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# XXVIII.36 On the public prosecutor

- The Spirit of Law - Book XXVIII. On the origin and transformations of the civil laws among the French -

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As by the Salic and Ripuarian laws, and in the other laws of the barbarian peoples, penalties for crimes were pecuniary ; there was then no public prosecutor, as there is among us today, charged with pursuing crimes. Indeed everything came down to restorations of damages ; all pursuit was more or less civil, and every individual could do it. On the other hand, Roman law had popular forms for the pursuit of crimes, which were inconsistent with the ministry of a public prosecutor.

The practice of judicial combats was not less inimical to this idea : for who would have wanted to be the public prosecutor and make himself the champion of everyone against everyone else ?

In a compendium of formulas which Mr. Muratori has inserted into the laws of the Lombards, I find that in the second dynasty there was an attorney for the public. [1] But if we read the entire compendium of these formulas, we will see that there was a total difference between these officers and what today we call the public prosecutor, our royal or seigniorial prosecutors. The first were rather agents of the public for political and domestic administration than for civil administration. Indeed, one does not find in these formulas that they were responsible for the pursuit of crimes and for matters concerning minors, the churches, or the state of persons.

I have said that the establishment of a public prosecutor was averse to the practice of judicial combat. I find, however, in one of these formulas an attorney for public prosecution who is at liberty to fight. Mr. Muratori has placed it in the wake of the constitution of Henry II, for which it was made. [2] It is said in that constitution that "if someone kills his father, his brother, his nephew, or another of his relatives, he shall lose their succession, which shall pass to the other relatives ; and his own will belong to the public treasury." But it is for the pursuit of this succession which has devolved to the treasury that the public attorney, who maintained its rights, was at liberty to fight : this case fell back within the general rule.

We see in these formulas the public attorney acting against [3] the man who had captured a thief, and had not led him to the count ; against the man [4] who had led an insurrection or assembly against the count ; against the man [5] who had saved the life of a man whom the count had given him to have killed ; against the attorney of the churches [6] whom the count had ordered to bring a thief to him, and who had not obeyed ; against the man [7] who had revealed the king's secret to foreigners ; against the man who had pursued armed the emperor's envoy [8] ; against the man who had scorned the emperor's letters, and was pursued by the emperor's attorney, or by the emperor himself [9] ; against the man [10] who had been unwilling to accept the prince's money ; in short, this attorney was demanding the things which the law awarded to the treasury. [11]

But in the pursuit of crimes, we see no attorney for the public, even when duels are in use, [12] even when there has been a fire, [13] even when the judge is killed on his bench [14] ; even when the issue is the state of persons, [15] liberty, and servitude. [16]

These formulas are made not only for the laws of the Lombards but for the appended capitularies ; there is thus no doubt that on this matter they furnish us with the practice of the second dynasty.

The practice of combats, which had become more frequent in the third dynasty, did not allow the establishment of a public prosecutor. Thus Boutillier, in his *Somme rurale*, speaking of the officers of justice, cites only bailiffs, peers, and sergeants. [17]

I find in the laws of James II king of Majorca [18] a creation of the position of royal prosecutor with the functions which ours have today. [19] Visibly, they came only after the judiciary form had changed here.

[1] *Advocatus de parte publica*.

[2] See that constitution and that formula in the second volume of the historians of Italy, p. 175.

[3] Muratori's *Compendium*, p. 104, on law 88 of Charlemagne, book I, tit. 26, §78.

[4] Another formula, *ibid.*, p. 87.

[5] *Formula*, p. 104.

[6] *Ibid.*, p. 95.

[7] *Ibid.*, p. 88.

[8] *Ibid.*, p. 98.

[9] *Ibid.*, p. 132.

[10] *Ibid.*

[11] *Ibid.*, p. 137.

[12] *Ibid.*, p. 147.

[13] *Ibid.*

[14] *Formulas*, p. 168.

[15] *Ibid.*, p. 134.

[16] *Ibid.*, p. 107.

[17] See also *Establishments*, book I, ch. i, book II, ch. xi and xiii, and Beaumanoir, ch. i and ch. lxi, p. 308 on the manner in which pursuits were done in those times.

[18] See these laws in the *Lives of the saints* of the month of June, vol. III, p. 26.

[19] *Qui continue nostram sacram curiam sequi teneatur, instituatur qui facta and causas in ipsa curia promoveat atque prosequatur.*