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THE LEADING PRINCIPLES OF THE BREHON LAWS.

By JOHN A. COSTELLO.

Introduction.

WHEN we enter upon the study and examination of the principles of the early Irish legal system, we are faced at once with a body of laws, or rather mass of customary rules, which has its basis on ideas fundamentally different from modern juristic doctrines.

The now-called Brehon Laws belong to the epoch of Customary Law; and many of their essential principles are similar to those found in all the early law-codes of the different branches of the family of nations from which the Celts derived their origin. The examination of these principles is important in historical and comparative jurisprudence, both as offering the best example in Western Europe of laws which have almost altogether escaped from the influence of the Semitic and Roman Laws, and as preserving most completely and purely in their basic structure the primitive legal rules of the Aryan people, and the Celtic form of the Aryan law.

The system contained in the Brehon-Law Tracts is the record of the customs which, handed down from immemorial antiquity, and preserved and administered by a privileged class of hereditary lawyers, formed the rules for the governance of the tribal communities of ancient Ireland; and which provided for and adapted themselves to a system of life wholly unlike our modern society in its elements and constitution. Historians tell us that the story of Ireland is the story of arrested development, and the same remark may be aptly applied to the story of the Brehon Laws. For they present the peculiar phenomenon of a legal system which, though remaining an actual and working system, continued stable for centuries, and reached down to quite modern times as a crystallised and rigid code of

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laws unprogressive and archaic. We have thus in the Brehon Laws the anomaly of a living but not a changing organism. It was a living organism because it regulated the actual life of some of the people up to the seventeenth century; and because it received at the hands of the professional class of lawyers which existed in Ireland the fullest possible development which its principles were capable of. Sir Henry Maine points out that law is stable while society is progressive. The complicated scheme of society which existed in ancient Ireland broke up and underwent radical changes. Owing, however, to the peculiar circumstances obtaining at the time, the native legal system which was in a remarkable degree suitable to the mode of life and government which it was intended to provide for, was prevented from adapting itself to the changing needs and structure of society. Hence the system was not a changing organism.

As a consequence of its geographical remoteness and insular isolation, Ireland was uninfluenced by any of the great movements in literature or thought which swept from time to time over the continent of Europe. Its literature is a natural growth, nourished solely by the Celtic genius. So, too, its laws are native, and, originating far back in the dim ages of the Celtic dawn, were handed down through the years—a purely indigenous growth self-centred and self-contained. The consequence was that there took place in Ireland what a French Jurist has called "un développment local des idées juridiques primitives." The ideas contained in the law were developed to their extreme logical conclusion in the Brehon law-schools by men who spent their lives in mastering the details of its complicated technique; and the result was the fact that—as Dr. Richey puts it—"the archaic character of the Brehon law lies rather in the absence of modern ideas than in the presence of early forms."

Almost the first thing that strikes the modern student of the Brehon Laws is the endless mass of specific detail and meticulous rules with which the law abounds, and from which he is obliged to educe the underlying principles which govern the various cases. As the law in ancient Irish society formed an integral part of the social structure, to this tendency to consider details is due the fact that in the laws as they have come down to us considerable light is thrown on almost every branch of the social, domestic, political and military life of the nation; and consequently the laws are a mine of information to the

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student of ancient Irish sociology. But to the jurist these details, which are applicable only to the primitive state of society for which they were framed, are useful only as being illustrative of the general principles for which he seeks, and as being indicative of a very careful and accurate administration of justice. In the law-tracts there is no attempt at a scientific classification or the statement of abstract general principles. The law administered by the Brehons was a thoroughly practical code intended for daily use. The method the lawyers pursued was to try to foresee all possible states of fact that might arise in various circumstances, and have a judgment ready cut and dry when such a fact should so arise. The inevitable result of this was to give rise to a mass of subtle and elaborate distinctions, and the laying down of a vast number of minute rules applicable to a huge variety of cases. From the detailed character of the law-books one writer has hazarded the theory that the law tracts which we now possess consist merely of the statement of those rules of law which, owing to their detailed nature, could not be retained by the most tenacious human memory, and which it was, therefore, necessary to reduce to writing. Another writer considers the contents of the tracts to be merely headings or notes of lectures. It is conceivable, therefore, that the Brehons had a clear perception of the general principles underlying the immense volume of legal rules, and that they only required the minutiæ to be reduced to writing.

The Irish law consists of customary rules expanded and enlarged by precedent and decided cases, and the speculation of the lawyers on hypothetical cases propounded by his pupils or educed from the ingenuity of his own brain. The laws are not legislative enactments, nor the commands of a sovereign political authority. They are merely the customs of the people; and the only "sanction"—in the Austinian sense—which supported them was a highly sensitive and organised public opinion. The Brehon Code contains all the details of a general legal system; and, roughly speaking, it may be said that the civil law is contained in the Senchus Mór, or Great Law Book, and the criminal law and the law of wrongs in the Book of Aicill. The proper word to describe the general body of the native Irish jurisprudence was "Fenechas," which consisted of three branches of law, Cáin Law, Urradhus Law and Cairde Law. Cáin Law was the general common law of the land in force throughout the whole country; Urradhus was this general

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law modified by local customs; and Cáirde Law was inter-territorial law.

In the following pages I proposed to set forth the main principles underlying the most important branches of the Brehon Laws:—

(1) Procedure by Distress. (2) The Land-Laws. (3) The Law of Crimes and Wrongs. (4) The Law of Contracts and Wills. (5) The Law of Husband and Wife. (6) The Law of Evidence.

PROCEDURE BY DISTRESS.

The Irish had courts of justice arranged in several grades on an ascending scale, and a body of professional lawyers, pleaders, and advocates. But the function and jurisdiction of the Judge and Court were wholly unlike those obtaining in modern times. The office of Brehon was not an office of state like that of the modern judge: the Brehon was an arbitrator who decided on the admitted facts of the case. Underlying the whole complicated structure of the civil and criminal law of ancient Ireland is to be found one great cardinal and fundamental principle which, as well as being productive of remarkable results in other directions, was responsible for the creation and elaboration of a large volume of legal rules constituting the Law of Distress. These rules continued in force for nearly seventeen centuries, were the main driving force in the working of the various branches of the Brehon Laws, and affected the whole operation of the laws. The principle referred to was that every person against whom any complaint lay, or who was accused of any wrong, was entitled to refuse to submit his case to the hearing and decision of a judge. Intimately connected with this was his right, if he did submit to arbitration, to select his own judge. Nowadays there exists state machinery for obliging the accused to appear to stand his trial; but in common with all primitive legal systems, there is to be found in the Brehon Code no conception of the State in the modern acceptation of the term, and there was, therefore, no state machinery for enforcing rights and redressing wrongs. The only method by which a person could enforce the trial of his claim and enforce a reference to the arbitration of a Brehon was by resort to the legal remedy of Distress. This part of the law was a most important branch of the native jurisprudence, and the rules relative to it occupy the greater part of

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the Senchus Mór. It was a universal method of enforcing rights, and the general means whereby satisfaction might be obtained for crime, non-payment of a just debt, breach of contract, or any other legal liability. The award of a Brehon in any cause, civil or criminal, was enforced by distress; and the trial of an action was instituted by means of it: "La saisie," says M. Dareste in his "Histoire du droit," "dans les législations primitives n'est qu'un moyen d' engager une action." Under the Brehon Laws, if a person wished to enforce a claim against another, he made a seizure on the defendant's goods, his object in so doing being to compel him to satisfy the claim, or else go voluntarily before a Brehon to have the dispute decided by him. The civil authority gave the person in whose favour damages were assessed no assistance in carrying out the judgment, because the institution of the sheriff or sheriff's officer did not exist. The creditor or plaintiff had himself to distrain in person, and, according to fixed rules, which are laid down with minute particularity and mathematical precision by the Senchus Mór, the provisions of which appear, as O'Curry has pointed out, to embrace almost every point possible that could be raised concerning the legality or illegality of a Distress.

The Law of Distress embodied in the "Great Law Book" relates to the seizure of personal chattels or movable property as a means of enforcing a right of commencing an action. In the law-tract itself we find what may be termed a definition and descriptive glorification of the procedure. "Distress (Athgabhail) is a general name for every security by which everyone recovers his right. 'Athgabhail' is that which renders good to the good, which renders evil to the evil . . . . which taxes the guilty for his guilt."

Distress may be classified as (A) ordinary Distress, which is further divided into (*a*) Distress with time or delays, technically called "Athgabhail iar fut"; (*b*) Immediate Distress, Athgabail tulla. (B) Distress by Fasting. Which distress was the proper one to resort to depended on the facts of the case and on the rank of the parties. As already mentioned, the responsibility of carrying out the procedure in all its formalities lay on the person interested; and it is noteworthy that, in order to commence the process, no preliminary application—under which the plaintiff could afterwards protect himself—to a court or judge was necessary. He was liable, however, if the distress was made *mala fide* or illegally.

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In ordinary distress, *i.e.*, where fasting does not precede distress, the Irish law distinguished two fundamental categories or species of seizure. In the first the objects distrained remained for a certain period of time in the hands of the debtor before the creditor could remove it; and in the second the creditor seized the property at once, and removed it to the pound. The first was distress with time, the second immediate distress. In the former class there were eight successive steps constituting the formality of distress. Firstly, there was the formality known by the technical name, "Aurfocre," which consisted in a demand for payment, stating at the same time, in the presence of witnesses, the amount due. Then there was the delay called "APAD," which separated this demand from the next step, which was the seizure, the name for which was "Athgabail." The plaintiff only went through the formality of seizing the goods without removing them from the defendants' possession. Next came the "ANAD," which was a stay of execution or delay after seizure, the duration of which varied in accordance with certain rules, and during which the property seized remained in the possession of the debtor. The succeeding stage was the "Toxal," or the removal of the thing distrained in the presence of witnesses, and the putting of it in the pound. When this was done, a notice was given to the debtor stating the amount due, the place in which the distrained goods are impounded, and the name of the law-agent present at the operation. The legal name for this notice was "Fasc." After this there was a further delay called "Dithim," during which the thing remained in the pound. The final stage was the one during which the property in the thing distrained passed from the debtor to the creditor. This was designated "lobad," and signified the destruction of the debtor's right of ownership, which BEGAN to merge in the creditor. This latter process was a gradual one, a certain proportion of the goods distrained becoming the property of the creditor the first day, another the second day.

The length of the various delays was fixed by law according to circumstances, there being Distress with delays of one day, of three days, of five and ten days. The Book of Aicill tells us that the "period of stay (*i.e.*, the Anad) is the period during which the distress remains for a while in the hands of the debtor." The plaintiff, as I have mentioned, before the Anad, only formally seized the goods without taking possession of them, but a right accrued to him in the process; he had a lien,

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as it were, on the cattle. The defendant had then to give a pledge to the plaintiff, by which he guaranteed either to pay or submit the matter to the arbitration of a Brehon to test the validity of the claim. It was during this stay or respite that he elected which course to pursue. When the duration of the Anad had expired, and the defendant refused to surrender the goods on which the distress was to be levied, pay the debt, or submit to arbitration, the pledge was forfeited. Should the defendant refuse to give the pledge, the distress became an "Immediate" distress, and the goods could be at once carried off and impounded. When, however, the "Anad" had expired, the plaintiff was entitled to remove the defendant's goods to a pound, and there were rules laid down in detail governing the care of the things while in the pound, and fixing the liability in case of accident. Cattle of various kinds were most commonly distrained, and the law declared that the expense of their upkeep during the period in the pound were to be paid out of the value of the cattle.

In the case of immediate distress, the delays of apad and anad were eliminated, so that the goods were distrained immediately, and were carried off without respite to the pound. The Law-Book says: "What makes a distress with time of it is a person of the same rank as the debtor taking it. What makes an immediate distress of it is a chief taking it from an inferior person." In this species of Distress, however, the delay in the pound—the dithim—was still preserved. The principle underlying immediate distress was that during the period of the stay the goods remained in the pound, or in the possession of the creditor. Immediate distress took place when the plaintiff was of a higher rank than the defendant, when the defendant was likely to abscond, and in various other cases. If, however, the debtor absconded, the principle is laid down in the law: "Every tribe is liable after the absconding of a member of it, after notice, after warning, and after lawful waiting."

In all cases of distress the law laid down that "three things are to be announced at the residence of the defendant—the debt for which it (the distress) was taken, the pound into which it was put, and the law agent in whose presence it was taken." The law took every precaution against unjust or illegal seizure, and provides heavy penalties for such cases. The cardinal principles and specific details of the law of Distress were so framed that injustice might not be worked, and that a person on whom a distress was to be levied should be made aware of all the

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facts of the case. The law, too, adopted the principle, "vigilantibus non dormientibus subvenit aequitas," and refused to assist the person who slept on his rights, or was guilty of laches. "To be asleep avails no one," was a principle on which the law acted. The principle of set-off was also recognised, and if the creditor or person distraining gained any profit from the objects distrained other than what was lawfully due to him, this was credited against the debt and expenses. The subject matter of the distress was any kind of movable property whatever, but cattle, horses, pigs, sheep, goats, and so forth, were most commonly distrained. The law permitted the creditor, if his debtor had no property, to seize the person of the debtor, and make him discharge the liability by his labour. The creditor was not allowed to seize any goods at his caprice. It was a cardinal principle which entered into all branches of the Brehon Law that "no one should be oppressed in his difficulty." If there were other distrainable goods, the creditor could not seize household goods or farming utensils; and, in the case of tradesmen, he could not take their implements or tools, because thereby their means of livelihood would be taken away. So, too, certain kinds of cattle were exempt if other less valuable were present sufficient to satisfy the claim.

The law of Distress was very technical, and any illegality was punished, so that the rule was laid down that a law agent should accompany the person distraining, and if the illegality was due to an error of this law-man, the distrainer was not mulcted as he would be if he was responsible for the illegality. M. D'Arbois de Jubainville states it as a fundamental principle of the Irish law of Distress that capacity to distrain was co-ordinate with and dependent upon capacity to contract. The general rule was that no one could levy a distress unless a distress could be levied against his own goods, and unless he had sufficient goods of his own which might be available to satisfy any claims due to illegality. The non-free classes could not in general distrain, nor could the insane, the Insolvent person, nor the person ineligible to become a surety. There is a provision in the laws of a peculiarly modern flavour, which declares that no one could levy a distress against a king. One of his officers—called the steward bailiff—was to be distrained in his place. Distress could be levied by women, but special rules existed for their case. She practised a distress with two days, and, it appears, could only distrain goods which were considered as pertaining to feminine occupations.

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The second kind of Distress was DISTRESS WITH FASTING. In the Irish law of Distress there existed a custom a parallel to which is not to be found in any of the Teutonic codes of law. This was the formality called Troscad or Fasting, which was a procedure analogous to the Hindoo custom of sitting dhurna. Before entering upon the process of levying a distress, the law required notice to be given in ordinary cases, but under certain circumstances—when the defendant was of a higher rank than the plaintiff, when he was a chieftain, belonged to the Flaiths or nobility, a brehon, a bard, or a bishop—the process of fasting was always necessary, in addition to the notice. The Senchus Mór says: "Notice precedes every distress in the case of the inferior grades except it be by persons of distinction; fasting precedes distress in their case. He who does not give a pledge to fasting is an evader of all; he who disregards all things shall not be paid by God or man." So that if a person was fasted on, and allowed the fasting to go on without paying the debt or submitting to arbitration, if it came in after times to be his turn to seek to get any debt of his own paid, the law would not assist him to recover his debt: "He would not be paid by God or man." In the case where fasting was required, the plaintiff served the required notice, and then went to the house of the defendant, and remained waiting at his door a certain time without food. The creditor was obliged to offer him food, and promise either to pay him or submit the question to a Brehon. For this he had to give "the security of a good surety . . . . or a pledge." Should the debtor refuse to do this, the law declared that his liability was doubled, and the creditor having duly fasted, proceeded in the ordinary way to distrain the goods with the difference that he distrained for double the amount of his original claim.

The procedure for the seizure of immovable property and the taking possession of land is described in the Law Tract on "The Taking Possession of Land." It was of a much more formal character, regulated upon entirely different principles from those of Distress, and the proceedings under it were of a highly symbolic character.

THE LAND LAWS.

The social organisation of ancient Ireland was based upon the system of clan, sept and finé; and it was with reference to this constitution of society that the law regulated and adjusted

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the rights and duties, liabilities and obligations of the different classes on the social scale. It is a fundamental principle of modern English jurisprudence that the law is the same for all persons. This rule, owing to the variety of persons it had to provide for, could not obtain in the Brehon laws. On account of the constitution of early Irish society, personal rights depended on social status, and social status was fixed on an ascending scale corresponding with the rank of the different kinds of persons. Status is the sum of a person's legal rights and liabilities, and these varied with the rank of the person, so that the Irish law had to make provision for these varieties of personal status. Society was divided into free and unfree classes, and the bond which held the free classes solidly together was the machinery of the clan system and the rules of kinship. The forms of land tenure in ancient Ireland, and the principles underlying the rules relative to land bear no resemblance to the feudal system, which is the basis of the modern law of Real Property in England. The native Irish law contemplates the state of things that existed when society was in the tribal state of evolution; when the legal unit was the group of kindred families and the importance of the individual a minimum, and when the idea of private property was only just beginning to be evolved and recognised. According to the theory of the feudal law, all land is supposed to be held either mediately or immediately of the King; but in Ireland neither the King nor the nobles who exercised jurisdiction over the territory of the tribe owned the territorial land of the tribe. The basic principle on which the whole system of native Irish land tenure proceeded was that the entire district or territory in the occupation and possession of the clan, and no matter in whom the usufruct or enjoyment of the land lay for the moment, was the absolute, permanent, and ultimate property of the clan. In this tribe land, however, all the free tribesmen had definite rights, and the tribe land was held by the tribe for their benefit. For it was one of the most fundamental and enduring principles of the Brehon laws that every freeman had a right to a portion of the land of the tribe on which to subsist. Some of the tribal territory was undoubtedly private property belonging to individuals or families in exclusive ownership. But the greater portion was divided up for the benefit of the freemen of the tribe. Specific portions were delimited and set aside for each free clansman or céile, as "dwelling and curtilage." Another part was granted to

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the kings, nobles, and professional and literary classes for their maintenance, and by virtue of their position. The residue of the land consisted of arable, pasture and waste land. This arable land, called the Fearan Fine or tribe's quarter, was the largest part of the territory, was free from private ownership, and was the common property of the whole clan to the enjoyment of part of which the law gave an indisputable right to every cécile. It is laid down in the law tract called the "Corus-Bescna" that "it is one of the duties of the tribe to support every tribe-man, and the tribe does this when it is in its proper condition." This land was apportioned then to the free members of the sept, and each one continued in undisturbed possession of his lot, not for any fixed period, but until the time when the land became subject to the custom of Gabhail cine or Gavelkind. It is worthy of note that in the Brehon law tracts which we now possess, the word gavelkind does not occur. By this custom the land of the sept was, at certain intervals, subject to a process of redistribution when some of the occupiers had died, and there were fresh claimants of full legal age seeking their share. The land was put into hotch-pot, and chance decided what farm or portion of land the former occupants would get of the land they had previously enjoyed. But there was a just provision which entitled a céile who, on redistribution, had not been granted his old farm, to compensation for unexhausted improvements. These clansmen had—subject to the right of clan resumption for gavelling—absolute security of tenure. They were not subject to any rent for the portion of the tribe-land which they held, beyond the tribute they paid as citizens for the maintenance of the state. They had to pay subsidies to their chief according to their means. While they had fixity of tenure, and fair rent, they had not the third "f"—free sale; because no part of the general tribe land was private property. It was subject to the further restriction that the land held by the céile could not be let, save in exceptional circumstances.

The pasture and waste land were used in common, every freeman being allowed to use it for grazing cattle and for other purposes. The only pasture land that was held in severalty was a portion granted to the chief as his mensal land. This right to the user of the commons land was a temporal right belonging to each free member of the tribe by virtue of his position as member of the clan.

It can hardly be questioned that, in spite of the theory which

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vested the collective ownership of the territorial land in the tribe, private and exclusive ownership of land did exist to a certain limited extent. The conception of private ownership seems to have been gradually evolving and breaking in upon the old theory of collective ownership, and, according as this idea gained ground, encroachments were made on the general tribe land, and the land thus seized claimed as private property and lands of inheritance. This idea of private ownership is given recognition to by the laws, and indeed Maine concluded from them that "all the Brehon writers seem to have a bias towards private, as distinguished from collective property." From the nature of things, and from the fact that private ownership in land was the exception and not the rule, and as a consequence of the regulation forbidding the letting of the general tribe land, it follows that there could not have been much letting among the ancient Irish. But to a certain extent it did exist; and Richey, from a consideration of the law-tract on "Judgments of Co-tenancy," deduces the fact that, at the date of the composition of that tract, there did exist tenants in the modern sense of the term, holding lands for periods either fixed or uncertain, and paying rent in kind. Private owners could, of course, let their land, and the same privilege might be exercised by chiefs over their mensal lands. The rent was always in kind, for at the period of the Brehon Laws money did not exist in Ireland.

Here we are met with another cardinal principle of the law. If the lessee fell into arrears with his rent, or if in the case of the ordinary tribesman occupying portion of the general land by virtue of his birthright as such, he failed to pay the subsidy due from him, he could not be evicted from his holding, because the idea of eviction was entirely foreign to the Brehon Law. In both cases resort had to be made to the law of Distress, and in both cases the liability was merely a simple debt to be recovered by seizure of the debtor's movable goods in the proper form prescribed by the law.

It should have been remarked that the waste lands and commons land of the tribe were not subject to the custom of gavelkind.

As an illustration of the equitable character of the laws, it may be mentioned that a portion of the general tribe land was set apart for the maintenance of the childless and indigent members of the clan. This was called the Cumhal Senorba or Old Age Inheritance. It was a leading principle of the law, too, that

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the child was bound to support his father whose lands he held, and the "Corus Bescna" lays down the rule: "The father may remove a son who does not maintain him from his land, and give his land to one who maintains him." Furthermore, landowners were subject to certain payments in support of the poor.

It remains to treat of the descent of Property. Owing to the theory that the ownership of the tribe land was in the tribe and *not* in the Ri, Flaith, or other individual, the idea of succession was not applicable to certain classes of land. In the case of the common tillage and meadow lands which were divided among all the free members of the tribe who had, as already described, the right of using the waste land, the idea of succession is not applicable, because the basis on which these rights rested was kinship and membership with the clan, which was a purely personal right. There were, however, lands which did not thus belong to the tribe, and which were called Orba or lands of Inheritance. According to the Irish custom, property descended originally only to the male heirs who took in equal shares. At first the daughters were wholly excluded, but ultimately they were granted the right of being called to the inheritance of all the property when there were no sons. The land then inherited by a daughter was called "Orba cruib is sliasta"—"an inheritance of hand and thigh." In such a case, part of the lands was taken from the inheritance and given to the Finé, or group of kindred, in payment of the military and other services attached to the land, which could not be fulfilled by women. Again, "Land held by a man outside his home farm, and which occupied an intermediate position between his private land and the common land of the clan, descended according to the Irish system of gavelkind; that is, on the holder's death, not only the particular land which had been thus held by him, but all the land of the same class belonging to his sept, was divided anew amongst the adult members of the sept."

In order to uphold the dignity of their office, the law held that the property given to kings, chiefs, flaiths, and other officers of rank in the district or Tuath, should not be subdivided at their death. This property descended according to the law of Tanistry, *i.e.*, the lands which they held by virtue of their public positions descended to their successor. The advantage thus obtained by making official property indivisible was that the aristocratic classes always had sufficient landed estate to maintain the dignity of their office; and the repeated subdivision in ordinary cases which tended to disintegrate a large estate was

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avoided. During the lifetime of the chief, his successor was elected by the clan, and the successor was called the Tanaiste. It did not always follow that the tanist was the son of the chief; he might be some other near relative. It was essential, however, that he should belong to his Finé.

As the result of the subdivision of law by inheritance among co-heirs, there is a series of legal rules—set forth in the Tract on "Judgments of Co-Tenancy"—which relates in detail the rights and duties of the joint tenants, and the mode of partition and fencing of the land, and contains various provisions as to the different kinds of trespass. It is noticeable that this part of the law distinctly recognises the incorporeal right which we now call a right of way of necessity.

THE LAW OF SAER-STOCK AND DAER-STOCK TENURE.

Ordinary free tribesmen in full possession of political rights, who held either part of the general tribe land, or had private property, or held land on lease, were called Céiles. When a Céile had not sufficient cattle to stock his lands, a new relation was set up between him and his chief by the operation of a system of rules which occupy an extensive portion of the Senchus Mór regulating the custom of stock-taking. This custom, by which either the chief or other noble gave stock to his tenants who needed it, in consideration of a certain rate of payment, was of great importance in ancient Irish domestic life, which was, of course, in the main, of a pastoral character. Its importance and universality can be realised when it is said of it that "the various grades of society were bound together by the nexus of stock-taking." This system has been compared to the metayer mode of land cultivation which is practised in parts of France and Italy, by which a cultivator tills the soil for a land owner on condition of receiving a share of its produce, the owner furnishing the whole or part of the stock. Between the two, however, there is very little analogy.

There were two modes of taking stock, and the stock-taking céiles were classified, according to the mode of taking, as saer-céile and daer-céile, or free tribesmen and bond tribesmen. The technical names for the two branches of the law regulating both classes are designated, respectively, Cáin Saerrath and Cáin Aigillne. The principles governing the law of the two tenures were fundamentally different. The tenant who took stock under saerrath—called saer-stock tenure—was not required to give

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security to the chief for the stock. Taking stock from a *chief* in saer-stock tenure was always a matter of choice, but he could be compelled to take it from the King; and as one of the incidents of saer-stock tenure was that the saer-céile was obliged to perform military services, this was of great advantage to the King. On the other hand, the daer-céile was obliged to give security, the amount of the stock generally taken in daer-tenure being larger, and the cause of taking it comparative poverty. The incidents of daer-tenure were burdensome, and the consequence of entering into it was to reduce the status or rank of the daer-céile, and accordingly the law adopted the principle that no one could be compelled to take daer-stock. It was a consensual transaction, and always a matter of contract; no one was bound to take stock in daer-tenure even from the King. The payments which both classes of tribesmen had to make, the subsidies they had to pay, and the services they were bound to perform were easier and more favourable in the case of saer-céiles than daer-céiles. "What is the worst of the Cáin Saerrath" (*i.e.*, the law of saer-stock tenure), says the Senchus Mór, which gives the answer, "Manual labour and full homage."

One of the incidents of saer-stock tenure was the house-tribute, technically called "Bes-tigi," or subsidy in kind, which he had to give to his chief. In addition, he had to perform certain acts of manual labour, or go on military expeditions. The payment which they had to make for the stock was valued at one-third of the stock, and, after paying this for seven years, the stock became his property. Daer-tenure was subject to a tribute called ciss-ninsciss, or wearisome tribute. The obligations attached to this method of taking stock were very burdensome. Twice each year the daer-céile had to pay a food-rent, in addition to manual labour and war service. This was called Biatad, and signified that he was bound to give hospitality and refection to the chief and his retinue on his visit to the tenant's house. He could not withdraw from the contract without being heavily penalised, and in ordinary circumstances the stock did not become his property, but had to be returned at the end of the term. The daer-tenant could not give evidence against the chief in a court, but the saer-tenant was competent so to do. In the case of saer-tenants the connection between chief and céile was a personal tie; but if the daer-céile became in arrears with his payments, his Finé were liable. For this reason, and for the reason that a free clansman, by becoming a daer-céile, lowered

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his own status and that of his Finé, he could only take stock in daer-tenure with the full knowledge and consent of his kindred, who could impugn the contract if this formality was not observed, unless they subsequently ratified it. The mode in which the stock was taken furnished an indication of the wealth of the taker.

THE LAW OF CRIMES AND WRONGS.

The two departments of the law which modern jurisprudence designates as the Law of Crimes and the Law of Torts are treated of in the law-tracts called the Book of Aicill, in which a large number of acts which the law regards as crimes, injuries and wrongs, are set forth in detailed variety. The act known to modern legal systems as a crime was not recognised by the Brehon law as being distinct from the act now called a tort. The Book of Aicill classifies both together, and treats of them as wrongs. "The Penal Law of ancient communities," says Sir Henry Maine, "is not the law of crimes; it is the law of torts." In this respect the penal law of the early Irish is in no way different from the penal law of other primitive communities. While other primitive legal systems expanded and developed, and kept pace with the social needs and the progression of the societies for whose guidance they existed, the Irish system remained, as stated already, a living but not a changing organism. The modern classification of the Law of Crimes and Torts is based on a difference of "sanction." The idea of sanction predicates the existence of the State which will take cognisance of and assume jurisdiction in respect to acts which are crimes, and the idea of a crime cannot arise until the idea of the State has been realised. The Irish law had not reached the conception that an offence against an individual may be also an offence against the State; it viewed crimes from a different standpoint to the moderns, and there was State interference to punish an act in the case only of political offences, such as treason and other wrongs, which were regarded as vitally touching the security and interest of the State.

The leading principle upon which the whole Brehon law of crimes and wrongs depends is that liability, whether it arises *ex contractu* or *ex delicto,* is to be discharged by the payment of pecuniary compensation, and the various species of wrongs and injuries are classified in the law with reference to the amount of compensation that was to be paid by the guilty party to the

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person injured. There was no distinction between civil and criminal liability, save in the amount payable. The Book of Aicill contains detailed rules for regulating the measure of damages due in the case of the different offences that might have been committed. Whether a person was guilty of negligence which resulted in injury to another; or whether he was guilty of trespass, aggravated assault, theft or rape; whether he was guilty of an illegality in carrying out a distress, or uttered a slander, or refused to pay a debt; whether he was guilty of a cruel and premeditated murder, or merely of manslaughter, there was no distinction between the mode in which the guilty party atoned for his offence. The Brehon lawyers reduced every species of liability to a definite material value, and aimed at having ready fixed the amount of compensation payable as reparation in every case of injury or wrong that could occur. On the individual injured, or on his kindred, if he were killed, devolved the onus and duty of seeking reparation. The most primitive idea of redress for wrong was by direct retaliation, the injured person returning like for like, exacting an eye for an eye and a tooth for a tooth. The idea of compensation for injury was introduced to put an end to this state of things, and marked a step in advance on the system of retaliation. At the time of the Brehon Laws, this was the function of the compensation fine, technically called Eric, by means of which every crime or offence was atoned for. The individual being thus prevented from taking the law into his own hands was, of necessity, constrained to have recourse to the ordinary civil action of Distress, the process being used to compel the wrong-doer to submit the case to the arbitration of a Brehon, who assessed damages. The Brehon, whose duties were almost precisely the same in a civil as in a criminal action, considered all the facts, the nature of the offence, the surrounding circumstances which, if proved, might modify the guilt of the offender, and the rank of the parties, and gave his award according to the rules and precedents. If the person had been killed, it was his kindred who had to use this method of obtaining justice. The word Eric, which properly signified the fine payable for "separating soul from body," was the general word for the compensation fine which was due for injuries or offences of every sort, whether against person, property, or reputation. The Irish law resolved this into two elements, and in this fact, as both M. Dareste and M. D'Arbois have shown, lies the originality of the treatment of the law of compensation by the Brehon Law. It

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should be noticed that in no case could the Brehon pass a sentence such as the modern judge has power to pass in criminal cases. He had to arbitrate and estimate the amount of the eric according to the law. The first element in the eric was that called body-price or coirp-dire, which was a fixed quantity for everyone depending on the nature of the injury and other considerations. The second was a variable quantity depending on the rank of the injured party. This was called Enechlann, or Honour-price. Honour-price was of great importance in several branches of the law, but was of paramount importance in determining the fine due in the case of crime or wrong. The value of the honour-price is given in the case of the various grades of society, and its amount depends on the dignity of the individual and his position on the social scale. It formed an important ingredient in determining status, and a person might suffer a change or loss of status—a capitis deminutio—by being guilty of any crime or other grave misconduct, and one result of a reduction in the honour price of a person was to lessen the amount of damages recoverable by him in case he was injured. In every case where Eric is to be paid the damages are calculated with reference to the rank of the injured party. There is in the Brehon Laws another fine called a "smacht" fine, which is reckoned on the basis of the honour price of the wrongdoer. The assessment of damages was of an exceedingly technical nature, involving complex arithmetical calculations and speculations, and proceeded, as is evident, on principles wholly different from the manner of estimating damages in modern times. The general theory of English law as to damages is that the injured party is, so far as money can do it, to be placed in the same position as he was before the cause of action arose. In the native Irish system, however, the compensations were dependent upon fixed considerations, the rank of the parties, the nature of the injury, and took, in the case of civil wrongs as in the case of crimes, no account of the actual loss suffered. The most remarkable thing about the ancient Irish code of wrongs is the full manner in which they have worked out the theory of contributory negligence.

I have stated that all offences and injuries were atoned for by the principle of pecuniary compensation. This includes the cases of murder and manslaughter, which were differentiated by the Brehons by the one being premeditated and the other unpremeditated. The Book of Aicill declares the principle that "Fines are doubled by malice aforethought," so that in the case

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of murder the fine was double that for manslaughter. The Brehons draw a distinction between crimes of necessity and crimes of non-necessity, the distinction being important both in calculating the fine and when the question arises as to the persons on whom the liability to pay the fine is to fall.

The idea of capital punishment as a method of atonement for crime was repugnant to the Brehon lawyers, as was also the primitive idea of direct retaliation, and the custom of private revenge. Nevertheless, it was a principle of their law that, if every other method of obtaining redress failed, the injured party might take the law into his own hands. But this was only admitted as a last resource. When such a contingency arose in the case of a murder, a person was entitled to use direct personal revenge for the murder of any individual included in his Finé or kindred. If, in the exercise of his vengeance, he killed the murderer, eric fine was not payable by him on that account. This species of homicide was classed by the primitive Irish jurists as a "murder of necessity," *i.e.*, marbad dethbire, along with unpremeditated crimes such as killing a man in self-defence or in accident. In homicide, as in many other cases, the law entered into a consideration of the "*intention*" of the wrong-doer in committing the crime; recognised the distinction between accessories before and after the fact; between the commission of a crime, and those who instigated to its commission, and made provision for all these cases. The crime of fratricide, or the murder by a person of any of his own kindred, and the case where the murderer conceals the body of his victim are marked out in the laws as being specially reprehensible.

Almost every possible variety of wrongs are enumerated in the Book of Aicill, bodily injuries and injuries to property and character, whether committed intentionally or by accident, and the compensation to be exacted in each case. The amount of this depended on the nature and gravity of the injury. There is a rhythmical enumeration at the close of the Book of Aicill dealing with this. Full honour-price is exacted for any injury which results in death. But for wounds and blows there is a scale of compensation, which is a fraction of that payable for murder. Robbery and theft are punished by fines. If a Brehon has delivered a false judgment he is fined, as is also the debtor who refuses to pay his debt. "L'action personnelle," says M. Daveste, "tendait primitivement au paiement, non de la somme due, mais de l'amende infligée par la coutume à la mauvaise foi."

A remarkable characteristic of the Brehon law of wrongs is

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the tendency to extend the area of the consequences of a wrong committed, and the number of persons whom any given wrong may affect. If a person is injured or killed, this constitutes a wrong not only against the person himself or his kindred, but also the person in whose house or in the neighbourhood of whose house it was committed. The guilty party was obliged to indemnify him, in addition to paying the eric fine to those entitled, so that the commission of a single offence might have widely extended consequences obliging the wrong-doer to pay a number of distinct payments by way of compensation to various persons. An example of this characteristic principle of the law is found in the case of theft from a house. The Book of Aicill says: "The 'dire'-fine for stealing from a house is a difficult dire-fine." And the commentary states that eleven honour prices are considered in it, and proceeds to state them. The house-theft, then, affects *eleven* persons, viz., the owner of the house, the owner of the object stolen, the *owner* of the bed in which the person slept who suffered the injury, the person who slept in that bed, and the seven noblest chiefs who were in the habit of visiting the house.

By what persons was the eric fine payable? The principles regulating this question were that the amount was primarily recoverable from the guilty party to the extent of his property, by the injured party or his family, as a debt by means of distress. But the liability did not cease if he was unable or would not pay it. It extended to his relations. In the case of homicide, the finé, *i.e.*, the kindred, of the victim were entitled to the eric. If the criminal had no property, and he absconded without paying, his kindred were liable to make good the eric to those entitled. The maxim is laid down in the Book of Aicill very tersely, "Every crime to the criminal." This maxim meant that every criminal was primarily responsible for his crime, and is explained in the commentary, "That is, as long as the criminal is in the territory, it is not lawful to sue his next of kin, or his kinsman surety, but to sue himself according to his rank; and to make a distraint upon him. . . . . ."

The fundamental principle which governs this part of the law is that the liability to pay fines and compensation for crimes should, in default of payment by the criminal himself, lie on those persons who, if he had possessed property, would have been entitled to it at his death; that the liability should be apportioned in the ratio of the respective shares to which these persons would have been entitled; that those who would have been

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entitled to receive the eric if it was the criminal who had been murdered should bear the burden of paying the fine when their relative is the criminal. The law tracts, however, are explicit in that this liability is secondary and subordinate to the original liability of the wrong-doer himself. Furthermore, the law provides a means whereby the finé might escape liability. Either of two courses was open to them. They might surrender the criminal to the kindred of the victim, who were at liberty to use him as they pleased, to kill him, or reduce him into slavery. Or they might formally expel him from the tribe, and send him into exile, at the same time giving a pledge as security against his future misconduct. The criminal then became an outlaw, and his life was forfeited. It appears that this course was not open to them when it was a case of manslaughter.

Another principle of the law was that if a robber was caught red-handed he might be lawfully killed, and no compensation could be exacted for his death. "A person who came to inflict a wound on the body may be safely killed when unknown and without a name, and when there was no power to arrest him at the time of committing the trespass."

Lastly, we must notice the principle, "the crime dies with the criminal," which is explained as meaning that when the effect of the crime was confined to an individual, and the kindred of the injured party did not make good their rights, their rights were lost at his death.

Law of Contract.

Owing to the constitution of ancient Irish society under the clan system, the uncommercial life of the people and the system of collective land-ownership and the insignificance of the individual, contract between individuals could not have attained the importance it holds in modern legal systems. Still, there is a law-tract called the "Corus Bescna" dealing with obligations, which contains some remarkably clear ideas on the subject of contract. Richey notices a very striking peculiarity of this branch of the law. The transfer of property in archaic law—the early Roman law for example—consisted largely of ceremonial. Certain acts which were regarded as primarily essential had to be gone through in order to give the transaction full force; and the due performance of every detail of the prescribed formalities was regarded as essentially important in conveying the subject matter of the contract, and not merely as evidence that a contract had been entered into. But Dr. Richey points out that in the

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"Corus Bescna" this well-known archaic form of law is absent. The rules deal with the CONTRACT between the parties, and not with the FORMALITIES by which the property is transferred.

The opening words of the "Corus Bescna" have a peculiarly modern flavour: "the world would be evilly situated if express contracts were not binding." The tract proceeds to say that there are two kinds of contracts, a valid contract and an invalid contract, so-chor and do-chor. Maine indulges in a sneer at this primitive classification into good and bad contracts; but the force of these words is wider than the literal translation conveys. The so-chor is the contract in which the advantages gained by one party equal those gained by the other. The do-chor is the contract obtained by the fraud of one of the parties to it, which results in a loss to the other. A contract could have been invalidated by fraud, lack of capacity, if made without the knowledge of a person whose consent the law declared essential, and other circumstances. The parties to a contract should be free clansmen, of legal age and sound mind, and suffering under no disability. A contract made by a servant without his master's authority, by a monk without authority from his abbot, by a son subject to his father without his father's authority, by infants, lunatics, idiots, fugitives from a tribe, were all invalid. The law gave little scope for contracts by persons of the base class of society, and the text expressly annuls the contracts of the "fuidir" tenants of a chief, who were the dregs and pariahs of society. The doctrine of sale with warranty was well recognised, and the law provided for the dissolution of a sale with "knowledge and warranty" in various circumstances within certain periods after the fraud was discovered. The doctrine of subsequent ratification was recognised, and the law said, "Every subsequent adoption renders the contract binding," and, "one adopts what he does not disallow, or what he does not repudiate after knowledge having the power to do so." From the nature of things there could have been very little contracts in relation to land. When any such did take place, it had to be made with the consent of the Finé, and in the presence of an official of high rank called the Aire-Forgaill. It appears also that witnesses were often necessary to the validity of a contract.

LAW OF WILLS.

There being very little absolute ownership of landed property vested in individuals, and the clan system fully providing for

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the distribution of their property after death, wills could not have been very common. There can be no doubt, however, that they did exist, because there are native Irish words for a will, and wills are referred to in the Corus Bescna. Dr. Joyce makes a bold claim for the Irish in this respect. He controverts Maine's theory that the idea of a will was developed in Irish law through the influence of ecclesiastics, who would be more or less imbued with Roman legal conceptions. Joyce points out that, when the Christian missionaries introduced any new doctrine or custom previously unknown in Ireland, they were obliged to import Latin words for them. In the case of wills, there existed three distinct native Gaelic words for a will, and if the conception had been unknown before the introduction of Christianity, these words could not have existed. He, therefore, concludes that the idea of testamentary disposition existed and grew up among the native Irish. "The presumption is," he says, "that the conception and practice of testamentary disposition were developed by the Irish." This is noteworthy in view of the fact that, as Dr. Sullivan puts it, "it is one of the strongest proofs of the antiquity and originality, and consequent value of the laws, that the technical language is native and not borrowed."

The Law of Husband and Wife.

A very striking feature of the Brehon Laws is the careful manner in which the rights of women in all departments of the law are defined and protected. In ancient Ireland a woman could hold separate property apart from her husband, and could make contracts in regard to it. The principles regulating the Brehon Law of husband and wife seem in many respects to forestall modern ideas on the same subject. One of the great principles of this branch of the Irish law was that it admitted that, under certain circumstances, a married woman might be in a position of equality with her husband, while under other circumstances she might occupy a position superior to him. The position she occupied depended on the amount of property she brought with her at her marriage. Broadly speaking, if the wife brought property equal in amount to that possessed by her husband she was his equal; if she brought more, she was his superior. A woman who possessed property was, thus, not deprived of her rights over it by her marriage. If the property of the wife at marriage equalled that of her husband, they had

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equal rights, and the woman was called a "wife of equal dignity." If, however, she had no property, she occupied a subordinate position. If the husband lived on the property of his wife, she was the person in authority, and he was called a "man of service."

In ancient Ireland the general rule was that a woman was incapable of contracting without the consent of her husband. In the case, however, where she had separate property equal to her husband's, she might validly contract with respect to it, provided it was to her advantage. If the contract was to her disadvantage, the consent of her husband was necessary; and if a contract was made without this, it was invalid. The property of husband and wife in practice became joint property; and all transactions affecting the joint property had to be made with the consent of both parties. If one or other made contracts with respect to this joint property, and if the contract proved to be of equal advantage to both, the contract held good, whether entered into with or without the knowledge and consent of the other. But if it only benefited one of them, and was made without the consent of the other, it was void. Provision was made to meet the case of separation, and special rules were set down to apportion the amount each was to receive of the original property, and the increase, if any. Various circumstances modified the distribution, as, for instance, if the wife helped by her industry to bring profit and increase to the property.

The law allowed married women to take legal proceedings in defence of their separate property, and gave them the benefit of the procedure by distress. Furthermore, in a Brehon's Court, if a husband gave evidence against his wife, she was entitled to give evidence against him. But she was not granted the same privilege if it was her father who gave evidence against her. She was not permitted to give rebutting evidence.

The remarkable peculiarity of the ancient Irish marriage, and one of which the Senchus Mór itself makes a note, was that the man purchased his bride from her father or guardian. He had to bring the dowry, which was called *coibche*, and which often consisted of a yearly payment. The woman's father was entitled to the whole of the first year's bride-price (coibche), two-thirds of the second year's, one-half of the third year, and so on down to the twenty-first, the residue in each case belonging to the wife. When a woman married, the Irish law, unlike the Roman law, did not consider that she thereby entered into the family of her husband; and the law made provision for the case

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of a woman who held land marrying a man of another tribe, so as to prevent the land going from the tribe. Land held by women were subject to the same rules of descent as the landed property of men. The sons took equally, and in default of sons, the daughters took the inheritance. If a husband killed his wife, he, or in his default his Finé, was bound to pay compensation to the family of his wife.

A large part of the Senchus Mór is devoted to the Law of Fosterage. This, however, consists mainly of details relative to the education, clothing and food of children in fosterage. The only principle of note in it is the one which fixed the foster child with a liability to support his foster father if he fell into poverty and want in his old age, provided he had complied with all the legal requirements during the time of fosterage.

Law of Evidence.

It appears that, to conclusively prove a matter in a court, two witnesses were required by the law. It has already been remarked that a chief was entitled to give evidence against a daer-céile who took stock from him, and that the daer-céile was not entitled to rebut this evidence. The privilege of being heard against the chief was granted to the saer-tenant. The competency of women to give evidence has been explained in previous section.

It was one of the many privileges enjoyed by the King that his evidence against all persons, with three exceptions, was irrebutable. A bishop, a doctor of learning, and a pilgrim were each competent to be heard against him. A person was not competent to give evidence until he reached the age of seventeen.

Such are the leading features of the main branches of the Brehon Laws. In many respects they anticipate modern legal notions; and, given a fair chance of free development, a legal code of remarkable scientific spirit might have been evolved. Regarding the vast structure of the Brehon Laws as a whole, there is nothing better to which I can compare it than to a certain wonderful fort which stands perched in lonely grandeur on the top of a high cliff on the Big Island of Aran, off the coast of Galway. This fort is Dun Aonghus. It is a huge structure, built entirely of loose stones thrown on top of each other apparently in complete disorder. No cement of any kind is used, but it has stood for a thousand years, and now stands on a land where the people still retain the old Irish customs, language and

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dress, an old-world civilisation in the presence of modern progressiveness. It fills the observer with wonder, and he realises how completely it fulfilled its function, how impregnable it was, and how eminently suited to its purpose. In all respects are the Brehon Laws like Dun Aonghus. They consist seemingly of a mass of disordered details, just as the fort seems a pile of disordered stones. In both cases an imposing, if primitive structure, is the result, and both have a symmetry all their own. The fort was suited to its purpose, because it is hard to conceive how an attacking force could ever hope to pass its extraordinary chevaux de frise and scale its walls of loose stones. So, too, the laws suited their purpose, and suited the age for which they were created, and were effective in keeping off the enemy of social disorder. But they stood for centuries, while other primitive Codes developed, just as the Fort stands in the old-world civilization of Aran. The old fort of the primitive warriors stood without any cement, and so did the legal structure of the primitive Irish lawyers. Dun Aonghus contemplates a civilization which has not kept pace with modern progress, and the Brehon Laws stood for centuries in their primitive state, and forgot that the world went round.

J. A. COSTELLO, B.A.

THE CAPTIVE ARCHER.

To-morrow I will bend the bow!
My soul shall have her mark again,
My bosom feel the archer's strain!

No longer pacing to and fro
With loosened arms and slackened brain,
As goes the arrow, forth I go!

And pride and purpose I shall know,
Red moon that hangs above the grain!
My soul shall have her mark again
My bosom feel the archer's strain!
To-morrow I will bend the bow!

PADRAIC COLUM.

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