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A Blend of English and Welsh Law in late Medieval and Tudor Wales: Innovation and Mimicry of Native Settlement Patterns in Wales

INTRODUCTION

Prior to the union of England and Wales,¹ Welsh land law had existed alongside English land law. The property portfolios of landowners in Wales, therefore, often included land which was regulated solely by the Welsh law and land regulated solely by the English law.² However, a wealth of evidence is now emerging from the archival material relating to the Penrhyn Estate³ which demonstrates that principles of Welsh land law survived *both prior to* the Acts of Union 1536-43, *and thereafter* within the framework of the English common law.⁴ We shall see how the Penrhyn Estate was innovative in off-setting the harshness of the *sole heir* inheritance principle

¹ 1536-43

² Following the Conquest of Wales (1282-84) by Edward I, it is true that in the Crown lands of north-west Wales (the extensive Penrhyn Estate formed part of such lands) legal practice had been less different from English law than in other areas, notably the Principality of south-west Wales and some of the marcher lordships of the north east, notably the lordship of Ruthin or Dyffryn Clwyd. For this reason, perhaps, historians have, until now, eschewed looking to estates such as the Penrhyn Estate (the Griffith family) for evidence of the survival of principles of Welsh law. The Clennau Estate which was situated some twenty miles to the west of the Penrhyn Estate, and which will be discussed in this article, is an example of an estate which came under the influence of English law far later than the Penrhyn Estate.

³ During the period covered by this article (1376-1580), the Penrhyn Estate extended to many parts of north Wales, and had a medieval court just outside Bangor which formerly stood on the present site of Penrhyn castle, which was built in the nineteenth century.

For the existing literature concerning the Griffith family of Penrhyn, see: A D Carr, 'Gwilym ap Gruffydd and the rise of the Penrhyn Estate' *Welsh History Review*, Vol. 15, no. 1 (June 1990), 1-20; G Roberts, *Y Bywgraffiadur Cymrieg: Atodiad*, 95-8; and *History: Selected papers of the late Glyn Roberts*, Cardiff, 1969, 206-13, and 253-8; A H Dodd, *A History of Caernarvonshire 1284-1900*, Caernarvonshire Historical Society, 1968, 28, 50 and 74; and J R Jones, 'The development of the Penrhyn Estate to 1431 (unpublished MA thesis, University of Wales, 1955).

⁴ The assimilation of Welsh and English law during the period under discussion is a much under researched topic which has not received sufficient discussion in the existing literature—see L.B. Smith, 'Family, Land and Inheritance in Late Medieval Wales: A case study of Llannerch in the Lordship of Dyffryn Clwyd, *The Welsh History Review*, vol 27 June 2015 no3, 417-458 where Smith says at p 454 that this is "a decisive, but still poorly understood, period of Welsh social history."

of the English common law (*primogeniture*) which was introduced by the Normans.⁵ Certain members of the Griffith family of Penrhyn attempted to do this by adopting principles of native Welsh law (to offset primogeniture) which were accommodated within the framework of the English common law.

The article will also consider new evidence which the authors have brought to light following research at The National Archives concerning the experimentation which was going on in this Estate concerning the development of the *use* (the precursor of the trust) *in both England and Wales* in the years leading up to the *Statute of Uses* 1536. This research fills a gap in existing knowledge by showing that principles of Welsh law and English law existed side by side in the Crown lands of north-west Wales even following the Acts of Union 1536-43; and demonstrates, by reference to new evidence, certain features in connection with *uses*, and settlement patterns in these Crown lands of north- west Wales.

Against this background, therefore, the article has two main aims: the first aim is to demonstrate how land settlement patterns, even in the period following the Acts of Union, continued to mimic native Welsh land laws. To demonstrate this, the Welsh concept of *cyfran*, (partible inheritance) which gave rise to difficulties in alienating land, and the use of *tir prid*⁶ to circumvent this have to be explained first of all, and this is done in parts I and II of the article.

In addition to detailing these native settlement patterns, the second main aim of the article is to provide evidence to show how certain settlement patterns in the

⁵ J.Goody, in *Family and Inheritance, Rural Society in Western Europe 1200-1800*, eds., J. Goody, J Thirsk and E.P.Thompson, (Cambridge University Press, 1976), pp 4-6 Goody has referred to this process when considering similar processes in the Basque region of Spain as 'resolution of conflict'

⁶ The free alienation of land in north Wales was not possible before a charter dated 3 March 1507. In order to overcome this, the *tir prid* device evolved whereby a purchaser would make payment to the vendor, but in the form of a loan. The purchaser would be given possession of the property and the *tir prid* was the security for the loan. The loan was repayable after a period of usually four years, but in practice it rolled over in the nature of a perpetual loan. Land held in *tir prid* constituted a chattel interest, and so could be left in a testament.

Penrhyn Estate mimicked the native Welsh laws; and to show how innovative experimentation was taking place with *uses in both England and Wales*. Therefore, the article will also examine the following *issues*: first, in part III of the article a comparative analysis of the differing views of the English common law and Welsh native law on legitimacy and inheritance laws will be undertaken, primarily by reference to *will* settlements, to include an examination of the influence of Canon law on these matters. Following this analysis the new evidence concerning the mimicking of the Welsh native laws will be introduced; second, an examination of *inter vivos* settlements by way of *uses* which will show innovation concerning *passive* and *active* uses⁷ in the Griffith family's English and Welsh estate in the years leading up to the Statute of Uses 1536. This will be dealt with in part IV of the article ; and finally in part V of the article, consideration will be given to the timing of the introduction of English laws into Wales.⁸ After analysing these matters, the article will conclude by attempting to suggest an answer to the question: did the different laws, English and Welsh, have any influence on one another?

It is important to bear in mind that the discussion in respect of the first main aim of this article (how land settlement patterns continued to mimic Welsh laws even after the Acts of Union) may be viewed as part of a much broader historical debate, namely the Anglicisation of the Welsh gentry following the Acts of Union 1536-43.⁹

The new evidence and analysis which will be considered in this article is significant in

⁷ These terms are explained in part III of the article

⁸ This analysis will throw light on the land settlement patterns of the Griffith family and demonstrate how *innovative* they were, especially in their experimentation with *uses* in respect of *both their English and Welsh* estates.

⁹ See J.G.Jones, *Wales and The Tudor State, Government, Religious Change and the Social Order 1543-1603*, (Cardiff, 1989), pp37; 139; 149;150-51; J.G.Jones, *Studies in Welsh History 12, Law, Order and Government in Caernarfonshire, 1558-1640, Justices of the Peace and The Gentry*,(Cardiff, 1996), pp 124-5; 185-6 and 192, and J.G.Jones, *The Welsh Gentry, 1536-1640*, (Cardiff, 1998), pp xxiii, 4; 52 and 246. See also, P.Roberts, 'Tudor Wales, national identity and the British inheritance' in *British consciousness and identity, The making of Britain, 1533-1707*, B.Bradshaw and P.Roberts, eds., (Cambridge, 1998).p 8 and K.W. Sweet, 'Widowhood, Custom and Property in Early Modern North Wales', *Welsh History Review* 18, 2 (Dec 1996), pp189-227 at p 193.

that it will reveal the mix of both English and Welsh legal options to suit particular circumstances and priorities. The research suggests that for the Welsh gentry things were more complicated than a black and white ‘Welsh’ or ‘English’ model, with families such as the Griffith family being comfortable in taking advantage of both systems. It is in this respect that the research impinges on a broader debate.

During the course of the discussion certain legal transactions concerning members of the Griffith family will be considered, namely Gwilym ap Gruffydd ap Tudur (d.1376) and his nephew, Gruffydd ap Gwilym ap Gruffydd (d. 1405), Gwilym ap Gruffydd ap Gwilym (d.1431), Gwilym Fychan (c.1420-1483)¹⁰ and his mother, Joan Stanley, Sir William Griffith II of Penrhyn (c.1445-1505/6), Sir William Griffith III of Penrhyn (1480-1531),¹¹ Edward Griffith (d. 1540) and Rhys Griffith (1513-1580), some of the *gwreiddyn boneddigeiddrwydd Cymru* ¹². In the first appendix to this article there is a basic family tree of the family members whose land transactions are considered.¹³

I CYFRAN (partible inheritance)

The Gwely

¹⁰ It appears that it was during the time of Gwilym Fychan that the family began using the anglicised form of Griffith. See A D Carr, *Medieval Anglesey*, (Anglesey Antiquarian Society 2011), 168.

¹¹ Known as William Griffith esquire in prior to the death of his father, Sir William II of Penrhyn in 1505/6.

¹² In English, ‘original gentry of Wales’, see *The Myvyrian Archaiology of Wales* (Denbigh, 1870), 741.

¹³ References to various deeds in the footnotes as either PCP or PFA mean the relevant catalogue number in the Penrhyn Castle Papers and the Penrhyn Further Additional collection respectively, both of which are held by the archives department at Bangor University.

References to depositions held at the National Library of Wales (NLW) taken in the Chancery actions concerning the Penrhyn entail are referred to by reference to the MS and folio numbers of the relevant deposition.

References to the pedigrees mean J.E.Griffith, *Pedigrees of Anglesey and Caernarvonshire Families* (1914), a second edition of which was published by Bridge Books, Wrexham (1985).

The *testament*¹⁴ dated 29 October 1375¹⁵ of Gwilym ap Gruffydd ap Tudur laid the foundation for the building of the Penrhyn Estate. His testament was not competent (for reasons which will be explained later in this section) to deal with his realty held under the Welsh concept of *cyfran*. This was the Welsh system of *partible inheritance* whereby land was shared *between* a deceased's male heirs (and it is by no means clear as to how this system might have worked in the medieval period¹⁶) in direct contrast to the sole heir inheritance principle of *primogeniture*.

Accordingly, the discussion will begin by explaining how *cyfran* might have operated according to *the Welsh laws*.¹⁷ As will be discussed later in this section, it is by no means generally accepted that the way in which *cyfran* is described according to *the Welsh laws* is how it actually worked in practice. The article will then go on to discuss the other quite separate issue of how *cyfran* worked in the medieval period by reference to evidence from the available *medieval extents*.¹⁸

The holding in which the concept of *cyfran* operated was known as a *gwely*, and land holdings in a *gwely* were known as *tir gwelyog*. By reference to *the Welsh laws*,¹⁹ the *gwely* consisted of a land holding comprised of persons descended along the male

¹⁴ PCP/5. The difference between a *will* and a *testament* is explained in part III of the article: in brief the difference is that chattels could be left by a testament, and after 1540 land could be left in a will. There is a useful discussion of the difficulties in making a clear distinction between these two terms in R.H. Helmholz, *Oxford History of the Laws of England*, vol.1, pp. 398-401.

Wills of the late medieval period in Wales have not survived in great number: see Llinos Beverley Smith, 'The Gage and the Land Market in Late Medieval Wales', *The Economic History Review* (1976) Second Series, Vol. XXXIX, No. 4, 549. See also Helen Chandler, 'The Will in medieval Wales to 1540' unpublished M.Phil thesis, department of Welsh history, Aberystwyth University (1991).

¹⁵ The testament was proved on 23 May 1376 before the Archdeacon of Anglesey in the Chapel of the Blessed Mary in the Town of Beaumaris.

¹⁶ 476-1000 AD (early middle ages), 1000-1300 AD (high middle ages) and 1300-1453 (late middle ages).

¹⁷ For a diagrammatic explanation, see G. Owen, 'Another Lawyer Looks at Welsh Land Law', at 190-199.

¹⁸ These were manorial surveys detailing land and tenants and known as Extent surveys, e.g. the Extent of Anglesey 1294.

¹⁹ For an explanation of how the Welsh law books were compiled, see G.A.Elias and M.E.Owen, 'Lawmen and Lawbooks', in *Canmlwyddiant, Cyfraith a Chymreictod* in Noel Cox and Thomas Glyn Watkin, eds, Welsh Legal History Society, 11, Cardiff, 2013, 106-150. The written laws were compiled the late twelfth and thirteenth centuries and some forty medieval manuscripts survive.

line from a common great-grandfather, i.e. a four generational group consisting of a man, his sons, grandsons and great-grandsons.²⁰ On the death of the great-grandfather, the *gwely* named after the great-grandfather came to an end and the patrimony was divided up between his sons, at which point new *gwelyau*²¹ were formed, named after the sons. Upon the death of the sons the patrimony was divided between the grandsons, and upon their death between the great-grandsons. The divisions were always on a per capita basis, and new *gwelyau* were formed as each generation died out.²² This description is consistent with how *cyfran* operated according to the laws,²³ and as one can see, it does not respect the common law concept of *primogeniture*.

Others contend that new *gwelyau* were not formed as each generation died out.²⁴ According to this view the *gwely* is not to be confused with the four generation agnatic group described above. This generation group was activated when inheritance was the matter at issue, but was not synonymous with the *gwely*. If there were sons, they alone would share, and if there were no sons, then the remoter kin would be called to the inheritance in accordance with the nearness of their relationship with the deceased. Therefore, the patrimony would normally be divided once, with other male relatives being added as above on the death of the sons. Therefore, the *gwely* was not confined to the descendants of a common great-grandfather. On this view, a *gwely* was an association of men descended from a common ancestor, not necessarily a great-grandfather, which was constantly changing, but not in accordance with any

²⁰ For a comparison with the Irish concept of the *derbfine*, see E. MacNeill 'Ireland and Wales in the History of Jurisprudence', in *Celtic Law Papers: Studies Presented to The International Commission for The History of Representative and Parliamentary Institutions*, Aberystwyth 1971, 179. See also, T.M. Charles-Edwards, *Early Irish and Welsh Kinship*, (Clarendon Press, 1993) 51-61.

²¹ Plural of *gwely*.

²² F. Seebohm, *The Tribal System in Wales*, (London,1904), viii-ix). For a summary see Ellis, *Welsh Tribal Law and Custom in The Middle Ages*, (Oxford, 1926), 224-225.

²³ See also, T.G.Watkin, *The Legal History of Wales*, (Cardiff, 2012), 58.

²⁴ For example, see F.W.Maitland, *The Economic Journal*, Vol. 5, No. 20 (Dec, 1895), 589-594, and Ellis, *Welsh Tribal Law*, 225-228.

mathematical rules.²⁵ Therefore, once the *gwely* had come into existence, it was a more stable structure than has been described at the beginning of this discussion.²⁶

Evidence from rentals in *medieval extents* of the high and late middle ages²⁷ can be cited to build up a more accurate picture of the workings of the medieval *gwely*.²⁸ The rental evidence shows that the *gwely* did not disintegrate into separate *gwelyau* as each generation died out.²⁹ However, there is evidence from the extents pointing to the fact that occasionally new *gwelyau* could be formed following the initial partition.³⁰ Therefore, the *medieval extents* of the middle and high medieval periods sometimes reveal a ‘kernel of truth’ for the proposition that *cyfran* could have operated as previously described according to the Welsh laws.³¹

In the authors’ view this then may leave open the possibility that at some point in the very distant past *cyfran* could have operated according to *the Welsh laws*, but that that was very much an exception to the rule in medieval Welsh society, and this contrast has been noted by Charles-Edwards.³² These conclusions illustrate the tension between *the Welsh laws* and the *medieval extents* of the middle and high medieval periods as to *the practice of cyfran*. The question which arises is: why should there be such a tension? A possible explanation might be because the laws

²⁵ T.Jones Pierce, ‘The Laws of Wales—The Kindred And The Bloodfeud’, (1952) in J. Beverley Smith, ed., *Medieval Welsh Society Selected Essays by T. Jones Pierce*, (Cardiff, 1972), 289-308 at 290. See also, T. Jones Pierce, *Agrarian Aspects of The Tribal System in Medieval Wales*, (1959) *Medieval Welsh Society*, 329-337 at 333-334.

²⁶ G.R.J. Jones, ‘The Tribal System in Wales: A Reassessment In The Light of Settlement Studies’, *The Welsh History Review* vol I (1961) 111- 132 at 122-123.

²⁷ 1000-1300 AD (high middle ages) and 1300-1453 (late middle ages).

²⁸ T.Jones Pierce, ‘An Anglesey Crown Rental of the Sixteenth Century’, (1940), in J. Beverley Smith, ed., *Medieval Welsh Society*, 87-101 and T. Jones Pierce, ‘The *Gafael* in Bangor Manuscript 1939’, (1942), *Medieval Welsh Society*, 195-227.

²⁹ T. Jones Pierce, ‘The *Gafael* in Bangor Manuscript 1939’, 221.

³⁰ *Ibid.*, 223. Jones Pierce’s view was that the *gwely* arose when the patrimony was divided for the first time and that another unit of land holding, the *gafael* (plural *gafaelion*), was usually formed out of subsequent partition, so that *gwelyau* were usually larger than *gafaelion*. Based upon his researches of rentals and medieval extents, Jones Pierce concluded that ‘ [s]ome *gwelyau* and probably most *gafaelion* subsequently emerged out of second and third partitions...’

³¹ *Ibid.*, 223-224.

³² T.M. Charles-Edwards, *Early Irish and Welsh Kinship*, (Oxford, 1993), 246 and 247.

were written by scribes in the middle-ages who were trying to record the laws as they once might have been against the background of a changing society. Laws are never static.

Whereas *cyfran* does not appear to have been practised in lands owned by the Griffith family during the period under discussion, there is evidence that the concept had been in operation in earlier times, and the discussion now moves on to consider this evidence briefly.

Evidence of the operation of cyfran in earlier times

Research at the British Library³³ by the authors has revealed that Sir William Griffith III acquired *gwely* land in *insula focarum* (the Skerries).³⁴ The three *gwelyau* acquired by him were: *gwely more* (or Mor), *gwely Komioys* (or Mor' ap Konnoys) and *gwely goyle sanfrayde* (or Gwassanfrait). Parts had descended to many individuals or groups of brothers, and Sir William III had bought them out by charter. The Skerries are small rocky islands but presumably these three *gwelyau* had land on Anglesey and parts of the Skerries were appurtenant to them.³⁵ It is likely that it was a late feudal requirement whereby the consent of all of the members of the *gwely* would have been required to allow the sale to take place.

II TIR PRID (TERRA PRIDATA)

Background

“The *prid* principle may have originated in the period of the princes³⁶, but the legal device itself probably owes its origin to the period following of the conquest of

³³ British Library MS Harley 696 folio 162.

³⁴ See M.Richards, *Enwau Tir a Gwlad*, (Gwasg Gwynedd, Caernarfon, 1998) 21. *Insula focarum* is the Latin name for The Skerries off the north West coast of Anglesey, and known in Welsh as *Ynysoedd y Moelrhoniaid*. The lands are referred to as *insula focarum* in the Harley MS.

³⁵ BMSS/27364 held at Bangor Archives states that there had been a dispute in 1498 between the Bishop of Bangor and Sir William III about fishing rights in the Skerries. Therefore, it is possible that the Harley MS could be a schedule of the evidence which Sir William III presented in connection with that dispute.

³⁶ Approximately 1063-1283. The reference to the conquest of Wales is by Edward I in 1282.

Wales.³⁷ In short, it appears to have been a device to overcome (1) the inalienability of land prevalent in north Wales generally and (2) the characteristics inherent in the Welsh system of *cyfran*.

Under the system of *cyfran* alienation was difficult for members of the *gwely*.³⁸ Land could be let for up to twelve months but that was all, and probably only in later feudal times could *gwely* land be sold,³⁹ though to achieve this the consent of all of the members of the particular *gwely* together with the consent of the lord would have been needed. In the context of land governed by Welsh law the concept of *tir prid* was developed as a means of avoiding the strict rules against alienation.

The tir prid transaction

There are few references to the *prid* in the texts of the native laws of Wales.⁴⁰ It came into prominence during the second half of the fourteenth century.⁴¹ A most satisfactory explanation of the *prid* transaction is provided by Watkin:

“The disability of the Welsh to hold property in these areas [English boroughs] led to the development of the *prid*, an institution which combined the concepts of the lease and *vifgage*. The would-be Welsh purchaser of land in a borough or town would purchase the land by giving the previous owner a capital sum in the form of a loan, receiving in return possession of the land for a fixed number of years as

³⁷ Llinos Beverley Smith, ‘The Gage and the Land Market in Late Medieval Wales’, *The Economic History Review*, Vol 29, issue 4, (1976), 541.

³⁸ See *Life in Wales*, A.H.Dodd, (Batsford, 1972), 56-57. This was seized upon upon by Henry VII at the time of the Wars of the Roses when he wrote to the Welsh gentry promising to restore the Welsh gentry to ‘their erst libertyes, delivering them of such miserable servitudes as they have piteously longe stande in’. Dodd points out that ‘For years Welsh lawyers had been devising ingenious means of getting round these ancient constraints.’

³⁹ However, the native Welsh laws did allow such land to be alienated in order to satisfy a payment of *galanas*. This was payment thrown upon members of the *gwely* if one of its members had committed homicide. See, D. Jenkins, *Hywel Dda The Law*, (Gomer Press, 1986), 146.

⁴⁰ T. J. Pierce in ‘The Law of Wales—The Last Phase’ in J Beverley Smith, ed, *Medieval Welsh Society*, 384 fn 58.

⁴¹ *Ibid.*, 385. However, the *prid* was certainly in use by the first half of the fourteenth century and the writ of covenant was introduced into the Crown lands in 1284.

security for the loan. Usually the period was fairly brief, for instance four years...At the end of the period, he was theoretically entitled to repayment of his money and the land should be given back, but the reality was that the loan would be extended, so that he kept the land and its profits. In effect, he had purchased it, but the method overcame his inability to take the legal title.”⁴²

At the end of the four year period if the property remained unredeemed, the *prid* became renewable. The essence of the *prid* was that the land was security for a loan which in truth was never going to be repaid. An interesting question then arises as to whether there was any means of enforcing the four year extension. It is likely that resort would have been had to English procedure, such as *an action on the writ of covenant*, which had proved unsatisfactory as a remedy for *termors* (those holding land for a term of years or for life).⁴³

A similar concept had existed in Ireland, called the *geall* but this may have been a later concept than the *prid*.⁴⁴ Smith has stated that the transaction should be viewed as a transfer of a term of years (not the freehold) in the land, rather than as a mortgage.⁴⁵ However, the authors do not view the transaction as a lease—i.e, land being let for a rent service. The land is security for a loan, which in truth is never going to be repaid. That is not a lease, and the common law leaseholders’ remedies are hardly applicable. In north Wales ‘the four-year period and the use of the formula *ad spacium quatuor annorum* were common features of the *tir prid* deed.’⁴⁶

⁴² T G Watkin, *The Legal History of Wales*, 113-114. However, early *prid* deeds do not show a preponderance of transactions in urban property although the device was certainly used in an urban context at a later date in both the Crown land and in marcher lordships.

⁴³ It might be, however, that in England an agreement of this type would be put into a conditional bond, in which case the appropriate form of action would be a writ of debt.

⁴⁴ G. Mac Niocail, ‘The Interaction of Laws’, in *The English in Medieval Ireland* (ed. James Lydon, Royal Irish Academy, 1984) 115-117.

⁴⁵ Llinos Beverley Smith, ‘The Gage and the Land Market in Late Medieval Wales’, 542.

⁴⁶ Llinos Beverley Smith, ‘*Tir Prid*: Deeds of Gage of Land in Late-Medieval Wales’, *Bulletin of the Board of Celtic Studies* 27 (1976-78) 265.

The authors believe that there are similarities between the *prid* transaction and the modern land law concept of overreaching.⁴⁷ As Watkin explains:

“The *prid* offered opportunities to Welshmen on Welsh lands as well as in the English boroughs. *Gwely* land which could not be alienated could be subjected to a *prid*, enabling a purchaser to take possession and profits for his purchase money, the family’s rights in effect being transferred to the cash. Technically, the land was still theirs, but their interests had been converted into interests in the liquid cash.

Lords saw a way of profiting from such transactions, and began to insist upon their permission, in the form of a licence, being obtained before land was subjected to a *prid*.⁴⁸

The importance of this type of tenure is that it provided a means whereby “an ambitious and acquisitive squirearchy or a struggling and industrious peasantry could add acre to acre in a period of restriction.”⁴⁹ Nor was this type of tenure the preserve of the ‘acquisitive squirearchy’ or the ‘industrious peasantry’. It was also utilised by the *uchelwyr*.⁵⁰ Accordingly, the Penrhyn papers reveal that Gwilym ap Gruffydd ap Gwilym (Gwilym)⁵¹ made full use of this form of tenure to extend his landholdings as evidenced by the substantial number of *tir prid* transactions in his property portfolio which coincided with the end of the Glyndŵr revolt⁵² in 1415.⁵³

⁴⁷ See, G Owen, ‘A New Model for Overreaching—Some Historical Inspiration’, (2015) 79 Conv. pp 226-230.

⁴⁸ T G Watkin, *The Legal History of Wales*, 113-14

⁴⁹ *Ibid*, 547.

⁵⁰ Free tribesmen.

⁵¹ The son of Gwilym ap Gruffydd ap Gwilym ap Gruffydd.

⁵² On 16 September 1400 a group of Welshmen assembled at Glyndyfrdwy in north East Wales, and two days later attacked Ruthin. This was the beginning of the revolt against the English Crown which ravaged through Wales until 1414. See, R.R. Davies, *The Revolt of Owain Glyndŵr*, (Oxford University Press, 1995). For references to Gwilym ap Gruffydd ap Gwilym of Penrhyn in connection with the revolt, see R.R.Davies, *Owain Glyndŵr, Prince of Wales*, (Y Lolfa, 2010, translated by Gerald Morgan.), 79 and 122.

III COMPARATIVE ANALYSIS
ON DIFFERING APPROACHES TAKEN BY ENGLISH COMMON LAW
AND WELSH NATIVE LAW ON LEGITIMACY AND INHERITANCE, AND
THE INFLUENCE OF CANON LAW

Default position under English common law (realty)

In England, in the absence of any other arrangement to the contrary, the default position was that the *common law canons of descent* applied. A widow could not inherit under the *canons of descent*. Her position was regulated by way of *dower* (which will be dealt with below under the heading dealing with *wives*). Under the *common law canons of descent*, the starting point was with the eldest son (*primogeniture*), and a deceased's eldest son would take in preference to a younger son.⁵⁴

It was not of any relevance from which marriage relevant issue came, and it was only in the absence of male issue that daughters could inherit.⁵⁵ Therefore, if a person died leaving no sons but a grandson in the male line, the grandson would take in preference to the daughter. Lineal descendants took priority over collateral descendants of the deceased. Therefore, if a deceased died without any sons or

⁵³ As to the reasons why Gwilym ap Gruffydd's portfolio of *tir prid* transactions commenced in 1415, see A D Carr, 'Gwilym ap Gruffydd and the rise of the Penrhyn Estate'. The authors have examined the relevant catalogues relating to the Penrhyn Estate for the commote of Cororion and have not noticed any reference to *tir prid* transactions following the Acts of Union 1536-43. Thereafter, the authors have noticed reference to *fee farm* transactions. These were similar to *fee simple* transactions but provided a perpetual rental payment in favour of the seller.

⁵⁴ J.H. Baker, *An Introduction to English Legal History*, 267.

⁵⁵ *Ibid.*, 267.

grandsons his daughter would take in preference to the deceased's brother. Under the *common law canons of descent* illegitimates could not take.

Native Welsh law (realty)

In Wales, as we have seen above under the norms of *cyfran*, the patrimony was divided equally between all of the sons of the deceased. The youngest son would make the division. Prior to the Conquest,⁵⁶ it did not matter if any of the male heirs were illegitimate.⁵⁷ Similar to the English canons of descent, a widow had no right to the patrimony. If a daughter had been given in marriage to a foreigner, her sons of that marriage could succeed to the patrimony under the Welsh custom of *mamwys*. It should be noted that *mamwys* was an aspect of the concept of *cyfran* and not a separate system. It was a way of uniting two powerful families.⁵⁸ Under the native Welsh laws, a payment known as the *ebidew* was payable to the lord when the sons (or daughters in the absence of male heirs) inherited the land.⁵⁹

The position of wives: England

Dower and jointure⁶⁰

As we have seen, although a wife could not inherit through the *common law canons of descent*, however at common law she was entitled to a life interest in up to one third of her husband's freehold lands.⁶¹ As will be seen in the case of Sir William III's settlements, an alternative means of settling lands by a husband on his wife was to make a marriage settlement by which land was settled on both the husband and wife jointly (called a *jointure*). This method was employed if a husband's lands were held in *use* (the precursor of the modern trust) by *feoffees* (the precursors of modern

⁵⁶ 1282-84

⁵⁷ D.Walker, *Medieval Wales* (Cambridge, 1990), 143.

⁵⁸ See T.G.Watkin, *The Legal History of Wales*, 2nd edn.,53 and 80.

⁵⁹ *Ibid*, 61.

⁶⁰ *Dower* was the gift by a husband to his wife on their marriage which would be effective on his death for her use during her widowhood.

⁶¹ J. Baker, *An Introduction to English Legal History*, 269-271.

trustees). In such a case it was not possible for a man to provide for his wife by way of *dower*, so instead the *feoffees* would be instructed to transfer an agreed amount of land to both husband and wife for their joint lives.⁶² Following the Statute of Uses 1536, a man's land was only subject to *dower* if a *jointure* had not been entered into on marriage. A *jointure* before marriage barred *dower*. A wife had the right to elect between *jointure* and *dower* if *jointure* was offered after marriage. In truth, a wife's entitlement by way of *jointure* was contractual in the sense that she could sue in relation to unprovided jointure in an action for breach of contract.⁶³ The rights under a jointure were enforced in contract by way of a writ of *assumpsit*, as a jointure had to be given by way of deed, in contrast to *dower* which was a common law right.⁶⁴

There is evidence of litigation concerning such matters within the Griffith family during this period. According to some deponents in 1555-56, Edward had considered challenging his stepmother's *jointure* at his father's inquisition post mortem in 1532.⁶⁵ Following Edward Griffith's death, there is evidence that Agnes' (Edward's first wife) father came to London to sue for her *dower*.⁶⁶

Maritagium

Long before the *jointure*, which became settled practice from the fourteenth century onwards,⁶⁷ the common law assisted the enforcement of the *maritagium*, a marriage settlement which was 'a gift to the wife, or to the husband and wife, by the bride's parents or other relatives.'⁶⁸ The gift was limited to this purpose and the donees held

⁶² See E. Spring, *Law, Land, Family*, 42-43.

⁶³ *Ibid*, 47-48.

⁶⁴ For an example, see Baker and Milsom, *Sources of English Legal History, Private Law to 1750*, 2nd ed., (Oxford University Press, 2010), p543. The example provided is an unnamed case: BL MS. Add. 35958, fo. 372v.

⁶⁵ See deposition of William Woodd of Rhosmor, [NLW MS 11126 folios 33-39]. It may be that he wished to assign different lands to her dower as part of a restructuring of his inheritance.

⁶⁶ REQ 2/4/258. Article 13 of evidence taken in London in 1541 in this case states: 'He saithe he cam to London for to sewe for the the righte of his doughteres dower in the spirituall Courte...'

⁶⁷ Baker, *An Introduction to English Legal History*, 270.

⁶⁸ *Ibid*, 271.

free of all *feudal services* for three generations (*in frank-marriage*).⁶⁹ The donees did not pay *homage* to the donor, which occurred after three generations. The rationale for deferring *homage* was to enable the land to be returned to the donor if there was no issue of the marriage. It is thought that the *maritagium* may have influenced the growth of the *entail* which concept is considered in this article when discussing the will of Edward Griffith.⁷⁰

The position of wives: Wales

As we have seen from the discussion on *cyfran* land could only be inherited by males, and in those areas of Wales in which the native laws were practised Welsh women had no rights to *dower*.⁷¹ The position was different in the Crown lands following the Statute of Rhuddlan 1284⁷² but that remained the position in the north-eastern March until the Acts of Union.⁷³

Testaments: England and Wales

Before going on to consider the topic of wills, it may be helpful to explain briefly the differences between a will and a testament and the influence of Canon law on wills and testaments in order to contextualise the analysis which will follow in this article.

⁶⁹ However, not all *maritagium* grants were in frankmarriage. In some cases services were reserved at the start.

⁷⁰ For an excellent in depth discussion of these points, see T.G.Watkin, ‘*Quia Emptores* and the Entail’, *The Legal History Review*, vol 59, issue 3, 353-374. See also, J. Biancalana, *The Fee Tail and the Common Recovery in Medieval England 1176-1502*, (Cambridge Studies in English Legal History, 2001), Baker, *Introduction to English Legal History*, (Oxford, 2002), 271-273; M. Sheehan, *Marriage, family, and Law in Medieval Europe*, 34-37 and E. Spring, *Law, Land & Family, Aristocratic Inheritance in England, 1300-1800*, (University of North Carolina Press, 1993), 27-28. For the earlier practice of *maritagium* in Wales, see R.R. Davies, ‘The Status of Women and The Practice of Marriage’, 108-109

⁷¹ R.R.Davies, ‘The Status of Women and The Practice of Marriage’, 98 and 101-102.

⁷² Walker, *Medieval Wales*, 143. See also, T.P. Ellis, *Welsh Tribal Law & Custom in the Middle Ages*, 390.

⁷³ R.R.Davies, ‘The Status of Women and The Practice of Marriage’, 98-99, and 101-102.

During the period covered by the article many of the principles underpinning the English law in relation to wills and testaments were part of the Canon law.⁷⁴ Therefore, as the law in relation to wills and testaments is much the same for Wales, the influence of Canon law, in this respect, applies to Wales as well. This derives from ‘the Christian desire to give alms at death’,⁷⁵ which then developed into using a will or testament as a means of ‘asserting a right of bequest’ and ‘the rectification of past injustice’⁷⁶ Consequently, the provision of legacies became the essential feature of the testament.⁷⁷ Examples of testaments among the Penrhyn documents include the testament of Gwilym ap Gruffydd ap Tudur which has already been mentioned in the section on *cyfran*.⁷⁸ His lands in *tir prid* were bequeathed under the terms of his testament as these were treated as *moveables*. *Chattels* is a common law term; testaments were canonical and therefore in Canon law they were known as *moveables*. As *tir prid* was not a freehold interest, it was classed as personalty, and capable, as such, of being bequeathed. This is of interest as it shows a common analysis being employed in a Canon law context.

In both England and Wales single women and widows could make either wills or testaments but a married woman had no right to dispose of property without her husband’s consent. The evidence is that husbands often did so consent.⁷⁹ The discussion now moves on to consider wills.

⁷⁴ The consistory courts exercised jurisdiction over probate matters until the Probate Act of 1857, after which the jurisdiction moved to the secular courts.

⁷⁵ M.S.Sheehan, *Marriage, Family, and Law in Medieval Europe*, (Cardiff, 1996), 3.

⁷⁶ M.S.Sheehan, *Marriage, Family, and Law in Medieval Europe*, 3-4. An example of seeking to rectify a past injustice can be seen in the 1549 will of John Phillips of Picton Castle: PROB 11/35. He was the brother in law of both Rhys and Edward Griffith. He had played a significant role in the retrieval and reading of the Penrhyn entail in 1529. He also enjoined Edward to the safe return of the document to custody so that it could be called for by Sir William III’s heirs, and was furious that this was not done. He was so furious that he described in his 1549 testament exactly what had happened.

⁷⁷ M.S. Sheehan, *Marriage, Family, and Law in Medieval Europe*, 5.

⁷⁸ PCP/5.

⁷⁹ Chandler, ‘The Will in Medieval Wales to 1540’, 46.

Wills:⁸⁰

English common law

Prior to the Statute of Wills 1540 it was not possible under the common law to devise freehold land by will,⁸¹ and the concept of the *use* was in part developed to overcome this. *Uses* were either passive or active. A *passive use* refers to a *feoffment* (similar to but not the same as a conveyance or transfer)⁸² to *uses* where the *feoffee* (the precursor of the modern trustee) is intended passively to hold the legal title over a period of time, which frequently happened for the purpose of making, in effect, a will of freehold land – the *feoffee* (or *feoffees*) holding the legal title passively to the *use* of the *feoffor* (settlor) or another during his life, and then following instructions in his will.⁸³ In this way a testator was able to circumvent the strict rules of the *canons of descent*. It was these *passive uses* which had caused the Crown to lose revenue because of the way in which they got around the problem of *feudal incidents*. *Passive uses* were ‘executed’⁸⁴ by the Statute of Uses of 1536 which strengthened the Crown’s ability to collect feudal dues. The position was different with regards to *active uses*. In this case, a grant was made to *feoffees* to the *active use* that they would shortly thereafter re-convey the land on different terms, as we shall see under the heading of settlements in this section. Here the duty was to re-convey, not to passively

⁸⁰ Large numbers of late medieval wills have survived in England but not in Wales. See M.S. Sheehan, *op cit*, 199. Cf. Llinos Beverley Smith, ‘The Gage and the Land Market in Late Medieval Wales’, *The Economic History Review* (1976) Second Series, Vol. XXXIX, No. 4, 549.

⁸¹ M.S. Sheehan, *op cit*, 6, and see also 311-323.

⁸² *Livery of seisin* (i.e. the transfer of possession which could be done symbolically by the handing over of a clod of earth) was required in respect of a *feoffment*.

⁸³ See Chandler, ‘The Will in medieval Wales to 1540’, 69. Very often the clergy were asked to act as feoffees.

⁸⁴ *Passive uses* were executed through *seisin* being passed under the Statute of Uses 1536 to the beneficiaries.

permit the *feoffor* to take the profits. Such *uses* were *not* ‘executed’ by the Statute of Uses.⁸⁵

It is probably better not to talk in terms of wills before 1540. Certainly, no will in respect of land could be made which would be recognised by the common law. Any ‘wills of land’ before 1540 were not ‘dispositive instruments, but directions—or declarations of interest to feoffees, and they did not require probate by the ecclesiastical authorities.’⁸⁶ Such declarations to *feoffees* were the *ultima voluntas* (the ‘last will’). The *ultima voluntates* very frequently appeared as a different document from the testament. The testament was a dispositive instrument, but of personalty and required probate. However, in practice both the testament and the *ultima voluntas* were proved together and sometimes combined in one document.⁸⁷

From an examination of a random sample of one hundred ‘wills’ from two of the volumes of enrolled probates of the Prerogative Court of Canterbury, the results of which are set out below, the authors have noticed other trends:

Both before and after the Statute of Uses and Wills some testators made devises of land in testaments that were hybrid documents such as the 1540 Testament of Edward Griffith which is considered later in this section.

Very few testators had made (or their executors had proved) separate ‘wills of land’.⁸⁸ These tend to be higher status or better educated.⁸⁹

⁸⁵ This is one example of why *active uses* were employed; it is not the only purpose for which they were used.

⁸⁶ Baker, *The Oxford History of the Laws of England 1483-1558*, (Oxford, 2003), vol VI 691-692.

⁸⁷ Ibid. See also, J. Bean, *The Decline of English Feudalism 1215-1540*, (Manchester, 1968), 149-150 and R.H.Helmholz, *The Oxford History of the Law of England, The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, vol I (Oxford, 2004) 398-399.

⁸⁸ For the purpose of this exercise, the authors have concentrated on fiction and effect rather than the form of the document. If fee simple land had been devised, it had been counted as a ‘will of land.’

⁸⁹ Edward Sharnbroke, clerk, 1530.

Sampling of devises of land in PCC Wills before and after the Statutes of Uses and of Wills

Samples were the first 50 probates in PCC Will Register PROB 11/24 (1530-33) and the first 50 probates in PCC Will Register 11/29 (1541-42)

	1530	1541
English testators %	98%	92%
Welsh testators %	2%	6%
Irish testators %	0%	2%
Separate will of land	8%	12%
Devises of freehold or copyhold land in fee	36%	48%
% of such devises that involved partibility	44%	52%
% of devises involving partibility among male kin	22%	52%
Bequests of leaseholds (/50)	Not counted	24%

Welsh law⁹⁰

The position outlined above in respect of post-1540 wills and *ultimate voluntates* attached to testaments in the ecclesiastical jurisdiction prior to 1536 was similar for Wales. For land held *in fee* the English system of entering into a *feoffment to uses*, and then leaving the land by the ‘last will’ was adopted. Further we have seen evidence of the bequest of *movables* in the testament of Gwilym ap Gruffydd ap Tudur. However, the ‘will’ of Edward Griffith is very unusual.

The ‘will’ of Edward Griffith⁹¹

⁹⁰ See Chandler, ‘The Will in medieval Wales to 1540’ 36-37. English ecclesiastical practices particularly influenced the way in which the will developed in medieval Wales.

⁹¹ This will and the wills of John Phillips and John Gruffith of Conway discussed later on in this section of the article are listed by Chandler in ‘The Will in medieval Wales to 1540’, but only the will of John Phillips is discussed in Chandler’s thesis. Edward Griffith’s father was Sir William Griffith III of Penrhyn. He was therefore a brother of Rhys Griffith and John Griffith.

Details of this will are to be found in the *Archaeologia Cambrensis*.⁹² It was dated in Dublin, where Edward died, on 11 March 1540 and was proved in the Prerogative Court of Canterbury on 7 April⁹³ in the same year by William ap Robert, Jane, Edward's widow, and her brother, John Puleston, who was represented by a Proctor.⁹⁴ Edward provided a life interest of certain land in Bangor and 'Maynoll' Bangor to his brother, Rhys, for his lifetime; certain land to his brother, John, for his lifetime; and a gift of chattels to his sister, Margaret, with the residue passing to his heirs. The will provides as follows:

“Item I leave unto myn heire all suche londes as I have, deducting suche porc'ons as here folowithe...to Rice Gryffyn all the londes wtin Bangor and Maynoll Bangor during his lyfe. Item to John Gryffyn the comodo of Meny during his lyfe. Item to Richard Will'm Nantporte and treporte during his lyfe...to my syster Margaret Gryffyn half of my kyne to hur marriage. Item I leave my wife Jane Gruffith...to bestowe all other my goodes...”

As Edward had provided that his lands were to be left to his heir, the *common law canons of descent* were not entirely avoided as reference had to be made to them to ascertain the identity of the heirs. As Edward did not have any male issue, then his heirs were his three daughters in *coparcenary* (i.e., jointly). Had those daughters been illegitimate then they would not have taken under Edward's will, and this is considered in more detail later in this section.

The document looks like a will of freehold land; it includes dispositions of freehold land, and yet it is called a Testament. Prior to the Statute of Wills 1540 land could not be left by will in such a way in either England or Wales. The question is:

⁹² Arch. Camb., 1881, 80-81.

⁹³ At this time the year ended on 24 March and the New Year began on 25 March. Edward's 'will' is clearly dated 11 March 1539 [i.e. 1539/40] and probate 7 April 1540.

⁹⁴ Probate and a copy of the Will are in TNA PROB 11/28/63.

why did Edward make such a ‘will’? One cannot discount the possibility that there were *feoffees* to the *use* of the last will, and that the ‘will’ is directing them as to what to do with the land.⁹⁵ The authors have not been able to find any evidence of such *feoffees*. However, there is evidence that the life interest in favour of John Griffith was created by deed and that there was a *feoffee* appointed. This is dealt with in the next section which considers whether the norms of *cyfran* influenced the way in which wills were made in Wales during the period under discussion. There may well be more to this will than meets the eye, as is explained next.

The Statute of Wills 1540 is the first enactment ascribed to the regnal year that began on 22 April. Edward’s will is dated 11 March 1540 and he must have died shortly thereafter⁹⁶ for it to have been proved on 7 April 1540. The Statute of Uses 1536 had the effect of stopping devises of land by will which had operated by devising the use, but crucially, only if the use was a *passive use*: *active uses* were *unaffected*.⁹⁷ The Statute of Wills 1540 created a completely new legal power to make a will of freehold land, rather than reversing the effect of the Statute of Uses in putting a stop (as it was thought) to the old mechanism of a *feoffment* to the *uses* of a last will. As he was close to death in 1540 he might have been advised to make a ‘will of land’ in view of the fact that the passing of the Statute of Wills was then imminent.

⁹⁵ In the sample from PROB 11/24 and PROB 11/29 set out in the text explicit references to *feoffees* is rare, even when devising land. Devises are usually worded (like bequests of chattels) as gifts in the present tense, and not instructions to feoffees. Uses are rarely explicitly invoked as a mechanism. A notable exception is the testament of Henry ap Jankyn ap Jevan Gwyne, dated 2 October 1540, which recites a feoffment to uses of his lands in Gower and Carmarthenshire dated 13 December 31 Henry VIII, and gives meticulous instructions to *feoffees* to execute entails in use.

Occasionally, there is evidence of a *feoffment to uses* in a testament which does not make any devise of land, and no ‘will of land’ has been proved (4% of the 1541 sample). For example, John Kaylway in 1530 gives £200 to his wife if she will convey her inheritance in south west England to his *feoffees to uses* for the benefit of their heir, but he devises no land and gives no instructions to his *feoffees* in his testament. There is thus an element of ‘under-reporting’ inevitable when using probate registers as evidence. ‘Wills of land’ were not necessarily proved in the ecclesiastical courts, and unless they were recited in Inquisitions Post Mortem, they might not survive at all.

⁹⁶ See, PFA 1/573. According to Edward’s IPM he died on the same day.

⁹⁷ This was because, as we have seen, it was the creation of passive uses which had caused the Crown to lose revenue.

However, the timing is a little problematic given that the relevant parliamentary session only began on 12 April 1540, the bill which became the Statute of Wills was first read in the Lords on 9 July 1540, for a third time on 14 July, and was then sent to the Commons, and given that it may be that the legislation was drafted in a hurry after Cromwell's fall in June 1540.⁹⁸

The author has two possible theories for the drafting of the 'will' in this manner. Firstly, that there might in fact have been *feoffees* appointed to the *uses* set out in this will, and that at the time the 'will' was drafted the legal profession arguably regarded the relevant *uses* as *active uses*. Perhaps the 'will' was drafted in Ireland by lawyers who were not Edward's usual legal advisers, and who were ignorant of the Statute of Uses.

Secondly, the single gift of the chattel interest might have been to ensure that the 'will' could not be completely rejected. The prize for Edward's daughters was that if Rhys entered his life estate it would imply that they were the true heirs. Following Edward's death there followed lengthy litigation concerning the Penrhyn *entail*.⁹⁹

⁹⁸ There is useful discussion of this point in J.M.W. Bean, *The Decline of English Feudalism, 1215-1540* (Manchester, 1968), pp. 298ff. See also, A.R. Buck, 'The politics of land law in Tudor England 1529-1540', *The Journal of Legal History*, vol 11 issue 2 (1990), 200-217. Professor Elton had argued that an earlier version of the Statute of Wills had been introduced in 1539 but abandoned. This assertion is contested in Buck's article.

⁹⁹ An *entail*, or *fee tail*, came into being when an estate was settled on certain beneficiaries and their lineal heirs. A *fee tail* was carved out of the *fee simple*, and as such was a lesser estate in land. A grant to the issue of a person's body was known as a *tail general*, and such heirs were known as *heirs general*. The *fee tail* could just be in favour of a person's male line, and such heirs were called *heirs male*.

The litigation was between Edward's three daughters and his brother, Rhys. One of the arguments advanced on behalf of the daughters was that their father, Edward, held the Penrhyn Estate in *fee simple* and not in *fee tail*. This then reserved to them the position that they inherited under the terms of Edward's will. Alternatively, they argued that they were the *heirs general* under the settlement which included the *entail*. One of Rhys' arguments was that the three daughters were illegitimate on the footing that Edward's marriage to Jane Puleston was bigamous. Had they been illegitimate they could not have inherited under the will or any *entail*. He would then take his brother's estate under the *common law canons of descent*. Sir John Puleston looked after the interests of his three granddaughters until they married after which their respective husbands' families, the Herberts and the Bagnalls, looked after their interests.

There is evidence that Serjeant Glyn allegedly assisted Sir John Puleston in burning the *entail* as it supported the claim of Rhys Griffith that it was in *tail male*-see deposition of Lowry Salisbury, NLW MS [111992]folios 16-18.

Edward had married twice¹⁰⁰ and his first wife contended that her marriage to Edward had not been annulled, thereby leaving open the possibility that Edward's second marriage to Jane Pulston had been bigamous, which meant that his daughters of that second marriage would have been illegitimate.¹⁰¹ It is possible that whoever drafted this 'will' was aiming to entrap all potential opponents into acknowledging the heirship of the three daughters. This suggestion becomes more significant in the litigation which took place following Rhys' death in 1580.

Notwithstanding all of the above, it may be said even if there had not been any *feoffees to uses* appointed in respect of this 'will' that it was still not unusual. As we have seen, the fact that it is called a 'Testament' and yet includes freehold land is not unusual according to the practice of the period. Further, it may well be that avoidance of feudal incidents was by no means universal, as many Inquisitions Post Mortem from the period will testify. In some instances, 'wills of land' might be transcribed in full or in part in an Inquisition.¹⁰² Conversely, in other instances, no

¹⁰⁰ By reference to '[d]epositions of witnesses taken before John Price Clarke and Thomas Powell Esquier Commissioners...in the Chathedrall Church of Bangor' [10 & 11 April 1556, NLW reference MS 11992, folios 1-27] : Edward had been married first of all to Jane daughter of William ap [son of] William of Cowichlan but after her death, aged only 13, their unconsummated marriage was dissolved by Cardinal Wolsey so that Edward could marry her younger sister, Agnes. The marriage of Edward and Agnes was celebrated at Ysbyty Ifan, and they cohabited for 18 months before Agnes returned to her father's house and Edward bigamously married Jane Pulston. Edward and Jane lived together for 18 months until Edward threw her out.

Wanting Agnes, William ap William's daughter back, he had to sue her father in the Court of Arches to obtain a citation against him for withholding his daughter from her lawful husband. It is uncertain whether the matter was resolved by the court or ultimately by way of arbitration. Whichever tribunal determined the issue, it was persuaded by seeing Wolsey's Dispensation. Agnes and Edward lived together again for 9 months, and their marriage was subsequently annulled. Edward swapped again to live with Jane Puleston, with whom he had three daughters. Agnes outlived Edward and after his death married William Eyton of Ruabon.

¹⁰¹ On 11 October 1558 Jane Puleston, gentlewoman, was cited to appear at Bangor Cathedral on 28 November, to give evidence about the marriage of Edward Griffith and Agnes, daughter of William [Penrhyn 64]. This document shows that Agnes may have appealed to the Pope about the annulment of her marriage to Edward. Jane Puleston's daughters would have all been bastardised if a Decree had been made retrospectively in favour of Agnes. So far as it is known, Agnes had no children by Edward, so Agnes' arguments could only serve Rhys' interests by eliminating the claims of Jane's daughters.

¹⁰² Edward Gruffith's 1540 Anglesey IPM [Bangor University Archives reference PFA/1/573] recites '*Thentent full mynd & will of me Willm Gruff*' relating to a *feoffment to uses of lands in Dindaethwy*. George Radford of Crich, Derbyshire, yeoman, executed a Testament and a separate Will of land on 7

Inquisition was held, because the *feoffment to uses* was so effective that the fiction was upheld that the landowner owned nothing.¹⁰³ It may well be that it was not seen as being desirable to rebel against the Crown. For instance, in a case of a ‘will of land’ (expressed as ‘my testament and my last will) in the Welsh Marches in 1530, Richard ap Jenkin gave one tenement in Ely, Glamorgan to his son, Iuean, and another to his son, William. His widow was to share Iuean’s tenement until she remarried, and was then Iuean was to have a half of it. Apparently, he had no *feoffees*. Tenure is not specified, but usually when a lease is bequeathed it is clear that it is only the residue of the term that is being given, so the authors assume that this is fee simple land. It may be said that this was invalid, but if it was respected by all parties without recourse to law, then validity means nothing.

However, what is very unusual about Edward Griffith’s ‘will’ was the life interests which were created, or as we shall see confirmed. The following discussion will show that there was also a gift *inter vivos* to at least one brother.

Did the norms of cyfran influence the way in which will settlements in Wales were made?

Chandler has stated that ‘it is difficult to ascertain what inheritance practices were pursued in different parts of Wales at various periods of time.’¹⁰⁴ The question which now arises is whether Edward’s ‘will’ was in some way an example of the influence of the norms of *cyfran* in will drafting in Wales? Could the provision of life estates for the wider kin¹⁰⁵ be viewed as forming a settlement pattern, which mimicked some of

August 1599; the Testament was proved in the Prerogative Court on 18 December 1602 [reference PROB 11/100] without the Will, which was recited in full in George’s IPM [reference C 142/409/100]

¹⁰³ An example of a ‘nil return’ IPM is that of Roger Wentworth of Nettlestead, Suffolk, 1464: ‘he held no lands or tenements in Suffolk in his own hands under the King nor under anyone else’ National Archives reference C 140/15/63. A grant exists in the Berkeley Castle Muniments, reference GC4253, dated 1446, from Roger’s grandmother Margery to Roger, his wife, their son, and two feoffees, of manors and lands in Suffolk

¹⁰⁴ Chandler, ‘The Will in medieval Wales to 1540, 132.

¹⁰⁵ i.e. the life interests in favour of his brothers, Rhys and John.

the qualities of a *gwely* and which could therefore be fairly be described as a ‘*quasi-gwely*’, constructed or described post Union within English rather than Welsh law? The discussion now moves on to consider this question.

Reference has already been made to the 1549 will of John Phillips of Picton Castle in Pembrokeshire who had married Elizabeth, the sister of Rhys and Edward Griffith.¹⁰⁶ He had settled Picton Castle by *feoffment* and *reoffment* and named six “trusty friends” in his will with specific roles.¹⁰⁷ These were not his executors, or *feoffees to uses*,¹⁰⁸ and they were given various powers.¹⁰⁹ One specific power concerned the equal division of lands in Osterlow, Llanstephan and St Clears between three younger sons for life with the remainder to pass to his heir on their deaths. Provision was made for these sons to “set and let” these lands upon attaining the age of twenty five. Therefore, in this will the English concept of *primogeniture* is tempered by life interests in favour of younger sons which appears to mimic the norms of *cyfran*. Other powers related to life estates to an illegitimate son and an illegitimate brother, which again appear to mimic the norms of *cyfran*.

In Edward Griffith’s ‘will’ two of the life interests were in favour of his brother Rhys and another brother, John Griffith. It will be recalled that there was a third life interest in favour of Richard William of land at Treborth and Nantporth. It is possible that the reference to Richard William could be some kind of bungling of the text of the will as Treborth and Nantporth (inter alia) had been *quitclaimed* (relinquished) to Rhys by Thomas Sares, so it was not in Edward’s gift to leave the

¹⁰⁶ PROB 11/35 with codicil 1551, proved 1552.

¹⁰⁷ OED notes the earliest usage of the word *trustee* as 1647 but the sixteenth century form *trustie* is noted.

¹⁰⁸ The *feoffees to use* are not named in John Phillips’ will but the will does contain confirmation that he wants the arrangement to continue whereby his wife is to have a life interest in Picton Castle.

¹⁰⁹

Treborth and Nantporth lands to Richard William.¹¹⁰ John Griffith's son, William, later claimed that his father's estate was created by a deed which had been jointly executed by Edward and Rhys Griffith, presumably after the death of Sir William III.¹¹¹ Their joint letters of attorney to deliver *seisin* have survived.¹¹² According to the letters of attorney one Richard ap William ap Lli ap Grono was John Griffith's *feoffee to uses*. The reference to a life interest in favour of Richard William could have been a mistake, and only life interests in favour of Rhys and John might have been intended. It is possible that Edward was doing what he could to divide the patrimony as best he could among his wider male kin to achieve the balance between his daughters and some of his male kin. Further, one cannot not discount the possibility that Edward might have still been hoping for a male heir. Either way, his will might be explained in the context of an attempt to create a '*quasi gwely*', i.e., a settlement pattern which displays some of the characteristics of the *gwely* system previously discussed in this article.

A similar formula can be seen in the 1541 will of John Gruffith of Conway.¹¹³ This will creates, by will or deed, life estates for male siblings with remainder to his heir, similar to the wills previously discussed from the point of view of the creation of a possible '*quasi- gwely*'. In order to argue this point within a tighter framework, the discussion will now move on to consider whether any similar patterns may be observed in English wills of the period. In undertaking this task, the authors have considered three sources: the sample of Wills from PROB 11/24 and PROB 11/29 to

¹¹⁰ PFA/1/434.

¹¹¹ Depositions taken at "Carnarven 24 Sept 1611: Peirce Griffith Esq by information and Sir Edward Herbert Knight and others defendants on behalf of the Querent, folios 70-72, William Gruffith of Keyghly Anglesey gent [NLW MS 11125].

¹¹² PFA/1/51.

¹¹³ 13 March 1540, PROB 11/28/435. The pedigrees (177 and 184) show John Griffith of Conway to be a son of Edmund Griffith, a son of Sir William Griffith I of Penrhyn.

which reference has already been made; and evidence of English settlement patterns noted by Howell,¹¹⁴ Spufford¹¹⁵ and Cooper.¹¹⁶

Were there similar settlement patterns in England?

The authors' sample of English wills show that testators may have used their new freedom to devise under the Statute of Wills to share out their land more equally among their children or other kinsfolk. This was unexpected by the authors as it may have been thought that the direction of travel was from local customs of inheritance, including gavelkind and ultimogeniture towards a more universal acceptance of primogeniture. However, the samples suggest that partibility was seen as desirable and its adoption increased between 1530 and 1540.

The sample shows that partitions of fee simple land of inheritance tend to be found in regions with traditions of gavelkind: Kent, Sussex, Surrey, East Anglia, Lincolnshire and the Welsh Marches.¹¹⁷

However, neither the sample nor the work of Howell, Spufford and Cooper note any life interests in favour of *brothers*. Cooper's work is of interest as he states that, in the context of offsetting the effects of *primogeniture* to provide for younger sons:

“[p]rovisions by grants of land may have been commoner in south-west Wales where there was a native tradition of partible inheritance. This had also been true of Kent.”¹¹⁸

¹¹⁴ C. Howell, 'Peasant inheritance customs in the Midlands 1280-1700, in *Family and Inheritance, Rural Society in Western Europe 1200-1800*, eds., J. Goody, J Thirsk and E.P.Thompson, (Cambridge University Press, 1976), pp112-155,

¹¹⁵ M. Spufford, 'Inheritance and land in Cambridgeshire', in *Family and Inheritance*, pp156-176

¹¹⁶ J.P.Cooper, 'Inheritance and settlement by great landowners', *Family and Inheritance*, pp 192-327.

¹¹⁷ An East Anglian example is the testament of Thomas Cater in Norfolk in 1541. His son, William Cater, was given 9 acres in Herdligfeld dying without issue it would pass to his brother, Thomas); the next son, Thomas Cater, was to have 7½ acres in West Feld (dying without issue it would pass to William, and if William died without issue it would go to a third son, Humfrey),, and Humfrey was to have 4½ acres in Seveley, and on his death without issue these passed to William. As if to reinforce the remainders, the testament states, 'every one of my sons to be the others heirs'.If all three brothers died without issue, all the land would be shared by two daughters.

¹¹⁸ *op cit*, 213-214.

This sits well with the notion of the *quasi-gwely* which is being contended in this article. Cooper then goes on to say:

“ Ferris considers that even the great gentry families of Dorset by 1640 generally granted only life estates to younger sons, though some got portions in cash...it is clear that in the fourteenth and fifteenth centuries grants of rent charges and lands for life to younger sons were made by greater and lesser landowners.”¹¹⁹

Cooper is saying that: (1) there appears to be a correlation in south-west Wales between partible inheritance and settlement patterns by the gentry; (2) in the context of his argument, the granting of life estates to younger sons in seventeenth century Dorset was a half-way house in the evolution from division of land among all sons to the later strict settlement, with younger sons bought off with portions or annuities.

Based on the evidence adduced in this article, the authors propose a possible alternative explanation in which life estates for brothers, cousins, uncles, as well as sons, echo the stable *gwely*. The authors argue that in the case of the Welsh settlement pattern under discussion it is all to do with expectations. It is not a case of Edward Griffith being inspired by Welsh custom but more to do with his brothers making demands *based upon tradition*. In sharing out land among children, parents might be inspired by love and affection, giving each child a good start in life, as much as by law and custom. However, the same is not true about sharing land out *between adult brothers and other kinsmen*, and this must have more to do with tribal structure and custom. That is the difference: it is not about need but about negotiation.

IV USES

¹¹⁹ *op cit*, p214.

Settlements other than by way of wills (*inter vivos* settlements by way of uses):¹²⁰

English law

An example of an *active use* can be seen in the way in which the original Penrhyn *entail* was formed in 1413, according to English law.¹²¹ The estate was transferred by way of grant by Gwilym ap Gruffudd ap Gwilym (Gwilym) (d. 1431) and his wife Joan Stanley to two *feoffees*. The 1413 grant has not survived but the re-grant has, and is dated 29 July 1413.¹²² After the grant, the two *feoffees* held the estate by way of an *active use* to transfer the estate back immediately to Gwilym and his wife. The purpose of this document was to change the basis upon which Gwilym and his wife held the land. This was a well-known practice as a landowner:

“could use a grant-regrant to change his fee simple into a fee tail. ...the practice of granting land to strawmen who would grant the land back. A grant-regrant was necessary to change the terms upon which one held land, because at common law one could not grant land to oneself...”¹²³

The re-grant confirmed unto Gwilym and his wife the Penrhyn estate in the following manner:

...to have and to hold unto the said William and Joan and the first male born or elder males lawfully begotten of their bodies...according to the law and custom of the Kingdom of England...And if it happen that the said William and Joan die without a male heir of their bodies lawfully begotten then all the said lands...*should remain unto the next male heirs of their blood* lawfully

¹²⁰ This section will concentrate on *inter vivos* settlements which created *entails*.

¹²¹ See Chandler, ‘The Will in Medieval Wales to 1540’, 88. Most people at this time would not have resorted to entail provision.

¹²² PFA/1/186.

¹²³ Biancalana, ‘Medieval Uses’, in *Itinera Fiducia. Trust and Treuhand in Historical Perspective (Comparative Studies in Continental and Anglo-American Legal History. Bd 19)*. Edited by Richard Helmholz and Reinhard Zimmerman [Berlin:Duckner and Humbolt 1998] 119

begotten...And if it happen that the said William and Joan die without heirs of their bodies lawfully begotten, then all the said lands...should remain wholly unto the right heirs *male of him* William...¹²⁴ [emphasis added]

The reason why this was done in this particular case was to avoid the possibility of the estate passing to Gwilym's son of a former marriage under the *common law canons of descent*. However, this *entail* did not entirely avoid the *common law canons of descent*.¹²⁵ The *heir in tail* or *in tail male* would be identified according to those rules. The exclusion of collateral heirs and the express choice of donees in remainder was what made the difference. Following the re-grant, a *legal fee tail* came into existence. The statute *De donis conditionalibus* 1285 had protected remainder interests under *legal fee tails* before the Statute of Uses 1536, but the common law had been seeking ways to break settlements.¹²⁶ *Passive uses* came to be employed to get the Chancellor to protect remainder interests under *entails* against the common law mechanisms for barring them, e.g. the *common recovery*, and this led to legal uncertainty.¹²⁷

An effect of *De donis* was that “[e]ach successive heir in tail, until the end of the line, could bring *formedon in the descender* to thwart any attempt to discontinue the tail.”¹²⁸ This raised the possibility of perpetual entails, and the *common recovery* was one way of barring *entails* in order to avoid the inalienability of land. This

¹²⁴ PFA/1/186. The wording which has been emphasised are erasures and alterations limiting descent to males of the blood. The handwriting by which these alterations were made could easily be of the reign of Henry VIII or just possibly even later. This is the *jointure* which marks the commencement of the Penrhyn *entail*. The influence of the earlier concept of *maritagium* on this *entail* can be seen in the wording ‘...unto the said William and Joan and the first male born or elder males lawfully begotten of their bodies...according to the law and custom of the Kingdom of England...’ In this respect, see the previous discussion in this article concerning the *maritagium*.

¹²⁵ See Watkin, ‘Quia Emptores and the Entail,’ 359-370 which traces the development of the *entail* from ‘the needs of thirteenth century fathers who wished to provide grants of their lands for their daughters and younger sons,’ 353. The purpose of the *entail* stemmed from their ‘unwillingness to allow such off-spring freedom to alienate to strangers as to destroy the chance of the land reverting to the main family line if the younger son or daughter died without issue,’ 353.

¹²⁶ *Ibid*, 370-373.

¹²⁷ There were earlier barring devices such as the *warranty* and the *fine*, so the position of remainder interests under entails had always been precarious.

¹²⁸ J.H.Baker, *An Introduction to English Legal History*, 281.

became common practice following *Taltarum's* case, and it left issue *in tail* under *legal fee tails* in a perilous position.¹²⁹ For this reason experimentation with *uses in tail* took place prior to the Statute of Uses 1536. As we shall see, the Penrhyn papers show that that this experimentation took place *in both England and Wales*. If the *entail* were in *use* (the modern equivalent of saying it was written in trust), the hope was that the courts of equity would protect the remainders. Professor Baker points to the fact that little discussion as to status of remainders in *use* has come to light.¹³⁰ The litigation in respect of the Penrhyn *entail* (discussed in the next section) supports Professor Baker's point that this was *not settled law* in 1506 which gave rise to legal uncertainty, and the evidence from these disputes shows that the transition from *active* to *passive uses* insofar as *entailed* land was concerned was not a smooth process.

Evidence of experimentation with uses prior to the Statute of Uses in England and Wales — what's the use?

The dispute in respect of the Penrhyn *entail* provides evidence of experimentation with a hybrid combination of *active* and *passive uses*. There is evidence that several documents executed during the time of Sir William Griffith III went missing,¹³¹ and this has a bearing on the disputes which took place within the family. On the death of Sir William Griffith III, his successor was his son Edward Griffith, but the difficulty lies in trying to identify the terms of the settlement by which Edward inherited his father's land. The problem was that without proof of the terms of the documents themselves there was (and still is) uncertainty concerning the nature of the remainders. Recent research by the authors at The National Archives, the National Library of Wales and The British Library has revealed information about these

¹²⁹ *Taltarum's Case* (1472) YB. 12 Edw. 4.

¹³⁰ J.H.Baker, *An Introduction to English Legal History*, 285.

¹³¹ Plaintiffs in Chancery frequently alleged a loss of documentary evidence to support their title to land. This may have been used as a device to obtain Chancery jurisdiction.

missing documents, and that it was these documents which formed the basis for the litigation which followed concerning the *entail*.

There is evidence that during 1505-6 Sir William Griffith III restructured his inheritance in radical and innovative ways. The starting point is a document dated 14 July 1505 and relates to the time of Sir William II, (c 1445-1505), the father of Sir William III.¹³² No signatures appear on the document and it is not a *recovery* but it recites certain *recoveries* which took place in 1484. It contains a clause appointing attorneys to deliver *seisin* to William Griffith Esquire.¹³³ In fact, this may have been the primary purpose of the document. There was no immediate re-settlement. It is not clear what William Griffith Esquire's intentions were. What is clear is that *seisin* followed, because on 9 January 1506, William Griffith Esquire (later to be called Sir William III of Penrhyn) and others entered into a recognisance for 1000 marks for the payment of £591 19s 5 ½d to the Crown for *seisin* of his lands, payable over five years.¹³⁴ This appears to have been the stimulus for the innovations which followed, and which are considered next.

Evidence for the existence of settlements made during the lifetime of Sir William III comes from various cases. *Recoveries* appear to have been 'suffered' in respect of his lands in Anglesey on 18 March 1504 (but more likely to have been sometime in 1506),¹³⁵ and Caernarfonshire on 19 October 1506.¹³⁶ In the petition of William Herbert in the case of *Herbert v Griffith*, William Herbert states "after which

¹³² PCP/44.

¹³³ Sir William III was referred to as William Griffith Esquire at this point.

¹³⁴ Calendar of Close Rolls, Hen VII (1550-1509) p 230 no. 603.

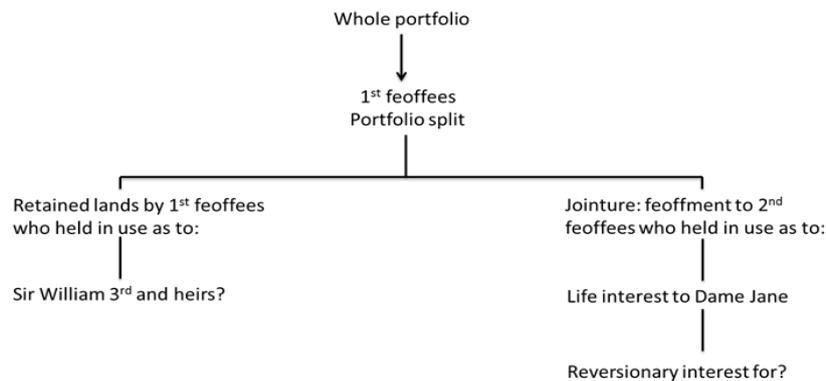
¹³⁵ TNA JUST 1/1154. There is a problem with the dating of this document.

There is also evidence of two further settlements by Sir William III. William Herbert produced a settlement by Sir William III made in 1523 [C 142/138/1] although no such document was produced in the Chancery proceedings in 1564. There was another settlement of all Sir William's lands in Dyndaethwy in 1526 which is described by two deponents in 1556 (William Woodd and Robert ap Griffith ap Res of Llanfairynghornwy), [NLW MS 11126 folios, 33-39, and 83-87].

¹³⁶ TNA C3/92/70, *Herbert v Griffith*. See also British Library MS Harley 696, folio, 2r, 16th century transcription of licence to alienate granted at Caernarvonshire Assizes, 19 October 1506.

recovery the said Sir William Griffith had estate but only for term of his life.”¹³⁷

What appears to have happened is that the whole portfolio was given to a first set of named *feoffees* (by way of *common recoveries*), and they were then instructed to create what appears to have been a *jointure* of only parcels of the whole,¹³⁸ and keeping certain lands free from the *jointure*.¹³⁹ In summary, the 1506 settlements appear to have created an *active use* in respect of the term of life of Jane, and a *passive use* in respect of the lands and reversion which were retained in *use*.¹⁴⁰ These transactions proceeded by way of common recovery. This may be set out conveniently by way of a diagram as follows:



¹³⁷ TNA C 3/92/70, *Herbert v Griffith*, petition of William Herbert.

¹³⁸ The intention was that this would protect certain retained lands in *use* not only against *feudal incidents* but also against any further claims to *dower* by Sir William III's wife, Dame Jane. The first set of *feoffees* then actively conveyed to a second set of *feoffees*, which second set of *feoffees* held *passively* by way of a second *use* to Sir William III's wife, Dame Jane, for her life. The first set of *feoffees* must have held *passively* to the *use* of William and heirs (however described or limited) in respect of the lands not conveyed to the second *feoffees*, and also in respect of the reversion of the second *use*.

¹³⁹ The licence for the Anglesey Jointure JUST 1/1154 uses the phrase 'inter alia' to indicate that the recoverors did indeed retain some lands, with the result that the *feoffees* retained lands which were not part of the *jointure*. They kept the legal title to those lands as well, so that all the lands which were retained would have had different *uses* affecting different parts of it. This was the first set of *uses*. The Courts of Chancery did not recognise *uses* in respect of *dower*. See, J. Baker, *An Introduction to English Legal History*, 270 and also, E. Spring, *Law, Land & Family, Aristocratic Inheritance in England, 1300-1800*, 42-43.

¹⁴⁰ It is not known what the *uses* and William's intentions were. The *recoveries* were 'suffered' in Anglesey and Caernarfon Assizes whose rolls are substantially lost. The licences to alienate to *feoffees* to the *use* of Jane for life do not indicate what was to happen after her death. Rhys later alleged that there was a separate document (not a limitation within his mother's settlement) from which he derived his *entail* in *tail male*. Edward's sons in law (i.e. the Herberts and the Bagnalls) on the other hand claimed that their respective wives, Jane, Elin and Katherine, had inherited the reversion of the *use* under Dame Jane's settlement.

These forms of settlement were not unique to the Penrhyn Estate. Research at Cheshire Archives by the authors has revealed that similar forms of settlements had been used by Sir William III's grandfather, Sir William Troutbeck in connection with his estate in Apethorpe (Northamptonshire), so the Penrhyn model was not unique. In respect of the *feoffees*, Sir William Troutbeck used the term 'feoffees to my use by recovery' to describe them. He also instructed these *feoffees* to make separate settlements for his widow and children, which may lend credibility to Rhys' claim that Sir William III's *feoffees* set up an *entail* that was independent of his mother's *jointure*. Troutbeck appreciated that some of this was innovative. He authorised his *feoffees* to get Counsel's opinion, and to have new deeds drawn up if the arrangements made before his death were insufficient in law.¹⁴¹ William had an *entailed* interest under the Troutbeck settlements, his English estate (Apethorpe in Northamptonshire), as well as an *entailed* interest under the terms of the Penrhyn estate. On 24 November 1506 William sold Apethorpe to the Chancellor of the Duchy of Lancaster.¹⁴² This was done possibly as part of the discharge of his debt to the Crown.

Welsh settlements

The *entails* created by the settlements of Sir William Troutbeck and Sir William III were motivated by desires of *power and control*. This is a prime example of what Davies describes as English law being "more convenient, adaptable and expeditious".¹⁴³ The use of the method of grant and re-grant changed the basis upon

¹⁴¹ Sir William Troutbeck died in 1510 and his will was proved in the Prerogative Court of Canterbury and is preserved in The National Archives [ref: PROB 11/16/316]. The will is dated 9 September 1510 and was proved on 3 December 1510, and cites 'divers dedes' dated 1 May 1507 containing his 'commaundment and request' to Thomas Hough and William Frodsham, whom he described as 'feoffez to myn vse by recouery'.

¹⁴² Northants RO, W(A) box 2/parcel X/no. 1/c7.

¹⁴³ R.R.Davies, 'The twilight of the Welsh Law', *History*, 51 (1996) 143-164 at 161.

which land was held (i.e. *in fee simple* or *in tir prid to fee tail*). The Welsh concept of *cyfran* on the other hand could lead to *fragmentation of land*. The question which now arises is: did the norms of *cyfran* influence the way in which settlements were made in any way in Wales? In this respect it is instructive to consider the neighbouring Clennau Estate which is important to this discussion, as there is far more evidence of survival of the Welsh native laws in the Clennau Estate than in the Penrhyn Estate. There was also a connection through marriage between the two estates as Rhys Griffith's first wife, Margaret, was the daughter of Morris ap John ap Meredydd of Clennau.¹⁴⁴

Did the norms of cyfran influence the way in which inter vivos settlements were made in Wales?

Clennau and Gresham's hypothesis

In 1485 John ap Meredudd entailed certain lands comprised within the Clennau Estate in favour of his second son 'Owen and heirs of this union.'¹⁴⁵ This appears to conform to the English concept of the *entail* as a means of avoiding the Welsh practice of *cyfran* but the position may have been otherwise.¹⁴⁶ John ap Meredudd's other living sons were Morris Gruffydd and Evan. Gresham has hypothesised that there would have been individual marriage settlements on each of his surviving sons, and not just Owen which would have followed the norms of *cyfran*.¹⁴⁷ The difficulty is that if there were other settlements, only Owen's settlement survives, so the assertion cannot be proved. However, a similar pattern can be seen in the will of Sir

¹⁴⁴ See T Jones Pierce, 'The Clennau Estate', *Medieval Welsh Society*, 229-249. See also, L.B. Smith, 'Family, Land and Inheritance in Late Medieval Wales: A case study of Llannerch in the Lordship of Dyffryn Clwyd', *The Welsh History Review*, vol 27 June 2015 no.3, 417-458, which contains an interesting discussion concerning the Lordship of Dyffryn Clwyd.

¹⁴⁵ C.A. Gresham, 'The origin of the Clennau Estate', *National Library of Wales Journal*, Vol. 15 no. 3 (Summer 1968) 335-343 at 336.

¹⁴⁶ *op cit*, 337. For a history of the Clennau Estate, see Gresham, *Eifionydd A Study in Landownership from the Medieval Period to the Present Day*, (Cardiff, 1973), 102-124.

¹⁴⁷ Presumably because not all of the Clennau Estate was included in the settlement in favour of Owen.

John Puleston,¹⁴⁸ father-in-law of Edward Griffith of Penrhyn. Puleston had already settled property in Wrexham on his son, Nicholas, and by his will he settled the residue of his lands in Denbighshire on his son and heir, Robert, and all of his lands in Caernarfonshire and Anglesey on his son, Rowland. We have already noted such permanent partition of estates having been made by English landowners. Spring refers to the ‘harsh rule of primogeniture’ and makes the contrast with continental laws ‘which mandated some form of partition’.¹⁴⁹ As a way of circumventing the rigours of *primogeniture* and *entail* provision, landowners had to ‘juggle land’.¹⁵⁰ However, in Wales needs of younger sons might have been inspired by memories of *cyfran*, and we have already noted Cooper’s comments that settlements in south-west Wales might have been inspired by Welsh customary law.

There is evidence in the Griffith family to show land being let within the wider male kin outside of the main *entail* provision by way of 101 year leases.¹⁵¹ There is a possible parallel here with the norms of *cyfran*. The effluxion of the leases by time might be compared to the re-sharing provisions of the native laws. These are issues which, to the best of the authors’ knowledge information and belief, have not been addressed previously, and it is suggested that more comparative research could be undertaken between English and Welsh estates in this respect in order to add to the evidence which has been discussed in this article. The evidence from the Penrhyn Estate suggests that Gresham’s view cannot be ruled out.

V TIMING OF ENGLISH LAW

¹⁴⁸ 1551, PROB 11/34/85.

¹⁴⁹ Spring, *Law, Land & Family*, 67.

¹⁵⁰ *Ibid*, 71.

¹⁵¹ For an example, see *Herbert v Gryffyth* C3/92/70, 101 year lease by Sir William Griffith III to an illegitimate son, Thomas Gryffyth.

The Conquest 1282 and the Statute of Rhuddlan 1284

Cyfran carried on until the Union. As already noted above, the reason why *cyfran* was not ousted by the Statute of Rhuddlan of 1284 was probably due to self-serving reasons of the Crown, and not out of any respect for the native Welsh laws.¹⁵² Even after the Union between England and Wales in 1536 there is evidence that *cyfran* was practised in parts of Wales on into the seventeenth century.¹⁵³

The Acts of Union 1536-43

An interesting question which arises in the context of the Penrhyn Estate is whether the abolition of the Welsh laws by the Acts of Union would have mattered. It might be said that for the Griffith family by 1536, “the clause in the Act of 1536 formally introducing the use of English law and thereby abolishing Welsh law can have called forth little more than a yawn.”¹⁵⁴ After all, as we have seen, principles of English land law had been at work in Wales well before the Acts of Union 1536-43. By way of example, and as evidenced by the documents from Penrhyn Estate, the concept of the *entail* was so firmly rooted in Wales by 1536, that the legislation made no

¹⁵² R.R.Davies, *The Age of Conquest* (Oxford University Press, 2000), 368:

“Welsh law was by no means totally ousted by the Statute [i.e. the Statute of Rhuddlan of 1284]. It specifically conceded-in response to popular request, so it was claimed-that existing native procedures should still prevail in disputes concerning lands and pleas about movables: specifically, the appointment of mutually agreed arbitrators for the former and reliance on proof of witnesses or wager of law for the latter. These were wise concessions to the needs and practices of a largely pre-documentary society...But it was with respect to the descent of land that Edward made his most momentous concession, when he confirmed the Welsh custom of dividing inheritances between male heirs.”

¹⁵³ See T.Jones Pierce, ‘The Laws of Wales—the Last Phase’, [1963] *Transactions of the Honourable Society of Cymmrodorion*, 7-32. However, it was Glanmor Williams who demonstrated that *cyfran* survived in Wales following the Acts of Union 1536-43: see his *Recovery, Re-orientation and Reformation-Wales c. 1415-1642, History of Wales*, Oxford & UWPress 1987, 274. There was recognition of this custom by the most famous renaissance English legal text writer: Littleton’s *Tenures*, writing of parceners and Kentish gavelkind, says that the custom of partible inheritance extends to north Wales, ed. T.E.Tomlins, London 1841, reprinted Law Book Exchange, New Jersey, USA 2006, 314-315. There is evidence that the laws of Hywel Dda were used in arbitrations in Wales after 1536: see Llinos Beverley Smith, ‘Disputes and Settlements in Medieval Wales: The Role of Arbitration,’ *The English Historical Review*, No. CCCCXXI-October 1991, 852. Further, the operation of *cyfran* is referred to in modern literature: see T G Watkin, *The Legal History of Wales*, 2nd edn. (University of Wales Press, 2012) 59 n92 and the reference to the novel by Bruce Chatwin, *On the Black Hill* (Jonathan Cape, London, 1982).

¹⁵⁴ R.R.Davies, ‘The Twilight of the Welsh Law’, 164.

difference in this respect. Further, even had the revolt of Owain Glyndŵr been successful it is questionable whether the Welsh system of law could have carried on independently of the English system. “The revival of Welsh law is not known to have been one of the points on his [Owain Glyndŵr] programme for a united and independent Wales.”¹⁵⁵

However, the Acts of Union had specifically saved Welsh tenures in this part of Wales, which suggests something other than enthusiasm for their abolition.¹⁵⁶ Therefore, is it correct to conclude that the abolition of the Welsh customs would not have mattered? In c 1536, Rhys Griffith and others had petitioned the King to stay a petition made by John Puleston to have the English common law applied to the three shires of Caernarfon, Meirionnydd and Anglesey. The reasons for the application for the stay were premised on the basis that the wholesale embrace of the English common law would have led to the imposition of taxes on the local community to pay for sea defences, which they would not have been able to afford.¹⁵⁷

Following the Statute of Rhuddlan 1284 and the Acts of Union 1536-43, the distinction between the native Welsh laws and their assimilation within the English common law becomes very blurred. For this reason, perhaps, it can be difficult at times to see when principles of native Welsh land law are at play within the framework of the English common law. The reason for this is probably due to the fact that parties would make reference to them as and when it suited their own particular

¹⁵⁵ Ibid, 162.

¹⁵⁶ See, H. Pryce and G. Owen, ‘Medieval Welsh Law and the Mid-Victorian Foreshore’, *The Journal of Legal History*, 2014 Vol.35, No. 2, 172-199.

¹⁵⁷[115] No.5707 c.1536, W.Rees, *Calendar of Ancient Petitions Relating to Wales*, (Cardiff, 1975), 186-187. There is evidence that there was a shortage of ammunition and that Conway, Caernarfon and Harlech castles were ill-equipped to repel any invasion: see letter dated 9 April 1539 from Sir Richard Bulkeley to Thomas Cromwell, *A Calendar of Letters Relating to North Wales 1533—circa 1700* ed., B.E.Howells, Board of Celtic Studies, University of Wales History and Law Series No. xxiii, (Cardiff, 1967), 37-38. See also, Watkin, *The Legal History of Wales*, 141.

needs and priorities. It has been suggested in this article that such motives lay behind the drafting of Edward Griffith's 'will'.

Although not concerning *cyfran*, in Victorian times there had been a readiness by the English common law to accommodate certain native Welsh laws.¹⁵⁸ On two occasions, the Crown itself made use of the native Welsh laws when it suited the Crown's purpose.¹⁵⁹

Although the Griffith family embraced the English concept of the *entail*, it is by no means certain that they would have embraced the wholesale abolition of the native Welsh laws. Spring makes the point that:

“[w]hat landowners wanted was a workable system of primogeniture—one that would make some compromise with family feeling but would at the same time actively limit family charges in the interests of the male head of the family.”¹⁶⁰

It is arguable that the Griffith family still embraced some form of partition to offset the rigours of primogeniture as evidenced by the fact that some of their settlement patterns display a tendency to mimic the norms of *cyfran* after the Acts of Union, but which are difficult to see within the wider framework of the English common law.

CONCLUSION

¹⁵⁸ See H Pryce and G. Owen, 'Medieval Welsh Law and the Mid-Victorian Foreshore', *The Journal of Legal History*, 2014, Vol 35, No 2, 172-199.

¹⁵⁹ See the article in Potter's Electric News dated 21 May 1862 which may be accessed via the following link: <http://newspapers.library.wales/view/3100546/3100548/10/>. Accessed 6 December 2016. See also the article in the Cardiff Times dated 16 November 1907 which may be accessed via the following link: <http://newspapers.library.wales/view/3433764/3433767/47/gwestfa>. Accessed 6 December 2016.

¹⁶⁰ Spring, *Law, Land & Family*, 72.

One can point to the fact that “native Welsh law and English custom stood poles apart on the vital issues of the tenure and transmission of land.”¹⁶¹ From this it might be said that it is difficult to point to any specific instances of the influence of English law on concepts of the native Welsh laws or vice versa insofar as land and inheritance are concerned.¹⁶² There appears to have been more of an affinity between Welsh and Irish law by reference to the similarities between the Welsh concept of *tir prid* and the Irish *geall*.¹⁶³ However, the task is not hopeless. We have seen from wills considered in this article how testators mimicked the norms of *cyfran* by applying principles of native Welsh land law in the wider context of English land law principles to offset the English practice of *primogeniture*. This can be cited as an example of borrowed practice, i.e. ‘English law and Welsh division.’¹⁶⁴ However, there is a paradox. This article has shown that the Griffith family entail was originally formed not in order to avoid the Welsh custom of partibility,¹⁶⁵ but *to avoid the effects* of the English *canons of descent*. However, once that entail was in being, the family then displayed a tendency to mimic the norms of *cyfran* in order to offset the harshness in the English practice of *primogeniture*. A large measure of expediency can be seen at play here.

Another example is to be found in the Welsh concept of *tir prid*. As we have seen, the members of a *gwely* could overcome the difficulties inherent in alienating such land in north Wales by ‘selling’ the land. Although, to all intents and purposes in many cases it had all the practical effects of a sale, it was technically not a sale but a loan by the purchaser to the ‘vendors’. The purchaser had possession of the land by

¹⁶¹ R.R.Davies, *The Age of Conquest*, 423.

¹⁶² See S Roberts, ‘Welsh and English Law in Medieval Wales’, in *Authority and Subjugation in Writing of Medieval Wales*, in Ruth Kennedy and Simon Meecham-Jones eds, (Palgrave Macmillan, 2008), 85-97.

¹⁶³ See also the discussion by T.M.Charles-Edwards about the ‘Common Celtic’ unity in *Early Irish and Welsh Kinship* (Clarendon Press, Oxford 1993), 213.

¹⁶⁴ R.R. Davies, *The Age of Conquest*, 423.

¹⁶⁵ Cf, *Ibid.*, 423.

way of security for the loan which he could call in, normally after a period of four years. However, the reality was that it was usually a perpetual loan. In effect, what had happened was that the rights of the ‘vendors’ had been converted into the cash. This is similar to the English concept of *overreaching* in the narrow sense of that term, i.e. whereby a person’s interest in property is transferred into the proceeds of sale. It is likely that the English concept of *overreaching*, which was developing during the period covered by this article, influenced the concept of *tir prid*. As with the previous example, a large measure of expediency can again be seen here: the *tir prid* brought practical benefits to the Welsh by providing a mechanism whereby land could be alienated, and also financial benefits to the Crown which could impose fees for providing licences to alienate and to convert an estate in *prid* into a fee simple estate in the Crown lands of north- west Wales.

The period under discussion is bisected by some of the most important Acts in the legal history of England and Wales, namely the Acts of Union 1536-43, the Statute of Uses 1536 and the Statute of Wills 1540. In the context of that legislation, the aspects of the legal history of the Griffith family of Penrhyn considered in this article have shown that innovative things were being done in *both England and Wales* with *active* and *passive uses* in the years leading up to the Statute of Uses 1536, which innovations cast further light on our knowledge of the development of *uses*.¹⁶⁶ Although this article has not considered in any great detail the lengthy litigation in respect of the Penrhyn entail, it has shown that at the heart of that litigation was a dispute about *uses*, i.e., trying to ascertain the precise terms of the *uses* declared in the settlements of Sir William Griffith III, which were employed against a backdrop of experimentation with *uses* prior to the Statute of Uses 1536. New research by the

authors at The National Archives and The British Library has revealed new evidence about these ‘missing’ *uses*. As we have seen, there is a dearth of evidence available concerning experimentation with *uses* before 1536, and this article has added to our understanding of the development of *uses* in that respect, and also by demonstrating that this experimentation was going on in both *England and Wales* by reference to the examples detailed in the article concerning the Griffith’s family’s estates in Penrhyn (north Wales) and Apethorpe (Northamptonshire) It has shown further how sophisticated this experimentation was, which is a testament to the skill and innovation of the lawyers of the period.

Whereas there is clear evidence that the Griffith family embraced English concepts of land law, it is by no means a foregone conclusion that they would have greeted the assimilation of English law into Wales with wholehearted enthusiasm. It would be incorrect to think that *all* traces of Welsh law disappeared with the Acts of Union 1536-43, as this article has endeavoured to show by reference to the willingness by certain members of the Welsh gentry to innovate by trying to adapt principles of native Welsh law within the broader structure of the English common law. Feelings must have been running high in 1536-43 because the Acts of Union¹⁶⁷ saved Welsh customs in the counties of Anglesey, Merionnydd and Caernarfon.¹⁶⁸ We have seen how Rhys Griffith and others petitioned the King to stay a petition by Sir John Puleston to have the common law applied to those three counties, which would have led to the imposition of taxes on the local community to pay for sea defences. It was therefore expedient to keep the native customs. It may well be that it was

¹⁶⁷ 1536, 27 Henry 8, c.26, and 1543, 34 and 35 Henry 8, c.26.

¹⁶⁸ The 1536 Act of Union abolished the native Welsh laws relating to the inheritance of land but contained a proviso in the following terms:

“Provided alway, That this present Act, nor any Thing therein contained, shall take away or derogate any Laws, Usages or laudable Customs now used within the three Shires of North WALES.” 27 Hen. VIII, c26, s31: Bowen, ed., *Statutes of Wales*, 91.

expedient to keep them in order to enable them to retain their place in the wider context of the English common law, and that resort could be made to them, when required, to offset the harshness of the common law as exemplified by the cases of taxes for sea defences, and with *primogeniture*.

Following the Acts of Union 1536-43, the influence of the native Welsh laws declined. This caused the late Professor Dafydd Jenkins to comment, “there is irony in the fact that so many good principles of Welsh law were lost when English law replaced it...”.¹⁶⁹ Wales’ native laws have also provided the Welsh nation with a sense of identity. Professor Dafydd Jenkins makes the point most powerfully in the following way:

“ So we Welsh can show good reason for our pride in the native law of our country; and for us (and through us, for other small nations) our old law is of special significance as one of the elements which made it possible for a politically fragmented people to attain consciousness and nationhood.”¹⁷⁰

Notwithstanding the fact that the native Welsh laws were put into the shade following the Conquest and the Acts of Union; even in areas which came under English domination far earlier than other areas in Wales, the native Welsh laws have been like a flickering light down the ages, which has never been entirely extinguished.¹⁷¹

¹⁶⁹ D. Jenkins, *Hywel Dda, The Law*, (Gomer Press, 1986), xxxvii.

¹⁷⁰ *Ibid.*, xxxvi.

¹⁷¹ See, *Sir Richard Buckley, Knight v Rice Thomas*, (1554) 1 Plowden 118; 75 E.R. 182, *Attorney General v Jones*, (1863) 2 Hurlstone and Coltman 347; 159 E.R. 144, *Attorney General v Reveley* (1864), report by William Wollaston Karlake, 1870, printed by G.E. Eyre and W. Spottiswoode, 1-138, and *Crown Estate Commissioners v Mark Andrew Tudor Roberts, Trelleck Estate Limited* [2008] EWHC 1302 (Ch). For a discussion of these cases, see C Davies and G.Owen, ‘Customary Land Title in Australia and Wales’, in *Canmlwyddiant, Cyfraith a Chymreictod, A celebration of the life and work of Dafydd Jenkins 1911-2012*, N. Cox and T. G. Watkin eds., The Welsh Legal History Society, Vol 11, 93-103.

