

The Act of Union 1536-43

Owen, Gwilym; Cahill, Dermot

Proceedings of the Harvard Celtic Colloquium

Published: 01/05/2019

Peer reviewed version

[Cyswllt i'r cyhoeddiad / Link to publication](#)

Dyfyniad o'r fersiwn a gyhoeddwyd / Citation for published version (APA):

Owen, G., & Cahill, D. (2019). The Act of Union 1536-43: Not quite the end of the road for Welsh Law. In *Proceedings of the Harvard Celtic Colloquium* (Proceedings of the Harvard Celtic Colloquium). Harvard University Press.

Hawliau Cyffredinol / General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

The Acts of Union 1536-43—Not quite the end of the road for Welsh Law?

* Gwilym Owen

** Dermot Cahill

I. INTRODUCTION

The sixteenth-century union of England and Wales has often been presented as an imposition of English law upon the Welsh by the Tudor government, with little sensitivity¹ or regard for Wales' separate identity.

This might be termed the orthodox view, accepted by scholars², namely that the common law obliterated the native legal system and its laws and customs. It emphasises the imposition of English models of government, an insistence upon the use of English in the administration of justice and the outright abolition of the centuries-old Welsh system of partible inheritance of land.

* Dr. Gwilym Owen, Lecturer in Law Bangor Law School

** Professor Dermot Cahill, Head of Bangor Law School

The authors are grateful to Melinda Kent, Manager, Research Services, Harvard Law School Library and to the following members of staff at the Law Society library, Dublin, for assisting in accessing certain references in respect of the Welsh mortgage, namely: Mary Gaynor, Mairead O'Sullivan, Eddie Mackey, Clare Tarpey, Anthony Lambe and Elizabeth Dowling. Also, our thanks to Peter Foden for translating the *tir prid* document set out in the appendix, and to Bangor University Archives department for permission to reproduce the Latin version of this document in the Appendix. The authors are also grateful to Professor Gwen Seabourne of Bristol University who helped with her comments at the Society of Legal Scholars Conference at University College Dublin in September 2017.

¹Parry makes the point most powerfully by reference to the following citation:

“ The distress of the people is incredible, especially the Welsh, from whom by act of parliament the king has just taken away their native laws, customs and privileges, which is the very thing they can endure least patiently.” Eustace Chapuys to Emperor Charles V, 1534, in Meic Stephens (ed.), *A Most Peculiar People*, and cited by G.Parry, ‘Is breaking up hard to do? The case for a separate Welsh jurisdiction’, *The Irish Jurist* 2017, 57, 61-93 at p. 61.

² See also, G.Williams, *The Welsh in their History* (London, 1982), p. 26; Durkacz, *The Decline of the Celtic Languages*, (Edinburgh, 1983), p.1; Saunders Lewis, *Braslun o Hanes Llenyddiaeth Gymraeg* (Cardiff, 1932), ch.7; Saunders Lewis, *Meistri'r Canrifoedd*, (Cardiff, 1973), p. 400; D.G.Jones in *Presenting Saunders Lewis* A.R.Jones and G.Thomas eds, (University of Wales Press, 1973), p.27. See also, K. Olson, “ ‘Y Ganrif Fawr’ ? Piety, Literature and Patronage in Fifteenth – and Sixteenth-Century Wales”, *Studies in Church History*, vol. 48, p.108.

This article challenges the orthodox view, by adducing *new evidence*³ from across a range of different fields, ranging from maritime inquiries to novel devices for financing the acquisition of land, to strengthen the challenge to the orthodox view. Indeed, some of the evidence will demonstrate examples of how both principles-and devices- based on Welsh law continued to be used in the common law system as recently as the 19th, 20th and 21st centuries, and were accepted by the courts. In other words, our most recent research, the subject of this article, provides mounting evidence that there was indeed ongoing frequent recourse to principles of Welsh *customary law post Union in the courts and other forums of legal inquiry*.

Paradoxically, the *new evidence* now presented in this article concerns the *English Crown*, and *Englishmen and Irishmen*, turning to the native Welsh laws *post Union* -in new fields of Mortgages, and Maritime Law - to further challenge the orthodox view and demonstrate that this legal pluralism also prevails in these other fields, right up to modern times.⁴

³ In our previous work (1) the authors have unearthed new evidence concerning settlement patterns in Tudor Wales, which demonstrates how testators mimicked some of the native Welsh laws in their attempts to lessen the rigours of the English common law concept of primogeniture; (2) how at the time of the first of the Acts of Union (1536) Welsh customs were expressly saved in the three counties of Anglesey, Caernarfonshire and Meirionnydd; (3) and how at the time of the second of the Acts of Union (1543) the authors have argued by reference to new empirical evidence that no such saving provisions were required; by then the Statute of Wills had been enacted which allowed Welsh stratagems to continue to be deployed in respect of land inheritance: See, G. Owen and D.Cahill, "A Blend of English and Welsh Law in Late Medieval and Tudor Wales: Innovation and Mimicry of Native Settlement Patterns in Wales", *Irish Jurist* 2017, 58, pp.153-183.

⁴ The earlier existing research (fn 3) conducted by the authors in the Penrhyn Estate archives in north Wales provided evidence of the way in which land was owned and inherited, revealing support for a contrary view, namely that *legal pluralism, rather than replacement of legal norms and devices*, was the reality in many areas. In other words, changes to the law of land ownership arising from the Union of England and Wales were not viewed by contemporaries in the period (or centuries following) as being *obliterative* of Welsh principles of property law, but rather they coexisted alongside each other, and indeed were resorted to, when required, by testators, landowners and their lawyers.

This can be explained by the first of the two 'Acts of Union', the 1535/6 statute, making allowance for the Welsh customs of landholdings to be retained, at the very least in north or north-west Wales. The second Act, in 1542/3 made no such allowance. The English system of primogeniture was imposed. However, as Watkin has argued, (T.G. Watkin, *The Legal History of Wales*, 2nd ed, Cardiff, 2012, p 168) between these two statutes, an important change was made in the English laws themselves. This was the introduction of the Statute of Wills in 1540 of the right to make a will of land, i.e. to choose how one's land should descend. This meant that by 1542/3, it was not necessary to make any saving with regard to the Welsh customs in respect of the inheritance of land. Anyone who wanted the Welsh or any other custom to apply could simply create a testamentary settlement to achieve that end. Statutory protection was not needed.

In previous work the authors provide concrete evidence in support of this view (fn 3). It clothes the bones of Watkin's argument with the flesh of firm evidence, drawn from the very area where the saving in the first Act was of most relevance, north-west Wales. The evidence from the papers of the Penrhyn estate in north-west

First, we examine *a series of judgments from Ireland*, which demonstrate that *mortgages to finance land acquisition, (of Welsh origin)*, were actively making use of a device known as “the Welsh mortgage” which has its roots in the Welsh native concept of *tir prid*,⁵: it will be seen that the *Irish courts* were actively enforcing and discussing the Welsh mortgage in the 19th and 20th centuries. The significance of this development cannot be overstated: these Irish judgments confirm that courts, inside the Union of Great Britain & Ireland (Act of Union, 1800) accepted, deployed, and enforced a key Welsh legal device within the unified legal system of Great Britain and Ireland (as it then was, the Union became the Union of Great Britain and Northern Ireland from 1922 when most of the island of Ireland departed from the Union to form the Irish Free State). This provides additional support for the view that not only did Tudor union with Wales not eliminate recourse to Welsh legal devices in areas as diverse as land inheritance,⁶ but now we see a similar phenomenon, namely the use of the Welsh mortgage in the 19th and 20th centuries to *finance the acquisition of land* by means of a highly innovative form of “unconventional” mortgage security.⁷ Further, the existing literature does not deal with the issues of: (1) why parties would enter into a Welsh

Wales makes it clear that *both before and after* the union, landowners in north-west Wales were fully aware of the opportunity that employing the English *use* (the precursor of the modern trust) and other techniques of landed settlement afforded them the means to achieve their wishes regarding descent of their lands. The evidence provided by the authors in that previous work establishes that landowners in north-west Wales were aware of how they could construct settlements to achieve their ends, and therefore – following the introduction of wills of land in 1540 – would have been able to achieve this by testamentary disposition. Both before and after the 1540 Act, Welsh landowners were able to create bespoke settlements combining elements of English law and Welsh legal devices to pursue and achieve their wishes. It may even have been the case that the Tudor government consciously dropped the saving provision in full knowledge of this fact.

⁵ This term will be explained in the text when analysing the new evidence concerning the Welsh mortgage. Thereafter, the authors have unearthed more evidence concerning the use of the Welsh concept of *tir prid*. The existing literature does not deal with the fact that principles of *tir prid* continued in modified form as the Welsh mortgage as part of the English common law *after* the Acts of Union until it was apparently abolished in 1925, although as we shall see later in Part IV of this article it may still be possible to create a Welsh mortgage.

⁶ fn 3.

⁷ So innovative in fact that it defied (1) the application of the rule against perpetuities (*Shields v. Shields* (1904) 38 ILTR 188); (2) the application of the statute of limitations, and (3) defied those who sought its enforcement by way of sale or forfeiture (*Fenton v. Walsh* (1909) 43 ILTR 54), the classic mortgage enforcement mechanism with which we are familiar in modern times; and (4) it was not repayable within the life term of the mortgagor *and* to top it all (5) the mortgagor went into possession of the asset (*Shields v Shields*)!

mortgage, and (2) trying to assess whether they were in fact more widely used than is commonly reported. This article also seeks to address those issues.

Secondly, we will examine *the maritime field*, where both an *English* Board of Inquiry (the St. David's Wreck Inquiry conducted in the nineteenth century), and subsequently an *English* court of law (*Crown Estate Commissioners v. Mark Andrew Tudor Roberts, Trelleck Estate Ltd* (2008) made key findings *based on Welsh* legal principles.⁸

In all of the foregoing instances outlined above, namely financing of acquisition of land, and in maritime matters, the legal system of Great Britain and Ireland - and those utilising it - were more than accommodative of these Welsh devices for centuries after the Union, thus the case for a reappraisal of the politico/historical "orthodox" view of Tudor Union obliterating Welsh legal devices requires serious review: certainly the present research by the authors among the law reports in both Ireland and the UK are testament to this contrary view.

Before proceeding further, it may assist the reader to be provided with some brief detail first of all concerning the Acts of Union 1536-43 themselves insofar as they are relevant to the themes being pursued in this article.

II. THE ACTS OF UNION 1536-43

⁸ In "Medieval Welsh Law and the Mid-Victorian Foreshore", (Pryce and Owen, "Medieval Welsh Law and the Mid-Victorian Foreshore", *The Journal of Legal History* vol. 35, no 2 at p.196), Professor Huw Pryce and the first named author analysed the case which commenced in 1862 of *The Attorney General v Jones* [(1863) 2 Hurlstone and Coltman 347, 159 E.R. 144. In that article reference was made to another case (the details of which were not known to those authors of that paper at the date of publication) in which it was alleged that the English Crown had used the native Welsh land laws for its own purpose in the *mid nineteenth century*. This was the "St. David's Wreck Inquiry" which will be considered in this paper. This paper will argue that notwithstanding the Tudor Acts of Union we see legal pluralism at work by reference to the way an English Board of Inquiry ("St. David's Wreck Inquiry"), and subsequently an English court [*Crown Estate Commissioners v. Mark Andrew Tudor Roberts, Trelleck Estate Ltd*, (2008) EWHC 1302 (Ch)], demonstrated a willingness to accommodate principles of Welsh native law within the construct of the English common law.

The native Welsh laws were allowed to continue following the conquest of Wales in 1282 until the Acts of Union 1536-43.⁹ The second of the Acts of Union (1543) repealed Welsh law in respect of real property.¹⁰ However, it is not generally well known¹¹ that there were saving provisions in *the first* of the Acts of Union (1536),¹² which allowed for native Welsh customary law to continue in the counties of Anglesey, Caernarfonshire and Meirionnydd.¹³ As recently as the nineteenth century it was argued that these earlier saving provisions had survived the second of the Acts of Union: the Court of Exchequer, when dealing with a case concerning rights to the foreshore in Anglesey,¹⁴ was prepared to consider whether principles from the laws of Hywel Dda (*cyfraith Hywel*) still formed part of the English common law. Further, the first of the Acts of Union 1535/36 contained specific provisions in respect of the Welsh Marcher Lordships and these will be commented upon below in Part IV of the article which deals, *inter alia*, with the St. David's Wreck Inquiry.

With regards to mortgages the second of the Acts of Union provided that:¹⁵

“...no Mortgages of Lands, Tenements, or Hereditaments...shall be hereafter allowed or admitted, otherwise than after the Course of the Common Laws or Statutes of the Realm of England; any Usage or Custom heretofore had to the contrary thereof notwithstanding.”

Thus, while from the above, it would appear that concepts such as the Welsh mortgage and *tir prid*¹⁶ were extinguished by such a provision, the position concerning the survival of

⁹ R.R.Davies, *The Age of Conquest* (Oxford University Press, 2000), p.368.

¹⁰ 34 & 35 Henry 8, c. 26, item 91. See I. Bowen, *The Statutes of Wales*, (2014, published by Gwasg y Gors on behalf of the Centre for Welsh Legal Affairs), p.122.

¹¹ For example, see J.Davies, *A History of Wales*, (Penguin, 2007), pp. 225-232, where the point is not mentioned by Davies.

¹² fn.11 pp.194-195.

¹³ The saving provisions reflect the long period during which this part of Wales had asserted its independence from the English Crown. From the time of the Plantagenets, the English Crown had had difficulty in imposing its authority in north West Wales-see W.L. Warren, *Henry II*, (Yale University Press, 2000), pp. 143; 158-159; 162; 165 and 169.

¹⁴ fn 8.

¹⁵ fn.10, 34 & 35 Henry 8, c. 26, item 92, p. 122.

¹⁶ See Part III below.

principles of Welsh law in respect of mortgages will demonstrate otherwise, and is considered in Part III below.

III. THE WELSH MORTGAGE

We now consider this new example of the survival of Welsh property law beyond the Acts of Union: the development of the Welsh mortgage from its early roots in the native Welsh concept of *tir prid* and its subsequent usage in more modern times. In order to understand the concept of the Welsh mortgage it is necessary to inform the reader of two concepts of native Welsh law, namely *cyfran* and *tir prid*, both of which played a key role in what later became known as the Welsh mortgage.

Cyfran

This was the Welsh system of partible inheritance whereby land was shared between a deceased's male heirs. A similar system, *gavelkind*, had existed in England. It is by no means clear as to how *cyfran*¹⁷ might have worked in pre-medieval times¹⁸ (one of the problems with *cyfran* being that it made the alienation of land difficult), and so the concept of *tir prid* developed in medieval times, as a means of overcoming the rigours of *cyfran* in order to facilitate the alienability of land.

In previous work, the authors considered how *cyfran might have operated according to the Welsh laws*, and then proceeded to analyse how *cyfran* worked *in practice* in the medieval period by reference to evidence from the available medieval extents.¹⁹ A possible explanation for the *difference in approach* probably lies in the fact that the Welsh laws were not written down until the high to late middle ages as “there are no manuscripts pre-dating the middle of

¹⁷ The holding in which the concept of *cyfran* operated was known as a *gwely* (plural *gwelyau*), and land holdings in a *gwely* were known as *tir gwelyog*.

¹⁸ c476-1,000 (early middle ages), c1,000-1,300 (high middle ages) and c1,300- 1453 (late middle ages).

¹⁹ fn 3 pp. 158-160.

the thirteenth century (though it is likely that the Book of Cyfnerth goes back to the end of the twelfth century)”.²⁰

Over time, one of the objectives of the Welsh system of land law was to try and make land a dynamic security (i.e. to facilitate the transfer of land in a way which would enable a purchaser to hold land free from hidden encumbrances). Under the English common law, this was achieved by means of various devices,²¹ whereas under the native Welsh land laws, this was achieved by means of the mechanism of *tir prid* which concept is examined next.

Tir Prid, leading to later known Welsh Mortgage

The device of the *tir prid*²² developed in medieval times as a means of overcoming the rigours of *cyfran* in order to facilitate the alienability of land.²³ The transaction was in effect a mortgage, and by this method the purchaser would pay the previous owner money for the land in the form of a loan. He was given possession of the land by way of security for the monies loaned, and usually for a period of four years.²⁴ At the end of that period the purchaser was entitled to repayment of the loan, but in practice the arrangement rolled over.²⁵

The truth of the matter was that the land was security for a loan which was never likely going to be repaid. Watkin summarises the position as follows:²⁶

²⁰ Gwilym Owen, ‘Another Lawyer Looks at Welsh Land Law’, in *Canmlwyddiant, Cyfraith a Chymreictod* in Noel Cox and Thomas Glyn Watkin, eds, Welsh Legal History Society, 11, Cardiff, 2013, pp.184-185. By way of comparison, In Ireland for example, customary sources were written down from perhaps as early as the fifth century: see T.G.Watkin, *The Legal History of Wales*, (Cardiff, 2012), p.40.

²¹ For example, see the conveyancing practice of *suppressio veri* discussed in G Owen and D Cahill, ‘Overreaching—Getting the Right Balance, (2017) 81 Conv. pp. 28-30.

²² See A.D.Carr, ‘This is my act and deed’: the writing of private deeds in late medieval north Wales in *Literacy in Medieval Celtic Societies*, in H Pryce ed., (Cambridge University Press, 1998) pp. 223-237: “The late medieval private deed in Wales followed the pattern of its English counterpart, and like it, derived originally from the late Anglo-Saxon writ. Even the indigenous Welsh private act, the conveyance in *tir prid* (a gage of land for a term of years) is Anglo-Norman rather than Celtic in its style.” For the early history of the gage in English law, see G.E.Osborne, *Handbook On The Law of Mortgages*, (West Publishing Co, St. Paul, Minn. 2nd ed., 1970), pp.2-5.

²³ fn 3 pp.161-162.

²⁴ This was the custom and practice in north Wales.

²⁵ fn 3 p. 161.

²⁶ fn. 4 pp. 113-11. 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.

“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 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.” [emphasis added]

Therefore, the salient features of the *prid* may be summarised as follows:

1. The payment made by the purchaser was in the form of a loan;
2. The purchaser did not take legal title but he was given possession of the land by way of security for the loan and was able to keep all profits from the land.
3. The period of possession was usually for four years and it was commonly rolled over as the loan was never likely to be repaid.
4. It was possible for the vendor to pay back the loan if he so wished in return for the land.
5. It will be noted that there was no condition for repayment of the loan by the vendor.²⁷

²⁷ A practical example of the operation of the *prid* is contained in a Release dated 29 April 1415 (which post-dates the Glyndŵr revolt). The Latin version of this document together with a translation is contained in the appendix to this article. This related to three parcels of lands and tenements in the ‘township of Crevoryon’ held in *prid* by Madoc fychan of the one part and William ap Gruff ap Willym (Gwilym) of the other part. The document recites how Madoc fychan had come by these lands in *tir prid* and is evidence of their sale in *prid* to Gwilym. Note how the document recites the three parcels of land, effectively purchased by Gwilym, as being capable of passing back to the vendor upon payment of the monies made over to him by Gwilym. This is evidenced by the wording ‘it lies in my hand for 60 shillings’, and of another tranche of land, ‘it lies in my hand for 26 shillings 8 pence.’ The ‘four-year period’ mentioned above is not spelt out. This, however, is implicit in the way in which the habendum has been drafted:

[t]o have and to hold unto the same William his heirs and assigns all the aforesaid tenements and lands with all their appurtenances for *prid* aforesaid just as is more fully contained in the Charters of my predecessors

Tir prid similar initially to the *mortuum vadium* (dead pledge) and later resembling the *vivum vadium* (live pledge)

The Welsh device of *tir prid* resembled the *mortuum vadium* referred to by Glanville²⁸ in the sense that the mortgagee (the creditor) was allowed possession of the property and all of its profits without having to account for those profits to the mortgagor (the debtor). There were different forms of Welsh mortgage which developed over time, but its earliest form was *tir prid*:²⁹

“ A Welsh mortgage in its original and strict form closely resembled the *mortuum vadium* described by Glanville, being a consequence of an estate, redeemable at any time on payment of the principal without interest: the rents and profits of the estate until redemption being taken *without account by the mortgagee* in lieu of interest.” [emphasis added]

Another satisfactory summary is provided by Wylie: ³⁰

“ This [the Welsh mortgage] differed from an ordinary mortgage in that here the very essence of the transaction was that the lender took possession of the land. Furthermore, the lender was entitled to receive the rents and profits of the land which were to be applied by him in lieu of interest charged on the capital sum borrowed or, even, sometimes, in lieu of both capital and interest. Because of this, unlike an ordinary mortgage, *a Welsh mortgagee was not liable to account for the rents and profits received by him.*” [emphasis added]

We have noted in Part II of this article that the *tir prid* transaction was abrogated by the second of the Acts of Union. However, this was due to the fact that the device had been developing over a period of time, and that it operated differently when the second of the Acts of Union was enacted (1543):³¹

made concerning them, until the true heirs of the same lands and tenements shall satisfy the said William his heirs and assigns concerning *prid according to the custom of North Wales for the same.* [emphasis added].

²⁸ Lib. 10, cap.6.

²⁹ Coote's *Treatise on the Law of Mortgages*, by R.L. Ramsbotham, 9th ed., Vol , (London, 1927), p.35.

³⁰ J.C.W. Wylie, *Irish Land Law*, 5th ed., (Bloomsbury, 2013), p. 602.

³¹ Coote, fn. 31, Vol , (London, 1927), p.35.

“Another kind of Welsh mortgage, or security in the nature of a Welsh mortgage, rather resembling the ancient *vivum vadium*, was where an estate was assured to a mortgagee in fee or for a long term of years *until out of the rents and profits he should have received the amount of principal and interest.*” [emphasis added]

In other words, the Welsh mortgage over time evolved such that *the mortgagee now had to account to the mortgagor for the rents and profits*, which he did not have to do under the original form of Welsh mortgage (*tir prid*). This transition probably took place between the time of Glanville (died 1190) and Littleton (died 1481). Glanville, as we have seen, noted the *mortuum vadium* and Littleton noted the *vivum vadium*.³² Therefore, at the time of the enactment of the second of the Acts of Union in 1543 the operation of the *tir prid* had been abolished but the Welsh Mortgage, which it had evolved into, was not. Fisher and Lightwood note that the Welsh mortgage was only abolished by the Law of Property Act 1925, and observed that the mechanism was ‘very rare’, and cannot now be used as a form of security³³; although Coote takes a contrary view as to the possible continued use of this type of security.³⁴

There are cases from the seventeenth, eighteenth, nineteenth and twentieth centuries concerning the Welsh mortgage which show how the Welsh mortgage developed from its original form (as outlined above), and from which it is possible to see what principles were being applied as it evolved, and what its main features were. These are conveniently summarised in an older edition of Fisher and Lightwood’s Law of Mortgage as follows:³⁵

³² See G.E.Osborne, *Handbook On The Law of Mortgages*, (West Publishing Co, St. Paul, Minn. 2nd ed., 1970), pp.2-4; and E.J. Simcox, *Primitive Civilisation or Outlines of the History of Ownership in Archaic Communities* Vol II, (London, 1894), Appendix C, pp. 416-417.

³³ Fisher and Lightwood’s Law of Mortgage, 7th ed., (London, 1931), p. 8.

³⁴ Coote, fn 31. pp. 39-40, “ By section 85 of the Law of Property Act 1925...a mortgage of land cannot now be effected by law except by a demise for a term of years absolute...or charge by deed expressed to be by way of legal mortgage...It would appear that, subject to the provisions of this Act, Welsh mortgages may still subsist and be created.”

³⁵ Fisher and Lightwood, fn 35 p. 8.

“ A Welsh mortgage was an assurance by which property was conveyed to the creditor without any condition for payment, but upon terms that he was to receive the rents and profits in satisfaction of principal and interest...: *Orde v Heming, 1686*, I Vern. 418;... Usually there was no covenant for repayment, but the presence of such a covenant did not prevent the security from being a Welsh mortgage, provided it satisfied the above two essential tests, namely there was no condition for payment (as distinguished from a personal covenant), and that there was a stipulation for receipt of rents and profits by the mortgagee: *Balfe v. Lord*, [1842, 2 Dr. & War.480] ; *Teulon v. Curtis*, 1832, I You. 610...Since the assurance was without condition, there could be no forfeiture...There was, however, a continuing equity of redemption, and the mortgagor might redeem at any time, but if the mortgagor obtained a decree for redemption, and failed to redeem he was foreclosed... ”³⁶

Application of the Welsh mortgage may also be seen in Irish legal history. Indeed, Coote notes that “ such mortgages appear to have been very common in Ireland;”³⁷ and as His Honour Judge Cook observed in 1904 in *Shields v Shields*:³⁸

“..., although stated to be extremely rare in other places, Welsh mortgages are common enough in this country as shown by the point arising on two successive circuits.”

The Irish context

Derbfine³⁹

The Irish concept of the *derbfine* displayed similar characteristics to the Welsh concept of *cyfran*. A satisfactory summary is provided by Byrne:⁴⁰

³⁶ In relation to the point concerning the equity of redemption and foreclosure, see the later discussion in the text concerning use of the Welsh mortgage in Ireland.

³⁷Coote, fn.31 p. 39.

³⁸ (1904) 38 ILTR 188.

³⁹ 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, p.179. See also, T.M. Charles-Edwards, *Early Irish and Welsh Kinship*, (Clarendon Press, 1993), pp.51-61.

⁴⁰ F.J. Byrne, *Irish Kings and High Kings*, 2nd ed., (Dublin, 2001), p. 35. Also, see the diagrams on pp. 122-123. For another useful summary, see M.T. Flannagan, *Irish Society, Anglo-Norman Settlers, Angevin Kingship, Interactions in Ireland in the Late Twelfth Century*, (Oxford, 1989), p. 81 and pp. 84-85.

“ This family, like any other fine, was a large agnatic kindred group which included second and third cousins. Promogeniture was not recognised in Irish law...

...Hereditary land could not be alienated: on a man's death it was normally divided up equally among his sons...”

The clan was known as the *fine* and as far as the rules of inheritance were concerned in more complex cases, one needs to be familiar with the complicated rules of the *derbfine*.⁴¹

Geall

A similar concept to the *prid* had existed in Ireland, called the *geall*, but this may have been a later concept than the *prid*.⁴² It was certainly in use in the sixteenth century as a device which was employed to overcome the inalienability of land under native Irish law.⁴³ There are several references to the *geall* (pledge) before the sixteenth century but the earlier references do not show that the *geall* was used as a legal device to alienate land until the late medieval period.⁴⁴ During the sixteenth century MacNiocaill has concluded that:⁴⁵

“ A substantial portion of the surviving documents consists of pledges of this kind; and ‘mortgage’ would be as accurate a translation of Latin *pignus* or Irish *geall* as ‘pledge’. I would argue that the late-medieval pledge is in substance a reshaping of the earlier form of ‘pledge’, which had consisted of moveable objects, as the model of the mortgage of common law. It is however taken further and transformed into an instrument for alienating land quasi-permanently, without requiring the consent of the kin group...”

However, MacNiocaill has noted that with the Irish *geall* there were stringent conditions attached to the equity of redemption which the authors have not noted with regards to the

⁴¹ On the different degrees of eligible consanguinity, see *Manners and Customs of the Ancient Irish* at clxviii et seq. and clxii, Vol. 1, O'Curry (O'Sullivan (ed.)), Lemma Publishing, 1873, New York.

⁴² G. Mac Niocaill, ‘The Interaction of Laws’, in *The English in Medieval Ireland* (ed. James Lydon, Royal Irish Academy, 1984), p.116, fn 2.

⁴³ fn 42 p.115.

⁴⁴ See F.J. Byrne, fn.40 p. 31; *Ancient Laws of Ireland*, Vol 1, (New York, 1983), pp. 115; 119; 261; 269; 275; 277-281; and p. 301

⁴⁵ fn 42 p.116.

Welsh concept of *tir prid*.⁴⁶ In view of the fact that there were similarities between the native Irish property laws of Ireland and Wales (i.e. the native Welsh concept of *cyfran* and the native Irish concept of the *derbfine* on the one hand, and the medieval Welsh concept of *tir prid* and the Irish *geall* on the other hand), it is probably not surprising that the Welsh mortgage should have been readily embraced in Irish property law.

Principles relating to the Welsh mortgage developed in Irish cases

In the 1832 Welsh mortgage case of *Teulon v Curtis*⁴⁷ (an English case) the Irish mortgage⁴⁸ case of *Hartpole v. Walsh* was distinguished⁴⁹(in *Teulon* no forfeiture was ordered, for reasons set out below, whereas in *Hartpole v Walsh* an order for foreclosure was made). In *Teulon v Curtis* Lord Lyndhurst observed:

“ The creditor might fairly say, I will take your covenant for the payment of money on demand, but, as further security, I will have a term of five hundred years granted to me of the property; and if, therefore, from any circumstance, I should not be able to enforce my remedy by a personal action for payment of the money, I shall have, at least, the power of paying myself out of the rents and profits of the estate.”⁵⁰

Lord Lyndhurst did not see any inconsistency between these two provisions:

“ It is not at all inconsistent that a party should stipulate that he should hold the property till his debt should be paid, and that the debtor should covenant to pay the debt on demand; the covenant and the proviso are not therefore inconsistent.”⁵¹

⁴⁶ fn 42 p.116.

⁴⁷ 1832, 1 You. 610.

⁴⁸ There was no separate concept known as the Irish mortgage. What is meant here is the concept of the Welsh mortgage being used in Ireland.

⁴⁹ 5 Bro.P.C. 267, Toml.edit; (1740) V Brown 267.

⁵⁰ Paragraph 618 of judgment.

⁵¹ Paragraph 619 of judgment. The key difference between the facts of *Teulon v Curtis* and *Hartpole v Walsh* was that in the former case the monies were payable on demand, whereas in the latter they were payable on eighteen months' notice. However, that was not material. The court held that the reason why the court decreed foreclosure in the Irish mortgage case of *Hartpole v. Walsh* was because a bill had been filed to redeem the

The concept of the Welsh mortgage was certainly accepted by the Irish judges. For example, in 1909 in *Fenton v. Walsh*⁵² it was held that a mortgagee in possession *following repayment of the loan* under a Welsh mortgage, acquires no title under the Statute of Limitations, unless possession continues for the period stipulated by law for adverse possession to occur (at the time 12 years). Furthermore, that case held that the absence or presence of a proviso for redemption was not an essential feature of the Welsh Mortgage. In 1904 in *Shields v. Shields*,⁵³ Cook J. held that redemption could be possible after 12 years and the Court considered that a Welsh mortgage was a most innovative device: it did not violate the rule against perpetuities (i.e., it was not void for want of term); it did not provide for forfeiture (as would an "ordinary" mortgage); and in a Welsh mortgage, the mortgagee enters an agreement to take possession of the asset (again an unusual feature); and agrees to take not repayments of principal and interest (as would be the case in an ordinary mortgage), but rather agrees to receive the rents and profits associated with the asset towards payment of principal and interest while in possession. In 1914 in *The Matter of Thomas Cronin*,⁵⁴ Madden J. held that:

“[i]n its ordinary form [a Welsh Mortgage] is a contract by way of mortgage by the terms of which it is agreed that the mortgagee shall take the rents and profits of the land in lieu of interest, until the mortgager thinks fit to redeem... [L]apse of time is no bar to redemption, unless it is proved that the mortgagee has held over for the space of twelve years after the debt has been paid by receipt of the rents and profits.”

The learned Judge continued: "Another feature of all such securities is the absence of the right to foreclose." ⁵⁵

mortgage and there had been substantial delays in proceeding with the redemption, and by reference to the above discussion relating to the Welsh mortgage, it was this delay which allowed foreclosure to take place. For other Welsh mortgage cases litigated in Ireland, see *O'Connell v. Cummins*, 1840, 2 Ir.Eq. Rep. 251; *Taylor v. Gorman* (1844) 7 Ir Eq R 259; *Cassidy v. Cassidy*, 1890, 24 L.R. Ir. 577. All of these cases, although litigated in Ireland, make it clear that the mortgage in question was in fact a Welsh mortgage.

⁵² (1909) 43 ILTR 54.

⁵³ (1904) 38 ILTR 188.

⁵⁴ [1914] 1 IR 23

⁵⁵ at pp. 28-29.

And in *Balfe v. Lord*,⁵⁶ no less than the Lord Chancellor had proclaimed back in 1882:-

“In [a Welsh mortgage] the mortgagee is to keep possession, until by perception of the rents and profits he is fully paid; but he cannot at any moment he pleases call for payment of the principal and interest. The essence of a Welsh mortgage is that there is no forfeiture, the principal not being payable at any given time”.⁵⁷

He continued:

“A Welsh mortgage is a conditional sale; under it the lender goes into possession of the rents, and continues to receive them, until the party, who borrowed the money, chooses to redeem, and this he is always permitted to do; so that the peculiarity is that while there can be no foreclosure on the part of the mortgagee, still a right of redemption subsists in the mortgagor.”⁵⁸

Finally, in a cautionary note, Gibson J in *Johnson v. Moore*, (1904)⁵⁹ although describing in detail the key features of the Welsh Mortgage⁶⁰ nevertheless went on to recommend that:

“This antiquated and convenient form of security should be abolished. The recent case illustrates its dangers and difficulties - an alleged owner out of possession 83 years seeking to enforce a right of redemption on foot of an unregistered deed”⁶¹

Presumably to eliminate such possibilities and other uncertainties, the Welsh mortgage was abolished in England and Wales by the Law of Property Act 1925 (although as has been noted earlier above, there are differing views with regards to that). However, it was only formally abolished in Ireland in 2009.⁶² Therefore, it is clear, that notwithstanding the Acts of Union, the arrival of the common law, and the imposition of the English system of law, the device of the Welsh mortgage continued in use in the United Kingdom of Great Britain and

⁵⁶ (1842) 2 DR & War 480.

⁵⁷ at p 486, per Sudden LC.

⁵⁸ at pp.487-488.

⁵⁹ (1904) 4 NIJR.

⁶⁰ "...liberty of alienation is largely interfered with, as the mortgagee has no power of sale, under the deed or by statute; there can be no foreclosure; and the mortgagor's right is unrestricted in point of time."

⁶¹ Per Gibson J. at pp.219-220.

⁶² See section 89(7) Land and Conveyancing Law Reform Act 2009 (Act no. 27 of 2009).

Ireland legal system up to modern times, and demonstrates that legal pluralism was prevalent, rather than the obliteration of native legal concepts and devices.

Having related the salient features of the history of the Welsh mortgage and establishing the main features of the mechanism, the discussion now turns to try and answer the following two questions: (1) why did parties enter into Welsh mortgages?; and (2) were Welsh mortgages that uncommon outside of Ireland? These questions are not considered in the existing literature.

Why enter into a Welsh mortgage?

One reason may be found in the rule against perpetuities. In *Shields v. Shields*,⁶³ Cook J. held that the Welsh mortgage did not infringe the rule against perpetuities, i.e., land could not be tied up indefinitely. As we have seen, a Welsh mortgage could be redeemed at any time by the mortgagor, which opens up the possibility of tying up land indefinitely without infringing the rule against perpetuities. In this respect, the 1715 Welsh mortgage case of *Howell v. Price*⁶⁴ is of interest. It should be noted that this is a rare report of a case concerning a Welsh mortgage in Wales itself. The mortgagor mortgaged property in the sum of £300 with a proviso that should either he or his heirs and assigns pay off the debt, the land had to be re-conveyed. The mortgagor paid all the interest himself on the loan during his lifetime, and declared certain settlements of the property in favour of family members including himself. The mortgagor then died, there was a dispute as to whether a certain beneficiary was liable for making payments in the event of the beneficiaries wishing to redeem the mortgage.

However, it should be noted that the beneficiaries were under no obligation to redeem the mortgage, which could last indefinitely. As the mortgage interest was being paid (by the mortgagor during his lifetime, and the relevant beneficiary under the terms of the settlement

⁶³ (1904) 38 ILTR 188.

⁶⁴ (1715) Precedents in Chancery 423, 24 E.R. 189.

after his death) the mortgagee was getting his return on his capital outlay. There is no evidence that the mortgagee went into possession following the conveyance in his favour. On that basis, he would have been content to have stayed out of possession while the interest continued to be paid. Therefore, the beneficiaries as long as they continued to ensure that the interest continued to be paid could enjoy the property for as long as they wished without having to be concerned about the rule against perpetuities.⁶⁵ It was down to the beneficiaries to sort out their differences following the death of the mortgagor if they wanted to continue to receive this particular legal advantage. The report of the case states that “ it was at the election of the heirs of the mortgagor for ever, whether they would redeem this estate or riot.”⁶⁶ Further, there is a note at the end of the case which states: “ [i]t was said to be common practice in *Wales* to make mortgages in this manner, with design to keep the estate for ever in their own family.”

An answer now needs to be given as to the reason why *creditors* would enter into such agreements. After all, they were not playing on a level playing field, as a mortgagee could not foreclose on his security. Simcox refers to ancient forms of pledge in Babylonia and Malabar in which similar forms of security “circulated as negotiable property, and a man who wanted to realise his capital could count on finding someone in want of an investment, willing to take his place as creditor.”⁶⁷ This may well be the reason why *creditors* entered into this type of transaction.

Were Welsh mortgages more common in Ireland than elsewhere?

⁶⁵ This case also highlights another advantage to the mortgagor which we have already noted, namely the fact that the mortgagor may redeem at any time, and as there is no covenant to repay, there can be no foreclo

⁶⁶ The reader might think that this should read “...redeem this estate or *not*”. However, the report of the case uses the word *riot*, as cited in the text above,.

⁶⁷ E.J. Simcox, *Primitive Civilisation or Outlines of the History of Ownership in Archaic Communities* Vol II, (London, 1894), Appendix C, pp. 416-417.

We have noted that the Welsh mortgage appears to have been quite common in Ireland and that there are reports of it having been rare elsewhere. Simcox observes that “ [a]mong English reported cases there are scarcely over half a dozen that deal with the Welsh mortgage.”⁶⁸ Although only one Welsh mortgage case having taken place in Wales has been analysed in this article (*Howell v. Price*), it does at least provide some evidence to the effect that this type of security was used in the early eighteenth century in Wales. Therefore, statements concerning the rarity of this form of security outside of Ireland should be treated with caution.

Interestingly, there was reference to a Welsh mortgage in the 1951 Texas case of *Humble Oil Refining Co v. Atwood*.⁶⁹ In this case, Atwood sought to redeem land owned by him from two oil and gas leases in favour of Humble Oil. Part of the argument advanced by Atwood involved trying to assert that the arrangement with Humble Oil was a later development of the Welsh mortgage, so that he could redeem it at any time, at which point the land should be returned to him free of the two oil and gas leases. This argument was unsuccessful and as Wilson J. noted in the case:⁷⁰

“ The *vivum vadium* early fell into disuse. A trace of it survives in an obscure form of pledge known as a Welsh mortgage where the mortgagee has possession in lieu of interest upon his debt. It seems to have been ‘substantially the same as *an ordinary mortgagee in possession under the later English law who must account in equity for rents and profits.*’ Osborne, *On Mortgages*, Sec. 1, p.4. Any such conception is wholly inconsistent with the actualities of an oil and gas lease.’[emphasis added]

⁶⁸ fn. 67 p. 419.

⁶⁹ 244 S.W. 2d 637. This is not the only reference to the Welsh mortgage which the authors have found in American jurisprudence. See the reference to the English case of *Lawley v. Hooper* 3 Atkyns 278 (which considered principles of the Welsh mortgage) discussed in F. Watts, *Reports of Pennsylvania*, Vol VII, May to September 1838, (Philadelphia, 1839), at p. 276, and a further reference to the Welsh mortgage in C.H. Browning, *Welsh Settlements of Pennsylvania*, (Heritage Books, 2007), at p.401.

⁷⁰ 244 S.W. 2d 637 at p. 643.

Although the argument premised on the Welsh mortgage was unsuccessful, the case does show a desire for litigants to turn to the concept where they see a potential benefit long after the so-called abolition of Welsh law by the Acts of Union.⁷¹

IV. OTHER EXAMPLES OF WELSH LAW IN ACTION POST-UNION: OWNERSHIP OF THE FORESHORE AND THE RIGHT TO WRECK

We now turn to consider further examples of where native Welsh concepts have been employed long after the Acts of Union, by discussing three examples from the Maritime area which provide yet further confirmation of “new” instances of persistence of the native Welsh laws:

- (i) Ownership of the Foreshore: *The Attorney General v. Jones*⁷²;
- (ii) Maritime Inquiry: The St. David’s Wreck Inquiry; and
- (iii) Court and Inquiry: *Crown Estate Commissioners v. Mark Andrew Tudor Roberts, Trelleck Estates Ltd*, (2008)⁷³

(i) Ownership of the Foreshore: *The Attorney General v. Jones* (1863)

This case has already been considered by the first named author in previous work but it needs to be detailed, briefly, here in order to set the scene for the new evidence concerning the St. David’s Wreck Inquiry and the case of *Crown Estate Commissioners v. Mark Andrew Tudor Roberts, Trelleck Estates Ltd*, (2008).

In *The Attorney General v Jones*, the defendant, William Bulkeley Hughes, seeking to prove title to a slipway and pier which had been erected in Cemaes Bay in north-east Anglesey, advanced argument premised on certain native Welsh laws in relation to the foreshore.

⁷¹ See also, A. Lyall, *Land Law in Ireland*, 3rd ed., (Roundhall, 2010), p. 872.

⁷² (1863) 2 Hurleston and Coltman 347, 159 E.R. 144.

⁷³ (2008) EWHC 1302 (Ch).

Counsel for the defendant, Aneas John McIntyre, argued that the Crown had reasons of its own for objecting to the introduction to the native Welsh laws (*cyfraith Hywel*), and this is summarised by Pryce and Owen as follows:⁷⁴

“According to Hughes’ defence, medieval Welsh law had not only been confirmed as valid by kings of England in the medieval and early modern periods, but had also been invoked quite recently on behalf of the Crown in a case not dissimilar to the present one. In his response to the prosecution counsel’s dismissal of Hywel’s laws McIntyre claimed that the Attorney General had reasons of his own for ignoring the laws, since one of the prosecution witnesses at the first trial at Chester, Mr O’Dowd, an official who had been inquiring into wrecks on the sea shore, ‘claimed on one occasion a moiety for the crown under the very laws of Howell Dda, and which he found to be so very useful and convenient’...

If the allegation about O’Dowd’s claim under Welsh law was true, this provides further evidence that in the mid-Victorian period recourse to the laws of Hywel Dda was not restricted to a case concerning the foreshore at Cemaes.”

In *The Attorney General v Jones* the matter was ultimately resolved in favour of the defendant on the basis of certain letters patent by James I in favour of one of his ancestors. The argument concerning the efficacy of the native Welsh laws formed part of an alternative argument put forward by the defendant. The trial judge *did not admit them into evidence* on the basis of an apparent inconsistency in the Welsh laws themselves, but *not* on the footing that they were of no relevance.⁷⁵ *The Attorney General v. Jones (1863)* began just as the St. David’s Wreck Inquiry was concluding and Mr O’Dowd played a role in both matters.

(ii) **Maritime Inquiry: The St. David’s Wreck Inquiry**

⁷⁴ fn 8, p.196.

⁷⁵ fn 8, p.199.

What is significant about the St. David's Wreck Inquiry is the fact that it was actually *decided by reference to the native Welsh laws*, and in the Crown's favour.⁷⁶ The Inquiry found a moiety of wreck of the sea in favour of the Crown, and by recourse to Medieval Welsh law. It is important to note that the legal issues in *The Attorney General v Jones* and the St. David's Wreck Inquiry were different, yet recourse was had to different elements of Welsh law in both: in *The Attorney General v Jones* the matter before the Court concerned title to the foreshore; in the St. David's Wreck Inquiry the issue was one concerning the right to wreck on the foreshore; and there was recourse to different Welsh medieval law in both hearings.

Background to the Wreck Inquiry

Reports of the Inquiry are to be found in an edition of *The Pembrokeshire Herald and General Advertiser* dated 16 May 1862, although records of the Board of Trade kept at The National Archives reveal a prior Inquiry had taken place on 3 April 1857 into the rights of the Bishop of St David's to wreck, although no details are given beyond the evidence adduced by the Bishop of St. David's of his rights.⁷⁷ As noted previously, the 1862 Inquiry was decided just as *The Attorney General v Jones* was commencing. James O'Dowd, the solicitor to the Merchant Shipping Department of the Board of Trade, and who later went onto give evidence on behalf of the Crown in *The Attorney General v Jones*, attended the Castle Hotel, St. David's, on 13 May 1862, to investigate claims on behalf of the Crown to rights to wreck in respect of a manor in the Hundred of Dewisland (Pebidiog in Welsh) in Pembrokeshire. The

⁷⁶ Therefore, it is arguable that this new evidence is more significant than that adduced in the article concerning *The Attorney General v Jones*.

⁷⁷ TNA BT 212/70.

rights claimed in the 1862 inquiry were the same as those claimed by the Bishop of St. David's in the 1857 inquiry.⁷⁸

The legal context

The Inquiry was held in accordance with the provisions of the Merchant Shipping Amendment Act 1862 (the 1862 Act)⁷⁹ which had updated and substantially incorporated provisions of the Merchant Shipping Act 1854 . An analysis of the relevant law relating to rights to wreck and procedure are set out in O'Dowd's publication relating to the 1862 Act.⁸⁰ The Bishop's agent produced a survey called the Extenta Terrarum which appeared to have been made in the time of Bishop Martyn (9th Ed. 2d, 1326). The report from *The Pembroke Herald and General Advertiser* stated that this survey:

“ contains various references to the right of wreck in the statement of the services of the freeholders and tenants of the Manor of Dewisland. Thus in the account of the Manor of Portbyllysky the following is among the services:...Et si fuerit wrecum supra mare sequi debent comu ad littus maris et bona custodire ibidem.”

According to the 1862 report of the Inquiry, O'Dowd then made reference to the seventh year of the reign of Richard II during which:

“the privileges of the Bishops of St. David's were recognised and confirmed by Royal Charter, granted to Bishop Adam Houghton,

⁷⁸ At an Inquiry held at Haverfordwest on 3 April 1857, the claim to wreck by the Bishop of St Davids was described as “...that part of the Welsh Coast which extends from the North side of Newgale Sands in the parish of Brawdy to a stream on the Northern extremity of Whitesand Bay in the Parish of St Davids where the Prince of Wales's Manor commences, and from the North side of St Davids where the Prince of Wales' Manor terminates to Abereidy Head, Also from Abereidy Head to Goodwick Sands.” See TNA BT 212/70. The Bishop's case was argued by his agent, a Mr Harvey of Messrs J. Harvey and Sons, which firm had also represented the Bishop at the 1857 Inquiry in Haverfordwest. It is likely that the evidence set out in the preceding paragraph contained references to much earlier documents, as the Bishop's agent argued that the Bishops of St. David's had from very early times been Lords of Dewisland, which entitled them in their capacity as Lords Marchers there to have the rights of wreck to the whole of the coast of Dewisland

⁷⁹ 25 & 26 Vict. c. 63.

⁸⁰ *The Merchant Shipping Amendment Act 1862, with An Introductory Analysis*, (J.O'Dowd, London, 1863). For the procedural requirements, see fn.25 p. 83.

which declares that the Bishops of St. David's had theretofore and should thereafter enjoy all privileges, &c., of Lord Marchers.”

O'Dowd then went on to consider what those privileges were by reference to certain provisions in the first of the Acts of Union.⁸¹ The report of the Inquiry then purports to set out the relevant provision. Whereas the report conveys the correct meaning contained in the first of the Acts of Union, a more accurate transcription of the relevant clause is provided below:⁸²

“ 30.And it is further enacted by the Authority aforesaid, That all and every *lay and temporal* Person and Persons, now being Lords Marchers, and having any Lordships Marchers or Lordships Royal, shall from and after the said Feast of All-Saints have all such Myses and Profits of their Tenants, as they have had or used to have at the first Entry into their Lands *in Times past*, and shall have, hold and keep within the Precinct of their Lordships, Courts Baron Court Leets and Law-days, and all and every Thing to the same Courts belonging; and also shall have, within the Precinct of their said Lordships or Law-days, Waife Straife, Infantheft, Outfantheft, Treasuretrove, Deodands, Goods and Chattels of Felons, and of Persons condemned or outlawed of Felony or Murder, or put in Exigent for Felony of Murder, and also Wreck de Mer, Whalage and Customs of Strangers, as they have had *in Times past*, and as though such Privileges were granted unto them by our Sovereign Lord, the King, by Point of Charter...” [emphasis added]

As O'Dowd noted, the above provision only extended to *lay and temporal* Lords Marchers; it did not cover a Lord Marcher in the position of the Bishop of St. David's, who was neither lay nor temporal. The position of an *ecclesiastical* Lord Marcher was covered by a later statute, namely the Act 1&2 Ph.&Mary, cap.15 (the Lord Marches in Wales Act 1554)⁸³ which confirmed that the liberties of Lord Marchers in Wales as set out above also extended

⁸¹ 27 Henry 8, c. 26.

⁸² 27 Henry 8, c. 26, item 30. See I.Bowen, *The Statutes of Wales*, published by Gwasg y Gors on behalf of the Centre for Welsh Legal Affairs, p.90.

⁸³ See also S Moore, *A History of The Foreshore and The Law Relating Thereto*, 3rd edn, (London, 1888), p. 512.

to ecclesiastical Lords Marchers. However, the report stated that neither Act gave the Marcher Lords “Wreck de Mer” (wreck from the sea) unconditionally; such privileges were “subject to such regulations and conditions, as existed antecedently to the Act of Annexation.” Therefore it was necessary for O’Dowd to undertake an examination of the law of wreck in Wales prior to the first of the Acts of Union, which therefore necessitated an analysis of the native Welsh laws.

Medieval Welsh Law

There are references in *The Pembrokeshire Herald and General Advertiser* to the native laws of Wales (*cyfraith Hywel*) cited by O’Dowd in relation to rights of wreck, and which are contained in Aneurin Owen’s *Ancient Laws and Institutes of Wales*.⁸⁴ Before continuing with the analysis, it may be helpful to explain what the Welsh law cited by O’Dowd consisted of. Twenty years before the St. David’s Wreck Inquiry, the Record Commission published in 1841 Aneurin Owen’s *Ancient Laws and Institutes of Wales*, which referred to three sources of law in the Welsh manuscripts which Owen termed ‘codes’: (1) the Iorwerth Redaction, as it is now known, was called the ‘Venedotian Code’ by Owen – Venedotian being an adjective for Gwynedd; (2) the Cyfnerth Redaction of manuscripts from south-east Wales, which Owen termed the ‘Gwentian Code’ ; and (3) the Blegwryd Redaction of manuscripts from south Wales which Owen called the ‘Dimetian Code’.⁸⁵ The manuscripts which Owen could not fit into the ‘Codes’ were recorded by him in a separate volume which he called the ‘Anomalous Laws’.

⁸⁴ Published by The Record Commission, (London, 1841).

⁸⁵ 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, pp. 106-150. The written laws were compiled in the late twelfth and thirteenth centuries and some forty medieval manuscripts survive.

The authors set out below the correct references to the native Welsh laws relating to wreck by reference to Owen's *magnus opus*, to which O'Dowd appeared to be referring⁸⁶ and by reference to the 'Dimetian Code.' The medieval Welsh version is cited first of all, followed by Owen's translation:

“XXXVII. Or tyrr llog ar tir esgob deuhanner vyd yr enill ro6g ybrenhin ar esgob os ar tir y brenhin [ehun] y tyrr y brenhin ehun bieiuud yr enill.”

“37. If a ship be wrecked upon the land of a bishop, the proceeds are to be shared between the king and the bishop: if it should be wrecked upon the land of the king himself, the proceeds belong to the king.”⁸⁷

As has been set out in section II above, Edward I's Statute of Rhuddlan 1284 did not abolish Welsh customary land law, and the native Welsh laws in respect of the right to wreck (as set out above) continued. O'Dowd concluded that they also continued following the Acts of Union 1536-43, and by reference to the analysis provided in this section of this article. On that basis, he concluded that the Crown was entitled to a moiety of the wreck which had been the subject matter of the inquiry. This was on the basis that, by reference to a proper interpretation of the first of the Acts of Union (1536), the customary native Welsh laws in respect of the right to wreck from the sea *had survived*, and as we shall now see was acknowledged in *Crown Estate Commissioners v Mark Andrew Tudor Roberts, Trelleck Estate Ltd* discussed below.

(iii) Modern Litigation: the example of *Crown Estate Commissioners v Mark Andrew Tudor Roberts, Trelleck Estate Ltd* (2008)

⁸⁶ The authors have had difficulty in following the references in the *Pembrokeshire Herald and General Advertiser* allegedly made by O'Dowd to the native laws of Wales (*cyfraith Hywel*) in relation to rights of wreck, contained in Aneurin Owen's *Ancient Laws and Institutes of Wales*.

⁸⁷ *Ancient Laws and Institutes of Wales*, ed. and trans. Aneurin Owen (Record Commission, London, 1841), I, pp.554-555.

More recently, and more importantly in the context of the St. David's wreck case, is the case of *Crown Estate Commissioners v Mark Andrew Tudor Roberts, Trelleck Estate Limited*.⁸⁸

What is of interest about this case is the fact that it is a recent case (2008) which dealt with an issue similar to the St. David's Wreck Inquiry; the locus in quo was similar; instead of the Merchant Shipping Amendment Act 1862, there was reference to the Merchant Shipping Act 1995;⁸⁹ there was reference to the some of the same historical authority, e.g., the charter granting rights to the Bishop of St. David's in the reign of Richard II;⁹⁰ the provisions in the first of the Acts of Union to lay and temporal Lords Marcher, and how this was extended to ecclesiastical Lords Marcher by the Lord Marches in Wales Act 1554;⁹¹ the references to the same provisions of medieval Welsh law;⁹² and the reference to the prior inquiry by the Board of Trade (it will be remembered that this is dated 3 April 1857 in the Board of Trade records), although the 2008 case gives a date of 1855.⁹³

Most important of all the 2008 case makes a short reference to what happened in 1862 but without detailing the inquiry itself:⁹⁴

“ By a letter dated 9 August 1928 the Welsh Church Commissioners wrote to the Mercantile Marine Department at the Board of Trade saying that they had ‘no reason to dispute the limits within which the Board admitted the title of the Lord Bishop of St Davids to the moiety of proceeds in 1862.’”

Lewison J (as he then was) found that the Defendant in the case was entitled to:⁹⁵

⁸⁸ [2008] EWHC 1302 (Ch).

⁸⁹ Para 101 of the judgment.

⁹⁰ Para 28 of the judgment.

⁹¹ Paras 43 and 49 of the judgment.

⁹² Paras 84-91 of the judgment.

⁹³ Para 105 of the judgment.

⁹⁴ Para 107 of the judgment.

⁹⁵ Para 172 of the judgment.

“ a right to a moiety of wreck in his capacity as Lord of the Manor of Trevine and in his capacity as Lord of the Manor of the City and Suburbs of St David’s...”

In arriving at his conclusion, the learned judge observed:⁹⁶

“ It is, I think, common ground that the origin of this most unusual division of the right to wreck is to be found in Welsh customary law.”

This is significant in that it shows recognition by the High Court of England and Wales of clear evidence for the existence of Welsh customary law within the common law of England & Wales.⁹⁷

V. CONCLUSION

In this article the authors have augmented the body of evidence for the case that elements of Welsh law continued to *co-exist* with the common law after the Union: legal pluralism has been tolerated by the common law system and this is clearly confirmed by the abundant examples that can be found in the Law Reports of the period post Union right up to modern times. The orthodox view clearly requires reappraisal. We do not call for its rejection, as clearly the common law firmly imposed its will on the Welsh, but certainly the above survey of the Law Reports for the period produce ample evidence that those employed by the Crown, where it suited the Crown’s purpose, and judges of the Crown’s courts were more than prepared to consider arguments based on native law, and also to enforce transactions or conduct proceedings applying those native concepts and devices in appropriate cases. Our research has produced clear evidence to demonstrate: (1) how the native Welsh concept of *tir*

⁹⁶ Para 151 of the judgment.

⁹⁷ This may be contrasted with Gavan Duffy P’s dictum in the Irish case of *Foyle and Bann Fisheries and Irish Society v Attorney General and Others* (in which arguments based on Brehon law (Irish native Law) had been made. Judge Gavan Duffy P held:

“ I apprehend that the study of Irish law, seriously undertaken only in recent times, is still in its infancy and the conclusions of the most experienced scholars are tentative, and seem at best generally to represent plausible historical speculation...the law texts cannot be used as a solid basis for any conclusion at all until they are edited and examined.” (Page 88 of judgment). See also, Thomas Mohr, ‘Salmon of Knowledge’, 16 *Periria*, (2002), pp.360-395.

prid subsequently developed into the Welsh mortgage, and survived in England and Wales until the enactment of the Law of Property Act 1925 in England and Wales.⁹⁸

The Welsh mortgage was considered on many occasions by the Irish courts in the period of Union between Ireland and Great Britain right up to the first two decades of the twentieth century when the Union concluded, and indeed survived as a recognised concept in the law of the new Republic of Ireland until 2009, when it was finally abolished. Other jurisdictions too have employed the concept, notably certain States in the USA, the most recent example we can find in the Law Reports in that jurisdiction (in a case where admittedly it was advanced as part of an unsuccessful argument) involving a landowner seeking to rid himself of an oil and gas lease in Texas as recently as 1951.

Then in the maritime field, there are two examples, one from an English court, the other from an English Board of Inquiry, where native Welsh law was either or acknowledged, as we have seen in applied in the St. David's Wreck Inquiry of 1862, subsequently acknowledged by the High Court in 2008 in *Crown Estate Commissioners v. Mark Andrew Tudor Roberts, Trelleck Estate Ltd* (2008).⁹⁹

What is very significant about this evidence is its revelation that it was the English Crown; English judges, or Irish and American litigants, who, on various occasions, in a variety of settings, were seeking to make use of the native Welsh laws. It is instructive to observe the judgment of Lewison J (*Crown Estate Commissioners v. Mark Andrew Tudor Roberts, Trelleck Estate Ltd*) which demonstrated an appetite to embrace native Welsh law notwithstanding being a Judge sitting in a court of the common law of England & Wales; and as the Irish Welsh mortgage cases show, there was a ready appetite to embrace *the Welsh*

⁹⁸ Although, as we have seen, it is by no means certain that it is impossible to create a Welsh mortgage after 1926.

⁹⁹ [2008] EWHC 1302 (Ch).

mortgage without difficulty by the Irish courts during the nineteenth and early twentieth centuries (within the united legal system of the United Kingdom of Great Britain and Ireland).

In undertaking this analysis, reference has also been made to the content of some of those native Welsh laws themselves, and how they were compiled by reference to what Aneurin Owen termed ‘Codes’. In a recent consultation paper (2015), the Law Commission consulted on whether Wales should look towards a codified system of legislation, which is certainly appropriate by reference to Welsh legal history.¹⁰⁰

The themes outlined above which have been analysed in this article are significant in themselves, but taken together amount to something which is significant, because the sum of its parts paints a quite different picture to that represented by the traditional orthodox view that the common law was completely obliterative of native Welsh legal principles and devices. This article has highlighted the unacknowledged persistence of native Welsh law and legal concepts, not just in the hands of Welsh lawyers and litigants, but also in the hands of non-Welsh actors, and moreover, beyond the borders of Wales, thereby strengthening the case that legal pluralism, rather than total replacement of native legal norms and devices by the common law, was the reality in several areas of law well after the Union, right up to modern times. It may well be that there are other areas of Welsh laws of devices, additional to those presented in this article, yet to be found within the construct of the common law of England and Wales some five hundred years after the Union. Clearly, the orthodox view requires reappraisal in light of this new evidence, and more evidence, surely to be discovered, will only make the case more compelling.

¹⁰⁰ Law Commission Consultation Paper No 223: Form and Accessibility of the Law Applicable in Wales 2015, Chapter 8, pp. 140-168.

APPENDIX

PFA 1 187 Grant in Tir Prid (29 April 1415)

In Latin

Sciant presentes & futuri quod ego Mad Vaghan ap Gruff ap Daudid ap Gruff filius & heres ac executor testamenti Morvidd vergh Jeuan ap Eign ap llowargh matris mee & predicti Gruff patris mei dedi concessi ac relaxaui Willelmo ap Gruff ap Willym pro quadam summa pecunie quam predictus Willelmus michi soluit totum statum & ius meum que habeo seu antecessores mei habuerunt nomine pride in terris & tenementis vocatis Tithyn Eign ap llowargh apud Brynllowargh quibus Tang' vergh Jeuan ap Eign est heres & iacet in manu mea pro lx [erasure] s ac alium [*sic, recte* alio] tenemento vocato tiddyn mergh Ph' ap Teg' iuxta Ogvayn & iacet in manu mea pro lx s ac alium [*sic, recte* alio] tenemento vocato tiddyn ken' ap Holl iuxta Maynkyngar & iacet in manu mea pro xxvj s viij d, cum omnibus terris eisdem tenementis spectantibus cum omnibus suis pertinentiis pro prida predicta prout in Cartis antecessoribus meis inde confectis plenius continetur quousque veri heredes earundem terrarum & tenementorum prefato Willelmo heredibus & assignatis suis de prida secundum consuetudinem North Wall' pro eisdem satisfecerint Et ego predictus Mad & heredes mei predicta terras & tenementa cum suis pertinentiis prefato Willelmo Heredibus & assignatis suis in forma predicta contra omnes gentes Warantizabimus. In cuius rei testimonium presentibus sigillum meum apposui Hiis testibus Thoma Chambr Gron ap Bled' & Mad ap Gron cum multis aliis Datum apud Crevoryon die lune proxima post festum apostolorum Philippi & Jacobi anno regni regis Henrici quinti tertio

Translated from Latin

Know present and future that I Mad Vaghan ap Gruff ap Daudid ap Gruff, son and heir and executor of the testament of Morvidd vergh Ieuan ap Eign ap llowargh my mother and of the said Gruff my father, have given granted and released to William ap Gruff ap Willym for a certain sum of money which the said William has paid to me, all my estate and right which I have or my predecessors had in the name of prid in the lands and tenements called Tithyn Eign ap llowargh at Brynllowargh to which Tang vergh Ieuan ap Eign is the heir, and it lies in my hand for 60 shillings, and another tenement called tyddyn mergh Ph ap Teg next to Ogvayn, and it lies in my hand for 60 shillings and another tenement called tiddyn Ken ap Hoell next to Maynkyngar, and it lies in my hand for 26 shillings 8 pence, with all lands belonging to the same tenements with all their appurtenances in the township of Crevoryon in the Commote of Vghaph, to have and to hold unto the same William his heirs and assigns all the aforesaid tenements and lands with all their appurtenances for prid aforesaid just as is more fully contained in the Charters of my predecessors made concerning them, until the true heirs of the same lands and tenements shall satisfy the said William his heirs and assigns concerning prid according to the custom of North Wales for the same. And I the said Mad

and my heirs shall warrant the said lands and tenements with their appurtenances unto the said William in the said manner against all peoples. In witness whereof I have appended my seal to these presents, these men being witnesses, Thomas Chambre, Gron ap Bledyt, Mad ap Gron with many others. Given at Crevoryn on Monday next before the feast of the Apostles Philip and James in the 3rd year of the reign of King Henry the Fifth.

Endorsements:

Contemporary, abbreviated Latin: Charter of Mad Vaghan ap Gruff ap dd concerning 3 tenements in prid

19th century, English: Gruff ap David ap Gruffyd to Wm ap Gruffyd ap William Grant in fee of lands in Creweryon