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Christophe Archan

## The *Small Primer* and the legal triads The judges and their sources in medieval Ireland<sup>1</sup>

I. The two triads of the *Small Primer* – II. The other triads in Irish law – III. The legal principles posed by the preamble of *the Small Primer*

ABSTRACT: Lawyers of the Early Middle Ages produced a large body of texts, mostly directed at law students or learning practitioners. Those texts, containing rules seemingly applicable to the whole island, are the witness of a certain judicial unity and give a priori the impression of a relative homogeneity. But this unity may sometime only be an appearance, and may hide variations linked to the age of the texts, their geographical origin, or their authors' train of thought. Indeed, lawyers do not always use the same terminology to express their own way to think of the law. Nonetheless they belong to the same judicial culture, which leads them to arrange their sources of law in triads, using different words in the various tracts to express the same rules.

KEYWORDS: medieval Ireland, sources of law, triads, judges, poets, *fénechas*, *filidecht*, *Hibernensis*, Small Primer (*Uraicecht Becc*).

RÉSUMÉ: Les juristes du haut Moyen Age ont produit de nombreux textes qui s'adressent principalement à des étudiants en droit ou à des praticiens en cours de perfectionnement. Ces textes qui semblent contenir des règles applicables dans toute l'île, témoignent d'une certaine unité juridique et donnent a priori l'impression d'une relative homogénéité. Mais cette unité n'est parfois qu'apparente et cache des variations liées à la date des textes, à leur origine géographique ou à la pensée de leurs auteurs. Les juristes n'ont en effet pas toujours recours à la même terminologie pour exprimer leur manière de concevoir le droit. Pourtant ils appartiennent à la même tradition juridique, qui les amène à classer leurs sources du droit par séries de trois en utilisant des termes différents selon les traités, pour désigner les mêmes règles.

MOTS CLÉS: Irlande médiévale, sources du droit, triades, juges, poètes, *fénechas*, *filidecht*, *Hibernensis*, Petite Introduction (*Uraicecht Becc*).

The *Small Primer* (*Uraicecht Becc*) is an early medieval law tract<sup>2</sup> on social ranks, in the same category as the *Branched Purchase* (*Críth Gablach*), *Rank Sections* (*Míadsleхта*) and the tract on “honour price” (*díre*)<sup>3</sup>. After enumerating a few legal principles in what we could call the ‘preamble’ (§§1-5), its author starts the main body of the tract with a long description of the Irish social hierarchy (§§6-60)<sup>4</sup>. Now, in that text, it has alluded

<sup>1</sup> This is an English version of an article published in the *Mélanges en l'honneur de Pierre-Yves Lambert*, ed. Guillaume Oudaer, Gaël Hily et Herve Le Bihan, Rennes 2015, p. 359-375, under the title “Uraicecht Becc et les triades du droit. Les juges et leurs sources dans l'Irlande médiévale”. I am most grateful to Professor Fergus Kelly, who read the French version of this article, for his precious advice. I'm also much indebted to Fangzhe Qiu who read the English version, for his useful comments. In both cases, any error remains my own responsibility.

<sup>2</sup> D. A. Binchy thinks the tract dates back to the beginning of the 8<sup>th</sup> century (and even earlier), “The Date and Provenance of *Uraicecht Becc*”, *Ériu* XVIII, 1958, p. 44-54 (p. 48); but Liam Breatnach dates it back to the beginning of the 9<sup>th</sup> or perhaps the 10<sup>th</sup> century, *A Companion to the Corpus Iuris Hibernici*, Dublin 2005, p. 315-318 (p. 316).

<sup>3</sup> Fergus Kelly, *A Guide to Early Irish Law* [GEIL], Dublin 1988, p. 267.

<sup>4</sup> I base myself on the cutting of the text made by Eoin MacNeill who offers a translation of it,

to two sets of three items – or triads<sup>5</sup> – on the sources of law. One of these appears in the body of the tract (§38) and the other in the preamble (in §2). That preamble is very instructive for whoever is interested in the sources of Irish law. Therefore *Uraicecht Becc* (*UB*) will be the starting-point of my study, from which I will then make a few comparisons with other tracts.

The study of the triads of law is not new. In 1970, Proinsias Mac Cana published an article entitled “The Three Languages and the Three Laws”<sup>6</sup>, in which he underlined “a close association, even juxtaposition, of the three main branches of learning, *fénechas*, *filidecht*, *légend*, the teaching of the law schools, the teaching of the schools of native poetry and the general tradition, and finally the teaching of the monastic schools”<sup>7</sup>. In the section of that article under the subtitle “The Three Laws in Irish Tradition”, Mac Cana quotes two passages of the *Small Primer*, which contain legal triads of Law: §45, which refers to the “jurist of the three languages” and §38 which refers to the “jurist of the three rules (*breithem teora mbreth*), viz. the rule of the Féni, and the rule of the *filid*, and the rule of the white language of Beatus”<sup>8</sup>. Mac Cana adds: “One may, with the glossator, read the passage in a more or less literal fashion and understand the *breithem téora mbreth* to be one who is learned not only in *fénechas*, but also in *filidecht* and Latin learning (*légend*) ‘in so far as *fénechas* is concerned’ with these (AL v. 92 gloss); or one may regard it rather as a theoretical schema symbolizing the universal range of the functions proper to the *ollam* or ‘master’ in law, ‘whose qualifications entitled him to decide cases of every kind’; or indeed one may interpret it as a judicious blend of both”<sup>9</sup>. Proinsias Mac Cana considers it is not unlikely that the master of judges (*ollam*) has some knowledge of *filidecht* (the poet’s art), since the profession of judges finds its historical origin in that of poets<sup>10</sup>. However, it is more difficult for him to explain why the *ollam* also masters the ecclesiastical law<sup>11</sup>. In response to that question, he concludes, notably, that “now, it also seems reasonably certain that the trivium of disciplines cited in the legend of Cenn Faelad<sup>12</sup> corresponds to the *teoir bretha* and the *trí bérlae* of the law-tracts”<sup>13</sup>.

Since Proinsias Mac Cana’s article, research has made significant advances, especially on the link between jurists and the Church<sup>14</sup>. Starting again from the *Small Primer*, one can then ask oneself what conception the judges have of their own law,

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“Ancient Irish law. The Law of Status or Franchise”, *Proceedings of the Royal Irish Academy* vol. 36, section C, n°16, 1923, p. 272-281.

<sup>5</sup> On the Irish triads, Fergus Kelly, “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).

<sup>6</sup> Proinsias Mac Cana, “The Three Languages and the Three Laws”, *Studia Celtica* v, 1970, p. 62-78.

<sup>7</sup> *Ibid.*, p. 66.

<sup>8</sup> *Ibid.*, p. 67.

<sup>9</sup> *Ibid.*, p. 67-68.

<sup>10</sup> *Ibid.*, p. 68-69.

<sup>11</sup> *Ibid.*, p. 70.

<sup>12</sup> Cf. below, note 77.

<sup>13</sup> *Ibid.*, p. 72.

<sup>14</sup> Particularly since Donnchadh Ó Corráin, Liam Breatnach & Aidan Breen, “The Laws of the Irish”, *Peritia* 3, 1984, p. 382-438.

through the study of triads.

A large corpus of medieval Irish legal texts have survived today in mostly late medieval manuscripts<sup>15</sup>. The tracts which mainly address to law students or jurists in further training seem to contain rules which applied to the whole island (it is in any case what some of their authors want to make believe)<sup>16</sup>. It follows that the texts testify to a certain extent of legal unity<sup>17</sup> and give *a priori* the impression of a relative homogeneity of law. But that unity is sometimes only too apparent that it conceals variations in the date of the texts, their geographical origin or the opinions of their authors<sup>18</sup>. Robin Chapman Stacey has convincingly pointed out that the technical legal terms were not interpreted in the same way everywhere by Irish jurists and that the temptation to generalize is however very strong today among historians<sup>19</sup>.

Starting from the observation that jurists do not always resort to the same terminology to express their way of conceiving law, but that nevertheless they belong to the same legal tradition, I would like to have a look at the way they classify their sources of law into series of three.

The *Small Primer* will be my starting-point; it contains two types of legal triads (I.). But triads also exist in different forms in other tracts (II.); they can explain the general principles of law laid down by our text (III.).

#### I. The two triads of the *Small Primer*

The preamble of the tract contains a first legal triad composed of *roscad*, *fásach* and *teistimin*; the body of the tract contains another one, composed of *fénechas*, *filidecht* and *légend*.

##### *Roscad*, *fásach* and *teistimin*

In the very first lines of the *Small Primer* (§2), the sources of law necessary for judgement are stated in these terms: “Truth<sup>20</sup> is founded on maxims (*roscaid*) and legal

<sup>15</sup> D. A. Binchy, *Corpus Iuris Hibernici [CIH]*, Dublin 1978.

<sup>16</sup> T. M. Charles-Edwards, “Custom in Early Irish Law”, in *La coutume (2<sup>e</sup> partie). Recueils de la Société Jean Bodin pour l’histoire comparative des institutions* LII, Bruxelles 1990, p. 439.

<sup>17</sup> Fergus Kelly, *GEIL*, p. 2. According to Michael Richter, “We may begin by pointing out that in spite of the political fragmentation of Irish society, namely its division into dozens of kingdoms, there was nevertheless an awareness that the island of Ireland formed one unit and was perceived as such”, *Ireland and her Neighbours in the Seventh Century*, Dublin 1999, p. 41.

<sup>18</sup> Fergus Kelly, *GEIL*, p. 1-2.

<sup>19</sup> Robin Chapman Stacey, *Dark Speech. The performance of Law in Early Ireland*, Philadelphia 2007, p. 172-173.

<sup>20</sup> The word Truth (*fír*) designates here a particular legal procedure, on which I think it leads to a judgement from the king helped by his judge, Christophe Archan, *Les chemins du jugement. Procédure et science du droit dans l’Irlande médiévale*, Paris 2007, p. 159-163. That paragraph designates, then, the sources of law the judge may resort to pass his judgement. The commentary confirms that truth is linked to the judgement: *.i. is cain astaigter in fír iregar in breitemnus, conid a roscaidib no conid a fasaigib no conid a tesemnaib iar fír berar he; in tan as brethemnacht sin*, *CIH* 1591.14-16, “i.e. well established is the truth through which he reaches the judgement, since it is from the maxims, or the legal precedents or the Scriptures that he passes it (the judgement) according to Truth; when he is in the phase of

precedents (*fásaige*) and true Scriptures (*teistimíní*)”<sup>21</sup>. Let us stop at the elements of that first triad for a while.

According to the *Dictionary of the Irish Language*, *roscad* designates “a legal maxim or aphorism”<sup>22</sup>. Fergus Kelly considers it means a “legal verse”<sup>23</sup>, and more precisely “a non-syllabic alliterative type of verse”<sup>24</sup>. For Proinsias Mac Cana, “*roscada* is also the recognized term for those legal aphorisms which derive from the oral teaching of the schools and which may well preserve the oldest stratum of the legal tradition”; [...] “*roscad* originally denoted a ‘vivid, memorable pronouncement’, or something of the sort, then this will readily account for the general literary usage as well as its specialized technical application in the legal language”<sup>25</sup>. According to a gloss of the *Primer of Stipulations (Uraicecht na Ríar)*, the *roscad* is recited or sung, since it is referred to “the *roscaid* which they (the poets) chant to all”<sup>26</sup>. Those legal verses (*roscaid*), which take root in the past, have been adapted to memorization in order to be passed on. Liam Breatnach, however, has demonstrated that some *roscaid* were still composed in a late period (8<sup>th</sup> century), which must incline to carefulness when it comes to dating that type of source<sup>27</sup>. Nevertheless, in jurists’ minds, *roscaid* are the mark of legal tradition, they are what we shall call the “maxims of customary law”<sup>28</sup>.

The second term of the triad is *fásach*. In the *Dictionary of the Irish Language*, *fásach* is translated into “a legal precedent, a decision which has passed into a maxim; a proverbial saying”<sup>29</sup>. Other scholars translate that word into “precedent”<sup>30</sup> or “legal precedents”<sup>31</sup>. D. A. Binchy defines the *fásaige* as “‘precedents’, the traditional decisions of real or (much more probably) mythical judges in what we may call

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judgement”.

<sup>21</sup> *Consuiter fír for roscadaib 7 fásaigib 7 tesdemnaib firaib*, CIH 1591.13-14.

<sup>22</sup> *Dictionary of the Irish Language [DIL]*, Dublin 1990, p. 512, s. v. *roscad*.

<sup>23</sup> Fergus Kelly, *GEIL*, p. 320.

<sup>24</sup> *Ibid.*, p. 196.

<sup>25</sup> Proinsias Mac Cana, “On the Use of the Term *Retoiric*”, *Celtica* VII, 1966, p. 72.

<sup>26</sup> *Ina rosgadha canaid fria chach*, CIH 2340.1-2; Liam Breatnach, *Uraicecht na Ríar. The Poetic Grades in Early Irish Law [UR]*, Dublin 1987, p. 112 (§18, gl. 5).

<sup>27</sup> Liam Breatnach, “Canon Law and Secular Law in Early Ireland: The Significance of *Bretha Nemed*”, *Peritia* 3, 1984, p. 439-59. See also T. M. Charles-Edwards, “Early Irish law”, in *A New History of Ireland I*, ed. Dáibhí Ó Cróinín, Oxford 2005, p. 356.

<sup>28</sup> “*Maxim*” is the term used by Kim McCone to translate “*roscad*” (*UB* §5), “Dubthach Maccu Lugair and a Matter of Life and Death in the Pseudo-Historical Prologue to the *Senchas Már*”, *Peritia* 5, 1986, p. 12. Likewise, according to Rudolf Thurneysen, “*roscad* is a legal maxim”, “Celtic Law”, in *Celtic Law Papers*, Bruxelles 1973, p. 60.

<sup>29</sup> *DIL*, p. 295, s. v. *fásach*.

<sup>30</sup> Kim McCone, “Dubthach Maccu Lugair and a Matter of Life and Death in the Pseudo-Historical Prologue to the *Senchas Már*”, *Peritia* 5, 1986, p. 12; Katharine Simms, “The brehons of later medieval Ireland”, in *Brehons, Serjeants and Attorneys, Studies in the History of the Legal Profession*, ed. Daire Hogan and W.N. Osborough, Dublin 1990, p. 71; Roisín McLaughlin, “A second source for the text on judges and poets in the pseudo-historical prologue to the *Senchas Már*”, *Celtica* XXVII, 2013, p. 29.

<sup>31</sup> Richard Sharpe, “Dispute Settlement in medieval Ireland: a preliminary inquiry”, in *The Settlement of Dispute in Early Medieval Europe*, ed. Wendy Davies & Paul Fouracre, Cambridge 1986, p. 185.

'leading cases'"<sup>32</sup>. On his part, Rudolf Thurneysen asserts: "*fásach* no doubt essentially a precedent, a judgement previously given"<sup>33</sup>. According to *the first Bretha Nemed (Bretha Nemed Toísech)*, those sentences must be sung or recited to be validly used as the foundation of a judgement<sup>34</sup>. Robin Chapman Stacey underlined the connection which is made between *fásach* and *forus* in *the first Bretha Nemed*. *Forus*, she says, is often translated into "promulgation" and is frequently associated with *fásaige* and not with *roscada*<sup>35</sup>. Fergus Kelly indicated that the term *forus* notably designate "the public announcement of the judgement"<sup>36</sup>. In that context, the association *forus-fásaige* may mean that *fásach* is indeed a trial, and that the *fásaige* constitute what we call today precedents. In any case, those "legal precedents" could be useful to the judge, to complement a *roscad*, according to a maxim which states "truth is wider than *fásachs*"<sup>37</sup>. This maxim, according to Fergus Kelly "means that a judge cannot expect to find all truth contained in *fásachs*"<sup>38</sup>. That is what justifies the diversity of sources and the existence of the triad.

The third element is called *teistimin* (borrowed from the Latin *testimonium*). We turn down the translation of that term into "*testimony, evidence*", to adopt those of "*text, scriptural quotation, passage*"<sup>39</sup> or "*texte, passage de l'Écriture*"<sup>40</sup>, since we are dealing with a list of sources of law. In doing so, we are following Rudolf Thurneysen (who translates the term into "*Schrifttext*")<sup>41</sup> as well as Fergus Kelly, who considers that *teistimin* "refers primarily to the text of Scripture as a guide and model for the early Irish judge"<sup>42</sup>. In a commentary to the *Small Primer*, *teistimin* is explained as: "i.e. from the word that is *testimonium*, the certain evidence of the Scriptures according to truth"<sup>43</sup>. We shall then translate the term *teistimin* as "Scriptures", noting that it refers to the legal rules contained in the ecclesiastical texts<sup>44</sup>: the ecclesiastical law.

The *Small Primer* then presents all the sources a judge has at his disposal to settle a case, that is to say, the old maxims of customary law in *roscad*, the legal precedents which complement them and finally the ecclesiastical law. That classification seems to

<sup>32</sup> D. A. Binchy, "The Linguistic and Historical Value of the Irish Law Tracts", in *Celtic Law Papers*, Bruxelles 1973, p. 86.

<sup>33</sup> Rudolf Thurneysen, "Celtic Law", in *Celtic Law Papers*, Bruxelles 1973, p. 60. In his edition of *Cóic Conara Fugill*, Rudolf Thurneysen translates *fásach* by "*früheres Urteil*" (previous judgement), "*Cóic Conara Fugill [CCF]*, Die fünf Wege zum Urteil, Ein Altirischer Rechtstext herausgegeben, übersetzt und erläutert", *Abhandlungen der Preussischen Akademie der Wissenschaften*, nr. 7, Berlin 1926, p. 59.

<sup>34</sup> Robin Chapman Stacey, op. cit., 2007, p. 74 et 274, n.132.

<sup>35</sup> Robin Chapman Stacey, op. cit., 2007, p. 211-212.

<sup>36</sup> Fergus Kelly, *GEIL*, p. 195-196.

<sup>37</sup> *leithiu firinde fasaigib*, *CIH* 1193.28; Fergus Kelly, *GEIL*, p. 197.

<sup>38</sup> Fergus Kelly, *GEIL*, p. 197.

<sup>39</sup> *DIL*, s. v.

<sup>40</sup> *Lexique Etymologique de l'Irlandais Ancien de J. Vendryes [LELA]*, Paris & Dublin 1959-, s. v.

<sup>41</sup> Rudolf Thurneysen, *CCF*, p. 59.

<sup>42</sup> Fergus Kelly, *GEIL*, p. 197.

<sup>43</sup> *i. oní as testimonium, deimin forgill na scribtuiri iar fir*, *CIH* 1592.20-21; *Ancient Laws of Ireland [AL]*, Dublin 1865-1901, vol. v 12.6-7.

<sup>44</sup> There existed various compilations, especially the *Collectio Canonum Hibernensis*.

have lasted through the ages, since it can also be found in the commentary in Middle Irish which accompanies the following two paragraphs (§§3 & 4)<sup>45</sup>, showing how familiar the triad “*roscad, fásach, teistimin*” is to jurists. That commentary repeats almost word for word the terms of the tract entitled *the Five Paths of Judgement*:

And what *breithem* means : the *ollam* (master) himself. And what judgement means : the maxim (*roscad*) and the legal precedent (*fásach*) and the Scriptures (*Testimini*). And it is drawn from what follows : they are five classes of things according to which the judgement is achieved: according to maxims, legal precedents, Scriptures, analogy, [and] equity (“nature”). As long as it [the judgement] is found according to maxim or legal precedent or Scriptures, his sentence should be [delivered] according to them. And if they are not found, his judgement is [pronounced] according to analogy. And if it is not found according to analogy, his judgement is pronounced according to strict equity (“exact nature”). And if one of those latter ones is given rather than the others, while he should have found himself, he risks a fine for false judgement (*CCF*, H§139)<sup>46</sup>.

The striking resemblance of that passage with the commentary to §§3 & 4 of the *Small Primer* can be accounted for by the fact that both tracts come from the so-called *Bretha Nemed* school<sup>47</sup>. That closeness can also be accounted for by the fact that one of the versions of *the Five Paths* (U version) has been incorporated into *the Small Primer* (D version)<sup>48</sup>. If the passage quoted above (*CCF* H§139) starts with referring to the most experimented judge, “the master” (*ollam*), it is because he is supposed to know the three sources of law (maxims, legal precedents and Scriptures) and manipulate analogy and equity<sup>49</sup>. In a previous study, I suggested seeing in that “master” the judge who sits beside the king<sup>50</sup>. Now, according to *the Small Primer*, the king is expected to use

<sup>45</sup> Let us take the example of the commentary of § 3: *Coig ernaili asa mberar in breth .i a roscad, a fásach, a testeamain, a cosmailius, a haigned. Gein fogabthar a roscad no a fásach no a teisteamain hi, as ed dlegar a breth estib; 7 in tan nach fuigbidter, is a bret a cosmailius, 7 in tan na fuidbiter a cosmaillus hi is a breth a lomainid. Fírbreth gach ní dib-sin, 7 da ructhar aní dib-sin rena celi 7 dogebtha ann bodein .i. a roscad no a fásach no a testeamain, is eraic gubrethi ar ann, CIH 1591.36-1592.2; “they are five classes of things according to which the judgement is achieved: according to maxims, legal precedents, Scriptures, analogy, [and] equity (“nature”). As long as it [the judgement] is found according to maxim or legal precedent or Scriptures, his sentence should be [delivered] according to them. And if they are not found, his judgement is [pronounced] according to analogy. And if it is not found according to analogy, his judgement is pronounced according to strict equity (“exact nature”). Each of those is a true judgement. And if one of those latter ones is given rather than the others, while he should have found himself, i.e. according to maxim, or legal precedent, or Scriptures, he risks a fine for false judgement” (*UB*, abstract of the commentary of §3), translation Fangzhe Qiu. Also see *AL* v 8.22-10.3 and the commentary of §4 (*CIH* 1592.4-5 & 1592.6-8), which resumes the same classification.*

<sup>46</sup> 7 is ed is brethem and .i. int ollam budein. 7 is ed is brethemnus .i. roscad 7 fásach 7 teiste[m]ain; 7 is as gabar sin .i. .u. ernaili as[a] mberar in brethemnus, a rosc, a fásach, a testemain, a cosmailius a haicnead; 7 gen fogabar a rosc he no [a] fásach no a testemain, is aisdib dlegar a breith; 7 in tan na fuigbitber [is a breth a cosmailius. 7 in tan na fuigbitber] a cos[m]ialis, is a breth a lomaine; 7 da ruca ní dib-sin riana chele 7 doghebad ann fein, is eric gubreith[e] air ann, *CIH* 1040.36-1041.2, translation Fangzhe Qiu. Also see *CCF* §§H3&5.

<sup>47</sup> It is D. A. Binchy’s hypothesis, in “*Bretha Nemed*”, *Ériu* XVII, 1955, p. 6 & “The Date and Provenance of *Uraicecht Bec*”, *Ériu* XVIII, 1958, p. 51.

<sup>48</sup> Liam Breatnach, *A Companion to the Corpus Iuris Hibernici*, Dublin 2005, p. 233 & 315.

<sup>49</sup> Christophe Archan, “La résolution des conflits de normes enseignée dans les écoles de l’Irlande médiévale”, *Savoirs en prisme* n°3, *La vie des normes*, 2014 ([savoirenprisme.wordpress.com](http://savoirenprisme.wordpress.com)).

<sup>50</sup> Christophe Archan, *Les chemins du jugement. Procédure et science du droit dans l’Irlande médiévale*, Paris 2007,

the three sources of law to judge: “the decision of a king, however, is founded on them all, on maxims (*roscaid*) and precedents (*fásaige*) and Scriptures (*teistimní*)” (UB§5)<sup>51</sup>. Both – the king and his judge – then use the same sources naturally. However, when the author of *the Small Primer* refers to the great judge, the “judge of the three judgements” or “judge of the three languages”, he associates him with another triad.

*Fénechas, filidecht and bérla bán (légend)*

In the part of the *Small Primer* dedicated to social ranks (§§6 ff.), the author mentions in paragraph 38, “the judge of the three judgements” (i.e. of the three laws): “if he be a judge of the three judgements<sup>a</sup>, i.e. the judgement of the *Féni*<sup>b</sup>, the judgement of the poets<sup>c</sup> and the judgement of the white speech (*berla bán*) of Beatus<sup>d</sup>”<sup>52</sup>. A commentator added: “if he is a judge who knows the three judgements, i.e. *fénechas*, *filidecht* and latin learning (*légend*)”<sup>53</sup>. Each of the sources is then glossed that way:

<sup>b</sup> “i.e. who is leaned in *fénechas*”<sup>54</sup>.

<sup>c</sup> “i.e. who is leaned in *filidecht*, in so far as *fénechas* [= law] is concerned”<sup>55</sup>.

<sup>d</sup> “i.e. who is learned in Latin learning (*légend*), in so far as *fénechas* [= law] is concerned”<sup>56</sup>.

That passage – which we also find in *the first Bretha Nemed*<sup>57</sup> – then alludes to a judge who masters three sources of law<sup>58</sup>. Once again, it is certainly this person that the authors of the tracts wish to see sitting beside the king<sup>59</sup>. A little below in the text, the author mentions again that great master, but this time under the name of “judge of the three [legal] languages”<sup>60</sup>. In the hierarchy, he dominates not only the judge “of the language of the *Féini* and of the poets’ art” but also the one who judges in matters relating to craftsmen<sup>61</sup>. He is – the gloss adds – “a judge who knows the three

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p. 159-163.

<sup>51</sup> *Breath flatha im[morro] consuiter foraib uili for roscadaib et fasaigib et teistemnaib*, CIH 1592.17-20. According to T. M. Charles-Edwards, “one element in the legal role of the king was his capacity to bring together both legal traditions in order to achieve a decision”, *The Early Mediaeval Gaelic Lawyer, Quiggin Pamphlets on the Sources of Mediaeval Gaelic History* 4, Cambridge, 1999, p. 25.

<sup>52</sup> *Mad breithem teora mbret .i. bret feni 7 breth filed breath berla bain bias*, CIH 1612.23-26; *AL* v 92.16-17; Eoin MacNeill, “Ancient Irish law. The Law of Status or Franchise”, *Proceedings of the Royal Irish Academy* vol. 36, section C, n°16, 1923, p. 277 (§38); the translation is mine.

<sup>53</sup> *.i. mad breteam bus eolach isna teora brethaib .i. i fenecbus 7 i filidicht 7 i legend*, CIH 1612.23-24.

<sup>54</sup> *.i. bus eolach i fenecus*, CIH 1612.24.

<sup>55</sup> *.i. bus eolach a filidecht do neoch taidleas feneochus di*, CIH 1612.25.

<sup>56</sup> *.i. bus eolach a legind du neoch taidleas feneachus de*, CIH 1612.26.

<sup>57</sup> *CIH* 2221.29-30.

<sup>58</sup> I agree on the translation of Proinsias Mac Cana who uses the terms “rule of the *Féni*”, “rule of the *filid*” and “rule of the white language of the Beatus”, cf. above, note 8.

<sup>59</sup> See above, note 50.

<sup>60</sup> *CIH* 1614.32 (UB§45).

<sup>61</sup> *CIH* 1613.38-1614.20 (UB§43 & 44); Proinsias Mac Cana, “The Three Languages and the Three

languages, i.e. *fénechas*, the poet's art (*filidecht*) and Latin learning (*légend*)<sup>62</sup>. He is an important judge since he has the same statute as a “lord of precedence (*aire tuiseo*)”<sup>63</sup>. Let us stop once again at the three terms of the triad, *fénechas*, *filidecht* and *berla bán* (*légend*).

*Fénechas* comes from *Féni*, which designates free men, the free Irishmen<sup>64</sup>. *Fénechas* is then customary law of the Irish<sup>65</sup>. In his legal glossary of *Críth Gablach*, D. A. Binchy gives the following definition of it: “*fénechas* (from *Féni*) means the traditional body of native custom which was preserved by oral tradition in the law schools. When the laws were first written down much of the *fénechas* was incorporated in the texts, and it forms the oldest stratum of the latter. For mnemonic purposes it was usually in a primitive form of verse, or rhythmical alliterative prose. A citation from it is usually prefaced by the phrase *ar-cáin fénechas* ‘the *fénechas* recites’ or ‘sings’”<sup>66</sup>. Robin Chapman Stacey showed however that *fénechas* could also designate some texts of another nature, which did not necessarily have the characteristics given by Binchy (archaism and orality). For her, “jurists from different schools understood and used the term in very different ways”<sup>67</sup>. Nevertheless, according to Stacey, “often *fénechas* functions as a generic term for ‘native law’ as distinguished from other types of legal dispensation, such as canon law or cáin regulation”<sup>68</sup>. It seems it is indeed in that sense, that the term was used by the author of our triad.

*Filidecht* or “poet's art” is thus defined in the *Dictionary of the Irish Language*: “the art, office or practice of the ‘fili’; poetry; also divination”. The poet of early Middle Ages is at the same time the author of praise-poems and satires, the guarantor of tradition (history, genealogy, place-lore), but also the judge<sup>69</sup>. That last activity connects him with our triad, in which the term *filidecht* must be understood in a strictly legal sense. It designates, then, in my opinion, the legal rules coming from the poets' activity, i.e. the judgements, the jurisprudence of the poets<sup>70</sup>. That jurisprudence had to be mastered at

Laws”, *Studia Celtica* v, 1970, p.67; Liam Breatnach, “Lawyers in early Ireland”, in *Brehons, Serjeants and Attorneys, Studies in the History of the Legal Profession*, ed. Daire Hogan and W.N. Osborough, Dublin 1990, p. 7; Christophe Archan, *Les chemins du jugement*, p. 117-118; “La résolution des conflits de normes”, op. cit.

<sup>62</sup> In *brethium 'ga tait na tri berla .i. fenechas 7 filidecht 7 legend*, *CIH* 1614.32-33; *AL* v 100.17-18; Eoin MacNeill, “Ancient Irish law. The Law of Status or Franchise”, *Proceedings of the Royal Irish Academy* vol. 36, section C, n°16, 1923, p. 279 (§45).

<sup>63</sup> *CIH* 1614.33 (*UB*§45).

<sup>64</sup> D. A. Binchy, *Críth Gablach*, Dublin 1941 (1979), p. 88, *s. v.* See also Eoin MacNeill, op. cit., 1923, p. 267; Rudolf Thurneysen, “Celtic Law”, in *Celtic Law Papers*, Bruxelles, 1973, p. 69; T. M. Charles-Edwards & Fergus Kelly, *Bechbretha*, Dublin 1983, p. 133-134.

<sup>65</sup> “The traditional customs and regulations of the *Féni* taken as a whole”, *DIL*, *s. v.*

<sup>66</sup> D. A. Binchy, *Críth Gablach*, Dublin 1941 (1979), p. 88, *s. v.*

<sup>67</sup> Robin Chapman Stacey, op. cit. 2007, p. 192.

<sup>68</sup> *Ibid.*, p. 190.

<sup>69</sup> Fergus Kelly, *GEIL*, p. 47-48.

<sup>70</sup> I think that *filidecht* does not correspond here to rules pertaining to the poetic activities: dispute arising from composing praise and satire, privilege and provision of poets, etc. That is not the business of a great character as the “judge of the three languages” to settle such cases. They belong to the poet's own activity (as confirmed later in the story included in the *Senchas Már*: “so poets were

least by the most learned of them, as testified by *the Primer of the Stipulations (Uraicecht na Ríar)* where the master (*ollam*) “is knowledgeable in the jurisprudence of Irish law”<sup>71</sup>.

*Berla bán*, literally “the white language” or “the pure language”<sup>72</sup> designates the ecclesiastical law. In the *Pseudo-historical prologue to the Senchas Már* the phrase is glossed *inna canóine* (of the canon)<sup>73</sup> and in our paragraph UB38, it is glossed *légend* (written law, Latin learning), which in a legal context refers again to the ecclesiastical law<sup>74</sup>.

If we accept the hypothesis of D. A. Binchy reiterated by Proinsias MacCana, that the judges of Early Middle Ages are the heirs of former poets, or of poets who would have specialized in legal matters during the development of Christianity,<sup>75</sup> we can consider the *ollam* of *the Small Primer* as the custodian of the Irish customary law (*fénechas*), of the jurisprudence of poets (*filidecht*) and of the ecclesiastical law (*bérta bán* or *légend*) i.e. of old law and new law.

That tripartite association also exists in *the Judgements of Inadvertence (Bretha Étgid)*,<sup>76</sup> in which one of the legends of the first writing down of Irish law is reported. The writing is reputed to be the work of the learned Cenn Fáelad (7<sup>th</sup> century) who, after being wounded in battle, undertook studies in three different schools – representing the three sources of law –: a school of customary law (*fénechas*), a school of poetic art (*filidecht*) and a school of ecclesiastical law (*légend*):

he (Cenn Fáelad) was brought to be cured to the house of Briccine of Tuaim Dreccain. And three schools there were at this place, an ecclesiastical law school (*scol léighind*) and a school of Irish customary law (*scol feinechais*) and a school of poetic art (*scol filidechta*). And everything that he used to hear of what was recited in the three schools, he had it by memory every night. And he set these things in a pattern of poetry and wrote them on slates and tablets, and transferred them into a vellum book<sup>77</sup>.

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deprived of the power to judge, save for what pertained properly to them”, John Carey, “An Edition of the Pseudo-historical Prologue to the *Senchas Már*”, *Ériu* XLV, 1994, p. 19 (§11).

<sup>71</sup> *Is éola i mbrithemnacht fénechais*, *CIH* 2336.6; Liam Breatnach, *UR*, p. 102 (§2); see also Liam Breatnach, “*Lawyers in early Ireland*”, in *Brehons, Searjeants and Attorneys*, ed. D. Hogan, W. N. Osborough, Dublin 1990, p. 3-4.

<sup>72</sup> Cf. *DIL*, s. v. *biait*.

<sup>73</sup> *CIH* 342.25; Kim McCone, “Dubthach Maccu Lugair and a Matter of Life and Death in the Pseudo-Historical Prologue to the *Senchas Már*”, *Peritia* 5, 1986, p. 9 (§8); cf. version H 3.18, *CIH* 876.13, John Carey, “An Edition of the Pseudo-historical Prologue to the *Senchas Már*”, *Ériu* XLV, 1994, p. 19 (§9).

<sup>74</sup> *CIH* 1612.24 & 1612.26; cf. *DIL*: “In Laws (mostly Comm.) written law (as oppd. to that preserved orally)”, s. v. *léigenn*. According *CIH* 1612.26, the judge of the three judgements “is learned in Latin learning (*légend*), in so far as *fénechas* [= law] is concerned”, text above, note 56.

<sup>75</sup> D. A. Binchy, “The Date and Provenance of *Uraicecht Becc*”, *Ériu* XVIII, 1958, p. 45; Proinsias MacCana, “The Three Languages and the Three Laws”, *Studia Celtica* v, 1970, p. 68. According to Seán Mac Airt, poets have abandoned law to the judge (*brithem*) and history to historian (*senchaid*), “*Filidecht and Coimgne*”, *Ériu* XVIII, p. 140-141.

<sup>76</sup> Fergus Kelly, *GEIL*, p. 272, n°33; Liam Breatnach, *A Companion to the Corpus Iuris Hibernici*, Dublin, 2005, p. 176-182.

<sup>77</sup> *Co rucad be da leiges co teg (?) bricin dreccain, ⁊ tri scola dobi isin baile, scol leigind ⁊ scol feinechais ⁊ scol filed; ⁊ cach ni docluined-sum da m[ist]isi (?) na tri scol cach lae dobid do glain mebru aice cach naidche, ⁊ docuir-sium glonsnaithi filed fuithib ⁊ doscrib-sum iat a leaib ⁊ i taiblib ⁊ rocuired(?)-seic i cairt liubair*. Version D, *CIH* 250.41-251.3;

If we now take the terms of the two legal triads of *the Small Primer*, we can now draw up the following table:

The legal triads in <i>the Small Primer (Uraicecht Becc)</i>		
Maxims of customary law	Legal precedents of the poets	Ecclesiastical law
maxims ( <i>roscaid</i> )	legal precedents ( <i>fásaige</i> )	Scripture ( <i>testimin</i> )
customary law ( <i>fénechas</i> )	poet's art ( <i>filidecht</i> )	white language / latin learning ( <i>bérta bán/ légend</i> )

It appears clearly that the ecclesiastical law is referred to in each of the two triads. It also appears that the jurists do not use a uniform terminology to designate that source (*testimin / bérla bán / légend*). In that context, we may think that the variability of terminology also applies to the other sources and that we can try to make both triads correspond to each other.

The link between *roscaid* and *fénechas* has already been established by some scholars. In 1986, Richard Sharpe connects indeed the term *roscada* with the “maxims of *fénechas*”.<sup>78</sup> In the same sense, T. M. Charles-Edwards evokes the “*roscaid style of the traditional Fénechas*”<sup>79</sup> and Robin Chapman Stacey shows that if the term *fénechas* may have various meanings<sup>80</sup>, it can also designate some maxims<sup>81</sup>.

Finally, the link between *fásach* (*legal precedents*) and the former legal activity of poets (*filidecht*) is possible, if we consider those two terms as synonyms designating the judgements of poets. Besides, a late passage of *The Scholars' Primer (Auricept na n-Éces)* alludes to the “legal precedents of the poets” (*fásaige na filed*), which constitute one of the five components of their “language”<sup>82</sup>. It may be deduced that the decisions of the poets (*fásaige*) are linked with the art of the poet (*filidecht*).

According to my hypothesis, both triads of law enumerated in *the Small Primer* then designate the same sources, but in different terms. If the terminology varies from one

Eoin MacNeill, “*A Pioneer of Nations*”, *Studies* vol. XI, 1922, p. 17; *AL* III, 88.9-17. Also see Liam Breatnach, *A Companion to the Corpus Iuris Hibernici*, Dublin 2005, p. 358. In version C, we can read in the following precision the place where Cenn Fáelad is staying: *a tuaim ndregan a comrac na tri sraided ider tigib na tri suadh .i. sai feinechais 7 sai filedachta 7 sai leigind* (CIH 926.12-13), “at Tuaim Dreccain, at the meeting of the three streets, between the houses of three masters, i.e. a master of customary law and a master of poet's art and a master of Latin learning (ecclesiastical law)”.

<sup>78</sup> Richard Sharpe, “Dispute Settlement in medieval Ireland: a preliminary inquiry”, in *The Settlement of Dispute in Early Medieval Europe*, ed. Wendy Davies & Paul Fouracre, Cambridge 1986, p. 185.

<sup>79</sup> T. M. Charles-Edwards, “Early Irish law”, in *A New History of Ireland I*, ed. Dáibhí Ó Cróinín, Oxford 2005, p. 356.

<sup>80</sup> Robin Chapman Stacey, *Dark Speech. The Performance of Law in Early Ireland*, Philadelphia 2007, p. 189-197.

<sup>81</sup> In the same work, the author underlined the association between “*ros*” and “*Fénechas-style*”, *ibid.*, p. 190-191.

<sup>82</sup> Georges Calder, *Auricept na n-Éces. The Scholars' Primer*, Edinburgh 1917, p. 100, l. 1303.

school to another or even from one tract to another, why do they appear here in the same text? We may here be facing two texts which have been combined into one. On one hand, the main part could then be identified as the one which deals with social ranks, i.e. paragraphs 6 to 60 of the edition of Eoin MacNeill (where our second triad is found). On the other hand, the first five paragraphs gather a series of general principles of Irish law, which constitute the real *Small Primer* to law (including our first triad).

Let us now turn to other tracts, to see how that type of classification is commonplace among jurists, even if the terminology differs.

## II. The other triads in Irish law

Without aspiring to be exhaustive, I shall deal here with the legal triads contained in the *Pseudo-historical prologue to the Senchas Már*, in the *Introduction to the Senchas Már*, in *Regulation of the proper behaviour (Córus Béscnai)* and in the *Irish Collection of Canons (Collectio Canonum Hibernensis)*.

### *Roscad, fásach* and *bérta bán*

The association *roscad, fásach* and *bérta bán* constitutes a mixture between the two triads of the *Small Primer*: *roscad, fásach* and *teistimin* (UB§§2&5) and *fénechas, filidecht* and *bérta bán* (UB§38). It appears in what we call the *Pseudo-historical prologue to the Senchas Már*<sup>83</sup>, a text dating back to the eighth century, for its oldest part<sup>84</sup>. The author of the text asserts that the custodians of tradition, who had been speaking freely until the arrival of Saint Patrick, then had to submit to the clergy in order to express themselves:

Until Patrick came (authority in) speaking was only granted to three men: the historian<sup>85</sup> with good memory for explanation and narration; the man of art (poet) for praise and satire; the judge for giving judgements with maxims (*roscaid*) and legal precedents (*fásaige*). After Patrick's coming, however, all of these (kinds of authoritative) speech are subject to the possessor of the white language (*bérta bán*), i.e., of Scriptures<sup>86</sup>.

The author thinks that from the moment when the Church developed in Ireland, the ecclesiastical law (“white language”) has imposed itself over the other two

<sup>83</sup> Fergus Kelly, *GEIL*, p. 266, n. 2; D. A. Binchy, “The Pseudo-historical Prologue to the *Senchas Már*”, *Studia Celtica* x/XI, 1975/76, p. 15-28; Kim McCone, “Dubthach maccu Lugair and a Matter of Life and Death in the Pseudo-historical Prologue to the *Senchas Már*”, *Peritia* 5, 1986, p. 1-35; John Carey, “The Two Laws in the Dubthach’s Judgement”, *Cambridge Medieval Celtic Studies* 19, 1990, p. 1-18; “An Edition of the Pseudo-historical Prologue to the *Senchas Már*”, *Ériu* XLV, 1994, p. 1-32.

<sup>84</sup> Kim McCone, op. cit. 1986, p. 19.

<sup>85</sup> Lit. “man of the historical knowledge”, hence, historian (*DIL*, s. v. *coimgne*).

<sup>86</sup> *Co tainic patraic tra ní tabarta urlabra acht do triur i nerinn: fer comgne fri asndeis 7 scelugud, fer certa fri molad 7 air, Breithem fri breithemnus a roscadaib 7 fasaigib. O tainic immorro patraic, is fo mam ata cach urlabra dona fúib-so do fír in berla bain .i. ina canoine*, *CIH* 342.22-25; John Carey, op. cit. 1994, p. 19 (§9), the modifications are mine.

traditional sources, namely the maxims and the legal precedents<sup>87</sup>. Another triad appears in the ‘real introduction’ to the *Senchas Már*, but in a less visible way.

*Dícbetal file, recht litre and recht aicnid*

The author of the introduction to the *Senchas Már* (beginning of the 8<sup>th</sup> century)<sup>88</sup> uses a different terminology to enumerate the three sources of law. The easiest source to be identified is the law of the Letter (*recht litre*)<sup>89</sup>, i.e. the ecclesiastical law, which is, once again, presented as having been added.

The tradition of the men of Ireland, what has preserved it? [1] Joint recollection of two elders, transmission from one ear to another, chanting of poets, [2] augmentation from the law of Scripture, [3] reliance on the law of nature. For those are the firm foundations on which the judgements of the world are fixed<sup>90</sup>.

Among the remaining two sources, the legal precedents of the poets (*fásaige/filidecht*) can very well correspond to “Joint recollection of two elders, transmission from one ear to another, chanting of poets”. We have indeed seen above that the *fásaige* can be chanted. The jurisprudential nature of the art of the poets is confirmed by the commentary on “joint recollection of two elders”: “as is said: ‘the tradition of old to old’; or Sen mac Aige and Sencha so of Ailill, son of Cól Cláen (?), it is by them the judgement has survived, i.e. the old poets”<sup>91</sup>. The two mythical poets Sen and Sencha<sup>92</sup> are supposed to have transmitted the judgement of poets. Another version of the introduction leads to that conclusion by commenting on “the chanting of the poets”: “or whoever was the poet that put the judgements into poetry, they survived until exhibited to Patrick”<sup>93</sup>.

<sup>87</sup> Christophe Archan, “La résolution des conflits de normes enseignée dans les écoles de l’Irlande médiévale”, *Savoirs en prisme* n°3, *La vie des normes*, 2014 (savoirsenprisme.wordpress.com); also see version H 3.18, *CIH* 876.10-13; John Carey, op. cit., 1994, p. 19 (§9) and p. 27.

<sup>88</sup> Rudolf Thurneysen, “Aus dem Irischen Recht IV”, *ZCP* XVI, p. 186; D. A. Binchy, “The Pseudo-historical Prologue to the *Senchas Már*”, *Studia Celtica* X/XI, 1975/76, p. 23.

<sup>89</sup> A commentator added: *.i. o recht petairlaichti ⁊ o nudfiadnaise .i. tuilled fris do canoin*, *CIH* 346.35, “i.e. from the patriarchal law and the New Testament, i.e. addition to it from the canon”, *AL* I 38.14-15.

<sup>90</sup> *Seanchus fer nEireand, cid conidruitear? Comchuimne da tsean, ti[n]dnacul cluaise diaraile, dicetal file, tormach o recht litre, nertad fri recht aicnid. Ar it e trénaílce in-sein fris astaíther bretha in bethu*, *CIH* 344.24-347.17 (introduction to the *Senchas Már*); *AL* I 30.24-28; Rudolf Thurneysen, “Aus dem irischen Recht IV”, *ZCP* XVI, 1927, p. 175 et 177; Liam Breatnach, “Lawyers in early Ireland”, *Brehons, Serjeants and Attorneys, Studies in the History of the Legal Profession*, ed. Daire Hogan and W.N. Osborough, Dublin 1990, p. 5; “The Early Irish Law Text *Senchas Már* and the Question of its Date”, *E. C. Quiggin Memorial Lectures* 13, Cambridge 2010, p. 5 (this translation).

<sup>91</sup> *Amail asberar: tidbnaic sen do tsin; no sen mac aigi ⁊ senca mac aillella mic coil claoín, is leo romarustar bretha, .i. na senfiled*, *CIH* 346.9-10; *AL* I 36.19-21.

<sup>92</sup> See Peter Smith, “Aimirgein Glúngel tuir tend: a Middle-Irish poem on the authors and laws of Ireland”, *Peritia* 8, 1994, p. 134-135; Christophe Archan, “Amairgin et ses héritiers. Les poètes-juges de l’ancienne Irlande”, in *Vertiges du droit. Mélanges franco-helléniques à la mémoire de Jacques Phytillis*, ed. Andréas Helmis, Nathalie Kálnoky & Soazick Kerneis, Paris 2011, p. 72.

<sup>93</sup> *No sicip hé filidb dorad dicetal fo bretha co romarustar co tarfenta do patraic*, *CIH* 878.5-6; *AL* I 38 n.1.

The last element of the triad is “the law of nature (*recht aicnid*)”. A little further down the text the gloss evokes that law of nature “from which the Pagans passed their judgements”<sup>94</sup>. It is generally admitted that the phrase *recht aicnid* designates the ancient Irish customary law in force long before the arrival of Christianity and which, according to Robin Chapman Stacey, “has resonance both in native and Christian tradition”<sup>95</sup>. In that context, it is quite possible to place that source into the category of ‘maxims’ (*roscad/fénechas*), which constitute the base of customary law. In that sense, Donnchadh Ó Corráin considers that “law of nature [...] is identical with *fénechas*”<sup>96</sup>.

*Recht aicnid, recht fáide and berla bán (recht litre)*

A passage from the *Regulation of the proper behaviour (Córus Béscnai)*<sup>97</sup> relates the circumstances of the arrival of Christianity and ecclesiastical law in Ireland. It tells the same legend as the one in the *Pseudo-historical prologue to the Senchas Már* (both texts belong to the same compilation) but here the terms of the triad differ:

*Córus Béscnai*: “Dubthach moccu Lugair the poet declared the judgements of the men of Ireland [which has been given] in accordance with the law of nature and the law of the seers<sup>98</sup> (*fáide*); for inspiration in the law of nature had ruled the jurisprudence (*breithemnas*) of men of Ireland and their poets; and seers of theirs had prophesied: the white language of the *beati* will come to us, i.e. the law of letter”<sup>99</sup>.

*Prologue*: “It is then, indeed, that it was entrusted to Dubthach to show the judgement and all the poetry of Ireland and whatever law had held sway among the men of Ireland in the law of nature and in the judgements of the island of Ireland and in the poets who had prophesied that the white, blessed language would come<sup>100</sup>, i.e. the law Letter”<sup>101</sup>.

<sup>94</sup> *aicned as a mberdis na genti a mbretha*, CIH 347.10.

<sup>95</sup> Robin Chapman Stacey, op. cit., 2007, p. 210; on the bibliography on that question, ibid., p. 307, n. 238.

<sup>96</sup> Donnchadh Ó Corráin, “Irish vernacular and the Old Testament”, in *Ireland and Christendom. The Bible and the Missions*, ed. Próinsias Ní Chatháin & Michael Richter, Stuttgart 1987, p. 292.

<sup>97</sup> That tract is part of the *Senchas Már*; cf. GEIL, p. 267 n. 10.

<sup>98</sup> Or ‘prophets’. Cf. R. Mark Scowcroft, “Recht fáide and its gloss in the pseudo-historical prologue to the *Senchas Már*”, *Ériu* LIII, 2003, p. 143-150. Also see Robin Chapman Stacey, op. cit., 2007, p. 204.

<sup>99</sup> *Roraide Dubthach mac ua Lugair in fili brethem fer nErend a racht aicnid ⁊ a racht faide arosfallnastar faidsine a racht aicnid i mbreithemnus indse herend ⁊ ina filedaib doroitcehnatar didbu faide leo donicfa berla ban biaid .i. racht litre*, CIH 528.17-20; Kim McCone, “Dubthach maccu Lugair and a Matter of Life and Death in the Pseudo-historical Prologue to the *Senchas Már*”, *Peritia* 5, 1986, p. 22; D. A. Binchy, “The Pseudo-historical Prologue to the *Senchas Már*”, *Studia Celtica* X/XI, 1975/76, p. 23; I used Donnchadh Ó Corráin’s translation, “The Laws of the Irish”, *Peritia* 3, 1984, p. 385.

<sup>100</sup> According to the legend, the poets of Ireland announced the arrival of Christianity.

<sup>101</sup> *Is and roberbad do dubthach tasfenad breithemnusa ⁊ uile filidechta eirenn ⁊ nach rechta rofalnasat la firu eirenn i recht aicnid ⁊ i mbrethaib innsi eirend ⁊ i filedaib. Toairngertatar donicfad berla ban bias .i. recht litre*, CIH 342.3-6; AL I 14.28-16.5, Kim McCone, op. cit., 1986, p. 9 (in this translation; the modifications are mine); John Carey, “An Edition of the Pseudo-Historical Prologue to the *Senchas Már*”, *Ériu* XLV, 1994, p.18. Dans la version A, H 3. 18, CIH 875.37, you can read: *doaircehnadar doicfa in berla mban mbiaid .i.*

In *Córus Béscnai*, we can identify the following triad: the law of nature (*recht aicnid*), the law of the seers (*recht fáide*), i.e. the law of the poets, and finally the “white language” or “law of Letter” (*recht litre*). In the *Prologue*, it is the law of nature, of the judgement of poets and of the “white language” (or “law of the Letter”). Again we are facing the three sources that we know very well.

No exhaustive list will be dawn here of all the triads which are formed after that model and which can still be identified in such tracts like *On the confirmation of right and law* (*Di Astud Chirt 7 Dligid*)<sup>102</sup> or *The first Bretha Nemed* (*Bretha Nemed Toísech*)<sup>103</sup>. Let us turn towards the Latin texts of *the Irish Collection of Canons* instead, where the same classification is not unknown, and then go beyond the frontiers of secular law.

*Natura, similitudine precedentium and verbis scripturae*

Chapter 6 of book XXI of *the Irish Collection of Canons* quotes the three sources of law which are at the judge’s disposal when pronouncing a judgement : “three measures must be used by a judge to pronounce a judgement : nature, i.e. the search for things, the similarity of precedents, and from the words of the Scriptures”<sup>104</sup>. That triad corresponds perfectly – in spite of its doubtful attribution to Augustin – to what we know from Old Irish law texts. Our author is very obviously familiar with ecclesiastical law (“the words of the Scriptures”), which does not prevent him, like “the judge of the three languages”, from knowing jurisprudence and the maxims of customary law (“nature”). But that cleric seems to be more hesitant as for that last source which is perhaps less accessible to him and which would necessitate the *indagatio rerum* (“the search for things”). Less comfortable on that field than a specialist of customary law would be, the author would then consider that it is necessary to gather information about that matter before judging. It is perhaps that step that we can have a glimpse of in the history of Cumain, a church scholar, who, being unable to judge a case, had to leave the Munster in order to learn customary law (*fénechas*) in the north of the island<sup>105</sup>.

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*canoim*, “They foretold that the white language of beatitude would come, i.e. the canon”; *AL* I 16 n.1.

<sup>102</sup> You can find in it the triad *aicned, fásach* and *scriptuir* : *na berrdar a fír aicnaid na screbtra na fasaigh* (Let not the truth of nature nor of scripture nor of precedent be abbreviated), *CIH* 241.1; *AL* V 480.21-22; Neil McLeod, “the Concept of Law in Ancient Irish Jurisprudence”, *The Irish Jurist* 17, 1982, p. 359. *Scriptuir*: “écriture, texte écrit”, désigne notamment l’écriture sainte”, *LEIA*, s. v.

<sup>103</sup> In the §8 containing a poem attributed to the jurist Cenn Fáelad, one can identify ‘the law of nature’ (*aicned*), the judgement (*breth*) through analogy (i.e. jurisprudence) and ecclesiastical law (*testimin*); *CIH* 2212.3-6; Liam Breatnach, “The First Third of *Bretha Nemed Toísech*”, *Ériu* XI, 1989, p. 12 & 32-33.

<sup>104</sup> *Tribus modis iudicibus iudicandum, natura, hoc est indagazione rerum, et similitudine precedentium et ex verbis scripturae*, Hermann Wasserschleben, *Die irische Kanonensammlung*, Leipzig 1885, p. 64.

<sup>105</sup> *CIH* 979.23-26; Liam Breatnach, “The Ecclesiastical Element in the Old-Irish Legal Tract *Cáin Fhuithbirbe*”, *Peritia* 5, 1986, p. 37 (texte and translation). Also see D. A. Binchy, “The Date and Provenance of *Uraicecht Becc*”, *Ériu* XVIII, 1958, p. 52; Proinsias Mac Cana, “The Three Languages and the Three Laws”, *Studia Celtica* V, 1970, p. 71.

All those examples show that the jurists have the same way of thinking of the sources of law, even if the terminology differs from one tract to another. By basing myself on that hypothesis, and also on my interpretation of the *Five Paths of Judgement* (*Cóic Conara Fugill*)<sup>106</sup>, it is then possible to attempt to explain the preamble of the *Small Primer*.

### III. The legal principles posed by the preamble of *the Small Primer*

The first paragraphs of *the Small Primer* pose a certain number of principles which govern Irish law<sup>107</sup>. They present themselves in the form of short sentences which must have been difficult to understand by the non-initiated, but educated jurists could understand and expand. The series starts with an evocation of the legal procedure: “Wherein is the judgement of the language of the Féni found? It is not difficult: in Truth and Right and Nature”<sup>108</sup>. In a previous study, I suggested seeing in these terms (“Truth”, “Law”, and “Nature”), three distinct procedures to refer a case to one of the judges mentioned in paragraphs 43-45<sup>109</sup>, according to the importance of the case<sup>110</sup>.

The author of the text goes on (§2) with the enumeration of the sources of law the judge can resort to when he pronounces a decision in the frame of the procedure of ‘Truth’ (*fír*): “Truth is founded on maxims and legal precedents and true Scriptures”<sup>111</sup>. We will not return to that triad which has been referred to above<sup>112</sup>. The author goes on to the second procedure, the procedure of ‘Right’ (*dliged*), which must be used for matters linked with contractual obligations (validity of contracts) and punishable obligations: “‘Right’ (*dliged*) is founded on verbal contracts and acknowledgement (*aititiu*)”<sup>113</sup>. Paragraph 2 ends up with the evocation of a third procedure, that of ‘Nature’: “Nature is founded on concession (or remission) and joint arrangement”<sup>114</sup>. It seems that the procedure, the name of which refers to the idea of balance and equity, is the same as the one which allows to restore the balance in unfair contracts

<sup>106</sup> Christophe Archan, *Les chemins du jugement. Procédure et Science du droit dans l’Irlande médiévale*, Paris 2007; “The five paths to a judge : an interpretation of *Cóic Conara Fugill* (Five Paths to Judgement)”, *Clio@Themis* 10, 2016, ([www.cliothemis.com](http://www.cliothemis.com)).

<sup>107</sup> D. A. Binchy, op. cit. 1958, p. 44; Katharine Simms, “The Poetic Brehon Lawyers of Early Sixteenth-Century Ireland”, *Ériu* LVII, 2007, p. 124-125.

<sup>108</sup> *Cid i nagar Breithemnus berla feini .nī. i fír 7 dliged 7 aignead*, *CIH* 1590.1 (UB§1); Eoin Mac Neill, op. cit., 1923, p. 272.

<sup>109</sup> Those three judges are evoked above, notes 60-62.

<sup>110</sup> Christophe Archan, *Les chemins du jugement*, p. 116-119; “The five paths to a judge”, op. cit.

<sup>111</sup> *Consuiter fír for roscadaib 7 fásaigib 7 tesdemnaib fíraib*, *CIH* 1591.13-14 (UB§2).

<sup>112</sup> Cf. above, note 21.

<sup>113</sup> *Consuiter dliged fo coraib bel 7 aititen*, *CIH* 1591.20 (UB §2); Eoin MacNeill, op. cit., 1923, p. 272. On the procedure of ‘Right’, see Christophe Archan, *Les chemins du jugement*, p. 189-190; “The five paths to a judge”, op. cit., §§19-23. T. M. Charles-Edwards considers that the term *aititiu* (acknowledgment) corresponds here to the “statements (backed up as appropriate by legal ceremony, guarantors, and pledges) which confer or admit rights”, *The Early Mediaeval Gaelic Lawyer, Quiggin Pamphlets on the Sources of Mediaeval Gaelic History* 4, Cambridge 1999, p. 25.

<sup>114</sup> *Consuiter ained for logud 7 cocorus*, *CIH* 1591.24 (UB §2); Eoin MacNeill, op. cit., 1923, p. 272.

before a judge in the *Five Paths of Judgement*<sup>115</sup>.

The rest is not easy to interpret: “Truth and Right together are founded on a ‘privileged person’ (*nemed*)”<sup>116</sup>. The commentary evokes a “judgement bound from the truth of the law and from canon-law”<sup>117</sup>, then enumerates the three sources of law (maxims, legal precedents and Scriptures) as well as analogy and equity (“nature”)<sup>118</sup>. We must rather link once again that principle to the procedure and to judges. This would mean that the judges referred to by the procedure of ‘Truth’ or by the procedure of ‘Right’ are “privileged”, i.e. they are part of the elite of Irish society. That hypothesis could then be confirmed by another passage of the same text, which locates judges in a category of “privileged persons” (*nemid*)<sup>119</sup>.

The following saying is certainly not linked to the previous one and remains difficult to understand out of its context: “Whatever judgement is not founded on any of these is altogether void”<sup>120</sup>. The commentator very rightly specifies that the things on which the judgement is established are the maxims (*roscaid*), the legal precedents (*fasaige*) and the true Scriptures (*teistimini*). He then adds analogy and equity to the list<sup>121</sup>. This passage shows the methods of learning of jurists: terse axiomatic texts evoke a whole series of rules, which the commentator judged useful to add to a main text, but which should be learned by heart at the start.

The following principle asserts that “Whatever judgement of the Church exists is founded on ‘Truth’ (*fír*)<sup>122</sup> and right of Scripture”<sup>123</sup>. A little further down in the text, the commentator establishes a link between truth and the Scripture: “i.e. from the word *testimonium*, the certain evidence of the Scriptures in truth”<sup>124</sup>. The judge of the Church would then base himself on the truth of facts and on the ecclesiastical law to make his decision<sup>125</sup>.

<sup>115</sup> Christophe Archan, *Les chemins du jugement*, p. 204-205; “The five paths to a judge”, op. cit., §§24-28. T. M. Charles-Edwards already makes the link between the *Aicned* (UB) and *Cert* (CCF) procedures *The Early Mediaeval Gaelic Lawyer, Quiggin Pamphlets on the Sources of Mediaeval Gaelic History* 4, Cambridge 1999, p. 28.

<sup>116</sup> *Consuiter fír et dlíged imaille for neimindh*, CIH 1591.31 (UB§3).

<sup>117</sup> CIH 1591.32.

<sup>118</sup> CIH 1591. 36-1592.2; cf. above, note 46.

<sup>119</sup> CIH 1612.4-9, *AL* v 90.19-21; Eoin MacNeill, op. cit. 1923, p. 277 (§37). Also see *ibid.*, p. 273 (§6); CIH 1592.40-1593.10; *AL* v 14.1-18. The text distinguishes the “free *nemed*” (*sóernemed*), such as the king/lord, the cleric or the poet, du “base *nemed*” (*dóernemed*), such as the blacksmith, the physician or the judge, Fergus Kelly, *GEIL*, p. 9-10; Thomas Charles-Edwards, Fergus Kelly, *Bechbretha*, Dublin 1983, p. 108; Christophe Archan, “Les chemins du jugement”, p. 88-89.

<sup>120</sup> *Nach breth nad astaiter fors nach ai nis fil i neoch etir*, CIH 1592.3-5 (UB§4).

<sup>121</sup> CIH 1592.5 et 1592.8. Comp. above note 45 (UB §3 comm.).

<sup>122</sup> The word *fír* also has the sense of “proof”.

<sup>123</sup> *Nach breat ecalsa dochnuisin is for fír 7 dlíged screptra consuiter*, CIH 1592.8-11 (UB§5); *AL* v 10.13-14; Eoin MacNeill, op. cit., 1923, p. 273.

<sup>124</sup> *.i. oní as testimonium, deimin forgill na scribtuiri iar fír*, CIH 1592.20-21.

<sup>125</sup> That could also mean that truth and ecclesiastical law are linked. That is what we can deduce from a passage from the *first Bretha Nemed, ar us for aicib fírinne fotbúithir ae eclasa*, CIH 2226.14-15, “for the law of the Church is founded of rocks of truth”; Donnchadh Ó Corráin, “The Laws of the Irish”,

Then it concerns the legal role of the poet: “The judgement of a poet, however, is founded on maxims (*roscaid*)”<sup>126</sup>. The author seems to remind here that the poet bases himself on the maxims of customary law (*roscaid*) in order to make the judgements which will become legal precedents (*fásaige*). Early medieval texts indeed mention the names of mythical poets who are reported to be the authors of great judgements constituting leading cases. Doesn’t Amairgin depend on customary law rules to make the first judgement in Ireland<sup>127</sup>?

The series ends with the judgements of the king (helped by his great judge)<sup>128</sup>. In that context it is hardly surprising – let us repeat – that all the sources of law then are enumerated by the author: “The judgement of a king, however, is founded on them all: on maxims (*roscaid*) and legal precedents (*fásaige*) and Scriptures (*teistimíní*)”<sup>129</sup>.

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Even if legal terms can have different meanings from one tract to another, it appears that in the particular context of the legal triads, jurists actually designated the three same sources. The first two (maxims and legal precedents) are of a customary nature, contrary to the third one (ecclesiastical law)<sup>130</sup>.

If it is easy to identify the ecclesiastical law in the texts, it is quite difficult with maxims and precedents. During the early Middle Ages, “the great bulk of legal activity was oral”, T.M. Charles-Edwards writes.<sup>131</sup> We do not have a precise knowledge of it. The legal sources have reached us only in the form of tracts dedicated to private consulting. They reflect accordingly a particular way of conceiving the subject, under

*Peritia* 3, 1984, p. 393.

<sup>126</sup> *Breth filed im[morro] fo roscadaib consuiter*, CIH 1592.12.

<sup>127</sup> Christophe Archan, “Amairgin et ses héritiers. Les poètes-juges de l’ancienne Irlande”, in *Vertiges du droit. Mélanges franco-helléniques à la mémoire de Jacques Phytillis*, ed. Andréas Helmis, Nathalie Kálnoky & Soazick Kerneis, Paris 2011, p. 67-69.

<sup>128</sup> Cf. above, note 50 on the king and his judge.

<sup>129</sup> *Breath flatha im[morro] consuiter foraib uili for roscadaib et fasaigib et teistemnaib*, CIH 1592.17-20; cf. above, note 51.

<sup>130</sup> Some passages, which try to describe retrospectively the legal context before the arrival of Christianity, only refer, of course, to the first two laws. It is the case of the *Pseudo-historical Prologue to the Senchas Már*, in which the judge speaks “for giving judgements with maxims (*roscaid*) and legal precedents (*fásaige*)”, cf. above, note 86. Don’t we find a similar distinction in Anglo-Saxon England in that same period? Patrick Wormald underlined indeed the use of two different terms to designate, on one hand, the law which is established and acknowledged by everyone (which would correspond to our Irish *roscaid*) and on the other hand the judgements which complete it (our *fásaige*). Such a distinction appears in the Laws of Hlothre and Eadric (end of 7th c.), in these terms: “Hlothre and Eadric, kings of the Kent-people, increased the law (*ecton pa æ*) that their elders produced before with these judgements (*ðyssum domum*) that are pronounced hereafter”, Patrick Wormald, *The First Code of English Law*, Canterbury 2005, p. 21. According to Wormald, the term *æ* “has strong connotations of accepted law”, whereas he writes about *dom*: “its primary meaning, as implied by etymology as well as usage, is ‘judgement’”, *The Making of English Law: King Alfred to the Twelfth Century*, Oxford 1999, p. 94-95.

<sup>131</sup> T. M. Charles-Edwards, “Early Irish Law”, in *A New History of Ireland 1*, ed. Dáibhí Ó Cróinín, Oxford 2005, p. 331.

the pens of scholars, who may have digressed from the original customary law in oral form. Consequently, we can only have a glimpse of the maxims of customary law in occasional quotations, or in poets' quotations, in a few allusions to the judgement of such and such a mythical character... As T. M. Charles-Edwards writes : "We may believe on the basis of sound general presuppositions that much of Irish law was in fact customary in the sense that it derived its content from local custom which was then taken up and canonized by the lawyers. But the texts themselves are, on the whole, of little help in deciding which rules were customary and which were not"<sup>132</sup>.

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<sup>132</sup> T. M. Charles-Edwards, "Custom in Early Irish Law", in *La coutume (2<sup>e</sup> partie). Recueils de la Société Jean Bodin pour l'histoire comparative des institutions* LII, Bruxelles 1990, p. 443.

## Appendix

### The *Small Primer* (§§1-5) from BB (23 P 12)

[§1] Wherein is the judgement of the language of the Féni found? It is not difficult: in Truth and Right and Nature.<sup>133</sup>

[§2] Truth is founded on maxims (*roscaid*) and legal precedents (*fásaige*) and true Scriptures<sup>134</sup>.

Right is founded on verbal contracts and acknowledgment (*aititín*)<sup>135</sup>.

Nature is founded on concession (or remission) and joint arrangement<sup>136</sup>.

[§3] Truth and Right together are founded on a ‘privileged person’ (*nemed*)<sup>137</sup>.

[§4] Whatever judgement is not founded on any of these is altogether void<sup>138</sup>.

[§5] Whatever judgement of the Church exists is founded on ‘Truth’ and right of Scripture<sup>139</sup>.

The judgement of a poet, however, is founded on maxims (*roscaid*)<sup>140</sup>.

The judgement of a king, however, is founded on them all: on maxims (*roscaid*) and legal precedents (*fásaige*) and Scriptures (*teistimín*)<sup>141</sup>.

<sup>133</sup> *Cid i nagar Breithemnus berla feini .nī. i fír 7 dlíged 7 aignead*, CIH 1590.1.

<sup>134</sup> *Consuiter fír for roscadaib 7 fásaigib 7 tesdemnaib fíraib*, CIH 1591.13-14.

<sup>135</sup> *Consuiter dlíged fo coraib bel 7 aítiten*, CIH 1591.20.

<sup>136</sup> *Consuiter aicned for logud 7 cocorus*, CIH 1591.24.

<sup>137</sup> *Consuiter fír et dlíged imaille for neimindb*, CIH 1591.31.

<sup>138</sup> *Nach breth nad astaiter fors nach aī nis fil i neoch etir*, CIH 1592.3-5.

<sup>139</sup> *Nach breat ecalsa dochnisín is for fír 7 dlíged screptra consuiter*, CIH 1592.8-11.

<sup>140</sup> *Breth filed im[morro] fo roscadaib consuiter*, CIH 1592.12.

<sup>141</sup> *Breath flatha im[morro] consuiter foraib uilí for roscadaib et fásaigib et teistimnaib*, CIH 1592.17-20; Eoin Mac Neill, op. cit., 1923, p. 272-273, the modifications are mine.

	Maxims of customary law	Legal precedents of the poets	Ecclesiastical law
UB§2 (CIH 1591.13-14) UB§3 (comm. : CIH 1591.36-37) UB§4 (comm. : CIH 1592.5) UB§5 (comm. : CIH 1592.17-20) CCF§H3 (CIH 1027.27-28) CCF§H5 (CIH 1028.2) CCF§H139 (CIH 1040.37s)	<i>roscad</i>	<i>fásach</i>	<i>teistimin</i>
UB§38 (CIH 1612.23-26) + gloss BNT (CIH 2221.29-30)	<i>breth Féni</i> ( <i>fénechas</i> )	<i>breth filed</i> ( <i>filidecht</i> )	<i>breth berla bán</i> ( <i>berla bán</i> )
BNT (CIH 2212.3-6)	<i>aicned</i>	<i>breth</i>	<i>testimin</i>
UB§45 (gloss : CIH 1614.32-33) B. Étg. (CIH 250.41-251.3) Findsruth Fíthail (CIH 2140.23-24)	<i>fénechas</i>	<i>filidecht</i>	<i>légend</i>
PPHSM (CIH 342.3-6)	<i>recht aicnid</i>	<i>filidecht</i>	<i>berla bán (recht litre)</i>
PPHSM (CIH 342.24-25)	<i>roscad</i>	<i>fásach</i>	<i>berla bán</i>
Intro. <i>Senchas Már</i> (CIH 346.25-347.7)	<i>recht aicnid</i>	<i>dicetal file</i>	<i>recht litre</i>
CB (SM1) (CIH 346.25-347.7)	<i>recht aicnid</i>	<i>recht faide</i>	<i>berla bán (recht litre)</i>
DAC&D (SM2) (CIH 241.1)	<i>aicned</i>	<i>fásach</i>	<i>scriptuir</i>
<i>Irish Collection of Canons</i> (Book XXI, chap. 6)	<i>natura</i>	<i>similitudine precedentium</i>	<i>verbis scripturare</i>

Abbreviations: UB (*Uraicecht Becc*); CCF (*Cóic Conara Fugill*); BNT (*Bretha Nemed toisech*); B. Étg. (*Bretha Étgid*); PPHSM (*Pseudo-historical prologue to the Senchas Már*); CB (*Córus Béscnai*); DAC&D (*Di Astud Chirt 7 Dligid*).