He kept her the space of a year: Celtic secular marriage in Late Medieval Scotland

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He kept her the space of a year: Celtic secular marriage in Late Medieval Scotland

by

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in partial fulfillment of the requirements for the degree of

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has met the thesis requirements of Iowa State University

Signatures have been redacted for privacy
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CHAPTER ONE: INTRODUCTION

According to oral tradition, medieval Scots appear to have participated in a Celtic secular marriage custom that was quite peculiar.¹ These stories report a custom, which allowed for a temporary union between men and women. This was the custom of trial marriages or 'handfasting,' as it has been popularly known.² But what exactly was this custom of trial marriage? More importantly, was the custom real or merely the product of overly active literary imaginations? And if it was real, how did such a custom come to be in use in Scotland?

Sir Walter Scott described the custom in his early nineteenth-century novel, The Monastery,³ when his medieval Baron of Avenel discussed marriage with an English priest: “We Border men are more wary...no jump in the dark for us, no clenching the fetters around our wrists till we know how they will wear with us: we take our wives, like our horses, upon trial.” Scott’s Baron then described the custom in more detail: “When we are handfasted, as we call it, we are man and wife for a year and a day; that space gone by each may choose another mate, or, at their pleasure, may call the priest to marry them for life....”

¹ Throughout this thesis, I use the term ‘Celtic’ cognizant of the fact that it has been overused to the point of inaccuracy. Therefore, it is important that I define what is meant by ‘Celtic’ from the outset: for this study ‘Celtic’ is used to denote the Gaelic Scots of the Highland regions of Scotland, as well as some portions of the western Isles, and their customs. It is the Gaelic segments of medieval Irish society, as opposed to the Anglo-Norman segments, whose laws and customs are discussed in chapter four.
² Although the term 'handfasting' has been widely used to describe this form of Celtic secular marriage, it has also been used to describe a betrothal. To avoid confusion I will use the term 'trial marriage' throughout this paper, except of course, when quoting sources. The origins of and problems with the term will be treated more fully in a subsequent chapter.
The late seventeenth-century author, Martin Martin, gave a similar, though less entertaining, description of the custom in his book, *A Description of the Western Islands of Scotland*. Martin, too, described a custom of marrying for a year that was practiced in earlier times by the inhabitants of the Islands of Scotland.

These literary interpretations of the custom are confirmed by further research. The evidence, when considered as a body, is sufficient to conclude that such a custom did indeed exist in medieval Scotland and elsewhere in Britain. It was practiced in its purest form by the common folk at the annual Lammas festival and variations of it were practiced by the Hebridean nobility, among others.

In researching material for this topic an obvious difficulty presented itself—the lack of material dating to the period this thesis covers. Contemporary sources that mention trial marriages are few. This is not a great surprise in view of the fact that even the records for “traditional” marriages are quite limited before the fourteenth century. It is necessary then, to go beyond the medieval chronicles and governmental documents as sources, although they, too, find their place in the research for this topic.

The sources consulted for this study are many and varied. The information provided by folklore, oral tradition, and Celtic mythology is invaluable. Genealogies are important in the research for this topic because they provide tangible dates and names that provide a link to oral tradition. The records of several Scottish families provide the names of participants in trial marriages that are dateable and important when considered with the other evidence. Modern reference works such as *Burke’s Peerage* and the

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Scots Peerage serve as excellent sources for cross-referencing and verifying names and dates. Scottish folk-loreist Margaret Bennett, in her book, Scottish Customs from the Cradle to the Grave, describes the oral tradition of a MacDonald-MacLeod trial marriage gone awry. Alick Morrison’s, Chiefs of Clan MacLeod, provides interesting and enlightening details about the genealogy of the MacLeods of Dunvegan and their relationships, both marital and martial, with the MacDonalds.

Although unquestionably helpful, genealogies and oral tradition give no clues to the origin of the custom. Celtic mythology, Brehon law, and folk-lore are required to fill in the gaps. Mythological tales, such as The Shadowy One, and ancient Irish law tracts, such as the Book of Aicill and the Cain Lanamhná of the Senchas Már, describe relationships that appear to be similar to the trial marriage, as described by Scott and Martin.

The sources best known for reporting the existence of a custom of trial marriages, such as the Old Statistical Account of Scotland, the ‘Statutes of

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7 Alick Morrison, Chiefs of Clan MacLeod (Edinburgh: The Associated Clan MacLeod Societies, 1986) 72-3.
12 The Statistical Account of Scotland, ed. Sir John Sinclair (Edinburgh: W. Creech, 1791-99), xii, 615. Contains both the Old Statistical Account of Scotland and the Statistical Account of Scotland, which was done later.
Iona, and Martin’s *A Description of the Western Islands of Scotland* were consulted and when considered as a body, serve to reinforce the other data. Further evidence in support of the custom can be found in the protocol books of medieval notaries, the Kirk session records of the Reformation, and the genealogies of many of the clans of the Highlands and Islands, as has been noted.

The *Calendar of Scottish Supplications to Rome* and the *Calendar of Entries in the Papal Registers Relating to Great Britain and Ireland* contain many petitions for papal dispensations for the upper classes of Scotland. In many of these requests, there was clearly prior knowledge of impediments to the marriage that were ignored. There is reason to believe that at least some of the relationships described within the petitions may have begun as trial marriages that the parties were subsequently seeking to solemnize, probably for the purpose of legitimizing offspring. This issue will be considered in more detail in Chapter III.

Only two modern studies specifically seek to determine whether trial marriages actually existed in Scotland. Alexander E. Anton’s article, “Handfasting’ in Scotland,” which appeared in the *Scottish Historical Review*, is the prominent work on handfasting to date. Anton’s analysis of

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13 Register of the Privy Council of Scotland (Edinburgh: H.M. General Register House, 1877), ix, 27.
14 Martin, *Description of the Islands*, 114.
16 Calendar of Entries in the Papal Registers Relating to Great Britain and Ireland, ed. J.A. Twemlow (London: Published by H.M. Stationery Office, 1912), ix, xi. Hereafter, PR.
17 The Papal Penitentiary Records for Scotland, which would provide similar information about the marriages of the lower classes, are currently unavailable. However, they are in the process of being translated by Jennifer McDonald et al, at Queen’s College, University of Aberdeen.
the available sources led him to the conclusion that handfasting probably did not exist, at least not in the sense described by W.F. Skene, nineteenth-century author of *The Highlanders of Scotland*,19 and Sir Walter Scott. However, he completed his study more than forty years ago and he did not include Celtic mythology, Celtic law, or oral tradition in his study. It should be noted that Anton was more concerned with analyzing the legal basis for trial marriages, particularly with regard to Canon law, than with seeking new information. This study, on the other hand, seeks to identify the origin of the custom within the framework of both the ancient laws of Ireland and the pagan festivals of Ireland.

In his article “Marriage, Divorce and Concubinage in Gaelic Scotland,” in *Transactions of the Gaelic Society of Inverness*,20 W.D.H. Sellar discusses Celtic secular marriage in detail and ably refutes Anton’s conclusions on trial marriages. In common with this study, Sellar’s study also advances the theory that the Gaelic Scots mirrored the marriage customs of the Gaelic Irish. Although Sellar refers to ancient Irish laws that support the custom, he does not go into detail on the law of ancient Ireland, nor does he consider the pagan origin of the custom.

Understanding the origin of this custom is critical, if one is to have a thorough understanding of the social and legal structure of medieval Scotland. Aside from the obvious need to define medieval Scottish society, there remains only limited understanding of the extent to which Celtic laws and customs survived in medieval Scotland. If indeed medieval Scots, and

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20 W.D.H. Sellar, “Marriage, Divorce and Concubinage in Gaelic Scotland,” *Transactions of the Gaelic Society of Inverness* (Inverness: Gaelic Society of Inverness, 1981), 51, 464-95. I owe a debt of gratitude to Professor A.D.M. Forte of Queen's College, University of Aberdeen, for generously referring me to this article, as well as other sources, that were critical to this study.
even early modern Scots, continued to practice this pagan custom, it says much about the strength of the Church in the remoter regions of Scotland. In medieval Scotland, it appears that Christianity and pagan custom were not necessarily mutually exclusive. Therefore, trial marriages must not be considered *within* the framework of Canon law but rather, *in spite* of Canon law. Some aspects of secular law may also need to be re-evaluated. For example, property laws that state that a woman may not inherit her husband’s property unless the union has lasted for more than a year and a day, gain new meaning when considered within the framework of trial marriages. Views on illegitimacy and right to succession may be clarified by a better understanding of Celtic secular marriage customs, giving clarity to the frequent succession disputes of medieval Scotland. If Gaelic society accepted trial marriage as a legitimate union, then it follows that they must also have accepted the offspring of such unions as legitimate. There is very good reason to believe that many of the struggles for succession that are found within the noble houses of Scotland, had their roots in disagreements over the supremacy of Canon law versus customary law. Indeed, Sellar specifically refers to two noble Scottish families whose end must be ascribed to the practice of marrying, and then repudiating, wives.  

It is the intent of this thesis to show that trial marriages were indeed practiced in medieval Scotland and to answer the questions posed previously. Chapter II will describe the cases of trial marriage that oral tradition and genealogies have handed down to the modern day, as well as other reports of the practice. Consideration will also be given to the Kirk session records of the Reformation, which sought to deal swiftly and

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21 Sellar, "Marriage, Divorce and Concubinage," *Transactions*, 483-4. The MacLeods of Lewis, for example.
decisively with the proliferation of irregular and clandestine unions among mid- to late-sixteenth-century Scots. In Chapter III, Canon law and the actions of the pre-Reformation Church, with regard to uncanonical unions, will be described. This will include consideration of the many requests for dispensation, after the fact, that are found in the *Calendar of Scottish Supplications to Rome* and the marriage dispensations that are found in the *Calendar of Entries in the Papal Registers Relating to Great Britain and Ireland.* Chapter IV will consider the origins of the custom in the pagan festivals and Celtic mythology of Ireland. Ancient Irish laws regulating social connections, marriage, and women will be discussed, with emphasis on understanding the laws of marriage, particularly in relation to pagan custom.

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22 CSS,ii-iv; PR,ix, xi.
Due to ongoing disagreement over the validity of the term 'handfasting,' it is necessary to first discuss the terminology that is often found in contemporary and secondary sources. This term has been popularly used by novelists, historians, anthropologists, folklorists, genealogists, and experts in legal jurisprudence. However, the term 'handfasting' promotes confusion because it has also been used to define a betrothal. It is very likely that the terms were used interchangeably. After all, a trial marriage was, in some ways, like a betrothal. It was not a permanent contract of marriage. It was an agreement that was probably conditional to the fulfillment of specific terms, which were very likely to have been concerned with the production of offspring. The term 'handfasting' was also used to signify agreement to a variety of contracts in early times, much like shaking hands to seal a bargain today. On the Orkney Isles, the fragments of an ancient holed stone, called the Odin Stone (see figure 2-1) are said to have survived into the 1940s. According to legend, the Odin Stone was used for sealing agreements and binding marriages and unions. It was customary, when promises were made, for the contracting parties to join hands through this hole. Promises made in this way were called the "promises of Odin."

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23 G.F. Black, "Examples of Printed Folk-Lore Concerning the Orkney and Shetland Islands," County Folk-Lore, ed. Northcote W. Thomas (London: Folk-Lore Society, 1903), iii, 2; "The Odin Stone," Heritage of the Orkney Islands (March/February, 2003), www.orkneyjar.ac.uk. Interestingly, the Danish term for such an agreement is 'handfaestung,' meaning "A giving of the hand by way of pledge." See: Joseph Bosworth, Anglo-Saxon Dictionary (Oxford: Clarendon Press, 1972), s.v. 'Hand-faestung'. Indeed, the custom of the Odin stone is thought to have been of Scandinavian origin. Despite this, I have been unable to find evidence to suggest that the custom of trial marriage was practiced in Denmark or Norway, although, as was the case in many early civilizations, their laws allowed for divorce. However, the Late Reverend Dr. Donald MacKinnon and Alick Morrison, authors of The MacLeods—The Genealogy of a Clan, allege that a trial marriage
allowed for divorce. However, the Late Reverend Dr. Donald MacKinnon and Alick Morrison, authors of The MacLeods—The Genealogy of a Clan, allege that a trial marriage occurred among the Norse progenitors of the MacLeod family in the twelfth century. According to this source, Godred the Black, grandson of Godred Crovan, who was the progenitor of the Clan MacLeod, had a "handfast marriage" prior to a later canonical marriage (Reverend Dr. Donald MacKinnon and Alick Morrison, The MacLeods—The Genealogy of a Clan (Edinburgh: The Clan MacLeod Society), 4-5). Unfortunately, I have not been able to determine whether Godred the Black had adopted the Scottish custom of trial marriage or was following a Norse custom of trial marriage. In recent years, there has been a neo-pagan movement that has resulted in the revival of what is termed 'handfast marriages' by the neo-pagans. The custom may not have moved as far from modern man as one might think. It is possible that the custom of binding the clasped hands of a bride and groom, which is customary in Catholic services in particular, originated in the 'handfast marriage.'
Therefore, because the term ‘handfasting’ is thought to have been used to describe not only betrothals, but also non-marital contracts, it promotes confusion. Although, as mentioned above, the term could legitimately have been used to describe an agreement to undertake a trial marriage, it will, for the sake of clarity, be avoided here. The term ‘trial marriage,’ being a straightforward and more accurate term for describing this type of Celtic secular marriage, will be used instead.

Fragments of the customs of the Celts appear to have been retained, with regard to marriage, throughout the medieval period in parts of northwestern Scotland and the western isles. Indeed, the last contemporary reference to the ongoing practice of peculiar marriage customs appears in the ‘Statutes of Iona,’ signed in 1609. The Lords of the Isles had managed to maintain a significant degree of sovereignty up to this time. As a result, the Statutes of Iona were passed by the Scottish government in an effort to take control of the western islands. Among other things, the ‘Statutes of Iona’ outlawed marriages that were “contracted for certain years and then completely discharged.” Significantly, it is among the families of this region of Scotland, where we most often find references to the custom of trial marriage. This is especially true of the Clans MacDonald and MacLeod.

The following examples, through the use of both oral tradition and the traditional accounts of the clans of the Highlands and Islands, suggest that trial marriages were fairly common events in the Highlands and Islands of medieval Scotland. The genealogy of the Clan MacDonald, as written by the Reverends Angus MacDonald and Archibald MacDonald, reports a trial marriage between the Macleods and the MacDonalds as follows: Alasdair

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24 Register of the Privy Council, ix, 27.
25 Ibid.
Crottach (the Hump-backed) MacLeod, who became the 8th Chief of the Clan MacLeod in 1500, had a daughter who was “handfasted” to and later repudiated by Allan MacDonald (Allan Mac Iain), 9th laird of Clanranald. John Bartholomew, who wrote *The Statutes of Iona*, agrees that Allan MacDonald repudiated his MacLeod wife and relates the story of Allan’s subsequent marriage to Janet, daughter of Hector Mor Maclean of Duart and Morvern. According to Bartholomew, Allan MacDonald saw “a daughter of Maclean” while visiting Duart. Upon deciding that he preferred Maclean’s daughter, Allan left his MacLeod wife on Duart and sailed away with his new ‘spouse.’ *Burke’s Peerage* confirms that Alasdair MacLeod’s daughter was repudiated by Allan MacDonald and that he subsequently married Janet, daughter of Maclean of Duart. The MacLeods, apparently believing that they must avenge themselves, initiated a feud with the MacDonalds. Of the many feuds between the MacLeods and the MacDonalds it is not clear which one came about as a result of the repudiation of MacLeod’s daughter, but it was not unusual for a clan war to be ignited by just such an event. According to Bartholomew, the feud following the repudiation engendered such hatred between the two clans that the massacre of the MacDonalds of Eigg and the Battle of Waternish came about, at least in part, as a consequence of that hatred.

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28 Ibid.
29 Ibid.
32 Ibid. The Battle of Waternish, according to Bartholomew, came about when the MacDonalds invaded MacLeod lands and massacred a number of MacLeods in a church at Waternish. As a result, the MacDonalds were attacked by the MacLeods and killed to a man.
Another instance of trial marriage is reported by *Burke’s Peerage*, which makes use of medieval chronicles, governmental documents, clan genealogies, and family archives to construct the genealogies of the noble families of Scotland. This source briefly tells the story of Alastair MacAllan MacDonald, 7th laird of Clanranald and Moydart in the early-sixteenth century. This MacDonald chief was said to have had eight sons by three “handfast unions.” The first four sons were said to have been the issue of Alastair’s union with Dorothy, daughter of a tenant of Brunery, in Kinlochmoidart. The eldest son, John of Moydart (Ian Moidartch MacDonald, 8th laird of Clanranald and Moidart), was granted a charter of legitimation by King James V on 15 January, 1531, confirming that he was born of an uncanonical union.33 *The ‘Black Book’ of Clanranald* states that Alastair’s other two wives were a daughter of Tormod, son of Gillepatrick O’Beolan, and a daughter of MacIntosh.34

The sixteenth-century historian, Lindsay of Pitscottie, author of *The Historie and Chronicles of Scotland*, reported a trial marriage between James Dunbar, 4th earl of Moray, and Isobel Innes, daughter of Sir Walter De Innes, 10th baron of that ilk. James Dunbar and Isobel Innes were “handfasted” in the early to mid-1400s, during the reign of James II of Scotland.35 A son named Alexander was born of this union. Although considered illegitimate under the Canon law, Alexander was allowed to succeed his father, perhaps because he was the only male issue of James Dunbar.

33 *Burke’s Peerage*, 102nd edition, 1452-3.
35 Robert Lindsay (1532?-1578?), *The Historie and Chronicles of Scotland* (Edinburgh: Printed for the Scottish Text Society by W. Blackwood & Sons, 1899-1911), i, 64.
Skene describes a succession dispute related to trial marriage in his book, *The Highlanders of Scotland*.\(^{36}\) According to Skene, although the offspring of Celtic secular marriages were considered legitimate by the Highlanders, they were often looked upon as bastards by the government and therefore, unable to succeed. Skene, citing Sir Robert Gordon’s genealogy of the Sutherland clan, gives as an example the case of Alexander Sutherland who, in the sixteenth century, claimed the earldom of Sutherland “as one lawfullie descended from his father Earle John the third, because as he alleged, his mother was handfasted and fianced to his father.”\(^{37}\) It is significant that Alexander claimed a handfasting AND a betrothal between his mother and father. The use of “handfasted and fianced” suggests that a distinction was made between the two conditions and that a trial marriage may have been a conditional promise of a future canonical marriage.

At least one instance of trial marriage has been preserved by oral tradition. Oral tradition says that there was a daughter of the Macleods of Dunvegan who was “handfasted” to a son of the MacDonalds of Sleat. The MacLeod daughter, reported to have been blinded in one eye as a result of her husband’s ill-treatment of her, was repudiated. MacDonald was said to have sent her back to her family riding a one-eyed grey horse accompanied by a ragged one-eyed groom and a one-eyed dog. The Macleods were so incensed by this insult that they torched many MacDonald holdings and thereby initiated a long feud.\(^{38}\) The enmity between the MacLeods and the MacDonalds was of longstanding, having originally begun as a dispute over


\(^{38}\) Bennett, *Scottish Customs*, 95-7. Portions of the story cited above were obtained by the author through correspondence with Margaret Bennett, March 2002.
which clan had the right to the lands at Trotternish. 39 Little fuel was required to re-ignite this particular feud and the shameless repudiation of this daughter of MacLeod was more than enough. MacKinnon and Morrison recount the reaction of the MacLeods in detail stating, “The arrival of this pathetic procession at the Castle of Dunvegan naturally roused Ruaraidh Mor’s ire, but at first he sent a civil message to the chief of Sleat to take his wife back, which Donald Gorm Mor...refused to do.” 40 Donald Gorm Mor then added insult to injury by immediately marrying a sister of Colin Cam MacKenzie, who was yet another enemy of the MacLeods. 41 Resolved to avenge the insult to his sister and to his family and clan, Ruaraidh Mor “immediately assembled his forces and invaded the MacDonald country of Trotternish. Donald Gorm Mor retaliated by invading Harris.” 42 MacKinnon and Morrison confirm that a bitter and bloody war was fought between the two clans for several years, bringing them both near to ruin, before the “Government” stepped in and effected a reconciliation between the chiefs. 43 Burke’s Peerage and Morrison’s The Chiefs of Clan MacLeod, also confirm the oral tradition and provide verification of names and dates. 44 According to these sources, Donald Gorm Mor MacDonald, 7th laird of Sleat, “handfasted” Margaret MacLeod, daughter of Tormod MacLeod, 12th Chief of MacLeod, in the late-sixteenth century. Donald Gorm repudiated Margaret in the year 1600, sending her back to her brother Rory (Ruaraidh) MacLeod, who then invaded MacDonald lands as a result.

39 Bartholomew, Statutes, 5. Refers to the Trotternish peninsula in the north of the Isle of Skye. It is the most northerly of Skye’s peninsulas extending north from the city of Portree and is approximately 20 miles long and 8 miles wide.
41 Bartholomew, Statutes, 6.
42 MacKinnon and Morrison, The MacLeods, 22; Bartholomew, Statutes, 6.
43 Ibid.
44 Burke’s Peerage, 102nd edition, 1493; Morrison, 92; c.f. MacKinnon and Morrison, The MacLeods, 21-22.
One of the dangers of using oral tradition in research is that there are sometimes conflicting stories, depending upon who is reporting the tradition. This is the case with the story just related. Although identical in the details, Sellar gives a version of this story that he attributes to Kenneth MacKenzie of Kintail, who was said to have repudiated his wife, Margaret, daughter to John, Lord of the Isles, in the late-fifteenth century.\(^45\) Sellar cites Alexander MacKenzie’s *History of the MacKenzies* as his source for the tradition. Since it is highly unlikely that such a unique incident occurred in both sets of families, the tradition for this story must be considered with caution. Although Kenneth MacKenzie of Kintail did indeed marry Margaret, daughter of John, Earl of Ross and Lord of the Isles, there is no evidence to support Alexander MacKenzie’s claim. *Burke’s Peerage* does not indicate that Kenneth MacKenzie repudiated Margaret, or that the children of this union were of questionable legitimacy.\(^46\) It is possible that the tradition was confused since Donald Gorm Mor married a sister of Kenneth MacKenzie of Kintail after his repudiation of Margaret MacLeod. According to *Burke’s Peerage*, Donald Gorm Mor married Mary MacKenzie, who was the daughter of Sir Colin MacKenzie, 11\(^{th}\) Feudal Baron of Kintail, and the sister of Kenneth, 1st Lord MacKenzie of Kintail.\(^47\) Donald Gorm Mor does not appear to have repudiated Mary MacKenzie. Therefore, given the ties between the two families, it seems likely that the tradition was confused. The MacLeod-MacDonald version seems to be more credible since it has


consistently been reported in a number of sources, including *Burke’s Peerage*, as noted. 48

Hugh MacDonald of Sleat appears to have been the product of yet another uncanonical union in the first half of the fifteenth century. According to Donald Gregory, author of *History of the Western Highlands and Isles*, Celestine (Gillespie) and Hugh (Uisdean) MacDonald, sons of Alexander, Earl of Ross and Lord of the Isles, were referred to in contemporary documents as *frater naturalis* and *frater carnalis*. Gregory states,

> The history of Celestine and Hugh and their descendants sufficiently shows that they were considered legitimate, and that, consequently, the words ‘naturalis’ and ‘carnalis’, taken by themselves, and without the adjunct ‘*bastardus*’, do not necessarily imply bastardy. It is probable that they were used to designate the issue of those handfast or left-handed marriages, which appear to have been so common in the Highlands and Isles. 49

In tracing the descent of the sons of Alexander, Earl of Ross and Lord of the Isles, *Burke’s Peerage* gives a daughter of Macfee of Lochaber as mother to Celestine and the second wife of Alexander. Hugh’s mother is given as a daughter of Gilpatrick Royson, by “another union.” 50 The phrase, “another union,” implies that the union was not a canonical marriage and gives credibility to the idea that the union was of a Celtic secular nature, as

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Gregory proposed. It is known that Alexander, Lord of the Isles, was
admonished by Pope Eugenius IV as the result of a petition to Eugenius by
his first wife, Elizabeth, daughter of Alexander Seton of Gordon and Huntly.
The Calendar of Entries in the Papal Registers gives the mandate from the
papal court of Eugenius IV as follows:

1445[-6]...Mandate, at the recent petition of Elizabeth, 
wife of Alexander de Yele, earl of Ross and lord of the 
Isles, of the diocese of Ross (containing that although 
they lived together for some time as husband and wife, 
the said earl, led astray by the persuasions and 
machinations of Cristiana Maclaide, of the said diocese, 
has put Elizabeth away, and adheres to Cristiana whom 
he keeps as his concubine, and that, on account of the 
said earl’s power, Elizabeth has no hope of being able to 
cause them to be with safety cited and monished) to 
monish the said earl and Cristiana, and by 
ecclesiastical censure etc. to compel him to send away 
Cristiana and receive Elizabeth, and compel her not to 
seek to hinder the earl and Elizabeth from living 
together. If they find that it is not convenient to reach 
the presence of the said earl and Cristiana for making 
the said monitions, the pope grants them faculty to 
make them by public edict posted in public places 
which shall be near the said parts and from which it is 
probable that they can come to the knowledge of those 
monished....51

According to the original Latin version of the mandate included in the 
Highland Papers, Eugenius rebuked Alexander for banishing his wife
Elizabeth, “Elizabeth a se de facto repulit.” Eugenius further admonished
Alexander, “eidem Christiane quam in concubinam tenere non trepidat
impudenter adheret,” for shamelessly clinging to the same Christiane whom
he does not fear to hold in concubinage.52 Whether Christiana was the so-

51 PR, IX, 545-6.
52 Highland Papers, ed. J.R.N. Macphail (Edinburgh: Printed at the University Press by T. 
and A. Constable for the Scottish History Society, 1914), i, 92-4; Sellar also refers to the
called second wife of Alexander, his partner in his third union, or his partner in yet another union, is impossible to say. Regardless, Eugenius’ response to Elizabeth’s request for help further supports Gregory’s assertion that Celestine and Hugh were probably the offspring of a temporary marriage.

At least three of Alexander’s sons were considered to be illegitimate under Canon law. Indeed, Alexander himself petitioned Eugenius IV in 1445 and as a result received a dispensation legitimating, “Hugh, Alexander and Donald, sons of... Alexander de Ylis, earl of Ross, a married man, and an unmarried woman.”53 It is unclear who Hugh, Alexander, and Donald were. They are not listed as Alexander’s offspring in any of the family records, nor are they listed among his offspring in Burke’s Peerage. J.R.N. Macphail, editor of the Highland Papers, which includes the “History of the MacDonalds,” indicates that this Hugh and Hugh of Sleat were two different sons of Alexander and even gives Elizabeth Seton as Hugh of Sleat’s mother. However, the MacDonald seannachie who wrote the “History of the MacDonalds,” is probably correct in stating that Hugh of Sleat was born of Alexander’s union with a “concubine.”54 For this reason, Hugh of Sleat cannot be ruled out as one of the subjects of the dispensation of legitimation. Of Alexander and Donald there is no trace, which may indicate that they died in childhood.

It is interesting to note here that Alexander’s son, Hugh MacDonald of Sleat, was granted a charter, in the fifteenth century, by his half-brother

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53 PR, IX, 523.
54 “History of the MacDonalds,” Highland Papers, i, 94-5.
John, 55 “last Celtic Lord of the Isles and Earl of Ross.” 56 The charter referred to various lands that were heritable by Hugh “and his heirs male lawfully and unlawfully [sic] begotten or to be begotten.” 57 According to Macphail, the charter simply refers to Hugh as ‘my most beloved brother’, without any qualifying words to indicate illegitimacy. 58 Therefore, Hugh must have either been considered legitimate under Celtic law, or he was indeed the subject of the above-mentioned dispensation of legitimation. Whatever the case may be, it is little wonder that Hugh and John seemed unconcerned with the canonical legitimacy of their own marriages and offspring, given the checkered marital record of their father.

John clearly learned his lessons about marriage at his father’s knee and appears in the Calendar of Entries in the Papal Registers in his own right, nineteen years later. According to this source, John’s wife, Elizabeth Levynston, countess of Ross, petitioned Pope Pius II in a manner very similar to the petition made my John’s own mother, Elizabeth Seton MacDonald. 59 The mandate of the papal court was as follows:

1463-4...The recent petition of Elizabeth Levynston, countess of the place of Ross in the diocese of Ross, contained that John earl of Ross, her husband, after lawfully contracting marriage with her before the church per verba de presenti and consummating it, and cohabiting with her for several years and having offspring by her, has put her away, and violently ejected...

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55 John, son of Alexander, Lord of the Isles and Earl of Ross, and his first wife, Elizabeth, daughter of Alexander Seton of Gordon and Huntly.
56 “Bosville MacDonald,” Burke’s Peerage (February/March, 2003), www.burkespeerage.com. Burke’s Peerage refers to John as the last Celtic Lord of the Isles, a title that seems to confirm Sellar’s assertion that the Lordship of the Isles was the “focal point of Gaelic Scotland in the later Middle Ages.” Sellar, “Marriage, Divorce, and Concubinage,” Transactions, 477. See chapter five for more on this topic.
57 Ibid.
59 Elizabeth Seton, daughter to Alexander Seton of Gordon and Huntly, first wife to Alexander, Lord of the Isles and Earl of Ross.
her from cohabitation with him and from all places subject to his temporal lordship, and has adhered to a certain adulteress, and does not allow her to enter his lands and cohabit with him as his wife. At the petition of the said Elizabeth, who alleges that processes in virtue of these presents cannot be published to him on account of his power...the pope hereby orders the above three to summon the said John and others concerned, and if they find the foregoing to be true, after first monishing him, to compel him by ecclesiastical censure, even extending to interdict against his lands and the churches and persons thereof, ecclesiastical and secular, without appeal, to put away the said adulteress, receive Elizabeth his wife, and treat her with marital affection, invoking, if necessary, the aid of the secular arm...⁶⁰

Burke’s Peerage does not give a wife for John, but does state that he had two natural sons, John and Angus, who succeeded him. It is unclear what happened to John’s offspring by Elizabeth Levynston.

Hugh MacDonald of Sleat, son of Alexander, Lord of the Isles and Earl of Ross, went on to have his own questionable marriages. According to the Highland Papers, Hugh himself had six sons, by six different wives.

John, 2nd of Sleat, son of Hugh and Fynvola, “... the daughter of Mac Ceain of Ardnamurchan...,” was his eldest son.⁶¹ John died in 1502, and was succeeded by his half-brother, Donald Galloch, 3rd laird of Sleat. Donald Galloch was Hugh’s son by Elizabeth Gunn, daughter of Gun, Cruineir Ghall (or Crown of Caithness). The Highland Papers describe this union as follows: “Austine [Hugh] having halted at Caithness he got a son by the Crown of Caithness’ daughter.”⁶² Hugh’s other sons include Donald of

⁶⁰ PR, xi, 671-2.
Harris [Donald Harrich], by MacLeod of Harris' daughter; Angus Collach by MacLean of Coll's daughter; and Angus Dubh by the daughter of the vicar of South Uist. 63 As Sellar has noted, "...the mothers are of noble birth, but it is straining credulity too far to believe that Hugh was canonically married to each of them in turn." 64

Of the six sons of Hugh MacDonald of Sleat, Erskine Beveridge, in his book, North Uist, writes the following,

Within the brief period from 1506 to 1517 five out of the six sons of Hugh MacDonald of Sleat each met a violent death...These murders bear all the worse aspect as having in almost every case been perpetrated by near relatives of the victim. The cause seems not far to seek, since no doubt the system of 'handfast marriages' (coupled with a generally loose standard of morals) would contribute much to this state of matters... 65

In a footnote, Erskine points out that the duration of trial marriages seems to have varied. Citing The Clan Donald, Erskine states that the union might be for "twelve months and a day," with the birth of a child as a condition for continuation of the marriage. 66 As an example of the varying duration of such unions, Erskine, citing An Historical and Genealogical Account of the Clan Maclean, describes the case of John, 4th MacLean of Ardgour:

...it is recorded that John, fourth MacLean of Ardgour, took a daughter of Maclain of Ardnamurchan "upon the prospect of marriage if she pleased him; at the expiration of two years, (the period of her noviciate,) he

63 Ibid.
64 Sellar, "Marriage, Divorce, and Concubinage," Transactions, 481.
sent her home to her father; but his offspring by her were reputed lawful children."\textsuperscript{67}

Sellar agrees with Beveridge’s assertion that the custom of trial marriage could contribute to great violence within a family. He cites the case of Ranald Mor of Benbecula as an example. According to the ‘Black Book’ of Clanranald, Ranald Mor, son of Allan, took as his first wife Maria, daughter of Ranald (Tanist of South Oirear) MacDonald, son of James MacDonald of Dunnyveg and the Glens. She bore him a son, Angus Mor, and was then "put away" by Ranald Mor.\textsuperscript{68} Ranald Mor, after having put away his first wife, took Fionnsgoth Burke, "a lady of the Burkes of the Province of Connaught, in the County of Mayo."\textsuperscript{69} This lady bore three sons of the union, Alexander, Rory, and Farquhar. Ranald Mor put away Fionnsgoth and then married Margaret, widow of Norman Og Macleod of Harris.\textsuperscript{70} By Margaret, Ranald Mor had another son, named Allan Og, before she died. Ranald Mor’s fourth wife was Mary, daughter of Gillespie of MacDonald and sister of Sir Donald MacDonald of Sleat, by whom he had yet another son, named Donald Gorm. This wife, too, was put away. Finally, Ranald Mor married Margaret, daughter of Angus MacDonald of Dunnyveg and the Glens, son of James. Margaret gave Ranald Mor five sons, Ranald Og, John Og, Angus, Ranald, and Rory. These sons were

\textsuperscript{67} Ibid. Erskine cites, \textit{An Historical and Genealogical Account of the Clan Maclean}, by a Seneachie (London, 1838), 265.

\textsuperscript{68} The phrase ‘put away’ does not seem to be used to mean that the woman was sent to a monastery. Instead it appears that a woman who was ‘put away’ often remarried or went back home to live out the rest of her life with her family.

\textsuperscript{69} Cameron, “Clanranald,” \textit{Reliquae Celticae}, 173-5.

\textsuperscript{70} “MacLeod of MacLeod,” \textit{Burke’s Peerage} (February/March 2003), www.burkespeerage.com.
made heirs to Benbecula and Ardnish.\textsuperscript{71} Ranald Mor died at Canna in 1636.

To summarize, of the five wives of Ranald Mor, three were put away by him. Of these marriages, there is official confirmation and evidence to support the theory that this particular Celtic tradition survived in the Isles as late as 1633. According to Sellar, who cites the \textit{Highland Papers}, criminal letters were raised against Ranald Mor on October 5, 1633, by Archibald, Lord Lorne, Heritable Justiciar of Argyll and the Isles. In the letters, Ranald Mor was charged with murder and polygamy. The charges dealing with polygamy read as follows:

\begin{quote}
Item having shakkin aff all feare of god and obedience to His Majesties Lawes he in 1603 with out any Lawful divorcement putt away [ ] nyn Rannald Vcdonald his first mareit wyiff and mareit umquhile Margaret nccleoyd sister to umquihile sir Rorie Mccleoyd of Dounvegoune. Efter quhais deceis he mareit Marie Ncconnell sister to Sir Donald McDonald of Sleatt and keepit house with her Ten yeires an d thaireftir in ane most godless an d Lawles manner without any Decreet of Devorcement patt the said Marie away an d mareit Margaret NcConnell Sister to Angus McConnell of Dounnavaig with quhome he keipes present companie an d societie an d sua at this present hour he hes thrie mareit wyieffes alive.\textsuperscript{72}
\end{quote}

Why Ranald Mor chose to forego obtaining a decree of divorce for each of the three wives he put away is cause for speculation. Certainly, divorces were easier to obtain after the Reformation. His failure to obtain a lawful


\textsuperscript{72} Sellar, "Marriage, Divorce, and Concubinage," \textit{Transactions}, 486-7; \textit{Highland Papers} IV, ed. J.R.N. Macphail (Scottish Historical Society, 1934) 225-7. It appears that Ranald Mor married the same Margaret MacLeod who was blinded in one eye and repudiated by Donald Gorm Mor MacDonald in 1600.
decree of divorce is likely explained by the fact that the Outer Hebrides were still quite isolated. This fact, together with Celtic tradition, which apparently retained some strength in the Isles, may have been enough to make such a formality seem impractical and unnecessary to Ranald Mor. However, both the church law and the secular law of Scotland had clearly taken a strong hold, even in the Islands, as is evidenced by the complaint against Ranald Mor. Hence, perhaps there was nothing more at work here than supreme arrogance and a disregard for the law on the part of Ranald Mor.

The genealogies of the clans of the Highlands and Islands of Scotland are filled with unions like the ones attributed to Ranald Mor and the MacDonalds. Indeed, the great majority of the clans have recorded similar unions in their histories.73 However, general reports of the custom can be found in many sources, as well.

The majority of sources that give a general accounting of the custom of trial marriages were written between the sixteenth and eighteenth centuries. The actions taken by the post-Reformation church of the late-sixteenth and early seventeenth centuries provide the researcher with strong evidence to support the existence of the custom of trial marriage.

*The Old Statistical Account of Scotland,* an eighteenth-century survey of parochial ministers, says, “In later times, when this part of the country belonged to the Abbacy of Melrose, a priest, to whom they gave the name of

73 For example, Bartholomew claims that John Mac Mhic Ewin, 4th laird of Ardgour “handfasted” a daughter of MacIan of Ardnamurchan and sent her home after two years. *Burke’s Peerage* does not report a wife for John, but given that the 4th laird of Ardgour was succeeded by his nephew, there is reason to speculate that if he did indeed repudiate his wife perhaps he did soon account of infertility. (*Statutes, 10*). *Burke’s Peerage* reports that John MacLean, styled Iain Og, 5th laird of Lochbuie, had a “handfast arrangement” with his first wife by whom he had two natural sons, Murdoch and Charles, who were legitimated on 13 September, 1538. (“MacLean of Ardgour,” *Burke’s Peerage*).
Book i’ Bosum (because he carried a register of marriages at his breast), came over from time to time to confirm the marriages.”

This account suggests that those who lived in the remoter regions of Scotland, such as the Highlands and Islands, regularly contracted uncanonical marriages that were later solemnized in the face of the church. This source specifically uses the term ‘handfasting’, and speculates on the possible origins of the custom, which will be addressed later in this section.

The Kirk Session records for Aberdeen address the issue of trial marriages in two decrees made on the same day:

(December 10, 1562) Item, Becaus syndrie and many within this toun ar handfast, as thai call it, and maid promei of mariag a lang space bygane, sum sevin yeir, sum sex yeir, sum langer, sum schorter, and as yit vill nocht mary and compleit that honorable band, nother for fear of God nor luff of thair party, bot lyis and continewis in manifest fornicatioun and huirdom: Heirfoir, it is statut and ordanit, that all sic personis as hes promei mariag faythfully to compleit the samen betuix this and Festeranis Evin nixt cummis, vnder the pane of [blank].

Item, That in tymis cuming, for eschewing of sic fornicatiouns, na personis that promeisse mariag sall hawe carnall copulatioun togidder vntill the tyme thai compleit the band, and that cautiou be found that thai compleit the same within [blank] efter the promeis making, and thair bannis to be proclamit wpone the Sonday, and na vderwais; and quha that makis promeis of mariag, lat it be befoir the minister or the clerk...
The Kirk Session evidently perceived that trial marriages were still being practiced six years later. On April 12, 1568, the Kirk Session ordained first, that no minister or reader was to be present "at contractis off marriage-making, as thai call thair handfastinis, nor mak na sic band, vnder the pane of [blank]..." In the item immediately following this decree, the Kirk Session again ordered that those persons who were contracted in marriage were not to have carnal copulation together before the solemnization of the marriage.

The Kirk Session records of Aberdeen provide evidence of the custom, by virtue of the efforts that the church elders made to end it. The post-Reformation church of Aberdeen was not alone in its efforts to end this peculiar custom, however. The Scottish government also took notice of the custom in the Statutes of Iona.

The Island chiefs gathered on the hill of Dun I in Iona on August 23, 1609, to sign the Statutes of Iona, by which Bishop Andrew Knox, who had been appointed Steward of the Isles by King James VI, extended the Roy authority to the Islands. Contained within the Register of the Privy Council of Scotland, 1610-1613, the Statutes of Iona were the Scottish government's attempt to end the virtual sovereignty of the western islands of Scotland. Largely by compulsion, the clan chiefs gathered at Iona to sign their oaths to obey the statutes, which were to have the strength of an Act of Parliament. One among the statutes shows very clearly that a custom of

76 Ibid, 16.
77 "MacLeod of MacLeod," Burke's Peerage (May 2003), www.burkespeerage.com. Also known as the Statutes of Icolmkill.
78 The following day (August 24, 1609), the chiefs of the Islands also signed the Bond of Obedience. The Bond of Obedience required the chiefs to promise that they would continue "profession of religion as embraced by his Majesty and the three estates of the realm, loyalty and obedience to the King, observance of laws, Acts of Parliament, and constitutions of the kingdom, and concurrence in enforcing such laws or ordinances," according to Bartholomew (Statutes, 9).
trial marriage did exist by virtue of the Scottish government's reaction to it. The statute specifically abolished marriages that were "...contractit for certane yeiris simpliciter dischairgit and the committaris theirof haddin, reput and punt as fornicatouris..."79 When considered together with the large body of evidence for trial marriage that is found in the genealogies of the Clans there seems to be little doubt that this statute refers directly to the custom of trial marriage as it has been discussed here. It is significant that there are very few cases of trial marriage recorded after this date. However, rumors that assign the practice of this custom to days of old did not die out and general reports of it continue to be found in seventeenth- and eighteenth-century works.

The seventeenth-century travel journal, *A Description of the Western Islands of Scotland*, written by Martin Martin, is one such work. Martin, a native of the Isle of Skye, describes the custom of trial marriages as follows: "It was the ancient custom in the Islands that a man should take a maid to his wife, and keep her the space of a year without marrying her; and if she pleased him all the while, he married her at the end of the year and legitimized the children."80

Eighteenth-century sources that describe a handfasting custom of years past include, *A Tour in Scotland and Voyage to the Hebrides, 1772*, by Thomas Pennant. 81 Pennant is the first author to mention a connection between trial marriages and the annual Lammas festival in the upland border regions of western Scotland. Trial marriages were obsolete by the

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80 Martin, *Description of the Islands*, 114.
time Pennant made his tour, but he states that it was reported to have been in use in the prior century and indeed, evidence to support this fact has been presented in this chapter.

According to Pennant, trial marriages took place in Eskdale, which was in the upland border regions of southwestern Scotland. Unmarried men and women met each year at the Lammas Festival, at which time they selected a partner with whom they "handfasted" themselves until the next Lammas festival, a year and a day later. At that time, the couples could either have their union solemnized before a priest or go their separate ways, free to contract another handfast marriage. 82

Like Pennant, *The Old Statistical Account of Scotland*, assigns the annual Lammas Festival as the *loci* for trial marriages. This source suggests that the Lammas Festival may have been brought to Scotland by the Romans, since there was at one time a Roman camp at Castle O'er. It further speculates that handfast marriages may have evolved from the Roman marriage *usu*. 83 Alexander Anton believes that this was unlikely however, contending that the Romans no longer practiced this form of marriage by the time they came to Scotland. 84 If Roman law did indeed influence marriage customs in Scotland, it was more likely to have come to Scotland indirectly through Irish law. The Roman practice of *usus* will be discussed in more detail in chapter four.

Pennant speculates that the custom existed due to the paucity of Catholic priests in the Highlands. 85 This was a valid supposition, but probably only partially true. The Church and its responses to Scottish

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82 Ibid, 80-1.
83 *Old Statistical Account*, xii, 615.
85 Ibid.
marriage customs do provide further evidence in support of this custom, however. Although ecclesiastical records do not reveal as much about Celtic secular marriage customs as one might wish, they do provide a wealth of contemporary information on late medieval Scottish supplications for dispensations from the prohibited degrees. As Sellar noted, "...it was not difficult to present relationships resulting from Celtic secular marriage in Canon law guise, and...it was often politic to do so." As feudal law increasingly clashed with Celtic law, the official legitimation of heirs may have been considered desirable, and even necessary, to many Scots.

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86 Sellar, "Marriage, Divorce and Concubinage," Transactions, 478.
CHAPTER THREE: THE CHURCH

The relationship between medieval Scots law and the Roman Canon law was quite complicated—particularly with regard to marriage laws. There has long been disagreement among legal historians over the history, changes, and modifications of the law on marriage. Although a thorough treatment of the legal history of marriage is beyond the scope of this thesis, a brief summary of the broader themes of this subject is applicable.

The Canon law of marriage appears to have been adjusted by some individuals to suit their particular needs and possibly even to disguise Celtic marriage practices in medieval Scotland. According to Sellar, "...although Celtic secular marriage and marriage under the Canon law were poles apart in legal theory, the contrast in practice, at least regards divorce...was not as great as might have been expected."\textsuperscript{87} Sellar is referring to the increasing ease with which annulments were obtained in the later Middle Ages, especially on the grounds of consanguinity and affinity.\textsuperscript{88} There were many requests for dispensation to marry, despite such impediments, as well, but the requests often were not made until after the couple had cohabited and the union had been consummated and delivered of offspring. Indeed, even the most casual perusal of the \textit{Scottish Supplications to Rome}, reveals a large number of requests for dispensation that were made in this manner.\textsuperscript{89} Of these practices Sellar writes, "Increasingly they found it politic to present their divorces as annulments under the Canon law, and to seek for their

\textsuperscript{87} Sellar, "Marriage, Divorce and Concubinage," \textit{Transactions}, 473.
\textsuperscript{88} Ibid.
\textsuperscript{89} CSS, ii, iii, iv.
marriages, if all went well, the blessing of a dispensation from the prohibited degrees."\(^90\)

It is the large number of such dispensations that begin to intrigue the researcher. The thirteenth-century Canon law forbidding marriages within the fourth degree of consanguinity and affinity seems very straightforward when read today. However, the ecclesiastical records for the fifteenth century show that the law was flexible and not at all straightforward. Medieval Scots were able to present their marriages in ways that allowed them to obtain papal sanction for uncanonical unions and legitimation for the offspring who were born of these unions. To fully understand this tendency to maneuver the Canon law to suit uncanonical unions, however, one must first understand medieval Scottish attitudes toward the Church.

Patrick Fraser, in his well-researched study, *A Treatise on Husband and Wife according to the Law of Scotland*, gathers together the opinions of the leading canonists and legal historians from the Middle Ages to the nineteenth century, giving a thorough treatment to the history of the law of marriage in Scotland.\(^91\) According to Fraser, "The Roman Canon law is not the Consistorial law of Scotland."\(^92\) Citing Lord Stair,\(^93\) Fraser writes, "...in treating of the Civil, Canon, and Feudal laws...none of them have the authority of actual law with us; and therefore are only received according to their equity and expediency."\(^94\) Pointing to a specific statute in the acts of

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\(^93\) Ibid, 27; Fraser cites, James Dalrymple Stair, Viscount Stair, *The Institutions of the Law of Scotland* (Edinburgh: Printed by the heir of Andrew Anderson, Printers to Their Most Excellent Majesties, 1693?), i, 1, 16.

\(^94\) Ibid, 28.
the Scottish legislature to support this view, Fraser states:

This act was passed, during the times when the Roman Catholic priesthood had full authority in Scotland, and 130 years before the Reformation. It declares that 'it is ordained by the King, by the consent and deliverance of the three Estates, that all and sundry the king's lieges of the realm, live and be governed under the king's laws and statutes of the realm allenarly; and under no particular laws nor special privilege, nor by no laws of other countries or realms. '"

Fraser clarifies the statute as it regards Canon law, saying, "...the Canons...have authority to the extent only to which they have been expressly allowed by statute or custom." Sellar cites a similar statute enacted by the Scottish Parliament in 1504:

Item that all our soverane lordis liegis beand under his obesance and in speciale all the Ilis be Reulit be our soverane lordis aune lawis and the commoune lawis of the Realme and be nain other lawis.

That this was the attitude of the Scottish government should not be surprising. Given William the Lion's defiance of the Vatican as an example, Fraser states, "There can be no doubt of this, that although Scotland was a Catholic country, yet the government, at all times, displayed a jealousy and aversion of Romish domination...." Indeed,

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95 Ibid, 29. Fraser gives the date of this Act as 1425 A.D. According to the The Concise Scots Dictionary, the term 'allenarly' is defined as follows: "only, without exception."
96 Ibid, 30.
many kings of Scotland disobeyed the Church of Rome, thereby setting an example that was followed, in 1222, by a resolution of the King and Estates to deny access to any papal legates to Scotland.98

If the Roman Canon law had no authority in medieval Scotland, the question that begs to be answered then, is what was the Scottish Canon law on marriage and divorce and how was it decided? According to Fraser, the most extraordinary result of the resolution to deny access to any papal legate was the receipt of a papal bull granting liberty “to the Scotch Church to hold provincial councils.”99 Accordingly, the provincial councils met and decided Scottish Canon law, which was then expressly approved by Parliament, recognized by the Popes, and enforced by the courts as the law of Scotland.100 However, Sellar points out in his essay, “Marriage by Cohabitation With Habit and Repute: Review and Requiem?,” Comparative and Historical Essays in Scots Law, that the medieval Scottish Parliament “did not and could not make any alteration to the law of marriage. Questions involving the status of marriage lay outwith the jurisdiction of Parliament and the king’s courts.”101 With regard to the function of the provincial councils, Fraser cites a “learned judge,” who said,

...these provincial councils contain the whole body of the Scotch Canon law...no part of the general Canon

98 Fraser, A Treatise on Husband and Wife, 32. Fraser cites Hector Boece 1. xiii. Fol. 282b.; David Dalrymple of Hailes, “Historical Memorials Concerning the Provincial Councils of the Scottish Clergy: from the earliest accounts to the aera of the Reformation,” Annals of Scotland: from the accession of Malcolm III to the accession of the House of Stewart, to which are added, several valuable tracts relative to the history and antiquities of Scotland (Edinburgh: Printed for William Creech, 1797) iii, 235.
99 Fraser, A Treatise on Husband and Wife, 33.
100 Ibid.
law could be called part of our law, till such time as it was made part of the decrees or acts of that particular system of Canon law. 102

Fraser’s source adds that for the Canons to have any authority in Scotland, the approval of the provincial council was necessary.103

Several statutes on the constitution of marriage and impediments to marriage have been preserved from the provincial councils held at Perth in the thirteenth century. Fraser cites these statutes to support his assertion that the provincial councils decided the Canon law of Scotland. Sellar agrees with Fraser on this point, noting that the law of marriage “fell within the province of the ecclesiastical courts, which looked to the Canon law and to Rome.”104

Scotland was not unique in adopting its own Canon laws. Fraser states that the Council of Trent recognized that there existed in different countries, laws and customs that were peculiar to that country. Although the papal courts provided the last court of appeal from the ecclesiastical courts, their decisions had to be based on the particular laws and customs of the country of origin. This was only true however, if the country in question was not subject to the Pope’s temporal power, whereas, if a country was under the temporal sovereignty of Rome, the Pope could decide the case according to his own laws and ideals. Because Scotland was not subject to the temporal power of the Pope, the provincial councils could and

102 Ibid, 35-6. Fraser cites Lord Robertson in, Robert Bell, Report of a case of legitimacy, under a putative marriage, tried before the second division of the Court of Session in February 1811 (Edinburgh: Bell and Bradfute, 1825), 178. Hereafter, the phrase ‘Roman Canon law’ will be used to denote the Canon law out of Rome, and ‘Scottish Canon law’ will be used to denote the Canon law made and/or adopted in Scotland.
103 Ibid.
did enact laws and customs that were not necessarily in line with Roman
Canon law.105

One example of this can be found within the Scottish laws of
relationship. Scotland followed the Roman Canon law in assigning
impediments to marriage based on consanguinity and affinity.106 However,
the method for calculating the degrees of relationship in the collateral line
was different and, oddly enough, stricter under Scottish Canon law. The
collateral line consisted of those persons who descended from the same
common root, but were not descendants or ascendants of one another, such
as brothers, uncles, and cousins. Calculated under Roman Canon law,
cousins-german were related to each other in the fourth degree, while under
Scottish Canon law, they were related to each other in the second degree.107
Since marriage was not allowed within four degrees of consanguinity, or
affinity, first cousins could not marry under the Scottish Canon law. If first
cousins were related in the second degree, then their children and
grandchildren would also be prohibited from marrying each other, since
they would be related in the third and fourth degrees respectively.

The impediment of affinity extended the prohibitions to marriage
further yet. Affinity was constituted by marriage, a party standing sponsor
at a baptism, and by illegitimate carnal connection with the relation of a
person. A marriage between people related in any of these ways was

105 Fraser, A Treatise on Husband and Wife, 62-4.
106 As with Roman Canon law, Scottish Canon law recognized prohibitions within the
seventh degree of consanguinity until the thirteenth century, when the degrees were
reduced to four by the Fourth Lateran Council (1215). The new rule was adopted under
Scottish Canon law at the Provincial Councils of Perth approximately ten years later, and
held forth in Scotland until the Reformation, when the Reformers removed all of the
impediments except those of the first degree, as long as this did not conflict with God's law.
107 Fraser, A Treatise on Husband and Wife, 62-4.
incestuous and the children were considered illegitimate under Scottish Canon law.

These extensive prohibitions operated in a kin-based society like Scotland, "in such a manner as to generate a profligacy without parallel in Scottish history."\textsuperscript{108} Calculating degree of relationship became so complicated that no one knew if they were married. After living together for years and having several children, a couple might discover that they were related in the second degree of affinity and the marriage would be annulled. As a result, suits of nullity became commonplace. The following Dispensatio Matrimonialis contained within the Scottish Supplications to Rome, is an example of nullity after years of marriage:

9 July, 1433...John de Dunnovyn, layman, and Eufemia Stewart, matron, d. Ross, desire to be married but are unable to do so without apostolic authority, since they are related in the double third degree, and since John committed fornication with Eufemia (who is believed formerly to have contracted marriage legitimately with one John McCulach) and had offspring by her. But after several years the marriage was dissolved by John bishop of Ross, then ordinary, and pronounced never to have been valid. John and Eufemia therefore supplicate the Pope to dispense them—nws above impediments—to contract and remain in matrimony, declaring legitimate their existing and future offspring. \textit{Concessum.}\textsuperscript{109}

It is not clear how the original marriage between John and Eufemia was constituted. They clearly thought that they were legitimately married, but this particular dispensation does not indicate whether the marriage was made in \textit{facie ecclesiae, per verba de presenti, or per verba de futuro cum}

\textsuperscript{108} Ibid, 67.
\textsuperscript{109} Archivio vaticano, \textit{Scottish Supplications}, iii, 13.
Whatever the original constitution of the marriage, it clearly was considered an uncanonical union by the Scottish Canon law. Dispensation was required to remove the stain of incest brought about by their being related in the double third degree.

In Scotland, as in the rest of the Christian world, the Pope (or one of his delegates) had the power to grant dispensations from the impediments to marriage. This removal of impediments was justified by the theory that hardship arises when one general rule is applied to all men under all circumstances. Thus, it was decided that the law should be relaxed in certain cases. That the prohibitions were relaxed, there remains ample evidence.

The Papal Registers and the Scottish Supplications to Rome provide many examples of dispensations to remove impediments. It is likely that most of the couples involved knew of their relationship before they married or cohabited. The overwhelming majority of requests for dispensation were made by couples who married or fornicated not in ignorance of their relationship. The following example is typical of the petitions for dispensation that can be found in the Scottish Supplications:

undated...William de Lesly, layman, d. Ross, and Egidia de Hay, matron, d. Aberd., not ignorant that they were related in the third and fourth degree of consanguinity and the third and fourth of affinity, contracted matrimony per verba de futura and consummated the same...they therefore supplicate the Pope to absolve them from excommunication and the sin of incest and excess and to dispense them to

in facie ecclesiae = in the face of the church; per verba de presenti = through words of the present; per verba de futuro cum copula = through words of the future with copulation.

10 Archivio vaticano, Scottish Supplications, 78; Fraser, A Treatise on Husband and Wife, 78. According to Fraser, the Pope assumed the right to dispense with impediments in the twelfth century.

11 Archivio vaticano, Scottish Supplications, ii-iv.
remain in matrimony, declaring their offspring, if any, to be legitimate. *Concessum.*\(^{113}\)

There were cases in which dispensation was received, but then denied by one or both of the parties involved, for the purpose of obtaining a divorce. Such was the case in 1441 when, according to a letter from Eugenius IV to the Bishop of Moray, Alexander de Seton petitioned to have his marriage with Egidia de Hay annulled on the grounds of their being related to each other in the fourth degree of consanguinity. According to this letter, cited by Sir Bruce Seton, in his article, "The Distaff Side: a Study in Matrimonial Adventure in the Fifteenth and Sixteenth Centuries," Alexander de Seton,

...having obtained a dispensation from the Apostolic See, at the same time contracted Holy matrimony by the lawful words and consummated it by holy wedlock through the procreation of offspring, the aforesaid Alexander, asserting the marriage contracted after this fashion between himself and Egidia to be null and void on account of the impediment...[of] consanguinity and by reason of a defect in the dispensation of the said Holy See, which dispensation he denied having obtained and concealed with malicious intent in his own house, sought that his marriage with the said Egidia should be declared null and void and that he should be divorced from the said Egidia....\(^{114}\)

Alexander de Seton ultimately got his divorce from Egidia de Hay and was allowed to contract marriage anew with Elizabeth Crychton, because Egidia had since died and Elizabeth had married him in alleged ignorance of his first marriage. In cases where one spouse married the other *in bona fide*

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\(^{113}\) *Ibid,* iii, 172.

\(^{114}\) Sir Bruce Seton, "The Distaff Side: a Study in Matrimonial Adventure in the Fifteenth and Sixteenth Centuries," *Scottish Historical Review,* 17 (1920), 277-8.
and ignorant of the first marriage, the Church held that the subsequent marriage was necessarily void, but the offspring were legitimate.\textsuperscript{115}

Also typical, were requests for dispensation where fornication had taken place between kindred, offspring had subsequently been born, and there was no mention of a prior marriage or betrothal. These petitions are of particular interest with regard to the subject of trial marriage because they may very well have been an attempt to wrap a Celtic secular marriage in Canon law guise. The following case is a good example of this type of petition found within the \textit{Scottish Supplications}:

4 February 1438...Torquel Roderici Macleoid and Mariota Johannis Macgilleoni, who, not ignorant that they were related in the third and fourth degrees of consanguinity, committed fornication and had offspring, supplicate for absolution from incest, for dispensation to marry and for a declaration that their offspring may be legitimate. \textsuperscript{116}

There was probably little difficulty involved (excepting of course, the expense and danger involved in sending to Rome) in getting a dispensation to solemnize a trial marriage or to legitimate the offspring of a trial marriage, particularly if it was presented as above. The difficulty would come when there was a provable previous marriage, whether a trial marriage or a canonical marriage, because the Scottish Canon law was rigid on this issue. Scottish Canon law closely followed the Roman Canon law on the subject of previous marriage. In Chapter II, many examples were given of men “putting away” or repudiating their wives. Under Scottish Canon law, a

\textsuperscript{115} Ibid; Fraser, \textit{A Treatise on Husband and Wife}, 81
\textsuperscript{116} Ibid, 107.
subsequent marriage was not considered to be valid as long as the first wife still lived and there was no decree of divorce. This was the case under every circumstance, including where there was impotency or barrenness.\textsuperscript{117} Even where one spouse deserted the other, the remaining spouse was not free to marry again without first obtaining a divorce on the grounds of desertion. This was not easily done, however, and generally the deserted spouse had to prove that there was good reason to believe that the spouse who had left was no longer living. Clearly then, desertion of a spouse would not clear the way for marrying again.

Fraser writes at some length on what constituted marriage, as do Scanlan and Sellar. On this issue, they all agree on the rules in practice in the Middle Ages. According to Scanlan, by the fifteenth century, medieval marriages were clearly regulated by the Church and by Canon law. Scanlan states, “One first principle dominates the Canon Law of Marriage, namely, that the marriage of Christians is a sacrament.”\textsuperscript{118} From this, writes Scanlan, the canonists concluded that there were two juridical consequences: first, the absolute indissolubility of consummated marriage, and second, the exclusive jurisdiction of the Church in causes relating to the bond thereof.\textsuperscript{119} Scanlan explains that the Sacrament of marriage is indissoluble because “it represents the union of Christ with his Church.”\textsuperscript{120} Until the end of the twelfth century marriage was not considered to be sacramental until it had been consummated. However, by the beginning of the thirteenth century, a marriage was considered sacramental even before consummation.

\textsuperscript{117} Ibid, 79-82.
\textsuperscript{118} Scanlan, “Husband and Wife,” \textit{Scottish Legal History}, 70.
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid.
Consummation, or *copula carnalis*, writes Scanlan, was the centerpiece around which most of the early Canon law regarding marriage was built. Questions of constitution and dissolution, annulment on the grounds of impotence, consanguinity, and affinity, and the rights and duties of spouses ultimately depended upon *copula carnalis*. According to Sellar, the Canon law at first looked for some evidence of consummation, when making a determination on whether a marriage had been constituted. But, by the later Middle Ages, the position was eventually adopted that consent alone was sufficient to constitute a valid marriage.  

A regular marriage, prior to the thirteenth century, was constituted by mutual consent and consummation. The Church preferred that the vows were made publicly and that they be blessed by a priest, but this was by no means required for a marriage to be considered valid.  

From 1215 on, after it had become the law of the Universal Church in the legislation of the Fourth Lateran Council of 1215, it was required that banns be read by the local priest, as well. Though this was required to constitute regular marriage, once again, it was not required to make a valid marriage. A marriage might be clandestine or irregular, but still considered valid.  

Consent would normally be expressed by *per verba de praesenti*. According to Sellar, "the exchange of such words was in itself sufficient to constitute a valid marriage, even although the formalities which the Church required for regular marriage had not been complied with." But, consent did not have to be expressed in words; tacit consent was also considered to be enough, in some circumstances, to infer marriage. According to William Hay, author of *William Hay's Lectures on Marriage*, the Decretals of Gregory

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121 Sellar, "Marriage by Cohabitation," *Essays in Scots Law*, 120.
122 Scanlan, "Husband and Wife," *Scottish Legal History*, 70.
IX, in which it was noted that deaf mutes could lawfully contract marriage, were the origin for this rule. Moreover, according to Hay, consent was not restricted to words even among those able to speak—consent could be given in writing or by signs. According to Hay,

A timid maiden’s silence is sometimes considered sufficient for marriage, without any sign at all, if she quietly allows all the usual formalities of a wedding to take place in her regard, without making any protest, for she is presumed to consent, and her silence is taken as a sufficient sign.

Sponsalia per verba de futuro cum copula, that is, copulation following a promise to marry, also constituted a valid, although irregular marriage. A valid marriage was formed based on the theory that copulation inferred a present consent to marry. In the case of sponsalia alone, however, whether de futuro or de praesenti, the rules were not so clear cut.

In the Middle Ages, the ability of sponsalia to be dissolved came to be in some doubt. According to Fraser, Canonists differed on whether sponsalia constituted marriage. Some maintained that it did, while others maintained that it was nothing but a “promise to enter into a contract, was not the contract itself, and that none of the effects of marriage could flow from sponsalia.” The resolution to the debate in Scotland was a differentiation between sponsalia de praesenti, and sponsalia de futuro, which Fraser asserts was maintained in no country other than Scotland. The distinction was considered to be absurd by many Scottish Canonists,

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125 Ibid, 179.
126 Fraser, A Treatise on Husband and Wife, 102.
127 Ibid.
128 Ibid.
since by their reckoning, the term sponsalia could only mean promise, regardless of whether it was followed by de praesenti or de futuro.¹²⁹ Nonetheless, sponsalia de praesenti was at length determined to be, at minimum, an indissoluble precontract to marriage, while sponsalia de futuro was determined to be a promise of marriage in the future.¹³⁰ Although Sponsalia de praesenti was considered by some canonists to constitute very marriage, the majority interpreted it to be an indissoluble precontract to marriage with the Church claiming the right to compel completion of the precontract. It is from this definition of sponsalia de praesenti that the betrothal came to be considered as good as a marriage. If sponsalia per verba de praesenti was exchanged between a couple, the marriage was bound to be completed and the Church had the handle to compel completion, if necessary.

Sponsalia de futuro, on the other hand, was considered to be merely a promise of future marriage and not indissoluble.¹³¹ According to Fraser, the issue was never really settled, for “the different modes in which the terms sponsalia de praesenti and de futuro, are interpreted, and are said to have been employed during the Middle Ages, shake all confidence whatever in any interpretation.”¹³² Thus, the issue of a promise of marriage remained a matter for interpretation, leaving the medieval Scot with yet another issue that confused the already complicated law of marriage. Sponsalia de futuro cum copula was a different matter, however. Promises of the future followed by copulation constituted an indissoluble precontract that the Church could compel the parties to complete.

¹²⁹ Ibid, 103.
¹³⁰ Ibid, 103-5.
¹³¹ Ibid, 159.
¹³² Ibid, 105.
According to Fraser, a promise of marriage followed by copulation did not constitute very marriage prior to the Reformation. Instead, as indicated above, *sponsalia de futuro cum copula* “constituted such an indissoluble precontract that it inferred an obligation to solemnize marriage, and barred either of the parties from entering into a new precontract, or from contracting marriage *in facie ecclesiae* with any third person.”\(^{133}\) This did not prove that a promise *cum copula* constituted marriage, however. In such a union, according to Fraser, the children were not legitimate and the woman was not entitled to *jus relictae* or *terce*, unless the union was solemnized or ordained by the decree of an ecclesiastical court, as in a complete marriage.\(^{134}\) This law becomes clear when the case of Archibald Douglas, Earl of Angus, and Margaret Tudor is considered. Margaret, widow of James IV, having married Angus subsequently decided that the marriage did not suit her. She proceeded to petition for divorce or annulment based on the fact “that Angus had been affianced, betrothed, or handfasted to that gentlewoman who bore the child to him before he had married her, and so, by reason of that precontract, could not be her lawful husband.”\(^{135}\) Margaret was granted a divorce based on the fact that Angus had contracted *sponsalia* with the daughter of Tracquair, which he then consummated. The offspring of the precontract was held to be illegitimate, while the offspring of the subsequent marriage was considered legitimate, since Margaret had contracted the marriage in good faith and ignorant of the precontract.\(^{136}\)

\(^{133}\) Ibid, 165. Fraser cites the *Decretalia Gregorii* here.
\(^{134}\) Ibid, 165-6.
\(^{135}\) Ibid, 174-5. Fraser cites Hume of Godscroft, *History of the House of Douglas and Angus*, p. 249, folio. Notice again the distinction that was made between affianced, betrothed and handfasted, indicating that they were three different types of relationships.
\(^{136}\) Ibid, 177. The offspring were Jean Douglas and Lady Margaret Douglas, respectively.
According to Fraser, *sponsalia de praesenti* or *de futuro cum copula* were never termed clandestine marriage, because they were not considered to be marriages. Rather, they were considered merely as *sponsalia*, or promises of marriage, that required solemnization by the Church. Once solemnized, the union would be considered an irregular marriage, as opposed to a clandestine one. A marriage was considered clandestine when either the banns had not been proclaimed or the ceremony did not take place in a church, and a priest was present.\(^\text{137}\) Such marriages were not considered null, merely were they prohibited. The only penalty for celebrating a clandestine marriage was given to the priest who presided over it and as a result was subject to canonical punishment. The object of the proclamation of banns was to prevent marriages that were not tolerated under the Canon law and to allow the kindred to object to the marriage, in the event there were grounds.\(^\text{138}\) According to Fraser, the proclamation of banns was first sanctioned in Scotland by the canons of the Provincial Councils of Perth in the thirteenth century.\(^\text{139}\) Because the proclamation of banns was not entered into Canon law, either Roman or Scottish, until after the Fourth Lateran Council in 1215, it follows that no such formality was required in the early Middle Ages. Nor was it required to be married in the face of the church or to have the marriage blessed by a priest.

In a marriage by cohabitation and habit and repute, banns were not read. Neither was a marriage publicly celebrated, nor a precontract made. Marriage by cohabitation and habit and repute was constituted when a man and a woman lived together and entertained others as a married couple, with subsequent copulation. In other words, couples who lived together and

\(^\text{137}\) Ibid, 108. Fraser cites the Canons of the Synod of Sodor in 1291 for this rule.

\(^\text{138}\) Ibid, 113-4.

\(^\text{139}\) Ibid, 113.
were reputed to be married, were considered under Scottish Canon law to be married.  

The origin of this law is unclear and can not be established definitively as the law of Scotland until the act of 1503, which said, “widows who were holden and reputed wives of the defunct, should have their terce...until it be clearly discerned that they were not lawful wives.”

Sellar treats at some length on this topic in his essay, “Marriage by Cohabitation and Habit and Repute,” cited previously. According to Sellar, evidence of cohabitation with the necessary repute might be enough to infer that matrimonial consent had been exchanged, but “the evidence lay in possession of the state of marriage.” The elements of nominatio, tractatus, and fama were relevant to this proof. Nominatio alone was the most minor of the three elements. According to Sellar, “Canonists recognized that assumption of the name of husband and wife could arise from all sorts of ulterior motives.” However, the presence of both of the other elements, cohabitation over a period of time (tractatus), and public repute (fama), raised a presumption of marriage. Sellar states that the Church initially hesitated over this doctrine, since it had spent a great deal of time and energy in combating concubinage and did not want to appear to be admitting it “through the back door.” However, since it was merely a method of proof and did not actually constitute marriage, it was generally accepted by the fourteenth century.

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143 Ibid.
144 Ibid.
145 Ibid.
Consent remained the all-important element to the constitution of marriage. Sellar, citing Stair, explains how the doctrine of consent was applied to marriage by cohabitation with habit and repute:

...the matter itself consists not in the promise, but in the present consent, whereby they accept each other as husband and wife: whether that be by words expressly; or tacitly by marital cohabition [sic], or by natural commixtion, where there hath been a promise of espousals preceding, for therein is presumed a conjugal consent *de praesenti*.\(^{146}\)

Therefore, tacit consent was inferred when a couple lived together and had marital affection toward one another.

The length of time that a couple must live together was never defined in the law of Scotland. However, Fraser states that many of the commentators on the Civil and Canon law fixed the required period of cohabitation at ten years.\(^{147}\) Fraser asserts that all the authorities in Scotland “sanctioned the doctrine that the intercourse must continue for a reasonable time, necessary to test the conduct and intentions of parties, and to afford rational grounds for building up habit and repute.”\(^{148}\) In other words, there had to have been ample time for friends, relatives, and neighbors of the couple to have ascertained that the relationship was that of husband and wife, rather than that of a man and his mistress.

A couple who was reputed to have had a marriage solemnized at some unknown time in the past or who was believed to have cohabited with the intention of constituting a marriage, would meet the requirement of habit and repute. However, if the issue of prior marriage was in doubt or if the

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\(^{146}\) Ibid, 123. Sellar does not provide the source for his citation of Stair.

\(^{147}\) Fraser, *A Treatise on Husband and Wife*, 204.

\(^{148}\) Ibid.
connection was considered to be of an illicit nature, the condition of habit and repute would not have been fulfilled and a marriage would not have been constituted.

The constitution of marriage under the Canon law of Scotland or Rome was a rather complicated issue. Even so, it is easy to see loopholes by which trial marriages could have existed. In a kin-based society like Scotland, the chances of finding a canonical impediment to marriage were very good. Indeed, John Dowden, the nineteenth-century author of *The Medieval Church of Scotland*, states that the problem of finding a spouse who was not within the forbidden degrees of consanguinity was sometimes mentioned in petitions for a dispensation to marry. Citing Theiner’s *Monumenta*, Dowden states that in 1353, Sir David Graham and Helen requested a papal dispensation to marry for reasons of consanguinity. The couple complained that the small number of persons of rank in their area and the large families of blood relations made it extremely difficult to find someone whom they could legally wed.149

The difficulty and expense involved in obtaining the required papal dispensation to marry complicated the problem further. In 1556, Mary of Guise addressed a letter to Pope Paul IV on this very issue. According to Dowden, who cites the *Liber Officialis St. Andree*, Mary wrote, “every day many illicit marriages are contracted between cousins and in the forbidden degrees, while partly on account of the great distance and the perils of the journey, and partly on account of poverty, they are unable to resort to the Most Holy See to seek the benefit of dispensation.”150 As a solution to this problem, Mary and her advisers requested that the Archbishop of St.

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149 John Dowden, *The Medieval Church of Scotland* (Glasgow: James Maclehose and Sons, 1910), 269-71.
150 Ibid, 270.
Andrews be granted the authority to dispense with the impediments of the spiritual relationship and the impediments of consanguinity up to and including the third degree. According to Dowden, this authority was apparently granted for a set number of years, usually five, and the number of dispensations granted could not exceed a pre-set number of couples. This type of mandate was not new to the sixteenth century. The *Papal Registers* contain several instances when authority was granted to dispense with impediments, such as the following:

12 Kal. April, 1456. To the bishop of Sodor. Faculty for him or (seu) to dispense twenty-four men and as many women of his city and diocese and also in the lands and dominions subject to John de Yle, earl of Ross, who are related in the third or fourth degrees of kindred or affinity, or both such degrees, to contract marriage; to dispense those who, in ignorance of such impediments, have contracted marriage per verba de presenti, to remain therein; and to dispense those who, not in ignorance of such impediment, have similarly contracted marriage, after absolving them from excommunication...and after temporary separation, to recontract marriage and remain therein...decreeing or proclaiming legitimate the offspring born and to be born of such marriages.\(^{151}\)

The number of dispensations allowed to the bishops of Scotland usually fell far short of the country’s needs, as was revealed in the *Register of St. Andrews Kirk Sessions*. In 1541, Rome granted authority to the Archbishop for a period of five years, in which time he could dispense up to forty-five couples. According to the *Register of St. Andrews Kirk Sessions*, thirty-nine

\(^{151}\) *PR*, xi, 54-5.
of the forty-five dispensations allowed to the Archbishop had been dispensed after a single year.\footnote{Register of St. Andrews Kirk Sessions, ed. David Hay Fleming (Edinburgh: University Press by T. and A. Constable for the Scottish History Society, 1889), 115-16. The reference is contained within footnote 2 on page 115. The editor attributes the reference to the Archbishop of St. Andrews, writing in 1554.}

The expense and hardship involved in sending to Rome for dispensation may well have been instrumental in the continued practice of trial marriages. If dispensation from impediments was going to be necessary in nearly any marriage, it would be much better to try the marriage out first, than to incur the expense of sending to Rome for dispensation or annulment over and over again.

The doctrine of annulment alone would have provided the necessary canonical umbrella for trial marriages. A couple could contract a marriage \textit{per verba de futuro cum copula} and then seek to have it annulled, on the grounds of consanguinity, after a trial period, if they so desired. Or, if the couple decided that they would suit and the union proved to be fruitful, they could petition for a dispensation to marry notwithstanding the impediment of consanguinity. Likewise, a couple could forgo making a promise \textit{per verba de futuro cum copula} and simply live together. Upon deciding that they wanted to solemnize the union and legitimize the children, they would simply need to admit to fornication and go to the Church for penance and dispensation.

In the case of marriage by cohabitation with habit and repute, the relatively short duration of the trial marriage probably would have saved the couple from being found to have constituted a marriage. If not, the couple would simply need to deny that there was ever a marital intent to the relationship. The opinions of friends, relatives, and neighbors might well
have gone along with this, if the practice of trial marriages was an accepted custom in the region.

Thus, it is easy to see how trial marriages might have existed within the medieval Canon law of marriage. Or, they may have existed despite the Canon law of marriage. In a region where the Celtic traditions of old were still strongly entrenched, as was the case in the Highlands and Islands of Scotland, society may have felt that the blessing of the Church on their marriages was unnecessary. Requests for dispensation were likely not made for the blessing of the Church as much as because it was politic and desirable for the legitimation of heirs, as Sellar noted.

Nor was Scotland the only country where the practice of trial marriage may have been an accepted custom. The people of medieval Ireland may also have practiced Celtic secular marriage customs. Indeed, there is evidence to suggest that not only were such marriages practiced in medieval Ireland, but also in ancient Ireland. The ancient laws and pagan rituals of Ireland provided for such a custom and it is very likely that the ritual came to Scotland when the Irish did.

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CHAPTER FOUR: THE IRISH CONNECTION

Two eighteenth-century works point to the annual Lammas festival as the site for contracting a trial marriage in Scotland, at least for the common folk. Thomas Pennant, in his travel journal, *A Tour in Scotland and Voyage to the Hebrides, 1772*, states that trial marriages occurred at the annual Lammas festival in Eskdale, which is in the upland border regions of southwestern Scotland.\(^{154}\) Although the custom of trial marriage was obsolete when Pennant made his tour of the Highlands, he remarks that it was reported to have been in use in the prior century. According to Pennant, unmarried men and women met each year at the Lammas festival, at which time they selected a partner with whom they “handfasted” themselves until the next Lammas festival, a year and a day later. At that time, the couple could either have their union solemnized before a priest or go their separate ways, free to contract another such marriage.\(^{155}\)

*The Old Statistical Account of Scotland*, too, assigns the Lammas festival as the site for contracting trial marriages. The author of this source remarks that an old Roman camp was near to the place of the festival where trial marriages were contracted and speculates that the Lammas festival may have been brought to Scotland by the Romans. The author further speculates that trial marriages may have evolved from the Roman marriage *usus*. According to the Twelve Tables of Roman civil law, *usus* was one of three ways in which a woman could pass into *manus* (marital power).\(^{156}\) A

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\(^{155}\) Ibid.

\(^{156}\) Jane F. Gardner, *Being a Roman Citizen* (London: Routledge, 1993), 92-6. When a woman entered into marital power she and all of her property were transferred into her husband’s *familia*. 
woman passed into manus by usus if she cohabited with her husband for a year without interruption. Thus, the Twelve Tables provided that if a woman did not wish to pass into her husband’s manus she should live apart from him for three nights of the year, thereby interrupting usus. The legitimacy of the marriage itself does not seem to have been affected—it was still a legitimate marriage whether a woman passed into manus or not. By not entering into her husband’s manus a woman simply kept authority over her person and her property in her own familia, rather than its being transferred to her husband’s familia. The only similarity between trial marriage and usus seems to be in the stated period of one year. In marriage usus the woman seems to have automatically passed into marital power after uninterrupted cohabitation for a period of one year. In a trial marriage however, there was nothing automatic about the woman’s position after one year of cohabitation—the marriage could just as easily have been terminated as formalized.

It seems unlikely that the law of usus was brought to Scotland by the Romans, since Roman contact in Scotland was brief and combative. Moreover, since many of the statutes governing marriage usus had been abolished, this type of marriage was no longer being practiced by the Romans by the time they invaded Scotland.

These mentionings of the Lammas festival as the occasion for contracting a trial marriage merit further research. Because most Lammas festivals had their origins in the pagan Lughnasadh festival, the next logical

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157 Charles Sumner Lobingier, The Evolution of the Roman Law: from before the Twelve Tables to the Corpus Juris, (Littleton, Co.: F.B. Rothman, 1923; Reprint, 1987), 35; Gardner, Roman Citizen, 92-6. The Twelve Tables legislation is believed to have taken place between 451-450 B.C. I would like to thank Dr. John Thomas for providing me with information about usus and the Twelve Tables and for pointing out similarities between Roman law and old Irish law.

158 Ibid.
step is to examine the genesis of the festival itself. For this, the most obvious place to begin is with the people who settled Scotland, particularly the western Highlands and Islands. It is known that the Scotti, a Celtic race, came from the east coast of Ireland to settle the western coast of Scotland in the early medieval period. The connections between Ireland and Scotland continued throughout the medieval period. The genealogies of the Clan MacDonald, for example, give many instances of marriage alliances between the Irish Clans and the Lords of the Isles.\(^{159}\) Sellar discusses at some length the ongoing "political and personal alliances between West Highland magnates and native Irish lords...."\(^{160}\) Therefore, the customs and pagan rituals of Ireland must be examined for evidence of similar marriages.

It is in the annual Lammas festival that we may perhaps find the origin of the trial marriage. Lammas, a calendar festival of major importance throughout the Middle Ages, began as a pagan Celtic celebration called the Lughnasadh festival and presided over by the god Lugh or Lugos.\(^{161}\) It is from the god Lugh, that the name of the festival of Lughnasadh was derived. The Lughnasadh festival is said to have had its origin in ancient Ireland. According to Máire MacNeill, author of *The Festival of Lughnasa*, it "was one of the quarterly feasts of the old Irish year...the other three were Samhain, Imbolc (or Oimelg), and Beltaine."\(^{162}\)

According to legend, Lugh established this festival in memory of his foster-mother, Tailtiu. Tailtiu, who died in 303 B.C., was a mortal woman


\(^{161}\) Máire MacNeill, *The Festival of Lughnasa: A Study of the Survival of the Celtic Festival of the Beginning of Harvest* (London: Oxford University Press, 1962), 1. MacNeill believes that Lammas was the Christian name given to the Lughnasadh festival by the Anglo-Saxons when they adopted this Celtic harvest feast into their own calendar.

\(^{162}\) MacNeill, *The Festival of Lughnasa*, 1. Lughnasadh is spelled in a variety of ways in the literature. In this paper, excepting quotations, I will use the form, Lughnasadh.
and the wife of MacUmoir, the last king of the Fir Bolg, an ancient Irish tribe. Tailtiu, after commanding that a huge expanse of land be cleared for crops, asked to be buried in the cleared plain and that it be named for her. In her honor, Lugh inaugurated an annual festival at this site, which came to be known as the Lughnasadh festival.\textsuperscript{163} According to MacNeill, the origin legends of Tailtiu and the Lughnasadh festival are recorded in \textit{Lebor Gabála}, in the \textit{Dindshenchas} poem, and in later works such as the \textit{Annals of the Four Masters}.\textsuperscript{164} The \textit{Dindshenchas} poem varies slightly from the other two origin legends, which give the legend as above. According to MacNeill, this poem reports that Tailtiu led the Fir Bolg after their defeat by Coill Chuan, where she herself cleared the land and died as a result of her heavy labors. The men of Ireland gathered at her death bed where she asked them to hold funeral games to lament her. She died on the Kalends of August or Luain Loga Lughnasa, which MacNeill states, is the only connection to Lugh's name in this version of the legend.\textsuperscript{165}

According to D.A. Binchy, in his article, "The Fair of Tailtiu and Feast of Tara," \textit{Eriú}, the Fair of Tailtiu was convened by the king of Tara and was held annually on the festival of Lughnasadh, possibly opening on the first Monday of August and lasting a full week.\textsuperscript{166} Thomas Westropp, in his article, \textit{Marriages of the Gods and the Sanctuary of Tailtiu}, puts the date of

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\item \textsuperscript{165} Ibid.
\item \textsuperscript{166} D.A. Binchy, "The Fair of Tailtiu and Feast of Tara," \textit{Eriú} (Dublin: Royal Irish Academy, 1958), xviii, 115. The phrases, 'Fair of Tailtiu' and the 'Lughnasadh festival' seem to be used interchangeably in the literature. However, 'Lughnasadh festival' or 'festival of Lughnasadh' seems to have been the original name for the celebration, as noted, and Fair of Tailtiu the name that it was known by after the death of Tailtiu. Because they occurred at the same time and in the same place, either term is acceptable for the purposes of the topic under discussion in this paper.
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the festival of Lughnasadh at sometime around August 1. Citing the *Book of Leacan*, Westropp suggests that Lugh celebrated Tailtiu's mourning games every year around August 1, "a fortnight before and a fortnight after." Both the Fair at Tailtiu and the Lughnasadh festival were held near Tailteann, or modern Telltown, in County Meath.

Probably intended not as a celebration of the harvest, but rather as a ritual meant to ensure a prosperous harvest, the ancient Lammas or Lughnasadh festivals appear to have included a ritual kind of marriage that symbolized the joining of Lugh to Eriú, or the land of Ireland. The marriage of the earth to the sun god at this annual festival is fundamental to the annual rebirth of the land in Celtic mythology. According to Westropp, the cooperation of the worshippers of the sun god was implicit to this marriage so that the harvest fruits of the earth might be made secure. For this reason, the Lughnasadh festival came to be associated with marriage. According to Miranda Green, author of *Celtic Goddesses*, Celtic mythology contained many variations on this theme. The element that remains constant in all of these variations is the execution of a sacred marriage for the purpose of ensuring rebirth of the land and a bountiful harvest.

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169 Ibid; c.f., MacNeill, *Festival of Lughnasad*, 9; *Ordnance Survey Letters Meath: Letters Containing Information Relative to the Antiquities of the County of Meath Collected During the Progress of the Ordnance Survey in 1836*, ed. Michael Herity (Dublin: Four Masters Press, 2001), 11-15; William R. Wilde, * Beauties of the Boyne and its Tributary the Blackwater*, 2nd edition (Dublin: James McGlashan, 1850), 150-1. The spelling for Tailtiu varies, particularly in the early sources. In this paper, excepting quotations, I will use the nominative form, Tailtiu when speaking of Lugh's foster-mother and Tailteann, when referring to the town, which has been anglicized to Teltown or Telltown.
172 Ibid.
The pagan Celts worshipped the sun god, Lugh or Lugos, whom Caesar, according to MacNeill, likened to the Roman deity, Mercury.¹⁷³ In his *De Bello Gallico Commentarius Primus*, Caesar wrote of the Celts, "Of the gods they worship Mercury most of all—there are very many images of him, this inventor of all the arts."¹⁷⁴ Unlike the Romans however, the Celts put their sun god at the forefront of their deities. According to MacNeill, Lugh was one of the primary gods of the Celts, rather than a secondary god, as was the case with the Roman deity, Mercury.¹⁷⁵

By the Middle Ages, the cooperation of the worshippers of the sun god had evolved to a state in which the worshippers were making their own marriages as a way to ensure a fertile crop for the next harvest. These marriages came to be called 'Telltown marriages,' after the place-name for the festival. 'Telltown marriages' were contracted at the festival for the period of time until the next festival or approximately a year and a day.

Many sources report that an unusual marriage custom took place at the Fair of Tailtiu or the Lughnasadh festival. John O'Donovan provides the most detailed account of the custom. O'Donovan was employed by Thomas Larcom in the fall of 1830 to research the ancient and current forms of place-names in Ireland, for the purpose of discovering the orthography of each name to be marked on the Ordnance Survey maps. It was when he was researching the site of ancient Tailtean, that O'Donovan became acquainted with the marriage tradition of the Fair of Tailtiu. In his

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¹⁷⁵Ibid.
correspondence contained within the *Ordnance Survey Letters County Meath*, O'Donovan describes the site and the custom in detail:

...a hollow called Lag an Aonaigh, i.e., the hollow of the fair [see figures 4-1 and 4-2]. Here according to tradition marriages were celebrated in pagan times. A well springs in the centre of this hollow a short distance...to the south of which a wall...(now a *ditch*) was erected, and in this wall there was a gateway closed by a wooden gate in which there was *hole* large enough to admit a human hand. This is the spot at which marriages were celebrated according to the odd manner following: A number of young men went into the hollow to the north side of the wall and an equal number of marriageable young women to the south side of the wall which was so high as to prevent them from seeing the men; one of the women put her hand thro' the hole in the gate, and a man took hold of it from the other side, being guided in his choice only by the appearance of the hand! The two who thus joined hands by *blind chance* were obliged to live together *for a year and a day*, at the expiration of which time they appeared at the *Rath* of Telton, and if they were not satisfied with each other they obtained a deed of separation, and were entitled to go to Leganeeny [Lag an Aonaigh] again to try their good fortune for the ensuing year. This tradition has given rise to a phrase in the Country 'they go a *Tailteann* Marriage' by which is meant that they took each other's word for *nine months*. The natives of Telton think that there was a great deal of fair play in this marriage....

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176 *Ordnance Survey Letters*, 14. O'Donovan does not explain the discrepancy between a 'year and a day' and 'nine months' in his description of the custom.
Figure 4-1. John O'Donovan's sketch map of the remains at Tailteann (see upper right side for Lag an Aonaigh or the marriage well)

O'Donovan, Ordnance Survey Letters, 12.
Figure 4-2. Map showing the old features at Teltown. The main modern roads are also shown to aid in locating the sites. The Oenach was probably held on the slope below the 'Knockans' (see arrow above).

MacNeill, “Illustrations and Appendices,” The Festival of Lughnasa.
Figure 4-3. Map of Teltown by Thomas Westropp

Westropp, Marriages of the Gods, 137.
O'Donovan notes in the margins of this letter that this agrees with the "hand-fasting of the Highlanders." William Wilde also notes in his book, * Beauties of the Boyne and its Tributary the Blackwater*, that the marriages at the Fair of Tailtiu were similar to a custom that existed in Scotland, "till very lately." 177

Wilde reports that the Fair of Tailtiu was established in the year of the world 3370 in the reign of Lugh Lamhfhada. For a description of the origins of the fair, Wilde quotes from the *Annals of the Four Masters*, "The fair of Tailltean was established in commemoration and in remembrance of his [Lugh's] foster-mother Tailte, the daughter of Maghmor, King of Spain, and the wife of Eochaidh, son of Erc, the last king of the Firbolgs." 178 He then describes the games, sports, and ancient ceremonies that took place.

Near Rath Dubh (see figure 4-3), writes Wilde, "the most remarkable of the Teltown ceremonies took place—the marriages or betrothals." 179 Wilde's description of the marriage ceremony is as follows:

Upon one side of this great embankment were ranged, it is said, "the boys," and on the other "the girls;"...They then, having had a good view of each other, passed down a little to the south, where there is a deep hollow in the land, evidently formed artificially, probably the ditch of one of the ancient forts, and called Lug-an-Eany, where they became separated by a high wall, which prevented their seeing each other. In this wall, say the local traditions, there was a door with a small hole in it, through which each young lady passed her middle finger, which the men upon the other side looked at, and if any of them admired the finger he laid hold of it, and the lass to whose it belonged forthwith became his bride...he took her for better or worse, but the key-hole or wooden ring was not as

178 Ibid, 150.
179 Ibid, 150-1. The term 'rath' is the Irish language equivalent of 'fort'.
binding as the modern one of gold; for, by the laws of Tailtean, the marriage only held good for a year and a day. If the couple disagreed during that time they returned to Tailtean, walked into the centre of Rath Dubh, stood back to back, one facing the north, and the other the south, and walked out of the fort, a divorced couple, free to try their luck again at Lug-an-Eany.  

Wilde does not cite a source for his version of the custom, other than his reference to local traditions. Although similar to O'Donovan's account, there are enough differences that it would appear that Wilde got his version from different sources, though he attributes it to the oral tradition of the local peasantry.

Geoffrey Keating described the Fair of Tailtiu in his early seventeenth-century work, The History of Ireland. Keating argued that the formation of marriage alliances was a main feature of the Fair at Tailtiu. According to Keating:

...a most becoming custom was observed in that assembly, namely, the men kept apart by themselves on one side, and the women apart by themselves on the other side, while their fathers and mothers were making the contract between them; and every couple who entered into treaty and contract with one another were married, as the poet says:

'The men must not approach the women,
Nor the women approach the fair bright men,
But every one modestly biding apart
In the dwelling of the great fair.'

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180 Ibid, 151. Wilde states that these marriages occurred, "upwards of a thousand years ago," which would be the ninth century.
182 Ibid, 249.
Although Keating does not specify the length of these marriages, his description of men and women lining up across from each other is similar to that part of the custom described by O'Donovan and Wilde. Further, it must be remembered that Keating was a Jesuit priest and as such, likely to be biased against reporting a custom that supported temporary marriages. Whether this marriage custom was practiced at other fairs in ancient and early medieval Ireland is unknown. The Fair at Tailtiu seems to have lasted longer than other fairs and, consequently, has been more often recorded by the annalists and poets.

That the Fair of Tailtiu (Óenach Tailten) existed is well documented. There are contemporary references to it in the annals of the eighth century onwards and in other historical documents from the sixth century. According to Binchy, the Annals of Ulster in 873, "note with intense disapproval the failure to hold it: Óenach Tailten was not celebrated sine causa iusta et digna, quod non auduimus ab antiquis temporibus cecidisse." Binchy argues that, according to other references in the annals, it is clear that the Fair of Tailtiu in the earlier historical period was an ancient institution intimately connected with the Tara monarchy.

Although the Fair of Tailtiu has been widely reported to have been a national meeting of the 'men of Ireland' under the High-King, Binchy demonstrates that this far overstates its scope. According to Binchy, "...Óenach Tailten, while undoubtedly the most important gathering of its kind in Ireland, had never been more than the principal fair of the Ui Neill confederation of dynasties and their vassal tribes." Binchy states that the

184 Ibid. Binchy and MacNeill both cite the many mentions of the Fair of Tailtiu in the annals, sagas, and poems of Ireland. Binchy covers this in pages 118-122, and MacNeill in pages 320-44.
185 Ibid, 117.
Fair of Tailtiu was held under the aegis of the king of Tara, whom he describes as the titular head of the Uí Néill kingdoms and the most powerful monarch in Ireland.  

Binchy discusses the reports, by O'Donovan and others, of the marriage customs of the Fair of Tailtiu. He points out that there were few more opportune occasions at which to transact marriages than at gatherings such as the Fair of Tailtiu. Binchy states, "the mass of popular traditions about 'Teltown marriages'...may reflect ancient practice at Oenach Tailten, though some features of these 'hand-fasting' unions suggest a different background." He suggests that the date on which such marriages were contracted was more likely to have been the Beltaine festivals held on May 1. This date, being near to planting time, is more in line with the idea of ensuring the fertility of crops than August 1, when the crops had already grown, or not, as the case may be. Furthermore, Binchy argues, May 1 was also the day on which the yearly marriages were begun and ended in the ancient laws of Ireland, as will be noted later in this chapter.

The Feast of Tara, which Binchy reckons to have been an archaic fertility rite of a type associated with primitive kingship the world over, may have been confused with the Fair of Tailtiu, since they were both held near modern Teltown. According to Binchy, who cites O'Rahilly, there is a great deal of evidence in the annals, poems, and sagas of Ireland, which prove that the ancient inauguration rituals of the king of Tara "amounted to a

186 Ibid, 126.
187 Ibid, 124.
188 Ibid.
189 Ibid.
symbolic mating with the local earth-goddess."\textsuperscript{190} Still citing O'Rahilly, Binchy continues, "this was a survival from primitive times, 'when men regarded the material Earth as a Mother, and when the ruler of the land was inaugurated with a ceremony which professed to espouse him to this divine mother with the intent that his reign might be prosperous and that the earth might produce her fruits in abundance.'" Many later legendary sources give the festival of Samhain (November 1) as the date for the Feast of Tara. Binchy believes, however, that it is "unlikely to have had any connexion with the festival of Samain and the dying year; on the contrary, one would expect it to be held, like similar rites the world over, at seed-time."\textsuperscript{191}

The descriptions of the religious significance of the rituals at the Feast of Tara and the Fair of Tailtiu are strikingly similar. Both traditions assert that the marriage of the sovereign to the earth mother was fundamental to ensuring prosperity. Both traditions describe a marriage ritual that was performed as a symbolic representation of this religious belief. This gives credence to the suggestion that the two events may have become confused as their legends came down through the centuries. Binchy constructs a sound argument to support his hypothesis that the trial marriages that are said to have occurred at the Fair of Tailtiu, more likely occurred at the beginning of the planting season. Because the Feast of Tara also probably occurred at this time of the year, it is easy to see how this may have become confused. Although these trial marriages may well have been contracted at the Lammas festivals in the Middle Ages, it seems that the original practice in pagan times may have occurred earlier in the growing season. This

\textsuperscript{190} Ibid, 134. Binchy cites "an important article which appeared in this journal," by O'Rahilly, giving only, \textit{E\'riu}, xiv. 14 ff.
\textsuperscript{191} Ibid, 134-5.
change in the dates when trial marriages were contracted could be explained by the fact that the Feast of Tara was last held in 560 A.D. The Fair of Tailtiu, on the other hand, continued for at least another 300 years. Therefore, the practice may have moved to the Fair of Tailtiu out of necessity. The size and convenience of the Fair of Tailtiu for contracting marriages should not be overlooked as a cause for the change either. As noted earlier, the Fair at Tailtiu was probably the largest gathering of its kind in early medieval Ireland. Because of this, perhaps it simply became a more likely gathering at which to contract such marriages as time went on.

The ancient Irish law tracts are most informative when it comes to understanding the nature of marriage contracts among the Celts. The study of these law tracts is important to understanding not only the structure of Celtic society, but also the origin of trial marriage customs. They also provide insight into why Celtic women may have seemed manly or immoral to classical authors, such as Diodorus Siculus.

Celtic gods and marital relationships among the Celts have been the subject of commentary as far back as 54 B.C. when Julius Caesar first invaded Britain. Caesar wrote of the unusual marital practices of the Celts in his *De Bello Gallico Commentarius Primus*. According to Caesar, among the inhabitants of the interior of Britain, “wives are shared between groups of ten or twelve men, especially between brothers and between fathers and sons, but the unions are counted as belonging to the man with whom the woman first cohabited.” According to Barry Cunliffe, *The Ancient Celts*, Diodorus Siculus said about Celtic women, “they generally yield up their virginity to others and this they regard not as a disgrace, but rather think

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193 Ibid.
themselves slighted when someone refuses to accept their freely offered favours."  

When reading these observations, it has to be remembered that Celtic women occupied a more independent position in society than their counterparts in the Graeco-Roman world. The intent of Caesar and other classical authors was likely to report the lack of sophistication and civilization that they observed among the Celts. In his *De Bello Gallico Commentarius Primus*, Caesar remarked that the Celts of Britain were considerably more primitive than the Celts of Gaul. However, that is not to say that there was not also admiration to be found for Celtic women, such as the famed Boudicea, in the mind of the Roman soldier. But, Celtic society, particularly male-female relationships and laws of marriage, were far more complex than the classical authors could have known.

There are other clues to the unusual marriage practices allowed by the ancient laws of Ireland and practiced up through the Middle Ages. The Church was vocal in its disagreement with the marriage customs practiced in medieval Ireland. Edmund Campion, a sixteenth-century fellow at St. John’s College in Oxford, complained volubly that the inhabitants of Ireland did not hold to Christian teachings in his book, *A Historie of Ireland*. Campion writes,

> The Honourable state of Marriage they much abused, either in contracts, unlawfull meetings, the Leviticall and Canonicallyl degrees of prohibition, or in divorcements at pleasure, or in omitting Sacramentall solemnities, or in retaining either Concubines or Harlots for Wives. Yea even at this day, where the

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195 Julius Caesar, *De Bello Gallico*
Cleargie is fainte, they can bee content to Marrie for a yeare and a day of probation, and at the yeares end, to returne her home upon any light quarrels, if the Gentlewomans friends bee weake and unable to avenge the injurie. Never heard I of so many dispensations for Marriages, as those men shew, I pray God graunt they bee all authentique and buylded upon sufficient warrant.\textsuperscript{197}

Lanfranc, the Archbishop of Canterbury, says much the same thing in his letter to Toirdelbach ua Briain in 1074:

In your kingdom a man abandons at his own discretion and without any grounds in canon law the wife who is lawfully married to him, not hesitating to form a criminal alliance—by the law of marriage or rather by the law of fornication—with any other woman he pleases, either a relative of his own or his deserted wife or a woman whom somebody else has abandoned in an equally disgraceful way.\textsuperscript{198}

Lanfranc’s successor to the archbishopric, Anselm, wrote two letters to Muirchertach O’Brien, Toirdelbach’s son and successor, complaining of the loose marriage customs in Ireland. In the first, he says:

It is reported among us that marriages are dissolved in your kingdom without any reason; and that kinsfolk are not ashamed to have intercourse, either under the name of marriage or under some other name, publicly

\textsuperscript{197} Ibid, 22-3. The Irish canonists based their marriage laws on the scriptures of Leviticus and this is what Campian meant by the “Leviticall...degrees of prohibition.” Because Leviticus forbade marriage with a sister, mother, mother’s sister, father’s sister, son’s daughter and daughter’s daughter, the canonists used Leviticus to justify marriages within the canonically prohibited degrees of consanguinity. Since first cousins were not mentioned in this list of forbidden marriages the early Irish canonists believed that they had biblical justification for allowing marriages between cousins. (Art Cosgrove, “Marriage in Early Ireland,” \textit{Marriage in Ireland}, ed. O Corrain, Donnchadh (Dublin: College Press; Dun Laoghaire, Co. Dublin, 1985), 11)

and without rebuke, against all the prohibitions of the Canon Law."\textsuperscript{199}

In his second letter to Muirchertach, he chastises him yet again, saying:

\begin{quote}
It is said that men exchange their wives with the wives of others as Freely and as publicly as a man might exchange his horse....\textsuperscript{200}
\end{quote}

According to Sellar, the Synod of Cashel in 1101, "forbade a man from marrying his stepmother or his stepgrandmother, his stepdaughter, his wife's sister or his brother's wife."\textsuperscript{201} As Sellar points out, this edict was a long ways from the seven forbidden degrees of kinship then in force. Several later synods tried again to reform the old marriage customs of Ireland, but met with little success. Indeed, Adrian IV gave Henry II of England the Lordship of Ireland in 1155, in large part due to Ireland's continued adherence to the ancient Irish laws of marriage.

The ancient Irish laws regulating relationships were complex and allowed for many different kinds of marriages between men and women. The origin of these laws is not known for certain, but many learned Irish historians have studied the question and have been able to trace them to at least the eighth century, with glosses of earlier laws dating back to the sixth century.\textsuperscript{202} According to W. Neilson Hancock and Thaddeus O'Mahony, who edited and partially translated the Ancient Laws of Ireland, the Senchas Már may have been written as early as the fifth century, during St. Patrick's time in Ireland.

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\textsuperscript{199} Sellar, "Marriage, Divorce, and Concubinage," \textit{Transactions}, 471.

\textsuperscript{200} Ibid.

\textsuperscript{201} Ibid.

\end{flushleft}
There were several bodies of Brehon law that regulated ancient and medieval Irish society. The *Senchas Már*, which means literally ‘great body of law’, was “Stamped with the authority of St. Patrick, [and] may have assumed the position of the authoritative Irish code,” according to the Introduction to the *Book of Aicill*203. It contains the laws that regulated relationships between men and women. This portion of the *Senchas Már* is referred to as the *Cain Lanamhna*, or the ‘Law of Full Pairs’.204 The *Cain Lanamhna* was the main legal tract that dealt with the Irish laws on marriage and sexual relationships in the early medieval period.

The *Book of Aicill*, which was the code of ancient Irish criminal law, was a compilation of the opinions of Cormac mac Airt and Cennfaelad. Cormac, an early Irish king (r. A.D. 227-266), having retired to Aicill, now known as the Hill of Screen, near Tara in County Meath, enunciated a number of laws, which had been handed down by the poets, from the ancient common law of Ireland.205 Cormac ostensibly did this for the guidance of his son and successor, Coirpri. However, according to M.J. Macauliffe, who wrote the introduction to *Gaelic Law: The Berla Laws*, Cormac’s real intent was to decrease the power of the poets, who had preserved and handed down the laws from ancient times in the Berla or poetic dialect.206 Cennfaelad was a seventh-century warrior, who, while recuperating from a wound, had the opportunity to learn the ancient law of

Ireland from professors of literature, law, and poetry. Cennfaelad noted and transcribed what he learned into an old text of the *Book of Aicill*.\(^{207}\)

Macauliffe speculates that Cennfaelad probably re-edited the entire work while he was at it.\(^{208}\)

The laws of both the *Senchas Már* and the *Book of Aicill* impacted upon marriage and family. Before exploring the applicable laws within the Book of Aicill however, it is helpful to first explore the various types of marriages allowed under the rules of the *Senchas Már*. In the *Senchas Már* marriages are discussed in two different sections: the *Dīre* text and the *Cain Lanamhna*. A woman is classed with reference to either her relationship to her husband or other male partner and/or her relationship to property. Thus, the connections detailed in the *Cain Lanamhna* are distinguished by the amount of property that was brought into the marriage by both parties, while the connections in the *Dīre* text were concerned with the woman’s status as it related to *dīre*.\(^{209}\) Because the divisions of property and *dīre* are very complex and largely irrelevant to the topic under discussion in this study, they will only be discussed briefly as required for a fuller understanding of the text.

According to Nancy Power, “Classes of Women Described in the *Senchas Már*,” in *Early Studies in Irish Law*, the *Dīre* text of the *Senchas Már* asks the following questions: “How many divisions of quality are fixed for a woman’s *dīre*? How are their offenses paid? What is the apportionment of compensation which can be paid for their lives? How is their property

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\(^{207}\) O’Mahony and Richey, “Introduction to The Book of Aicill,” *AIL*, iii, lxxvii.

\(^{208}\) Cormac, “Introduction,” *Gaelic Law*, i.

\(^{209}\) *Crith Gablach*, ed. D.A. Binchy (Dublin: The Dublin Institute for Advanced Studies, 1970), vol xi, *Mediaeval and Modern Irish Series*, 84. According to Binchy, *dīre* refers to honour-price, which he describes as follows: “in the earliest period of Old Irish law every penalty was calculated on the basis of the honour-price of the injured party—the whole of it or a fraction or a multiple.”
allotted on their death?" 210 The answers to these questions describe five different divisions of property, according to the status of the wife in the marriage. The different classes of wives were as follows: (1) the cētmuinter, or chief wife; (2) the cētmuinter with no sons; (3) the ben aitéten aranaiscce fine, a woman who is recognized and who has been betrothed by her family; (4) the ben aitéten nad-aurnascar nad-forngarar, a woman who is recognized but who has not been betrothed or ordered to marry; (5) the ben bis for foxul dar apud n-athur no fine, a woman who has been abducted against the wishes of her family. 211

The Cain Lanamhna defines the different types of marriage connections that women could enter into. The status or lawfulness of the marriage is determined by the property that is brought into the marriage by both parties. In general, there were eight kinds of social connections under the Cain Lanamhna, including that of a man with a woman. The connection that exists between them is that "she is to give him her will and desire and female act, and he gives her the virile act..." 212 This connection is further delineated into ten types of marriage connections: (1) lānamnus comthinchair, a union with joint property; (2) ben for ferthinchair, a woman with a man of property; (3) fer for bantinchair, a man with a woman of property with service; (4) ben for airitin n-urala, a woman received on inducement (or command); (5) fer tathaigthe cen urgnam cen urail, cen tarcud cen tinol, the connection of a frequenting man without acquired property, without service; 213 (6) lānamnus foxail, a union with abduction; (7)

211 Ibid.
213 "Cain Lanamhna," ALI, ii, 399. For the definition of the ‘frequenting man’ I went directly to this translation and commentary of the text of the Cain Lanamhna, as Nancy Power’s discussion of this union seemed confusing and contradictory.
lānamnus *amsa* for faeniul, a union of wandering mercenaries; (8) lānamnus tothla, a clandestine union; (9) lānamnus écne, a union brought about by force; (10) lānamnus genaige, a union brought about in mockery. 214

In the first of these marriages, *comthinchuir*, the wife was equal to her husband, if her rank and standing equaled that of her husband. This meant that the woman enjoyed almost the same legal rights as her husband and possessed considerable independence and prestige in her own right. This woman was described as *bē cuitchernsa*, which is glossed "of equal lordship." 215 A *bē cuitchernsa* was a cētmuinte, or chief wife, as described in the *Dire* text. 216 The *cētmuinte*, or chief wife, held the highest position of all married women. A woman was a chief wife if her rank and status equaled that of her husband, regardless of the amount of property that she brought into the marriage. Thus, in a *ferthinchur* marriage, one in which most of the joint property is brought to the marriage by the husband, the woman is still considered a cētmuinte if she is of equal rank and standing to her husband. The difference between a *bē cuitchernsa* and a *ferthinchur* lay in their ability to conduct business independently. While the *bē cuitchernsa* had to give her consent to most of the contracts made by her husband, the *ferthinchur* did not, though she had the right to dissolve any bad contracts made by her husband.

According to Donnchadh Ó Corráin, in his article "Marriage in Early Ireland," *Marriage in Ireland*, the concepts of the *comthinchuir* and the *bē cuitchernsa*, (or a woman "of equal lordship"), seem to have evolved from late Roman law, as it was interpreted by Pope Leo the Great and other

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215 Ibid, 82.
216 Ibid.
canonists. Citing the letter of 459 of Leo the Great to Rusticus, bishop of Narbonne, Ó Corráin writes, “the spouses must be free-born equals, the woman must have a dowry, and the marriage must be celebrated publicly.” Ó Corráin assigns the legal background of Leo’s interpretation to the Roman ideology of a payment by the man (donatio propter nuptias) and a payment by the wife (dos), which he believes to be of ancient origin, though it was unregulated under Roman law until the third century A.D. This donation by the husband was to be equal to the woman’s dowry, a custom which Ó Corráin believes was in practice in the fifth century, if not before.

Contribution of property continues to be important in the third type of marriage connection described by the Cain Lanamhna, that of the bantinchur. In this connection, the woman brings not only her share to the marriage but also the husband’s share. Again, the bantinchur could also be a cètmuinter, or chief wife.

There were two types of cètmuinter in addition to the type described above. Citing a commentator in the Ancient Laws of Ireland, Powers states that these were the “cètmuinter cròlige (‘in a sickbed’) and the cètmuinter for muin araile (‘on the neck of another’).” According to Power’s commentator, the husband of a cètmuinter cròlige might take another wife if she did not recover her health, though he was required to continue to maintain her while she lived. The second wife then was the cètmuinter for

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218 Ibid, 13-4. Ó Corráin cites Migne, Patrologia latina 54, cols 1204-1205, for this quotation.
219 Ibid, 14.
220 Ibid.
221 Power, “Classes of Women,” SEL, 83.
muin araile, a wife “on the neck of another” or in her place. Another circumstance in which a husband might take a ‘secondary wife’ was when the chief wife was unable to bear sons. Despite the presence of a ‘secondary wife,’ the chief wife maintained her status as head of her husband’s household. The term ‘adaltrach’ was, according to Power, used throughout the commentaries to denote a secondary wife. Power speculates that the term adaltrach may have been deliberately adopted in the Christian era to denigrate secondary wives. However, an adaltrach was second only to the chief wife and enjoyed some of the same privileges. If the adaltrach had sons, her status increased considerably raising her to the level of the “lawful women.”

The lānamnus foxail, a union in which a man carries off a woman by abduction to cohabit with her, seems to occupy an unusual position within the grouping of the “lawful women”. According to Power, her status as an abducted woman ultimately depended upon her status at the time of her abduction. If she was a chief wife when abducted, then she seems to have fallen within the category of the cētmuinters (cētmuinter foxail). Conversely, if she was an adaltrach at the time of her abduction, her status continued to be that of an adaltrach. As an adaltrach foxail, her status improved when she gave birth to sons, just as it did with the non-abducted adaltrach. Upon separation, the Cain Lanamhna states that they “ought not to divide anything of live chattels or dead chattels, except the offspring.” If the

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222 Ibid.
223 Ibid, 84.
224 Ibid, 86. The term “lawful women” was a designation found in the commentaries, but not in the text of the laws. However, in the texts there is reference to the right of a chief wife to make contracts on her own and to dissolve her husband’s contracts. This was a right that was not extended to the adaltrach, unless, and until, she had sons.
225 Ibid, 88.
226 “Cain Lanamhna,” ALI, ii, 401.
woman who was abducted gave anything to the man who abducted her, whether it was her own property or property that another had a share in, it was to be restored to the tribe when they separated, and the man was required to pay a fine. Because this union is grouped together with the union of secrecy and a distinction is made between a union by abduction and a union brought about by force, unions by abduction were clearly voluntary. The *Cain Lanamhna* provides for involuntary abductions and rape under the connection *lánamnus écne*, (a union brought about by force), which is an unlawful connection. In this case, the woman did not receive property or any other compensation from the man who forced her. However, the man was required to pay a fine to the family of the woman.

Other unions that were not included in the grouping of "lawful women" include concubines whose position was open and established, and women whose association with men was irregular and without legal sanction. The *ben for airitin n-urala*, (a woman received on inducement or by command) falls into the first of these categories. Although the standing of these women was inferior to that of the "lawful women," concubines were recognized and stood in a clearly defined relationship with one man. The position of the *ben for airitin n-urala* seems to have been superior to others in this group, since the man and woman each received a portion of the profits earned from their handiwork during their association upon separation. In addition, the man paid seds for this woman so that he might have her at his will or command. In other words, the woman is "supported to be at his will." 

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227 Ibid, 103.
228 Ibid, 95. The term *airech* is used in the commentaries and glosses of the *Cain Lanamhna* to describe the woman who is received on inducement.
Next in the grouping of the recognized concubines was the union of *fer tathaigthe cen urgnam cen urail, cen tarcud cen tinol* (the connection of a frequenting man without acquired property, without service). This is the "woman to whom the man habitually comes to cohabit with her, or the 'carrthach'-woman," i.e., who is seduced in the house of a friend, and in whose case no 'seds' are given for the seduction, i.e., a woman of compact and covenant with cognizance of the man usually visiting her, or a 'carrthach'-woman."\(^\text{230}\) Because no seds were given for her, this woman was of a lower standing than the woman received on inducement.

Of the remaining connections, the *lānamnus tothla*, a connection of secrecy, is the only one relevant to this study. This connection is grouped by Power under those that were irregular and without legal sanction. A connection of secrecy was one that was brought about when the woman was cohabited with secretly and without the knowledge of her family. Power includes it under a description of the *baitsech*, glossed "a secret woman or every woman who deserts her marriage."\(^\text{231}\) Interestingly, the commentary for the *Cain Lanamhna* groups the union of secrecy with the union by abduction. This is presumably done because in both cases, the connection is made without the knowledge and consent of the woman’s family. The division of property upon dissolution of the "connexion of secrecy which is made by elopement" was the same, with regard to *díre-fine*, the distribution of property, and the care of offspring, as the union by abduction.\(^\text{232}\)

When either or both of the parties desired to dissolve their union, it was easily done. The *Cain Lanamhna* laid out the terms for the division of property and, in some cases, the care of offspring in the event that a couple

\(^{230}\) "Cain Lanamhna," *ALI*, ii, 399.  
\(^{231}\) Power, "Classes of Women," *SEIL*, 100.  
\(^{232}\) "Cain Lanamhna," *ALI*, ii, 403.
separated. It is through these provisions that we are able to confirm that marriages for a year did indeed occur, despite the effort made by Christian clerics to expurgate these laws from the ancient law tracts. The text of the *Cain Lanamhna* is translated as follows:

If they (a man and a woman) separate, and that by mutual consent, and that their property be equally good at their separation, what they have consumed of each other’s property without dishonesty is remitted, together with equal property at separation that there may be no fraud. Restitution is to be given for every thing as it was when consumed, with growth, increase, milk, and addition. Everything stolen, everything taken by violence, everything carried away without leave, permission, or entreaty, is to be returned with ‘dire’-fine.

The text continues with a breakdown of how the profits of the labor of the man and the woman should be divided. Of particular interest to this study is the following passage:

One-ninth of his (the man’s) increase, and of his corn, and of his bacon is due to the woman if she be a great worker; she has a sack every month she is with him, to the end of a year, i.e. to the next May-days, for this is mostly the time in which they make their separation.

The commentator here glosses *she has a sack every month*, as “a sack [of grain] for every month to the end of the year in which the separation takes place between them....” *To the next May-days*, is glossed “because then they are likely to separate.” Binchy, Thurneysen, and Westropp interpret this

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234 *Cain Lanamhna*, *ALI*, ii, 389.
235 *Cain Lanamhna*, *ALI*, ii, 391.
236 Ibid.
clause to be the provision for marriages lasting a year only. The reference to May 1 is important to this interpretation, since the *Book of Aicill* refers to marriages lasting from May 1 to May 1.\(^{237}\)

Marriages from May 1 to May 1 fit neatly with Binchy’s hypothesis regarding the Feast of Tara. If indeed, the Feast of Tara was held around May 1 as the sources seem to indicate, according to Binchy, then these references in the *Ancient Laws of Ireland* may well refer to this event.\(^{238}\) However, it seems more likely that the Feast of Tara was simply an ideal gathering place for contracting marriages for a year, indeed, marriages of all kinds, and that the date was the important point not the event. The idea of a transitory marriage meant to last for a year seems less ludicrous when considered within the framework of old Irish law.

The ancient law tracts clearly allowed for a variety of unions in which there was a great deal of freedom for both the man and the woman. Of the marital connections that Power assigns to the group of concubines or to the group of irregular connections, many could have been of a transitory nature. The connections by abduction, the frequenting man, and the secret woman were perhaps intended to be transitory in nature. Indeed, the *Cain Lanamhna* even discusses a woman whose relationship with another man is recognized by her husband (the *bé nindlis* or ‘indlis’-woman).\(^{239}\) Even the connection of the *adaltrach* had the potential to be transitory, if the woman failed to bear sons of the union. Indeed, according to Sellar, an *adaltrach* could be “summarily dismissed” if she did not give birth to a son within a year.\(^{240}\) This circumstance is strikingly similar to the circumstances that

\(^{237}\) “Book of Aicill,” *ALI*, iii, 143.


\(^{239}\) “Cain Lanamhna,” *ALI*, ii, 401.

appear to have attended at least some trial marriages in medieval Scotland. It is very likely that there were trial marriages that were predicated on the condition that the union had to be fruitful, first and foremost. For example, Margaret MacLeod, whose repudiation by Donald Gorm Mor MacDonald was discussed in such detail previously, did not bear a child and her subsequent repudiation may have been the result of this. Ensuring fertility was almost certainly the intent of the trial marriage when it began as part of a pagan ritual.

Transitory marriages seem to have first appeared as part of the pagan religious rituals that were observed at the annual festivals. The laws of ancient Ireland would have reflected the customs of the country, thus, the laws of marriage likely came after this type of marriage connection had been in use for some time. As a tradition that was firmly entrenched within the customs of the Gaelic Irish, it is perhaps not surprising then, to find that the practice persisted well into the Middle Ages. According to Art Cosgrove, author of “Marriage in Medieval Ireland,” in Marriage in Ireland, monogamy was not considered mandatory by the Gaelic Irish until the seventeenth century. Indeed, when it is considered that the ancient laws of Ireland were written as late as the eighth century, it appears that polygyny, polyandry, and serial monogamy were practiced as a matter of course throughout the early Middle Ages and perhaps longer.

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241 Ironically, Donald Gorm Mor's second wife did not bear children either, indicating that the fault may have been with Donald Gorm and not his wives. Ultimately, he was succeeded by his nephew.

CHAPTER FIVE: CONCLUSION

The evidence in support of trial marriage might be considered by some to be circumstantial, at best. Still, a circumstantial case can sometimes be as strong, or stronger, than a case built on an eyewitness account. Although there are no documents that can be pointed to as irrefutable proof that trial marriages were practiced in late medieval Scotland, the evidence that does exist paints a picture that strongly supports the likelihood.

Given the connections that existed between medieval Scotland and Ireland, the addition of evidence from the Brehon law and medieval Irish festivals brings the picture into sharp focus. Although, it is prudent to be cautious when attempting to import Irish custom wholesale into Scotland, in this case, the evidence seems to support the compunction to do so. It is undeniable that the old Irish law tracts allowed for many kinds of unions that would have been considered uncanonical by the Church. These laws came about because they met the needs of society, just as modern laws are made to meet the needs of society today. Ludo Milis, author of The Pagan Middle Ages, theorizes that pagan customs endured well into the Middle Ages because Christianity either failed to cater to an important need or lacked the means to adequately impose its will. It is in the effort made by Christian clerics to reform marriage practices that the tenacity of Celtic secular marriage customs is revealed. The Church in Scotland was clearly fighting the influence of Celtic tradition when St. Margaret attempted to reform the Celtic church in the eleventh century. Efforts at reform continued well into the sixteenth century, as evidenced by the Kirk Session

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records of Aberdeen. Contemporary evidence, such as the eleventh-century letters of the Archbishops of Canterbury to the Irish kings, confirms that these unions were still being contracted by the Gaelic Irish, as well.

If the Gaelic Irish were practicing uncanonical unions in the twelfth century, the oral tradition reporting that similar unions were contracted at the early medieval festivals of Ireland is likely accurate. Early medieval references to the Fair of Tailtiu and the Feast of Tara by Irish annalists confirm that those gatherings continued to be held well into the early medieval period. Citing O'Rahilly, who drew his evidence from poems, sagas, and entries in the annals of Ireland, Binchy contends that the Feast of Tara, "amounted to little more than a symbolic mating with the local earth-goddess." It is not difficult therefore, to believe that there is something to the oral tradition that trial or temporary marriages were contracted at ancient and early medieval Irish festivals. When the oral tradition is considered together with the ancient laws of Ireland, it seems even more likely that the oral tradition is accurate in its essentials, at least.

It is not a great leap to consider that the ancient laws and customs of Ireland may have carried over into medieval Scotland. John Cameron, author of Celtic Law, affirmed that fragments of Gaelic law remained in use in medieval Scotland. Indeed, the Lords of the Isles appear to have been chief among the inhabitants of Scotland who applied Gaelic law in their position as sovereign of the Islands. According to Sellar, "the main focal point of Gaelic Scotland in the later Middle Ages was the Lordship of the

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244 MSS, Kirk Session Records of Aberdeen, National Archives of Scotland, Aberdeen City Archives, CH1, 8.
245 "Fair of Tailtiu," Éiriú, 134. Binchy cites an article by O'Rahilly in Éiriú, xiv, 14 ff.
Sellar supports this opinion by pointing to the fact that the judges in the Islands carried the Celtic title *britheamh* (brievices), the best known of these being the Morrisons of Ness on the Isle of Lewis. Sellar establishes that not only Gaelic, but also official Scots sources implied that there were laws in use that were not the laws of the kingdom of Scotland. As an example, Sellar cites Donald Monro, author of *Description of the Western Isles of Scotland Called Hybrides*, 1549, who refers to, “the Laws made be Renald McSomharkle [Ranald son of Somerled] callit in his time King of the Occident Iles.” When such information is put together with the reports of “handfast” marriages and other uncanonical unions in the genealogies of the Island clans, it seems likely that Celtic customs were being used.

If the researcher pulls the many threads of evidence together, some conclusions can then be drawn. The persistence of the oral tradition and later written sources in claiming that trial marriages were practiced cannot be ignored, nor should they be denied out of hand. Although the Clan genealogies and the reports from Martin and Pennant are not contemporary, they were reported at a time when the memory of such customs may have still resided in the Highlands and Islands. The Church reacted to these practices and the Church records of the Middle Ages confirm that uncanonical unions were contracted on a regular basis in Scotland. When feudal law reached the Highlands, it appears that it came into direct confrontation with Celtic law. Indeed, Sellar proposes that the twelfth- and thirteenth-century succession disputes in the families of Athol, Mar, and Menteith came about as a direct result of Celtic secular marriages that were

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248 Ibid.
249 Ibid.
contested under feudal law.\textsuperscript{251} By the fifteenth century this phenomena obliged the nobles of the Highlands and Islands to come up with a new strategy that would allow their sons to succeed. As discussed in Chapter two, it was quite easy to wrap Celtic secular marriage into a guise that was more palatable to the Christian Church. Although travel to the papal court was fraught with danger and difficulty and the expense would have been prohibitive to the inhabitants of a 'cash-poor' country like Scotland, the dispensations themselves appear to have been relatively easy to obtain. A careful perusal of the \textit{Scottish Supplications to Rome} shows that there may have been a kind of template that one followed to receive papal dispensation to marry. Marriages or cohabitations that were presented as a \textit{fait accompli} with offspring already born seem to have been dispensed the greater majority of the time.

The evidence from Scotland is supplemented by the evidence from Ireland. Again, the evidence begins, to some degree, with oral tradition. Reports of 'Teltown Marriages' and trial marriages contracted at the annual Lammas festivals provide clues to marriage practices in medieval Ireland. Tracing back to the festivals themselves reveals a whole world of pagan practice that lingered into the Middle Ages. The festival inaugurated by the god Lugh in honor of his stepmother was carried forward many centuries by the inhabitants of Ireland and Scotland. Eventually, these festivals appear to have evolved into a kind of pre-harvest festival. Rituals to ensure the harvest would have been fundamental to pagan society. It is clear that the advent of Christianity did not erase many of these superstitious practices. Indeed, superstition lingers today, as evidenced by the frequency with which modern man 'knocks wood' to avoid jinxing himself or avoids breaking

\textsuperscript{251} Sellar, "Marriage, Divorce, and Concubinage," \textit{Transactions}, 477.
mirrors 'just in case' you really do get seven years of bad luck. Why then, should it be presumed that the arrival of Christianity would miraculously and suddenly erase all of the ritual practices of the Celtic peoples? Having relied on such rituals for centuries, it would be disingenuous to suppose that the Celts would suddenly cease practicing them, even if there was a wholesale migration to another region.

There can be little doubt that the Scotti would have brought such customs to western Scotland when they migrated in the early Middle Ages. Whether the customs endured is the question that this thesis seeks to answer. Given the similarities between the oral traditions of trial marriage in Scotland and Ireland and the fact that the custom was apparently practiced at the Lammas festivals in both countries, it appears that this custom, at least, did endure. The precedent for such marriages can be found in the Brehon law of Ireland. This, combined with all of the other evidence, makes a strong case for the likelihood that the custom of trial marriage was brought to Scotland by the Scotti and continued to be used by medieval Scots. Fifteenth-century ecclesiastical records and the Kirk session records of the Reformation suggest that the practice did indeed endure not only through the migration of the Irish to Scotland but also into the late Middle Ages.

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