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Comparative Legal History

DOI:

<https://doi.org/10.1080/2049677X.2022.2131527>

Published: 01/01/2022

Publisher's PDF, also known as Version of record

[Cyswllt i'r cyhoeddiad / Link to publication](#)

Dyfyniad o'r fersiwn a gyhoeddwyd / Citation for published version (APA):

Korporowicz, L., & Owen, G. (2022). Polish Ordynacje and the English Common Law Entail and Strict Settlement: Social, Political and Religious Comparative Contexts. *Comparative Legal History*, 10(2), 172-203 . <https://doi.org/10.1080/2049677X.2022.2131527>

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To cite this article: Lukasz Jan Korporowicz & John Gwilym Owen (2022) Polish *ordynacje* and the English common law entail and strict settlement: Social, political, and religious comparative contexts, Comparative Legal History, 10:2, 172-203, DOI: [10.1080/2049677X.2022.2131527](https://doi.org/10.1080/2049677X.2022.2131527)

To link to this article: <https://doi.org/10.1080/2049677X.2022.2131527>



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Published online: 12 Oct 2022.



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Polish *ordynacje* and the English common law entail and strict settlement: Social, political, and religious comparative contexts

Lukasz Jan Korporowicz and John Gwilym Owen*

Entailing landed property was a common feature of European property law in the late medieval and early modern periods, and beyond. Entails were far more common in some European states than others. This article undertakes comparative research into different forms of entailed property in Poland (where entails were uncommon) and England and Wales (where entails were common). It also undertakes comparative analysis with the later English common law strict settlement, which had the entail at its core. It investigates who created such settlements; why they were created; the different methods of creation; the attitude of the state/royal government; who benefitted under such settlements; inalienability of land; and perpetuity.

Keywords: real property; inheritance law; entails; Poland; England and Wales; Crown

I. Introduction

When exploring the transfer of real property from one generation to another, the first question to ask is what legal methods have been used by different jurisdictions. This has often been achieved by way of an entail, which will be analysed in this article as a means by which land was settled to follow a certain line of descent, with the terms of the settlement reflecting an intention that it would not be freely disposed of by those in possession. In this respect, an entail displaced the standard rules of inheritance. The study of English common law entails and strict settlements has been richly enhanced by the analysis of comments by and debates amongst leading Anglo-American academics over the

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years. Such studies have also made invaluable contributions to our understanding of continental and Anglo-American legal history from a comparative perspective.¹ Comparative legal history is important lest we otherwise rely solely on broad narratives of legal history from the point of view of a single jurisdiction. As this article will demonstrate, entails were common across medieval and early modern Europe to varying degrees. Despite their similarities, entails differed greatly in many ways, eg why they were created, their method of creation and the social function of entailed property in a given legal system. One such European state which utilised entails (known as *ordynacje*)² was the Polish-Lithuanian Commonwealth.

One reason for comparing Poland with England and Wales is that entails were far less common in Poland than in other European states. Another is to analyse how the entail developed in different environments. These differences may be viewed from different perspectives – social, political, as well as religious. This article therefore considers how two different legal systems sought to accommodate the wishes of those who were dissatisfied with the standard rules of inheritance, and how these systems struggled to achieve a balance between freedom of disposition for one generation and their successors.

No such comparison has been hitherto undertaken between these two states on this topic, and there does not appear to be a standard methodology for this kind of comparative analysis. As Andrew Lewis has said:

... the most frequently expressed concern about Comparative law: what is the comparison and how is it to be carried out? I do not despise theoretical discussions on this theme, though I am troubled by their utility.³

In undertaking this comparison, the authors will establish an evaluative framework in relation to entailed property, then undertake a functional analysis based on those questions in respect of England and Wales and Poland. This approach facilitates what Lewis calls the ‘soft’ or ‘weak’ comparative development of entails in England and Wales and Poland,⁴ meaning ‘those chances or structural factors which have led systems separated in time and place to adapt broadly

¹See eg Eileen Spring, *Law, Land and Family: Aristocratic Inheritance in England 1300–1800* (University of North Carolina Press 1993); Lloyd Bonfield, *Marriage Settlements 1601–1740: The Adoption of the Strict Settlement* (CUP 1983); Joseph Biancalana, *The Fee Tail and the Common Recovery in Medieval England 1276–1502* (CUP 2001); Neil G Jones, ‘Trusts in England after the Statute of Uses: a View from the 16th Century’ in Richard Helmholz and Reinhard Zimmermann (eds), *Itinera Fiducia, Trust and Treuhand in Historical Perspective* (Duncker & Humblot 1998) 173; and Thomas G Watkin, ‘Quia Emptores and the Entail’ (1991) 59(3) *The Legal History Review* 353.

²Pronounced /ɔr.diˈnats.ja/ and /ɔr.diˈnats.je/.

³Andrew Lewis, ‘On Not Expecting the Spanish Inquisition: The Uses of Comparative Legal History’ (2004) 57(1) *Current Legal Problems* 57.

⁴Ibid 64.

similar institutional features.⁵ This may be contrasted with ‘strong’ comparisons, examining how one ‘feature of a later system has been borrowed from the earlier’.⁶ There are no such ‘strong’ features in the comparisons comprising the subject matter of this article. Due to the distance between the two territories, as well as the different directions of travel concerning the development of the law in England and Wales and in Poland, it was impossible that English and Polish entailed property instruments could be related, as will be analysed later in the article.

The evaluative framework for comparison used in this article focuses on the following questions: who made such settlements and why were they created?; how were they created?; what was the attitude of the relevant state authorities to the creation of *ordynacje* and entails respectively?; who benefitted from such settlements?; what problems did the inalienability of entailed land create?; and what barring methods were there restricting entails from existing in perpetuity? Section IV of this article undertakes a functional analysis based upon this evaluative framework. Section V analyses the demise of *ordynacje* and of the entail and strict settlement. The conclusion in Section VI is thematic, analysing the roles of religious, political, and social influences on settlements. It demonstrates that entail-like structures were powerful devices which always seemed to require some sort of limitation – either by explicit restrictions on who could use them, as in Poland, or by barring strategies, as in England and Wales. Further, English and Welsh entails developed without close Parliamentary supervision, whereas the opposite was true in Poland. Firstly, however, Sections II and III deal with Polish entails (*ordynacje*) prior to 1795, and a description of the English common law fee tail.

II. *Ordynacje* in old (pre-1795) Polish law

Before we discuss the details of how Polish law entailed property in the institution known as the *ordynacja*, some general issues relating to Polish legal history are worth mentioning.⁷ It must be emphasised that, in the early modern period, the Kingdom of Poland (formally the *Corona Regni Poloniae* – ie ‘the Crown of the Polish Kingdom’; commonly referred to as ‘the Crown’) was part of a wider political structure known as the Polish-Lithuanian Commonwealth (*Rzeczpospolita Obojga Narodów*). Poland and the Grand Duchy of Lithuania had a close political relationship from 1386 to 1434, from the reign of King Władysław

⁵Ibid 64.

⁶Ibid 57.

⁷The history of Polish law is not widely known amongst non-Polish speakers. For English language speakers, a useful account of Polish legal history can be found in the following two works: Wencelas J Wagner (ed), *Polish Law Throughout the Ages: 1,000 Years of Legal Thought in Poland* (Stanford University Press 1970) and Tadeusz Maciejewski, *The History of the Polish Legal System from the 10th to the 20th Century* (CH Beck 2016).

Jagiello (c 1352/1362–1434), who was also Grand Duke of Lithuania from 1377 to 1434. In the early stages of that relationship, the countries were joined together by consecutive sovereigns – a personal union under a single monarch, whilst maintaining their boundaries with each other. This changed with the Union of Lublin in 1569, which established the Polish-Lithuanian Commonwealth. Even then, their political and legal frameworks remained mostly separated, and both countries had their own judicial structures, civil and military public offices. As a result, it was possible to compare ‘mirror organisations’ in both member states, for example the Polish Great Crown Marshal’s counterpart was the Great Lithuanian Marshal; and the Great Crown Chancellor was matched by the Great Lithuanian Chancellor.

There was, however, one constitutional entity in addition to the monarchy which was shared by the entire Polish-Lithuanian Commonwealth: the Sejm (or General Sejm; *Sejm Walny*). This parliamentary assembly was divided into two chambers: the lower assembly, known as the Chamber of Deputies; and the upper assembly, known as the Senate. The Sejm was validly assembled when the so-called ‘three assembled estates’ participated in its meetings. These ‘three estates’ were the king, the senators (the holders of high civic and ecclesiastical offices), and the deputies elected by local assemblies of the nobility (*sejmik*). The townspeople of particular towns could participate in the Sejm but did not have voting rights.

The last factor to explain before moving forward concerns the Polish legal system in the early modern period. The separation of Polish and Lithuanian offices and judicial structures was a natural consequence of the separation of their legal systems, and to this extent the Polish-Lithuanian Commonwealth functioned in much the same way as England and Scotland after the Acts of Union in 1707. In addition, Polish law (which included most of the *ordynacje*) was multi-layered, and until the end of eighteenth century, was divided into three large groups: rules concerning the aristocracy and nobility (land law; *prawo ziemskie* the group which encompassed *ordynacje*), townsmen (municipal law; *prawo miejskie*), and the peasantry (rural law; *prawo wiejskie*).

The idea of entailing property was well known in late medieval and early modern Europe, including English common law entails, which lay at the heart of the English strict settlement.⁸ In Polish legal history, the counterpart of

⁸Different forms of entailed property were known throughout late medieval and early modern Europe: the Spanish *mayorazgo*; Portuguese *morgadio*; French *majorat*; Italian (post-Roman) *fideicommissum*. The latter term was Germanised to describe different forms of entailed property in German states – *Familienfideikommiss*, or local terms like *Familienanwartschaft* or *Stammgut*. Some authors believe that different entailing medieval and early modern mechanisms had a common origin in Roman inheritance law. According to this theory, the Roman *fideicommissum* was used as a pattern to create entailed property in places like Italy and Spain. Although this possibility cannot be fully disproved, it should be treated with some caution. There is no doubt that the reception of Roman ideas into

western and southern European entailed property was known as *ordynacja*.⁹ In general, the *ordynacja* may be viewed as an exception to the general rules of Polish land (ie nobility) law: the property concerned gained special status and was removed from economic circulation. Surprisingly, there is a dearth of literature in Polish legal history concerning *ordynacje* created under pre-1795 Polish law. Apart from summary descriptions in popular textbooks,¹⁰ only three major works have been written on the subject.¹¹ The first was a basic analysis written by Aleksander Meleń and published in 1929.¹² The second study, which partially reinterpreted Meleń's findings, was published by Teresa Zielińska in the late 1970s.¹³ The third and most recent work, which advanced some new arguments concerning the early history of *ordynacje*, was written by Jarosław Kłoczek.¹⁴ In addition to these three publications the work of Katarzyna Sójka-Zielińska on family trusts (*Familienfideikommiss*) in Prussian law is also relevant, because of the influence of Prussian law on the Polish territories which became part of Prussia after the partitions of Poland (1772–1795).¹⁵ Other scholarly works

some entailing institutions is plausible, but it would be hard to make a direct link between developed early modern entailing instruments and Roman fideicommissary disposition. See eg Marek Kuryłowicz, 'Zapis uniwersalny i podstawienie powiernicze (uwagi historycznoprawne)' (1991) 6 *Rejent* 38–9 and Tünde Mikes and Tomàs de Montagut, 'Family Succession Wars: Succession Norms and Practices in Medieval and Modern Catalonia' in Maria Gigliola di Renzo Villata (ed), *Succession Law, Practice and Society in Europe across the Centuries* (Springer 2018) 39–40.

⁹Plural: *ordynacje*.

¹⁰Zdzisław Kaczmarczyk and Bogusław Leśnordorski, *Historia państwa i prawa Polski. Od połowy XV wieku do r 1795* (PWN 1966) vol 2, 288–89; Stanisław Płaza, *Historia prawa w Polsce na tle porównawczym, Part I, X–XVIII w.* (Księgarnia Akademicka 2002) 280.

¹¹The list of works enumerated in this paragraph includes only works that are fundamental from the perspective of the legal framework of the *ordynacje* designed and created before 1795. It is true that there are also some other works which deal predominantly with the historical aspects of the development of the *ordynacje*. These works do not contain, however, much information about the legal context of establishing the *ordynacje*. One such work which is often mentioned but which does not seem to be pertinent from the perspective of this article is Konstanty Kościński, *Polskie ordynacje i związki rodowe z szczególnym uwzględnieniem Ordynacji Książąt Sulkowskich* (Nakładem autora 1906).

¹²Aleksander Meleń, 'Ordynacje w dawnej Polsce' (1929) 7(2) *Pamiętnik Historyczno-Prawny* 75. This work became a standard point of reference for generations of Polish legal historians who were presenting their views on *ordynacje*. Some of the works can be treated as a sort of paraphrase of Meleń's article. A good example of this is an article written by Henryk Świątkowski, 'Ordynacje rodzinne (Zarys historycznoprawny)' (1937) 9(5) *Głos Sądownictwa* 377–80.

¹³Teresa Zielińska, 'Ordynacje w dawnej Polsce' (1977) 68(1) *Przegląd Historyczny* 17.

¹⁴Jarosław Kłoczek, 'Ordynacje rodowe w Rzeczypospolitej. Powstanie i funkcjonowanie w okresie staropolskim' in Dariusz Kuźmina et al (eds), *Szlachta polska i jej dziedzictwo. Księga na 65 lat Prof. dr. hab. Jana Dziegielewskiego* (Aspra 2013) 75.

¹⁵Katarzyna Sójka-Zielińska, *Fideikomisy rodzinne w prawie pruskim (w XIX i pocz. w XX)* (Wydawnictwo UW 1962). For the partitions, see Norman Davies, *God's Playground:*

dealing with *ordynacje* tend only to focus on one particular *ordynacja*¹⁶ or on certain aspects of how they functioned.¹⁷

The word *ordynacja* is unusual and does not appear in any other medieval or early modern European legal system. It originates in the Latin term *ordination*, derived from *ordinare* – an equivalent of Latin technical phrases such as *statuere* or *disponere*. This suggests that the term *ordynacja* was a reference to the charter which had to be granted to establish the ‘entail’.¹⁸ It is commonly thought that the earliest *ordynacja* was established in 1470 by Spytko and Rafał Jarosławski. That *ordynacja* was later taken over by the Tarnowski family and eventually abolished by King Zygmunt I in 1519. The first fully successful creation of an *ordynacja* occurred in 1579 (approval by the Sejm having been granted in 1587) when three brothers in the Lithuanian Radziwiłł family established three separate entails. This event is generally acknowledged as the starting point for the developed legal concept of entailed property in Polish law.

Kłóczek, however, has argued that these three *ordynacje* were only an intermediate step, illustrative of the transformation of the proto-*ordynacje* into their developed form. That author has also pointed out that the earliest attempts to establish entailed estates in Poland took place in the second half of the fourteenth century. In his opinion, the first such attempt was a trust-like grant by Janusz of Kobylany in 1366.¹⁹ However, Mariusz Kowalski contends that an even earlier grant in 1354 by Jarosław Bogoria (from the village of Skotniki) was the first proto-*ordynacja*.²⁰ The early period of the development of *ordynacje* was characterised by a rather fluid structure, and it was not until the creation of the three *ordynacje* in the Radziwiłł family that more stable entails came about.²¹

A History of Poland (OUP 1981) vol 2, 3–162 and Jerzy Lukowski, *The Partitions of Poland. 1772, 1793, 1795* (Longman 1999). Prussia, and its successor the German Empire, occupied the northern and western territories of modern Poland, including Greater Poland and Pomerania. The two remaining parts of Poland were under the occupation of Austria and Russia, but there is no work similar to Sójka-Zielińska’s on entailed property in that area. General information about the survival of *ordynacje* during the period of partition can be found in Franciszek Longchamps de Bériér, ‘Podstawienie powiernicze’ (1999) 8(2) *Kwartalanik Prawa Prywatnego* 334.

¹⁶For instance, the only existing article written in English about the *ordynacje* is: Wojciech Bańczyk, ‘The Entailed Estate in Polish Law from late 15th to the 20th Century: Exceptions from General Succession Law and Perpetuation of Estate’ (2019) 80 *Studia Iuridica* 9.

¹⁷Eg Grzegorz Jędrejek, ‘Regulacje prawne dotyczące ordynacji zamojskiej’ (2012) 22(3) *Rocznik Nauk Prawnych* 7.

¹⁸Meleń (n 12) 92; Kłóczek (n 14) 76 fn 9.

¹⁹Kłóczek (n 14) 78–80.

²⁰Mariusz Kowalski, *Księstwa Rzeczypospolitej. Państwo magnackie jako region polityczny* (IGiPZ PAN 2013) 162.

²¹There is also information about some unsuccessful attempts by wealthy families to establish entailed property in the 1530s, the 1540s, and the 1570s, See Tomasz Brodacki,

It is not entirely clear from where and how the concept originated. Melań and Sójka-Zielińska suggest that the idea of entailing estates was taken from Germany,²² whilst Zielińska argues that the Polish *ordynacje* originated in Italy. The difficulty with these arguments is that they do not consider the earlier attempts set out above, pre-Radziwiłł, to create entailed estates in Poland.²³ Nonetheless, Kłóczek does provide some support for Zielińska's claim to an Italian or southern European heritage for Polish *ordynacje*.²⁴ Scholars have also debated why *ordynacje* did not attain the popularity of their western and southern European counterparts. Polish *ordynacje* were relatively small in number compared with fees tail in England and Wales, or the numerous family instruments providing for the inalienability of land within such settlements in Germany. Up until the final fall and partition of the Polish-Lithuanian Commonwealth in 1795, only eight genuine *ordynacje* had been established or attempted. Besides the three Radziwiłł *ordynacje* (1579/1587), Jan Zamoyski established one in 1589, and in 1601 the Myszkowski *ordynacja* was created. These were followed in 1609 by the Ostrogoski *ordynacja*, and the debatable *ordynacja* established by Litawor Chreptowicz in 1740, which was not confirmed by the Sejm.²⁵ Finally, in 1775 the last pre-partition *ordynacja* was established by Duke Sułkowski. It is worth emphasising that six out of the eight pre-1795 *ordynacje* were established in a relatively short period of only 30 years (1579–1609). This may suggest a sudden fascination with non-Polish mechanisms which quickly evaporated.

The evidence shows that these *ordynacje* were invariably set up by established wealthy aristocratic families, or by families which had recently gained that status. In such circumstances, *ordynacje* could be viewed as a kind of status symbol indicating a certain position in society by reference to the wealth of the family. They were therefore the preserve of the old nobility as well as the *nouveau riche*.²⁶ It has been contended that the creation of these entails, which made the land inalienable, was a means of preventing the transfer of the old nobility's wealth to those *nouveau riche*.²⁷ However, this view is hard to justify: Melań has pointed out that many

'Uwarunkowania prawne ordynacji Radziwiłłowskiej I jej wojsk w Rzeczypospolitej Obojga Narodów' (2016) 109 *Zeszyty Naukowe Uniwersytetu Przyrodniczo-Humanistycznego w Siedlcach* 223–25.

²²Melań (n 12) 76–79; Sójka-Zielińska (n 15).

²³Zielińska (n 13) 19–20.

²⁴Kłóczek (n 14) 80 and 87.

²⁵The validity of this *ordynacja* will be discussed further below.

²⁶Kaczmarczyk and Leśnodorski (n 10) 289. Entailing property to preserve acquired or inherited property is a common feature in different jurisdictions, both medieval as well as early modern.

²⁷Plaza (n 10) 280. This idea was like the German family trusts. Their creation is often described as an attempt to secure *spelndor familiae et nominis*, see eg Andreas Deischl, *Familie und Stiftung* (Herbert Utz Verlag 2000) 29 and Ulrike Vedder, 'Continuity and Death: Literature and the Law of Succession in the Nineteenth Century' in Steffan

rich aristocratic families never attempted to establish entails.²⁸ It appears that the reasons for establishing *ordynacje* were more complex – or perhaps much simpler: it is possible that *ordynacje* were made solely on a whim. There is some evidence for this possibility in that most of the *ordynacje* were established by a small group of closely related aristocratic families.²⁹ It has been suggested that there were few *ordynacje* because the nobility³⁰ were eager to oppose attempts by aristocrats to create entails and the inequality that they generated. The reality, however, was less simple: the nobility was in fact often keenly interested in such attempts, as many members of noble families were financially dependent on aristocratic patrons, so creating strong local *ordynacje* would have been advantageous for them.³¹

As we have seen, although the total number of *ordynacje* was small, in theory Polish law required certain legal processes to perfect the grant of a valid *ordynacja*. The fundamental document which was needed to create an *ordynacja* was its charter. In some cases, the founder (akin to the common law settlor) would ask the Sejm for prior permission to establish the *ordynacja*: this was not compulsory but, subject to what is said below, the grant of a charter at some point was obligatory. It is important to note that Polish law required that the charter was an individual, unilateral legal act made by the founder (who may or may not have declared himself an *ordynat*, ie the head of the *ordynacja*), and *ordynacje* were never created by means of a will. The charter was registered in court, usually in the Crown Tribunal in Lublin – the highest appellate court for the Polish nobility. Any change in the text of the charter required re-registration. Following these procedural steps, the founder had to present the charter during a session of the Sejm and seek approbation and confirmation of the newly created entailed estate. Such confirmation could be treated not only as Crown approval, but also as a safeguard against other families attempting to take over an entailed estate.³² Once the Sejm had granted its confirmation (in an Act of Parliament),³³ a valid *ordynacja* came into being.

Müller-Wille and Hans-Jörg Rheinberger (eds), *Heredity Produced: At the Crossroads of Biology, Politics, and Culture, 1500–1870* (MIT Press 2007) 89.

²⁸Meleń (n 12) 89.

²⁹Zielińska (n 13) 28.

³⁰In the Polish context it is not entirely correct to refer to the nobility and the aristocracy. The nobility comprised both groups, which included both the very wealthy and less wealthy members of that class. In England and Wales, there was a distinction between the gentry class and the aristocracy, which was comprised of barons, holders of the more senior peerages such as earls, marquesses and dukes, and, from 1440, viscounts. In both Poland and England and Wales, ‘aristocracy’ and ‘nobility’ were interchangeable terms, although a more natural English term for nobles/aristocrats might be ‘peers’, or the ‘peerage’. It was not impossible for a member of the English gentry to be wealthier than a peer, but that would not make him an aristocrat.

³¹Meleń (n 12) 90.

³²Zielińska (n 13) 21; Płaza (n 10) 280.

³³The Sejm’s involvement in the process of establishing *ordynacje* is very helpful from a scholarly point of view, as it provides written evidence. A small number of *ordynacje* are well attested in the so-called *Volumina Legum: leges, statuta, constitutiones et privilegia*

The process described above was, theoretically, the only proper way to create an *ordynacja*.³⁴ In practice, the position was sometimes very different. For instance, there are some serious doubts over the validity of the Ostrogoski *ordynacja*, because the Sejm never approved its charter – but the attempted *ordynacja* on this estate was nonetheless treated as one for about a century and a half. Some scholars have argued that Ostrogoski's estate was commonly considered to fulfil the requirements of an *ordynacja*, despite the lack of a formal confirmation of the charter by the Sejm. As was noted above, Meleń argued that this was a case of an intermediate creation or proto-*ordynacja*.³⁵ However, it is likely that every *ordynacja* was, in practice, created in a slightly different way, with no unequivocal rules concerning the creation of entailed estates.

A key consequence of creating an *ordynacja* was to bind that estate to the conditions of the given *ordynacja*, departing from the general law of property in relation to alienation and inheritance.³⁶ Sometimes the *ordynacja* concerned both movable and immovable property, although the latter alone was more common. Property was also divided into two general categories – heritable and acquired.³⁷ The head of the *ordynacja* acted as an administrator of the whole estate, but his rights were effectively limited by the rights of the remaining members of the family.³⁸ Compared to the average landowner, the scope of the individual decisions he could make regarding the estate was much more limited.³⁹ The *ordynat* was not entitled to sell, donate, mortgage, or exchange any land, although in exceptional situations, part of the *ordynacja*'s lands could be disposed of with the consent of the Sejm. The entailed estate could also not be encumbered in any way.

An important feature of the *ordynacje* charters was to establish specific rules of succession, and without exception, the charters allowed for variations from the general rules. In old Polish law, all heirs co-inherited the estate,⁴⁰ but with

Regni Poloniae, Magni Ducatus Lithuaniae omniumque provinciarum annexarum, a comitiis visliciae anno 1347 celebratis usque ad ultima regni comitia, 10 vols, 1732–1952 (multiple reprints) (hereinafter *VL*). This work offers a semi-official list of all the Parliamentary Acts (constitutions) debated and voted upon in pre-partition Poland. This is also how we know that no more than eight attempts could be made to establish the *ordynacja*.

³⁴See Bańczyk (n 16) 16 which details the Sejm's opposition to entailed interests as infringing the principle of equality within the nobility, as well as among their sons. A comparison is made in Section 4 of that article with English Crown opposition to English common law entails.

³⁵Meleń (n 12) 101–4.

³⁶Teresa Zielińska emphasized the exclusion of the general rules of inheritance and the prohibition of alienation as two main features of *ordynacje*, see Zielińska (n 13) 17.

³⁷Meleń (n 12) 105–6.

³⁸*Ibid* 108.

³⁹Zielińska (n 13) 27.

⁴⁰This is considered further in Section IV below, along with the definition of 'heir'.

ordynacje the rule was that only one person could be appointed as heir. Usually, this was the eldest son of the previous *ordynat*, and women were generally precluded from inheriting an entailed estate, although they had certain rights if there were no living male descendants of the first *ordynat*.⁴¹ Charters would set out the order of succession in detail. Usually, if the male line of the eldest son of the first *ordynat* died out, the descendant of the second son was entitled to take over as head of the *ordynacja*. Meleń proposed a catalogue of requirements to which the *ordynat* had to conform based on the charters of different *ordynacje*. They were: (1) being the son of a lawful marriage (illegitimate sons did not qualify, even if they were later recognised), (2) being of Polish origin (no foreigners could inherit), (3) being a member of the Catholic Church, (4) belonging to the nobility, (5) not having committed any crimes, (6) not being a priest ordained in the Catholic Church, and (7) being of sound mind. An *ordynat* could be a minor but had to be under the control of a guardian during his minority.⁴²

Some believe that the *ordynacje* played an important role in the political life of the Polish and Lithuanian Commonwealth, and it is generally believed that *ordynacje* had a function in military structures. However, these ‘public’ features are hard to prove, and as Zielińska has shown, any claims to a relationship with the military should be treated as an exaggeration. Similarly, any public importance for entailed property only developed after the mid-eighteenth century, when there was public debate in relation to the so-called ‘transaction of Kolbuszowa’.⁴³

The proposed requirements for establishing the *ordynacje* are, therefore, largely artificial and superfluous. Most of the technical requirements were originally grouped together according to Meleń’s description, especially the procedural rules and the requirements to be an *ordynat*. Although these rules may be viewed as having a common foundation, in practice there were differences in each *ordynacja*. We therefore believe it is not possible to talk about a separate law regulating the *ordynacje* in old Polish law. Rather, they should be viewed as a transient feature which was attractive to some very wealthy Polish and Lithuanian families who eventually forced the King and the Sejm to cater for their whims.

III. Summary of the fee tail

Before considering the fee tail, attention needs to be given to some of the relevant political, legal, and socio-economic background in England and Wales in order to provide a parallel analysis with Poland. Unlike Poland, the history of England and Wales is generally well known beyond national borders, so it will be

⁴¹Meleń (n 12) 114.

⁴²Ibid 117–18.

⁴³Zielińska (n 13) 21–2. See further Section IV below.

addressed more succinctly. During the medieval and early modern periods, and particularly following the Norman Conquest in 1066, England was a single sovereign state – unlike politically and legally divided Poland. In England, communal justice gave way to seignorial authority, followed by regional and itinerant royal justice and the development of the common law.⁴⁴ In the Middle Ages and early modern period, the English Crown was more powerful than the Polish Crown in that it could raise taxes. Matters came to a head in England when the Crown had to make concessions to the Barons in 1215,⁴⁵ but successive monarchs attempted to diminish or repeal Magna Carta, and over time the Crown's influence strengthened, particularly under the Tudors (1485–1603). The Stuart dynasty (1603–1714) then began to advance the concept of the divine right of kings, which led to the English Civil War (1642–51), following which the notion of constitutional monarchy developed in England and Wales.⁴⁶

Entails existed in England from the end of the thirteenth century and became a central feature in the later concept of the strict settlement. Section II above pointed to specific examples of *ordynacje*, made possible because there were so few of them in Poland. However, entails and strict settlements were prevalent in England and Wales, and there were so many of them that it is difficult to single out particular examples.⁴⁷ Similarly, the dearth of literature concerning *ordynacje* in Poland may be compared with the substantial scholarly work on the English common law entail and strict settlement.

An outline of the fee tail is also required before embarking on the comparative analysis in Section IV below. To understand the fee tail,⁴⁸ one must understand

⁴⁴ John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 6–31.

⁴⁵ *Ibid* 217 fn 90: 'Magna Carta (1215), cl 12, provided that no taxation should be imposed except by the common council of the realm'. Poland, unlike many late medieval and early modern European countries, did not have a coherent tax system nor a coherent fiscal administration. Juliusz Bardach even suggests a gradual decentralization of already scanty financial offices. The tax system was largely diffused, and most of the Polish nobility was convinced the state should be maintained by incomes from royal land. Attempts to bring this about were part of the so-called 'execution of rights movement' in the second half of the sixteenth century. Furthermore, after the 1374 decree of the Privilege of Koszyce by King Ludwik I, the King could not levy any new tax without the consent of the Sejm, which in practice meant without the consent of the nobility (see Kaczmarczyk and Leśnodorski (n 10) 142–46 and 255–60).

⁴⁶ See generally, John D Mackie, *The Earlier Tudors 1485–1558* (OUP 1963); John B Black, *The Reign of Elizabeth 1558–1603* (OUP 1959); Godfrey Davies, *The Early Stuarts 1603–1660* (OUP 1959); George Clarke, *The Later Stuarts 1660–1714* (OUP 1956).

⁴⁷ See John Baker and Stroud Francis Charles Milsom, *Sources of English Legal History* (1st edn, OUP 2010) 42–67 for some primary sources relating to 'Maritagium and fee tail'.

⁴⁸ It should also be understood that the entail was influenced by the older concept of the *maritagium*. This was 'a gift to the wife, or to the husband and wife, by the bride's parents or other relatives' – see Baker (n 44) 291. See also Biancalana (n 1) 37–83; Watkin, 'Quia Emptores' (n 1) 353–74; Spring (n 1) 27–28; and Michael M Sheehan,

what is meant by the 'fee'.⁴⁹ The fee was a product of the so-called 'feudal system',⁵⁰ whereby freehold land was granted by a lord (A) to a person who would stand beneath his lord on the feudal ladder (B). B would then pay homage and render services to A in return for protection in their landholding by A. In early English law, A required payment of a fine to secure their consent to any alienation of land by B to a third party (C). However, later law found ways to overcome the consent requirement.⁵¹ B could 'subinfeudate': alienating either the whole or part of the land held to C, thereby creating further rungs on the feudal ladder and, in theory, this could be carried on indefinitely. However, this practice was abolished in respect of subinfeudation in fee by the Statute *Quia Emptores Terrarum* in 1290,⁵² but not in respect of subinfeudation in fee *tail*.

Over time, the fee became heritable,⁵³ and a person entitled to inherit B's lands on their death could be substituted on the feudal ladder in place of B upon payment of a 'relief' to the Crown.⁵⁴ This payment enabled the heir to claim the inheritance, and was one of several burdens on the land known as 'incidents'.⁵⁵ Relief was due whenever someone inherited under the common law canons of descent (the standard rules of succession) explained below.⁵⁶ In part to avoid these payments,⁵⁷ a practice developed whereby a testator would transfer land to persons whom he trusted ('feoffees'), and then execute a separate document (the '*ultima voluntas*')⁵⁸ informing his feoffees of his wishes as to how the land should be distributed on his death. A 'passive use' (the 'use' being the precursor of the English common law trust) was thereby created. On the death

Marriage Family and Law in Medieval Europe: Collected Studies (University of Wales Press 1996) 34–37.

⁴⁹See Baker (n 44) 279–83.

⁵⁰*Ibid* 241–42.

⁵¹By means of the lord's warranty to protect his tenants. See *ibid* 245.

⁵²Statute of Westminster III, *Quia emptores*.

⁵³Baker (n 44) 279–80. See also, John L Barton, 'The Rise of the Fee Simple' (1976) 92 *LQR* 108 and Thomas G Watkin, 'Feudal Theory, Social Needs and the Rise of the Heritable Fee' (1979) 10 *Cambrian Law Rev* 39.

⁵⁴This would be the case if B had been a tenant in chief. If B was not a tenant in chief, then the relief would be payable to the lord of whom B had held the land (and the payment to the Crown by a tenant in chief would be to the Crown as feudal lord).

⁵⁵Relief was one incident, but there were others, eg wardship.

⁵⁶For the common law canons of descent, see Baker (n 44) 286–88.

⁵⁷Feoffments to uses were not primarily designed to avoid feudal incidents, but to enable the creation, in effect, of a will of freehold land: these were not permitted at common law. The effect on incidents was a benefit, but what Milsom called a 'sub-plot', not the main 'plot': see Stroud Francis Charles Milsom, *Historical Foundations of the Common Law* (2nd edn, OUP 1981) 208. The most valuable aspect of avoiding incidents was not about relief, which was a fixed customary sum, but concerned wardship of land held in military tenure, and avoiding escheat where a tenant died without an heir. These latter two incidents enabled the relevant lord to appropriate the income from the land, either temporarily in the case of wardship, or permanently in the case of escheat.

⁵⁸See Baker (n 44) 268–78.

of the testator, the feoffees transferred the land to the beneficiary named in the *ultima voluntas*,⁵⁹ such that the land did not descend under the common law canons of descent and the relevant incidents did not apply. The English Crown disliked this income-diminishing practice, and in 1536 the Statute of Uses was enacted to 'execute' passive uses created in this way and compel land to descend once again under the common law canons. This was unpopular, and one of the demands of the 'pilgrims' in the Pilgrimage of Grace (1536–37) was the repeal of the Statute of Uses.⁶⁰ It is possible that this discontent was a factor in the passing of the Statute of Wills in 1540, which established a new power to make a will of a certain amount of freehold land. In the absence of a will, freehold land would continue to descend according to the common law canons of descent, which provided for inheritance by the first born legitimate male issue of the body of the deceased (primogeniture)⁶¹ in preference to younger sons or any daughters. If there were no legitimate male issue, then any daughters would take in equal shares in preference to any collateral male issue of the deceased (eg brothers).⁶² If there were no issue of the body of any kind, then any living eldest brother of the deceased's eldest would take. It should be noted that, by default, only legitimate issue could inherit under the common law canons of descent, but this could be avoided if the testator executed a will of freehold land after 1540 (or created a feoffment to uses prior to 1540). Further, the fee could and still can be inherited,⁶³ sold, mortgaged, or have leases carved out of it. It was, and still is, the greatest estate⁶⁴ in land.

The fee tail⁶⁵ was created by the Statute *De donis conditionalibus* in 1285.⁶⁶ As we shall see, the entail lay at the core of what later became known as the strict

⁵⁹It was a 'passive' use because the feoffees held the land until the feoffor's death, usually for a period of years. This may be contrasted with an 'active' use, where the feoffees were required to transfer the property back to the feoffor immediately: this was often used to change property from fee to fee tail. This is examined in more detail in Section IV below.

⁶⁰The Pilgrimage of Grace was a rebellion against, *inter alia*, the dissolution of the monasteries by Henry VIII. One of the pilgrims' demands was the restoration of abbeys and the Pope. However, the causes of the rebellion are complex, and although the Statute of Uses 1536 was a contributing factor, it was not the sole cause. The leader of the Pilgrimage of Grace, Robert Aske, was executed in York in 1537.

⁶¹For primogeniture, see Baker (n 44) 287.

⁶²Ibid 286–88.

⁶³Inheritance in the old sense of fee was abolished by statute in the late-nineteenth century, such that land in England or Wales no longer descends to an heir but passes to the executors of the will. Taking land under a modern will is commonly referred to as inheritance, but not in the same sense.

⁶⁴'Estate' in the Polish section above is used in the sense of a large area of land under the same ownership (which is also the normal vernacular meaning of 'estate' in modern England). However, the technical term 'estate' used here has a different sense and relates to the quantum of time for which land is held of a lord and/or the Crown.

⁶⁵For the fee tail, see Baker (n 44) 299–303.

settlement, discussed at the end of this Section. The fee tail, like the fee,⁶⁷ was an estate of inheritance.⁶⁸ However, the way in which the fee and the fee tail were inherited differed. As we have seen, the fee could be devised by will to whomsoever the testator wished after 1540, subject to certain limitations. With a fee tail, inheritance of entailed land was by way of lineal descendants (issue/heirs of the body) only. It could be further specified that land could descend lineally to heirs in tail general or to heirs in tail male.⁶⁹ The fee tail ensured that the property would pass down a specified line of descent. For example, if a person settled land on heirs in tail general and had no sons or other legitimate male issue of his body (primogeniture always preferred the eldest son over younger sons and daughters), then his legitimate daughters would take the entailed land in equal shares (coparcenary).⁷⁰ If the land were settled in tail male, the position would be the same, except daughters could not take. If there were no legitimate male heirs of the body, collaterals, eg the deceased's eldest brother, would also not take unless there was specific provision for the eldest brother to take under a remainder interest. If land was granted in fee tail, that is, to X and the heirs of his body, and X died without issue, the land would not descend to or be inherited by X's brother. It would either revert to the donor or his heirs, or, if provision were made for a remainder, it would pass to the remainderman.⁷¹ The reversioner or the remainderman took by virtue of the grant, not by descent, that is, by virtue of having been granted an interest in the settlement which granted the entail.

Entails provided for remainder interests setting out what would happen if it transpired that no issue could be found in the given line of descent.⁷² However,

⁶⁶Stat Westminster II (1285), c I. See Baker (n 44) 293–94.

⁶⁷To create a fee tail out of the fee, the settlor (feoffor) would execute a feoffment to uses with feoffees who would stand possessed of the property by way of an active use to reconvey it back to the settlor in fee tail. It was not possible for a settlor simply to declare that he held the land in fee tail.

⁶⁸Baker (n 44) 298.

⁶⁹For a practical example setting out these differences by reference to primary sources see Gwilym Owen and Peter Foden, *At Variance: The Penrhyn Entail* (The Welsh Legal History Society 2019) vol 14, 17–25. If there was an entail, either a tail general or a tail male (the former allowing for inheritance by daughters if there were no sons), the common law canons of descent were partially disapplied. If a tenant in tail male died with no sons, the land would not descend to a daughter (as land held in fee would) but would pass to the reversioner or remainderman (as applicable) under the settlement which had created the fee tail.

⁷⁰For an account concerning coparcenary, see Łukasz J Korporowicz, 'Some Remarks Regarding Land Partition in Eighteenth Century England' in Łukasz J Korporowicz and Dagmara Skrzywanek-Jaworska (eds), *Cui bono? Księga jubileuszowa dedykowana Profesor Annie Pikulskiej-Radomskiej* (Łódź University Press 2020) 251.

⁷¹Land 'descended' to a remainderman in a 'loose sense'. See Baker (n 44) 295.

⁷²See also Bonfield (n 1) 8; 'Unfortunately, it is far more difficult to establish practice before the turn of the seventeenth century given the dearth of surviving settlements among family muniments'.

these remainder interests could only give rise to a new entail, not a continuation of the previous one. Remainder interests were sometimes contingent upon the death of the person currently seised of the entailed property:⁷³ these were called legal fees tail. Entails were also used in strict settlements, but an estate under a strict settlement differed from one entailed.⁷⁴

The problem with the fee tail was what would happen if the person currently seised of the entail decided to sell and break the entail, with the result that no other heir in tail general or heir in tail male could take. Prior to the Statute of Uses 1536, the position of such beneficiaries was protected by the action of *formedon in the descender*.⁷⁵ Notwithstanding *De Donis*, the common law abhorred inalienable interests in land,⁷⁶ as illustrated by *Taltarum's Case* in 1472.⁷⁷ This left the heirs of entailed interests in a precarious position. By the later sixteenth century, a mechanism known as the common recovery could be used to transform an entail into a fee, barring the entail, and the common law judges were coming to the view⁷⁸ that any attempt to prevent the barring of a fee tail would be void (as would any attempt at a substitute for a fee tail, eg a perpetual series of life estates).

Entailed interests did come to be protected from these attacks. The Statute of Uses 1536 created some uncertainty as to whether *De Donis* would still be effective in protecting remainders (and, as we have noted, remainders under fees tail need not be contingent or conditional), such as the future interests of heirs in tail general or in tail male. Even before 1536, settlors had been experimenting with written uses concerning the relevant tail⁷⁹ – a precursor of the modern trust.⁸⁰ Their hope was that the emerging Court of Chancery would protect the

⁷³However, the remainder need not necessarily be contingent. For example, a grant to A in tail, remainder to B in fee would give B a vested (rather than contingent) interest in remainder if B were alive at the time of the grant. The vested remainder would be a property right owned by B during A's life, which could be sold or otherwise alienated, though it would give no right to enjoyment of the land until A died: it was vested in remainder, not vested in possession.

⁷⁴Baker (n 44) 314. If land were granted to A in fee tail it would not be expected that it would be resettled on every generation. However, such an expectation did arise where land was granted to A for life, remainder to A's first son in tail, which was the building block of the strict settlement. Resettlement on each generation ensured that the tenant in possession was never more than a tenant for life.

⁷⁵See Bonfield (n 1) 17, for a discussion of the obscure provenance of *De Donis* and the extent to which entails were in fact adhered to during the period under discussion.

⁷⁶It is likely that this change was instigated by those holding land in fee tail.

⁷⁷YB (1472) 12 Edw IV 19–21.

⁷⁸As confirmed in *Mary Portington's Case*, *Portington v Rogers* (1613) 10 Co Rep 35.

⁷⁹In the sense that land would be conveyed to trustees upon trust for X and the heirs of his body, creating an equitable fee tail. This clearly did happen (there is, for example, discussion in Chancery in the early seventeenth century about whether an equitable fee tail could be barred).

⁸⁰For an example, see Gwilym Owen and Dermot Cahill, 'A Blend of English and Welsh law in late medieval and Tudor Wales: Innovation and Mimicry of Native Settlement Patterns in Wales' (2017) 58 *The Irish Jurist* 175–77.

use which had been written in tail from attacks by the common law.⁸¹ However, the Statute of Uses did not abrogate the effect of *De Donis* (though the latter was reinterpreted in the sixteenth century). The key sixteenth-century development was the rise of the common recovery as a means of enabling a fee tail to be barred and turned into a fee. This was not connected with the Statute of Uses (except perhaps indirectly).

The person currently seised of land under an entail held the property for life. However, as has been mentioned, they could not effectively sell or mortgage the property, as any sale or mortgage would only endure for the life of the current tenant in tail. As for the problem of inalienability in strict settlements, John Baker notes that an effect of the Statute of Uses was that the creation of legal powers became more common in the seventeenth century, with trustees enabled to sell or mortgage according to the terms of strict settlements. However, it should be noted that if such powers were not expressly provided, the problem remained.⁸²

As will be elaborated in Section V below, there is now no entailed land in Poland, and the creation of new entails has been impossible in England and Wales since 1 January 1997, although pre-1997 entails are upheld and preserved. Prior to the 1925 reforms of the law of property, a fee tail was classified as an estate in land, but the Law of Property Act 1925 changed this, and provided that fee tail could henceforth only exist behind a trust. However, fees tail in their original form had fallen out of popular use well before 1925: the predominant mode of settlement from the seventeenth century onwards had been the strict settlement. No new strict settlements can be created following the Trusts of Land and Appointment of Trustees Act 1996, although existing strict settlements were not abolished.⁸³

IV. Comparison between *ordynacje*, English common law entails, and family settlements

Ordynacje were used in Poland from the late fifteenth century (although, as we have seen, there is evidence of proto-*ordynacje* in the fourteenth century) until the land reforms of 1944. Entails have existed in England and Wales since the passing of the Statute of Westminster II in 1285⁸⁴ (although, as has been

⁸¹Baker (n 44) 303–4. See also, Jones (n 1) and Neil Jones, ‘Trust Litigation in Chancery after the Statute of Uses: The First Fifty Years’ in Matthew Dyson and David Ibbetson (eds), *Law and Legal Process: Substantive Law and Procedure in English Legal History* (CUP 2013) 103.

⁸²Baker (n 44) 308–09. See also Bonfield (n 1) 19.

⁸³Trusts of Land and Appointment of Trustees Act 1996, s 2(1).

⁸⁴It seems that the fully developed entail which would last for so long as issue in tail continued to exist was not in place until the early fifteenth century. However, the practice of granting land to X and the heirs of his body, began to become common in the late twelfth century.

explained, the much earlier concept of the *maritagium* is thought to have influenced their development).⁸⁵ Against this background, this Section will undertake a comparative analysis of these concepts.

1. *Who made such settlements and why were they created?*

We have already discussed the reasons for making *ordynacje* in Section II above. In Poland, there was a requirement that only Catholics could entail land,⁸⁶ whereas there were no such religious bars in England and Wales.

Poland

Meleń discussed the requirement for an *ordynat* to be a member of the Roman Catholic Church.⁸⁷ This was a serious restriction on the class of who could potentially create *ordynacje*: although most of Polish society remained loyal to Rome, a relatively large percentage of the nobility was involved in the Protestant movement. This eventually led to the so-called Warsaw Confederation on 28 January 1573,⁸⁸ following which no religious persecutions were allowed in the Polish-Lithuanian Commonwealth and religious freedom for all free inhabitants of the country, but predominantly the nobility, was assured. Whilst *ordynacje* charters nominally required the potential *ordynat* to be a member of the Roman Catholic Church, we have argued that under the old Polish law such requirements were inconsistently applied. This particular requirement seems to have arisen as a product of life stories of the creators of the few Polish *ordynacje*, and their individual conversions to the Catholic faith.

An examination of the six *ordynacje* created between 1579 and 1609 reveals some uncanny similarities. In the case of the three *ordynacje* created by the Radziwiłł brothers, it seems that the Catholic faith requirement can be attributed to Mikołaj Krzysztof Radziwiłł, the first *ordynat* of Nieśwież. Although he was

⁸⁵See (n 48). See also Bonfield (n 1) 1 who states that marriage settlements became popular in England and Wales from the fourteenth century which he attributes to the popularity of feoffments to uses.

⁸⁶Also in early modern Czechia, the Catholicity of families that wanted to establish entailed property was one of the official requirements (see Sójka-Zielińska (n 14) 7–8). It must be emphasised, however, that it was part of a systematic policy to diminish the importance of the Bohemian Protestant nobility by the Habsburgs, see eg Tadhg Ó hAnnracháin, *Catholic Europe, 1592–1648: Centre and Peripheries* (OUP 2015) 104–05 and Peter Thaler, ‘Fall of Peacemakers: Austria’s Protestant Nobility and the Advent of the Thirty Years’ War’ (2016) 39(3) *Renaissance and Reformation/Renaissance et Réforme* 133.

⁸⁷Meleń (n 12) 177.

⁸⁸For the circumstances that led to the signing of the Confederation see Katharine A Wilson, ‘The Politics of Toleration: Dissenters in Great Poland (1587–1648)’ (PhD thesis, UCL 2005) 41–51.

brought up in a Calvinist family, during a visit to Rome (in the mid-1560s) he met several leading counter-reformation activists, professed his ardent Catholic faith, and began fighting against all forms of Protestantism. All Mikołaj Krzysztof's brothers went the same way and became zealous followers of the Catholic Church. Stanisław, the first *ordynat* of Ołyka, even acquired the nickname 'Pious'. The fourth brother, Jerzy, who was not included in the partition of family property, was ordained and eventually made a cardinal.⁸⁹

There is a similar narrative in respect of the creator of the second Polish *ordynacja* – Jan Zamoyski. Like the Radziwiłłs, Zamoyski was brought up in a Calvinist family and was sent to Western Europe for his education. He spent some time in Paris and Strasburg (an important stronghold for Protestantism) before moving to Padua, where he studied law and converted to Catholicism.⁹⁰ A conversion from Calvinism to Catholicism also featured in the life of the creator of the third *ordynacja*: Zygmunt Myszkowski was, like the Radziwiłłs and Zamoyski, brought up in a Calvinist family. When his father died, he came under the patronage of his uncle, Piotr Myszkowski, bishop of Kraków. His uncle managed to convince Zygmunt to convert (in 1578).⁹¹ Later, Zygmunt studied in the Jesuit college in Siena, and in 1596 he and his brother, Piotr, received aristocratic titles from Pope Clement VIII. A year later, both brothers were adopted by the Gonzaga family, and they started to use the surname Gonzaga-Myszkowski.⁹² Again, all of these narratives share features with the life story of the creator and first *ordynat* of the Ostrogoski *ordynacja*. Janusz Ostrogoski was a member of the grand Ruthenian nobility family, all of the members of which belonged to the Orthodox Church. Janusz's father, however, married a Catholic; Zofia Tarnowska, and their daughters were raised in the Catholic faith. Janusz also converted to Catholicism. As was the case with many rich converts, Janusz Ostrogoski was very engaged in supporting the Catholic Church, and was a great supporter of the Jesuits, financing the maintenance of their churches.⁹³

⁸⁹It is worth noting that Catholic conversions were stimulated by the royal court. Despite the freedom of faith guaranteed by the Warsaw Confederation, religious affiliation played a crucial role in the monarchy's everyday personal policy. The Radziwiłłs' conversion provided them with access to a number of politically important positions, see Kazimierz Bem, *Calvinism in the Polish Lithuanian Commonwealth 1548–1648* (Brill 2020) 198.

⁹⁰For more about Jan Zamoyski's political career see eg Daniel Stone, *The Polish-Lithuanian State 1386–1795* (University of Washington Press 2001) 123–25; for more about his conversion see Bem (n 89) 168 and 229.

⁹¹Bem (n 89) 179.

⁹²'Myszkowski Gonzaga, Zygmunt (1562-1615)' in George J Lerski, Piotr Wróbel and Richard J Kozicki (eds), *Historical Dictionary of Poland, 966–1945* (Greenwood 1996) 369.

⁹³On Jesuits, their mission among the Orthodox aristocracy and their relations with the family of Ostrogoski see Tomasz Kempa, 'Konstanty Wasyl Ostrogoski wobec katolicyzmu i wyznań protestanckich' (1996) 40 *Odrodzenie i Reformacja w Polsce* 17 and 21–2.

This short analysis shows that for all of the *ordynacje* created between 1579 and 1609, the religious requirement was probably connected with the personal conversions of their founders and their desire to secure the purity of the faith which they had all accepted. In addition, it is worth emphasising that the Catholicism of the *ordynat* was not promulgated in the Parliamentary constitutions, unlike the other requirements regarding the gender of the *ordynat*, and general rules regarding inheritance and the property comprised in the *ordynacja*.

The importance of Catholicism in respect of the *ordynacje* is clearly demonstrated in the charters of Jan Zamoyski and Janusz Ostrogoski. Zamoyski proclaimed a general rule that the *ordynat* should be a *keeper* of the Catholic faith,⁹⁴ and Ostrogoski was more specific: in his charter, the *ordynat* had to be *of the* Catholic faith.⁹⁵ Any change of faith by the *ordynat* would result in his immediate loss of the title and its transfer to the closest Catholic male kin.⁹⁶

It seems that another important feature of the *ordynat* was his lay status. Although not every charter expressly prohibited ordained priests from holding the position, this was a general rule. There was a direct prohibition in the charter of the Myszkowski *ordynacja* – only a *persona saecularis non spritualis* was allowed to be a leader of the *ordynacja*.⁹⁷ It is reasonable to believe that entrusting the *ordynacja* to a person who was celibate contradicted its purpose, ie it would militate against the perpetual nature of the *ordynacja*, discussed further below. This is why only three of the four Radziwiłł brothers created *ordynacje*: the fourth brother, Jerzy, was an ordained priest, and then a bishop. In addition, prohibiting a clerical *ordynat* fit with the general privilege entitling only the nobility to own land. This general prohibition surely had an influence on the numbers of *ordynacje* which were created.

This condition of laity resulted in the lack of formal confirmation of the Ostrogoski *ordynacja* by the Sejm. In its charter, Janusz Ostrogoski proclaimed that in the event of all lines of succession dying out, the *ordynacja* was to be managed by the Military Order of Malta,⁹⁸ with the role of *ordynat* entrusted to one elected person after approval by the King and Senate. Ostrogoski emphasised that a clergyman would only gain a right to possess the *ordynacja* in this specific scenario, and that they must come from the Military Order of Malta: no other potential *ordynat* could come from an ecclesiastical order.⁹⁹ However, this provision was at least partially why the Sejm did not confirm the charter.

The Parliamentary constitution of 1766 regarding the annulment of Ostrogoski's charter explains that the lack of prior confirmation was because the religious order of the Knights of Malta was established as the successors of the *ordynacja*.

⁹⁴*Statuta Ordynacyi Zamoyskiej od r. 1589–1848* (Warsaw 1902) 24.

⁹⁵*Akta Publiczne Do Interessu Ordynacji Ostrogoskiej Należące* (1754) 5.

⁹⁶*Ibid.*

⁹⁷Citation after Meleń (n 12) 46 fn 2.

⁹⁸*Akta* (n 95) 4v.

⁹⁹*Ibid* 6.

However, the lack of approval also related to the fact that the Knights came 'from foreign powers' ('*Kawalerów Maltańskich od zagranicznej władzy dependujących Sukcesorami położył*').¹⁰⁰ Therefore, the possibility of succession by members of the clergy laity was only one of two reasons the charter was not approved: the other was the prohibition against foreigners owning land.

Ordynacje were in practice made by the very wealthy and for those with political influence, although there were no regulations prescribing that this had to be the case. However, the procedures which had to be followed, involving access to the Sejm to seek confirmation of the charter, would have meant that *ordynacje* would only have been available to the wealthy.

England and Wales

Unlike in Poland, there were no religious restrictions concerning heirs or the original donor who created the entail, but that is not to say that religion did not play an important part in land ownership. In Poland, there was religious tolerance, but in England and Wales, following Henry VIII's break with Rome, Catholics were persecuted. This began with the Act of Supremacy in 1534¹⁰¹ which declared Henry VIII '... shall be taken, accepted, and reputed the only supreme head of the Church of England ...'. Anybody who defied this and/or swore allegiance to the Pope committed treason.¹⁰² This Act was repealed by his Catholic daughter, Queen Mary, in 1554, only for the repeal to be set aside in turn following the accession to the throne of her Protestant half-sister, Elizabeth I. Further discriminatory laws followed, beginning with the Act of Supremacy 1559.¹⁰³ In the context of property, the Act provided that anybody swearing allegiance to the Pope would forfeit '... all his and their goods and chattels, as well real as personal'.¹⁰⁴ Further Acts during Elizabeth's reign imposed more punitive measures against Catholics and their property,¹⁰⁵ and matters did not begin to improve for Catholics in England and Wales until the Papists Act 1778.¹⁰⁶ The latter, also known as the First Relief Act 1778, heralded the Catholic Emancipation¹⁰⁷ and

¹⁰⁰VL vol 1, fo 487.

¹⁰¹Act of Supremacy 1534.

¹⁰²Ibid. See generally, Christopher Haigh, *English Reformation, Religion, Politics and Society under the Tudors* (OUP 1993); Peter Marshall, *Heretics and Believers A History of the English Reformation* (Yale University Press 2017); Diarmaid MacCulloch, *The Later Reformation in England 1547-1603: British History in Perspective* (2nd edn, Palgrave Macmillan 2001).

¹⁰³Act of Supremacy 1559.

¹⁰⁴Ibid.

¹⁰⁵An amending Act 5 Eliz I, c 1 followed by: 13 Eliz I, c 1; 13 Eliz I, c 2; 13 Eliz I, c 3; and 27 Eliz I, c 2.

¹⁰⁶Papists Act 1778.

¹⁰⁷See Robert W Linker, 'The English Roman Catholics and Emancipation: The Politics of Persuasion' (1976) 27(2) *Journal of Ecclesiastical History* 151.

allowed Catholics to hold land upon the swearing of an oath of allegiance. The practice of Protestant heirs taking over the patrimony of Catholic heirs was also abrogated.

In England and Wales, some common law entails and strict settlements were made by extremely wealthy people, as in Poland, but they were more widely available. Lloyd Bonfield observes that '[e]states of the lesser landowners were often likewise entailed ...'.¹⁰⁸ Political influence was not required in order to make such a settlement, although common law entails and strict settlements were primarily the preserve of the landed gentry, who often had political roles. In England and Wales, common law entails and strict settlements were created in order to ensure that landed estates were passed down a given lineal line of descent¹⁰⁹ – whether to heirs in tail general or to heirs in tail male, and were far more popular than *ordynacje*. As Bonfield has noted '[i]n short, the meshing of landlord wealth with legal and administrative duties required a system of inheritance which promoted a stable ruling class, entail and primogeniture provided the legal framework for the preservation of the elite'.¹¹⁰

2. *Method of creation and the attitude of the Crown*

There were differences between Poland and England and Wales regarding the creation of entails. On the one hand, in Poland the settlor of the land could simply declare that he wished to create an entail, but this was not possible in England and Wales. On the other hand, a charter was required for the creation of an entail in Poland, whereas this was not necessary in England and Wales.

Poland

In Poland, entailed land was created by way of a unilateral *inter vivos* act by a founder. In the interests of the Crown, Polish law commonly required the confirmation of the charter setting up the *ordynacja* by the Sejm, although, as we have seen in respect of the Ostrogowski *ordynacja*, this was not always the case.

Although it is true that Polish kings were generally in favour of the *ordynacje*, there are some indications of tension between the nobility and the Crown on the issue. By way of example, Jan Zamoyski proclaimed that the property of his *ordynacja* could not fall into royal hands. This statement was preceded in the charter by regulations entrusting the King of Poland with some specific functions supporting the wardens of an underage *ordynat*, or in selecting a new *ordynat* in

¹⁰⁸Bonfield (n 1) 20 and 89–92.

¹⁰⁹However, a key motivation behind early strict settlements was to protect land from forfeiture should one turn out to be on the losing side in the Civil War.

¹¹⁰Bonfield (n 1) 15.

the event of the lack of an eligible successor.¹¹¹ Zamoyski's provision here is therefore difficult to interpret. In the late sixteenth century, Polish kings were no longer attempting to illegally enlarge their own lands at the expense of the nobility, as fourteenth- and fifteenth-century kings had.¹¹² It seems that Zamoyski was referring to the so-called *prawo kaduka* (escheat), ie the right of the king to acquire the land in the absence of a named heir. According to Sejm constitutions decreed in the 1560s and 1570s, royal *prawo kaduka* was only allowed if there were no eligible heirs following the eighth degree of kinship. Zamoyski's charter provision may be understood as intending the complete elimination of the *prawo kaduka* in relation to the lands of Zamoyski *ordynacja* and should not therefore be interpreted as evidence of any tension between the Polish Crown and the nobility in the creation of *ordynacje*.¹¹³

Overall, the Polish Crown was in favour of the creation of *ordynacje*. An analysis of the events leading to the creation of *ordynacje* between 1579 and 1609 shows that all the founders were closely associated with the royal court and the royal cause. Indeed, only those who were allies of the king could entail their property. For instance, Mikołaj Krzysztof Radziwiłł was a leading figure responsible for signing the personal union between Poland and Lithuania (the so-called Treaty of Lublin in 1569).¹¹⁴ Jan Zamoyski was a chancellor and close advisor of King Stefan Báthory for many years, as was Zygmunt Myszkowski to Zygmunt III Waza, holding the office of the Great Marshal of the Crown (1600–15). Janusz Ostrogoski fought on the side of the King during the rebellion of Polish nobles 1606–07 (the so-called *Rokosz Zebrzydowski*).¹¹⁵

England and Wales

Common law entails were created entirely differently, and subject to one qualification, no Parliamentary consent was required. However, in England and Wales, a person holding the fee could not simply declare that the land would henceforth be held in fee tail. The holder of the fee (the 'feoffor') had to first convey the land to people whom he could trust ('feoffees'), who were charged with immediately

¹¹¹*Statuta* (n 94) 16 and 22.

¹¹²Krzysztof Gózdź-Roszkowski, 'Z badań nad nietykalnością majątkową polskiej szlachty. Postanowienia przywilejów z lat 1386-1454' (2007) 10 *Studia z Dziejów Państwa i Prawa Polskiego* 15.

¹¹³Kaczmarczyk and Leśnodorski (n 10) 294.

¹¹⁴For more about the Treaty of Lublin as well as the role of Mikołaj Krzysztof Radziwiłł concerning signing the Treaty, see Robert I Frost, *The Oxford History of Polish-Lithuania: The Making of the Polish-Lithuania Union, 1385–1569* (OUP 2015) vol 1, 477–94.

¹¹⁵See Norman Davies, *God's Playground A History of Poland* (OUP 2004) vol 1, 260–64, 270, 328–29, 331, and 336. For *ordynacja* or *maioratus*, see *ibid* 175. However, for the period under discussion in this article, the correct term is *ordynacja*.

returning the property to the feoffor in fee tail in an 'active' use.¹¹⁶ Such entails were called legal fees tail. The Penrhyn entail of 1413 concerning land comprised in the Penrhyn Estate in north-west Wales is an example of how this worked.¹¹⁷ As noted above, following the Statute of Uses 1536, fees tail came to be written in use, ie in trust, although it is not clear how common this practice was.

As in Poland, there was generally no Crown objection to the creation of entails. However, there was a brief period in the lead up to the Statute of Uses in 1536 when it appeared the English Crown did object. A measure was proposed which, if passed might have created a distinction between peerage and gentry settlements. As was discussed above, the Statute of Uses 1536 was enacted to preserve Henry VIII's revenues from incidents, which were eroded by secret conveyances to uses.¹¹⁸ A draft Bill in 1529–30, which was never enacted, provided for the abolition of all entails, which would have become estates in fee. However, this would only have applied to gentry entails, and not to those of a group of 30 peers comprising the nobility. The latter would have had to apply to the Crown for a licence to alienate land within any settlement. Had the draft Bill been enacted, there would have been more similarity between *ordynacje* and entails, in that there would have been significantly less entailed land in England and Wales, although it cannot be assumed that the 30 peers would have been very wealthy. However, the Bill never became law.¹¹⁹

3. *Beneficiaries of the settlements*

As we have seen, in Polish law all the *ordynacje* were established in favour of male lines, and only the eldest son could take. In England and Wales, entails could be in favour of heirs in tail male or heirs in tail general (ie there was a possibility of females inheriting). Differences in who benefitted under the standard rules of succession in both states are discussed below.

It is noteworthy that two Sejm enactments in 1505 and 1510 led to a prohibition on disposals of land by will – exactly the opposite of what happened in England in 1540, when the Statute of Wills provided for wills of freehold land.

¹¹⁶Alternatively, a tenant in fee could grant land to another person who was intended to be the first tenant in tail. For example, a father could grant some of the family land to a son in fee tail. As the fee tail did not include the father, there would be no need for a grant and regrant in those circumstances.

¹¹⁷See Owen and Cahill (n 80) 174–75.

¹¹⁸Feoffments to uses might be made secretly, but the real difficulty for the Crown was the fact that where a tenant in chief died having made a feoffment to uses, there would be no descent to the heir, and hence no wardship (and if there was no heir, no escheat). There were certain statutory provisions, ultimately based on the Statute of Marlborough 1267, which protected the Crown from these losses to a degree, but they were not perfect.

¹¹⁹Bonfield (n 1) 18 and Eric William Ives, 'The Genesis of the Statute of Uses' (1967) 82 *EHR* 673 which contains a detailed consideration of the draft Bill. See also, Baker (n 44) 273–74.

Under the latter, testators could devise all their land in socage tenure,¹²⁰ and up to two thirds of land in military tenure,¹²¹ leaving only one third to descend by reference to the common law canons of descent and subject to Crown incidents. Sejm policy in making these enactments was to encourage the nobility to rely solely on the provisions of customary Polish law outlined below.¹²²

Poland

With *ordynacje*, the patrimony passed to the first-born male successor of the founder, and hence to his eldest son, and so on, with all female relatives removed from succession (*oddalone*). The *ordynat* was responsible for providing for female members of the family out of his personal estate, and there was an expectation that daughters would receive dower on marriage. Younger sons were entitled to inherit some of the founder's personal estate, except for that property forming his daughter's portions. If the founder's first line of succession became extinct, a successor was appointed from the second line of succession, and if necessary, from the third and subsequent lines. As we have seen, for example, in the case of the Ostrogski *ordynacja*, it was provided that in the absence of an heir the entailed estate should pass to the Order of Malta to determine the line of succession. On the other hand, in the case of the Zamoyiski *ordynacja*, the king could be called upon to settle the future of the *ordynacja*, if all lines became extinct.

In Poland, the state controlled the creation of these settlements. The reason for this was because they displaced the old Polish customary laws which provided that sons inherited in equal shares (in contrast to primogeniture's prevalence in England and Wales). It is worth giving some further consideration to these Polish customary laws.

Prior to the seventeenth century, the customary rules of Polish inheritance law provided for a division of the estate between sons. The eldest son divided the property according to the number of heirs entitled to it. Those heirs were able to choose their share of the land, starting with the youngest son, with the eldest son taking the last portion. After the seventeenth century, only three quarters of the estate was divided between the sons in this way, while the daughters (irrespective of their number) were guaranteed one quarter of the estate amongst themselves.

Alongside this general provision, it was possible to dispose of land and chattels by way of a testament, but only one third of land could be freely disposed of (*trzecizna*).¹²³ The Church encouraged the nobility to do so, as it was common

¹²⁰Baker (n 44) 257.

¹²¹Ibid 276.

¹²²Kaczmarczyk and Leśnodorski (n 10) 292–93.

¹²³Wacław Uruszczyk, *Historia państwa i prawa polskiego, 966-1795*, vol 1 (Wolters Kluwer 2015) 112.

practice to devise a certain amount of land to them. In the late medieval and early modern periods, this started to change. The two enactments in 1505 and 1510 which established a general prohibition on the free alienation of land meant that testaments could henceforth only provide for pecuniary bequests and the disposition of chattels.

England and Wales

In England and Wales there was no state control over entailed settlements, even though they could be written in such a way as to avoid the common law canons of descent. The *ultima voluntas* could also be used to work around primogeniture and provide for younger sons or daughters. The common law canons of descent also made no provision for widows, who had to rely on rights to dower,¹²⁴ unless land was settled jointly on husband and wife, known as a jointure.¹²⁵

4. *Inalienability of land: The powers of the ordynat and tenant for life*

In Poland, the *ordynacja* estate was inalienable; it could not be burdened or divided. This was also true of the English entail, but the common law evolved various barring strategies to overcome this impediment. The later strict settlement was also inalienable in the absence of express powers to do so, until statutory provision facilitating this was enacted in the nineteenth century.

Poland

Meleń stated that ‘inalienability and a lack of encumbrances together with *ordynacja*’s inheritance law are essential legal principles of the *ordynacje*; they are the main expression of the purpose for which *ordynacje* are established’.¹²⁶ This statement reflects that the core idea behind the creation of entailed property in Poland was its constancy, a feature strengthened by the perpetual nature of the settlement.

Inalienability of land was also among several features of the *ordynacje* proclaimed by the Sejm’s constitutions. In almost every constitution (except for Radziwiłłs’) it was proclaimed that the entailed property could not be alienated either in whole or in part.¹²⁷ The charters provided more comprehensive

¹²⁴Under the English common law, this was a life interest in up to one-third of the husband’s freehold lands: Baker (n 44) 289–90.

¹²⁵See Spring (n 1) 42–43; and Owen and Cahill (n 80) 164.

¹²⁶Meleń (n 12) 109.

¹²⁷*VL* vol 2, fo 1282; *VL* vol 2, fo 1515; *VL* vol 2, fo 1668; *VL* vol 2, fo 318.

regulations. In general, however, it can be said that every form of alienation was prohibited – sale, donation, mortgage, exchange, and dereliction of the property.¹²⁸

It seems that, extraordinarily, the Sejm could nonetheless authorise alienation. For example, in 1667 the Sejm allowed the guardians of the *ordynat* Aleksander Janusz Ostrogoski, who was a minor, to sell a small portion of land in Warsaw comprising part of the entailed property.¹²⁹ However, this permission concerned the doubtful *ordynacja* of the Ostrogoski family, and this is the only example of a sale of entailed property. As was previously discussed, the Sejm had not confirmed that *ordynacja*, its founder having made provision for the Military Order of Malta as a potential successor. Nevertheless, it was commonly accepted that Ostrogoski's property was somehow entailed.¹³⁰ After the death of the founder, the *ordynacja* was transferred from one related family to another (first to Zasławscy, then to Lubomirscy, and finally to Sanguszko). Eventually, in 1753, the last holder of the property – Janusz Aleksander Sanguszko – sold it: an event known as the 'transaction of Kolbuszowa'. This led to serious political crises – protests by the nobility created aristocratic political factions between those benefitting and those not benefitting from the transaction. It was so significant that Jędrzej Kitowicz, the author of the most important historical work written in this period (*Opis obyczajów za panowania Augusta III* – *The Description of Customs during the Reign of August III*), devoted considerable attention to these events.¹³¹ The legal character of the transaction was dubious, but in 1766 the Sejm approved the transaction and all its provisions.¹³² It may be argued that the Sejm approved the transaction because of the doubtful validity of the Ostrogoski *ordynacja*, as well as the lack of a coherent procedure relating to the creation of the *ordynacje* in general. However, if the Ostrogoski *ordynacja* was not truly 'entailed property', why was the Sejm forced to deal with the

¹²⁸See Melań (n 12) 109. Melań noted that there was no direct prohibition against renting out the property of the *ordynacja*. The Myszkowski family did this in 1649 and 1658, after receiving the Sejm's permission. Every time, however, the Sejm emphasised the extraordinary character of this kind of transaction, see *ibid* 111.

¹²⁹*VL* vol 4, fo 954.

¹³⁰During the following Sejm's sessions, it was natural to refer to the Ostrogoski's entailed property as the *ordynacja* or as to the 'goods of *ordynacja*', see, eg *VL* vol 7, fo 487; *VL* vol 7, fo 748; *VL* vol 7, fo 809; *VL* vol 8, fo 202. It is interesting that after the death of Janusz Ostrogoski, his successors inherited the entire entailed property, but according to the general rules of Polish inheritance law (Kowalski, *Księstwa* (n 20) 174).

¹³¹Oscar E Swan (trs), *Customs and Culture in Poland under the Last Saxon King. The major texts of Opis obyczajów za panowania Augusta III. Description of customs during the reign of August III by Jędrzej Kitowicz* (Central European University Press 2019) 248. For more about the circumstances and the aftermath of the transaction, see Józef Długosz, 'Transakcja Kolbuszowska 1753 r. i jej wewnętrzne skutki polityczne' (1998) 37 *Zeszyty Naukowe Uniwersytetu Opolskiego. Historia* 63.

¹³²*VL* vol 7, fo 488.

transaction? The answer may lie in the fact that old Polish law did not follow cohesive rules regarding *ordynacje*.

England and Wales

The background to the later development of what came to be known as the strict settlement, which was often made on marriage, has already been considered in Section III above.¹³³ The strict settlement 'was perfected between 1640 and 1700, and remained in use for three hundred years'.¹³⁴ It was a common law arrangement which gave 'only a life estate to the owner of the land for the time being, and successive remainders in tail to each of his children in order of seniority',¹³⁵ so the entail was at its very core. As stated by Baker, '[t]his could be protected against destruction by the insertion of trustees to preserve the contingent remainders, and trustees were also charged with raising sums of money for the maintenance of various members of the family'.¹³⁶ The disadvantage of the strict settlement was that, although this type of settlement was only intended to last for one generation, in practice each generation resettled and tied up the land, effectively rendering the tenant in possession unable to alienate. The 'owner', as a mere tenant for life, could not exercise the powers of an absolute owner (eg sale, mortgage, leasing), unless such powers had been specifically reserved by the settlement. To overcome this difficulty, the Settled Land Act 1882 provided that every tenant for life (ie the owner of the land for the time being) under a settlement had the power to sell the land in fee simple, and a purchaser from them would take freely, provided that the capital monies were paid to at least two of the settlement trustees.¹³⁷

5. Perpetuity

The core idea of entailing property, regardless of the legal system and specific instruments designed to have that effect, was to make decisions concerning the descent of the particular property (usually land, but often also movables) for the future. The idea of entailing was to avoid the ordinary system of inheritance and in future dispose of the property outside of those rules. The issues of alienability of land comprised within the settlement and the period during which property was to remain entailed were closely linked and varied between legal systems. Creators of Polish *ordynacje*, as well as the Sejm, took the position that *ordynacje* were perpetual.

¹³³See also, Baker (n 44) 313–15.

¹³⁴*Ibid* 313.

¹³⁵*Ibid*.

¹³⁶*Ibid*.

¹³⁷For further reading on strict settlements, see: Spring (n 1) and John Saville, *Strict Settlement: A Guide for Historians* (University of Hull Press 1983).

Poland

The Polish charters considered in Section II did not deal with the dissolution of the *ordynacje*, because it was believed that the entailed estate would exist in perpetuity. As will be seen below, in default of eligible heirs it was provided that the succession of the Zamoyski *ordynacja* was to be determined by the King of Poland, and in the case of the Ostrogski *ordynacja* by the Sovereign Order of Malta. In practice, however, the estate could be dissolved in two circumstances: when any land in the estate was 'lost', or if all the males in the collateral line of descent died out and there was no provision in the charter as to how a new *ordynat* was to be appointed.¹³⁸ Although Melen describes these two forms of dissolution, it is not clear, especially in the case of 'losing' the land, to what he was referring. It may be assumed that he had in mind such situations as 'loss' due to a natural catastrophe or military conquest. However, in the second instance, lack of eligible heirs would lead to the revival of the general rules of land inheritance.

An analysis of the Sejm's constitutions leaves no doubt as to the perpetual character of the *ordynacje*. All of them contained an unambiguous statement that the *ordynacja* was to 'last forever'.¹³⁹ The charters contain similar provisions, for example, in Ostrogoski's charter the provisions were proclaimed firm and irrevocable.¹⁴⁰

The lack of provision in charters concerning their termination was also clear evidence of the perpetual character of *ordynacje*. Their founders were convinced that they had to establish a transparent system of succession to ensure this. Jan Zamoyski's charter, for example, contains the most extensive system of conditional successors,¹⁴¹ but other founders were equally ingenious. In practice, as Melen pointed out, dissolution could only occur in certain factual circumstances, such as the lack of a new eligible heir, 'loss' of land, or a loophole in the charter's provisions regarding succession as *ordynat*.¹⁴²

The idea of perpetuity seems to have been so deeply rooted into the concept of *ordynacja* that their potential dissolution always gave rise to legislative and political difficulties. Ensuring the continuance of the *ordynacja* and the selection of a successor was usually accompanied by violent disputes between various factions of the surviving family. These tensions led to lengthy litigation and semi-legal military action. The most famous of these is the dispute regarding the Zamoyski

¹³⁸Melen (n 12) 130–32.

¹³⁹Eg *VL* vol 2, fo 1282.

¹⁴⁰*Akta* (n 95) 6v.

¹⁴¹Zamoyski's charter (amended several times) contained five to six degrees of possible heirs. Each degree referred to further lines of the family. Following on from these, Zamoyski declared it possible to transfer the leadership of the *ordynacja* to kinship families who used the same arms as the Zamoyski family. These meticulous regulations regarding the succession may be viewed as reflecting his concern to keep the entire estate in the hands of one person.

¹⁴²Melen (n 12) 130–32.

ordynacja which lasted between 1665 (the year of the death of the third *ordynat*) and 1674, when the Sejm confirmed the right to inherit by the younger line of the Zamoyski family. Interestingly, the dispute was led by two sisters of the third *ordynat*, who argued for the dissolution of the line of succession set out by Jan Zamoyski and the re-establishment of the ordinary rules of inheritance.¹⁴³

England and Wales

It was the opposite story in England and Wales compared to Poland. As we have noted in Section III above, the common law sought ways to allow the breaking of settlements, whilst this was resisted by *De Donis* and the practice following the Statute of Uses 1536 of writing fees tail in use in the hope that the emerging Court of Chancery would protect them.¹⁴⁴

V. The demise of *ordynacje* and the strict settlement

It was noted above that there is currently no entailed land in Poland. In England and Wales, no new entailed land can be created after 1 January 1997, although pre-1997 entails are recognised and can still exist.¹⁴⁵ This Section will provide more detail concerning the respective demises of *ordynacje* and the strict settlement.

Poland

The end of the Polish-Lithuanian Commonwealth did not end the *ordynacja*. In fact, during the partitions their number increased, and it is possible to count more than 40 established across the three parts of the former Polish-Lithuanian Commonwealth. They were, however, established under different legal regimes, ie Prussian (German), Austrian, and Russian. Regaining independence in 1918 brought about serious legal difficulties, not only for *ordynacje*, but also for the law in general. After 123 years of partition, and following three invasions, Poland inherited incongruous legal systems. Most of the interbellum period was marked by attempts to bring about the unification of Polish law.¹⁴⁶ In the case of the *ordynacje*, it was clear from the beginning of the Second Polish Republic that they would have to be abolished. The Polish authorities repeatedly attempted to achieve that goal, viewing *ordynacje* as out-of-date, old fashioned relicts of feudalism, but their actions were only partially successful. More coherent actions were

¹⁴³Ibid 83.

¹⁴⁴For an in-depth account, see Alfred William Brian Simpson, *A History of the Land Law* (OUP 1986) 208-41.

¹⁴⁵*Trusts of Land and Appointment of Trustees Act 1996*, section 2(1).

¹⁴⁶More about the history of entailed property in the interbellum period for Poland see Longchamps de Brier (n 14) 334-35 and more recently Zbigniew Naworski, Tomasz Kucharski and Anna Moszyńska, 'Fideikomisy rodzinne w Drugiej Rzeczypospolitej – główne postulaty badawcze' (2020) 72(1) *Czasopismo Prawno-Historyczne* 27.

undertaken in the final years before the Second World War. On 13 August 1939, the *Ustawa o znoszeniu ordynacji rodowych* (ie the Abolishment of the Family *Ordynacje* Act) was promulgated. It provided that most of the *ordynacje* were to be abolished upon the formal request of the head of the *ordynacja* or a voivode of the voivodship where the *ordynacja* was located.¹⁴⁷ There were three exceptions to this rule: (1) *ordynacje* which had been created before 1795, ie according to old Polish law; (2) *ordynacje* which were deemed important for national cultural heritage or because they held important archival, library, or museum collections; and (3) forests located in *ordynacje* exceeding 2500 hectares. In these three situations, the consent of the Council of Ministers (ie the government) was required before an *ordynacja* could be brought to an end.¹⁴⁸ The outbreak of the Second World War, just weeks after the Act was promulgated, effectively prevented the fulfilment of its provisions. The final abolition of the *ordynacje* occurred several years later when the communist-led Polish Committee of National Liberation issued a decree on 6 September 1944 in respect of agricultural land reforms and the nationalisation of all landed estates exceeding 100 hectares, effectively dissolving all remaining *ordynacje*.

England and Wales

Difficulties with the strict settlement were a matter of some concern by the mid-nineteenth century.¹⁴⁹ If there were no powers reserved in the settlement to allow the tenant for life to sell or mortgage, estates were liable to fall into disrepair. The Settled Land Acts of 1882 and 1925 increased the powers of tenants for life to deal with entailed property, but problems remained. For example, if settlements were not carefully worded to ensure that they were subject to a trust for sale, then strict settlements were created unwittingly, and not in accordance with the settlor's intentions. Further, they were complex and required both a deed vesting the legal estate in the tenant for life, and a trust instrument setting out the beneficial interests. This was a cumbersome procedure which had to be followed each time settled land was sold.¹⁵⁰ Another problem concerned a conflict of interest in respect of the position of the tenant for life as both a trustee and beneficiary. The tenant for life was not treated as a normal trustee and not held to account by the courts and was never held accountable to remaindermen if the settled estate became derelict.¹⁵¹ As was noted prior to the abolition of new entails:

¹⁴⁷*Voivodship* is a historical term which describes a certain area governed by a *voivode* – a representative of the central government. Since the restoration of Poland in 1918, voivodships are the highest level of local administration. Voivodes represent the government.

¹⁴⁸*Ustawa o znoszeniu ordynacji rodowych 1939*, DzU nr 63, poz 417, art 3 (= Dziennik Ustaw 'Journal of Laws' nr 63, position 417, art 3).

¹⁴⁹See The Law Commission, *Trusts of Land* (Working Paper No 94, 1985) 5.

¹⁵⁰*Ibid* 10.

¹⁵¹*Ibid* 11.

Entails might well have been abolished in 1925 along with the old rules of inheritance. They are now little more than a nuisance, accompanied by much intricate law. It is true that entails played an important part in the old-fashioned type of strict settlement. But such settlements are out of favour today and were not of paramount importance even in 1925.¹⁵²

VI. Conclusion

We have seen how the different legal systems analysed in this article (1) sought to accommodate the wishes of those who were dissatisfied with the default rules of inheritance, (2) struggled to achieve a balance between freedom of disposition for one generation, and (3) protected freedom of disposition for succeeding generations. The entail touched the first and the strict settlement touched the second and third, whilst the *ordynacje* only touched the first.

From a religious perspective, we saw how religion played an important part in settlements in both Poland and in England and Wales. In Poland, the charters of the *ordynacje* which have been examined reveal that only Catholics could inherit under an *ordynacja*. This probably related to the religious conversions of their founders, and not religious intolerance or persecution. The reason why Catholic priests could not inherit, again, does not stem from any form of intolerance but related issues with celibacy, which was viewed as going against one of the central tenets of the *ordynacje*: its perpetual status. In England and Wales, following the Reformation, by virtue of various Acts of Supremacy and repeals, religious intolerance had a major effect on the efficacy of settlements, depending on the religious persuasion of the English Crown at any given point in time.¹⁵³ However, notwithstanding these religious vacillations, fee tail settlements flourished in England and Wales, and it has been argued that one reason for this is the common law's abhorrence of perpetual settlements. Indeed, it may be ventured that one of the reasons why *ordynacje* were not as prevalent in Poland as they were in England and Wales was because no attempts were ever made to enable them to be terminated in the former: there was no appetite in Poland to change the perpetual nature of *ordynacje*.¹⁵⁴

Some interesting conclusions may be reached in respect of politics. In the leadup to the Statute of Uses 1536, a draft Bill had been drawn up in 1529–30. Had this Bill been enacted, it would have converted fees tail into estates in fee – apart from the estates of 30 peers. This was part of the Crown's drive to generate

¹⁵²Robert Megarry and William Wade, *The Law of Real Property* (5th edn, Stevens 1984) 1151.

¹⁵³In Poland there were specific legal rules about religion in relation to *ordynacja*. The disabilities imposed upon Roman Catholics in England and Wales did not have any specific relation to fees tail but applied to other forms of landholding too.

¹⁵⁴We have also noted the difficulties in respect of alienation with *ordynacje* and with English common law entails. In England and Wales, a solution developed in the various devices to bar entails, and later the Settled Land Acts of 1882 and 1925.

income from incidents in view of the parlous state of its treasury.¹⁵⁵ Had this Bill become law, there would have been a dramatic fall in the number of entailed settlements in England and Wales and the position could have resembled Poland – namely fees tail in England would have been much reduced.

Turning to social factors, another reason for the lack of popularity of *ordynacje* in Poland may be because the estate had to be shared more equally under old Polish law. Therefore, it might be said that there was little appetite to change the standard rules of succession and create *ordynacje* which favoured the eldest son and cut out daughters. Under the English entail, a settlement in favour of heirs general did not exclude the possibility of daughters inheriting.¹⁵⁶ We have also seen how only members of the Polish nobility could be landowners, again limiting the numbers of *ordynacje* which were created.

Finally, a conclusion is required in respect of the relationship between customary law and settlements. As we have seen, the principle of primogeniture applied in respect of *ordynacje*, and in the English common law canons of descent in respect of heirs in tail male or heirs in tail general. Primogeniture eventually displaced the customary laws of gavelkind in England and Wales.¹⁵⁷ Similarly, the constitution of an *ordynacja* displaced the old Polish law, which is why the involvement of the Sejm was required in setting up an *ordynacja* charter. Therefore, in neither Poland nor England and Wales did primogeniture reflect any principles of customary law.¹⁵⁸

Ordynacje no longer survive in Poland, nor may any new entails be created in England and Wales after 1 January 1997. However, it is instructive to undertake comparative research into this once prevalent form of settlement to get a more nuanced understating of how it developed in different environments.

Disclosure statement

No potential conflict of interest was reported by the author(s).

¹⁵⁵It is a moot point as to whether the Bill was of official (Crown) origin. See Ives (n 119) who argues that it is reasonable to doubt that it was official.

¹⁵⁶Spring (n 1) 67, where Spring comments on the 'harsh rule of primogeniture' in England and Wales and practice elsewhere 'which mandated some form of partition'.

¹⁵⁷Gavelkind was not the only custom of inheritance in England and Wales which departed from the common law rules. The other notable one was borough English, which was a form of ultimogeniture. It is uncertain when exactly primogeniture became prevalent: see Barton (n 53); Watkin (n 53); and Baker (n 44) 287–88.

¹⁵⁸In the case of England and Wales this may depend upon chronology. It seems clear that in the twelfth century (pre-common law) the usual custom for succession to/inheritance of military tenure land was primogeniture. It is probable that the common law rule of primogeniture was influenced by the preceding custom.