Sir John Davies' law reports and the consolidation of the Tudor conquest of Ireland.

Pawlisch, H S

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SIR JOHN DAVIES' LAW REPORTS AND
THE CONSOLIDATION OF THE TUOR
CONQUEST OF IRELAND

by

HANS SCOTT PAWLISCH

A thesis submitted in the Department of History
King's College, The University of London
for the Degree of Doctor
of Philosophy

March 1981
ABSTRACT

The story of the English advent in Ireland during the sixteenth century has been well told by many historians. What has not been emphasized is the role played by English law in making the conquest of that country endure. Following the end of the Nine Years War English law became, in the hands of Sir John Davies (Solicitor-General, 1603-06, Attorney-General, 1606-1619), the single most important agency of colonial development in Ireland. More than any other English administrator, Davies realized that military force in itself did not constitute an adequate instrument to facilitate the economic and social development of the newly conquered kingdom. To discover the salient role played by English law as an agency of early seventeenth-century colonialism, this thesis examines Sir John Davies' Law Reports and the role of judge-made law in transforming the legal, administrative and economic structure of Ireland during the early seventeenth century.

In part I, chapter one sketches out Davies' career as the necessary biographical setting to discuss, in chapter two, the structure and content of his Law Reports and the use of judge-made law to achieve major legal and administrative reforms. In Part II, which focuses on the native community, chapter three details the role of the English judiciary in Dublin in assimilating Gaelic land tenures while chapter four explores the legal mechanisms employed to sequester the richest fishery in Ulster as an incentive to attract private capital to the plantation of Ulster.
Part III concentrates on the colonial community and lays out the consequences of the Tudor conquest for the Old English. Chapter five discusses the use of religious persecution in the courts to erode the privileged status and influence of the colonial community while chapter six explores the use of judge-made law to deprive the Old English towns of their considerable liberties and franchises acquired during previous reigns. Chapter seven details the attempts by the judiciary to reform the Irish currency as a means to place the burden of the war debt on the shoulders of the colonial community. In Part IV, the concluding chapter examines Davies' use of argument from Roman law in providing the necessary precedents and legal principles to consolidate and perpetuate the Tudor conquest of Ireland.
# TABLE OF CONTENTS

**PART I: Introduction**

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Sir John Davies: A Biographical Sketch</td>
<td>7</td>
</tr>
<tr>
<td>2</td>
<td>Ireland and the Origins of <em>Stare Decisis</em></td>
<td>38</td>
</tr>
</tbody>
</table>

**PART II: Judicial Encounters: The Native Community**

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>The Cases of Gavelkind and Tenistry: Legal Imperialism in Ireland, 1603-1610</td>
<td>68</td>
</tr>
<tr>
<td>4</td>
<td>The Case of the Bann Fishery</td>
<td>114</td>
</tr>
</tbody>
</table>

**PART III: Judicial Encounters: The Colonial Community**

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>The Mandates Controversy and the Case of Robert Lalor</td>
<td>141</td>
</tr>
<tr>
<td>6</td>
<td>The Case of Customs Payable for Merchandize</td>
<td>169</td>
</tr>
<tr>
<td>7</td>
<td>The Case of Mixed Money</td>
<td>199</td>
</tr>
</tbody>
</table>

**PART IV: Conclusion**

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>Sir John Davies, The Ancient Constitution and Civil Law</td>
<td>225</td>
</tr>
</tbody>
</table>

**BIBLIOGRAPHY**

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>224</td>
</tr>
<tr>
<td></td>
<td></td>
<td>225</td>
</tr>
<tr>
<td></td>
<td></td>
<td>251</td>
</tr>
</tbody>
</table>
# TABLE OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AJLH</td>
<td>American Journal of Legal History</td>
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<td>An. Hib.</td>
<td>Analecta Hibernica</td>
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<td>Arch. Hib.</td>
<td>Archivium Hibernicum</td>
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<tr>
<td>BIHR</td>
<td>Bulletin of the Institute of Historical Research</td>
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<tr>
<td>BL</td>
<td>British Library</td>
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<td>BNJ</td>
<td>British Numismatic Journal</td>
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<td>Bodl.</td>
<td>Bodleian Library, Oxford</td>
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<td>C</td>
<td>Code of the Corpus Iuris Civilis</td>
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<td>CLJ</td>
<td>Cambridge Law Journal</td>
</tr>
<tr>
<td>CSPD</td>
<td>Calendar of State Papers Domestic Series, London, 1860-1911</td>
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<td>CSPI</td>
<td>Calendar of State Papers, Ireland, London, 1860-1911</td>
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<td>CUL</td>
<td>Cambridge University Library</td>
</tr>
<tr>
<td>D</td>
<td>Digest of the Corpus Iuris Civilis</td>
</tr>
<tr>
<td>EHR</td>
<td>English Historical Review</td>
</tr>
<tr>
<td>HJ</td>
<td>Historical Journal</td>
</tr>
<tr>
<td>HLQ</td>
<td>Huntington Library Quarterly</td>
</tr>
<tr>
<td>HMC</td>
<td>Historical Manuscript Commission Reports</td>
</tr>
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<td>IER</td>
<td>Irish Ecclesiastical Record</td>
</tr>
<tr>
<td>IHS</td>
<td>Irish Historical Studies</td>
</tr>
</tbody>
</table>
Inst. - Institutes of the Corpus Iuris Civilis
Lam. Pal. - Lambeth Palace Library
LQR - Law Quarterly Review
NILQ - Northern Ireland Legal Quarterly
NLI - National Library of Ireland
NYULR - New York University Law Review
P & P - Past and Present
PRO - Public Record Office, London
PROI - Public Record Office of Ireland, Dublin
PRONI - Public Record Office of Northern Ireland, Belfast
RIA, Proc., - Proceedings of the Royal Irish Academy
RSAI - Journal of the Royal Society of Antiquaries of Ireland
SHR - Scottish Historical Review
TCD - Trinity College Dublin
TRHS - Transactions of The Royal Historical Society
UJA - Ulster Journal of Archaeology
PART I

INTRODUCTION
As a minor figure in late Elizabethan literary society, Sir John Davies' main attraction for scholars has been his reputation as a poet and a man of letters. Since the appearance of Alexander Grosart's edition of Davies' prose and poetry in 1869, historians have concentrated almost exclusively on the links between Davies' upward mobility in Jacobean society and literary patronage arising from his major poems, Orchestra, Hymns to Astrea and Nosce Teipsum. Whilst the poetry doubtless played a role in gaining Davies access to influential circles at court, current scholarship has strangely neglected his more important professional career. Between the appearance of the last poems in 1602


2. These poems, with the rest of Davies' poetic works are featured in R. Krueger, op. cit., pp.1-126.
and his appointment as Chief Justice of the English Court of King's Bench in 1626, Davies served as one of the major legal officials in Ireland during the period of the consolidation of the Tudor conquest of that kingdom. Publication of his Irish Law Reports in 1615 demonstrated Davies' own personal achievement, as Irish Attorney General, in securing the transformation of the island from an economic and strategic liability to a self-sustaining appendage of the English crown. Neglect of this important chapter of Irish legal history has left an enormous gap that can only be remedied by re-examining Davies' life against the backdrop of his Irish career. For a more balanced view we must reduce the theme of literary patronage to its proper perspective by emphasizing the jurisprudential aspects of a career that elevated the third son of a Wiltshire tanner to an appointment as Chief Justice of the King's Bench in England.

Davies was born in Tisbury, Wiltshire and christened in the parish church on 16 April 1569. His forbears had lived in Wiltshire for two generations after Sir John's grandfather, John Davies of Shropshire, emigrated from Wales with the Earl of Pembroke. The grandfather seems to have done well in Wiltshire; a measure of his prosperity can be seen in his status as lord of the manor of Chicks Grove. The family apparently remained in the manor house for some time, because John Davies of Chicks Grove, the father of Sir John, died there in 1580. The elder John Davies earned a prosperous living as a tanner. Following the death of his father, John, along with four other children, was raised by his widowed mother, the former Mary Bennet of Pitt House, a small village located only a mile from Tisbury. Of the four other children, there were two sisters, Edith and Mary, and two older brothers, Edward and Mathew, who were both born in 1566. Mathew preceded John at Winchester and later became vicar of Writtle, Essex.
Following in his brother’s footsteps, John Davies was elected a scholar at Winchester in 1580, where he studied for four years until he reached the age of sixteen. As Robert Krueger has pointed out, the years at Winchester sparked Davies’ interest in literature, and there he came into contact with John Hoskyns, Thomas Bastard, John Owen and other important epigrammists and budding men of letters. From Winchester, Davies seems to have gone to Queen’s College, Oxford but the evidence on his university career is confusing. The matriculation rolls for Queen’s record his admission there on 15 October 1585. However the Carte Manuscript notes on Davies life, which are generally reliable, claim that Davies studied at New College. The latter would have been the more conventional choice for a Winchester scholar, but we cannot discount the possibility that Davies studied at New College only after his expulsion from the Middle Temple on 9 February 1598. At any rate Davies’ stay at Oxford lasted only eighteen months and it is doubtful if he ever graduated. By February 1588 we find him entering the Middle Temple, where his admission is fully recorded: 'Mr. John Third son of John Davies of Tisbury, Wiltshire gent. and late of New Inn gent.' Davies apparently spent the time between leaving Oxford

and entering the Middle Temple in attendance at New Inn, the Inn of Chancery associated with the Middle Temple, which made him eligible for a reduced admission fee.\(^8\)

Davies distinguished himself from the beginning of his legal career and he was called to the degree of the utter bar with the assent of all the Masters of the Bench after the minimum seven years residence.\(^9\) The significance of this achievement is made clear by comparison with the career of Davies' friend Richard Martin, who spent fourteen years as an inner barrister before being called to the utter bar.\(^10\) Nevertheless, Davies' legal acumen seems to have been offset by certain defects of character, underscored by a flamboyant and tempestuous personality. Sprinkled throughout the Middle Temple records of this period are numerous references to Davies' general rowdiness, and he was frequently disciplined for minor infractions of decorum. On 25 November 1590, Davies, along with several others, was fined for 'making outcries, forcibly breaking open chambers in the night and levying money as the Lord of Misrule's rent'.\(^11\) Within a year, Davies found himself temporarily expelled, along with William Fleetwood and Richard Martin, for committing similar offences against fellow students. This unruly behaviour may have represented a kind of ritualized fraternal chaos endemic to the Candlemas season. However, the Middle Temple Records for 1590-92 demonstrate instances of disciplinary action taken against Davies at other times as well.\(^12\) One of these occasions inspired Davies' only recorded trip to

\(^8\) The fee for former residents of New Inn was set at 20 shillings.

\(^9\) MTR, 1:354.

\(^10\) MTR, 1:293,419.

\(^11\) MTR, 1:318.

\(^12\) MTR, 1:327-328; For other disciplinary action see pp.311,318,320 and 332.
the continent. In 1592, Davies, along with William Fleetwood and Richard Martin, journeyed to Leyden with letters of introduction from Camden to Paul Merula the famous Dutch jurist. Since Merula held the chair of civil law and jurisprudence at Leyden, it may be that Davies' sojourn implied an early interest in the theory and practice of continental civil law.

After his return to England, Davies wrote to acknowledge Merula's hospitality in a letter dated 17 March 1592. He described his studies at the Middle Temple and enclosed an English lawbook as a token of his admiration for the Dutch jurist. In language unbecoming to a lawyer who has since acquired a reputation for insularity as ingrained as that of Sir Edward Coke, Davies explained his choice of a Latin edition of Fortescue's treatise on English municipal law by claiming that the barbarous character of the English legal vernacular would be unsuited for a cosmopolitan lawyer like Merula. In a subsequent letter Davies complained of the tedium of studying English municipal law, and enviously remarked upon Merula's security in the ivory towers of Leyden where the 'musae nectar et ambrosiam omni ac abundantia apponant.' Davies may have felt a nostalgic longing for the scholarly tranquility of university life, but as the world of the Middle Temple drew him further away from the 'musae nectar et ambrosiam', contact with Leyden ceased.

The significance of the friendship, however, lies in Davies' interest in civil law which, as his Irish Law Reports show, he would use with devastating effect in consolidating the Tudor conquest in Ireland.

From 1592 to 1598, Davies' life centered on the Middle Temple. During this period, however, his social advancement was interwoven with

13. For Merula's letter to Camden see: BL Cotton Ms. Julius C.V., f. 49a; For Davies' letters see: Bodl. Ms. D'Orville 52, ff. 49a-50a.
15. Ibid. f. 50a.
his increasing success as a poet. Sometime during 1594, Davies completed the poems *Nosce Teipsum* and *Orchestra*. In the same year Charles Blount, Lord Mountjoy, who was subsequently appointed Lord Deputy of Ireland, presented Davies at court. Although Mountjoy’s patronage may have resulted from an appreciation of the poet’s talents, it is equally possible that the contacts had originated at the Inns of Court, for Mountjoy had been admitted to the Middle Temple on 20 June 1579. At any rate, the connection with Mountjoy, whom Davies later described as his patron, proved fruitful. In 1594, Queen Elizabeth had Davies sworn in as servant-in-ordinary and encouraged him in his law studies at the Middle Temple. In the same year he was part of the official party sent to the christening of Prince Henry in Scotland.

During the next few years Davies continued to write poetry and to pursue his legal studies; as we have seen, in 1595 he was admitted to the utter bar. In 1598, however, an incident occurred which threatened to end abruptly his successful advance. Since the traditional interpretation of Davies’ rise rests on the story of this event, it will be necessary to recount in some detail Davies’ friendship with his fellow Templar Richard Martin, and the circumstances of its rupture and Davies’ expulsion from the community in which he had spent the last decade.

Richard Martin was the colleague with whom Davies had travelled to Holland in 1592 after their joint suspension from the Middle Temple for misconduct. The poem *Orchestra* was dedicated to Martin and Davies called him ‘mine owne self’s better halfe, my dearest friend.’ John Aubrey described Martin as a very ‘handsome man, a graceful speaker,

16. SP/63/218/f.152a; CSPI, 1603-06, p.463; ‘For myself I have lost so noble a patron of my poor fortune as the Earl of Devonshire, who first transplanted me here’.

17. MTR, 1:228.


facetious and well beloved,20. Benjamin Rudyerd, another Elizabethan poet, portrayed him as

...... of face thin and leane of a cheareful and gracious countenance blackhaired tall bodyed and well proportioned of a sweet and faire conversation to every man that kept his distance. Fortune never taught him to temper his own will or manhood. His company commonly weaker than himself put him into a just opinion of his own strength of a noble and high spirit as far from base and infamous strains as ever he was from want. Soe wise that he knew how to make use of his own subjects and they their own contentment soe eloquent in ordinary speech by extraordinary practices and loss of too much tyme that his judgement which was good study could not mind it. He was very fortunate and discreete in the love of women, a great lover and complainer of company having more judgement to mislike their power to forbear.21

By contrast, contemporaries thought Davies an agressive indiscreet man with a penchant for showy behaviour. In 1607 the Earl of Tyrone, in an apologia written to James I justifying his flight from Ireland, angrily commented on Davies' defects in personality, portraying him as a man 'more fit to be a stage player than a counsaill to your highness',22

While some observers took note of the contrasts in personality between Davies and Martin, others remarked on the equally striking difference in their physical appearances. The most vivid illustrations of Davies' physique appears in two rather coarse selections from Manningham's diary.

...... B. Rudyerd or Th. Overbury: He never walks but he carries a cloake bag behind him his arse sticks out so far.

Jo. Davy goes waddling with his arse out behind him as though he were about to make every one that he meets a wall to piss against.23

An equally graphic description may be found in Benjamin Rudyerd's poem

22. SP/63/222/f.319a.
23. BL Harl. Ms. 5353, f. 127b.
entitled Mathon, where Davies (Mathon) is depicted as a short, stout pockmarked man with little to offer in the way of social graces:

..... Matho the dauncer with the maple face.

..... Matho hath got the barr and many graces by studdying, noble men, newes and faces.

..... Mathon why shouldst thou think of common lawe, None can into an ordered method draw Since thy rude feet, whose gate confusion wrought. Weare by great paynes ordered dancing brought.24

These contrasts between Davies and Martin are helpful in understanding the events described in Benjamin Rudyerd's narrative of the Candlemas festivities in 1598, when both men found themselves in competition for the coveted position of Prince d'Amour. As an integral part of the annual Candlemas ritual, the Middle Templars elected, from among their ranks, a Prince d'Amour to supervise their festivities. In 1598, Martin and Davies appeared as the principal candidates, which in itself illustrates their popularity among their fellow lawyers. Davies, however, narrowly lost the election, and Martin, in the company of his supporters added to the injury by heaping abuse on his friend. Davies made a spirited attempt to defend himself with an extemporaneous oration that was shouted down by the Middle Templars. Rudyerd, with rude allusions to Davies' squat stature and strange ambling gait, described his reaction upon losing the election. Davies, he said:

..... ran down amongst them, like Lacoon ardens; and with a most curious and turbulent action uttered these two proverbs, the one borrowed from a smith and the other from a clown.25

Unable to impress the revellers, Davies sought refuge in liquor, but in his drunkenness succeeded only in casting lewd and offensive remarks


25. BL Harl. 1576, f. 556.
at a number of ladies present at the festivities. His flamboyant costume of orange taffeta, which accentuated his defective physique, added to his ignominy, and Rudyerd accused him of poor taste in clothing. Davies is further alleged to have 'practiced factiously against the prince and earnestly stirred up enmity betwixt him and the Lincolnians.\(^{26}\)

Undaunted, Davies made another attempt to regain the spotlight but this time was countered by a vicious premeditated satire which lampooned both his poetry and his social origins. According to Rudyerd, Davies, who was dubbed Stradilax in the impromptu drama, 'in great pomp with a left handed truncheon miscalled himself a lord no man gainsaying it or crying: God save your Lordship'. An unidentified poet 'Matagonius' then presented Davies a 'shield wherein was drawn the monster sphinx; the word was Davus sum, non Oedipus, and saluted him by the name of Stradilax to the tune of the Tanner and the King.\(^{27}\)

As Philip Finkelpearl and J.R. Brink have shown, the Middle Templars' prank represents a cleverly arranged piece of sixteenth century class satire\(^{28}\). First the Templars' choice of music served to remind the prideful Davies of his humble social origins as the third son of a tanner. The mysterious iconography of the sphinx and the allusion to Oedipus are a bit more difficult to analyze, but Brink has cogently argued that the sphinx represents a standard seventeenth-century literary motif employed to show ignorance of self\(^{29}\). The classical allusion to Oedipus' solution to the sphinx's riddle symbolized the importance of knowing one's self.

27. Ibid., f. 559.
and of understanding the complexities of human nature. The juxtaposition of the sphinx and the inscription 'Davus sum, non Oedipus' therefore represents a direct reference to the poem Nosce Teipsum, 'Know Thyself'. In other words, Davies not only neglected to understand himself, but he also failed to know anything of human nature. This elaborate, ingenious and obviously premeditated sneer must have dealt a devastating blow to Davies' ego.

Still smarting from this wave of insults, Davies constructed an equally staged, albeit more violent revenge directed against Richard Martin, the probable author of his torment. The following excerpt from the minutes of the Middle Temple records what happened.

...... While the Masters of the Bench and other fellows were quietly dining publicly in the hall, John Davies, one of the Masters of the Bar, in cap and gown, and girt with a dagger, his servant and another with him being armed with swords, came into the Hall. The servant and the other person stayed at the bottom of the hall, while he walked up to the fireplace and then to the lower part of the second table for Masters of the Bar, where Richard Martyn was quietly dining. Taking from under his gown a stick, which is commonly called a bastinado he struck Martyn on the head with it till it broke, and then running to the bottom of the hall he took his servant's sword out of his hand shook it over his own head (super caput suum proprium quatiebat) and ran down to the water steps and jumped into a boat. He is expelled never to return.30

Martin seems to have escaped with little or no damage, but the following anagram attributed to him amply shows his chagrin at having been betrayed by his friend.

...... Davis/Advis/Iudas/Martin 31

Since literary scholars have concentrated their attention on the novelty of Davies' attack on Martin, it should be noted that its style


31. BL Harl. 5353, f. 12b.
and execution show a surprising parallel to an incident at another of the Inns of Court. Between 5 February 1598 and 12 May 1598, Henry Colt committed a suspiciously similar offence against the steward of Lincoln's Inn.

"... With a revenge extraordinary in most outrageous and violent manner in the hall and the skreene, before the benchers were risen from the table, he did strike the said steward with a cudgell or bastinado upon the heade, giving unto him a most dangerous blowe, almost to the perill of his lyfe.

"... And for other misdemeanours then by him committed, as in drawing his rapier, presently upon the said outrage done, in the court of this house, to yll example of others, intending as yt seemed thereby to have done some further outrage. He is therefore expelled the house."32

In view of this precedent, it would be difficult to represent Davies' transgression as an isolated incident, and Colt's activities at Lincoln's Inn may have served as inspiration for Davies' assault on Martin. The records of Lincoln's Inn also describe, on the same occasion, an incident in which a Mr. Watts cudgelled the Pannyerman over the head, an offence which he followed up by attempting to stab a Mr. Holland, one of the fellows, with a dagger. Although one would normally consider attempted homicide with a dagger to be a more heinous crime than Davies' offence, it is interesting to note that Watts got off with a fine of £10.33

The crucial difference between the two assaults seems to deal with the question of decorum. It was one thing for Watts to commit an assault on the street or in the hallways of Lincoln's Inn, quite another for Davies and Colt to bastinade their enemies during dinner hour before the watchful presence of their respective Inns of Court. A measure of official distaste over this lack of etiquette is illustrated in the epigrammist John Hoskins' allusion to Davies' assault:


33. Ibid., 2:55.
Shall a soldier for a blow with his hand given in war to a captain, be disgraced, and shall a lawyer for the bastinado given in a hall of court to his companion be advanced? We that profess laws maintain outrage, and they that break all laws in this yet observe civility.\textsuperscript{34}

The significance of the attack on Richard Martin lies in the role it has played in the myth of Davies' rise through literary patronage. According to tradition, Davies followed his disgrace with a period of extreme soul-searching, and out of sorrow and penance, scourged himself of his former pride by writing the introspective poem entitled \textit{Nosce Teipsum}, which brought him to the attention of James I. This is to say that the poem \textit{Nosce Teipsum} has been seen as the source of Davies' readmission to the bar and his subsequent legal career in Ireland culminating in an appointment as Chief Justice of the Court of King's Bench in England.

The origins of the story lie in an apocryphal anecdote invented by Anthony Wood who misinterpreted several biographical details in the Carte manuscripts. Wood tells us that Davies, upon the death of Elizabeth, accompanied Lord Hunsdon to Scotland to congratulate James I on his accession to the throne. On being introduced to Davies, James allegedly inquired as to whether he were 'Nosce Teipsum Davies'. Having received an affirmative reply, James embraced him and 'thenceforth had so great favour to him, that soon after, he made him his Attorney-General in Ireland'\textsuperscript{35}. Wood's fallacious story later served as inspiration for Alexander Grosart's forced construction of Victorian moral progress onto Davies' career\textsuperscript{36}. This virtuous chronology of


\textsuperscript{35} Carte Ms. 62, f. 590a.

Davies' life was subsequently endorsed by A. L. Rowse, who repeats Wood's account as a classic illustration of an Elizabethan political career launched through literary patronage. On all counts, this traditional story is false. As Brink has demonstrated, both the Carte 'Notes' on Davies and Rudyerd's description of the Candlemas revels, indicate that the poem Nosce Teipsum was written before the violent incident with Martin. Nor can it be shown that Davies was at all penitent for his crime. Robert Krueger has recently found a contemporary manuscript attributed to Davies that would hardly indicate remorse.

...... Davies beinge committed to prison for a quarrel between him and Martin, wrote as ensueth.
          Now Davies for a bird is in
          But yet it is but for a Martin.

That Davies returned to Oxford after his expulsion from the Middle Temple is confirmed by John Aubrey, who mentioned that Davies 'spent some more time there again then wearing only his cloak'. The notion that he subsequently accompanied Lord Hunsdon to Scotland is, however, unfounded. It was not George Carey, Lord Hunsdon, but his brother Sir Robert Carey, who took the news of Elizabeth's death to Edinburgh - Davies could not have gone to Scotland with a man who never even left England. It is possible that Davies did accompany part of James' progress south into England. In a letter written to Dudley Carleton on 30 March 1603, Chamberlain commented on the flurry of activity surrounding the new king's progress and gave the names of various figures who had presented themselves for preferment, one of whom was 'John Davies the poet'.

Although Davies may have met the king at this time, there is no evidence to show that he received any immediate marks of royal favor. In the first month of his reign, James created 906 new knighthoods, 432 of which were dubbed on a single occasion on 23 July 1603. Davies was not included in this group. An entry in Manningham's diary records one sceptic's impressions of Davies' relations with the new monarch:

..... Jo: Davies reports that he is sworne the King's man, that the king shewed him great favour. Inepte. He slandars while he prayses.41

The Carte 'Notes' on Davies' life provide the solution to the problem of the timing of the mysterious patronage link with James. Davies did indeed meet James I, but not in the fictionalized encounter of 1603 created by Wood and Grosart. Rather Davies' association with James stems from the earlier journey to Scotland to attend the christening of Prince Henry, or as the Carte 'Notes' put it:

AD 1594 when Prince Hen: was borne from whom Q. Eliz. was Godmother he went in the company of ytt Ambassye and when he kissed the King of Scats hand he was owned by him with the name of Nosce Teipsum Davies.42

The revision in the chronology of Davies' trip to Scotland, and the reference to the poem Nosce Teipsum in the Candlemas satire serve to scuttle the story that Davies' return to grace following his expulsion from the Middle Temple was based on some personality transformation enshrined in the poem Nosce Teipsum, which had actually been written some six years before.

While the Nosce Teipsum story is certain apochryphal, it is true that Davies was not averse to using his literary talents to bring himself

41. BL Harl. Ms. 5353, f. 127b.
42. Bodl. Carte Ms. 62 f. 590a.
to the attention of influential men at court in the years following his disgrace. On the death in 1600 of Elizabeth Moore, the second wife of Sir Thomas Egerton, Davies sent the Lord Chancellor an autographed copy of *Orchestra* with an introductory sonnet designed to console the bereaved Egerton. In the attached letter, Davies reaffirmed his friendship to Egerton and added:

..... A French writer (whom I love well) speaks of 3 kinds of companions; Men, Women and Books; the losse of the second makes you retire from the first, I have therefore presumed to send your Lordship one of the third kind, which it may be is a stranger to your Lordship. Yet, I persuade me, his conversation will not be disagreeable to your Lordship. 43

There is also evidence to suggest that literary talent helped in Davies' attempts to ingratiate himself with Robert Cecil. During January 1601, Davies wrote to Michael Hicks, Cecil's secretary, offering his literary services:

Mr. Hicks: I have sent you here enclosed that cobweb of my invention which I promised before Christmas; I pray you present it, commend it, and grace it as well for your own sake as mine because by your nomination I was first put to this task, for which I acknowledge myself beholden to you in good earnest though the employment be light and trifling because I am glad of any occasion of being made knowne to that noble gentleman whom I honor and admire exceedingly. If it ought to be added or altered, let me hear from you. I shall willingly attend to do it, the most speedily if it be before the term. 44

Within a year Davies composed another poem entitled *A Contention Betwixt a Wife, a Widow and a Maid* which was presented at Cecil's home. John Chamberlain mentioned the event in his diary, and referred to the poem as a 'pretty dialogue'. 45

44. BL Lansdowne Ms. 88, f.4a.
The fact is that one need not look to the accession of James in 1603 to account for Davies' rehabilitation and subsequent rise. As early as 1601, Davies' cause had been taken up by some of the most powerful men in the government. Whether his literary efforts alone would have been enough to secure the attention of men such as Cecil and Egerton is questionable. Surely it is not far-fetched to think that his legal promise and abilities played some part as well. At any rate in June 1601 we find Davies writing to Robert Cecil:

"... I hold it a necessary Duty to present my humble thanks to your lordship for the special favour you were pleased to show me, the last day, at York house. Which though it hath not yet effected that good which your Lordship wisht it should, yet it reflected much grace uppon me another way. For many that were present did valew me the better, when they saw so great and worthy a personage have such respect and care of me. My Lord Chief Justice pretended he could not end the business, because my adversary was absent. That lett is removed, for he is now returned to town and will not depart till the end of the terme.

Therefore, though I make so precious an account of your Lordships words, as I am sorry and ashamed that they should be spent in vayne, and in so trifling a busenes yet I humbly beseech your Lordship to cast one Sun-beame more of your favor uppon me in this behalf; which if it clear not my disgrace I will draw a clowd over me and so rest until I may overcome it either by time or by desert. In the meane time vowing that all the affections of my heart, and power of my brain shalbee ever dedicated to your honors service."
Later in the same month, Sir Thomas Egerton, openly petitioned the Middle Temple on Davies' behalf:

..... The tyme that he hath been already sequestered from your house seemeth in mine opinion a sufficient punishment, and the repentence which he hath shewed, a reasonable satisfaction for his offence. Whereof I have thought fitt once againe to putt you in minde, and ernestly to move you to take consideration thereof. And so, expecting now done present satisfaction from your in his behalf, I bidd you hartily farewell.48

The collective patronage of Cecil, Egerton and others proved effective. As John Chamberlain noted a few weeks later, 'The Lord Chief Justice and Master Secretarie have taken great paines to compound the quarrel twixt Martin and Davies which they have effected to the satisfaction of both parts'. Only two and a half years earlier, the Middle Temple had disbarred Davies 'never to return'. On 30 October 1601, the presence of the Chief Justice, the Chief Baron of the Exchequer, several serjeant's at law and the assembled members of the Middle Temple, Richard Martin publicly accepted his adversary's apology, and Davies was restored to the 'Societye amongst whom I have had my chiefest education, and from whence I expect my best preferment'49.

Following Davies' return to grace, the Middle Temple records make only brief mention of his activities. Davies never seems to have served as reader, or to have become a member of the Middle Temple Bench - even after his appointment as Serjeant-at-Law. In fact, after 1601, there are only three references to Davies in the Middle Temple Records, all dealing with room assignments. Nor apparently did Davies use his

48. Huntingdon Ms. 2522; I wish to thank Miss Kate Howells for sending me a transcription of this manuscript.

49. Lord Stowell, 'Observation on with a Copy of, the Proceedings Had in the Parliament of the Middle Temple Respecting a petition of Sir John Davies to be Restored to the Degree of Barrister, AD 1601', Archaeologia, 21 (1827) p.112; Chamberlain's Letters, 1:126.
influence to gain admission for friends, or for that matter his relatives. One of his nephews, for example, was admitted to the Middle Temple in 1612, but Davies is not mentioned as a sponsor. After 1601, then, it seems that Davies did not participate in the daily affairs of the Middle Temple at all, although he did keep chambers there until 1610. The most important result of his readmission to the bar was the right to practice law, but the immediate effect of his reinstatement was to secure sponsorship for a seat in the parliament of 1601. Shortly after his return to favour, Davies was elected MP to represent the borough of Corfe Castle. It is difficult to disentangle the patronage links that led Davies to a Dorset seat. Davies' association with Lord Mountjoy, who was implicated in the Essex plot of 1601, suggests a distant association with the unfortunate Essex. But in view of Cecil's role in securing Davies' return to the Middle Temple, it is more likely that Davies owed sponsorship to the parliament to Secretary Cecil.

The history of Elizabeth's last parliament has been well told, and it is not intended here to survey the whole of its proceedings. What follows represents a synopsis of Davies' role in the debate over monopolies, an issue which dominated the business of that parliament.

It will be recalled that the House of Commons, faced with the likelihood of paying out enormous sums to support the wars against Spain and Ireland, directed its discontent, not at military subvention, but against money wasted in granting monopolies of various concessions to court favourites, who frequently gouged the public with excessive prices. Davies distinguished himself in the debates over monopolies. The central conflict dealt with the question of whether the House should seek

50. MTR, 1:429; 2:482; 511 & 524; For his nephew’s admission see MTR, 2:578.

redress by petition to the queen, or should pass legislation against monopolies on its own. Cecil expected the House of Commons to proceed by petition. The majority of members seemed to accept his influence, albeit reluctantly. Davies, however, proved an exception, hurling himself into a spirited oration that began with a series of legal precedents.

..... God hath given power to absolute princes, which he attributed to himself. And so, as attributes unto them, he hath given them Majesty, Justice and Mercy. Majesty in respect of the Honour that the subject sheweth unto his prince. Justice in respect he can do no wrong. Mercy in respect he giveth leave to his subject, to right themselves by law. And therefore, in the 44 Ass. an indictment was brought against bakers and brewers; and for that by colour of license, they had broken the assize: wherefore, according to that precedent, I think it most fit to proceed by bill and not by petition.52

Secretary Cecil, obviously displeased by Davies' rhetorical display, delivered an eloquently reasoned speech reducing the dispute to two basic legal principles, the prerogative and the fundamental liberties of English citizens.

..... I am born an English-Man, and a Fellow member of this house. I would desire to live no day, in which I should detract from either.

I am servant to the queen; and before I would speak, give my consent to a cause that should debase the prerogative or abridge it, I would wish my tongue cut out of my head. I am sure there were law-makers before there were laws.53

After a few more brief speeches, the subject was referred to committee for discussion in the afternoon. But Cecil's rebuke did not prevent Davies from launching another assault on monopolies in the afternoon session54. While Davies succeeded in amusing the assembly, Richard

52. Townshend, p.244.
53. Ibid., p.242; See also S. D'Ewes, The Journal of All the Parliaments During the Reign of Queen Elizabeth (London, 1682) p.555.
54. Townshend, op. cit., p.244.
Martin, his former adversary, took steps to soften the vehemence of this offensive speech. Martin apologized for Davies' rhetorical excesses, but cogently defended the substance of his friend's comments.

..... And therefore, the Gentleman that last spoke, spoke most honestly, learnedly, and stoutly. Yet this much I must needs say. His zeal hath masked his reason; and that, I think was the cause of his fervent motion; which I desire may be cooled with a petition, in most dutiful manner, and humblest terms, most fitting to the majesty of the Queen, and the gravity of this house. So, I doubt not, but our actions will have prosperous and successful event.55

Further argument was forestalled by a royal proclamation withdrawing the more obnoxious monopolies, but Davies, undaunted, rose once again to speak. Upon this, the speaker queried, 'What needs this new zeal?' Davies replied that he wanted the proclamation registered in writing for 'as the Gospel is written and registered, so would I have that also: For good tydings come to the hearts of the subjects that is all'.56 Thereafter followed a series of speeches as to whether Davies' request represented an insult to the queen, and 'Mr. Comptroller soundly rebuked Davies for his ironic skepticism; I think that he that moved this first question exceedingly forgot himself, and exceedingly detracted from her majesty.57

Davies' behaviour in the debates over monopolies is significant for the clues it gives to his personality and oratorical style. Certainly his actions serve to demolish any image of the sycophantic courtier conveyed by Wood and Grosart. For if we consider his speech against monopolies, delivered in the face of those who were instrumental in

55. Ibid., p.244; D'Ewes, p.656.
56. Townshend, op. cit., p.258.
57. D'Ewes, op. cit., p.656.
restoring him to favour, Davies emerges as a tenacious and hard-headed adherent to causes - in short, a man of sharp-witted conviction. The proceedings of the parliament also show, incidentally, that by 1601, Davies and Martin were on friendly terms again, for they had participated in the battle against monopolies together.

There is one last intriguing element to consider in Davies' rise in Jacobean society. In March 1609, Davies married Eleanor Touchet, the fifth daughter of an English peer, Baron George Audley who was later created on 6 September 1616, the Earl of Castlehaven. It is difficult to reconstruct the social context which served to procure Davies a marriage with the daughter of a peer. Possibly Davies met Eleanor while riding the Munster assize in 1606, but a more probable explanation lies, once again, in Davies' association with the Middle Temple. Although Audley was not a formal member of that body, he was a frequent guest, and is mentioned in Hutchinson's Catalogue of Notable Middle Templars. One would ordinarily presume a marriage into the peerage to be socially advantageous, but Davies, like many an unwary suitor, found himself saddled with a set of in-laws whose emotional and mental stability left much to be desired. Almost immediately after the marriage, his father-in-law importuned Davies for political favours that included a request for 100,000 acres in Ulster. Audley's rapacity became notorious, and Lord Deputy Chichester found reason to complain of his proposal to the English privy council, where he commented on the man's inherent meanness and general inability to support financially even a small estate in the Ulster plantation. Then there was the unsavoury case of Davies'
brother-in-law, Mervyn Touchet, the second Earl of Castlehaven, who though also listed as a guest of the Middle Temple could hardly be considered an asset to any professional body. In 1631, he was tried before the English House of Lords and executed for sexual offences that included supervising the premeditated rape of his wife and daughter, and sodomizing one of his servants. State's evidence was provided by the Earl's wife and daughter.

Nor was Davies' wife Eleanor exempt from the family's instability, and her seventeen year association with Davies could hardly be described as one of marital bliss. Eleanor's defects of personality included a penchant for scriptural anagrams and prophesying. These skills, frequently cited in the domestic state papers, involved her in religious and doctrinal offences that eventually brought her to the attention of the High Commission. Such activities did not augur well for married life. Although the marriage produced three children, there were no surviving male heirs. Two sons, John and Richard, died before reaching manhood. Richard died in infancy, while John, an idiot, drowned in Ireland, at what date is uncertain. A letter from Davies' friend Sir Robert Jacob, the Solicitor-General for Ireland shows that the idiot son was alive in 1617.


61. HMC Hastings Mss., 4:17
On the evidence of this letter, we must assume that John died sometime between the years 1617 and 1619 when Davies terminated his Irish service. There was also a third child Lucy, who eventually married, at the age of eleven, Ferdinando Hastings, the sixth Earl of Huntingdon. The fact that the whole of Davies' estate passed to Lucy, rather than to his widow, serves to illustrate the state of Davies' marriage. Although Eleanor's most notorious activities took place after Davies' death in 1626, there is an incident in the domestic state papers in 1622 that serves to preview her later career. Evidently Eleanor had been badgering a Mrs. Brooke and her daughter with her religious mania, and Mr. Brooke reproached her for having 'abandoned all goodness and modesty', noting also that Eleanor was 'mad, ugly and blinded with pride of birth'. Moreover, Brooke informed her, if she did not cease her 'abuse of his wife and innocent child' he would 'scratch a mince pie out of her'. He further assured Eleanor that he wished only the most terrible of curses upon her, i.e. that she would 'remain ever what thou art'. Unfortunately the factual circumstances surrounding this incident are incomplete, but a letter from John Chamberlain dated 1 July 1622, indicates that the controversy between Brooke and Eleanor had gained the attention of the Star Chamber.

..... There is a hot suit commenced in the Star Chamber twixt Sir John Davies' lady and the Lady Jacob about womanish brabbles, and an uncivill scurrilous letter written by Kit Brooke in his wife's behalf.

It is possible that this incident inspired Davies to burn Eleanor's prophecies, an act that can hardly be viewed as a disservice to the reading public. Eleanor, however, was not amused, and predicted 'his doom

62. SP/14/130/135; CSPD.1619-23, p.400.
63. Chamberlain's Letters, 2:444.
in letters of his own name (John Davies: Jove's Hand) within three years to expect the mortal blow'. Davies' response was in keeping with his personality, 'I pray weep not while I am alive, and I will give you leave to laugh when I am dead'. From that time until his death in 1626, Davies suffered the uncomfortable experience of staring across the breakfast table at a hopelessly insane wife dressed in mourning.

Eleanor, however, lived to inflict herself on a second husband, Sir Archibald Douglas, who also made the mistake of burning her manuscripts, for which he was allegedly struck dumb and reduced to grunting like a beast. In 1633, Eleanor was indicted by the Court of High Commission for her prophesying, and there survives an interesting anecdote which serves to underscore Eleanor's growing mental confusion. While appearing before the court, Eleanor claimed to be infused with the spirit of Daniel, which she attempted to prove with an anagram composed from the letters of her own name: Eleanor Davies - Reveal O Daniel. After great pains had been taken to show her the error of her ways, Lamb the Dean of the Arches, contrived another anagram for Lady Eleanor which said: 'Dame Eleanor Davies - Never so mad a Lady'. The ensuing laughter from the members of that solemn tribunal threw Eleanor into a confused silence, and she was subsequently committed to prison. Within months, Eleanor's daughter Lucy sought to lessen the severity of her sentence and petitioned the High Commission to remove her mother to another prison and appoint some 'grave divine to comfort her in her troubles of mind which lie heavy upon her, and for informing her in some points of learning and conscience'. A fine of £3,000 and several months in prison did


66. SP/16/255/19 & 20; CSPD,1633-34, p.261; SP/16/255/21; CSPD,1633-34, p.274.
not diminish Eleanor's madness. By 12 July 1635, her reputation was such that Lady Alice Hastings wrote to her father, the fifth Earl of Huntingdon, to prevent her brother Ferdinando from bringing his mother-in-law to live with the Hastings family. Not only did Eleanor attempt to inflict herself on her in-laws, but she also appears to have initiated litigation to contest Davies' will. According to J.R. Brink, Lady Eleanor claimed that Davies' Englefield estate in Berkshire was part of her jointure. Hastings eventually won the case, but it is interesting to note, once again, that Davies deliberately excluded Eleanor from his will in favour of his daughter Lucy.

In 1636, Eleanor's activities finally landed her in Bedlam for defiling the Bishop of Lichfield's seat with a so called 'Holy water that proved to be a combination of tar, pitch, sink puddle and water and such kind of nasty ingredients'. By 1640, similar offences brought her to the tower for prophesying the death of Charles I. In 1646, she was rearrested for her religious activities and remanded to the custody of the Hastings family where she appears to have remained until her death in 1652. There is, however, one more anecdote to show her inability to get on with others, even with those whose religious/political hysteria approached her own. From August to December 1650, Lady Eleanor employed the impoverished Gerrard Winstanley to act as estate agent to harvest wheat. In 1650, Digger agents were active in the vicinity of Eleanor's home at Pirton, Hertfordshire, and it is likely that she and Winstanley had much in common. However, Eleanor's refusal to pay her new agent demonstrates that even among Utopians, unpaid wages served to divide the community of

68. Ibid., p.63.
69. Ballard, op. cit., p.278.
To evaluate the impact of Davies' disastrous marriage, we must view it within the context of the social leverage it was designed to procure. Whether or not Davies reaped any benefits from his marriage to the daughter of a peer is, in view of the Audleys' history, problematical. Still one might conjecture, that this absence of marital bliss enabled Davies, like many a tormented husband, to develop a prodigious capacity for work. Whatever the source of Davies' industry, his many talents ultimately led, through a complex patronage net involving Devonshire, Cecil and Ellesmere, to his political appointments in Ireland - first as Solicitor-General in 1603, and then as Attorney-General from 1606-1619.

For Davies' part, there is some question as to whether or not he viewed his Irish appointments as anything but temporary exile. This sentiment was expressed in a letter written by Bacon to Davies on 26 December 1606, which instructed Davies to remain a 'laborer' in that state (Ireland) and not a 'plant'. In fact, in 1604, shortly after his arrival in Ireland, Davies complained to Salisbury that:

..... I would Serjeant Heale might be banished hither, if it be trew that he has antedated the scire facias, I wish not this maliciously, like an ill angel that is fallen, and would have all others in as desperate a case as himself; but I fear a heavier punishment will light upon him, for I hope shortly to see this a rich and flourishing kingdom. This with my humble presentation of my duty and devotion to your Lp. I leave the same to divine preservation.

73. SP/63/216/f. 34a; CSPI,1603-06, p.155.
Then once again in 1610, Davies petitioned Salisbury to secure an appointment elsewhere, by listing his personal achievement in securing a wide range of administrative reforms in Ireland\textsuperscript{74}. These accomplishments, which include the constitutional assimilation of the autonomous Gaelic lordships to the crown, the reduction of medieval corporate liberties, the implementation of religious conformity and the mobilization of the Irish revenue will be detailed in subsequent chapters. Certainly his Irish career served to secure rapid advancement. On 18 December 1603, Davies was knighted in Dublin by Lord Deputy Carey\textsuperscript{75}.

In 1612, while serving as Attorney-General for Ireland, he was created Serjeant-at-Law, and by 1613, was financially secure enough to be included as one of the adventurers in the Virginia Company\textsuperscript{76}. In 1612, Davies published a \textit{Discoverie of the True Causes Why Ireland Was Never Entirely Subdued Nor Brought Under Obedience of the Crown of England Until His Majesties Happie Raigne}, in which he attributed the shortcomings of English rule in Ireland to the failure to establish successfully a system of territorial rather than personal law\textsuperscript{77}.

\begin{itemize}
\item \textsuperscript{74} SP/63/229/f. 34a & b; CSPI,1608-10, pp.451-452.
\end{itemize}
Three years later Davies published his Primer Reports des Cases in Les Courts del Roy elaborating step by step the innovative judicial measures he had employed to consolidate the Tudor conquest of Ireland. Indeed Davies' legal skills and familiarity with Irish affairs earned him a high reputation with the king, and James himself ordered that he expected Davies to be Speaker of the House when the Irish parliament convened in 1613. Various letters and papers in the Carte Manuscripts show the degree to which Davies was personally responsible for planning the narrow Protestant majority of that parliament. The new boroughs arising from the plantations in Munster and Ulster returned 84 Protestants, leaving the government a narrow majority of 32. In the House of Lords, the Protestant episcopate, which outnumbered the twelve Catholic and four Protestant peers, gave the government a majority of eleven votes in the upper house. Nonetheless, the Catholic Old English objected to the validity of the Protestant majority in the lower house by claiming that false returns had been made by the sheriffs, and that many other MPs were not even resident in their newly created boroughs. This conflict resulted in a contest for the speakership, where a deadlock election produced one of the most amazing episodes in Irish parliamentary history. Once the election appeared to be a draw, the recusant faction rushed the speaker's chair and placed John Everard, former second justice of the King's Bench, whom Davies had forced to resign for recusancy, into the speaker's chair. At this point, Davies'


party simply placed the corpulent Attorney-General in Everard's lap
where business was conducted until Everard was finally ejected by Davies' supporters.  

Within several years of the Irish parliament of 1613-15, Davies petitioned Buckingham to be relieved of office as Attorney-General of Ireland, and on 30 October 1619, he was replaced by Sir William Ryves. From 1619 to 1626, it is difficult to follow Davies' career consistently. During these years he probably composed his well known abridgement of Coke's Reports. He also published in 1622, a revised edition of his three major poems, Nosce Teipsum, Astrea and Orchestra which contained a new dedication for Orchestra and a revised conclusion. More significantly, Davies served in the parliament of 1621 as MP for Newcastle-Under-Lyme, but unlike his earlier performance in the parliament of 1601, he failed to distinguish himself in the debates. In view of the outbreak of the Thirty Years War and a renewed attack on monopolies, this reticence is surprising. There does survive, however, one interesting speech which demonstrates the degree to which Davies' Irish experience conditioned his view of the public law relationship between England and Ireland. In response to a bill calling for restrictions against the Irish cattle trade, Davies demonstrated his newly acquired planter mentality.

80. The best summary description of the 1613-15 parliament may be found in the commissioners' report over the disputed election: SP/63/232/ f. 131a; CSPI,1611-14, pp.426-428.
83. Sir John Davies, Nosce Teipsum, Hymns of Astrea in Acrosticke Verse, Orchestra or, a Poeme of Dauncing, (London, 1622).
..... Sir John Davies saitheth, that it is expressly in the Law Books set down, that Ireland is a member of the crown of England; That there was in Ireland also a patent of Alehouses, which, on the complaint of some principal men of that kingdom, the king did recall about two years since; and gave order to redress the same; That this kingdom here cannot make laws to bind that kingdom, for they have there a parliament of their own.84

Apart from Davies' appearance in the English parliament, he also rode the assize circuit between 1620 and 1626, and his speech to the grand jury at the York assize in 1620 represents a classic contemporary exposition on the jurisprudence of assize justice85. In 1626, King Charles appointed Davies Chief Justice of King's Bench to replace Randolph Crew as a result of Crew's refusal to declare the legitimacy of the forced loan. In view of Davies' treatise on the right of the monarchy to levy impositions without parliamentary consent, it is understandable that Davies was an attractive candidate for the job86. It is certain that Davies admired Charles and harbored great expectations for the reign of the young king. On 1 April 1625, he wrote to Henry, fifth Earl of Huntingdon, praising the virtues of the new monarch.


86. To Davies, impositions had their origins in the 'ius gentium the law of nature and the law merchant which pertained to the crown alone'. BL Harl. Ms. 278, ff.411a-412b; 416b-422b; Sir John Davies, The Question Concerning Impositions, (London, 1656) pp.1-9.
...... for the King desires that he and the Queen may be crowned together to save a double charge, which saving will be more than an entire subsidy. The young king doth already show many excellent tokens of a stout, a wise, and a frugal prince, and is like to restore the glory of our nation by his wisdom and valor.87

There can be little doubt that, had Davies lived, he would have been a stout royalist in the civil war. On 26 December 1626 Davies prepared for his new judicial appointment by purchasing the robes of office, but an excess of food and drink took its toll and bore out the truth of Eleanor's prophecy. He died in a fit of apoplexy the night before he was to become Chief Justice - an act of God, wrote the English judge James Whitelock, that prevented 'so inconvenient an intention to the commonwealth'.88 At the funeral John Donne preached the oration, and Davies was subsequently interred in St. Martin-in-the-Fields89.

89. Carte Ms. 62, f.590b.
IRELAND AND THE ORIGINS OF STARE DECISIS

In 1603, John Davies travelled to Dublin to assume his duties as Solicitor-General for Ireland. His appointment followed the defeat of Tyrone's rebel forces and the final subjugation of the long recalcitrant kingdom. As one of the principal advocates of English policy during the next sixteen years Davies worked to consolidate and perpetuate this military conquest by a series of judicial decisions which transformed the legal and administrative structure of the island. In 1615 the Attorney-General presented these revolutionary judgements in his publication of the Irish Law Reports. In format these Reports reflect the early modern reporting system at its most mature level. Like the law reports of Plowden, Dyer and Coke, Davies' work departs from the Yearbook tradition, giving full introduction to written pleadings that focus either on demurrers or special verdicts. Davies' care in

1. Although it is alleged that Davies' Irish Law Reports represent the first reporting activity for the central Irish courts, it should be noted that the presence of an Irish Inn of Court dating from the reign of Edward I clearly suggests the existence of at least some reporting activity. This point was elaborated in Sir James Ware's Scriptoribus Hiberniae which lists an abridgement to the second part of the Yearbook of Henry VI edited by one Robert Barnewell, a Pale lawyer admitted to Gray's Inn in 1584, which was alleged to have contained many cases dealing with Irish affairs. Unfortunately this book, dedicated to Sir Robert Gardiner, Chief Justice of Ireland from 1584-1603, does not appear to have survived. This means that Davies' Reports, along with a handful of medieval plea rolls, James Mill's edition of The Calendar of the Justiciary Rolls, 2 vols. (Dublin, 1905) and a few scorched chancery bills from the sixteenth and seventeenth centuries, represents the full corpus of source material reporting litigation in the Irish courts. James Ware, The History and Antiquities of Ireland, 2 vols., trans. by Richard Harris, (Dublin, 1764) 2:100. For the limited range of source materials for Irish legal history see: R.J. Hayes, ed., Manuscript Sources for the History of Irish Civilization (Boston, 1965) 5:260-265; 6:28-35; See also H. Wood, 'Public Records of Ireland Before and After 1922', Royal Historical Society Transactions, 4th Series, 17 (1930) pp.19-51.
framing full case headings also allows the reader to identify easily the precise tribunal adjudicating each case. The Reports highlight the pleadings of the Attorney-General or the Solicitor-General, thus underscoring the growing importance of the King’s advocate in the central courts, but, as King’s advocate, Davies was meticulous in divorcing his own opinions from those of other counsel and the court. Like Coke, however, Davies was not averse to using the Reports to emphasize his own arguments, and one should not discount a certain propagandistic element in tone and style.

A close examination of the Irish Reports reveals two striking features of the litigation dealt with by Davies. One is the frequency of judicial resolutions, or collective decisions issuing from the Irish judiciary in conclave; the other is that the cases cover almost every sensitive aspect of constitutional and administrative reform at issue in the first twelve years of James I’s reign. Here are decided, via judicial resolution, cases involving such long standing problems as assimilation of the autonomous Gaelic lordships, the formulation of a crown right to the richest fishery in Ulster, the imposition of religious conformity, the elimination of corporate liberties and franchises, and the reform of the national currency. In fact a thorough scrutiny of the Irish Reports, in conjunction with manuscript state papers and other sources, reveals nothing less than an intention on the part of the Dublin government to consolidate the English conquest and extend the tenets of an uncompleted Tudor Revolution to Ireland, by using judicial resolutions to establish precedents which would be binding on lower courts and for subsequent cases. Nor, of course, can the English government be excused from complicity, for while most of the judicial resolutions issued from the Irish justices in the Privy Council Chamber in Dublin Castle, in some instances decisions were referred back to the assembled English justices, who ratified them with resolutions of their
own decided in the Exchequer Chamber or in Serjeants’ Inn in London.

The scenario of an English government deliberately using judicial procedures and mechanisms to consolidate its hold over Ireland in the early seventeenth century has never been fully explored and it is, perhaps, unexpected, given the more usual Tudor expedient of executing such sweeping changes by parliamentary statute. The explanation for this truly revolutionary use of judge-made law lies in a conjunction of circumstances peculiar to Ireland, notably the failure of the Irish parliaments to secure in the sixteenth century the statutory reforms that were the hallmark of the Tudor-Revolution in England, the nature of the Irish legal system, and the questionable reliability of an Irish judiciary comprised almost entirely of Old English descendents of the Anglo-Norman conquest of 1171.

Certainly the changes wrought by collective resolutions in Ireland run counter to our understanding of the exalted role attributed to reform by statute law. Professor Elton has indicated clearly enough the lofty status of English parliaments and the supremacy of statute law by his designation of parliamentary statute as the one ‘omnicompetently sovereign’ tool of legal-constitutional change in Tudor England\(^2\). While no one would dispute the accomplishments of Tudor parliaments in effecting the revolutionary secular and ecclesiastical changes in sixteenth-century England, the use of statute law in Ireland was far less significant. It is not an exaggeration to say that the firm execution not only of the Supremacy, but also of direct control by a central government based in Dublin did not become an established fact until the early seventeenth century.

The comparative weakness of the role of statute law in Ireland had several causes, the most apparent being that effective English sovereignty during the major part of the sixteenth century penetrated to only a handful of port towns and to a fifty mile radius around Dublin. Even within areas of English control, a parliamentary tradition on the English model was significantly less developed. In 1495 Poynings Law restricted the Irish parliament's legislative initiative by proscribing all meetings of parliament without royal license and setting forth a requirement that all bills submitted for parliamentary approval required the prior assent first of the Lord Deputy and council in Ireland, and second of the king and his council in England. The purpose of this manoeuvre was to restrict a renegade Anglo-Irish Lord Deputy like the Earl of Kildare from using parliament for his own ends. In addition to Poynings Law, the sixteenth century also witnessed the appearance of an Anglo-Irish opposition which, with a growing sense of national consciousness, frequently pitted itself against the Irish policy formulated either by the monarch and the English Privy Council, or by English administrators in Dublin.  

While the scarcity of manuscript evidence does not allow a precise determination of the total number of sessions for each of the Irish Tudor parliaments, it is possible to demonstrate, by comparing the number of parliaments called in both kingdoms, the absence of a significant Irish parliamentary tradition. In England during the twenty-four year reign of Henry VII, there were seven English parliaments as opposed to five in Ireland. During Henry VIII's thirty-seven year reign, there were nine parliaments called in England, and again only five in Ireland — all

of much shorter duration than their English counterparts. While Edward VI summoned two parliaments during his six year rule, none was called in Ireland. Mary, in her brief four years tenure of the English throne, called five English parliaments and one in Ireland. Her successor Elizabeth, during her forty-five year reign, summoned ten parliaments in England, and only three in Ireland - all of very short duration.

Given such statistics, it is perhaps surprising to learn that at one time during the sixteenth century, there was an attempt to carry the Tudor revolution to Ireland in a move that would have enhanced the role of an independent Irish parliament in the political relations of the two countries. As Dr. Brendan Bradshaw has shown, Sir Anthony St. Leger while Lord Deputy of Ireland (1540-47, 1550-56) evolved a program critically dependent on the use of statute law, which envisaged a 'commonwealth' state appendant to the English crown and an active national parliament grounded in a consensus that extended to the Gaelic polity.

This 'liberal' or 'commonwealth' solution was designed to repudiate first the notion of papal territorial sovereignty in Ireland, and to extinguish all autochthonous claims to sovereignty put forth by the independent Gaelic dynasts, by legislating an alteration of Henry VIII's title from feudal Lord to King of Ireland. As a second step in this revolutionary legislation St. Leger attempted to extend both the royal title and the Supremacy throughout the island through a novel policy of surrender and regrant which in essence involved the feudalization of the Gaelic nobility who, in return, would acknowledge the king as their


legitimate sovereign. Had this program succeeded, Professor Elton's comments on the importance of statute law in determining constitutional change might be as applicable to Ireland as they are on the other side of the Irish Sea.

Unfortunately St. Leger's liberal formula was scuttled by the complexity of the surrender and regrant program and more importantly, by the indifference of the king, who in 1540-41 was preoccupied with the proposed annexation of Scotland and with preparations for the coming war with France. In the end, only a handful of Gaelic dynasts subscribed to the surrender and regrant formula, a limitation illustrated by the fact that as late as 1603 no royal title could be found to the whole of Donegal. The marginal results of the liberal formula meant the collapse of the national Irish parliament which, under the administration of St. Leger, was the key to the program's success. When St. Leger was recalled in 1556, his efforts for reform through parliamentary statute were overruled by the radicalism of the Earl of Sussex and Sir Henry Sydney who initiated a strategy that dominated the course of Irish history throughout the second half of the sixteenth century - conquest and colonization. Thereafter the Irish parliament ceased to function independently and declined drastically in political importance - a fact evidenced by the transformation of the Old English consensus party that had subscribed to the commonwealth solution of 1540-41, into an opposition party in the parliaments of 1560, 1569-71


and 1585-86. From the standpoint of 1603, it can be argued that it was awareness of this opposition in Elizabeth's Irish parliaments, in combination with religious disturbances in the towns, that led the English government to refrain from employing the parliamentary expedient in favour of the new and untried program of reform by judicial fiat.

If the Irish parliament at the beginning of James I's reign was a less than perfect instrument for dealing with issues of constitutional significance, the hodge-podge of overlapping and conflicting jurisdictions which made up the Irish legal system provided an equally inauspicious mechanism for change. By the early seventeenth century, the Irish courts comprised a system of common law, equity and conciliar tribunals that paralleled those in England. Located in Dublin, the common law courts were the King's Bench, Common Pleas, the Exchequer and the Chancery. As in England, the King's Bench held jurisdiction over civil and criminal cases and exercised a reviewing jurisdiction over cases originating in the Common Pleas. The Court of Common Pleas, sometimes known as the Court of Chief Place, held jurisdiction over civil suits between parties where no crown interest was involved.


emerged only during the sixteenth century, held extensive jurisdiction over cases of equity but also adjudicated common law cases: during the course of the sixteenth century, the Chancery Court absorbed the business of other tribunals and caused some jurisdictional friction with the common law courts. The increased significance of the Irish Chancery Court can be attributed to the fact that the whole of Ireland was only shired during the reign of James I. In the absence of an effective legal organization in many areas outside the jurisdiction of the royal writ, it was difficult to obtain impartial juries. In addition, the cumbersome and dilatory procedure of the common law courts led inevitably to Chancery's expanded jurisdiction.

Apart from the central common law tribunals in Dublin, we must consider the activities of the conciliar courts. In addition to the Privy Council itself, which possessed a quasi-judicial function, these were the Irish Court of Castle Chamber and the provincial presidency courts in Munster and Connaught. The Court of Castle Chamber, which paralleled closely the development of the English Star Chamber, can be detected as an institution separate from the Irish Privy Council as early as 1534, but it was not until 1562, during the deputyship of the Earl of Sussex, that the Castle Chamber acquired the status of a formal conciliar court. This tribunal, like the Star Chamber, exercised jurisdiction over riots, unlawful assemblies, unlawful retainerers and maintenances, embraceries of subjects, false returns by sheriffs, the failure of sheriffs


to execute writs, the taking of money by jurors, perjury of jurors, forgery, slander, extortion of public officials, sedition, abduction, trespass and the enforcement of proclamations. The installation of the conciliar courts in the provinces of Munster and Connaught owed its origins to similar institutions set up by Thomas Cromwell in Wales and the North of England as a measure to incorporate these areas into the state system. Accordingly the provincial conciliar courts in Munster and Connaught, established by Henry Sydney in 1571, bear a strong similarity to the Council of Wales and the Council of the North. The purpose of these provincial conciliar jurisdictions with authority to hear civil, criminal, ecclesiastical and martial causes was to extend the sovereignty of English law to those areas beyond the reach of the central courts in Dublin and to offset the authority of local dynastic interests.

In addition to the conciliar tribunals there existed at the end of the Nine Years War, the court of the Tipperary palatinate, a liberty jurisdiction held by the Earls of Ormonde from the time of Edward I. From the surviving records of this last remaining medieval franchise, it is known that the court exercised, until its suspension by quo warranto proceedings in 1621, a comprehensive jurisdiction over all equity and common law cases, excepting the pleas of fine, rape, forestalling and treasure-trove that arose from within the boundaries of the palatinate. Since the jurisdiction of the Tipperary palatinate was independent of the common law courts in Dublin, only writs of error


to the Irish Court of King's Bench could transfer litigation outside
the venue of the palatine court.

The discussion of the major Irish law courts as they existed in
1603 inevitably simplifies and systematises what amounts to a maze of
judicial institutions whose jurisdictions frequently overlapped and
sometimes conflicted with each other. It does, however, provide
a useful outline of the Irish legal system as it existed during the
early years of James I, and establishes the necessary institutional
background to discuss the personnel staffing the Irish bench and the
circumstances that led to wholesale replacement of judges of Old English
extraction by those of English birth.

The term Old English refers to the descendants of the Anglo-Norman
invasion of 1171. As the heirs of Strongbow the Old English exercised
a monopoly over the administration of national, local and municipal
government that changed only gradually during the second half of the
sixteenth century. This group possessed extensive holdings of land
which as late as 1640 amounted to one third of the total profitable
acreage in Ireland, mainly located in the most fertile regions
14. The predominance of the Old English was particularly evident in the courts
and had been encouraged from the reign of Henry VIII when a body of local
lawyers trained at the English Inns of Court was viewed as the ideal
instrument for executing Reformation policy in Ireland.

14. The distinction between this group and the rest of Irish society
was stated by Richard II in his threefold division of Irish society:
les irrois savage, nos enmis, (Irish enemies) les irrois rebelz
(degenerate English gone native) and les englois obeissant
(obedient vassals); R.D. Edwards, 'Ireland, Elizabeth I and the
Counter Reformation' in Elizabethan Government and Society, (London,
1961) pp.32-37; R. Bagwell, Ireland Under the Tudors, (London,
1963) 3:17-20; Aiden Clark, The Old English in Ireland, 1625-42,
(Ithaca, 1966); A. Clarke, 'The Policies of the Old English in
the Parliament, 1640-41', Historical Studies, 5 (1965) p.86 and
N.P. Canny, 'The Formation of the Old English Elite in Ireland',
(University College Cork, O'Donnell Lecture, 1975).
Whether or not there even existed an institution to train the legal profession in Ireland is problematical. It has been claimed that the first Irish Inn of Court was established during the reign of Edward I. This institution, known as Colletts Inn, was purely a voluntary association of judges and barristers dangerously housed outside the city walls. In the early fourteenth century, the 'wild Irish' descended from the Wicklow mountains to destroy the Inn and succeeded in massacring the unlucky residents in a midnight raid. In 1384, Sir Robert Preston, Chief Justice of the Common Pleas, assigned his house, subsequently known as Preston's Inn, to the body of lawyers residing in Dublin. During the early sixteenth century, for reasons which are not understood, Preston's descendants succeeded in recovering the Inn from the legal body, and it became necessary to secure a new dwelling place. Thereafter Henry VIII established another collegiate body called the King's Inn in a confiscated Dominican priory. This institution, unlike its English counterparts, had no power to confer degrees, and a further statutory requirement, laid down in 1542, required all barristers practising law in Ireland to spend at least three years residence at an English Inn of Court. Since implementation of the Irish Reformation involved the active participation and support of a group of Old English lawyers, it seems that the deliberate elevation of a local Irish legal profession trained at the English Inns of Court had an initial success. This policy also had pragmatic grounding in the unpalatable fact that it was difficult to attract competent English lawyers to Ireland.

During the second half of the sixteenth century, the support given by the Old English legal profession for the Supremacy did not extend to further innovations in religious doctrine, and almost all attempts to legislate changes in religion, particularly in the parliaments of 1569-71 and 1585-86, had to be dropped in the face of a determined Old English opposition party. To a hard-pressed English government that could ill-afford the enormous costs of military subvention, toleration of Old English recusancy was a cheap price to pay for the preservation of whatever narrow foothold the English maintained in Ireland during the second half of the sixteenth century. Lacking both the will and the necessary statutory tools to enforce religious conformity, the English government never extended to Ireland the practice of excluding Catholics from office, and the Irish judiciary continued, until the end of the Nine Years War, to be dominated by Old English lawyers.

In early 1603, however, a spontaneous uprising in the corporate towns, which directly implicated prominent members of the Old English community, brought home the fact that the adherence of the Old English to an outlawed religion was at odds with their privileged status of landed wealth and political influence on both the local and national levels. Inspired by the belief that James I intended to grant religious toleration in Ireland, the revolt of the Munster towns owed something to the economic chaos engendered by a debased coinage and to a desire to vindicate the extensive corporate liberties of the towns against potential encroachments by the crown. The active participation of two Old English lawyers in the city of Cork, Thomas Sarsfield and William Meade, the city’s mayor and recorder, fueled earlier complaints by English administrators that prominent members of the Irish legal profession were

guilty of aiding and abetting the movement of the recusant clergy in the towns\textsuperscript{18}. The revolt seriously challenged the assumption that an education at the English Inns of Court would provide a sufficient basis to ensure a loyalist outlook on the part of the Irish legal profession. More important, the accusations extended not only to the legal profession but to 'some officers of the King's Majestie in his several courts',\textsuperscript{19}.

Further complaints levelled against the judiciary and the Pale lawyers resulted first in the application of the Oath of Supremacy as a pre-requisite to practising law before the Irish bar, and secondly in a wholesale purging of the Irish Bench in favour of a judiciary comprised almost entirely of English rather than Old English lawyers.

As an example to both lawyers and judges, proceedings were initiated against John Everard, second justice of King's Bench, who had a reputation of being a 'notorious and obstinate recusant'.\textsuperscript{20} Everard's subsequent refusal to resign was complicated further by the government's inability to find a suitable alternative. In the end, Everard was driven from office by direct order of the king. A pension of 100 marks and the generosity of the Earl of Ormonde combined to relegate him to the judicial scrapheap as justice of the palatine court of Tipperary\textsuperscript{21}.

Everard's forced resignation was followed by a deliberate and ultimately successful attempt to pack the Irish Bench with English Protestant


\textsuperscript{19} SP/63/215/f. 127a; CSPI,1603-06, pp.65-68; SP/63/215/f. 209b; CSPI,1603-06, p.78; Bodl. Tanner Ms. 458, f.33b; SP/63/216/f.163a & b, CSPI,1603-06, pp.219-220; See also Charles Hughes, Unpublished Chapters of Fynes Moryson's Itinerary, (London, 1903) p.229.

\textsuperscript{20} SP/63/224/f.19b-20a; CSPI,1606-08, pp.507-08; Everard's brother was a notorious Jesuit living in the vicinity of Cashel. In early 1608, the priest had gone so far as to forbid the children of Cashel to pray for the king. PRO/31/8/201/f.132; CSPI,1603-06, p.299.

\textsuperscript{21} Carte Ms. 1, f.42a; F.E. Ball, The Judges in Ireland, 1221-1921, (New York, 1927) 1:231.
lawyers. To aid this manoeuvre, it was deemed necessary to increase the number of justices in each of the common law courts\(^\text{22}\). In February 1607, the Dublin government added two more justices increasing the total number of judges from seven to nine. In 1613 four additional judges were appointed raising the total number of Irish justices to thirteen. By that time, only two judges, Sir Dominic Sarsfield, Chief Justice of the Common Pleas, and John Elliot, third Baron of the Exchequer, were native-born\(^\text{23}\). Sarsfield's appointment, in particular, to replace the vacancy left by the death of Nicholas Walsh was designed as a sop to Old English lawyers resentful of the new order. Sir John Davies, who was instrumental in securing Sarsfield's promotion, cynically commented that this 'will make the lawyers of this nation to see they are not disregarded, as now they seem to suppose'\(^\text{24}\). All other justices were practicing members of the English bar, and by 1613, all the Irish judges, including Sarsfield and Elliot, were conformable in religion.

In view of the history of Irish parliaments in the sixteenth century, the packing of the Irish bench seems more than fortuitous. Since the style of law reform contemplated by Davies and the English government depended wholly on judicial resolutions, or more precisely majority decisions issuing from the Irish justices in conclave, the wholesale transformation of the Irish judiciary from Old English jurists to lawyers

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22. SP/63/221/f.65a; CSPI.1606-08, pp.117-119; Bodl. Carte Ms. 30, f.53a; CSPI.1606-08, p.116; SP/63/219/f.80a; CSPI.1603-06, p.575; To enhance the appeal of a career on the Irish Bench, Irish justices were to be dignified with the title of Lord and promoted to Serjeant-at-law. SP/63/218/f.186a; CSPI.1603-06, p.484; As a further incentive, the fees of all justices were substantially increased. SP/63/218/f.195a-195b; CSPI.1603-06, p.489.


24. SP/63/228/f.207a; CSPI.1608-10, pp.420-424; Fynes Moryson was also consistent in his criticism of the native legal profession. See his 'Commonwealth of Ireland' in C. Litton Falkiner, ed., *Illustrations of Irish History*, (London, 1904) pp.278-279.
born and trained in England was a necessary prelude to overcome Old English provincialism and to ensure a view favourable to the use of judicial resolutions as binding precedent in cases of constitutional significance.

The existence of judicial resolutions, issued by the assembled Irish justices as binding precedent for all subsequent litigation involving like cases may seem surprising to those who have accepted the view commonly held by legal scholars that *stare decisis* does not appear in English law until the nineteenth century. This doctrine as it is applied currently in the courts of Britain and the United States refers to the general policy of all courts to adhere to the *dicta* of prior cases decided by the highest tribunal in a given jurisdiction. A modern theory of precedent, scholars argue, cannot be found in either the yearbooks or the various early modern law reports because the citing of case precedent was construed by contemporary jurists to imply the existence of a custom, or more precisely, to elucidate some universally accepted principle or maxim that was beyond dispute. In 1934, Holdsworth buttressed this argument by noting that the authority of reporters not officially appointed to the court of record was suspect and could be dismissed on the basis of inaccuracy. In other words, it was only the development of official court reporting in the nineteenth century and the abolition of the old central courts in favour of a judicature comprised of a High Court of Justice and a Court of Appeal in 1873 that allowed a strictly defined modern theory of *stare decisis* to emerge in the English courts.


No one would dispute the application of this orthodox position to the vast majority of cases argued before early modern English tribunals, but the argument put forth by Holdsworth and others fails to take into account the emergence of the Exchequer Chamber for debate which W.J. Jones has recently described as one of the most important developments in early modern English administrative, legal and political history\textsuperscript{27}. The Court of Exchequer, of course, had its own statutory jurisdictions, but as early as the fifteenth century, and increasingly during the sixteenth and seventeenth centuries, it appears that difficult matters of law in any of the common law courts might be referred to the Exchequer Chamber for discussion by all the justices of the King’s Bench and Common Pleas, together with the Barons of the Exchequer\textsuperscript{28}. When agreement had been reached by the assembled judiciary, the decision was recorded in a certificate, referred back to the original tribunal and read before the court. Given the sixteenth-century avalanche of statute law and the consequent difficulties of applying statutes to litigation in the courts, it is not surprising to find justices willing to refer controversial legal issues to a convenient forum for debate, and even to subordinate their own minority views to the decisions of a

\textsuperscript{27} W.J. Jones, \textit{Politics and the Bench}, (New York, 1971) p. 49.

\textsuperscript{28} The statute of 31 Ed. III c.12 for example established the court of Exchequer to determine cases upon writs of error from the common law side of the Exchequer. The statute 27 Eliz. c.5. authorized the justices of the Common Pleas and the barons of the Exchequer to reverse judgement on writs of error brought from the court of King’s Bench. There was also another tribunal which functioned as a court of equity solely for the Exchequer see: Sir Edward Coke, 4th Institute, (Oxford, 1773) Blackstone, Commentaries on the Laws of England, (Oxford, 1773) 3:55-56; W.H. Bryson, \textit{The Equity Side of the Exchequer}, (Cambridge, 1975).
more authoritative majority. But it should be noted that the practice of referring to the Exchequer Chamber thorny questions on matters of public law placed the judges in the unique position of defining principles of constitutional law with an authority that clearly resembles the modern doctrine of stare decisis.

As Jones has shown, the habit of using collective resolutions to resolve litigation referred from the central courts (see for example the cases of Capel, Chudleigh, Slade, Shelley and Calvin) led in the 1620's and 1630's to the judges issuing decisions which, unlike the resolutions on issues referred from other tribunals, were divorced from any cases pending in the central courts. These extra-judicial resolutions, which involved the English judiciary in the approval and formulation of controversial financial policy, were subsequently employed by the government in the development of Charles' forest policy, in the extension of Stannary jurisdiction, and finally in the controversy over ship money, when as early as March 1637, one year before Hampden's Case, all the judges were in agreement over the government's right to collect this controversial levy. Jones has also argued that both types of resolution, those arising from cases referred to the Exchequer Chamber for debate as well as those derived extra-judicially, insofar as they were used to bind subsequent litigation, conformed very closely to a modern theory of precedent and exerted an authoritative influence over other tribunals.


It is interesting to consult the attitude of contemporary jurists towards the authority of resolutions arising from the Exchequer Chamber for debate. In the case of Alton Woods decided in 1601, the Lord Keeper admitted that it was necessary for him to rely upon 'the opinions of the said grave and reverend judges, without whom he could not proceed to judgement.'\(^{31}\) The redoubtable Coke, in commenting on resolutions, asserted the importance of such decisions in 'maintaining the honor of the law and for the quiet of the subject in appeasing much diversity of opinion.'\(^{32}\) Moreover, in his *Institutes*, Coke placed the authority of judicial resolutions next only to statute law.\(^{33}\) Similarly Coke's antagonist Bacon, in commenting on Calvin's Case, went so far as to admit that even the Lord Chancellor would abide by the decision of all the judges.\(^{34}\) In 1602, Chief Justice Popham elaborated a similar theme and maintained that judicial resolutions were 'to be a precedent for all subsequent cases.'\(^{35}\) By the late seventeenth century Justice Herbert, in the trial of Sir Edward Hales, would claim that 'after any point of law has been solemnly settled in the Exchequer Chamber by all the judges, we never suffer it to be disputed or drawn in question again.'\(^{36}\) Surely then to contemporaries, such weighty pronouncements of law must have appeared to carry the fullest authority.

So far this discussion of judicial resolutions has been confined solely to affairs in England. But it is obvious from Davies' *Reports* and the manuscript Irish state papers that judicial resolutions, similar to those pronounced by the English Exchequer both extra-judicially and

for cases referred to it from the other courts, were employed in Ireland in the early seventeenth century with an effect so devastating as to bear out the awesome authority ascribed by contemporary jurists to such decisions. What has not been realized, moreover, is the degree to which the political application of judge-made law as binding precedent in England during the 1620's and 1630's was conditioned by Irish antecedents laid down in the early years of James I. Indeed the problems of ruling Ireland in the absence of parliaments during the Early Stuart period foreshadow the political contours of Caroline England, and the exalted status accorded to the English judiciary in the 1630's can be seen much earlier in the role played by the Irish judiciary when it applied both types of resolutions to politically controversial litigation in the central courts. In fact it is possible to infer from Davies' Reports that resolutions in Ireland, during the first decade of the seventeenth century, became the single most important instrument for executing legal-constitutional change in a manner that supports Jones' argument for a theory of modern precedent in England during the 1620's and 1630's.

Probably the most important and far-reaching application of judge-made law in Ireland was to the problem of assimilating the former autonomous lordships. The precise issue revolved around the identification of indigenous patterns of landholding and descent that were construed by Davies and other English jurists as a system of law lying outside the jurisdiction of the royal writ. By espousing Bodin's maxim that a 'king is not sovereign where others give law without reference to him', Davies endowed the autonomous Gaelic lordships and all tenures derived from Gaelic law with the full status of sovereignty. In order to

37. Henry Morley, ed., Ireland Under Elizabeth and James, Described by Edmund Spenser, by Sir John Davies and by Fynes Moryson, (London, 1890) p.10; For the problem of Gaelic tenures see chapter three of this thesis.
incorporate this allegedly sovereign and alien system of law and land
tenure into the new state system, Davies envisaged a revolutionary two
part plan that would use extra-judicial decisions to proscribe the
customary Gaelic forms of land tenure.

First Ireland and the Gaelic dynasts would have to accept the
English common law without competition from the Brehon law, or more
precisely such customary patterns of Irish land tenure and partible
inheritance as 'gavelkind' and 'tanistry'. Next, the civil law doctrine
of conquest, applicable because of the victory of 1603, would justify
the eradication not only of the sovereignty associated with the domestic
Irish laws, but also of all derivative foreign or Gaelic claims to Irish
dominion that were contingent upon the Papal Donation of Ireland in
1155. As a result of this second step, and as a significant departure
from the liberal surrender and regrant formula applied by St. Leger in
1540-41, a superior and therefore sovereign possessory right was to be
lodged over all non-English tenures by applying two extra-judicial
resolutions to void the customary patterns of Gaelic landholding and
descent. The intent of these resolutions is obvious from Davies'
correspondence of 1606 with Cecil and the English Privy Council, in which
he confided that the Irish customs 'both of tanistry and gavelkind in
this kingdom lately by the opinion of all the judges here adjudged to
be utterly void in law, and they are so void, so shall they be shortly

38. Papal dominium of Ireland was based on the notion that the Donation
of Constantine also granted ownership over all islands. For Ireland
see: L. Weckman, Las Dulas Alejandrinas de 1483 y la Teoría
Política del Papado Medieval: Estudio de la Supremacía Papal
Sobre Islas 1091-1493, (Ciudad de Mexico, 1949) pp.45-88; Maurice
Sheehy, Pontifica Hibernica: Medieval Papal Chancery Documents
Concerning Ireland, 640-1261, 2 vols., (Dublin, 1862) 1:19-23.
See also: J. Muldoon, 'The Remonstrance of the Irish Princes and
the Canon Law Tradition of the Just War', AJIH, 22 (1978) pp.309-25;
avoided and extinguished either by surrender or resumption of all the lands so holden.  

The manuscript records show that these extra-judicial resolutions were used as 'binding precedent' in further disputes. In the famous Case of Tanistry argued before the King's Bench in 1608, the government settled, along lines laid down in the 1606 resolutions, a longstanding succession dispute involving two prominent Gaelic families in Cork, in which one party had revived a claim to the estate as tanist, or heir apparent to lands that had been surrendered during Elizabeth's reign, in return for a common law estate. In the infamous Cavan case in 1610, and in the disposition of certain types of ecclesiastical property in the North, these resolutions were also employed as a tool to invalidate native Irish titles that stood in the way of the Ulster plantation. In this manner the extra-judicial resolutions reported by Davies, insofar as they bound subsequent litigation over similar cases, conform very closely to the modern theory of precedent that Jones attributes to similar decisions rendered by the English judiciary during the 1620's and 1630's. Other litigation in the North illustrates further this novel power acquired by the Irish judiciary. During 1610 the Irish judges, in a manoeuvre to attract private capital to the Ulster plantation, voided by judicial resolution Sir Randall MacDonnell's claim to the Bann Fishery. Thus by judicial fiat, on a case referred from the Irish Privy Council, the Irish judges secured the richest Fishery in Ireland as an incentive to colonize the heartland of Gaelic revolt.


40. Davies, Reports, pp.78-115.


42. Davies, Reports, pp.150-158; See Chapter four of this thesis.
As a second step in consolidating the Tudor conquest and extending a wholesale constitutional revolution to Ireland, Davies' Reports show that the English and Irish Privy Councils collaborated to employ judicial resolutions as a solution to the long-standing abuses associated with the corporate autonomy of the Munster towns. In this instance the spontaneous uprising by the southern towns in the spring of 1603 gave the government an excuse to deal with the unruly port towns along jurisdictional lines consistent with the extra-judicial resolutions applied against the tribal system. As in the cases voiding the customary forms of Gaelic landholding and descent, the government embodied its action against the towns in three judicial resolutions to: (1) enforce religious conformity by validating a proclamation extending to Ireland the English penal laws passed by late Elizabethan parliaments, (2) eliminate extensive corporate liberties including appropriation of customs revenue and (3) reform the national currency that eroded Irish trade and commerce. These resolutions, the first and second of which were also decided by resolutions of all the judges in England, have yet to receive the full attention they deserve.

Let us take for example the application of judge-made law to the issue of religion. In this instance, the stringent application of English penal laws to Old English recusants, particularly the gentry, the legal profession and municipal officials, caused a constitutional furore that seriously troubled the Dublin government. What historians have failed to recognize is that it was a judicial resolution, rendered by the English judiciary based on principles suggested by the Irish judges, that staved off the aggressive assaults of the Pale lawyers who questioned the validity of extending English statutes to Ireland by proclamation and of enforcing religious conformity by using the Court of Castle Chamber as a spiritual consistory.

43. PRO/31/8/199/ff.197-198; For Chief Justice Popham's certification see SP/14/24/f.5lb; CSPD.1603-10, p.339; TCD Ms. 843 (F.3.17) f.401; CSPI,1603-06, pp.584-589. See Chapter five of this thesis.
In addition to the proceedings against recusants, it is also clear that the Dublin government interpreted the Munster disturbances of 1603 as an excuse to dismantle the extensive privileges of the port towns. In this instance Attorney-General Davies set up a test case against the corporation of Waterford which possessed extensive rights and privileges guaranteeing not only political autonomy, but also freedom to collect all customs duties normally due to the crown. This case, which was validated by a resolution of all the English justices in conclave at Serjeant's Inn in London, sustained a crown right to Irish customs duties and was subsequently endorsed by the king and employed as binding precedent against all the port towns.44

To these religious and jurisdictional applications of judge-made law, we may add the issue of finance. Both the manuscript Irish state papers and Davies' Reports make it clear that the Munster disturbances of 1603 were interpreted as an excuse to reform the Irish currency, which on account of a disastrous debasement in 1601, had all but paralyzed Irish trade and commerce. In this case, the refusal of Irish merchants to accept the base coin was countered by another judicial resolution requiring a one-to-one valuation between the old sterling and newly minted base money. The case, involving an intent to repudiate the war debt, was subsequently used, to bind other litigation to the judicial resolution reported in Davies' Irish Reports. As Davies tells us, 'several other cases on the same point were afterward ruled and adjudged in the several courts of record in Dublin.'45 The resolution on the coinage, in combination with the resolutions that facilitated the assimilation of the

44. Irish Reports, pp.41-42. See Chapter 6 of this thesis.
45. Irish Reports, p.77; See Chapter 7 of this thesis.
Gaelic tenurial system, the sequestration of the Bann fishery, the enforcement of religious conformity and the destruction of corporate liberties, helped to achieve a centralized control of Ireland that proved impossible in the Tudor period. Together they represented a wholesale redefinition of the nature of English sovereignty in Ireland.

While the *Irish Reports* and the manuscript Irish state papers detail fully the use of judicial resolutions as the preferred instrument of constitutional reform in Jacobean Ireland, there is further evidence to show that judge-made law continued to be used as the instrument of reform to secure a more efficient administration of both government and finance. Use of the judicial resolution can be seen in the administration of the Munster plantation, the mobilization of ecclesiastical revenue and in the application of wardships.

Like most sixteenth-century plantations in Ireland, the colonization of Munster was only a marginally successful enterprise. Inadequate surveys made titles uncertain and possession of the land was difficult to obtain. This uncertainty of title was further clouded by an official penchant for retaining natives often with some measure of their own laws and customs, as tenants and labourers on colonized estates. In the case of the Munster plantation, this practice proved especially troublesome and confusion arose over the precise status of the attainted Desmond's undertenants who brought continual suits against the Munster undertakers claiming that their tenure under Desmond exempted them as 'freeholders' from the attainder of their overlord. As late as 1611, Attorney-General Davies complained that the estates of the Munster undertakers continued to 'be sued and vexed by the Irishrie.'

While information detailing the precise nature of this litigation is sparse, it appears from scattered manuscript evidence that difficulties arose over the ability of Desmond's litigious undertenants to avoid the findings of the escheator by denying, through a legal

manoeuvre known as a traverse, the facts established by the office that
found title for the crown. Since Jacob's *Law Dictionary* defines this
manoeuvre as presupposing title in the person (i.e. Desmond's under-
tenants) who brought the traverse, it is not surprising to find Sir
James Ware, Recorder of Dublin, complaining to the English Privy Council
that the Irish judges were incapable of resolving the issue\(^\text{47}\). In the
end, a direct plea from the Irish justices to the English judiciary
resulted in a judicial resolution, rendered by the English judges, on
the validity of the traverse in Ireland\(^\text{48}\). In the event the English
judges scuttled the claims of the Munster 'freeholders' by resolving that
the 'statuteof 2 Edward 6 allowing a traverse and monstrans de droit'
was not in force in Ireland. While it is beyond the scope of this study
to measure the impact of this resolution on the administration of the
Munster colony, it is possible to say that the decision had the
significant effect of vesting presumptive title in the crown, thereby
validating the original grants to the undertakers. Thereafter those
who 'pretended title could only sue by petition as if the land was still
in the King's hands'\(^\text{49}\). While the resolutions' punitive intent towards
those suing actions against the Munster undertakers is obvious, it is
also clear that the resolution, insofar as it affected the Munster
undertakers, was to pay added dividends by allowing the Irish Exchequer
to levy retroactive rents on the undertakers.

Less significant than the resolution voiding the traverse was the
further application of judge-made law to the problem of restoring the
patrimony of the church. In this instance the Dublin government

\(^{47}\) See 'traverse' in G. Jacob, *A New Law Dictionary*, (London, 1772)

\(^{48}\) SP/63/223/f.113a; *CSPI*,1606-08, pp.432-33; SP/63/234/f.140a.

\(^{49}\) SP/63/234/f.141a; *CSPI*,1615-1625, p.181.
employed another judicial resolution to define the ambiguous status of ecclesiastical procurations, a type of revenue previously appendant to Irish religious houses. In the formative period of the early Christian church, these procurations represented a form of taxation levied in kind to support episcopal visitation. In the later middle ages, proxies were reduced to a fixed monetary fee and, after the Reformation, appropriated by various Irish bishops as lying appendant to their respective sees. In the case under discussion, the bishop of Meath, after the dissolution, exchanged the proxies with the king for various impropriate parsonages with a set annual value of £170. During the Elizabethan period, the government leased in fee farm many of these rectories to which proxies had been appendant, as a reward for faithful service, to members of the Pale gentry and to various government officials. Thereafter the crown never attempted to collect the proxies that had been appendant to lands so leased.

When, during the early seventeenth century, the crown attempted to resume collection of these proxies, litigation resulted, often involving prominent local officials. Once again the Irish judiciary appears to have found difficulty judging the issue, and referred the controversy to the English judiciary for their resolution on the case. The question put to the English judges dealt with whether or not the unity of possession brought about by the resumption of the proxies by the crown extinguished the collection of all proxies appendant to the parsonages granted by Elizabeth in fee farm. In their reply the English judges confirmed by resolution the arguments put forth by Attorney-General Davies in the Case of Proxies argued before the Dublin 50.

50. SP/63/223/f.113a; CSPI,1606-08, pp.432-33; Davies Irish Reports, 1-17; For the litigants see: Fiants 4094,5593,6797.
Court of Exchequer in 160551. Predictably the English judges resolved that the unity of possession resulting from the surrender of the bishop as ordinary to the king as 'supreme ordinary' did not extinguish the proxies and that the crown notwithstanding prior alienation, could still levy proxies over lands leased in fee farm by Elizabeth. While it would be difficult to determine the extent of revenue obtained by virtue of the English resolution, it is interesting to note that the crown regranted the proxies to the Archbishop of Dublin which demonstrates, in a small way, the manner in which extra-judicial resolutions could be applied in matters touching ecclesiastical revenue52.

There is one more graphic use of judicial resolutions to cite. In the general attempt to mobilize secular revenue, the Dublin government identified efficient administration of Irish wardships as a much neglected yet potentially lucrative source of revenue. As Dr. H.F. Kearney has shown, the creation of an Irish Court of Wards in the early seventeenth century eventually yielded up to 25 per-cent of the total national revenue53. There were, however, formidable barriers that stood in the way of this achievement. With no statutory requirement to register

51. The difficulty with procurations seems to have troubled Davies for several years. See his letter to Salisbury concerning Beeston's Case in 1608. SP/63/223/f.122a; CSPI,1606-08, p.436. See also John Godolphin, Repertorium Canonicum or an Abridgement of the Ecclesiastical Laws, (London, 1678) pp.75-79.

52. CSPI,1611-14, p.511; (Philadelphia Papers); Further details of the proxies enjoyed by the Bishop of Meath can be found in the visitation of Meath of 1622 printed in: C.R. Elrington, Usher's Works, (Dublin, 1847) Vol.1, Appendix V, pp.lvii-lviii; On the proxies granted to the Archbishop of Dublin see: SP/63/242/ff.229a & 241a; CSPI,1625-32, pp.111.115.

transfers of real property either in the Chancery, or in the localities, the collection of rents and escheats was frequently evaded. Unlike in England, it was also possible until 1634, for A to grant land to B to the use of one or more third parties and their heirs. As a means to overcome this familiar device to avoid payment of the traditional feudal duties associated with wardship, the Master and Comptroller of the Irish Court of Wards in 1624 petitioned the English judges for a resolution over whether or not the 'heir of a cestui qui use' in fee farm or fee tayle could be compelled to sue livery. The weight of the case was such that the king himself demanded a resolution, not only from the Irish judges but from the English judiciary as well. In the event the English judges upheld payment of livery, anticipating, by nine years, formal passage of the statute of uses through the Irish parliament.

Additional examples of the use of judicial and extra-judicial resolutions in Ireland could be cited from the manuscript Irish state papers, but the cases discussed above illustrate that the Irish judiciary continued to apply judge-made law as a preferred instrument of legal reform long after the constitutional revolution described by Davies' *Law Reports* for the period 1603-1613. The relationship between the use of

54. SP/63/239/f.98a; CSPI,1615-25, p.576; SP/63/239/ff.98a & 100a; CSPI,1615-25, p.577.

55. SP/63/227/f.98b; PRO/31/8/201/f.534; CSPI,1611-14, p.106; SP/63/234/f.26a; CSPI,1615-25, p.173; SP/63/232/f.86a; CSPI,1611-14, p.304; It is interesting to note that in 1613, the recusant party of the Irish parliament formally complained about cases between 'party and party which are properly determined by the ordinary cause of law, are directed at the counciul table, and the cause of common law, and execution of judgement sometimes stayed by warrant from them, which is contrary to express laws and statutes made in that kingdom'. In his reply, the Lord Deputy Chichester pointed out that the 'cause of the common law is very seldom seized by order from the table, but when some stay is made, it is done either in case of great equity, or upon some reason of state, which in question of law doth arise at the table, the judges, who are of the Privy Council do always give rule in such cases. John Lodge, Desiderata Curiosa Hibernica, 2 vols., (Dublin, 1772) 1:243; 1:260-261; SP/63/232/f.102a; CSPI,1611-14, p.373.
judicial resolutions reported by Davies and the application of judge made law in England during the 1630's is difficult to determine exactly. However it may not be coincidental that several of the Irish judges who participated in the constitutional revolution of 1603-13 went on to acquire high positions on the English bench in the twenty-year period preceding the outbreak of the English civil war. This connection, when considered with the fact that two of the cases reported by Davies involved the active participation of the English judiciary, suggests the possibility that Ireland served as a kind of testing ground for the controversial application of judge-made law which Jones describes in the Caroline period.

At any rate, the decisions reported by Davies certainly support Professor Jones' argument that an essentially modern theory of precedent did apply in the use of judicial resolutions in England - and as we have seen, in Ireland - during the decade preceding the outbreak of the civil war. While some legal scholars have argued that a theory of modern precedent was not clearly formulated or applied in the early seventeenth-century, it is evident that the use of judge-made law in Ireland, alongside the examples cited by Jones, carried much of the weight of modern precedents and conformed very closely to the modern doctrine of stare decisis. In this sense, the cases of Gavelkind, Tanistry, the Bann Fishery, Customs Payable for Merchandize and the Case of Mixed Money should be ranked alongside the cases of Calvin, Slade and Hampden as significant not only for the constitutional history of Ireland, but for that of England as well.

56. Ball, op. cit., pp. 238-41; 312-24; Sir John Davies himself, it will be recalled, was appointed Chief Justice of the Court of King's Bench in 1626; Sir James Ley, Chief Justice of King's Bench in Ireland, became Chief Justice of the King's Bench in England in 1622; Sir Humphrey Winch, Chief Baron of the Irish Exchequer became a Justice of the English Common Pleas in 1612; Sir John Denham, Chief Baron of the Irish Exchequer became a Baron of the English Exchequer Court in 1617.
PART II

JUDICIAL ENCOUNTERS: THE NATIVE COMMUNITY
The previous chapter summarizing the contents of Sir John Davies' Irish Law Reports introduced the role of judicial resolutions in consolidating the Tudor conquest of Ireland. The single most important example of the use of such resolutions was their application against the customary patterns of Gaelic succession and land tenure known as tanistry and gavelkind. The need for judicial action to void native forms of landholding and descent became clear to Davies when he analyzed the barriers to English sovereignty in Ireland raised by the manner in which land was used and owned in the Gaelic districts. Like other administrators concerned with the legal status of the Gaelic polity, Davies saw the extension of common law tenures to the formerly autonomous Gaelic lordships as the most important pre-condition of the exercise of English sovereignty in Ireland. The decision to employ extra-judicial resolutions, or legal decisions divorced from litigation pending in the central courts, involved the Irish judiciary in the formulation of a policy that aimed at assimilating an alien scheme of law and land tenure into the new state system.

I.

Davies' reflections about the problems posed for English rule by the existence of the autonomous Gaelic lordships are summarized in the Law Reports and the Brief Discovery. Davies concurred with Bodin's civil law maxim that 'a king is not sovereign where others give law without reference to him'. Precisely this situation, he argued,
applied to large areas of Ireland right up to his own day:

..... The Irishrie governed their people by the Brehon law, they made their own magistrates and officers, they pardoned and punished all malefactors within their several countries; they made warre and peace one with the other without controulment; and this they did not only during the reigne of King Henry II, but afterward in all times, even until the reign of Queen Elizabeth.¹

In Davies' view, obstreperous Gaelic dynasts had always used their separate political institutions and landholding patterns, embodied in and legitimized by the domestic system of Brehon law, to escape the jurisdiction of the royal writ and to assert independence from English rule.

The problem of Ireland's division into two societies, separated by a tenurial frontier, had begun with the failure of medieval governments to achieve a complete military conquest of the island. This view of Davies was shared by other jurists of his generation. It is easily detected in the briefs filed in the Case of the Post-Nati (Calvin's Case) long regarded as the definitive view of alien status at the beginning of the seventeenth century. Francis Bacon's discussion of Irish sovereignty in Calvin's Case bears out Davies' interpretation of the limitations to English rule:

..... And hereof many ancient precedents and records may be shewed that the reason why Ireland is subject to the law of England is not ipso jure upon conquest, but grew by a charter of King John, and that extended but to so much as was then in the king's possession, for there are divers particular grants to sundry subjects of Ireland and their heirs, that they might use and observe the laws of England.²


The failure of the military efforts of Henry II and his successors meant that the English crown had never succeeded in extending a sovereign possessory right or what Davies called a 'paramount lordship' to Ireland. English rule had penetrated only to those areas physically seised under common law tenures.

England's tenuous hold on Ireland became evident during the fourteenth century when significant portions of the Anglo-Norman colonial community seemed to be adopting the customs, mores and laws of the native society. Dr. Robin Frame has urged restraint in assessing the degree to which the Norman conquerors were assimilated into Gaelic society. Nevertheless the fact remains that official policy - if such existed in late fourteenth-century Ireland - of juridically assimilating the native community was abandoned in favour of formalizing a system of personal law to safeguard Anglo-Norman society from what had become a Gaelic revival. This defensive effort, begun during the reign of Edward III, culminated in the legislation passed by the Kilkenny parliament in 1365. Known to historians as the Statutes of Kilkenny, this controversial legislation proscribed in English areas, on pain of high treason, the use of Irish surnames, Irish law, the Gaelic language, fosterage of sons and inter-marriage with the Irish race. In 1494, the Statutes of Kilkenny were renewed and in 1536 supplemented by equally strict and more specific proscriptions against Irish dress and customs within the Pale itself. As late as 1534, George Cromer, Archbishop of Armagh and Primate of Ireland, obtained a formal pardon for having


5. Ir. St. 10 H. VII., c.8; 28 H. VIII, c.15.
used the Brehon laws.

What was the structure of Gaelic law and society which had threatened to overwhelm the small enclaves secured to English law? To answer this question there are two lines of approach: either through Gaelic sources, most important the Brehon law, or through the eyes of contemporary English or Old English observers. Neither is entirely satisfactory. The Brehon laws have been variously interpreted as a Corpus Iuris Hibernici, or as a local rather than a national system. For the handful of scholars qualified or courageous enough to tackle them, reading the texts is an unrewarding task. It is difficult to see in an intricate pattern of canonical distinctions, glosses and commentaries, and a text that is all too frequently formulary rather than descriptive, patterns that are valid for Gaelic society as it existed in the Early Modern period. To make matters worse, an ambitious project of translation has, over the last thirty years, fallen under sharp criticism. The problems centre around the translators' habit of pulling contextual meaning from gloss and commentary and applying it to thorny passages without regard to the fact that the chronological gap between gloss, commentary and text is as much as five hundred years.

The difficulties in using the Brehon law texts to reconstruct the

edifice of Gaelic society during the sixteenth and early seventeenth centuries lead us to observations written by English and Old English administrators who came into contact with the Gaelic polity. These critical and often highly politicized descriptions of native society must also be read with some care. But the fact remains that the contours of early seventeenth-century native policy were shaped by the plethora of reports on Gaelic society one finds in the official state correspondence. Therefore it is through the eyes of contemporary observers, with some assistance from Irish philologists and more recent scholarship on Gaelic law, that we must with great caution turn.

Irish society consisted of groupings of landholders into independent or autonomous political units. Each landholder, or freeholder, as the English sometimes called him, theoretically possessed as a mark of his free status an honour price or *eremic* that varied, like the early Germanic *wergeld*, according to an individual's social rank. Groups of landholders were attached through kinship or clientage to more powerful freeholders whose territorial jurisdiction varied from what English contemporaries called a 'country' to a much wider jurisdiction that was frequently provincial in size - such as the MacCarthy Mór in Munster or the O'Neills and O'Donnells in Ulster. In theory, political power within a Gaelic district resided in a leading family group, the chief of which was elected by a four generation family grouping from a common ancestor: great grandfather, grandfather, father and son. This grouping, called the *derbhfín*, was the legal family in which property

passed on to the male descendants\textsuperscript{11}.

Aggregate or composite groups of territories or unit states of the Gaelic system were frequently bound by clientage or kinship under the suzerainty of a 'captain', lord or chieftain. In the north of Ireland, by far the most Gaelic part of the island, such groupings within Tyrone included the septs or corporate lineages of O'Cahan, MacMahon, O'Reilly and Maguire and in Tyrconnell, the MacSweeneys, the O'Dohertys and the O'Boyles. Where there existed a superior lord, the head of each political unit was usually, though not always, an urriagh or subsidiary chieftain in permanent alliance through clientage, kinship or coercion with his immediate lord\textsuperscript{12}. By Davies' time there remained only two such lordships, that of O'Neill and that of O'Donnell in Tyrone and Tyrconnell.

It seems, therefore, that there were three tiers of jurisdiction in Gaelic areas comprising a provincial chief, the urriagh or territorial chief who ruled collectively over a number of Gaelic sub-units and the single extended legal family ruled by a chief or captain. For a financial base, each tier possessed a number of privileges and obligations that allowed, for example, Hugh O'Neill to draw not only on the resources of his own subordinates, but also from the territories of each subsidiary urriagh\textsuperscript{13}. This meant that client septs to O'Neill like Maguire and O'Cahan were obliged to set aside either demesne land or chief rents for O'Neill within their own jurisdiction\textsuperscript{14}. Conversely, each urriagh,


\textsuperscript{12} Hayes McCoy, \textit{op. cit.}, p.51; Nicholls, \textit{op. cit.}, p.188.

\textsuperscript{13} Nicholls, \textit{op. cit.}, pp. 31-37; See also collections of Tyrones' rents; Bodl. Carte Ms. 61, ff.30a-31a; Another list of Irish exactions appears in Lam Pal. Ms. 617, ff.212b & 213a; Cal. Car., 1589-1600, p.71.

\textsuperscript{14} See the report of the 1606 inquisition into Fermanagh. BL Add. Ms. 4793, ff. 45a-50b; SP/63/219/ff.92a-112a.
in addition to privileges over lands owing refectory duties within his own territorial unit, could draw on the resources of kin and client from his own districts. This is to say he had either demesne or mensal rights in each of the territories of his client septs.

Apart from landed interests, there were other social categories that included bards, brehons, chroniclers, artisans, scholars, and a professional military caste of mercenaries or galloglaigh, all of whom were provided mensal lands within the tribal system. The amount of such land varied according to the strength and territorial jurisdiction of each chief or urriagh. By far the most numerous element of the population were landless tenants variously referred to by English observers as naturals or natives, whose status, free or unfree, was the source of some dispute and confusion not only to contemporaries, but also to modern scholars of Irish history. For Sir John Davies, who rode numerous assizes in Gaelic districts during the first decade of the seventeenth century, the treatment accorded by the Gaelic nobility to landless undertenants and others dependent on their will was little better than that accorded to a hereditary serf, bound as a mere chattel or appurtenance to the land.

The results of centuries of divided rule in Ireland could be seen in the peculiar legal status accorded to the inhabitants of the Gaelic districts up to the Tudor conquest. This status, as revealed in

15. In Fermanagh, Davies described their tenure as a form of free land. 'Namely such land as is possessed by the Irish officers of their country; viz. chroniclers, Galloglass and divers others'. BL Add. Ms. 4793, f.50b; See also the list of tribal exactions of the hereditary military castes in Lam. Pal. Ms. 635, f.62a; Cal. Car., 1601-1603, pp.454-459. J.P. Prendergast, 'The Ulster Creaghts', Kilkenny Archaeological Society Journal, 3 (1855) pp.420-430.

Davies' works, involved a number of legal disabilities not too dissimilar from those pertaining to aliens. In civil litigation, for example, Irish widows were frequently disabled from securing dower and excluded from suing real or personal actions in the central common law courts. In fact all natives living outside royal protection were forced to purchase charters of denization as a pre-condition to owning land or suing actions in the Dublin courts. In other words, unless a litigant enjoyed the privilege of English law accorded to the 'five bloods', the royal families of O'Neill of Ulster, O'Melaghlin of Meath, O'Conor of Connacht, O'Brien of Munster and MacMurrough of Leinster, he or she suffered without a charter of denization, the effects of a peremptory plea of Irishry which dismissed the case from court.

For Sir John Davies, who was himself responsible for issuing a general proclamation of denization to enfranchise tribal undertenants in Ulster during March, 1605, the legacy of an uncompleted medieval conquest remained operative in his own day.


18. Hand, *English Law*, p.199; See also Hand's 'The Status of the Native Irish in the Lordship of Ireland', *Irish Jurist* 1 (1960) p.109; Also Davies, *Irish Reports*, pp.103-106; Davies used similar evidence in his *Brief Discovery*. See Morely, pp.253-266. As Hand has suggested, Davies may have used Cambridge University Add. Ms. 3104, ff.49-50.
English jurists like Bacon and Davies were concerned about the legal disabilities that resulted from 'alien status' ascribed to the Gaelic polity, but even as early as the second half of the sixteenth century, observers had begun to identify the Irish laws of succession and shared inheritance as the single most important obstacle preventing full assimilation of the autonomous Gaelic enclaves into the state system. As distinct from primogeniture, Irish succession devolved through the male or agnatic descendants of a common great-grandfather to the 'most worthy' male collateral of the extended kin group. This scheme of succession, known to contemporary English observers as the custom of 'tanistry' derived from the technical Gaelic term *tanaise rig*, meaning literally second or next to the king\(^{19}\).

At the upper reaches of Gaelic society, a 'tanist' or heir apparent to an *urriagh*, 'captain' or 'chief' was, at least in theory, elected by the landed freeholders from within the legal family before the decease of the leader of the sept. To many English observers during the sixteenth and seventeenth centuries, the custom of tanistry became synonymous not only with succession by right of seniority, but also with the position of chief itself, which frequently included certain lands and other privileges appendant to the office\(^{20}\). The advantage of 'tanistry' as a lateral system of succession, peculiar to societies where agriculture is extensive rather than intensive, lies in the avoidance of the uncertainties associated with minority or regency government\(^{21}\).


In Ireland, however, the realities of succession by right of tanistry meant that the strong arm usually prevailed over the franchise, and the selection of a 'tanist' frequently erupted into bloody family strife. The excesses associated with succession by forte main paralleled the instability of Gaelic land tenure which vested ultimate proprietership in the corporate body of the extended kin group.

In Gaelic or Gaelicized districts, individual allotments of land were distributed through shared inheritance among the adult males of the extended legal family. English observers familiar with Welsh and Kentish partible distribution of land called the Gaelic inheritance pattern 'gavelkind'. While recent scholarship has demonstrated considerable variation in local practices, the custom of 'gavelkind' which Davies noted in the lesser Gaelic tenures in Ulster was not atypical of customs observed elsewhere in Ireland. The usual ritual, according to Davies, was for the extended legal family to gather at the death of a landholder and throw tokens representing their possessions into a hodgepodge. The family lands would then be distributed among the male collaterals, legitimate or illegitimate, according to age.

22. Nicholls, op. cit., p.26; G.A. Hayes McCoy, 'The Making of an O'Neill, A View of the Ceremony at Tullaghoge, Co. Tyrone', UJA, 33 (1970) pp.89-94; SP/63/112/f.150a; CSPI.1574-85, p.534; 'The custom of tanistry is the root of all the barbarism of Ireland', State Papers Henry VIII, Ireland, II:5. 'Also the son of every the said captains shall not succeed to his father without he being the strongest of all his nation; for there shall be none chief captain in any of the said regions by lawful succession but by fort main and election; and he that hath the strong arm and the hardest sword amongst them hath the best right and title'. See also Lam. Pal. Ms. 609, f.15b; Cal. Car., 1515-74, p.339; 'The hope that every Irishman hath come in e to be elected captain of his nation is the cause why every of them keepeth idle men of war, that thereby he might be stronger, and so thought the worthiest to be elected'. For similar comments see Lam. Pal. Ms. 616, ff.116a-117b; Cal. Car., 1589-1600, pp.27-28.


24. Davies, Reports, pp.134-137.
frequency of land redistribution allowed critics like Davies to argue that the limited tenancy associated with Irish gavelkind worked against intensive exploitation of land and prevented the formation of stable rural communities.\textsuperscript{25}

To English observers who viewed the canons of English descent as normative, the Irish customs of 'tanistry' and 'gavelkind', which bypassed traditional English patterns of lineal inheritance, represented little more than a limited tenancy or life trust in land which militated against the formation of a stable Gaelic body politic.\textsuperscript{26} In the absence of a coherent state system, the inability of Gaelic law to systematize a political order more definite than the temporary authority associated with elective succession meant also that the possessory rights conferred within the framework of the Gaelic tenurial system were only as permanent as the political authority from which they devolved. This inability to abstract political institutions and proprietary rights more lasting than the limited tenure associated with a life trust emanating from the corporation of the extended kin group had, in one view, a significant impact on the failure of the 1540-41 constitutional revolution to effect a lasting penetration into the autonomous Gaelic lordships.

In commenting on the refusal of substantial sections of the Gaelic polity to abide by the political engagements laid down by their forbears in the 1540's, the poet Edmund Spenser noted in 1597 that the descendants of those who had subscribed to the royal title and supremacy under St. Leger's liberal formula of surrender and regrant, based their relapse to Gaelic practice on the rules of 'tanistry'.

\textsuperscript{25} Davies, Brief Discovery, in Morley, pp.291-293.

\textsuperscript{26} For the problems associated with the conflict of laws and defining native custom through the mechanism of metropolitan law see: J. Montrose, 'The Use of Legal Categories in Problems Concerning Compilation of Customs and of Codification', Precedent In English Law and Other Essays, (Shannon, 1968) pp.79-80.
..... Eudoxus: Doth not the act of the parent in any lawful grant or conveyance, bind their heires forever thereunto? Shall it not tye their children to the same subjection?

Irenaeus: They say no; for their auncestors had no estate in any of their lands, seignories, or hereditaments, longer than during their own lives, as they allege, for all the Irish doe hold their land by tanistry; which is say they no more but a personal estate for his lifetime, that is tanist, by reason that he is admitted therunto by election of the country.27

Writing ten years later, Fynes Moryson, secretary to Lord Deputy Mountjoy, made a similar but more succinct observation, noting that the heirs of any 'chiefs or lords of countries' who had made surrenders of their lands under St. Leger's scheme or under subsequent attempts to assimilate the autonomous Gaelic lordships, 'baldly say that he held his lands by the tenure of tanistry only for his life, and so will not be tied to any of his acts'.28 This alleged refusal by Gaelic leaders to ascribe any permanence to the covenants of their predecessors is easily portrayed by the examples of the O'Neill lordship.

In the general attempt to substitute English for Gaelic tenures during the 1540's, the St. Leger government convinced several of the principal Gaelic dynasts to surrender their lordships in return for a heritable estate good before English law. One such dynast was Con O'Neill, newly created Earl of Tryone, who attempted to stabilize the scheme of succession in his country at the expense of the rightful heir Shane O'Neill. In the end, Con's arrangements to manoeuvre an illegitimate son Mathew in place of Shane, who would have inherited by right of 'tanistry', threw the whole of Ulster into turmoil. In 1558, Shane killed Mathew, but Mathew left two sons, Brian and Hugh Roe, to

27. Edmund Spenser, A View of the State of Ireland: Written Dailoquete-Wise Between Eudoxus and Irenaeus, in Morely, pp.41-43.

whom the title descended by English law. In 1561, Turlough Luineach, a kinsman of Shane, murdered the elder son Brian, leaving young Hugh, who was too young to threaten Shane, as rightful heir under English law. Shane then succeeded in having himself elected O'Neill and successfully pleaded his own case before Queen Elizabeth who conceded in 1562 official sanction of Shane's leadership, as tribal chief under Gaelic law, of Tyrone. In summarizing this episode, Dr. Canny has remarked that the case of the O'Neill lordship was not atypical of the surrender and regrant formula pursued by St. Leger in 1540 - a fact underscored by the case of Donegal for which no crown title could be found until 1603.

In addition to the presumptive sovereignty associated with the Gaelic customs of 'tanistry' and 'gavelkind', the medieval legacy left by the twelfth-century donation of Ireland by Pope Adrian IV in the bull Laudabiliter clouded further the constitutional relationship between the colony and the independent native lordships. In the charged atmosphere of the sixteenth century, several independent Gaelic dynasts exploited the theory of papal sovereignty over Ireland either to deploy the forces of Catholic Europe in Ireland by offering an 'Irish crown' to a foreign monarch, or to legitimize the independence of their own laws and institutions.


considerable advantage of hindsight, to dismiss any significance to
the attempts by various continental monarchs to assert legal claims
to Irish dominion, it should not be forgotten that to contemporary
English policymakers and legal thinkers confronted with the problem of
native Irish lords asserting autochthonous powers over their Gaelic
enclaves, foreign designs on Ireland, poorly conceived and executed as
they were, represented something more than mere nuisance.

This concern can be detected in the literature of various English
jurists and polemicists who attempted to deny the validity of Papal
temporal jurisdiction in Ireland. An anonymous contribution to the
Book of Howth, for example, maintained an antecedent claim to Irish
dominion, because English rule in Ireland owed its origins to king
Arthur and not to the pope. Sir Edward Coke, a man always partial
to Anglo-Saxon myth, developed a similar theme. Coke, however,
relegated Arthur to a marginal note and justified an English title to
Ireland by citing a rather spurious Anglo-Saxon charter legitimizing
an alleged conquest of Ireland by king Edgar. The appearance of a
coherent theory of conquest to justify English rule in Ireland,
elaborated more completely in the final chapter of this thesis, provided
legal thinkers like Coke, Ellesmere and Davies with an ultimate right
to Irish dominion that challenged any other claim to Irish sovereignty,
either through the alleged papal donation of 1155, or through the
presumptive sovereignty associated with the independent Gaelic
lordships. Yet despite the end of the Nine Years War and the
subjugation of the last great Gaelic lordships it is interesting to note

31. Lam. Pal. Ms. 623 f.48b; Lam. Pal. Ms. 598, f.28b; Cal. Car.,
Book of Howth, pp.100,312.


33. See chapter eight of this thesis.
that as late as 1608, it was still possible to encounter references
to papal jurisdiction in temporal Irish affairs. One such reference
is the deposition of John Leigh, High Sheriff of Tyrone, who complained:

...... Another matter of note is that the permitting of
some of the naturals in every quarter of that country to
bear the title of officials for the Bishop, is a great
inconvenience and hurt to the establishment of the
King's laws and courses of justice amongst the barbarous
people for these kind of fellows under color of their
authority from the Bishops take upon them to decide all
private controversies committed between party and party
in the nature of Brehans or judges according to the
rules of the Popish canons.34

Leigh's deposition also suggests, however, that the jurisdictional
problems brought about by the Reformation worked hand-in-hand with the
more tangible barriers raised by Gaelic political institutions, kinship
and land tenure. To those chieftains sophisticated enough to view
their own customary law as legitimate, the legal status of their own
territories represented a form of autonomy independent from the
jurisdiction of the English crown. This view was widely held during
the Nine Years War, and can be seen in Hugh O'Neill's attempt to extend
his authority over the whole of Ulster in what may have been a prelude
to an attempted resurrection of the 'high kingship' of Ireland.

It is well known, for example, that Tyrone maintained two agents,
Peter Lombard of Waterford and Edmund MacDonnell, Dean of Armagh, at
the courts of Rome and Spain to solicit foreign support. In 1595, the
Gaelic nobility went so far as to offer the Irish crown to the Spanish
king, an event that probably inspired Lord Deputy Fitzwilliam in 1597,
to link the tenurial and political structure of Gaelic society with the
designs of foreign monarchs in Ireland:

The rebels pretend to recover their ancient land and territory out of the Englishman's hands and for the restoring of the Romish religion and to cast off English laws and government and to bring the realm to the tanist law acknowledging Tyrone to be Lieutenant to the Pope and king of Spain.³⁵

The fact that some English administrators linked this international dimension to the problem of assimilating Gaelic society provides an essential public law framework with which to examine Davies' controversial assessment of alien status which he associated with Gaelic patterns of landholding and descent operating outside the jurisdiction of the royal writ.³⁶

II.

The impact on the political contours of early seventeenth-century Ireland of the medieval legacy arising from the papal donation and from the autonomous status accorded to those areas subscribing to Gaelic customary law is readily evident in the Treaty of Mellifont which ended the Nine Years War on 4 April 1603. In this Treaty, Hugh O'Neill, Earl of Tryone agreed to abjure all dependency on foreign potentates, in particular the king of Spain, to forswear the title of O'Neill, to


³⁶. SP/63/206/f.154a; CSPI, 1599-1600, p.280; SP/63/183/f.317a; CSPI, 1592-96, p.423. 'For now the Ulster men and these are joined in one action and one quarrel, striving for the maintenance of their tanist law an old Irish custom, under which they acknowledge little or no sovereignty to your majesty, and now these men term themselves the Pope's men and the traitor Tyrone's and in show of religion openly profess popery and massings, having roving wicked priests and titular Bishops, which daily resort to them from Rome and parts beyond the see'. See also SP/63/186/f.179a; CSPI, 1592-96, p.468; The Lord Deputy speaks of the 'disloyal resolution of the rebels to shake off her Majesty's government, and a settled wilfullness to bring in foreign rule'...
terminate all 'challenging or intermeddling with urriaghts', to renounce all 'claims and title to any land but such as shall be now granted by his Majesties' letters patent', and to assist the abolition of all 'barbarous customs contrary to the laws being the seeds of all incivility'. In return the English government exercised a restraint that was surely remarkable, the more so in view of its response to previous rebellions in Ireland. Whereas earlier disturbances entailed extensive confiscation and plantation of rebel estates, in 1603 O'Neill, O'Donnell and other leaders of the Nine Years War found themselves restored to much of their former property replete with new titles of nobility.

These amicable and auspicious beginnings were shortlived. Within a year, reports began to drift in to the Irish Privy Council that the Ulster nobility was deliberately exploiting the liberal tenets of the Mellifont agreements in order to establish full possession over vast areas that may even have exceeded the personal demesnes allowed to them under Gaelic law before Tyrone's rebellion. In Tyrconnell, for example, Rory O'Donnell succeeded in convincing his former subject urriaghts to surrender their estates to himself, thereby acknowledging him as owner in fee simple of all Tyrconnell - conditions very similar to those enjoyed by his predecessors under Gaelic law during the Nine Years War. Fynes Moryson, secretary to Lord Lieutenant Mountjoy, discovered the mechanics of O'Donnell's subterfuge, wryly commenting that O'Donnell retained a Pale lawyer to convince the men of Tyrconnell that they had, in the absence of a specific pardon for their complicity in the Nine Years War, no lawful estate in their property.


To the east in Tyrone, similar events seemed to indicate another attempt to return to the old ways. O'Neill, however, relied less on O'Donnell's legal chicanery than on his own abilities as a statesman to restore his old position. Tyrone's negotiating skills are clearly revealed in the land settlement formalized by the English Privy Council at Hampton Court during the month of August 1603. In accordance with the general principles laid down by the Treaty of Mellifont, Tyrone convinced the Privy Council to restore the same estate allowed to him by Elizabeth in 1587 - a grant which confirmed the Earl in possession of all lands, tenements and hereditaments held by his grandfather Con Bacagh O'Neill at the time of his surrender and regrant in 1542. It should be noted, however, that Tyrone subsequently interpreted this to mean:

..... The country of Tyrone and all his interest and command over the lords and chieftains of countries within the province of Ulster in Ireland, who held of him and were subject to his taxes.

The only property that the English Privy Council at Hampton Court exempted from the Earl's control was the allocation of 300 acres to each of the forts at Charlemont and Mountjoy, and further grants of territory ceded to Henry Oge O'Neill and Turlough McHenry of the Fews. Henry Oge's

41. James Morrin, Calendar of the Patent and Close Rolls of Chancery in Ireland from the 18th to the 45th year of Queen Elizabeth, 2 vols., (Dublin, 1862) 2:130.
42. SP/63/219/f.230a; CSPI,1606-08, p.51.
territory, located north of the Blackwater, stood in the heart of Tyrone's land and the loss must have been difficult for the Earl to accept. The Fews, a forested area in Armagh bordering the Pale, was granted to Turlough McHenry to safeguard the government's line of march into the formerly autonomous O'Neill lordship. However, as Canny has pointed out, the loss of these territories, in view of the fact that both men had a history of opposing Tyrone's overlordship, cannot be termed excessive. Thus, despite the crushing defeat dealt by English forces to Gaelic dynastic ambitions in the Nine Years War, events in both Tyrone and Tyrconnell allowed not only O'Neill and O'Donnell, but also the rest of the tribal leadership, O'Doherty, O'Hanlon and O'Neill of the Fews, to appropriate to themselves in fee simple, the counties of Donegal, Tyrone, Derry and Armagh.

It has been traditional for Irish historians to fasten responsibility for this lenient policy on the Lord Lieutenant, Charles Blount, Baron Mountjoy and Earl of Devonshire, who as member of the English Privy Council then resided in England. Whatever its origins, official Irish policy as enshrined by the Treaty of Mellifont and the land settlement at Hampton Court changed completely within a year's time, and the munificence accorded to Tyrone and Tyrconnell soon hardened into an attitude that approached hostility. The reasons for this change may in part lie in Mountjoy's growing alienation from Cecil and the English Privy Council. This estrangement stemmed from Mountjoy's shady association with the Essex plot, and from his scandalous marriage to Essex's sister Penelope Rich, which led to a noticeable cooling of

relations with Robert Cecil. By late 1605, Mountjoy's proposed marriage to Penelope led to his virtual disgrace at court, which suggests that the formulation of Irish policy had, for some time, shifted elsewhere. While it is difficult to determine the precise locus of Irish policy, the comments of Miss P.M. Handover, Robert Cecil's biographer, are certainly worth noting. To Handover, Cecil's foreign policy aims, particularly rapprochement with Spain, depended entirely on the pacification of Ireland. It was Cecil, she argued, who was prominent in dictating Irish policy. This assessment is supported by Sir Roger Wilbraham, who preceded Sir John Davies as Irish Solicitor-General. Writing on the eve of Cecil's death in 1612, Wilbraham noted that Cecil alone exercised responsibility for Irish affairs. Insofar as Wilbraham's testimony affects the change in policy towards the Gaelic leadership in Ulster, Sir John Davies, who owed much to Cecil, remarked in November 1608 that it was Cecil, on advice provided by himself, 'who moved the king to write special letters to the Earl (Tyrone) and other lords of the North requiring them to make a competent number of freeholders in their several countries'.

This new defensive strategy, formulated by Cecil and Davies, to install a pattern of freeholders to limit the powers of Tyrone, Tyrconnell and other Gaelic chiefs in the north emerged as a result of

46. See the 'Confessions of Southampton and Danvers' in J. Bruce, ed., Correspondence of King James VI of Scotland with Sir Robert Cecil, Camden Society, (Westminster, 1861) pp.101-107; F. Moryson, An Itinerary Written First in the Latine Tongue and Then Translated by Him into English, (London, 1617) Part II:89; SP/14/18/f.19a; CSPD,1603-1610, p.287; F.M. Jones, Mountjoy, The Last Elizabethan Deputy, (Dublin, 1959) p.180.


Davies' extensive investigations of Gaelic society. By April, 1604, Davies began to complain to Cecil that the demesnes granted to the Gaelic nobility were excessive, comparing Tyrone's hold over his tenants to that of the Earl of Warwick over his own barons in the period of feudal anarchy during the reign of Henry VI. Davies concluded that Tyrone's usurpation 'Upon the bodies of persons of men' in Ulster had allowed O'Neill, like the Earl of Warwick, to make 'war against the state of England and make his barbarous followers think they had no other king than Tyrone, because their lives and their goods depended upon his will'.

This assessment subsequently led Davies to devise the controversial theory of alienage which he applied to the Gaelic Irish living outside the protection of the royal writ. According to Davies such persons were:

..... Not reputed free subjects nor admitted to the benefit of the laws of England until they had purchased charters of denization. Touching their denization they were common in every king's reign since Henry II and were never out of use till his majesty that now is came to the crown.

Within one year Davies' alien theory resulted in a general proclamation of denization, granting the benefits of English law to all under-tenants and former 'freeholders' residing in Ulster. As a further measure to limit the powers of the Gaelic nobility, this same proclamation clarified the land settlement of 1603, announcing that the letters patent issued to Tyrone and Tyrconnell and other chieftains, 'notwithstanding the said general words therein conveyed', did not transfer to the lords the lawful freeholds of inheritance that had formerly belonged to various tribal undertenants in accordance with the customs and traditions of Gaelic land law.

49. SP/36/216/f.45a; CSPI,1603-06, p.160.
50. Morley, pp.262 & 264.
51. See note 16.
The government supplemented this directive by authorizing a commission on 19 July 1605 to investigate the patterns of land tenure in Ulster. In the event, the commissioners attempted to remedy a number of serious defects in civil government resulting primarily from the absence of freeholders in Gaelic areas for jury service, to 'perform other services for the commonwealth' and generally to restrict the powers of the Gaelic nobility. As a result of this commission, the English Privy Council, advised by Davies who had returned to England, informed Lord Deputy Chichester and the Irish Privy Council that it had never been their purpose to grant the whole of Tyrone and Tyrconnell to O'Neill and O'Donnell. They thereby authorized the commissioners to accept voluntary surrenders of Gaelic estates in return for common law tenures. To supplement this directive, the Irish chancery warranted a special commission to determine the number of freeholders within the various tribal jurisdictions in Ulster, and to accept surrenders of Gaelic estates held by titles not derived from the common law. The commissioners were to take particular care in accepting surrenders of 'tanist' lands, stipulating that such lands could only be surrendered and regranted in the presence of the Lord Deputy and four members of the Irish Privy Council.

Despite the powerful commissions for the surrender of defective titles and 'tanist' lands, the results of this expedition into the north


53. Erck, pp.182-184; There were in fact two separate commissions - one for the surrender of uncertain titles and one for the surrender of tanist lands only. Lam. Pal. Ms. 629 ff.138a-139a; See also R. Steele, Proclamations, II:p.18, nu.186, p.19 nu.196.
were not altogether encouraging. In Tyrconnell things seemed to go well. Here Davies and the commissioners succeeded in forcing O'Donnell to restore the rights of the MacSweeney's and the O'Boyles. The government also dealt generously with Sir Neill Garve O'Donnell, a rival claimant to the O'Donnell lordship, allocating him 12,900 acres in the vicinity of Lifford, considered by O'Donnell to be the only 'jewel' left in his lordship. For O'Donnell, whose position in the north was rapidly crumbling, the loss of income and prestige arising from these decisions must have been overwhelming.

In Tyrone the commissioners were less successful. Although various cadet branches of the O'Neill family, as well as other septs subordinate to Tyrone's rule, presented petitions to the commissioners claiming rights to freehold, O'Neill outmanoeuvered them by presenting his immediate kinsmen as freeholders instead. As an interim measure the commissioners accepted this arrangement but deferred making a final settlement until a later date. Within a year, the government authorized a second commission to determine as far as possible the various freeholds unlawfully expropriated and mistakenly assigned to the various Gaelic chiefs in Ulster.

There were, however, certain differences about the commission of 1606. To speed the surrender of all lands held by tenures alien to the common law, Davies conspired with the Irish judiciary to supplement the proclamation of denization conferring the protection of English law


55. SP/63/217/f.155a; CSPI,1603-06, pp.318-319.

56. For the 1606 commission see: Canny, Career of Hugh O'Neill, pp.143-168; SP/63/218/ff.207a & b; CSPI,1603-06, p.492; SP/63/219/f.3b; CSPI,1603-06, p.512.
on the inhabitants of Ulster with two extra-judicial resolutions voiding
the customs of 'gavelkind' and 'tanistry'. From Davies' Reports and
from scattered manuscript references, it is clear that the Dublin
government viewed these resolutions, at the outset anyway, as a con-
stitutional mechanism to facilitate the surrender of Gaelic tenures in
return for common law estates which in turn would firm up the tenancies
of tribal undertenants as freeholders against the claims of superior
chiefs like Tyrone. Insofar as this strategy affected the lesser
tenancies held by Irish partible inheritance, Davies' report of the
resolution against gavelkind maintained:

..... This resolution of the judges, by the special
order of the lord deputy was registered among the
acts of the council; But there this provision was
added to it, that if any of the meer Irish hath
possessed and enjoyed any portion of land by this
custom of Irish gavelkind, before the commencement
of the reign of our lord the king who now is, that
he should not be disturbed in his possession, but
be continued and established in it.57

As for the resolution voiding the custom of tanistry, there survives
no record of the judges' deliberations but the intent, as described
by Davies to Salisbury in the 1606 commission into Ulster was clear.
The Irish customs:

..... both of tanistry and gavelkind in this kingdom
lately by the opinion of all the judges here adjudged
to be utterlie voide in law, and they are so voide,
so shall they be shortly avoided and extinguished
either by surrneder or resumption of all lands so
holden.58

With the extra-judicial resolutions voiding the Gaelic tenurial
system, and a commission of defective titles to revalidate Gaelic

58. SP/63/219/ff.109b-110a; CSPI,1603-06, p.575; BL Add. Ms. f.53b-54a,
Morley, pp.376-377.
estates with common law titles, the government acquired the instrument to break up the over-liberal grants allowed to the Gaelic leadership in 1603. The strength of these judicial weapons became apparent when the commission began to investigate the nature of landholding in three other Ulster counties, Monaghan, Fermanagh and Cavan. In Fermanagh, for example, Davies reported to Salisbury that 'far from Maguire (the chief) owning all, he possessed only in right of his chiefry, certain demesnes in various places and a chiefry or right to levy contributions or taxes in the rest'\(^59\). Similarly a jury in Cavan reported that:

...... There is first a general chieftain of every country or territory, which hath some demesnes and many household provisions yielded unto him by all the inhabitants; under him every sept or surname hath a particular chieftain or tanist, which has likewise his peculiar demesnes and duties and their possessions go by succession or election entirely without any division; but all other lands holden by the inferior inhabitants are partible in the course of gavelkind.\(^60\)

In the Leinster assize of autumn 1606, Davies discovered similar patterns of landholding, and he stressed the point to Salisbury that the system of demesnes and freeholds were 'alike throughout the former Irish districts'\(^61\). Against the backdrop of the renewed commission for defective titles and the surrender of tanist lands in 1606, it appears that the commissioners used these decisions in Fermanagh to divide the tribal demesnes equally between rival Maguire claimants and to re-distribute the remainder of the county to various other freeholders. In Cavan, which was adjudged to be crown property, the replacement of Gaelic tenures by common law estates proved simple enough, and the commissioners found little difficulty in appointing sufficient freeholders.

\(^{59}\) BL Add. Ms. 4793, f.51a; Morley, p.372; SP/63/219/f.106a & b, CSPI,1603-08, p.575.  


\(^{61}\) SP/63/219/f.174a; CSPI,1606-08, p.20.
there. In Monaghan, however, the commissioners resorted to a settlement laid down by Lord Deputy Fitzwilliam in 1591, confirming an earlier scheme to redistribute the lands of the MacMahons among various freeholders as the commissioners saw fit. The effects, therefore, of the extra-judicial resolutions eliminating 'tanistry' and 'gavelkind' were to create a large class of freeholders in Fermanagh, Cavan and Monaghan, or as Davies summarized the event to Salisbury, to 'cut off the three heads of that Hydra from the North, namely McMahon, McGwyre and O'Reilly'.

Within the precincts of Tyrone the impact of these extra-judicial resolutions is more difficult to assess. But Davies' praise for the 1606 settlement, that it had prevented 'the error which hath formerly been committed in passing all Tyrone to one and Tyrconnel to another and other large territories of O'Dogherty and Randal McSorley without any respect of the king's poor subjects who inhabit and hold the lands under them', clearly indicated that Tyrone was in for trouble.

Ever suspicious of events in Ulster, Davies kept careful watch over Tyrone's attempts to thwart the extension of crown government within his lordship. To Davies, Tyrone's interpretation of the land settlement at Hampton Court allowed the Earl, 'like the Turk or Tartar to have all in possession, and consequently all the tenants of that country to be his slaves and vassals'. To safeguard the north from these encroachments, Davies sought to delineate the metes and bounds of Tyrone's districts and found in Donal O'Cahan, Tyrone's son-in-law and former urriagh, a likely candidate to limit O'Neill's extensive claims to freehold.

63. BL Add. Ms. 4793, ff.38b-39a; Morley, p.351; SP/63/219/f.111b; CSPI,1603-06, p.575.
64. BL Add. Ms. 4793, ff.38b-39a; Morley, p.351; SP/63/219/ff.94b-95a; CSPI,1603-06, p.575.
65. SP/63/222/f.8a; CSPI,1608-08, p.212.
For several generations, the chiefs of the O'Cahan sept had possessed the traditional right to preside over the investiture of the O'Neills - a relationship that reflected the strategic importance of O'Cahan's country which guarded the northern approaches into Tyrone's territories. Towards the end of the Nine Years War, O'Cahan deserted Tyrone's cause in return for a promised crown title to his lordship, a traitorous move that must have hastened the decline of Tyrone's military fortunes. Pending final termination of the Nine Years War, the government granted a custodiam or temporary usufruct to O'Cahan as an interim settlement. In the wake of agreements laid down at Mellifont and Hampton Court during the spring and summer of 1603, the government reneged its agreements. Thereafter O'Cahan was forced to enter into an uneasy arrangement with Tyrone whereby O'Neill received one third of O'Cahan's territory and an annual rent of 160 cows. Since this agreement appeared to violate one of the fundamental provisions of the Treaty of Mellifont, that Tyrone 'terminate all challenging or intermeddling with the urriaghts', Davies seized on a ready and useful tool with which to cut Tyrone down to size.

Davies capitalized on another tenurial dispute in Tyrone involving O'Neill and George Montgomery, Bishop of the Northern Sees of Derry, Clogher, and Raphoe. Like the dispute over O'Cahan's territories, the disagreements with Montgomery dealt with the status of Gaelic ecclesiastical tenures within Tyrone's district. In this instance, Montgomery attempted to expand his plural living by laying claims to all

termon and *erenagh* property within his jurisdiction. O'Neill seems to have had similar trouble with the Archbishop of Armagh who also pressed suits against the Earl before the Irish Privy Council. In reality, however, possession of these lands resided with the septs of the hereditary tenants, known as *coarbs* and *erenaghs*, who lived on church lands and held their tenures by 'tanistry' and 'gavelkind', rendering annual rents and hospitality to the local bishop. Montgomery, conscious of the notorious poverty of the Irish *ecclesia*, righteously argued for the patrimony of his church while Tyrone, who saw in Montgomery a likely attempt to introduce more freeholders within his lordship, claimed these ecclesiastical tenures as parcel to his own demesne.

These disputes involving O'Cahan and Montgomery gave Davies further opportunity to research the historical background to O'Neill's claim to the whole of Tyrone. In response, the Earl petitioned Salisbury and the English Privy Council, stating his own understanding of the Mellifont agreements to mean that the lands of all subordinate septs rendering tribute to him under the Gaelic system were his in demesne. Davies argued the contrary, focusing attention on the land settlement laid down at Hampton Court, during August 1603 where Tyrone renounced all 'claims to land and authority not granted or conferred unto me by the late queen'. Davies then called attention to the royal patent establishing Tyrone in his lordship dated 1587, which granted to O'Neill the same estate held by his grandfather, Con Bacagh O'Neill at the time.


68. SP/63/221/f.139a; CSPI,1606-08, p.151; SP/63/222/f.55b; CSPI,1606-08, pp.244-245.

69. BL Add. Ms. 4879, f.180a.
of his surrender and regrant in 1542. But, argued Davies, the express words of Con O'Neill's patent, that his son Mathew should receive 'all the castles, manors and lordships which he formerly possessed', did not convey the whole of Tyrone, a fact witnessed by two jury inquisitions carried out as a preliminary formality to issuing the 1587 patent. According to this document, Davies having 'drawn the case more exactly out of the records themselves', concluded that neither Montgomery, O'Cahan nor Tyrone had any title to the lands in dispute.

This daring assertion arose from two very interesting jury inquisitions taken during the month of June 1587 to determine the metes and bounds of Tyrone's lordship. Here the jury found that Hugh was justly entitled to his lordship by virtue of his grandfather Con's surrender of 1542. But, concluded the jurors, the boundaries of O'Neill's lordship did not include O'Cahan's country in Coleraine, the vast forest of Glanconkein bordering the south of O'Cahan's country, or the area known as Killetragh, an extensive territory bordering the northwest extremity of Lough Neagh. With respect to the disposition of various abbeys, priories and other forms of ecclesiastical property at the time of Con's surrender, the jurors anticipated the arguments put forward by Bishop Montgomery twenty years later, explaining that religious foundations within Tyrone paid only rents to O'Neill and were not parcel to his demesne. As a result Davies concluded that neither O'Cahan, Tyrone nor Montgomery had any title:

70. SP/63/135/ff.77a-87a; CSPI,1586-88, pp.520-522; SP/63/129/f.112a; CSPI,1586-88, p.332; SP/63/219/ff.174b-175b; CSPI,1606-08, pp.20-21; SP/63/221/ff.214a-218a; CSPI,1606-08, pp.190-202.

71. SP/63/222/ff.6b-7a; CSPI,1606-08, p.211

72. It is interesting to note that Con O'Neill's patent makes no mention of these territories. J. Morrin, Calendar of the Patent and Close Rolls of Chancery in Ireland in the Reigns of Henry VIII, Edward VI, Mary and Elizabeth, (Dublin, 1861) p.88. For the territories in question see the manuscript map drawn up in conjunction with the 1587 inquisition; MPF 307.
..... to the freehold or inheritance of the country, or territory in question but that it now is and ever hath been vested in the actual possession of the crown since the eleventh year of Queen Elizabeth.73

In other words, all the lands not parcel to the demesne lands set out in Con Bacagh O'Neill's patent, belonged beyond any 'color or shadow of doubt' to the state by virtue of the attainder of Shane O'Neill in the Irish parliament of 1569-71.

Apart from O'Cahan and Montgomery, Davies' prying into Tyrone's patent also demonstrated the existence of a substantial number of small freeholders occupying land by Gaelic tenures who now, as a result of Davies' research into Con O'Neill's patent, owed only rents to Tyrone. With the abolition of 'tanistry' and 'gavelkind' by judicial fiat, Davies also acquired the institutional leverage to convert these holdings into common law tenures that would limit not only the powers of the Earl, but also extend local government and English law to areas previously subject to the whims of tribal leadership. Confronted with litigious disputes from all sides, Tyrone complained bitterly of these vexatious proceedings to dispossess him of his lands. Thus harried by the state, Tyrone took matters into his own hands and committed a violent distress of cattle from O'Cahan. In an attempt to settle the dispute, the Irish Privy Council called both men to Dublin to present their respective grievances, where Tyrone, in a fit of anger, recklessly tore O'Cahan's petition to shreds in front of the Lord Deputy. The Earl complained of Davies' effrontery on the same occasion, quoting the Attorney-General as having remarked that he would never 'serve the king if I had not lost all the land of Iraght-I-Cahan and much more of that I hold and thought myself most assured of'.74 By July 1607, the O'Cahan affair approached

74. SP/63/221/f.199a; CSPI.1606-08, p.193; SP/63/222/f.316a; CSPI.1606-08, p.376.
breaking point. Davies, for his part, proposed submitting the case to the English justices for their collective resolution. In the end he was pre-empted by James I, who authorized Chichester to refer the various disputes over Tyrone's estates to Westminster for the 'sentence of their sovereign'.

Tyrone at this point appears to have lost his nerve. Unable to weather the obvious hostility of Davies and others within the Irish government, the Earl grew apprehensive over his future in a thoroughly Anglicized Ulster and retired to an ignominious exile on the continent. On the night of September 3, 1607, O'Neill, O'Donnell and ninety of their followers boarded ship at Rathmullen and left, never to return to Ireland. Combined with the failure of Sir Cahir O'Doherty's hopeless and pathetic attempt to lead a revolt in Ulster during the month of April 1608, the flight of the Earls left a vacuum so enormous as to open up the whole of Ulster to confiscation and plantation. For Davies, who had been instrumental in assimilating Gaelic tenures into the new state system ruled only by the sovereignty of the common law, the judicial resolutions against tanistry and gavelkind, previously employed as a constitutional mechanism to incorporate an alien system of law and land tenure, were now transformed into a tool of confiscation that paved the way for one of the biggest plantations in Irish history.

III.

In the wake of Tyrone's rebellion, colonization of the north was no innovation. As early as 1604, James I expressed some interest in

75. PRO/31/8/201/f.242a; CSPI,1606-08, p.221
planting Irish freeholders and English servitors around key military posts. Again in 1606, James was reported to have favoured a plantation in Cavan, except that any English or 'foreign settlement should be confined to church land which the Irish seldom claimed, so as not to create the impression that there was a general attempt to displace the original inhabitants'. As least until O'Doherty’s rebellion in the summer of 1608, there appears to have been no specific scheme of a general plantation. Chichester himself suggested only a limited settlement of the demesnes belonging to the departed Gaelic leadership - thus leaving the newly created freeholders in possession of their lands. Nonetheless O'Doherty’s rebellion gave rise to more thorough schemes of colonization that included not only the four counties of Tyrone, Armagh, Derry and Donegal, but also the counties of Fermanagh and Cavan. In other words, the Irish government threw all caution to the wind in favour of a general plantation whose most enthusiastic supporter, Lord Deputy Chichester, commented:

..... If my endeavors may give any help and furtherence to so glorious and worthy a design, besides my duty and obedience to your majesty, my heart is so well affected unto it, that I would rather labor with my hands in the plantation of Ulster than dance or play in that of Virginia.

Once again, the immediate obstacle of finding title to the escheated lands had to be overcome. In these altered political conditions

77. BL Add. Ms.4819, f.186a; BL Cecil Papers, 117, f.162a; HMC, Salisbury Mss., 18:314.

78. SP/63/224/f.194a-195b; CSPI,1606-08, pp.606-607; SP/63/225/f.113a; CSPI,1608-10, pp.63,65; The English Privy Council adopted a harder line: CSPI,1608-08, p.617; Davies continuously called for a general rooting out of natives. SP/63/224/f.250b; CSPI,1608-10, p.17.

79. SP/63/229/f.171b; CSPI,1608-10, p.520.
the judicial resolutions voiding the customary patterns of Gaelic succession and partible inheritance assumed a totally different role. Whereas the first application of these decisions served as a constitutional means to limit the powers of the Gaelic nobility, the 'flight of the Earls' allowed the government to use the same extra-judicial resolutions to confiscate estates for which no crown title could be found.

This new strategy to employ the extra-judicial resolutions against the customs of 'tanistry' and 'gavelkind' as a tool of confiscation resulted from the shortcomings of the more traditional measures used to confiscate native estates - by attainder or revived medieval titles. Of the six northern counties, Armagh, Tyrone, Derry, Donegal, Fermanagh and Cavan, all save the last two were easily brought into the government's net. To get around the landholders in Armagh, Tyrone and Derry, Davies fell back on the attainder of Shane O'Neill which established crown title to the land in these three counties. Donegal, however, proved a bit more difficult, because 'until the first year of his Majesty's reign, the county was always a mere Irish country, not governed by the common nor statute law, nor subject to the ordinary ministers of justice, for the king's writ did never run there'. Here Davies used another expedient. Under cover of the patent dated 1 February James I, Davies used the pretext that the crown had conveyed the whole of Donegal to Rory O'Donnell in fee simple, hence it all devolved back to the crown by virtue of O'Donnell's attainder.

Problems did arise with the freeholders so laboriously created by the commissioners during the summers of 1605 and 1606 in Fermanagh and Cavan, and with the termon and erenagh property within each of the several

80. Bodl, Carte Ms. 61, ff.111a-123b; CSPI,1608-10, pp.553-568.
81. Bodl, Carte Ms. 61, ff.126a-127b; CSPI,1608-10, p.569.
counties. But the inquisition carried out by Davies and the commissioners in these counties in 1606 had demonstrated the freeholder's potential vulnerability.

..... But forasmuch as the greatest part of the inhabitants of that country did claim to be freeholders of their several possessions, who surviving the late rebellion had never been attainted, but having received his majesty's pardon, stood upright in law, so as we could not easily entitle the crown to their lands, except it were in point of conquest, a title which the state here hath not at any time taken hold of for the king against the Irish; which upon the conquest were not dispossessed of their lands, but were permitted to die seized thereof in the king's allegiance, albeit they hold the same not according to the course of the common law, but by the custom of tanistry, whereby the eldest of every sept claimed a chiefry over the rest, and the inferior sort divided their possessions after the manner of gavelkind.82

Only now with the departure of the Gaelic nobility, the abolition of 'tanistry' and 'gavelkind' by judicial fiat was turned against the network of freeholders so laboriously created by Davies and the commissioners of 1605 and 1606.

It is interesting to note, however, that the first test of the extra-judicial resolution against tanistry arose from litigation referred to the Court of King's Bench from county Cork. Why Davies and the Dublin government chose this particular suit as a test case is unclear. In light of Davies' earlier statement to Salisbury that the scheme of demesnes and freeholds in Gaelic districts was universally the same, it may be that Davies was unsure of the authority of an untried extra-judicial resolution and wanted to test the abolition of tanistry by judicial fiat before a jury that would prove more amenable to crown policy than an Ulster jury. This possibility is suggested further by the timing of the case referred from the Munster Presidency Court to the Court of King's Bench which fits conveniently, perhaps too conveniently, the need for an authoritative decision to scuttle the 'freeholders' in

82. BL Add. Mss. 4783, f.45b; For Cavan see ff.53b-54a; SP/63/219/ff. 109b-110a; CSPI,1603-06, p.575.
Fermanagh and Cavan. Whatever the reason for playing up the case in county Cork, the fact remains that the judicial guideline laid down by the abolition of tanistry in 1606 served as a precedent to guide judgement in the Case of Tanistry in 1608.

The famous Case of Tanistry began as a forcible ejectment from a common law estate containing the castle and six ploughlands of Dromaneen in Duhallow, county Cork. The dispute arose between the plaintiff, Murrough MacBryan, and the defendant, Cahir O'Callaghan on 4 March 1604 and appeared first in the presidential court of Munster. Like the provincial courts in England, the Munster Presidency Court was empowered to examine titles to land as a preliminary step to a common law action that would subsequently be referred to the central common law courts in Dublin. The purpose of this possessory jurisdiction was to provide a temporary settlement over disputed titles to prevent violent disseisins or breaches of the peace. In the Case of Tanistry, the presidency court seems to have been unable to provide a satisfactory interim settlement, because the decree book of the Court of Castle Chamber shows that the litigants were fined for forcibly ousting John Barrie, sheriff of Cork, from the castle with an armed mob of over 200 persons. The reasons for the extraordinary passions generated by the case become evident if we examine the pedigree of the litigants and the numerous counterclaims to the contested estate.

From various manuscript sources, it is possible to identify with some certainty the lineage of the litigants, and the welter of claims to the castle and six ploughlands in Duhallow. Both the plaintiff, Murrough MacBryan, and the defendant, Cahir O'Callaghan of Publicallaghan, belonged to an extended legal family from Duhallow who paid allegiance to

83. BL Harl. Ms. 697, f.20a; From the Presidency Court in Munster the case was referred to the Court of Chancery in Dublin for preliminary hearing. See PROI, Chancery Pleadings, G73 and I222.

84. BL Add. Ms. 47172 ff.135a-136b; HMC, Egmont Ms., p.30.
the chief of Clan Carty. In turn the Clan Cartys were subject to the MacCarthy Mor, principal dynasts of Munster who were, at the end of the sixteenth century anyway, loyal to the government. The case pended before the Court of King's Bench for over three years and was argued several times. The extraordinary time taken by the dispute is explained by the convoluted series of land transfers that formed the substantive facts of the case.

According to Davies' Reports, the story begins with Donogh MacTeige O'Callaghan, chief of his name, who was 'seised of the seignory or chieftainship of Publicallaghan, and of the land aforesaid, according to the custom and course of tanistry; and being so seised, had issue Conogher O'Callaghan; Conogher had issue a son and daughter; Teige and Eleanor; Teige had issue Donogh MacTeige the Younger; Eleanor was married to Art O'Kiefe and had issue Manus O'Kiefe. Sir John Davies, Attorney-General, was counsel for the defendant, while Richard Bolton, Recorder of Dublin, and John Meade, a Munster lawyer, represented the plaintiff. Contending that tanistry existed time out of mind, Bolton and Meade argued on MacBryan's behalf that the custom of tanistry was good in law by prescriptive right, as was partible inheritance in Kent and Wales. Davies, however, employed his practical knowledge of the workings of Gaelic land law to point out that the rules of Gaelic succession were not only technically different

85. W.F.T. Butler, Gleanings from Irish History, (London, 1925) pp.78-97; H.W. Gillman, 'The Chieftains of Pobul-callaghan', Journal of the Cork Historical and Archaeological Society, 3 (1897) pp.201-220; Lam. Pal. Ms. 831, f.70a; Cal. Car., 1599-1600, p.69; Here the land in question is described: 'Dowallie is equalie divided into three parts, viz. one part called Clan Cartie of Dowallie; the second O'Calchans country; the third part is MacAlies, O'kiffes and O'Kirkes countries'. See Appendix 1-pp.112-113.

86. Davies, Reports, pp.81-86; Also F.H. Newark, 'The Case of Tanistry', Northern Ireland Legal Quarterly, 9 (1950-52) pp.215-221.
from those of Kent and Wales, but also, by virtue of their instability, prejudicial to the king's peace. Moreover, Davies argued, the custom of tanistry represented little more than a temporary life trust in land inimical to the canons of English descent. More precisely, land could not be appended to an office unless the successor was a corporate person, such as an ecclesiastical prebend, which a tanist was not. Since a tanist came to office by way of election, freehold was held in suspense. Hence there was no fee simple, because succession by tanistry denied Littleton's canon that 'que de chescun terre il y ad fee simple'.

Therefore the 1593 surrender made by Conogher of the Rock as tanist for a common law estate was void because he had, as a tanist, nothing to surrender. The effect of Davies' arguments was to call in question the validity of the statute 12 Elizabeth c.4., which had empowered 'tanists' to surrender their estates in return for a regrant under a common law title.

On the specific pleadings of the case, the judges of the King's Bench failed to reach a decision and the litigants came to an agreement dividing the disputed property between themselves. But on the larger

87. Davies, *Irish Reports*, p.94.

88. The case also raised doubts over the accuracy of official sources recording common law tenures in Gaelic or Anglicized districts where, in fact, the older Gaelic customs prevailed. In the early seventeenth century, for example, a chancery suit between the extended kin group of the McKiernan family from county Cavan and the English adventurer James Craig further illustrates the point. In this instance, Brian McKiernan, who had surrendered his family's land for a common law title, 'being the chief and eldest of his sept', sold the lands of his extended kin group to Craig. Five members of the McKiernan family successfully petitioned Craig for the return of the family lands. Since Brian McKiernan held the family estate by English patent under common law, the case illustrates the fascinating problem of the survival of Gaelic practice under the guise of a common law estate. PROI, Chancery Suits, N.153.
issue of the validity of tanistry, the judges came to a resolution that had far-reaching implications. For in Davies' words, it was 'resolved by the court, that the said custom of tanistry was void in itself, and abolished when the common law of England was established'. The impact of this pronouncement was profound for two reasons. First, the judges' decision to void the 1593 common law surrender and regrant to Conogher of the Rock rendered insecure the titles of all de facto lords who, like Conogher of the Rock, had acquired their estates against all notions of equity and fair play by the strong arm. Second, the decision of the judges in 1606 to adhere to the extra-judicial resolutions voiding the custom of 'tanistry' in 1606 also provided the Irish government with a handy tool to eliminate Gaelic tenures in Ulster.

This punitive application of the abolition, not only of 'tanistry', but also of 'gevelkind', can be seen in further litigation involving the Ulster plantation. On June 5, 1610, when Sir Arthur Chichester received the King's warrant to establish a commission for putting

89. Davies, *Irish Reports*, p.86; In the end, Davies' client, Cahir O'Callaghan, whose title rested on the common law settlement made by Donogh MacTeige in 1574, bested the plaintiff by obtaining seisin of the castle with its adjacent lands. There is, however, an interesting footnote to the story. In 1631 the rival claim to Castle Dromaneen merged when Eleanor, granddaughter and surviving descendant of Conogher of the Rock, and Donogh, the son and heir of Cahir O'Callaghan the defendant, were married. During the protectorate, Donogh was banished to Clare where the Comwellian government awarded him a lease of land at a Peppercorn rent for 1,000 years until such time as he would return to Dromaneen. Donogh, however, fared ill in the Restoration Settlement, and the family remained in Clare where its descendants live to this day. Griffith, p.200; Butler, *Gleanings*, p.92.

planteers in possession of their estates, the freeholders in Cavan, 'who bordering on the Pale had learned to talk of freehold and estates of inheritance', decided to make a fight of it. Once the proclamation for removal of the natives had been announced in the public sessions house, an unidentified Pale lawyer challenged the proclamation, asking to traverse the office that had found title for the crown. He further argued that the Cavan 'freeholders' did indeed have estates of inheritance that were not forfeited by the attainder of their chief, and that the Cavanmen might have the benefit of the king's proclamation of denization of 1605, which promised undisturbed possession of their lands.

Realizing that the eyes of Ulster 'were turned upon this country', Davies rose to the occasion noting that he was:

..... glad this occasion was offered of declaring and setting forth his Majesty's just title, as well for His Majesty's honor (who being the most just Prince living, would not dispossess the meanest of his subjects wrongfully to gain many such kingdoms) and for the satisfaction of the natives themselves and of all the world.

In his rejoinder, Davies argued that 'the Cavan freeholders cheefries were ever carried in a course of tanistry which hath lately been adjudged no estate in law' and 'their inferior tenancies did run in another course of gavelkind', which 'by the opinion of all the judges in the kingdom is adjudged and declared void in law'. In other words Davies concluded that the Cavan freeholders had no grounds on which to base their traverse.


94. BL Cott. Ms., Titus B X, ff.203a & b; SP/63/229/ff.128b-129a; Morley, p.386; CSPI,1608-10, p.498.
Furthermore, if they had no estate in the land they possessed, 'the proclamation which receives their lands into His Majestie's protection does not give any better estate than before'\textsuperscript{95}. Like the arguments used in the Case of Tanistry, Davies held that the absence of any kind of lawful English tenure disallowed the Cavan freeholders from bringing any legal action before the assize judges or the central common law courts in Dublin - a situation that parallels very closely the dilatory exception of Irishry mentioned by Professors Murphy and Hand in their discussion of Irish alien status from the fourteenth to the sixteenth centuries. Only now with the abolition of Gaelic tenures and the creation of what Davies called a 'paramount lordship' arising from the Tudor conquest, the medieval racial exception of Irishry was replaced by a tenurial exception of tanistry and gavelkind.

It should be noted, however, that this tenurial exception was not confined to the Gaelic polity. It will be recalled that one of the main disputes leading to the departure of O'Neill involved Bishop George Montgomery's claim to most of the termon and herenagh property in Ulster. Montgomery's rapacity in the title-finding commissions of 1608 and 1609 became notorious, and the bishop even went so far as to scuttle the commission of 1608, because the commissioners failed to set aside these Gaelic ecclesiastical tenures for the church\textsuperscript{96}. In the subsequent commission to investigate titles in Ulster in 1609, the commissioners discovered that termon and herenagh tenures were not the proper demesne of the church and were in fact held by the course of 'gavelkind' and 'tanistry'. Indeed, Davies' abstract of the king's title

\textsuperscript{95} SP/63/229/f.129a; CSPI,1608-10, p.499.

to the escheated lands in Ulster shows that the judicial resolutions against 'gavelkind' and 'tanistry' played a role in recovering these Gaelic ecclesiastical tenures, and to the chagrin of Montgomery, some 60,490 acres lapsed to the crown. While much of this was later granted to the church, it is significant to note that the extra-judicial resolutions against tanistry and gavelkind allowed Davies to affirm the state's right to arrogate rights of disposition over all secular and ecclesiastical property in Ireland.

The application of these resolutions to support a massive confiscation of the northern counties, has led to considerable misunderstanding of Davies' native policy during the first decade of the seventeenth century. Not surprisingly, Davies has fared ill with a distinctly nationalist historiography which says, in effect, that the Attorney-General sought to generalize a national system from local observation. This argument emerged in the early seventeenth century when Geoffrey Keating, the famous Gaelic scholar, condemned Davies for not judging the Gaelic system on its own merits rather than that of the common law. This imposing verdict has been substantiated by more recent scholarship, and K.W. Nicholls has shown considerable variation of tribal organization and descent patterns that are in fact at odds with Davies' Law Reports. Similarly other students embellished this argument by borrowing from the Teutonic myth of collective ownership, implying that the preconquest Celts, unsullied by the corruptive influence of private property, were in fact defiled


by contact with English law and society. This view also has an antithesis which sees the destruction of Gaelic society as the inevitable triumph of natural selection over an inferior species of law. Hence the dictates of social Darwinism, as expounded by D. Mathew, determined the victory of Renaissance civilization over Gaelic barbarism.

Against this formidable array of scholarship, it would be difficult to vindicate Davies' understanding of Irish society, but valid as these criticisms may be, they involve technical questions of Gaelic law and language with which Davies was probably unconcerned. Nor can it be said that Davies was ever interested in an equitable conflation of the two laws. As we have seen the extra-judicial resolutions against 'gavelkind' and 'tanistry' arose from Davies' perception of alien status ascribed to the Gaelic Irish and were constitutional in scope, designed to limit the powers of the tribal elite by stabilizing a system of freeholds within Gaelic districts. As we have also seen, in the wake of the mysterious Flight of the Earls in September, 1607, the abolition of 'tanistry' and 'gavelkind' by judicial fiat served as a device to circumvent native rights in land whenever the more usual methods of attainder and revived medieval titles proved unsatisfactory. The cases of 'gavelkind' and 'tanistry' were indeed employed in a conscious program of legal imperialism, but not, as the critics allege, as an entirely punitive measure aimed at the complete destruction of Gaelic

99. See P.W. Joyce, A Social History of Ancient Ireland, (London, 1903) 1:184-196; See also D. Coghlan, The Ancient Land Tenures of Ireland, (Dublin, 1933) pp.60-76; The myth of collective ownership was later demolished by Eoin MacNeill in his 'Communal Ownership in Ancient Ireland', Irish Monthly, 57 (1919) pp.407-415; 463-474; MacNeill interpreted the growth of tanistry as a response to the Norman invasion. See Early Irish Law and Institutions, (Dublin, 1935) pp.148-149; More recent research has conclusively shown the custom to be pre-conquest and Gaelic in origin. See D.A. Binchy, 'Some Celtic Legal Terms', Celtica 3 (1956) pp.221-223.

society. As Kenneth Nicholls has recently shown, the Irish Court of Chancery adjudicated cases of Irish partible inheritance as late as 1622. Moreover in subsequent plantations in Wexford, Longford and Leitrim, a great deal of equity was shown when the government granted to natives, in what appears to be a rule of thumb, \(\frac{2}{3}\) to \(\frac{3}{4}\) of their former lands held by Gaelic forms of tenure. Further references to Irish partible inheritance and elective succession may be found in a number of commissions set out to enquire into the state of landholding in Wexford, Longford, Kings' and Queen's counties more than ten years after the litigation recorded by Davies in his *Irish Reports*.

There also exists, among a number of other proposals, a bill intended for the parliament of 1613 calling for the extirpation of 'tanistry'. The fact that no such bill ever passed testifies to the strength of judicial resolutions in early modern jurisprudence, and to the willingness of the government to deal with Gaelic land tenures equitably before the Privy Council, the Court of Chancery or through various commissions of defective titles. Insofar as the government used these decisions to augment the more traditional forms of forfeiture in the Ulster plantation, Davies was able to obtain the much coveted security of land tenure so absent during previous Irish


The disastrous Munster Plantation may have conditioned Davies' policy towards Gaelic tenures during the Ulster Plantation. According to the German scholar Julius Bonn, out of 577,000 profitable acres originally escheated to the crown in the Munster plantation, about 375,000 reverted back to the 'freeholders' who managed to escape the attainder of their immediate overlords. While it is true that many problems arose from inadequate surveys and conveyancing to uses, it is clear that some confusion arose over the status of the freeholders in Gaelic law. The inhabitants of Kerrycurrihy, for example, exploited the curious system of tribal demesnes and freeholds to protect themselves as 'freeholders' from the attainder of Desmond. This was precisely the situation Davies prevented in the Cavan sessions house in 1610. M.J. Bonn, Die Englische Kolonisation in Irland, (Stuttgart, 1906), p.304; SP/63/144/ff.252a-255a; CSPi,1588-92, pp.200-203; SP/63/147/f.149a & b; CSPi,1588-92, p.258; SP/63/164/f.86a &b; CSPi,1588-92, p.485; SP/63/131/f.33a; CSPi,1586-88, p.406; SP/63/132/f.101a; CSPi,1586-88, p.453.
From this genealogy and various manuscript sources, it is possible to unravel the claims and counterclaims to the disputed property.

1. Sometime before 1574, Conoghor and Teige died while Donogh MacTeige the elder was still alive. This probably influenced Oonogh to attempt to keep the estate in the family by circumventing the Irish pattern of lateral succession.

2. As a result, Donogh MacTeige in 1574, settled the land by a common law feoffment to his second grandson, Callaghan for life, remainder to Donogh MacTeige the younger for life, remainder to the heirs male of the body of Donagh MacTeighe the elder.

3. Donogh MacTeige, the elder died in 1578 and a year later Callaghan, the first life tenant was drowned. He left no legitimate issue, but there was a bastard son Cahir O'Callaghan.

4. Donogh MacTeige the younger succeeded as second life tenant, but died in 1584 without heirs. Since both Callaghan and Donogh MacTeige the younger died without issue, neither estate tail took effect and the land then passed under the ultimate remainder to Eleanor O'Kiefe.

5. The idea of a woman succeeding to the family estate may have been contrary to local forms of Gaelic succession, and a distant relative, Conoghor O'Callaghan, known as Conoghor of the Rock, seized and occupied the property in accordance with the custom of tanistry.

1. It has been suggested that the status of women in Gaelic society may not have excluded them from holding and inheriting property. See K. Simms, 'The legal position of Irish Women in the later Middle Ages', Irish Jurist, 10 (1975) pp.96-111.
It was with the entry of Conoghor of the Rock into the estate that complications began to set in. By Irish statute 12 Eliz. c.4., all persons holding land by Irish custom were empowered by the authority of the statute to surrender their estates in return for a regrant under a common law title.

(1) In 1593 Conoghor of the Rock made a surrender of the aforementioned estate and received a regrant in fee simple, which he then enfeoffed to one Fagan, who in turn enfeoffed to Murrough MacBryan.²

(2) Then it appears that the heirs of Donogh MacTeige the Elder decided to resurrect their rights. Art O'Kiefe and Eleanor were dead, but Manus O'Kiefe entered on the land and transferred to Cahir O'Callaghan, the bastard son of the O'Callaghan who was drowned.

(3) The case was brought to trial by action of ejectment between Murrough MacBryan the plaintiff and Cahir O'Callaghan the defendant. At issue was the title of Murrough MacBryan based on Conoghor of the Rock's claim as tanist, and of Conoghor of the Rock's title based on the surrender and regrant of 1593. Cahir O'Callaghan's title rested on the settlement made by Donogh MacTeige the elder in 1574.

THE CASE OF THE BANN FISHERY

The preceding discussion of the differences between English and Gaelic patterns of landholding at the beginning of the seventeenth century examined the limits of English sovereignty arising from the medieval legacy of personal law in Ireland. The Tudor conquest, however, enabled the government to eliminate tribal patterns of descent and partible inheritance by judicial resolution, thus extending English law throughout the whole of Ireland. At the same time judge-made law became a tool in the government’s plan to establish English tenures throughout the former autonomous Gaelic lordships. This new departure launched by the proclamation of denization in March, 1605, resulted in a series of investigations into patterns of landholding in Ulster that reduced significantly the large tracts of land allocated to the Gaelic leadership by the settlement made at Hampton Court during August, 1603. While the government concentrated this campaign against the Earls of Tyrone and Tyrconnell, Davies’ Law Reports also record its efforts to disrupt the estates of Sir Randall MacDonnell1.

Like the Northern Earls, this renegade Scottish chieftain fared well in the land settlement of 1603, obtaining much of his family’s traditional estate comprising the territories known as the Rout and the Glens in the present county of Antrim, running along the coast from Larne to Coleraine. This grant, exceeding 300,000 acres, owed much

1. Davies, Irish Reports, pp.149-158.
to the personal influence of the new Scottish king James I, as well as to the political acumen of Sir Randall himself. During the Nine Years War, James VI of Scotland had openly supported the MacDonnells in their rebellion against the English government, partly in order to monitor affairs in Ulster, and partly to play off the Irish branch of the family against the rebellious Scottish MacDonnells inhabiting the islands and coastal regions between the two countries. In 1597 James knighted Sir Randall's older brother, James MacDonnell, in a ceremony held with much pomp at the Scottish court. When Sir James died in 1601, Sir Randall succeeded as chief and maintained the family connection with the Scottish court, meanwhile seizing an opportune moment to defect from the rebel Tyrone's cause at the time of Kinsale.

MacDonnell's shrewd transfer of political loyalty, combined with a contribution of 40 horses and 500 foot to the government's war effort, resulted in further honours. In Dublin, on 13 May 1602, Lord Deputy Mountjoy knighted MacDonnell in his own right. A year later the government restored MacDonnell to the family's traditional territories in county Antrim. This grant of 28 May 1603 was subsequently expanded to include the castle at Dunluce, Rathlin island and the most valuable portion of the Bann river fishery running seven and one half miles from the salmon leap south of Coleraine to the sea. Such was MacDonnell's skill, or perhaps fortune, that he managed, during the same year, to mend fences with Tyrone by marrying the Earl's daughter Alice.

With the government's decision in 1605 to diminish the estates of the native leadership in Ulster, MacDonnell's good fortune took a turn for the worse. Indeed the personal animosity of the Lord Deputy, Chichester, and the private ambitions of a small clique of adventurers in Dublin soon embroiled MacDonnell in lengthy disputes over his claim to the Bann fishery arising from conflicting interpretations placed on the latter's patent assigning his estate. The resulting affray, which continued intermittently from 1604 until 1610, constitutes perhaps one of the most extraordinary cases in Irish legal history with MacDonnell, Lord Deputy Chichester, the Earl of Tyrone, the city of London and a Scottish adventurer named Sir James Hamilton all vying for possession of Sir Randall's portion of the lower Bann river.

Some of the heat generated by this controversy can be accounted for by examining contemporary descriptions of the renowned bounty of the Bann river which runs approximately thirty-one miles from Lough Neagh to the sea and forms the present boundary between the counties.

5. This chapter follows closely the path laid down by the Irish nationalist MP T.M. Healy at the beginning of this century. Carefully researched and well argued, Healy's nationalist bias led him to commit several minor errors in fact and more serious deficiencies in interpretation. Nevertheless, this revision owes much to Healy's pioneer work. See the following: T.M. Healy, Stolen Waters, (London, 1913); The Great Fraud of Ulster, (Dublin, 1917); There is also a condensed version: The Planters Progress, (Dublin, 1921).
of Antrim and Derry. While no detailed account of the Bann fishery for the reign of James I survives, it is known that the combined yield of the Bann and Foyle fisheries in 1609 amounted to 120 tons of salmon. In 1635, Coleraine alone produced 62 tons in a single day. The Bann was also renowned for its eels. Archbishop Laud was reported to have said that they were the 'fattest and fairest' that he had ever seen.

The most vivid estimate of the Bann's commercial potential is contained in the following account written by George Phillips, grandson of the famous English adventurer Sir Thomas Phillips, in 1689.

6. Before the extension of English sovereignty to Ulster, it appears that cadet branches and client septs of the O'Neill family shared the fishing rights to the Bann between themselves. Although the crown occasionally adjudicated disputes over the river, it does not appear that the Dublin government ever pressed a definitive claim to riparian rights prior to 1603. At the end of the Nine Years War, it seems that fishing rights to the Bann devolved to Hugh O'Neill, Earl of Tyrone, and to Sir Randall MacDonnell. It could be said, however, that the crown maintained the requisite animus to sustain a superior right over the river. In 1543 the Dublin government negotiated a bitter feud over fishing rights to the Bann between the McQuillans and O'Cahans in which the disputants renounced their claims in return for crown pensions. Fishing rights were subsequently leased to John Travers, the Master of the Ordnance, for 41 years. Bradshaw, Irish Constitutional Revolution, p.220; James Morrin, ed., Calendar of the Patent and Close Rolls, Henry VIII, Edward VI, Mary and Elizabeth. (Dublin, 1861) p.12; In the late sixteenth century, the fiants and patent rolls show a number of grants and conveyances extending a limited but derivative title to the river. The first grant was made to William Piers of Carrickfergus on 24 March 1571 for a lease of 21 years. Piers in return, agreed to pay an annual rent of £10 to be increased to £40 per year 'should he be able to enjoy (the river) peaceably without interruption for a year'. Nevertheless the frequency of such 21 year leases to Charles Russell in 1586, to Charles Howard Lord High Admiral in 1587 and to Sir William Godolphin in 1600 suggests that the Gaelic fastness of Ulster did not readily lend itself to exploitation by colonial adventurers. Irish Fiants, 1798,4827,5040,6413; J. Morrin, ed., Calendar of the Patent and Close Rolls of Chancery, 1576-1602, (Dublin, 1862) p.562.

7. As cited in T.W. Moody, The Londonderry Plantation, (Belfast, 1939) p.44.
I am loth to pass by the salmon pond (commonly called the cutt) near Colrane, because I conceive such another thing is not in the world. It is a great trough made like a tanner's vat, about 50 foot long, 20 foot wide and six deep; a stream of the river Bann runs through it, and at the place where the water enters a row of stakes are placed very near together, like a rack in a stable; at the other end of the cutt a parcel of sharp spikes are clustered together very close at the point and wide at the head, so that the salmons (who always swim against the stream) and other fish may get in at pleasure but can neither return the way they went in nor get out at the other end; whereby it happens that on Monday morning (there being a respite to fishings all Sunday and none taken out of the cutt with their loops) a stranger would be astonished to see an innumerable company of fish riding on the backs of one another even to the top of the water, and with great ease and pleasant divertisement taken up in loops.8

Although the economic potential of the Bann fishery does much to explain the six year's feuding over rights to the river, motives of greed account for only part of the story. The dispute was also influenced by personal animosities between Chichester and MacDonnell. As commander of the royal garrison at Carrickfergus, along the government's main approach into Ulster, Chichester had experienced a number of unpleasant encounters with the MacDonnells during the Nine Years War. The most serious occurred in 1597, when Sir Randall's eldest brother James captured and beheaded the Lord Deputy's brother Sir John Chichester, sending the head to Tyrone's camp where the common soldiers used it for a football.9 Perhaps understandably Chichester had little reason to approve the liberal treatment accorded to MacDonnell in 1603, and the Lord Deputy was never entirely convinced of Sir Randall's loyalty.

The Lord Deputy was quick, therefore, to seize the opportunity offered


by the government's offensive against the Gaelic leadership in Ulster to carry out a campaign of personal harassment against MacDonnell and to divest the Scot of his coveted portion of the Bann fishery. Given the Scot's influence at court, any attempts to vilify MacDonnell had to be played with skill and caution. In the event, Chichester employed a string of informers and adventurers in the North, placing his heaviest reliance on Sir Thomas Phillips, commander of the military garrison at Castle Toome bordering MacDonnell's territories. In early August 1604, the plot against MacDonnell began to unfold. Chichester first attempted to impugn MacDonnell's loyalty to the English Privy Council by linking Sir Randall with the presence of suspicious assemblies of islanders and mercenary 'redshanks' within the Scot's territories. Interpreting the presence of these professional soldiers as a threat to political stability, Chichester proposed to increase the garrison at Castle Toome, announcing that no country 'better required looking after, nor a better man for the business than Captain Phillips'. Quickly adapting to his role as Chichester's sentinel in the North, Phillips reported to Salisbury that he had thwarted the desires of Sir Randall to repossess Port Rush, a notorious beachhead for mercenary 'redshanks' from the isles only a mile and a half from Castle Toome. Since Scottish mercenaries often formed the vanguard of Irish rebellion, Phillips played on Chichester's earlier sightings of 'redshanks', to warn Cecil that MacDonnell aspired for the return of Port Rush and was 'sorry to have let him have it, and would give him any reasonable thing to have it back again'.

11. SP/63/216/f.105a; CSPI.1603-06, p.194.
12. Ibid., f.105a; Ibid., p.194.
13. SP/63/217/f.72b; CSPI.1603-06, p.276.
When the official campaign to limit the powers of the Gaelic leadership began in March 1605, both Chichester and Phillips renewed their attacks on MacDonnell. After proclaiming the grant of denization in Antrim during the spring of 1605, Phillips gleefully noted to Salisbury that within MacDonnell's territories, the new departure 'abates the superiority of their lords to their great grief for now they fall from them and follow his Majesty's officers to crave justice against their lords'14. Echoing Davies' criticisms of Tyrone and Tyrconnell, Chichester faulted the liberal grants which had been bestowed on MacDonnell without care taken to establish an adequate number of freeholders who were now 'as slaves to him'15. As proof of MacDonnell's perfidy, Chichester went on to criticize the extent of the Scot's estate, noting that the sixteen 'tuoughes' or territories assigned in 1603 far exceeded the four 'tuoughes' held by his father, implying that MacDonnell, like Tyrone before him, had appropriated to himself the entire property associated with his extended kin group16. This last criticism, which conveys once again the English government's apprehension over Gaelic patterns of inheritance, was followed by further attempts to implicate MacDonnell in conspiracies in the North. Within months, Chichester reinforced his earlier suspicions about Sir Randall by capitalizing on the testimony of Neale Garve O'Donnell, kinsman to the Earl of Tyrconnell, that MacDonnell had conspired with the northern Earls in some mysterious plot to restore the powers of the Gaelic leadership in Ulster and that he 'hath given out that he cares not for Sir Arthur Chichester, more than for any ordinary person, knowing the king will hear him and further his desire'17. In

14. SP/63/217/f.72a; CSPI,1603-06, p.275.
15. SP/63/218/f.219b; CSPI,1603-06, p.502
16. SP/63/218/ff.219b-22a; CSPI,1603-06, p.503.
17. SP/63/219/f.78b; CSPI,1603-06, p.569.
September 1606, Chichester asserted that in all the North, there was 'not a more cancered and malitious person than Sir Randall MacDonnell'.

In Antrim, as well as Tyrone and Tyrconnell, a deliberate campaign was afoot to strengthen English rule in the North at the expense of traditional native leadership.

During the summer of 1606, MacDonnell journeyed to England to clear himself of the libellous charges made by Chichester and Phillips. Although he was well received at court, MacDonnell returned to Antrim only to find that Phillips and a Scottish schoolmaster, Sir James Hamilton, had effected a coalition to separate him from his 'fourth part of the fishery of the Bann, being the best stay of my living'. During negotiations between the antagonists, Phillips physically threatened Sir Randall and his retinue with an armed company of pike and shot, heaping numerous unnamed 'provocations and injuries' on the bewildered Scot. Phillips then levied charges in the Court of Castle Chamber against sixty of MacDonnell's tenants for alleged outrages and riots committed to vindicate their landlord's title to the fishery. These extraordinary events, remarkably similar to Davies' assaults on Tyrone, assume greater significance if we examine the attempts by Chichester and others to exploit the chaos of Irish conveyancing at the beginning of the seventeenth century in order to acquire Sir Randall's portion of the Bann for themselves.

II.

Of the many transfers and conveyances involving the Bann fishery, the single most important instrument for passing real property took the form of a grant of fee farm or fee simple resulting from a warrant made out to

18. SP/63/219/f.76a; CSPI.1603-06, p.566.
19. SP/63/219/f.16a; CSPI.1603-06, p.518.
20. SP/63/219/f.16b; CSPI.1603-06, p.518.
chancery officials in Dublin to issue letters patent to recipients of lands rated at a specific annual value. This rather unusual practice arose from the simple fact that there was no longer any ancient royal demesne to bestow in Ireland. Hence all transfers of real property took the form of letters patent rated, for example, at an annual value of £200 a year which the recipient could then apply to upgrade title of leaseholds or reversions held from the crown. This meant, in effect, that inferior tenancies, such as lands held for years or lives at a fixed rent, or land held in perpetuity for a fixed rent, could easily be transformed into a rent-free hereditary estate. Conversely, an astute adventurer who did not possess any land could sell his 'book' to someone in possession of an inferior tenancy for a market rate that varied anywhere between one and two thousand pounds for a book of land rated at £100 per annum. Under this system, the planter class went on to acquire huge estates in Ireland. As T.O. Ranger has shown, Richard Boyle, the first Earl of Cork, owed his astounding rise to power in Jacobean Ireland to his very shrewd application of such 'books' of land to limited tenancies in Munster. In the case of the Bann fishery, two such books, one to Richard Wakeman, an executor of the Earl of Devonshire's will, and another to Thomas Ireland, a Scottish tavern keeper residing in London, ultimately transformed the whole of the Bann into a fee simple estate that ended in the hands of the Lord Deputy Sir Arthur Chichester.

Before discussing the series of transfers associated with the Wakeman and Ireland books, it is necessary to review several other methods of either acquiring or improving titles to land in Ireland. Apart from the passing of books in fee farm and fee simple at a rated


annual value there was also the special commission for defective titles which allowed landholders to upgrade inferior tenancies, concealments and tribal tenures. As discussed in the previous chapter, this commission, established on 10 June 1606, was instrumental in breaking up the over-generous estates allocated to the Gaelic leadership in Ulster during the summer of 1606, and helped to create a network of freeholders in that province. Described by one contemporary as a 'sovereign salve to cure the breaches in men's titles and to settle their estates against all future vexation', the commission for defective titles was also rapidly exploited by the planter class to secure title to lands surreptitiously acquired or made unstable by years of chaotic civil strife. In reality, the benefits of this commission were restricted to furthering the interests of the planter class, and complaints levelled by the Earl of Tyrone against the operation of the commission within his territories demonstrates how selective the munificence of the commission could become. Conversely, Sir John Davies' advice to another Irish noble, the Earl of Clanricard in 1608, to take advantage of the commission for defective titles 'because of the danger of certain parts of his land being passed to others in book without knowledge of the king's officer', fully demonstrates that the fruits of the commission were intended for those who fought on the right side during the Nine Years War.

In addition to the above, it was also possible to convey or acquire land by conveyancing property in trust to the use of one or more third parties. With no statutory requirement to register transfers of real

25. SP/63/222/f.315a-316a; CSPI,1606-08, p.378.
26. SP/63/228/f.253a; CSPI,1608-10, p.435; For this commission the Dublin government derived a separate though contiguous body to receive and regrant lands held by tanistry. Bodl. Carte MsS.61, f.152a; R. Steale, Proclamations, II p.18, nu.186, p.19 nu.196.
property, either in the chancery or in the localities, this familiar
device to avoid the feudal duties of livery and wardship and to evade the
legal bar to bequeathing lands held by knight service was a frequent
source of abuse at least until the passage of the statute of uses in the
Irish parliament in 1634. Since officials within the Dublin government
were barred by a statute of Edward II from acquiring lands without royal
license, conveyancing to uses provided a mechanism for sharp officials
in Dublin to build estates without the approval of authorities in England.
In the case of the Bann, all the above methods of conveyancing played a
part in the story of the disputed fishery, and the ill treatment accorded
to MacDonnell by Chichester and Phillips owed not a little to the complex
of conveyances and obfuscation of transfers surrounding the conflicting
claims.

Apart from the patent of 28 May 1603 assigning lands to MacDonnell
excepting 'three parts in four of the fishery of the river Bann', the
single most important conveyance to the Bann was a life estate assigned
to Lord Deputy Chichester on 9 May 1604 as a perquisite arising from the
governorship of Carrickfergus. According to this patent, the government
granted Chichester:

..... the office of Admiral and commander-in-chief of
Lough Sidney, otherwise Lough Neagh in the said province
for disposing of all shipping, boats and vessels that
shall be found there, with the fishing of the Lough,
as far as the salmon leap on the Bann.

As a result of this grant, Chichester acquired a life estate to three-
quarters of the Bann, leaving the last quarter, running from the salmon
leap to the sea, to Sir Randall MacDonnell in accordance with the terms

27. Ir. St. 10 Ch.I. Sess. 2. c.1; For typical problems associated
with the use in Ireland see: SP/63/131/f.33a; CSPI,1586-88,

of the patent granted in 1603. In addition, Chichester was granted Belfast castle and a landed estate that included no less than fifty-five townlands. If, however, Chichester harboured desires to improve his life estate to the Bann, either through the commission for defective titles or by other means, his ambitions were soon threatened by the arrival of a Scottish schoolmaster, Sir James Hamilton, in county Antrim. Hamilton had previously acted as an agent for the Scottish king in Dublin during the Nine Years War. He arrived in Ireland in possession of a book of Irish land, rated at an annual value of £100, made out to one Thomas Ireland, a fellow Scot and innkeeper residing in London, who had paid the staggering sum of £1,678 6s 8d for the book. Hamilton presented himself as an assignee or agent for Thomas Ireland. In truth, he was using the innkeeper's name to separate himself from a series of dubious land transactions in Ireland. In particular Hamilton's part in the break-up of Con O'Neill's estate in Ulster demonstrates the reasons for the Scot's desire for anonymity.

Hamilton, in combination with another Scots adventurer, George Montgomery from Braidstone in Ayrshire, had seized upon a chance to extort the vast portion of Con O'Neill's estate in north Down, the Ards and upper and lower Clandeboy. The opportunity arose from Con's...


30. Erck, p.199.

complicity in Tyrone’s rebellion, and from a drunken affray shortly before Elizabeth’s death, between several of Con’s men and soldiers from Chichester’s garrison at Carrickfergus. As a result of this incident, Chichester had imprisoned Con in the royal prison at Carrickfergus. Montgomery and Hamilton, hearing of the Irishman’s plight, held a number of meetings with Con and agreed to use their private influence at court (Montgomery’s brother George was chaplain to James I) to secure him a royal pardon. In return for the pardon and a cleverly arranged escape from prison, Con agreed to divide his extensive estates in Down and Antrim between himself, Hamilton and Montgomery. In the event, Con received half of upper and lower Clandeboy and the two Scots divided between themselves the other half of upper Clandeboy and the whole of the Ards. On account of this extraordinary arrangement, Hamilton felt compelled to disguise any further acquisitions of Irish land, and Thomas Ireland’s patent provided him the necessary cover to avoid any uncomfortable charges of peculation that might be levelled by Lord Deputy Chichester or other officials within Dublin Castle.

Lord Deputy Chichester, who had his own designs in counties Antrim and Down, looked askance at these developments and complained to Cecil during the summer of 1605, of this shameless alienation of Irish real estate. Despite Cecil’s curt reply that Chichester refrain from interfering with royal largesse, the Lord Deputy attempted to thwart the two Scots by launching an investigation into Hamilton’s dealings in the North. To avoid a confrontation, Hamilton struck a bargain with Chichester in return for the latter’s aid in sanctioning the tripartite agreement between himself, Montgomery and Con. O’Neill.

32. Bodl. Carte Mss. 61, f.145a; CSPI, 1603-06, p.271.
As a gesture of good will, Hamilton conveyed a large estate to Chichester in county Antrim which included the territories of Moylinny, Ballylinny, the island of Magee and other lands at Woodburn and Inver on the outskirts of Larne. Chichester also received the Thomas Ireland patent, which he subsequently employed to consolidate and upgrade his life estate to the Bann. In fact it is possible to deduce, from a deed registered on 3 April 1611, that Chichester’s interest in the Bann ‘between Lough Neagh to the Salmon leap’ passed surreptitiously through Ireland’s book from Hamilton to Chichester for an undisclosed sum of money. Simply stated, Chichester employed the Ireland book to disguise the fact that he acquired, without royal license, a heritable fee in what had formerly been a life estate in the Bann. Since this relatively simple transaction did not appear to conflict with any alternative claims to the river, Chichester and Hamilton worked their subterfuge without so much as a stir either from the English Privy Council, or from other potential claimants in the North.

In attempting to extend their interest to include MacOonnell’s portion of the Bann fishery, the unlikely combination of Hamilton and Chichester ran into trouble. Much of their difficulty arose from a second book of land for £100, dated 8 November 1603, assigned to John Wakeman, a Barbary merchant and executor of the Earl of Devonshire’s will. On 20 October 1604, Wakeman granted power of attorney to Sir James Ware, Auditor of Dublin, to dispose of Wakeman’s book in satisfaction of some of Devonshire’s debts in Ireland. In carrying out his duties, Ware subsequently sold to James Hamilton, ‘all that river of the Bann in Ulster; that is from the rock called the salmon leap in the same river unto the maine sea’. This book according to the deed enrolled

34. Erck, p.199; Griffith, p.200; Roebuck, op.cit., p.9.
on 3 April 1611, was then sold to Chichester and his heirs in perpetuity on 14 May 1606. Since there was no need to register the conveyance in the central or local archives, the whole of the Bann passed, for all outward appearances, to Sir James Hamilton, when in reality it resided in the hands of Lord Deputy Chichester. Once again conveyancing through third parties avoided the statutory requirement for the Lord Deputy to acquire land through royal license.

Apart from conflicting with MacDonnell’s patent to the lower Bann, the Wakeman patent contradicted a more serious claim from the Earl of Tyrone who objected that the former Lord Lieutenant, the Earl of Devonshire, who possessed a moiety of the Bann fishery through his assign Wakeman, had promised to convey the fishery to himself. Tyrone claimed this right as repayment for £200 for revictualling the northern garrisons. Instead, Ware conveyed the tidal Bann to Hamilton. There is, however, an air of mystery about the Wakeman-Tyrone conveyance. In an undated manuscript brief concerning the Bann controversy, Davies noted that ‘Sir James Hamilton agreed to pass or confer to the Earl the moyeties of the fishing for £200 to Mr. James Carroll to the use of the said Sir James Hamilton which the late Earl of Tyrone satisfied to Mr. Carroll accordingly’. In reporting on the complaints made by Tyrone, Chichester explained that Hamilton did indeed agree to reconvey the grant to Tyrone for the sum of £200, and while the Earl seems to have lived up to his side of the bargain, neither the money nor the deed to the Bann ever left the hands of the Vice Treasurer, James Carroll.

Tyrone was further vexed by an alternative claim lodged by the merchant Nicholas Weston, who maintained that Tyrone, as security for a loan, had

38. SP/63/227/f.145a; CSP1,1608-10, pp.301-302.
39. Ibid., f.145a; Ibid., pp.301-302.
granted him the fishery of the Bann from the 'salmon leap to the sea'. Notwithstanding Sir Randall MacDonnell's claim to the same, Weston demanded, after the flight of the Earls, either restitution of the fishery, or of the £200 at 10 per cent interest owed to him by Tyrone. This claim was later satisfied by the government through a cash payment, indicating that perhaps Tyrone's claim to the Bann had some substance despite the various grants made to Chichester, MacDonnell and others.

The truth of the matter, however, emerged in Davies' abstract of the king's title to the escheated counties in Ulster taken after the flight of the Earls. At that time Davies reported that it was found by office in August 1608, that Tyrone, at the time of his treason, 'was seised of the moyetie of the fishing in demesne'. In commenting on the alleged Hamilton-Tyrone conveyance, Davies noted that the transfer had never been formalized by government patent, even though the Earl had taken the profits from his interest in the Bann. A subsequent incident involving the Archbishop of Armagh, Miler MaGrath, throws further light on the problem. Following the departure of the northern Earls, MaGrath found himself under indictment before the palatine court of Tipperary for libellously 'uttering these words, or words to the same effect: That O'Neill was greatly wronged when he was dispossessed of the fishing of the river Bann, and that he had better right to it than any English or Scottish, yea and that he had better right to the crown of Ireland than any Englishman or Scottishman whatsoever.'

Whatever the extent of Tyrone's interest in the Bann fishery, the incident illustrates not only the uncertainties of Irish conveyancing, but also throws light on the well orchestrated campaign to reduce the size of

40. PRO/31/8/199 ff.457a-458b; CSPI,1608-10, p.199.
41. Bodl. Carte Ms. 61, f.87a; CSPI,1608-10, p.564.
42. SP/63/223/f.183a; CSPI,1606-08, pp.468-469.
Tyrone's estate and livelihood. Following the Earl's departure to the continent in 1607, the incident figured high in Tyrone's list of grievances sent to the king. Had the Wakeman-Hamilton-Tyrone patent been executed, Tyrone's ill-defined interest in the Bann fishery should have devolved to the crown through Tyrone's attainder. The reality, however, was something different, and Davies' undated brief of the Bann controversy along with the previously mentioned deed of 3 April 1611 fully records a conveyance of the fishery, notwithstanding previous grants to Sir Randell MacDonnell, to the use of Sir Arthur Chichester and his heirs forever. By 1606, one year before the departure of the northern Earls, Lord Deputy Chichester had surreptitiously acquired a heritable fee simple estate to the whole of the Bann river running from Lough Neagh to the sea. To secure this new estate, Chichester had only to find a mechanism to dispose of MacDonnell's claim to the lower quarter of the Bann.

III.

These events, which go far to explain the frequent attempts by Chichester and Phillips to throw suspicion on the activities of MacDonnell, resulted in a royal directive to sequester MacDonnell's portion of the river pending a solution to the disputed claims. MacDonnell, however, attempted once again to capitalize on his connections at court and succeeded in having the sequestration removed, only to have it reimposed. Royal equivocation continued, and within months, another royal order dissolved the said 'sequestration until the same shall be evicted from him by due course of our laws in some

43. SP/63/222/f.315a; CSPI,1606-08, p.375.
44. Griffiths, p.200.
45. SP/63/222/f.82a; CSPI,1606-08, p.252; PRO/31/8/201/f.227a; CSPI,1606-08, p.134.
of our courts of record there. For Chichester and Phillips, who had supervised the establishment of freeholders within MacDonnell's districts, this proposition must have been unsettling. A jury of local freeholders nominated and put forward by MacDonnell during the years of 1605 and 1606 would hardly favour official attempts to purloin the lower quarter of the Bann. In spring of 1607, for example, a report from the north claimed that Sir Randall's followers had riotously asserted the said Sir Randall's right to a fourth part of the fishing to the Bann. As tempers flared and accusations flew back and forth across the Irish sea, the precipitous flight of the Earls in the fall of 1607, decisively altered the delicate balance of power in Ulster. Thereafter the Dublin government no longer felt constrained to deal cautiously with either MacDonnell or any other Gaelic leaders in the North.

During January 1608, Chichester sent a letter to the English Privy Council suggesting that the dispute over the Bann be referred to them. Enclosed with this request was a very important manuscript brief written by Davies impugning the general validity, not only of MacDonnell's patent to the Bann, but also of the whole estate assigned to the Scot at the end of the Nine Years War. This attack, which parallels very closely Davies' investigation into the patents assigned to Tyrone and Tyrconnell, anticipated a wholesale change in the previously equivocal attitude taken by the king and the English Privy Council towards MacDonnell and the contested fishery.

In outlining the metes and bounds of MacDonnell's estate, Davies testily noted that the patents assigning MacDonnell the territories traditionally occupied by his predecessors had in fact included lands purloined from the McQuillans and from Angus MacDonnell of Dunyveg.

46. SP/63/222/f.82a; CSPI,1606-08, p.252.
47. PRO/31/8/201/f.227a; CSPI,1606-08, p.134.
Moreover, argued Davies, neither MacDonnell nor his ancestors possessed more than four 'tuoughes' or territories of land in Ulster before the Nine Years War. It seemed, therefore, that MacDonnell had bilked the government of over nine 'tuoughes' of land. Davies also catalogued a number of defects in MacDonnell's patent of 1603, noting the failure to include Rathlin island and the existence of a significant forfeiture clause for non-payment of rent. These omissions, noted Davies, had been remedied by a regrant of MacDonnell's estate on 4 July 1604.

With regard to the fishery, however, Davies discovered that the lower fourth of the Bann river had never been expressly set forth in MacDonnell's patent, yet 'three partes of the fyshery of the said river is excepted in every of the said grauntes'. By drawing attention to the traditional estate assigned to the MacConnells before and after 1603, Davies rightly argued that sequestration of the Bann fishery could hardly seem unfair. While Davies' brief also laid out Hamilton's alternative claim to the lower Bann, it judiciously neglected to mention the secret conveyances to Lord Deputy Chichester. As far as Davies was concerned, the dispute depended solely on the question of whether MacDonnell's patent allowed a right 'to any part of the fishing of the salmon leap or in any part of the river of the Bann'.

MacDonnell's reaction to this turn of events revealed a certain confusion over precisely who was responsible for his torment. Mistaking Hamilton as his adversary, MacDonnell admitted to Salisbury during May 1608, that he was not 'so clereful in law matters as Hamilton'. Recognizing the implications of Davies' brief, he further confessed that he could not take advantage of Hamilton as he 'hath done against my patent for want of one word'. As an alternative arrangement he

48. SP/63/223/f.96a; CSPI,1606-08, p.428.
49. Ibid., f.96a; Ibid., p.428.
50. Ibid., f.97a; Ibid., p.428.
51. SP/63/224/f.55a; CSPI,1606-08, p.524.
suggested the free exercise of riparian rights to his own lands bordering the river, or failing this, a general remission of rent 'to a sum of seventy cows or seventy pounds of rent yerely'\textsuperscript{52}. MacDonnell noted, however, that Hamilton paid no rent at all for his portion of the Bann, arguing that it could be no 'augmentation of his higness rent that my fourth part should be taken from me'. He then offered, in an attempt to retain his portion of the fishery, £100 annual rent to the crown. In view of Sir Thomas Phillips' estimate of an annual value in excess of £800, this suggestion reveals not only the transparence of Sir Randall's offer, but also the extreme carelessness of authorities in England to allow Hamilton/Chichester to acquire the Bann virtually free of rent\textsuperscript{53}. In the end these pathetic entreaties fell on deaf ears, and the omnipresent Sir Thomas Phillips sequestered, once again, the disputed fishery. At every juncture, the Dublin-based conspiracy, led by Hamilton and Phillips, kept a step ahead of Sir Randall who helplessly complained of their clever attempts to 'deprive and dispossess me of my right to the said fishery'\textsuperscript{54}.

In the wake of the flight of the Earls, MacDonnell's troubles were compounded by another more formidable claim to his fishery arising from the projected plantation in Ulster. During January 1609, the king decided to grant the salmon and eel fisheries of the Bann and Lough Foyle to the city of London as an incentive to encourage private capital to the new enterprise\textsuperscript{55}. During August, 1609, agents from the city of London arrived to inspect the fisheries and were reported to 'like and praise the country very much especially the Bann and the river of Loughfoyle'\textsuperscript{56}. In 1610, when the Londoners arrived to take possession

\textsuperscript{52} Ibid., f.55a; Ibid., p.524.


\textsuperscript{54} SP/63/224/f.270a; CSPI,1608-10, p.21.

\textsuperscript{55} SP/63/228/f.15a; CSPI,1608-10, p.361.

\textsuperscript{56} SP/63/227/f.94b; CSPI,1608-10, p.281.
of the Bann and Loughfoyle, in accordance with an agreement formalized on 28 June 1610, they found to their dismay that Hamilton/Chichester had occupied the prized and coveted Bann. To solve this extraordinary dilemma, the king decided to clear the title acquired by Hamilton and Chichester by paying the costs from his own purse, which meant in the end, that Lord Deputy Chichester succeeded in cheating the royal coffers of £2,260. This unusual transaction, which ignored Sir Randall's claim, conveyed the whole of the Bann to the Londoners through the Ireland-Wakeman patents, and it is very doubtful whether Cecil or the King understood the real story of this remarkable subterfuge.

Nonetheless, suspicions were aroused. In a letter written on 23 January 1610, Chichester feigned ignorance of the whole affair, protesting to Salisbury that he was personally of the opinion that the 'moyetie of the fishing of that river of the Bann did revert again to the king upon Tyrone's attainder'. In explaining the need to extend a cash payment to Hamilton, Chichester noted that it was the Scottish schoolmaster, not himself, who had 'procured a declaration from some of the commissioners there appointed for Irish causes that the right of the fishery was in him'. Chichester must have known, however, that Tyrone had never held a valid title to any part of the river, which meant in the end, that the king had to pay the expenses from his own pocket. Nevertheless, before formal title could be granted to the Londoners, the government had to contrive a means to invalidate MacDonnell's patent.

Given the complexity of the case, and the urgency of confirming the Londoners' title to the Bann, it is not surprising that the English Privy Council decided to employ the familiar expedient of adjudicating

57. SP/63/229/f.66a; CSPI,1608-10, p.477.
58. SP/63/228/f.24a; CSPI,1608-10, p.353.
the claims to the contested fishery by a resolution of all the Irish justices. In a letter dated 24 April 1609, the English Privy Council sent the following directive to Lord Deputy Chichester.

'..... We direct you to call together some of the judges and learned counsel, and to take such cause in the matter as may be most agreeable in equity and also to determine it with all convenient expedition.'

It was a year, however, before the judges convened to adjudicate the controversy. According to Attorney-General Davies, who argued the case on behalf of the crown during Michaelmas term, 1610, 'the Lord Deputy being informed by the king's attorney that no part of the fishery passed to Sir Randall by this grant required the resolution of the chief judges being of the Privy Council in this matter.' The familiar recourse to executing change by judicial fiat assumes greater significance if we examine the substantive legal principles by which Davies attempted to lodge a superior crown right to MacDonnell's portion of the lower Býnn. In this brief Davies sought to demonstrate a royal right to the Bann by citing not only precedents drawn from the common law, but also principles drawn from continental civil law. In fact, Davies' report of the case reveals that argument from Roman law served not only to elucidate the common law, but also to fortify the short-comings of a very defective legal brief lacking the necessary principles of public law to establish a convincing claim to the disputed fishery.

Davies' argument rested on a series of precedents to show that a fishery represented a category of freehold that was not contiguous with the banks along which it ran. This attempt to deny MacDonnell's

59. PRO/31/8/199/f.453a; CSPI,1608-10, p.199.

60. Davies, Reports, p.154.

61. For the significance of argument from Roman law in early modern law and jurisprudence see Chapter eight of this thesis.
riparian rights along the Bann through common law principles seems to have troubled Davies, and some of the precedents employed in his legal paradigm were quite frankly questionable. At one point, for example, he cited the London commission of sewers, which, awarded by the king, 'extended not only to walls and banks of the sea, but also to navigable rivers and fresh waters'\textsuperscript{62}. As further evidence of this point, Davies contrived to argue that the city of London's claim to the \textit{solum} and \textit{fundum} of the Thames arose only through a royal grant - implying once again in a roundabout way a superior prerogative right to navigable rivers. In his search for Irish precedents, Davies was even less convincing, and a case taken from an Irish plea roll dated 40 Ed III in combination with an Irish statute 28 H VIII c.27 establishing a royal right to the Boyne '\textit{a villa de Drogheda usque ad Trim}' and to the rivers Barrow, Nore and Suir could hardly apply to a river in northern Ulster that had only recently been subjected to the sovereignty of English law\textsuperscript{63}.

As a means to overcome the obvious weakness of this argument, the Irish Attorney-General opted to employ the legal principles of the civil law to supply a defect in his own national legal tradition. Hence Davies identified the law practised in continental legal tribunals as the common law of the land\textsuperscript{64}. This approach to remedying the absence of convincing common law precedents in his own brief was made manifest by lavish references taken from the established corpus of civil and canon law which included elements of Justinian's \textit{Institutes}, the English canonist Lyndwood, and the humanist French legal scholars Jacques Cujas and Renattus Choppinus. The use of legal maxims and principles drawn from the civil law helped Davies to establish a prerogative right to the

\textsuperscript{62} Davies, \textit{Reports}, p.154.

\textsuperscript{63} Ibid., p.154.

tidal Bann by distinguishing between two types of rivers - navigable and non-navigable. In making this distinction Davies conceded the exercise of private riparian rights to non-navigable rivers, but employed a rule of the civil law taken from Justinian's Institutes to show a prerogative right to all rivers so high as the sea ebbed and flowed. To confirm this rule, Davies borrowed from select passages of Bracton and Lyndwood glossing the principles laid down in Inst. 2.1.1. to corroborate a prerogative right not only to the high seas, but also to all rivers and waterways 'so high as the sea flows and ebbs in them.' Davies went on to vindicate this extreme position by citing from the works of the two great French humanist legal scholars Jacques Cujas and Renatus Choppinus.

In a treatise by Cujas entitled De Feodis, Davies found support for a prerogative right to navigable and non-navigable rivers by citing the civil law maxim that 'Regalia sunt viae publica, flumina navigabilia, ex quibus fiunt navigabilia, portus vectigalia, etc.' Since MacDonnell's portion of the disputed fishery was a tidal river, Davies confirmed his

65. Davies, Reports, p.152; Inst. 2.1.1.


argument by referring to Renatus Choppinus' treatise, De Dominio Franciae, in which all tidal or navigable rivers flowing 'per confinium praediorum' belonged to the monarch, either by prerogative or prescriptive right. Therefore, argued Davies, a prerogative right to the tidal Bann could not be impugned by the general words of MacDonnell's patent 'exceptis tribus partibus piscariae de Bann', because the king's grant 'shall not pass such special regality which belongeth to the crown by prerogative'. Thus the Irish judiciary stripped Sir Randall MacDonnell of his interest in the Bann fishery.

In assessing the extraordinary arguments outlined in Davies' Law Reports, a decidedly nationalist historiography has roundly criticized the litigation over the disputed fishery by arguing that the case against MacDonnell represented little more than an illegal proceeding to divest MacDonnell of his estate in the Bann for the personal aggrandizement of a small group of officials in Dublin. Indeed the controversial nature of the case imposed a historical legacy on future litigation of its kind, and the famous House of Lords decision on the disposition of fishing rights to Lough Neagh in 1908 made the case of Sir Randall MacDonnell something of a cause célèbre within nationalist circles.

At that time, no less an antagonist than Tim Healy, the famous Irish nationalist, picked up the cudgel in MacDonnell's defense. Yet the title of his work, Stolen Waters, and its subsequent condensed version, The Great Fraud of Ulster, revealed a predictable theme. To Healy, the case of the Bann fishery represented 'the third case in which evidence exists that Chichester filled the roll of both judge and plaintiff, while

68. Davies, Irish Reports, p.157; Renatus Choppinus, De Dominio Franciae, (Frankfurt, 1701) pp.111-115; For his career see: Biographie Universelle Ancienne et Moderne (Paris, 1844) i:199.
70. Healy, Stolen Waters, pp.468-485.
pretending that the proceeding was taken on behalf of the crown'.
Moreover, Healy complained, 'in a district where the laws of England
never prevailed until 1603, a tidal river was in 1610 held to be the
personal perquisite of the king by ancient right' Healy's nationalist
outrage has influenced more balanced scholarship, and Professor Perceval-
Maxwell's recent study of the Scots plantation in Antrim and Down also
moralizes on the fundamentally illegal nature of the proceedings against
Sir Randall 72.

Given the authority of judicial resolutions in early modern
jurisprudence, it would be hard to sustain any notion of illegality in
the controversial litigation over the tidal Bann. Considering MacDonnell's
success in maintaining his original grant of 300,000 acres, it is also
difficult to represent the seizure of the Bann as a slaughter of the
innocents. While it is valid to call into question the string of con-
vveyances through the Wakeman and Ireland patents, and to expose the shady
dealings of Chichester, Hamilton and their accomplices, we must still
acknowledge the ingenuity with which the Bann was secured as an incentive
to colonize the heartland of Irish revolt. Through a perfectly
lawful judicial resolution confirmed by legal principles drawn from
continental civil law, Davies contrived a curious twist of logic. While
the dictates of natural geography suppose that rivers flow towards the sea,
Sir Randall MacDonnell lost his fishery because the sea flows into
rivers 73.

71. Healy erroneously attributed the decision arising from the case of the
Bann to the Court of Castle Chamber. Stolen Waters, pp.181-183.
73. In 1637, Sir Henry Marten, Judge of the English Court of Admiralty,
cited Davies' report of the Bann fishery as binding authority to
establish a prerogative right to collect all ferry tolls over
navigable rivers in Ireland. SP/63/256/ff.3a & 40a; CSPI, 1633-47,
pp.144,150.
PART III

JUDICIAL ENCOUNTERS: THE COLONIAL COMMUNITY
Through the innovative use of judicial resolutions, Sir John Davies was able to effect a sweeping transformation in the relationship between the English conquerors and the native elements in Ireland. As the Irish Law Reports demonstrate, however, judge-made law also became a tool against the Old English colonial community, the descendants of those who had settled in Ireland since the twelfth century. This assault against a group which had been instrumental in securing the Tudor conquest may seem paradoxical. Yet it was not without provocation.

I.

In early April 1603, immediately after the death of Elizabeth, the southern towns in Ireland went on the rampage, expelling Protestants, reconsecrating Catholic churches and defying all central authority. Inspired partly by reports that James I intended to grant religious toleration to the island, the citizens of Waterford, Cork, Limerick, Kilkenny, Drogheda, Wexford, Clonmel and Cashel took the occasion to assert their solidarity against Protestant officials. In Waterford, the corporation closed the city gates to Lord Deputy Mountjoy and his army of 5,000 men who had marched south from Dublin to restore order. In justification for this defiant behaviour, the unruly townsmen claimed to act under the authority of a four hundred year old charter granted by King John. With Mountjoy waiting on the outskirts of the city, the corporation dispatched an ecclesiastical emissary, Father James White, Vicar-Apostolic of Waterford and Lismore, to negotiate. Leading a
solemn procession from the city gates, White engaged the Lord Deputy in a theological debate over the right of Catholic subjects to take up arms against their sovereign. Mountjoy, who was known for his bookishness, bested the Catholic divine by demonstrating before an assembly of recusant townsmen that White's defense of the city rested on a deliberate misinterpretation of St. Augustine, 'whereupon the doctor was confounded, the citizens ashamed and the conference ended'. When Mountjoy threatened to cut King John's charter with King James' sword, the City opened its gates.

Similar events took place in Cork where municipal officials contemptuously refused to proclaim James I as lawful successor to Elizabeth. When Sir George Thornton and Sir Charles Wilmot arrived in Cork empowered by the Munster council to hear the proclamation of the new king, the Mayor and Recorder of the city, Thomas Sarsfield and William Meade, gave them an unpleasant surprise. As Meade impudently reminded Thornton and Wilmot, the recognition bestowed by the corporation on Perkin Warbeck during an earlier succession had proved unfortunate for the city. Moreover, argued Meade, the commission empowered to rule the province of Munster had no validity after the death of Elizabeth, thus depriving Wilmot and Thornton of authority to make demands upon the corporation. As passions rose, the citizens expelled the commissioners from the city and hostilities broke out between the corporation and troops dispatched to Cork by the Munster Council.

On 10 May 1603, when the Lord Deputy arrived from Waterford

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the corporation wisely opened its gates, and Mountjoy promptly arrested the main offenders. Mayor Sarsfield who had reportedly paraded himself in the forefront of Catholic processions as a kind of 'Doge of Venice', wisely recanted and made full and ample submission to the Lord Deputy, in addition to acknowledging the legitimacy of the new monarch. Recorder Meade, however, adamantly refused to co-operate and was arrested and tried for high treason before the Munster Presidency Court. The account of Fynes Moryson, secretary to Lord Deputy Mountjoy, described the predictable outcome of the trial. According to Moryson, the Lord Deputy might as well have forgiven Meade, for no 'man that knew Ireland did imagine that an Irish jury would condemn him'. Despite fines of £500 and government intimidation in the Court of Castle Chamber, a jury of nine Old English and three Irish freeholders refused to convict Meade. Not one to press his luck, the Recorder took the occasion of his reprieve to depart for the continent where, supported by a Spanish pension, he continued to agitate for Catholic rights in Ireland until his death.

In summarizing these events which comprised the Munster uprising to the English Privy Council, the Lord Deputy noted the absence of foreign involvement and attributed no great significance to the whole affair. Despite Mountjoy's leniency towards the towns, however, it was soon decided that for a government only just triumphant over one of the most serious rebellions in Irish history and for a monarch only recently established on the English throne, the rising of the port towns

3. Fynes Moryson, Itinerary of Ten Years Travel, (London, 1617) pp.293-297; SP/63/215/f.177a & 181a; CSPI,1603-06, pp.65-66; SP/63/215/f.271a; CSPI,1603-06, p.68; Meade was tried on two charges: denial of the king's lawful title to the English crown and levying of war. BL Add. Ms. 47,172, ff.130a-132a; HMC, Egmont Ms., 1 Part I, p.28; In 1611 Meade wrote a tract entitled 'Advice to Catholics of Munster' in which he argued that the Irish penal laws imposed by the Irish statute of 2 Elizabeth expired on the death of the queen. BL Cott. Ms. Titus B X f.292a and Bodl. Laudian Misc. 612, f.143a.
could not be ignored. In dealing with the unruly municipalities, a means was found to force at least the outward conformity of Old English leadership in a manner consistent with the style of law reform applied to native society. In the event, the government formulated its assault against the towns in three judicial resolutions that addressed not only the issue of religion, but also the jurisdictional and economic undercurrents to the Munster disturbances. Hence judge-made law was employed to: (1) enhance the enforcement of religious conformity by validating a proclamation extending to Ireland the tenets of penal laws passed against recusants by late Elizabethan parliaments in England, (2) eliminate extensive corporate liberties that included full appropriation of the customs revenue, and (3) reform a debased national currency that had eroded local regional and international commerce.

II.

Of all the issues surrounding the Munster disturbances, the problem of recusancy most attracted the attention of contemporaries at home and abroad, and the question of religious conformity became fundamental in altering the relationship between the central government and the towns. Under the last Tudor monarch, penal laws for recusancy had seldom been enforced in Ireland. Nor was the English policy of excluding Catholics from positions within the central government, the judiciary and the municipalities ever consistently applied. As late as 1596, Robert Cecil's refusal to prosecute penal legislation against recusants in the Pale and port towns reflected the power inherent in Old English society and the government's reluctance to alienate a useful ally that had remained faithful during the endemic upheavals in the Gaelic
or Gaelicized hinterland of the late sixteenth-century. In response to this liberal treatment, the towns provided local militia, supplies and occasional loans to aid the government's war effort. With the end of the Nine Years War, however, the equation linking the interests of the towns with the policies of the English government had lapsed, and the Tudor conquest soon forced the colonial community to recognize the unpalatable truth that its services were no longer critical to the survival of English rule in Ireland.

A preview of the government's eventual policy can be seen in Lord Deputy Mountjoy's attempt early in 1603 to revive the court of High Commission as a means to tender the Oath of Supremacy to municipal officials in Dublin. When the commissioners imprisoned several aldermen for refusing the Oath, the English Privy Council halted further proceedings as politically unseasonable. After the Munster rising, however, Old English activities at court forced a change in the English Privy Council's attitude towards recusancy in Ireland. On 6 August 1603,

4. BL, Cecil Ms. 186, f.41a; HMC, Salisbury Mss., 13:609; In Gaelic areas the government placed the religious problem within the larger context of Anglicizing Gaelic society. Here the government launched a program of evangelism and conversion that hinged on publishing the New Testament and Book of Common Prayer in Gaelic, and on staffing at least some benefices with preachers learned in the Irish tongue. The New Testament and Book of Common Prayer were translated into Gaelic by William Daniel, the Lord Archbishop of Tuam. SP/63/217/f.263b; CSPI,1603-06, p.357. See also G. Litton Falkiner, 'William Farmer's Chronicles of Elizabeth Queen of Ireland', EHR, 22 (1907) p.535. For the appointment of Gaelic speaking clerics see: SP/63/215/f.217a; CSPI,1603-06, p.86; Erck, p.30; Such linguistic skills were obviously in short supply. As late as 1618, the Earl of Thomond complained of the general inability of Protestant clerics to reach the mass of Gaelic speaking natives. Lam. Pal. Ms. 207, f.211a; Cal. Car., 1603-24, p.376.

5. SP/63/212/f.331a; CSPI,1601-03, p.569; Attempts to revive the commission in the first decade of the seventeenth century were cancelled because the commissioners were more interested in levying fines than enforcing religious conformity. Bodl. Carte Ms. 30, ff.75a-78a.
four agents from the 'nobility and gentry of Ireland', who arrived in England to petition the king for the public use of their religion, the maintenance of Old English officials in positions of local and national government and the reform of the coinage, were promptly arrested. Sir Robert Wilbraham, Davies' predecessor as Solicitor-General in Ireland, witnessed the event and attributed the Privy Council's action to the offensive theatrics of the recusant agents who had staged their petition in the presence of 'thirty or more persons of the nobles and gentlemen of Ireland that attended for other sorts, as though they would put his majesty in fear if he grant not their unjust desire'.

Heeding the example of the English Privy Council, the Dublin government began to apply the Irish acts of Uniformity and Supremacy as a means to purge the towns of Catholic officials, to deny the right of Catholic lawyers to plead before the Irish bar and to eliminate Catholics from the Irish bench. As the government set about substituting English for Old English lawyers in the Irish courts, further proceedings were launched against civil officers in the towns, especially in the city of Dublin. Recusancy in the capital city was notorious and the complaints made by the English servitor Barnaby Rich that the city could 'not make a yearly choyce of a mayor and two sheriffs that will either goe to church or willingly take the oath' are confirmed in Davies' account of the election of John Skelton, a Dublin alderman, to the mayoralty of the capital city. Under normal procedure, it was standard for the mayor-elect to take the Oath of Supremacy before the assembled Barons of the Exchequer. Owing to the plague, however, the barons were absent from the city and Skelton put forward the disingenuous claim that he had subscribed to the Oath before his predecessor and the assembled aldermen

6. For Wilbraham's diary entry see Camden Miscellany, 10 (1902) p.66.
of the city. In the precincts of Dublin, the recusant clergy manufactured the fiction that Skelton had avoided taking the Oath altogether. To combat this attempt to make Skelton a popular hero for allegedly hoodwinking the state, Lord Deputy Chichester and Sir John Davies decided to convene a special commission to tender the Oath to Skelton in the proper manner.

When summoned before the commissioners, Skelton attempted to postpone the issue by asking leave to examine his conscience. The commissioners obligingly accommodated this request and arranged a conference between Skelton and a Dr. Chalomer, a noted Protestant divine then resident in Dublin. In the event, Chalomer convinced the mayor-elect that the Oath provided in the Irish statute of 2 Elizabeth could indeed be taken without offending Skelton's conscience. Thus satisfied, Skelton signified his willingness to indulge in the usual legal formalities at a date in the near future. Skelton thereafter fell under the influence of an anonymous but prominent member of the recusant clergy, who 'partly with entreaty, partly with threats prevailed with him so far as he lost his resolution'. A few days later, when Skelton appeared at the appointed time, he refused to acknowledge the Supremacy because the words of the statute referred to the 'Queen's Majesty' rather than that of the king. When informed by Davies that the word 'Queen' referred to the corporation sole, Skelton insisted on substituting an oath of loyalty for the Supremacy. Tiring of these tedious evasions the commissioners angrily dismissed Skelton and ordered the alderman to elect a new mayor who readily took the Oath. Like the incident with Sarsfield and Meade, the Skelton affair demonstrated, once again, the difficulty of ensuring a Protestant view among Old English officials in the towns.

8. SP/63/215/f.149a & b; CSPI,1603-06, pp.212-213.
Remedies for the government's problem were limited by the paucity of penal statutes at its disposal. Anti-Catholic legislation in Ireland had been in existence since the mid-sixteenth century, but the Acts of Supremacy and Uniformity were less than adequate tools with which to tackle Old English recusancy. As the incident with Skelton suggests, the Oath of Supremacy seems to have been only sporadically enforced, and the Act of Uniformity, which called for only a one shilling fine for non-attendance at church, could have little effect except upon the very poor. The absence of adequate statutory authority to expel the recusant clergy and to enforce a meaningful degree of religious conformity within the colonial community led to the novel proposal of William Saxey, Chief Justice of the Munster Presidency Court, to enforce in Ireland the English statute of 27 Elizabeth ordering the expulsion of all Jesuits and seminary priests from the realm. This scheme, presented to the Irish Privy Council sometime during 1604, was challenged when an unidentified member of the Irish Privy Council objected that 'His Majesty's dominion extended no further than England and Wales, and the English statutes without the consent of the Irish parliament, could not bind Ireland.'

9. Ir. St. 28 H.VIII, c.13; 2 Eliz. c.1 & 2; The Henrician Act and Oath of Supremacy were abolished by Mary but later introduced in 1560 by Elizabeth. The English Act of Uniformity was extended to Ireland by Edward VI and subsequently passed by the Irish parliament in 1560. For the limited inroads made by the Reformation in Ireland see: N.P. Canny, 'Why the Reformation Failed in Ireland: Une Question Mal Posee' Journal of Ecclesiastical History, 30 (1979) pp.423-450; For another view see B. Bradshaw, 'Sword Word and Strategy in the Reformation in Ireland', Historical Journal 21 (1978) pp.475-502.

10. SP/63/216/f.162b; CSP1, 1603-06, p.219; At that time Saxey, who had practiced law for 46 years, 12 of them in Ireland, was petitioning Salisbury for promotion to replace Sir Edward Pelham as Chief Baron of the Exchequer. BL. Cecil Ms. 119, f.90a; HMC, Salisbury Mas., 18:154-155; SP/63/216/f.161b; CSP1, 1603-06, p.218.
pointed out not only the shortcomings of the Irish statute book, but also the very real problem surrounding the constitutional validity of extending English statutes to Ireland without the prior approval of the Irish parliament.

Caught on the horns of this weighty constitutional dilemma, the English and Irish Privy Councils devised a solution that may have originated with Adam Loftus and Thomas Jones, the bishops of Dublin and Meath. In a petition addressed to the king dated 4 June 1603, Loftus and Jones made a plea for royal support to expel the recusant clergy and to compel the laity to attend Protestant services. This proposal which anticipated by one month a plan submitted by the Lord Deputy and Privy Council was subsequently endorsed by the king and the English Privy Council, resulting in a royal proclamation expelling the Catholic clergy from the realm. This use of the prerogative had the advantage of avoiding the constitutional difficulties described in Saxey's dispatch to Salisbury, at the same time that the provisions enshrined in the English statute of 27 Elizabeth could be extended to Ireland by royal fiat. It is interesting to note, however, that the government decided to test the new program in Munster under the authority of the provincial seal before extending the proclamation to the country at large.

Munster had of course been the focal point of religious and corporate discontent in 1603. As early as August, 1604, the Lord President of Munster, Sir Henry Brouncker, anticipated official policy by proclaiming the expulsion of all 'Jesuits, Seminaries and massing priests', and offering rewards to the value of £40 for every Jesuit, £6 8s 4d for every seminary priest, and £5 for every massing priest who

refused to depart the realm within thirty days of the proclamation\textsuperscript{12}. A year later, the Irish Privy Council, suitably impressed with Brouncker's progress, issued a royal proclamation that was similar to that employed by the Munster Presidency\textsuperscript{13}. In addition to expelling the dissident clergy, however, the Dublin government appended to the royal edict a sweeping decree aimed at securing the outward conformity of recusant officials in the towns - particularly in the capital city. The government's course involved publishing the Irish Act of Uniformity under the great seal and thereby summoning the laity to church through letters or mandates sent to prominent citizens. Thus by royal fiat, the Dublin government extended to Ireland the tenets of the Elizabethan penal statutes, expelled the recusant clergy from the realm and demanded the attendance of prominent officials at church in the company of the Lord Deputy, or in the case of the provincial presidencies, in the presence of the Lord Presidents of Munster and Connaught\textsuperscript{14}. In Dublin, which became the focal point for the government's onslaught, mandates were issued to sixteen of the principal merchants and aldermen of the city - including the recalcitrant Skelton. As Davies explained to Salisbury, the government devised the new strategy to demonstrate its resolve to enforce religious conformity among the lesser sort by making examples of the principal gentlemen and householders of the capital city - men who were in effect immune from any serious damage arising from the one shilling fine for non-attendance at church imposed by the statute of 2 Elizabeth\textsuperscript{15}.

\textsuperscript{12} Bodl. Carte Ms. 61, f.160a; CSPI,1603-06, p.190. As the patentee officer responsible for the collection of fee farm duties on wine, Brouncker had a very active intelligence network to focus on the movements of the recusant clergy. Erck, pp.1 & 73; For some of the tactics employed by the recusant clergy see: BL Lansdowne Ms. 159, f.270a.

\textsuperscript{13} SP/63/217/f.127a; CSPI,1603-06, pp.300-301.

\textsuperscript{14} SP/63/217/f.212a; CSPI,1603-06, p.346.

\textsuperscript{15} SP/63/217/f.254a-256a; CSPI,1603-06, pp.370-372.
By autumn 1605, Davies claimed significant results from this novel but heavy-handed legal experiment. Despite an outbreak of the plague, the mandates formula succeeded in compelling the mayor, seven aldermen and 400 other persons to attend Protestant services in Dublin. There were, however, a number of prosperous merchants and aldermen who openly defied their mandates. To punish these recalcitrants, the Court of Castle Chamber fined Skelton, four other aldermen and several of the principal merchants £50 to £100 each for contemptuous disobedience of the royal proclamation. Attorney-General Davies followed up by indicting 400 Dublin householders before the Court of King's Bench.

The assault continued in the provinces. In Munster, where Brouncker's earlier proclamation served as a blueprint for subsequent policy, the Lord President proved to be an aggressive champion of Protestantism. Following Davies' lead, Brouncker issued mandates to the aldermen and burgesses of the several port towns. These, however, proved to be as obdurate as their Dublin counterparts. Brouncker retaliated by deposing the mayors of all the towns of the province, with the exception of Waterford, for refusing either to attend church or to subscribe to the Oath of Supremacy. As a further measure, the Lord President suggested that the Dublin government compel all the Munster towns to forfeit their charters for their recusancy - a view which appears to have attracted the support of Bacon and Ellesmere on the English Privy Council. Unfortunately Brouncker's overzealous administration of the mandates raised such a tempest that officials in Munster took care after his death in 1607, to deny rumours spread by the recusant clergy that Brouncker had perished gnawing the flesh from his hands in remorse for harsh persecution of Catholics. Even James I felt constrained to comment that Brouncker's zeal was 'more than required in a governor, however allowable in a private man', and many of the

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16. TCD Ms. 852 (G.3.1.) f.89a; CSPI,1603-06, pp.348-349,353.
17. SP/63/219/f.103a; CSPI,1603-06, p.551; Bodl. Carte Ms. 61, ff.83a & b; CSPI,1606-08, p.cv.
fines imposed on the Munster towns were subsequently reduced or remitted\(^\text{18}\).

In Connaught, the seat of the other presidency court, mandates were also issued under the provincial seal, but the absence of records disallows a detailed picture of developments there. It is known, however, that Sir Robert Remington, the provincial Vice-President, issued mandates to municipal officials and prominent citizens of Galway\(^\text{19}\). It seems therefore, that in the Presidency Courts of Munster and Connaught, as well as in the central courts in Dublin, the English and Irish Privy Councils had contrived a highly organized and well co-ordinated assault against Old English privilege. Against this policy of selective repression levelled at leading members of Old English society, there developed an equally obdurate defense against the government's attempt to impose religious conformity by executive fiat.

During early December, 1605, ill-feeling within leading circles of the colonial community culminated in a petition addressed to the Irish Privy Council, questioning the legality and protesting the severity of the mandate policy. Carrying the signatures of over 219 members of the Pale gentry and five Irish peers, the petition, delivered in the aftermath of the gunpowder plot, ignored all dictates of political discretion and sparked a crisis that eventually involved the English and Irish judiciaries in validating the controversial mandates with a judicial resolution\(^\text{20}\). Shortly after receiving this petition, Chichester had the ringleaders arrested, attributing authorship of the troublesome document to a trio of Old English lawyers - Henry Burnell,

\(^{18}\) SP/63/221/f.171a; CSPI,1606-08, p.186. PRO/31/8/201/f.246; CSPI,1606-08, p.222.

\(^{19}\) CSPI,1606-08, pp.xcvi-xcvii.

Richard Netterville and Sir Patrick Barnewell. Subsequent interrogation revealed that Burnell and Netterville, who had caused Sydney so much trouble over purveyance in 1577, were the principal architects of the petition. Barnewell in particular was singled out for orchestrating the mass signatures of the Pale gentry and acting as an agent between Netterville, Burnell and certain members of the Pale nobility. On account of their extreme age, Burnell and Netterville were confined to their homes, but Barnewell and two leading members of the Irish peerage, Lords Gormanston and Dillon, were thrown into prison and severely fined by the Court of Castle Chamber.

The Dublin administration decided, however, to treat Barnewell as the principal conspirator. Since Barnewell was funded by a national collection to act in religious and 'civil matters for the general good and benefit of the whole kingdom', this decision was not without foundation. The son of Henry VIII's Solicitor-General for Ireland, Barnewell was one of the principal landowners of the Pale, and his marriage to Mary Bagenal indicated a certain Gaelic connection as well - Mary's sister Mabel eloped with the Earl of Tyrone from Barnewell's house in Terbury in 1591, and Tyrone and Barnewell became, after a fashion, brothers-in-law. There was also a problem with Barnewell's mixed academic background. Like a good English lawyer, he derived his legal training from the English Inns of Court, but information that he was 'the first gentlemen's son of quality that was ever put out of Ireland to be brought up in learning beyond the seas' testified to his Catholic sympathies. Indeed, Davies' complaint in early June 1605 that Barnewell refused to recall his son from a Catholic school on the

continent suggests that he had no intention of giving in to the new religion at all. It seems therefore, that as a Catholic lawyer and landowner with Gaelic connections, Barnewell represented everything repugnant to full extension of New English rule in Ireland.

In combination with Lord Gormanston and several other Irish peers, Barnewell had the temerity to challenge the validity of the mandates 'wherein the Court of Castle Chamber, never before used as a spiritual consistory, was used to fine, imprison and deprive men of all offices and magistracies.' In correspondence with Salisbury, Barnewell truculently affirmed that 'for the drawing of men into the Castle Chamber, the learned in the laws there affirm to be contrary to the law.' He cited Sir James Ley, recently appointed Chief Justice of King's Bench, as the author of the mandates strategy, complaining that Ley 'to the great scandal of justice, denieth men the copy of their indictments.' Equally intemperate charges of brutality were leveled against local Dublin magistrates for forcing entry into private homes and violently distraining the goods and chattels of numerous citizens for failure to pay recusancy fines. Barnewell summarized these complaints with an ominous warning that 'such proceedings could only lay the foundation of some future rebellion.'

Such indiscretion succeeded only in forcing an indictment in the Court of Castle Chamber, where in the presence of several Dublin aldermen and merchants who were also being prosecuted for their refusal

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23. SP/63/217/f.6a; CSPI.1603-06, p.172.
27. SP/63/217/f.267a; CSPI.1603-06, p.374.
to attend church, Barnewell continued his rhetorical excesses. When admonished by his adversary Chief Justice Ley, Barnewell responded by shouting at Ley to 'leave his carping and therewith struck the cushion before the Lord Deputy in Council, and held his hand there till he was reproved for it'.

This exchange inspired Lord Deputy Chichester to deliver a stinging rebuke:

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.... No sir, we have endured the miserie of the war, we have lost our blood and our friends and have indeed endured extreme miseries to suppress the late rebellion whereof your priests for whom you make petition and your wicked religion was the principal cause.
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This charged dialogue demonstrates the seriousness of the confrontation and helps to explain the English Privy Council's subsequent decision to support the Dublin government by roundly punishing Barnewell in England. Heeding Davies' warning that the recusant party expected Barnewell to procure a reversal of the mandates, Salisbury assured the authorities in Dublin that Barnewell would not escape 'just reproof and punishment'. Upon Barnewell's arrival at court, Salisbury promptly had him arrested and committed to the Tower. For a man who had seriously anticipated a favourable hearing, this cavalier treatment must have dealt a serious blow to Barnewell's expectations and the humiliation was compounded by the ease with which the English Privy Council disposed of his objections to the mandates.

The Privy Councillors began first by dealing with Barnewell's impolitic complaints against Chief Justice Ley, assuring Chichester that such criticism represented in their minds little more than 'false and forward information'. They further instructed Chichester that

29. SP/63/217/f.256a; CSPI,1603-06, pp.370-372; Also SP/63/221/f.63a; CSPI,1606-08, p.117.
Sir James Ley should under no circumstances depart Ireland to answer Barnewell's charges, because 'the same will be interpreted to your disgrace'. On the more specific issue concerning the legal principles involved in the controversial mandates policy, the English Privy Council solicited the advice of Davies and the Irish judiciary, and Salisbury himself cynically instructed Chichester to provide a list of authorities in 'law or precedent' to which we would have you send us some answer rather for forms sake than that we doubt of you being easily able to give us sufficient satisfaction. Attorney-General Davies ransacked the records in Dublin Castle to comply with Salisbury's directive while Chichester expressed the Dublin government's gratitude to Cecil, noting that Barnewell's imprisonment in the Tower 'greatly comforted the state'. He further advised Salisbury of his decision to 'hold on our course with the recusants of this city and are hopeful to reform the multitude genrallie'.

In responding to Salisbury's request for a list of precedents to legitimize the mandates, Davies and the Irish judiciary managed to avoid the thorny constitutional dilemma mentioned by Chief Justice Saxey in 1604, i.e. that the late Elizabethan recusant statutes in England, particularly those expelling the recusant clergy and imposing the forfeiture of £20 a month for non-attendance at church, had no force in Ireland without the approval of the Irish parliament. For a man who argued for the legislative autonomy of Ireland in the English parliament of 1621, it is not too surprising to discover Davies constructing a brief that would circumvent the limitations of a defective

31. Bodl. Carte Ms. 3 f.82a; CSPI,1603-06, p.509.
32. SP/63/219/f.3a; CSPI,1603-06, pp.509-510; PRO/31/8/199/f.118; CSPI,1603-06, p.547.
33. SP/63/219/f.3a; CSPI,1603-06, pp.509-510.
34. SP/63/217/f.254a; CSPI,1603-06, p.370.
Irish statute book. In the end both Davies and the Irish judges hit upon a strategy to support the mandates by drawing from the legal and theological corpus arising from the conflict of church and state during the middle ages.

Davies argued that a prerogative court had every right to exercise jurisdiction over ecclesiastical affairs, because the English monarchy, as illustrated by the maxim 'Rex est mixta personal cum sacerdote', had been Caesaropapist from earliest times\textsuperscript{35}. More convincing illustrations were drawn from the investiture controversy. Citing the famous maxim attributed to the medieval civilian Baldus, that only the king is absolute emperor in his realm, Davies recalled the statute of \textit{praeunire} and delivered an oration presenting numerous legal precepts and statutes common to both England and Ireland supporting a hierarchial relationship between the English monarchy and God that served to circumvent the authority of the papacy. By adopting this approach, Davies presented a coherent body of pre-Reformation legal principles derived from 'popish judges' to justify the Court of Castle Chamber's jurisdiction over the mandates in 1605\textsuperscript{36}.

The Irish judges supplemented this argument by delivering their own opinion that the mandates served as a legitimate tool to enforce the royal prerogative. For evidence, the Irish justices also drew heavily on medieval precedents citing, for example, the case of Anselm who suffered loss of all his goods and chattels for departing the realm

\textsuperscript{35} Bodl. Carte Ms. 61, f.151a; \textit{CSPI,1603-06}, p.350.

\textsuperscript{36} Bodl. Carte Ms. 61, f.151a; \textit{CSPI,1603-06}, p.351; A.G. Petti, 'Recusant Documents from the Ellesmere Manuscripts', \textit{Catholic Record Society}, 60 (1968) p.177.
against the royal mandate. Similarly in Edward II's time, John of Brittany's refusal to obey a royal mandate to return from a diplomatic mission was judged a treasonous offence. During the same reign, the monarchy had imprisoned an Abbot Oswald for disobeying a royal mandate to attend the English parliament. Such practice, argued the judges, was evident in contemporary litigation. During the reign of Elizabeth, one Bellew, an Irishman had conspired with an unnamed printer to publish an abridgement of law reports for the reign of Richard II. Since Queen Elizabeth had granted sole license to print lawbooks to Tothill, with express mandate excluding all others from printing the same, Bellew was fined and imprisoned by the English Court of Star Chamber.  

Having thus produced the historical antecedents to validate the use of mandates as a means to promote religious conformity in Ireland, the Irish justices went on to refute the curiously convoluted if not illogical argument put forth by the recusants, that if jurisdiction enforcing punishment for non-attendance at church pertained to the prerogative, statutory proscription of recusancy was both redundant and invalid. To this argument the Irish judges responded that the English Court of Star Chamber itself exercised jurisdiction over many statutory offences. Hence the use of mandates issued to prominent Dublin officials to amplify the insufficient penalties imposed by the Irish Statute of Uniformity was perfectly consistent with English practice. As for Barnwell's objection that the issuing of mandates was 'against men's conscience and repugnant to the law', the judges developed a line of reasoning that paralleled the hierarchial relationship between church and state perceived by Davies.  

Since the laws of God and parliament compelled attendance at church services, the justices argued, the policy of enforcing attendance at church
by royal mandate rendered a favour to all Irish recusants, because they were bound 'sub poena damnationis deponere conscientam illam tanquam erroneam'. For this reason, the judges concluded, the mandates merely reflected the benevolent concern of the state to put Old English Catholics out of their state of damnation. Nor could the exception of conscience be allowed, because the Bishop of Rome himself had yet to issue a decretal outlining the canonical and doctrinal implications of such a position. Therefore the recusant petitioners were required to submit their conscience to 'the wisdom of their magistrates and commandment of the law'.

The strategy of emphasizing domestic Irish statutes and precedents antecedant to the Reformation as a means to side-step the constitutional issue of extending English statutes to Ireland was ultimately confirmed by a judicial resolution formulated by the English justices, certified by the Lord Chief Justice Popham, and returned to Ireland as formal approval by the English government of the controversial mandates program. On 31 December 1606, the English Privy Council informed Chichester and the Irish Privy Council:

..... Concerning Sir Patrick Barnewell, the greatest judges of England being made acquainted with the reason and authority lately sent by the chief justice and the rest justifying their sending of privy seals for reducing men to outward conformity have delivered their opinion that the same is no way contrary to law nor to precedent and authority.

The authority of judicial resolutions in early modern jurisprudence has been developed elsewhere. Obviously a government crisis on the

38. TCD Ms. 843 (F.3.17), f.401; CSPI,1603-06, p.588.
39. TCD Ms. 843 (F.3.17), f.401; CSPI,1603-06, p.588.
40. PRO/31/8/199/ff.197-198; CSPI,1608-08, pp.49-50; PRO/31/8/199/ff.118-119; CSPI,1603-06, p.547; For Chief Justice Popham's certification see: SP/14/24/f.51b; CSPD,1603-10, p.339.
order of the mandates demanded an extraordinary proceeding, and the resolution of the English judges validating the legal principles put forward by Davies and the Irish judges helped the Dublin government to evade the constitutional problem over the validity of English penal statutes in Ireland. Having thwarted the attack of the colonial community, the English Privy Council returned Barnewell to Ireland where he was forced to submit 'his ample submission and acknowledgement in writing of his offense in Ireland to the Lord Deputy and the Irish Privy Council'.

III.

The humiliation of Barnewell and the validation of the prerogative mandates through pre-Reformation legal doctrine provides a context to examine further litigation before the Irish Court of King's Bench. Here the arrest and indictment of Robert Lalor, a recusant priest, on a charge of praemunire bore out the legal principles laid down by the English and Irish justices in the Barnewell affair. As a 'notable seducer of the people and alleged Vicar-General of Dublin, Kildare and Ferns', Lalor had been active in fomenting trouble in the vicinity of Dublin. For eight months after the appearance of the royal proclamation expelling the Catholic clergy from the realm, Lalor succeeded in evading arrest by going to ground in the precincts of Dublin. There, under the protection of friends, he continued to carry out his clandestine activities, until February 1606 when, at the height of the mandates controversy, he was betrayed by a servant and promptly arrested by Sir Oliver Lambert, the Provost Marshall of Dublin.

41. PRO/31/8/199/f.198; CSPI, 1606-08, p.50.
42. SP/63/218/f.38a; CSPI, 1603-06, p.408; There is a manuscript report of Lalor's case in the British Museum. See Royal Ms. 18. C. XV: The Case of Praemunire, ff.1a-22b.
43. SP/63/218/f.57b; CSPI, 1603-06, p.416.
Subsequent interrogation revealed a background that was typical of many recusant clergymen in Ireland. According to several dispatches filed by Chichester and Davies to the English Privy Council, Lalor's career began in 1579 when Richard Brady, titular Bishop of Kilmore, ordained him as a parish priest. Years later, Mathew de Oviedo, the titular Archbishop of Armagh who accompanied the Spanish army to Kinsale, elevated Lalor to the archdiocese of Dublin, Kildare and Fernes. Of particular interest to Davies was Lalor's close association with the Pale gentry and nobility, and further investigation revealed that Lalor was 'feoffee in trust' to the greater part of the Earldom of Kildare and the Barony of Delvin, and that 'sundry gentlemen had also sued liveries before him'. This improvident dabbling with the temporal affairs of the gentry played into the hands of Davies and Chichester who easily manoeuvred Lalor's timely arrest as a counterblow to the unrest stirred up by Barnewell and the Pale gentry over the mandates.

Lalor, however, wisely decided to co-operate with the state and readily confessed the unlawful exercise of a foreign jurisdiction. When pressed with Suarez's troublesome doctrine over the Pope's power to excommunicate and depose heretic monarchs, Lalor prudently denied such authority for the simple reason that James I was not a Catholic prince. This distinction, failed to impress the court which convicted Lalor and sentenced him to one year's imprisonment and loss of property under the Irish statute of 2 Elizabeth for maintaining and upholding the civil and religious jurisdiction of a foreign prince or prelate. After two terms of imprisonment, Lalor petitioned the Lord

44. Petti, op. cit., p.165; SP/63/218/f.57b; CSPI.1603-06, p.416.
45. SP/63/222/ff.6a & 6b; CSPI.1606-08, pp.209-210; BL Cecil Ms. 112, f.156a; HMC, Salisbury Mss., 17:476; The Countess of Kildare is represented as being a 'teat to give such nourishment to all Romish Rebels'.
46. Petti, op. cit., p.166.
Deputy for release, agreeing in the meantime to acknowledge the royal superemacy and to submit a written confession admitting his earlier transgressions. Apparently convinced by Lalor's change in religious conviction, Chichester ordered the priest's release from prison, only to find that Lalor's supporters within the precincts of Dublin had deliberately misconstrued this liberal gesture as a recusant victory for religious toleration in Ireland. Lalor himself was reported to have denied 'giving any ground in admitting royal jurisdiction over spiritual cases', maintaining instead that he had merely acknowledged the English monarch's authority in civil and temporal matters, not in spiritual affairs. This repudiation of what had actually transpired during his first arrest represented, like the confrontations with Skelton and Barnwell, another attempt to test the government's will to establish outward adherence to the Protestant religion among the colonial elite.

In response Davies had Lalor rearrested, indicting the priest on a more serious charge of praemunire. As an important weapon in the contest with the Papacy during the late middle ages, the statute of praemunire common to both England and Ireland, allowed the government to punish any persons suing actions outside the realm without royal approval. In the sixteenth century the scope of the statute was considerably broadened and during the Elizabethan period, provided the basis for a variety of legal actions, both against recusants, and as a tool for the common lawyers to prevent or defeat judgements in any one of the non-common law jurisdictions in England. In the case of Lalor, however, Davies decided to apply the statute in its original context - to

47. Ibid., p.166.
48. SP/63/218/f.127b; CSPI,1603-06, p.448.
exclude foreign authority from exercising either ecclesiastical or
temporal jurisdiction in Ireland. Thus the case of Robert Lalor conforms
to the strategy of prosecuting recusancy with pre-Reformation statutes
laid down in the judicial resolution validating the mandates.

The details of the government's brief against Lalor are too
lengthy to develop here, but Davies' *Reports* reveal a style of pleading
consistent with previous litigation over the mandates. Beginning with
a long historical disquisition demonstrating the superiority of temporal
authority over ecclesiastical affairs, Davies went on to establish the
existence of an independent English national church that ran from Anglo-
Saxon times to his own day. The Attorney-General drew further evidence
from the investiture controversy, noting numerous legal precepts, maxims
and case precedents limiting Papal jurisdiction, in particular appeals
from the various ecclesiastical courts or controversies arising over the
disposition of ecclesiastical revenue. All these laws argued Davies,
particularly the statutes of provisors and *praemunire*, were passed by
'good Catholics or good subjects against the Pope', and were by virtue
of the Irish statute of 10 Henry VII c.22, 'established and made of
force in Ireland'.

Having thus laid the legal grounds for the case
against Lalor, Davies went on to deliver a stinging harangue for the
benefit of the recusant party.

..... So now master Lalor you have no excuse, no evasion;
but your conscience must condemn you as well as the law;
since the lawmakers and all religious papists and
Protestants do condemn you. Unless you think yourself
wiser than all the bishops that were then in England or all
the judges who were learned in the civil and canon laws, as
well as in the common law of England.

Armed with the statutory weapons to justify Lalor's indictment, Davies
produced a damning collection of evidence to procure Lalor's conviction

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on a charge of praemunire. This evidence included various letters and bulls in Lalor's hand showing institution of 'popish priests to benefices', and more significantly, Lalor's earlier confession for having violated the Irish acts of Uniformity and Supremacy during the previous year⁵².

Against this evidence, Lalor attempted to deny any wrongdoing, claiming that he had accepted the Catholic office of Vicar-General 'virtute obedientiae' only as a means to render obedience to his superior in Rome. In other words, argued Lalor, the office had been forced upon him, implying that his jurisdiction was exercised in foro conscientiam tantum and not in foro judicii⁵³. Davies' rejoinder to this extraordinary defense easily rivalled and surpassed Lalor's own splitting of hairs. First, argued Davies, any office upholding a foreign jurisdiction could never be virtuous or obedient. Furthermore, Lalor's previous confession clearly superseded any plea of conscience, a point which Davies readily drove home by ordering Lalor's confession read aloud before a courtroom packed with eager recusant supporters who must have sensed that Lalor was not 'a little abashed at the publishing of this acknowledgement and confession'⁵⁴.

In response Lalor attempted to deny telling friends and supporters that he had rejected the royal supremacy during his previous arrest and confinement. Rather, he argued, he refused to accept the king's supremacy in 'causes ecclesiastical but not causes spiritual'⁵⁵. Anticipating this characteristic distinction, Davies demanded an explanation of the difference between causes spiritual and ecclesiastical, only to be met with a rather lame request for further time to prepare an

⁵². Ibid., p.270; Ibid., p.189.
⁵³. Ibid., p.270; Ibid., p.189.
⁵⁴. Ibid., pp.271-272; Ibid., pp.189-190.
⁵⁵. Ibid., p.272; Ibid., p.190.
answer. Davies, however, doggedly persisted his attack in language consistent with his aggressive and occasionally imperious nature.

...... Nay we can never speake of it a better time or fitter place. And therefore, though you that beare soe reverend a title and hold the reputation of soe great a clarke, require further time, yet shall you hear that wee layman that serve his majestie, and by the duty of our places and to maintain the jurisdiction of the crowne, are not so unprovided but that we can say somewhat ex tempore touching the matter and difference of these causes.56

Davies' extensively researched and well argued brief demonstrating the absence of any distinction between the terms spiritual and ecclesiastical belied this modest avowal. During the late Roman empire, Davies argued, all spiritual and ecclesiastical jurisdiction was delegated 'by the emperor and civil magistrates by rules of the imperial laws', because the canon law 'was not then dreamt of'57. In other words, the terms spiritual and ecclesiastical were interchangeable words referring to a jurisdiction belonging to the civil power - a hierarchical relationship that was resumed during the Reformation by a Protestant national church. Therefore the establishment of the king's ecclesiastical law represented little more than a resumption of original jurisdiction that had been usurped by the Bishop of Rome. Having witnessed the demolition of Lalor's last defense, the jury left the courtroom and returned, within an hour, to deliver a verdict of guilty. Maximum punishment was imposed and Lalor was sentenced to forfeiture of all property and to life imprisonment58.

In summarizing the case to Salisbury, Davies trumpeted the state's achievement, noting that Lalor's conviction on a charge of praemunire was the first ever recorded in Ireland. Davies took particular satisfaction that the verdict arose from clear evidence presented before

56. Ibid., p.273; Ibid., p.191.
57. Ibid., p.274; Ibid., p.191.
a courtroom packed with the Vicar-General's supporters. Lalor's defeat, continued Davies, 'hath bred terror among the principal gentlemen of the Pale' who, having sued liveries and taken various dispensations from Lalor, were also subject to the penalties imposed by the same statute. Lalor's conviction, therefore, conformed not only to the general pattern of prosecuting recusancy through pre-Reformation statutes laid down by the English and Irish judicries in the mandates crisis, but also supplied the Dublin government with another tool to secure the outward conformity of Old English recusants residing in the towns and the Pale.

In assessing the episode of the mandates controversy and of the general high-handed manner, as illustrated by the cases of Barnewell and Lalor, of prosecuting recusancy through pre-Reformation statutes, a distinctly nationalist historiography has denied both the validity and the success of the government's attempt to disrupt the colonial community's optimistic assumption that adherence to an outlawed religion was perfectly consistent with loyalty to the state. According to this view, the protest of the Pale orchestrated by Barnewell forced the English Privy Council to restrain the Irish administration from further punitive action against recusant officials in the towns thereby humiliating the Dublin government. Given the role of the English judiciary in validating the mandates by judicial resolution, it would be difficult to cast doubt on the general validity of the legal principles employed to prosecute Barnewell, Lalor and other lay and ecclesiastical persons for recusancy. What has been interpreted as official displeasure

59. SP/63/222/f.6a; CSPI,1606-08, p.210; SP/63/218/f.163a; CSPI,1603-06, p.476.

with the mandates arose not from proceedings in Dublin, however, but from the excesses associated with Brouncker's administration of the mandates in Munster. On 12 April 1607, when the English Privy Council proposed to substitute a policy of selective repression for gradual conversion, it was Brouncker's excessive zeal in Munster that was criticized, not the Irish Privy Council's attack on Barnewell and the Pale gentry. Support for the policy pursued in Dublin is best illustrated by the English Privy Council's instructions to Chichester on 30 April 1606:

..... We do very well approve of your proceedings towards particular persons, whom you find contemptuous and seditious especially some as profess it so factiously as they make themselves procurators for multitudes, avow harboring priests, and in a word so publicly refuse that outward obedience and respect to governors and officers of authority.

It should be stressed, however, that the less onerous strategem of evangelism and conversion was not to be taken as a sign of weakness. In the event of future conflicts with the colonial community over religious policy, the English Privy Council advised the Dublin government and the Munster presidency, that where any 'public affront is offered, by a notorious disobedience and of pernicious example to draw others, the authority of state alloweth in discretion extraordinary punishment.' Despite the appearance of equivocation, both the provincial presidency courts and the central courts in Dublin were to continue 'without too much straying of the laws of the kingdom' the policy of selective repression aimed at securing the appearance of religious conformity among leading Old English officials. This policy which was designed as the necessary

61. PRO/31/8/199/ff.221-222; CSPI,1606-08, p.137.
63. PRO/31/8/199/f.218; CSPI,1606-08, p.138.
64. PRO/31/8/199/f.222; CSPI,1606-08, p.137.
prelude to the mass conversion of colonial society, continued in the
towns up to a year after Barnewell's release from the Tower. There-
after the flight of the Earls in September 1607 led to an understandable
desire, in unstable political circumstances, to preserve the 'good
affection of the towns unto his Majestie' - a policy that was sustained
at least for a time, by improved relations with Spain.

While it must be conceded that the government's concerted attempt
to secure the outward conformity of Old English leadership in the towns
and in the Pale did not result in the mass conversion of the colonial
community, the message delivered by the resolution of the English judges
certifying the extension of English penal laws through prerogative
mandates based on pre-Reformation legal principles supplied by the Irish
judges was very clear. The old political equation linking English
policy with de facto tolerance of Catholicism in the towns and the Pale
was now obsolete. While the co-operation of the towns had been
instrumental in ensuring the survival of English rule in Ireland, the
mandates controversy and the case of Robert Lalor made it strikingly
evident to the colonial community that it would not share in the fruits of
the victory in which it had played so vital a part.

65. BL Add. Ms. 47,172 f.148a; HMC, Egmont Mss. p.32; SP/63/221/f.92a;
CSPI,1606-08, p.131; SP/63/222/f.68a; CSPI,1606-08, p.250.

66. Alfred J. Loomie, ed., 'Spain and the Jacobean Catholics', Catholic
Record Society, 64 (1973) pp.xv-xx; See also SP/63/225/f.269a;
CSPI,1608-10, p.122; Remission of fines was sued for by all the
Munster towns in late 1608 and subsequently granted in early 1609.
PRO/31/8/199/f.419; CSPI,1608-10, p.129.
THE CASE OF CUSTOMS PAYABLE FOR MERCHANDIZE

The English government's attempt to secure religious conformity among leading officials in the Pale and the port towns of Munster proved to be only one phase in its assault on the Old English community in Ireland. During the same period, Davies and the central government authorities waged a systematic campaign against the cherished liberties and privileges that had allowed the port municipalities to operate independently of royal control. This jurisdictional dimension to the conflict was nowhere better illustrated than in Waterford's refusal to admit the Lord Deputy to the town, on the authority of a charter granted by King John. The most valued of the municipal privileges in question was that granting full appropriation of customs revenues and the appointment, normally vested in the crown, of customs officials. Considering the size of the economic stakes involved, it is interesting to find that the government's attempt to eliminate corporate privilege also owed something to the designs of Robert Cecil and a clique of London-based entrepreneurs who proved more than willing to manoeuvre the cause of the English state to further their own commercial interests.¹

To appreciate the impact of these jurisdictional and commercial influences it is necessary to discuss first the central position of the towns in determining a successful outcome to the more aggressive Elizabethan policy of conquest and colonization in Ireland; second, the nature of corporate liberties and franchises that operated independently of government control; third, the arguments propounded by Davies against Waterford; and finally, the application of the decision to the rest of the Old English towns.

I.

The wholesale alienation of crown rights to the port towns began with Sir Henry Sydney's successful campaign (1565-75) to expand English influence beyond the narrow boundaries of the English Pale. Sydney more than his predecessors viewed the allegiance and security of the Old English towns as vital to an aggressive policy towards the Gaelic interior. As he noted in a letter to the queen on 20 April 1567, the loss of the port towns would be tantamount to losing the whole of Ireland. Sydney's political equation linking the allegiance of the towns to the security of Ireland is illustrated by one of the more succinct maxims of sixteenth-century Irish municipal history:

..... The corporate towns are the strength and sinews of the commonwealth in times of war and the ornaments of the commonwealth in times of peace, and if these fail then the commonwealth decays.

Throughout the sixteenth century, the towns of Munster, unlike the rest of the island, maintained their allegiance to the crown. As citadels of English influence in a sea of civil strife and barbarism, the towns functioned as assembly areas for tactical operations against


the interior, frequently providing military, logistical and financial support to a hard-pressed English government. As the most recent historian of Sydney's deputyship has shown, the perception that a forward Irish policy would depend on the loyalty of the port towns proved accurate.

By the end of the century, however, Sir John Davies and other observers began to look askance at the favoured status granted to the towns. Municipal loyalty, they complained frequently, had not been obtained without a price. Apart from extensive jurisdictional liberties which guaranteed them almost full autonomy, the towns had acquired through charter, statute or prescription control of all customs appointments and of customs revenue normally due to the crown. Davies asserted that the customs revenue had been detained by the towns for over a hundred years. To illustrate the dilapidated state of the customs administration, Davies examined the Irish pipe rolls lodged in the Bermingham tower in Dublin.

...... Wherein the accounts of customs are contained, and found those duties answered in every port for 250 years together, but did not find that at any time they did exceed £1,000 per annum - and no marvel, for the subsidy of poundage was not then known and the greatest profit did arise from the cocket of hides, for wool and woolfels were ever of little value in that kingdom.

Davies was not alone in his condemnation of the privileges the port towns had acquired. Even before the end of the Nine Years War, high placed figures within Irish administration had had serious doubts over the utility of official policy toward the municipalities. In 1592 a royal commission enquiring into the nature of Irish corporate privilege


angrily criticized the extortionate liberties and franchises of the Irish ports, pointing out that the cities of Ireland enjoyed a status more favourable than that granted to any English municipality. Even so Sir Anthony St. Leger, a Munster servitor, informed the English Privy Council in 1599 that the loyalty of the towns could not be taken for granted. As a protective measure, St. Leger advised the construction of a fortress in the Lee Estuary, cautioning his superiors in England that 'upon the first arrival of Spaniards, for my life they will all revolt'. St. Leger's assessment impressed authorities enough to authorize construction of Fort Haulbowline, which was subsequently demolished by the irate citizenry in the Munster disturbances of 1603. St. Leger's observation, in combination with events in Cork during the Munster rising, demonstrates an increasingly uneasy relationship between the central government and the corporation.

Following the defeat of the Spaniards at Kinsale, criticism of the towns became more frequent. In January 1602, Sir George Carew, Lord President of Munster, informed Robert Cecil and the English Privy Council that the structure of corporate privilege in Ireland was detrimental to the queen's service. By March 1602, Carew refused a petition by the freemen of Cork to enlarge their existing liberties, a decision subsequently endorsed by the queen. When petitioned by the citizens of Kinsale to renew their charter, the English Privy Council, in general reference to all the port towns, angrily informed Sir George Carew that the liberties and franchises bestowed on the towns were both 'immoderate and inconvenient' for the proper administration of efficient government. This obvious

7. SP/63/205/f.429b; CSPI,1599-1600, p.201.
8. SP/63/210/f.64a; CSPI,1601-03, p.280.
displeasure undoubtedly influenced official circles in Dublin, and Fynes Moryson, secretary to Lord Deputy Mountjoy, noted that Mountjoy, despite his moderate dealings with the towns in 1603, intended to 'procure the cutting off of many exorbitant privileges in the renewing of their charters'. Mountjoy's subsequent removal from the Irish scene and premature death did not prevent the assault. The colossal Irish war debt incurred by Tyrone's Rebellion soon led an impecunious English government to cast a covetous eye on the long neglected customs administration appropriated by the various towns. Although the towns had provided the necessary counterweight to subdue the restive natives, the fiscal imperatives of the English government made it very doubtful that their extensive jurisdictional privileges would survive the Tudor conquest.

However, the government's assault on the privileged status of the Irish towns can be understood fully only by reference to the commercial interests that first propelled the move to reorganize the Irish customs, for this policy paralleled changes in English customs administration during the same period. In 1604, English officials concluded that direct government administration of the customs had been less rewarding than farming the customs out to private individuals. As a result the English customs were leased to a circle of London merchants headed by Francis Jones, Nicholas Salter and William Garway for a rent of £112,000 - a sum increased in 1607 to £120,000. This consolidation of the English customs undoubtedly influenced a similar


scheme for Ireland, and on Christmas 1604, Arthur Ingram, the controller of the customs for the port of London, began negotiations for a farm of the Irish customs on the English model. Ingram, who had been actively involved in negotiations over the English customs farm, enjoyed a close association with Lionel Cranfield. Both had earlier dealings with commercial traffic in the port of London, and both men had a personal interest in the Irish project. This interest was strongly supported by Robert Cecil who emerges as a central figure in the plan to divest the Irish towns of their extensive privileges. Cecil's role was confirmed by John Bingley, Chief Remembrancer of the Irish Exchequer. Writing thirty-four years after the event, Bingley recalled to Ingram how Cecil, upon information provided to himself, had laboured to effect a new administration that would add vigor to the moribund system of customs collection in Ireland. As Bingley remembered it, he had informed

..... the late noble Earl of Salisbury of the little custom that Ireland paid to the crown, they were exceeding glad and strove how to improve them and had many conferences with you about it.

Bingley's letter makes it clear that Cecil, as in the case of the religious mandates policy, also played a significant role in determining policy towards the towns.

In 1604, therefore, it was clear that an official enquiry into the long neglected status of the Irish customs was in the offing, and the investigation was hastened by a bid to farm the Irish customs by a clique of London speculators that included Arthur Ingram, Lionel Cranfield and


Ingram's patron, the Earl of Nottingham. In the fall of 1606, a study carried out on behalf of Cecil and the English Privy Council by Sir Thomas Ridgeway, Irish Treasurer at War, revealed that the net customs revenue did not exceed £200/annum. Ridgeway attributed this dismal return partly to the vissicitudes of war which had severely restricted international trade with England and Spain and partly to inefficient administration of the Irish exchequer. In Ridgeway's estimation, however, the most serious difficulty arose over the extensive privileges and liberties of the port towns. This last problem, he felt, could only be overcome by parliamentary statute. In fact it was extremely unlikely that an Irish parliament would ever provide the necessary consensus to legislate against the liberties of the port towns.

II.

Inspired by Ridgeway's prediction that the collection of Irish customs could be increased to over £10,000/annum, the English Privy Council informed Lord Deputy Chichester that the king intended to establish a consolidated farm of the Irish customs, and that two agents, Robert Cogan and Thomas Waad, were authorized to carry out an enquiry of all corporations claiming exemptions from customs duties. Cogan was connected with the clothworkers syndicate in London and was a kinsman to Ingram, while Waad, an associate of Ingram, had been involved in business dealings with Cranfield in the farm of the English tobacco duties. In the end, both Cogan and Waad became shareholders in the farm of the Irish customs. Cogan himself becoming first surveyor-general of the


15. SP/63/221/f.1a; CSPI, 1606-08, pp. 74-75.

16. SP/31/8/199/f.191a; CSPI, 1606-08, pp. 105-106; Cogan and Waad were paid £476 out of the English exchequer for their expenses. SP/14/192/13.
Irish customs at a fee of £100/annum - a reward no doubt for the thorough investigation carried out in 1607.\(^{17}\)

Working between March and June 1607, Cogan and Waad quickly discovered an appalling alienation of crown rights in the various Irish ports. In the southern towns, the investigators noted that the ports of New Ross, Wexford, Waterford, Cork, Dungannon, Kinsale, Dingle, Youghal and Limerick all claimed exemption from customs duties through charter or prescription and that none had paid any revenue since the reign of Henry V. In the smaller southern ports, Strongford, Ardagh, Clegagh, Baltimore, Crookhaven, Wicklow, Arklow and the Skerries, none had paid any revenue for years and all claimed exemption by either charter or prescription. In the other ports, the administration of the customs revenue had been granted to a handful of servitors and local officials at extraordinarily low rents. In Dublin, the farm of the customs had, by the end of Elizabeth's reign, fallen into the hands of the Grimsditch family for a rent of £173 6s 8d. Irish. In Drogheda, the customs were leased by John Bingley at a rent of £104 2s. Irish. In the north, the customs of Carrickfergus were taken up by Roger Longford at a rent of £10 sterling. The ports of Derry and Ballyshannon, newly created in 1604, were leased to another servitor, Richard Bingley, at £1 6s 8d. Irish. In Dundalk, the customs were leased to a former military man, Rice Ap-Hugh, for £5 Irish. The port of Carlingford, long considered part of the Bagenal inheritance, was held by that family in fee simple, and in the west, the port of Galway was leased to the mayor and commonality for a rent of £36 12s 6d. sterling.\(^{18}\)

In summarizing the results of their investigation, Cogan and Waad concluded that the customs revenue for the four years since the

\(^{17}\) Lib. Mun. Hib. II:137.

\(^{18}\) BL Lansdowne Ms. 156, ff.204a-205a; SP/63/221/ff.123a-124a; CSPI,1606-08, p.147.
accession of James had yielded a total gross revenue of only £554 which, after deducting salaries and expenses, left a residual net income of only £238. What little revenue the crown derived from the Irish ports arose only from poundage paid on prohibited goods traded under license, the petty custom levied on merchant strangers, and the custom of a few native commodities such as timber, hides and furs that were unregulated by the trade acts of 1569-71. Thomas Ridgway, who collated the results of Cogan and Waad's efforts, drew attention, once again to the wall of existing corporate privilege, commenting in particular on the exemptions from poundage granted to the freemen of Dublin, Waterford and Drogheda by the poundage act of 1500. Ridgway also noted that the benefit of the customs revenue and the control of the officers appointed to collect such customs had, in the majority of cases, been appropriated by the towns frequently by the authority of royal charter.

Of all the towns, however, Waterford with its profitable deep water port and strong chartered privileges, stood out as the worst offender. Situated on the south-east coast, Waterford was second only to Dublin in the volume of trade moving in and out of port. Throughout its history, Waterford had remained steadfast to the crown, and when the Anglo-Norman colony threw its support behind the Yorkist pretenders Simnel and Warbeck in the late fifteenth century, the city refused to be taken in by the conspiracy. A grateful crown in return rewarded the city with the title urbs intacta. However, the devotion of Waterford, as Mountjoy discovered in 1603, had proved inconsistent with

19. BL Lansdowne Ms. 156, ff.203a-205a; Lam. Pal. Ms. 629, ff.74a-76b; Cal. Car. Mss., 1603-24, pp.85-86; SP/63/221/ff.119a-120a; 123a-124a; CSPI,1606-08, pp.146-147.

20. BL Lansdowne Ms. 156, ff.203a-205a.

the title granted by the first Tudor king. As a renegade city, moreover, Waterford had a great deal to lose, for over the years the corporation had acquired the right to collect the great custom, the small custom, the subsidy of poundage and the right to appoint a customer or collector of the customs, a controller of the customs and a search/gauger.\(^2^2\)

By May 1607, the government began its assault by instructing Davies to set up *quo warranto* proceedings against the corporations of Waterford and Drogheda. From a collection of crown briefs currently lodged in the British Library and a fragmentary transcript of a King's Bench plea roll in Dublin, we know that Davies also initiated proceedings against the corporations of Dublin, Limerick, Kinsale, Youghal and Dungarven.\(^2^3\) The opening blow, however, was aimed at Waterford. Before exploring this litigation it will prove useful to review the kinds of duties levied upon Irish trade during the sixteenth and early seventeenth century.

Apart from Dr. V.R. Treadwell's thesis on the administration of Irish customs in the early seventeenth century, the best account is still to be found in Davies' *Law Reports*.\(^2^4\) Indeed Davies' research into the Irish pipe rolls and other records then extant in the Bermingham tower in Dublin was so thorough that medieval historians have yet to alter his basic conclusions. In his report of the case against Waterford, Davies enumerated three types of customs duties: the great custom, the petty custom and the subsidy of poundage.

The great custom, introduced into Ireland by a writ of Edward I, represented a standard levy on the principal exports of wool, wool-fells

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23. SP/63/222/ff.8b-9a; CSPI,1606-08, p.213; BL Harl. Ms. 2058, ff.59a; 62b; 63a; 65a; PROI, Ferguson Ms. 27 ff.1-2.

and hides. This levy consisted of 6/8 per sack of wool of 364 lbs. and per 300 wool-fells, and 3/4 per last of hides (200 to the last) on all exports shipped abroad by English subjects, with an added duty of 1/3 the above rates to be paid by aliens. The petty custom, established in Ireland during the early 14th century by exemplification under the great seal of England and special writs to Irish customs officials, consisted of an additional duty of 3d in the pound levied on the imports and exports of all aliens. By far the most valuable source of customs revenue was the levy of poundage, a 5 per cent ad valorem duty placed on all imports and exports. The original purpose of Irish poundage differed considerably from its English counterpart. Whereas English poundage was appropriated by the crown, Irish poundage, established by statute in 1474, was devised to support a special paramilitary group known as the fraternity of St. George. This corporate body, consisting of thirteen landowners of the pale, was to protect the ever-shrinking boundaries of English influence from incursions by the Gaelic Irish. Exemptions from payment were granted, however. In 1474 Waterford and Drogheda were freed from paying poundage on hides and other commodities, an exemption extended the following year to all residents of the pale who made other contributions to the defense of the colony. In 1495, Poynings parliament dissolved the fraternity, but the levy of poundage, formerly collected by the fraternity, was appropriated by the government with exemptions from payment granted to the freemen of Dublin, Waterford.


26. Davies, Reports, p.31; Morley, pp.243-244.

27. Ir. St. 14 Ed. IV. c. 2; 15 Ed. IV. c. 56; 16 Ed. IV. c. 14; 19 Ed. IV. c.24 & 27.
and Drogheda. In 1500, the crown secured an act for the grant of poundage in perpetuity, but due to the unsettled times maintained the privileged exemption formerly granted to the freemen of Dublin, Drogheda and Waterford. Wine, as Treadwell has shown, escaped effective taxation until 1569. Prisage, consisting of a levy of 1 tun of wine in every cargo of 9 to 19 tuns, was collected by the Earls of Ormonde and yielded only a very small sum to the state. Tunnage, a duty granted out of every tun of wine imported remained unknown in Ireland until 1608.

The piecemeal alienation of customs revenue was aggravated by the loss of government control over the appointment of patentee officers in the various ports. These officers, whose presence gave a port official status, were: the customer/collector who had the authority to receive revenue, keep accounts and to certify the loading and unloading of all shipping under warrant of the port cocket seal; the controller who kept a parallel account as a check on the customer; a searcher/packer/gauger who examined cargoes and certified goods liable to duty to the customer; tide waiters who were required to keep watch on ships awaiting permission to break bulk, and land waiters who attended onshore cargo.

In England, the authority to appoint these officials rested with the Lord Treasurer whose warrant served as lawful authority. In Ireland, the situation was somewhat different. In theory, the Irish Lord Treasurer possessed the same power as his English counterpart, but the realities of Irish practice meant that the Lord Deputy appointed customs officials under authority of the great seal. Twice during the sixteenth century, in 1589 and 1594, the Irish Lord Treasurer, the Earl of Ormonde, attempted to resurrect his latent powers of appointment, but this conflict

28. Ir. St. 10 H. VII. c. 8; Davies, Reports, p.31.
29. Ir. St. 15 Hen. VII. c. 1.
31. Davies, Reports, p.34; Treadwell, Ibid., pp.391-392.
of interest was confined solely to the ports of Dublin and Drogheda. The rest of the towns had, during the course of the sixteenth century, acquired effective control of all customs appointments.

These then were the customs revenues and appointment powers appropriated by Waterford and other major ports during the course of the late middle ages and during the reign of the Tudors. Waterford, which possessed the strongest privileges, was selected as a test case. By 1 July 1607, Davies contemptuously referred to the feeble defences offered by the towns and predicted a quick victory for the crown.

Taking Davies' estimate to heart, the English Privy Council on 6 August 1607, informed Chichester that no corporations were to have their charters renewed until Davies determined the full extent of crown rights by quo warranto against Waterford. Thomas Ridgeway, the Treasurer at War, was less sanguine and noted to Dorset on 3 June 1607 that some of the towns were building a defence on charters antecedant to the poundage act of 1500 and that Waterford had presented a case so strong that the crown would be lucky to gain more than the petty custom on strangers.

III.

The quo warranto proceedings against Waterford, opened before the Irish court of King's Bench during Michaelmas term 1607, sought to determine the validity of the city's claim to the great and small custom and the subsidy of poundage, and of their claim to appoint a customer, collector, a controller and searcher/gauger within the said

32. Treadwell, Ibid., pp.392-393.
34. SP/63/221/ff.8b-9a; CSPI,1606-08, p.213.
35. CSPI,1606-08, p.249; SP/31/8/199/ff.241-242.
36. BL Lansdowne Ms. 156, ff.200a-202a.
In its rejoinder, the city pleaded its several charters, the first of which dated from the reign of King John. This charter, which had caused so much trouble for Mountjoy in 1603, granted, apart from extensive jurisdictional autonomy, the custom of murage and of all commodities bought and sold 'sicut Burgesses villae suae de Bristol habebant'. By second charter, dated 6 May 1 Henry V, the city expanded its privileges through a royal grant of the cocquet customs. By virtue of a third charter, dated 12 May 3 Hen 7, the citizens received a further grant of the custom of poundage. These claims were strengthened by a fourth charter dated 8 Feb. 11 Elizabeth which granted to the corporation the authority to appoint a searcher, gauger and other 'usual and necessary officials' to attend the administration of the customs. This the corporation chose to sanction the appointment of a customer and controller - being necessary officers to administer the coquet custom granted by the charter of 1 Henry V. Against this formidable accretion of rights and privileges, Attorney-General Davies demurred on two points, attempting to establish first an ultimate prerogative right to the customs revenue and second, to demonstrate that the exemptions claimed by the corporation on the basis of its four charters represented a gross misinterpretation of the actual powers conferred by the several charters granted to the city.

As with other cases in the Irish Reports, Davies' attempt to sustain a prerogative right to the customs revenue relied heavily on the universalist principles found in the Corpus Iuris Civilis of Justinian. In the apparent absence of common law principles, Davies' proof developed along

37. Davies, Reports, pp.18-19.
38. Ibid., p.19.
39. Ibid., p.19.
40. Ibid., p.20.
lines consistent with the arguments used to justify a prerogative right to impositions set forth in an earlier treatise on government finance in England. The authority to regulate trade, Davies argued, sprang from the *ius gentium* and the Law Merchant, which, being separate from the common law, devolved to the crown by prerogative right. To illustrate this claim, Davies drew attention to the legal history of Rome, citing the following passage which he ascribed to Justinian's *corpus*: 'Vectigal origina jus caesarum & regum patrimoniale est.'

On the basis of this text of the Roman law, Davies claimed a prerogative right to collect the customs revenue because 'the rules of our law are agreeable to those of the imperial law'. He further argued that the Roman law foundation of this English 'Jus caesarum' could not be faulted, for the simple reason that the levy of English customs lacked the severity of customs duties imposed by the monarchs of Turkey, France, Tuscany and Spain.

In dealing with the more specific powers granted to the city of Waterford by each of the four charters, Davies adopted a rather different strategy that attempted to invalidate the charters on more narrow grounds of interpretation. In pleading against the first charter granted by King John - that awarding murage and all tolls and customs granted to the English city of Bristol - Davies convinced the court that murage amounted to nothing more than a toll payment for the repair of city walls taken from retail sales in the city market, not from the import and export trade conducted in the harbour. As for the clause referring to the customs of Bristol, Davies cleverly argued that the corporation of Bristol, lying outside the kingdom of Ireland, could not serve as a valid

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42. Davies, *Reports*, p.33; It is difficult to determine the precise foundation for this statement in Roman law. Very similar statements occur in *C.* 4.61.10-13; *D.* 50.16.16-17.

plea for corporate rights in Ireland, because Ireland was a kingdom distinct from England. Using the constitutional relationship between England and Ireland to invalidate the rights conferred by King John's charter, Davies' brief was sustained by the court.

Against the charter of 6 Henry V granting the cocket custom — a levy collected for validating payment of customs duties — Davies found himself on weaker ground. In presenting the crown's case, Davies objected that the cocket represented only a bill validating the payment of customs duties 'so that the merchant is de costuma quietus'. The general words implied in the city's charter Davies argued could never alienate the great custom, it 'being a special inheritance of the crown'. In their reply, agents of the corporation argued that the express words of the charter conferring 'custumam vocatum the coquet' sustained the corporation's plea for the great custom. In the end, the court appears to have upheld the city's claim to the great custom on wool, woolfells and leather, but held that the petty custom of 3d in the pound on the merchandize of aliens, being an ancient heritage of the crown, did not pass to the city by the express words of the charter.

As for the third charter dated 12 May 3 Henry VII, Davies' victory was more complete. While Davies willingly conceded that the express words of the charter conveyed the grant of poundage to the city, he noted that the act of resumption of 10 Henry VII which abolished the fraternity of St. George, vested possession of poundage in the crown. Since the perpetual poundage act of 1500 specifically exempted the freemen of Waterford from payment, the court held that only merchant

44. Ibid., pp. 35-36.
45. Ibid., p. 36.
46. Ibid., p. 37.
47. Ibid., p. 37.
denizens and aliens were subject to payment of poundage. Davies did succeed, however, in maintaining the right of the state to collect the custom of poundage which the corporation had unlawfully usurped from the crown.

The limited gains against the charters of Henry V and Henry VII allowed for a more complete victory over appointment of customs officials allegedly conveyed by the charter of 8 February 11 Elizabeth. Since the pleading over the charter of Henry V and Henry VII maintained a crown right both to the petty custom and to poundage, the charter of 11 Elizabeth could not be interpreted to imply the right of municipal officials to collect the revenue of the crown. Thus Davies convinced the court that the charter allowing the appointment of a 'searcher/gauger and other officers and ministers whatsoever' could not be allowed. This privilege, he argued, in the absence of a lawful claim to collect the petty custom and the levy of poundage, rendered municipal appointments unnecessary.

These were the arguments offered by the state to impose a pre-rogative right to the Irish customs revenue, and it is clear from the Law Reports that the court was on the verge of agreeing with the pleas outlined by Davies. However a final verdict from the Irish court of King's Bench was never obtained. Official impatience in Westminster over the time consuming litigation in combination with pressure from private commercial interests ensured a more extraordinary outcome, for in fact the quo warranto proceedings were taken out of the hands of the Irish courts and assigned to a special deliberating body at Serjeants Inn in London.

48. Ibid., p.41.
49. Ibid., p.41.
50. Davies, Reports, pp.41-42; SP/31/8/199/ff.378-379; CSPI,1606-08, p.579.
The impetus for this action came in part from the same group of speculators who had been angling for a share of the reformed Irish customs all along. During November 1607, at the height of the *quo warranto* proceedings against Waterford and the other towns, Nottingham and his son received a grant of £3,000 for seven years out of the Irish customs. This eleemosynary largesse, drawn on account from an inchoate customs administration, undoubtedly reflected official optimism over Davies’ prediction of a quick victory before the Irish courts. Events in Dublin, however, must have moved too slowly, despite the fact that Henry Hobart, the English Attorney General, and John Foster, learned Serjeant-at-Law, had been despatched by the English Privy Council to aid in preparation of the assault on the port municipalities. The English Privy Council pressed home its attack. On 14 November 1607, Chichester and the Irish Privy Council were informed that the pleas of Waterford and the rest of the towns were ‘utterly insufficient in law and that their grants also are of no validity to give unto them the subsidy of tonnage and poundage which they claim by the same’. The Privy Council further instructed Chichester to inform the towns that unless they yielded their claims to the various customs duties, the municipalities would be charged with arrearages that would ‘lie very heavy and burdensome upon them’. These threats undoubtedly owe something to the private sector. Even so, out of personal anxiety for his pension of £3,000/annum from the Irish customs, Nottingham testily complained to Salisbury on 4 June 1608.

51. BL Lansdowne Ms. 156, f.186a; Griffith, p.133; BL Cecil Papers 123, f.69a; HMC, Salisbury Mss., 19:349; CSPD,1603-10, p.384.
52. SP/63/225/f.173a; CSPI,1608-1610, p.93.
53. SP/31/8/201/f.221a; CSPI,1606-08, p.330.
54. Ibid., f.221a; Ibid., p.330.
blaming the corruption of officials in Dublin for preventing an end to the litigious proceedings before the Irish courts.\footnote{SP/14/34/f.8a; CSPD.1603-10, p.437.}

In the end a combination of official displeasure at the recalcitrance of the port towns and the pressures of private interests led the English Privy Council to the extraordinary recourse of assembling elements of both the English and Irish judiciaries to issue an authoritative collective decision on the matter. Noting the 'great offence and distaste taken by the various port towns of Ireland taken against them by quo warranto', the English Privy Council referred the case to London for a 'further trial by the judgement of the chief judges of this land'.\footnote{SP/31/8/201/f.308a; CSPI.1606-08, p.579.}

This strategy of effecting reform by judicial resolution, familiar by now from the chapter outlining the other cases in Davies' Law Reports, conforms in tone and style to those procedures outlined in Professor W.J. Jones' recent study of the Exchequer Chamber for Debate in England. In the case of Waterford, however, both the place of meeting and the personnel comprising the deliberating body of judges differs slightly from those described by Jones. Instead of referring the case to the Exchequer Chamber for debate at Westminster Hall, the judges adjourned the case to Serjeant's Inn on Chancery Lane. Rather than convene an assembly of all the English justices, the English Privy Council directed instead a tribunal constituted from both sides of the Irish Sea. Those present were Sir Lawrence Tanfield and Sir James Heron, chief and second barons of the English court of Exchequer, Sir John Dodderidge, King's Serjeant and future justice of the English King's Bench, Sir Henry Hobart, English Attorney-General, Sir James Ley, Irish Chief Justice, Sir Anthony St. Leger, Irish Master of the Rolls and Sir John Davies, Irish Attorney-General.\footnote{Irish Reports, p.42.}
From the text of Davies' Reports, as well as other more fragmentary sources, it appears that this extraordinary body upheld the earlier pleas reported by Davies in the *quo warranto* proceedings begun before the Irish court of King’s Bench in July of 1607. At Serjeant’s Inn, however, the litigation involved not only Waterford, but also ten other municipalities which sent their representatives to London to plead their various charters. In the event, the judges affirmed Davies’ arguments against Waterford, and strangely enough only Dublin appears to have seriously challenged the principles laid down in Davies’ earlier report of the proceedings against that city. Represented by Sir Richard Bolton, the Recorder of Dublin, the capital city built a defence around an ancient charter granted to the corporation by Henry II. This charter, which granted the right of the citizens to appropriate theolonea and consuetudines, was construed by the town to imply a right to the great and petty customs. To advance this argument, Bolton rather lamely defined theoloneum through the text of the gospel of St. Mathew, by which a sort of custom or toll was inferred. Annoyed by these equivocations Davies replied that it was not the Gospel that served as the fount of English law, but the ‘interpreters of our law’. He then cited Fitzherbert to show that the word theoloneum referred to a petty duty levied on retail sales in markets and fairs, not to a levy on overseas trade. In this point he was sustained by the court.

As for the word consuetudines, mentioned in Dublin’s charter, Davies conceded that one of its several meanings did indeed imply a

60. *Davies, Reports*, p.43.
right to collect customs payable for merchandize. But the justices
resolved that the Latin term consuetudines signified far too many
meanings and that such a general term could never convey a special
royal duty like the customs revenue. Further evidence on the case of
Dublin may be gleaned from Bolton’s letter to the mayor of Dublin
written on 24 December 1608. Accepting defeat over the charter of
Henry II, Bolton attempted to cut his losses by pleading an alternative
claim to the petty custom. Having received ‘private intelligence’
that Davies would base a crown claim to the petty custom on the act of
resumption of 20 Hen VII, Bolton in the absence of documentary evidence
craftily averred that the city’s collection of 3 pence in the pound
on the merchandize of aliens represented a municipal, not a national,
levy for the maintenance of the city walls.61 The judges in this
instance allowed the maintenance of this municipal levy by prescriptive
right, but claimed the petty custom for the crown. In the event,
Bolton crowed to the mayor of Dublin that ‘we shall hold what we receive,
and the strangers shall be double charged’.62 As for the levy of poundage,
Davies was once again frustrated by the poundage act of 1500 which
exempted the freemen of the city from the five per cent ad valorem duty
on all merchandize imported and exported.

The paucity of manuscript material detailing the pleas of the
rest of the port towns does not allow as precise an analysis as that
provided by the litigation against the corporations of Waterford and
Dublin. It does appear, however, that the case against Waterford served
as a test case against the rest of the towns. After a second hearing
at Serjeant’s Inn the judges returned a certificate of their opinion
to the English Privy Council on 16 December 1608.63 In this document

63. BL Harl. Ms. 2138, ff.23a-23b.
the judges resolved that the customs revenue had in fact been unlawfully detained from the crown by eleven port towns. Three types of customs duties due to the crown were identified. First, the judges resolved that the custom of poundage, the five per cent ad valorem tax on imports and exports, belonged to the crown by virtue of the Irish statute 15 Henry VII. The great custom was held to be an ancient right of the crown by inheritance, while the Irish statute 22 Ed. III vested the petty custom in the possession of the crown.

With respect to collection of these customs duties, the judges resolved that the freemen of Dublin, Waterford and Drogheda were exempt from paying poundage by virtue of the poundage act of 1500. Merchant aliens and all others were, however, subject to payment of poundage within the precincts of the three privileged ports. Further exemption was granted the city of Galway, where freemen and merchant strangers were, on the basis of two charters, 36 Hen. VIII and 20 Eliz. exempted from paying poundage. As for the rest of the towns, the judges resolved that the cities of Cork, Limerick, Wexford, Ross, Youghall, Kinsale and Carrickfergus were without exception to yield up the levy of poundage.

In their deliberations on the collection of the great and small customs, the judges resolved that all charters granting the same to any of the several towns from the last year of Edward II to the first year of Henry VII's reign were void by the act of resumption dated 1 Henry VII. Some equity was shown, however, in the execution of this decision. In Cork the great and petty customs were found for the king, but the justices exempted the citizens and freemen from paying the great custom. In Limerick, the justices allowed the corporation

64. BL Harl. Ms. 2138, f.23a.
65. BL Harl. Ms. 2138, f.23a.
66. BL Harl. Ms. 2138, f.23b.
67. BL Harl. Ms. 2138, f.23b.
68. BL Harl. Ms. 2138, f.23b.
69. BL Harl. Ms. 2138, f.23b.
to collect the petty custom but maintained a royal right to levy the
great custom\textsuperscript{70}. In the cities of Drogheda, Wexford and New Ross,
both the great and petty customs were resolved to lie with the king\textsuperscript{71}.
In the port of Kinsale, the great and petty customs were found once
again for the king, but the justices mitigated this loss by sustaining
the corporation's right to collect the cocquet custom granted in a
charter by Elizabeth for 31 years\textsuperscript{72}. Similarly in Youghal, the justices
allowed the town to collect the cocquet of hides for the repair of the
city walls\textsuperscript{73}. In Galway, freemen, commons and merchant strangers were
exempt from both the great and petty customs excepting the cocquet of
hides which was leased from the crown\textsuperscript{74}. In Carrickfergus all customs
were subject to the strangely worded charter of 20 Elizabeth which
divided customs duties 'within the bounds of breare homes and the fair
furlong' between the crown and freemen of the towns two-thirds to the
queen and her successors and one-third to the town\textsuperscript{75}.

The certificate of the judges, which detailed the application of
the principles laid down by Davies against the city of Waterford to the
rest of the port towns, demonstrates once again the extent to which the
novel use of judge-made law emerged as the preferred instrument of
major legal/constitutional change in early Jacobean Ireland. Despite
the decision, however, the major towns continued, throughout the
first half of 1609, to swamp the English Privy Council with petitions
to exempt themselves from the effects of the judicial resolution -
alleging at one point that the absence of an adequately printed and
collated book of Irish statutes had prevented them from preparing a

\textsuperscript{70} BL Harl. Ms. 2138, f.23b.
\textsuperscript{71} BL Harl. Ms. 2138, f.23b.
\textsuperscript{72} BL Harl. Ms. 2138, f.24a.
\textsuperscript{73} BL Harl. Ms. 2138, f.24a.
\textsuperscript{74} BL Harl. Ms. 2138, f.24a.
\textsuperscript{75} BL Harl. Ms. 2138, f.24a.
On 17 January 1609, the English Privy Council, by order of the king, admonished Chichester and the Irish Privy Council for transferring troublesome suits from Ireland to England. It further informed the Irish government that the king, by virtue of the resolution against the towns, wished to inform the municipalities that their former liberties amounted to little more than a temporary arrangement which, in view of the Tudor conquest, could no longer be tolerated.

Despite this doctrinaire backing of the judges' decision the government granted the towns remission from all arrearages due from uncollected customs revenue and, as we have seen, renewed many of the lesser privileges. In Munster almost all the towns were allowed to maintain existing leases of the cocquet of hides for the maintenance of city walls and other public works and Youghal and Galway even succeeded in enlarging their privileges. The port of Kinsale, in recompense for the desolation incurred by the Spanish invasion in 1601, was even freed from the stringent fines for recusancy imposed by the overzealous Lord President Sir Henry Brouncker.

Further developments hastened the application of the judges decision against the towns. With the appearance of an official book of rates and

76. SP/31/8/199/f.449a; CSPI,1608-10, p.190.

77. SP/31/8/199/ff.446a-447a; CSPI,1608-10, p.128.

78. SP/31/8/199/f.417a; CSPI,1608-10, p.133. On 19 January 1609, Galway was exempted from all customs except for the cocquet of hides. The town, like the city of Drogheda, was also made a county. The corporation of Limerick was exempted from poundage and granted the great custom. SP/31/8/199/f.426; CSPI,1608-10, p.139. See also SP/63/227/f.66a; CSPI,1608-10, p.257. On account of its adherence to the Protestant religion, Youghal was granted the cocquet custom and the custom of poundage for the repair of city walls. In the proposed division of County Cork, Youghal was designated the seat of the new shire, the mayor and recorder being assigned as justices of the peace for the town and county. See Davies' letter to Chichester on the grant of the cocquet custom to the Munster towns. SP/31/8/199/f.509.

79. SP/31/8/199/f.447a; CSPI,1608-10, p.129.
the termination of all temporary farming arrangements that followed
the resolution of December 1608, the path lay clear for a centralized
administration of the Irish customs on the English model. By May
1610, Davies boasted his achievement to Salisbury, noting that it was
his own labour and experience that resulted in the successful case against
the towns, and that the customs revenue was now ready to be farmed.
On 18 March 1611, the king issued a directive to the Lord Deputy that
the 'resolution as to the customs' should be enforced and that
collection should begin at once. Unfortunately, obstacles remained.
During the summer of 1611, the Ingram group dispatched Robert Cogan,
who was now surveyor-general of the Irish customs, and William Massam,
a bankrupt associate of Ingram and Cranfield, to Ireland. Ingram,
however, on account of business affairs in England was forced to stay
behind and the government sent Lord Carew, former Lord President of
Munster, in his place.

On 28 July 1611, Chichester wrote to Salisbury that all the towns
were beginning to have second thoughts about the judicial decision of
December 1608 and were deliberately obstructing the appointment of
customs officials in the various ports. Several months later, Cogan
toured the major Irish ports, reporting that the cities of Dublin, Drogheda,
Waterford and Galway still insisted on their privileges, particularly
the exemption of freeman from poundage allowed by the judges in 1608.

80. Bodl. University College Ms. 103, ff.74-80; BL Lansdowne Ms.156 ff.289a-292a; BL Add Ms. 11,402, f.136a; Treadwell, 'The Establishment of the Farm of the Irish Customs', pp.494-495.
81. SP/63/229/f.34a; CSPI,1608-10, p.451
82. SP/31/8/199/f.452; CSPI,1611-14, p.21; Cal. Car., 1603-24, pp.64-5.
84. BL Cecil Papers 196, f.45a; HMC, Salisbury Mss., 21:304-305.
Despite municipal uneasiness, Cogan estimated a potential customs revenue of £211,000 of which about half would come from the port of Dublin. Of the three towns enjoying exemptions of freemen from the collection of poundage, Dublin, Drogheda and Waterford, Cogan estimated a combined commercial traffic yielding a potential value of £170,000/annum. On the basis of these figures, Cogan predicted that the collection of poundage had the potential of yielding a total revenue of £10,500/annum which, on account of the exemptions granted to the freemen of the three privileged towns, reduced the overall figure to about £2,000 a year.

Since the judicial resolution had allowed this exemption, the English government, taking its cue from Davies, made up for its loss by levying an imposition of 12d in the pound on the freemen of the privileged ports for all merchandize imported and exported. This imposition, which caused howls of protest from the towns of Dublin, Waterford and Drogheda is only one illustration of the growing confidence exhibited by the central government in Dublin. During the month of July 1611, the government renewed its attacks on recusancy, issuing a proclamation similar to that of 1605 banning Jesuits and massing priests from the realm and reviving the Oath of Supremacy to purge recusants from municipal office and from the legal profession.

By 1612, the central government succeeded in placing a corps of state customs officials in nine of the port towns. This firm extension


87. See Davies' uncalendared 'Propositions for the Increase of his Majesties' Revenue in Ireland', Bodl. Carte Ms. 61, f.140b; CSPI, 1611-14, p.144; PRO/31/8/199/f.515; CSPI,1611-14, p.230; Morrin, p.208.

88. The 1611 proclamation banning massing priests and Jesuits was the same as the one issued in 1604. See chapter five of this thesis. Lam. Pal. Ms., 629, ff.139a-140a; Cal. Car., 1603-24, p.74; Griffith, p.255.

of royal control yielded within the year an annual customs revenue of £1,500 which in the estimation of the Earl of Northampton, Nottingham's cousin, could be raised to a sum of £8,000/annum\(^90\). As rumour of this potential windfall spread, two groups began to contend for the lease of the Irish customs farm. One was led by Ingram and the other by John Swinnerton, the farmer of French and Rhenish wines in England, who had unsuccessfully bid for the farm of the English customs in 1604.

In the end, the contending parties reached an agreement in which a number of familiar names reappear. While the original lease bore the names of Arthur Ingram, Richard Calthorpe, Martin Freeman and George Law, it is known that the active partnership included almost all those who laboured to bring about a successful conclusion to the farm of the Irish customs. These persons included Lionel Cranfield, John Bingley, Robert Cogan, William Massam and Thomas Waad. The terms of the new arrangement called for a lease of 9\(\frac{1}{2}\) years with an annual rent of £12,000 to be paid in six month instalments of £6,000 to the English exchequer\(^91\).

This firm installation of a consolidated administration of the Irish customs, based on the judicial resolution reported by Davies in 1608, eventually succeeded in transforming the almost non-existant customs revenue into one of the main pillars of state income. Dr. Treadwell, who has thoroughly examined the reform of the Irish customs administration during the reign of James I, provides some interesting statistics to show the contribution made by the customs to government finance. In 1606 and 1607, at the time of Treasurer-at-War Ridgeway's initial enquiry into the Irish customs revenue, the income derived from the Irish customs amounted to only £574/annum. During the period 1623-24, the same revenue rose to the unprecedented net income of £9,000/annum\(^92\).

90. Spedding, Bacon's Works, 4;358-360.
91. Leeds Public Record Office: TN/P07 III(3); Treadwell, 'The Establishment of the Farm', pp.600-601.
When examined against the whole of Irish revenue, these figures assume even greater significance. During the period 1607-1608, annual crown revenue stood at £21,648 of which only £700 or approximately 1/30th was derived from the customs. In 1623 the customs amounted to £10,783 or 30 per cent of a total annual revenue of £37,000. With the general reduction of the military establishment, the consolidation of the Irish customs administration helped to limit the massive inflow of English money to finance the high cost of Irish administration. By the end of the reign of James I, the customs revenue, in combination with income derived from a revitalized administration of Irish wardship, became one of two pillars of government finance that lasted until the outbreak of the civil war.

Davies' role in shaping this achievement has never been entirely recognized. In general agreement with earlier historians who dismissed the judicial proceedings against the towns as so much legal casuistry, Dr. Treadwell has gone so far as to deny the authority of the resolution against the towns. In a recent article, Treadwell stated that the resolution reported by Davies against Waterford and the towns was not binding, and that it was only the fortuitous acquiescence of the towns that prevented the re-opening of time consuming *quo warranto* proceedings against the towns before the Irish court of King's Bench.

We now know, however, that the government's application of this

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96. Treadwell, 'The Establishment of the Farm', p.593.
decision fell in line with the attitudes of contemporary jurists outlined in the second chapter of this thesis. This is particularly evident in official correspondence between the king, the English Privy Council and the Irish Privy Council during the spring and summer of 1611 when the ports of Dublin, Drogheda, Waterford and Galway began to drag their feet, seeking further concessions to enhance their claims to the customs revenue and to maintain their exemption of freemen from poundage. In a royal directive dated 15 March 1611, the king wrote to Chichester ordering that the 'resolution of the customs of Ireland' be put in force. In further correspondence with the Irish executive during July 1611, the English Privy Council reaffirmed the resolution of the 'Lord Chief Baron, the barons of the Exchequer of England, the King's learned counsel of England and his Attorney-General of Ireland'. A third directive written during September 1611 again referred to the resolution of 1608 as the authority upon which the crown justified its claims to the long-dormant customs revenue. This preference to execute a major change in the relationship between the towns and the central government by judicial fiat can be understood, once again, as a response to fears of opposition within the Irish parliament. This anxiety, in view of the mandates controversy and the quo warranto proceedings against the towns, was confirmed in the parliament of 1613-1615, when the government attempted to terminate the various exemptions granted to the freemen of Dublin, Waterford and Drogheda from the levy of poundage and, in select cases, from the great and petty custom.

97. SP/63/231/f.62a; CSPI,1611-14, p.21; It is interesting to note that on 29 May 1609, the resolution of the judges in England was enrolled in the Irish Court of Exchequer, PROI, Ferguson Ms. 11, f.176.
The bill, however, met with a strong and determined resistance which successfully countered the government's attack. Existing but fragmentary evidence indicates that the upper house introduced the bill on October 14, 1614. Four days later the bill was engrossed and transmitted to the lower house by John Blennerhasset and Robert Oglethorpe, Lord Barons of the Exchequer. On 19 October, the bill received its first reading and was trenchantly opposed by Richard Bolton, the former Recorder of Dublin, who had so staunchly advocated that city's cause in the litigation before Serjeant's Inn during December 1608. Sir Oliver St. John, former Master of the Ordnance, attempted to deflect Bolton's speech on procedural grounds, claiming that 'none could speak to a bill at first reading.' At this juncture it appears that foes of the bill succeeded in manoeuvring it into the committee for examining privileges of the house from which it never emerged for a second reading.

This determined resistance meant in the end that the judicial resolution reported by Davies provided the sole legal basis for a reformed customs administration that demolished the old political equation linking crown policy to the interests of the towns. The firm installation of a state bureaucracy to collect the long neglected customs revenue secured a fundamental shift in the relationship between the central government and the towns. In the wake of the Tudor conquest, the dismantling of the medieval lumber of corporate privilege which resulted in an extension of a national customs administration in the port towns was accomplished not by statute law, but by the extraordinary conclave of English and Irish justices at Serjeant's Inn in London.

101. See also the fragmentary journal of the proceedings in the Irish House of Lords. BL Add. Ms, 4792, f.94a; Treadwell, 'The House of Lords in the Irish Parliament', EHR, 80 (1965) p.100.

102. The Journals of the House of Commons of the Kingdom of Ireland, (Dublin, 1753) 1:16.

103. Ibid., 1:17.
THE CASE OF MIXED MONEY

In discussing the events in the Munster towns during the spring of 1603, conventional historiography has understandably drawn attention to the obvious religious and jurisdictional undercurrents to the civil disturbances in the major corporations. Davies' Reports, however, reveal a less visible but equally significant motive of purely economic origin. This economic variable enters into the equation of Anglo-Irish political and religious difficulties as a result of the government’s disastrous attempt to finance the cost of Tyrone's rebellion through a royal proclamation dated 20 May 1601 debasing the Irish coin from 9 oz. fine to 3 oz. fine of silver. The subsequent failure to withdraw the old sterling money from the economy, combined with the government’s inability to circulate the base coin at face rather than intrinsic value, rapidly inflated the price of grain and other foodstuffs. Increased prices were further aggravated by the refusal of merchants to accept the base coin in commercial transactions, which led to the disruption of the vital subsistence links connecting England with the port towns. The unrest launched by the appearance of the base coin was the subject of frequent complaint, and the role of the bogus shilling in feeding the fires of anarchy in the corporations has not received the attention it deserves.

1. SP/63/208 Part II; ff.76a-101a; CSPI,1600-01, p.350; Lam. Pal. Ms. 617, f.204a; Cal. Car., 1601-03, pp.67-68.

2. Dr. C.E. Challis devotes several pages to Elizabeth's Irish debasement in his recent study: Tudor Coinage, (Manchester, 1978) pp.268-274.
I.

This oversight is particularly striking when balanced against remarks by contemporaries. The comments by Lord Deputy Mountjoy and Solicitor-General Davies illustrate the difficulties caused by the new coin. In his march south to subdue the unruly towns, Mountjoy blamed the base money for aggravating municipal discontent and confided to Cecil that:

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..... The discontentment of the coin is infinite and more insupportable to us all for it is generally refused. I know of no way to make it current where I go but by the cannon. 3
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Six months later, Sir John Davies, newly arrived in Ireland, observed that corporate unrest over the base coin continued, and that riots in Galway had caused the Lord Deputy to commit 'divers tradesmen for refusing to accept the base coin.'4 Davies’ reference to the Galway disturbances and Mountjoy’s comments on the deteriorated coin serve to underscore the seriousness of the problems created by Elizabeth’s billon coin. In view of contemporary testimony, it is surprising to find that the history of Elizabeth’s Irish debasement has neither been fully told, nor placed within its proper political context.

If indeed the constitutional revolution inaugurated by the judicial resolutions against the native tenurial system and those enforcing religious conformity in the Pale and port towns were to be taken seriously, a means had to be devised to restore public confidence in a national monetary system that reflected the extension of English rule to the whole of Ireland. The validity of this public law context to the problem of

4. SP/63/215/f.261b; CSPI,1603-06, p.112.
the base coin is best illustrated by Davies' comment on the utility of a national monetary system.

\[\text{\ldots.. In every commonwealth, it is necessary to have a certain standard of money. For no commonwealth can subsist without contracts, and no contracts without equality, and no equality without money.}\]

Recognizing the constitutional significance attached to the crisis in confidence over the Irish coinage, the Irish government employed a style of law reform consistent with the reforms it had applied to other thorny issues of public law. Thus the reform of the Irish coinage was also executed by judicial fiat stemming from a collective resolution of all the justices of the realm. As with the Case of the Bann Fishery, the judicial resolution concerning the validity of the debased coinage depended almost wholly on legal principles drawn from continental civil law.

To appreciate the political context surrounding the Irish coinage issue, the 1601 debasement must be examined against the rising cost of the Irish wars, and more particularly, the gross expenditure resulting from the Earl of Essex's failure to score any success against Tyrone. The story of Essex's return to England and subsequent fall from grace has been well told, and there is nothing more to add to that sad narrative. Nonetheless a quick review of the cost incurred by the Essex fiasco serves to justify the Queen's displeasure with her former favourite.

According to Professor Dietz, Essex's leisurely progress through Leinster and Munster in the summer of 1599 ran up a cost £280,000, an expenditure that inaugurated a vicious spiral in military spending that did not end until spring of 1603. In the wake of Essex's departure from Ireland, Tyrone pillaged the borders of the Pale and conspired to bring in troops from Spain. As military tension increased, the English

5. Davies, Reports, p.50; The Case of Mixed Money may also be found in: T.B. Howell, State Trials, (London, 1816) 2:114-130.
government, between March 1600 and March 1601, invested a further £206,673 in the Irish morass. Still the war continued. From March 1601 until April 1602, Spanish intervention resulted in a further investment of £415,401, and an English victory at Kinsale did not prevent a return to the small unit savagery of earlier campaigns in Ulster. From 1 April 1602 until 30 September 1603, Tyrone's rebellion consumed another £125,795. At war's end in April 1603, the total cost of the Nine Years War came to the staggering sum of £1,045,696. If this figure is compared to the £1,419,496 spent on military subvention in the Low Countries during the period 1585-1603, the rising of Hugh O'Neill clearly emerges as the most expensive of Elizabeth's wars. It is not surprising, therefore, that the soaring Irish war debt inspired the English Privy Council to pay off a substantial portion of Tyrone's rebellion in bad coin. It should be noted, however, that the debasement of the Irish coin which began in 1601, had a number of antecedents, and a review of the history of the Irish coinage is necessary to put the Elizabethan debasement in a proper historical setting.

Until recently, Irish numismatics was a relatively neglected field, broken only by occasional antiquarian research. During the last five years, however, Michael Dolley and C.E. Challis have remedied this absence of scholarship with several preliminary studies on the history of the Irish monetary system. To understand the Elizabethan debasement of 1601, it will be helpful to review briefly their research, which indicates that the alteration of the Irish coin in 1601 had several medieval and early modern antecedents. It is worth noting that from the

7. BL, Lansdowne Ms. 156, f.253.
8. BL, Cecil Ms. 92, f.68a; HMC, Salisbury Mss., 15:1-2.
thirteenth to the mid-fifteenth centuries, all coins minted in Ireland corresponded in intrinsic value to English coins of the same weight and denomination. This monetary Union between England and Ireland existed not for reason of political amity, but to further the massive transfer of Irish sterling to finance the ambitions of Plantagenet kings. By 1460, however, the wholesale removal of Ireland’s silver reserves inspired the Irish parliament to initiate protective legislation to prevent further withdrawal of Irish specie. In what amounts to the first debasement in Irish history, the Drogheda parliament reduced the intrinsic value of the Irish coin by 25 per cent, lowering the silver content of the Irish shilling from 11 oz. fine to 9 oz. fine of silver. The significance of this action lies in the official standardization of intrinsic values between English and Irish coins at the ratio of 3:4 - a measure which lasted, with a few exceptions, for the next 150 years. At a practical level, the demise of the monetary union between the two kingdoms meant that an Irish groat or four-penny piece contained only three penny’s worth of silver, or conversely, an English shilling circulated in Ireland brought a premium of 16 Irish pence. It needs to be stressed, however, that unlike subsequent alterations of the Irish coin, the statutory debasement of 1460 was self-imposed by the colonial community and represented a debasement by weight rather than alloy. As Dolley has shown, the initiative taken by the 1460 parliament succeeded in cutting off the outflow of Irish silver by tarriffing the Irish coin at a value less than English coins of the same denomination.

In the sixteenth century, alterations of the Irish coin, insofar as they were imposed by the metropolitan rather than the colonial government, differed considerably from the protective measures set down by the parliament of 1460. This is to say that the debasement policies

10. Ir. St. 38 Hen. VI c.11; M. Dolley, 'Anglo-Irish Monetary Policies, 1172-1637' pp.52-53.
pursued by Tudor monarchs, which were exploitative and opportunistic in nature, were dictated by the debilitating cost of military subvention engendered by frequent revolt. This pattern emerged first in the reign of Henry VIII. To balance the £40,000 spent in subduing the Geraldine revolt, the Henrician government, between 1534 and 1546, gradually lowered the intrinsic value of the Irish coin from the nine ounce standard set down by the Drogheda parliament to an alloy or billion coin composed of only three oz. fine of silver\textsuperscript{11}. This base issue was notable for its novel appearance. Struck in shillings and groats, the new coin bore on the obverse a crowned shield with the arms of England and France, and on the reverse, for reasons which are still not understood, a crowned harp. The new 'coin of the harp' as it was called by contemporaries, was also distinctive for its epigraphy which heralded, beginning with the issue of 1541, the new constitutional relationship between England and Ireland by substituting Rex for Dominus on the coin's reverse. This 3 oz. base coin continued to be struck during the reigns of Edward and Mary, and Elizabeth's first coins, struck in shillings and groats in 1559, were as disreputable as those struck by her three predecessors. It was not until 1561 that the base coin of 3 oz. fine of silver was replaced by a sterling issue approximating the ratio of 3:4 set down by the Drogheda parliament in 1460. As Dolley has shown, the new coin, struck in shillings and groats, consisted of an alloy of 90 per cent silver\textsuperscript{12}. The 1561 issue was also distinctive for its reverse impression

\textsuperscript{11} C.E. Challis, 'Tudor Coinage', pp.101-109; M. Dolley, \textit{op. cit.}, New History of Ireland, pp.408-411.

\textsuperscript{12} Dolley, New History, p.412; The whole range of Irish coins from the Middle Ages to the present may be seen in the Ulster Museum in Belfast.
that featured three small harps in place of the single harp struck by Henry VIII, Edward and Mary. The intrinsic value of the new coin, when juxtaposed to the base money issued by Elizabeth's predecessors, must have led to extensive hoarding, because circulation of the revalued coin seems to have been limited.

II.

The outbreak of the Nine Years War in 1594 tempted the English government once again to revalue the Irish coin along the lines set down by Henry VIII, Edward and Mary. As previously mentioned, the prohibitive cost of O'Neill's rebellion led to massive expenditure of English silver. In 1600, George Carey, the Irish treasurer, complained to Cecil that the Irish wars:

..... exhaust the treasure of England, that the state of England doth ever groan under the burden thereof, and that we expend faster here than you can gather it in England.13

In response, Elizabeth returned to the three ounce standard set by her three predecessors, and the new coin, which appeared on 24 May 1601, was struck in shillings, sixpence and three pence pieces. This currency bore on the reverse a crowned harp, and on the obverse the arms of England which replaced the royal portrait featured on the sterling issue of 1561 and on coins struck during the reigns of Edward and Mary14.

In addition to the altered silver coin, the English government also sent to Ireland, for the first time, an enormous quantity of copper pence and half-pence to serve as a medium of exchange for petty consumer transactions and payment of wages. Despite the unpopularity of the copper money, it gained grudging acceptance and undoubtedly helped to facilitate

14. SP/63/213/f.151a; CSPI, 1601-03, p.629.
the expansion of a money economy.

Few clues survive to trace the exact origins of the decision to alter the Irish coin in 1601. As previously shown, Sir Roger Wilbraham who served as Solicitor-General for Ireland from 1586 to 1603, claimed on the day of Salisbury's death in 1612, that Robert Cecil alone was instrumental in determining Irish policy\(^\text{15}\). This comprehensive statement, insofar as it affected the 1601 debasement, was confirmed by a letter written to Cecil by Thomas Hayes, the man responsible for coining the new money, sometime during 1602. According to Hayes, it was Cecil who convinced the Lord Treasurer and the queen of the plan's utility\(^\text{16}\). Within the English Privy Council itself, there appears to have been little disagreement over the decision to alter the Irish coin. It is worth noting, however, that Wilbraham's diary account of the English Privy Council's deliberations demonstrates an awareness of the evils traditionally associated with debasement. Recognizing that their decision would probably condemn the army and civil populace to rapid price inflation, the Privy Council defended its position on strategic grounds. The debasement would, they argued, cut off the flow of specie into the hands of Tyrone who was known to employ English sterling money to purchase arms and munitions from Spain\(^\text{17}\).

Whether the Privy Councillors actually believed that a wholesale debasement of the Irish coinage would cut Tyrone off from continental support is not clear. Contemporary observers in Ireland, however, were not so convinced of this argument which was faulted on a number of grounds.

15. Wilbraham's observations on Cecil can be found in his diary which is printed in *Camden Miscellany*, 10 (1902) p.106.

16. For Hayes' plan to alter the coinage see: SP/63/209/ff.352a-352b; CSPI,1601-03, p.225; SP/63/212/f.244a; CSPI,1601-03, pp.543-544; BL, Harl. Ms. 38, ff.225a-236a.

In the first place, tantalizing references in the Irish State Papers indicate that it was Spanish rather than English coin that served as the primary means of monetary exchange within O'Neill's autonomous Gaelic lordship. Whether this Spanish coinage originated from the Armada wrecks is doubtful, but it is interesting to note a proclamation issued by Tyrone on 23 January 1601 directing that Spanish coin, on penalty of death, would pass as current money within his territories. But even if we admit that alteration of the coin would result in the withdrawal of specie from rebel hands, there is evidence to show that the illicit supply of arms ran unabated. Allegations of a clandestine arms trade between unscrupulous merchants in the port towns and the northern rebels were too emphatic to ignore. Yet apart from the seedy transactions of renegade gun-runners, an anonymous discourse written in 1602 has greater plausibility. The absence of specie, the writer argued, could have little permanent impact on a semi-nomadic society whose basic commodities of tallow, sheepskin and wool served as ample exchange to purchase the sinews of war. Despite official claims to the contrary, the debasement of 1601 can more clearly be seen as an attempt to dump a large part of the colossal Elizabethan war debt on the army and civil population in Ireland.

Providing, of course, that the government could circulate the base money at face rather than intrinsic value, this last attempt to alter the coin promised to yield enormous profit to an impecunious crown. The government's potential return is best illustrated by Dr. Challis' figures on the intrinsic values of the silver and copper metal employed in manufacturing the new coin. One pound of silver valued at 16s 1d

18. SP/63/208/Part 1/f.43a; CSPI.1600-1601, p.158; SP/63/207/Part6/f.321a; CSPI.1600-1601, p.126; SP/63/208/Part1/f.41a; CSPI.1600-1601, p.158.
19. SP/63/208/Part 1/f.43a; CSPI.1600-1601, p.158.
would yield, when coined into base money, a face value of 62 shillings. Similarly one pound of copper worth 61d would circulate at a face value of 16 shillings. Stated more clearly, the total face value of the base money, amounting to £307,281 cost the English government only £64,526 to produce. It should be stressed, however, that full realization of the expected profit depended on the government's ability to ensure confidence in the new coin, which in turn depended on the successful withdrawal of the 9 oz. sterling money from the Irish economy. To facilitate this withdrawal, the proclamation establishing the base coin forbade the circulation of all sterling and foreign money by decrying it as bullion. The edict also established a second control measure by erecting exchange banks in the cities of Chester, London, Dublin, Cork, Galway and Carrickfergus where sterling was to be exchanged for the new base coin.

In theory, the purpose of the exchange was to serve as a collection point for the old sterling money and to monitor more closely the movement of trade into Ireland. An examination of the mechanics of the exchange serves to elucidate the government's intentions. According to the proclamation, all persons, including soldiers and servitors returning to England, were required to turn in their base Irish money for bills of exchange in England drawn in English sterling at the rate of 21 shillings Irish for every English pound. Conversely English merchants trading in Ireland were to receive 21 shillings Irish for each pound sterling turned into the exchange. Since the wages of most soldiers and servitors were consumed in Ireland, the success of the scheme depended on the willingness of merchants to comply with the exchange regulations and to refrain

22. C.E. Challis, Tudor Coinage, p.272; For production costs see Carey's accounts: PRO E351/239; E351/239/286; A01/289/1086; See also: SP/63/209/Part 2/f.425a; CSPI.1601-03, p.248.

from raising prices for commodities traded in base money. Within a year, complaints by the Irish Privy Council dimmed expectations of merchant co-operation and seriously reduced official optimism of realizing a profit from the base money.

In the spring of 1602, Robert Morgan, the master of the Cork exchange, reported that he had not taken in any of the old sterling harps 24. Despite the provisions of the proclamation, the old coin continued to circulate, and from 2 May 1601 to 31 March 1602, the Irish Lord Treasurer Carey's accounts show that only £19,093 17s 3d of the old sterling money passed into the net of the Irish exchange 25. Indeed for the two year period encompassing the debasement, only £40,680 3s 8d of the old sterling harps were collected. When balanced against the £297,070 3s 4d paid out by the English Exchequer in sterling money for Irish bills of exchange, it appears that the control measures set down to regulate the transfer of currency leaked like a sieve 26.

The co-existence of two standards of money allowed unscrupulous merchants to exploit the different intrinsic values of old and new money by deliberately inflating the price of commodities paid in base coins to double or triple their former value. The persistence of the decried money can best be explained by the rather low premium of 5 per cent given for its redemption in the exchange. This led to hoarding and to clandestine trafficking in the old coin by merchants at a premium of 50 to 100 per cent more than the government rate. As Robert Morgan, the master of the Cork exchange, wryly commented, 'Her Majesty's exchange must needs fail where she is outbidden' 27. In rural areas, sharp traders

24. SP/63/210/f.65a; CSPI,1601-03, p.280.
25. These figures differ slightly from those provided by Dr. Challis. See E351/239.
26. E351/239; E351/266; A01/289/1086; A01/289/1082.
27. SP/63/210/f.65a; CSPI,1601-03, p.281.
dealing in whiskey, wine and cloth were known to insist on payment in the decried harp shilling without informing their clients of the difference between the two coins. Morgan informs us, however, 'when required to forego the old money, merchants would quickly learn them the difference.' The failure to withdraw the old money was further complicated by an extensive net of counterfeiting. On 4 July 1602, Richard Hadsor, an Irish servitor, complained to Cecil that a Breton goldsmith counterfeited coins of the new standard selling his bogus money at the rate of £100 sterling for every £1,000 of counterfeit base money.

Six months before Carew, the Lord President of Munster predicted that the exchange would be jeopardized by counterfeiter, and that Tyrone himself had set up a counterfeit mint at Dungannon to exploit the chaos inflicted by the debasement. These and other abuses led, on 9 June 1602, to a second proclamation designed to establish more stringent controls on the exchange.

This second proclamation attempted to accelerate the removal of the old sterling harps by stipulating that 25 per cent of the total exchange must be submitted in the old sterling money. As a further control to prevent unlawful transactions in sterling money, merchants exchanging base money were required to submit a customs certificate to the exchange master accounting for the value of merchandise sold in Ireland. This certificate, when compared to the amount of base money exchanged for sterling, would reveal unreasonable profits and expose clandestine commerce in the old sterling money. As a concession to the military and civil establishment, the proclamation exempted soldiers and servitors from the

28. SP/63/210/f.65b; CSPI.1601-03, p.281.
29. SP/63/211/f.205a; CSPI.1601-03, p.432.
30. SP/63/210/f.64a; CSPI.1601-03, p.280.
requirement to submit 25 per cent of their exchange in sterling. To
discourage speculation among soldiers and servitors, however, any exchange
in excess of an individual's salary was subject to the same restriction
imposed on the merchant class. The proclamation also established
punitive measures to discourage unlawful circulation of the decried coin.
All persons apprehended for either hoarding or trafficking in the nine ounce
sterling coin were subject to fines and/or imprisonment with rewards of
up to one half of all confiscated coin to be paid to informers.  

Despite these restrictions, the second proclamation succeeded no
further than the first in withdrawing sterling from Ireland - a fact that
is confirmed by frequent illustrations of merchant fraud in the Irish
state papers. In order to understand the collapse of the exchange, it will
be useful to examine some of the devices used to circumvent the exchange
regulations. One anonymous compendium of merchant abuse, dated November
1602, serves to demonstrate the extent of commercial misconduct performed
by merchants against the exchange. In particular, this document accuses
the merchants of Cork, Galway, Kilmallock and Youghal of trafficking in
sterling money, buying up £200 Irish for £100 English money and turning
the base money into the exchange at a handsome profit. Another favourite
abuse seems to have involved processing bills of exchange under other
men's names. This subterfuge was practiced by Richard Martin, an
English goldsmith who attempted to conceal clandestine sales of plate
by transferring his profit of £100 onto a bill of exchange submitted by
a London haberdasher named Arnold. Arnold willingly subscribed to this
scheme, but under interrogation by suspicious exchange officials, later
confessed his complicity in furthering Martin's fraud. Such
transactions were difficult to detect, and frequent references to this

31. SP/63/211/f.139a; CSPI,1601-03, pp.407-409; Lam. Pal. Ms. 617,
f.264a; Cal. Car., 1601-03, pp.246-247.
32. SP/63/212/f.148a; CSPI,1601-03, p.511.
33. SP/63/212/f.146b; CSPI,1601-03, p.509; BL, Cecil Ms. 91, f.139a; HMC, Salisbury Mss., 12:648.
particular abuse in the state papers seems to demonstrate its popularity among dishonest merchants. There is, however, one more example worthy of consideration.

This last illustration of commercial misconduct involves a clandestine liquor trade between English merchants and rebel forces in Ulster which served not only to defraud the exchange, but also to demonstrate the impossibility of drawing commerce and money away from the rebel forces. In this case two London merchants, Gunter and Bowling, were discovered buying up many tuns of white *aqua vitae* on the London market at 2s 8d per gallon. From London, Gunter and Bowling shipped their cargo to Carrickfergus where an agent off-loaded the *aqua vitae* and adulterated it with a 'yellowish stain'. Following this metamorphosis, a middleman, one 'Moses Hill of the isle of Magee', marketed the concoction to rebel forces, selling it as genuine Irish whiskey at a price of ten shillings a gallon - a mark-up of 500 per cent. Since Tyrone maintained a counterfeit mint at Dungannon to imitate the base shilling, it is possible to infer that our English bootleggers may have been paid in bogus coin which was then returned to the exchange. English officials found particular annoyance with this clandestine liquor trade, because alcohol was seriously esteemed as one of the principal provisions of the rebel army. One English official, complaining of the great strength and comfort alcohol gave to the rebels, confessed that 'our English nation cannot devour such quantities for it is known they do not much accustom to drink thereof'. Even in the sixteenth century, the Irish were renowned for a prodigious capacity for strong drink.

Given these illustrations of continued commercial misconduct, it appears that the restrictions laid down by the second proclamation

34. SP/63/212/f.147a; *CSPI, 1601-03*, pp.509-510.
35. SP/63/212/f.147b; *CSPI, 1601-03*, p.510.
succeeded no further than the first in withdrawing the old sterling money from the economy. The inability of government officials to prevent merchant fraud led, on 24 January 1603, to a third proclamation that established more severe exchange regulations. To speed the withdrawal of sterling from the economy, the third proclamation increased the sterling requirement for merchants changing base money to sterling from £25 to £40 sterling for every £100 turned into the exchange. As a further measure to protect the exchange, the proclamation reduced the number of exchange banks from six to two, leaving only London and Dublin to satisfy outstanding bills. The results insofar as they affected Anglo-Irish trade and the vital supply of foodstuffs to the port towns were disastrous. Impatient with the extreme distance involved in travelling to London to satisfy bills of exchange, English merchants from Chester, Lancashire and Wales expressed their contempt over slack payment of bills by withdrawing completely from Irish commerce. The stoppage of trade is reflected in numerous references to food shortages in the municipalities. In January 1603, for example, John Tirrell, the mayor of Dublin, complained to Cecil of acute grain shortages in the city. He further advised the secretary that only an emergency grain shipment from England paid for in English sterling could prevent starvation conditions. In further comment on the shortage of provisions in the port towns, the Irish Privy Council blamed the merchants who 'refused to import things from abroad alleging their slack payment of their bills whereby they are not able to hold traffic'.

37. SP/63/212/f.299a; CSPI,1601-03, p.561; BL, Cecil Ms., 91, ff.122a; 139a: HMC, Salisbury Mss., 12: 624 & 646.
38. SP/63/212/f.269a; CSPI,1601-03, p.551; For further complaints by the Dubliners see: J.T. Gilbert, Calendar of the Ancient Records of Dublin, (Dublin, 1891) 2:283.
39. SP/63/212/f.298b; CSPI,1601-03, p.560.
end of February, only slightly more than one month before the Munster disturbances, Lord Deputy Mountjoy warned Cecil that, on account of the bad coin, prices had risen four-fold and not even his own salary was sufficient to provide a living commensurate with his high office.

Given the testimony of contemporaries, it seems possible to infer that the English government unwittingly jeopardized the subsistence trade links between England and Ireland by reducing the number of exchange banks in Dublin and London. Since bread serves as the traditional rallying cry of most revolts, we may assume that the base money, insofar as it disrupted trade and helped to inflate commodity prices beyond the reach of the civil populace, served as an important backdrop to the municipal revolt in 1603. Indeed Mountjoy's comment on the base coin, made during his hurried march south to subdue the Munster insurrection, that he 'knew no way of making the base money current, except by the cannon' provides a fitting epitaph for the last Tudor debasement in Ireland.

Recognizing the vital role of English commerce in victualling the Irish towns, James I took it upon himself to revive Anglo-Irish trade by issuing a proclamation setting the base coin at a value consistent with its silver content. Thereafter base shillings were tariffed as groats with other coins decried proportionately according to their denomination. It was deemed necessary, however, to encourage retail transactions by continuing circulation of the copper money at its face value. This reduction of the base money to its intrinsic value was followed by the appearance in 1603 of a new Irish coin bearing, on the reverse, a crowned harp and on the observe, a portrait of the new king.

40. SP/63/212/ff.335a & b; CSPI, 1601-1603, p.571.
42. SP/14/1/28; CSPD, 1603-10, p.3; CSPI, 1603-06, p.87; BL, Cecil Ms. 99, f.118a; HMC, Salisbury Mss., 15:49-50.
Issued in denominations of shillings and half-shillings, the Jacobean coin contained nine ounces fine of silver and was therefore consistent with the standard laid down by the parliament of 1460. This is to say that English money, allowed after 1607 to circulate freely within Ireland, enjoyed a premium of 25 per cent over Irish coins of the same denomination. In 1607, the government also removed the base coin from circulation. The disappearance of the base money and free circulation of English sterling represents, in effect, a return to the two tier currency system set out by the parliament of 1460 and after 1607, separate Irish coins ceased to be struck altogether.\(^{43}\)

III.

Although the proclamation restoring the harp shilling to the nine oz. standard revived the vital subsistence trade between England and the Irish towns, the edict failed to put an end to further disagreements, frauds and controversies over the mixed money. The Irish state papers continued to focus government invective against commercial interests, singling out merchants for profiteering on the base coin by purchasing it at a price less than its silver content. This subterfuge was facilitated by dishonest brokers who convinced the local populace that the silver content of the base money consisted of less than three oz. fine.\(^{44}\) Another problem arose over the term sterling which unscrupulous merchants and landlords misrepresented to imply an obligation to pay sixteen pence Irish, the intrinsic or silver value of English shillings circulating in Ireland.\(^{45}\). This second difficulty continued unabated in


\(^{44}\) SP/63/215/f.265b; CSPI.1603-06, p.115.

\(^{45}\) For problems over the precise value ascribed to sterling money in Ireland see: James Simon, An Essay Towards An Historical Account of Irish Coins, (Dublin, 1749) p.110.
Ireland until 1637 when a royal proclamation laid down the regulation that 'all accomptes, receipts, payments and issue of his majesties moneys in Ireland' would be rendered and accounted in English rather than Irish money.  

Particular confusion arose, however, over a third issue involving payment in base money for debts incurred prior to the debasement. This last impropriety seems to have dealt largely with contracts negotiated for Irish trade in England payable in English rather than Irish money. Following the debasement, such commercial contracts commonly attempted to guarantee payment in English sterling—thereby avoiding the Irish exchange requirements. But by the summer of 1604, controversies concerning payment of the base coin for obligations antecedent to the debasement precipitated a major constitutional crisis by questioning the validity of the base coin to pass as legal tender for payment of public and private obligations.

The incident that provoked the crisis in confidence over the base coin arose from litigation between an Irish merchant, one Brett of Drogheda, and an English merchant from London named Gilbert. In brief, Brett purchased wares from Gilbert to the value of £200, £100 to be paid in advance and the balance to be paid at some future date at the tomb of Earl Strongbow in Christchurch Dublin. Following the proclamation decrying the Irish coin from 9 oz. fine to 3 oz. fine of silver, Brett tendered his debt in base Irish money which led Gilbert to bring suit to recover Brett's debt in English sterling. The significance of this case was not lost on contemporary Irish jurists and Solicitor-General Davies reported that:

46. The proclamation may be found in the above, p.116.
47. SP/63/210/f.295a; CSPI,1601-03, p.355; CSPI_1601-03, p.lxix; Davies, Reports, p.49.
48. Reports, p.49.
Inasmuch as this case related to the kingdom in general, and was also of great importance in consideration of reason of state, Sir George Carey, then Lord Deputy and also Treasurer, required the Chief Judges, being of the Privy Council, to confer on and consider this case, and to return their resolution on it. 49

Similar to the pleadings used in the Case of the Bann Fishery, Davies' arguments to support the resolution validating payment made in the base money also rested heavily on legal principles drawn from continental civil law. This further illustration of argument from Roman law in early seventeenth-century common law litigation assumes particular significance through examination of the three basic legal principles involved with Brett of Drogheda's refusal to tender his obligation to Gilbert in English sterling rather than base Irish money. In their deliberations, the Irish justices resolved the case on three general principles dealing with (1) the prerogative (2) the nature of sterling money and (3) the time of payment. In pleading to support the prerogative of coining money, Davies' argument that all proclamations concerning the minting of money possess the power of statute relied heavily on some of the more authoritarian and absolutist doctrine of sixteenth and seventeenth-century civil law. In his use of sources, Davies demonstrated a striking awareness of foreign jurisprudence dealing with the minting of money. Indeed on the basis of his citations, it appears that the majority of the civil law references used in the crown's brief were culled from a compendium of civil law treatises entitled De Moneta edited by Rene Budelius in 1591. 50 As a civil lawyer responsible for supervising the Bavarian mint, Budelius enjoyed a reputation among contemporaries for being one of the most learned authorities on the public law of minting money. And indeed, it was Budelius whom Davies cited as one of the

49. Davies, Reports, pp. 49-50.
50. René Budelius, De Monitis et Re Nummaria, (Köln, 1591); For Budelius see: Biographie Universelle Ancienne Et Moderne, (Paris, 1843) 6:112.
principal authorities to establish a prerogative right for English
monarchs to alter the intrinsic value of money. According to Budelius,
any alteration of a national currency could be carried out by royal or
imperial edict without the consent of a national assembly. Davies found
further support for the English prerogative by citing from a tract
written by the Spanish canonist Leyva Covarríus. As Bishop of Segovia
(1563) and president of the Castilian senate, Covarríus was also the author
of an influential treatise concerning the public law of coining money.
The Spanish bishop proved particularly useful for the Irish justices,
because he denied the need to consult national assemblies to alter money
in time of war. Having thus established the English monarch's right
to alter the coin, Davies justified the use of civil law principles in
common law litigation by saying simply that the 'common law of England
agreed well with the rules of the civil law', without showing any con-
vincing parallels in the common law.

The next issue resolved by the Irish justices dealt with the question
of whether or not the base money tendered by Brett of Drogheda could
lawfully be taken as sterling money. To resolve this difficulty, the
Irish justices sought to establish a one to one ratio between the base
Irish and English sterling money of the same denomination by setting
forth the etymology and historical development of sterling money in
England and Ireland. In an impressive display of learning, Davies
sketched out the common origins of sterling money in the two kingdoms by
citing, once again, a number of continental jurists. The method
employed differed, however, in tone and argument from the civil law

51. Davies, Reports, p.60; J.F. Van Schulte, Die Geschichte der
Quellen Und Literatur des Canonischen Rechts, 3 vols. (Stuttgart,
1875) 3:721; Leyva Covarríus, Veterum Collatio Numismatum Cum his,
Quae Modo Expendatur Publicae & Regia Authoritate Percusa,
(Salamanca, 1582) pp.51-52.
52. Davies, Reports, p.54.
53. Davies, Reports, pp.61-69.
citations used to uphold the English monarch's prerogative of minting money. In this instance, continental jurists served Davies' argument in a negative way. This is to say that, to establish the etymology of sterling, Davies felt constrained to correct the errors of Covarrius and Renattus Choppinus, a sixteenth-century French civilian, who, being misinformed by Polydor Vergil, held that the word sterling evolved as a diminutive form of the Latin verb *stare* which was then stamped on English coins. Equally mistaken, Davies assured the court, was the historian Camden's argument that the name sterling derived from the coining of money in Sterling Castle in Scotland. To correct these mis-statements, Davies cited Mathew Paris' *Chronica Majora* in which the word sterling is clearly shown to derive from the word 'Esterling' a name applied to the Ostmanni or Vikings who 'were the first to coin money not only in England, but also in Ireland'. After using the Vikings to establish the existence of sterling as current money common to both England and Ireland, Davies then upheld a one-to-one ratio between the sterling base coin of Ireland and the sterling money of England by resorting to some truly extraordinary mental gymnastics derived from Budelius' distinction between *bonita extrinsica* and *bonita intrinsica*. The legal question involved in these concepts is whether there is a difference between the face (*bonita extrinsica*) as opposed to the metallic (*bonita intrinsica*) value of coin in normal commercial transactions. Davies argued that, of the two values, the *bonita extrinsica* was the most important, because it is the impression of the monarch or emperor, not the


55. Davies, Reports, pp.62-64.
metallic content, that makes a coin pass as money. Thus Davies concluded that, as the king by his prerogative can exalt the status of a mean person through a title of honour, so he is able to give value to base money by setting his impression on the coin. In this manner the civil law distinction between _bonita extrinsica_ and _bonita intrinsica_ served to validate Brett of Drogheda's tender in base money, which the Irish justices resolved to be every bit as valuable as sterling English money of the same denomination.

Having thus determined a one-to-one ratio between base Irish sterling and English sterling, the Irish justices began to deliberate what was probably the key issue in the Case of Mixed Money. Did Brett of Drogheda's tender in mixed money amount to full and valid payment for an obligation contracted before the debasement? To resolve this question, the justices confined their deliberations to defining the words 'current money' as employed in the contract between Brett and Gilbert. According to the terms of the contract:

> .... Brett shall pay or cause to be paid £100 sterling current money etc. and therefore such money shall be paid as shall be current at such future time.

In analyzing this passage, the justices emphasized the meaning of 'current money' rather than the date of the contract negotiated between Brett and Gilbert. The significance of this point becomes clear if we examine their legal argument which was based, once again, on principles from the civil law. As Davies succinctly summarized the contents of Budelius' compendium.

56. Davies, Reports, p.67; Davies also cites Charles Dumoulin, the great French legal humanist and Marquard Freherus, another well known 16th-century French civilian. See Budelius, op. cit., pp.485 & 528. For Dumoulin’s position in French humanist scholarship, see Kelley, op. cit., pp.189-94; Also Marquard Freherus, _De Re Monetaria Veterum Romonorum et Hodierini Apud Germanes Imperii_, (Lubduni, 1605) p.47. For Freherus' career as a civil lawyer see _Biographie Universelle Ancienne et Moderne_, (Paris, 1843) 15:132.

57. Davies, Reports, pp. 49 & 73.
'all the doctors who write De Re Nummaria agree in this rule verbum currentis monetae tempus solutionis designant.'\(^{58}\). In other words, Davies justified Brett's payment by simply stating that the words 'current money' pertained to the time of payment, not to the money current at the time of contract. This maxim was further supplemented by a gloss extracted from the English canonist Lyndwood's comments on testamentary succession where wills which 'non excedit centum solidorum sterlingorum' were to be determined in 'monetae currentis et non respectu antiquae.'\(^{59}\). Therefore the Irish justices resolved the words current money in Brett of Drogheda's contract meant an obligation in the debased currency current at the time payment had been due, not in the coin in circulation at the time the contract was made. Moreover, they argued, since the proclamation decrying the nine oz. harp shilling made it unlawful to traffic in the decried coin, Brett, in order to avoid criminal prosecution, had no choice but to tender payment in the mixed money.\(^{60}\) To illustrate this last point, the Irish justices referred to a maxim written by Budelius to the effect that all contracts negotiated by merchants were determined by:

\[\ldots\ldots Consecutudo at statua loci, in quem est destinato solution, recipienda sunt.\] \(^{61}\)

In this manner, the Irish justices upheld not only Brett's payment to Gilbert in mixed money, but also the validity of the government's tender of public obligations in the base coin.

\(^{58}\) Davies, Reports, p.73; Budelius, op. cit., p.194.

\(^{59}\) Davies, Reports, p.75; Davies cites only one common law illustration taken from the Case of Pollards reported by Dyer. See James Dyer, Reports, (London, 1794) 1:81b;82b; G. Lyndwood, Provinciales, (Oxford, 1679) p.171. Lyndwood's comments appear to be a gloss on C. 11.11. (10).

\(^{60}\) Davies, Reports, p.76.

\(^{61}\) Davies, Reports, p.76; Budelius, op. cit., p.215.
The precise impact of the judicial resolution legitimizing the 1601 debasement is, in the absence of records, difficult to determine. From references in the state papers, however, it is clear that the Irish government had, in the absence of statutory authority, enough confidence in the judicial resolution on the Case of Mixed Money to use it as a mechanism to halt further controversies over the mixed coin. With respect to subsequent litigation, Davies' Reports in combination with other manuscript sources demonstrate that the common law resolution built on a legal paradigm drawn almost completely from the civil law served as a precedent to guide judgement in similar cases. As Davies testified:

..... According to this resolution other cases of the same point were afterwards ruled and adjudged in the several courts of record in Dublin. 62

In this sense, the resolution supporting Brett of Drogheda's refusal to tender an obligation in sterling money of the 9 oz. standard also served to validate all payments made in the base coin. It is worth noting, that no less a figure than Lord Deputy Carey was also subject to the provisions of the resolution. Following his dismissal from office, the English Privy Council demanded restitution of money paid by Carey to 'the captains and officers of the army' in the 9 oz. standard. The government disallowed Carey's payment in the old standard because the 3 oz. base coin was still the current money of the realm and not due for recall for several days 63. There is, however, one more significant

62. Davies, Reports, p.77.
63. Government allegations of fraud were subsequently levelled at Carey himself and continued against his heirs until 1637. PRO/31/8/199/ff.301-302; CSPI.1606-08, p.396; For official charges against Carey for alleged misconduct over the exchange see: PRO E/126/3 ff.352a-354a; As early as 1603, Chief Justice Popham expressed an awareness of Carey's misdeeds: BL, Cecil Ms. 96, f.128a; HMC, Salisbury Ms., 12:522-523.
illustration of the impact of the Case of Mixed Money on future litigation. Despite John Dodderidge's assertion that Davies' Reports 'fuerent faits pour le meridian de Ireland seulement', the Case of Mixed Money with its heavy reliance on civil law principles, served as future precedent to guide litigation in the highest tribunal in the United States.

Against the backdrop of the American civil war, the supreme court validated an obligation tendered in paper money for a debt contracted before the appearance of the Yankee 'greenback dollar'. To decide the case, the supreme court employed Davies' civil law interpretation of the words 'currentis monetae' to justify payment in paper currency. Even 250 years after the resolution on the base coin in Ireland, Davies' report of the Case of Mixed Money, with its heavy emphasis on civil law, served as an authoritative guideline to determine the outcome of common law litigation in the United States.

PART IV

CONCLUSION
SIR JOHN DAVIES, THE ANCIENT CONSTITUTION AND CIVIL LAW

The chapters dealing with the Case of the Bann Fishery and the Case of Mixed Money have demonstrated how Sir John Davies, as Irish Attorney-General, supported both private and public interests in Irish litigation through argument from Roman law. In these and other cases in the Law Reports, Davies' use of continental law was so extensive as to cast doubt upon the conventional notions of an insular common law mentality put forward by Professor J.G.A. Pocock. In his well-known study, *The Ancient Constitution and Feudal Law*, Pocock asserted:

..... There was no reason why a common lawyer should compare his law with that of Europe except an intellectual curiosity arising and operating outside the everyday needs of his profession.\(^1\)

This assumption that English lawyers practised their trade in a professional climate devoid of all practical contact with European law is, however, extremely narrow and fails to take into consideration the extent to which common lawyers were exposed to the civil law tradition in the seventeenth century. The major points of contact with foreign legal sources were: the law practised in the numerous non-common law jurisdictions, the legal training at the universities and Inns of Court, the early Stuart political controversies concerning public law, and finally the movement for law reform that began at the end of the sixteenth century. All these influences gave common lawyers considerable

exposure to the principles and procedures of the civil law, and as Davies' work in Ireland demonstrates, this familiarity often had concrete effects in the decisions rendered by common law judges in litigation pending before the central courts.

Even a cursory glance at the English legal system as it existed in the early seventeenth century reveals the plethora of non-common law jurisdictions that operated alongside the common law courts. These included the hundreds of church courts that adjudicated English ecclesiastical law, the High Court of Admiralty and twenty Vice-Admiralty Courts that exercised their authority according to the rules of an emergent system of international maritime law, and the small and infrequently convened Court of Chivalry that determined cases according to the law of arms. Professor Brian Levack has shown that all these minor non-common law jurisdictions were readily accommodated, even by Coke, within the larger framework of the common law; for English jurists held that these lesser jurisdictions and their substantive law had been used time out of mind, and had acquired the full status of customary law². In his study of English law reporting, Dr. Lewis Abbott argued that common law judges and advocates frequently consulted civilians on difficult points of law outside the purview of the common law³. Coke himself admitted that the common lawyers, 'in matters of difficulty do use to confer with the learned in that art or science, whose resolution is requisite to the true deciding of the case in question'⁴.

The English universities and Inns of Court provided additional opportunity for acquaintance with the civil law tradition. As university

education became less clerical in the sixteenth century, and as admissions to Oxford and Cambridge increased between 1540 and 1640, many future practitioners of the common law spent at least some time at universities where training in the classics, in rhetoric and in the civil law itself was not unusual. One recent study has shown that this exposure to classics and to continental law was sustained by readings at the Inns of Court. Lord Chancellor Ellesmere himself acquired the basics of Roman law through study at Lincoln's Inn. William Fulbecke, a member of Gray's Inn trained in both the civil and common laws, wrote a treatise in which he openly encouraged students of the common law to learn the fundamentals of Justinian's *Corpus Juris Civilis*. The judge James Whitelocke was a student of Gentili, and John Dodderidge, Justice of the Court of King's Bench, was reputed to have been trained, not only in the civil law, but in the canon law as well.

If the existence of the non-common law tribunals and of the civil law training at universities and Inns of Court shows the avenues by which continental law could penetrate English legal thinking, the political debates of the Jacobean period provide dramatic examples of the uses to which such knowledge could be put, particularly in


controversies surrounding public law and the nature of the royal pre-
rogative. Perhaps because the common law evolved as an accretion of
rights, duties and obligations over real property, legal controversialists
found its vocabulary deficient for enunciating principles of public law.
Searching for additional and more fruitful concepts, Jacobean lawyers
were understandably attracted by the Roman law of Justinian. There
they could find, as Maitland pointed out in his introduction to Bracton
and Azo, a highly organized and flexible system of public law to
buttress the less adequate formulations of their own legal tradition.9

A striking example occurs in the debates over impositions which
featured certain borrowings from the more universalist second century
Roman concepts enshrined in the ius gentium or natural law.10 It will
be recalled that in 1610 the House of Commons aired a number of secular
and ecclesiastical grievances which led into a debate on the ability
of the King to levy impositions without parliamentary consent. Dissenting
voices argued that the royal prerogative itself did not constitute
sufficient authority either to make or alter a law. As Justice Whitelock
asserted, in acts of parliament the 'act and power is the King's but with
the assent of the Lords and Commons which maketh it the most sovereign
and supreme power above all and controllable by none'.11 While some
opposed this view by defining sovereignty as vested in the king's person

9. F.W. Maitland, Select Passages From the Works of Bracton and Azo,
Selden Society, 8 (1894) p.xxx.

10. See Ulpian on ius naturale in D.1.1.1.3; Inst.1.2.2.; Natural law
was identified with the instincts all men share with other creatures.
The law of nations or ius gentium was seen as a component part of
the natural law, but was for the most part used interchangeably
with natural law. See J.A.C. Thomas, Textbook of Roman Law, (New

11. G.W. Prothero, Select Statutes and Other Constitutional Documents
Illustrative of the Reigns of Elizabeth and James I, (Oxford, 1898)
pp.351-352; S.R. Gardiner, Parliamentary Debates In 1610, Camden
Society 81 (1887) pp.69,90 & 119.
rather than in the corporation of the king-in-parliament, more innovative royalists like Sir John Davies got around Whitelock’s theory by recourse to the laws of nature or of nations. In his treatise on impositions, Davies argued that the king’s right to levy impositions had no relationship to parliamentary authority at all. On the contrary, parliament had no jurisdiction in such matters, because impositions had their origins in the ’ius gentium, the law of nature and the law merchant, which pertained to the crown alone’.12.

 Appeals to the *ius gentium* of ancient Roman law could also be employed against the interests of the crown. In 1604, the law of nature served to justify a proposal by Nicholas Fuller, a puritan lawyer, to abolish the Court of Wards.13. In 1628, Sergeant Ashley explained confidently to the House of Lords that it was 'the ius gentium whichever serves for a supply in defect of the common law when ordinary proceedings cannot be had'.14. This pragmatic view was corroborated by John Dodderidge, Chief Justice of the Court of King’s Bench, whose manuscript treatise on the King’s prerogative cited over 38 civilians and canonists. Dodderidge confessed that:

..... We do, as the Sorbonnists and civilians, resort to the law of nature, which is the ground of all law, and then drawing that which is more comformable for the commonwealth, do adjudge it for law.15

Thus even senior members of the English bar acknowledge the usefulness of Roman doctrine in formulating principles of public law.

12. BL Harl. Ms. 278, ff.411a-412a; 418b-422b.


15. I am indebted to Professor Brian Levack for calling my attention to this manuscript. Harl. Ms. 5220, f.4b.
The pragmatic approach to use of Roman doctrine was not limited to issues of constitutional law. In 1604, Sir Thomas Craig, a Scottish Bartolist, wryly commented that the common lawyers while never admitting the use of Roman law, could still readily 'salute it from the threshold'\textsuperscript{16}. He then went on to show how Roman private law, particularly the laws of female succession and heritable property, featured in the reports of Plowden and Oyer. The traditional interpretation of the Germanic origins of seisin has also been called into question, and Professor Charles Donahue has cautiously put forth a notion suggesting a parallel between the Roman law of acquisitive prescription and the law of possession arising from the limitation act of 1624\textsuperscript{17}. Even in the realm of property law, the common law was influenced by foreign legal doctrine.

At this point an important qualification is necessary. Outlining the attractions which made some common lawyers abandon their Littleton for Justinian, is not equal to supporting those historians who argue that the common law was severely threatened by a 'reception' of Roman law either in 1534 or in the first decades of the seventeenth century. Such was the thesis put forward by Maitland for the 1530's in his famous Rede Lecture, a theory which was subsequently revived and applied by C.H. MacIlwain to the early Jacobean period\textsuperscript{18}. If however, by reception of Roman law we mean the assimilation of an expeditious Roman procedure to overcome the shortcomings of the more dilatory common law, or a conspiracy


to build a more centralized and perhaps despotic government - then nothing of the sort took place in either period. As Professors Thorne, Elton and others have shown, the humanist Thomas Starkey's suggestion in the 1530's that England receive the law of the Romans amounted to little more than one man's modest program for law reform. We know also that neither Henry VIII nor Thomas Cromwell had any intention of erecting a despotic government inspired by the principles of the *Lex Regia* found in Justinian's corpus, and that the new prerogative courts cannot be described as forums of strict civil law procedure. As Elton has shown, the purpose of the prerogative courts was to supplement and correct the common law in those areas where its enforcement or authority were deficient. There is slightly more basis for a 'reception' in the early seventeenth century when tracts by two civilians, John Cowell, Regius Professor of Civil Law at Cambridge, and Alberico Gentili, Regius Professor of Civil Law at Oxford, appeared to uphold an expanded royal prerogative on the basis of maxims drawn from the *Lex Regia* of Justinian's *corpus*. But such was the public outcry that James himself was compelled to repudiate the powers urged on his behalf.

Enough has been said to indicate the ways in which English common lawyers could exploit the civil law, but it is important to note also the growing support for law reform within the legal profession during the early seventeenth century. The common law itself did possess the


means to execute change - by statute, by equity as illustrated by the use or trust, and by constructive fiction as in the replacement of real actions by ejectment. Nonetheless pressures to reform the statute law in the 1590's, the proposed union between England and Scotland in 1604, and the English expansion into Ireland compelled English jurists such as Dodderidge, Bacon, Hobart and the civilians Cowell and Hayward to compare the deficiencies of the common law with the codified and more systematic civil law. Once more, the picture of common law insularity and antagonism to foreign innovation gives way before the common lawyers' pragmatic appreciation of the civil law tradition.

To this point we have found that both legal training and the existence of numerous non-common law tribunals would have acquainted Jacobean lawyers with the precepts and practice of continental law, at the same time that the political and administrative problems of the period encouraged selective use of the civil law tradition for rhetorical purposes and to supply deficiencies in the common law itself. Given these facts, we must conclude that Pocock's argument for a common law 'frame of mind' is, if not illusory, at least very much overstated. This impression becomes even stronger if we examine more closely the specific evidence upon which Pocock based his conclusions.

Like so much of the literature on Jacobean law, Pocock's theory of a common law zeitgeist bears the indelible stamp of Sir Edward Coke. For Coke the common law embodied the 'highest perfection and reason', and

his voluminous Reports are riddled with rhetorical bombast praising the certainty, immutability and perfection of the common law whose origins stretched unbroken into some distant and idealized Anglo-Saxon past. For Coke a continuum of English law ran from Anglo-Saxon time to the early seventeenth century, a truly Teutonic vision made possible by interpreting the Norman incursion of 1066 as the vindication of a valid claim to the English throne through trial by combat. By denying the Norman conquest, Coke maintained that the ancient laws survived intact, unsullied by the corrupting influences of Norman feudal law, or of the Roman and canon laws practiced in continental tribunals. Coke's antipathy to the civil law tradition was notorious and is best summarized in the famous passage in his Institutes where he claimed:

..... Upon the text of the civil law there be so many glosses and interpretations and again upon these so many commentaries and all these written by doctors of equal degree and authority and therein so many diversities of opinion that they do rather increase the doubts and uncertainties and the professors of that noble science say that it is like a sea full of waves.

This invective against the civil law seems to support Pocock's assertion that Coke was insular as insular could be, but there are strong reasons to suspect that neither the Institutes nor the Reports represent an adequate measuring stick to gauge Coke's attitude toward the civil law. An examination of Coke's library for example, shows that the Chief Justice maintained a complete collection not only of the Corpus Juris Civilis and the canon law, but also of the glossators as well as selected works of the humanist jurists. In commenting on Coke's awareness of continental law and jurisprudence, T.E. Scrutton, in his study of Roman law influence

in early modern England, uncovered quite a number of references to the civil law in Coke's Reports\textsuperscript{26}. More recent scholarship has reinforced Scrutton's findings, and Professor Peter Stein has discovered that some of Coke's maxims were derived from Justinian's Digest\textsuperscript{27}.

If Coke's aversion to using civil law principles when expedient is itself in doubt, it is equally unclear to what extent he typified the English legal profession in the early Stuart period. Among contemporaries, Coke's place as a jurist seems to have been less influential than many modern historians assume. Sir Francis Bacon, for example, spoke slightingly of Coke's Reports and cautioned readers that there were 'many peremptory and extrajudicial resolutions more than are warranted'\textsuperscript{28}. In 1615, Lord Chancellor Ellesmere, in his Observations Upon the Lord Coke's Reports, provided a more devastating critique of the corpus of Coke's work and summarized the Reports as 'sunt mala, sunt quaedam mediocria, sunt bona plura'\textsuperscript{29}. He then went on to warn that Coke, 'in order to serve his own conceits', deliberately misrepresented judgement to establish his own views touching the decision of the court. It seems, therefore, that even among contemporaries, Coke did not possess the inviolable authority depicted by many modern historians. In the eighteenth century, Justice William Mansfield described Coke as 'an uncouth crabbed author who has


\textsuperscript{27} Peter Stein, Regulae Iuris, (Edinburgh, 1974) p.101.

\textsuperscript{28} Spedding, Bacon's Works, 13:65.

disappointed and disheartened many a Tyro. In the nineteenth century, one English jurist wryly observed that Coke rarely had any authority for what he wrote, and James Stephen, in his history of English criminal law, written in 1883, attributed Coke's prominence not to any technical legal expertise, but to the fact that his voluminous Reports dominated English legal literature - a monopoly 'behind whose work it was not necessary to go.'

If Sir Edward Coke cannot be seen as wholly representative of English legal thought in the seventeenth century, it is necessary to examine the remaining evidence that supports Pocock's 'common law frame of mind'. Aside from Coke, the balance of Pocock's argument rests on Sir John Davies' introduction to the Irish Law Reports. No other English lawyer of the seventeenth century, with the exception of Coke, praised the certainty of the common law more than Davies; no other lawyer so emphasized the immemorial character of English law and no other English jurist compared the common law more favourably to the civil law. A brief illustration of Davies' rhetorical style provides a flavour of his invective against civilian critics of the common law. Against aspersions cast at the dilatory nature of English litigation, Davies cited Bodin's reference to a case that pended in the French courts for over a hundred years.

He then launched a rejoinder to the civilians and canonists by comparing,


32. Of the several editions of the Reports, the introduction may only be found in: Sir John Davies, Le Primer Report des Cases in Les Courts del Roy, (Dublin, 1615); Le Primer Report des Cases & Matters en Ley Resolves & Adjudges en les Courts del Roy en Irel, (London, 1628), and Les Reports des Cases & Matters en Ley Resolve & Adjudged in Les Courts del Roy en Irel, (London, 1674).

33. Davies, Le Primer Report, f.6b.
as Coke compared, the decisions of the doctors to a sea full of waves.

To elaborate his point, Davies borrowed a rather extraordinary metaphor
from the sixteenth-century Spanish canonist Loudovico Gomez who compared
the work of the civilians and canonists to:

..... Calices in capite elephantis, qua vident priora
et posteriora.34

On the basis of such evidence, it was unnatural for Pocock to
conclude that Davies conformed to all the attitudes ascribed to Coke.
This interpretation, however, can only be sustained by isolating the
introduction from the text of Davies' Irish Reports. If we peer beyond
the introduction and examine the substance of the legal arguments used by
Davies in the Irish courts, a rather different pattern emerges. Indeed
the Reports show that the Irish Attorney-General cited the civil and
canon laws as frequently as statute law in active Irish litigation35.

On the basis of the Reports themselves, we must conclude that Davies does
not fit the pattern of a common law orthodoxy.

Davies' familiarity with the Roman and canon laws probably originated
in his educational training at Oxford and the Middle Temple. If it is
ture that Davies studied at New College, Oxford, we can infer some
exposure to the civil law tradition there. The New College statutes,
issued by William of Wykeham in 1379, established a strong legist tradition
by stipulating that ten fellows were to study canon law and ten civil law36.

34. Davies, op. cit., ff.5a-5b; For Gomez see: J.F. Schulte, Die
Geschichte der Quellen und Literatur des Canonischen Rechts, (Stuttgart,
1880) 3:554; An Irish civilian picked up the cudgel in defense of
his profession. See William Clerke, An Epitome of Certaine Late
Aspersions Cast at Civilians, the Civil and Ecclesiasticall Laws, the
Courtes Christian, and at Bishops and their Chancellors, (Dublin, 1631)
p.6.

35. There are 98 statute citations (English and Irish) and 85 Roman and
canon law citations.

36. Carte Ms. 62, ff.580a-590b; A. Wood, Athenae Oxoniensis, (London,
1691) 430-432; T. Ashton, 'Oxford's Medieval Alumni', Past and Present,
Such an emphasis on legal training, and the college's collection of civil and canon law manuscripts, second only to that of All Souls, provided ample study material, and we know from the text of the Irish Reports that Davies consulted some of the college's canon law manuscripts. A more important source of contact with civil law practice may have been Davies' friendship with the Dutch civilian, Paul Merula. During the fall of 1592, while still a student at the Middle Temple, Davies journeyed with two friends to the Low Countries to visit Merula at the University of Leyden. Professor of civil law and jurisprudence and mentor of Grotius, Merula was one of the premier jurists of his day. Two letters written by Davies to Merula reveal a close professional friendship, and we cannot discount the possibility that Davies' mysterious absence from the Middle Temple records between 16 October 1595 and 9 February 1598, may have been due to an extended period of study on the continent. This sojourn in the Low Countries, where the civil law was accepted in commerce and in other areas where it did not conflict with Dutch customary law, provides an analogy to the situation in England and Ireland, and Davies' subsequent use of the civil and canon laws to consolidate the Tudor conquest may reflect his observations on the relationship between the civil and customary law in the Netherlands.

Of course, residual civil law influences existed in Ireland as they did in England at the beginning of the seventeenth century. There were the same ecclesiastical and admiralty jurisdictions, Trinity College Dublin was empowered to confer degrees in civil law, and certain categories

37. In the Case of Commandams, for example, Davies cites materials from the library of New College. See Irish Reports, pp.193,195.

38. For Merula see: J.W. Wessels, History of Roman Dutch Law, (Grahamstown, 1908) p.234.

39. Bodl. Lib. D'Orville Ms. 52, ff.49-50; BL Cotton Ms. Julius C.V. f.49; It has also been suggested that Davies may have accompanied one of the expeditions to the Azores. P. Finklepearl, John Marston of the Middle Temple (Cambridge, 1969) pp.50-54.
of Roman law may have supplied the organizational framework to administer the Brehon law. However the use of the civil law in Ireland was significantly expanded by Davies and other English jurists as they attempted to justify and consolidate English sovereignty over the island.

The most important and most drastic use of civil law principles is found in the assertion by Davies and other contemporary jurists of an English title to Ireland by right of conquest. According to established civil law doctrine, conquest eliminated all prior and current rights to property and rule on the part of the conquered. Professor Donald Sutherland has shown that the patterns of proprietary exclusiveness laid down in Justinian's *corpus* to describe the status of real and moveable property taken by conquest were elaborated and extended by medieval and early modern

40. D.E.C. Yale, 'Notes on the Jurisdiction of the Admiralty in Ireland', *Irish Jurist* 3 (1968) pp.146-62; See also Archbishop Usher's treatise on the 'Reception of the Imperial Laws in Ireland', Bodl. Lib. Tanner Mss. 458, f.21a; V.T.H. Delaney, 'A Note on the History of Legal Education in Ireland', *Northern Ireland Legal Quarterly*, 11 (1955) p.217; K.W. Nicholls has shown that the municipal code of Galway employed certain aspects of Roman law. See his *Gaelic and Gaelicized Ireland in the Middle Ages*, (Dublin, 1972) p.49; In 1578 the famous Jesuit Edmund Campion, while visiting the recorder of Dublin - Sir Richard Stanyhurst - described certain schools in Gaelic districts where students memorized Justinian's *Institutes*. E. Campion and M. Hanmer, *Two Histories of Ireland*, (Dublin, 1633) p.18; In 1609, the classical training of the professional scholars surprised even Davies, who remarked: 'for the jurors, being fifteen in number, thirteen spake good Latin, and that very readily'. SP/63/227/f.94a; In 1608, John Leighe, the high sheriff of Tyrone, complained that legal matters were being settled in his district by 'Breghans or judges according to the rule of the Popish canons'. Lam. Pal. Ms. 607, ff.166a & b; *Cal. Car.*, 1603-24, pp.30-31.
jurists to imply a sovereign title to all conquered territory. The classical antecedents to this latter doctrine are particularly evident in Grotius, Gentili and Zouche, and the same principles appear to have coloured discussions on Irish sovereignty even before Davies used similar arguments in the *Reports* and the *Brief Discovery*. As early as 1534 Patrick Finglas, Henry VIII's Chief Baron of the Exchequer, claimed that the true restoration of English sovereignty in Ireland lay in a military conquest. This proposition may have influenced Thomas Cromwell's draft bill of the same year to establish a public law title to Ireland by right of conquest.

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41. D. Sutherland, 'Conquest and Law', *Studia Gratiana*, 15 (1972) 33-51; The origin of this tradition is of course in the *Ius gentium* of the classical Roman law. The notion that a violent conquest could generate just title may be found in the following selections from Justinian's *corpus*: D.11.7.36; D.41.2.16.4; D.41.2.1.1; D.49.15.4; Inst.2.1.17; See also the marginal gloss on each of the above in: *Digestum Vetus Seu Pandectorum Iuris Civilis Commentariis Accursii & Multorum Insuper Aliorum tam Veterum*, (Lugduni, 1569); It is interesting to note that the medieval *Book of Feuds* defines a conquest feud as superior to any held by succession. *The Jus Feudale* by Thomas Craig, (Edinburgh, 1934) 1:164.


The purpose of Cromwell's plan was to exploit the radical powers conferred by conquest to secure a resumption of all spiritual and temporal land by the crown. At the time, the state lacked the financial and military assets to make this claim a reality, but in 1558, a proposal was again made to initiate a military conquest based on the model of the Roman law, anticipating by 45 years the solution applied by Davies and other English jurists at the end of Tyrone's rebellion in 1603.45

In the wake of Tyrone's Rebellion, the legal theory of conquest as propounded by Davies had two purposes. First Ireland, including the Gaelic dynasts, would have to accept the English common law as its own, without competition from the Brehon law, especially such customary procedures of Gaelic landholding and descent as gavelkind and tanistry. Second, conquest would justify the eradication of the domestic Irish laws and the elimination of all derivative claims, foreign and Gaelic, that were contingent upon the papal donation of Ireland in 1154.

The Papal donation, a legacy from the middle ages, cropped up on several occasions during the sixteenth century and compelled English lawyers and polemicists like Davies, Ellesmere and Coke to deny papal temporal jurisdiction in Ireland by invoking the powers of conquest.46 Thus despite Pocock's claim that 'conquest was not admitted in the age of Blackstone any more than in the age of Coke', Davies and other legal theorists held that the military victory of 1603 superseded the limited sovereignty left by an incomplete medieval conquest.47 This use of the

45. BL Harl. Ms. 35, f.197b.
conquest doctrine imposed a legacy on future discussions of Irish sovereignty. As Dr. A.G. Donaldson has shown in his study of English statutes in Ireland, the maxims of the Roman law doctrine of conquest continued to serve as a justification for English sovereignty through to the end of the nineteenth century.\(^{48}\)

The text of Davies' *Irish Reports* shows that the civil and canon laws also played a significant role in litigation argued before the central common law courts in Dublin. This projection of continental law onto the forum of active litigation represents an elaboration of the tendency of the common lawyers to identify the law practiced in the various civil law jurisdictions as the common law of the land.\(^{49}\) Davies endorsed this tendency to ascribe a customary status to foreign law in his application of the medieval canon law to several common law cases argued before the central courts in Dublin.

Davies' obvious familiarity with the medieval canon law can only be explained by the fact that, despite the split with Rome, the canon law continued to be used in the various ecclesiastical jurisdictions within England. There had been, it is true, a number of attempts to adapt the old 'Popish canons' to the radically altered political situation launched by the supremacy. In 1534, the English parliament provided that the king might appoint a commission of 32 jurists to prepare a new code of the 'King's ecclesiastical laws of the church of England', but the king failed to act on the statute.\(^{50}\) A further enabling statute passed in 1536 extended the provision of the act of 1534, but Henry once again failed to act. In 1544,

a new statute authorized another commission which apparently did receive
the royal assent, but the appearance of a new book of ecclesiastical law
in 1546 failed to obtain royal approval. A similar effort authorized
in 1550 to carry on the task of Henry's earlier commission was discontinued
during the Marian reaction. Further attempts to reform the old canon
law under Elizabeth were no more successful, and the appearance of
John Foxe's *Reformatio Legum Ecclesiasticarum*, which represented a synthesis
of the work of earlier reformers, never received the approval of the
queen, parliament or convocation. This meant that the pre-Reformation
*Corpus Iuris Canonici*, excised of those provisions repugnant to the royal
supremacy, continued to be practiced in the various ecclesiastical courts
in England. In his use of this canon law, Davies like other English
civilians and common lawyers took the position that the canon law of Rome
was received through the medium of provincial and diocesan legislation -
a view which attained the status of orthodoxy and was espoused by Stubbs
and the Anglican hierarchy at the end of the nineteenth century. In
other words, Davies subscribed to a constitutional theory which held
that the *Decretum* of Gratian, the *Decretales* of Gregory IX, the *Liber
Sextus* of Boniface VIII, the *Clementines* or rescripts of Clement V and the
*Extravagantes* or uncodified edicts of succeeding popes all represented a
body of law that had acquired the status of English customary law.

51. J. Spalding, 'The *Reformatio Legum Ecclesiasticarum* of 1552 and the
pp.162-171.

52. William Stubbs, 'The History of the Canon Law in England', *Select
Essays in Anglo-American Legal History*, (Cambridge, 1907) 1:263-265;
*Seventeen Lectures on the Study of Medieval and Modern History*,
(Oxford, 1900) pp.354-356; Also his introduction to Report of the
Commissioners, *The Constitution and Working of the Ecclesiastical
Courts*, (London, 1883) pp.24-25; J.W. Gray, 'Canon Law in England:
Some Reflections on the Stubbs-Maitland Controversy', *Studies in
Such was the rationale Davies used in arguing the Irish Case of Commendams, where he defined the evolution of the legal doctrine authorizing clerics to hold plural benefices \textit{in commendam} by citing no less than a dozen authorities from the standard text of the \textit{Corpus Iuris Canonici} \textsuperscript{53}. Davies explained his lavish display of canonical learning by claiming that the canon law of Papist Europe was accepted as a customary law of the English church \textsuperscript{54}. The argument is further developed in Davies' presentation of the Case of Proxies and the Case of the Dean and Chapter of Fernes.

In the Case of Proxies, argued on a demurrer before the assembled barons of the Irish exchequer court in 1605, Davies secured a crown right to procurations, a kind of tax levied to support ecclesiastical visitation, which before the dissolution had belonged to the hospital of St. John of Jerusalem of the Abbey of Thomas Court in Dublin \textsuperscript{55}. Following the dissolution, these procurations were alienated by the crown to supplement the income of crown officials as well as others loyal to the English government. In a test case that was later endorsed by a judicial resolution, Davies succeeded in securing a resumption of the coveted proxies by supplementing his common law brief with numerous citations from

\textsuperscript{53} Davies, \textit{Reports}, pp.185-229; The case dealt with a dispute between a local incumbent, Cyprian Horsefall, and a royal appointee, Robert Wale, to a vicarage in the diocese of Ossory. James Ware, \textit{The History and Antiquities of Ireland}, trans. by Richard Harris, (Dublin, 1764) 1:419; \textit{Irish Fiants}: 4256 and 6706.

\textsuperscript{54} Davies argued that the Pope's decretals were never entirely received in any European country outside the Pope's temporal authority. In other words, England would only use those canons which 'by such acceptance and usage obtained the force of laws in such particular realm of state and became part of the ecclesiastical law of such nation.' Davies, \textit{Reports}, p.186.

\textsuperscript{55} Davies, \textit{Reports}, pp.1-17.
the medieval canon law. In this instance, however, Davies took a slightly different approach from that pursued in the Case of Commandarii. Rather than define the nature of proxies through the standard text of the *Corpus Iuris Canonici*, he referred instead to two well-known sixteenth-century secondary handbooks on the medieval canon law. From the text of the *Irish Reports*, it is possible to identify these secondary works as the *Institutiones Iuris Canonici*, written by the sixteenth-century Italian jurist, Giovanni Paolo Lancelloti, who organized the canon law according to the categories set down in Justinian's *Corpus Iuris Civilis*, and the *Catalogus Gloriae Mundi*, a compendium of legal and antiquarian knowledge assembled by the sixteenth-century French jurist Barthelemy de Chasseneux. Unlike the standard corpus of the canon law, these secondary works proved particularly useful to persons lacking formal training in the canon law for the simple reason that they were indexed. Not only were these sources instrumental in recovering the procurations to the crown, but they were also subsequently endorsed, through Davies' *Reports*, as an authoritative exposition of Anglican canon law in John Godolphin's

56. SP/63/234/f.140a; SP/63/234/f.142a; The difficulty with procurations seems to have troubled Davies for several years. See his letter to Salisbury concerning Beeston's Case in 1608. SP/63/223/f.122a; *CSPI*, 1606-08, p.436; For the litigants in Davies' Reports, see: *Irish Fiants*, 4094, 5593 and 6797; The Case of Proxies represents one illustration of a general attempt to restore the church to its patrimony. See W.A. Phillips, *The History of the Church of Ireland From the Earliest Times to the Present Day*, (Oxford, 1933) 2:498-500.

This reliance on secondary texts is further illustrated by the Case of the Dean and Chapter of Fernes where the canon law of corporate consent was defined once again through Lancellotti and supplemented by the fifteenth-century Italian jurist, Nicolo de Tudeschi, whose authority in canonical studies earned him the title 'lucerna iuris', or lamp of the law. In this instance the Roman canon law facilitated the recovery of the manor of Fedart which had been unlawfully alienated by the dean and chapter. Like the Case of Proxies, the Case of the Dean and Chapter of Fernes also served to define precisely, through the vehicle of the Roman-Canon law, the canon law of Protestant England concerning valid alienation of ecclesiastical property. Gibson's eighteenth-century edition of the Anglican canon law used this case as an authoritative exposition of the ecclesiastical law of corporate consent.

In his interpretation of the medieval canon law, Davies was in line with the view taken up by Phillimore, Stubbs and the Anglican hierarchy in the late nineteenth century. This orthodox position, which was almost universally upheld by English theologians and ecclesiastical historians from the time of the Reformation, maintained that the canon law of England, before and after the Reformation, was binding in the English ecclesiastical courts, not by reason of papal auctoritas, but through the discriminating authority of English provincial synods.

This official interpretation of the medieval canon law remained


unchallenged until the appearance of Maitland's devastating study of Lyndwood's Provinciale. Contrary to accepted theory, Maitland discovered that medieval English canonists and theologians readily accepted the canon law on the basis of papal auctoritas, and that English provincial synods had no authority either to receive or to reject decretals from Rome.

The practice of ascribing customary status to continental law was also followed in some of the secular litigation in the central Irish courts. In the Case of the County Palatine of Wexford, Davies discussed the origins and the jurisdictional powers assigned to a palatinate by citing the well known maxim attributed to Baldus, the famous medieval Italian jurist, that 'solus princeps qui est monarch et emperator in regno suo, ex plenitudine potestatis potest creare comitem palatinum'. He then went on to say that according 'to this rule, the king of England may well create an earl palatine, as he is monarch and emperor in his reign'. The importance of the case lies in its definitive statement of the nature and authority of palatine jurisdictions in Ireland, and it is significant to note that the case was cited as justification for restoring the Ormonde palatinate in 1660 A further illustration of Davies' pragmatic approach to the civil law may be seen in his arguments reported in the Case of the Bann Fishery. In the absence of fully adequate common law precedents, Davies fortified his brief to secure the seizure of the richest fishery in Ulster by citing 'divers rules of the civil law and the customary law of France agreeable to our law in this point.'

61. F.W. Maitland, Roman Canon Law in the Church of England, (London, 1898) pp.1-50 This was elaborated in a second chapter entitled 'Church, State and Decretals' pp.51-99.
63. Nat. Lib. Dublin, Mss. 11,044. This document was found in a tin box of roughly 300 unfoliated papers, most of which date after 1660.
64. Davies, Reports, p.158.
Once again the corpus of civil law, as defined by the sixteenth-century French humanist legal scholars, Jacques Cujas and Renattus Choppinus, made up for the shortcomings of Davies' own legal brief. Although the dictates of natural geography tell us that rivers flow toward the sea, Davies' application of the civil law led to the government's seizure of the Bann Fishery because the sea flows into rivers.

The Case of Mixed Money reveals Davies once again exploiting the civil law on a difficult question of public law. The case arose from the refusal of Irish merchants to accept base money for debts antecedent to the appearance of the debased coin in 1601. In the absence of common law principles, Davies justified a prerogative right to alter the coinage by referring to a compendium of civil law tracts entitled *De Monetis et Re Nummaria*, edited by René Budelius, a sixteenth century French civilian responsible for the operation of the Bavarian mint. Through Budelius, Davies adopted some of the more authoritarian legal principles developed by Bodin, Dumoulin and other French humanist lawyers to establish a prerogative right to alter the intrinsic value of money without the consent of estates or parliaments. As Davies smugly noted, 'in this point the common law of England agrees well with the rules of the civil law.' The results of the case were to saddle the merchant class

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66. René Budelius, *De Monetis et Re Nummaria*, (Koln, 1591); For Budelius see *Biographie Universelle Ancienne et Moderne*, (Paris, 1844) 8:112.

67. Davies, *Reports*, p.54; 'Monetandi jus principium ossibus inhaeret. Jus Monetae comprehenditur in regalibus quae nunquam a regio sceptro abdicantur'.

68. Davies, *Reports*, p.54.
and the army with the Irish war debt. In 1609, four years after the
Case of Mixed Money, Davies demonstrated his esteem for Budelius' work
by sending a copy to Cecil as a gift to guide him in legal matters
associated with his newly acquired post of Lord Treasurer. 69

Davies' legal pragmatism could be illustrated by further litigation
from the Irish Reports, but the examples already discussed are more than
sufficient to show that Davies' alleged common law orthodoxy arises solely
from Pocock's uncritical acceptance of the introduction divorced from
the text of the Irish Reports. As we have discovered, a more critical
examination of that text shows Davies to have been a thoroughly
cosmopolitan and innovative legal thinker fully acquainted with the
sources of continental law and jurisprudence. Indeed, Davies'
familiarity with the civil law tradition justifies not only a revision of
the notion that common lawyers in the Jacobean period rejected foreign
doctrine in framing principles of common law, but also a revision of
Pocock's central thesis - that the common lawyers' sense of history stemmed
from their ignorance of continental legal scholarship.

Such is the reputation of Pocock's thesis that it has reappeared
in a more recent historical controversy. In an exchange in Past and Present,
Mr. Christopher Brooks and Mr. Kevin Sharpe took issue with Dr. D.H. Kelley
over the alleged insularity of the common lawyers. 70 Like Pocock before him,
Kelley contended that in the political controversies of Jacobean England,
English lawyers, untouched by the scholarly tradition of the French

69. SP/63/226/f.18a; CSPI, 1608-1610, p.135.

70. K. Sharpe and C. Brooks, 'English Law and the Renaissance', Past and
Present, 72 (1976) pp.133-147; See Kelley's rejoinder pp.143-146
of the same issue of P & P. The controversy was sparked by D.H.
Kelley, 'History, English Law and the Renaissance', Past and Present
65 (1974) pp.24-51; See also Kelley's book: Foundations of Modern
Historical Scholarship: Language, Law and History in the French
historical school of jurisprudence, interpreted their history through the ahistorical context of some mythical Anglo-Saxon past. By contrast, French lawyer-polemicists served the political controversies of the French wars of religion in a different way. They exploited the counter-point of written civil law and unwritten customary law to unravel their historical past through the feudal origins of their laws and institutions. In other words, the historical arguments put forth by the common lawyers in the political controversies of early seventeenth-century England, as evidenced by writers like Sir Edward Coke and Sir John Davies, were possible only because English jurists remained ignorant of the civil law tradition, and of the impact of humanist scholarship on the development of law and jurisprudence on the continent. Since it has been argued here that Coke himself was not wholly ignorant of the civil law tradition, and that Davies was thoroughly familiar not only with the Roman and canon laws, but also with the literature of French legal humanism, it is no longer possible to accept the view, as presented in The Ancient Constitution and Feudal Law, that the common lawyers' sense of history stemmed from their congenital ignorance of continental law and jurisprudence. In other words the creation of a common law 'frame of mind' to explain the use of a mythical Anglo-Saxon past in structuring the course of English history needs to be thoroughly revised, because it implies that lawyers like Davies did not understand what they read. Such a revision lies beyond the scope of this study, but future research might very well focus on simpler and more obvious reasons of utility.

Given the convoluted nature of hermeneutics and philology developed by continental legal scholars, the myth of an Anglo-Saxon heritage, which appeared as early as the reign of Edward I in the Mirror or Justices, provided a ready-made and far more straightforward instrument to structure
a national past\textsuperscript{71}. Although Kelley recently altered his description of early modern common lawyers from 'insular' to 'peninsular', a more fitting adjective would be eclectic\textsuperscript{72}.


\textsuperscript{72} K. Sharp, C. Brooks and D.R. Kelley, op. cit., p.146.
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**THESIS**


