

## ON PRIMOGENITURE.

up rents and profits for a lesser though still a considerable period. Such powers are, it is obvious, wholly unconnected with, and are indeed in their origin directly opposed to, what is known as the custom of primogeniture; a right which, supposes the owner of the estate *wholly to abstain* from the exercise of any disposing power over his property, and to leave it, by the negative act, as it were, of dying intestate, to the law to settle the course of descent; in other words, to the operation of the custom under which the estate goes to the eldest son to the exclusion of all other descendants.

Two things, therefore, are to be kept clearly distinct if we would form an accurate opinion on the merits of this controversy. One is the entire exemption of leasehold interests in land from the custom of primogeniture; and the other is, that the rule itself is an act of law, a consequence of intestacy, as opposed to an act of the party, the owner of the estate. That law, as it at present stands, will indeed give the estate to the eldest son to the exclusion of his brothers and sisters, provided the owner, before his death does no act to disturb its effect by such a procedure, as making his will, or executing a deed of gift; but the influence of this law is, for the reasons we have already stated, comparatively restricted and exceptional. In fact, primogeniture, as a feature in our law of real property, is kept alive and perpetuated by the voluntary acts of individual owners. The evils which spring from the prevalence of this custom arise from the settlers and testators themselves, who, while still in the enjoyment of their property, and in the exercise of what are considered as the legitimate privileges of ownership, choose of their own will, and tax to the utmost the skill and ingenuity of lawyers to secure, that their land shall be so settled as to devolve in a fixed and certain channel to the furthest limits which Acts of Parliament and the decisions of courts will allow. And hence it may be inferred that the allowed partiality for limiting estates to the eldest son is more than a mere consequence of defects in our system of law, or an exceptional employment on the part of testators of the privileges which that law confers. It has a deeper root in the nature of the English people and their attachment to the soil; the desire to become holders of land, and to found a family which shall inherit it. These motives are so powerful that, as is well-known, every Act of Parliament which has been passed to encourage the alienation of land and to place it *intra commercium* earlier than would otherwise be the case, has been eluded and sometimes wholly set aside by the ingenuity of lawyers, who, instructed by testators—not unfrequently persons of obscure origin who have acquired wealth in trade—frame conveyances which have the effect of settling property to the utmost limits which an artificial and strained construction of the existing law will allow, and quite opposed to, nay, almost in fraud of, the intention of the Legislature.

II. It will be seen therefore that the measure proposed by Mr. Locke King will be very restricted in its operation, and can have comparatively but slight effect in checking the excessive accumulation of land in the hands of individual owners; which is supposed particularly to be the chief evil attached to the custom of primogeniture. In what way then it will be asked can we best deal with that tendency which leads men to acquire and entail land, and which in these days so much occupies the attention of economists and statesmen? For unless the difficulty is now fairly examined, and if possible solved, without violent or undue interference with proprietary rights, a solution of this problem, attempted at a future time and under less favourable conditions, may be attended with grave results. The remedy will probably be best found in the imposition of additional restraints on that power of testamentary alienation of real estate which seems in modern times to have reached an excessive growth. For in truth if we examine the matter, the conception of a will, especially as known to English law and English lawyers, and viewed as a method of transferring property, is one of the most artificial of all possible ideas. That a man should have during his life and while his faculties remain to him, the fullest control over what he possesses as long as such control is not at variance with public policy, seems just and right; although the Roman law, it is worthy of note, which is the most perfect model of philosophical legislation, went further than the English system in placing limits on what at the present day would be considered as a reasonable exercise of the right of ownership and testamentary capacity. But that a testator should have the power, simply at his caprice, to impose restrictions on the enjoyment of property for years after he is in his grave, and in favor of persons of whose very existence he is ignorant, and of whom it is doubtful whether they will ever come into being at all, seems *ultra vires* in the highest sense of the words. It is here, far more than in other branches of the law, that the highly technical character of the English law of real property is seen. For while bequests of personal estate, that is to say, money, chattels, leasehold interests, &c., are dealt with in the larger and more equitable spirit of the civil law, with reference to which every will of personal property is expounded, and from which the law governing such instruments has been derived, devises of real estate, that is freehold interest in the land itself, rest on principles having their origin in the feudal law, in the light of which they are still interpreted. The differences between these two classes of instruments may simply be stated thus: a will of personality is regarded as the expression of the last wishes of a testator as to what he desires should be done with his personal estate; and accordingly in this class of instruments certain fixed limits, arising partly from the nature of the property itself