GAVELKIND ON THE GROUND, 1550-1700

IMOGEN WEDD

In around 1570 Thomas Hayward of *Tye Haw* in Chiddingstone married his first wife, Joan. The parish registers record the christenings of four sons, Richard in 1572, Erasmus in 1574, Thomas in 1578, and Charles in 1580, but then the burial of Joan in December 1581.[1] Trouble began when Thomas married Petronella Brightred from Sundridge, whose husband William had also died recently. Shortly after this they were arrested and charged with poisoning Joan and William with rat bane. Rat bane was a compound of arsenic which appears to have been freely available; Cockburn records a similar poisoning in 1622.[2] The Maidstone assize of March 1583 recorded that both Thomas and Petronella were convicted and sentenced to death. Petronella, however, was found to be pregnant and reprieved.[3] She may indeed have been pregnant, or this might have been a case of 'pious perjury' to save her from the draconian punishment which applied to the killing of a husband, held to be 'petty treason'.[4] Thomas' execution was recorded in the court of Tyehurst Manor on 11th April 1583.[5]

The significance of this story is as a practical example of the value of gavelkind to Kentish families; it gave an exemption to the common law which ruled that the lands of a felon were forfeit, escheating to the manorial lord. Gavelkind is a well-known and distinctive feature in the history of our county but there has been much debate as to whether it was still of any practical significance by the early modern period. This article is an exploration of that question. The first part describes the principles of gavelkind and how they operated in the lives of landowners in the sixteenth and seventeenth centuries. The second looks at avoidance, through wills, settlements, conveyances, and disgavelling Acts. (A separate paper will examine the possible consequences for land ownership and the society and economy of Kent as a whole.)

In addition to protection from forfeiture under the felony law the provisions of gavelkind included rules on wardship, the age of majority, dower, and on the disposal ('alienability') of land. It is best known, of course, for partible inheritance among sons, but of equal significance was that land was freehold, giving its owners status, voting rights, and access to the royal courts. Some other features had largely died out by 1500 or were no longer understood, not least where, as one local solicitor suggested, 'the rule was expressed in a Kentish dialect of which the [London] clerks were ignorant', a suggestion which the pronunciation of our place names renders not wholly unbelievable.[6]

Uniquely among local customs it was the default system of the whole county; manorial custom did not have to be demonstrated, it was 'as a general law', giving

it the dignity of the title of the 'Common Law of Kent'.[7] For inheritance matters no special evidence of the custom (such as previous partition) was required, effectively this reversed the onus of proof onto anyone wanting to claim another tenure. Lands in Kent were presumed to be of the nature of gavelkind.[8] This is significant in two ways, in giving it a higher status than other local customs, and in securing its perpetuation.

In the medieval period, the influence of partible inheritance alone was probably significant. J.E.A. Jolliffe, writing in 1933, said:

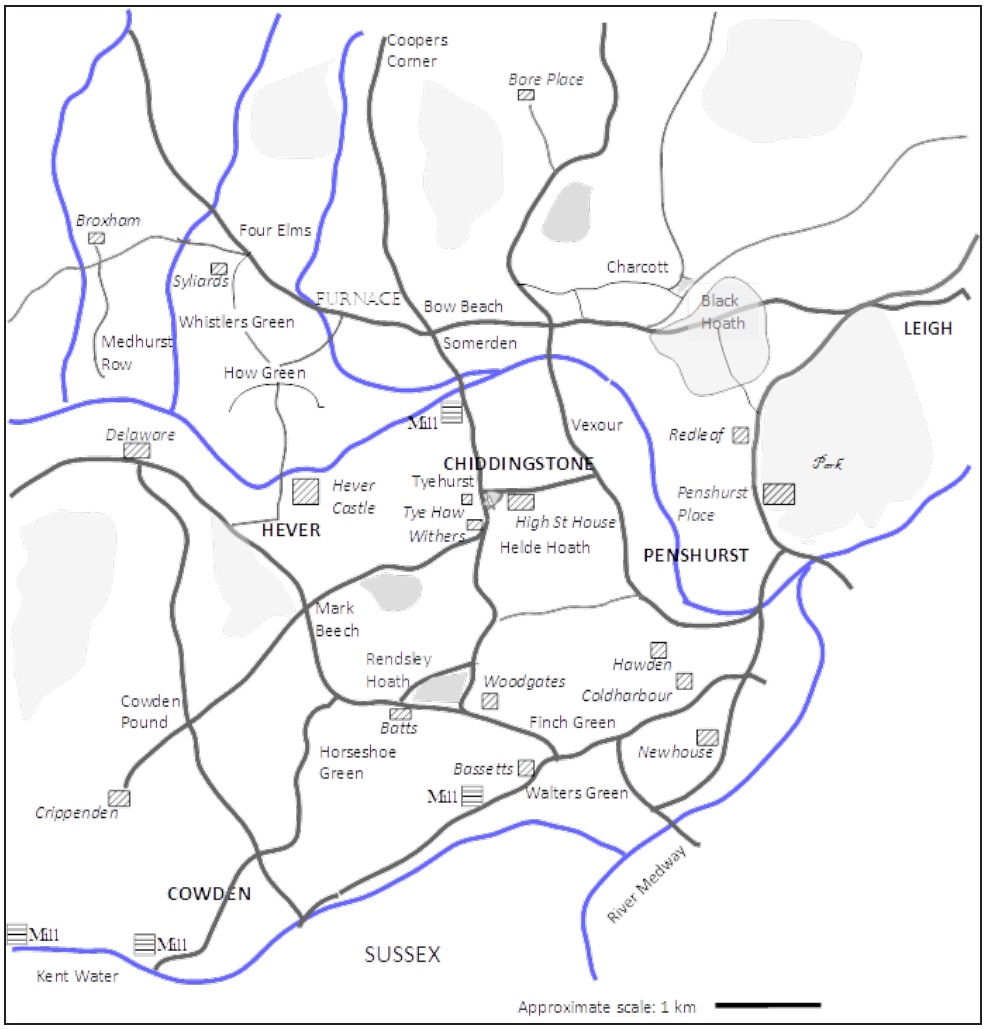
> Gavelkind, the partible inheritance of land, which was the custom of the peasantry of Kent before the Norman Conquest, became the common law of Kent after it, and as such was pleadable in the king's courts. So much is recognized in every law-book and is a commonplace of every economic history. Yet it is doubtful if the full implications of the fact have been realized.[9]

In his mind were certainly some of the distinctive features of Kent: a landscape pattern of scattered settlements, small enclosed fields, and subsidiary farmhouses, a predominance of middle-sized yeoman estates rather than dominance by wealthy aristocrats, and the readiness of the men of Kent to defend their rights. However, by the early modern period changes in the law had provided landowners with the means to evade the inheritance rules: the establishment of the right to devise by will, the development of 'uses' (predecessors of the trust), and private disgavelling Acts (converting partible inheritance to primogeniture). Some historians argue that this had rendered gavelkind obsolete, or at best residuary. Peter Clark, writing of Kent in the period 1500-1640 has said:

> ... while partible inheritance was probably more widespread and important in Kent than any other county before 1640, it would be wrong to see it providing a central clue to other peculiarities of the county's agrarian economy, even less to view it as a central motif in the community's social or political life.[10]

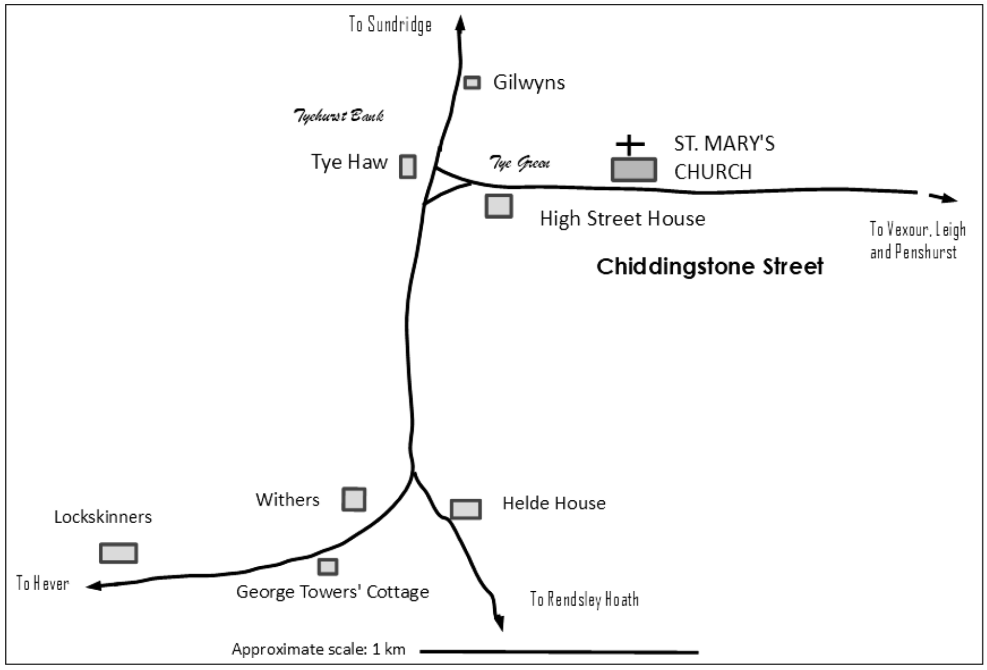
However, Alan Everitt had a different view. Writing of the civil war, he saw gavelkind as a factor not only in the agrarian economy but in the political situation, and in forming, in Joan Thirsk's words, 'a socially distinctive county in which kinship and the rule of partible inheritance shaped local loyalties and significantly affected the course of events'.[11] Which of these different views is nearer the reality?

How we see the significance of gavelkind may depend not just on the period we study but on the sources we use. The documents most commonly available to investigate land are manorial records; the ground-breaking work of Jane Whittle and French and Hoyle were made possible by their survival and availability.[12] However, they are most useful for customary tenants, and have limited value for freeholders where the role of the manor was reduced. Bruce Campbell has described the consequence for historical research as a 'pronounced historiographical bias' towards customary tenants.[13] The second most commonly used, estate papers, are slanted towards the gentry and aristocracy, families whose papers are most likely to survive in the muniment rooms of country houses or in county record offices. This is a particular problem in Kent where small freeholders dominate, where the survival of records for lay manors is rather poor, and where estates are scattered and fragmented.[14]



Map 1: Sketch map of the Hundred of Somerden in the south-west corner of Kent. Based on E. Hasted's *History and Topographical Survey* (1997), amended from title deeds and other sources.

The research for this article used an alternative methodology: a reconstruction using all the available records, including title deeds. When historians have used title deeds this has generally been to investigate a type of transaction, such as Lloyd Bonfield's research into marriage settlements, or a type of family, as in Laurence Stone's investigation of the aristocracy.[15] Here, they were used to draw up the history of a property, akin to family reconstitution but for land, and were supplemented with probate, parish, administrative and tax records to reconstruct the owners. The result could not provide a complete picture of all properties in the area, but it allowed a view of small freeholders which is difficult to achieve in other ways.[16] The area investigated was the Hundred of Somerden (**Map 1**).



Map 2: Sketch map of Tyehurst (in Chiddingstone parish). Based on title deeds and other sources.

Somerden is, as its name suggests, a former 'den' of wood pasture in the Weald. It was dominated by the large parish of Chiddingstone, with parts of Cowden, Penshurst, Hever, Leigh and Edenbridge. The Low Weald is here at its narrowest extent, broken here and there by hoaths, outcrops of sandstone amid the heavy clay. This is wet land; a tributary of the Medway winds its way through all but one of its parishes, and the Kent Water bounds it to the south. The den was originally attached to the upland manor of Sundridge, and the road from Sundridge still passes down the scarp of the sandstone hills into the Weald along the line of one of the ancient drove-ways.[17] This road crosses the river at Chiddingstone Mill and reaches Chiddingstone at Gilwyns crossroads. Here the original road was realigned in the nineteenth century to divert traffic round the new park of *High Street House* (now Chiddingstone Castle). In Thomas Hayward's time the 'Quene's highwaie' continued south to Tyehurst, passing the small triangular Tye Green with its pound, to reach Hill or Helde Hoath at the top of the hill. There the old road divided, one lane going to Hever and Four Elms, the other to Rendsley Hoath and on to Finch Green and Penshurst.[18]

The village street, later partly subsumed into the new park, ran from Tye Green eastwards past the parish church to Vexour (**Map 2**). Thomas Hayward's house, *Tye Haw*, faced the green, looking down the length of the village street, at right angles to *High Street House*. The Hayward family also owned a house called *Helde House* a short distance up the lane at Hill Hoath, and a larger farm, *Lockskinners*, on the Hever road. Opposite *Helde House* was *Withers*, the farmhouse for the land

at Hill Hoath. The families at these properties, the Haywards, Piggotts, Everests, and Streatfeilds, with their kinsfolk the Combridges, Ashdownes, and Woodgates, provide the examples which follow. Some of these yeoman families were Tudor newcomers, some had very ancient roots in the area indeed.

The Common Law of Kent

The earliest primary source for gavelkind is the Custumal of Kent, written down around 1300, when legal and administrative records were first being systematically recorded in writing.[19] The sixteenth-century lawyer and antiquarian William Lambarde copied a version which he thought dated from Edward I (1272-1307).[20] Thomas Robinson of Lincoln's Inn produced a treatise on gavelkind and Borough English in 1741, in which he reproduced Lambarde's copy, with notes on the differences in two other texts, one from Tottel of 1556 and one from a copy in Lincoln's Inn.[21] In modern times the archivist Felix Hull found a total of eight texts up to the sixteenth century, of which the earliest dated from around 1300.[22] The suggestion, incorporated into some versions of the custumal, that it was accepted as the 'Common Law of Kent' at the Eyre of Kent under John de Berwick in 1293, has not been confirmed from the original rolls, despite exhaustive searches by Robinson himself. However, Sinclair Williams thought it not unlikely to have emerged from *Quo Warranto* ('by what authority') proceedings instituted in 1290, and Hull found legal activity in the years immediately following, in particular at the Eyre of 1313/14, suggestive of additions and clarifications to a recent document.[23] In 1925 Nellie Neilson analysed gavelkind as an example of local custom in the period before 1350, using the Year Books.[24] In addition to the main rules she found occasional secondary customs which were only indirectly related to land such as rights in the dens and rights of way, customs of commoning and manorial services.[25] Her evidence suggests that the law was being refined in the period immediately after 1300, with a particular focus on the ability of king and courts to alter the tenure, which fits the description of developments just after 1300 described by Hull.

Much early interest in gavelkind was a search for its origins, on which there was no definitive conclusion. In 1998 Richard Smith described the historiography, so just a brief summary is appropriate here.[26] Commentaries were written in the sixteenth and seventeenth centuries by William Lambarde (1570), William Somner (1647), and Silas Taylor (1663); but a detailed treatise on the law had to wait until that of Robinson (1741), and an analysis of the extent of the tenure to Charles Elton (1867).[27] The Custumal of Kent, quoted here and elsewhere from the version given by Lambarde, says that the custom 'furent devaunt le conquest'. Given the Anglo-Saxon etymology, the weight of evidence seems to lie in a Germanic origin, probably dating from the 'Jutish' settlement.[28] Other forms of partible inheritance are found earlier, but these, like the Irish type, tend to be based on communal or clan ownership of land whereas the Kentish form is based on individual ownership and heritability.[29] The 'Invicta' legend of the Moving Forest of Swanscombe by which the Men of Kent secured their customs from William the Conqueror, was given no credence by the antiquaries, but has not been wholly dismissed by Sinclair Williams, who points out that the Customs of London were ratified shortly

after the Conquest, or by Hull, who quotes a reference to it as early as the 1280s.[30] However, we only have documentary references from slightly after the Conquest. Paul Barnwell has dismissed a 'Jutish' origin for gavelkind, on the basis that the peculiarities were survivals from a pattern which was once more widespread.[31] Partible inheritance is found in manors elsewhere, more common in some areas than others, and may once have been the dominant form of inheritance for free tenants.[32] The Kentish custom occasionally extended into Sussex, particularly on the areas of reclaimed marsh which are across the county boundary.[33] However, no other area had such a widespread and complete system; gavelkind was the default system of the whole county and it became the type by which partible inheritance was known generically.[34]

Perhaps even more curious to us today is the fact that gavelkind survived the imposition of military tenures after the Norman Conquest and the rise of primogeniture. There were attempts to abolish it, yet it survived until the re-codification of property law in 1925-26. Kentish writers like Everitt tend, atavistically, to attribute this to the singular independence of the men of the county and their sense of identity, fitting for a county which was once a kingdom in its own right.[35] With much of the county nearer to France than London, its geography is peculiarly designed for independence, and before turnpiking parts of the Weald were isolated by the terrain and soils. Barnwell thought the answer to the survival of the custom lay in the 'political geography' of the county; its peculiarities were a survival in what became a political backwater.[36] Yet this is hard to credit; its coast commands the narrow seas towards France and the Netherlands, the land and sea approaches to London and the east coast, and the high ground overlooking the Thames. Simon Keynes has argued that it was the very importance of Kent strategically which ensured the survival of gavelkind.[37] Either way, the obvious deduction is that the men of Kent were attached to their ancient custom, evidence that for them it performed important social functions. William Somner suggested that this was because yeomen were less concerned than the knightly class to uphold 'their name or house' at the expense of their family.[38] The features of gavelkind were significantly known as 'privileges', and were deemed to represent particular freedom, as Thomas Hayward's case shows.

GAVELKIND IN OPERATION IN SOMERDEN HUNDRED

The Rule on Felony[39]

For a felon such as Thomas Hayward, the common law provided that his freehold lands escheated to the manorial lord, who in turn had to pay a year's proceeds to the crown. In Kent the felony law was exempted as one of the privileges of gavelkind; this is described by the well-known couplet:

> The father to the bough
> The son to the plough

This is a translation from the early English, whose meaning has been debated; in all probability the word 'plough' should read 'logh' or homestead.[40] Whatever its origins and strict meaning, Thomas' case shows that it was a principle which was

still in practical operation, and continued for some up to the abolition of escheat in 1870.[41] Although the gavelkind lands of a felon went to the heirs, his goods and chattels were still forfeited to the crown. There was an exception to the rule where the culprit was convicted of treason. Sir John Isley of Sundridge was implicated in Wyatt's Rebellion and executed; he lost his lands, although his son was later allowed to buy them back.[42] Robinson held that even in such a case, when the land was regranted by the Crown inheritance would be partible.[43]

This was not a common situation; only one other instance is known for this area, a case recorded in Cowden in 1476 when Richard Wicking, of another ancient local family, was executed.[44] There were other felonies and it was only too easy to hang, but for a freeholder to be in this position was less common. Nevertheless, if the occurrence was infrequent the value to the family was great. Eric Kerridge suggested that this rule alone was one reason for the Kentish resistance to the abolition of their custom.[45]

Wardship

No more was heard of Thomas Hayward's sons until they reached adulthood. They may have grown up with their kin at *Lockskinners*; it is suggestive that *Lockskinners* was sold by Richard Hayward senior in the year that the youngest came to adulthood. Certainly, they would have been in the wardship of a guardian. Under feudal law a minor who inherited under knight service tenure was in the wardship of the lord, who held the land and could arrange the ward's marriage.[46] For socage tenure, the next of kin not inheriting was the guardian. However, those who inherited even a small portion of land in chief came under the 'Prerogative Wardship' of the Crown. This was valuable for profit and patronage. The Tudors sought to revive the prerogative and its profits from the sale of wardships; the Court of Wards was set up in 1540. It was greatly disliked, was suspended by the Commonwealth in 1646, and abolished in 1660. The guardian was in a position to avail himself of the income of an estate, and if unscrupulous of the capital asset, and to arrange the marriage of the heir.

Under gavelkind, as with common socage, the heir was in the guardianship of the nearest relative who could not inherit. At its best this was a significant protection against exploitation. Shortly before the trial of Thomas Hayward, little James Beecher of *Brook Street Farm* at Vexour was left fatherless, with his property mortgaged. His guardian, John Beecher of *Wickhurst*, was particularly conscientious in securing his future, and by the time James came of age thirteen years later he had redeemed the mortgages, and accounted to him in form for his management of the estate.[47] Things were not always so satisfactory, even with gavelkind land. In 1680 Oliver Combridge, the heir to *Hawden* in Penshurst, sued his stepfather. Oliver had been left in the guardianship of his grandfather and uncle but his uncle had died and his grandfather was preoccupied by his own difficulties so that his affairs were left to his mother and her new husband who, he said, wasted the estate.[48] The protection was therefore not certain, but must have been a significant safeguard against exploitation by a relative in the line of succession, or by a lord.[49] As Oliver's case shows, the wardship rule could be over-ridden by the appointment of a guardian by the father, known as 'testamentary wardship'.[50]

Age of Majority

Thomas Hayward's sons could take over their land when they attained the age of majority. According to the Kentish custom, this was at fifteen.[51] At this age a boy could both marry and sell his land, although he could not bring an action in the courts until he was twenty-one.[52] The age of majority for gavelkinders was ratified in the reign of Edward II by a writ to the Justices in Eyre in 1313/14.[53] In fact, there is little evidence in Somerden of holding to the old custom. By 1600 the commonly accepted age of majority had, in daily practice, become 21. However, there are examples elsewhere during the seventeenth century of boys selling land at the age of fifteen, looked on with a little suspicion, but nevertheless held to be lawful.[54] There are also instances where a father left his property for his son to inherit at fifteen: in 1606 Richard Streatfeild of Penshurst did so, possibly adhering to old tradition, but more probably because this was the age in which he might need to buy an apprenticeship.[55] Unless alternative provision was made, the default applied, so the Hayward sons reached their ages of majority between 1587 and 1596.

Alienation

In 1598, Thomas Hayward's eldest son, Richard, now aged 26, sold his share of *Tye Haw*; by June 1606, the youngest son, Charles, 'yeoman of Chiddingstone', had done the same. The property passed to the Willoughbys, gentry landowners from *Bore Place* to the north. It was then sold to William Birsty of Hever, whose new wife, Anne, was the widow of the adjacent owner and Tyehurst manorial lord, Richard Streatfeild the ironmaster.[56]

The Custumal of Kent says 'and that they may their landes and their tenements give and sell, without licence of their Lordes; Saving unto the Lordes the rents and the services due out of the same tenements'.[57] This was a privilege; in some areas, family land in the Middle Ages was due to the next heir and could not be sold outside the kin. This is perhaps a hangover from the Saxon distinction between 'folkland' – land which was inherited – and 'bookland' – land which was granted. The latter was held by charter, and the former, by implication, under customary tenure.[58] Bookland could be left away from the family, for example to endow the church. Sometimes this distinction was still to be found; Somner suggested that for inherited land, unlike purchased land, the heirs had to be included in a deed of sale.[59]

Customary land was very much under the control of the manor. It required permission of the lord for a holder to sell. After the fourteenth-century population crisis, unfree land was gradually converted into 'copyhold', held by a document which was an extract from the court rolls. By the seventeenth century the law was developing to allow copyholders to sell, as freeholders could, but this always involved a surrender and re-admittance in the manorial court. It is difficult to exaggerate the importance of the freedom to alienate. The debate on agrarian reform has often turned on the freedom or otherwise of copyholders to alienate; for gavelkind this was never in doubt. This is critical to the development of a market in land, and it is not hard to see that it would be a factor in the type of society which developed. Perhaps one reason for the difference between gavelkind in Kent

and European systems of partible inheritance where property was successively divided into ever smaller holdings is that freedom to sell counteracted partition, allowing for both geographic and social mobility. But what were they selling under a principle of partible inheritance?

Partible Inheritance

After Thomas Hayward's execution, the manorial court duly affirmed the heirship of all his sons equally under gavelkind.[60] By default, inheritance was as 'coparceners', that is in 'undivided shares', although these shares were inheritable, devisable and saleable rather than accruing to the survivor. In order to take possession in 'severalty' a partition would have to be made by legal deed, allotting to each son particular lands, a process known in Kent as a 'shift'. If one of the parties did not want the partition, there was a writ to submit to the court.[61] The Haywards sons sold their undivided shares to Thomas and Percival Willoughby one by one, until the Willoughbys owned the whole property.

In 1597, *Lockskinners* was sold by Richard Hayward senior to Thomas Everest.[62] It was inherited after his death by his son Thomas Everest junior, and in 1650 as coparceners by his two grandsons, who opted for immediate partition. In a partition, the eldest brother had the privilege of choosing his property; however, in the rare instances where the capital messuage itself was divided the youngest son got the part with the hearth, and then his brothers took their choice.[63] This occurred at *Lockskinners*; William, the younger son, took the half with the chimney piece, and Thomas took the part behind the chimney.[64] Every field and farm building was listed in detail, with the rails and divisions to be made and how the costs were to be paid. Practice varied with the circumstances, but commonly there was a very precise valuation, any discrepancy being adjusted by a cash payment.

In the Somerden records there were twenty surviving partition deeds for the period 1550-1700 but the true extent of coparcenary is probably indicated by the fact that of 175 sale conveyances over the period 22% (39) were of divided or undivided shares.[65] Many properties were held in common for decades, the coheirs sharing the rental value, or one farming and paying his brothers their share.[66] It was perfectly possible for a shared property of this type to be invisible in the record for many years. The Lockyer brothers, both wheelwrights, held *Butt House*, a few yards from *Tye Haw,* as coparceners without any partition until it was sold.[67] Such undivided shares were marketable, capable of providing a foothold on the property ladder. William Webb, a miller, purchased a three-quarters share of Edenbridge Mill, and two years later was able to purchase the remaining quarter. By the time he died twelve years later he had acquired a mill at Hadlow for his younger sons to share.[68]

Under gavelkind daughters had no rights to land where there were sons, but where there were not, they inherited as coparceners and could be desirable heiresses. Daughters could inherit a father's share if he died before himself inheriting.[69] The purchaser of *Tye Haw* was William Birsty who had married the widow of Richard Streatfeild the ironmaster of *High Street House*. His youngest stepson, Thomas, died in 1627 leaving four small daughters who inherited two manors and several freehold properties. In this case it was fifty years before a partition took place,

by which time they had all been widowed. By contrast, in the Jemmett family of Edenbridge there were repeated partitions over a ten-year period as each of Timothea Jemmett's unmarried daughters died.[70] The position of daughters was in theory disadvantaged, but things were not quite as this seems. No daughter in the research was left entirely without provision, and although they received cash and goods more often than land, this provided a marriage portion, and as a widow a woman was entitled to dower.

Gavelkind Dower

Under the common law a widow was entitled to dower of a third of the property for life; under gavelkind this was half (a 'moiety'), but only until she remarried or had a child, and this condition could not be avoided by the widow opting to take dower at common law instead.[71] There were cases where the widow could live into very old age, which would be much to the disadvantage of the heir. When Sarah Streatfeild died in March 1693, she had been a widow for 39 years, her first husband, John Woodgate of Rendsley Hoath, having died at the age of 30 and her second husband, John Ashdowne of Hever, at 31.[72] On occasions the widow would release her right to her sons; in 1648 Susan Lamb, widow of Henry Streatfeild, released her right of dower in return for a cash payment.[73] Difficulties would be less likely to occur where, as here, the heirs were her own children.

Dower of a half appears to date back to the early days of the English settlement. 'If she bear a live child, let her have half the property if the husband die first. If she wish to go away with her children, let her have half the property' say Chapters 78 and 79 of the Laws of Aethelberht of Kent (560-616), though it is a little uncertain if this is her husband's whole property or merely the *maritagium* or marriage gift.[74] Of particular significance is the rule that the right of dower was of all the husband's lands held during the marriage, even if disposed of before his death; so that particular conveyancing practice was required to ensure that a purchaser had good title.[75] Normally dower lands were specifically allotted to her by agreement and held in severalty, but in theory could be held in common with the heir if this suited both parties, or if the estate was held undivided in coparcenary by her husband.[76] The widow under gavelkind was therefore more generously treated than under common law, but at the same time the heir was better protected. Manors elsewhere in the country could have a similar principle, but the generality was for dower of a third, a principle so entrenched that 'her thirds' became a synonym for a widow's dower.

The position for a widower was similar in some respects to that of the widow: under 'curtesy' he had a moiety of the wife's estates until remarriage. Unlike common law, there was no requirement that children had been born of the marriage, and even if there were, he could only claim a half.[77] Robinson, like Somner, described both dower and curtesy as 'special customs incident to Gavelkind'; that is, they were not intrinsic to the tenure, but were 'by immemorial Usage annexed to land of this Tenure', remaining even if the land was disgavelled.[78] This was partly to press gavelkind into conformity with legal theory (the doctrine of tenures), partly to emphasise that it attached to the land with no 'personal prescription', but it was also a legal ruse, separating the inheritance 'law' from the 'special customs', so that disgavelling did not cost the holders the advantages of their privileges.[79]

Freehold Land

Last, but most importantly, gavelkind land was freehold. Lambarde's often-quoted comment that Kentish yeomen 'rejoiced exceedingly' in their condition was no exaggeration. There was an obvious financial advantage. The freeholder in Kent paid modest dues to the manor, but otherwise was at liberty to do as he wished, and freehold land carried with it not just personal freedom but status. After 1436 voting had a property condition of an annual worth of 40 shillings (£2) per annum; by 1500 a small yeoman farm would have met this qualification easily. In 1587 the demesne land of Tyehurst manor, 70 acres, was leased for 230 shillings (£11 10*s*.) per annum, about 3*s*. 4*d*. an acre, and by 1600 few rents were below 5*s*. an acre. Freeholders had access to the Royal Courts, whereas holders of customary land could only act through the lord, and leaseholders through the freeholder. This was a problem if the dispute was with the landlord himself, though the law developed in the sixteenth century to provide them with a remedy through the writ of 'ejectment'.[80]

Because gavelkind was the default form of tenure, Kent was a county dominated by freeholders, and the significance of this should not be overlooked. Throughout history the people of Kent were found to be disproportionately involved in riot and rebellion, and often it was the middling sort who were the leaders in these risings.[81] We should not, however, make the mistake of interpreting this as radicalism. It was the opposite: a readiness to defend their liberties, customs and privileges.

Gavelkind and the Courts

The Manor Courts: because the land was freehold, the duties of the manorial Court Baron were largely limited to establishing the heir and recording changes of ownership.[82] *Tye Haw* was in the manor of Tyehurst; tenant lists show that the freeholder in 1612 was William Birsty, in 1656 his grandson Anthony Combridge, and in 1700 the lord, Henry Streatfeild.[83] This is as much as we are likely to learn for most property. Recording is poor at best, where the rolls survive at all. Courts were for long periods held only annually, and changes are often recorded years after the event. The ownership of one Chiddingstone property, *Gilridge*, was between two and six years out of date throughout the seventeenth century, and in one instance misleadingly incorrect.[84]

The lord was entitled to charge feudal 'incidents' to the manorial tenants, but the charges in Kent were light.[85] In addition to a small lord's rent or 'quit-rent', there were sometimes additional dues: a heriot of the best beast or 3*s*. 4*d*. on inheritance, and relief, commonly one year's quit-rent on entry. Henry Streatfeild the lawyer (d.1747), recorded the details of his property in twenty-two manors in Kent, for three of which he was himself the lord, and to the remainder of which he was a free tenant.[86] In the manor of Tyehurst the liability was for quit-rent only. The dues were fixed by custom, so with inflation the real value was declining by the late sixteenth century, greatly to the advantage of the free tenant. For Tyehurst the quit-rents remained at 14*s*. 7½*d*. throughout the seventeenth century. The holder was still paying 8*d*. for *Tye Haw* in the 1690s, when the leasehold rent (with a 3 acre field) was £5 10*s*.[87] Eventually the lord began to buy in the holdings; it must

have been to his advantage to obtain the land and farm it out at market rent.[88] By the early eighteenth century most of the land was being leased as Tyehurst Farm, and only quitrents of 2*s*. 10*d*. remained.[89]

Freeholders were not only liable for manorial charges. In the early sixteenth century, the owner of *Bore Place*, Sir Robert Rede, was paying ecclesiastical dues ranging from dues to the Archbishop and Priors at Canterbury to 'Peter's Pence'.[90] Although the Reformation removed many of these dues, landowners now had to pay not only tithes but poor rates, and over the seventeenth century increasingly punitive land taxes. In 1655 John Evelyn noted that he had disposed of his Manor of Warley Magna in Essex, because 'the taxes were so intollerable that they eate up the Rents etc'.[91] By the end of the century the problem for small landowners had escalated: William Streatfeild, tenant of *Delaware*, recorded 'An Account of what money I have disburs'd for my Cosen Streatfeild to be allowed out of Lady-Day and Michaelmas Rents in the Year 1704'. He had paid £61 7*s*. 3*d*., including tithes and four tax assessments, at a time when his lease rent was £190 per annum.[92]

In sum, the manorial court baron had an interest in listing the tenants, accounting for quit-rents, establishing whether heriot or relief were due, and establishing the heir, but not in resolving disputes about the minutiae of the law.[93] For this the tenant in gavelkind had recourse to the king's courts, a right which was clearly laid down in the nature of the tenure.

The Royal Courts: there was no detailed legal treatise on gavelkind before Robinson. Littleton, the great authority on tenures, mentioned it only in passing, although much of what he said would be applicable both to the common law and to gavelkind. He did not, for example, draw out the distinctions between dower at common law and dower under the custom of gavelkind, but he did describe the methods of partition and the options for holding land jointly.[94] Those wishing to establish the law would therefore have to search the court rolls. This was no simple matter. There was no control of reporting until 1865, and comprehensive publication had to wait until after 1900. Every lawyer would have kept a commonplace book, but would also have searched the private ('nominative') reports. Up to the mid seventeenth century there were less than a dozen of these; then within a few decades over fifty appeared.[95] Quality varied, and the same case might appear in more than one report, perhaps even in conflict with one another. The 1858 edition of Robinson cites 166 cases of significance, scattered between a plethora of reports. The important case of *Wiseman v. Cotton* of 1662 is referenced on different pages to Hardres (1655-1669), Siderfin (1657-1670), Levinz (1660-1690), and Raymond (1660-1684).[96] Different reporters highlighted different elements of the judgement.

By the sixteenth century property cases were heard in both the common law courts and the courts of equity, sometimes in competition with one another. Over thirty cases can be found for Somerden. Four cases were heard in King's Bench and two in Common Pleas. These were generally day-to-day disputes about matters such as the removal of animals by way of distraint from disputed property, and disputes over payment of portions, dower and debt.[97] The debts of Timothea Jemmett's son-in-law, John Reddich, feature largely. A more interesting case occurred in 1680 about *Princkham's Farm*, Chiddingstone. The purchaser, Richard Stevens, had taken the property by a long lease of 1,000 years to avoid heriot, but later changed

his mind and took a conveyance. In the confusion the tenant had been wrongly ejected.[98]

The equity courts saw 30 cases in Chancery with one in Exchequer, but they are not much more informative. The Exchequer case related to a mortgage.[99] The Chancery cases include disputes about the title of a vendor to sell where there was a pre-existing conveyance, actions on legal obligations secured on property subsequently sold.[100] Again the debts of John Reddich appear. The most common causes are allegations of waste, most often the felling of trees. In about 1600 Richard Ashdowne sued his sister-in-law for felling of trees on his brother's property, *Batts* at Rendsley Hoath, and the alteration of the title deeds; her reply was that her husband's will entitled her to fell a certain number of trees, and that she had had the title deeds read through by Thomas Willoughby, and copied by the scrivener Nicholas Hooper of Tonbridge.[101] Other complaints were the failure of the landlord to repair farm buildings, and a claim in the Carter family to land in Leigh.[102]

For a brief period the Court of Requests provided a quick resolution to disputes over wills, marriage settlements, and the ownership of land, but few Kentish cases occur after 1550; the only one which relates to Somerden is just before this date.[103] The Court of Wards and Liveries heard a local case concerning gavelkind, but argument and principle, as so often in this period, are sadly lacking.[104] This concerned *Wilderness* in Seal whose owner had left it to his eldest son not wanting it to be divided, leading to conflict with a younger son.

Inquisitions Post Mortem occur in small numbers. James Beecher, 'late of *Moreden* in the parish of Leigh' had left his lands between his sons. The Escheator for Kent issued a writ regarding the status of *Beechers*, a property in Hale Lands, which was found to be held in chief so that a new partition had to be made.[105] In theory these cases might be helpful in establishing the nature of tenure, but ended 1640 and were finally abolished with the 1660 Tenures Act.[106] Even here one cannot be entirely sure that the case was not prompted by enmity or cupidity.

The story so far is one of gavelkind operating in its usual ways. It is a picture of freehold land, partible among sons, with privileges relating to felony forfeiture, generous treatment of widows, and the ability of owners to sell and devise, the former even from the ancient age of majority of fifteen. By the end of the seventeenth century a complex body of law had developed. However, this is only half the story, for the law had also developed ways in which the customary law could be evaded. It is the argument of those who downplay gavelkind that these ways were almost universally employed. The next section will examine how far we can draw conclusions from the evidence of this one area of Kent.

AVOIDANCE

It has been shown how the sons of Thomas Hayward of *Tye Haw* benefited from the exemption from felony forfeiture which gavelkind provided, inherited his property as coparceners, grew to adulthood and were able to sell their undivided shares. It has also been described how *Lockskinners* was sold by Richard Hayward to the Everest family, and partitioned in a subsequent generation, and how *Tye Haw* and

Helde House were acquired by William Birsty of Hever and became the inheritance of daughters. In just this small area of Somerden Hundred around a single hoath there are examples sufficient to provide an illustration of the experience of default gavelkind provisions in the sixteenth and seventeenth centuries.

But what of the argument that they were routinely avoided? Landowners who held gavelkind land had four options for avoiding the rules. The most drastic was to obtain an Act of Parliament to change the custom of the land permanently, to 'disgavel'. Short of this, they could draw up a settlement determining the inheritance of widow and children. Alternatively, they could make a joint purchase of land with a named child. Finally, they could make a will at the end of life. This second part of the article looks at these tactics and how far they were utilised in practice. It then looks at the question of how much land in Kent was held in other tenures. Analysis of disposition of land has tended to emphasise gentry and aristocracy, giving them undue prominence in history. The reconstruction of land ownership in Somerden allows an insight to the yeomen who were the predominant gavelkind holders.

Settlements

Settlements are the devices most commonly thought to have been used to evade gavelkind. They were usually employed on the marriage of a son, sometimes on the landowner's own marriage. This was a flexible device based on the *use*, whereby property was transferred to trustees for the benefit of others.[107] It began in a simple way in the medieval period, but during the sixteenth century it developed in sophistication, and by the late seventeenth century had attained the form known as the 'strict settlement' which depended on a development in the courts which recognised the rights of children as yet unborn.[108] A settlement could be used to provide for inheritance by a son, or for a widow in substitute for dower, or for a portion for a daughter on whom the custom was silent. In the strict settlement form, it could determine the succession by a type of heir, usually eldest male heir. Often a single settlement met multiple purposes. It could be drawn up at any time, but was commonly prenuptial when it was held to be a binding contract between the parties.

From an examination of the data for Somerden it becomes evident immediately that bypassing partible inheritance was not the main purpose of most settlements. Of 157 provisions made in the 105 surviving deeds, 44% (69) were provisions for wives, 10% (16) provision for daughters, and 28% (44) provision for sons, 11% (17) were making provision for retirement, or separation, or for grandchildren; only 7% (11) were creating an entail to the eldest male heir. Of the 42 sons who received land 26% were only sons, 31% eldest sons, 31% younger sons, and 12% sons of unknown seniority. Even here, it would be a mistake to conclude that an eldest son receiving land was always benefiting from primogeniture. Younger sons could be provided for by other devices, including later settlements which might not survive. From the Streatfeild records we can see that Henry Streatfeild (1586-1647) of *High Street House*, adjacent to *Tye Haw*, made settlements of land on his eldest son in 1636, his daughter in 1644, and his second son in 1646, as they married.[109]

Settlements by the aristocracy and gentry were most likely to institute primogeniture, and at 40% of settlors they were disproportionately likely to settle a part at least of their estates, but even among the gentry and aristocracy, only 36% (16) were making provision for sons, and even fewer, 20% (8), were setting up an entail to male heirs. Typical of gentry is the Seyliard family of Hever, who had been owners of Seyliards (*Syliards*) at Four Elms in Hever parish since 1200, and had acquired a considerable estate over the centuries, in Hever and Edenbridge.[110] Thomas Seyliard who died in 1536 provided each of his six sons with an estate; the eldest son received *Delaware* and other sons How Green, Brook Street, *Gabriels*, *Syliards* and *Cords*. John, the eldest son, died in 1559 leaving only a son, William. In the next two generations the younger sons received only money portions. In the fifth generation there was again only one surviving son. Two of five generations privileged the eldest son, in two it was irrelevant, in one there was division of the estate.

If gentry and aristocracy, estimated at less than 5% of the Somerden population, were responsible for 40% of surviving settlements, nevertheless 40% were made by yeomen, and 20% by tradesmen and women. The settlements of yeomen were less likely to override partible inheritance and only 5% (2) set up an entail. An example of the yeomen is George Children of Hildenborough (d.1660), who settled *Bough Beech Farm* in Chiddingstone on his second son, George, when he married in 1652.[111] George's provisions for his sons, all of whom received land, are described in more detail later.

From the analysis of settlements, it is clear that provision for wives was the primary purpose in most, overriding partition being secondary. By 1600 the right of dower was almost universally replaced with a 'jointure', the allotment of specific property to the widow, usually of lesser value than a half, especially where there were multiple sons. By the mid seventeenth century this had moved to a further stage; the provision of an annuity arising out of the land. This followed the pattern seen outside Kent; as far as settlements were concerned Kentish women were treated no differently, but of course where custom was left in place they were more fortunate.[112] Jointure (settled land) had advantages for the both the widow and the heir, in that the property was agreed in advance, whereas dower land was unspecified. With annuity, the advantage is not so clear.[113] The annuity was secured on a particular part of the property, but the widow was dependent on the heir to pay it. In principle, a widow could insist on her dower, but there was little evidence of this happening, and it would probably have required a suit in the courts. In addition, the custom developed for the annuity to be based not on the value of the husband's property but on the value of the wife's marriage portion, setting at nought any contribution she might have made to the economics of the family.

The story of Timothea Newman, widow of Robert Jemmett of Edenbridge, is a case in point. The settlement in 1648 on her marriage to the younger son of Richard Jemmett and Margaret Seyliard, was worth £52 per annum. The early death of her brother-in-law a few years later would have entitled her to dower worth about £240 per annum, so this proved much to her disadvantage. Worse, through the successive deaths of her husband, father-in-law, son, and two unmarried daughters, the estate devolved on her married daughter and was lost through her son-in-law's profligacy. Although the annuity remained secured on the land, she was dependent

on the occupier to pay it, and had to assert her right to dower property. At one point her goods were seized to pay for her son-in-law's debts, and after being bought in for her by a friend were seized again.[114]

Among the gentry, provision for widows was 51% (35) of purposes. When William Seyliard married Dorothy Crowmer in 1580 her father agreed to pay a portion of £1,000 in instalments over three years, and in return William settled land in the form of a jointure, that is for them both then for the lifetime of the survivor. When his eldest son Thomas married in 1608 the settlement was similar but a little more sophisticated, putting the land in the hands of trustees for him and trustees for her, to provide for her should she survive him, in return for her portion. Thomas (unlike his father and grandfather) lived to see his sons reach adulthood, and was a party to the settlement made by his eldest son John (later the first baronet), when he married Mary Glover in 1647. This was particularly detailed, in six documents. This time, Mary brought land to the marriage, and her inherited property was also settled on trustees.[115] This type of settlement would typically use the wife's property to provide for younger children, and the husband's would go to the eldest son, but with a commitment to provide cash portions for other children. The Seyliard case illustrates the pitfall of entailing property. In 1699 the young heir to the estate, Thomas the 3rd baronet, was left with no way to pay the portions bequeathed to his sisters. It required an Act of Parliament to allow him to sell sufficient land to do this. The ancient estates in Somerden passed into new hands.[116]

For yeomen, provision for wives constituted 57% of settlement purposes. Typical of the yeomen was the settlement made in 1649 by Edward Beecher on his marriage to Joan, daughter of Robert Combridge of Walters Green. In a deed of 33 lines, this provided for Joan to receive an annuity if he died of £10 per annum for life, secured on *Little Brownings* in Chiddingstone, about half of his patrimony. It is not detailed in the settlement, but Robert would have given his daughter a cash portion in return for the jointure settlement. Edward died four years later, leaving his land to his small son, £200 to his daughter (who did not survive to receive it), and increasing his wife's annuity by another 40 shillings per annum.[117]

Women were not always significantly disadvantaged. A number of husbands left their widows in full possession of their property. Some, like Edward Beecher, later increased the size of the widow's settlement provision. When Henry Piggott of *Withers* died in 1595, his wife would have been entitled to dower of lands worth perhaps £12 per annum, but she gave this up in return for an annuity of £6 per annum in accordance with the terms of her husband's will. Her three eldest sons increased this to £9 p.a., agreeing to pay an extra pound each. Daughters were usually provided for with goods in the sixteenth century, and in cash in the seventeenth, but it was not uncommon for them to receive a small portion of land. Once married, in theory this became the property of the new husband, but it was usually covered by a marriage settlement.[118] There may have been no legal concept of 'women's property', but in Somerden there was evidence of a traditional one.[119] By 1612 *Tye Haw* had been acquired by William Birsty of Hever and it became the portion of his daughter when she married Anthony Combridge of *Coldharbour*. In 1684 it was bequeathed in the will of her son Francis Combridge, with his wife's property, to his two daughters.[120] They held it for thirteen years and it was only divided when one couple wished to sell.[121]

Joint Purchase

Once children were born of a marriage, there was a way of providing for them which is often overlooked but which emerges from the reconstruction method used here and proves to be surprisingly common. A father could purchase property and include the name of his son on the deed as joint tenant, which (unlike coparcenary) carried the right of survivorship.[122] When the father died the property devolved onto the son by right, or the father could release his own right at any time during his lifetime, but he could not reduce his son's rights once created.[123] Of surviving purchase conveyances in the study, 6% were in this form.

This method was often used to provide for younger sons, and it allowed the patrimony to pass to the elder son without disadvantaging the younger. The son could be, and usually was, a minor. In 1675 Francis Combridge, father of the daughters who inherited *Tye Haw*, purchased a five-acre plot, including on the deed the name of his younger son, at the time only three years old.[124] It was not a method confined to younger sons, however. Henry Streatfeild of *High Street House* (d.1598) made purchases in 1567 and 1574 with his only son, Richard, who was aged eight on the first occasion.[125] Once the son was established in life, a property could be purchased for him outright, but the joint purchase was preferable where he was young and might not reach adulthood. Fathers who prospered could make significant investments in purchases for their children. George Children bought *Bough Beech Farm* in Chiddingstone for his second son, property in Tonbridge and Kingsdown for his third son, and in Headcorn for his youngest son.[126] Where an *inter vivos* gift was not possible, a will could be used to dictate the division of land and property.

Wills

Settlements and purchases could be part of a scheme of family provision; a will was a final disposition. When George Children died in 1660 he made a will in which he described the provisions he had already made, and made bequests of land recently purchased and his goods and cash.[127] In addition to the land given to each son, his servants, his grandchildren, and his third son received cash, his youngest son a mortgage instrument, and eldest son John received furniture. Similarly, when *Lockskinners* passed to Thomas Everest in 1597, he left it to his eldest son, but he had other property in Chiddingstone, Seal, and Sutton at Hone to leave to his two younger sons.[128]

The ability of a landowner to decide to whom he would leave his land was a point of difficulty in the middle ages. Both tradition and ecclesiastical principle held that it was not acceptable for a man to leave his wife and children impoverished, and provision should be made for them, usually through goods and chattels. The Custumal of Kent is clear on the division of personal property. It says

> In like sort let the goods of Gavelkinde persons be parted into three parts, after the funerals and debts paied, if there be lawfull issue on live, So that the dead have one part, and his lawful sonnes and daughters an other part, and the wife the third part.[129]

The *Statute of Distributions* of 1670 clarified provision for division of goods under

common law, but local custom such as gavelkind was specifically excluded. In practice, goods were left partly as personal gifts and partly as a means to adjust the value of children's portions.

However, the Custumal is silent on the question of devisability of real property. The position in the country at large prior to 1540 was that wills operated through the equitable principles of the 'use'. This was stopped by the *Statute of Uses* of 1536, so the *Statute of Wills* was passed in 1540 to encode the ability to devise into common law, enforceable in the common law courts not just the courts of equity.[130] Attempts were made to read into the Custumal provision for land to be devised. One view held that land which could be devised before the *Statute of Wills* was either described specifically to be devisable or was land devised through feoffees (trustees), and the second held that the ability to devise more generally was established by precedent. William Somner came down in favour of the former.[131] Charles Elton thought that the devise of land was originally permitted but only if 'not part of the inheritance of his ancestors'.[132] The *Statute of Wills* was decisive; now all freehold lands were devisable, although with restrictions on land held in Chief of the monarch.

The ability to devise applied only to individual transactions; Thomas Robinson was clear that gavelkind land could not be permanently altered to another tenure, 'disgavelled', by anything the holder did; only Parliament could do this. Neither grant nor devise would do away with the rights of future younger sons; these were valid transfers but could not alter the *nature* of the land. Moreover, the wording of a devise had to be careful; a small variation could alter the nature of the title.[133]

If gavelkind holders could devise their land so as to diverge from custom, it remains to be shown how frequently they actually did so. In Somerden 501 male wills and 91 female wills have been located for the period 1550-1700, of which 268 male wills made provision for land. Of the latter, 18% were gentry or aristocracy, 59% yeomen, 16% merchants or tradesmen.[134] Three points need to be made at once. Firstly, wills were made widely, but by no means universally. Takahashi and others have estimated that will-makers were from a third of men dying to as little as a quarter.[135] During the last twenty-one years of the seventeenth century when occupations were entered in the parish registers at Chiddingstone, of 76 men buried wills have been found for 32%: that is 17% of tradesmen, 21% of husbandmen, and 72% of yeomen; disposal of land clearly raised the need to make provision, but only to a point.[136] Secondly, any land devised in a will was unsettled land. Not all testators were as kind to history as George Children and listed their *inter vivos* provisions. We have to read wills extremely carefully to be sure that apparent discrimination is all that it appears. Many are the sons who appear to have been 'cut off with a shilling' but had in fact already received a portion. Francis Combridge's will divided all his goods between his younger sons and daughters and left his eldest son Anthony only £5; there is nothing in it to tell us that Anthony had received *Coldharbour*. Thirdly, of those making wills barely half had more than one son. Of the 268 will makers, 47% had no sons or only one son, so that the decision on whether to give preference to one did not arise.

The evidence is that even of those who had such a decision to make, the emphasis was more on who received what land rather than evading partible inheritance. Where they had sons, 35% of Somerden men devising land left it to one son,

usually the eldest, 45% divided it among their sons, 10% included daughters, and 10% other members of the family. The proportion of dividers was highest among yeomen at 65%, as compared with aristocracy and gentry at 33%, indicating how misleading figures based only on gentry estates are likely to be. The figures for dividing property are generally higher than those found in other areas of England. Cicely Howell found that fewer than 10% of testators in Kibworth Harcourt (Leics.) left their land jointly.[137] Barry Stapleton, in his study of Odiham, Hampshire, on the edge of the Weald and in many ways comparable to Somerden, found that only 40% of landowners made a will, and of those just over half had more than one son; but of these 45% left their property to the eldest son, 2% left their property to a younger son, and 34% divided their property.[138] Amy Erickson found great regional variation, from 32% dividing in Cambridgeshire to 57% in Lincolnshire.[139]

A Somerden father might choose to keep his land together, especially if he had inherited it himself, but make cash bequests of similar value. The fathers who favoured primogeniture tended to be those with ancient holdings, gentry with ideas of status, or those with very small holdings. The Seyliard family provide a fifth of the wills leaving land primarily to the eldest son; four out of six bequests of this nature are among gentry.[140] In the small holding category was Andronicus Jessup, yeoman, who left *Mapletons* in Penshurst with ten acres of land entirely to his eldest son Nathaniel in 1615, with portions of £20 to his younger sons.[141]

Even among those who left land to one son, there is no instance of younger sons being left totally unprovided for, although the degree of inequality varied. A number of fathers, while making a will, still left all or part of their land to sons jointly. Henry Piggott of *Withers*, who died in 1595, left his land to his three eldest sons, with bequests of £80 to each of his younger sons. The eldest sons were to maintain the family until the youngest was independent and to pay his portion, then to choose their shares. In 1602, when the youngest reached his majority they partitioned the land. The two younger sons were by no means disadvantaged by this. The youngest went to Cambridge University and became vicar of Meopham, the next son became a clothier in Biddenden. One of the elder sons became a mercer, but kept his land, which went down through two further generations of his family.

It can be very hard to establish the value equivalence of dispositions in a will. The value of *Withers* can be estimated by comparison with nearby *Lockskinners*, sold the year after Henry Piggott's death, to be around £400.[142] By the time the youngest son's portion was paid and their mother's annuity capitalised, the sons with land received very similar value to their landless brothers' £80. The apportionment was harmonious; the Piggotts remained close as a family and served as each other's trustees and executors.[143] However, there was considerable individuality and the provisions in wills varied greatly. In one, that of Richard Kettle of *Moreden* in 1658, seniority took precedence over gender. His second son received £100, his eldest unmarried daughter £80, the next £60 and his youngest son £66, including compensation for the fact that his payment was delayed and paid in instalments.[144]

Landowners could therefore override the customs of gavelkind by making joint purchases, through a marriage settlement, and making a will. Sometimes all three were used at different stages of life. There remained the nuclear option of disgavelling, which altered the custom for all time.

Disgavelling

The question arose early as to whether the nature of gavelkind could be altered. It appears that originally this could be done by royal charter. At first, this was to enable land to be granted in perpetuity to the Church, but it developed into more general use.[145] Du Boulay gives an example where in 1201 Archbishop Hubert Walter asked King John for the privilege of transferring gavelkind into knight's fee and was apparently granted it.[146] In the reign of Edward II it was ruled that the king did not have the right to make this conversion, and it required an Act of Parliament.[147] The decision in question was made in *Gatewyk's Case*, 1313. The manor of Scotgrove in Ash (in Ash cum Ridley) was descendible according to gavelkind, but it had been granted as a fourth part of a knight's fee, and the grant ratified by Henry III. The land was subsequently purchased by Richard de Gatewyk. His two younger and surviving sons sued for their share, as land in gavelkind, on the basis that the king could not alter its nature.[148] By 1500 it was accepted that the land could only be changed in nature by Parliament passing Acts to disgavel particular estates. Such Acts date predominantly from the Tudor dynasty. One Act is recorded in the Statutes of the Realm for 1539/40.[149] Private Acts were recorded, in 1495/96, 1523/24, 1549/50, 1558/59, 1565/66.[150] An Act in 1623/24 Act was the last; a draft Act for Sir Thomas Twisden and Sir Norton Knatchbull was drawn up in 1670 but does not seem to have been implemented.[151] The 1858 edition of Robinson records no further Acts after 1623/24.[152]

The property of 86 landowners are listed by Robinson as those disgavelling, which include most of the county aristocracy, the majority during the reigns of Henry VIII and Edward VI.[153] Thomas Willoughby was the only landowner in Somerden included; it is notable that the Seyliards and Streatfeilds, with aspirations to gentry status but with deep Kentish roots, were not.[154] Nor were the new gentry who rose to prominence in the eighteenth century, whether through acceptance of the custom, or reliance on wills and settlements and their more comprehensive effect, or simply through lack of funds required for a private Act.

Even disgavelling could cause problems. The first related to record-keeping; the landowner and the lawyers needed to be aware of the Act; only the general Act of Henry VIII was ever printed, and no lands were listed in the private Acts. Edward Wootton of Boughton Malherbe, brother-in-law of Sir Thomas Willoughby, had the foresight to survey his estate, which has been digitised by KAS.[155] Most landowners did not. As early as the 1570s, Lambarde (himself a lawyer) was commenting that it would be 'right woorthie the labour' to establish of what those estates consisted.[156] The issue was that disgavelling operated only at a moment in time, and could not bind land acquired subsequently: *Tye Haw*, purchased around 1600, would not have been included in the Willoughbys' disgavelled lands. A second problem was that from the phraseology of the Acts it was not clear whether the effect was to void all the customs which gavelkind comprised, or whether it only removed the obligations of partible inheritance. In *Wiseman v. Cotton 1662* it was finally held that only the manner of descent was altered, so that devisability, alienability, wardship and the other customs remained. Otherwise, said Robinson significantly, 'owners of Gavelkind Lands would suffer a great Prejudice by the loss of their former Privileges, as in the Case of Forfeiture for Felony and the like'.[157]

Even the existence of an Act was not *prima facie* evidence of disgavelling; it was necessary to submit the Act itself as evidence, and the onus of proof was on the claimant.[158] Cases did succeed: in south-west Kent, one of those who disgavelled his estates was Sir Henry Isley of Chevening.[159] Hasted records that in 1709 the nieces of the then holder, Thomas Lennard, Earl of Sussex, claimed that the Manor of Brasted was gavelkind, but the verdict went against them, Thomas successfully demonstrating that the manor was in Isley's possession at the time of the disgavelling Act. But such cases were rare. It was the land, not the holder, which had the benefit of the disgavelling, and in the climate of much buying and selling, dispersal and accumulation, it was likely that even disgavelled land would be absorbed back into the pool of gavelkind land over time. As Robinson put it:

> the presumption of law that all lands in this county are gavelkind is a great friend to the custom, and if we consider the difficulty complained of even in the last age, and now grown much greater, of proving what estates the persons comprehended in the disgavelling statutes were seized of at the time of makeing those acts ... I believe I should not seem much mistaken were I to assert that there is now near as much land in this country subject to the controul of the custom as there was before the disgavelling statutes were made.[160]

By 1913 Percy Maylam was making an even stronger case, saying that in practice proving land to have been disgavelled was hopeless: 'for all practical purposes these disgavelling Acts might never have been passed'.[161]

Extent of Gavelkind Lands in Kent

Even before the disgavelling Acts, not all land in Kent was gavelkind, but that it predominated is indicated by a statute passed in 1439 which removed from gavelmen the privilege of not sitting as jurors in attaints, on the basis that this left 'but 30 or 40 Persons at most who had any Lands or Tenements out of the Tenure of Gavelkind'.[162] Outside the county a variety of local customs pertained, but the most common tenures were knight service, common socage, and copyhold. The owners of English manors before 1660 generally held as tenants in knight service. This was an institution which aimed to provide for mounted soldiers, obsolete long before 1500. Normally such property would be held in chief of the monarch, but there might be a mesne lord.[163] The manors of Hever, Penshurst and Ensfield in Somerden Hundred are recorded as being so by Elton.[164] Such manors would be subject to primogeniture, although this did not affect the tenure of the free tenants of the manor. Knight service was abolished by Ordinance of the Commonwealth, and by the 1660 *Military Tenures Act* converted into common socage.[165] This was the main form of freehold tenure for yeomen outside Kent. It was comparable to gavelkind in that lord's rent was fixed, and the holder was able to sell. However, it was commonly subject to greater manorial dues, inheritance was according to primogeniture, and property legislation applied to it as the common law, where the Custom of Kent was usually exempt.[166] Kent, with its Continent-facing ports had localities where the manorial structure was overridden; for example, 'castleguard' of Dover and Rochester castles, or the Cinque Ports structure after the twelfth

century. These forms were early commuted into scutage and by the seventeenth century remained only as a royal perquisite. It also had, rarely, areas where town burgage might apply, particularly in Dover and Canterbury.[167]

It is repeatedly said that land held by copy of court roll did not occur in Kent. It is true that copyholds for lives were 'quite unknown'.[168] However, there are rare examples of copyhold by inheritance, mainly where parts of the waste had been brought into cultivation at a late date, or where a cottage had been built at the roadside and the lord gave it title, sometime called 'demesne copyhold'.[169] Typical is *Towers Cottage*. In 1639 John Towers compounded for building a cottage on the road from Hill Hoath to *Lockskinners*, in breach of the legislation on building cottages. The manorial lord certified that he had granted it copyhold right.[170]

Elton held that if a property had not been disgavelled, establishing the tenure required finding first if the manor was originally gavelkind, second if the land in question was demesne (Lord's land) and so followed the tenure of the manor. He suggested that it was not a major task to establish which manors were originally held by military or spiritual tenure, a confidence it is hard to share. The manorialisation of the country was never wholly successful in Kent with its extensive freehold land. Some property seems to have evaded the system; *Waystrode* in Cowden was an example of a property on its own where the manor could not be identified.[171] With time, as manors were divided and amalgamated, detached from head manors, and in some cases had their obligations purchased out, the position became extremely complex indeed. Tenants in the manor of Cowden Lewisham bought freedom from quit-rents for their properties after a long dispute.[172] On the second plank, even Elton admitted that establishing which land was demesne was a problem. He suggested that it was necessary to go back to the Conquest, and to Domesday Book where it was possible to find the proportion of a manor which was demesne land, estimated from the number of sulungs (the Kentish measure of area, similar to a 'hide').[173] How this could identify a single field, perhaps altered in bounds and in name many times, probably never accurately surveyed, is not easy to see.

There were additional sources which attempted to clarify the position such as Hasted's *A History and Topographical Survey of the County of Kent* published in 1797. Although this is a *tour de force*, it is not without its errors and inaccuracies. Hasted took each parish of the county one by one and gave a history of each manor. This in itself raises problems, because there is a notorious discontinuity between the manors and parishes of Kent. Discussing Edenbridge, he recorded:

> There is a small part of it, called the Borough of Linckhill, comprehending part of this parish, Chiddingstone, and Hever, which is in the Hundred of Ruxley, and being a part of the manor of Great Orpington, the manorial rights of it belong to Sir John Dyke, bart., the owner of that manor.[174]

Even in well-documented Chiddingstone, Hasted failed to identify all the historic manors or 'reputed' manors. As to the use of court rolls, Hasted himself was not always clear as to what was a manor and what a mere estate. The courts might have declined. Even old seats which might originally have owed dues to the manor, had detached themselves; he instanced *Combe Bank* in Sevenoaks which still paid the fee farm rent to the manor of Sundridge, although prior to Tudor times it was an estate belonging to the Isley family.[175]

Commonly, new manors were carved out from others: Hever Cobham and Hever Brocas arose when daughters inherited the manor of Hever as co-heirs, and they were divided into separate manors; Chiddingstone Cobham and Chiddingstone Burwash had similar origins. In many areas it was so complicated that 'the continuing a series of them would afford no entertainment to the reader' or broken up 'since which it has been of no consequence worth mentioning'.[176] In these circumstances, where no lord of the manor continued and the rolls were lost, it is not possible to establish the ancient custom of the manor, and each piece of land was likely to be absorbed into the tenure of the greater estate. Even where the sources exist and provide information they sometimes disagree. Hasted records Morant's Case in 1292/3 in which the three sons of Morant established that their property was gavelkind; yet Elton records it as Knight Service.[177] Given the different eras from which these sources come, it is difficult to establish the situation at one point in time.

Altogether, everything militated against identifying the tenurial history even of a particular holding. In the absence of universal land registration, there was nowhere a definitive record of tenure and the impact must have been for gavelkind to be presumed. This absorption into gavelkind of other land was occurring from the earliest times: du Boulay describes the history from 1173 to 1285 of land in Gillingham that began as half a knight's fee, showing that it was partitioned as gavelkind at least once and was also included in a survey of customary lands.[178] Such cases tended to produce a *fait accompli*.

New lands

Significant areas in Kent were still unsettled at Domesday, including most of the Weald and Romney Marsh, so that new lands were steadily being created during the medieval period. The general rule was that land which was 'inned' from the marsh or 'assarted' from the native woodland, was gavelkind (in the former case, even if it was in Sussex). However, the privilege of gavelkind was later deemed to depend on having continued since 'time out of mind', taken as 1189, so in theory no new estates in gavelkind could be created.[179] Manorial waste which was enclosed was therefore more likely to be deemed demesne copyhold, particularly in the eighteenth and nineteenth centuries. In addition to *Towers Cottage*, there are a small handful of examples. A rental of 1616 for the manor of Chiddingstone Burwash granted William Brooker a piece of waste land near Bourne Brook in Penshurst 'to hold by copy of court roll' and in 1638 a cottage at Stonelake in Chiddingstone is described as Copyhold of the Honour of Otford, 'lately part of the manorial waste', carrying with it 'five dayworks of land'.[180] A property at Vexour Bridge was recorded as copyhold of the Manor of Penshurst Halemote in 1812, and two copyhold properties of Penshurst Halemote were enfranchised (converted into freehold) in 1843.[181] Of these one was apparently in the centre of Chiddingstone and the other in the south at Hill Hoath, making its presence in Penshurst Halemote to the north one of the puzzles of manorial Kent.

CONCLUSIONS

This paper has described the experience of gavelkind through particular families. Although partible inheritance is by far and away the best-known and most influential characteristic, it is a mistake to treat gavelkind purely as a system of inheritance.[182] Almost as influential was the second major plank, the widow's right of dower, and the other customs, alienability, devisability, no escheat for felony, treatment of chattels, wardship, age of majority, were still considerations in the early modern period. Importantly in comparison with customary tenures, the land was freehold. The evidence of Somerden is clear that gavelkind was more than a system of establishing the heir in cases of intestate inheritance. As society developed, some aspects became anachronistic. The age of majority of 15 was already becoming rare in practice in the seventeenth century, and the rights of copyholders caught up with those of freeholders, narrowing the advantages.[183] Dower and the felony forfeiture provisions continued to apply into the late nineteenth century, and partible inheritance until abolition. Nor was it a system which was routinely bypassed in practice. Much of this perception arises because studies have concentrated on the aristocracy and gentry. Holders in gavelkind were predominantly yeomen. At this middle level of society, provision for each son – and, indeed, each child – usually outweighed the desire to build an estate. Where the estate was small, or where other property could be provided, a father might leave his patrimony to the eldest son, but it was common to divide. Joint purchases, settlements, and wills were entered into, but by no means universally, and these were not primarily a means of establishing primogeniture. The rights of widows were usually commuted, often but not invariably to their disadvantage.

Nellie Neilson argued that in Kent gavelkind was not just a survival, but a living and developing system.[184] The last edition of Robinson, updated by J.D. Norwood in 1858, illustrates this. Although most of the fundamentals of the custom were established, common law systems ceaselessly amend and modify.[185] The important case of *Wiseman v. Cotton* was heard in 1662. *Gouge v. Woodwin* in 1734 discussed the identification of gavelkind lands.[186] The Kent Assize in 1845 considered a question as to whether exhibiting an attested solicitor's copy of a disgavelling Act was admissible.[187]

It seems cavalier indeed to suggest that this had no impact on the society of Kent. In the seventeenth century there was still a preponderance of small freeholders in Kent, a product of gavelkind among other influences. That they were declining there is no doubt; the owners of land in Somerden in 1600 were many, by 1841 they were considerably fewer. But that is another subject.

ENDNOTES

1 KHLC U908 P89.

2 J. Cockburn, 'Early Modern Assize records as historical evidence', *Journal of the Society of Archivists*, 5:4 (1975), p. 219. Murder by poison incurred a traitor's death under an Act of 1531/2 [22 Hen. VIII c.9] but not treason forfeiture.

3 J. Cockburn, *Calendar of Assize Rolls Elizabeth I* (HMSO, 1985), 1687, $1200.

4 J.H. Baker, *An Introduction to English Legal History*, 4th edn (2002), pp. 517, 528. She lived to marry again.

5 KHLC U908 M50.

6 P. Maylam, *The Custom of Gavelkind in Kent* (Canterbury, 1913), p. 3. For example, the place name Vexour on the border of Chiddingstone and Penshurst, is rendered 'Backsover' on one well-known early map.

7 This applied only to rules relating to land: H. Kingsford and W. Beale, *Address to the Freeholders of the County of Kent on the Subject of Gavelkind by the Law Society of Kent, 1836* (Maidstone, 1907), p. 9. It has been suggested with some cogency that gavelkind cannot really sustain the title 'Common Law of Kent' frequently given it: C.L. Sinclair Williams, 'The codification of the customs of Kent', *Archaeologia Cantiana*, 95 (1979), p. 69. The term 'Common Law' has various meanings; generally it describes the national rules, to which gavelkind provided an exception.

8 T. Robinson, *The Common Law of Kent or the Customs of Gavelkind* (London, 1741), pp. 38-44, says 'all land in Kent shall be presumed to be gavelkind', no 'special pleading' was required. However, pleading differed in matters other than inheritance. By the same token, absence of partition could not be used to assert another tenure: p. 50. For Thomas Robinson, see note 21.

9 J.E.A. Jolliffe, *Pre-Feudal England: The Jutes* (Oxford, 1933), p. 2.

10 P. Clark, *English Provincial Society from the Reformation to the Revolution: Religion, Politics and Society in Kent 1500-1640* (Sussex, 1977), p. 7.

11 J. Thirsk, 'Obituary: Alan Everitt', *Archaeologia Cantiana*, 129 (2009), 435; A. Everitt, *The Community of Kent in the Great Rebellion, 1640-1660* (Leicester, 1973).

12 J. Whittle, *The Development of Agrarian Capitalism: Land and Labour in Norfolk 1440-1580* (Oxford, 2000); H.R. French and R.W. Hoyle, *The Character of English Rural Society, Earl's Colne 1550-1750* (Manchester, 2007).

13 B.M.S. Campbell, 'The agrarian problem in the fourteenth century', *Past & Present*, 188.3 (2005), pp. 23-24.

14 Jane Whittle comments on the inconsistency of records of freeholders in court rolls: J. Whittle, 'Individualism and the land-family bond: A Reassessment of Land Transfer Patterns among the English Peasantry', *Past & Present* 160 (1998), p. 29. Michael Zell makes the same point in *Industry in the Countryside: Wealden Society in the Sixteenth Century* (Cambridge, 1994), p. 13.

15 L. Bonfield, *Marriage Settlements 1601-1740* (Cambridge, 1983); L. Stone, *Crisis of the Aristocracy 1558-1641* (London, 1965).

16 An article on the virtues and pitfalls of this methodology is in preparation.

17 Alan Everitt suggests that Sundridge itself was originally attached to Lewisham and Woolwich and severed in the early middle ages, the very name Sundridge meaning 'sundered': A. Everitt, 'The making of the agrarian landscape of Kent', *Archaeologia Cantiana*, 92 (1975), p. 19. By the seventeenth century it was divided into the manors of Sundridge Upland and Sundridge Weald.

18 Rendsley Hoath is now known as Chiddingstone Hoath.

19 Baker, *Introduction to English Legal History*, Chapter 11; J.M. Kaye, *Medieval English Conveyances* (Cambridge, 2009), Introduction. The written *Lex Scripta* was distinguished from the traditional *Lex Non-Scripta* before 1189, deemed 'time immemorial', although systematic rolls began only in the time of Edward III; M. Hale, *The History of the Common Law* (London, 1713), Chapter 1.

20 W. Lambarde, A *Perambulation of Kent* (1576), p. 519.

21 T. Robinson, *Common Law of Kent or the Customs of Gavelkind* (1741), pp. 279-298. Thomas Robinson (*c*.1715-1747) had links with Kent through his mother's family property at Monks Horton. A second edition of his treatise was produced in 1788, and updated editions in 1822 edited by John Wilson, 1858 edited by John Norwood, and 1897 edited by Charles Elton. [*Hereafter references are to the 1741 edition, except where there are important differences.*]

22 F. Hull, 'John de Berwicke and the Consuetudines Kanciae', *Archaeologia Cantiana*, 96 (1980), 8. See also his 'The Custumal of Kent', *Archaeologia Cantiana*, 72 (1958), pp. 148-159.

23 Robinson, *Common Law of Kent*, p. 279; Sinclair Williams, 'Codification', pp. 65-80; F. Hull, 'John de Berwicke', pp. 1-15.

24 N. Neilson, 'Custom and the common law in Kent', *Harvard Law Review*, 38.4 (1925), pp. 482-498.

25 Robinson, *Common Law of Kent*, Book II, Ch. VIII lists obsolete customs, those relating to trees receiving particular attention.

26 R.J. Smith, 'The Swanscombe Legend and the historiography of Kentish Gavelkind', in R. Utz and T. Shippey, *Medievalism in the Modern World* (Brepols, 1998), pp. 85-103.

27 Lambarde, *Perambulation*; W. Somner, *A Treatise on Gavelkind both Name and Thing,* 2nd edn (London, 1660); S. Taylor, *The History of Gavelkind with the Etymology Thereof* (London, 1663); Robinson, *Common Law of Kent*; C.I. Elton, *Tenures of Kent* (London, 1867).

28 K.P. Witney, *The Jutish Forest: A Study of the Weald of Kent from 450 to 1380 A.D.* (London, 1976); G.C. Homans, 'The rural sociology of medieval England', *Past & Present*, 4 (1953), pp. 35-7; Jolliffe, *Pre-Feudal England*.

29 Robinson, *Common Law of Kent*, p. 15. Irish land was held, in modern terminology, by joint tenancy: C. Lennon, *Sixteenth-Century Ireland* (Dublin, 2005), p. 49.

30 Thomas Sprott's story, recorded in the eleventh-century chronicle of St Augustine's Abbey, in which the Kentish Men confronted the Conqueror and secured their customs, repeated by William Thorne and Michael Drayton: W. Bell, *Thomas Sprott's Chronicle of Sacred and Profane History* (Liverpool, 1819); A.H. Davies, trans., *William Thorne's Chronicle of Saint Augustine's Abbey* (Oxford, 1934); M. Drayton, *Polyolbion* (London, 1612); Williams, 'Codification', p. 73; Hull, 'John de Berwyke', 15. See Robinson *Common Law of Kent*, p. 22, although at p. 28 he questions whether at that time the common law had diverged from the Kentish custom sufficiently far as to warrant separate recognition.

31 P.S. Barnwell, 'Kent and England in the Early Middle Ages', *Southern History*, 16 (1994), pp. 1-2.

32 Robinson thought that primogeniture became the default in the reign of King John, *Common Law of Kent*, p. 26.

33 D.R. Clarke found it the custom in Brede: 'The 'Land-Family Bond' in East Sussex c.1580-1770', *Continuity & Change*, 21.2 (2006), pp. 341-369.

34 Robinson, *Common Law of Kent*, p. 6 shows this usage of the word to be late, not a hangover from an earlier convention.

35 A. Everitt, *Continuity and Colonisation, the Evolution of Kentish Settlement* (Leicester, 1986), p. 21.

36 Barnwell, 'Kent and England', p. 15.

37 S. Keynes, 'The Control of Kent in the Ninth Century', *Early Medieval Europe*, 2.2 (1993), pp. 111-131.

38 Somner, *Treatise on Gavelkind*, p. 90.

39 For an exposition of the complex law on felony forfeiture, see K.J. Kesselring, 'Felony forfeiture in England, c.1180-1870', *Journal of Legal History*, 30 (2009), pp. 201-226, and 'Felony forfeiture and the proceeds of crime in early-modern England', *The Historical Journal*, 53.2 (2010), pp. 271-288. Kesselring found at least two instances of customary exemption outside Kent, but very local in effect. She did not accept that forfeiture had ceased to be enforced by the eighteenth century, a view which was based on a misreading of jury verdicts.

40 Sinclair Williams, 'Codification', p. 75. This is one of the 'Three Old Saws' of Kentish custom recorded in the Custumal in English rather than the Anglo-French of the courts or the Latin of treatise.

41 Forfeiture Act 1870 [Statute 33&34 Vict c.23].

42 E. Hasted: *History and Topographical Survey of the County of Kent*, vol. 3 (1797), p. 126. He had, in fact, disgavelled his estate as of 1539/40, but this only altered the inheritance custom of gavelkind not felony forfeiture: see section on avoidance.

43 There was lengthy discussion of this in the 1741 edition of Robinson, *Common Law of Kent*, pp. 55-71.

44 Guy Ewing: *The History of Cowden* (1926), p. 17, from Cowden Leighton Court Baron.

45 E. Kerridge, *Agrarian Problems in the Sixteenth Century and After* (Cambridge, 1969), p. 34.

46 For common law wardship, see J.H. Baker, *The Oxford History of the Laws of England* (2000), vol. 2, pp. 453-454; S.F.C. Milson, 'The origins of prerogative wardship', in *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt* (Cambridge, 1994), pp. 223-244; S. Painter, *Studies in the History of the English Feudal Barony* (1943), pp. 65-66. The Church also had a *de facto* role in guardianship under its probate jurisdiction: R. Helmholtz, 'Roman law of guardianship in England 1300-1600', *Tulane Law Review*, 52.2 (1978), pp. 223-257.

47 KHLC U908 T136.

48 TNA C9/417/81.

49 1535 *Re Lord Dacre of the South* demonstrates this: Baker, *Introduction to English Legal History*, p. 255.

50 Robinson, *Common Law of Kent*, 1858, p. 116 fn. This footnote does not appear in earlier editions, but it was clearly the case.

51 Common Socage tenure was similar, but inheritance was at 14: Kingsford and Beale, *Address*, p. 9.

52 Robinson, *Common Law of Kent*, Ch. III, in particular pp. 193, 221.

53 Statute 7 Ed. II 1314, quoted by Neilson, 'Custom', p. 492. See also Hull, 'John de Berwyke', on the Eyre.

54 For example, KHLC U1590 T32. An example of a deed for sale by a 'minor' is given in the conveyancing precedent book E. Henden, W. Noy, R. Mason and H. Fleetwood, *The Perfect Conveyancer* (1650), p. 190, and three precedents in Robinson, *Common Law of Kent* (1858).

55 TNA PROB11/108.

56 KHLC U908 M50, U908 M51, U908 T74.

57 Lambarde, *Perambulation*, p. 515.

58 J.E.A. Jolliffe, 'English Book-Right', *English Historical Review*, 50, 197 (1935), pp. 1-21; T.F.T. Plucknett, 'Revisions in Economic History III: Bookland and Folkland', *The Economic History Review*, 6.1 (1935), pp. 64-72.

59 Somner, *Treatise on Gavelkind*, p. 39. He cited Glanvil, Coke and Blackstone, and other examples.

60 KHLC U908 M50.

61 Abolished in 3-4 Wm IV: Robinson, *Common Law of Kent* (1858), p. 61.

62 In 1577 *Lockskinners* was owned by John Hayward, perhaps Richard's father: Nottingham University Library (NUL) Mi5 162-29.

63 Lambarde, *Perambulation*, p. 519; Robinson, *Common Law of Kent*, p. 112.

64 KHLC U908 T60.

65 A partition was not required by law to be a signed document until the *Statute of Frauds* in 1677 [Statute 29 Car.2 c.3].

66 The obligations were also shared, but this was a complicated area of the law: Robinson, *Common Law of Kent*, pp. 113-116, and was still being refined in the nineteenth century: Robinson, *Common Law of Kent* (1858), p. 66.

67 KHLC U908 T95.

68 KHLC U908 T171.

69 Robinson, *Common Law of Kent*, p. 91.

70 KHLC U908 T22. See also, H.L. Somers-Cocks, *Edenbridge* (1912), reprinted 1995, Ch. 8.

71 For regional variations in common law and practice see A.L. Erickson, *Women and Property in Early Modern England* (1993); Staves, S., *Married Women's Separate Property in England, 1660-1833* (Harvard, 1990).

72 Parish Registers, Society of Genealogists (SoG) KE/86. Her will is at KHLC U908 T264.

73 KHLC U908 T260. Her sons had already received part of the estate on their respective marriages.

74 *Medieval Sourcebook: The Anglo-Saxon Dooms, 560-05*, [www.fordham.edu, accessed 13 July 2012].

75 Robinson cites *Davis v. Selby* (Cro.Eliz.825).

76 Robinson: *Common Law of Kent*, Bk. II, Ch.2.

77 Robinson: *Common Law of Kent*, Bk. II, Ch.1.

78 Robinson: *Common Law of Kent*, p. 136.

79 Susan Reynolds gives Henry Spelman (c.1561-1641) a critical role in giving *tenure* a technical meaning: 'Tenure and property in medieval England', *Historical Research*, 88.2 (2015), pp. 563-576. Robinson, *Common Law of Kent*, p. 42, quotes *Wiseman v. Cotton 1662* as a precedent. One of the justices was Thomas Twisden of East Malling.

80 A.W.B. Simpson, *A History of the Land Law* (Oxford, 1986), pp. 163-4.

81 A. Fletcher and D. MacCullough, *Tudor Rebellions*, 5th edn (2004); H. Falvey, *Custom, Resistance and Politics, Local Experiences of Improvement in Early Modern England* (University of Warwick thesis, 2007), p. 222.

82 Lloyd Bonfield discusses the role of manor courts in customary law in more detail in 'What did English villagers mean by customary law?', in Z. Ravi and R. Smith, *Medieval Society and the*

Manor Court (Oxford, 1996), Ch. 3. Courts Leet, in this area held at Hundred level, are even less informative than Courts Baron, being predominantly concerned with neighbourhood disputes and highway maintenance: KHLC U1000/M14.

83 KHLC U908 M50, T74.

84 KHLC U908 M52, T178.

85 H.W. Knocker, *Kentish Manorial Incidents*, The Manorial Society, No. 7 (1912).

86 KHLC U908 E2.

87 KHLC U908 T75. *Benge Land*, next door to *Tye Haw*, was in the manor of Bore Place three miles away, a typical example of the sometimes inexplicable dispersal of Kentish manors.

88 KHLC U908 M63, M64, M65.

89 KHLC U908 T8, T10, L35-6, P3.

90 NUL Mi6 161-1-43.

91 R. Strong (ed.), *The Diary of John Evelyn* (2006), p. 329.

92 KHLC U908 E7, T48.

93 Bonfield, 'What did English villages mean by customary law?'.

94 Littleton: *Tenures* (1482/1903), §210 on partition, §265 on parceners by custom, and §736 on warranties binding heirs.

95 Van Vechten Veeder, 'The English Reports,1292-1865', *Harvard Law Review*, 15.1 (1901), pp. 1-15. A useful list of reports is available from Leicester University Library.

96 Of these, only Thomas Hardres (1610-1681) was from Kent himself.

97 KHLC U908 L3, L35, L37, L38, L40, L41, L42.

98 KHLC U908 L37. The long lease transferred possession without ownership, evading dues on transfers of title: Baker, *Introduction to English Legal History,* p. 303; Simpson, *History of the Land Law,* p. 252 n.42.

99 KHLC U908 L48.

100 KHLC U908 L43,44, 45.

101 TNA C2/Eliz/14/58.

102 KHLC U908 L1, L32, L33, L63, L64, TNA C2/Eliz/C15/26.

103 REQ/2/6/120 Leigh 1538.

104 West Sussex Record Office: WISTON/5044-5047, TNA WARD/7/96/111 1642.

105 KHLC U1986 T26-1, TNA C142/161/83 1571.

106 Statute 12 Car.II c.24.

107 Bonfield, *Marriage Settlements*; A.L. Erickson, 'Common law and common practice: the use of marriage settlements in early modern England', *Economic History Review*, 43.1 (1990), pp. 21-39; Women and Property; E. Spring, *Land, Law and Family: Aristocratic Inheritance in England 1300-1800* (Chapel Hill & London, 1997).

108 Colthirst v. Bejushin (1550); Baker, *Introduction to English Legal History*, p. 284; Spring, *Law, Land and Family*, pp. 132-139; A.W.B. Simpson, *A History of the Land Law*, 2nd edn (Oxford, 1986), pp. 212-215.

109 KHLC U908 T155, T257, T258.

110 KHLC U908 Z20-1.

111 KHLC U908 T184.

112 Bonfield*, Marriage Settlements*, pp. 117-118; Staves, *Married Women's Separate Property*; Erickson, *Women and Property*, Part III.

113 An annuity was encompassed under the term 'jointure' but for clarity the latter has been limited to its original meaning of land settled jointly, i.e. with the right of survivorship.

114 KHLC U908 L39-L46, T21-T41; Somers-Cocks, *Edenbridge*, Ch. 8.

115 KHLC U908 T47.

116 KHLC U184 T2; 10&11 Will. III c.39: *An Act for the vesting certain Lands of Sir Thomas Seyliard Baronet in the County of Kent in Trustees to be sold for the Payment of his sisters' portions, charged thereon*.

117 KHLC U1986 T26.

118 S. Staves, 'Resentment or resignation? Dividing the spoils among daughters and younger sons', Chapter 10 in J. Brewer and S. Staves, eds, *Early Modern Conceptions of Property* (London, 1995).

119 Erickson, *Women and Property*, pp. 106-113.

120 TNA PROB11/394.

121 KHLC U908 T74. The undivided share could have been sold, but sharing out multiple properties was unproblematic.

122 In theory this could apply to daughters, but was most applicable to sons.

123 E. Coke, *First Part of the Institutes of the Lawes of England, or A Commentary of Littleton*, 12th edn (London, 1738), §287. See also J.V. Orth, 'The perils of joint tenancies', *Real Property, Trust and Estate Law Journal*, 44.3 (2009), pp. 427-440.

124 KHLC U908 T160.

125 KHLC U908 T1, T2. One can, of course, perceive other legal advantages to this method of acquiring land.

126 KHLC U908 T184; TNA PROB11/302.

127 TNA PROB11/302.

128 TNA PROB11/131.

129 Lambarde, *Perambulation*, p. 521.

130 Statute of Distributions [Statute 22 & 23 Car. II c.10]; Statute of Wills [Statute 32 Hen.VIII c.1].

131 Somner: *Treatise of Gavelkind*, pp. 152-170.

132 Elton, *Tenures*, pp. 39-40.

133 Robinson, *Common Law of Kent*, pp. 70-76.

134 Will makers were taken on their own evaluation of their status. For a discussion of the difficulties of any other assessment, not least change over time, see M. Campbell, *The English Yeoman* (London, 1942), Ch. 1.

135 M. Takahashi, 'The Number of Wills Proved in the Sixteenth and Seventeenth Century', in G.H. Martin and P. Spufford, *The Records of a Nation* (Woodbridge, 1990), p. 213; J. Whittle, *Development of Agrarian Capitalism*, p. 130.

136 Chiddingstone Parish Registers transcript, Society of Genealogists KE/86. Over such a short period the numbers are small and can only be indicative of the social structure. Occupations are seldom given before 1695.

137 C. Howell, *Land, Family and Inheritance in Transition: Kibworth Harcourt 1280-1700* (Cambridge, 1983), p. 155.

138 B. Stapleton, 'Family Strategies: patterns of inheritance in Odiham, Hampshire 1525-1850s', *Continuity and Change*, 14.3 (1999), pp. 385-402.

139 Erickson, *Women and Property*, p. 75.

140 TNA PROB11/39, 87, 145, 211, 214; KHLC U908 T162.

141 Lambeth Palace Library (LPL) VH96/4884.

142 KHLC I908 T60.

143 TNA PROB 11/85, KHLC U908 T157.

144 TNA PROB11/295.

145 K.E. Digby, *An Introduction to the History of the Law of Real Property*, 5th edn (Oxford, 1897), p. 11; T.F.T. Plucknett, 'Bookland and Folkland', *Economic History Review*, 6.1 (1935), pp. 64-72; Jolliffe: 'English Book-Right', p. 11.

146 F.R.H. du Boulay, 'Gavelkind and Knight's Fee in Medieval Kent', *English Historical Review*, 77.304 (1962), pp. 504-511.

147 C.I. Elton, *Origins of English History* (London, 1882), Ch. VIII, 'Customs of Inheritance and Family Religion', pp. 205-6.

148 9 Edw. II (1315/16). Elton, *Tenures*, pp. 369-372. Elton notes some exceptions accepted in that case.

149 Parliamentary Archives, HL/PO/PU/1/1539/31H8n3. Another was drafted in 1597.

150 Parliamentary Archives, HL/PO/PB/1/1558/Eliz1n28; HL/PO/PB1/1566/8Eliz1n30; HL/PO/PB/1/1623/21J1n70.

151 KHLC U274-E7.

152 Robinson *Common Law of Kent* (1858), p. 40.

153 Robinson, *Common Law of Kent*, pp. 299-300.

154 Lambarde, *Perambulation*, p. 531; Robinson *Common Law of Kent* (1858), p. 40.

155 http://www.kentarchaeology.ac/wottonsurveys.

156 Lambarde, *Perambulation*, p. 533.

157 Robinson, *Common Law of Kent*, p. 77.

158 As late as 1845 exhibiting a disgavelling Act was discussed: Robinson, *Common Law of Kent* (1858), pp. 44-45.

159 Statute 2&3 Ed.VI.

160 Robinson, *Common Law of Kent*, p. 88.

161 Maylam, *Custom of Gavelkind*, p. 6.

162 Statute 18 Hen.6 c.2 *Jurors in Attaints Act*: Robinson, Common *Law of Kent*, p. 262; Somner, *Treatise on Gavelkind*, p. 145.

163 The interposition of mesne lords and the break-up of knights' fees was blocked in 1290 by *Quia emptores* inhibiting subinfeudation: Baker, *Introduction to English Legal History*, p. 242; Simpson, *History of the Land Law*, p. 22.

164 Elton, *Tenures*, pp. 411-419.

165 Statute 12 Car. II c.24.

166 As in the *Statute of Distributions* [Statute 22 & 23 Car.II c.10].

167 F.W. Hardman, 'Castle-guard of Dover Castle, *Archaeologia Cantiana*, 49 (1937), pp. 96-107; Hasted, *History*, vol. 9 (Canterbury, 1800), 'The town and port of Dover', pp. 475-548.

168 H.W. Knocker, 'Kentish Manorial incidents', *The Manorial Society No. 7* (1912), p. 4. As manorial steward, Herbert Knocker had knowledge of over a hundred manors in Kent.

169 H.R. French and R.W. Hoyle, *The Character of English Rural Society: Earl's Colne 1550-1750* (Manchester, 2007), Ch. 1 n.23.

170 KHLC U908 T87.

171 Guy Ewing, held that it was allodial, or a manor in its own right. G. Ewing, *A History of Cowden* (Tunbridge Wells, 1926), p. 46. However, it is possible that it had originally owed dues to a head manor.

172 Ewing, *Cowden*, pp. 51-53.

173 Elton, *Tenures*, pp. 122-134.

174 Hasted, *History*, Hever, p. 190.

175 Hasted, *History*, vol. 3, Sundridge, pp. 126-145.

176 Hasted, *History*, vol. 2, p. 504.

177 Hasted, *History*, vol. 3, pp. 105-126: Chevening; Elton, *Tenures*, p. 413.

178 F.R.H. du Boulay: 'Gavelkind and Knight's Fee in Medieval Kent', *English Historical Review*, 77:304 (1962), pp. 504-511.

179 Robinson, *Common Law of Kent*, p. 51. Hence the rule that former knight service land did not become gavelkind after 1660. However he argues, somewhat opaquely, that former gavelkind land granted out as knight service would be subject to partible inheritance.

180 KHLC U908 M48, T216.

181 KHLC U908 T169, T199.

182 Eric Kerridge uses the terms interchangeably, and applies the name gavelkind to systems of partible inheritance outside Kent: E. Kerridge, *Agrarian Problems in the Sixteenth Century and After* (Cambridge, 1969).

183 Baker, *Introduction to English Legal History*, p. 308; Simpson, *History of the Land Law*, pp. 162-164.

184 Neilson, 'Custom', p. 498.

185 'Common law' is here used in the sense of being based on precedent.

186 Robinson, *Common Law of Kent* (1858), p. 27.

187 Robinson, *Common Law of Kent* (1858), p. 45.