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Edward S. Bade

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A PRINCELY JUDGMENT  
(The Earl of Ormond's Case)

By EDWARD S. BADE\*

The only reason for the following brief review of the clashes between Sir Edward Coke and James I is that those conflicts form a setting for a consideration of the Earl of Ormond's Case.<sup>1</sup> Of necessity, one begins with a reference to Coke's daring answer to the King's claim of right to decide in his own person cases pending in the courts.<sup>2</sup> Before this, and continuing thereafter, there was the dispute over the power and jurisdiction of the Court of High Commission,<sup>3</sup> through which James I sought to implement his views of the supremacy of the royal prerogative.<sup>4</sup> As a result of Coke's opposition, the Court of High Commission was reformed so that the Lord Treasurer said "that the principal feather was plucked from the High Commissioners and nothing but stumps remaining."<sup>5</sup> It was thought that by making Coke a member of the Court of High Commission, his opposition might be changed to cooperation, but Coke refused to take the oath as Commissioner, and refused to sit as a member of it.<sup>6</sup> Though the court was revived after Coke's dismissal, it was abolished by the Long Parliament under Charles I.<sup>7</sup> Coke further made himself obnoxious to the King by denying the claimed royal power to create offenses by proclamation.<sup>8</sup> Finally came the Case of the Commendams.<sup>9</sup>

\*Assistant Professor of Law, University of Minnesota.

<sup>1</sup>(1618) Hobart 348.

<sup>2</sup>Prohibitions del Roy, (1608) 12 Coke 63. This date is contended for by Mr. Roland G. Usher in (1903) 18 Eng. Hist. Rev. 664 and is accepted as probably correct by Dr. Holdsworth, 5 Hist. of Eng. Law (2d ed. 1937), 430, n. 2.

<sup>3</sup>A study of the judicial process involved in the Earl of Ormond's case, and its historical setting forces home anew the aphorism that history repeats itself. The Court of High Commission of James I bears a strong resemblance to some of our modern boards and commissions that combine within themselves the functions of a detective agency, prosecutor, jury, judge, and executioner, e.g. The National Labor Relations Board.

<sup>4</sup>5 Holdsworth, Hist. of Eng. Law (2d ed. 1937), 429 et seq.; Re Power of High Commissioners, (1606) 12 Coke 19; Nicholas Fuller's Case, (1607) 12 Coke 41; High Commission, (1608) 12 Coke 49; Lady Throgmorton's Case, (1610) 12 Coke 69; High Commission, (1611) 12 Coke 84; Edward's Case, (1608) 13 Coke 9, in which case, the Court of High Commission is rebuked for sitting in judgment in a matter concerning it.

<sup>5</sup>High Commission, (1611) 12 Coke 84, 86.

<sup>6</sup>High Commission, (1611) 12 Coke 88; 5 Holdsworth, Hist. of Eng. Law (2d ed. 1937), 431.

<sup>7</sup>6 Holdsworth, Hist. of Eng. Law (2d ed. 1937), 112.

<sup>8</sup>Proclamations, (1610) 12 Coke 74. This attempt by James I to

Before this, the common law judges under Coke's leadership had resisted the King's intermeddling with the courts by the writ of *de non procedendo rege inconsulto*.<sup>10</sup> The Case of the Commendams brought this matter to a head.

In this case, upon the Bishop of Winchester's *ex parte* report of the matter to the King, the latter directed the attorney general to write to the judges forbidding any further proceedings in the action "till his Majesty's further pleasure bee knowne upon consulting with him." The judges nevertheless proceeded with the hearing of the case, and sent a certificate to the King in which they stated that the case was between private litigants in respect to private interests, that it depended on certain acts of Parliament whereof the judges by their oaths were bound to "deliver the true understandinge faithfully and uprightly." They reminded the King that their oath in express words provided "that in case anie letters come unto us contrary to lawe, that wee doe nothinge by such letters, but certefie your majestie thereof, and goe forth to doe the lawe, notwithstandinge the same letters."<sup>11</sup> They then bluntly said they considered the letter contrary to law and contrary to their oath, and certified the fact to his majesty that they had proceeded with the case.

This answer obviously infuriated the King, as a reading of his letter in answer and the subsequent proceedings in the Privy Council clearly show.<sup>12</sup> The answering letter of the King admonished the judges to remember "what princely care wee have ever had, since our comeinge to this Crowne, to see justice duly administered to our subjects with all possible expedicion, and howe farr wee have ever benn from urginge the delay thereof in anie sorte. . . ."<sup>13</sup> He resented being reminded of the judges' oath, and in that connection makes a notable confession and boast—"although wee never studied the common lawe of Englaunde, yet are wee

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create offenses by royal proclamations also has its modern counterpart in the executive and administrative orders now flooding the country. See for example, *Panama Refining Company v. Ryan*, (1935) 293 U. S. 388, 55 Sup. Ct. 241, 79 L. Ed. 446.

<sup>9</sup>*Colt v. Bishop of Coventry*, (1612) Hobart 140, Moore, K. B. 898, 1 Rolle 451.

<sup>10</sup> Holdsworth, *Hist. of Eng. Law* (2d ed. 1937), 439.

<sup>11</sup>The clash between the judges and the King on this issue seems also to have had its modern counterpart.

<sup>12</sup>Acts of the Privy Council, 1615-1616, p. 595 et seq. where the letters and proceedings are set out.

<sup>13</sup>A reading of the Acts of the Privy Council during the reign of James I gives this claim the lie. He was constantly and repeatedly intermeddling in private litigation, either to delay the proceedings, or to fix some particular time, or to withdraw the case from the court entirely.

not ignoraunt of anie pointes which belonge to a kinge to knowe." But most of all, he objected to having the judges determine the extent of the royal prerogative. Accordingly the King's letter continued: "Our pleasure therefore is, who are the heade and fountaine of justice under God, in our dominions, and wee, out of our absolute authoritie royall, doe commaunde yow, that yow forbear to meedle anie further in this plea, till our comeinge to the towne, and that out of our owne mouth yow may heare our pleasure in this business. . . ."

The common law judges were called before the Privy Council, where the King himself angrily called them to account.<sup>14</sup> A reading of the Privy Council proceedings makes manifest the King's anger—nay fury. The issue is put under the spotlight by the King's repetition of the phrase that he did not wish the royal prerogative wounded—indeed, he objected even to having it debated in the courts or parliament. The royal anger was such that all the judges submitted themselves to the king's will—all but Coke. Coke alone justified the letter of the judges and the action of the courts in refusing to stay proceedings in actions between private litigants at the King's behest until the royal will in respect to the action should be known. The contest between Coke and the Chancery courts, and the feud between Coke and Sir Francis Bacon was also a factor in the proceedings mentioned, as well as in those to follow. The Lord Chancellor and the Attorney General were powerful royal yes-men, egging the King on, as were most of the privy counsellors, having been selected for just such qualifications.

Under date of June 26, 1616,<sup>15</sup> we again find Coke before the council, charged with certain acts and speeches. Undoubtedly the third charge stated the real grievance: "uncomely and undutifull carryage in the presence of your Majestie, your Privie Councell, and your Judges." Coke's obdurate and powerful resistance to the claimed prerogatives of the King made it impossible to retain him as Chief Justice of the King's Bench. The Court must be purged—and it was.<sup>16</sup>

Under date of June 30, 1616,<sup>17</sup> Coke again appeared before the privy council, and was then ordered to absent himself from

<sup>14</sup>Acts of the Privy Council, 1615-1616, p. 595 et seq., under date of June 6, 1616. The letters quoted from ante are there set out and are dated in the latter part of April.

<sup>15</sup>Ac's of the Privy Council, 1615-1616, p. 644 et seq.

<sup>16</sup>There is a singular current history flavor in the history of James I.

<sup>17</sup>Acts of Privy Council, 1615-1616, p. 648 et seq.

the privy council until further order, not to ride the circuit that summer, and to revise his reports. The middle of November 1616, he was dismissed and his successor, Sir Henry Montagu, appointed.<sup>18</sup> The speech of King James' yes-man and Lord Chancellor upon the induction of Sir Henry makes plain the reason for Coke's dismissal. The Lord Chancellor said that Coke's dismissal was "a lesson to be learned of all, and to be remembered and feared of all that sit in judicial places."<sup>19</sup>

Coke had been an uncooperative judge, not only in respect to receiving the King's views, as in the Case of the Commendams, but he had also been increasingly uncooperative in his opposition to giving his views to the King in respect to pending litigation. On this matter his views had changed gradually from the position that the judges should not be interviewed singly, to the position that the King had no right to consult the judges for their opinion in any matter that might come before them judicially for determination.<sup>20</sup>

This brief resumé<sup>21</sup> gives the setting for the princely judgment handed down by the King in the Earl of Ormond's Case.<sup>22</sup> The curious complexion of the court that appeared to decide this case is explained by the fact that the case was decided by King James I after consulting the judges named by Hobart and some not named. Who were the personalities concerned in this case? The Ormond Butlers were an ancient and illustrious family that had settled in Ireland at least as early as the twelfth century. The house of Ormond and the Geraldine Desmonds of Ireland were interrelated, but rivals for all that. The mother of Ann Boleyn was descended from an Ormond Butler. A granddaughter of Edward I was the mother of James Butler, Second Earl of Ormond. The Butlers, like the other important nobles of the times, were a turbulent and belligerent lot. In standing up for their claimed rights, they sometimes clashed with the kings and queens under whom they held a vast extent of Ireland; but for the most part, the Butler sword was wielded in defense of

<sup>18</sup>1 Campbell, *Lives of the Chief Justices* (1849), 292 et seq., 353 et seq.

<sup>19</sup>(1616) Moore K. B. 826.

<sup>20</sup>5 Holdsworth, *Hist. of Eng. Law* (2d ed. 1937), 438 et seq.

<sup>21</sup>Other brief accounts of the events above reviewed may be found in Campbell's *Lives of the Chancellors*; Vide, Vol. 2, *Life of Lord Francis Bacon* and of Lord Ellesmere; Campbell's *Lives of the Chief Justices*, Vol. 1, Sir Edward Coke; and Foss' *Judges of England*, Vol. 6, under Coke, Francis Bacon, Montagu, Hobart, Doderidge, and Hutton. See also 5 Holdsworth, *Hist. of Eng. Law* (2d ed. 1937), 423 et seq.

<sup>22</sup>(1618) Hobart, 348. Hobart gives the time as about 15 James I.

the English kings and queens.<sup>23</sup> Thomas Butler, Tenth Earl of Ormond, was the immediate predecessor of Walter Butler, Eleventh Earl of Ormond, who is one of the parties in the case under consideration.

Earl Thomas had been a trusted servant of Queen Elizabeth and stood high in her favor. She had made him Lieutenant General and Captain of her Army in Ireland and one of her council in Ireland.<sup>24</sup> Earl Thomas was the father of two sons who predeceased him, and of a daughter Elizabeth. Earl Thomas evidently took some pains so to arrange his affairs as to keep his estate together. He married his daughter Elizabeth to her cousin Theobald, Lord Tulleophelim,<sup>25</sup> his nearest male heir. It was in connection with this marriage that the old Earl settled some of his lands on his daughter and Lord Tulleophelim.<sup>26</sup> However, Lord Tulleophelim died without issue in 1613. His death is noticed in the Acts of the Privy Council in a letter bearing the date February 15, 1614, directed to the Lord Deputy of Ireland. In this letter, it is stated that the Earl of Ormond had settled lands on Lady

<sup>23</sup>A brief genealogy of the Ormond Butlers may be found in MacCraith, *Caitheirm Thoirhealbhagh* (English translation by A. H. O'Grady), pp. 172-177, see also *Dict. of Nat'l Biography* sub nom. Butler.

<sup>24</sup>Acts of the Privy Council, 1597-1598, p. 76; 2 *Morrin, Cal. of Patent Rolls, Ireland, Eliz.* 484, 485. Indeed, he and his predecessors had held high offices in Ireland for centuries before. The reports of the Acts of the Privy Council of the time of Elizabeth and *Morrin, Calendar of the Patent Rolls, Ireland, Eliz.* abound with favorable references to Thomas Butler, Tenth Earl of Ormond, including letters of thanks from the Privy Council and the Queen for his excellent services.

<sup>25</sup>The spelling of names of persons and places in the records of the time was at least resourciful. They could be and were spelled variously. Herein the spelling most commonly used is adopted.

<sup>26</sup>One of the deeds of settlement, perhaps *the deed*, is set out in *Cal. of Patent Rolls, Ireland, James I, 1603-1619*, at page 254, art. cxxxviii, memb. 43. It bears date March 19, 1602. See also *id.* p. 10, art. xli, memb. 39; *id.* p. 16, art. xcii, memb. 40; *id.* p. 94, arts. lxxii-lxxiv, memb. 15-16 incl. and art. lxxix, memb. 18. A further settlement seems to have been made by a deed of March 23, 1604, *id.* p. 75, art. lvii, memb. 32. There is also a reference to a conveyance from Earl Thomas to Lady Elizabeth, his daughter, in *Morrin, Cal. of Patent Rolls, Ireland, Charles I*, at page 468, as being locked in a chest under several locks, in the house and custody of Richard Lawles in the city of Kilkenny. Possibly the conveyances in question will be included in the *Calendars of Ormond Deeds*, now in course of publication.

The reference herein to the *Calendar of Patent Rolls, Ireland, James I, 1603-1619*, is to a folio volume numbered to page 372, to be found in the Harvard Law Library. The volume lacks a title page. It is probably part of the *Cal. of Patent Rolls, Ireland, James I*, listed in catalogs under a publication date of 1886. There is reason to believe that the publication of this work was begun long before 1886, but may have been completed in 1886. It is probably the work referred to by Mr. James *Morrin* in the preface (p. xxvii) to his *Vol. I, Cal. of Patent Rolls, Ireland, Henry VIII-Eliz.* Citations of this work in this essay will refer to the volume here described.

Elizabeth at the request of Queen Elizabeth, and directed the Lord Deputy to require the feoffees to deliver the conveyances up for safe keeping and to send copies to Lord Sheffield.<sup>27</sup> The son of the Earl of Thomond sought the widow's hand, but King James insisted on her marriage to Richard Preston, a Scotch gentleman of the bedchamber, who had been with the King from childhood, and who had accompanied him to England.<sup>28</sup> He seems to have been a person of no consequence, perhaps one of the crowd of hungry courtiers of James' Court mentioned by Gardiner.<sup>29</sup> James I had dubbed Mr. Preston Lord Dingwell about 1607, and created him Earl of Desmond about 1619.<sup>30</sup> This is the Earl of Desmond mentioned in the Earl of Ormond's Case, and is to be distinguished from the Geraldine Earls of Desmond.<sup>31</sup>

This Richard Preston was sent to Ireland by King James with a royal letter recommending him to Earl Thomas Butler as a son-in-law—a royal recommendation amounting to a command.<sup>32</sup> The marriage was celebrated some time in 1614, probably before the death of Thomas Butler, Tenth Earl of Ormond, which happened on November 22, 1614.<sup>33</sup> On November 24, 1614, King

<sup>27</sup>Acts of Privy Council, 1613-1614, p. 345. This letter from the King is also noted in the Cal. of Patent Rolls, Ireland, James I, 1603-1619, p. 254, art. cxxxvii, memb. 43. Its date is there indicated as February 15, 1615, but that would seem to be an error. The entry appears in the Pat. Rolls of the 11th year of James I. It is in this connection that the deed of settlement is set out as previously noted, *supra* note 26.

<sup>28</sup>1 Bagwell, *Ireland under the Stuarts*, (1909), 139, 226.

<sup>29</sup>3 Gardiner, *Hist. of England*, 1603-1642, 74.

<sup>30</sup>1 Bagwell, *Ireland under the Stuarts*, (1909), 139-141. His title as Lord Dingwell was confirmed by the Scotch Parliament in 1609, Scotland, 4 Acts of Parl. ch. 44, p. 452.

<sup>31</sup>The Geraldine Earl of Desmond had rebelled against Queen Elizabeth and had been attainted. James I intended that Richard Preston, Lord Dingwell, should have some of the Irish estates formerly held by the Geraldine Earls of Desmond as appears by a communication in Morrin, Cal. of Patent Rolls, Ireland, Charles I, 93, superseded by another communication, *id.*, p. 300, purporting to put in execution the wishes of James I, expressed on December 10th in the 18th year of his reign. In 1628, these grants are again referred to, *id.*, p. 343. Query: were they ever carried into execution in the lifetime of the new Earl of Desmond, Richard Preston? In a communication dated August 25, 1629, Morrin, Cal. of Patent Rolls, Ireland, Charles I, 496, the death intestate of the Earl of Desmond is referred to as having occurred "in October last." According to 1 Burghclere's, *Life of James, First Duke of Ormond* (1912), 36, Richard Preston, Lord Dingwell, Earl of Desmond, was drowned October 28, 1628 in a shipwreck while he was bringing a quantity of his father-in-law's plate to England. His wife, Lady Elizabeth, had died in England, three weeks before.

<sup>32</sup>1 Burghclere, *Life of James, First Duke of Ormond* (1912), 24.

<sup>33</sup>Dict. of Nat'l Biography, sub nom. Thomas Butler, Tenth Earl of Ormond. It is unfortunate that the reports of the Acts of the Privy Council immediately preceding this marriage are incomplete. A fire at Whitehall in January, 1618 destroyed most of the records covering the period from

James granted Lord Dingwell: "the privileges of an English subject" with "freedom from the yoke of Scotch and Irish slavery."<sup>34</sup> A contemporary of Lady Elizabeth described her as "a courtier even as it were by birth" with "a sharp conceit and knavish wit." It seems also, that on achieving widowhood she exhibited immediate anxiety for the preservation of assurances giving her any property rights.<sup>35</sup> If these accounts are credible and not merely catty, it would seem that the King had united kindred minds in marriage.

After the death of Lord Tulleophelim, a Captain Thomas Butler, referred to as a supposed brother of Lord Tulleophelim, under some real or pretended claim of right, seized certain lands which Lady Elizabeth claimed from her father. In a letter to the Lord Deputy of Ireland, he is directed to restore Lady Elizabeth to possession of these lands until she should be evicted by due course of law.<sup>36</sup> The basis of this quarrel seems to have been that on the death of Lord Tulleophelim without heirs, some of the lands settled on him and his heirs in male tail reverted to the King; the King promised to grant these lands to Lady Elizabeth if she married with the King's consent, and that on her marriage to Lord Dingwell, it was found that through alleged error, some of these lands had been granted to Sir Charles Willmot, who had conveyed them to Captain Thomas Butler.<sup>37</sup> There are also references indicating conveyances from Lord Tulleophelim to Captain Thomas Butler.<sup>38</sup> Evidently Thomas Butler, Tenth Earl of Ormond, also claimed reversionary rights in these lands or some of them. On his death, Walter Butler of Kilcash, eldest son of John Butler, younger brother of the deceased earl, succeeded to these interests as heir and thus was drawn into this quarrel. Lord Dingwell came into the litigation as husband of Lady Elizabeth.

One is compelled to piece together many scattered references here, and it is impossible to say so with certainty, but it seems that

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January 1, 1602 to April 30, 1613. See Preface to Acts of Privy Council, 1613-1614, by Mr. H. C. Maxwell Lyte.

<sup>34</sup>Cal. of Patent Rolls, Ireland, James I, 1603-1619, p. 274, art. xliii, memb. 47. Possibly, the date is significant. Several years before that, an act had been passed repealing an Act of Philip and Mary, 3 & 4 Philip and Mary, ch. 15, making it a felony for natives of Ireland to intermarry with the Scots, Stats. of Ireland, 11, 12 & 13 James I, ch. 6.

<sup>35</sup>1 Burghclere, Life of James, First Duke of Ormond (1912), 20.

<sup>36</sup>Acts of Privy Council, 1613-1614, 462.

<sup>37</sup>Cal. of Patent Rolls, Ireland, James I, 1603-1619, p. 314, art. lxxxvi, memb. 46; id., p. 366, art. xxxvii, memb. 18.

<sup>38</sup>E.g. see, Morrin, Cal. of Patent Rolls, Ireland, Charles I, 213.

this was the beginning of the Earl of Ormond's Case.<sup>39</sup> Whether the Earl of Ormond's Case had its origin in the disseisin of Lady Elizabeth by Captain Thomas Butler or in a separate dispute between that lady and the new Earl of Ormond, the dispute between the latter parties was at issue in Ireland in 1615. In a letter to the Lord Deputy and Council of Ireland, those officials are directed to put Lord and Lady Dingwell in possession of certain of the lands. The Privy Council also directed that an action be required to be brought in Ireland to try the issue, and the Earl of Ormond was to be ordered to bring in all conveyances touching the matter. The matter appears to have been before the Privy Council on petition of both parties.<sup>40</sup>

By a letter to the Lords Justices of Ireland, under date of April 8, 1616,<sup>41</sup> it appears that the matter was at issue in the Irish courts, in an action of *ejectione firmæ*. The Judges are told that "for as much as the Lord Dingwell and the Lady Elizabeth, his wife, by reason of their attendance here upon his Majestie for causes much importinge their estate, could not conveniently appeare, or pleade" in the time limited therefor, they are to give the defendants further time. It was about this time that the King was telling Coke and the English judges that he never interfered with the courts in private litigation. The King not only meddled with the courts in this matter; but he was not even a disinterested intermeddler. We find that before the date of this letter to the judges, he had sent another under date of January 28, 1616,<sup>42</sup> to the Irish judges and council, directing them to examine into the title of the late Earl of Ormond to the County Palatine of Tipperary, on the claim that this was now in the dis-

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<sup>39</sup>It is also possible that there were a number of connected quarrels and suits. There is no doubt that Walter Butler was a party to some litigation to which Captain Thomas Butler was a party. The quarrel between Captain Thomas Butler and the new earl continued, to permit Charles I and his Privy Council to intervene in it. It was referred to certain judges for decision. *Morrin, Cal. of Patent Rolls, Ireland, Charles I, 194*, under date of March 29, 1627; *id.*, p. 281, under date of October 17, 1627; *id.*, p. 378, under date of August 4, 1628; *id.*, p. 398, under date of October 21, 1628; *id.*, p. 651, under dates of April 18, May 7, and May 14, 1632. The Acts of the Privy Council also make frequent reference to this dispute, beginning in the year 1614, and continuing through all the published volumes to August 31, 1627, which is as far as the published Privy Council Reports of these times go at present. In part, at least, the quarrel with Captain Thomas Butler was separate from the Earl of Ormond's case, and is another story.

<sup>40</sup>Acts of Privy Council, 1615-1616, p. 222.

<sup>41</sup>Acts of Privy Council, 1615-1616, p. 474.

<sup>42</sup>Acts of Privy Council, 1615-1616, p. 382.

position of the King.<sup>43</sup> Bagwell<sup>44</sup> says that at this time, James had conceived the idea of dividing up at least some of the late Earl of Ormond's lands among his favorites, of whom Lord Dingwell seems to have been one. No doubt he had this in mind when he insisted on the marriage of Lady Elizabeth Butler to Lord Dingwell.

A letter to the Lord Deputy of Ireland under date of June 26, 1617<sup>45</sup> states "that his Majestie had taken upon him the determination of those differences betwixt the new Erle of Ormond and Lady Dingwell . . ." concerning the estate of her late husband and "that his Majestie by reason of his other waighty affairs hath not yet made any finall determinacion of those controversies, but hath thought meete to take a new submission of the partyes for a longer tyme."<sup>46</sup> Was one of the "waighty affairs" of the King that kept him from making a "finall determinacion," the cashiering of Coke?

On June 10, 1618,<sup>47</sup> the matter was still undecided, and a protection granted to Lord Dingwell against his creditors was renewed for six months longer. The records indicate<sup>48</sup> that the Earl of Ormond and Lord and Lady Dingwell were called before the Lords Commissioners in the Star Chamber by the special order and direction of the King. At this time the King had made his award in the case<sup>49</sup> "upon a free submission<sup>50</sup> first made of all the parties

<sup>43</sup>There is also a note of an *Inspecimus* of an Act of the Irish parliament passed in 33 Henry VIII, confirming to James Butler and his heirs male, the title and dignity of Earl of Ormond. This record is dated April 10, 1617. Cal. of Patent Rolls, Ireland, James I, 1603-1619, p. 326, art. lxxii, memb. 7. One can but guess at its significance.

<sup>44</sup>Bagwell, Ireland under the Stuarts (1909), 139-141.

<sup>45</sup>Acts of the Privy Council, 1616-1617, p. 273.

<sup>46</sup>It is interesting to note that though James I took several years to decide this one dispute, he appointed additional judges to the Courts of King's Bench and Common Pleas because he claimed these courts were behind in their dockets. See preface to 4 Coke's Reports; 6 Foss, Judges of England (1857), 9.

<sup>47</sup>Acts of Privy Council, 1618-1619, p. 164.

<sup>48</sup>Acts of Privy Council, 1618-1619, p. 301.

<sup>49</sup>The date of the award is not given. It must have been made before this conference with the parties which is stated to have been November 11, 1618.

<sup>50</sup>We are not told how the King came to take the case over. In references to the King's award, it is usually stated that it was "upon the free submission" of the parties. As to Lord Dingwell, we may believe the recital to be true. As to the Earl of Ormond, one may entertain doubt. However, the Earl may have trusted more to royal integrity than the character of James I warranted. Or again, the Earl may have remembered that Queen Elizabeth had intervened in several disputes between Thomas Butler, Earl of Ormond and others, particularly in a dispute between that Earl of Ormond and the late Geraldine Earl of Desmond. But Queen Elizabeth was a ruler of a different stripe from James I. Queen Elizabeth seems to have referred those issues to competent persons for decisions

unto his princely judgment" after mature deliberation and "after consultations" with his judges and learned counsel as well as counsel of the parties.

The parties were required to declare that they would obey and perform the award. Lord and Lady Dingwell did so enthusiastically. Not so the Earl of Ormond. He claimed to have received hard measure by reason of error and misinformation. But the Lords Commissioners, of whom Sir Henry Montague, Coke's successor, was one, declined to revise the judgment the King had "with soe greate wisdom, moderation, and justice" settled. The Earl was told he had better submit—or else; that if he continued "to murmur and repine thereat" the King would no doubt see that he got his deserts. Being pressed further to promise to submit to the judgment, the Earl refused to make a direct answer.

The King's displeasure was not slow in coming.<sup>51</sup> A communication of April 18, 1619,<sup>52</sup> states that the Earl "is by his Majesty's speciall comaundement to remayne here for some tyme." On June 11, 1619<sup>53</sup> a warrant was issued to the warden of Fleete prison to receive into his charge, and safely keep, the Earl of Ormond. In the meantime on December 6, 1618<sup>54</sup> the protection or moratorium in behalf of Lord Dingwell was renewed until Michaelmas next, to enable him to go to Ireland and raise funds out of the lands awarded him.

The Earl of Ormond remaining obdurate, the King levied an extent on the Earl's lands in Ireland for the benefit of Lord Dingwell, now the Earl of Desmond.<sup>55</sup> The Earl of Ormond's son, Viscount Thurles, had been drowned in a shipwreck,<sup>56</sup> and the Earl's grandson had been ordered brought to England to be reared to the King's liking. One may infer the degree of pressure put on the Earl of Ormond from the fact that the Earl of Desmond

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and allowed them to decide them. See 1 Morrin Cal. of Patent Rolls, Ireland, Henry VIII-Eliz., p. 485 et seq.; Acts of the Privy Council, 1558-1570, pp. 69, 215, 218, 219, 220, 235, 269, 295, 296. It may be noted that in this last case also, the parties were required to give bonds to abide the decision in the case.

<sup>51</sup>Each party had given bond in the penal sum of 100,000 pounds to stand to the King's award. An extent levied to collect the penalty of the Earl of Ormond's bond left the latter without means.

<sup>52</sup>Acts of the Privy Council, 1618-1619, p. 420.

<sup>53</sup>Acts of the Privy Council, 1618-1619, p. 467.

<sup>54</sup>Acts of the Privy Council, 1618-1619, p. 328.

<sup>55</sup>Acts of Privy Council, 1621-1623, pp. 159-160, 361; Morrin, Cal. of Patent Rolls, Ireland, Charles I, pp. 10, 12, 97, 98 indicates that Lord and Lady Dingwell assigned their action on the Earl of Ormond's bond to King James I, who then levied the extent on it for the benefit of Lord and Lady Dingwell.

<sup>56</sup>Acts of Privy Council, 1621-1623, p. 361.

(Dingwell) was ordered to pay 200 pounds per annum for the maintenance of the Earl of Ormond's grandson out of the funds the Earl of Desmond received through the King's extent on the Ormond estates. So reduced was the Earl of Ormond, that his young grandson was living with him in Fleete prison.<sup>57</sup> This was thought no fit place for Lord Thurles, who was later to succeed the Earl of Ormond and become the first Duke of Ormond. The Archbishop of Canterbury was directed to see to the proper education and upbringing of young Lord Thurles, and we find him later<sup>58</sup> committed to the care of the Provost of Eaton who is directed "to carry an eye over him." The King and the Earl of Desmond were also graciously moved to allow the Viscountess Thurles, mother of young Lord Thurles, something to live on.<sup>59</sup> How much of these allowances either received is questionable.

In January, 1625, we find the Earl of Ormond still a prisoner in the Fleete. He had held out against King James' princely judgment for some six years of privation and imprisonment. He had yielded in the last year of the reign of James I. While James had the satisfaction of sending a letter to Ireland announcing the Earl of Ormond's submission and directing the Earl of Desmond to come to England "that we may see all things really performed on both sides . . . according to our original and most gracious intention,"<sup>60</sup> yet King James did not live to see it. Indeed, his successor had to send another letter of the same general tenor to Ireland.<sup>61</sup> The Earl of Ormond was now temporarily released from prison until the Earl of Desmond should arrive, when he was again to be imprisoned if he did not perform the award.<sup>62</sup> The extent on the Earl's estates was now mitigated by a direction that the rents and profits should be sequestered in the hands of indifferent persons until the Earl should perform the award, and in the meantime, the Earl was to receive 1000 pounds a year.<sup>63</sup>

The records seem to indicate that the Earl of Desmond and his Lady had arrived in England for the final settlement by February 1625,<sup>64</sup> for they then entered a protest against the mitigation of the extent which was heard in the presence of both parties.

<sup>57</sup>Acts of Privy Council, 1621-1623, p. 160.

<sup>58</sup>Acts of Privy Council, 1621-1623, p. 204, under date of April 29, 1622.

<sup>59</sup>Acts of Privy Council, 1621-1623, p. 361.

<sup>60</sup>Morrin, Cal. of Patent Rolls, Ireland, Charles I, p. 10. The given date of this letter is March 19, 1624, but the year must have been 1625. See Acts of Privy Council, 1623-1625, p. 420.

<sup>61</sup>Morrin, Cal. of Patent Rolls, Ireland, Charles I, p. 12.

<sup>62</sup>Acts of Privy Council, 1623-1625, p. 420.

<sup>63</sup>Morrin, Cal. of Patent Rolls, Ireland, Charles I, pp. 10, 12. Id. p. 140.

<sup>64</sup>Morrin, Cal. of Patent Rolls, Ireland, Charles I, pp. 97, 98.

The Earl of Desmond's objection to the mitigation of the extent may not have been due to pure churlishness. Notwithstanding that he married an heiress under royal patronage, notwithstanding the benefit of the royal extent, and notwithstanding the Irish grants to him by King James, and Charles I, the Earl of Desmond's capacity for creating debts seems always to have exceeded his capacity to pay. Not only did he repeatedly require King James' royal protection against creditors as has been noted, but after King James' death, Charles I had likewise to intervene in his behalf. Thus, under date of October 29, 1626,<sup>65</sup> we are informed that the Earl of Desmond had been sent for from Ireland "for the perfecting of the award made by King James of blessed memory" and that upon his coming, his creditors had again or still prosecuted him for debts he claimed were not his own, but for which he stood as surety, and a protection against these creditors was granted for six months, which was renewed for another six months.<sup>66</sup> But even this did not suffice. The records indicate that the Earl of Desmond had mortgaged vast Irish estates to the Earl of Middlesex and a Richard Croshawe of London.<sup>67</sup>

The performance of the princely judgment did not proceed with despatch. As of January 25, 1626, we are informed that while the Earl of Desmond is present in England for the final performance, "some new question hath happened here between the said Earls, the examination whereof will require a further time . . . for a final conclusion of the great controversy depending before us touching their estates."<sup>68</sup> While the Earl of Ormond had promised upon his honor and under his hand and seal, to perform the award, apparently he was not as submissive as he had appeared to be, and was finding reason or pretext for delaying its final conclusion. Under date of September 23, 1626, directions were sent to the Lord Deputy in Ireland for the settling of lands in accordance with the award to the Lady Elizabeth and the heirs of her body without other limitation or restraint. The assurances from the Earl of Ormond had not yet been delivered. It is stated that the Earl of Desmond and his attorney are to draw up the

<sup>65</sup>Acts of the Privy Council, June 1626-December 1626, p. 339. Query as to the date.

<sup>66</sup>Acts of the Privy Council, January 1627-August 1627, p. 259.

<sup>67</sup>See *Morrin, Cal. of Patent Rolls, Ireland, Charles I*, pp. 165, 347 et seq.; *id.*, 386 (referring to the mortgage as having been made in December 1620); *id.*, 405 (new mortgage by way of 21 year lease); *id.*, 461 (where protection against this mortgage is given by Charles I after the death of the Earl of Desmond).

<sup>68</sup>*Morrin, Cal. of Patent Rolls, Ireland, Charles I*, p. 144.

necessary assurances, and that conveyances both ways were to be completed by December first next.<sup>69</sup>

On March 29, 1627, a letter from King Charles states that "the conveyances for performing our late dear father's award are in hand, and that the not perfecting thereof hitherto hath not proceeded from any inconformity in him" (the Earl of Ormond).<sup>70</sup> On March 11, 1628, these conveyances were still "not yet perfected."<sup>71</sup> A conveyance from the Earl of Ormond and three others, probably the Earl's feoffees, to the Earl of Desmond and Lady Elizabeth his wife pursuant to the award by King James appears bearing date March 7, 1620.<sup>72</sup> That the conveyance was not delivered or perfected at that time seems certain. Indeed, it would seem doubtful whether the award was performed in the lifetime of the Earl of Desmond or his lady.<sup>73</sup> The Earl of Desmond died intestate in October 1628. In a communication dated August 25, 1629, the Earl of Desmond's death is referred to as having occurred "in October last."<sup>74</sup> The communication last mentioned states that the Earl "was indebted in great sums" naming some of the creditors.<sup>75</sup>

With the death of the Earl of Desmond and his wife, the tide of events turned in favor of the Earl of Ormond. The Earl of Desmond and Lady Elizabeth left as their sole heir a daughter, Lady Elizabeth Preston, a minor.<sup>76</sup> The Earl of Ormond could move fast when it was to his interest to do so. Under date of August 26, 1629, articles of agreement were entered into between the Earl of Ormond, James, his grandson and heir, Lady Elizabeth Preston, the Earl of Holland,<sup>77</sup> and others, proposing the marriage of Lady Elizabeth Preston and James Butler, and the settlement of the Ormond and Desmond estates to the satisfaction of all concerned.<sup>78</sup> On September 3, 1629, the King gave his royal

<sup>69</sup>Morrin, Cal. of Patent Rolls, Ireland, Charles I, p. 149-151.

<sup>70</sup>Morrin, Cal. of Patent Rolls, Ireland, Charles I, p. 194.

<sup>71</sup>Morrin, Cal. of Patent Rolls, Ireland, Charles I, p. 331.

<sup>72</sup>Morrin, Cal. of Patent Rolls, Ireland, Charles I, p. 642.

<sup>73</sup>The conveyance may have been thus dated and enrolled and note of livery of seisin made in order to have the assurance ante date mortgages given by the Earl of Desmond.

<sup>74</sup>Morrin, Cal. of Patent Rolls, Ireland, Charles I, p. 496.

<sup>75</sup>See also Morrin, Cal. of Patent Rolls, Ireland, Charles I, p. 435.

<sup>76</sup>Morrin, Cal. of Patent Rolls, Ireland, Charles I, pp. 435, 467 (where it is stated that "the uncertainty of the age of Lady Elizabeth Preston" had prevented finding an office to entitle the King to the wardship of her body and lands, and the Lord Deputy of Ireland is told to find out the facts so that the King may not suffer prejudice. She was found to be a minor).

<sup>77</sup>The wardship of Lady Elizabeth, it seems, had been granted to the Earl of Holland. His cooperation in and consent to the marriage is said to have been purchased for 15,000 pounds.

<sup>78</sup>Morrin, Cal. of Patent Rolls, Ireland, Charles I, p. 648.

assent to the marriage, granted the wardship of Lady Elizabeth Preston to the Earl of Ormond, and discharged the Earl of the 100,000 pound bond given by him to secure his performance of the King James award and the extent levied thereon.<sup>79</sup> The marriage of James Butler and Elizabeth Preston was celebrated at Christmas time the same year, and the estates of the House of Ormond were reunited, apparently with something added, despite King James' princely judgment.<sup>80</sup>

Having traced the history of the case as revealed in the published records of the Privy Council and Irish Patent Rolls, it will be interesting to turn back and observe the judicial process of the case. Justice Hobart states the issues,<sup>81</sup> and that the case had been referred by James I to the two Chief Justices, Montagu and himself, and to Justice Doderidge, who reported back to the King as set out by Hobart. Montague reported in favor of Lady Elizabeth on the controlling point. Hobart and Doderidge reported against Lady Elizabeth on this point, though they expressed the view that since two (out of three) of the feoffees to the new uses took with notice of the former limitations, they should be liable

<sup>79</sup>Morrin, *Cal. of Patent Rolls, Ireland, Charles I*, p. 499.

<sup>80</sup>Morrin, *Cal. of Patent Rolls, Ireland, Charles I*, p. 599, *id.* 649.

<sup>81</sup>The Earl of Ormond's Case, (1618) Hobart 348. The deed of March 19, 1602 set out in the *Cal. of Patent Rolls, Ireland, James I, 1603-1619*, p. 254, art. cxxxviii, memb. 43, names Thomas, Earl of Ormond, John Horsfall, Patrick Sentleger, and Richard Comerford Fitz-Thomas as parties of the one part; Sir Nicholas Walshe, John Everard, Robert Roth, Henrie Shee, John Fitz-Lewes, and Richard Comerford Fitz-Richard as parties of the other part. It recites the recovery as having been had in Michaelmas term, of 41st Eliz. to the use of the Earl's will. The Earl and his recoverors then convey lands described to Sir Nicholas Walshe et al.: "To hold to the use of the earl for life; remainder to the use of lady Elizabeth Butler his daughter and the heirs of her body; remainder to the heirs male of his body; remainder to Theobald Butler Fitz-Edmond his nephew; to sir Walter Butler Fitz-John his nephew; to Piers Butler Fitz-Walter his nephew; to his lordship's brothers, Edward and Piers Butler Fitz-James, in tail male successively; remainder to the heirs male of the body of his deceased uncle sir Richard Butler, knt, late viscount Mountgarret; remainder to the heirs male of the body of Edmond Butler Fitz-Richard, late of Powleston, deceased; remainder to the heirs male of the body of Walter Butler, ancestor to the said Edm. of Powleston; to those of sir James Butler, late of Lismalin, knt, of Edm. Butler, ancestor to the said sir James, and second son to Edmund Butler sometime earl of Carrick; remainder to James. lord Dunboyne, and the heirs male of the body of his first ancestor Thomas Butler; remainder to Thomas, lord Cahir, and the heirs male of the body of his ancestor James Butler otherwise James Galdy; remainder to the right heirs of Piers Butler Fitz-Thomas of Graige, esq. deceased; provided that, if the earl's said daughter should not marry his said nephew Theobald Butler Fitz-Edmond, before the last day of June next it shall be lawful for the earl to alter, determine, annul, change, abridge, or enlarge any or all of the said uses, and to limit the premises to any person or persons in fee, life or years, or otherwise, &c."

to Lady Elizabeth Butler, and that since the new limitations were for the Earl of Ormond's benefit, this recompense might well be made good out of the Earl's estate. We are told this report was not to the King's liking, and so he canvassed the opinion of other judges, of whom Hutton was one. "But" as Hobart tells us, "the Earl of Ormond knew not of it, neither were his learned counsel heard to speak before them, as they did before the first three."

Justice Hobart had succeeded Coke as Chief Justice of the Common Pleas in November of 1613. Justice Doderidge had been named a puisne judge of the King's Bench in November of 1612. Sir Henry Montagu had succeeded Coke as Chief Justice of the King's Bench in November 1616 when Coke was dismissed. The Lord Chancellor's speech at Sir Henry's induction into that office has been noticed.<sup>82</sup> Had Sir Henry taken the lesson to heart? The Earl of Ormond's case must have been referred to these judges after the appointment of Chief Justice Montagu. It may not have been so referred until the spring of 1617, when Sir Richard Hutton was appointed puisne judge of the Common Pleas. The canvassing of Hutton's opinion, according to Hobart, followed the divided report of the three judges first named. Lord Campbell says of Sir Henry Montagu<sup>83</sup> that he had a very slender stock of law, and that he often expressed the wish that "the time might come when he should hear no more of executory devises, or recoveries with double voucher." According to this biographer, he relied much on Mr. Justice Doderidge. Apparently not in this case, however. As for Mr. Justice Doderidge, Bacon had reported to the King "that he had found Judge Doderidge very ready to give opinions in secret." And there are occasions when he had shown himself willing to accommodate his opinions to the royal wishes. On the other hand, he seems to be regarded as one of the abler and better judges of the time.<sup>84</sup> Mr. Foss<sup>85</sup> also speaks well of Chief Justice Hobart and Justice Hutton. Mr. Justice Hutton, according to Hobart, gave his opinion in this case on an *ex parte* statement of the case and without benefit of argument by counsel. Perhaps that explains his opinion, assuming (as to which there is no evidence) that he agreed with Chief Justice Montague. Other judges consulted remain unnamed.

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<sup>82</sup>Ante, note 19 and text *passim*.

<sup>83</sup>1 Campbell, *Lives of the Chief Justices* (1849), 356.

<sup>84</sup>6 Foss, *Judges of England* (1857), 306.

<sup>85</sup>6 Foss, *Judges of England* (1857), 328, 332.

Thus we have here a princely judgment arrived at by a judicial process that included most of the practices against which Coke had contended. The King assumed to decide the case after it was at issue in the courts. He decided it in his own person after taking "auricular opinions," some of them from judges on an *ex parte* statement of the case in the absence of the parties or their counsel. In coming to a decision, he sought the advice of cooperative judges, one of them successor to a judge cashiered because of his independence. And though the Earl of Ormond claimed there was error,<sup>83</sup> it was beyond appeal or remedy. Coke had well said, "if the King give any judgment, what remedy can the party have?"<sup>87</sup> The Earl of Ormond pondered this question for eight years in Fleete prison while his adversary, the creditor-hounded, heiress-hunting gentleman of the royal judge's bed-chamber received the benefit of a royal extent levied on the Earl's estate. But a subsequent marriage, reported to have been a love match, set this princely judgment at naught.

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<sup>86</sup>Acts of Privy Council, 1618-1619, p. 301.

<sup>87</sup>Prohibitions del Roy, (1608) 12 Coke 63, 64. Indeed, Coke's words were prophetic. When the Earl of Ormond claimed he had received hard measure and claimed error, "Their Lordships tolde him that they were not judges of his Majesty's proceedinges, nor might now admitt any dispute of that which his Majesty had . . . ordered and settled." Acts of Privy Council, 1618-1619, p. 302.