“The Dearest Birth Right of the People of England”

The Jury in the History of the Common Law

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Towards the Jury in Medieval Wales

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Introduction

With the exercise of some ingenuity, it would be possible to write a general history of law around the word which has in English the form "right", for it appears in the juristic vocabulary of so many Indo-European languages—in Scandinavian rätt, in German Recht, and in the indirectly related French droit and corresponding forms in other Romance languages. In all these languages the word has more than one meaning, so that, for instance, in German the sense of English "law" has to be distinguished as objectives Recht, and the sense of English "right" as subjektives Recht. In English it is "law" which confuses by its two senses, of objectives Recht and of what is in German Gesetz. It was failure to distinguish the two senses which caused Austin to send English jurisprudence astray for a century; there is some excuse for him in the precedent set by medieval Roman law, which misinterpreted a famous text from the Digest by omitting its explanation. Quod principi placuit legis habet vigorem was read as meaning that it was the ruler's command which gave the law its power; the explanation cum lege, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem concessit shows that for Ulpian the justification of the legislative power of the princeps was the legislative act of the people, who could, in theory, by another legislative act rescind the delegation. If we admit that the people's power over the Roman princeps was purely theoretical, that does not acquit the medieval Romanists of a charge of misreading the text.

1 D. 3 I. pr. Austin was groping after a truth about law in a developed society. Where he spoke of the command of a sovereign, one or many, he should have thought of a rule enforced by the state, which is the legal person representing society. Of course, the concepts of enforcement and the state need much fuller analysis than it possible or would be appropriate here. The philosophers' criticism of Austin and of other lawyer-jurists is too often misconceived because the philosopher does not distinguish between moral duty and legal obligation. Lord Hewart, Lord Chief Justice at the time, saw the distinction clearly when he said during the hearing of an application to re-open a re-trial from Caernarfon to London, "I seem to remember an eighteenth-century philosopher who said that a rebel might think it a moral duty to rebel, but the State might think it a duty to hang him for it": D Jenkins, A Nation on Trial, tr. by A Cockett (Cardiff, Welsh Academic Press, 1998), 104. There may well be a prima facie duty to obey the law because there is a presumption in an ordered society that the law is aiming at maintaining the right; but the presumption is certainly rebuttable.
In Irish, recht means "law", but the Welsh cognate means neither "right" nor "law", though a compound cyfraith² ("co-law", as it were), is the still living word for "law", in the Recht sense, and often in ordinary usage in the Gesetz sense also.³ Rhait is not a living word in modern Welsh; in the medieval lawbooks it means compurgation or the group of compurgators, and rheithwr ("rhait-man") means "compurgator"; today rheithwr means "juror", and the twentieth century coined rheithgar for "jury". The account which here follows will suggest that this development is not an accident; and any reader familiar with English medieval law will recognise parallels and contrasts with that law: most of them can be traced through Pollock and Maitland, so that we can be sparing of references. Before we can begin to trace the development, however, we must look at the sources of our information about medieval Welsh law. Our main source is the manuscript lawbooks in Latin and Welsh, for we have no "native Welsh" court records:⁴ it was apparently a principle of Welsh law that the written record of proceedings should be destroyed when the case was concluded, and if any question later arose about the proceedings it would be decided by the testimony of the judges involved.⁵

THE EARLY TEXTS

In medieval Welsh texts, and in modern Welsh-language treatment, Welsh medieval law is Cyfraith Hywel, "the law of Hywel", and no one doubts that the Hywel in question was Hywel Dda, "Howel the Good", who died in 949 or 950 as ruler of all Wales except the far south-east. Most of the medieval manuscripts of Welsh law have a preface that tells of a codifying assembly convened by Hywel at "the White House",⁶ which is taken to mean Whithorn on the Carmathenshire-Pembrokeshire border.⁷ Most students agree that

² Here and elsewhere modern Welsh spelling is used for Welsh words, since there is no uniform standard medieval orthography; but quotations will follow the spelling of the quoted texts.
³ In careful writing and speech, Gesetz will be dafad, and in the names of statutes, Act is translated Dafad. In theological writing "Law" (as contrasted with "Grace") is normally cyfraith; but dafad is also fairly common.
⁵ "The court priest has three functions in sessions: to delete every case (dad) which has been concluded from the roll; second is to keep in writing until judgment every case until it is concluded; third is to be ready and sober at the king's need to write letters and to read them": Cyfraithau Hywel Uda yn yr Llyfr Blegywyrd, ed. by S J Williams and J E Powell (Cardiff, University of Wales Press, 1942, repr. 1961; hereafter Bleg.) 13.15–20. More detail, and more improbable detail, is added in manuscripts from the early fourteenth century on.
⁶ Whithorn Abbey is Y Ty Gwyn, "the White House" in Welsh, but the abbey was founded some two centuries after Hywel's time; it is argued that Hywel would have had an administrative centre in that district, and one manuscript says that the White House was a white-walled hunting lodge. See also infra at n. 85.

Hywel did something for Welsh law; but it is clear, as Maitland said well over a hundred years ago, that much of the material in the Welsh lawbooks is "neither law made by any 'sovereign one or many' ..., nor yet 'judge-made' law, nor yet again a mere record of popular customs. It is lawyer-made law, glossators' law, text-writers' law".⁸ Yet there can be no doubt that until 1536, when the law and constitution of Wales were assimilated to those of England, we had in parts of Wales a quite advanced body of law of our own. In these manuscripts, written between the first half of the thirteenth century and the early sixteenth, practitioners or teachers of law recorded old and new material which might be of use in court or classroom: hence they show some survivals from a much earlier age, often in fossilised form, but they also contain some sophisticated statements of principle, as well as effective rules of practice.⁹ The picture they present is partly modified by such records as survive, in extents and surveys and court records from the period after 1282, but is on the whole confirmed by them: if medieval Wales had no sovereign lawmakers, it certainly had official law-enforcement officers.¹⁰

The oldest surviving manuscripts of this law are of the thirteenth century; some 40 manuscripts, five in Latin and the rest in Welsh, survive from the period during which Welsh law was of practical importance somewhere in Wales, rather than of merely antiquarian interest. Among all these manuscripts there is only one exception to the rule that they are all at least slightly different,¹¹ because every compiler, to use a neutral word, took into his book whatever he thought might be useful, so that any Welsh law manuscript is virtually certain to include, on the one hand, obsolete material retained ex abundanti cautela or from force of habit, and, on the other, recent innovations and even statements of what the compiler hoped would be accepted as good law.¹² All the manuscripts are made up of tractates.

¹² Because an item in a lawbook may be a fossil or a recent innovation, it is unsafe to cite passages from the lawbooks as evidence of conditions in either Hywel's century or that in which the manuscript was written.
¹ⁱ MS Cardiff 2 is an exact copy of BL Cotton Titus D.X. On the other hand, Gwilym Wasa (of the New Town of Dinewr, near Llandeilo in the Tywi Valley), cut out the "Laws of Court" from the three manuscripts which he wrote early in the fourteenth century because they were no longer in use. Gwilym was an "English burgess" of this new borough, though his name, like that of several of his fellow-burgesses, shows that he was Welsh: M E Owen and D Jenkins, "Gwilym Was Da", (1980) 21 National Library of Wales Journal 429.
¹² "Every legal treatise, to one degree or another, states law as the author thinks it should be": D J Scipio, "The Mirror of Justices", in J A Bush and A Wiffels (eds), Learning the Law (London and Rio Grande, The Hambledon Press, 1995), 85 at 97. This accounts for the many statements in the Mirror which conflict with the law found in the records of its age.
with or without fragments and a “tail”. In a few manuscripts the tractates are not arranged in any discernible order, but the manuscripts which have the Hywelian preface show enough order to imply an intention to present a comprehensive statement of the law; and in spite of their differences, the comprehensive Welsh-language manuscripts fall into three groups, which we now label with the personal names “Cyfnethr”, “Blegwyryd”, and “Iorwerth”, without thereby implying any particular relation between the lawbook and the person. Most of our attention will be given to the Iorwerth Redaction, with its presentation of the “classical law” of thirteenth-century Gwynedd, and to the “revised edition” (Llyfr Colan), which draws on the Iorwerth Redaction and a lost Latin source. All three redactions purport to present their material in three books, the first being “the Laws of Court” and the second “the Laws of the Country”; but whereas these two can be clearly identified, the third book can be so identified only in the Iorwerth Redaction, which is the most tidily organised of the three.

The Cyfnerth and Blegwyryd Redactions have a southern bias and Iorwerth was quite certainly put together in Gwynedd early in the thirteenth century. Of the five Latin manuscripts, Redactions B, C and E “probably belong to North Wales”, whereas Redactions A and D have a southern bias, and indeed it has been shown that the Blegwyryd Redaction is a translation of a lost Latin manuscript from which Latin Redaction D is also derived. 16

13 A tractate is a collection of statements on some particular aspect of law. The name was adopted by Sir Goronwy Edwards because “tract” (the word used by specialists in Irish law) “might suggest something which smacks of political or ecclesiastical propaganda”: G Edwards, “The Historical Study of the Welsh Lawbooks”, (1962) 12 Transactions of the Royal Historical Society, 5th series, 144.

14 The existence of the three groups was first brought before the public in Ancient Laws and Institutes of Wales, ed. by A Owen (Public Record Commission, 1841; hereafter AL) in two editions—a two-volume octavo and a one-volume folio. References are to book, chapter and section e.g. V1.6.6, with the addition e.g. VC, DC or GC for books I-III. Owen called the Iorwerth, Blegwyryd, and Cyfnerth Redactions respectively the Venediotan, Dimeritan, and Gwentian Codes—names which are now avoided, though the abbreviations are used for any necessary reference to these texts (hereafter VC, DC and GC respectively), using the division into books, chapters, and sections which is the same in octavo and folio editions. The “Codes” are followed (in the second volume) by books numbered IV to XIV, of various dates. Book XIII was suspect for Mainland, supra n. 8, vol. 1, 206 and note 1 and, having been denounced about 1800, is not now used by scholars. Charles-Edwards, supra n. 4, 17–38 discusses the manuscripts. See also D Jenkins, “The Lawbooks of Medieval Wales”, in R Eales and D Sullivan (eds.), The Political Context of Law (London and Konceverte, The Hambledon Press, 1987), 1: this revision in the light of later work by other students, and I would no longer venture on a stemma diagram. For a general account of work on Welsh medieval law, see D Jenkins, “A Hundred Years of Cyfranet Hysw”, (1997) 49/50 Zeitschrift für Celtische Philologie 349.

15 Charles-Edwards, supra n. 4, 20.


There is abundant evidence, in the wholesale copying of fragments and tractates from one redaction to another, for what can be called the dogma that there was one law for all Wales, despite its political fragmentation, so that any lawbook could be used anywhere in Wales. The work of nearly half a century has refined, but in essence confirmed, the view expressed in 1951 by the late Professor T Jones Pierce, “that from the point of view of content the books of Cyfnerth, Blegwyryd, and Iorwerth stand in related chronological sequence—and in the order named”. 17

The third book in the Iorwerth Redaction is given the title “Justices’ Test Book” (Llyfr Prawf Ynaid), 18 and the prologue of some manuscripts to that Book tells us that it

“was gathered together by Iorwerth ap Madog from the book of Cyfnerth ap Morgenau and the book of Gwair ap Rhunfawnd and the book of Goronwy ap Moriddig and the old book of the White House, and besides that from the best books that he found also in Gwynedd and Powys and Deheubarth.”

The first chapters of this Test Book are a fine illustration of the way in which the lawbooks took the form in which we now have them. At some date at which I will not try to guess, someone, probably a teacher rather than a practitioner, saw the mnemonic value of the enamef form, and cast his learning about abetment into that form, perhaps with a little stretching at some points. He may have dictated it to pupils, who made it the nucleus of their commonplace books, adding to it other statements about the same subjects; the added statements would of course vary from pupil to pupil, and might lead from one subject to a subject related to it: so the treatment of homicide (galanaf) led to sarhaed. Perhaps the principle had already


18 The Welsh word translated “juridical office” is the abstract noun ymddiaeth: it might be more correct to translate it by “judicial status” or even “juristic status”. One of the officers of the court is sometimes called braudur, which can be analysed as “judgement-man”, i.e. “judge”: he is sometimes called ynaf, which is, less easily analysed and may imply learning rather than office. The court ynaid would give advice on law to the court as well as sitting in judgement on occasion.

19 The Law of Hywel Dda, Law Texts from Medieval Wales, ed. and tr. by D Jenkins (Llandysul, Gomer Press, 1986; 2nd edn with minor corrections, 1990; hereafter LTFMW), 141.25–31, translating AL, supra n. 14, VC III. pr., (vol. 1, 218–7). This introduction is not in Llyfr Iorwerth, ed. by A R Wllam (Cardiff, University of Wales Press, 1960; hereafter Ior.), its main text is taken from manuscript C, which is now thought likely to be the oldest surviving manuscript of the Iorwerth Redaction: see D Huws, “The Manuscripts”, in T M Charles-Edwards et al. (eds.), Lawyers and Laymen (Cardiff, University of Wales Press, 1986), 119, but the mention of the White House book is an addition from a fifteenth-century manuscript. The White House Book is, however, cited as authority in Llyfr Colan, ed. by D Jenkins (Cardiff, University of Wales Press, 1963; hereafter Col. cited by numbered sentences) in terms which suggest that it was in Latin: see infra at n. 87.
emerged that no-one should be accepted as a lawyer without a knowledge of the Three Columns and the Value of Wild and Tame: this principle is presented in a single sentence in the Cynethr Redaction; 20 but in the Blegywyrdd Redaction and in some Iorwerth manuscripts there is much more detail, including a description of the procedure for formal admission to the status after an examination by the Court justice. 21 It was then a good teacher (a successful crammer?) who saw the value of a Test Book which would contain those materials of which his pupils had most need. So was created a separate book, in manuscript C, which appears to have existed separately before being attached to the books I and II of the Iorwerth Redaction.

There was good reason for the importance to young lawyers of the Three Columns: the abetments were crimes which were not primarily torts. The Welsh lawbooks certainly support Maine's assertion "that in the infancy of jurisprudence the citizen depends for protection against violence or fraud not on the Law of Crime but on the Law of Tort." 22 We need to remember that private prosecution, the appeal of felony in medieval England, came before any organised public presentation of crime, and in Welsh law it is clear that crime is secondary. The norm may allow the state (that is the ruler, whether he is called king or lord) a penalty as incidental to the compensation paid to the victim: but to allow the ruler to claim a penalty when no claim is made on behalf of the victim was exceptional, as the triad of the "three staves of blood" strikingly illustrates. Bloodshed was an offence against the ruler as well as the victim; the ruler was entitled to the larger penalty, the dirivy of twelve kine for this. 23 But there were three degrees,
The point could be more clearly made; but it is evident that the victim of theft or arson, or the kin of the homicide victim, took nothing from the abettor, because they were fully compensated by the principal offender and/or his kin. And though we speak of compensation, the Powysian Three Columns will serve to remind us that homicide was originally grounded for feud between the kin of the killer and the victim; and though the word galanas is in most instances applied to an act of homicide or to the compensation due for the homicide (in English terms wergeld), its basic meaning is “blood-feud”, and indeed galanas is linguistically equal to gelynaeth, the still living word for “enmity”. The ruler, the infant state, comes into the picture as soon as he feels important enough to regard the blood-feud as damaging to the prosperity of society or to his own dignity and strong enough to induce the victim’s kin to waive the feud in return for a price paid by the homicide and his kin. That price is the price of peace for the homicide’s kin, rather than compensation for the loss of a kinsman. If such a distinction seems a little too fine-drawn, we can cite in its support a ruling about the payment of land in discharge of galanas liability: if a man gave up all his patrimony in such discharge, his son could not reclaim the land, “since peace was bought with it for the son as for the father”. The ruler was concerned to preserve harmony in his realm, but in the basic case he claimed no penalty from the homicide, though he did take a commission of a third of the compensation as the “enforcing third” (traean cymell). Only where some special feature of the killing could be regarded as affecting the dignity of the ruler was a penalty payable to him in respect of the principal offence; but it was the ruler alone who claimed payment in respect of the abetments. Those guilty of abetment would often be of kin to the principal offender so that they must contribute to the galanas: that would not affect their liability for abetment.

32 LTWM, supra n. 19, 143.23–9, translating lor., supra n. 19, §104/10–12.
33 The form gelynaeth already existed in the early lawbooks’ period: the modern word for “enemy”, gelyn, has replaced gal, (plural galon) which seems to have other meanings as well as the undoubted meaning of “enemy”. The comments of some language specialists have tended to confuse by concealing the truth that galanas means “homicide” and “wergeld” because it means “enmity”.
34 LTWM, supra n. 19, 110.16, translating lor., supra n. 19, §87/2.
35 The galanas payment was distributed among the victim’s kin in the same way as it was levied from the homicide’s kin: thus the victim’s brother would take as much as the homicide’s brother paid. The homicide himself must pay one-third of the galanas, and as the victim was not alive to take that payment, it was conveniently available for the ruler.

MEDIEVAL TEXTS ON PROCEDURE

Material relevant to procedure can appear almost anywhere in a lawbook: thus it is a triad that brings out effectively a principle of procedure:

“There are three legal replications in law, differing from each other: confession; or denial; or lawful defence so that the claim is not answered.”

The third replication is what would be called “confession and avoidance” in English law. A simple Welsh example would be that of a defendant charged with theft, who could plead that he acquired the property from a named person—in English terms, “voucher to warranty”. We shall return to this point later.

There are, however, some tracts which concentrate on procedure: the lorwerth Redaction has a detailed account of procedure in land law. But overarching interest attaches to a tractate which is dignified in the manuscripts with the name of “Llyfr Cynghwaesedd”. Aled William made Llyfr Cynghwaesedd conveniently available in a paper of that name in 1988. T M Charles-Edwards had broken new ground in his of 1986. Both men followed Ancient Laws in translating cynghwaesedd by “pleadings”, but Llyfr Cynghwaesedd is better understood as “the Book of Procedure” than as “the Book of Pleadings”. Charles-Edwards pointed out that it was a sign of the maturity of the thirteenth-century Welsh law that it developed a “new genre of legal writing”, which created a lasting record of instruction on the presentation of cases to the courts—earlier in the Welsh lawbooks than in the English works published under such modern names as Novae Narrationes and Bresia Placitata. Llyfr Cynghwaesedd assumes the existence of the lorwerth Redaction and is a conscious supplement to it.

31 AL, supra n. 14, XIXxx.1, correcting in italics the translation of AL.
32 A William, “Llyfr Cynghwaesedd”, (1988) 35 Bulletin of the Board of Celtic Studies 73. Unlike such modern labels as Llyfr Iowrwaeth, Llyfr Cynghwaesedd/Cynghwaesedd is used in the medieval manuscripts to identify (not always very clearly) a particular collection of material.
34 I have been glad to find that my translation was forestalled by M Owen in Y Traddodiad Rhyddiaeth ynsy Oesau Camol, ed. by G Bowen (Llandyssil: Gomer Press, 1974), 237.
35 Attention has been drawn before now to passages in Welsh lawbooks which anticipate declarations of principle by English common law judges: see D Jenkins, “The Significance of the Law Of Hywel”, (1978) Transactions of the Honourable Society of Cymmrodorion 54 at 66. Like some of the names used for Welsh material, the names of these English collections are modern labels.
MEDIEVAL WELSH PROCEDURE

Medieval methods of deciding cases have traditionally been condemned as irrational. The better view about the contrast between those methods and our modern methods is that the former are objective and the latter subjective: that is why it has been appropriate to say that in the medieval context, "we have not to speak of trial, we have to speak of proof". For England, the painfulness of the ordeal and the apparent unfairness of battle excuse the condemnation; but Wales knew neither ordeal nor battle. There is no early Welsh word for "ordeal"; and the word ornest, found in some late texts for "trial by battle", is a borrowing first clearly evidenced in the fourteenth century. The references in the lawbooks are all late and ambiguous: at the most they may be evidence of a little infiltration of English practice into a marcher or near-marcher community. For medieval Welsh law, the all-important element was the oath: the litigants' oaths in affirmation of their claims or their denials of assertions made against them, and the oaths of testifiers of one kind or another. If we suppose that the operation of those oaths was unconditionally mechanical, so that in the absence of supernatur- al intervention the final judgment of the court might be directly contrary to

39 The word aihirbraid is found earliest in a dictionary of the early eighteenth century. A poem in the classical form known as the awdl is given in the manuscripts the title "Awdl yr Hazarn Twymyn", "the awdl of the Hot Iron". This was written by a poet who composed for many years on either side of the year 1200, and is an appeal to the saints and to God for help in carrying the hot iron: but there is nothing to show where the ordeal was to be conducted, and it is more than likely that it was somewhere in the Marches where Norman practice ruled: N A Jones, "Prydydd y Moch: Dwy Gerddi "Wahanol!"", (1992) 18 Ysgrydym Beirnasodi 71. The only reference to trial by ordeal in the law manuscripts is a trial (A1, supra n. 14, XIV-21.4) listing the three pains (fair poen) according to the law of Dyfawd, the mythical predecessor of Hywel Dda. These were hot iron, hot water and comb: since Hywel Dda is said to have ruled that these were not right, it is clear that ordeals were not used in indigenous Welsh law. For a persuasive explanation of this striking fact see T G Watkin, "Saints, Seaways and Dispute Settlements" in W M Gordon and T D Fergus (eds), Legal History in the Making (London and Rio Grande, The Hambledon Press, 1991), 1. The passage cited as referring to ordeal in T F Ellis, Welsh Tribal Law and Custom in the Middle Ages (Oxford, Clarendon Press, 1926), vol. 2, 303 in fact refers to battle (orneste). The agreement of 1126 AD recorded in the Book of Llan Ddau, under which ordeals at Cardiff were to be sanctified by the church of Llandaff, is of course concerned with the law of the Norman lordship: J Gwenogryn Evans and J Rhys 1979, repr. Aberystwyth, National Library of Wales, 1979), 28.
38 According to Geirredwr Preifysgol Cymru (Cardiff, University of Wales Press, 1950); hereafter GPC, s.v. "ornest", the borrowing may be from Old English, but this seems improbable. The word is found in some late law texts in Old English, but is not recorded in the dictionaries of Middle English. Like many other borrowed words in Welsh, ornest has acquired an initial g; and gornest is now used for sporting contexts of all kinds, and also figuratively, perhaps most often in politics.

the truth, we have not looked at the lawbooks closely enough. The presentation of oaths in evidence and compurgation is so hedged about by special conditions, with the obvious intention of making it as likely as possible that the truth would emerge, that few swearers can have succeeded in the effort to mislead the court. In England:

"The concentration of justice at Westminster did much to debase the wager of law by giving employment for a race of professional swearers. In the village courts, on the other hand, it would not be easy for a man of bad repute to produce helpers: his neighbours would be afraid or ashamed to back his negations".

So for Wales, where there was no central concentration of justice, much of the learning about procedure relates to the validity of oaths and to the extent and conditions of the support required for them.

The abnormal word "testifier" has just been used with intent, partly because the word "witness" would carry too much of the aura of twenty century trials, and partly because of a linguistic difficulty, which arises from an overlap between terms and senses. Like Irish, Welsh has borrowed the Latin testis, in the regular form tyst, and has formed from it the verb tystu and the action-noun tystiolaeth, which in turn has given a verb tystiolaeth. The basic noun tyst is used in two senses: the wide sense of the giver of any kind of evidence, which I have translated as “testifier”, and the narrow sense of my “attester”, who is specifically called to witness to something. So when a tyst is contrasted with a testifier of another kind, he must be an attessor; and the verb tystu is used for actions concerned with attestation, and tystiolaeth for the giving of evidence. The other kinds of testifier were the “keeper” or “maintainer” (ceidwaid) and the “knower” (gwybydd); the maintainer testified to some state of affairs, the gwybydd to some event. Testifiers would need certain qualifications and must confirm their testimony in a specified way, but if the objective requirements were fulfilled, the matter was concluded: the court must give its verdict accordingly, though it might hold it up until security had been given for payment of the judges’ fees. This means that the judge’s function was simpler than in modern Wales, though it

39 Pollock and Maitland, vol. 2, 636. Cf. ibid. 543: “The church could not keep up the character of the compurgators in her own courts. To say of a man that he was a common swearer before the ordinary was to blast his character.” For a twentieth-century parallel, see M Hasluck, The Unwritten Law in Albania (Cambridge, University Press, 1954), updated by P Stein, Legal Institutions (London, Butterworths, 1984), 22-3.
40 In modern Welsh another form, tyst, is most often used for the giving of evidence; tystiolaeth may be written and heard in that sense, but perhaps more naturally in relation to testimony to religious experience.
41 In some translations “eye-witness” is used, though the gwybydd is often an ear-witness. “The Irish parallel suggests that gwybydd is a re-formation from gwydd, in which the root is gwydd, ‘presence’: (LTMW, supra n. 19, 256). But knowe is kept as the translation here, if only because ‘presence’ does not offer a convenient agent-noun.
was comparable in one respect with that of the judge in a jury trial. The modern judge sums up the evidence, and tells the jury what the law requires from the evidence. Because the jury has to decide what evidence to believe as well as applying the law to the accepted evidence, there is a real danger that the judge’s statement of the law is misunderstood: so the jury’s verdict may be upset on appeal because the judge’s presentation of the law was unsatisfactory. Thus the really important function of the judge is to decide on the relevant law—and that is what the medieval Welsh judge did. He chose the rule of law which was to be applied, and called for the appropriate proof by the appropriate oaths: if these were duly given, the case was decided in one way, and if they were not duly given, it was decided in another way. The final result of the case could be the subject of what we may think of as appeal; but it is appeal only if we remember that the Welsh word means “call”. In the appeal of felony the man accused was called out, just like the man challenged to a duel. Moreover, it was the judge’s ruling which was being doubted, and it was he who was challenged to defend it, by procedures involving oaths. A judge who was validly held to have given the wrong ruling would be disqualified for life and required to pay the legal value of his tongue, which was 176 kin, equal to £44 at the standard legal price for the cattle.

RULES ON PROOF

Our first samples of the limitations on oaths in litigation can be taken from the first chapters of the Iorwerth Test Book. These carry out all the redactions of the First Column of Law, the Nine Abetments of Homicide (galanas), Theft, and Arson.

The first Column of Law sets out the basis of liability under the nine heads, and the penalty for liability and the requirements for disproof of liability under three heads. Like the Powys version, the Gwynedd version has some words of linguistic interest; of these, only one will be noticed here, namely tafawrdd, “red-tongued”, which is clearly modelled on llofrudd, “red-handed”. In contemporary Welsh, llofrudd means “murderer”, and llofruddiant, “murther”, is contrasted with dynladdiad, “manslaughter”, but for medieval Welsh “murther” is a wholly misleading translation. For one thing, the contrast is not between murder and other forms of homicide, but between the principal offence and the abetments. For another thing, llofrudd is sometimes used for the principal offender in relation to other crimes: thus abettors of theft do not have “to pay anything to him who owns the goods, since they are not principal offenders” (canyt ynt llourudywyt).

The teaching lawyers may have been trying to devise a mnemonic system for the abetments, for as well as the red-handed and the red-tongued, we have in some manuscripts “the red-eyed”, llygadrudd, who has watched or seen the killing and has not prevented it.44 Any such mnemonic plan was not carried out, but the abetments of galanas were tidily arranged in three sets of three, of increasing seriousness. Of the nine as given in the Iorwerth Redaction:

“[F]irst is pointing out the person who will be killed to him who will kill him, and he is called red-tongued; second is giving counsel to the person who kills the other, to kill him; third is agreeing with him and approving him. For each of those three points, the oath of a hundred men denies if; if he admits it, let him pay nine score pence. Fourth is being an onlooker; fifth is companionship with the person who kills the other; sixth is going to the townland where the person who will be killed is, with him who will kill him. For each of these three, the oath of two hundred men, or twice nine score pence if it is admitted. Seventh is, helping the person who kills the other, and that is called aid to violence; eighth is to hold the person who will be killed, until he who will kill him comes; ninth is to see the person killed in his presence, without protecting him. For each of these three, if it is denied, the oath of three hundred men, or thrice nine score pence if it is admitted”.45

The Three Columns are concerned with prosecution by the rular of abettors who are not being accused of the principal offence: it seems likely enough that the oaths to deny abetment needed more backing than the oath to deny the principal offence, or the principal offence and all abetments, as some passages put it. But the lawbooks do not speak with one voice, and a judge faced with advocates citing different lawbooks would find it difficult to decide exactly what proof should be offered. There is manuscript authority for requiring the oath of three hundred to deny “the principal offence of blood and wound and killing of a person”;46 that is as much as the backing required for the most serious of the abetments. The “revised edition” of this text, Llyfr Colan, has a different rule: “The oath of a hundred men denies homicide and the killing of a person, and that according to the law of Hywel”,47 and this edition seems to be claiming the strong authority of an

42 It has been used far too often by responsible scholars. The entry in GPC, supra n. 38, is confusing: it should have presented the medieval and later meanings under separate subheads.
43 LTMW, supra n. 19, 157.11, translating lor., supra n. 19, §111/13. A William’s note is
44 Nothing in the texts reveals whether the llygadrudd was the fourth or the ninth abettor; the latter seems more likely.
45 LTMW, supra n. 19, 143.1–21, translating lor., supra n. 19, §104/4–9.
46 LTMW, supra n. 19, 149.1–3, translating Llyfr Dy Du o Wwnn, Fasmisyle of the Chirk Codex of The Welsh Laws, ed. by J Gwennogfr Evans (Llandrindod, issued to subscribers only, 1909 [reprint 1921]), 77.2–3 (= VC III.17A “Llyfrchafar da a genedlyd y wuda llourudywyt gwaed a gwebyll llygadrud y ddyn.”
47 "Liu canien a gynwa llygadrywydd, a llaf dyn a henny herywyd keurew y Hywel": Col., supra n. 19, §276.
older tradition for this rule. The Cyfrnerth and Blegywyrd Redactions go further: for them the denial of the principal offence of homicide needs the backing of only fifty men; but the wording in the two Redactions pulls in opposite directions. According to the Blegywyrd Redaction:

“Whoever denies homicide [lofrudyaeth] and its abetments wholly gives the oath of fifty men. And that is a compraguration of country [reith gwalat]; and it is called ‘denying wood and field’ [diwat coet a maes]. And like to that, whoever denies homicide apart from the abetments, or one abetment without anything else, gives the oath of fifty men.”

The expression gwadu coed a maes must imply denial of homicide, and the Cyfrnerth Redaction uses only that expression in the rule “the one who denies wood and field, let him give the oath of fifty men without slave and without alien, and three of them under vow of abstinence from riding and linen and woman.” Coed a maes seems to look back; but we shall see that rhaith gualad looks forward. For the moment we turn back to the abetments of homicide, and note that if the numbers of compurgators required seem incredibly large, there is evidence that in the aftermath of the Glyn Dwyrising, people loyal to the English Crown were complaining that the kin of those killed by such loyalists were requiring:

“that they would them excuse of the Death of such Rebels so slain by one Assache, after the custom of Wales, that is to say by the Oath of Three hundred men”.

The lawbooks’ definition of the Three Columns confines them to the abetments, and the abetments of homicide may once have stood alone: but in the oldest surviving manuscripts there are substantial additions about various aspects of the law of homicide, beginning with rules for the distribution among the kin of the liability to contribute to the galanas payment and the right to share in it. There is confusion enough in these rules to confirm the belief that the whole system was breaking down in the thirteenth century. We may indeed doubt whether the ruler would allow the law to “release vengeance” if the compensation procedure was not carried through, as the Blegywyrd Redaction provides; but this passage makes it clear that we have to do with commutation of vengeance, as do other passages such as this from Llyfr Colan:

48 Bleg., supra n. 5, 30.29–31.5; LartD, supra n. 25, 333.22–27 gives the same rule in Latin, with llaurnystaeth, affileshen, and diuwad coed a maes in Welsh; it does not mention rhaith gualad.

49 WMl, supra n. 20, 37.17–20. The provision about abstinence is found elsewhere in special cases.

50 1 Henry V c.6 (1415).

51 Bleg., supra n. 5, 110.3,6,9.

“Neither a cleric nor a woman is entitled to share of galanas, since they are not avengers. They are bound to pay on behalf of their children unless they give their oath that they will never have children.”

The appended material also deals with special cases of liability, of which only one will be mentioned here:

“If it happens that a person kills another with poison, he pays double galanas, for it is furious; or else let his life be forfeit for one galanas, and his manner of death will be at the will of the Lord, whether by hanging or burning; if he denies it, let him give the denial for killing a corpse, redoubled; that is the oath of six hundred men. The persons who make poison in order that others be killed with it are at the option of the Lord, whether they are banished or put to death; if they deny it, let them give the oath of six hundred men.”

As a further pendant to the abetments of homicide the Test Book has much to say about sarbhaed, which in Welsh law corresponds closely enough to the intestitia of Roman law. To kill anyone was prima facie sarbhaed, but the Iorwerth Redaction goes too far with “no one is killed without first suffering sarbhaed” for there were exceptions: if a blow aimed at an animal rebounded and killed someone, galanas was payable but not sarbhaed. Perhaps we have pedagogic ingenuity in the case of the bowman whose arrow goes through his intended victim and kills another man behind him: sarbhaed is payable only for the first. The measure of galanas and sarbhaed varied with the status of the victim, so that the lawbooks have to go into more detail than need concern us. According to the Test Book:

“The legal measure of galanas is three times the sarbhaed of the person killed, according to his status. Others say that for the person whose sarbhaed is three kine and three score pence, the worth is three kine and three score kine; and similarly as every person’s status rises”.

52 Col., supra n. 19, §§ 299, 300: “Ny dily na gureyc na oc cheilec nan o alanas, canyt ynt dyal. Wynens a delmain talus tro eu plant or odrom eu lla na to plant udun yth.” Cf. LTMW, supra n. 19, 130.22–9, translating Bleg., supra n. 5, 32.27–33.3.

53 LTMW, supra n. 19, 151.13–26, translating AL, supra n. 14, IV.11.12,13.

54 In modern Welsh sarbad means “insult”. Since the medieval form sarbhaed has the double sense of the insulting act and the compensation payable for it, the medieval spelling is used for these senses. There is no sufficient authority for the spelling sarbaed used in the translation of Ancient Laws.

55 Col., supra n. 19, § 297: “Fau blader din, centaf y serbheyr.”

56 LTMW, supra n. 19, 147.29, translating lor., supra n. 19, § 108/1; cf. Col., supra n. 19, §297.

57 LTMW, supra n. 19, 153.11–28, translating DwCol., supra n. 23, §§ 169–72.

58 LTMW, supra n. 19, 144.15–20, translating lor., supra n. 19, § 105/3,4. “Score pence” translates Welsh segaen arian, for which some scholars prefer “ounces of silver”. The Latin texts have unciae, and of course twenty silver pences did (or should) weigh one ounce Troy.
The others were certainly right: only the king and his “members” had a *sarhaed* of a third of the *galanas*. The Welsh theory of class and status is briefly expressed by the Blegwyrd Redaction in triad form:

“There are three kinds of man [dym, that is, “human being”]: a king, a *breyr*, and a villein, and their members. The members of a king are those who are related to royal status though it does not belong to them”.

The Iorwerth Redaction is more definite: the king’s members “are his sons and his nephews and his male first-cousins”, and adds that these men

“will be of that status until they take land, and after that their status will follow that of the land they take, except for this, that if it happens that they take villein-land the status of their land will rise to make it free land”.

The *breyr* was a free man who had come into his inheritance of land by the death of all his direct male ancestors: his status was higher than that of his descendants, but he was of the same gentry class. The class is defined by the Welsh word *bonbeddig*, a derivative of *bôn*, “stock”. The three-unit status was that of the male *bonbeddig* who had not yet inherited land: on his father’s death he would rise to six-unit status, but he might in the interim have risen to four-unit status by becoming a member of the royal bodyguard (teitlu), or to even higher status as a court officer. Most court officers were of six-unit status, and the chief officers were of a nine-unit status. An unmarried woman was half the status of her brother: when she married, her *galanas* was unaffected, for it was her own blood relations who were concerned in any question of homicide: but her *sarhaed* would be one-third of the *sarhaed* of her husband, or of her last husband if she was a widow. The status of a villein depended on the class of his patron-lord: a king’s villein was of three-unit status, a *breyr*’s villein of half the status of a king’s villein.

This relation between *galanas* and *sarhaed* applied to the gentry and villein classes, and to the class of settled aliens, though the triadic statement does not account for them. It did not apply to those above or below those

59 Bleg., supra n. 5, 5.12–15.
60 LTMW, supra n. 19, 7.1–2, 16–21. The final exception recalls the arguments in England about the relation of villein tenure to villein status.
61 The word means “stock” both literally and metaphorically: it is today freely used for the trunk of a tree or the stub of a cheque. It is unfortunate that so many writers have regarded the *breyr* as a noble, perhaps under the influence of the nobilis of some Latin texts: the name *uchelur*, an alternative for *breyr*, has had a similar effect, since in modern Welsh it is used of the squ赖archy. *Breyr* can be translated by *paterfamilias* if we remember that his position was not exactly that of his Roman counterpart. The point of the name *bonbeddig* is that the *bonbeddig* is of identifiable stock; the gentry likewise belong to a known *gens*, and gentle behaviour is in origin that to be expected of people of a known stock.
62 WML, supra n. 20, 44.18–22, among others.

two classes. It did not apply to those of royal class, nor to chattel slaves. The manuscripts’ accounts of the rights of a king and his members vary significantly and suggestively: they may reflect the provenance of the manuscripts, and they are certainly evidence for change in political conditions. The reference to “the members of a king” shows that the Laws of Court were presented as laws for the court of any Welsh king, whose realm was, in modern language, a sovereign state. But all the surviving manuscripts imply that if all rulers were royal, some were more royal than others. So the Blegwyrd Redaction, after setting out in detail the way the *sarhaed* of a king was paid, adds that this is how *sarhaed* is paid to “a king who has a principal seat [eisteddf ta arbenig; Latin sedes principalis], as Dinewr under the king of Deheubarth, or Aberfraw under the king of Gwynedd.” The Iorwerth Redaction Test Book gives the full royal *sarhaed* only to the king of Aberfraw; he is given less than some other texts give their more royal kings, but the measure is given in the same kind of terms:

“a gold plate for him, as broad as his face and as thick as the nail of a ploughman who has been a ploughman nine years; and a gold rod as long as himself and as thick as his little finger, and a hundred cows for every cantred that he has, with a white bull with red ears for every hundred cows among them.”

For the king’s “members” we turn to Llyfr Colan:

“The *galanas* of the King’s wife, and his son, and his captain of the household, and his *ediling*” and his nephew, one third of the King’s *galanas*, without gold and without silver; and the *sarhaed* of each of those is one third of his *sarhaed*.”

At the other end of society was the slave, to whom the principles of *galanas* did not apply because society did not regard him as having relatives: if he was killed, his value must be paid to his owner, but even he was entitled to *sarhaed*:

“The *sarhaed* of a slave, twelve pence: six for a smock and three for breeches and one for a rope and one for a hedging-bill and one for brogues. His worth is a

63 Here “king” means the rulers of any realm, however small; the designation king (brinun, Latin rex) was freely used for the rulers of every small realm until the Welsh found it tactful not to use it; in the lawbooks the ruler may be either *brinun* or *angluwydd*, “lord”.
64 Bleg., supra n. 5, 3.17–29.
65 LTMW, supra n. 19, 154.12–18, translating loc., supra n. 19, § 110/3.
66 Here, the designated heir to the throne: *ediling* is from OE *ætheling*, which applied to all those who would be “members” of a Welsh king; and the Welsh word had this wider meaning at first, but was later confined to the member who had been named by the king as his successor. The English word never came to have the narrower meaning: D N Dumville, “The *Ætheling*: A Study in Anglo-Saxon Constitutional History”, (1979) 8 Anglo-Saxon England 1.
67 LTMW, supra n. 19, 153.33–154.4, translating Col., supra n. 19, §§ 304,305.
pound if he comes from this island; if he is from overseas, his worth will be six score pence and a pound.  

The female slave's sarhaed was the same but "if she is servant and does not go either to the spade or to quern, twenty-four pence". The Blegwyrd Redaction explains that the servient slave was a needlewoman. Whereas there are wide-ranging parallels to the slave woman's working the quern, neither spade nor needle seems to appear: it is milking which is associated with milking in the Germanic texts.

In the two other Columns, the abetments of theft and arson, there is no division into grades, and the provisions may well surprise the modern reader. For all abetments of theft the penalty was a dirisy, the larger penalty of twelve kine or £3, which is greater than the triple penalty for the gravest abetments of homicide: but we must remember that the essential secrecy of theft made it the most disturbing offence in early society, so that when the principal offender was liable to the death penalty, it was not unreasonable to penalise the abettor heavily. But if the abetments were denied, "their denial is as great as the denial of principal offenders". And the measure of support for denial of theft is another surprise:

"The oath of twelve men for a horse, and for three score pence, since that is the horse of lawful value in law . . . To deny a horse's burden, and a steer (for a horse can carry a steer as its burden), six men are required of him, with himself as the seventh . . . To deny a pig, or a sheep, or a back-burden, his oath as one of five".

The value of the stolen property was significant for the thief himself, since his fate varied with that value:

"In the law of Hywel, he is a sale thief up to the value of fourpence, and from there on his life is forfeit. Others say that for every four-footed animal which is stolen, whether lamb or kid or piglet, his life is forfeit; nevertheless it is safer to say from fourpence".

The "sale thief" (lleidr guwrth) was to be sold into slavery at the price of £7: he could and no doubt most often would redeem himself by paying that price. For most items likely to be stolen, the lawbooks specified a legal value, and a passage in the Blegwyrd Redaction is one of few references to legislation by a Welsh ruler:

"For everything which has no legal value, sworn appraisal is allowed according to the law of Hywel. Rhys ap Gruffudd, the suzerain of Deheubarth, by agreement with his country, laid down sworn appraisal for every beast, to wit, that the owner should swear that the beast was worth the value he put on it, and that he would get that for it".

That statement from a southern text meets the difficulty for which a Gwynedd manuscript has made special provision:

"If it happens that a person swears to property in the hands of another person as being stolen, and that the thing has no legal value and because of that the defendant thief seeks, although the thing is worth much, to appraise it at little (since there is no right to put anyone to death save for the value of fourpence or more): then it is proper for the owner of the property to swear to it a second time. This is how he swears to it: that he would get so much for it, and that he would not give less than that".

More will be said about the procedure in cases of theft when we look at Llyfr Gynghaeusìd: here must be briefly mentioned the variants on unlawful taking. Surrection (anhyfarch) was "everything taken in absence which is not denied"; the name was also applied to other acts done without the appropriate permission. Robbery (trais) was "everything taken in presence against the will"; it was less serious than theft, and was not a capital offence. Fury (ffyngwgruwyd) was "spoiling the property both for himself and for him to whom it belongs", in modern terms "malicious damage to property"; the denial was "double the denial of other theft" and would or might carry the death penalty.

The nine abetments of fire have a further surprise for us in their logical application of principle. The oath of fifty men is required to deny any of these; but there is a problem if the abetment was committed "by stealth" (yn lladad). According to one view of that case, the rhaieth was subject to a condition to which we shall return, but:

"Others say that no compurgation in the world for stealth is more than twelve men, and that it is twelve men that deny stealth, . . . since the status of the stealth is greater than that of the burning."
The same condition applied to the twelve as to the fifty. This invocation of the status of stealth gives expression to the fear in early society of the secret offender who undermines mutual confidence: the principle is applied in the rule “if a thief is found burning a house by stealth and is caught, let his life be forfeit”, a rule to be found, not in the Column, but appended to the values of kilns.

This reliance on the higher status of stealth has a doctrinaire look which gives some support to modern disdain for medieval methods: but the fact is that in our period the doctrinaire was struggling with the practical, and for the special rules which limited the swearers’ freedom, we turn first to the Three Columns and to the general statements about the qualification and disqualification of testifiers. The Blegwyrd Redaction uses two different words for two groups of disqualification: for one group, we can say that the testifier is “repelled”, since Latin Redaction D has repelli for the Welsh gurtbheu; for the other group the Welsh word is ilysu, which is in general use for all barring of testifiers. The distinction between the groups turned on the stage in the procedure at which objection was to be made: that could be important, as the triad of the three vain statements in law (tair ofer ymadrod) shows:

“Three vain statements which are said in court and do not thrive: denial before verdict, and objection before its time, and case put after judgment.”

“Denial before verdict” was in vain, because the verdict in question was the judge’s ruling on the form of proof required by the case presented, and it was improper to offer denial before judgment made denial appropriate.

“Objection before its time” was in vain, because the party would not know that the testifier’s evidence was not favourable to him until he had heard what the testifier said, and a testifier who was prematurely challenged would stand as valid, even though there might be good ground for a bar. The challenge must be made when the testifier gave his evidence in reply to the justice and swore by the relic: the Lorwerth Redaction makes the challenger counterswear and charge the testifier with perjury before he adds that the testifier’s word is no word against him. There seems to have been a traditional triad of the bars to a testifier, and these are named in the Lorwerth Redaction: Llyfr Colan on the other hand has drawn on another source for something more analytical. The objections are said to be “in the law of Hywel according to the Book of the White House”. Since Llyfr Colan concludes its account of the objections by saying that if it is doubted whether all those objections are in the law of Hywel, “let the Latin books be looked up, and there they will be found”, it seems that this White House Book was in Latin. That Latin source has not survived, and the earliest extant Latin manuscript which carries material similar to that in Llyfr Colan is the late medieval MS 434 of Corpus Christi College, Cambridge. The Latin text names three classes of reprobatio: natural, general and singular. It illustrates natural incapacity with the single example: a woman, who cannot testify against a man because of the instability of the sex. General incapacity is “as for a hand-having thief, even if he has made amends; a perjurer, and an excommunicate, who cannot testify anywhere.” Singular incapacity arises “as of galanas, contention over inheritance, abuse of a wife, and sarhaed previously committed ... and as yet unamended”. The distinction is between the natural incapacity, which is ingrained in the would-be testifier: the general incapacity, which applies in all cases, but has been acquired by the testifier: and the singular, which applies only vis-à-vis the particular party with whom the testifier has an unresolved dispute. The classification in Llyfr Colan is slightly different: this recognises “objection for offence, objection for nature, and objection for act.” While its objections for offence are the same as the Latin cases of general incapacity, the objections for nature add to a woman “nearer kin, ... and an alien against a Welshman”. Again:

“by reason of act there are in the law of Hywel these objections: those are land-feud and blood-feud and woman-feud, and those last count as one objection, for woman-feud is of the essence of enmity of kindred.”

These grounds of disqualification did not apply equally to all kinds of testifier:

“There is no right to object to a maintainer if he is of status, for he charges no ill against anyone, but keeps for the owner what is his.”

80 LTMW, supra n. 19, 169.25–6, translating WML, supra n. 20, 104.1–2.
81 "Tri ofer ymadrod a dywedir yn Ilys ac ny fynniant gbat kyn dethuri, a Ilys kyn amser, a chlychdeんでいる broth". WML, supra n. 20, 125.24–126.1, re-punctuated. "Case put" seems to fit best the use of cynges in the Lorwerth land law tracts, and to make the best sense here. When final judgment has been given (following the success or failure of the proof required by the verdict), it is too late to state a case.
82 LTMW, supra n. 19, 89.29–33, translating Loc., supra n. 19, § 77/13.
83 LTMW, supra n. 19, 93.28–37, translating Loc., supra n. 19 § 79/10–12/1.
Whereas "as an attester charges ill against a person, that person can object to him". 88 That must depend on what the attester has been called to witness to, and the exemption of maintainers from objection does not mean that they were exempt from all discredit. It was the *reprobacio singularis*, the "objection for act", which was inappropriate because it was personal to the party against whom the testimony was given, and as we shall see from the list of the cases in which maintainers are appropriate, the testimony of the maintainer for one party was given without reference to any other party. We are told, however, that maintainers must be "of status" (*breiniol*), which seems to mean that they must have a status recognised by their society, so that aliens and slaves were excluded: that hardly needed saying. A more important rule required all maintainers to be *adduyn*, for which the most useful English rendering will be "credible". 89

Maintainers can be discredited under several heads, some of which overlap other fields of disqualification. Discredited are an alien; the three persons whose word is no word (a religious who has broken his profession, a testifier who has given false testimony, a confessed coward), 90 a person not of age to answer, and a woman (since maintainers are not possible from those); and a blind man too, since he does not see what he maintains.91 The "ways in which it is right that there should be maintainers" are:

"First, to maintain land and earth for a man. Second is keeping before loss. Third is maintaining birth and rearing. Fourth is maintaining hospitality. Fifth is maintaining status. Sixth is maintaining an alien for a person." 92

The maintainer had not only to be credible: he must also be well-informed on the matter on which he testified: at least, he must have a named qualification which meant that he should know the truth. Keeping before loss and birth and rearing were special pleas in answer to a charge of theft: the defendant claimed in the one case that the animal had been born and reared in his care and had never left it, and in the other that the animal was in his keeping before the time at which the claimant asserted that he had lost it: neither

plea implied that any other person had done anything wrong. For these pleas the maintainers must be men of the same status as the defendant, unless the defendant was not of status, for in that event the overriding requirement of status applied to them. 93 For hospitality, which meant liability for the goods of guests in the defendant's house, the maintainers must be the people of the house. 94 Cases of "land and earth" were brought by claimants to hereditary right in particular land: though the claim would usually be made when the claimant was not occupying the land, it did not necessarily imply wrong on anyone's part: the occupier might also have a hereditary right, or he might be occupying the land in virtue of some right less than hereditary proprietary right. In such a case the maintainers must be *uchelwyr o amhiniogau tir*, "landed proprietors holding adjoining land". 95

This reference reminds us to look at the Llwyth Redaction's account of procedure in cases relating to land. This gives a detailed account of the way the claim is to be brought to court and the date for the hearing is fixed, and then describes the layout of the court, illustrating it with a diagram:

"And at that adjudged date it is proper for all to come to the land, both them and their aid. And then it is proper to make two parties and to sit legally. This is how they sit legally: The King, or the man who is in his place, sits with his back to the sun or the weather (lest the weather should disturb his face), with the court justice or the commote justice (whichever is the senior) sitting in front of him, with the other justice or justices who may be present on his left hand, and the priest (if any) or priests, on his right hand; and next to the King his two elders, with his goodmen from there on, on either side of him. From there a gangway for the justices, opposite them, for them to proceed to their judgment seat. The claimant's *cyngawes* with his left hand to the gangway, with the claimant next to him in the middle and his *canillau* on the other side of him, and the serjeant standing behind the *cyngawes*. The other party on the other side of the gangway: the defendant's *cyngawes* with his right hand to the gangway, with the defendant next to him in the middle and his *canillau* on the other side of him, and the serjeant behind the latter". 96

Three points call for particular attention. First is the location of the hearing, on the land in question. We shall see that this may have some practical significance, but we shall also see (from *Llyfr Cynghasweddd*) that this location was not essential. For if the court in fact came together at some other place, though the defendant was entitled to call for a move, he must do so as soon as the claimant had presented his claim; if he put in an answer to the claim, he thereby waived the right to have the hearing moved. Second is the identity

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88 LTWM, supra n. 19, 95,11–17, translating for., supra n. 19, § 805/6.
89 There is confusion between two words which would be *adduyn* and *adduyn* in modern Welsh, because almost any possible medieval spelling could represent either word. *Adduyn* has survived: at Matthew 5.5 it corresponds to the "meek" of the authorised version, but has none of that word's suggestion of weakness. *Adduyn* has died out, and early dictionaries offer the English equivalents "honest, just" (1688) and "honest, virtuous, good, blameless" (1753): "credible" is here preferred, as leading to "discredit" for the Welsh anadduyn.
90 The expression translates literally the Welsh nid gair eir gair, which reflects a concept found in various contexts in the lawbooks: thus the Prologue to the Cyfeirnod Redaction records that Hywel Dda's word was a word over all within his dominions, where no-one's word was a word over him: his authority was paramount: WML, supra n. 20, 1,8–9.
91 AL, supra n. 14, IX.xxxvi.1.
92 AL, supra n. 14, IX.xxxvi.2.
93 AL, supra n. 14, IX.xxxvi.3.
94 LTWM, supra n. 19, 84,26–85,9, translating loc., supra n. 19, § 73/1–6. In the oldest manuscripts the diagram is a simple arrangement of the names; in later manuscripts it depicts the people of the court; the most imaginative (and perhaps more imaginary) picture is that of manuscript S (BL Add 22356), which is reproduced as the frontispiece of LTWM, supra n. 19.
of the elders and good men, and their function, to which we shall return. Third, and of the greatest interest to the legal historian, is the significance of the cyngaus and caniilaw. It has never been shown what, if any, was the difference between the two; and what is more important, there seems to be a conflict between texts about their function. In the account of procedure in an action for land, both in the Forwerth Redaction and in Llyfr Colan, the two representatives are named and the parties put "loss and gain in their mouth". 97 This seems to imply that, like the attorney in English law, the representative's act binds the party. Elsewhere in the classical law, the principal is allowed to repudiate the statements of his caniilaw and cyngaus, which seems to imply that their function was that of the counter or narrator whose act did not bind the principal. 98

With sureties given for law, the sureties being "pledges in the form of living persons, two or more from each party" who are held in the ruler's prison, 99 the hearing could go on and the parties would present their case. According to both the Forwerth land law tractate and Llyfr Cyngbauwedd, the claimant would tell the court that he was a proprietor of the land claimed and was ejected from it by the defendant, and that he had maintainers to prove his proprietorship and knowing to prove the ejectment. On this two-handed plea the Forwerth tractate comments:

"If there are some who are surprised that maintainers and knowing are offered by the same party, the law says that it can be done until the defendant's answer is heard."

The old-fashioned Welsh lawyer no doubt felt that only one kind of testifier could be invoked at any one point in a case. Llyfr Cyngbauwedd puts the point in more formal shape. The claimant pleads both elements, saying:

"that he is a proprietor by kindred and descent over this land, and that he was illegally driven from it, and that if there is anyone who doubts him he has enough who will maintain his proprietorship, and if there is anyone who doubts that he was illegally driven, that he has enough who know it."

If now "it is said against him that he has two pleas, maintainers and knowing, and it is said that it is not right to have them for the same claim", the passage turns to oratio recta for the claimant's reply:

97 LTWM, supra n. 19, 85.29-86.6, translating lor., supra n. 19, § 742/2-11; Col., supra n. 19, §§ 453-9.
98 DwCol., supra n. 23, § 483: if different answers to a claim have been put forward by the defendant and his caniilaw and cyngaus, and the claimant tries to choose the "worst answer", "the law says that it is right for the defendant to choose the plea he wishes from the three".
99 LTWM, supra n. 19, 85.18-21, translating lor., supra n. 19, § 73/7.8. According to Col., supra n. 19, §§ 460-2, the call for sureties is made by the claimant's cyngaus after the parties have been bound: but "others say that it is the claimant who should call for surety and on the law, and that before the two parties are legally bound", which is the forwerth rule. Of course the call could not be made by the cyngaus before he had been named.

"God knows, wherever I am doubted about as much as I said, I want [myn eu a welhaf] maintainers where they are right and knowing where they are right to prove that what I said was true."

The text approves this argument as good law. 100 The mixture of direct and indirect speech shows that the Welsh courts did not apply "that hard rule, He who fails in a Syllable, fails in the whole cause", a rule which would not be applied when some institutions of English law were introduced by the Statute of Wales of 1284: here Welsh practice gave a better precedent. 101

The whole field of lease law is illuminated by Llyfr Cyngbauwedd; but its most important contribution is the principle of the three replications, already cited. 102 What is effectively a charge of theft arises when property is claimed by the claimant's laying one hand on it and the other on reliics and asking who will "keep" it—who will resist the claim. If no-one responds, the claimant seeks the authority of a justice and takes the property: but anyone who responds has the three replications, to admit the claim and give up the property; to deny the claim and support denial by the appropriate oath; or to offer another plea (arddelw), which amounts to a denial of the offence without denying the taking ("asportation"), which is the defining element for theft. The commonest such plea is what an English lawyer would call "voucher to warranty": the defendant asserts that he acquired the goods from a named third person, who can be brought before the court in due course: if that vouchee admits that he transferred the goods to the defendant, the latter is freed from the charge and drops out of the case entirely. The claimant must then bring a fresh case against the vouchee, who has the same choice of pleas as the original defendant. If the vouchee denies the transfer, the defendant stands convicted, though he is given the opportunity to disprove the vouchee's refusal. The Welsh lawyers were perhaps not altogether happy with this kind of pleading, which took the proof away from the claimant who had made an assertion which he was prepared to prove: the name cyfrwth agbas, "hateful law" was applied to some cases in which "the defendant takes the proof from the claimant for his own, and that is like upsetting law into its opposite". 103

An example which the lawyer-historian may find more attractive is given in the treatment by Llyfr Cyngbauwedd of a claim to land by mother-right (mammws). Land could not be inherited by a woman: the basic thought was

100 Wilam, "Llyfr Cyngbauwedd", supra n. 32, § 10; AL, supra n. 14, VII.1.10.
101 Statute of Wales 1284, c. 8: "it is necessary that the Demandant should count against the Deforciant, and express the Cause of his Demand, and this by Words that contain the Truth, without Exception to Words: Not following that hard rule, He who fails in a Syllable, fails in the whole cause."
102 See supra at n. 31.
103 Cfreythiwm Hwyl Dda yn ôl llawysgrif Coleg yr Iesu Rhychewen LVII, ed. by M Richards (Cardiff, University of Wales Press, 1957, rev. edn 1990), 138, cf. ibid., 105. Did the difficulty arise because the defendant was proving something positive, rather than denying the
that daughters were to be given in marriage to husbands who held land or who would inherit land on the death of all direct male ancestors. In certain specified cases, however, a daughter could transmit a right to land to her son by an alien who held no land. In the case we are concerned with, a man is claiming a share of land with or from his maternal uncles because those uncles (and/or others of the kin) gave his mother to an alien. His claim can be met with a denial of the gift, for a woman who gave herself to an alien would not transmit any right to her son by that alien: but our pleading reveals a different possibility. The defendant is named in the singular, for the law provided for the appointment of a single representative for a group having the same rights. He admits that the kin gave the claimant’s mother in marriage to an alien, but goes on to say that this alien (the claimant’s father) had become a landholder—by making a successful claim to land by mother-right for himself. Since the no-longer-alien’s land will pass from him to the claimant and to his other sons, the claimant has patrimony in another place, and has no right to inherit through his mother. The claimant may admit this assertion, and if he does so, there will be no need of proof: but if he does not, the proof promised by the defendant will be called for. Since the defendant is alleging that the claimant’s father has landholding status, it might seem that maintainers should testify to that state of affairs: but the rule requires knowers, who will testify, not to the status but to the event which created it, the concession of mother-right to the claimant’s father. 104 This is a good rule, for the claimant’s father might have lost his right to the patrimony (by its being given up as guaetir, “blood-land”, if not in any other way) after the concession of mother-right: but that loss would not help the claimant, since it would not make the claimant’s father an alien.

PROCEDURE IN COURT

We may now look a little more closely at the elders and goodmen of the Iorwerth land law tractate’s court. If we assume that they were essential members of the court, who joined in expressing the final judgement, we still have to ask whether the elders were men specifically appointed to an office, or only elderly men who were picked up to strengthen the court because they would remember facts from an earlier period. We must also ask whether the claimant’s assertion, as the party impugned usually did? The explanation is probably the attempt of a later jurist to explain a traditional expression which he knew as defining a legal practice, though he did not know its origin. M Owen has suggested to me that atgus should be understood as “hate-causing”, rather than in its modern sense of “hateful”. Neither Geirfur Barddomasth Gynnar Gymnaeg, ed. by J Lloyd-Jones (Cardiff, University of Wales Press, 1931–8) nor GPC, supra n. 38 offers light on the expression. A Owen has the neutral “unto-ward law” in both passages: AL, supra n. 14, VII.i.25; Wiliam, “Llyfr Cymhawedd”, supra n. 32, § 15.

104 AL, supra n. 14, VII.i.25; Wiliam, “Llyfr Cymhawedd”, supra n. 32, § 15.

easters who were the appropriate maintainers for a claim of proprietorship were the same men as the court elders and what they were. To these questions we have no ready answer. There may be a clue in the Latin Redactions’ translation of the Welsh words for “elder”: this is sometimes naut major, which must mean “older”, and sometimes senior, which may mean either “older” or “senior” in the modern English sense of “of higher standing in some respect”. 105 Leaving that question unanswered, we ask about the number of maintainers, and find that there is a minimum of two: in contrast with attestors, of whom two and only two are obligatory, the case will be the stronger for having more than two maintainers. Indeed, there is a general principle that where no number is specified, two are needed.

“If he promises a particular number of testifiers, let him fulfil or fail. If he promises what will be a quota in law, two or three are enough, though more would be better. The testimony of one person is not testimony.”

This last rule there were exceptions, set out in the enname of the Nine Tongued-ones (Y Nau Tafodiog), which have become ten or more in some manuscripts. 106 Of these the most disturbing to us is “a thief at the gibbet as to his fellow-thieves”.

Another significant refinement of the rules of evidence needs closer attention. We perhaps assume that when a maintainer supports a claim to proprietorship he does so by simply swearing that the claimant is a proprietor. The better view is that the maintainer would speak of his reasons for his belief: this is implied by the triad of the Three Dead Testimonies (Tair Marw Dystiolaeth):

“One is, if a person claims land, and says that he is entitled to it and that his ancestors were on that land before him and left ditches or other works on the land, and if there were anyone who doubted it that he had maintainers who would be enough in law to maintain it; and that when it was desired to test the maintainers they returned that they had heard from their ancestors that it was the other’s ancestors who made that stone work or the ditches or banks, that is taken as testimony.”

If the hearing was being held on the land, as it should be, the “works” would be pointed out to the court.

“Second is, if it happens that a person claims land by kindred and descent and puts that in the mouth of maintainers, and that the maintainers say that they heard from their ancestors that that was true, and did not see it, yet that is taken in place of testimony. Third is, if a person claims land and the defendant answers him and says that it was adjudged by law to his father and his grandfather, and

105 Finding a satisfactory Welsh translation for “senior” is an unsolved problem in bilingual Wales today.

106 LTM, supra n. 19, 95.31–4, translating lor., supra n. 19, §§ 81/1−3.

107 LTM, supra n. 19, 61.18−62.36, translating lor., supra n. 19, §§ 56/1−9 with some variants from Ileg., supra n. 5 and WML, supra n. 20.
puts that in the mouth of knowers, and the knowers stand by him that they heard that from their ancestors before them, and that they did not see it adjudged, that is a quota". 108

There was a fairly general requirement that compurgators should be of the galanat-kin of the principal, and that two-thirds should come from the father’s kin and one-third from the mother’s. This requirement would reduce the likelihood of false compurgation for two reasons. On the one hand, if the compurgation failed for lack of the full number of compurgators, those who had sworn would stand convicted of perjury and would thereby suffer in prestige and lose the right to testify. On the other hand, a successful compurgation would define the swearsers as liable to pay galanat in any later case.

The most important refinements take different forms in the southern and northern traditions, and both forms may be attributable to the thirteenth century. In the lorwerth Redaction and Lyfr Colan many compurgations are required to include “designated compurgators” (gwyf nod). The references are not as clear as might be desired, but they are definite enough to show that these compurgators were picked out by name in advance—as they were in many other countries. We cannot tell who did the naming: if the principal did it, he would be naming relatives without knowing whether they would indeed support him. The designated compurgators were at the heart of the process of proof:

“It is right for a designated compurgator to swear that the oath of the person with whom he swears is clean; and if one man from among the designated compurgators fails, the whole compurgation fails. It is right for another compurgator to swear that it is to his mind most likely that what he swears is true; and though a third of the ordinary compurgation fail, it is right to judge according to the two-thirds”. 109

The southern development is revealed in several passages in the Bleywyrd Redaction. We have already seen that that redaction used the name “compurgation of country” (rhaith gualad) for the oath of 50 which is required for denial of homicide and all abatements. 110 Elsewhere in the redaction there is a definition:

“Where a compurgation of country is appropriate, it is right for the King to compel compurgators to a relic, to swear with the denier or against him, at their option”. 111

This compurgation is further defined as “the oath of fifty landed men [deg uwr a den ugeint o uwr tirywau] under the king”: while in contrast “where compurgation of country is not appropriate, the denier is entitled to seek compurgators for himself as may be judged”. 112 To judge by the number of casual references to rhaith gualad in the Bleywyrd Redaction, the older compurgation was being replaced by something very like the English jury, under a name which reminds us that the English defendant put himself “on his country”. If we suppose that the 12 and 24 found in England are sacrosanct numbers for jury-like inquisitions, the sources studied by Brunner for Die Entstehung der Schneurgerichte will tell us that the numbers varied widely, though the Welsh 50 has no exact counterpart in any of them. In the relevant passages in Latin Redaction D rhaith gualad is translated only once (as iuramento in patria). 113 The Cynderth Redaction’s only reference is under the second head of the trial of the Three Fours (Tri Phedwur), which is also in the Bleywyrd Redaction at two different points. This second head names the four shields which protect a man from rhaith gualad. 114

Since there are provisions for rhaith gualad in the Blegwyrd Redaction and Latin Redaction D, they must have been in the lost Latin text which lies behind the two, and since the references in Latin D almost all use the Welsh name, it seems fairly certain that the lost Latin text also used it. There is no real evidence of a source for the concept in any earlier text, and it thus seems to be the innovation of a lawyer thinking in Welsh terms and adapting a form which he will have known from some contact with English law. We of the “Celtic fringe” have been conditioned to think of all new developments as coming to us from the Continent through England, and we need to remind ourselves that before Macadam and Telford the Western Seaway was a much easier route to travel than the muddy roads of England. Whereas today we are told that, in terms of travel by public transport from London, Aberystwyth lies west of Chicago, in the Middle Ages Holyhead, Iona, and even Stornoway were nearer to Santiago da Compostella than to London. The use in the Latin Redactions of technical terms from the vocabulary of Roman law shows that our jurists knew enough Roman law to translate Romanly to effect: they seem also to have anticipated some well-known dicta of English judges. Every legal historian knows of the dictum of Brian CJ, who said in 1467 that “the thought of man shall not be tried, for the devil himself knoweth not the thought of man”. 115 Some two centuries earlier, the nameless scribe of the Black Book of Chirk had noted the rule “testimony is possible for word and act and testimony is not possible for thought”. 116 In about 1309, that medieval

108 LTMW, supra n. 19, 98.8–31, translating DwCol., supra n. 23, §§ 339–42.
109 LTMW, supra n. 19, 95.20–27, translating lor., supra n. 19, § 807.
110 See supra at n. 48.
112 Bleg., supra n. 5, 106.25–9.
113 LTWML, supra n. 19, 367.19, corresponding to Bleg., supra n. 5, 34.18.
114 WML, supra n. 20, 124.9–10, Bleg., supra n. 5, 109.9. At Bleg. 44.8–13 the four shields are named without reference to the trial, and in a slightly different form.
116 Evans, Chirk Codex, supra n. 46, 121.2–4; DwCol., supra n. 23, § 10.
Lord Denning, Beresford CJ, said:

"God forbid that he should get to his law about a matter of which the country may have knowledge; for then with a dozen or half-a-dozen ruffians he might swear an honest man out of his goods." 117

Half a century earlier, the redactor of *Llyfr y Damweiniatu* noted:

"If it happens that a person does a public wrong and he seeks to deny it in the session, it is not right for the lord to allow that, either by denial or by attesters, for public testimony is greater than testimony of law". 118

From one source or another the Welsh medieval lawyers were continually finding ideas which could be applied to their own legal problems, and so grafting them onto the native stock that they would bear fruit. It is because the Welsh lawyer who is hidden behind the Blegywryd Redaction and Latin Redaction D wrote about *rhaiith gyfad* that our word for "juror" today is *rheithiwer*.


118 DwCol., supra n. 23, §203.

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**Petit Larceny, Jury Lenity and Parliament**

**ROGER D GROOT (LEXINGTON)**

**INTRODUCTION**

The Statute of Westminster I in 1275 provided that one indicted for "Petty Larceny that amounteth not [above the Value] of twelve-pence" should be bailable. That statute is thought to have created the distinction between grand and petit larceny—the former a felony and the latter a misdemeanour—based upon the value of the stolen goods. 1 In fact, for a half-century prior to 1275 capital larceny was differentiated from minor larceny and the differential was based in value. This chapter argues that from the 1220s onward, there was a "rule" that minor larcenies were not capital felonies. For the "rule" to operate, the juries needed to report that, while the accused had stolen the goods, they were of little value. The justices had then to apply the "rule" by imposing some non-capital penalty. A number of cases demonstrate that the juries and the justices acted in precisely this way. As juries had the power to set value, they also had power to spare the accused the gallows; there is evidence that they did so. There are tantalising hints that they did so by declaring value, long before 1275, at less than twelvepence. Finally, then, this chapter argues that the Statute of Westminster I did not create a new rule about the substantive law of larceny and the attendant penalties. Rather, the statute simply recognised an existing rule and applied it to an earlier stage of the proceedings.

**THE STATUTE OF WESMINSTER I**

In its fifteenth chapter, the statute provided:

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1 In my state, Virginia, for example, stealing goods valued at $200 or more is grand larceny, a felony, while stealing goods valued at less than $200 is petit larceny, a misdemeanour. Virginia Code Annotated §§ 18.2-95, 18.2-96 (Charlottesville, Virginia: The Michie Co., 1996).