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IN THE MIDDLE AGES

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PART V  
THE LAW OF  
CIVIL OBLIGATIONS

# I

## THE FORMALITIES OF BARGAINING

### 1. *Introductory.*

§ 1. The Welsh Law of bargaining, using the word bargaining in a wide sense to cover all transactions of a civil nature whereby one person entered into an undertaking with another, can be considered in two aspects, the one dealing with the form in which bargains were entered into, or to use the Welsh term, the 'bond of bargain' forming the nexus between the parties to it, the other dealing with the nature of the bargain entered into.<sup>1</sup>

§ 2. The characteristic of all early law relative to bargain is that the formalities attendant upon the bargain, not the subject-matter of the agreement, form the contract, and without the observance of the formalities there is nothing to enforce.

The conception that an agreement without the prescribed formalities was enforceable was a later development.

Hence we find the Welsh Laws, like other early laws, deal mainly with the formalities and the legal consequences ensuing on the observance or non-observance of those formalities rather than with the agreement itself.

We have in the Codes matter dealing with the subject of agreements, e.g. the sale of goods, loans, and the like, but we have a larger volume of law dealing with the procedure to be observed on entering into a transaction.

The Welsh Laws recognized three principal modes of agreement, 'briduw', 'amod', and 'machni'.

### 2. '*Briduw.*'

§ 1. Not much is said in the laws about 'briduw'.

The word is said to mean 'the dignity or honour of God', but the origin of the phrase seems to be a popular mistranslation of an oath beginning with 'Pro Deo'.

<sup>1</sup> IX. 304 ; XIV. 658.

§ 2. Any agreement could be entered into by 'briduw', but, inasmuch as it was a 'mutual bond', it would seem that there must be reciprocal promises.

The fact that there must be reciprocal promises in 'briduw', 'amod', and 'machni', seems to prove conclusively that there could be no unilateral obligation entered into.

§ 3. An agreement by 'briduw' was entered into by the parties to the agreement grasping each other's hand, and, while holding the hand of the other, each party swore 'briduw', or 'Pro Deo', to carry out the promise made by him.

The swearing with clasped hands made the agreement binding.

It will be observed that, unlike the transactions by 'amod' or 'machni', no third person was involved or made responsible to enforce the agreement. Hence it is said that an agreement by 'briduw' was to be enforced by the King and Church, because God, whose name had been invoked in the oath, was the surety.

The grasping of hands was essential to the agreement, and if one person, in the course of the transaction, placed his hand on the shoulder or other part of the body of the other, instead of grasping hands, it was an insult which had to be compensated for with honour-price.

§ 4. Any person over seven, being *compos mentis*, could enter into 'briduw', even a married woman.

An agreement by 'briduw' was enforced by suit and distress.

Early English custom had the same mode of entering into bargains, and reference to it is made in Ælfred's Laws, c. 33, under the name of 'God-borh'.<sup>1</sup>

### 3. 'Amod.'

§ 1. 'Amod', or as it is rendered 'contract', plays a large part in the Welsh Laws, though inferior in frequency to 'machni'.

Like 'briduw', it was a mutual bond, and so there could be no 'amod' where there was a unilateral agreement.

<sup>1</sup> V. C. 128, 132; VI. 108; XIV. 658.

§ 2. The ordinary method of entering into 'amod' is fully described in the Venedotian Code. The two parties met, grasped hands, and stated what their promises were one to the other in the presence of special witnesses who were called 'amodwyr' or 'contract-men'.

An agreement entered into by grasping hands only, without the presence of 'amodwyr', was not an 'amod', and a denial of such an agreement was established by the sole oath of the alleged promisor.

Mere negotiations did not make an 'amod', nor did the proposal and acceptance unless and until it were entered into by the grasping of hands in the presence of 'amodwyr'.

The object of having 'amodwyr' present was twofold, viz. to furnish evidence of the agreement entered into and to provide for its enforcement when proved.

'Amod' could be enforced by the 'amodwyr' without suit, or after suit; they, and not the executive arm of the King and the authority of the Church, being charged with the enforcement of the 'amod' when established.

§ 3. Quite a number of people were incompetent to enter into 'amod'.

An idiot, a drunken man, a man sick unto death, a youth under fourteen, professed religious men or canonists under vows, women under the dominating rod of their husbands, and the Sovereign were all incapable of 'amod'.

'Amod' was a personal obligation limited to the persons entering into it, and no person could, by 'amod', contract so as to bind a third person; hence an 'amod' by a son did not bind the father, and the father could make no 'amod' to bind his son after his death.

In the law of the land we saw that, except for certain lawful needs, no ancestral land could be alienated so as to affect the son's rights therein. One passage in the Dimetian Code, which says that an 'amod', involving the passing of an inheritance for consideration or, with the will of the owner, without consideration, secured the inheritance, might seem to throw doubt on this; but the passage simply means that a title to land acquired by 'amod' was as good a title as one of inheritance. It

does not mean that a man could disinherit his son by 'amod'.

§ 4. An 'amod' to be binding must be entered into freely; coercion and fraud annulled it.

Fraud or coercion in fact not only annulled an 'amod', but coercion had the effect of freeing the person acting under it from all liability, criminal and civil, and both fraud and coercion entitled the person who, under the influence thereof, had been induced to deliver property, to recover the same; if it were land at any time, if it were other property at any time within the period of limitation.

The performance of an 'amod' was also excused if sickness, poverty, or military service prevented the obligor from carrying out his undertaking.

Otherwise the sanctity of contracts was supreme, and is best expressed in the adage that an 'amod' was like a vow, which, if once broken, must be renewed and kept afresh.

§ 5. An important limitation on the power to contract existed in the provision that no contract to supply corn could be enforced after the expiry of the next succeeding calends of winter. The object was to prevent 'forward contracts' affecting ungrown crops, and to forbid speculation in the necessities of life.

'It is not right', says the Code of Gwynedd, 'to claim corn from one year unto another.'

§ 6. Contracts were enforced by actions for specific performance through 'amodwyr'.

A person breaking his part of the 'amod' lost all rights under it, but the other side could at any time claim its enforcement and performance.

§ 7. Perhaps the most remarkable feature about 'amod' in Wales was the absolute freedom there was for freemen to contract.

We are accustomed to the fact that society developed from status to contract; but what is remarkable in the Welsh Laws is that, while society rested on status, it was permissible for every freeman to contract outside law.

This power is not referred to once or twice only, but the expressions that 'contract always overrides law' and that

'a contract contrary to law must be kept' are frequent both in the Codes and the commentaries.

The only limitation on this power to contract outside the law was where the contract entailed harm or injury to a third person, e.g. a contract involving the killing of a person or the doing of an atrocious act.

It is not that it was permissible to contract for the performance of an illegal act: that is not what is meant.

The rights and liabilities of people were regulated by law or custom, and what is meant is that, if a contract conferred rights or imposed liabilities on a person contrary to those provided by the law, the rights or liabilities conferred or imposed by the contract were to be given effect to in preference to those secured by law or custom.

The exact scope of this freedom to contract outside law can be illustrated by reference to its application to particular instances.

In the law of marriage we saw that 'amobyr' was paid to the lord by the woman's father or kinsmen giving her in marriage. But, by virtue of the power of free contract, the giver might contract with the woman herself or a third person that she or he would pay the 'amobyr', and in that case liability to pay it passed to the other party to the contract.

Again we have seen that the law provided for the right to readjust partitions of 'tref y tad', but, if there were an agreement at the time of partition that there should be no readjustment, the contract overrode the law.<sup>1</sup>

#### 4. 'Machni.'

§ 1. The third formality by which agreements were entered into in Wales, and by far the most important of all, was 'machni' or suretyship.

The Welsh Laws are full of provisions regarding suretyship, which seem at first sight extremely complex.

One commentator complains that suretyship is one of the three complexities of law, because it is so hard to remember and reduce to rule, while another plaintively

<sup>1</sup> V. C. 96-8, 134-6, 202, 330; D. C. 448, 450, 542, 612; G. C. 788; IV. 30; V. 80, 90; VIII. 198; X. 330, 366, 388; XI. 404-8, 410, 424; XIV. 636, 640, 658.

remarks 'that if the most practised and greatest in the law were to study it from his youth to his old age, some point would crop up at the end, of which he had never before heard'.

Not only did the complexity of the law strike the commentators, but they were equally astonished that any one should, in view of the risks involved, be foolish enough to become surety for another in a bargain.

In the Book of Cynog there occurs the following aphorism :

'Be not quick handed among a multitude and take up no mischief not originating with thee, and take not the debt of another upon thee without anything being due from thee.'

The philosophy of backing another man's bills can be carried no farther than in the words of this old-time legalist, but the fatherly advice of Cynog to his sons, and the astonishment of other commentators, overlooked the fact that it was difficult to avoid being a surety if asked.

The Venedotian Code insists strongly on the social duty, and says that no one should refuse to be a surety if he were a person who ought to stand.<sup>1</sup>

§ 2. The complexity of the law of 'machni' is more apparent than real, and it is made so by confusing it with the law of 'gorfodogaeth', the law analogous to the Roman 'actio sacramenti', and the law of distress.

These are all allied to the law of 'machni', but it will conduce to a better understanding if we deal with them separately and in their proper places.

There were three kinds of suretyship in the Welsh Law : suretyship to abide law, suretyship on behalf of a person charged with crime, and suretyship in a bargain. The first is dealt with under Procedure, the second under the Law of Crimes and Torts, and at present we are concerned only with the last mentioned.

§ 3. 'Machni' was, like 'briduw' and 'amod', mutual, that is to say, there was a reciprocal undertaking by two parties to an agreement. The formality was applicable to all agreements, and especially to sales of goods, gifts, exchanges, and the like.

<sup>1</sup> V. C. 128 ; VIII. 184, 206 ; X. 334 ; XIV. 660.

We have noticed in 'briduw' and in 'amod' that it was necessary for the parties to grasp hands, and to repeat the substance of the agreement. Exactly the same requirements were needed in 'machni'.

When two parties entered into an agreement by 'machni', each of them provided the other with a surety for the performance of his part of the undertaking, e.g. in a transaction for the sale of an animal the vendor gave the vendee a surety who guaranteed the vendor's title to the animal and the animal's soundness—the 'dilysrwd' and 'teithi' of the subject-matter—and the vendee gave the vendor surety guaranteeing the payment of the price at the time fixed in the bargain for payment.

In a transaction by way of suretyship, the surety and the man who gave him as surety, who is universally spoken of as the debtor (*cynnogyn*), grasped hands, the surety and the man to whom he was given as surety, the 'hawlwr' or creditor also grasped hands, and the debtor and creditor also did the same ; the substance of the agreement being repeated at each grasping of hands.

There was no 'tradio' or handing of property over, except in certain transactions, but the grasping of hands was absolutely essential ; it sealed the bargain and made it irrevocable, and, just as in 'briduw', the placing of a hand on the shoulder of another party, instead of in his hand, was an insult to be compensated for by the payment of honour-price.<sup>1</sup>

§ 3. If there were no mutual grasping of hands there was no complete agreement between those who had not grasped hands, and any promise made without it was of no effect.

If, however, any two parties to a bond of 'machni' grasped hands and others did not, there was an effective bond between those who had done so, but none between those who had not. A transaction, in which some of those engaged did grasp hands and others did not, was described as a delusive (*gwaradog*) or slip (*pallog*) suretyship, the latter

<sup>1</sup> V. C. 132 ; D. C. 428, 598 ; VI. 108 ; VIII. 176 ; IX. 240-304 ; XIV. 658.

phrase being derived from the metaphor of a knot which did not hold.

The Dimetian Code is so concise and explicit on the subject that what it says is worth reproducing in full :

‘ If there be one hand wanting in mutually plighting, it is called a slip surety ; the nature of a slip surety is that one end is bound, and the other loose, and on this account if the creditor accept the faith of the debtor for paying the debt, and the faith of the surety for compelling the debtor to pay the debt, then each of them must be responsible by his agreement to the creditor ; if he take but the faith of one of them, then only one of them is responsible to him ; if the surety give his faith to the creditor to insure to him his debt he must be responsible to him for the whole debt since he takes not the faith of the debtor.’

The Venedotian Code and the Xth Book give the delusive sureties in the familiar form of Triads. In the former there is obviously a slight corruption of the text, as it includes in the delusive suretyships the case where no one had grasped hands with another. That was not a delusive suretyship, but no suretyship at all.

The three delusive suretyships were the following :

(i) If the vendee bought and demanded a surety from the vendor for title and soundness, and the vendor proffered a surety without taking him by the hand ; then, if the vendee took the surety's hand, there was no agreement whatsoever between the vendor and vendee, or between the surety and vendor.

There was, however, a bond between the surety and vendee ; and, if either title or soundness failed, the vendee could recover from the surety ; but neither he nor the surety could make any demand upon the vendor.

(ii) Likewise if the vendor's surety grasped the vendor's hand only, and not that of the purchaser, the vendor and vendee grasping hands, the only enforceable bond was that between the vendor and vendee.

(iii) If one person entered into a bargain on behalf of another and himself stood surety for that other, the bargain was not binding on the person on whose behalf it was made. The laws did not recognize the act of an agent, unless that act were ratified by the formal procedure. The agent, however, having grasped hands with the other party, was responsible to him, and that party to the agent.

Of course these instances do not exhaust the delusive suretyships which might arise. The same rule applied if

the vendee's surety omitted the grasping of hands, and the grasping of hands by the two sureties without the parties doing the same was of no avail to bind the parties.<sup>1</sup>

§ 4. The delusive sureties are also mentioned elsewhere in the Anomalous Laws, but they must not be confused with what are called the useless or futile (*ofer*) suretyships, referred to in the Venedotian Code.

A delusive suretyship was one where promises were made which could not be enforced, because the full ceremony of grasping hands had not been observed ; useless or futile suretyships were bonds, which either had been entered into with full ceremony and were useless because the sureties were in law incapable of being sureties, or in which one side had given a surety and the other had not, and that other resiled from the bargain before being bound. The surety given by the vendor in that case was useless, because the vendee did not wish to avail himself of it, having resiled from the bargain, and he was useless to the vendor as he had not guaranteed anything to the vendor.

Yet a third useless surety is mentioned, viz. where a surety guaranteed title, which he could not guarantee, the vendor having no title. In that case, if the real owner came and demanded possession, it must be restored to him. The surety was useless to preserve possession to the vendee as against the real owner, though of course the vendee could obtain an equivalent from the surety.<sup>2</sup>

§ 5. We have said that among the ‘ofer’ sureties were persons incapable of being sureties.

Incapacity might arise from two causes, the one want of will, the other want of competency.

The Welsh Laws never recognized any agreement entered into other than with full and free consent, or as it puts it, ‘ absence of compulsion, free giving or suffering removal of property without impediment, threat, or question’. Consequently, if any one induced another to become surety either through fraud, coercion, or fear, the suretyship was of no avail.

<sup>1</sup> V. C. 132 ; D. C. 428 ; VI. 108 ; VIII. 176 ; X. 342.

<sup>2</sup> V. C. 126 ; XIV. 658, 702.

There were many people incompetent to give or be sureties; the question of competency being determined with reference to the time at which the transaction was entered into. So a person who was competent to be or to give a surety was not relieved from liability if, after becoming or giving, he were rendered incompetent.

Of the persons lacking competency, the most important was a woman. A woman was competent to give or receive a surety, if she were competent to enter into a bargain. As the law puts it, 'a person who is competent to inquire into title, is competent to provide a guarantee of title'. But, with one exception, no woman was competent to be a surety. The one exception was the case of a 'lady paramount' in Dinefwr, who could guarantee a bargain entered into by some one under her.

Where, however, a woman provided a surety she was not competent to produce a compurgating jury of women to deny it; her compugators must be men, and we must also not lose sight of the fact that a married woman could not ordinarily make a bargain, except through her husband.<sup>1</sup>

§ 6. The ordinary rule was that a surety had to be of the same status as the person for whom he gave surety, hence it was that the King could neither give nor be a surety.

But in addition to the King there were others incompetent. A foreigner, a monk, a friar, a hermit, a scholar, a clerk, a man in debt, a person not free to attend court without permission of his superior, a son under the dominion and authority of his father, a drunken man, a leper, an insane person, and a blind man were all incompetent, except that in Dinefwr a friar or a scholar could be a surety if his abbot or master allowed him to be so.<sup>2</sup>

§ 7. There was certain property also for which suretyship for title was unnecessary; such property carried its own guarantee. In this category were money, girdles, knives, arms, all property brought by a woman on her marriage, property given by a lord to his man, testamentary bequests,

<sup>1</sup> V. C. 98, 102, 126-8; D. C. 432; IV. 24, 30; VI. 110; VIII. 208; XI. 404; XIV. 588, 658.

<sup>2</sup> V. C. 122-8; D. C. 432; IV. 2, 30; VI. 110; XI. 404.

property received by a doctor from his patient, property received by a woman from her husband as 'wynebwerth', or property taken as spoil of war.

§ 8. No suretyship was valid if given for the payment of a reward for the commission of a tort or crime. Any person who stood surety for such payment was an accessory and punishable as such. So, too, the promisor; while the person who committed a crime and sued for the reward promised was at once punishable for the crime committed.

A bargain conducted in open market was also in South Wales not a subject for suretyship. To such bargains the rule of 'caveat emptor' applied, but it is significant that that rule is found nowhere except in that part of South Wales which came early under Norman influence.

Persons bargaining in open market were of the privilege of the mart, and so a stranger and a Cymro were on the same footing in a mart. Free trade in open mart was recognized early, and persons incompetent to give or be sureties were at full liberty to trade in market unrestricted.<sup>1</sup>

§ 9. The next question is whether a person could stand surety for himself.

The ordinary formality of suretyship was, as we have seen, for each party to proffer sureties to the other, but we find some references to a 'debtor-surety', in some of which it would appear at first sight that the possibility of a man standing surety for himself was contemplated. Is this the correct meaning or not?

The references to the triple grasp, and the powers given to compel a debtor to pay, seem to preclude any such possibility, but the phrase needs examination.

In the Dimetian Code, p. 430, we have the following passage as translated by Mr. Aneurin Owen:

'Whoever shall buy property of another, and shall be himself surety ("ac afo mach ehunan") for the worth of the property, and die before payment of the debt, and leave the property in the custody of friends, the claimant is entitled to payment for that property because the dead who became debtor-surety to him ("a fu vach kynogyn idau") was owner of that property: he ought to swear . . . to having sold

<sup>1</sup> D. C. 606; G. C. 680; V. 56; VI. 120.

that property and to that person's being debtor-surety (*vach kynogyn*) to him for the worth of that property.'

This passage, as given, clearly contemplates a debtor being himself surety, but we have to note that it does not appear in all the MSS., that in some the word 'ehunan' is absent (which would make that part run, 'and there shall be surety for the worth of the property'), and that in some the words 'vach kynogyn' do not appear, either the word 'vach' or 'kynogyn' standing alone. Still, even if we take full cognizance of these variations, the fact remains that the transcript appears, standing alone, to be a fair collation from the MSS.

In another part of the Dimetian Code, pp. 396-8, a 'mach cynnogyn' is said to be 'a person who becomes surety for one unable to abide law on account of poverty, and in that case the inability of the party compels the surety to be a debtor'. In yet another part of the same Code, p. 428, we are told that unless there be a triple grasping the surety is a slip surety, 'except where a person comes as a debtor-surety on behalf of himself or of another whom he does not produce as surety'.

The Venedotian Code, p. 122, is, however, clear. 'A man is not to take a debtor as surety . . . no individual can be both surety and debtor (*vach kynogyn*).'

These appear to be the only references to the 'vach kynogyn', and there is no possibility of reconciling them.

It is, however, certain that in North Wales no debtor could stand surety for himself; and what seems to have happened was that, where a debtor became impoverished and unable to pay his debts, his surety, who had then to take on all liability without hope of recovery, was called a 'debtor-surety'. This phrase became applied, as Norman influences spread allowing a man to give his own security, to a man who pledged his own property as security or 'wadium' direct.

We know as a matter of fact that in early Teutonic Law it was possible for a man to be his own surety by giving his own 'wadium' or pledge at the time of the bargain, and it would seem as if in South Wales this variation was accepted.

It is safe, it seems, to assume that the original formality required the surety to be a person other than the debtor, and it was only as barter increased—as it did more rapidly in South Wales, where towns grew up earlier than in the north—rendering the formality cumbersome on occasion, that the practice of a man being his own surety was introduced.

§ 10. We have now to consider whether a surety's liability died with himself or not. Apparently it did not.

The laws provide that the liability of a surety was transmitted to his son, provided always that the son derived property from the father. It did not descend if the son did not inherit property from his father. The same rule applied if a surety became civilly dead, say by becoming a monk and taking his property to the Church. In the latter case the Church had to assume the surety's responsibility.

If there were no son, then the lord, who took the deceased's property by escheat, was responsible to carry out the surety's undertaking.

The Dimetian Code provides a procedure for the case where a surety died before the debt was paid to establish the fact that the deceased was a surety. The creditor swore with six others on the surety's grave, and thereafter the lord enforced the suretyship.<sup>1</sup>

§ 11. We have now to turn to the duties of a surety.

A surety given to a vendee guaranteed title and soundness, and, if title and soundness failed, he was responsible to enforce recoupment by the vendor to the extent which the law provided or else make the recoupment himself.

A surety given to a vendor guaranteed payment of the price at a fixed time, and, if the price were not then paid, he was bound to force the vendee to pay or pay himself, when called upon to do so by the creditor.

The method of enforcing payment is described in detail in the part dealing with the Law of Distress.

It is this which distinguishes transactions through sureties from transactions through 'amodwyr'. They were alike in the fact that it was a duty common to both to force the

<sup>1</sup> V. C. 124-6; D. C. 430; G. C. 788; IV. 32; VIII. 208.

debtor to pay; they were different in that 'amodwyr' were not liable to make good the deficiency of the debtor, whereas the surety was. The contract-man's duty ended when he had done his best to enforce payment, the surety's did not until he had paid the uttermost farthing himself where the debtor did not pay.

The surety had, however, one chance of postponing the evil day of having to pay himself.

If he were satisfied that the debtor was unable to pay at the time fixed, he could ask him to free him from his suretyship by providing another surety to the creditor guaranteeing payment at some future date. If the creditor accepted that novation, well and good; the old surety was discharged; if the creditor would not, the surety remained liable.

The absolute liability of the surety to pay was subject to certain limitations in special circumstances.

The failure of the surety to compel the debtor to pay might be due to various causes. If it were due to the surety's own unwillingness to put the law of distress into motion, there was no excuse for him; but it might be due either to the debtor being poverty-stricken or to the debtor being outside the jurisdiction of the lord where the liability was incurred and to his having no property in that jurisdiction. In both of these cases the surety was said to be a surety for a nullity (*diddim*).

If the non-payment by the debtor was due to poverty, the authorities differ as to the effect.

The laws required a surety to compel a debtor to pay, even if he reduced the latter to insolvency, and the test of insolvency was whether the debtor was reduced to his last garment or not. The Dimetian Code says that the surety was bound to pay the whole of the balance due after the debtor had been reduced to this state of insolvency, but one passage in the Anomalous Laws says that in that case the surety was only responsible for half the balance. This limitation occurs nowhere else, and, in spite of its mention, it must be taken that the true rule was that a surety must make good all deficiencies caused by the debtor's poverty.

If the debtor had left the lord's jurisdiction, leaving no property therein, the same authority says that the surety was only bound to pay half the debt.

The Dimetian Code has much more elaborate provisions, and these provisions seem to represent the real law.

In determining the surety's liability in such a case, the first question was whether the debtor had left the jurisdiction before the due date for payment, that is before the date on which the creditor could have demanded payment, or after. If he had left before, then the surety was bound to pay half the debt immediately; for the other half he remained surety for a year and a day, at the expiration of which time, if the debtor had not paid, the surety must pay.

If the debtor left after due date, then the question arose as to whether the creditor had made demand or not. He was entitled to make demand on due date, and unless he did so and his demand were refused, he could not come down on the surety.

Now the law provided that if the creditor did not make demand on due date or within nine days of due date, and the debtor thereafter left the jurisdiction, the failure to recover was due to the creditor's own laches, and the liability of the surety disappeared. 'The obligation of the surety', it is said, 'shall be deemed to have passed away in the path of oblivion.'

The Venedotian Code does not deal with this particular point, but it does deal with something very similar to it. It is said that, if the debtor were banished from the country, after incurring the debt and before payment, on account of a crime committed by him, the liability of the surety was limited to one half the debt, the creditor suffering the loss of the other half, each of them being entitled to recover from the debtor whenever he returned.

Somewhat analogous to the case of the debtor being absent from the country was the case where he died before due date.

Here again we have different provisions in the laws. The Anomalous Laws provide that, if the debtor died, the surety was responsible for half the debt only, and he was not

responsible for that half if the debtor had provided by will for its payment. The Dimetian Code in one passage deals with the case where the debtor was his own surety. It provides that the creditor was entitled to follow the debtor's property into whosoever's hand it had come, and exact payment therefrom, if he swore to the debt with six others over the grave of the deceased. This provision merely regulates the right of a creditor to recover from the deceased's property, but it does not refer to the liability of a surety where the debtor had died.

In another passage it provides that the surety should proceed by a like oath to exact payment from the three persons nearest in kin to the deceased.

The Venedotian Code states that, where a debtor died before payment, the surety was to compel the son of the debtor to pay, exactly as he would have compelled the debtor to pay, provided the son had ascended to property on his father's death. If there were no son, and the lord had taken the debtor's property, the lord became liable for the debt.

The surety could proceed against the lord, and, though that might savour of contempt of the lord's authority, it is specially provided that a surety enforcing payment by a lord was not to be subjected to any punishment.

It would appear from these provisions, therefore, that where the debtor died, the surety was to proceed against the deceased's property as he would have proceeded against the debtor, and we may conclude that if he could not recover therefrom he must make good the liability himself.

This conclusion is definitely supported by the Xth Book. We have to note here that no demand could be made by the creditor, either on the debtor or the surety, if they were out on military service, suffering from the effects of a violent attack, or being subjected to a prosecution for theft.

The due date was extended until those causes were removed. But subject to this, the creditor must make his demand, and he was not entitled to keep the surety in suspense. He could not grant time to the debtor for payment;

he must demand payment or get a new surety to cover any extended period. If he granted extension without the surety agreeing, the surety was freed from all liability.

It is simply necessary to add that a surety paying a debt due by a debtor was always entitled, whenever he could, to recover from the debtor, and that he was entitled, before being forced to pay himself, to a period of eight days within which to make arrangements for paying.<sup>1</sup>

#### 5. *Other modes of bargaining.*

§ 1. It must not be supposed that at the time the laws were redacted every agreement must of necessity be entered into by 'briduw', 'amod', or 'machni'.

§ 2. As we have seen in South Wales, it was possible for the debtor to cover his liability to the creditor by handing over to the creditor at the time of the bargain some property as a pledge, a 'wadium', or 'gwystl', which secured payment, and in such a case the 'gwystl' could be disposed of, on failure to pay on due date, just as a pledge seized under the law of distress might be.

§ 3. In addition, just as in Rome the 'jus civile' required no formalities in some transactions and allowed agreements 'consensu', so, too, in Welsh Law, any transaction other than sale or exchange could be effected by oral agreement; in which case, however, there was a risk that a debt claimed or agreement relied upon could be denied by the single oath of the alleged debtor.<sup>2</sup>

#### 6. *Like provisions in other systems.*

§ 1. The Welsh Laws in regard to formalities in bargaining, so far as essentials were concerned, did not differ from other systems.

§ 2. The Roman Law of the XII Tables demanded the utterance of words in a solemn form before a transfer was effected or before there could be a binding 'nexus' or delivery of 'mancipium'.

The right to property transferred depended also on certain prescribed acts, e.g. 'traditio', those acts constituting the

<sup>1</sup> V. C. 108, 122-4; D. C. 398, 400, 426-8, 430-2; IV. 6; VIII. 182-6; X. 334, 392; XIV. 582.

<sup>2</sup> VII. 152; XI. 418.

conveyance. The ceremony conveyed the property, and was not merely evidence of the fact of a contract or agreement to convey. The principle, though not the method, is identical.

§ 2 The Irish Laws present a closer resemblance, but still there are marked differences.

The Irish Laws appear to treat all transactions as 'contracts' without reference to formalities as being the effective part of the contract. That is to say, agreement itself in Irish Law might form contract, no matter how the agreement was entered into. In this particular Irish Law, which in so many matters is primitive, arrived at a conception of contract, approaching modern ideas, long before most other systems did.

At the same time there are elaborate provisions relative to sureties, directed not so much to indicate how an agreement was entered into as to provide for the carrying out of agreements when made, and in many particulars the Irish Law corresponds to the Welsh Law.

What is very striking in the Welsh Laws is that bargaining was individual and not communal. Throughout the whole of the Welsh Laws, notwithstanding the importance attached to kin responsibilities and kin rights in land and in the matter of torts and crimes, there is not the slightest trace of any responsibility on account of relationship in the matter of bargaining, beyond that it was a social duty to stand surety for a kinsman. Bargaining was a matter for individuals, and, wherever any liability was imposed on persons other than those who were parties to a bargain, it was imposed, e.g. on 'amodwyr' and sureties, by virtue of a contractual relationship freely entered into by such persons.

In Ireland bargaining or contract was not entirely individual: the communal bond of the tribe is constantly in evidence. We get frequent references to the fact that contracts were made by the tribe or family acting as a body, and to the power of the tribe to repudiate contracts made by members of it.

The principle of Irish Law was that contracts were entered

into by individuals under the sanction or approval of the tribe or family. Sometimes such sanction or approval was assumed or deemed to have been given, because the contract was of such a nature that consent to it could not be refused: in other cases such sanction was a necessary preliminary to make it binding on the tribe, and, if not obtained, the contract could be impugned.

But if sanction were assumed or given, the liability to carry the contract out or to make good any loss occasioned by non-performance fell upon the tribe or family. For example, in the *Senchus Mór*, I. 183, it is said:

'The default of thy great-grandson, the default of thy great-great-grandson, the default of every relative as far as 17,

and on p. 195 there is a similar expression.

The most eloquent account, however, is in the *Senchus Mór*, p. 283. The passage is worth quoting in full as showing the rigidity and all-embracing sphere of the tribe:

'Every tribesman is able to keep his tribe land; he is not to sell it, nor alienate it, nor conceal it, nor give it to pay for crimes or contracts: he is able to impugn the contracts of his tribe, and to impugn every contract of his kinsmen for whose crimes and securities and contracts and fosterage liabilities and land deeds he is accountable. Every litter of pigs (i.e. a share in the young), every reward, every purchase, every sale, every covenant, every contract, every tenancy, every *giall*-security, every service is properly due to the lawful tribesmen by consanguinity to whom fosterage is due, and crimes as well as profits and losses and the support of the common senior.'

But, notwithstanding this communal nature of contract in Irish Law, we find in the later tracts that contract had become an individual act, and limitations on the power to contract, similar to those in Welsh Law, had taken the place of the earlier power of the tribe to regulate contracts.

The *Corus Bescna*, IV. 5, allowed the making of contracts between two 'lan' persons, two 'saer' persons, and two sane adults. It prohibited contracts by sons under the domination of the father, 'fuidhir' tenants, monks, 'daerstock' tenants, fugitives, women, and idiots, but it has the comparatively advanced provision that contracts entered

into by such persons might be ratified by the persons under whose authority they were.

The Crith Gablach prohibited contracts by sons, bondmen, monks, and fugitives, and the Senchus Mór has similar prohibitions.<sup>1</sup>

Though we have practically nothing relative to formalities, there are traces that the procedure of 'amod' and 'machni' existed. For example, we read of the evidence of a contract-binder being conclusive, of immediate distress upon a surety who evaded justice, of two classes of sureties, kinsmen sureties and hostage sureties. The former were such as were given when both parties resided in the same country, the latter (*giall*) such as were given when the debtor resided in another country, the hostage-surety given being resident in the creditor's country.<sup>2</sup>

We have also mention of the right of a surety to recover what he had paid from the debtor, of the duty of the creditor to proceed against the surety before suing the debtor, and many other indications of a comparable system.

As in Welsh Law much insistence is placed on the inviolability of contract. 'The world would be evilly situated if express contracts were not binding', say both the Senchus Mór and the Corus Bescna, and 'the binding of all to their good and bad contracts prevents lawlessness in the world', runs the Senchus Mór.<sup>3</sup>

We have also reference to the fact that a contract debt must be paid on the specified date, or, if no date were specified, on demand, and likewise we have references to the place of payment.<sup>4</sup>

The inviolability of contract in Irish Law was, however, contingent, as in Wales, upon the absence of fraud and the presence of full knowledge and consent, and the Corus Bescna, IV. 5, gives an account of the effect of incomplete knowledge or consent upon a contract comparable to the Welsh Law relative to failure of 'teithi' and 'dilysrwd'.<sup>5</sup>

The differences in the Irish Law, due to different lines

<sup>1</sup> Senchus Mór, I. 51, II. 283; Din Techtugad, V. 55.

<sup>2</sup> Senchus Mór, I. 139, 215-17; Bk. of Aicill, III. 513.

<sup>3</sup> Senchus Mór, I. 51; Corus Bescna, IV. 3.

<sup>4</sup> Senchus Mór, I. 147; Bk. of Aicill, III. 155.

of development, are great, but there are sufficient indications that the original principles were of a similar character.

§ 3. The early English Laws of contract are meagre. Those laws being of a fragmentary nature do not give us the same details as to formalities as do the Welsh ones.

That similar formalities existed there is, however, no doubt.

The existence of a formality like 'amod' is established by the Fragment on Oaths, c. 8; of a warranty for soundness of cattle and for payment of price by the same Fragment, cc. 7, 9, the Dooms of Ine, c. 56, Edward's Laws, c. 1, the Carta of William the Conqueror, c. 10, &c.; of a formality similar to 'briduw', or Godborh, as it is termed, by Ælfred's Laws, c. 33; but the principal characteristic of English law was the need of witnesses and guarantors or sureties to all transactions, mainly as a security against theft. This was over and over again insisted upon;<sup>1</sup> and it was the common characteristic of most Teutonic and Scandinavian Laws, e.g. the Lex Burgund., Tit. XCIX.

As to kinds of transactions the English Law has little to say, but we do know of sales and purchases, deposits (where the law is comparable to the Welsh Laws), &c.

§ 4. The provisions of the early Scots Law are also meagre, and practically the only law of civil obligations found therein relates to the provisions that all transactions, particularly of the sale of cattle, must be conducted in the presence of witnesses,<sup>2</sup> but the few provisions there are seem to indicate the same methods of contracting as prevailed in Wales.

§ 5. In the Germanic Laws there is little relative to contract. The Lex Baiuor., Tit. XVI, cc. 9-15, does give an elaborate account of the procedure to be adopted in contracts of sale, in which special emphasis is placed on the phraseology, a derivative apparently from Roman Law, but beyond that there is little in their Codes.

<sup>1</sup> See, e.g., Ethelred's Laws, cc. 3, 4; Hlothaire and Edric's Laws, c. 16; Dooms of Ine, c. 25; Ælfred and Guthrum's Peace, c. 4; Athelstan's Ordinance, c. 12; Edmund's Council of Culinton, c. 5; Edgar's Laws, c. 6; the Laws of Edward the Elder, c. 1; Cnut's Laws, c. 24; the Laws of the Confessor, c. 38; and the Laws of the Conqueror, c. 45.

<sup>2</sup> See, e.g., Assize of King William, c. 5.

## II

## THE SUBJECT-MATTER OF AGREEMENTS

THE common transactions mentioned in the Welsh Laws are 'cyfnewid' (sale and purchase or exchange), 'llog' (leasing or hiring), 'benffyg' and 'echwyn' (lending), 'adneu' (deposit), 'rhodd' (gift), and 'cymyn' (bequest), with which may be compared the Irish list in the *Corus Feine*—loan, lending, purchases, contracts, and pledges.

i. *Sale, purchase, and exchange.*

§ 1. Wales, being a pastoral and agricultural community, was concerned almost entirely with the sale and purchase of animals, but the rules applicable thereto are equally applicable to the sale and purchase of goods.

The Welsh Laws recognized no distinction between sale for a monetary price and exchange for other goods. Both are called 'cyfnewid'. The absence of differentiation is no matter for surprise, as the sale and purchase of goods was made at least as often by barter as by the giving and receiving of a price in money.

§ 2. A sale or exchange might be effected through surety, contract, or 'briduw', but the first named was the principal form in actual practice. No sale or exchange without one or other of these formalities was fully binding.<sup>1</sup>

A sale was completed and property passed the moment the parties to the transaction sealed the bargain by the clasp of hands. Immediate delivery of the property or the payment of price was not a necessary ingredient of the contract, they were incidents to the contract which could be enforced.

§ 3. In every sale of goods or animals there was on the one hand a warranty of title to convey and a warranty of soundness (*dilysrwydd* and *teithi*), and on the other side a warranty to pay the price at the time fixed in the agreement,

<sup>1</sup> V. 76; VI. 124; VIII. 176; X. 304; XIV. 590-8, 658.

the warranty being usually covered by security. The *Corus Bescna* is identical in its provisions regarding soundness.

The guarantee of soundness had a few exceptions, which appear to show the beginnings of a rule of 'caveat emptor'.

They are so few as to deserve notice.

Reference has already been made to the traces of this rule in transactions conducted in open market. In addition the *Venedotian Code*, p. 268, exempted from liability the vendor of a horse suffering from internal disorders, if he swore to his ignorance thereof at the time of sale: the *Gwentian Code*, p. 706, laid down a general rule of 'caveat emptor' in regard thereto, while the *Dimetian Code*, p. 572, maintained that a guarantee of soundness included all internal disorders. The VIth Book, p. 98, provided a rule of 'caveat emptor' in all cases of animals with defective teeth, and these are the only instances in the laws where the doctrine was applied.

§ 4. We have to consider the effect of selling an article or animal whose title or soundness failed, and the effect of non-payment of the price agreed upon.

In no case was the contract voided; it had been irrevocably sealed by the grasping of hands.

In the case of non-payment of price at the fixed day the vendor proceeded to recover the price by putting into motion the law of distress (q. v.) either before or after suit. In every transaction of sale the price must be paid at once or upon a date fixed for payment in the agreement itself; if no time were fixed, the debtor could pay when he chose.

If the price were not paid at the time of agreement, the date for payment must be at least one day later.

Time for payment could be extended if the fixed date happened to fall on Easter Day, Whit Sunday, or Christmas Day, for a week, but, subject to that exception, payment had in law to be made on due date. The creditor could, subject to the freeing of the surety from liability if the latter did not consent, extend the period of payment for the debtor's benefit, but if the debtor insisted on payment on due date, the creditor must accept payment or find himself debarred for ever from claiming.

There was no bar to payment being made before, if there were no contract to the contrary, but a creditor who demanded payment before due date, lost the right to claim on the proper date: he had to wait until the expiry of the same number of days after due date, so, if he demanded payment a week before due date, he had to wait until a week after due date had expired before he could seek payment. In Irish Law a creditor suing prematurely was fined five 'seds'.

In case of failure of soundness the vendee also proceeded to put the law of distress into motion to recover damages, and the amount of damages he could claim was fixed in the laws themselves. Nothing was left to the idiosyncracies of judges in determining the quantity of damages. They had to decree the amount fixed by custom.

Such amount was a definite proportion of the legal worth of the animal or goods.

The general rule was that if an animal were clean, that is one whose milk could be used for human consumption, half the legal worth of the animal was the standard of damages; if it were unclean, one-third. In the Gwentian Code the universal rule was one-third the legal worth.

There were certain variations of too minute a character to be worth repeating.

The guarantee of soundness was not for all time, and we have already noted in the chapter on the Worth of Men and Things the time limitation.

In the case of failure of warranty of title the vendee was entitled to recover the full value which he had paid. The warranty for title endured for ever.

But it must be noted that this warranty was for title, and not for continued possession. There was, therefore, no insurance against the animal being stolen. Title was only guaranteed so long as the vendee retained the article in his own possession, and, if he parted with the property to another, the vendor's warranty did not enure to the benefit of the new vendee. If the new vendee found his title challenged, say by a charge of theft, he could protect himself by relying on the first vendee's warranty to him, and

the charge was then diverted to the first vendee, the property being placed in his hands. The first vendee could then protect himself by relying on the vendor's warranty to him. This was in theft cases called the law of the 'arwaesaf' (q. v.), but the principle was operative in all matters where warranty of title had to be supported.

If, however, the vendee lost the property, the warranty ended with the loss, but the benefit of it revived immediately the property found its way back to the vendee's hand.

We can see, therefore, why a vendee, purchasing property 'bona fide' from a vendor who had stolen it, could not retain the property against a claim for recovery by the true owner. His sole remedy, warranty having failed, was to recover damages from the vendor.<sup>1</sup>

## 2. 'Llog.'

§ 1. The second transaction referred to in the Welsh Laws is 'llog', which Mr. Aneurin Owen has rendered in various places as 'interest', 'lending', and 'hiring'.<sup>2</sup>

Interest was prohibited in the time of these laws by the canonists, and 'llog' does not mean interest. Nor does it mean lending. 'Llog' was simply the leasing out of the property by the owner in return for a hiring fee, which the canonist doctrine allowed.

The word 'llog' is derived from the Latin 'locatio', and the transaction is identical with the 'locatio' of the Roman Law.

§ 2. Not much is said about 'llog' in the Codes.

The Venedotian Code, p. 180, refers to 'llog' of land in one place only, where it is said that the owner of land is free to lease (*lloget*) it for the space of a year without permission of the lord; while the IXth Book, p. 276, says that no one has a pre-emptive right in respect to a lease, particularly if of 'manured' land.

§ 3. 'Llog' could be effected by 'briduw', 'amod', or 'machni', but the transaction could be entered into by 'consensus' without formality.

<sup>1</sup> V. C. 116, 122-6, 130, 264, 266, 268, 270, 274, 276, 278; D. C. 564-8, 570-4; G. C. 706, 710-18; VI. 104, 120; VIII. 182, 186, 188, 208; X. 344; XIV. 702.

<sup>2</sup> IX. 240.

When property was hired out in 'llog', the lender did not part with the ownership thereof, but, during the currency of the period of 'llog', the owner, being out of possession, was not entitled to swear to it as his, nor was he entitled to inquire from the person to whom he had leased it what was being done with the property.

The transaction of 'llog' required that the identical property leased was to be restored on the expiration of the lease, and not property of a like nature. It had to be returned immediately the period expired, along with the hiring fee.

§ 4. While property leased on 'llog' was in the possession of the hirer, the latter had to take all reasonable care of it, and return it in the state in which he had received it, and, provided reasonable and lawful use alone was made of it, the hirer was not responsible for any damage to it.

Consequently, if a hired animal lost its life or was injured while with the hirer, he was not to pay compensation for it, unless he had used it in contravention of the agreement of hiring. If it were injured by unlawful use, the hirer paid for it, his own oath being sufficient if he denied having used it otherwise than he would have used his own. In every case the hiring fee must be paid.

§ 5. The use to which animals or goods leased on 'llog' could be put was expressed in the agreement, and use in excess of such terms was illegal, and must be compensated for. The standard illustration given in the Codes is the case where a man hired a horse to ride for a certain distance. If he rode it beyond he paid a surreption fine to the lord, and handed over half or a third of the extra profit he had derived from such user to the lessor.

We have exactly the same rule in the *Senchus Mór*, I. 169, 'Wherever there is use, there is payment for use; wherever there is wear, there is payment for excessive wear of a loan.'<sup>1</sup>

### 3. 'Benffyg' and 'echwyn'.

§ 1. 'Benffyg' and 'echwyn' are different forms of loan.

The Roman Law divided loans of property into two, 'commodatum' and 'mutuum'. The Welsh Law had an

<sup>1</sup> V. C. 248, 266; D. C. 572; G. C. 744; VI. 100; IX. 240; XIV. 588, 590-8.

identical division into 'benffyg' and 'echwyn', and a similar, though not identical, division appears to exist in the Irish Law of 'arra' and 'anarra', the former corresponding to 'benffyg', the latter to 'echwyn'.

Mr. Owen translates the two words as 'loan' and 'borrowing', using the translations indiscriminately. The terms cannot be rendered exactly into English, and, in the presence of Latin equivalents, it is unnecessary to seek English ones.

§ 2. 'Benffyg' or 'commodatum' was a gratuitous loan for a period of an article or animal, at the expiration of which period the exact article or animal had to be restored.

'Echwyn' or 'mutuum' was a gratuitous loan, also for a period, at the expiration of which an equivalent for the article or animal loaned had to be restored.

Some things were incapable of being the subject of 'benffyg', e.g. seed-corn; the exact seed being used for sowing could not be restored, but an equivalent in kind could be, and a loan of seed-corn would accordingly be an 'echwyn'. So, too, nothing that was liable to waste could be the subject of 'benffyg'.

On the other hand, land could never be the subject of 'echwyn'; it must always be hired (*llog*), or if lent gratuitously, be lent as 'benffyg'.

§ 3. The ownership of anything given in 'benffyg' was not separated from the lender; he could not, however, swear to it as his during the period of 'benffyg', as it was out of his possession legally; but he could swear to it after the period had expired.

§ 4. There was a material difference as to liability for damage caused to 'benffyg' from that caused to 'llog'. In the latter case, as we have noted, provided the lessee took reasonable care of the property hired, he was not responsible for damages caused; but, in the case of 'benffyg', the borrower was responsible for all damage caused, and was liable to make compensation therefor. Even if the damage caused were not permanent, e.g. temporary disablement by accident, the borrower must give the lender an equivalent for use until complete recovery, and, failing

recovery, the substitute could be retained by the lender as his own.

§ 5. A 'benffyg' could be created by 'briduw', 'amod', or 'machni', though no formality was compulsory, but the Gwentian Code advises in such a case the taking of a pledge (*gwystl*) from the borrower, for otherwise his own oath denying the loan sufficed to prove there was no loan.

§ 6. In all cases of 'benffyg' the purpose for which it was made was stipulated in the agreement, and any use of it in excess entailed a surreption fine to the lord and a surrender of half the profit accruing from such use to the lender.

A person taking goods on 'benffyg', denying the loan, had to refund double the value when proved.

§ 7. Inasmuch as a 'benffyg' had to be restored in the state it was in when lent, no person could create a charge on such property, or as it is called 'return it with a surclaim on it'. The application of this doctrine to the case where a third person claimed the subject-matter as his, or in virtue of a charge on it in the hand of the person to whom it had been lent, is enlarged on in the Anomalous Laws.

It is provided that the borrower must take the property at once to the lender, and if the latter admitted the loan or the loan by him was proved, and that the third person's charge existed on it at the time of loan, the borrower could return it to the lender subject to the claim. If the lender denied the charge, the borrower could prove its existence at the time of loan.

If, however, the borrower admitted or it was proved that at the time of loan there was no charge on the property, then the lender could force the borrower to defend the claim of the third party, and decline to accept the property back until the claim were removed from it. Should the borrower discharge the third party's claim or give sureties to answer for it before reference to the lender, he created a charge on the property, and he could not call on the lender to recoup.

The rule of 'arwaesaf' applied to all 'benffyg', alleged to be stolen property in the hand of the lender, who had passed it on to a bona fide borrower.

If a borrower himself created a charge on the loan, he was compelled to restore to the lender property of an equivalent value free of charge.

§ 8. In 'echwyn', inasmuch as the identical property lent was not to be restored, the ownership in the article lent passed at once to the borrower. No question, therefore, arose as to excess use, and no stipulations restricting user were needed.

Likewise there could be no charge of theft where the 'echwyn' was retained beyond the stipulated period.

Like 'benffyg', an 'echwyn' could be effected by 'briduw', 'amod', or 'machni', or by pledge or 'consensu'.

§ 9. In both 'benffyg' and 'echwyn' a definite date for return of the article lent or its equivalent was fixed; but, if no date were mentioned, it could be demanded back the following day, and if demand were not then made, the period of currency was fixed as a year and a day.<sup>1</sup>

#### 4. 'Adneu' or Deposit.

§ 1. The transaction of 'adneu' is in the main identical with the 'depositum' of Roman Law.

It is briefly mentioned in the Codes, but with some detail in the Laws. The references to it in the Codes are sufficient to justify us in asserting that the transaction was known in very early times.

§ 2. A deposit both in Welsh and Roman Law was the entrusting of property to another for safe keeping. It could be made in Wales with or without 'briduw', 'amod', or 'machni'.

Ownership in the property was not transferred by the act of deposit, and the owner was entitled to recover the identical article deposited by him.

So long, however, as the property was in the hands of the bailee, the owner could not swear to it as his, as property must always be in hand before it could be sworn to; title and possession in early law being so closely allied as to be almost indistinguishable.

<sup>1</sup> Bk. of Aicill, 151, 153, 155; V. C. 248, 266-8; D. C. 572, 598; G. C. 708, 728; IV. 12; VI. 124; VII. 168, 170; IX. 302; X. 324, 378, 380; XIV. 588, 590-8, 658, 670.

There is an interesting discussion in the laws as to whether the owner of a deposit could prosecute for its theft while in the depositee's custody. He could not swear to theft, as he had to swear to its having been taken out of his hand, and the ultimate conclusion arrived at that he could prosecute is not arrived at on any logical ground.

§ 3. The prime duty of a depositee was to take such care of the article deposited as he would of his own property. Consequently, if the deposit were lost through negligence, the depositee had to make good its value.

There are numerous references to a depositee's liability where the property was stolen from him. If it alone were stolen, the depositee was primarily responsible to make good the loss: he was not responsible if goods of his own were also stolen and there were distinct traces of house-breaking; nor was he responsible if the deposit had been buried in the ground and had been dug up by the thief. In the latter case, apparently, the owner could come down on the lord to recoup him.

The responsibility of the depositee extended to a deposit burnt in his house.

§ 4. A deposit made in the precincts of a church was illegal and irrecoverable; and if the depositee became a receiver of stolen property and his house thereby became forfeit, the sentence of forfeiture did not extend to the deposit.

The owner could demand the return of his deposit at any time, and a denial of receipt by the depositee involved the latter, if the deposit were proved, in a penalty of double the value of the deposit.<sup>1</sup>

§ 5. There are incidental references in the Anglo-Saxon Laws, which show that the same rules existed in the main in that law. There is a slight reference to the same system in the *Lex Baiuor.*, Tit. XV, providing that the bailee of animals was not responsible for damage caused by them, and further providing similar rules as to liability for burnt and stolen deposits.

<sup>1</sup> V. C. 244-8, 258; D. C. 484; IX. 238; XI. 420; XIV. 588, 590-8, 652, 672.

The Irish Law also had similar rules relative to the loss or destruction of deposits, the test always being whether there was or was not negligence in guarding.<sup>1</sup>

The references are slight, but sufficient to show that the same law was of wide prevalence.

#### 5. 'Rhodd' or gift.

§ 1. 'Rhodd' or gift is referred to in both the Codes and the commentaries.

A gift caused the immediate transfer of ownership in the property to the donee. A gift once made was irrevocable, and that rule applied to donations of land by a lord, which could not be revoked by his successor.

§ 2. Gift could be made by 'briduw', 'amod', or 'machni', but none of these formalities was essential. It could be effected by delivery into the donee's hand in the presence of witnesses, or by delivery under suretyship or indemnity by the donor against claim.

In every case removal by the donee was essential, but the requirements of removal were satisfied if the donee removed it for a short space and then returned it to the donor, apparently as a deposit.

In making a gift it was permissible for the donor to contract that any profit made by trading with it should accrue to himself, but, without such contract, he could claim nothing.

§ 3. The necessity for delivery of possession before the gift could be considered complete gave rise to an interesting comment on the case where the donor sent a gift by a messenger, and the messenger, having given no sureties to deliver it, misappropriated it.

The commentators say that the donor had parted with the property, and the donee had not received it, and so neither could recover from the messenger. If, however, goods were sent by messenger, say to market, there was no separation of the dominium over it from the owner, who could accordingly charge the messenger misappropriating with theft.<sup>2</sup>

<sup>1</sup> Ir. Laws, I. 279-81; IV. 191-7.

<sup>2</sup> V. C. 248; IV. 28; V. 54-6; XIV. 588, 590-8, 658.

























































































































































































































































































































































































































<i>Rhwym dadl.</i>	Bond of suit.
<i>Rhyddid.</i>	Freedom.
<i>Sarhad, saraad.</i>	Insult, honour-price.
<i>Symwd car.</i>	See 'car-gychwyn'.
<i>Taeog.</i>	'Aillt', q.v.
<i>Taeog-tref.</i>	An unfree ville.
<i>Tafod.</i>	Tongue.
<i>Tafodiog.†</i>	Tongue-man. A class of conclusive witnesses.
<i>Tan.</i>	Fire, arson.
<i>Tarian.</i>	Shield.
<i>Teisbantyle.†</i>	A word of doubtful origin. Commonly rendered 'family representative'. Possible origin 'teis-ban', the pivot or cartilage, of the 'tyle', couch, i.e. the husband or head of family.
<i>Teithi.</i>	Full qualities.
<i>Telyn.</i>	Harp.
<i>Terfyn.</i>	Boundary.
<i>Terfysg.</i>	Tumult.
<i>Tir.</i>	Land.
<i>Tir-bwrdd.</i>	Board land of the lord.
<i>Tir caeth.</i>	Bond land.
<i>Tir cyfrif, trefgefery.†</i>	Class of unfree land, in which there was no succession.
<i>Tir cynnyf, cynyd, pryd, pryn.</i>	Purchased or acquired land.
<i>Tir gwelyog, truwelloghe.†</i>	Land held by a free or unfree 'gwely'.
<i>Tir rhyd.</i>	Free land.
<i>Tom.†</i>	MW. dirt. Special meaning in Laws appears to be derived from long-extinct word meaning 'draught', drawing.
<i>Tomawg.†</i>	Adjective from 'tom'.
<i>Tonawg.†</i>	Broken. Cf. 'ton', a breaker.
<i>Tref.</i>	A settlement, a ville.
<i>Tref y tad, tadawc.</i>	The paternal or ancestral settlement.
<i>Treis.</i>	Violence.
<i>Treth.</i>	Land dues, excluding 'twnc'. MW. tax.
<i>Twnc, tunc.†</i>	Commuted 'gwestfa'.
<i>Twrf cyfraithol.</i>	Lawful disturbance.
<i>Ty a tal.</i>	= 'ty a dal', house to hold, a site for a house, not MW. 'ty a tal', house and gable-end.
<i>Tyddyn.</i>	Homestead.
<i>Tyst, -ion.</i>	Witness, especially a court attestator.
<i>Tystiolaeth.</i>	Testimony.
<i>Tystiolaeth marwol.</i>	Dead testimony.
<i>Uchelwr.</i>	Head or high man. Gentleman of position.
<i>Wynebwerth,† -warth.</i>	Lit. face-value. Equals 'sarhad'.
<i>Wyrion.</i>	Lit. grandsons. A body of clansmen.
<i>Ymladd.</i>	Fighting.
<i>Ymwrthyn.†</i>	To oppose one another. Land-suit based on trespass.
<i>Ymwystlo.</i>	To give mutual pledges. Challenge of judge.
<i>Ynys Prydain.</i>	Isle of Britain.
<i>Ysgar, escar.</i>	Divorce, separation.

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