

sion of fiefs in a collateral line did not extend further than to brothers-german, though of late it was carried as far as the seventh degree, and by the new code they had extended it in a direct line *in infinitum*." It is thus that Conrad's law was insensibly extended.

All these things being supposed, the bare perusal of the history of France is sufficient to demonstrate that the perpetuity of fiefs was established earlier in this kingdom than in Germany. Towards the commencement of the reign of the Emperor Conrad II in 1024, things were upon the same footing still in Germany, as they had been in France during the reign of Charles the Bald, who died in 877. But such were the changes made in this kingdom after the reign of Charles the Bald, that Charles the Simple found himself unable to dispute with a foreign house his incontestable rights to the empire; and, in fine, that in Hugh Capet's time the reigning family, stripped of all its demesnes, was no longer in a condition to maintain the crown.

The weak understanding of Charles the Bald produced an equal weakness in the French monarchy. But as his brother, Louis, King of Germany, and some of that prince's successors were men of better parts, their government preserved its vigor much longer.

But what do I say? Perhaps the phlegmatic constitution, and, if I dare use the expression, the immutability of spirit peculiar to the German nation made a longer stand than the volatile temper of the French against that disposition of things, which perpetuated the fiefs by a natural tendency, in families.

Besides, the Kingdom of Germany was not laid waste and annihilated, as it were, like that of France, by that particular kind of war with which it had been harassed by the Normans and Saracens. There were less riches in Germany, fewer cities to plunder, less extent of coast to scour, more marshes to get over, more forest to penetrate. As the dominions of those princes were less in danger of being ravaged and torn to pieces they had less need of their vassals and consequently less dependence on them. And in all probability, if the emperors of Germany had not been obliged to be crowned at Rome, and to make con-

antiquis sapientibus constitutum, licet moderno tempore usque ad septimum geniculum sit usurpatum, quod in mas-

culis descendantibus novo jure in infinitum extenditur.—Ibid.

tinual expeditions into Italy, the fiefs would have preserved their primitive nature much longer in that country.

31.—*In what Manner the Empire was transferred from the Family of Charlemagne*

The empire, which, in prejudice to the branch of Charles the Bald, had been already given to the bastard line of Louis, King of Germany,^u was transferred to a foreign house by the election of Conrad, Duke of Franconia, in 912. The reigning branch in France being hardly able to contest a few villages was much less in a situation to contest the empire. We have an agreement entered into between Charles the Simple, and the Emperor Henry I, who had succeeded to Conrad. It is called the Compact of Bonn.^v These two princes met in a vessel which had been placed in the middle of the Rhine, and swore eternal friendship. They used on this occasion an excellent middle term. Charles took the title of King of West France, and Henry that of King of East France. Charles contracted with the King of Germany, and not with the Emperor.

32.—*In what Manner the Crown of France was transferred to the House of Hugh Capet*

The inheritance of the fiefs, and the general establishment of rear-fiefs, extinguished the political and formed a feudal government. Instead of that prodigious multitude of vassals who were formerly under the king, there were now a few only, on whom the others depended. The kings had scarcely any longer a direct authority; a power which was to pass through so many other and through such great powers either stopped or was lost before it reached its term. Those great vassals would no longer obey; and they even made use of their rear-vassals to withdraw their obedience. The kings, deprived of their demesnes and reduced to the cities of Rheims and Laon were left exposed to their mercy; the tree stretched out its branches too far, and the head was withered. The kingdom found itself without a demesne, as the empire is at present. The crown was, therefore, given to one of the most potent vassals.

The Normans ravaged the kingdom; they sailed in open boats

^u Arnold and his son Louis IV. le Mire, "Cod. donationum piarum,"
^v In the year 926, quoted by Aubert chap. xxvii.

or small vessels, entered the mouths of rivers, and laid the country waste on both sides. The cities of Orleans and Paris put a stop to those plunderers, so that they could not advance farther, either on the Seine, or on the Loire.^w Hugh Capet, who was master of those cities, held in his hands the two keys of the unhappy remains of the kingdom; the crown was conferred upon him as the only person able to defend it. It is thus the empire was afterwards given to a family whose dominions form so strong a barrier against the Turks.

The empire went from Charlemagne's family at a time when the inheritance of fiefs was established only as a mere condescendence. It even appears that this inheritance obtained much later among the Germans than among the French;^x which was the reason that the empire, considered as a fief, was elective. On the contrary, when the crown of France went from the family of Charlemagne, the fiefs were really hereditary in this kingdom; and the crown, as a great fief, was also hereditary.

But it is very wrong to refer to the very moment of this revolution all the changes which happened, either before or afterwards. The whole was reduced to two events; the reigning family changed, and the crown was united to a great fief.

33.—Some Consequences of the Perpetuity of Fiefs

From the perpetuity of fiefs it followed, that the right of seniority or primogeniture was established among the French. This right was quite unknown under the first race;^y the crown was divided among the brothers, the *allodia* were shared in the same manner; and as the fiefs, whether precarious or for life, were not an object of succession, there could be no partition in regard to those tenures.

Under the second race, the title of Emperor, which Louis the Debonnaire enjoyed, and with which he honored his eldest son, Lotharius, made him think of giving this prince a kind of superiority over his younger brothers. The two kings were obliged to wait upon the Emperor every year, to carry him presents, and to receive much greater from him; they were also to consult

^w See the Capitulary of Charles the Bald, in the year 877, "apud Carisiacum," on the importance of Paris, St. Denis, and the castles on the Loire, in those days.

^x See above, chap. 30.

^y See the Salic Law, and the law of the Ripuarians, in the title of "allodia."

with him upon common affairs.^z This is what inspired Lotharius with those pretences which met with such bad success. When Agobard wrote in favor of this prince,^a he alleged the Emperor's own intention, who had associated Lotharius with the empire after he had consulted the Almighty by a three days' fast, by the celebration of the holy mysteries, and by prayers and almsgiving; after the nation had sworn allegiance to him which they could not refuse without perjuring themselves; and after he had sent Lotharius to Rome to be confirmed by the Pope. Upon all this he lays a stress, and not upon his right of primogeniture. He says, indeed, that the Emperor had designed a partition among the younger brothers, and that he had given the preference to the elder; but saying he had preferred the elder was saying at the same time that he might have given the preference to his younger brothers.

But as soon as the fiefs became hereditary, the right of seniority was established in the feudal succession; and for the same reason in that of the crown, which was the great fief. The ancient law of partitions was no longer subsisting; the fiefs being charged with a service, the possessor must have been enabled to discharge it. The law of primogeniture was established, and the right of the feudal law was superior to that of the political or civil institution.

As the fiefs descended to the children of the possessor, the lords lost the liberty of disposing of them; and, in order to indemnify themselves, they established what they called the right of redemption, whereof mention is made in our customs, which at first was paid in a direct line, and by usage came afterwards to be paid only in a collateral line.

The fiefs were soon rendered transferable to strangers as a patrimonial estate. This gave rise to the right of lord's dues, which were established almost throughout the kingdom. These rights were arbitrary in the beginning; but when the practice of granting such permissions became general they were fixed in every district.

The right of redemption was to be paid at every change of heir, and at first was paid even in a direct line.^b The most general

^z See the Capitulary of the year 817, which contains the first partition made by Louis the Debonnaire among his children.

^a See his two letters upon this subject, the title of one of which is "de divisione imperii."

^b See the ordinance of Philip Augustus, in the year 1209, on the fiefs.

custom had fixed it to one year's income. This was burdensome and inconvenient to the vassal, and affected in some measure the fief itself. It was often agreed in the act of homage that the lord should no longer demand more than a certain sum of money for the redemption, which, by the changes incident to money, became afterwards of no manner of importance.^c Thus the right of redemption is in our days reduced almost to nothing, while that of the lord's dues is continued in its full extent. As this right concerned neither the vassal nor his heirs, but was a fortuitous case which no one was obliged to foresee or expect, these stipulations were not made, and they continued to pay a certain part of the price.

When the fiefs were for life, they could not give a part of a fief to hold in perpetuity as a rear-fief; for it would have been absurd that a person who had only the usufruct of a thing should dispose of the property of it. But when they became perpetual, this was permitted,^d with some restrictions made by the customs, which was what they call dismembering their fief.^e

The perpetuity of feudal tenures having established the right of redemption, the daughters were rendered capable of succeeding to a fief, in default of male issue. For when the lord gave the fief to his daughter, he multiplied the cases of his right of redemption, because the husband was obliged to pay it as well as the wife.^f This regulation could not take place in regard to the crown, for as it was not held of anyone there could be no right of redemption over it.

The daughter of William V, Count of Toulouse, did not succeed to the county. But Eleanor succeeded to Aquitaine, and Matilda to Normandy; and the right of the succession of females seemed so well established in those days, that Louis the Young, after his divorce from Eleanor, made no difficulty in restoring Guienne to her. But as these two last instances followed close on the first, the general law by which the women were called to the succession of fiefs must have been introduced much later into the county of Toulouse than into the other provinces of France.^g

^c We find several of these conventions in the charters, as in the register book of Vendôme, and that of the abbey in St. Cyprian in Poitou, of which Mr. Galland has given some extracts, p. 55.

^d But they could not abridge the fiefs; that is, abolish a portion of it.

^e They fixed the portion which they could dismember.

^f This was the reason that the lords obliged the widow to marry again.

^g Most of the great families had their particular laws of succession. See what M. de la Thaumassière says concerning the families of Berri.

The constitution of several kingdoms of Europe has been directed by the state of feudal tenures at the time when those kingdoms were founded. The women succeeded neither to the crown of France nor to the empire, because at the foundation of those two monarchies they were incapable of succeeding to fiefs. But they succeeded in kingdoms whose foundation was posterior to that of the perpetuity of the fiefs, such as those founded by the Normans, those by the conquests made on the Moors, and others, in fine, which were beyond the limits of Germany, and in later times received in some measure a second birth by the establishment of Christianity.

When these fiefs were at will, they were given to such as were capable of doing service for them, and, therefore, were never bestowed on minors; but when they became perpetual, the lords took the fief into their own hands, till the pupil came of age, either to increase their own emoluments, or to train the ward to the use of arms.^h This is what our customs call "the guardianship of a nobleman's children," which is founded on principles different from those of tutelage, and is entirely a distinct thing from it.

When the fiefs were for life, it was customary to vow fealty for a fief; and the real delivery, which was made by a sceptre, confirmed the fief, as it is now confirmed by homage. We do not find that the counts, or even the king's commissaries, received the homage in the provinces; nor is this ceremony to be met with in the commissions of those officers which have been handed down to us in the Capitularies. They sometimes, indeed, made all the king's subjects take an oath of allegiance;ⁱ but so far was this oath from being of the same nature as the service afterwards established by the name of homage, that it was only a ceremony, of less solemnity, occasionally used, either before or after that act of obeisance; in short, it was quite a distinct thing from homage.^j

^h We see in the Capitulary of the year 817, "apud Carisiacum," art. 3, Baluzius's edition, tom. ii. p. 269, the moment in which the kings caused the fiefs to be administered in order to preserve them for the minors; an example followed by the lords, and which gave rise to what we have mentioned by the name of "the guardianship of a nobleman's children."

ⁱ We find the formula thereof in the second Capitulary of the year 802. See

also that of the year 854, art. 13, and others.

^j M. du Cange in the word "hominium," p. 1163, and in the word "fidelitas," p. 474, cites the charters of the ancient homages where these differences are found, and a great number of authorities which may be seen. In paying homage, the vassal put his hand on that of his lord, and took his oath; the oath of fealty was made by swearing on the gospels. The homage was

The counts and the king's commissaries further made those vassals whose fidelity was suspected give occasionally a security, which was called *firmitas*,^k but this security could not be an homage since kings gave it to each other.^l

And though the Abbot Suger^m makes mention of a chair of Dagobert, in which according to the testimony of antiquity, the kings of France were accustomed to receive the homage of the nobility, it is plain that he expresses himself agreeably to the ideas and language of his own time.

When the fiefs descended to the heirs, the acknowledgment of the vassal, which at first was only an occasional service, became a regular duty. It was performed in a more splendid manner, and attended with more formalities, because it was to be a perpetual memorial of the reciprocal duties of the lord and vassal.

I should be apt to think that homages began to be established under King Pepin, which is the time I mentioned that several benefices were given in perpetuity, but I should not think thus without caution, and only upon a supposition that the authors of the ancient annals of the Franks were not ignorant pretenders,ⁿ who in describing the fealty professed by Tassillon, Duke of Bavaria, to King Pepin, spoke according to the usages of their own time.^o

34.—The same Subject continued

When the fiefs were either precarious or for life they seldom bore a relation to any other than the political laws; for which reason in the civil institutions of those times there is very little mention made of the laws of fiefs. But when they became hereditary, when there was a power of giving, selling, and bequeathing them, they bore a relation both to the political and the civil laws. The fief considered as an obligation of performing military service, depended on the political law; considered as a kind of commercial property, it depended on the civil law. This gave rise to the civil regulations concerning feudal tenures.

performed kneeling, the oath of fealty standing. None but the lord could receive homage, but his officers might take the oath of fealty.—See Littleton, secs. 91, 92, faith and homage, that is, fidelity and homage.

^k Capitularies of Charles the Bald in the year 860, "post reditum a Confluentibus," art. 3, Baluzius's edition, p. 145.

^l Ibid. art. 1.

^m "Lib. de administratione sua."

ⁿ Anno 757, chap. xvii.

^o "Tassilo venit in vassatico se commendans, per manus sacramenta juravit multa et innumerabilia, reliquiis sanctorum manus imponens, et fidelitatem promisit regi Pippino." One would think that here was an homage and an oath of fealty. See the note ^j, preceding page.

When the fiefs became hereditary, the law relating to the order of succession must have been in relation to the perpetuity of fiefs. Hence this rule of the French law, "estates of inheritance do not ascend,"^p was established in spite of the Roman and Salic laws.^q It was necessary that service should be paid for the fief; but a grandfather or a great-uncle would have been too old to perform any service; this rule thus held good at first only in regard to the feudal tenures, as we learn from Boutillier.^r

When the fiefs became hereditary, the lords who were to see that service was paid for the fief, insisted that the females who were to succeed to the feudal estate, and I fancy sometimes the males, should not marry without their consent; insomuch that the marriage contracts became in respect to the nobility both of a feudal and a civil regulation.^s In an act of this kind under the lord's inspection, regulations were made for the succession, with the view that the heirs might pay service for the fief: hence none but the nobility at first had the liberty of disposing of successions by marriage contract, as Boyer^t and Aufrelius^u have observed.

It is needless to mention that the power of redemption founded on the old right of the relatives, a mystery of our ancient French jurisprudence I have not time to unravel, could not take place with regard to the fiefs till they became perpetual.

Italiam, Italiam v.

I finish my treatise of fiefs at a period where most authors commence theirs.

^p Book IV. "de feudis," tit. 59.

^q In the title of "alodia."

^r "Somme Rurale," book I. tit. 76,

p. 447.

^s According to an ordinance of St. Louis, in the year 1246, to settle the customs of Anjou and Maine; those who shall have the care of the heirs

of a fief shall give security to the lord, that she shall not be married without his consent.

^t Decision 155, No. 8 and 204; and No. 38.

^u In Capell. Thol. decision 453.

^v "Æneid," lib. III. v. 523.