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# The five paths to a judge: an interpretation of *Cóic Conara Fugill* (Five Paths to Judgement)<sup>1</sup>

## *Les cinq chemins vers un juge : une interprétation du Cóc Conara Fugill (Cinq chemins du jugement)*

**Abstract:** This interpretation offers an analysis based on the *Small Primer* (*Uraicecht Becc*), a text which may come from the same school as *Cóic Conara Fugill*. A passage from that tract about social ranks notably presents a hierarchy of three judges, who seem to correspond to the first three procedures of the *Five Paths of Judgement*. The choice of the right procedure would then actually be the choice of the right judge. A first block of three paths would then be distinguished, to which a second block of two paths would then be added.

**Résumé :** Cette interprétation présente une analyse fondée sur la *Petite introduction* (*Uraicecht Becc*), un texte qui provient sans doute de la même école que les *Cóc Conara Fugill*. Un passage de ce traité sur les rangs sociaux présente une hiérarchie de trois juges qui semble correspondre aux trois premières procédures des *Cinq chemins du jugement*. Choisir la bonne procédure reviendrait en fait à choisir le bon juge. Un premier groupe de trois procédures pourrait être identifié, auquel un second groupe de deux procédures aurait été ajouté.

**Keywords:** Early Irish Law – procedure – trial – classification - Irish king as judge – judges – recourse to appeal

**Mots-clés :** droit irlandais ancien – procédure – procès – classification – roi irlandais qui juge – juges – procédures d’appel

1. Towards the end of the tract entitled *Cóic Conara Fugill* (*Five Paths to Judgement*)<sup>2</sup>, the author asks why there are five paths of judgement. And he ends up giving the answer: “So that unlearned people and those ignorant in law cannot take legal action against those who have a knowledge in law”<sup>3</sup>. We have to admit, indeed, after a first reading of the tract, that the aim of the author has certainly been reached. In a general way, not all law tracts are so obscure and require such a great mastery of the keys of reading as *the Five Paths*. The jurists, probably jealous of their prerogatives, seem to have taken particular care to protect the procedure, which is at the heart of law.

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1 This article is an expanded version of a paper which I gave at Jesus College Oxford on 9 May 2013 at the conference on *Celtic Legal Procedure* organized by T. M. Charles-Edwards and Jaqueline Bemment, and also at the School of Celtic Studies *Tionól* on 16 November 2013. I warmly thank the organizers of those conferences as well as Professors Fergus Kelly and Liam Breatnach for inviting me and I am most grateful to Professor Fergus Kelly for reading a draft of this article. Any errors are my own responsibility.

2 This tract (7<sup>th</sup>-8<sup>th</sup> century) is the main source of information on procedure, edited and translated by R. Thurneysen, *Cóc conara fugill* [CCF], *Die Fünf Wege zum Urteil, Ein altirischer Text herausgegeben, übersetzt und erläutert, Abhandlungen der preussischen Akademie der Wissenschaften, Jahrgang 1925*, Philosophisch-historische Klasse nr.7, Berlin, 1926; Ch. Archan, *Les chemins du jugement. Procédure et science du droit dans l'Irlande médiévale*, Paris, 2007.

3 *D'fubthach borb , aneolach , a.ssa fainn arna tistais buirb no aneolaig do acrau eolach, Corpus Iuris Hibernici* [CIH], ed. D. A. Binchy, Dublin, 1978, 2202.12.13; CCF, p. 23-24 (version R§23).

2. There are a few tracts specialized in the matter, which have been investigated by Fergus Kelly, in his famous *Guide*<sup>4</sup>. But *Cóic Conara Fugill* is the most complete one. It envisages five procedures according to the nature of the cases: 1) serious crimes, disputes linked to land property or to power and “great difficulties”, 2) the validity of contracts, and some offences, 3) the balancing of contracts, 4) disputes concerning dependent people, 5) the right to ask for rejudgement. The procedures all bear names whose mere evocation doesn’t allow us to give a precise definition: “Truth” (*fír*), “Right” (*dliged*), “Justice” (*cert*) “Due” (*téchta*) and the right to ask for rejudgement (*cóir n-athchomairc*). The parties or their lawyers have to choose the appropriate procedure and follow it till the sentence is passed, without changing it. There are several versions of that tract<sup>5</sup>. They are all contained in manuscripts which were written as late as from the 12<sup>th</sup> to the 16<sup>th</sup> centuries. However, we know that the text itself was composed in the 7<sup>th</sup> or 8<sup>th</sup> century.

3. Two scholars have provided explanations of this text. Rudolph Thurneysen writes in his 1926 edition, that the names of the procedures correspond to the question that the judge asks himself in various situations. For instance, he asks himself for *fír*: “Ist er es wirklich (*iar fír*) oder ist er es nicht?”<sup>6</sup>. For *dliged*, he asks himself: “Besteht ein gültiger also einzuhaltender Vertrag oder nicht?”<sup>7</sup>. The third procedure is used, according to Thurneysen, in cases of hidden defects which only become apparent later<sup>8</sup>. The question of the status of dependent people and of their level of freedom is settled by following the third procedure, particularly by resorting to *senchaide* “die Kenner der Vergangenheit”<sup>9</sup>, the custodians of the past<sup>10</sup>. Finally, the fifth path allows the parties who are not capable of determining by themselves the path to follow to ask the judge before the start of the trial<sup>11</sup>.

4. A few decades later, Robin Chapman Stacey offers another interpretation of the text, based on the sureties required for each procedure. According to her, a link between the nature of the surety which is required and the nature of the case can be established. So, *fír*, which also means “ordeal”, would concern the disputes settled by the judgement of God, because a “true-gage” (*firgille*) would be necessary. An association between *naidm*-sureties<sup>12</sup> and contractual entitlement is “a natural one” for the second procedure (*dliged*). Gages are “one of the most common forms of security for payments owed”<sup>13</sup> and Robin Chapman Stacey thinks they are given to settle disputes over unfair exchanges of the third procedure (*cert*). The paying surety (*ráth*) is linked to *téchta* (fourth procedure), because it is often used when the parents’ or lords’ responsibility for the acts of their subordinates is involved. Finally, *cóir n-athchomairc* would be a “catch-all” procedure, as would be the guarantor who is linked to it: a hostage (*aitire*) who is linked to no particular contract. That fifth path then corresponds to a stage through which all claims would progress. At that point, the proper path was chosen and the proper guarantors exchanged<sup>14</sup>. It is clear that sureties play an important part in a trial in Ireland, and that to each path corresponds a particular surety, which, as Robin Chapman Stacey writes, has a link with the very nature of the case. But is it really according to the sureties that the cases are shared?

5. Without questioning the links between sureties and the nature of the cases of each procedure demonstrated by Robin Chapman Stacey, I offer a different analysis, by using the *Small Primer* (*Uraicecht*

4 Fergus Kelly, *A Guide to Early Irish Law* [GEIL], Dublin, 1988.

5 Rawlinson B 502 (R), CIH 2200.1-2203.5; G 3 (U), CIH 2257.12-2261.17; Egerton 88 (E), CIH 1280.1-1282.23; H. 3. 18 (H), CIH 1027.21-1041.38; H. 3. 18, (O), CIH 1018.26-39. See L. Breatnach, *A Companion to the Corpus Iuris Hibernici*, Dublin, 2005, p. 233-234.

6 CCF, p. 8. But it is a very general question which can be posed for the other procedures, as Robin Chapman Stacey very rightly remarks, *The Road to Judgment. From Custom to Court in Medieval Ireland and Wales*, Philadelphia, 1994, p. 117.

7 CCF, p. 8.

8 CCF, p. 9.

9 CCF, p. 10.

10 R. Chapman Stacey, *The Road to Judgment*, *op. cit.*, p. 122.

11 CCF, p. 10-11.

12 *Naidm*: “enforcing surety”.

13 R. Chapman Stacey, *The Road to Judgment*, *op. cit.*, p. 121.

14 R. Chapman Stacey, *Ibidem*, p. 124-5.

*Becc*), a text which may come from the same school as *Cóic Conara Fugill*<sup>15</sup>. A passage from that tract about social ranks notably presents a hierarchy of three judges, who seem to correspond to the first three procedures of the *Five Paths of Judgement*. The choice of the right procedure would then actually be the choice of the right judge. A first block of three paths would then be distinguished, to which a second one would then be added<sup>16</sup>.

6. After showing the method used as regards social classification which may have been applied to the judicial field (I.), I will present the first group of three procedures (II.), a group to which two other paths have been added (III.).

## I. Procedure and classification

7. The will to establish a classification is visible from the very beginning of the tract, when the author writes: “Five paths of judgement are being examined here”<sup>17</sup>. And the question that immediately comes to mind is why there are five procedures? A difficult question. Let’s content ourselves first, with observing the authors of law texts at work, while they are elaborating such classifications.

8. It is the case in versions E and H of the *Five paths* with the seven categories of things which compose the procedure (§2), the three elements of knowledge necessary for those categories (§3), the three “things” that repress falsehood and testify to truth and right (§4), the eight “things” a lawyer can do before his (legal) action (§6), the twelve “things” a lawyer can do during his action (§7), the five “things” a lawyer can do after his action (§8), the eight steps of the procedure (§16), and the five foundations of judgement (§139). If it is not easy here again to explain some of those classifications, others are justified by the text itself. Paragraphs 2, 4 and 6 are indeed linked to Latin grammar. Let’s take the example of paragraph 6. It links the eight “things” the lawyer has the right to do or to have before his legal action, with the noun, pronoun, verb, adverb, participle, conjunction, preposition, interjection of Latin grammar. We may, then, presume that the eight steps of the law-case enumerated in paragraph 16 are also inspired by the same model.

9. Beside that text, classification is very common in law tracts, especially in those concerning social ranks. According to the *Branched Purchase* (*Críth Gablach*), the laymen are classified into seven ranks after the model of the ranks of the Church<sup>18</sup>. Indeed, in the *Collectio Canonum Hibernensis*, you can find the following classification: bishop, priest, deacon, subdeacon, lector, exorcist and doorkeeper<sup>19</sup>. That is how we find it in the *Small Primer*, with seven ecclesiastical ranks<sup>20</sup>, seven ranks of noblemen and of poets.

10. But all this mustn’t make us forget that Ireland must have known a previous system of classification, whose traces are still visible in some texts. Their study allowed us to de-construct the social structure into seven ranks, elaborated by law schools, to get to what must have been the original classification. Neil McLeod’s work has contributed a lot in this area. Indeed, he has shown that Kings, Lords and Commons must originally have been known as an internal classification into three ranks. The category of kings was

15 D. A. Binchy considers that text comes from *Bretha Nemed* school, as well as *Cóic Conara Fugill*, “*Bretha Nemed*”, *Ériu*, XVII, 1955, p. 4-6; and “The date and provenance of *Uraicecht Becc*”, *Ériu*, XVIII, 1958, p. 44-54.

16 This is the analysis I have made in my doctoral thesis presented in 2001 and published in 2007, *Les chemins du jugement*, *op. cit.*

17 *Coic conara fugill fegaiter ann*, *CIH* 2200.1; *CCF*, p. 15 (R§1).

18 *Cid asa fordailtea grád túa[i]tbe? A [a]urlunn grád n-ecalsa*, *CIH* 777.10; *Críth Gablach*, D. A. Binchy (ed.), Dublin, 1941, p. 1.6-7; E. MacNeill, “Ancient Irish Law. The Law of Status or Franchise”, *Proceedings of the Royal Irish Academy*, XXXVI, 1923, p. 268.

19 H. Wasserschleben, *Die Irische Kanonensammlung*, Leipzig, 1885, books I-VIII, p. 3-26.

20 In the *Small Primer*, the exorcist comes between the subdeacon and the doorkeeper.

composed of “King of Great-kings” (*ri ruirech*), “Great king” (*ruire*) and “King” (*ri*)<sup>21</sup>. The category of lords was composed of “High lord” (*aire ard*), “Lord of precedence” (*aire tuiseo*) and “Ordinary lord” (*aire déso*)<sup>22</sup>. Finally, the category of Commons was composed of the “Cow-freeman” (*bóaire*), of the “Young freeman” (*ócaire*) and the “Man between the two houses” (*fer midboth*)<sup>23</sup>. The idea of an original classification into three groups seems to be shared by a certain number of scholars such as Fergus Kelly who thinks that the organization of ideas in groups of three is commonplace in ancient Irish literature<sup>24</sup>. And Thomas Charles-Edwards wrote that “grouping things into threes is, of course, far older than the textbook style. A comparison between Irish and Welsh suggests that it is an ancient mode of ordering material far predating the introduction of literacy into Ireland or Wales”<sup>25</sup>.

11. But let’s come back to procedure. If we don’t know why it is number 5 that was chosen, we may wonder whether number 3 was not, here again, the original number. By following Neil McLeod’s logic, the answer is perhaps to be found in a tract which is not specialized in the subject, such as the *Small Primer*. In the first lines, the tract asks: “Wherein is the judgement in the language of the *Féni*? It is not difficult: in Truth and Right and Nature”<sup>26</sup>. The question could be rephrased in this way: “What allows to get to judgement in Irish customary law? It is not difficult: the procedure called ‘Truth’, the procedure called ‘Right’ and the procedure called ‘Nature’”. A glossator seems to confirm it by adding: “In Truth, that is that he knows the path of judgement which is truth. And Right, that is that he knows the path which is Right. And Nature, that is that he knows the path which is natural for it, on the three paths of judgement which he has put forward”<sup>27</sup>.

12. For its part, *Cóic Conara Fugill* envisages the following five procedures: “*fir* and *dliged*, *cert* and *técht* and *cóir n-athchomairc*”<sup>28</sup>. If we compare the two lists, we find again *fir* and *dliged* in first and second positions, then *cert* and *aicned*. I think those two terms (*cert* and *aicned*) actually apply to the same procedure: that of the balancing of contracts; but I’ll come to that question later.

13. If the *Small Primer* presents three different procedures, it also describes a hierarchy of three judges. The most important one is the judge of the “three (legal) languages”, which are customary law (*fénechas*), the poet’s art (*filidecht*) and the Church’s law (*légend*)<sup>29</sup>. Then comes the “judge of the language of the *Féni* and of the poet’s art”<sup>30</sup>, which are the two sources of lay law. And then, at the very bottom of the ladder, we find

the judge who is competent to give judgement for the folk of art in regard of justice, in the estimation and measurement of the work and the remuneration of every product, and who is competent to reconcile custom and judgement<sup>31</sup>.

21 N. McLeod, “Interpreting Early Irish Law: Status and Currency (Part 1)”, *Zeitschrift für Celtische Philologie* [ZCP], 41, 1986, p. 59.

22 N. McLeod, *Ibidem*, p. 62-65. Also see B. Jaski, *Early Irish Kingship and Succession*, Dublin, 2000, p. 41.

23 N. McLeod, “Interpreting Early Irish Law: Status and Currency (Part 2)”, *ZCP*, 42, 1987, p. 56-7.

24 F. Kelly, *GEIL*, p. 243<sup>6</sup>; Id., “Thinking in Threes: The Triads in Early Irish Literature”, *Proceedings of the British Academy*, 125, 2004, p. 1-18 (Sir John Rhŷs memorial lecture 2003).

25 T. M. Charles-Edwards, “Review article: The *Corpus Iuris Hibernici*”, *Studia Hibernica*, XX, 1980, p. 149.

26 *Cid i nagar Breithemnus berla feini .nī. i fir , dliged , aignead*, *CIH* 1590.1 (UB §1).

27 *Hi fir .i. co roaichni in conair fuigill is fir; et dliged .i. co roaichni in conair is dliged. , aigned .i. co roaichni in conair is aiccinte do, arna tri conairib fuigill tug ar aird*, *CIH* 1590.11-14 (UB, gloss of §1).

28 *Fir. & dliged. cert , techta , coir nathchomairc*, *CIH* 2200.1-2; *CCF*, p. 15 (R§1=H§17).

29 *Breitheam tri mberla*, [gloss:].i. *fenechas , filidecht , legend*, *CIH* 1614.32-3 (UB§45), “The judge of the thee languages”, [gloss:] i.e. customary law (*fénechas*), the poet’s art (*filidecht*), and church’s law (*légend*); E. MacNeill, “Ancient Irish law”, *art. cit.*, p. 279. See Christophe Archan, “*Uraicecht Becc* et les triades du droit. Les juges et leurs sources dans l’Irlande médiévale”, *Mélanges en l’honneur de Pierre-Yves Lambert*, éd. Guillaume Oudaer, Gaël Hily et Herve Le Bihan, Rennes, 2015, p. 359-375.

30 *Breithem berla feini , filidiacta*, *CIH* 1614.20 (UB §44), “the judge of the language of the *Féni* and of the poet’s art”; see E. MacNeill, *Ibidem*, p. 278.

31 *Breithem bes tualaing fuigill fris frisind as ndana a cuid firinde oc meas , tomus , frithgnum , duilgbine caca boic , beas tuailing coicerta noise , breithe*, *CIH* 1613.38-1614.4 (UB §43); E. MacNeill, *Ibidem*, p. 278.

Contrary to the first two, the training he may have received is not even evoked by the text. That might indicate he has only received an elementary teaching, which accounts for his position at the bottom of the hierarchy.

14. The question of the link between the three procedures and the three judges is now posed. Can it be that the choice of the right procedure was actually the choice of the right judge? That would mean that some fields are reserved to some judges, for instance due to their seriousness or their technical aspects.

## II. The three paths of judgement

15. The principle according to which a party has to choose the judge who corresponds to his case is not foreign to Irish law. Indeed, a tract bears a title – though it comes late – but which expresses that idea: “To ascertain who is a judge in every case”<sup>32</sup>. In that spirit, let’s see now what our three “paths” may correspond to.

### *The first procedure*

16. The first procedure is called *fír*: truth. And it may also be the noblest term, used to apply to justice. Then, it is not surprising that it should be linked to the person of the king<sup>33</sup>. Indeed, it is very widely admitted today that the king judges<sup>34</sup>, and that he judges the most difficult cases. Then, the word *fír* is often linked to the royal function. The king’s sentences are referred to as “true judgements” (*bretha fíra*)<sup>35</sup>. *Fír* is also linked to kingship (*flaith*), particularly in the *Testament of Morann*<sup>36</sup>, which repeatedly uses that term. Royal justice provides peace and prosperity<sup>37</sup>. The king appears as the supreme judge and the guarantors of the good functioning of justice<sup>38</sup>: “Let him preserve justice, it will preserve him. Let him raise justice, it will raise him”, we read in the *Testament of Morann*<sup>39</sup>.

17. The king is expected to have a certain knowledge in legal matters. “Be skilled in every tongue”<sup>40</sup>, we read in a story<sup>41</sup>. He was certainly expected not to lose face in front of jurists. For instance, a poem enumerates what is expected from the king in that matter:

32 *CIH* 1964.21-1973.40; F. Kelly, *GEIL*, p. 267, n°11.

33 “The general welfare of the people is dependant upon the king’s justice as a ruler and legislator. The *fír*, his responsibility, reflects clearly the sacral nature of Irish Kingship [...]”, H. Wagner, “Studies in the Origins of Early Celtic civilisation”, *ZCP*, XXXI, 1970, p. 8.

34 M. Gerriets, “The king as judge in Early Ireland”, *Celtica*, XX, 1988, p. 29-52; F. Kelly, *GEIL*, p. 23-25; Ch. Archan, *Les chemins du jugement, op. cit.*, p. 138-163.

35 For example in “the Teachings of Cormac” (*Tecosca Cormaic*), K. Meyer, “The Instructions of the King Cormac Mac Airt”, *Todd Lectures Series*, xv, 1909, §1 l.38; also see M. Gerriets, “The king as judge”, *art. cit.*, p. 32 & 40-1.

36 Morann is a legendary judge accredited with authorship of *Audacht Morainn* (7<sup>th</sup> century), an example of the ‘Mirror of Princes’. R. Thurneysen, “Morands Fürstenspiegel”, *ZCP*, XI, 1917, p. 56-106; F. Kelly, *Audacht Morainn [AM]*, Dublin, 1976; A. Ahlqvist, “Le Testament de Morann”, *Études Celtiques*, XXI, 1984, p. 151-170.

37 F. Kelly, *AM*, p. 6 (§§12, 17, 19, 20, 21); also see M. O Daly, “A poem on the Airgialla”, *Ériu*, XVI, 1952, p. 181 & 186 (§22).

38 F. Kelly, *AM*, p. 6 & 8 (§§ 13, 14, 15, 16, 18, 24, 25, 26, 27, 28).

39 *Comath firinni, cotn-ofathar*, *AM*, p. 4 (§6); *Turbath firinni, tan-uicéba*, *AM*, p. 4 (§7).

40 *Bat eolai in gech berla*, R. I. Best, “The battle of Airtech”, *Ériu*, VIII, 1916, p. 173. *Bélrae*: technical language, legal language.

41 R. I. Best, *Ibidem*, p. 170-190.

If thou be a king you should know, the prerogative of a ruler [...], valuation of lands, measurement by poles; augmentation of a penalty, larceny of tree-fruit; the great substance of land-law: marking out [fresh] boundaries, planting of stakes, the law as to points [of stakes], partition among co-heirs...<sup>42</sup>.

Most qualifications that are required here are related to land law. Then the sharing of lands between heirs is a competence we'll find again in the cases of the first procedure. But the king doesn't judge alone, since he is not an expert in law<sup>43</sup>. Indeed, he is assisted by the one we can call the "royal judge". He is a judge we can often see in literary or legal texts, such as the image of the great *Caratnia*, who delivers so-called "false judgements"<sup>44</sup>. He is a judge who is very much linked to royal power<sup>45</sup>. Then, if the texts indicate that it is the king who chooses his judge<sup>46</sup>, everything leads us to believe that he chooses the best one, the highest-ranking one in the hierarchy, to settle the most difficult cases. It would then appear natural to see the most learned of them – the "judge of the three [legal] languages" – sitting next to the king. All that legal knowledge is necessary to judge the most diverse cases, but above all the most important ones: those that the *Five paths of judgement* intend for the first procedure of "Truth". Because that text shows that "what is claimed for on that procedure is heavier and higher than what is claimed for on the other paths"<sup>47</sup>. What are, then, those difficult cases that the king and the royal judge are going to settle? The answer is given by the text:

You must follow the "Truth" in case of shameless denial, great difficulties, sharing between brothers, acceptance of a lord, claim for heritage, claim for the right to command<sup>48</sup>.

18. The list is completed below by the

intentional or unintentional offences with full fine and every offence that might benefit no concession (*logad*) or mercy (*trócaire*). And a lord's claim for rule and an abbot's claim for an office<sup>49</sup>.

In other words, the king and his judge settle serious crimes and offences the presumed author denies all responsibility for, disputes related to land property, clientelism, access to power and finally, "great difficulties". Those are the most important cases in that society and I think that the king intervenes in each of those fields<sup>50</sup>.

## *The second procedure*

19. A first paragraph reads: "take *dliged* for contracts"<sup>51</sup>. Since Thurneysen's study, it is commonly agreed that it is more precisely about settling the matter of the validity of contracts. And it is no wonder, since Irish law is particularly precise about the respect for the consent of the parties, about the capacity to

42 *Ma be ri rofesser, recht flatho*, [...], *mess tíre, tomus forrag, forberta díri, díthe mesraid; mórmáin mruigrechtó: mrogad coicrích, cor cualne, córus rinde, rann ete comorbu*, D. A. Binchy, "An archaic legal poem", *Celtica*, IX, 1971, p. 156-7.

43 Marilyn Gerriets writes: "Although the king was indeed a judge, most likely few kings possessed sufficient mastery of the laws to judge without assistance from a *brithem*", "The king as judge", *art. cit.*, p. 31.

44 Caratnia is a legendary judge who gives exceptions to many of the basic principles of Irish law, R. Thurneysen, "Aus dem irischen Recht III, 4. Die Falschen Urteilsprüche Caratnia's", *ZCP*, XV, 1925, p. 302-370.

45 M. Gerriets, "The king as judge", *art. cit.*, p. 45-51; Ch. Archan, *Les chemins du jugement*, *op. cit.*, p. 159-163.

46 M. Gerriets, *Ibidem*, p. 46; *Críth Gablach*, ed. D. A. Binchy, *op. cit.*, p. 20.498, §35; E. MacNeill, "Ancient Irish law", *art. cit.*, p. 302.

47 *Ar is trummu 7 is uaisle inni acarair fuirri na forna conaraib aili*, *CIH* 2200.25-6, *CCF*, p. 17 (R§6).

48 *Lia do fir fti sena nanbal fri ancessa mara fri derbranna brathbar fri flaithe fti airtin fri asnam ndibaid fri dliged tuisse*, *CIH* 2200.11-17; *CCF*, p. 16 (R§3).

49 *Cinta comraiti 7 anfoit lanfachaig 7 cach cin imna dir logad no trocaire. Ocus dliged flatha i flathemnas 7 abbad i n-abdaine*, *CIH* 2200.21-23; *CCF*, p. 17 (R§5).

50 Ch. Archan, *Les chemins du jugement*, *op. cit.*, p. 145-159.

51 *Tog dliged im churu bel bid*, *CIH* 2200.35; *CCF*, p. 18 (R§8).

contract, or about the guarantees which go with conventions<sup>52</sup>. If the conditions necessary to constitute a valid contract are not fulfilled, the judge is faced with what Irish law calls a “bad contract”, liable to be repealed by following the second procedure.

20. But paragraph 10 adds another case, which was put aside by Rudolf Thurneysen and Robin Chapman Stacey’s studies. It concerns “unintentional offences with half the fine and the unexcused injury”<sup>53</sup>. Those offences are only sentenced to half of the fine, they are not as serious as the ones treated by the first procedure. Here, the offence is admitted and can even be unintentional.

21. Contracts and offences would then be linked in that second procedure of “Right” (*dliged*). This reminds us of the distinction in Roman law of obligations, between contractual obligations and punishable obligations. You find that distinction in Gaius<sup>54</sup>, then in the *Institutes* of Justinian (*Inst.* III, 13, 2) and finally, a little differently in Alaric’s *Breviarum*<sup>55</sup>. I don’t know if the Irish had access to the *Breviarum*, like Aldhelm of Malmesbury (639-709) in England at the same period<sup>56</sup>, but I think the category of punishable obligations of paragraph 10 mustn’t be put aside too rapidly. It may have appeared later as the structure of the tract suggests<sup>57</sup>, but its presence is not meaningless.

22. The offences of paragraph 10 are not, indeed, serious enough to appear in the category of *fir*. They are here because their resolution is, by nature, easier. They are either unintentional offences, or inexcusable damages, which can be settled by paying compensation. Version E even adds “carelessness”. We are indeed in a different position from the first procedure where it is about “shameless denial”, offences punished by the whole fine or punished without mercy or pity. Here, far from the crisis bad faith or lies can provoke, both parties will head for a more peaceful settlement of their case. *The Small Primer* seems to confirm the distinction between contractual obligation and punishable obligation. The second procedure is described in that way: “Right (*dliged*) is founded on verbal contracts and acknowledgment (*aititiu*)”<sup>58</sup>. We find again the contracts of §8 of *Cóic Conara Fugill* and probably the offences of §10, which are admitted or confessed (so, easier to settle). In that case the link between contractual and punishable obligations appears in both texts under the name of *dliged*.

23. So, the judge who is to settle those problems must have a solid knowledge of Irish law, given the great diversity of the situations that can be submitted to him. Contracts appear, indeed, at all levels of society and in many fields. And punishable offences are not fewer. In our hierarchy of judges, the one who is placed immediately under the royal judge is the one who knows customary law (*fénechas*) and the art of poets (*filidecht*). Those two sources of law are very likely to be complementary and indispensable to the judge who will give his verdict about contractual and punishable obligations.

52 See in particular, N. McLeod, *Early Irish contract law [EICL]*, Sydney, 1992, especially the “Legal Introduction”, p. 13-91. Also see *Berrad Airechta*, *CIH* 591.8-599.38, translated by R. Thurneysen, “Die Bürgschaft im irischen Recht”, *Abhandlungen der preussischen Akademie der Wissenschaften*, nr. 2, Berlin, 1928, p. 6-32 and R. Chapman Stacey, “*Berrad Airechta*: an Old Irish Tract on Suretyship”, *Lawyers and Laymen*, Cardiff, 1986, p. 210-233.

53 [...] *int anfort lethfiachach* ⁊ *int indeithbir torbai*, *CCF*, p. 18-19 (RE§10).

54 Gaius writes about obligations: *Nunc transeamus ad obligationes, quarum summa diuisio in duas species diducitur: omnis enim obligatio uel ex contractu nascitur uel ex delicto*, “We proceed to treat of obligations, which fall into two principal classes, obligations created by contract and obligations created by delict”, Gaius, *Gai Institutiones or Institutes of Roman Law by Gaius*, ed. E. Poste, Oxford, 1904, p. 315 (§88).

55 “*Contractus*” and “*culpa*” (II, 9, pr.), instead of “*contractus*” and “*delictum*” (*Institutes*), J. Gaudemet, *Le Bréviaire d’Alaric et les Epitomes, Ius Romanorum Medii Aevi*, 1965, p. 35, n. 129.

56 H. Mayr-Harting, *The Coming of Christianity to Anglo-Saxon England*, London, 1972 (1994), p. 197.

57 Rudolf Thurneysen thinks paragraphs RE 3, 8, 11, 14 & 18 are the oldest. They would then have been completed by a second series: § 5, 10, 13, 16 & 20, *CCF*, p. 5. Offences (§10) are part of that second series.

58 *Consuiter dliged fo coraib bel* ⁊ *aititen*, *CIH* 1591.20; E. Mac Neill, “Ancient Irish law”, *art. cit.*, 1923, p. 272 (*UB* §2).



### *The third procedure*

24. We read in §II of *Cóic Conara Fugill*, that *cert* must be chosen concerning the comparative evaluation of things, their compensation and exchange<sup>59</sup>. That procedure opens the possibility of getting from justice some adjustments in case of defect. Besides, it is a practice admitted by other legal texts<sup>60</sup>. In that context, the third judge seems to be quite proper for fulfilling that function, he is – I have already mentioned it – “the judge who is competent to give judgement for the folk of art in regard of justice, in the estimation and measurement of the work and the remuneration of every product”<sup>61</sup>. Therefore, indeed, there exists a judge in charge of “estimating” and “measuring” products and work.

25. We have seen that in the *Small Primer*, the third procedure was not called *cert*, but *aicned*. I think, however, that it is the same. Paragraph 2 of the *Small Primer* indeed reads: “Nature is founded on concession (or remission) and joint arrangement”<sup>62</sup>. Then, this is precisely what the judge will have to try and get with *cert*: a “concession” (*logad*) from the party who asked for too much and then the “arrangement” (*cocorus*) between the parties. That definition shows how close *aicned* is to *cert*. In that context, the term *aicned* means balance and equity that we also find in the list of §139 in *Cóic Conara Fugill*<sup>63</sup> (*aicned* must not be mistaken for the phrase *recht aicnid* which designates customary law).

26. If that’s the way it is, we can consider, then, that our two tracts deal with three identical procedures: *fír*, *dliged* and *cert/aicned*. We know that *cert* is a borrowing from the Latin *certus*. A scribe may very well have substituted that word for *aicned* in *Cóic Conara Fugill*. *Cert*, by keeping the meaning of “just” and “fair” of his predecessor, then gives that procedure a more precise and technical meaning of “exactness” which may have appealed to the author.

27. It results from that distribution of cases, that both parties will have to know who to address before taking legal action. A craftsman will not require the “great learned judge” who has the status of lord, to examine a dispute concerning the sale of one of his products. That judge will also look unfavourably on a request concerning a simple theft or some injuries. On the contrary, he will draw a certain prestige out of settling some disputes about pieces of land between great landowners, or again difficult cases, involving murders or linked to power. Consequently, the change of procedure is tantamount to a change of judge, poorly considered by the one who was requested for nothing. That accounts for the fact that the fine of a cow was paid by the party who was badly advised.

28. The first three procedures, then, constitute a coherent group of cases classified according to their seriousness. To each of those three groups corresponds a judge: the master, the generalist and the beginner. That triad is typical of traditional Irish categories. However, the text reached us along with two other procedures that are very likely to have been added.

59 *Bid cert im chotomus folad folaid cutrumai forsatu forlain. Forlinad forbfais. Foraice cert crece for briathruib cundartha comuin. Ascada lanamnais Aurgais, CIH 2201.9-18; CCF, p. 19 (RE§II).*

60 *im-tecarthar cach lethchil i cutrummai fri arail arnacon derpara nech in n-aile, CIH 786.32-4, “every lop-sidedness is set in order in evenness against the other, lest anyone should take unfair advantage of the other”, N. McLeod, *EICL*, p. 180-181, §45, also see *ibid.* p. 39; F. Kelly, *GELL*, p. 163. In another tract, we can read: *dírgithber dochuir do choibchib cen imdíubairt di reir Dé 7 duini, CIH 599.19-20, “let bad contracts be set straight for contracting parties without mutual fraud according to the law of God and man”, R. Chapman Stacey, “Berrad Airechta”, *art. cit.*, p. 227.**

61 See above, n. 31.

62 *Consuiter aicned for logud 7 cocorus, CIH 1591.24, E. MacNeill, “Ancient Irish law”, *art. cit.*, p. 272 (§2).*

63 See below, n. 64.

### III. The last two procedures

29. If the hypothesis of the addition of two procedures is correct, it means that the author of the tract is trying to constitute a group of five. It also means number five is linked, in those jurists' mind, to the judicial activity (as well as number seven is linked to the ranks of society). Confirmation of that link can be found through other gatherings in fives. Thus, in our tract, the judge is expected to found his decision on one of the following five elements: *roscad*, *fásach*, *teistimin*, *cosmailius* and *aicned*<sup>64</sup>. In the *Airecht*-text, the tribunal is divided into five parts (five courts)<sup>65</sup>. And in another text, it is admitted there exist five types of judgements<sup>66</sup>. It is noteworthy that all those passages are linked to procedure.

30. In that context, the author of *Cóic Conara Fugill* had to find two other procedures to complete the first three, and add a procedure linked to seignorial justice and another one allowing appeal against a sentence.

#### *Seignorial justice*

31. The fourth procedure bears the name of *téchtá*. That term is thus defined in the *Dictionary of the Irish Language*: “In Laws legal rightness, that which is in conformity with law (of dues, fines, etc.)”, “frequently meaning what the lord was entitled to demand from his tenants, but perhaps referring originally to the status of the tenant, i.e. to what extent he was free or unfree”<sup>67</sup>. That procedure allows to solve the disputes about dependent people living under the authority of a master or a lord. Those dependent people are enumerated under the mention “perpetual origin”, paragraph R14 (H§112), which gives the following list: “cottiers” (*bothaig*), “tenants-at-will” (*fuidri*), “hereditary serfs” (*senchléithe flatha*), “old rust of crime” (*sensmúr cinad*), “commoners of origin” (*aithig bunaid*), “commoners of tribute” (*aithig chís*)<sup>68</sup>. That list is taken up again and completed by R/E§16 (H§127). Every time, the lists of the various versions start with the same three types of dependent people (*bothaig*, *fuidir*, *senchléithe flatha*) and vary after the mention of the “old rust of crime”, by the addition of other individuals characterized by their submission to an authority (commoner of origin, commoner of tribute, client of the lords, client of the monastery, child in fosterage). Therefore, the original list only seems to have been made of the first three dependent people<sup>69</sup> and the “old rust of crime” (*sensmúr cinad*), as Rudolf Thurneysen suggests<sup>70</sup>.

32. According to him, “*Sen-smúr cinad* bedeutet also ‘alter Rost von Vergehen’, ‘Vergehen, die so alt sind, daß sie gleichsam eingerostet sind’ ”<sup>71</sup>. The offences it is about are dealt with differently from those of the first two procedures (*fír* et *dliged*). They concern dependent people and are settled later than the others. Here indeed “every offence [is dealt with] after a year” (*cach cin iar mbliadain*)<sup>72</sup>. Those are offences which are at least a year old. Although it is generally recommended to take legal action within reasonable time – which is often indicated by the texts – here, the legal action is postponed. That delay is justified, in my opinion, by the system of penal responsibility of dependent people. The lord is indeed responsible for offences committed by the dependent people who are under his authority. Conversely, he recoups the

64 CCF, p. 59 (§H139).

65 F. Kelly, “An Old-Irish Text on Court Procedure”, *Peritia*, 5, 1986, p. 74-106.

66 CIH 2341.8-2342.15. The text gives new evidence of the importance given to numbers. Indeed, it is organized in a numerical progression: 5 kinds of judgements, 6 difficulties of the court, 7 doors of lie and finally the 16 signs of a bad plea.

67 *Dictionary of the Irish Language [DIL]*, Dublin, 1990, s. v. *téchtáe*.

68 CIH 2201.26-32; CCF, p. 21 (R§14); R. Chapman Stacey, *The Road to Judgment*, op. cit., p. 121-122 & p. 273, n. 40 & 41.

69 i. e. three types of people called *bithbunud* (perpetual origin), a generic phrase which allows to include them all. Besides, that phrase is no longer indicated in the other paragraphs of any other versions.

70 CCF, p. 10. R. Chapman Stacey also thinks so, *The Road to Judgment*, op. cit., p. 273, n. 40.

71 CCF, p. 78, n. 55.

72 CIH 2201.35-36; CCF, p. 21 (R§16).

compensations paid in case of offences against them<sup>73</sup>. Indeed we know the *fuidir* “does not pay for the offence of his son nor of his grandson or his great-grandson or his great-great-grandson or his [other] kinsmen or for his own offences. The lord who feeds him pays for his offences”<sup>74</sup>. Then, Irish law allows the least dependent (“free *fuidri*”) to leave their lord under some conditions, especially if they do not leave any debt unpaid and particularly any debt linked to an offence. It can be read, for instance, that “a *fuidir* of land is capable of parting from his lord provided he shows his possessions to his lord and provided he does not make his lord liable for an offence”<sup>75</sup>. Another passage confirms that mechanism specifying that “Every *fuidri* except unfree *fuidri* are capable of separating from a lord, provided they do not leave him with liabilities or with [anything to be paid for] offences”<sup>76</sup>. Old offences, then, are those which were voluntarily kept as debts, they are dependent people’s offences. Under those conditions, the *téchtá* procedure allows the judge to settle the problems linked to the rights and duties in relation to dependent people, including the possible disputes linked to their departure. Whenever the *fuidir* leaves his lord, he must pay him back the possible “old rusts of crime” before being totally freed.

33. Therefore several hypotheses can be made. The payment of the debts could entail a dispute with the lord, since he could play on the amount of the old rusts of crime to maintain a *fuidir* insolvent. The dependent person who was about to recover his freedom could attempt to get justice through *téchtá*. But maybe that procedure must rather be considered as being used to decide between two lords fighting over a dependent person, one having to pay the other one the liabilities of his *fuidir* (hence the calculation of the amount of old offences). Dependent people must have been the objects of envy between big land-owners who went as far as attracting those who could terminate their contracts. According to Nerys Patterson indeed,

competition between lords for clients was keen; competition for *fuidri* may also be inferred, or else the rules governing their social position would have hardened into caste-like hereditary servitude. But the on contrary, various “degrees” of *fuidir*ship were recognised, according to how long the *fuidir*’s ancestors had served those of the lord (Binchy 1984). In my view, these rules were not designed to protect the inconsequential *fuidri*, but to safeguard rising local lords from charges of illegality when they poached their kinsmen’s labor-force. Such laissez-faire provisions protected the brehons from the consequences of having to rule against emerging local powers<sup>77</sup>.

That would account for dependent people being judged separately, and not through one of the first three procedures. Finally, *téchtá* may have allowed, as Rudolf Thurneysen thinks, the question of the status of dependent people to be judged<sup>78</sup>. If it is difficult to imagine the most dependent people taking legal action (a *senchléthe* who would claim the right to be classified as a *fuidir*, for instance), we may admit a man reduced to the status of dependent person but pretending to be free can refer the matter to an authority (the lord of his pretended lord) for him to acknowledge his status through the fourth procedure<sup>79</sup>.

73 The rule is not applied for the “*fuidir* who have five holdings” (a grade between the free man and the dependent one), he is capable of paying for his offenses and receives the compensations, R. Thurneysen, “Irishes Recht – II. Zu den unteren Ständen in Irland”, *Abhandlungen der Preussischen Akademie der Wissenschaften*, Nr. 2, Berlin, 1931, p. 63 (§2).

74 *Ni icca cinaid a meic nach a hui nach a iarmui nach a indui nach a comoccu[i]s fine nach a cinaid fadeisin. Flaith a(i)ridmbiatha, is [s]i iccass a cinaid.* CIH 426.1-3; R. Thurneysen, *Ibidem*, 1931, p. 63 (*Fuidir*-text §1).

75 *Is meise fuidir griain imscartha fri flaith, acht do-airfena a selba do flaith, acht ni-forgaba cinaid for flaith.* CIH 428.12-14; translation T. M. Charles-Edwards, *Early Irish and Welsh Kinship [EIWK]*, Oxford, 1993, p. 332; R. Thurneysen, *Ibidem*, 1931, p. 66 (*Fuidir*-text §8). See CIH 428.12-14; *AL* V 360.18-20 (heptad LXXII).

76 *Cach fuidir acht doerfuidir, it meise imscartha fri flaith, acht ni-fargbat domuine na cinta foraib,* CIH 429.9-10; R. Thurneysen, *Ibidem*, 1931, p. 67 (*Fuidir*-text §11); T. M. Charles-Edwards, *EIWK*, p. 318 & 340.

77 N. Patterson, *Cattle-Lords and Clansmen*, Notre Dame, 1994, p. 153.

78 Here, I am qualifying my 2007 assertions, p. 225-226.

79 Such a procedure will later exist in England before the king, thanks to the writ *De libertate probenda*: “The king to the sheriff, greeting. R., who claims to be a free man, has complained to me that N. seeks to reduce him to villain status. Therefore I command you, if the aforesaid R. gives you security for prosecuting this claim, to transfer that plea before me or my justices on such-and-such a day, and to see that he goes in peace meanwhile. And summon the aforesaid N. by good summoners to be there then, to show why he unjustly seeks to reduce him to villain status. And have there the summoners and this writ. Witness R., etc.”; *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, ed. G. D. G. Hall, Oxford, 1965 (2002), p. 54.

34. It is likely that, as in other medieval societies, the lord judges by himself the matters of those who live under his authority. The *Law of Base Clientship (Cáin Aicillne)* which indicates that the lord must not pass bad judgements on his *base clients (dóercele)*<sup>80</sup> indeed does not mention any professional judge<sup>81</sup>. Thomas Charles-Edwards writes about that tract that “lords who have kept their side of the bargain have the right, indeed the obligation, to judge their clients”<sup>82</sup>.

35. If the rule concerns the relationships between a lord and his base clients, it applies, particularly, towards dependent people. In the tract about the *Divisions of the Kindred (Fodlai Fine)*<sup>83</sup> it seems to be alluding to that lord who judges the ones he governs, since he knows them well:

No one is capable of acting as judge of kin or *fuidir* who does not know their subdivisions and their *dire* and [the nature of] authority over them and their honour-price. How many divisions of kin are there? His *fuidirs*, his offspring, his “forks” who serve him are kin to each lord, so that a name for them all is “lords’ kin”<sup>84</sup>.

36. The fourth procedure would then correspond to seignorial justice, a judicial activity indeed, but which is not dispensed by a professional judge and which had to be added to the list of the first three procedures, so as to reach number five. Dependent people are judged there, particularly the debts contracted from their lords, especially whenever they leave them (old offences). Maybe the lords are judged there who are fighting over dependent people before their overlord or again the issues of the status of dependent people. However that may be, *téchtá* represents a supplementary judicial activity allowing the author of our tract to reach number four. He then had one last step left.

### *A recourse to appeal*

37. The compound phrase *cóir n-athchomairc* means, to my mind, “in accordance with the new request” or “accordance of the new request”, and indicates that the fifth procedure offers the parties the possibility of contesting a judgement which has already been passed (an appeal procedure)<sup>85</sup>. According to the *Dictionary of the Irish Language*, *cóir n-athchomairc* applies, in the *Five paths of judgement*, the “name of one of the procedures used in deciding a law case” and the translation of a part of paragraph 18 is given: “*cóir n-athchomairc* is chosen in a case which has been well-prepared and for which suitable guarantees have been given, provided this is the decision of one learned in law”. Robin Chapman Stacey gives the following definition: “*cóir n-athchomairc* is selected concerning every speedy, well-bound [case] but [only] according to (or “after”) a declaration of a verdict [based on the] true-learning of knowledge”<sup>86</sup>. If you examine the two terms of the phrase separately, you find for *cóir*: “proper, correct, right; suitable, fitting, just” and for *athchomarc*: “act of asking, enquiry; request, question” (*DIL*).

38. In the beginning of the 20<sup>th</sup> century, Robert Atkinson gives the following translation: “*ath-chomarc*, the act of re-interrogating, asking leave, (right of) appeal”<sup>87</sup>. A little bit later, in 1926, Standish Hayes O’Grady gives the translation of the first words of *Cóic Conara Fugill*’s E version: “Five ‘paths of

80 Base clients are free men who, to a certain extent, depend on their lords, but remain much freer than *fuidir*, *bothach* or *senchléithe* who are much more, or even totally dependent.

81 *Nach flaith be[s] sofoltach, is [s]i ima(n)-dene feib a set do neoch nadbi dearb la fiadna; ocus is [as]a reir ictair aithgein ocus fuillium, mana-tairiset a gubreatha nach a guforgell nach a mignima nach a mifolaíd fria deis, CIH 499.12-15; R. Thurneysen, “Aus dem Irischen Recht I, 1. Das Unfrei-Lehen”, *ZCP*, XIV, 1923, p. 389 (*Cáin Aicillne* §55). Also see *Cáin Aicillne* §53.*

82 T. M. Charles-Edwards, “Early Irish law”, *A New History of Ireland I*, ed. Dáibhí Ó Cróinín, Oxford, 2005, p. 341.

83 *CIH* 429.14-432.15; *AL* IV 282-91.

84 *Ni tualaing brethemnachta for fine na fuidri nad fiastar a n-etarscartha 7 a ndire 7 acain 7 (a) llog a n-enech. Cís lir fodlai fine la Feniu? It e fine cach flaith a fuidri, a ciniud, a gabail foda-gniat, conid ainm doib ule flaith fine, CIH 429.14-21; Categories of Kin (Fodlai Fine§1-2); translation T. M. Charles-Edwards, *EIWK*, p. 309 and 515.*

85 Rudolf Thurneysen translates *cóir n-athchomairc* by “ordnungsgemäß zur Anfrage” (*CCF*, p. 10), and Robin Chapman Stacey by “suitability of inquiry” or “proper inquiry”, *The Road to Judgment, op. cit.*, p. 124.

86 R. Chapman Stacey, *Ibidem*, p. 132-133.

judgment' they are that have to be considered viz. Truth and Right, Right and Possession, and the right of Appeal"<sup>88</sup>. According to the *Dictionary of the Irish Language*, "aith-, ath- prep. prefix forming compounds with nouns, adj(j). and verbs, leniting. [...] With verbs and verbal nouns corresponds in sense to Latin re-, with nouns second, a further"<sup>89</sup>. Then, there is the idea that something is being re-claimed.

39. However, according to Rudolf Thurneysen, *cóir n-athchomairc* is used whenever the parties do not know which path to choose at the beginning of the trial. He writes that:

Der Hauptsatz, wonach der Ausdruck ein gemeinsamer Name für alle vier Urteilswege ist, und der Ausdruck *cóir n-athchomairc* „das Ordnungsmäßige der Anfrage“ selber zeigen, daß man wohl diesen Urteilsweg wählen konnte, wenn man nicht von vornherein sich für einen der vier andern zu entscheiden wußte; man überließ dem Richter die Anweisung, ging ihn um sie an, wie zu plädieren war. Als unmittelbare Ergänzung von *athchomarc* hat man sich ursprünglich wohl nicht, wie in der obigen Erklärung, den Urteilspruch (*breth*) zu denken, sondern entweder „Anfrage an den Richter“ oder „Nachfrage nach dem zu wählenden Urteilsweg“<sup>90</sup>.

For Robin Chapman Stacey,

it would be possible to argue that *cóir n-athchomairc* refers not to a separate plea or procedure, but rather to a stage through which *all* claims pursued in a curial setting would progress. [...] At that point the proper path was chosen and the appropriate guarantors exchanged, while disputes that did not fall on one of the other four paths continued on *cóir n-athchomairc* with the *aitire* as guarantor<sup>91</sup>.

For those two authors, the fifth path is then a preparatory step used in case of doubt about the procedure to be used (Thurneysen) or “to guarantee the defendant’s appearance in court” (Stacey).

40. If *cóir n-athchomairc* is, as Rudolf Thurneysen says, a means of asking the judge which path to follow for those who do not know the procedure, why does the author of the text want, on the contrary, to exclude the “uneducated” and the “ignorant of law” instead of sending them to *cóir n-athchomairc*? We are facing there a first contradiction. Moreover, why has the fine of a cow “on each path” (R§2) been provided to punish the one who could not choose the right procedure, whereas the fifth path would allow to make that choice (according to Thurneysen)? There too is a contradiction. Finally, why should one pass through *cóir n-athchomairc* before the choice of the final procedure (Stacey) whereas such a step already seems to exist with the “fore-pleading” of paragraphs R26 and 29? You can read indeed: “fore-pleading (fore-arguing) before the choice [of plea] and the bond of the *corpus* of each path” (§26)<sup>92</sup>, and then: “what is common to them: a fore-pleading (fore-arguing), since it takes place before the choice [of plea] and the bond of the *corpus* of each path” (§29)<sup>93</sup>. It is also very odd to place in fifth position – at the end of the list – a path which should be used at the beginning of procedure. Even though law texts are sometimes obscure, our jurists have often got us used to more logical constructions.

41. In the *Dictionary of the Irish Language*, the end of §R18 is translated thus: “after the verdict has been declared” (*s. v. derosc*). Thurneysen is embarrassed by that phrase and admits: “aber die Ausdrucksweise ist sehr eigentümlich, da das Vorgehen selber als ein Aussprechen, Konstatieren bezeichnet zu sein scheint”<sup>94</sup>. He writes:

87 *AL* VI, s. v.

88 Standish O’Grady, *Catalogue of the Irish Manuscripts in the British Museum*, tome I, London, 1926, p. 87-88.

89 *DIL*, s. v. *aith-, ath-*, p. 32. See also R. Thurneysen, *A Grammar of Old Irish*, Dublin, 1998, §824: *aith: re-, ex*, p. 499.

90 *CCF*, p. 79, n. 62.

91 R. Chapman Stacey, *The Road to Judgment*, *op. cit.*, p. 124-125.

92 *Aurtacra ria togu 7 arach cuirp cacha conaire*, *CIH* 2202.24; *CCF*, p. 24 (R§26=H§144).

93 *Coitbenn doib uili aurtacra, ar is ria togu 7 arach cuirp cacha conaire dognither*, *CIH* 2203.2-3; *CCF*, p. 25-26 (R§29=H§147).

94 *CCF*, p. 80, n. 62.

Das Wort *derosc* bezeichnet in den Rechtstexten immer den Abschluß von etwas, einer Verfallszeit, einer Bußleistung usw., die Erklärung, daß etwas voll abgebüßt ist. Es wird immer mit *derb-cinniud* glossiert (wie auch hier), was nicht „sichere Bestimmung“, sondern „sicheres finire“, „sichere Begrenzung, Abschließung“ beudeuten muß<sup>95</sup>.

I think the new claim can be explained precisely because there has already been a judicial decision (*derosc*) that is being contested through *coir n-athchomairc*.

42. Therefore, the first four paths can lead to the fifth one, whenever a party contests a first judgement through that appeal procedure. That is, in my opinion, the meaning of the following phrase that can be found in paragraphs 23 and 28 of R version (=H§133 & H§146): “for *coir n-athchomairc* is a name common to them all, whenever the parties are, in accordance with order, entitled to re-claiming before the judge” (R§23)<sup>96</sup>. The phrase is used again a little bit further:

one asks then, what is peculiar, proper, common and improper of the paths of judgement. [...] It is common to them, that they are called *coir n-athchomairc*, as said in *Senchas Már*<sup>97</sup>: for *coir n-athchomairc* is a name common to them all, whenever the parties are entitled to re-claim his judgement<sup>98</sup> before the judge<sup>99</sup>.

The parties ask the judge to give his verdict about a case which has already been judged. The gloss of paragraph 23, which adds “i.e. whenever there is a law-case of arrangement between the judges”<sup>100</sup> induces the idea that it is meant to re-establish law in a case, correct something. Finally, it can be read paragraph 16 of H version, that “the four-path procedure makes (leads to) five”<sup>101</sup>, which means the four procedures go towards the fifth one (and not the other way round).

43. Is the idea of contesting a judicial decision foreign to Irish law? We know that King Conn contests the judgements of his judge Caratnia, that he calls “false judgements”, fifty one times (even though it turns out that the latter was finally right)<sup>102</sup>. Fergus Kelly has made an inventory of the faults the judge can be blamed for in law tracts: “indulgence”<sup>103</sup>, “foolishness, ignorance and negligence”<sup>104</sup>, disrespect of

95 CCF, p. 79, n. 62.

96 *Ar in coir n-athchomairc is ainm doib uile, du imbi cora fechemain fri athcomarcc do brithemain*, CIH 2202.10-11; CCF, p. 23-24 (R§23=H§133).

97 The phrase is indeed used at the beginning of the *Senchas Már*, in the tract entitled *On the four divisions of distraint (Di Chetharslicht Athgabála)*: *Ocus ara ind hi as cetharda fris ngaibther athgabail: fir, ocus dligid, cert, ocus techta; [ocus coir nathcomairc ar in coir nathcomuirc is ainm] coitcend doib uile, du i mbeth corai fechemoin fri aithcomarc a breithi don breithemuin*, CIH 1711.6-8; AL I 258.19.20 (cf. CCF, p. 25 (R§28=H§146)). This passage is taken up again in another manuscript under a slightly different form: *Ocus ara ind hi as cetharda fris ngaibther athgabail; fir, ocus dligedh, .i. ocus ar in ni is cethri ernuile ar a ngeibther in gabail aith no eghda, .i. ogus ar in ni is cetheora hernuile ar a nagurthar in cin im ar gabadh in gabail aith no eghda, fir ocus dliged, .rl. Coir n-athchomairc, .i. ar in ni is ainm doib uile, .i. is les a fis in conair ar a n-aigera in cin im ar gabadh in athgababail, in conair fugill; is coir n-athcomairc. Du imbeth corai fechemoin fri athcomarc, .i. du, baile no inad imbid na fechemain um in caingen a fir coir re fiarfai a brethe do brethemhain. Cid fath fo dera in conair fuigill do tabairt ar aird idir is na athgabhalaiab ann so, [...] Ise in fath fo dera, maith les in fechemuin toithi a fir in conair fuighill ar a n-aigera in cin ima ngebaidh in athgabail*, CIH 410.6-17; AL I 272.6-19 (*Di Chetharslicht Athgabála*).

98 Thurneysen inserts [*a brethe*] by basing himself on the phrase from paragraph 146 version H: *ar in coir nathcomairc as ainm coitcend doib uili du i mbiat coire a fechemnus fri athcomarc a breithe don brethemain*, CIH 1041.26-28.

99 *Ruidles, diles, coitcenn* [7] *indles condagar dona conaraib fugill*. [...] *Coitcenn doib coir nathcomairc do rad friu, amail asbeir i Senchas Mar: ar in coir nathcomairc is ainm coitcenn doib du imbit core fechemain fri athcomarcc [a brethe] do brithemain*. [...], CIH 2202.34-39; CCF, p. 25 (R§28=H§146).

100 *.i. baile i mbi ai coraigthe eter na brithemna*, CIH 2202.11-12. *Córaigthe*: genitive of *córugud*: a case of regularization/adjustment.

101 *Conair for a .iiii. condar a .u.*, CIH 1029.23; CCF, p. 30 (H§16).

102 R. Thurneysen, “Aus dem irischen Recht III, 4. Die falschen Urteilsprüche Caratnia’s”, ZCP, XV, 1925, p. 302-370.

103 K. Meyer, “The Instructions of King Cormac Mac Airt”, *art. cit.*, p. 50-51 (§34).

104 Dialogue between Briathrach and Cormac, CIH 573.20-1; see also: *brithem cen fotha neoluis*, “a judge without foundation of knowledge”, CIH 1377.40, AL V 352.21-354.1 (heptad LXVIII).

procedure<sup>105</sup>; he has also shown the judge at fault has to justify himself by paying a fine or by losing his office<sup>106</sup>. But sanctions are not only human, they are also divine, since a bad judgement entails the ruin of the *túath*<sup>107</sup>, or the “failure of corn and milk and fruit as well as diseases and disasters”<sup>108</sup>. Likewise, the king is warned against the calamities that could descend upon his kingdom if he should judge badly<sup>109</sup>. Therefore the judge is not infallible<sup>110</sup>.

44. Whenever a party considers the judge did not make his decision according to law, he probably does not content himself with a mere declaration of false judgement. Marilyn Gerriets, who showed in 1988 that the king has an important role in judicial matters, writes that “even among the laity cases could be heard independently of the king, and normal procedure may have required all but the most serious cases to be heard by the king only in appeal”<sup>111</sup>. She then quotes an excerpt from the text called *To ascertain who is a judge in every case* (*Dia fis cíá is breitheamh i ngach cúis*)<sup>112</sup>, whose translation I give:

Any judge who gives a judgement of the laity or of the Church; if a party (to the dispute) impugns (the judgement) immediately he gives a pledge of five ounces regarding the objection... If the party does not dare to object to the judgement immediately, he counts ten days from the day of the judgement regarding the objection. And his objection is established thus: a cross on the storeroom of the judge, or before him. And he does not restore the pledge... If he does not dare to oppose the judgement at the end of ten days he restores the pledge from it... An objection (is made) in the house of their own leader who precedes them to the king (about) any judgement that the parties cannot establish among themselves<sup>113</sup>.

45. According to that excerpt, it is possible for a party to contest a judgement, immediately or within the ten days following the decision. He informs the judge by a sign left at his home or given to him in person: a cross (*cross*) whose nature is difficult to determine. It seems to be a code which signals to the judge that his decision is being questioned. Perhaps *Cóic Conara Fugill* alludes to that sign in the poem of paragraph H5, precisely about the fifth procedure, talking about “the true new inquiry with ogam”<sup>114</sup>, since there exists an ogamic cross-shaped letter<sup>115</sup>. Then the party goes to his “own leader”, a lord who precedes him to the king, who is the appeal judge. The presence of those lords is probably justified by the fact one had to have sureties at one’s disposal when addressing a judge, and particularly the king. We know the people who stand bail and guarantors are often of a higher rank than that of the parties who appeal to them<sup>116</sup>. Then it is no wonder that the parties in the text above are accompanied by their lords who are very probably their guarantors. Paragraph R19 in *Cóic Conara Fugill* and its gloss confirm that hypothesis for the fifth procedure, which provides that action be guaranteed by a “hostage-surety” (*aitire*)<sup>117</sup>. The gloss indicates it is a hostage-surety from the rank of the lords committed to the recognition of the path of judgement

105 *Brithem na laimetar gell fri biumcosnum a breithe* “a judge who does not dare [give] a pledge in defense of his judgement”, *CIH* 1377.39-40; *AL* V, 352.20-21 (heptade LXVIII); *Brithem berus breith for lethagra cin imaidhbi*, “a judge who passes judgement on half-pleading without hearing both sides”, *CIH* 1377.40-1; *AL* V 354.1 (heptad LXVIII).

106 F. Kelly, *GEIL*, p. 53-55.

107 K. Meyer, “The Triads of Ireland”, *Todd Lecture Series*, XIII, 1906, p. 12 (triad 96).

108 F. Kelly, *GEIL*, p. 54-55; *CIH* 1377.38-9; *AL* V 352.17-20 (heptad LXVIII).

109 F. Kelly, *GEIL*, p. 18; Ch. Archan, “Les règles de droit dans la prose du *Dindsenchas* de Rennes”, *Droit et Cultures*, 64, 2012/2, p. 113-115.

110 A commentator of the *Small Primer* suggests that a false judgement should be cancelled: *masa firbreth rucsat, is asdaidi; masa gúbret, is taithmigi*, *CIH* 1591.35-36.

111 M. Gerriets, “The king as judge”, *art. cit.*, p. 30.

112 F. Kelly, *GEIL*, p. 267, n. 11; L. Breatnach, *A Companion*, *op. cit.*, p. 79 (D17).

113 *Nach brithem beres breth tuaithe no eccolsa mad fofuasna feichem do maigin dober geall .u. nuingi fri fuaidreadh... Mana lamathar an fechem fuaidread na breithe fo cetoir adrimbe dechmaid o lo na breithe fria fuaidre. ⁊ as e fuaidre a suidhiugh cross fo cuile in breitheman no ara beolu. ⁊ ni taisic in geall... Mana lamathar fuaidre na breithe dia dechmaide taisic a ngell uadha... Nach breth nad astaither iter feichemna manetar a fuaidread a tigh a muireach fadeisin ardofeith co righ*, *CIH* 1968.17, 1968.37-1969.2, 1969.15-6, 1969.26-7; M. Gerriets, “The king as judge”, *art. cit.*, p. 34-35.

114 [...] *athchomarc fir re bóghombh*. [...], *CIH* 1028.9; *CCF*, p. 27 (H§5).

115 There exists a cross-shaped ogamic letter, cf. D. McManus, *A Guide to Ogam*, Maymooth, 1991, p. 13; S. Kerneis, *Les Celtiques, Servitude et grandeur des auxiliaires bretons dans l'Empire romain*, Clermont-Ferrand, 1998, p. 149.

116 N. McLeod, *EICL*, p. 16.

which is *cóir n-athchomairc*<sup>118</sup>. Paragraph 134 in the H version takes up again both R§19 and its gloss. The guarantor who has to be designated for the *cóir n-athchomairc* procedure is from noble rank, which completely corresponds to the text called *To ascertain who is a judge in every case*, which provides for an appeal before the king. It is a sign which shows the fifth procedure holds an unusual importance, and allows appeal to a great king, thanks to the *aitire* (lit. “being between”), who, as a nobleman, has easy access to Court and has the means of being heard by the king<sup>119</sup>.

46. To regard *cóir n-athchomairc* as a path of appeal against the decisions made in the first four procedures would perfectly correspond to the spirit in which *Cóic Conara Fugill* was built. All the disputes of Irish society are included in *fír*, *dliged*, *cert* and *téchta*, and an appeal is possible through *cóir n-athchomairc*. Let us then formulate a few hypotheses. If that procedure allows appeal against decisions taken on the first four paths, it can be expected that only the most important decisions are concerned, those which are worthy of being heard by a great king. *Fír* matters are already important, by definition. The most important contracts and offences (*dliged*) could come up before the king as well, as could matters concerning the most precious goods (jewellery, weapons, etc.), whose worth would have been undervalued (*cert*). Finally, which serious enough matters judged on *téchta* could attract the attention of a great king for him to re-judge them? Perhaps those in relation to the claim for the status of freeman, by a person claiming to be unjustly maintained in servitude<sup>120</sup>.

47. *Cóir n-athchomairc* would allow the great king – at least in theory – to control the judicial system, as the *Testament of Morann* (*Audacht Morainn*) seems to suggest in these terms:

*Ad-mestar cert 7 cóir, fír 7 dliged, cumthús 7 córus cacha flatho fire fria huili aicillni* – Let him estimate right and justice, truth and law, contract and regulation of every just ruler towards all his clients (≈ *téchta?*) –<sup>121</sup>.

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48. I fully agree with Robin Chapman Stacey when she writes that “*Cóic Conara Fugill* was but one step in the process by which the jurists sought to bring under curial jurisdiction structures and affiliations that had for so long been crucial to the private settlement of dispute”; and also that “the elaboration of curial procedure might be linked to the consolidation of kingship that is so marked a feature of the seventh and eighth centuries in Ireland”<sup>122</sup>. If the hypotheses I am presenting in this study are right, one can think that the author of the text has tried to classify matters and the competences of judges into a hierarchy by placing the king at the summit of that hierarchy and by constituting a field reserved to him so as to reinforce his power and his image. That will to reinforce kingship also exists elsewhere in western areas during the high Middle Ages and appears in churchmen’s writings. And it is certainly not by chance that the royal judge is the “judge of the three languages”, who masters the law of the Church in particular (we

117 *A harach. Aragar for aitire cois di choimthecht*, *CIH* 2202.3; *CCF*, p. 23 (R§19). Concerning *aitire*, see F. Kelly, *GEIL*, p. 172-173 and R. Chapman Stacey, *The Road to Judgement*, *op. cit.*, p. 82-III.

118 *Argidir for aitire do gradaib flatha comimthecht dia chois fri aichne na conaire fugill is choir nathcomairc*, *CIH* 2202.3-5; *CCF*, p. 23 (R§19).

119 In 1873, Eugene O’Curry suggests that the “Back Court” (*Culairecht*), is a “high court of appeal, composed of kings, bishops” “and *Ollambs*”, *Manners and Customs of the Ancient Irish*, vol. 1, Dublin, p. cclxx-cclxxi. That hypothesis – mentioned by Sharpe (“Dispute settlement in medieval Ireland: a preliminary inquiry”, *The Settlement of Disputes in Early Medieval Europe*, W. Davies & P. Fouracre (ed.), Cambridge, 1986, p. 186) – has not been taken up again by anyone, as far as I know. However, it is true that for its composition, that court appears as the most important of all. In his edition of the *Airecht-text*, Fergus Kelly writes “that the *rí* of our text is to be equated with the highest grade of king distinguished in the above sources [*BDC*, *CG* & *Miadshlechts*], i.e. that he is a *rí ruirecht* ‘king of overkings’” (“An Old-Irish Text on Court Procedure”, *Peritia*, 5, 1986, p. 89). Moreover, that court is called the “cliff which is behind (i. e. controlling) the courts”, F. Kelly, *GEIL*, p. 193. There would then be a high court which controls the others, in which the greatest of kings would notably sit. Perhaps it is the king of the text quoted below (n. 113) who receives appeals.

120 See the later English example, above, n. 79.

121 F. Kelly, *AM*, p. 14-15.

122 R. Chapman Stacey, *The Road to Judgment*, *op. cit.*, p. 135.



know it is for some “a sea over streams” and “the most wonderful law”<sup>123</sup>). In that context, the presence of such a judge near the king is then not insignificant, especially when you know that this one can have the last word, as did the great Caratnia<sup>124</sup>.

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<sup>123</sup> *Is muir tar glasa ai eculsa, adamra ae ai neclasa*, CIH 2226.3, “the law of the Church is a sea over streams, the law of the Church is the most wonderful law”; D. Ó Corráin, “The Laws of the Irish”, *Peritia*, 3, 1984, p. 393, n. 1; “The Church and secular society”, *L’Irlanda e gli Irlandesi nell’alto medioevo*, Spoleto, 2010, p. 303.

<sup>124</sup> It is not said that Caratnia is a “judge of the three languages” since the scene is set in the pagan past, but the character shows the great authority of the royal judge.