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XXX.22 That justices were established before the end of the second dynasty

- The Spirit of Law - Book XXX. Theory of feudal laws among the Franks, in the relation they have to the establishment of the monarchy -

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It has been said that it was in the disorder of the second dynasty that vassals appropriated justice to themselves in their treasuries ; making a general proposition was preferred to examining it : it was simpler to say that vassals did not possess than to discover how they possessed. But the courts do not owe their origin to usurpations ; they derive from the earliest settlement, and not from its corruption.

"He who kills a free man," it is stated in the law of the Bavarians, "shall pay the composition to his family, if he have one ; and if not, he shall pay it to the duke, or to whomever he had petitioned during his lifetime." [1] We know what it meant to petition [2] for a benefice.

"He whose slave has been abducted," says the German law, "shall go to the prince who is over the abductor in order to obtain composition from him."

If a centenarius," it is stated in the decree of Childebert, "finds a thief in another*centena* than his own, or within the confines of our fidèles, and does not drive him out, he will stand in for the thief or purge himself [3] by oath." [4] There was therefore some difference between the territory of the centenarii and that of the fidèles.

This decree of Childebert's [5] explains the constitution of Chlothar of the same year, which, issued for the same case and the same situation, differs only in the terms, the constitution calling *in truste* what the decree calls *in terminis fidelium nostrorum*. Messrs Bignon and Du Cange, [6] who have said that *in truste* referred to the domain of another king, did not get it right.

But to wind up quickly, the second dynasty was neither in disorder nor dying in the time of Charlemagne : no usurpations took place under his reign. If in his time patrimonial courts were established, the convenient system that they are proposing falls of itself.

In a constitution of Pépin, king of Italy, [7] made for the Franks as well as the Lombards, that prince, after imposing penalties on the counts and other royal officers who err in the exercise of justice, or who delay in dispensing it, orders that, should it occur that a Franc or a Lombard holding a fief is unwilling to dispense justice, the judge in the district to which he belongs will suspend the exercise of his fief, and that in that interval he or his envoy will dispense justice. [8]

A capitulary of Charlemagne proves that the kings did not levy the *freda* everywhere. [9] Another by the same prince repeals several articles of the Salic, Burgundian, and Roman laws [10] so that each of his fidèles [11] will dispense justice similarly. Another by the same prince shows us the feudal rules and feudal court already established. [12] In terms of another, by Louis the Debonaire, when the holder of a fief does not dispense justice, or prevents its being dispensed, one should live freely at home until justice is dispensed. [13] I shall further cite two capitularies of Charles the Bald, one from the year 861, where we see private jurisdictions established, judges and officers under them [14] ; the other from the year 864, where he makes the distinction between his own seigniories and those of private citizens. [15]

We have no original concessions of fiefs, because they were established by the division we know to have been made among the victors. We can therefore not prove with the original contracts that justice in the beginnings was attached to fiefs ; but if, in the formulas of the confirmations or transfers of these fiefs in perpetuity, we find, as we have said, that justice was established there, it must have been that this right of justice was of the nature of the fief and one of its principal prerogatives.

We have a larger number of documents establishing the patrimonial justice of the churches in their territory than we

have proving that of the benefices or fiefs of the leudes or fidèles, for two reasons. The first is that most of the documents extant have been preserved or collected by monks for the use of their monasteries. The second, that the patrimony of the churches having been formed by individual concessions, and a sort of derogation to the established order, it took charters to do that ; whereas the concessions made to the leudes being consequences of the political order, they were not required to have, and even less to preserve, an individual charter. Often even the kings were content to make a simple transfer by the scepter, as appears in the *Life of St. Maurus.*

But the third formula of Marculfus proves to us sufficiently that the privilege of immunity, and consequently of justice, were common to ecclesiastics and seculars, since it is made for both kinds. [16]

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[1] Tit. 3, ch. xiii, Lindenbrog ed.

[2] [*Se recommander* : see XXXI, 24 and XXXI, 33 : "Quand les fiefs étaient à vie, on se recommandait pour un fief."]

[3] [*Se purger* : "On se purge par serment à l'audience sur un fait dont il n'y a point de preuve."]

[4] Of the year 595, art. 11-12, ed. Baluze of capitularies, p. 19. *Pari conditione convenit ut si una centena in alia centena vestigium secuta fuerit and invenerit, vel in quibuscumque fidelium nostrorum terminis vestigium miserit, and ipsum in aliam centenam minime expellere potuerit, aut convictus reddat latronem*, etc.

[5] *Si vestigius comprobatur latronis, tamen præsentia nihil longe mulctando ; aut si persequens latronem suum comprehenderit, integram sibi compositionem accipiat. Quod si in truste invenitur, medietatem compositionis rustis adquirat, and capitale exigat a latrone* (art. 2-3).

[6] [See glossary at the word *trustis*.]

[7] Appended to the *Leges Langobardoroum*, book II, tit. 52, §14. It is the capitulary of the year 793 in Baluze, p. 544, art. 10.

[8] *Et si forsitan Francus aut Langobardus habens beneficium justitiam facere noluerit, ille judex in cujus ministerio fuerit, contradicat illi beneficium suum, interim dum ipse aut missus ejus justitiam faciat*. See also in the same *Leges Langobardoroum*, book II, tit. 52, §2, which related to the capitulary of Charlemagne in the year 779, art. 21.

[9] The third of the year 812, art. 10.

[10] The second of the year 813, Baluze ed., p. 506.

[11] *Ut unusquisque fidelis justitias ita faceret* (*ibid*.).

[12] Second capitulary of the year 813.

[13] *Capitulare quintum anni 819*, art. 23, Baluze ed., p. 617. *Ut ubicumque missi, aut episcopum, aut abbatem, aut alium quemlibet honore præditum invenerint, qui justitiam facere noluit vel prohibuit, de ipsius rebus vivant quandiù in eo loco justitias facere debent*.

[14] *Edictum in Carisiaco*, in Baluze, vol. II, p. 152. *Unusquisque advocatus pro omnibus de sua advocatione [...] in convenientia ut cum ministerialibus de sua advocatione quos invenerit contra hunc bannum nostrum fecisse [...] castiget.*

[15] *Edictum Pistense*, art. 18, Baluze ed., vol. II, p. 181. *Si in fiscum nostrum, vel in quamcumque immunitatem, aut alicujus potentis potestatem vel proprietatem confugerit*, etc.

[16] Book II. *Si beneficia opportuna locis ecclesiarum, aut cui voluerit dicere.*