

## **Securing the Protestant interest: the origins and purpose of the penal laws of 1695**

The origin and the purpose of the Irish Penal Laws have always been subjects of contention. These laws have often been viewed as a ‘rag-bag’ of legislation, lacking in government policy, without precedent or forethought, motivated by rapacity, unfavoured in England and yet tolerated in return for concessions by an Irish parliament greedy for Catholic land and wealth.<sup>1</sup> However, in the context of the first two Irish penal laws of 1695, and most specifically the disarming act, this generality does not hold good. It is the aim of this article to show that the two penal laws of 1695, for disarming Catholics and prohibiting foreign education, were the result of a definite policy which existed in Ireland from the time of the Williamite war. This policy was built upon a previous tradition of English statutes and Irish proclamations. The pressure for this policy came not only from Irish Protestants, but also from English ministers and from the crown. And the prime motive was security of the Protestant interest.

Victory at Limerick in October 1691 did not end the threat to the Williamite Protestant interest in Ireland. Fear of Catholic Europe remained constant as long as William III was at war with France, a fear that was heightened by the activities of privateers and rapparees.<sup>2</sup> In the search for greater security, a policy developed for disarming Irish Catholics, which was actively supported by William III and his executive and legislature in England, was implemented by the executive in Ireland,

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<sup>1</sup> S. J. Connolly, *Religion, law and power: the making of Protestant Ireland 1660-1760* (Oxford, 1992), pp 263-313; Maureen Wall, *Catholic Ireland in the eighteenth century; collected essays*, ed. Gerard O’Brien (Dublin, 1989), pp 1-60; Lecky, *Ire.*, i, 140-41; Froude, *Ire.*, i, 219-31; R. H. Murray, *Revolutionary Ireland and its settlement* (London, 1911), pp 348-9; R. E. Burns, ‘The Irish penal code and some of its historians’, *Review of politics*, xxi (1959), pp 276-99; idem, ‘The Irish popery laws: A study of eighteenth century legislation and behaviour’, *Review of politics*, xxiv (1962), pp 485-508. For a discussion of the differing views of historians on the penal laws see Thomas Bartlett, *The fall and rise of the Irish nation: the Catholic question 1690-1830* (Dublin, 1992), pp 18-20.

<sup>2</sup> J. F. Boshier, ‘The Franco-Catholic danger, 1660-1715’, *History*, lxxix (1994), pp 5-30.

and encouraged and promoted by the Irish Protestant interest. Having its origins in Restoration England, this policy was adopted in Ireland as a response to fears for the security of the Protestant interest, and was continually adhered to throughout the 1690s, eventually resulting in the enactment of legislation in 1695.

In August 1695 in his opening speech to the Irish Parliament, Lord Deputy Henry Capell informed the assembled Lords and Commons that the English lords justices had retransmitted all the bills sent to them:

Some of these bills have more effectually provided for your future security than hath ever hitherto been done; and, in my opinion, the want of such laws has been one the great causes of your past miseries; and it will be your fault, as well as misfortune, if you neglect to lay hold on the opportunity, now put into your hands....of making such a lasting settlement, that it may never more be in the power of your enemies to bring the like calamities again upon you.<sup>3</sup>

The core of this 1695 security legislation comprised two penal laws, one for disarming and dismounting Catholics, the other for prohibiting foreign education. To understand the development and implementation of these first two penal laws, the prevailing attitude among Irish Protestants towards Catholics from the outset of the Williamite War must be explored. The position of the government in England and Ireland was also of great significance, as the penal laws could not have been implemented without the concurrence of William III, Whitehall and Dublin Castle. Yet, in *The fall and rise of the Irish nation: the Catholic question 1690-1830*, Thomas Bartlett argued that there was a complete absence of government policy in relation to penal legislation;<sup>4</sup> while in *Religion, law and power*, Sean Connolly suggested that during the 1690s the government only gave in to Irish Protestants' desire for penal legislation because of the increased status of the Irish Parliament.<sup>5</sup> Earlier historians, up to and including J. C. Beckett, have argued that the Williamite government actually followed a lenient policy towards Catholics in the early 1690s.<sup>6</sup> These arguments do not withstand

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<sup>3</sup> *Commons' jn. Ire.*, ii, 644.

<sup>4</sup> Bartlett, *The fall and rise of the Irish nation*, p. 20.

<sup>5</sup> Connolly, *Religion, law and power*, p. 267.

<sup>6</sup> See J. I. McGuire, 'Government attitudes to religious non-conformity in Ireland 1660-1719', in C. E. J. Caldicott, Hugh Gough and J-P. Pittion (eds), *The Huguenots and Ireland: anatomy of an emigration*

detailed examination.

## I

While a full body of penal legislation existed in England, dating back to the reign of Elizabeth, the Irish experience was very different. Apart from the 1650s, when Ireland fell directly under the scope of the laws of the English parliament, there existed no clear-cut law penalizing Irish Catholics.<sup>7</sup> In England the penal code covered vast areas relating to Catholic worship, organisation, and personal rights. The main impetus for the most repressive acts stemmed from fears for state security.<sup>8</sup> The 1606 Act ‘for the better discovering and repressing of popish recusants’ made specific reference in the preamble to the Gunpowder Plot. The same parliament passed a further act ‘to prevent and avoid dangers which grow by popish recusants’, imposing the fullest range of disabilities on Catholics within the entire penal code.<sup>9</sup> Among the many provisions of this law, it was enacted that the arms and munitions of English Catholics were to be confiscated, and their children were not to be sent overseas if the intention was to ‘prevent their good education in England’.<sup>10</sup> The clause on overseas travel was more clearly defined by a law of 1628, restraining the ‘passing or sending of any to be popishly-bred beyond the seas’.<sup>11</sup> The clause for disarming Catholics was superseded in 1689 by an act of a Williamite English parliament ‘for the better securing the Government by the disarming papists and reputed papists’. This more extensive act included provision for the confiscation and appropriation to the crown’s use of all arms belonging to Catholics, and any horses worth more than five pounds.<sup>12</sup> These acts were to play an important role in the formulation of the Irish penal laws of

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(Dublin, 1987), pp 267-71; Beckett, *Mod. Ire.*, pp 151-2; Froude, *Ire.*, i, pp 219-31; Lecky, *Ire.*, i, pp 140-41; J. G. Simms, ‘Case of Ireland stated’, in Brian Farrell (ed.), *The Irish parliamentary tradition* (Dublin, 1973), p. 131.

<sup>7</sup> Connolly, *Religion, law and power*, p. 17.

<sup>8</sup> John Miller, *Popery and politics in England 1660-1688* (Cambridge, 1973), pp 52-6.

<sup>9</sup> *Stat. at large* (London, 1763), vii, 162-74; Miller, *Popery and politics*, p. 55.

<sup>10</sup> *Stat. at large*, vii, 162-74.

<sup>11</sup> *Ibid.*, 321.

<sup>12</sup> *Stat. at large*, ix, 15-18.

1695.

During the Restoration period in England fitful penal repression remained the answer to political and security crises.<sup>13</sup> The 1673 Test Act was a reaction to the perceived threat to Protestantism encapsulated in Charles II's Declaration of Indulgence, and the Duke of York's conversion to Catholicism. The 1678 Test Act was similarly a reaction to the 'popish plot', and the dangers of a Catholic succession.<sup>14</sup> Such laws were part of the deep-rooted anti-Catholic tradition of Restoration England, originating in the reign of Queen Mary Tudor, and exacerbated by fears of Louis XIV's expansionism, the Duke of York's Catholicism, Charles's apparent leniency towards Catholics, and at times fear of the activities of Irish Catholics.<sup>15</sup> Catholics in Ireland did not escape this anti-papist hysteria. In general, the Irish government tended to follow the English lead in taking repressive action.<sup>16</sup> In November 1673 the Irish lord lieutenant, Essex, issued a proclamation for disarming papists, at a time when fear of popery peaked in England.<sup>17</sup> In November 1678 a disarming proclamation was issued in Ireland due to an alleged plot against the king. This proclamation appeared amidst a series of similar proclamations issued in England during October-November 1678, and January 1679,<sup>18</sup> forming part of the reaction to the revelations of the 'popish plot', and once again dragging Ireland into an 'essentially English crisis of political and religious passions'.<sup>19</sup> Charles II's leniency towards Catholics in Ireland ceased in 1673 due to pressure from the English parliament. For the same reasons, sporadic repression remained the norm until the reign of James II.<sup>20</sup>

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<sup>13</sup> Miller, *Popery and politics*, p. 56; John Miller, *Charles II* (London, 1991), pp 76-7.

<sup>14</sup> Miller, *Popery and politics*, pp 90, 93, 121, 125, 163; Miller, *Charles II*, pp 175, 178, 191, 199, 203; Edward Norman, *Roman Catholicism in England*, (Oxford, 1986), p. 38.

<sup>15</sup> Miller, *Popery and politics*, pp 67-93, 106.

<sup>16</sup> Connolly, *Religion, law and power*, p. 21; Brendan Fitzpatrick, *Seventeen-century Ireland; the war of religions* (Dublin, 1988), pp 231, 258.

<sup>17</sup> Disarming Proclamation, 8 Nov. 1673 (N.L.I., MSS 1793); Miller, *Charles II*, pp 210-11.

<sup>18</sup> See N.L.I. MSS 1793 and H.M.C., *Ormond*, ii, 352-9.

<sup>19</sup> Connolly, *Religion, law and power*, p. 22.

<sup>20</sup> Miller, *Popery and politics*, pp 126-7.

The influence of the English anti-Catholic tradition and fitful penal repression upon the minds of the Irish government and Irish Protestants during the Restoration period, and, most importantly, after the reign of James II, was to be significant. At first this influence was seen primarily in the temporary expedients implemented by the Irish government in reaction to the external pressures of matters wholly English in origin and design.<sup>21</sup> In the aftermath of the Williamite war, securing the Protestant interest in Ireland became of paramount concern for the Irish government and Irish Protestants, creating a new dynamic within the Protestant political nation for security-based penal legislation. The Irish government and Protestant nation used past proclamations, existing English penal laws, and past experience to create a ‘modus operandi’ for the first Irish penal laws. These proposed penal laws in themselves provided a point of agreement between the Irish government and Protestant nation in the aftermath of the debacle of the 1692 parliament.<sup>22</sup> Ultimately, the two penal laws of 1695 were an integral part of the efforts to secure the Protestant interest against internal discontent, and external interference.

## II

From a Protestant perspective there was little problem in identifying the main areas of danger to Irish security. Irish Catholics were the ‘enemy’ within, and increased rapparee activity in the aftermath of the Williamite war fuelled Protestant fears. At the same time William III’s war with France kept alive fears of a French invasion, and subsequent Catholic insurrection in Ireland.<sup>23</sup> Actions of French privateers off the Irish coast helped to sustain such fears.<sup>24</sup> To many Irish Protestants the Irish Catholic community was inextricably involved in the activities and aims of the French

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<sup>21</sup> Connolly, *Religion, law and power*, p. 21. On the opposition of the Irish government to permanent penal measures, see H.M.C., *Ormond*, v, 313; Sean Egan, ‘Finance and the government of Ireland 1660-85’ (Unpublished Ph.D thesis, 2 vols, TCD, 1983), i, 110-13.

<sup>22</sup> C. I. McGrath, ‘Securing the Protestant Interest: policy, politics and parliament in Ireland in the aftermath of the Glorious Revolution 1690-1695’ (Unpublished MA thesis, UCD, 1991), *passim*.

<sup>23</sup> Beckett, *Mod. Ire.*, pp 150-51.

<sup>24</sup> Connolly, *Religion, law and power*, pp 236-7.

monarchy, Irish outlaws, French privateers, and ultimately to any perceived Jacobite endeavours to overthrow William III and Protestantism.<sup>25</sup>

In December 1689 Richard Cox, a future lord chancellor of Ireland,<sup>26</sup> expressed the prevailing attitude of many Irish Protestants in his discourse on ‘the methods necessary to be observed for the speedy reduction of Ireland’. He believed that Irish Protestants were firmly on the side of righteousness, due to ‘their passionate affections to King William, and their firm adhesion to the Protestant religion and English interest’, and that they had ‘(naturally and by custom) an ascendant over the Irish’. Irish Catholics, on the other hand, were unanimously engaged in the cause of King James, ‘and thereunto they are obliged by gratitude, interest and honour (and which is more than all the rest) by their bigotry to their false religion’. In the belief that Irish papists ‘forever will hail King William at the highest degree of malice’, Cox could readily justify coercion on political grounds.<sup>27</sup> Other notable Irish Protestants expressed similar views. In 1691 William King wrote that

the Irish may justly blame themselves ... for whatever they have, or shall suffer of this matter, since it is apparent that the necessity was brought about by them, that either they or we must be ruined.<sup>28</sup>

A Member of the Southwell family, although arguing against the ‘rigorous compelling’ of Catholics to convert to Protestantism, still condoned the coercion of Catholics, as ‘the whole Irish popish party’ had undoubtedly been involved in ‘fomenting and carrying out of this rebellion’. That there was a close affinity between Irish Catholics and the French ‘upon the score of their religion and sake of the late King James’ was

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<sup>25</sup> D. W. Hayton, ‘Ireland and the English ministers 1707-16; A study in the formulation and working of government policy in the early eighteenth century’ (Unpublished D.Phil. thesis, Oxford, 1975), p. 20; Boshier, ‘Franco-Catholic danger’, passim.

<sup>26</sup> *New Hist. Ire...*, ix, 510; F. E. Ball, *The judges in Ireland, 1221-1921* (New York, 1927), p. 51.

<sup>27</sup> Richard Cox, ‘A discourse on the methods necessary to be observed for the speedy reduction of Ireland’, 2 Dec. 1689 (T.C.D., Southwell papers, 1180, ff 67-73); aphorisms relating to the kingdom of Ireland submitted to the Convention at Westminster, 12 Jan. 1690 (T.C.D., Southwell papers, 1181, ff 29-35).

<sup>28</sup> William King, *The state of the Protestants of Ireland under the late king James’ government* (London, 1691), p. 239.

beyond doubt. Ultimately the attitude of Protestants to Catholics seemed fully justified, on the grounds that popery was profane, blasphemous and ‘the mother of abominations’.<sup>29</sup>

It was also quickly apparent that the Irish parliament of 1692 would be predominantly anti-Catholic. While preparing a bill of indemnity, the lord lieutenant, Henry Sidney, noted that if the bill ‘extends too much to the favour of the popish party, it will never pass’.<sup>30</sup> The great resentment ‘the Protestant party here still retain of the injuries and oppression they suffered from the papists during the late rebellion’ ensured that not only the parliament but Sidney’s own Privy Council were opposed to an indemnity bill.<sup>31</sup> Such anti-Catholic sentiments were not the preserve of Irish Protestants. In March 1693 both houses of the English parliament addressed the King over alleged abuses and mismanagement of affairs in Ireland, including the favouring of Irish papists to the great detriment ‘of your Majesty’s good and loyal Protestant subjects’.<sup>32</sup> Catholic expressions of loyalty were treated with great suspicion by Protestants on both sides of the water.<sup>33</sup> The threat of Catholic Ireland had to be combated, in order to secure the Protestant interest.

### III

Efforts to secure the English and Protestant interest in Ireland took various forms. The most immediate issue on conclusion of the war was the safe dispersal of the Jacobite army. Although about 14,000 soldiers had gone to France with Sarsfield under the military articles of Limerick, the great fear was that the remaining force would turn rapparee.<sup>34</sup> One way of solving the problem was to encourage disbanded

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<sup>29</sup> ‘Discourse concerning the securing the government of the kingdom of Ireland to the interest of the English nation’ [by one of the Southwell family] (B.L., Add MSS 28,724, ff 1-12).

<sup>30</sup> Sidney to Nottingham, 3 Sept. 1692 (*Cal. S.P. dom., 1695 and Add.*, p. 199).

<sup>31</sup> Sidney to Nottingham, 9 Sept. 1692 (*Cal. S.P. dom., 1695 and Add.*, p. 201).

<sup>32</sup> Address of the English House of Commons to the King, 4 March 1693; Nottingham to Sidney, 18 March 1693; Sidney to Nottingham, 30 June 1693 (*Cal. S.P. dom., 1693*, pp 55-6, 71-2, 203-4).

<sup>33</sup> Capell to Shrewsbury, 13 June 1695; Shrewsbury to Capell, 20 June 1695 (*Cal. S.P. dom., 1694-5*, pp 494, 502).

<sup>34</sup> An account of all men and horses that have been transported out of Ireland from 31 July 1690 to 31

Jacobites to join the Williamite forces.<sup>35</sup> By the end of 1693, 3,650 ex-Jacobite soldiers had been sent overseas to serve with William's allies.<sup>36</sup> But William III's endeavours to recruit ex-Jacobite soldiers into his army in Ireland were resisted fiercely by Irish Protestants, and the Irish and English governments.<sup>37</sup> The 'mere Irish', being 'brought up in the customs, manners, and religion of their ancestors' were believed to have 'a natural aversion to the laws, government and religion of the English'. It was seen as dangerous to the Crown, the government, and peace in Ireland, to allow such 'unqualified and disaffected persons' into the army. In 1693 Sidney ordered that in the future only 'persons duly qualified ... and known protestants' were to be recruited.<sup>38</sup> This policy seems to have been successful to a large extent, although some complaints still occurred.<sup>39</sup> In the meantime, the remainder of the Jacobite army were disbanded, sent home, and given money to induce them to remain within the law.<sup>40</sup>

Keeping Irish Catholics out of the Williamite forces in Ireland and sending others to serve on the continent did not eradicate the threat to security. During the war years the number of Tories and rapparees increased throughout the country.<sup>41</sup> In an effort to counter this problem Sidney issued a proclamation on 2 October 1692

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March [1694] (B.L., Add MSS 18,022, ff 62-3). Simms estimates the figure at 12,000. *New Hist. Ire.*, iv, 630. For government fears see *Cal. S.P. dom., 1690-91*, pp 385-6; *Cal. S.P. dom., 1695 and Add.*, pp 176, 178-9; H.M.C., *Finch*, iii, 302.

<sup>35</sup> Memorial of what Ginkel submitted for the King's definite orders, 22 May 1691 (*Cal. S.P. dom., 1690-91*, pp 385-6).

<sup>36</sup> *Cal. S.P. dom., 1695 and Add.*, pp 178-80, 183-8; *Cal. S.P. dom., 1691-2*, p. 512; *Cal. S.P. dom., 1693*, pp 3, 105; B.L., Add MSS 18,022, ff 62-3; N.A.I., Wyche papers 1/2/25, 1/3/28.

<sup>37</sup> *Cal. S.P. dom., 1693*, pp 205-6; *Cal. S.P. dom., 1695 and Add.*, pp 55-6, 176; Beckett, *Mod. Ire.*, p. 151.

<sup>38</sup> Copy of the lord lieutenant's warrant for discharging the Irish out of the army, 30 May 1693 (*Cal. S.P. dom., 1693*, pp 160-61).

<sup>39</sup> *Cal. S.P. dom., 1693*, pp 380-82, 374-5, 389; *Cal. S.P. dom., and Add*, p. 59.

<sup>40</sup> Lords justices to Nottingham, 1 Feb. 1692 (*Cal. S.P. dom., 1695 and Add.*, p. 178).

<sup>41</sup> *Cal. S.P. dom., 1690-91*, pp 230-32, 385-6; H.M.C., *Le Fleming*, 281; P.R.O.N.I., De Ros MSS D638/14/29; Edward Berwick, *Rawdon papers* (London, 1819), pp 338-9.



allowing for the prosecution, pursuit and killing of tories.<sup>42</sup> The lords justices who replaced him followed this standard policy in compliance with their instructions.<sup>43</sup> In August 1693 they issued a proclamation along the lines of proclamations issued during the Restoration.<sup>44</sup> The 1693 proclamation reflected the identification of anti-establishment activity with the Catholic community as a whole. Besides normal methods used for apprehending outlaws, the proclamation allowed for the apprehension of ‘the popish pretended parish priest of such parish or place where any such robberies occur, and the relations of such robbers and other persons who they suspect of helping or concealing offenders’.<sup>45</sup> Despite this proclamation, tory and rapparee activity continued to cause problems.<sup>46</sup> In August 1694 the lords justices wrote to the principal secretary of state in England, Sir John Trenchard, to explain that the previous proclamations had been ineffective, because ‘they [outlaws] have been too much favoured by many of the inhabitants’. In Cork, as elsewhere, everyone, including the gentry, seemed to be their abettors. The lords justices blamed the whole problem on the ravages of the late war.<sup>47</sup> In December they issued another proclamation, which included a printed list of tories and rapparees, and offered a reward for the apprehension of any ‘rebels’, dead or alive, who had turned outlaw.<sup>48</sup>

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<sup>42</sup> Proclamation against tories, 2 Oct. 1692 (N.L.I., MSS 1793; H.M.C., *Ormond*, ii, 449).

<sup>43</sup> Instructions to the lords justices [Capell, Wyche and Duncombe], 26 June 1693 (*Cal. S.P. dom.*, 1693, p. 196).

<sup>44</sup> Proclamations against tories, 14 Dec. 1674, 10 June 1675, 7 July 1675, 21 Feb. 1687 (N.L.I., MSS 1793); Lords justices to Nottingham, 19 Aug. 1693 (*Cal. S.P. dom.*, 1693, p. 277).

<sup>45</sup> Printed proclamation, 18 Aug. 1693, enclosed with the lords justices letter to Nottingham, 19 Aug. 1693 (*Cal. S.P. dom.*, 1693, p. 277). Some justices of the peace felt they were not covered by law to carry out arrests of priests and relations, which only served to strengthen the argument for permanent legislation against tories (see P.R.O.N.I., De Ros MSS D638/18/29).

<sup>46</sup> *Cal. S.P. dom.*, 1694-5, pp 41-2, 57, 59, 94.

<sup>47</sup> Lords justices to Trenchard, 27 Aug. 1694 (*Cal. S.P. dom.*, 1694-5, p. 227); Porter to Coningsby, 19 Nov. 1694 (P.R.O.N.I., De Ros MSS D638/18/29).

<sup>48</sup> Printed list and proclamation, 10 Dec. 1694 (*Cal. S.P. dom.*, 1694-5, pp 353-4); Porter to Coningsby, 17 Dec. 1694 (P.R.O.N.I., De Ros MSS D638/18/32).

The incidents of outlaw activity seem to have lessened during 1695,<sup>49</sup> but insufficiently to weaken the resolve of Irish Protestants.<sup>50</sup> Previous proclamations had mostly proved ineffectual, owing to their transient nature. The answer was seen in permanent legislation.<sup>51</sup> Although absent from the privy council's initial transmission of bills in June 1695, the heads of a bill for the suppression of tories, robbers and rapparees was drawn up by the House of Commons during the parliamentary session, and passed into law on 7 December 1695.<sup>52</sup>

Concern about tories and rapparees was inevitably identified with fear of a French or Jacobite invasion. As long as William III remained at war with France, the possibility of a Franco-Jacobite force invading England or Ireland was widely credited, and served to fortify the resolution of the English and Irish governments, and Irish Protestants, to settle the Catholic question permanently.<sup>53</sup> Harassment of the Irish coast by French privateers served as a constant reminder of the threat.<sup>54</sup> The position of Irish Catholics was not assisted by interaction between these privateers, Irish outlaws, and local inhabitants. Privateer activity became identified with the apparent desire of Catholics to undermine Protestant rule. Frequent reports from remote areas of Ireland about Catholics and rapparees assisting French privateers, and evidence of Irish recruitment to the French and Jacobite forces aligned against

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<sup>49</sup> Capell to Somers, 15 Aug. 1695 (Surrey Record Office, Somers papers, 371/14/4); Newsletter, 2 April 1695 (*Cal. S.P. dom., 1695 and Add.*, p. 320).

<sup>50</sup> B.L., Add MSS 28,880, f. 261; Bodl., Carte MSS 76, f. 723; H.M.C., *Downshire*, i, 710.

<sup>51</sup> Capell to Trenchard, 14 July 1694; Col. Philips to Capell, 19 July 1694 (H.M.C., *Buckleuch and Queensberry*, ii, 99, 105); Porter to Coningsby, 13 Nov., 19 Nov. 1694 (P.R.O.N.I., De Ros MSS D638/18/28, 32).

<sup>52</sup> First transmission of bills, 17 June 1695, and third transmission of bills, 24 Oct. 1695 (B.L., Add MSS 9715, ff 22-3); *Commons' jn. Ire.*, ii, 661, 800-1; *Stat Ire.*, iii, 321-5.

<sup>53</sup> P.R.O.N.I., De Ros MSS D638/14/45, 46, 48, 49, D638/18/2; H.M.C., *Downshire*, i, 509, 529, 534-5; H.M.C., *Buckleuch and Queensberry*, ii, 163-5, 169-70, 187, 205.

<sup>54</sup> For the concerns of the Irish government, and their endeavours to deal with French privateers between 1691-5, see Bodl., Carte MSS 170, ff 129, 172; B.L., Add MSS 28,940, ff 78-9; *Cal. S.P. dom., 1693*, pp 238, 251, 413; *Cal. S.P. dom., 1694-5*, pp 94, 434; *Cal. S.P. dom., 1695 and Add.*, pp 37, 45, 182, 185, 188, 193-4, 204, 251, 265, 280, 319-20; P.R.O.N.I., De Ros MSS D638/14/56,

William III, ensured that Irish Protestants were confirmed in the belief that coercive measures were necessary for the security of the English and Protestant interest.<sup>55</sup>

#### IV

In any assessment of the first penal laws it must be remembered that the overriding motivation behind them was fear for the safety of the Protestant interest in Ireland. Well into the eighteenth century an attempted Stuart restoration remained a real threat. In such circumstances Irish Protestants viewed the upkeep of their ‘interest’, based upon hegemony over Catholics, as not just a bid for wealth and power, but primarily as a prerequisite for survival.<sup>56</sup> Hence a perceived urgent need for penal legislation can be seen as one of the main reasons, alongside financial concerns, for the calling of the parliament of 1695.<sup>57</sup>

Henry, Lord Capell, played an important role in the final formulation of the penal measures of 1695.<sup>58</sup> In July 1694 he wrote to inform Trenchard that a parliament was urgently needed in Ireland. There was a need for laws

which, after so great a revolution ought to be enacted, for strengthening and securing the English and Protestant interest; such as are bills, for disarming Irish papists, for preventing them from keeping horses above five pound[s] value or thirteen hands and a half high; for restraining foreign education.<sup>59</sup>

Capell identified the three main aspects of the penal legislation to be introduced under his lord deputyship in 1695. It was the first time the three issues were grouped together and put forward as necessary legislation for the settlement of Ireland. These measures were an integral part of the negotiations, which Capell was already involved in with former opposition leaders such as Alan Brodrick and Robert Rochfort, for a

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D638/18/6, 9; H.M.C., *Bucclench and Queensberry*, ii, 183-4.

<sup>55</sup> B.L., Add MSS 28,940, f. 144; *Cal. S.P. dom., 1693*, pp 364, 418; *Cal. S.P. dom., 1694-5*, pp 76-7, 94, 117-8, 154.

<sup>56</sup> F. G. James, *Ireland in the Empire 1688-1770* (London, 1973), p. 22.

<sup>57</sup> McGrath, ‘Securing the Protestant Interest’, ch. 1.

<sup>58</sup> Capell was appointed as a lords justice on 26 June 1693, and as lord deputy on 9 May 1695 (*New Hist. Ire.*, ix, 490).

<sup>59</sup> Capell to Trenchard, 14 July 1694 (H.M.C., *Bucclench and Queensberry*, ii, 99).

compromise political solution over the issue of money-bills in an Irish parliament. In the parliament of 1695, the passing of the penal bills was seen as an important moment in the success of that parliament at a financial level. As for Capell, his attitude in 1694 on Irish affairs played a major role in securing for him the position of lord deputy in May 1695.<sup>60</sup> But the measures suggested by Capell had existed as individual policies of the Irish government from 1690 onwards, long before his appointment to office.

## V

It was natural during times of crisis for the government to disarm the disaffected, or in time of war to disarm defeated enemy forces while any threat remained.

Proclamations for disarming Irish Catholics had been issued by Essex and Ormond in the 1670s.<sup>61</sup> Tyrconnell had also issued a proclamation in 1689 for disarming any persons likely to assist a Williamite invasion force.<sup>62</sup> William III was no exception. On 31 July 1690 he issued a proclamation for disarming all papists in Ireland.<sup>63</sup> Four months later the lords justices were instructed to ensure that the 'several' disarming proclamations issued by William, were being implemented successfully.<sup>64</sup> William's proclamation, as a war-time expedient, was not issued with the intention of turning it

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<sup>60</sup> McGrath, 'Securing the Protestant Interest', chs 4, 5.

<sup>61</sup> Disarming proclamations, 8 Nov. 1673, 2 Nov. 1678, 12 Dec. 1678 (N.L.I., MSS 1793). The issuing of these proclamations during the reign of Charles II ensured that the disarming policy pursued by William III and his governments did not really contradict the sense of the articles of Limerick, as Irish Catholics had looked to the reign of Charles II as a model for religious toleration when negotiating the articles. Thus William III's desire to uphold the terms of the Limerick agreement, did not necessarily mean that he wished to maintain a benign policy towards Catholics.

<sup>62</sup> Disarming proclamation, 25 Feb. 1689 (N.L.I., MSS 1793). This proclamation did not refer specifically to Irish Protestants.

<sup>63</sup> Disarming proclamation, 31 July 1690 (N.L.I., MSS 1793).

<sup>64</sup> Instructions to the lords justices of Ireland, 4 Dec. 1690 (*Cal. S.P. dom., 1690-1*, pp 179-80). The lords justices were Henry, Viscount Sidney, Sir Charles Porter (lord chancellor), and Thomas Coningsby (*New Hist. Ire.*, ix, 490).

eventually into a statute.<sup>65</sup> There is little positive evidence of such a detailed plan of religious policy for Ireland, but necessity and expediency ensured that the 1690 policy was adhered to until the perceived logic of the situation demanded that penalization of Catholics became a permanent fixture.

As long as the war continued, it was hard to implement the disarming policy, but with the signing of the articles of Limerick, this became an overriding concern of the lords justices.<sup>66</sup> As Jacobite and Catholic were synonymous, from the outset Irish Catholics as a whole were treated as a threat if they retained their weapons.<sup>67</sup> In February 1692 the lords justices issued a proclamation which ‘commanded and encouraged’ the Irish ‘rebels’ to hand in their arms.<sup>68</sup> This proclamation had little success. In May the lords justices took more forceful action, as Irish Catholics ‘had some more than ordinary expectation’ of an invasion from France,<sup>69</sup> and because it was feared that the withdrawal of parts of the Williamite army from Ireland would be viewed by Catholics as offering an opportunity for rebellion.<sup>70</sup> The lords justices ordered the militia to muster throughout the country, as a show of strength, and to assess their weaponry. Any deficit was to be provided for from those arms ‘which hereafter shall be brought in or found amongst the Irish’.<sup>71</sup> 20 May was appointed as the day for militia units countrywide to search for and confiscate any arms and ammunition found among ‘Irish and other Roman Catholics’. Exemption was granted

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<sup>65</sup> Disarming proclamation issued by William, 31 July 1690 (N.L.I., MSS 1793).

<sup>66</sup> Sidney returned to England at the end of 1690, leaving Porter and Coningsby as the two lords justices. See *Cal. S.P. dom., 1690-91*, p. 192; J. I. McGuire, ‘The Irish Parliament of 1692’ in Thomas Bartlett and D. W. Hayton (eds.), *Penal era and golden age: essays in Irish history, 1690-1800* (Belfast, 1979), pp 10-11.

<sup>67</sup> Lords justices to Robert Colvill, 26 Oct. 1691 (T.C.D., MSS 1178, f. 42).

<sup>68</sup> Enclosure, lords justices to Nottingham, 14 May 1692 (*Cal. S.P. dom., 1695 and Add.*, p. 187).

<sup>69</sup> Lords justices to Nottingham, 14 May 1692 (*Cal. S.P. dom., 1695 and Add.*, p. 186). For the preparations for a Franco-Jacobite invasion, March-June 1692, see Piers Wauchope, *Patrick Sarsfield and the Williamite war* (Dublin, 1992), pp 286-91.

<sup>70</sup> Lords justices to Colvill, 6 May, 14 May 1692 (T.C.D., MSS 1178, ff 46-7).

<sup>71</sup> Lords justices to Colvill, 6 May 1692 (T.C.D., MSS 1178, f. 46).

to any Catholics who held official licences for arms.<sup>72</sup>

The lords justices' action was itself an admission that earlier proclamations had failed. Yet even a more coercive implementation of the disarming tactic was to prove ineffectual. In Antrim the militia were uncooperative and inefficient.<sup>73</sup> A general lack of confidence in the militia would suggest that similar problems occurred elsewhere.<sup>74</sup> Setting aside only a day to search for arms restricted the effectiveness of the order, while leaving the future acquisition of arms by Catholics open to interpretation. Such ambiguities could not be tolerated for long.

The lords justices were replaced by a lord lieutenant, Henry, Viscount Sidney, who arrived in Ireland in August 1692.<sup>75</sup> One of his instructions was to inquire into whether the King's orders for disarming Catholics were being obeyed.<sup>76</sup> A more immediate concern was the preparation of bills for parliament. Among the bills prepared was a militia bill, purportedly 'of the greatest concern to their Majesties and their Protestant subjects',<sup>77</sup> and which included a clause for the 'disarming of papists and reputed papists'. In the English disarming act of 1689, the word 'reputed' had been seen to allow the subjection of some non-papists to 'the malice or revenge of a troublesome neighbour or informer', but it was believed that the militia bill would not have the same ill effect in Ireland 'since in this Kingdom it is well known by the neighbourhood who are papists, and who are not, though few or none of them are legally convicted as such'. Unless the bill extended 'to the disarming of reputed papists, as papists, it will be of little or no effect'.<sup>78</sup> Had the militia act been passed in the 1692 parliament, it would have made the policy of disarming Catholics a

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<sup>72</sup> Lords justices to Colvill, 14 May 1692 (T.C.D. MSS 1178, f. 47; *Cal. S.P. dom., 1695 and Add.*, p. 187). The exemption was granted in order to avoid a breach of the articles of Limerick.

<sup>73</sup> Warrant to Capt. McCartney from Governor Colvill, 19 May 1692; Colvill to Secretary Davis, 17 June 1692 (T.C.D. MSS 1178, ff 50, 57).

<sup>74</sup> *Cal. S.P. dom., 1693*, p. 22; *Cal. S.P. dom., 1694-5*, pp 41-2; *Cal. S.P. dom., 1695 and Add.*, pp 192, 196, 198; H.M.C., *Bucleuch and Queensberry*, ii, 99.

<sup>75</sup> *New Hist. Ire.*, ix, 490.

<sup>76</sup> Instructions to Sidney, 3 March 1692 (*Cal. S.P. dom., 1691-2*, p. 169).

<sup>77</sup> Lords justices to the lords of the council, 21 July 1692 (*Cal. S.P. dom., 1695 and Add.*, p. 192).

<sup>78</sup> Sidney to Nottingham, 3 Sept. 1692 (*Cal. S.P. dom., 1695 and Add.*, p. 199).

permanent fixture, thereby overcoming the inherent weaknesses of one-off proclamations. As it was, the bill was rejected amidst the conflicts of that parliament, and the uncertainties involved in disarming Catholics remained.<sup>79</sup>

Sidney's failure in parliament did not prevent him from fulfilling his other obligations of office. On 26 November he issued orders for the confiscation of 'the arms of papists who were involved in rebellion, or haven't a proper licence'. In obedience to this order the high constable of Antrim, Robert Nevin, issued warrants to the constables under his authority.<sup>80</sup> Once again the returns appear to have been negligible. The initial order to Nevin had come from William Crafford, in charge of the barony of Belfast. Examining the returns from the constables, Crafford noted that they had found 'neither horses nor arms nor persons to be seized'.<sup>81</sup> Similar sentiments were expressed in other returns, both in Antrim and elsewhere.<sup>82</sup> Heightened fears of a French invasion the following month caused the government to increase the severity of its disarming policy. On 17 December Sidney and the council took the unprecedented step of ordering the confiscation of arms from all papists including 'those who have, as [well as] those who have not licences from us'.<sup>83</sup> An account was to be kept of licenced arms, which were to be returned to the owners when the threat of invasion subsided. This was a breach of the seventh civil article of Limerick, a point noted in a review of Irish Catholic grievances written in 1693.<sup>84</sup>

The non-statutory nature of the government's disarming policy meant that successive chief governors had to be individually ordered to deal with the issue. In

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<sup>79</sup> McGuire, 'Irish parliament of 1692', pp 17-18. Porter believed that the majority of the Irish parliament regretted rejecting 'that security' of the militia bill 'upon such silly notions'. Porter to Coningsby, 18 Nov. 1692 (P.R.O.N.I., De Ros MSS D638/18/2).

<sup>80</sup> Warrant issued by Robert Nevin, 10 Dec. 1692 (T.C.D., MSS 1178, f. 62); Porter to Coningsby, 23 Nov. 1692 (P.R.O.N.I., De Ros MSS D638/18/3).

<sup>81</sup> Warrant issued by William Crafford, 10 Dec. 1692, endorsed on the back, 11 Jan. 1693 (T.C.D., MSS 1178, f. 67).

<sup>82</sup> W. Lesley, Charles Stewart and [Galland?] to Colvill, 30 Dec. 1692 (T.C.D., MSS 1178, f. 71); Porter to Coningsby, 20 Dec. 1692 (P.R.O.N.I., De Ros MSS D638/18/6).

<sup>83</sup> Lord lieutenant and council to Colvill, 17 Dec. 1692 (T.C.D., MSS 1178, f. 69).

<sup>84</sup> A short review of the Roman Catholic grievances, 1693 (*Cal. S.P. dom.*, 1693, p. 444).

June 1693 the new lords justices, who replaced Sidney,<sup>85</sup> were instructed to ensure that the disarming proclamations, issued by William in 1690, were implemented in full.<sup>86</sup> Although overall implementation of the disarming policy was haphazard during this period, the instructions to the lords justices do represent a continuum in government policy, and provide a sense of uniformity with the orders given to, and by, Porter and Coningsby as lords justices, and Sidney as lord lieutenant. Similarly, the constant adherence to the disarming policy reflected the unabated Protestant fear of Irish Catholics.

It was during 1694 that the final stages in the development of a government-sponsored legislative policy for disarming Catholics took place. In July the lords justices divided in opinion when replying to the English privy council's request for their views on the calling of parliament.<sup>87</sup> Capell, favouring a parliament, gave a detailed explanation of the bills necessary for the settlement of Ireland, including one for disarming 'Irish papists'.<sup>88</sup> Wyche and Duncombe did not mention any bills, having opposed the calling of parliament.<sup>89</sup> Capell based his arguments for calling a parliament on the premise that the problems of the 1692 session had now been overcome.<sup>90</sup> The many Irish politicians with whom he conversed informed him of what they believed necessary for the settlement of Ireland, including 'many beneficial laws relating to religion, peace, and our secular interest, in which England is beforehand with us'.<sup>91</sup> These views coincided with existing government policy. A majority of Irish government officials and English politicians accepted that an Irish parliament would have to pass coercive legislation against Irish Catholics at some

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<sup>85</sup> The new lords justices were William Duncombe, Sir Cyril Wyche and Henry, Lord Capell (*New Hist. Ire.*, ix, 490).

<sup>86</sup> Lords justices' instructions, signed by the Queen, 26 June 1693 (*Cal. S.P. dom.*, 1693, p. 195).

<sup>87</sup> Privy council minutes, 22 April 1694 (H.M.C., *Bucclench and Queensberry*, ii, 63).

<sup>88</sup> Capell to Trenchard, 14 July 1694 (H.M.C., *Bucclench and Queensberry*, ii, 99).

<sup>89</sup> Wyche and Duncombe to Trenchard, 14 July 1694 (B.L., Add MSS 21,136, ff 25-6).

<sup>90</sup> Capell to Trenchard, 14 July 1694 (H.M.C., *Bucclench and Queensberry*, ii, 100).

<sup>91</sup> Capell to Shrewsbury, 8 Aug. 1694; Philips to Capell, 19 July 1694; Brodrick senior to Capell, 5 Aug. 1694 (H.M.C., *Bucclench and Queensberry*, ii, 115, 104-5, 110-11).



time in the future.<sup>92</sup> Capell identified what was necessary (revenue) and what was desired, and amalgamated the two into a political formula for holding a successful parliament in Ireland. The penal laws were an integral part of that formula.<sup>93</sup>

With the emerging predominance of the Whig junto in English politics during 1693-4, Capell's position in Ireland was in the ascendant, and his viewpoint the most acceptable to the English privy council.<sup>94</sup> By May 1695 Wyche and Duncombe had been recalled and Capell made lord deputy,<sup>95</sup> with orders to hold a parliament. His instructions made reference once again to the necessity for continuing the disarmament process.<sup>96</sup> In June 1695 an initial fourteen bills were transmitted to England by Capell and the privy council.<sup>97</sup> Included, with an accompanying explanation, was 'a bill for the better securing the government by disarming Papists'.

This bill hath for a precedent in most parts of it an Act already past [sic] in England where the Papists are less numerous and formidable than they are in this country, and we are humbly of opinion this bill is absolutely necessary and essential for the security of his Majesty's authority and the safety of the whole Protestant interest in this Kingdom.<sup>98</sup>

A security measure, based upon previous English law and practice,<sup>99</sup> this bill represented the logical conclusion of a policy initiated by William III in 1690<sup>100</sup> and continued and developed by successive governments.

The bill was unlikely to face any serious opposition in parliament, but two

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<sup>92</sup> *Commons' jn.*, 12 Jan. 1694, quoted in James, *Ireland in the Empire*, p. 22; address of the English House of Commons to King William, 4 March 1693 (*Cal. S.P. dom.*, 1693, pp 55-6).

<sup>93</sup> McGrath, 'Securing the Protestant Interest', ch. 4.

<sup>94</sup> See, B. W. Hill, *The growth of parliamentary parties 1689-1742* (London, 1976), ch. 2; Henry Horwitz, *Parliament, policy and politics in the reign of William III* (Manchester, 1977), ch. 6; McGrath, 'Securing the Protestant Interest', ch. 4.

<sup>95</sup> *New His. Ire.*, ix, 490.

<sup>96</sup> Capell's instructions (*Cal. S.P. dom.*, 1694-95, p. 459).

<sup>97</sup> First transmission to English privy council, 17 June 1695 (B.L., Add MSS 9715, f. 22).

<sup>98</sup> Capell and council to English lords justices, 17 June 1695 (B.L., Add MSS 40,771, f. 33).

<sup>99</sup> *Stat. at large*, ix, 15-18; H.M.C., *Portland*, iii, 432, 434, 440-41; H.M.C., *Le Fleming*, 274, 328-9, 331.

<sup>100</sup> H.M.C., *Portland*, ii, 54, 161, 163.

petitions presented to the English lords justices and council on behalf of the Catholics of Ireland, although rejected, ensured that the bill received greater scrutiny before being re-transmitted to Ireland.<sup>101</sup> Concerned that the bill took away ‘the benefit of the art[icles] of Lim[erick]’, the privy council ordered the attorney-general to insert a clause to exempt any beneficiaries, without actually mentioning the articles.<sup>102</sup> On 4 July Capell was notified that there was some difficulty in bringing the council to agreement, as it was not easy ‘to reconcile the supporting the articles that grant an allowance of arms with the security and satisfaction of the Protestants in taking them away’. The situation was not helped by the arrival of Wyche and Duncombe in England, who ‘opened themselves pretty freely against several of the bills’, including the disarming bill, which they felt was already provided for by former laws ‘still in force and practice’.<sup>103</sup> However, their argument had little to support it, especially when Porter came out in defence of the penal bills:

They are indeed of great moment, and when the King’s affairs will bear such laws, they will be of great use and in time may so settle this Kingdom that it come to be much more the interest of England than any age has hitherto found it.<sup>104</sup>

The bills also had the backing of ‘the majority of the commons’.<sup>105</sup> By 6 July the attorney general had completed a new clause to support

the King’s honour in making good the articles of Limerick and Galway, as far as they related to that particular and yet at the same time to avoid any mention of the capitulations, which some perhaps may not be so well able to bear.<sup>106</sup>

It was based upon a precedent established in an English act for abrogating the Oath of Supremacy in Ireland and appointing other oaths, to which ‘practicioners in Law, and Physic’ were exempt. In the case of the disarming bill, individuals were allowed until

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<sup>101</sup> *Cal. S.P. dom., 1694-5*, p. 513; H.M.C., *Downshire*, i, 488-9; B.L., Add MSS 40,771, f. 37; H.M.C., *Bucleuch and Queensberry*, ii, 197.

<sup>102</sup> Shrewsbury to Capell, 2 July 1695 (H.M.C., *Bucleuch and Queensberry*, ii, 198).

<sup>103</sup> Vernon to Capell, 4 July 1695 (B.L., Add MSS 40,771, f. 39).

<sup>104</sup> Porter to Trumbull, 3 July 1695 (H.M.C., *Downshire*, i, 493).

<sup>105</sup> *Ibid.*

<sup>106</sup> Shrewsbury to Capell, 6 July 1695 (B.L., Add MSS 40,771, f. 42).

March 1696 to make their claims under the articles, at which time the act would be implemented in full.<sup>107</sup> Another amendment placed the power for granting licences for arms in the control of the chief governor and council together, supposedly out of fear ‘of another Tyrconnell’.<sup>108</sup> Although there was some debate over this clause in parliament,<sup>109</sup> the bill was accepted in its amended form and passed during September 1695.<sup>110</sup>

## VI

The second of the three coercive measures recommended by Capell in July 1694, was that for preventing Catholics ‘from keeping horses above five pound[s] value or thirteen hands and a half high’.<sup>111</sup> Although this penal measure eventually ended up as a part of the disarming bill, its origins and development can be traced independently of, though often in conjunction with, the disarming policy.

Although a notorious measure in the history of Irish penal legislation, the confiscation of horses belonging to disaffected elements, or the defeated enemy, was not an original policy when adopted by the Irish government in the aftermath of the Williamite war. Similar policies had been pursued in Ireland under Cromwell and Tyrconnell.<sup>112</sup> The main innovation in the confiscations of the early 1690s were the aspects of selectivity and permanence insinuated into the orders. To the victors of the war it was no longer enough just to ‘dismount’ the rebels during times of danger. They began to feel the need to make it a permanent arrangement, ensuring security for the future. As with the disarming policy, the ‘dismounting’ policy was to be directed

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<sup>107</sup> Ibid.

<sup>108</sup> Warburton to Ellis, 19 Sept. 1695 (B.L., Add MSS 28,879, ff 138-9). For views on this clause see Shrewsbury to Capell, 6 July 1695 (B.L., Add MSS 40,771, f. 42); Capell to Shrewsbury, 10 July 1695 (*Cal. S.P. dom., 1695 and Add.*, p. 12); Porter to Trumbull, 9 July, 15 July 1695 (H.M.C., *Downshire*, i, 499, 507).

<sup>109</sup> Warburton to Ellis, 19 Sept. 1695 (B.L., Add MSS 28,879, ff 138-9).

<sup>110</sup> Gerald [Borr] to Ellis, 7 Sept. 1695 (B.L., Add MSS 28,879, f. 108).

<sup>111</sup> Capell to Trenchard, 14 July 1694 (H.M.C., *Buccleuch and Queensberry*, ii, 99).

<sup>112</sup> Disarming and dismounting proclamation, 25 Feb. 1689 (N.L.I., MSS 1793; H.M.C., *Ormond*, ii, 392-3); Order for seizing horses, 6 Sept. 1651 (B.L., Egerton MSS 1761, ff 44-5).

at the whole Catholic population.

A major logistical problem in the immediate aftermath of the war was the shortage of horses fit to serve in a military capacity. Lack of fodder, deprivations of battle, and the exigencies of sieges had all taken their toll on the equine population of Ireland. The Jacobite troops that left Ireland between November and December 1691 took a total of 437 horses with them.<sup>113</sup> Two months later the lords justices purchased 400 horses from Jacobite soldiers in Ireland, paying no more than £10 for troop horses, and £5 for dragoon horses, thereby dismounting many Jacobites and providing much needed horses for the Williamite army.<sup>114</sup> But the shortage and poor condition of horses among the Williamite forces remained an urgent problem.<sup>115</sup> At the same time the government began to implement a policy of seizing the horses of Irish Catholics. Initially these were not intended as permanent confiscations, just a temporary 'holding' for security reasons; it was not a policy of dismounting papists in order to provide horses for Williamite soldiers. However, the shortages in the army would have enhanced alarm at the disaffected Irish being in possession of horses of a military capacity.

In light of a threatened French invasion the lords justices issued a general order on 24 May 1692 for the confiscation of all serviceable horses belonging to papists. The order followed similar lines to contemporary disarming orders. The militia was 'to seize all serviceable horses which are in the custody of any Roman Catholics or other persons disaffected to their Majesties' government'.<sup>116</sup> Reference to 'other disaffected persons' suggested a unilateral approach, but specific reference to 'Roman Catholics' ensured a greater degree of selectivity. The confiscation was only a temporary measure, while a French fleet was off the coast of England. By June a Williamite victory at sea removed that threat, and the lords justices ordered the

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<sup>113</sup> 'An account of all the men and horses that have been transported out of Ireland from 31 July 1691 to 31 March [1694]' (B.L., Add MSS 18,022, ff 62-3).

<sup>114</sup> Lords justices to Nottingham, 1 Feb. 1692 (*Cal. S.P. dom., 1695 and Add.*, p. 178).

<sup>115</sup> *Cal. S.P. dom., 1695 and Add.*, pp 182, 184, 188.

<sup>116</sup> Order to seize all serviceable horses of papists, issued by Colvill from his residence at Gollgorme, 27 May 1692 (T.C.D., MSS 1178, f. 53).

restoration of all horses to their owners. As a security measure, an account was to be kept of all horses and owners.<sup>117</sup> The lords justices, acknowledging the importance of horses to the livelihoods of many Irish Catholics, did not endeavour to enact a permanent confiscation.<sup>118</sup> Such an attitude was not to persist in the face of continuing threats from abroad and outlaw activity within Ireland. The constant sense of vulnerability among Irish Protestants and the government ensured a more coercive implementation of the dismounting policy.

The question of Catholic horse-ownership caused further concern under Sidney's lord lieutenancy. On 26 November 1692 the lord lieutenant and council issued warrants for an inquiry into how many 'Irish or English papists' had horses, and how many of them were 'fit and proper for service in war'. A list was to be made of all horses and their owners, who were to give 'good security' that their horses would be forthcoming when required by the government, 'upon which security the said horses shall be left in their custody'. All horses 'above five pounds price and under eight pounds' were judged fit to mount dragoons, 'and above that price for horsemen'.<sup>119</sup> The clause in the penal law passed in 1695 for restricting Catholics to owning horses worth five pounds or less adheres to this estimation of the relative values of horses fit for military service, which in turn is a copy of the five pounds or less value system used in the English penal law of 1689.<sup>120</sup>

The warrants as issued showed that the government still acknowledged the needs of the Catholic community by not actually confiscating the horses, but it was a definite endeavour to tighten control over, and access to, such horses should the security of the country be threatened. Selectivity in the dismounting policy had also progressed a stage further, as the warrants only applied to Irish or English papists, and did not specify any other 'disaffected' persons. It was also the first time that direct reference was made to the government's intention to make use of any confiscated

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<sup>117</sup> Lords justices to Colvill, 4 June 1692 (T.C.D., MSS 1178, f. 54).

<sup>118</sup> Lords justices to Colvill, 14 June 1692 (T.C.D., MSS 1178, f. 56).

<sup>119</sup> Warrant signed by Robert Nevin, high constable of Antrim, 10 Dec. 1692 (T.C.D., MSS 1178, f. 62); Porter to Coningsby, 23 Nov 1692 (P.R.O.N.I., De Ros MSS D638/18/3).

<sup>120</sup> *Stat. Ire.*, iii, 260-67; *Stat. at large*, ix, 18.

horses in the service of the Williamite army.<sup>121</sup>

As with the disarming policy of the Irish government, there existed a continuity of policy for dismounting Catholics, as pursued by Porter and Coningsby as lords justices, and Sidney as lord lieutenant. Although there was no direct reference to the dismounting of Catholics in the instructions given to Wyche, Duncombe and Capell when beginning their tenure of office as lords justices in July 1693, the policy still developed along similar lines to that for disarmament.<sup>122</sup> Capell's recommendation in July 1694 that a law be introduced in Ireland for preventing Catholics 'from keeping horses above five pound[s] value',<sup>123</sup> reflected the Protestant desire for laws relating to 'religion, peace, and our secular interest'.<sup>124</sup> The perceived need to dismount Catholics during times of danger had, like the disarming policy, followed a logical progression by which it had come to be seen as a permanent need. The English disarming act of 1689, which allowed for the confiscation of all horses belonging to Catholics which could be of use in the Crown's service, served only to strengthen the argument for a similar act in Ireland, where Catholics were in the majority.<sup>125</sup> The English House of Commons was of the same opinion, having supported a recommendation that the Irish parliament should be called in order to pass 'such laws as shall be necessary for the security' of Protestants.<sup>126</sup> The consensus of opinion among English and Irish Protestants since the Williamite war favoured penal legislation. Ultimately, Capell's reference to the need for a law dismounting Catholics, as with that for disarming them, represented the fusion of the will of the Protestant interest, and the perceived logical conclusion of previous Irish government policy in the early 1690s.

When it came to drawing up the initial bills to be presented to the Irish

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<sup>121</sup> Warrant signed by Robert Nevin, high constable of Antrim, 10 Dec. 1692 (T.C.D., MSS 1178, f. 62).

<sup>122</sup> Lords justices instructions, 26 June 1693 (*Cal. S.P. dom.*, 1693, pp 194-6).

<sup>123</sup> Capell to Trenchard, 14 July 1694 (H.M.C., *Buccleuch and Queensberry*, ii, 99).

<sup>124</sup> Col. Philips to Capell, 19 July 1694 (H.M.C., *Buccleuch and Queensberry*, ii, 105).

<sup>125</sup> *Cal. S.P. dom.*, 1694-5, pp 255, 493; H.M.C., *Downshire*, i, 493-4; *Cal. S.P. dom.*, 1695 and Add., pp 357-8.

<sup>126</sup> *Commons' jn.*, 12 Jan. 1694, quoted in James, *Ireland in the Empire*, p. 22.

parliament in 1695, the dismounting of Catholics was included as a clause in the disarming bill. Obviously Catholics objected to its inclusion, arguing that this would 'be prejudicial to the breed[ing] of horses in Ireland',<sup>127</sup> and would prevent 'those of best quality' from possessing horses strong enough for riding, and pulling coaches.<sup>128</sup> A case was put for an allowance for the keeping of breeding mares of any value, and their colts till they were four years old, and that the chief governor and council should be empowered to grant licences, similar to those in the disarming clauses, by which coach horses or riding horses could be kept by the gentry.<sup>129</sup> The English lords justices, although thinking the proposals quite reasonable, dismissed them, as the bill had already been approved and re-transmitted to Ireland. The bill caused little debate in the Irish parliament and passed without difficulty.<sup>130</sup>

## VII

The third, and final, coercive measure relating to Catholics, which Capell had specified in his letter of 14 July 1694 was that 'for restraining foreign education'.<sup>131</sup> When the initial bills were transmitted to the English privy council in June 1695, Capell pointed out that the bill for disarming Catholics would 'secure the Protestant interest', but that the bill for restraining foreign education would secure 'the Protestant religion'.<sup>132</sup> From the outset, the motivation for the disarming policy had been specific, tangible threats to the security of the Protestant interest. In the case of the prohibition of foreign education, concern for security against the general threat of European counter-reformation Catholicism was allied with the advent of a longer-term policy for undermining the institution of the Catholic church in order to secure the

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<sup>127</sup> Minutes of the proceedings of the lords justices of England, 12 July 1695 (*Cal. S.P. dom., 1695 and Add.*, p. 15).

<sup>128</sup> Porter to Trumbull, 8 July 1695 (H.M.C., *Downshire*, i, 496).

<sup>129</sup> Minutes of the lords justices of England, 12 July 1695 (*Cal. S.P. dom., 1695 and Add.*, p. 15); Porter to Trumbull, 8 July 1695 (H.M.C., *Downshire*, i, 496).

<sup>130</sup> Warburton to Ellis, 19 Sept. 1695 (B.L. Add MSS 28,879, ff 138-9).

<sup>131</sup> Capell to Trenchard, 14 July 1694 (H.M.C., *Buccleuch and Queensberry*, ii, 99).

<sup>132</sup> Capell to Vernon, 18 June 1695 (*Cal. S.P. dom., 1694-5*, p. 500).

Protestant religion.<sup>133</sup> But in the early 1690s the threat to security engendered in contact between Irish Catholics and France was much more pertinent to Protestants, than any desire to reform Catholic Ireland.

Restrictions on Catholic education already existed in Ireland as part of the 1666 Act of Uniformity, and had been implemented as a clause in the banishing of clergy proclamations in the 1670s.<sup>134</sup> But Capell's proposal of a law specifically restraining foreign education for Irish Catholics was the first definite acknowledgement of such a singular need.<sup>135</sup> The desire for such a measure was motivated not only by an awareness of the fact that Irish Catholics receiving religious education on the continent ensured the survival of the Catholic church in Ireland, but also by the knowledge that Irish Catholics being educated abroad were in contact with exiled Irish Jacobites, many of whom were fighting in the French armies under the nominal leadership of the Stuarts.<sup>136</sup> These exiles kept alive Protestant fears of a Jacobite invasion, and represented the spirit of resistance to Protestant rule.<sup>137</sup> Contact with such individuals was detrimental to the security of the Protestant interest, as it encouraged disloyalty to the English Crown, government and the Protestant church. The prohibition of foreign education, while protecting the Protestant religion, would also help to secure the Protestant interest by encouraging greater loyalty from Irish Catholics, and where possible, their conversion to Protestantism.<sup>138</sup>

Fear of the encouragement given to Catholics by exiled Irish Jacobites was very real among Protestants. When the proceedings against Lady Tyrconnell, who

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<sup>133</sup> Lecky, *Ire.*, i, 156-69; Wall, *Catholic Ireland in the eighteenth century*, pp 9-18; Beckett, *Mod. Ire.*, p. 159; David Dickson, *New foundations: Ireland 1660-1800* (Dublin, 1987), p. 43.

<sup>134</sup> Banishing proclamations, 27 April 1674, 16 Oct. 1678, 6 Nov. 1678, 26 March 1679 (N.L.I., MSS 1793); Dickson, *New foundations*, p. 13.

<sup>135</sup> Capell to Trenchard, 14 July 1694 (H.M.C., *Buccleuch and Queensberry*, ii, 99).

<sup>136</sup> Maureen Wall, *The penal laws* (Dundalk, 1961), p. 16.

<sup>137</sup> Boshier, 'Franco-Catholic danger', pp 20-25; Wauchope, *Patrick Sarsfield*, pp 286-90.

<sup>138</sup> Capell to Shrewsbury, 24 Nov. 1694; Shrewsbury to the lords justices, 8 Dec. 1694; Shrewsbury to John King, 8 Dec. 1694; Shrewsbury to the lords justices, 23 March 1695 (*Cal. S.P. dom.*, 1694-5, pp 344, 352, 410).



lived in France, were stopped in July 1693 at Queen Mary's behest, there were great protests from Irish Protestants.<sup>139</sup> The lords justices explained to Nottingham that 'the Protestants apprehend that the popish interest here is not likely to be much weakened if so inveterate a woman' was allowed to return and enter into her estate.<sup>140</sup> They also informed Queen Mary that such action

would tend to the strengthening of the popish interest, and would confirm those of that party, who are not subjects by inclination but by force, in their obstinancy against the government.<sup>141</sup>

In November the proceedings were revived on William III's orders,<sup>142</sup> as lady Tyrconnell was in possession of 'deeds, writings and evidences relating to her husband' which she was not prepared to surrender.<sup>143</sup>

The case of John King, brother of the deceased Lord Kingston, was a prime example of the motivation behind the measure. King was an outlawed Catholic, who was to be pardoned as he had not been actively involved in the Williamite war.<sup>144</sup> In November 1694 Capell objected to the pardon on the grounds 'that Mr King has a wife and two sons in France educated in the popish religion'. He advised that the pardon be withheld until King's children were brought into England, 'to be brought up in the Protestant religion'. Otherwise 'it may prove of ill consequence to the public and be strengthening to the popish interest'.<sup>145</sup> William III agreed with Capell,<sup>146</sup> and the situation was represented to King by Secretary Shrewsbury, who informed him that William III had no intention of granting an 'act of mere grace and favour' to any Catholics 'who are kept in France to be educated there'. He was either to remove the

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<sup>139</sup> Memorial of Sir Richard Levinge, knt., solicitor-general of Ireland, to the lords justices, 24 Oct. 1693 (*Cal. S.P. dom.*, 1693, p. 377).

<sup>140</sup> Lords justices to Nottingham, 7 Oct. 1693 (*Cal. S.P. dom.*, 1693, p. 357).

<sup>141</sup> Lords justices to Queen Mary, 7 Oct. 1693 (*Cal. S.P. dom.*, 1693, pp 357-8).

<sup>142</sup> Nottingham to the lords justices, 2 Nov. 1693 (*Cal. S.P. dom.*, 1693, p. 388).

<sup>143</sup> Memorial of Sir Richard Levinge, knt., solicitor-general of Ireland, to the lords justices, 24 Oct 1693 (*Cal. S.P. dom.*, 1693, p. 377).

<sup>144</sup> Blathwayt to Shrewsbury, 31 July- 10 Aug. 1694 (H.M.C., *Buccleuch and Queensberry*, ii, 108).

<sup>145</sup> Capell to Shrewsbury, 24 Nov. 1694 (*Cal. S.P. dom.*, 1694-5, p. 344); Wyche and Duncombe held similar views: Wyche and Duncombe to Shrewsbury, 24 Nov. 1694 (Bodl., Carte MSS 170, ff 160-62).

<sup>146</sup> Shrewsbury to the lords justices, 8 Dec. 1694 (*Cal. S.P. dom.*, 1694-5, p. 352).

‘impediment’ or forgo his pardon.<sup>147</sup> In March 1695 the lords justices were directed by Shrewsbury to proceed with the pardon, as King had sent his eldest son to England, into the care of the earl of Burlington, ‘who has undertaken to bring him up a Protestant’.<sup>148</sup> The pardon was duly granted in April 1695.<sup>149</sup>

This case showed the consensus of opinion between Irish Protestants, the Irish and English governments, and William III, with regard to the foreign education of Catholics. The prevailing attitude of Protestants was that foreign education for Catholics was a threat to the Protestant interest, and should be prevented when at all possible. In the case of John King, the threat of losing his pardon had ensured that he removed his children from France. But such a threat was not applicable to the majority of Irish Catholics. So the logical progression was permanent legislation covering all Catholics. In June 1695 a bill for restraining foreign education, with an accompanying letter of explanation, was included in the initial transmission of bills to the English privy council.

This bill is designed to bring the Irish from their foreign correspondency and dependency and to incline them to affirm loyalty to the Crown. It is for want of such like law that the English ancient families in this kingdom have degenerated and are become as much or more inveterate against the Crown of England than the descendants of the mere Irish families. But this act being duly put in execution may in a competent time bring them over to our Church, make them good subjects and utterly take away their inclinations to any foreign prince and power against their own natural sovereign.<sup>150</sup>

While the hope was expressed that some Catholics might convert to Protestantism, the main thrust of the bill was to allay Protestant fears of the further growth of popery, of losing Protestants to Catholicism, and ultimately of European counter-reformation Catholicism, leading, as it was perceived, to a Frenchified Catholic universal monarchy.<sup>151</sup>

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<sup>147</sup> Shrewsbury to John King, 8 Dec. 1694 (*Cal. S.P. dom., 1694-5*, p. 352).

<sup>148</sup> Shrewsbury to the lords justices, 23 March 1695 (*Cal. S.P. dom., 1694-5*, p. 410).

<sup>149</sup> Warrant for pardon, 7 April 1695 (*Cal. S.P. dom., 1694-5*, p. 420).

<sup>150</sup> Capell and the privy council to the lords justices of England, 17 June 1695 (B.L., Add MSS 40,771, f. 33).

<sup>151</sup> On the threat of France and Catholicism to England and Ireland see Boshier, ‘Franco-Catholic

As with the disarming bill, the bill restraining foreign education received close scrutiny from the English lords justices and privy council due to allegations by Irish Catholics that the bills contravened some of the articles of Limerick and Galway.<sup>152</sup> Fear of losing these two bills caused consternation among Irish Protestants. Porter rose to the defence of both, making specific reference to the bill against foreign education as being ‘a very necessary and good law’. While acknowledging that only the English lords justices and council could judge if the time was right for such a law, he pointed out that in his opinion there was nothing ‘in either of those bills contrary to any articles or proclamations of his Majesty’.<sup>153</sup> However, the English lords justices and council felt that some aspects were ‘a little too severe, or at least too early to be put in practice, before trial has been made of other parts of the bill’. Their main concerns were the ‘taking away the liberty of having children instructed in the houses of their parents or guardians’, ‘making it as penal to be in private houses abroad, as in seminaries’, and ‘the hardship of subjecting justices of the peace to such fines, as will make men decline accepting that office’.<sup>154</sup> By 9 July the lords justices and council had amended the bill, removing the ‘retrospect’, so that ‘the Act is now only a provision for the future’, and doing away with the penalties placed upon justices of the peace. The education clauses were also amended.

Public schools are not to be kept but children may be taught privately by popish masters in the house of their parents or guardians; children are not restrained from their being sent abroad, provided it be to private families, and not in order to their being instructed in the Romish religion.<sup>155</sup>

It still remained to be qualified whether ‘the conviction of one who sends a child abroad shall not be “ipso facto” a conviction of the child’, but that the child could be relieved of such conviction if on his return he made it clear ‘his being abroad was not contrary to the intention of the act’. Yet even this was believed to be near a resolution,

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danger’, pp 5-30.

<sup>152</sup> Vernon to Capell, 29 June 1695 (B.L., Add MSS 40,771, f. 37); See also, H.M.C., *Downshire*, i, 488; H.M.C., *Buccleuch and Queensberry*, 197; *Cal. S.P. dom., 1694-5*, p. 513.

<sup>153</sup> Porter to Trumbull, 3 July, 8 July 1695 (H.M.C., *Downshire*, i, 493, 496-7).

<sup>154</sup> Shrewsbury to Capell, 6 July 1695 (B.L., Add MSS 40,771, f. 42).

<sup>155</sup> Vernon to Capell, 9 July 1695 (B.L., Add MSS 40,771, f. 44).

and the English attorney-general felt certain that all the bills would be engrossed by the end of that week.<sup>156</sup> The bill was eventually returned to Ireland and presented to the Irish parliament where it passed along with the disarming bill in September 1695. The only cause for debate upon the bill was that ‘though it prohibits public Irish schools it allows of private ones provided they only teach the children and wards of those in whose house they keep’. This was thought to be too great a liberty, and ‘more than the Act of Uniformity allows’. But rather than lose ‘the benefits of both acts’, the Irish parliament ‘swallowed them with their faults’.<sup>157</sup>

### VIII

The three penal measures specified by Capell on 14 July 1694 as necessary for the settlement of Ireland had passed through the Irish parliament of 1695 without great difficulty. They represented the logical, formulated conclusion to an amalgam of Irish Protestant attitudes towards Catholics and developing government policy, both in England and in Ireland, during the years immediately following the Williamite war. At a political level, they played an important role in establishing a compromise policy in the Irish parliament over the issue of money-bills, and in so doing helped to develop a system of ‘undertakers’ in the management of the Irish parliament for the executive, Capell’s ‘managers’ being the first in a long line of court ‘undertakers’.<sup>158</sup> At a security level, they were part of the answer to the threat of external invasion and internal turmoil. France and England were at war from 1689 to 1697, and the threat of counter-reformation Catholicism and a Frenchified absolutism kept alive a constant fear for the security of the Protestant interest in Ireland. The penal laws of 1695 were an attempt to lessen that threat, and to secure the benefits of the Glorious Revolution.

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<sup>156</sup> Ibid.

<sup>157</sup> Warburton to Ellis, 19 Sept. 1695 (B.L., Add MSS 28,879, ff 138-9).

<sup>158</sup> Porter to Trumbull, 3 July 1695 (H.M.C., *Downshire*, i, 492-3); Rev. Dr Burridge, *A short view of the present state of Ireland - with regard particularly to the difficulties a chief governor will meet with there in holding a parliament* (published 1708), pp 17-18; D. W. Hayton, ‘The beginnings of the “Undertaker System”’ in Bartlett and Hayton (eds), *Penal era and golden age*, pp 40-44; McGrath, ‘Securing the Protestant Interest’, p. 227.

Past proclamations and the English parliament's disarming act of 1689 provided the example for the first Irish penal laws, William's war-time proclamation of 1690 set the precedent, and from that point onwards a continuity of government policy in England and Ireland ensured the constant implementation of these penal measures up to, and beyond, 1695. Ultimately the first penal laws were an integral part of the securing of the protestant interest in Ireland.<sup>159</sup>

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