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The Early Irish Law of Pledging

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Abstract

Jaqueline Bemmer, Jesus College, Trinity 2015, The Early Irish Law of Pledging.

This thesis investigates the law of pledging as presented in the early Irish laws and draws connections to its relations within the overall system of security. At the centre of my research stands the question what pledges Irish law recognised and how their application was determined, so as to provide a paradigm for the law of pledging in its entirety. A pledge is usually a movable, material object of symbolic and economic worth that is given to another person as a security deposit for an outstanding obligation.

The main findings of this thesis are a first paradigm of the law of pledging and a methodological and contextual categorisation of all types of pledges that opens doors for future research into property law. The combined discussion of pledges, hostages and sureties offers the reader insight into a triple method of security and its differences. Moreover, the close relationship between given pledges and distrained pledges is unravelled for the first time. Of further note is the comparative investigation into pledging. Therein, the reader is presented with how pledges are used in Welsh, Salic, Lombard, Visigothic, and Burgundian law. The objective is to offer the reader a view into the possibilities of pledging and to provide a framework against which the Irish evidence can be probed, which reveals how sophisticated and attentive to detail the Irish laws were. Finally, a translation of the primary source text *Bretha im Fúillemu Gell* (Judgements concerning Pledge-interests) is made available to the reader in the Appendix.

Extended Abstract

Jaqueline Bemmer, Jesus College, Trinity 2015, *The Early Irish Law of Pledging*.

This thesis is composed of eight chapters presenting the collective evidence on pledging as depicted in the early Irish laws, where each chapter deals with a particular aspect of pledging. The intended goal of this presentation is to depict the way pledges are used in legal procedure and to discuss in particular the question of how this security operated both on a theoretical, judicial level as well as within the social context of its application, where different scenarios unfold. *The first chapter* introduces the reader to my approach to the evidence and the methodology I applied in order to categorise the material and provide coherence, pointing the reader to the lack of elaboration in the sources. It is this state of the evidence that I seek to counter by focusing on what lies behind the succinct statements and so to reveal the information hidden behind these scraps of information. It also includes a summary of all the sources relevant to pledging and provides an overview on the structure of the core text. *The second chapter* focuses on the legal theory of pledging and its terminology. It provides explanations of rare terms that are relevant to pledging and provides definitions essential for an understanding of what follows. Furthermore, it depicts the fate of a pledge from its beginning until its forfeiture and demonstrates the symbolic and qualitative characteristics that a chattel had to meet in order to take on the legal function of a pledge. *Chapter three*, then, leads us into even more complex territory and introduces the different types of pledges known in early Irish law based on value, time period, custody, utilisation, and forfeiture. The viability of this theory is then linked to a contextual approach in the *fourth chapter*, where I offer a discussion of pledges in the context of

their practical application. It is there that I take account of special forms of pledges that occur exclusively in particular procedures deeply rooted in the socio-legal history of early medieval Ireland, including pledges in the law of neighbourhood, in the procedure of sick-maintenance, as part of ecclesiastical and royal ordinances as well as their role as guarantees for pleas in court. The following *fifth chapter* moves the thesis from a discussion within the law of pledging to an investigation of the place of pledges alongside other forms of guarantees, namely sureties and hostages, as one part of a triple method of security. It approaches both the role of the pledge extracted by sureties, the pledge given by sureties on behalf of the party they were appointed to support, as well as the surety that is taken in person and can be released through a pledge. *The sixth chapter* dismantles the relation between pledging and distraint as two interwoven procedures that both use property as security. The close relationship between pledging and distraint has informed my line of enquiry and a chattel that is conveyed from a person to another, voluntarily or forcefully, can be the same object, fulfil the same function and have the same fate. It is for this reason that the two procedures have to be compared in order to reveal the purpose of pledging as opposed to seizure as well as the role of the pledge within distraint. My interest in this connection has been particularly motivated by evidence derived from *Bretha im Fúillemu Gell*. This law text is the only one that allows for the characteristic asset subject to distraint to be used as a voluntarily given pledge also, namely cattle, and introduces an entirely new concept previously deemed non-existent, the usufruct pledge. This circumstance raises new issues of entitlements to products and duties of care, and, above all, about the fate of the cattle pledge and its relation to the debt. Furthermore, there is evidence from both procedures that the object given as pledge or taken in distraint need not be physically removed but that it could be a standing

pledge, a non-possessory pledge. This is a second point of contact where these mechanisms of enforcement align and become almost indistinguishable. The merit in this chapter also lies in the many more questions it raises, particularly since the text on distraint is the longest in the entire corpus of early Irish law and an up-to-date translation and analysis of it is wanting. It is hoped that this chapter stimulates further enquiry. *The seventh chapter* takes a comparative approach and positions the Irish evidence in the wider context of European legal history, redeeming it from its isolated position. The intent of this chapter is to enhance the position of early Irish law among legal historians from disciplines outside of ‘Celtic’ and is ambitious in including Welsh, Salic, Lombard, Burgundian, and Visigothic law into the analysis. It draws heavily on primary sources, since the study of pledging appears to be vestigial in discussions of many of these laws also. *The eighth chapter* represents the conclusion and draws the thesis to a close.

Among the most significant findings are first of all, the fact that different types of pledges existed and that the pledge usually comes into play after a default and not, like sureties, at the outset of an agreement, which carries significant implications for property law. Moreover, the finding of evidence for usufruct rights in pledges, predominantly in the form of livestock pledges, poses a vital contribution, because it had not previously been known and demonstrates a concern of economic viability that represents a second layer of relevance alongside its vital symbolic strength. I regard this evidence as being of great significance in understanding the historical progression of pledging, because it is the only type of pledge that can lead to a reduction of the debt through its produce, which directly goes against the Irish tendency progressively to raise the debt to an excessive level, and which shows its proximity to distraint. Of further relevance is the initiation of a discussion of chattels as given pledges or taken pledges representing two

mechanisms that are very closely connected from a legal perspective but were perceived as very distinct on a symbolic level for their repercussions on status issues. Originally, they served two opposite goals, pledging extended the temporal scale of the debt, and could lead to further dependence, but it was voluntary. On the other hand, distraint gradually reduced the debt until it was quit but it was also associated with a level of indignation towards the debtor and a public display of his inability or unwillingness to satisfy his creditors. However, this symbolic space separating both remedies was drastically reduced when the object was only conveyed when forfeiture was imminent, namely in the form of standing pledges. This tangency is particularly revealed in the comparative chapter, with the distrainted pledge taking a far more dominant position in the continental laws. The overall merit in this thesis lies in presenting a picture of the law of pledging as a whole and making this paradigm as well as a translation of the primary source text, *Bretha im Fúillemu Gell* available to researchers for the first time. In many ways, it presents a first contribution to an open field of discussion stimulating future research and refinement in so many legal areas of which pledges formed part, notably the law of obligations, security and property.

Abbreviations

- AL** *Ancient Laws of Ireland*, 6 vols. (Dublin, London, 1865-1901).
- ALW** *Ancient Laws and Institutes of Wales*, ed. Aneurin Owen (London, 1841).
- BB** *Bechbretha: An Old Irish Law-tract on Bee-keeping*, Early Irish Law Series 1, eds. T. M. Charles-Edwards & F. Kelly (Dublin, 1983).
- BCró** *Bretha Crólige*, ed. D. A. Binchy, *Ériu* 12 (1938), 1-77.
- BCom** *Bretha Comaithchesa*, ed. T. M. Charles-Edwards (forthcoming).
- BFG** *Bretha im Fúillemu Gell*
- Bürgschaft** *Die Bürgschaft im irischen Recht*, ed. R. Thurneysen, Abhandlungen der preussischen Akademie der Wissenschaften 2 (Berlin, 1928).
- CCF** *Cóic Conara Fugill: Die fünf Wege zum Urteil*, ed. R. Thurneysen. Abhandlungen der preussischen Akademie der Wissenschaften 7 (Berlin, 1926).
- CCH** *Collectio Canonum Hibernensis*, ed. H. Wasserschleben, *Die irische Kanonensammlung* (Leipzig, 1885); ed. R. Flechner, *The Hibernensis* (forthcoming).
- CCIH** *A Companion to the Corpus Iuris Hibernici*, L. Breatnach (Dublin, 2005).
- CG** *Críth Gablach*, ed. D. A. Binchy. Mediaeval and Modern Irish Series vol. 11 (Dublin, 1941, repr. 1979).

- CIH*** *Corpus Iuris Hibernici*, ed. D. A. Binchy, 6 vols. (Dublin, 1978).
- CL*** *Lánamna: An Old Irish Tract on Marriage and Divorce Law*, ed. C. Eska,(Leiden, Boston, 2010); ed. R. Thurneysen, ‘Cáin lánamna’, in *SEIL* (Dublin, 1936), 1-80, repr. R. Thurneysen, *Gesammelte Schriften* i-iii, ed. P. De Bernardo Stempel & R. Ködderitzsch (Tübingen, 1991), iii 287-366.
- CMCS*** *Cambridge Medieval Celtic Studies*, later: *Cambrian Medieval Celtic Studies*
- DIL*** *Dictionary of the Irish Language*, Royal Irish Academy (Dublin, 1913-1976; compact edition, 1983).
- EICL*** *Early Irish Contract Law*, ed. N. McLeod (Sydney, 1992).
- EIF*** *Early Irish Farming*, F. Kelly (Dublin, 1997).
- EIWK*** *Early Irish and Welsh Kinship*, T. M. Charles-Edwards (Oxford, 1993).
- Études*** *Études sur le droit celtique*, H. d’Arbois de Jubainville, vol. 1, Cours de Littérature Celtique 7 (Paris, 1895; repr. Osnabrück, 1970) &vol. 2, Cours de Littérature Celtique 8 (Paris, 1895; repr. Osnabrück, 1970).
- GEIL*** *A Guide to Early Irish Law*, F. Kelly (Dublin, 1988).
- GMW*** *A Grammar of Middle Welsh*, D. Simon Evans, (Dublin, 1964).
- Hib*** *CCH*, ed. R. Flechner.
- IR*** *Aus dem irischen Recht* I-V, R. Thurneysen, *ZCP* 14-16, 18 (1923-1930).

- LAL** *Lawyers and Laymen: Studies in the History of Law Presented to Professor Dafydd Jenkins on His Seventy-fifth Birthday*, T. M. Charles-Edwards, M. Owen, & D. B. Walters (eds.), (Cardiff, 1986).
- LL** *Leges Langobardorum*, ed. F. Beyerle, *Leges Langobardorum, 643-866*, Germanenrechte Neue Folge (Witzenhausen, 1962-3).
- LV** *Leges Visigothorum*, ed. K. Zeumer, MGH, *Leges Nationum Germanicarum* (Hannover, 1902, repr. 2005).
- MGH** *Monumenta Germaniae Historica*
- Misc. Ir. Arch.Soc.** *The Miscellany of the Irish Archaeological Society*, ed. J. O'Donovan, (Dublin, 1846).
- OGSM** *Old Irish Glossing of the Senchas Már*
- PLS** *Pactus Legis Salicae*, ed. K. A. Eckhardt, MGH, *Legum Sectio 1, Leges Nationum Germanicarum vol. iv, part i* (Hannover, 1962).
- PRIA** *Proceedings of the Royal Irish Academy*
- SCF** *Studia Celtica Fennica*
- SEIL** *Studies in Early Irish Law*, R. Thurneysen, *et al.* (Dublin, 1936).
- VGKS** *Vergleichende Grammatik der keltischen Sprachen I-II*, H. Pedersen, (Göttingen, 1909-13).
- ZCP** *Zeitschrift für celtische Philologie*

1. Introduction

1.1. Outline & State of the Art

Pledging is an understudied and overlooked field of research that holds a lot of potential for revealing the operation of legal procedure, status dynamics within property rights, and the elaborate system of security and bonds, but it has so far not drawn the attention it merits. The mechanism of pledging incorporated both the giving of a pledge and the accepting of a pledge as a security deposit for an obligation. The legal evidence on pledging is not straightforward at all and it has not helped in making it a prominent target for those few scholars active in the field of early Irish law. First of all, unlike many other legal matters, there is no single tract devoted to pledging but relevant passages occur scattered throughout the corpus of early Irish laws and it is only by sifting through these individual references that interesting glimpses of their usage can be discovered. Second, when a pledge occurs it is never the main topic of the text but only mentioned as an addendum to the central legal issue, without further explanation, along the line of: a pledge is given from X to Y. Unfortunately, we are regularly left in the dark as to what chattel it was, when and why it was given, or what its value and relationship to the liability it secured was. One of the reasons for this may arise from the fact that pledges are believed to represent an old form of security, and it is often the absence of elaboration that is telling of the long-standing nature and familiarity with an institution, which rendered explanations superfluous. In line with this interpretation is the fact that references to pledges are very frequent, which argues for their importance and regular use, as does the vast range of legal activities in which pledges are encountered, particularly contract law and by extension, the law of obligations, liabilities,

property, neighbourhood, marriage, service agreements, royal and ecclesiastical legislation and many more. While this is testimony to their significance it leaves the modern researcher with a corpus of scattered information on pledging, which made it a great challenge to unveil the sources and so to reveal the underlying system of pledging used in early medieval Ireland.

One law text in particular should be mentioned in this respect, namely *Bretha im Fúillemu Gell* (Judgements concerning Pledge-Interests), henceforth *BFG*, a translation of which is provided in the Appendix. This text comes the closest in addressing pledges at hand, and contains a list of pledge objects that illuminate the material culture of pledging, and it contains indispensable insights into the procedural fate of a pledge. Nevertheless, as its title indicates, the principal focus of the text is the interest rate on pledges given by a third party, which rose with the status of the pledgor. Therefore, pledging was both a social phenomenon in which individuals interacted on a political and personal level, and a legal authority. It operated through the solidarity and commitment among kin-members but also enforced status differentiations between superiors and subordinates. A pledge that was offered automatically conveyed power and thereby, created dependence, a phenomenon known as the creation of ‘symbolic capital’.¹ Therefore, while *BFG* is valuable for many reasons outlined further below, the main focus of the text are the status differentiations in pledge interest payments. For these reasons, pledges in early Ireland so far have not drawn the attention which they merit and no attempt has yet been made to present a picture of the law of pledging in a systematic fashion, which renders this thesis the first

¹ For a network analysis of personal pledging and suretyship as a means of social control in the Middle Ages see, D. Postles, ‘Personal Pledging: Medieval “Reciprocity” or “Symbolic Capital”’, *Journal of Interdisciplinary History* 26:3 (Winter, 1996), 419-435.

contribution to a promising field of research, which is of vital and timely importance precisely because pledges accompany so many of the most significant legal activities. Therefore, an understanding of the law of pledging will shed light on many legal areas and hopefully will serve as an innovative impetus for future research.

1.2. Previous Research

The contributions to pledging that, so far, have been made are representative of the state of the evidence outlined above, and therefore, analyse particular pledges within a restricted legal setting and usually in the context of a particular law text. Below, I will outline those texts relevant to the law of pledging in a broader context and whose editions contain some additional information on the pledges featuring in the respective text provided by the editor(s). Details on the texts are provided in the chapter on the sources. There are also three accounts of pledging not linked to a specific law text. First, there is a good introductory summary on pledges in Kelly's chapter in his *A Guide to Early Irish Law*.² Second, Stacey offers a chapter on pledges in *Dark Speech*, in which she provides an interpretation of pledging as part of the social power structure of early Ireland and also discusses evidence from *BFG*.³ Third, Stacey analyses the two types of pledges encountered in curial pleadings in her book *The Road to Judgment*.⁴

² F. Kelly, *A Guide to Early Irish Law* (Dublin, 1988), 164-167.

³ R. C. Stacey, *Dark Speech – The Performance of Law in Early Ireland* (Philadelphia, 2007), 43-47; for individual references to pledges, see 343: gages.

⁴ R. C. Stacey, *The Road to Judgment – From Custom to Court in Medieval Ireland and Wales* (Philadelphia, 1994), 112-140.

Thurneysen's contribution to the study of pledging comprises his edition and translation of *Cóic Conara Fugill* (The Five Paths to Judgement),⁵ which contains an important discussion of pledges and their function in relation to court procedure. Moreover, he edited and translated *Gúbretha Caratniad* (The false Judgements of Caratnia), a law text that contains an important paragraph on the quality of a pledge and permitted exceptions.⁶ Moreover, his edition and translation of *Berrad Airechta* (Abridging of the Court; Court Summary)⁷ offers many important details on the role of sureties in pledging. It is the most profound analysis of early Irish suretyship and despite the age of this work, Thurneysen's philological and legal skills have ensured that *Die Bürgschaft* remains the authoritative text for any student endeavouring to commence study on this topic. Accompanying his analysis, edition and translation one is advised to consult Robin Chapman Stacey who provides the first English translation of *Berrad Airechta* (Abridging of the Court; Court Summary),⁸ as well as a further in-depth analysis on the issue of the surety's liability and legal immunity.⁹ As pertains to the broader historical development of suretyship, D. A. Binchy's

⁵ *Cóic Conara Fugill – Die fünf Wege zum Urteil*, ed. R. Thurneysen, *Abhandlungen der preussischen Akademie der Wissenschaften* 7 (Berlin, 1926).

⁶ *Gúbretha Caratniad*, ed. R. Thurneysen, 'Aus dem irischen Recht III', *ZCP* 15 (1925), 302-370; *CCIH*, 5.43, p. 262.

⁷ *Berrad Airechta*, ed. R. Thurneysen, 'Die Bürgschaft im irischen Recht', *Abhandlungen der Preussischen Akademie der Wissenschaften* (Berlin, 1928), repr. *Gesammelte Schriften i-iii* ed. Patrizia de Bernardo Stempel & Rolf Ködderitzsch (Tübingen, 1991), iii 90-174;

⁸ R. C. Stacey, 'Berrad Airechta: an Old Irish Tract on Suretyship', in T. M. Charles-Edwards, Morfydd E. Owen, D. B. Walters (eds.), *Lawyers and Laymen. Studies in the History of Law presented to Professor Dafydd Jenkins on his seventy-fifth birthday Gŵyl Ddewi* 1986 (Cardiff, 1986), 210-233.

⁹ R. C. Stacey, 'Ties That Bind: Immunities in Irish and Welsh Law', *CMCS* 20 (Winter 1990), 39-60.

article on ‘Celtic Suretyship, a fossilized Indo European institution’,¹⁰ is an excellent study, as well as D. B. Walters’ discussion of ‘The general features of Archaic European suretyship’.¹¹

Regarding the procedure of distraint, the principal tract is *Di Chetharslicht Athgabála* (On the Four Divisions of Distraint). Sir Henry Summer Maine first analysed the tract in 1885.¹² Henry D’Arbois de Jubainville extensively worked on the distraint material, edited, translated and analysed most of the text in 1895 in his two volumes *Études sur le droit celtique*.¹³ He was followed by Binchy in 1973 who provided the authoritative analysis and interpretation of *Di Chetharslicht Athgabálae*.¹⁴ Stacey devotes attention to the theatrical aspects of the procedure and the importance of dramaturgy and symbolism.¹⁵ More recently, Amy Smith has offered a fresh insight into the different time periods of stay within distraint whose elusive distinction aroused curiosity.¹⁶ Binchy also offers an edition and translation of the alternative form of distraint, known as ‘A Text on the Forms of Distraint’, which appears in MS H 3. 18 in the form of very short extracts with glosses and commentary in Old Irish that form part of the Old Irish glossing on the *Senchas Már*.¹⁷

¹⁰ D. A. Binchy, ‘Celtic Suretyship, a fossilized Indo-European Institution?’, in G. Cadona, H. M. Hoenigswald & A. Seen (eds.), *Indo-European and Indo-Europeans. Papers Presented to the Third Indo-European Conference at the University of Pennsylvania* (Philadelphia 1970), 355-67, repr. *The Irish Jurist* 7 (1972), 360-72.

¹¹ D. B. Walters, ‘The General Features of Archaic European Suretyship’, in T. M. Charles-Edwards, Morfydd E. Owen, D. B. Walters (eds.), *Lawyers and Laymen. Studies in the History of Law presented to Professor Dafydd Jenkins on his seventy-fifth Birthday Gŵyl Ddewi 1986* (Cardiff, 1986), 92-116.

¹² H. S. Maine, *Lectures on the Early History of Institutions* (London, 1874, 7th ed. 1914), 141.

¹³ H. D’Arbois de Jubainville, *Études sur le droit celtique* vol. 1. Cours de Littérature Celtique 7 & vol. 2. Cours de Littérature Celtique 8 (Paris, 1895; repr. Osnabrück, 1970).

¹⁴ Binchy, ‘Distraint in Irish Law’, *Celtica* 10 (1973), 22-71.

¹⁵ Stacey, *Dark Speech*, 20-29.

¹⁶ A. Smith, ‘A note on Cethairslight Athgabálae’, *Celtica* 26 (2010), 161-170.

¹⁷ Binchy, ‘A Text on the Forms of Distraint’, 72-86; see discussion of *OGSM* in *CCIH*, 7.2, 338 ff., and 3.5.2, 97-8.

He also discussed an important passage in *Críth Gablach* (Branched Purchase) that deals with the qualities of a pledge.¹⁸ In addition to that Binchy edited and translated *Bretha Crólige* (Judgements on Blood-Lying), the principal law text on sick-maintenance and the only one in which pledges are mutually exchanged to bind obligations and counter-obligations.¹⁹ Furthering an understanding of the procedure is his accompanying analysis of sick-maintenance that also incorporates further fragments of text dealing with *othrus*.²⁰

Charles-Edwards and Kelly discuss one specific type of pledge, the fore-pledge, in their edition and translation of *Bechbretha* (Bee-Judgements).²¹ Further information on the fore-pledge is offered in another text central to the law of neighbourhood, *Bretha Comaithchesa* (Judgements of Neighbourhood), currently being edited by Charles-Edwards.²² As can be surmised from the above, specific specialised scenarios of pledging have been analysed, but what is required is a coherent picture of the scope of pledging as a legal institution that forms part of a bigger scheme.

1.3. Objectives

The overall objective of this thesis is to present and interpret the collective evidence on pledging and by doing so, to draw an overall paradigm for the early Irish law of pledging, which may be used and refined through future investigations. My main interest lies in the procedural

¹⁸ *Críth Gablach*, ed. D. A. Binchy, Mediaeval and Modern Irish Series (Dublin, 1941, repr. 1970, 1979), 94-5.

¹⁹ *Bretha Crólige*, ed. D. A. Binchy, *Ériu* 12 (1938), 1-77.

²⁰ Binchy, 'Sick-Maintenance in Irish Law', *Ériu* 12 (1934-8), 78-134.

²¹ *Bechbretha: an Old Irish law-tract on bee-keeping*, eds. T. M. Charles-Edwards & F. Kelly (Dublin, 1983), reprinted with new appendix in 2009, notes on § 3, 93-94, § 24, 113-115, § 26, 118, and their discussion of the related text *Caithchi bech* (trespass-penalties of bees), 187-188.

²² I thank Prof. Charles-Edwards for sharing his working edition and translation of this text and for discussing it with me, which has been very helpful in understanding the operation of the pledge in neighbourhood.

applicability of pledging and the details of its operation within a broader system of security and enforcement. In order to achieve this objective, answers to the following questions drove my research:

- 1) What types of pledges can we discover in the law texts and how did they differ?
- 2) What relationship did pledges have with other forms of security?
- 3) What are the similarities and differences between pledges that are voluntarily given and those that are extracted against the owner's wishes?
- 4) Where does the Irish evidence stand compared to the laws of pledging in other legal systems?

1.4. Methodology

I first collected references to pledges from across the *Corpus Iuris Hibernici* and methodologically separated and categorised the evidence based on the ways in which the legal sources responded to my questions, according to five main criteria:

- 1) *Value* (symbolic, lower than debt, matches debt, higher than debt)
- 2) *Time period* (before an offence, after an offence)
- 3) *Custody* of the pledge (debtor, creditor, independent custodian)
- 4) *Use* of the pledge (prohibition of use, use of necessity, use instead of interest, use to diminish the debt)
- 5) *Forfeiture* (on top of the debt, as part of the debt, instead of the debt)

From this evidence I derived a first paradigm for the legal theory of pledging which I then linked to the practical applicability in the various contexts in which pledges appear. I did this because it

revealed which types of pledges were used in what legal environments and how a pledge in the same context could shift from one category into another. This step also ensured that pledges were interpreted within their social and procedural milieu, drawing a connection between theory and applicability, and hence between juridical framing and on-the-ground operations.

As a second step, I analysed pledges as one part of a triple system of security, the other two tools being sureties and hostages. This is of great relevance, because all three guarantees are closely connected, yet serve different purposes and it is only from a combined view that we can achieve an understanding of property rights and the elaborate network of conveyance and security, of which pledging was part and which pledging itself reinforced.

As a third step, I focused on the differences between pledging and distraint, because in both procedures property is taken from a debtor, first as a security, and later in order to satisfy (part of) the debt. It is essential to understand the proximity between these procedures to reveal in what the differences between a voluntarily given pledge and a taken pledge are grounded. I hold this approach to be vital because *BFG* is the only text that mentions pledges consisting of livestock, the hallmark of distraint, and this raises entirely new questions on the relationship between pledging and distraint.

The final step of my methodological approach was to probe the Irish evidence and the paradigm for pledging I had derived against other legal systems. This has proved indispensable because many obscure points could be enlightened by looking at comparative sources and it has provided a framework of reference against which the quality of the Irish evidence could be tested. It has revealed in how sophisticated and private a way the law of pledging operated, without state

involvement being a necessary sanction for procedures, and shows that it represents an outstanding example in European legal history. Moreover, this investigation may be of value in establishing a historical paradigm for the development of the procedure in future research.

1.5. Early Irish Contracts

Pledges always occur in situations where the fulfilment of an obligation has to be guaranteed. Therefore, the dominant legal realm under which this investigation falls is contract law. In the following, the basic set-up of early Irish contracts will be explored, which provides a necessary background for the more specialised discussion that is to follow in later chapters. The principal text on early Irish contract law is *Di Astud Chor* (On the Securing of Contracts), which has been studied in detail by McLeod, who edited, translated and analysed the text.²³ He notes that it ‘more than most texts is a compilation of material from disparate sources on the topic of the binding nature of contracts.’²⁴ It survives in four principal versions, all of which were used as the basis of McLeod’s edition.²⁵ Further vital information on witnesses and sureties that had to accompany contractual agreements derives from *Berrad Airechta* (Abridging of the Court, Court Summary, see 1.6.3.1., p. 30 on sources), which includes important archaic material entitled *Córus Fíadnaise* (The Law of Witnessing) and is the core text on early Irish suretyship.²⁶

²³ N. McLeod, *Early Irish Contract Law* (Sydney, 1992); see also the introduction by Kelly, *GEIL*, 158-163.

²⁴ *ibid.* 111: where he notes that ‘In the form in which it is found in our MSS, the text could not have been finalised until after the compilation of the *Senchas Már*’ and analyses *Di Astud Chor* and its relation to other texts, including the Introduction to *SM* and *Córus Béscnai*; cf. *CCIH*, 5.33, pp. 244-246.

²⁵ *Di Astud Chor*, (A) *CIH* 985.24-1002.31, (B) *CIH* 1194.10-1198.20 and *CIH* 1348.21-1359.25, (C) *CIH* 2040.28-2045.36 and *CIH* 2046.34-2050.32, (D) *CIH* 1962.27-1963.35; *CCIH* 5.35, pp. 244-246; McLeod, *EICL*, 94-122: introduction to his edition.

²⁶ *Córus Fíadnaise* see *BA*, ed. & trans. Thurneysen, *Bürgschaft*, §§ 58-63, pp. 19-22, trans. Stacey, 219-221.

A contract was one of the most common legal acts and covered a wide range of agreements, including marriage, fosterage, clientship, and central to the interest of this research, commercial activities, such as purchases and sales. Any male person with full contractual capacity could enter a contract up to the value of his *lóg n-enech* (honour-price) and transfer property whose rightful owner he was, namely to which he had a legal title. The restriction to one's honour-price ensured that a party could meet his obligations and affected all legal roles within contract law, including suretyship, pledging, giving testimony as a witness, and oath-swearing. If a person wished to enter into agreements exceeding his honour-price, he could only do so if approved by his kin.

Deich séoit a eneclann, immus-toing, is naidm, is ráth, is aitare, is féchem, is fiadnaise friu.

Ten *séts* [are] his honour-price, he swears to them [i.e. to that value] in compurgation, he is enforcing surety, paying surety, hostage-surety, contracting party [and] witness in accordance with them.²⁷

When two parties entered a contractual agreement, the process followed a certain paradigm and included particular gestures and formulaic phrases, such as *gaib it láim* (take into your hand), followed by the terms of the contract, and bound by a handshake.²⁸ Sureties were appointed by one party demanding from the other: *aicc maccu* (invoke enforcing sureties), and setting out their respective obligations. This appeal was echoed by the sureties asking the other party: *Indin aicde?* (Do you invoke us?).²⁹ The confirmation of the sureties' appointment was cemented with handshakes, which were exchanged between the two contractual parties as well as the parties and their sureties, in order to bind all respective obligations from the contract itself and including the

²⁷ *CG*, 14.347-9; trans. *EICL*, 83.

²⁸ *BA*, §§ 51-7, 65, 74-7; see detailed discussion in *EICL*, 23.

²⁹ *BA*, §§ 57; see detailed discussion in *EICL*, 23.

compensatory payments for the sureties' actions. The basis upon which the contract was founded was the actual exchange of consideration and entailed that one party rendered *folud* (consideration) to the other, which created a *dliged* (entitlement) to the *frithfolud* (counter-consideration) owed by the respective other party.³⁰

Since contracts were not evidenced in writing, legal transactions required the presence of at least two independent witnesses as principal resource of direct evidence. The contractual witness had a special name, *roach* (witness to a contract) but often is referred to with the general term *fiadu* (eye-witness).³¹ *Berrad Airechta* illustrates this point clearly:

Corus fiadnuise: cid ara nepar fiada? Arindi is fiada, ar ni demtar fiada acht di aurchond cuibhsech; no dā fiado, fiado³², ar ni oeinifer is coir da fiadnaise, ita do t a tri. Fiadnaise di, fiad neoch naisi, ar ni og nach cundrad ocna bidh fiadnaise fo bith coimeta comme.

The law of witnessing: Why is witness (*fiada*) so called? Because he is a lord (*fiada*), for witnessing cannot be done except by a conscientious responsible person, or else [because] witness (*fiado*) is in the presence of two (*fiad a do*), for [the testimony of] a single man is not lawful in witnessing – two or three persons are [required]. Witnessing (*fiadnaise*), then, [is so called because the transaction] is to be bound (*naisi*) in the presence (*fiad*) of someone, for no contract at which there is no witness present to keep [the details of the transaction] in memory is complete.³³

The absence of witnesses made the enforcement of claims virtually impossible, because only direct eye-witnesses to the event were accepted while hearsay was dismissed. Hence, a case that was presented without witnesses supporting the claim was not going to be successful. Two further passages from *Berrad Airechta* make this clear.

³⁰ N. McLeod, *EICL*, 14.

³¹ *Bürgschaft*, n. 3, § 40, p. 12; *DIL*: roach, fiada.

³² *CIH*596a, Binchy remarks: *sic*, for *fiad a do* (homoioteleuton)?

³³ *CIH*596.3-6 = *BA*, §§ 58, ed. & trans. Thurneysen, *Bürgschaft*, 19, trans. Stacey, 219-20.

Can as³⁴ marbmes cluas i necndairc cluinte? Ar is be carnæ cluas caich, conid inadilus³⁵ cluas cloathar, cid fir l anfir 'ma clu .i. scel³⁶ cluizither.

Why is a report that is heard [about an event which occurred] in the absence [of the person bearing witness] a 'dead-opinion'? For everyone's hearing is a whore, so that a report that is heard is invalid, whether the matter concerning which a rumour {i.e. a tale} is heard be true or untrue.³⁷

Dith naee, dith nadgaire nad hi suilibh sinemoin .i. senfiadnaisē³⁸ segar.

[When a case] is not prosecuted before the eyes of an old pair [of witnesses] {i.e. old witnessing}, [it is] the ruin of a lawsuit [and] the destruction of a prosecution.³⁹

Contracts became binding after nightfall on the day on which they were entered. Thus, each party could withdraw from the contract during the day on which it was made but thereafter, whether the contract was advantageous or disadvantageous, it was valid.

Ní taithbis-siu táth cundartho iar ngréne góligiu.

You should not dissolve the joining of a bargain after sunset.⁴⁰

However, contracts could be rescinded if there was a lack of contractual capacity, if a party had been coerced, or if fraud was involved, since a seller had the duty to disclose.

Cisé cuir forsna íada mac na ráth la Féniu? Cor tobaig, cor tothlaigthe, cor díten, cor díthli, cor écuinn, cor écne; cor éicis, cor eailse, cor mogo, cor manaig, cor bothaig, cor bailethaig, cor mná, cor maic béo-athar – i mbet a cenna uili i n-écmais.

What are the contracts which neither enforcing surety nor paying surety secure, according to Irish law? A forced contract, an extorted contract, a protection contract, a contract of defrauding, the contract of a poet, the contract of the church, the contract of a slave, the contract of a monastic tenant, the contract of a dependent

³⁴ Thurneysen read *cani* for *can as* and translates: 'Ist nicht eine tote Schätzung ein Hören das in Abwesenheit gehört wird? Denn das Hören eines jeden ist eine Dirne.' This was refuted by O'Neill who suggests retaining *can as* and translates 'Whence is it that ... For ...etc.', M. A. O'Brien, 'Varia IV', *Ériu* 11 (1932), 155, and who is followed by Stacey, *BA*, see her note 67, p. 231.

³⁵ *CIH596e*, Binchy remarks: a *subscript. Read* indiles (*Thurneysen*)? Or conid de nad diles?

³⁶ *CIH596b*: interlinear gloss.

³⁷ *CIH596.13-15* = *BA*, § 59, ed. & trans. Thurneysen, *Bürgschaft*, 19-20, trans. Stacey, 220.

³⁸ *CIH596b*: interlinear gloss.

³⁹ *CIH596.24-25* = *BA*, § 60, ed. & trans. Thurneysen, *Bürgschaft*, 20, trans. Stacey, 220.

⁴⁰ *Di Astud Chor*, § 28, trans. N. McLeod, *EICL*, 161, cp. *Gúbretha Caratniad*, § 2.

tenant, the contract of a deranged person, the contract of a woman, the contract of the son of a living father – when all their superiors are in absence.⁴¹

In the absence of any of these circumstances, a rescission could also be sought on the basis of defects in consideration. If the goods purchased entailed hidden defects this meant that the buyer overpaid, and this *díupart* (over-payment) was (partially) recoverable. A rescission, namely an annulment of the contract altogether was subject to three bars: (1) knowledge of the defect by the buyer, (2) no possibility to restore precontractual positions, for instance because the goods received have already been sold to a third party, and (3) the appointment of sureties. In the event that a rescission was not possible based on any of the previous three reasons, the party could still bring a claim for damages, known in Irish as *fuilned*. The extent to which this claim would be successful depended on (1) the knowledge of the buyer about the defect and (2) the presence or absence of sureties. The amount of damages recoverable has been summarised by McLeod:⁴²

Knowledge	Sureties	Damages
-	-	100 %
+	-	66 ² / ₃ %
-	+	50 %
+	+	0 %

Table 1: damages for defects in consideration

⁴¹ *Di Astud Chor*, § 54, 192-3.

⁴² *EICL*, 43; for a detailed explanation of the grounds for an action for damages that falls outside the scope of this presentation, see *EICL*, 39-43.

The period during which such a complaint had to be made was ten days after discovery. After this *iubaile* (limitation period) the lack of action was counted as silent acceptance of the defect and all further actions were excluded.

Cor dá gáeth gaibte,	The contract of two capable persons which they undertake,
Co sainte sáithiugud,	In succumbing to [their] eagerness,
Cen meso móiniugud:	Without the benefit of an evaluation:
Tecmaic iarum aithirge	Regret occurs thereafter
Ría ndechmaide díth.	Before the expiry of ten days. ⁴³

Having alluded to the involvement of sureties in contracts, the principles of early Irish suretyship will be outlined below, in order to appreciate the detailed discussion of guarantors later on (chapter 5, p. 125 ff.). The role of sureties was to ‘safeguard the performance of the agreement’, and so to satisfy the liabilities owed by each contractual party.⁴⁴ There were three different types of surety, each of which fulfilled this function by virtue of their authority deriving from higher social standing, but with different means. These are: (1) *naidm*, earlier: *macc* (enforcing surety), (2) *ráth* (property, paying surety), and (3) *aitire* (personal, hostage surety). The two classical contractual sureties were the *naidm* and the *ráth*. The *naidm* secured and enforced claims on the basis of his executory force with which he acted against a defaulting debtor. The *naidm* had the power of distraining the defendant’s cattle up to the value of the outstanding debt, but he was also permitted to inflict violence where necessary, and could even seize him and theoretically, kill him.⁴⁵ These encompassing powers are linked to the high status of this surety and the fact that a *naidm* would lose his honour-price if he was negligent to fulfil his obligations.⁴⁶ The *ráth*, on the

⁴³ *Di Astud Chor*, § 26, 156-7.

⁴⁴ *EICL*, 16.

⁴⁵ *CIH* 594.31-32 = *BA*, § 46, ed. Thurneysen, *Bürgschaft*, 14; see also 56; Stacey, 217; Heptad 6 in *CIH* 9.5, trans. Kelly, *GEIL*, 17.

⁴⁶ *CG*, 305 = *CIH* 782.4.

other hand, guaranteed the fulfilment of the contract with his wealth and bore financial liability if the principal debtor defaulted. This means that the paying surety stepped into the defendant's shoes and satisfied the creditor on his behalf. Therefore, he must have had at least as much as the value of the debt and vouched with this property as a subsidiary liability, a secondary payer. Where the amount to be guaranteed was too large to be bound by a single paying surety, two sureties may be appointed. In the section titled *Dona ráthaib sīsanaigh* (On paying-sureties here below) of the Digest, commentators suggest that the main surety, known as *cétráth* (chief surety) guarantees two-thirds of the value at stake, while the *cúlráth* (back surety) is liable to the remaining one-third.⁴⁷ The paying surety's services would only be required where the *naidm* failed to compel the principal debtor, and now used his power against the paying surety. Often, as Kelly remarks, 'a typical contract may be bound by two *naidm*-sureties on each side – one to compel each contracting party to fulfil his part of the bargain, and one to compel each *ráth* to pay up in the event of default'.⁴⁸ In the first instance, the *ráth* would give a pledge that initiated a respite for payment. During this pledge period the debtor was expected to redeem the surety's pledge by paying the debt and a one-third additional charge for defaulting. If he fails to release the pledge, it falls forfeit and the paying surety has to satisfy the creditor in full. This increases the compensation owed to the surety. Subsequent to the *ráth*'s payment, he was entitled to heavy compensation from the debtor, including his honour-price, double the amount that he had paid and additional interest.⁴⁹ In order to obtain this the *ráth* could enlist the services of a *naidm* who redressed the compensation owed. The paying surety's role involved the danger of staking

⁴⁷ *CIH*2027.22-9, *CCIH*, fourth Digest D, p. 326-335, see particularly D 39, p. 334; cf. *GEIL*, 169-170.

⁴⁸ *GEIL*, 171.

⁴⁹ *CIH*598.4-598.6 = *BA*, § 71, ed. Thurneysen, *Bürgschaft*, 26; Stacey, 223-224.

considerable amounts of his assets, as well as putting his honour-price on the line if he could not fulfil his role, but it also held the potential to profit from the substantial returns.

The *aitire*'s role in securing private obligations is not as straightforward. In fact, his office appears to be predominantly public. He occurs with frequency in the context of obligations involving high status individuals who may belong to different *túatha* that are united in the form of inter-territorial treaties, and he is himself from the elevated social ranks. (This will be discussed in detail in sub-chapter 5.5., p. 166 ff.) The *aitire* vouched with his own body for the fulfilment of the obligation and upon default of a party, had to submit himself into the captivity of the plaintiff. He also would lose his honour-price if he refused to fulfil his duty. There, he was kept for a period of ten days, awaiting his ransom. At the conclusion of this period, and in the absence of his release by debt payment, he had the option to free himself by paying seven *cumala*, the body-price of a freeman. He was also entitled to compensation and could recover his honour-price and payment from the debtor following his service.⁵⁰ His office closely resembles the *gíall* (hostage) that was taken as political leverage but contrary to him, the hostage-surety operated as guarantor for parties of relatively equal status and did not imply submission.

The law of pledging, that stands at the centre of the investigation here presented is situated within the realm of contractual obligations and has a legal relationship with the principal claim. Pledges do not secure contracts from the beginning, like witnesses and sureties do, but are guarantees used after a default, either to reach a postponement of enforcement or to challenge the claim in front of a judge. Therefore, they enter the scene coinciding with the sureties' activities and have

⁵⁰ *CIH*597.26-29; *BA*, § 67, ed. Thurneysen, *Bürgschaft*, 24-25; Stacey, 223.

to be understood in relation to them as well as the procedural milieu of contract law. In a classical scenario A and B make a contract in which B promises to deliver at date X. There is no pledge involved as yet. On date X, however, B is not in a position to deliver, but gives a pledge that, at date Y, he will deliver. This context is the essence of the law of pledging and a useful premise to our investigation. Since it is the default that prompts the pledge, the latter is always bound to and dependent on an original, principal legal obligation, and is accessory to it. Before entering this discussion in more detail, a background into the rich source material for pledging will be provided.

1.6. The Sources

1.6.1. Component tracts of *Senchas Már*

Many of the texts examined form part of the important early Irish law book known as *Senchas Már* (great antiquity, henceforth: *SM*), which included a wide-ranging scope of legal topics with

texts being linguistically dated between c. 650 to 750 A.D.⁵¹ Breatnach has argued that *SM* emanates from an ecclesiastical milieu and argues for its composition in Armagh in the seventh century.⁵² A description of the tracts that form part of this collection is given below and adheres to the original order of texts in *SM*.

1.6.1.1. *Di Chetharslicht Athgabála*

Of particular interest in respect of enforcement and procedure is the text on the distraint of property, which, excluding the introduction, is the very first text of *SM*, namely *Di Chetharslicht Athgabála* (On the Four Divisions of Distraint).⁵³ There is one copy that breaks off incomplete at *CIH* 352.25-422.26, citations with commentary at *CIH* 1438.36-1455.32, and further copies at *CIH* 1663.20-1723.10 and *CIH* 1897.16-1904.16, the latter breaking off incomplete.⁵⁴ The tract on distraint is by far the longest in *SM*. The edition of the text, glosses and commentary and English translation in the Ancient Laws of Ireland amount to 368 pages and even at this length, we know that the text is incomplete.⁵⁵ Moreover, there exists additional material on distraint that is part of the Old Irish glossing on *SM* and is commonly referred to as ‘A text on the forms of distraint’, constituting a separate legal tradition of *athgabál* (distraint), *CIH* 897.29-898.33,⁵⁶ and also including a section known as *Athgabál bech* (Distraint of Bees), *CIH* 898.19-27.⁵⁷ Binchy

⁵¹ L. Breatnach, *A Companion to the Corpus Iuris Hibernici* (Dublin, 2005), 25; L. Breatnach, ‘On the Original Extent of the “Senchas Már”’, *Ériu* 47 (1996), 5, 27.

⁵² L. Breatnach, *The Early Irish Law Text Senchas Már and the Question of its Date*, E. C. Quiggin Memorial Lectures 13 (Cambridge, 2011).

⁵³ D. A. Binchy, ‘Distraint in Irish Law’, *Celtica* 10 (1973), 22-71; H. D’Arbois de Jubainville, *Études sur le droit celtique* vol. 1. Cours de Littérature Celtique 7, vol. 2. Cours de Littérature Celtique 8 (Paris, 1895; repr. Osnabrück, 1970).

⁵⁴ *CCIH*, pp. 24, 65, 71, 72.

⁵⁵ Binchy, ‘Distraint in Irish Law’, 25; *AL* i. 64-304, *AL* ii. 2-130.

⁵⁶ Binchy, ‘A Text on the Forms of Distraint’, *Celtica* 10 (1973), 72-86; on *OGSM*, see *CCIH*, 338-346.

⁵⁷ *Athgabál bech*, ed. Charles-Edwards & Kelly, App. 6 to *BB*, 189, discussion on 190-191.

suggested that these glosses and commentaries are exceptionally important, because ‘they take us back far behind the ordinary routine of the later scholiasts’ and are substantially earlier than ‘the great bulk of the material transmitted in nearly all the other legal manuscripts’, dating to the late eighth century.⁵⁸ Binchy goes further and argues that ‘not only are they written in Old Irish but they incorporate material which may go back to the oral teaching of the schools’.⁵⁹ He regards this text as a separate tract on *athgabál* that supplements it but also ‘modifies the general picture given in the basic tract of the *Senchas Már*’ which enticed him to argue for a different provenance from another law school.⁶⁰

1.6.1.2. *Sechtae* (Heptads)

The Heptads form the ninth text in *Senchas Már* and are a collection of material from a broad range of legal areas that is generally arranged in groups of seven. There are a total of sixty-five Heptads of which nine contain information on pledges.⁶¹ There is one continuous copy of the whole tract at *CIH* 1.1-64.5 and four copies, each containing a variety of Heptads.⁶² Fragments with Old Irish glosses occur at *CIH* 905.10-906.38 and longer extracts with later glosses and commentary at *CIH* 2241.15-2243.37 and 2246.30-2249.12.

1.6.1.3. *Bretha Comaithchesa* and *Bechbretha*

⁵⁸ Binchy, ‘A Text on the Forms of Distraint’, 72: dates it to the ninth century; *CCIH*, 344: dates it to the late-eighth century and locates it in Munster; *CIH* 897.29-898.33.

⁵⁹ *ibid.* 73.

⁶⁰ *ibid.* 73.

⁶¹ These are Heptads II, XVI, XVIII, XXVIII, XXXII, XXXVI, XXXVII, LVIII, and LXV.

⁶² See discussion in *CCIH*, p. 291-2; continuous copy from the beginning up to Heptad XXV at *CIH* 1881.9-1896.22, from Heptad XXII up to Heptad XXIV at *CIH* 537.1-549.18, Heptad XXVI, XXXIV, XV, XXVII up to XXIX, VI up to XIII, XVII, XVIII, XXV, XXVI, XXX-XXXIII, XXXVI, XXXVII at *CIH* 1044.31-1053.2, Heptad XII, XIX up to XXIV at *CIH* 1053.3-1054.28. There are seventeen ‘Additional Heptads’ that do not form part of this tract but which are based on a variety of sources, see *CCIH*, 291-2.

A special type of pledge known as *tairgille* (fore-pledge) occurs in law texts that deal with the legal relationship between neighbours, in particular the issue of trespassing livestock and appropriate fencing. The two primary texts of relevance both belong to the *Senchas Már*. The tenth text in *SM* is *Bretha Comaithchesa* (Judgements of Neighbourhood), with two continuous copies, one at *CIH* 64.6-79.12, and the other at *CIH* 191.1-205.21.⁶³ There are also extracts with extensive Old Irish commentary from this text that include a section titled *Caithchi bech* (Tresspass-penalties of bees), *CIH* 196.18-29 and *CIH* 575.4-582.22.⁶⁴ The twenty-first text of *SM* is *Bechbretha* (Bee-Judgements), one continuous copy at *CIH* 444.12-457.10, and fragments with Old Irish glosses at *CIH* 923.17-924.25.⁶⁵ One other text that belongs in the category of rights regarding neighbours is *Coibnes Uisci Thairidne* (Kinship of Conducted Water), henceforth *CU*, the twenty-second text in *SM*, with one continuous copy at *CIH* 457.11-462.18, and fragments with Old Irish glosses at *CIH* 924.26-31.⁶⁶ This text deals with the rights of neighbours when a watercourse is built across their holdings in order to power a mill. Although it does not mention the fore-pledge, it stands in close relation to both *Bechbretha* and *BFG* in respect of its legal context as well as its textual background. *BB*, *CU*, and *BFG* form a group of texts that appear in this order in the same manuscript, H 2.15A, and in *SM*. Binchy argued that *BB* and *CU* were ‘almost certainly the work of the same man’, produced in the same law school.⁶⁷ Charles-Edwards

⁶³ *Bretha Comaithchesa*, ed. T. M. Charles-Edwards (forthcoming).

⁶⁴ *Caithchi bech*, ed. Charles-Edwards & Kelly, App. 5 to *BB*, 186-187, with discussion on 187-188; see discussion of the Old Irish commentary on *BC* in *CCIH*, 7.3, pp. 346-348.

⁶⁵ *Bechbretha: an Old Irish law-tract on bee-keeping*, eds. T. M. Charles-Edwards & F. Kelly, (Dublin, 1983, repr. 2009); also see *CCIH*, (21), p. 296, longer extracts with later glosses and commentary at *CIH* 1916.36-1917.20 and citations with later commentary at *CIH* 1286.1-1287.40.

⁶⁶ Binchy, ‘*Coibnes uisci thairidne*’, *Ériu* 17 (1955), 52-85; also see *CCIH*, (22), p. 296.

⁶⁷ *CU*, 54.

and Kelly, referring to the extent of common stylistic features, have added that it is likely that *BFG* also derives from this school, though not from the same author and at a later date.⁶⁸

1.6.1.4. *Bretha im Fúillemu Gell*

The most important source for the law of pledging is the law text *Bretha im Fúillemu Gell* (Judgements concerning Pledge-Interests). It forms part of the second third of *SM* and is the twenty-third text thereof. The text of the only complete manuscript is edited in *CIH* 462.19-477.30. There are two out-dated translations of it; one is found in *AL* v 377-423,⁶⁹ and the other is a seventeenth-century partial translation believed to be attributable to the Irish scribe Dubhaltach Mac Fhirbhisigh.⁷⁰ The text is a rich source for the material culture of the time and allows us insights into the range of chattels available for different social classes that were used as pledges. In the discussion below, the reader will see how these chattels are grouped together in the structure of the text. This accompanies the discussion of what can be given in pledge according to *BFG* in section 2.2.2.1., p. 50 ff. A modern translation of the text is provided in the Appendix to which the reader may refer.

1.6.1.4.1. The structure of *Bretha im Fúillemu Gell*

The structure of *BFG* comprises fifteen thematic sections. Most of these deal with a particular category of objects that can be given as a pledge. Within each category the payments vary

⁶⁸ *BB*, 27-29.

⁶⁹ *CCIH*, 296.

⁷⁰ *Collectanea de Rebus Hibernicis*, ed. C. Vallancey, vol. I, 2nd ed. (Dublin, 1786), 657-671; N. Ó Muraíle, *The Celebrated Antiquary: Dubhaltach Mac Fhirbhisigh (c. 1600-1671) – His Life, Lineage and Learning* (Maynooth, 1996), 313: The name of the text is not mentioned but he points out that the first edition of the *Collectanea* was in 1774, and appears to be the work of Mac Fhirbhisigh (though at least one editorial comment is followed by the initials C.V.). I am grateful to Prof. McLeod for pointing this out to me and for sending me copies of the relevant pages.

depending on the particular object and usually also depend on the status of the person giving the pledge. A significant amount is devoted to pledges being given by women, pledges consisting of silver articles, clothing items, animals, and items of the household. Those sections that differ from this set-up discuss conditions attached to giving pledges, namely dues and time periods for payment of interest and compensation, and the value of the pledge itself.

First section:

The title *Bretha im Fuillemu Gell* is given in the beginning. The text commences with two introductory paragraphs that deal with minimal dues, namely the smallest interest rate before forfeiture and the smallest compensation payment after forfeiture of the pledge.

§ 1 *Cia luigem i fuillemaib gell.*

(What is the smallest among the interest-payments for pledges)

§ 2 *Cia luigem i ndírib gell.*

(What is the least among compensation payments of pledges)

Second section:

This is followed by a lengthy discussion of pledges given by women. This section can be separated into:

(a) pledge interest based on the nature of the pledge,

§ 3-4 *snáthat* (needle)

§ 5 *íadach mná rí*g (workbag of a queen)

§ 6 *étach mná cáich* (garment of the wife of any [class of] person)

§ 7 *gell trencech* (tripartite pledge, given by a woman)

(b) pledge interest according to the status of the woman's husband,

§ 8 *aire febe* (noble of excellence)

§ 9 *briugu* (hospitaller)

§ 10 commoner

(c) § 11 special cases, such as the female satirist.

Third section:

This part enters into the discussion of interest paid to men according to their order and rank. It commences with persons belonging to the *áes dána* (men of art), including several members of the ecclesiastical order.

§ 12 *Suí no tánaise suad* (man of learning or a second to him in rank)

§ 13 Churchmen up to and including the priest

§ 14 *Epscop/suí* (bishop/man of learning)

Fourth section:

The discussion is interrupted by a transition to the:

§ 15 *gell faithche* (lit. pledge of the green), given by *ócaire* and *bóaire*

§ 16 and *Mesta Mugdorn: cétna cumal* (Mugdorn: first slavewoman).

Fifth section:

Here, the text moves on to interest being paid for a pledge consisting of a silver article, according to the status of the giver of the pledge.

- a) § 17 *Dí-renar comdíre fri bés comaltuir*
(equal compensation is paid according to the custom of co-fosterage)
- b) § 18 *Ócaire*
- c) § 19 *Bóaire* and up to, but not including, *aire forgill* (lord of superior testimony)
- d) § 20 *Aire forgill*
- e) § 21 *Rí nó suí* (king or man of learning)

Sixth section:

This deals with clothes for special occasions (*étach líthlaithi*) and ordinary working clothes (*étach fognama*).

- a) § 22 *Líthlaithe* etc.: *lánlóg enech* (feast day etc.: full honour-price)
- b) § 23 *TFG étach fognama: airig febe* (work garments: noble)
- c) § 24 *TFG étach líthlaithe: airig febe* (feast-day garments: noble)
- d) § 25 *TFG étach fognama rí* (work garments of a king)
- e) § 26 *TFG étach líthlaithe rí* (feast-day garments of a king)
- f) § 27 *TFG étach fognama ócairech nó bóairech* (work garments of *ócaire* or *bóaire*)
- g) § 28 *TFG étach líthlaithe bóairech nó ócairech* (feast-day garments of *ócaire* or *bóaire*)

Seventh section:

This section moves the discussion to one of the novel aspects of this legal text, animals being given as pledges.

- (a) Cows according to owner
 - § 29 *Annsom i fuillemaib gell baí briugad*
(most difficult in regard to interest payments for pledges are the cows of a hospitaller)
 - § 30 *TFG bó airech forgill* (cow of a lord of superior testimony)
 - § 31 *TFG bó airech febe* (cow of a noble)
 - § 32 *TFG bó cach bóairech ⁊ cach ócairech* (cow of every *bóaire* and of every *ócaire*)
- (b) § 33 Sheep
- (c) § 34 Pigs
- (d) § 35 Unbroken horses and dry stock
- (e) § 36 Cart horse
- (f) § 37 *Ech aige* (driving horse)

Eighth section:

§ 38 This is another long section in the text, discussing various household articles (*séoit trebe*) being given as pledges.

- (a) § 39 *Cia annsom trebdíre*
(What is the most difficult of household compensation payments): beautiful nuts etc.
- (b) § 40 *Cnoi gnoe ⁊ cuirnn* (beautiful nuts and horns)
- (c) § 41 *Escra* (goblet, drinking bowl)
- (d) § 42 *Cíngit* (long-stemmed goblet)
- (e) § 43 *Án trenech; cuach ríge nó epscuip* (tripartite cup: bowl of king or bishop)
- (f) § 44 *Cuach cach airech* (drinking bowl of every noble)
- (g) § 45 *Cuach cach ócairech ⁊ cech bóairech* (bowl of every *ócaire* and every *bóaire*)
- (h) § 46 *Cuach cach cruimthir, cuach cach decoin* (bowl of every priest)
- (i) § 47 *Cuach* of other church grades

Ninth section:

This discusses *allmaire sét* (foreign articles).

- (a) § 48 *Long caire cach airech febe/ríge* (ship cauldron of every noble-king)
- (b) § 49 *Long caire ócairech nó bóairech* (ship cauldron of *ócaire* or *bóaire*)
- (c) § 50 *Lethól, díre for long coire* (half an *ól*-measure, compensation for a ship cauldron)

Tenth section:

This section focuses on bridles consisting of precious metal.

- (a) § 51 *Srían óir nó airgit cech airech* (bridle of gold or silver of any noble):
compensation is paid in horses
- (b) § 52 *Srían cach ócairech ⁊ cech bóairech* (bridle of every *ócaire* and every *bóaire*)
- (c) § 53 *Srían cach airech febe* (bridle of every noble)
- (d) § 54 *Srían cach ríge* (bridle of every king)

Eleventh section:

This moves the discussion from the objects given in pledge to a discussion of the value of pledges.

It commences with pledges whose value falls short of the value of a full pledge. Such a pledge is known as *ingille* (part-pledge).

- (a) § 55 *Ingille cressa cach ócairech ⁊ bóairech*
(part-pledge of a girde of every *ócaire* and *bóaire*)

- (b) § 56 *Ingille cressa cach airech febe* (part-pledge of a girdle of every noble)
- (c) § 57 *Ingille cressa cach rí* (part-pledge of a girdle of every king)

Twelfth section:

Following the interest rate on part-pledges, the text introduces the *lángille* (full pledge).

- (a) § 58 *Lángille cressa cech ócairech ⁊ cach bóairech*
(full pledge of a girdle of every *ócaire* and every *bóaire*)
- (b) § 59 *Lángille cressa cach airig feibe* (full pledge of a girdle of every noble)
- (c) § 60 *Lángille cressa cach rí* (full pledge of a girdle of every king)
- (d) § 61 *Lángille and ingille* (full pledge and part-pledge)

Thirteenth section:

This section deals with the different time periods (*inbuid cressa*) for the payment of interest and restitution.

- (a) § 62 *Inbuid cressa cach ócairech ⁊ bóairech, airech febe*
(the period of time for every *ócaire* and every *bóaire*, noble.)
- (b) § 63 *Inbuid cressa cach rí* (the period of time for every king)

Fourteenth section:

This section focuses on weapons given in pledge, with armoury being particularly representative for the *fénid* and the warriors protecting the border.

- (a) § 64 *Lándíre do fennid ⁊ caithchid crích*
(full compensation for a champion and a defender of territories)
- (b) § 65 Three in a *túath* not entitled to *fullem a n-airm* (interest for their weapon)

Fifteenth section:

Here, the conditions attached to giving pledges are outlined. This section also introduces pledges given under the terms of ecclesiastical law and inter-territorial treaties.

- (a) § 66 *Nach duine do-rata a ngell, mad di chommaín fiad fiadnaib*
(any person who may have given a pledge, if it consists of wealth jointly exchanged in the presence of witnesses)
- (b) § 67 *Nach duine do-rata a gell 7 fo-coissle íarum i cáin nó chairdde*
(any person who may have given his pledge and subsequently takes it away within [the period of] a *cáin* or a *cairde*)
- (c) § 68 *Nach dune do-mbera a gell 7 fo-choissle, na bí i cáin nó chairdde*
(any person who may have given his pledge and removes it, and it is not in a *cáin* or a *cairde*)
- (d) § 69 *Nach duine do-bera a gell i ndílmáine 7 da-nic aithrige de ria tr[e]ise 7 fod-coisle*
(any person who may have given his pledge in immunity and repentance about it comes to him before (the end of) three days and he removes it)

This section brings *BFG* to a close. In addition to this text, there are several surviving citations from *BFG* with extensive commentary (see below on Digest, 1.6.2.1., pp. 25-6).

1.6.1.5. *Bretha Crólige*

Bretha Crólige (Judgements on Blood-Lying) is yet another text that belongs to *SM* and constitutes its thirty-third text, *CIH* 2286.24-2305.3.⁷¹ It deals with sick-maintenance that has to be provided to an illegally injured person arranged by the offender, the performance being guaranteed through mutually exchanged pledges.

1.6.1.6. *Bésgnae Ráithe*

It is known that the final third of *SM* originally contained a tract on suretyship, known as *Bésgnae Ráithe* (The Discipline of Suretyship) that survives only in a fragmentary state.⁷² This was the thirty-ninth text of *SM* and numerous citations as well as marginal notes referring to the title are

⁷¹ *Bretha Crólige*, ed. D. A. Binchy, *Ériu* 12 (1938), 1-77.

⁷² See discussion in *CCIH*, p. 305-6; the title is found in a marginal note in *CIH* 957g, and in an extract from this tract in *CIH* 790.11-12.

testimony to its existence. There are surviving fragments with commentary at *CIH*957.23-958.15 and *CIH*789.25-790.19.⁷³ Since this material has not yet been edited and analysed and is only fragmentary, our knowledge on suretyship as recorded in the *SM* law school is marginal in comparison to the long text *Berrad Airechta* that does not belong to *SM* (see 1.6.3.1. below).

1.6.2. Digest

1.6.2.1. *Do breitheamhnas for ghellaibh sīsana*

Of particular note are the references to pledges with the late title *Do breitheamhnas for ghellaibh sīsana* (On Judgements on Pledges here below), a digest consisting of citations from *BFG*, edited in *CIH*1997.34-2004.26.⁷⁴ Contained therein are also extracts from other known law-texts, such as *Bretha Nemed toísech* (The first *Bretha Nemed*), *CIH*2004.3-12,⁷⁵ the Heptads, *CIH*1997.35-1999.13,⁷⁶ and the lost text *Finnśruth Fíthail* (The Fair Stream of Fíthail), *CIH*2004.13-26.⁷⁷

1.6.2.2. The Advice to Doíden

This is not a unitary text but consists of citations from at least more than one text. It deals with what acceptable sureties are and occurs at *CIH*1381.4-1382.11, with material in *CIH*1381.1-27 forming section 56 of Digest B and deriving from the law text *Bretha Nemed Dédenach* (The Last *Bretha Nemed*), and at *CIH* 1122.3-37, positioned within a copy of *Bretha Nemed*

⁷³ *ibid.* citations in *O'Davoren's Glossary*, 109-11, 274, 480-2, 683-7, 794, 1115-6(1), 1372 and 1478; discussion in *CCIH* p. 305-6 and on the relevance of *O'Davoren's Glossary* for tracts in the final third of *SM*, see 5.50.5.3., p. 282-284.

⁷⁴ *CCIH*, 81, for a full analysis of the sources of Digest D32, see p. 332.

⁷⁵ *ibid.* 188-191; *idem.* 'The first third of *Bretha Nemed Toísech*', *Ériu* 40 (1989), 1-40; *idem.* 'Canon Law and Secular Law in early Ireland: the Significance of *Bretha Nemed*', *Peritia* 3 (1984), 439-459.

⁷⁶ *ibid.* 25.

⁷⁷ F. Kelly, *A Guide to Early Irish Law* (Dublin, 1988), 278, n.59; this fragmentary text is currently being edited and translated by C. Guy Yocum, *Finnśruth Fíthail* (draft from 23rd December 2014).

Dédenach, *CIH* 1111-1138.⁷⁸ The latter law text primarily deals with the laws regulating poets, but it contains passages on many other legal topics, including suretyship and pledge-interest. Binchy regarded *Bretha Nemed Dédenach* to form part of a group of law texts that derive from a different law school to that where *SM* was produced.⁷⁹ Other texts in this group include *Bretha Nemed Toísech* (The first *Bretha Nemed*), *CIH* 2211-2232, the oldest recension (R) of *Cóic Conara Fugill* (Five Paths to Judgement), *CIH* 2200.1-2203.5, and *Bretha Étgid* (Judgements of Inadvertence), *CIH* 250.1-337.36; 925.1-945.19 etc. The texts in this collection have in common that they are preoccupied with the rights of *áes dána* (men of art), particularly poets, whose status depended on their professional skills. It is believed that this poetico-legal ‘*Nemed* school’ can be associated with the region of Munster.⁸⁰ The Advice to Doíden belongs to the genre of *teosc*-texts wherein Doíden mac Nine is advised on how to choose a profitable surety.⁸¹ The text bears close resemblance to *Heptads* XXX-XXXII (see above) which deal with paying- and hostage-sureties, as well as pledges, of an invalid or unprofitable nature.

1.6.3. Other texts not belonging to *SM*

1.6.3.1. *Berrad Airechta* (Abridging of the court; court summary)

There is a sole surviving copy of *Berrad Airechta* (Abridging of the Court; Court Summary), edited at *CIH* 591.8-599.38.⁸² This long text deals with all three types of sureties known in early

⁷⁸ *The Advice to Doidin*, ed. R. M. Smith, *Ériu* 11 (1932), 66-85; see discussion in *CCIH*, pp. 47, 62; *GEIL*, 170.

⁷⁹ Binchy, ‘Bretha Nemed’, *Ériu* 17 (1955), 4.

⁸⁰ Binchy, ‘The Date and Provenance of *Uraicecht Becc*’, *Ériu* 18 (1958), 44-54; *GEIL*, 246.

⁸¹ R. M. Smith, ‘The Advice to Doidin’, *Ériu* 11 (1932), 66-85, Smith states that little is known about the person Doíden mac Nine. His name occurs twice in the laws, in the pseudo-historical prologue to the *Senchas Már* (*CIH* 1654.35 = *AL* i 24.2) and in the text *Din Techtugud* (*CIH* 210.12 = *AL* iv 18.17).

⁸² *Berrad Airechta*, ed. R. Thurneysen, ‘Die Bürgschaft im irischen Recht’, *Abhandlungen der Preussischen Akademie der Wissenschaften* (Berlin, 1928), repr. *Gesammelte Schriften i-iii* ed. Patrizia

Irish law and provides a detailed account of their procedural duties in the stages through which a claim passes.

1.6.3.2. *Cóic Conara Fugill* (Five Paths to Judgement)

In respect of pledges operating within the authority of the court, the outstanding source is the *Cóic Conara Fugill* (The Five Paths to Judgement),⁸³ both for its daunting complexity and vast amount of thought-provoking legal concepts not encountered elsewhere. It survives in five copies, following Thurneysen's sigla: (R) *CIH*2200.1-2203.5, (U) *CIH*2257.12-2261.17, (H) *CIH* 1027.21-1041.38, all three consisting of Old Irish text with glosses and commentary, (E) *CIH* 1280.1-1282.23, consisting of extracts of the Old Irish text interspersed with glosses and commentary, and (O) *CIH* 1018.26-39, consisting of 'glosses (mostly etymological) on the opening words of the text'.⁸⁴

1.6.3.3. *Críth Gablach* (Branched Purchase)

Críth Gablach (Branched Purchase) survives in three incomplete copies, (A) *CIH*777.6-783.38, (B) *CIH*563.1-571.16, (C) *CIH*952.1-953.9 and is the most important law text on the status of

de Bernardo Stempel & Rolf Ködderitzsch (Tübingen, 1991), iii 90-174; ed. R. C. Stacey, 'Berrad Airechta: an Old Irish Tract on Suretyship', in T. M. Charles-Edwards, Morfydd E. Owen, D. B. Walters (eds.), *Lawyers and Laymen. Studies in the History of Law presented to Professor Dafydd Jenkins on his seventy-fifth birthday Gŵyl Ddewi 1986* (Cardiff, 1986), 210-233; Thurneysen translates the title as 'Die Schur des Gerichts', followed by Stacey 'The Shaving/Shearing of the Court', but O'Brien translates *berrad* as 'making short, shortening, abridging', see M. A. O'Brien, 'Varia', *Ériu* 11, 88-9. Kelly suggests 'court summary, synopsis of court procedure' as translation for the title, see *GEIL*, 278; cf. Breatnach, *CCIH*, pp. 169-70.

⁸³ *Cóic Conara Fugill – Die fünf Wege zum Urteil*, ed. R. Thurneysen, *Abhandlungen der preussischen Akademie der Wissenschaften* 7 (Berlin, 1926); *Les Chemins du Jugement – Procédure et science du droit dans l'Irlande médiévale*, ed. C. Archan (Paris, 2007).

⁸⁴ *CCIH*, pp. 233-234.

the lay grades, including commoners, nobles, and kings.⁸⁵ *CG* does not form part of *SM* and Binchy argued that it derives from another law school, which may explain why it was never glossed and rarely quoted.⁸⁶ Traditionally, it is dated to *c.* 700 AD, since it has to be later than *Cáin Adamnáin*, dated to AD 697, to which *CG* itself makes reference,⁸⁷ but earlier than the second quarter of the eighth century, since there is a reference to *CG* in the law text *Bretha Nemed Toísech*, *CIH*2213.30.⁸⁸

1.6.3.4. *Gúbretha Caratniad* (The False Judgements of Caratnia)

Gúbretha Caratniad survives in a complete glossed copy at *CIH* 2192.1-2199.26, and an incomplete copy at *CIH* 1582.1-25.⁸⁹ This text collects instances in which a legal exception is granted to a general rule of law. Judge Caratnia explains to Conn Cétchathach, who referred the legal cases to him for consideration, why he granted an exception in each of the fifty-one cases. Each paragraph follows the same pattern, in which Caratnia states his judgement in the case,

⁸⁵ *Críth Gablach*, ed. D. A. Binchy, Mediaeval and Modern Irish Series (Dublin, 1941); *CCIH*, 5.34, pp. 241-244.

⁸⁶ *CG*, xvii.

⁸⁷ *ibid.* 21.524.

⁸⁸ *CCIH*, 5.34.3, p. 244; Breatnach, 'Canon Law and Secular Law in Early Ireland: the Significance of *Bretha Nemed*, *Peritia* 3 (1984), 456-7.

⁸⁹ *Gúbretha Caratniad*, ed. R. Thurneysen, 'Aus dem irischen Recht III', *ZCP* 15 (1925), 302-370; *CCIH*, 5.43, p. 262.

followed by Conn responding that his judgement was false, which is rebutted by Caratnia with an explanation of the particular circumstances leading to his exceptional ruling.

1.6.4. Ecclesiastical law

Pledges also feature in ecclesiastical legislation and Canon law. Comparatively many instances of pledging occur in the *Collectio Canonum Hibernensis* (The Irish Collection of Canons), which combines Biblical and patristic sources with native Irish legal traditions. It survives in two recensions, A and B, and has been copied extensively on the continent.⁹⁰ Furthermore, there are two ecclesiastical texts that employ the system of pledging to guarantee the enforcement of those regulations targeted by the texts. First, *Cáin Domnaig* (The Law of Sunday), that deals with penalty payments for the violation of the sanctity of Sunday, with the duty of observance lasting from Saturday evening until Monday morning. The date for *Cáin Domnaig* is uncertain. Linguistically, it has been dated by Hull to the first half of the eighth century, but he also points to entries in the Annals that would place it later.⁹¹ Most notably, the Annals of Ulster note that an epistle was brought to Ireland by a pilgrim in AD 887 (there: AD 886). This epistle is The Epistle of Jesus on the observance of Sunday and is closely affiliated with *Cáin Domnaig*, and it might have been brought to Ireland together with it.⁹² This is undoubtedly the reason why Thurneysen stated that The Law of Sunday cannot be much older than AD 887.⁹³ Whitelock,

⁹⁰ *Die irische Kanonensammlung*, ed. H. Wasserschleben (Giessen, 1874), based on recension A; *The Hibernensis*, ed. R. Flechner (forthcoming), including both recensions A and B; references to the sources of *Hib* that can be identified are provided throughout and follow Flechner's Index, 982-1011; M. Sheehy, 'Influence of Ancient Irish law on the *Collectio Canonum Hibernensis*', S. Kuttner (ed.), *Proceedings of the third International Congress of Medieval Canon Law*, Monumenta Iuris Canonici Series C, Subsidia 4, (Vatican City 1971), 31-42.

⁹¹ *Cáin Domnaig*, ed. V. Hull, *Ériu* 20 (1966), 151-177.

⁹² J. G. O'Keefe, 'Cáin Domnaig', *Ériu* 2 (1905), 189-214: edition and translation of The Epistle of Jesus.

⁹³ *IR* V, 395.

against Hull's interpretation, is inclined to place the Sunday letter as coming to Ireland around AD 811.⁹⁴ Another aspect is that *Cáin Domnaig* quotes *Cáin Phátraic* (The Law of Patrick), a law text that dealt with offences against the clergy and of which no complete copy survives.⁹⁵ *Cáin Phátraic*, according to Hull, was probably operating in Ireland before but is known to having reached widespread acceptance throughout Ireland in AD 737: *Lex Patricii tenuit Hiberniam*.⁹⁶ Breatnach has challenged the conclusiveness of Hull's linguistic dating criteria and suggests that in the absence of convincing evidence to the contrary, all parts of the tract known as *Cáin Domnaig* should best be taken together as a ninth-century text.⁹⁷

The second text is *Cáin Adomnáin* (The Law of Adomnán), also known as *Lex Innocentium* (Law of Innocents) that introduces penalties for offences committed against women, clerics, and children, recorded in the *Annals of Ulster* as having been promulgated by Adomnán, at the Synod of Birr in AD 697,⁹⁸ and it is also referred to in *Críth Gablach* under the title *Recht Adamnáin*.⁹⁹

While these are the principal texts informing the law of pledging, individual phrases on aspects of pledging were included from the wider corpus. The sources used for the comparative chapter are provided separately therein.

⁹⁴ D. Whitelock, 'Bishop Ecgred, Pehtred and Niall', in D. Whitelock, R. McKitterick & D. N. Dumville (eds.), *Ireland and Mediaeval Europe: studies in Memory of Kathleen Hughes* (Cambridge, 1982), 47-52.

⁹⁵ *IR* V, 389-396, discussing The Law of Patrick and its relation to The Law of Adomnán; for a discussion of *Cáin Phátraic* see: *CCIH*, 218-227.

⁹⁶ *Cáin Domnaig*, ed. Hull, 156-7.

⁹⁷ *CCIH*, 209-212.

⁹⁸ *The Annals of Ulster* (to A.D. 1131), eds. S. Mac Airt & G. Mac Niocaill (Dublin, 1983), 697.3, 159; *Cáin Domnaig*, ed. V. Hull, 151-177; *Cáin Adamnáin: an old-Irish treatise on the law of Adamnan*, ed. K. Meyer (Oxford, 1905); *Adomnán's 'Law of the Innocents': Cáin Adomnáin: a seventh century law for the protection of non-combatants*, trans. G. Markus (Glasgow, 1997).

⁹⁹ *CG*, 524, p. 21.

2. The legal theory of pledging

The purpose of the present chapter is to introduce the legal theory of pledging. It is separated into two parts. The first part deals with difficult terminology relevant to pledging, while the second part explains the life-cycle of a pledge, depicting the pledge's fate from the beginning to the end. The goal of this arrangement is to offer the reader a general picture for pledges before introducing differences between the various types of pledges known.

2.1. The legal terminology of pledging and definitions

What follows will explore the legal terminology of pledging and offers clarity over definitions of difficult terms that directly relate to pledging. This is of great relevance because many different words exist, which can sometimes semantically overlap and a clear legal terminology has to be established to begin with, in order to avoid ambiguity and confusion. Moreover, the linguistic background is intended to provide the reader with a basis from which the legal framework and concepts of security can be explored. Some of the terms that will be encountered are badly attested but a genuine attempt has been made to clarify their meaning. Following this philological approach, the thesis proceeds to explore the socio-legal applicability of pledging. Some of the terms I analyse below in concise form will be re-encountered in later chapters, where the concept underlying the terminology will be taken into account in greater detail and where further background on their practical applicability is provided. In relation to some other terms, which only occur in specialised scenarios, it proved beneficial to postpone their discussion until the setting in which they occur becomes relevant. As Calvert Watkins remarked in his study of Indo-European Legal Language, Institutions, and Mythology, ‘the linguist studying legal language must here as elsewhere be concerned with content as well as form; with “legal meaning”, and by extension, with a whole cultural subsystem. It is to be expected that an understanding of this special cultural context may frequently provide the key to the proper linguistic interpretation of a given form.’¹⁰⁰ Following the same logic from the opposite perspective, the legal historian may often be enlightened on a particular legal topic by the choice of terminology used within a specific cultural setting, and the present chapter takes account of this mutual benefit.

¹⁰⁰ C. Watkins, ‘Studies in Indo-European Legal Language, Institutions, and Mythology’, in G. Cardona, H. M. Hoenigswald & A. Senn (eds.), *Indo-European and Indo-Europeans. Papers Presented at the Third Indo-European Conference at the University of Pennsylvania* (Philadelphia, 1970), 321.

2.1.1. *gell*

The standard Irish word for a chattel given from one person to another as a legal guarantee is *gell*, which is similar to Latin *pignus* (pledge).¹⁰¹ This term has parallels in the other Celtic languages, namely Welsh *gwystl*, *guystyl*, *guestel* (pledge, security, or hostage),¹⁰² Old Cornish *guistel* and Breton *goestl* (gage, caution).¹⁰³ Modern researchers translate *gell* variably either as ‘pledge’ or ‘gage’, and while one could make arguments for either preference, and in the absence of a common, absolute terminology, I have adhered to the translation of *gell* as ‘pledge’, although I abstained from altering differing translations in direct quotations.¹⁰⁴ In legal texts *gell* generally refers to an object which is handed over to another person as security for a legal obligation following a breach, or in some cases related to the law of neighbourhood, as an in-advance security anticipating a potential, consecutive breach of the law; and which, in the majority of cases, is inanimate, durable and symbolic of the pledgor’s status. On occasion, *gell* can also refer to a pledge of a person, particularly so outside the legal sources. A pledge consisting of a human being is known as human pledge or hostage. Binchy remarks that without a doubt *gell* ‘was

¹⁰¹ It is relevant to explain Thurneysen’s choice of translation for *gell*. In his edition and translation of *Cóic Conara Fugill* Thurneysen refers to the pledge as ‘das Unterpfand’ (lit. the under-pledge). The standard, modern term for pledge would be ‘Pfand’. ‘Unterpfand’ is an older word that coexisted alongside ‘Pfand’ and it carried specific, contradictory connotations, among which were: a movable pledge or a standing pledge in the form of a mortgage. The evidence for the term is ambiguous and the term itself was later given up entirely. The best survey I have found discussing the evidence and meanings of ‘Unterpfand’ is provided in the famous German dictionary: *Deutsches Wörterbuch*, Jacob & Wilhelm Grimm (eds.), 16 vols. 32 sub-vols. (Leipzig, 1854-1961), vol. 24, Sp. 1712-15, <http://dwb.uni-trier.de/de/>, accessed 12 January 2015.

¹⁰² T. Lewis, *A Glossary of Medieval Welsh Law* (Manchester, 1913), 185.

¹⁰³ H. Pedersen, *Vergleichende Grammatik der keltischen Sprachen* vol. 1 (Göttingen, 1909), 136.

¹⁰⁴ It may be worth noting that the older meaning of ‘pledge’, latinized as *plegius*, was ‘surety’, compare German *pflegen*, *Pflicht* (obligation, duty): K. Schwenk, *Wörterbuch der deutschen Sprache in Beziehung auf Abstammung und Begriffsbildung* (Frankfurt am Main, 1838).

originally regarded as a substitute for the *gíall*, and links this to ‘the intimate personal character of the object given in *gell*’.¹⁰⁵ This background has led to the idea to convey an item belonging to the person, instead of conveying the person itself.

2.1.2. *fer gill*

The term *gell* features in several phrases which are denominators for people who fulfil a function or responsibility in particular, recurring situations within the law of pledging. One of these phrases is the term *fer gill* (man of pledge). It is attested in *Críth Gablach*, which states: *fer gill do gíal(d)naib* (a man of pledge for base clients; a man [who provides] a pledge for base clients).¹⁰⁶ Stacey translates this phrase as: ‘man of security for [the king’s] base clients’.¹⁰⁷ We can see that the *fer gill* occurs in the context of clientship, but there is controversy about the meaning of the term. The term could be used for a designated representative of a group of clients who provides a pledge on behalf of all of them to their lord. However, it could also refer to a human pledge given from the base clients to their lord. In both cases, the pledge would be a guarantee that the clients fulfil the duties owed to the lord.

The terminology of clientship itself would suggest that a hostage was involved. *Aicillne* (base clientship) is a verbal noun of *ad-gíallna*, containing the root *gíall* (hostage),¹⁰⁸ and *gíallnae* (lit. hostageship) is the abstract of *gíall* (hostage). Thurneysen first dismissed the idea of a human

¹⁰⁵ *CG*, 95: discussing the linguistic relationship between *gíall* and *gell*; *GEIL*, 167-173.

¹⁰⁶ *CG*, 23.585-6, *AL* iv 338.10; for the second translation see Charles-Edwards, *Early Irish and Welsh Kinship* (Oxford, 1993), 5.

¹⁰⁷ Stacey, *The Road to Judgment*, 86.

¹⁰⁸ *ibid.* 86; *DIL*: *aicill(n)e*, the status of the *céle* (client), *ad-gíall(n)a* (serves, is in clientship to; gives hostages to), *gíall* (human pledge, hostage), *gíallnae* (submission, hostageship, security; a hostage-surety; coll. pledges, hostages; leg. technical term for status of a *dóerchéle* ‘unfree client’).

pledge,¹⁰⁹ but later suggested that a *fer gill* could have been a hostage given from the client to the lord at the beginning of clientship.¹¹⁰ Binchy was of the same opinion and held it to represent an early stage in the development of clientship, where every client was required to give a hostage to his lord as a guarantee that he would fulfil his obligations of base clientship.¹¹¹ However, he also concedes that the term *fer gill* could refer to a chattel pledge.¹¹² One problem with these views is that, if there was a hostage involved, why would it not simply be called *gíall*? Moreover, the text on unfree clientship does not mention the term *fer gill* at all.¹¹³

The term *gíallnae* is used to describe one of the two forms of clientship as base clientship (as opposed to free clientship). The client received a fief, sometimes known as *rath ngíallnae* (fief of hostageship, base fief).¹¹⁴ However, this contract lacked the formalities usually required and was valid without sureties, and even if entered in the state of drunkenness, which has led Charles-Edwards to question why there should be a hostage.¹¹⁵ He also points to the fact that the *fer gill* is said to have a seat in the king's court but that within this arrangement 'this puzzling figure is not counted as a *gíall*, which directly contradicts previous interpretations.'¹¹⁶ This leaves the issue

¹⁰⁹ *Bürgschaft*, 77.

¹¹⁰ Thurneysen, 'Nachträge zu "Irisches Recht"', *ZCP* 19 (1933), 346-51: 'der Mann des Unterpfans für die Unfreienossen'.

¹¹¹ *CG*, 585-586.

¹¹² *ibid.* 95.

¹¹³ Thurneysen, 'Aus dem irischen Recht I. Das Unfrei-Lehen: *Cáin Aicillne*', *ZCP* 14 (1923), 335-94.

¹¹⁴ *CG*, 4-5: terminology, 7-8: basic description of base clientship.

¹¹⁵ *EIWK*, 5; on the issue of immunity: Stacey, 'Berrad Airechta: an Old Irish Tract on Suretyship', in T. M. Charles-Edwards, Morfydd E. Owen, D. B. Walters (eds.), *Lawyers and Laymen. Studies in the History of Law presented to Professor Dafydd Jenkins on his seventy-fifth birthday Gŵyl Ddewi 1986* (Cardiff, 1986), §§ 17-18, 212, *CIH* 591.9-11; but cf. §§ 42, 73, *CIH* 594.17-18; A *naidm* is once mentioned to enforce a contract of base clientship, *CIH* 598.12.

¹¹⁶ *EIWK*, 5.

why the name for clientship itself contains the term for *gíall* if there was really no hostage given to the lord.

The term *giallaid* came to mean ‘submits’, because hostages were regularly exchanged as a token of political obedience to over-kings as a guarantee for loyalty and hence, became symbolic for submission.¹¹⁷ Charles-Edwards argues that this symbolism of submission may have been transferred to the law of clientship in which base clientship was the far less favourable form and carried implications of submission, with the goal to maintain the client and his descendants in service, for ‘as the fief of base clientship endows a man with cattle, so must the render gradually strip him of his cattle’, making it hard for him to sustain himself outside of the bonds to his lord.¹¹⁸

‘Even though the parallel may not be exact it may have been sufficiently close to allow the term *giallnae* to be used for the vassalage of the base client’.¹¹⁹ If we take this combined evidence, there is little reason to believe that there was a hostage involved in ordinary clientship contracts and even less so that the term *fer gill* referred to it.

This leaves the option that, instead, the *fer gill* was a person who offered a pledge on behalf of base clients. Thurneysen remarked that the following Old Irish gloss on the transferring of property in the *SM* text *Di Dligiud Raith 7 Somáine la Flaith* comes closest to the *fer gill* mentioned in *Críth Gablach*, even though it only uses the term *gíall*:

¹¹⁷ *ibid.* 4.

¹¹⁸ *ibid.* 16.

¹¹⁹ *ibid.* 6.

.i. *amail* bis meth mbid na *flatha* asrubartmar, a lethchummad-side dlighes in gíall mad he isidria don *flaith tar* cenn in celi, la taisic neich asren.¹²⁰

.i. as is the case with the failure (to fulfil an obligation of supplying) food to the lord, about which we have spoken, the hostage is entitled to half of the previously mentioned amount, if he pays it to the lord on behalf of the client, with restitution of anything he pays.¹²¹

In other words, the client ends up paying 1 ½, whereas he would have had to pay twice the value to the lord. Relevant to this discussion is the passage in *Críth Gablach* that describes the status of the *fer gill*:

Cía [a] míad sídí? Fer las mbí tír .vii. cumal, forbí a sétaib it *er* flaith 7 andóin 7 chórus Féne.

What is his rank? A man who has land [worth] seven *cumals*, who is (or stands) above their (the unfree clients') *séts*, in regard to ruler, Church and ordinary law (i.e. is responsible for the performance of their obligations under the above headings).¹²²

A person who inherits land worth seven *cumala* is usually the average *ócaire* (small farmer), a commoner.¹²³ Thurneysen holds the *fer gill* to earn his place in the king's hall, as mentioned above, because he provides a pledge to those entitled to the clients' obligations and here regards him as a surety for them.¹²⁴ He compares him explicitly to the *naidm giall nae* who appears in the same function: *naidm do-thē fri gialla* (an enforcing surety who goes [as security] for clients) and

¹²⁰ *CIH* 919.2-3; gloss on *imard*, *DIL*: *immord* (transposition, changing the order of, ?transferring of property after the death of its owner), Thurneysen, 'Aus dem irischen Recht V: Nachträge zur Bürgschaft', *ZCP* 18 (1930), 405.

¹²¹ *ibid.* 405: 'wie die Ausfallsbuße für (nicht gelieferte) Nahrung an den Herrn ist, von der wir gesprochen haben, - auf deren halben Betrag hat der Geisel Anspruch, wenn er sie (die Nahrung) dem Herrn für den Genossen zahlt (liefert), neben dem Rückersatz dessen, was er zahlt'; also cp. analysis in: *EIWK*, 5.

¹²² I follow Thurneysen's translation of this passage and not MacNeill's. *IR* V, 406: 'Ein Mann, der Land von 7 cumal besitzt, der über ihren (der Genossen) Wertgegenständen (Leistungen) steht sowohl inbetreff des Herrn als der Kirche als der auf alle Freien bezüglichen Rechtsordnung'; *DIL*: s.v. *andóin* (provides the English rendering of Thurneysen's translation).

¹²³ *CG*, 4.91; Kelly, *GEIL*, 'ownership of land', 100.

¹²⁴ *IR* V, 406.

who has to fulfil the outstanding duties on behalf of the clients if the latter fail to do so.¹²⁵ The *gíall* would receive some form of compensation for this service but the *naidm* usually only functions as an enforcer and not a substitute payer, which causes some difficulty with this interpretation. But from the passage in *Críth Gablach* it would appear that the *fer gill* was a person who provided a pledge to higher authorities as a guarantee that the clients would fulfil their duties to them. This function would certainly put him in a position superior to those on whose behalf he acts and that, from a legal perspective, would make him a surety, since he guarantees their compliance and, is made liable if the clients fail in their obligations. Binchy alludes to this interpretation in his notes on *Críth Gablach* when he takes the responsibilities secured by the *fer gill* to refer to those owed to the king by his clients.¹²⁶ In other words the king is not liable, which would explain why the *fer gill* has a seat in the king's hall, taking over this duty in a way akin to the *aithech fortha* (substitute churl). The latter was appointed by the king from among the members of his kindred or his unfree clients and acted as his substitute in legal claims brought against him, because the king was of a status too elevated to be acted against directly.¹²⁷

What this tells us in relation to the *fer gill* is that he, indeed, could have been an intermediary between the lord and the clients. In this sense, he would hold a position that enabled him with a higher degree of authority over the base clients but which also made him liable to take care of

¹²⁵ *Bürgschaft* § 42, 13, note particularly n. 3: Der *naidm* muss selber die Leistungen des Genossen übernehmen, bis der Herr seinen Anteil an dem Lande des sich entziehenden Genossen erhalten hat, cf. *IR I: Cáin Aicillne*, 343 f. and *IR III: Zum Frei- und Unfreilehen*, 375 f..

¹²⁶ *CG*, 96: *gíall*.

¹²⁷ *CCF*, ed. Thurneysen, n. 56, p. 78.

any of their shortcomings. This would explain why he is mentioned as being present in the king's hall but why he is not regarded as a hostage.

2.1.3. *fear tairgille*

A further person that should briefly be mentioned is the *fear tairgille* (lit. man of fore-pledge), who may or may not bear some relation to the *fer gill* (man of pledge). The *fear tairgille* appears in a gloss in *Di Chetharslicht Athgabálae* where he is curiously identified as the *aigne* (lawyer, advocate, pleader), a term employed in general for a person who is learned in the law or its practice.¹²⁸

.i. fer tairigilli .i. aighne, fiadh, fethem.

i.e. the man of fore-pledge, i.e. lawyer, witnesses, advocate.¹²⁹

Tairgille itself refers to the fore-pledge exchanged between neighbours (sub-chapter 4.1, p. 81 ff.). but in *Do breitheamhnas for ghellaibh síšana* (On Judgements on Pledges here below) it carries a different meaning, namely an additional, added guarantee following default in payment, in other words an 'overpledge'.¹³⁰ Thus, Plummer thought of the *fear tairgille* as a possible 'collector' of pledges.¹³¹

Moreover, in *Bretha Éitgid* we find the following statement:

Tairgille arna gellaib risin re-sin.

This is the time during which addition should be [made] to pledges.¹³²

¹²⁸ *CIH*417.25 = *AL* i 288.21.

¹²⁹ *CIH*417.25-6 = *AL* i 288.21; n. j *sic*, for *fiadha*.

¹³⁰ *DIL*: *tairgille* (b): O'Donovan Supp.; *CIH*2002.24, cp. *CIH*296.36 = *AL* iii 322.10. Cf. *CIH*197.2 = *AL* iv 114.12.

¹³¹ Plummer MS notes, *DIL*: *tairchell* VN of *do airchella*; *AL* i 288.21, *Comm.* 302.18; cp. Binchy, 'Féchem, fethem, aigne', *Celtica* 11 (Dublin, 1976), 18-33.

¹³² *CIH*297.31 = *AL* iii 326.5-6; cf. *BB*, § 26, 64-5, 118.

This addition or interest appears to increase over a period in time until it becomes forfeit at the maximum fine, which we encounter in a commentary to *Cáin Lánamna* (The law of couples):

.i. is cona landire toibgithir he, int errech, iar[r]e tairgille
i.e. it is with its full *díre* that the fine is exacted after the period of *tairgille*.¹³³

A passage in *Bechbretha* also argues for the *tairgille* to function as a form of payment:

Cip dune lasimb asu tairgille n-airiu oldáte smachta.
Whoever should think a fore-pledge in respect of them more convenient than fines.¹³⁴

A possibility would be that the initial fore-pledge in neighbourhood had fallen forfeit and the defaulting neighbour now had the option either to pay the *smacht*-fine appropriate for the respective offence, or, if he could not, alternatively give another, additional pledge (see discussion in 4.1., p. 83 ff.) Either this second pledge guaranteed that he was to pay all of the fines at a later point or the first pledge became forfeit as payment and the second pledge functioned as the new fore-pledge for future offences. The person having custody over the fore-pledge may then be called *fear tairgille*, but we have no other references or associations with this term at our disposal.

2.1.4. *aire forgill*

The *aire forgill* (lord of superior testimony) is a person of great interest, though our understanding of the precise nature of his name and position in society is incomplete.¹³⁵ His name contains the term *forgell*, also *forгал(l)*, the verbal noun of *for-gella* (gives superior testimony), which refers to the bearing of witness to a case,¹³⁶ more precisely to the ‘conclusive testimony’

¹³³ *CIH*505.10 = *AL* ii 353.43-45; cf. *CL*, ed. Eska, 110-111.

¹³⁴ *CIH*448.33-34, *BB*, part of § 26, 64-5.

¹³⁵ *CG*, 72.

¹³⁶ *DIL*: *forgell*, *for-gella*.

given in a case of inconsistent proof.¹³⁷ This interpretation is based on the fact that the testimony of an *aire forgill* in a law case ‘outweighs that of his inferiors in all cases where there is a conflict of evidence’.¹³⁸ The *aire forgill* is the highest non-royal grade, given in *DIL* as ‘a landed proprietor next in rank to a *ri* (king)’.¹³⁹ Binchy remarks that the *aire ard* (high noble) is once identified with the *aire forgill*.¹⁴⁰ Charles-Edwards suggests that he was probably of royal blood.¹⁴¹

Oath-swearing was an ultimate solution to fall back on if other physical evidence or proof by eye witnesses was absent or insufficient to establish definite results.¹⁴² To settle a case by oath is known as *fortach* (over-swearing), and meant that the oath of any superior social grade automatically outweighed the oath given by a party of inferior social standing. In cases of parties of equal rank, oath-helpers were called to aid and the party who could accumulate support by a higher number won the case. This concept is well known from the Irish law of witnessing and oath-swearing. *Di Astud Chirt 7 Dligid* (On the Confirmation of Right and Law) states:

Nach grad bes isle araile is fair fortongar, nach grad bes uaisle araile is e fortoing arail.

Any grade which is lower than another is oversworn, any grade which is higher than another overswears the other.¹⁴³

¹³⁷ *CG*, 72.

¹³⁸ *ibid.* 17.417-19; 72; *DIL*: *forgell* (b); cf. *superiurare* and *iurare super* in the Book of Armagh, *Tírechán*, 18. 4, *Collectanea de Vita S. Patricii*, ed. & trans. L. Bieler, *The Patrician texts in the Book of Armagh*, *Scriptores Latini Hiberniae* 10 (Dublin, 1979).

¹³⁹ *DIL*: *forgell* (b).

¹⁴⁰ *CG*, 70; *AL* iv 346.15.

¹⁴¹ Charles-Edwards, ‘*Críth Gablach* and the Law of Status’, *Peritia* 5 (1986), 61-2.

¹⁴² On the different forms of oath in early Ireland, see *GEIL*, 198-202; see also N. McLeod, *Early Irish Contract Law* (Sydney, 1992), 22.

¹⁴³ *CIH* 234.20-2 = *ALv* 460.16-7; *GEIL*, 199-200.

The *aire forgill* plays a special role also in the procedure of distraint. If a claimant took distraint not on the defendant himself but on a stand-in person referred to as *inmlegon*,¹⁴⁴ he had to drive the cattle to the property of a high judge, a chief poet or the *aire forgill*, which is symbolic of a high degree of authority invested in him.¹⁴⁵ Stacey has tentatively proposed that one category of judge would fit his description, regarding him as ‘an aristocratic intimate of a noble household (secular or ecclesiastical) whose main function was to intervene on behalf of his lord in cases of interest to him’, and it was the lord who instructed him as opposed to a legal professional.¹⁴⁶

2.1.5. *fuigell*

The term *fuigell* (older: *fugall*, *fugell*) equals the Latin *iudicium* (judgement), and refers both to a decision taken by a judge as well as its judicial pronouncement. It is the verbal noun of *fo-gella* (passing judgement on).¹⁴⁷ The term is most prominently known from the title of the law text *Cóic Conara Fugill* (Five Paths to Judgement) which discusses the *actiones* in a court hearing, each of its five methods of pleading culminating in a judgement. While the preliminary decision at the initiation of a legal process is referred to as *airfuigell* (pre-judgement), the final decision is commonly called *lánfuigell* (full judgement) and if it is an incorrect decision, it takes the common negative prefix *an-* to form *anfuigell* (wrong judgement).¹⁴⁸ The latter is contained in extracts from the text *Anfuigell* in a collection of short legal treatises in MS H 5. 15, edited by Gwynn,

¹⁴⁴ *DIL*: *inmlegon* is the verbal noun of *in-omlig* (milks out into, mulcts, levies), often found in compound: *athgabál inmleguín* (distraint of a surrogate).

¹⁴⁵ *CIH* 1727.34-5 = *AL* ii 16.11-2: *Eagair athgabail inbleguin i faitche nairiuch forgill no ollamhun filed no brítheamon aird*; for an overview on the restrictions on distraint see: *GEIL*, 183-185.

¹⁴⁶ Stacey, *Dark Speech*, 66, n. 76, 269.

¹⁴⁷ *DIL*: *fuigell*.

¹⁴⁸ *DIL*: *airfuigell*, *anfuigell*.

which contains the following charming analogy: *Anfuigell breath (leg. breitheman) brangaire catha*. (The wrong decision of a judge is a raven's call to battle).¹⁴⁹ A judge had to pay a fine amounting to one *cumal* if his judgement was challenged and proved to be wrong, but was likewise entitled to a fine if he had been correct.¹⁵⁰

MacNeill remarks that *fuigell* (judicial decision) 'must have meant first a pledge to submit to adjudication, then submission to adjudication, lastly adjudication'.¹⁵¹ However, the judge himself also had to provide a pledge in order to guarantee for the accuracy of his judgement and he could be challenged on his verdict through an appeal.¹⁵² Following Archan, such an appeal was pursued on the fifth path of *CCF*, known as *coir n-athchomairc* (proper enquiry).¹⁵³ Apparently, this pledge was worth five ounces (of silver).¹⁵⁴

2.2. The character and life-cycle of a pledge

2.2.1. Symbolic Context

As previously mentioned the term *gell* is cognate with the term *gíall* (hostage).¹⁵⁵ *Gíall* is 'the oldest word for a personal surety' or a human pledge.¹⁵⁶ It is this etymological link which remained intact through time and is still reflected in the object offered by a pledgor, who in

¹⁴⁹ *CIH*2146.16; *CCIH*5.5, 164; E. J. Gwynn, 'Miscellanea: H 5.15', *Ériu*9 (1921-1923), 28-29; O'Davoren's Glossary, ed. W. Stokes, *Archiv für celtische Lexikographie* II (1904), 292, p. 243.

¹⁵⁰ *CIH*1968.1: *cumal for britheamain berus ambreath*; *GEIL*, 54.

¹⁵¹ MacNeill, 'Ancient Irish Law', n. 4, 278.

¹⁵² *CIH*1377.39 = *AL*v 352.20, referred to as *gell*.

¹⁵³ *CCF*, ed. Archan, pp. 231-241.

¹⁵⁴ *CIH*1377.39 = *AL*v 352.20; *CIH*1986.31; also see: *GEIL*, 54.

¹⁵⁵ *VGKS*, 136; *CG*, 94-6.

¹⁵⁶ *CG*, 95.

Binchy's words, 'is regarded as handing over, as it were, part of himself to the pledgee'.¹⁵⁷ The sources bear witness to this association and render it apparent that pledges which lack this symbolism fail in their authority and therefore, not any object was deemed appropriate for any class of person. For instance, the pledge of a weapon was meaningless if provided by a hospitaller, a poet, or a hermit because they were not men at arms and, hence, these chattels were not representative of them.¹⁵⁸ In a similar fashion, items from the *faithche* (green, infield), such as axes, billhooks, spades, coulter and plough-irons were only appropriate in relation to the two types of farmer, the *bóaire* (cow-freeman) and the *ócaire* (young freeman).¹⁵⁹ Particularly prominent are also pledges associated with the art of embroidery, which are representative of and appropriate to women, such as needles, cloak-threads and the *íadach* 'bag for jewellery or work-bag where embroidery tools were kept'.¹⁶⁰

Therefore, the symbolic strength of a pledge was a significant feature and connected it to the status of the pledgor thereby endowing the person receiving the pledge with a material token of his honour. This is of particular relevance when a person of superior status provided the pledge on behalf of one of his subordinates because it extended the spectrum of authority and conveyed the power to the creditor who, so to speak, held the pledgor's honour as hostage. Interestingly, while a person could pledge for himself by offering a chattel from his own belongings, both *Críth Gablach* and *Bretha im Fúillemu Gell* exclusively deal with the situation where the pledge was offered by another person on behalf of the debtor. This person usually was of higher status and

¹⁵⁷ *ibid.* 94.

¹⁵⁸ *CIH*476.27-30 = *BFG*, § 65.

¹⁵⁹ *CIH*467.6-30 = *BFG*, § 15.

¹⁶⁰ *CIH*463.28-464.25 = *BFG*, §§ 3-5; cp. the entry in The University of Manchester's 'The Lexis of Cloth and Clothing Project', courtesy of Dr Mark Zumbühl.

this invested the pledge's conveyance with added authority and provided an extended security. The pledge was the visible manifestation of this association and, therefore, Stacey holds it that 'a great deal of the effectiveness of the gage derived from the ability of others to recognize instantly whose honor was at stake in the affair'.¹⁶¹

2.2.2. Quality of the Pledge

The second aspect of relevance for a chattel to function as a pledge is its quality and durability. According to *Críth Gablach* a pledge, here the one given by the *aire coisring* (*aire* of constraint) on behalf of his kindred, had to consist of enduring material so as not to suffer a reduction in its quality.

Cía méit in gill dobeir? Gell cóic sét di neoch rodmbí, di arggut nó umu nó ibur.¹⁶²

What is the amount of the pledge he gives? A pledge (to the value of) five chattels of whatever he has, of silver or bronze or yew.¹⁶³

A pledge that was subject to material change could not be accepted as lasting security for the outstanding obligation if it was itself diminishing in quality. A decline in the condition of the pledge could have caused contention and may have been interpreted as a symbolic marker of the agreement's downturn also and therefore, held the potential of jeopardising its binding strength. Linked to this reason is the fact that any use of the pledge was forbidden, so that some items appear to have been handed over to the claimant in a *cumtach* (cover, case, receptacle),¹⁶⁴ or an *aite* (case, container, repository made of precious metal used to enclose or protect an object of

¹⁶¹ Stacey, *Dark Speech*, 45.

¹⁶² *CG*, 11.282-83.

¹⁶³ Mac Neill, 'Ancient Irish Law', § 96, 295.

¹⁶⁴ *CG*, 12.293-95; Mac Neill, 'Ancient Irish Law', § 98, 295.

value given as pledge).¹⁶⁵ The pledge would usually be stored away safely by the pledgee, namely the claimant, until it either became forfeit to him or was returned to the pledgor, namely the defendant after the acquittal of the debt. When the pledge was subject to material change, such as rust or moth, and thus vulnerable to a loss in its very own quality, it represented a weak guarantee.

Co b̄er breith im t̄echta ngill? Nach gell im-chn̄ae b̄as n̄o meirge n̄o luch n̄o legheam n̄i hingill n̄i hingab̄ala, acht .g. ōir n̄o airgit n̄o umha n̄o t̄ire, ar n̄i hingill n̄i cheana.

How will I give judgement on what is proper as a pledge? Any pledge which death or rust or mouse or moth consumes is not pledgeable, is not acceptable, only a pledge of gold or silver or copper or land, for nothing else is pledgeable.¹⁶⁶

Gúbretha Caratniad takes a similar stance but suggests that a person's *étach* (garment) can be acceptable provided it is offered for short-term contracts or promises of one day which do not allow for enough time to affect their quality.¹⁶⁷

‘Rucus gell n-étaig do gabáil’. ‘Ba gó’, ar Conn, ‘nod birt’. ‘Ba deithbir, ar ba gell díthma ría fescur’.

‘I have judged that a pledge of clothing be accepted’. ‘It was falsely’, said Conn, ‘that you thus judged’. ‘It was justifiable, because it was a pledge subject to forfeiture by the evening of the same day’.¹⁶⁸

This presentation of the material requirements for pledge objects is in some disagreement with the chattels mentioned in *BFG*. While *BFG* includes durable objects whose quality would remain intact, it also allows for items to function as pledges whose values can fluctuate substantially. It is worth considering the pledge objects of *BFG* in more detail.

¹⁶⁵ *DIL: aite*, *CIH*793.12-15: citations with commentary from *BFG*; see: *CCIH*, 34.

¹⁶⁶ *CIH*2004.13, Breatnach, ‘Forms of Payment in Early Irish Law Tracts’, *CMCS*68 (Winter, 2014), 10.

¹⁶⁷ R. Thurneysen, ‘Aus dem irischen Recht III: *Gúbretha Caratniad*’, *ZCP* 15 (1925), § 8, 314-15, § 32, 342.

¹⁶⁸ *ibid.* § 32, 342; normalised edition and translation by Breatnach, ‘Forms of Payment in Early Irish Law Tracts’, 10.

2.2.2.1. Pledge Objects in BFG

The text includes a large number of objects consisting of precious metal, that are associated with the higher social classes, such as various *séoit trebe* (household articles), which may consist of different materials, including gold, silver, and bronze.¹⁶⁹ These comprise items such as the *cuach* (drinking bowl), provided by the noble grades, and including king, bishop, priest, and various church grades,¹⁷⁰ the *escra* (goblet, drinking bowl),¹⁷¹ and the *cingit* (long-stemmed goblet),¹⁷² the *án trenech* (tripartite cup),¹⁷³ and also the *chnoi gnoe* ⁊ *cuirnn* (beautiful nuts and horns).¹⁷⁴ Moreover, they comprise the *lann* (cooking-plate, griddle) with the *lainnín* (lit. little blade, griddle-slice), *airmed* (grain) and *síthal* (lat. *situla*, a vessel for drawing water, bucket),¹⁷⁵ *losat* (kneading-trough) and *críathar* (sieve, riddle),¹⁷⁶ *mías* (dish, a flat board or slab) and *cúad* (drinking-vessel, cup), *gemen* (skin, hide) and *cerchail* (pillow, bolster, cushion), and *fidlestra* (wooden vessels).¹⁷⁷ There is also mention of *allmaire sét* (foreign articles), including the *long cairé* (ship cauldron).¹⁷⁸ Other precious items include the *srían* (lat. *frenum*, bridle) consisting of gold or silver as well as the *cris* (girdle, belt), presumably with a buckle out of precious metal.¹⁷⁹

The text also includes precious objects such as the *snáthat* (needle) of an embroideress, which

¹⁶⁹ CIH472.1-4 = BFG, § 38.

¹⁷⁰ CIH473.10-474.2 = BFG, §§ 43-47.

¹⁷¹ CIH472.28-33 = BFG, § 41.

¹⁷² CIH473.4-6 = BFG, § 42.

¹⁷³ CIH473.10-15 = BFG, § 43; DIL: *án* (cup, drinking vessel), *treinech* (threefold, tripartite).

¹⁷⁴ CIH472.16-21 = BFG, § 40.

¹⁷⁵ CIH472.1-4 = BFG, § 38; for *airmed* cp. CG, 20.109: *che(i)thir méich mracha* ⁊ *fidlan[n] airmeide dí tharu* (a wooden vessel (or platter) containing the full of an *airmed* of kiln-dried wheat); DIL: *airmed*, *síthal*.

¹⁷⁶ CIH472.1-4 = BFG, § 38; DIL: *losat*, fig. to represent 'household' in the levying of tribute.

¹⁷⁷ CIH472.1-4 = BFG, § 38; DIL: *fid* (tree, wood), *lestar* (vessel, container (for liquids)).

¹⁷⁸ CIH474.4-16 = BFG, § 48-50; DIL: *long* (ship, vessel), *coire* (cauldron, pot).

¹⁷⁹ CIH474.24-475.24 = BFG, §§ 51-60; DIL: *srían* (lat. *frenum*, bridle), *cris* (girdle, belt).

entailed more interest than was due even to queens, the *íadach mná rí*g (workbag of a queen), and the *arm* (weapon) used by champions and defenders of the territory.¹⁸⁰

However, contrary to the other texts mentioned, *BFG* also allows for iron tools for ploughing and tillage, appropriate only for *ócaire* and *bóaire*,¹⁸¹ and very prominently features garments, including (1) the *étach* (garment) of the wives of men from different social ranks, (2) the *étach líthlaithi* (clothes for special occasions, feast-day garments) and *étach fognama* (ordinary working clothes, work garments) of grades from the king down to the *ócaire*.¹⁸² These are clearly intended to be given for substantial periods of time, since the text includes a provision that they ought to be returned if the pledgor requires wearing them for a festive occasion.¹⁸³ Without a doubt, the most outstanding provision in this law text is the inclusion even of livestock pledges, including cows, sheep, pigs, and various categories of horses. These can be given by anyone who possesses them but particularly cattle would be more readily available the higher a person's status was and the grades mentioned include the *bríugu* (hospitaller), *aire forgill* (lord of superior testimony), and other nobles, in addition to *bóaire* and *ócaire*.¹⁸⁴ Livestock pledges are subjected to changes in their material quality, since they yield products but also require attending to them and may become diseased or perish, as well as cause damage to the land. This novelty will be discussed in detail in sub-chapter 3.3.3, p. 76 ff. Although contradictions between and even within a single text are fairly common in early Irish law texts, the new picture offered by *BFG*

¹⁸⁰ *CIH*463.28-464.12 = *BFG*, §§ 3-5, 64.

¹⁸¹ *CIH*467.6-12 = *BFG*, § 15.

¹⁸² *CIH*464.26-29 = *BFG*, § 6, *CIH*469.3-5 = *BFG*, § 23, *CIH*469.7-11 = *BFG*, § 24, *CIH*469.17-18 = *BFG*, § 25, *CIH*469.19-23 = *BFG*, § 26, *CIH*469.27-28 = *BFG*, § 27, *CIH*469.29-32 = *BFG*, § 28.

¹⁸³ *BFG*, § 22.

¹⁸⁴ *CIH*470.2-471.25 = *BFG*, §§ 29-37.

considerably expands our previously held views about the quality of pledges and also demonstrates a strong association of the material culture of pledging with the higher classes of the social hierarchy.

2.2.3. The pledge period (before forfeiture)

BFG distinguishes two different periods of interest, which are indicative of the usual life-cycle of a pledge. A glossator remarks the following on this issue:

.i. breitheamnas seo *berar* imna fuillmhib *daberar* laisna geallaib no imna gellaib laisa tabar infuille *m* iarna follugudh.

.i. this is judgement which is passed regarding the interest payments which are given with the pledges, or regarding the pledges with which interest is given after failure to honour them.¹⁸⁵

Therefore, the first period refers to interest which is charged from the outset, namely from the moment that the pledge is given from the pledgor to the other party and ends with the forfeiture of the pledge. The smallest interest is paid for the *gell forcsen* (pledge of over-seeing), which is not physically handed over to the creditor but remains in the custody of the pledgor until it becomes forfeit. The reason why the non-possessory pledge entails the smallest interest may stem from the fact that it causes minimal disturbance to the superior. He retains the pledge in his possession (though any use of it would be barred) and does not run the risk that his chattel may be exposed to possible harm or carelessness when kept in another location.

2.2.4. The forfeiture period (after forfeiture)

¹⁸⁵ *CIH*462.22-23 = *BFG*, § 1, gloss 2.

The second period commences after the pledge has not been redeemed and hence, became forfeit. This would come into effect if the debtor fails to pay even though a pledge was given as a security for his payment and the failure renders the pledge forfeit. When this happens in a case where a third party provided the pledge on behalf of the debtor, the interest is re-calculated at a higher rate against the honour-price of the pledgor, and the default also entails the payment of *díre* (honour-price, compensation) itself. As will be seen, this interest can consist in multiple returns of the value of the item given and would cause the person on whose behalf the pledge was given great turmoil and to suffer mounting debts. The text marks its minimum value as follows:

Cia luigem i ndirib gell la *Féniu*? Ni *ansae*: gell foregar iar tabair[t] a dilse, coronastar a slan. Cid ed on, ni dithlit[h]er a fuillem la *Féniu*. Arna[d] [sh]anna nech do dithim gill a coimded dara chenn. Rosuidiged for seoit [seut].ui. screpal a fuillem, mani deroth. Cia deroth *dano*, ni tet dar ni-siu, la aithgin a seoit do cach.

What is the least among compensation payments of pledges according to Irish law? Not difficult: a pledge that is retained after granting that it is forfeit, so that compensation for it may be bound. Even so, its interest is not stolen away according to Irish law. So that no one should alienate [the interest] arising from the forfeiture of his lord's pledge (given) on his [the defendant's] behalf. Its interest has been fixed at a *sét* worth six scruples, if it has not fallen forfeit. Though it has fallen forfeit, it does not go beyond that, together with restitution of his chattel to each person.¹⁸⁶

This paragraph appears to tie in with the first one mentioning the *gell forcsen* in that a pledgor who was allowed to retain his chattel would be forced to bring it forth (as intended, voluntarily) on the day of its forfeiture. The debtor had to compensate the pledgor for this default by paying a chattel worth six scruples in interest as well as the restitution of his chattel (or an equivalent in value). Simple restitution is indeed a remarkably low penalty. As for the procedure, it remains somewhat unclear whether, on the day of forfeiture, the claimant would claim the pledge directly

¹⁸⁶ *CIH*462.30-34 = *BFG*, § 2.

from the superior, who is understood by the glossator on *iar tabair[t] a dilse* to be the *áige fine* (head of a kindred), or if he was to approach the debtor. How this operated depends on the authority the *áige fine* held over such undertakings. According to the glossators, he held the right to stipulate periods between him and the defendant which differed from the one the defendant fixed with the creditor.¹⁸⁷ How far we are to believe the intellectual exercise our glossators undertook in this particular case is difficult to estimate but there is a clear concern as to the role of the *áige fine*, and a pledgor of higher status would have had greater power of negotiation, and appears to negotiate separately both with the creditor and the debtor.

2.2.5. Interest Rate

The calculation of interest was dependent both on the object offered as pledge as well as the status of the pledgor, although the latter appears to have been more significant.¹⁸⁸ An increase in social grade correlated with an increase in interest received. As Stacey has rightly pointed out, status was such a major factor that it not only determined the rate of interest but also ‘the length of time over which that interest accrued, with persons of higher status earning interest for longer periods of time than did those lesser in rank’.¹⁸⁹

BFG shows that interest was paid before forfeiture and that this interest, or compensation, would increase drastically after forfeiture. The vast majority of the text is occupied with the calculation of payments caused by the forfeiture of the pledge, which was more complicated because it now required three different payments. A pledge that became forfeit required the payment of (1)

¹⁸⁷ *CIH* 462.30-463.27 = *BFG*, § 2.

¹⁸⁸ Cp. Stacey, *Dark Speech*, 46.

¹⁸⁹ *ibid.* 44; *CIH* 470.23-25 = part of *BFG*, § 31, *CIH* 470.31-33 = part of *BFG*, § 32.

honour-price according to the pledgor's status, (2) restitution of the value of the pledge, as well as (3) mounting interest. The interest often consisted of simple or multiple returns of the item pledged in addition to restitution.¹⁹⁰ It has been noted that the interest due to the *aire coisring* in *Críth Gablach* was considerably higher than for other grades and that this may be linked to the fact that he had to provide a pledge on behalf of his clients and did not have a choice.¹⁹¹ The patterns for interest are not always straightforward, which is why I have chosen one of the transparent ones for the following paradigm that exemplifies how the payment of interest operated for a pledge consisting of a silver article. The interest for each status group after forfeiture was as follows:

pledge consisting of a silver article	
King & man of learning	30 yearling heifers
<i>aire forgill</i>	15 yearling heifers
<i>airig febe</i>	10 yearling heifers
<i>bóaire</i>	5 yearling heifers
<i>Ócaire</i>	3 yearling heifers

Table 2: interest rates for a pledge of a silver article¹⁹²

¹⁹⁰ *BFG*, §§ 5, 6, 9, 23, 24, 28, 34, 35, 37, 38, 55 one chattel in addition, §§ 26, 36 three chattels in addition.

¹⁹¹ *CG*, 70.

¹⁹² *BFG* deliberately combines together ranks as *airig febe* (§§ 8, 23, 24, 31 etc.). It mentions the *aire itir da airig* once in § 44.

In addition, *díre* (honour-price) was due according to the above ranks. Payments of *díre* after forfeiture were made in three periods whose length varied, although the duration of ten days was common.¹⁹³ With the end of each period a third of the *díre* became due, these being called first, middle, and last *díre* respectively. On some occasions, the periods decreased in time, speeding up the process, while on other occasions, the debt relationship was extended with each added period. For instance, the cows of various grades of *aire* show a pattern of ten, five and three days,¹⁹⁴ while the cows of *bóaire* and *ócaire* require payment to be forthcoming in intervals of five days, three days and milking days.¹⁹⁵

Techte Fuillema Gell bo airech rebe otha airig etir da airig co ruicce ardairig: cet[h]eora boae i muin na cetbo, .iii. bai i muin na tanaise, di bai i muin na trissi bo. Bo i muin *cacha* bo otha suide, ciaba lin cipa n-uite. Ferthair a cetdire dia .x. fertair a medonach dia cuicthe, ferthair a ndedenach dia trisse.

The proper value of the interest of pledges (consisting) of a cow of an *aire feibe* from an *aire* between two *airig* up to the *aire ard*: four cows in addition to the first cow, three cows in addition to the second, two cows in addition to the third cow. A cow in addition to every cow from that out, whether a great number or a small number. The first compensation is paid at the end of ten days; the middle (compensation) is paid five days later, the last (compensation) is paid three days later.¹⁹⁶

Techte Fuillema Gell bo *cach* occairech .iii. bae i cetdithim a mbo-side, di ba isin tanaise, bo i muin na trisse bo, ag lethloige bo i muin *cacha* bo otha suidiu cia[pa] lin cipa n-uaite. Ferthair a ccetdire dia .u., ferthair a tanaise dia .iii., ferthair a ndedenach dia etrud dara araile cobdaile ercce.

The proper value of the interest of pledges (consisting) of a cow of every *bóaire* and of every *ócaire*: three cows for the first forfeiture of their cows, two cows for the second, one cow in addition to the third cow, an animal having half the value of a cow in addition to every cow from that out, whether a great number or a small number. Their first compensation is paid at the end of five days, their second

¹⁹³ *CIH*467.36-39 = *BFG*, § 16, *CIH*469.19-23 = *BFG*, § 26; *CG*, 11.280-94: the pledge of the *aire coisring*.

¹⁹⁴ *CIH*470.23-25 = *BFG*, § 31.

¹⁹⁵ *CIH*470.31-33 = *BFG*, § 32.

¹⁹⁶ *CIH*470.23-25 = *BFG*, § 31.

(compensation) is paid three days later, their last (compensation) is paid for the milking time beyond the next one (??) of the equal division of *éric*.¹⁹⁷

To the contrary, the cows of the hospitaller show an expanding pattern and require the first *díre* to be paid in ten days, but the middle *díre* in one month and the last *díre* in one month and three days.

Anson i fuillemaib gell la *Féniu* bai briugad na airemad nech acht nech fodaroch[l]ethar¹⁹⁸ dagairilliud; ailliud¹⁹⁹ a cetdithim bo bri[u]gad cuma[i]l n-oig n-inndib inna muin. Nochis for cumail deich set conamas in cumal-sin la *Féniu*. Lethcumal/i mmuin in tanaise, teora bae i muin na tr[e]jissi bo. Bo i muin cacha bo otha suidiu, ciapa lin, ciaba n-uaite. Fert[h]air colainn aithgena *cach* æ dīa tr[e]jise co boin inna muin; ferthair a cetdire dīa .x.maide; ferthair a medonach dīa mīs; ferthair²⁰⁰ a ndedhinach dīa tr[e]jisse for mīs.

Most difficult in regard to interest payments for pledges according to Irish law are the cows of a hospitaller that no one would accept, except for someone who cares for them with good merit. In a first forfeiture a hospitaller's cow entails a full *cumal* in them (of young gain, first forfeitures?). That *cumal* has been estimated at the same value as a *cumal* of ten *séts* according to Irish law. A half *cumal* in addition to the second (cow), three cows in addition to the third cow. A cow in addition to every cow from that out, whether a great number or a small number. The substance of restitution for each of them is paid on the third day with a cow in addition to it; the first compensation is paid at the end of ten days; the middle (compensation) is paid a month later; the last (compensation) is forthcoming a month and three days later.²⁰¹

Some pledge objects that were required for specific occasions necessitated that the pledgor was facilitated for the event with a substitute garment he could wear and which was of equal value. In the case of the king's festival garment that was not available, this incurred his full honour-price, and in the case of *bóaire* and *óaire* half honour-price.²⁰²

¹⁹⁷ *CIH*470.31-33 = *BFG*, § 32.

¹⁹⁸ *DIL* s.v. *fo-cíallathar* suggests inserting an *l* after *ch*, *fodaroch[l]ethar*.

¹⁹⁹ Read: *Ailid i cetdithim bo bri[u]gad?*

²⁰⁰ MS: *ferthain*.

²⁰¹ *CIH*470.5-8 = *BFG*, § 29.

²⁰² *CIH*469.19-23, 469.29-32 = *BFG*, §§ 26, 28.

Techte *Fuillema Gell* etach lithlaithe rig: ailed son iar n-i[n]baid(a)ib dligid trechelt inna muin. Ferthair son i teora[ib] dechmadaib iar n-inbaidib dligid. Otha suidiu ma tecmai lithlaithe no thocomracc tuaithe, dosli lanlog enech for fer lasan ndithat a ngell dara dithat cenn. Direnar dia dechmaide iar cuimlechtaib Fene.

The proper value of the interest of pledges (consisting) of the festival garments of a king: that entails, after the lawful periods, three garments in addition to it. It is supplied in three periods of ten days according to the lawful periods. From that out, if a festival or a meeting of the *túath* should occur, it incurs full honour-price to be paid by the man whose pledge falls forfeit, on whose behalf it acts as security. It is paid on the tenth day according to the common processes of the Féni.²⁰³

The same provision applied for a race-horse that was given in pledge but was required for a chariot-race, in which case an equally capable horse had to be provided for the event.

Techte *Fuillema Gille*[i]ch aige, is comdire do cach recht. Ni aile *acht* hech besid fiu ina muin, mani tecmai luglasnad (*sic*) no la taurchomraicc tuaithe. Ma tecmai sson, dosli lanlog enech, mani toire hech beissid fiu oiges a mamu, la diabul n-aithgena.

The proper value of the interest on a pledge (consisting) of a chariot-race-horse,²⁰⁴ it is equal compensation for every class of person. It entails only a horse which is equal in value to it in addition, if *Lugnasad* or a meeting of a *túath* does not occur. If that does occur, it incurs full honour-price, if a horse of the same value which fulfils its functions does not appear promptly, together with double restitution.²⁰⁵

BFG also includes many items that are characteristic for women, such as embroidery tools including needles, workbags and female garments,²⁰⁶ but many items were restricted to men. Hence, women were barred from giving cattle, horses, gold, silver, bronze or iron unless with the permission of their husbands and it is to the latter that interest was paid in such cases.

Techta *Fuillema Gill* etaig mna caich: cia deroth, ni aile acht etach besid fiu inna muini. Mat bai no eich no ór no airget no huma no iarann dorata isin gell, dointaiter in chair-sin diam[b] cen athc[h]omarcc dia celiu. I neoch ma [a]drodma in celi, is do direnar a fuillem.

²⁰³ *CIH*469.19-23 = *BFG*, § 26.

²⁰⁴ Lit. 'horse of driving', i.e. a horse fit for a chariot-race: *EIF*, 99.

²⁰⁵ *CIH*471.22-25 = *BFG*, § 37; Stacey, *Dark Speech*, 44.

²⁰⁶ *CIH*464.1-29 = *BFG*, §§ 4-6.

The proper value of the interest on a pledge (consisting) of the garment of the wife of any [class of] person: though it should become forfeit, it entails only a garment which is of equal value in addition to it. If it be cows or horses or gold or silver or bronze or iron that have been given as a pledge, those contracts are reversed if it be without (asking) permission from her husband. In respect of that which the husband has acknowledged, it is to him that its interest is paid.²⁰⁷

As Stacey correctly points out the law did not perceive these items as legally being offered by a woman but saw her husband as ‘the true donor.’²⁰⁸

This evidence from *BFG* shows that there was no uniform approach as to what pledge objects were acceptable and this could be due to regional variation as much as a historical development that changed the scope of legally permitted items. It is certainly true that objects of precious metal were prominent across the sources and most of the chattels mentioned were associated with high status individuals, including the royal and ecclesiastical elite. Persons of higher status would be better positioned to own those items given as pledges and could more easily put their wealth at the temporary disposal of others, which is why they were more readily associated with this form of guarantee. It is clear from *BFG* that jurists primarily were concerned with the value of interest payments derived from pledging that increased in proportion to the pledgor’s status. These payments were at the centre of attention to the jurists, because they imposed enormous pressure on the defendant before forfeiture and ensured a substantial return for the pledgor after forfeiture. The notion to tie financial returns through pledging to the social class of their provider will appear most natural to anyone familiar with early Irish law texts and their preoccupation with compensation according to the status of the afflicted party.

²⁰⁷ *CIH*464.26-29 = *BFG*, § 6, where the glossators imply a change in practice and allow for a share of one-third of the interest to go to the woman with the remaining two-thirds going to the husband.

²⁰⁸ Stacey, *Dark Speech*, 45.

3. The types of pledges

3.1. Based on value

With the issue of the debt and its relation to the pledge we are moving towards one of the most complicated questions within the law of pledging, namely the value of the pledge. Once we allow ourselves to think of the pledge not only as a symbolic token but also as an economic reality linked to a debt, we need to ponder what value the pledge had and how it was calculated. Naturally, the distinction between symbolic and financial capital is not a definite one but both considerations can complement each other and move on a scale. Nonetheless, there are two possibilities: either the pledge had a pre-determined, fixed value or it was dependent on the amount at issue and thus variable.²⁰⁹ For instance, it would appear from *Críth Gablach* that the pledge the *aire coisring* gave on behalf of his kindred had a predetermined value of five *séts*, i.e. two and a half ounces, but this pledge secured future obedience and was not already tied to an existing debt.²¹⁰

When we turn to the sources, we find, first of all, a distinction between different classes of *gell*. These four classes in descending order of value are given in *Di Chetharslicht Athgabálae: lánigille* (full-pledge), *lethgille* (half-pledge), *triangille* (third-pledge) and *smachtgille* (penalty-pledge).

It cetheora fodlai fil for gellaib: langille, ocus lethgille, triangille, ocus smachtgille.

There are four divisions in respect of pledges: full pledge, and half pledge, one-third pledge, and penalty pledge.²¹¹

²⁰⁹ *CCF*, ed. Thurneysen, n. 51, pp. 75-76.

²¹⁰ *CG*, 11.282-83; MacNeill, 'Ancient Irish Law', § 96, 295.

²¹¹ *CIH*412.20-21 = *AL* i 260.18, cf. *CIH*296.36-7 = *AL* iii 323.12-13 comm.: *Na ceithri langille 7 na ceithri leithgilli 7 na ceithri triangille 7 na ceithri smachtgille*. (The four full pledges and the four half pledges and the four one-third pledges, and the four penalty pledges).

The latter regularly appears as *smachtgille sechtmaid* (one-seventh penalty-pledge).²¹² *BFG* also distinguishes the *lángille* from a further category it introduces called *ingille* (part-pledge).²¹³ The *lángille* is given at the value of one ounce of silver or more, the *ingille* goes from half an ounce up to an ounce and the *lethgille* would then be half an ounce,²¹⁴ though there is considerable fluctuation across the sources. For instance, in *Cáin Domnaig* (The Law of Sunday), different values of *gell* and *lángille* are outlined.

Gell n-unge trá di maigin i rréir fir ad-[f]íri mad inríarthæ impe.

If he is capable of imposing his wishes concerning it, a pledge consisting of an ounce [is given] then immediately at the order of the man who acts as identifier.

Fer ad-[f]íri, im *urgu*, ma ar-bera túarusndal 7 ni tecmuic lais di maigin 7 tairic treisi n-úad 7 ni fulangar cuccai co tairi no astud úad fri láim brithe a llaa-sin co llángilli forsa mberar breth .i. di ungi.

If, however, the man who acts as identifier puts forward oral evidence and he does not happen to have it immediately, but it is forthcoming three days thereafter, he is not maintained up to that time until it is forthcoming, or a binding engagement with a view to (?) judgement [is made] by him on that day, together with a full pledge, namely two ounces.²¹⁵

The *lángille* on the basis of which judgement is passed for the violation of the sanctity of Sunday is given at a value of two ounces, whereas the value of an ounce is mentioned for the standard *gell*. One ounce is equal to twenty-four scruples or two *séts* which is sometimes a third of a *cumal*.²¹⁶ Therefore, the full pledge of *Cáin Domnaig* stands at double the value of the full pledge in the *fénechas*. *DIL* suggests that the *ingille* (part-pledge) is ‘an article which to some extent falls short of the value of the object for which it is given in pledge’.²¹⁷ However, this implies that the

²¹² *CIH*1712.32-1713.4; *CCF*, ed. Thurneysen, n. 51, pp. 75-76.

²¹³ *CIH*475.11-27 = *BFG*, §§ 55-61.

²¹⁴ *CIH*475.26 = *BFG*, § 61,

²¹⁵ *Cáin Domnaig*, part of §§ 3, 5, pp. 164-5.

²¹⁶ Kelly, *Early Irish Farming* (Dublin, 1997), 587, 592-3.

²¹⁷ *DIL*: *ingille*.

pledge had to be equivalent to the debt and anticipates that in cases where the pledge becomes forfeit it would automatically cover the original debt. Therefore, it assumes that the pledge may itself go for the debt if equal to it,²¹⁸ and thus be the payment itself. While this scenario is certainly possible, the sources offer a much broader and far more complicated picture. Pledges can constitute a payment in earnest, namely a small share of the entire debt, they can clearly also exceed the value of the debt, given that the king's garments and his adorned girdle feature among the items said to be pledged, and they may apparently vary, increase and decrease throughout procedural action. That the pledge could form part of the debt payment is reiterated in the

Hibernensis:

Sinodus Hibernensis statuit quintam partem debiti in pignus tribui, ut in lege dicitur: Redde quintam partem.

A Hibernian Synod decreed that a fifth part of a debt is rendered as a pledge, as it is said in the law: Render a fifth part.²¹⁹

Thus, there are several aspects that need to be taken into consideration when estimating the value of the pledge. Variations in value also occur in *Cóic Conara Fugill*, a law text delineating the procedural paths or pleas taken in court. Before pleading had started the parties were required to give a *lángille* in order to secure the payment of the *smacht* (fine) falling due for various sorts of unpermitted behaviour before and during arbitration,²²⁰ but this pledge was lowered to the level of *lethgille* after proceedings had commenced.²²¹ Thurneysen amusingly yet precisely to the point argues that the parties may abscond from arbitration if the judge deemed their path to be

²¹⁸ *CIH*792.39-793.12.

²¹⁹ *Hib*, 32.9, 262: gives *reddet* (i.e. future), trans. 706 = *Wasserschleben*, XXXIII. 9, pp. 142-3; Numbers 5:7.

²²⁰ *CCF*(R), § 2, ed. Thurneysen, pp. 15-16; ed. Archan, pp. 288-9.

²²¹ *ibid.* (R), §§ 4, 7, ed. Thurneysen, p. 17; ed. Archan, pp. 290-3.

wrong but are not likely to do so after pleading had begun on one path.²²² However, it has to be borne in mind that in the vast majority of cases the texts would simply mention the term *gell*, without specifying a particular category of value for it. On the basis of the objects enumerated in *BFG*, the range of values that a pledge can comprise is considerable and often noticeably higher than what we can reasonably surmise it secured. Irish law ties the value of the pledge much more to the status of its giver than to the economic worth it secures.

When drawing a paradigm for the standard values attributed to the different types of pledge, the following unfolds:

Name of pledge	Standard values	Values in <i>CD</i>
<i>Lángille</i>	1 ounce	2 ounces
<i>Gell</i>	-	1 ounce
<i>Ingille</i>	1/2 ounce up to 1 ounce	-
<i>Lethgille</i>	1/2 ounce	-
<i>Triangille</i>	1/3 ounce	-
<i>Smachtgille</i>	1/7 ounce	-

Table 3: pledge values

3.2. Based on custody

3.2.1. Possessory pledge

Binchy was the first person to note that ‘usually the *gell* is transferred to the physical possession of the creditor’,²²³ and this appears to have been the norm. We can infer this from the valuables mentioned themselves, since most of them would be far more potent if physical possession of

²²² *Bürgschaft*, n. 5, p. 63: Tatsächlich wird er eher darauf beruhen, dass sich die Prozessierenden, wenn der Richter ihren ‘Weg’ nicht als den richtigen anerkennt, aus dem Staub machen könnten, während dies nach Beginn der Verhandlung nicht mehr wohl möglich ist.

²²³ *CG*, 94.

them was granted. Moreover, there is the evidence of livestock being used, which would have no effect if not transferred so as to obtain access to products as well as to deny such access to the pledgor. To round the evidence up, there is a reference in *Collectio Canonum Hibernensis* which clearly demonstrates that the pledge was usually removed. Before turning to this evidence, I shall briefly discuss the evidential value of the *Hibernensis* for my purposes. The *Hibernensis* is of special significance because it is not a typical collection of canon law but, to quote Flechner, ‘stands out as a glaring exception for its preoccupation with ostensibly secular matters’, which received wide-spread reception in continental Europe.²²⁴ In it we see, so Charles-Edwards, ‘an attempt to create a Christian law for a Christian society’.²²⁵ In the realm of legal procedure the reality of what was done on the ground, as far as vernacular law allows us to make such judgements, and classical Canon law often went into very different directions and it is here where the harmonising with native legal concepts faced particular challenges and therefore, was of particular importance. Within the regulations of legal procedure, especially the stance against using violence in the enforcement of claims as well as against usury is not easily aligned with regulations encountered in the law of pledging, with interest payments mounting debts ever further, and suretyship, which permitted use of physical coercion against debtors. In this respect, we shall see through *Hibernensis* how it attempted to answer such questions at the interface of ecclesiastical and lay society, and how its regulations differed from those encountered in the native laws.

Lex dicit: Si debet aliquid frater tuus et non habet quod reddat tibi, sum(m)e pignus ab eo et custodi, ut accipias quod debet.

²²⁴ *Hib*, p. 2*.

²²⁵ Charles-Edwards, ‘Early Irish Law’, in D. Ó Cróinín (ed.), *A New History of Ireland I*, (Oxford 2005), 331–370; 353.

The law says: If your brother is in debt to you, and does not have the means to repay you, accept a pledge from him, and keep it, that you may receive what he owes.²²⁶

When the pledge was handed over physically, the person with the pledge, therefore, had in his hand a valuable chattel as guarantee that the obligation owed to him was going to be fulfilled. Therefore, the pledge served as a material representation of the pledgor's status. German legal terminology employs a poignant term for this type of pledge and calls it *Faustpfand* (lit. fist pledge; pawn, security deposit, collateral).²²⁷ There is an important distinction that has to be drawn in this respect, which is the division of the bundle of property rights. The *gell* was in the possession of the creditor while the debtor remained its owner. On this basis, the debtor still held the legal rights to the pledge and had not yet lost the item permanently. However, he no longer had it with him and therefore could not make use of it or dispose of it in full capacity, such as selling it. The removal of the pledge constitutes the first major shift in legal entitlement over the pledge and thus, property rights on both sides. Neither the creditor nor the debtor could sell the pledge or give it. Hence to pledge something was to withdraw it from normal exchange.

The central idea is clearly that gaining possession of a pledge makes for a stronger guarantee than only to hold an abstract right to it, since the custodian of the chattel held a symbolic and economic worth in his hand. Nevertheless, Irish law also recognized this secondary form and we shall see that it poses problems of its own.

²²⁶ *Hib*, 32.8, 262, trans. 709, [my emphasis] = *Wasserschleben*, XXXIII. 8, p. 142.

²²⁷ Note: This term is derived from Roman etymologists who deliberately linked the term *pignus* to *pugnus* (fist), indicating that the pledge was indeed physically handed over. From it derives the German translation *Faustpfand*.

3.2.2. Non-possessory pledge

In certain cases, the pledge was not handed over to the creditor at all but retained by the pledgor. We may refer to it as the non-possessory pledge, or standing pledge. This form of pledge would often be locked away in a container in order to ensure that it was not used by the pledgor during its function as a pledge, which was explicitly prohibited.²²⁸ There are also references to particular classes of persons whose pledges are not meant to be removed, because their profession depended on them. It sufficed to indicate the prohibition of use publicly, which demonstrated the legal conundrum of the debtor and forced his compliance. (This is another complex issue discussed in sub-chapter 6.8., p. 207 ff.). The debtor remains both owner and possessor although he is barred from making any use of the chattel.²²⁹ In Hohfeld's terms, he lacks one primary right (to use) but retains another (to deny use to others), while the secondary right to change ownership and even possession is in abeyance.²³⁰ There exists a special term for a pledge that was not physically removed but retained by the pledgor. This type of pledge is referred to as *gell forcsen* (pledge of over-seeing) in *BFG*. It would appear that such a pledge was common when the leader of a kin-group provided the pledge in order to constrain his kin-members to obedience to political, ecclesiastical or professional authorities. *Críth Gablach* mentions that the *aire coisring* (noble of binding obligation, lord of constraint, kindred leader) may retain the pledge

²²⁸ Binchy takes this to be the *gell forcsen* of *BFG* and is followed by Stacey in his view. See: *CG*, 94; Stacey, *Dark Speech*, 43-44.

²²⁹ Stacey, 'Ties That Bind: Immunities in Irish and Welsh Law', *CMCS* 20 (Winter 1990), 59.

²³⁰ W. N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, Walter Wheeler Cook (ed.), (Yale University Press, New Haven, 1923); repr. of two Yale Journal articles from 1913 and 1917.

he provides in a receptacle, a secure location where it remains until possible forfeiture or
quittance of the debt.²³¹ *BFG* provides us with the following:

Cia luigem i fuillemaib gell la *Féniu*? Ni *ansae* gell foircsen, fo bid bith fonascc omna
iarna chul. Nochis ed gell forccsen la *Féniu*, gell bis i llaim neich bessas set co brith
no deroscc.

What is the smallest among the interest-payments for pledges according to Irish law?
Not difficult: a pledge of overseeing because there is a bond of fear behind it. And a
pledge of overseeing according to Irish law is one which remains in the custody (lit.
hand) of him whose property it is until removal or verdict.²³²

Therefore, in this case the chattel was not physically removed although certain property rights
had legally been removed which is the reason why the debtor was barred from making any use of
the chattel.²³³ The pledge has entered a condition where it hangs in the balance between debtor
and creditor pending further action. Since this situation is weaker than the possessory pledge, ‘a
bond of fear’ is behind it because there is an imminent danger that the pledge may not be handed
over when it falls forfeit. This could refer to both the fear of the creditor and to the fear of a
superior who has to provide a pledge on behalf of his subordinates when they fail to pay their
debts, but also to the fear felt by the debtor that he will lose possession. A close parallel to this
regulation occurs in ‘A text on the forms of distraint’, which forms part of *OGSM*.²³⁴ Therein,
numerous chattels are mentioned which are taken in distraint but not physically removed. They
clearly carry the prohibition of use. The first of these examples refers to animals shut in for their
own offences until compensation is paid by their owner:

Nach mil fil a seilb duine ata athgabál/techta airi: a foil do iadad for mucaib, a lias
for cair[ch]ib fria cinta(i) fadesin. Back do echaib s̄ serrchu, is command do
suidi(u)b.

²³¹ Stacey, *The Road to Judgment*, 77, n. 106, 258; Stacey, ‘Ties That Bind’, 59.

²³² *CIH* 462.19-21 = *BFG*, § 1.

²³³ Stacey, ‘Ties that Bind’, 43-44; Binchy, ‘A Text on the Forms of Distraint’, 79.

²³⁴ *ibid.* §§ 1-11, 79-80.

There is a proper method of distraining any animal which is in human ownership. Pigs are to be shut into their sty, sheep into their fold; [this is when they are being sued] for offences committed by themselves. For horses a paddock except for foals, a pound for the latter.²³⁵

The problem that a person may withhold or take away a pledge that is no longer or not yet his is further reflected in the sources:

Nach dune dombera a gell 7 fochoisle na bi i cain no chairdde dir *enar* lanlog enech ind ir ara foxlaiter la taisecc in gill inna don in cetna.

Any person who gives a pledge and takes it away, and it is not in *cáin*-law or *cairde*, the full honour-price of the man from whom it has been taken away is paid together with the restitution of the pledge in the same place.²³⁶

The illegal taking of property and the payment of honour-price confirm that certain property rights had already shifted to the creditor and that the debtor was not entitled to attempt re-possession unless for lawful reasons. This shows the evident awareness of different rights to property and that a physical dislocation was not essential in order to create legal entitlement.

3.2.3. Insolvency

The purpose of the pledge is to guarantee payment and therefore, it only makes sense if the debtor was expected to be able to pay in the near future. However, if he suffered from solvency problems, for instance due to a blight on his stock, which threw him into financial difficulty, further pressure would not have achieved the desired result. The *Hibernensis* raises a concern about this problem:

Item in lege: Non tolles molam aut uestimentum proximi tui in pignus, quia his sustentatur uita eius.

²³⁵ *ibid.* § 1, 78-9.

²³⁶ *CIH*477.18-19 = *BFG*, § 68.

Likewise, in the law: You shall not take the millstone or clothing of your neighbour as a pledge, because by means of these his life is sustained.²³⁷

The concern that the debtor needs to make sufficient profit to repay the debt is further stressed in the following:

Lex dicit: Cum repetis aliquam rem a proximo tuo, quam debet tibi, non ingredieris domum eius, ut auferis pignus, sed stabis foris et ille tibi proferat quod habuerat. Si pauper est, non pernoctabit apud te, sed reddes ei ante solis occasum, ut dormiens benedicat tibi et habeas iusticiam coram Deo.

The law says: When you shall ask back from your neighbour anything that he owes to you, you shall not go into his house to take away a pledge, but you shall stand outside and let him bring out to you what he has. If he be poor, the pledge shall not lodge with you that night, but you shall restore it to him before sunset, that he, sleeping, may bless you, and you may have justice before God.²³⁸

While this seems to emphasize primarily the hostile attitude of the Church to violent seizure of property and by extension also legal distraint, it shows the close connection of the law of pledging and the distraint taken on property as stages of the same goal, to recover a debt. Apart from the option of forgiveness, a debtor who was unable to pay might ultimately fall into debt-slavery as a *mug* (male slave) or *cumal* (female slave).²³⁹ Therefore, *Hib* permits a debtor to keep his pledge or at least, grants him re-possession and, as would appear, the right to use it to sustain his life.

3.3. Based on utilisation

3.3.1. Forfeiture pledge

A forfeiture pledge is a pledge that falls forfeit irrespective of its relation to the value of the debt.

When the pledge becomes irretrievably forfeit to the creditor, he acquires full ownership of it

²³⁷ *Hib*, 32.10, 262, trans. 710 = Wasserscheleben, XXXIII. 10, p. 143; Exodus 22:26; Deuteronomy 24:6.

²³⁸ *Hib*, 32.10, 262, trans. 709 = Wasserscheleben, XXXIII. 10, p. 143; Deuteronomy 24:10-13.

²³⁹ *GEIL*, 95; *Vita Sancti Columbae*, eds. A. O. Anderson & M. O. Anderson, *Adomnan's Life of Columba* (Edinburgh, 1961, repr. Oxford, 1991), 84b).

and the debtor no longer holds any proprietary right to demand its return even when he subsequently forwards payment of the debt. The debtor has lost all rights to the pledge at the very moment at which it lapsed and cannot, therefore, subsequently, claim it back, without reference to differences in value. This approach would imply that the object pledged functions primarily as a bond of honour and it would be inherent to this function that its redemption before forfeiture could be expected and was a socio-legal imperative and that a person failing to redeem his pledge would not be worthy of any further leniency and simply forfeits what he has given. As far as the Irish sources allow us to pass judgement on this issue, the value of the pledge was of great relevance, but it is far from transparent whether the pledge originally fell forfeit irrespective of its value, or as part of the debt. However, Old Irish commentary shows a concern over the issue of the value of the pledge in relation to the debt, which would argue for an awareness of the forfeiture pledge in the context of its demise.²⁴⁰ Before going into detail on this issue, it is useful to describe the alternative option to a forfeiture pledge, namely the sale pledge.

3.3.2. Sale pledge

The option open to the creditor who had acquired ownership of a pledge through forfeiture is to liquidate its value by sale, which is from where the terminology derives. However, any surplus obtained through its sale that exceeds the amount of the debt owed to him had to be returned to the debtor. This constitutes the substantial difference from the forfeiture pledge. If the pledge's value equalled the debt, including the original due and penalties for late payment, the creditor could have been satisfied and the case settled. A long commentary in H 3.18, which as presented,

²⁴⁰ *CIH*792.39-793.9.

starts off with embedded citations from *BFG* includes a surprisingly explicit paragraph which deals with the value of the pledge in cases of livestock lost due to the creditor's fault.

Ma g[ell] bes airde inait a feich, 7 foiche dé dia tárachtain, 7 ni bi fonaidm a taisic, is diles cia beth urain and cin hic. Dia mbe fonaidm a taisic, is aisic na hurana. Mad comard fri fiachad, cia beth fonaidm cinco bé, is diles. Mad ísli 'nait a feich, is tuilled fris gura fiu a fiachud, cia beth cinco bé fonaidm. Mad gell bus airde inait a feich, 7 nidat foichaid dé donairteit, 7 ni bi fonaidm a thaisic, is aisic na hurana bis and. Dia mbe fonaidm a thaisic, is a híc uile .i. anmanda amal é fein ind, 7 a feich dia chind. Mad comard fri fiachu, 7 ni fuil fonaidm a t[aisic], is a tuitim ina fiachaib. Dia mbe fonaidm, is anmand amail he fein ind 7 a feich dia cind. Mad isle 'nait a feich, 7 ni fonaidm a taisic, is a dilsi, 7 tuilled fris gura fiu a fiachu. Dia mbé fonaidm a thaisic, is anmann amal hé fein ind, 7 a feich dia chind.²⁴¹

If it be a pledge of higher value than the debts, and an act of God overtakes it and there is no enforcing surety for its restitution, it is forfeit (to the pledgee), even if there should be an excess in that case that has not been paid. If there is an enforcing surety for its restitution, the excess is restored. If it (the pledge) is of the same value as the debts, whether there is a surety or not, it is forfeit. If it is of lower value than the debts, it is a case of filling it up so that it be worth the same as the debts, whether there is a surety or not. If it is a pledge that is of higher value than the debts, and no act of God has overtaken it, and there is no surety for its restitution, in that case the excess is restored. If there is a surety for its restitution, it is all paid, i.e. the animals in the state in which they themselves are, and their debts in return for it. If it (the pledge) be of the same value as [the] debts, and there is no surety for its restitution, it is a case of its being forfeit for the debts it was pledged for (lit. 'for its debts'). If there is a surety, it is a case of an animal in the state in which it itself is and its debts [paid] in return for it. If it is of lower value than his debts, and there is no surety for its restitution, if it is a case of it being forfeit, and it is filled up so that it is worth as much as the debts. If there is a surety for its restitution, it is a case of an animal of the same quality being [due] for it and the debts [are paid] in its place.²⁴²

The above commentary falls into two halves. The first half deals with the situation where a pledge has been destroyed by an 'act of God'. This scenario covers those cases where the animals suffered death by natural causes or due to an accident. The second half deals with cases where

²⁴¹ *CIH*792.39-793.12, punctuation slightly modified.

²⁴² J. Bemmer, 'The types of pledge in medieval Irish law: form, function and context', in A. Ahlqvist & P. O'Neill (eds.), *Medieval Irish law: text and context* (Sydney, 2013), 14-15, analysis: 15-16.

no ‘act of God’ has occurred, but the animals pledged have been disposed of or destroyed by the pledgee. In both scenarios, one further factor of influence is the presence or absence of a *fonaidm*. The *fonaidm* is a term frequently encountered in legal commentary and appears to be equivalent in meaning to the *naidm* (enforcing surety).²⁴³ We shall first turn to pledges being destroyed by natural causes.

Pledge destroyed by ‘act of God’

value of pledge	No <i>fonaidm</i>	<i>Fonaidm</i>
higher than debt	it is all forfeit in payment for debt (including excess)	only the value of the debt is forfeit (excess restored)
same as debt	the pledge is forfeited for the debt	the pledge is forfeited for the debt
lower than debt	forfeited, plus remainder still due	forfeited, plus remainder still due

Table 4: pledge destroyed by ‘act of God’

In cases where an ‘act of God’ overcame the pledge, the animal carcass is never returned to the pledgor but becomes forfeit for (or as part of) the debt. However, when the value of the pledge was worth more than the actual debt, the *fonaidm* secured that the excess amount would be returned to the pledgor.

This provision, however, was overruled in the absence of the *fonaidm* which made the pledge fall including the excess. When the difference in value between the pledge and the debt was not accounted for, it represented a forfeiture pledge which marks it as sharply distinct from the sale pledge, and it is the presence of sureties that determines this decision. In cases where the pledge

²⁴³ *CG*, 100-101.

was destroyed by an ‘act of God’ and either equalled the debt or was lower than the debt, the regulations do not differ in respect of the surety but the pledge fell for the debt and any possible shortage in value needed to be filled up until it reached the full amount of the debt, following the principles of contract law.

Pledge destroyed, but by the pledgee rather than by an act of God

value of pledge	No <i>fonaidm</i>	<i>Fonaidm</i>
higher than debt	only the value of the debt is forfeit (excess restored)	pledge returned; debt is paid instead
same as debt	the pledge is forfeited for the debt	pledge returned; debt is paid instead
lower than debt	forfeited, plus remainder still due	pledge returned; debt is paid instead

Table 5: pledge destroyed by the pledgee

In cases where no ‘act of God’ was involved but the pledgee destroyed the pledge, the regulations differ as set out above. In this scenario, the involvement of the *fonaidm* secured the return of the pledge to the pledgor in exchange for the debt payment in all cases. Of note is also that the excess value of the pledge that surpassed the value of the debt had to be returned to the pledgor even without a *fonaidm* being present. In cases without a *fonaidm* and where the pledge either equalled the debt or when its value lay below the debt, the regulations mirror the ones described above and the pledge became forfeit for the debt and any missing amount had to be added. These cases are representative of the Irish principle of equity and clearly depict how important this concept was, and that a surety was not necessary to obtain this right if the pledge was destroyed by the pledgee.

A related passage occurs in *Do breitheamhnas for ghellaibh sīsana* (On Judgement on Pledges here below).²⁴⁴ It demonstrates the attitude towards a livestock pledge that perished due to an illness. The determining factor in this scenario was whether the animal was handed over already carrying the disease or if it became infected while in the custody of the pledgee.

Masa galar .b. cinnte rucastar in gell, a mart do bidhbaid₇ a feich do feichemain toicheda. Masa galar cunntabartach ruc in gell, leth a mairt do bidhbaid₇ leth a fiach do feichemain toicheda.²⁴⁵

If it be a definite, inherent disease that has taken the pledge the corpse [goes] to the defendant and the debt to the plaintiff.

If it be a doubtful disease that has taken the pledge, half of the carcass to the defendant and half of the debts to the plaintiff.

There is a clear concern over the difference in value between the pledge and the debt and the question of equity following the demise of the animals. If it cannot be proven that the animal already carried the disease the guilt was shared between the parties, but if it was an inherent illness the pledgor only received the corpse of his animal, which was of far lower value and had to pay his debt in full. As has been seen in the previous examples, the *fonaidm*'s involvement in the giving and accepting of pledges clearly implies that the transaction may itself have been secured contractually. The *fonaidm* may secure the return of the pledge once the debt has been paid. That might explain the *fo-* in *fonaidm*: he does not enforce the primary debt but only a subsidiary or consequential obligation.²⁴⁶ As can be seen from the above, this was of potentially substantial relevance when the pledgor wanted to protect himself against the loss of his pledge in payment for the debt or against the loss of the excess payment. I cannot claim certainty as to

²⁴⁴ *CCIH*, Digest D32, p. 81, also see discussion, p. 332.

²⁴⁵ *CIH*2001.26-28.

²⁴⁶ I thank Prof. Charles-Edwards for pointing out this possibility.

whether pledging would have always been bound by sureties but since it regularly occurs within the progression of a contract, this may well have been the case within these contexts.

3.3.3. Usufruct pledge

One issue that is closely tied to the preceding discussion is the question of whether the pledge was allowed to be used, particularly in those cases where the use was inherent in the item pledged, such as was the case with livestock. The maintenance of an animal raised concerns about protection against disease, cost of sustenance and security, namely appropriate fencing as well as general care-taking. These chattels were clearly not only prone to damage but in fact could become sick, could reproduce and were also perishable. Thus, livestock was prone to raise a set of legal questions and proves far more complex than the retention of a simple object such as a silver vessel.²⁴⁷ Livestock that lodges with another person as opposed to the original owner for a limited period of time is a situation where certain strands from the bundle of property rights (ownership, possession, right to transfer entitlements such as use) shift from one person to the other, namely from the pledgor to the creditor. With the usufruct pledge, a person grants a right to (1) temporarily possess the pledge to another, who is entitled to use it, and (2) a property right in the fruits derived from the pledge, which he is entitled to consume.²⁴⁸

²⁴⁷ Cf. *IR II: Cáin Sóerraith*, § 3, 240: ás ocus los ocus gert, and *EIWK*, 356-7.

²⁴⁸ In pledges of real property, (1) is known in Latin as *mortuum vadium* (French: *mortgage*, German: Zinnsatzung, ein abnießbares Pfand), in which the *usus fructus* is exclusively calculated against the interest on the debt but not the capital of the debt, and (2) as *vivum vadium* (French: *vifgage*, German: Totsatzung), where the profits derived from the *usus fructus* are calculated against the debt leading to its gradual extinction, see Hübner, *A History of Germanic Private Law*, 377-379; H. D. Hazeltine, 'Die Geschichte des englischen Pfandrechts', in O. Gierke (ed.), *Untersuchungen zur Deutschen Staats- und Rechtsgeschichte* (Berlin, 1907), 204-213; cf. the distinction in Roman law between *usus (ius utendi)* and *usus fructus (ius utendi et ius fruendi)*.

This distinction may be familiar from the difference drawn in contemporary law between movables given in ‘rent’ or as ‘tenure’. A cow given in rent entails only use while a cow given in tenure includes the commodities, most significantly, by extension, the young of the cattle.²⁴⁹ One illustrious example which bears witness to the presence of this concept in a literary setting can be found in the *Vita Prima* of St Brigid. When Dubthach’s wife insists that he sell the bondmaid he impregnated and who later was to give birth to Brigid, Dubthach is careful to alienate only the slave but ‘did not sell the offspring which she had in her womb.’²⁵⁰ From a legal perspective, Dubthach’s move involved an intelligent legal trick. While he handed over his chattel he did not include its fruits, namely the unborn baby, to which he maintained proprietary rights.²⁵¹

This new dimension of pledging calls into question whether the use may be calculated against the debt and if so how this was accounted for. With this we enter a difficult legal field where property rights and economic value are in fluctuation, because the use of the pledge brought profit to the creditor but simultaneously may have decreased the debt due to him. It is well established that unauthorized use of chattels not owned by the user was illegal and accordingly punished.²⁵² A usufruct pledge would constitute a denotative shift away from pledges which are deeply rooted in symbolic authority towards pledges whose main purpose lay in their economic benefits. However, elaboration is particularly prominent in commentaries and this requires caution, since

²⁴⁹ For a very brief summary, see: H. Honsell, *Römisches Recht*, 7. Auflage (Berlin, Heidelberg, 2010), 75: for *usufructus* and the regulation of restitution see discussion in: N. Benke & F. S. Meissel, *Übungsbuch Römisches Sachenrecht* vol. 10 (Vienna, 2012), 165-168; 183-4.

²⁵⁰ S. Connolly, ‘Vita Prima sanctae Brigitae Background and Historical Value’, *The Journal of the Royal Society of Antiquaries of Ireland* 119 (1989), § 4, 15.

²⁵¹ In Roman law, the child of a slave belongs to the proprietor of the slave, not the usufructuary. The opposite is true for the offspring of animals.

²⁵² *EIF*, 169-70.

they are unlikely to represent accurately the main principles of Old Irish law. The idea of a usufruct pledge stems from a very different legal reasoning compared to the pledge intended as a tool of coercion. If a creditor received a pledge for use, the income derived from it could be in lieu of interest or even be calculated against the debt, thereby including the possibility of its gradual extinction. Therefore, the questions we have to answer are, provided a creditor was allowed to use the pledge, how did he become entitled to this right and how did the jurists account for it in value? In other words, could the use of the pledge reduce the debt and thereby extinguish it?

Having explained the theory of usufruct we shall examine the evidence. The idea of use was not restricted to livestock but also affected inanimate chattels. The first issue encountered is the question of the protection afforded to the pledge at its conveyance. The relevant paragraphs derive from material consisting of citations from *BFG* with extensive commentary and are provided jointly below.²⁵³

*Dia cinnter cen aite forru, is a fiach dia cind 7 a naisic as cidat olca. Dia cinnter cin foimrim na ngell-só 7 dia ndentariar sin a foimrim, .u.s. † .x.s. ind.*²⁵⁴

If it is provided for that they don't have a case/repository, it is the debt on account of them and their restitution though they are in bad condition.

If it is agreed that these pledges are not to be used and if use is made of them after that there is five *séts* or ten *séts* in that case.

*Muna cinnter cin a foimrim, is leth .u.s. ind; isin cunntabairt sin. Dia comairlectar don'tí nosbeir i foimrim, islan muna forcraid ngnima; dia forcraid gnima doberad forru, is a tuitim ina fiachaib ma comard. Munab comard, is amail roraidsium; † dō a tri trocar .i. dilsí in feich ma luga ina fiach foimrime in gill, no dilsí a inforbtha no colda, † diablad ngnimraid.*²⁵⁵

²⁵³ *CCIH*, 34.

²⁵⁴ *CIH* 793.15-16.

²⁵⁵ *CIH* 793.17-21.

If it is not determined that they are not to be used, it is half five *séts* for it; that is because of the uncertainty. If it be permitted to the person who takes them to use them, it is fine if there be no excess of use; if there is excessive use of them, they fall for the debts if equally high.

If they are not equal, it is as we have said, or indeed the three leniencies .i. the debt is forfeited if it is less than the due for use of the pledge, or the increase of the ‘body’, [object pledged] is forfeited, or doubling of work.

Again, the provisions in respect of the use had to be explicitly determined because illegal use entailed the payment of penalties. If it was explicitly agreed that the pledge was not to be used, payment of 5 or 10 *séts* (2 cows and one heifer or 5 cows) became due in the event of violation. If the pledgor failed to clarify this, the uncertainty still entailed payment of half 5 *séts* for the use, since this represents unauthorized use. If the pledge was allowed to be used and this is our first direct encounter with the pledge that is being actively used, this was *slán*. Only when the way in which the pledge was used was so excessive that the profit obtained through the use made up for the debt did the increase in the value of the pledge go for the debts. Again, the sources do not fail to stress the fact that imbalances had to be adjusted in the same way as previously discussed.

Use of the pledge

agreement	penalty for illegal use
without use	5 <i>séts</i> or 10 <i>séts</i>
use not clarified	half 5 <i>séts</i>
with use	1) excessive use: pledge falls forfeit for debt if equal to it. 2) standard use: no consequences

Table 6: use of the pledge

The following situation returns to livestock pledges and the highest economic gain through fruit rights one could make, namely their return in the form of offspring.

Ma gell doberar fri fiachu 7 bid los forin fiach, dia mbé fonaidm in luis, is a íc. Cinco be fonaidm danó, dia mbé aitiu a íc[i] in cach trāth acartar, is leth in luis do íc Mu na be fonaidm na aitiu, ni hícār s̄ coland nama, 7 taisic in gill.²⁵⁶

If a pledge is given for debts and the debt is liable (to give birth to) offspring against the debt, if there be security in respect of the offspring, it is to be paid. Though there be no security moreover, if there be acknowledgement that it is to be paid whenever it is claimed, half of the offspring is to be paid.

If there be neither security nor acknowledgement, nothing is paid except the original debt (i.e. original debt without *los*), and restitution of the pledge.

The entitlement to the fruits, just like the use of the pledge and the return of the pledge could be fixed through a *fonaidm*, which we encounter again here. If a *fonaidm* was in place, payment had to be made for the young cattle and the pledgor did not lose his entitlement to them. This is the equivalent to what Dubthach did in that he retained his right to the offspring. Even if the pledgor failed to provide a *fonaidm* but acknowledgement of the pledgee was in place, it was still half of the fruits that were paid. Only if neither *fonaidm* nor acknowledgement existed the offspring went to the pledgee, who received payment of the debt and returned the original pledge only. The reference to pleading refers to the fact that in the absence of a surety it was the pledgor who had to claim the offspring and initiate the legal process in order to obtain his right.²⁵⁷ Legal knowledge was, therefore, crucial in order to maintain entitlement.

Fruits of the pledge

+ <i>fonaidm</i>	payment for fruits
- <i>fonaidm</i> + acknowledgement	half payment for fruits
- <i>fonaidm</i> - acknowledgement	No payment for fruits, only restitution of the pledge

Table 7: fruits of the pledge

²⁵⁶ CIH793.22-25.

²⁵⁷ This is the same provision as in Roman law, where it is known under the maxim: *nullo actore nullus iudex*.

It becomes apparent from the sources examined that early Irish jurists recognized the necessity to regulate the use of objects given in pledge. Originally, the pledge only served as an item held in custody awaiting its release through payment and use of the pledge was not envisaged. This can be surmised from the provisions outlined which still include penalty payments for use where no explicit arrangement was in place. However, issues of diminishment in the quality of the pledge through storage conditions but also its demise through disease or theft gave rise for further regulations in order to decide what level of protection against losses was afforded to the pledgor and the custodian respectively. It is from this angle that the commentators approach the subject of usufruct, and it is in this spirit that excessive use of a pledge, even when use was permitted, incurred forfeiture of the pledge in lieu of the debt. The method with which use was granted or, in other words, the means by which a pledgor protected himself against losses was bound and enforced through the suretyship of the *fonaidm*. However, there is no indication that the usufruct pledge was used as an economic tool with which a debtor could reduce his obligation by granting the creditor a right to traffic in its profits. Under normal conditions, whether the pledge was a standing pledge that remained with the debtor or a possessory pledge that was transferred to the creditor, it was withdrawn from normal exchange.

4. Special types of pledges

4.1. The pledge of neighbourhood: *tairgille*

One special type of pledge for which we have comparatively many references is the *tairgille* (fore-pledge). It occurs in those texts that deal with the law of neighbourhood, foremost *Bretha Comaithchesa* (Judgements of Neighbourhood) and *Bechbretha* (Bee-judgements).²⁵⁸ Furthermore, the *tairgille* occurs in two short texts known as *Caithchi bech* (Trespass-penalties of Bees) and *Athgabál bech* (Distraint of Bees).²⁵⁹ These texts deal with the laws operating between adjacent neighbours and focus on trespasses and damage caused by animals. As a consequence, appropriate fencing was a dominant concern in order to prevent livestock from grazing on neighbouring pasture. The *tairgille* was a security given at the outset that any arising penalties related to animal trespass would be paid. In this respect, bees posed a particular challenge since they could not be prevented from flying into the neighbour's field to take nectar. With the growing importance of bee-keeping, the jurists tried to integrate the new rules for bees within the existing laws of *comaithches*, often quite unsuccessfully, one may add.

Annsam hi tairgillib tairgille ar bechaib.

Most difficult among fore-pledges is a fore-pledge for bees.²⁶⁰

²⁵⁸ *Bretha Comaithchesa*, ed. T. M. Charles-Edwards (forthcoming), *CIH* 64.6-79.12; 191.1-205.21; *AL* iv 69-159; T. M. Charles-Edwards & F. Kelly, *Bechbretha – an Old Irish law-tract on bee-keeping*, Early Irish Law Series 1, (Dublin, 1983, 2008 reprint with addenda); *CIH* 444.12-457.10; *AL* iv 162-202.

²⁵⁹ *BB*, *Caithchi bech* is edited and translated with a discussion in appendix 5, 186-188 and *Athgabál bech* is edited and translated with a discussion in appendix 6, 189-191.

²⁶⁰ *BB*, § 1, 50-51.

In these settings, the pledge plays an important role and, contrary to other scenarios, is given at the beginning of the relationship and thus, before any debt is incurred. It serves as a pre-emptive security within a context that expects and a group that is prepared for future trespasses. Since the pledge usually denotes an acceptance of a claim, a fore-pledge is an *a priori* acknowledgement of the future claim and therefore, synonymous with a potential entitlement to payment. Let us explore this type of pledge in further detail.

Tairgille, sometimes *tairgell*, has a meaning that remains somewhat unclear.²⁶¹ *Bretha Comaithchesa* and *Bechbretha* each mention the *tairgille* on five occasions.²⁶² Glossators of both texts speak of *na gella toirithnecha* (the relieving pledges).²⁶³ Sometimes, the *tairgille* is used in the sense of ‘added security’, in cases when a debt is not paid on the appointed day and hence translated by O’Donovan as ‘over-pledge’.²⁶⁴ In this sense, it may also denote an ‘addition to accumulated fine or interest’.²⁶⁵ When *tairgille* is used in this context, it is no longer an in-advance security but something additional added after a default, very much like a standard *gell* would usually be used. This notion is particularly important because it is not at all clear what happens to the fore-pledge when a trespass occurs. The neighbours will remain neighbours even after a trespass and therefore the issue of maintaining a balance of security is paramount. If the fore-pledge becomes forfeited, does another pledge have to be given as an ‘added security’ as described above? Does the payment of the penalty prevent the pledge from falling forfeit? The

²⁶¹ *DIL*: *tairgell*, *tairgille*.

²⁶² *CIH*64.28 = *BCom*, § 3; *CIH*66.32 = *BCom*, § 6; *CIH*69.5 = *BCom*, § 7; *CIH*73.20 = *BCom*, § 22; *CIH*75.5 = *BCom*, § 25; *BB*, §§ 1, 2, 3, 24, 26.

²⁶³ *CIH*64.33 = *BCom*, § 3d; *CIH*69.7-8 = *BCom*, § 7b; *CIH*197.4 = *BCom*, § 22f; *CIH*198.3 = *BCom*, § 25j; *BB*, §§ 1b, 2a, 3a, 26a.

²⁶⁴ *DIL*: *tairgille*, the latter description according to O’Donovan’s law transcripts, 559.

²⁶⁵ *ibid.* 559.

relationship between the penalties in the law of neighbourhood and the fore-pledge, perhaps, is the most complex issue in the whole discussion. We may explore the process a *tairgille* undergoes in order to find some answers to this conundrum.

According to *Bretha Comaithchesa*, the law of neighbourhood is initiated when land is newly divided and thus new neighbours emerge. This would happen when a kinsman died and left multiple co-heirs. Each of them would inherit a share of the *finniu* (kin-land) following the death of their father. After the division of property has been made, each one of them was obliged to erect an appropriate fence around his territory. According to *Bretha Comaithchesa* a light fence was finished in ten days and a full fence was completed in one month.²⁶⁶ What was regarded as a legal fence was described in great detail, since it was the main bar to trespass for most livestock.²⁶⁷ After the group of neighbours have been set up in this way, they each gave a *tairgille* to the others. The *tairgille* is given a value of two scruples by glossators both in *Bretha Comaithchesa* and *Bechbretha*.²⁶⁸ That the fore-pledge could have a pre-determined value is a serious possibility since its value cannot be dependent on the offence, because no trespass had yet occurred. However, there is evidence that would suggest otherwise. After the fore-pledges have been exchanged, the period of *tairgille* commenced.

²⁶⁶ *CIH*65.4-11 = *BCom*, § 4.

²⁶⁷ *CIH*73.7-10 = *BCom*, § 20; exceptions are animals capable of flying, eg. bees, possibly also domesticated hawks, as well as high leaping animals, such as deer.

²⁶⁸ *CIH*64.24, gloss 8 = *BCom*, § 2h; *BB*, § 26a.

4.2. The tairgille in Bretha Comaithchesa

Charles-Edwards and Kelly remark that the fore-pledge in *comaithchesa* ‘guarantees the payment of *caithchi* (or *caithig*), ‘the penalty for an offence against the land of a neighbour through direct personal neglect or a deliberate personal act’.²⁶⁹ The editors advance the argument that this appears to be the case when a herdsman was attending the livestock and no fence was erected. If land was fenced, the presence of a herdsman was not necessary and personal neglect only had an indirect impact on the results. In this case a fore-pledge is not necessary. If an animal trespassed a fenced pasture, the fine required was called *smacht*, paid mostly in bushels of malted barley.²⁷⁰ In cases where the fence was not properly erected, the neighbour could move straight to distraint.²⁷¹

Do-fet rann imbe. Cach n-imbe cona smachtaib; cach tairgille cona chaithchib; ar i mbiat smachta ní biat caithchi, i mbiat caithchi ní biat smachta.

Sharing precedes fencing. Every fence has its fines; every fore-pledge has its penalties; for where there are fines, there are no penalties; where there are penalties, there are no fines.²⁷²

There is a clear distinction drawn between either (a) a *tairgille* and *caithchi* or (2) a fence and *smachta*.²⁷³ Therefore, we encounter two quite different legal concepts in neighbourhood. As previously mentioned *caithchi* were linked to the idea of personal failure and I presume that a

²⁶⁹ *BB*, notes on § 24, 114 and § 26, 118.

²⁷⁰ *ibid.* notes on § 24, 114; *CIH*66.32-66.39 = *BCom*, § 6.

²⁷¹ *BB*, 114; *CIH*75.24-29 = *BCom*, § 27; on boundaries see: Charles-Edwards, ‘Boundaries in Irish Law’, in P. H. Sawyer (ed.), *Medieval settlement: continuity and change* (London, 1976), 83-7.

²⁷² *CIH*64.27-9 = *BCom*, § 3; the text quoted and all following citations from *BCom* have been normalised.

²⁷³ On *smacht* cf. K. Simms, ‘Gaelic Military History and the Later Brehon Law Commentaries’, in C. G. Ó Háinle & D. Meek (eds.), *Unity in Diversity. Studies in Irish and Scottish Gaelic Language, Literature and History* (Dublin, 2004), 61, where she states that the *smacht* ‘is calculated in relation to the status of the person paying the fine’.

pledge was used here because this was regarded as a debt caused through the negligence of a human. A fence could render the fore-pledge unnecessary in so far as any trespasses despite this boundary did not imply full human failure. The period of *tairgille* would end when the fence was erected, but it would still be required for unfenced land. This is the situation in *Bretha Comaithchesa* so far. In spite of this, the text goes on to state:

Tairgille smachtae: tairced .u.the íar fogail úadaib i caithchi cen naidm nóesaib.

A fore-pledge for fines: let it come from them on the fifth day after damage, in respect of trespass-penalties without a binding surety, according to customary rules.²⁷⁴

Now we have a combination of *tairgille* and *smachta* that had previously been excluded. However, the passage refers to a pledge required after damage had occurred, and not before. Later on in the original text, we find the following:

Lethchaithig i tairsce; ócaithig ina caithig n-aidche. Ar atá i ndligiud inna Féne: búachaill oc cach cethrai fri dé. Is de atá ‘cond bó búachaill i mbánshoillsi.’ A mbeith i mbúailid fo íadud i n-aidchi. Mat muca, a feis i foil; mat baí, biat i mbódaingiu; eich i cuimriug théchtu no i n-indiu; cáirig i llías.

There is a half-penalty for trespass in respect of ‘crossing over’; a full trespass-penalty for their trespassing by night. For it is [the rule] in the law of the Feni: a herdsman is to accompany all sorts of farm quadrupeds by day. Hence the maxim ‘a herdsman in clear light is the guardian of a cow’. They are to be shut up in a cow-pen during the night. If it be pigs, they are to spend the night in a sty; if it be cows, let them be in a cow-stronghold; horses in a proper fetter or in a paddock; sheep in a fold.²⁷⁵

There is a distinction drawn between leaping trespass that occurs during the day, when a herdsman is expected to guard the animals, and overnight trespass, ‘for every lying down’ that

²⁷⁴ *CIH* 69.5 = *BCom*, § 7; though this could refer to the offences the fines penalized, see *smachta mruigrecht* (breaches of land law), *CG*, 2.37-8; 100.

²⁷⁵ *CIH* 72.4-13 = *BCom*, § 17.

continues after nightfall, where the animals are meant to be kept inside.²⁷⁶ Both payments required are again referred to as *caithig* here, since both times a person was responsible if he neglected his duties, during the day, to guard, at night, to shut them in. Kelly points to a reference that yet again, strengthens the argument that *caithig* are strongly associated with human neglect. Therein, a farmer observes his own livestock on the neighbour's land but does not act upon it, proving total negligence on his part. This failure renders him guilty of *aircsiu* (looking on) and turns the trespass into the more serious classification of a 'human offence', entailing the heavier penalty of *duinechaithig* (human penalty).²⁷⁷ But our paragraph in *Bretha Comaithchesa* does not mention the *tairgille*. To the contrary, earlier on it is explicitly stated that:

Smachta tairgilli cach ráithi ... Tréidib míach mittir cach n-etham, míach i n-athlumpaire, lethmíach fri mónai, ar airm. Berae da dartaid ar feis, ar is feis cach lige, cach tarraide, airm acht na deilset, naich tarraide acht tarraide and íar n-aidchi.

The fines of a fore-pledge at every season ... For leaping-trespass every [preserved] field is adjudged at a trio of sacks, a sack for repeatedly cropped pasture, half a sack for rough pasture. You should adjudge two male calves for overnight-trespass, for every lying down, every remaining (?) is overnight-trespass; it is leaping-trespass provided that they have not lain down, and it is not remaining except remaining after nightfall.²⁷⁸

This brings us back to *smacht*-payments in combination with a fore-pledge, in the same situation that elsewhere requires *caithchi*. The term *smachta* also is very difficult and deserves some explaining. It is usually translated 'fine' but takes on the meaning of 'requirements of a particular law', so for instance the *smachta imbi*, which are things required in order to fence, specifically the

²⁷⁶ *CIH* 66.32-66.39 = *BCom*, § 6.

²⁷⁷ *EIF*, 138; *CIH* i 235.29 = *AL* v 464.7-8; cf. *CIH* iii 913.5-6; *CIH* vi 2228.7; *CIH* ii 580.24-5 = *AL* iv 146.16-17.

²⁷⁸ *CIH* 66.32-66.39 = *BCom*, § 6.

tools.²⁷⁹ Therefore, *smacht* need not refer to the fine only but to the duties to be fulfilled under a specific law, in order not to become liable to a fine. In this sense, the pledge is then not exclusively given to secure the payment of the *smacht* but in order to compel a person to fulfil what was required of him. Charles-Edwards suggests that ‘this raises the possibility that one reason why *smacht* is relatively common in tracts to do with the law of neighbourhood, *Bretha Comaithchesa* and also *Bechbretha*, is that *comaithches* is a legal regime to which the neighbours agree.’²⁸⁰ In support of this argument, Thurneysen makes some important remarks on a paragraph in *Gúbretha Caratniad*.

‘Rucus airtin iairnn i ngell.’ – ‘Ba gō.’ – ‘Ba deith *bír*, ar ba gell fri fiach mbrugridit *her* brugib.’

‘I decided: Iron is to be accepted as pledge.’ – ‘You were wrong.’ – ‘It was lawful, because it was a pledge for a debt if holdings are being extended.’²⁸¹

Thurneysen relates this evidence to § 5 of *Bretha Comaithchesa* that lists the iron items given in pledge:

Cair: cateat smachta imbi 7 comaithcheso? Smachta imbi: rámae fri clais, socc fri coraid, bíáil fri dairimbe, fidbae fri felmaid. Dairt fair cacha treise nad imchoi rain de ro-seola fair.

Query: what are the requirements of fencing and neighbourhood? The requirements of fencing: a spade for a ditch, a crow-bar for a stone wall, an axe for an oak-fence, a bill-hook for a bare fence. A calf is the fine for every three day period during which he has not fenced a part of it which may be outstanding to him.²⁸²

²⁷⁹ Personal correspondence with Prof. Charles-Edwards; *DIL*: *smacht*.

²⁸⁰ Personal correspondence with Prof. Charles-Edwards.

²⁸¹ *IR* III: *Gúbretha Caratniad*, § 8, 314-6: ‘Ich entschied: Eisen ist als Unterpfang anzunehmen.’ – ‘Du entschiedest falsch’ usw. – ‘Ich tat es sachgemäß, denn es war ein Unterpfang für eine Schuld bei Ausdehnung von Ländereien.’; *DIL*: *brugridither* (?), *bruig*.

²⁸² *CIH* 65.12-13 & 65.19-20 = *BCom*, § 5; see the discussion on walls and fences in Kelly, *EIF*, 372-78, and therein for the term *felm/felmae* ‘bare fence’, 374-5; *IR* III: *Gúbretha Caratniad*, Thurneysen’s comm. § 8, 315-6.

There are four different boundary demarcations mentioned and for each one of them a specific chattel is required. According to Thurneysen, the purpose of the pledge in *Bretha Comaithchesa* was to compel the neighbour to perform his work on the next day and so to fulfil his *smachta*. He also refers to commentary that would suggest the iron tool from one neighbour is kept by the other overnight as a pledge that he would turn up and perform his duties the next morning, or else, his pledge can be used by others.²⁸³ Therefore, if someone fails to appear for fencing, his absence allows use of the pledged iron tools by other neighbours. In *Gúbretha Caratniad* the pledge secures the payment of the *dairt*-heifer if he fails to build his fence, and this is why this text refers to it as ‘debt’. What is particularly remarkable about this passage is that it mentions pledges consisting of iron, a material which is elsewhere excluded for pledging due to its susceptibility to rust and diminishment in quality. The allowance of these items is in line with *BFG* that mentions plough irons and tillage irons as pledges. This text counts these chattels among ‘the most difficult’, because they should only be given in relation to the farming community, more specifically the *bóaire* and *óaire*.²⁸⁴ It may well be the case that the issue of durability is not of great relevance if the pledges were used to compel the neighbour to build his fence, an endeavour that, according to *Bretha Comaithchesa* would be completed within the period of one month. The fore-pledge in *comaithches* would then ensure that the neighbours properly build their fences, or forfeit their exclusive right to use, pushing the exchange of the *tairgille* earlier than previously assumed and at the point of property sharing.

²⁸³ *ibid.* Thurneysen’s comm. § 8, 315-316; referring to *CIH*66.12 = comm. on *BCom*, § 5.

²⁸⁴ *CIH*467.6-12 = *BFG*, § 15.

4.3. The *tairgille* in *Bechbretha*

The *tairgille* in *Bechbretha* serves a slightly different purpose and is temporary. When a neighbour became a bee-keeper, he gave a fore-pledge to his four nearest neighbours, in return for which he had immunity for a period of three years in respect of bee trespasses. During this time, he was protected against claims for injuries, such as stings,²⁸⁵ and his bees were protected against being killed by the neighbours.²⁸⁶ This security operated on the condition that in the fourth year, a swarm was given to the first three neighbours, with the fourth neighbour gaining entitlement in the fifth year.²⁸⁷ The neighbours now had bees of their own, and the process just described was now commenced by them as well, each giving a *tairgille* in turn. The trespassing of bees would eventually cancel each other out once everyone had a hive of his own.

The *tairgille* served as a security that the swarms were, indeed, handed over in the fourth and fifth years respectively, following a three year neighbourly tolerance.²⁸⁸ There is some indication that honey may be paid to the neighbour for injuries sustained during that time.²⁸⁹ It is assumed by the editors that the *tairgille* is returned at this point, since it served its purpose. The swarms owed to the neighbours are identified as the *smachta* by the editors.²⁹⁰ Therefore, *Bechbretha* envisages bee trespass to be regulated by a combination of *tairgille* and *smachta*. Once the obligation was fulfilled by payment in the form of a swarm, the fore-pledge has fulfilled its purpose. The use of *smachta* makes perfect sense since bees cannot be prevented from

²⁸⁵ *IR III: Gúbretha Caratniad*, § 12, 319-20.

²⁸⁶ *BB*, Appendix 6: *Athgabál bech*, 189.

²⁸⁷ *ibid.* §§ 5, 9, 10, 19, 22.

²⁸⁸ *ibid.* § 7.

²⁸⁹ *ibid.* Appendix 5: *Caithchi bech*, 187.

²⁹⁰ *ibid.* notes on § 26, 118.

committing regular trespasses. Thus, human neglect does not have a place in the choice of regulation. The question, however, is: would a fore-pledge be appropriate?

In § 26 of *Bechbretha* we encounter a neighbour who does not want to become an apiarist and refuses to accept a swarm. The editors suggest that he keeps the fore-pledge and it becomes his permanent possession. In this way, it would also ‘cease to be a guarantee of future *smachta* and would become, instead, the property of the neighbour’.²⁹¹

Cip dune lasimb asu tairgille n-airiu oldáte smachta; is foma do cach recht oca mbiat.

Whoever should think a fore-pledge in respect of them more convenient than fines, the choice (?) belongs to the person on whose land they are.²⁹²

The question whether a fore-pledge was at all appropriate to secure payments for bee-trespasses is also what Conn had in mind when he challenged the legendary judge Caratnia on this issue, who, as expected, proved him wrong, deeming a *tairgille* appropriate:

‘Rucus tairgilli ar bechaib.’ – Ba gō.’ – ‘[Ba] deith *bir*, ar ní fulaing nech na déolaith diarailiú.’

‘I decided: a fore-pledge (for the payment of grazing on neighbouring pasture) [is required] in respect of bees.’ – ‘You were wrong’. – ‘It was lawful, because no one puts up with (has to put up with) someone else getting something for nothing.’²⁹³

The editors of *Bechbretha* concede that ‘if the distinction between a *caithig*, in the sense of a penalty for neglect or an offence committed by a person, and *smacht*, in the sense of a penalty for trespass when personal neglect is not immediately responsible, is not always maintained in the texts’ then ‘it is not surprising that further distinctions concerning the need for a *tairgille* are not

²⁹¹ *ibid.* notes on § 26, 118.

²⁹² *ibid.* § 26, 64-5.

²⁹³ *IR III: Gúbretha Caratniad*, § 12, 319-20: ‘Ich entschied: Für Bienen ist ein *tairgille* (Unterpfand für die Vergütung für das Weiden auf dem Nachbarland) zu stellen.’ – ‘Du entschiedest falsch’ usw. – ‘Ich tat es sachgemäß, denn keiner unterhält (füttert) dem andern etwas umsonst.’; amendment to *diarailiú*.

maintained either'.²⁹⁴ There appears, indeed, to be a great flux in how this issue is tackled and no legal consensus can be detected, even within a single text. Concerns over the quality of the land that the trespass was committed on and the extent of the damage were as relevant as the type of animal trespassing, the time of day and the season. This lack of homogeneity may reflect the different practices in various geographical areas of Ireland, with different types of fences being required in specific locations.²⁹⁵

4.4. Relation of the *tairgille* to *caithchi* or *smachta*

The question that remains is, independent of whether *caithchi* or *smachta* were paid, what is the relation of these penalties to the *tairgille*? MacNeill, in his translation of the status tract *Críth Gablach* notes that the following passage may represent an example for the forfeiture of a fore-pledge.

Mleth díchmairc i mmuiliunn mrugfír, cóic séoit 7 dílse mine melar díchmairc, 7 lóg a enech dia toichne[a] a dá[i]m. Diam a bronnad aineclann cháich as a aí 7 aithgein la tairgell mlethe(i).

Grinding without leave in the mill of a 'landman', five chattels and forfeiture of the meal that is ground without permission, and honourprice if his guests have to fast. If there be damage, honourprice of each man whose property it is, and restitution with (forfeiture of) the forepledge of grinding.²⁹⁶

This passage deals with the issue of a neighbour grinding in the mill of another without leave, for which he had to pay five *séoit* and forfeit the ground cereal. If there was additional damage, the honour-price of the mill-owner was due as well as restitution and the forfeiture of *tairgell mlethe* (fore-pledge for grinding). However, the text *Coibnes Uisci Thairidne* (Kinship of Conducted

²⁹⁴ *ibid.* notes on § 24, 114.

²⁹⁵ For a discussion of the types of walls and fences see: *EIF*, 372-78.

²⁹⁶ *CG*, 18.238-10.241; trans. MacNeill, 'Ancient Irish Law', § 91, 293.

Water), which deals with rights to a watercourse to power a mill is distinctive in not including a fore-pledge at all.²⁹⁷ Charles-Edwards suggests a more convincing solution for this situation. An offender has damaged the mill having used it without permission. He does not appear to be part of a group entitled to use the mill and would not have had occasion to give a fore-pledge. The *tairgell mlethe* may be what he would have given if he had been a member of the group. This seems more likely than that he was part of the group and used the mill on a day other than his own.²⁹⁸

Kelly also points to the option that in some cases the *tairgille* can become forfeit for a trespass.²⁹⁹

The relevant passage reads:

Smacht petae cuirre 7 circe 7 petae n-uis 7 petae maic thíre 7 petae senéoin 7 petae sinnaig. Tairgille n-airib. It é insin a caithchi.

A fine for a domesticated heron and a hen, and a domesticated deer and a domesticated wolf and a domesticated hawk (?) and a domesticated fox. A forepledge for them. Those are their trespass-penalties.³⁰⁰

This paragraph is ambiguous, because it combines all three options: *caithchi* penalties, *smacht* fines and the *tairgille*. The *tairgille* is defined as the *smacht* for *caithchi*. The passage suggests, albeit vaguely, that a fore-pledge may be given instead of the fine. This is what led Kelly to suggest it is the *tairgille* that becomes forfeit. If this was so, and the *tairgille* became forfeit, what happened next? To pursue this line of thought, we have to explore the payments in more detail.

The payments in *Bretha Comaithchesa* did not depend on status. This is a vital exception to virtually all other early Irish legal tracts, where status is an important component in the degree

²⁹⁷ Binchy, 'Coibnes uisci thairidne', *Ériu* 17 (1955), 52-85.

²⁹⁸ Personal correspondence with Prof. Charles-Edwards.

²⁹⁹ *EIF*, 135; *CIH*73.19-20 & *CIH*197.2 = *BCom*, § 22.

³⁰⁰ *CIH*73.19-20 = *BCom*, § 22.

of payment incurred. The combined penalty payments did, however, vary depending on the circumstances of the trespass: (a) the time of year, summer or winter,³⁰¹ (b) the type of land on which the trespass was made, a preserved field, a cropped pasture, a rough pasture, etc.,³⁰² and (c) the extent of damage caused, grazing trespass or rooting up of land.³⁰³ Charles-Edwards and Kelly note that Binchy pointed to the possibility that these payments may be subtracted from the *tairgille*.³⁰⁴ In commentary added by a later scribe on the law of distraint the *tairgille* can fluctuate in relation to what it secures. The paragraphs infer that the fore-pledge goes through four stages during its use and secures different amounts of *díre*-payment:

Cetharda in tairgill: lan n-diri ar di laithe dec, leth diri ar se laithe, trian ndiri ar ceithri laithib, ocus cethruimi diri ar tri laithe.

The fore-pledge has four stages: (it is equivalent to) full *díre* at the end of twelve days, (to) half *díre* at the end of six days, (to) third *díre* at the end of four days, and (to) fourth *díre* at the end of three days.³⁰⁵

Unfortunately, there is no early evidence to corroborate this statement. If we assume that the fore-pledge could become forfeit, and the evidence does lean towards this outcome, would the neighbour have to provide a new one in order to remain in *comaitches*? A convenient possibility would be that the fore-pledge in neighbourhood law was a standing pledge, being handed over after an offence had occurred, but having been in force from the beginning of the relationship.

³⁰¹ *CIH*71.22-23 = *BCom*, § 15.

³⁰² *CIH*70.3-6 = *BCom*, § 10.

³⁰³ *CIH* 72.1-4 = *BCom*, § 16, concerning the cumbersome issue of trespassing pigs. Pigs are known to cause considerable damage to land and it is for this reason that they are counted among the ‘impossible’ or undesirable things that can be given in pledge in *BFG*, § 34.

³⁰⁴ *BB*, notes on § 3, 93.

³⁰⁵ *CIH*411.16-17 = *AL* i 274.5 comm. on distraint; *DIL*: *tairgille*.

4.5. The pledges in sick-maintenance including *aurgell & frithgell*

Another special context in which pledges are used is during *folog n-othrusa* (sick-maintenance; often simply *othrus*). This procedure was not simple nursing of a sick man but covered a whole range of obligations that were contractually agreed and bound by pledges. When a person was illegally injured, deliberately or unintentionally, and did not immediately die, his kindred would attend to his wounds. Provided the injured man survived the following nine days, a physician was called to examine him and evaluate his chance for survival. If he was judged to have a good chance at recovery but that he was in need of further nursing, sick-maintenance had to be offered by his offender. If the injured man died before *othrus* could be arranged, *éraig* was due; if he succumbed to his injury after *othrus* was arranged, *crólige mbáis* (penalty for mortal blood-lying) was due, which was subtracted from the *éraig*.³⁰⁶ The injured person would be transferred to the home of a kinsman of the offender, in the company of his attendants and in the presence of three lords.³⁰⁷ Based on his status, he would receive refectation, be set up with a sick-bed and be nursed back to health. To this end, the injurer has to organise the care, including the services of a physician. Furthermore, a substitute would be provided to perform the work in his stead for as long as he was on sick-maintenance. Failure to comply with the requirements entailed heavy penalties.

Sick-maintenance was agreed on with a contract and the pledges we encounter, therefore, are contractual pledges and secure obligations that had to be performed during nursing. Despite *folog n-othrusa* being established by contract, we do not encounter the usual contractual sureties

³⁰⁶ Binchy, 'Sick-Maintenance', 95; *BCró*, 1-77 (§§ 1-66); *GEIL*, 129-131.

³⁰⁷ Binchy, 'Sick-Maintenance', 105: a gloss suggests these lords to be the head of the kin, the lord of clientship and a worthy lord of acknowledgement, for whom Binchy suggests the lord of superior testimony, the *aire forgill*.

in *Bretha Crólige*, the *naidm* (enforcing surety) and the *ráth* (paying surety). However, an important interpolation dealing with *othrus* occurs in *Críth Gablach*, which was inserted at a later point, ‘although most of it is based on ancient materials’,³⁰⁸ does mention the *aitire* whose role it was to guarantee that the offender observed the rules of sick-maintenance but there are *rátha* as well.³⁰⁹

Tonga[i]r fri corp γ anmain, γ doté(i)t aitire ar ffer feras in fuil i córus [n-]othrusa, i mboin. Atnaig tar fót crúach i n-ardnemed di[a] díte, dieim ar díantóla[e] slúraig; i n-aurgell tar[a] ési cen lepaíd aracuili liaig, i tógud lego co derosc (i)n-a[u]rsláine in na íarsláini, i sslán líno leptha, a snádud co forus túaithe. Cateat a fólta córai ó chách fris[s]a cuirther aitire? Frepuith réir lego. Ógfritecht for rátha mani éta nech a frepaid ó fí[u]r chinad, combi ar écin dobongar; is co n-ógdíriu γ eneclainn fo míad adgairther cid tre etged rop othar.

An oath is sworn by body and soul, and a hostage[-surety] is given (lit. goes) on behalf of the man who sheds the blood, for fulfilment of the law (lit. in the law) of sick-maintenance to the value of (lit. in) a cow. (The wounder) conveys (the wounded man) over gory sod into a high sanctuary with protection that protects against sudden wave of throng. He gives additional pledge afterwards against a bed that a physician forbids, (and) to provide a physician until final cure, in fore-health, in after-health. It is fulfilment (of the due) of the carriers (lit. number) of the bed, to protect them as far as the station of the *túath*. What are the proper provisions due from everyone for which a hostage is given to obey the physician’s decision? Full attendance secured upon guarantors [paying sureties], unless one obtain his care from the offender – and by force it is exacted. It is along with full *díre* and honourprice that the claim is sued, even though suit be made through a tongueless person.³¹⁰

To the contrary, as Binchy points out, *Bretha Crólige* never mentions a personal surety.³¹¹

Moreover, the mention of enforcement of obligations by force (*combi ar écin dobongar*) in *Críth Gablach* suggests the *naidm*.³¹² The *aitire*-surety in combination with pledges is not a common

³⁰⁸ *CG*, 8.52-62 = Binchy, ‘Sick-Maintenance’, § 3, 82; also see n. 1, 83.

³⁰⁹ *CG*, 8.52, 8.58; 8.59.

³¹⁰ *CG*, 8.52-62, trans. MacNeill, ‘Ancient Irish Law’, § 71 and part of § 72, p. 285, [my addition], also see his note on this passage, p. 285, n. 1; cf. Binchy, ‘Sick-Maintenance’, p. 83-85.

³¹¹ Binchy, ‘Sick-Maintenance’, n. 1, 104.

³¹² *CG*, 8.52, 8.58; 8.59.

occurrence in the laws and the reason for this combination is not obvious. Furthermore, the surety once is said to pay on the offender's behalf if he evades his duties and thus, would serve as an additional security driving enforcement and possibly overseeing the entire procedure.³¹³ I assume that the time-sensitive case of sick-maintenance favoured a readily available *aitire*. Putting him at disposal would be a sign of ceding power, a desirable move following an inflicted injury prone to cause tensions under any circumstances. This would align with the interesting idea proposed by Binchy who saw the likely context of *othrus* as feud: 'the victim seems to have been injured in the course of a feud'.³¹⁴ It is worth noting the figure of the *aitire chairdi*, the hostage-surety of an inter-territorial treaty, who may be an heir-apparent.³¹⁵ If we visualize a treaty following a decisive victory, within the territory of the defeated king, the duty of *othrus* for those wounded on the victor's side might have been imposed on the defeated.³¹⁶ A *cairde* was guaranteed through the *aitire* and this context may explain why we find this surety associated with *othrus*.³¹⁷

Bretha Crólige enumerates three pledges and counter-pledges, revealing that pledges are not only given by one party but are mutually exchanged. The reason for this is that both sides to the contract of sick-maintenance have to fulfil different duties, the fulfilment of each being guaranteed with a pledge. Second, the pledges are given in advance, similar to the *tairgille* in

³¹³ Binchy, 'Sick-Maintenance', 83-85, n. f, 85: Binchy suggests that the *aitire* may only pay the one-third automatic increase caused by the offender's failure to agree to sick-maintenance but the surety would distraint the offender for the debt as well as his own compensation.

³¹⁴ *ibid.* 106.

³¹⁵ Bemmer 'The Hostage-Surety and Inter-territorial Alliances', *Historical Research* (forthcoming).

³¹⁶ Personal correspondence with Prof. Charles-Edwards; note the *dieim ar díantóla[e] slúaig* (protects against a sudden wave of throng) in *CG*, 8.54.; trans. MacNeill, 'Ancient Irish Law', § 70, 285.

³¹⁷ Translation into German: *Slán n-aitire cairde*, ed. Thurneysen, *Bürgschaft*, 32-33.

neighbourhood law. Sick-maintenance is the consequence of a party having been injured but pledging occurs immediately after the contract for nursing has been agreed and secures various activities that are to be undertaken during the period of sick-maintenance and at its conclusion. *Bretha Crólige* invariably uses the term *gell* for a pledge given from the offender to the injured man, but our passage in *Críth Gablach* dealing with sick-maintenance introduces the term *airgell*, also *aurgell* (fore-pledge), defined by Binchy as ‘a *gell* given in advance as security for the proper performance of certain duties, eg. in connection with sick-maintenance’.³¹⁸ The only other reference to this term occurs in *Bretha Déin Chécht* (Judgements of Dían Cécht), a law text that deals with the fines due for illegal injuries and their respective shares for the physician, Dían Cécht being a mythological physician.³¹⁹ Therein, it is glossed as *usalgell* (noble pledge), and it is the pledge given to the physician.³²⁰ The *airgell*, thus, is undoubtedly one of the pledges given in sick-maintenance and we have reason to believe that it is the term used for the pledge associated with the physician. It is the physician’s duty to provide a verdict at the very end of sick-maintenance on the injured person’s state of health. If he finds him to be cured, the patient is restored to his own home. A pledge guarantees this restoration. It covers the longest time period in the procedure and this may be the reason why it is sometimes referred to as ‘fore-pledge’. Returning to *Bretha Crólige*, the following reference in the main text discusses the pledges in sick-maintenance:

Frisgnáther gellaib. co treoda teit: geall foluic, *gell* fritgnama, *gell* taisic iar frepaid fosisedar derosc. cach gell cona [f]ritgill do di[a] nascmaí coir.

³¹⁸ *CG*, 8.55; 95.

³¹⁹ *Bretha Déin Chécht*, ed. Binchy, *Ériu* 20 (1966), § 24, 36.

³²⁰ *ibid.* § 24, gloss 12, 56; *usalgell* is a standard etymological gloss implying progression *ar* > *ér* > *úasal* (cf. *DIL* s.v. 1 *ér*), personal correspondence with Prof. Breatnach.

There is a service by pledges; it extends to three things: a pledge for [proper] maintenance, a pledge for service [to be supplied in the invalid's stead], a pledge for restoration after cure which a [leech's] verdict acknowledges. Every pledge [shall be] with its counter-pledge to him [the defendant] on the basis of which he attains [his] right.³²¹

The three pledges are: (1) *gell foluic* (pledge of maintenance), (2) *gell fritgnama* (pledge for service), and (3) *gell taisic* (pledge for restoration after cure). The first pledge, *gell foluic* is intended to guarantee the standard of nursing. This entails that the food adequate to the victim's status will be provided and that all detailed aspects for his class of person are executed. The second pledge, *gell fritgnama* is given as a guarantee that a substitute will be provided to undertake the work that the injured party cannot do while being nursed. Certain high status classes of persons are excluded from sick-maintenance for this very reason, because no one could possibly fulfil their duties in their stead. The third pledge, *gell taisic* guarantees that the injured party will be returned home after cure. Glossators assign a value of half the victim's honour-price (or a quarter of seven *cumala*) to the pledge of maintenance, full honour-price to the pledge for service by a substitute, and seven *cumala* to the pledge of restoration.³²² The three pledges that the injured man's kin had to provide on his behalf to the offender are each referred to as *frithgell* (counter-pledge).³²³

What counter-pledges consist of is not enumerated in the text but is the subject of several glosses that detail their purposes. The first *frithgell* is given the value of half the honour-price and guarantees that the injured man will not demand refection exceeding the value that he is entitled to according to his status. One gloss implies that he may initiate a legal fast in order to compel a

³²¹ *BCró*, § 60, 46-49.

³²² *ibid.* § 56, gloss 5, 54-55; § 61, gloss 25, 48-51; Binchy, 'Sick-Maintenance', 104.

³²³ Cf. *GOI* § 839.

higher refection, which is a procedure employed against high status individuals to force their compliance. The second counter-pledge is worth seven *cumala* and ensures that the substitute provided to fulfil the injured man's work in the latter's absence is safely returned home. It is surely telling that the value of the pledge is the same as the fixed penalty for homicide. The third counter-pledge is given a value of full honour-price in glosses and ensures that the injured person returns home after being cured and does not deliberately remain on sick-maintenance beyond necessity.³²⁴

The pledges exchanged in sick-maintenance stand out since they represent the only pledges that have to be matched by counter-pledges by the opposing party. It is the context in which they are provided that motivates this operation. Just as the offending party has to provide security that he will comply with all requirements of the contract of *folog n-othrusa*, so does the injured person's kindred have to guarantee that they will not exploit this provision and restore his substitute at the conclusion of maintenance. This way of exchanging pledges demonstrates that each party stood in debt to the other, when the first one fulfilled his due, the other became liable to fulfil theirs also. The pledges are given values in the glosses that are of some interest. The value of the pledge is not tied to the debt, since the value of the respective performance cannot be assigned an absolute worth. The only exception are the seven *cumala* for the return of the substitute, which is the price of a freeman and thus, the debt that would be incurred if he was not returned, if he became forfeit, or was killed. To the contrary, the pledge value was tied to the status of the person and represented the honour-price of the offender and the injured man respectively. That means

³²⁴ *BCró*, § 56, gloss 5, 54-55; § 61, gloss 25, 48-51; Binchy, 'Sick-Maintenance', 104.

that for instance, if a person did not return home after being fully cured, he would lose his honour-price. If the offender did not provide the injured man with appropriate refection, one-seventh of the wergild would become due for every night of evasion, increasing the pledge value to full *díre* at the end of seven days.³²⁵

The procedure of *othrus* evolved over time, as evident from a passage discussed by Binchy:

Ferrdar a notrusa uile acht a ferg; folongar *othrus eitgid*, ni folungur ferg.

All their sick-maintenances are provided, save [those] resulting from anger. Sick-maintenance of [unintentional injury inflicted through] wantonness is borne, [but that which results from] anger is not borne.³²⁶

The paragraph infers that a person injured in anger, namely with intent does not receive *othrus*, for only those injured through wantonness, that is unintentionally are entitled to sick-maintenance. Binchy held it that ‘a law of this kind makes *othrus* the exception rather than the rule, for the vast majority of injuries would come under the heading of wilful wrong’.³²⁷ To the contrary, McLeod holds that most injuries are not inflicted intentionally and argues that early Irish law shows a sophisticated idea of cause and effect, separating intention, negligence, utility and folly.³²⁸ Binchy takes the above paragraph to show that the regulations therein must be much later compared to those elaborated in *Bretha Crólige* and sees in it an indication that *othrus* in the classical sense was superseded by a newer system with more exceptions, and a tendency ‘to abandon in every case the older institution in favour of *tincisin*’, interpreted by Binchy as ‘*othrus*

³²⁵ *BCró*, § 61, glosses, 48-51.

³²⁶ *ibid.* 89-90; *Bretha Éitgid*, *CIH* 1217.5, also 304.18, 1624.4.

³²⁷ *ibid.* 124.

³²⁸ McLeod, ‘When did removal on sick-maintenance cease?’, paper presented at: One day law conference in honour of Professor Fergus Kelly, Dublin Institute for Advanced Studies, 28th June 2014, quoting *Bretha Éitgid*, *CIH* 1066.16-23; It may be questioned whether the argument that most injuries are not inflicted intentionally was true for seventh century Ireland as it is nowadays in modern developed societies.

provided by the defendant at the victim's own house'.³²⁹ Therefore, we have a transitional stage between *othrus* proper and the substitution of it through a fixed penalty, where the victim receives *othrus* but remains in his own home. Eventually, a fixed payment superseded all earlier regulations.

In other medieval legal systems the standard procedure was for the offender to pay the expenses of sick-maintenance while the injured party would remain in his own house. This was initially not the case in early Irish law, and the law texts preserve 'the relics of a more primitive system' that entailed personal care instead of a physician's fee.³³⁰ Even in Irish law, certain people were always excluded from removal, for the benefit of the victim or the defendant and received a payment instead. McLeod has recently argued that the value of sick-maintenance was based on the value of the body-fine for the respective injury. The more severe the injury was, the higher the amount for the care. The benefits of *dingbáil* (removal) had to be weighed against the value of the fee. McLeod worked out that for a general bed-wound, a value of 12 *séts* is given by the commentaries on nursing wounds and body-fine, which correspond precisely to the 12 *séts* given in *Cáin Adomnáin* and fragments of *Cáin Phátraic*, going against the 7 *séts* in the *Senchas Már*. He concludes that this increase in body-fine immediately benefitted those who were usually not removed, namely nobles, clerics, women and children, mirroring the same classes of persons which the ecclesiastical *cáin*-legislations were meant to protect. Therefore, he regards the removal on sick-maintenance as ceasing very soon after *Cáin Adomnán* was promulgated in AD 697 (*Cáin Phátraic* being later, AD 737), simply because it was too profitable to take the payment

³²⁹ Binchy, 'Sick-Maintenance', 125-6.

³³⁰ *ibid.* 78.

and by consequence, no one opted for removal any longer.³³¹ The system of multiple, mutually exchanged pledges would not fit these changed circumstances but a single contractual pledge to secure the payment might.

4.6. The pledges in *cáin*-legislation

There are some interesting references to pledges in the two surviving Old Irish texts that deal with ecclesiastical legislation, *Cáin Domnaig* (The Law of Sunday) and *Cáin Adomnáin* (The Law of Adomnán).³³² What both law texts have in common is that they use a combination of *gella* (pledges) and *aitiri* (hostage-sureties) to enforce breaches of *Cáin Adomnáin* and *Cáin Domnaig*.

Turning first to the chronologically earlier law, we read the following in *Cáin Adomnáin*:

It é gella na cānu sǣ: trīan gild di humui nō argit fo mes cacha crīchiu a tōthucht cacha caingne. Gellar trisi, breth ar cōicthi, híc ar dechmaid di caingnib olchenæ. Gell a ochtaib, breth ar trisi, híc ar cōicthi isin caingin se.

These are the pledges of this *Cáin*: a one-third pledge in bronze or silver according to the estimation of each territory from the entitlement of every case. The pledge before [the end of] the three-day period, judgement before [the end of] the five-day period, payment before [the end of] the ten-day period in all other cases. The pledge immediately, judgement before [the end of] the three-day period, payment before [the end of] the five-day period in this case.³³³

First of all, we have precious metal that the pledge needs to consist of which is of characteristically high value for violations against high status individuals or entities, such as the Church would certainly be, namely bronze or silver. This has to account for one-third of the full pledge value.

³³¹ McLeod, 'When did removal on sick-maintenance cease?'

³³² *Cáin Domnaig*, ed. Hull, 151-177; *Cáin Adomnáin: An Old-Irish Treatise on the law of Adamnan*, ed. K. Meyer, (Oxford, 1905); M. Ní Dhonnchadha, 'The Law of Adomnán: A Translation', in T. O'Loughlin (ed.), *Adomnán at Birr, AD 697* (Dublin, 2001), 53-68.

³³³ *Cáin Adomnáin*, ed. K. Meyer, § 38, 26-27; translation: M. Ní Dhonnchadha, 'The Law of Adomnán: A Translation', 53-68.

Regarding the two periods of pledging, the first refers to other legislation, and the second, which is speeded up to half the time, to the legislation of *Cáin Adomnáin*. As will be seen below, *Cáin Domnaig* shows a similar temporal shortening.

In order to implement the Law of Sunday, every person in the *túath* was obliged to be ready to act as a person called ‘identifier’, that being a person who observes another breaching the law. If he did not act as identifier, he rendered himself liable for the offence of on-looking, which was punished with the same penalty as if he had himself offended against the Law of Sunday. Therefore, there was a strong incentive to fulfil this executory duty to avoid making oneself guilty by association and suffer the ‘battle of the soul’, described by Adomnán as an oath taken with the recognition that perjury should incur damnation.³³⁴ The identifier has to enforce and drive judgement, and as part of this duty, he is the one who takes pledges from the offender. He also receives a remuneration for fulfilling this duty.

It é a féich .i. cetheóir samaisci la dílsi a thimthaich co nneoch tecmai leiss eterech
7 sét 7 is fiach gaite bís inna muin .i. ocht n-ungi mani dílsigter no mani fácabtar la
nnech ad-[f]íri 7 is cummæ fiach neich ad-chí 7 nad aidbri 7 nad thobaing iarum fri
nech chuilles sóiri in Domnuig.

These are his fines, namely four heifers, together with forfeiture of his apparel along with whatever may happen to be with him, including horse and chattel. The fine for theft is in addition, namely eight ounces, if they are not handed over or if they are not left with the person who acts as identifier; and the fine for someone who looks on and who does not act as identifier and hwo does not thereupon levy is equal to the fine for the person who violates the sanctity of Sunday.³³⁵

When the identifier encountered a breach of *Cáin Domnaig*, the offender was to forfeit his entire apparel, including his garments, his horse, if he had one, and all chattels he was carrying. It is as

³³⁴ *Cáin Domnaig*, ed. Hull, § 10, 170-171; *Vita Sancti Columbae*, eds. Anderson & Anderson, iii.13, 114b, pp.200-1; for other examples cp. *CIH*1151.17; 1410.33; 1414.4.

³³⁵ *Cáin Domnaig*, ed. Hull, part of § 2, 162-163.

if he was stripped down, being judged metaphorically and to some degree actually naked before the eyes of God. All of these belongings were left with the identifier. In addition, he had to pay four heifers as a fine for the violation. If the accused tried to abscond and thus refused to forfeit his apparel, he was liable to the fine for theft in addition to it, that being another eight ounces.³³⁶

The fine was apportioned as follows:

Leth do neuch ad-[f]íri 7 dod-boing; leth n-aill do flaithib 7 muirechaib 7 sechtmath do aitirib óadib uilib.

A half [goes] to the person who acts as identifier and who levies it; the other half [goes] to lords and *muirig*, and a seventh [goes] to the hostage-sureties from all of them.³³⁷

It becomes evident that the enforcement of the *cáin* relies strongly on people acting as identifiers but also invokes the authority of *muirig*. The term *muire* is very badly attested but associated with a high status military leader. The *aitiri chána* are also often high status individuals, particularly so if we call as witness the guarantor list attached to *Cáin Adomnáin*, which features multiple ecclesiastical authorities and Irish kings.³³⁸ A law like *Cáin Domnaig* requires the sanctity of authoritative figures from both ecclesiastical and royal spheres, even evoking Patrick himself, in order to achieve a successful implementation:

Gell n-unge trá di maigin i rréir fir ad-[f]íri mad inríarthæ impe. Manip túalaing brithe fair, fa-naisc fria réir fadeisin co n-aitsichu chlérig no brithemon túaithe co n-immitech di maigin i réir fir ad-[f]íri bes gaíthem 7 bes chráibdigem bes i cech túaith no ardflatho for-bé tóatha 7 is di aitiri chána Pátric do-bongatar féich inna cána-so in Domnuig.

If he is capable of imposing his wishes concerning it, a pledge consisting of an ounce [is given] then immediately at the order of the man who acts as identifier. If he is incapable of passing judgement thereon, he binds him at his own recognizance,

³³⁶ *ibid.* of § 2, 162-163.

³³⁷ *ibid.* § 2, 162-163, I have amended the translation, leaving the difficult term *muire* untranslated, which Hull renders ‘high dignitaries’ and changed ‘sureties’ to ‘hostage-sureties’.

³³⁸ M. Ni Dhonnchadha, ‘The Guarantor List of Cain Adamnain, 697’, *Peritia* 1 (1982), 178-215.

together with the affirmation (?) of a cleric or a lay judge who is wisest and most pious in each tribe or of a noble lord who rules over tribes, and departure [takes place] on the spot according to the order of the man who acts as identifier. And it is on the basis of a surety of the Law of Patrick that the fines of this Law of Sunday are levied.³³⁹

It would appear that the offender against *Cáin Domnaig* has to give a pledge with the value of one ounce to the identifier. The value of one ounce is regularly encountered in *Bretha im Fúillemu Gell* and is the value known to represent the minimum requirement for a pledge to be a *lángille* (full pledge).³⁴⁰ I take this to imply that the offender is aware of his guilt and accepts the charge, a sentiment represented by the conveyance of the pledge, referring to the first case in *Cáin Adomnáin*. The identifier, then, can pass judgement on him immediately.

If the guilty party does not comply, the identifier has to gather assistance from a cleric, a lay judge, a sage (?), or a noble overlord. At this point, and since there is no pledge being conveyed, the *aitire* comes into play. This hostage-surety is identified as *aitire chána Phátraic* (hostage-surety of the *cáin*-law of Patrick), evoking Patrick's authority for the enforcement of the Law of Sunday and referring back to the earlier *Cáin Phátraic* already mentioned. Depending on the time of the offence, the surety was detained and it would appear that the identifier maintained him until a judgement was possible. If the surety was seized before midday, he was held immediately, unless a pledge was offered. If the surety was seized after midday, the offender likewise had the opportunity to give a pledge, but this was postponed until the next day if the offender was not to be found.³⁴¹ If the offender then chose to give a pledge, having the pressure of the surety's presence added to his strenuous situation, judgement was passed immediately or, at the latest,

³³⁹ *Cáin Domnaig*, ed. Hull, § 3, 164-165.

³⁴⁰ *CIH*476.4-9 = *BFG*, § 63.

³⁴¹ *Cáin Domnaig*, ed. Hull, § 4, 164-165.

three days thereafter. This context explains the second case in *Cáin Adomnáin*. If the claim was challenged, the identifier had to put forward oral evidence, and was given a three-day period to produce witnesses. It seems that he had to give a full pledge; here, however, this full pledge is given the value of two ounces, ‘on the basis of which judgement is delivered’.³⁴² Thus, the pledge was higher in value than the pledge required from the accused, but this only applied if the accusation was challenged in the first place. For comparison, the pledge of a judge in a legal case had a value of five ounces, serving as a guarantee that his verdict may be challenged by a dissatisfied party.³⁴³ Rebuttal of a case including witnesses had to happen before the fifth day and, if proven guilty, the fines had to be paid before the tenth day. Apparently, the identifier had to be maintained by the accused until the case was settled.

Testimony to the Law of Sunday was limited to the word of ‘an innocent youth without prompting’, and the evidence of ‘an honourable person without concealment’.³⁴⁴ The refusal to take an oath without immunity from *cath anmæ* (the battle of the soul) also disqualified a witness. Denial could only succeed if the defendant gave his oath together with his father and his mother, or in case of their death, brother and uncle, or in the absence of immediate family, two *bóaires*, the *aire déssa*, and the immediate superior of the accused.³⁴⁵

If the accused absconded, the *aitire* had to provide maintenance to the identifier and also had to pledge and make payment in the defendant’s stead. As is characteristic for his office, his indemnification entailed doubling of anything that he had to provide, including pledge, refection,

³⁴² *ibid.* § 5, 164-167.

³⁴³ *CIH* 1968.31; see also *GEIL*, 166.

³⁴⁴ *Cáin Domnaig*, ed. Hull, § 4, 164-165.

³⁴⁵ *ibid.* § 5, 164-167.

and payment. The *aitiri* themselves may abscond, leading to a *cumal* worth eight ounces being levied from among their properties. This is the same value previously given for theft. Enforcement can proceed ‘on the basis of a cross or a hostage or a distraint of a kinsman surety.’³⁴⁶ The latter implies that there was indeed a standing surety in a kindred who would be prepared to step in whenever called upon and shows how *cáin*-laws were implemented and enforced by a cooperation of royal and ecclesiastical authorities, who operated the existent system of pledging to meet their goals. This argument for each kindred having an *aitire*-surety that would be ready and prepared to undertake this function has been made by Stacey.³⁴⁷ Thus, in total, there are four persons jointly acting together with their surety and until the first suit has reached the stage of pledge and judgement, no counter-claims can be made. This hints at the order of priority in such cases and seeks to point out that the person breaching the Law of Sunday has to be prosecuted first and the case needs to reach its final stage of pledge and judgement before the secondary means of levying are evoked.

The three days mentioned for judgement share a link to the procedure of fasting and it is explicitly stated that a three-day fast has to be maintained, which is the exact same period until a pledge needs to be given and judgement delivered in case two.³⁴⁸ Therefore, we have a combination of penance and penalty perfectly suitable to *cáin*-law. The moral imperative to observe the law is uttered in strong terms:

... troscad airiu in fer ad-gair i persain Dé 7 Pátraicc arnacha-cloathar in tan bes ndilem ndóib 7 arnap aurlabrith Pátraicc dia n-anmannaib. 7 nach miscath do-ratath ó tossuch domuin for cach n-óen con-ascar recht nDé 7 a timna for-bia a n-urlabrad

³⁴⁶ *ibid.* § 6, 166-167.

³⁴⁷ Stacey, *The Road to Judgment*, 77-78.

³⁴⁸ *Cáin Domnaig*, ed. Hull, § 7, 166-169.

7 a n-airmitin fiad Día 7 doínib la mallachtain fer n-Érenn cen sodin; 7 is tar turtuguth nDé 7 Pátraicc cech gíall 7 cech aitare 7 nach feithem doda-incai i llessaib 7 adalcib co cenn mbliadnae.

... let the man who sues fast against them in the name of God and of Patrick so that he shall not hear them when it shall be most needful for them and so that Patrick shall not be a spokesman for their souls. And any curse that from the beginning of the world has been put upon every one who has violated the law of God and His commandments shall fall on pleading for them and reverencing them in the sight of god and of mankind, together with the malediction of the men of Ireland besides; and every hostage and every surety and any advocate who furthers them in [their] interests and requirements is outside the protection of God and of Patrick for a year thereafter.³⁴⁹

The period of one year during which an offender against the sanctity of Sunday is placed outside of the protection of God and Patrick is not only a spiritual concept but affects an individual in his material existence also. For instance, a person who works on a Sunday will be stripped of his wages for the period of a year, a punishment that impacts him financially.³⁵⁰

Returning to the issue of pledges, I would argue that the pledges in *Cáin Adamnáin* and *Cáin Domnaig* serve the purpose usually attached to court pledges. While the pledge naturally was some security for the payment of the fine incurred, the primary enforcement mechanism of ecclesiastical laws in the absence of agreement was provided by the *aitiri*, as well as distraint. However, the pledge was designed to ensure judgement being passed upon the offender and thus, targets a final, public verdict upon his guilt or innocence. This interpretation is reflected in the pledge given by the identifier, which is similar to the pledge of a judge. The process implied by the *cáin* was similar to the procedure of *Cóic Conara Fugill* (Five Paths to Judgement), in which pledges also were given as a guarantee during litigation, culminating in a final judgement. The debt incurred through breaches of the *cáin* is a debt owed to God, and his representatives on

³⁴⁹ *ibid.* § 7, 166-169.

³⁵⁰ *ibid.* § 8, 168-169.

earth, the monastic community that issued the respective law. The purpose of the pledge, therefore, was not to grant a postponement of payment as it would be in contractual breaches, but it was instead a pledge for judgement.

4.7. The pledges in *Cóic Conara Fugill*

Cóic Conara Fugill (Five Paths to Judgement) is a law text that deals with the classification of curial pleas, each being put to the judge on one of the five paths to judgement. The use of the term *fuigell* suggests that this is what constituted a court. It has to be clarified at this point that a court in early Ireland merely indicated that a judge was present in order to adjudicate on a legal matter, but this need not entail any further formalities that the word ‘court’ may imply. Places where judgements were made varied from large open air hilltop assemblies for cases of public interest, possibly as part of a king’s annual assembly, to a scenario as small as the judge’s own dwelling.³⁵¹ Each path was reserved only for specific legal cases and a case could be pleaded exclusively on the path where it belonged. The five paths are ordered according to the severity of the cases, with the first path subsuming the most difficult ones under it and the rest following in declining order. Each path also required a specific guarantee to be put forward, either a pledge or one of the types of surety. In *Cóic Conara Fugill* these curial guarantees are referred to as *árach* (binding).

Stacey sees the origin of this division between the five paths in the nature of the cases attached to each path and the guarantee traditionally required for them when they are resolved

³⁵¹ *CCF(R)* § 27, ed. Thurneysen, pp. 24-5; ed. Archan, pp. 300-1.

privately.³⁵² The common factor of the cases subsumed under a single path, therefore, would be the guarantee used to bind and enforce them. In this sense, the customary paradigm for dispute resolution would have been adapted to the way jurists dealt with cases in the framework of a court. Archan has put forward an alternative argument, suggesting that pleas litigated on each path had to be decided by a different class of judge, based on the nature of the cases.³⁵³ There existed different requirements for the classes of judges and it is feasible that minor cases could be decided with limited training while significant knowledge was essential to regulate cases such as prerogatives of leadership. Therefore, the correct path would indicate quite literally, the path leading to the correct judge qualified to pass a verdict on the respective case. The level of the judge, thus, would coincide with the specific legal area and difficulty of the case.

The five paths are known as: (1) *fír* (truth), (2) *dliged* (entitlement), (3) *cert* (right, justice), (4) *téchteae* (propriety), and (5) *coir n-athchomairc* (proper inquiry). Of these, two paths required a pledge as guarantee and three paths required a surety. The paths whose *árach* takes the form of a pledge are: *fír* which requires a *fírgille* (truth pledge) and *cert* which requires a *smachtgille* (penalty-pledge). For the purpose of comparison, the sureties may also be enumerated, namely a *naidm* for *dliged*, under which contractual claims fall, a *ráth* for *téchteae* that covers cases relating to the semi-free and unfree classes, over whom their lord had certain entitlements of jurisdiction, and an *aitire* for *coir n-athchomairc*, a path whose nature is most difficult to ascertain

³⁵² Stacey, *The Road to Judgment*, 112-140.

³⁵³ Archan, 'The five paths to a judge: an interpretation of Cóc Conara Fugill (Five Paths to Judgement)', (forthcoming); On the legal profession see: Charles-Edwards: *The early mediaeval Gaelic lawyer*, Quiggin pamphlets (Cambridge, 1999).

but which Archan takes to be a path on which appeals can be made, which seems to be the most plausible suggestion.³⁵⁴

Thurneysen was the first one to note that the purpose for which the guarantees were given is not entirely clear, particularly so since they vary so drastically and incorporate many different categories of gravity, yet they appear to be guarantees for the same thing, to ensure that the person giving the pledge or surety appears in court and to secure the acceptance of the judgement at the end of the procedure. One aspect that is specifically mentioned in the text was that the guarantees secured the *smacht* worth one cow to which a party became liable when breaching the order of the court.³⁵⁵ This *smacht* is of the same value for whichever path was pursued but the bindings, as has been seen, differed for each part. It is not obvious what precisely the guarantees' function was and the notion that they secure the *smacht* alone comes with certain problems. For instance, certain guarantees were considerably below the value of what could ultimately be the penalty. This by itself would not necessarily be disturbing but that there should be such a significant fluctuation in guarantee values for the very same penalty is. The two types of pledges in *Cóic Conara Fugill* shall receive our attention below.

4.7.1. The *fírgille*

The *fírgille* (truth pledge, proof pledge) is not mentioned in any other text but *Cóic Conara Fugill* and both Stacey and Archan see it as representative of the cases pleaded under the first path called *fír* (truth), though each of them attributes a different nature to the path.³⁵⁶ The cases under

³⁵⁴ *CCF*, ed. Archan, 231-41.

³⁵⁵ *CCF*(R), § 2, ed. Thurneysen, pp. 15-16; ed. Archan, pp. 288-9.

³⁵⁶ Stacey, *The Road to Judgment*, 117-18, 138; *CCF*, ed. Archan, p. 249.

fír include issues relating to lordship and status, such as the acceptance of a lord and claims to leadership, as well as the division of an inheritance between brothers.³⁵⁷ The range of cases covered is more versatile than is the case for most other paths of *Cóic Conara Fugill*. *Fír* also serves cases relating to offences that entail a full fine and offences for which mercy is not appropriate, and cases without witnesses where the issue of evidence is most difficult to ascertain, except by means of oath. This is the reason why Stacey calls the *fírgille* ‘ordeal gage’, since she takes cases to be decided under *fír* largely to come to a verdict by means of the ordeal.³⁵⁸ She holds that its name ‘seems almost to have been invented for the purpose of proving its relevance to the path in question’.³⁵⁹ The ordeal was the ultimate means of establishing a person’s guilt or innocence in the absence of other possibilities. While the ordeal can be used for some pleas under *fír*, it is to be doubted whether this was the original solution for all cases subsumed under this category and by consequence, if that alone was sufficient to justify assigning that guarantee to the entire path. Archan has proposed an entirely different interpretation and suggests that the cases of *fír* are decided by the highest authority, namely the king or the royal judge, matching the serious nature of the pleas in question by requiring adjudication through royal power.³⁶⁰

Recension H of *Cóic Conara Fugill* contains the order of the procedural code and lists eight stages which each law case will undergo. These are: (1) *ré ría toga* (period before choice [of path]), (2) *toga ría n-árach* (choice before binding), (3) *árach ría tagra* (binding before pleading), (4) *tagra ría fregra* (pleading before rejoinder [of the opposing party]), (5) *fregra ría mbreith*

³⁵⁷ *CCF(R)*, § 5, ed. Thurneysen, p. 17; ed. Archan, pp. 290-1.

³⁵⁸ Stacey, *The Road to Judgment*, 117-19.

³⁵⁹ *ibid.* 118; ed. Thurneysen, p. 8, suggests *fír* may have been added for alliteration.

³⁶⁰ Archan, ‘The Five Paths to a Judge: an interpretation of *Cóic Conara Fugill*, (forthcoming); also see: M. Gerriets, ‘The king as judge in Early Ireland’, *Celtica* 20 (1988), 29-52.

(rejoinder before judgement), (6) *breth ria forus* (judgement before pronouncing [judgement]), (7) *forus ria forba* (pronouncing [judgement] before closure), (8) *forba for conair* (closure on one path).³⁶¹ We can see that the path on which the case will be pleaded is chosen first and then the *árach* attached to each path is provided. It would appear that the curial pledge was not identical with the pledge that the accused gave to the defendant upon accepting arbitration but rather, that each party had to give a pledge to the judge to whom it would be forfeited if the order of the court was breached. The court pledges did not stand in any direct relation to the bonds that had already been exchanged between the parties in their prior legal relations.

The *fírgille* is given to a neutral, third party before proceedings but its value would reduce during the hearing. It had the value of *lángille* (full pledge) before pleading started but was reduced to *lethgille* (half pledge) after pleading had started.

A hárach. Árach fir fíri fírgilli. Airgítur langilli na bo iar fir i llaim coit *chinn* ra aichne co ragbaithear *tacra*, 7 o gebthar, is lethgilli na bo i llaim coit *chinn*.

Its binding. The binding of *fír* with a *fírgille*. A full pledge of a cow according to justice is bound into a common hand for the recognition [of the path] until pleading be started, and when it is started, it is a half pledge of a cow into a common hand.³⁶²

I am inclined to take the cow to represent the pledge value rather than the pledge item. As argued in sub-chapter 2.2.2., p. 48 ff., a pledge of livestock was not the norm and more importantly, it was not permitted for any class of person. If a *bóaire*, an *ócaire*, or a hospitaller had to present himself in court, it is, of course, possible that they simply brought a cow along. However,

³⁶¹ *CCF(H)*, § 16, ed. Thurneysen, p. 30; ed. Archan, pp. 326-7; see also *GEIL*, 191: who takes (1) to refer to the period during which a date was fixed for the hearing.

³⁶² *CIH*2200.19-21; *CCF(R)*, § 4, ed. Thurneysen, p. 17; ed. Archan, pp. 290-291; all translations of *CCF* references are my own. Thurneysen's text differs in some significant ways from Binchy's. I adhered to the text given in *CIH*, which is also used by Archan.

particularly the reduction of the pledge value and the necessity to convey this to the judge in case of forfeiture makes the use of precious metal or household items far more agreeable and easily divisible. However, since there is no reference to the actual chattel that the court pledge consists of, there is no way of being certain. Furthermore, it is not clear whether the pledged object would be changed when its value was halved after pleading started, or if it was only symbolically reduced. However, we are told why the pledge value was reduced after the hearing has been set in motion:

Ocus cid foterá langilli na bo ría ñgabail tacraí 7 lethgilli iar ñgabail tacraí, 7 conid iunn in smachtgilli ría ñgabail tacraí 7 iar ñgabail tacraí? Is ed foterá: ar ní iunn ní frísi fil in langilli 7 lethgilli. Uair frí aichni na conaire ita in langilli, 7 frí dul din chonair for araili í i roairdi í i roisle gotha ita [i. in lethgilli]. Ocus fath aili dana: o daberá iñt aigni aichni forin comair coir ría ñgabail tacraí, is comarda neolais do 7 is coraiti etr ummugud naraig fair iar ñgabail tacraí.

And what is the reason for a full pledge of a cow (being given) before beginning pleading and half a pledge after beginning pleading, and that the penalty-pledge is the same before beginning pleading and after beginning pleading? This is what causes it: the full pledge and the half pledge do not refer to the same thing. For the full pledge is for the recognition of the path and for going from one path to another or for speaking too loudly or too quietly is [the half pledge]. And another reason: when (the advocate) has recognized the right path before beginning pleading, it is a sign of him having legal knowledge and it is all the more right to lighten the binding after beginning pleading.³⁶³

The pledge for the first path, as the other guarantees for their respective paths, secured the payment of the one cow *smacht* (penalty fine) that would befall parties breaching what we may collectively call procedural rules. This penalty remained the same throughout a court hearing but the *árach* that secured its payment varied in form and value. Thurneysen states that the reason for this reduction in pledge value is that a party was less prone to ponder absconding after having begun to present his case.³⁶⁴ Archan states that the value of one cow is a notably high pledge value

³⁶³ *CIH2200.27-33; CCF(R)*, § 7, ed. Thurneysen, p. 17; ed. Archan, pp. 292-293.

³⁶⁴ *CCF*, ed. Thurneysen, n. 5, p. 63.

and the parties, therefore, put a large stake in the curial game, demonstrating their wealth and submission to the judgement made by the king or his royal judge.³⁶⁵

Ocus cid *fotera* conid *trummu imt* árach *doberar fri* aichni na Conair .f. is fir na *fri* aichni na conar naili. Iss ed *fotera*: ar is *trummu* ₇ is uaisle *imi* acarair *fuirri* na *foma comaraib* aili.

And what is the reason for it [that] the binding given in respect of the recognition of the path which is *fír* is heavier than in respect of the recognition of the other paths? This is what causes it: because what is prosecuted on it is weightier and nobler than [what is prosecuted] on the other paths.³⁶⁶

In summary, the *fírgille* appears to represent a pledge of the value of one cow at its height that is at the arrival at the court. Subsequently, it is halved to relieve the burden on the parties or rather their lawyers, once they had begun to address the court on the appropriately chosen path to judgement. The pledge could initially become forfeit to the judge if a party chose the wrong path and subsequently for changing from one path to another as well as for inopportune behaviour during pleadings, such as arguing loudly or being too hesitant and silent when presenting one's case.³⁶⁷ It would appear that the judge can terminate the hearing or choose to continue despite a violation of court order. Since the pledge is a guarantee for behaviour in court also, this would suggest that both parties at the hearing had to offer a pledge. However, this is not stated as such. As has been seen, a pledge was usually given by the party accused of an offence as an agreement to submit to arbitration. This would imply that it is always the party defending himself in court who has to offer the guarantee and indeed, this is easy to understand, since he is the one in the less favourable situation and may not agree and abscond. The claimant had an interest to appear in court since he claims to have suffered an injustice and has sought a remedy for it. He was the

³⁶⁵ *CCF*, ed. Archan, p. 249.

³⁶⁶ *CIH2200.24-27*; *CCF*(R), § 6, ed. Thurneysen, p. 17; ed. Archan, pp. 290-291.

³⁶⁷ *CCF*(R), § 2, ed. Thurneysen, pp. 15-16; ed. Archan, pp. 288-9.

one driving the procedure. The situation in *fír* is somewhat more complex. As has been seen, the pledge also guarantees appropriate behaviour in court. Therefore, we cannot exclude the claimant. Moreover, it is not clear which of the two advocates chooses the correct path, the advocate for the claimant or the defendant, or both jointly? Usually, it would be expected that the claimant who presents the suit has to know where and how to present it. But does the claimant give a pledge? The text never mentions explicitly that more than one pledge is being conveyed nor does it use any counter-binding that we encounter elsewhere in similar contexts (sub-chapter 4.5. pledges in sick-maintenance, p. 96 ff.). Since the *árach* in court is not bound to a specific party but primarily the binding of a specific path of pleading, a judge who was presented with a plea on the wrong path could dismiss the ignorant pleaders altogether, leaving them to resolve their dispute in private. *CCF* itself states at one point that it was written to scare away ‘rude, ignorant and paltry folk’ from the business of litigation, which Stacey sees as having ‘originated in the desire of jurists to be the ones to guide claimants’ and ‘the more inaccessible the procedures and the more involved the jurisprudence, the more securely could legal matters be situated within the custodianship of a learned legal class’.³⁶⁸

4.7.2. The *smachtgille*

The *smachtgille*, as the name tells us, is a *gell* for a *smacht* (fine). Thurneysen analyses the term *smachtgille* in his edition of *CCF* stating that it originally referred either to a ‘fixed, determinate pledge’ or a ‘pledge for a fixed *smacht*’, but was subjected to a shift in meaning due to reasons

³⁶⁸ Stacey, *The Road to Judgment*, 139-140; *CCF*(R), § 23, ed. Thurneysen, pp. 23-4; ed. Archan, pp. 298-299.

unknown.³⁶⁹ What he refers to is the fact that whenever we encounter the *smachtgille* it is almost always qualified by a following *sechtmaid* (one-seventh).³⁷⁰ This specification became so common, that whenever *smachtgille* was used on its own it was assumed to have a value of one-seventh, which becomes evident in the following enumeration in old text in *Di Chetharslicht Athgabálae*:

It cetheora fodlai fil for gellaib: langille, ocus lethgille, triangille, ocus smachtgille.

There are four divisions in respect of pledges: full pledge, and half pledge, one-third pledge, and *smacht*-pledge.³⁷¹

Supporting Thurneysen's idea that the *smachtgille* originally had a specific value that did not vary according to the debt it secured is a reference of its antonym in commentary to *Di Chetharslicht Athgabálae*, the *smachtgille écinntech* (undetermined penalty-pledge), which is calculated at a value of twelve scruples,³⁷² and juxtaposed with the *smachtgille sechtmaid*.³⁷³ Twelve scruples is the value attributed to the *lethgille* (half-pledge) elsewhere (see sub-chapter 3.1., p. 61 ff., and table on p. 64). Moreover, it is noteworthy that Thurneysen analysed the *smachtgille* as a 'pledge for a fixed fine', such as the name indicates, being a composition of *smacht* (fine, penalty) and *gell* (pledge), but he himself alluded to the fact that it is not at all clear whether the pledge itself has a predetermined value or if it was calculated on the basis of the amount contested.³⁷⁴ An

³⁶⁹ *CCF*, ed. Thurneysen, n. 51, 75-6.

³⁷⁰ *CCF* (R), § 12, (H) § 105, ed. Thurneysen, pp. 20-21, 51; ed. Archan, pp. 294-295, 364-365: *smachtgilli .uii.aid* in the gloss in (R) and the text of (H).

³⁷¹ *CIH* 412.20-1 = *AL* i 261.18-19; *DIL*: *gille*; *CCF*, ed. Thurneysen, n. 51, 76; points to this example.

³⁷² *CIH* 1713.24-25 = *AL* i 278.9: *smacht.g. ecimtec in da sgrepal .x. uii.air ria mbreithemnus*; *CCF*, ed. Thurneysen, n. 51, 76, fn. 1.; cp. *CIH* 2003.34, 38; *CIH* 1712.32-1713.4 = *AL* i 276.8-18, *CIH* 1713.25 = *AL* i 278.9.

³⁷³ *CIH* 1712.32-1713.4 = *AL* i 276.8-18. Commentary on: *Occus arinti it .iiii.a fodlai filit for gealluibh .i. lan.g. 7 leth.g. 7 trian.g. 7 smachtgille*. cp. *CIH* 1711.6-8 = *AL* i 272.6-14.

³⁷⁴ *CCF*, ed. Thurneysen, n. 51, p. 75: 'festes (bestimmtes) Unterpfand' oder 'Unterpfand für feststehende Buße'.

associated problem is that ‘fine’ is not the only sense of *smacht*, which can also refer to ‘the offences that the fines penalize’ and the requirements by a particular law, including ‘a particular level of fines’, as already explained earlier (under sub-chapter 4.2., p. 86).³⁷⁵

The path it binds is known as *cert* (justice), the third path of *Cóic Conara Fugill*. It deals with the adjustment of inequalities in the values of what has been exchanged by contract and where the consideration exchanged was found to be defective (see 1.5. Early Irish Contracts, p. 9 ff.). The purpose of this path was not to rescind the contract but to adjust the imbalance, an option applied when the deficiencies were within a value of one-sixth or one-seventh of the consideration.³⁷⁶ Thus, the provisions for the redress of damages up to one-sixth or one-seventh mirror the value of the pledge used as guarantee for this path to judgement. Contract law relies on the concept of equity and, therefore, any unjust over-payment was actionable so that either the defect was filled-up or the unjust enrichment returned.³⁷⁷

If a debtor acknowledged that a claim brought against him was justified, he gave a pledge to the creditor, or the enforcing surety, indicating his willingness to make good the discovered shortcoming. I hold it that when a pledge was given there was no room for a rescission of the contract but the rectification of consideration.³⁷⁸ The enforcing surety only secured pleas pursued

³⁷⁵ *BCom*, note on § 5.

³⁷⁶ *ibid.* (R), § 11, ed. Thurneysen, p. 19; ed. Archan, pp. 294-5, for *cert*, see: 195-206; Stacey, *The Road to Judgment*, 119-121; J. Bemmer, ‘Validity and Equality in Early Irish Contract Law: *Dliged* and *Cert* in the light of *Cóic Conara Fugill*, *Studia Celtica Fennica* 8, (2011), 5-18: cf. *CCF*(R), n. 5, § 11, ed. Thurneysen, 19; ed. Archan, 294-295.

³⁷⁷ *EICL*, 39-46.

³⁷⁸ There are several grounds on which a rescission was barred. The further the parties moved towards the fulfilment of the contract, the less likely it got that pre-contractual conditions could be re-instated, a scenario which inhibited an annulment. (cp. *restitutio in integrum* in Roman law.), see McLeod, *EICL* for a detailed analysis of all scenarios. For my interpretation on the nature of the two paths, see: Bemmer,

on ‘entitlement’ but not on ‘justice’, demonstrating that the weight of the legal action and its pursued goals were different. On the third path to judgement, willingness to settle the case was implicit in the conveyance of the pledge. The contract itself was not in jeopardy, but the adjustment of consideration within the contract was.

Cia ronasar commæ cach cundrad iter feichemma for nadmann₇ ratha fia fiadnaisib, doathbongatar no forlinaiter mani betogha folaithe.

Though every contract be bound in the same way between contracting parties, through *naidm*-sureties and *ráth*-sureties [and] in the presence of witnesses, [discrepancies in the value of the goods or services exchanged] are ‘cut away’ or ‘filled up’ if the goods or services be not complete [in value].³⁷⁹

Both *Cóic Conara Fugill* and *Berrad Airechta* state that such defects needed to be ‘filled up’, or ‘cut away’, the intention being that the advantaged party would give the disadvantaged party an additional consideration or return the unjustified profit. The low value of the pledge in relation to the debt could be explained thus, because it was not given to cover the actual debt but only the deficiency.

It is a viable possibility that, once a case has reached the period of pledging, an annulment was excluded. The fluctuations in pledge value throughout arbitration may reflect the negotiations as to the value still outstanding. The *naidm* remained the overseer of the contract but the case did not have to revert to ‘entitlement’, since the *naidm* could safely pursue his duties including to enforce payment for defects in the consideration. This was also the case when the party was fully aware of his overpayment because ‘a *naidm*-surety is more to be respected with regard to that

‘Validity and Equality in Early Irish Contract Law: *dliged* and *cert* in the light of *Cóic Conara Fugill*, *SCF* 8 (2011), 5-18.

³⁷⁹ *CIH*599.15-17 = *BA*, § 78, ed. Thurneysen, *Bürgschaft*, 29-30; Stacey, 226.

[transaction], for that excludes entitlement'.³⁸⁰ But his own role was not in question, as long as no fraudulent action had been undertaken. In the event of an accusation of fraud, the situation is different and the essence of the contract was in question. In those cases, a party may have tried to involve the *ráth*-surety, but this was expressly forbidden and it is of utmost significance that the paying surety was prevented from offering a pledge.

Ni gellait ratha diandochor dochuind na diubairt lobair.

Ráth-sureties do not give a gage for the hasty disadvantageous contract of a foolish person or the defrauding of a weak person.³⁸¹

Ni ruiglet cit rechidhi ratha clænnadm^{ann} tolla lā; ni cloin ce thoithbestar fossair anaie; is cos fo coraith manipetoga folaith; ni tuilli dilsí anfolta naich diless duis diupartæ.

Even lordly *ráth*-sureties cannot give a gage for crooked, pierced bindings in Irish law. It is not unjust though the basis of an invalid suit be impugned. It is a foot against a stone wall if the goods or services exchanged be not complete. Improper goods or services do not entail immunity, and the reward given for a fraud is not immune from claim.³⁸²

Berrad Airechta may not distinguish the procedural pleas in question but it does follow the same logic behind *Cóic Conara Fugill* and with the growing limitation of rescission, the separation of pleas may have had a practical basis. When the *naidm* was corrupted because the contract was subject to fraud, such as on the basis of hidden defects not known to the buyer, the *naidm* was 'pierced' and the contract reverted to a suit on *dliged* (entitlement). The surety's enforcement would be to no avail, like 'a foot against a stone wall'.³⁸³ The contract was brought to a halt and a dissolution possible. As the text states, even the pledge of a powerful and exalted paying surety

³⁸⁰ *CIH* 593.14-15 = part of *BA*, § 31, ed. Thurneysen, *Bürgschaft*, 10; Stacey, 214.

³⁸¹ *CIH* 599.18-19 = part of *BA*, § 79, ed. Thurneysen, *Bürgschaft*, 30; Stacey, 226-227.

³⁸² *CIH* 599.25-27 = part of *BA*, § 81, ed. Thurneysen, *Bürgschaft*, 30-31; Stacey, 227.

³⁸³ *BA*, § 81, ed. Thurneysen, n. 5, cp. also § 78, 29-30; Stacey, 226.

was not acceptable. A pledge could only be given when the contract's validity was established beyond doubt because once it had been conveyed, it was immune from claim.

Inconveniently, there is a further distinction based on need, namely between *lángille fri(sa) nesam* (full pledge for that which is closest (the most urgently needed) and *lethgille fri(sa) nemnesam* (half pledge for the not closest (that which is not most urgently needed)).³⁸⁴ It appears to refer to the releasing of cattle taken by distraint, which can be achieved by offering a pledge (see chapter 6, p. 181). As Thurneysen argued, 'the nearest' refers to that which a person requires immediately, to those things which are indispensable to him and which, therefore require a higher pledge.³⁸⁵ The issue of how the value of the pledge may be calculated is subject to an extended commentary in *Bretha Éitgid* (Judgements of Inadvertence) following the concise statement in the main text: *Caite gell coibeis? Colla*. 'What is [the value of] a pledge? An equivalent of the subject of the bargain.'³⁸⁶ The general line of the commentators seems to be that the pledge starts out as a *smachtgille* in arbitration and is intended to increase over time, reaching the level of full pledge for an article of necessity and half-pledge for an article not of necessity after judgement according to the native laws. However, the information is difficult to interpret and contains milder regulations for the ecclesiastical legislations of *Cáin Adomnáin* and *Cáin Phátraic* with the former culminating in half-pledge after judgement and the latter at only one-third pledge independent of the necessity of the article. The commentary then drifts off into a discussion of pledges being given in order to stop fasting at the initial period of stay in

³⁸⁴ *CIH*1031.16-22; *CCF*(H), § 41, ed. Thurneysen, pp. 35, see also n. 8, p. 63; ed. Archan, pp. 336-337.

³⁸⁵ *CCF*, ed. Thurneysen, n. 8, p. 63; cf. *DIL*: nes(s)a.

³⁸⁶ *CIH* 296.36 = *AL* iii 322.10, with commentary at: *CIH* 296.36-297.37 = *AL* iii 322.12-326.16; *DIL*: *colainn* (body, material subject of a bargain, capital, object pledged)

distrain.³⁸⁷ A similar commentary is found in the actual text on distraint but with a variation in the values provided pointing to a general confusion about the calculation of pledges. Further confusion is caused by this commentary since it states that ‘indefinite *smachtgille* to stop fasting, definite *smachtgille* before judgement, and one-third pledge after judgement, both in *Cáin*-law and *urradhus*-law, except for *Cáin Adomnáin*’.³⁸⁸ The variations in pledge value certainly provide us with much material for speculation but in this case, appear to contribute little to our understanding of the old law. The distinctions in value can be summarised as such:

Pledge Values	Text
<i>lángille ~ gell</i>	<i>Cáin Domnaig</i>
<i>lángille ~ ingille</i>	<i>BFG</i>
<i>lángille ~ lethgille ~ triangille ~ smachtgille</i>	<i>Dí Chetharslicht Athgabálae</i>
<i>lángille ~ lethgille ~ smachtgille</i>	<i>CCF</i>

Table 8: pledge values across texts

³⁸⁷ *CIH* 296.36-297.37 = *AL* iii 322.12-326.16.

³⁸⁸ *CIH* 1712.32-1713.4 = *AL* i 276.8-18.

5. Early Irish sureties and their role in pledging

Having provided an analysis of pledges both on a theoretical and practical basis, this chapter moves the discussion to the place of pledges alongside guarantees provided by sureties and hostages. In order to understand the nature of the Irish system of security, it is useful to commence with some background on the institution of suretyship. It represents one of the most widely-used and effective means of maintaining peace by securing the performance of social and legal duties in stateless societies, across geographical and temporal boundaries. The reason why suretyship was such a powerful cohesive mechanism in systems lacking a central authority and officially imposed enforcement, is that they enabled performance. They did so by operating within a system of pre-existing personal bonds, such as kinship, fosterage and clientship relations, from which sureties could be drawn, while, at the same time, the connections created through suretyship reinforced this mutual dependence. The king must rule by mobilizing these mechanisms of control within society.

Suretyship in early Ireland is largely pre-emptive, which means that guarantors were not sought after the fact but were already in place when disputes occurred. This anticipatory character played a vital role in how early Irish law was structured and allowed for the effective and largely private enforcement of claims. As Sharpe rightly concludes ‘much of Irish law is framed in such a way as to anticipate, and contain if it could not prevent, the kind of disputes which might interfere with essential cooperation in society.’³⁸⁹ Sureties guaranteed that compensation was

³⁸⁹ R. Sharpe, ‘Dispute settlement in medieval Ireland’, in W. Davies & P. Fouracre (eds.), *The Settlement of Disputes in Early Medieval Europe* (Cambridge, 1986), 169-189, for a survey of the vernacular sources, see in particular: 178-187.

received. They were intermediaries between the parties, creating a neutral space or buffer that transferred legal action into the hands of third persons, even though they operated together with the claimant and the debtor. Early Irish jurists sought to restrict the use of violence as a legal remedy to an ultimate recourse and based redress on a firmly established and schematised system of compensation, though physical force was an ultimate, legally sanctioned option.³⁹⁰ Binchy noted that ‘the origin of suretyship in primitive society can thus be traced to the absence of any public enforcement of private engagements’ and that ‘the first duty of the surety was to compel the principal to carry out his obligation’ by all possible means, including violence.³⁹¹

One may contrast this way of organising social life and ensuring compensation on the basis of security with the exceptional anthropological analysis of the egalitarian and democratic system described by Evans-Pritchard in his famous work on the Nuer, a Nilotic ethnic group inhabiting the African Nile valley. There he demonstrates how a political system can operate despite the lack of governmental organs but also showing the absence of legal institutions, developed leadership and organized political life in general. Among the Nuer, redress was facilitated by use of arms by the victim, in the form of fights between two individuals without interference by the larger social group, or in cases of homicide, through a blood-feud supported by a kindred strong enough to compel compensation. Therefore, Evans-Pritchard calls the Nuer an ‘acephalous

³⁹⁰ Cp. McLeod, ‘The blood-feud in medieval Ireland’, in Pamela O’Neill (ed.), *Between Intrusions: Britain and Ireland between the Romans and the Normans* (Sydney, 2004), 114–33.

³⁹¹ Binchy, ‘Celtic Suretyship, a fossilized Indo-European Institution?’, in G. Cadona, H. M. Hoenigswald & A. Seen (eds.), *Indo-European and Indo-Europeans. Papers Presented to the Third Indo-European Conference at the University of Pennsylvania* (Philadelphia 1970), repr. *The Irish Jurist* 7 (1972), 357.

kinship state' ensuring a form of 'ordered anarchy',³⁹² where 'fear of incurring a blood-feud is, in fact, the most important legal sanction within a tribe and the main guarantee of an individual's life and property'.³⁹³ Here, we encounter a system where the threat of violence executed by the aggrieved party was the motivation for the offender to come to justice. In early Irish law, the norm was to accept compensation in lieu of violence and every step was taken to ensure that this compensation was forthcoming. Therefore, sureties held encompassing powers and were the most vital enforcers of claims.

The emphasis on sureties in early Irish law is reflected in that no less than three different types of sureties were known and they were representative of the different requirements of the legal scenarios, as well as historic developments of security. Binchy made the important observation that 'the Irish law of suretyship may well reflect the various stages in the development of this institution throughout the Indo-European world'.³⁹⁴ The three sureties are (1) *naidm*-surety (binding surety, enforcing surety), (2) *ráth*-surety (property surety, paying surety), and (3) *aitire*-surety (hostage-surety). One should add as a fourth form of security, which bridges the gap between sureties and pledges, (4) *gíall* (hostage). The role of the pledge and its connection to personal guarantors varies along the respective cases covered by them. As has been seen in the previous chapters, pledges were powerful guarantees in early Ireland, and they received a share of this strength from the concession made by the defaulting party by giving them in the first place. A pledge always signified that the party offering it had accepted an aspect of guilt about his

³⁹² E. E. Evans-Pritchard, *The Nuer – A description of the modes of livelihood and political institutions of a nilotic people* (Oxford, 1940), 'The Political System', 139-191, see particularly 'IV: feud', 150-152, 'V: Settling the blood-feud', 152-155, and 'XII: The lack of governmental organs', 181-184.

³⁹³ *ibid.* 150.

³⁹⁴ Binchy, 'Celtic Suretyship', 365.

actions, for they were a re-affirmation of the intent to fulfil the outstanding obligation and facilitated a delay of a pending redress. However, sureties often were the driving force behind pledging, even though pledges were given voluntarily. Without sureties, the refusal to offer a pledge was not backed up by a remedy to facilitate execution. Many cases in which pledging occurred had already been guaranteed by sureties, thus anticipating their presence and making the surety either the conveyor of pledges or a subsidiary pledgor. Therefore, it becomes clear that these two forms of security were very closely connected. Despite this link, no one has so far explained the way the two guarantees differed and complemented each other. Thus, the interest of this chapter lies in the framework in which pledging is encountered and since the vast majority occurs within contractual settings, there are already sureties in place who are acting in their capacity when the pledge comes into play. Where this was not the case, there were often authoritative figures present who held sway over the scenario, such as the identifiers in *cáin*-law, who could restrain the offender on the spot, but also the retinue accompanying a victim on sick-maintenance, who would have observed the procedure and ensured compliance (see p. 104 ff. and p. 96 ff.). In the law of neighbourhood, the social and physical set-up of the parties made sureties largely superfluous, since their relationship was enduring and long-lasting (see p. 83 ff.). This is also the rationale behind making the following contracts valid in the absence of sureties and even if concluded in the state of drunkenness (which might have been a regular component of neighbourly get-togethers): (1) a promise of a fief for base clientship, (2) an agreement for joint-ploughing, and (3) all neighbourhood relationships.³⁹⁵ It stands to reason that contracts subject to these conditions did not have a need for sureties and this seems to be confirmed in

³⁹⁵ *BA*, § 17, ed. Thurneysen, *Bürgschaft*, p. 8; Stacey, p. 212.

their being listed among the exceptions in *Berrad Airechta*, which were valid even in the complete absence of sureties to bind and execute them.³⁹⁶ By looking at each one of the three types of sureties in turn, we can investigate what they secured respectively and in what legal contexts they were relevant. This will allow us to probe what their connection to the law of pledging was and where the differences between these securities lie.

5.1. The Advice to Doíden

It is helpful to approach suretyship from within the cultural context in which it came into being. The interest of the jurist lies in a legal segregation of capable persons for suretyship based on status, as a means of guaranteeing contentment among all parties involved. Therefore, the legal provisions for suretyship targeted particularly the safety and immunity of contracts so that no claim remained unsatisfied. However, suretyship, as much as pledging, incorporated a symbolic level alongside the legal norms. Therefore, it will be very useful to take a more inclusive approach.

The Triads of Ireland warn of certain suretyships related to status restraints:

Tri húas dóib: dul ar rí g nó úasal nemid, ar is lethiu enech rí g aidbriud; dul fri cath, ar ní túalaing nech glinni fri cath acht rí g lasmbíat secht túatha foa mán; dul fri cimmidecht acht nech lasa mbí mug dóer. Secht n-aurgarta dóib: dul ar deoraid, ar drúth ⁷ ar dásachtach, ar díaraig, ar angar, ar éconn, ar essconn. Imnedach da *no* cach ráth, ar is écen dí díanapud im cach ngell do *beir*, aill riam, aill íarum.

Three hard things: to go security on behalf of a king or highly privileged person, for a king's honour is wider than any claim; to go security for battle, for no one is capable of any security for a battle save a king under whose yoke are seven tribes; to go security for captivity, except one who owns a serf. Seven prohibitions: to go security for an outlaw, for a jester and for a madman, for a person without bonds, for an unfilial person, for an imecile, for one excommunicated. Troublesome moreover is

³⁹⁶ *BA*, Stacey, 212.

every security, for it is necessary for it to give sudden notice as regards every pledge which he gives, now beforehand, now afterwards.³⁹⁷

The very act of guaranteeing is counted among:

Trí dorcha in betha: aithne, ráthaiges, altrom.

Three dark things of the world: giving a thing into keeping, guaranteeing, fostering.³⁹⁸

The text ‘The Advice to Doíden’ offers instructions to Doíden mac Nine on the proper virtues that a surety should display ideally and thereby guiding him towards rational choice.³⁹⁹ It belongs to the genre of *tecosc*-texts that offer insights into the ‘moral thought’ of the learned classes, which were guided, in part, by experiences in the larger social sphere, and which reflect real life problems.⁴⁰⁰ The text focuses primarily on the *ráth* (paying surety) but also describes faculties which are usually attributed to the *naidm* (enforcing surety), the two classical contractual sureties.

The text commences by enumerating those criteria which are undesirable for a surety, commencing with persons of elevated status, because it was virtually impossible to act against them in the case of a default. This affects first of all the highest echelons of society with the king on top of it, because they could not be combatted, legally or socially, on the grounds of their high status.

³⁹⁷ K. Meyer, *The Triads of Ireland*, Todd Lecture Series, vol. 13 (Dublin, 1906), Triad 235, 30-31.

³⁹⁸ *ibid.* Triad 249, 32-33.

³⁹⁹ R. M. Smith, ‘The Advice to Doidin’, *Ériu* 11 (1932), 66-85, Smith states that little is known about the person Doíden mac Nine. His name occurs twice in the laws, in the pseudo-historical prologue to the *Senchas Már* (*CIH*1654.35 = *AL* i 24.2) and in the text *Din Techtugud* (*CIH*210.12 = *AL* iv 18.17).

⁴⁰⁰ Charles-Edwards, *Early Christian Ireland* (Cambridge, 2000), 141; *DIL*: *tecosc* (teaching, instructing; advising, advice, counsel).

Ni urfaoma righ na righ-domna hi rathaighes friut, ar ni tualaing imgona friut im a n-anfir.

Do not accept a king or a prince as surety for you, for it is not possible for you to fight with him in the event of his unrighteousness.⁴⁰¹

It is for this reason, for instance, that the king cannot himself be distrained but often has an *aithech fortha* (substitute churl taking the king's place in legal actions against him) among his companions who can be distrained in his stead.⁴⁰² Persons of high status are substantially more difficult to force to act and enforce against. If a person chose to engage with them, he did so giving consideration to the risk involved for him.

Another concern of enforcement is that the suretyship is lasting and perpetual. This addresses the issue of a surety's death which would automatically end any possibility of enforcement, unless the office was passed down to his heirs.

7 ni urfaoma gobaind na briughaidh na *brethemain*, ar ní saigh a rathaighes for a comarbaib dia n-eis.

And do not accept a smith or a hospitaller or a judge, for their suretyship does not attach to their heirs after them.⁴⁰³

Moreover, limited contractual capacity can be an obstacle to the smooth processing of suretyship. For instance, going surety for a son of a living father can be dangerous since he is contractually incapable and his contracts can be contested by his father. If the surety had to pay on his behalf, he had no remedy to receive restitution either from the son or the father.

7 ni bi raith fruit mac beo athar na aithir gosingaibh a gaire, ar is tualaing cechtar na[i] as-rob cur u araili.

⁴⁰¹ Smith, 'The Advice to Doidin', § 1, 73, trans. 75; § 9, 74, trans. 77.

⁴⁰² Binchy, 'A Text on the Forms of Distrain', § 9, 81; *CCF(R)*, § 14, ed. Thurneysen, 21; ed. Archan, 296-7; *DIL: aithech*.

⁴⁰³ Smith, 'The Advice to Doidin', § 2, 73, trans. 76.

And let not be surety for you the son of a living father or a father who is exempt by his maintenance, for either of them is capable of setting aside the contracts of the other.⁴⁰⁴

Equally disagreeable sureties are satirists and poets because of the possibility that one becomes the subject of ridicule.

7 ni bi raith friut eigis na bard na cainti, ar-nat-aorat dligud sceo inndligud, ar is rechtaidh gach ae a tengad.

And let not be surety for you a poet or a bard or a satirist, lest they satirize you (when you are in the) right and (they are in the) wrong, for each one of them is master of his tongue.⁴⁰⁵

Next to these concerns as to the procedural success and reasonability of enforcement stand the personal qualities of the person going surety and what we may call his eudaemonic character.

Sureties had to remember the contractual terms and could not doubt themselves when their testimony was to be decisive. Triad 245 lists:

Trí adcoillet gáis: anfis, doas, díchuimne.

The three things that ruin wisdom: ignorance, inaccurate knowledge, forgetfulness.⁴⁰⁶

If a surety was confused as to what he guaranteed, this jeopardised enforcement and indeed, the contract itself. Moreover, concerns over a surety's abilities stretch from purely economic reasoning, such as landlessness and indigence to intrinsically personal traits, namely stubbornness, hesitation, contempt, and detestation which can have equally negative influence on the suretyship.⁴⁰⁷ Suretyship, like pledging, was personal and symbolic; and the display of

⁴⁰⁴ *ibid.* § 3, 73, trans. 76, read: *ni be*, and *as-ingaib*; see *IR III: Gúbretha Caratniad*, § 7, 311-314 for exceptions to this rule.

⁴⁰⁵ Smith, 'The Advice to Doidin', § 5, 73, trans. 76; see also Breatnach, 'Satire, Praise, and the Early Irish Poet', *Ériu* 56 (2006), 63-84.

⁴⁰⁶ Meyer, *The Triads of Ireland*, Triad 245.

⁴⁰⁷ Smith, 'The Advice to Doidin', § 11a-i, 74, trans. 77-8; 13a-k, 74-5, trans. 78.

authority had to be matched not only by legal criteria but by the overall appearance and standing of the surety in society. It is for this reason that the text advises one to exclude misfortunate, poverty-stricken members of the community for these can no longer be endowed with the capacity since their lack of resources means inability to pay up.⁴⁰⁸

Yet another category of undesirable traits for a surety addresses behaviour in a curial setting or judicial contest. It is part of a long list of traits to be avoided in a surety.

Is caol minnegh. Is eitgi dala.
He is shrill-swearing. He is mute in a lawsuit.⁴⁰⁹

This phrasing reminds of the behaviour required by the parties to a dispute and their legal representatives when litigating in front of a judge. The importance of rhetorical skills in legal proceedings is emphasized particularly in *Cóic Conara Fugill* (Five Paths to Judgement). As already mentioned, a litigant whose voice was too loud or too low, or who behaved in a fashion inappropriate in a court, was immediately charged with the appropriate *smacht* (fine) of one cow.⁴¹⁰ The behaviour in front of a judge had a decisive impact on the credibility of the case and consequentially his verdict. This speaks for the importance of presenting an argument in the fashion of a theatrical performance on the stage of the court, for the Irish evidence suggests that ‘drama and law were intimately linked’,⁴¹¹ although it also hints at the use of a particular legal language and grammatical sophistication without which one could not expect to be taken

⁴⁰⁸ *ibid.* § 11e, 74, trans.77.

⁴⁰⁹ Smith, ‘The Advice to Doidin’, § 13g, 75, trans. 78, § 13h, 75, trans. 78; see notes p. 84: Smith takes *minnegh* as adjective from *mind* (oath, perjury) but notes that O’Donovan translates ‘whose private house is narrow’, which would require *minnegh* to be amended to *mennat* but this interpretation does not have meaning in a legal context. For the translation of ‘mute’ cp. *et-tenga* (tongue-less), meaning ‘not skilled in legal phrase and procedure’.

⁴¹⁰ *CCF(R)*, § 2, ed. Thurneysen, pp. 15-16; ed. Archan, pp. 288-9.

⁴¹¹ Stacey, *Dark Speech*, 53; see particularly ‘Jurists on Stage’, 53-94.

seriously. It is rendered obvious in *Cóic Conara Fugill* that the legal class did not wish to be called upon by parties entirely ignorant of the language of the court and were required to be represented by a *fethem*, the plaintiff's superior (his lord or head of his kindred) or the *aigne* (law-agent).⁴¹² The surety's testimony had to follow the same principles and an awareness of the requisites of curial performance was desirable. Hence, *Berrad Airechta* states:

Nibi forranach dalæ, arnapat huidech airechtæ.

'Thou shouldst not be violent in a [judicial] assembly, lest thou be a delayer of the court'.⁴¹³

Rhetorical skills went hand in hand with physical appearance that hints at the importance of proving that the surety had fulfilled his enforcement to the utmost extent and had not been feeble or unheeding in his attempts. At this point *The Advice to Doíden* moves towards a description which seems more appropriate for the *naidm* (enforcing surety) for whom physical force is essential, and possibly to extended allowances of enforcement endowed to the *ráth* after it emancipated itself as the dominant guarantor. The characteristics of an ideal paying surety, namely the *bóaire*, are described in the following paragraph, which is a variant of a passage in *Bretha Nemed Dédenach*:

Gab so dot ae fruit *fer selba bona*: Beo a ceithir-fine. *Cuic dor n a sciath*. Sé duir *n a claide m*. Midhach teor *a com*. Connail a *mét*. Aurraic a *scoth*. Ní dlegar dé dechde a buar: boa ire fir, in cétna boa ire. Beo a c[h]uimne. Saighi[dh], asren, ní ditoing.

Take this man for your transaction: a man of original possession. His four families (are) living. His shield (is) five fists (in diameter). His sword (is) six fists (in length). (He is a) hero of three fights. His size (is) becoming. His speech (is) excellent. He

⁴¹² Binchy, '*Féchem, fethem, aigne*', *Celtica* 11 (Dublin, 1976), 25.

⁴¹³ *CIH* 599.37-38 = part of *BA*, § 84, ed. Thurneysen, *Bürgschaft*, 31-32; Stacey, 227.

owes not more than ten cows: a true *boaire*. His memory (is) active. He prosecutes, he pays, he does not deny upon oath.⁴¹⁴

The possession of a sword suggests prosperity and people not allowed to use force were not able to fulfil an executory suretyship. The combination of these features ensured that his appearance created the outward impression of authority and power. As Thurneysen has argued the *ráth*-surety appears to have taken on several functions of the *naidm* at a time when the enforcing surety came to be out of use and the property surety's levying duties were extended.⁴¹⁵ What the ideal image in the Advice to Doíden appears to do, is to combine the characteristics of two types of surety in one person. Indeed, even at a time when *ráth* and *naidm* both operated, they regularly acted together as if they were one, using their combined force against the debtor. Thus, the text concludes: 'He prosecutes, he pays, he does not deny upon oath.'⁴¹⁶ This sentence is also found in two of the Digests:

raith tri ngnímh (.i. saighi[dh], as·ren, ní·ditoing)
a *ráth* of three actions .i. he attains, he pays, he does not swear away.⁴¹⁷

The Advice to Doíden makes it clear that a surety should be the commendable image of a respectable man, physically appealing and strong, with a mind steady in memory and eloquent rhetoric, bred from a respectable family with sufficient landholdings and assertive and

⁴¹⁴ Smith, 'The Advice to Doidin', § 14a-f, § 15a-c, 75, trans. 78; cp. *CIH* 1122.34-37: *Dotae friot fer sainsealbha bunaidh, beo a cheithirfine, cuig duirn a sgiath, se dorna a chalg, miodhach theora cham, cundail a mhéd, urdhaire a sgoth, ni dlegar dhe, deichde a bhuar. bóaire fíor, béo a chuimhne, saighidh, asrean, ní díothoing.* = E. J. Gwynn, 'An Old-Irish Tract on the Privileges and Responsibilities of Poets', *Ériu* 13 (1942), 29.31-34; trans. *GEIL*, 'a man with his own property, his four kins are living, his shield is five fists (in diameter), his sword is six fists (in length), he is the victor of three fights, his size is impressive, his speech (?) is clear, he does not owe anything, he has ten cows, he is a true bóaire, his memory is lively he ensures [payment], he pays, he does not deny on oath'.

⁴¹⁵ *Bürgschaft*, 38.

⁴¹⁶ Smith, 'The Advice to Doidin', § 15c, 75, trans. 78.

⁴¹⁷ *Bürgschaft*, 41; *CIH* 1938.6, *CCIH*, Digest C31, p. 76; *CIH* 1371.14, *CCIH*, Digest B39, p. 61; *saigid* occurs in many meanings, depending on the context, see *DIL: saigid*.

trustworthy in his performance. This is not to say that a surety coming short in some of these respects was legally invalid. It could be expected, to the contrary, that such a surety would have been hard to find. However, the degree of weakening of a guarantee that a party was willing to accept must have depended greatly on the individual situation in question and what character trait was deemed most effective against the respective debtor. It is reasonable to suggest that the party accepting a surety was in the position to make certain demands as to who was chosen and what features would be of sufficient merit to be acceptable, since suretyship always had to be counter-bound. Thus, both parties had to agree to the sureties. As long as the surety's characteristics were legally acceptable and agreeable to the parties, the qualities of the guarantor were allowed to move within these frames. The Advice to Doíden offers an ideal image so as to provide the instructed with an optimum level of consideration when making his choice of a surety. The legal reality was not strictly bound to this aspired *Wunschbild* but it provided a theoretical delimitation to which one should have aspired to approximate as the situation allowed.

5.2. Suretyship among the ecclesiastical order

When the church or its representatives were invoked as sureties there were limitations as to who was deemed worthy to fulfil or enjoy the protection of such a guarantorship. Often suretyship did not meet the preferences of the church and this is the reason why we encounter limitations on liability among the monastic community. The *Hibernensis* agrees with the native laws in excluding those who were subordinate and therefore, not of full contractual capacity:

Sinodus Hibernensis: Non est dignus fideiusor fieri seruus nec perigrinus, nec robustus, nec monachus, nisi imperante abate, nec filius, nisi imperante patre, nec foemina, nisi domina uirgo et sancta.

A Hibernian synod: It is not fitting for a surety to be either a slave, or a stranger, or an imbecile, or a *monachus*, unless ordered by his abbot, or a son, unless ordered by his father, or a nun, unless she is an abbess (*domina*), both virgin and holy.⁴¹⁸

There is a clear tendency towards avoiding suretyship provided by monks to lay people:

Clericus fideiussoribus seruiens deponatur.

A cleric who commits himself to acts of assisting sureties, should be demoted.⁴¹⁹

This *fideiussor* is either a *naidm* or the cleric is acting as a *naidm* when called upon to enforce a debt by a *ráth*. An incident described in The First Synod of St Patrick, also known as The Bishops' Synod, reads as follows:

Clericus si pro gentili homine fideiussor fuerit in quacumque quantitate et si contigerit, quod mirum non potest, per astutiam aliquam gentilis ille clerico fallat, rebus suis clericus ille soluat debitum. Nam si armis conpugnauerit cum illo, merito extra ecclesiam computetur.

If a cleric has given surety for a pagan in whatsoever amount, and it so happens – as well it might – that the pagan by some ruse defaults upon the cleric, the cleric must pay the debt from his own means; should he contend with him in arms, let him be reckoned to be outside the Church, as he deserves.⁴²⁰

The clerical *fideiussor* in the quote is clearly a *ráth*, who is being told that he must not behave like a *naidm*. The person *fideiussoribus seruiens* receives a severe punishment, which makes it unlikely that he is himself a *ráth*. To the extent that the prohibition on clerical violence still holds, there is a very good reason for keeping the *ráth* separate from the *naidm*. Therefore, a member

⁴¹⁸ *Hib*, 33.3, 265, trans. 711 = Wasserschleben, XXXIV. 3, p. 145; Flechner notes that his translation of *domina* is interpretative and points to B. Jaski, 'Marriage laws in Ireland and the Continent in the early Middle Ages', in C. Meek & K. Simms (eds.), *The fragility of her sex? Medieval Irishwomen in their European context* (Dublin 1996), 19, who suggests equating *domina* with a woman of high status (*bé cuitchernsa* or *cétmuinter*) and translates: 'nor a woman, unless she is the head of a household, or a holy virgin'; cf. the similar rules regarding contract, McLeod, *EICL*, 60, 62.

⁴¹⁹ *Hib*, 33.2, 264, [my translation] = Wasserschleben, XXXIV. 2, p. 144; *Canones apostolorum* 20; see *Dionysiana* version, ed. A. Strewe, *Die Canonessammlung des Dionysius Exiguus in der ersten Redaktion* (Berlin, 1931), 1-10.

⁴²⁰ *The Irish Penitentials*, ed. L. Bieler, (*Scriptores Latini Hiberniae* V, Dublin 1963, repr. 1975), *Synodus I Sancti Patricii*, 8, 54.

of the monastic community would end up having to pay the debt himself and also could not distraint his compensation for he was not entitled to recover it by coercive means. There is a clear awareness of this problem in *Hib* which mentions various periods of notice given to the debtor in the hope that he would pay.

Sinodus Hibernensis dicit, ut rata reddat debita pro quibus fixerat manus, ita ut prima uice XV diebus expectet debitorem, secunda uice XX diebus, tertia uice XXX diebus, quarta uice XL diebus. Postea sine reputatione reddat debitum.

A Hibernian synod says that a 'paying surety' pays the debt of those on behalf of whom he fixed his hand, in such a manner that, after the first time he gives notice, he shall wait fifteen days for the debtor to settle the debt, after the second time twenty days, after the third time thirty days, and after the fourth time forty days. Thereafter let him repay the debt without giving it another thought.⁴²¹

There was a strong injunction against going surety for a foreigner and a pagan, further emphasized in the following prediction:

Adfligetur malo, qui fidem facit pro extraneo.

He who is surety for a foreigner, shall be afflicted with evil.⁴²²

Another reason for limiting suretyship is that the surety would usually swear to the truthfulness of his words in cases of a disputed claim and it was this which triggered caution:

Omnis audax iuramenti mendacii proximus est.

'Every one who dares to swear is a neighbour to lying'.⁴²³

The eternal truth lay in the hands of God alone:

⁴²¹ *Hib*, 33.4, 265, trans. 712 = Wasserschleben, XXXIV. 4, p. 145; *sine reputatione* alternatively may be translated as 'without recalculating it', in the technical sense of *reputare* (personal conversation with Prof. Paul Russell).

⁴²² *Hib*, 33.1, 264, trans. 711 = Wasserschleben, XXXIV. 1, p. 144; Proverbs 11:5. [I amended 'stranger' to 'foreigner']

⁴²³ *Hib*, 34.2, 267, trans. 715 = Wasserschleben, XXXV. 2, p. 147; Genesis 24:1-3; 24:9; *mendacii proximus* is understood to refer to a person who is very close to lying, but does not actually tell a lie.

Verus enim repromissor Dominus ait: Si duo ex uobis conueniant super terram in nomine meo de omni re quamcumque petierint fiet illis.

For the true surety, the Lord, said: Should two of you come to an agreement upon the earth in my name, concerning any thing whatsoever they shall ask, it shall be done for them.⁴²⁴

It is known that relics were employed for that purpose. The following passage is from the legal text *Coibnes Uisci Thairidne*, and therein the *peregrinus pro amore Dei* (exile of God), was required to enforce the guarantee offered by relics:

Ní i n-aiccditer fir nime 7 soscéla[e] críst, ar dlega[i]r do cach déorad dé saigid a nadma[e] amal ad-rogesta[e] ind no do-dic[h]sed a chelebrad aire.

A thing for which the men of heaven and the gospel of Christ are invoked [as sureties], for every ‘exile of God’ is obliged to enforce their suretyship as though he himself had been invoked for it or as though his celebration [of religious rites] had guaranteed it.⁴²⁵

As can be seen, a person may invoke as surety the saints (‘men of heaven’) and the Gospels, by which is likely meant ‘relics’, since gospel-books as well as such items as bells which were believed to have belonged to saints were treated as relics. On the whole, the main opposition against suretyship was directed at those who had to enforce their guarantee by means of force. It is this type of enforcing surety that we shall turn to examine in the following.

5.3. *Naidm*

The early Irish enforcing surety is termed *naidm* (act of binding, bond, contract), the verbal noun of *naiscid* (binds, makes fast).⁴²⁶ It is well attested in the text of the laws but in glosses the word

⁴²⁴ *Hib*, 19, 123-124, trans. 609= Wassersleben, XIX, p. 71; Matthew 18:19.

⁴²⁵ Binchy, ‘Irish Law Tracts Re-Edited’, *Ériu* 17 (1955), § 7, 66-69; cp. Stacey, ‘The Suretyship of the Gods’, in her book *Dark Speech*, 199-221.

⁴²⁶ *DIL*: *naidm* & *naiscid*.

fonaidm is used regularly, which does not seem to differ significantly in meaning.⁴²⁷ *Fonaidm* is the verbal noun of *fo-naisc* (act of binding an obligation or a contract; binding one or pledging something as security, guarantee), and is sometimes written *fosnaidm*, alongside the word *fornaidm*, verbal noun of *for-naisc* (binding; an additional bond).⁴²⁸ On the other hand, there is the much rarer and archaic term, namely *macc*, *mac*, which often occurs as *mac(c) nascairi* (binding of a *nascaire*) in glosses, *nascaire* literally meaning ‘maker of *nasc*s, chain- or ring-maker’, with the legal meaning of ‘contract-binder’.⁴²⁹ *Macc* is a homonym of *mac(c)* (son), which is the reason why it ‘became obsolete at a very early period’.⁴³⁰ *Macc* (surety, security, deposit) corresponds to Welsh *mach*, from the Common Celtic **makkos* whereas *macc* (son) corresponds to Welsh *mab* (son), derived from **mak^wk^wos*.⁴³¹ The *naidm* and the *ráth*, moreover, are the only two sureties occurring in the *Collectio Canonum Hibernensis* where they are given the Hiberno-Latin terms *stipulator* and *rata* respectively; whereas the classical Roman legal term *fideiussor* is used by the Canonists to denote in general a surety or guarantor.⁴³²

The more frequently encountered legal term in the sources is *naidm* and its semantic range testifies to a certain flexibility in meaning representative of the almost synonymous use of *naidm* with *cor* (contract) in the original context of suretyship: *Fuil fir saiges naidm* (blood spilt by a man who is enforcing his surety),⁴³³ *tellach la naidm ⁊ raith ⁊ fiadnaise* (entry with *naidm* and

⁴²⁷ J. Vendryes, *Lexique Étymologique de l'Irlandais ancien* (Paris 1960, repr. Dublin, 1983), N-1.

⁴²⁸ *DIL*: *fonaidm*, *fornaidm*, *fosnaidm*, cf. *snaidm* (Mid. or Mod. Irish form of *naidm*).

⁴²⁹ *DIL*: *nascaire*, cf. *nasc* (fastening, tie, spancel, ring; legal: bond, obligation), *ar-nasc* (ring, collar), *ar-naisc* (binds, guarantees).

⁴³⁰ Binchy, ‘Celtic Suretyship’, 360.

⁴³¹ *Bürgschaft*, n. 3-4, 56; Vendryes, *Lexique Étymologique de l'Irlandais ancien*, M-2-3.

⁴³² *IR* V, 364-372; *Hib*, n. 313, 934; cf. *Hib* 33, 264 = *Wasserschleben* XXXIV, pp. 144-146: *De fideiussoribus et ratis et stipulatoribus*; Proverbs 6:1, 11:5, 20:16, 22:26-7.

⁴³³ *DIL*: *naidm*, *CIH*9.5 = *AL*v 142.9; trans. *GEIL*, 171.

security and witness),⁴³⁴ *naidm meisce* (a bond of drunkenness),⁴³⁵ and therefore a bond of a drunkard. As can be seen from these meanings associated with the legal guarantee of the *naidm*, there is a metaphorical link between the surety and the contract itself. The chains by which a person is bound are a metaphor for the contractual terms by which a party needs to abide. These terms are enforced by the *naidm* who is literally the personification of the contract, a connection first noted by Thurneysen who refers to the enforcing surety as virtually ‘the contract in person’.⁴³⁶

The concept of contractual security is inseparable from the occurrence of a debt between two persons, for which liability was born by the debtor and to varying degrees by his sureties. The concept of debt can take various forms and, as D. B. Walters notes, ‘is not restricted to notions of money or its equivalent but includes the sense of “anything that can be owed” including services, behaviour of a stated kind, the production of a person, immunity and so on, as well as the more obvious sense of the duty to transfer something with a money value, or the units in which that value is calculated, money itself’, thus incorporating payment as much as performance of a particular duty.⁴³⁷ The enforcing surety’s role was to extract this debt from the debtor and, in line with Binchy’s first observations as to the historical development of suretyship, the *naidm*, as original surety did not bear the debt or liability, for ‘he was pledged to enforce it, not to discharge it’.⁴³⁸ Kelly remarks that this suretyship entailed a relatively small risk, which explains that the *naidm* of *bóaire* rank only received a fee to the value of a *colpthach* (two year old heifer).⁴³⁹ The

⁴³⁴ *DIL: naidm, CIH23.10 = ALv 206.4.*

⁴³⁵ *DIL: naidm, CIH2159.27.*

⁴³⁶ *Bürgschaft, 57.*

⁴³⁷ Walters, ‘The General Features of Archaic European Suretyship’, 92-93.

⁴³⁸ Binchy, ‘Celtic Suretyship’, 357.

⁴³⁹ *GEIL, 171-2; BA § 40, ed. Thurneysen, Bürgschaft, 12; Stacey, 216.*

naidm's original capacities were far reaching and 'not designed merely to supplement or to facilitate the public administration of justice: he was rather a primitive substitute for it.'⁴⁴⁰ Binchy argues that the earliest type of human surety would have been capable of forcing the other to meet his obligations alone 'by virtue of his superiority over another', on the grounds of his status and position in society, such as head of a kindred or lord over clients that allowed him to exercise this authority and compel performance.⁴⁴¹

The type of suretyship that the *naidm* incorporates is known as *Leistungsbürgschaft* in German legal terminology (surety for performance) and used for 'a person whose status convinces the creditor of his ability to compel performance by or for the debtor', for which reason he would usually have to be a superior of the party he supports, or 'among the higher social classes, possibly his peer'.⁴⁴² Binchy holds the earliest Irish enforcer to represent this 'archaic type of surety' who acted 'as a primitive substitute for judge and bailiff', a capacity for whose fulfilment he 'must obviously have been a man of considerable standing'.⁴⁴³ Glossators also associate the *naidm* with the grades of nobility and Binchy regarded it as 'most unlikely that a mere commoner would ever have been invested with such far-reaching powers' of execution, which included not only the distraint of the debtor's property but also the right to imprison and, theoretically, kill the debtor with impunity.⁴⁴⁴ This capacity is attested, moreover, in Heptad 6, which mentions seven

⁴⁴⁰ *ibid.* 356-357.

⁴⁴¹ *ibid.* 357.

⁴⁴² Walters, 'The General Features of Archaic European Suretyship', 95-96; Binchy, 'Celtic Suretyship', 361-362; a good summary of Otto Friedrich von Gierke's analysis of debt and liability can be found in K. von Amira, 'Otto Gierke, Schuld und Haftung im älteren deutschen Recht, insbesondere die Form der Schuld- und Haftungsgeschäfte', *Zeitschrift der Savigny Stiftung für Rechtsgeschichte. Germanistische Abteilung* vol. 31, issue 1 (Aug. 1910), 484-499.

⁴⁴³ Binchy, 'Celtic Suretyship', 361.

⁴⁴⁴ *ibid.* 361.

bloodsheds not subject to compensation and where the victim was not entitled to the usual practice of sick-maintenance. These include the references quoted above to the *fuil fir saiges naidm* (blood spilt by a man who is enforcing his surety), which does not incur liability.⁴⁴⁵

Likewise, *Berrad Airechta* mentions the *aitire* employing the force of a *naidm* on his behalf:

Ata *aitire* gaibhes gnimu nadma: *aitire son dobeir* laim i mbrollach feicheman co nadhmaim le, saigid riasiu ascomra; ass *ed* a slan.

There is an *aitire*-surety who undertakes the responsibilities of a *naidm*-surety: that is an *aitire*-surety who puts his hand on the breast of a debtor [to enforce a claim] together with a *naidm*-surety. He enforces [the claim] before he has paid. In that way he is free from liability.⁴⁴⁶

That the surety ‘puts his hand on the breast of a debtor’ is thought to be a symbolic gesture when apprehending a debtor but also to expel an outsider, who may have received this status from failing to pay a debt, for which he was exiled.⁴⁴⁷ This allowance attests that the *naidm* does not act as a purely private individual but as a contractual enforcer immune from the usual legal constraints. That this was the case is further evident in that a debtor might flee under the protection of a high status individual or escape into hiding elsewhere when expecting the *naidm*’s appearance.

Cadeat *tra* imdeglā fechemon ar nadmāim, ma theis for snadhuth? Ata triar dodneim lā ar nadmāim .i. ansruth 7 daul 7 a[e]nach.

What, then, are the defences [available to] a debtor [which protect him] from a *naidm*-surety, if he seeks protection? There are three things which protect him from a *naidm*-surety in Irish law, i.e. a high noble and a court and an assembly.⁴⁴⁸

⁴⁴⁵ *CIH*9.5 = *AL* v 142.9; trans. *GEIL*, 171.

⁴⁴⁶ *CIH*594.15-16 = part of *BA*, § 42, ed. Thurneysen, *Bürgschaft*, 13; see also 56; Stacey, 216.

⁴⁴⁷ *DIL*: *brollach*; *CIH*594.15-16 = *BA*, § 42, ed. Thurneysen, *Bürgschaft*, 13; Stacey, 216.

⁴⁴⁸ *CIH*594.26-27 = *BA*, § 45, ed. Thurneysen, *Bürgschaft*, 13-14; Stacey, 217.

This is also the underlying reason when the *naidm* says the following to the creditor in respect of debt collection:

‘fuircim-se cobach lat-sa armo chind i maighin an forais, cen carpat, cen faesam, 7
sesa lat-sa fair iarum.’

‘Let me find the debtor with you, awaiting me in the place appointed for payment, without a chariot, without protection, and I will, then, with you, enforce [the claim] against him.’⁴⁴⁹

I follow Thurneysen in taking this mention of a chariot to refer to a debtor who has put his belongings on his chariot trying to do away with his debt and fleeing the territory.⁴⁵⁰ When the debtor enlisted the protection of one of the three possibilities above, the *naidm* could not enforce the claim immediately. Clearly, the debtor did not offer a pledge and was not willing to wait for enforcement by the *naidm*. The *naidm*-surety’s duty also encompassed forcing the debtor’s re-appearance in those cases where he had actually absconded out of guilt and fear.⁴⁵¹ The *naidm* had the possibility to shut in the debtor’s calves.

Os moni dama in snadugh fuige//fris, iatair dā fora loighaib beós co tuidig ara cend-
side, Co roast[a]tar a chuir bel fair.

And if the protection does not permit a judgement [to be enforced] against him, his calves are nevertheless then enclosed [apart from their mothers] until he comes [to tend] those [calves], so that his verbal contracts can be made fast upon him.⁴⁵²

The point was that the calves were separated from the mothers, thus exposing the debtor’s livestock to potential demise and the serious impact this could have had on the debtor himself

⁴⁴⁹ *CIH* 594.23-25 = *BA*, § 44, ed. Thurneysen, *Bürgschaft*, 13; see also 56; Stacey, 217.

⁴⁵⁰ *BA*, ed. Thurneysen, *Bürgschaft*, n. 5, p. 13.

⁴⁵¹ *BA*, §§ 44, 46, ed. Thurneysen, *Bürgschaft*, 13-14; Stacey, 216-217.

⁴⁵² *CIH* 594.31-32 = *BA*, § 46, ed. Thurneysen, *Bürgschaft*, 14; see also 56; Stacey, 217; notice the parallel to the leading legal case *Fergus mac Léti*; Binchy, ‘Distrain in Irish Law’, 36; *roast[a]tar*, following Thurneysen.

for lack of food resources and the inability to fulfil other agreed transactions.⁴⁵³ Therefore, he was forced ‘to come face to face with the *naidm*-surety’.⁴⁵⁴ Ultimately, if the debtor were not to make an appearance, the indemnity would still be guaranteed by distraining the debtor for the full amount of the debt, provided the claim was justified, but the *naidm*’s primary duty clearly was to deliver the debtor in person to answer the charge against him and a denial presumably was essential in order to pursue with this remedy. To seek out the debtor would also be the surety’s primary function if the claim was held to be subject to dissolution, in which case the *naidm* would ensure that the claimant and defendant presented themselves in front of a judge. Accordingly, the three main responsibilities of the *naidm* were:

C̄s, cadeat t̄ri gni \bar{m} a nad \bar{m} a? Imcoim̄et neic a naicdicher arna tormastar ni fair 7 arna dighaibhthar de, a luighe cen conn (*read on*), 7 a saigith cen ailseth.

A question: what are the three responsibilities of a *naidm*-surety? Preserving [in his memory the value of] the thing for which he is appointed *as surety* lest anything be added to it and lest anything be subtracted from it, [giving] his oath without blemish, and enforcing it (the contract) without neglect.⁴⁵⁵

That the *naidm* had to memorise the precise wording of the contract formed an essential part of his repertoire since he had to enforce the contract in pursuance of the terms. An emphasis was put on the precise value of the consideration due to be exacted without deficiency or surplus. This phrasing is important because it provides the foundation for a party to try for annulment or sue for indemnity, depending on several variables, which moves the case towards the adjudication of a judge (see 1.5. Early Irish Contracts, p. 9 ff.).⁴⁵⁶ A significant aspect is the limitation period

⁴⁵³ Cf. Binchy, ‘Distraint in Irish Law’, 36.

⁴⁵⁴ *BA*, § 44, 46, ed. Thurneysen, *Bürgschaft*, 13, n. 1, p. 14; see also 56; see also 56; Stacey, 216.

⁴⁵⁵ *CIH*594.18-20 = *BA*, § 43, ed. Thurneysen, *Bürgschaft*, 13; Stacey, 216; *conn*, MS: ̄on, Thurneysen reads *clith*, cp. § 65g; Binchy suggests *on*, which Stacey follows.

⁴⁵⁶ See N. McLeod’s presentation in *EICL*, ‘defects in consideration’, 32-54.

during which a party had to declare that he noticed defects in consideration. The period commenced with the time of discovery. A common period was ten days for inanimate chattels and carcasses, but there were others, ranging from four months (pig, sheep, goat) to nine months (cattle and slaves) up to one year (steed and horse) and three years (for land claims).⁴⁵⁷

Mā ro ināsastar inn re re na hiubaiġe 7 nir fuitris⁴⁵⁸ re re na hiubaiġe, 7 ni rotocaith a re dechmaide ina aititin, roinas ni .ii. ann iar re na hiubaiġe, nochan uil a athchor ris ach tic aneth (ineich) is esbadach de re re niubaiġe nama, 7 ni hictar andí roinnas ann iarsan iubaiġe.

If it developed in it during the limitation period and he has not brought an action during the limitation period, and the period of ten days in its acknowledgement has not expired, and he has discovered something else in it after the time of the limitation period, restitution is not available for it but payment for the thing which is [discovered to be] lacking from it during the limitation period only, and there is no payment made for the thing which he discovered in it after the limitation period.⁴⁵⁹

If a contract was annulled based on fraud this was regarded as a disgrace for the surety and the case reverted to *dliged*:

Is treissiu naidm im̄ in tan is do reir nadma 7 fiadan dotet. Ata ait im̄it sruithiut dliged oldas naidm: in tan donathbongar indliged .i. diubart tar enech nadmæ 7 atsuidter dliged cen naidm; is de ata: atguidter na seghar, seagar na aiciter.

There is a situation in which entitlement is more to be respected than is a *naidm*-surety: when injustice { i.e. fraud } is dissolved to the dishonor of a *naidm*-surety and entitlement is bound without a *naidm*-surety. Therefore is it said: “[A *naidm*-surety] is appointed and [a claim] is not enforced; [a claim] is enforced and [a *naidm*-surety] is not appointed.”⁴⁶⁰

This is another instance in which it becomes apparent that when the contract dies, so also does the *naidm*-surety’s office and the claim reverts to *dliged*. However, in the absence of fraudulent

⁴⁵⁷ *ibid.* 47-48, n. 127-145, 53-54; for examples see: *CIH* 1086.42, 832.31-32, 696.6-8, 832.34, 1087.9-12.

⁴⁵⁸ *CIH* 841.3: *fuited*, amended to *fuitred*; McLeod silently amends to *fuitris*.

⁴⁵⁹ McLeod, *EICL*, n. 128, 53; *CIH* 841.3-6; slightly amended, McLeod gives: ‘Ma roinasastar’ and translates ‘If it has been discovered’.

⁴⁶⁰ *BA*, § 33, ed. Thurneysen, *Bürgschaft*, 11; Stacey, 214-215.

behaviour and therefore, in cases where a party accepts the overpayment in full awareness, the contract is unimpeachable, and the *naidm* ‘pierces entitlement’.⁴⁶¹

Returning to the *naidm*-surety’s function during pleading, Thurneysen makes the significant observation that the enforcing sureties are positioned in the *airecht fo leth* (court apart), a secluded area within the court, where they sit together with the witnesses and the *catha* (troops, battalions), presumably the cavaliers who had engaged in a judicial duel.⁴⁶²

Airecht fo leth, is a suidhi bit nadmand ⁊ ratha ⁊ fiadain [⁊] maic cormbel, noch ni tiaghatsaide co neoch ni tedi nech cucussum *acht* bit oc seis coir co tiaghat co cumnib glanaib i craes na hair *echa* ⁊ is *aire* is airect fo leth.

The court apart, it is there that there are enforcing sureties and property-sureties and witnesses [and] sureties to contracts, and they do not go to anybody, and no one goes to them, but they remain properly seated until they go with clear memories into the midst of the court and it is for that reason that it is [called] the court apart.⁴⁶³

When they were called upon to give their testimony and oath, they stepped into the centre of the court with ‘unclouded memory’.⁴⁶⁴ It has been suggested that the location of the enforcing sureties in this area of the court has the purpose to keep them out of the hearing range of pleading so that the argumentation of the parties’ advocates would not be audible to them and thus, not taint their memory.⁴⁶⁵

Since the *naidm*-sureties were active until all entitlements resulting from the contract had been fulfilled, they also guaranteed that the paying surety would have been indemnified if he had to

⁴⁶¹ *BA*, § 31, ed. Thurneysen, *Bürgschaft*, 10; Stacey, 214.

⁴⁶² *Bürgschaft*, 57: *airecht fo leth* ‘abgesonderte Versammlung’, cp. K. Meyer, ‘Mitteilungen aus irischen Handschriften’, *ZCP*12 (1918), 360; for *catha*: see n. 6, 57: ‘vermutlich die Kämpen, die einen gerichtlichen Zweikampf ausgefochten haben’.

⁴⁶³ Kelly, ‘An Old-Irish Text on Court Procedure’, *Peritia* 5 (1986), § 5, 86-87.

⁴⁶⁴ *Bürgschaft*, 57-58; cp. also the gloss in the Advice of Doíden that a surety should not have ‘mist in his head’, Smith, ‘The Advice to Doidin’, § 7, 73, trans.76.

⁴⁶⁵ *Bürgschaft*, 58.

perform on behalf of the defendant. The compensation of such a *naidm*-surety was agreed upon even before the surety agreed to his own obligations. It was a prerequisite for the *ráth*-surety's promise of subsidiary payment in case of default.

Nascar a slan nairaiti .c.amus rea nadmair forri fadeisne.

The freedom from loss of the *ráth*-surety is bound first of all, before the binding [of the *ráth*-suretyship] on [the *ráth*-surety] himself.⁴⁶⁶

The *naidm* was a tie between the debtor and the creditor, the debtor and the *ráth*-surety, and the creditor and the *ráth*-surety. This is the reason why Thurneysen called him 'a type of supervisor over the contract'.⁴⁶⁷ The *naidm* was the authoritative bond accompanying, remembering and enforcing the claims of each participant in the contract until all claims had been fully satisfied. In the absence of the debtor's conceding to the claim, the *naidm* had to distrain the debtor for what he owed and thus, is the most significant person to convey the pledges taken in distraint and guarantee redress.

5.4. Ráth

The *ráth*-surety (property surety, paying surety) stands closest in character to a contemporary surety for he paid where the debtor did not. Presumably, he was the latest occurring type of surety, although he was well-established already in the canonical texts.⁴⁶⁸ The *ráth* vouched with his own property that he would fulfil the obligations in question if the principal party defaulted and he did pledge on his behalf.

⁴⁶⁶ *CIH*598.14 = *BA*, § 74, ed. Thurneysen, *Bürgschaft*, 26-27; Stacey, 224.

⁴⁶⁷ *Bürgschaft*, 57: 'eine Art Oberaufseher über den Vertrag'.

⁴⁶⁸ Walters, 'The General Features of Archaic European Suretyship', 96.

Báeth nech nad mbí naidm, na ráth, na fíadnaise fri cach cundrath fri forgell cuimne ... Fir n-ambechtae cor cen ráith, cen fíadna, cen naidm. Ar is naidm do-boing, ráth gellas, fíadnaise con-oí la folta fíachu.

Senseless [is] anyone [for] whom there is not enforcing surety, nor paying surety, nor witnessing in regard to every bargain for the testimony of remembrance ... An unprovable truth [is] a contract without a paying surety, without witnesses, without an enforcing surety. For in addition to considerations and obligations, it is the enforcing surety who exacts, paying surety who pledges, and the witnessing which preserves.⁴⁶⁹

This default was essential in order for the paying surety to become liable, because he was a subsidiary security and thus, only a secondary option but never the first port of call. The claim in question originated in a contractual debt, which came into being at any time when one party had fulfilled his part of the contract first and was waiting for the other party to follow. To put this in legal terms, parties A and B rendered *folud* (consideration) to each other, the acceptance of which created *dliged* (entitlement) to a *frithfolud* (counter-consideration), see section 1.5., on early Irish contract law, p. 9 ff.⁴⁷⁰ Whenever the exchange of consideration that is the giving of *folud* and receiving of *frithfolud* did not occur simultaneously, a debt relationship began. Usually, a specific pay day would have been arranged at which the payment (counter-consideration) should be met. If the debtor did not show, the claimant had to make a public demand for the debt by reciting a lengthy formula. This allowed him, in cases where a *ráth*-surety secured the original contract, to lay claim to payment from the subsidiary liability.

‘Fiach nondlighiu-sa sunn *in*diu, dathluichur *tam*ingarim. Bith fiach, s̄ rombe dirir dirraith, 7 firfithir a lethchor oim-si cach techta. Atrogath macu be coir airiten 7 dingbalaе, slain 7 frettechtæ tairis, acht rombe fiach.’

‘The debt to which I am entitled here today, I demand it, I claim it. Let it be a [valid] debt-payment, provided that it be in my possession [and] that he has paid it in full,

⁴⁶⁹ BA, § 63, *EICL*, 15.

⁴⁷⁰ McLeod, *EICL*, 14; on the term *dliged* see: Charles-Edwards, ‘Dliged: its Native and latinate Usages’, *Celtica* 24 (2003), 65–78.

and the side of the contract affecting him will be fulfilled by me according to whatever is due. I have appointed *mac*-sureties that I will behave correctly with respect to receiving and removing [the payment] and [with respect to a declaration of] freedom from loss and renunciation [of any further claims on the debtor], provided that the debt has been paid to me.⁴⁷¹

The debtor's failure or refusal to meet the demand entailed a *smacht* (fine), set at one-third of the value of the debt, which was automatically added to the original obligation. The creditor could levy the overall debt from the paying surety, making him liable for the debt inclusive of the fine at this point.

Gaib it laim, nach airm na taire a llaa-sin, reithith a trian nair/di \bar{n} d fiach nascar an \bar{n} .

Take into your hand that, should you not come on that day, as a consequence one third of the debt that is here bound 'runs' (becomes an additional debt).⁴⁷²

Tobongar iarum in fiach-so dind raith cona smachtaib iar sin.

This debt is then subsequently exacted from the *ráth*-surety with its fines.⁴⁷³

Naturally, the surety could not be made liable in the event that the contract was challenged, since the validity of it had to be established first. On the other hand, should the creditor not make an appearance to collect the debt, the defendant had to state his own formula that allowed for an automatic deferral of the debt payment for the length of no less than one year.

Ma feicem co fiach todhi. asbeir cadisin fiad fiadnuib. 'Fiach dleghar di \bar{m} -se sunn indiu. ag ondar sunn ... ' is fiach dia bliadna do iarsin \bar{n} d hi nap⁴⁷⁴ turbuith deithb \bar{i} r dothnairiu dia nephthairiuc.

If it should be the debtor who comes there with the debt-payment (and the creditor does not appear), he for his part says in the presence of witnesses: ['As for] the debt that is due from me here today, here it is ...' it becomes for him a debt [payable only] in a year's time unless a legitimate excuse excuses him for his non-appearance.⁴⁷⁵

⁴⁷¹ CIH595.20-23 = part of BA, § 52, ed. Thurneysen, *Bürgschaft*, 17; Stacey, 218.

⁴⁷² CIH595.5-7 = part of BA, § 51b, ed. Thurneysen, *Bürgschaft*, 16; Stacey, 218.

⁴⁷³ CIH595.23 = part of BA, § 52, ed. Thurneysen, *Bürgschaft*, 17; Stacey, 218.

⁴⁷⁴ Binchy suggests reading: *iar sin, dinap?*

⁴⁷⁵ CIH595.23BA, § 53, ed. Thurneysen, *Bürgschaft*, 17; Stacey, 219.

This long delay meant that the debtor would remain in the creditor's dependence for another year, and gave the latter at least symbolic power.

Whenever the *ráth*-surety had to forward payment, he, consequently, could take action against the principal and exact compensation both for the remuneration for his performance as paying surety and all incurred expenses related to his office. By logical reasoning, a *ráth*-surety is only a viable guarantee if he has sufficient means to cover the debt in question. In order to ensure this, legal limits were set.⁴⁷⁶ These limits include that nobody can function as surety for a debt exceeding his honour-price or for a debt that goes beyond one-third of his possessions.⁴⁷⁷ Larger debts may have been bound by more than one paying surety.⁴⁷⁸ Such limitations secure the surety against burdening himself with expenses beyond the level of sustainability and pose a solid guarantee for the creditor because the incumbent debts were in line with relative affordability. Since the *ráth*-surety was an alternative payer and in this capacity the creditor's next option to indemnification, great importance was given also to his ready availability. By all means, the *ráth* had to be a 'ráth-surety of three deeds', namely pledging, enforcing, and 'milking' (paying).⁴⁷⁹ Likewise, the *ráth* was only considered a strong and reliable force if he was a 'ráth-surety of "rest"', namely if he had a permanent, stable residence within the community and hence, was easy to find and not likely unexpectedly to withdraw precisely because he was easy to corner.⁴⁸⁰ In the case that the *ráth*-surety had to pledge, one reference is made to the pledge having to be

⁴⁷⁶ *Bürgschaft*, 41.

⁴⁷⁷ *ibid.* 41.

⁴⁷⁸ *GEIL*, 171; *BA*, § 26, 75, ed. Thurneysen, *Bürgschaft*, 9; Stacey, 213-4: use of *nadmann* (plural of *naidm*); *CIH*2027.22-9 = D39, *Dona ráthaib síšanaigh* (On paying sureties here below), see *CCIH*, p. 334.

⁴⁷⁹ *BA*, § 76, ed. Thurneysen, *Bürgschaft*, 28-29; Stacey, 225-226; n. 93, 233.

⁴⁸⁰ *BA*, § 76 a, c, ed. Thurneysen, *Bürgschaft*, 28-29; Stacey, 225-226; n. 93, 233.

from his ‘own place of residence’.⁴⁸¹ The *Collectio Canonum Hibernensis* reveals very interesting ideas as to how this action was perceived which are in line with the native laws. The passage discusses the suretyship for a stranger which traditionally was not considered acceptable. This negativity is paralleled in the description of the removal of a pledge from the surety, a step which was bound to happen if one vouched for a stranger debtor with little or no means. The message is clear:

Noli esse cum his qui defingunt manus suas et qui uades se offerunt pro debitis aliorum. Si enim non habeas unde restituas, quid cause est, ut tollat opperimentum de cubili tuo?

Item: Tolle uestimentum eius, qui fideiussor extitit alieni et pro extraneis defixit manum; aufer pignus ab eo.

Be not with them that join their hands, and offer themselves as sureties for the debts of others. For if you have not the means to restore, what cause is there, that he should take the covering from your bed?

Likewise: Take away the garment of him who went surety for an outsider and engaged fast his hand for strangers; take the pledge from him.⁴⁸²

This passage, indeed, is truly revealing. It refers to the pledge being taken from the paying surety, in other words, the distraint of the paying surety. The use of clothing items as voluntarily given pledges is well documented in *Bretha im Fúillemu Gell*.⁴⁸³ The idea of bed clothes is a biblical reference and occurs in Proverbs 22:27: ‘If you have nothing with which to pay, why should your bed be taken from under you?’ The intention of the utterance is merely to visualize the potential dangers of suretyship and to render obvious the negative consequences a surety may face. The

⁴⁸¹ BA, § 76 b, ed. Thurneysen, *Bürgschaft*, 28-29; Stacey, 225-226; n. 93, 233.

⁴⁸² *Hib*, 33.1, 264, trans. 711: trans. amended to ‘join their hands’, based on Stacey, *The Road to Judgment*, 36; the first paragraph is Flechner’s HV (*Hib.B*), precisely H 36.1 & V 35.1; the second paragraph = Wasserscheben, XXXIV. 1, p. 144; Proverbs 22:26-7, 20:16.

⁴⁸³ CIH 464.26-29 = BFG, § 6, CIH 469.3-5 = BFG, § 23, CIH 469.7-11 = BFG, § 24, CIH 469.17-18 = BFG, § 25, CIH 469.19-23 = BFG, § 26, CIH 469.27-28 = BFG, § 27, CIH 469.29-32 = BFG, § 28.

removal of his garment feels as if the creditor was literally disrobing him, baring his honour open in front of the eyes of witnesses and effectively removing it until justice be done.

Another important factor was that the principal debtor could have been distrained for the debt, which was the only option in cases without a paying surety present. Therefore, the creditor had two options at his disposal, when a *ráth* was involved: (1) distraint of the principal debtor, or (2) substitute payment through the *ráth*-surety. It is not made clear explicitly which of the two options was to be given preference, due to the scope of interpretations permissible from the reference in question.

Tiagair da- docom (or: *danō* docom) raithe iar nel *ud* feich *eman*.

One goes to the *ráth*-surety, moreover, after evasion by the debtor.⁴⁸⁴

The paying surety's main purpose was his financial guarantee, which would argue for his ready involvement. However, his function was vicarious and therefore, the debtor had to make his refusal to pay clear, before the creditor was permitted to demand payment from his *ráth*-surety or distraint the principal debtor. It does appear that the older texts do not mention distraint as a preferable outcome in this scenario.⁴⁸⁵ Indeed, this would defeat the purpose of having a secondary payer present. The situation appears to have been that there existed a period following the principal's default, during which measures were taken against him. This period commenced after the principal's first failure to pay, at which point or shortly after the surety gave a pledge in acknowledgement and as a re-affirmation of his liability. During this period the surety would attempt to force the debtor into accepting the claim and accompanies the *naidm* on his path

⁴⁸⁴ *CIH*594.37 = part of *BA*, § 48, ed. Thurneysen, *Bürgschaft*, 14-15; Stacey, 217.

⁴⁸⁵ *Bürgschaft*, 37; he compares the regulations in old texts with commentary in *AL* iv 258-60 where distraint is envisaged as a possibility in particular circumstances.

whose function it was to coerce the principal debtor to comply so that he, the *ráth*, would not himself be made liable.⁴⁸⁶ This period is said to last sixteen days in *Berrad Airechta* but considerably longer periods are given elsewhere.⁴⁸⁷ That the length of this period is changeable is very important because the pledge periods in *BFG* also change according to the parties as well as according to the pledge. A large amount of glosses on one paragraph raise the possibility that the head of the kindred who offered a pledge on behalf of someone else had the power to negotiate different lengths for interest payments with the plaintiff and the defendant respectively, suggesting that an active negotiation was involved.

Is eadh begaighes fuille *m* in gill-sea: a beith a laimh int aige *Áine*, uair is eagail leisín feichemain toicheda gan a tabairt do i *forba* in ree. Mani dearadh, manar tuit, on aigi *Áine* dun *féchemu* in toichedha, *7* tainig in re raachtaigh int aige fine aturu *7* bidbu, *7* gairde in re raachtaig int aige fine eaturu *7* bidbu na in re raachtaig aturu *7* feichem, *7* fuillium do on re raachtaig ar bidbaidh imac.

It is this that reduces the interest of this pledge: its being in the hand of the head of the kindred, because the plaintiff fears that it will not be given to him at the end of the period. If it has not fallen forfeit, if it did not fall from the head of the kindred to the plaintiff, and the period has come that the head of the kindred has fixed between them, him and the defendant and the period that the head of the kindred has fixed between them, him and the defendant is shorter than the period he fixed between them, him and the plaintiff, interest is to be paid from the period fixed with the defendant.⁴⁸⁸

This seems highly plausible since the beginning and end of each period mark major shifts in property rights. Thus, there were three stages: (1) failure of *féchem* to appear; hence the one-

⁴⁸⁶ *BA*, § 73, ed. Thurneysen, *Bürgschaft*, 26; Stacey, 224.

⁴⁸⁷ *BA*, § 70, ed. Thurneysen, *Bürgschaft*, 25-6; Stacey, 223; *Hib*, 33.4, 265, trans. 712 = Wassersleben, XXXIV. 4, pp. 122-3; see also *IR V*, 369-370, 378.

⁴⁸⁸ *CIH* 463.11-16 = gloss in marg. sin. on *BFG* § 2; but cp. *CIH* 463.9-10 = gloss in marg. dext. on *BFG* § 2.: .i. *cutruma in re roachtaig int aige fine etura 7 in bidbu 7 in re roachtaig int aige fine etaru 7 in fechem toicheda, 7 fuille m do beth do o sin amach*. 'i.e. the period that the head of kin has fixed between them, [him] and the defendant is equal to the period the head of kin fixed between them, [him] and the claimant, and interest is to be paid from then on; further cp. *CIH* 463.21-27 = gloss in marg. inf.

third fine; (2) the *naidm* may enforce, but if not (3) the *ráth* was called on to pay. However, sometimes it seems as if (2) could come after (3), as in *Berrad Airechta*.⁴⁸⁹

According to Binchy, the original function of a surety in primitive social orders was the right and ‘duty of a surety to distrain a defaulting principal and convey the distraint to a safe place for delivery to the creditor’,⁴⁹⁰ and such a threat underlies the delay until the subsidiary liability steps in. If the debtor came to justice during this period, the *ráth* did not have to pay in his stead and the pledge was returned to him. The paying surety received as remuneration one sack of grain per day, totalling at the value of one cow after the period came to a closure.⁴⁹¹

Mad ic u^rslucuth iⁿdisi ria ndiriuch tíí feichem, asren fadesin 7 a colainn feich 7 a smachta riasiu asria rath tara cenⁿ; 7 asren boin do raith inna imloth 7 in naurslucud a iⁿdisi; Ar at se laa deac immeroloith rath; miach cach laithe do dī tar heisi ind imloid, bo do samlaith; is edislan n^urslicthi indise in so.

If it happens that the debtor comes at [the time of] the opening of the milking enclosure [but] before the stripping, he himself pays the principal of the debt and its fines before the *ráth*-surety pays on his behalf, and he pays a cow to the *ráth*-surety for his disturbance and for the opening of his milking enclosure. For there are sixteen days during which a *ráth*-surety is ‘disturbed’: he receives then a sack every day after that for the disturbance – he thus receives a cow. This is the compensation for the opening of a milking enclosure.⁴⁹²

Thurneysen and Stacey hold the opening of the milking enclosure to refer to the *ráth* offering a pledge, and equate actual milking with paying.⁴⁹³ In other words, the creditor has come to the surety’s cattle, and is about to take them, and only then the debtor arrives and settles, so that the

⁴⁸⁹ *BA*, § 73; (2) emerges from § 53; ed. Thurneysen, *Bürgschaft*, 26, 17; Stacey, 224, 219.

⁴⁹⁰ Binchy, ‘Distraint in Irish Law’, 24, 27.

⁴⁹¹ *BA*, § 70, ed. Thurneysen, *Bürgschaft*, 25-26; Stacey, 223.

⁴⁹² *CIH*597.37-598.3, *BA*, § 70, ed. Thurneysen, *Bürgschaft*, 25-26; Stacey, 223; see also Stacey, *The Road to Judgment*, 39-40.

⁴⁹³ See particularly Stacey’s note on this: *BA*, Stacey, n. 80, 232: Thurneysen gives ‘standing in for’, and within distraint it can mean ‘surrogate debtor, kinsman debtor’; *in-omlig* (levies, mulcts).

enclosure was ‘opened’ but nothing was taken. The temporal space before the *ráth* has to pay is confirmed in the following statement:

Rath saiges for feche^muin la naid^m riasiu docoimrastar.

A *ráth*-surety who enforces [a claim] against a debtor together with a *naidm*-surety before he has been stripped.⁴⁹⁴

Stacey comments that ‘since all three of these individuals [creditor, *ráth*, and *naidm*] were likely to be known, and some perhaps even related, to the debtor, the pressures on the debtor must have been social as well as physical, psychological as well as material’.⁴⁹⁵ However, Stacey points to the issue that the value of one cow seems insufficient for compensating the surety for this disturbance. We may be able to solve this problem, however, when turning to *Bretha im Fúillemu Gell*. There, the pledge of the *faithche* (green, infield),⁴⁹⁶ given by the *bóaire* requires restitution and a *sét clithair* (relieving, sheltering *sét*).⁴⁹⁷ The *bóaire* is often used as a standard figure to represent a status group and *Berrad Airechta* uses his rank when discussing the remuneration of the *ráth*-surety. The *sét clithair* is given the value of an ounce of silver or a cow that would purchase it (have the same value). If this underlies *Berrad Airechta*, the surety receives one cow in interest and the creditor had to return the surety’s pledge, which can be expected since he redeemed this pledge within the sixteen day period by offering payment. Therefore, the interest rate may not be irreconcilable with what the surety could be expected to receive. It would be even less surprising if the pledge of the green could be a standing pledge that was not physically

⁴⁹⁴ *CIH*598.11-12 = part of *BA*, § 73, ed. Thurneysen, *Bürgschaft*, 26; Stacey, 224.

⁴⁹⁵ Stacey, *The Road to Judgment*, 40.

⁴⁹⁶ On *faithche* see *EIF*, 369-70.

⁴⁹⁷ *CIH*467.6-12 = *BFG*, § 15.

conveyed to the creditor, thus limiting the surety's disturbance to a minimum. This idea seems to be confirmed in a reference in *Berrad Airechta* which states:

Aicc macu gillfai 7 incoisis,

‘Appoint *mac*-sureties [to guarantee] that you (the *ráth*) will give a gage and identify [it?]. . .’⁴⁹⁸

Therefore, it could have been a possibility that the paying surety offered a standing pledge valid through the period during which attempts were made to get payment from the debtor. It would have been normal to identify the pledge object to the creditor, since the pledgor was not permitted to make any use of it while the creditor had a charge on it. After this failed and the sixteen days had expired, the surety had to release the pledge and forfeit it to the creditor. Failure to convey a standing pledge when it fell forfeit entailed the smallest *díre* payment, not exceeding six scruples, according to *BFG*.⁴⁹⁹ Possibly supporting my argument, this non-possessory pledge is the only instance in *BFG* where status is irrelevant. I would argue that this standing pledge could have consisted of cattle.

That interest was involved when the *ráth* had paid for the principal is evident from *Berrad Airechta*:

Os slan nurslictho iar ndiriuch. Caide son? Ma ’scomræ rath tar[a] c[h]end, co ndecomrastar a indes airi, logh a enech iarna míad. Is *edí slan*, 7 gert 7 indoth 7 fuillim 7 colainn feich.

And the compensation for the opening [of the *ráth*-surety's milking enclosure] after stripping – what is that? When a *ráth*-surety has paid on [the debtor's] behalf, so that his milking enclosure has been stripped to his disadvantage, his compensation is his

⁴⁹⁸ *CIH*598.35 = part of *BA*, § 76b, ed. Thurneysen, *Bürgschaft*, 28-29; Stacey, 225, see also n. 95, 233; cf. *DIL: in-coisig*,

⁴⁹⁹ *CIH*462.30-34 = *BFG*, § 2.

honour-price according to his rank together with cattle by-products and the young [of his cattle] and interest and the principal of the debt.⁵⁰⁰

When the *ráth*-surety had to pay, the debtor did not owe anything to the creditor any more but he became liable to very high compensation payments towards the surety (see below). When a standing pledge became forfeit, it entailed the payment of the pledgor's honour-price, a return of the pledged item's value, as well as interest. Moreover, it is implied that the creditor received the profits of the pledge (by-products and offspring) during this period, for which the surety had to be compensated also. Stacey has analysed this passage and has drawn very insightful conclusions.⁵⁰¹ She quotes a highly poetic passage from *Bretha Nemed* discussing the indemnification of the *ráth*:

Slanadh soráthusa sluinnter iar néiric in ndaghlaithibh dlighidh; Dleghar fiach, fodhbaiter cosmhailsi máir, [is] (n)etaim cuigedh colla feich fedhair fri mís. máraighidh saoghlonna. Soilbhech beithech la lógh niomsaotha im airchenn eallamh, no séd i muin araile ar lá go noidhche, go tresi do sédaibh la logh n-enech neallamh fir bes a séd serbthar.

The indemnifying of a good *ráth*ship – let it be declared [as having been completed] after [the] payment [of compensation] in the good days of law. A debt is owing, let the equivalent of the large amount (i.e. the principal of the debt) be obtained; a fifth of the principal of the debt is the *etaim* – let it be calculated at a month. A sage exalts. A cow in good milk with the price for disturbance [is given] for a speedy resolution, or [one] *sét* in addition to another [is given] for [every] day and night until three days [worth] of *seoit* [have been given], along with the ready honor-price of the man whose property is led astray.⁵⁰²

Of particular interest is the phrase ‘a fifth of the principal of the debt is the *etaim* – let it be calculated at a month’. The exact meaning of *etaim* remains uncertain but Stacey describes it as

⁵⁰⁰ CIH598.4-598.6 = BA, § 71, ed. Thurneysen, *Bürgschaft*, 26; Stacey, 223-224; see also Stacey, *The Road to Judgment*, 39-40; *fuille*m could be a mistake for *fulled* here, as Thurneysen suggested, see IRI: *Unfrei-Lehen*, 346, 365-66, 377.

⁵⁰¹ Stacey, *The Road to Judgment*, 39-43.

⁵⁰² CIH1122.27-31, *Bretha Nemed Dédenach*, ed. & trans. Stacey, *The Road to Judgment*, 40-41 = Smith, ‘The Advice to Doidin’, 66-85.

‘something that could fall due to a person in certain ill-defined but often punitive circumstances’, and mentions that it can refer to a type of pledge, but is also once glossed *smacht*.⁵⁰³ The *Hibernensis* states similarly: ‘the fifth part of a debt is rendered as a pledge’.⁵⁰⁴ Stacey also quotes from a passage from the Irish canons which state that in case of a merciless *ráth*-surety, who charges interest, this interest grows for the period of one year and the debtor has to ‘pay the entire debt and a fifth part of the debt for every month of one year’.⁵⁰⁵ This led Stacey to conclude that the *etaim* of *Bretha Nemed* ‘must then refer to the interest paid by a defaulting debtor to his forfeited surety, which increased month by month at the rate of a fifth of the debt per month until the end of a year’.⁵⁰⁶ This combined evidence suggests that the pledge may have had a value of one-fifth of the debt, which would be due every month. The period of a month occurs in *BFG* for payments of restitution, but this is not consistent.⁵⁰⁷ If the pledge had the value of one-fifth of the debt, the repayment of one-fifth twelve times constitutes more than double, in interest alone, together with restitution. *BFG*, if we can identify the third-party pledgor as the principal debtor’s paying surety, is unique in correlating the compensation for suretyship with the substance of the pledge as well as the status of the pledgor. Since the *ráth*-surety’s status was such a relevant theme in enabling him to fulfil his office, it would almost be surprising if no judicial, status-motivated preferences were to occur. In the quest to identify the third-party pledgor’s legal role, lordship and clientship play a vital role, because a lord might offer a pledge on behalf of his clients. It is

⁵⁰³ Stacey, *The Road to Judgment*, 41-42; referring to *Hib*, 33.5, 265, trans. 712 = Wasserschleben, XXXIV. 5, p. 145.

⁵⁰⁴ *Hib*, 32.9, 262, trans. 706 = Wasserschleben XXXIII. 9, p. 142-3; Numbers 5:7.

⁵⁰⁵ Stacey, *The Road to Judgment*, 42.

⁵⁰⁶ *ibid.* 42.

⁵⁰⁷ *CIH* 474.26-7 = *BFG*, § 52, but compare *CIH* 467.31-39 = § 16: 10 days, *CIH* 470.2-9 = § 29: 3rd day, *CIH* 475.16, 476.10-14 = §§ 57, 64: 5 days.

known that the lord also functioned as *ráth*-surety for semi-dependent people, to which particularly the fourth path of *Cóic Conara Fugill*, called *téchtae*, is living testimony.⁵⁰⁸ This gives us cause to take this option seriously and explore it in even further detail.

The authority of the *ráth*-surety's office was defined by his assets, his property, and was not as personal in character as some other forms of security. Of course, the surety's honour was always on the line if he did not fulfil his office in an appropriate fashion. The paying surety is the closest in his performance to a principal debtor and as such, his pledge and payment were in lieu of the principal debtor. One fictitious etymological story can illustrate the point.

In *Die Bürgschaft* Thurneysen commences his analysis with the story of an old Irish etymologist who relates an imaginary *Geschichtchen* about the origin of the word *ráth*.⁵⁰⁹ *Ráth* and *ráith*, (with both words fluctuating in their use of 'i'), refers to 'an earthen rampart surrounding a chief's residence, a fort.'⁵¹⁰ Thurneysen notes that it is usually equated etymologically (not in meaning) with the Latin *pratum* and refers to 'a place surrounded by a rampart and a ditch'.⁵¹¹ In this leading legal case preserved in the *Senchas Már* tract *Sechtae* (Heptads), we encounter Aimirgin Ráthach, (the owner of forts), who possessed seven forts which formed the basis for his suretyship.⁵¹² He went *ráth*-surety for a man called Conall Eachlúath (Conall, swift as a horse), who, *nomen est omen*, absconded from payment. The *ráth* (paying surety) had to make good the

⁵⁰⁸ *CCF*(R), § 14, ed. Thurneysen, p. 21; ed. Archan, pp. 296-7.

⁵⁰⁹ *Bürgschaft*, 3; *CIH* 63.7-28.

⁵¹⁰ *DIL: ráth*, The antiquity of the *i*-stem *ráith*, gen. sg. *rátho*, -a, is confirmed by the Gaulish inscription at Vieux-Poitiers, see: P.-Y. Lambert, *La langue gauloise: description linguistique, commentaire d'inscriptions choisies* (Paris, 1994), 92-3; J. Vendryes, *Lexique étymologique de l'irlandais ancien* (Paris, 1974, repr. Dublin, 2007), R-8.

⁵¹¹ *Bürgschaft*, 3.

⁵¹² *CIH* 63.7-11; *CCIH*, p. 291, see p. 305 for evidence of another version of this leading case.

debt and so the fort fell to the creditor, Éogan mac Durthacht. Once Conall was found, he had to make restitution for/to the *ráth*. This consisted in the return of two *ráith* for the one *ráth* given for him, and yet another as payment for the violation of his honour, in total three *ráithi* to be paid in compensation to Aimirgin Ráthach. Double restitution for the payment made by a *ráth* came to be the standard retributory payment.⁵¹³ This penalty of double the debt had been extended from the principal debtor alone to all warrantors.⁵¹⁴ This is said to be the first time a *ráth* was paid in Ireland.

The lawyer's play on the two words *rá(i)th* (fort; stronghold and the legal term for a paying surety, which may well be etymologically related) represents, willingly or not, a vivid realisation of the close connection between a surety and a third-party pledgor.⁵¹⁵ In our case Aimirgin Ráthach went surety for a defaulting debtor. He vouched for his suretyship with his property, his assets, which consisted specifically of his *ráth*. By fulfilling his suretyship, when Conall defaulted, his fort became irretrievably forfeit to the creditor on behalf of the debtor. The contract was entered under the condition that the fort would be used as payment and was of such a value that the claim would be satisfied. Since the fort was forfeited to the creditor, Éogan mac Durthacht, this very fort was lost indefinitely. The property of the *ráth* which constitutes his guarantee could also be seen as the property he pledges in the case of the debtor's default. In this sense, the surety's pledge would become forfeit for the debt at the end of the pledge period. The lien the creditor held over the *ráth* is realised in the form of a forfeiture pledge. Of course, the surety could, in the following, bring claims against the principal, Conall Eachluath, who has to make

⁵¹³ *ibid.* 3.

⁵¹⁴ *ibid.* 39.

⁵¹⁵ Binchy, 'Celtic Suretyship', 360.

double restitution and pay his honour-price, or in other words, who would have to return three, new, equally conditioned and valuable ferts. Please note, however, that the original fert the surety possessed was lost permanently. His pledge was not redeemed but, from the start, was intended to go for the debt since it covered the debt. It was the substance of consideration agreed upon if the debtor defaulted. Is it possible to escape the fact that the surety is a third-party pledgor who offers his fert as a standing pledge, since it remained in Aimirgin's hands initially? Does Aimirgin Ráthach's fert not strike us as a pledge over which the creditor held a lien and that, eventually, became forfeit following Conall's default? The only difference between a third-party pledgor and a surety lies in the scope of liability. A creditor exclusively had recourse against the pledge of the third party but could not lay claim on any other of his assets. To the contrary, a paying surety agreed to make good the debt of the principal, usually, without specification as to the goods affected by this liability, although we know that, in the event of distraint, his cattle would be affected. However, as in our example, the difference between these two possibilities is marginal and payment is made in the form of a fert. If this fert functioned as a standing pledge, this solution would be particularly fruitful in this scenario since the surety's office is contractually bound and there is little room for him to deny payment. If the *ráth* surety legally conveyed his pledge to the creditor by clearly pointing out the respective item in the presence of witnesses, there was little necessity physically to withdraw it.

The *ráth*-surety's indemnification drew the attention of jurists and appears to be a legal response to a real life problem. A *ráth*-surety only had to pay in the case that the debtor did not or could not. There must have been cases where the debtor was incapable of compensating his surety, a payment that was substantially higher than his original debt to the creditor. To prevent the paying

surety from permanently being deprived of his compensation, the debts secured by the *ráth* and owed to the *ráth* were passed on to the respective heirs. The following formula is spoken from the creditor to the other contracting party, the debtor:

Aicc macu nosnicfae iar neraic, iccait do chomarba-so a comarbai-som, nosnicfae fadein it biu, condo fargbae-so 7 do comarbæ slan neoch adrathmæ aurut for raith.

Appoint *mac*-sureties that you will pay him after he pays [the debt on your behalf], that your heirs [will] pay his heirs, [and] that you will pay him yourself while you live, so that you and your heirs may leave him free from loss with respect to anything that he may have acknowledged on your behalf in [his] *ráth*-suretyship.⁵¹⁶

The complexity of enforcing long past claims is obvious but the legal phrasing has caused long and considerable disagreement among the most eminent scholars of Irish linguistics and law: *Téit ráth for comarbu co nómad nó* (The *ráth* goes over onto the heirs *co nómad nó*).⁵¹⁷

The phrase *co nomad náu (nó)* only occurs twice in the extant legal texts, in *Críth Gablach* and in an old quotation in the otherwise younger recension H of *Cóic Conara Fugill*.⁵¹⁸ It is a ‘stereotyped legal phrase’ that referred to ‘a definite period of time’ and ‘then passed into general speech with a much vaguer connotation, “for ages”, perhaps even “forever”’.⁵¹⁹ Much debate, however, has been caused over the analysis of the final word, and the original meaning and interpretation of the phrase as a whole.⁵²⁰ Thurneysen took it to mean ‘until the ninth generation’,

⁵¹⁶ *CIH*598.19-21; *BA*, § 74b, ed. Thurneysen, *Bürgschaft*, 27; Stacey, 224.

⁵¹⁷ *CCF*(H), § 32, ed. Thurneysen, p. 33; ed. Archan, pp. 332-3; cf. *Bürgschaft*, 42.

⁵¹⁸ *CG*, 13.327.

⁵¹⁹ Binchy, ‘The Original Meaning of *Co Nómad náu (nó)*; Linguists v. Historians?’, *Celtica* 16 (1984), 1.

⁵²⁰ Possibilities raised: 1) *náu/nó* is related to *noi* (nine), 2) *n-áu*, later *n-ó* with nasalisation after acc. *nómad* is identical with *ae/ó, úa* (grandson, descendant), and is not, as also proposed, related to *óa* (younger), see Binchy, ‘The Original Meaning of *Co Nómad náu (nó)*’ for a survey of this debate; R. Baumgarten, ‘*Co nomad n-ó*: an Early Irish Socio-legal Timescale’, *Peritia* 17-18 (2003-2004), 338-356; see also *CCF*, ed. Archan, n. 68, pp. 409-10.

as in ‘the ninth man from him’, which would imply, as Binchy demonstrates, that the debt due to the *ráth*-surety would be claimed by his heirs about 250 years after the fact, which is difficult to reconcile with legal or practical logic.⁵²¹ Binchy, so far, has had the final word on the subject when he advanced the strong argument that the phrase did not refer to generations but to the ninth man within the *derbfine* (certain kindred), the family unit that shares a common great-grandfather and which is traditionally counted as extending to nine men. As Binchy states the *ráth* ‘undertakes to discharge the debt if the principal defaults and thereby creates a charge on the property (*fintiu*) of the whole *derbfine*, all the members of which, under the older dispensation, were his heirs, one degree after another, down to the last surviving second cousin’, from the point of view of the ancestor, the last *aue*.⁵²² With this we arrive at a much more sensitive legal time frame, although, as Binchy himself pointed out, it is not clear how the charge on the *fintiu* (kinland) that the original *ráth* caused is distributed among a new *fine* when the ninth man dies.⁵²³

In *Críth Gablach* the phrase *co nomad náu* occurs in connection with semi-dependent figures who owe unspecified duties to their lord, namely the *bothach* and the *fuidir*. They are both tenants at will who are able to terminate their association with the lord under certain, restricted conditions.⁵²⁴ However, after a certain period of permanent settlement the descendants of a *fuidir* turn into *senchléithi* (old retainers, *adscripti glebae*), who become permanent possessions

⁵²¹ Binchy, ‘The Original Meaning of *Co Nómad náu (nó)*’, 8-9.

⁵²² *ibid.* 11; With ‘older dispensation’ he refers to the occurrence of the narrower three generation kin-group, the *gelfine* (white kindred), which became the standard family unit.

⁵²³ Binchy, ‘The Original Meaning of *Co Nómad náu (nó)*’, 12.

⁵²⁴ *CG*, 78: *bothach* ‘cottier, crofter’, 93: *fuidir* (of uncertain etymology); *CIH*426.1-429.10 = Thurneysen, *Irishes Recht I. Díre. Ein altirischer Rechtstext. II. Zu den unteren Ständen in Irland*. Abhandlungen der preussischen Akademie der Wissenschaften (Berlin, 1931), 63-7.

of the lord and remain tied to the soil,⁵²⁵ a period given in *Críth Gablach* as *co nomad náu*.⁵²⁶ Therefore, semi-dependants are ‘perceived as freemen in process of falling into servitude or as unfree in process of liberation’.⁵²⁷ *Cóic Conara Fugill* reserves a separate path to judgement for claims related to this social group, known as *téchtae* (propriety), which is closely linked to rights over property, and particularly land, inclusive of semi-free and unfree dependants, though its precise nature remains debated.⁵²⁸ This path includes past and unatoned claims, referred to as *sen-smúr cinad* (lit. old rust of crimes; rust of old claims).⁵²⁹ *Berrad Airechta* explicitly mentions that the enforcing sureties have to secure the *ráth* against all losses ‘without the “rust [of old claims]”’, reaffirming the complications of time besetting an effort to indemnify the paying surety.⁵³⁰ We may link the extent of entitlement granted to the *derbfíne* of a *ráth*-surety, *co nomad náu*, to the plea for old entitlements pursued under *téchtae*, the very plea that is bound by the *ráth*-surety.⁵³¹ If, as Binchy proposed, there was a charge on the kin-land caused through the original *ráth*, there also was a pending demand against the heirs of the original debtor, and the duration of these claims is associated with a shift to servile status. The *ráth*-surety’s heirs would be entitled to receive the outstanding compensation out of the inheritance of the debtor, and this consisted predominantly of kin-land, including semi-free and unfree dependants. Therefore, I would argue that in the absence of other compensation, the *ráth*-surety’s heirs receive an entitlement to a share of kin-land, including *adscripti glebae*, equal to what is owed to

⁵²⁵ *CCF(R)*, § 14, ed. Thurneysen, p. 21; ed. Archan, pp. 296-7.

⁵²⁶ *CG*, 13.327.

⁵²⁷ *EIWK*, 307.

⁵²⁸ *CCF(R)*, §§ 14-17, ed. Thurneysen, pp. 21-22; ed. Archan, pp. 296-7.

⁵²⁹ *CCF(E)*, § 16, ed. Thurneysen, p. 21; ed. Archan, pp. 314-5.

⁵³⁰ *CIH* 598.19; *BA*, § 74a, ed. Thurneysen, *Bürgschaft*, 26-27, also see n. 3; Stacey, 224; *CCF*, ed. Thurneysen, n. 55, 78; *IRIV*, 230.

⁵³¹ *CCF(R)*, § 15, ed. Thurneysen, p. 21; ed. Archan, pp. 296-7.

them. In order to prevent that retrograde claims led to a loss of kin-land, it was vital to compensate the *ráth*-surety by other means, and precisely this outcome lent strength to the realisation of compensation.

5.5. *Aitire & gíall*

Aitire (hostage-surety) and *gíall* (hostage) are two types of guarantors that are difficult to distinguish. In fact, Stacey rightly stated that ‘the basic nature of the offices exercised by the *aitire* and the *gíall* would appear to have been exactly the same’.⁵³² Both *aitiri* and *géill* are associated primarily with the public political sphere of claims which is supported by what is known as the ‘*airecht*-text’.⁵³³ In the seating arrangement for a court hearing suggested therein, both hostages and hostage sureties are seated in the *taebairecht* (side court), together with *senchaid* (custodians of tradition), *rátha* (paying sureties) and the *ruirig* (over-kings), a set-up for public affairs rather than private contracts.⁵³⁴ It is well attested in the Irish law texts, as well as the Irish Annals and wisdom texts that hostages were taken regularly for political leverage and always symbolized a degree of subordination by the person giving them, just as much as the amount of hostages held in fetters by a king enhanced his status and position.⁵³⁵ The term *aitire* does not appear in Irish Annals until just after 1000 A. D. Before that point in time *gíall* (hostage) was the only term used to describe the guarantorship of a hostage.⁵³⁶ In the law texts, both terms, *gíall* and *aitire*, are

⁵³² Stacey, *The Road to Judgment*, 98.

⁵³³ Kelly, ‘An Old-Irish Text on Court Procedure’, *Peritia* 5 (1986), 74-106.

⁵³⁴ *ibid.* 78.

⁵³⁵ For a brief survey of these, see *GEIL*, 173-176.

⁵³⁶ Personal correspondence with Philip Healy, who also points to the occurrence of the term *brágae* (captive, prisoner, hostage) that does not appear in legal tracts but was used elsewhere from the twelfth century onwards and came to be the dominant term for a hostage, cf. *GEIL*, 174; see P. Healy, *Unwilling Guests: Hostages in Medieval and Early Modern Ireland* (ongoing PhD thesis, University College Cork).

used and this must be based on some underlying differences, although, as has been conceded, it is often not clear where the line needs to be drawn between the hostage and the hostage-surety.⁵³⁷

The term *aitire* is the standard word used for the early Irish hostage surety and an abstract noun that is a ‘derivative of the preposition *eter/etir*(between)’, thus literally meaning ‘betweenship’.⁵³⁸

This terminology was deliberate and real, because the *aitire*, as opposed to the other types of surety, was the first point of contact for a creditor and a barrier between him and the debtor. He, literally, stood between the parties and his suretyship was personal, since he secured a liability by offering himself as a bond. The creditor had permission, following the principal debtor’s default, to seize the hostage surety in person and hold him in captivity, usually for a period of ten days.

Thurneysen thought that the difference between the *aitire* and the *gíall* primarily lay in the ‘nature and responsibilities of the offices that they exercised’ and regarded the *gíall* as a standing hostage surety who was appointed to act in any legal claims arising between or within a kingdom at any point in time.⁵³⁹ To the contrary, to him the *aitire* was contractual in nature and appointed for a specific legal obligation, at the conclusion of which he was released from his suretyship.⁵⁴⁰

Binchy remarked that ‘suretyship was in origin simply an adaptation of hostageship to matters of private law’ and a natural step to use the ‘system of securing political fidelity by means of human pledges’ and transfer it ‘to the domain of private obligations’.⁵⁴¹ Thus, both of them associated

⁵³⁷ *Bürgschaft*, 82-3; Stacey, *The Road to Judgment*, 82-111; *GEIL*, 175.

⁵³⁸ *BA*, § 64, ed. Thurneysen, *Bürgschaft*, 22, also see notes on pp. 77-8; Stacey, 221, also see notes on pp. 231-232; M. A. O’Brien, ‘Miscellanea hibernica’, *Études Celtiques* 3 (1938), 372; Breatnach, ‘On Abstract Nouns from Prepositions in Irish’, *Celtica* 15 (1983), 18-19; Russell, ‘Varia I’, *Ériu* 36 (1985), 163-68; *DIL: aitire*.

⁵³⁹ *Bürgschaft*, 74-83; Stacey, *The Road to Judgment*, 82.

⁵⁴⁰ *Bürgschaft*, 61-74.

⁵⁴¹ Binchy, ‘Celtic Suretyship’, n. 16, 366, 358 discussing Pedersen’s theory that Ir. *macc* < W. *mach* (or rather Brit. **makkos*), a theory that Binchy then rejects; *VGKS*, i. 128; Binchy did believe that suretyship

the *aitire* with contractual obligations arising between private individuals. However, Stacey has convincingly shown that there is minimal evidence for both the *aitire* and the *gíall* of ever having participated in the enforcement of personal obligations within the tribe.⁵⁴² What, then, are the differences between the *aitire* and the *gíall*?

One of the major problems with the source material is the state of evidence on the *gíall*. The primary source text *Di Gnímaib Gíall* (On the Actions of Hostages) is only preserved fragmentarily, and a modern edition and translation has not yet been published.⁵⁴³ Regarding this problematic text, Stacey commented that ‘the lone tract on the *gíall* has the distinction of being incomplete, imperfectly preserved, and almost impenetrably obscure.’⁵⁴⁴ Thurneysen has attempted to analyse the material and identified three main differences between the *aitire* and the *gíall*: (1) The *gíall* is always held by a king, (2) in cases of default, the *gíall* appears to be detained for a period of thirty days, not ten days, like the *aitire*, and (3) the *gíall* may be able to avoid imprisonment by offering a pledge, an option not open to the *aitire*.⁵⁴⁵ Regarding his first two statements, it is true that the *gíall* was regularly held by kings and there is also good evidence that the period of his captivity was thirty days, as *Di Gnímaib Gíall* reads:

Rsuid⁵⁴⁶ trichu mbuair *berur* (It stipulates that thirty cows are taken.)⁵⁴⁷

began with two, or three, distinct types of surety: (1) the supernatural security of the gods; (2) the enforcing surety; and (3) very possibly also the *Geiselnbürgen*. He also thought that the *ráth* developed from the *aitire*. On the other hand, he did believe that the *aitire* developed from the *gíall*. (‘Celtic Suretyship’, 357-8).

⁵⁴² Stacey, *The Road to Judgment*, 85.

⁵⁴³ *GEIL*, Title 65, 279; *CIH* 1755.17-1759.5 (MS H 3.17) and *CIH* 901.14-33 (MS H 3. 18); *CCIH*, *SM* 1, 3, p. 288.

⁵⁴⁴ Stacey, *The Road to Judgment*, 84.

⁵⁴⁵ *Bürgschaft*, 82-3.

⁵⁴⁶ Read: *arsuidi*.

⁵⁴⁷ *CIH* 1756.4 = *Di Gnímaib Gíall*; *Bürgschaft*, 78.

Ar boin cach naidc~~he~~ ailes (A cow for every night that he is entitled to it.)⁵⁴⁸

A gloss on the former statement reads as follows:

.i. in trichu bo dorime sunn, teora luluca 7 .uiii. mba .xx. in~~n~~laega cunid bo ar fithid
sam~~l~~aid do lulucuibh cunut e-sin .uiii. cumula urruduis.

i.e. the thirty cows mentioned here, three milch-cows and twenty-seven in-calf
heifers, so that these are, thus, twenty-one milch-cows, seven *cumala* in Urradhus.⁵⁴⁹

Thurneysen envisaged that the *gíall*, for the first twenty-seven nights, could give a pledge to the value of a yearling heifer, worth eight scruples. Each of these pledges rose to the value of sixteen scruples over night. Thus, the defendant could only redeem it by paying double its original worth. For the last three nights he gives a pledge worth twelve scruples, which also doubles over night to the value of twenty-four scruples. This equals the value of a milch cow. Thus, in total, the amount reaches twenty-one milch cows over the period of thirty nights.⁵⁵⁰ Of note is that the thirty-day period is a very common period in *BFG*, which strengthens the symbolic idea of the hostage as a pledge, rather than a surety. What resonates with this proposition is Stacey's point that one-sided exchanges of hostages (as of pledges) 'seem thus to have enlarged the status of one participant and diminished the status of the other in a manner that the giving of an *aitire* did not'.⁵⁵¹ The evidence as to whether the *gíall* was allowed to avoid captivity by offering a pledge as outlined above is contradictory. Kelly remarks that Triad 156 shows that *gíallaigeacht* (hostageship) is listed among 'the three things which are not entitled to postponement

⁵⁴⁸ *CIH*1756.21 = *Di Gnímaib Gíall, Bürgschaft*, 78, amendment based on Binchy, 'Sick-Maintenance', n. 4, 103 but Thurneysen reads: 'For he is entitled to a cow every night'.

⁵⁴⁹ *CIH*1756.4-6; Binchy remarks that 'do lulucuibh' may be omitted, n. d, p. 1756; O'Donovan calculated: 'If the in-calf cows are worth two-thirds of the milch-cows, 8 scruples each, and the milch cows 12 scruples, then the proportion here stated comes out.', *AL* ii fn. 2, 134; but there is good old evidence for 1 milch cow = 1 ungae = 24 scruples, eg. *CIH*467.6-12 = *BFG* § 15; cp. *EIF*, 591-2.

⁵⁵⁰ *Bürgschaft*, 79.

⁵⁵¹ Stacey, *The Road to Judgment*, 107.

(*taurbaid*), which implies that any respite was disallowed.⁵⁵² Moreover, it is not clear when precisely the *gíall* would be appointed. Walters noted that the *aitire* (hostage-surety) only falls into the creditor's hands upon default, which marks him off from the *gíall* who would be given at the outset of the agreement and thus, remain in custody from the very beginning.⁵⁵³ However, Stacey, referring to a gloss in *Di Gnímaib Gíall* observes 'that the *gíall* might not have been appointed until after the lord had received notification of the offense',⁵⁵⁴ which means that the removal of the *gíall* could happen after a default, akin to a pledge's conveyance.

In the following we shall examine the modes of captivity. One story presented in *Vita Sancti Columbae* by Adomnán offers a picture of a person named Scandlán, a forfeited *gíall* held in chains by king Aíd.⁵⁵⁵ Columba prophesied the death of Aíd, upon which Scandlán went into exile but later returned to reign as king among his own people for thirty years. Scandlán also appears in the context of a battle meeting between the men of Ireland and Scotland, and which we shall include for its dramaturgical value.⁵⁵⁶ Colum Cille, interfering in order to establish peace between the kingdoms, himself appears as guarantor for the return of Scandlán, son of Cennfaelad (wolf's head), son of the king of Ossory, and heir-apparent to the kingdom, who was given as a *gíall* (hostage) into the hand of Aed, son of Ainmire. Colum Cille guaranteed his release

⁵⁵² *Bürgschaft*, 82-3; *GEIL*, 175, also see n. 128, 175.

⁵⁵³ Walters, 'The General Features of Archaic European Suretyship', 100; cf. *Recholl Breth*, *CIH* 219.5; *CG*, 594-97; Stacey, *The Road to Judgment*, 107.

⁵⁵⁴ Stacey, *The Road to Judgment*, 84; *CIH*901.22 = *Di Gnímaib Gíall*. But this involves the complex figure of the *muire*: ... *muire* adguid iar napad doib (he invokes the *muire* after the period for them).

⁵⁵⁵ *Vita Sancti Columbae*, eds. Anderson & Anderson, *Adomnan's Life of Columba*, i. 11, 19b-20a, pp. 34-5.

⁵⁵⁶ W. Stokes, *Lives of Saints from the Book of Lismore*, *Anecdota Oxoniensia* (Oxford, 1890), 309-310; The term used here for the legal role of Colum Cille derives from *ráth* (paying surety), see *DIL: ráthaiges* (guaranteeing, going bail, suretyship).

from captivity as a forfeited *gíall*, a *gíall díthma*, after a year's time or alternatively, his substitution with a *brágae* (captive, prisoner, a younger term for hostage).⁵⁵⁷ In our case, the hostage was not redeemed in either way and upon his forfeiture, the following scenario unfolded:

Ocus do righnedh cro caelúigh uime gan conair as acht eolus a tuctha began goirt bidh do 7 terci lenda. Ocus nobidis .l. læch oca coimed fan cro amuich, 7 .ix slabradh fairsium isin cro, 7 gach aen atcidh seocha is ed adberedh: 'Deoch,' ol se.

And a hut of wattles was built around him, without any path out of it save a way (?) by which a little salt food and scanty supply of ale were given him. And fifty warriors were guarding him outside the hut, and nine chains were on him in the hut, and to every one whom he saw passing by he used to say this: 'A drink.' saith he.⁵⁵⁸

It was only when the king of Ossory died out of grief that Scandlán ascended into the kingship and had to be released. According to evidence from the Annals, a king's hostage that became forfeit in the absence of ransom by a third party, could be blinded, or killed.⁵⁵⁹ As to concerns over violent treatment of hostages, Healy gives a 2 % death rate across the period from 600 to 1200 for the 200 instances of hostageship in the Annals, a relatively low ratio in line with the European experience.⁵⁶⁰

Captivity was also an inherent part of the *aitire's* obligations, which moves the discussion on to the hostage-surety, for whom evidence is much better. Though only the *géill díthma* were held in chains, the possibility of the *aitire's* imprisonment was an inherent part of his suretyship and when the *aitire* was appointed he had to swear that he would allow this to happen. Because of the oath he had to give he was also known as *aitire luigi* (the hostage-surety of an oath):

⁵⁵⁷ On the term see: *GEIL*, 174.

⁵⁵⁸ Stokes, *Lives of Saints from the Book of Lismore*, 310.

⁵⁵⁹ *The Annals of Ulster* (to A.D. 1131), eds. S. Mac Airt & G. Mac Niocaill, s. a. § 5, 1127; 1259; § 6, 1029; *Annals of Inisfallen*, ed. S. Mac Airt (Dublin, 1951), s. a. § 6, 1124; *GEIL*, 174.

⁵⁶⁰ Personal correspondence with Philip Healy; for a full account of the role played by hostages in medieval Europe, see: A. J. Kosto, *Hostages in the Middle Ages* (Oxford, 2012).

Toing to dia, *be n-aurlam*⁵⁶¹ aurlithe to chuisse hi nglas, to braghat hi slabraith co tumidiu cip no carcrae, conut foaslicther as fiachaib no con ruigle (.i. coro gella) dit fadein iar ndithim.

Swear to God that you will be ready [and] willing [to put] your foot in a fetter [and] your neck in a chain, [and] to remain in the stocks or in prison until you are released from it by debt-payments [by the debtor], or until you can give a gage for yourself after the forfeiture [period].⁵⁶²

Upon the principal party's default, the creditor had instant access to the *aitire*. The claimant, together with the *aitire* approached the defaulting party and demanded payment, ensuring that the hostage-surety's removal, as a consequence of the debtor's refusal, would become a public event. This served, in the first instance, the purpose of pressurising the debtor on an emotional and reputational level. Secondly, the debtor's room for manoeuvre was substantially narrowed, for were the debtor to let the *aitire* become forfeit, he would have to face heavy compensatory payments and, thus, added financial pressure.

Caite a sslan na aitire? .i. a fomeilt 7 a imluath 7 a gnim, 7 log .uii. cumal niath iar ndithmair .i. logh cimedha, ar is cimidh ind aitiri iar ndithmair fuirri. ascomrae, ar atrean-si huile don cach fristet, amail riongab aitire cairde, ar is i cairde citroibi aitire luigi.

What is the compensation of the *aitire*-surety? I.e. [the price of] his maintenance and [of] his disturbance and [of] his [missed] work, and the price of the seven *cumals* of a warrior after forfeiture, i.e. the [ransom] price of a captive, for the *aitire*-surety is a captive after falling forfeit, [and the double of?] what he has paid, for he pays all to each person against whom he acts as surety, as it is with an *aitire*-surety of a peace treaty, for it is in respect of a peace treaty that there first was an *aitire*-suretyship of an oath.⁵⁶³

Although there seems to be an omission of one or more words before *ascomrae*, it is still likely that the paragraph quoted above envisages the *aitire* paying his principal's debt. Hence, it is

⁵⁶¹ The text has *benai foria* which Thurneysen takes to be a corrupted form and suggests reading: *be n-aurlam*, see *BA*, § 65f, ed. Thurneysen, *Bürgschaft*, n. 1, p. 23.

⁵⁶² *CIH* 597.21-24; *BA*, § 65f, ed. Thurneysen, *Bürgschaft*, 23; Stacey, 222.

⁵⁶³ *CIH* 597.26-29; *BA*, § 67, ed. Thurneysen, *Bürgschaft*, 24-25; Stacey, 223.

crucial for Binchy's theory who saw in this development an *aitire* evolving into a *ráth*, which eventually made the hostage surety obsolescent.⁵⁶⁴ Stacey is not inclined to accept this proposed historical development but to the contrary, regards payment as one of the essential, original aspects of the *aitire*'s suretyship, forming part of his binding oath.⁵⁶⁵ If the *aitire* was not redeemed he became forfeit, and subsequently was referred to as *cimbid* (condemned person).⁵⁶⁶

Triad 235 lists among the difficult things of suretyship:

Dul fri cimmidecht acht nech lasa·mbí mug doer.⁵⁶⁷
Going [surety] for captivity except if he has an unfree slave.

Thurneysen held this to refer to the situation whereby a captive was given from one party to the other like a pledge under the protection of suretyship.⁵⁶⁸ However, Kelly suggests that 'a man can procure the release of a *cimbid* if he owns a slave (*mug dóer*) whom he can give in exchange.⁵⁶⁹ The legal phrase *gell do bás* (lit. pledge for death; pledge for redemption from death) is pertinent to this situation.⁵⁷⁰ It is a pledge offered at the verge of a captive's killing to save his life, and this pledge could consist of a slave.

⁵⁶⁴ Binchy, 'Celtic Suretyship', 364-366.

⁵⁶⁵ Stacey, *The Road to Judgment*, 87-88, n. 26, 260; she refers to an old quotation in *CIH* 1371.6-7 including the phrase: *fial gach aitir asren gin dithach* (every honourable hostage-surety pays without loss (before the expiry of the period of grace called *dithim*); also see Breatnach, *CCIH*, B 39, 60-1, Digest B.

⁵⁶⁶ *DIL*: *cimmid* (earlier: *cimbid*); *GEIL*, 129, 215; cf. Meyer, 'Echtra Nerai (The Adventures of Nera)', *Revue celtique* 10 (1889), 214-5, where Ailill and Medb had just hung two captives for whom they had been willing to accept a ransom fee.

⁵⁶⁷ Meyer, *The Triads of Ireland*, Triad 235, 30-31.

⁵⁶⁸ *IR V*, n. 1, 375.

⁵⁶⁹ *GEIL*, 98.

⁵⁷⁰ *DIL*: s.v. *bás*; *AL v* 220.13, see *IR III*: *Gúbretha Caratniad*, notes on § 15, 322-324: Thurneysen compares the *gell do bás* with the *gell do anmain* (pledge for life): *AL v* 206.18, 208.6. *Gúbretha Caratniad* refers to a woman in childbirth whose child could not pass through the birth canal and 'closed her'. This acute danger to the mother's life rendered actions against the fetus that led to its death free of charge. Other examples also refer to an action that would require a payment, but that does not in the case that one's own life was in danger. A person in danger of drowning or fleeing from a battlefield, can rescue himself onto the ship or horse of another person without incurring the payment usually due to his saviour. It is noticeable

A different provision for the *aitire*'s compensation is illustrated in relation to *cairde*-law (treaty law), as evidenced in Old Irish glosses on the *Senchas Már* tract *Di Dligiud Raith 7 Somaíne la Flaith* (On the Law relating to the Fief and Profit of a Lord).⁵⁷¹

Slan cairde .i. ma dollece nech forsin aitaire fiachu cairdi do er[aic] (?) dia chin, is rath cin athchor sin forsan fine mana errither fo cétoir cona meth coir, nibi rath for ceile a meth-sin ond flaith.

The compensation of a *cairde* – that is, if anyone should cause the *aitire* to pay the fines [for a breach of] a *cairde* on his behalf, that [becomes] a fief [for which food rent is due from] the kindred that is not (cannot be) returned unless [the fines are] paid immediately with their proper doubling-fine; that doubling-fine [itself] is not [considered as] a fief on a client from the lord.⁵⁷²

The payment of the *aitire*, who in our example is the heir-apparent, was treated as *rath* (fief) for the debtors that could not be returned that is ‘a grant of stock that had been made by the surety to the defaulting debtor, and for which the debtor would now owe food-rent to the *aitire*’.⁵⁷³ This provision is remarkable, because it deliberately draws the debtor kindred into a submissive position in the less favourable form of association, unfree clientship. We may think of the *aitire* as having a property right over the offender’s livestock, of the kind that the lord had for the first seven years, receiving perpetual renders without leaving the kindred the option of termination. Therefore, a debtor kindred that had violated a treaty and provoked the *aitire*-surety’s substitute payment, by consequence, was forced to submit to the *aitire* in unfree clientship, unless they compensated the hostage-surety by other means.

that the phrase is used symbolically, since no pledge is being handed over in any of the examples for *gell do anmain*.

⁵⁷¹ *CIH* 432.21-436.32; *CCIH*, 25.

⁵⁷² *CIH* 919.6-8; Stacey, *The Road to Judgment*, 91; cp. *Slán nAitire Cairde*, ed. Thurneysen, *Bürgschaft*, 32-33, where no provisions are given for the case of non-payment; see also: *IR* V, 381-82; on treaty law: *Bretha Cairdi*, *CIH* 791.5-792.23 and 807.17-809.2; Bemmer, ‘The Irish Hostage Surety and Inter-territorial Alliances’, *Historical Research* (forthcoming).

⁵⁷³ Stacey, *The Road to Judgment*, 91-92.

The satisfaction of the hostage-surety in the broader political sphere of treaty law was, indeed, so significant that a separate discussion of his entitlements occurs in the Old Irish glossing of the *Senchas Már*.⁵⁷⁴ Most of it has been edited and translated into German by Rudolf Thurneysen as *Slán n-aitire cairde* (The Immunity of a Hostage-surety in a Treaty).⁵⁷⁵ It is telling that the *aitire* occurs with noticeable frequency in legal material relating to *cairde* (inter-territorial and inner-territorial alliance or treaty) and *cáin* (ecclesiastical and royal ordinance), although the latter are also associated with *géill*. The common factor of these two genres of legal writing is their prescriptive character. They were texts written and designed to enforce a specific agenda and were implemented by enabling the public to hold offenders to the law and by operating the existing system of private administration. Some of them were temporarily limited to the lifetime of the king issuing them but others were renewed, reissued, and spread, so that they eventually became part of the fibre of social conduct and amalgamated into a fixed pattern of legal operation. Stacey has suggested that the distinction between the *aitire* and the *gíall* lies within the party on whose behalf they acted. She argued that ‘the major difference between them would seem to be the group on whose behalf they undertook their suretyship; the *aitire* of a *cáin* acted on behalf of his kindred, the *aitire* of a *cairde* on behalf of his tribe’.⁵⁷⁶ However, because the *aitire* was of high status he did not imply political subordination, like *géill* did, which also explains why ecclesiastical *cánaí* were guaranteed through *aitirí*, since they ‘enhanced the stature’ of those

⁵⁷⁴ *CCIH* 26-7: There are two copies, one at *CIH* 892.39 (Old Irish glossing on *SM*) and the other at *CIH* 574.18 (not an independent text but an extract from the former).

⁵⁷⁵ *Slán n-aitire cairde*, ed. Thurneysen, *Bürgschaft*, 32-33; version A at *CIH* 574.18-35 and version B at 892.39-893.10, MS H 3. 18; *GEIL*, n. 63, 279.

⁵⁷⁶ Stacey, *The Road to Judgment*, 96.

associated with it.⁵⁷⁷ Therefore, in her view the *aitire* served the need for a hostage-surety who was able to stand between *túatha* or kindreds of relatively equal status, because he ‘symbolized nobility and prestige rather than political subservience’.⁵⁷⁸ These types of *aitire* also appear in *Cáin Adomnáin*, which includes a long list of guarantors who lent their authority to the enforcement of this law and who are interpreted as being *aitiri* for a *cáin* (law, statute), a law prescribed by the king or the church and in this sense very similar to a *cairde*.⁵⁷⁹ Thus, both guarantors regularly occur within a political set-up that is intended to secure legal interactions between kindreds and across territorial borders. In this context *Críth Gablach* offers important information on two relevant individuals who would be fit to fulfil the role of such cross-border guarantors.

Is é aire fine insin tobeir gell tar cenn a fine do rí 7 senud 7 óes cherdd dia timorggaindo réir.

He is the lord of a kin who gives a pledge on behalf of his kin to king and ecclesiastical authority and poets that he will force them to compliance.⁵⁸⁰

The lord of a kin, appearing in a section that deals with the *aire coisring* (noble of constraint) ensures compliance by offering a pledge on behalf of his kindred to royal and ecclesiastical authorities and poets.⁵⁸¹ The king may be a *rí túaithe* (king of one petty kingdom) but he may also be an over-king (over two or more petty kingdoms). Poets also functioned across *túath* boundaries and synods commonly had members from more than one *túath*. *CG* also mentions a

⁵⁷⁷ *ibid.* 109.

⁵⁷⁸ *ibid.* 109.

⁵⁷⁹ Ni Dhonnchadha, ‘The Guarantor List of Cain Adamnain, 697’, *Peritia* 1 (1982), 178-215.

⁵⁸⁰ *CG*, 11.280-82; trans. Breatnach, ‘On Satire and the Poet’s Circuit’, in C. G. Ó Háinle & D. Meek (eds.), *Unity in Diversity. Studies in Irish and Scottish Gaelic Language, Literature and History* (Dublin, 2004), 29; he also discusses the difficult phrase *óes cerdd*.

⁵⁸¹ *CG*, 11.280-82; trans. Mac Neill, ‘Ancient Irish Law’, § 95, 294.

second figure, the *aire tuisea* (leading noble) who is the leader of a noble kindred whose role appears to have extended beyond the boundaries of his own *túath*:

Combi lánchongnam i túaith do aidbdenaib, do noillechaib, do gi[u]ll, do gíall, do chairdiu tar cenn cenúil tar crích 7 i tech flatha.

So that he is full help in the *túath* for pleadings (?), affirmations, pledge, and hostage in treaty-law across the border on behalf of his kindred and in the house of (his) lord (the king).⁵⁸²

As can be seen both *gíall* and *gell* are mentioned in relation to the *aire tuisea*. The *flaith* of the *tech flatha* may well be an over-king, a *márflaith*. We may consider both the *aire coisring* and the *aire tuisea* in relation to *cairde* and *cáin*, and therefore, to *aitire* and *gíall*. A topic that comes up in *Bretha im Fúillemu Gell* are meetings of the *túath*.⁵⁸³ If there was a commercial element to them in which exchanges and thus contracts between people from different *túatha* were made, these contracts, because they were made under a *cairde*, could have been guaranteed by an *aitire*. If this was true, then the *aitire* would also act as guarantor for contractual obligations between individuals and unite both private and public procedure. Thus, one may have a way to reconcile the positions of Binchy, Thurneysen and Stacey, in that the *aitire* could secure obligations between private individuals, but only when the parties belonged to different *túatha* who stood in a *cairde*-relationship to each other.

When a claim arose between kindreds from two different *túatha* that were united in a type of *cairde*, the procedure to rectify this default and secure satisfaction is as follows, according to *Slan n-Aitire Cairde*.⁵⁸⁴ Within a *cairde* the people were bound to the obedience of the treaty through

⁵⁸² *CG*, 411-13; trans. Mac Neill, 'Ancient Irish Law', § 112, 299.

⁵⁸³ *BFG*, §§ 22, 24, 26, 28, 37; *DIL*: 2 *dál* II, III.

⁵⁸⁴ For a discussion of the different types of *cairde* and the role of the hostage-surety therein, see: Bemmer, 'The Early Irish Hostage-Surety and Inter-territorial Alliances', *Historical Research* (forthcoming).

their king and a breach of treaty law evoked his authority. Since a person's legal rights generally were restricted to their own kingdom, a designated enforcer existed who was permitted to cross the border in official capacity and remained under protection. This person was an obscure figure known as *muiredach* (specific social grade, probably headman of a district or kindred),⁵⁸⁵ from the victim's *túath* who was sent into the neighbouring *cairde*-territory to seek out the *aitire*, and collect the debt. It is not clear how he summoned the *aitire* representing the other *túath* but there must have been a means in place facilitating the successful execution of this process. Upon finding him, he stated the following formula:

'Rombid-sa fiach lat' (Let me have what is owed from you.)⁵⁸⁶

Upon this demand, the *aitire* answered:

'Roga', ol inn aitire, 'dochum na fine fodruich'
'I shall go', says the *aitire*, 'to the kindred that has committed violence against you.'⁵⁸⁷

Both went to the kindred and when they reached them they asked:

'in mbiat feich? Manim bet-ni, iadfaimme for naitire'
'Shall we have what is owed from you? If we do not, we shall close in on your guarantor.'⁵⁸⁸

If the procedure followed the ideal norm, the kindred would have been ready to make the agreed payment and answered the following:

'ni ricfaid a less, rodbia[t] feich'
'You will not need to: you shall have what is owed.'⁵⁸⁹

⁵⁸⁵ *Bürgschaft*, 61; *DIL*: *muire*, *muiredach*; The latter happens also to be a common male personal name.

⁵⁸⁶ *CIH* 892.41; for all references to *Slán n-aitire cairde*, see Thurneysen's edition and translation, *Bürgschaft*, 32-33.

⁵⁸⁷ *CIH* 892.41; *roga* = *rega*.

⁵⁸⁸ *CIH* 893.1, reading: *manin bet-ni*.

⁵⁸⁹ *CIH* 893.1-2.

The next step would have been to forward payment and perhaps, to offer adequate hospitality to the *cairde* friends. However, if the kindred refused to pay even after the *aitire* prompted them, the *muiredach* took the hostage-surety with the statement:

‘dlegar duit-si dul lium-sa’(You are obliged to go with me.)⁵⁹⁰

Following this step, the *aitire* would have been carried off into captivity, awaiting redemption for a period of ten days.

In conclusion, the *aitire* and the *gíall* both occur frequently in contexts of a public, political character and it would appear that there existed a significant overlap between the hostage-surety and the hostage. What united them was their close connection to prescriptive laws that were issued and implemented by an authority, royal or ecclesiastical, or both in a joint endeavour, that stood in marked contrast to the vernacular laws grown out of customary procedure. The *aitire* was often equated with a very high status individual although the nature of his office, namely captivity, stood in marked contrast to this elevated social status. This need not have been the case, however, since the *aitire* of high status who was an honourable guest during his captivity would draw significant profits by consequence, enforcing his large compensatory entitlement against those on whose behalf he acted and ensuring a gain for himself and reputational subjugation of those who failed him. As has been shown, the *aitire* fulfilled the role of pressurising the defaulting kindred together with the *muire* into fulfilment of their obligations. This authoritative role is not associated with the *gíall* in the sources and strengthens the

⁵⁹⁰ *CIH*893.7-8.

interpretation that the *aitire*, indeed, was suitable to operate in public procedures involving *túatha* of relatively equal rank united in *cairde*.

6. Given pledges vs taken pledges: The legal relationship of pledging and distraint

The purpose of the present chapter is to provide a coherent account of distraint examining its similarities and differences with pledging, so that we have a context from which to evaluate unique evidence from *BFG* that connects both procedures. The property components in both procedures were remarkably similar: property was taken away from the debtor and held by the creditor as a security until it became forfeit or was redeemed by payment. Regarding (1) distraint, the property was removed against the debtor's will and there was a clear economic link between the distrained chattels and the value of the debt, with the distraint matching the value of the outstanding obligation. Moreover, distraint was usually performed against the debtor himself and once his forfeited chattels have become forfeit, the debt becomes extinct, leaving no further claims open. Distraint expedited the debt resolution and theoretically was open to be performed by all classes in society but not against all of them, such as persons of high rank. On the other hand, in (2) pledging the chattel was given, more or less, at the debtor's own volition and the items had no apparent correlation with the liability but were closely tied to the pledgor's status, regularly exceeding the obligation still owed. Pledging predominantly is discussed in relation to a third party providing the chattel on behalf of the debtor. Thus, even when the pledge became forfeited for the debt, there remained to be settled the excessive debt and interest payments owed to this third-party pledgor. Pledging decelerates the debt resolution and creates further debts along the way. Since pledges were intrinsically related to the status of their giver, the higher the status, the more valuable the pledge. Thus, it is not surprising that pledging was associated with

the highest ranks in society. This context set the two procedures apart but it reveals that they shared many common points of contact. Binchy himself stated: ‘An obvious method of redress was for the aggrieved party to seize certain chattels of the offender and hold them as a pledge for the discharge of his obligations’. ‘The process of *athgabál*, ... after all is based on pledges too, except that these are taken against the will of the other party rather than handed over voluntarily by him or on his behalf.’⁵⁹¹

It is in this respect that *Bretha im Fúillemu Gell* assumes a position of special interest. It is the only surviving legal text that includes pledges consisting of cattle, as well as other livestock. Cattle were used in distraint but nowhere else were allowed as pledges. Animals and other changeable items were usually prohibited because they could gain value (products and offspring) or lose value (disease, death), circumstances which would have made the pledge a questionable security. Further to that, this text suggests that such livestock pledges did not become forfeit at the end of the pledge period at once, which was usually the case, but that they became forfeit in stages, precisely mirroring distraint, and that even the interest payments varied with each step in the forfeiture process. Another concern in both remedies, pledging and distraint, was the potential involvement of a third party, who gave a pledge on behalf of the principal defendant or who could be distrained in lieu of the primary debtor. Based on this evidence, *BFG* brings the law of pledging closer to the law of distraint and this is truly remarkable and raises many questions as to the development and connection between both procedures that could otherwise not be raised.

⁵⁹¹ Binchy, ‘Distraint in Irish Law’, 22, 48.

It is essential to present the procedure of distraint first, before moving into the complex matter proposed by *BFG*.

Binchy provides a thorough analysis of the different forms of distraint and the stages involved in the procedure. He had an interest in tracing the evolution of distraint and holds it that originally, distraint was an unrestricted seizure of property until the jurists succeeded ‘in establishing the practice of giving notice beforehand to the defendant or his surrogate’.⁵⁹² Following this step, the assets would be removed in a fast paced seizure and fall forfeit after only one day, but jurists had an interest in investing the procedure with considerable publicity, thereby continuing to expand its temporal scale and allowing more time for a peaceful settlement, so that the ‘drastic primitive custom of forfeiture at the end of twenty-four hours was replaced by a fourfold period of *díthim* (lapsing, becoming forfeit)’.⁵⁹³ Eventually, a second form of distraint developed that introduced another stay after notice, during which the chattels were not yet removed from the debtor’s custody but had a charge on them. It was only at the expiration of this period that they were removed and the second delay commenced. Even then, they no longer became forfeited at once but in progressive stages.⁵⁹⁴ Most of the discussion in the sources is reserved for this final stage of the procedure that must have become the accepted standard by the time of the canonical texts, and therefore, it forms the basis for the following analysis.

⁵⁹² Binchy, ‘Distraint in Irish Law’, 64.

⁵⁹³ *ibid.* 64.

⁵⁹⁴ *ibid.* 64.

6.1. Introduction to Distraint

Distraint was the formal seizure of property for the recovery of a debt by the aggrieved party in recompense for the satisfaction of a claim and proceeded outside the court, though with the assistance of a legal expert. In short, the plaintiff, after giving preliminary notice (normally to the defendant), sequestered chattels up to the amount of the outstanding debt from the debtor's property and removed them. After a specified period of respite, these chattels progressively fell forfeit to the creditor unless payment came forth during this time or the claim was submitted to the judgement of court. The expropriation of a debtor through distraint was presumably the most widely used remedy of execution by self-help in early medieval Ireland and restored the status quo. The finality of the procedure is apparent in *Berrad Airechta*, which holds property forfeited through distraint as irretrievably lost, with no option to appeal once finalised:

Diles dō athgabailagar, ma diroth here a dithme, cein ronastar a dilsifor curu bél.

Distraint which is prosecuted is also immune from claim, if the period of its forfeiture has expired, though its immunity from claim may not have been bound through oral contracts.⁵⁹⁵

In most other medieval legal systems, distraint had already lost its significance as a self-help remedy without curial sanction and was limited to official distraint by statute. In feudal England lords used distraint primarily in order to exact the performance of feudal duties for a land holding, with property being used to seize movables that belonged to any sub-tenant, immediate or more distanced.⁵⁹⁶ Even nowadays, the levy of distraint by a bailiff is predominantly carried

⁵⁹⁵ *CIH*594.2-3 = *BA*, § 38, ed. Thurneysen, *Bürgschaft*, 12; Stacey, 215-16.

⁵⁹⁶ *Glanvill*, ed. & trans. G. D. G. Hall (London, 1965), 112: where the lord's distraint is *per iudicium curie sue*, i.e. by the judgement of *his own* court; discussed by. P. Brand, *The Making of Common Law* (London, 1992), 305-306.

out against reluctant rent- or taxpayers. This also occurred in early medieval Ireland: *forcomal chíis flatha* (seizure to satisfy the lord's rent).⁵⁹⁷ However, the original, privately employed distraint with full legal validity generally 'belongs largely to the pre-history of other documented legal systems' and, as such, had already been extremely limited in Roman Law at the time of the Twelve Tables in the fifth century B. C.⁵⁹⁸ In Ireland, however, the picture was very different and distraint was actively and widely used as a potent economic and social tool. Maine stated that 'there have been times when the real difficulty lay, not in conceiving what a man was entitled to, but in obtaining it; so that the method, violent or legal, by which an end was obtained was of more consequence than the nature of the end itself.'⁵⁹⁹

6.2. Terminology

The Irish term *athgabál* has a parallel in Old Breton known as *adgabael* as well as in Middle Welsh *adauayl* (*adafael*), tracing it back to a Common Celtic form **ategabaglā*.⁶⁰⁰ There were many different words used in the Irish language that denoted the taking of another person's property. The word *gabál* referred to any (legal) taking into possession of chattels. However, interestingly, the standard term used for the procedure of taking distraint on a debtor's property and the title of the very law tract dealing with this subject is *athgabáil* that literally means 'taking

⁵⁹⁷ *DIL*: *forcomol* (forcible entry (on land), claim, compulsion), Binchy: 'the security (?) of the chief's rent, seizure to satisfy the lord's rent', *CIH* 229.11-12 = *AL* v 442.23.

⁵⁹⁸ *GEIL*, 177; R. Karl, 'Kurz- und langfristige Geschäfte – Grundlagen alteuropäischen Vertragsrechts', in M. Schönfelder, H. Stäuble & F. Falkenstein (eds.), *Langfristige Erscheinungen und Brüche von der Bronze- zur Eisenzeit. Akten der gemeinsamen Sitzung der AG Bronzezeit und AG Eisenzeit am 5. Deutschen Archäologenkongreß, Frankfurt a. d. Oder 2005. Beiträge zur Ur- und Frühgeschichte Mitteleuropas* 51 (Langenweißbach, 2009), 30.

⁵⁹⁹ H. S. Maine, *Lectures on the Early History of Institutions* (London, 1874, 7th ed. 1914), 141.

⁶⁰⁰ *GEIL*, 231-232; Old Breton *adgabael* (glossing *occupanda*) has to do with seizure but it is not clear that there is implication of legal process. (personal correspondence with Prof. Paul Russell).

back'. It is the verbal noun of *ad-gaib* (get back, recover, take back). Binchy, followed by McLeod suggest that the reason for this peculiarity is the leading legal case preceding the tract on *athgabáil* in the *Senchas Már, The Saga of Fergus Mac Léti*, in which a legal fault leads to a second seizure.⁶⁰¹ Moreover, the term *athgabáil*, while primarily referring to the process of recovery of debts by means of distraint, is often also employed in the sense of pledge, particularly in the phrase *fo-ácaib athgabáil* 'leaves, gives pledge, security (in compensation)'.⁶⁰² While *gabál* and *athgabáil* thus denote the legal taking and re-taking of property respectively, the 'unlawful seizure' of property is known as *gabail étechta*.⁶⁰³ Another term for the unlawful acquisition of property is *forgabál* (forcible or illegal seizure) referring especially to the exacting of a due already paid.⁶⁰⁴

Distraint had to follow certain provisions, which, to some extent, can be compared to the *pignoris capio*, one of the *legis actiones* in Roman law.⁶⁰⁵ If it did not, the procedure was regarded as illegal distraint and the claimant lost his case. As with many socio-legal remedies, the impending threat of a sanction was only in itself powerful if a practical execution of it was not only possible but also carried out on occasion to cement its authority.⁶⁰⁶ *Bretha Nemed Dédenach* (The Last

⁶⁰¹ Binchy, 'Distraint', 28; McLeod, 'Fergus mac Léti and the Law', *Ériu* 61 (2011), 1-28.

⁶⁰² *DIL: athgabáil*.

⁶⁰³ *DIL: étechta*.

⁶⁰⁴ *DIL: forgabál*; note that *for-* generally has a sense of 'in excess' in such formations.

⁶⁰⁵ D'Arbois de Jubainville, 'Mélanges – Le Manuscrit Cottonien Otho E. XIII. La Saisie Irlandaise et Galloise, la Sasine Bretonne', *Revue Celtique* 7, (1886), 238; The *pignoris capio* is a mode of execution that consisted in the taking of a pledge combined with the recitation of a legal formula in the presence of a *praetor*.

⁶⁰⁶ cp. the consolidating effect of the feud: McLeod, 'The Blood-Feud in Medieval Ireland', in *Between Intrusions* (2004), 114-133.

Bretha Nemed), a text dealing with the responsibilities and privileges of poets highlights these purposes:

Ar imgaibh dlighi imatimairg mainder .i. inti imgaibes riar dlighi .i. is emh timairctear athgabail de a mainder.

He who eludes legality, an enclosure compels him, i.e. he who eludes the stipulation of law, i.e. it is promptly that distraint is driven from him into an enclosure.⁶⁰⁷

Although distraint was designed for all layers of social standing there is a clear preference for more elevated solutions for the upper echelons of society, with distraint remaining the sole remedy for the lower orders:

Ocus ar *indī* it .iiii. ārag fris tobngiter na ceithri aurrathas: aithgabāil fri brāta Caī, gāll fri cāin, aitire fri cairddi, gell fri neimthiu.

And because it is four kinds of constraint by which the four kinds of liability are enforced: distraint in the case of *Bretha Caí*, hostage[-taking] in the case of promulgated law, hostage-surety in the case of treaty, a pledge in the case of dignitaries.⁶⁰⁸

This is even more explicitly stated in the Old Irish glossing of the *Senchas Már*, which specifies the remedies available to different orders of society:

O rusuigigestar patraic 7 maithi fer neirenn in dligid-sa, is iarom conaimdetar cia tucht dombibsat a dliged do cach fohich friu .i. clocc 7 salm d'eclais, gell do flathaib, trifoclad do filedaib, aithgabail do feinib.

When Patrick and the men of Ireland had established this law, they then decided how they will recover their due from those who commit offences against them, i.e. bell and psalm for the church, hostages [read *géill*] for lords, *trefocal* for poets, distraint for commoners.⁶⁰⁹

⁶⁰⁷ Breatnach, 'The First Third of Bretha Nemed Toísech', *Ériu* 40, 30: citation from the missing beginning of *Bretha Nemed Dédenach*; *CIH* ii, 725.10-11, note that the last clause of this is an etymological gloss on *imatimairg* (personal correspondence with Prof. Paul Russell); *DIL*: *ar-imgaib*.

⁶⁰⁸ *CIH* 412.13-5 = *AL* i 260.16-7; text normalised and translated based on *CCIH*, 171; on *Bretha Caí* see *CCIH*, 5.8, 170ff.

⁶⁰⁹ Breatnach, 'On Satire and the Poet's Circuit', 25-26, read: *géill* following Breatnach; *CIH* 884.1, cf. 1951.1. *Trefocal* is a very specific reference to the warning given by a poet that, if his claim is not satisfied,

The ultimate asset a person may jeopardise by ignoring a plaintiff was his own honour and the loss of face was the highest price to pay and removed the person from the protection of the law.

6.3. Origin of the claim leading to distraint

The reason that led to a distraint concisely can be called a ‘debt’ but the causes that gave rise to this debt were manifold. The debt could have consisted in the retention of goods, payment or service to which the creditor was entitled, and this entitlement could have different causes as well. Property rights were not only a means of obtaining a right and control over a specific good but also a way of defining the social and legal relationship between the parties,⁶¹⁰ and these movements of property in the form of payment of fines and compensation were themselves one of the common means by which goods changed hands in early Ireland.⁶¹¹ The distraint of property was part of this framework but rarely are the origins of the claim resulting in distraint discussed, owing to the complexity of the procedure itself. The Irish laws employ distraint for a variety of minor and serious offences, which offer some insight into the vast scope of this remedy. To provide some excerpts, *Dí Chetharslicht Athgabálae* addresses, quite abundantly, illegal use of and damage to property. The examples provided tend to be of a malicious nature with a noticeable intent to cause uproar and damage. These damaging deeds vary in their severity and include

he will proceed to satirize; also see: Breatnach, ‘Satire, praise and the early Irish poet’, *Ériu* 56 (2006), 63-84; *DIL: fócr(e)e: trefocal fócr(e)*.

⁶¹⁰ C. M. Rose, *Property & Persuasion: Essays on the History, Theory, and Rhetoric of Ownership*, New Perspectives on Law, Culture, and Society, (Boulder, 1994).

⁶¹¹ M. Gerriets, ‘The Organization of Exchange in Early Christian Ireland’, *The Journal of Economic History*, vol. 41, nr 1, The Tasks of Economic History, (March 1981), 171-76.

cutting up the plaintiff's land,⁶¹² attacking the plaintiff's horses,⁶¹³ over-fettering his horses,⁶¹⁴ and carrying off his pet animals,⁶¹⁵ or wilfully damaging his fish pond.⁶¹⁶ Apparently, it even covered cases where a dog has been fed a bad bite of food.⁶¹⁷ Examples for illegal use were drying in the plaintiff's kiln or grinding in his mill,⁶¹⁸ as well as using his cooking utensils,⁶¹⁹ gardening equipment,⁶²⁰ but also his silver-mine or bee-hive.⁶²¹ Especially in regard to the latter two cases, the intent of permanently depriving the plaintiff of the thing itself and the profits it yields is self-evident. Early Irish property law does not show distinctions as precise as one may wish for, between sale, purchase, barter, exchange, loans, fiefs, gifts and so forth, not least due to the absence of a monetary system.⁶²² Naturally, it would burst the scope of this thesis to offer a study of the abundant property movements and terminology that operated in early Ireland but it is very important to offer some insight into this difficult field, because this is indispensable to pledging and distraint. I chose to select those scenarios that can tell us something about the connection between distraint and pledging.

⁶¹² *CIH*383.3 = H.d'Arbois de Jubainville, *Études*, vol. 2, title 2, ch. 6, art. 27, § 18, p. 306.

⁶¹³ *CIH*383.4-5 = *Études*, vol. 2, title 2, ch. 6, art. 27, § 21, p. 306.

⁶¹⁴ *CIH*385.22 = *Études*, vol. 2, title 2, ch. 6, art. 28, § 59, p. 310.

⁶¹⁵ *CIH*383.32 = *Études*, vol. 2, title 2, ch. 6, art. 27, § 22, p. 306.

⁶¹⁶ *CIH*383.4 = *Études*, vol. 2, Title 2, ch. 6, art. 27, § 19, p. 306.

⁶¹⁷ *CIH*387.32 = *Études*, vol. 2, Title 2, ch. 6, art. 29, § 84, p. 312.

⁶¹⁸ *CIH*383.32 = *Études*, vol. 2, title 2, ch. 6, art. 27, §§ 23-4, p. 306.

⁶¹⁹ *CIH*384.15-16 = *Études*, vol. 2, title 2, ch. 6, art. 28, § 37, 308.

⁶²⁰ *CIH*384.17-18. 385.9 = *Études*, vol. 2, title 2, ch. 6, art. 28, § 41, p. 308: axe and billhook.

⁶²¹ *CIH*384.19-385.17; = *Études*, vol. 2, ch. 6, art. 28, § 44, p. 308-9.

⁶²² For the use of money in the early Irish laws see: Breatnach, 'Forms of Payment in the Early Irish Law Tracts', *CMCS* 68 (Winter 2014), 1-20; M. Gerriets, 'Money in Early Christian Ireland according to the Irish laws', *Comparative Studies in Society and History* vol. 27, nr 2 (Apr. 1985), 323-339; *DIL*: *crenaid* (buys, obtains, later: sells), *renaid* (sells, barter, exchanges), *ón* (the act of lending, loan), *dán* (gift, bestowal, endowment, present, lat. *donum, donatio*), *taurchreicc, turchrecc* (lit. fore-purchase, fief, grant).

6.3.1. Land Pledges

One question that naturally arises when dealing with debt is the possibility of using land as security. Usually, this is regarded as uncharacteristic of early Irish law. According to Binchy, at the time of the law tracts, the procedure of *athgabál* exclusively referred to movables and ‘even if *athgabál* originally covered a wider area of legal remedies, it was limited to distraint of chattels at a very early period’.⁶²³ However, as we have already seen in the discussion of paying suretyship, entitlements to land were familiar. It has to be probed whether, in the case that the debt was not paid and no other resources were available, the plaintiff would have gained an entitlement in the land, in other words, a mortgage on real property, which is a form of standing pledge. I base this idea on one statement in *Di Chetharslicht Athgabálae* that provoked my curiosity as to whether the Irish recognised this form of security:

Arindí ata cetheoir athgabála gaibter and .i. duine 7 íriu 7 marbdili 7 beochethrae.

Because four [kinds of] distress are taken: a human being, land, lifeless chattels and live animals.⁶²⁴

Land was primarily acquired through patrilineal inheritance and inherited land could not be alienated without permission from the whole kin-group, whereas acquired land could.⁶²⁵

Likewise, the kindred could be made responsible for duties endowed upon a kinsman who failed to meet his legal obligations, which could consist of the performance of a particular service.⁶²⁶

⁶²³ Binchy, ‘Distraint in Irish Law’, 30.

⁶²⁴ *CIH*409.1-2: ocus arindhi it .iiii. athgabála gaibtir ann .i. duine 7 hiriu marbdili 7 beocethrae = *AL* i 258.4 f.; Binchy, ‘Distraint in Irish Law’, 29: He does note that the tetrad is ‘to some extent suspect’; *athgabál* in this context may also mean ‘recovery (cf. ‘Distraint’, 29), or, more particularly ‘thing recovered’ (personal correspondence with Prof. Charles-Edwards); *DIL*: *íriu* (land, earth, soil).

⁶²⁵ *EIWK*, 67.

⁶²⁶ Smith, ‘A Note on *Cethairslicht Athgabálae*’, 166.

The obligations in question refer to the Irish practice of co-operative farming,⁶²⁷ including joint-ploughing and joint-herding, as well as erecting a fence.⁶²⁸ The fines for failure to erect a proper fence are given in *Bretha Comaithchesa* (Judgements of Neighbourhood) as such:

Dairt fair cacha treise nad imchoi rainn de ro-seola fair.

A calf is the fine for every three day period during which he has not fenced a part of it which may be outstanding for him.⁶²⁹

In the case of two competent co-heirs next to an *eisirt* (absentee), the former were entitled to use distraint against the absentee and then the absentee's kindred to compel compliance.

Os airm i mbiat da chomarbae trebairi im eisirt, cid do-gníther fri eisirt? Gaibet airi co n-imchúa. Os mani bé trebad inforais lais, gaibther ara fini comocais dó co n-imchúat airi no co-tardat férdílsi co cenn mblíadnae.

And where there are two competent co-heirs next to an absentee, what is done about the absentee? They distrain on him so that he may fence. And if he has no adequate farming equipment, distraint is taken on his close kindred so that they may fence on his behalf or so that they may alienate the pasture to the end of a year.⁶³⁰

The absentee's kindred could fence on behalf of their kinsman or else, they had the prerogative to alienate the absentee's share of *fintiu* (kin-land) until the end of the year. To the contrary, a kinsman who held land independently for which he alone was responsible, was entitled to dispose of it freely:

Ni udbairnech seilb acht mad ni do ruaicle.

Nobody should grant land except such as he has purchased himself.⁶³¹

The use of distraint in this context is interesting because, as has been seen, offences in the law of neighbourhood were secured with the special type of pledge known as *tairgille* (fore-pledge), and

⁶²⁷ *CIH*375.32-376.3 = *Études*, vol. 2, title 2, ch. 4, art. 20, §§ 86-88, p. 294-5.

⁶²⁸ *CIH*402.10-11 = *Études*, vol. 2, title 3, ch. 11, article 42, § 31, p. 335.

⁶²⁹ *CIH*65.19 = *BCom*, § 5.

⁶³⁰ *CIH*75.24-27 = *BCom*, § 27.

⁶³¹ *CIH*534.20 = *AL* iii 52.8, *Córus Béscnai*.

a combination with *smachta* and *caithchi*, two forms of fine or penalty payments. In my opinion, this pledge secured the fulfilment of duties once the relationship between the neighbours had been lawfully established. Fencing was an essential part of creating this relation and the payment that became due before, by consequence, could only be obtained by distraint. Upon the death of a kinsman and the distribution of his bequest among his sons, the new boundaries had to be established first. Since the neighbour had not moved any cattle on the land and was not present, the land itself was held in pledge in order to compel his performance or provoke a kin-liability to come forward. Therefore, a kinsman would not be allowed to encumber his inherited share of kin-land with debts or mortgages towards non-kinsmen, but his kindred would be compelled to take action.

It cannot go without saying that titles to immovable property were usually established by applying another Irish legal procedure known as *tellach* (entry).⁶³² It follows an elaborate and ceremonial process of three subsequent entries onto the respective parcel of land.⁶³³ The procedure was used predominantly by kinsmen who wanted to establish their right to a share of kin-land that had not been granted them or was occupied by someone else of which they had been deprived. On the other hand, *athgabál* of land would not imply any hereditary title to it; rather it would simply be another means of enforcing payment of what was due to one. The process of *tellach* was in many ways analogue to distraint. In distraint livestock was removed from the defendant's property, creating a physical distance to the debtor. The loss of ownership was heightened with each step in the forfeiture process. In *tellach* the opposite was done. The plaintiff moved his livestock onto the

⁶³² *GEIL*, 186-189; *CIH* 205.22-213.37, *Din Techtugad* (On Legal Entry); C. Watkins, 'Indo-European metrics and archaic Irish verse', *Celtica* 6 (1963), 221, 227-8, 234-5.

⁶³³ *EIWK*, 260-274.

land to which he laid claim, intensifying his entitlement to the land with each subsequent entry and thus, manifesting his ownership. Moving chattels onto the land in *tellach* as much as removing chattels from the land in *athgabál* played a vital role in the process of establishing ownership. *Tellach* was perhaps more final even than distraint for it required no other legal formalities, not even any oral formulas, for the execution of the procedure to culminate in ownership. In Charles-Edwards' words: '*Tellach* is a legal sacrament: it effects what it signifies.'⁶³⁴ But it remains important to note that legal entry was based on a hereditary title while the procedure of distraint regarding land was possible to execute a contractual debt.

6.3.2. Distraint in person

Another important aspect of distraint was the option of seizing the debtor in person. In the discussion of the *gíall* (hostage) and *aitire* (hostage surety), it has been established that the captivity of persons was a well established means of security, but to what extent did early Irish law allow for the person responsible for the debt to be distrained himself? Here, we have to distinguish between two main concepts, (1) the seizure of a person who committed an offence, such as theft, and (2) the seizure of a person who was insolvent or of such a low status that he had no other property and could only be seized in person to compensate for his offence. Pertaining to the former, distraint could be taken for the compensation of a range of offences. *Di Chetharslicht Athgabálae* includes offences such as theft of male and female slaves, pigs, and sheep,⁶³⁵ the robbery of a fruit garden and of a beehive, very valuable assets and beneficial

⁶³⁴ *EIWK*, 260.

⁶³⁵ *CIH*383.33-4 = *Études*, vol. 2, title 2, ch. 6, art. 27, §§ 29-30, p. 307; *CIH*384.17-8 = art. 28, § 40, p. 308.

robberies for the production of mead, honey and candles,⁶³⁶ as well as attacks against life and limb resulting in injuries, such as a blow to the head or a slash wound.⁶³⁷ Could the compensation owed for these offences be collected by distraining the offender in person, due to the serious nature of them? A passage that belongs to *OGSM* reads:

Aithgabail gona duine, ni teit fuiri s̄ guine. Aithgabail gaide, ni teit fuiri s̄ gat. (...)
Aithgabail cinad: ni teit tar .uii. cumala; arna rasa .uii. cumala ni tet s̄ aoncin fuiri.

Distrain for shedding the blood of a person, nothing is made subject to it except the wounds. Distrain for theft, nothing is made subject to it except the theft. (...)
Distrain for an offence: it does not go beyond seven *cumala*; in order that it should not reach [beyond] seven *cumala* no more than a single *offence* is subject to it.⁶³⁸

I would argue that a debtor who failed to pay seven *cumala*, which is precisely the price of a freeman, ultimately could be seized in person. Seven *cumala* is the same amount required to redeem a forfeited hostage or captive, for this was the position the offender would enter when he failed to offer a settlement and recompense. Once he was held in captivity, he could be redeemed by a kinsman if they paid on his behalf, or, presumably, if they substituted him with a slave. Under other conditions, the inevitable outcome would be his reduction of status to a slave or, in fact, his life being taken (see my detailed discussion of this process in sub-chapter 5.5., p. 166 ff.).

This aspect leads us directly to the second type of seizing a person, offenders of low rank (slaves, tenants-at-will, shepherds and cowherds) who had no cattle of their own and thus could not be distrained in the normal manner. If they were in the service of a lord, it was the lord who was responsible for them. Paradoxically, one of the main reasons why a freeman could sink to the level of a slave in the first place was that he did not have the means to pay the debt. Of course, this was

⁶³⁶ *CIH*384.17 = *Études*, vol. 2, title 2, ch. 6, art. 28, § 39, p. 308; *CIH*384.19-20 = § 45, p. 309.

⁶³⁷ *CIH*386.21-2 = *Études*, vol. 2, title 2, ch. 6, art. 29, §§ 69-70, p. 311.

⁶³⁸ *CIH*899.28-31; *cin*aid forcinad, gen. sg. of *cin*, *CCIH*, 287-8.

not specific to pledging and there were many other ways by which a person ended up in enslavement, such as committing a crime for which he would be set adrift, and when luckily being washed up at a neighbouring shore, entered his new community as a slave.⁶³⁹ It shows that he was lacking the necessary assets but not only in respect of property but also as pertains to support by his kindred. This scenario occurs in *The Saga of Fergus mac Léti*. Therein, the illegitimate son of Dorn, Buide's daughter, takes part in the slaying of Eochu Bélbuide,⁶⁴⁰ who, however, enjoyed the protection of Fergus mac Léti. The violation of this protection entitled Fergus to payment of his honour-price of twenty-one *cumala*, to be divided among the *gelfine*.⁶⁴¹ Dorn's son was the result of an expressly forbidden union between Dorn and a *déorad* (outsider), presumably a *cú glas* (lit. grey wolf; an exile from overseas), circumstances which excluded her son from kin liability and rendered his mother solely responsible for him.⁶⁴² The text suggests that the son was subject to capital punishment unless his mother assumed responsibility for him. This she did and gave herself up into bondage with Fergus mac Léti, *i ngill fri cimbid* (as a pledge for the surrender of a captive).⁶⁴³ If a slave attempted to escape, the action was interpreted as theft in commentary: *beodil conic a gait budein* (livestock that can steal themselves), i.e. slaves.⁶⁴⁴ We must not ignore the fact that a more economic solution to killing an unredeemed captive, would be to let him work off his debt in kind, as a form of debt-slavery or penal-slavery, but there is no direct evidence for slaves securing their freedom by the value of their work. Slaves were of great economic

⁶³⁹ M. E. Byrne, 'On the Punishment of Setting Adrift', *Ériu* 11 (1932), 97-102.

⁶⁴⁰ McLeod, 'Fergus mac Léti and the Law', § 1, 3.

⁶⁴¹ For this interpretation see McLeod, 'The Saga of Fergus mac Léti', n. 12, 3; idem. 'Kinship', *Ériu* 51 (2000), 1-2.

⁶⁴² For a detailed explanation of her son's status and Dorn's liability see: McLeod, 'Fergus mac Léti and the Law', 21-22, recension L of the text gives *albanaig*, see Binchy, 'The Saga of Fergus Mac Léti', 36.

⁶⁴³ McLeod, 'Fergus mac Léti and the Law', 15.

⁶⁴⁴ *CIH*316.34 = *AL* iii 432.9.

importance and it is well known that the slave functioned as a currency because the original meaning of *cumal* was 'female slave'.⁶⁴⁵ For this reason, there was a strong sentiment against the release of slaves regarding them as essential to a lord's prosperity. *Di Astud Chirt 7 Dligid* (On the confirmation of right and law) includes the release of slaves among those things that 'cause a lord's corn and milk and fruit to fail', a feature that led Kelly to suggest that 'the release of slaves is not merely economic folly, but also an immoral and antisocial act liable to bring the same sort of supernatural retribution as royal injustice'.⁶⁴⁶

6.3.3. Distrain of items given as pledge, loan, or deposit

Another reason for distraint can arise when the claimant sought to take back movable property that belonged to him but that had been borrowed, given out on loan or deposited with another party who subsequently failed or refused to return it. In these cases, distraint was taken because the plaintiff desired the surrender of his own possessions and vindicated his right over the chattels subject to the dispute by employing distraint. This category is located at the interface of customary and contractual obligation, for although loans and deposits were given under contractual obligation, they need not have been bound by sureties. These transactions operated in a different framework of liability and duty, in which a contractual relationship between the parties was implied and also created through the exchange of goods and where a full-fledged contract was not necessarily envisaged. Representative of this notion are the two different types of *aithne* (deposit; handing over or depositing of an object of value with another person

⁶⁴⁵ *GEIL*, 96.

⁶⁴⁶ *CIH* 231.15-7 = *AL* v 450.12-5; *GEIL*, 96, referring to *fir flathemon*.

apparently either for safe keeping or on loan),⁶⁴⁷ recognized in early Irish law: *fri airchenn* (a temporarily limited loan that had to be returned at a specific point in time) and *fri anairchen* (an open-ended loan, which, presumably, had to be returned upon request).⁶⁴⁸ There existed two further distinct forms of loan: *airliciud* and *ón*. The difference between them has been subject to debate for a considerable amount of time but McLeod has convincingly established that *ón* addresses a loan (gratuitous or with interest) that merely transfers possessory rights to the object transferred, while *airliciud* is a loan (always with interest) that includes also ‘the right [of the borrower] to transfer the chattel to a third person during the period of the loan’, and thus transfers proprietary rights with the possibility of subletting the item borrowed and thereby generating economic profit.⁶⁴⁹

Examples for deposits include for instance the depositing of a horse with a messenger,⁶⁵⁰ or a hound with a huntsman for training purposes.⁶⁵¹ Numerous items that were recovered by distraint

⁶⁴⁷ *DIL*, s.v. 1 *aithne*.

⁶⁴⁸ *GEIL*, 118.

⁶⁴⁹ McLeod, ‘*Ón* and *airliciud*: loans in medieval Irish law’, in A. Ahlqvist & P. O’Neill (eds.), *Celts and their cultures at home and abroad: A Festschrift for Malcolm Broun* (Sydney, 2013), 189; Breatnach, ‘Cáin Ónae: An Old-Irish Law Text on Lending’, in Jay Jasanoff, H. Craig Melchert and Lisi Olivier (eds.), *Mír Curad: Studies in Honor of Calvert Watkins* (Innsbruck, 1998) 29-46; W. Stokes, *Thesaurus palaeohibernicus: a collection of old-Irish glosses, scholia, prose, and verse* (Cambridge, 1901-3), 700.37; The editors of the Würzburg Glosses hold *airliciud* to correspond to the Roman legal term *mutuum* and see *ón* as a pendant to *commodatum*; *GEIL*, 117-118; H. Hausmaninger & W. Selb, *Römisches Privatrecht* (Vienna, 2001), 213, 216-221, 256: The Roman *mutuum* is a gratuitous relinquishment/cession of money or economically justifiable things (such as seeds, wine, or oil) into the proprietorship of the recipient who is obliged to return a thing equal to the subject of the loan at the point of time agreed upon. This transaction is created out of social duty or friendship. The *commodatum* (borrowing) is also a gratuitous cession of the thing for use, however, the recipient does not become proprietor of it but simply *detentor*. This has significant implications for the recovery of assets in cases of loss, theft, fire, accident et al. Both bear close resemblance to the *depositum* (deposit, custody) and the *mandatum* (mandate).

⁶⁵⁰ *CIH* 373.28 & 373.32 = *Études*, vol. 2, title 2, ch. 4, art. 20, §§68-70, p. 292: distraint of bridles, reins, and halters.

⁶⁵¹ *CIH* 19.3-6 = *AL* v 190.13-19 = Heptad 19; cp. *CIH* 20.13-5 = *AL* v 196.1-4 = Heptad 20; *CIH* 11.26-29 = *AL* v 160.1-6 = Heptad 9.

could have been subject to loans, such as the utensils of a carpenter and smith,⁶⁵² a butter churn,⁶⁵³ a knife,⁶⁵⁴ axe,⁶⁵⁵ and billhook,⁶⁵⁶ but also a mirror,⁶⁵⁷ and a child's toy.⁶⁵⁸ The great legal difficulty with loans and deposits lay within the question of liability. What happened when a deposited article was stolen or destroyed, intentionally or accidentally and who was liable to what degree of compensation? If a return was refused but the article was not otherwise affected, the depositor, our plaintiff, could distrain the article he had given. But in the case that it perished, his entitlement could no longer be clearly defined. The jurists sought to regulate the return in the form of an equivalent in value by making it dependent on the presence or absence of sureties and the depositor's caution when handing it over. A claimant could take distraint only for the precise value due to him or be guilty of illegality in distraint.⁶⁵⁹ Having examined the origins of the claim leading to distraint, the procedure itself shall be explored in what follows.

6.4. Distraint without and with a stay of execution

There were temporal variations in the form of distraint taken. These were *tulathgabál* or *athgabál tulla* (immediate distraint) and *athgabál iar fut* (distraint with a stay). Both d'Arbois de Jubainville and Binchy regarded the former procedure as an older and less restricted form of seizure that was, in its essence, of a primitive and violent nature while distraint with a stay was

⁶⁵² *CIH*370.32 & 371.1 = *Études*, vol. 2, title 2, ch. 4, art. 20, §§ 40-41, p. 290.

⁶⁵³ *CIH*371.4 = *Études*, vol. 2, title 2, ch. 4, art. 20, § 44, p. 290.

⁶⁵⁴ *CIH*373.21 = *Études*, vol. 2, title 2, ch. 4, art. 20, § 64, p. 292.

⁶⁵⁵ *CIH*374.1 = *Études*, vol. 2, title 2, ch. 4, art. 20, § 71, p. 292.

⁶⁵⁶ *CIH*374.4 = *Études*, vol. 2, title 2, ch. 4, art. 20, § 72, p. 292.

⁶⁵⁷ *CIH*373.23 = *Études*, vol. 2, title 2, ch. 4, art. 20, § 65, p. 292.

⁶⁵⁸ *CIH*373.25 = *Études*, vol. 2, title 2, ch. 4, art. 20, § 66, p. 292.

⁶⁵⁹ This complex issue is discussed particularly in Heptads 19 and 20 where the primary factor to determine liability lies within the security measurements taken by the depositor when giving the deposit. For a discussion of deposits see *GEIL*, 120.

legally more sophisticated. Binchy states that ‘they represent not two co-existing types but two successive stages in the evolution of this primitive legal remedy’.⁶⁶⁰ By the time when legal tracts were committed to parchment, distraint with a stay had already become the norm and appears to have taken the position of the standard form of distraint in the seventh and eighth centuries, at least, it would appear as such from the compiler’s perspective. Stacey, however, has pointed to the option that there might have existed variations in the formalities of distraint and that the procedure ‘as an institution was likely still evolving at the time the lawbooks were compiled’,⁶⁶¹ which seems entirely likely. Although, in origin, still a private remedy of redress, the procedure became considerably more complicated over time and it is hard to imagine that the average freeman would have been familiar with the many details found in it. Binchy states that ‘in any event the rules governing *athgabál* are so torturous and confusing that only a professional jurist could hope to remember them all’,⁶⁶² and interprets the legal framework in which this private procedure was embedded as a product of the law schools. Stacey sees in the ‘intervals of rest and negotiation’ a ‘clear attempt to defuse hostilities that might have been ignited by a more hurried or forceful confiscation’.⁶⁶³ *Di Chetharšlicht Athgabálae* was concerned with the seizure of cattle (and sheep for the female claimant) and as such with an exemplary model of a contractual debt, even though, as has been made clear in the previous sections, distraint of all sorts of chattels underlies the extended scope of the procedure. In the following, I will draw a brief sketch of how both forms of distraint operated.

⁶⁶⁰ Binchy, ‘Distraint in Irish Law’, 56.

⁶⁶¹ Stacey, *Dark Speech*, 21-22.

⁶⁶² Binchy, ‘Distraint in Irish Law’: confirm the text quoted at 31-32.

⁶⁶³ Stacey, *Dark Speech*, 25.

6.5. *Athgabál tulla* (immediate distraint)

In the immediate form of distraint, the procedure, as its title itself implies, was faster paced and the defendant was not awarded much further leniency in the fulfilment of his duty and the discharge of liability. I agree with Stacey when she states that *tulathgabál* ‘stood as an intermediate stage between unrestrained seizure and full-blown *athgabál iar fuí* (distraint with a stay; see below).⁶⁶⁴ A debtor had to be given formal notice that his chattels would be seized as a consequence of his default. This notice was known as *aurfócre* or, more regularly, *apad*. In immediate distraint, notice was followed instantaneously with the removal of the chattels, known as *tóchsal* (carrying away). Therefore, there was no further period of respite between notice and removal; the levying of execution took place essentially simultaneously. The cattle, that had to have the equivalent value as the outstanding debt, were physically removed from the debtor and driven into a pound. As Stacey has demonstrated, this visual distancing of property from the debtor heightened the procedure.⁶⁶⁵ It is open to debate whether the principal debtor was informed about the location of the pound, but it is clear that a stand-in liability would have been provided with this information.⁶⁶⁶ Therefore, he had lost the connection to his assets and was further pressured into action if he had any desire of redeeming them. The pound to which the

⁶⁶⁴ *ibid.* 21.

⁶⁶⁵ *ibid.* 25.

⁶⁶⁶ Binchy, ‘Distraint in Irish Law’, 46-7: holds it that this is a privilege reserved for those standing in for the principal debtor. However, Stacey also raises the possibility that ‘notice of this sort might have formed a normal part of the procedure’, pointing to *CIH* 409.17-19: *Ocus araindhi as cethardae conogi aithgabail iar suidiu toxul iar nelud dligid comnaeth iar toxul fasc iar coimdeth aurnaide dligid frí forus techtae co cuingelniu coir in ninbaid dligid*. She gives the four parts of the seizure enumerated here as: ‘seizure after the evasion of law, security [of the items taken] after seizure, notice after security, and awaiting law in the proper place with proper mutual pledging in the time of law’, 22, n. 58, 257.

cattle were driven was known as *forus n-athgabálae*, and could be the *faithche* (green, infield) of the debtor or the residence of a third party.

Once the chattels had been received into the pound they hung in the balance between creditor and debtor and it was at this point that a respite was granted, even in immediate distraint. This stage was known as delay in pound, *díthim* (lit. lapsing, becoming forfeit) or *ré ndíthma* (time period of lapsing). In immediate distraint, this period could consist of one, three, five or ten days. Binchy argued that upon the expiry of this period ‘the whole of the distress was immediately forfeit’,⁶⁶⁷ a feature that defined *tulathgabál*. This would render the distrained chattels the equivalent of a *Verfallspfand* (forfeiture pledge) that, following the law of pledging, also became forfeit, at once, at the end of this period. It was during this first and final period that the claimant granted the defendant time, awaiting his discharge of the debt, either by payment or by offering a pledge. If the defendant did not act, his chattels, as the title of this period indicates, became irretrievably forfeit to the creditor. Since the property taken in distraint was of equal value as the outstanding debt, the end of forfeiture equalled the satisfaction of entitlements. Distraint without a stay was considerably faster-paced than later developments and the process that the property underwent was evidently similar to the fate of a pledge voluntarily conveyed; it was taken, held for a specific time, and then became forfeit. As will be seen, for the second form of distraint to unfold, a far more extended temporal space was envisaged by the jurists.

⁶⁶⁷ Binchy, ‘Distraint in Irish Law’, 61.

6.6. *Athgabál iar fut* (distrain with a stay)

This second form of distrain was longer than immediate distrain and bought the defendant considerably more time to avoid the irrevocable forfeiture of his property. It strove to avoid the defendant's loss of assets and clearly complicated the procedure from the perspective of the claimant who had to engage a legal advocate and observe each period without fail or he would himself be subjected to illegality of seizure, penalised at five *séts*. The procedure commenced, as did *tulathgabál*, with the formal notice of the pending distrain. However, the claimant, then, retreated again without removing any chattels as yet. A stay of execution known as *anad* (delay, waiting) followed, during which the creditor had a charge, or lien, on the chattels subject to the distrain. However, they remained in the custody and possession of the defendant for the time being, rendering them equivalent to a standing pledge. This period could have a length of one, two, three, five or ten days.⁶⁶⁸ Only in the event that he failed to broker a settlement during this period, did the plaintiff return and perform *tóchsal*, the formal removal of the distrain to the pound, which had to be performed in the early morning hours. The main reason for this was that the cows were milked after dawn and this day's milk already belonged to the plaintiff, a remarkable example of the sophisticated awareness of property rights in early Ireland. Stacey has added an interesting point to this stage of the procedure. She suggests that a further motivation for the early time was that the milking-enclosure was located in the farmyard, very close to the debtor's house and removing the cattle before they had been put into the enclosure may be

⁶⁶⁸ The delay of two days is reserved for the female plaintiff and only occurs in distrain with a stay; for a detailed discussion, see: Hanne-Mette Alsos Raae, *The representation in Old Irish law texts of the legal position of women in early medieval Ireland as regards the ownership of property*, (unpublished PhD thesis, National University of Ireland, Galway, 2013).

perceived as ‘less provocative’ and providing room for ‘consensus and the mutual saving of face’.⁶⁶⁹ Here, as with immediate distraint, the period of *díthim* commenced granting the defendant a second respite of one, two, three, five or ten days, the same length as granted in the first delay called *anad*, and a further opportunity to discharge his debt. Smith’s analysis of these periods may be summarised as such:⁶⁷⁰

Period of stay in days	Reason
1	Extenuating urgency on the part of the plaintiff
2	Only for female plaintiff, only occurs in distraint with a stay
3	Standard length
5	Distraint against a substitute defendant
10	Extenuating exemption on the part of the defendant

Table 9: different periods of stay in distraint

At the end of this second period, the chattels did not, at once, become forfeit, as they did in immediate distraint. To the contrary, the period was followed by *lobad* (lit. rotting, decay), a procedural step never mentioned in respect of immediate distraint.⁶⁷¹ During this stage, the chattels did become forfeit, but only progressively, one by one. In the first night, five *séts* became forfeit and on the second and any other consecutive night three *séts* each became forfeit until the entire amount of the debt had expired with the time passing. This would make the length of *lobad* dependent on the amount of the debt, the higher the debt, the longer the process would take. However, Stacey points to a reference that allowed for the whole distraint to become forfeit after ten days, pointing to a divergence in legal opinion.⁶⁷² The requirement for restitution to be

⁶⁶⁹ Stacey, *Dark Speech*, 26.

⁶⁷⁰ The nature of this temporal distinction has been and remains subject to debate; Smith, ‘A Note on *Cethairślicht Athgabálae*’, 165.

⁶⁷¹ Binchy, ‘Distraint in Irish Law’, 61.

⁶⁷² *CIH*900.19-21; Stacey, *Dark Speech*, 23.

forthcoming after ten days is also encountered on a regular basis in *BFG* and appears to be one of the common periods associated with property entitlements.⁶⁷³ Progressive forfeiture, according to Binchy, was the result of a newer development that gave the defendant ‘a chance of saving at least something from the wreck up to the last moment’.⁶⁷⁴ At whichever point the end of *lobad* was reached, the forfeiture of all of the property led to the satisfaction of the claim. As can be seen clearly, the procedure took far longer to come to an end and involved a total of three temporal extensions, *anad* (stay of execution), *díthim* (lapsing), and *lobad* (rotting). It afforded the defendant with an initial period during which he did not lose possession and perhaps allowed him to settle the matter in a more dignified manner. However, even if he failed to act at this early stage, he was given further opportunity to settle during *díthim* and could even recover part of his chattels during the final stage of *lobad*, in each case either by paying or by offering a pledge. This form of distraint clearly benefitted the defendant more than did *tulathgabál*. Depending on the stage in the execution process, a defendant can be in possession of his property, but not be allowed to use it anymore; he could be the owner but not have it in his possession anymore; or he could have forfeited his ownership and possession altogether.⁶⁷⁵

⁶⁷³ *CIH*467.31-29 = *BFG*, § 16; *CIH*469.19-23 = *BFG*, §26; *CIH*470.2-9 = § 29; *CIH*470.21-25 = *BFG*, § 31; *CIH*472.16-21 = *BFG*, § 40, all of which regard the period of ten days as the point in time at which the first restitution (in case of multiple restitution) has to be forthcoming. The examples include cattle, though they are not restricted to livestock.

⁶⁷⁴ Binchy, ‘Distraint in Irish Law’, 61.

⁶⁷⁵ For a ground-breaking analysis of the bundle of property rights, see: W. N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, ed. Walter Wheeler Cook (New Haven, 1923); repr. of two Yale Journal articles from 1913 and 1917.

6.7. *Athgabál inmlequin* (distrain of a stand-in/surrogate debtor)

A further distinction within the procedure of distraint had its origin not in a temporal divergence but in the legal role of the person against whom the distraint was taken. Under certain conditions, the debtor was not directly distrained but, instead, a stand-in security took his place. This form of distraint was known as *athgabál inmlequin* (distrain of a surrogate) and was subject to a five-day stay.⁶⁷⁶ Who fulfilled this role? The surrogate debtor could either have been an *inmlegon fine* (stand-in of the kindred), or an *inmlegon ráithe* (stand-in paying surety), the two forms of financial guarantors. The *inmlegon* originally derives from ‘the solidarity of the kindred in primitive law’,⁶⁷⁷ ultimately represented through the *ágae fine* (head of kin), but in the first instance the next-of-kin, the strategy being to spread liability so that there is a better chance that someone will pay what is due. Such a kinsman surety could be distrained if the principal debtor failed to comply, or, if he was absent and the creditor sought to compel his kindred to act in his stead. From the idea of this automatic, surrogate liability developed a more advanced form of secondary liability, that we have already encountered, the *ráth* (property or paying surety).⁶⁷⁸ This abstract form of legal guarantor did not have to be a kinsman and contrary to a duty imposed by the social give-and-take implicit in a kin-group, paying suretyship was entered by appointment and was, therefore, theoretically voluntary, although surely also a social obligation. Therefore, we notice a shift from an inherent, unappointed communal responsibility to a specifically appointed, individual liability. However, I would argue that even the paying surety would have

⁶⁷⁶ *DIL: inbleoga(i)n*, VN of *in-ombliġ* (distrain of the surety, distraint of the kinsman surety; surety, kinsman surety).

⁶⁷⁷ Binchy, ‘Distraint in Irish Law’, 33.

⁶⁷⁸ *ibid.* 33; *BA*, §§ 76b, 77, ed. Thurneysen, *Bürgschaft*, 29; Stacey, 225-6.

had to stem from a circle very close to the defendant and if not his agnatic lineage, could have come from other family-related bonds, very likely the extended network created through the practice of fosterage. Suretyship in early Irish law was so prominent that it is hard to imagine that there was not a system in place that facilitated this network with ease.

In the procedure of distraint, both types of *inmlegon* were treated less harsh than the principal defendant. This is evident in two principal differences. First, they were granted a longer period of delay. This makes sense if the intention was that the *inmlegon* attempted to coerce the debtor into payment. Naturally, he had an interest in doing so in order to avoid his own chattels from being seized and the evidence on suretyship clearly states that at least the *ráth* accompanied the *naidm* to fulfil this duty.⁶⁷⁹ It was only when this combined effort failed, that the *ráth* himself had to pay in his stead. Second, the *inmlegon* was informed for what offence the distraint was taken, since he for instance may not yet be aware of the breach of the contract, and he was also informed to which pound the cattle were being driven.⁶⁸⁰ This favouritism towards the *inmlegon* is understandable, since it was not his failure that gave rise to the distraint. The involvement of the *inmlegon* provided the plaintiff with a secondary liability he could fall back on and when the stand-in paid the debt on his behalf, voluntarily or through the forfeiture of his chattels in distraint, the claimant was satisfied. However, a new claim had arisen between the *inmlegon* and the debtor who subsequently, could be distrained by the *inmlegon* for his indemnification.

⁶⁷⁹ *BA*, § 73, ed. Thurneysen, *Bürgschaft*, 26; Stacey, 224.

⁶⁸⁰ Binchy, 'Distraint in Irish Law', 46.

6.8. Alternative distraint

One text that offers an alternative form of distraint was translated by Binchy, known as ‘A Text on the Forms of Distraint’.⁶⁸¹ Indeed, the information contained in it differs significantly from the procedural elements described in the first tract. As Binchy observed, the text is concerned with two principal aspects: the distraint of animals for their own offences and the distraint of privileged persons, particularly craftsmen. The form of distraint described therein bears even closer resemblances with the law of pledging and is of exceptional value in the light of this investigation (see discussion under 3.2.2. non-possessory pledge, p. 67 ff.).

This type of distraint addresses many cases of the *áes dána* (people of art). The goal of distraint against craftsmen was to heighten the pressure to an extent where they had no other option than to comply, being bereft of their sources of income. That a special form of distraint was envisaged for them is clearly linked to their status as a professional class, and it includes distraint against poets, doctors, metalworkers, ecclesiastical figures and the king. If they did not yield to the claim they would theoretically become liable to being distrainted like a commoner. However, neither was this the desired outcome envisaged nor would it be as effective a means of execution as a direct attack on their means of income, as in the following example:

Aithgabail lega: togthar a nechlaiscc γ a fraig; maini be lincoir lais, snaithi *immon* mer as nesam don ludain; mani dama, is elud do; γ apad la *cach* nath*gabail* dib.

To distraint a leech: let his horsewhip and his lancet (?) be taken away. If he has no medicine-bag (?) with him, [bind] a thread round the finger next to the little finger.

⁶⁸¹ Binchy, ‘A Text on the Forms of Distraint’, 72-86; see discussion of *OGSM* in *CCIH*, 7.2, 338 ff., and 3.5.2, 97-8.

If he does not [then] cede justice, it amounts to default on his part. And notice is to be given with each of these [types of] distraint.⁶⁸²

6.8.1. Distraint of animals not for human liability

Among the animals said to be distrained for their own offences are pigs, sheep, horses and dogs.

Bretha im Fúillemu Gell likewise treats these animals as possible pledges, with the exception of dogs. It lists several types of horses, the *ainindle ech* (unbroken horse),⁶⁸³ *capall cairr* (draught horse of a cart),⁶⁸⁴ and the *ech aige* (a race (?) horse, perhaps for chariot-racing?).⁶⁸⁵ Pigs, apparently, were permitted as pledges but not recommended, because they caused considerable damage by rooting up the ground:

Is di ecmachtaib gell la Feine mucca.

Pigs are among the impossibilities (great difficulties?) of pledges according to Irish law.⁶⁸⁶

Nevertheless, an example for the distraint of pigs occurs in the so called *Stories from the Law-Tracts*.⁶⁸⁷ The pigs of Mugna were left without a swineherd to guard them and tore to pieces and devoured the son of Maine, after which Maine seized them:

Dobert maine muca mugna i tech fithe forchai robai i faithci in lis dia comdeth fria cinta.

⁶⁸² *CIH* 898.4-6 = Binchy, 'A Text on the Forms of Distraint', 78-9, he notes that the third finger is the classical *digitus medicinalis*, the *mér midaig* (physician's finger), 83. *DIL*: 3 *fraig*, 'a pointed instrument, a needle or stiletto (?)', 'probe' (part of a physician's property).

⁶⁸³ *CIH* 471.15-6 = *BFG*, § 35; *DIL*: *ainindle*; as opposed to *ech riata* (broken-in horse).

⁶⁸⁴ *CIH* 471.18-20 = *BFG*, § 36; *DIL*: *capall* (horse, freq. draught horse); as opposed to *ech* (saddle horse, chariot horse); cf. M. E. Dobbs, 'A Poem ascribed to Flann Mac Lonáin', *Ériu* 17 (1955), 20-21: *do bhí carr eich in gach muic* 'each pig was a horse's load (?)'.

⁶⁸⁵ *CIH* 471.22-25 = *BFG*, § 37; *DIL*: *ech*; *AL* v 406.6.

⁶⁸⁶ *CIH* 471.9-13 = *BFG*, § 34.

⁶⁸⁷ These fourteen 'stories from the law-tracts' are citations with glosses and commentary from *Bretha Nemed Toísech* (the first twelve) and *Bretha Nemed Dédenach* (the last two) in MS H 3. 17, *CIH* 2112.29-2118.2; see *CCIH*, p. 86, and for a discussion pp. 349-350.

Maine brought the pigs of Mugna to a wattled covered house on the lawn of the enclosure to impound them for their offences.⁶⁸⁸

However, this solution is opposed by a passage in ‘A Text on the Forms of Distraint’ that is part of *OGSM*:

Nach mil fil i sseilb duine, ata athgabail techta airi; a foil do iadad for mucaib, a lias for cairib, fria cintuib fadesin. Baicc do echaib s serrchu, is command do suidiub.

There is a proper method of distraining any animal which is in human ownership. Pigs are to be shut into their sty, sheep into their fold: [this is when they are being sued] for offences committed by themselves. For horses a paddock except for foals, a pound for the latter.⁶⁸⁹

In the latter example the animals were not physically removed from their owner but simply separated and shut in. The intention was to coerce the owner of the animals to pay for their offence. If he did not comply with the demand, the offence of his animals became subject to a shift in liability and turned into *duinechin* (a human wrong-doing). The goal was not effectively to seize the animals in question for, as Binchy has noted, their value would in most cases be less than the penalty for the offence. However, by shutting them in and holding them in pledge, the owner was not only barred from using them in any way, but he was forced to react to the claim or himself be made liable, regarding their offence as if he committed it and thus, increasing the penalty and making him subject to the ordinary process of distraint.⁶⁹⁰ This type of distraint stood between distraint proper and a non-possessory pledge and for this reason, it is of particular importance.

⁶⁸⁸ Breatnach, ‘The First Third of Bretha Nemed Toisech’, *Ériu* 40 (1989), 30; M. Dillon, ‘Stories from the Law-Tracts’, *Ériu* 40 (1989), 44, 53; *CIH*2113.19.

⁶⁸⁹ *CIH*897.29-31; *CCIH*, 40; Binchy, ‘A Text on the Forms of Distraint’, § 1, 79.

⁶⁹⁰ *ibid.* 75.

To represent the procedures of pledging and distraint alongside each other, the following diagram shall provide more clarity.

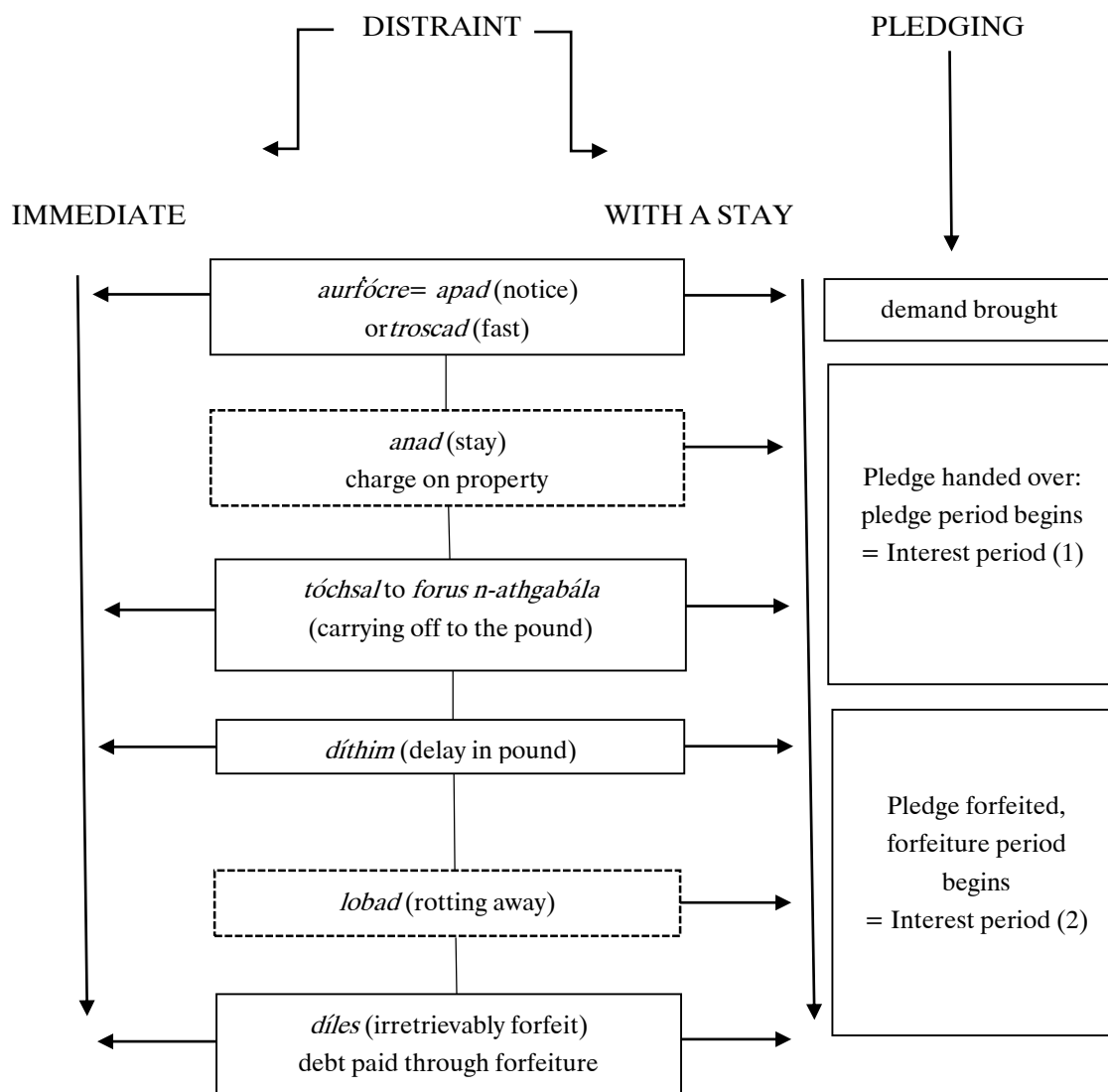


Diagram 1: temporal progression of distraint and pledging

The diagram above describes in a combined approach how the procedure of immediate distraint, distraint with a stay and pledging may progress through time from the origin of a debt to the ultimate forfeiture of the chattels. The difficulty in explaining the connection of pledging and distraint lies primarily within the occurrence of pledges both as guarantees but also as payment

and the fact that the distrained chattels constitute a pledge exacted by force themselves, while, at the same time, they can be redeemed through a pledge. This complex correlation and entanglement of different forms of pledges led to a variation in values being moved from one person to the other, with worth being added to, partially falling forfeit and sometimes being returned or exchanged for something else. Ideally, this complexity motivated a negotiation between the parties involved so that the case could be settled before forfeiture itself led to its final resolution.

6.8.2. Periods of Pledging within Distrain

Bretha im Fúillemu Gell distinguishes between two different types of periods: 1. the time during which the pledge has been given from the pledgor to the creditor, and 2. the period after which the pledge became forfeit and was legally owned by the creditor. (see pledge and forfeiture period, 2.2.3. and 2.2.4, pp. 52 & 53 ff.). In *BFG* the shift within these periods was constituted by the variation in interest payment due to the pledgor from the defendant on whose behalf he had given the pledge. There was a difference in payments before and after the pledge became forfeit. Both periods can be associated with a particular scenario within the law of distraint.

6.8.2.1. Variations in value: *ingille* and *lángille*

In the period of pledging the pledge has been given (physically or only legally) from the debtor to the creditor as a guarantee of subsequent payment. At the moment that this period comes to an end, the pledge becomes forfeit, initiating a new period and a new relationship between the parties.

Nach dune dorata a ngell, mad di chomain fiad fiadnaib, is diles do fir dia dabuir, nech ma diroth, cini tabarthar a llog, ar is di ruidilsib Fene.

Any person who may have given the pledge, if it consists of wealth jointly exchanged in the presence of witnesses, it belongs indefeasibly to the man to whom it is given, if it has fallen forfeit, although its value is not given, for it belongs among the immunities of the Irish.⁶⁹¹

Throughout the text of *BFG* we encounter the term *gell* but roughly in the last quarter of the tract two subdivisions are added, the *ingille* (part pledge) and the *langille* (full pledge). The part pledge is lower in value than the full pledge and so is its return in interest.

Ingille cressa *cach occairech*, *cach boairech*: ailid set inna muin la aithgin.

The part-pledge (consisting) of a girdle of every (kind of) *ócaire* and every *bóaire*: it entails a *sét* in addition to itself, together with restitution.⁶⁹²

Langille cressa *cech occairech* *7 cach boairech*: dosli tri set (seotu?) la aithgin.

The full pledge (consisting) of a girdle of every (grade of) *ócaire* and every *bóaire*: it entails three *séts*, together with restitution.⁶⁹³

The final part of the tract in which this occurs is more obscure than the rest of the text and also shows divergent scenarios of pledging, likewise introducing a separation of levels of interest payment into *lethfullem* (half interest) and *trianfullem* (third interest).⁶⁹⁴ These, however, represent calculations of interest based on the highest grade of a given group, within which each inferior grade is calculated against the superior one. Our focus here shall lie only with the differences within the pledge itself.

⁶⁹¹ *CIH*477.1-13 = *BFG*, § 66.

⁶⁹² *CIH*475.11-12 = *BFG*, § 55.

⁶⁹³ *CIH*475.18-19 = *BFG*, § 58.

⁶⁹⁴ *CIH*473.24-474.3 = *BFG*, §§ 45-47.

6.8.2.2. Carrying-off and delay

In the absence of a settlement, the next stage in the standard procedure of distraint was the physical removal of the cattle from the debtor to a pound. As previously stated, there were numerous occasions during the entire procedure of distraint at which the debtor was given opportunity to offer a pledge in settlement. At whichever point in time the pledge was given, the period of pledging according to the provisions stipulated in *BFG* commenced. Since a claimant in Irish law had to initiate proceedings himself, the most natural point in time to receive a pledge would be sometime shortly after having given notice of the claim and demanding the pending debt. Even though a debtor could offer a pledge when his cattle were already taken, the leverage in these later cases already lay with the creditor who was in a much stronger position than he had previously been. This refers not only to the economic threat the debtor was exposed to but also to the psychological dimension of creating a geographical distance between the debtor and his property, an argument Stacey put forward.⁶⁹⁵ In the preceding diagram (p. 212), the moment at which a pledge was given is indicated as shortly after notice. However, a pledge could be offered at any point throughout the process of distraint and if it was, its value varied based on the yet outstanding debt. Thus, the value of the pledge necessary to function as leverage diminished proportionately to the length of distraint.

Let us explore the evidence that clearly links pledging and distraint.

Rosuidiged for .u. setaib fuillem cacha lethoile cip recht laisinda tecmai. Is for athgabail .u. ata inbuid a loinge caire do cach; ferthair a n-aithgin dia mis.

⁶⁹⁵ Stacey, *Dark Speech*, 25.

The interest of every [cauldron] of half an *ól*-measure,⁶⁹⁶ whatever class of person may happen to own it, has been fixed at five *séts*. Everybody's period of his ship cauldron is as for distraint of five days. Their restitution is paid in one month.⁶⁹⁷

One glossator explains this as follows:

.i. is forind athgabail arata anad cuice rosamaiged † rohordaigedh inbaidh a choiri longan do chach; neimnesum sin, 7 freagra da ditim, 7 is as-sin is follos gunid (read: conid) o re anta 7 dithmha imach ita reatha fuillema.

i.e. it is in relation to the distraint for which there is a stay of five days that has been established or arranged for everyone the period for his ship-cauldron; that is not immediate and a corresponding amount for its forfeiture, and from this it is clear that it is from the period of the stay and of forfeiture that is [derived] the progression of interest.⁶⁹⁸

In her analysis of the periods in distraint Smith refers to cases that require a five day stay as 'the most elusive' of all claims because their nature is not apparent.⁶⁹⁹ However, she does suggest that what defines this category are the parties involved in the cases and argues that these are the plaintiff and the defendant's substitute, in other words his stand-in security.⁷⁰⁰ The distraint of a stand-in constitutes a specific form of distraint, as discussed above (sub-chapter 6.7., p. 205 ff.). It has been established that this person would either have been a kinsman who took over the liability in question or the later developed office of the *ráth* (paying surety). In either case the substitute was a form of security for the debtor, who could pledge, pay and be distrained in lieu of the principal. On the whole, this so-called *inmlegon* would have been treated more leniently but the steps involved in the procedure were essentially the same as with the principal.

⁶⁹⁶ McLeod, 'The *ól*: standard drinks in medieval Irish law', *AusCeltJ5* (1996-7), 5-8.

⁶⁹⁷ *CIH*474.13-15 = part of *BFG*, § 50.

⁶⁹⁸ *CIH*47418-21 = gloss 4, *BFG*, § 50.

⁶⁹⁹ Smith, 'A Note on *Cetharshlicht Athgabálae*', 169.

⁷⁰⁰ *ibid.* 169.

Let us recall the two interest periods: the first one commenced with the offer of a pledge, either a non-possessory pledge equal to a charge on the property or a possessory pledge conveyed at the beginning of the pledge period; the second one commenced with the forfeiture of the pledge. In the case of the *inmlegon*, Smith rightly argues that the substitute was meant to ‘convince the defendant to offer a pledge’ which was the reason why he was awarded a stay of five days in order to fulfil this task.⁷⁰¹ However, if there was no settlement brokered with the principal debtor during this stay, the *inmlegon*’s property was physically removed from his possession and the period of pledging commenced. This pledge could have consisted of precious metal, such as the ship cauldron in our example above, but it could also have consisted of livestock and it is here where the correlation with distraint is most obvious. The grades mentioned in respect of pledges of cattle derived their wealth from possession of livestock, particularly the *briugu* (hospitaller) but also the *aire forgill*, *aire feibe*, *bóaire* and *ócaire*. We do have an example that refers to the forfeiture of a cattle pledge and it is telling that it envisages progressive forfeiture as in the procedure of distraint with a stay. Interest is charged according to each forfeited cow respectively.

Techte fuillema gell bo airech febe otha airig etir da airig co ruicce ardairig: cet[h]eora boae i muin na cetbo, .iii. bai i muin na tanaise, di bai i muin na trissi bo. Bo i muin cacha bo otha suide, ciaba lin cipa n-uite. Ferthair a cetdire dia .x. fertair a medonach dia cuicthe, ferthair a ndedenach dia trisse.

The proper value of the interest of pledges (consisting) of a cow of an *aire feibe* from an *aire* between two *airig* up to the *aire ard*: four cows in addition to the first cow, three cows in addition to the second, two cows in addition to the third cow. A cow in addition to every cow from that out, whether a great number or a small number. The first *díre* is paid on the tenth day; the middle (*díre*) is paid on the fifth day, the last (*díre*) is paid on the third day.⁷⁰²

⁷⁰¹ *ibid.* 169.

⁷⁰² *CIH470.21-25 = BFG*, § 31.

Here we see the connection of pledging and distraint coming to full life. As we can see, the lapsing of the first cow entitles the respective *aire*-grades to four cows in addition to restitution, the lapsing of the second cow to three cows in addition, and the lapsing of the third cow to two cows in addition. From that out, each cow until the last one required one cow in addition. Therefore, their pledge consisted of as many cows as were necessary in order to cover the amount of the debt.

1 st cow forfeit	2 nd cow forfeit	3 rd cow forfeit	4 th cow forfeit	each subsequent cow forfeit
4 cows in addition	3 cows in addition	2 cows in addition	1 cow in addition	1 cow for each in addition

Table 10: progressive pledge forfeiture and return in interest

It is perhaps this final statement that renders it axiomatically evident that we are dealing with cattle in the process of subsequent forfeiture. ‘Whether a great number or a small number’, so the text proceeds, means that whether the debt was large or small, and hence, whether the number of cattle was great or small, the interest was set at this fixed rate. It is evident that the cattle would be held in the pound and it was there where they began to become forfeit, following the procedure described as *athgabál iar fut* (distraint with a stay). *BFG* talks about the distraint falling forfeit as ‘pledge’. The interest paid was interest for the *gell* and all of this occurs not in glosses or commentary, but in the original text. *BFG* is the only text that introduces pledges consisting of livestock and establishes such a close parallel to distraint. If my analysis and interpretation of the standing pledge hold true, this could explain this correlation and it may well reflect a reaction to the still evolving procedure of distraint and the complexity of cattle pledges.

We are, therefore, presented with two different options of solving a debt scenario, pledging and distraint, which, however, were evidently, very closely entwined and could complement each other. I would argue that it depended on the status of the party acted against what procedure would have been preferable but it may also have depended on the case in question, the urgency of the taking of re-possession and the social relationship put in potential jeopardy through a seizure. A survey of the many origins of a claim that led to the distraint of the outstanding debt has shown the scope of legal activity covered by this procedure and the social environments in which it could occur. Particularly in the case of a third-party being made liable for the claim, we can see the two remedies of pledging and distraint united in the form of cattle pledges. The interesting aspect is that with each forfeited cow of the stand-in security would the principal debtor accrue heavy interest payments towards him, and thus, increase his financial burden. For the debtor, it was imperative to release his liability at the earliest possible point in time. Therefore, a cattle pledge from a stand-in led to a growing debt from the principal debtor to his surety while it led to the satisfaction of the creditor. If the principal debtor himself was pledging or distrained, this action also led to the satisfaction of the creditor, but contrary to the involvement of a third party, it also progressively reduced the debt owed by the principal debtor. Therefore, the results for him differed drastically.

7. The Law of Pledging in Other Legal Systems

While the previous chapters focused on the different aspects of the law of pledging in Irish law and thus took an inward look, this chapter seeks an inclusive view and takes a comparative approach. It has the purpose of informing the reader of the operation of pledging in other legal systems and thereby to offer a frame of reference against which the Irish evidence can be compared. As a result, this approach will make it possible to position Irish law within a wider historical context. Pledges are employed as a binding security in all legal systems under consideration and there is an overwhelming focus on the pledge guaranteeing a contractual obligation. However, there are different nuances in the context in which pledges are used and to what end they are given. It makes a significant difference, to provide an example, whether the pledge was intended to fall forfeit for the debt, whether it transferred usufruct rights to the creditor, or if it had purely symbolic relevance. Moreover, it is of interest if pledges occur in the context of symbolism and honour, or within a discussion of debt and liability, or as a means of proof connected to testimony and oath swearing. By opening a window into the law of pledging in other legal systems, it is hoped that one may gain an appreciation of the fruitful grounds for the study of early Irish law, which is rich in information on pledging and which contains many distinctive features that render it particularly valuable.

In the search for suitable systems for comparison, Welsh law was the most natural choice as it represents the second Celtic legal descendant and, despite being dated considerably later, informs and complements the Irish evidence in many crucial areas. Additionally, the continental *leges barbarorum* including the law codes of the Lombards, the Salian Franks, the Visigoths, and

the Burgundians constitute an intriguing bulk of evidence for comparison. Taken together, they date from the fifth to the ninth centuries and thus, are closer in time to the Irish laws. However, they are very different from them, having been impacted by Roman law and adapting its formalism to their own needs. Moreover, some show considerably more influence of a centralised authority with the court and its administrative officials representing a present entity where the Irish and Welsh laws often still envisage private procedures and extra-curial redress. However, the barbarian law codes do maintain a layer of customary elements and, while information on pledging in the individual codes varies in density and usefulness, as a whole, the *leges barbarorum* offer exceptionally interesting details on the operation of pledging. It has to be noted that the terms ‘Celtic’ and ‘Germanic’ are, of course, linguistic terms and require caution when applied in the context of law. Therefore, one has to allow for similarities arising from Frankish influence as well as those inherent from a stage of linguistic unity. On the same basis, Irish settlements in Wales make it possible that some similarities do not go back to a ‘Common Celtic’ stage.⁷⁰³

It has proved extremely beneficial to look at the regulation of pledging in other legal systems, because this approach has allowed me to understand the meaning behind certain provisions in Irish law and has made it clear that the Irish law texts offer exceptionally rich information on pledging, absent elsewhere. This chapter does not claim a state of completeness but seeks to bring attention to parallels in a generally understudied area of legal authority. Initially, I offer essential information on the scope of pledging in those systems that I draw on. In the following, I discuss each legal tradition on its own terms, commencing with a survey into the sources available, to

⁷⁰³ Binchy, ‘Some Celtic Legal Terms’, *Celtica* 3 (1956), 221-31.

offer the reader a basic idea of the historical context in which the respective legal texts came into being, for the spirit in which the texts came into being, naturally, had a direct influence on what we would find in their contents. My account of the different law codes among the *leges barbarorum* also includes a joint introduction to pledge provisions that occur in all of them and in which tendencies of common legal thought are explained. Giving account to the amount of evidence some systems merited more consideration than others.

7.1. The pre-eminence of the taken pledge in the sources

It will be immediately apparent from the Welsh laws and the *leges barbarorum* that the pledge taken in distraint is given a clear prominence in the sources over the pledge that is voluntarily provided. In the Welsh laws this feature is linked to the role of the surety and his development from a purely executory function to one including subsidiary liability. In the barbarian law codes, we notice the involvement of the court in sanctioning distraint executed by the creditor. The seizure of a chattel against the wishes of its owner and possessor was problematic for both parties. The debtor was no longer able to maintain face and was confronted with the sequestration of his belongings. The creditor had to be careful to follow the legal procedure or might risk an accusation of theft and robbery. Clearly, the scenario was challenging the boundaries of illegality and violence. The compilers had a more potent and urgent interest in controlling private undertakings that could quickly lead to violence and it is for this reason that the *taken pledge* is regularly attributed far more attention in the sources. As has been demonstrated, this was also the case in Irish law, even though, the *given pledge* has a comparatively very prominent position as security.

The focus in the sources on the ultimate recourse of forceful pledge taking has somewhat overshadowed the role of the given pledge, which was of significance also but not prone to cause as many subsequent tensions as distraint might have. It would be misleading to imply that the voluntarily given pledge attracted the same interest of the jurists as distraint did, but all the same, it would be wrong to overlook its power as guarantee and realisation of liability. Due to these circumstances, the analogy between given and taken pledges already conjectured in the Irish laws, is found in its full form in the Welsh laws as much as in developments within the barbarian law codes. When looking at pledges in a broader perspective, thus, it will be useful to treat things being shifted from one person's possession to another's as a form of security for the redress of a wrong or to induce payment of a debt in the most inclusive way and to expand the definition and scope of pledging by incorporating both the *given pledge* and the *taken pledge* into our analysis.

7.2. Medieval Welsh Law

7.2.1. Sources

The Welsh legal tradition, known as *Cyfraith Hywel Dda* (The Law of Hywel the Good), survives in several law books represented by families of manuscripts. The most significant redactions of the law books are *Llyfr Cyfnerth* (Cyfn), also known as *Dull Gwent*, *Llyfr Iorwerth* (Ior), also called *Dull Gwynedd* or Venedotian Code, *Llyfr Blegywryd* (Bleg), also called *Dull Dyfed* or Dimetian Code, which is largely a Welsh translation of the Latin redaction D, and the five Latin

lawbooks (redactions A, B, C, D, and E).⁷⁰⁴ Although the Welsh laws are attributed to king Hywel Dda (who reigned from 909 to 950), the laws can be linguistically and historically dated to the twelfth and thirteenth centuries and there are noticeable differences in the laws along the geographical divide of North and South Wales.⁷⁰⁵ Despite this significantly later dating compared to the Irish material, the Welsh laws maintain an archaic core that reveals old regulations many of which may already have been extinct at the time of compilation.⁷⁰⁶ Unlike Irish law, the textual transmission of the Welsh law texts is characterised by progressive updates of written material and innovations that document changes in legal custom. These were recorded together with the original text and not in the form of glosses and commentary. This process has sometimes blurred the lines of old tradition and increasing seigniorial influence on legal procedure but it also displays the development of law alongside political changes. The numerous surviving manuscripts are characterised by the fact that ‘each manuscript is an individual entity in that no one manuscript presents a text exactly the same as any other’ but ‘the manuscripts fall into groups because they share, to a greater or lesser extent, the same content’ (see above on redactions).⁷⁰⁷

A large amount of source material has yet to be edited and translated.

Jenkins, in his translation of *Cyfraith Hywel*, presents the laws separated into three sections, first, the Laws of Court, that deal with topics related to the king and his business; second, the Laws of

⁷⁰⁴ On the manuscripts see, D. Huws, *Medieval Welsh Manuscripts* (Cardiff, 2000), 24-35; T. M. Charles-Edwards, *The Welsh Laws* (Cardiff, 1989), 20-21, Latin A, B, D, E are complete, while Latin C is incomplete.

⁷⁰⁵ See Charles-Edwards, *Wales and the Britons, 350–1064* (Oxford, 2012), ‘charters and laws’, particularly 268-272: the law of Hywel.

⁷⁰⁶ Stacey, ‘The Archaic Core of Llyfr Iorwerth’, in *LAL*, 15-46.

⁷⁰⁷ Charles-Edwards, *The Welsh Laws*, 17.

the Country, which deal with all other legal concerns and third, the Justices' Test Book.⁷⁰⁸ Jenkins' translation is a composite one; the main text is from the Iorwerth redaction but indented text comes from other redactions. It is his second section, the Laws of the Country, which contains a systematic treatment of pledges embedded within a discussion on surety and contract as well as numerous individual references relevant to pledging across the corpus.⁷⁰⁹ Apart from these sections, one may turn to Aneurin Owen's edition and translation of the *Ancient Laws and Institutes of Wales*. The first volume is organised according to redactions, with each redaction consisting of manuscripts that display certain similarities.⁷¹⁰ The material that, in his view, did not fit with this division was put into a collection of additional material known as *Anomalous Laws* or with their better description in the Welsh language *Cyfreithiau amryfal o amryw lyfrau* (laws of different kinds from various books). These include often later manuscripts and there is some evidence for later development of law. It includes two kinds of particular importance that bear names of genres of legal writing, *damweiniau* (lit. happenings, eventualities), found in later versions of the *Iorwerth* redaction and *cyngawsedd* (statement made by either plaintiff or defendant so as to set out the essence of his position).⁷¹¹ It is within this material where further important sections on pledges are found, and which has to be treated separately.⁷¹² *Damweiniau*,

⁷⁰⁸ Jenkins, *The Law of Hywel Dda: law texts from medieval Wales* (Llandysul, 1986); see also Charles-Edwards, *The Welsh Laws* (Cardiff, 1989), 26-31.

⁷⁰⁹ Charles-Edwards, 'The Iorwerth Text', in *LAL*, 137-179; M. E. Owen, 'The Cyfnerth Text', in *LAL*, 179-200; H. Davies, 'Latin Redaction E', in *LAL*, 202-209; *The Latin Texts of the Welsh Laws*, ed. H. D. Emanuel, History and Law Series, 22 (Cardiff, 1967); *Vita Griffini filii Conani*, ed. & trans. P. Russell (Cardiff, 2005), 17-25.

⁷¹⁰ *Ancient Laws and Institutes of Wales*, ed. A. Owen, (London, 1841), vol. 2: numerous interspersed references, eg. Books VII, IX 'Pleadings', Books V, VII, XVIII 'Elucidation'.

⁷¹¹ T. M. Charles-Edwards, *The Welsh Laws*, 49, for an explanation of *cyngawsedd*, also *cyngheusaeth*, from *cyngaws* (sharing of a *caws*, Lat. *causa*), see particularly 54-57.

⁷¹² *ALW*, Books X, XI, XII 'Additional Laws'.

‘preserved in several thirteenth-century manuscripts immediately after *Ior*’ succeed the systematic part of a tractate in a series, and are regarded by Charles-Edwards as ‘quite likely to include early material which the compiler of *Ior* was unwilling to get rid of and yet did not incorporate into his main text’.⁷¹³

7.2.2. The Role of the Surety in Pledging

In Welsh, the word *gwystl* can refer to a chattel pledge as well as a person (hostage). Information on pledges is almost exclusively situated within the regulations of suretyship. The reason for this circumstance is that the pledge is always being conveyed to the creditor by the surety, independent of who provides it. This context argues for the idea that, while the pledge represents an alternative form of bond along with the surety, it was not entirely independent from it. The surety held an authoritative position in Welsh law and represented an overseer of contractual undertakings enforcing any claims arising out of the agreement. From this context it can be deduced further that there existed a clear spatial distance between debtor and creditor with the surety acting as intermediary and control mechanism of proceedings. For this reason, the surety had to be involved before any other security and the pledge followed it in the procedural sequence. In other words, it was the surety’s prerogative to convey the pledge and this function was so powerful that a creditor who attempted to take a pledge on his own from the debtor was charged with three kine for his neglect of consulting the surety.⁷¹⁴ We have at our disposal explicit references as to who the persons offering a pledge could be. Notice the position of the surety in this sequence:

⁷¹³ Charles-Edwards, *The Welsh Laws*, 49-50.

⁷¹⁴ T. P. Ellis, *Welsh Tribal Law and Custom in the Middle Ages* (Oxford, 1926), vol. II, 248.

Tri dyn y digwydd gwystyl a roddoent: mach; arglwydd; a pherchen y da.

Three persons whose pledge, which they give, lapses: a surety; a lord; and an owner of the property.⁷¹⁵

A similar passage provides for the same triad:

Rey a dyweyt na dygwyd gwystyl o law vach hyt em pen vn dyd a blwydyn; e kyvreyth a dyweyt e dygwyd gwystyl o law try dyn en y oet. Esef ew e try dyn henny, mach ac arglwyd a pherchennavc da.

Some say that a gage is not forfeit from the hand of a surety for a period of a day and a year; the law says that a gage is forfeit from the hand of three persons at its appointed time. Those three persons are as follows: a surety and a lord and an owner of goods.⁷¹⁶

In both references, it is either the surety, the lord, or the debtor who may offer a pledge. In the case of the lord's pledge, it is his exalted status that provides the necessary guarantee and thus, functions as suretyship.

Sef achaws ew, kanys er arglwyd a vyd mach ar pob da adevedyc; vrth henny e dygwyd o'y law entew e gwystyl new o law y wassanaethwyr.

The reason is because the lord is surety for all acknowledged goods; as a consequence the gage is forfeit from his hand or from that of his servants.⁷¹⁷

However, if the owner provided a pledge from his own property, this pledge contract had to be bound by an additional surety, guaranteeing for the validity of the pledge and conveying it. This provision secures the creditor against the danger that someone might pledge something that was not his. Therefore, the surety created immunity from third party claims and guaranteed that the pledge was *dilys* (valid).

Y gan perchen e da e deleyr kymryt mach ar dylysrwyd e gwystyl, rac y gwadv ohonaw ef ay yr chwant e da ay yr peth arall nas rodassey.

⁷¹⁵ *ALW*, vol. 2, XIV.xv.27, 634-35.

⁷¹⁶ *Ior*, § 66/1-2, ed. Charles-Edwards, 'The Iorwerth-Text', 154-55: much earlier and wider MS attestation.

⁷¹⁷ *ibid.* § 66/3, 154-55.

From the owner of the goods a surety for immunity from claim should be accepted, lest he should deny [the transaction] either because he desires the goods or for some other reason [and says] that he did not give them.⁷¹⁸

It has often been asked, in a system where suretyship held such a prominent position and was of regular occurrence, how persons were found who were willing to become a surety in the first place. While there are social ties that urged compliance with a demand for suretyship, first of all kinship but by extension also such bonds as created through fosterage as well as clientship, there also existed a legal obligation to do so. In medieval Wales, this responsibility was bound on to the freemen of the community as a moral and legal duty that could not easily be circumvented.

Ny dely nep dywedwyt nat el en vach tros y gylyd or byd kyvryw gwr ac e delyo mynet en vach.

No one ought to say that he will not act as surety for another if he be the sort of man that ought to act as surety.⁷¹⁹

It is purposeful to look at the Welsh surety and its role in pledging in further detail.

7.2.3. The *mach*

The Welsh did not use three different types of sureties, as the Irish did, but employed one principal executor, the *mach* (from *makkos, the Common Celtic term for suretyship).⁷²⁰ *Meich* (sureties) were regularly provided as guarantors to a contract entered between the *hawlwr* (plaintiff, creditor) and the *cynnogyn* (defendant, debtor), and secured the delivery of property and reception of payment.⁷²¹ From the sources we can deduce that the original function of the *mach*-surety lay in his executory force and that, within a later, secondary development, initially

⁷¹⁸ *ibid.* § 66/5, 154-55; Jenkins, *The Law of Hywel Dda*, 75.

⁷¹⁹ *Ior*, § 66/6, ed. Charles-Edwards, 'The Iorwerth Text', 154-5; cf. Jenkins, *The Law of Hywel Dda*, 75.

⁷²⁰ T. Lewis, *A Glossary of Medieval Welsh Law based upon the Black Book of Chirk* (Manchester, 1913), 210-11.

⁷²¹ Ellis, *Welsh Tribal Law and Custom in the Middle Ages*, vol. II, 4-15.

confined to South Wales, the *mach* also assumed the function of a substitute payer.⁷²² Therefore, at the time of the composition of the lawbooks, the *mach* was both the chief enforcer of the obligation but also liable to pay, once the debtor publicly asserted his intention or inability to meet the claim.⁷²³ In this sense, the *mach* combines those two functions that are separated in Irish law between the closely collaborating *naidm* (enforcing surety) and *ráth* (property, paying surety), respectively.⁷²⁴ Stacey, discussing the historical developments underlying a modification in the *mach*-surety's office and the reduction of its encompassing powers in the light of seigniorial influence and the growing importance of curial administration to sanction his enforcement, argues that by the thirteenth century at least, the *mach* was a 'true paying surety' in the South of Wales, and possibly also in the North.⁷²⁵

In the following, we shall explore the *mach*-surety's procedural activity in relation to pledging in more detail. Once the surety had entered his office and bound an agreement, he had three options of ending his involvement:

O vn o try achavs e byd ryd mach: ay o talw trostaw ay o wystlaw ay o gwadw mach.

⁷²² Stacey, *The Road to Judgment*, 146; n. 32, 281; 'The Archaic Core of Llyfr Iorwerth', in *LAL*, 27-31.

⁷²³ Stacey, *The Road to Judgment*, especially 146-164; Ellis, *Welsh Tribal Law and Custom in the Middle Ages*, vol. II, 'The Law of Distress', 245-256, 'The Formalities of Bargaining: 4. *machni*', 7-19; cp. W. Davies, 'Suretyship in the Cartulaire De Redon', in *LAL*, 72-91, on Breton suretyship.

⁷²⁴ It should be remarked that there is, in particular, one other relevant form of security intrinsic to Welsh law, the *amodwyr* (lit. contract-maker; contract man). The presence of the *amodwyr* was essential for the *amod* (contract) to come into existence and was enforced through them. The *amod*, along with *machni* and *briduw* (suretyship of God) were the three modes of agreement known to Welsh law. The *amod*-man can function as privileged witness to a contract, with his sole statement being absolutely conclusive and indisputable; and 'he has a role in the ceremony by which the contract is made'. (see notes on § 69, *Lawyers and Laymen*, 176-77 & Ellis, *Welsh Tribal Law and Custom in the Middle Ages*, vol. II, 3-5, 15-17, 214, 374).

⁷²⁵ Stacey, *The Road to Judgment*, 149, see her discussion, 141-178.

A surety is free for one of three reasons: either payment on his behalf or giving a gage or denial of a surety.⁷²⁶

As explained previously, the *mach*-surety originally was not himself liable to function as a substitute payer. However, at some point the liability of payment was subsumed under his repertoire and thus, the debtor's duty was shared with his surety. When the *mach* failed to execute payment from the debtor, the creditor now could turn to the surety and collect from him. Before this development, the surety's only path of action was to take a pledge from the debtor in distraint, if the latter was reluctant to pay or if he was insolvent, the claim would have remained unsatisfied. However, after this shift in performance, the *mach*-surety was only released from his office after one of the following three actions. He could pledge or pay out of his own property, or alternatively elect to deny the office altogether. The denial of suretyship was a highly formalistic procedure comprised of oath-swearing by compurgation in the presence of justices and possibly members of the church.⁷²⁷

7.2.4. The *mach* receives or takes a pledge from the debtor

Within procedural action, it was the *mach*-surety who received a pledge from the debtor first, and only if the latter failed to pay by the appointed time, did the pledge become forfeited to the creditor. The pledged item, which usually exceeded the debt, thus, was a guarantee first, to the debtor's surety, and second, to the creditor. However, in the southern texts the surety distrained the item of the debtor to enforce payment. Although the difference between these two scenarios 'is one of conception rather than of substance', the crucial difference is the notion that 'if the debtor refuses in the presence of the surety either to pay the debt or to give a gage, the surety can

⁷²⁶ *Ior*, § 58/3, ed. Charles-Edwards, 'The Iorwerth Text', 140-1; cf. Jenkins, *The Law of Hywel Dda*, 63.

⁷²⁷ See the lengthy description of the procedure in *Ior*, §§ 58-60, ed. Charles-Edwards, 'The Iorwerth Text', 140-143.

then take a gage by force’, representing ‘a novel and ingenious combination of the two types of security, the gage and the surety’.⁷²⁸ It is this origin that is revealed in the description of his procedural activity provided in the following paragraph. The text assumes that a possible obstruction of the secure conveyance of the pledge may occur since it could be taken against the debtor’s wishes and stipulates a most interesting rule:

O deryd llvdyas rody gwystyl, e mach pyew heprwng e gwystyl y gyt a’r hawlwr hyt en dyogel, ac a dely kymryt e ffonnawt kyntaf o byd emlad. Ac ony gwna henny talet ehvn e dylyet.

If it happens that the giving of a gage is hindered, it is the job of the surety to bring the gage, together with the claimant, to a safe place, and he ought to take the first blow if there is fighting. And if he does not do that, let him pay the debt himself.⁷²⁹

My interpretation of this passage is that the contract provided for performance by both sides and both sides gave a surety. The implied context would then be that one side has performed and thus the surety became redundant but that the other side has not performed. This arrangement could prove a strong guarantee because the surety had considerable interest in forcing the debtor into payment since he, himself, were to become liable if he was not prepared to suffer (and perhaps use) force in taking a pledge. In our Welsh example, the *mach* could already become liable to pay the entire debt. The reference to possible fighting does not stem exclusively from their opposing interests but has a more intricate motivation which is revealed in the following reference:

O deryd y vach keyssyaw dwyn gwystyl hep e kynnogyn en y kyffroy, ny dely y dwyn: ny dely mach dwyn gwystyl hep e kynnogyn ony byd negydaeth kyndrychavl en y wyd. O gweles ef negydaeth en erbyn er hawlwr kynt no henny, entev a eyll rody gwystyl e kynnogyn y’r hawlwr en y absen.

If it happens that the surety seek to take a gage without the debtor urging it, he is not entitled to take it: a surety is not entitled to take a gage in the absence of the debtor

⁷²⁸ See the detailed discussion in Charles-Edwards, ‘The Iorwerth Text’, notes on § 62, 168-171.

⁷²⁹ *Ior*, § 62/3-4, ed. Charles-Edwards, ‘The Iorwerth Text’, 146-7.

unless there is a face to face refusal in his presence. If he has previously seen a refusal against the claimant, he is entitled to give the debtor's gage to the claimant in his (the debtor's) absence.⁷³⁰

The pledge referred to in this passage is the pledge of the debtor. The creditor, accompanied by the surety, sought out the debtor in order to demand payment. The debtor could offer a pledge at this point indicating his compliance. We will see shortly that it was essential, if the debtor refused payment (or voluntary pledging) to make this opposition evident. A silence on his part did not amount to permission to distrain upon the property. In the example above, it can be observed that a public refusal against the creditor entitled the surety to proceed with his enforcement and extract a taken pledge from the debtor, even in the latter's absence. This view is confirmed by the following explicit statement:

O deruyd y dyn dylu peth y arall amach arna6 abot negydaeth y kynogyn y talu; ya6n y6 yr mach rodi g6ystyl yr amdiffynn6r yr ha6l6r.

If a person owe a thing to another, with surety thereon, and the debtor refuse to pay; it is right for the surety to give a pledge of the defendant to the plaintiff.⁷³¹

The notion that the debtor's refusal was essential is linked to the legality of the procedure of distraint. The surety actively compelled a response from the debtor, a situation for which a beautiful, theatrical passage has come down to us:

O deryd y vach a chynnogyn kyvarvot ar pont vn pren, ny dely bot en negyf ydaw hep gwnevthvr vn o try pheth: ay talw ay gwystlaw ay kyrchw kyvreyth; ac ny dely ef o kychwyn y vawt hyt y savdyl hep gwnevthvr vn o'r try henny. O byd negyf ef o gwnevthvr vn o'r try henny, rodet e mach y wystyl entew y'r havlwr. O byd gwell kanthav entew, kyrchet kyvreyth dyannot.

If it happens that a surety and a debtor meet on a bridge consisting of a single log, he (the debtor) is not entitled to refuse him or to avoid doing one of three things: either pay or give a gage or go to law; and he is not entitled to move his toe to his heel

⁷³⁰ *ibid.* § 62/5-6, 146-7; cf. Jenkins, *The Law of Hywel Dda*, 68.

⁷³¹ *ALW*, VI.i.46, 110-11.

without doing one of those three things. And if he refuse to do one of those three things, let the surety give that person's gage to the claimant. If he, the debtor, should prefer, let him go to law without delay.⁷³²

However, there is some indication that the secondary liability, the surety, could actively choose to pledge out of his own property rather than compelling the debtor to pay, a scenario that stems from an entirely different perception of the power relationship between debtor and surety. The following passage is devoted to this issue:

O deruyd y dyn erchy o'e uach deuot y kymell ydau er eydau, a bot en well gan e mach guyst[l]au o'r eydau e hun no kymell ar e llall, ellegho nac ellegho, talet e hun e deleyt.

If it happens that a person calls on his surety to come and enforce payment of what is his for him, and the surety prefers to gage from his own, rather than enforcing against the other: whether he releases or not, let him pay the debt himself.⁷³³

O deruyd g6ystla6 o uach yr eida6 ehun rac kymhell ar y kynnogyn; bit h6nn6 yn lle tal yr ha6l6r.

If a surety pledge his own property, to avoid bringing compulsion to bear on the debtor; let that be instead of payment to the plaintiff.⁷³⁴

Therefore, if a surety chose not to enforce, thereby neglecting the very duty of his office, he rendered himself liable to the full debt. Perhaps, there were situations in which a surety preferred to avoid a confrontation with the principal debtor and instead pledged from his own property, either out of fear or in the hope that this action would warrant him some benefits from the debtor in the future. The case where a surety does not enforce is also discussed in the following passage:

Tri gwystyl a ddigwydd dydd y dycer: un mach ny chymello y fechni ac yn addef; ac un a ddyccer dros ledrat barnedic; ac un a ddecet, [dros?] alanas cyfaddef.

⁷³² *Ior*, § 66, ed. Charles-Edwards, 'The Iorwerth Text', n. 14-16, 154-157; cf. Jenkins, *The Law of Hywel Dda*, 76; *vawt*, *bawt*, here 'big toe' rather than 'thumb'.

⁷³³ *Col* (Peniarth 30), a thirteenth-century MS, also to be found in G (Peniarth 35, an early fourteenth-century MS, fo. 24r) from where it is printed in: *Llyfr Cynog*, ed. A. R. Wiliam (Aberystwyth, 1990), 73. I take the phrase *ellegho nac ellegho* (whether he releases or not) to refer to the surety (not the principal).

⁷³⁴ *ALW*, V.ii.64, 66-67, D (Peniarth MS 32), c. 1400, simplified version of the same idea as in *Col* and *G*.

Three pledges which lapse the day they are taken; that of a surety who shall enforce not his suretyship, although he confesses it; that taken for the sentence on theft; and that taken for acknowledged *galanas* [originally: feud; payment for homicide].⁷³⁵

The combination with penalty payments for theft and homicide, two fundamentally serious offences, may seem odd but reinforces the crucial role of pledges as powerful mechanisms to prevent the threat of revenge killing and feuding as a security and realisation of compensatory payments. The pledge in these cases guarantees the payment of debts for which the respective creditor or victim was not expected to wait. Based on socio-legal reasoning and the seriousness of the offence, the pledge falls forfeit on the same day. It also explains why the formal pleas in both cases are completely separated. This provision is explicitly provided for:

Ny dely dyn kymryt mach kynnogyn, kanys dev ardelw ynt ac na cheyff entew namyn dewys y ardelw: os o vechny e dewys y ardelw nyt oes kynnogyn; os o kynnogyn e dewys nyt oes vach; ac wrth henny ny eyll vn dyn sevyll en vach kynnogyn.

No one should accept someone who is both surety and debtor, for they are two legal roles and that person must choose his role: if he chooses to put himself forward as a surety there is no debtor; if he chooses to put himself forward as a debtor there is no surety; and because of that no man may act as both surety and debtor.⁷³⁶

A comparison for this urgency may be found in Anglo-Saxon law. The relevant section deals with a debtor who encumbered himself with compensatory payments for the offence of theft. He was given an opportunity to find sureties but in the absence of someone supporting him, a pledge was taken from his own property.

Si nesciat, quis eum capiat in plegium, accipiant illi, quibus hoc pertinet, de pecunia sua inborhgum.

⁷³⁵ *ALW*, XIV.xv.26, 632-33; [my addition]; the word *barnedic* is rare except in *ALWXIV* (H). Presumably, the pledge is given for the theft rather than the sentence as such. Moreover, something appears to be missing from the text before the lenited *galanas cyfaddef*, possibly *dro*, which is implied by Owen's translation. (Prof. Charles-Edwards, personal correspondence).

⁷³⁶ *Ior*, § 63/2, ed. Charles-Edwards, 'The Iorwerth Text', 148-9; cf. Jenkins, *The Law of Hywel Dda*, 70.

If he does not know anyone, who would take him in pledge (who would go as surety for him), those, to whom it pertains, let them take security from his wealth.⁷³⁷

7.2.5. The Value of the Pledge

It is of relevance to a discussion of pledging that the first default in payment, that is the failure to comply with the contract or legal provision to forward payment on the agreed date, always resulted in an increase of the debt in virtually all legal systems under consideration. If the debtor gave a pledge at any point during this period and prior to seizure, the question has to be answered whether this had any repercussions on its value and if so, were the additional fines covered by the pledge?

It is often not necessary to assign a specific value to the given pledge where its power as bond could be defined by the individual perception of security by its recipient. A pledge of personal value given after the first default in payment would be a strong incentive for the debtor to release it and, for the same reason, a good security for the creditor. However, some legal systems required that the pledge, at this stage, had a certain economic value that could be liquidated in the event of further default. It is likely that the regulations pertaining to the pledge value were influenced by the allowances granted to the creditor while he held it in custody. If the entitlements attributed to the creditor included, for instance, the right to use the pledge and traffic in its profits, this could have immediate repercussions on the effectiveness of this security. In Welsh law, the pledge,

⁷³⁷ *Die Gesetze der Angelsachen*, ed. F. Liebermann, 3 vols., (Halle, 1903), Eadweard: Gesetz zu Exeter, § 3.1, 143: 'Wenn er niemanden weiss, der ihn in Bürgschaft nehme, dann sollen diejenigen, denen es zukommt, pfandliche Sicherheit an seinem Vermögen nehmen.'

whether given voluntarily or taken by distraint had to have a legally determined value. This ‘legal pledge’ is described as follows:

O deryd bot mach adevedyc ar peth a bot negydaeth kan e kynnogyn am talw, yawn ew y’r mach rody gwystyl kyvreythyavl. Ac esef ew gwystyl kyvreythyawl e trayan en gwell no’r tal.

If it happens that there is an acknowledged surety for something and that the debtor refuses to pay, it is right that the surety should give a lawful gage. And the lawful pledge is a third more than the payment.⁷³⁸

The respective passage is extremely intriguing because we are given a precise value of the pledge that was determined by law and dependent on the debt. The Welsh pledge was assigned the legal value of one and one-third of the debt and as such, would have been a strong cover for the outstanding liability if it was to fall forfeit eventually.⁷³⁹ However, it has to be conceded that there exists some scholarly disagreement on this issue due to the ambiguity of the sources.⁷⁴⁰ It is important to remember that this is the value both of the given and the taken pledge and it can address the pledge from the debtor as much as the pledge from the surety. Why does the pledge have this value?

We may entertain the thought that this one-third increase represents either a penalty for late payment or initially accrued interest for the default. It is useful to turn to Irish law in this case which may hold the key to answering this question. In Irish contract law, a failure to pay on the due date led to an automatic increase of the debt by one-third calculated against the value of the

⁷³⁸ *Ior*, 62, ed. Charles-Edwards, ‘The Iorwerth Text’, n. 1-2, 146-47; Ellis, *Welsh Tribal Law and Custom in the Middle Ages* vol. II, 249; Jenkins, *The Law of Hywel Dda*, 68.

⁷³⁹ *ALW*, VIII. 198, XIV, 590.

⁷⁴⁰ *Ior*, 62/2, *Col*, 92; Stacey, ‘The Archaic Core of Llyfr Iorwerth’, n. 38, 39: The one-third could be one third of the debt but in some passages appears to refer to one-third of the pledge.

debt.⁷⁴¹ It seems likely that this is the reason underlying the regulation in Welsh law.⁷⁴² It can be concluded that instead of assigning a straightforward penalty for late payment, the Welsh lawyers assigned the required value to the pledge that lay one-third above the value of the debt. By using this elegant device, they incorporated a fine for late payment into the laws without leaving room to evade its fulfilment as easily as it would have been otherwise. The security requested at this point would incorporate both the amount of the original debt and the one-third increase calculated against the value of the debt.

7.2.5.1. Pledge exceeding desired value

This legally required value of the pledge caused some difficulty in application. Therefore, in the case that a surety gives ‘a large thing as a gage for a small thing’, the claimant was permitted to accept what was offered him, but he was not obliged to restore more than one third of its intended legal value.⁷⁴³ It becomes clear quickly that this pledge value was a theoretical denominator not always met in practice. A danger that went hand in hand with assigning a specific value to the pledge was the case where a surety took a pledge whose value was not adequate, since he might not have found a chattel of the precise value and did not desire to pledge out of his own property. The passage has the appearance of a didactic instruction providing a theoretical outline applicable to all potential divergences in pledge value. In both subsequent cases the surety gave a pledge worth one pound, although he should have given a pledge worth one penny, thereby surpassing its intended value.

⁷⁴¹ *BA*, § 51b, ed. Thurneysen, *Bürgschaft*, 16; Stacey, 218.

⁷⁴² This argument previously has been made by Stacey, ‘The Archaic Core of Llyfr Iorwerth’, 20; *BA*, § 51b, Stacey, n. 38, 230.

⁷⁴³ *Ior*, § 62/10, ed. Charles-Edwards, ‘The Iorwerth-Text’, 146-7; Jenkins, *The Law of Hywel Dda*, 69.

O chanhyatta e kynnogyn y'r mach rody gwystyl pvnt en lle vn keynnyawc, a chynn oet e gwystyl kolly e gwystyl, ny dyweyt e kyvreyth delyw ohonaw trachevyn namyn dymey, kanys henny ew trayan e keynnyawc kyvreyth.

If the debtor permits the surety to give a gage worth a pound in the place of one worth a penny, and before the time limit for the gage he loses the gage, the law says that he is only entitled to a halfpenny back, because that is a third of a lawful penny.⁷⁴⁴

In this first case, the pledge was lost while in the possession of the creditor but before it would have fallen forfeit, namely during the pledge period. The creditor did not have to restore more than one-third of the *legal value* that the pledge should have had, which was one penny. The fact that the actual pledge given was of much higher value made no difference because the law did not require the debtor to agree to give a pledge beyond the legal norm. The actual worth of it was irrelevant and deliberately ignored.

O deryd y dyn rody kywerthyd pvnt en lle vn keynnyawc eg gwystyl, a dygwydaw e gwystyl, ny wrthveryr y'r kynnogyn kymeynt ac vn fyrdlyng, kanys ef ehvn a lygrws breynt e gwystyl.

If it happens that a man give the value of a pound instead of a penny as a gage, and the gage is forfeit, not even as much as a farthing [1/4 penny] is returned to the debtor, since he himself debased the status of the gage.⁷⁴⁵

In the second case, the pledge fell forfeit to the creditor at the end of the period of pledging and he acquired ownership. The creditor did not have to return anything. This type of pledge was a forfeiture pledge because its full value moved into the creditor's ownership, even though it lay far above the debt. At the moment at which the debtor agreed to this pledge, the entire risk was conveyed to him. In order to prevent this scenario, a debtor was entitled to object by responding

⁷⁴⁴ *Ior*, § 62/7-8, ed. Charles-Edwards, 'The Iorwerth-Text', 146-7; Jenkins, *The Law of Hywel Dda*, 68-9; [my addition]; Ellis discusses the same passage: 250-51.

⁷⁴⁵ *Ior*, § 62/7-8, ed. Charles-Edwards, 'The Iorwerth-Text', 146-7; Jenkins, *The Law of Hywel Dda*, 68-9; [my addition].

in the following manner to the claimant who came, with the surety, to enforce payment of the debt:

O deryd bot mach ar devdec keynnyavc, a dyvot oet e devdec keynnyavc, ac nat oes ar helw e kynnogyn namyn march a talho dec pvnt, a dyvot er havlwr a'r mach y kymhell ew devdec keynnavc, a dywedwyt o'r kynnogyn, 'Nyt oes kenhyfy a talwyf ychwy namyn ve march, a hvnnv nys talafy ychwy ac nys gwystlaf,' ny dely e mach eyssyoes dwyn gwystyl arnaw ef, ac ny dely er havlwr dwyn gwystyl e mach, namyn kyrchw er arglwyd elldev, a mynegy y'r arglwyd nat oes kanthav namyn peth mawr, ac na deleyr dwyn e peth mawr hvnnv eg gwystyl peth bychan.

If it happens that there is a surety for twelve pence, and the time-limit for the twelve pence is up, and there is nothing in the possession of the debtor except a horse worth ten pound, and the claimant and the surety come to enforce [payment of] their ten pence, and the debtor says, 'I have nothing that I can pay you except my horse, and as for that, I shall not give it to you in payment and I shall not give it as a gage,' the surety is nevertheless not entitled to take a gage from him, and the claimant is not entitled to take the surety's gage, but they are both to seek out the lord, and they are to explain to the lord that he only has a valuable thing in his possession, and that that valuable thing ought not to be taken as a gage for something cheap.⁷⁴⁶

It is clear from the above that the lack of an appropriate pledge did not constitute a legal refusal to pledging. If it had, the creditor could have taken the surety's pledge instead, which he was explicitly forbidden under these conditions. To the contrary, the case was referred to the lord, who should 'give the surety permission to give a valuable gage instead of the cheap thing'.⁷⁴⁷ The lord's involvement at this point indicates that his approval was essential in order to proceed.

Referring back to our original case and the surety's duty of care in executing his office, we see that the surety's liability can only address the case where the debtor cannot be located and the surety takes a pledge in excess of the debt from him during his absence, which he was allowed to do after observing an explicit refusal of payment to the creditor. In this case, it would be

⁷⁴⁶ *Ior*, § 62/12, ed. Charles-Edwards, 'The Iorwerth-Text', 146-7; Jenkins, *The Law of Hywel Dda*, 69.

⁷⁴⁷ *Ior*, § 62/13, ed. Charles-Edwards, 'The Iorwerth-Text', 146-7; Jenkins, *The Law of Hywel Dda*, 69.

understandable that the debtor had to be protected against a sequestration of pledges out of his own property irrespective of their relative value:

O deryd y'r mach rody peth mawr eg gwystyl peth bychan, kyvreythyawl ew y'r hawlwr kymryt er hynn a roder ydaw eg gwystyl; a chen kollo hwnnw kynt no'r oet, ny dywc ef namyn e trayan trachevyn. E mach hagen a'y dywc en kvbyl y'r kynnogyn, kanys agkyvreythyawl y dwc.

If it happens that a surety give something valuable as a gage for something cheap, it is lawful for the claimant to take what is given to him as a gage; and though he should lose it before the time-limit, he only gives a third back in compensation. The surety, however, pays compensation in full to the debtor, since he took it unlawfully.⁷⁴⁸

The creditor did not have to object to receiving a pledge of higher value and it seems natural that, to all intents and purposes, he would not have any motivation to do so. However, the surety bore the responsibility to select appropriate pledges as part of his enforcement duties. If he withdrew a pledge of problematic value, he became liable to reparation payments for the losses incurred to the debtor. It is for this very reason that the surety had to compensate the debtor for the extra value lost to him in the first case under consideration above, where the pledge was lost before its due date. However, after the due date, our second case, the debtor was not entitled to any compensation from the surety for it lay in his power to redeem the pledge in time. The scenarios discussed above may be understood more conveniently by using a pledge of cattle as example and are summarised below:

⁷⁴⁸ *Ior*, § 62/10-11, ed. Charles-Edwards, 'The Iorwerth-Text', 146-7; Jenkins, *The Law of Hywel Dda*, 69.

Circumstances	Legal Pledge	Pledge higher than debt
Value of Debt	3 cows	3 cows
Value of Pledge	4 cows	9 cows
Return in case of the loss of the pledge		
1. Debtor agrees to the pledge	1 cow (= 1/3)	1 cow (= 1/3)
2. Debtor does not agree to the pledge	1 cow (= 1/3)	6 cows: 1 cow from the creditor (= 1/3) & 5 cows from the surety
Return in case of the forfeiture of the pledge	Nothing	Nothing

Table 11: value of the pledge in Welsh law⁷⁴⁹

7.2.5.2. Pledge falling short of desired value

In the Welsh laws, a surety who was offered a pledge falling short of the desired value by the debtor had to take what the latter offered him and return each day to exact more until the required value of the pledge was reached:

O deruyd nachaffo o da kymeint ar g6ystyl nny dyd h6nn6; rodetae tranoeth ae trad6y nny [uo] g6ystyl kyfreitha6l y am peth y dyd kyntaf arodes.

If he shall not find property equal in amount to the pledge on that day; let him, the next or the following day, give as much as shall make a legal pledge for the thing the first day he gave it.⁷⁵⁰

When the *mach*-surety was confronted with a debtor who had difficulty to pledge or pay, he was to take what the debtor had to offer. We know from the preceding paragraph that the pledge belonged to the defendant and not the surety. But the *mach* was meant to return on as many occasions as necessary, in order to exact the amount required by law. It is evident that a resistance

⁷⁴⁹ The case whereby a pledge of lower value is given to the creditor is not discussed in the sources, but can be reconstructed based on the pledge of higher value.

⁷⁵⁰ *ALW*, VI.i.47, 110-11; Owen uses two fifteenth-century MSS, Q (for his base text) and K (for his variants). K is the source of the [uo]. It also has *am y peth* rather than *y am peth*, and that is what he translates. *Y am* normally means ‘in addition to, besides’ (*GMW*§ 223 (a)). The text may indeed be saying ‘as much as shall make a legal pledge in addition to (=when added to) what he gave the first day’, but one would expect a different word order, *y am peth a rodes y dyd kyntaf*. (personal correspondence with Prof. T. M. Charles-Edwards).

to this second taking of pledges on the grounds that one pledge sufficed was not legally valid, because it was not until the full required value was accumulated, if necessary through multiple pledge taking, that the requirements were fulfilled, as seen in the following reference:

Or deruyd yr amdiffynn6r tebygu na dyly ef h6anneccav g6ystyl onyt y kyntaf arodes; kyfreith ady6eit y uot yn uach ar y geina6c di6ethaf val ar y gyntaf; ac 6rth hynny y dyly ynteu c6plau y 6ystloryaeth ar dylyet h6nn6.

If the defendant supposes that he is not to add to the pledge beyond the first one he gave; the law says, that he is surety for the last penny as well as for the first; and, therefore, he is to complete his pledging for that debt.⁷⁵¹

The same issue is addressed in *Iorwerth* in respect of the *mach*-surety.

O deryd y dyn tebygv bot en ryd mach o'y vechny o talv peth o'r dylyet a hep talv kvbyl, e kyvreyth a dyweyt hyt na byd ryd a dylyw ohonaw bot en vach ar e keynnyavc dywethaf mal ar e kyntaf.

If it happens that a man suppose that a surety is free of his suretyship by the payment of part of the debt and not the whole, the law says that he is not free and he is obliged to be surety for the last penny just as for the first.⁷⁵²

Therefore, we can see that the Welsh surety's primary role was to exact pledges from the debtor up to the required amount and that this could be in the form of multiple pledges. Alternatively, he made himself liable to pledge and pay, or, could choose to do so at his own volition. The relevant passage from the Anomalous Laws reads as follows:

Yneb a vo mach dros dyn, onys tal y tala6dyr yn oet dyd, oet pymthec ni6arna6t ageiff ymach yna, os ar da mar6a6l y byd yn vach; ac ony thal y tala6dyr yna, oet dec ni6arna6t arugeint ageiff y mach yna: ac ony thal y tala6dyr yna, oet deg ni6arna6t a deugeint ageiff y mach yna; ac ony thal y tala6dyr yna, talet y mach ehunan. Os ar da by6a6l y byd mach, ac na thalo y tala6dyr yn oet y dyd, oet pymthec ni6arna6t ageiff ymach yna; ac ony thal y tala6dyr yna, oet deg ni6arna6t ageiff y mach yna; ac ony thal y tala6dyr yna, oetpump di6arna6t ageiff y mach yna; ac ony thal y tala6dyr yna,

⁷⁵¹ *ALW*, VI.i.48, 112-13.

⁷⁵² *Ior*, § 61/8, ed. Charles-Edwards, 'The Iorwerth Text', 144-5.

talet y mach ehunana. Aphan gyfarfo y mach ar tala6dyr, yspeilet ef oc a vo ymdana6 o dillat, eithyr y pilin nessaf ida6: ac velly g6naet byth, hynny gaffo tal c6byl y ganta6.

Whoever may be surety for a person, if the payor do not pay on the appointed day, is to have fifteen days; if he be surety for dead property; and if the payor do not then pay, the surety has then thirty days; and if the payor do not then pay, the surety has then fifty days; and if the payor do not then pay, let the surety himself pay. If he be surety for live property, and the payor shall not pay on the appointed day, the surety has then fifteen days; and if the payor do not then pay, the surety has then ten days; and if the payor do not then pay, the surety has five days; and if the payor do not then pay, let the surety himself pay. And when the surety shall meet the payor, let him strip off his clothes, with the exception of the garment next his skin: and let him always so do, until he shall get payment of the whole from him.⁷⁵³

The time periods for the *mach*'s actions may be summarised as follows:⁷⁵⁴

Type of property	Attempts to collect after	Total Delay	Action of surety (1)	Action of surety (2)
Inanimate property (chattels)	15 days	95 days	Surety pays creditor	Surety distrains debtor
	30 days			
	50 days			
Animate property (livestock)	15 days	30 days	Surety pays creditor	Surety distrains debtor
	10 days			
	5 days			

Table 12: timeline of the *mach*-surety's actions

The temporal distance between the three calls to justice was dependent on the type of property subject to the debt. It is interesting that the time period in the case of inanimate property was extended with each attempt while the time period in respect of livestock became shorter. There was an urgency to gain possession of animals at the closest date possible which derives from the problematic issue that they are assets producing a return and had the creditor received payment in time, he would have already been able to enjoy their products. Inanimate property, on the

⁷⁵³ *ALW*, X.vii. 44, 342-5, word-division normalized; cf. *Hib*, 32.10, 262, trans. 709-10 = *Wasserschleben*, XXXIII. 10, p. 143; Exodus 22:26; Deuteronomy 24:6, 24:10-13.

⁷⁵⁴ Ellis, *Welsh Tribal Law and Custom in the Middle Ages*, vol. II, 247, *V.C.* II. vi. 7 = *Ior* § 61; *D.C.* II. vi. 1-5, 8-9 = *Bleg* 40.23-5; *D. C.* 426; X. vii. 44.

other hand, allowed for more lenience. With each warning, the debtor was allotted a further period of respite in order to comply with the demand. In the absence of a settlement through a voluntary pledge or payment, the debtor subjected his property to a pending distraint. However, the seizure of a pledge was only granted to the surety *after* the third attempt to collect was ignored.

7.2.6. Pledge Periods

In Welsh law, the duration of the pledge period could be agreed on contractually and thus have any length suitable to both parties. However, there are also several legal periods indicated as to when a pledge was to lapse if no arrangements had been put in place. These periods show variations dependent on the type of pledge offered, although there is no apparent consistency in the order. One standard period was one year and one day and it was characteristic for pledges consisting of precious metal such as gold and/or silver, unrefined, or refined, in the form of vessels or as armour.⁷⁵⁵ This is the longest period in the sources and appears to mark a final limit for property rights to become absolute.⁷⁵⁶

Tri gwystyl ni ddigwydd hyt ym pen undyd a blwyddyn: eur; a lluryc; a llystyr eureit.

Three pledges which do not lapse until the end of a year and a day: gold; a lorica; and a golden vessel.⁷⁵⁷

One curiosity in the Welsh laws is that they mention six types of pledges that can never become forfeit. Apparently, they are practically no effective security at all, since a pledge that cannot become forfeit would not entice the debtor to redeem it. The law states that in the case that the

⁷⁵⁵ The period of one year and one day is one of the most common legal periods in the Middle Ages and always indicates a shift in property rights.

⁷⁵⁶ *ALW*, X.xi.21, 360-361.

⁷⁵⁷ *ALW*, XIV.xv.24, 632-33.

debtor offered these pledges willingly despite this quasi-prohibition, they ought to be treated like standard pledges and can lapse. If the surety took them, they still lapsed but at different periods for the debtor and the surety. There are two triads that illustrate this regulation in more detail.

Tri gwystyl ni ddigwydd byth: cwlldyr, a challawr, a bwyall gynnyt.

Three pledges which never lapse: a coultter, a cauldron, and a fuel axe.⁷⁵⁸

There is a second reference to another triad of non-forfeitable pledges:

Tri g6ystyl ny dyg6ydant vyth: telyn, aphayol y6, affl6. Os rodei dyn o'e uod vn o'r tri hynny, ef a dygg6ydei mal g6ystyl arall, kanys ehun a lygra6d y vreint pan y g6ystla6d. Os dyckeï y mach y arna6 o'e anuod, ny dyg6yd hyt ympenn vn dyd abl6ydynd; 6ynt a dyg6ydant yna y'r ha6l6r hagen ympenn y na6uettyd, kanys ef adyly y'r mach 6ystyl kyfreith; y mach adyg6yd y'r kynnogyn y k6byl.

Three gages that never lapse: a harp, and a yew pail, and a plume. If a man willingly gives one of those three, it will lapse like another gage, because he himself degraded its value when he gaged it. If a surety takes them from him against his will, they will not lapse until the end of a year and a day; they lapse then to the claimant at the end of the ninth day, because he is entitled to a legal gage from the surety; the surety is wholly liable to the debtor.⁷⁵⁹

The above case is slightly more complicated. There are two different periods arranged for forfeiture and they are linked to the crucial aspect of the debtor's agreement or lack thereof in relation to problematic pledges. Akin to the previously elaborated problem of pledges whose value was in excess of the legal norm, these pledges also were not legally desired but were valid. The debtor who willingly agreed to offer an object in pledge that was not suitable degraded the respective pledge because his agreement rendered it forfeitable. On the other hand, a pledge that was removed by the surety against the debtor's wishes, would only lapse at the usual period, which was one year and one day. However, the creditor was entitled to receive a pledge from the surety

⁷⁵⁸ *ALW*, XIV.xv.25, 632-33.

⁷⁵⁹ *ALW*, X.vii.39, 340-1 = ed. & trans. S. E. Roberts, *The Legal Triads of Medieval Wales* (Cardiff, 2007), 188-9, Q 192.

after nine days,⁷⁶⁰ and it was for this reason that the surety's pledge would have lapsed to the creditor as early as the ninth day, while the debtor's pledge would not. This regulation would indicate that the creditor was satisfied by the surety and that the surety had to indemnify the debtor because he, the surety, took one of the three things that do not fall forfeit. The surety bore the full liability in this scenario, just as he did in the case where he withdrew a pledge of higher than the legal value without the debtor's allowance. That this was the case is confirmed by the following passage that elaborates on the three periods of lawful pledges.

Tri oet y digwydd gwystyl cyfreithiawl: un yw gwystyl am lwyg yr ny ddigwydd hyt galangayaf, ac ny ellir y wrthot am yt o deyth yn y ysgub; eil y nawfet dydd, ar fach a chynogyn, a da barnedic arall; trydydd lluric, a llestri eureit ni ddigwyddant hyt penn y flwyddyn.

Three periods for a lawful pledge to lapse: one is, a pledge for corn damage lapses not until the calends of winter, and it cannot be refused corn, if put in its sheaf; second, the ninth day, as to surety and debtor, and other adjudged property; third, as to a cuirass, and vessels of gold, which do not lapse until the end of the year.⁷⁶¹

The case of corn represents a special case. The respective regulation derives from the social and agricultural context, because the debtor had to be facilitated with the means of producing the return out of his own corn. It was for this reason that he was permitted to keep the pledge until the winter when he could be expected to have filled up the deficiency. It has already been seen that the surety's pledge lapsed, if not on the due date, at least by the ninth day.⁷⁶² The final period indicated as at the 'end of the year' is likely to refer to the common period of forfeiture of one year and one day since the same objects are mentioned in those paragraphs that set their

⁷⁶⁰ *ALW*, X.vii.39, 340-1.

⁷⁶¹ *ALW*, XIV.xviii.9, 640-1.

⁷⁶² *ALW*, X.vii.39, 340-1 = Roberts, *The Legal Triads of Medieval Wales*, 188; Ellis, *Welsh Tribal Law*, 282.

forfeiture after a year and a day. This is the legal limit, provided no other action was taken, after which property ownership was irrevocably established.⁷⁶³

7.2.7. Prohibition of use

In Welsh law, the use of the pledge usually was prohibited. The chattel given in pledge was a physical proof of outstanding liability but it was not designed as a means of amortization or acquittance. The creditor was expected to put the pledge into a place of safekeeping and would suffer the loss of the pledge and the debt were he to breach this regulation, a provision paralleled by some sources in Irish law (see 3.2.2., p. 67 ff. on the non-possessory pledge). However, it should be noted that two parties enjoyed the legal freedom to find other arrangements that suited them and in those cases anything they agreed upon outweighed the law and remained fully valid.

P6ybynhac a 6ystlo g6ystyl y arall: ny dyl y neb y g6ystler ida6 namyn y gymryt yny la6 ae doddi ar y ysg6yd, ac ody na y doddi yn lle y catwer: arei hynny y6 teir g6anas g6ystyl. Ac o g6na m6y no hynny ef adyly colli y 6ystyl ac auo arna6 ony amot ae duc ida6 canys amot atyrr dedyf.

Whoever shall pledge a pledge with another: the person, to whom it is pledged, is only to take it in his hand and place it on his shoulder, and thence put it in the place where it shall be kept: and those are called the three stays of a pledge. And, if he do more than that, he is to lose the pledge, and what it may be for, unless contract allow him: for contract breaks regulation.⁷⁶⁴

A second reference to the same three stays of a possessory pledge is found in the following passage:

Tri g6anas g6ystyl ynt: lla6, a breich, ac ysg6yd.

These are the three supports of a gage: a hand, and an arm, and a shoulder.⁷⁶⁵

⁷⁶³ *ALW*, X.ix.21, 360-361; cf. *Ior 87/10*, trans. D. Jenkins, 111.

⁷⁶⁴ *ALW*, VIII.xi.5, 198-9, punctuation amended.

⁷⁶⁵ ed. & trans. Roberts, *The Legal Triads of Medieval Wales*, 179, Q 171; cf. *ALW*, XIV.xv.19, 632-33.

An attenuation of this rule was granted only in those cases, where the use of the pledge was either necessary for its wellbeing (in respect of livestock) or where people were unable to resist its enjoyment and the use did not affect the quality of the property. There are a total of three pledges that fall under this category:

Tri gwystyl rhydd eu mwynhau cyn y digwyddaw: blith; a thelyn; a thawlwrdd: canys ny bydd wayth yr hynny.

Three pledges free to use, before they lapse: a milch cow; a harp; and a throwboard: for they will not be worse on that account.⁷⁶⁶

The milch cow appears to have posed an exception and was only to be pledged by the surety. Usually, it was not forfeitable and hence, not a viable security, but when pledged by the surety, it could be used.

O gystla mach gystyl dros kynogyn ny dyly mynet madeu arna6 hyt ym pen vn dyd abl6ydynd onyt amot ae duc; ac yna ydylyir y dill6ng oe werth ae trayanwerth. Ac ny dyly neb gystla6 gystyl blith dros aryant onyt mach ae gystla; cany dylyir mynet madeu ar ulith canys dros aryant ybyd, ac nat oes na6uet ida6, canys y u6ynhau awneir.

If a surety pledge a pledge for a debtor, it is not to be forfeited until the end of a year and a day, unless contract allow it; and thence it is to be redeemed by its worth and a third. And no one is to pledge a milch animal for silver, unless pledged by the surety; for a milch animal is not to be forfeited, although pledged for silver, because there is no ninth for it, since it is to be used.⁷⁶⁷

We can see that the law of pledging in the Welsh laws is intrinsically tied to the *mach*-surety and contractual in nature. The value of the pledge required by law or agreed on between the respective parties was very relevant and stood in direct relation to the liability of the surety once he assumed financial responsibility. Along with the extension from enforcer to payer the pledge

⁷⁶⁶ *ALW*, XIV.xviii.7, 640-41; the *tawlwrdd* (*taflwrdd*) is a medieval Welsh board game.

⁷⁶⁷ *ALW*, VIII.xi.6, 198-9, punctuation amended; Owen explains 'no ninth' in his footnote as: 'That is, it does not become forfeited on the ninth day'.

at stake was primarily the one given by the defendant himself and only secondarily the one offered by the surety. The examples surveyed show that the conveyance of pledges could operate largely without involvement by authorities, who only played a role once problems in the procedure transpired.

7.3. Leges barbarorum

The *leges barbarorum* are a complex and abundant corpus of numerous codes originating from the historically crucial period during which Germanic kingdoms were established on former Roman soil, following the breakup of the western Roman world and are collectively known as *leges barbarorum* or *Germanenrechte*.⁷⁶⁸ The laws have been created under the influence of Roman law and show varying degrees of impact therefrom. The long history of Roman legal life and its codification in writing motivated the creation of the barbarian law codes and it is likely that they were compiled under the guidance of Roman jurists. Except for Anglo-Saxon law, and later Scandinavian laws (eg. Grágás) all barbarian law codes were composed in Latin, instead of the respective vernaculars, which, by itself, is telling of the circumstances in which they emerged.⁷⁶⁹ Nevertheless, they do incorporate many non-Roman principles deriving from

⁷⁶⁸ For an introduction see: *The Cambridge Ancient History* vol. 13: The Late Empire, AD 337-425 (Cambridge, 1997), part iv: foreign relations and the barbarian world, 538-664; vol. 14: Late Antiquity: Empire and Successors, AD 425-600 (Cambridge, 2001), part ii: government and institutions, 135-314.

⁷⁶⁹ One should point out the much debated Malberg glosses, Old Frankish words that occur in some redactions of *Lex Salica* and which are of great importance to linguists and historians. See the discussion in: F. Beyerle, 'Die Malberg-Glossen der Lex Salica', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 89 (2003), 1-32; R. Gmür & A. Roth, *Grundriss der deutschen Rechtsgeschichte*, Academia Iuris, 13th edition (Munich, 2011), 23.

continuous customary practice.⁷⁷⁰ The issue of what the laws represent and with what agendas they were issued is a complicated one. When we look at the prologue to *Edictus Rothari*, the image presented is that of a code of law issued by the Lombard king, which amends all earlier laws, adds what is lacking and eliminates what is superfluous. It includes the names of the sixteen predecessors of King Rothari and is a law book issued by the king and ‘with the aid of God’.⁷⁷¹ In contrast to this stands the short prologue to *Pactus Legis Salicae*, which makes no reference to a king but regards its contents as ‘decided and agreed among the Franks and their notables in order that peace be established’, naming chosen men from the remote past.⁷⁷² In respect of the Frankish legal tradition, an important, related aspect is the distinction and relationship between *lex* and *capitularia*. Wormald points to the problematic idea among the traditional German *Rechtsschule* that *lex* represented *Volksrecht* ‘traditional and customary’, while *capitularia* were *Königsrechte*, ‘a series of individual regulations in chapters (*capitula*) covering problems as and when they arose’; therefore they were ‘innovative or administrative in character, and represented the

⁷⁷⁰ H. Brunner, *Deutsche Rechtsgeschichte, Systematisches Handbuch der Deutschen Rechtswissenschaft*, 2 vols. (Leipzig, 1892); V. von Meibom, *Das deutsche Pfandrecht*, (Marburg, 1867): focuses on the development of the German law of pledge throughout time; Gmür & Roth, *Grundriss der deutschen Rechtsgeschichte*: a brief summary of German legal history from 100 BC up to the present, 22.

⁷⁷¹ *Leges Langobardorum*, ed. F. Bluhme, *LL 4* (Hannover, 1868); ed. F. Beyerle, *Leges Langobardorum, 643-866*, Germanenrechte Neue Folge (Witzenhausen, 1962); Drew, *The Lombard Laws* (Philadelphia, 1973), 39-40.

⁷⁷² *Pactus Legis Salicae: Recensiones Merovingicae*, ed. K. A. Eckhardt, *Die Gesetze des Merowingerreiches 481-714*, (Weimar, 1935), 8-9: the short prologue belongs to his C recension; Drew, *The Laws of the Salian Franks* (Philadelphia, 1991), 59; Jean-Pierre Poly, ‘La corde au cou. Les Francs, la France et la Loi salique’, in *Genèse de l'État moderne en Méditerranée. Approches historique et anthropologique des pratiques et des représentations*. Actes des tables rondes internationales tenues à Paris (24-26 septembre 1987 et 18-19 mars 1988), Publications de l'École française de Rome 168, (Rome, 1993), 287-320; S. Kerneis, ‘Le pacte et la loi, Droit militaire et conscience franque à la fin de l'Empire romain’, in *Auctoritas, Mélanges offerts à O. Guillot, Études réunies par G. Constable et M. Rouche*, PUPS, 129-139.

policies and judgements of the king and his immediate advisers'.⁷⁷³ However, this classification is not exclusive, and, as Wormald pointed out, emendations and changes to a *lex* in the form of capitularies required popular consent and the king is also a present entity in the texts titled *lex* themselves and royal influence, thus, present in both categories.⁷⁷⁴ Therefore, this does not distinguish them from the *lex* itself.⁷⁷⁵ Caution should be maintained since the texts, as in any legal system, represent the desire of an ideal state of law and moreover, they were issued at the request of the respective Germanic kings. By nature, their contents may deviate from real life application to some extent.⁷⁷⁶ Before discussing the individual codes, some general observations have to be made in advance.

⁷⁷³ P. Wormald, *Legal Culture in the Early Medieval West* (London, 1999), 6.

⁷⁷⁴ *ibid.* 6; S. Stein, 'Lex and Capitula. Eine kritische Studie', in W. Bauer (ed.), *Mitteilungen des österreichischen Instituts für Geschichtsforschung* vol. 41 (Innsbruck, 1926), 289-301.

⁷⁷⁵ There is a distinction between the *capitularia legi Salicae addita* and others, such as *Capitularia Regum Francorum*, I. i, ed. A. Boretius, MGH, Leg. II. (Hannover, 1881), no. 2, *Childeberti I Regis Praeceptum* (pp. 2-3); no. 5, *Guntchramni Regis Edictum* (pp. 10-12); no. 8, *Chlotharii II Praeceptio* (pp. 18-19); no. 9, *Chlotharii II Edictum* (pp. 20-3). These can be distinguished from, e.g., the *Pactus pro Tenore Pacis*, which is attached to some MSS of *Pactus Legis Salicae*. See Charles-Edwards, 'Law in the Western Kingdoms between the Fifth and the Seventh Century', in A. Cameron, B. Ward-Perkins, & M. Whitby (eds.), *The Cambridge Ancient History* vol. 14 (Cambridge, 2001), 260-287.

⁷⁷⁶ An insightful account on this issue is given in: P. Wormald, '*Lex scripta* and *Verbum regis*: legislation and Germanic kingship from Euric to Cnut' in P. H. Sawyer & I. N. Wood (eds.), *Early Medieval Kingship* (Leeds, 1977). On the relationship of law and ethnicity see: P. Wormald, 'The *leges barbarorum*: law and ethnicity in the post-Roman West' in H.-W. Goetz, J. Jarnut & W. Pohl (eds.), *Regna and Gentes: The Relationship between Late Antique and Early Medieval Peoples and Kingdoms in the Transformation of the Roman World* (Leiden, 2013), 21-53. For an informative introduction to the topic see: A. Rio, 'Introduction' in A. Rio (ed.), *Law, Custom, and Justice in Late Antiquity and the Early Middle Ages. Proceedings of the 2008 Byzantine Colloquium* (London, 2011), 1-22; as well as *Legal Practice and the Written Word in the Early Middle Ages: Frankish formulae c. 500-1000* (Cambridge, 2009), and for an example see: *The Formularies of Angers and Marculf: Two Merovingian Legal Handbooks*, trans. with comm. A. Rio (Liverpool, 2008). For an account of the plurality of laws in the Roman world see C. Humfress, 'Law & Custom under Rome', in A. Rio (ed.), *Law, Custom, and Justice in Late Antiquity and the Early Middle Ages* (London, 2011), 23-47. If one compares the desires of present day legislation and real life usage, it will be noticed that the same problem occurs and that such divergences are inherent to the tension between law and life in modern as much as medieval times. For a general account on the relationship between the *de facto* and *de jure* authority of law, see the excellent study of J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, 1979, 2nd ed. 2009).

7.3.1. Terminology & Meaning

7.3.1.1. fiducia, pignus & hypotheca

Roman law knows of a distinction that will be re-encountered in the development of the barbarian laws and which will illuminate conceptions of pledge security and the historic connection between a pledge right and the right of distraint. Being aware of this background will serve our understanding of the individual codes. It distinguishes between *fiducia* (trust) and *pignus* (pledge). The ‘earliest Roman form of real security’ was ‘a conveyance subject to a covenant for reconveyance on payment of the debt’, meaning that the creditor acquired ownership of the pledge but was trusted to return it when the debt was paid.⁷⁷⁷ The debtor was disadvantaged by this provision because he ran the risk that the creditor might betray his ‘trust’ but he had only a moral not a legal remedy against the creditor’s refusal of a return. In time a more flexible institution developed that did not transfer ownership of the pledge but it did transfer possession, the *pignus*.⁷⁷⁸ The pledge lifted the burden on the debtor although it slightly disadvantaged the creditor. Subsequently the *ius in re aliena* came into being where neither ownership nor possession was transferred but the creditor was granted a right to take possession of the property. He had a *hypotheca* (charge) on the respective property, in other words, a right to take distraint on the property over which he held a lien.⁷⁷⁹ This form of pledge is also known as execution pledge. As we can observe, there is a smooth transition. The pledged property could

⁷⁷⁷ Nicholas, *An Introduction to Roman Law*, 151; Hausmanninger & Selb, *Römisches Privatrecht*, IV *Pignus*, 221-223, V *Fiducia*, 223-224.

⁷⁷⁸ Nicholas, *An Introduction to Roman Law*, 151.

⁷⁷⁹ *ibid.* 151-52.

be the same, whether *fiducia*, *pignus*, or *hypotheca*.⁷⁸⁰ However, the property rights over the chattel differ depending on each scenario and the favourability towards the creditor or debtor is subject to a significant shift.

7.3.1.2. Real right vs right of distraint

The Germanic idea of pledge, originally also was an attested ‘real right in the pledge’, as in Roman law.⁷⁸¹ A real right indicated that the creditor ‘had recourse exclusively against the thing pledged’ but could not make the pledgor liable beyond this, for instance by taking other property in his possession or by taking the debtor himself as hostage (personal liability); this form of liability in the thing alone is known as *Sachhaftung* in German, real liability.⁷⁸² In the course of the development of the law this legal concept was considerably modified and the creditor was afforded extended allowances going far beyond his right in the pledge. At the last stage of this development, at the end of the 1100s, the whole property of the debtor, immovable and movable, was subject to debt execution and could even include possessions he was to acquire in the future.⁷⁸³ The right of the creditor had moved from a pledge right to a right of distraint.⁷⁸⁴

7.3.1.3. Pfand & Wedde

While the early *leges barbarorum* were composed in Latin, the lawbooks of the High Middle Ages already use an earlier form of German (Middle High German, Middle Low German). It is

⁷⁸⁰ Note, however, that in the case of *hypotheca* the charge on the property originally would be of the same value of the debt while a *fiducia* or *pignus* possibly could show variations in value.

⁷⁸¹ Hübner, *A History of Germanic Private Law*, 375.

⁷⁸² *ibid.* 53, 69, 375.

⁷⁸³ *ibid.* 384.

⁷⁸⁴ *ibid.* 384.

therein where a highly instrumental linguistic distinction between the modality of pledges is found, a distinction that can also inform an analysis of pledging in the other legal systems and periods. At a time when that distinction was important, two separate terms were used in the German language for each type of pledge, respectively. The first of these is the word used in German for the distrained pledge, which is *Pfand* (Old High German: *pant*, *phant*, *fant*, related to Old French: *paner*, which means ‘to rob, to take away, especially a debt’ and which is linked to Lat. *pannus*, *pannum* ‘a taken away, ripped off piece’).⁷⁸⁵ The word used for the given pledge, to the contrary, is *Wedde* (Gothic: *vadi*, Old High German: *wetti*, ‘binding together, yoking, linking’, latinised: *wadium*, *wadia*, from which French *gage* is derived,⁷⁸⁶ from the Old Frankish word **waddi*). The semantic nuances of each term are telling of the originally very different perception of each institution. The term for the procedure of the distraint itself is semantically revealing, namely *Pfändung*, which contains the word for the forcefully removed pledge, *Pfand*. Viktor von Meibom categorises both types of pledges and accordingly distinguishes between ‘the pledge that is taken’ and ‘the pledge that is given or staked’.⁷⁸⁷ The former refers to the pledge taken in distraint from the debtor for the satisfaction of the creditor and the latter is the pledge offered by the debtor voluntarily to secure his liability towards the creditor. It was only in the later Middle Ages that the terms *Pfand* und *Wedde* lost their distinction and *Pfand* was generalised and sometimes separated into *Notpfand* (pledge of need) and *Gebepfand* (given pledge) to render

⁷⁸⁵ V. von Meibom, *Das Deutsche Pfandrecht*, 25; The oldest reference to the word *pant* occurs in Title VIII of the *Additio Sapientum* of the *Lex Frisionum*, see *Lex Frisionum*, ed. Eckhardt, *Fontes Iuris Germanici Antiqui* XII. Monumenta Germaniae Historica (1982), Tit. VIII, §§ 1-2, 100.

⁷⁸⁶ V. von Meibom, *Das Deutsche Pfandrecht*, 25.

⁷⁸⁷ *ibid.* 25.

the previous distinction obvious in its changed shape.⁷⁸⁸ From a judicial point of view, the respective chattel is in the same position prior to forfeiture. I would argue that the proximity of the given and taken pledge can be observed in many other legal systems too because it is tied to the inherent legal similarity of both scenarios. With this background in mind, attention will be devoted to the presentation of pledging in the individual law codes.

7.3.2. Salic Law

7.3.2.1. Sources

The date for the earliest laws of the Franks is controversial.⁷⁸⁹ The first Salic law promulgated is usually attributed to Clovis (481-511).⁷⁹⁰ The Salic law is not a complete code of law and the laws survive in several redactions in no less than over eighty known manuscripts, with none of the manuscripts dating earlier than the mid-eighth century.⁷⁹¹ The redaction with 65 titles is attributed to Clovis and known as *Pactus Legis Salicae*, regarded as ‘not a well-organized code,

⁷⁸⁸ *ibid.* 25.

⁷⁸⁹ E. Ewig, *Die Merowinger und das Frankenreich* (Stuttgart, 1988), 30; I. N. Wood, *The Merovingian Kingdoms* (London, 1994), 112, for two different verdicts in general accounts of the Merovingians. The most elaborate discussion was by Eckhardt, *Pactus Legis Salicae*, i. *Einführung und 80 Titel-Text*, Germanenrechte Neue Folge, westgermanisches Recht (Göttingen, 1954), 177-218.

⁷⁹⁰ T. J. Rivers, *Laws of the Salian and Riparian Franks* (New York, 1986), 2; It was only one of several laws in operation, eg. Theodosian Code, mentioned in: *Hincmar, Vita Remigii*, ed. B. Krusch, MGH, *Scriptores Rerum Merovingicarum III* (Hannover, 1896); *Flodoard of Reims, Historia Remensis ecclesiae, Die Geschichte der Reimser Kirche*, ed. M. Stratmann, MGH *Scriptores 36* (Hannover, 1998); E. Roberts, ‘Flodoard, the will of St Remigius and the see of Reims in the tenth century’, *Early Medieval Europe* 22:2, (2014), 201-230; for the shorter form of the will (the one thought to be authentic), see *Testamentum S. Remigii*, ed. B. Krusch, MGH, SRM iii. 336-47, and CCSL 117/1, 473-9; cf. A. H. M. Jones, P. Grierson, and J. A. Crook, ‘The Authenticity of the “Testamentum S. Remigii”’, *Revue belge de philologie et d’histoire*, 35 (1957), 356-73.

⁷⁹¹ *Pactus Legis Salicae*, ed. Eckhardt, MGH, *Legum Sectio I, Leges Nationum Germanicarum vol. iv*, part i (Hannover, 1962), xi-xxvii.

nor is it very comprehensive.⁷⁹² It received later additions by Childebert I and Chlotar I (ca. 524), known as *Pactus pro tenore pacis*, both of whom were Clovis's sons, as well as Chilperic I (ca. 575) and Childebert II (596), which are all known as capitularies.⁷⁹³ There is an ongoing debate as to the date of Salic law as well as the audience for whose use it was intended.⁷⁹⁴ A reform of Frankish law during the Carolingian period under Pepin the Short (763-4) produced a lawbook consisting of 100 titles (or 99 in some versions) of the entire corpus of Frankish law.⁷⁹⁵ 'This version was reissued in slightly revised form by Charlemagne, probably in 798' as *Lex Salica Emendata*.⁷⁹⁶ A second version, with a rich manuscript transmission, also exists, which is known as *Lex Salica Karolina*, produced in 802-3.⁷⁹⁷ The Salic law is known to maintain details on the administration of justice according to Germanic principles and shows considerably less influence from Roman law than other barbarian law codes.⁷⁹⁸ The enforcement of compensatory payments rested with the courts as a platform for dispute resolution and was presided over by the count and his subordinate royal appointees, the *centenarius* (hundredman) or *thunginus*.⁷⁹⁹ Truth was

⁷⁹² Drew, *The Laws of the Salian Franks*, 52-53, 30.

⁷⁹³ Rivers, *Laws of the Salian and Ripuarian Franks*, 3.

⁷⁹⁴ *Pactus Legis Salicae*, i. *Einführung und 80 Titel-Text*, ed. Eckhardt, 129-65; É. Renard, 'Le *Pactus Legis Salicae* règlement militaire romain ou code de lois compilé sous Clovis?', *Bibliothèque de l'École des chartes* (2009), 321-352.

⁷⁹⁵ *Lex Salica*, ed. Eckhardt, MGH, Legum Sectio I, Leges Nationum Germanicarum, vol. iv, part ii (Hannover, 1969); *Lex Salica 100 Titel-Text*, ed. Eckhardt, *Germanenrechte Neue Folge* (Weimar, 1953).

⁷⁹⁶ This is Eckhardt's Textklasse E; Drew, *The Laws of the Salian Franks*, 53.

⁷⁹⁷ *Pactus Legis Salicae*, ii. 2. *Kapitularien und 70 Titel-Text*, ed. Eckhardt, *Germanenrechte Neue Folge* (Göttingen, 1956).

⁷⁹⁸ Drew, *The Laws of the Salian Franks*, 33.

⁷⁹⁹ For a brief discussion of the difference between *centurion*, *grafio*, *thunginus*, and *sacebaro* see: J. Brissaud, *A History of French Public Law* (Boston, 1915), 'Provincial Administration' – Functionaries according to the Salic Law, § 91, 87-88; for the complex figure of the *thunginus* see R. Wenskus, 'Bemerkungen zum Thunginus der Lex Salica', in P. Classen & P. Scheibert (eds.) *Festschrift Percy Ernst Schramm*, 2 vols. (Wiesbaden, 1964), vol. 1, 217-36, who states: 'In der Lex Salica erscheint der *thunginus* durchweg in der Funktion eines Vorsitzers des Dings, des *mallus*.', 219.

found by means of compurgation or the ordeal (usually the hot water cauldron). Capitulary III contains the only explicit paragraph on pledging but important information pertaining to perceptions of property rights are found in the original titles also. One of the reasons for this scarcity may be the predominant interest in offences against life and limb as well as various damages to property and the outlining of tariffs for such wrongdoings, a feature that has been associated with the notable distance from Roman law and its preoccupation with private law; it was, perhaps, a deliberate move to put onto parchment those laws that differed from the Romans.⁸⁰⁰

7.3.2.2. Pledge taking by public authority

In Salic law information on pledging is relatively scarce and when discussed, focuses on the situation where no voluntary pledge came forth and the debtor had to be compelled by curial action. In such a situation and upon default of a debtor, a three-fold demand to come to justice was required before a creditor could proceed to withdraw a pledge. But even then the procedure of pledge taking had already been incorporated fully into the authority of the court without whose title, distraint was illegal. The procedure in case of a default, where the debt was contested, is as follows.⁸⁰¹

Agreements would be entered privately between two parties and in the presence of witnesses. Upon the first default, the creditor had to approach the debtor in his house, accompanied by the contract witnesses and state his demand. A refusal to pay increased the overall debt by 600 denarii

⁸⁰⁰ Drew, *The Laws of the Salian Franks*, 30.

⁸⁰¹ Brunner, *Deutsche Rechtsgeschichte*, vol. 2, § 120: Das Betreibungsverfahren, 519-522: he notes that an uncontested debt could be redressed without involving the court by distraining the debtor.

(15 solidi). The creditor, now, had to involve the court and present his demand to the *thunginus* (public official presiding over a court),⁸⁰² who then summoned the *gasachio* (adversary) to court in order to answer the claim. The creditor had to testify in court that he had neither received payment, nor a pledge as guarantee for payment, nor any other fulfilment. A *mannitio* (summons to court) increased the debt by 120 denarii (3 solidi).⁸⁰³ The creditor had to summon the debtor on three occasions and if the latter ignored all of them, the total of 360 denarii (9 solidi) was added on top of the original debt. The creditor, then, went to the *grafio* (count; the chief judicial officer of a district). He had to carry a *festuca* (stick), which, in this case, might be a symbolic representation of the debtor, and state the following:

‘Tu, grafio, homo ille (qui) mihi fidem fecit, quem legitime habeo iactiu(um) aut admallatum in hoc, quod lex Salica (habet et) continet; ego super me et (super) furtunam meam pono, quod (tu) securus mitte in furtunam suam manum.’

‘*Grafio*, that man who made a pledge of faith to me, and I lawfully summon [him] in accordance with what the Salic law specifies. I take it upon myself and my property that you may safely seize his property.’⁸⁰⁴

Note, that the term *fides* stands for the promise to fulfil the agreement and addresses a pledge of trust, but not a chattel pledge. If the debtor had offered a pledge, the matter would not have had to go to court. The *grafio* and seven chosen *rachimburgi* (men from the community designated to speak the law),⁸⁰⁵ went to the debtor and officially demanded that voluntary payment had to come forth immediately. If the debtor refused but also in cases where he was absent, the *rachimburgi*

⁸⁰² *ibid.* § 79: Das Ämterwesen der Lex Salica, 149-153.

⁸⁰³ *ibid.* § 98: Ladung und Streitgedinge, 332-342.

⁸⁰⁴ *PLS*, L.3, p. 139; trans. Rivers, 50.3, p. 97 [slightly amended].

⁸⁰⁵ Drew, *The Laws of the Salian Franks*, 32-4: The *rachimburgi* were men from the community chosen to determine matters of law, but the mode by which they were trained and designated is not known. There were usually seven *rachimburgi* in each court and they did not receive payment for their services. Cases that could not be decided by popular justice were referred to the king as head of the judicial system. On the *rachimburgi* see *PLS*, LVII.1-6, pp. 215-7.

proceeded to exact the amount of the debt from his property. In other words, they took distraint on the debtor. One-third of the payment went to the count and two-thirds to the plaintiff. As becomes clear from the procedure described, administrative officials were involved in the collection of compensation and the procedure of distraint subsumed under their ultimate authority. This marks a clear move towards subjecting the sequestration of property to the prior order of the court.

I would argue that the three calls or warnings are not only representative of pledge taking, but, as can be seen in the example of Salic law, mark a shift in entitlements over property and a change in the liability pattern. In Salic law, like in Irish law, the giving of a pledge could either indicate a commitment to pay the composition owed or be a declaration that one would submit to judgement, which, in this case, was submission to the ordeal. The debtor had to be called to comply with the demand on three subsequent occasions. If a debtor among the Salic Franks failed to offer a pledge, the king ultimately declared him *extra sermonem suum* (outside his protection) and sequestered all his property.

Similiter illa die, si non uenerit, collicet ei solem et ill atria testimonia, qui *ibidem* fuerunt, ubi culcauerit solem. Tunc si ista omnia impleuerit, qui eum admallat, et ille, qui admallatur, ad nullum placitum uenire *et per legem se educere* uoluerit, tunc rex, ad quem manitus est, eum extra sermonem suum ponat.

Similarly, if he does not come on that day, let the sun set on him, and there should be three witnesses there who were present when the sun set. If he who summoned him has fulfilled everything, and he who was summoned does not come within the time period and is unwilling to vindicate himself in accordance with the law, then let the king, before whom he was summoned, put him outside of his protection.⁸⁰⁶

⁸⁰⁶ PLS, LVI.1-6, 210-214; trans. Rivers, *Laws of the Salian and Ripuarian Franks*, p. 103.

This action represents a public pledge taking, with the king taking distraint on the debtor's property following the final warning. There is one explicit reference that renders the growing prerogative of the court over titles to property evident. In respect of pledging, the creditor was not allowed to take pledges from his debtor without having involved the authorities and would indeed incur a penalty for doing so:

De Pignoribus

Si quis debitorem suum per ignorantiam sine iudice pignoraerit, antequam eum nestigan the (t)higio <hoc est aecusante>, et debitum perdat et insuper <similiter>, si male pignoraerit, cum lege conponat, hoc est capitalem reddat et <insuper> solidos xv culpabilis iudicetur.

Concerning Pledges

If anyone pledges [something] through ignorance to his creditor without a judge before he is compelled by him [*nestigan the thigio*], that is, by accusation, let him lose the debt, and in addition let him compensate in accordance with the law as if he pledged unlawfully, that is, let him pay the value [of the property pledged] and also let him be held liable for fifteen solidi.⁸⁰⁷

Among the Salian Franks, the role that was fulfilled by enforcing sureties elsewhere, had already been subsumed under the administration of the Frankish court, who had to be approached fairly early on. Our attention shall be devoted to a further example which confirms this development. The section titled: *De re prestita* (Concerning property that has been lent)⁸⁰⁸ discusses the issue that loans were not returned. A chattel given on loan or as pledge was exposed to almost the same legal situation and for this reason, the reference is important. The problem discussed in the section commences with the borrower's unwillingness to return the item and the options open to the lender to solve this issue. The first measure he ought to take was to summon the borrower to

⁸⁰⁷ *PLS*, III.103, p. 259; Eckhardt uses <...> when a word or phrase is not in all MSS and may be an amplification; trans. Rivers, *Laws of the Salian and Ripuarian Franks*, p. 133; cp. Drew, *The Burgundian Code*, XIX, 1, 36: fine of twelve solidi for the removal of pledges before the court hearing.

⁸⁰⁸ *PLS*, LII.1-5, pp. 197-200.

court. The lender does this by seeking out the person in his house, accompanied by witnesses and states:

‘Quia res meas noluisti reddere, quas tibi prestiteram, in hoc eas teneas nocte proxima, quod lex Salica continet.’

‘Since you have refused to return the property that I lent to you, in this you may keep it until the next night, as the Salic law provides.’⁸⁰⁹

This warning initiated the debtor’s first period of respite to comply with the demand and at which the creditor formally set the day on which the property was to be returned. If the borrower did not return the property the next day, he was given another period of seven days after which the procedure just described was repeated. If the borrower still did not pay at that point, the procedure was repeated once more and another seven days were added. Once a date had to be set for three times, each time or ‘warning’ had increased the debt by 120 denarii (three solidi).⁸¹⁰ At this final point, the debtor was expected either to pay or to give sufficient security for the amount of the loan and the nine solidi for the three warnings he became liable to in addition. If he refused to oblige, his debt was increased to six hundred denarii (fifteen solidi) on top of the debt.

<Et> si nec tunc uoluerit <nec> reddere nec fidem facere reddendi, super debitum ei, qui prestatit, et super illos nouem solidos, qui per tres admonitiones adcreuerunt, *mallobergo nectantheo antesalina sunt*, DC denarios qui faciunt solidos XV adhuc amplius <super debitum> culpabilis iudicetur.

And if he still is not willing either to return it or make a pledge of faith to return it (known in the malberg as *nectantheo antesalina*), let him be held liable to him who loaned him [his property] for 600 denarii, which make fifteen solidi, in addition to his debt, and [also] in addition to those nine solidi that were added through the three warnings.⁸¹¹

⁸⁰⁹ *PLS*, LII.1, pp. 197-8; [my translation].

⁸¹⁰ *PLS*, LII.4, p. 199.

⁸¹¹ *PLS*, LII.5, pp. 199-200 ; trans. Rivers, 52.5, p. 99.

As previously indicated, a debtor who evaded all attempts to bring him to justice was outlawed. However, it is important to note that outlawry for debt appears to have been a temporary state which could be remedied as soon as the debtor came and paid his debt.⁸¹² Any person aiding an outlaw was liable to pay six hundred denarii (fifteen solidi), coincidentally the same amount as the penalty for not responding to the three warnings.

It is noticeable in the regulations pertaining to pledging depicted in Salic law that the jurists subsumed pledge taking against the debtor's wishes under the authority of the court. The creditor, even after three warnings to the debtor to come to justice, was not permitted to distrain him but had to involve the court, who, in turn, received a third of the payment thus executed.

7.3.3. Lombard Law

7.3.3.1. Sources

The Lombard Laws, operating predominantly in North Italy, were issued under the order of various Lombard kings between 643 and 755. The two major collections are the 388 titles issued under King Rothari in 643, the year of the conquest of Liguria, which are systematically arranged and were presumably intended to constitute a 'complete code of law', else known as Rothari's Edict, and the 153 titles issued by King Liutprand from 713 to 735.⁸¹³ Among the Lombards, each

⁸¹² *PLS*, LII.6, p. 213.

⁸¹³ *Leges Langobardorum*, ed. F. Bluhme, LL 4 (Hannover, 1868); ed. F. Beyerle, *Leges Langobardorum, 643-866*, Germanenrechte Neue Folge (Witzenhausen, 1962); ed. F. Beyerle, *Die Gesetze der Langobarden* (Weimar, 1947); trans. F. Beyerle, *Die Gesetze der Langobarden*, Germanenrechte Texte und Übersetzungen, vol. 3, 2nd ed. (Witzenhausen, 1962); Drew, *The Lombard Laws*, 21: 'In 668, nine titles

province was assigned a duke. Dukes were ‘virtually independent rulers on a local scale’, and co-existed with the royal authority of the king,⁸¹⁴ though this varied with period and part of Italy. The power of the dukes in this dual administration was subject to limitations following Rothari’s reign. Lombard legal administration rested in the hands of the royal courts, with the king holding a fundamental prerogative for the dispensation of justice. Cases would first enter the lower court presided over by the *schultheis* who was ‘a lesser administrative-judicial officer responsible to the *gastald*’, but could proceed to the court of the *gastald (iudex)*, the ‘most important of the royal administrative-judicial officials) who held superior jurisdiction. The lesser royal officials, the *degani* aided them but had no independent power of judicial decision.⁸¹⁵ In exceptionally difficult cases the highest form of suit would be an appeal to the Lombard king.⁸¹⁶ Judgements in the Lombard courts were issued ‘in accordance with accepted custom as codified in the Lombard Laws’ and it is within these modes of legal activity where our interest lies.⁸¹⁷ The Lombards also used compensatory payments for any type of offence and employed compurgation and trial by combat as the two means of finding truth. The Lombards are regarded as legally well-versed and show a great talent for judicial thought.⁸¹⁸ Lombard law, by far, offers the most examples of pledging of all the barbarian law codes, both in Rothari’s Edict and the laws of King Liutprand.⁸¹⁹ These appear to proceed without involvement of a court.

were added by King Grimwald; further additions were made by [Liutprand, and then] King Ratchis in 745 and 746 and others by King Aistulf in 750 and 755.’[my addition]

⁸¹⁴ Drew, *The Lombard Laws*, 23.

⁸¹⁵ *LL*, Liutprand, 44.

⁸¹⁶ Drew, *The Lombard Laws*, 25-28.

⁸¹⁷ *ibid.* 26.

⁸¹⁸ Gmür & Roth, *Grundriss der deutschen Rechtsgeschichte*, 23.

⁸¹⁹ *LL*, Rothari, Titles 245-252: *pignus, pignerare*, pp. 101-103; Titles 360-361: *uuadia*, pp. 122-123; Title 366, p. 124; Liutprand: Title 15.I, pp. 150-151; Title 36.VII.-41.XII, pp. 162-163; Title 58.V, p. 168; Title

7.3.3.2. Three demands

In Lombard law, a creditor also had to make three demands for his debt following the debtor's default but subsequently, he was granted permission to sequester a pledge. Rothari's Edict contains the following title:

De pignorationibus et devitas.

Si quis debitorem habens, appellet eum semel, bis et usque tertio; et si debitum non redderit aut non composuerit, tunc debeat pignerare in his rebus, quibus pignerare licitum est.

On pledges and debts.

He who has a debtor shall demand his debt from him once, twice, and even three times, and if then the debtor has not returned or paid composition for the debt, he [the creditor] may take a pledge from those properties which can be pledged.⁸²⁰

If the debtor failed to react to all three warnings, a pledge could be taken from among his possessions as security. It is made clear in Rothari's Edict that the premature taking of pledges before the righteous demand for payment was considered to be a grave offence:

Si quis ante contestationem pigneraberit.

Si quis alium pro quolibet debitum aut causam pignerare praesumpserit, antequam tertium eum pulsaverit, pignus, quod ante contestationem tulerit, sibi nonum reformet in potestatem domini.

On taking pledges before demanding payment.

If anyone presumes to take a pledge from another man for any debt or cause whatever before [the debt] has been demanded of the debtor three times, the pledge which was taken before the demand shall be returned ninefold to the possession of its owner.⁸²¹

The penalty for taking a pledge before three warnings were given to the debtor provoked a severe punishment, namely a ninefold return. This shows that it was imperative to follow the procedure

61.VIII, p. 169; Title 67.III, pp. 172-173; Title 96.I, p. 186; there are further references to property movements relevant to pledging in several other titles.

⁸²⁰ *LL*, Rothari, 245; [my translation].

⁸²¹ *LL*, Rothari, 246, trans. Drew, 101.

of pledging precisely, or else one faced a penalty for enforcing a right illegally. It is telling that among the Lombards, a ninefold return was required as composition for the theft of property. If the perpetrator could not pay such composition, he was to be killed.⁸²² A creditor was not acting wisely if he heedlessly distrained the debtor in the light of this danger.

7.3.3.3. Pledge exchanged by surety

After a pledge had already been conveyed, Lombard law allowed for this pledge to be substituted by a surety.⁸²³ Therefore, pledges that already were in the hands of the creditor could be released again, if the debtor offered a surety instead. This provision implies that originally, no surety was involved and the debtor found a guarantor after the fact and after he had already pledged out of his own property. There is a most intriguing regulation in the laws of King Liutprand that shows that if subsequently a surety was found, this surety could now offer pledges in exchange for the debtor's pledges. Since he undertook this duty willingly, these pledges would have been given voluntarily in an attempt to aid the principal debtor and so to release his property.

Si quis alii homini wadia dederit et fideiussorem posuerit, et ipse fideiussor eum pigneraverit, et pignera ipsa ad creditorem eius dederit, et postea ei ipse, cuius pignera fuerit, per virtutem tulerit, conponat ipsa pignera in actogild.

If anyone gives a pledge to another man and then names a surety, and if the surety pledges for him, and gives these [new] pledges to the creditor, and if afterwards [the creditor] takes [the original pledges] by force from the debtor who had reclaimed his pledges [by naming a surety], then [the creditor] shall pay an eightfold composition for those pledges.⁸²⁴

The second half of this paragraph addresses the issue that a creditor may not accept the new pledges offered to him by the surety but illegally re-took the original pledges, an offence almost

⁸²² *LL*, Rothari, 253, cp. 263, trans. Drew, 103; cp. 104-5.

⁸²³ *LL*, Liutprand, 38, ed. Beyerle, 120; trans. Beyerle, 30; trans. Drew, 162.

⁸²⁴ *LL*, Liutprand, 40, trans. Beyerle, 30; trans. Drew, 163.

equal to theft, namely an eightfold return.⁸²⁵ The terminology is of great importance. In the Lombard laws the ancient distinction between *pignero* ‘I pledge’ and *pigneror* ‘I take as a pledge’ has entirely gone. The *pignero* often is closer in meaning to the old *pigneror* than to the old *pignero*.⁸²⁶ The pledge given by someone as a security is *uuadia*, whereas *pignus*, *pignerare*, and *pigneratio* are used for the pledge taken by someone in distraint.⁸²⁷ Because the Lombard laws kept the old Latin word for this procedure and had the Germanic *uuadia* for the given pledge, they could make the distinction between the two clear.

A creditor who took distraint as described in the paragraph above incurred the same penalty that a debtor would incur if he re-took his pledges from the creditor before releasing them through the provision of a surety.

Si quis alium ante constitutum pigneraverit, et probatum fuerit, quod ante constitutum pignerasset, conponat ipsum pignum in actogild.

If anyone takes his pledges from another man before the established time [i.e. before he provides a surety], and if it is proved that he had taken a pledge before the established time, he shall pay an eightfold composition for those pledges.⁸²⁸

The surety functioned as a type of secondary security that should ensure that pledges and debt would be received and paid if the principal debtor desired to release his own. Sureties are only sought after severe complications have occurred and after pledges had already been given. As will be seen, the quality of this security depended largely on the value owned by the surety and excerpts

⁸²⁵ *LL*, Liutprand, 40, trans. Beyerle, 30; trans. Drew, 163.

⁸²⁶ *LL*, Rothari, 245-52, 360-6, Liutprand, 15, 36-44, 108-10, 128.

⁸²⁷ *LL*, *uuadia*, fem. and with the same form normally used for all cases: *uuadia dare/suscipere*, R 360 etc.: *de uuadia*, R 360, L 96; *sine uuadia*, L 96; *per uuadia*, R 362, L 8; *quando ipsa uuadia data fuerit*, Ratchis 5; exceptionally, *uuadium suam, de ipsam uuadium*, L 128; note also L 36, *Si quis dederit uuadia, et eam recipere neglexerit*. I wish to thank Prof. Charles-Edwards for discussing this evidence with me.

⁸²⁸ *LL*, Liutprand, 41, [my translation].

from a paragraph in Liutprand offer a candid view of the problems associated with such *impromptu* sureties.

Modo vero, dum pravûs homines cognovissimus talis fidiussores velle statuere, qui nihil habuerent, nisi solummodo personam suam, ut per eos iustitiam suam creditûr ipse invenire menime possit, statuimus, ut talis esse deveant fidiussoris ipsi, ut, si amplius non habuerent, quomodo eum pignerare possint, quam ipsa oblicatio sit, vel tantum habeant, quantum, ut diximus, ipse oblicatio est, unde fideiussores intervenire debeant. Nam si minus habuerent, non sit culpavelis ille, qui eum recepere noluerit, nec ipse qui dare devit, possit se excusare a culpam dicendo, quod fideiussores paratûs habuissit; quia inposibilem est, ut talis fidiussoris homo recepiat, qui non habent, etsi amplius non, vel quantum ipsum devitum fuerit, quod tollere locum pigneris possit.

Now since we realize that evil men wish to offer as sureties those who possess nothing but their persons alone so that through them the creditor himself cannot in any way find justice, we decree that sureties should have as much property, if not more, as is the amount of the obligation so that if necessary they can give pledges on behalf of him who owes the debt for which sureties were required. If the sureties do not have this much, the creditor who does not wish to accept them ought not to be blamed, nor can the debtor offering the surety excuse himself from blame by saying that he had ready sureties; for it is not possible that a man be compelled to accept as a surety someone who does not own as much, if not more, than is the amount of the debt which can be taken in place of the pledge.⁸²⁹

This section modifies Liutprand § 36, in which the creditor, who is offered a surety, is required to release the debtor's pledge to the surety and who faced a penalty if he neglected to do so.⁸³⁰ A creditor did not have to accept a surety with insufficient means and forfeit the pledge previously given to him, which had a value at least equivalent to the debt. On the other hand, there seems to be a time factor involved here. Sureties may offer their own pledges so that the debtor could redeem his. Such a substitution possibly allowed the debtor extra time, and the forfeiture date by which these new pledges had to be redeemed may be later. The text mentions that the older laws required *tres fideiussores*, which could imply

⁸²⁹ *LL*, Liutprand, 128, [my translation].

⁸³⁰ *LL*, Liutprand, 36.

that they jointly contributed property to reach the value of the debt as opposed to each of them owning property to that amount.⁸³¹ Clearly, the pledges were intended to be of such a worth that they could go for the debt owed.

7.3.3.4. Second pledges

The Lombard laws indicate that a debtor who failed to recollect his pledge, automatically granted the creditor leave to make use of it after twelve days. At this point, he was also allowed to take a second pledge, ‘the pledge thus totalling double the amount of the debt.’⁸³² The value of the Lombard pledge, therefore, always had to match the value of the debt it secured. After a further period, both pledges fell forfeit to the creditor who acquired ownership of them. One may assume that the pledges covered the debt but this was not the case. The pledge functioned as a coercion but it was always considered to be payable on top of the debt. Even after both pledges to the value of double the debt had been received by the creditor, he still maintained ‘the right to bring and to prosecute his case.’⁸³³ This regulation indicates that the second pledge taking was purely intended as a further means of pressurising the debtor into fulfilment and it is telling that the first pledge would also only become forfeit at the end of the second pledge period, but not the first. In the event that both pledges ultimately fell forfeit to the creditor, they could be interpreted as additional penalties while the creditor maintained all rights to demand the payment of his original debt, presumably in the form agreed upon in the original contract. The period of the second pledge taking differed depending on the respective territory and may be appreciated below:

⁸³¹ *LL*, Liutprand, 38.

⁸³² *LL*, Liutprand, 108, trans. Beyerle, 61; trans. Drew, 191.

⁸³³ *ibid.* 108.

Pledge	Type of pledge	Pledge period	End of period
First pledge	Chattel or slave	12 days	Exclusive right to use
Second pledge	Chattel or slave	30 days (Neustria and Austria) 60 days (Tuscany)	Ownership

Table 13: second pledges in Lombard law

This is the only instance in the barbarian law codes I examined where the value of the pledge was entirely independent from the realisation of liability. The Edict of Rothari confirms the period of sixty days as indicator for the shift of ownership.

Nulli liceat pro quolebit debitum casa ordinata tributaria loco pigneris tollere, nisi servûs, ancillas, vaccas, pecoras; ita ut ipsum pignus, quod tulerit, per sua custodiam saluum faciat usque ad praefinitum tempus, sicut subter adnexum est: id est inter eas personas, qui intra centum milia intra se habetant, dies viginti. Et si super centum milia inter se creditor et debitor habitaverit, tunc usque sexaginta dierum spatia poena suprascripta custodiatur.

It is not lawful that anyone take a holding owing tribute (casa ordinata tributaria) as pledge for any debt – only male and female slaves, cows, or sheep. Indeed, the pledge which the creditor takes should be kept safe in his care for the prescribed time: twenty days in cases between those persons who live within 100 miles of one another. If the creditor and debtor live more than 100 miles from one another, then the pledge should be guarded for sixty days.⁸³⁴

The period of redemption in Lombard law was made dependent on the geographical distance between the respective creditor and debtor and was tripled in cases where the space exceeded one-hundred miles. Reference is made to the items pledged and since they exclusively refer to property in humans and livestock that have to travel on their own feet, their transport was more burdensome and extended the respite granted.

In conclusion, in Lombard legal procedure action against a debtor commenced with three calls to justice, after which, however, the creditor himself was permitted to take a pledge from him.

⁸³⁴ *LL*, Rothari, 252, trans. Beyerle, 55-6; trans. Drew, 102.

When this happened, the debtor later could procure the release of his pledge if he named a surety. This surety could offer his own pledges on behalf of the debtor. Again, a failure to abide with the temporal limitation entailed heavy penalties, both if breached by the creditor (if he took a pledge before the third warning) and the debtor (if he re-took the pledge that he had given to his creditor before offering a surety). In addition to this provision, pledges that were not redeemed in time entitled the holder to use after twelve days and also permitted him to take a second pledge. There is no indication that curial involvement was envisaged in executing the procedures outlined.

7.3.4. Burgundian Law

7.3.4.1. Sources

The *Lex Burgundionum* also known as *Lex Gundobada* falls into two sections, which are difficult to demarcate, the older *Liber Constitutionum sive Lex Gundobada*, (Book of Constitutions or Law of Gundobad) by king Gundobad who reigned from 474 to 516, including *antique* (earlier laws) and *nouellae* (later laws) by his son and successor Sigismund († 524), and the *Constitutiones Extravagantes*, additional enactments, sometimes called *additamenta*. They jointly form what is

understood as the Burgundian Code.⁸³⁵ The original titles of *Liber Constitutionum* contain detailed information on pledges and guarantors.⁸³⁶

The *Lex Burgundionum* survives in thirteen manuscripts, ‘none of which are earlier than the ninth century’.⁸³⁷ The *Lex Burgundionum*, a *lex barbarorum*, applied to cases between Burgundians, and between Burgundians and Romans. For cases between Romans a separate code existed, the *Lex Romana Burgundionum*, which is made up from Roman legal sources.⁸³⁸ However, already in the *Lex Gundobada* one can see that ‘the Burgundian legislation seems to be a body of tribal custom that has evolved a considerable distance in the direction of positive statute law, especially in the case of the *nouellae*’ and represents a move towards ‘more complex royal legislation’.⁸³⁹

7.3.4.2. Surety’s role

In the Burgundian law code, the surety also had a prominent role and combined the functions of enforcer and vicarious liability. The *leges barbarorum* use the Roman legal term for surety,

⁸³⁵ Drew, *The Burgundian Code: book of constitutions or law of Gundobad, additional enactments* (Philadelphia, 1972), 6-7: Titles 2-41 (compiled sometimes between 483 and 501), titles 42-88 (between 501 and 517), titles 89-105 and *Constitutiones Extravagantes* (sometime during the reign of Godomar 524-32), ‘or after the fall of the independent Burgundian kingdom.’, 8: It is believed that under the first Burgundian kingdom (capital at Worms), which was destroyed in 436, attempts were made to codify Burgundian custom in writing but these earlier laws did not come down to us. Their second kingdom was established in 443.

⁸³⁶ *Leges Burgundionum*, L. R. de Salis, XIX, De ablates pigernibus et fideiussoribus, 57-59; ed. & trans. F. Beyerle, *Gesetze der Burgunden*, Germanenrechte, vol. 10 (Weimar, 1936), 34-9; Drew, *The Burgundian Code*, 36-7.

⁸³⁷ Drew, *The Burgundian Code*, 6.

⁸³⁸ A useful summary account of both *Lex Gundobada* and *Lex Romana Burgundionum* is: R. Buchner, *Die Rechtsquellen, Beiheft zu Wattenbach-Levison, Deutschlands Geschichtsquellen im Mittelalter, Vorzeit und Karolinger* (Weimar, 1953), 10-13; Drew, *The Burgundian Code*, 5-6: The *Lex Romana Burgundionum*, due to an early MS mistake, is also known as ‘Papian’. It is based on ‘three Codices, the *Sententiae* of Paul, a writing by Gaius, and school interpretation.’ Following the Frankish conquest in 532, it was eventually supplemented by the *Breviary* of Alaric.

⁸³⁹ Drew, *The Burgundian Code*, 10.

fideiussor, which is the classical surety in Roman law (here translated as guarantor or oathtaker, since he would have to testify to the accuracy of the claim in curial pleadings):

Quicumque fideiussor res debitoris dederit illi, cui fideiussor accessit, usque ad domum ipsius sub sua defensione perducatur; si autem non fecerit, non sit a fideiussione penitus absolutus.

If any guarantor (oathtaker) hands over a debtor's property to him, to whom he came as guarantor, let him bring it up to the creditor's house in his own defense (to satisfy his obligation); if he does not do it, let him not be wholly released from his obligation.⁸⁴⁰

We can see that, as in Welsh law, it was the surety who conveyed the pledge or distraint to the creditor. If he executed this performance duty to the satisfaction of the requirements associated with his office, he was released and no further duties were required of him. However, in cases where the debtor did not have the means to pledge or pay, the surety could be made liable and had to provide a pledge worth one and one-third of the value of the debt.

Modus vero pignorum hic erit, ut tertiam partem fideiussor amplius tollat, quam summa debiti est, et denunciaret coram testibus debitori. Quod si intra tres menses solute debito pignora sua non receperit, postmodum ea requirendi pontificium non habebit.

'The manner of giving pledges shall be this: let the guarantor (oathtaker) raise a third part more than the sum of the debt (i.e., the total debt) and let him make declaration to the debtor in the presence of witnesses. But if when the debt has been paid, he (the guarantor) shall not take back his pledges within three months thereafter, he shall no longer have the right (pontificium) of seeking them back.'⁸⁴¹

⁸⁴⁰ *Leges Burgundionum*, L. R. de Salis, XIX.9, pp. 57-59; ed. & trans. Beyerle, *Gesetze der Burgunden*, 37; Drew, *The Burgundian Code*, 37; I amended the translation.

⁸⁴¹ *Leges Burgundionum*, L. R. de Salis, XIX.6, p. 58; ed. & trans. Beyerle, *Gesetze der Burgunden*, 37; trans. Drew, *The Burgundian code*, 36.

These pledges could be redeemed by payment within three months, after which they became irretrievably forfeited.

Quod si dissimulaverit implere, quod placitum est, et necesse fuerit, fideiussorem constrictum atque compulsum debitum de suo solvere, in triplum ab illo quem fidedixit impleatur, quidquid fideiussorem in hac causa solvisse constiterit.

But if he has failed to pay what it has been established that he owes (*quod placitum est*), and it has become necessary that the guarantor (oathtaker) be bound and compelled to pay the debt from his own property, let threefold satisfaction be received by the guarantor who offered the oath (or pledges) whatever it is established he has paid in this case.⁸⁴²

It was common that an oath was bound by a pledge, symbolically guaranteeing that it would not be broken. The surety, in the absence of effective distraint on the debtor had to use his own property to fulfil the liability. Provided that *constrictum* was meant literally, he may have been taken hostage, in order to force his compliance, which increased the compensation due to him from the debtor threefold. However, a revealing regulation complementing this scenario with an alternative option is provided in the following paragraph.

7.3.4.3. Personal pledges

Si is, qui fideiussorem dedit, non habuerit unde solvat, ipsum fideiussor ad se absolvendum tradat, et a fideiussore aliud non queratur.

If he who offers a guarantor (oathtaker) does not have the wherewith to pay, let the guarantor (oathtaker) hand the debtor over to the creditor to clear himself, and let nothing else be required from the guarantor (oathtaker).⁸⁴³

⁸⁴² *Leges Burgundionum*, L. R. de Salis, XIX.8, p. 58; ed. & trans. Beyerle, *Gesetze der Burgunden*, Germanenrechte, vol. 10 (Weimar, 1936), 36-7; trans. Drew, *The Burgundian Code*, p. 37, I amended the translation.

⁸⁴³ *Leges Burgundionum*, L. R. de Salis, XIX.7, p. 58; ed. & trans. Beyerle, *Gesetze der Burgunden*, Germanenrechte, vol. 10 (Weimar, 1936), 36-7; trans. Drew, *The Burgundian Code*, 37.

The surety, in the absence of sufficient funds belonging to the debtor, was meant to hand over the debtor in person to the creditor. In other words, the surety did not convey his property as a taken pledge but delivered the debtor himself as a personal pledge to the creditor.

In the Burgundian code it is apparent that the surety had a prominent role and was responsible for conveying the pledge, worth one third more than the debt, to the creditor. In the absence of assets, the surety had to pledge and pay on his behalf but received a threefold compensation for this duty. Alternatively or possibly earlier, the surety delivered the debtor to the creditor in person to answer and submit himself to the claimant. There is no remark about curial involvement in his actions.

7.3.5. Visigothic Law

7.3.5.1. Sources

The *Lex Romana Visigothorum*, also known as *Breviarum Alarici* (The Breviary of Alaric), compiled in 506 at the order of the Visigothic King Alaric II, is a representation of Roman Vulgar Law and the most important western Gothic law.⁸⁴⁴ Its actual name in the text is *Forum Iudicum* (Judges' Convention). It was superseded by *Liber Iudiciorum* under King Reccesvinth (653-672), which itself was based on the earlier *Codex Euricianus*, issued by King Leovigild (569-586). The latter was a codification of Roman law, compiled in 483 and traditionally ascribed to King Euric

⁸⁴⁴ Gmür & Roth, *Grundriss der deutschen Rechtsgeschichte*, 22.-23; *Leges Visigothorum*, ed. K. Zeumer, MGH, *Leges Nationum Germanicarum* (Hannover, 1902, repr. 2005); on the creation of *Breviarum Alarici*, and its reception in the Roman West and relationship to Justinian's Code in the East, see Vinogradoff, *Roman Law in Mediaeval Europe*, Lecture 1: Decay of the Roman Law, 1-31.

(466-484). Drew argues that it may have served Gundobad as model for his Burgundian law code.⁸⁴⁵ It is broadly based on the Roman *Codex Theodosianus*, issued in 438 under the auspices of the eastern Roman emperor Theodosius II (408-450) and the western Roman emperor Valentinian III (425-455).⁸⁴⁶ Strong influence from Roman law is present throughout the Visigothic Code. It was applicable to all *hispani* and no longer distinguished between Goth and Roman, thus, representing a territorial law.⁸⁴⁷ It was ‘a more or less complete Code for the usage of the Roman populations of France and Spain’ and became ‘the standard source of Roman Law throughout western Europe during the first half of the Middle Ages.’⁸⁴⁸ Title VI of the Visigothic Law Code is dedicated to pledges and debts and shows close parallels to Roman law.

7.3.5.2. Combination of Pledging and Distrain

Visigothic law features a combination of what appears to be pledging and distraint in order to ensure the satisfaction of the creditor. The decision as to equity, however, was not taken by private agreement between the parties but determined by a judge and based on written evidence.

Pignus, quod pro debito deponitur, si per cautionem fuerit obligatum, et ille, qui pignus deposuerat, ad tempus constitutum debitum reformare dissimulet, post diem cautionis exactum usque ad decem dies pignus saluum suo domino reservetur aut

⁸⁴⁵ Drew, *The Burgundian Code*, 6.

⁸⁴⁶ B. Nicholas, *An Introduction to Roman Law* (Oxford, 1962), 38: ‘This was indeed more than a compilation, since the commission entrusted with the work was directed to make alterations and amendments in the interest of clarity and consistency. It was superseded in the East by Justinian’s *Codex* but it continued to be used in the West and a substantial part has been recovered from various manuscripts and from other sources, especially the *Lex Romana Visigothorum*.’; R. Collins, ‘Visigothic law and regional custom in disputes in early medieval Spain’, in W. Davies & P. Fouracre (eds.), *The Settlement of Disputes in Early Medieval Ireland* (Cambridge, 1986): There is a thirteenth century vernacular version of the *Liber Iudiciorum* known as *Fuero Juzgo*, which was still applicable at the time in Catalonia.

⁸⁴⁷ P. D. King, ‘King Chindasvind and the First Territorial Law-code of the Visigothic Kingdom’, in E. James (ed.), *Visigothic Spain: New Approaches* (Oxford, 1980), 131-157; on the survival of the Visigothic code: C. Chandler, ‘Carolingian Catalonia: the Spanish March and the Franks, c. 750-c. 1050’, *History Compass*, vol. 11:9 (Oxford 2013), 739-750.

⁸⁴⁸ Vinogradoff, *Roman Law in Mediaeval Europe*, 7.

eidem domino, si in propinquo est, reportetur, adque, ut restituat debitum, moneatur. Quod si per negligentiam suam debitor ad diem constitutum adesse neclexerit aut debitum implere distulerit, addantur usure. Ceterum si adesse usque ad decem dies, sicut supra scriptum est, aut quod debet reformare dissimulaverit, tunc creditor iudici vel preposito civitatis pignus ostendat, ut, quantum iudicio eius et trium honestorum virorum fuerit estimatum, sit licentia distrahendi. Et postmodum de pretio venditi pigneris creditor, quantum ei debetur, sibi evidentius tollat, et relicum ille recipiat, qui pignus seposuerat.

If a pledge is deposited as security for a debt, and the debt be evidenced by an instrument in writing, and he who deposited the pledge should refuse to pay the debt at the appointed time, the pledge shall be kept safely for its owner for the space of ten days, or it shall be carried to him, if he is at hand, and he shall be notified to make payment. But if the debtor should, through negligence, fail to come on the appointed day, or should put off the payment of the debt, additional interest may be collected. But if the ten days have elapsed, as has been hereinbefore stated, and the debtor should not discharge his obligation, the creditor may bring the article pledged before the judge, or the governor of the city, and shall have the right to collect, after the seizure of said pledge, whatever amount may be deemed equitable, in the opinion of the judge or in that of three respectable persons. The creditor can afterwards reserve whatever is due him from the proceeds of the sale of the property pledged, and the person who gave the pledge shall be entitled to the remainder.⁸⁴⁹

As can be seen, the pledge was deposited with the creditor as security who had custody over it until the debt should be paid. If the debtor failed to redeem it in time, he was notified of the pending payment and given a period of ten days (pledge period) during which he was able to release his pledge. That the item pledged can be carried to the debtor as well as shown to the judge later on demonstrates that it was a material proof of the outstanding debt, even though an instrument of writing was required to supplement it. We can see that further interest could be charged on top of the debt if the debtor subsequently failed to realise the liability. After ten days the creditor not only acquired ownership of the pledge but was granted allowance also to take distraint on the debtor for any outstanding penalties for the delay, an amount decided at the

⁸⁴⁹ *LV*, Book V, Title VI, § 3, 232; trans. Scott, *The Visigothic Code*, 178, I amended the translation.

discretion of the judges. Once the creditor had sold the pledges and liquidated their value, he could satisfy himself from the income but had to return any profits above the overall debt to the original debtor, a form of pledge already encountered, namely the sale pledge. There is no explicit mentioning of the value of the pledge but it is made clear that a pledge coming short in value compared with the overall debt and potential interest incurred, could be topped up by taking distraint up to the necessary value.

7.3.5.3. Personal Pledges

Moreover, Visigothic law, which was strongly influenced by Roman legal thought, also made use of personal pledges:

Si una persona, reatu vel debito, multis teneatur obnoxia.

Quod si, quibus reus vel debitor manet, uno eodemque tempore contra eum agere ceperint, secundum quantitatem debiti vel reatus aut reddat omnibus, aut omnibus addicendus est serviturus. Querere tamen a iudice ad liquidum oportebit, cui magis reus vel debitor maneat, ut ipsi maiorem partem reddi precipiat; et de reliquo, quod de facultate rei vel debitoris remanserit, quantum reddatur ceteris, iudex ipse manifeste perpendat. Certe si non fuerit, unde compositio exolvi debeat, cum id saltim, quod videtur habere, pro debito vel reatu perpetim serviturum iudex petentibus trader non desistat.

Where a person is liable to many, by reason of guilt (for an offence) or debt.

If those to whom someone continues to be liable as wrongdoer or as debtor have begun to take action against him at one and the same time, let him, according to the amount of the debt or the guilt, either compensate all of them or be handed over to serve them as a slave. However, it shall clearly be right for him to whom he is most indebted as wrongdoer or debtor to make a complaint to the judge, so that he [the judge] may command that the greater share be handed over to him. And, as for the rest, whatever may remain of the property of the wrongdoer or debtor, let the judge himself openly examine how much is to be handed over to the rest. Without doubt, if there is not enough, when it is seen just what he possesses, from which payment should be made, the judge should not refrain from handing him over to the claimants to serve them as a slave for ever.⁸⁵⁰

⁸⁵⁰ trans. T. M. Charles-Edwards, personal correspondence; *Leges Visigothorum*, ed. Zeumer, MGH (Hannover, 1902), Book V, Title VI, § 5, 233; punctuation amended. cp. S. P. Scott, *The Visigothic Code* (Boston, 1910), Book V, Title VI, § 5, 180; in the first half of the paragraph (not reproduced here) it is

Visigothic law envisaged that the debtor who accumulated unsecured liabilities with various creditors had no other, ultimate fate left than to become their slave. This is no longer debt slavery for a temporarily limited period as a set-off against the overall debt but a state of permanent enslavement. The difference is that a quasi-slave goes free after the debt is paid and can return to society, while a true slave can be sold and, therefore, was given up by society, entering a permanent state of unfreedom (perpetual pledge). The debtor had been irretrievably forfeited. Personal liability of this sort is a concept well known in the *leges barbarorum* and Roman law.⁸⁵¹

In Roman law the handing over of the debtor's body is most profoundly discussed in the procedure of *partis secanto*, which concerns the dismemberment of a debtor's body by joint creditors. It is telling that just as our example above, it refers to claims brought by multiple creditors against an insolvent debtor. Thereby, a debtor could be seized *in personam suam* and put in chains for the period of sixty days, during which he was presented at the *comitium* (market) on three occasions. These appearances went hand in hand with a public proclamation of his debt and offered a chance for his ransom. Following the third public notice and the absence of redemption, *capite poenas dabat* was reached. This phrase has been subject to much debate, and has been interpreted variously as the debtor being either sold overseas, losing his legal rights or being killed and literally cut into pieces in order to satisfy his many creditors, each of whom

stated that if one of the creditors establishes his claim prior to any others, he ought to have preference independent of the value of his claim.

⁸⁵¹ On the proximity of penal enslavement and debt slavery in the Middle Ages, see A. Rio, 'Penal Enslavement in the Early Middle Ages', in A. Lichtenstein & C. De Vito (eds.), *Global Convict Labour* (Leiden, forthcoming); idem. 'Self-sale and voluntary entry into unfreedom 300-1000, *Journal of Social History* 45:3 (2012), 661-685.

received a piece of his body.⁸⁵² Londres da Nobrega makes the accurate observation that the phrase rather refers to the relationship of demands of each of the debtor's creditors and their respective entitlements.⁸⁵³ It is agreed nowadays that the debtor did not lose his life and that his property was not affected but that he served the creditor as would a slave, usually only until his debt was paid.

7.3.5.4. Failure to return

In Visigothic law, the pledge could be redeemed for a period of ten days.⁸⁵⁴ In the following paragraph, the point of redemption is discussed from the opposite angle and the case occurs where the creditor did not seek to return the pledge he had received from the debtor despite the fact that the latter, in the meantime, had paid the debt.

Si quis ei, qui rem pro pignere credidit, ad constitutum tempus representato debito pignus acceptum distulerit reddere et hoc ante tempus lege superiori taxatum vendere vel in usus proprios adque alienos conterendum presumserit adtentare vel malitiose differens noluerit adsignare: pignus quidem, quod accepit, integrum reddat et medietatem, quantum pignus valere constiterit, domino pigneris coactus inpendat.

If anyone who has loaned money upon a pledge and, after the debt has been paid at the time appointed, should delay the restoration of the property pledged to its owner; or should sell the same before the time appointed by the above law, as aforesaid; or should appropriate it for his own use: or should bestow it upon another; or should maliciously refuse to surrender it; he shall be compelled to restore the pledge intact to its owner, and to pay him, in addition, half its agreed value.⁸⁵⁵

⁸⁵² J. Muirhead, *Historical Introduction to the Private Law of Rome*, 2nd ed. H. Goudy (London, 1899), Section 36: The Legis Actio per manus Iniectionem, 182-194.

⁸⁵³ V. Londres da Nobrega, 'Partis Secanto', *Zeitschrift der Savigny Stiftung für Rechtsgeschichte. Romanistische Abteilung* vol. 76, issue 1 (Aug 1959), 499-507.

⁸⁵⁴ *LV*, Book V, Title VI, § 3, p. 232; trans. Scott, *The Visigothic Code*, 180.

⁸⁵⁵ *LV*, Book V, Title VI, § 4, p. 232; [my translation]; cp. trans. Scott, *The Visigothic Code*, p. 179.

The case addresses the common phenomenon that a pledge was given as security for the repayment of a money loan. The misuse of such a pledge made the creditor liable to restore the pledge and in addition, half its value in compensation. It can be assumed that the court had to compel the previous creditor to release the pledge he was retaining illegally.

In summary, the Visigothic Code shows that a debt secured with a pledge could be remedied by selling the pledged item and distraining the debtor for any additional debt incurred, if he failed to redeem it following a further period of ten days. When a debtor encumbered himself with debts towards many creditors that he was not able to satisfy, he would be handed over to them in debt slavery, a procedure closely resembling Roman law.

When attempting to summarise the evidence from Medieval Welsh law, Salic law, Lombard law, Burgundian law, and Visigothic law, the first tendency that becomes apparent is that the interest of the jurist is devoted to means of pressurising the debtor into fulfilment through added penalties and, in the event of non-compliance the consequence of distraint (either of property or in some cases of his own person). The duty of performing distraint, however, regularly had to be preceded by warnings that allowed the debtor time to settle, however, at further financial expense. Distraint itself could be performed by the debtor or surety privately, but often required curial approval first, and a share of the profits so derived went to the administration. Where a pledge was conveyed, attention was devoted to issues over its value, incidents of the unlawful sequestration of pledges not in line with the determined time periods, and options of releasing the pledge. However, pledging remains discussed within the realm of duties a debtor and his surety had to fulfil, but notably with little attention being devoted to the material culture of pledging or the various types of pledges, and without any judicial interest in the status of the person providing the pledge nor

associated interest. Furthermore, the range of legal activities in which a pledge occurs is very limited and it functions merely as a financial tool of respite and payment within a contractual set-up. It had become an economic valuable accessory to the debt it secured without a tangible symbolic significance. The silence of the codes examined in this regard is a dormant backdrop to the vivid interest in status distinctions among the early Irish law texts and the extraordinary detail and richness of this legal guarantee as discussed by the jurists.

8. Conclusion

This thesis set out to explore the law of pledging in early medieval Ireland based on the surviving corpus of native Irish law texts from the seventh and eighth centuries. It has identified the nature and types of pledges from a theoretical basis as much as on practical grounds, arguing from within the socio-economic contexts of particular legal relationships. Research into this field has also sought to position the law of pledging alongside other modes of guarantorship, namely suretyship and hostageship and raised questions as to the proximity of pledging and distraint. Moreover, it presented the position of Irish law compared to medieval Welsh law, as well as several law codes belonging to the realm of *leges barbarorum*. The literature on the subject of pledging is limited and particularly an encompassing study of the law of pledging missing. Thus, individual evidence on pledging is inconclusive on several vital questions that can only be understood when stepping back from the detail to look at the broader context of the institution as a coherent whole. The research presented in this thesis sought to answer some of the questions that address this need:

(1) What types of pledges do we encounter in the laws and how may we distinguish them? (2) What role do pledges play in legal procedure alongside other forms of security? (3) To what extent does the law of pledging resemble or complement the law of distraint? (4) Where does the Irish evidence stand compared to other legal systems?

Synthesizing the findings, it has been discovered that pledges can be distinguished based on (1) value, (2) time period, (3) custody, (4) use, and (5) forfeiture. Encompassed in this scheme are those pledges that form part of particular legal procedures, such as the *tairgille* (fore-pledge) in the law of neighbourhood, the *gell forccsen* (pledge of overseeing) in *BFG*, that is not physically

removed, as well as the *aurgella* (fore-pledges) and *frithgella* (counter-pledges) given during sick-maintenance, which also comprises the *gell foluic* (pledge of maintenance), *gell fritgnama* (pledge for service), and *gell taisic* (pledge for restoration after cure). What has become evident from this investigation is that pledges, though they occur throughout the social spectrum, are far more prominent among the higher social classes who would own the kind of precious objects which are used as pledges. The association with the upper status stratum is particularly true for the scenario of contractual pledges and thus, those discussed in *BFG*. Often, the pledge does not seem to bear much relation to the economic value of the transactions being guaranteed but is predominantly tied to the status of the person offering it. Therefore, status concerns are a prominent factor in pledging while the economic value of the chattels in relation to the debt is at the forefront of distraint, which bears a clear link to the financial value at stake. Considerations of this type were analysed, especially in respect of the challenging evidence on the cattle pledge of *BFG* that demonstrated the congruence of both procedures.

The next step focused on the study of the different forms of guarantee, (1) pledges, (2) sureties, and (3) hostages, which are the driving actors within contract law. Corroborating the argument that pledges have a long-standing and widely spread use has been this inclusive approach that examined pledges in the broader context of security, procedure and enforcement. Investigating their joint application has contributed to answering the research questions posed. Therein, it has been shown that pledges would enter the stage only after a first default, while sureties were present from the outset, namely the moment the agreement was entered. Sureties have been presented as those guarantors who receive or withdraw pledges from debtors, and who themselves may offer pledges from their own property, or, in the case of hostage-sureties, their

own bodies. Suretyship has been well studied and my analysis drew on the fundamental research undertaken by Thurneysen and Stacey. The main argument posed has been that the presence of sureties in the same context in which pledges occur, make them the primary actors responsible for the conveyance of pledges, and in this respect, the powerful mechanism backing up their function. More importantly still, the surety bearing financial liability, the *ráth* (paying surety), is the prime candidate for providing a pledge on behalf of those whom he supports, and has been studied in relation to the third-party pledgor in *BFG*. In scenarios where no surety was involved, either the parties themselves offered a pledge (law of neighbourhood) or their lord was acting on their behalf (ecclesiastical ordinances, inter-territorial treaties). *BFG* sets out the compensation and interest rates given to these third-party pledgors, schematising their financial returns based on their status as well as the chattel that was given in pledge. Thus, it has been proposed that those pledges of high value offered by the elevated social order in society, served as a means of subduing the parties they supported and so to increase their dependence on them.

The examples used in order to demonstrate how sureties operated paved the way to investigate the correlation between pledging and distraint. This has proved a significant line of inquiry since the pledge taken in distraint plays a dominant role not only in Irish law but also in Welsh law and the barbarian law codes. A possible convergence of both procedures has been proposed and the alignment and temporal correlation of both remedies was investigated. Central to this argument was the cattle pledge of *BFG* falling forfeit in progressive stages, as characteristic for the pledge taken in distraint. This evidence impinged on the existing beliefs held about pledging and opened a new scope of understanding for both procedures. Naturally, in addition to change over time that led to a congruence of both remedies, consideration has to be given to factors such as

regional variation and disagreement among jurists as possible indicators for discordances in the sources. The findings presented inform future lines of research and will influence the application of knowledge in this subject.

The comparative chapter sampled the legal systems operating in medieval Wales, the laws of *Cyfraith Hywel*, and several of the law codes of the *leges barbarorum*, including Salic law, Lombard law, Burgundian law, and Visigothic law. The latter have been demonstrated to employ a system of pledging partially deprived of the private enforcement characteristic for the Irish corpus and, on many accounts, incorporated the necessity of sanctioning by the public authority, particularly the taking of property in distraint. On the other hand, evidence from Wales, though the latest in date of those systems under consideration, complemented and informed the Irish evidence, especially in respect of the surety's rigorous procedural activity. This pattern is consistent with the historical diversity of those systems deprived of the long-lasting and perpetual influence of Roman law and served the purpose of highlighting the major contribution of Irish law to the history of law in Europe.

Some lines of investigation fell outside the scope of this thesis but pose important areas to expand the scale of this field of research. Reflecting on the future potential of the evidence presented in this thesis, the following avenues may be pursued:

(1) First, now that the context and application of pledging have been analysed, the topic of pledge interest presented in *BFG* and constituting a specialised area within the law of pledging can be looked at in further detail and with an enhanced understanding of the subject matter. The text including glosses and commentary merits further attention on a philological basis and

towards an archaeological identification of the material culture underlying the chattels incorporated in it. The correlation of the pledged chattel with the schematised classes of social rank, including the intriguing pledges offered by the wives of various grades of freemen and nobles call for a detailed analysis. This should include a comparison with other texts on status and evaluate the link between the value of the pledge and the status of its pledgor. The notable amount of pledges of significant value in *BFG* has shown that pledging was predominantly associated with high status classes, which, in turn raises the question what objective the legal regulations served that allot high interest rates to their benefit.

(2) Second, although this thesis has come some way to illuminate this issue, the connection of pledging and distraint would greatly benefit from a virtuous soul who takes on the challenging task of providing a modern edition and translation of the longest legal text in the Irish corpus, *Di Chetharslicht Athgabála* and all related material dealing with this subject. *BFG* has shown that both remedies are connected to each other but further new evidence could influence the discourse and allow scholars to develop a paradigm for the historical development of both procedures.

(3) Third, the pledges that occur in *Collectio Canonum Hibernensis* provide an intriguing avenue for investigation, with biblical law contesting but also harmonising with native legal concepts, as is typical of its pro and con character. It would be a worthwhile endeavour further to build on this research and especially to relate the evidence from *Hib* to those pledges encountered in the *cáin*-laws. Ecclesiastical ordinances have been shown to use different pledge

values, demanding a chattel of higher value if given in relation to Canon law, and this desire is given recognition in *BFG*. There is a need for understanding the historical background of *BFG* and the motivation behind its regulations that meet ecclesiastical demands and afford high interest payments to the Church but also recognize alternative penance. The approach of relevant texts has to be probed against the paradigm for pledging developed in this thesis. Exploring the research strategies outlined above can facilitate the attainment of this goal.

The overall significance of this study lies in its analysis of the law of pledging as a whole, including its symbolic and economic impact and giving consideration to the many particular social contexts in which pledges occur and their detailed procedural role. It has been vital to collect and describe the different types and scenarios of pledging and thus to allow for the description of the evidence in a coherent paradigm that can be used in all future studies incorporating evidence of pledging. It is important to know about this subject in general because pledges occur in a vast range of legal texts and contexts but without much elaboration. The benefits of having at disposal the study of pledges here presented will raise awareness of the significance of the pledge and the reason and background to its presence in the given text under consideration. Thus, this research contributes significantly to the body of knowledge and will be of interest to historians and legal scholars investigating related subjects from various angles.

Appendix 1: translation of *Bretha im Fúillemu Gell*⁸⁵⁶

BRETHA IM FÚILLEMU GELL.

Judgements concerning interest payments on pledges.

§ 1

CIA LUIGEM I FUILLEMAIB GELL LA *FÉNIU*? NI *ANSAE* GELL FOIRCSEN, FO BID
BITH FONASCC OMNA IARNA CHUL. NOCHIS ED GELL FORCCSEN LA *FÉNIU*,
GELL BIS I LLAIM NEICH BESSA SET CO BRITH NO DEROSCC.

What is the smallest among the interest-payments for pledges according to Irish law? Not difficult: a pledge of overseeing because there is a bond of fear behind it. And a pledge of overseeing according to Irish law is one which remains in the custody (lit. hand) of him whose property it is until removal or verdict.⁸⁵⁷

§ 2

CIA LUIGEM I NDIRIB GELL LA *FÉNIU*? NI *ANSAE*, GELL FOREGAR IAR
TABAIR[T] A DILSE CO RONASTAR A SLAN. CID ED ON, NI DITHLIT[H]ER A
FUILLEM LA *FÉNIU*. ARNA[D] [SH]ANNA NECH DO DITHIM GILL A COIMDED
DARA CHENN. ROSUIDIGED FOR SEOIT [SEUIT] .UI. SCREPAL A FUILLEM, MANI
DEROTH. CIA DEROTH DANO, NI TET DAR NI-SIU LA AITHGINA SEOIT DO CACH.

⁸⁵⁶ The edition is based on that in *CIH*462.19-477.30 with minor changes where normalised versions of text have already been published.

⁸⁵⁷ The translation of the final sentence is based on Binchy, 'IE. **QuE* in Irish', *Celtica* 5 (1960), 87. He gives *gell foircsen* as lit. 'a pledge of surveillance'.

What is the least among compensation payments of pledges according to Irish law? Not difficult: a pledge that is retained after the bringing of its forfeiture, so that compensation for it may be bound. Even so, its interest is not stolen away according to Irish law, so that no one should alienate [the interest] arising from the forfeiture of his lord's pledge (given) on his [the defendant's] behalf. Interest on it has been fixed at a chattel worth six scruples, if it has not fallen forfeit. If it has fallen forfeit, it does not go beyond that, together with restitution of his chattel to each person.

§ 3

CID FORSO ROSUIDIGED TECHTA FUILLEMA GILL SNAT[H]AITE LA *FÉNIU?* NI *ANSAE*, DAIRT DIRENAR INNA FUILLEMA-SIDE. MAD BRATSNAT IS COLBT[H]ACH INNA FUILLEM-SID[E]. NOCH IS COMDĪRE DI CECH RECHT ACHT IT MNA ATA CORUI DIA TABAIRT I NGELL.

What has the proper value of the interest for a pledge consisting of a needle been fixed at according to Irish law? Not difficult: a yearling heifer is paid for its interest. If it be a cloak-needle,⁸⁵⁸ it is a heifer for its interest. And the same compensation [is paid] to every class of person, but it is women who are more appropriate to give it as a pledge.

⁸⁵⁸ *Bratsnāt*, a form of *snáthait* 'needle' rather than *snáth* 'thread'?

§ 4

TECHTA FUILLEMA GILL SN[ATH]AITE DRUINIGE LA *FÉNIU*: IM DENMAIB
DIRENAR CORRUICE LOG N-UINGE ARGIT, AIR IS MO DO DO THORBU DOSLI
CACH BEN BES DRUINECH OLLDAITE CID RIGNA.

The proper value of the interest on a pledge (consisting) of a needle of an embroideress according to Irish law: for decorative works (a penalty) going up to the value of an ounce of silver is paid, for every woman who is an embroideress earns more profit even than queens.

§ 5

TECHTA FUILLEMA GILL IADAIGE MNA RIG, MA BEITH CONA THOTHGUSAIB
TECHTAIB: ROSUIDIGED FORS .UI. SETAIB ACCOBAIR I FUILLIUMAIB A DIRE.
NECH MANI BET A TOTHCUSA TECHTAI INDE, NI AILE ACHT SET BESID FIU IINN-
AILE I MUIN CACH SET BES INDE DO NEOCH BES INMUINE.

The proper value of the interest for a pledge (consisting) of the workbag of the wife of a king [i.e. queen], if it be with its lawful possessions: it has been fixed at six ‘chattels of desire’⁸⁵⁹ in respect of the interests of its compensation. If its proper possessions are not in it, it entails only a chattel of the same value as the other in addition to every chattel which is in it (consisting) of anything which is capable of having (exchangeable) value.

⁸⁵⁹ For the *sét accobuir*, see *EIF*, 591.

§ 6

TECHTA FUILLEMA GILL ETAIG MNA CAICH: CIA DEROTH, NI AILE ACHT
ETACH BESID FIU INNA MUINI. MAT BAI NO EICH NO ÓR NO AIRGET NO HUMA
NO IARANN DORATA ISIN GELL, DOINTAITER IN CHAIR-SIN DIAM[B] CEN
ATHC[H]OMARCC DIA CELIU. I NEOCH MA [A]DRODMA IN CELI, IS DO DIRENAR
A FUILLEM.

The proper value of the interest on a pledge (consisting) of the garment of the wife of any [class
of] person: though it should become forfeit, it entails only a garment which is of equal value in
addition to it. If it be cows or horses or gold or silver or bronze or iron that have been given as a
pledge, those contracts are reversed if it be without (asking) permission from her husband. In
respect of that which the husband has acknowledged, it is to him that its interest is paid.

§ 7

NOCHISS E FUILLEM GILL TRENIG LA *FÉNIU*: DA TRIAN A LOGE DOBERAR INNA
FUILLEM LA AITHGIN. NI TUILLI NI BES MŌ ACHT RO[B] BEN DORATTA I NGELL.

And this is the interest of a tripartite pledge according to Irish law: two-thirds of its value is to be
given as its interest together with restitution. It incurs nothing more provided that it has been a
woman who has given it as a pledge.

§ 8

TECHTA FUILLEMA GELL DOBEIR BEN CACH AIRECH FEIBE: ROSUIDIGED FOR
TRIB SETAIB ACCOBUIR INNA FUILLEM, NEOCH MANIP IADACH CONAE

ECURTUTH DORATA NO NI CONAI FETHAL CONNDUALA. MAD ED ON, NI AILE
ACHT AITHGIN ⁷ SET INNA MUIN CACH AE BEISSID FIU.

The proper value of the interest of pledges that the wife of every 'noble of excellence' gives: it has been fixed at three chattels of desire as its interest, if it be not a workbag which safeguards its standard contents⁸⁶⁰ that has been given or one that safeguards an engraved relic. If it is such, it entails only restitution and a chattel which is of equal value in addition to it.

§ 9

TECHTA FUILLEMA GELL DOBEIRBEN CACH BRIUGAD LA *FÉNIU*. CIPE A ISLE
CIAPE A HUAISLE, NI AILE *ACHT* SET INAN MUIN BESID FIU LA AITHGEIN, AR IS
RECHTAID DILGEDA BEN CACH BRIUGAD.

The proper value of the interest for pledges that the wife of every hospitaller gives according to Irish law. However low or high, it entails only a chattel in addition that is equal in value together with restitution, for the wife of every hospitaller is a ruler of remission (person with the legal authority to forgive?).

§ 10

TECHTE FUILLEMA GELL DOBEIRBEN BOAIREIGH ⁷ OCCAIRECH LA *FÉNIU*. NI
TAIBRET-SIDE ACHT LUSAIB A CETHRA. ROSUIDIGED A NGELL-SIDE FRI⁸⁶¹
TEORA DARTAIB CO RRUICE DÍ MBO ECTA SET.

⁸⁶⁰ Based on the gloss. Not in *DIL*.

⁸⁶¹ Should be *for*; cf. §§ 4, 5, 8 etc.

The proper value of the interest of pledges that the wife of a *bóaire* or an *ócaire* gives according to Irish law. They give only [pledges] from the young of their cattle. Their pledge has been fixed at three yearling heifers until it reaches two cows, the chattel of slaughter.⁸⁶²

§ 11

TECHTA FUILLEMA GILL CACHA MNA RINDAS LA *FÉNIU*: MA DOROTH, IS DILES DO SUIDIU AIGE FINE CAICH DARA NDICHET CENN A GELL DO RINNAD CO ROFUIGLE DIA INCHUIB TRE GABLA SET. IMTHA DANO TECHTA FUILLEMA GILL CACH FIR RINNAS: ROSUIDIGED I CCOMDIRE OTHA TIGERNBARDD CO RUICCÉ DRISCONA, IS INUNN FUILLEM DIA NGELLAIB.

The proper value of the interest of the pledge of every woman who satirizes according to Irish law: (if it should fall forfeit, it is immune from claim for the latter⁸⁶³ to satirize the head of kin of each person on behalf of whom his pledge has acted as guarantee, so that he may submit to judgement on account of his honour),⁸⁶⁴ three ‘forks of chattels’.⁸⁶⁵ The proper value of the interest of the pledge of each man who satirizes is the same: it has been fixed at equal

⁸⁶² It could be *echta* (pure) or *écht* I (slaying, slaughter). See J. Pokorny, ‘Zum Wörterbuch der kgl. Irischen Akademie’, *ZCP* 20 (1936), 481, where he notes: ‘?écht: *eochair atchoir écht* ZCP vi, 270, pl. oder io-Ableitung von *écht*?’. note: cp. *aire écht* (lord of slaughter); Given that the interest consists of the young of cattle, the context would be in favour of the second reading.

⁸⁶³ Reading *suidí* for *suidiu*, since it refers to the *benrindas*.

⁸⁶⁴ The translation of the text in brackets assumes that the syntax of the copula sentence is: *is díles do shuidi áige fine . . . do rinnad*, where *áige fine . . . do rinnad* is the subject and *díles do shuidi* the predicate.

⁸⁶⁵ Probably so called because they consisted of ‘two animals, a *dartaid* and a *colpthach*’, *EIF* 589 n. 250.

compensation from the ‘prince-poet’ to ‘briar-hounds’,⁸⁶⁶ it is the same interest from their pledges.⁸⁶⁷

§ 12

TECHTA FUILLEMA GILL SUAD NO TANAISE, CIAPA MET CIABA LAIGET:
ROSUIDIGED FOR CUIC SETAIB ACCOBUIR LA AITHGIN.

The proper value of the interest of the pledge of a sage or a second to him in rank, however great or small (the pledge): it has been fixed at five chattels of desire together with restitution.

§ 13

TECHTE FUILLEMA GILL CACH COMGRAD DO GRADAIB ECALSA OTHA
CETGRADAIB CO RUICCÉ CRUIMTHER: ROSUIDIGED FOR TRIB SETAIB I
FUIILLIUM A DIRE LA LOG A TOMALTA, MANI ROCHESTAR TROSCUD NŌ
CHELEBRAD AIRE; NOCHIS ED LOG TOMALTA: ROSUIDIGED DO SET BESSID FIU
LA AITHGIN.

The proper value of the interest of the pledge of every person of equal grade of the grades of the Church, from the first grades up to the priest: it has been fixed at three chattels in respect of the interest of his compensation, together with the fee for its consumption, if recourse is not had to

⁸⁶⁶ *Tigernbard*, a poet of the fourth class, *Uraicecht Becc* gives his honour price once as equivalent to that of an *aire tuíseo* and then equivalent to that of an *aire déso*. The *tigernbard* is said to have twelve clients. *Drissiuc* (fourth base bard); see *Uraicecht na ríar – The Poetic Grades in Early Irish Law*, ed. L. Breatnach, (Dublin, 1987), 48, 50-3); A. Ward, *A Checklist of Proto-Celtic Lexical Items* (1982, revised 1996): *drissiuc* < **dristiknú* (briar singer).

⁸⁶⁷ Partially translated in L. Breatnach, ‘On Satire and the Poet’s Circuit’, in C. G. Ó Háinle & D. Meek (eds.), *Unity in Diversity. Studies in Irish and Scottish Gaelic Language, Literature and History* (Dublin, 2004), 29.

fasting or religious rite because of it.⁸⁶⁸ And the consumption-fee which has been ordained for it is a chattel of equal value together with restitution.⁸⁶⁹

§ 14

TECHTA F *UILLEMA GILL* EPSCOIP NO SUAD: ROSUIDIGED I COMDIRIU FOR. UI.
SETAIB. FERT[H]AIR A LLOG DI PENNAIT LA LOG FOMALTA 7 AITHGIN NO ERICC
LA AITHGIN 7 LOG FOMALTA, ACHT IS FEICHEM DOGOA, CONID DE ADTA ‘DAGO
FIACHACH LA AITHGIN FO CHOIBNE’.

The proper value of the interest of the pledge of a bishop or a sage: it has been fixed as an equal compensation at six chattels. Their price is paid on the basis of penance together with the value of consumption and restitution – or wergild with restitution and the price of consumption, but it is the debtor who chooses, so that from this is [the saying]: ‘the debtor chooses, together with restitution according to what is appropriate’.

§ 15

NI ASSU ARAILE IMCOMMUS GELL LA *FÉNIU*, GELL FAITHCHE, AR NI TECHTA
GELL FAITHCHE ACHT AR OCCAIRECHAIB 7 AR BOAIRECHAIB. ROSAIG GELL
FAITHCHE CO RUICCHE HECH INATHGABALA 7 ERNA ARATHAIR 7 ERNA
TREBTHA 7 INTREB TIGE CAICH DI LESTRAI CO RUICCHE COIMSID COMOIL.
ERNA ARATHIR, CIPE DARA DERTAISET CENN, AILID AITHGIN 7 SET CLITHAIR
GILL AINECH BOAIRECH INNA MUIN. ROSAIG SET CLITHAIR ENACH BOAIRECH

⁸⁶⁸ For this meaning of *celebrad* see *DIL C* 108.78.

⁸⁶⁹ Cf. Binchy, ‘IE. **QuE* in Irish’, 87.

CO RUICCÉ CUMAIL N-UINGE NO BOIN NUDACRIAD, AR IS SI CETNA CUMAL
CETARABAI FO BITH . . .

Another thing is no easier in the estimation of pledges in relation to each other: a pledge of the *faithche*, because a pledge of the *faithche* is only lawful for *ócairig* and *bóairig*. A pledge of the *faithche* extends as far as a horse capable of being distrained and plough-irons and irons household goods, and the furnishing of everyone's house in vessels as far as 'the lord of a feast' [or, following Plummer: as far as what is sufficient for a feast];⁸⁷⁰ [as for] plough-irons, whoever it may be on whose behalf they may have lapsed, [it entails] restitution and a chattel sheltering the pledge of the face (honour) of a *bóaire* in addition to it. A chattel sheltering the honour of a *bóaire* extends as far as a *cumal* (consisting) of an ounce [of silver] or a cow that it would purchase (or: that would purchase it). For that was the first *cumal* that first was in existence, because . . .

§ 16

MESTA MUGDORNN INGEN MOGA FRI CUMAIL N-UINGE NO BOIN NODACRIAD.
NICON FRITH ARA RUICCTHA A MMES TAIRSE. NOCHIS (SI NOCHIS) SI CETNA
CUMAL CETARAGAIB BROIN INNA LAIM LA FIRU ERENN, MUGDORNN INGEN
MOGA (MOGA). NICHON DICHET MESS MOGA LA *FÉNIU* GELL OIR NO AIRGIT
NO HUMAI, AR NI TECHTA GELL N-OIR ACHT AR CENN RIG NO ECALSANO
UASAIL AIRECHTA ARAILI ACHT RAMNIA DIOIR LA CUMAIL .X. SET INNA MUIN.

⁸⁷⁰ See *DIL* under *coimsid* (*commus* + agent suffix -id), where it is suggested this might be 'lord of the feast', a figurative expression for a drinking horn. It is also noted that Plummer suggested an amendment to *coimse*, 'enough, a sufficiency', and hence 'enough for a feast'. At first sight this gives better sense, but perhaps *coimsidcomōil* should be retained as the *lectio difficilior*? Moreover, if *rosaig co ruicce* means 'including, as the most valuable item', the *coimsid comoil* should be a valuable item, corresponding to the horse, and not a whole collection of items.

DIRENAR I TEORA DECHMADAIB: .X. FRI CETAITHGIN, .X. AILE FRIA CUTRUMA,
.X. AILE FRIA CUMAIL A FUILLEMA, SECHIS COMDIRE DO CACH RECHT CIAPA
MET CIABA LAIGET I MESSAIB. IS SAMLAID ROSUIDIGED I FUILLEMAIB GELL.

Mugdorn,⁸⁷¹ the daughter of Mug, was estimated at a *cumal* worth an ounce [of silver] or a cow that it would purchase [i.e. or a cow of equal value]. There was nothing found that could carry her value beyond it (or: It was not found, so that a judgement was passed concerning her.) And she was the first slavewoman who first took hold of a quern in her hand among the men of Ireland, namely Mugdorn, daughter of Mug. The estimation of a slave according to Irish law may not go [as far as] a pledge of gold or silver or bronze, for a pledge of gold is appropriate only for a king or the head of a church or the high person of another hierarchy of nobles, except for a gilded *ramnia* together with a *cumal* of ten *séts* in addition to it. It is paid in three periods of ten days: ten (days) for first restitution, another ten for the equal amount, another ten in respect of the *cumal* of their interest, and it is an equal compensation for each class of person, however great, however small in estimations. It is like that that it has been fixed among interest payments on pledges.⁸⁷²

§ 17

TECHTA FUILLEMA GILL AICCDE AIRGIT: DIRENAR COMDIRE FRI BES
COMALTUIR, AR IS FOR DARTIB ROSUIDIGED FUILLEMA DIRE.

⁸⁷¹ For *mesta* see *DIL*: *midithir*, *Mugdorn* (lit. slave fist).

⁸⁷² *CIH* 467.31-33 cp. translation by C. Eska, 'Women and Slavery in the Early Irish Laws' *SCF* 8 (2011), 36.

The proper value of the interest on a pledge (consisting) of a silver article: equal compensation is paid according to the custom of co-fosterage, for the interest of its compensation has been fixed in yearling heifers.⁸⁷³

§ 18

TECHTA FUILLEMA GILL AICCDE ARGIT CECH OCCAIRECH: DIRENAR TEORA DARTIB I FUILLEM A DIRE CACH AE DIA .III. O ARAILIU LA INRAICC N-AITHGIN.

The proper value of the interest on a pledge (consisting) of a silver article of each *ócaire*: it is paid at the rate of three yearling heifers for the interest of its compensation, each one three days from the other, together with fitting restitution.

§ 19

TECHTA FUILLEMA GILL AICDE AIRGIT CACH BOAIRECH: FOR CUIC DAIRTIB DIRENAR; OTA SUIDE CO RUICC AIRIG FOR(N)GILL, DIRENAR .X. DAIRTIB LA AITHGIN.

The proper value of the interest on a pledge (consisting) of a silver article of every *bóaire*: it is at the rate of five yearling heifers that it is paid. From him [the *bóaire*] up to the *aire forgill*, it is paid at ten yearling heifers with restitution.

⁸⁷³ Pledge of fosterage.

§ 20

TECHTA FUILLEMA GILL AICCDE AIRGIT CACH AIRECH FORGILL, DOSLI .U.
DAIRTE DEC A FUILLEM LA INRAICC N-AITHGIN

The proper value of the interest on a pledge (consisting) of a silver article of every *aire forgill*, it incurs fifteen yearling heifers in interest with fitting restitution.

§ 21

TÈCHTE FUILLEMA GILL AICCDE AIRGIT RIG NO SUAD RO SUDIGED FOR
TRĪCAIT DAIRTE A DĪRE LA AITHGIN. ARGET MBRUITHE, CIPE DOD-RATA I
NGELL, DI-RENAR DIB TRENIB FUILLEMA GILL AICCDE AIRGIT LA ATHGIN.

The proper value of the interest on a pledge (consisting) of a silver article of a king or a sage its compensation has been fixed at thirty yearling heifers together with restitution. Bullion silver, whoever may give it as a pledge, is compensated for at two thirds of the rate of the pledge-interest on a silver article, together with restitution.⁸⁷⁴

§ 22

MA TECCMAI LITHLAITHE NO DAIL NO THOCOMRACC TUAITHE, MANI TOIRE A
GELL DO NO SET BESID FIU, DOSLI LANLOG ÆNECH DO CACH FO MIAD LA
ERAICC DO NEOCH DO-RUIRMESEM DI SMACHTAIB 7 AITHGENAIB.

⁸⁷⁴ The final sentence has also been translated by L. Breatnach, 'The Early Irish Law Text *Senchas Már* and the Question of its Date', 20-21: it is compensated for by [payment of] two thirds of the pledge-interest on a silver object, together with restitution?.

If a feast day or a meeting or an assembly of the *túath* should occur, [and] if his pledge should not return to him promptly, or a chattel which is equal in value, that incurs full honour-price for everyone according to his rank together with *éric* of what we have enumerated in *smacht*-fines and restitutions.⁸⁷⁵

§ 23

TECHTE FUILLEMA GELL ETAIG FOGNAMA CAICH DOMELAR CACH DIA, DIRENAR COMDIRE DO AIRECHAIB FEIBE .UII. NDAIRTE I FUILLEM A DIRE LA ETACH BESID FIU INA MUIMLA AITHGIN.

The proper value of the interest of pledges (consisting) of the work garments of everyone that is worn every day, equal compensation is paid to nobles, seven yearling heifers for the interest of his compensation, together with a garment which is equal in value in addition together with restitution.

§ 24

TECHTE FUILLEMA GELL ETACH LITHLIAITHLE, DIRENARCOMDIRE DA AIRECHAIB FEBE: ALID ETACH INA MUIN BESSID FIU. DI-RENAR I TEORAIB TRESSIB. OTHA SUIDE, DIA TECCMAI DUNAD NO DAIL NA TOCHOMRACC TUAITHE NO SOLLAMON N-ADRATHA, DOSLI LANLOG FOR FER DARSAN NDITHAT CENN. DIRENARDIA DECHMAIDE IARNA (IARNA) INBUID DITHMA.

⁸⁷⁵ First reference to *smachta* being paid.

The proper value of the interest of pledges (consisting) of a feast-day garment, equal compensation is paid to nobles: it entails a garment which is equal in value in addition. Compensation is paid for it over three three-day periods. Apart from that, if an encampment or a meeting to an assembly of a *túath* or a feastday of worship should occur, it incurs full [honour-]price to be paid from the man on whose behalf it falls. It is paid on the tenth day after (after) the period of forfeiture.

§ 25

TECHTE FUILLEMA GELL ETACH FOGNAMA CACH RIG DOMELAR CACH DIA: DIRENAR COMDIRIU FRI ETACH LITHLAITHE NA N-AIRECH FEIBE.

The proper value of the interest on a pledge (consisting) of the work garments of every king that are worn every day: compensation is paid at a rate equal to the festival garment of the nobles.

§ 26

TECHTE FUILLEMA GELL ETACH LITHLAITHE RIG: AILID SON IAR N-I[N]BAID(A)IB DLIGID TRECHELT INNA MUIN. FERTHAIR SON I TEORA[IB] DECHMADAIB IAR N-INBAIDIB DLIGID. OTHA SUIDIU MA TECMAI LITHLAITHE NO THOCOMRACC TUAITHE, DOSLI LANLOG ENECH FOR FER LASAN NDITHAT A NGELL DARA DITHAT CENN. DIRENAR DIA DECHMAIDE IAR CUIMLECHTAIB FENE.

The proper value of the interest of pledges (consisting) of the festival garments of a king: that entails, after the lawful periods, three garments in addition to it. It is supplied in three periods of ten days according to the lawful periods. From that out, if a festival or a meeting of the *túath*

should occur, it incurs full honour-price to be paid by the man whose pledge falls forfeit, on whose behalf it acts as security. It is paid on the tenth day according to the common processes of the Féni.

§ 27

*TECHTE FUILLEMA GELL ETACH FOGNOMA OCCAIRECH NO BOAIRECH
DOMELAR CACHDIA, DIRENAR TEORA DAIRTIB HI FUILLEM A DIRE LA ETACH
BESID FIU INA MUIN ARAILE.*

The proper value of the interest of pledges (consisting) of the working garments of an *ócaire* or a *bóaire* which are worn every day: it is paid at the rate of three yearling heifers for the interest of its *díre* together with a garment that is equal in value in addition to the other.

§ 28

*TECHTE FUILLEMA GELL ETACH LITHLAITHE BOAIRECH NO OCCAIRECH:
AILID⁸⁷⁶ ETACH INA MUIN BESID FIU. OTHA SUIDIU, MA TECCMAI LITHLAITHE
NO THOCOMRACC TUAITHE, DOSLI LETHLOG [ENECH] DOIB A TUTHACHTAIB
INDA TECCMAI. FERTHAIR DIA CUICTHE IAR N-INBUIDIB DLIGID.*

The proper value of the interest of pledges (consisting) of festival garments of a *bóaire* or an *ócaire*: it entails another garment in addition which is equal in value. From that out, if a festival or a meeting of the *túath* should occur, it incurs half honour-price [paid] to them, according to

⁸⁷⁶ MS: *ailed*.

the property conditions in which they are. It is paid on the fifth day according to the lawful periods.

§ 29

ANSOM I FUILLEMAIB GELL LA *FÉNIU* BAI BRIUGAD NA AIREMAD NECH ACHT
NECH FODAROCH[L]ETHAR⁸⁷⁷ DAGAIRILLIUD; AILLIUD⁸⁷⁸ A CETDITHIM BO
BRI[U]GAD CUMA[I]L N-OIG N-INNDIB INNA MUIN. NOCHIS FOR CUMAIL DEICH
SET CONAMAS IN CUMAL-SIN LA *FÉNIU*. LETHCUMAL I MMUIN IN TANAISE,
TEORA BAE I MUIN NA TR[E]ISSI BO. BO I MUIN CACHA BO OTHA SUIDIU, CIAPA
LIN, CIABA N-UAITE. FERT[H]AIR COLAINN AITHGENA *CACHÆ* DĪA TR[E]ISE CO
BOIN INNA MUIN; FERTHAIR A CETDIRE DĪA .X.MAIDE; FERTHAIR A
MEDONACH DĪA MĪS; FERTHAIR⁸⁷⁹ A NDEDHINACH DĪA TR[E]ISSE FOR MĪS.

Most difficult in regard to interest payments for pledges according to Irish law are the cows of a hospitaller that noone would accept, except for someone who cares for them with good merit. In a first forfeiture a hospitaller's cow entails a full *cumal* in them (of young gain, first forfeitures?). That *cumal* has been estimated at the same value as a *cumal* of ten *séts* according to Irish law. A half *cumal* in addition to the second (cow), three cows in addition to the third cow. A cow in addition to every cow from that out, whether a great number or a small number. The substance of restitution for each of them is paid on the third day with a cow in addition to it; the first

⁸⁷⁷ *DIL* s.v. *fo-cíallathar* suggests inserting an *l* after *ch*, *fodaroch[l]ethar*.

⁸⁷⁸ Read: *Ailid i cetdithim bo bri[u]gad?*

⁸⁷⁹ MS: *ferthain*.

compensation is paid at the end of ten days; the middle (compensation) is paid a month later; the last (compensation) is forthcoming a month and three days later.

§ 30

TECHTE FUILLEMA GELL BO AIRECH FORGILL: DIRENAR DIB TRENIB FUILLEMA GILL BO BRIUGAD. NOCHIS INUND INBAID ROSUDIGED FRIA TAISECC 7 A NDIRE.

The proper value of the interest of pledges (consisting) of a cow of an *aire forgill*: it is paid at the rate of two-thirds of the interest on the pledge of a hospitaller's cow. The period which has been fixed in regard to their restitution and their compensation is the same.

§ 31

TECHTE FUILLEMA GELL BO AIRECH FEBE OTHA AIRIG ETIR DA AIRIG CO RUICCÉ ARDAIRIG: CET[H]EORA BOAE I MUIN NA CETBO, .III. BAI I MUIN NA TANAISE, DI BAI I MUIN NA TRISSI BO. BO I MUIN CACHA BO OTHA SUIDE, CIABA LIN CIPA N-UIITE. FERTHAIR A CETDIRE DIA .X. FERTAIR A MEDONACH DIA CUICTHE, FERTHAIR A NDEDENACH DIA TRISSE

The proper value of the interest of pledges (consisting) of a cow of an *aire feibe* from an *aire* between two *airig* up to the *aire ard*: four cows in addition to the first cow, three cows in addition to the second, two cows in addition to the third cow. A cow in addition to every cow from that out, whether a great number or a small number. The first compensation is paid at the end of ten days; the middle (compensation) is paid five days later, the last (compensation) is paid three days later.

§ 32

TECHTE FUILLEMA GELL BO CACH BOAIRECH 7 CACH OCCAIRECH .III. BAE I
CETDITHIM A MBO-SIDE, DI BA ISIN TANAISE, BO I MUIN NA TRISSE BO, AG
LETHLOIGE BO I MUIN CACHA BO OTHA SUIDIU CIA[PA] LIN CIPA N-UAITE.
FERTHAIR A CCETDIRE DIA .U., FERTHAIR A TANAISSÉ DIA .III., FERTHAIR A
NDEDENACH DIA ETRUD DARA ARAILE COBDAILE ERCCE.

The proper value of the interest of pledges (consisting) of a cow of every *bóaire* and of every *óaire*: three cows for the first forfeiture of their cows, two cows for the second, one cow in addition to the third cow, an animal having half the value of a cow in addition to every cow from that out, whether a great number or a small number. Their first compensation is paid at the end of five days, their second (compensation) is paid three days later, their last (compensation) is paid for the milking time beyond the next one (??) of the equal division of *éric*.

§ 33

TECHTE FUILLEMA GELL CAIRECH CAICH: ROSUIDIGED I COMDIRIU DO CECH
RECHT FRIA CETHRAI OLCENA, ACHT AT CAIRIG DOTIAGAT I NMUIN NA AILE.
INUNN INBAID ROSUIDIGED FRIA TAISECC 7 A NDIRE.

The proper value of the interest of pledges (consisting) of the sheep of everyone: it has been fixed at the same [rate of] compensation as for other quadrupeds for every class of person, but it is sheep in place of other (sheep). The period that has been fixed for their return and their compensation is the same.

§ 34

IS DI ECMACHTAIB GELL LA *FÉNIU* MUCCA, AR NI TUILLET-SIDE ACHT MUICC I
MUIN ARAILE, .I. CACH MUICCÉ, LA A[I]THGIN CO RRUICE TEORA MUCCA.
OTHA SUIDIU IS AITHGIN NAMMA DOSLIAT, CIABA LIN CIBA N-UAITE, AR NI
MUINEGETAR MUCCA CE A MBAS NO A LLOG, AIR NI LUGU DO FOGLAIB
FOFECHAT OLLDAS DI THORBU DOGNIAT CO N-AURLUND A NDITHMA.

Pigs are among the impossibilities (extreme difficulties?) of pledges according to Irish law, for they entail only a pig in addition to another, i.e. of every pig, together with restitution up to three pigs. From there out it is merely restitution that they can earn, whether a great number or a small number, for pigs do not bring profit though (it comes from) their death (slaughter) or their [sale] value, for no less is the damage that they cause than the profit that they bring until completion of their lapsing.⁸⁸⁰

§ 35

ANINDLE ECH ₇ SISCLABRA⁸⁸¹ CIA DOROTSAT LA NECH, NI TUILLET ACHT SET
INA MUIN LA AITHGIN.

⁸⁸⁰ This paragraph has been analysed and translated by Damian McManus in ‘Varia X. Moínigidir/Moínigud’, *Ériu* 36 (1985), 202-203. His translation runs as follows: ‘Pigs are among the weak (or powerless?) pledges according to Irish law, for they earn only a pig in addition to another (gl. i.e. double up to three pigs) i.e. [in addition to] every pig with restitution, up to three (that is, for the first three) pigs. From that on (that is, all pigs with the exception of the first three) they earn only restitution, however great or small their number. For pigs do not enrich except by their death (slaughter) or their [sale] value (gl. their sal6), [and] because they do no less damage than the profit (gl. of propagation) they yield until they become forfeit.’ (p. 203).

⁸⁸¹ Cf. *CIH* ii. 391. 1.

Unbroken horses and dry stock, although they may have fallen forfeit on anyone's part, they entail only a chattel [equivalent to it] in addition to it together with restitution.

§ 36

TECHTE FUILLEMA GILL CAPUILL CAIRR 7 HERE, ROSUIDIGED I COMDIRIU DO CACH RECHT. AILID TRI ECH INA MUINN LA AITHGIN A COLLNNA. FERTHAIR CACH AE DIA CUICTHE O ARAILIU.

The proper value of the interest on a pledge (consisting) of a horse of cart and load,⁸⁸² it has been fixed at equal compensation for every class of person. It entails three horses [equivalent to it] in addition to it, together with restitution of the original (pledge). Each of them is supplied five days after the other.⁸⁸³

§ 37

TECHTE FUILLEMA GILL E[I]CH AIGE, IS COMDIRE DO CACH RECHT. NI AILE ACHT HECH BESID FIU INA MUIN, MANI TECCMAI LUGLASNAD (*sic*) NO LA TAURCHOMRAICC TUAITHE. MA TECCMAI SSON, DOSLI LANLOG ENECH, MANI TOIRE HECH BEISSID FIU OIGES A MAMU, LA DIABUL N-AITHGENA.

The proper value of the interest on a pledge (consisting) of a chariot-race-horse,⁸⁸⁴ it is equal compensation for every class of person. It entails only a horse which is equal in value to it in addition, if *Lugnasad* or a meeting of a *túath* does not occur. If that does occur, it incurs full

⁸⁸² i.e. able to pull a *carr* and carry a load (*ere, aire*): *EIF*96.

⁸⁸³ i.e. in successive periods of five days each.

⁸⁸⁴ Lit. 'horse of driving', i.e. a horse fit for a chariot-race: *EIF*, 99.

honour-price, if a horse of the same value which fulfils its functions does not appear promptly, together with double restitution.

§ 38

CID FORSORO SUIDIGED TECHTA FUILLEMA GILL SEOT A THREBE DO CACH?
FODLAI TREBE, CIA DA-ROTSAT DAR CENN NEICH, NI AILET ACHT SET IMMUIIN
CACH AE BESID FIU (TAIRICC AR TRISE) AMAL LANN 7 LAINNENE, AIRMED 7
SITHAL, LOSAT 7 CRIATHAR, MÍAS 7 CUAD, GAIMEN 7 CHERCHUILL 7 FIDLESTRA
FOGNAMA OLCHEANA.

At what has the proper pledge-interest on household chattels been fixed for all? Various household items, if they fall forfeit on behalf of someone, they entail only a chattel [equivalent to it] in addition to it to every one (it is forthcoming on the third day), such as a griddle and a griddle-slice, a measure of grain and a bucket, a kneading-trough and a sieve, a dish and a drinking-vessel, a hide and a pillow and other everyday wooden vessels.

§ 39

CIA ANNSOM TREBDIRE LA *FÉNIU* DI ADAMRAIB SET NADA GAIBET AR
THORBA 7 A N-AILITHRE? CNOE GNOE 7 CUIRNN NACH AUROEMAD NECH I
NGELL ACHT RIGA NO EPSCOP NO FER CO RATH DE. IT COMDIRE CO CACH

[RECHT?] RODBI⁸⁸⁵ DI FOLUD A N-ET. CNOE GNOE 7 CUIRNN 7 AIBINN CACH
AIRDIGE 7 CACH LESTAR FODLAI.

What is the most difficult of household compensations according to Irish law of the wonderful items of chattels which they do not acquire (in exchange) for profit and their pilgrimage (while being abroad?). Beautiful nuts and drinking horns⁸⁸⁶ that no-one may accept as a pledge except kings or a bishop or a man with God's grace. They have an equal compensation for every class of person, whatever he has (amounting to) wealth (sufficient) to acquire them, beautiful nuts and horns and the stand of every cup and every dispensing vessel.

§ 40

CNOE GNOE 7 CUIRNN, AILIT ARTECHTA FUILLME GILL .I. CUIC SEOTU BESSID
FIU MA DOROTSAT DAR CENN NEICH. IS ECCEN A N-ATHGIN FO COIBNE FRIA
COLLNA SET NO SET ADGO FECHEM DARA N-ESSE CONID CETRARDA I N-ÖEN;
CUICED IND AITHGIN DIB-SEOM. FERTHAIR CACH AE DIA .X.MAIDE
HUARAILIU. AIMIND CACH AIRDIGE 7 CACH LESTAR FODLA, DIRENAITER
COMDIRE A FUILLEMAIB GILL. AILID .III. SEOTU BESDA FIU INNA FUILLEM.
CETHRAMAD AITHGIN A COLLNA.

⁸⁸⁵ do *cach* [recht] rodbi? Cf. § 43 (the closest) and §§ 3, 16, 37, 41, 42, which all support supplying *recht*; also, for *rodbi*, *CG* 283: Gell cóic sét di neoch rodbí, di arggut nó umu nó ibur, 'of whatever he has', n. 283, 32.

⁸⁸⁶ F. Kelly, 'Drifting on the Ocean: Are Old Irish *cnoe gnáe* 'beautiful nuts' to be identified as sea beans?', he remarks that *cuirn búabail* (ornamented drinking horns) is regularly paired with *cnoe gnáe* in legal texts. (p. 215).

Beautiful nuts and horns, they entail the proper interest payments of a pledge, i.e. five chattels that are equal in value with it (the pledge?) if they have fallen forfeit on anyone's behalf. It is necessary to make restitution for them according to the proportion of their original articles of property or an article that the creditor chooses in their place so that it is fourfold for one; the fifth is the restitution of them. Each of them is paid on the tenth day [one] from the other. The stand of every cup and every dispensing vessel: equal compensation is paid from interest payments of a pledge. It entails three chattels which are equal in value as them for their interest. The fourth is the restitution of the original article.

§ 41

TĒCHTA FUILLEMA GILL ESCRA LA FÉNIU, DO-SLI .U. SEOTU. TRENIB COBFOD(L)AILE DI-RENAR GELL: TRIAN DI SĒTAIB FAITHCHE, TRIAN DI SĒTAIB TIGE, TRIAN DI COLAIND FADESIN LA AITHGIN A CHOLLNNAI. COMDIRE A ESCRA DO CECH RECHT OTHA AIRIG ITIR DA AIRIG CO RUICCÉ RIG RUIRECH. .III. *SEOIT* I NDIRE N-ESCRA BOAIRECH 7 OCCAIRECH .I. SET FAITHCHE 7 SET TREBE 7 SET DIA COLAIN FODESSIN BESSID FIU LA ATHGIN A COLLNA.

The proper value of the interest on a pledge (consisting) of an *escra* (a short-stemmed goblet)⁸⁸⁷ according to Irish law, it incurs five *séts*. Compensation for a pledge is paid in thirds of division: a third of chattels from the infield, a third of chattels from the household chattels, a third from

⁸⁸⁷ Cf. *CIH*ii. 554. 23–4: EASCRA CUACH CINGIT .i. escra .i. soithech, 7 deifir eitir eascra 7 cingit .i. cos gairit asin escra 7 cos fada asin cingit. *CIH*i. 32. 5, 34. 5: ESCRA

the (same kind as the) original article, together with restitution of the original article. Equal compensation for his goblet for every class of person from ‘a noble between two nobles’ up to a king of great kings. Three *séts* for the compensation of a goblet of a *bóaire* and an *ócaire*, i.e. a chattel of the infield, a chattel of the house, and a chattel of the same nature as the original article which is equal in value to it, together with restitution of the original article.

§ 42

TECHTA CINGITTE, IS COMDIRE DO CACH RECHT. DIRENAR TRI SETAIB,
LUCHAIRSET FAITHCHE, LUCARSET TREIBE, LUCARSET DIA CHOLAINN
FADEISIN BEISID FIU LA AITHGIN A CHOLLNA.

The proper pledge-interest of a *cingit* (long-stemmed goblet): the compensation for it is the same for every class of person. Compensation is paid at the rate of three *séts*, a ‘splendid chattel’⁸⁸⁸ of the infield, a ‘splendid chattel’ of the house and a ‘splendid chattel’ of the original material (and) of the same value, together with restitution of the original article.

§ 43

TECHTE FUILLEMA GILL ĀINE TRENEGE LA FÉNIU: DIRENAR TRIB SETAIB
TRENIB COBADAILE SET, NA DIRENAR ĀN LA FÉNIU ACHT HUMA NO ARGAT
NÓ OR LA SET BEISSID FIU INA MUIN LA AITHGIN A COLLNA, SECH⁸⁸⁹ IS
COMDIRE DO CACH RECHT RODABII DI FOLUD A N-ET, INGE MAD LA RIG NO

⁸⁸⁸ What a *lucha(i)rset* was is unknown; see *EIF*591 n. 259. Could it mean any shining or brilliant article, such as a glass or piece of precious metal?

⁸⁸⁹ Binchy, ‘IE. **Q̄E* in Irish’, 88: reads [*s]echis* and translates ‘In Irish law the legal interest on a pledged goblet with three handles is compensated for by [payment of] three *séoit*, ... and it is the same mulct for every class [of person]’.

EPSCOP. MAD LA SUIDIU, IT COMDIRE FRI GELL CHUAICH RIG NO EPSCUIP;
NOCHIS DEICH SETAIB DIRRENAIT^{ER}-SIDE COMACCOBRUI SET LA AITHGIN.

The proper value of the interest on a pledge (consisting) of a tripartite cup according to Irish law: compensation is paid at the rate of three *séts* according to the thirds of the division of chattels, and compensation is not paid for a cup except for bronze or silver or gold, together with a chattel which is equal in value in addition to it, together with restitution of the original article, and it is equal compensation to every class of person whatever⁸⁹⁰ (made) from the material of their acquisition, unless they be in the possession of king or bishop. If they be in their possession, they are of equal compensation as the pledge (consisting) of a bowl⁸⁹¹ of king or bishop, and it is at the rate of ten *séts* that compensation is paid for the latter, in desired chattels, together with restitution.

§ 44

LETHFUILLEM GILL CAUICH CACH RIG DO CHUUCH CACH AIRECH OTHA
SUIDIU CO RRUICE AIRIG ITIR DA AIRIG.

Half the interest on a pledge (consisting) of a drinking-bowl of any king belongs to the drinking-bowl of every noble from the latter as the *aire* between two *airig*.

⁸⁹⁰ Cf. § 39.

⁸⁹¹ This seems to imply that a *cauich* is normally of higher value than an *ān*. In *Thes.* i. 4. 8 it glosses *scyphus* (in Latin a loan from Greek), which is used e.g. for wine-cups.

§ 45

TRIANFUILLEM GILL CUICH RIG DO CUUCH CACH OCCAIRECH 7 CECH
BOAIRECH.

A third of the interest on a pledge (consisting) of a king's drinking-bowl for the drinking-bowl of every *ócaire* and every *bóaire*.

§ 46

LETHFUILLEM GILL CUICH CACH EPSCUIP DO CHUUCH CACH CRUIMTIR.
TRIANFUILLEM GILL EPSCUIP DO CHUUCH CACH DECOIN.

Half of the interest on a pledge (consisting) of a bishop's drinking-bowl for the drinking-bowl of every priest. A third of the interest of a bishop's pledge belongs to the drinking-bowl of every deacon.

§ 47

FOR COMDIRE ROSUIDIGED FUILLEM GILL CUICH CACH COMGRAID O SUIDIU
DI GRADAIB ECALSA OLCENA.

The interest on a pledge (consisting) of a drinking-bowl of every equal grade of the other grades of the church from that out has been fixed at equal compensation.⁸⁹²

⁸⁹² This and the preceding paragraph have also been translated by L. Breatnach, 'The Early Irish Law Text *Senchas Már* and the Question of its Date', 17: 'Half the pledge-interest due for the goblet of every bishop for the goblet of every priest. A third of the pledge-interest of every bishop for the goblet of every deacon. At the same [level of] compensation has been fixed the pledge-interest due for the goblet of every corresponding grade of the church grades from that on'.

§ 48

NI ASSU ARAILIU I FUILLEMAIB GELL LA *FÉNIU*, ALLMAIRE SET, LONGA CAIRE,
SREIN OIR NO ARGIT, AR TECHTA⁸⁹³ FUILLEM[A] GILL LONGE CAIRE
CACHAIRECH FEBE ROSUIDIGED FOR .X. SETAIB LA AITHGIN; MAD LONG
CAIRE RIG, ROSUDIGED FOR XX.IT SET LA AITHGIN.

Other (cases) among interests of pledges according to Irish law are no easier: foreign chattels, ship cauldrons⁸⁹⁴ (?), bridles of gold or silver, for the proper value of the interest of a ship cauldron belonging to a noble has been fixed at ten *séts* together with restitution; if it be the ship cauldron of a king, it has been fixed at twenty *séts* together with restitution.

§ 49

MAD LONG CAIRE OCCAIRECH *NO BOAIRECH*, ROSUDIGED FOR .U. SETAIB LA
AITHGIN.

If it be a ship cauldron of an *ócaire* or a *bóaire*, (the interest) has been fixed at five *séts* together with restitution.

⁸⁹³ MS *artechta*, Cf. § 40.

⁸⁹⁴ Imported or shaped like a ship? It may be connected with a *lethól* in § 50; but whereas it is normally relatively valuable and the *fuillem* varies according to status (20 s. king; 10 s. noble; 5 s. commoner), the *fuillem* of a vessel containing a *lethól* is always 5 s., i.e. does not vary with status. Presumably, a normal *long caire* contained more than a *lethól*. In all cases, §§ 48, 49, and 50, it is a phrase, 'ship of a cauldron', rather than a compound, 'ship-cauldron'. *DIL*: *long caire* 'some sort of cauldron', *long* 'vessel, container (usually for holding liquid), cauldron, some sort of cauldron', cp. *lón choire* 'Speisekessel' *ZCP* xii 273.1 (LL 14608), *lón* 'provision(s), food, victuals, sustenance, feast'; *coire* 'cauldron, pot'.

§ 50

ROSUIDIGED FOR .U. SETAIB FUILLEM CACHA LETHOILE CIP RECHT LAISINDA
TECMAL. IS FOR ATHGABAIL .U. ATA INBUID A LOINGE CAIRE DO CACH;
FERTHAIR A N-AITHGIN DIA MIS. FERTHAIR A NDIRE DIA MIS AILE, AIR IS
INAN⁸⁹⁵ MUNIB SET ROSUIDIGTHE CO RRICCE A MMESS FRI THORBA A
MMESSAIB FOGNOMA.

The interest of every [cauldron] of half an *ól*-measure,⁸⁹⁶ whatever class of person may happen to own it, has been fixed at five *séts*. Everybody's period of his ship cauldron is as for distraint of five days. Their restitution is paid in one month. Compensation is paid for them in another month [i.e. after two months], for it is the same, if it is not a chattel that has been fixed, until they are valued by the profit according to the valuations of use.⁸⁹⁷

§ 51

NI ASU ARAILE HI FUILLEMAIB *GELL LA FÉNIU*, SRIAN OIR NO AIRGIT CECH⁸⁹⁸
AIRECH; ROSUIDIGED I COMDIRE; IMCOMUS GELL DIRENAITER ACHT IS
ECHAIB.

⁸⁹⁵ Inserted by a glossator.

⁸⁹⁶ N. McLeod, 'The *ól* standard drinks in medieval Irish law', *AusCeltJ5* (1996-7), 5-8.

⁸⁹⁷ The payment can consist of work, the value of which has to match the debt. The *fuidir* and base-client would fit into this category.

⁸⁹⁸ MS: *cecha*.

Another thing among the interests of pledges according to Irish law is no easier, a bridle of gold or silver of any noble; it has been fixed at equal compensation; it is according to proportionate valuation that their compensation is paid, but (the payments consist) of horses.⁸⁹⁹

§ 52

AILID SRIAN CACH(A) OCCAIRECH 7 CECH BOAIRECH ECH CUMAILE ECHTA
INNA FUILLEM LA AITHGIN SREIN.

The bridle of every (grade of) *ócaire* and every *bóaire* entails a horse worth a ‘*cumal* of slaughter’⁹⁰⁰ as its interest, together with restitution of the bridle.⁹⁰¹

§ 53

SRIAN CACHAIRECH FEIBE, AILID-SIDE HECH CUMAILE .X. SET INNA FUILLEM
LA AITHGIN SREIN.

The bridle of every *aire feibe*,⁹⁰² it entails a horse worth a *cumal* of ten *séts* as its interest, together with restitution of the bridle.⁹⁰³

⁸⁹⁹ *Imcomus*, dative without preposition (in proportion to), R. Thurneysen, *Irishes Recht* § 11 ‘Bemessung’; D. A. Binchy, ‘Bretha Crólige’, § 33, one thing is compared to another: *fo-fria in-chommu*.

⁹⁰⁰ Cp. *CIH*1545.38 (SM 26. Status-tract), where *ech cumaile ēchta* is glossed *.i. eich is fiu cumail do-berar i nn-ēiric iar n-ēcht* ‘a horse [reading *ech*] worth a female slave which is given in wergild after committing a deed of violence’.

⁹⁰¹ The value of the *cumal* has to be less than 10 *séts* because all of the following grades are higher. 1 *cumal* should be 6 *séts* here.

⁹⁰² Lit. ‘noble of excellence’.

⁹⁰³ Ten *séts* would usually equal 5 cows, with each cow being worth two *séts*, thus one *cumal* being worth 6 *séts*. cf. *Críth Gablach*. Our text has different values assigned to the *cumal*.

§ 54

AILID SRIAN CACH RIG ECH CUMAILÉTRICAT SET INNA FUILLEMLA AITHGIN,
ACHT NI CON-DAILET ILGNIMA. FOR CUICTHE ROSUIDIGED AITHGIN SREIN
CAICH; FOR .X. ROSUIDIGED A DIRE.

The bridle of every king entails a horse worth a *cumal* of thirty *séts* in its interest, together with restitution, except for something which many functions share/participate in.⁹⁰⁴ Restitution of everyone's bridle has been fixed at a period of five (days); its compensation has been fixed at ten (days).

§ 55

INGILLE CRESSA CACH OCCAIRECH₇ CACH BOAIRECH: AILID SET INNA MUIN
LA AITHGIN.

A part-pledge (consisting) of a girdle of every (kind of) *ócaire* and every *bóaire*: it entails a chattel in addition to itself, together with restitution.⁹⁰⁵

§ 56

INGILLE CRESSA CACH AIRECH FEIBE: DOSLI TRI SEOTU INNA FUILLEM LA
AITHGIN.

⁹⁰⁴ A gloss implies that this case addresses a pledge given on behalf of a group, each member of which pays separately. One penalty will not compensate for more than one fault.

⁹⁰⁵ Here starts a section dealing with articles given in pledge that, to some extent, fall short of the value of the thing they secure and for which they were given in pledge. *DIL: ingille vs lángille*. The implication is that the girdles have metal buckles whose value varies.

A part-pledge (consisting) of a girdle of every *aire feibe*: it incurs three *séts* as its interest, together with restitution.

§ 57

INGILLE CRESSA CACH RIG: DOSLI .U. SEOTU LA AITHGIN.

A part-pledge (consisting) of a girdle of every king: it incurs five *séts*, togetherwith restitution.

§ 58

LANGILLE CRESSA CECH OCCAIRECH ⁷ CACH BOAIRECH: DOSLI TRI SET
(SEOTU?) LA AITHGIN.

A full pledge (consisting) of a girdle of every (grade of) *ócaire* and every (grade of) *bóaire*: it incurs three *séts*, togetherwith restitution.

§ 59

LANGILLE CRESSA CACH ARIG FEIBE: DISLI .U. SEOTU LA AITHGIN.

A full pledge (consisting) of a girdle of every *aire feibe*: it incurs five *séts*, togetherwith restitution.

§ 60

LANGILLE CRESSA CACH RIG.⁹⁰⁶ DOSLI .X. SEOTU LA AITHGIN.

A full pledge (consisting) of a girdle of every king: it incurs ten *séts*, togetherwith restitution.

⁹⁰⁶ *Ri* added later over an erasure.

§ 61

INGILLE OTHA LETH N-UN[GE] CO RUICCÉ UNGE, LANGILLE OTHA SUIDE.

A part-pledge from half an ounce up to the ounce, a full pledge from that out.

§ 62

INBUID CRESSA CACHOCCAIRECH 7 CACHBOAIRECHETERAITHGIN 7 DIRE FOR
CUICTHE, 7 FOR TREISSI DO AIRECHAIB FEIBE EITER AITHGIN 7 DIRE.

The period of time for a girdle of every (rank) of *óaire* and every (rank) of *bóaire*, including both restitution and compensation (has been fixed) at five (days), and at three days for nobles, including restitution and compensation.

§ 63

FOR UÍN INBUID CRESSA CACH RIG ETER AITHGIN 7 DIRE. TRENIB COBADAILE
SÉT DIRENAR IN FUILLEM-SEO: TRIAN DO ETUCH, TRIAN DO SETAIB
ACCOBAIR, TRIAN DI ADBUR DIA MBI LA AITHGIN.

On a period of one day is prescribed for girdles of every (grade of) king, including restitution and compensation. This interest is paid in the three parts into which chattels are divided: a third of clothing, a third of chattels of desire, a third of the material of which it consists, together with restitution.

§ 64

TECHTE FUILLEMA GILL AIRM LA FÉNIU: DIRENAR LANDIRE DO FENNID 7
CAITHCHID CRICH, DAIRT CACH CUMLAINN DO CACH FIR IMGONA ROI DO

CACH DILLA A GRESSA DO CACH RIG. NOCH IS ED AN LANDIRE SET CACHA
TRISSE CORUICCE TEORA TRISSE. NI AILE BES MO A CUIMLECHTAIB FENE.
OTHA SUIDIU, MA FOLLOGETHAR, DOSLI LANLOG ENECH CAICH FO MIAD LA
AITHGIN FUILLEMA.

The proper value of the interest on a pledge (consisting) of a weapon according to Irish law: full compensation is paid to a champion and a defender of territories,⁹⁰⁷ a yearling heifer for every equally matched fight is due to every man of dueling on a field of combat, to everyone who drives off attacks from every king.⁹⁰⁸ And the full compensation for it is a chattel every three days until the end of nine days. It does not entail more according to the customs of the Irish. From that out, if he is neglectful, it incurs everyone's full honour-price according to their rank, together with restitution of the interest.

§ 65

ATAAT TRIAR I TUA[I]TH NAD AILET FUILLEM A N-AIRM I MBESSAIB GILL LA
FÉNIU – IMTA CIPE FRISA NNDEROTH CIA ROBRIATHAR – ACHT AITHGIN:
BRIUGU, FILE(D), 7 FER DO-AIRGAIR A BITHERCHUĪLIUD AR IS SRUITHIU DI
SUIDIB A NGOBOLLORGGGA OLDATE A N-AIRM, AR DOSLIAT-SIDE TRI SEOTU
INNA FUILLEM.

⁹⁰⁷ *DIL*: *fénnid* (member of the *fián*, warrior, champion), *do fennid* 7 *caithchid crích* (the champion and combatant), *caithchid* (warden of the marches, defender of border territories), *crích* (boundary, limit (of territory)). Compare *TBC*: Cú Chulainn acting as the champion, fighting one opponent at a time. Note also: a level ground is essential for a judicial duel but not for the battlefield. Lawsuits can take place out in the open and culminate in a judicial duel, i.e. ordeal by battle. Link to *cairde*?

⁹⁰⁸ *DIL*: 1 *dó-la* (puts away, expels, rejects), cp. *díl* VN of 1 *do-lá* (I legal act of discharging, taking the place (?), II general sense (a) requital, recompense, retribution, atonement, (b) satisfaction, act of satisfying (a debt); for *cách* in the sense of 'he who' as antecedent of a relative clause see *DIL* s.v. (C column 5.29 ff.).

There are three persons among the laity who, in the customs of pledge, are not entitled to interest for their weapon according to Irish law – it is so whoever it may be in respect of whom it has lapsed, though it be damaged – only restitution [i.e. they only get restitution, no interest]. A hospitaller, a poet, and a man who promises his perpetual chastity,⁹⁰⁹ for their forked staffs are more precious for them than their weapons, for they incur three *séts* as their interest.⁹¹⁰

§ 66

NACH DUNE DORATA A NGELL, MAD DI CHOMAÍN FIAD FIADNAIB, IS DILES DO
FIR DIA DABUIR, NECH MA DIROTH, CINI TABARTHAR A LLOG, AR IS DI
RUIDILSIB FENE.

Any person who may have given the pledge, if [given] as a boon (i.e. on behalf of someone else) in the presence of witnesses, it belongs indefeasibly to the man to whom it is given, if it has fallen forfeit, although its value is not given, for it belongs among the immunities of the Irish.

§ 67

NACH DUNE DORATA A GELL 7 FOCOISSLE IARUM I CAIN NO CHAIRDDE,
DIRENAR AMAIL BITH SET INNA BETH CUIT DO.

Any person who may give his pledge and subsequently takes it away within [the period of] a *cáin* or a *cairdde*, compensation is paid as if it were a chattel in which he has no share.

⁹⁰⁹ On fer do-airgair a bithreachuiliud see Uraicecht na Ríar, ed. Breatnach, 123-4.

⁹¹⁰ Reading *file* for OIr. *fili*; reading *ar it sruithiu* for *are sruithiu*.

§ 68

NACH DUNE DOMBERA A GELL 7 FOCHOISLE NA BI I CAIN NO CHAIRDDE
DIRENAR LANLOG ENECH IND [FH]IR ARA FOXLAITER LA TAISECC IN GILL
INNA DON IN CETNA.

Any person who may give his pledge and removes it, and it is not in a *cáin* or a *cairdde*, the full honour-price of the man from whom it is removed is paid, together with restitution of the pledge to the same place.

§ 69

NACHDUINE DOBERA A GELL I NDILMAINE 7 DANIC AITHRIGE DE RIA TRISE 7
FODCOISLE, NADBI GIALI NA ATHGABAIL DODBOING, ALID SET INA MUIN
BESID FIU LA TAISECC IN GILL INNA DON IN CETNA. IS FOR SUNN ROSUIDIGED
IMCHOMUS GELL LA *FÉNIU*.

Any person who may give his pledge in immunity and repentance about it comes to him before (the end of) three days and he removes it, and there is no hostage or distraint which enforces it, it entails a chattel in addition to it which is equal in value, together with restitution of the pledge into the same place. It is on this basis that relative estimation of pledges has been fixed according to Irish law.

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