The Case of Tanistry *(Le Case de Tanistry)*

Irish Court of King's Bench, on referral from the Presidency Court of Munster

(1608) Davis 28; 80 ER 516[1]

Rights of the king on conquest of a new realm — rights of the inhabitants on conquest — effect of introduction of common law into Ireland — extinguishment of Brehon law — recognition of tanistry as local custom — rules on recognition of custom — extinguishment of custom — extinguishment of tanistry

Introduction

As arguably the first English colony, Ireland was key in the development of a jurisprudence of colonial expansion, the effects of which can be seen in the legal rules applied to the settlement of Australia. The Case of Tanistry, referred to briefly by Brennan J in Mabo v State of Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1, is perhaps the first case of which we have some report to consider the relationship of the common law to a foreign legal system in the context of a colonial situation. The Case of Tanistry also forms the link between the early exercises of jurisdiction by the common law over custom in a domestic setting, and the eventual recognition of native title, in part by transferring the rules on recognition of common law custom in an English domestic setting to the recognition of custom in a colonial context.

Short historical background

It was generally conceded that prior to what is known as the re-conquest of Ireland, or the Tudor conquest of Ireland, British control of Ireland had been limited. Effective English control penetrated to only a handful of port towns and a fifty mile radius around Dublin, an area known as 'The Pale'. Davies makes it clear that in many parts of Ireland, 'Brehon law' remained largely operative after the arrival of the English. The English described Brehon law as 'the common law of the Irishry'. This promoted a view of Brehon law as a national law, such as the rapidly emerging common law of the period aspired to be in England. Originally,

however, the word Brehon was simply an anglicisation of the Irish *breitheamh*, or judge, and did not define the nature of the law administered by such a man.[2] According to Nicholls, Brehons settled legal disputes as arbiters rather than officials of the court. Their decisions were based on the principle of arriving at a compromise rather than necessarily on the basis of enforcing a known legal rule.[3]

Despite the Treaty of Mellifont on 4 April 1603, which officially finalised the Tudor conquest of Ireland, it was clear by 1606 that the Ulster nobles were still relying on the possession of vast tracts of land in order to enhance their power and authority against that of the British Crown. In particular, it appeared to the Crown that they were relying on the customs of tanistry and gavelkind.

Tanistry was the name given by contemporary English observers to the practice under which Irish succession devolved through the male line or agnatic descendants of a common grandfather to the most worthy male member of the extended kin group. The result of this was not infrequent strife between rival family factions. The Irish system of individual land tenure was known to the English as gavelkind, so named because it reminded the Norman settlers of a local feudal system in Kent, called gavelkind. Under this system, at least as it was understood by Sir John Davies, ultimate proprietorship of land lay in the extended kin group and the allocation of individual allotments of land was temporary and subject to periodic redistribution. Thus, tanistry and gavelkind were construed by Davies and other English jurists as constituting a system of law which lay outside the jurisdiction of royal writ.[4] As such, they lay in the way of assimilation of the autonomous Gaelic lordships by providing a power-base outside the jurisdiction of the common law. In order to assert full authority over Ireland, therefore, it was necessary to proscribe Gaelic forms of land tenure.

As a result, in 1606, by an extra-judicial resolution of the Privy Council, the customs of tanistry and gavelkind were ‘adjudged to be utterly void in law’, with the result that they were to ‘be shortly avoided and extinguished either by surrender or resumption of all the lands so holden’.[5] Extra-judicial resolutions (ie those collective decisions made by the English or Irish judiciary in conclave) were used during the first decade of the sixteenth century in Ireland (and to a lesser extent in England) in order to establish policy guidelines in a variety of constitutionally and politically significant cases. Such decisions were intended to establish precedents which would compel other tribunals to follow their lead in cases involving similar disputes.[6]

In 1608, the case known as the *Case of Tanistry* was referred to the Court of King’s Bench from the Presidency Court of Munster. Although the issue of tanistry had supposedly been dealt with by extra-judicial resolution, this case

provided the Crown with an opportunity to confirm the abolition of tanistry by a trial before a jury on the issue.

A note on case reporting

The case was reported by Sir John Davies, Solicitor-General (later Attorney-General) for Ireland, who appeared on behalf of the defendant. There is no clear distinction made by Davies between the plaintiff's arguments, the defendant's arguments and the judgment. As the case was argued several times, the report of the judgment is a synthesis by Davies of several judgments by the Court of King's Bench.

Facts and arguments

The case was an action for ejectment, and involved a complicated set of land transfers, based in turn on a complicated family tree. At its most basic, however, the case revolved around the question of which of two competing titles to a particular piece of land was better: that of the plaintiff, Murrough Mac Bryan, derived from the title of the tanist, or that of the defendant, Donogh Mac Teige Callaghan, derived from the title of the heir at common law. The main legal issue in the case was the validity of the 'custom' of tanistry. This required the consideration of two interrelated questions: first, was the custom of tanistry abolished by the introduction of the common law; and second, was the custom of tanistry good at common law? In other words, did it meet the common law requirements by which the validity of customs generally at common law were decided?

The jury had already issued a special verdict to the effect that the land in question lay in the county of Cork, and since time out of mind had been in the tenure and nature of tanistry.

The defendant contended that the introduction and establishment of the common law of England had abolished tanistry on the basis that the custom of tanistry was the common custom of the land of *Ireland*before the conquest and therefore had been abolished by the establishment of another general law — that is, the common law. Counsel for the plaintiff conceded this point. However, he maintained that despite this, particular customs might stand, just as 'the custom of *Gavelkind* in *Kent*, and other customs in particular places in *England* remain'd after the Norman conquest'. These customs could be established by recourse to the usual common law criteria used to determine the validity of local customs. The case proceeded on this basis.[7]

Held

On the particular question of law at issue, it was held that the custom of tanistry was void at common law. However, on the matter before the court, the judges never handed down a verdict. Rather, as is recorded on the final page of the judgment, after the case had been argued several times and had languished before the Kings Bench for three or four years, the parties came to an agreement and divided the land.

The case

[A recitation of the facts]

Upon which, one main question ariseth, *viz* whether the title of the heir at common law which the defendant hath, or the title of the *tanist*, which estate the lessor of the plaintiff hath, should be preferred, as this case is. And in the discussing of this question, three principal points were moved and argued.

The plaintiff argued as follows:

1. Whether the said custom of *tanistry* was void or not in itself, or otherwise abolished by the introduction of the common law of *England*.

2. Admitting that it was a good custom and not abolished by the common law, whether it be discontinued and destroyed by the feoffment which created and limited an estate tail in the land, according to the course of the common law, so as that it shall not be reduced to the course of *tanistry*, when the estate tail is determined.

3. ...

As to the first point, it was objected by the council of the plaintiff, that the said custom of *tanistry*, as it is found, is good by the rules of the common law: For three things ought to concur to make a custom good, antiquity, continuance and reason, and it is expressly found, that this custom is antient beyond time of memory, and continual time out of mind; and therefore, if it be reasonable also, it hath all the qualities of a good custom; and certainly, this custom which giveth the land to the *oldest and the most worthy man of the blood and surname* of him who died, is very reasonable in this kingdom, because he can better manure the land and defend it, than an infant or a woman; and the continuance of the land in the blood and surname is a good consideration to raise an use; *Plowd. Comm.* 305 *Bainton*'s case, where the dignity of the heir male is expressed in several cases, wherefore this custom doth not want reason to support it; and *Litt. Lib* I. *s.* 80 puts this rule, to wit, that in divers seignories and divers manors, there are several and divers customs, as to take lands and tenements, and as to plead, and as to

other things, and that whatsoever is not against reason, may well be admitted and allowed.

And altho' this custom should be repugnant to the rule of common law, this doth not prove it to be unreasonable; for the customs of *Borough English*, and of *Gavelkind*[8] are contrary to the common law, in point of descent of inheritance, and yet are approved as reasonable customs; so the custom of turning the plough upon the headland of another; and of drying nets upon anothers land, 21 *Ed.* 4. 50. 8 *Ed*. 19. So, that a feoffment with warranty made by a tenant in tail, shall not be a discontinuance, contrary to the rule of law, and yet is a good custom, 30 *Ass*. p. 47. and several cases were put to that purpose.

And as this custom is not void for want of reason, so it is not void for want of certainty, for the land shall descend to the *oldest and most worthy*; the oldest may be certainly known, but the most worthy seems to be uncertain; for who shall be the judge of that? certainly the law, which is always certain and infallible in judgment, and the law will say that the oldest is the most worthy as well in this case as other cases of this nature, and therefore *Litt.* saith, *lib*. I. *s.* 5. if there be three brothers and the middle brother purchaseth lands, and dieth without issue, the eldest brother shall have the land by descent, because the eldest is most worthy of blood. And in the chapter of Remitter, Sect. 659 he siath, where a man has two titles to lands and tenements, *viz.* one more ancient and another later, the law will adjudge him by force of the more antient title, because the ancient title is the more sure and more worthy title; see *Plowd. Comm.* 259.*a*. But admitting that the affirmative part of the custom, *viz.*, that the land shall descend to the *oldest and most worthy man*, &c. should be void, yet the negative part of the custom, *viz.* that the daughters shall not be inheritable, is good; for there are several good customs in the negative, against the express maxims and rules of the common law; as that the wife shall not have dower, where she hath received part of the money arising from the sale of the land, 20 *Ed.* 3 *Br. Customs*, 53. and 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*, and the custom of which *Kitchin* speaks, 149.*b*. that if a man marries a widow, she shall not have dower; and then if this part of the custom be good, judgment must be given against the defendant, because he deriveth his title from the daughter, who is the heir at common law.

And this custom is not abolish'd by the introduction of the common law, for divers reasons.

1. Because it is a reasonable custom and agreeable to the rules of the common law, as is before shewn; and for this reason it is resolved 21 *El. Dyer*, 363. that the custom of the town of *Denbigh* in *Wales*, that a *feme covert* with her husband, may alien her land, by surrender and examination in court here, and that shall

bind the wife and her heirs as a fine, is not taken away by the stat. of *Hen*. 8. altho' that act introduces the common law in *Wales*, as appears by the title of it, *for laws and justice to be administered in* Wales *in like force as in the realm of* England.

2. 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, as appears in *Calvin's* case, 7 *Co. rep.* 17. *b.* yet the 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.

3. It may be collected by the judgment of parliament, 12 *Eliz. c.* 5. that this custom of *tanistry* was not taken away by the common law because by this act, *the pretended lords, gentlemen, and freeholders of the Irishry, and degenerate men of English name, holding their lands by Irish custom*, have power of surrendering their lands to the queen, and of taking estates by letters patent, which shall be good and effectual in law, against all persons except those who have estate, title or right to the said land by the due course of the common law.

As to the second point, it was objected that the gift in tail, the remainder to the right heir of the donor, did not destroy this custom, for two reasons.

1. Because he who hath land of the tenure and nature of *tanistry*, hath not such an estate as that he can alien his land in perpetuity, but only during his life and his estate is qualified like the estate of a parson or prebendary,[9] so that the fee simple is in abeyance.

2. 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 in the possession of the king as of a subject; as the customs of *Borough English*, and *gavelkind*. For if land in *Borough English* be given in tail, the younger son shall have a *formedon*, II *Ed.* 3. *Fitz. Formedon.*[10] 30. 32. *Ed.* 3. *Fitz. Age*. 81. 2 *Eliz.* 176.*b*. and if the land in *gavelkind* be given in tail, the remainder to the right heirs of the donor, as this case is, as well the reminder as to the possession shall go to their heirs by custom, and not to the heirs at common law. 26 *Hen.* 8. 4.*b.* 6 *Ed.* 6 *Dyer* 72.*b*. and altho' it be held 37 *Hen*. 8. *Br. Done & Rem.* 42. that if land in *Gavelkind* be leased for life, remainder to the right heirs of *I. S.* if *I. S.* hath four sons, and die, the remainder shall go to the eldest, for he is the right heir, and that is a name of purchase, yet that differs from our case, for the remainder limited of the right heirs of the donor is only a reversion, and the heir shall have it by descent. And that the possession of the kind doth not extinguish such custom, see *Hen.* 7. 10. 21 *Ed.* 3. 46. 14 *Hen.* 4. 2, 3.

3. ...

The defendant replied as follows:

And as to the first point touching the custom it was first said, that a custom, in the intendment of law, is such an usage as hath obtain'd the force of a law, and is in truth a binding law to such particular place, persons or things as it concerns; and such custom cannot be established by the King's grant, 49 *Ed.* 3. 3.*a*, nor by act of parliament, but it is *jus non scriptum*, and made by the people only of such place, where the custom runs. For where the people find any act to be good and beneficial, and apt and agreeable to their nature and disposition, they use and practice it from time to time, and so by frequent iteration and repetition of the act, a custom is formed, and being used time out of mind, it obtains the force of a law. And so the rule 44 *Ed.* 3.19. is true, that no law binds the people only that which is made by consent of the people, for consent may be express'd as well by deed, as by word, and that which is expressed by deed is stronger than that which is expressed by word; and that which is expressed by several and continual acts of the same kind, is a custom; and so briefly, custom is a reasonable act, re-iterated, multiplied, and continued by the people time out of mind. And this is the definition of custom, which hath the virtue and force of a law.

Secondly, it was said, that such custom ought to have four inseparable qualities, 1. It ought to have a reasonable commencement. 2. It ought to be certain and not ambiguous. 3. It ought to have an uninterrupted continuance time out of mind. 4. It ought to be submitted to the prerogative of the kind, and not exalted above it.

1. The commencement of a custom (for every custom hath a commencement, altho' the memory of a man doth not extend to it, as the river *Nile* hath a spring, altho' geographers cannot find it) ought to be upon reasonable ground and cause. For if it was unreasonable in the original, no usage or continuance can make it good. ...

But to distinguish what is an unreasonable custom, and what not, these differences were put. Every custom is not unreasonable that is contrary to a particular rule or maxim of positive law. ...

Yet a custom may be prejudicial to the interest of a particular person, and reasonable also, where it is for the benefit of the commonwealth in general, as a custom to make bulwarks on the ground of another for the defence of the realm, 36 *Hen*. 8 *Dyer*, 60.*b.* and to pull down houses in a public fire, 29 *Hen.* 8. *Dyer*, 36.*b. so* to turn the plough on the headland of another in favour of husbandry; and to dry nets on the land of another in favour of tithing and navigation. 8 *Ed.* 4. 18. 21 *Ed*. 4. 28. But a custom which is contrary to the publick good, which is the scope and general end of all laws (*salus populi suprema lex*) or injurious and

prejudicial to the multitude, and beneficial only to some particular person, is repugnant to the law of reason, which is above all positive laws, and therefore cannot have a reasonable or lawful commencement, but is void *ab initio*, and no prescription of time can make it good.

...

2. A custom ought to be certain. For *incerta pro mullius habentur, & consutudo ex certâ cause rationabili usitata privat communem legem*. Here three of the essential qualities of a custom are expressed, *viz.*certainty, reasonableness, and usage or continuance. 13 *Ed.* 3. *Fitz Dum fuit infra ætatem*[11] 3. A writ of *dum fuit infra ætatem* was brought against an infant; the tenant pleads a custom, that when an infant is of such an age, that he can count 12*d*. or measure an ell of cloath, his feoffment shall be good; this custom was adjudged void on account of the uncertainty, 14 *Ed.* 3. *Fitz. Barr.* 277. in trespass for trees taken away, the defendant pleads a custom, that such one of the tenants of the manor as first comes to the place where, *&c.* shall have all windfalls there; this custom is void also, for the uncertainty: and the reason alledged there is, that this doth not lie in prescription, which lieth in the will of man, for the will of man is uncertain. 42 *Ed.* 3. 46. in replevin brought by the prioress of *Shafton*, the defendant vows as bailiff to the sheriff or *Dorsetshire*, who prescribes to hold his torn[12] in the place where, &c. and to have from the tertenant[13] a demy-mark or horse as a fee at each torn. This prescription is held void for the uncertainty, for it is said there also that this uncertainty lieth in the will of the donor which is uncertain.

And besides this, two reasons were given why an uncertain custom should be void: 1. Because an uncertain thing cannot be continued, time out of mind, without interruption. 2. Because a man cannot prescribe in a thing, which could not, at its commencement be well granted. 13 *Hen.* 7. 16.*b*. But an uncertain thing could never be well granted, and therefore a prescription of an uncertain thing is void also.

3. Custom ought to have an uninterrupted continuance, time out of mind; for if it be discontinued within the time of memory, the custom is gone. As if a copyhold be leased by the lord of the manor for the life or for years, according to the course of the common law, it shall not be afterwards demised as a copyhold according to the custom. 28 *Hen.* 8. *Dyer*, 30.*b*. *Consuetudo semel reprobata non potest amplius induci*. For as continuance makes a custom, discontinuance destroys it.
...

4. A custom, which exalts itself on the king's prerogative, is void also against the king. For prescription of time makes a custom; but *nullus tempus occurrit regi*. 49 *Ed.* 3.3. the custom of *London* to make corporations is held void, for the king only can make them by his prerogative. 35 *Hen.* 6. 26.*a.* ...

The Court's judgment

By these rules of customs in general, this particular custom of *tanistry* was examined; and first it was resolved that this custom was unreasonable and void *ab initio*. For it is against the commonwealth, and goeth utterly in destruction of it; for a commonwealth cannot subsist without a certain ownership of land, or if the right of inheritance of land doth not rest in some person.

For if men have not such an estate in their lands, as their issue or cousins next of blood may inherit, so that they may know certainly for what person they travail and defraud their souls of pleasure, as *Solomon* saith, they will never improve their land to the best use and profit, nor build houses of any value, nor give civil education to their children; but having respect to their present time only, will be utterly careless of their posterity. And this is the true cause of the barbarism and desolation which was in all the *Irish* counties, where the custom of *Tanistry* was in use.

Also this has been the great cause of the continual felonies and treasons committed by the *Irish* in time heretofore. For when they knew that their wives were not to be endowed, nor their issue inheritable to their lands, they committed such crimes with greater audacity' for from affection to their wives and children, men more eschew to commit felony, as *Litt.* saith.

Therefore this custom which lets the inheritance and the freehold also be in abeyance, after the death of every tenant, is unreasonable, and goeth in destruction of the commonwealth. And therefore our law, altho' it suffers the fee-simple in some cases to be in abeyance for a little time, yet it ought never to suffer the freehold to be in suspence; and therefore, if a lease for years be made, the remainder to the right heirs of *I. S.* the limitation of the remainder is void, And if the kin's tenant dieth without heir, or the king's donee in tail dieth without issue, the land is immediately in the possession of the king without office, to avoid this absurdity, 9 *Hen.* 7. 2.*b*. And for this reason, 6 *Ed*. 6 *Dyer* 71. land cannot be appendant to an office for life, but to an office of inheritance only; for if it were appendant to an office for life, a great inconvenience would ensure as is their said, *viz.* the freehold would be in suspence, after the death of the officer, until a new officer were made or created, if the office did not descend unto the heir, or to a man who hath a perpetual succession by the common law; and that is the most apt case in the law to be resembled to the case in question. For the custom of *Tanistry*, the oldest and the most worthy doth not come in as heir (for heir is always the nearest of blood) but as a successor; yet because he is not incorporated by the common law, as a parson, prebendary, &c, he doth not come in by course of perpetual succession, but as an officer for life only, and by election; but until election made, the freehold of the land is in suspense, and the fee simple and

inheritance is always in abeyance, and so no fee simple *in actu* at any time contrary to the principle of the common law, that of every land there is a fee simple.

This custom is also unreasonable for another reason, *viz*, because this custom (as is found by the special verdict) that the land shall descend *seniori et dignissimo viro*, &c. appears plainly to have commencement by the usurpati- and tyranny of those who were most potent amongst them. As several customs, whereof mention is made before, adjudged in our books to be void in law, commenced by oppression and extortion of lords. For the antient *Brehon* law was, that such land should go the oldest of the sept, who was the true *tanist*, and called in *Latin, fecundus*, being the successor apparent: but the oldest was not always the most active, or had not the greatest number of followers, another more powerful person by faction and strong hand intruded on the oldest, and procured himself to be elected as the most worthy in the opinion of the people, yet it was bad in the commencement, and bad in the continuance, for it was the cause of great effusion of blood, and many other mischiefs.

Also, the negative part of the custom is unreasonable, which utterly excludes the daughters from inheriting an estate of fee-simple: 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 their heirs male of his body; and it is against the nature of a fee-simple to exclude the heir female, if the heir mail fails; and therefore, if a feoffment be made to *I. S.* and his heirs, provided that he daughters shall not inherit, this is a void proviso; and if the land be given to *I. S.* and his heirs male, he hath a fee-simple and their heir female shall inherit in default of an heir male; ...

...

Secondly, it was resolved that this custom was void for uncertainty. For where by this custom the land is to descend, *seniori et dignissimo viro sanguinis & cognominis* of him who died seised. 1. The person is uncertain. 2. The estate is uncertain.

....

So that some will say, that the most learned and knowing man is the most worthy; some, that the most valiant; some, that the richest; and some, that the most liberal; and so the multitude can never agree, and therefore the most powerful man was always preferred, which is contrary to all laws. *Inde datæ leges, ne fortior omnia possit*. But if it were referred to the judgment of the wisest man that ever was, to judge who is the worthiest man in any country, he would take a long time to deliberate in such case.

But it was said, that the law will adjudge the oldest to be the most worthy. Certainly, in cases of descent of inheritance, the law respects primogeniture, birth-right and proximity, and wholeness of blood, but gives no regard to the worthiness or sufficiency of the heir; and therefore the law casts the inheritance, as well on an ideot or an infant, as on a person of discretion; wherefore this difference is taken in Sir *Hen. Nevil*'s case, *Plowd. Comm*. 379.*b.* that an officer for life cannot assign over his office without special words in the grant, for the law intends him to be an officer of trust, and chosen for his knowledge and diligence, *viz.* for his worthiness: but an officer of inheritance may grant over his office, for the law doth not intend that the grant was made upon a confidence of the sufficiency of the officer: for it may descend to a woman, an infant, or an ideot; and therefore the law doth not respect dignity of person in case of descent of inheritance. For although primogeniture having a prerogative given to it by the law of God, be preferred also in our law, and so the oldest be in some sense the most worthy, yet by this custom, the dignity is intended to be of another quality than seniority, *viz*. another virtue or merit in the person which must concur with the seniority; for otherwise the word *seniori* had been sufficient, and the word *dignissimo* would be idle; ... and therefore such limitation by prescription is void also, according to the rule taken, 13 *Hen*. 7. 16.*b*.

2. The estate is uncertain, for every person who hath an estate of inheritance, hath it either in his natural or his political capacity. But a *tanist* hath not an estate of inheritance in his natural capacity, because the oldest and most worthy doth not take as heir; for the most worthy comes by election, and not as heir; ... And the *tanist* hath not an inheritance by succession in a politick capacity, because he is not incorporate by the common law, as a parson, prebendary, &c. and if he hath only an estate for life, it cannot descend, and so he hath no estate whereof the law can take notice, and by consequence the uncertainty of his estate maketh it void in law.

Thirdly, it was resolved, that this custom was interrupted and destroyed in the land, when *Donogh Mac Teige* executed an estate tail of it, according to the course of the common law. For there is a difference where the custom runs with the seigniory, and where it runs with the tenancy; for where it runs with the tenancy, it shall not be destroyed by the conveyance according to the custom of the common law; as if a fine be levied of land held in *gavelkind*, (although the course of inheritance be altered and made descendible to the heir at common law,) yet it was agreed by the court here, that the custom was not altered; and so it was held of land in *Borough English*, 2 *Eliz*. *Dyer* 179.*b.*

But this land in question is parcel of the demesne of the chieftain or lord of *Publicallaghan* (for the lands only which go with the chiefries are of the tenure and nature of *tanistry*) and therefore like copyhold land, which is parcel of the

demesne of the lord, and if the lord executes an estate of it, according to the course of the common law, the custom is gone for ever. ...

Also, this custom of *tanistry* is not inherent in the land, as the custom of *gavelkind* or *Borough English*, but is rather 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 for ever.

Lastly, this custom of *tanistry* must be void against the king, as being prejudicial to his profit and prerogative; for where all lands are held mediately or immediately of the king, by his custom the king would lose all the benefit of his seigniory paramount in this land, which was *quasi in manu mortua*; of which the king can never have wardship or escheat, or any manner of service, testifying his being the lord of it; and *Litt. s.* 138. saith, that it would be inconvenient and against reason, that any one should be tenant to another of an estate in inheritance, and yet the lord have no manner of service from him; and for this reason the custom of *Kent, the father to the bough, the son to the plough* extends only to felony, and not to treason; for there the king shall have his escheat; 22 *Ed.* 3 *Fitz. prescr*. 40. so a prescription to have sanctuary for treason is void, 1 *Hen.* 7. 23. and therefore, although such *tanist* had not an estate of inheritance by the custom, yet if he had been attainted of treason, the course of the *Exchequer* here hath always been to seize the land as forfeited or escheated to the crown, notwithstanding this custom of *tanistry*.

But admitting that this custom had not been void in itself, yet the introduction and establishment of the common law of *England* hath abolished it; for this custom of *tanistry* was the common custom of the land of *Ireland* before the conquest, and generally used in all the *Irish* countries, and in the same nature and form as is found here; and therefore it must of necessity be abolished by the establishment of another general law in the same point.

But as to the introduction of the common law of *England* into this kingdom of *Ireland* it is to be observed that as this island was not fully conquered and reduced to subjection of the crown of *England*, all at one time, but by parcels, and in several ages; so the common law of *England* was not communicated to all the inhabitants, *simul & semel*, but from time to time, and to special persons and families of the *Irishry*, to whom the king was pleased to grant the benefit and protection of his laws. ... it is manifest by all the antient records of this kingdom, that the common law of *England* was only put in execution in that part of *Ireland*, which was reduced and divided into counties, and possessed by *English* colonies, which were not reduced into counties until the time of queen *Mary* and queen *Elizabeth*, and yet were in extent of ground more two third parts of this island.

...

And therefore it was impossible that the common law of *England* could be executed in these countries or territories; for the law cannot be put in execution where *breve domini Regis non currit*, and the king's writ cannot run, but where there is a county and a sheriff, or other ministers of the law, to serve and return the king's writs.

And for this cause, it appears by the antient records, that the meer *Irish* were out of the protection of the king. For *Litt. s* 199, siath, that the king's law, and the king's writs are things by which a man is protected and aided; and so during the time that a man is out of the king's protection, he is out of help or protection by the king's law or the king's writs. And ... the meer *Irishry* had not the benefit of the law of *England*, without special charters of the king's to enable them ....

[The court outlined the legal history of the English colonisation of Ireland and concluded on the law as follows:]

And as to the land in question, it lieth in the county of *Cork*, which is one of the antient counties made by king *John*, and in which the common law of *England* has had its course for the space of 150 years at least after the conquest: wherefore, although by the incursion of the *Irishry*, the course of the common law of *England* was interrupted and discontinued in this county for a long space of time, yet the execution of the common law being revived and restored, the custom of *tanistry* and all other *Irish* customs not agreeable to the rules of the common law, are annulled and abolished, as they were by the first introduction of the law of *England* in this country.

And although this custom of *tanistry* hath been the custom of a particular place only, yet being repugnant to the rules of the common law, it was abolished by the introduction and establishment of the common law in this kingdom; and it is not like the case of *Wales*, *Dyer* 21. *Eliz.* 363.*b*. where the particular custom of *Denbigh* continues, notwithstanding the statute which establisheth the common law in *Wales*' for the intent of the makers of that statute appears to be, that the customs of *Wales* agreeable to any customs in *England* should be preserved; for by the same statute it is provided, that a commission should issue to examine the *Welsh* customs, and that those which should be found reasonable, upon certificate of the commissioners, should be allowed.

Also this custom cannot be resembled to the custom of *gavelkind* in *Kent*, which had continuance after the *Norman* conquest; for the common law of *England* was

not introduced by the conqueror, as hath been observed and proved very learnedly by lord *Coke* in preface to the third part of his reports.

...

Lastly, where it was objected by one of the council for the plaintiff, that queen *Elizabeth* should be said to be in possession of this land by virtue of the first conquest of *Ireland*, against *Donogh Mac Teige O Callaghan* the feoffer, who cannot derive any title to this land from the crown, and therefore his feoffment by which the defendant claimed, was void, being made by an intruder upon the possession of the queen: it was resolved against this objection, that queen *Elizabeth* shall not be said to be in actual possession of this land, by virtue of the first conquest, if it doth not appear by some record that the first conquest had seised this land at the time of the conquest and appropriated it particularly to himself as parcel of his proper demesne.

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 goods, and a freehold and inheritance in their lands; but under a despotick monarchy or tyranny, they are all as villains or slaves, and proprietors of nothing but at the will of their *Grand Seignor* or tyrant, as in *Turkey* and *Muscovy*. And therefore when such a royal monarch, who will govern his subjects by a just and positive law, hath made a new conquest of a realm, although in fact he hath the lordship paramount of all the lands within such realm, so that these are all held of him, *mediate vel immediate*, and he hath also the possession of all the lands which he willeth actually to seise and retain in his own hands for his profit or pleasure, and may also by his grants distribute such portions as he pleaseth to his servants and warriors, or to such colonies as he will plant immediately upon the conquest, (as the antient *Romans* upon their conquest used to appropriate the seventh part of the territory conquered, for the plantation of their colonies, and the *Vandals* in *Italy* took the third part;) yet Sir *James Ley* chief-justice said, 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 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.

[A short discussion of the Norman conquest and the rights of William the Conqueror followed. Sir John Davies then concluded his report as follows:]

This case depended in the king's-bench for the space of 3 or 4 years, and was argued several times, and the justices at several times delivered their opinions in the several points aforesaid: but afterwards, Sir *Humphrey Winch* being chief-justice, the parties with leave of the court came to an agreement, by which a reasonable division was made of this territory amongst them; in which division the castle and land in question, amongst others, were allotted to *Cahir O Callaghan* the defendant; and now besides their mutual assurances, they have obtained several grants from the king, by virtue of a commission for strengthening defective titles. And so this country is well settled. *Bolton* recorder of *Dublin*, and *John Meade* were of council with the plaintiff; and the attorney-general with the defendant.

[1] This report is taken from the English translation by Sir John Davies in Davies Sir John *A Report of the Cases and Matters in Law, Resolved and Adjudged in the King's Courts in Ireland* Printed for Sarah Cotter under Dick's Coffee House in Skinner Row Dublin 1762 p 78. The script has been updated but the original spelling and punctuation have been retained in this reproduction.

[2] Simms K 'The Brehons of Later Medieval Ireland' in Hogan D & Osborough W (eds) *Brehons, Serjeants and Attorneys: Studies in the History of the Irish Legal Profession* Irish Academic Press Dublin 1990 p 51.

[3] Nicholls K *Land, Law and Society in Sixteenth-Century Ireland* O'Donnell Lecture delivered at University College Cork, May 1976, National Library of Ireland Dublin 1978 p 6.

[4] Pawlisch H *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism* Cambridge University Press Cambridge 1985 p 45.

[5] British Library Add. Manuscript 4793, fos 45b, 53b–54a, quoted in Pawlisch above note 4 at 46. While there is no extant copy of the resolution by which tanistry was voided, the resolution on gavelkind is reported as *Le Resolution des Justices touchant le Irish Custome de Gavelkind* (1608) Davis 49 (80 ER 535). For the English translation see Davies Sir John *A Report of the Cases and Matters in Law, Resolved and Adjudged in the King's Courts in Ireland Ireland* Printed for Sarah Cotter under Dick's Coffee House in Skinner Row Dublin 1762 p 134.

[6] See Pawlisch above note 4 at 35.

[7] For the rules at the time on validity of local custom see Coke Sir Edward *The Compleat Copyholder: Being a Learned Discourse of the Antiquity and Nature of Manors and Copyholds, with all Things thereunto incident. Included within The First Part of the Institutes of the Laws of England: or a Commentary upon Littleton* (originally published 1630, 1719 ed) and Coke Sir Edward *The first part of the institutes of the lawes of England: or, A commentarie upon Littleton, not the name of a lawyer onely, but of the law it selfe* (1628).

[8] It should be noted that in this context 'gavelkind' refers to the Kentish custom, not the Irish custom.

[9] A prebendary was an ecclesiastical person serving on the staff of a cathedral and receiving a stipend from the income or endowment of that cathedral.

[10] A formedon was a writ of right available to one who had a right to lands or tenements by virtue of a gift in tail.

[11] A writ fuit dum infra ætatem was a writ of entry which lay for an infant after he attained full age in order to recover lands alienated during his infancy.

[12] A tourn was a county court of record of criminal jurisdiction held before the sheriff.

[13] A ter(re)-tenant was a tenant who was actually in occupation of land.