There is, however, an ironic twist to the tale. Despite the embarrassment of the losses, Government reaction to the outcome of the lugger cases was tinged with a distinguishable element of relief. Officials had, throughout, endeavoured to use "great tact", and although some of the evidence heard "afforded opportunity for the Japanese to take offence", there was a feeling that at least Justice Wells' decision would "have probably restored the Japanese equanimity to a certain extent".[71] For, by the late thirties, the Government was pursuing a conscious policy of appeasement towards Japan, aware that war was to come, but wanting as much time as possible in which to make preparations.

There is no doubt that fears aroused by the activity of Japanese vessels in the Arafura Sea contributed towards the Government's overall policy towards Japan during these years.[72] It became increasingly difficult to decry press suggestions that the Japanese sampans were not mere fishing vessels operated by 'humble fishermen' but 'sinister naval vessels' commanded by naval officers involved in charting Australian waters in preparation for imminent invasion. Information supplied by Longfield Lloyd, the Australian Trade Commissioner in Japan, did not counteract such suspicions.[73] The Japan Pearling Company, under which operations had been unified in 1938, was reported to be associated with the South Sea Development Company, in which the Navy had strong interests. A number of the captains of the luggers operating in the Arafura Sea were thought to be officers of the naval reserve, and reportedly made no attempt to conceal their knowledge of Australia's north coast. A senior officer of the Imperial Japanese Navy was present during the proceedings of the lugger cases.[74] This was all thought to be associated with wider Japanese plans for the area north of Australia: the 'southward advance'. Lloyd used the pearling issue in support of his view that Japanese investment in an iron ore project at Yampi Sound, Western Australia, was designed to give Japan exclusive rights over a portion of Australian territory and thus a foothold in Australia. Although the Government's stated reason for imposing the 1938 embargo on iron ore was fresh uncertainty as to the

71 "Japanese Encroachment in Australian Waters": AA A461 I345/1/3.

72 Shepherd, *Australia's Interests and Policies in the Far East* (International Secretariat, Institute of Pacific Relations, New York 1939) p165.

73 See Longfield Lloyd, Australian Trade Commissioner in Japan to the Secretary, Commerce, 6 May 1937: AA A1/1 I36/7994.

74 Haultain, *Watch off Arnhem Land* p230.

extent of Australia's deposits, it appears that the interpretation Lloyd placed on the issue was in fact one of the deciding factors.[75]

The view of the Defence Department in 1938 "that the solution [to the Japanese 'threat'] is to decide exactly what constitutes our sovereign rights, and devise means to ensure that they are respected"[76] was inadequate because Japanese pearling operations were, for the main, carried out on the high seas in complete accordance with international law. Australia had attempted unsuccessfully to deal with a threat lying beyond Australian sovereign jurisdiction via domestic legislation. Following the Second World War, Australia was to shift its efforts to the international legal arena and was successful in influencing the development of the continental shelf doctrine in such a way as to favour the Australian pearling industry against Japanese competition. That, however, is another story.[77]

75 Murphy, "Australian-Japanese Relations, 1931-41" (Unpublished PhD Thesis, University of NSW 1975) p318.

76 Shedden, Secretary of the Department of Defence, to the Secretary, External Affairs, March 1939: AA A432/85 I1938/1391.

77 An account of post-War efforts to find a legal means by which to compete with Japanese competition in the pearling industry can be found in Scott, "The Inclusion of Sedentary Fisheries within the Continental Shelf Doctrine" (1992) 41 *ICLQ* 788.

*Prue Vines**

LAND AND ROYAL REVENUE: THE STATUTE FOR THE EXPLANATION OF THE STATUTE OF WILLS, 1542-1543

INTRODUCTION

IN the English Parliamentary session of 1542-3, the *Statute for the Explanation of the Statute of Wills* was passed.[1] The Statute has been largely ignored by commentators, who generally remark only that it was passed, treating it as no more than a footnote to the *Statute of Wills*. The statute is of particular interest to feminist scholars as modern treatments of married women's capacity to make a will are frequently dated from this time. However, the statute encompasses much more than just married women's capacity to make a will. This article attempts to address the question, why was such an explanatory statute needed, and was it a response to particular events or a mere 'tidy-up' of poorly drafted legislation?

The background to the passing of the *Statute for the Explanation for the Statute of Wills* was a series of statutes relating to land law which were passed during the reign of Henry VIII. The series included the *Statute of Uses* of 1536 (designed to ensure that landowners could not defeat the rules of inheritance of land, and by this means reduce the revenues to the Crown),[2] the *Statute of Enrolments* (a land transactions registration scheme)[3] and the 1540 *Statute of Wills*.[4] The *Statute for the Explanation of the Statute of Wills* followed two years after the *Statute of Wills*, and was passed by a differently constituted Parliament.

There have been various theories as to whether or not there was a consistent strategy developed by Henry VIII or his chief minister, Thomas,

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1 34 & 35 Hen VIII c 5 (1542-43).

2 27 Hen VIII c 10 (1536).

3 27 Hen VIII c 16 (1536).

4 32 Hen VIII c 1 (1540).

Lord Cromwell, in relation to land law. The 1530s was a time of rising costs while the revenue to the Crown had been eroded before the accession of Henry VII and was barely being maintained under Henry VIII who had embarked on war with France which proved an expensive failure. Professor Elton's theory is that all the land law statutes were part of a master-plan created by Cromwell to ensure a proper revenue structure for the realm.[5] However, while Cromwell was responsible for drafting many of Henry VIII's statutes, at least some of the new land law, in particular the Statute of Wills, could not have been drafted by Cromwell, as will be later explained.[6] It is therefore possible that the Statute of Wills was not an original part of Cromwell's master-plan if there was such a thing, or, if it was, that Cromwell did not draft the details of the statute.

It is impossible to consider the explanatory statute without considering the *Statute of Wills* and the earlier *Statute of Uses*. Along with other historians, Buck has argued that the *Statute of Wills* of 1540 was a compromise solution to the differing demands of King and landowners.[7] It is arguable that the changes created by the statutes of uses and wills were less about land law than about the King's desire to maintain revenue from the incidents of feudal tenure, and that the responses of landowners were also at least partially about the desire to avoid paying the incidents of tenure and not the desire to pass land on after death. The King was responsive to the desires of his subjects so long as he could also maintain his revenue, which largely came from land.

LAND LAW AS REVENUE RAISER

The land law of England operated both to consolidate the political power of the King and the aristocracy and to maintain the King's revenue by the use of feudal incidents of tenure. Most of the aristocracy held their land by Knight's Service.[8] The growing gentry,[9] in contrast, generally held

5 Elton, "English Law in the Sixteenth Century" in Elton (ed), *Studies in Tudor and Stuart Politics and Government* Vol 3, Papers and Reviews 1973-1981 (Cambridge University Press, London 1983).

6 Bean, *The Decline of English Feudalism* (Manchester University Press, Manchester 1968).

7 Buck, "The Politics of Land Law in Tudor England" (1990) 11 *J Leg Hist* 200. See also, for example, Baker, *An Introduction to English Legal History* (Butterworths, London, 3rd ed 1990); Milsom, *Historical Foundations of the Common Law* (Butterworths, London, 3rd ed 1981).

8 Originally, of course, land held by Knight's Service was so held because the tenant owed the service of so many Knights to his lord, and if the tenant could not produce the Knights the tenant paid a fine to his Lord. Tenants in chief

their land in common socage,[10] which was less valuable to the Crown, but still provided some revenue. The incidents of tenure which provided revenue to the Crown largely derived from Knights' Service. They were wardship, marriage, fines payable to the Lord on alienation, relief or primer seisin, forfeiture and escheat (reversion of the land where there was no heir). Where the King or Lord had a right of wardship the King or Lord had a right to the incomes from the ward's estate and to custody of the ward's person during minority.[11] The King had 'prerogative wardship' which gave him the right not only to the wardship of the land held in chief but also to the wardship of lands the deceased held from other lords.[12] In relation to marriage, the King or Lord had a right to the value of the marriage if it was refused. The right of marriage could be sold to the heir, or the family of the heir or proposed spouse, or indeed to any third party. Primer seisin and relief related to the amount paid by the heir to land when claiming possession of it from the King, and the King would be entitled to the profit of the land until the relief was paid. It was not in doubt that the heir would take the land, but the relief (a year's profit)[13] was paid to show the superior right of the King, that is, the King's right to hold the seisin and occupy the land on the death of the tenant, until homage was performed - the first right, ahead of the heir and all the world.[14] Primer seisin and relief were a substantial source of revenue to the Crown. Common socage normally involved the payment of rent by this time. It did not involve

would be liable for an amount which appears to have been uncertain. But tenants of the tenants in chief were liable for a quite definite amount, known as 'scutage'. A tenant in chief who had paid his fine would be allowed by the King to levy scutage from his tenants. After some time it became common for the tenant in chief to simply grant the scutage payable by his tenants to him, directly to the King, and the King could then levy this as a form of taxation through the sheriff. By 1503 the distinction between the two forms of fine was no longer of any value: Holdsworth, *A History of English Law* Vol 3 (Methuen, London, 5th ed 1942) pp34-73.

9 Buck, "The Politics of Land Law in Tudor England, 1529-1540" (1990) 11 *J Leg Hist* 200 at 204 suggests that in 1500 there were only 60 temporal peers and about 6 000 members of the gentry. The gentry were people entitled to a coat of arms and owning land worth between 50 and 300 pounds per year.

10 Common socage was any free tenure which could not be classified as frankalmoign, Knights' Service or sergeanty. Its incidents could vary, deriving from agricultural service, but by Tudor times they were most often money rent, and did not include wardship or marriage.

11 The age of majority was 21 for males, 14 for females if they were married or betrothed at the death of the tenant, 16 if they were not.

12 Bean, *The Decline of English Feudalism* pp9-10.

13 Baker, *An Introduction to English Legal History* p276

14 In 1660 by 12 Charles II c 24 the royal right to primer seisin and therefore relief was abolished.

marriage or wardship and was therefore not of great value in revenue to the Crown. However, the payment of relief was required to inherit in common socage.

These incidents of feudal tenure were very valuable to the Crown. For example, Lord Dacre of the South died in 1533 leaving an estate with income of a thousand pounds per year,[15] which would have been the amount payable in relief to the Crown.[16] The net value of income from the Percy estates in 1523 was approximately 3600 pounds. This was significant to the Crown which had real financial problems.[17] The value of the feudal revenues became even greater with the dissolution of the monasteries. This provided a large amount of land to the Crown which was sold in Knight's Service, thus increasing the proportion of Knight's Service land held - an extra twenty percent of the land in England thereby became held by Knight's Service and thus subject to the greater incidents of feudal tenure.[18]

At common law, the passage of land to the next generation on death was governed by the rules of inheritance, and the land was held by the tenant of the Lord or the King. The rules of inheritance were strict, and the heir at law (usually male) was determined by primogeniture and a parentela

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15 Buck, "The Politics of Land Law in Tudor England" (1990) 11 *J Leg Hist* 200 at 208; Bean in *The Decline of English Feudalism* discusses the finances of the Dacre estate in detail at pp275ff. Lord Dacre had manors in thirteen counties.

16 Bean, *The Estates of the Percy Family, 1416-1537* (Oxford University Press, London, 1958) p141

17 The Crown's total income declined during the early years of Henry VIII's reign from 1509 and was gradually restored during Cromwell's time. The total royal income from land was about 40 000 pounds at the death of Henry VII but only 25 000 pounds in 1515. There is a suggestion that Henry VIII received some 300 000 pounds in jewel and plate from his father, but Henry VIII spent a great deal of money on wars, which was not entirely paid for by taxation: Wolffe, *The Crown Lands, 1461-1536* (Allen & Unwin, London 1970) pp85ff. Elton blames Wolsey for part of this problem: "despite his abilities and display, Wolsey proved a singularly ill-advised minister who ruined the finances": *England Under the Tudors* (Routledge, London, 3rd ed 1991) p80. There were also significant price rises in England generally in the early 1500s. The price of oats rose from 2 shillings per quarter in 1510 to a high of 3 shillings and 10 pence in 1532 and dropped again to 3 shillings and 4 pence in 1543: *Cobbett's Parliamentary History of England: From the Norman Conquest in 1066 to the year 1803* (TC Hansard, London 1806) p567. This, along with wars against France and Scotland, was proving very expensive for the Crown.

18 Buck, "The Politics of Tudor Land Law" (1990) 11 *J Leg Hist* 200 at 210.

calculus.[19] Holders of land were not permitted to devise their land by will. The common law only recognised land being passed by inheritance (from blood relatives) or between two living people. Devising land was impossible at common law before 1540 because wills were regarded as a form of conveyance requiring the ritual of livery of seisin which could only be done between two living persons. On inheritance of land the heir was expected to pay relief to his lord. This relief was a primary source of revenue for the King. However, landholders had been using the use to avoid these incidents of tenure for some hundred years by the time of Henry VIII's reign. All the owner had to do was enfeoff several joint tenants to the use of the feoffor, that is, convey the land to trustees, and one was protected against the incidents of feudal tenure as the property would not 'descend'. This could be done in life or in death. In either case it prevented the Lord from claiming the incidents of tenure. The use was protected by the law of equity in Chancery. Holdsworth pointed out that it was only the King who wholly lost by this: "He alone was always lord and never the tenant."[20] Thus the King was the party with the greatest interest in the incidents of feudal tenure, and almost every other landholder had an interest in defeating those incidents of tenure.

It is clear that Henry VIII was looking for a way to ensure that his revenues were maintained. Entails and uses were defeating the incidents of tenure. In 1529 a draft agreement between the Chancellor and thirty peers was made which would have set up a class-based scheme of landholding. It proposed the abolition of entails for commoners, so that land could only be held in fee simple, and that no uses would be valid. This would maintain primer seisin and relief revenues. All purchasers would be required to have the deed read in church (to avoid forgery) and the deed would be registered. This would give most noblemen indefeasible title. The nobility would be able to create entails, but their land could only be purchased from them with the King's permission.[21] This scheme was attractive to the nobility, but certainly not to commoners. A Bill in 1532, based on the 1529 agreement, provided that the King would allow the devising of half the land if he was guaranteed the feudal

19 See Watkins, "An Essay towards the Further Elucidation of the Laws of Descents" in *Law of Descent* (Clarke, London, 3rd ed 1819) and Blackstone, *Commentaries on the Laws of England* (London, Straham, 9th ed 1783) Vol 2, ch14. A parentela (from Lat *parens,* parent) included all living persons who traced their blood from that person. Closer descendants excluded those of remoter degree.

20 Holdsworth, *A History of English Law*, Vol 4 (Methuen, London, 3rd ed 1945) p446.

21 Lehmberg, *The Reformation Parliament* (CUP, Cambridge 1970) pp95-96.

dues from the other half.[22] That is, in return for these advantages to the nobility, the King would get the wardship of the lands of all his tenants by Knights' Service who left an infant heir, whether they were held by use or legal estate. If land was devised or otherwise settled, the King would get wardship of a half. The Bill included various ways of preventing the nobility from evading feudal dues. The King and nobles agreed on this but when a Bill based on this was introduced into the Commons in 1532, the Commons refused to pass it.

The courts appeared to take a lenient view of claims by the King that people were denying him his revenue. For example, Holdsworth[23] refers to the case of Lord Dacre's will which provided feoffments to uses which, it was argued, effectively defrauded the King.[24] Lord Dacre had died in 1533. His will bequeathed a use of land, which deprived the Crown of all feudal incidents of tenure. The court initially refused the Crown's plea saying that merely making a will could not be fraudulent, and that, therefore, there was nothing in the will to indicate fraud. However, after pressure from Henry VIII, the judges finally held the Dacre will invalid, saying that it was against the nature of land to be devisable by will, and that a will of the use of land was just as invalid as a will of the land itself.[25] The fact that the King pressured the court indicates the degree of his interest in maintaining revenue.

THE STATUTE OF USES

In 1536 the *Statute of Uses* was passed. Cromwell was involved in its drafting and the final version among his documents is almost the same as the Act as it was passed.[26] Briefly, it abolished the power to devise freehold at law by executing the use which had been used to evade the

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22 The 1529 agreement specified a third share of feudal dues for the King. The Bill increased this proportion: Lehmberg, *The Reformation Parliament* pp95-96.

23 YB 27 Hy VIII Pasch pl 22 (pp9, 10). Note that in *A History of English Law* Vol 4 (Methuen, London, 5th ed 1945) pp405ff, Holdsworth suggests that the use actually came from Germanic tribes usage rather than from Roman law. He says that it was picked up by Chancery after the common law courts refused to accept it. Bean in *The Decline of English Feudalism* pp104 and 130 states that the word 'use' is derived from the Latin 'opus', but agrees that the concept was derived from the Germanic tribes.

24 YB 27 Hy VIII Pasch pl 22.

25 Buck, "The Politics of Tudor Land Law" (1990) 11 *J Leg Hist* 200 at 208-209. In 1490 a statute had been passed which clearly envisaged that wills of uses of land were valid: 4 Hen VII c 17.

26 Lehmberg *The Reformation Parliament* p237.

common law and effectively devise land.[27] It ensured the King's receipt of the incidents of tenure by making the person who profited from the use responsible for the whole of the feudal incidents of tenure. It was extremely unpopular with landowners, who by the statute were at least partially deprived of the ability to deal with their land as a commodity, something they had been doing for some hundred years. And, of course, it meant the reintroduction of 'taxes' in the form of incidents of feudal tenure, which had been evaded during that past century.

Holdsworth remarks that the *Statute of Uses* accomplished the restoration of revenue to the King and the abolition of the power to devise "so effectually that it helped to cause rebellion".[28] The rebellion was known as the "Pilgrimage of Grace".

THE PILGRIMAGE OF GRACE

The Pilgrimage of Grace developed in the north of England and moved south. It appears to have been a series of uprisings whose underlying cause was disquiet about Henry VIII's changes to religion - the Reformation itself, the sale of the monasteries, the levy of 'first fruits and tenths' from the Church. Other claims included a request that Princess Mary should be legitimised, and that various statutes be repealed including the act allowing the King to devise the Crown by will[29] and the *Statute of Treason by Words*.[30] A major demand was repeal of the *Statute of Uses*. It was thus an uprising with a variety of causes, of which changes to the land law was only one. Scarisbrick's verdict was:

> The Pilgrimage must stand as a large-scale, spontaneous, authentic indictment of all that Henry most obviously stood for; and it passed judgement against him as surely and comprehensively as *Magna Carta* condemned King John or the *Grand Remonstrance* the government of Charles I.[31]

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27 There is some controversy about whether the *Statute of Uses* actually did prevent the devise of land at all. See Holdsworth, *A History of English Law* Vol 4 (Methuen, London, 4th ed 1935) p464 where he discusses the use of vesting property for a term of years in order to effectively devise land.

28 Holdsworth, *A History of English Law* Vol 4 (Methuen, London, 4th ed 1935) p469.

29 *Succession Act* 1536, 28 Hen VIII c7, section ix.

30 *An Act whereby Divers Offences be made High Treason* 1534, 26 Hen VIII c13.

31 Scarisbrick, *Henry VIII* (Penguin, London 1968) p444. See also Elton, "Politics and the Pilgrimage of Grace" in Elton (ed), *Studies in Tudor and Stuart Politics and Government* Vol 3 (Cambridge University Press, London 1983).

It has traditionally been characterised as a popular uprising, but Elton points out that the Pilgrimage of Grace was less a popular and spontaneous uprising carried out by the common people than one led and developed by the landowning classes.[32] These landowning classes were largely the gentry, who were much more numerous than the aristocracy, although there were aristocrats involved. The gentry were very important to the King for the purpose of local government, as they acted as magistrates and carried out many local government functions for the King, often without payment.[33] If the gentry were an important part of the Pilgrimage of Grace, that may explain why a major demand of the 'Pilgrims' was the repeal of the *Statute of Uses*, as the statute had curtailed their ability to pass land after death to whomever they chose.

The uprising gained sufficient support to be taken very seriously by the King. This, combined with the various attempts to evade the *Statute of Uses*, led to an attempt to reduce opposition to the Crown's activities and maintain revenue by the passage of the *Statute of Wills*.

EVADING THE STATUTE OF USES

Various people tried to find ways around the *Statute of Uses*, and some succeeded. For example, it is reported that Sir John Shelton:

> conveyed his land in three separate parcels to a trustee to execute in 15 days. One section went to Sir John himself and those he named for a term of 99 years, one section to his wife for life with a remainder to Sir John, his executors and those he named for the remainder of the 99 years. Finally, it was provided that all would eventually fall to his grandson, Ralph, the son and heir apparent of Sir John's son, in tail male, by those means it was intended that Sir John's son would enter his inheritance without paying livery or primer seisin.[34]

The legal advice given to Sir John Shelton on how to evade the Statute of Uses came from Sir Nicholas Hare, the Speaker of the House of Commons, and two other lawyers and members of Parliament, William

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32 Elton, *Studies in Tudor and Stuart Politics and Government*, Vol 3 pp193ff.

33 Elton argues that much of Cromwell's administration was based on his ability to persuade the gentry to act for the Crown for nothing: *The Tudor Constitution* (Cambridge University Press, Cambridge, 2nd ed 1982) pp452ff.

34 Buck, "The Politics of Tudor Land Law" (1990) 11 *J Leg Hist* 200 at 211.

Coningsby and Humphrey Browne. For giving this advice, they were imprisoned in the Tower in March 1540, and lost their offices under the Crown, although Hare retained the Speakership.[35] Clearly the Crown took such evasions seriously and sought to prevent them.

THE STATUTE OF WILLS 1540 AND THE DEMISE OF CROMWELL

After the Pilgrimage of Grace, Parliament passed the *Statute of Wills*. Cromwell was probably not involved in the drafting of the *Statute of Wills* and was certainly not available to guide it through Parliament as was his usual practice.[36] He was arrested on 10th June 1540.[37] The statute was introduced into Parliament in the House of Lords on 9th July, almost a month after his arrest. He was beheaded on 28 July. At the very least it is clear that Cromwell could not have overseen the Bill's passage through Parliament. It seems to have been welcomed by both Houses, because the Bill went through both Houses of Parliament without alteration within a week, and the House of Lords did not even require a third reading of it.[38]

The *Statute of Wills* was a comprehensive statute which gave power to devise land by will to those who held it by socage tenure, and those who held land by Knight's Service were given power to devise two-thirds of it. This power meant that the same ability to devise land existed as had previously existed to pass it *inter vivos*. The King reserved his rights to the incidents of tenure - they were to be paid by the devisee instead of the heir. Fines for alienation remained payable on the whole of the land devised. The widow's dower was to be paid out of the two-thirds of the property which was devisable. The Act did not mention the capacity of particular persons to make wills.

THE STATUTE FOR THE EXPLANATION OF THE STATUTE OF WILLS

The *Statute for the Explanation of the Statute of Wills* was introduced into Parliament in 1542, but it did not pass through before the end of the

35 Lehmberg, *The Later Parliaments of Henry VIII, 1536-1547* (Cambridge University Press, Cambridge 1977) p98. Note that Hare was released after two days on a surety. This was not regarded as a breach of Parliamentary privilege because Parliament was not in session at the time.

36 Lehmberg, *The Later Parliaments of Henry VIII, 1536-1547*; Bean, *The Decline of English Feudalism* p300.

37 The Statute which attainted Cromwell is 32 Hen VIII c 62 (1540).

38 Lehmberg, *The Later Parliaments of Henry VIII, 1536-1547* p99.

session and was committed to the Attorney-General and the Solicitor-General. It was re-introduced into the House of Lords on 31 January 1543, and passed the Lords on 13 February. It then went to the House of Commons until 15 March.[39] The Commons added two provisos to the Bill before sending it back to the House of Lords. One of these, s18, provided that the Act was not to apply to the wills of Sir John Gainsford, Sir Peter Philpot, Richard Creswell or Thomas Unton, whose heirs presumably had friends in Parliament.[40] The other was s19 which provided that any devisee who was disadvantaged because the King or Lord was taking the King or Lord's third of Knight's Service land could bring an action in Chancery.

The statute provided that the power to give by will only applied to estates in fee simple,[41] and that corporations could not devise land.[42] Sections 7 and 8 made the revenue requirements of the Act clear: they provided an exposition of the savings, reservings and provisions made "as to Wardships, Reliefs and Primer Seisins: and as to the third Part, not Devisable". Similarly, ss9 -12 referred to the requirement that relief from alienation had to be sued for by the heir to the land, "paying the third part of the yearly Value of the Lands holden in chief". By s14 married women, infants and idiots were declared not to have capacity to make a will. 'Covinous' gifts, that is, gifts made with the intention of defrauding the King or other Lords of wardships, marriages, relief etc were declared void by ss15-17. Section 5 provided that where the land was held by Knight's Service, some clarifications were made - if a gift by will of more than two-thirds of the property was made, then it would only pass two-thirds.

THE NECESSITY FOR THE STATUTE FOR THE EXPLANATION OF THE STATUTE OF WILLS

Holdsworth is typical of the commentators when he merely says: "In 1542-1543 it was found that the breadth of the terms in which the power to devise had been conferred by the Act of 1540 needed some explanation."[43] The statute is treated as a mere footnote to the Act, and the impetus for passing it has not been examined. However, if we are to understand its

39 Ast p176.
40 Holdsworth, *A History of English Law* Vol 4 (Methuen, London, 4th ed 1935) pp465-466.
41 Section 1.
42 Section 4.
43 Holdsworth, *A History of English Law* Vol 4 (Methuen, London, 4th ed 1935) p466.

impact as a piece of legislation in its own right, it is necessary to investigate why it was considered necessary.

The short answer to the question why the Act was required seems to be that defects were perceived in the statute, and that the Parliament following 1541 passed several Acts designed to remedy defects in Acts passed by the preceding Parliaments. Lehmberg's view that "[t]hese Acts should be thought of as tidying up the structure of financial administration rather than introducing any fundamental reforms"[44] should be given some weight in view of the changed composition of the Parliament and some of its other activities; however, some parts of the Act, particularly the provisions about testamentary capacity, are not explained by this hypothesis. The following possibilities seem likely to be of explanatory value:

Revenue

It was important for revenue purposes that the position regarding land held by Knight's Service was clear, so that the administration of revenue could be carried out easily, and not dissipated or delayed by disputes about what the Crown was entitled to from any one devise. The statute did not create new revenues, but explained the position where a person attempted to devise more than two-thirds of their land. The devise would be limited to two-thirds, and any person who suffered loss by this would have a right to an appeal in Chancery. Such an appeal would take the form of an adjustment of the devises within the two-thirds share. This latter provision was one of the amendments passed by the House of Commons during the Bill's passage. Sections 15-17 of the statute were intended to prevent conveyances designed to defraud the Crown of its proper revenues such as Sir John Shelton's attempt to evade the *Statute of Uses*. These provisions indicate that Parliament was attempting to close loopholes in the *Statute of Wills* which enabled people to evade their proper responsibilities.

Other Acts modified at the same time also operated to clarify the processes by which the Crown gained its revenues from the incidents of tenure. These Acts included 33 Hen VIII c 22 (1541) which altered the Court of Wards by annexing it to the Office of Liveries, where heirs sued for possession of land. This statute also made the Court of Wards and Liveries a superior court of record whose role was also to preserve the documents of land tenure. Another Act which altered an existing institution was 33 Hen VIII c 39 (1541), which erected the Court of

44 Lehmberg, *The Later Parliaments of Henry VIII, 1536-1547* p154.

General Surveyors to allow the King to more speedily collect rents, hereditaments and other incidents of tenures. There was also an Act allowing revenue court officers to have private chaplains. 32 Hen VIII c 28[45] was clarified by 34 & 35 Hen VIII c 23[46] to establish the validity of examinations of femes covert in relation to fines and recoveries by their husbands, which might diminish the wives' land-holdings.[47] This also would have had an impact on revenue.

There was no provision in the *Statute of Wills* to deal with conveyancing practices like Sir John Shelton's so it is possible that the *Statute for the Explanation of the Statute of Wills* was deemed necessary to deal with this in a general way. Sections 15-17 declared covinous (fraudulent) conveyances void where they were carried out with the intention to defraud the King of his feudal revenues. This would cover matters like Sir John Shelton's conveyance. The Parliament also passed a specific statute voiding Sir John Shelton's actual conveyances of 1541-42. This was:

> An Act to make frustrate certain Conveyances devised by Sir John Shelton.
>
> A repeal of certain fraudulent Deeds, Estates, Wills and conveyances made by Sir John Shelton, of Lands in Norfolk and Suffolk, to defeat the King and others of Wardship, Primer Seisin, Relief &c and he adjudged to die seised of such Estate in those Lands, as he was before the said Conveyances made.[48]

The Demise of Cromwell: Allegations of Treason

Professor Elton has argued that the *Statute of Wills* was part of a grand plan of land law by Cromwell, but his view seems to be based on the notion that the *Statute of Wills* is the same as the 1539 *Billa concernens Reformationem Testamentorum in quibusdam causis*, which does not seem to be the case.[49] That Bill was not passed by the Lords, and Lehmberg suggests it was very different from the 1540 statute and probably only dealt with the wards of lesser Lords. He also suggests convincingly that

45 *An Act that Lessees shall enjoy their Farms against Tenants in Tail* 1540.
46 *An Act that Fines in Towns Corporate shall be made as the same have been in Times Past*, 1542-43.
47 33 Hen VIII c 28 (1541).
48 As above.
49 *Reform and Renewal*, cited in Lehmberg, *The Later Parliaments of Henry VIII, 1536-1547* p99.

the Lords would not have abandoned anything so useful to them as the 1540 statute.[50] Bean argues that the *Statute of Wills* was a concession wrenched from Henry by the plotters against Cromwell, and that Cromwell was not involved in the drafting of the 1540 Act.[51] They both agree that there is no evidence to show a link between Cromwell and the Statute of Wills. This is significant because Cromwell had been the drafter of many statutes, and was a precise and clear drafter who would presumably have ensured the blocking of devices like that of Sir John Shelton in his drafting.

Sir Thomas Cromwell's period of influence began in about 1530 and ended with his arrest and imprisonment for alleged treason in 1540. During his time in High Office he was the person in charge of the major legislative programme of the Reformation - overseeing the breach with Rome, and in particular he directed the dissolution of the monasteries. One of his early statutes was the *Statute of First Fruits and Tenths* of 1534 which was designed to transfer an income of some 40 000 pounds per year from the Church to the Crown.[52] He was also responsible for the Statute of Uses, the *Statute of Enrolments* and many other pieces of legislation including the Reformation legislation. Cromwell guided these pieces of legislation through Parliament. The extent of his influence in Parliament can be seen by the fact that before he entered Parliament in 1532, Bills were mainly introduced by members. After 1532, when Cromwell was chief of the King's ministers, the Parliament mostly debated Bills produced by the government. Cromwell was "the prototype of all those English statesmen who have regarded membership of the Commons, management of business there, and leadership in its debates as an essential part of their equipment".[53] He drafted and redrafted statutes, presented them in Parliament and led debate on them. He also worked at obtaining what he called "a tractable parliament" in elections although there is no evidence that Parliaments were ever mere puppets.[54] While Cromwell was in the House of Commons all Bills were introduced there, but when he moved to the House of Lords, Bills were introduced into the Lords first.

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50 Lehmberg, *The Later Parliaments of Henry VIII, 1536-1547* p310.

51 Bean, *The Decline of English Feudalism* pp300ff.

52 Elton, *England under the Tudors* (Routledge, London, 3rd ed 1991) p143.

53 Elton, *The Tudor Constitution* (Cambridge University Press, Cambridge, 2nd ed 1982) p286.

54 Elton, *England under the Tudors* (Routledge, London, 3rd ed 1991) p173.

The loss of Cromwell's political and drafting skills when the *Statute of Wills* was passed may have contributed to a lack of precision in drafting which otherwise might not have existed.

A New Parliament

It seems that Parliament around 1542 did have a general 'tidy-up'. The Parliament of 1542 was a new one. The new House of Commons had a greater proportion of lawyers than had the 1540 Parliament: "Taken as a group they appear well-educated, prominent local citizens with minimal ties to the central administration and the court."[55] However, we have no real evidence of their political views. It is worth noting that elections were not carried out as they are today, with voters choosing between two candidates, but rather, one candidate would be agreed on by the major families or the gentry of the area, or indeed, be recommended by the King.[56] Apparently the composition of the House of Lords had changed little, apart from the reduction in numbers caused by the dissolution of the monasteries.[57] The first business of the Parliament was the attainder of Lady Catherine Howard, but the Parliament then went on to clarify and amend a number of statutes from the previous Parliaments of the 1530s and 1540, notably the *Statute of Proclamations* 31 Hen VIII c 8 (1539) which was refined by the 1540 *Statute of Wills*, 32 Hen VIII c 28, as well as various others. Part of the explanation for this attention to detail may have been the greater number of lawyers scrutinising any legislation. This may also account for the fact that the *Statute for the Explanation of the Statute of Wills* was passed to the Attorney-General and the Solicitor-General before passage through the House of Lords. Of course, one major difference in the new Parliament was that the person who had been guiding the legislative program, Cromwell, was no longer a member. Thus there was no visionary or parliamentary statesman to introduce significant reforms.

Testamentary Capacity

The one issue which appears so far to have no answer at all is why the *Statute for the Explanation of the Statute of Wills* bothered to state that

55 Elton, *The Tudor Constitution* p138.

56 Elton, *England under the Tudors* p173.

57 Between 1529 and 1545 the number of peers in the House of Lords dropped gradually from 107 to 69. This was largely because of the dissolution of the monasteries which removed 29 abbots and priors, although a number of attainders and a lack of male heirs also slightly reduced the numbers of Lords Temporal: Lehmberg, *The Later Parliaments of Henry VIII, 1536-1547* p217.

married women, infants, idiots and persons of non-sane memory did not have the capacity to make a will. This was certainly not a new proposition at common law. In relation to the capacity of married women, Holdsworth says from the end of the thirteenth century it is clear that at common law a married woman's husband has all the property in her chattels.[58] This remained the common law position. However, land which had come to the husband from the wife could not be passed to the husband's heirs, but would go to the wife's heirs if she predeceased him. If he died before her, she could use the writ of *cui in vita* (a writ of entry) to get back any lands alienated by him.

However, the ecclesiastical lawyers took the view that women could have capacity to make a will - of whatever chattels the common law allowed them. To complicate this further, according to Sheehan, during the thirteenth century there was:

> a steady application of pressure by the bishops and the canonists ... to extend the use of the will to wives ... So far as the law was concerned, this effort failed. In practice, however, wills were often made by such persons.[59]

This meant in practice that married women made wills, albeit with the consent of their husband, at least of the portion which amounted to her dowry and her paraphernalia. Glanvill says:

> A woman of full capacity [unmarried, of full age and under no disability] may make a testament; but if she is in the power of her husband she may not, without her husband's authority, dispose of chattels which are her husband's even in her last will. Yet it would be truly kind and creditable in a husband were he to allow his wife a reasonable division, namely up to that third part of his chattels which, as will appear more fully below, she would have obtained had she survived her husband; many husbands in fact do this, which is much to their credit.[60]

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58 Holdsworth, *A History of English Law* Vol 3 (Methuen, London, 5th ed 1942) p526 .

59 Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century* (Pontifical Institute of Mediaeval Studies, Toronto 1963) p233.

60 Glanvill, *Treatise on the Laws and Customs of the Realm of England* Hall (ed) (with Selden Society) (Brenard Quaritch, London 1965) p80. The treatise was probably written (whether by Glanvill or not) about 1187-89.

Bracton, who died in 1268, took a similar view.[61] It seems that it was quite common for a wife to make a will, and normally she would state that she had her husband's permission, or name him as executor. Usually she would make a will which referred only to her chattels. However, Sheehan refers to a will in the thirteenth century made by Agnes de Condet, a woman whose husband was alive, who by her will left land, money and jewellery. The will makes it clear that some of the property was recognised as hers as distinct from her husband's.[62] The married woman could also hold property as an executor, and she could make a will of property she held as an executor.[63] This was the position up to at least 1497.[64] Sheehan further points out that it was important to ecclesiastical law that a married woman be able to make a will because of the connection of sin with intestacy, and that the church made frequent statements about married women's testamentary capacity which the common lawyers refuted by saying that English law recognised no such custom.

There was thus a conflict between the views of married women's capacity at common law and in the ecclesiastical jurisdiction, and a further conflict between law and practice. Thus, once the *Statute of Wills* provided that land could be devised by will, wills being ecclesiastical law matters, a possibility was raised that a married woman could devise land. Indeed, the possibility existed that married women might go on ignoring the law because of the confusion and the opinions in some quarters that married women did have capacity, and continue to make wills of both land and chattels. There was also a possible conflict raised by the difference between law and equity, in that equity had been allowing wills of uses of land and the common law had accepted this until Lord Dacre's case. Henry VIII's reign had been characterised by a rejection of ecclesiastical control, and indeed the House of Lords after the dissolution of the monasteries was a much less spiritual place. From a composition of about half Lords Temporal and half Lords Spiritual in 1536, by 1543 the House

61 Brachton, *On the Laws and Customs of England* (Belknap Press, Cambridge 1968).

62 Sheehan, *The Will in Medieval England* p237. See also Pollock & Maitland, *The History of English Law* (Cambridge University Press, London, 2nd ed 1968) pp428ff.

63 Sheehan, *The Will in Medieval England* p179.

64 Holdsworth, *A History of English Law* Vol 3 (Methuen, London, 5th ed 1942) p544, referring to Fineux CJ in 1497: YB 12 Hy VII Trin pl 2, p24.