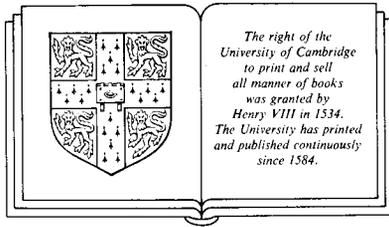


SIR JOHN DAVIES AND THE CONQUEST OF IRELAND

A study in legal imperialism

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CAMBRIDGE UNIVERSITY PRESS

Cambridge

London New York New Rochelle

Melbourne Sydney

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

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First published 1985
First paperback edition 2002

A catalogue record for this book is available from the British Library

Library of Congress catalogue card number: 84-9407

ISBN 0 521 25328 4 hardback
ISBN 0 521 52657 4 paperback

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Law as an instrument of colonization

The sixteenth and early seventeenth centuries in Ireland constitute one of the great watersheds in Irish history, a decisive period that witnessed the reduction of the whole island to effective English sovereignty. This conquest was not, however, the result of a consistent expansionist policy until the reign of Elizabeth, when an aggressive Dublin administration led by Sir Henry Sydney (1569–76) succeeded in establishing a militant programme that eventually tied successive administrations to extending English influence by forcible means into areas hitherto beyond the reach of crown government.¹ Yet it was not until the end of Elizabeth's reign that the final contest for Irish sovereignty was fought. From 1594 until 1603, Hugh O'Neill, the Earl of Tyrone, led the last great Gaelic rebellion that shook the very foundations of English rule in Ireland and compelled the English government to commit financial resources that far exceeded the cost of military subvention in any of Elizabeth's continental wars.

The crushing success of English arms over rebel forces aided by Spain at the battle of Kinsale ultimately compelled O'Neill's unconditional submission to the Lord Deputy Mountjoy at Mellifont in county Louth on 30 March 1603 – six days after the death of Elizabeth. This military victory represented a necessary and primary phase in English domination over Ireland, but the second stage of political consolidation by judicial means was equally essential for England's lasting supremacy over the island. Thus the military victory of 1603 enabled English jurists and administrators to accomplish a variety of reforms that encompassed the defeat and break-up not only of native forms of political organization and landholding, but also of the Catholic religion and those elements of the social polity which adhered to it. The consolidation of the Tudor conquest that took place during the early years of James I's reign also set the

stage for the 'Protestant ascendancy' of the eighteenth century out of which emerged those familiar social, political and religious tensions that are the hallmark of twentieth-century Irish history. In any event, the death of the last Tudor monarch on 24 March 1603 ushered in a new era that produced changes as far-reaching in Irish history as the famine, the land war and the creation of the Free State.

In discussing this significant period, conventional scholarship has rightly stressed not only the political and military events that led to English hegemony over Ireland, but also the intellectual currents that influenced the formulation and direction of native policy. But in contrast with historians of colonial expansion by continental powers, Irish historians have yet to explore the role of metropolitan law as an agency in promoting and maintaining English rule in Ireland. This study focuses upon the juridical strategies employed by England during the first decade of the seventeenth century to lock a newly conquered country into permanent colonial dependence. Of the crown lawyers involved in the formulation of Irish policy and reform, the most important was Sir John Davies, whose career spanned sixteen years' service in Ireland, first as Solicitor-General, 1603–6, and second as Attorney-General, 1606–19.

More than any other English administrator, Davies realized that military force in itself did not provide an adequate basis for the economic and social exploitation of the newly conquered kingdom. To secure the long-recalcitrant country, Davies proposed the universal application of English law to the whole of Ireland in a way that would facilitate assimilation of the Gaelic polity and reduce the influence of the Old English descendants of earlier Anglo-Norman settlements that preceded the sixteenth century. To elucidate this and other complex and much neglected aspects of legal and administrative reform in Ireland in the wake of the Tudor conquest, this book discusses the role played by English law as an agency of colonialism in Ireland by reviewing select cases taken from Davies' *Reports*.² The study divides itself into four sections with the first concerned with the jurisprudential and biographical background to Davies' *Reports*, while the second deals with the impact of English law on the native community. The third part reveals the erosion of the privileged position of the Old English colonial community. A final section comments upon the significance of Roman law in Davies' *Reports*.

The argument of the book is fairly simple. This introductory chapter emphasizes the importance of Ireland in a developing juris-

prudence of colonial expansion that would have a significant impact on the development of the British empire. Chapter two sketches out Davies' professional career as background to the third chapter, which outlines the structure and content of his *Reports* and examines the emergence of judge-made law as precedent. Part II, containing chapters four and five, focuses on the native community and details the role of the English judiciary in Dublin in assimilating Gaelic land tenures. Further commentary is devoted to the legal mechanisms employed to sequester the richest fishery in Ulster as an incentive to attract private capital to the plantation of Ulster. Part III concentrates on the colonial community and considers the consequences of the Tudor conquest for the Old English. Chapter six discusses how selective religious persecution by the courts eroded the privileged status and influence of the colonial community, and chapter seven explores the use of judge-made law to deprive the Old English towns of their considerable liberties and franchises acquired during previous reigns. Chapter eight analyses the attempts by the judiciary to reform the Irish currency in order to place the burden of the war debt on the shoulders of the colonial community. Finally, chapter nine in part IV concludes the study by examining Davies' employment of Roman law to provide the necessary precedents and legal principles to confirm and legitimize English rule in Ireland.

This study concentrates on the role of English law in consolidating the Tudor conquest, but it is necessary to concede that the common law never operated alone in the pacification of Ireland. English sovereignty had behind it the ultimate sanction of force, and the maintenance of an army in Ireland was indispensable in ruling the country as a conquered nation. Although the large forces necessary to subdue Tyrone's rebellion had been cut back at the end of the Nine Years War, there still remained at the end of 1603 some 9,000 troops in the country. That number was subsequently reduced in 1606 to a permanent establishment of 880 foot and 234 horse, but the Lord Deputy retained the right to levy a further 2,000 men without consultation with the English government.³ By contrast to its task in the previous decade, the army's primary mission was not to guard against foreign invasion, but to maintain internal security throughout the country in small garrisons – most of them in Ulster which had, after all, been the heartland of Gaelic revolt during the last decade of the sixteenth century. This emphasis on internal security was not misplaced, and the army proved readily adapted to its new mission by its quick dispatch of Cahir O'Doherty's abortive uprising in early 1608.⁴

Still, the limitations of brute force must be recognized. Coercion could be used to intimidate or to subjugate the natives, but terror in itself did not give rise to co-operation between the native polity and the conqueror or establish the conditions necessary for the economic and social development of the country. In other words, 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. In the hands of Sir John Davies, that instrument proved to be the common law, which along with other elements of English judicial machinery became the major tool of a practical colonialism in Ireland.

Some historians might hesitate to use the term 'colonial' to describe the Irish situation at the beginning of the seventeenth century, yet Ireland did possess the characteristics of colonial and dependent status. These features included an obvious native problem and a divided settler community of Old English descendants of an earlier Norman conquest along with New English settlers and administrators who established themselves in various settlements planted during the sixteenth and seventeenth centuries.⁵ Irish colonization has attracted attention from a variety of scholars and disciplines, ranging from those medieval historians who view English penetration into Ireland as an integral part of a wider scheme of European expansion stretching back into the twelfth century, to social scientists who see in Ireland a pattern of 'internal colonialism' that can be ranked alongside the extension of English influence into Wales and Scotland. Thus sixteenth- and seventeenth-century Irish history represents a kind of early modern 'nation building', an attempt to assimilate outlying Gaelic areas into a coherent state system.⁶

More recently a strongly revisionist historiography has emphasized other themes of the Tudor conquest by combining a more traditional political narrative with investigations into the mental world of policymakers in England and Ireland as the key to understanding the mechanisms of change that led to the conquest of 1603. In his most recent book Dr Brendan Bradshaw attributed the political transformation of Ireland from that of a 'medieval lordship' granted by the pope in the twelfth century to kingdom status conferred by the Irish parliament in 1541, not to aggressive designs of English policymakers in Westminster, but to a group of Pale reformers attempting to thwart the long-standing influence of overmighty Anglo-Irish magnates. In the minds of the Pale reformers

this political metamorphosis paid the added dividend of committing the English monarchy to the political unification of Ireland under the crown. As a second step in this scheme, according to Bradshaw, the Dublin government under the deputyship of Sir Anthony St Leger sought an accommodation with the native population by assimilating the autonomous Gaelic lordships through an institutional mechanism known as 'surrender and regrant', whereby native chieftains would surrender their territories and accept the sovereignty of the crown in return for English titles and common law estates. As Professor Aidan Clarke noted recently, the liberal formula pursued during these years displayed the traits of colonial patterns elsewhere – the search for a system of collaboration with the natives and the attempt by the colonial community to manipulate official policy in order to serve its own interests.⁷

Bradshaw has astutely perceived the deeper implications of the liberal policy by analysing its intellectual origins. Rather than attributing the accommodations reached in the 1540s chiefly to political events, Bradshaw chose instead to assign the genesis of the liberal policy to the influence of European humanism. The Dublin administration, in Bradshaw's view, launched a scheme to reform Gaelic districts through a policy of education and persuasion rather than coercion. But the Reformation, argued Bradshaw, was responsible for the subsequent pursuit of a militant policy that shifted the locus of change away from the Pale reformers into the hands of English administrators whose policies were shaped, not by humanistic ideas of reform, but by the predestinarian ideas of Calvin. The new ideology also displayed features derived from Aristotle's views on government and society which stressed force of arms as the essential device to reduce the Irish to civility. This Protestant ideology of compulsion, according to Bradshaw, inspired the conquest and subjugation of the autonomous Gaelic lordships, the creation of plantations and the substitution of New English elites for the Old English in positions of favour and government in Ireland.⁸

Dr Bradshaw's emphasis on intellectual beliefs in the formulation of Irish policy has also attracted the attention of Professor Nicholas Canny, whose study of Sir Henry Sydney's deputyship from 1569 to 1576 discerned a significantly different conceptual design in explaining the Tudor conquest. Canny traced the origins of the new aggressive policy to a completely different intellectual context. As distinct from a Catholic-humanist ideology promoting reform by education and persuasion, or the converse Protestant and Aristo-

telian approach to change by coercion, Canny pointed instead to attitudinal currents in England and Europe arising from the complex of changes wrought by the Reformation, the 'price revolution' and the Spanish conquest of New Spain.⁹

According to Canny, these events conditioned European thinkers to form a new social perception, which displaced a static outlook on society in favour of an anthropological view of social development. Belief in an unchanging social order receded before an appreciation of the world's peoples as ranging from the primitive savagery of the Amer-Indians to the alleged civility and sophistication of contemporary Europe. English thinkers adapted this viewpoint to the Irish situation and concluded that the native Irish, like the Amer-Indians, were anthropologically inferior beings at a lower stage of social evolution than the English. Hence, in the words of Professor Canny, English policymakers in Ireland firmly believed 'that in dealing with the native population, they were absolved from all normal ethical restraints'.¹⁰ Thus the germ of social Darwinism laid the basis for a violent conquest of the Gaelic Irish whose barbarism was frequently linked to that of the savages in America. In advancing this view Canny has added a new and different perspective to the conclusions of an earlier generation of Irish historians. In addition to patterns of colonial organization and finance, Irish native policy also served as a prototype for English subjugation of native peoples elsewhere, particularly in the American colonies.

The significance attributed by Professor Canny and Dr Bradshaw to the intellectual origins of the Tudor conquest has yielded fresh insights into a vital period of Irish history. Yet Canny's reliance on the transference of Spanish ideas to Ireland and the appearance of anthropological modes of thought disregarded a related and crucial topic that much exercised the Spanish intelligentsia during that period. This issue was, of course, the vexed debate concerning the legal rights and privileges of the conquerors and the conquered. Neglect of this juristic dimension in Canny's discussion of Spanish policy towards the Amer-Indians seems surprising since the literature generated by the lawyers to justify the conquest of New Spain achieved a volume comparable to that produced by the proponents of humanism, Aristotelianism or, as Canny has inferred, an emergent doctrine of social Darwinism.

In Europe both civil and canon lawyers had for several centuries discussed the issues of conquest and native rights largely as a result of medieval expansion into the Levant and Baltic regions.¹¹ This

literature not only influenced Spanish juristic commentaries on the conquest of the New World, but also helped to shape the ideology of English expansion in Ireland. The origins of this continental legal tradition coincide with the eleventh-century revival of Roman law which became, after its acceptance by the church in the twelfth century, the learned law of Europe. Of particular interest to medieval canonists and civilians was the elaboration of conquest right as the paramount legal justification to validate titles to territories acquired by military force. European jurists discussed at length the legal effects of warfare, and agreed that conquest of a territory in a just war yielded full sovereignty to the conquering power.

In their extensive treatment of warfare and conquest right between Christians and non-Christians, the civilians and canonists evolved two approaches to define indigenous property rights in non-Christian territories. One of them constructed by Innocent IV in the thirteenth century recognized the validity of governments and property rights of non-Christians regardless of religious or political considerations. The other tradition, as outlined by Hostiensis, another thirteenth-century canonist, asserted that no legitimate *dominium* could exist without ecclesiastical approbation.¹² This meant that infidels and heretics lacked the capacity to exercise legitimate political control and ownership without approval of the papacy. Accordingly two legal viewpoints had emerged around 1500 to deal with the property and rights of native peoples in the expansion of Europe. The paradigm most favoured by ambitious rulers and governments was, of course, the Hostiensis model, which proved so useful to Spanish expansionists in the sixteenth century.¹³ Indeed from the eleventh through the sixteenth centuries, the extension of European influence overseas, including Ireland, owed much to secular authorities acting on papal letters authorizing the secular arm to invade and conquer territories, on the convenient pretext that either the inhabitants or their rulers had somehow fallen foul of the Christian church and its civilizing role.¹⁴

Sir John Davies' selective approach to the Roman law allowed him to choose those aspects of conquest doctrine that would fit most easily within the intellectual framework of his own legal tradition. As propounded by Davies, the application of conquest right vested England with a public law title to Ireland. Based on the Elizabethan victory over Tyrone, Davies invoked the now familiar powers of conquest to justify the eradication of domestic Irish law as little more than a barbarous and lewd custom, with an eye to eliminating all

competing claims to Irish dominion, foreign and Gaelic, that were contingent either upon the political authority accorded to Gaelic chieftains, or upon the papal donation of Ireland to Henry II in 1154.¹⁵

Davies portrayed this selective adaption of the civil law to his own legal tradition in the brightest possible light by invoking the national chauvinism characteristic of Jacobean lawyers. To mitigate the drastic powers conferred by conquest right, Davies made a distinction between conquest under a 'despotic monarchy or tyranny' as opposed to conquest under an English or 'royal monarchy'. Where despots ruled, as in 'Turkey or Muscovy', or even New Spain, conquest right vested the state with title to all lands conquered and occupied, reducing the inhabitants to 'villains or slaves as proprietors of nothing but at the will of their Grand Seigneur or Tyrant'.¹⁶ But under the milder governance of an English monarch, as Davies confided to the English Secretary of State, Sir Robert Cecil in 1606, a public law title to Ireland by right of conquest did not serve as a means to expropriate universally the personal estates of the Irish. Rather, in Davies' view, conquest first created what he called a 'lordship paramount'; this vested the state not only with a title to the whole of Ireland, but more importantly permitted the crown subsequently to confer rights of ownership to individual estates.¹⁷

Davies' main objective and most difficult problem was to reconstruct property rights in land, especially those held by customary Gaelic tenures derived from a political authority other than the crown. To facilitate the transformation of such titles Davies relied on the juridical teaching that property in the abstract sense represented a legal right acquired from the sovereign that enforced it. The defeat and subsequent departure of an old sovereign power, in this case the demise of Hugh O'Neill and his confederates, presented Davies with an opportunity to refashion all rights to real property in former Gaelic districts. In summarizing Chief Justice Ley's argument in the case of *tanistry*, Davies constructed a legal doctrine of considerable importance.

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 in 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 hold their lands according to the rules of it and not otherwise.¹⁸

Davies and the Irish judiciary had thus created a legal formula subsequently adapted by English jurists in their discussions of native property rights during the period of rapid colonial expansion in the eighteenth and nineteenth centuries. According to the tenets of this formula, all laws and customs repugnant to the laws of the conquering power, particularly of landholding and succession, were either destroyed or subject to modification.¹⁹

The jurisprudence revealed by Davies' observations on native property rights demonstrates a distinctly English focus stemming from fundamentally different perceptions of property in the common law and in the domestic system of the *brehon* law. The common law, as one scholar has recently argued, stressed the individual over the family or extended kin group in landownership or occupation. English law, as distinct from *brehon* law, vested the individual with a variety of estates, interests and rights in land—fee simple estates, estates tail, life estates and leaseholds.²⁰ In what has been described as a lineage or clan-based society, Gaelic customary law vested property rights in the corporation of the extended kin group. In practice this meant that individual holdings of land in Gaelic districts were temporary and subject to periodic redistribution either by what contemporaries referred to as the custom of *gavelkind* or by a scheme of succession known as the custom of *tanistry*.²¹ In discussing such tenures in Gaelic districts Davies concluded, rightly or wrongly, that 'all the possessions within these Irish territories (before the common law of England was established in this realm, as it now is) ran always either in course of *tanistry* or in course of *gavelkind*'.²² It was this perception of Gaelic and Gaelicized Ireland that laid the foundation of native policy in Ireland during the first decade of the seventeenth century.

Gavelkind referred, of course, to the prevailing custom of inheritance in Kent in which lands descended to all legitimate male heirs in equal portions over the prevailing custom of *primogeniture*. In Ireland and in Wales, however, the custom referred to as *gavelkind* showed a marked deviation from Kentish practice. Apart from the aforementioned emphasis placed on the extended kin group as the unit of landownership, Irish *gavelkind* also excluded women from inheritance and allowed bastard males a portion or share of property alongside legitimate heirs.²³ In addition to such temporary rights in land, there also existed the custom of *tanistry*, which was in the strict sense a scheme of succession whereby the successor to a chief or king was nominated during the lifetime of the man to be

succeeded. The office of tanist usually included lands and other privileges appendant to it, but Davies and other English jurists employed their own concepts of property to define the Irish custom as a kind of life trust in land for which there existed no ultimate proprietorship. As one legal historian has recently commented, English jurists were caught in the trap of *quia emptores*, a statute of 1290 which had the effect of concentrating all feudal tenures in the crown; consequently, English common lawyers in Ireland lacked the conceptual apparatus to posit a precise tenurial solution to accommodate native tenures.²⁴

In order to incorporate such alien forms of property and landholding into the new state system whose sovereignty had been justified by conquest right, the Irish judiciary simply invalidated both gavelkind and tanistry by resolution of all the Irish justices acting in conclave. This extraordinary use of judge-made law became not only the instrument by which English lawyers sought to assimilate Gaelic tenures, but also contributed to the emergence of a doctrine of precedent in English jurisprudence. In practice, elimination of native custom by judicial fiat meant that prior possession might be respected, but unless accepted as lawful by the sovereign or the judiciary, Irish tenures had no validity against a superior common law title. In other words, legal sanction by the conquering power was necessary to validate or create rights over real property in Ireland.²⁵ The crown lawyers would thus allow the inhabitants to enjoy their lands, not according to Gaelic law, but according to the laws of the conqueror, regranting estates to natives under common law titles through voluntary surrender or through various commissions launched to repair defective titles.

The significance of Davies' application of conquest right to Ireland and the consequent elimination by judicial fiat of those aspects of native customary law that were either barbarous, unreasonable, absurd or lewd can be seen in subsequent litigation justifying English claims to distant lands during the formative years of the empire. As in the case of Ireland, territories acquired by conquest during the period of expansion in the seventeenth and eighteenth centuries were frequently inhabited by people of different cultures and races whose forms of political and social organization differed completely from that of Britain. Frequently in such areas it was not uncommon to find several racial groups and cultures existing within a single territorial unit. While the realigning of property rights by Britain in non-European territories has yet to attract the attention it deserves from

historians and legal scholars, substantial evidence exists to show that Davies' imperial formula regulating the legal position of natives and their property rights in Ireland had set the pattern for colonial expansion elsewhere. As early as 1694 William Salkeld, an English Serjeant-at-Law, reported the case of *Blankard v. Galdy* referred from Jamaica to the King's Bench, in which the justices found it necessary to summarize the status of conquered kingdoms.

Where an inhabited country is found out and planted by English subjects, all laws in force here are immediately in force there; but in the case of an inhabited country conquered, not till declared so by the conqueror . . . That in Davies 36, it is not pretended that the custom of tanistry was determined by the conquest of Ireland, but by the new settlement made there after the conquest: That it was impossible the laws of this nation, by mere conquest without more, should take place in a conquered country, because for a time, there must want officers, without which our laws can have no force . . . also they held, that in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity.²⁶

This doctrine provided continuity for a colonial jurisprudence and for a strategy of imperial control over conquered territories. It was to appear again in an anonymous Chancery case reported by Peere Williams in 1722. According to Williams, conquest right not only vested the English monarch with a right and property in the conquered people, but also allowed the English state to impose or modify whatever laws deemed necessary to govern the conquered territory.²⁷ Writing later in the century, Sir William Blackstone incorporated the principles set forward by the Anonymous case of 1722 in his discussion of overseas plantations and colonies expanding the doctrine to cover territories acquired by cession as well as conquest.²⁸ The formula was corroborated by Sir Frederick Pollock's comments on the 'external conquests of the common law' in which English law was seen to regulate the legal systems of India, the Sudan and other territories within the empire.²⁹ Indeed, more recent research strongly suggests that the Davies formula became the basis for defining the status of native law and landholding throughout British overseas possessions.³⁰ According to a study on African territories subject to the crown, colonial jurists and administrators have regulated indigenous laws and customs in a pattern consistent with the Davies formula by allowing only those aspects of native law and custom that were not repugnant or incompatible with metropolitan law. Small wonder then that a scholar writing in 1977 on the

formulation of native policy in Nigeria ascribed to English law the same power as the Maxim gun in subjugating Africa to colonial rule.³¹ Davies' formula for Ireland – 'to give laws to a conquered people is the principal mark of a perfect conquest' – had established a paradigm for British expansion elsewhere.³² In the wake of the Tudor conquest of Ireland, Davies' juridical stance on Gaelic property rights laid the basis for an imperial formula that was fundamental in the creation of the British empire.