Wills and Primogeniture

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Geoff writes...The history of the development of wills and testaments from ancient times gives one a greater understanding of the rules and strategies for inheritance that prevailed in the 16th – 19th centuries where most family history research is conducted. In particular, the feudal system (of which the manorial system is part) was responsible for the concept of primogeniture. What follows is mostly a summary of chapters VI and VII of "Ancient Law" by Sir Henry Maine, a book first published in 1861 and considered to be a classic with regards to the origins of human society.

THE ORIGINS of the will, as we know it today, is considered to have been begun with the Romans. In early society, men were treated as members of a group, not as individuals, with the lowest group being the family. The head of the family enjoyed certain rights and privileges but held ownership over property and possessions as custodian for the family group. On his death, the rights and duties of the position fell to another but everything else stayed the same. The early Roman wills were therefore concerned with the investiture of a successor in this role, essentially a succession of the entire legal position of the deceased man, including his liabilities. So, the first Roman wills were not concerned with the distribution of a dead man's goods and property, but in transferring the representation of the household to a new head of the family.

So how did it change from this to our understanding today, that a will gives us the right to dictate the posthumous disposal of property that we own to whoever we favour? It is not a Law of Nature that we have a right to do this simply because we are the proprietor of that property. Originally property was transferred to the heir to allow him to govern the family group, as the position carried with it the power to dispose of common property. The will was never regarded as a means of disinheriting or affecting an unequal distribution of patrimony. However, various historical developments allowed this change to happen and the claims of blood kin to be overridden.

During the Roman era the concept of a will developed to the point where it became a written document, where the testator could give directions for legacies for others (with the heir responsible for implementing them) and for the will becoming a revocable document (i.e. that it could be re-written). As developments occurred, so did laws limiting the power to disinherit.

Church influence

During the Middle Ages in Europe, the church was quick to gain the privilege of custody and regulation of Testaments, understandably so as private bequests created much of the church wealth. However, the church also exerted a moral authority protecting the rights of widows and children which eventually led to the concept of a widow's "right to dower" being incorporated into customary law across all Western Europe, eliminating the danger of complete disinheritance. Even today, the legal concept of "family provision" applies and shows that a will cannot always dispose of assets with absolute freedom.

One of the greatest influences on the development of wills was the introduction of feudalism which, through primogeniture, disinherited all children in favour of one. Importantly, an equal distribution of the family estate ceased to be viewed as a duty. There had been no trace of primogeniture in Roman or German law, so where did feudalism get this idea from?

Primogeniture – the eldest son

Feudalism began with grants of large tracts of land by conquering chieftains on condition of providing military service. Initially they were not hereditary but eventually became so. The rule of succession was originally quite varied but primogeniture prevailed and spread rapidly. Ultimately the law followed and stipulated that lands held by knight service should descend to the eldest son (i.e. freehold land held by military service). For servile tenures (villein or customary tenure) succession was prescribed by custom and varied greatly, often more generous to the surviving widow and children.

One of the reasons for primogeniture being so readily accepted is that it was formed at a time of great unrest and violence where the feudal system offered better security if the fief descended to a single person rather than be split up. In this, the concept of primogeniture can be seen to have grown from the idea of strengthening the family rather than disinheriting the bulk of the children in favour of one. Another factor was that with feudalism, patriarchal power had become both domestic and political. History shows that the succession of political power in a family almost universally follows the rule or primogeniture.

Later, the courts and lawyers made the eldest son legal proprietor of everything to do with the feudal estate and the conversion of the patrimony of many to the estate of one was complete. This was then applied at all levels in society and in many families, for centuries following, the younger brother participated on equal terms in all the dangers and enjoyments of his kinsmen but was treated poorly regarding inheritance. The family history researcher will find many cases where the eldest son inherits the family property and the younger sons become priests, soldiers or are apprenticed so they can earn a living.

Statute of Wills 1540

Before 1540 in England only moveable property (the Testament) was devisable by will. Freehold property was subject to primogeniture and customary property subject to the customary laws of inheritance applicable to that area. The Statute of Wills 1540 allowed freehold property to be devisable by will. Customary property eventually became devisable by will in 1815 although mechanisms had developed well before this to achieve the same result (e.g. surrendering the property to the use of a will).

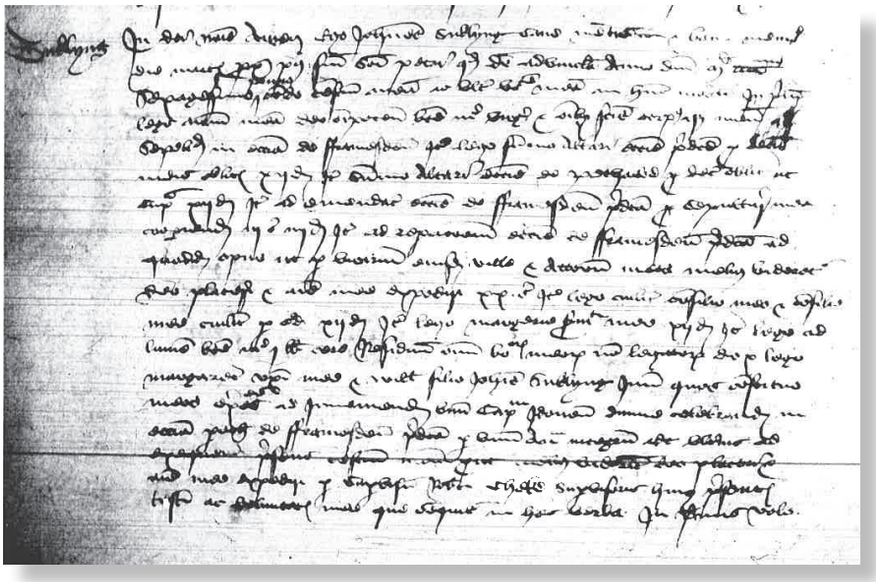
Amongst the common people,

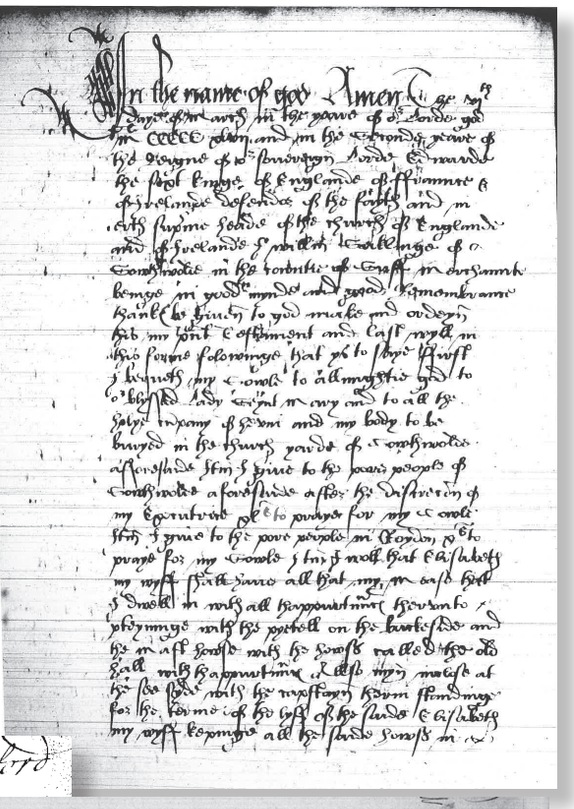
primogeniture survived as a practice until the 19th century when families more frequently sought a more equitable distribution of assets to their children. The concept survived as long as it did partly because English Society considered that the preservation of landed wealth in the upper classes was essential to the general well being of society, so the idea of dividing estates was abhorrent to them. This idea appears to have prevailed at all levels of society, probably supported in the middle and lower classes by the precarious nature of existence in general and the potential loss of security from division of property. The growing prosperity of the 18th and 19th centuries would have removed some of these concerns.

A fairer system these days

Today, we no longer have dower but the laws of intestacy are much fairer (generally an equitable distribution among close family members - no longer based on primogeniture!) and the legal concept of family provision attempts to provide a remedy for wills that disinherit close family members. This continues to be a developing area of the law.

Countries such as France have gone further and have granted specific and entrenched rights of inheritance to the children so that they are protected from being disenfranchised from the estate, a return to the attitudes of ancient times when the will was never regarded as a means of disinheriting or affecting an unequal distribution.





Samples of Wills and Testaments from different eras. Clockwise from top left: 1461 Suckling, 1548 Suckling, 1837 Harris, 1753 Croxford. The later ones become easier to read, although with practice the earlier ones are decipherable. *Source - Silvester research files*