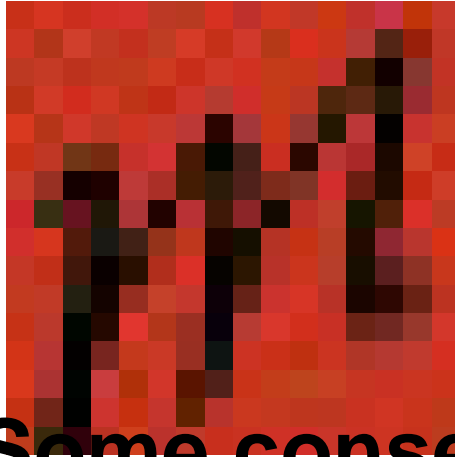


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# XXXI.32 Some consequences of the perpetuity of fiefs

- The Spirit of Law - Book XXXI. Theory of feudal laws among the Franks, in their relation to the transformations in their monarchy -

Date de mise en ligne : samedi 8 septembre 2018

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It followed from the perpetuity of fiefs that the right of the eldest, or primogeniture, became established in France. It was unknown in the first dynasty [1] : the crown was divided among brothers, allods were likewise divided ; and revocable or lifetime fiefs, not being an object of succession, could not be an object of division.

In the second dynasty, the title of emperor held by Louis the Debonaire, with which he honored his eldest son Lothaire, gave him the idea of giving that prince a sort of primacy over his younger brothers. The two kings were to go see the emperor every year, take him presents, and receive greater ones from him ; they were to confer with him on common matters. [2] That is what gave Lothaire the pretensions that turned out so badly for him. When Agobart wrote for this prince, he alleged the disposition of the emperor himself, who had associated Lothaire with the empire, after - in three days of fasting and celebration of the holy sacrifices, in prayers and alms - God had been consulted, that the nation had sworn fealty to him and could not perjure itself, that he had sent Lothaire to Rome to be confirmed by the pope. [3] He emphasizes all this, and not his birthright. He does say that the emperor had stipulated a division with the younger sons, and that he had preferred the eldest ; but to say that he had preferred the eldest, was to say at the same time that he could have preferred the younger ones.

But when fiefs became hereditary, birthright was established in the succession of fiefs, and for the same reason in that of the crown which was the great fief. The old law that formed divisions no longer subsisted ; the fiefs were accompanied by a service, which the possessor had to be in a position to fulfill. The right of primogeniture was established ; and the reason of feudal fidelity forced that of political or civil law.

With the fiefs passing to children of the possessor, lords lost the freedom of disposing of them ; and to indemnify themselves, they established a right which they called the right of redemption, mentioned in our customs, which was paid first in direct line, and over time came to be paid only in a collateral line.

Soon fiefs could be transferred to outsiders, like a patrimonial property. This gave rise to the right of permission and sales, established almost throughout the realm. These rights were at first arbitrary ; but when the practice of granting these permissions became general, they were fixed in each region.

The right of redemption was to be paid at each change of heir, and was at first paid even in direct line. [4] The most general custom had fixed it at one year's revenue. That was onerous and troublesome for the vassal, and, in a sense, mortgaged the fief. He often obtained in the act of homage that the lord would no longer require more than a certain sum of money for redemption, [5] which, through changes that have taken place in the currencies, has become insignificant : thus the right of redemption is at this point reduced to almost nothing, whereas the right of permission and sales has subsisted in its full extent. As this right concerned neither the vassal nor his heirs, but was a fortuitous case which they were not expected to foresee or anticipate, these sorts of stipulations were not made, and they continued to pay a certain portion of the price.

When the fiefs were for life, one could not give a part of his fief in order to keep it forever as a sub-fief ; it would have been absurd had a simple usufructuary disposed of its property. But when they became perpetual, that was allowed, [6] with certain restrictions placed on it by customs, [7] which was called dismembering one's fief. [8]

The perpetuity of fiefs having led to the establishment of the right of redemption, daughters were able to succeed to a fief for want of males. For by giving the fief to the daughter, the lord multiplied the cases of his right of redemption, because the husband was to pay it as well as the wife. [9] This provision could not apply to the crown ; for since it was not held in anyone's dependency, it could not be eligible for right of redemption.

The daughter of William V, count of Toulouse, did not succeed to the county. Subsequently, Eleanor succeeded to

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Aquitaine, and Mathilde to Normandy ; and the right of daughters to succession seemed so well established in those times that Louis the Younger, after the dissolution of his marriage with Eleanor, made no difficulty about returning Guyenne to her. As these last two examples came very soon after the first, the general law calling daughters to the succession of fiefs must have been introduced later in the county of Toulouse than in the other provinces of the realm. [10]

The constitution of various kingdoms in Europe has followed the present state which fiefs were in at the times when those kingdoms were founded. Women succeeded neither to the French crown nor to the empire, because in the establishment of those two monarchies women could not succeed to fiefs ; but they succeeded in kingdoms whose establishment came after that of the perpetuity of fiefs, so that those which were founded by the Norman conquests, those that were founded by conquests made over the Moors, and finally still others which, beyond the limits of Germany and in relatively modern times, had a sort of second birth with the establishment of Christianity.

When the fiefs were revocable, they were given to men who were in a position to serve them, and there was no question of minors ; but [11] when they became perpetual, the lords took their fief until their majority, either to increase their profits, or to have the pupil raised in the exercise of arms. This is what our customs call *garde-noble*, which is based on other principles than those of guardianship, and is entirely distinct from it.

When the fiefs were for life, one petitioned for a fief, and the real transmission that was done by the scepter confirmed the fief, as it is confirmed today by the homage. We do not see that the counts, or even the king's envoys, received homages in the provinces ; and this function is not found in the commissions of those officers that have been preserved for us in the capitularies. They did indeed sometimes require all subjects to take the oath of fealty [12] ; but that oath was so far from an homage of the same nature as those since established that in these latter homages the oath of fealty was an act [13] coupled with the homage, which sometimes followed and sometimes preceded the homage, did not apply in all homages, and was less solemn than the homage and entirely distinct from it.

The counts and the king's envoys further, on occasion, had vassals whose fidelity was suspect put up a security which they called *firmitas* [14] ; but this security could not be an homage, since the kings gave it to each other. [15]

Now if the abbé Suger [16] speaks of a chair of Dagobert, on which, according to the report of antiquity, it was the custom for kings of France to receive the homages of the lords, it is clear that he is making use here of the notions and language of his time.

When fiefs passed on to the heirs, the acknowledgment of the vassal, which in the earliest times was only an occasional thing, became an act of duty ; it was done in a more pompous manner, it was filled with more formalities, because it was to vehicle the memory of the mutual duties of the lord and the vassal in all ages.

I could believe that homages began to be introduced in the time of king Pépin, which is the time when I have said that some benefices were given in perpetuity ; but I would believe it hesitantly, and only on the supposition that the authors of the ancient annals of the Franks [17] were not ignorant men who, describing the ceremonies of the act of fealty which Tassillon, duke of Bavaria, made to Pépin, spoke in terms of the usages they were seeing practiced in their time. [18]

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[1] See the Sallic law and the law of the Ripuarians, at the heading on *Alleux*.

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[2] See capitulary of the year 817, which contains the first division that Louis the Debonaire made among his children.

[3] See his two letters on this subject, one of which has as its title : *De divisione imperii*.

[4] See Ordinance of Philip Augustus, 1209, on fiefs.

[5] We find in the charters several of these conventions, as in the Cartulaire de Vendôme and of the abby of St. Cyprien in Poitou, of which Mr. Galland, p. 55, has given excerpts.

[6] But one could not shrink the fief, in other words, eliminate a portion of it.

[7] They set the portion which they wished to break up.

[8] [*Se jouer de son fief* : "In feudal jurisprudence, it is said that a lord is allowed to *dismember his fief*, meaning that he is allowed to sell a part of it, to dismember it without paying the permission and sales to the higher lord" (*Trévoux*.)]

[9] That is why the lord forced the widow to remarry.

[10] Most of the great houses had their own laws of succession. See what Mr. de la Thaumassière tells us about the houses of the Berry.

[11] We see in the capitulary of the year 877 *apud Carisiacum*, art. 3, Baluze ed., vol. II, p. 269, the moment when the kings had the fiefs administered, to preserve them to the minors : example that was followed by the lords, and furnished the origin of what we have called the *garde-noble*.

[12] We find its formula in the capitulary II of 802. See also that of 854, art. 13 and others.

[13] Mr. Du Cange, at the word *hominium*, p. 1163, and at the word *fidelitas*, p. 474, cites the charters of the ancient homages where these differences are found, and a large number of authorities which one can see. In the homage, the vassal placed his hand in the hand of the lord, and swore, the oath of fidelity was taken by swearing on the Gospels ; the homage was done kneeling, the oath of fidelity standing ; only the lord could accept the homage, but his officers could take the oath of fidelity. See Littleton, sect. 91-92, *Foi et hommage*, it is *Fidélité et hommage*.

[14] Capitulary of Charles the Bald, 860, *post reditum a Confluentibus*, art. 3, Baluze ed., p. 145.

[15] *Ibid.*, art. I.

[16] Book *de administratione sua*.

[17] *Anno 757*, ch. xvii.

[18] *Tassillo venit in Vassatico se commendans, per manus sacramenta juravit multa et innumerabilia, reliquiis sanctorum manus imponens, et fidelitatem promisit Pippino*. It would seem that this includes an homage and an oath of fidelity. See on p. 506 note (b).