Contrasting Sources: Court Rolls and Settlements as Evidence of Hereditary Transmission of Land amongst Small Landowners in Early Modern England

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CONTRASTING SOURCES: COURT ROLLS AND SETTLEMENTS AS EVIDENCE OF HEREDITARY TRANSMISSION OF LAND AMONGST SMALL LANDOWNERS IN EARLY MODERN ENGLAND†

Lloyd Bonfield*

I. INTRODUCTION

Two decades ago, Joan Thirsk reviewed the work of French historians of the family, and pondered the quality of evidence available to their English counterparts.¹ In addition to art, literature, and law, English historians could draw upon more personalized sources such as family papers and correspondence to discern the quality of familial relationships. Thirsk also noted that researchers on her side of the Channel were likewise fortunate in having large quantities of wills which she referred to as “faithful mirrors in England, at least, of the quality of family life.”² In subsequent discussion on the use of local records, Thirsk established a more detailed framework for exploiting wills.³ Referring to them as “one of the finest” sources for the history of the family, she advocated a systematic study of patterns of testation.⁴ From this investigation, historians could discern societal attitudes towards the family, the quality of familial relationships, and its structure.

In the following decade, Margaret Spufford took up Thirsk’s challenge and relied heavily upon wills to produce an exhaustive local study of three Cambridgeshire villages.⁵ Spufford prefaced her

† An earlier version of this article was delivered to the 1983 meeting of the American Society of Legal History.
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2. Id. at 117.
4. Id. at 16.
substantive discussion with what she calls "special pleading" for the use of wills. Decrying the failure of the local historian to use wills, Spufford argued that they provide a mass of social detail and are "the only source" from which the private lives of the villagers can be reconstructed.\(^6\) Although the concerns of her study were religious and educational aspects of life in rural communities as well as rural society and its economy, Spufford initially explored alterations in the pattern of landholding in the sixteenth and seventeenth centuries. Spufford attributed much of the change that she observed to inheritance practices, and wills provided evidence of inheritance practices, which she suggested was otherwise unavailable. To quote Spufford: "[Wills] give invaluable information on the extent to which inheritance customs contributed, by primogeniture, to the accumulation of land in the hands of individuals, or by partible inheritance to the redistribution of holdings amongst the members of the family concerned . . . ."\(^7\) Nonetheless, the legal historian would probably rephrase this explanation of the contribution of wills to analysis of property distribution: wills enable us to see how inheritance practice modified inheritance custom so that we can understand the connection between hereditary transmission and wealth distribution within the family. This link between intergenerational transfer of property and family formation, structure, and relationships provides the nexus that Thirsk first suggested exists between wills and family history.

The strength of the link, however, depends upon the quality of the source. Accordingly, the purpose of this article is to consider the possible limitations of wills as evidence of property distribution patterns. Such analysis is appropriate at this juncture because other historians have been laboring in county archives, producing a varied body of social and economic studies that rely wholly or in part upon wills. Systematic exploitation has rescued the will from ignominy and has achieved for the document the historical as opposed to genealogical respectability for which Spufford pleaded. It is therefore appropriate to assess the will's evidentiary value.

This article considers the will's role in property transmission and questions the extent of its utility. While wills may accurately reflect the transfer of property from the testator to the living, historians who wish to draw structural conclusions about the family or to reflect upon the quality of familial relationships must recognize that inheritance is only the final phase of a wider process of transfer which has been referred to as "devolution."\(^8\) This article initially focuses on the stages of this process in early modern England.\(^9\) 

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\(^6\) Id. at 56.

\(^7\) Id.

\(^8\) J. Goody, Death, Property and the Ancestors 311-14 (1962).

\(^9\) For the purpose of this study, the time period denominated "early modern England" ranges from approximately 1500 to 1750.
thereafter considered by referring to sources other than wills: a series of manor court rolls, and marriage and family settlements. By placing the will in context, this article sounds a note of caution regarding the "faithful mirror."\textsuperscript{10}

\section*{II. \textsc{Wills as Historical Evidence}}

Lest I should appear to disparage unduly the usefulness of wills, our discussion will commence with a consideration of their use in less problematic contexts. Considering the will in other contexts facilitates, through contrast, an assessment of the suitability of using these documents to ascertain the devolution of property.

Recently, historians have attempted to assess the importance of kinship in property devolution in early modern England by analyzing bequests embodied in wills. In a study of the Essex village of Terling, Keith Wrightson and David Levine found limited recognition of kin in a series of wills of residents.\textsuperscript{11} Although testators often called upon collateral kinsmen to serve as executors, bequests to kin other than the testator's spouse and children were rare.\textsuperscript{12} Wrightson and Levine used this pattern of bequests to corroborate other evidence and to argue that a very loose kinship network existed in the village. Richard Vann, however, came to the opposite conclusion in his study of will-making from 1550 to 1800 in the market town of Banbury.\textsuperscript{13} Vann found a higher level of kin recognition during the first century of that period, particularly among those he termed "prestigious men."\textsuperscript{14} The decline in kin recognition after 1650 led Vann to conclude that the wealthier bourgeois adopted the same pattern which Lawrence Stone has suggested the squirearchy followed: focusing distribution on the nuclear family.\textsuperscript{15}

By systematically studying wills, historians can therefore shed some light not only upon kinship solidarity, but also upon the role of women in early modern society. Assuming no inherent bias in those who took the opportunity to make a will,\textsuperscript{16} the results of the systematic analysis are illuminating. Wrightson, Levine, and Vann also tabulated their respective sets of wills in terms of the individual chosen to serve as executor, which allowed them to make observations about the category of person selected to administer the decedent's estate. In Terling, family members served as executors, leading Wrightson and Levine to

\begin{enumerate}
\item[10.] See supra note 2 and accompanying text.
\item[11.] K. Wrightson & D. Levine, Poverty and Piety in an English Village: Terling, 1525-1700, at 102-03 (1979) [hereinafter cited as Wrightson & Levine].
\item[12.] \textit{Id.} at 94-100.
\item[14.] \textit{Id.} at 364-65.
\item[15.] \textit{Id.} at 365-66.
\item[16.] For a discussion of potential bias, see \textit{infra} note 28 and accompanying text.
\end{enumerate}
argue that there was a bias towards kin in matters of property. Vann, however, found that late seventeenth-century testators increasingly used wives as the sole executrix. According to Vann, the concurrent disappearance of overseers suggests that husbands reposed a greater degree of confidence in their wives' business acumen. His findings run counter to those of Susan Amussen who argued that a decline, albeit a slight one, in nominations of wives as sole executrix in four Norfolk villages indicated an erosion in the status of wives in arable farming areas. Testators' increasing use of joint executors, however, may have had more to do with the disappearance of the overseer rather than diminished involvement of farming wives in the family economy. Regardless of the difficulty in discerning causes of change, it is useful to consider alterations in patterns of selecting individuals to wind-up the decedent's affairs and distribute property because of the importance of the executor's functions.

Other uses of wills, particularly as they bear upon the question of literacy, have been the subject of some debate. For example, even Spufford, a prominent apologist for the use of wills, raised doubts about using language that bequeaths souls as an indicator of the progress of the Reformation among the laity. Because scribes rather than testators wrote the wills, Spufford's identification of draftsmen enabled her to demonstrate that the draftsman rather than the testator selected the language used to commit the soul. Thus, the language reflects the religious persuasion of the scrivener rather than that of the testator, except in those few instances where the will recorded highly personal statements.

Although this brief summary does not do justice to the many uses to which wills have been put, it underlines the seductiveness of the source. Because wills survive in relatively large numbers, they are subject to quantitative analysis allowing the historians to make more positive assertions. In the area of property transmission, historians can not only quantify distributions, they can surmise what contemporary attitudes towards devolution were. Yet as Spufford's work on will draftsmen demonstrates, serious reflection upon the use of wills may uncover technical difficulties. These difficulties are particularly prevalent when historians use the document to explain more than merely its contents by attempting to use it to illuminate ancillary attitudes. The quality of familial relationships may well be one such area. Accordingly, the nexus between property devolution and wills requires further analysis.

17. Wrightson & Levine, supra note 11, at 102.
18. Vann, supra note 13, at 366.
20. Vann, supra note 13, at 366.
22. Id.
III. Testation and Property Devolution

The primary purpose in considering the process of devolution in early modern England is to assess the role of wills in the process of hereditary transmission of property. By relating testamentary transmission to the whole of property devolution, family historians may better understand both the will’s function and testators’ reasons for executing a will. By first delineating the stages of devolution, the historian may then speculate upon the likely considerations that led property owners to use wills rather than other means to transmit wealth between generations.

Devolution embraces the totality of the transfer of resources from a senior generation to a junior generation. Anthropologists who devised and use the concept are primarily interested in social reproduction, and are therefore less concerned with the timing of transfer than with the share of familial wealth dispensed. However, the family historian’s consideration of what might be called the “when” of transmission is as crucial as the analysis of “how much to whom.” The matter under consideration will dictate whether the time and pattern of property transfer may be viewed as independent. For example, if a historian wishes to explain or compare mean age at marriage in particular societies and assumes that some transfer of property is ordinarily required for a union to occur, the analysis would focus more on the timing of passage rather than the quantity of property transferred.

Frequently, however, historians are more interested in the broader pattern of devolution. If, like Spufford, the historian wants to identify possible causes for fragmentation of land holdings, “how much to whom” is the crucial question. Yet ignoring the issue of timing would be unwise in attempting to understand the process of devolution because the transfer of property from the senior generation to the junior occurs at various stages in the life cycle. Accordingly, focusing on the “when” of devolution requires family historians to consider the limitations of the particular type of evidence. Historians must not attempt to analyze a continuous process by unduly emphasizing one event, albeit a crucial one. Ignoring the issue of timing may entice historians into believing that they are observing the totality of property transmission rather than one point on a continuum. Moreover, to gauge accurately

23. J. Goody, supra note 8, at 311-14.
24. John Hajnal, for example, tentatively proffers an indirect connection between the death of a landholder and the formation of a new family by the heir (or perhaps heirs) in attempting to explain the European marriage pattern. Hajnal, European Marriage Patterns in Perspective, in POPULATION IN HISTORY: ESSAYS IN HISTORICAL DEMOGRAPHY 133-34 (1965). See also Hajnal, Two Kinds of Pre-Industrial Household Formation Systems in FAMILY FORMS IN HISTORIC EUROPE 65 (1983). A recent study, however, finds little correlation between a parent’s death and the child’s marriage. Levine, “For Their Own Reasons”: Individual Marriage Decisions and Family Life, 7 J. FAM. HIST. 255 (1982). Goran Ohlin, however, argues that in respect to “group behavior,” there was a direct connection between paternal death and marriage in the next generation. Ohlin, Mortality, Marriage and Growth in Pre-Industrial Populations, 14 POP. STUD. 190 (1961).
the extent to which partition of resources within the family may have led to the fragmentation of holdings, historians must view *inter vivos* transfers and customs of inheritance in conjunction with testamentary provisions. Failure to consider other methods of transfer because they are too difficult, or perhaps even impossible to ascertain, might produce misleading results.

Devolution, therefore, is a process of property divestment that extends throughout life; the will represents only one phase. Piecing together the totality of intergenerational transfer should assist the historian in drawing conclusions regarding the nature of family relationships whereas focus on the will alone cannot. The "faithful mirror" may reflect an accurate picture, but in many cases exclusive reliance on the will produces, to carry Thirsk’s metaphor further, a partial image.

An ancillary consideration in a discussion of the will’s function in property devolution is the frequency of will-making. In early modern England, most men and women did not execute wills. Consequently, in trying to understand the will’s role in hereditary transmission, the historian may appropriately ponder why most individuals failed to execute wills. Except for those whose death was sudden, the majority of individuals who died intestate must have done so by conscious choice: they were content with the inheritance custom in force and saw no need to ratify it. Intestates either made substantial *inter vivos* transfers or were willing to allow inheritance customs to transfer the bulk of their property. Individuals who had no property had no need to write wills; but, an assumption that those who had small amounts of property were unconcerned with its passage would be misleading. Because probate fees were in theory minimal for the poor, cost should not have been a deterrent to executing a will. Consequently, in attempting to determine why some men and women wrote wills and others did not, there are two important considerations. The first factor is the inheritance custom in effect—what happens to property not disposed of during life or by testament? The second factor is the extent of *inter vivos* transfer—what remains to be passed at death?

As the preceding analysis indicates, property devolution consists of three facets: *inter vivos* transfer, testamentary disposition, and customary inheritance. The amount of property passing at each level depends upon individual choice, influenced no doubt by family relationships, by

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25. More persons may have written wills than probate records indicate. For example, some wills may have been destroyed by disappointed heirs or remained undiscovered. If, however, the parish priest wrote the majority of wills at testators’ death beds, the wills would have been more difficult to conceal or destroy.

26. Probate fees were a subject of complaint against the church courts in the Commons’ Supplication against the Ordinaries of 1532. Fees which had previously been regulated by a provincial scale were set by statute, 21 Henry VIII, c.5. For estates under £5, the fee was 6d exclusive of scribe’s fees. But even before the statute, over 40% of the estates in the Norwich Archdeaconry between 1525 and 1527 were too small to attract fees. R. Houlbrooke, *Church Courts and the People During the English Reformation* 1520-1570, at 95 (1979).
inheritance customs, and perhaps by the nature of property involved. What becomes immediately apparent from this tripartite analysis is that concentrating exclusively upon wills for evidence of property devolution always results in an incomplete picture of devolution, except when *inter vivos* transfer was negligible. Moreover, focusing solely on wills underestimates the amount of property a person controlled during life. As a result, calculations of wealth based on data culled from wills and inventories are problematical. Nevertheless, the serious flaw from the perspective of the family historian is the misleading picture of familial relationships that a historian produces by exclusively relying on wills in analyzing property devolution. Failing to investigate the other two facets might entice a researcher into believing that widows, daughters, younger sons, or male heirs were excluded from property distributions when what actually occurred was endowment by another means of transfer.27 Far from being a “faithful mirror,” the will resembles one of a concave or convex glass which produces distorted images.

Having illuminated the role of wills in the process of devolution and suggested that exclusive reliance upon wills produces an incomplete or distorted picture of property transmission between generations, our attention may now turn to levels of testation. Determining the percentage of individuals who wrote wills helps historians understand patterns of devolution and may also shed light on the factors that led them to choose particular means of property transfer. In addition, such calculations may clarify the reasons why property was transmitted at particular stages in their lives. Furthermore, the analysis pinpoints the segments of society that wills-based studies of inheritance observe. After all, if testators were only a small portion of the population of the geographical area in which they lived, or if they had different economic or age characteristics than the general community, the resultant pattern of devolution reflects a particular group strategy or behavior. Although it is not inappropriate to focus upon a particular group rather than upon the community at large, most studies using wills purport to deal with the entire community but fail to consider whether the sample is socially or economically biased.28

Historians are often the captives of their sources; consequently, the issue of the representativeness of testators is crucial in assessing the

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27. In discussing patterns of intergenerational transfer in particular families, Spufford is aware of the will's potential for creating a misleading picture of family size and wealth distribution. For example, Robert Tebbutt died in 1668 leaving a will which distributed all his goods, valued at £258 19s 8d, to his widow, and although “it sounds from his will as if he was childless; in fact he left a son and a daughter.” M. SPUFFORD, supra note 5, at 74. His son, Robert, was in possession of the decedent's house and farm of at least 150 acres of leasehold until the son's death in 1682. Had Tebbutt been a copyholder, there would have been no evidence of his son's succession from the rental books Spufford uses. One would therefore have concluded that Tebbutt either held no land, or that he disinherited his son. *Id.* at 72-75.

28. Spufford and Wrightson/Levine deal with village residents. Only Vann has separated a community into occupational groups.
strength of conclusions of wills-based studies of inheritance. Ascertain-
ing the percentage of villagers who troubled themselves to make wills is
frequently difficult. Such calculations require a parish register that was
the subject of a family reconstitution study or that includes notations
by successive clerks of the decedent’s age at burial. Without such infor-
mation, it is impossible to ascertain which decedents were older than
the minimum age for testation. Vann’s Banbury study considered this
issue. Because the Banbury register was reconstituted, Vann was able
to calculate the proportion of will-makers to intestates. He found that
twenty-five percent of the males and ten percent of the females buried
in the parish who were “potential testators” actually left wills.29

As previously noted with respect to kin recognition, the study of
Banbury yielded different results from that of Terling.30 For purposes
of comparison, calculations similar to those of the Banbury study from
villages examined by Wrightson, Levine, and Spufford would be use-
ful. Regrettably, the Cambridgeshire parishes were not reconstituted
and the indices of adult mortality in Terling can not be used to ascer-
tain which decedents were older than the minimum age of testation
because they are not age-specific.

There is, however, an alternative method of estimating the propor-
tion of testators to the eligible population. Using a parish register with
a reliable list of burials, one may make a crude calculation of “poten-
tial testators” by employing model life tables.31 First, the appropriate
model populations based upon assumptions of life expectancy and esti-
mated rates of population growth is selected.

| TABLE 1 |
| AGE DISTRIBUTION OF DEATHS32 |

<table>
<thead>
<tr>
<th></th>
<th>1550-1624a</th>
<th>1625-1674b</th>
<th>1675-1700c</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Deaths age</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>29 and under</td>
<td>58.37%</td>
<td>55.26%</td>
<td>54.69%</td>
</tr>
<tr>
<td>30 and over</td>
<td>41.63%</td>
<td>44.74%</td>
<td>45.31%</td>
</tr>
</tbody>
</table>

The calculations were based upon:

a Model West—Mortality Level 8; Population Growth Rate 10/1000
b Model West—Mortality Level 7; Population Growth Rate 7/1000
c Model North—Mortality Level 6; Population Growth Rate nil

29. Vann, supra note 13, at 352 (Table 1).
30. See supra notes 11-22 and accompanying text.
31. I have used the model life tables in A. Coale & P. Demeny, Regional Model Life
    Tables and Stable Populations (1966). Model life tables describe the “varying chances of
dying as a function of age.” Id. at 5.
32. See generally id.
For the period 1550-1624, for example, Model West at a mortality level of eight, and with a growth rate of ten per thousand is appropriate. If twenty-nine is chosen as the age under which those buried will not write wills, the result is that approximately four deaths in ten were of individuals over the estimated minimum age of testation. The proportion increases slightly during the period due to declining fertility. For purposes of simplicity, about half of the burials that clerks recorded in the parish register were for persons over the minimum age of testation. Assuming that burials were evenly distributed by sex, the figure must be further reduced by one-half. Therefore, one-quarter of those buried in a parish should have been males above the age of testation.

By using this crude indicator, the percentage of testators in the villages of Terling, Willingham, and Orwell may be calculated. The following table presents the results of applying the indicator of potential testators to the findings of three studies:

33. Admittedly, selecting 30 as the age of "majority" for determining "potential testators" is arbitrary. One might argue that the quinquennium 20-24 should be the dividing line because persons 25 years or older would have enough property to warrant a will. However, marriage may be the event that creates a need for a will because thereafter parents and spouse would be competing for the decedent's estate. During the course of the seventeenth century, mean age at first marriage for males was between 27 and 28. E. Wrigley & R. Schofield, The Population History of England: 1541-1871, at 424 (1981) (Table 10.1). Because model life tables underestimate mortality, it is justified to include the quinquennium of ages 25-29 with the group too young to write a will. Because mortality between 25 and 30 is relatively low, the conservative choice will likely not greatly alter the percentages supra Table 1.
### TABLE 2
**Estimated Proportions of Testation in Three English Villages***

<table>
<thead>
<tr>
<th>Time period observed</th>
<th>Orwell 1543-1630</th>
<th>Willingham 1575-1603</th>
<th>Terling 1550-1669</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of wills</td>
<td>50</td>
<td>55</td>
<td>192</td>
</tr>
<tr>
<td>Total number of burials</td>
<td>616</td>
<td>369</td>
<td>3000</td>
</tr>
<tr>
<td>Estimated number of male decedents</td>
<td>308</td>
<td>184</td>
<td>1500</td>
</tr>
<tr>
<td>Estimated male decedents aged 30 and over</td>
<td>154</td>
<td>92</td>
<td>750</td>
</tr>
<tr>
<td>Percentage of testators to male decedents</td>
<td>32.5</td>
<td>59.8</td>
<td>25.6</td>
</tr>
</tbody>
</table>

The data indicate that Terling and Orwell had roughly the same incidence of testation as Banbury, but there was a greater prevalence of testation in Willingham.

Although speculating upon differences that may have prompted men in Willingham to produce wills in a greater proportion than their counterparts in Terling, Orwell, and Banbury, is dangerous, it may shed light on the general question of why men chose wills as a vehicle for property devolution. One might suggest that their behavior was the result of the economic crisis which faced subsistence farmers after the mid-1580's. Increased mortality during that period would likely have resulted in a greater number of men dying at a younger age with family responsibilities. Yet Spufford argues that the existence of the fen common in Willingham provided a cushion against the effects of bad harvests. *Moreover, others dispute the notion that those with minor children tended to write wills in greater numbers.* Regardless, the higher mortality rate might have been concentrated among infants and children, and would therefore have little effect upon potential testators. Furthermore, historians are concerned with the proportion rather than

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*34. The Orwell and Willingham data is found in M. SPUFFORD, *supra* note 5. The Terling data is found in WRIGHTSON & LEVINE, *supra* note 11.

35. Although recognizing the exception of 1596 when the parish register records heavy mortality, Spufford argues that “Willingham people were not vitally affected by bad harvests.” M. SPUFFORD, *supra* note 5, at 152.

the absolute number of decedents who make wills; the percentage of will-makers should not be effected by higher mortality rates absent other economic and social forces. Although Banbury was a market town rather than an agricultural village, the proportion of testators to decedents did not increase greatly during periods of high mortality.  

Historians have proffered various other theories to explain why some men were inclined either to interfere with or to confirm the laws of descent by making wills. Margaret Spufford and Cicely Howell suggest that family responsibilities, whether the parent had provided for dependent children through *inter vivos* transfer of property, is determinative. Spufford finds that the largest group of testators in Willingham (34.7%) had unmarried daughters or children under the age of majority. Approximately another one-third of the testators had two or more adult sons alive at their death. Spufford combined these two groups together suggesting that such children "were not yet independent." Admittedly, a father would have to make a decision regarding apportionment of property if he left more than one child living at his death. Without evidence of the children's dependency, however, viewing the need to make a will in such situations in terms of "family responsibility" is difficult. The father could have, and likely already had to some extent, advanced his adult children through *inter vivos* property transfer. Men with minor children were less likely to have made *inter vivos* transfers of property and would therefore be concerned with a different matter: "How can I arrange for my child's support during minority?" Unlike men with adult children, men with minor children would find the ultimate distribution less pressing; interim support would have been their concern. Furthermore, to argue, as Spufford does, that family responsibility prompts men to write wills requires classifying decedents according to their stage in life and calculating the ratio of testators to intestates in each class, because the proportion of testators in each group rather than absolute numbers is relevant.

Historians have also explained patterns of testation in terms of

37. *Id.* at 350 (Figure 2).


39. Spufford, *supra* note 38, at 171. The study found that only five childless men left wills. The numbers are troublesome. If the distribution of testators was a random sample of the community, which of course it is not, a 10% (5/49) childless rate is very low. R. M. Smith estimates childlessness at 20% in light of preindustrial levels of fertility and mortality. R. M. Smith, *Some Thoughts on Families and Their Land in England, 1200-1800*, in *Land, Kinship and Life Cycle* (R. M. Smith ed. forthcoming 1984). This figure comports well with Wrightson and Levine's findings in Terling. *Wrightson & Levine, supra* note 11, at 96.

40. Men with adult children or no children faced a common problem of apportionment of property.

wealth. Their assumption is that individuals owning substantial amounts of property are more concerned with its distribution than are individuals without property. Although Spufford and Howell deny the existence of a correlation between wealth and propensity to make a will,42 Vann found a higher incidence of testation among the wealthy by comparing probate and nonprobate inventories.43 Wrightson and Levine’s findings in Terling based upon a study of hearth tax assessments support Vann’s view.44 Ignoring the implication of inter vivos transfers upon accurate estimations of wealth, both the Vann study45 and the one by Wrightson and Levine46 found substantial numbers of wills of poor men. The experience in Banbury, however, was not constant over time; there was a reversal of the pattern in the first quarter of the eighteenth century.47 These conflicting results suggest that wealth was not the sole determining factor in the decision to make a will. Even if more wealthy men made wills than poor men, the motivation for making wills may have been independent of the variable “wealth.”

A further plausible factor influencing property devolution, and one that historians have yet to consider, may be the nature of the property to be transferred. By considering this variable, historians may be able to explain the greater incidence of testation in Willingham. Land use in Willingham differed markedly from that in Orwell and Terling, and property rights also varied. Spufford suggests that the economy of Willingham was dependent upon the exploitation of the fens.48 Excerpts from wills support this view by indicating that a major concern of testators was to distribute rights in the fens and the livestock with which those rights were exercised.49 Spufford does not mention either the inheritance custom with respect to common rights or inter vivos transfer of common rights in the court rolls. To assure a secure disposal of common rights, many individuals may have committed the distribution to paper. Such rights seem to have been less susceptible to inter vivos transfer than the shillings or acres which constituted wealth in the uplands. Indeed, landholding did not make one more likely to write a will;50 it would be interesting to know whether possession of common rights did. Thus, the incorporeal nature of the property to be transferred may have governed the means that individuals selected for property devolution.

42. Spufford, supra note 38, at 170 (Table 2); Howell, supra note 38, at 141.
43. Vann, supra note 13, at 353-55.
44. WRIGHTSON & Levine, supra note 11, at 96.
45. Vann, supra note 13, at 353.
46. WRIGHTSON & Levine, supra note 11, at 96.
47. Vann, supra note 13, at 353.
48. Spufford, supra note 38, at 166-67. Spufford found that most of the testators in Willingham (34 of a total of 49, or 69%) were either cottagers with common rights or men who held less than two acres of land. Id. at 170.
49. Id. at 166-67.
50. Id. at 170 (Table 2).
Historians must undertake more detailed comparisons of the substance of bequests embodied in wills and intestate succession to property before such a hypothesis for property devolution can be accepted. As modern lawyers can attest, however, contemporary will-making is merely one event in a life-long process of property transfer. The extent of the probate estate varies with the nature of property, the property's suitability for inter vivos transfer, and the law of descent. In a cross-cultural comparison of hoe and plow societies, Jack Goody argues that family structure and attitudes towards property, including inheritance, reflect peculiarities in the means of production. There is no reason to believe that patterns of devolution in early modern England were un-governed by similar forces.

Linked with the notion that the nature of property may govern the manner of devolution is the view that the use of the property may have had a bearing upon transmission. If a particular means of production required heavy labor, the senior generation may have transferred the associated property to the junior generation earlier in the donor's life. Spufford, for example, found evidence of "retirement" in Willingham. This pattern of inter vivos surrender of arable copyhold by fathers to the use of their sons parallels the "social security" discerned in medieval villages. In addition, men working the fens may have been physically able to exploit their property longer than the holder of arable land, the half-yardlander, and therefore died in possession of the property rights. This proposition, that the timing of transfer of resources depends upon the ability of the aged to exploit it, might also explain the relatively high levels of testation among both individuals involved in food distribution and certain types of tradesmen such as tailors, weavers, and mercers in Banbury.

Finally, levels of testation may reflect local peculiarities. The discussion of testators' motives assumes that the testator thought inheritance laws were either unsatisfactory for his purposes or improperly implemented. Levels of testation may reflect not only the nature of property or its use, but also an inheritance law whose sanctity may have varied locally. Early modern English inheritance law was complex because the course of descent and the court supervising transfer varied according to the type of property. Freehold land, for example, passed in accordance with the common law. Primogeniture applied to devolution except where the customs of gavelkind or borough English

52. Spufford, supra note 38, at 173.
54. A half-yardland in Willingham was approximately 15 acres. Spufford, supra note 38, at 160 (Table 1).
55. Vann, supra note 13, at 355 (Table 2).
Copyhold property passed according to custom in the manor court. During the course of the sixteenth and seventeenth centuries, equity and then the common law protected the customary inheritance of copyhold. Accordingly, half-yardlanders in Willingham may not have written wills because they wished to follow customary descent and were sufficiently certain of its implementation.

Personal property of decedents was subject to the jurisdiction of ecclesiastical courts. Through the probate process in the church courts, local variations may also have affected individuals with considerable personal property. The reliability of the church courts in consistently applying the law to cases of intestacy is questionable. Before the passage of "An Act for the Better Settling of Intestates Estates," in 1670, a contemporary commentator asserted that "there was no certain and positive law here to guide the Distribution of Intestates Estates." Although this position may be extreme, the evidence suggests that the administration of intestates' estates was not effectively supervised by the church courts. For example, once an administrator was appointed, the ordinary found it difficult to compel the administrator to distribute the surplus after debts to the decedent's spouse and children in accordance with custom. The law required officials to grant intestate administration to the deceased spouse or next of kin, and the ordinary required the administrator to file a bond in the amount of the surplus after debts. However, relatives may not have been honest in determining what assets were included in the estate. In addition, calculations of estate value were often difficult to make. Furthermore, the ordinary had no power to compel a distribution to heirs.

Because clerical supervision of intestate estates was flawed, some men may have preferred to write wills. Some testators may have preferred to secure a trusted individual to act as executor rather than leave the estate in the hands of a court-appointed administrator. To do so, required the writing of a will. Moreover, because the probate jurisdiction was local, its efficacy and the security it offered to intestates may have varied. For example, a person living in an efficient archdeaconry or peculiarity may have had no reason to confirm the law of descent through a will whereas a person living in an inefficient or inconsistent jurisdiction may have written a will to assure the customary descent of

57. C. GRAY, COPYHOLD, EQUITY, AND THE COMMON LAW, 4-21 (1963).
58. M. SPUFFORD, supra note 5, at 172.
59. 22 & 23 Charles II, c.10. The Act is also known as the Statute of Distributions.
61. Id. at 18-19.
62. 21 Henry VIII, c.5, as cited in id. at 19.
63. W. NELSON, supra note 60, at 19.
64. Id. at 18-19.
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personal property. Although this difference may not have affected levels of testation within a particular village, such factors make comparisons between local studies problematical.

Thus the historian must approach the "faithful mirrors" with circumspection. Probate is only one stage in the intricate process of devolution; testamentary patterns and their usefulness as evidence of property transmission may vary due to a myriad of peculiarities: institutional, economic, and structural. Accordingly, historians can only ascertain the will's niche in the puzzle of devolution through a better understanding of the alternatives to testamentary transfers. It is to these contrasting sources which I will now turn.

IV. CONTRASTING SOURCES: COURT ROLLS AND FAMILY SETTLEMENTS

The argument thus far is that the process of devolution likely consists of stages of property divestment and transfer. We may now turn to the evidence that substantiates this position. By considering the mechanics of devolution, a more complete picture of strategies of inheritance can be fashioned. Because a heriot was due on the death of each copyholder, the court rolls provide a reasonably accurate listing of deaths of copyhold tenants on a particular manor. Using court rolls allows us to determine the proportion of small landholders who wrote wills by comparing names in the court rolls with those listed in the index of the appropriate probate jurisdiction. Moreover, court rolls indicate the course of intergenerational transfer, and permit historians to trace both the mechanics of transfer and the course of devolution.

This article focuses on the manor of Preston in Sussex, during the period 1562-1702. Unfortunately, in common with most longer runs of manorial court rolls, there are gaps in the series. Nevertheless, the Preston materials are sufficiently complete for study. During the period examined fifty-three copyhold tenants died, twenty-one or around forty percent (39.6%) left wills that were probated in the court of the Archdeaconry of Lewes. Fourteen (26.4%) of the copyholders allowed the inheritance custom of borough English with the widow's right to free bench to run its course.

The Preston court rolls also illustrate an interesting third approach to the mechanics of intergenerational trans-

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65. C. Thomas-Stanford, An Abstract of the Court Rolls of the Manor of Preston (1921). The most serious gap is a 36 year period from 1592 to 1628. John and Sue Farrant have compiled a useful study of Preston. Farrant & Farrant, Preston in the Seventeenth and Eighteenth Centuries (1975) (Occasional Paper No. 3, University of Sussex Centre for Continuing Education). Dr. Sue Farrant kindly discussed her work on Preston and shared photocopies of documents. I am grateful for her assistance.

66. C. Thomas-Stanford, supra note 65, at xxvi-xxvii. In a survey carried out in 1608, the jury presented the following custom: "[i]f a copyholder die seized of a hereditary estate his widdow shall have her widdows bench contynuing the same so long as shee shall keepe her self chast and unmarried." Id. at xxvi (spelling of original retained).
fer: the *inter vivos* settlement. Twenty-six, or about one-half (49.1%) of the copyholders made *inter vivos* property transfers, often reserving a life interest in themselves while directing the course of descent by remainder.

If the methods of intergenerational transfer in Preston were not unique, these findings have broad implications for studies of devolution based exclusively on wills. A wills-based analysis of devolution would either omit or misconstrue the strategies of inheritance used by individuals undertaking *inter vivos* settlements. Why property owners chose to arrange intergenerational transfer of land prospectively is not always clear. Two-thirds of the settlors retained life estates; apparently, the settlor's motive in such a case was not to transfer an entire interest immediately. Moreover, one-half of the settlements merely confirm the customary order of succession. The strategies of the remaining one-half of the settlements are more complex: two settlors transferred land to heirs but retained an annuity ("retirement"); two widows settled land on their husbands' children; two settlors provided for succession to their children's spouses; one landholder provided a fee interest for a spouse (presumably instead of her bench); and one settlor altered the course of succession to favor his eldest son. With the exception of settlors who retained life estates, landholders could have used wills to accomplish the same goals. Instead, they chose to settle their affairs prospectively in the manor court.

Over a third of the landowners who made wills also made *inter vivos* transfers of land. This statistic indicates that the pattern of devolution which a historian would derive from their affairs prospectively in the settlors' wills alone would be incomplete. In most instances, wills merely supplemented the pattern of transmission implemented by surrender and admittance in the manor court. Considering the will as a supplement is appropriate because without exception individuals who used both means of intergenerational transfer passed most of their copyhold through *inter vivos* settlement.

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67. The mechanics of property settlement included surrendering the copyhold to the lord and receiving a regrant to oneself for life, with remainders over. Because the grantor paid an entry fine at the time of the surrender and the regrant, the motive for settlement was not pecuniary.
68. The total exceeds 100% because some individuals who executed settlements also made wills.
69. The settlement created an estate for life in the settlor and an estate for life in the surviving spouse, with a remainder to heirs.
70. Eight out of 21 landowners made *inter vivos* transfers in addition to making a will.
71. C. Thomas-Stanford, *supra* note 65. To the extent that income producing land was more valuable to the copyholder than personal property, this position is defensible. For example, the court rolls show that on April 7, 1565, Robert Prior purchased a cottage, a barn, half a virgate of customary land and another piece of land of about half an acre. At the same court, he surrendered the purchase and an additional virgate to the use of himself and then to his younger son, Robert. *Id.* at 4. Four years later, Robert Prior, Sr. appeared in court to surrender three virgates and receive the same "to the said Robert and Joan his wife and William their son." *Id.* at 9. Joan and Robert, Jr. entered into possession after Robert, Sr.'s death, of which the court rolls took
items, farm implements, stock, and money—generally passed by will, and two of the settlors' wills included bequests of lesser landholdings. Testators primarily settled land on persons who would not have taken immediately by intestate succession. For example, four settlements deprived widows of all or part of their bench, and the settlors' wills compensated the widow with personalty. One settlor also transferred land to a child's spouse.

Thus, nearly half (49.1%) of the copyholders whose deaths were recorded in the court rolls of the manor of Preston used settlements rather than wills to pass land to their heirs. Some individuals executed wills as well, and some intergenerational transfers also embodied customary transmission. To hark back to the prior tripartite analysis of devolution, the evidence demonstrates that some copyholders availed themselves of all three facets.72

A number of factors contribute to the distortion of the pattern of property devolution created by exclusive reliance on wills. A researcher relying exclusively upon probate materials will draw a pattern of devolution that is seriously distorted because wills rarely confirmed inter vivos settlements. Reliance upon wills without reference to court rolls or land surveys produces an incomplete universe of landholders because not all testators bequeathed land even though they held it.73 Moreover, the Preston evidence suggests that slightly less than one-half of the copyholders wrote wills.74 Therefore, determining the quantity of land held may prove impossible without reference to manorial records because many landholding testators made inter vivos transfers by settlement or allowed part of their holdings to pass according to custom. The pattern of distribution which historians derive from exclusive reference to probate documents will be likewise inaccurate. For many testators the will was a supplement, the means of correcting biases in inter vivos transfers or creating them at death.

The Preston materials, then, underscore the multidimensional nature of the process of devolution. Another document that demonstrates the multidimensional nature of property devolution and makes the notice on April 9, 1575. Id. at 16. In his will, dated October 8, 1574, Robert, Sr. divided 22 oxen, 220 sheep, and various household items among his three sons. East Sussex Record Office A.6. 363-12.

A less wealthy copyholder also followed this pattern of devolution. By the time of George Blaker's death in approximately 1587, Blaker had surrendered and been readmitted to two half virgates to himself and his son, Henry. C. THOMAS-STANFORD, supra note 65, at 33. George Blaker's will divided his personalty between his wife Alice and his daughters Anne and Joan. East Sussex Record Office A.8 105-6.

72. See supra text following note 26.
73. To be fair to Spufford, and this article should not be construed as an attack upon her research, court rolls and land surveys are employed when available. Regrettably, the court rolls in the villages Spufford studied were often unusable. My reservation is whether the missing documentation limits the strength of her conclusions. More broadly, I also question whether historians should conduct studies of patterns of inheritance in villages with unusable court rolls.
74. See supra text following note 65.
findings of wills-based studies suspect, is the marriage or family settlement. Elsewhere, I have considered the increasing tendency among the upper strata of landed society to use the occasion of the marriage of the male heir to arrange the intergenerational transfer of the patrimony and distribute its wealth in the next generation. The will became a rather less significant document for individuals who executed these settlements because the settlement fixed the proportion of familial wealth that each member was to receive with respect to the bulk of the patrimony. As Sir Geoffrey Palmer, a lawyer whose name has been associated with the development of the strict settlement, noted in his own will: "I have disposed of my Lands of inheritance (which by God's Blessing upon my endeavors are much more than I derived from my ancestors) by Acts during my lifetime." For historians interested in the inheritance practices of small landholders with a parcel or so of freehold, the availability of settlements at marriage or thereafter requires a consideration of how far down the social and economic ladder the practice of settlement occurred.

In light of the nature of the source, the task is daunting. Unlike wills or manorial court rolls, marriage settlements are not "court documents." Rather, marriage settlements are akin to deeds, and the survival of settlements in family muniments and solicitors' collections is patchy at best even for the peerage. One would therefore expect a reduced survival rate of settlements from families towards the lower end of the social scale. Thus the existence of even a few settlements of smaller landholders might indicate that the practice of settlement was sufficiently widespread to require a historian to exercise caution before relying solely upon wills (or even court rolls coupled with wills) to ascertain patterns of devolution.

Interestingly, in Kent and Northamptonshire an extensive search of the county archives revealed that marriage settlements executed by a variety of occupational groups survive. The occupations included individuals who styled themselves clothier, draper, fisherman, schoolmaster, apothecary, weaver, mariner, baker, churgeon.

77. Settlements of lesser landholders survive in the collections of greater landowners primarily because the latter often served as trustees and therefore received a copy of the settlement. The county record offices generally catalogue settlements of smaller landowners with the landed family's muniments.
78. Kent Archives Office U481 T45; U1006 T1; U1006 T5B [hereinafter Kent Archives Office is abbreviated as K.A.O.].
79. Northamptonshire Record Office Acc. 1972 6189, Bundle 3 [hereinafter Northamptonshire Record Office is abbreviated as N.R.O.].
80. K.A.O. U1158 T68.
81. K.A.O. U1738 T55.
82. K.A.O. U548 T36.
83. K.A.O. U769 T78.
84. K.A.O. U1063 T61.
85. K.A.O. U779 T457A.
doctor of physic, and clerk. These were primarily men whose landholdings were likely to constitute a small portion of their wealth. Yet, they prospectively arranged for the support of their surviving spouse and the intergeneration transfer of land through either marriage or family settlements. Likewise, the survival of relatively large numbers of marriage and family settlements of the yeomen indicates that men whose incomes were more directly derived from land also transferred property through inter vivos measures. In Kent, where their wealth was often considerable, or at least reknown, settlement practice was not uncommon. Moreover, the use of settlements was not limited exclusively to the wealthy farmer. Marriage settlements of laborers and husbandmen also survive, suggesting that the practice was not confined to the relatively wealthy.

Attempts were made to link the marriage settlements of the twenty-one seventeenth-century Kentish yeomen and husbandmen to these men’s respective wills. Unfortunately, the connection could be made in only six instances. While it is tempting to suggest that the remaining men saw no need to secure the devolution of their property through the probate process, other explanations for the low level of linkage are also plausible. Given the degree of geographical mobility in early modern England, some men may have moved to a different probate jurisdiction after executing a marriage or family settlement. Others may have been so economically successful that the diverse geography of their landholdings brought them to the Prerogative Court of Canterbury. Finally, misfortune may have rendered them substantially without property. The inability to link settlors with wills is therefore difficult to explain; and one should consequently eschew rash conclusions even when they support one’s own argument.

Accordingly, caution is required before suggesting that the increasing practice of inter vivos settlement at marriage rendered the will less crucial in directing the devolution of property merely because the wills of most of the settlors are missing. Nevertheless, the attempt to

86. K.A.O. U1045 T1.
87. N.R.O. Baker MS, no. 714.
88. K.A.O. U1063 T45H.
89. The Kent Archive Office contained 21 settlements. The Northamptonshire Record Office contained seven settlements.
90. For examples of a laborer, see N.R.O. Tryon MS 292; K.A.O. U774 T681. For data regarding husbandmen, see K.A.O. U774 T745; N.R.O. Silverman (G) 229, Tryon MS 290/1.
91. The individuals were:
   John Bradford: U771 T170, P.R.C. 17/78, fol. 460.
   William Dyne: U511 T46/3, P.R.C. 32/54, fol. 212.
The numbers following each name refer to Kent Archives Office records.
92. A check of the calendar of wills probated in the Prerogative Court of Canterbury uncovered no corresponding will.
link settlements and wills sheds light upon the reliability of studies of property transfer that are based exclusively on analysis of wills. Three of the six individuals did not confirm *inter vivos* settlements in their wills even though they clearly possessed settled lands at death. For example, Henry Streatfield, a Kentish yeoman, settled land upon his son Richard shortly before dying. His will, however, does not recite the terms of the conveyance. In this particular case, the terms of the conveyance are crucial to an assessment of property devolution because the settlement required Richard to pay his sisters sums totalling £110. Accordingly, what appears in Henry’s will as rather insubstantial gifts to his daughters was really a “topping-up.” Similarly, in 1677 William Lydd of Dyne’s will left only a total of £11 to his nephews, while leaving four acres and the residue of his estate to his niece. In fact, the testator had divided the property differently because by operation of a marriage settlement the eldest nephew succeeded to twenty-nine acres.

V. CONCLUSION

Analysis of the Preston court rolls and the survey of *inter vivos* settlements of freehold reveals the complexity of the process of property devolution. Landholders frequently used marriage and family settlements and surrenders and admittances in the court rolls to effect *pre-mortem* transfers. Wills simply do not reflect these transfers because landowners saw no need to confirm *inter vivos* acts in their wills. Moreover, in Preston, approximately one-third of the copyholders never even wrote a will. Accordingly, in ascertaining the nature of devolution a historian’s reliance upon data or conclusions drawn exclusively from testamentary disposition is misplaced. Wills can assist historians in understanding the process of devolution but only with the recognition that they represent one method of transmitting property rather than the totality of inheritance.

93. The three individuals were Bradford, Dyne, and Streatfield. *See supra* note 91.
95. K.A.O. U908 T302.
96. K.A.O. U511 T36/3.
98. This article is a preliminary report on a broader study of inheritance and family structure in early modern England, which will appear as a monograph in 1986.