Downton Abbey and Thomas Jefferson: Primogeniture, Entails, and More

by Frank Overton Brown, Jr.

By now, many thousands of twenty-first century Virginia television viewers have watched multiple seasons of “Downton Abbey,” the Masterpiece/PBS international hit series from writer and creator Julian Fellowes. As a consequence, today’s viewers know a bit more than did their nineteenth and twentieth century Virginia ancestors (unless their ancestors were students of the law and history) about “fee tail” (or “entailed”) property and “primogeniture.” Downton Abbey deals with the fictional Earl of Grantham (Robert Crawley), his family, and their concerns as occupants of an “entailed” estate in England in the early twentieth century; despite their titles and privileged lifestyle, the unseen but constant presence is the entail, affecting practically every aspect of their lives. On condition of anonymity, an occupant of an entailed estate in England once referred to it “as a kind of life sentence”; it should be added though, quite a posh life sentence. There are many twists and turns of plot regarding the issues that the lord and his family face, but at their core are primogeniture and fee tail. We are given some scant background about how Downton Abbey came to be entailed, but we must fill in some details in order to understand how things came to be as they were for the titled Crawley Family in England in the first and second decades of the twentieth century.

Though we do not know the exact wording of the instrument that created the entail on Downton Abbey, we suspect that a generations-earlier ancestor of Lord Grantham provided that the estate pass “to my son and the male heirs of his body, lawfully begotten,” creating what was called a “fee tail male,” and under the male-only version of primogeniture, the property, subject to its entail, passed to the eldest son, and then to his eldest son, and so on. If an heir had only daughters, the heir apparent could be a distant male cousin, which is what happened in Downton Abbey when Matthew Crawley (a distant cousin of Lord Grantham) became the heir apparent. Upon Matthew’s untimely death, Matthew’s infant son became the heir apparent. Of course, viewers have already learned that, like many of the other landed gentry in England, Lord Grantham, early on, had found it opportune to marry his Lady Grantham (Cora), a daughter of a wealthy American family who could, and did, bring her wealth to England to support the entail and the lifestyle that accompanied it. This was an ironic twist when we look back on the relative positions of early colonial Virginia and England.

Across the Atlantic Ocean and looking back across time to colonial Virginia, we realize that Thomas Jefferson was also concerned about primogeniture and entails, but for a very different set of reasons than Lord Grantham and his family.
a law in cases of the intestate descent of real estate, and it was a law when combined with entail; it was also a societal custom, particularly among the upper classes). In her award-winning 1997 article, “Entailing Aristocracy in Colonial Virginia: ‘Ancient Feudal Restraints’ and Revolutionary Reform,” Holly Brewer, after disputing many of the conclusions in the 1968 article of C. Ray Keim (see references below) and in the articles of others, concluded that “At this point, however, the weight of evidence, dare I say, entails the conclusion that the dead hands of ancestors did control a majority of the land in Virginia in 1776. Thomas Jefferson and other legislators throughout the middle and southern states, who thought they were taking a significant step when they eliminated entail and primogeniture, were indeed radical. This transformation in inheritance law was much more than the ritual abolition of an obsolete institution that most recent scholars have believed it to be.”

In looking at entails and primogeniture in Virginia, we must remember that an act was passed by the General Assembly in October 1705 (Chapter XXIII), declaring that, subject to certain provisos of the act “... all negro, mulatto and Indian slaves, in all courts of judicature, and other places, within this dominion, shall be held, taken, and adjudged, to be real estate (and not chattels) [emphasis added] and shall descend unto the heirs and widows of persons departing this life, according to the manner and custom of land of inheritance, held in fee simple...” This, of course, meant that slaves could be entailed with the very land on which they worked, adding yet another worse-than-feudal aspect to the barbarous practice of slavery. An act affirming that slaves could be entailed with the land was contained in Chapter XI enacted in February 1727.

In October 1748, an act, chapter II, was passed intituled (a now archaic term in the United States meaning “to furnish (as a legislative act) with a title or designation”) “An act declaring slaves to be personal estate and for other purposes therein mentioned,” which act declared: (“...And that for the future, all slaves whatsoever shall be held, deemed, and taken, to be chattels personal.”) By royal proclamation, this act of 1748 was repealed by the king’s proclamation of October 31, 1751, and communicated within the colony by proclamation, dated April 8, 1752. It is instructive to read the preamble to this latter proclamation, since it illustrates the growing intensity of the relationship between Virginia’s elected assembly and the crown:

“Whereas all Laws, Statutes and Ordinances, made and passed in the General Assembly of this Dominion, are according to the Constitution of this Government, by his Majesty’s Letters Patent under the Great Seal of Britain, to be transmitted to his Majesty, for his Royal Approbation or Disallowance, and such of the said Laws, Statutes and Ordinances, as shall be thereupon disallowed or disapproved, and so signified by His Majesty, under his sign manual and signet, or by order in Privy Council, are from thenceforth to cease, determine, and become utterly void. And Whereas his Majesty, in Council has been pleas’d to signify his disapprobation and disallowance of several Acts passed in the years 1748... (to wit)... An Act, intituled, An Act declaring Slaves to be personal Estate, and for other purposes therein mentioned...” The rules were that, if the king disapproved and disallowed an act, that act could not be reenacted by the assembly without the express approval of the crown, so it was not until after the Revolution on December 17, 1792, that the assembly passed chapter 41 (which was a kind of codification of the various laws regarding slaves): “An ACT to reduce into one, the several acts concerning slaves, free negroes, and mulattoes... Paragraph 43. All negro and mulatto slaves in all courts of judicature within this commonwealth, shall be held, taken and adjudged to be personal estate.”

In addition, it should be borne in mind that Virginia’s Laws of Descent (regarding the passage of real estate in intestacy, in which primogeniture was the rule), and the Laws of Distribution (regarding the passage of personal property in intestacy, in which primogeniture was not the rule), were different in that respect.

In writing or reading about Thomas Jefferson, the writer or the reader remembers that Jefferson: served twice as the Governor of Virginia (appointed once and elected once); attended the College of William and Mary; read law under George Wythe in Williamsburg; practiced law from 1767 to 1774; served in the Virginia House of Burgesses and the House of Delegates; served in the Continental Congress; was the author of the Declaration of Independence and of the Virginia Statute on Religious Freedom; was Secretary of State, the third President of the United States, and the Father of the University of Virginia. Jefferson was also a slaveholder through
the date of his death on July 4, 1826, a date of death which he shared with his friend, John Adams. In the codicil to his Last Will and Testament, Jefferson did manumit five of his numerous slaves.

In 1776, in the first session of the House of Delegates subsequent to the Declaration of Independence, there were two bills that were of special significance to Jefferson: One was “An Act for the Revision of the Laws” through which primogeniture was finally abolished in 1785, and the other was a “An Act declaring tenants of lands or slaves in taille to hold the same in fee simple” by which entails were abolished in 1776. Both of these are found in Henings Statutes at Large, Volume 9, and are described in the following two paragraphs. It is helpful to read verbatim the words used, both for their tenor and significance.

“CHAP. IX
An Act for the revision of the Laws
Preamble
WHEREAS on the late change which hath of necessity been introduced into the form of government in this country it is become also necessary to make changes in the laws heretofore in force, many of which are inapplicable to the powers of government as now organised, others are founded on principles heterogeneous to the republican spirit, others which, long before such change, had been oppressive to the people, could yet never be repealed while the regal power continued, and others, having taken their origin while our ancestors remained in Britain, are not so well adapted to our present circumstances of time and place, and it is also necessary to introduce certain other laws, which, though proved by the experience of other states to be friendly to liberty and the rights of mankind, we have not heretofore been permitted to adopt, and whereas a work of such magnitude, labour, and difficulty, may not be effected during the short and busy term of a session of assembly...”

The General Assembly then authorized the establishment of a five member committee for the revision of the laws. On November 5, 1776, the General Assembly appointed the five members to the committee (although over time the composition of the committee changed): Jefferson, Edmund Pendleton, George Wythe, George Mason, and Thomas Ludwell Lee. In allotting responsibilities regarding the revisions, Jefferson’s part, included the laws (among others) dealing with testate and intestate estates and related matters.

The other act was written by Jefferson and shepherded through the assembly by him. His choice of language in the preamble, and his later writings about this act are illustrative of some of Jefferson’s publicly expressed political, governmental, and social philosophies.

“CHAP. XXVI.
An Act declaring tenants of lands or slaves in taille to hold the same in fee simple.
Preamble
I. WHEREAS the perpetuation of property in certain families, by means of gifts made to them in fee taille, is contrary to good policy, tends to deceive fair traders, who give a credit on the visible possession of such estates, discourages the holder thereof from taking care and improving the same, and sometimes does injury to the morals of youth, by rendering them independent of and disobedient to their parents; and whereas the former method of docking such estates taille by special act of assembly, formed for every particular case, employed very much of the time of the legislature, and the same, as well as the method of defeating such estates, when of small value, was burthensome to the publick, and also to individuals:

II. Be it therefore enacted by the General Assembly of the Commonwealth of Virginia, and it is hereby enacted by the authority of the same, That any person who now hath, or hereafter may have, any estate in fee taille, general or special, in any lands or slaves in possession, or in the use or trust of any lands or slaves in possession, or who now is or hereafter may be entitled to any such estate taille in reversion or remainder, after the determination of any estate for life or lives, or of any lesser estate, whether such estate taille hath been or shall be created by deed, will, act of assembly, or by any other ways or means, shall from henceforth, or from the commencement of such estate taille, stand ipso facto seized, possessed, or entitled of, in, or to such lands or slaves, or sue in lands or slaves, so held or to be held as aforesaid, in possession, reversion, or remainder, in full and absolute fee simple, in like manner as if such deed, will, act of assembly, or other instrument, had conveyed the same to him in fee simple; any words, limitations, or conditions, in the
said deed, will, act of assembly, or other instrument, to the contrary notwithstanding..."

At the same time, back across the ocean, and looking from an economic point of view, Adam Smith wrote in *The Wealth of Nations*, published in 1776: “Laws frequently continue in force long after the circumstances, which first gave occasion to them, and which could alone render them reasonable, are no more...The right of primogeniture, however, still continues to be respected, and as of all institutions it is the fittest to support the pride of family distinctions, it is still likely to endure for many centuries. In every other respect, nothing can be more contrary to the real interest of a numerous family, that a right which in order to enrich one, beggars all the rest of the children...Entails are the natural consequences of the law of primogeniture. They were introduced to preserve a certain lineal succession of which the law of primogeniture first gave the idea, and to hinder any part of the original estate from being carried out of the proposed line either by gift, devise, or alienation...They are founded upon the most absurd of all suppositions, the supposition that every successive generation of men have not an equal right to the earth, and all that it possesses; but that the property of the present generation should be restricted and regulated according to the fancy of those who died perhaps five hundred years ago.” Smith’s trenchant observations continued to be pertinent in England, but no longer in Virginia.

The elimination of primogeniture in Virginia was finally accomplished through the work of the Committee of Revisors, which presented its report to the General Assembly in 1779 with a proposed act which was finally passed in October 1785 in the form of “An act directing the course of descents,” that provided that at the first course any real estate of inheritance of an intestate decedent would descend and pass in parcenary to his kindred male and female, “To his children or their descendants, if any there be...” As before, a widow was entitled to a life estate in one-third of the real estate.

In volume 1 of his Jefferson work, Dumas Malone observed about Jefferson: “In the course of his legislative career he concerned himself with the land question in all its more important phases, and he viewed all phases with the same eyes; but the victories over landed privilege that he remembered most vividly in other years were the abolition of entail and primogeniture. The two reforms were widely separated in time, since one of them was effected immediately [entails in 1776], and the other was not finally brought about until nearly ten years later [primogeniture in 1785], but he coupled them in his own mind.”

Despite all of his writings, Jefferson published only one book during his lifetime, and a relatively small one at that; its title was *Notes on the State of Virginia*. This compilation was written in 1781, corrected and enlarged in 1782, printed in 1785 in a limited private edition and in 1787 as a public edition. It was published in both French and in English. The book was a compendium of facts and answers to queries that had been posed to American leaders by François Marbois, secretary to the French Minister to America. It was written to project abroad the image of the United States in a favorable light, and Jefferson’s description in *Notes* of his successful first piece of legislation in the new Virginia General Assembly, passed in October 1776, abolishing entails, shows how much significance Jefferson attached to the actual and symbolic importance of the bill in disestablishing part of the old order in Virginia and therefore breaking another tie with the laws of England: “Slaves, as well as lands, were entailable during the monarchy [emphasis added]; but by an act of the first republican assembly [emphasis added], all donees in tail, present and future, were vested with the absolute dominion of the entailed subject.” Sadly and tragically, although Jefferson’s bill abolished entails in slaves, human slavery, itself the worst abomination of the old order, was not abolished (notwithstanding the Emancipation Proclamation) until December 6, 1865, when the Thirteenth Amendment to the United States Constitution was ratified by the required number of states (three fourths). In May 1782, in Chapter XXI, the Virginia General Assembly passed “An act to authorize the manumission of slaves,” which authorized the owners of slaves to emancipate their slaves by “last will and testament, or by any other instrument in writing...,” subject to certain conditions. If the freed slaves were not of sound mind, or were over the age of forty-five years, or males under the age of twenty-one years, or were females under the age of eighteen years, then the liberating owner, or his estate, was responsible for the liberated slaves’ support and maintenance. Under the authority of that act, there were many slaves who were freed (although
not a large number in relation to the total number of slaves held in Virginia at that time). In looking at some of the county and city will books and deed books subsequent to the passage of the 1782 act, the author was struck by the expressed convictions of the testators and grantors who manumitted their slaves either immediately or gradually, and by the language used by some of them in their deeds of emancipation or wills, sometimes making direct or indirect reference to our Declaration of Independence and its principles, or to the enabling act, for example [note that spellings and punctuation are as shown in the original documents and have not been corrected and modernized]:

Norfolk City Deed Book 1, page 229, May 23, 1791 — “Know all Men by these presents that I Thomas Newton the Younger for divers good causes me thereunto moving, Do by these presents Manumit and Set free my Servant Man Commonly called Frank Drake, And I do further declare the said Negro Man Frank Drake to be liberated and set free to all intense & purposes, agreeable to the Act of General Assembly passed in the Year One Thousand Seven Hundred Eighty two Entitled “An Act to Authorize the Manumission of Slaves”...”

Chesterfield County Deed Book 11, page 517, February 11, 1789 - “Know all Men by these Presents that I Samuel Landrum of Chesterfield County do believe that all Men are by Nature equally free and from a clear Conviction of the Injustice & Criminality of depriving my fellow Creatures of their natural Right do hereby emancipate or set free the following Men, Women and Children Viz...”

Chesterfield County Deed Book 11, page 639, April 7, 1790 - “Know all Men by these Presents that I Jordan Anderson of the County of Chesterfield seeing such an Insconsistency betwixt our Declaration of Independence vizt That all men are equally born free and our Practice in holding a great number of our fellow Men in the most abject Slavery especially those born since that Declaration and also seeing our Youths supported thereby instead of becoming useful Members of Society in our Commonwealth are rather become a mere nuisance and Scandal thereto: observing these things I do gradually emancipate and set free the following persons vitz...”

On Jefferson’s grave marker at Monticello is his epitaph, which he wrote himself, that states the things for which he wished to be remembered: “Author of the Declaration of American Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia.” On January 6, 1821, at age 77, and five years before his death, Jefferson began “to make some memoranda and state some recollections of dates & facts concerning myself, for my own more ready reference & for the information of my family.” In that autobiography, Jefferson wrote this remembrance regarding the first bill that he introduced as a member of the new Virginia legislature, and the fact that he focused on it some forty-five years later illustrates its importance to him: “On the 12th. [of October, 1776] I obtained leave to bring in a bill declaring tenants in tail to hold their lands in fee simple. In the earlier times of the colony when lands were to be obtained for little or nothing, some provident individuals procured large grants, and, desirous of founding great families for themselves, settled them on their descendants in fee tail. The transmission of this property from generation to generation in the same name raised up a distinct set of families who, being privileged by law in the perpetuation of their wealth were thus formed into a Patrician order, distinguished by the splendor and luxury of their establishments. From this order too the king habitually selected his Counsellors of State, the hope of which distinction devoted the whole corps to the interests & will of the crown. To annul this privilege, and instead of an aristocracy of wealth, of more harm and danger, than benefit, to society, to make an opening for the aristocracy of virtue and talent, which nature has wisely provided for the direction of the interests of society, & scattered with equal hand through all it’s conditions, was deemed essential to a well ordered republic. To effect it no violence was necessary, no deprivation of natural right, but rather an enlargement of it by a repeal of the law. For this would authorize the present holder to divide the property among his children equally, as his affections were divided;... the victories over landed privilege that he remembered most vividly in other years were the abolition of entails and primogeniture."
and would place them, by natural generation on the level of their fellow citizens. But this repeal was strongly opposed by Mr. Pendleton, who was zealously attached to ancient establishments; and who, taken all in all, was the ablest man in debate I have ever met with. He had not indeed the poetical fancy of Mr. Henry, his sublime imagination, his lofty and overwhelming diction; but he was cool, smooth and persuasive; his language flowing, chaste & embellished, his conceptions quick, acute and full of resource; never vanquished; for if he lost the main battle, he returned upon you, and regained so much of it as to make it a drawn one, by dexterous manoeuvres, skirmishes in detail, and the recovery of small advantages which, little singly, were important altogether. You never knew when you were clear of him, but were harassed by his perseverance until the patience was worn down of all who had less of it than himself. Add to this that he was one of the most virtuous & benevolent of men, the kindest friend, the most amiable & pleasant of companions, which ensured a favorable reception to whatever came from him. Finding that the general principle of entails could not be maintained, he took his stand on an amendment which he proposed, instead of an absolute abolition, to permit the tenant in tail to convey in fee simple, if he chose it: and he was within a few votes of saving so much of the old law. But the bill passed finally for entire abolition.”

“Entire abolition”—One can only think about what a blessing it would have been if there had also been an entire abolition of human slavery at that time, or if, better still, there had never been human slavery at all. The apology that is often made is, “Yes, but it was a very complicated situation,” the simple response to which is that when decisions are made and actions taken that are morally right, the results are most often simpler and more straightforward than when the decisions that are made and the actions taken are morally wrong, when, indeed, the results are very complicated. The bittersweet words of the American poet, John Greenleaf Whittier, come to mind: “For of all sad words of tongue or pen, the saddest are these: ‘It might have been!’”

Those were revolutionary acts, abolishing entails in 1776 and primogeniture in 1785; but then, there was revolution in the air, more than two centuries before Virginians watched Downton Abbey on public television, and learned about entailed property and primogeniture in England through the first quarter of the twentieth century. In some sense there is an irony in twenty-first century Virginians, whose ancestors, in the eighteenth century, were freed from primogeniture and entails (but who have struggled for centuries with human slavery and its aftermath) viewing fictional Englishmen who were struggling in the early twentieth century with primogeniture and entails in a vestigial semi-feudal context.

I thank my wife, Susan V. Brown, and my son, Matthew R. O. Brown, for their help to me in my writing this article; as always, their careful proofreading, thoughtful suggestions, and patient encouragement were of great importance. In addition, I thank Matthew for his many years of loyal and dedicated assistance and research skills.

References:

Frank Overton Brown Jr. is in private practice in the Richmond and concentrates his practice in the areas of wills, trusts, estate planning, estate and trust administration, and related tax matters. He is a member of the Virginia State Bar Senior Lawyers Conference. He is a fellow of the Virginia Law Foundation and is a fellow of the American College of Trust and Estate Counsel. He is a recipient of the Virginia State Bar Tradition of Excellence Award. He is Past Chair of the Senior Lawyers Conference of the Virginia State Bar and has served on the Virginia State Bar Council.


Hening’s Statutes at Large, Being a Collection of all the Laws of Virginia from the first session of the Legislature, in the Year 1619, Vols. 1 through 13, vagenweb.org/hening.


Access to Justice Hero

Are you providing service to someone who can’t afford legal representation, is your law firm, or another attorney you know? We’d like to tell the members of the Virginia State Bar about it. We’d also like to hear about work lawyers have done on special pro bono projects, or any access to justice program or issue that needs assistance. The VSB is continuing its focus on access to justice by regularly raising awareness of outstanding service by pro bono, legal aid, and indigent defense lawyers.

So send us your story — 400 words or less — about access to justice, along with a photo. We’ll pick the best and feature it in Virginia Lawyer. E-mail your stories to us at hickey@vsb.org.

By the way, the Access to Justice/Pro Bono pages of the VSB website at http://www.vsb.org/site/pro_bono have begun featuring a Volunteer Lawyer Spotlight. Please send a brief “blurb” (3 to 5 sentences and a photo) about an outstanding contribution by a volunteer lawyer or law student. The Special Committee on Access to Justice will update the spotlight each month. Please send your “blurbs” to doss@vsb.org.