# CUSTOMS IN CONFLICT

## Sir John Davies, the Common Law, and the Abrogation of Irish Gavelkind and Tanistry

by
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## Thesis Abstract

This thesis examines the abrogation of the Gaelic Irish land customs of tanistry and gavelkind in the Dublin courts in the first decade of the seventeenth century. Sir John Davies, Solicitor- and later Attorney-General of Ireland, was the key figure in using the King's Bench to reorganize Gaelic society along lines more amenable to the Dublin administration. A key element in this anglicizing process was the abolition of Gaelic partible inheritance, known to the English as "gavelkind", and "tanistry", which affected the lands of the political successor to the clan chief, known as the tanist. These two customs were seen by English administrators in Ireland as perpetuating unstable political and social practices and blocking the "civilizing" influence of English legal and administrative structures.

This thesis also incorporates the thought of English common lawyers concerning the status of custom and the common law. Drawing on the 1610 parliamentary speech of Thomas Hedley and the 1615 *Primer Report* of Irish cases by Davies, it compares two common lawyers' conception of custom and the common law. Hedley presented an interpretation of the common law as based on the customary practices of the English people which met the two criteria of rationality and immemoriality, determined by the royal courts. Davies emphasized the customary and unwritten nature of the common law. In his view, English common law was comprised of the general customs of the English people which had developed over time, and had been observed from time immemorial. The analysis of these common lawyers will then be utilized to examine the abrogation of Irish gavelkind and tanistry in the Dublin common law courts. It is argued that both Irish gavelkind and tanistry met the criteria of English common lawyers for recognition as valid customs at the common law. As such their abrogation by the Dublin courts had more to do with the

necessities of reorganizing Gaelic society along more English lines, than with inherent deficiencies as local customs at the common law.

Partible inheritance customs in Kent and in Wales are examined to provide a comparative context. Observation and understanding of gavelkind and tanistry by English administrators in Ireland was shaped by the Wales and Kent examples. Welsh gavelkind had been abolished by the union legislation of the 1530's and 1540's, while gavelkind in Kent remained until the twentieth century. This thesis argues that the actions of English administrators in Ireland to abolish Gaelic Irish land customs are best understood when analysed within the context of similar practices which were allowed to remain in an English county, but were abolished by statute when a non-English nation was incorporated into the English state.

# 1 Introduction

In 1612, Sir John Davies, Attorney-General for Ireland, optimistically wrote of the Irish people that he hoped "the next generation will in tongue and heart and every way else become English, so as there will be no difference or distinction but the Irish Sea betwixt us."[1] Recent events in Ireland would not have discouraged such a view. With the surrender of Hugh O'Neill to Lord Deputy Mountjoy in 1603, concluding the Nine Years War, England finally had military control over the whole island. The presence of a standing army in the following years enabled the Dublin administration to further the policy of substituting English for Irish institutions. Throughout the first decade of the seventeenth century, English administrative and legal structures reached into all parts of Ireland for the first time: assize circuits and sheriffs were instituted into Ulster, the most Gaelic area of the island. Gaelic landholding and inheritance patterns were voided and common law forms instituted; this reorganized Gaelic society and undermined the power base of such great Gaelic lords as O'Neill, Earl of Tyrone, and O'Donnell, Earl of Tyrconnell. Finally, with the "flight" of the Ulster lords to the continent in 1607, a power vacuum was created in Ulster, which enabled the anglicizing process to make further inroads. The forfeited lands of the earls provided ideal grounds for plantation. Ireland at no other time had seemed so pliable to the hand of English government.

For Davies, the most important of these achievements was the restructuring of the Gaelic land system. Two key native land customs, which English observers called the

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[1] Sir John Davies, *A Discovery of the True Causes Why Ireland Was Never Entirely Subdued Nor Brought Under Obedience of the Crown of England Until the Beginning of His Majesty's Happy Reign* (1612), in Henry Morley, ed., *Ireland Under Elizabeth And James the First*, (London: George Routledge and Sons, Limited, 1890), pp. 335-6. To be referred to hereafter as Davies, *Discovery*.

customs of "tanistry" and "gavelkind" were abolished. Tanistry affected the lands of the political successor to clan chiefs, known as the tanist. The tanist, who was an elected officer of the clan, often received lands to hold until he succeeded to the chieftaincy. Other holdings of clan members were held and inherited by a custom which English administrators called gavelkind after a similar land custom in Kent. Irish gavelkind was a form of partible inheritance in which lands were divided among sons or male co-heirs. English observers and administrators in Ireland believed that both customs had helped to keep the Gaelic Irish in a state of barbarity, had perpetuated lawlessness, and had stunted the economy. These customs probably had buttressed the traditional power base of independent Gaelic lords and allowed them to avoid the arm of English law and government. In 1606, both customs were abrogated by the Court of King's Bench in Dublin. As a result, only the general forms of common law land practices, such as inheritance by primogeniture and holdings by freehold and tenancies, became valid in Ireland.[2] Sir John Davies, the Solicitor- and then the Attorney-General for Ireland, was instrumental in dismantling the Irish land system by arguing these cases in court. He was probably the member of the English administration in Ireland most familiar with the workings of the Gaelic land system and society, knowledge he built up as he rode assize circuits and sat on various land commissions.[3] The use of judge-made law to change landholding customs and to restrict political privileges to Protestants,

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[2] Sir John Davies, "The Resolution of the judges, touching the Irish custom of gavelkind", *A Report of Cases and Matters in Law Resolved and Abridged in the King's Courts in Ireland*, (1615), (Dublin: Printed for Sarah Cotter, 1862).

[3] Sir John Davies, (1569-1626) was a poet, the Irish Solicitor-General, 1603-1606, Irish Attorney-General, 1606-19, and Speaker of the Irish parliament, 1613. The third son of a Wiltshire tanner, he attended Oxford and the Middle Temple, and was called to the bar in 1595. Alexander Grossart, *The Works in Verse and Prose, Including Hitherto Unpublished MSS, of Sir John Davies*, 3 vols. (St. George's, Blackburn: Printed for private circulation, 1876), ii, "Memorial-Introduction"; Pawlisch, *Sir John Davies and the Conquest of Ireland*, (New York: Cambridge University Press, 1985), pp. 15-33.

played a key role in the process of anglicizing Gaelic society and consolidating English rule in Ireland.

Historians have not written a great deal on the abrogation of Irish land customs by the Irish judiciary. The issue was not seriously broached until Hans Pawlisch's 1985 study, *Sir John Davies and the Conquest of Ireland.* Other historians have sought to utilize Pawlisch's findings rather than to delve further into issues that he raised.[4] Quite simply, Pawlisch was the first to examine the use of judge-made law as a means of consolidating the English conquest of Ireland. Under the guidance of Davies, he argued, matters that hindered the extension of English legal and administrative structures were changed by the Irish courts. Judge-made law, rather than parliamentary statute, restricted political participation to Protestants, reformed the Irish coinage, upheld the royal prerogative by rescinding private powers to collect custom revenues, and abrogated key land customs of the Gaelic Irish.[5] Pawlisch argued that the Dublin administration used the law as an instrument of conquest and colonization. The common law became a means to facilitate the reorganization of Irish society along lines more acceptable to the English governors in Ireland. After the military victory of 1603, "the pacification of Ireland required an instrument other than military force to bring about an orderly administration under the supervision of a central government in Dublin."[6] Gaelic Irish land customs were seen by the English administration as perpetuating unstable social and political practices and blocking the civilizing anglicization of the island. Institution of the common law of England would

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[4] Pawlisch, *Sir John Davies and the Conquest of Ireland*, (New York: Cambridge University Press, 1985). Earlier, F.H. Newark had recounted the arguments of the 1608 case of tanistry, and suggested that Davies conspired with the judges on favourable legal arguments, but he did not place the issue in any wider context than as an important legal case in Irish law. "The Case of Tanistry", *Northern Ireland Legal Quarterly*, no. 4 (9) 1952.

[5] Pawlisch, *Sir John Davies and the Conquest of Ireland*; chapter six, "The mandates controversy and the case of Robert Lalor"; chapter eight, "The case of mixed money"; chapter seven, "The case of customs payable for merchandise"; and chapter four, " The cases of gavelkind and tanistry: legal imperialism in Ireland".

alter the way in which land was held and inherited, create social stability and curb the independent power of Gaelic lords.

The programme of using the common law as an instrument of conquest was spelled out by Davies in his treatise on the historic failure of the Crown to subdue and "civilize" Ireland. He argued that English rule in Ireland had failed for two principal reasons. First, that a complete military subjugation of the Irish had eluded the English until 1603; and second, that the English had failed to extend the common law throughout the island.[7] A civil policy could only follow military success; the achievement of both made possible what Davies called a "perfect conquest." "For that I call a perfect conquest of a country which doth reduce all people thereof to the condition of subjects; and those I call subjects which are governed by the ordinary laws and magistrates of the sovereign."[8] Native land customs and the political structures they supported blocked the realization of a nation under one law. Pawlisch saw this argument as key to the imperial mission of the English in Ireland, and by extension, in later colonies.[9]

Although a pioneering and comprehensive study, *Sir John Davies and the Conquest of Ireland* left some issues regarding the abrogation of Irish land customs unanswered or not fully treated. The abolition of gavelkind and tanistry was an integral part of Pawlisch's analysis of the law as a mechanism of imperialism. It provided a prominent example of how native custom was abolished by common law in an effort to consolidate the English legal and administrative presence in Ireland.

To understand more fully the significance of the abolition of native land customs,

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[6] Ibid, p. 6.
[7] Davies, *Discovery*, pp. 218-19.
[8] Ibid, p. 219.
[9] Pawlisch, *Sir John Davies and the Conquest of Ireland*, pp. 12-14.

however, the Irish case should be interpreted within the context of a similar pattern established sixty years earlier with Wales. The legislation of 1536 and 1542-3, joining Wales to England, abrogated Welsh partible inheritance. Arguments against the Welsh custom would later appear in Ireland: it stunted the Welsh economy; it sustained lawlessness; and it maintained familial loyalty to the clan rather than to the state. Land customs in both nations were abolished when each was brought under full administrative and legal control of the Crown. The major difference between the two cases, however, was that native land custom in Wales was abolished by parliamentary statute, whereas in Ireland it was achieved by judge-made law. Of course, Wales and Ireland had considerably different relationships with the English Crown both before and after the change in landholding discussed in this thesis. [rework]

An examination of the prevalence of gavelkind in Kent, as well, should help to provide a wider context for the Irish case. Gavelkind, although practiced elsewhere in England, was the predominant form of inheritance in Kent in the early modern period. English common lawyers, in fact, often pointed to Kentish gavelkind as an example of a local custom fundamentally at odds with the normal practice of the common law. Although partible inheritance in Kent differed in significant respects from that in Gaelic Ireland, it provided common lawyers such as Davies with a prominent example of an established practice of partible inheritance at odds but successfully co-existent with the normal common law practice of primogeniture. In legal arguments for and against Irish land customs, Kentish gavelkind became the yardstick for a valid local land custom governing inheritance. The abrogation of tanistry and gavelkind in Ireland becomes easier to understand when placed in the context of the treatment of similar practices in Wales and Kent. Recently, some historians of the early modern period have begun to analyse events, personalities, and

issues within the context of all the political jurisdictions in the British Isles.[10] Thus, in this "New British History", the traditional appellation of the "English Civil War" has, in some circles, become the "War of the Three Kingdoms." Although this framework has mostly been applied to the events of the 1640's, it should also help in the case of the abrogation of Irish land customs.

In the cases of tanistry and gavelkind before the Dublin courts, Davies manipulated the evidence to build a case that did not accord entirely with the reality of the legal status of the Gaelic Irish in the early seventeenth century. In addition, the interpretation of the customary nature of the common law set forth in the preface to the *Primer Report*, did not correlate with that presented in the case of tanistry of 1608. In a treatise on the common law contained in the preface, Davies argued that a custom was an ancient practice of a people, which over centuries became legitimized by time and eventually achieved the status of law.[11] Thus the common law perfectly suited the English people because it was derived from their customs – beneficial practices that developed over time. In the case of tanistry, however, Davies did not indicate that this was an ancient practice, but placed more emphasis on the initial rationality of the custom; tanistry was not a valid custom because the principle or maxim upon which it was based was unreasonable.[12] In Davies' argument, Gaelic Irish custom was not afforded the same status as the local custom of Kent at the common law. He altered the emphasis on the validity of a custom from ancient usage to reasonableness to achieve the desired result in the case at hand.

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[10] For a recent treatment, see David Armitage, "Greater Britain: A Useful Category of Historical Analysis?" and Jane Ohlmeyer, "Seventeenth-Century Ireland and the New British and Atlantic Histories", and the sources cited therein, *The American Historical Review*, 104, April 1999. Also see Brendan Bradshaw and John Morrill eds., *The British Problem, c.1534-1707*, (London: MacMillan Press Ltd., 1996).

[11] Davies, *Primer Report*, p. 252 (preface)

[12] Davies, "The Case of Tanistry", pp. 88-9.

This thesis will examine the role of custom in the thought of common lawyers to show how local custom could contravene the normal practice of the common law and still be valid. It will then provide a brief account of partible inheritance customs in Kent and Wales and show how local custom posed no problem in an English county, but was abolished when an orbit nation was joined to the English state. It will then examine those Irish land customs which seemed so alien and problematic to English jurists and administrators. A detailed examination of Gaelic society will elucidate the social and political basis of these customs. Finally, it will examine the arguments used by Davies in the 1606 judicial resolution voiding tanistry and gavelkind, and the 1608 test case on tanistry, and examine their problematic nature.

# 2 Common Law Thought in Early Stuart England

*For the Common Lawe of England is nothing else but the Common custome of the Realme; and a custome which hath obtained the force of a lawe, is always said to be Ius non scriptum; for it cannot be made or created, either by Charter, or by Parliament, which are Acts reduced to writing, and are alwaies matter of Record; but being onely matter of fact and consisting in vse and practise, it can be recorded and registered no where, but in the memory of the people.*[1]

In early seventeenth century England common lawyers held a prominent position in shaping political discourse, both inside and outside of Parliament. In law cases, in House of Commons debates, and in published and unpublished treatises, common lawyers not only contributed points of view to pressing issues such as the king's authority and power in governance and its relation to law, but also provided the most important language and conceptual apparatus which shaped how these issues were discussed. One of the fundamental issues in early Jacobean political discourse was the notion that the common law shaped the relations between the powers that govern – the king, lesser magistrates, and the Parliament – as well as those between the governors and the governed. In particular, the common law was conceived of as protecting the individual's property from the possible encroachment of other subjects and the crown. This was clearly articulated in the debate over the legality of impositions.

The common law also reinforced the dominant view in early modern England that antiquity conferred legitimacy to a custom or system of governance. Innovation was suspect for it had not been subject to what common lawyers generally saw as one of the best judges –

[1] Sir John Davies, *Le Primer Report des Cases et Matters en Ley Resolves et Adjudges en les Courts del Roy en Ireland*, (Dublin 1615), A.B Grossart, ed., *The Works in Verse and Prose Including Hitherto Unpublished Manuscripts of Sir John Davies*, (Blackburn, 1869-1876), iii, pp. 251-2 (preface).

time. Whether common lawyers saw the common law predominantly in terms of custom, reason, or a combination of both, the legitimacy (some lawyers would argue the supremacy) of the common law rested substantially on its antiquity. Common law developed over time, deriving largely from the practices of the English people as refined in the courts. Thus, the farther back a practice, system, or idea was rooted in the past, the more legitimate it could claim to be in debate and in law. Practices rooted in the mists of time (or rather without a specific point of origin), carried the greatest force of all. Longevity was particularly important in the early Jacobean discussions of the relations of governance – which were described in terms of the "ancient constitution."

Not only did common lawyers provide some of the key concepts and language that guided political discourse, but lawyers themselves were prominent in English political life. Johann Sommerville has identified three ways in which common lawyers were important in Jacobean England. Firstly, a legal career was a well-trodden path to high office. Lawyers were prominent in Parliament, although "their influence was out of all proportion to their numbers."[2] As the business of Parliament was partly to fashion new and interpret old laws, legal training of some degree was advantageous to members of parliament, especially for the drafting of statutes which would endure the challenge of application in the courts. Thus the laws had to be sound. Secondly, the common law, which shaped the relations between the governors and the governed, was "the sole effective barrier against absolutism available within the established constitution."[3] Common lawyers were the guardians and practitioners of those laws and practices which served to safeguard the liberties of English subjects from the potential encroachment of royal servants. For example, one could look at the prominent role

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[2] Johann Sommerville, *Politics and Ideology in England, 1603-1640*, (New York: Longman, 1986), p. 86.

[3] Ibid.

of common lawyers such as Thomas Hedley in the impositions debate in the parliament of 1610.[4] Thirdly, the common law was a strong cultural and intellectual force in English society outside of Whitehall. The Inns of Court, in which gentlemen studied to become common lawyers, were socially more prestigious than the two universities. Even without proceeding to the bar, study at the Inns provided the basic legal knowledge to equip gentlemen for a career in politics at the national level in Parliament or as Justice of the Peace in local governance. Thus the ethos of the ruling groups in both local and central English society was shaped, in part, at the Inns of Court where the common law notions of the antiquity and supremacy of English law, as well as ideas that the common law was rational and customary, were learned. The influence of the common law and its lawyers was thus key to Jacobean politics. Common lawyers were not merely participants in important political discourse, but were also instrumental in maintaining the most widely used language and conceptual framework for the debate of key political issues.

Debates over governance during the Jacobean period were often part of a larger discourse on the nature of the English constitution.[5] Such issues as the Crown's power to collect non-statutory customs (impositions) encompassed constitutional issues – such as the king's authority and power in governance and its relation to law. Out of these debates inside and outside of Parliament came conceptions of the common law in its relationship to governance. Paul Christianson has identified three positions on the nature of the English constitution in the early Jacobean period. James I and VI, in a March 21, 1610 speech to both Houses, presented a view of the English constitution as a "constitutional monarchy

[4] Elizabeth Read Foster, ed., *Proceedings in Parliament 1610*, 2 vols., (New Haven: Yale University Press, 1966), ii, pp. 170-97. To be discussed below.

[5] The relations of English central governance were generally called "the ancient constitution" because of the presupposition that legitimacy came from ancient usage. The English constitution was deemed to be the same or very similar to what it had been in Saxon (i.e. pre-conquest) times.

created by kings." In his view, kings arbitrarily governed only at the beginning of a society, but then, by making law and establishing institutions, restricted their own actions and those of their successors.[6] The coronation oath reaffirmed the king's commitment to upholding the laws of the realm and the liberties of his subjects. A second position on the English constitution, also expressed in 1610, was the view of the common lawyer Thomas Hedley, who fashioned a view of a "constitutional monarchy governed by the common law." In his House of Commons speech on impositions, on June 28, 1610, Hedley argued for the supremacy of the common law over the King-in-Parliament. Since the common law was immemorial it could not wholly be abrogated by Parliament; Parliament derived its authority from it, not the other way around.[7] A third position was put forth by the common lawyer and antiquarian John Selden, who represented England's constitution as a "mixed monarchy" in which monarchs, nobles, clergy, and representatives of the people had shared sovereignty from the beginning of the society. Still a foundational feature of this view of a mixed monarchy, the common law "underlined the sovereign place of the king-in-parliament in the constitution."[8]

Although the common law was generally seen by those engaged in political discourse to be an integral if not guiding force in the constitution of England, there were a variety of possible positions on exactly what was the common law. One possibility was that it was comprised of the customs of the English people. Another, that it consisted primarily of the statutes created by the king-in-parliament. Still another, that it represented the practical realization of God's law or natural law. Or, it could have been a combination of some or all

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[6] Paul Christianson, "Ancient Constitutions in the Age of Sir Edward Coke and John Selden" in Ellis Sandoz, ed., *The Roots of Liberty*, (Columbia: University of Missouri Press, 1993), pp. 92-4.

[7] Ibid., pp. 97-9. Hedley also saw common law as more beneficial or more suited because it developed over time, rather than statute law which was created at a specific place and time.

[8] Ibid., p.104

of these. In an important work published in 1957, J.G.A. Pocock argued that by around 1600 there was a consensus among English common lawyers as to what constituted English common law.[9] The "common-law mind" as Pocock called it, was essentially constructed of three key interpretations. First, that all law in England was common law: that the common law was the only law the English people had ever known.[10] Second, that common law was customary: that it was comprised of the general customs of the English people. Third, that all custom was by definition immemorial: that there was not a time when the custom could be shown not to have been observed.[11] Thus, according to Pocock, common lawyers thought of the common law as customary, immemorial, and the supreme law of the land.

Since the publication of his ideas on the "common-law mind" over forty years ago, Pocock has come under criticism, some of which he attempted to answer or rebut in a retrospect of the new edition of 1987. In constructing his interpretation, Pocock drew almost exclusively upon works by Sir John Davies and Sir Edward Coke, who, some historians have argued, did not accurately reflect the ideas of most common lawyers of the period.[12] As a prudent first observation, it should be remembered that Pocock's "common-law mind" provides a model whose force, like any other model, lies in its power to generalize. Its generalizations may or may not hold true in all cases, but its explanatory power lies in its ability to show what a politically and culturally prominent group generally thought of the common law – a legal system which was seen as foundational to the English constitution.

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[9] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law*, (originally 1957, reissued with a retrospect, New York: Cambridge University Press, 1987).

[10] According to Pocock, "Except for Ireland, Celtic law was forgotten, and local customs, like those of Kent, survived only because the King's courts recognized them." Ibid., p. 30.

[11] Ibid., pp. 30-1.

[12] Glenn Burgess and J.W. Tubbs, for instance, argued that Coke was not only not a representative common law thinker, but that his views on the nature of the common law themselves were confused or, at the least, substantially evolved over time. Burgess called Coke "eccentric, and sometimes a confused thinker." *The Politics of the Ancient Constitution*, (London: Macmillan, 1992), p. 21. For the evolutionary nature of Coke's thought, see Tubbs, "Custom, Time and Reason: Early Seventeenth-Century Conceptions of the Common Law," *History of Political Thought*, 19 (1998), pp. 388-92.

Challenges to a particular component of the model, such as attacks on the atypicality of Coke, are useful in delving into the thought of that particular person, but do not necessarily erode the validity of the entire model. Context is a key. For example, the Irish *Primer Report* of Sir John Davies, which shall be examined in detail below, appears to have had two agendas. In the preface to the *Primer Report*, he presented a treatise on the supremacy and absolute wisdom of the English common law, yet in the law cases themselves, Davies used arguments based on maxims and principles taken from both civil and canon law.[13] As well, in a later treatise, Davies in fact argued for the original absolute power of the king in England before the creation (or evolution) of common law.[14]

The career and writings of Davies have proved grist for the mill of Hans Pawlisch, one of the first historians to challenge Pocock's thesis about the insularity of the "common law mind." Not entirely fair, Pawlisch argued that "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." [15] Pawlisch has shown that Davies received considerable exposure to both civil and canon law during his study at New College, Oxford and through his friendship with the Dutch civil lawyer Paul Merula, under whom Davies most likely studied in the 1590's.[16] This challenge by Pawlisch and similar attacks by others, however, have missed the point: Pocock did not

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[13] Paul Christianson has deemed this activity a "receptionist" view of law, in that common lawyers such as Davies 'received' useful aspects of civil or canon law. Christianson, "Political Thought in Early Stuart England," *The Historical Journal*, 30 (1987), p. 966.

[14] *An Argument Upon the Question of Imposition, digested and divided into sundrie Chapters by one of his Majestie's Learned Counsel in Ireland* in Grossart, ed., *The Works in Verse and Prose Including Hitherto Unpublished Manuscripts of Sir John Davies*, (Blackburn, 1869-1876), iii, Chapter 7.

[15] Hans S. Pawlisch, "Sir John Davies, The Ancient Constitution, and the Civil Law," *The Historical Journal*, 23 (1980), p. 689.

[16] Ibid., p. 695; and Hans S. Pawlisch, *Sir John Davies and the Conquest of Ireland*, (New York: Cambridge University Press, 1985), p. 17.

argue that common lawyers were oblivious or ignorant of other law systems such as the *Corpus Iurius Civilis* or the canon law. Rather, he argued that what they did know of these systems did not significantly alter their conception of the common law. Common lawyers were acquainted with the civil law, and probably knew many of its fundamental points or maxims, but this did not greatly alter the way they thought about the common law of England.

Davies provides a case in point. In the preface to his *Primer Report*, he articulated a view of the common law which stressed, perhaps more strongly than any other common lawyer, the customary nature of the common law: "For the Common Lawe of England is nothing else but the Common Custome of the Realme."[17] Not only did Davies conceive of the common law as customary, but he also argued that this customary nature was fundamental to its superiority in England: "And this Customary Lawe is the most perfect, and most excellent, and without comparison the best, to make and preserve a Commonwealth."[18] Ironically, Davies could express such high views of the common law, and yet in the same treatise, could employ maxims and principles from the civil and canon laws to further his case at law. Specifically, Davies used civil law arguments in his prosecution of constitutionally sensitive cases before the courts in Dublin.

Pocock's model of the "common-law mind" also stressed that the common law was customary and immemorial. In other words, English common lawyers came to conceive of the common law as the common custom of the realm, which stretched back into antiquity in an unbroken chain of usage. However, J.W. Tubbs has recently argued that early Jacobean common lawyers placed more emphasis on the rationality of the common law than its

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[17] Davies, *Le Primer Report des Cases et Matters en Ley Resolves et Adjudges en les Courts del Roy en Ireland* in *Works*, iii, pp. 251-2 (preface).

[18] Ibid., p. 252.

customary nature, stressing that it was far more important to conceive of the common law as a system of rational practices than a system of ancient usages.[19] Even when lawyers said that the common law was based on custom, they were really using "custom" as a short-form for the common law's rationality. Tubbs pointed out that common lawyers, unlike their civilian or canon counterparts, had no theory explaining why their law was authoritatively binding. "As long as they called it custom they did not need to provide a theoretical justification for its authority because custom was a recognized source of law all over Europe."[20] Glenn Burgess has also argued that common lawyers thought of the common law as primarily rational: "Reason, it can truly be said, was in the eyes of the common lawyers the fabric from which the laws were cut."[21] Burgess, however, still saw an important role for custom in the lawyers' conception of the common law. Custom explained how laws could be both rational and mutable.[22] For example, natural reason (as opposed to a form of legal thought or reasoning which Coke deemed "artificial reasoning") could not explain why primogeniture was the normal inheritance practice for most of England, while gavelkind, a form of partible inheritance, was the norm for the county of Kent and other practices such as borough English, in which only the youngest son inherited, were prevalent in other communities. Thus the notion of custom solved this rational puzzle: the reason why gavelkind was practised in Kent was because it had always been practised in Kent. At some point, beyond the written sources which recorded it as custom, the practice was adopted. Over time and through continuous observance, the legitimacy of the practice was reinforced by usage and by judgements in the records of the king's courts. Aspects of the common law such as inheritance customs did not require specialized legal training to understand them because

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[19] Tubbs, "Custom, Time and Reason," pp. 386-9; 406.
[20] Ibid., p. 406.
[21] Burgess, *The Politics of the Ancient Constitution*, p. 20.

they were the practices that held the society together and were normally followed without recourse to the courts.[23] Indeed, as we shall see below, inheritance customs provide an excellent illustration of the role of custom in the conception and practice of the common law.

One of the issues of intense debate in James I and VI's reign was the question of impositions or taxes on imported goods which were levied without consent of Parliament. An important legal decision in Bate's Case in 1606, claimed that in areas of public interest the king had an "absolute" authority and was not bound by the contours of the common law. The king decided what was in the public interest and, in the words of Chief Baron Fleming, "the wisdom and providence of the king is not to be disputed by the subject."[24] Following this decision, the king sought to increase royal revenues by authorising collection of impositions on many commodities, issuing a new book of rates in 1608. This revenue raising policy, however, sparked an important constitutional debate centering on the principle that taxation required consent. It was during the parliamentary debate on impositions on June 28, 1610, that the common lawyer Thomas Hedley articulated a position on the common law that emphasized its rationality and immemorial customary character. Hedley's speech also provided an important example of a common lawyer's conception of the common law.

### *Thomas Hedley and the Common Law*

Near the beginning of this speech in the House of Commons, Hedley stressed the

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[22] Ibid., p. 29.
[23] Ibid., p. 34.
[24] Cited in Sommerville, *Politics and Ideology in England*, p. 152.

rationality of the common law. "For as the rules and maxims of all arts are agreeable to reason, and grounded thereupon, so especially is that of the common law."[25] Since the common law was harmonious with reason, it followed that an intelligent person, although unlearned in the technicalities of the law, could understand the rationality of a particular law by understanding the maxims or principles upon which it was based. "For to be bound to observe a law that a man is not only ignorant in, but uncapable of, were unreasonable, for that were *ignorantia inimicalis*, which by all laws excuseth *et a tanto et a toto.*"[26] Hedley's portrayal of the common law as based on maxims which any intelligent person could understand, however, was a procedural argument in favour of Parliament's suitability to comment on a matter already decided in the king's courts. Hedley noted that the Commons members were "for the most part no professed lawyers, nor learned in the law" and thus he needed to show that non-lawyers in Parliament were justified in debating a major issue at law.

With this objection set aside, Hedley delved into the nature of the common law. Although he argued that non-lawyers could understand the law, he did suggest that the common law merely reflected common reason. Even if all law was rational, this did not mean that everything rational was legal, "for though it be true that all law is reason, yet that is no convertible proposition, for everyone knows that all reason is not law...".[27] En route to arguing for the supremacy of the common law in the realm, Hedley also dismissed the view that the common law was "reason approved by the judges to be good and profitable for the commonwealth," a view similar to Coke's "applied reason" which emphasized the legal

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[25] Foster, *Proceedings in Parliament 1610*, ii, p. 172. Thomas Hedley (c.1570-1637), was Member of Parliament for the city of Huntingdon.

[26] Ibid., p. 173.

[27] Ibid.

experience and training of judges and lawyers that uniquely enabled them to understand the inner-workings and logic of the law. The common law was not this judicial reasoning because statutes formed part of the common law and judges had no direct hand in the framing of legislation at Westminster. The king-in-parliament legislated. Although the king-in-parliament created positive laws for the land, it did not stand above the common law: "the parliament hath his power and authority from the common law and not the common law from the parliament. And therefore the common law is of more force and strength than the parliament, *quod effecit tale maius est tale.*"[28] Parliament in the past had found defects in the common law ("for what is perfect under the sun"), yet Parliament was neither as wise nor had the power of the common law. Parliament could not abrogate the whole common law, because its power came from the common law itself.[29] The common law also held sway in important royal matters, such as the descent of the crown, which Hedley doubted statute could do. At the opening of his speech, then, Hedley placed the common law in supreme position in the ancient constitution and stressed its rationality.[30]

Building upon the words of a member from the previous session who had noted that statutes were based on the reason and wisdom of parliament, Hedley argued that the common law "was somewhat more than bare reason," for it was "tried reason, or the quintessence of reason."[31] Some might think that Parliament, which represented the wisdom of king, commons, clergy, and nobility, might provide an unsurpassed "trier" of reason. Others would favour judges with their specialized knowledge and experience of the law, but Hedley lightly dismissed judges as "all joined to the parliament."[32] This may seem an

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[28] Ibid., p. 174.
[29] Ibid.
[30] Christianson deemed Hedley's position on the ancient constitution as "constitutional monarchy governed by the common law." See "Ancient Constitutions," pp. 97-102.
[31] Foster, *Proceedings in Parliament 1610*, ii, p. 175.
[32] Ibid.

ambiguous phrase because justices were royal servants, appointed, and paid by the king; however, the judges of the central common law courts did advise the House of Lords during parliamentary session. The ultimate demarcator of the common law's reasonableness according to Hedley was neither king, judge, nor Parliament, but time: "the trier of truth, author of all human wisdom, learning and knowledge, and from which all human laws receive their chieftest strength, honour, and estimation."[33] A sound law could be enacted in Parliament after much debate and reasoning, but only the test of time would determine whether the statute was in the best interests of the commonwealth. Time was the ultimate judge for Hedley. "Time is wiser than judges, wiser than the parliament, nay wiser than the wit of man."[34] For this purpose, Hedley had in mind not relatively short increments of time, say between parliaments, or even medium periods, such as between a generation or two, or even a century, but extensive amounts of time – preferably several centuries or time-out-of-mind. Time immemorial meant the law originated beyond any human record or memory.[35] If the origin of a law could be pointed to, it did not necessarily negate the reasonableness of the law, but perhaps lessened its legitimacy, since time was the great legitimator.

Hedley thus defined the common law as a mixture of reason and immemorial usage. In his own words: "the common law is a reasonable usage, throughout the whole realm, approved time out of mind in the king's courts of record which have jurisdiction over the whole kingdom, to be good and profitable for the commonwealth."[36] This statement requires interpretation to understand its implications. An important component was the definition of the common law as a reasonable usage "throughout the whole realm" – thus

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[33] Ibid.
[34] Ibid.
[35] Time immemorial strictly meant before 1189, the date fixed by the 1290 statute *Quo Warranto*. J.H. Baker, *An Introduction to English Legal History*, Third edition, (Toronto: Butterworths, 1990), p. 167.
[36] Foster, *Proceedings in Parliament 1610*, ii, p. 175.

implying uniform observance of the same law throughout the land, as opposed to local customs, which would not have the same standing. A second qualification relating to the law's legitimacy was its continual approval in the courts. Ironically, Hedley stressed that a law must be "approved time out of mind in the king's courts of record", something impossibly combining immemoriality with written records, unless he meant that a law had already existed time-out-of-mind before being recorded and then was continuously upheld in courts of record. The legitimacy afforded to a law by its long-standing recognition in the courts was an important factor in Hedley's conception of the common law.

Hedley raised a significant qualification about the force of recorded usages in courts. The fact that a law or national usage had an antique history in legal record did not necessarily mean it was just or advantageous for the English people. "For whatsoever pretended rule or maxim of law, though it be colored or gilt over with precedents and judgements, yet if it will not abide the touchstone of reason and trial of time, it is but counterfeit stuff, and no part of the common law."[37] Recorded usage in the courts did not outweigh for Hedley the foundational legitimacy conferred by time and reason. Following from this came the proposition that no legal judgement was sacrosanct, since the decision given by a particular judge on a certain occasion did not carry the same weight as time and reason.

> And if a judgement once given should be peremptory and trench in succession to bind and conclude all future judges from examining the law in that point or to vary from it, then the common law could never have been said to be tried reason grounded upon better reason than the statutes, for it should then be grounded merely upon the reason or opinion of 3 or 4 judges, which must needs come short of the wisdom of the parliament.... Therefore no reason that a judgement should be so sacred or firm that it may not be touched or changed, for then every judgement should be stronger than an act of parliament, besides

[37] Ibid., p. 178.

> the parts of the common law could never have so good a coherence or harmony as now they have.[38]

The decisions of justices were not only less forceful than the tests of time and reason, but they were also below the law-making powers of parliament. Otherwise, three or four crown appointees could make law instead of the king-in-parliament. Although inferior to the test of time, Parliament retained a supreme law-making function.[39]

One key element of Hedley's common law view was the role of custom. In his model of the "common-law mind," Pocock argued that common lawyers understood English common law to be customary and emphasized its immemorial character. Hedley drew a distinction between local customs and those practiced across the nation. For example, although partible inheritance was ubiquitous in Kent, throughout the rest of the kingdom, inheritance through the eldest son (primogeniture) was the normal practice.[40] For Hedley, then, the practice of gavelkind in Kent was a custom, but primogeniture was a usage in the common law. Pocock has pointed to the fact that the term "custom" in the early seventeenth century sometimes bore local and sometimes national connotations. "We must separate usage and custom (*usus et consuetudo*) altogether and declare that they bore radically different meanings; or (which seems more reasonable) we must acknowledge that the latter

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[38] Ibid., pp. 178-9.

[39] According to Sommerville, Hedley saw common law judges as possessing unique legal experience and reasoning which they somehow imparted from previous generations of judges. "In Hedley's view, the pronouncements of contemporary judges were not the mere expressions of personal opinion, but the culmination of a long historical process. The judges spoke not for themselves alone, but for their predecessors, and their decisions encapsulated the distilled wisdom of bygone generations." *Politics and Ideology in England*, p. 91. Although Sommerville's remarks lend legitimacy to the notion of judges' decisions – based on a continuity of legal wisdom – this does not alter the fundamental point that judge-made law was seen as incomparable to the wisdom of time.

[40] There were other inheritance customs throughout the kingdom, including borough-English (predominantly in towns) in which the youngest son inherited, and other forms of partible inheritance. For partible inheritance in the north of England, see S.J. Watts, "Tenant-Right in Early Seventeenth-Century Northumberland," *Northern History*, VI (1971), pp. 64-87. For partible inheritance customs in Cambridgeshire, see Margaret Spufford, "Peasant Inheritance Customs and Land Distribution in Cambridgeshire from the Sixteenth to the Eighteenth Centuries," in Jack Goody, et al., eds., *Family and Inheritance: Rural Society in Western Europe, 1200-1800*, (New York: Cambridge University Press, 1976).

term could either be read as having a local and particular significance or be enlarged and enter into the former."[41] Hedley, however, seems to have kept the two terms apart. To recall his definition of the common law, it was "a reasonable usage, throughout the whole realm, approved time out of mind...". Hedley noticeably employed the term "usage" rather than "custom" to denote a practice observed commonly throughout the kingdom. Customs, on the other hand were "confined to certain and particular places."[42] Presumably a custom would become a usage once it was more generally observed throughout the country. Hedley made this evident in a passage on the reasonableness of customs and usages in courts, arguing that no unreasonable practice could be upheld in an English court: "for as no unreasonable usage will ever make a custom (pleadable in law) to bind within any manor or town, so no unreasonable usage (prejudicial to the commonwealth) will ever make a law bind the whole kingdom."[43]

The extent of the practice, however, was not sufficient for it to become a usage or for it to have force in a court of law. The other key ingredients were reason (expressed in maxims) and time. Hedley put the case in terms of the difference between custom and the common law, which he saw as differing "as much as artificial reason and bare precedents."[44] He seems to have meant that customs were fundamentally based on the fact that the same practices had been observed time and time again, whereas practices under the umbrella of the common law were antique practices that also had the stamp of reason conferred in the courts by the decisions of judges.[45] The common law was "extended by equity, that whatsoever falleth under the same reason will be found the same law" whereas in the case of a custom,

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[41] *The Ancient Constitution and the Feudal Law*, Part Two: "The Ancient Constitution Revisited," p. 273.

[42] Foster, *Proceedings in Parliament 1610*, ii, pp. 175-6.

[43] Ibid., p. 178.

[44] Ibid., p. 175.

[45] Ibid.

the reasonableness of the practice was "taken strictly according to the letter and precedent."[46] In other words the common law was ultimately based upon some principle or maxim, such that, all things being equal, in the same circumstances, the same common law judgement would be given in Sussex as in Northumberland, whereas a custom, because of its local nature, was not founded on a principle or maxim, but was based merely on continual observance. The common law, Hedley argued, "hath not custom for his next or immediate cause, but many other secondary reasons which be necessary consequences upon other rules, and cases in law, which yet may be so by degrees till it come to some primitive maxim...".[47]

If custom did not play a key role in the common law, however, what did Hedley mean when he noted that the common law "depends wholly upon reason and custom"?[48] One reading could follow Pocock's suggestion that "custom" was variously used in the seventeenth century to denote local and national practices. The use of "custom" rather than "usage" marked a lapse of precision in Hedley's language. A second reading could have Hedley noting the two foundational aspects of the common law as reason and custom and using "custom" to mean the origin of a tradition in local practice before it became observed nationally and acquired the status of a "usage." In this reading, reason and custom would come to be expressed in maxims and usages, the foundations for Hedley's interpretation of the common law. The latter seems better to capture Hedley's meaning.

An important precondition for a custom or usage was its continuity over a long stretch of time, indeed for "time-out-of-mind" in the royal common law courts. In his discussion of time as the ultimate judge, Hedley stated that the amount of time needed was not "for 7 years or till the next parliament, but such time whereof the memory of man is not

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[46] Ibid., p. 176.
[47] Ibid.
[48] Ibid., p. 180.

the contrary, time out of mind, such time as will beget a custom."[49] For Hedley, the immemoriality of a custom or usage was expressly tied to its record in English common law courts. "[T]he common law" he argued, "is a reasonable usage, throughout the whole realm, approved time out of mind in the king's court of record...".[50] The common law was based on customary practices, but for Hedley these practices had to meet the two criteria of rationality and immemoriality, both of which were determined by the courts of law.

### *Sir John Davies and the Common Law*

In 1615, Sir John Davies published the first ever collection of Irish law case reports, which included the resolution voiding gavelkind and tanistry and other recent constitutionally significant cases.[51] Prefaced to these cases was a treatise on common law in which Davies, more than any other lawyer at the time, identified the common law with immemorial custom. As a starting point, Davies saw the common law as the best law in the world, in part because it protected liberties of the people and the prerogatives of the monarch:

> ...[Y]et we may truly say, That no human Law, written or unwritten, hath more certaintie in the Rules and Maximes, more coherence in the parts thereof, or more harmonie of reason in it: nay, we may confidently averre, That it doth excell all other lawes in upholding a free Monarchie, which is the most excellent forme of government; exalting the praerogative Royall, and being very tender and watchful to preserve it, and yet maintaining withall the ingeneous liberty of the subject.[52]

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[49] Ibid., p. 175.

[50] Ibid.

[51] *Le Primer Report des Cases et Matters en Ley Resolves et Adjudges en les Courts del Roy en Ireland.* (Dublin, 1615), translated as *A Report of Cases and Matters in Law Resolved and Abridged in the King's Courts in Ireland.* (Dublin, 1862). The early editions of the work included a Preface on common law in English and accounts of the cases in law French. Eighteenth and Nineteenth century editions translate the latter into English.

[52] Davies, *Primer Report*, pp. 254-5 (preface).

Here Davies implicitly made a connection between English common law as the best law on earth and the law of nature. There were thought to be two types of laws that governed the world in the early modern period. The law of nature or the law of God, was a static and inherently rational code which operated among people and among nations. It was the yardstick of proper conduct against which all human laws – the laws of particular jurisdictions – were measured. Thus by arguing that English common law was the best human law on earth, Davies made the case that the common law most closely mirrored the law of nature. As we shall see, this assumption was also important in shaping Davies' attitude to Gaelic law as a competing law system in Ireland.

In part, because no law reports for cases at common law existed for medieval and Tudor Ireland, Davies strongly stressed the customary and unwritten nature of the common law in the *Primer Report*'s preface.[53] He went as far as to argue that when Parliament altered aspects of the common law, it produced detrimental rather than positive results: "when our Parliament have altered or changed any fundamentall points of the Common Lawe, those alterations have beene found by experience to be so inconvenient for the Common-wealth, as that the Common Lawe hath in efect beene restored again, in some points, by other Acts of Parliament in succeeding generations."[54] The common law uniquely fit the needs of the English people. Davies said it was "connaturall to the Nation, so as it cannot possibly be ruled by any other law."[55] This law perfectly fit the people, because it was comprised of their very customs.

More than any other lawyer of the early seventeenth century, Davies identified the common law with the customs of the people. Hedley had stressed the customary nature of

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[53] See Christianson, "Ancient Constitutions," pp. 106-9.
[54] Davies, *Primer Report*, p. 253 (preface).
[55] Ibid., p. 255.

the common law, but was equally adamant about its rationality; like the civil law, it was founded on secure principles and maxims. Sir Edward Coke emphasized the antiquity of the common law and identified it with custom; however, Glenn Burgess and J.W. Tubbs have shown that, over time, he came to see the common law as characterized by its rationality. In particular, Coke came to stress the "artificial reason" of practitioners, a legal reasoning learned over time by lawyers and judges that uniquely enabled them to understand and apply the principles of the common law.[56] Davies, however, was exceptionally clear about the customary nature of the common law: "For the Common Lawe of England is nothing else but the Common custome of the Realme."[57] The common law, which shaped the powers of governance in the constitution, which ruled through the courts, and which guided the activities of English subjects, sprang from the common customary practices of the English people.

But what does this mean, to say that a law system was comprised of the common customs or practices of the people which it governed? How did practices become laws? Davies identified a clear evolution of usage in which practices that were continually observed achieved the status of custom, and customs observed time-out-of-mind became law. For Davies, the common law was not merely customary, but was comprised of immemorial custom. The first step in this evolution of custom was the common-sense observation that people continue to perform or observe beneficial practices: "When a reasonable act once done, is found to be good and beneficiall to the people, and agreeable to their nature and disposition, then do they use it, and practise it againe, and againe."[58] The starting point of a

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[56] Burgess, *The Politics of the Ancient Constitution*, pp. 45-46; Tubbs, "Custom, Time and Reason," p. 389, 392. Pocock used the writings of Davies and Coke in particular to buttress his argument for the 'common law mind.' Both Burgess and Tubbs point to the evolution in Coke's thinking on the nature of common law as evidence against his inclusion in the 'common-law mind.'

[57] Davies, *Primer Report*, pp. 251-2 (preface).

[58] Ibid., p. 252.

law therefore was not the conscious decision of a sovereign or assembly, but the everyday practices of ordinary people. The second step in the evolution of a practice to law was its continued observance, until it became a way life – a custom: "and so by often iteration and multiplication of the act, it becometh a Custome."[59] Davies did not attach a time frame to the creation of custom, but one can imagine that an action could be performed continually until it was no longer considered new and became such a way of doing things that people agreed that it was correct and came to expect it.

The term "reasonable act" in the early seventeenth century could have several meanings: one involved comparing a particular practice to the law of nature discovered by innate reason. God gave humans reason as a tool to make moral and rational decisions about the world, and the value or reasonableness of a practice could be determined by comparing it to the best laws of other countries and the moral writings of philosophers.[60] A second was that advocated by Hedley in his speech on impositions, where he argued that the common law was comprised of reasonable usage approved time-out-of-mind in the king's courts.[61] This involved reasonableness as decided by judges and juries. Davies, however, seems to have had in mind another test for the reasonableness of a practice: the fact that people continued to observe it over a long period of time. If it were not beneficial to the people, if it contravened their belief system, or was materially damaging to their community, it would become an unreasonable practice, and the people, unless compelled not to do so, would presumably discontinue the practice. Rationality based upon custom provided the foundation for Davies' conception of the common law.

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[59] Ibid.

[60] According to Sommerville: "There was very wide agreement among Englishmen on the existence of a natural law inscribed by God in the hearts of men and discoverable by reason. Indeed, the notions that the law of nature is reason, implanted in man by God at the creation, that it is the rule of right and wrong, and that it is superior to any human law, were commonplaces." *Politics and Ideology in England*, p. 15.

[61] Foster, *Proceedings in Parliament 1610*, ii, p. 175.

For Davies, as for Hedley, time was the ultimate legitimizer, and immemorial usage formed the final step in the evolution from a practice to a customary law. When a custom continued "without interruption time out of mind, it obtaineth the force of law."[62] Unless one could point to a time when that custom was not obeserved, that custom had become law. Evidence which pointed to a custom's specific origin in time could indicate a time when it was not observed, and that custom could not be considered immemorial. Davies employed slightly different criteria than Hedley for a custom's legitimacy. Whereas Hedley argued that the common law was comprised of customs that were judged reasonable and recorded in the earliest existing court records, Davies defined a customary law as one that had been observed time-out-of-mind – not stressing documentary evidence to enforce the custom's status.[63] This criterion became important in the analysis of Irish customs; no common law reports of cases from medieval or Tudor Ireland provided the extensive recording of customs that existed in England. Documentary evidence of Irish customs increased in the later sixteenth and early seventeenth centuries, with the extension of English common law throughout Ireland; as more and more Irish were incorporated into the English legal system, their cases were brought to common law courts, and thus their customs were recorded. Chancery pleadings of the later sixteenth century, for example, recorded some of the earliest accurate documentation of Irish customs in English legal records. The *Primer Report* of Davies, however, provided the first of the common law case reports from Ireland.

Central to Davies' conception of the common law as custom was the conviction that the common law uniquely fit the English people like a glove fit a hand. Problems or

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[62] Davies, *Primer Report*, p. 252 (preface).

[63] In his account, Pocock emphasized the role of the courts in legitimizing custom for Davies. "One is obliged to say that he [Davies] knew the common law to have been shaped in the courts, and that his language somehow denotes a process whereby the courts ascertain or determine law and declare it to be common custom." *The Ancient Constitution and the Feudal Law*, p. 266. The evidence from the preface of the *Primer Report* does not seem to bear out this interpretation.

inconveniences with any custom, any aspect that did not fit the needs of the people who observed that custom, would presumably have been abandoned long ago. A customary, unwritten law was necessarily reasonable and fit the needs of the English people:

> But a Custome doth never become a law to bind the people, until it hath bin tried and approved time out of mind; during all which time there did thereby arise no inconvenience; for if it had beene found inconvenient at any time, it had bin used no longer, but had bene interrupted, and consequently it had lost the vertue and force of a law.[64]

The common law developed from the practices of a particular people and having stood the test of time perfectly suited their needs. This would seem to mean that the customary common law of England applied only to the English people. By extension, the customary laws of the French and Spanish people perfectly suited their societies, having arisen to suit their particular needs and values. According to this line of reasoning, Spanish customs would no more suit the English than English custom would suit the Spanish or the English common law would suit the Gaelic Irish.[65]

Davies also characterized the common law of England as unwritten. Written laws, whether the edicts of princes, assemblies, councils or judges could not compare to the common law since they came into operation without the critical test of time to determine their suitability for the people. Such laws were "imposed upon the Subject before any Triall or Probation [was] made, whether the same befit to the nature and disposition of the people, or whether they wil breed any inconvenience or no."[66] Laws not derived from the practices of the people and refined over time were an imposition upon the people. It was like a tailor making a suit without first measuring the client: this might result in a perfect match, but

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[64] Davies, *Primer Report*, p. 252 (preface).

[65] The issue is a bit cloudier than it first appears. The issue of conquest right over Ireland will be discussed in chapter five.

[66] Davies, *Primer Report*, p. 252 (preface).

more likely would not. A measurement of the client and several fittings would improve the chances of obtaining a well fitting suit. The test of time involved in unwritten law assured a fit between the people and their laws.

The role of reason in Davies' conception of the common law has become a point of contention in the historiographical debate over the nature of the "common-law mind." Pocock maintained that common lawyers saw the common law primarily as immemorial custom, while Tubbs and Burgess have argued that common lawyers stressed the rationality of the common law. Indeed, Tubbs argued that when common lawyers discussed the customary nature of the common law they were in reality using it as a short form for its rationality.[67] Davies clearly identified the common law with the common customs of the English kingdom: "For the Common Lawe of England is nothing but the Common customs of the Realme."[68] However, Burgess has pointed to another passage from the *Primer Report* to support his claim that Davies really saw the common law as reason: "Certainte it is, that Law is nothing but a rule of reason, and human reason is *Lesbia regula*, pliable in every way...".[69] The metaphor of the Lesbian rule came from Aristotle; Lesbian builders used flexible measurements in construction. Likewise, there were situations where immutable law was unsuitable and needed to be supplemented by "the flexibility of equity, just as the Lesbian builders found need for a flexible rule."[70] Burgess, however, neglected the context of the passage. Davies used the Lesbian metaphor at the beginning of a defensive treatment of the common law, to answer three "vulgar" objections to the common law: that it was uncertain in its reasons and judgements, that there were unnecessary delays in the

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[67] See above, p. 8.
[68] Davies, *Primer Report*, pp. 251-2 (preface)..
[69] Ibid., p. 259.
[70] Burgess, *The Politics of the Ancient Constitution*, p. 243, n.73.

proceedings of the law, and that lawyers defended causes they knew to be bad or immoral.[71] The image of a flexible rule thus helped to combat the claim that the common law was uncertain in its "reasons and judgements."[72] According to Davies, the common law was certain and reasonable: disputes that arose in cases normally did not concern points of law, but the facts of the case. "But for one cause wherein a question of Law doth arise, that is indeed worth the debating, there are a thousand causes at least, wherein if the truth of the fact were knowne, the Law were cleere and without question."[73] Customary law for Davies was inherently rational – based upon tried and true human judgement. According to his model for the development of customary law, people would only maintain practices which best suited the needs of their communities. A custom observed time-out-of-mind became *ipso facto* rational: the proof of the pudding was in the eating.

If a customary law was by definition rational for Davies, we need to establish how geographically extensive the practice was to be considered a customary law. Hedley made a distinction between "custom" – which seemed to mean local practice – and "usage" – which denoted a more generally observed custom. However, this distinction was not explicitly made by Davies, who used only the term "custom" and by it he meant generally observed rather than local practices.[74] In other words, Davies used "custom" to cover what Hedley designated as "usage." This distinction was important. Such language provides a key for understanding the views of custom and law held by leading English common lawyers. It also provides a key to the sort of conceptual predispositions that they brought to their perception of other systems of law or even to the distinction between local and general customs. A

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[71] Davies, *Primer Report*, p. 259 (preface).
[72] Ibid.
[73] Ibid., p. 260.
[74] Pocock: "it is clearly not enough to say that he [Davies] thought of custom as local and exceptional." *The Ancient Constitution and the Feudal Law*, p. 266.

discussion of the issue of inheritance in England and Wales will illustrate how common lawyers incorporated such local customs as partible inheritance in Kent and Wales into the fabric of the common law. It should also provide a key to unlock the approach of Davies to similar customs in Ireland.

# 3 Local Custom and the Common Law: Gavelkind in Kent and Wales

*The v. grounde of the lawe of Englande standyth in dyuers partyculer customes vsed in dyuers countres/ townes/cyties/ & lordshyppes in this realme/the whiche partyculer customes bycause they be no agaynste the lawe of reason/nor the law of god/ though they be agaynste the sayde generall customis or maxymis of the law: yet neuthereles they stand in effecte and be taken for lawe... Fyrste there is acustome in Kent that is called gauelkynde/ that all the bretherne shall enheryt togyther as susters at the common lawe.*[1]

Land or real property in early modern England, Wales, and Ireland was a fundamental part of life. From it the sustenance of life was sown and reaped, and the possession or occupation of it represented tangible wealth and power. In early modern England and Wales, land was a primary source of power in local governance. The laws that governed access to the possession or occupancy of land thus in some sense controlled access to wealth and power. In clan-based societies such as Wales and Ireland land was held by kin-groups and distributed to its members, often sustaining independent polities where loyalty to the clan overshadowed that to the English Crown and administration. The native laws of inheritance, which maintained these cohesive clan territories, threatened to block the extension of English legal and administrative structures in both Wales and Ireland, and thus posed obstacles to the more complete incorporation of them into the English state. In Ireland, one of the primary policies of the crown in the first decade of the seventeenth century was to substitute English primogeniture for Gaelic partible inheritance, as means of curbing the authority of strong Gaelic lords.

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[1] Christopher St. German, *St. German's Doctor and Student* (1523), T.F.T. Plucknett and J.L. Barton, eds., (London: Selden Society, 1974), p. 71.

An examination of some of the particular inheritance customs in England and in Wales in this chapter will provide a comparative context for a further discussion of traditional Irish land customs in the next. Such an inquiry will show that partible inheritance – the division of real property among more than one heir – was not unique to Ireland. It was the general custom in Wales until it was abrogated by statute in 1542, and common in many parts of England, especially Kent. This chapter will illustrate how partible inheritance customs in some English localities had the force of law even though the general inheritance practice for the kingdom was descent through the eldest son – primogeniture. Common lawyers were well acquainted with local inheritance customs that differed markedly from primogeniture. Because of their customary nature, such practices as partible inheritance had the force of law in their particular areas and could successfully coexist with the general custom of primogeniture.

The general abrogation of the inheritance custom (known as "gavelkind") in Wales and the piecemeal "disgavelling" or abrogation of partible inheritance lands in Kent were achieved by parliamentary statute, setting a precedent which could have been followed in the case of Ireland. When voices were raised in the Parliament of 1601 for the abolition of gavelkind for the whole of Kent, the House of Commons debated and defeated the ensuing bill.[2] Shortly thereafter, a decision by the judges of the central courts in Dublin, achieved this goal in Ireland without recourse to the Irish Parliament.

In England, primogeniture was the general inheritance custom established at common law. It originated from the military tenures associated with feudalism, introduced

[2] Sir Simon D'Ewes, *A Compleat Journal of the Votes, Speeches and Debates, Both of the House of Lords and House of Commons, Throughout the whole Reign of Queen Elizabeth, of Glorious Memory*, (London, 1693), pp. 674-6.

into England after the Norman Conquest.[3] This feudal structure involved a personal relationship between superior and inferior marked by reciprocal duties of protection and services. Primogeniture made sense in this context; a military man held a parcel of land so long as he faithfully performed the requisite services. A tract of land split up among many proprietors, on the other hand, could not provide an expensive knight. When royal courts began applying the rules affecting military tenure to all free tenures, primogeniture became the norm.[4] As early as 1309, primogeniture had become the rule and partibility, except in Kent, had to be proved as a special custom.[5]

In theory, descent in England followed from father to eldest son; however practice was never so tidy. Partible inheritance, for instance, was never unique to Kent. Among peasant families, it held sway over parts of the north and east of England.[6] Indeed, the examination of wills from the sixteenth to eighteenth centuries made by Margaret Spufford shed revealing light on the practice of primogeniture; since the heir often had to provide for his brothers, and possibly his sisters, out of his inheritance, even primogeniture often became a kind of partibility in disguise. In her study of the basic farming structures of England's different regions, Joan Thirsk noted a correlation between settlement pattern, type of farming, and social structure on the one hand, and the type of inheritance custom on the other.[7] Partible inheritance in sixteenth century England was more widely practiced in

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[3] A.W.B Simpson, *A History of the Land Law*, Second Edition, (Oxford: Clarendon Press, 1986), p. 62.

[4] W.S. Holdsworth, *A History of English Law*, iii, (London: Meuthen & Co., 1909), p. 140. With free tenure the tenant was protected by the courts of common law. Ibid., p. 22.

[5] Ibid., p. 141.

[6] S.J. Watts, "Tenant-Right in Early Seventeenth Century Northumberland", *Northern History*, VI (1971), pp. 64-87; Margaret Spufford, "Peasant inheritance customs and land distribution in Cambridgeshire from the sixteenth to the eighteenth centuries", in Jack Goody, et al., eds., *Family and Inheritance: Rural Society in Western Europe, 1200-1800*, (New York: Cambridge University Press, 1976), pp. 156-76.

[7] Joan Thirsk, "The Farming Regions of England", Joan Thirsk, ed., *The Agrarian History of England and Wales*, iv, (Cambridge: Cambridge University Press, 1967).

highland areas characterized by pastoral farming, than in lowland regions, characterized by a system of mixed husbandry. In lowland regions where cultivation was done in common ploughlands, there was more communal control of farming and submission to stricter manorial regulation of inheritance: "For the most part they were inclined to accept the custom of primogeniture, that is to say, they commonly accepted it as the custom of the manor...".[8] Highland regions, where settlement patterns were typically the hamlet or small farmstead rather than manors, experienced less manorial control. In these regions, peasants had fewer working associations with neighbours than in lowland regions, with their more nucleated villages and cultivation in common fields.[9] Thirsk has suggested that partible inheritance was common in highland areas and lowland areas such as Kent because they shared a social framework in which the family acted as a powerful agent of social control and discipline. "Thus many communities in pastoral regions were not firmly held together by manorial discipline so much as by their loyalty to kinsmen, whether to the large clan or small family. These loyalties controlled the younger generation, and governed the distribution of land among descendants."[10] Although people commonly practiced partible inheritance in many parts of England, it was most famous in Kent.

### *Gavelkind in Kent*

In a mid-seventeenth-century treatise on gavelkind in Kent, William Somner argued that the custom put Kent on the map. "Among the many singularities of Kent, that of so much more note, both at home and abroad, commonly called *Gavelkynd*, may seem to bear away the bell from the rest, as being indeed a property of that eminent singularity in the

[8] Ibid., p. 14.
[9] Ibid., p. 8.
[10] Ibid., p. 9.

Kentishmens possessions, so generally in a manner, from great antiquity, over-spreading that Country, as England at this day cannot shew her fellow in that particular...".[11] Sixteenth and seventeenth century writers offered several explanations for the origin of gavelkind. Silas Taylor suggested that partible inheritance had been the general practice throughout the world before primogeniture became the norm in England and France. "And for my part" Taylor argued, "I make no question, but in elder times it was the custom of all *Europe*, if not of all the *world*: especially then, when the inhabitants, by reason of their paucity, could so easily afford Ground and Room to their branching and spreading Generations."[12] Taylor's linking of partible inheritance to the availability of extensive land has been accepted by modern historians. According to Thirsk, partible inheritance could survive without causing great economic difficulty only so long as the commons provided a reserve of land from which succeeding generations could draw their living.[13] With partible inheritance, land would be divided continually, one generation after another; even when some kind of reconsolidation took place, division would begin again. Bringing common land into arable provided the reserve that allowed partible inheritance to continue.

In 1577, William Harrison cited classical sources to suggest that partible inheritance originated as an imposition by the Romans upon the quarrelsome Germanic peoples, in an effort to sap their strength and reduce their rebellious nature.

> It was first devised by the Romans, as appeareth by Caesar in his *Commentaries*, wherein I find that to break and daunt the force of the rebellious Germans they made a law that all the male children (or females for want of males, which still holdeth in England) should have their father's inheritance equally divided amongst them. By this means also it came to pass that, whereas beforetime for the space of sixty years after this law made, their power did wax so feeble and such discord fell out amongst themselves that they were not able to maintain wars with the Romans nor raise any just army against them. For as a river running with

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[11] William Somner, *A Treatise of Gavelkind, Both Name and Thing*, (London, 1660), p. 1.
[12] Silas Taylor, *The History of Gavelkind, With the Etymology thereof*, (London, 1663), pp. 4-5.
[13] Thirsk, "The Farming Regions of England," p. 11.

> one stream is swift and more plentiful of water than water when it is drained or drawn into many branches, so, the lands and goods of the ancestors being dispersed amongst their males, of one strong there were raised sundry weak, whereby the original strength to resist the adversary became enfeebled and brought almost to nothing.[14]

Early antiquarians such as John Lambarde pointed to Saxon law codes in Kent to mark gavelkind's antiquity in the county. Lambarde's study, *A Perambulation of Kent* (1576), was the authoritative statement on the laws and customs of Kent for the late sixteenth and early seventeenth centuries.[15] Common lawyers used Lambarde's text to discuss points of law regarding legal customs in Kent. Even the judges in the Dublin common law courts in 1606 cited Lambarde as the authority on the gavelkind of Kent, which they compared to Irish partible inheritance.[16] Most sixteenth and seventeenth century writers, including Lambarde, looked to the etymology of the term gavelkind in their attempts to understand its origins. One interpretation was that "gavelkind" derived from the Old English *gafol* or *gavel*, which meant a rent or performance of customary agricultural services.[17] The other interpretation held that gavelkind came from the partible inheritance of dividing the lands among sons – that is, "give all kind." "Now, for as much as all the next of the kindred did this inherite together," Lambarde noted, "I coniecture, that therefore the land was called, either Gavelkyn, in meaning Give all kyn, bicause it was given to all the next in one line of kinred: or Give al kynd, that is, to all the male children: for kynd, in Dutch, signifieth yet a male childe."[18]

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[14] William Harrison, *The Description of England*, George Edelen, ed., (Ithaca: Cornell University Press, 1968), pp. 172-3.

[15] William Lambarde, *A Perambulation of Kent: Conteining the Description, Hystorie, and Customes of That Shire*, (London: Baldwin, Cradock, and Joy, 1826).

[16] Sir John Davies, *A Report of Cases and Matters in Law Resolved and Adjudged in the King's Courts in Ireland*, (Dublin, 1862), "The Resolution of the judges, touching the Irish custom of Gavelkind", p. 136.

[17] Lambarde, *Perambulation of Kent*, p. 477. The English legal historian Holdsworth deemed this the "true derivation" of the term. *A History of English Law*, iii, p. 224.

[18] Lambarde, *Perambulation of Kent*, p. 476. Lambarde gave both roots of the term, but left it up to the reader to choose.

Gavelkind has sometimes been discussed as a form of tenure and other times as a custom of inheritance. Holdsworth, who took the view that "gavelkind" originated from Old English term for rents or agricultural services, argued that it was originally a tenure with services due the lord which over time became a free socage holding.[19] By the middle of the fifteenth century, a socage tenant owed a money rent rather than labour services to the lord, a rent known as a "quit rent" since by the payment of which, the tenant was quit of other service.[20] Lambarde noted the famous assumption that all land in Kent was held by socage tenure in gavelkind and that military tenure by knight service was a later intrusion: "As touching the lande it selfe, in which these customs have place, it is to be understanded, that all the lands within this Shyre, which be of auncient Socage tenure, be also of the nature of Gavelkind."[21]

The fundamental feature of gavelkind in Kent was the partibility of land among all heirs. "If a man die seised of landes in Gavelkinde, of any estate of inheritance, all his Sonnes shal have equall portion: and if he have no Sonnes, then ought it equally to be divided amongst his daughters."[22] Daughters only chanced to inherit in default of male heirs. In the common law, of course, descent went to the eldest son or male heir, although females could inherit if there were no males in the same degree. John Oliver of Seal, a yeoman in Kent who died in 1622, left a will in which he bequeathed a fairly equal portion to each of his sons. To his eldest son Robert, he left Faulkehouse; an orchard and field; and eight parcels of land. Out of this Robert was to pay £20 to the third son, also named Robert, and £10 to each of his other younger brothers. To the second son Thomas, went another

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[19] Holdsworth, *A History of English Law*, iii, p. 224.
[20] Simpson, *A History of the Land Law*, p. 12.
[21] Lambarde, *Perambulation of Kent*, pp. 478-9.
[22] Ibid, p. 507.

house and six parcels of land. To the fourth son John went a house in the hamlet of Stone Street and lands, and to the fifth son William went a dwelling and lands. To the sixth son George went a house at Redewell.[23] Although the eldest son appears to have inherited the lion's share of the estate, from it he had to compensate his younger brothers, thus evening-out the portions. Each of the sons was provided with land to establish a family and livelihood.

In Kent, the pattern of inheritance was tied to the estate; if an estate held in knight service was altered to socage tenure, for example, primogeniture inheritance continued, rather than changing into gavelkind. "If land aunciently holden by Knights service, come to the Princes hand, who afterwards giveth the same out againe to a common person...I suppose that his land (notwithstanding the alteration of the tenure) remaineth descendable to the eldest son only, as it was before."[24] The common law presumed that all land in Kent was gavelkind, unless proved otherwise; outside of Kent, all land was presumed to descend by primogeniture, unless dictated to the contrary by local custom. From the middle ages onwards, gavelkind inheritance was thought to account for the relative strong position of the tenantry in Kent. According to Lambarde, copyhold tenure – customary tenure held by transcript in a manorial court – was rare in Kent. Until the sixteenth century, copyhold tenants had no recourse against their lords in the common law courts. They had to seek justice, for example, for ejection from their holding, from the manorial court.[25] Thus a freehold tenant had a stronger position than a copyhold tenant at the common law. With gavelkind, each son became a freeholder: "But in place of these [copyhold tenures], the custome of Gavelkind prevailing every where, in manner every man is a freeholder, and hath

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[23] C.W. Chalklin, *Seventeenth-Century Kent*, (London: Longmans, 1965), pp. 55-6.
[24] Lambarde, *Perambulation of Kent*, p. 482.
[25] Simpson, *A History of the Land Law*, p. 155.

some part of his own to live upon. And in this their estate, they please themselves, and joy exceedingly...".[26] Indeed, from the late thirteenth century onwards, the fact that one's father was born in Kent was sufficient proof of one's free status.[27]

There were other enviable aspects of gavelkind land enjoyed only in Kent. In criminal proceedings, the custom of gavelkind ensured that the estate remained in the family rather than reverting to the crown. Those guilty of such non-treasonous felonies as murder would be executed, and their chattels forfeited to the crown, but gavelkind lands would descend to the criminal's sons. "For in that case, the Heire, notwithstanding the offence of his auncestor, shall enter immediately, and enjoy the landes, after the same Customes and services, by which they were before holden: in assurance whereof, it is commonly said, 'The Father to the Boughe, The Sonne to the Ploughe.'"[28] When Richard II wrote to a sheriff of Kent to redeliver the lands of a man executed for felony, he received a disappointing reply: "Since according to the custom of Gavelkind in this case, we ought not to have the year, day, nor the waste, nor the chief lords the escheat thereof; but the next heirs of those thus convicted and hanged shall immediately succeed to their inheritance, notwithstanding such felony."[29] However, when felons fled the county and became outlaws, their lands were then escheated to the crown and no heirs inherited.

Women in Kent under the gavelkind custom received more advantageous settlements upon the death of their husbands than under the common law. Under the common law, when a husband died seized of lands, his widow received one third of his estate. With gavelkind, however, the widow received one half of her husband's lands for use during her

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[26] Lambarde, *Perambulation of Kent*, p. 7.
[27] Holdsworth, *A History of English Law*, iii, p. 225.
[28] Lambarde, *Perambulation of Kent*, p. 497.
[29] Cited in Charles Sandys, *A History of Gavelkind and other Remarkable Customs in the County of Kent*, (London: John Russell Smith, 1851), p. 151.

life. There were, however, some important strings attached. The widow could not remarry without forfeiting her husband's lands. Nor could she "be found with childe, begottin in fornication."[30] Lambarde saw the second stipulation as sound, as it guarded against immoral behaviour, but he thought that the prohibition against remarriage was unjust. "In which behalfe, as I must needes confesse, that the later condition hath reason, bicause it tendeth (though not fully) to the correction of sinne and wickedness: So yet I dare affirme, that the former is not onely not reasonable, but meerely lewde and irreligious also."[31] Another advantage for the widow was that she did not lose her moiety (share of her deceased husband's lands) if her husband had been convicted of a felony. She would lose it only in cases – such as treason – where the heir would lose right of inheritance as well.[32]

When a wife died seized of lands under the common law, her husband received all of her lands for life, but only if the marriage had produced a child. In the case of gavelkind lands, the husband only received half of his deceased wife's gavelkind lands; however, he received these lands even without issue from the marriage. Lambarde thought this stipulation was "more courteous" than the common law, but the fact that the husband received only half rather than all of the lands was obviously "less beneficiall."[33] Nowhere did Lambarde or other contemporary sources on Kentish gavelkind mention what would happen to the husband's courtesy upon the conviction of his wife for a felony.

An important distinction that modern historians have noted about gavelkind in Kent has involved the social status of those holding these lands. Whereas the families of gentry status and above in Kent sought to maintain their prime estates in single possession, the

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[30] Lambarde, *Perambulation of Kent*, p. 501.
[31] Ibid., p. 502.
[32] Ibid., p. 503.
[33] Ibid., p. 501. The husband's right to his deceased wife's estate was known as 'courtesy.'

lower levels of society seemed to have divided their estates in fairly equal portions to provide land for all their sons. C.W. Chalklin, who has studied seventeenth-century wills in Kent, has noted that this applied from yeomen to tradespeople and even labourers.[34] Among yeomen farmers and below, if there was only one estate, the lands and buildings were sometimes divided equally among sons rather than leaving these to one son with gifts of money to the others. In 1603, two yeomen brothers, Richard and William Hatche, and their nephew Walter Hatche, inherited and divided the farm of Terwynes in Chevening. To obtain a fair division they relied upon the advice of friends. In the dwelling house, Richard got the parlour with the loft over it, the buildings to the east of the parlour, the little barn, half the stable and milkhouse, and six parcels of land and wood. William and Walter received similar portions of the house, outbuildings and fields.[35] This led to rather complex living arrangements and farming operations, but satisfied feelings of equity. Joint-ownership of one estate could become even more complicated, especially if descendants further divided the shares or sold some to an outsider. In general, heirs in-common came to some kind of arrangement whereby one heir either gained full possession or purchased the shares of the other co-heirs.[36]

Originally all strata of society in Kent, including gentry, held land by gavelkind, except for the small number who held by knights service. By the seventeenth century, however, nearly all gentry families had "disgavelled" their lands. Gentle families passed most if not all property to the eldest sons, while rent charges, money, or smaller outlying estates passed to younger sons and daughters.[37] There were two main periods of disgavelling. The

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[34] Chalklin, *Seventeenth-Century Kent*, p. 55.

[35] Ibid., p. 57, n. 2.

[36] Ibid. According to Chalklin, by the late sixteenth century, single holdings were only rarely physically divided among co-heirs.

[37] Ibid., p. 55.

first was during the reigns of John, Henry III and Edward I, when the disgavelling or alteration of gavelkind tenure, was done by royal prerogative. The second, stretching from the 1530's to the 1620's, was marked by the disgavelling of lands by parliamentary statute.[38] Individuals petitioned parliament to have the inheritance pattern of their estates altered from gavelkind to primogeniture. In 31 Henry VIII c. 3, for instance, thirty-five men, ranging from gentlemen to lords and including the king's chief minister, Thomas Cromwell, obtained the disgavelling of their estates in Kent.[39] The move toward disgavelling lands of gentry in Kent in the sixteenth and early seventeenth centuries was aimed at curbing what was seen as the decay of prominent old families because of the partitioning of lands.[40] The power and influence of prominent families in county society partly rested on their influence over their tenants and partly derived from income. Landed wealth was a prerequisite to any substantial position of public service in local governance. William Harrison's suggestion that gavelkind originated as an imposition upon the Germanic peoples by the Romans, to sap their strength, appeared in this period of disgavelling and may have projected the fears of contemporary Kentish gentry families upon the past. Unigeniture inheritance ensured that the family lands would pass, as far as possible, intact to the next generation, thus maintaining the family's status in local society.

There seems to have been only one attempt in the early modern period to abrogate the custom of gavelkind for the whole of Kent. In November 1601, a bill "that Lands in the nature of Gavelkind may descend according to the Custom of the Common Law" was introduced into the House of Commons.[41] Thomas Harris, serjeant-at-law and member for

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[38] Charles Elton, *The Tenures of Kent*, (London: James Parker and Co., 1867), p. 365.

[39] *Statutes of the Realm*, 31 Henry VIII c. 3. Unfortunately the preamble did not give any indication for the reasons of the act, only stating that the king was doing it "for diverse considerations."

[40] Elton, *The Tenures of Kent*, p. 382.

[41] Sir Simon D'Ewes, *A Complete Journal*, pp. 668-676.

Truro, argued in favour of the bill, suggesting that the custom was originally an imposition from the Norman conquest to reduce the power and influence of important British families – a variation on Harrison's view. Harris said it was a good bill, "for it defeats a Custom which was first devised as a punishment and plague unto the Country. For when the Conqueror came in, the reason of this Custom was to make a decay of the great Houses of the antient Britons."[42] If a man had an estate of £800 per annum and had eight sons, the estate would be divided into eight parts worth only £100 per annum each. The original estate would be further divided if the heirs had children. However, if the estate had remained descendable by primogeniture under the common law, "it would still have flourished."[43] Against the bill, Francis More, common lawyer and member for Reading, thought it "a very frivolous Bill, and injurious," pointing to the fact that a widow received half her deceased husband's estate, but only one third by the common law. More also thought highly of the provision of the custom whereby the sons did not lose their inheritance upon the felony of their father.[44] The most compelling argument against the bill and the one which most likely carried the day, however, was that it would cause the Crown to suffer a financial loss. Many yeomen in Kent had under £10 per annum income from their land and were, accordingly, taxable for subsidies. John Bois, common lawyer and member for Canterbury, argued that in Kent "there were many ten pound men" and thus the bill "would make the Queen a great loser."[45] The bill was eventually defeated by a vote of 138 to 67.

Among members of parliament, opinion was divided over the merits of the custom of gavelkind. The recurring argument that gavelkind was a debilitating custom for families

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[42] Ibid., p. 676; History of Parliament Trust, *The History of Parliament*, (Cambridge: Cambridge University Press, 1998), (CD-ROM), II-1558-260-1.

[43] D'Ewes, *A Compleat Journal*, p. 676.

[44] Ibid.; *History of Parliament*, III-1558-72.

[45] D'Ewes, *A Compleat Journal*, p. 676; *History of Parliament*, I-1558-476.

attempting to maintain their estates intact, was not that forceful. Families could alter the descent pattern on their estates by petitioning parliament to have their lands disgavelled, although this involved a fair expense. The interests of the crown in maintaining its subsidy base and other positive features of gavelkind overrode the objections raised by those who wished to abolish it completely. Kentish gavelkind met all the requirements of a custom having the force of law. It was ancient – believed by most to have been the inheritance custom of the area before the Norman invasion. It was reasonable – Taylor even pointed to evidence in scripture of partible inheritance to show that it was not against God's law.[46] Finally, for centuries the king's courts had upheld the custom. No significant problems mitigated against the operation of gavelkind in Kent and its legal status at the common law. Ancient land customs could successfully operate along side the normal customs of the common law. The custom of gavelkind remained strong in Kent until finally abrogated by parliamentary statute in 1922, when all lands held and inherited by the custom of gavelkind came under common law forms.[47]

Partible inheritance customs also applied in other localities throughout England in the sixteenth and early seventeenth centuries. On the manor of Harbottle, in the valleys of the Tyne and Rede in Northumberland, the inheritance custom in 1604 was that: "The Tenement, after the death of the Tenant, is parted equally among his sonnes, bee they never so manye, both rent and farme."[48] This inheritance custom was in fact known to the people of Harbottle as "gavelkind, after the custom of Kent."[49] Tenants in Northumberland

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[46] Taylor, *History of Gavelkind.* Taylor referred to Deuteronomy 21.

[47] The Law of Property Act was passed in 1922 and took effect in 1926. R.E. Megarry and H.W.R. Wade, *The Law of Real Property,* third edition, (London: Stevens & Sons Limited, 1966), p. 35.

[48] *Survey of the Debatable and Borderland Adjoining the Realm of Scotland and Belonging to the Crown of England,* Roundell Sanderson, ed., cited in S.J. Watts, "Tenant-Right in Early Seventeenth-Century Northumberland," p. 69.

not only practised partible inheritance, but they conceived of it in terms of the custom of Kent, located at the other end of the kingdom.

One of the most revealing insights into English inheritance has come from Margaret Spufford's study of inheritance customs in Cambridgeshire.[50] Though inheritance was nominally by primogeniture, tenants made provisions in their wills for parcels of land and sums of money for younger sons, dowries for daughters, and maintenance for widows – all of which came out of future profits of the primary holding. This burden on the primary holding inherited by the eldest son was a key factor in the decline of tenant holdings of 15-45 acres in the late sixteenth and early seventeenth centuries, while the number of cottagers prominently increased and large farmers profited.[51] Spufford's findings from Cambridgeshire show that the distinction between primogeniture and partible inheritance was not as great in practice as in theory. Although the eldest son inherited the lion's share of the estate, he often had to maintain his younger siblings, both brothers and sisters, from the profits of the holding. Richard Kettle, a yeoman who made his will in 1560, made such an arrangement. He cancelled the debts of his eldest son Arthur, who was already married. His second son, John, inherited the copyhold, but on the condition that he paid the youngest son William a sum of £9 15s 0d at a rate of 30s 0d a year out of the profits of the holding. If John failed to maintain the payments, the holding was to pass to William "according to ye Lawdable custome of Orwell aforesaid."[52]

Even the poorest members of rural society, farm labourers, attempted to provide for their children out of their holdings. William Sampfield, a labourer who made his will in

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[49] P.R.O.E. 112/113/211, cited in ibid., p .70.

[50] Spufford, "Peasant inheritance customs and land distribution in Cambridgeshire from the sixteenth to the eighteenth centuries." For this paper, Spufford examined fifty surviving wills for Orwell in the period 1543-1660.

[51] Ibid., pp. 157-8.

[52] Cited in ibid., p. 159.

1588, left his cottage, garden, and orchard to his only son. Out of this inheritance, the son was to pay 13s 4d a year for four years after he reached the age of twenty-two to support his two sisters, the payment to be divided equally between them. Finally, the son was also to maintain his mother by giving her houseroom. "It is difficult to conceive" Spufford commented, "how a labourer's cottage could bear such an annual burden on top of the rent when wages of agricultural labourers were steadily losing purchasing power."[53] A fundamental feature of these English inheritance customs in the sixteenth and early seventeenth centuries was the provision for all siblings out of the primary holding. It is not clear, however, whether the pattern Spufford has identified, in which the primary holding of an estate descendable by primogeniture bore a heavy burden in providing for all siblings, was more than a regional phenomenon. Only a detailed examination of inheritance patterns throughout the whole of England in the early modern period will determine how much the effects of primogeniture differed from those of partible inheritance.

### *Gavelkind in Wales*

In addition to Kent and other parts of England, partible inheritance was custom in Wales. English administrators there used the term "gavelkind" to describe customs which they saw as analogous to those practiced Kent. William Somner thought that the Welsh had adopted the term from Kent, rather than Englishmen employing the term in Wales. "As then for other Countrey-mens communication with us of Kent in the Tenure, I conceive it first came up, by way of imitation of our example, in Ireland especially, and amongst the Welch-men, in whose Vocabulary or Dictionary the word is sought in vain...".[54] The

[53] Ibid.
[54] Somner, *Treatise of Gavelkind*, p. 55.

interaction between English common law and inheritance customs in Wales formed an important background to the later experience in Ireland.

Both traditional Welsh and Irish societies were Gaelic and clan based. Generally, clans held property as a corporate group. Inheritance customs in both societies co-existed after initial exposure to English customs and the gradual extension of common law. In both Ireland and Wales, the process of Anglo-Norman domination, conquest and settlement was "slow, spasmodic, and long drawn out."[55] In both countries, gavelkind was abrogated by the extension of full English sovereignty and the English common law over each nation. In Wales, this was achieved by the acts of union legislation of the 1530's and 1540's. The abrogation of native land customs in Ireland followed the defeat of Irish chiefs at the end of the Nine Years War in 1603, and was achieved outside of parliament, by judge-made law in the Dublin courts in the first decade of the seventeenth century.

In late medieval Wales, land was held corporately by the family or clan group known as the *gwely*. Free land was hereditary and each individual member of the group was entitled to a share, though unlike Irish practices, there was no right of alienation.[56] Since the Welsh term for this tenure was *gafel*, English observers and administrators easily came to call it gavelkind. Partible inheritance was a fundamental part of Welsh land customs, and the division of clan lands between all sons was known as *cyfran*. Although lands could not be alienated, they could be conveyed or pledged for a sum of money. Conveyance was a means by which individuals began to acquire land in their own right; if the land was never redeemed, the transaction amounted to a permanent conveyance.[57] By the early fourteenth

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[55] Rees Davies, "Frontier Arrangements in Fragmented Societies: Ireland and Wales", in Robert Bartlett and Angus MacKay, eds., *Medieval Frontier Societies*, (Oxford: Clarendon Press, 1989), p. 77.

[56] A.D. Carr, *Medieval Wales*, (New York: St. Martin's Press, 1995), p. 92.

[57] Ibid.

century, individuals had begun to acquire lands outside of the traditional landholding system. As well, some Welsh in areas settled by Anglo-Norman lords acquired lands by means of the common law and passed it to their main heirs by primogeniture. This co-existence of Anglo-Norman areas with a general inheritance pattern of primogeniture and Welsh areas with a traditional partible inheritance was quite analogous, as we shall see, to the situation in Ireland from the twelfth to the early seventeenth centuries.

The undermining of Welsh land customs, however, began much earlier than in Ireland. After the Edwardian conquest of Wales in the late thirteenth century, the Welsh landholding system came under pressure. Edward I, concerned to maximise his revenue, altered traditional payments in kind to money payments, thus eroding the co-operative structure of landholding and opening the way for the acquisition and consolidation of individual estates.[58] This alteration in payments may have affected only the lands held by the socially highest members of Welsh society, however, and may not have reached down to smaller holdings. The proximity and interaction of Welsh and English in the various lordships probably eroded traditional Welsh land customs. Coupled with the fluid land market created by the plague and the effects of the Glyndwr rebellion,[59] the example of estates held by primogeniture hastened the transformation from corporately held to individually held land.[60] The result of this pressure on land customs and creation of a land market was the emergence by the fifteenth century of a rentier group who derived their

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[58] Gareth Elwyn Jones, *Modern Wales*, second edition, (New York: Cambridge University Press, 1994), p. 6.

[59] The Glyndwr revolt, c. 1400-1410 was a reaction to the increased Anglo-Norman colonization in Wales, especially to the privileged position of the English settlers. Glanmor Williams, *Recovery, Reorientation and Reformation Wales, c.1414-1642*, (Oxford: Clarendon Press, 1987), pp. 4-8; 93.

[60] Gareth Elwyn Jones, *Modern Wales*, pp. 6-7. William Rees has noted that in Welsh areas, "English principles of tenure had already made considerable headway, particularly as a result of the escheat of much land to the lords during the troubled years of the fourteenth and fifteenth centuries...". *The Union of England and Wales*, (Cardiff: University of Wales Press, 1967), p. 43.

wealth from rents and invested their capital in properties.[61] "The gradual transformation of the great marcher landowners into *rentiers* and their willingness to convert a significant portion of their rights of lordship into transferable leaseholds encouraged the development of a mobile land market in the marches. This tendency was paralleled in ethnically Welsh regions by the steady, if by no means complete, decline in the importance of the ancient clans' territorial rights, and the gradual abandonment of traditional modes of inheritance, in particular that of equal partition."[62]

The rise of landholding gentry paved the way for the eventual abrogation of partible inheritance in Wales. Two kinds of gentry lived in early modern Wales, the native Welsh gentlemen known as *bonheddig* or *uchlewr* and English families settled in Welsh areas known as the *advenae*. According to Glanmor Williams, however, ethnic origin was not as important as the acquisition of land, wealth and, power represented by individual land holdings passed on by primogeniture. "What really counted by the fifteenth century, however, was not their origins but their ability to take advantage of opportunities open to thrusting individuals to acquire land, wealth, and office by war, service, marriage, enterprise, or any combination of them."[63] However, the pace of the gentry's rise in Welsh society should not be overstated. G. Dynfallt Owen, for instance, has called the survival of gavelkind in sixteenth century Wales "an anachronistic form of tenure in the aggressively individualistic age of the Tudors...".[64] Clearly, there were different ideals and motivations

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[61] J. Gwynfor Jones, *Early Modern Wales, c.1525-1640,* (New York: St. Martin's Press, 1994), p. 10. According to Gareth Elwyn Jones, "By the fourteenth century can be discerned the origin of many of those substantial gentry estates which were often consolidated in the fifteenth centuries." *Modern Wales*, p. 7.

[62] Ciaran Brady, "Comparable Histories? Tudor reform in Wales and Ireland", in Steven G. Ellis and Sarah Barber, eds., *Conquest and Union: Fashioning a British State, 1485-1725,* (New York: Longman, 1995), p. 70.

[63] Glanmor Williams, *Recovery, Reorientation and Reformation Wales*, p. 97.

[64] G. Dyfnallt Owen, *Elizabethan Wales: The Social Scene,* (Cardiff: University of Wales Press, 1962), p. 75.

for people at different levels of society. As in England, the larger landowners moved first toward unigeniture inheritance. "Tenure and preservation were considered essential for the survival of the landed élite and this was accomplished primarily, where circumstances allowed, by the application of male primogeniture "[65]

In Wales, the gentry played a key role in the union with England. Brendan Bradshaw has stressed the role of the emergent Welsh gentry to account for the relatively smooth incorporation of Wales into the English state, in part because they came to view the rise of the Tudors as a revival of the pre-Saxon kingdom.[66] With the extension of the shire system into Wales, the Crown benefited from the realignment of local power structures – away from the clan and towards the state. Since the administration of local governance devolved to the gentry who filled the offices of Justice of the Peace and sheriff, their power and prestige increased as well.[67]

Voices raised in Wales calling for the abolition of gavelkind and the institution of primogeniture often argued that partible inheritance perpetuated a state of lawlessness and disorder. An attorney at the Court of the Welsh Marches, for instance, commented on this link between endemic disorder and partible inheritance: "For further suppressynge of the enormyties foresaid, if it were ordered that the eldest sone shulde enherit in every place in Wales, it shuld avoyde moch evyll ffor those as pretend to be gentlymen and have lands departed amongst them. Although every mans parte be but Xid by yere, they will reteyne

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[65] J. Gwynfor Jones, *Wales and the Tudor State: Government, Religious Change and the Social Order, 1534-1603,* (Cardiff, University of Wales Press, 1989), p. 133.

[66] Bradshaw, "The Tudor Reformation and Revolution in Wales and Ireland: the Origins of the British Problem," in Brendan Bradshaw and John Morrill, eds., *The British Problem, c.1534-1707: State Formation in the Atlantic Archipelago,* (London: Macmillan Press, Ltd., 1996), pp. 49-52.

[67] Ibid., p. 52. "The momentum that sustained the initiative from the centre was supplied by the local elite, who, as its beneficiaries, were willing to implement the programme." Ibid., p.53.

theffs and harlotts to them so that one of them will have XXti or XXXti watyng uppon him in a ffayre markett."[68] Partible inheritance allowed these undesirables to remain on the land and presumably continue their criminal and immoral activities. The identification of partible inheritance with disorder and primogeniture with order emerged as a major theme in the debate. "Primogeniture" commented J. Gwynfor Jones, "served to strengthen patriarchal authority and control over all the children of the marriage in the sense that the eldest son was virtually governed by his father's will and the younger sons and daughters disposed of according to means and circumstances."[69] Disorder in Wales on a wider scale, it was argued, could be curbed by abolishing partible inheritance. This would strengthen the authority of the gentry and also greatly speed up the erosion of tribal ties of kinship. The ties of loyalty which traditionally bound the individual to the wider family group could thus be directed toward the crown, and leading gentry could exercise their power through royal offices such as Justices of the Peace. The rise of the gentry who received their income from money rents had already begun this process; uniform inheritance along English common law lines could complete it.

Welsh gavelkind was also portrayed as detrimental to Welsh agriculture. In particular, partible inheritance continually broke down estates into small parcels of lands which were not economically maximized, at least in comparison to English estates. George Owen argued that the abolition of gavelkind opened the way for the enclosure of fields and the sowing of winter grains, both seen as advantageous to Welsh agriculture. Without enclosures, Owen noted, winter grains were "eaten by sheepe and other cattell, which could not be kept from the same: for all the wynter longe the sheepe, horses, Mares, coltes, and so

[68] P.R.O.E. Miscellania, 15/9, cited in G. Dyfnallt Owen, *Elizabethan Wales*, p. 75.
[69] J. Gwynfor Jones, *Wales and the Tudor State*, p. 133.

manye cattell as are not housed doe grase all the fields without restrainte ouer all the countrie."[70] Since the livestock were not kept off the crop – "being eaten and troden of Cattell all the winter" – by March, the winter wheat would be "halffe spoiled."[71] Writing in 1603, Owen looked back over the past century and concluded that gavelkind was "one chief cause they restrained sowing of wynter corne." Since it had been abolished "for these threescore years past in many partes the grounde is brought together by purchase & exchanges and hedging & enclosures much encreased, and now they fall to the tillage of this wynter corne in greater abundance then before."[72] Agriculture in Wales had become more English and more productive.

Gavelkind was officially abolished by the acts of union in the 1530's and 1540's. It was part of an overall policy to bring Welsh laws and institutions in line with those of England and, in part, to enforce the legislation of the Reformation there. As Peter Roberts has noted: "Wales had to be brought within the parliamentary system if statute law were to apply there without exception or ambiguity."[73] The incorporation of Wales into England coincided with the dissolution of the monasteries, and the Welsh gentry as Justices of the Peace and members of the House of Commons, could "join their English counterparts in securing a share of the dissolved monastic lands, and with it a vested interest in the Henrician Reformation."[74] As well, there was the issue of order and security. The Welsh coastline presented a risk for the possibility of invasion, especially at a time when the military response of Spain and France to the English Reformation was unknown.[75] Although the first

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[70] George Owen, *Description of Pembrokeshire*,(London: Charles J Clark, 1892), i, p. 61.
[71] Ibid.
[72] Ibid.
[73] Peter Roberts, "The English Crown, the Principality of Wales and the Council in the Marches, 1534-1641." in Bradshaw and Morrill, eds., *The British Problem*, p. 122.
[74] Ibid.
[75] Glanmor Williams, *Recovery, Reorientation and Reformation Wales*, p. 266.

union legislation appeared in 1536, a year earlier the crown had been petitioned to abolish gavelkind in Wales. This petition from "the inhabitants of the Marches in the Welshery" asked that "lands, &c. may not descend by gavelkind, but to the eldest son or heir male, and default to be divided among issues female."[76] This made it appear that local interest wanted to alter descent in Wales to the practice under English common law.

The preamble to the first union legislation of 1536 made the significant though dubious claim that Wales had always been subject to the imperial crown of England. It also drew attention to the differences in rights, laws, customs, and speech between Wales and England and used this to argue that "rude and ignorant people" had drawn "distinction and diversity" between the Welsh and the King's other subjects on these grounds.[77] However, the 1536 legislation did not abrogate gavelkind outright in Wales. There were two clauses in the act which referred to inheritance customs. The first stipulated that after the next All Saints Day (November 1) all land in Wales would descend according to English law.[78] However, a second clause in the section of qualifications at the end of the act, made a provision that: "Londes Tenementes and Hereditamentes lieng in the said Countrey and Dominions of Wales, which have benne used tyme out of mynde by the lawdable Customes of the said Countrey to be departed and departable amonge issues and heires males, shall still so continue and be used, in like forme fascion and condicion as if this acte had never be had ne made...".[79] Thus lands which had descended by the custom of gavelkind time-out-of-mind could continue that custom. This clause appeared, as well, to uphold the view of English common lawyers of the day that reasonable customs practiced time-out-of-mind and upheld

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[76] James Gardiner, ed., *Letters and Papers, Foreign and Domestic of the Reign of Henry VIII*, (London: Longman & Co., 1883), ii, p. 545.

[77] *Statutes of the Realm*, p. 563: 27 Henry VIII c. 26.

[78] Ibid.

[79] Ibid., p. 569.

in English courts should hold force at the common law. This first legislation involving Welsh gavelkind took an equitable stance which allowed those members of Welsh society who wished to keep their ancient land customs – probably those below gentry status – to continue to practice partible inheritance. Those Welsh land holders who wished to convert the inheritance pattern on their particular holding probably had to resort to a petition to parliament, like the men of Kent. By the 1536 act of union, all the Welsh were recognized as subjects of the crown, to "enjoye and inherite all and singuler fredomes liberties rightes privileges and lawes within this Realme."[80] Thus, they came under the jurisdiction of the English courts and parliament.

Six years later a second wave of union legislation wholly abrogated gavelkind in Wales. According to William Rees, the two acts worked together as "the expression of a single policy, the former proclaiming the general terms upon which the Union was to be effected, the latter setting forth the new constitution."[81] The second act stipulated that all lands sold, inherited, or mortgaged in Wales would revert to English common law tenure and descent on the next feast of John the Baptist (June 24).[82] Rees' interpretation for the discrepancies in the two acts, however, is not adequate for the important issue of landholding. The second act more than merely clarified the ambiguities on gavelkind expressed in different sections of the first act; it abolished partible inheritance outright in Wales.

This abrogation of the predominant land custom in Wales may well have benefited gentry and yeoman. According to G. Dyfnallt Owen: "The abolition of gavelkind was undoubtedly welcome to the generality of Welshman, since it removed the one restriction

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[80] Ibid., p. 563.
[81] Rees, *The Union of England and Wales*, p. 2.
[82] *Statutes of the Realm*, 34-35 Henry VIII c. 26, p. 933.

that militated against the concentration of land in the hands of one person and its disposal by him at his own will."[83] However, not all farmers wanted to concentrate their lands and pass them on to a single heir. Traditional customs died hard, especially for those who did not prosper by new ones. In Cambridgeshire, even the smallest holders were concerned to divide their lands "to give their younger sons at least a toe-hold on the land."[84] The voices of the poor small holders in Wales did not sound as loudly as those of the gentry in this debate.

The abrogation of Welsh gavelkind could have furnished a model for common lawyers and administrators such as Sir John Davies on how to conceive and treat the native inheritance customs of other non-English people. Both Ireland and Wales had similar native social frameworks in which partible inheritance flourished, but the abrogation of the custom of Wales did not serve as a blueprint for Ireland. In Wales, the trend toward inheritance through the eldest son was initiated by an emerging group of landowners – the gentry – who sought to consolidate their lands and increase their power and influence in society. In Gaelic Ireland, there was no comparable social group and landholders believed that they benefited from traditional landholding practices. In both Ireland and Wales, the curbing of native customs was part of a larger policy to integrate each jurisdiction into the English state – especially in the attempt to shift the loyalty from the clan or chief to the crown and in the policy of anglicization of language and agricultural practices. Hence, the argument was often made that partible inheritance perpetuated a state of lawlessness in the more Gaelic Irish or Welsh regions, and that it promoted bad agriculture. Common law inheritance was deemed to be amenable to law and order – to a structured society in which there was one proprietor per estate.

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[83] G. Dyfnallt Owen, *Elizabethan Wales*, p. 75.
[84] Spufford, "Peasant inheritance customs", p. 158.

Ironically, the inheritance customs in Kent remained at odds with the common law and were only abrogated in the early twentieth century. According to sixteenth- and seventeenth-century writers it was the most famous custom of Kent. Common lawyers were thus aware of the status of gavelkind in Kent, as a custom theoretically at odds with the common law, but successfully co-existing with it. A common lawyer like Sir John Davies could bring with him to his service of the crown in Ireland in the early seventeenth century two different approaches to partible inheritance. From the example of Kent came the principle that local land customs at odds with the common law could successfully coexist if they met the criteria of a reasonable and ancient custom upheld in the king's courts. From the example of Wales came the principle that variant land customs were acceptable until the crown wished to tighten the reins of rule through the extension of English institutions and the common law by statute. As we shall see, neither of these procedures fully applied in Ireland.

# 4 Gaelic Society: Law and Land Customs

*Many greate families of the meere Irishe holde their seignories & landes by their auncyent Irish custome called Tanestrie which is that the oldest & worthiest of the name should have the signorie during life, whereof groweth much bloodshed & rebellion by contencion for the seignorie every discent, he being often reputed the worthiest man who draweth most blood, which incyteth them to comitt outrages.*[1]

Richard Hadsor's copious statement on one of the important Irish land customs, what the English called "tanistry", highlights some of the important themes and issues to be analysed in this chapter on Gaelic society in Ireland in the later sixteenth century. The use of the term "mere Irish", for instance, was a contemporary term which denoted the Gaelic Irish, rather than the other major cultural ethnic group in Ireland, the Anglo-Irish, of whom Hadsor was one. From the twelfth-century invasion of Ireland by Henry II and the piecemeal colonization by Anglo-Norman lords and English settlers, there were two major cultural communities in Ireland.[2] During the later middle ages a process of Gaelic resurgence took place, when Anglo-Irish lords intermarried with Gaelic aristocratic families and adopted Irish dress, manners, and power structures in their lordships. This process was deemed "degeneracy" by English observers such as Edmund Spenser and Sir John Davies. English colonists debased themselves by adopting the customs of the Gaelic Irish, who were generally deemed barbarous in comparison to English notions of civility.[3]

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[1] Joseph McLaughlin, "Select documents XLVII: Richard Hadsor's 'Discourse' on the Irish State, 1604," *Irish Historical Studies*, 30 May 1997, p. 346.

[2] Historians variously use Anglo-Norman, Anglo-Irish or Old English to refer to the descendants of this group of Anlgo-Normans and of other English colonists who settled in Ireland. Edmund Spenser, Secretary to Lord Deputy Grey in the 1580's, and author of the influential *A View of the State of Ireland* (written 1596, published 1633) is credited with first using the term "Old English." Nicholas Canny, "Identity Formation in Ireland: The Emergence of the Anglo-Irish," in Nicholas Canny and Anthony Pagden, eds., *Colonial Identity in the Atlantic World, 1500-1800*, (Princeton: Princeton University Press, 1987), p. 160. The term "Old English" only made sense after the influx of new English colonist in the course of plantation schemes throughout the sixteenth century.

[3] Sir John Davies, *A Discovery of the True Causes Why Ireland Was Never Entirely Subdued Nor Brought Under Obedience of the Crown of England Until the Beginning of His Majesty's Happy Reign* (1612), p. 229.

The subject of Hadsor's observation, the inheritance of lands attached to the position of a Gaelic political successor, the tanist, was one of two key Irish customs which English observers and administrators loathed and sought to abolish. Both tanistry and partible inheritance, called gavelkind by English writers, were linked in the English mind with what was generally seen as the endemic violence and rebelliousness of the Gaelic Irish and the poor state of Irish agriculture. By the early seventeenth century, these two customs were seen as perpetuating a state of instability in the Irish lordships and standing as an obstacle to the extension of English law and administrative structures throughout the whole island. Irish land customs, tenurial arrangements and inheritance practices, differed greatly from normal English customs and, therefore, seemed inferior and unreasonable to English observers. In the first decade of the seventeenth century, Sir John Davies, as Attorney-General of Ireland, took the initiative in abrogating both gavelkind and tanistry throughout Ireland by a legal decision in the King's Bench in Dublin.[4]

Other aspects of Irish society were seen as roadblocks to effective English sovereignty in Ireland. One of the most important, emphasized by Davies perhaps more than any other writer of the period, was the problem of two competing law systems in Ireland. The English common law system – including its courts, concepts of justice, and land customs – operated more or less in the anglicised areas of the Pale,[5] English colonial pocket territories, and the marcher areas between Irish and English settlements. The native law system, brehon law, operated in Gaelic and in some gaelicized (or "degenerate") regions. It differed markedly from the common law both in landholding customs and providing compensation payments,

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[4] Hans Pawlisch was the first historian to focus on the efforts of Davies in the Dublin courts, in a framework which he deemed legal imperialism, and saw a series of legal decisions prosecuted by Davies as playing a key role in the consolidation of the English conquest of Ireland and the anglicization of Gaelic Ireland. *Sir John Davies and the Conquest of Ireland*, (New York: Cambridge University Press, 1985).

[5] The Pale, comprising four shires around Dublin, was the seat of the English administration of Ireland.

rather than punishments, for crime. In the sixteenth and early seventeenth centuries, English law courts often upheld the decisions of brehons; in particular, courts upheld land transactions and inheritances by Gaelic Irish custom. As with Wales, particular native customs were sustained only until English sovereignty was more fully established. Examination of Gaelic society – its clan structure, its polities or lordships, social status, the law system, and land customs, will provide a context for the abrogation of gavelkind and tanistry which will be discussed in the following chapter.

Because of the nature of surviving Gaelic source material, historians have not found it an easy task to reconstruct Gaelic social structures in the early modern period. There are two main reasons for this, reflecting two streams of source material. One body of sources stemmed from English observers, usually from English administrative officials in Ireland, men like Spenser and Davies, who approached the topic with a mission of reform. These accounts were inimical to Gaelic traditions, and must be treated with due caution. One need not go as far as Colm Lennon, however, who has suggested that "undue emphasis has been given to accounts by hostile outsiders."[6] In his historical account of England's failure to obtain a firm grasp over Ireland, Davies clearly wrote a hostile account of Gaelic law but also provided valuable observations of Irish culture and customs. Since Davies was the key agent in the abrogation of Irish inheritance customs in the early seventeenth century, his views on Irish society take on a special importance for the historian. Many observations made by Englishmen in Ireland were measured against a yardstick of English "civility". This perspective coloured state papers and other official sources as well as private observation or

[6] Colm Lennon, *Sixteenth-Century Ireland: The Incomplete Conquest*, (New York: St. Martin's Press, 1995.), p. 42.

accounts.[7] With these qualifications in mind, English sources can provide a strong contribution to the understanding of sixteenth and early seventeenth century Ireland.

The second stream of source material, native sources, has its own limitations as well, most significantly, the scarcity of surviving documents. This had much to do with the nature of Gaelic society itself: Gaelic Ireland was comprised of numerous independent lordships, without any central form, system, or apparatus of governance. There was no high king or court, no central bureaucracy to keep records, no central legal court system to document cases. Recently historians sought to use Gaelic literary tracts and in particular, poems, to shed light on Gaelic society, much more than they did in the past.[8] Irish bardic poetry for instance, has been used by Michelle O Riordan to elucidate the response of Gaelic Ireland to the changes in Irish society caused by the Tudor and Stuart conquest. According to O Riordan: "Their unique social, political, and cultural position lends the work of the bardic poets an authority which is overlooked only at the cost of further reducing the already scant source material of the Gaelic Irish response to the destruction of the Gaelic world...".[9] Bardic poetry, however, has its limitations. Because the poets addressed the concerns of the aristocratic world, and concentrated upon local matters effecting them and their lord (their patron), they dealt largely with issues outside the scope of this thesis. Gaelic law tracts are another native source material. Historians of early modern Ireland, however, no longer use these tracts because they were recorded in the seventh- and eighth-centuries. To use them as

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[7] For a recent treatment of Davies and Spenser's view of the Irish as barbarous, see Debora Shuger, "Irishmen, Aristocrats, and other White Barbarians," *Renaissance Quarterly*, 50 (1997). Shuger argued that they adopted the classical view of northern European people as barbarians to this context.

[8] Michelle O Riordan, *The Gaelic Mind and the Collapse of the Gaelic World*, (Cork: Cork University Press, 1990); Brendan Bradshaw, *The Irish Constitutional Revolution of the Sixteenth Century*, (New York: Cambridge University Press, 1979) and "Native Reaction to the Westward Enterprise: a case-study in Gaelic ideology" in K.R. Andrews, et. al., eds., *The Westward Enterprise*, (Liverpool: Liverpool University Press, 1978).

[9] O Riordan, *The Gaelic Mind*, pp. 3-4.

sources for sixteenth century Ireland would be to treat Irish society as static.[10] Because of their early date, the law tracts could not account for the exposure of Irish society to Anglo-Norman and English law, customs, and institutions One final type of source material, Court of Chancery pleadings from the latter sixteenth century, represent a mixture of English and Irish sources. These reflect Gaelic land customs since they recorded the decisions of brehons and disputes arising over divisions of land according to Irish customs. This intersection of the Irish and English legal worlds has preserved our best insights into the Irish land practices in the later sixteenth century. Much of the information that was recorded in the documents of the English administration and courts in Ireland was lost in the 1922 fire at the Public Records Office in Dublin.[11] Thus fewer sources exist for examining Irish society in this period than for England.

### *Gaelic Social Structures*

Fynes Moryson, who toured Ireland between 1606 and 1609 noted an obvious difference in the social organization of the Gaelic Irish from that in England. "[A]ll of one name or Sept and kindred," he observed, "dwell (not as in *England*) dispersed in many shyres, but all liue together in one village, lordshippe, and Country...".[12] Gaelic Ireland was a lineage, or clan-based, society in which one's identity, as well as economic and political participation in the community was based on membership in an extended kin-group.

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[10] Kenneth Nicholls called the use of these law tracts for early modern Ireland a "monument to wasted labour" which attempted to "reconcile the irreconcilable." *Land, Law and Society in Sixteenth-Century Ireland,* (O'Donnell Lecture, University College Cork, 1976), n.5, p.21. Hereafter to be referred to as Nicholls, *Land, Law and Society.*

[11] R.W. Dudley Edwards and Mary O'Dowd, *Sources for Early Modern Irish History, 1534-1641* (New York: Cambridge University Press, 1985), pp. 201-202.

[12] Graham Kew, ed.,"The Irish sections of Fynes Moryson's Unpublished Itinerary." Irish Manuscripts Commission, *Analecta Hibernica,* no. 37, 1998, p. 35. Moryson was chief secretary to Lord Mountjoy, Lord Deputy of Ireland.

Kenneth Nicholls has defined clan as a "unilateral (in the Irish case, patrilineal) descent group forming a definite corporate entity with political and legal functions."[13] In this patrilineal society descent was reckoned through the father's rather than the mother's line. The clan elected its chief and the successor to the chief (the tanist), as well as interacting with neighbouring lineages and territorial lords. In the legal sphere, clan members had joint-responsibility for the actions of its members, including the payment of fines for transgressions. Membership in the clan also determined one's legal rights in the property of the clan. Although property rights will be discussed in detail below, it can be noted here that in some patterns of partible inheritance in Ireland, the eldest male heir or the son of the eldest male heir, had first selection of the divided lands. A 1576 family agreement recording a permanent division of lands illustrates this hierarchy of clan membership: "I, Toirdhealbhach son of Brian Og, by virtue of the seniority of my father, viz. Brian Og Mac Mathghamhna, had the first choice of that posterity of Brian son of Toirdhealbhach, and Toirdhealbhach son of Brian son of Toirdhealbhach had the second choice, and Murchadh Ruadh, as junior, had the third choice...".[14]

Although a clan normally occupied and possessed a particular territory, it was not held in common among the members of the clan. The land was held by the clan as a corporate entity, but each member had his or her own portion. The functions of the clan were political and legal in nature, rather than social or familial.[15] Landownership, justice, defence, and relations with neighbouring clans and lords were the fundamental functions of

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[13] Kenneth Nicholls, *Gaelic and Gaelicised Ireland in the Middle Ages* (Dublin: Gill and Macmillan, 1972), p. 8. Hereafter to be referred to as Nicholls, *Gaelic and Gaelicised Ireland.* Nicholls defends use of the commonly employed term "clan" because it is an Irish word: "clann" meaning literally "children" or "offspring." Ibid.

[14] " G.983 [I]" in G.Mac Niocaill, trans. and ed., "Seven Irish Documents from the Inchiquin Archives." Irish Manuscripts Commission, *Analecta Hibernica,* no.26, p. 49.

[15] Nicholls, *Gaelic and Gaelicised Ireland,* p. 8.

the Irish clan. In the relations between clans, even of the same name, a significant characteristic in the sixteenth century was the relative rise and decline of lineages. As some lineages or branches grew in power and influence, others contracted – an important factor to account for the transfer of land.[16] In Ulster at the end of the sixteenth century, for example, the dominant O'Neill and O'Donnell lineages expanded at the expense of the less successful branches of their own clans.[17]

Although there was much fluidity among the lineages, it appears that on an individual basis there was not much social mobility in Gaelic Ireland. Irish society has traditionally been viewed as a two-fold system of the free and the unfree, but this appears to have been the result of mistaken observations and deductions made by English writers.[18] Nor was there a simple distinction between landowners and cultivators. Colm Lennon has suggested that there was an upper-middling group between the poorer tenant and labourer, and the great landowners, who may well have had many dependants as cultivators and set aside part of their lands for rental tenancies. "Thus, a middleman or rural capitalist class was present at least embryonically in sixteenth-century Ireland, taking advantage of opportunities for renting lands with their stock...".[19] As well, there were several layers of tenantry below the larger landowner, including (often hereditary) families who performed special services for

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[16] Nicholls, *Land, Law and Society*, p. 7.

[17] Hiram Morgan, "The End of Gaelic Ulster: A thematic interpretation of events between 1534 and 1610," *Irish Historical Studies*, 26, (1988), p. 13. Hugh O'Neill (c.1550-1616) gained supremacy in Ulster in the 1590's, and led the Ulster lords against English encroachment in Ulster in what is deemed the "Nine Years War" (1594-1603) or "Tyrone's Rebellion." The 1607 departure, or "flight" of O'Neill and Rory O'Donnell, the two great Ulster lords, left a power vacuum in Ulster and led to the confiscation of their lands by the crown and the subsequent implementation of the Ulster plantation.

[18] Nicholls, *Gaelic and Gaelicised Ireland*, p. 68.

[19] Lennon, *Sixteenth-Century Ireland*, p. 49. Lennon's use of "class" and "rural capitalist" is problematic for sixteenth-century Ireland. The terms are anachronistic and overstate the economic freedom of this upper-middling group – which in Lennon's portrayal seem to mirror the earlier emergent Welsh gentry – who were to an extent bound by the will of their territorial lord.

lords, such as poets, brehons and mercernary soldiers.[20] Traditionally, historians have seen tenants either as substantial landholders who could negotiate with their landlords and protect themselves, their people and their property against raids or as small cultivators or share-cropping labourers, completely dependant on their landlords.[21] The notion of Irish society divided into the free and the unfree perhaps resulted from the immense exactions which lords collected from everyone in their territory. In Gaelic society, the number of tenants and labourers from whom a lord could draw exactions was much more important than the amount of land in his possession. Moryson noted this phenomenon: "And because they have an ill Custome, that Tennants are reputed proper to those lands on which they dwell, without liberty to remoue theire dwelling vnder an other landlord, they [lords or chiefs] still desyre more land, rather to have the Tennants than the land...".[22] Exactions formed the basis of his political authority. Ireland had a relatively low population density – less than twenty per square mile in 1600.[23] After 1550, a shortage of labour may have caused lords to prohibit labourers from leaving their jurisdiction by tying them further to the lord through more and more exactions.[24]

Gaelic social structure rested upon the labours of the lower orders although the clan did not necessarily hold any importance to those of lower social and economic status. Without political influence or property, labourers did not belong to recognized clans or

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[20] Mary O'Dowd, "Gaelic Economy and Society," in Ciaran Brady and Raymond Gillespie, eds., *Natives and Newcomers: Essays on the Making of Irish Colonial Society, 1534-1641*, (Shannon: Irish Academic Press, 1986), p. 125; "Land Inheritance in Early Modern Sligo," *Irish Economic and Social History*, X (1983), p. 6.

[21] D.B. Quinn and K.W. Nicholls, "Ireland in 1534", in T.W. Moody, et al., eds., *A New History of Ireland. Volume III, Early Modern Ireland, 1534-1691* (Oxford: Clarendon Press, 1976), p. 36.

[22] Kew, "The Irish sections of Fynes Moryson's Unpublished Itinerary," p. 35.

[23] R.A. Butlin, "Land and People, c. 1600," in ibid., p. 147.

[24] Steven Ellis, *Tudor Ireland: Crown, Community and the Conflict of Cultures, 1470-1603* (New York: Longman, 1985), p. 44. The nature of the lord's exactions will be discussed below.

descent-groups. Their ties were to their nuclear family.[25] These churls or sharecropping labourers were effectively tenants-at-will, whose only ties beyond their immediate family was to their lord, for whom they performed labour services in return for stock. According to Steven Ellis, the majority of the Gaelic population in the sixteenth century were of this status.[26] As with the lower members of any society in early modern Europe, the lives of those at the bottom, even though they were the most numerous, generated the least documentation.

Political units – lordships or "countries" in contemporary English parlance – were comprised of dominant and subordinate clans. Each clan had a chief, and came under the suzerainty of an overlord, the chief of the (perhaps temporarily) dominant clan. The O'Neills in Tyrone in the sixteenth century were an example of such territorial lords. Because of their central position in Tyrone and a succession of strong leaders, they became overlords to lordships both to the north and south of Tyrone and claimed suzerainty over much of the rest of Ulster.[27] In this hierarchy, the power and authority of Gaelic and some Anglo-Norman territorial lords over their *urriaghs* (sub-kings or sub-chiefs) manifested itself in the system of rights and exactions. Included in these were the right of lords to take over land of occupiers who were unable or unwilling to pay their exactions. Lords also had the right to use any unoccupied land for grazing, a significant prerogative in a predominantly pastoral society.[28] Exactions levied by the lord usually consisted of money or food (especially oats and butter), labour services (such as a fixed number of days of ploughing, sowing and reaping), and military service in times of "rising out."[29] Assize judges in what is now County

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[25] Nicholls, *Gaelic and Gaelicised Ireland*, p. 9. Conall Mageoghagan wrote in 1627 of this group as "mere churls and labouring men, [not] one of whom knows his own great-grandfather."

[26] Ellis, *Tudor Ireland*, p. 44.

[27] O'Dowd, "Gaelic Economy and Society," p. 121.

[28] Nicholls, *Land, Law and Society*, pp. 14-5.

[29] Lennon, *Sixteenth-Century Ireland*, p. 54; Nicholls, *Gaelic and Gaelicised Ireland*. pp. 31-7.

Laois in 1606 heard the complaint of a number of the inhabitants under the territorial lord O Dunne. They complained of

> divers extortions upon them by compulsion and coercion of distress by O Doyne [O Dunne] their chief lord and his predecessors, as namely upon every quarter in the said country he and they would exact two milch cows or if they like them not [the cows] then one pound for every cow; item, two pecks of summer oats for his horses, meat and drink for twenty-four horseboys in summer, and so [also] in winter. Item, 22 measures of wheat to O Donne's studkeeper. Item, meat and drink to O Donne's tailors and carpenters every Sunday and holiday throughout the year. Item, seven pair of brogues [shoes] every year to O Donne's marshals and officers to be paid by every shoemaker inhabiting upon the said freeholders' Item, 16 horseshoes unto O Donne yearly and 8 horseshoes to each of his horsemen of every smith dwelling upon the said freeholders' lands. Item, that O Doyne every year laid upon every freeholder all his horses twice a year at which times they were to give to every [i.e.war] horse 24 sheaves of oats and to every hackney 16 sheaves. Item, that O Donne customarily used at his going to Dublin or the sessions to cut, impose and levy his charges upon the freeholders' lands. Item, that he used to lay his kerne [unarmoured footmen ] and bonnaghts [wages and provisions for the galloglass, professional footsoldiers] upon the said freeholders for meat and drink.[30]

The taxes levied for troops, as well as the lord's travelling expenses were common charges in most lordships, as well as cuddies – the provision of one or two night's feasting for one's lord. These exactions were onerous on the tenantry, who struggled to maintain their dues. Davies thought the exactions so severe and oppressive that it shaped the Irish accent: "all the common people have a whining tune or accent in their speech, as if they did still smart or suffer some oppression."[31]

This system of exactions – from the billeting and provisioning of troops to entertaining the lord – was called "coyne and livery" by English observers.[32] The most important taxes were those which supported the lord's military retinue. One such tax was

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[30] Cited in *Gaelic and Gaelicised Ireland*, pp.32-33. Ciaran Brady has called the system a protection racket. "The Decline of the Irish Kingdom," in Mark Greengrass, ed., *Conquest and Coalescence: The Shaping of the State in Early Modern Europe*, (London: Edward Arnold, 1991), p. 98.

[31] Davies, *Discovery*, p. 295.

[32] Davies, pointing to an ancient treatise called "Of the Decay of Ireland," suggested that the practice was invented in hell. Ibid., p. 229.

the bonaght; John Dymmok, an English writer, noted that there were two kinds: the bonaght-bonny, and the bonaght-beg. For the bonaght-bonny, tenants were "bound to yield a yearly portion of victuals and money, of their finding, everyone to his ability, so that the kerne and gallowglass are kept all the year by the Irishry, and divided at times between them." The bonaght-beg or little bonaght was "a proportion of money, rateably charged upon every ploughland, towards the finding of the gallowglass."[33] This levying of exactions, which provided the basis of the Gaelic system of authority and that of many Anglo-Irish lords, survived into the first decade of the seventeenth century. It came under attack from English policies which sought to limit the power of the Gaelic chiefs and assimilate their independent lordships. The attack on "coyne and livery" was part and parcel of the abrogation of land customs and of the attempt to establish freeholders in Ulster. Freeholders, under the English land system, would have "certain" estates – they could not be removed by the will of the chief – and they would have a fixed rent charge rather than the exactions which often altered from year to year.

### *Law in Ireland*

Along with "coyne and livery", English administrators in Ireland deplored the Irish law system; it was also viewed as oppressive to the weak and of no benefit to the general population. In his treatise on the historic failure of English policy in Ireland to subdue and "civilize" the Irish, Davies singled out the failure to extend English common law universally throughout the island as its biggest shortcoming.[34] Not only was it difficult for the English

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[33] John Dymmock, *A Treatise of Ireland* [1600], in Constantia Maxwell, ed., *Irish History From Contemporary Sources, (1509-1610)*, (London: George Allen and Unwin Ltd., 1923), p. 328. A ploughland was valued at 120 acres of arable land. Ibid, p.324, n.1.

[34] Davies, *Discovery*, p. 259.

to achieve effective control in Ireland with a competing law system, in the eyes of lawyers and administrators such as Davies, brehon law was inherently inferior to the common law.

The Gaelic legal system differed fundamentally from the English common law: structurally, there was no court system – central, regional, or local – in which cases were argued and binding judgements given. In each lordship there was a law professional, a brehon – usually a hereditary professional – attached to the household of the lord. Brehons did not give judgements in cases, but acted as arbitrators between two disputing parties – not unlike medieval English judges, who often acted outside of court as arbitrators and accepted gifts from the public for this service.[35] The two parties agreed in advance to accept the decision of the brehon, though it was not uncommon for the plaintiff to bring an unwilling defendant to submit to arbitration by seizing his or her goods (especially cattle) or by fasting on the doorstep as a pressure tactic.[36] Also indicative of the personal nature of legal practices, oaths were often sworn on the hand of the territorial lord and if perjury was discovered after the oath, it was deemed an insult to the lord, who could exact a fine as punishment.[37]

Brehon law differed markedly from English common law in its conception of crime. The Gaelic system made no distinction between civil and criminal offences, nor between an offence against an individual and one against the public order. There was no system of incarceration – compensation for injury was reckoned in monetary terms. This notion of compensation was particularly reprehensible to Davies – a common lawyer and the Solicitor- and later Attorney-General for Ireland – who saw it as a barrier to the true administration of justice in Ireland. To pay a fine was not to have justice done to the injured

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[35] J.H. Baker, *An Introduction to English Legal History*, third edition, (London: Butterworths, 1990), p. 190.

[36] Nicholls, *Gaelic and Gaelicised Ireland*, p. 51.

[37] Ibid., p. 44.

party or to the wider society. By the "just and honourable law" of England and other "civil" nations, Davies noted, murder, rape and theft were punishable by death, but under Irish law, "the height of these offences" was only punishable by a fine.[38] The Old English historian Geoffrey Keating (Seathrun Ceitinn) in his history of Ireland (1622), argued that the payment of a fine was the only way to achieve justice under the Gaelic system:

> it was necessary that Money or Cattel should be admitted satisfaction for a Person kill'd, because if the Murderer [had] means to escape into the County, he avoided the Hands of Justice, and it was impossible to punish him; and therefore the Law ordain'd, that the Friends of the Deceased should receive a Satisfaction from the Relatives of the Murderer, which was a Sum of Money, or a Number of Cattel, for it would have been Injustice, if the Relatives, who were not accessory to the Fact, should answer it with their Lives, if the Principal was not to be found.[39]

Theft and homicide were resolved by payment of damages to the injured party, his or her lord, or kin. The idea of *cin comhflocuis* or joint responsibility was a key principle in Gaelic law: the corporate family was responsible for the acts of its members. If, however, a person was very poor and did not belong to a clan or if he or she were renounced by the clan, the person became an outlaw outside the protection of the clan and could be put to death for injury to another party.[40] Clan members came under the compensation system, where the amount due was commenserate with status of the injured person – by his or her *enech* or honour price. In the case of homicide, there was an extra fine, known as *eric*, which also varied according to social status. In 1554, the Earl of Kildare received the hefty sum of 340 cows for the murder of his foster-brother; the fine reflected the insult to the earl's honour rather than the standing of the murdered man.[41] Part of the *eric* would have gone to the lord

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[38] Davies, *Discovery*, p. 290.

[39] Geoffrey Keating, *The General History of Ireland*, trans. Dermo'd O'Connor, (Dublin: 1723), p. xiv.

[40] Nicholls, *Gaelic and Gaelicised Ireland*, pp.56; 54. As Nicholls pointed out, someone of a lower status would not have family who could afford to pay the high fines for serious offences.

[41] Ibid. Fosterage was the custom of sending one's son or daughter to be raised by another family, an important means of creating alliances.

of the territory. This has led some historians to posit that Gaelic law in the sixteenth-century was moving towards a concept of public justice, although it could also indicate that the incremental rise in the power of territorial lords was drawing more and more exactions and revenues from the inhabitants of their territories.[42] In *Discovery,* Davies recounted the exchange between Lord Deputy, Sir William Fitzwilliam (1571-5, 1588-94) and the Fermanagh lord Maguire, when a sheriff was being placed in Maguire's territory; "Your sheriff," he replied, "shall be welcome to me; but let me know his ericke, or the price of his head, aforehand, that if my people cut it off I may cut the ericke upon the country."[43]

The placement of a sheriff in Maguire's territory raises the issue of the co-existence of brehon and common law in Ireland in the sixteenth century. From the twelfth-century invasion of Ireland, the use of English common law had gradually expanded and contracted throughout the island. Most purely practiced in the Pale, it also held sway in other areas where the authority of the Dublin administration had a strong hand, particularly in towns. Elsewhere, a mix of brehon and common law called march law was observed by the descendants of the Anglo-Normans and Gaelic tenants. Indicative of the contraction of the common law in Ireland, the number of common law judges steadily decreased. In the beginning of the fifteenth century, for example, royal judges ceased to be appointed for Munster and Connacht.[44] Some lords, such as the powerful Anglo-Norman Earl of Kildare, used both systems, "whichever he thought most beneficial, as the case did require."[45] Ellis has argued that the borrowing of some Irish legal forms by the Anglo-Normans, as well as other practices such as the exactions levied by the lord, often made practical sense in the

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[42] Ibid.; Lennon, *Sixteenth-Century Ireland,* pp. 58-9
[43] Davies, *Discovery,* p. 290.
[44] Ibid., p. 333.
[45] Cited in Nicholls, *Gaelic and Gaelicised Ireland,* p. 48.

economic, geographical considerations of the island, particularly in view of the short arm of the English administration centred in Dublin. Some of the penalties under English law, especially capital punishments for theft, seemed too harsh and unproductive to the Irish situation, especially in view of the shortage of labour in the sixteenth century. It did not take brehons, Ellis commented, "to advise the earl of Kildare that it might be more sensible to fine a tenant for stealing a sheep or killing a neighbour than to see him hang and his lands go to waste."[46]

Davies accounted for the failure of the common law to take root across all of Ireland by his historical framework which stressed the failure of the English to conquer the island. English law did not take hold, both because the native population had not been militarily subdued and thus could not be forced to use it and also because the English, who colonized patches of Ireland, kept the common law to themselves rather than sharing it with the greater native population. The Anglo-Norman lords "persuaded the King of England that it was unfit to communicate the laws of England unto them; that it was the best policy to hold them as aliens and enemies, and to prosecute them with a continual war."[47] In this view, the Irish were innocent bystanders: it was the English who failed in their duty, like missionaries, to extend the civilizing benefits of the common law to the Irish. Davies had a moral conception of the historical process, in which just acts were rewarded and unjust acts punished. Accordingly, the failure to extend English laws throughout Ireland led to the "degeneracy" of the Anglo-Norman settlers, to the point where they adopted Irish customs

[46] Ellis, *Tudor Ireland*, p. 48.

[47] Davies, *Discovery*, p. 280. The Irish were legally considered aliens before the common law and the crown because they did not recognize the English monarch as their sovereign. The nature of Irish alien status will be discussed in the next chapter.

and thereby became "barbarous".[48] The famed Statutes of Kilkenny – issued in 1366, renewed in 1498 and supplemented in 1536 – sought to curb the gaelicization process – most importantly, to keep the Irish and English communities at arms length culturally, economically, and politically. The statutes, for instance, forbade use of brehon or march law by English settlers, and the intermarriage between Irish and English persons.[49] The resurgence of common law only began in earnest in the 1530's following the increased attention paid to the island by the crown following the Kildare rebellion in 1534.

Brehon law and English common law courts had a curious relationship in Ireland in the later sixteenth century. Although brehon law was universally deplored by English administrators, many brehon decisions were upheld under the common law. A pleading from the Irish Court of Chancery referred favourably in 1592, to an award for damages made by brehons in the territory of Conley Mageoghegane. The document did not discuss the original injury, but thirty-three years after the brehon award, Sir William Fitzwilliam (the later Lord Deputy) was ready to issue a warrant to enforce payment for the residual of the original sum:

> ...xxxiii yeares paste, the then Brewhons or judges of that country under Conley Mageoghegane weare appointed by the said Conly to take order in the premisses with the consentes of boathe parties, who ordered and adjudged and accordingly gave up their verditt that the said Shane [the father of the 1592 plaintiff] shoulde pay accordinge the custome of that country the nomber of lxx kine [cows], *viz.* to Mageoghogane as Lord of the country xiiii kine and to his defendaunte lvi kine...[50]

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[48] Ibid., p. 290. The English "embraced Irish customs, then the estate of things, like a game at Irish, was so turned about as the English, which hoped to make a perfect conquest of the Irish, were by them perfectly conquered, because *Victi victoribus leges dedre* [the vanquished give laws to the victors], a just punishment to our nation, that would not give laws to them."

[49] For an important reinterpretation of the statutes and their significance, see Bradshaw, *The Irish Constitutional Revolution*, pp.3-12. Bradshaw sees them as a means of government control rather than "an instrument of aggressive colonial prejudice." Ibid., p. 6.

[50] "The Awnswere of Moriertaughe O Kinga to the bill of O[we]n mcShane." in Nicholls, ed., "Some Documents on Irish Law and Custom in the Sixteenth Century." Irish Manuscript Commission, *Analecta Hibernica*, no. 26 (1970), p. 126.

Full payment of the sum was not paid, but the ruling was sustained.

As a rule, it appears that Irish Chancery upheld brehon decisions where they appeared reasonable and equitable. In particular, the court accepted and enforced Irish rules of inheritance as local customs having the force of law.[51] A notable exception which Chancery would not uphold, however, was the prohibition of women from inheriting land under Gaelic law. The fact that Irish land customs were routinely upheld in Chancery has important implications for the status of Irish customs under the common law, which shall be elucidated further in the next chapter. In the late sixteenth century, it appeared, many Irish inheritance customs presented no legal problem for the common law courts. In fact, Chancery pleadings provide some of the best records of Irish land practices as they worked in individual families.

*Gaelic Land Customs*

Perhaps one of the reasons English observers in Ireland deplored Irish land customs, apart from the assumption that all English customs and institutions were normative, was that they often had difficulty understanding the way land in Gaelic and gaelicized areas was held and inherited. The Irish land system invested land ownership in the kin group as a corporate entity rather than in the individual. In England, land was normally held directly or indirectly from the Crown, although in the case of some customs, such as gavelkind in Kent, lands were not always automatically escheated to the Crown for felonies.[52] In addition, an individual holding by freehold or by some customary lease, held a certain interest in his or

[51] Ellis, *Tudor Ireland*, p. 164; Nicholls, *Gaelic and Gaelicised Ireland*, p. 50.

[52] A.W.B. Simpson notes: "The doctrine that all land is *owned* by the Crown is a modern one; it is quite misleading." *A History of the Land Law*, (Oxford: Clarendon Press, 1986), Second Edition, p. 1, n. 2.

her estate and maintained the holding as long as certain conditions were met, such as the payment of rent.

In Gaelic Ireland, although there were many regional and even local variations reflecting the autonomous nature of the lordships, land was occupied by an extended kin group and families received or chose portions during periodic redistributions of the land.[53] As Nicholls has noted, "Gaelic Ireland did not possess a legal system imposed and administered by central authority, and there was therefore no theoretical imperative which demanded that interests in land – or in anything else – should be reducible to a common denominator of consistency."[54] Landholding practices developed to suit the demographics and economy of the clan and the needs of a predominantly pastoral society. As Nicholls commented, "a society whose economy depends upon less intensive forms of land utilization, such as pastoralism, will have less need of such sharply differential rights."[55] English common lawyers did not always seem to grasp the diversity of Irish practices.

Irish tenants did not normally experience the permanence afforded by the English freehold or lease system. The majority of the Gaelic Irish population held their lands as tenants-at-will, sharecroppers who relied on the landowners need for labour.[56] They obviously had no "certain" estate in the holding they worked, for they occupied it at the will of the landlord. The economic position of tenants varied depending on whether they possessed any stock of their own or had to rely on their landlords for this sort of capital.

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[53] This was the case for the majority of Gaelic Ireland. O'Dowd, however, has shown that it did not hold true for Co. Sligo in Connacht, where the father and his sons were the principal landholding unit, and sons usually inherited the lands of their father. "Land Inheritance in Early Modern County Sligo," pp. 13-16.

[54] Nicholls, *Land, Law and Society*, p. 6.

[55] Ibid., p. 9. Nicholls suggested that the confusion of English observers regarding Irish land rights may have stemmed from Ireland's "pastoral and agriculturally underdeveloped economy...". It is not clear what Nicholls means by this. The economy was underdeveloped only according to other standards, such as the English economy.

[56] Ellis, *Tudor Ireland*, p. 44.

Individuals who were clan members were better off than ordinary tenants. Although they normally had only temporary use of an allotted share of the clan lands, permanent divisions were sometimes made. This diversity did not make it easier for English administrators to understand Irish landholding customs.

English observers lumped together the various forms of partible inheritance in Ireland as "gavelkind", as they had done in Wales. The formal legal phrase commonly used was "custom in nature of gavelkind", referring to the practice of Kent.[57] Gavelkind in Ireland had none of the tenurial aspects of the custom in Kent; the term referred primarily to inheritance practices. One major difference between the two, was that with Irish partible inheritance women were generally excluded from inheritance.[58] An undated Chancery bill involving disputed lands in County Westmeath recorded this exclusion: "They [the defendants] also say that the custome of the said Barony is and tyme out of mynde have bene that women should never inherite or have lands by course of inheritance there."[59] In the later sixteenth century, the Irish Chancery upheld Irish inheritance practices where they seemed reasonable and equitable, but generally did not uphold the exclusion of women to inherit. In 1595, for example, it was recorded that "by several decrees in this honourable Court the said custom hath ben dissalowed as well in the same contrey of Calry as in Dillon's Contrey and mcGeoghegan's Contrey where, contrary to the allegation of such custom, order hath bene gyven for the daughters."[60] One explanation for the exclusion of women to inherit in

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[57] Nicholls, *Gaelic and Gaelicised Ireland*, p. 59.

[58] Nicholls, "Irishwomen, and Property in the Sixteenth Century," in Margaret MacCurtain and Mary O'Dowd, eds., *Women in Early Modern Ireland*, (Edinburgh: Edinburgh University Press, 1991), p. 23. Elsewhere Nicholls has cautioned that the "scantiness of the available evidence does not permit us to say whether or not some of the exceptions to the general rule of the exclusion of women form inheritance in land may have survived in practice" into the sixteenth century. "Some Documents on Irish Law and Custom in the Sixteenth Century", p. 107, n. 12.

[59] "The aunswer of Henry Dalton and Richard Dalton to the bill of Malaghlen O Bryne and Honory Magawell," in "Some Documents on Irish Law and Custom in the Sixteenth Century", p. 118.

[60] "The rejoinder of Auly mcAuly to the replication of Shan O Colman, the matter being renewed in the name of Shan mcRoirk and Reise ny mcRoirke," ibid., p. 120.

Gaelic society has been that it followed as a consequence of the concept of the patriarchal family corporation as the landowning unit. Since descent was patrilineal, the mother's children belonged to the father's clan, and thus the mother's clan had no claim to a share of the inheritance.[61]

Although women could not inherit land, they could acquire and hold land independently of their husbands by other means. Women could receive and hold pledged or purchased lands for their lifetimes, since these lands were deemed separate from corporate clan property.[62] As well, property which a woman brought to the marriage was redeemable upon the dissolution of the marriage or the death of her husband.[63] For example, lands were often mortgaged to provide security for the dowry which the woman brought to the marriage. Reamonn mac Maoilir de Burgo gave the lands of *Disert Chleircin* in County Galway to his wife Syly ni Huag, in mortgage for her dowry. She was to retain the lands for thirty years until his brother redeemed them.[64] According to Nicholls, the Church may have supported the practice of women holding land, because it could materially benefit from the practice. "The wife's right to hold property independently of her husband was of considerable interest to the Church, since it invalued not only her right to make bequests for the goods of her soul but also the Church's right to take a 'mortuary' – usually the best suit of clothes left by the deceased – and a 'canonical portion' (a kind of death duty levied by the Church) on her decease, a practice repugnant to practitioners of the common law."[65] As well, evidence from the 1606 judicial decision abrogating Irish gavelkind has been cited to suggest that wives could hold property independently of their husbands. In the decision, the

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[61] Nicholls, *Gaelic and Gaelicised Ireland*, pp. 59-60.
[62] Ibid., p. 60.
[63] Lennon, *Sixteenth-Century Ireland*, p. 59.
[64] Nicholls, "Irishwomen and Property in the Sixteenth Century," p. 23.
[65] Ibid., p. 19. The taking of mortuaries on the death of married women was forbidden by 1621.

judges declared that the goods of a married woman were to belong to her husband, according to the custom of the common law.[66]

Another characteristic of Irish inheritance customs which was deplored by English observers and administrators was the absence of a distinction in Gaelic law between "legitimate" and "illegitimate" heirs. The fact that Gaelic marriage was traditionally a secular institution may have accounted for this. Under medieval canon law, legal marriages involved the declaration of the parties followed by consumation, and Irish marriage customs met these criteria. However, other aspects of Irish marriage customs did not fulfil the requirements of canon law, such as the prohibition of marriage between those closely related by blood of affinity; indeed, the Gaelic Irish tended to marry their kinfolk.[67] The place of heirs who were born out of wedlock was an important factor in the expansion of the clan as it sought a stronger relative position amongst other clans. A ruling clan could increase its domination, or a lesser clan could obtain a better relative position by a greater population base. The Maguires in Fermanagh were an example of such an expansive clan. Of relative unimportance before the end of the thirteenth century, they possessed three-quarters of the land in Fermanagh by the beginning of the seventeenth century.[68]

For Davies, this immorality of bastards inheriting land under law no doubt contributed to his sense of the barbarous and shameless character of the Gaelic Irish. Allowing "illegitimate" children to inherit estates only encouraged more illicit relations within the society, leading to a proliferation of bastardy. As Davies expressed it, the inheritance custom sustained immorality: "and yet weeds are like to grow up apace, if every

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[66] Ibid., p. 17.

[67] Nicholls, *Gaelic and Gaelicised Ireland*, p. 74.

[68] Ibid., p. 11. According to Nicholls: "The rate at which an Irish clan could multiply itself must not be underestimated."

lewd woman may father her child upon whom she list, and the promiscuous generation of bastards to be suffered."[69] Under the common law, children born outside the bonds of canonical marriage could not inherit estates.

The division of lands among male members of a clan was an important aspect of Irish gavelkind. One common practice was to divide the lands of the clan on the death of a landholder. A Chancery Pleading from 1589 recorded that upon the death of Fargarnarim O Moloye, from what is now County Offaly, "all the premises descended and came, as of right they out to discend and com by the custom of that country in manner of gavelkind to all the said sonnes as coheirs."[70] In other clans, particularly in Connacht, the custom was to redistribute lands each year on Mayday, also the date for the termination of yearly tenancies and the redemption of pledged lands.[71] Frequent redistribution of lands, either annually or periodically upon the death of a male clan member, was considered an 'uncertain' custom by English common lawyers.

In particular with annual redistributions, there was no guarantee that a person would receive the same lands from year to year, and this was deemed a cause of the poor state of Irish agriculture, and an important part of "Irish barbarism". "For who would plant or build upon that land which a stranger whom he knew not should possess after his death?" Davies asked.[72] That a "stranger" would take over a holding hardly applied since it could only have gone to a fellow clan member. Davies thought that frequent redistributions were "the true reason why Ulster and all the Irish countries are found so waste and desolate at this day, and

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[69] Sir John Davies, "Observations to the Earl of Salisbury: May 4th 1606. After a Journey to Munster", in A.B. Grossart, ed., *The Works in Verse and Prose Including Hitherto Unpublished Manuscripts of Sir John Davies* (Blackburn, 1869-76), iii, p. 168.

[70] "P.R.O.I. [Salved] C[hancery] P[leadings], [Parcel] A [no.] 220" in "Some Documents on Irish Law and Custom in the Sixteenth Century", p. 111.

[71] Nicholls, *Gaelic and Gaelicised Ireland*, pp. 61-2.

[72] Davies, *Discovery*, p. 292.

so would they continue till the world's end if these customs were not abolished by the law of England."[73] However, he wrote this in 1612, after the Nine Years War which ravished much of the Irish countryside, particularly in Ulster, including the scorched earth techniques by both Irish lords and the English army.[74] As well, families of lower status than the chief and other great landlords did have permanent dwellings and buildings. Nicholls points out that in many cases co-heirs would group their dwellings and buildings together in some central or fortified place such as an earthen fort or castle.[75] Even enclosures were not uncommon in Gaelic Ireland, at least in lowland areas of cultivation. Irish enclosures tended to be low banks, shallow ditches, wattle fences or turf walls, which would, according to R.A. Butlin, have gone "unnoticed to the inexperienced eye more used to substantial hedgerows as means of enclosure."[76] Frequent partitions could stand in the way of permanent improvements, but it should be remembered that Gaelic society was predominantly pastoral. As such, mobility was a key factor in settlement patterns and types. Part of the community would move with the herds to summer pasture – the important seasonal "booleying" or transhumance migrations. English observers did not discern the fact that partible inheritance was probably the effect rather than the cause of the low intensity of land use.[77] The social structure developed from agricultural practices, not the other way around.

There were essentially two methods for dividing lands in Gaelic Ireland. By one practice the youngest co-heir divided the lands into equal shares and lots were chosen on the basis of seniority. A Chancery Pleading from 1589 recorded this custom in what is now County Offaly: "And to satisfie this honourable Court further the defendant saithe that

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[73] Ibid.
[74] Ellis, *Tudor Ireland*, p. 307.
[75] Nicholls, *Land, Law and Society*, p. 19.
[76] Butlin, "Land and people, c. 1600," *New History of Ireland*, iii, p. 150
[77] Ibid., p. 10.

the custom in Ferkall is (wheare the lands in demaund lieth) that betwene anie great Cept [clan] or kindred the youngest shall make division of all lands into soe many parts as there are people to challenge portions thereof, and the elders in order to make choice of their parts."[78] The reasoning here would be that the youngest, by virtue of being the last to choose his share, would make the most equitable division. In the second general method, the eldest co-heir made the division of lands and choice was made by seniority. Davies thought that this was the universal method: "after partition made, if any one of the sept had died, his portion was not divided among his sons, but the chief of the sept made a new partition of all the lands belonging to that sept, and gave every one his part according to his antiquity."[79]

The Irish custom of gavelkind was also attacked for creating too many small fragmented holdings. Davies observed that the holdings "have been from time to time divided and subdivided, and broken into so many small parcels of land as almost every acre of land hath a several owner, which termeth himself a lord and his portion a country."[80] This probably confused the tiny holdings of a few acres of share-croppers with those who had affinity with the clan. As well, in some cases, families did make permanent division of lands. The co-heirs of an inherited estate could come together, agree that they were content with their present holdings, and seek to make the division of their land permanent:

> What this writing makes known is that we, Toirdhealbhach son of Brian Og Mac Mathghamhna and Toirdhealbhach son of Brian son of Toirdhealbhach Mac Mathghamhna, have jointly given our consent to Murchadh Ruadh son of Brian Man Mathghamhna to a make a permanent division between us instead of the annual division that we have hitherto been accustomed to make; and we, those three persons, unamiously agreed to make the permanent division that there be no more dispute between ourselves nor our posterity after us for ever, but that each person should control his own share henceforth.[81]

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[78] "P.R.O.Q. [Salved] C[hancery] P[leadings], [Parcel] A [no.] 220", in "Some Documents on Irish Law and Custom in the Sixteenth Century", p. 113.

[79] Davies, *Discovery*, p. 291.

[80] "A Letter from Sir John Davies, Knight, Attorney-General of Ireland, to Robert Earl of Salisbury", in Morley, *Ireland Under Elizabeth and James the First*, p.372.

[81] "G 983" in G. Mac Niocaill, ed., "Seven Irish Documents from the Inchiquin Archives", p.49.

In this case, the father, his son, and his brother made a permanent division, apparently to avoid disputes that the redistribution of land may have caused in the past. Disputes over inherited portions of land were not uncommon in sixteenth-century Ireland. An award from 1587 was disputed by two brothers in Tipperary: the younger brother refused to leave the lands he occupied in favour of his elder brother, who chose them by right of seniority in the partition, the typical custom of north Munster.[82] The younger brother claimed that his father had placed him in the holding and that he had spent most of his life there. The two brothers took the matter to arbitration, a process involving their lord, O'Dwyer, and four other people. Because of his seniority and wealth, the elder brother was recognized as having the strongest right to the disputed lands; however, for the sake of fairness, the arbitrators then proceeded to award the lands back to the younger son and his sons forever. The elder brother was to choose other lands and receive compensation from the younger brother.[83] Brehon law could make equitable decisions to reconcile conflicting interests. In this case, the right of the elder brother was clearly upheld in theory, but in practice the younger brother kept the lands which he had held for a good length of time.

Part of the inheritance system relating specifically to the political succession of the chieftaincy was the practice which English observers termed "tanistry". In Gaelic, *tanaiste* meant second in place or position, and a tanist was the nominated successor of a chief.[84] The English connotation of the word was often much more general, however, focusing on succession by seniority to both lands and office. Since one of the dominant forms of partitioning lands was for the eldest co-heir to make the division, this emphasis on seniority

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[82] Kenneth Nicholls, "Gaelic landownership in Tipperary in the light of the surviving Irish deeds." in William Nolan, ed., *Tipperary: History and Society*, (Dublin: Geography Publications, 1985), p. 101.

[83] Ibid., pp. 101-2.

[84] Nicholls, *Gaelic and Gaelicised Ireland*, p. 25.

caused many English observers to identify partible inheritance by gavelkind with that of succession by right of tanistry.[85] Indeed, the custom of tanistry was abrogated along with gavelkind in 1606 as part of a general reform of Irish land customs.[86]

A note in the State Papers, on the traditional lands of the O'Sullivans, described how the tanist received special allotment of lands:

> The proper inheritance of land belonging to the O'Sullivans is fifteen quarters, every quarter containing three ploughlands. The one half wherof was by ancient custom allotted to the O'Sullivan, lord of the country for the time being. The other half to be divided and distributed among the worthiest and best of the name, as cousins and kinsmen to the lord, as a portion to live upon, viz. to the tanist, the best part of the said one half, which is two quarters, every quarter containing 3 ploughlands. To the second eldest next the tanist, which is Donall O'Sullivan...there is allotted of the said one half 6 ploughlands, and so the rest be divided against the kinsmen.[87]

The custom among the O'Sullivans was thus that the tanist received about 720 acres of "the best part of the said one half" of the clan's lands.

The major objection to the custom of tanistry by English observers and administrators was not the large allotment of land to the tanist to enjoy while waiting to succeed to the chieftaincy, but the uncertain nature of the actual succession. Succession to both the offices of tanist and chief were elective, taking place at an assembly of the clan. Those eligible to become tanist came from an extended four-generation family group called the *derbfine*.[88] However, the elected tanist – termed the "eldest and worthiest" member eligible, often the chief's eldest son – did not necessarily succeed to the chieftaincy. A more powerful contender could oust the tanist from succession. As English observers commonly

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[85] Pawlisch, *Sir John Davis and the Conquest of Ireland*, p. 60.

[86] No decision for the abrogation of tanistry itself remains. It is most likely that tanistry was also voided by the 1606 resolution abolishing gavelkind. To be discussed in the following chapter.

[87] *Calendar of State Papers Relating to Ireland, 1586-1588*, (London: Longman & Co., 1877) "A Note Describing the ancient custom of division of lands, time beyond the memory of man among the O'Sullivans of Beare and Bantry", pp. 363-4. A ploughland was reckoned at 120 arable acres.

[88] Lennon, *Sixteenth-Century Ireland*, p. 51; Nicholls, *Gaelic and Gaelicised Ireland*, pp. 26-7.

noted, the eldest and worthiest often meant the most powerful militarily. Richard Hadsor in 1604 described tanistry as the custom that "the eldest & worthiest of the name should have the signorie during his life, whereof groweth much bloodshed & rebellion by contencion for the seignorie every discent, he being often reputed the worthiest man who draweth most bloode, which incytheth them to commit outrages."[89] Clearly, this was a hostile witness, but enough successions ended in disputes to make it seem plausible. The advantage of the system, as Edmund Spenser pointed out in 1596, was that it avoided the uncertainty associated with a minority rule of the clan in a militaristic society:

> for when their captain dieth, if the seignorie should desend unto his child and he perhaps an infant, any other might perhaps step in between and thrust him out by strong hand, being then unable to defend his right or to withstand the force of a foreigner. And therefore, they do appoint the eldest of the kin to have the seignory, for that he commonly is a man of stronger years and better experience to maintain the inheritance and to defend the country, either against the English which they think lie still in wait to wipe them out of their lands and territories; and to this end the Tanist is always ready known, if it should happen the captain suddenly to die or to be slain in battle or to be out of the country, to defend and keep it from such doubts, and dangers; for which cause the Tanist hath also a share of the country allotted to him, and certain cuttings and spendings upon all the inhabitants, under the lord.[90]

Although the office of the tanist thus mitigated against usurpation in theory, the uncertainty of succesion to the position of chief, could result in the use of force or a show of force, bringing the custom into ill repute with the English administrators.

Gaelic social and political systems markedly differed from those across the Irish Sea, or even those of many of the Old English in Ireland. English observers universally deplored Gaelic landholding and legal customs especially those which looked exotic from the perspective of primogeniture. In the political sphere, the autonomous lordships seemed

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[89] McLaughlin, "Select Documents XLVII: Richard Hadsor's 'Discourse' on the Irish State, 1604," in *Irish Historical Studies*, 30 (1997), p. 346.

[90] Edmund Spenser, *A View of the Present State of Ireland*, ed., by W.L. Renwick, (Oxford: Clarendon Press, 1970), p. 8.

petty kingdoms in which the lord had tremendous power to control the economic and social lives of its inhabitants. Gaelic lords could demand and receive extensive exactions from their tenants which often altered from year to year. English administrators saw these as keeping the Irish tenantry in a wretched state of existence. The crown had unsuccessfully attempted to bring aspects of Gaelic inheritance customs under effective control through a policy of extending English-style tenures to great Irish lords, a policy which historians refer to as "surrender and regrant".[91] Effective control of the whole island by the administrators in Dublin was difficult to establish when many Irish lords, let alone the majority of the population, did not even recognize the English monarch as their sovereign. English administrators also saw the dynastic challenges of the tanistry system and the political instability of rising and declining clans as detrimental to peace.

While partible inheritance was familiar to English observers, especially in the gavelkind of Kent and Wales, the Irish version varied considerably from both of these. The principle of partible inheritance was familiar, but some of the particular aspects of the custom, such as the exclusion of women from inheritance, the allowance of "illegitimate" children to inherit, and the periodic, sometimes annual, redistribution of land seemed alien and unreasonable. Other aspects of Gaelic landholding, such as the frequent division of holdings, were regarded as impoverishing Irish agriculture. The importance of mobility in the pastoral society was often seen as a means by which the Irish could escape the orderly hand of English law and administration. Thus, with the end of hostilities between the northern Irish lords and the crown in 1603, one of the first steps, in the words of Davies, to "finally subdue" Ireland, was to reorganize the tenurial and inheritance customs of the Irish. Only this would bring peace and order to the island. Whereas in the previous encounter of

[91] Gaelic tenures were surrendered to the Crown and in return granted common law tenures.

the English crown and common law with "alien" customs in Wales, the abrogation of land customs was achieved by parliamentary statute, in the Irish case, abrogation followed the untrodden path of judicial decision.

# 5 Davies and the Irish Bench: The Abrogation of Irish Gavelkind and Tanistry

*For the conquest is never perfect till the war be at an end, and the war is not at an end till there be peace and unity; and there can never be unity and concord in any one kingdom but where there is but one King, one allegiance, and one law.*[1]

For Sir John Davies, the Crown could never achieve what he called a "perfect conquest" of Ireland while Brehon law and autonomous lords competed with the common law and the Dublin administration. He agreed with the civil law maxim that "a king is not sovereign where others give law without reference to him."[2] Both the independent power of Gaelic lords, particularly in Ulster, and the Brehon law loomed as barriers to the full extension of the English legal and administrative arm throughout the whole island. With the surrender of Hugh O'Neill to Lord Mountjoy in March 1603, the Dublin government finally had military control over the whole island. The presence of an English army in Ireland afforded the security and stability to allow the Dublin administration, chiefly through the initiative of Davies, to reshape the manner in which the Gaelic Irish held and inherited land.[3] To recall Davies' historical framework for England's failure to "subdue" the Irish until his day, there were two principal causes. First, the Crown never had complete control over the whole island at the same time – now it had. Second, English common law had not extended its "civilizing" effect onto the Gaelic Irish. Only after military defeat in 1603, Davies argued, could they be forced to be receptive to the common law: "the husbandman must first break

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[1] Davies, *Discovery*, p. 270.

[2] Pawlisch, *Sir John Davies and the Conquest of Ireland*, p. 55.

[3] Davies noted that "His Majesty, in his wisdom, thought it fit still to maintain such competent forces here as the Law may make her progress and circuit about the realm, under the protection of the sword." *Discovery*, p. 248

the land before it be made capable of good seed; and when it is thoroughly broken and manured, if he do not forthwith cast good seed into it, it will grow wild again and bear nothing but weeds".[4] The military defeat of 1603 represented the ploughing of the field, and the abrogation of Gaelic Irish gavelkind and tanistry and the institution of common law tenures and primogeniture, the planting of good seed.

By altering the way in which land was held and inherited, the Crown could "civilize" the Irish. Offspring from illicit unions would no longer be suffered to inherit land. Daughters could inherit estates, if no male issue survived. Changes to tenure would undermine the revenue and authority of the Gaelic lords. Tenants would no longer owe heavy and varying exactions and could not be removed from their holdings at will. Davies looked forward to the creation of freeholders, secure in their property as long as they paid a certain rent. These tenures also provided secure inheritance rights. This manipulation of the land system was similar to the process which occurred a century and a half earlier in Wales, where the co-operative nature of clan life was challenged by altering traditional payments in kind to money payments, and then abolishing partible inheritance as the standard way of passing on land.

Hans Pawlisch was the first historian to study the use of the Irish bench to consolidate the Tudor conquest. He revealed how Davies placed constitutionally sensitive issues which hindered the extension of English legal and administrative structures before the Irish courts and received decisions which restructured Irish society.[5] Pawlisch's study showed how all of these cases were integral in consolidating the Crown's position in Ireland

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[4] Ibid., p.218.

[5] Pawlisch, *Sir John Davies and the Conquest of Ireland.* See chapter six, "The mandates controversy and the case of Robert Lalor:; chapter eight, "The case of mixed money"; chapter seven, "The case of customs payable for merchandise"; and chapter four, "The cases of gavelkind and tanistry: legal imperialism in Ireland, 1603-10."

in the early seventeenth century. The events leading up to the decisions on gavelkind and tanistry and the effect of these decisions as tools to remanipulate the land system in Ulster received full coverage in his account. However, the cases of tanistry and gavelkind can profit from further analysis; in particular, a close examination of the arguments employed to combat the customs.

According to Brendan Bradshaw, one of the most constitutionally important events for Ireland in the sixteenth century, was the 1541 act for kingly title.[6] Calls for Henry VIII to assume the title of King of Ireland began as early as 1537. During his tour of Ireland before becoming Lord Deputy, Anthony St. Leger entreated Bishop Staples of Meath to set down his ideas on the political reform of Ireland. In particular, the bishop stressed the fact that the Irish had traditionally viewed the Pope as sovereign and the English monarch as only his vassal. In 1538, Staples wrote to St. Leger reminding him of his "instructions that I wrott concernynge thys contre by your commaundememt, and specyally to hav our Maister recognisyd Kynge of Irlond, and dowght not, in short tyme, to have all Irond then sworne to deu obedyence."[7] Traditionally, the act for kingly title has been seen, Bradshaw has noted, "as a manisfestation of the king's own political ambitions in Ireland, an earnest of his determination to subjugate the whole island." However, it was rather the Irish Council who petitioned for the change, and the king in fact did not warm to the idea because of the commitment it carried to complete the conquest of Ireland.[8]

The act of 1541 noted quite clearly that the lack of kingly title contributed to the rebelliousness of the Gaelic Irish and their lack of loyalty to the English monarch as Lord of Ireland. The preamble made the connection that:

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[6] Bradshaw, *The Irish Constitutional Revolution*, pp. 231-3; 265-6.

[7] *State Papers Henry VIII*, iii, p. 30.

[8] Bradshaw, *The Irish Constitutional Revolution*, pp. 231-232. "the king subsequently berated his councillors in Ireland for urging the title upon him, precisely because it carried a moral commitment to subjugate the whole island."

> where the King's majestie and his most noble progenitors justly and rightfully were, and of right ought to be , Kings of Ireland, and so to be reputed, taken, named, and called, and for lacke of nameing the King's majestie and his noble progenitors, Kings of Ireland according to their said true and just title, and name therein, hath beene great occasion that the Irish men and inhabitants within this realm of Ireland have not beene so obedient to the King's highnesse and his most noble progenitors, and to their laws, as they of right and according to their allegeance and bounden duties ought to have been....[9]

With the 1541 act, as well, the Irish Parliament now claimed to legislate for both the "Irishry" and the "Englishry", the Gaelic Irish and the Old English. The Gaelic Irish were no longer "enemies" but "subjects" of the king.[10] Of course, as Ciaran Brady has pointed out, the assertion that Henry VIII was the monarch "of all the inhabitants of Ireland extending to each the order and protection of his royal justice and receiving, in return, allegiance and obedience from each one, was, in the context of mid-sixteenth century Ireland, manifestly untrue."[11] Until the early seventeenth century, this constitutional alteration existed more in theory than in fact.

In his publications, Davies made much of the argument that the Gaelic Irish were legally and constitutionally considered "aliens", though some inconsistency on this point existed between the *Discovery* and the *Primer Report.* In the *Discovery,* he noted the fact that "the mere Irish were reputed aliens appeareth by sundry records wherein judgement is demanded, if they shall be answered in actions brought by them, and likewise by the Charters of Denization which in all ages were purchased by them."[12] Davies cited a number of records to show that Gaelic Irish had to purchase charters of denization to acquire the

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[9] 33. Hen. 8 c.1. *The Statutes at Large, Passed in the Parliaments Held in Ireland: From the Third Year of Edward the Second, A.D. 1310, to the Twenty Sixth year of George the Third, A.D. 1786 inclusive,* i, (Dublin: George Grieson, 1786), p. 177.

[10] Ibid., p. 266; Nicholas Canny, "Identity Formation in Ireland: The Emergence of the Anglo-Irish", p. 161.

[11] Brady, "The Decline of The Irish Kingdom", p. 94.

[12] *Discovery,* p.261. Not all Irish were outside the law. There were, from the time of Edward III, five families who enjoyed the privilege of English law: the royal families of O'Neill of Ulster, O'Melaghlin of Meath, O'Connor of Connacht, O'Brien of Munster and MacMurrough of Leinster.

right to bring actions before the common law courts. However, these examples of legal disabilities all dated from before the end of the fifteenth century.[13] If more contemporary examples had existed, Davies most likely would have used them; his works abounded with references to the Irish patent and common plea rolls. The fact that Davies did not cite any contemporary examples points to the conclusion that the Gaelic Irish were no longer regarded as aliens in the later sixteenth century. Indeed, in the case of tanistry (1608), Davies provided a brief narrative on the slow extension of English common law into Ireland which recognized the change in status of the Gaelic Irish resulting from the 1541 act. They were "accepted and reputed subjects and liege-men to the kings and queens of *England*, and had the benefit of the law of England, when they would use or demand it."[14]

Davies also pointed to the Statutes of Kilkenny which sought to separate the Irish and English communities by forbidding English settlers to marry Irish, and to speak and even dress in Irish manner. Although enacted in 1366, renewed in 1498 and supplemented in 1536, these statutes were superseded by the 1541 act of kingship which recognized all Irish as subjects of the king.[15] Davies was correct that the Irish faced legal and social disabilities, but these applied in late medieval Ireland rather than his own day. Clearly, Davies portrayed the Irish in this debilitated manner to buttress his attacks on the Irish land system. Rather than critically assessing the documentary evidence used by Davies, Pawlisch noted that "English jurists like Bacon and Davies were concerned about the legal consequences that resulted from 'alien' status ascribed to the Gaelic polity"; this, however, ignored the constitutional implications of the act of 1541which made Henry VIII and his

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[13] Ibid., pp. 261-266.

[14] Davies, "The Case of Tanistry", p. 107.

[15] Bradshaw, *The Irish Constitutional Revolution*, p. 266. The statutes were finally taken off the books in the 1613 Parliament, the first parliament in twenty-seven years.

successors the monarchs of Ireland.[16] The constitutional shift of the Gaelic Irish from "enemies" to "subjects" had serious consequences for the policies of the early seventeenth century.

*The Post-1603 Situation*

By any reckoning, the land settlement formalized by the English Privy Council at Hampton Court in 1603 was extremely generous to the rebellious Ulster leaders. O'Neill, the Earl of Tyrone, was allowed to retain the estates he had surrendered and regranted to Elizabeth I in 1587, a grant which had reconfirmed the lands of his grandfather, Con Bacagh O'Neill at the time of his surrender and regrant in 1542. This confirmed his possession of the whole of Tyrone, with the exception of lands to support two English garrisons. Rory O'Donnell, Earl of Tyrconnell, established himself as owner in fee simple of all Tyrconnell by convincing his sub-chiefs to surrender their estates to him.[17] As Pawlisch noted of the generous settlement, "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."[18] Mountjoy, who negotiated the Treaty of Mellifont with O'Neill which was formalized at Hampton Court, most likely offered such liberal terms as the quickest means to end hostilities. O'Neill surrendered on March 30, but Elizabeth I had died six days earlier; Mountjoy surmised that O'Neill would not surrender if news of the queen's death reached him.

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[16] Pawlisch, *Sir John Davies and the Conquest of Ireland*, p. 60.
[17] Ibid., pp. 65-6.
[18] Ibid., p. 66.

The land settlement did not sit well with the Dublin officials or English soldiers in Ireland who eyed lands in Ulster as the spoils of victory. To them, it seemed a betrayal that the Ulster nobles who had opposed the Crown had gained a stronger position in their lordships. As Fynes Moryson, the chief secretary to Lord Deputy Mountjoy later noted of the situation: "This most worthy Lord [Mountjoy], cured Ireland from the most desperate estate in which it had ever beene since the first Conquest thereof by our Nation. Yet hee left this great worke unperfect, and subject to relaspe, except his successors should finish the building whose foundation he had laied, and should pollish the stones which he had onely rough hewed."[19] Building upon Mountjoy's foundation took the shape of establishing assize circuits and royal officials in Ulster. As Davies noted, 1604 witnessed "the first sheriffs that ever were made in Tyrone and Tyrconnell, and shortly after sent Sir Edmund Pelham, Chief Baron, and myself thither, the first justices of assize that ever sat in those countries."[20] Although the assizes were "distasteful to the Irish lords", they were "sweet and most welcome to the common people, who, albeit they were rude and barbarous, yet they did quickly apprehend the difference between the tyranny and oppression under which they lived before and the just government and protection which we promised unto them for the time to come."[21] It was from these experiences on the assize circuits in Ulster, that Davies observed the working of Gaelic society, in particular the power base of the lords and the oppression suffered by their tenants. He then formulated a plan to curb the power of the Gaelic Irish lords. Since their authority and power resulted from their influence over the lives of their territorial inhabitants, especially the drawing of exactions, Davies sought to subvert the

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[19] Moryson, *Itinerary*, iii, cited in McCavitt, *Sir Arthur Chichester: Lord Deputy of Ireland, 1605-16*, (Belfast: The Institute of Irish Studies, 1998), p.25.

[20] Davies, *Discovery*, p.332.

[21] Ibid., pp.332-3.

lords by buttressing the position of their tenants. This could be achieved by converting their tenures to freehold. In a letter to Sir Robert Cecil from April 1604, Davies remarked on the strength of the English tenantry, who would not stand illegal incursions from their landlords: "but as for their tenants who have good leases, or being but copyholders, seeing that by the law at this day they may bring an action of trespass against their Lords, if they dispossess them without care of forfeiture; those fellows will not hazard the losing of their sheep, their oxen, and their corn, and the undoing of themselves, their wives and children, for the love of the best landlord that is in England."[22] The key here was that tenants under common law tenures could bring actions before the courts to protect themselves. Davies also commented to Cecil in the same letter, that he hoped to see the introduction of common law tenures achieved by an act of the next Irish parliament.[23] Parliament would not meet until nine years later but the common law tenures were established by abrogating Irish land customs in the Dublin courts in 1606.

The first step in undermining the power of Ulster lords was to create a stratum of freeholders. According to Pawlisch, Davies's assessment of the Ulster situation led to the issuance of a general proclamation of denization in 1605, which granted the benefits of English law to all undertenants in Ulster.[24] It not only granted legal liberties to tenants, but also reinterpreted the generous land settlement of 1603. The proclamation declared that the letters patent issued to O'Neill and O'Donnell in 1603 did not grant to them their estates under the Gaelic landholding system, but that the settlement required them to divide their estates into freeholds and tenancies.[25] Concerned that tenants should enjoy the equivalent of

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[22] Sir John Davies to Cecil, April 19, 1604. *Calendar of State Papers Relating to Ireland, 1603-1606*, i, p. 160.

[23] Ibid.

[24] Pawlisch, *Sir John Davies and the Conquest of Ireland*, p.67.

[25] Ibid., pp. 67-8; Canny, *From Reformation to Restoration*, p.157.

freehold status in Ulster, Davies also wished to clip the wings of the powerful Ulster nobles, who were the strongest supporters of Gaelic customs.

To supplement the general proclamation reorganizing the Ulster lordships, a land commission was established to investigate the patterns of land tenure in Ulster, and to accept voluntary surrenders of Gaelic estates in return for common law tenures. Davies, who was one of the commissioners, described how the commission worked:

> We called unto us the inhabitants of every barony severally...and so calling one barony after another, we had present certain of the clerks or scholars of the country who know all the septs and families and all their branches, and the dignity of one sept above another, and what families or persons were chief of every sept ...and so forth, till they descended to the most inferior man in all the baronies. Moreover, they took upon them to tell what quantity of land every man ought to have by the custom of their country, which is of the nature of gavelkind...When this was understood, we first inquired whether one or more septs did possess that barony which we had in hand; that being set down, we took the names of the chief parties of the sept or septs that did possess the baronies, and also the names of such as were second in them, and so of others that were inferior unto them again in rank and in possession.[26]

Despite the authority of the commission, it failed to meet the administration's expectations for creating freeholds and tenancies. In Tyrone, for example, O'Neill outmanoeuvred the commission by presenting his immediate kinsmen as freeholders to the exclusion of other minor branches of the O'Neill family.[27]

In 1606, another land commission was established to determine which freeholds had been "mistakenly" assigned to various Irish chiefs in Ulster. However, as Pawlisch has noted, this commission was equipped with a judicial resolution voiding the Irish land customs of gavelkind and tanistry. "Davies' *Reports* and scattered manuscript references make it clear that the Dublin government viewed these resolutions, at the outset anyway, as a

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[26] Davies, *Discovery*, p.372.
[27] Pawlisch, *Sir John Davies and the Conquest of Ireland*, p.68,

constitutional mechanism to facilitate the surrender of Gaelic holdings in return for common law estates. In turn, these common law tenures would strengthen the tenancies of tribal underlings as freeholders against the claims of superior chiefs like Tyrone."[28] With the new judicial resolution, a commission on defective titles was established to confirm common law tenures from Gaelic estates, and the Dublin administration could finally achieve its objective of curbing the autonomy of the great Ulster lords.

### *The Abrogation of Gavelkind and Tanistry*

In a letter to secretary Cecil, the leading minister of James I, Davies noted his desire "in this next Parliament to see an Act passed in this land, that shall enjoin every great Lord to make such certain and durable estates to his tenants, which would be good for themselves, good for their tenants, and good for the commonwealth."[29] This seemed a logical course of action. Common law tenures had been established in Wales by parliamentary statute with the union legislation of 1542, and gavelkind lands in Kent were also altered to common law forms by statute. However, when Dublin officials began making preparations for a parliament in 1605, they soon realized that the House of Commons would be dominated by Old English representatives who were in large part Catholic. As a major portion of the proposed legislation dealt with political restrictions for Catholics, the religious affiliation of MP's posed a problem. A parliamentary solution did not seem possible, so the officials looked to the law courts for a more favourable outcome. During and after the Nine Years War, Catholics had worshipped more publicly in the Pale and in towns.[30] With the accession

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[28] Pawlisch, *Sir John Davies and the Conquest of Ireland*, p.69.

[29] Davies to Cecil, April 19, 1604. *Calendar of the State Papers Relating to Ireland, 1603-1606*, i, p. 160.

[30] Canny, *From Reformation to Restoration*, pp. 152-3; Pawlisch, *Sir John Davies and the Conquest of Ireland*, pp. 103-5.

of James I and VI to the English throne, Catholics expected a move toward greater religious toleration. There was not a great deal of fear that an Irish parliament would block legislation against Gaelic landholding and inheritance customs, but these were overshadowed by other important issues such as public religious worship and the privilege of political participation. Catholic judges on the Irish bench posed a problem in using the courts for law making. In 1604, Davies remarked on the need for more English judges, "both in the King's Bench and Common Pleas; for there are but two in either Court, and the second judges are but weak."[31] Appointing additional English Protestants to the courts while simultaneously removing remaining Catholic justices overcame this obstacle; the last Catholic judge, Sir John Everard, left his position in 1607.[32]

The particular circumstances surrounding the abrogation of gavelkind and tanistry remain somewhat unclear, for only the resolution of the Dublin judges on land customs and the 1608 case of tanistry survive, both in Davies' 1615 *Primer Report.* With new judges trying the cases, Davies probably had a strong hand in shaping their perceptions of Gaelic inheritance and landholding patterns. As Attorney-General he commanded attention. Few other legal minds in Ireland had both the common law background and the knowledge of Gaelic customs that Davies gained on the assize circuits and the land commission of 1605. In the case of tanistry, Davies was counsel for the defence.

The "Resolution of the judges touching the Irish custom of Gavelkind" (1606), opened with a detailed analysis of Gaelic social structures and land customs, noting that "the meer *Irish* within this realm, were divided into several territories or countries, and the

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[31] Davies to Cecil, March 7, 1604. *Calendar of the State Papers Relating to Ireland, 1603-1606,* i, p. 154.

[32] Ibid., p. 158; McCavitt, *Sir Arthur Chichester,* p. 98. Lord Deputy Chichester was key in augmenting the Irish bench with English Protestants.

inhabitants of every *Irish* country were divided into several septs or lineages."[33] Observing that inheritance ran either by gavelkind or by tanistry, the judges claimed that Gaelic Irish holdings were too transitory to be considered inheritable estates, since with tanistry, the lands of the chief did not descend to his eldest son, but to the eldest and worthiest of the sept, and all other estates were partible among the male heirs of the clan. In their description of partitions, the judges failed to mention that the division of lands by the clan chief was not the universal method. They claimed that the chief "made all the partitions at his descretion", though we know from our analysis of Gaelic land customs that other methods were commonly used, such as the youngest heir making the division and lots being chosen on the basis of seniority.[34]

A major assumption behind the decision to abrogate Irish gavelkind was simply that it differed from the practice in Kent. Citing Lambarde's *Perambulation of Kent*, the judges observed that the Irish custom differed from the Kentish custom in four respects. Under Kentish gavelkind: the estate was partible only among the nuclear family ("the next heirs males only"); illegitimate sons could not inherit; the widow of a deceased tenant received a moiety (half of the lands); and females could inherit in default of male heirs.[35] Although Lambarde was the authority of the day, it is clear that in practice lands under Kentish gavelkind were inherited outside of the direct line of father and son. In Chevening, Kent, in 1603, for instance, two sons inherited their father's estate along with their first cousin.[36]

In addition, it was argued that a similar custom of partible inheritance in Wales had been amended in the 1284 *Statuta Wallie* that annexed part of Wales to the Crown of

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[33] "The resolution of the judges, touching the Irish custom of Gavelkind." Davies, *A Report of Cases and Matters in Law Resolved and Abridged in the King's Courts in Ireland*, (Dublin: Printed for Sarah Cotter, 1862), p. 134.

[34] Ibid., p. 135.

[35] Ibid., p. 136.

[36] Chalkin, *Seventeenth-Century Kent*, p. 57. n.2.

England.[37] The statute permitted partible inheritance to continue in Wales with the exceptions that illegitimate sons were forbidden to inherit, females could inherit in default of males, and widows would receive a moiety ("Women shall have their portions thereof").[38] In the words of the 1606 judges, these stipulations "reproved and reformed" Welsh gavelkind, so that it more closely mirrored the custom in Kent. Reference was also made to the union legislation of 1542 where "the custom of *gavelkind* in *Wales* is utterly abolished, with divers other usages resembling other customs of the *Irish.*"[39] Reformation of a similar custom in the thirteenth century in Wales and its abolition in the sixteenth century were argued to have set a precedent for eliminating Irish gavelkind. However, this disregarded the successful co-existence of Irish land customs in the common law courts in Ireland during the sixteenth century. Gavelkind in Wales was abrogated when it joined with England in 1542; a year earlier, the Irish Parliament had recognized Henry VIII as King of Ireland, which made all Irish inhabitants into free subjects. Thus common law courts in Ireland in the sixteenth century had established another precedent, albeit a short-lived one, of upholding the particular customs of Irish subjects which differed from the common law.

The judges further claimed that Irish gavelkind was unlawful because all the Irish were "to be governed by the common law of *England.*"[40] The 1605 proclamation of general denizenation extended the benefits of the common law to all inhabitants, but, in theory, so had the act of 1541. Gaelic Irish frequently brought matters before the common law courts, as noted in the Chancery pleadings of the later sixteenth century. With the extension of legal and administrative structures through Irish lordships after the military victory of 1603,

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[37] *Statutes of the Realm*, 12 Edward I, c. 13.
[38] Ibid., pp. 67-8.
[39] "The resolution of the judges, touching the Irish custom of Gavelkind," p. 137
[40] Ibid.

particularly in Ulster, the Gaelic Irish could no longer avoid the common law. The judges may have assumed a right of conquest, that the victor had the right to reorganize the land customs and legal system of the conquered nation,[41] but they did not make this explicit in the case on gavelkind.

The argument that gavelkind was void in law "not only for the inconvenience and unreasonableness of it, but because it was a meer personal custom" appears incongruent with the views of custom and the common law expressed by the common lawyers discussed above. More than any other common lawyer of his day, Davies identified the common law with the customs of the people: "For the Common Law of England is nothing else but the Common custome of the Realme."[42] The common law of England, as an unwritten law, was comprised of the ancient customs of the English people. Since the laws developed from the practices of the people, they were not oppressive, nor introduced by a legislator, but passed the test of time by ancient observance, thereby fitting the people like a glove to a hand. Davies identified a clear evolution of usage in which a practice continually observed achieved the status of custom, and a custom observed time-out-of-mind became a law: "When a reasonable act once done, is found to be good and beneficiall to the people, and agreeable to their nature and disposition, then do they use it, and practise it againe, and againe."[43] A custom was reasonable because it was immemorial: time was the ultimate judge of reason. If a practice was not beneficial to the people, if it hindered them in some respect, it would be an unreasonable practice, and the people, unless compelled to do so, would presumably discontinue it. For Davies, the Gaelic system of exactions served as an example of a practice

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[41] Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, (Oxford: Clarendon Press, 1996), pp. 29-32.

[42] Davies, *Le Primer Report des Cases et Matters en Ley Resolves et Adjudges en les Courts del Roy en Ireland*, (Dublin, 1615) in *Works*, iii, pp. 251-2 (preface).

[43] Ibid., p. 252.

that harmed the majority of clan members and inhabitants of a given territory; it continued because the people were compelled to follow it or risk losing their lands. In the common law view of Davies, this was clearly an unreasonable custom.

Irish gavelkind, on the other hand, would seem to fit Davies' criteria for a reasonable custom. Firstly, it fit the needs of the people. The custom arose out of the Gaelic economic system which was largely pastoral and which involved a great amount of mobility in practices such as transhumance. English observers failed to realize that partible inheritance was the effect rather than the cause of the low intensity of land use.[44] Secondly, Irish gavelkind was *ipso facto* reasonable because it had been observed time out of mind. From the Chancery pleadings of the sixteenth century we have descriptions of gavelkind that noted the custom's immemorialty. A pleading from a County Westmeath litigant noted that all of the lands in dispute "hath time out of mynde bene devided betwene all the sons of any dienge seised thereof or of any parte thereof in nature of Gavelkind."[45] The evidence from Chancery pleadings also fulfilled another criterion for the reasonableness of a custom emphasized by common lawyers such as Thomas Hedley; the custom was upheld in common law courts.

Hedley had made a distinction between a "usage" and a "custom". For him, a usage denoted a practice commonly observed throughout the kingdom, whereas a custom was "confined to certain and particular places."[46] However, this distinction was absent in Davies, who used "custom" for both local and a national practices.[47] The Irish judges in 1606, however, made a distinction similar to Hedley's, claiming that gavelkind was void in law because it was "a meer personal custom."[48] The suggestion here was that gavelkind was not a

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[44] Butlin, "Land and people, c.1600" in *New History of Ireland*, iii, p. 150.

[45] Chancery Pleading, A. 238, in "Some Documents on Irish Law and Custom in the Sixteenth Century", p. 114.

[46] Foster, *Proceedings in Parliament 1610*, ii, pp. 175-6.

[47] Pocock, *The Ancient Constitution and the Feudal Law*, p. 266.

[48] "The resolution of the judges, touching the Irish custom of Gavelkind", p. 137.

common practice throughout the island, and therefore had no force in law. Gavelkind, however was the common practice of the Gaelic Irish, and even some gaelicized Anglo-Irish, and could not justly be so readily dismissed as a local custom in terms of geographic observance. As the judges themselves noted of Gaelic society in the resolution, "all the inferior tenancies were partible between males in gavelkind."[49] Even local customs such as gavelkind in Kent successfully coexisted with the greater usage of the common law. Where specific aspects of Irish gavelkind were deemed unreasonable, such as the exclusion of females from inheriting, the lack of a moiety for widows, and the eligibility of illegitimate sons to inherit, they could have been abrogated while leaving partible inheritance intact.

However, an equitable presentation of Irish custom was not the purpose for the resolution by the judges of the Dublin courts. Davies probably worked with the judges to abolish the custom since it blocked the transformation of the Gaelic land system into common law forms. Ironically, the extension of common law – the customary law of England – to Ireland defied the logic of Davies' common law position. Longstanding Gaelic customs which had received the recognition of the Irish common law courts should not have come under threat in theory. However, the practical considerations of the time dictated otherwise. The institution of common law tenures and inheritance practices became a key way to consolidate English rule in Ireland. Gaelic Irish land customs, therefore, came under attack. In the judicial resolution, Gaelic custom was not given the same standing as English local custom at the common law. The necessities of government outweighed theoretical justifications for local custom.

In the gavelkind resolution, the judges declared that all inheritance in Ireland had to follow common law forms. Daughters would inherit (in default of sons), widows would

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[49] Ibid., p. 134.

receive a portion of their deceased husbands' estate, and illegitimate children would not be heirs at law.[50] In a stipulation that reduced the rights of women to hold land independently of their husbands, the judges declared that all lands and goods possessed by the wife "be adjudged to be in the husbands, and not in the wives, as the common law is in such case."[51] To minimize the disturbance which the abrogation of the native form of inheritance would create, all those in possession of lands by gavelkind before the beginning of James I's reign retained their estates. After March 1603, all lands inherited were "adjudged to descend to the heirs by the common law, and should be adjudged from henceforward possessed and enjoyed accordingly."[52]

Pawlisch has argued that the resolution of Irish gavelkind also abolished the custom of tanistry. The importance of the eldest co-heir in some forms of partition often led many English observers to link gavelkind and tanistry. "In this sense," Pawlisch commented, "Davies and the English judiciary may very well have considered the judicial resolution voiding gavelkind as applicable to the custom of tanistry as well."[53] This apparent imprecision by the judges is problematic, but the lack of any documentary proof to the contrary supports Pawlisch's position. Davies included no resolution from the judges specifically voiding the custom of tanistry in his *Primer Report*, but he clearly believed that it had been abolished as well. As noted by Pawlisch, Davies wrote to Salisbury in 1606, that "both these customs, both tanistry and gavelkind, in this kingdom are lately, by the opinion of all the judges here, adjudged to be utterly void in law."[54]

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[50] Ibid., p. 137.
[51] Ibid., p. 138.
[52] Ibid.
[53] Pawlisch, *Sir John Davies and the Conquest of Ireland*, p. 191, n. 60.
[54] Ibid., p. 69; Davies to Salisbury, 1606, in Henry Morley, ed., *Ireland Under Elizabeth and James the First*, (London: George Routledge and Sons, Ltd., 1890), p. 376.

The judicial resolution voiding gavelkind and tanistry aimed at establishing a binding precedent for future cases. The first test case for tanistry came before a jury in the Court of King's Bench in Dublin from County Cork, after it had languished for several years at the Presidency Court in Munster.[55] The dispute arose over a forcible ejection from a common law estate which contained a castle and 720 acres of land. In the Dublin court, Richard Bolton, Recorder of Dublin, and John Meade, another common lawyer, represented the plaintiff, Murrough MacBryan. Sir John Davies, Attorney-General, was counsel for the defendant, Cahir O'Callaghan. According to Davies, the background to the dispute involved land transactions from the later sixteenth century. Donogh Mac Teige O Callaghan (Mac Teige the elder) died in 1578, in possession of the disputed lands which "time out of mind have been of the tenure and nature of tanistry."[56] Mac Teige the elder had a son, Conoghor, who had two sons, Callaghan and Teige the younger, and a daughter, Eleanor. After Conoghor died in 1574, Mac Teige the elder conveyed his lands to his grandsons and their heirs, to keep the lands in his descent line. By 1584, both grandsons died. Instead of passing to the granddaughter Eleanor, the estate was seized and claimed by the right of tanistry (eldest and worthiest of the name), by a distant relative, Conoghor Callaghan, also known as Conoghor of the Rock. In 1593, Conoghor of the Rock obtained letters patent to the lands by surrender and regrant, and then promptly sold the lands until they came into the possession of Brian MacOwen, who leased the lands to the plaintiff of the tanistry case, Murrough MacBryan. In the 1590's, there was a renewed claim to the lands from the descendants of Mac Teige the elder. Manus O'Kieffe, son of Eleanor O Callaghan

[55] Connacht and Munster had Presidency Courts that could examine titles to land and establish temporary settlements before actions were brought before the common law courts in Dublin. Pawlisch, *Sir John Davies and the Conquest of Ireland*, p. 76.

[56] Davies, "The Case of Tanistry", p. 78. For genealogy, see appendix below, p. 121.

(granddaughter of Mac Teige the elder) entered the lands and conveyed them to Cahir O Callaghan (son of Callaghan O Callaghan, son of MacTeige the elder) who was the defendant in the case.[57] Clearly, the Irish showed a propensity to hire common lawyers to defend their property. The crux of the case rested on who had the better title to the lands: the defendant by common law descent, or the plaintiff by tanistry.

Arguments for the plaintiff rested on two points. First, that tanistry was a certain and reasonable custom at the common law and, therefore, the plaintiff's title by tanistry was good. Second, that the introduction of common law had not abolished tanistry. Arguments for the defence centred on the same issues. Davies argued that the custom was founded on an unreasonable principle; that it was uncertain; that it had not have uninterrupted observance; and that it challenged the king's prerogative. The second line of argumentation was that the introduction of the common law following conquest had in fact abolished the practice of tanistry. In the *Primer Report*, our only source for the case, Davies gave minimal space to the plaintiff's arguments compared to the in-depth recording of his own.

Counsel for the plaintiff argued that tanistry was a sound custom at the common law, "For three things ought to concur, to make a custom good, antiquity, continuance and reason."[58] According to Bolton and Meade, tanistry met these three criteria for a valid custom; it was "antient beyond time of memory", it was "continual time out of mind", and it was reasonable.[59] The problems of minority rule were pointed to establish the custom's reasonableness. Because of the fragmented nature of the Gaelic polities, tanistry helped to defend the clan's lands where an infant or woman (in the case of Eleanor O'Callaghan) might otherwise inherit. The custom was therefore reasonable as a practice, and reasonable

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[57] Ibid., pp. 79-80; F.H. Newark, "The Case of Tanistry", *NILQ*, 9 (1952), p. 216.
[58] Davies, "The Case of Tanistry", p. 81.
[59] Ibid.

in the widespread view among common lawyers, that antiquity and continual observance created legitimacy for a custom.

Davies prefaced his arguments on the unreasonableness of tanistry with a brief analysis on the points that made a custom reasonable. First, a custom was not unreasonable simply because it contravened some principle or maxim of positive law. The custom of gavelkind in Kent was contrary to the common law rule that all land was held from the king and all land reverted to the king on commission of a felony, yet was a sound custom. However, if a custom violated the purpose of laws, to preserve the good of the community, then it was unreasonable and had no force of law. In such a case, the fact that the custom was immemorial and had experienced continual observance, could not obviate its unreasonableness.[60] Davies' emphasis here on the requirement that a custom not contravene some maxim or principle diverged from his views on common law expressed in the preface of the *Primer Report,* where he stressed immemoriality over the initial reasonableness of a custom to confer legitimacy.[61] In the case of tanistry, however, Davies argued that no amount of time could legitimate a custom that went against the common good. Tanistry contravened the common good because it prevented the improvement of land and sustained barbarism. A commonwealth, Davies declared, "cannot subsist without a certain ownership of land, or if the right of inheritance of land doth not rest in some person."[62] Buildings would not be erected, land would not be reclaimed and agriculture would not be properly practiced without a direct line of descent where the children of a landholder legally inherited their father's estate. Davies then suggested a link between tanistry and crime: "For when they know that their wives were not to be endowed, nor their issue inheritable, they

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[60] Ibid., pp. 88-9.
[61] Davies, *Primer Report*, pp. 251-4, (preface)
[62] Davies, "The Case of Tanistry", p. 92.

committed such crimes [felony and treason] with greater audacity; for from affection to their wives and children, men more eschew to commit felony, as *Litt[leton]* saith."[63] Here, however, Davies seemed to be arguing against tanistry on the basis of his view of the negative effects of gavelkind.

Davies argued three additional points to support the claim that tanistry was unreasonable: it left the estate in abeyance upon the death of the holder; it led to violence; and excluded women from inheritance. Although the common law sometimes left holdings in abeyance for a short time, "yet it ought never to suffer the freehold to be in suspense." In Gaelic society, upon the death of the chief, challenges to the succession of the tanist sometimes took place; Davies saw this as a headless polity. Although elected during the life of the chief, the tanist had no certainty of succession if challenged by a "more worthy" contender. Tanistry led to violence in the lordships since election of the eldest and most worthy really meant "by usurpation and tyranny of those who were most potent amongst them."[64] Finally, the exclusion of females from inheriting also established the unreasonableness of tanistry. Comparing land under tanistry to an estate of fee simple, Davies argued against the exclusion of daughters from inheriting: "for the *tanist*, if he hath any estate of inheritance, hath a fee-simple, for he hath no particular estate tail limited to him and the heirs male of his body and it is against the nature of a fee-simple to exclude the heir female, if the heir mail [sic] failes."[65] Of course, a tanist estate was not a fee simple; it did not fit into common law tenure categories, so this twisted the situation. The tanist lands went to the elected male of the clan who was deemed the eldest and worthiest; the lands of the chief might pass to his eldest son, but only if he were elected as the tanist. A fee simple

[63] Ibid., pp. 92-3.
[64] Ibid., p. 94.
[65] Ibid., pp. 94-5.

was an unconditional grant of interest in the land, that passed to the male heirs, and female heirs in default.[66] Davies here argued against tanistry on the basis that it differed from a tenure of a different land system.

Counsel for the plaintiff argued that the exclusion of women was a negative part of the custom, but that the negative aspects of customs often had support at the common law. Many good customs existed "in the negative, against the express maxims and rules of the common law", Bolton and Meade argued, such as "the custom in *Kent*, that the lord shall not have the land by escheat, *the father to the bough, and the son to the plough.*"[67] As a result, the jury should find for the plaintiff; the defendant Cahir O Callaghan derived his title from Eleanor the daughter (the common law heir), but this contravened the local Gaelic custom.[68]

They also presented the stronger argument that variance from the common law in practice need not necessitate a local custom's abrogation. Here, they pointed to Kentish gavelkind and to borough English as two customs "contrary to the common law, in point of descent of inheritance, and yet approved as reasonable customs."[69] Gavelkind in Kent was generally seen by common lawyers as an ancient custom, pre-dating the Norman Conquest, and provided an often cited illustration of how local customs deemed reasonable could successfully co-exist with the common law. In contradiction to Davies, they further argued that tanistry provided for a certain inheritance, for "the land shall descend to the *oldest and most worthy*; the oldest may be certainly known."[70] English observers often objected to the "uncertainty" of tanistry because the heir to the chief did not always succeed to the office. Many common lawyers emphasized certainty as a criterion for establishing the legitimacy of

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[66] Simpson, *A History of the Land Law*, pp. 56-63.
[67] Davies, "The Case of Tanistry", p. 83
[68] Ibid.
[69] Ibid., p. 81. Borough English was the custom practiced in some English towns whereby the youngest son, rather than the eldest, inherited the estate
[70] Ibid., p. 82.

a custom, so this issue had some force. Bolton and Meade argued for the certainty of tanistry by pointing to Littleton, the great authority on land law of their day, who equated "worthiest" with "eldest".[71]

On the other hand, Davies argued that tanistry remained an uncertain custom; it made both the heir and the estate itself uncertain. First, he dismissed Bolton and Meade's equation of "worthiest" with "eldest" as an equivocation: "for otherwise the word *seniori* had been sufficient, and the word *dignissimo* would be idle."[72] Second, he argued that worthiest "cannot be reduced to certainty by any trial or proof, for the dignity of a man lieth in the opinion of the multitude, which is the most uncertain thing in the world."[73] The worthiest male member of the clan could be the wisest, the richest, or the most courageous; however, the uncertainty of public opinion led the multitude always to select the most powerful. Of course this hit the nail on the head, for the most powerful was the best choice for the Gaelic polity, since a seasoned warrior could best defend the clan's interests, especially their land and cattle.

The common law, on the other hand, provided a "certain" principle of inheritance; the general practice of primogeniture dictated that the eldest son inherited the family estate. In addition, Davies argued, primogeniture had "a prerogative given to it by the law of God," surely a hefty argument on the side of the common law.[74] Anticipating the objection that borough English and gavelkind opposed descent by primogeniture and yet were acceptable common law customs, Davies argued that these customs still passed on "certain" estates (either all sons or the youngest sons inherited), whereas tanistry did not. "For every person

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[71] Ibid. According to Meade and Bolton, "if there be three brothers, and the middle purchaseth lands, and dieth without issue, the eldest brother shall have the land by descent, because the eldest is more worthy of blood."

[72] Ibid., p. 98.

[73] Ibid., p. 96.

[74] Ibid., p. 97.

who hath an estate of inheritance, hath it either in his natural or political capacity. But a *tanist* hath not an estate of inheritance in his natural capacity, because the oldest and most worthy come by an election, not as heir."[75] Davies contended that the tanist did not have an estate of inheritance through "his political capacity". Actual practice would not always have upheld this argument. The tanist received lands to hold as political successor to the chief and, in some cases, specific lands in the territory were set aside, as Nicholls has shown with the Mac Dermots of Moylurg who set aside a portion of their territory named Tanistagh for the tanist.[76]

As common lawyers, Bolton and Meade knew of another important criterion for an accepted custom at the common law. Not only had a custom to be reasonable and certain, but it also had to have unbroken observance in the area in question. In this case, this hinged on the entailment of lands by Donogh MacTeige (the elder) which may have broken the continuity of tanistry in the lands. Bolton and Meade ignored this and looked to the local English customs of borough English and Kentish gavelkind to argue that the custom ran with the land itself: "Because this custom is inherent in the land, and runs with it, and cannot be extinguished by any alienation, but continues in any persons hands, as well as in the possession of the king as of a subject, as the customs of *Borough English* or *gavelkind.*"[77] In Kent, landowners had to petition Parliament to alter the custom of gavelkind on their land, because it was assumed that all land in Kent was held by gavelkind.

Davies countered that tanistry had been interrupted on the estate when MacTeige the elder conveyed the estate. When an estate which was previously held by customary tenure became a common law estate, it superseded the customary tenure. "It is like copyhold

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[75] Ibid., p. 98.
[76] Nicholls, *Gaelic and Gaelicised Ireland*, p. 26.
[77] Davies, "The Case of Tanistry", p. 85.

land", Davies analogized, "which is parcel of the demense of the lord, and if the lord executes an estate of it, according to the course of the common law, the custom is gone forever."[78] Tanistry did not run with the land, however, he argued, nor did it constitute a political office; a tanist was a particular person, selected for a particular purpose. Therefore, tanistry was "a personal custom, which goeth with the person of the oldest and most worthy, and therefore when the land is once conveyed to another person, *viz.* the heir at common law, the custom is gone forever."[79]

The last point of argument raised by Davies was that tanistry infringed upon the king's prerogative and, therefore, was void in law. Even if a custom were ancient, it could not contravene the royal rights: "For prescription of time makes a custom; but *nullum tempusoccurrit regi.*"[80] Davies cited the example of London's custom to create corporations. This custom was voided by statute because it infringed the royal prerogative that only the king could create corporations.[81] Tanistry contravened the royal prerogative because it deprived the king of wardship and escheat of tanistry lands. With common law tenures, if the tenant died without an heir, the land reverted to the lord (the king in the case of military tenures). Lands were also forfeited to the lord in case of a felony and to the king in case of treason. Wardship was the lord's right to have custody of the lands or person of an heir who inherited before attaining his majority.[82] This really argued that tanistry was illegal because it did not fit into the common law tenure system. In this case, the particular estate in question had come under common law tenure (fee simple) by its surrender and regrant in 1593 by

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[78] Ibid., p. 99.
[79] Ibid., p. 100.
[80] Ibid., p. 91.
[81] Ibid., pp. 91-2. Davies refers to 49 Edward III, c. 3.
[82] Simpson, *A History of the Land Law*, pp. 18-20; Baker, *An Introduction to English Legal History*, pp. 274-6.

Conogher of the Rock.[83] He had taken possession of the lands by right of tanistry and then had sought letters patent to hold it by common law tenure. Davies, however, dismissed the surrender and regrant as ineffectual, arguing that it had not followed the correct procedure, though he did not specify how. He suggested that the statute 12 Elizabeth I, c. 5, which enabled the surrender and regrant of tanistry lands, "requires divers necessary circumstances, which were omitted in the obtaining and passing of this grant."

The last and most interesting argument, presented by both the counsel for the plaintiff and that for the defence, raised the issue of whether tanistry had been abolished by the introduction of the common law into Ireland. Introduced after the twelfth-century Anglo-Norman invasion, common law usage subsequently expanded and then contracted during the fourteenth and fifteenth centuries. By the later sixteenth century, most areas of Ireland followed some of the legal structures of the common law and, by 1608, the assize circuits ran in all of the provinces. The notion that one law system was replaced by the institution of another rested on the right of conquest, although there was no universally accepted view on what this right entailed. Pawlisch has identified two main traditions on the issue. Pope Innocent IV in the thirteenth century argued that the governments and property rights of a conquered people were valid, regardless of whether they were Christian or not. In the other tradition, the thirteenth-century canonist Hostiensis argued that infidels or lapsed Christians lacked the ability to legitimately govern themselves or hold property without papal consent.[84] In 1155, Pope Adrian IV issued a papal letter authorizing a conquest of Ireland in the interests of reforming the Irish Church; this resulted in the Anglo-Norman invasion which instituted English common law in some areas of Ireland. Since title to Ireland

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[83] Newark, "The Case of Tanistry", p. 216.
[84] Hans Pawlisch, *Sir John Davies and the Conquest of Ireland*, p. 9.

came by papal consent, English common lawyers could argue that the right of conquest permitted the reorganization of native land customs and the abrogation of native law.

Bolton and Meade recognized that England had conquered Ireland, but argued that conquest did not necessitate the abrogation of native land customs. They pointed to the Norman Conquest of England to illustrate that local customs were allowed to remain, even though the general law of the land was altered. "Altho' the *Brehon* law, which was the common law of the *Irishry* before the conquest, be abolished by the establishment of the common law of *England*, which was justly done according to the law of nations, notwithstanding that this was a christian kingdom...yet particular customs may stand, as the custom of *Gavelkind* in *Kent*, and other customs in other particular places in *England* remain'd after the *Norman* conquest."[85] Common lawyers of the day, often on the authority of Lambarde, agreed that Kentish gavelkind had preceded the conquest, and was not altered by the imposition of new law forms.[86] Local customs need not be abrogated with the establishment of a new legal system.

On the other hand, Davies argued that the introduction of English common law voided all other Irish customs, since the common law now governed tenure and inheritance. Tanistry, he noted, "was the common custom of the land" before the conquest, and was "generally used in all the *Irish countries.*" With the introduction of common law, "therefore it must of necessity be abolished by the establishment of another general law in the same point."[87] In this view, local customs had no validity in law since a new law system necessarily replaced existing practices. The objection immediately arises that the local custom of gavelkind in Kent remained after the Norman Conquest of England. In the tanistry court

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[85] Davies, "The Case of Tanistry", p. 84.
[86] Lambarde, *Perambulation of Kent*, p. 478.
[87] Davies, "The Case of Tanistry", p. 101.

case, however, Davies noted that the "common law of *England* was not introduced by the conqueror, as hath been observed and proved very learnedly by lord *Coke* in the preface to the third part of his reports."[88] The Conquest could pose a problem for common lawyers who stressed the antiquity of the common law, because it represented an apparent breach in the continuity of the law. Davies overcame the problem of the Conquest by arguing that the common law predated it, since the common law itself was comprised of custom, which must necessarily be immemorial. This also overcame Bolton and Meade's objection that local customs such as gavelkind in Kent remained after the Norman Conquest, by having the common law predate 1066.

Bolton and Meade pressed on, arguing that the English monarch held all the lands of Ireland by right of conquest. This meant that the conveyance of the disputed lands from Mac Teige the elder to his grandsons was void, "being made by an intruder upon the possession of the queen."[89] Thus the surrender and regrant made by Conogher of the Rock in 1593 was valid, because it transferred legal possession of the estate from the Crown to Conogher. After countering that this particular surrender and regrant was null and void for procedural reasons, Davies distinguished between conquest under a royal and tyrannical monarchy. "For the kings of *England* have always claimed and had within their dominions, a royal monarchy and not a despotick monarchy or tyranny; and under a royal monarchy the subjects are freemen, and have a property in their goods, and a freehold and inheritance in their lands; but under a despotick monarchy or tyranny, they are all villeins or slaves, and proprietors of nothing but at the will of their *Grand Seignor* or tyrant, as in *Turkey* and

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[88] Ibid., p. 109. Sir Edward Coke argued that a large part of the common law structures, such as central law courts, and parts of the law itself pre-dated the Conquest. Paul Christianson, "Ancient Constitution", p. 110.

[89] Davies, "The Case of Tanistry", p. 111.

*Muscovy*."[90] The English monarchy had a "lordship paramount" in Ireland, which meant that all lands were held from the monarch.[91] Thus the original conveyance of Mac Teige the elder was sound, since he had been in possession of the estate, not Queen Elizabeth I. Davies also wanted to make it clear that the Norman conquest of England did not place all lands in the possession of King William. He noted that the continental jurist Bodin "was not well informed" when he wrote that upon conquering the country, William I "declared all the country in general, and the inheritances of each in particular, to be acquired by him, and confiscated by the right of war, treating the *English* as his farmers."[92] As in Ireland, the conqueror in England established a "lordship paramount", and distributed land to his "servants and warriors" and to colonists.

Continuing this argument, Davies concluded that native inhabitants had to conform to the laws and customs of the conqueror. This fundamental assumption lay behind his attempts at systematically altering Gaelic land customs to meet common law forms. The military conquest of 1603 gave the conquerors the right to abrogate Gaelic Irish land customs.[93] Summarizing the views of Chief Justice Ley in the tanistry case, Davies noted that "if such conqueror receiveth any of the natives or antient inhabitants into his protection and avoweth them for his subjects, and permitteth them to continue their possessions and to remain in his peace and allegiance, their heirs shall be adjudged by good title without grant or confirmation of the conqueror, and shall enjoy their lands according to the rules of the law which the conqueror hath allowed or established, if they will submit themselves to it, and

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[90] Ibid.
[91] Ibid.
[92] Ibid., p. 113.
[93] Pawlisch, *Sir John Davies and the Conquest of Ireland*, p. 10.

not otherwise."[94] Native land customs objectionable to the laws of the conqueror could be either destroyed or modified.

The invocation of conquest right in the Irish case, however, was not so clear. Gaelic customs had consistently been upheld in common law courts, particularly in the Court of Chancery, in the late sixteenth century, and the courts had recognized Gaelic Irishmen as subjects of the queen. This made the question of conquest very problematic. Military engagement between sovereign and subjects fit into the categories of rebellion and civil war, rather than conquest, an encounter between two different realms. The twelfth-century papal bull sanctioning an invasion of Ireland gave the English Crown title to Ireland which other jurisdictions had recognized. Dublin-centred legal and administrative structures had made great inroads throughout various Irish lordships in the sixteenth century. After 1541, even the Gaelic Irish were recognized as subjects of the Irish Crown. This made it more difficult to categorize the customs of the Gaelic Irish as alien; they were treated as local custom by the Irish Chancery of the late sixteenth century. On the whole, however, Davies was not interested in the ambiguities of conquest in Ireland; he wanted to get on with the task of consolidating the position of English law, and achieving a more easily governed peaceful island.

Although a test case, the tanistry case ended without a decision from the court. The litigants came to a settlement which divided the estate. Cahir O Callaghan, the defendant, apparently received the better portion, including the castle. The families of the two rival claimants eventually united through the 1631 marriage between the granddaughter of Conogher of the Rock, and the son of Cahir O'Callaghan.[95] However, Davies suggested in the *Primer Report* that had a decision from the court been necessary, it would have gone in

[94] Davies, "The Case of Tanistry", p. 112.

his favour. Davies noted that the court had accepted his arguments: "it was answered by the council for the defendant, and resolved by the court that the said custom of *tanistry* was void in itself, and abolished when the common law of *England* was established."[96] Although the case was settled by a compromise, Newark has argued that Davies put forward a case that would have appealed to the judges: "since the defendant's counsel was Davies himself as Attorney-General it is not unreasonable to assume that the defendant's arguments, if not devised in concert with the judges, were at least directed along lines known to be acceptable to them."[97]

The judicial resolution of 1606 abrogating gavelkind and tanistry provided the Dublin administration with the necessary tool to modify the overgenerous land grants from the 1603 settlement with the northern Gaelic leaders. Armed with the resolution and a land commission to inquire into defective land titles, the government was able to establish a large group of freeholders in Ulster. Davies and the land commission progressed through Ulster, converting tanistry and gavelkind estates into common law tenures and reducing the power of such territorial lords as the Earl of Tyrone. Davies was particularly interested in Tyrone's estates and examined his land titles very carefully; an action that probably helped drive Tyrone and Tyrconnell to the continent.[98] A more long-term effect of the judicial resolution, as Pawlisch has shown, was the confiscation not only of the lands of the earls who fled, but those of the very freeholders that Davies had created in 1605 and 1606. According to Pawlisch, the judicial resolution against gavelkind and the attack on tanistry which was "previously employed as a constitutional mechanism to absorb an alien system of law and

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[95] Newark, "The Case of Tanistry", p. 220.
[96] Ibid., p. 86.
[97] Ibid.
[98] *Calendar of the State Papers Relating to Ireland, 1606-1608*, i, p. 376. This was the famed 1607 "Flight of Earls".

land tenure, [was] now to be transformed into a tool of confiscation that paved the way for one of the biggest plantations in Irish history."[99]

Although this use of judge-made law to abrogate native customs came about as the result of circumstance rather than predetermined policy, it raised the issue of the validity of judge-made law versus statute. In 1610, Hedley had argued that time was the best judge of law: "Time is wiser than judges, wiser than the parliament, nay wiser than the wit of man."[100] He also noted that the opinion of a few judges could not compare to the wisdom of parliament, comprised of the king, nobles, and commons:

> And if a judgement once given should be peremptory and trench in succession to bind and conclude all future judges from examining the law in that point or to vary from it, then the common law could never be said to be tried reason grounded upon better reason than the statutes, for it should then be grounded merely upon the reason or opinion of 3 or 4 judges, which must needs come short of the wisdom of parliament.[101]

Davies did not write so directly about the validity of judge-made law in the preface to his *Primer Report* of Irish law cases or his historical narrative on the failure of England to conquer Ireland. Citing a number of English jurists from the early seventeenth century, Pawlisch, however, has argued that common lawyers accepted the authority of judicial resolutions.[102] This still leaves moot the question of the propriety of proceeding by statute on such an important issue.

In 1611, a direction was sent from the English Privy Council to that in Dublin propounding a number of bills to be introduced in the next Irish Parliament. One of them was an "Act to extinguish the custom of tanistry, and to make all lands descendable

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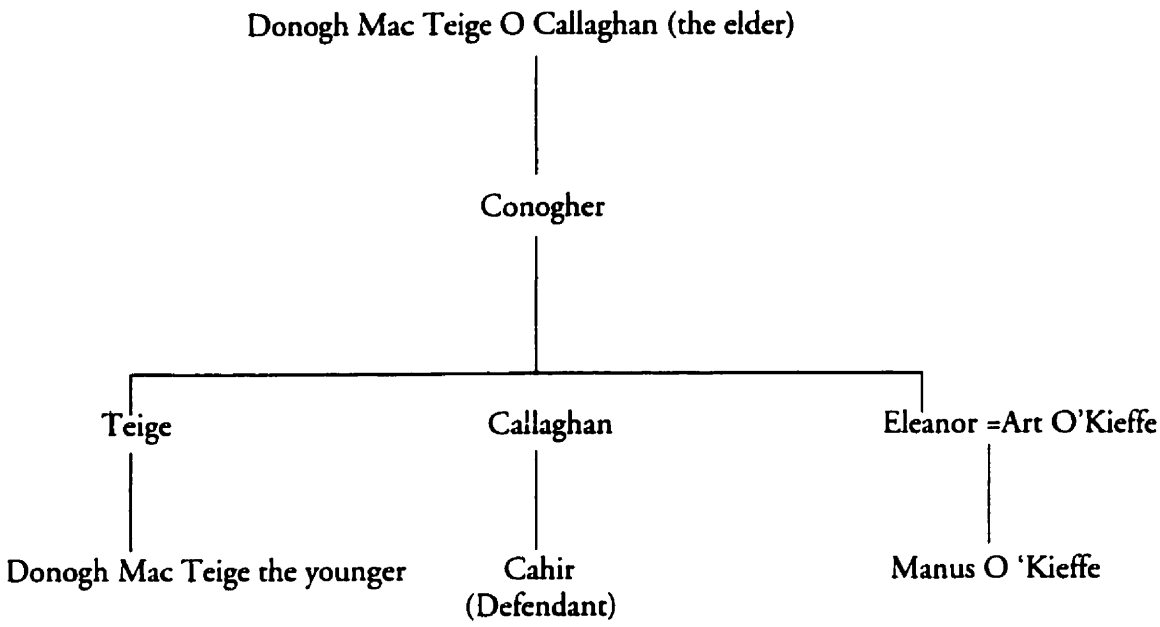
[99] Pawlisch, *Sir John Davies and the Conquest of Ireland*, p. 74.
[100] Foster, *Proceedings in Parliament 1610*, ii, p. 175.
[101] Ibid.
[102] Pawlisch, *Sir John Davies and the Conquest of Ireland*, p. 44. Pawlisch also argues that the judicial resolutions contained in Davies' *Reports* may represent the origin of the modern doctrine of precedents. See pp. 42-4.

according to the course of the common law of this realm."[103] Even after the law cases examined in this chapter, it was recommended that these issues be solved by an act of the Irish Parliament. When the Irish Parliament finally convened in 1613, after a twenty-seven year hiatus, it passed no bill abrogating tanistry. However, this fact need not have pointed to Pawlisch's conclusion that since "no such bill was ever passed testifies to the strength and usefulness of judicial resolutions, and to the willingness of the of the government to deal with Gaelic tenures equitably before the Privy Council, the Court of Chancery, or through various commissions of defective titles."[104] It may also have stemmed from the fact that Davies also directed the legislation of the 1613 parliament as speaker. For Davies to have pressed for a statute abrogating tanistry and gavelkind might in some sense have cast doubt on either the legitimacy or the effectiveness of his actions in the Dublin courts between 1606 and 1608. Complexities and ambiguities continued to characterize the cases against gavelkind and tanistry in Ireland.

[103] "The Titles of certain Acts thought fit to be propounded at the next Parliament to be holden in Ireland", *Calendar of the Carew Manuscripts*, v, (London: Longman & Co., 1873), p. 157.

[104] Pawlisch, *Sir John Davies and the Conquest of Ireland*, p. 81.

## Appendix: O Callaghan Lineage in Tanistry Case



# 6 Conclusion

In 1612, when Sir John Davies looked back over the events in Ireland of the previous decade, he concluded that Ireland was on track to become a stable, peaceful and law-abiding nation. In particular, the extension of English legal and administrative structures throughout the whole island would ensure orderly government and justice: "Briefly, the clock of the civil government is now well set, and all the wheels thereof do move in order."[1] Assize circuits ran throughout the island. Sheriffs and other royal servants existed in areas where previously the royal writ had not run. The great Gaelic lordships in Ulster had been turned into counties and divided into freeholds and tenancies. The flight of the Gaelic lords to the continent provided fertile soil for the planting of English stock. Whereas Ulster held out against English customs and institutions before 1603, with the large plantation of lowland Scots and English settlers that followed in the wake of the "Flight of Earls", it would soon become the most Protestant in Ireland.

The abrogation of Irish land customs played a significant role in this anglicization of Ireland. Tenancies and freeholds provided more continuity to Irish holders, without the disruptions of periodic redistributions among clan members. This security would lead to other economic benefits such as the reclamation of land, the building of more permanent structures, and a shift from pastoralism to arable agriculture. As well, the morality of the Gaelic Irish would presumably be improved by not permitting "illegitimate" sons to inherit lands. The stake of women in the land system clearly grew, because females could legally inherit in default of male heirs. On the other hand, the ability of married women to hold

[1] Davies, *Discovery*, p. 341.

and administer land was circumscribed by the common law dictum that the wife's possessions belonged to her husband. For a variety of reasons, the power structure of Gaelic lords declined. Under the common law, tenancies and freeholds were maintained through the payment of money rents rather than the varying and burdensome exactions imposed by the Gaelic system. When troops could no longer be billeted on or levied from tenants, the traditional military power of the Gaelic lords suffered a serious blow. The Irish land customs of gavelkind and tanistry had supported key elements of Irish Gaelic society; their abolition weakened the whole traditional political and social structures.

Although gavelkind and tanistry generally had been upheld in common law courts in Ireland, this was not taken into consideration in the cases presented by Attorney-General Davies. Neither the resolution abolishing the two customs, nor the arguments employed by him in the case of tanistry dealt with this issue. English common lawyers like Hedley held that an important criterion for a valid custom was that it had a long history of recognition in the royal courts.[2] In the case of Ireland, the sources for continuity were problematic in the early seventeenth century. Davies produced the first printed collection of case law reports in 1615 and the common law had fully spread throughout the entire island only during the previous decade.[3] Records of the Court of Chancery provided ample evidence of the recognition of Gaelic Irish customs by a common law court, but that court only emerged in Ireland in the sixteenth century.

Tanistry and gavelkind themselves met many of the criteria demanded for status as a legal custom. In Davies' view, reasonable practices performed over generations acquired the status of custom and the sanctity of law. "Reasonableness" of course was the key term. In

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[2] Foster, *Proceedings in Parliament 1610*, ii, p. 175.
[3] Pawlisch, *Sir John Davies and the Conquest of Ireland*, p. 38.

the preface of the *Primer Report*, Davies emphasized the legitimacy conferred by time; the fact that a practice had been continually observed, from beyond recorded memory, pointed to its inherent reasonableness.[4] In the tanistry case, however, he emphasized the initial reasonableness of a custom over its immemoriality: "But a custom which is contrary to the publick good...cannot have a reasonable or lawful commencement, but is void *ab initie*, and no prescription of time can make it good."[5] What is the historian to make of the discrepancy? As we have seen, such tests of reasonableness were stressed by common lawyers, including Coke and Hedley. On the other hand, the two views appeared in different sections of the same work, the preface, which contained an in-depth examination of the common law, and the account of the case of tanistry, which was argued before a judge and jury – a practical implementation of the legal interpretation of custom. Perhaps Pocock made more of Davies' emphasis on the immemorial, customary nature of the common law than did Davies. If so, then Davies in the case of tanistry was not necessarily inconsistent, but merely doing his job as an attorney in the Dublin courts, defending the interests of his client to the best of his ability. The inheritance customs of the Gaelic Irish did not carry the same force for common lawyers as the gavelkind of Kent, probably because the judges understood the former only through their conception of the latter.

In the tanistry case, Davies argued that the custom was both unreasonable (and therefore void) and had been superseded by the conquest of Ireland by the English. Discussion of the right of conquest in this Irish context raised a number of ambiguities. The conquest either meant the twelfth-century Anglo-Norman invasion or the surrender of O'Neill in 1603. In the first case, a partial conquest did take place and Gaelic customs had

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[4] Davies, *Primer Report*, pp. 251-4, (preface).
[5] Davies, "The Case of Tanistry", p. 89.

continued to flourish for five hundred years along side common law forms, even after all Irish inhabitants became royal subjects in 1541. In the second case, the term became more problematic, unless the Crown could conquer its own subjects or, at best, extend the earlier conquest to new areas. Although a general proclamation of denization was issued in 1605, it did not substantially alter the constitutional position of the Gaelic Irish. The notion of a right of conquest superseding all prior claims to land use patterns, although perhaps sound in theory, did not fit so well in late sixteenth- and early seventeenth-century Ireland.

In 1988, Brendan Bradshaw commented on what he saw as the malaise of Irish historical scholarship.[6] He suggested that "value-free" history, associated with the 1931 work of Herbert Butterfield, *The Whig Interpretation of History*, when attempted by historians of Irish history, had sanitized Ireland's past. Events such as the conquest of Ireland, colonization, and the great famine, had been stripped of their inherent traumatic nature, thereby dislocating the present from the past.[7] Historians had become so intent on presenting "value-free" interpretations of the past, that they inverted the nationalist anachronism, "extruding the play of national consciousness from all but the modern period."[8] According to Bradshaw, this not only created suspect scholarship, but also had proved detrimental to the present-day Irish community by breaching its links to the past.

To pass the abrogation of Irish land customs through Bradshaw's lens, the historian could validly mourn the loss of ancient Gaelic customs at the hand of the English common law. Clearly, not all contemporaries accepted this assault on the Gaelic land system as beneficial or accepted the fundamental assumption behind the English anglicization

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[6] Brendan Bradshaw, "Nationalism and Historical Scholarship in Modern Ireland", in Ciaran Brady ed., *Interpreting Irish History: The Debate on Historical Revisionism, 1938-1994*, (Dublin: Irish Academic Press, 1994). Originally published in *Irish Historical Studies*, xxxvi (1988-9), pp. 329-51.

[7] Ibid., pp. 201-3.

[8] Ibid., pp. 209-10.

programme, that English customs and institutions were normative and all others were abnormal. In 1622, an Irish historian argued that attacking Irish customs simply because they differed from the English practices was unjust. Geoffrey Keating, a priest from a gaelicized Old English family wrote the first narrative history of Ireland in Gaelic. In *The General History of Ireland*, he chided English observers for focusing solely on what they saw as the negative aspects of Irish society and culture. He sought to defend the Irish (particularly those of higher status) from these misrepresentations. Keating singled out Giraldus Cambrensis, Edmund Spenser, Richard Stanihurst, Fynes Moryson and Edmund Campion as guilty of concentrating solely on the negative, comparing them to the dung beetle, "which, when enlivedn'd by the Influence of Summer Heats, flies abroad, and passes over the delightful Fields, neglectful of the sweet Blossoms, or fragrant Flowers that are in its way, till at last directed by its sordid Inclination, it settles itself upon some nauseous Excretement."[9] Keating also identified the prominent role of Davies in attacking native landholding and inheritance customs, noting that "*John Davis*, an *English* Author, takes upon him to censure the Laws and Usages of *Ireland*."[10] In particular, Keating noted his attacks on gavelkind and tanistry as reprehensible. However, before articulating his own defence of these Irish customs, Keating made the acute observation that "the Laws and Customs of Countries generally differ, and are variable in their own Nature, as the Exigency of Affairs requires."[11] Laws and customs differed because of the particular circumstances of the society, economy, and the needs of the people. Thus Keating concluded, Davies "might have look'd at home, and first have reformed the Laws of his own Country, before he

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[9] Geoffrey Keating, *The General History of Ireland*, trans. Dermod O'Connor, (Dublin, 1723), p. i.
[10] Ibid., p. xiv.
[11] Ibid.

attempted to censure and reflect upon the inoffensive Customs of the *Irish*."[12] Keating was neither a cultural relativist nor even necessarily an early ancestor of the Irish nationalist historiographical tradition. His remarks defended Gaelic Irish customs as suitable to the people who used them for many centuries. Of course, this defence also represented the logical extension of Davies' view on the customary nature of the common law. Laws in different nations varied because they derived primarily from the customary practices of the people in each area. The economic and social circumstances of highland Scotland differed from those of lowland England, and the customary laws of both naturally reflected this. Davies himself clearly admitted that Gaelic Irish social and economic structures differed radically from those of the English, but he did not grant that they fit and supported the Gaelic people of Ireland in a positive way.

[12] Ibid.

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