeniture, an unwritten law until 1833, as Evelyn Cecil points out⁷, represented only a preliminary battle in the war against the enduring institution of primogeniture in all its social and legal applications. By using the *law* of primogeniture as their

⁴ John ApRobert, *Younger Brother, His Apologie* (Oxford: J. Litchfield, 1634), 32.

⁵ Evelyn Cecil, *Primogeniture: A Short History of Its Development in Various Countries and Its Practical Effects* (London: John Murray, 1895). According to Evelyn Cecil, resistance to the abolition, or even the reform of the law of intestacy was strong from Locke-King’s Real Estate Intestacy Bill of 1859 to Lord Herschell’s Law of Inheritance Amendment Bill of 1894. Cecil indicates that Locke-King, a champion of land law reform in the House of Commons, defended the principle of applying partibility to intestate succession to both real and personal property, and that his 1859 Bill was rejected by a large majority of MPs (271 to 76).

⁶ C. S. Kenny, *The History of the Law of Primogeniture in England and Its Effects on Landed Property* (Cambridge: John Hall and Son, 1878), 54.

⁷ *Primogeniture*, 53.

target, the adversaries of primogeniture as a general principle of inheritance may have preferred to carry out their assaults first on the less “impregnable” flank of this great social “fortress”⁸.

Indeed to attack primogeniture in whatever respect was to call into question what had been regarded for centuries as a fundamental inheritance principle on which rested and depended the continuity of the social and political influence of the greater land-owning families up to the end of the 19th century. Primogeniture operating within the entails and settlements of the gentry and the nobility had perhaps a narrower social range than the law of intestacy in terms of potential numbers involved, but it concerned precisely those social categories which dominated English social and political life up to the end of the 19th century.

Primogeniture in Entails and Settlements

As has already been said, an entail was the legal framework within which the rule of primogeniture operated, or “the basic mechanism to enforce it”, as Lawrence Stone and Jeanne C. Fawtier Stone put it.⁹ It was the legal device by which property in land was left to a predetermined line of heirs, and the succession to the family estate and title was prearranged for a number of generations. In *The Wealth of Nations* (1776), Adam Smith writes:

Entails are the natural consequences of the law of primogeniture. They were introduced to preserve a certain lineal succession of which the law of primogeniture first gave the idea, and to hinder any part of the original estate from being carried out of the proposed line either by gift, devise or alienation.¹⁰

A. W. Brian Simpson, a historian of the land law, points out that “before the Statute De Donis in 1285 the common law knew only one sort of fee, the fee simple.”¹¹ From that date on the entailed estate, or the fee tail, became a common practice. In “fee simple”, the word “fee” points to the inheritability of the estate, while the word “simple” means that the heir

⁸ Joan Thirsk uses the metaphor in her article, “Younger Sons in the Seventeenth Century”, *History* 54 (1969): 375.

⁹ Lawrence Stone and Jeanne C. Fawtier Stone, *An Open Elite? England 1540-1880*, abridged edition (Oxford, New York: Oxford University Press, 1986), 47.

¹⁰ Adam Smith, *The Wealth of Nations* (Harmondsworth: Pelican Books, 1973), 484-85.

¹¹ A. W. Brian Simpson, *A History of the Land Law*, 2nd ed. (Oxford: Clarendon Press, 1996), 66.

to that estate enjoyed all rights of ownership without restrictions, including the right of alienating and devising it, or granting leases¹². In “fee tail” the word “tail” comes from the French word “taille”,¹³ which means cutting or pruning. Thus a fee tail, as opposed to a fee simple, imposed restrictions on the freedom of the tenant in possession to alienate the estate, or leave it away from the next heir according to the original order of lineal descent predetermined by the entail, or even to grant leases beyond his lifetime.

It would not be inappropriate here to point out that the word “tail” has been the occasion for much punning based on a wrong popular interpretation of the word “tail”, mistaken for the “posterior extremity of an animal” (*Shorter Oxford English Dictionary*). One of the best instances of such punning was produced by a severe critic of primogeniture, Defoe who, in his *The Compleat English Gentleman* (1890), writes: “Happy Constitution! glorious England! where the inheritance descends in tail and the head has no share in the claim.”¹⁴ There is also the case of Squire Shandy’s boots in Sterne’s *Tristram shandy* (1759-67). Trim who has made mortar pieces out of a pair of jack-boots, is being scolded by Squire Shandy:

By Heaven! cried my father, springing out of his chair, as he swore—I have not one appointment belonging to me, which I set so much store by as I do by these jack-boots—they were our great grandfather’s, brother *Toby*—they were *hereditary*. Then I fear, quoth my uncle *Toby*, Trim has cut off the entail.—I have only cut off the tops, an’ please your honour, cried Trim.¹⁵

The estate was the foundation, not only of the family’s prosperity, but also of its social status and political influence, and as such, it had to be transmitted undivided and, ideally, improved, or at least undiminished

¹² W. Blackstone defines a tenant in fee simple as “he that hath lands, tenements, or hereditaments, to hold and his heirs for ever; generally absolutely and simply; without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law...this is property in it’s highest degree,” *Commentaries on the Laws of England*, 8th ed. (Oxford, 1778), vol. II, 104.

¹³ Legal documents relating to the inheritance of landed estates in colonial Virginia quoted by C. Ray Keim use the term with the original French spelling: “...the Assembly passed ‘An Act to enable tenants in taille to make leases of their lands.’”, “Primogeniture and Entail in Colonial Virginia”, *The William and Mary Quarterly*, 3rd series, 25: 548.

¹⁴ Daniel Defoe, *The Compleat English Gentleman*, ed. Karl D. Büllring (London: David Nutt, 1890), 94.

¹⁵ Laurence Sterne, *Tristram shandy* (London: John Dent and Sons, Everyman’s Library, 1972), 147.

from one generation to the next, according to the lineal order of succession established in the entail. This meant the exclusion of all except the first-born of the children, if any, and restrictions on the freedom of the possessor with regard to the estate in his possession.

From the late 13th century, when the practice of entailing the larger landed estates began to spread in England, to the advent of the strict settlement in about the middle of the 17th century, the successor to the estate was called *tenant in tail*. While primogeniture was invariably the criterion adopted in the designation of the line of successors, the family estate descended either in *tail male* or in *tail general*. In the course of the long and demanding task of drawing up an entail, the usual options were either the restriction of the lineal succession to the male line (tail male) or the inclusion of women (tail general), when there were no sons to inherit the estate. Hence the distinction made in the dictionary definition quoted above between “son” and “child”.

In James Boswell’s *The Life of Samuel Johnson* (1791), which will be given special attention in a later chapter, the Boswells, the father and the eldest son and heir (James), are preparing to resettle the family estate. Some disagreement arises between them, however, as to the nature of the entail, the first preferring tail general and the second, tail male.¹⁶

Insofar as families were keen on maintaining the estate attached to the name, primogeniture in tail male was more universally preferred. “And, in case of an entail male,” W. Blackstone writes in his *Commentaries on the Laws of England* (1765-9), “the heirs female shall never inherit or any derived from them.”¹⁷ Christopher Clay observes in “Marriage, Inheritance and the Rise of Large Estates in England”: “Very often, however, estates passed to a man’s brother, uncle, nephew or cousin, instead of to his daughter, because of the terms of a family settlement.”¹⁸ Such will be the fate of Mr Bennet’s five daughters in Jane Austen’s *Pride and Prejudice* (1813) and of Sir Walter Elliot’s three daughters in her last novel, *Persuasion* (1818).

In the long history of entails all attempts to circumvent the rigour of their restrictive prescriptions were made naturally in favour of the *tenant*

¹⁶ James Boswell, *The Life of Samuel Johnson* (London: Everyman’s Library, 1963), vol. I, 592.

Although Boswell was not “English”, his inclusion in the study seems fully justified by his association with S. Johnson and by the valuable and particularly relevant comments of the latter regarding the Boswells’ inheritance practices.

¹⁷ W. Blackstone, *Commentaries on the Laws of England*, II, 114.

¹⁸ Christopher Clay, “Marriage, Inheritance and the Rise of Large Estates in England, 1660-1815”, *Economic History Review*, 2nd Series, 21 (1968): 511.

in tail or life tenant, as he would be named under the strict settlement. Ways of eluding those restrictions were sought and found. The most efficient procedure employed was to *cut off, dock, bar, or destroy*¹⁹ the entail, thereby turning the fee tail into a fee simple, so as to empower the tenant to exercise full rights of ownership.

The most widespread procedure, “based on a legal fiction”, and known as *common recovery*, consisted in a fictitious lawsuit involving three parties: the tenant in tail, a friend of his, who would bring an action at court against him, “as though hee had good right to the Land, and the other shall not enter into Defence against it, but alleadge that he bought the Land of he who had warranted unto him”, as Francis Bacon indicates in *The Use of the Law* (1629).²⁰ The third party, the common voucher, who is called in to warrant the title of the tenant in tail expresses his readiness to defend the title of the tenant and asks the court to set a date for the defence, but fails to appear on the day appointed for it. As a result, the court pronounces against the tenant by default, and the land is given in fee simple to the friend who has brought the action against the tenant in tail., who, of course, recovers his land, now in fee simple.

The practice of common recovery grew very widespread from the 15th century to the Restoration. It was deemed most dangerous by advocates of entails and primogeniture, for the process by which the fee tail was turned into a fee simple could only serve the interests of the possessor by leaving him free to do with the estate as he might wish. It deprived the next heir of rights guaranteed by the entail, and more important still, it sacrificed the common good or family continuity to the suspected selfish individualistic ambitions of the tenant in tail. Therefore a new legal device had to be thought out with a view to limiting the freedom of barring entails. That device was going to be the strict settlement. The strict settlement which, according to most historians, dates back to Charles II’s reign (Christopher Hill traces it back to 1647²¹), was not meant to be a substitute for the entail but a deed drawn up in each generation, usually on the majority of the elder son and heir, or on the occasion of his marriage, to confirm the broad prescriptions of the original entail. P. M. Laurence writes:

The usual course is for the son, who is tenant in tail in remainder, on marrying, or sometimes immediately on attaining his majority, to concur

¹⁹ W. Blackstone uses the word “destroy” in his *Commentaries*, vol. II, 116.

²⁰ Francis Bacon, *The Use of the Law, Provided for the Preservation of Our Persons, Goods and Good Names* (London: Ben Fisher, 1629), 63.

²¹ Christopher Hill, *Reformation to Industrial Revolution* (Harmondsworth: Penguin Books, 1978), 147.

with his father, the protector of the settlement, in re-settling the estate. The entail is barred; the son becomes tenant for life in remainder expectant on his father's death; and a contingent remainder in tail is limited to his unborn heir.²²

Neither was the settlement worked out for the sole purpose of restricting the power of the life tenant to cut off the entail. "The capital purpose of the strict settlement," F. M. L. Thompson writes, "was no doubt, to keep the family estate intact," adding a little further on: "The second purpose of the strict settlement, to make provision for members of the family other than the eldest son, was perhaps after all the purpose which produced the greater effects in practice."²³

While confirming primogeniture as the surest safeguard against the disintegration of patrimony and family, the strict settlement sought to counterbalance the negative effects of primogeniture on wives, daughters and younger sons by making provisions for them in the form of jointures, marriage portions and capital sums or life annuities respectively. "These family charges," Thompson explains, "were the price paid by the landed classes for primogeniture."²⁴

As these heavy charges represented sums of ready money that could hardly be available to the life tenant, estate mortgaging, within limits prescribed in the settlement, was often inevitable. There again, safeguards were necessary to prevent the estate from descending overburdened with debts to the next heir, the degree of encumbrance being a sure indicator of the state of the patrimony. Indeed, estate encumbrance was going to be used as a strong economic argument in favour of the abolition of strict settlements. Nineteenth century advocates of free trade in land claimed (not unreasonably) that the possessor of an encumbered estate was too much fettered financially to invest in the land to the necessary extent, and to make it yield as much as it could be expected to.

To return to the question of the strict settlement as a new development of the second half of the 17th century, the innovation it brought, besides making the father life tenant and the eldest son and heir, tenant in tail, was to establish between the two a new and peculiar kind of partnership. Indeed the strict settlement resulted in a relationship of interdependence and in the impossibility for the life tenant to cut off the entail without the concurrence of the tenant in tail, and at any rate not until the latter came of

²² P. M. Laurence, *The Law and Custom of Primogeniture*, 63.

²³ F. M. L. Thompson, *English Landed Society in the Nineteenth Century* (London: Routledge & Kegan Paul, 1980), 68-69.

²⁴ *Ibid.*, 70.

age and had no objection to the procedure. A good illustration of this relationship is provided in the case of Edward Gibbon and his father, as described in the *Memoirs* (1796) of the former, which will be dwelt on later.²⁵

The power of cutting off entails was made more difficult, but recourse to the common recovery procedure was to remain the appropriate instrument for it, until it was abolished in 1833 (the Fines and Recoveries Act). James Boswell points out in the *The Life of Samuel Johnson* that “the privilege of perpetuating in a family an estate and arms indefeasibly from generation to generation is enjoyed by none of this Majesty’s subjects except in Scotland, where the legal fiction of fine and recovery is unknown.”²⁶ In England, where the effects of the land laws were in many other ways comparable to those produced in Scotland, the strict settlement played an essential role from its advent to the last quarter of the 19th century. As A. W. Brian Simpson asserts in his book, “The strict settlement, by perpetuating and consolidating the wealth and power of the wealthy families, and by preserving their estates intact through the years, had an immense effect upon the social and political life of the country until very recent times.”²⁷

Origins

There seems to be, as far as could be gathered from relevant history books, no strong evidence as to how and where exactly primogeniture as a rule of inheritance of real property was originally adopted by families on a large scale. Historians rather have a tendency to say where it was not, and to what cultures it was alien, thus proceeding, as it were, by elimination in their cautious approach to this complex subject. One meets with such statements as: “Neither the Romans, nor the German barbarians know it

²⁵ Edward Gibbon, *Memoirs of my Life* (Harmondsworth: Penguin Books, 1984).

²⁶ *The Life of Samuel Johnson*, vol. I, 606, note 1.

²⁷ *A History of the Land Law*, 239.

and it also remained uncommon among Islamic cultures”²⁸, or, concerning the case of England: “We may assume then with as much confidence as is possible in enquiries of this nature, that Primogeniture is essentially a feudal institution. It cannot be traced back to any age preceding feudalism.”²⁹ The prudence which characterizes such statements suggests that much remains to be done with regard to the actual origins of primogeniture, as well as to other aspects of this social phenomenon and its effects.

It is a generally accepted fact, in the case of England, however, that the introduction of primogeniture was not only contemporaneous with the Norman invasion, but somewhat organically linked to the feudal organization set up in its wake. Indeed the gradual spread of primogeniture in England during the two centuries following the Conquest, was achieved at the expense of the pre-existing Saxon system of inheritance based on the law of gavelkind or partibility, under which sons of the same parents were entitled to more or less equal shares of the inheritance.

It is assumed that the hundreds of barons and knights from Normandy, who had helped William invade England, received royal grants in English land as a reward for their involvement on the side of the Conqueror. This operation must have required the expropriation of native landowners, and the new landlords were to constitute a network of militarily powerful families ready to confirm their domination and consolidate their occupation in the face of what must have been, despite William’s claim to legitimacy, a hostile environment. Heads of families had military responsibilities commensurate with the size of their land tenures, and, unless estates descended undivided to the next heads of families, the whole military organization was in danger of collapsing. Henry Maine writes: “It is asserted that the feudal superior had a better security for the military

²⁸ J. P. Cooper, “Patterns of Inheritance and Settlement by Great Landowners from the Fifteenth to the Eighteenth Centuries,” *Family and Inheritance: Rural Society in Western Europe 1200-1800*, ed. Jack Goody, Joan Thirsk and E. P. Thompson (Cambridge: Cambridge University Press, 1976), 192.

According to Islamic inheritance rules, sons inherit equal shares of their parents’ property, and so do daughters. However, a son’s share is double the share of a daughter. Under these rules, the father or testator may dispose of only one third of his/her possessions in favour of a person or persons of his/her choice, provided they be not any of his/her legal heirs, the remaining two-thirds of the inheritance necessarily going to the latter.

²⁹ George C. Brodrick, “The Law and Custom of Primogeniture” in *Cobden Club Essays*, 2nd series, (London: 1872): 60.