

Chicago-Kent Law Review

Volume 70

Issue 4 *Symposium on Ancient Law, Economics & Society Part I: The Development of Law in Classical and Early Medieval Europe / Symposium on Ancient Law, Economics & Society Part I: The Development of Law in the Ancient Near East*

Article 9

June 1995

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Recommended Citation

Katherine F. Drew, *Public vs. Private Enforcement of the Law in the Early Middle Ages: Fifth to Twelfth Centuries*, 70 Chi.-Kent L. Rev. 1583 (1995).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol70/iss4/9>

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PUBLIC VS. PRIVATE ENFORCEMENT OF THE LAW IN THE EARLY MIDDLE AGES: FIFTH TO TWELFTH CENTURIES

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Considerable scholarly attention has been given to the shift from private to public justice accompanying the development of the modern state system of western Europe. Various explanations have been given that cover such diverse trends as the growth of more rational thought accompanying the renaissance of the twelfth century and the rediscovery of the classical Roman law as contained in Justinian's *Corpus Iuris Civilis* in the late eleventh and twelfth centuries. Both of these developments accompanied the revival of interest in learning, the transmission of certain ancient Greek mathematical and scientific works into western Europe via Islamic Spain, and the development of the scholastic method of thought and the rise of universities.

Although all of these movements certainly made a contribution in providing background for the shift from private to public justice, the central feature seems to be the utilization of all of these arguments by the new monarchs and their courts seeking to overcome the breakdown of central authority that had developed between the ninth and eleventh centuries. Seemingly this could be done only by demonstrating that the crown could offer a better brand of justice, whether based on the unifying principles of the rediscovered "classical" Roman law or on the equally centralizing principles of the English common law worked out by justices staffing the royal English courts. In either case, the conclusion seems to be that the rationality of the new procedures justified the attack on the private courts leading to their virtual extermination.

There is general agreement that the public courts provided by the modern western states gradually led to the disappearance of private courts, but little has been offered to explain the rise of private justice in the early Middle Ages and its relationship to the public court system. This Article examines some of the evidence for this development. The court system of the later Roman Empire (second to sixth centuries A.D.) reflected the increasingly absolute place that the em-

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peror occupied in the center of his administration, a position that justified the statement in Roman law that the will of the emperor was indeed law.¹ In effect, the emperor was the source of law, but not only in a legislative sense, but also in the judicial sense since in the centralized Roman court system, judges in doubt always sought an imperial opinion. Except perhaps in some of the most lordly immunities in the late Imperial period, there was no room for private justice. Dispute resolution was accomplished by appeal to the central authority and the decision of the justice system was binding on all, although persons who qualified as *honestiores* had more appeal rights than the lesser *humiliores*.² Quite obviously the later medieval rulers, both ecclesiastic and lay, regarded this as an ideal pattern: what better than equal justice for all enforced from the top? To further solidify the change, the new centralized justice was accompanied by a change in the procedure of proof away from the older compurgation³ and ordeal,⁴ of which the ordeal especially had lost the confidence of men with a broader, more rational outlook upon justice.⁵

The new romano-canonical procedure of the civil and canon law courts, as well as the new procedures of the English common law courts utilizing writs and juries, forged ahead and by the early modern period had virtually eliminated the old procedures of compurgation and ordeal as well as most of the manorial and seignorial private courts. What was lost in the process?

1. *Institutes of the Corpus Iuris Civilis*, Bk. I, Title II, 6.

2. When the Edict of Caracalla (A.D. 212) extended Roman citizenship to all freemen of the Empire, it did not extend the right of appeal to the Emperor to everyone. Hereafter only the *honestiores* (the more honorable, the holders of honors or offices) had this right. The more humble (*humiliores*) had no such right.

3. Compurgation was a form of proof assigned by the court to persons of good reputation in the community. It was a solemn oath-taking by the defendant supported by a specified number of oath helpers, the number of oath helpers usually depending on the seriousness of the charge. Accusers could also be required to take an oath and provide oath helpers.

4. In the case of serious accusation or when the accused was of unfree birth, the court could specify proof by ordeal, which was essentially an appeal to the deity to reveal the guilt or innocence of the party undergoing the ordeal (whether it was the hot or cold water or hot iron ordeal or the ordeal by battle). Both compurgation and ordeal depended on the participation of a priest.

5. The new procedures relying heavily on questioning and hearing testimony did not immediately replace compurgation and ordeal. Compurgation continued in use for some time, and one form of the ordeal, battle, would be retained for centuries especially in suits involving landed property. See R.C. Van Caenegem, "Methods of Proof in Western Medieval Law," in *Legal History: A European Perspective* (London: Hambledon Press, 1991), 71-113; Paul Hyams, "Trial by Ordeal: The Key to Proof in the Early Common Law," in *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, ed. by Morris S. Arnold, Thomas A. Green, Sally A. Scully, and Stephen D. White (Chapel Hill: University of North Carolina Press, 1981), 90-126; and Kenneth Pennington, "Law, Procedure of, 1000-1500," *Dictionary of the Middle Ages*, 7 (New York: Scribner's, 1986), 502-506.

The early medieval rulers had worked out a compromise between the state-run justice system of the late Roman Empire and the feud-driven justice of the Germanic barbarians. As a result, all the legal and judicial institutions of the early Germanic kingdoms reflected a fusion of Roman and Germanic elements with one or the other predominating depending on how long that people had been in contact with the Roman world before the establishment of their kingdom and in what part of the former Roman Empire the kingdom was established. In general, the more southerly Germanic kingdoms established in the more thoroughly romanized portions of the Empire (Visigothic, Burgundian, and Lombard) reflected more Roman influence, whereas the more northerly ones (Frankish and Anglo-Saxon) reflected more Germanic influence. But in all, the power of the new kingdom was not so overwhelming as that of the Empire had been. For the purposes of justice, all these kingdoms recognized the need for self-help and the usefulness of belonging to either a strong family or kin group or enjoying the protection of a more powerful individual, whether he was your lord and you his humble servant or tenant, or whether he was the lord who accepted your free service and provided protection in return.

Early medieval justice was essentially provided through the state's offering a tribunal before which disputes could be resolved. Getting one's case before the court, however, depended on the initiative of the aggrieved party or his family, while enforcing the decision depended heavily upon the community's desire to maintain the peace and avoid escalating feud. Almost from the beginning, the justice system of the early Germanic kingdoms depended on a combination of private and public initiative. It was in the public interest to maintain peace and therefore to avoid feud, and to accomplish this courts were made available. In the case of Burgundians, Visigoths, and Lombards, professional justices presided over these courts; among the Franks and Anglo-Saxons, justices presided over more popular courts where the law was stated by representatives of the community. Complaints could be brought before these courts with the accuser usually summoning his opponent to court. Where the summons according to specified form was repeatedly ignored, the court could assess outlawry and confiscation of property. It was the function of the court to determine which of the parties would present proof and what the method of proof would be. In the case of persons of free birth and good reputation, proof was normally by compurgation. In the event of persons of non-free birth or poor reputation, the proof was likely to be by

ordeal. In either case, the decision was in the final analysis in the hands of God who could intervene to cause a false or broken oath or who would reveal guilt or innocence through the physical manifestations of the ordeal. In the case of proof of guilt, Germanic law favored compensation rather than punishment since compensation was more likely to have a calming effect on the injured feelings of an aggrieved family than would punishment. There were always families, however, who refused compensation and preferred blood.

Although the aim of Germanic law was to avoid feud,⁶ obviously it did not always succeed as the many tales of famous feuds recited in

6. For example, see from the Lombard Laws Rothair 45: "In the matter of composition [the payment made for compensation] for blows and injuries which are inflicted by one freeman on another freeman, composition is to be paid according to the procedure provided below and the blood-feud (*faida*) shall cease." Rothair 74: "In the case of all wounds and injuries mentioned above, involving freemen as they do, we have set a higher composition than did our predecessors in order that the *faida*, that is the blood feud, may be averted after receipt of the abovementioned composition, and in order that more shall not be demanded and a grudge shall not be held. So let the case be concluded and friendship remain between the parties." Rothair 75: "Concerning the death of a child in its mother's womb. If a child is accidentally killed while still in its mother's womb, and if the woman is free and lives, then her value shall be measured in accordance with her rank, and composition for the child shall be paid at half the sum at which the mother is valued. But if the mother dies, then composition must be paid for her according to her rank in addition to the payment of composition for the child killed in her womb. But thereafter the feud shall cease since the deed was done unintentionally." Rothair 138: "Concerning the case of a man killed by a tree cut down by several men. If two or more men cut down a tree, and another man coming along is killed by that tree or it causes some damage, then those who were cutting the tree, however many they were, shall pay composition equally for the homicide or for the damage. In the case where one of those cutting the tree is killed by the tree, then, if there were two colleagues, half of the wergeld shall be assessed to the dead man and the other half shall be paid by his colleague to the relatives [of the dead man]. And if there were more than two men involved, an equal portion shall likewise be assessed to the dead man and to those who still live: each shall pay an equal share of the total wergeld, the feud ceasing since it happened without design." Rothair 143: "Concerning the man who seeks revenge after accepting composition. If a freeman or slave is killed and composition paid for the homicide and oaths offered to avert a feud, and afterwards he who received the composition tries to revenge himself by killing a man belonging to the associates from whom he received the payment, we order that he repay the composition twofold to the relatives of the freeman or to the slave's lord. In like manner concerning him who tries to avenge himself after accepting compensation for blows or injuries, he shall restore that which he accepted in double amount. In addition, he shall pay composition, as provided above, if he has killed the man." See also Rothair 162, 188, 190, 214, 326, 387; Liutprand 13, 119, 135. *The Lombard Laws*, tr. by Katherine Fischer Drew (Philadelphia: University of Pennsylvania Press, 1973).

From the Carolingian capitularies, see *Capitulary of Herstal*, 779: "22 If anyone is unwilling to accept a payment instead of vengeance he is to be sent to us, and we will send him where he is likely to do least harm. Likewise, if anyone is unwilling to pay a sum instead of vengeance or to give legal satisfaction for it, it is our wish that he be sent to a place where he can do no further harm." *General Capitulary for the missi*, spring 802: [This is a very long chapter justifying harsh treatment of murder and also relating it to the outbreak of feud, the breakdown of peace.] "32 . . . For this reason we have sought, by every kind of precept, to prevent the people entrusted to us for ruling from perishing as a result of this evil; for he who feels no dread at the anger of God should not receive mild and benevolent treatment from us; rather would we wish a man who had dared to commit the evil act of murder to receive the severest of punishments. Nevertheless, in order that the crime should not increase further, and in order that serious enmity should not

chronicles and stories indicate. Feud is certainly the most obvious form of private enforcement of justice in the early Middle Ages.⁷ Nonetheless there continued to be active public courts throughout the Merovingian and early Carolingian periods; it is not until we come to the ninth, tenth, and eleventh centuries that the breakdown of central authority led to the establishment of local lordships presiding over courts that were not subordinate to the central authority. What is the background for the establishment of private or franchisal courts in the central Middle Ages?

The immediate cause of the breakdown of central authority was a new series of barbarian invasions beginning at the end of the eighth century and continuing through the ninth and tenth centuries (Northmen, Vikings, or Danes descending from the north; Saracens, Muslims from north Africa, raiding from the south; and Hungarians invading from the east). These invasions coincided with internal difficulties in the Frankish empire, which had expanded under Charlemagne to include not only all of Roman Gaul, but part of northern Spain, most of the Italian peninsula, and a large part of Germany. Charlemagne brought all this territory under one rule and attempted to revive many of the classical traditions of literature, law, and government (culminating in his coronation as Roman Emperor in 800). The ultimate failure of his aims, however, was revealed shortly

arise among Christians when they resort to murders at the persuasion of the devil, the guilty person should immediately set about making amends, and should with all possible speed pay the appropriate recompense to the relatives of the dead man for the evil he has done to them. And this we firmly forbid, that the parents [relatives would be a better translation] of the dead man should dare in any way to increase the enmity arising from the crime committed, or refuse to allow peace when the request is made; rather, they should accept the word given to them and the compensation offered, and allow perpetual peace, so long as the guilty man does not delay payment of the compensation." And from the second capitulary of the *Double Capitulary of Thionville for the missi*, 805: "To all and sundry . . . 5 Concerning arms, and the prohibition on carrying them within the country—that is, shields and lances and coats of mail. And if there is a private feud, an inquiry is to be made as to which of the two parties is in the wrong, with a view to pacifying them, even if it means doing so against their will; and if there is no other way of pacifying them, let them be brought to our presence. And if, after they are appeased, one of them should kill the other, he must make a payment for him and must lose the hand by which he was forsworn, and in addition pay the royal fine." Taken from H.R. Loyn and John Percival, *The Reign of Charlemagne: Documents on Carolingian Government and Administration* (New York: St. Martin's Press, 1975), 49, 77, and 88.

7. See J.M. Wallace-Hadrill's "The Bloodfeud of the Franks," originally published in the *Bulletin of the John Rylands Library* but republished in *The Long-Haired Kings: And Other Studies in Frankish History* (London: Methuen & Co., 1962), 121-147. Wallace-Hadrill argues that the Salic Laws of the Franks never actually refer to the resort to bloodletting but provide for the peaceful resolution of disputes that might lead to feud. Nevertheless, that the Franks did resort to feud (especially in circles close to the royal family) is clear from a number of stories related by Wallace-Hadrill from the pages of Gregory of Tours *History of the Franks* and the *Continuation of Fredegar*, as well as from other sources.

after his death in the fratricidal wars engaged in by his grandsons that effectively divided his empire into many fractious parts. Civil wars demoralized the army, and a disunited state could not face invasion on one, two, or even three fronts at the same time. In desperation, people sought protection from their local lord. In the feudal period that followed, the central authority tended to become shadowy and in many places public justice was replaced by private courts.

What were the origins of this private justice?

There were hints in the later Lombard laws of the mid-eighth century⁸ that the king's justice was being challenged by men who bypassed the royal justice to seek adjudication of their disputes from a personal lord. Although the Lombard laws prohibited this practice, the fact that such a prohibition was necessary indicates that private justice was already developing at the expense of the public courts.

The more formal recognition of private justice comes as a result of a number of developments that are usually associated with the growth of feudalism. These developments began in the mid-eighth century when the Frankish ruler, Charles Martel, who was at that time only mayor of the palace, not king, revived the Roman practice of benefice⁹ giving in order to provide for a professional core of mounted soldiers in the Frankish army. The new Frankish benefice differed from the Roman, however, in that the Roman grant was made for past services whereas the Frankish grant (normally made for one life) was made in the expectation of future services. As time passed, these Frankish grants, originally made for the lifetime of the recipient, tended to be confirmed to the heir and eventually became essentially hereditary. Furthermore, when the benefice was granted to a royal official, the benefice came to be identified with the office itself and the private rights of the holder merged with the public functions of the official.

In the breakup of the Carolingian empire in the ninth and tenth centuries, the various contestants for a share of that empire had to entice followers by generous grants of benefices. In this period, it became customary to make the grant with immunity. The evolution of the immunity can be traced most clearly in Italy. A limited form of

8. Ratchis 10-11 (746). *The Lombard Laws*, 221-223.

9. The Roman benefice was a grant (of land or office) from a lord to a follower (typically from the Emperor to someone who had served him well). It was essentially a reward for past services and so was made for a specified period of time after which the benefice reverted to the donor: for one life (the life of the recipient); for two lives (the lives of the recipient and his heir); or for three lives (the lives of the recipient, his heir, and his heir's heir).

immunity can be traced back to the Lombard period. In 755, King Aistulf, confirming an earlier grant by King Aribert (652-661), granted to the church of St. Lawrence, Bergamo, immunity from paying tribute and enjoined all public officials (dukes, counts, gastalds, and royal stewards) to observe the terms of the decree.¹⁰ A more fully developed immunity began to appear in charters issued by the Carolingians shortly following their overthrow of the Lombard kingdom in 775. As time passed, the terms of this immunity took two different forms, sometimes called the lesser immunity and the greater immunity.

The lesser immunity appeared first and was modeled on the imperial Roman immunity, which was an exemption from certain public burdens extended to religious institutions or persons by the Christian emperors. The same use of the term continued under the barbarian rulers of Italy but there it became fused with an essentially Germanic concept so that to be immune was regarded as being *in mundio* or under the protection (*mundium*) of the king. In practice, the grant usually conveyed a specific immunity from the interference of state officials and might have economic, military, and jurisdictional aspects. In effect, the grant of immunity allowed the immunist to exercise certain functions on behalf of the state. If the grant was of the lesser immunity type, this concession was not a delegation of the state's sovereign powers; instead, the immunist became for all practical purposes one of the officials of the state.¹¹

The lesser immunity conveyed exemption from the entry of royal officials for the purpose of holding court, implementing the regular activity of the courts (such as taking sureties and enforcing distraint), or the exaction of tribute. The immunist's property and dependents were still subject to the jurisdiction of the regular courts and were still liable for the same tribute as before the grant, but the immunist himself now acted in the place of the royal officials and was responsible for seeing that his dependents appeared before the proper courts and for collecting the tribute on behalf of the state. In addition, the lesser immunity might also convey the right of *inquisitio*, the right to use the inquest procedure to determine the rights, especially the property rights, of the immunist.¹²

10. Giulio Porro-Lambertenghi, *Codex Diplomaticus Langobardiae*, in *Monumenta Historiae Patriae*, XIII (Turin, 1873), xv (c.33).

11. Giuseppe Salvioli, *Storia delle immunità della signorie e giustizie delle chiese in Italia* (Modena, 1888); Carlo Guido Mor, *L'età feudale*, II (Milan, 1952), 193-197, and 223, note 1; P.S. Leicht, *Studi sulla proprietà fondiaria nel medio evo* (Verona-Padua, 1903), 163-175.

12. There are numerous examples of such grants in the documents collected in Porro-Lambertenghi, *Codex Diplomaticus Langobardiae*, and in *Diplomatum Karolinorum*, I, *Monu-*

On occasion the grant of immunity might go further than simply empowering the immunist to act in place of the royal officials and the estate became a kind of jurisdiction of its own. The simplest form of this greater immunity was the cession to the immunist of the regalia or fiscal returns, as a result of which the immunist did not collect the tribute on behalf of the state but rather collected it for himself. When the greater immunity had developed to its fullest extent, the immunist would exercise the right to hold his own court and his estate would constitute a territorial jurisdiction.

Churches and manorial lords holding church lands had had a kind of domestic jurisdiction from a much earlier time. In 787, Pippin, representing his father, Charlemagne, issued the so-called Mantuan Capitulary. It clearly stated that lesser clerics shall come first under the jurisdiction of the bishop's court, and only if the bishop is unable to render justice shall the injured party, accompanied by a representative of the bishop, seek justice from the royal courts. The Mantuan Capitulary also provided that the agricultural dependents of an ecclesiastical establishment should receive justice from their patron or lord, whether that patron or lord was the ecclesiastical establishment or a freeman holding a benefice from the church.¹³

menta Germaniae Historica (Hanover, 1906). For examples and references see my "The Immunity in Carolingian Italy," *Speculum*, XXXVII (1962), republished in *Law and Society in Early Medieval Europe* (London: Variorum Reprints, 1988), 182-197.

Just as immunity from the entrance of royal officials for fiscal and judicial purposes can be traced back to the Lombard period, so too the use of the inquest can be traced back to the Lombards. A transcript of an inquest as a royal prerogative survives from the reign of King Liutprand (715). The tone of the document indicates that the procedure was not unusual. This is a transcript of an inquest conducted by Gunteram, as a royal notary to the king. The inquest was held to determine the respective claims of the bishoprics of Siena and Arezzo to certain churches and monasteries in the territory of Siena. A number of witnesses, mostly ecclesiastics, were interrogated and their replies recorded by the notary under the heading, "Statement of individual priests whom I, the notary Gunteram, at the command of my most excellent lord King Liutprand, interrogated (*inquisibi*)." The replies are given under oath taken on the four Gospels and the cross. The next document, recorded by Schiaparelli, is the judgment rendered by the bishops of Fiesole, Pisa, Florence, and Lucca on the basis of the inquest conducted by Gunteram, who is here described as the *missus* of King Liutprand. The document cites the names of the bishops present in judgment, lists the numerous churches, baptisteries, and monasteries in controversy, summarizes briefly the chief arguments of the bishops representing Siena and Arezzo, and continues that an inquest has been held. The judgment goes to Arezzo and the bishop of Siena is enjoined from entering that property thereafter. Luigi Schiaparelli, *Codice diplomatico longobardo, Fonti per la storia d'Italia*, 2 vols. (Rome, 1929-33), I, 61-82.

The inquest procedure seems to be well established here—there is no indication that it is a novelty. Although the controversy concerns church land, the inquest was ordered by King Liutprand and conducted by the king's notary. The persons called and placed on oath are lesser churchmen whose position gave them an intimate knowledge of the antecedents of each of the properties in dispute. This is not an inquest of neighbors but rather an inquest conducted among those parties most likely to have knowledge of the matters in controversy.

13. *Capitularia Regum Francorum*, Vol. I, No. 93, Cap. 1 and 5.

But something more than jurisdiction over clerical or servile dependents came eventually to be provided for in the greater immunity. We may take as the fully developed Carolingian immunity the grant made by King Lothair to the church of Trieste in 948:

We grant [to the bishop and his successors, our *fideles*] all the things of our kingdom, the *districtum* and public justice together with all else which belongs to our public authority, whether within the walls of the city of Trieste or outside the walls up to a distance of three miles, including the whole circuit of the city wall with its three gates. And we order that no greater or lesser personage in our kingdom shall dare exercise any public function however slight within the aforesaid city of Trieste or outside, up to a distance of three miles.¹⁴

With such extensive local jurisdictional privileges enjoyed by the Italian churches and communes, it is no wonder that Frederick Barbarosa found it necessary to try to regain the regalia at the Diet of Roncaglia in 1158.¹⁵ As it was to prove, imperial authority was never to be reasserted effectively over the north Italian towns. However, outside of the German and Italian parts of the Empire, the new western monarchs of the twelfth and following centuries would gradually succeed in bringing such independent jurisdictions, including the administration of justice, under royal control. The Norman-Angevin kings of England were the first successfully to assert this control; however, they did not have to face a long-established independent feudal aristocracy since the kind of feudalism that gave fiefholders jurisdictional rights over their land was not introduced into England until the Norman conquest. Even the Norman rulers succeeded in maintaining that a landholder's first loyalty was to the king, no matter how many feudal ranks intervened between man and king. In contrast, the kings of France did have to face a feudal aristocracy that was accustomed to exercising jurisdiction over their lands and men and accordingly, it was not until the end of the fifteenth century that the Capetians succeeded in bringing the last of the fiefs under royal control. However, even then much private justice continued until the legal reforms of Napoleon at the beginning of the nineteenth century. The *Coutumes de Beauvaisis* written by Philippe de Beaumanoir¹⁶ in 1283 for an area of France technically under royal control, contains three chapters (out

14. L. Schiaparelli, *I diplomi di Ugo, Lotario, Berengario II e di Adalberto* (Rome, 1924), 250 (27 May 945).

15. For Frederick's reliance on Roman law to justify his claims, see Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993), 8-37.

16. *The Coutumes de Beauvaisis of Philippe de Beaumanoir*, tr. by F.R.P. Akehurst (Philadelphia: University of Pennsylvania Press, 1992).

of seventy) regulating what was still private enforcement of justice. The fifty-eighth chapter "speak[s] of high and low justice, and the cases which fall into one or the other, . . . [and whether a person can] go about in someone else's jurisdiction in force and bearing arms, . . . [and how lords can] appropriate their men's fortresses if they need them for war."¹⁷ The fifty-ninth chapter "speaks of [private] wars, how wars come about [according to custom], and how wars are ended, . . . [and how a person] could raise as a defense the right of war."¹⁸ And the sixtieth chapter "speaks of truces and guaranteed peace."¹⁹ Even in the late thirteenth century after the new procedures had pushed compurgation and ordeal into the background and the new royal power claimed a residual jurisdiction over the entire kingdom, it seems as if that ultimate form of private enforcement of justice, the feud, was still alive and well in northern France where the Capetian kings were striving mightily to centralize their realms. Even in the *Coutumes*, however, it is clear that the right of private warfare had been limited to the upper classes, and although private courts claiming jurisdiction over feudal and manorial tenants were far from dead, they had lost their vitality and were doomed to be absorbed by the public courts.

17. *Ibid.*, 599-609.

18. *Ibid.*, 610-618.

19. *Ibid.*, 619-626.