

# Women and the Law in Early Ireland

*Donnchadh Ó Corráin*

Donnchadh Ó Corráin, 'Women and the law in early Ireland', Mary O'Dowd and Sabine Wichert (ed), *Chattel, servant or citizen: women's status in church, state and society=Historical Studies* 19 (Belfast 1995) 45–57

In the case of early Ireland we have no marriage charters, no records of law-suits concerning property, and thus virtually no prosopographical data about marital property in the broadest sense or its assignment. What we do have is very detailed treatment of christian marriage in the Latin law tracts<sup>1</sup> and, in the vernacular law, detailed treatment of divorce and the division of marital property in the case of divorce. We also have a good deal of information on a woman's legal position, the relationship with uxorilateral kindred, women's relationships and responsibilities in regard to children, women and personal injuries (including rape and marital violence).<sup>2</sup> This material occurs in extensive vernacular legal tracts written for the most part between 650 and 850, and these are equipped with an elaborate apparatus of gloss and commentary that refers sometimes to this period, and often to much later times. (Some of the commentaries are best regarded as law tracts in their own right that refer to a period later than that of the classical tracts.) These materials can be supplemented by reference to the contemporary genealogies (of which there is an abundance, though material on women is relatively thin),<sup>3</sup> the *Banshenchas* 'History of women' a twelfth-century tract, in prose and verse recensions, listing famous women and their marriages),<sup>4</sup> and to a very extensive vernacular literature, prose as well as poetry,

1. *Hibernensis*, books 45 ('De quaestionibus mulierum') and 46 ('De ratione matrimonii'), F. W. Wasserschleben (ed.), *Die irische Kanonensammlung* (2nd. ed., Leipzig) 180–95 [hereafter cited as Hib.]; Donnchadh Ó Corráin, 'Marriage in early Ireland', Art Cosgrove (ed), *Marriage in Ireland* (Dublin, 1985) 5–24 has references to the more recent literature.

2. Most of this material is conveniently collected and discussed in R. Thurneysen, D. A. Binchy, et. al., *Studies in early Irish law* (Dublin, 1936) [hereafter SEIL]. The central text, 'Cáin lánamna', is edited and translated into German by Thurneysen, *ibid.* 1–80. All these texts have been re-edited in D. A. Binchy's monumental *Corpus iuris Hibernici* (Dublin, 1978) [hereafter abbreviated as CIH]. These materials are ably discussed in Fergus Kelly, *A guide to early Irish law* (Dublin, 1988), 68–79, 134–37.

3. M. A. O'Brien, *Corpus genealogiarum Hiberniae* (Dublin, 1967) is an edition of some of the earliest materials.

4. M. E. Dobbs (ed.), 'The Banshenchas', *Revue Celtique* 47 (1930) 283–339; 48 (1931) 163–234; 49 (1932) 437–89; see Muireann Ní Bhrolcháin. 'The manuscript tradition of the Banshen-

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including a fairly extensive wisdom literature.<sup>5</sup> I will refer briefly to one literary text: the introduction to the recension of *Táin Bó Cúalnge* in the Book of Leinster, namely, the famous pillow-talk between king Ailill and queen Medb in Cruachain.

A word about the legal materials. These are not the unaltered records of a pagan past, the oral teaching of pagan lawyers, and thus an artifact of the Celtic culture, if not of a remote Indo-European antiquity. This peculiar understanding of Irish law held the field until recently amongst scholars who saw the texts as pagan, with a light christian varnish.<sup>6</sup> In fact, the laws are the product of the self-confident and vigorous clerical culture of early Ireland that consciously created a christian law for a christian people.<sup>7</sup> The encounter between inherited legal ideas, the law of the Pentateuch in the hands of skilful exegetes, and the general christian inheritance in law led to rapid legal developments and a remarkable and independent juris-prudence. For this reason, I will be pointing to explicitly biblical, Roman, patristic and papal sources for some aspects of the law governing women. Here I propose to deal only with three points: the contractual nature of marriage and the lawyers' concern with property, the law concerning rape, and the rules about female inheritance.

### THE CONTRACTUAL NATURE OF MARRIAGE

The lawyers writing in the vernacular discuss three principal kinds of marriage: *lánamnas comthinchuir* 'marriage of common contribution'; *lánamnas for ferthinchur* 'marriage on man contribution'; *lánamnas for bantinchur* 'marriage on woman contribution'. The concern of the lawyers is with property and status. This becomes evident even in the introduction to the main tract on marriage where they dwell on

chas', *Ériu* 33 (1982) 109–35; eadem, 'The *Banshenchas* revisited', Mary O'Dowd & Sabine Wichert (ed.), *Chattel, servant or citizen: women's status in church, state and society=Historical Studies* 19 (Belfast 1995) 70–81

5. For some more conjectural reflections on women in early Irish literature, see Charles Bowen, 'Great-bladdered Medb: mythology and invention in *Táin Bó Cuailnge*', *Éire-Ireland* 10 (1975) 14–34; Lisa Bitel, "'Conceived in sins, born in delights": stories of procreation in early Ireland', *J Hist Sexuality* 3 (1992) 181–202.

6. K. McCone, *Pagan past and christian present in early Irish literature*, Maynooth Monographs 3 (Maynooth, 1990) 84–106.

7. Donnchadh Ó Corráin, 'Irish law and canon law', Próinséas Ní Chatháin & Michael Richter (ed.), *Irland und Europa: die Kirche im Frühmittelalter* (Stuttgart 1984) 157–66; idem, 'Irish vernacular law and the Old Testament', Próinséas Ní Chatháin & Michael Richter (ed.), *Irland und die Christenheit* (Stuttgart 1987) pp 284–307; Donnchadh Ó Corráin, Liam Breatnach & Aidan Breen, 'The law of the Irish', *Peritia* 3 (1984) 382–438; Liam Breatnach, 'Canon law and secular law in early Ireland: the significance of *Bretha nemed*', *ibid.* 439–59; idem, 'The ecclesiastical element in the Old-Irish legal tract *Cáin Fhuithirbe*', *Peritia* 5 (1986) 36–62; idem, 'The first third of *Bretha nemed*', *Ériu* 40 (1989) 1–40; the role of the monastic men of learning as lawyers is discussed in Donnchadh Ó Corráin, 'Nationality and kingship in pre-Norman Ireland', T. W. Moody (ed.), *Nationality and the pursuit of national independence*, *Historical Studies* 11 (Belfast, 1978) 1–35.

the general characteristics of relationships sharing a common life and a common economy (abbot and *manaig*, teacher and pupil, man and wife):

*Comdíles do cách díb cia tarta di araile, cia imarbara cách díb ar araile cen elguin, cen taíde. As-renar aithgin cach díchmairc cairighther co troscud acht i n-eclais. Aithgin olchena cach díchmairc cairighther co imchim troiscthe nó é lud dligid. Cach taíde, cach elguin, cach díchmairc cairighther follaighther, is cona díre do-bongar.*<sup>8</sup> ‘Equally exempt for each is whatever one of them may have given the other, whatever one of them may have used as against the other, without violent crime, without stealth. Everything taken without permission that is complained about is repaid by simple replacement of the object until the matter reaches the legal remedy of fasting,<sup>9</sup> except in the case of the church. Repayment by simple replacement of what is taken without permission and complained about is all that is required until evasion of the legal obligations arising from fasting or legal default. Anything taken by stealth, by violent crime, anything taken without permission that is complained about and ignored, is levied with its penalty fine’.

This sets out the basis of the marriage partnership: the couple are partners in a joint enterprise, in which they invest, in different proportions, and in which their property-nexus is regulated as in similar relationships.<sup>10</sup>

I cite the relevant texts in respect of the first two types of marriage (the third, that of the marriage of heiresses, is a special case, to be dealt with later):

*Lánamnas comthinchuir: mad co tír cethra intreb mad comsáir comthéchta a cuma lánamnusa— is don bein sin as-berar bé cuitchernsa—nibi cor cor nechtar dá lína sech araile inge curu lesaigter a cumthus. It é-side in so: comul comair fri coibne téchta in tan nád bí occaib fadesin comobair trebtha; fochraic tíre; tionól cua; comull sollumun; síl cethra do luaig; lánad treib intreib; comul comsa; creic neich do-da-esaib do toischidib. Cach cunnrad cen díchell, sochur sochubus iarna coir coitechta, co n-imaitiu i neoch crenar amal mbes selb neich renar and.*<sup>11</sup> ‘Union of common contribution: if it is a

8. CIH 504; SEIL, p. 3, §3. Thurneysen (ibid. 4) makes the odd suggestion that the Irish lawyers list all such legal relationships ‘because definition is foreign to the Irish’.

9. A formal hunger-strike by which a plaintiff forces a defendant (usually of higher rank) to initiate a legal settlement of his claim; for details see R. Thurneysen, ‘Das Fasten beim Pfändungsverfahren’, *Z Celt Philol* 15 (1925) 260–76; D. A. Binchy, ‘A pre-Christian survival in mediaeval Irish hagiography’, D. Whitelock et al. (ed.), *Ireland in early mediaeval Europe* (Cambridge 1982) 165–78.

10. cf. the implicit comparison between divorce and the parting of a superior from his church: Ó Corráin, ‘Irish law and canon law’, 161–64.

11. CIH 505–06; SEIL18–19 §5.

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union with land and stock and household equipment, and if their condition of marital relationship is one of equal status and equal propriety—and a woman in such situation is called a woman of joint dominion—no contract of either is a valid one without the consent of the other, except for contracts that benefit their establishment. These are: an agreement for common ploughing with proper kinsmen when they do not themselves have a full ploughing team; the leasing of land; getting together food for a coshering; getting food for feast-days; the buying of young stock; outfitting the household; making an agreement for joint husbandry; the purchase of any essentials that they lack. Every contract shall be without neglect, an advantageous contract, conscientious, in accordance with right and propriety, with acknowledgement on both sides that the ownership of what is acquired belongs to the person whose property was alienated to acquire it.’

*Lánamnus mná for ferthinchur: is cor a chor in fir sech in mbein acht reic étaig bíd; rec bó cērech mad bé n-urnadma nab cétmunnter. Mad bé cétmunterasa téchta, comaith comcheniúil—sech is comcheniúil cach comaith—fo-fuasna-ide a churu uile mad baith—ar ní-said dílse for diubirt ná fogurrud—conda-tathbongat a maic.*<sup>12</sup> Union of a woman on a man’s contribution: the man’s contract is a valid contract without the wife’s consent, except for the sale of clothing and food; and the sale of cattle and sheep if she is a duly contracted wife who is not a *cétmuinte* (principal wife). If she is a proper *cétmuinte* equally good and equally well bred—for everyone of equal goodness is of equal birth—she impugns all his contracts if they are foolish—for validity does not sit on cheating and on what is forcefully protested against—and her sureties annul them.

The most formal type of marriage is a contract brought about by a procedure called *airnaidm* ‘binding, tying’ (the term is the verbal noun of the verb *ar-naisc* ‘to bind’). The force of the pre-verb *ar* is a little uncertain: it may mean to ‘bind forward’ but it more probably means ‘to bind publicly’. This is a formal contract between two families marked by the exchange of property. The term used for the property paid by the groom, in the first instance to the father or legal representative of the bride (what the anthropologists call bridewealth), is *coibche*. This word is an innovation that displaced the older term *tinscra*, associated with the older type of marital contract, *lánamnus for ferthinchur*. *Coibche* originally meant ‘contract’, and shifted semantically to mean ‘marriage contract’, and then the ‘consideration’ or principal external ‘consideration’ of the contract, the bridewealth, or, to use the Roman law term, *donatio propter nuptias*. This semantic shift underlines the contractual nature of the proceeding. *Airnaidm* completes the contract: it was not necessary for less formal

12. CIH 512; SEIL 45–46 §§21–22.

kinds of marital relationships. Like other contracts, its execution is guaranteed by others.<sup>13</sup> The guarantors were usually more exalted personages than the parties to the contract. Others members of society, then, had an interest in seeing that the conditions of the contract were observed and had a legal role in suing out a woman's rights in marriage.

Two things are evident from the texts cited: the lawyers are preoccupied with the need of the couple to be free and equal and, in the most formal type of marriage, formal payments are made by both parties. These conditions derive from late Roman law—the constitution of Majorian of 458 (abrogated by Leo and Severus in 463), as interpreted by pope Leo the Great in his letter to Rusticus, bishop of Narbonne in 459. This letter is cited at length in the *Hibernensis*, appears in the *Hispana* (first half of the seventh century), and in the fifth-century collection of Dionysius Exiguus.

*Nuptiarum autem foedera inter ingenuos sunt legitima et inter aequales ... nisi forte illa mulier et ingenua facta et dotata legitime et publicis nuptiis honestata uideatur.*<sup>14</sup>

It is evident that, in the most formal type of marriage, the Irish lawyers prescribe the two payments made in late Roman law and custom—*donatio propter nuptias* and *dos*. Hence the technical term *lánamnas comthinchuir* 'marriage of common contribution', implying not equality of total assets, but equality in marital payments in the way the *donatio propter nuptias* and *dos* were equal in late Roman usage. The third condition of Leo's Letter—*publicis nuptiis honestata* i.e. that the contract be a public, and not clandestine—is met by the term *airnaidm* itself. By definition, this is a contract with witnesses and guarantors for both sides and the term may well mean 'public contract'.<sup>15</sup> It is clear, then, that *lánamnas comthinchuir* is essentially a chris-

13. The expression *conda-tathbongat a maic* 'and her sureties annul them' (cited above) indicate that the guarantors had an on-going role in the observance of the terms of the *airnaidm* rather than the simpler duty of seeing to it that the terms of its dissolution were equitable. cf. *Is mese cach ben a uccu im la mac beith a cáin fa la fine fa la fer a sliasta, acht cétmuinter. Ar is la cach cétmuinter téchta a cáin-side, manis-coirbet a anfolaid lánamnais; a n-am inda-coirbet, is ann is meise side imscartha fris* (CIH 443=R. Thurneysen, 'Irisches Recht', *Abh Preuss Akademie Wiss, Phil-Hist. Kl. 2.*, Jhrg 1934 (Berlin 1931) 34, §34) 'Every woman is competent to decide whether the suing out of her rights should belong to her guarantor, her family, or the man she is sleeping with, except for a *cétmuinter* (principal wife) for her suing out of rights belongs to every proper husband (*cétmuinter*) unless his misdeeds pollute her. When they do, she is entitled to divorce him'.

14. PL 54, 1205-05; Hib. 46:19 (Wasserschelben, *Kanonensammlung*, p. 190).

15. A nice parallel for Irish law is found in *Lex Romana Burgundiorum* (dating from the beginning of the sixth century): *Nuptiae legitimae contrahuntur, si conventu parentum aut ingenuorum virorum, intercurrente nuptiali donatione, legitime celebrentur. Quodsi pares fuerint honestate personae, consensus perficit nuptias, sic tamen ut nuptialis donatio solenniter celebretur: aliter, filii exinde nati legitimorum locum obtinere non poterint* (MGH, *Leges in Quart. Sect. I 2 37 §§1-2*). This is a mixture of late Roman law, the Novel of Majorian, and the Letter of pope Leo I. Note that the semantic instability of *donatio/dos* also occurs in Irish material.

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tian Roman marriage and the more formal kind of *lánamnas for ferthinchur* has been reshaped by clerical thinking. Thurneysen and Binchy have both argued that *lánamnas comthinchuir*, the type of marriage treated of in greatest detail in *Cáin lánamna*, was the normal form of marriage in early Ireland.<sup>16</sup> If this is correct (and it seems to be), clerical re-formation of the institution of marriage was both radical and successful.

One of the more remarkable echoes of Roman law occurs in *Cáin lánamna* in regard to the improper repudiation of a wife and, again, it is concerned with property rather than morality.

*Mad coibche fir bein do-rata cid dia sétaib fadesin, is dílis don chétmuintir in choibche sin má ógaid a mámu téchta i lánamnas {gloss: ni ime tucad bean tara cend im inddliged to denam}. Is fiachach cach adaltrach do-thét for cend cétmuintire: as-ren lóg n-enech na cétmuintire.<sup>17</sup> ‘If he gives bridewealth to another woman, even from his own private property, that bridewealth is forfeit to his *cétmuintir* (principal wife) if she carries out her marital obligations {gloss: It was not because she did wrong that another woman was married ‘over her head’}. Every secondary wife [literally: adulteress] who comes ‘over the head’ of a *cétmuintir* is liable to penalty: she pays the honour-price of the *cétmuintir*’.*

These provisions do not derive from any traditional Irish law but from rules of Roman law that occur in the *Codex Theodosianus* and subsequently in the various recensions of the *Lex Romana Visigothorum* (whence they may have reached Irish lawyers). That will be evident from the following citation:

Codex Theodosianus III 16.1 (Mommsen, i 156): *In masculis etiam, si repudium mittant, haec tria crimina inquiri conveniet, si moecham vel medicamentariam vel conciliatricem repudiare voluerint. Nam si ab his criminibus liberam eiecerit, omnem dotem restituere debet et aliam non ducere. Quod si fecerit, priori coniugi facultas dabitur domum eius invadere et omnem dotem posterioris uxoris ad semet ipsam transferre pro iniuria sibi inflata.* ‘In the case of a man also if he should send a notice of divorce, inquiry shall be made as to the following three criminal charges, namely, if he wishes to divorce her as an adulteress, a sorceress, or a procuress. For if he should cast off a wife who is innocent of these crimes, he must restore her entire dowry, and he shall not marry another woman. But if he should do this, his former wife shall be given the right to enter his house by force and to transfer to herself the entire

16. R. Thurneysen, SEIL 20 (*Lánamnas comthinchuir* ist für den Verfasser offenbar gewissermassen die Normalehe; darum stellt er sie voran und behandelt sie ausführlicher als alle anderen’); D. A. Binchy, *ibid.* 210.

17. CIH 513; SEIL 49 §23.

dowry of his later wife in recompense for the outrage inflicted upon her'. [AD 331]

These parallels with Roman law point to the syncretistic activities of the early Irish clerical lawyers in devising an innovative law of marriage for their christian society. It goes without saying that other inherited usages in regard to marriage were tolerated in Ireland—as they were elsewhere in early medieval Europe—and the second type of marriage, *lánamnas for ferthinchur*, seems to preserve more of the characteristics of native marriage and of marriage as it was generally understood in northern Europe.

The marriage of an heiress, *lánamnas for bantinchur*, is a special case but one in which the general rule that property determines marital status holds good. I cite some of the relevant texts:

*Lánamnas fir for bantinchur: is i suidiu téit fer i n-uidiu mná ben i n-uidiu fir. Mad fer fognama is nómad a h-arbim don fir; don saill mad cend comairle cuindrig muintire fri comairle commirt ... Acht is fer do-renar a h-inchaib na mná mad lé in tothchus uile, inge mad sofoltachu in fer oldaas in ben, nó mad cáidiu nó mad saíre no mad airmidnechu*<sup>18</sup> 'Union of a man on a woman's contribution: in that case, the husband goes in the track of the wife and wife in the track of the husband. If he is a man of service he receives [on the occasion of a divorce] a ninth of the corn; and of the salt meat if he is a "head of counsel" who controls the people of the household with advice of equal standing [to that of his wife] ... But he is a husband who is paid honour-price in accordance with his wife's status if she holds all the property, unless he is more godly, more high-born or more estimable than she'.

*Ar cach recht la Féiniú acht óentríar, is lethlóg a enech dia mnaí: fer cen seilb cen tothchus lasmbí bancomarba, a inchaib a mná dí-renar side; fer in-etet tóin a mná tar crích, dí-renar a inchaib a mná; cú glas, dí-renar side a inchaib a mná is sí íccas a cinta, mad iarna urnadmaim nó aititen dia finib. It tualaing na téora mná so imoicheda cor a céle, connatát meisse recce ná crecce secha mná acht ní for-congrat*<sup>19</sup> 'In the case of all kinds of men in Irish law, except for three alone, their wives have half their honour-price: a man without land without property who is married to an heiress—he is paid honour-price according to the honour-price of his wife; a man who follows his wife's arse over a border<sup>20</sup>—he is paid honour-price according to the honour price of his wife; and a foreigner—he is paid honour-price according to the honour price of his wife;

18. CIH 515–16; SEIL 57 §29, 62 §31.

19. CIH 427; Thurneysen, 'Irisches Recht' 64 §4; D. A. Binchy, 'The legal capacity of women in regard to contracts', SEIL, 215.

20. i.e. a man who marries a woman from another kingdom and goes to live with her.

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she pays for his offences if she is contracted in marriage or recognised by her family. These three women are capable of impugning the contracts of their husbands, so that these latter are not competent to sell or buy without their wives, but they can do only what their wives authorise.’

This is the whole point of the spirited dialogue in the *Táin Bó Cuailnge*: king Ailill is a lackland and an outlander, and his spouse queen Medb is heiress-queen of Connacht and daughter of the high-king of Ireland—and thus his superior by birth. Even the term *coibche* is cleverly inverted in Medb’s speech:<sup>21</sup>

*Tucusa cor 7 coibchi duit amal as dech téit do mnaí .i. timthach dá fher déc d’étuch, carpat trí secht cumal, comlethet t’aigthi do dergór, comthrom do riged clí do fhindruinni. Cipé imress méla 7 mertain 7 meraigecht fort, ní fhuil díri nó eneclann duit-siu ind acht na fil dam-sa’, ar Medb, ‘dáig fer ar tincur mná atachomnaic ‘I gave you a contract and a bride-price as befits a woman, namely, the raiment of twelve men, a chariot worth thrice seven *cumala*, the breadth of your face in red gold, the weight of your left arm in white bronze. Whoever, brings shame and annoyance and confusion on you, you have no claim for compensation or for honour-price for it except what claim I have’, said Medb, ‘for you are a man dependent on a woman’s marriage-portion’.*

### RAPE AND ILLICIT INTERCOURSE

Some texts deal with serious crimes against women—rape and illicit intercourse. Here it possible only to treat the matter briefly and to point out the hand of the church—and the effect of the Old-Testament legal inheritance on Irish law.

*Tá .uii. mná la Féniu ada dílsi ina frithigib nacon dlegar díre ná eneclainn ina sleith; ní tuillet fiachu ná éric ina forcur cibé do-d-róna: echlach oides a corp do chách co rogaib genus, ben ara-túaisi a sleith, ben con-ceil a forcor, ben for-curthar i cathuir ná fóccuir co ndichet do ráith, ben ara-foím immarmus do chind a céile, ben ara-dála fer cuice i muine no lige, ben ad-guid aitire Dé no duine i fomatu a cuirp, ben do-fairget ar decmuic. It é .uii. mná inso ada tualuing taburta a corp i fomatu lánamnuis acht ná methat a ngnímu. Ní berat com-perta for fine nadbi tualuing somaine lánamnuis<sup>22</sup> ‘There are seven women in*

21. Ernst Windisch (ed), *Die altirische Heldensage Táin Bó Cúalnge* (Leipzig 1905) 1–17; R. I. Best & M. A. O’Brien (ed), *Book of Leinster* ii (Dublin 1956) 261–63 [diplomatic edition]; Cecile O’Rahilly (ed. & trans.), *Táin Bó Cúalnge from the Book of Leinster* (Dublin 1967) 1–3 (text), 137–40 (translation); summary, Rudolf Thurneysen, *Die irische Helden- und Königsage* (Halle a.S. 1921) 242–43.

22. Heptad 47=CIH 42 (cf. 1845)=ALI v 272–77.

Irish law who are liable in their encounters [? who are without remedy in their encounters] and who are not entitled to penalty or honour-price for their *sleith*;<sup>23</sup> they are not entitled to fine or body-fine for rape whosoever may have done so: a whore who offers her body to all, until she becomes chaste; a woman who observes that she is the victim of *sleith* [and does nothing about it]; a woman who conceals her rape; a woman who is raped in a town and who does not cry out until the rapist has got away; a woman who agrees to have illicit intercourse in despite of her husband; a woman who trysts with a man in the bushes or in bed; a woman who invokes a body-surety, cleric or lay, by the offer of sexual favours; a woman who offers herself for something trivial. These are seven women who are capable of giving their bodies in sexual intercourse, provided they do not fail in their duties.<sup>24</sup> Their children do not belong to the family and they are not entitled to the profits arising from cohabitation’.

The same provision in respect of rape is adverted to in *Gúbretha Caratniad*:

*Rucus éricc do mnaí nad ége oca forcor ... ba deithbir ar ba i ndithruib forcorad*<sup>25</sup> ‘I granted *éraig* (body fine) to a woman who did not cry out at her rape ... it was proper because she was raped in a deserted place.

This rule about rape (and *sleith* is legally only a variety of rape) derives not from any tradition of Irish law but from Hebrew law as set out in Deuteronomy 22:23–27:

si puellam virginem desponderit vir et invenerit eam aliquis in civitate et concubuerit cum illa educes utrumque ad portam civitatis illius et lapidibus obruentur puella quia non clamavit cum esset in civitate vir quia humiliavit uxorem proximi sui et auferes malum de medio tui sin autem in agro repperit vir puellam quae desponsata est et adprehendens concubuerit cum illa ipse morietur solus puella nihil patietur nec est rea mortis quoniam sicut latro consurgit contra fratrem suam et occidit animam eius ita et puella perpressa est sola erat in agro clamavit et nullus adfuit qui liberaret eam.

23. This term (the verbal noun of *\*selid* ‘creeps’) is defined (DIL s. v.) as ‘the act of surprising a sleeping woman, having intercourse with her’. It is better understood as non-consensual sexual intercourse with a woman who is sleeping, in a drunken stupor, or comatose for whatever reason.

24. The glossator (CIH 43) offers the tart comment: *amail robattar mna Tulcha Leis uair is ed fa gnathugad doib: cid mor do indlighid donedis, acht gu toirsidis do bleogain a mbo im eatra, a slainti doib* ‘such were the women of Tulach Léis, for their practice was that however much wrongdoing they did, they were reprieved provided they came home to milk the cows at milking time’.

25. CIH 2197; R. Thurneysen, ‘Aus dem irischen Recht III: die falschen Urteilsprüche Caratnia’s’, *Z Celt Philol* 14 (1925) 302–76: 350 §39.

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Irish law took over the principle of Hebrew law but not its harsh sanction. Something of the punishment for rape—that is, the legal penalty, as distinct from the possibly violent summary justice of kinsmen—can be found elsewhere.

*Lánamnas éicne nó sleithe: ní téchtat ba acht comperta. 7 as-renar lánéaic i n-ingin macdacht 7 i mmacaillig ná diúlta cailli 7 i cétmuintir, lethéaic mad adaltracha—cen frithuide in so uile—co lánlóig éinech bes sruithem fordo-bé do neoch diambi saindíles<sup>26</sup> ‘Sexual union by rape or by stealth (*sleith*): they [the partners] possess nothing but offspring. Full wergild is paid for a virgin, for a young nun who does not reject her veil and for a *cétmuintir* (principal wife); half wergild for secondary wives—all this without the co-operation of the woman—together with the full honour-price of the man of highest rank who has authority over her of those to whom she specially belongs’.*

*Éraic*, often translated ‘wergild, body-fine’ is the fixed penalty for homicide, namely, seven *cumals*. A *cumal*, literally ‘a bond-maid’, is a unit of account generally taken to be equal to three milch cows. The first penalty for the rape of a virgin, young nun or principal wife was 21 milch cows. The second is the honour-price of the man of highest rank who has authority over the woman—father or grandfather, guardian or, in the case of a young nun, her superior in religion. Honour-price varied according to status—from two-and-a-half milch cows in the case of a substantial farmer (*bó-aire*) to seven *cumals* in the case of a petty king, bishop or senior monastic superior. Therefore, the penalty for rape varied with the social connections and status of the victim.

A coarser indication of social life occurs elsewhere:

*Rucus slán slithi mná óentama i tig midchuarda ... Ba deithbir ar ba écóir ben i teglug cena céle ’co imchomé<sup>27</sup> ‘I dismissed the *sleith* of an unaccompanied woman in an feast-house.... It was correct for it was wrong for a woman to be in a house-party without her partner to watch over her’*

The commentator’s observation is enlightening: *sleth cétamus, atá tucht ad-claid bein .i. cen éricc i saide dia fir ‘sleith*, then, there is a case that inculpates a woman i.e. no *éraic* is payable to her man on that account’. Another passage expresses the same attitude to a woman’s contributory negligence:

*Is and is díles sleith na mná gan éric .i. mása colladh do-rigni in ben i n-aenach nó a cuirmthech gan teist aga testugud, ní ful éric ina sleith<sup>28</sup> ‘This is when*

26. CIH 519; SEIL 71 §5

27. CIH 2198; Thurneysen, ‘Gúbretha’, 351 §40. I emend MS *teglai*g to *teglug*

28. CIH 827.

*sleith* perpetrated on a woman is not actionable and without wergild i.e. if the woman fell asleep in a assembly or in an ale-house without a witness to testify there is no wergild for *sleith*'

WOMEN AND INHERITANCE

The general rule is that daughters inherited real estate only in default of male siblings, and then they inherited only a life-interest in the estate which reverted to the nearest agnates. One of the most important sources on female inheritance is the difficult legal poem 'In-longat bantaid banchuru'. Myles Dillon edited and translated it in 1936<sup>29</sup> but much still remained dark. In 1993 Dr Thomas Charles-Edwards offered a fresh text and new translation that lightens much of its obscurity.<sup>30</sup> Earlier, Charles-Edwards dated this poem to the late sixth or the first half of the seventh century.<sup>31</sup> I should now much prefer the later date—and perhaps one later still.

The poem envisages a case in which the smallest kin-group, the *gelfhine* (the common descendants of a grandfather), issues in an heiress (§1). *Ar-naisc finsruith finteda/ manip sesed imbera* 'The head of the kindred binds forward family lands unless a sixth man acts' (§2) What this means is that the surviving senior male of the *gelfhine* or, if he is dead or incapable, one of the ultimate heirs, a member of the *derbfhine* (the *sesed* of the poem) causes the inheriting female to enter into bonds that she will not alienate family land, namely, attempt to transmit it to her children by a non-kinsman, for she has a life-interest only and, on her death, the land should revert to her father's or grandfather's nearest male relatives. By executing such bonds, women may inherit land lawfully (and within these restrictions) (§3). Stanzas §§4--11 discuss the rules of inheritance generally. Stanza §12 states: *Ní mac bratas finteda/ fine fri fót frithmesso/ manip nessa fírchoibnius/ máthair athair inorbae* 'he is no son who takes kin-lands, lands that revert to the *fine*, unless a father capable of inheritance is nearer in true kinship than a mother'. This exceptionally succinct piece of legal writing can be interpreted as follows. When the *gelfhine* has none to inherit but an heiress, the land reverts on her death to the patrilineal kin and the heiress's offspring is excluded. Her son(s), however, can succeed if their father is nearer in relationship to the ultimate heirs than his mother i.e. he must be one of the ultimate heirs. Stanza §13 adds: *Orbae máthar munchoirche/ a maic o laithib a ardinnai* 'the

29. Myles Dillon, 'The relationship of mother and son, of father and daughter, and the law of inheritance with regard to women', SEIL 129–79; his edition and translation of the poem is at 135–59.

30. T. M. Charles-Edwards, *Early Irish and Welsh kinship* (Oxford 1993) 516–19. I wish to express here my deep indebtedness to his work on this difficult tract and I depend on the text he has established. Reference will be to the sections of the poem in his edition: I call them stanzas for convenience.

31. T. M. Charles-Edwards, 'Kinship, status and the origin of the hide', *Past & Present* 56 (1972) 3–33.

land of a mother thus contracted in regard to property belongs to her son from the days of her testamentary disposition’—which may mean that a woman who has been under such property bonds and who concludes a marriage with the appropriate cousin may make her son an heir by a testamentary disposition.

But her offspring does not receive it all: *Do-aisic a leth immurgu/ Dochum fine fírgriain/ a leth n-aill a fírbrethaib/ Síil a féola fodlaither* (§13) ‘However, he restores half of it/ to the true kindred of the land/ the other half, according to just judgements/ is divided amongst the seed of her flesh’. This provision limits the amount of the estate heritable by the heiress’s offspring to half.

Another much later prose passage throws some more light on female inheritance:

*Má tá comarba ferrdha ann nocho berann in ingen ní do díbad a athar do scuichthibh ná do annscuichthib acht lanna, ranna 7 bregda. Nó dano is na scuichthe do chomraind doib, 7 is as gabar esén: ‘rannait ingena fri macu dlighthecha séta saindílsi athar ilchoraigh, genmothá orba n-athar urrannat maicne ciniudha caín’. Muna fhuil comarba ferrdha ann na scuichthi do breith di uile 7 na h-annscuichthi go fuba 7 ruba, nó a leth gen fuba 7 gen ruba<sup>32</sup>* ‘If there is a male heir a daughter receives nothing of her father’s inheritance of mobilia or immobilia except *lanna*, *rann*, and *bregda* [either utensils for female work or jewellery]. Or, otherwise, the mobilia are divided amongst them equally and that is taken from the maxim: “Daughters share with lawful sons possessions that are the personal property of a capable father, except for inherited paternal land that sons of fair kindred share”. If there is no male heir, all the mobilia are given to her, and the immobilia with the obligation of military service or half without the obligation of military service’.

This contains an interesting distinction: kin-land is for male heirs only. Not so personal property—mobilia and immobilia—acquired by a successful father in his lifetime: his daughter may inherit that. Here Thurneysen sees the influence of canon law and cites the rulings: ‘De eo quod dare debet pater hereditatem filiae inter fratres suos’ and ‘De eo quod feminae dividunt hereditatem, non tamen principalem’,<sup>33</sup> but it is, perhaps, better to see the Latin canon law and the vernacular law as parts of a single system produced by a single class of lawyers.

Now the rules of female inheritance set out in the ancient poem will, at first sight, give rise to problems for the churchmen because of the church’s laws of consanguinity. Briefly, the church took over the prohibitions of Roman law and added to them. Taking its cue from Lev.18:6 (*Omnis homo ad proximam sanguinis suae non accedat ut revelet turpitudinem eius*) forbade marriage with a widening circle of kindred: the sixth degree and some categories from the seventh. In the sixth century,

32. CIH 736, 2039; Dillon, op. cit.133; Thurneysen, ‘Irishes Recht’, 30–31.

33. ‘Irishes Recht’, p. 31; Hib. 32:17, 19 (Wasserschleben, *Kanonensammlung*, 115–16).

Gaulish and Spanish synods forbade marriage within the sixth degree (thus excluding first and second cousins). Gregory the Great in his letter to Augustine of Canterbury (AD 601) absolutely ruled out marriage of first cousins and in a concession to the weakness in the faith of the Anglo-Saxons, allowed them for the time being to marry their second and third cousins.<sup>34</sup> When one applies these rules to the Irish situation, they pose a problem, especially in the matter of female inheritance. Irish canon law deals in detail with it:

*De his quod addunt auctores ecclesiae in feminis heredibus. Sinodus Hibernensis. Auctores ecclesiae hic multa addunt, ut feminae heredes dent ratas et stipulationes, ne transferatur hereditas ad alienos; Dominus enim dicit: Transibit hereditas earum fratribus patris sui, inde propinquis. Sciendum est, utrum dabunt partem Domino; si tacuerint propinqui earum, Domini erit, quod dabunt, sin autem, irritum erit. Sciendum est quid dabunt in testamentum, hoc est, vaccas, vestes et vasa. Sciendum est quid dabunt ministris, hoc est, partem de ovibus et lanam; si vero de propinquis fuerint ministri, dabunt eis aliquid de hereditate, et si ecclesiae habuerint partem (vl. ecclesiam habuerint paternam), dabunt ei de sua hereditate, et si genuerint filios viris suae cognationis dabunt hereditatem*<sup>35</sup> ‘Concerning what the authorities of the church add in respect of female heirs. Irish Synod: The authorities of the church add much here, that female heirs should give guarantees and bonds lest they alienate the inheritance. The Lord says [paraphrase of Numbers 27:10, 11] their inheritance will go to their father’s brethren and thus to their relatives. May they give a bequest to the Lord? If their kindred do not protest, what they will give will belong to the Lord. If not, the bequest is invalid. What may they give by testamentary disposition? Cows, clothes and vessels. What may they give to the servants? Portion of the sheep and the linen. If the servants be kin, they will grant them some of the inheritance. If they be part-owners of a church (vl. if they have a hereditary church) they will make a grant to it from the inheritance. If they have sons by men of their own kindred, they will transmit the inheritance to them.

The provisions of vernacular law and of canon law evidently derive from the same source—the one mentioned in the canon law tract itself, namely, the church authorities. But if women married their patrilateral cousins in order to preserve a right of inheritance for their children and if parallel cousin marriage was used to consolidate family land in this way, was in not in breach of the universal teaching of the church in the sixth and seventh centuries and later? The Irish lawyers found the answer in the Old Testament and spelled it out in the canon law:

34. G. H. Joyce, *Christian marriage*, Heythrop Series 1 (London 1933) 505–20.

35. Hib. 3220 (Wasserschleben, *Kanonensammlung*, 116).

*De eo quod feminae dividunt hereditatem, non tamen principalem. ... Lex dicit: Filiae Selphat de tribu Manassen accesserunt ad Moysen in campestribus Moab dicentes: pater noster mortuus est, non habens filios, nec fuit in seditione Chore et Dathan, sed in suo peccato mortuus est, cur privamur hereditate ejus? Moyses retulit hanc questionem ad iudicium Domini, qui dixit: Rem justam postulant filiae Selphat; date eis hereditatem in medio fratrum suorum. Sed Dominus praecipit, ut viris tribus suae nuberent, ne transferatur hereditas de tribu in tribum. In quo intelligendum est, quod Dominus ideo dixit: Nemo copuletur uxori nisi de tribu sua, ne hereditas transferatur de tribu in tribum*<sup>36</sup>

That women share the inheritance but not as the ultimate heirs ... Scripture says [paraphrase of Numbers 27:1–11 and Josh. 17:3–6]: The daughters of Salphaad came to Moses in the plains of Moab saying: our father died in the desert nor did he take part in the sedition of Core and Dathan but he died in his own sin. And he had no sons. Why are we deprived of his inheritance? And Moses referred their cause to the judgement of the Lord, who said: The daughters of Salphaad demand a just thing. Give them an inheritance amongst their father's kindred. And the Lord commanded [Nm 36:8–13] that they should marry men of their own tribe, so that the inheritance should not be transferred from tribe to tribe. From which is to be understood: let no man be joined to a wife not of his own tribe, lest the inheritance be transferred from tribe to tribe.

When we compare Nm 26:28–43 with Nm 36:10–13 we find that the daughters of Salphaad married their father's brother's sons. This text, then, was used to legitimise the marriages of inheriting females with patrilateral kinsmen. This had two effects: women could inherit a life interest in their father's estates in kin-land and transmit an interest in the property to their offspring, and kin-lands were thus protected against alienation. But the lawyers go further and prescribe parallel cousin marriage as the preferred form of marriage, as it is in Semitic society.

In another recension of the *Hibernensis* there is an additional book 'De tribu' that contains the following:

*De eo quod omnia patris non habentis filium debentur viro filiae suae post mortem suam in una tribu*<sup>37</sup> 'That all the property of a man without sons should

36. Hib. 32:19 (Wasserschleben, *Kanonensammlung*, 115–16. Much the same rule occurs in Hib. 32:9 (Wasserschleben, *Kanonensammlung*, 112): *De hereditate non habentis filios servanda filiae ceterisque post eam heredibus* 'That the inheritance of a man without sons is to be held by a daughter, and after her by the other heirs'. This is supported by a citation from Nm 27:8–11: 'Homo cum mortuus fuerit absque filio ad filiam eius transibit hereditas, si filiam non habuerit habebit successores fratres suos, quod si fratres non fuerint dabitur hereditatem fratribus patris eius; sin autem nec patruos habuerit dabitur hereditas his qui ei proximi sunt'.

37. Wasserschleben, *Kanonensammlung*, 171, note cc. The MSS that contain this book are: London, British Library, Cotton Otho E XIII (s. Xin.); Oxford, Bodleian Library, Hatton 42 (s. IX);

be given to the husband of his daughter who is of the same family’.

Evidently, the canonist translates Irish *fine* as Latin *tribus*, here as elsewhere—a satisfactory and accurate reading of the genealogies in Numbers. In support of this ruling, he cites Tobias 6:11~13 ... *est hic Raguhel nomine propinquus vir de tribu tua et hic habet filiam nomine Sarram sed neque masculum neque feminam ullum habet praeter eam tibi detur omnis substantia eius et oportet te eam accipere coniugem* ‘... Raguel, a near kinsman of thy tribe. And he hath a daughter named Sara: but he hath no son or other daughter beside her. All his substance is due to thee, and thou must take her to wife’. She is, of course, his father’s brother’s daughter. The leitmotiv of the book is the obligation to marry a woman of one’s patrikin (1:9, 4:12–13, 6:16–19, 7:9–14). When Tobias married her, he received half of his father-in-law’s property, and the balance later.

The provisions of the vernacular law and Latin canon law are, to a degree, different in detail, but they spring from the same principle. This lack of agreement may be due to diversity of regional custom or to changes that took place over time or to differences of opinion amongst the lawyers. However, it is evident that Hebrew law and Irish law (canon and vernacular) are at one in essentials in regard to female inheritance, and the latter is a borrowing of the former. How did this situation come about? Did the clerical lawyers succeed in replacing inherited native custom with Hebrew law? We know nothing at all about this hypothetical native custom that was evidently displaced by the work of the canonists, and we cannot even guess at its nature. When we first encounter it, the Irish law governing female inheritance (and parallel cousin marriage) is evidently a borrowing from the Old Testament and the Irish lawyers continued to adhere to this legal resolution of the problem of inheritance long after marriages of this kind were forbidden in the West. What, then, will appear to reformers—and to some modern historians—as a stubborn adherence to pagan practices is, in fact, an old-fashioned rule firmly based on Scripture. It is difficult to tell how old this rule is but I should not be surprised if it were in place by the end of the sixth century.

\* \* \*

In the case of marriage law, the Latin canon law and the vernacular law are complementary. *Cáin lánamna* is, for the most part, a practical guide to equity in regard to marital property and to its apportionment in the case of divorce rather than an ethical treatise as such. But it is evident from both *Cáin lánamna* and the Latin tracts that whilst the church prudently tolerated many different kinds of marital arrangements its aim was christian monogamy.<sup>38</sup> The *cétmuintir* (‘principal wife’) is so privileged that

Rome, S. Maria Valicella XVIII (s. XI).

38. Hib. 46:14 (‘De eo, quod non accipienda uxor, vivente priore, licet adultera’), 15 (‘De

one may feel that for the lawyers she is the real wife (and women would have stood out for these privileges),<sup>39</sup> and the secondary wife, in *Cáin lánamna* and increasingly in later tracts, is termed *adaltrach* ‘adulteress’.<sup>40</sup> Beside pragmatic provisions for life as it was actually lived in society, one can find a spirited defence of christian monogamy in the vernacular laws:

*Ar nach rath érenar ní athcuirither corub comísel comarba uasal fir h-ísel corub comuasal comarba ísel fri h-uasal, ar is é triar nad scara commaid co bás: céile fria thigerna iar ndígbáil tséd do dernuind, manach fria airchindech, cétmuinte dligthech fria céile iar n-urnaidm etar dá daingen, ar it díetarscarta iar comrac comlemaid co ro scara lám fria taib cend fri colaind tenga fri comlabra. Amail nad scarat-saide co bás, ní arscara manach fria airchindech co saigid n-éca, ar ní arscara céile fria tigerna ná cétmuinte dligthech fria céile co n-adnacal díb línaib*<sup>41</sup> ‘For every fief that is granted is not returned until a noble heir is as base as a base one and a base heir is as noble as a noble one, for these are the three that do not break their partnership until death: a client and his lord after taking chattels from his palm, a monastic tenant and his superior, and a legal first spouse and his/her partner after a marriage contract witnessed by two firm sureties, for they are indissoluble after sexual intercourse and sleeping together until the hand part from the side, the head from the body and the tongue from speech. As they do not part until death, so a monastic tenant does not part from his superior until death, for a client does not part from his lord or a legal first spouse from his/her partner until they are both in the grave’.

adulterio femiae non celando et penitentia ejus recipienda et alia uxore non ducenda’, 18 (‘De concubinis non habendis cum legitima uxore’), 31 (‘De omni adultero excommunicando’) (Wasserschleben, *Kanonensammlung*, 188, 190, 193).

39. To the privileges in the texts cited above, one can add the canon law: *Non est dignus fideiusor fieri servus nec peregrinus nec brutus, nec monachus nisi imperante abbate, nec filius nisi imperante patre, nec femina nisi domina, virgo sancta* (Hib. 34:3=Wasserschleben, *Kanonesammlung*, 122–23; cf. R. Thurneysen, ‘Zu der Etymologie von ir. *ráth* ‘Bürgschaft’ und zu der irischen Kanonensammlung und den Triaden’, *Z Celt Philol* 18 (1930) 364–75: 368). The *domina* and the holy virgin are exceptionally the two women capable of acting as sureties, and *domina* is almost certain to be identified with the *bé cuitchernsa* (‘woman of joint dominion’) of *lánamnas comthínchuir* (Binchy, SEIL 233. A tract on status of c. AD 700, *Críth gablach*, represents the *bóaire* (the characteristic substantial farmer) as living in legitimate marriage with a *cétmuinte* of his own class (‘a ben, ingen a chomgráid inna coir chétmuinterasa’), the precise prescription of *Cáin lánamna*: see D. A. Binchy (ed.), *Críth gablach*, Mediaeval and Modern Series 11 (Dublin, 1941) 8 §15.

40. SEIL 49 §23 (the bridewealth paid her falls forfeit to the innocent *cétmuinte*); 71 §35 (the wergild for her rape or *sleith* is half that of a *cétmuinte*); N. Power, ‘Classes of women described in the *Senchas Már*’, SEIL 84–89.

41. CIH 2230-31.

Other rules that govern aspects of women's lives may equally derive from clerical law-making. One of the more interesting of these concerns women's right to contract (or rather the lack of it):

*Messom cundrada cuir ban. Air ní tualaing ben ro ria ní sech óen a cenn: adagair a athair i mbe ingen; adagair a cétmuinter i mbi bé cétmuinter; adagair a mmeicc i mbi bé clainne; adagair fine i mbi bé fine, adagair eclais i mbi bé eailse. Ní tualaing reicce ná creicce ná cuir ná cundrada sech óen a cenn, acht tabairt bes téchta d'óen a cenn cocur cen díchill* <sup>42</sup> 'The worst of transactions are women's contracts. For a woman is not capable of selling anything without the consent of one of those who has authority over her: her father looks after her when she is a girl; her *cétmuinter* looks after her when she is a *cétmuinter*; her sons look after her when she is a widow with children; her family looks after her when she is a woman of the family [a widow without living father, spouse or children]; the church looks after her when she is a woman of the church. She is not capable of selling or buying or contract or transaction without the consent of one of those who has authority over her, apart from a proper gift to one of those authorities with agreement and without neglect'

Binchy saw these as inherited provisions and compared them with early Roman law and Indian law<sup>43</sup> but it is possible that one need not go so far afield or argue for separate development. Very likely, the Irish lawyers found these principles—as they found others—in Roman law and adapted them for their own purposes. It is surely interesting that in three of the texts that deal with women's lack of capacity to contract,<sup>44</sup> there are specific rules governing cases that involve the church or its dependent tenantry. Further research may show that the early Irish law in regard to women was more innovative—one might even say original—than scholars have thought.

42. CIH 443; R. Thurneysen, 'Irisches Recht', 35 §38; Binchy, SEIL 213–14.

43. SEIL 223.

44. For the others, see CIH 522 (=SEIL 212, §7) and CIH 351 (=R. Thurneysen, 'Aus dem irischen Recht, iv', *Z Celt Philol* 16i (1926) 177 §12; 181 §12).