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Critical Analysis

Aspects of the Laws of Real Property in England and Wales— A Welshman's Perspective

Introduction

This critical analysis is based upon the author's published research¹ tracing the development of certain aspects of the law of real property in England and Wales, especially in relation to trusts. The overarching theme which underpins the author's body of research, which will be discussed in this analysis, is the development of aspects of the English law concept of uses (the precursor of the modern trust) and the way in which uses were, (and subsequently the method by which trusts are), overreached; together with the author's proposals for reform of the modern doctrine of overreaching. As will be seen from the

¹ *The historical publications are:*

(1) Gwilym Owen with Chris Davies, 'Customary Land Title in Australia and Wales', in Noel Cox and Thomas Glyn Watkin, eds., *Canmlwyddiant, Cyfraith, a Chymreictod: A Celebration of the Life and Work of Dafydd Jenkins 1911-2012*, Welsh Legal History Society, 11, (Cardiff, 2013), pp76-105;

(2) Gwilym Owen, 'Another Lawyer Looks at Welsh Land Law', *op cit*, pp183-221;

(3) Gwilym Owen with Huw Pryce, 'Medieval Welsh Law and the Mid-Victorian Foreshore', *The Journal of Legal History*, 2014, Vol.35, No. 2, 172-199;

(4) Gwilym Owen with Peter Foden, *At Variance: The Penrhyn Entail*, Welsh Legal History Society, 14, (Cardiff, 2017);

(5) Gwilym Owen with Dermot Cahill, 'A Blend of English and Welsh Law in late Medieval and Tudor Wales: Innovation and Mimicry of Native Settlement Patterns in Wales', *The Irish Jurist*, 2017, LVIII, pp 1-42.

The modern law publications are:

(6) Gwilym Owen with Osian Rees, 'Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: A Misconceived Approach?', [2011] 75 Conv. pp 495-506;

(7) Gwilym Owen, 'A New Paradigm for Overreaching—Some Inspiration from Down Under', [2013] 77 Conv. pp377-394;

(8) Gwilym Owen, 'A New Model for Overreaching—Some Historical Inspiration', (2015) 79 Conv. pp 226-239;

(9) Gwilym Owen with Dermot Cahill, 'Overreaching—Getting the Right Balance', (2017) 81 Conv. pp 26-44;

(10) Gwilym Owen, 'Priorities and Registered Land during the Registration Gap', (2017) 81 Conv. pp 226-237.

author's range of publications, the author has: (a) considered the above topics in their full historical context, and in so doing his published work spans across four subsidiary themes; and (b) wherever possible, the author's body of work analyses these themes from a Welsh perspective.

The author's interest in the concept of overreaching goes back to his days as a practitioner. As a practitioner, it always intrigued the author as to why there had to be two as opposed to one trustee for overreaching to work. *Boland* was decided in 1981, the year in which the author qualified as a solicitor, and *Flegg* was decided only a few years later in 1988, when the author was still a young solicitor. These important cases were therefore decided during the author's formative years as a lawyer, and it has been useful to reflect on these cases from an academic perspective several years later, and also to include some Welsh historical perspective as part of that process of reflection.

Before summarising the four sub-themes below, the author's published works will demonstrate that the Tudor Acts of Union 1536-43 did not wholly displace Welsh law and that Welsh stratagems continued to be deployed to offset the rigours of the English common law concept of primogeniture, by reference to the fact that some post-Union settlement patterns tended to mimic some of the norms of the native Welsh property laws.

On the English side, the author considers that the two-trustee rule (as now applied in the modern concept of overreaching) is, by reference to the author's historical analysis, anachronistic, and reform proposals are made which call for the registration of trusts in the context of registered land transactions. Further, in the context of the operation of overreaching in breach of trust situations in registered land transactions, the author considers that it would be more appropriate to approach this type of transaction from the imposition of *in*

personam liability, rather than analysing such transactions from the perspective of not allowing a statute to be used as an instrument of fraud.

Turning now to the four sub-themes:

Sub-Theme(1): *the inalienable nature of land (i.e. the preservation of the 'static' as opposed to the 'dynamic' interest in land) under the native Welsh laws, and the introduction and assimilation of English law in Wales.*² An examination of this first sub-theme will reveal how principles of native Welsh law (*cyfran*)³ and English law *existed side by side* in the centuries leading up to the Acts of Union 1536-43 in Wales, and also *thereafter*, and furthermore, that: the native Welsh laws were not wholly abrogated following the Statute of Rhuddlan 1284 and the Acts of Union 1536-43. The author challenges the orthodox view that the sixteenth-century union of England and Wales was an imposition of English law upon the Welsh, with scant regard for Wales' separate identity. In fact, it is not generally well known that the Acts of Union *specifically saved* the operation of Welsh customary law in the Welsh counties of Anglesey, Caernarfonshire and Meirionnydd. (This presented several interesting possibilities: for example, as will be discussed, in the nineteenth century the Court of Exchequer⁴ was prepared to consider the possibility of assimilating certain aspects of Welsh native land law within the broader ambit of the common law of England and Wales, by reference to certain saving provisions in the Acts of Union).

² Gwilym Owen with Dermot Cahill, 'A Blend of English and Welsh Law in late Medieval and Tudor Wales,' Innovation and Mimicry of Native Settlement Patterns in Wales', *The Irish Jurist*, 2017, LVIII, pp 1-42; Gwilym Owen with Huw Pryce, 'Medieval Welsh Law and the Mid-Victorian Foreshore,' *The Journal of Legal History*, 2014, Vol.35, No. 2, 172-199.

³ The Welsh form of partible inheritance.

⁴ *The Attorney General v Jones* (1863) 2 Hurlstone and Coltman 347, 159 E.R. 144.

The assimilation (i.e. the way in which English law was absorbed into Wales) of native Welsh land law with English law reveals itself to be a much under-researched topic. Historians have generally looked to areas in Wales which were slower to embrace concepts of English law for evidence of Welsh law. Therefore, little research has been undertaken in this field in the Crown lands of north-west Wales following the Conquest of Wales by Edward I in 1282. These Crown lands came under the influence of English law *far sooner* than other areas in Wales following the Conquest. The author's published works reveal, by reference to the Penrhyn estate (which formed part of the Crown lands) adjoining Bangor in north-west Wales, how principles of native Welsh law *continued to exist* alongside English law in the years prior to, *and after*, the Acts of Union 1536-43.⁵

The research highlights how testators in Wales continued to mimic some of the settlement patterns of the native Welsh laws within the construct of the English common law even after the Acts of Union.⁶ It will be seen that wills executed by members of the Griffith family of Penrhyn displayed a tendency to *mimic* some of the native Welsh land laws, presumably in an attempt to offset the harshness of the English concept of *primogeniture* (i.e. whereby land passed to the first male heir). It is submitted that this piece represents a major step forward in advancing our understanding of how Welsh law concepts and stratagems continued to play a role in the settlement of property *long after* English rule had arrived in Wales.

In addition to the aforementioned settlement patterns, the author's published works concerning the Penrhyn estate also show that there was experimentation prevalent in both England and Wales in connection with *uses* in the years leading

⁵ Gwilym Owen with Dermot Cahill, 'A Blend of English and Welsh Law in late Medieval and Tudor Wales,' Innovation and Mimicry of Native Settlement Patterns in Wales', *The Irish Jurist*, 2017, LVIII, pp 1-42.

⁶ Ibid, pp 24-28.

up to the Statute of Uses 1536.⁷ These works also show that although the deployment of *uses* facilitated inheritance, they nevertheless gave rise to difficulties with regards to the alienability of land, which sub- theme is considered next.

Sub-Theme:(2) *attempts at making land a more dynamic security under the native Welsh laws along with such attempts in England by reference to the historical development of overreaching in English law.* This second sub-theme examines attempts at making land a dynamic security in both England and Wales. On the Welsh side, it will be revealed how this was achieved by reference to the device of the *tir prid*, and on the English side by the adoption of conveyancing practices to facilitate purchasers holding property free from hidden *uses*. The author's published work⁸ analyses the possibility that the English common law concept of overreaching may have influenced the Welsh concept of *tir prid*.

Although one of the objectives of the present day English and Welsh system of land law is to facilitate the dynamic security in land (i.e the transfer of land in a way which enables a purchaser to hold land free from hidden encumbrances), the author's published works⁹ show how, up until later feudal times, land in Wales which was subject to Welsh law was to all intents and purposes *inalienable* by virtue of the Welsh concept of partible inheritance (i.e. *cyfran*, the sharing of the patrimony between male heirs). The Welsh concept of *tir prid* was devised to overcome the rigours of *cyfran*, in an attempt to ease the alienability of land. Although *tir prid* operated differently from the English

⁷ Ibid, 30-33.

⁸ Gwilym Owen with Dermot Cahill, 'A Blend of English and Welsh Law in late Medieval and Tudor Wales,' Innovation and Mimicry of Native Settlement Patterns in Wales', *The Irish Jurist*, 2017, LVIII, pp 9-12, and 39-40.

⁹ Ibid, pp 5- 9. See also, Gwilym Owen, 'Another Lawyer Looks at Welsh Land Law', in Noel Cox and Thomas Glyn Watkin, eds., *Canmlwyddiant, Cyfraith, a Chymreictod: A Celebration of the Life and Work of Dafydd Jenkins 1911-2012*, Welsh Legal History Society,11, (Cardiff, 2013), pp 190-197.

concept of overreaching, its objectives were similar, namely to make land a dynamic security. In this sense, the native Welsh concept of *tir prid* had similar objectives to the English common law concept of overreaching.

There were also problems in English law concerning the dynamic security in land. Prior to the Statute of Wills 1540, freehold land could not be devised directly by will. As a way of overcoming this impediment, the concept of the *use* was conceived.¹⁰ As a consequence, there was much land held in *use* prior to the Statute of Wills 1540. The danger for purchasers when purchasing land from *feoffees*, was that they might buy land which was subject to a hidden *use*, thereby encumbering the land to the detriment of the purchaser. The doctrine of overreaching aims to make land a dynamic security, enabling purchasers to purchase land free from such encumbrances. The author has endeavoured to trace the historical development of the concept of overreaching *uses*, by which the dynamic security in land could be preserved, through to the modern concept of overreaching trusts, and has found (by reference to the historical development of the concept of overreaching) that the overreaching doctrine is not fit for purpose in the twenty first century and is in need of reform.¹¹

Sub-Theme(3): The third sub-theme examines *whether trusts should be registrable in England and Wales and considers the application of in personam liability to deny overreaching in a breach of trust situation*. Currently, all trusts have to be kept behind ‘the curtain’ (this term will be explained when dealing with this sub-theme) in registered land transactions. The author has made proposals for the curtain principle to be breached in order to mitigate the

¹⁰ i.e, whereby a *feoffor* (settlor) would transfer land (by way of a document known as a *feoffment*) during the lifetime of the settlor to *feoffees* (trustees) who would hold the land *to the use of* (on trust for) the *feoffor* during his lifetime, and then pass the land to his intended beneficiary under the terms stipulated in his will concerning the disposition of the relevant *uses*.

¹¹ Gwilym Owen, ‘A New Model for Overreaching—Some Historical Inspiration’, (2015) 79 Conv. pp226-239; Gwilym Owen with Dermot Cahill, ‘Overreaching—Getting the Right Balance’, (2017) 81 Conv. pp 26-44.

anomalous nature of the operation of the modern doctrine of overreaching.¹² Further, the author has suggested cases should be analysed more in terms of applying *in personam liability* to deny the effects of overreaching in a breach of trust situation.¹³

In the author's view the modern concept of overreaching is flawed. The author makes proposals for the reform of overreaching in relation to registered land transactions in this jurisdiction.¹⁴ These proposals are twofold: firstly, it is proposed that trusts (*both express and implied*) should be capable of registration to alleviate the anomalies of the two-trustee rule, which is explained in section 2.1.3 of this critical review below, and the author proposes that overreaching should only apply in the absence of registration (and an alternative to the registration proposal, namely controlling the concept of overreaching by means of the provision of better restrictions in registered land transactions is also discussed).

The second reform proposal concerns situations giving rise to a breach of trust in registered land transactions in which overreaching does not apply. It is suggested that we should desist from explaining these situations in terms of not allowing s 27 of the Law of Property Act 1925 to be used as an instrument of fraud (this is explained in 3.5 below). Rather, it should be explained in terms of applying the concept of *in personam* liability (explained in 3.5 and 3.6) to deny the effects of overreaching, along the lines of the Australian *Torrens* land registration system.

¹² Gwilym Owen and Dermot Cahill, 'Overreaching—Getting the Right Balance', (2017) 81 Conv. pp37-40.

¹³ Gwilym Owen, 'A New Paradigm for Overreaching —Some Inspiration from Down Under', [2013] 77 Conv. pp377-394 pp 384-391.

¹⁴ Gwilym Owen with Dermot Cahill, 'Overreaching—Getting the Right Balance', (2017) 81 Conv. pp 37-42.

Sub-Theme(4): *The author's fourth and final sub-theme is devoted to examining the relationship between the modern concept of the trust, and how it interfaces with the concept of proprietary estoppel.* There always has been a close relationship between trusts and proprietary estoppel. In the context of s 2(5) Law of Property (Miscellaneous Provisions) Act 1989: suggestions for reform to the wording of that section are proposed.¹⁵

The discussion now moves on to discuss these individual themes in detail:

1. Sub-theme (1):

The inalienable nature of land (i.e. the preservation of the static as opposed to the 'dynamic' interest in land) under the native Welsh laws and the introduction and assimilation of English law in Wales.

The first sub-theme is important to the overall theme because it sets the scene for the second sub-theme by analysing the inalienable nature of land under the early native Welsh land laws. There was little recognition of the dynamic security in land insofar as land subject to Welsh law was concerned. The position changed over time in the Crown lands of north Wales with the assimilation of English law into Wales, which looked more to the dynamic nature of security in land.

This analysis will also reveal new evidence unearthed by the author concerning the development of the *use* in the years leading up to the Statute of Uses 1536. Therefore, the early history of the development of the *use*, the precursor of the modern trust, is of interest because prior to the Statute of Uses 1536 much of the land in England and Wales was subject to *uses* and ways had to be found to enable purchasers to take free of hidden *uses*. These are the *passive uses* which

¹⁵ See, Gwilym Owen with Osian Rees, 'Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: A Misconceived Approach?', [2011] 75 Conv. pp495-506

are analysed and explained in the analysis which follows. Overreaching is all about preserving the dynamic security in land, by seeking to enable a purchaser to take free of hidden trusts. This sub-theme will also deal with a particular aspect of the development of *uses* in the years leading up to the Statute of Uses 1536, i.e. the *use in tail* (this term will be explained in the appropriate section of this critical review¹⁶). The author's work is original in that it details, by reference to documents from the Penrhyn estate, the experimentation which was going with *uses in tail* in the years leading up to the Statute of Uses 1536, and there is a dearth of evidence in the existing literature concerning this phenomenon.¹⁷

An unexpected consequence of pursuing this sub-theme has been the discovery by the author of settlement patterns in Wales following the Acts of Union, which mimic the norms of some of the native Welsh land laws.¹⁸ This is significant because the sixteenth-century union of England and Wales has often been presented as an imposition of English law upon the Welsh. Watkin has argued that between the two Acts of Union 1536-43, the Statute of Wills 1540 allowed a testator to make a will of freehold land, i.e. to choose how one's land should descend.¹⁹ Therefore, by 1543, it was not necessary to make any saving with regard to Welsh customs, as was the case in 1536 when statutory protection was needed. The author's evidence demonstrates that 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 demonstrate the soundness of the author's findings, first it is necessary to go back to the

¹⁶ See section 1.5.1 of this critical review.

¹⁷ J.H.Baker, *An Introduction to English Legal History*, (Oxford, 2002), p285

¹⁸ Gwilym Owen with Dermot Cahill, 'A Blend of English and Welsh Law in late Medieval and Tudor Wales: Innovation and Mimicry of Native Settlement Patterns in Wales', *The Irish Jurist*, 2017, LVIII, pp24-28.

¹⁹ T.G.Watkin, *The Legal History of Wales*, (University of Wales Press, 2007 and 2012) p 137.

Conquest of Wales 1282 and work on from there to the later medieval period. This will now be considered.

1.1 *The Conquest of Wales 1282*

Notwithstanding the fact that Wales was conquered in 1282, for self-serving reasons,²⁰ the English Crown allowed some of the native Welsh laws to continue, and in particular the native Welsh laws relating to property.²¹ The author's work in the field is original in that it endeavours to explain how the Welsh concept of *cyfran* (explained below) might have operated according to the *Welsh laws* themselves.²² Heretofore, academics have generally eschewed providing an explanation by reference to *the Welsh laws*, instead preferring to explain matters by reference to what is contained in various *medieval extents*.²³ However, an explanation is required for what is contained in the various Welsh Codes (the laws), and the author's work in this area does fill a gap in existing scholarship by providing a detailed explanation as to how the native Welsh law concept of *cyfran* might have operated according to the native laws, and this is discussed below.²⁴

1.2 *Native title*

1.2.1 *Cyfran*

²⁰ Charges could be made by the Crown to grant permission before land was subjected to a *prid*. See 'A Blend of Welsh Law in late Medieval and Tudor Wales: Innovation and Mimicry of Native Settlement Patterns in Wales', *The Irish Jurist*, 2017, LVIII, pp 11 and 40.

²¹ See Gwilym Owen with Dermot Cahill, 'A Blend of English and Welsh Law in late Medieval and Tudor Wales: Innovation and Mimicry of Native Settlement Patterns in Wales', *The Irish Jurist*, 2017, LVIII, p 36.

²² G. Owen, 'Another Lawyer Looks at Welsh Land Law', in Noel Cox and Thomas Glyn Watkin, eds., *Canmlwyddiant, Cyfraith, a Chymreictod: A Celebration of the Life and Work of Dafydd Jenkins 1911-2012*, Welsh Legal History Society, 11, (Cardiff, 2013), pp 190-199.

²³ These were land surveys undertaken by surveyors working for the Crown. Examples are the Extent of Anglesey 1294, the Extent of Denbigh 1335 and the Record of Caernarfon 1352.

²⁴ For an explanation of the Welsh Codes, see G. Owen, 'Another Lawyer Looks at Welsh Land Law', in Noel Cox and Thomas Glyn Watkin, eds., *Canmlwyddiant, Cyfraith a Chymreictod: A Celebration of the Life and Work of Dafydd Jenkins 1911-2012*, Welsh Legal History Society, 11, Cardiff, 2013, pp183-221, at pp 184-186.

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*²⁵ might have worked in pre-medieval times.²⁶ One of the problems with *cyfran* was that it made the alienation of land difficult and so the concept of *tir prid*²⁷ developed in medieval times as a means of overcoming the rigours of *cyfran* in order to facilitate the alienability of land.²⁸

In 'Another Lawyer Looks at Welsh Land Law'²⁹ (2013) and 'A Blend of English and Welsh Law in late Medieval and Tudor Wales: Innovation and Mimicry of Native Settlement Patterns in Wales',³⁰(2017) the author considers how *cyfran* might have operated according to *the Welsh laws*, and then goes on to discuss the other quite separate issue of how *cyfran* worked in practice in the medieval period by reference to evidence from the available *medieval extents*. A possible explanation for this *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 the thirteenth century (though it is likely that the Book of Cyfnerth goes back to the end of the twelfth century)'.³¹ By way of comparison, in Ireland for example, customary sources were written down from perhaps as early as the fifth century.³² In undertaking this analysis the author does so by reference to documents relating to the Penrhyn estate.

²⁵ 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*.

²⁶ 476-1,000 (early middle ages), 1,000-1,300 (high middle ages) and 1,300- 1453 (late middle ages).

²⁷ The Welsh native concept of *tir prid* played a significant role in the development of the Penrhyn estate and the concept is considered in section 2 of this critical review

²⁸ Gwilym Owen with Dermot Cahill, 'A Blend of English and Welsh Law in late Medieval and Tudor Wales: Innovation and Mimicry of Native Settlement Patterns in Wales', *The Irish Jurist*, 2017, LVIII, pp10-11.

²⁹ pp 190-199.

³⁰ pp 5-9.

³¹ Gwilym Owen, 'Another Lawyer Looks at Welsh Land Law', in Noel Cox and Thomas Glyn Watkin, eds., *Canmlwyddiant, Cyfraith, a Chymreictod: A Celebration of the Life and Work of Dafydd Jenkins 1911-2012*, Welsh Legal History Society, 11, (Cardiff, 2013), pp 184-185.

³² T.G.Watkin, *The Legal History of Wales*, (Cardiff, 2012), p40.

Although land comprised in the Penrhyn estate came under the influence of English law far earlier (there is evidence in the Penrhyn documents to land being transferred according to principles of English law in 1288, shortly after the Conquest³³) than some other Welsh estates³⁴ following the Conquest in 1282, there is ample archival material in the Penrhyn papers to evidence the operation of the native Welsh laws in medieval and early Tudor times.³⁵ For instance, research by the author at the British Library has revealed that Sir William Griffith III of Penrhyn acquired land (which had formerly been subject to the native Welsh custom of *cyfran*) on the Skerries which lie off Anglesey.³⁶ The land was bought out by charter and presumably the consent of all of the members of the *gwely* would have been required for this.³⁷

1.3 *The Acts of Union 1536-43*

The native Welsh laws were allowed to continue following the conquest of Wales in 1282 until the Acts of Union 1536-43. However, it is not generally well known³⁸ that there were saving provisions in the Acts of Union, which allowed for native Welsh customary law to continue in the counties of Anglesey, Caernarfonshire and Meirionnydd. Indeed, as recently as the nineteenth century, the Court of Exchequer³⁹ was prepared to consider whether principles from the laws of Hywel Dda formed part of the English common law, which is explored in 'Medieval Welsh Law and the Mid-Victorian Foreshore (2014).' More

³³ See Penrhyn Castle Papers, PCP/404, for a deed of sale in 1288 by Anian ap Gwyn ap Gwiaun.

³⁴ The Clenennau estate for example, which is situated approximately twenty miles to the west of Bangor in north Wales.

³⁵ The Tudor period was between 1485-1603.

³⁶ British library MS Harley 696 folio 162. I am grateful to Peter Foden for bringing this manuscript to my attention and assisting with its transcription. See Gwilym Owen with Dermot Cahill, 'A Blend of English and Welsh Law in late Medieval and Tudor Wales: Innovation and Mimicry of Native Settlement Patterns in Wales,' *The Irish Jurist*, 2017, LVIII, pp8-9.

³⁷ *Ibid*, pp 8-9.

³⁸ For example, see J.Davies, *A History of Wales*, (Penguin, 2007), pp 225-232, where the point is not mentioned by Davies.

³⁹ *Attorney General v Jones*, (1863) 2 Hurlston and Coltman 347; 159 E.R. 144.

recently, in *Crown Estate Commissioners v Mark Andrew Tudor Roberts*,⁴⁰ the High Court upheld claims to right to wreck in Pembrokeshire based upon native Welsh law and this is considered by the author in 'Customary Land Title in Australia and Wales' (2013).⁴¹ This leads on to the broader issue of the assimilation of English and Welsh law which is considered next.

1.4 *The assimilation of English law into Wales and the adaption of native Welsh law in the English common law*

The Penrhyn documents⁴² researched by the author clearly reveal how the native Welsh concepts of land law existed *side by side* with English land law concepts prior to the Acts of Union 1536-43. The original Penrhyn *entail* was created in 1413⁴³ but at the same time, the Griffith family of Penrhyn was rapidly building the estate by acquiring land in *tir prid*.⁴⁴ The topic of the assimilation of English law into Wales is a much under-researched area as academics have generally not looked to estates such as the Penrhyn for evidence of the assimilation of English law with Welsh law. Consequently, important evidence in respect of the development of the concept of the *use*, and mimicry of native Welsh land law settlement patterns within the framework of the English common law have been overlooked, and how the author's work deals with these matters is now considered below.

⁴⁰ [2008] EWHC 1302 (Ch).

⁴¹ See, Gwilym Owen with Chris Davies, 'Customary Land Title in Australia and Wales', in Noel Cox and Thomas Glyn Watkin, eds., *Canmlwyddiant, Cyfraith, a Chymreictod: A Celebration of the Life and Work of Dafydd Jenkins 1911-2012*, Welsh Legal History Society, 11, (Cardiff, 2013), pp 94-97.

⁴² These have been researched by the author at the Bangor Archives, the National Archives, the British Library and at the National Library of Wales

⁴³ G Owen with D Cahill, 'A Blend of English and Welsh Law in late Medieval and Tudor Wales: Innovation and Mimicry of Native Settlement Patterns in Wales', *The Irish Jurist*, 2017, LVIII, pp 28-30.

⁴⁴ See section 2.1.4 of this critical review and Gwilym Owen with Dermot Cahill, 'A Blend of English and Welsh Law in late Medieval and Tudor Wales: Innovation and Mimicry of Native Settlement Patterns in Wales', *The Irish Jurist*, 2017, LVIII, pp 9-12.

1.5 Uses

As has been explained in the Introduction above, under English law, freehold land could not be devised by will prior to the Statute of Wills, 1540. In order to overcome this limitation the practice developed whereby a settlor (*feoffor*) would transfer land to trusted friends (*feoffees*) *inter vivos*, who would then hold the land upon *use* (the precursor of the trust), to deal with the land in accordance the *feoffor's* wishes expressed in his will. In this way, it was the *use* which passed on the *feoffor's* death. By this method, the legal estate in land did not *descend*, thereby avoiding the payment of *feudal incidents* on death, which was a consequence of the *common law canons of descent*.

The *uses* which have been described in the preceding paragraph (by which land was held in *use* until the *feoffor* died) were called *passive uses*. This is where the land was held in *use* for some considerable time during the *feoffor's* lifetime, and it was the *use* which passed under the terms of the *feoffor's* will. The problem for the Crown was that the creation of such *passive uses* meant that *feudal incidents* could be avoided. This is why the Statute of Uses 1536 was enacted, which had the effect of executing *passive*, but not *active uses*.

Before proceeding with this discussion it may be helpful to remind the reader that the analysis which follows provides evidence of an important development in the concept of the *use* in an area where there is a dearth of such evidence. For the reasons previously given, much of the land in England and Wales was subject to *uses*. In the discussion of the third sub-theme, and by reference to the author's published research, an examination will be undertaken of the conveyancing practices which were adopted to effectively overreach these *uses*, in order to enable a purchaser to take clean title against the interests of a party having an interest under a *use* for his own benefit *absolutely*. The analysis of the

development of *uses* in this sub-theme is slightly different. What is being examined below are *entailed interests* in land. This is where land was settled to pass down a particular line of the settlor's relations, commonly in favour of the eldest male heir.

A beneficiary under such an entail (called a *tail male*) would hold for his lifetime only, and consequently, he only had a *limited* interest. The problem was that at *common law* such entails could be broken, with the result that the interests of beneficiaries in reversion could be thwarted. In 'A Blend of English and Welsh Law' (2017),⁴⁵ the author explains how for centuries the interests of such beneficiaries were and are protected by the *Statute De donis conditionalibus* 1285, and how over time the interests of reversionary beneficiaries under entailed provisions were written in *use* (in modern language, held in trust), with the *hope* that the courts of equity would protect these remainder interests.

Over time, that is what happened. However, not much information has come to light concerning the experimentation which had been going on in *both* England and Wales concerning the possibility of writing these reversionary interests in *use* in the years leading up to the Statute of Uses 1536,(which is considered next). Before moving on it should be pointed out that this sub-theme is relevant to the overarching theme of overreaching for reasons slightly different from those which will be discussed in the third sub-theme. In this part of the critical review the author is considering *entails* which were important in the development of what later came to be termed the strict settlement.

There were problems with strict settlements in respect of the alienability of land in the absence of appropriate powers to effect sales, and this led to the Settled Land Act 1882 which provided an overreaching machinery all of its own insofar

⁴⁵ pp 28-30.

as Settled Land was concerned. These aspects of overreaching are discussed in the third sub-theme. Therefore, the reader will appreciate that the experimentation with hybrid and passive uses detailed below is an important aspect in the development of the *uses* which eventually led to the interests of beneficiaries with reversionary interests being protected in equity. This then gave rise to problems with the alienability of land as evidenced by the subsequent development of the strict settlement (this was developed between 1601-1740), which in turn led to the Settled Land Act 1882, and the overreaching machinery provided by that legislation to facilitate land becoming more of a dynamic rather than a static security.

1.5.1 *What's the use?*

The author's research⁴⁶ has thrown considerable light on the bitter litigation which took place concerning the Penrhyn entail, which has uncovered that what lay at the heart of the dispute concerned 'missing' documents in respect of *uses*. These documents were probably entered into in c1505-1506, i.e. prior to the Statute of Uses 1536, and at a time when there appears to have been experimentation going on in both England and Wales with regard to *uses*.⁴⁷ What is interesting about this aspect of the research is the fact that Sir William III of Penrhyn had interests in both an English and a Welsh estate. There is evidence of the same kind of experimentation going on in respect of *both* estates, so the position was not unique to Wales and the Penrhyn estate. Baker refers to this kind of experimentation having 'been a topic of debate' in the years

⁴⁶ G Owen with 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, LVIII, pp 30-33. Also, see generally, Gwilym Owen with Peter Foden, *At Variance: The Penrhyn Entail*, Welsh Legal History Society, 14, (Cardiff, 2017).

⁴⁷ G Owen with 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, LVIII, pp 28-30.

leading up to the passing of the Statute of Uses 1536, but no particulars are provided.⁴⁸

The experimentation by Sir William III which the author has uncovered in documents held at the National Archives is in respect of a hybrid combination of *active* and *passive uses* in connection with the Penrhyn *entail*. What appears to have happened was that, in the years prior to the passing of the Statute of Uses 1536, landowners were concerned that if they created *legal fee tails*, the remainder interests would be in a perilous position having regard to common law mechanisms to bar them, such as the *common recovery*.⁴⁹ This became common practice following *Taltarum's* case.⁵⁰ By way of a hybrid combination of *passive* and *active uses*, Sir William III was seeking to protect the remainder interests under the Penrhyn *entail* by writing the reversionary interests in *use* (i.e. *the use in tail*; writing them in trust). This is explained by the author in 'A Blend of English and Welsh Law in late Medieval and Tudor Wales.'⁵¹ The problem was that these documents went 'missing' and 'without proof of the terms of the documents themselves there was (and still is) uncertainty concerning the nature of the remainders'.⁵² It was this factual uncertainty which led to the disputes in respect of the Penrhyn *entail* which have never been considered in depth before, by either general or legal historians. The author's

⁴⁸ J.H.Baker, *An Introduction to English Legal History*, 4th ed., (Oxford University Press, 2002), 285.

⁴⁹ Following the grant and re-grant transaction described in 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, LVIII, p29, 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 always been seeking ways to break settlements. Passive uses came to be employed to get the Chancellor to protect remainder interests under entails against the common law mechanisms for barring them...For this reason experimentation with *uses in tail* took place prior to the Statute of Uses 1536. If the entail were in use, the idea was that the courts of equity would protect the remainders,' p28.

⁵⁰ (1472) YB. 12 Edw.4.

⁵¹ G Owen with 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, LVIII, pp 30-33.

⁵² Ibid.

publication, *At Variance:The Penrhyn Entail*,⁵³ (the entail came into being in 1413) throws much more light on these disputes.

Whereas the next topic in this sub-theme does not have a bearing on the overarching theme of overreaching which is being discussed in this critical review, as had been mentioned, an unforeseen consequence of the author's research, has been to reveal certain interesting settlement patterns in Wales. That is why there is a brief discussion of this below by reference to the author's published work.

In this regard, the author has unearthed evidence that the Griffith family of Penrhyn appears to have been innovative in the way in which they executed their wills. Some of the family's wills show a tendency to mimic the native Welsh laws of *cyfran*. For example, the will of Edward Griffith is a very unusual will, and this is considered next.

1.6 The will of Edward Griffith and the possible influence of the norms of cyfran on the making of wills and settlements in Wales

In 'A Blend of English and Welsh Law in late Medieval and Tudor Wales' (2017), the author points out that Edward Griffith's will is unusual, because although it pre-dates the Statute of Wills 1540, it looks very much like a will of freehold land, even though, technically, freehold land could not be left by will in this way prior to the Statute of Wills!⁵⁴ Two theories for this are considered and the author has now come to the conclusion that the formula of providing two life interests to male siblings, and the remainder to heirs, mimicked the norms of *cyfran* in the

⁵³ Gwilym Owen with Peter Foden, *At Variance:The Penrhyn Entail*, Welsh Legal History Society, 14, (Cardiff, 2017).

⁵⁴ G Owen with 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, LVIII, pp 17-18.

sense that it had the effect of ameliorating the concept of *primogeniture* under the *common law canons of descent*. The other two wills which are discussed in the article employ a similar formula, which is why the author has suggested that what we are seeing here is a *quasi-gwely*.⁵⁵

The discussion now moves on to consider the second sub-theme which considers in more detail the historical development of overreaching by reference to the native Welsh laws and by reference to the English common law. The following sub-theme is relevant to the overarching theme being pursued in this critical review as it details the Welsh concept of *tir prid* which was devised to overcome the inalienability in land by reference to the Welsh concept of *cyfran*. As will be discussed below, it is the author's view that *tir prid* was influenced by the historical development of the English common law concept of overreaching (which is considered in the discussion on sub-theme (3) below).

As has been explained, overreaching is all about preserving the dynamic security in land, so an examination of its historical development in England and Wales is essential before we move onto the third sub-theme. The third sub-theme analyses reform options from which it will be seen that the author considers the modern concept of overreaching to be something of an anachronism by reference to its historical development, and for the reasons given, the discussion now moves on to consider the historical development of overreaching.

Sub-theme (2):

⁵⁵ An explanation for the concept of the *gwely* is offered in '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, LVIII, pp 5-9. This will appears to mimic that concept in the sense that under the *gwely* system of the native Welsh laws land was divided among male heirs. The provisions of Edward Griffith's will appear to mimic the operation of *cyfran*, hence the reference to a *quasi gwely*.

Attempts at making land a more dynamic security under the native Welsh laws along with such attempts in England by reference to the historical development of overreaching in English law

The dynamic security in land

As has been noted in the Introduction above, one of the objectives of modern systems of land law is to try and make land a dynamic security (i.e. to facilitate the transfer of land in a way which enables a purchaser to hold land free from hidden encumbrances). Under the English common law, this was achieved by means of various devices, and under the native Welsh land laws, this was achieved by means of the mechanism of *tir prid*. These matters are now analysed below: .

2.1 Problems with dynamic security in English and native Welsh land law and the tir prid

As was noted in the Introduction above, there were also problems in English law concerning the dynamic security in land: prior to the Statute of Wills 1540, freehold land could not be devised directly by will, and so this was overcome by adopting the concept of the *use*. This led to much land being held in *use* prior to the Statute of Wills 1540. In order to protect the purchaser, methods were devised under English law to enable the holder of the dynamic security in land (the purchaser) to hold the land free from the holder of the hidden static security (i.e. hidden *uses*). This is the common law concept of overreaching. Overreaching is the mechanism by which beneficial interests under *uses*, and later trusts, could be transferred into the proceeds of sale, so that purchasers could take free from them.

In 'Overreaching—Getting the Right Balance'(2017), the author pieces together the early history of overreaching in a way which has not been attempted before. Commonly, no explanation is given of the *curtain principle* beyond the fact that "[o]verreaching establishes the curtain principle, whereby a curtain is drawn between purchasers and the beneficial interests."⁵⁶ The author takes a different approach: the author's approach is to analyse the concept in its full historical context, and in so doing has revealed that the curtain principle evolved during a time when land was thought of more in terms of personalty than realty, and when home ownership was not as prevalent as it is now. This is important to the overarching theme as the author has demonstrated that at the time the curtain principle evolved (during World War I) the dynamic security in land was placed ahead of the static security.

Over the last century there has been an increase in home ownership, with the result that the operation of the doctrine in a modern context is anachronistic, and reform is needed which is discussed in the third sub-theme later below. Therefore, the starting point is to show how the curtain principle evolved (this is the device used in registered land transactions whereby trusts of land are kept off the register, and are effectively swept under the carpet in order to preserve the dynamic security in land).⁵⁷ The reason for this is to try and extract key features which the early Land Registration Acts were trying to capture, in order to provide an evaluative framework. Using that framework as a benchmark, a functional analysis was then undertaken to address two fundamental issues: (1) whether we should abandon overreaching altogether; and (2) if we are to

⁵⁶ R.J.Smith, *Property Law*, 8th edn, (Pearson, 2014), p347.

⁵⁷ See, G Owen with D Cahill, 'Overreaching—Getting the Right Balance', (2017) 81 Conv. pp 28-34.

continue with the doctrine, (a) is there a need to suggest changes, and if there is a need, (b) to set out what those changes should be.

The author suggests that there were three key elements which were important in the development of the curtain principle:

2.1.1 *Suppressio veri*

As we saw in section 1.5 freehold land was held by *feoffees* by way of *passive uses*. In view of the fact that so much land was held in *use* prior to the Statute of Uses 1536, the author poses the question: what protection was there for purchasers from hidden *uses* on sales by feoffees?

If a purchaser could show that he was a *bona fide purchaser for value without notice* of the *use*, then he would take free of it. To that end, there developed the fictitious practice of *suppressio veri*. By this method, if a *feoffor* empowered his *feoffees* to sell land, the relevant *feoffment* (transfer) would contain an untruthful recital to the effect that the feoffees were the absolute owners of the property. Of course, everybody knew that this was not true, but it provided the purchaser with an excuse not to make further enquiries so that he could say that he was not on notice. The problem was that an unscrupulous *feoffee* could act fraudulently and sell land without reference to the *feoffor*, and make off with the proceeds of sale.⁵⁸ It was for this reason that the two- trustee rule was introduced, (see 3.3 below).

2.1.2 *Caveats/cautions*

In view of the fact that land registration involved getting rid of the doctrine of notice, thereby changing the substantive law, caveats (later called cautions)

⁵⁸ G. Owen, 'A New Model for Overreaching-Some Historical Inspiration', (2015) 79 Conv. p227.

were introduced in the first attempt at land registration, namely the Declaration of Title Acts 1862. The entry of a caveat/caution on the register enabled a beneficiary of an equitable interest to be heard on an application to a transfer which might defeat his/her interest.

2.1.3 *Settled Land Act 1882*

The problems with *suppressio veri* detailed above weighed heavily with the legislature when it introduced the two-trustee rule in the Settled Land Act 1882. The Settled Land Act brought about two major reforms: (1) it empowered the tenant for life to sell the settled property, or part thereof, and to give the purchaser clean title free from the settled land trusts, on the condition that (2) the purchase monies were paid to at least two of the settled land trustees. This was a reaction to some of the abuses in the practice of *suppressio veri* as it was considered that fraud would be less likely in cases involving *two trustees* than in cases in which there was *only one trustee*. Eventually the same rule in respect of the payment of the capital monies to two trustees (*in order to overreach the relevant trusts*) made its way into the Law of Property Act 1925.⁵⁹

The author has concluded that⁶⁰ the salient features which the early Land Registration Acts were trying to capture were: the right of a beneficiary to be heard on an application which would defeat his/her interest; and the requirement that capital monies be paid to no fewer than two trustees. At the time when the early Land Registration Acts were passed, land was thought of more in terms of personalty than realty; therefore, one feature which the early Acts were *not seeking* to capture was the use of property *primarily as a home*.

⁵⁹ G Owen with D Cahill, 'Overreaching—Getting the Right Balance', (2017) 81 Conv. p29.

⁶⁰ Ibid, pp 33-34.

As the socio economic climate was very different in 1925 from what it is today,⁶¹ this is why the modern concept of overreaching is flawed and anachronistic, i.e. land was thought of more in terms of *personalty* and less in terms as *a home*. However, it may be argued that there is no need to change the law, as hard cases are few and far between. The author has attempted to argue that these types of cases could possibly increase in number as the economy continues to improve,⁶² and having regard to the current state of the law, people could well have to suffer in silence unless something is done.⁶³

2.1.4 *Tir Prid*

Before proceeding, it is the author's view that the medieval Welsh concept of *tir prid*, although different from the modern concept of overreaching, displayed similar objectives. We have already seen that one of the problems with the concept of *cyfran* was that it made the alienation of land difficult and the device of the *tir prid* developed in medieval times as a means of overcoming the rigours of *cyfran* in order to facilitate the alienability of land.⁶⁴ 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. At the end of that period the purchaser was entitled to repayment of the loan, but in practice the arrangement rolled over.⁶⁵ It is the author's submission that , *tir prid* displayed certain similarities with the English concept of overreaching *uses* and later on

⁶¹ G. Owen, 'A New Model for Overreaching—Some Historical Inspiration', (2015) 79 Conv. pp232-234.

⁶² Because the two factors which give rise to cases on overreaching are on the increase: mortgage lending and the desire for increased home ownership.

⁶³ G Owen, 'A New Model for Overreaching—Some Historical Inspiration' (2015) 79 Conv. pp 232-234.

⁶⁴ G Owen with 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, LVIII, pp10-11.

⁶⁵ *Ibid*, pp11-12.

trusts as discussed in the author's article, 'A Blend of English and Welsh Law in late Medieval and Tudor Wales,' (2017).⁶⁶

Given this historical background, the core sub-theme of this critical analysis now needs to be considered, namely the anomalous nature of the modern concept of overreaching and reform proposals.

Sub-theme (3):

Whether trusts should be registrable in England and Wales and the application of in personam liability to deny overreaching in a breach of trust situation

The modern concept of overreaching

3.1 Is there a continuing need for the curtain principle?

There is general agreement that the concept of overreaching in England and Wales is flawed in view of anomalies in the operation of the two-trustee rule which has just been described in section 2.1.3.⁶⁷ Although this is not a fast-moving area of the law, overreaching is a 'pivotal' concept in the laws of England and Wales, and as such ought to be of concern to academics and practitioners alike.⁶⁸ Drawing inspiration from the Australian 'caveat' system, the author has proposed that *both implied and express trusts* should be capable of registration, and has argued that overreaching should only take place in situations when a trust has not been registered.⁶⁹ It is suggested that the comparison with Australia is apt in view of the fact that, firstly, the earliest attempt in this

⁶⁶ pp 11 and 39-40.

⁶⁷ For a discussion of the anomalies, see G Owen, 'A New Paradigm for Overreaching—Some Inspiration from Down Under', [2013] 77 Conv. pp 380-381.

⁶⁸ K. Gray and S.F. Gray, *Elements of Land Law*, 4th edn (Oxford: Oxford University Press, 2005), p. 1114.

⁶⁹ G Owen with D Cahill, 'Overreaching—Getting the Right Balance,' (2017) 81 Conv. pp 37-40. There have also been calls for registration of trusts in Torrens title in New South Wales. See, R.Stein, 'Torrens Title—A Case for the Registration of Trusts in New South Wales', [1982] 9(3) Sydney Law Review, p605.

jurisdiction at land registration drew inspiration from Australian *Torrens* title; and secondly, because the Australian caveat system at least gives the owner of a beneficial interest the opportunity of being heard on a disposition which is likely to affect his or her interest. It is submitted that registration in this jurisdiction would afford beneficial owners with a similar opportunity. In order for this proposal to take effect it would require an amendment to the Land Registration Act 2002 to allow for the registration of trusts in respect of registered land transactions. The author's proposal⁷⁰ has come to the attention of leading academics: for instance, McFarlane Hopkins and Nield have said:

“...since the time that Harpum wrote, both TOLATA and the LRA 2002 have expressed the powers of trustees and registered proprietors broadly. Further, restricting the powers of mortgage is contrary to a general recognition of the utility of being able to draw on equity in the home for a variety of purposes. More recently, Owen [the author] has suggested that beneficiaries should be able to register their beneficial interest, with overreaching only operating in those cases where registration has not taken place. Owen acknowledges that, in the case of implied trusts, beneficiaries may not be aware of their interest and in any event, may not wish to register. However, he argues that the LRA 2002 is being too ‘paternalistic’ in denying the chance of registration to those who wish to do so. To date, however, as we have seen ..., English law appears resistant to curtail the curtain principle through which trusts are kept off the register.”⁷¹

⁷⁰ G. Owen with D.Cahill, ‘Overreaching—Getting the Right Balance,’ (2017) 81 Conv. pp 37-40.

⁷¹ McFarlane, Hopkins and Nield, *Land Law, Text, Cases, and Materials*, 3rd ed., (Oxford, 2015), pp 670-671.

The author developed the proposal for the registration of trusts in a conference paper at the Modern Studies in Property Law (MSPL) conference held at Queen's University Belfast on 6 April 2016. This conference paper has now been published,⁷² and the author's main arguments in favour of trust registration may be summarised as follows: there ought to be more transparency in respect of trusts in this jurisdiction, and beneficiaries should be given an opportunity of being heard on a disposition which might defeat their interests.

3.2 Lessons from the debates on the Fourth Money Laundering Directive

In March 2014 the European Parliament published proposals, the effect of which would have been to require EU Member States to set up a public register of trusts as part of the EU's drive to combat money laundering. If implemented in accordance with the original proposals, trustees would have been required to register private details concerning trusts. This would really only have affected those Member States with common law jurisdictions, as the concept of the trust is not a feature of civil law based systems. The proposals met with fierce resistance in England and Wales on the basis that such transparency was seen as a way of eroding privacy.⁷³ In the event, the Directive⁷⁴ which was eventually adopted on 20 May 2015 was less extensive in scope than was originally feared: the 'mandatory register of trusts applies only to taxable trusts and it will not be public.'⁷⁵ However, the debates which took place in connection with the passing of the Fourth Money Laundering Directive highlighted the distrust that there is

⁷² See, G Owen with D Cahill, 'Overreaching—Getting the Right Balance', (2017) 81 Conv. pp 26-44.

⁷³ See, G Owen with D Cahill, 'Overreaching—Getting the Right Balance', (2017) 81 Conv. pp 37-39.

⁷⁴ Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist funding, amending Regulation (EU) no 648/2012 and repealing Directive 2005/60/EC and Commission Directive 2006/70/EC [2015] OJ L141/73.

⁷⁵ See STEP article, <http://www.step.org/full-text-fourth-european>, Accessed, 31 January 2016.

in Europe towards the concept of the trust, which is regarded in civil jurisdictions as shady and underhand.⁷⁶

Whereas the author would not subscribe to the misguided views held by some in Europe concerning trusts in this jurisdiction, he does feel that the debates highlighted the need to revisit the need for transparency in certain areas concerning our trust laws. At present we do not have any means by which beneficiaries under a trust can be heard on a disposition which could affect their interests. This is a basic Human Right of which beneficiaries under trusts are being deprived in England and Wales.⁷⁷ Rather, they have the dubious protection of a restriction.

3.3 *Lessons from other jurisdictions*

To the best of the author's knowledge information and belief, the only jurisdiction in which it is possible to register trusts substantively is in British Columbia, and any such trusts would have to be express rather than implied trusts.⁷⁸ It will be recalled that the author is proposing that *both express and implied* trusts should be capable of registration in this jurisdiction. In practice, trusts are seldom registered in British Columbia in view of the fact that the transfer of legal title in British Columbia attracts property transfer tax, and the transfer of property into the name of a trustee would attract this tax. As in the Australian *Torrens* States and Territories, in the Canadian provinces with a

⁷⁶ See F. Nosedá, "For or against the registration of trusts-why it matters: balancing regulatory concerns and the right to privacy" [2014] P.C.B. p137.

⁷⁷ See, G Owen with D Cahill, 'Overreaching—Getting the Right Balance', (2017) 81 Conv. p 39 "...the lack of an opportunity for beneficiaries to be heard on an application for registration which might defeat their interests may form the basis for a challenge in the future under arts 1(deprivation of rights) and/or 8 (respect for the home) of the First Protocol of the European Convention on Human Rights (ECHR)."

⁷⁸ See s 180 Land Title Act, R.S.B.C. c250. The registration of trusts of land in British Columbia is explained in the British Columbia decision of *Graham v Smith*, 2009 BCCA 192. See also, Di Castri, *Registration of Title to Land*, (Carswell 1987) 17-23 to 17-26. Other Canadian provinces have their own specific Acts precluding the registration of trusts, e.g., ss 23 and 35 of the Saskatchewan Land Titles Act 2000. See also, G Owen with D Cahill, 'Overreaching—Getting the Right Balance', (2017) 81 Conv. pp 34-35.

Torrens land title system, the supersession of the beneficial interest by a transfer of the ‘uncaveated’ registered title to a purchaser for value takes place, in the absence of fraud, as a result of the operation of the relevant land title statute which obviates the need to look behind the register.⁷⁹ In the Republic of Ireland, the beneficial interests of beneficiaries are not capable of registration but they can be protected by entering an inhibition.⁸⁰ The only dubious form of protection available in this jurisdiction is by the registration of a restriction.

Therefore, what can we learn from other jurisdictions insofar as far as trust registration is concerned? With the exception of British Columbia, it is not possible to register trusts in either Canada or Australia. However, the beneficial interests of beneficiaries under trusts can be protected as claims in the various Canadian provinces and Australian States and Territories. In the Republic of Ireland, the beneficial interests of the beneficiaries are not capable of registration but they can be protected by entering an ‘inhibition’.⁸¹ The only form of ‘protection’ available in this jurisdiction is by the registration of a restriction.⁸² Although the ‘caveat’ systems of the Canadian provinces, the Australian States and Territories and the Irish ‘inhibition’ may have their respective drawbacks,⁸³ they at least provide a mechanism by which beneficiaries are given *the opportunity of being heard* on a registered disposition affecting their interests, a right which is not afforded to them in England and Wales.

⁷⁹ The author is obliged to Greg Blue, Q.C. Senior Staff Lawyer at British Columbia Law Institute for providing this information.

⁸⁰ G Owen, ‘A New Model for Overreaching—Some Historical Inspiration’, (2015) 79 Conv. p236.

⁸¹ G. Owen, ‘A New Model for Overreaching—Some Historical Inspiration’, (2015) 79 Conv. p236.

⁸² The weakness of a restriction is that the beneficiary is left with whatever equity there is in the property after sale, which is illusory in the case of a sale of a property with negative equity.

⁸³ The equitable interest is lost if ‘uncaveated’. What the author proposes is that overreaching would only take place in the absence of registration.

3.4 *Proposals for reform*

The author has submitted proposals to the Law Commission as part of its Thirteenth Programme of Law Reform to consider reforms to the doctrine of overreaching in respect of registered land in this jurisdiction. The author has suggested an amendment to section 33 of the Land Registration Act 2002 to allow for trusts to be noted by way of a notice on the title register.⁸⁴ The author's analysis on the question of whether any such notice should, or should not, trump overreaching, concludes that the proposed new form of notice should trump overreaching.⁸⁵ This would provide more transparency, and, it is suggested that it would not result in the clogging up of the register in view of the sanctions set out in section 77 Land Registration Act 2002, in the event that notices were registered without reasonable cause. In his published works,⁸⁶ the author sets this discussion in the context of a much broader debate concerning the registration of trusts generally.

The author concludes that more discussion concerning this issue needs to take place in this jurisdiction, and that until the position becomes clearer, we should consider regulating the overreaching defence mechanism by way of providing for better restrictions, but still preserving overreaching.⁸⁷ The author's view is that whichever alternative (i.e. the registration of trusts or the provision of better restrictions) is adopted, either sit well with current trends concerning broader societal moves demanding transparency in business affairs generally.

⁸⁴ G Owen with D Cahill, 'Overreaching—Getting the Right Balance', (2017) 81 Conv. pp 39-40.

⁸⁵ Ibid.

⁸⁶ Ibid, pp 37-38

⁸⁷ Ibid, p 41. In order to be clear, the author is arguing that (1) trusts should be *capable of registration*. This would defeat overreaching, but (2) where a beneficial owner did not protect his or her interest by way of registration, then overreaching would occur. As the issue of trust registration is wider than the discrete defence mechanism of overreaching, until we have these debates about the registration of trusts of land in this jurisdiction, then (3) a beneficiary should be able to 'protect' his or her interest by means of *better restrictions*, the detail of which is set out in the page numbers of the author's published work referred to at the beginning of this footnote.

Further, giving the beneficiary the opportunity of being heard on a disposition which might have the effect of depriving the beneficiary of his or her interest, would assist in fending off any potential future Human Rights challenges concerning the operation of overreaching to which reference has already been made.

Finally, the recent case of *Baker v Craggs*⁸⁸ has attracted much academic criticism in respect of that part of trial judge's judgment which held that a derivative interest in land such as an easement can give rise to overreaching effect. In his published work, the author has criticised the decision and suggested that aspects of the case should be considered by the Law Commission.⁸⁹

Breach of trust; *in personam* liability and the overreaching of trusts

3.5 The concept of in personam liability

Traditionally, in this jurisdiction, the legal explanation for denying the operation of overreaching in a situation giving rise to a fraudulent breach of trust has been to say that a statute cannot be used as an instrument of fraud (i.e. in this case section 27 LPA 1925 which provides for equitable interests to be overreached if the capital monies are paid to no fewer than two trustees). In other words, A cannot rely on the fact that he paid over capital monies to A and B to get the protection of the overreaching provisions in fraudulent circumstances. This is all very well in a situation in which the circumstances giving rise to the breach are clearly fraudulent. However, what about circumstances in which the facts

⁸⁸ [2016] EWHC 3250 (Ch).

⁸⁹ Gwilym Owen, 'Priorities and Registered Land during the Registration Gap', (2017) 81 Conv. pp 226-237.

giving rise to the breach of trust fall short of fraud, but where there is clearly some form of sharp practice?

Our land registration system is not premised on any concept of good faith and, in the absence of fraud, what is noted on the register is broadly speaking conclusive. Consequently, all unregistered estates and interests are postponed in favour of registered estates and interests. However, it seems unfair that a registered proprietor, who is guilty of sharp practice as against a third party which does not amount to fraud, should be able to get clean title at the expense of a third party whose interest has not been registered.

In personam liability may be explained as a mechanism which seeks to provide the third party in such a situation with a means of redress. The concept seeks to get around the problem of the conclusive nature of registration by saying that if A, as the registered proprietor, has committed some act of sharp practice (which falls short of fraud) against B, who has an unregistered interest, then B can argue a breach of undertaking on the part of A towards B with the result that A will take subject to B's interest. Congalen and Goymour, have argued against this possibility in this jurisdiction,⁹⁰ whereas the author has argued to the contrary, namely that *in personam* liability is certainly possible.⁹¹ Indeed, some recent cases allow for *in personam* liability.⁹²

In such cases, it would not be possible to argue that the statute is being used as an instrument of fraud because there is no evidence of fraud. What the author has proposed is an analysis which applies the concept of *in personam* liability to

⁹⁰ M. Congalen and A. Goymour, "Knowing Receipt and Registered Land" in C. Mitchell (ed.), *Constructive and Resulting Trusts* (Oxford: Hart, 2010).

⁹¹ For the arguments, see, G Owen, 'A New Paradigm for Overreaching—Some Inspiration from Down Under', [2013] 77 Conv.pp388-391.

⁹² See Emmet and Farrand on Title, vol 1, (Sweet and Maxwell), para 5.124.

restrict the operation of overreaching in a breach of trust situation which falls short of fraudulent conduct.

3.6 The application of In personam liability to deny overreaching in a breach of trust situation

Typically, cases highlighting this particular issue involve mortgages by banks. A common scenario arises when two trustees, A and B, hold registered land either for certain beneficiaries, C and D, or for themselves and C and D, and there is then a subsequent mortgage of the property to E. At the point when the mortgage is made, there will usually have been a breach of an undertaking to C and D: for instance, A and B might connive to transfer the property to A in circumstances in which A breaches a contract to C and D. A then mortgages the property to E. In such circumstances, notwithstanding the fact that the transfer to A alone is by way of two trustees, if A breaches an undertaking to C and D, E will not take free of C and D's equitable interests. This is because A has more than mere notice of a breach of trust;⁹³ A actually perpetrates it and, as such, breaches his undertaking to the beneficiaries. The overreaching of the interests of C and D does not take place and E is bound.

In arriving at this conclusion the author has drawn inspiration from the debates on *in personam* liability in Australia.⁹⁴ This is a radical departure from conventional thinking in this area. The attraction of this proposal is that it provides a jurisprudential basis for denying overreaching in situations in which there has been sharp practice which falls short of fraud. The difficulty lies in deciding upon the nature of acts which constitute sharp practice to deny the effects of overreaching. In Australia there have been debates between

⁹³ As in *HSBC Bank Plc v Dyche* [2009] EWHC 2954 (Ch); B.P.I.R. 138.

⁹⁴ G Owen, 'A New Paradigm for Overreaching—Some Inspiration from Down Under', [2013] 77 Conv. pp384-388

academics, advocating both broad and narrow approaches, to settle this issue as to where the line should be drawn. This issue has not been debated in England and Wales to anything like the extent to which it has been debated in Australia. However, there is growing acceptance that the matter is open for fresh discussion, and McFarlane, Hopkins and Nield have recognised that the author's contention merits consideration:

"Views on the potential scope of personal liability remain mixed. Smith welcomes Congalen and Goymour's conclusion that receipt-based liability should not be recognised, whilst acknowledging that the distinction between vindication and wrongdoing may not always be clear. Through a comparison with *in personam* liability in Australia, Owen suggests that receipt-based liability should be imposed only where the purchaser has 'more than mere notice of the trustee's breach'; such as where the purchaser acts contrary to a specific undertaking. He suggests, for example, that personal liability could have been imposed in *HSBC Bank plc v Dyche*. There, as we have seen..., the court held that overreaching did not take place on a transfer of land by the trustees, Mr and Mrs Dyche, to Mrs Dyche alone, as the transfer was in breach of trust. In the absence of overreaching Mrs Dyche's liability was proprietary. When the property had been vested in them, Mr and Mrs Dyche had agreed to (re)transfer the land to the beneficiary (Mrs Dyche's father) on the discharge of a debt. Owen questions the imposition of proprietary liability in the case, but instead suggests that Mrs Dyche's breach of the specific undertaking would justify the imposition of personal receipt-based liability on her."⁹⁵

⁹⁵ McFarlane, Hopkins and Nield, *Land Law, Text, Cases and Materials* (2015), p675.

The author has attended two major conferences over the last two years at which leading Australian academics and senior members of the Australian judiciary have been present.⁹⁶ The author has taken the opportunity of discussing with them the issue of *in personam* liability as an exception to the Australian concept of indefeasibility of title. Not one person with whom the author spoke raised any concerns about how *in personam* liability was operating in practice in the Australian States and Territories.

Sub-theme (4):

The relationship between the modern concept of the trust and how it interfaces with the concept of proprietary estoppel

The relationship between the concepts of trusts, contract and proprietary estoppel is dealt with in the author's publications as discussed below. This does not fit into the main overreaching topic as overreaching does not form part of that discussion. However, the author's publication referred to below is dealt with in this critical review in order to highlight a wider debate concerning trusts of land beyond issues concerning the overreaching of trusts which are the main focus of this critical review.

4.1 Sections 2(1) and 2(5) Law of Property (Miscellaneous Provisions) Act 1989 (the 1989 Act)

The author has argued that it is unnecessary to assimilate the doctrine of proprietary estoppel with the common intention constructive trust. This is because the Law Commission always intended that contracts for the sale of land should be enforceable even if the requisite formalities were missing in situations in which proprietary estoppel applied. Therefore, there is no need to look for

⁹⁶ The British Legal History Conference (Reading, 2015); Modern Studies in Property Law Conference (Belfast, 2016).

artificial overlaps with the doctrines of the constructive and/or resulting trust, which are referred to in the saving provisions of section 2(5) of the 1989 Act,⁹⁷ as a means of disengaging the provisions of section 2(1) of the 1989 Act. The saving provision was inserted by the legislature in order to disengage the provisions of section 2(1) of the 1989 Act (i.e. the requirement that contracts for the sale of land must be evidenced in writing).⁹⁸ This aspect of the author's work has been commented upon by Professor Ben McFarlane when dealing with a certain aspect of his own analysis when he states: '[t]here is also strong academic support for the submission...' Professor McFarlane then footnotes the author's article along with articles by Professor McFarlane and by Professor Martin Dixon.⁹⁹

Following the author's article on the point (2011), interestingly, Crozier has come to the same conclusion via a different route.¹⁰⁰ Crozier cites the author's publication, and argues his point of view by way of an historical analysis which sits well with the author's general overall methodology in seeking to identify, and in subsequently proposing solutions to current legal problems, by reference to historical analysis. As is set out in the author's publication on the point, the proviso to section 2(5) of the 1989 Act erroneously borrows wording from section 53 (1)(b) and sections 53(2) of the Law of Property Act 1925. These provisions relate to trusts and not contracts, and have no place in section 2 of the 1989 Act which deals exclusively with contracts and not trusts. On that footing, proprietary estoppel remedies apply quite independently to disengage

⁹⁷ NB: this saving provision does not make reference to proprietary estoppel which is why overlaps between proprietary estoppel with the concept of the trust have been made by the courts.

⁹⁸ G.Owen with O.Rees, 'Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: A Misconceived Approach?', [2011] 75 Conv. pp 496-497.

⁹⁹ Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press, 2014) at p365 footnote 68 and page p374 footnote 108.

¹⁰⁰ Rawdon Crozier, 'Estoppel and Elephant Traps: Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989', (2015) 79 Conv. pp240-244.

section 2(1) of the 1989 Act, and without recourse to section 2(5) of the 1989 Act.

Crozier, by analysing the precursor to section 2(1) of the 1989 Act, namely section 4 of the Statute of Frauds 1677 (SoF), concludes that the SoF did not relate exclusively to contracts for the sale of land. Had it done so, the proviso in the SoF relating to trusts would have been unnecessary. However, the provisions of the SoF went further than just dealing with contracts; they also dealt with trusts. It was for that reason that the proviso in the SoF for dealing with trusts was introduced.

Crozier argues convincingly that on its true construction section 2 of the 1989 Act is only meant to deal with contracts and not trusts. On that footing, equitable remedies such as proprietary estoppel exist quite independently to disengage the provisions of section 2 (1) of the 1989 Act, without having to rely on the proviso contained in section 2(5) of the 1989 Act. The proviso contained in section 2 (5) of the 1989 Act would have been required had a wider construction of section 2 of the 1989 Act been justified, namely that it applied to trusts as well as contracts. As this is not the case, then the wording in the proviso to section 2(5) of the 1989 is just verbiage and no attention should be paid to it.

The recent case of *Matchmove Ltd v Dowding*¹⁰¹ has shown how the courts still look to this artificial overlap which has generated more academic criticism.¹⁰² Further, the author's work in this area has been cited in more recent publications.¹⁰³

¹⁰¹ [2016] EWCA Civ 1233; [2017] 1 WLR 749

¹⁰² M. Dixon, Editorial 'More moves in constructive trusts and estoppel', Conv. 2017 pp. 89-92.

¹⁰³ T. Boncey and F.Ng, Case comment, ' "Common Intention" constructive trusts arising from informal agreements to dispose of land *Matchmove Ltd v Dowding* [2016] EWCA Civ 1233; [2017] 1 WLR 749', Conv. 2017

Conclusion

The overarching theme which spans the four sub-themes considered in this critical review, and which underpins the author's publications, has been to analyse the early development of the trust by reference to *uses* in order to inform our understanding of the modern concept of overreaching, by which trusts are swept under the carpet in registered land transactions. This is an important topic as overreaching lies at the very core of our system of land law. Its operation in a modern context is proving to be anachronistic, which is why the author has made proposals to the Law Commission to undertake a review of the doctrine in its 13th programme of law reform.

As was stated in the Introduction, the author has, where possible, tried to undertake the examination of the overarching theme and its sub-themes from a Welsh perspective. This is important because of the current political climate in which some in Wales are calling for the establishment of a separate legal jurisdiction. The author's publications are important in the sense that they remind us of Wales' unique past legal identity, by reference to her native laws, against the backdrop by some in Wales to establish Wales' own separate legal identity in what is currently a nationalistic political climate.¹⁰⁴ Further, Parry reminds us that in view of the UK's departure from the European Union "[t]he

pp. 146-156 at p 153 fn. 31. See also, W. Duncan, 'Property Law Review, Issue Paper Property Law Act [Qld]-Sales of land and other related provisions', Commercial and Property Law Research Centre QUT Law, 2016, p 34 fn 91; and Spencer Bower: Reliance-Based Estoppel The Law of Reliance-Based Estoppel and Related Doctrines, (Bloomsbury, 2017), pp 291 fn. 85 and 565 fn. 373.

¹⁰⁴ This is very relevant having regard to the continuing calls that Scotland should break away from the Union (possibly less so now following the recent general election), and the dilution of Unionist support in Northern Ireland's Assembly. See also, G. Parry, 'Is breaking up hard to do? The case for a separate Welsh jurisdiction?', *The Irish Jurist* 2017, 57, 61-93.

constitutional future of Wales must be considered with haste and urgency in rapidly changing circumstances.”¹⁰⁵

The discussion below begins with the author’s conclusions in respect of reforms to the operation of overreaching and then moves on to discuss the author’s findings concerning native Welsh law and Welsh identity.

The author is firmly of the view that the modern operation of the doctrine of overreaching is anachronistic. It was fashioned at a time when land was thought of more in terms of personalty than realty and when home ownership and mortgage lending were not as extensive as they are now. Consequently, at the time of the 1925 Law of Property legislation, sweeping trusts under the carpet and trading a beneficiary’s right to occupy land in favour of its proceeds of sale made sense. In fairness to the legislators at the time, they could not have envisaged the huge demand in mortgage lending and home ownership in the following century. However, there is no excuse at the present time for not making reforms. The problems associated with overreaching emanate from these trends and the doctrine is simply not fit for purpose in a modern context. We have seen how the earliest land registration Acts provided beneficiaries with a right to be heard on a disposition which would defeat their interests, a right currently denied to them. It is for this reason that the author proposes the controversial suggestion of breaching the long standing curtain principle, and calling for a simple amendment to section 33 of the Land Registration Act 2002 to allow for the registration of trusts.

Of course, the issue of registration of trusts of land is of wider interest than the discrete defence of overreaching. This matter needs to be fully debated and the author’s published works call for academic lawyers to join in the debate

¹⁰⁵ G. Parry, ‘Is breaking up hard to do? The case for a separate Welsh jurisdiction’, p 69.

alongside practitioners in the field. Until the matter is fully debated, the author has made suggestion for the provision of better restrictions.

Turning to the operation of the doctrine in a breach of trust situation, the author cannot agree that such cases should be analysed purely in terms of displaying the doctrine on the basis that a statute should not be used as an instrument of fraud. The author is firmly of the view that such instances should be analysed in terms of *in personam* liability in registered land transactions, and from the citations of the author's work by leading academics in the field noted in this critical review, there is strong academic support for analysis on this basis.

The author's views, and his understanding of the theoretical basis of overreaching, are premised on a sound analysis of the historical development of the doctrine. Whereas there was provision made for overreaching in *statutory form* in the Declaration of Title Acts 1862, the author's research has demonstrated that the doctrine is firmly rooted in the *English common law* and extends back at least five hundred years. As we have seen, overreaching of *uses* was achieved by means of the conveyancing practice of *suppressio veri*, a practice which continued for centuries.

On the Welsh side, the author has now come to the conclusion that the better view is that the Welsh concept of *tir prid*, which attempted to preserve the dynamic security in land to overcome the rigours of the inalienable nature of *cyfran*, was probably developed during the middle ages. Consequently, it was probably influenced by the English conveyancing practice of *suppressio veri* which attempted to preserve the dynamic security in land on the English side.

The continued efficacy of some of the native Welsh laws is a much under researched area. In *Attorney General v Jones*¹⁰⁶ considered by the author in ‘Medieval Welsh Law and the Mid-Victorian Foreshore’ (2014), and noted in this critical review, one of the chief prosecution witness for the Crown was one Mr O’Dowd who had been a legal official for the Board of Trade who had been inquiring into wrecks on behalf of the Crown on the sea shore. In the case O’Dowd supported the Crown’s contentions denying the efficacy of the native Welsh laws. However, the author has recently discovered a case which O’Dowd himself heard on behalf of the Crown in Pembrokeshire just as *Attorney General v Jones* was starting. On that occasion, O’Dowd found in favour of the Crown and premised his arguments on the efficacy of the native Welsh laws. The author has now substantially completed his paper, which deals with this further research, for the conferences at which he will be presenting his findings to the Society of Legal Scholar’s Conference in Dublin in September 2017 and the Harvard Celtic Colloquium in October 2017.

The issue of Welsh identity is an issue which is of great interest to general historians; it is also of much interest to legal historians. In undertaking his research concerning the dynamic security in land from a Welsh perspective the author has noted that some of the native Welsh laws can still be embraced within the matrix of the English common law, as evidenced by the recent case of *Crown Estate Commissioners v Mark Andrew Tudor Roberts*.¹⁰⁷ Further, In Tudor times, it will be recalled how the author has unearthed new evidence concerning settlement patterns in Wales, which shows how testators mimicked some of the native Welsh laws in their attempts to lessen the rigours of the

¹⁰⁶ (1863) 2 Hurlston and Coltman 347: 159 E.R. 144

¹⁰⁷ [2008] EWHC 1302 (Ch). The author considers this case in more detail in his SLS and Harvard conference paper.

English common law concept of primogeniture. The author's published works show that 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. At the time of the second of the Acts of Union (1543), it has been 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.

Against the background of calls by some in Wales (and the author supports those calls) to assert a claim for a separate legal jurisdiction, the author's published works firmly demonstrate Wales' distinct and unique legal identity in former times by reference to her native Welsh land laws. If some of Wales' native laws are *still to be found* within the construct of the common law of England and Wales¹⁰⁸ (some five hundred years after the so-called union with England), and if the "assimilationist trajectory which seemed destined to politically and legally to subsume Wales into England has been gradually reversed",¹⁰⁹ then there are now surely compelling reasons for Wales to have a separate legal jurisdiction. The UK government needs to be reminded of these historical points of detail along with the fact that the Acts of Union themselves were tolerant of Welsh customs and practice, and that against this backdrop a change is now needed. Whereas property is not a devolved area, it is nevertheless instructive to study the Welsh native land laws which serve as a reminder of Wales' distinct legal history, and act as inspiration in the debates in Wales for the establishment of a separate legal jurisdiction.

¹⁰⁸ The author develops this theme more in his SLS and Harvard paper, which is not included in the bundle of publications accompanying this critical analysis.

¹⁰⁹ G. Parry, 'Is breaking up hard to do? The case for a separate Welsh jurisdiction', p 92.

