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Land, Credit and the Constitution

Debtor Protections and Catholic Rights in Eighteenth-Century Ireland

JULIA RUDOLPH

Several mortgage bills – aimed to allow so-called papists to lend money to Protestants on mortgages of land – were proposed, but failed to secure passage in the Irish parliament in the 1760s and early 1770s. Examples include a bill from 1764 "To ascertain what securities may be taken by persons professing the Popish religion for monies lent," and a bill from 1771 "To secure the repayment of money really lent and advanced by Papists . . . to Protestants, on mortgages of lands, tenements and hereditaments within the kingdom of Ireland."[1] Opponents of these bills trotted out familiar anti-Catholic attacks. MP Thomas LeHunt, for example, objected to the 1764 proposed bill as "dangerous to the Protestant interest," because it would undermine what were known as the "Popery laws" or the "penal code." Those laws were essential, he thought, not only because they kept Catholics from acquiring property and power but also because they worked to "reclaim [Catholics] from idolatry and heathenism."[2] James Caldwell, "an improving and enlightened landlord" who published on a range of political and economic topics, used even more pointed language and inflammatory analogies.[3] In his pamphlet against that same 1764 mortgage bill, Caldwell insisted

[1] 1763/64, "To ascertain what securities may be taken by persons professing the Popish religion for money lent, or to be lent by them, and also what remedies they may have recourse to for recovery thereof": www.qub.ac.uk/ild/?func=display_bill&id=1353; and 1771A. "To secure the repayment of money really lent and advanced by Papists, or persons professing the Popish religion, to Protestants, on mortgages of lands, tenements and hereditaments within the kingdom of Ireland": www.qub.ac.uk/ild/?func=display_bill&id=1772, Irish Legislation Database, Queens University Belfast.

[2] J. Kelly, 'Repealing the Penal Laws, 1760–95', in K. Costello and N. Howlin (eds.), *Law and Religion in Ireland 1700–1970* (Basingstoke 2021), 88.

[3] H. Andrews, 'Caldwell, Sir James (c. 1720–1784)', *Dictionary of Irish Biography*, www.dib.ie/biography/caldwell-sir-james-a1389.

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that Catholics posed a threat to state and society. The state must treat them with firmness and even severity, he said, in the same way that the state would properly treat other religious groups that, for example, engaged in child sacrifice or worshipped trees.[4] While Caldwell endorsed the familiar assertion that men's consciences could not be forced, he resisted the conclusion that men could not be punished for their beliefs. Such state action was required in order to defend the religious and constitutional settlement achieved in 1689, he explained, since "popery necessarily includes notions contrary to the safety and well-being of a Protestant state, under a Prince who owes his succession to the abdication and exclusion of a popish king."[5] Caldwell defended his arguments as political prudence and denied that he was motivated by a desire to persecute Catholics.

Only a few years after the creation of that Protestant state in 1689, the Irish parliament had passed repressive legislation intended to punish Catholic beliefs and actions. This penal code prohibited Catholic religious practice and education, proscribed Catholic political and professional activity, and significantly inhibited Catholic property holding.[6] Mortgage legislation proposed six decades later clearly raised questions about continued enforcement of these penal laws, as opponents expressed concern that the legislation would undermine this foundation of the Protestant constitution. At a time of widespread debate about constitutional change in many parts of Britain's Atlantic empire, commentators like Caldwell firmly rejected any relaxation of those laws that prohibited Catholic landownership in Ireland. When he repeated familiar arguments about an association between "popery" and "tyranny," and invoked long-lived Whig defenses of the revolution as a triumph of "liberty" over "slavery," Caldwell took part in a contentious imperial

[4] J. Caldwell, *A Brief Examination of the Question, Whether It Is Expedient Either in a Religious or Political View to Pass an Act to Enable Papists to Take Real Securities for Money Which They May Lend* (Dublin, 1764), 5–7.

[5] Ibid., 7.

[6] J. Bergin, E. Magennis, L. Ni Mhunghaile and P. Walsh (eds.), *New Perspectives on the Penal Laws, Eighteenth-Century Ireland*, Special Issue No. 1 (Dublin, 2011); I. McBride, *Eighteenth-Century Ireland: The Isle of Slaves* (Dublin, 2009), ch. 5; W. N. Osborough, 'Catholics, Land and the Popery Acts of Anne', in T. P. Power and K. Whelan (eds.), *Endurance and Emergence; Catholics in Ireland in the Eighteenth Century* (Dublin, 1990), 21–56; J. G. Sims, 'The Making of a Penal Law (2 Anne c. 6) 1703–4' (1960) 12 *Irish Historical Studies* 46, 105–118; J. Rudolph, 'A Broker's Advice: Credit Networks and Mortgage Risk in the Eighteenth-Century Empire', in M. Lobban and I. Williams (eds.), *Networks and Connections in Legal History* (Cambridge, 2020), 199–205.

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discourse about economy, jurisdiction and rights. Yet when he warned that the proposed mortgage bill was "a project which tends to make Protestants slaves to Papists," and would empower Catholics "to subvert the very being of the Constitution," he was not contributing to critiques of colonial slavery or imperial governance.[7] Rather, Caldwell drew upon an Irish patriot language, contrasting English liberties with continental tyranny, in order to amplify particular religious fears about the political, economic and social changes that might follow from the proposed legislation.[8]

Scholars generally interpret these mortgage bills, and the negative reactions to them, within the context of a broader controversy over Catholic relief that occurred in the 1760s and 1770s. James Kelly, for example, analyzes this "sequence of initiatives . . . to secure legislative protection for [Catholic] lenders" as part of what he calls the "first attempts" to repeal the penal laws.[9] Kelly and other scholars also emphasize the significance of economic improvement in Ireland after 1750, and highlight growing constitutional challenges to Irish legislative dependence, in order to explain the Catholic relief efforts of these years.[10] Such histories of the penal laws and of Catholic emancipation are essential to a longer narrative about politics and religion, and are certainly important contexts for these legislative proposals and failures. But critics of the proposed mortgage legislation, like James Caldwell, didn't just talk about politics or religion. They also talked about debt law and property law.

[7] Caldwell, *Brief Examination*, 12, 21. For the longer history of discourse, and examples of similar language used in 1771 and 1774, see J. Marshall, 'Whig Thought and the Revolution of 1689–91', in T. Harris and S. Taylor (eds.), *The Final Crisis of the Stuart Monarchy: the Revolutions of 1689–91 in Their British, Atlantic and European Contexts* (Woodbridge, 2013), 71–86; C. L. Brown, *Moral Capital: Foundations of British Abolitionism* (Chapel Hill, NC, 2006), 46–48, 209–213; Kelly, 'Repealing Penal Laws', 89–91; M. J. Powell, 'Credit, Debt and Patriot Politics in Dublin, 1763–1784' (2010) 25 *Eighteenth-Century Ireland* 140.

[8] McBride, *Eighteenth-Century Ireland*, 17; C. Kidd, 'North Britishness and the Nature of Eighteenth-Century British Patriotisms', *Historical Journal* (1996) 39(2) 380–381.

[9] Kelly, 'Repealing Penal Laws', 86.

[10] Ibid., 78–79; J. Kelly quoted in P. Higgins, 'Matthew Carey, Catholic Identity and the Penal Laws' (2014) 49 *Eire-Ireland* 176–177; T. O'Connor, 'The Catholic Church and Catholics in an Era of Sanctions and Restraint, 1690-1790', in J. Kelly (ed.), *The Cambridge History of Ireland. Volume III. 1730–1880* (Cambridge, 2018), 278–279; D. Dickson, 'Society and Economy in the Long Eighteenth Century', in J. Kelly (ed.), *Cambridge History of Ireland. Volume III. 1730–1880* (Cambridge, 2018), 167; S. J. Connolly, *Divided Kingdom: Ireland 1630–1800* (Oxford, 2008), 384–420.

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They referred to specific legal dangers Catholic mortgagees posed, sometimes citing elements of writ and judgment process. In order to understand their fears, and to interpret these legislative failures, we also need to understand the history of mortgage law in Ireland and in the empire. How did these Irish bills look in the context of evolving mortgage practice? How did they look compared to other examples of mortgage legislation proposed, and sometimes passed, in eighteenth-century Ireland, England and other parts of the British Empire?

Since the end of the seventeenth century, when modern mortgage principles were distinctly articulated in English law, strong debtor protections had been enshrined in the doctrine of the equity of redemption.[11] According to this doctrine, a mortgagor retained a right to redeem his property, even after default on the loan, and this right could only be extinguished through a lengthy and difficult foreclosure process. While at common law a mortgage had long been understood as a form of property transfer, in equity mortgage was now defined as redeemable debt security. This equitable doctrine aimed to protect the mortgagor from avoidable loss of property while also preserving the creditor's right to repayment of the loan, with interest and costs. This debtor-friendly doctrine was a critical feature of eighteenth-century mortgage agreements, litigation and legislation in England, Ireland, the Caribbean and North America, as mortgage lending spread across the British Empire.[12] Yet while mortgage doctrine promised key protections for debtors, promoting stability in landed property and stimulating new kinds of investment, the nature and extent of debtor protections were frequently contested. Religious and political concerns shaped mortgage law and policy in Ireland, and so too did imperial and economic factors. As mortgage lending spanned imperial networks, and periodic credit crises emerged, mortgagees often pushed for increased creditor protections.

[11] R. W. Turner, *The Equity of Redemption: Its Nature, History and Connection with Equitable Estates Generally* (Cambridge, 1931); A. W. B. Simpson, *A History of the Land Law* (Oxford, 1986), ch. 10; D. P. Waddilove, 'Why the Equity of Redemption?', in C. Briggs and J. Zuijderduijn (eds.), *Land and Credit: Mortgages in the Medieval and Early Modern Countryside* (London, 2018), 117–148; W. Cornish et al., *Law and Society in England 1750–1950* (Oxford, 2019), 128–132.

[12] J. Rudolph, 'The Last Will and Testament of John Gardner Kemeys: Jamaican Mortgages and English Inheritance Disputes', in C. Griffiths and L. Korporowicz (eds.), *English Law, the Legal Profession and Colonialism: Histories, Parallels, and Influences* (Abingdon, 2024), 219–234.

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The failure of numerous proposed mortgage bills in late-eighteenth-century Ireland must, then, be understood as contemporaries saw it, not only as a part of the history of the penal laws and Catholic emancipation, but also as part of the history of mortgage law and the testing of the equity of redemption. Concerns about deceit and mismanagement in mortgage were widespread at this time and, like other concerns about the growing credit economy, this disquiet was frequently expressed through statute. Indeed the "Dublin parliament passed more than 2300 acts between 1660 and 1800," Julian Hoppit calculates, "of which a half concerned economic matters."[13] Irish and British mortgage legislation often focused on restraining fraudulent debtors, but some legislators elsewhere in the empire also targeted predatory lenders. Thus, in drafting and debating their bills, Irish legislators likely considered the wider potential impacts of their proposals to enable Catholics to become creditors: Would passage of these laws necessitate new kinds of legal protections for debtors? How might these laws affect other creditors; would they undermine the security that other lenders, in other places, had fought for and won?

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In the late seventeenth and early eighteenth centuries, as debtor-friendly mortgage doctrine took hold, Irish and English parliaments enacted several creditor-friendly mortgage laws. These laws promoted transparency and penalized the deceitful mortgagor who tried, surreptitiously, to solicit multiple loans. For example, a 1692 English Act Against Clandestine Mortgages denied "the benefit of equitable rules" to such debtors who mortgaged property without "notice of prior encumbrance."[14] It was understood that these mortgagors should not enjoy protections afforded by the equity of redemption. The Irish parliament passed a similar Act to Prevent Frauds by Clandestine Mortgages in 1697.[15] As part of these efforts to prevent harms caused by secretive sellers and mortgagors, legislators also considered bills to establish land registries in both England and Ireland. Proposals for a national land registry had been discussed in England for decades, but the idea gained new prominence among advocates of a national land bank during the

[13] J. Hoppit, *Britain's Political Economies: Parliament and Economic Life, 1660–1800* (Cambridge, 2017), 130.
[14] 4 & 5 William & Mary c. 16 (Eng.).
[15] 9 William 3 c. 11 (Ire.).

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1690s' public policy debate known as the "battle for the banks."[16] The most successful land bank scheme, promoted by the lawyer and economic writer John Asgill, included detailed plans for a public register of deeds. Asgill articulated his arguments about the stability and elasticity of credit founded upon land in his 1695 *The Settlement of the Land Bank*, and published a second stand-alone proposal, entitled *An Essay on a Registry, for Titles on Land*, in 1698. As Asgill explained, a registry would not only confirm land values underpinning his proposed bank, but would also guarantee transparency and avoid secret liens, which were known threats to creditors' interests.[17] Similar arguments about the importance of registration as a vital tool in the fight against fraud were made by other advocates, and although attempts to introduce a national registry ultimately failed, local deed registries were established in England soon after the turn of the century. Legislation created a registry in the West Riding of Yorkshire in 1704, and subsequent acts established local registries in the East Riding and in Middlesex in 1707–1708.[18]

The Irish parliament successfully launched its own comprehensive registry of deeds at this time with the 1707 Act for Irish Registration of Deeds, which created a national, rather than simply local, system of registration.[19] While this Irish act shared some of the goals of English legislation, it is important to emphasize that its passage was not simply an indication of direction or control from Westminster. By the early eighteenth century, Irish lawmakers were practiced at skirting restrictions on legislative independence imposed by Poyning's Law. Members of the Irish parliament initiated legislation in the form of "heads of bills" and

[16] Between 1691 and 1695 several economic projectors, including Hugh Chamberlen, John Briscoe, Nicholas Barbon and John Asgill, produced land bank designs and polemics. D. Rubini, 'Politics and the Battle for the Banks, 1688–1697' (1970) 85 *English Historical Review* 693; R. Kleer, 'Fictitious Cash: English Paper Finance and Public Money 1689–97', in C. I. McGrath and C. Fauske (eds.), *Money Power and Print: Interdisciplinary Studies on the Financial Revolution in the British Isles* (Newark, DE, 2008), 82; C. Wennerlind, *Casualties of Credit: The English Financial Revolution, 1620–1720* (Cambridge, 2011), 114–121.

[17] J. Asgill, *Settlement of the Land Bank* (London, 1695), 3–4.

[18] 2 & 3 Anne c. 4 (Eng.), 6 Anne c. 62, 7 Anne c. 20, 8 George 2 c. 6 (GB). F. Sheppard and V. Belcher, 'The Deeds Registries of Yorkshire and Middlesex' (1980) 6 *Journal of the Society of Archivists* 274.

[19] 6 Anne c. 2, amended in 8 Anne c. 10 (Ire.). This "Act for the public registry of all deeds, conveyances and wills [that shall be made of any honours, manors, lands tenements and hereditaments]" was approved after two unsuccessful bills to establish Irish registries failed before the English Privy Council in 1697 and 1705: www.qub.ac.uk/ild/?func=display_bill&id=728; www.qub.ac.uk/ild/?func=display_bill&id=860.

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while these bills would still be scrutinized, and possibly rejected, by the British Privy Council, Irish MPs played a major role in framing laws.[20] It is possible that the framers of the Act for Irish Registration of Deeds were influenced by contemporary arguments for land registration, like those circulated by John Asgill, whose "Essay on a Registry, for Titles on Land" appeared, with extended debate, in a Dublin edition in 1701.[21] Also significant is the fact that these Irish legislators were operating during the lengthy period of Catholic dispossession imposed in Ireland after 1689. Like earlier English legislation, the Irish Act was framed as a necessary response to the general dangers of deception and fraud, but it further singled out the particular threat of fraud practiced "especially by papists, to the great prejudice of the protestant interest."[22] This statutory language has led some scholars to describe the Irish registry as an adjunct of the penal laws.[23]

At a time of property seizure and land transfer, when accusations of manipulation, deceit and violence were lodged against Protestants as well as Catholics, the Irish Acts for the registering of deeds and against clandestine mortgages were intended to ensure property title, and prevent deception in mortgage, leasing and sales. These Acts were shaped by Protestant determination to prevent Catholic evasion of the penal laws, but they were also informed by other areas of concern in contemporary property and debt law. The widespread use of mortgages in estate management in Ireland as well as England meant that mortgage doctrine was of particular interest and that new questions arose. With regard to formerly Catholic-owned property, for example, it was unclear what remedies would be available for creditors of a mortgaged estate that

[20] J. Kelly, 'The Making of Law in Eighteenth-Century Ireland', in N. M. Dawson (ed.), *Reflections on Law and History: Irish Legal History Society Discourses and Other Papers, 2000–2005* (Dublin, 2006), 270; J. Kelly, *Poyning's Law and the Making of Law in Ireland, 1660–1800* (Dublin, 2007), 11 and ch. 3; Connolly, *Divided Kingdom*, 202, 235.

[21] P. A. Walsh, 'Asgill, John 1659–1738', *Dictionary of Irish Biography*, https://doi.org/10.3318/dib.000238.v1; B. Twomey, *Personal Financial Management in Early Eighteenth-Century Ireland: Practices, Participants and Outcomes* (unpublished PhD dissertation, Trinity College Dublin, 2018), 84–85.

[22] "For securing purchasers, preventing forgeries and fraudulent gifts and conveyances of lands, tenements and hereditaments, which have been frequently practiced in this kingdom, especially by papists, to the great prejudice of the protestant interest thereof." 6 Anne c. 2, *The Statutes at Large, Passed in the Parliaments held in Ireland* (Dublin, 1786), vol. 4, 112.

[23] P. Roebuck, 'The Irish Registry of Deeds: A Comparative Study' (1972) 18(69) *Irish Historical Studies* 64–65; J. Howell, 'Deed Registration in England: A Complete Failure?' (1999) 58(2) *Cambridge Law Journal* 377.

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had been forfeited, and where title remained in dispute.[24] Further, when Catholic landowners managed to hold on to their estates, despite seizures and the growing number of repressive laws, the interpretation of debtor protections was changeable and contested. Family settlements and entails created before 1703 had helped some Catholic families to safeguard property, and even "to circumvent inheritance restrictions," like the gavelling clause mandating subdivision of estates of inheritance, that were part of the 1704 penal legislation targeting Catholic landownership.[25] Although Catholics could not legally hold mortgages on the lands they retained, some Catholics did manage to mortgage their property to sustain these family settlements, sometimes as part of collusive actions with Protestant discoverers.[26] Other Catholic landowners were able to secure mortgages after agreeing to convert to Protestantism, and this added to already widespread concern about debtor deceit. Creditors took note of the possibility of false conversion, leading mortgage lenders in Ireland, and in other parts of the British Empire, to try to check property deeds now validated at the registry in Dublin, and to seek assurances from local informants about the religious convictions of potential borrowers.[27]

Creditor suspicion about mortgage fraud and deception was, however, not only directed at Irish Catholics. Heavily indebted Protestant landowners in Ireland also relied on mortgages in order to maintain and

[24] Rudolph, 'Broker's Advice', 200–201. The general issue of repayment to Protestant creditors was a question posed early in the Williamite settlement: see the discussion of the debt of Colonel John Browne and the articles of Limerick in E. Kinsella, 'In Pursuit of a Positive Construction: Irish Catholics and the Williamite Articles of Surrender, 1690–1701' (2009) 24 *Eighteenth-Century Ireland* 25–29.

[25] R. Fitzpatrick, 'Catholic Inheritance under the Penal Laws in Ireland' (2020) 44(166) *Irish Historical Studies* 224, 227–229; see also K. J. Harvey, 'The Family Experience: The Bellews of Mount Bellew', in T. P. Power and K. Whelan (eds.), *Endurance and Emergence; Catholics in Ireland in the Eighteenth Century* (Dublin, 1990), 177–178.

[26] Harvey, 'Family Experience,' 172; T. P. O'Neill, 'Discoverers and Discoveries: The Penal Laws and Dublin Property' (1983) 37(1) *Dublin Historical Record* 2, 6–7. For an example of the contest over discovery and the equity of redemption see *Foot v. Nagle* in G. E. Howard, *Several Special Cases on the Laws against the Further Growth of Popery in Ireland* (Dublin, 1775), 84–88.

[27] 8 Anne c. 3 s. 27–30 (Ire.) An Act for Explaining and Amending an Act Intituled, An Act to Prevent the Further Growth of Popery; Rudolph, 'Broker's Advice', 205–207; C. Bailey, *Irish London: Middle-Class Migration in the Global Eighteenth Century* (Liverpool, 2013), 95–96. On the significance of Catholic Irish merchant networks see also J. Bergin, 'Irish Catholics and Their Networks in Eighteenth-Century London' (2015) 39(1) *Eighteenth-Century Life* 75–85, 89–92.

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expand family wealth. Taking on mortgage debt was an accepted way to charge an entailed estate so as to raise marriage portions for daughters, produce maintenance for younger sons, and provide for wives' trusts and jointures.[28] The earls of Donegall, aristocratic proprietors of Belfast, afford a good example of how this wide recourse to mortgage could stimulate creditor concern. The fourth earl, who suffered from chronic physical and mental illness, succeeded to his title in 1706. Soon after, the family moved from Belfast to England and estate finances were then taken over – and mismanaged – by trustees. Creditors challenged this estate administration and many of the Donegall debts, including several large mortgage loans, were "entangled in a web of lawsuits and legal settlements" for decades.[29] The fifth earl, more capable and more ambitious, inherited and increased these debts after he succeeded to the title in 1757. In addition to the mortgages, unpaid portions, annuities, and legacies he inherited, the fifth earl acquired new mortgage loans worth tens of thousands of pounds. He borrowed this money from individual lenders, and from Hoare's Bank in London, in order to finance the purchase and improvement of Fisherwick Park. This was an estate in Staffordshire, England that he had recently purchased from another heavily indebted Irish landowner, the fifth Viscount Massereene.[30] The fifth Earl of Donegall further embarked on "a major programme of urban improvement" in Belfast which established some of its features that still endure today.[31] Donegall not only took out major loans to finance these projects but he also raised rents and levied new fines on some of his properties in Belfast and elsewhere in Ulster. These actions contributed to the outbreak of agrarian protests – what were known as the "Hearts of Steel" risings – in County Antrim between 1770 and 1772.[32]

Irish Protestant property owners, both lesser gentry and great peers like the earls of Donegall, looked to debtor protections in mortgage

[28] D. Wilson, *Women, Marriage and Property in Wealthy Landed Families in Ireland, 1750–1850* (Manchester, 2009), 20; P. Roebuck, 'Landlord Indebtedness in Ulster in the Seventeenth and Eighteenth Centuries', in J. M. Goldstrom and L. A. Clarkson (eds.), *Irish Population, Economy and Society* (Oxford, 1981), 153–154.

[29] S. J. Connolly, 'The Origins of Public Space', in D. Bryan, S. J. Connolly and J. Nagle (eds.), *Civic Identity and Public Space: Belfast since 1780* (Manchester, 2019), 19; Roebuck, 'Landlord Indebtedness', 139–140.

[30] W. A. Maguire, 'Absentees, Architects and Agitators: The Fifth Earl of Donegall and the Building of Fisherwick Park' (1977/78–1981/82) 10 *Proceedings of the Belfast Natural History and Philosophical Society* ser. 2, 6.

[31] Connolly, 'Origins Public Space', 20.

[32] Maguire, 'Absentees', 8–12; Roebuck, 'Landlord Indebtedness', 137–138.

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doctrine as a way to ensure that they would be able to hold on to their estates. Many mortgage deeds enrolled at the Irish Registry made clear reference to that doctrine by using the term "equity of redemption" or including a "proviso or condition of redemption."[33] Mortgagees to these Protestant landowners also sought protections: pro-creditor legislation against clandestine mortgages and for establishing deed registers could help them make sure that borrowers weren't lying about prior liens, or about the extent and current value of their properties. Further pro-creditor legislation was developed to help mortgagees bring difficult debtors more swiftly to account since, as we can see from the Donegall example, redemption claims could be prolonged and litigation could drag on.[34] Given the expense and complexity of mortgage litigation in particular, some remedies had to be devised so as to preserve and promote credit. As the Irish legal writer G. E. Howard explained in his *Treatise on the Rules and Practice of the Equity Side of the Exchequer in Ireland*, men bringing bills of foreclosure often encountered "infinite delay" and this kind of obstruction and frustration might lead some of them to become suspicious of the entire legal system. "If something be not speedily done, to remedy this every Day growing Evil," Howard warned, "it will at length come to that Pass, that not any Man in his Senses will lend his Money on any Security in the Kingdom."[35]

Mortgage laws that addressed creditor concerns about procedural delay included an Irish Act for the Relief of Mortgagees, passed in 1733, when "the first serious banking crisis in Ireland" was connected to a general downturn in credit.[36] At a time when it was seen as important to open up credit, this Irish Act offered increased protection,

[33] Brendan Twomey avers that "the explicit citing of an equity of redemption term" was a "regular feature" in the first 200 "satisfied and discharged" mortgage deeds he surveyed. Twomey, *Personal Financial Management*, 119. These terms appear throughout the Irish registry, in later as well as earlier volumes considered by Twomey. See, for example, Registry of Deeds (ROD) 1 166 99, 5 363 2074, 72 57 4907, 108 24 74434, 247 6 15787.

[34] See, for example, continued negotiations over mortgage lending and repayment between Donegall and representatives at Hoare's Bank: letter to Earl of Donegall 1784, Private Letter Book 1778–1784, Hoare's Bank, London, HB/8/T/3 fol. 76; Earl of Donegall, n.d., and Earl of Talbot to Messrs Hoare, Bankers, 15 April 1795, Hoare's Bank, London.

[35] G. E. Howard, *A Treatise on the Rules and Practice of the Equity Side of the Exchequer in Ireland* (Dublin, 1760), vol. 1, xxv.

[36] L. M. Cullen, 'Problems in and Sources for the Study of Irish Economic Fluctuations 1660-1800' (2014) 41 *Irish Economic and Social History* 3–4; Dickson, 'Society and Economy', 155. A total of eight Dublin banks failed between 1727 and 1760 Powell, 'Credit, Debt and Patriot Politics in Dublin', 124.

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and thus encouragement, to lenders. The Act specifically addressed the problem of mortgagors who "absconded or [have] gone out of the kingdom" to avoid their creditors' suits. It detailed the legal responsibilities of resident estate agents, and clarified the steps by which a bill of foreclosure would move toward a final decree in the Irish Chancery.[37] This law would not only have impacted mortgagors who had only temporarily fled at a time of crisis, but also Irish absentees, and great debtors, like the earls of Donegall who had been living in England for decades. This legislative relief for creditors was part of the development of mortgage law that informed later debates about whether legislation should openly recognize and extend protection to Catholic mortgagees too. In these earlier decades there were some who already defended Catholic lending, arguing that since Catholics had "engrossed to themselves a great share of the trade and commerce," this expansive Irish Catholic merchant wealth was a reservoir of credit that ought to be acknowledged and accessed.[38]

More broadly, 1733 was a moment of economic and political upheaval in Britain and other parts of the empire, when complaints about deceits, speculation and "shameful frauds" were fueled by any number of controversies, including the excise crisis, increased risks in colonial credit markets and a stock market plunge.[39] The Westminster parliament addressed credit and investment concerns in legislation like the Colonial Debts Act 1732, which aimed to protect British merchant creditors, Barnard's Act 1734, intended to suppress the more speculative methods of securities trading or "stockjobbing," and the Act for the More Easy Redemption and Foreclosure of Mortgages passed in 1734.[40] Like the Irish Act of 1733, this British mortgage legislation outlined methods for promoting creditor rights. Both British and Irish legislators sought to protect mortgagees by establishing specific steps by which a cooperative mortgagor participated either in redemption or foreclosure processes. At the same time, both bills maintained the principle of debtor

[37] 7 George 2 c. 14 (Ire.). J. Gabbett, *A Digested Abridgement and Comparative View of the Statute Law in England and Ireland* (Dublin, 1812), vol. 2, bk. 3, 339–340.

[38] *Some Considerations on the Laws Which Incapacitate the Roman Catholicks of Ireland from Purchasing Lands, from Taking Long or Beneficial Leases, and from Lending Money on Real Securities* (Dublin, 1740), 19–20.

[39] M. J. Daunton, *Progress and Poverty: An Economic and Social History of Britain, 1700–1850* (Oxford, 1995), 510; S. Banner, *Anglo-American Securities Regulation: Cultural and Political Roots, 1690–1860* (Cambridge, 1998), ch. 3.

[40] 5 George 2 c. 7, 7 George 2 c. 8, 7 George 2 c. 20 (GB).

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redemption rights enshrined in mortgage doctrine. Indeed, the Irish Act for the Relief of Mortgagees included several sections setting out extended times for mortgagors to respond to decrees of foreclosure as a way to preserve absentees' ability to redeem their mortgages.[41] A subsequent amendment, passed in 1739, offered some clarification of this decree process in yet another attempt to protect mortgagees against mortgagors who failed to participate.[42] The goal common to Irish and British legislation for "relief" and "easy redemption and foreclosure" was to allow for a mortgagor's redemption of property, but at the same time to expedite the decree process for the benefit of the mortgagee.

It was only much later that methods for mandating debtor cooperation, and ensuring payment, were enacted in Ireland. In 1772 an Irish Act for Rendering Securities More Effectual provided for the appointment of a "Receiver" in those cases where a lender had received no mortgage interest payments for over a year. The Receiver was empowered to gather "such part of the rents of the mortgaged premises" necessary to meet the mortgagor's obligations "to pay such arrear of interest, and also the accruing interest . . . until the whole of such interest due on the said mortgage be discharged."[43] This Irish Act was another example of extending protection for creditors at a time when money was tight. In 1770, a credit crisis had affected certain Irish banks and merchants, and by 1772 there was a widespread financial crisis throughout Britain and the empire.[44] Protections for creditors were broadly defended as necessary steps in order to promote national, commercial and imperial success.

The Irish Act for Rendering Securities More Effectual established enhanced supervision of debtors by creating an additional salaried administrator, the Receiver, who was to be involved in a landowner's affairs. Many, if not most, Irish landowners, residents as well as absentees, already employed agents, attorneys, surveyors and accountants to assist in running their estates. But those men were supposed to work for their landowner's benefit, and even before the 1772 Act lawmakers had raised questions about collusion between deceptive agents and indebted

[41] 7 George 2 c. 14, sects. 3–8 (Ire.); Gabbett, *Digested Abridgment*, 340.
[42] 13 George 2 c. 9, sects. 1–3 (Ire.).
[43] 11 & 12 George 3 c. 10 (Ire.).
[44] Cullen, 'Problems and Sources Irish Economic Fluctuations', 4, 7; J. Hoppit, 'Financial Crises in Eighteenth-Century England' (1986) 39(1) *Economic History Review* (new series) 51–54.

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landowners. Two bills aimed to "better regulat[e] agents, receivers and attorneys" had been proposed, but failed, in the 1740s and 1750s. These mid-century regulatory proposals generally focused attention on willful corruption and undue influence, but there was also disquiet "about the ease with which Catholics had moved into this work" as agents.[45] The court-appointed Receiver mandated by the 1772 Act was meant to be a check on a corrupt agent's power, and also a limit on a landowner's options. The Receiver's function was to advance the creditor's interests; the point of the 1772 legislation was to root out debtor frauds and evasions, and to compel a recalcitrant mortgagor to stay up to date on mortgage payments.

Similar questions about agency, and problems regarding absenteeism, were also prevalent in Jamaica at this time. But in that part of the British Empire remedies for fraud were not solely aimed at debtors and agents. They were also sometimes aimed at creditors. Warnings about "malicious and crafty creditors" who threatened planter power had been aired in angry response to the Colonial Debts Act of 1732.[46] In subsequent years the Jamaican Assembly passed legislation against creditor deceits, seeking to exercise some control over creditor power. They enacted laws in 1740 and 1751 requiring regular and transparent accounting by mortgagees in possession, as well as by attorneys, trustees and executors, so as to ensure that any profits coming out of mortgaged plantations would be accurately recorded. While legislation in the early 1780s did bring the Jamaican foreclosure process into line with the creditor-friendly procedures outlined in earlier British and Irish legislation, Jamaican legislators took care to retain the requirement for mortgagee honesty in accounting in order to protect planter interests.[47] If British and Irish mortgage legislation mainly focused on fraudulent debtors, these colonial legislators also targeted predatory lenders.

[45] T. Barnard, *A New Anatomy of Ireland: The Irish Protestants, 1649–1770* (New Haven, CT, 2003), 211–212, 225. As Barnard notes, proposed legislation to ban Catholic agents failed in 1749: www.qub.ac.uk/ild/?func=display_bill&id=1999, and 1755: www.qub.ac.uk/ild/?func=display_bill&id=2103.

[46] S. D. Smith, *Slavery, Family, and Gentry Capitalism in the British Atlantic* (Cambridge, 2006), 166–167.

[47] 13 Geo. II c. 9, 24 Geo. II c. 19, 25 Geo. III c. 10, 33 Geo. III c. 21 (Jamaica). J. H. Howard, *Laws of the British Colonies, in the West Indies and Other Parts of America, Concerning Real and Personal Property and Manumission of Slaves* (London, 1827), 50–52, 54–56, 70–73.

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It is likely that worries about powerful and predatory lenders also motivated some Irish lawmakers to reject the so-called popish mortgage bills of the 1760s and 1770s. They did so in the context of this persistent pro-creditor trend in eighteenth-century mortgage legislation. Participants in debate were aware of developments in credit and debt law. They referenced leading cases, citing English and Irish precedents that called into question the practice of Catholic mortgage lending. And they used the language of the law to argue their points. James Caldwell, for example, elaborated on the specific legal dangers that Catholic mortgagees posed. In his publication against the 1764 bill, Caldwell warned that if Catholics were allowed to lend on mortgage, they might actually come into possession of Protestant lands as tenants in *elegit*. In the event of an unpaid mortgage debt, he explained, the Catholic creditor who obtained judgment could choose a writ of execution called *elegit*; this writ directed the sheriff to deliver half of the debtor's lands to the creditor, who then utilized these lands to extract wealth in order to discharge the debt owed.[48] The "right of Papists levying their debts by elegit" was a point of contention in Irish parliamentary debate in part because any claim to *elegit* would be in conflict with early eighteenth-century British legislation and English case law, as well as with a recent decision in the Irish courts.[49] James Caldwell joined that debate, arguing that even if it were permissible for Catholics to hold only half of the estates of Protestant mortgagors through *elegit*, it would mean that "their power and influence [would] be encreased to a dangerous degree."[50] Caldwell did acknowledge that mortgage law should protect the Protestant borrower's right to redeem his debt since, according to the doctrine of the equity of redemption, even if a mortgagor defaulted on the loan, he had an equitable right which could only be ended by a court's decree of foreclosure. But in practice, Caldwell said, the Protestant debtor would

[48] As Caldwell's contemporary, the English legal scholar William Blackstone explained, the creditor then "held, occupied and enjoyed [these lands] until his debt and damages [were] fully paid." This kind of possession was another kind of "conditional estate, created by operation of law, for security and satisfaction of debts." W. Blackstone, *Commentaries on the Laws of England, Book II*, ed. Simon Stern (Oxford, 2016), 108–109. For a discussion of the longer history of *elegit* and the common-law mortgage, see D. P. Waddilove, 'The Mendacious Common Law Mortgage' (2018) 107(3) *Kentucky Law Journal* 435–438.

[49] J. P. Day, 'The Catholic Question in the Irish Parliament, 1760–82' (MA thesis, National University Ireland, 1973), 63; Kelly, 'Repealing Penal Laws', 85–86. The relevant statutes and case law were summarized in G. E. Howard, *Several Special Cases on the Laws against the Further Growth of Popery in Ireland: 1720–1773* (Dublin, 1775).

[50] Caldwell, *Brief Examination*, 14.

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not be so well protected: "it is also well known," he noted, "that the agreement between the debtor and creditor may be so managed, as that neither the debtor nor his heir can redeem without such loss as will make the redemption a moral, though not a physical impossibility."[51]

The 1772 Act for Rendering Securities More Effectual, the only mortgage bill to be enacted in Ireland in this period of failed bills, outlined another way for a mortgagor to meet his interest payments and so, perhaps, avoid foreclosure. The Act gave the mortgagee an alternative process to *elegit*, a way to get a return on his investment without taking possession of a mortgaged property and so, if "papist" lending were permitted, could preclude a Catholic mortgagee from seizing Protestant lands. Further, passage of the 1772 Act occurred at the same time as the Irish legislature notably provided for some Catholic landholding, by ratifying an Act that allowed "every papist or person professing the popish religion, who shall be desirous to employ his industry and money for the improvement of the kingdom," to take long leases on bog land.[52] These two Acts were ratified at the same time as the legislature again took up the question of whether such wealthy Catholics could employ their "industry and money" as mortgagees.

Questions about debt process remained at issue in the debate. A legal commentator such as G. E. Howard, who published his collection of *Several Special Cases on the Laws Against the Further Growth of Popery in Ireland* in 1775, reassured contemporaries that debtor protections in mortgage law remained strong. Howard demonstrated that Catholic possession of Protestant property through mortgage was not a particular threat by citing Irish and English precedents against a Catholic right to claim *elegit* or pursue foreclosure.[53] Further, Howard actively defended the proposed bills to allow Catholics to lend on mortgage. Indeed, like other proponents of change, he argued that such mortgage loans would bind Catholics more closely to state and society, serving as what he called "a further pledge for their peaceful conduct," since Catholic money would be tied up in Protestant lands and out of reach for many years. "[S]urely the most prejudiced . . . must admit," Howard concluded, "that a rich papist could be a far more formidable enemy with money in his chest, than if it were out upon a mortgage, when twenty battles might be

[51] Ibid., 16.
[52] 11 & 12 George 3 c. 21 (Ire.); Kelly, 'Repealing Penal Laws', 91.
[53] Howard, *Special Cases*, 201–202, 294–295, 314–315.

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fought before he could command a single shilling of it."[54] Here Howard referred to existing impediments to foreclosure and highlighted the mortgagor's equity of redemption – his persistent right to redeem. Howard viewed this aspect of mortgage doctrine as a powerful protection against any creditor, Catholic or other, who might threaten to foreclose.

Although another bill to "secure the repayment of money really lent and advanced by Papists" failed to secure passage in 1773/74, these ongoing arguments about mortgage doctrine were significant. They contributed to the change that was achieved in the "breakthrough" Catholic Relief Act a few years later.[55] Questions about creditor power clearly informed fears of Catholic power, and the testing of the equity of redemption was central to the debate over constitutional change.

[54] Ibid., vii–viii.
[55] Kelly, 'Repealing Penal Laws', 91–95.

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