

Validity and Equality in Early Irish Contract Law: *Dliged* and *Cert* in the light of *Cóic Conara Fugill*

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Abstract: The purpose of this article is to analyse the unique procedural division between *dliged* (entitlement) and *cert* (justice) in the *Cóic Conara Fugill* (The Five Paths to Judgement), by means of comparing its evidence with other Irish legal sources relevant to contract law, such as *Berrad Airechta* (The Shearing of the Court) and *Di Astud Chor* (On the Securing of Contracts). *Cóic Conara Fugill* is the only tract which delineates specific paths to judgement in court and distinguishes between *dliged*, envisaged as an action taken to challenge the validity of a contract and *cert* as a plea directed to adjust inequities within a valid contract. This division finds further reflection in the differing guarantees demanded for each plea, the classical, contractual *naidm*-surety for *dliged* but, on the contrary, a *smachtgille* (one-seventh pledge) for *cert*. This classification is striking because it is not found in any other legal source and stands in marked contrast to provisions in *Berrad Airechta* and *Di Astud Chor* which appear to treat the issue of commercial activities as having but one underlying judicial concern, the overall regulation of contractual agreements. A closer examination of *Cóic Conara Fugill* will contribute to the understanding of the nature of contractual obligations in early Ireland and will certainly provide us with intriguing questions for further investigation.

The eighth century legal tract *Cóic Conara Fugill* (The Five Paths to Judgement) is one of the most intriguing and complex early Irish legal texts and probably the most important one pertaining to court procedure. *Cóic Conara Fugill* survives in three main versions: (R) – preserved in the oldest Irish legal manuscript Rawlinson B 502 (= *CIH* 2200.1–2203.5) dating to the early twelfth century, possibly *c.* 1120; (E) – contained in manuscript Egerton 88 (= *CIH* 1280.1–1282.23), dating to *c.* 1564 *terminus post quem*; and (H) – preserved in manuscript H. 3. 18 (now MS 1337), (= *CIH* 1027.21–1041.38), dating to the sixteenth century. Another relevant version, unknown to Thurneysen at the time of his edition, is (U) – that is part of manuscript NLI G3 (= *CIH* 2257.12–2261.17), dating to the fourteenth century. Moreover, two further, individually not comprehensive versions survive, known as (N) – contained in H. I. 15 (now MS 1289), dating to 1730 and later copied into manuscript H. 4. 17 (now MS 1358), and (O) – one page in manuscript H. 3. 18 (=

CIH 1018.26–39).¹ A combined analysis of versions (R), (E) and (H) allows for a comprehensive picture of the textual content and hence, these are the versions taken into particular consideration in this article. Moreover, they represent the versions edited and translated by Thurneysen (1926) and Archan (2007). *Cóic Conara Fugill* is outstanding in the corpus of early Irish law because it separates legal matters into five different paths to judgement and thereby draws a division between the question of entitlement to a consideration and the equality of the considerations exchanged between the two parties to a contract. This division is reflected in a procedural separation once a case arising from either environment goes to court.

To clarify further, *Cóic Conara Fugill* distinguishes between a total of five paths to judgement. Each of these paths refers to a method of pleading a case in front of a judge and each path has a separate legal imperative as its basis and a list of legal issues which could be prosecuted exclusively on it. The code of procedure, as enumerated in version (H), involves eight stages (Thurneysen 1926, §16, 30): (1) Fixing the *ré* (period, time) until proceedings begin; (2) *toga* (choice) of the appropriate path; (3) giving of the *árach* (binding, guarantee) according to the chosen path, i.e. either a pledge or a surety; (4) *tacra* (plea) of the plaintiff; (5) *frecra* (rejoinder) of the defendant; (6) *breth* (judgement) is passed; (7) *forus* (promulgation) of the judgement; and (8) *forba* (perfection, conclusion) of the case on one path, i.e. execution of the verdict.

The legal preliminaries differed depending on the chosen path, in particular as pertains to the *árach* (the various forms of guarantee required in order to prosecute a claim in court). Within the sphere of private dispute resolution where legal mechanisms operated without the necessary involvement of a jurist, the exchange of sureties and pledges symbolized the parties' willingness to fulfil the terms agreed upon and was meant to secure and drive its execution. If the enforcement of the contract was disrupted by either party, the authority of the court could be called upon for the independent adjudication of a *brithem* (judge). A different form of *árach* is required for each one of the five paths of *Cóic Conara Fugill*. However, their function in court is yet to be studied in greater detail. The system is described as follows.² The first path is called *fír* (truth) and requires the guarantee of a *fírgille* (truth pledge). The second path bears the name *dliged* (entitlement) and is secured by a *naidm* (enforcing, binding surety). The third path is referred to as *cert* (justice) and requires a *smachtgille* (one-seventh pledge, penalty-pledge). The fourth path is *téchtæ* (propriety) and is secured by a *ráth* (paying surety). The fifth path is

1 For details on the transmission and the scribes see: Thurneysen 1926, 1–8; Archan 2007, 123–9.

2 As to a theory on the origin of the guarantees in a customary sphere and their influence on the creation of the five paths, see the intriguing and detailed analysis of Stacey 1994, 112–40.

titled *coir n-athcomairc* (proper inquiry, suitability of inquiry) and necessitates the guarantee of an *aitire* (hostage surety). Stacey has advanced the argument that these bindings are given by the parties in dispute in order to ‘warrant that they will abide by the verdict reached by the judge’ and to also secure the enforcement of the judgement (Stacey 1994, 115). It was of importance to choose the appropriate path, because a party was fined with a *smacht* (penalty, fine), resulting in the payment of one milch-cow, if they either brought a case on the wrong path or if they attempted to change their path, i.e. their line of argument, during proceedings (Thurneysen 1926, 7, §2, 16). It is not clear whether this *smacht* was due to the judge or the other party but a pledge for it was initially given into the hand of a neutral third party (1926, n. 5, 62–3). The assistance of a legal representative appears to have been essential given the presupposed high level of legal knowledge and in particular about legal procedure required to undertake any path. It is crucial to keep this highly formalized and judicially shaped pattern in mind because clearly, in the eyes of the jurists, the paths to judgement were strictly separate entities and hence the cases subsumed under each path were intellectually, legally and procedurally distinguished, therefore allowing greater insight into the workings of curial development.

The two legal paths of particular concern within this paper are *dliged* (entitlement) and *cert* (justice). *Cóic Conara Fugill* is the only legal tract which gives a procedural dimension to the distinction between *dliged* and *cert* and therefore probes, (A) legal claims which aim at a rescission of a contract or a declaratory statement upon the existence or non-existence of a contract and (B) legal claims which do not seek to abandon the contractual relation but require a readjustment of consideration, either due to missing or defective goods or services. Both *Berrad Airechta* (The Shearing of the Court) and *Di Astud Chor* (On the Securing of Contracts) assign both legal issues to *dliged* and treat claims related to, or resulting from, contractual agreements as reflecting but one underlying legal concern. In fact, as Stacey has argued, it appears that ‘the likely resolution to a suit pursued on *dliged* was the very process *Cóic Conara Fugill* assigns to *cert*’ (Stacey 1994, 120). How does this unique distinction in *Cóic Conara Fugill* operate?

Cóic Conara Fugill reserves one path to judgement specifically for contracts, the path named *dliged* (entitlement), stating clearly: *Tog dliged im churu bel bid* (Choose *dliged* regarding contracts) (Thurneysen 1926, §8, 18). In the following, the text lists four *tabarta* (gifts) which appear to be the subject of the contracts in question.³ These *tabarta* are not gifts in the modern sense of a present which is given

3 There are two further issues mentioned under *dliged*: *anfot lethfiachach* (unintentional offences with half-liability) and *indeithbir torbai* (unnecessary/inexcusable injury due to negligence). Thurneysen argues that both these issues originally belonged to the first path, *fir* and were only later wrongly moved to the second path, *dliged* (Thurneysen 1926, 9). To the contrary, Archan has recently defended their position among the cases of *dliged* (Archan 2007, 188–91).

free-willed to another person without demanding anything in return. They seem to cover the legal obligation of a party to fulfil what he has contractually promised in regard to sale, tenancy and loans (1926, n. 36, 71) and are thus as much as an economic device, for they are gifts which *require* reciprocation.⁴ The acceptance of this type of gift in early Ireland created an immediate dependence in the form of an imperative obligation to reciprocate and on a political scale it carried importance for hierarchy and authority, most prominently in the relationship between the overking and his client-kingdoms (Charles-Edwards 2000, 522–3, 534–48). The refusal of this type of gift was regarded as an offence against the donor but its acceptance brought oneself under the obligation of return and therefore in debt to the donor.⁵ Doherty argues that ‘in the early middle ages goods changed hands mostly by way of gift-exchange, reciprocity or redistribution’ (Doherty 1980, 70). The socio-political context in which the *tabarta* came into being is reflected in the concern of *dliged* which discusses claims related to gift-exchanges stemming from a contractual environment.

Dliged shows a particular concern about the validity of these gift-exchanges, the *tabarta*. The moment in which a *taba(i)rt* becomes valid is dependent on the status of the contracting parties. In the case whereby a party of high status is involved in the transaction, namely a person whose *lóg n-enech* (honour-price) equals seven *cumal* (milch-cows), either as donor or recipient, the *tabairt* is fully valid after twenty-four hours and the appointment of a surety is rendered unnecessary.⁶ After twenty-four hours, the *tabairt* enters into full entitlement of the other contracting party at which moment in time it becomes *diles* (lapsed, forfeit) and immune from claim despite the absence of a surety. If, to the contrary, two people of lower status are contracting over a *tabairt* the contract is only valid after twenty-four hours if a surety is present who is standing for the full value of the given property at play.⁷ If there is no such surety involved, one-third of the consideration becomes valid after twenty-four hours but the remaining two-thirds become valid after ten days (Thurneysen 1926, §8, 18). Archan has recently suggested that a noble’s status is a warrantor for his solvency and credibility. A commoner, on the other hand, is in a more difficult position and the delay until his contract gains full validity may give him either the option to withdraw from the contract in due time or to extend the

4 The term *tabairt* is also used in the exact opposite sense for a gift which does not require reciprocation and is thus given free-willed, such as in version H §110, 53, which states: *da deoin fen dober nech hi 7 nocha bi iarraidh uirraidh* (one gives it of his own will and one does not demand it back) Thurneysen 1926, n. 53, 76. [my translation]

5 One of the most important studies of gift-exchange in archaic societies has been undertaken by Mauss 1954.

6 Thurneysen 1926, §10, 18–9. The term used here is *trebaire* (in legal tracts a general term for security or guarantee).

7 *ibid.* §8, 18. The term used here is *trebaire rudilsi* (security for property).

delivery time of the total consideration, paying a third up-front and the remaining two-thirds within the next ten days.⁸ The time-scale referred to for these contracts finds reflection in other law tracts, such as *Cáin Sóerraithe* (The Law of Free Fief), where such contracts are called *diubarta* (frauds, cheats), (*CIH* 1777.37–1778.2, *AL II* 218.10–11).

Table 1: Validity of the *tabarta* (Bemmer 2009, 69)

contractual setting	status of the party instigating the contract	status of the party accepting the contract	contract valid after	necessity to appoint sureties
.iii. <i>tabarta</i>				
<i>Tabairt .i.</i>	High	High	24 h	No
<i>Tabairt .ii.</i>	High	Low	24 h	No
<i>Tabairt .iii.</i>	Low	High	24 h	No
<i>Tabairt .iiii.</i>	Low	Low	24 h ----- 24 hours: 1/3 10 days: 2/3s	Yes ----- No

The absence of a surety in a classical early Irish contract is highly unusual. As stated in *Coibnes Uisci Thairidne* (Kinship of Conducted Water) ‘every contract without surety may be dissolved’ (Binchy 1955, §6, 66–7) because the lack of forces executing the agreement makes it impossible to uphold the contract in case a party chooses to withdraw. The *cor mbél*, the classical early Irish oral contract, generally required the presence of at least two *naidm*-sureties, one appointed by each side to the contract, in addition to witnesses. In fact, a contract that was unsecured was held to be unenforceable. On this basis, we would expect the classical contractual surety, the *naidm* (enforcing, binding surety), also referred to as ‘the contract in person’ (Thurneysen 1928, 57), to appear in this context. Given the environments in which contracts were made and the importance of certain arrangements on socio-legal as well as economic grounds, it does not come as a surprise that the maintenance

8 Archan 2007, 168 ‘Il s’agit alors peut-être d’une possibilité de rétractation, s’il s’aperçoit que l’exécution du contrat ne peut s’effectuer complètement, faute de moyens. Un tiers du contrat devra être exécuté au bout de 24 heures, le reste pourra encore être remis en question dans les dix jours.’

and perpetuation of the personal bonds created was carefully fostered and the non-fulfilment of a contract frowned upon within the various legal texts mentioned. The *naidm* was meant to memorize the terms of the agreement and, in the event that the contract was not fulfilled as agreed upon, to pressurize the defaulting party to contractual fulfilment, including the distraint of his property and the use of considerable physical force without invoking a penalty.⁹ In respect of the legal tracts, Sharpe pointedly states that ‘the need for sureties and pledges in the vast majority of minor obligations shows that, even if default was not frequent, normal procedure always sought to anticipate it’ (Sharpe 1986, 182). In this context it may be noted that *Berrad Airechta* mentions the role of ‘un-appointed’ *naidm*-sureties which are persons of high status in a supervisory role to one of the contracting parties and which fulfil the role of a *naidm* without being technically appointed to that position (Stacey 1986, §§23–4, 212). The *naidm*’s absence from the *tabarta* is even more puzzling, because precisely this very surety is essential in order to proceed with a claim under *dliged*. It explicitly states: *A harach .i. Gabail dliged do nadmair nascair na do gill gaibthir*. (The taking of *dliged* is bound on a *naidm* and it is not taken with a pledge.) (Thurneysen 1926, §9, 18). The text justifies this by stating that the absence of a surety in contracts with nobles is reasonable since a noble’s word equals suretyship and hence renders the presence of a surety obsolete (1926, §8, 18). Interestingly, contracts with nobles are also generally regarded as unenforceable in the greater legal corpus, because there was no easy way to redress an obligation from them were they later unexpectedly to default by virtue of their exalted status.¹⁰ This problem occurs in the literary example *Tochmarc Étaíne* (The Wooing of Étaín) in the context of a marriage contract, where the *Mac Óc* woos *Étaín Echraide* but *Ailill*, her father refuses to give her in marriage stating: ‘I can in no way profit from thee, because of the nobility of thy family ... no redress whatsoever can be had of thee.’¹¹ This uttering is followed by his demand of immediate payment of the bride-price before he himself gives his daughter in marriage which would be his consideration affirming the contract. Version (E) of *Cóic Conara Fugill* adds an alternative option to version (R), stating in similar tone, that the *tabairt* given from a commoner to a noble is invalid until he, the superior, pays for it in that he brings the case to the *dál* (assembly) or the *airecht*

9 For an overview on the procedure of distraint see Kelly 1988, 177–86.

10 *CIH 1118.21 (Bretha Nemed Déidenach)*, *ní cor cor for nemthiu* (a contract with *nemed*s is not a contract.); Kelly 1988, 162.

11 Bergin & Best 1938, 148–51, ‘*Nis tiber deit, ’ol Ailill, ’dáigh ní rochaim bá fort ar suiri do cheniul ... ní rochar fort itir.*’

(court).¹² In *dliged* an avenue for the various contexts of a contractual agreement depending on the status of the contracting parties is revealed.

Version (H) of *Cóic Conara Fugill* provides a possible context from which these unsecured contracts stem and lists seven *tabarta* (gifts) regarding specific business arrangements which are valid without sureties. Their character forms an exemption to the general rule and allows for their validity without support through suretyship. It is worth mentioning them in order to provide a sense of the possible nature to these transactions. These are as follows: (1) the sacrifice for the soul, which refers to the payment offered to a cleric for the singing of an intercession; (2) the loan for the *ollam* (chief poet); (3) the remuneration for breaking a horse, the amount of which is a share of the increase in value brought about through the training of the foal; (4) the loan for language (education);¹³ (5) the loan for manufactured goods, i.e. handicraft and artisanship of men and women; (6) the *tabairt* of a bishop: and (7) the *tabairt* of a king.¹⁴ It is evident that what the majority of these *tabarta* provide are not usual material goods but services and even more, services of a professional kind of craftsmanship, an argument brought forward by McLeod (McLeod 1992, 19). Stacey has added that the parties to these contracts are likely to stand in an ‘enduring relationship’ to each other, the demise of which would be highly disadvantageous (Stacey 1990, 39–60). Furthermore, a similar list of cases is provided in the ‘Heptads’ (*AL V, Heptad XXV*, 212) and in *Berrad Airechta*, the latter of which regards these contracts as entirely immune from claim without a surety, provided that the consideration at stake has been exchanged in its entirety (Stacey 1986, §1–9, 210–1; n. 4, 228).

One needs to remember that, although the classical early Irish contract was bound through specific formulae and secured by guarantors in the presence of witnesses, this arrangement was not obligatory in order to establish a person’s legal entitlement to a promised good, though it made proof of its existence more difficult. The validity of a contract arose from the mutual willingness of the contractual partners to fulfil the agreement and the actual exchange of consideration. Contracts of this nature may not have been the standard but they were, nevertheless, legal in their exceptional status. Therefore, *Berrad Airechta* states: ‘Though neither *naidm-*

12 Thurneysen 1926, §10, 18–9, *No dō cena conabu dilus inní dobera int isil don uasal no go nderna a logh da leas a ndail no a nairacht.* (Otherwise, that which the commoner gives to the noble is not his [the noble’s] possession until he [the noble] pays him for it in that he brings the case in the *dál* or the *airecht*.) [my translation]

13 Archan discusses *lóg mbérlai* (the price of language) in relation to the teaching and payment of legal language or payments due to the judge (2007, 185).

14 Thurneysen 1926 §81, 47, The text reads: *ubairt ar anmuin, duais techta d’filid, aithe nimrime 7 lamtoraid, log mberla, duilcine cacha híce* [read: *haicde*], *tabairt espaig, tabairt ríg.* (the offering for the soul, the fitting reward for a poet, the recompense for riding [a horse] and handicraft, the price for language, the price for any manufactured article, the gift of a bishop, the gift of a king.) [my translation]

surety nor a *ráth*-surety may hold them fast, entitlement holds them fast, ... they are made fast by [the other party] allowing [possession]; they are made immune from claim by [the other party] recognizing [possession]' (Stacey 1986, §39, 216). Although we may suspect that these contracts were generally upheld because the advantages in regard to the *status quo* of said agreements simply outweighed their disadvantages, it has also been suggested that such transactions were indeed 'particularly vulnerable to annulment or emendation' (Stacey 1994, 75). From a mere legal perspective, a person agreeing to an unsecured contract was in a weak position to receive his rightful due and susceptible to having his contract neglected. *Dliged* operated on this precept and caters for claims aiming at the rescission of a contract.

The rescission of a contract in general was regarded as highly detrimental to societal order. As Stacey has pointed out, early Irish law 'was ranking the dissolution of contracts up with plague and war as a principal source of global instability' (Stacey 1994, 27). Even more telling, early Irish law usually did not even allow for the rescission of a *dochor* (disadvantageous) contract (Kelly 1988, 159). In general every bargain undertaken by two competent adults, except if fraud was involved, was legally binding (Thurneysen 1926, 9). Hence, the rescission of a contract was subject to several bars. The three clear contexts in whose absence a rescission was not permitted can be summarised as follows: First, any defect in the purchased goods must have been unknown at the time the contract was made, second, the pre-contractual positions of both parties have to be restorable and third, the contract was not to be secured by sureties! (McLeod 1992, 34–9) This makes it more than clear that a move to rescind was indeed complicated and had to fulfil several circumstances, all of which may not have been in place collectively. McLeod argues that the availability of rescission was progressively restricted over the period of the commentaries, (1992, 48) from the late thirteenth to the fifteenth century (Simms 1998, 24). The *tabarta*, or seven contracts of *dliged* which predominantly deal with issues linked to the noble class, allow for the option to rescind a service contract whose very structure would have made this highly difficult. If a rescission of the contract was not possible on particular legal grounds or simply not feasible, a party had the option to challenge the contract by other means which leads us to another path of *Cóic Conara Fugill*, namely *cert* (justice).

Cert is concerned primarily with the renegotiation of a contract through which the value of considerations can be adjusted and thus equalized, namely the *cotomus folad* (assessment of the value of considerations), for which the guarantee of a *smachtgille* (one-seventh pledge) has to be provided (Thurneysen 1926, §§11–2, 19–20). The contexts mentioned from which such a claim may arise include contractual agreements, business arrangements, marriage duties, exchanges, and gifts and payments of various sorts (1926, §13, 20–1). *Cert*, the contrary path to

dliged by allowing a renegotiation to occur, moves within the borders of a valid agreement and thus seeks to maintain the contract but to adjust or renegotiate the agreement as a consequence of the dissatisfaction of one party to the contract. This comes into effect when the goods delivered do not have the expected form, because the consideration was not handed over in full, and/or if it has innate diseases or damages which were unknown at the time of entering the contract. The implication appears to be that no wilful deception or intent occurred on the part of the seller which led to the overpayment caused by the default in value. Gerriets notes that ‘extensive networks of exchange’ were required ‘in order to provide social cohesion’ (Gerriets 1985, 328) and the breach of a contract always entailed a whole set of socio-economic difficulties in addition to legal consequences. The facilitation of exchange ‘was intended to create interpersonal ties’ and was ‘not designed to aid individuals in maximizing their material incomes’ (Gerriets, 1981, 171–2). Hence, a fraudulent contract could immediately be rescinded. An annulment ‘on the basis of defective consideration’, on the other hand, would only be allowed in exceptional cases (McLeod 1992, 34–9). To illustrate this with a simple example, a certain amount of *coibche* (bride-price, dowry), usually paid to the father of the bride, may have been agreed upon. When the payment fell due, the groom’s family may not have been in a position to forward the payment agreed upon, for instance due to a blight on their crops. At least in the time of the glossator of (E) an *aisgid* (gift), presumably including what is termed *ascada lánamnais* (gifts at marriage), that has not been reciprocated through a counter-consideration after a year turns into a *rath* (here: loan with interest) for the noble class, but requires the lower classes to pay a penalty for withdrawal, which is the substantial amount of doubling the original debt, the honour-price of the insulted person and five *séoit* (Thurneysen 1926, n. 1, §13, 21). Alternatively, the dowry may have contained an amount of cultivable land and cattle which are only later found to suffer from innate diseases or infertility, which would drastically diminish their value. In both situations, the contract would no longer be a just one and the considerations would not be of equal value. Once consideration has begun to be exchanged, it is less likely that pre-contractual positions could be restored and the option to pressurize the opponent into fulfilment or renegotiations may be more appreciated, keeping in mind the increasing *fuillem* (interest) that also falls on the debtor after payment has not been made for a year. The law generally seeks to re-balance the contract to these changed circumstances and to equalize any unjustified over-payment as opposed to rescinding the agreement altogether. The challenge of the inequity in a valid agreement is the exact concern of *cert* which operates within the borders of an existing contract and aims to control its fulfilment according to the principles of fairness.

In order to achieve such a harmonization in the consideration exchanged there are two clear options. First, what is referred to as *forsatu forlain* (pouring away of the excessively full) and second, what is called *forlinad forbfais* (topping up of the over-empty). The first case refers to what is known across the legal corpus as *diupart* (defrauding), the over-payment which is taken away by one contracting party (Thurneysen 1926, n. 4, §11, 19; McLeod 1992, 39).¹⁵ It appears that this illegitimate gain has to be redressed by the respective party. The second case, topping up of the over-empty, addresses an innate blemish in the goods purchased which covers both congenital faults (in animals or land) and defects regarding other moveable property (Thurneysen 1926, n. 5, §11, 19). The glossator of (R) sets a limitation on claimable faults at a blemish amounting to one-sixth or one-seventh, (1926, n. 5, §11, 19) presumably of the consideration given. Version (H) adds that the vendor has to provide a *fola comthoirnighthech* (helping, supplementary consideration) to the buyer to redress the inequity (1926, §103, 51). *Berrad Airechta* takes a similar stance, stating that ‘Though every contract be bound in the same way between contracting parties, ... [discrepancies in the value of the goods or services exchanged] are “cut away” or “filled up” if the goods or services be not complete [in value]’ (Stacey 1986, §78, 226) and adds that in case the total consideration has not been forwarded, ‘It is a foot against a stone wall if the goods or services exchanged be not complete. Improper goods or services do not entail immunity ...’ (1986, §81, 227). Clearly, this is synonymous with a claim mentioned above under *cert* in needing to equalize the consideration exchanged to the satisfaction of both parties and according to the principles of fairness.

What has to be noted at this point is that evidence from *Di Astud Chor* (On the Securing of Contracts) makes it clear that the level of damages awarded, namely the amount of over-payment recoverable, is dependent on both knowledge of the defect and presence of sureties at the time of the agreement. The following standard system is suggested, with slight variations across the sources. If there were neither sureties nor knowledge involved in the contract, the entire over-payment is recoverable until ten days after the discovery (McLeod 1992, 40; n. b, §2, 274, 276). If someone were to sue for this under *cert*, he could thus recover the total amount of his over-payment and the contract would have been equalized accordingly, i.e. *foraice cert* (exact value/equal evaluation), which appears to be the primary stance taken in *Cóic Conara Fugill*. If there were sureties present but no knowledge of the defect, one-half of the over-payment can be recovered until the tenth day but the other half goes to the sureties who need to be reimbursed for their involvement (McLeod 1992, n. c, §2, 274, 276). If there were no sureties but knowledge of the defect (though possibly not the extent of it), two-thirds can

15 Thurneysen 1926, n. 4, § 11: *In diupart beres indara fer* (The over-payment that one of the two carries away). [my translation]

be recovered until the tenth day but one-third goes to the defendant (1992, n. d, §2, 274, 276). If there were both sureties and knowledge present, nothing of the over-payment can be recovered after twenty-four hours (1992, 42, n. a, §2, 274, 276). What seems interesting about these regulations is that once the defect has become known the claimant only had a maximum of ten days to recover all or part of his over-payment, for after that the entire arrangement becomes completely legally binding and therefore without scope for any further alteration. It appears that the claim has to be brought to the attention of the court during this time which would imply its relative proximity. According to our text the house of the judge sufficed in order to establish the power of the court which renders the possibility of proceedings to take place quickly feasible.¹⁶

Table 2: Adjustment of consideration

- sureties - knowledge	<i>Diupart</i> – fully recoverable	10 days after discovery
+ sureties - knowledge	<i>Diupart</i> – 1/2 recoverable	10 days after discovery
- sureties + knowledge	<i>Diupart</i> – 2/3s recoverable	10 days after discovery
+ sureties + knowledge	<i>Diupart</i> – nothing recoverable	24 hours after discovery

Moreover, version (E) adds that, depending on the specific terms of the agreement, payment or reciprocation was required at different stages (Thurneysen 1926, §13, 20–1). Either both parties hand over consideration after the contract was entered at the same time or only one person forwards his goods or services while the other party is granted a delay for his fulfilment or is allowed payment at a later stage. Unfortunately, the distinction between a gift, an exchange, a sale, and consideration does not appear to be clearly defined in early medieval Ireland.¹⁷ It is, however, clear that a consistency and reliability of exchanges facilitated and strengthened socio-economic ties within the community and their possible longer-term impact on a person’s status in society. The concern of *cert* is thus of paramount importance.

Cóic Conara Fugill clearly shows that the regulation of exchange was of particular concern to the jurists, a concern shared by *Berrad Airechta* and *Di Astud Chor*. The fact that it envisaged two procedural paths dealing with matters intrinsically related may indicate that an in-depth preoccupation with this material and a tighter structure for their resolution was deemed beneficial. Moreover, it

16 Thurneysen 1926, §27, 24–5, *Ara-fesser coic raitte riagaiter hi tech mbritheman*. (So that you may know the five roads that one rides to the judge’s house.) [my translation]

17 A discussion of these terms is provided in Thurneysen 1926, n. 50, 73–5.

would strongly suggest that the trained judicial profession was actively involved within the development of this legal field. From a curial perspective faster progress of a claim would have been possible if both parties agreed upon either a rescission or an adjustment in advance of the hearing and this would have been dependent on the specifics of their agreement. However, this would put the judge in the role of a mediator more than an independent adjudicator. Nevertheless, it remains fairly obscure how a separation of these two issues, a rescission and an adjustment, would have operated on the ground.

Dliged would be chosen in order to challenge the validity of a contract or to have a contract rescinded when faced with a debtor reluctant to discharge his debt. If no consideration has exchanged hands and no sureties were present, a party could force a rescission if he, for instance, wished to engage in business with a more profitable or reliable partner. However, if the contract was judged to be valid, the contract presumably could, if the considerations were unequal, be adjusted under *cert*. The legal issues, a claim for rescission under *dliged* and a claim for adjustment under *cert*, are exclusive in respect to their paths, although it appears that both claims may be brought consecutively in regard to the same case. One can see that the issues are, though legally distinct, closely connected. The fact that the jurists chose to separate them and thus to clarify and precisely control the goal of a claim from its outset, presupposes the judgement, though not its specifics. In the wake of the general negativity associated with the dissolution of a contract and the impact this might bring to bear on personal relationships, it is possible that the jurists regarded it as beneficial to separate these two issues procedurally and to demand a considerably lower guarantee for the re-balancing of a contract, the *smachtgille*. A party was not in danger of having one's contract rescinded once it went to court under *cert*. If one, for justified reasons, chose to annul a contract or to have it declared void, he could still do so under *dliged*. But then, the goal would have again been clear from the outset and no disruption to the process would have occurred.

The essential benefit of a procedural separation of a rescission and an adjustment seems to lie in the clear and original objective sought after by a given party, which in turn finds reflection in the choice of the legal path undertaken. The concern expressed about the regulation of fair behaviour in commercial transactions, in order to limit gains for one's individual profit against the maintenance of socio-economic bonds between members of the *túath* does not necessarily imply that this specific area was in need of judicial interference due to a growth in public non-abidance. However, it does clearly demonstrate that the authority of the court showed an interest in the regulation of situations likely to generate dispute. Moreover, the judicial interest in exchange contracts may point to the importance of having authority over them. Consequently, the significant position of exchanges

within the workings of society was underpinned by the addition of a judicial domain, executed through a procedural differentiation, whether applied as such or not. For now, the application of the differentiation depicted in *Cóic Conara Fugill* in a court hearing remains a challenging, though particularly fruitful area of research on legal thought and procedure with more work still to be undertaken. Certainly, *Cóic Conara Fugill* and its numerous versions prove that it enticed not only the mind of the legal historian but also the medieval jurist.

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Abbreviations

AL *Ancient Laws of Ireland*
CIH *Corpus Iuris Hibernici*

Bibliography

Primary Sources

- Ancient Laws of Ireland*. 6 vols. Dublin and London: Her Majesty's Stationery Office, 1865–1901.
- Berrad Airechta*. *CIH* II 591.8–599.38. Ed. (partially) and transl. into German in R. Thurneysen 1928, transl. into English in R.C. Stacey 1986.
- Bretha Nemed Déidenach*. *CIH* III 1111.1–1132.40. Ed. by E. J. Gwynn: 'An Old Irish Tract on the Privileges and Responsibilities of Poets'. *Ériu* 13 (1942), 1-60, 220-236.
- Cáin Sóerraiith*. *CIH* V 1770.15–1778.33 & *CIH* III 902.15–25, *AL* II 194–221. Ed and transl. into German by R. Thurneysen: 'Aus dem irischen Recht [2. Das Frei-Lehen].' *Zeitschrift für celtische Philologie* 15 (1925), 239-53.
- Coibnes Uisci Thairidne*. *CIH* II 457.11–462.18 & 924.26–31. Ed. and transl. in D.A. Binchy 1955.
- Cóic Conara Fugill*. (R): *CIH* VI 2200.1–2203.5, (E): *CIH* IV 1280.1–1283.23, (H): *CIH* III 1027.21–1041.38, (U): *CIH* VI 2257.12–2261.17. Ed. and transl. into German in Thurneysen 1926.
- Corpus Iuris Hibernici*. Ed. D. A. Binchy 1978. 6 vols. Dublin: Dublin Institute for Advanced Studies.
- Di Astud Chor*. (A): *CIH* III 985.24–1002.31, (B): *CIH* IV 1348.21–1359.25 & 1194.10–1198.20, (C): *CIH* VI 2040.28–2045.36 & 2046.34–2050.32, (D): *CIH* VI 1962.27–1963.35. Ed. and transl. into English in McLeod 1992.
- Heptads*. *CIH* I 1.1–64.5 & *CIH* V 1881.9–1896.22 & *CIH* II 537.14–549.18 & *CIH* V 1821.28–1854.36 & *CIH* III 905.10–906.38, *AL* 118–350.
- Tochmarc Étaíne*. Ed. and transl. by O. Bergin & R.I. Best 'Tochmarc Étaíne' *Ériu* 12 (1938), 137–96.

Secondary Sources

- Archan, C. 2007. *Les Chemins du Jugement – Procédure et Science du Droit dans l'Irlande médiévale*. Paris: De Boccard.

- Bemmer, J. 2009. *Early Irish Law Enforcement*. Vienna: (unpublished Magister dissertation).
- Binchy, D. A. 1955. 'Irish Law Tracts Re-Edited'. *Ériu* 17, 52–85.
- Breatnach, L. 2005. *A Companion to the Corpus Iuris Hibernici*. Dublin: Dublin Institute for Advanced Studies.
- Charles-Edwards, T. M. 2000. *Early Christian Ireland*. Cambridge: Cambridge University Press.
- Doherty, C. 1980. 'Exchange and Trade in Early Medieval Ireland'. *The Journal of the Royal Society of Antiquaries of Ireland* 110, 67–89.
- Gerriets, M. 1985. 'Money in Early Christian Ireland according to the Irish Laws'. *Comparative Studies in Society and History* 27, no. 2, 323–39.
- Gerriets, M. 1981. 'The Organization of Exchange in Early Christian Ireland'. *The Journal of Economic History* 41, no. 1, 171–6.
- Kelly, F. 1988. Repr. 2005, *A Guide to Early Irish Law*. Dublin: Dublin Institute for Advanced Studies.
- Mauss, M. 1954. *The Gift – Forms and Functions of Exchange in Archaic Societies*. Transl. I. Cunnison. Repr. 2011, Eastford: Martino Publishing.
- McLeod, N. 1993. *Early Irish Contract Law*. Sydney: Sydney Series in Celtic Studies 1. Centre for Celtic Studies.
- Sharpe, R. 1986 'Dispute settlement in medieval Ireland: a preliminary inquiry'. In W. Davies & P. Fouracre (eds.) *The Settlement of Disputes in Early Medieval Europe*. Cambridge: Cambridge University Press, 169–89.
- Simms, K. 1998. 'The Contents of Later Commentaries on the Brehon Law tracts'. *Ériu* 49, 23–40.
- Stacey, R. C. 1994. *The Road to Judgment – from custom to court in medieval Ireland and Wales*. Philadelphia: University of Pennsylvania Press.
- Stacey, R. C. 1990. 'Ties That Bind: Immunities in Irish and Welsh Law'. *Cambridge Medieval Celtic Studies* 20, 39–60.
- Stacey, R. C. 1986. '*Berrad Airechta* – An Old Irish Tract on Suretyship'. In T. M. Charles-Edwards, Morfydd E. Owen & D. B. Walters (eds.) *Lawyers and Laymen*, Cardiff: University of Wales Press, 210–33.
- Thurneysen, R. 1928. *Die Bürgschaft im irischen Recht*. Berlin: Verlag der Akademie der Wissenschaften.
- Thurneysen, R. 1926. *Cóic Conara Fugill – Die fünf Wege zum Urteil*. Berlin: Abhandlungen der Preussischen Akademie der Wissenschaften.
- Thurneysen, R. 1925. 'Aus dem irischen Recht II. Das Frei-Lehen'. *Zeitschrift für celtische Philologie* 15, 239–53.