# *Trafodion Anrhydeddus Gymdeithas y Cymmrodorion 2005*

CYFRES NEWYDD, CYFROL 12 (2006)

# *Transactions of the Honourable Society of Cymmrodorion 2005*

NEW SERIES, VOLUME 12 (2006)

*Golygydd: Editor:*

PETER R. ROBERTS

Cyhoeddir gan y Gymdeithas Published by the Society

30 EASTCASTLE STREET, W1W 8DJ
LLUNDAIN : LONDON

ISSN 0959 3632

# *The Law of England and Wales: The Welsh Contribution**

by Sir David Williams, QC, MA, LLB

In a frenzy of constitution-making after New Labour's election victory in the late spring of 1967, three schemes of devolution emerged in the United Kingdom.[1] Each was enshrined in legislation of 1998 but each had its own genesis and style. Scotland was able to build on its distinct identity, traditions and legal systems[2] and to profit from a Constitutional Convention which sat from 1989; and the result was the establishment of a Scottish Parliament with powers of primary legislation in all but designated matters reserved for Parliament at Westminster.[3] In Northern Ireland an elected Assembly emerged from the Good Friday Agreement[4] as a power-sharing institution; but the scheme has had a chequered history and is at present still wrestling with the legacy of 35 years of sectarian dispute and political intransigence.[5]

In contrast to both Scotland and Northern Ireland, Wales emerged with a National Assembly which appeared to lack adequate authority, especially in the area of primary legislation. This was after 'a referendum preceded by inadequate consultation, allegedly conducted in a financially unfair manner... and endorsed only by a tiny majority from a turnout of only 50.1 per cent of the electorate'.[6] Irrespective of initial gloom about Welsh devolution, which I shared, there has been significant progress since its inception in a number of directions. This progress has been charted by Richard Rawlings, applauded by

---

* Based on a lecture delivered to the Society at the British Academy on 29 September 2005, with the Rt Hon. Lord Justice Thomas in the chair. Dr Peter Roberts made invaluable suggestions in the preparation of this lecture for publication. His own influential writings are referred to in several notes.

1 See A. W. Bradley and K. D Ewing, *Constitutional and Administrative Law* (13th ed. 2003), at 41-48; Vernon Bogdanor, *Devolution in the United Kingdom* (1999); Jack Beatson, Christopher Forsyth and Ivan Hare (ed.), *Constitutional Reform in the United Kingdom: Practice and Principles* (1998). See, at the start of devolution debates, Harry Calvert (ed.), *Devolution* (1975).

2 'A Better Tomorrow' (Conservative Party Manifesto for the General Election 1970), at 24.

3 See the White Paper, *Scotland's Parliament*, Cm 3658 (July 1997).

4 *The Belfast Agreement: An Agreement Reached at the Multi-Party talks on Northern Ireland*, Cm 3383 of 1998.

5 See Hilaire Barnett, *Constitutional and Administrative Law* (6th ed. 2006), at 51-52. See, generally, Vernon Bogdanor, *Devolution in the United Kingdom* (1999), esp. ch. 3.

6 See Williams, 'Wales, the Law and the Constitution' (Inaugural Annual Lecture of the Centre for Welsh Legal Affairs) (2000) 31 *Cambrian Law Review*, 51, 55.

Lord Carlile of Berriew, and firmly endorsed by the Richard Commission.[7] Both Lord Carlile and Lord Bingham have drawn attention to the rapid development of Welsh judicial institutions in the broader context of devolution,[8] and Professor Rawlings has commented that 'national devolution both works to generate, and to be properly grounded requires, a distinctive legal culture... A thousand years on from the great codification of Welsh law, it is time once again in the law to take Wales seriously'.[9] There has been influential analysis of recent changes with a noval identification of Legal Wales based on the development of the law and its institutions, albeit in a spasmodic fashion, since the mid-nineteenth century. This analysis was given an immense stimulus in Sir John Thomas's Lord Morris of Borth-y-Gest Lecture of 2000[10] and is especially important as the process of devolution gathers momentum. Two lawyers from Swansea University have argued 'not so much that legal institutions are vital to the national identity of Wales, but that developments in the legal sphere are a necessary part of the process of devolution'.[11]

It has to be recalled, however, that – in the words of Richard Rawlings – 'Wales of the three Celtic lands was the least prepared for devolution'[12] and it is instructive to itemise why this should have been so. Modern Wales, as opposed to Legal Wales, can be accepted as starting with the Acts of 1536 and 1543 – the so-called Act of Union[13] – which amounted to an imposed rather

7 See Richard Rawlings, *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution* (2003), Lord Carlile of Berriew, QC, 'The Evolution of Devolution' (2002), 2 *Wales Law Journal* 86; Report of the Richard Commission (the Commission on the Powers and Electoral Arrangements for the National Assembly of Wales), The Stationery Office, Spring 2004; Richard Rawlings, ''Say not the Struggle Naught Availeth'. The Richard Commission and After' (an expanded and updated version of the Fifth Annual Lecture of the Centre for Welsh Legal Affairs, University of Wales, Aberystwyth, delivered on 18 June 2004); Williams, 'Devolution: The Past and Future' (2005) 4 *Wales Journal of Law and Policy*, 17; Michael Sullivan, 'The State of the Nation or Welsh devolution comes of age: a reflective commentary on four devolution essays' (2005) 4 *Wales Journal of Law and Policy*, 54. See most recently, the Government of Wales Bill 2006.

8 Lord Carlile of Berriew QC, *supra* note 7, at 90; Lord Bingham of Cornhill, Conference Address at the Legal Wales Conference, 19 September 2003, (2004) 3 *Wales Journal of Law and Policy*, 121, 122.

9 Richard Rawlings, *Delineating Wales*, *op. cit.* note 7, at 493. See esp. ch. 14 ('Devolution, Courts and Lawyers'), 458-93.

10 'Legal Wales: its modern origins and its role after devolution: national identity, the Welsh language and parochialism', published in T. Watkin (ed.), *Legal Wales: Its past, Its Future* (2001).

11 Timothy H. Jones and Jane M. Williams, 'Wales as a Jurisdiction' (2004) *Public Law* 78, 101.

12 *Delineating Wales*, *op. cit.* note 7, at 492.

13 See David Williams, *A History of Modern Wales* (1950), ch. 3 ('The Union of England and Wales'). See *e.g.* Peter Roberts, 'Wales and England after the Tudor "Union": Crown, principality and parliament 1543-1624' in Claire Cross, David Loades and J. J. Scarisbrick, *Law and Government under the Tudors* (1988) at 111-138; 'The Welsh Language, English Law and Tudor Legislation' (1989) *Transactions of the Honourable Society of Cymmrodorion*, 19-75.



than a negotiated settlement. The major survivor of the Union was the Welsh language, cemented by the translation of the Bible by 1588 which ensured 'the continuance of the Welsh language as something more than a spoken language.'[14] It was, incidentally, a statute of 1563 which gave statutory permission for the translation of the Book of Common Prayer and the Bible, and the regular use of Welsh 'as the official language of worship in the Established Church (and later among dissenting congregations) which has marked it off from its sister Celtic languages in Great Britain and Ireland'.[15] The Welsh language and culture were no substitute for political and legal markers, and the problem of two competing languages remained a divisive issue up to the present day. The Commissioners of Inquiry into the State of Education in Wales, whose Report of 1847 led to accusations of the Treachery of the Blue Books (Brad y Llyfrau Gleision), were appointed in 1846 to look especially 'into the means afforded to the Labouring Classes of acquiring a knowledge of the English Language'. Poor schools and a poor command of English also led to want of chastity, it was reported. The custom of Wales, claimed one of the commissioners, justified the 'barbarous practices which precede the rite of marriage'.[16] It was no wonder that 'the formal and official usage of the Welsh language had tended to become increasingly neglected and even condemned'.[17]

The factors, apart from linguistic confusion, which weakened the Welsh position in the prelude to devolution included the arbitrary border established in the time of Henry VIII, the absence of a capital city until 1955, the late development of executive government in or for Wales above the level of local government, the failure to establish even a rudimentary parliamentary system, the extinction of Welsh law and customs, and the inability to secure a strong system of courts or legal system generally. A further distraction for a protracted period of dispute was the issue of the disestablishment of the Welsh church, especially as Ireland had secured disestablishment in 1869, and success in following the Irish example came about only in 1920. Something of the flavour of the battle is captured in the claim in 1894 by Sir G. Osborne

14 John Davies, *A History of Wales* (1993) at 244.

15 *Legal Status of the Welsh Language* (Report of the Committee under the Chairmanship of Sir David Hughes Parry QC, LLD, DCL, 1963-1965), Cmnd. 2785 of 1965. Dr Peter Roberts has argued that the translation neutralized some of the anglicising effects of the Tudor legislation: see 'The Union with England and the Identity of "Anglican" Wales', *Transactions of the Royal Historical Society*, 5th ser., vol. 22 (1972), at 49-70.

16 Reports of the Commissioners into the State of Education in Wales (1847), as printed in 1848 (for HMSO) by William Clowes & Sons in London), at 534.

17 The Hughes Parry Report, *supra* note 15, at para. 40.

Morgan in the House of Commons that the 'Church of England, with its stereotyped ritual and hierarchical constitution, was utterly unsuited to the genius of the Welsh people. In one word, it was too cold for an emotional people, too aristocratic and Bishop-ridden for a democratic people'.[18]

As for the border between England and Wales, there was an element of arbitrariness in the statute of 1536 when the intention was to incorporate Wales into England. John Davies has pointed out that it 'did not follow the old line of Offa's Dyke nor the eastern boundaries of the Welsh Dioceses; it excluded districts such as Oswestry and Ewias, where the Welsh language would continue to be spoken for centuries...';[19] and Linda Colley has noted that Shropshire and Herefordshire shared with Wales 'centuries of cross-border trade, migration and marriage' forging a 'mongrel regional culture'.[20] Consider also the anomalous position of Monmouthshire which for several centuries was, because of proximity to London, incorporated within the English system of courts and originally vested with more generous parliamentary representation even though, as Asquith (then Home Secretary) pointed out in 1894, 'it has always remained from what it was from the first, predominantly Welsh in the habits, the sentiments, and the general character of the people'.[21] The anomaly was ended only by the Local Government Act 1972. All of this is not surprising when one bears in mind that it was only by virtue of the Welsh Language Act 1967 that England no longer included Wales as a term in law, though it had long been the practice to refer to England and Wales in legislation. Yet it was as late as 1998 before Lord Bingham insisted that the title of Lord Chief Justice of England should henceforth refer to England and Wales. The combination of the arbitrary border between England and Wales and the centralist use of the term 'England' underlines in one regard the difficulty of speaking with accuracy or precision of the Welsh contribution to English law.

The absence of a capital city until Cardiff was so designated in 1955 deprived Wales of an obvious centre – akin to Edinburgh, Belfast and Dublin – for governmental institutions. Administrative decentralisation from London to Wales developed in the nineteenth century, but progress was slow, at least until the Second World War and afterwards.[22] Only in 1951 was the office of

[18] House of Commons, Vol. 23 (4th series) c. 1505, 26 April 1894. In its Report of 1973, the Royal Commission on the Constitution spoke (Vol. 1, Cmnd 5460) at para. 118 of the impact of the Welsh Disestablishment Act 1914 which was delayed to 1920 in its operation because of the First World War.

[19] *Op. cit.*, note 14, at 233.

[20] Linda Colley, *Britons. Forging the Nation 1707-1837* (1992), Pimlico ed. 1994, at 16.

[21] House of Commons, Vol. 23 (4th series), cc. 1455 ff, 26 April 1894.

[22] On earlier variants in 'devolved government', however, see Peter Roberts, ' Precedents for Autonomous Welsh Government, 1533-1653' in Pamela O'Neill and Jonathan M. Wooding, eds, *Literature and Politics in the Celtic World* (Sydney, 2000) at 1-16.



Minister for Welsh Affairs created, tagged on initially to that of Home Secretary, and it was not until 1964 that a Secretary of State for Wales was included in the Government. The latter office is now tagged on to that of the Secretary of State for Northern Ireland, contrary to the explicit assertion in the White Paper ('A Voice for Wales') of 1997 which was in effect the prospectus for the devolution referendum. The White Paper declared that there would be 'a continuing role for a separate Secretary of State for Wales, with a seat in the Cabinet, to safeguard Welsh interests'.[23] The range of administrative decentralisation in Scotland was, for historical reasons, much greater and longer established than in Wales, and the executive machinery focused on Edinburgh was well in place for devolution.

Scotland, however, had not had a parliament of its own since 1707, but there had been a parliamentary history stretching back to the Middle Ages. Wales had no such history except for somewhat shadowy events at Machynlleth and Harlech in the time of Owain Glyn Dŵr.[24] Moreover the manner of the assimilation of Wales into England ensured that from the outset of the modern era Wales felt the full force of Parliamentary sovereignty. The Acts of 1536 and 1543 were unilateral enactments setting out the framework of government for the Principality. Of course, some legislation was to emerge relating to Wales alone; but the Royal Commission on the Constitution noted that the 'only Acts relating exclusively to Wales which were passed by Parliament in the post-war period up to 1971 were concerned with the Welsh language and Welsh cultural institutions'.[25] This scarcely gave the impression of a nation on the verge of adopting a scheme of devolution. In addition Welsh law prior to the Tudor settlement did not survive as a concern for Parliament at Westminster.[26] It is nonetheless worth noting that there was considerable law-making activity in medieval Wales, even in the absence of a parliament, and Dafydd Jenkins has written that 'our old law is of special significance as one of the elements which made it possible for a politically fragmented people to attain a consciousness of nationhood'.[27] One might add that activity in matters of law was to be carried over to the period after 1536-43 when the Welsh were contributing directly to the development of the law of England or, as we would now say, the law of England and Wales.

[23] *A Voice for Wales. Llais dros Gymru*, Cm 3718 of 1997, at 1.16.

[24] See R. R. Davies, *The Revolt of Owain Glyn Dŵr* (1995), at 163-64; J. E. Lloyd, *Owen Glyn Dŵr* (1931) at 82; Glanmor Williams, *Owain Glyndŵr* (1993), at 37, 41, 47.

[25] Cmnd. 5460, at 133.

[26] See generally T. M. Charles-Edwards, Morfydd E. Owen and D. B. Walters, eds, *Lawyers and Laymen*. Studies in the History of Law presented to Professor Dafydd Jenkins on his seventy-fifth birthday Gwyl Ddewi 1986 (1986); Dafydd Jenkins, The Law of Hywel Dda. Law Texts from Medieval Wales, Translated and Edited (1986).

[27] *The Law of Hywel Dda, op cit.* note 26, at xxxvi in the Introduction.

What, then, of that contribution? The first point to note is that, for close on three centuries after the Tudor settlement, the Welsh lawyers were active both within Wales with its own system of courts and more broadly within the entirety of England and Wales. The Welsh dimension was reflected in the Courts of Great Sessions, which enjoyed a civil and criminal jurisdiction but had competitors including the Council of Wales and the Marches which stuttered to a halt in the seventeenth century and was finally abolished in 1689.[28] The Council had a judicial and administrative role over the four English counties (Gloucester, Worcester, Shropshire, Hereford) as well as Monmouthshire but it was mainly identified with Wales.[29] The Courts of Great Sessions evoked strong emotions, for and against, but they clearly remained active until they were abolished by statute in 1830. Professor Geraint Jenkins has given a vivid view of a system where 'cases were tried in a language which was, for most defendants and witnesses, either hard to understand or totally incomprehensible', and both the judges and the lawyers involved came in for abusive criticism from contemporaries.[30] The Great Sessions had their defenders, not least one John Jones MP, an Old Etonian from Carmarthen, born in 1777, who spoke of 'the practical utility of the system'.[31] What worked against them most of all, however, was their ultimate subservience to the English courts which had encroached significantly on the judicial territory of the Great Sessions.

Encroachment by the English courts is demonstrated by the decision of the Court of King's Bench in 1723 in the case reported as *R v Athos*[32] and which was later recorded by George Borrow – he of *Wild Wales* fame – in a six-volume collection of celebrated trials and remarkable cases published in 1825.[33] The defendants were Thomas Athos, Mayor of Tenby, and his son, also Thomas, who had been accused in Pembrokeshire of the murder of one George Martin (or Merchant) in November 1722. The case, which involved various possible remedies including habeas corpus and certiorari, was based essentially on the wish of the Attorney General to have the trial for murder moved from Pembrokeshire to Hereford – in other words, from the Great

[28] See Report of the Royal Commission on the Constitution, Cmnd 5460, para 113; John Davies, *op cit.* note 14, at 272-73, 292.

[29] Harold Carter, 'Local Government and Administration in Wales, 1536-1939' in J. A. Andrews (ed.), *Welsh Studies in Public Law* (1970), ch. 3, at 38-39.

[30] Geraint H. Jenkins, *The Foundations of Modern Wales 1642-1780*, ch. 8. See Peter Roberts, 'The Welsh Language, English Law and Tudor Legislation', *supra* note 13.

[31] See entry in the *Oxford DNB* (2004). John Jones, who spoke Welsh himself, was not in favour of the Welsh language which, he believed, hindered the material progress of the Welsh people.

[32] (1723) 8 Mod. 136, 88 E R 104.

[33] *Celebrated Trials and Remarkable Cases of Criminal Jurisprudence from the Earliest Records to the Year 1825* Vol. 3 at 404-07.



Sessions to the English Assizes. The two defendants were convicted of murder, they were then taken to London for the Court of King's Bench to rule on the jurisdictional arguments based on statutory interpretation which they duly lost, they were sentenced to death on 22 June 1723 and executed on 5 July. Early on in the proceedings in the King's Bench the Court is reported as expressing the view that they were broadly in favour of changing the venue

> because it was very difficult to have justice done in Wales by a jury of Welshmen, for they are all related to one another, and therefore would rather acquit a criminal than have the scandal that one of their name or relations should be hanged; and that to try a man in Wales for murder was like trying a man in Scotland for high treason, those being crimes not much regarded in those respective places.[34]

One of the judges, Mr Justice Fortescue, conceded that the jurisdiction to change venue should be 'sparingly exercised' but, confronted with an extra-judicial view of Chief Justice Vaughan, a former Chief Justice of the Court of Common Pleas, which took a different view on statutory interpretation from that of the King's Bench, suggested that 'he being a native of Wales, might be prejudiced in favour of his country…'.[35] Disparaging remarks about Welsh juries doubtless reflected the linguistic difficulty inherent in Welsh courts until very recent times.[36] More important, the case of *R* v *Athos* illustrates the dominance of the English courts when the English courts chose to enforce that dominance, and the issue of change of venue was to be raised many years later, in, for instance, the case of John Saunders Lewis and two others who were charged with setting fire to a 'bombing school' near Pwllheli. In a highly-charged trial at Caernarfon in 1936 the jury could not agree and the case was transferred to the Old Bailey where guilty verdicts were secured and terms of imprisonment imposed. John Davies has pointed out that plans for bombing schools in England had been dropped by the Air Ministry in response to the protests of naturalists and historians and that the choice of a Welsh site instead aroused nationalist as well as pacifist, cultural and environmental protests.[37] The failure of the jury at Caernarfon to agree on a verdict is best understood against that background. The change of venue aroused much controversy, and Lloyd George wrote to his daughter Megan that they (the Government) 'might at any rate have had a second trial, or removed it to some

[34] 88 E R at 104.

[35] *Id*, at 109. Sir John Vaughan (1603-74) was the Chief Justice in question. He was from Cardiganshire and was renowned for his 'silver-tongued eloquence' (*Oxford DNB*).

[36] But see the comments of Lord Russell of Killowen CJ in his last public utterance, quoted in R. Barry O'Brien, *The Life of Lord Russell of Killowen* (1902) at 378-79.

[37] *Op cit.*, note 14, at 592.

other part of Wales, but to take it out of Wales altogether and, above all to the Old Bailey, is an outrage that makes my blood boil'.[38]

In the trial at the Old Bailey the three defendants refused to give evidence, a stark reminder of the linguistic issue which has been so crucial in an understanding of the Welsh and the law – principally, of course, in Wales itself. This has been brought out vividly by Sir John Thomas in his Lecture on 'Legal Wales', not least in his description of the development of county courts in Wales from 1846. From the sixteenth to the nineteenth century, it should be stressed, the Welsh language had survived despite the legislation of 1536 providing that the language of the law courts should be English. 'Though the law was administered in English', declared the Hughes Parry Committee in 1965, 'the Welsh language was undoubtedly widely used in the law courts, from those at the highest level, like the Council in the Marches and the Court of Great Sessions, down to the humblest hundred and manor courts'.[39] Nevertheless the formal status of Welsh remained low well into the twentieth century, and its painfully achieved recovery, underwritten by the Welsh Language Acts of 1967 and 1993, has been an important feature in the emergence of Legal Wales. The subservience of the law administered in Wales, as illustrated in the *Athos* case and – even at Assize level – in the *Saunders Lewis* case, is surely gone for ever, save perhaps in curiously directed words used about some lawyers and judges who happen to be Welsh. One of the many biographies of Judge Jeffreys, who rose to become Lord Chief Justice and later Lord Chancellor, appeared in 1898 with these early comments:

> It must not be forgotten that... 'Judge Jeffreys' was a Welshman. Matthew Arnold has described wit, vivacity, an audacious love of excitement, a want of measure and steadfastness and sanity, as prevailing characteristics of the Celtic nature. Lord Justice Vaughan Williams has added disregard of personal liberty. These qualities have been for some time associated in the public mind with 'Judge Jeffreys'. Amidst the Teutonic moderation of his immediate relatives, it may not be unreasonable to regard George as a wilful protest on the part of the Celtic element in the family character against threatened extinction.[40]

That rather confused statement, with its generalisation about Celts turned specifically to the Welsh, does raise some legitimate points. First of all, there is the

[38] See Kenneth O. Morgan, *Wales 1880-1980. Rebirth of a Nation* (1981, Paperback edn 1982), 254-55. See also, Gwyn A. Williams, *When Was Wales?* (Penguin edn, 1985), 283-84.

[39] Cmnd. 2785, at para 31.

[40] H. B. Irving, *The Life of Judge Jeffreys* (1898) at 2-3. For an account of some of the writings about and books about Jeffreys, see G. W. Keeton, *Lord Chancellor Jeffreys and the Stuart Cause* (1965), at 19-25.



reputation of George Jeffreys himself. Born near Wrexham he went to school in England and spent a short period at Cambridge University (without graduating) before moving to the Inner Temple to start his astonishing career. Assessments of the quality of his performance, both as an advocate and as a judge, have been much more balanced and favourable in recent years. He is no longer simply the monster of the Bloody Assizes which followed on the failure of the Monmouth Rebellion. He held several judicial offices with distinction. Yet George Jeffreys was only one of what Professor G. W. Keeton described as 'the able group of Welsh lawyers' – all from the families of country gentlemen in Wales – 'who appear so prominently in the political history' of the later seventeenth century.[41]

Jeffreys himself has had testimony paid to 'his great intellectual talents, the immense skill of his advocacy, the legal acumen to discern the legal core in a mass of evidence, and the strength of the legal judgement which well withstood the reviews of posterity'.[42] One of his Welsh contemporaries was Sir Thomas Jones (1614-92) who lost his position as Chief Justice of the Common Pleas in 1686 because he refused to accept the dispensing power urged by the King. In the *Oxford DNB* David Yale cites a description of Jones as 'a very reverend and learned judge, a gentleman, and impartial, but being of Welsh extraction was apt to be warm...' Another who lost his position as a judge in those turbulent times was Sir John Powell (1632/3-96) who was one of the judges in the Trial of the Seven Bishops in 1688.

Like so many Welsh lawyers from 1543 onwards, Sir John Powell cut his teeth in the Great Sessions. Keeton wrote that Welsh judgeships were often used for 'testing the judicial qualities of persons who might be considered for High Court Judgeships', adding that the list of those promoted – including a number of Englishmen – 'is a long and distinguished one, especially in the eighteenth century'.[43] Whether or not they had a period in the Great Sessions, however, the activity of Welsh judges in the seventeenth century was considerable and they were involved, usually on the royalist side, in many of the great constitutional cases.[44] There were also many Welsh counsel who did not reach the Bench; and some indication of the flow of Welshman to legal London is given in the work, *The Welsh in London 1500-2000*, published in 2001 on behalf of this Honourable Society.[46] This flow was achieved despite the fact that, as the Hughes Parry Committee said, Wales was, economically

[41] G. W. Keeton, 'The Judiciary and the Constitutional Struggle, 1660-88' (1962) 7 *Journal of the Society of Public Teachers of Law*, 56, 65.

[42] D. Seaborne Davies, *Welsh Makers of English Law* (Annual Lecture broadcast in Radio Four from Wales, 13 November 1967), published as a pamphlet, at 18-19.

[43] See *op cit.*, note 40, at 149.

[44] See generally, Seaborne Davies, *op. cit.*, note 42.

[45] *Id*, at 12-13.

[46] Emrys Jones (ed.), *The Welsh in London 1500-2000* (2001), at various parts (see the index), but see esp. ch. 1 (William Griffith, 'Tudor Prologue').

speaking, 'a static and poor country with a primarily pastoral farming economy'[47]. The law students of the period came from the landed gentry to no small extent, but some of the few established schools, such as those at Cowbridge and Carmarthen, may well have encouraged some less wealthy pupils to take off to Oxford or Cambridge and then to the Bar. For innumerable Welshmen London was Mecca and Law was the vehicle. Much more than in Parliament up to the nineteenth century and much more than in executive government to the twentieth century, Welsh participation in the machinery and making of law was consistently strong.

The strength of the Welsh legal tradition is well illustrated in the history of a particular family named Williams. John Williams was born in Job's Well, Carmarthen, in September 1757, educated at the local grammar school, at Oxford and the Middle Temple. He practised law both in England and Wales and he enjoyed the old Carmarthen circuit under the Great Sessions: though he recalled in later years that the roads then were so bad that he and his companions had to ride rather than use a carriage in order to get around. Along with his practice he helped to edit two editions of Blackstone's *Commentaries* and he edited with full notes the law reports prepared by Chief Justice Saunders in the seventeenth century. The law reports achieved fame as *Williams Saunders*. Sergeant John Williams – he became a King's Sergeant in 1804 – died in 1810. One of his sons, Sir Edward Vaughan Williams (1793-1875) was a judge of the Court of Common Pleas for many years, but he retired in 1865 because of increasing deafness. He was also a legal writer and one of his works – Williams on Executors – became one of our great standard legal works.[48] More important perhaps, he was the grandfather of Ralph Vaughan Williams (1872-1958), the great composer.

Sir Edward Vaughan Williams had several sons, one of whom was Sir Roland Lomax Bowdler Vaughan Williams (1838-1916) – allegedly the one who doubted the wish of the Celts to safeguard personal liberty – who went on to become a member of the Court of Appeal. Later in his time on the Court of Appeal he played a prominent role in the Archer-Shee case of 1911.[49] His elder son also became a lawyer, serving as Recorder of Carmarthen and of Swansea. Lord Justice Vaughan Williams was also one of those behind the establishment of the law school – the first Welsh law school – at Aberystwyth in 1901. The final decision to set up the law school was taken by a committee chaired by him and he delivered a lecture at the celebration to mark its opening.[50] An academic

47 Cmnd. 2785, para 39.

48 D. Seaborne Davies, *op. cit.*, note 42, at 29.

49 See Edward Marjoribanks, *The Life of Lord Carson*, Vol. 1 (1932), ch. xxxii ("The Archer-Shee Case"), esp. at 428. H. Montgomery Hyde, *Carson* (1953), at 263-76, esp. at 270.

50 See John Andrews, 'A Century of Legal Education' (2003) 34 *Cambrian Law Review* 3, esp. at 4; Williams, 'Wales, the Law and the Constitution' (2000) 31 *Cambrian Law Review* 51.



commitment to the law was clearly shown by Sergeant John Williams, Mr Justice Williams and Lord Justice Vaughan Williams; and in the words of the original *DNB (Supplement 1912-1921)*, 'This Welsh family thus furnishes a remarkable illustration of the inheritance of legal genius… (and) in sustaining through three successive generations the highest level of erudition and the ability to apply it in practice, it can claim a pre-eminent position in the annals of English law'. A different sort of Welsh legal tradition began to appear from the later eighteenth century, stemming from the growth of Nonconformity and from the beginnings of the Industrial Revolution. It may be a surprise to many that the American War of Independence, in a historian's words, 'developed a political awareness in Wales' and 'crystallised the attitude of the dissenters towards politics'[51]. Closely associated with the new radicalism were writers such as Richard Price, author of *Observations on the Nature of Civil Liberty*[52] in 1776 and David Williams, author in 1782 of *Letters on Political Liberty*[53]. There was overt Welsh support for John Wilkes in London, and Wales, like East Anglia, was unhappy about the war being waged against the American colonists. By contrast Scotland, perhaps seeking to demonstrate their political reliability after the events of 1715 and 1745, strongly supported 'armed coercion of the American colonists'. A Wilkite journalist had argued even in 1769 that '[t]he Welsh and the Scotch, who inhabit the remote ends of this kingdom, are very opposite in their principles. The former are hot, generous and great lovers of liberty. The latter violent and tyrannical'.[54]

The career of one of the greatest of Welsh lawyers also reflected this radicalism. Sir William Jones (1746-94) was to achieve fame as a distinguished orientalist and a brilliant linguist; he wrote legal books including a treatise on Bailments which had 'a profound influence on English law'; he took up a judicial post in Bengal in his later years but only after early practice as a member of the Inner Temple.[55] For some eight years he practised on the Carmarthen circuit and he soon became outraged by the oppression of the 'yeomanry and peasantry of Wales and represented some impoverished clients gratis'.[56] As the *Oxford DNB* puts it, 'in the great and petty sessions of Welsh towns he championed the rights of a peasantry oppressed by the arbitrary and discretionary power exercised by the largely Anglicized landowners, a rack-

51 David Williams, *A History of Modern Wales* (1950) at 168-69.

52 See Roland Thomas, *Richard Price. Philosopher and Apostle of Liberty* (1924).

53 See Whitney R. D. Jones, *David Williams: the Anvil & The Hammer* (1986).

54 See Linda Colley, *op. cit.*, note 20, at 138-141.

55 For an excellent account of his many-sided career, see David Ibbetson, 'Sir William Jones (1746-1794)', (2000) *Transactions of the Honourable Society of Cymmrodorion* 66-82. This was the inaugural lecture of the Welsh Legal History Society.

56 Garland Cannon and Michael J. Franklin, 'A Cymmrodor Claims Kin in Calcutta: An Assessment of Sir William Jones as Philologer, Polymath, and Pluralist' (2004) *Transactions of the Honourable Society of Cymmrodorion*, 51-53.

renting squirearchy, and English-speaking monoglot magistrates and judges'.[57] Unsurprisingly he vigorously supported the Court of Great Sessions as a protection against 'the tyrannical agents and stewards of indolent gentlemen'[58]. In a wide constitutional sense he believed in the responsible exercise of power: he 'was deeply conscious of the need for those with power to exercise it properly'.[59]

Jones's radicalism was at the root of one of the most celebrated cases of the eighteenth century, Shipley's Case. William Shipley, the Dean of St Asaph and brother-in-law of Sir William Jones, had published in Wrexham what was originally a brief publication written by Jones concerned with representative government and the right to carry arms. To the astonishment of many, the Dean – at the instance of the Sheriff of Flint – was indicted for seditious libel and the trial was scheduled for the Court of Great Sessions at Wrexham in 1784. Thomas Erskine was retained for the defence but trial was delayed and eventually, almost as an echo of the *Athos* case, a writ of certiorari was secured to transfer the trial to the Assizes at Shrewsbury where Mr Justice Buller presided. Erskine's defence was centred on the role of the jury in cases of libel, he was initially frustrated by judicial rulings against him, but then the Court of King's Bench settled the proceedings by holding that the publication was not seditious as a matter of law. Despite the contrary rulings about the role of juries, Erskine had effectively laid the ground for Fox's Libel Act of 1792 which did underpin the authority of juries. Even before the trial in Shrewsbury, however, Sir William Jones, the author of the allegedly seditious pamphlet, was braving the seas on his way to take up office as a judge in Bengal.[60] He died young but he had secured his place as an outstanding scholar and lawyer.[61]

Another prominent Welsh lawyer, who was born in 1732, was Lloyd Kenyon who went on to be Attorney-General, Master of the Rolls and Lord Chief Justice. Unlike Sir William Jones, who was a London Welshman, Kenyon was born in Wales and attended 'the flourishing grammar-school of Ruthin' which was 'a favourite foundation with the gentry of North Wales'.[62] It was said of him years later, when he was in high judicial office, that he 'was abrupt in speech and temper, often rude to counsel, not given to oratory unless it concerned an issue that touched him deeply'. Moreover he was not a radical

57 *Oxford DNB*.

58 Cannon and Franklin, *supra* note 56, at 53.

59 David Ibbetson, *supra* note 55, at 71.

60 *Id*, at 73.

61 It is said that Sir William was once introduced by the English ambassador to Louis XVI as the man who could speak every language in the world except his own. See *The Welsh in London 1500-2000, op cit.*, note 46, at 198

62 The Hon. George T. Kenyon, *The Life of Lloyd, First Lord Kenyon. Lord Chief Justice of England* (1873), at 8-9.



and he disliked the revolutionary flavour at the end of the eighteenth century.[63] Not all Welshmen were radicals.

The Industrial Revolution, however, brought a different form of radicalism into Welsh life, with the result that many more people were made aware of the law and especially of the criminal law. Through the nineteenth century and well into the twentieth century there were bursts of serious unrest in the industrial and non-industrial areas of Wales. The Merthyr Riots of 1831 led to the prosecution, conviction and hanging of one Richard Lewis, known as Dic Penderyn, a case which drew angry, emotional responses for many years.[64] Other dramatic events were to occur in Newport in 1839, when Chartist ideas were flourishing,[65] and in West Wales 1839-44 when the Rebecca Riots sprang from agrarian discontent.[66] A sharp political consciousness was now emerging in Wales and, with the extension of the franchise in 1832 and especially 1868, the new radicalism was powerfully represented in the House of Commons. Without a parliamentary history of its own, a distinctive Welsh and/or radical element at Westminster gave Wales a voice in a wider parliamentary context.

The end of the nineteenth century produced a new breed of Welsh Members of Parliament. Tom Ellis was elected as a Liberal MP for Merioneth in 1886 and was remarkably influential up to his untimely death in 1899. One writer claimed in 1908 that he 'interested the House of Commons in Wales to an extent that no Welsh Member has done since his time'.[67] Also influential was Sir Samuel Evans, a solicitor (later to be called to the Bar) who was returned for Mid-Glamorgan in 1890 and held the seat for twenty years before becoming President of the Probate, Divorce and Admiralty Division of the High Court and achieving particular recognition for his work as a Prize Court judge during the First World War. Another solicitor elected in 1890 was David Lloyd George who was to retain his seat until he accepted an earldom in 1945. The achievements of such people inspired Welsh participation in Parliament throughout the twentieth century and it would be wrong to assume that devolution, when it eventually was secured at the end of the century, needed

63 *DNB*. But note the comment of Seaborne Davies *op. cit.*, note 42 at 26, that Lord Kenyon showed 'marked efficiency in the despatch of business. He constantly cut short over-elaborating counsel; and his own judgments are models of precision and brevity'.

64 See especially, Nicholas Cooke QC, 'The King v Richard Lewis and Lewis Lewis, Cardiff, 13 July 1831. The Trial of Dic Penderyn' (2002) *The Welsh Legal History Society Publications*, ed. Thomas Glyn Watkin, Vol. 2, 2002, 110-27. See, generally, Gwyn A. Williams, *The Merthyr Rising* (1978).

65 See David Williams, *John Frost. A Study in Chartism* (1939).

66 See David Williams, *The Rebecca Riots: A Study in Agrarian Discontent* (1955); Pat Molloy, *And They Blessed Rebecca* (1983).

67 The Rev. J. Vyrnwy Morgan, *Welsh Political and Educational Leaders in the Victorian Era* (1908) 373-405, at 393. See also, Wyn Jones, *Thomas Edward Ellis 1859-1899* (1986).

to be tailored differently from Scotland or Northern Ireland. Scotland had had no parliament of its own since 1707 and Northern Ireland had barely had a working parliament since 1972. At a time when the White Paper of June 2005, *Better Governance for Wales*,[68] has been subjected to detailed scrutiny against the background of the devolution legislation and the Report of the Richard Commission, the parliamentary experience of Wales should be highly relevant. The legislative activity of Welsh MPs has contributed greatly to changes in the law of England and Wales. One cannot, for instance, divorce the Welfare State from the inspiration and leadership of David Lloyd George and Aneurin Bevan.

The Welsh contribution to the law of England and Wales, as expounded or developed in the courts of law, has remained strong to the present day. In his published Lecture on *Welsh Makers of English Law*,[69] Professor Seaborne Davies traced the judicial side down to forty years ago. In the House of Lords in its judicial capacity reference should be made to Lord Chancellors – Lord Simon, who in his devotion to the Land of his Fathers yielded to no one, and Lord Elwyn Jones[70] – and to Law Lords including Lord Morris of Borth-y-Gest, Lord Griffiths, Lord Edmund Davies, Lord Jenkins, and especially Lord Atkin of Aberdovey, Queensland-born but a product of Christ's College, Brecon and deeply involved in the land of his mother. Lord Atkin will be remembered for many of his judgments and speeches, none more than his celebrated dissent in *Liversidge v Anderson* in 1941 which was concerned with detention without trial, a topic of immediate contemporary significance. 'In this country', he declared, 'amid the clash of arms, the laws are not silent'. He was unhappy both with the views of his colleagues – 'more executive minded than the executive' – and with arguments before the House of Lords 'which might have been addressed acceptably to the Court of King's Bench in the time of Charles I'[71]. He was 74 at the time. Some years earlier in the case of *Donoghue v Stevenson*, he spoke as one of the majority in a 3-2 decision of the House of Lords in bringing together different strands in the law to lay the basis of the modern law of negligence.[72] His two colleagues were Scottish, and Professor R. M. Jackson was later to observe: 'If the rabid nationalism that is afflicting the world should reach England, we may see a rebellion against a state of affairs in which two Scotsmen and one Welshman may lay down the law of England, but so far we have escaped such adolescent neuroticism'.[73]

[68] Wales Office, Cm 6582.

[69] *Op. cit.*, note 42.

[70] See Viscount Simon, *Retrospect* (1952), ch. 1, esp. at 14; Lord Elwyn-Jones, *In My Time* (1983).

[71] [1942] AC 206 at 244. See Geoffrey Lewis, *Lord Atkin* (1983), at 132-57.

[72] [1932] AC 502. See Geoffrey Lewis, *op. cit.*, note 70 at 51-67.

[73] *The Machinery of Justice in England* (5th ed., 1967), at 92. The first edition appeared in 1940.



That last statement is a reminder that it is customary for two judges from the Scottish courts to be elevated to the House of Lords and there is usually one from Northern Ireland as well. With devolution now in place, albeit with many changes to come, and with the recognition of Legal Wales, there might seem to be a case for at least one Welsh Law Lord or member of what may become our Supreme Court. The position of Wales is, of course, different from that of Scotland and Northern Ireland, which have separate legal systems, and there is no room for more than nine judges on the Supreme Court of the United States despite the existence of fifty states with their own legal systems. Circumstances may change but for the present the Welsh presence in the judiciary does not require a customary seat in the highest court.

In any assessment of the Welsh contribution to the law of England and Wales some attention ought be paid to members of the legal profession, as barristers or solicitors or as in-house lawyers in government and in commercial firms. Likewise Welsh lawyers played a prominent role in various parts of the Empire, not least India, in earlier times. Sir William Jones was one such. Academic lawyers from Wales have also contributed to the formulation of the law in England and Wales; and mention might be made of Glanville Williams, perhaps the greatest of them all, a product of Cowbridge and the University of Wales, Aberystwyth; T. A. Levi (Tommy Levi) who oversaw almost forty years of the new law department at Aberystwyth; Sir David Hughes Parry; Seaborne Davies, a superb after-dinner speaker; and countless others. If time allowed I might more generally speak of Sir David Williams (1550-1613) who was appointed to the King's Bench in 1603 and whose tomb is in Brecon Cathedral; of another High Court judge named Williams who allegedly died at Nottingham in 1884 'in disreputable circumstances'; of Sir Leoline Jenkins (1625-85), another product of Cowbridge School and later Principal of Jesus College, Oxford, a judge (especially in the area of Prize Law), and a distinguished diplomat; and indeed of the leading Welsh eccentric William Price (1800-93) who, according to the *Dictionary of Welsh Biography down to 1940*, 'practised free-love, advocated cremation, was a vegetarian, opposed vaccination and vivisection, scorned orthodox religion, despised the law and its administrators, and was a Chartist leader' and, through a leading case of 1884, effectively established the legality of cremation.[74]

Over the centuries since the settlement under Henry VIII, Welshmen have shown a vitality and aptitude for the law and have contributed significantly to the law of England and Wales in particular. There have been various themes such as the royalist leanings of the seventeenth century and radical leanings of the later eighteenth century and the nineteenth century. Up to 1830 there were the Courts of Great Sessions, and I suspect that the courts and judges of Wales

[74] The *Dictionary* appeared in 1959 under the auspices of the Honourable Society of Cymmrodorion.

were more successful than is often appreciated, not least because they could overcome the language problem at the grass-roots level. Individually Welsh judges in London have been prominent from the outset. In addition, the Welsh parliamentary involvement flourished after a late start, bringing with it influence in policy and legislation. The ground had been laid, to a far greater extent than was previously appreciated, for devolution. This should not be ignored amid the current efforts to secure an improved scheme of devolution.