

E. C. QUIGGIN MEMORIAL LECTURES 4

T. M. CHARLES-EDWARDS

The Early Mediaeval Gaelic Lawyer



DEPARTMENT OF ANGLO-SAXON, NORSE, AND CELTIC

UNIVERSITY OF CAMBRIDGE

Edmund Crosby Quiggin (1875-1920) was the first teacher of Celtic in the University of Cambridge, as well as being a Germanist. His extraordinarily comprehensive vision of Celtic studies offered an integrated approach to the subject: his combination of philological, literary, and historical approaches paralleled those which his older contemporary, H.M. Chadwick, had already demonstrated in his studies of Anglo-Saxon England and which the Department of Anglo-Saxon, Norse, and Celtic continues to seek to emulate. The Department has wished to commemorate Dr Quiggin's contribution by establishing in his name, and with the support of his family, an annual lecture and a series of pamphlets. The focus initially was on the sources for Mediaeval Gaelic History. Since 2006 the Quiggin Memorial Lecture is on any aspect of Celtic and/or Germanic textual culture taught in the Department.

The Early Mediaeval Gaelic Lawyer

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Law was one of the greatest achievements of the Irish in the early middle ages. By the conversion of Ireland to Christianity two systems of law were, in the long run, brought into a fruitful interaction. Within the Roman empire there had been no full system of Church-law to match Roman law. There were canons but these only covered a restricted range of issues. Bishops often acted as judges; indeed, their judicial authority was protected by Imperial edict.¹ Their procedures were not the same as those of other courts — torture was not the widespread and accepted tool for obtaining the truth which it was elsewhere — but they had no other system of law than the ordinary Roman law modified by conscience and perhaps the greater freedom of manoeuvre allowed to one acting predominantly as an arbitrator.² On the Continent the judicial role of the bishop and the authority of Roman law within the Church were transmitted to the successor-states such as Francia.³

Ireland was principally converted from Britain. One strand, however, in the detachment of Britain from the Empire was the full rehabilitation of native British law. Some native legal tradition must have continued throughout the period of Roman rule, but in the fifth and sixth centuries it appears to have triumphed over whatever remained of Roman law. For this development we have only the odd hint in contemporary texts, but it is presupposed by the character of later Welsh law, in particular by the far clearer affinities between Welsh and native Irish law than between Welsh and Roman law. As Gildas remarked, the Britons had only received ‘the edicts of the Romans’ *tepide*, without enthusiasm.⁴ He could, I suggest, draw this conclusion from what had happened to Roman law in Britain in his own lifetime if not before. The Irish Church was never likely, therefore, to live, like its Frankish counterpart, under a modified Roman law. Elements of Roman law could find their way into the law of the Irish Church, such as respect for the authority of written documents, but this never amounted to anything approaching a ‘reception of Roman law’. The best example cited for such a process — the form of marital union known as *lánamnas comthinchuir*, ‘union of joint-contribution’ — is open to question.⁵ It is essential to distinguish between the historical origins of a social practice, on the one hand, and, on the other, the legal authority quoted for that practice. Irish ecclesiastical lawyers cited a letter of Pope Leo I which itself embodied elements of the Roman law of marriage and dowry; in doing so, they may indeed have wished to invoke papal authority for *lánamnas comthinchuir*. It does not follow for one moment that that was the historical origin of ‘the union of joint-contribution’. As we shall see, Irish ecclesiastical lawyers worked within a tradition one of whose principal characteristics was a search for authorities, in the Bible and elsewhere. They as often began with an existing rule or practice and then found an authority for it as *vice versa*.

¹ A. H. M. Jones, *The Later Roman Empire* (4 vols, Oxford 1964), I.90-1.

² On torture, see Augustine, *De Ciuitate Dei*, XIX.6: *Sancti Aurelii Augustini De Ciuitate Dei*, edd. Bernard Dombart & A. Kalb (2 vols, Turnhout 1955), II.670-1.

³ Gregory of Tours, *Vita Patrum*, VIII.3 (on Nicetius of Lyon, his kinsman): *Gregorii Turonensis Opera*, edd. Wilhelm Arndt & B. Krusch, *Monumenta Germaniae Historica, Scriptorum rerum merovingicarum*, I (Hannover 1884/5), pp. 661-744, at 692-4; *Gregory of Tours, Life of the Fathers*, transl. Edward James (2nd edn, Liverpool 1991), pp. 52-3. Cf. Orléans I (A.D. 511), § 1, ed. Carlo de Clercq, *Concilia Galliae, A. 511 - A. 695* (Turnhout 1963), pp. 4-5; and the famous phrase of *Lex Ribuarica*, § 61.1, edd. Franz Beyerle & R. Buchner, *MGH Leges nationum germanicarum*, III, 2 (Hannover 1951-4), p. 109, *secundum legem Romanam, quam ecclesia uiuit*.

⁴ *De excidio Britanniae*, I.5: *Gildas: The Ruin of Britain and Other Works*, ed. & transl. Michael Winterbottom (Chichester 1978), pp. 18, 91.

⁵ D. Ó Corráin, ‘Marriage in early Ireland’, in *Marriage in Ireland*, ed. Art Cosgrove (Dublin 1985), pp. 5-24, at 13-15, and T. M. Charles-Edwards, *Early Irish and Welsh Kinship* (Oxford 1993), p. 465(-6), n. 17.

Similarly, since Roman law was on the retreat in Britain, it was never likely that Irish settlements on the eastern side of the Irish Sea would lead to any major reception of Roman law by any Irish kingdom either east or west of that sea. That is not to say that the former Roman empire and its legacy were not a crucial influence on the development of early Christian Ireland; but its influence was more subtle than any ‘reception’, working as much through emulation as through borrowing. In the legal sphere, the letter of Pope Leo I to Rusticus, bishop of Narbonne, raises several useful questions.⁶ Leo took the authority of Roman law in matrimonial matters for granted, just as Justinian would do a hundred years later. In the fifth and sixth centuries there was no such developed system of canon law as there would be by the thirteenth century — a canon law which then claimed marriage and sexuality as lying within its own sphere of authority. In the fifth and sixth centuries one might appeal to ‘the canons’ but not to a system of canon law.

The first question posed by this situation is, then, whether the new Irish Church would accept ordinary Irish secular law of the fifth and sixth centuries as having the same kind of authority over Christians, including the clergy, as Roman law had, not just for Leo I but also for the bishops of King Clovis. We have very little direct evidence on this issue, but the subsequent results of the whole historical process make it evident that the answer was negative. The law of the Irish Church might be influenced by native Irish law, but there was no wholesale acceptance that the Irish Church lived by Irish law in the way the Frankish Church lived by Roman law. The successors of Palladius and Patrick were in a situation utterly different from that of Leo I in Rome or the Frankish bishops assembled at Orléans in 511.

The Irish Church needed its own law. Because Roman law had lost its authority in Britain, the missionaries had not introduced Roman law; and yet they did not accept that Irish law should, quite simply, be their law. In Western Christendom, therefore, the Irish Church was apparently the first to develop what one could call a full canon law, a developed legal system with a wide jurisdiction. As we shall see later, however,⁷ this ecclesiastical law was also of interest to those who had brought Christianity to the Irish, the Britons. Indeed, the beginnings of the tradition may go back to fifth-century Britain. The Britons did not accept that their law was Roman law, and as a result the British Church also needed its own law. For a later period, in the eighth and ninth centuries, the evidence of textual history suggests a lively interest in, and willingness to make use of, the legal texts of the Irish Church, especially in Brittany but also, it may be surmised, in Wales.⁸ If there was a major reception of law in this latter period, it is more likely to have flowed south and east from Ireland to Wales, Cornwall, and Brittany, rather than north and west from the former Empire.

⁶ *Patrologia Latina*, ed. J.-P. Migne (221 vols, Paris 1844-64), LIV, cols 1204-5; this was subsequently incorporated in the *Collectio canonum* of Dionysius Exiguus (*ibid.*, LXVII, cols 288-9) and quoted thence in *Collectio canonum hibernensis* XLVI.19 (*Die irische Kanonensammlung*, ed. Herrmann Wasserschleben [2nd edn, Leipzig 1885], p. 190).

⁷ Below, pp. 42-3.

⁸ On Brittany and ‘The First Synod of St Patrick’, see H. Simpson, ‘Ireland, Tours and Brittany: the case of Cambridge Corpus Christi College, MS. 279’, in *Irlande et Bretagne. Vingt siècles d’histoire*, edd. Catherine Laurent & H. Davis (Rennes 1994), pp. 108-23; for a new text and translation see David N. Dumville, *Councils and Synods of the Gaelic Early and Central Middle Ages*, Quiggin Pamphlet 3 (Cambridge 1997), pp. 6-17. The popularity of *Collectio Canonum Hibernensis* in Brittany has been well known since Henry Bradshaw’s letter, *apud* Wasserschleben, *Die irische Kanonensammlung*, pp. lxxv-lxxv; cf. D. N. Dumville, ‘Ireland, Brittany, and England: transmission and use of *Collectio canonum hibernensis*’, in *Irlande et Bretagne*, edd. Laurent & Davis, pp. 84-95; for Wales, see H. Pryce, ‘Early Irish canons and medieval Welsh law’, *Peritia* 5 (1986) 107-27.

We see Irish ecclesiastical law mainly through its culmination in ‘The Irish Collection of Canons’, *Collectio canonum hibernensis*, often referred to, as it will be here, simply as the *Hibernensis*; it is datable to the period 716 × 725. The earlier stages of Irish canon law can only be reconstructed in outline. While, therefore, the broad shape of what was happening can be perceived with reasonable confidence, the details are almost always beyond our view.

The same is true for vernacular or secular Irish law. Broadly, the vernacular texts are distinctively Irish — a law perceived as an intrinsic part of native Irish tradition — and also secular by contrast with ecclesiastical law. The three characteristic oppositions — Latin versus Irish, ecclesiastical versus secular, and international versus native — generally coincided. The main exception to this rough division, the ecclesiastical *cánai*, will be discussed below.⁹ The frontier between the two laws was a zone rather than a line, and there was trade in both directions; but the two territories had consciously different traditions. Recently, most interest has been in borrowings from one tradition into the other and in the ideological image presented of the native law. While these are important topics, they should not distract attention from three central families of questions. How did the two laws work as intellectual traditions? What kind of authority did each tradition recognise to make, to discover, and to interpret law, to promulgate it and to impose it? And what range of persons or aspects of life was subject to each law? There may not be single answers to these questions: the question who or what was subject to each law may not have received the same answer in the eighth century as it had in the fifth. In this pamphlet I shall concentrate principally on the first family of questions.

First, however, we need to consider the evidence. Most texts can be dated to the seventh and eighth centuries (apart, that is, from later glosses and commentaries). Even within that period, most of the material probably comes from a single century, 650-750. This is true of the major compilation of Church-law, ‘The Irish Collection of Canons’. It is also probably true, although the evidence is less conclusive, of the major corresponding collection of secular law, *Senchas Már*, literally ‘The Great Antiquity’ but meaning ‘The Great Collection of Ancient Tradition’.¹⁰ The *Hibernensis* was created in the years after Iona had adopted the ‘Roman’ Easter and when the Irish Church was no longer divided between ‘Roman’ and ‘Hibernian’ synods. It incorporated material from both sides in the conflict, but itself adopted an explicitly ‘Roman’ standpoint. By being a single compilation yet drawing on material from both sides, it may have helped to ensure harmony between the two parties: both could appeal to the same written authorities. As for the material in Irish, the dates 650-750 are suggestive in themselves: the earliest written origin-legends, the earliest of the Ulster sagas, the earliest ‘voyage’-text, the earliest grammar of Irish have all been dated within the same century. Legal writing may have been part of a broad movement to give textual definition to Irish tradition in the century after the hegemony of Uí Néill had finally been consolidated.¹¹

⁹ See pp. 43-61.

¹⁰ D. Flanagan, ‘A reappraisal of *da* in Irish place-names’, *Bulletin of the Ulster Place-name Society*, 2nd series, 3 (1980/1) 71-3, threw doubt on Pokorny’s theory — used by R. Thurneysen in his discussion of the date of *Senchas Már*, ‘Aus dem irischen recht, IV’, *Zeitschrift für celtische Philologie* 16 (1926/7) 167-230, at pp. 177, 186 — that *da* in place-names is a survival of the early genitive plural *inda*.

¹¹ A pair of early tracts written by the same author, *Bechbretha* and *Coibnes Uisci Thairidne*, has a *terminus post quem* in that one of them refers to an incident which almost certainly occurred in the 630s: see *Bechbretha*, edd. & transl. Thomas Charles-Edwards & F. Kelly (Dublin 1983), p. 27, and also the notes to §§ 31 and 32 (pp. 123-31).

A broad classification of Irish legal texts might begin by dividing them into four primary categories, two in Latin and two in Irish. On the Latin side, the records of the decrees of synods may be distinguished from learned tracts such as *De Decimis*, 'On Tithes'.¹² On the one hand, we have texts which claim to record the edicts of legislative assemblies, and, on the other, texts which make no such claim but instead embody the expertise of a scholar. The authority behind the two is different: one has the authority of legislation, the other the authority of learning. These two are the primary types; the *Hibernensis*, however, is a composite text, a compilation drawing on many different sources, among them some which are legislative, some learned; it also shows extensive use of the Bible and of exegesis. Alongside the two primary genres, namely the record of a synod and the text written by an expert, we now have a secondary genre, the compilation of other texts. The *Hibernensis* was created by men whom the Irish annalists called either *scribae* or *sapientes*; that is to say, experts in the exegesis of the Bible and thus in biblical law.¹³ To that extent, the closer connexion of the *Hibernensis* is with the second primary category of text, the learned tract, but it is by no means impossible, as we shall see,¹⁴ that it was also confirmed by synodal authority. Among the records of legislation, there are texts whose titles proclaim them to be products of a synod of *sapientes*.¹⁵ Moreover, this is only one of several bits of evidence which demonstrate a proposition of crucial importance for the government of the early mediaeval Irish Church as well as for the background to early mediaeval Irish ecclesiastical law: those entitled to participate in synods as full members included not just bishops but leading scholars and the heads of the most important monasteries.¹⁶ Expertise in exegesis and Church-law (the two went hand in hand) had a more direct input into synodal authority than elsewhere in Christendom. Our two primary genres were distinct, but they were less far apart than one might have expected.

Legal texts in Irish also fall into two primary categories accompanied by a secondary category.¹⁷ These, in essence, correspond with those of the Latin texts. On the one hand, there

¹² On the synods see Dumville, *Councils*.

¹³ AU 725.4; 747.6 (for 'AU', see n. 101, below). The *scriba* in canonical texts is not a calligrapher but the *suí litre*, 'scholar of the written word', or *roshuí*, 'great scholar', of the vernacular laws: compare *Canones Hibernenses*, I.29, IV.1 and 9, V.11, edd. & transl. Ludwig Bieler & D. A. Binchy, *The Irish Penitentials* (Dublin 1963), pp. 162-3, 170-1, 174-5, with *Uraicecht na Ríar*, ed. & transl. Liam Breatnach (Dublin 1987), p. 84 (the two Old-Irish terms seem to have been *suí litre* and *roshuí*: *druimchlí*, explained as *fer léiginn*, is probably a kenning). In the same texts, *sapientes* is used for scholars involved in synods as judges; in Irish chronicles *sapiens* is the more common term until the mid-eighth century; thereafter *scriba* became more common; the most important distinction, however, is that in the chronicles *scriba* is usually attached to a church (very occasionally a province), whereas *sapiens* rarely is. My strong suspicion is that, in the chronicles, *sapiens* is a term of status, while *scriba* is used for someone who has an office in a particular church. That is to say, the *scriba* of the canon-law texts is the *sapiens* of the chronicles, while *sapiens* in the canon law is a more general term for ecclesiastical scholar.

¹⁴ Below, pp. 60-1.

¹⁵ *Canones Hibernenses*, III (edd. & transl. Bieler & Binchy, *The Irish Penitentials*, pp. 166-7), where the title has *sapientes*, and § 1 says what *auctores* were saying; VI is a synod of *sapientes*, according to the title, and § 4 refers to *statuta prudentium*.

¹⁶ *Cummian's Letter De Controversia Paschali*, edd. & transl. Maura Walsh and D. Ó Cróinín (Toronto 1988), p. 90. AU 780.12: 'An assembly of the synods of Uí Néill and the Leinstermen in the *oppidum* of Tara, where there were many anchorites and *scribae*, whose leader was Dublitter'. For Dublitter see his obit, AU 796.1; his name, 'Blackletter', suggests that he was a *scriba*.

¹⁷ For a very useful list, see Fergus Kelly, *A Guide to Early Irish Law* (Dublin 1988), pp. 264-83 (Appendix I), which also includes some Latin texts. L. Breatnach, 'On the original extent of the *Senchas Már*', *Ériu* 47 (1996) 1-43, at pp. 20-37, has given a list of tracts belonging to *Senchas Már*, both those for which continuous text survives and those for which we only have fragments. For earlier observations on the uneven and defective

were those which recorded the decisions of an assembly; they were called *cánai*, *rechtgai*, or *rechta*.¹⁸ I shall here adopt one of these terms, *cáin* (plural *cánai*, later *cána*). On the other hand, there were texts which embodied expertise; instead of decrees promulgated by an assembly and binding upon ordinary people by virtue of the authority of that assembly, these other texts had an authority simply by being good accounts of Irish law. They have usually been seen as having been composed by lawyers to instruct other lawyers — as legal manuals rather than as being primary law directed at a general population.¹⁹ Again there is a secondary compilation, *Senchas Már*; however, in this case, the compilation, or lawbook, was apparently composed solely of manuals (tracts) and did not include *cánai*.²⁰ Thus not merely was it a learned compilation but it was composed of learned texts. *Senchas Már*, therefore, did not have the obvious links with *cánai* which the *Hibernensis* had with synods.

This preliminary survey of Irish legal texts throws up some problems. Why are some texts in Irish but others in Latin? What is the relationship between legislative and non-legislative texts? And, finally, why did *Senchas Már*, unlike the *Hibernensis*, not set out to include the legislation of Irish assemblies? Or, if it did, why is there no trace of the legislative origins of any of its material? If both main compilations, the *Hibernensis* and *Senchas Már*, were produced in the first half of the eighth century, was there any connexion between them which would explain their near-contemporaneity?

Before we approach some of these issues, however, a brief survey of how scholars have investigated the evidence is in order. Both of the two compilations were first published in the second half of the nineteenth century. Most of *Senchas Már*, as well as other tracts not included in the main compilation, were transcribed by Eugene O'Curry and John O'Donovan, whose work was used, after their deaths, to produce *The Ancient Laws of Ireland*.²¹ This edition included translations and a glossary as well as texts. Its shortcomings were evident from the start. Indeed it has been seen as a false beginning;²² yet, as the history of scholarly work on the *Hibernensis* suggests, defective scholarship is sometimes more of a spur to later work than is a serviceable edition. Herrmann Wasserschleben's book *Die irische Kanonensammlung*, in its second edition of 1885, remains the standard text of the *Hibernensis*. It was principally based on two manuscripts of the A-recension;²³ but it included, in the footnotes, much, though not all, of

preservation of Irish law, see C. Plummer, 'On the fragmentary state of the text of the Brehon Laws', *Zeitschrift für celtische Philologie* 17 (1927/8) 157-66.

¹⁸ *Cáin Adomnáin*, ed. & transl. Kuno Meyer (Oxford 1905), pp. 20-33 (§§ 29, 34-41, 43, 47-9, 53); also known as *Recht Adamnáin*, as in *Críth Gablach*, ed. D. A. Binchy (Dublin 1941), p. 21, line 524 (§38), and as *Lex Innocentium*, 'The Law of Innocents', AU 697.3; for the category known as *rechtge*, see *Críth Gablach*, ed. Binchy, pp. 20-1 (§§ 36 and 38).

¹⁹ R. Thurneysen, 'Das keltische Recht', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, 55 (1935) 81-104, translated in *Celtic Law Papers introductory to Welsh Medieval Law and Government*, ed. Dafydd Jenkins (Bruxelles 1973), pp. 51-70; D. A. Binchy, 'The linguistic and historical value of the Irish law tracts', *Proceedings of the British Academy* 29 (1943) 195-227, reprinted in *Celtic Law Papers*, ed. Jenkins, pp. 71-107, and 'Ancient Irish law', *The Irish Jurist*, new series, 1 (1966) 84-92.

²⁰ Breatnach, 'On the original extent'.

²¹ *The Ancient Laws of Ireland*, edd. & transl. W. N. Hancock *et al.* (6 vols, Dublin 1865-1901). Some copies of the transcripts made by O'Curry and O'Donovan were produced and deposited in major libraries.

²² Binchy, 'The linguistic and historical value', pp. 197-8 (reprinted in *Celtic Law Papers*, ed. Jenkins, pp. 75-6).

²³ Sankt Gallen, Stiftsbibliothek, MS. 243 (*saec.* ix, written by an Anglo-Saxon scribe, Eadberht), and Paris, Bibliothèque nationale, MS. latin 12021 (*saec.* ix, written by a Breton scribe, Arbedoc, for Abbot Haelhucar). The Sankt Gallen manuscript is defective at the beginning (as far as III.2); Wasserschleben therefore took the first two books from the Paris manuscript.

the extra material found in the B-recension. It might reasonably be argued that any new edition should be of the B-recension; for Wasserschleben's edition has, on the whole, served subsequent scholarship well.²⁴ What is noticeable, however, is how much more work has been done on the Irish than on the Latin texts. Likewise there has been far more discussion of the contents of texts in the vernacular.

Part of the reason is that two outstanding Celtic scholars began to study the vernacular texts in the inter-War period.²⁵ The first was Rudolf Thurneysen, already the foremost student of Old Irish and of mediaeval Irish literature. He did a little work, which was of considerable importance, on the *Hibernensis*,²⁶ but his background naturally impelled him to concentrate on the vernacular texts. He began, in his first edition, by depending on the text of *The Ancient Laws of Ireland*, but he went on to publish the first critical editions of Irish law-tracts.²⁷ These included full commentaries, which were notably balanced and well informed; yet he was also very willing to revise his own opinions and to correct his own editions.²⁸

What Thurneysen set out to do was to edit and explain texts. He briefly collaborated with a legal historian, Josef Partsch, but after the latter died he continued on his own.²⁹ Daniel Binchy was an historian who subsequently studied Roman law and legal history; later still, he came to Old Irish. The pattern of his intellectual development was thus very different from that of Thurneysen, yet he was also the pupil of the older scholar and was conscious of carrying on in the same philological tradition. As we have seen,³⁰ written Irish law was, initially, a product of a single great surge of activity between 650 and 750. Binchy inherited from Thurneysen a suspicion of the later glosses and commentaries (with the outstanding exception of a series of glosses on part of *Senchas Már* contained in Dublin, Trinity College, MS. 1337 [H.3.18]).³¹ Both regarded them as unreliable aids to understanding the primary texts and even more unreliable aids to understanding Irish law of a later period. They thought that the glossators and commentators were usually attempting, and all too often failing, to explain the meaning of old law and only sometimes making connexions between old texts and the law of their own day. Yet, as an historian by training, Binchy wanted to detect changes in his sources; and, since he had serious doubts about the evidence offered by the glosses and commentaries, he needed to

²⁴ Users of his edition should beware of two things: (1) his letters for individual items of evidence within a chapter (which are, of course, editorial) sometimes fail to distinguish separate items, and this is especially true for *exempla*; (2) he sometimes interpreted *exempla* as if they were *testimonia*.

²⁵ A third major scholar, Charles Plummer, began to work on Irish law before the First World War but died in 1926.

²⁶ R. Thurneysen, 'Zur irischen Kanonensammlung', *Zeitschrift für celtische Philologie* 6 (1907/8) 1-5, and 'Aus dem irischen Recht, V. 9. Zu der Etymologie von ir. *ráth* "Bürgschaft" und zu der irischen Kanonensammlung und den Triaden', *ibid.*, 18 (1929/30) 364-75.

²⁷ *Cáin Aicillne* was the first: ed. & transl. R. Thurneysen, 'Aus dem irischen Recht, I. Das Unfrei-Lehen', *Zeitschrift für celtische Philologie* 14 (1923) 335-94. For the others see the Bibliography, below, pp. 64-6.

²⁸ For example, he gave one explanation of the phrase *rath tar airdig* (*Cáin Aicillne*, § 22) on pp. 362-3, corrected it on p. 393, and then reverted to his first explanation in 'Aus dem irischen Recht, IV', p. 210.

²⁹ See the forewords to *Cáin Aicillne* ('Aus dem irischen Recht, I') and *Cóic Conara Fugill*, ed. & transl. R. Thurneysen, *Abhandlungen der Preussischen Akademie der Wissenschaften, Phil.-hist. Klasse* (1925) Nr. 7, at p. 3.

³⁰ Above, pp. 5-6.

³¹ *Corpus Iuris Hibernici*, ed. D. A. Binchy (6 vols, Dublin 1978), III.874-924; and see Breatnach, 'On the original extent', p. 4.

detect change in the primary texts, those written between 650 and 750.³² Sometimes he was able to ground distinctions between earlier and later law in the texts themselves. An important example is a statement in *Críth Gablach*, a text on status which he dated to the early eighth century. It contains a brief account of procedure in cases of ‘sick-maintenance’ — cases when the injurer might have a duty to arrange the medical care of the person whom he had injured.³³ The account of sick-maintenance in *Críth Gablach* is plausibly interpreted as an extended quotation from an earlier source; stylistically it is out of character with the rest of the tract. The passage is also introduced by a sentence which declares the procedure to be outdated.³⁴ This was crucial evidence when Binchy came to edit the tract on sick-maintenance found in *Senchas Már*, an edition to which he added a major study of the development of the institution.³⁵ Here, then, Binchy could find the historical depth which he sought. Elsewhere, however, the reluctance of the sources to acknowledge change compelled him to depend more heavily on general theories of legal and social development. When he came to legal history, the readiness of such great nineteenth-century scholars as Tocqueville, Maine, and Marx to argue for long-term patterns of change remained influential. Even Durkheim — who, in *Les Règles de la méthode sociologique*, championed the claims of synchronic over diachronic explanation — was to develop one of the most brilliant theories of long-term change in his book *De la division du travail social*.

Comparative philology was a further aid in the struggle to get historical perspective into the resolutely unchanging picture purveyed, with only a very few exceptions, by the texts. Thurneysen had written an article entitled ‘Celtic Law’; although this was founded principally on early mediaeval Irish sources, he pointed to parallels in the Welsh laws. Some of Binchy’s most brilliant work exploited this line of investigation: he was able to point to technical terms used in both Irish and Welsh law which were cognate (derived from the same Celtic forms). He assembled enough examples to give support to the thesis that these were cognate terms in two related legal traditions, with their own inherited technical vocabularies, and not just cognate words in two related languages. Since this line of argument no longer has the benefit of either novelty or current fashion, it is only just to point out quite how exciting were the possibilities which his work opened up. If these technical vocabularies were indeed inherited, at least to some extent, from a period when Irish and Welsh were instead one and the same ancestral language, they already had a history of at least a millennium when, about A.D. 650, the first Irish law-tracts were written. From texts which appeared to be unchanging, Binchy had conjured exhilarating evidence for *la longue durée*.

The situation in the middle years of the twentieth century, after the death of Thurneysen during the Second World War, was that Binchy was employing his formidable abilities partly in editorial work but also in using tools derived from nineteenth-century legal history and comparative philology to tease out chronological strata in the texts. At a period when intellectual fashion was tending to favour structural and functional explanations, his efforts were in a contrary direction. That does not imply for one moment that his approach was wrong: some

³² For Binchy’s use of material from glosses and commentaries, see his article ‘The legal capacity of women in regard to contracts’, *apud* Rudolf Thurneysen *et al.*, *Studies in Early Irish Law* (Dublin 1936), pp. 207-34, where his C-group of texts (pp. 217-23) comes from them.

³³ *Críth Gablach*, ed. Binchy, p. 3, lines 52-62 (§8); also D. A. Binchy, ‘Sick-maintenance in Irish law’, *Ériu* 12 (1934-8) 78-134, at pp. 82-5.

³⁴ *Críth Gablach*, ed. Binchy, p. 2, lines 47-51 (§8).

³⁵ *Bretha Crólige*: ed. & transl. D. A. Binchy, *Ériu* 12 (1934-8) 1-77; cf. Breatnach, ‘On the original extent’, pp. 2, 10, 32-3, on *Bretha Crólige* and *Bretha Déin Chécht*.

of the intellectual tools of the nineteenth century may last much better than the fashionable approaches of the late twentieth; and, in any case, it may have been thoroughly salutary to have the best scholar of his generation in that field working against rather than with the current of fashion. Those who read his work do, however, need to realise that he had a taste for grand intellectual constructions and that some of the materials which he used to build them may have been less sound than others. All this also helps to explain a certain reaction against his work since his death. Contemporary approaches are, on the whole, closer to those of Thurneysen than to those of Binchy — content, first, to edit and comment on texts and, secondly, to investigate what the texts tell us of their own time rather than to propose new theories of long-term change.³⁶ This is hardly surprising, since much of the work now being done on Old-Irish law is by philologists rather than historians.³⁷ Yet, whatever the changes of approach, ever since Thurneysen began to study Irish law in the 1920s, the field to which he gave new life has been central to the whole project to develop a more accurate understanding of Ireland in the early middle ages.³⁸

On the Latin side there has been important editorial work by Ludwig Bieler but relatively little close analysis of the texts. The long-awaited new edition of the *Hibernensis* by Maurice Sheehy was apparently far advanced at this death, but only indistinct rumours of it have been heard since. There is no sustained discussion of how the *Hibernensis* was compiled, what kind of authority it had, and the range of people subject to its rules.³⁹ The most valuable recent work has been in two directions: on its sources and on its reception in carolingian Europe.⁴⁰

There is only space here for one clue to some answers to these major problems.⁴¹ Wasserschleben's edition of the *Hibernensis* ends with a book (LXVII) whose title is 'About contrary cases', *De contrariis causis*, by which was meant issues on which authoritative evidence was conflicting.⁴² In the B-recension the same title is used for the penultimate book, but the contents are quite different. The nature of these contents, principally in the A-recension, provides precious evidence on the reasoning underlying the *Hibernensis* and also on the way in which it was put together. As a final benefit, it may throw some light on the relationship between the A- and B-recensions.

³⁶ Outstanding editorial work has been done by Liam Breatnach on the difficult *Bretha Nemed* material in Part I of his edition and translation of *Uraicecht na Ríar* (Dublin 1987) and in 'The first third of *Bretha Nemed Toísech*', *Ériu* 40 (1989) 1-40; for a general discussion of the material see especially Kelly, *A Guide*, and Fergus Kelly, *Early Irish Farming* (Dublin 1997).

³⁷ An exception is Robin Chapman Stacey, *The Road to Judgment. From Custom to Court in Medieval Ireland and Wales* (Philadelphia, PA 1994).

³⁸ There are important possibilities for cross-fertilisation between studies of the legal texts and archaeology: Kelly, *Early Irish Farming*, and Matthew Stout, *The Irish Ringfort* (Dublin 1997), pp. 110-34.

³⁹ For bibliographical guidance see Michael Lapidge & R. Sharpe, *A Bibliography of Celtic-Latin Literature, 400-1200* (Dublin 1985), pp. 156-7.

⁴⁰ Sources: R. Sharpe, 'Gildas as a Father of the Church', in *Gildas: New Approaches*, edd. Michael Lapidge & D. Dumville (Woodbridge 1984), pp. 191-206; D. Ó Corráin, 'Irish law and canon law', in *Ireland and Europe. The Early Church*, edd. Próinséas Ní Chatháin & M. Richter (Stuttgart 1984), pp. 157-66; L. M. Davies, 'The biblical text of the *Collectio canonum hibernensis*', in *Ireland and Europe in the Early Middle Ages. Learning and Literature*, edd. Próinséas Ní Chatháin & M. Richter (Stuttgart 1996), pp. 17-41, and 'Isidorian texts and the *Hibernensis*', *Peritia* 11 (1997) 207-49. Reception: R. E. Reynolds, 'Unity and diversity in Carolingian canon law collections: the case of the *Collectio hibernensis* and its derivatives', in *Carolingian Essays*, ed. Uta-Renate Blumenthal (Washington, DC 1983), pp. 99-135; Hubert Mordek, *Kirchenrecht und Reform im Frankenreich* (Berlin 1975), pp. 255-9.

⁴¹ What follows is based on my paper, 'The construction of the *Hibernensis*', *Peritia* 12 (1998) 209-37.

⁴² *Die irische Kanonensammlung*, ed. Wasserschleben, pp. 240-3.

We may take as an example the first chapter of *De contrariis causis* in the A-recension:

Chapter 1. That every judge ought not to be changeable in his judgments, and, on the contrary, ought to change an injustice.

- a. Pilate said: What I have written, I have written.
- b. Jerome: Let a judge give his verdict and let him not change it; for if he should change it, let him be stripped of his office.

On the contrary:

- c. Paul: Every unjust bond will be dissolved.
- d. Jerome: It is better to change rather than to confirm what appears not to be just.

The chapter-heading contains two opposed rules. The body of the chapter then presents evidence in favour, first, for one rule and, then, for the other. This structure of the chapter may conveniently be termed ‘dialectical’ in that it turns on the opposition between a thesis and an antithesis; but it should be noted that there is no synthesis, no resolution of the conflict between the two rules. The result is that the chapter divides into three parts:

1. The chapter-heading: rule y and the contrary rule z.
2. Evidence for rule y.
3. Evidence for rule z.

I shall consider, briefly, the chapter-headings and the two great categories of evidence: *exempla* (events in the Bible, ecclesiastical history, or saints’ Lives, treated as instances of a possible rule) and *testimonia* (pieces of text from authoritative sources supporting a possible rule).

The type of chapter-heading found in *De contrariis causis* — a single heading stating two opposed rules — is not found elsewhere in the *Hibernensis*; yet there are many pairs of chapter-headings which are similarly opposed. In such cases, the opposition is no longer within a single chapter but is expressed by two distinct headings within one book. A clear example is chapter 5 of *De contrariis causis*: ‘Concerning the guilt of guilty persons being attached to those who defend them; and, on the contrary, not being attached to those who defend them with good intentions’. This corresponds to chapters 19-20 of Book XXVII:⁴³

Chapter 19: Concerning the guilt of guilty persons [being attached to] releasing them alive.

Chapter 20: Concerning those who, with good intentions, help ‘apostates’.⁴⁴

The chapter-headings have undergone significant change, but the phrasing of the heading to chapter 19, in particular, as well as the identity of part of the evidence presented in the body of the two chapters, shows that the same material is being presented in different forms.⁴⁵

XXVII.19.d	=	LXVII.5.c
e	=	d

⁴³ *Ibid.*, pp. 92-3. There is also a link with §§ 21-3 (*ibid.*, p. 93).

⁴⁴ *Apostatae* = *inimici* as the *exempla* show; cf. the ‘apostate Picts’ of Patrick’s *Contra Coroticum*, § 2, discussed by P. Grosjean, ‘Les Pictes apostats dans l’Épître de S. Patrice’, *Analecta Bollandiana* 76 (1958) 354-78, and David N. Dumville *et al.*, *Saint Patrick, A.D. 493-1993* (Woodbridge 1993), pp. 129-31.

⁴⁵ I have supplied the letters in square brackets; the others are Wasserschleben’s.

<i>f</i>	=	<i>a</i>
<i>g</i>	=	<i>b</i>
20. <i>a</i>	=	[<i>f</i>]
<i>c</i>	=	[<i>g</i>]
<i>d</i>	=	[<i>e</i>]

A single heading stating a *contraria causa* has now become two separate headings, still looking in different directions, but far from being directly contradictory.

Such cases as this, when gathered together, show that the book *De contrariis causis* in the A-recension was part of the preparatory work for Books XXI-XXIX. There may have been other collections of *contrariae causae* for other parts of the work. Moreover, once Books XXI-XXIX had been produced, the A-recension of *De contrariis causis* was largely redundant. The B-recension's book *De contrariis causis*, on the other hand, is a collection of disputed issues which were not covered in the main text. It still had a clear *raison d'être* in the final text. A possible theory to account for this evidence would be that the A-recension is where the work had got to when one of the compilers, Ruben, died in 725. Others, perhaps Ruben's collaborator, Cú Chuimne, then revised and expanded the text.⁴⁶ The revision is shown by the superior accuracy of the quotations; the expansion is obvious. If this theory is correct, the B-recension ought to provide the basis for a new edition.

The *Hibernensis* was made by two processes working at the same time: headings looking for evidence and evidence creating its own heading. In some instances — as in XV.5 and XXVII.19 — both processes worked upon a single chapter. In other cases, one process was uppermost. We cannot always decide which of these processes lay behind a particular chapter, but such a decision is possible sufficiently often for us to appreciate how the compilers worked. And we can also appreciate that, sometimes, much of the work had been done before they ever began their great task.⁴⁷

The law into which the *Hibernensis* attempted to bring order was, therefore, a consistently text-based tradition. So much is obvious for *testimonia*, authoritative pieces of text; but *exempla*, too, were drawn from texts, from the Bible, from ecclesiastical history and from saints' Lives. The importance of *exempla* should not make one think that this was a tradition based on case-law: *exempla* were not cases decided in courts which then had an authority in subsequent cases. They are, however, instructive for us, in that they reveal, even more than the biblical *testimonia*, the role of the exegete as a maker of law. A good case in point is that of Rahab, the harlot of Jericho. It was in her house in which, as it happened, the spies sent by Joshua lodged. The compilers of the *Hibernensis* had a fondness for Rahab. In XXVII.20 the saving of Rahab and all her household when Israel sacked the town illustrates the heading, 'On those who help the enemy with good intention'. This is derived, via some necessary refinement of the issues, from *De contrariis causis* (LXVII.5.e). In XXXII.19, she illustrates the rule that,

⁴⁶ On Ruben and Cú Chuimne see Thurneysen, 'Zur irischen Kanonensammlung'. For translations of the preface to the B-recension (*Die irische Kanonensammlung*, ed. Wasserschleben, p. 1), see: Neil Wright *apud* Dumville, 'Ireland, Brittany, and England', p. 92; *Prefaces to Canon Law Books in Latin Christianity*, transl. Robert Somerville & B. C. Brasington (New Haven, CT 1998), p. 58.

⁴⁷ As shown by Sharpe, 'Gildas as a Father of the Church', p. 196; another slighter but clear example is *Hibernensis* XXVII.19.a-c (*Die irische Kanonensammlung*, ed. Wasserschleben, p. 92), discussed in my paper, 'The construction of the *Hibernensis*', pp. 215-18.

while women may share an inheritance, they do not obtain the principal share: Rahab the harlot, we are told, obtained an inheritance in Jericho. Again, in LVI.2, the happy consequences of offering hospitality are exemplified by the statement that ‘by hospitality Rahab the harlot freed her household from Jericho’. Clearly the life of a harlot in Jericho was not necessarily a model for Christian living. It has been made so by an exegete looking for ‘the moral sense’, the *moralis* or *béstatu*, in a particular story in the Book of Joshua.⁴⁸ This is also true of *testimonia*, though not quite to the same degree. Pontius Pilate’s remark, ‘What I have written I have written’, is quoted in support of the rule that judges should not be ready to change their judgments. Again, Pontius Pilate was not manifestly an authority on Christian living; the exegete turned this utterance into evidence for a legal rule.⁴⁹

The *Hibernensis*, then, is a book founded upon exegesis — specifically of the moral sense — and addressed to judges who were themselves trained in the same tradition. It did not claim to give straight and simple answers, as *De contrariis causis* shows. Moreover, its combination of moral persuasion and legal rule is explained by a corresponding combination, on the part of bishops and other ecclesiastical authorities, of two roles: of judge and of spiritual director or ‘soul-friend’. The *Hibernensis* was a learned guide to a complex intellectual tradition and was aimed at scholar-judges, not at a wider public.

Some of this is also true of the principal vernacular texts: *Senchas Már*, and the looser *Bretha Nemed* family of tracts from Munster.⁵⁰ An appropriate way to begin to explore the links and the differences between the two traditions is to consider further what they say about their respective authoritative sources of law.

The main statement in the *Hibernensis* is Book XIX, ‘On the order in which one should investigate cases’. It consists of a single chapter, containing a single *testimonium*.

Innocent says: As for those cases in which there is a power to remit and to bind, if the answer is not clear, you should have recourse to the twenty-two books of the Old Testament and the Four Gospels, together with all the writings of the apostles [*sc.* the Epistles], which in Greek are called ‘holy writings’. If the answer is not in them, take hold of the histories of the catholic Church and the writings of catholic teachers. If it is not in them, examine the canons of the Apostolic See; and if it is not in them, look at and examine with intelligence the examples given by holy men. If you have looked at all these, and the nature of the problem is not clearly revealed, summon the *seniores* of the province and put your question to them; for the solution is more easily found when the one problem is examined by many. Hence the Lord, whose promises are true, said: ‘If two or three of you come together in my name, whatever they have sought will be theirs’.

This passage, ascribed to a Pope Innocent, though never found among the writings of the plausible candidate, Innocent I, both names the authorities and puts them in order, the highest authority coming first: if the answer is in the Bible, there is no need to look further, since the authority of the Bible is supreme. The essential sequence is (putting ecclesiastical histories together with other Patristic texts): (1) the Bible; (2) the Fathers; (3) papal decrees; and (4) the Lives of the saints. The order may be crucial: it implied a solution to the paschal question, since (3), papal authority, came before (4), the example of holy men (such as Columba).⁵¹ On the

⁴⁸ Cf. Cumman’s phrase *moralis sapientia*, which must mean something like ‘profound learning in exegesis of the moral sense’: *Cumman’s Letter*, edd. & transl. Walsh & Ó Cróinín, p. 56, lines 8-9.

⁴⁹ This was easier because of the context of the statement in St John’s Gospel, 20:22.

⁵⁰ See D. A. Binchy, ‘*Bretha Nemed*’, *Ériu* 17 (1955) 4-6, and ‘The date and provenance of *Uraicecht Becc*’, *Ériu* 18 (1958) 44-54.

⁵¹ *Cumman’s Letter*, edd. & transl. Walsh & Ó Cróinín, pp. 17-18: they have rightly compared Cumman’s *modus operandi*. Note the point over which the unity of the Synod of Mag Léne broke down: ‘a certain “whited

other hand, this passage does not explain where synodal decrees fit in, although elsewhere the compilers of the *Hibernensis* evidently regarded them as authorities.⁵²

When we turn to the nearest equivalent statement in the native law, we find something different. Instead of categories of text, there are what look like very broad juristic concepts and, instead of an order of authorities, we have categories of law:⁵³

On what is the judicial role founded in Irish law? Not difficult: on justice and entitlement and nature.⁵⁴ Justice is established on the basis of *roscada* and *fásaige* and truthful texts. Entitlement is based on verbal contracts and acknowledgment. Nature is based on remission and communal order. Justice and entitlement are both founded on the holy. Any judgment not based on one of these has no force at all. Any judgment of the Church is based on the justice and entitlement of Scripture. A judgment by a poet, however, rests on *roscada*. A judgment by a ruler, on the other hand, is based on them all: on *roscada*, on *fásaige*, and on truthful texts.

A further type of consideration mentioned as governing judgments is analogy, *cosmailius*. Its Latin equivalent, *similitudo*, is mentioned in the *Hibernensis*, but it is more often cited in the vernacular law.⁵⁵ Thus, the principal tract on distraint remarks:⁵⁶

Distraint of one day has been prescribed thus far, not including anything which conscience and nature add according to Irish law by means of analogies in accordance with justice.

In some tracts, for example *Coibnius Uisci Thairidne*, ‘Kinship of Conducted Water’, and *Bechbretha*, ‘Bee-judgments’, *cosmailius*, analogy, plays a crucial role.⁵⁷ For the text on distraint, however, it seems to have a secondary, though not necessarily inferior, authority. The main provisions of the law are established by other means; analogy comes along subsequently.

Our secular lawyer differs from his ecclesiastical counterpart in that here, as elsewhere, he is explicitly aware of the other tradition. There are very few places where the *Hibernensis* mentions a person who, in the context, appears to be a secular judge (‘the secular scholar’, *mundialis sapiens*, or the *iuris peritus*);⁵⁸ and one purpose of noticing his existence is to warn him not to intrude himself into ecclesiastical cases.⁵⁹ It would be wrong to say that the secular lawyers were incessantly looking over their shoulders at the lawyers and law of the Church, but they certainly did so quite often. It is interesting to see what this particular lawyer picked out as the differences between the authorities cited in the two traditions. Quite rightly, he picked out the Bible as the Church-lawyer’s leading source of law. For his own tradition, however, the

wall” arose, pretending to “preserve the tradition of our elders” (pp. 92-3, line 271); the argument from the holiness of ‘our fathers, men beloved of God’ was central to the case put by Colmán at the Council of Whitby, as reported by Bede, *Historia ecclesiastica gentis Anglorum*, III.25, edd. & transl. Bertram Colgrave & R. A. B. Mynors, *Bede’s Ecclesiastical History of the English People* (Oxford 1969), pp. 294-309; and see also Stephen’s Life of St Wilfrid, § 10, ed. & transl. Bertram Colgrave, *The Life of Bishop Wilfrid by Eddius Stephanus* (Cambridge 1927), pp. 20-3.

⁵² Dumville, *Councils*, p. 22.

⁵³ *Corpus Iuris Hibernici*, ed. Binchy, VI.2256.13-2257.11; 2261.18-36.

⁵⁴ Compare *Hibernensis* XXI.6.a (*Die irische Kanonensammlung*, ed. Wasserschleben, p. 64): ‘Agustinus dicit: Tribus modis iudicibus iudicandum: natura, hoc est indagazione rerum, et similitudine precedentium et ex uerbis scripturae’.

⁵⁵ *Hibernensis* XXI.6 (see n. 54, above). Cf. Wb. 5 b 42 and 30 a 17, in *Thesaurus Palaeohibernicus*, edd. & transl. Whitley Stokes & J. Strachan (2nd edn, 2 vols, Dublin 1975), I.529, 692.

⁵⁶ *Corpus Iuris Hibernici*, ed. Binchy, II.377.9-10.

⁵⁷ *Coibnes Uisci Thairidne*, ed. & transl. D. A. Binchy, *Ériu* 17 (1955) 52-85, at pp. 56-7, 59-60; *Bechbretha*, edd. & transl. Charles-Edwards & Kelly, pp. 31-5.

⁵⁸ *Hibernensis* XXI.1.b, 26.b (*Die irische Kanonensammlung*, ed. Wasserschleben, pp. 62, 72).

⁵⁹ *Hibernensis* XXI.26.b (*ibid.*, p. 72).

authorities vary according to two considerations: first, the nature of the issue; and, secondly, who is to deliver the judgment. On the second, it is striking that the lord (*fíath*, here used for the ruler of a territory) can appeal to the sources used by the Church-lawyer as well as those invoked by the *filid*. This matches what is said in the *Hibernensis*, which implies that the king might summon to his aid both the secular judge and the *scriba*, namely the ecclesiastical judge whose judicial role was based on his knowledge of exegesis.⁶⁰ One element in the legal role of the king was his capacity to bring together both legal traditions in order to achieve a decision.

The nature of the issue was also crucial in determining the kind of authority sought. The clearest example is *dliged*, ‘entitlement’.⁶¹ *Dliged* is based on contracts and acknowledgment, in other words on statements (backed up as appropriate by legal ceremony, guarantors, and pledges) which confer or admit rights. *Dliged*, then, pertains to that great class of rights which are artificial, deliberately created, or confirmed by human speech and action. A feature of disputes in this area of the law is that the crucial statements on which the case will turn will have been made by ordinary people in the past. The judge’s problem was: Who promised what to whom? Any such promises are unlikely to have been made before a legal authority.⁶²

Fír, ‘justice’, ‘truth’, appears to be different. Here appeal is made to *roscada*, *fásaige*, and ‘truthful texts’; *roscad* is a term normally referring to non-syllabic alliterative verse; *fásaige* are probably ‘maxims’.⁶³ Whereas *dliged* looks outwards to what ordinary people have promised, *fír* looks back into the legal tradition itself. It claims to rely on written texts, *testimni*, but also on two genres which are apparently not written, *roscada* and *fásaige*. Elsewhere, in the original introduction to *Senchas Már*, it is put rather differently: the native legal tradition rests on oral transmission, on the memory of old men, but it then also draws on the written law, the law of the Church.⁶⁴

Aicned, ‘nature’, apparently looks to a third type of consideration, being based on ‘remission’, *logad*, and *cocorus*, which I have translated ‘communal order’.⁶⁵ This, like *dliged* and unlike *fír*, seems to look outwards, beyond the legal authorities themselves, whether written or unwritten, towards the nature of the reality with which the lawyer was dealing.⁶⁶ A clue is again offered by *dliged*, ‘entitlement’. In that case the issue was the rights deliberately created by contract or by ‘acknowledgment’; an example of the latter would be a marital union not made, as it ideally should have been, by contract, but nevertheless formally acknowledged by

⁶⁰ *Hibernensis* XXI.1.b (*ibid.*, p. 62). As comparison with XXI.1.a shows, the *scriba* operated without the *iuris peritus* in ecclesiastical cases (unless the latter was included among the *omnes periti* summoned by the *contemptibilis omnis negotii secularis*, which seems unlikely); on the other hand, the *scriba* only operated in secular cases via the king. Neither of the two attributions to Gregory Nazianzen (the Cappadocian Father) is correct; both texts cited are evidently Irish (for another appearance of this pseudonymous Gregory, see *Canones Hibernenses*, I, title, edd. & transl. Bieler & Binchy, *The Irish Penitentials*, pp. 160-1).

⁶¹ For the concepts of *fír*, *dliged*, and *aicned*, see Kelly, *A Guide*, p. 197, and Stacey, *The Road to Judgment*, pp. 115-21.

⁶² The *naidm*, ‘binding surety’, was the standard and privileged witness in such cases: Stacey, *The Road to Judgment*, pp. 36-8.

⁶³ Kelly, *A Guide*, pp. 196-7.

⁶⁴ *Corpus Iuris Hibernici*, ed. Binchy, II.344.24-347.16; ed. & transl. Thurneysen, ‘Aus dem irischen Recht, IV. 6. Zu den bisherigen Ausgaben der irischen Rechtstexte. I. Ancient Laws of Ireland und Senchas Már’, *Zeitschrift für celtische Philologie* 16 (1926/7) 167-96, at pp. 175 and 177-8 (§1).

⁶⁵ *Aicned* may refer to ‘the law of nature’, *recht (n-)aicnid* (*Corpus Iuris Hibernici*, ed. Binchy, II.347.7; 527.14-15, 17, 20; 528.18, 28), but not, I think, in this case.

⁶⁶ Compare the similar attitude implied by the explanation given in the *Hibernensis*, XXI.6.a (*Die irische Kanonensammlung*, ed. Wasserschleben, p. 64; see above, n. 54): one should judge by *natura, hoc est indagatione rerum*.

the woman's kindred as a legally valid arrangement.⁶⁷ In a tract called 'The Five Paths to Judgment', *Cóic Conara Fugill*, one of the paths is called *dliged*:⁶⁸

The basis on which to illuminate the judgment-path which is *dliged*: choose *dliged* in respect of verbal contracts.

The next 'judgment-path' was called *cert*, here meaning 'fairness':⁶⁹

The basis on which to illuminate the judgment-path which is *cert*: let *cert* operate for the equalisation of contractual 'considerations': equally weighty considerations; the reduction of the over-full; the filling-out of the excessively empty . . .

Both *dliged* and *cert* are relevant to contracts, but in opposite directions.⁷⁰ For *dliged* a promise is a promise; for *cert* fairness trumps the one-sided bargain. It seems that different plaintiffs used the two paths: *dliged* was the path for the plaintiff whose contractual entitlement had been flouted; *cert* was for the debtor who did not dispute the existence of the contract but did dispute its fairness. A crucial aspect of this procedure was that someone was penalised if he were to switch from one path to another;⁷¹ hence, if the plaintiff chose *dliged* because the other party to the contract had failed to fulfil his promise, it was no good the defendant replying that the contract was unfair. He should, in that case, already have brought an action on the *cert*-path, whereas this case was proceeding on the *dliged*-path. Prudent disputants, therefore, got in their shot first by hastening to the judge's door.⁷² This should have had the agreeable consequence that the judge's jurisdiction was ample — and his coffers well filled.

Aicned, resting as it did on 'remission' and 'communal order', probably included the issues appropriate to the path entitled *cert* in *Cóic Conara Fugill*. Most cases, even today after many centuries of intellectual elaboration in the law, turn on fact rather than on law, on who did or said what to whom. The early mediaeval Irish concepts of the bases of judgment recognise this truth explicitly. They are not so much abstract terms of jurisprudence as useful reminders to a judge of where he should look to find a solution — and the answer is, for the most part, outwards to the facts. Moreover, they were reminded that, although some issues might be decided by 'proof' — *fír* ('truth') in one of its meanings —, others might need *cocertad*, reconciling according to principles of *cert*, 'fairness'.

Each legal text has its own problems, but a tolerably typical example to show how one can set about a close reading and analysis of such material is *Bretha Crólige*, 'Judgments on Blood-

⁶⁷ *Cáin Lánamna*, §§ 32-3: ed. & transl. R. Thurneysen, 'Cáin Lánamna, "Die Regelung der Paare"', *apud* R. Thurneysen *et al.*, *Studies in Early Irish Law*, pp. 1-80, at 63-8.

⁶⁸ *Cóic Conara Fugill*, R/E Recension, § 8 (ed. Thurneysen, p. 18).

⁶⁹ *Cóic Conara Fugill*, R/E Recension, § 11 (ed. Thurneysen, p. 19). It is a possible source of confusion that what is here called *dliged* is in *Berrad Airechta*, §§ 28-33 (*Corpus Iuris Hibernici*, ed. Binchy, II.593.8-21; transl. R. Thurneysen, 'Die Bürgschaft im irischen Recht', *Abhandlungen der Preussischen Akademie der Wissenschaften, Phil.-hist. Klasse* (1928) Nr. 2, at pp. 10-11, and R. Stacey in *Lawyers and Laymen*, edd. T. M. Charles-Edwards *et al.* [Cardiff 1986], pp. 210-33, at 214-15), called *naidm*, and what is there called *dliged* is here called *cert*.

⁷⁰ Cf. *Di Astud Chor* (ed. & transl. Neil McLeod, *Early Irish Contract Law* [Sydney n.d.]), §§ 1-36 versus 37-60 (in my opinion, the author of this tract set out to assemble arguments for *dliged* first and then arguments for *cert*; the advocate, *aigne*, then had a guide to how he should argue his case, on whichever 'path' he might be pleading).

⁷¹ *Cóic Conara Fugill*, R/E Recension, §§ 2, 23 (ed. Thurneysen, pp. 15-16, 23-4).

⁷² See the quotation from the lost tract, *Aí Cermna*, in *Cóic Conara Fugill*, R/E Recension, § 27 (ed. Thurneysen, pp. 24-5); Stacey, *The Road to Judgment*, pp. 131-4.

lyings'. It was edited, translated, and discussed by D.A. Binchy in his first published work on Irish law, and it already exemplifies the approach which he was to take to the laws for the rest of his career.⁷³ It has a sister-tract, *Bretha Déin Chécht*, 'Judgments of Dían Cécht' (the physician-god of Irish paganism), but, in general, we can confine ourselves to *Bretha Crólige*.⁷⁴ The nature of a *crólige*, 'blood-lying', can be appreciated if it is understood that the text assumes a distinction between three levels of compensation corresponding to three levels of serious physical injury — injury, that is, which prevents a person from working or hampers his movements. First, there is outright killing, for which the compensation is the full panoply of *éaraicc*, fixed wergild, and *díre*, variable honour-price.⁷⁵ This was not the concern of our tract. Secondly, there was the 'blood-lying of death' or 'mortal blood-lying', when it was clear to the physician at the end of nine or ten days that the patient was not going to survive. This was only marginally the concern of our text, being disposed of in the opening sentences. Thirdly, there was *crólige* in the sense intended by the tract, more particularly *crólige n-othrais*, 'blood-lying of nursing'. Here there was at least a prospect of survival. The reason why this third level of injury was of special interest is plain enough: death is one thing, whether prompt or moderately delayed; but a more or less mangled survival threw up all kinds of intriguing problems. There were issues of what compensation should be paid for various wounds, scars, and the like: this was the subject of the sister-tract, *Bretha Déin Chécht*. What concerned *Bretha Crólige* was the treatment of the injured man, while he was recovering, or attempting to recover, from his wounds.

The logical starting-point for the way in which *crólige* was handled was, perhaps, the considerations mentioned twice in the tract, most graphically in the final portion of the text (the section in 'heightened style'):⁷⁶

Let there be proclaimed what things are forbidden in regard to him [who is] on his sick-bed of pain. There are not admitted to him into the house fools or lunatics or senseless people or half-wits or enemies. No games are played in the house. No tidings are announced. No children are chastised. Neither women nor men exchange blows. No hides are beaten. There is no fighting. He [the patient] is not suddenly awakened. No conversation is held across him or across his pillow. No dogs are set fighting in his presence or in his neighbourhood outside. No shout is raised. No pigs grunt. No brawls are made. No cry of victory is raised nor shout in playing games. No shout or scream is raised.

On this Binchy remarked: 'No doubt some of these prohibitions had originally a more technical meaning than my translation suggests . . . There are others which, unless our national characteristics have changed in the meantime, must have been more honoured in the breach than in the observance.'⁷⁷ The crucial point, however, was that the appropriate place for nursing was all too likely not to be the patient's home, or, indeed, the home of the injurer. It might be the home of the physician, but this is never stated. The implication was that hospitality had to be provided in some house suitable for nursing an injured person; and this entailed, as a corollary, that the law of 'blood-lying' and the law of hospitality overlapped. In particular, the injured man was entitled to a company, suitably subdued in its conduct, but more or less numerous according to his rank. A further corollary was that the injurer was liable both for the hospitality and for the costs of the physician's care. The nearest modern counterpart would be that the injurer was liable for the medical treatment, food, and lodging provided by a more or less select private

⁷³ *Bretha Crólige*, ed. & transl. D. A. Binchy, *Ériu* 12 (1934-8) 1-77; cf. Binchy, 'Sick-maintenance'.

⁷⁴ *Bretha Déin Chécht*, ed. & transl. D. A. Binchy, *Ériu* 20 (1966) 1-66.

⁷⁵ Kelly, *A Guide*, pp. 125-7.

⁷⁶ *Bretha Crólige*, § 61 (ed. & transl. Binchy, pp. 48-9); cf. also § 23 (*ibid.*, pp. 18-19).

⁷⁷ Binchy, 'Sick-maintenance', p. 107.

nursing-home (the requirements for peace and quiet would certainly exclude an ordinary ward in a general hospital).

This, then, is perhaps the functional basis of the institution of *crólige n-othrais*, and a logical exposition of the topic might have begun here; but it is not how *Bretha Crólige* approaches the subject. This is not to say that the treatment is muddled or illogical but simply that it is not organised according to functional considerations. What *Bretha Crólige* offers is effectively an annotated narrative. It begins with *crólige mbáis*, ‘mortal blood-lying’, because the issue which must be decided first (chronologically) is whether the patient has any real hope of survival. The feeding of the patient and the size of his company, and indeed the nature of the house in which he is to be nursed, are discussed later, because, chronologically, they arise later. Yet, although the underlying structure of the tract is chronological, the narrative is not what primarily engaged the author’s attention. His main contribution comes in the annotations, and these were most often concerned with exceptions, special cases and difficulties, not with the normal sequence of events. It is as if the author, himself a judge with years of experience, were instructing his pupil: ‘Now, let me take you through it step by step . . . You must look out for this problematic case . . . and this exception to the normal rule . . .’

The arrangement of the text is also complicated because it has two separate attempts at the main portion of narrative. Indeed, Thurneysen thought for this very reason, together with some minor inconsistencies, that the existing tract had been put together from two pre-existing texts.⁷⁸ The main sections of the tract may thus be distinguished as follows (we are assumed to begin after the injury has been inflicted).

- A. Will the patient survive? If, in the opinion of the physician, given on the ninth or tenth day, he will not, it is *crólige mbáis*, ‘mortal blood-lying’. The compensation, *díre*, is set out:
 - i. The standard case: the layman (§ 2).
 - ii. Women (§ 3).
 - iii. Churchmen (§ 4).
 - iv. *Cáin* and Church-law are different: there are no distinctions of rank there, unlike *Fénechas* (§ 5).

- B. If the case is not one of *crólige mbáis* but of *crólige n-othrais*, ‘blood-lying entailing nursing’ (provided by the injurer), who is entitled to ‘removal’ (*dingbáil*) — in other words, to be removed to a house suitable for medical treatment?
 - i. The norm is that the injured person is entitled to removal (§ 6).
 - ii. Special cases: women and children (§§ 6-7).
 - iii. Exceptions: injured persons not entitled to be removed; persons entitled even though they have not been injured (§§ 8-9).
 - iv. The cost of nursing reduces the *díre* (§§ 10-11).

⁷⁸ Reported by Binchy, ‘Bretha Crólige’, p. 69 (note to § 45). Anyone who has read much of Thurneysen’s work, especially his book *Die irische Helden- und Königssage* (Halle a.S. 1921), will appreciate how typical this is of his approach to texts. Binchy, however, was unwilling to take simple inconsistency as a sufficient reason for treating a text as composite in origin.

- v. More exceptions: persons who are not removed for nursing (§ 12).
 - vi. Otherwise the general rule is that nursing is provided (by the injurer) (§ 13).
 - vii. Difficult cases and exceptions (§§ 14-17).
- C. The injured person demands to be removed.
- i. Circumstances increasing or decreasing the compensation due (§§ 18-19).
 - ii. The special problem of the churchman (§§ 20-1).
- D. The normal lay person, when injured but with hope of recovery, is entitled to be fed and maintained according to his rank (§ 22).
- i. Exception: houses excluded from sick-maintenance (§ 23).
 - ii. Feeding of patient and his company (§§ 24-8).
 - iii. A special case: men who must be accompanied by their women (§ 29).
- E. The sick-maintenance of women (*banothrus*) is fundamentally as for men (but with half the company). Hence this section (§§ 30-40) is almost all about exceptions.
- F. A new start: the text goes back to ‘removal’, *dingbáil* (B, above), and advances again from that point.
- i. The standard procedure: no removal before the tenth day; on the tenth day the physician makes a prognostication; those judged fatally wounded are not removed (§ 41).
 - ii. A wound which does not diminish capacity for work or movement does not entail sick-maintenance (§ 42).
 - iii. Exceptions: a triad of men and a triad of women not entitled to sick-maintenance (§§ 43-4).
- G. The feeding of the person removed, with his or her company (cf. D).
- i. According to rank (§§ 45-7 and 49).
 - ii. Feeding of the company (§§ 48 and 50).
 - iii. Exception: a triad of persons who might claim high rank by virtue of their occupation, but such claims should be disallowed (§ 51).
- H. A problematic case: the sick-maintenance of children (*macothrus*) (§§ 52-3).
- Exceptions: children not maintained.

- I. Concluding observations.
 - i. Every *othrus* must be secured by contract (§ 55).
 - ii. The feeding of women according to the status of their marital union (§§ 56-7).

- J. A final passage, in heightened style, which is not integrated with the structure of the tract and partially covers the field of *Bretha Déin Chécht* (§§ 58-66).

What does this specimen-case tell us about the Gaelic lawyer? His intention is to offer a guide for potential or actual judges: the exceptions and special cases are what might trip up a judge. The latter must take special care with those things which are ‘most difficult in the judgment of nursing in Irish law’ (§§ 30, 38, 52; similarly §§ 15 and 24). He must look out for the nastier problems since ‘He who knows not the three errors of nursing is, according to the Irish, incapable of passing judgment on nursing’ (§ 14). Not everything is explained: this is not an elementary text but, instead, is concerned with difficulties; also the text presupposes oral instruction. The numerous triads in the text, mostly concerned with difficulties and exceptions, suggest this wider background. We are never told what are ‘the three errors in nursing’ in § 14, or who may be the ‘man to whom no injury is done’ and yet must be maintained, or ‘the man who injures not’ and yet must maintain (both in § 15). There is always the possibility, especially since the full text is only in one manuscript, that material has been omitted, but the more likely explanation is that it was supplied orally. It is eminently possible, for example, that the text was read out and given an oral commentary: preparation for such teaching may be the ultimate origin of the earliest written glosses, which are in Old Irish.⁷⁹

The tract is equally informative about the fundamental assumptions of the author. He works with a concept of a normal, reasonable person. He is male, adult, and lay: women, children, and clergy diverge from the norm. So too do men who are of especially high status or those whose conduct is unreasonable: those who have failed to perform their obligations to the standard trio of kindred, lord, and church are not nursed (§ 16); nor is the man who cannot restrain his lust or someone who is senile and fearful (§ 8). The assumption, then, is that there are two kinds of divergence from the norm: the first kind includes women, children, and clergy, who can be maintained but are variously different from the normal man; the second kind comprises the exceptions in the full sense, those, whether men, women, or children, who are to be nursed in their own homes. Women and children are nursed away from home, although they may pose particular problems, but there were very high-ranking and also unreasonable persons — men, women, or children —, who were nursed in their own houses.⁸⁰ Among the women of a status too high for them to be ‘removed’ were those working as wrights or physicians.⁸¹

Uraicecht Becc may have claimed that, alongside the *testimonia* and *exempla* of the canonist, the secular lawyer deployed his own authorities, *roscada* and *fásaige*; yet, in point of fact, *Bretha Crólige* did not attempt to ground its rules in such a manner. At least, it is far from clear that the final passage, in heightened style, was being used in this way, even if it would have been regarded as an example of the *roscad*-genre. The function of this passage in the text is, as we have seen already, thoroughly problematic, and I shall not pursue the issue any further.

⁷⁹ Especially *Corpus Iuris Hibernici*, ed. Binchy, III.874-924 (cf. n. 31, above).

⁸⁰ *Bretha Crólige*, §§ 12, 16, 32, 34, 43-4, 54 (ed. & transl. Binchy, pp. 10-13, 14-15, 26-7, 28-9, 34-5, 42-3).

⁸¹ *Bretha Crólige*, § 32 (*ibid.*, pp. 26-7).

There are, however, other texts which do seem to quote *roscada* and *fásaige*.⁸² Yet, even in them, such citation of authorities is usually fairly infrequent. One should probably except the *Bretha Nemed* material, but what I have just said holds true for *Senchas Már*. Moreover, quotations of *roscada* and *fásaige* are not much more frequent than quotations of ‘truthful texts’, authorities borrowed from the canonist or his sources. Moreover, some *roscada* contained *testimonia*: they were not always, as *Uraicecht Becc* implies, oral material quoted by the writer of a text, but sometimes one text quoted in another.⁸³ The presentation of the practices of his brethren by the author of *Uraicecht Becc* makes them look at one and the same time less and more like those of the Church-lawyers than they were: less, because the *roscad* was not always oral by contrast with the *testimin*; more, because the secular lawyer did not usually rely on authorities, whether textual or oral, as much as did the canon lawyers.

Some secular lawyers could, it seems, argue like Church-lawyers, using the same sources; they must, therefore, have had a training in exegesis. The most important example is in the old Introduction to *Senchas Már*; it is more significant for our purposes than the more elaborate exegetical argument in the ‘Pseudo-Historical Prologue’ to *Senchas Már*, probably of the ninth century.⁸⁴ Whereas the older Introduction is likely to have been written by the person who himself compiled *Senchas Már*, the latter is a subsequent elaboration. The ‘Pseudo-Historical Prologue’ cannot be taken as evidence for how the lawyers were thinking when the constituent tracts of *Senchas Már* were being written, or even when they were brought together into a single law-book.

For the period of compilation, however, the original Introduction is direct evidence. The passage which shows the way in which the presumed compiler could argue goes as follows:⁸⁵

¹¹Keeping everyone to his favourable and to his unfavourable contract wards off the insanities of the world — ¹²with the exception of the five contracts which, in Irish law, should be rescinded, even though they have been bound [*sc.* by ‘binding-sureties’, *nadmann*]: the contract of a slave in despite of his lord; the contract of a monk in despite of his abbot; the contract of a son of a living father without the involvement of his father; the contract of a fool or an insane person; the contract of a woman in despite of her husband. ¹³Otherwise verbal contracts are firmly maintained in Irish law, just as Adam was kept to his clearly unfair contract: the whole world died for one apple.⁸⁶

Our author is a defender of the claims of *dliged* over the possible objections which might arise on the grounds of *cert*: a man’s word, for him, is indeed his bond, assuming that is he is not insane or, for other reasons, without independent contractual capacity. If contracts could be undone merely because they turned out to be disadvantageous to one side, the whole vast social, political, and legal edifice which rested on *dliged* would be undermined; human society would

⁸² For example, *Críth Gablach*, ed. Binchy, pp. 1, lines 21-2 (§5), 11, lines 272-5 (§19), 13, line 325 (§23), 18, lines 462-5 (§32); *Di Astud Chor*, ed. & transl. McLeod, *Early Irish Contract Law*, appears to be an eighth-century text which includes earlier passages, many of them *roscada*.

⁸³ The outstanding example is from *Bretha Nemed Toisech*: see L. Breatnach, ‘Canon law and secular law in early Ireland: the significance of *Bretha Nemed*’, *Peritia* 3 (1984) 439-59, especially pp. 445-52.

⁸⁴ For the Pseudo-Historical Prologue see J. Carey, ‘An edition of the Pseudo-Historical Prologue to the *Senchas Már*’, *Ériu* 45 (1994) 1-32; see also K. McCone, ‘Dubthach maccu Lugair and a matter of life and death in the Pseudo-Historical Prologue to the *Senchas Már*’, *Peritia* 5 (1986) 1-35; J. Carey, ‘The Two Laws in Dubthach’s judgement’, *Cambridge Medieval Celtic Studies* 19 (1990) 1-18; D. Bracken, ‘Immortality and capital punishment: Patristic concepts in Irish law’, *Peritia* 9 (1995) 167-86, and ‘Latin passages in Irish vernacular law: notes on sources’, *Peritia* 9 (1995) 187-96.

⁸⁵ Thurneysen, ‘Aus dem irischen Recht, IV’, pp. 176-7, §§ 11-13 (translated on p. 181); I have placed his paragraph-numbers superscript, in order not to break up the flow of the text.

⁸⁶ The last sentence recurs in *Di Astud Chor*, § 33 (and cf. § 15), ed. & transl. McLeod, *Early Irish Contract Law*, pp. 164-5 (cf. 140-1).

be flung into irrational chaos. As a clinching piece of evidence for an argument which hitherto had been one of legal and political philosophy, he adduced the Fall. What happened to Adam was a *derbdiupart*, 'a manifestly unfair contract'. Adam knew what he was doing; he was a sane and independent adult (no escape possible via § 12). When God came to question Adam about what he had done, God was, in effect, a plaintiff on the path of *dliged*: he had made a bargain with Adam that he should have paradise provided that he did not eat of the Tree of the Knowledge of Good and Evil; and Adam had knowingly flouted the terms of the contract. What the author of the Introduction was doing, therefore, was to deploy a biblical *exemplum*. True, he was interpreting it in terms of Irish law; but, as we saw with Rahab, many *exempla* might need an application of ingenious exegesis to make them pertinent authorities. And, in any case, the law of contract was one area in which Irish canon law had borrowed quite heavily from its secular counterpart.⁸⁷

In this argument, the mentalities of the canonist and the secular lawyer have fused. Not every theologian might like the implication that God had driven Man from paradise and condemned him to death unfairly (though justly — observing *dliged* not *cert*), but an authoritative *exemplum* was being used as it might have been in the *Hibernensis*. Perhaps the compiler was having a small laugh at the expense of the *scribae*, but he seems to have been an entirely genuine upholder of the claims of contractual entitlement and is perhaps unlikely to have wanted to subvert his own case through some mild, if naughty, fun. It has been argued from evidence such as this that the authors of the secular law-tracts and the authors of canon-law texts were essentially the same people: they were clerical, based in monasteries, and educated in the same way as Ruben and Cú Chuimne. There was, it is claimed, a single 'mandarin class', not in the sense of a corps of educated administrators, but rather a single intellectual elite sharing a single education, an education, moreover, which was the basis of their high social rank.⁸⁸ Some members of the caste might be straight theologians, some canon-lawyers (of a theological stamp), some secular lawyers, but, whatever they did for a living, they were marked by the same school-curriculum. Some elements of this picture are indubitably true of some authors of secular law-tracts. But a few distinctions will help to do justice to some quite complex evidence. First, early mediaeval Irish clerical education appears, as one would expect, to have progressed through a graduated curriculum, from an elementary study of the Latin alphabet and Latin grammar at the beginning to exegesis at the end. There is no reason to assume that all those who studied the elements progressed to the very end. Secondly, the institutional context of this Latin-based education can be presented in an oversimplified fashion as if the only places where it was available were the great monasteries. Any such assumption cannot survive a careful reading of the chronicles: they record numerous *scribae* in the eighth and early ninth centuries and many of them were attached to local churches whose origins may have been as much episcopal as monastic. Thirdly, the *familiae* of the greater (and better attested) churches were notable for their elasticity: many who were not living in or close to the main church were nevertheless members of the *familia*; some of them were regarded as laymen.⁸⁹ One must also take account of the practice of multiple fosterage among the elite,

⁸⁷ Thurneysen, 'Aus dem irischen Recht, V', pp. 364-72.

⁸⁸ D. Ó Corráin, 'Nationality and kingship in pre-Norman Ireland', *Historical Studies* [Irish Conference of Historians] 11 (1975) 1-35, at p. 19; I have discussed some of the problems in this view in 'The context and uses of literacy in early Christian Ireland', in *Literacy in Medieval Celtic Societies*, ed. Huw Pryce (Cambridge 1998), pp. 62-82, at 70-4.

⁸⁹ For example, *Vita prior Sancti Fintani seu Munnu*, § 26: ed. W. W. Heist, *Vitae Sanctorum Hiberniae ex Codice olim Salmanticensi nunc Bruxellensi* (Bruxelles 1965), p. 206.

whether ecclesiastical or lay, whereby one child would usually have more than one fosterer:⁹⁰ fosterage was used as a basis for education, and in this way even those who ended up as cenobitic monks might have had education from more than one teacher.⁹¹ Finally, the well attested secularisation of many Irish churches in the eighth century raises problems for those who would assert without major, perhaps fatal, qualification that those with access to the resources of churches must themselves have been churchmen. If kings or their kinsmen could become abbots, kings' judges could secure ecclesiastical preferment. Another aspect of the convergence between the Church and the World was the expectation that a great churchman needed a household of at least similar proportions to that of a king: he too needed his *brithem*.⁹² One has to allow for several different ways in which secular learned men might be connected with churches. Nevertheless, making all due allowance for these complexities, the way in which the compiler of *Senchas Már* (or, at least, the author of the original Introduction) deployed his *exemplum* strongly suggests that he at least had progressed a long way through a Latin curriculum of which exegesis was the culmination.⁹³

A plausible account of the links between the secular lawyers and Latin clerical education must, then, allow for variation. All authors of tracts written in Irish will have studied elements of grammar; they must also have applied those elements to the vernacular in the way implied by 'The Primer of the Poets', *Auraicept na nÉces*.⁹⁴ This does not prove that all secular lawyers had progressed even so far; there may have been some who were unable to read or write in either Irish or Latin. On the other hand, the influence of Latin grammar on many eighth-century vernacular legal texts is obvious — significantly more obvious than its influence on the *Hibernensis*.⁹⁵ Some lawyers, who ended by practising as judges or advocates in the secular law, are likely to have been trained in exegesis and would thus have been equipped to act as canon lawyers. Of these a proportion, probably a high proportion, will have been clerical. But, whatever their background, the authors of the tracts claimed an authority to instruct by virtue of their expertise in a law which they rightly perceived as native and secular, even though it could and did borrow from a different law. This ecclesiastical law, in its turn, had no doubt that it should be contrasted with secular law, and its learned men with secular learned men.⁹⁶ It drew its authorities from the Church at large, not just from Irish synods and Irish exegetes. By the eighth century, when Roman law in Gaul had tended to retreat southwards into *Romania* (Aquitaine and Provence), conditions in Francia were ripe for the *Hibernensis* to exercise an influence both direct and indirect in northwestern Christendom. The secular law, by contrast, was limited to the Gaelic world: it spread with Gaelic influence, settlement, and conquest in

⁹⁰ The best evidence for this, because it is an assumption taken for granted, is provided by Tírechán, *Collectanea*, § 26.5, in *The Patrician Texts in the Book of Armagh*, edd. & transl. Ludwig Bieler & F. Kelly (Dublin 1979), pp. 142-3.

⁹¹ Examples are Columba and Columbanus.

⁹² See the text edited and translated by L. Breatnach, 'Lawyers in early Ireland', in *Brehons, Serjeants and Attorneys*, edd. Daire Hogan & W. N. Osborough (Blackrock 1990), pp. 1-13, at 8-9, and compare *Bethu Phátraic. The Tripartite Life of Patrick*, ed. Kathleen Mulchrone (Dublin 1939), p. 155, where Bishop Erc's role as Patrick's *brithem* is a justification for Slane's ninth-century prominence as a centre of native legal studies; on this and other cases, see Ó Corráin, 'Nationality', pp. 13-16.

⁹³ Breatnach, 'Lawyers', p. 5, has rightly adduced this passage as evidence that 'the early Irish law-texts were written in a context of cooperation and mutual influence between ecclesiastics and lay academics, which also included the involvement of practising members of the legal profession'.

⁹⁴ *Auraicept na nÉces*: ed. & transl. Anders Ahlqvist, *The Early Irish Linguist. An Edition of the Canonical Part of the Auraicept na nÉces* (Helsinki 1983).

⁹⁵ T. M. Charles-Edwards, 'The *Corpus Iuris Hibernici*', *Studia Hibernica* 20 (1980) 141-62, at pp. 147-52.

⁹⁶ *Hibernensis* XXI.26 and cf. 27.b, 28, 29 (*Die irische Kanonensammlung*, ed. Wasserschleben, pp. 71-3).

North Britain but no further. For some centuries in the central middle ages it was the law of the new Gaeldom north of Forth and Clyde, but its influence would decline from the twelfth century.⁹⁷ It is likely to have played a part also in the laws of Galloway.⁹⁸

Bretha Crólige distinguished two laws — or, perhaps better, legal regimes — from the native *Fénechas*: the law of the Church and *cáin*-law.⁹⁹ The first we have discussed; *cáin*-law remains to be explained. Here, while we have very few texts, we have considerable chronicle-evidence; this makes it easier to sense patterns of change as well as to test the evidence of surviving texts. To judge by the chronicles, the *cáin* or *lex* flourished in the eighth century and the early ninth but failed to survive the intensification of viking-attacks in the second quarter of the ninth century.¹⁰⁰

The first distinction to be noted is between two ways in which a named person can be connected with a *cáin*: the law of X versus the law promulgated by X. Usually, but not always, the person whom a law is said to be ‘of’ is a dead saint, while a law is (promulgated) by a living person. A standard example is provided by ‘Annals of Ulster’ 793.3:¹⁰¹

Lex Comáin la Aildobur ocus Muirghus for téora Connacht.

‘The law of Commán (saint of Roscommon) [was promulgated] by Aildobur (abbot of Roscommon) and Muirghus (king of the Connachta) on the Three Connachta.’

I. The law of someone

(1) The law of the beneficiaries: for example, *Lex Innocentium*, 697.3; 810.4 (‘cow-laws’)

(2) The law of a saint: for example, 767.10, The Law of Patrick¹⁰²

737.10; 744.9 (× 2); 753.4; 757.9; 767.10; 772.8; 778.4; 780.14; 783.9; 788.9; 793.2; 793.3; 799.9; 806.5; 811.1; 814.11; 823.5; 825.14; 836.4.

The following were adopted as patron-saints of *cánai*.

Ailbe: 784 (AI); 793.3

Brendán: 744.9

Ciarán: 744.9; 788.9; 814.11

⁹⁷ W. D. H. Sellar, ‘Celtic law and Scots law: survival and integration’, *Scottish Studies* 29 (1989) 1-27; G. W. S. Barrow, *The Kingdom of the Scots. Government, Church and Society from the Eleventh to the Fourteenth Century* (London 1973), pp. 69-82.

⁹⁸ H. L. MacQueen, ‘The laws of Galloway: A preliminary survey’, in *Galloway: Land and Lordship*, edd. Richard D. Oram & G. P. Stell (Edinburgh 1991), pp. 131-43, and ‘The kin of Kennedy, “kenkynnol” and the Common Law’, in *Medieval Scotland: Crown, Lordship and Community*, edd. Alexander Grant & K. J. Stringer (Edinburgh 1993), pp. 274-96.

⁹⁹ *Bretha Crólige*, §5 (ed. & transl. Binchy, pp. 8-9).

¹⁰⁰ The vernacular terms, *cáin*, *rechtge*, *recht*, and the Latin term *lex* were not necessarily entirely synonymous, but they certainly overlapped: *Críth Gablach*, ed. Binchy, pp. 20-1 (§ 38), especially line 524; AU 783.9.

¹⁰¹ All references in this form are to *The Annals of Ulster (to A.D. 1131)*, I, edd. & transl. Seán Mac Airt & G. Mac Niocaill (Dublin 1983). References marked ‘(AI)’ are to *The Annals of Inisfallen*, ed. & transl. Seán Mac Airt (Dublin 1951).

¹⁰² But note AClon. 761.3, ‘The Lawes of St. Patricke were established by the kinge’ (presumably Níall Frossach): *The Annals of Clonmacnoise*, ed. Denis Murphy (Dublin 1896), p. 122. The precise readings given are from London, British Library, MS. Additional 4817, fo 65v.

Columba: 753.4; 757.9 (cf. 754.3); 778.4

Commán (of Roscommon): 772.8; 780.14; 793.2 (the 'first Law of Commán' is not in the surviving chronicles)

Patrick: 737.10; 767.10; 783.9; 799.9; 806.5; 811.1; 823.5; 825.14; 836.4; 842 (AI)

A problematic case is Dar Í: 812.13; 813.8; 826.10. This law first appears at 810.4 (AI), where Dar Í appears to be a sponsoring nun; by 826 at least she should have been the patron-saint of the law; according to Pádraig Ó Riain she, and Adúar, were both early saints, dead long before the ninth century.¹⁰³

(3) The law of a churchman

Lex aui Suanaich:¹⁰⁴ 743.7; 748.8¹⁰⁵

?*Lex Dar Í* (see above)

(4) The law of a saint and of a churchman

772.8: The second Law of Commán and Áedán [enforced] on the Three Connachta¹⁰⁶

780.14: The third Law of Commán and Áedán begins.

II. Law (promulgated) by someone

(1) The law of a saint is promulgated by a king.

744.9: The Law of Cíarán son of the wright and the Law of Brendán [were imposed] at the same time by Forggus son of Cellach.¹⁰⁷

For other examples see 753.4; 806.5; 814.11.

(2) The law of a saint is promulgated by a churchman.¹⁰⁸

721.9: Inmesach *religiosus* establishes a law, together with the peace of Christ, over the island of Ireland. [AT, CS have further detail: that is, in Mag nDelenn / *in campo Delenn*.]

For other examples see 757.9; 799.9; 811.1; 825.14; 842 (AI).

(3) The law of a saint is promulgated by both a churchman and a king.

778.4: The Law of Colum Cille was promulgated by Donnchad and Bresal.

¹⁰³ P. Ó Riain, 'A misunderstood annal: a hitherto unnoticed *cáin*', *Celtica* 21 (1990) 561-6; for the name cf. Nath Í.

¹⁰⁴ Cf. 757.1; 763.2. The sponsor of this law was, to judge by the phrasing of 757.1, the anchorite of Rahan who died in that year, rather than his kinsman, the abbot, whose obit is at 763.2.

¹⁰⁵ The second enforcement was *for Leith Cuinn*.

¹⁰⁶ Áedán was abbot of Roscommon (Ros Commáin); his obit is at 782.1.

¹⁰⁷ This is annalistic confirmation of the implication of the texts, namely that a *cáin* had a specific objective; otherwise it would be difficult to see why the king should have imposed two laws at the same time.

¹⁰⁸ The same situation may be differently expressed in 772.8 and 780.14, where the law is *of* the saint and the abbot of Roscommon.

For other examples see 783.9; 793.2; 823.5.

- (4) The law of a saint is promulgated by a dynasty.

813.8: The law of Dar Í [was promulgated] by Uí Néill.

III. Time, promulgation, domain of a law, and its association with relics

- (1) References to the element of time (renewed, first, second, etc., begins)

727.5: The relics (*reliquiae*) of Adomnán are taken across to Ireland and the law is renewed.

772.8: The second Law of Commán and Áedán [was enforced] on the Three Connachta.

780.14: The third Law of Commán and Áedán begins.

- (2) Relics and saintly insignia associated with the promulgation of a law

727.5: The relics (*reliquiae*) of Adomnán are taken across to Ireland and the law is renewed (the relics returned from Ireland three years later: 730.2); 734.3 (*commotatio martirum*); 811.1 (*armarium*); 836.4 (*uexilla*).

- (3) Terms expressing the action of lawgiving

721.9 (*legem constituit*); 734.3 (*ad legem perficiendam*); 737.10 (*tenuit*); 783.9 (*forus cáno Patricii*); 814.11 (*eleuata est*)

- (4) The domain of the law

697.3 ('to the peoples'); 721.9 (Ireland); 737.10 (Ireland); 748.8 (*Leth Cuinn*); 772.8 (*Connachta*); 784 (AI: Munster); 788.9 (*Connachta*); 793.2 (*Connachta*); 793.3 (Munster); 799.9 (*Connachta*); 810.4 (AI: Munster); 811.1 (*Connachta*); 812.14 (*Connachta*; and cf. 813.8, where the same law is said to have been promulgated by Uí Néill); 823.5 (Munster); 825.14 (*Connachta*); 836.4 (*Connachta*); 842 (AI: Munster)

- (5) A law is promulgated in a place.

721.9 (only in AT and CS); 737.10 (probably at the monastery, Terryglass, mentioned in 737.9);¹⁰⁹ 783.9 (in Crúachain); 814.11 ('over' Crúachain).

The evidence of the chronicles is not always easy to handle, here as elsewhere. It is a matter of judgment how much information is implicit. When we come across an entry as succinct as that of 'Annals of Ulster' 767.10, 'The Law of Patrick' (*Lex Patricii*), we are perhaps to assume (1) that the law was promulgated jointly by Níall Frossach, king of Tara and member of Cenél nÉogain, and the current heir of Patrick, Fer dá Crích; (2) that the law was promulgated for all Ireland; (3) that it was a renewal of an earlier Law of Patrick (734-7), sponsored by Níall's elder brother, Áed Allán; and (4) that it was understood that it would only last for a period, perhaps seven years. My own judgment is that (1) is almost certain; (2) quite a strong possibility, at least that an all-Ireland enforcement was the plan, although it may have started, and even ended, with *Leth Cuinn*, as in 748; (3) is quite likely but one cannot tell;¹¹⁰ (4) is almost certain. All this,

¹⁰⁹ For previous discussion of this, see Dumville, *Councils*, pp. 31-2 and n. 100. See also below, pp. 50-1.

¹¹⁰ The commentary on *Féilire Óengusso: The Martyrology of Oengus the Culdee*, ed. & transl. Whitley Stokes (London 1905), p. 210 (Notes, 23 September), might be invoked, but this evidence is too late to be persuasive.

however, depends on assessing the material as a whole and only then drawing any conclusions about whether any one entry's lacunae indicate that something did not happen or that the habitual conciseness of the annalist allowed information to be assumed.

We may take first the promulgation of a *cáin* or 'law', beginning with a contrast between two situations. On the one hand, we have the promulgation of *Cáin Adomnáin* in 697, and, on the other, the numerous provincial *cánai* for the Connachta.¹¹¹ In the 'Chronicle of Ireland', taken in this instance to be derived from an Iona chronicle,¹¹² we are told that 'Adomnán proceeded to Ireland and gave the Law of the Innocents to the peoples'. There was a single sponsor (as we may call him, with deliberate imprecision), the abbot of Iona; an indication of the beneficiaries ('the innocents', as we learn from the Old-Irish text of the *Cáin*, were non-combatants, women, children, and clergy); and a suggestion that 'the peoples' might be those of Ireland. From the text of the *cáin* we learn that it was promulgated at an assembly held at the church of Birr, on the frontier between Munster and the lands of Uí Néill, and that it had a multitude of guarantors, divided into two groups, one ecclesiastical, headed by Flann Febla, bishop of Armagh, and the other lay, headed by Adomnán's kinsman, Loingsech mac Óengusso, king of Tara.¹¹³ The list of guarantors, confirmed elsewhere in the text, shows that what was later known as *Cáin Adomnáin* or *Recht Adomnáin* was held to be in force throughout Ireland, Dál Ríata (on both sides of the sea), and Pictland.

Among the provincial kings, the leading exponents of the *cáin* were the kings of the Connachta. The number of entries on their *cánai* is very striking, since the province otherwise makes relatively infrequent appearances in the chronicle-record. Of the eleven promulgations among the Connachta, two were explicitly associated with Crúachain (Rathcroghan, Co. Roscommon). In both cases the royal sponsors were named, and both were kings of the Connachta who were also of the local dynasty, Uí Briúin Aí.¹¹⁴ The two entries are worth juxtaposing.

783.9. The promulgation of the Law of Patrick in Crúachain by Dub dá Leithi and by Tipraite son of Tadgg.

814.11. The Law of Cíarán was enacted (*eleuata est*) by Muirgus over Crúachain.

The usual phrase to state who was bound by a *cáin* was *for X*, for example, *for Connachta* (even in entries otherwise in Latin the Irish preposition *for* is normally found). The expression used in 814 is unique but explicable. Crúachain was the site of an *óenach*,¹¹⁵ a combination of assembly and fair (the *óenach* was effectively a more concentrated version of the Victorian London season: grand party, horse-racing, judicial hearings, and political-cum-legislative assembly all brought together). According to *Críth Gablach*, one of the things which a king could pledge on an *óenach* was a *rechtge* (here including a *cáin* such as the *recht Adomnáin* mentioned later in the tract).¹¹⁶

These events of 697, 783, and 814 suggest a distinction: an all-Ireland *cáin* was promulgated at what was sometimes called a *rígdál*, a meeting between kings, usually held at or

¹¹¹ On the former see M. Ní Dhonnchadha, 'The *Lex Innocentium*: Adomnán's law for women, clerics and youths, 697 A.D.', *Historical Studies* [Irish Conference of Historians] 19 (1993) 58-69.

¹¹² John Bannerman, *Studies in the History of Dalriada* (Edinburgh 1974), especially p. 12.

¹¹³ *Cáin Adomnáin*, §28 (ed. & transl. Meyer, pp. 14-21); M. Ní Dhonnchadha, 'The guarantor list of *Cáin Adomnáin*', *Peritia* 1 (1982) 178-215.

¹¹⁴ Tipraite mac Taidgg, *ob.* 786, and Muirgus mac Tommaltaig, *ob.* 815.

¹¹⁵ *The Triads of Ireland*, ed. & transl. Kuno Meyer (Dublin 1906), pp. 4-5, no. 35.

¹¹⁶ *Críth Gablach*, ed. Binchy, pp. 20-1, especially lines 502-8, 520-4 (§§ 36, 38). Cf. n. 18, above.

near the frontier of a province; provincial *cáinai*, however, were promulgated at an *óenach*. The distinction is useful but oversimplified. One might think that it is borne out by two neighbouring entries under 737.

737.9. A meeting (*dál*) between Áed Alddán (king of Tara) and Cathal (king of Munster) at Terryglas.

737.10. The Law of Patrick was in force throughout Ireland (*tenuit Hiberniam*).

This looks like a re-run of the events of 697, renewed in 727, only now with Armagh and Cenél nÉogain in place of Iona and Cenél Conaill.¹¹⁷ Yet the reality was probably rather different, to judge by an earlier entry:

734.3. The taking on circuit of the relics of Peter and Paul and Patrick to put the law into force (*ad legem perficiendam*).

This is comparable with an entry on the renewal of the Law of Adomnán in 727 and its sequel in 730:

727.6. The relics of Adomnán are taken across to Ireland and the Law is renewed.

730.2. The return of the relics of Adomnán from Ireland in the month of October.

The likelihood is, then, that the Law of Patrick began to be put into force in 734 but that the process was not complete until 737, Munster being the last province to be included; promulgation was not at a single great assembly.

Another example is from the early ninth century, when the enactment of the *cáin* appears to have begun in Munster.

AI 810. The cow-laws [accepted] by the Munstermen, by Dar Í (MS.: *Dare*) and Adúar mac Echin.¹¹⁸

812.14. The Law of Dar Í [was imposed] on the Connachta.

813.8. The Law of Dar Í [was accepted] by Uí Néill.

The Law of Dar Í seems indeed to have come into effect throughout Ireland (we shall consider Leinster and Ulster in a moment),¹¹⁹ but it did so through a series of provincial promulgations, probably at *óenaige*, rather than at one great *rígdál* as in 697.

What we now have is a more graduated picture.

1. An all-Ireland *cáin* promulgated at a *rígdál* (as in 697).
2. A *cáin* which begins by being promulgated on a provincial basis but is eventually given an all-Ireland status at a *rígdál* (as in 734-7).
3. A *cáin* which is never promulgated at a *rígdál* but achieves an all-Ireland status by being accepted at a series of provincial assemblies (as in 810-13).
4. A provincial *cáin*.

¹¹⁷ Cf. Máire Herbert, *Iona, Kells, and Derry* (Oxford 1988), p. 63.

¹¹⁸ 'By' Dar Í is an error on the part of the annalist; the *cáin* was 'of' Dar Í. See Ó Riain, 'A misunderstood annal', and Kelly, *A Guide*, pp. 275-6.

¹¹⁹ See below, p. 58.

When a *cáin* was promoted on an all-Ireland basis (namely types 1 and 2), the king of Tara was probably always a sponsor; but type 3 shows that a *cáin* could achieve such a status even if it did not begin with such sponsorship.

Among the provincial *cánai* and those grander *cánai* which were nevertheless to a greater or lesser extent promulgated on a provincial basis, Munster and the Connachta are well attested;¹²⁰ there are no examples of provincial *cánai* in Leinster or among the Ulaid. This is odd, since *Críth Gablach* gives the impression that at least any provincial king, and perhaps others, could ‘pledge a *rechtge*’ on an *óenach*.¹²¹ Simple failure on the part of the annalist to mention any *cánai* from those two provinces is not a plausible explanation: both Leinster and Ulster are, on the whole, better covered in the annals of the early middle ages than is Connaught. The contrast raises the question, only touched on so far, whether the *cáin* as seen in the chronicles is simply the *rechtge* of the laws. So as to be able to allow for further distinctions, I shall term the standard *cáin* of the chronicles the ecclesiastical *cáin*; that is to say, it is enough for a ‘law’ to be an ecclesiastical *cáin* if it is promulgated by a churchman, with or without the co-operation of a king, or if it is ‘of’ a saint or churchman. The term is not meant to imply that either the content of the law or the definition of those subject to it had anything ecclesiastical about them. Whatever may be true about the content, the ecclesiastical *cáin* was evidently an attempt to regulate the lives of the laity. The terms *cáin* and *rechtge* will not help us: *cáin* was commonly used for any kind of penal authority or penal regulation (by ‘penal’ is meant enforced by penalties). The ‘debts of *cáin*’ referred to in *Cáin Adomnáin* are also cited in a legal tract as being owed by kinsmen to the head of a kindred¹²² and in another tract as being a necessary perquisite of kingship.¹²³ Fosterage may be seen as a *cáin*, when it is considered as a particular regime as far as the payment of penalties is concerned.¹²⁴ It is evident that *Cáin Adomnáin* created just such a particular regime; and hence there is no difficulty in explaining why it was called a *cáin* as well as a *recht*, ‘law’, or *rechtge*, ‘edict’.

We have, then, two problems which may be interrelated: why no provincial *cána* are recorded for Leinster and Ulster, and what the difference was between an ecclesiastical and an ordinary *cáin*. An answer will be easier if we summarise what has been learnt about the ecclesiastical *cáin* so far.

The ecclesiastical *cáin* is what in *Críth Gablach* is first called ‘a *rechtge* of faith’ and then illustrated with the example of *Cáin Adomnáin*, namely, a particular species of a wider category, the *rechtge*. Only ecclesiastical *cánai* were noticed in the ‘Chronicle of Ireland’ (the

¹²⁰ An early example is *Cáin Fhuithirbe*, a Munster *cáin* from about 680; see L. Breatnach, ‘The ecclesiastical element in the Old-Irish legal tract *Cáin Fhuithirbe*’, *Peritia* 5 (1986) 36-52.

¹²¹ Compare the way in which an Old-Irish glossator could speak of lawyers being engaged in making *rechtgi* for kings, Wb. 28 a 1 (*Thesaurus Palaeohibernicus*, edd. & transl. Stokes & Strachan, I.679); what is especially interesting about this passage is the shift from ‘teachers of law’, *legis doctores* in the lemma, to participation in legislation in the gloss, (*conro*)*ibtis oc dénum rectche la ríga*, ‘so that they might be making *rechtgi* with kings’ (*rectche* must be genitive plural, not, as Stokes and Strachan took it, genitive singular).

¹²² *Cáin Adomnáin*, ed. & transl. Meyer, pp. 30-3, § 48 (and *féich* without *cána* being specifically mentioned frequently); *Díre* tract, § 36, ed. & transl. Thurneysen, ‘Irisches Recht’, *Abhandlungen der Preussischen Akademie der Wissenschaften, Phil.-hist. Klasse* (1931) Nr. 2, at p. 34.

¹²³ ‘He who has no hostages in fetters, to whom the tribute of lordship is not given, to whom the debts of *cáin* are not paid, is no king’: *Corpus Iuris Hibernici*, ed. Binchy, I.219.5-6.

¹²⁴ *Díre* Tract, § 25, ed. & transl. Thurneysen, ‘Irisches Recht’, p. 25. This is probably the reason why base-clientship could be a *cáin*.

basic stock behind the existing chronicles as far as A.D. 911).¹²⁵ The ecclesiastical *cáin* was the outcome of collaboration between a church or churchman and a provincial king or king of Tara; usually it is likely to have been promulgated by both king and churchman at an *óenach*, exceptionally at a *rígdál*. Since there is some evidence for the participation of a synod,¹²⁶ the assembly at which *Cáin Adomnáin* was promulgated, with its two lists of guarantors, ecclesiastical and lay, may have been seen as a joint session of a synod and a royal assembly. It is known that a synod might be held at Tailtiu, site of the principal *óenach* of *Leth Cuinn*;¹²⁷ and this raises the possibility that an ecclesiastical *cáin* was jointly promulgated by synod and king (at an *óenach* or *rígdál*). The association with a particular church might be strengthened by the conjunction of a *cáin* with a circuit of relics or other saintly insignia, but this was not essential; relics were not required in order to make the saint of the church the saint of the *cáin*, so that the *cáin* was his and the *féich cána*, ‘debts of *cáin*’, were seen as paid to him. The saint could be male or female, as the example of Dar Í shows: gender is not the explanation why the chronicles do not record a ‘Law of Brigit’ for Leinster, perhaps promulgated at the *óenach* at Carman. The promulgation is described as ‘raising’ the law as well as ‘establishing’ it; in *Cáin Adomnáin* the promulgation of the law is ‘over’ the peoples (*for-tá forus na cána . . . for . . .*);¹²⁸ similar language is therefore found in the chronicles (*for Connachta* etc.) and in the principal surviving *cáin*. It is also apparently true that, within the particular scope of the law (such as the safeguarding of non-combatants in 697), penalties for violation did not vary according to the rank of the injured person: status, we are told by *Bretha Crólige*, was not relevant to compensation for physical injuries in a *cáin*, as it was in *Fénechas*, ordinary native law.¹²⁹ This implies that the average level of penalties would be higher in a *cáin*. The special legal regime established by a *cáin* was said to begin at a particular time; and since the law of Commán was renewed in 780, eight years after it had been promulgated for the second time, the period for which it lasted may have been seven or eight years.

The machinery of the ecclesiastical *cáin* had four main elements. First, it made full use of existing authority, in particular the guarantors offered by kindred and lord;¹³⁰ however, it also had its own specially appointed sureties, the *aitiri cána*, ‘hostage-sureties of a *cáin*’.¹³¹ The surety’s obligations are likely to have been restricted in time, so that the temporary nature of the *cáin* may have been a direct consequence of the temporary office of the *aitire*.¹³² Thirdly, apart from guarantors, whether existing or specially appointed, there were enforcing officers, *muirí*

¹²⁵ On the ‘Chronicle of Ireland’ see Kathryn Grabowski & D. Dumville, *Chronicles and Annals of Mediaeval Ireland and Wales. The Clonmacnoise-group Texts* (Woodbridge 1984), pp. 53-6.

¹²⁶ Adomnán, *Vita S. Columbae*, II.45: *Adomnán’s Life of Columba*, edd. & transl. Alan Orr Anderson & M.O. Anderson (2nd edn, Oxford 1991), pp. 174-9; *Adomnán of Iona, Life of St Columba*, transl. Richard Sharpe (Harmondsworth 1995), pp. 200-3.

¹²⁷ Adomnán, *Vita S. Columbae*, III.3 (edd. & transl. Anderson & Anderson, pp. 184-7; transl. Sharpe, pp. 207-8).

¹²⁸ *Cáin Adomnáin*, ed. Meyer, pp. 24-5, § 34: *forus cána Adomnán for Hérinn ocus Albain* (which is very close to the language of AU 783.9); *For-tá forus na cána-sa*, pp. 26-7, § 36 (and similarly pp. 26-9, §§ 39-41, and pp. 30-3, § 48).

¹²⁹ *Bretha Crólige*, §5 (ed. & transl. Binchy, pp. 8-9).

¹³⁰ *Cáin Adomnáin*, §53 (ed. & transl. Meyer, pp. 32-3); *Cáin Domnaig*, ed. & transl. V. Hull, *Ériu* 20 (1966) 151-77, §§ 2 (pp. 152-3, lines 25-8), 3 (pp. 164-5, line 36), 6 (pp. 166-7, line 58); cf. *Críth Gablach*, ed. Binchy, p. 11 (§ 20, lines 277-82).

¹³¹ *Cáin Adomnáin*, ed. & transl. Meyer, pp. 26-7, 32-3 (§§ 39, 49, 53).

¹³² Cf. *Cáin Adomnáin*, ed. & transl. Meyer, pp. 30-1, § 47 (an offender is banished ‘until the end of the *rechtge*’); *Berrad Airechta* (see above, n. 69), § 65.e (ed. Thurneysen, p. 23), transl. Stacey, “Swear to God of heaven that, wherever an obligation may ‘reach’ your responsibilities until [the end of the established] time period...” (p. 222).

and *rechtairi*, and sometimes also ‘identifiers’ — an approximate equivalent in *cáin* to a ‘neighbourhood-watch scheme’.¹³³ Finally, as we have seen already, there were special penalties; moreover, it was an essential element in the whole strategy of the *cáin* that powerful men should profit by assisting in enforcement.¹³⁴ A *cáin* created extra means of social control; but, even more, it deployed existing power.

A difference between the ecclesiastical *cáin* and the ordinary royal *rechtge* described in *Críth Gablach* may be that the ecclesiastical *cáin* was a fusion of two contrasted relationships.¹³⁵ One was also called *cáin*, the other *cairde*. The *cáin* was proper to relationships between ‘base-client peoples’, *aithechthúatha*, and their overkings; it entailed the right of the overking to intervene as a judge and as an enforcer of legal rights within the *aithechthúath*. From such interventions he took his profit. It might even, in extreme cases, extend to penalties imposed on social groups, kindreds or churches, by which they became *fo chís*, *sub censu*; and this unenviable condition involved not just tribute (*cís*, *census*) but the right of the overking to succeed to one third of all lands and movables.¹³⁶ *Cáin* was enforced by requiring the subject people to give hostages. *Cairde*, ‘alliance’, on the other hand, was enforced by *aitiri*, a much more honourable version of the hostage.¹³⁷ The principal function of the *cairde* was to safeguard life and property and to prescribe special arrangements by which debts or penalties due across a border might be enforced. The *cairde*, therefore, was not a penal regime, still less an exploitative one.

The ecclesiastical *cáin* may be seen as a composite and innovatory institution. It took the *aitire* from the *cairde*. In addition, the characteristic objectives of the ecclesiastical *cáin* were, as in the *cairde*, the protection of life and property. On the other hand, much of the machinery, apart from the *aitire* and the *muiredach* or *muiri*, probably came from the *cáin*. It is very likely that this was true of the penal element.

The ecclesiastical *cáin* secured, as one of its effects, an enhancement of royal power, but not for all kings. In the eighth century, the Ulaid and the Laigin were the victims of the military power of Uí Néill.¹³⁸ If, in 780, an Uí Néill king, Donnchad mac Domnaill, could compel the synod of the Leinstermen to join the synod (or synods) of Uí Néill in a joint meeting at Tara, it may be suggested that Uí Néill could prevent both the Ulaid and the Laigin from exploiting the new possibilities opened up by the ‘edicts of faith’. On the other hand, there is no evidence that the popularity of the ecclesiastical *cáin* rendered the ordinary *rechtge* obsolete. In 972¹³⁹

three *cánai* were made by the counsel of the nobles of Munster, namely Mathgamain (of Dál Cais), Fáelán, and the son of Bran (Máel Múad), and others, that is, the banishment of the (Scandinavian) officials, the banishment of the Foreigners from Limerick and the burning of the fortress.

¹³³ *Cáin Adomnáin*, § 48 (ed. & transl. Meyer, pp. 30-3); *Cáin Domnaig*, especially § 2 (ed. & transl. Hull, pp. 162-5).

¹³⁴ *Cáin Adomnáin*, §§ 36-40, 48 (ed. & transl. Meyer, pp. 26-7, 30-3); *Cáin Domnaig*, § 2 (ed. & transl. Hull, pp. 162-5).

¹³⁵ What follows is heavily dependent on Stacey, *The Road to Judgment*, pp. 98-111.

¹³⁶ Charles-Edwards, *Early Irish and Welsh Kinship*, pp. 324-34. Hence the role of Satan as *císel*.

¹³⁷ See, for example, the short text ed. & transl. Thurneysen, ‘Die Bürgschaft’, pp. 32-3.

¹³⁸ For the Ulaid, this was so especially after their defeat in the battle of Fochart, 735: for example, AU 809.3, 7.

¹³⁹ AI 972.1.

This is highly reminiscent of one of the *rechtgai* described in *Críth Gablach*: ‘a *rechtge* to expel a foreign people, that is, against the English’.¹⁴⁰ In 1040 Donnchad mac Bríain made ‘a *cáin* and a *rechtge* . . . that none should dare to steal or to do feats of arms on Sundays . . .’.¹⁴¹ This edict was presumably at least a partial renewal of *Cáin Domnaig*, an ecclesiastical *cáin*. It looks as though Dál Cais revived both main varieties of *cáin*.¹⁴² *Cáin Adomnáin* appears to have been renewed in the tenth century, to judge by an obit for a *máer* of *Cáin Adomnáin*.¹⁴³

We have noticed in passing the evidence pointing to the extension of Irish law among the Gaelic kingdoms of northern Britain. There are likewise two scraps of evidence for the *cáin* and the *rechtge*, preserved in the ‘Chronicle of the Kings of Alba’. The first is an entry assigned to the reign of Domnall son of Ailpín (858-62):¹⁴⁴

In his time the Gaels (*Goedeli*), together with their king, established the rights and laws of the kingdom of Áed mac Echdach at Forteviot.

Áed mac Echdach was a king of Dál Ríata who died in 778 and is known to have attacked one of the Pictish kingdoms, Fortriu.¹⁴⁵ The notice about his laws combines elements found also in the Irish *cánai* and *rechtgai*: the collaboration of king and people is attested in *Críth Gablach* and implied if the promulgations at Crúachain were indeed at an *óenach*. The same collaboration is suggested by the entries in the ‘Annals of Ulster’ on the Law of Dar Í being accepted by the Munstermen and Uí Néill. Similarly, renewal of *cánai* is well attested in the chronicles; it is much less likely that ordinary law, *Fénechas*, would need to be renewed. On the other hand, *Críth Gablach* refers to one form of *rechtge* being designed to reinforce *Fénechas*. The first *rechtge* ‘which a king pledges upon his peoples’ is the *rechtge Fhénechais*: ‘it is the peoples who adopt it, it is the king who confirms it’.¹⁴⁶ Here and only here, in *Críth Gablach*, is the role of a people or peoples in making a law given a precedence over the royal role, as it is in the notice in the ‘Chronicle of the Kings of Alba’. An hypothesis, therefore, to account for the wording of the entry might run along the following lines: Áed had, in his own day, promulgated a *rechtge* which was still remembered nearly a century later; the enactment by the Gaels and their king at Forteviot between 858 and 862 was intended to do two things in combination — first, it renewed the *rechtge* promulgated by Áed; and, secondly, it confirmed the *Fénechas* inherited through Dál Ríata as the law of Domnall’s kingdom, especially Fortriu, which Áed had at least attempted to conquer. It is not impossible to imagine that Áed’s original *rechtge* had also been intended to confirm *Fénechas*, which would make the connexion between Domnall’s law and that of his predecessor more straightforward. This explanation does not detract from the political nature of the proceedings, which would appear to have been part of a Gaelicising policy for the new kingdom.

¹⁴⁰ *Críth Gablach*, ed. Binchy, pp. 20-1 (§ 38, lines 522-3).

¹⁴¹ AI 1040.6; cf. 1068.4, which is reminiscent of the *bóshlechta* of Dar Í (AI 810).

¹⁴² Cf. Dumville, *Councils*, pp. 35-6.

¹⁴³ AFM 927.3: *Annala Rioghachta Eireann. Annals of the Kingdom of Ireland, by the Four Masters, from the Earliest Period to the Year 1616*, ed. & transl. John O’Donovan (2nd edn, 7 vols, Dublin 1856), II.620-1.

¹⁴⁴ Marjorie O. Anderson, *Kings and Kingship in Early Scotland* (2nd edn, Edinburgh 1980), p. 250 (and discussed on pp. 189-90). See also Benjamin T. Hudson, *Kings of Celtic Scotland* (Westport, CT 1994), pp. 47-8; on the setting, S. Airlie, ‘The view from Maastricht’, in *Scotland in Dark-Age Europe*, ed. Barbara E. Crawford (St Andrews 1994), pp. 33-46, at 34-6.

¹⁴⁵ AU 768.7.

¹⁴⁶ *Críth Gablach*, ed. Binchy, p. 20 (§ 38, lines 515-16).

The second passage in the ‘Chronicle of the Kings of Alba’ is in the notice of the reign of Constantine son of Áed and is placed two years before the death of Cormac mac Cuilennáin, therefore in 906.¹⁴⁷

And in his sixth year King Constantine and Bishop Cellach vowed, together with the Gaels (*Scotti*), to maintain the laws and disciplines of the faith and the rights of churches and of gospel-books¹⁴⁸ on the Hill of Faith close to the royal *ciuitas*¹⁴⁹ of Scone.

This has the combination of a king, a churchman, and the people characteristic of the ecclesiastical *cáin*. It can hardly be a form of coronation-oath (quite apart from the unlikelihood that kings of Alba were crowned at this period) since it was six years after Constantine’s accession. The verb used, *deuouere*, may refer to the *cáin* as a contract and thus to the appointment of *aitiri*, who, if it were a *cáin*, would probably be headed by Constantine and Cellach.¹⁵⁰ The wide scope of the enactment, on the other hand, suggests something a little more like the decrees of carolingian assemblies, with their penchant for high moral rhetoric.¹⁵¹ Yet it could also be seen as employing the *rechtge* to confirm the law of the Church just as it had been used to confirm *Fénechas*.

The Irish legal tracts are rich in legal contrivance. They assume that, for all their talk of ‘nature’ and even ‘the law of nature’, much of human society has to be constructed. The sphere of *dliged*, ‘entitlement’, is so extensive more because of artificial than natural rights. The term *cor*, used for a deliberate legal act, is ubiquitous. The political order, exemplified by *rechtge* and ecclesiastical *cáin*, was thus understood to be extensively artificial — and all this without any hint of surprise.¹⁵²

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For an excellent survey of the content of the texts see Fergus Kelly, *A Guide to Early Irish Law* (Dublin 1988).

For briefer guides to both ecclesiastical and secular law see Kathleen Hughes, *Early Christian Ireland: Introduction to the Sources* (London 1972), chapters 2 and 3.

B. Texts and Translations

(1) Canon Law

¹⁴⁷ Anderson, *Kings*, p. 251; Dumville, *Councils*, p. 47.

¹⁴⁸ This may refer to charters written into gospel-books as in the ‘Lichfield Gospels’ and, later, the ‘Book of Deer’, but some gospel-books became relics and thus symbolic of the status of their churches.

¹⁴⁹ Perhaps equivalent to *cathair*, ‘seat’.

¹⁵⁰ Compare *Cáin Adomnáin*, § 29 (ed. & transl. Meyer, pp. 20-1): *To-chuitchetar trá huli læchaib ocus cléirchibh ógh cána Adomnán do comalnad*, ‘Then they have all sworn, laymen and clerics, to fulfil the whole of Adomnán’s *cáin*’.

¹⁵¹ AU 804.8 may refer to a royal *rechtge* freeing churches from military service, promulgated by Áed Oirdnide, and sponsored by Fothad Canóine, but the entry was added in the margin by the second scribe and is in Middle Irish.

¹⁵² I am grateful to David Dumville for the honour of being invited to give a Quiggin Lecture in the University of Cambridge (held in the Umney Lecture Theatre, Robinson College, on Friday, 17 November, 1995) and for his hospitality when I gave it. Perhaps I may also add an apology to those, especially perhaps my host, who may have expected publication to occur rather sooner than it has. The reason which made it easy to accept the invitation in the first place, namely that I had written a chapter on the subject for the *New History of Ireland*, volume I, was also the reason why it was difficult to complete the written version, why the latter bears very little resemblance to the lecture, and why some central questions are circumvented.

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