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Marriage Settlements 1601-1740

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MARRIAGE SETTLEMENTS, 1601–1740

THE ADOPTION OF THE STRICT SETTLEMENT

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INTRODUCTION

> For the desire of great landowners has constantly been to make the strictest settlements which the law would allow, and the law . . . has set bounds, though liberal ones, to the power of fettering inheritances and suspending absolute ownership. And the ingenuity of conveyancers, devising how to satisfy private ambition within the field left clear to it by public ordinance, has produced that curious and exquisite structure [the strict settlement] which, a hundred years hence, will probably be abandoned to the care of a few legal antiquaries as the learning of disseisin and collateral warranty.
>
> Sir Frederick Pollock,
> *The Land Laws*, 2nd edn (London, 1887), 114–15

In the mid-seventeenth century, conveyancers developed a form of property settlement which was rapidly adopted by most segments of English landed society. With minor modifications this conveyancing precedent, the strict family settlement executed upon the marriage of the eldest son, remained the prevailing means by which landed wealth was transmitted between the generations until the twentieth century when a changing economic and political climate rendered moribund the social structure which the settlement sought to preserve. For more than two centuries, however, much of the land in England was held under strict settlement. Particularly in pre-industrial England, where so vast a proportion of the nation's capital and human resources was invested in land and agricultural production, the restraints which the strict settlement placed upon the freedom of the tenant in possession to alienate, consolidate, or exploit his estate must have had a profound effect upon the economy.

For the most part, however, I shall leave the task of assessing the economic impact of the strict settlement to others; instead, I shall join the ranks of the 'legal antiquaries' where, as Sir Frederick Pollock correctly predicted, this 'curious and exquisite structure' remains of interest. The focus of this monograph will be upon developments in the mechanics of marriage settlements which resulted from the elaboration in the courts of legal doctrine

regarding future interests. The prevailing forms of marriage settlement during the period 1601–1740 will be investigated, and in particular, the adoption of the strict settlement in the eighty-odd years after its formulation will be charted.

Such a task requires an incursion into the controversy over perpetuities which raged in the courts of common law and equity during the late sixteenth and early seventeenth centuries. In the main, legal historians have categorized the period as one of great uncertainty in the land law. It will be suggested, however, that several threads of legal doctrine were established during this period which enabled conveyancers to effect the intergenerational transfer of the patrimony by marriage settlement. Essentially, the development of legal theory to conveyancing practice will be related and the similarity between the prevailing form of marriage settlement in the early seventeenth century and the strict settlement will be illustrated. Once this initial mode of settlement had been established, a life estate in the tenant in possession followed by an entail in his unborn eldest son, conveyancers set out to protect the contingent entail in the unborn son, and the strict settlement was spawned.

At times, however, I shall be treading upon the territory of economic historians since my concern lies also with the ramifications of the trends in marriage settlements. In particular, two points will be addressed. First, the proffered connection between the strict settlement and the 'rise of great estates' in the period 1680–1740 will be assessed.[1] Secondly, the changing pattern of provisions for younger sons and daughters by marriage settlement will be traced in an attempt to determine whether the strict settlement was, as Sir William Blackstone suggested, developed to secure provisions for the children of the impending marriage.[2] Thus I shall be enmeshed in the controversy over the workings of marriage and inheritance in the late seventeenth and early eighteenth centuries, but squarely within the context of the strict settlement. How the trends in settlement practice will be established is central to the validity and the strength of the conclusions, and it is therefore necessary to explain, and to defend, the methodology employed.

In commenting upon empirical research in the social sciences, Professor Arthur Schlesinger Jr noted that 'almost all important

1 H. J. Habakkuk, 'English landownership 1680–1740', *Econ. Hist. Rev.*, X (1940).
2 2 *Bl. Comm.*, 172.

[historical] questions are important precisely because they are *not* susceptible to quantitative answers'.[3] It is not my intention here to debate the merits of quantification in history; others have taken up the challenge.[4] However, in attempting to resolve historical questions, important or otherwise, it is incumbent upon the historian to exploit the available evidence in the most propitious manner. In attempting to illuminate conveyancing *practice*, as opposed to *theory*, it seemed appropriate to study as large a quantity of settlements as possible, and to exploit mechanical aids where they could be of assistance. Thus instead of embarking upon a study of a family or group of families whose settlements have been preserved, I resolved to select two counties and examine *all* of the settlements executed during the period which have been preserved in the county archives.

I am, however, aware of the limitations of this method of establishing the developments in marriage settlements. Although I have studied over 230 settlements executed during the period 1601–1740, this group constitutes a small percentage of the total number of marriage settlements executed by the peerage and gentry. Moreover, I realize that my group of settlements may well be biased; the mere fact that these settlements survive while the majority have been lost does not render the group a 'random sample'. Indeed, by virtue of their survival these settlements are by definition 'atypical'. But in many areas of the discipline, historians do not operate in a quantitative paradise. Given the nature of the evidence, I believe that my approach is the one *most* calculated to resolve the questions which I have set out to determine. In stating my conclusions, however, the researcher, and the reader, must recognize the limitations of the data set.

To determine the extent of the marriage settlements which survive was a time-consuming and somewhat monotonous task. It was necessary to sift through numerous catalogues of title deeds to extract the marriage settlements. Once the body of surviving settlements was ascertained, the various clauses had to be sorted to establish the patterns of legal form and disposition. With technical

3 Arthur Schlesinger Jr, 'The humanist looks at empirical social research', *American Sociological Review*, 27 (1962), 770; quoted in W. O. Aydelotte, *Quantification in history* (Reading, Mass., 1971), 55.
4 In particular see the essays of Professor Aydelotte in *Quantification*; and the Introduction to R. Floud, *An introduction to quantitative methods for historians* (London, 1973).

assistance,[5] a method was developed to sort the clauses by computer. This process aided immeasurably in establishing the patterns of settlement which will be illustrated in the succeeding chapters.

Finally, in defining the limitations of my data set, something must be said about the peculiarities of the counties under study. First let us consider Kent. During the seventeenth and early eighteenth centuries, Kent was a county with an exceptionally large body of gentry. Yet the actual numbers remain uncertain. Contemporary and modern estimates vary greatly, and these judgments are largely educated guesses.[6] Moreover, the origins of the gentry, a factor which may well have influenced their settlement habits, are also in dispute. Professor Coleman[7] reckons that the appraisal of William Lambarde in the sixteenth century holds true for the mid-seventeenth and early eighteenth century as well: 'The Gentlemen be not here (throughout) of so ancient stocks as else where, especially in the parts neere to London, from which citie (as it were from a certaine rich and wealthy seedplot) Courtiers, Lawyers, and Merchants be continually translated.'[8] Professor Everitt, however, considers the gentry for the most part to be indigenous.[9]

5 I am indebted to Dr John Dawson of the University of Cambridge Literary and Linguistics Computing Centre for his assistance in developing a method to code the rather cumbersome clauses of the settlements.

6 Professor Everitt estimates the body of gentry to be 'at least 800 and possibly more than 1,000'. No contemporary source which he cites estimated such a large number. A. M. Everitt, *The community of Kent and the Great Rebellion* (Leicester, 1973), 33–4. Cf. T. P. R. Laslett, 'The gentry of Kent in 1640', *Cambridge Historical Journal*, X (1949).

7 D. C. Coleman, 'The economy of Kent under the later Stuarts' (Unpublished University of London Ph.D. thesis, 1951), part III. Cf. D. C. Coleman, *Sir John Banks: baronet and businessman* (Oxford, 1963), 97.

8 William Lambarde, *A perambulation of Kent* (London, 1596), 12–13.

9 Everitt, *Community of Kent*, 37. Cf. A. M. Everitt, 'Kent and its gentry, 1640–60, a political study' (Unpublished University of London Ph.D. thesis, 1957), Appendix IV. My rather unsophisticated contribution to the controversy tends to confirm Professor Coleman's view. By tracing the descent of manors in Edward Hasted, *The history and topographical survey of the county of Kent* (4 vols., Canterbury, 1778–99), the mean number of 'turnovers' of manors during the period 1601–1720 was 2.07. Thus the 'average' manor saw a new owner about every 40 years. Admittedly, there appears to have been a core of indigenous and stable families, but they controlled a rather insubstantial proportion of the manors. I should also state that in my 'counting of manors', I considered the unit as one rendering a degree of social rather than economic status. As Professor Coleman has demonstrated, the value of a manor in economic terms was often negligible: Coleman, 'Economy of Kent', 35. For a contrary view, see C. W. Chalkin, *Seventeenth century Kent* (London, 1965), 54, and Peter Clark, *English provincial society from the Reformation to the Revolution* (Sussex, 1977), 397.

A final peculiarity of Kent, the custom of gavelkind, is worthy of note. Although slowly losing favour amongst the upper reaches of landed society, the tradition of partible inheritances may have rendered Kentish families more inclined to endow their younger sons. In assessing the effects of gavelkind upon landownership, however, it must be recalled that partibility occurred only in instances of intestate succession; a landowner who wished to strengthen his patriline at the expense of his younger sons could circumvent the operation of gavelkind by executing a settlement or will.[10]

In some respects, though, Kent is an ideal county to consider. While some may consider Kent to be a 'home county', and therefore more susceptible to the influence of innovations from London, Professor Everitt has noted that geography renders parts of Kent decidedly remote; Canterbury is in fact further from London than is Cambridge.[11] Thus landed society in Kent was composed of a mixture of indigenous gentry and newcomers, cosmopolitan to some extent, yet partially insular.

In selecting a county for the purposes of comparison, geography appeared to be the most salient consideration. It seemed most appropriate to choose a county in the Midlands; and Northamptonshire was selected for two reasons. The first was practical: the county archives in Northampton contained the largest number of settlements. Secondly, Northamptonshire is the county where the proffered 'rise of great estates' occurred. Treading upon Professor Habakkuk's terrain would therefore be useful in testing the nexus between the strict settlement and 'the rise of great estates'.

In addition, the two counties provide a contrast owing to the supposed origins of the gentry. Professor Everitt has argued that unlike their Kentish counterparts the Northamptonshire gentry were of much more recent origin.[12] Such a difference might account for contrasts in settlement practice. While a comparative study of two counties does not permit broad generalizations for the whole of

10 *Co. Litt.*, 11b. Cf. Thomas Robinson, *The common law of Kent: or the customs of gavelkind* (London, 1788), Chapter V.

11 Everitt, *Community of Kent*, 22.

12 A. M. Everitt, 'Social mobility in early modern England', *Past and Present*, XXX (1966), 64.

England, the differences between the two counties enlarge the scope for possible conclusions. Constraints of time dictate certain limits to the areas which can be examined in detail.

To conclude this introduction, I should like to re-affirm the interdisciplinary nature of this study. I believe that it is appropriate to view the law touching settlements in historical perspective as both a legal and an economic phenomenon; by determining the extent to which one could control the disposition of the patrimony in a society in which land was the chief source of wealth, the judges were exercising a rudimentary form of 'trade regulation'. The opinions of the judges suggest that they were aware of the economic ramifications of their decisions; and modern legal historians should share that awareness. This monograph is a modest attempt to enlighten them.

1

THE MEDIEVAL INHERITANCE AND THE STATUTE OF USES

The making of financial arrangements at marriage has been a concern of landed families in England since Anglo-Saxon times. In a society with high mortality and one in which men controlled the bulk of wealth-producing property, perhaps the most pressing concern was to secure provision for women who survived their husbands. The Anglo-Saxons provided for their widows through the institution of *morgengifu*.[1] Early on, the common law recognized the obligation of the groom to endow his wife at the church door, and directed an appropriation of land at his death if he failed to do so.[2] Towards the close of the Middle Ages the provision for maintenance was coupled with the transmission of the patrimony between the generations by marriage settlement.[3] The early modern marriage settlement, the subject of this study, was an elaboration of this medieval form.

The increased incidence of marriage settlements in the fourteenth century can in part be attributed to the popularity of feoffments to uses. Because common law dower attached only to lands of which her husband had stood seised, a widow could not claim her thirds in land held to his use. Legal commentators in the sixteenth century who opposed uses argued that one of their most serious consequences was that they deprived widows of their

1 Ernest Young, 'The Anglo-Saxon family law', in *Essays in Anglo-Saxon law* (Boston, Mass., 1905), 174. Young suggested linear development in provisions for widows from the *morgengifu* through to the forms of dower recognized by Littleton.

2 F. Pollock and F. W. Maitland, *The history of English law before the time of Edward I*, 2nd edn (2 vols., Cambridge, 1968), II, 420–8; *The treatise on the laws and customs of the realm of England commonly called Glanvill*, ed. G. D. G. Hall (London, 1965), Book VI, 1; *Bracton on the laws and customs of England*, ed. S. E. Thorne (4 vols., Cambridge, Mass., 1968–), II, 265–8.

3 J. M. W. Bean, *The decline of English feudalism, 1215–1540* (Manchester, 1968), 114–28; Simpson, *Land law*, 218.

dower.[4] Modern historians, however, have a more balanced view, citing examples of directions to feoffees which allow land in excess of the third permitted at common law.[5] Regardless, if a substantial proportion of a landowner's estate was held in use it was necessary to execute a settlement which specified maintenance for the bride if she survived the groom. Normally the bride and groom were granted a joint life estate, or jointure as it was called, with a remainder in tail to their heirs male.[6] Consequently the woman would hold the specified estates to her own use for her life if she survived her husband, and upon her death they would pass to the eldest son. In this manner, feoffment to uses came to deal with the two major concerns of the early modern marriage settlement: the fixing of maintenance should the bride survive her husband and the hereditary transmission of the patrimony.

Since marriage settlements were effected by feoffments to uses it has been suggested that the enactment of the Statute of Uses[7] in 1536 significantly altered the means by which landowners settled their estates.[8] A more detailed enquiry of early-sixteenth-century settlements must be undertaken to confirm this hypothesis, but the transformation of hitherto equitable estates into legal interests which the statute engendered did affect the position of widows. Dower could be claimed in estates held by way of use which the statute had transformed into a legal interest.

In families where jointures had been executed by settlement, therefore, the widow might have been able by virtue of the statute to enjoy her jointure lands and also claim common law dower. This unwanted consequence of the operation of the statute was prevented by certain provisions embodied in the Act; specifically,

4 For example, Bacon's 'Reading upon the Statute of Uses', in *Works of Lord Bacon*, ed. J. Spedding (London, 1857), VII, 418; *St German's Doctor and Student*, ed. T. F. T. Plucknett and J. Barton (Seldon Society, London, 1974), 91, 224: 'The evil consequence of uses', reprinted in *H.E.L.*, IV, 577–80, no. 16.

5 Bean, *Decline of English feudalism*, 136–7; M. E. Avery, 'The history of equitable jurisdiction of Chancery before 1460', *B.I.H.R.*, XLII (1969), 139–44.

6 G. A. Holmes, *The estates of the higher nobility in fourteenth century England* (Cambridge, 1957), 41–5; K. B. McFarlane, *The nobility of later medieval England* (Oxford, 1973), 64–7, 85–6; J. P. Cooper, 'Patterns of inheritance and settlement by great landowners from the fifteenth to the eighteenth centuries', in *Family and inheritance*, ed. J. Goody, J. Thirsk and E. P. Thompson (Cambridge, 1976), 200–1.

7 27 Hen. VIII c. 10.

8 Cooper, 'Patterns of inheritance', 203.

section 6 stipulated that the widow could not have both her jointure and her dower. With respect to pre-existing and future marriage agreements, widows who agreed to jointure were precluded from claiming their dower.

But the statute went further; and a subsequent provision had a considerable effect upon the future pattern of settlement.[9] The statute provided that those widows who had accepted jointures prior to marriage were barred from renouncing the allocation and claiming their dower at common law. However, the same was not the case with regard to post-nuptial agreements; here the widow was free to renounce her jointure 'and take her dower by a writ of dower or otherwise according to the Common law'. The effect of the statute, therefore, was to press those landowners who wished to fix immutably the bride's jointure to execute a settlement prior to marriage. Because the consent of the bride's family was necessary, considerable leverage was bestowed upon them with respect to the disposition of the groom's patrimony embodied in the settlement. The ability to make jointures was so crucial to effect a suitable marriage that it was often read into pre-existing settlements:

> And it is great reason, although he willed that the order of his inheritance should be preserved, yet to make a provision for jointure; and it is a great reason and cause to his family to enable and make them capable of great matches, which should be a strengthening to his posterity, which could not be without great jointures, wherefore I conceive it reasonable to construe it so, that here they have power to make jointures for their wives.[10]

One of the effects of the Statute of Uses, then, was that it encouraged the execution of pre-nuptial marriage settlements which contained provisions both for jointure and for the transmission of the estate between the generations.

During the sixteenth century, a body of law concerning the appropriate mechanics for creating a jointure was fashioned. Coke noted that 'to the making of a perfect joynture within that statute six things are to be observed'.[11] The first requirement was that the jointure estate must take effect 'presently after the decease of her husband'.[12] To constitute a binding jointure, it was necessary for the wife to come into enjoyment of her interest immediately upon

9 The eighth section.

10 *Read* v. *Nash* (1589), 1 Leon. 147, 147–8.

11 *Co. Litt.*, 36b.

12 *Ibid.*

the death of her husband. The most effective method of meeting this requirement was for the settlement to grant a joint life estate to the prospective husband and wife, or else limit successive life estates to their use.[13] As Coke noted, the limitation of an intervening estate to a stranger after the husband's death, perhaps to his executor, followed by an estate limited to the wife did not create a valid jointure. On the other hand, a jointure could be raised even though the estate was upon condition.[14]

The second requirement dealt with the quality of estate which was to comprise the jointure. According to the statute, it was necessary for the assurance to be to the wife 'for the term of her life or otherwise in jointure'.[15] Initially there was some controversy over the interpretation of the word 'otherwise'. In *Dame Dennis' Case*,[16] a marriage settlement had been executed which granted a fee simple to the husband and wife, and there was a diversity of opinion as to whether such an interest could constitute a valid jointure. Catlyn, Saunders, and Dyer preferred a broader construction, and argued that limitations in fee simple were within the equity of the statute. Browne and Whyddon cited authority from the reign of Edward VI reported by Brooke which allowed only life estates and estates in fee tail. From the report of the case by Dyer, it would appear that the latter view prevailed. Coke's report in *Vernon's Case*,[17] however, suggests that it was agreed by 1572 that Brooke had misreported the case. Nevertheless, by this time it was clear that limitations in fee simple could constitute a valid jointure. It was, however, agreed that as a third requirement the estate had to be granted to the wife herself; an estate limited to others in trust for the wife was insufficient.[18]

The final requirements noted by Coke dealt with the mechanics of creating the jointure estate. In the first place it was essential that the jointure be in total and not partial satisfaction of dower. Although no specific language within the act directed such a rule, it was likely thought that the intent of the statute was for dower and jointure to be mutually exclusive. Such an interpretation must have

13 *Villers* v. *Beamon* (1557), Dyer 146a, 148a.
14 *Vernon's Case* (1572), 4 Co. Rep. 1.
15 The sixth section.
16 (1572), Dyer 248a.
17 4 Co. Rep. 1.
18 *Co. Litt.*, 36b.

seemed obvious, at least to Coke, who considered that the requirement 'is so plaine as it needeth not any example'.[19]

Coke's fifth requirement was that the instrument had to aver that the jointure was created in satisfaction of dower. This was based upon the words of the statute: that the interest was to be 'in manner or form expressed . . . for the jointure of the wife'.[20] But this requirement was not adhered to strictly. In *Ashton's Case*,[21] for example, a feoffment was made to the bride for her life prior to her marriage in pursuance of 'certain covenants contained in a pair of indentures . . . concerning a marriage'. Although the feoffment did not express that the estate was in jointure in satisfaction of dower, it was held to create a valid jointure. Perhaps the court was influenced by the existence of the original agreement, because three years later in an anonymous case[22] the judges were less lenient. A widow had taken possession of lands pursuant to a post-nuptial settlement and then had sued for her dower; Dyer noted: 'Whether this matter generally alleged without averment that it was for jointure or dower shall be a bar to dower or not, *quaere* well, for the words of the statute of 27 [Henry VIII] are expressly for the jointure of the wife.'[23] It was not until the late seventeenth century that the word 'jointure' alone was held sufficient.[24]

The final requirement was that a jointure had to be made either before an intended or after an existing marriage.[25] For the jointure to be binding, however, the statute stipulated that the agreement be executed prior to marriage. It is unclear as to why the widow was allowed to renounce a jointure executed after marriage even though she consented to the agreement. Perhaps it was thought that wives might be compelled by their husbands to accept the jointures. Such an argument might be more persuasive if the woman's consent was necessary in arranging jointure by a pre-nuptial settlement. But this was not the case, since parental consent was sufficient to bind the bride. Because of the *feme covert*'s general inability to contract, the

19 *Ibid.*
20 The sixth section.
21 (1565), Dyer 228a.
22 (1568), Dyer 266a.
23 *Ibid.*
24 Or so Lord Chancellor Somers held in *Lawrence* v. *Lawrence* (1699), 2 Vern. 365. Lord Keeper Wright reversed the decree in 1702, but Somers's position eventually prevailed in an unreported case: *Vizard* v. *Longdale* cited by Lord Hardwicke in *Walker* v. *Walker* (1747), 1 Ves. Sen. 55.
25 *Co. Litt.*, 36b. This is perhaps a somewhat obvious requirement.

non-binding nature of a post-nuptial settlement would appear consistent with her legal position.

In the course of the sixteenth century, the settling of jointure was becoming increasingly popular.[26] Commentators noted its practical advantages over dower.[27] In the first place, since a jointure created prior to marriage barred dower claims, the husband was free to deal with the residue of the patrimony as he pleased, particularly with regard to alienations. It was only with respect to the jointure lands that the consent of the widow was necessary in order to alienate. Where a jointure had been created, the purchaser could be certain that the lands which he bought were free of dower claims. Moreover, there were considerable advantages to the prospective heir in effecting a settlement which barred dower. To him, such claims were often a nuisance, preventing him from consolidating his estate and interfering with his freedom of alienation.[28] Because a jointure specified the lands which the widow was to enjoy, these two problems were avoided, as well as the often arduous task of sorting out a common law dower. There were advantages to the bride in jointure as well; upon marriage, she became seised of an immediate estate of inheritance, and upon her husband's death she could enter without suing out a writ. Moreover, her consent was necessary for her husband to alienate jointure land.

The increased incidence of marriage settlements after the Statute of Uses may therefore be ascribed at least in part to the desire of both families to fix jointures, and we may now consider their form in more detail. Unlike their Anglo-Saxon counterparts,[29] medieval marriage settlements often directed the hereditary transmission of the patrimony. The avoidance of feudal dues may have prompted some settlors to employ the settlements to this end but after the statute, and the enactment of the Statute of Wills, other reasons must have prompted settlors.[30] Perhaps the most significant

26 M. L. Cioni, 'Women and law in Elizabethan England with particular reference to the Court of Chancery' (Unpublished University of Cambridge Ph.D. thesis, 1974), 198.

27 *Co. Litt.*, 36b; *The lawes resolution of women's rights* (London, 1632), 182–3.

28 I address this question in more detail elsewhere: L. Bonfield, 'Marriage settlements 1660–1740: The adoption of the strict settlement in Kent and Northamptonshire', in *Marriage and society*, ed. R. B. Outhwaite (London, 1981), 101–15.

29 A. J. Robertson, *Anglo-Saxon charters* (Cambridge, 1939), LXXVI, LXXVII.

30 J. L. Barton has recently stressed the financial advantages of such a settlement where the entail was limited to the settlor's grandson: J. L. Barton, 'Future interests and royal revenues in the sixteenth century', in *On the laws and customs of England: essays in honor of Samuel E. Thorne*, ed. M. S. Arnold, T. A. Green, S. A. Scully and S. D. White (Chapel Hill, North Carolina, 1981), 321.

was to effect the orderly transmission of the patrimony in the manner which the landowner desired. The alternative to the settlement was the will, but it was less satisfactory. Wills were often executed on one's deathbed, without the assistance of a lawyer.[31] Enumerating all the various parcels of land which comprised the patrimony would have been awkward. Without the assistance of counsel a complex disposition would not be possible. Then, as now, the deathbed was not the most appropriate place for prudent estate planning. Moreover, sloppy draftsmanship might pave the way to an expensive lawsuit regarding matters of interpretation.

Thus the early modern marriage settlement accomplished two goals: immutably fixing the bride's jointure and transmitting the patrimony between the generations in the manner desired by the landowner. The forms which these dispositions assumed are of great interest to the legal historian, and are the concern of this monograph. In the succeeding chapter, it will be suggested that the period after the Statute of Uses witnessed the emergence of two types of settlement, one which secured the orderly transmission of the patrimony and the other which attempted to go further: to deprive succeeding generations of freedom of disposition. The validity of particular settlement forms, and consequently the ability to attain specific 'estate planning' goals, was determined by the courts during the sixteenth and early seventeenth centuries, a period considered one of great uncertainty in the land law. A system of jurisprudence which sanctions innovation retrospectively, that is only when forms of settlement are controverted, necessarily breeds some degree of turmoil. The extent of the uncertainty, however, depends upon the amount of experimentation, and whether secure alternative forms exist. During our period, cautious landowners always had the option of executing settlements whose validity had been accepted by the judges.

31 Henry Swinburne suggested that only the 'ruder and more ignorant people' were reluctant to make wills whilst in good health fearing that so doing would have an adverse effect upon their life expectancy. But his discussion of written testaments suggests that deathbed dispositions were not unknown amongst the better sort. Henry Swinburne, *A briefe treatise of testaments and last wills* (London, 1635), 43, 39–40. See also J. March, *Amicus republicae: the commonwealth's friend* (London, 1651), 157–8; and Pollock and Maitland, *History of English law*, II, 314, 337, 356.

Eventually, settlements which unduly attempted to circumscribe freedom of alienation, perpetuities and the like, were disallowed. But the common law courts in the late sixteenth and early seventeenth centuries ultimately sanctioned a less restrictive form, one in which a life estate was limited to a living person with an entail in remainder granted to his unborn heir. This concession was significant because it allowed for the transmission of the patrimony by marriage settlement, while conferring some protection against alienation by the tenant in possession. It was from this form that the strict settlement was developed.

But to argue that it was experimentation followed by judicial sanction which led to the widespread adoption of a particular form of settlement requires one to ascertain what came before. Unfortunately, it is far more difficult to establish practice before the turn of the seventeenth century given the dearth of surviving settlements amongst family muniments. There is, however, a less satisfactory source, but one which accurately details the forms of settlement: the law reports. Embodied within the printed cases are numerous actions involving settlements. In many of the cases the form of settlement is not controverted so a data set based upon this evidence is not biased towards settlements of dubious validity.

In order to gain an impression of sixteenth-century settlement forms, and it must be admitted that the evidence employed permits no more than this, I have extracted the settlements noted in the reports of Plowden, Dyer, Leonard, Coke, and Croke. All settlements have been included in order to construct a larger body of data. It would appear to be legitimate to make no distinction between marriage and family settlements since during the period they do not differ in legal mechanics. Two distinct forms emerge, and their frequency is tabulated in Table 1. During the sixteenth century, the most common form of settlement was the limitation of an entail to a living person or persons; in marriage settlements the entail was granted to the prospective groom and bride, and in family settlements to the male heir. The actual wording of the grant was: 'to groom and bride and the heirs male of their two bodies begotten'. During the reign of Elizabeth, an alternative form appears with reasonable frequency: the 'life estate-entail' mode. In this disposition, a successive life estate or a joint life estate was limited to the groom and bride with the entail secured in the male heir produced by the marriage. Although this form of settlement

was not novel – examples appear in the reign of Henry VIII[32] – the life estate-entail mode would seem to be exceptional until the latter part of the reign of Elizabeth. Conveyancing books, both printed and manuscript, appear to confirm this trend.[33]

Table 1 *Sixteenth-century settlement practice* (N = 172)

Settlement forms	Pre-Statute of Uses N	%	1536–1558 N	%	Elizabethan N	%	Unknown N	%	Totals N	%
Entail to living person	26	96.3	29	90.6	34	82.9	66	91.6	155	90.1
Life estate-entail	–	–	1	3.1	6	14.6	3	4.2	10	5.8
Other forms	1	3.7	2	6.3	1	2.4	3	4.2	7	4.1
Totals	27	100.0	32	100.0	41	99.9	72	100.0	172	100.0

The settlements under consideration highlight two points. The first is that the Statute of Uses had little impact upon the legal form employed in marriage settlements. What it may have done was to encourage the execution of pre-nuptial settlements to fix jointures. These settlements, like their medieval predecessors, also directed the hereditary disposition of the patrimony. Secondly, it would appear that there was considerable uniformity in settlement practice, and that male heirs were destined to come into possession of their estates as tenants in tail with powers of deposition.

To conclude, then, the provision of maintenance for widows at marriage has long been a concern of English landowners. Common law dower initially limited the quantity of land which could comprise the widow's maintenance to a third of her husband's

32 Examples of 'life estate-entail' settlements can be found in decisions noted in *Spelman's reports*, ed. J. H. Baker (Selden Society, London, 1977), 93, 210, 226; but the majority of settlements in the reports confer entails as discussed above; 225, 226, 228.

33 The first printed conveyancing book to contain examples of 'life estate-entail' settlements is W. West's *Symbolaeographia* (London, 1590), 25–7. Thomas Phaer printed a marriage settlement which granted an entail to the bride and groom, *A newe boke of presidents in manner of a register* (London, 1543), lxiii. No marriage settlement of the period is printed in Thomas Madox, *Formulare anglicanum* (London, 1702). For 'life estate-entail' settlements in Elizabethan manuscript precedent notebooks, see B.L., Add. MS 29871, fos. 30–1, 32, 54–5, 70–1; B.L., Add. MS 25240, fos. 24–5, 31–3, 37–8, 139–40, 144–6; C.U.L. MS Ee. iv. 1, fos. 185–7.

estates. With the introduction of feoffments to uses, individual discretion and negotiation determined the amount of provision. By the time of Littleton, the common law of dower had become more flexible, allowing a groom to endow his wife with as much of his estate as he deemed prudent. But the institution of uses in the fourteenth century had a considerable impact upon the financial arrangements at marriage, because the determination of maintenance for the widow was combined with the decision regarding the devolution of the patrimony. The complex marriage settlements of the early modern period are descended from these medieval conveyances. While the Statute of Uses had little impact upon the legal mechanics employed in the dispositions, it did tend to encourage their execution prior to marriage. It was not until the latter part of the sixteenth century that experimentation with regard to mechanics began to occur, and it is to those developments that we may now turn.

2

LAW IN TRANSITION: THE CONFLICT OVER RESTRAINTS UPON ALIENATION

It is commonplace to consider the century and a quarter between the enactment of the Statute of Uses[1] and the development of the strict settlement as an era of great uncertainty in the land law. Legal historians have cited the succession of cases which invalidated various clauses in settlements and wills, as well as the comments of distinguished members of the bar, to attest to this sense of profound confusion.[2] Indeed, Sir Francis Bacon's oft-quoted statement in his argument in *Chudleigh's Case*[3] may well summarize the verdict of modern historians: 'It is likely that Counsellors of the law have advised men in such cases [regarding settlements] that when the cases come to be scanned it is hard to argue how the law will be taken.'[4] Yet his statement must be read in context, as the argument of counsel; no doubt Bacon's modern brethren often express such reservations to their clients, and have been known to echo similar sentiments in court to bolster their arguments.

The purpose of this chapter is to consider the state of the law regarding the settlement of land in the sixteenth and early seventeenth centuries in order to ascertain the extent of uncertainty and its implications for settlement practice. While it must be conceded that few are the periods in which the common law remained static, neither contemporaries nor modern legal historians have ever effectively demonstrated the extent to which this uncertainty affected the fortunes of the landowning class. An examination of the relevant cases suggests that all was not unsettled, but that much of the law was in transition.[5] In particular, two

1 27 Hen. VIII c. 10.
2 See generally, *H.E.L*, VII, 92, 118; and Simpson, *Land law*, chapter IX.
3 (1595), 1 Co. Rep. 120a.
4 Bacon, *Works*, VII, 623.
5 When the arguments in the chapter were first formulated, I did not have the benefit of Mr Barton's essay, 'Future interests and royal revenue'. Although our focus is upon different aspects of the issue of restraints upon alienation, it would appear that our views are not broadly inconsistent.