Book XXVIII. Of the Origin and Revolutions of the Civil Laws among the French

1. Different Character of the Laws of the several People of Germany.

After the Franks had quitted their own country, they made a compilation of the Salic laws with the assistance of the sages of their own nation.[1] The tribe of the Ripuarian Franks having joined itself under Clovis[2] to that of the Salians preserved its own customs; and Theodoric,[3] King of Austrasia, ordered them to be reduced to writing. He collected likewise the customs of those Bavarians and Germans, who were dependent on his kingdom.[4] For Germany having been weakened by the migration of such a multitude of people, the Franks, after conquering all before them, made a retrograde march and extended their dominion into the forests of their ancestors. Very likely the Thuringian code was given by the same Theodoric, since the Thuringians were also his subjects.[5] As the Frisians were subdued by Charles Martel and Pepin, their law cannot be prior to those princes.[6] Charlemagne, the first that reduced the Saxons, gave them the law still extant; and we need only read these last two codes to be convinced they came from the hands of conquerors. As soon as the Visigoths, the Burgundians, and the Lombards had founded their respective kingdoms, they reduced their laws to writing, not with an intent of obliging the vanquished nations to conform to their customs, but with a design of following them themselves.

There is an admirable simplicity in the Salic and Ripuarian laws, as well as in those of the Alemans, Bavarians, Thuringians, and Frisians. They breathe an original coarseness and a spirit which no change or corruption of manners had weakened. They received but very few alterations, because all those people, except the Franks, remained in Germany. Even the Franks themselves laid there the foundation of a great part of their empire, so that they had none but German laws. The same cannot be said of the laws of the Visigoths, of the Lombards and Burgundians; their character considerably altered from the great change

which happened in the character of those people after they had settled in their new habitations.

The kingdom of the Burgundians did not last long enough to admit of great changes in the laws of the conquering nation. Gundebald and Sigismond, who collected their customs, were almost the last of their kings. The laws of the Lombards received additions rather than changes. The laws of Rotharis were followed by those of Grimoaldus, Luitprandus, Rachis, and Astulphus, but did not assume a new form. It was not so with the laws of the Visigoths;[7] their kings new-moulded them, and had them also new-moulded by the clergy.

The kings indeed of the first race struck out of the Salic and Ripuarian laws whatever was absolutely inconsistent with Christianity, but left the main part untouched.[8] This cannot be said of the laws of the Visigoths.

The laws of the Burgundians, and especially those of the Visigoths, admitted of corporal punishments; these were not tolerated by the Salic and Ripuarian laws;[9] they preserved their character much better.

The Burgundians and Visigoths, whose provinces were greatly exposed, endeavoured to conciliate the affections of the ancient inhabitants, and to give them the most impartial civil laws;[10] but as the Kings of the Franks had established their power, they had no such considerations.[11]

The Saxons, who lived under the dominion of the Franks, were of an intractable temper, and prone to revolt. Hence we find in their laws the severities of a conqueror,[12] which are not to be met with in the other codes of the laws of the barbarians.

We see the spirit of the German laws in the pecuniary punishments, and the spirit of a conqueror in those of an afflictive nature.

The crimes they commit in their own country are subject to corporal punishment; and the spirit of the German laws is followed only in the punishment of crimes committed beyond the extent of their own territory.

They are plainly told that their crimes shall meet with no mercy, and they are refused even the asylum of churches.

The bishops had an immense authority at the court of the Visigoth Kings, the most important affairs being debated in councils. All the maxims, principles and views of the present inquisition are owing to the code of the Visigoths; and the monks have only copied against the Jews the laws formerly enacted by bishops.

In other respects the laws of Gundebald for the Burgundians seem pretty judicious; and those of Rotharis, and of the other Lombard princes, are still more so. But the laws of the Visigoths, those for instance of Recessuinthus, Chaindasuinthus, and Egigas are puerile, ridiculous and foolish; they attain not their end; they are stuffed with rhetoric and void of sense, frivolous in the substance and bombastic in the style.

2. That the Laws of the Barbarians were all personal. It is a distinguishing character of these laws of the barbarians that they were not confined to a certain district; the Frank was tried by the law of the Franks, the Aleman by that of the Alemans, the Burgundian by that of the Burgundians, and the Roman by the Roman law; nay, so far were the conquerors in those days from reducing their laws to a uniform system or body, that they did not even think of becoming legislators to the people they had conquered.

The original of this I find in the manners of the Germans. These people were parted asunder by marshes, lakes, and forests; and Cæsar observes[13] they were fond of such separations. Their dread of the Romans brought about their reunion; and yet each individual among these mixed people was still to be tried by the established customs of his own

nation. Each tribe apart was free and independent; and when they came to be intermixed, the independence still continued; the country was common, the government peculiar; the territory the same, and the nations different. The spirit of personal laws prevailed therefore among those people before ever they set out from their own homes, and they carried it with them into the conquered provinces.

We find this custom established in the formulas of Marculfus,[14] in the codes of the laws of the barbarians, but chiefly in the law of the Ripuarians[15] and the decrees of the kings of the first race,[16] whence the capitularies on that subject in the second race were derived.[17] The children followed the laws of their father,[18] the wife that of her husband,[19] the widow came back to her own original law,[20] and the freedman was under that of his patron.[21] Besides, every man could make choice of what laws he pleased; but the constitution of Lotharius I[22] required that this choice should be made public.

3. Capital Difference between the Salic Laws and those of the Visigoths and Burgundians. We have already observed that the laws of the Burgundians and Visigoths were impartial; but it was otherwise with regard to the Salic law, for it established between the Franks and Romans the most mortifying distinctions. When a Frank, a barbarian, or one living under the Salic law happened to be killed, a composition of 200 sols was to be paid to his relatives;[23] only 100 upon the killing of a Roman proprietor,[24] and no more than forty-five for a Roman tributary. The composition for the murder of one of the king's vassals, if a Frank, was 600 sols;[25] if a Roman, though the king's guest,[26] only 300.[27] The Salic law made therefore a cruel distinction between the Frank and Roman lord, and the Frank and Roman commoner.

Further, if a number of people were got together to assault a Frank in his house,[28] and he happened to be killed, the Salic law ordained a composition of 600 sols; but if a Roman or a freedman was assaulted,

only one-half that composition.[29] By the same law,[30] if a Roman put a Frank in irons, he was liable to a composition of 30 sols; but if a Frank had thus used a Roman, he paid only 15. A Frank, stripped by a Roman, was entitled to the composition of 62 1/2 sols, and a Roman stripped by a Frank received only 30. Such unequal treatment must needs have been very grievous to a Roman.

And yet a celebrated author[31] forms a system of the establishment of the Franks in Gaul, on a supposition that they were the best friends of the Romans. The Franks then, the best friends of the Romans, they who did, and they who suffered from the Romans such an infinite deal of mischief![32] The Franks, the friends of the Romans, they who, after subduing them by their arms, oppressed them in cold blood by their laws! They were exactly the friends of the Romans as the Tartars who conquered China were the friends of the Chinese. If some Catholic bishops thought fit to make use of the Franks in destroying the Arian Kings, does it follow that they had a desire of living under those barbarous people? And can we hence conclude that the Franks had any particular regard for the Romans? I should draw quite different consequences; the less the Franks had to fear from the Romans, the less indulgence they showed them.

The Abbé du Bos has consulted but indifferent authorities for his history, such as poets and orators; works of parade and ostentation are improper foundations for building systems.

4. In what manner the Roman Law came to be lost in the Country subject to the Franks, and preserved in that subject to the Goths and Burgundians. What has been above said will throw some light upon other things, which have hitherto been involved in great obscurity.

The country at this day called France was under the first race governed by the Roman law, or the Theodosian code, and by the different laws of the Barbarians,[33] who settled in those parts.

In the country subject to the Franks, the Salic law was established for the Franks, and the Theodosian code[34] for the Romans. In that subject to the Visigoths, a compilation of the Theodosian code, made by order of Alaric,[35] regulated disputes among the Romans; and the national customs, which Euric caused to be reduced to writing,[36] determined those among the Visigoths. But how comes it, some will say, that the Salic laws gained almost a general authority in the country of the Franks, and the Roman law gradually declined; whilst in the jurisdiction of the Visigoths the Roman law spread itself, and obtained at last a general sway?

My answer is that the Roman law came to be disused among the Franks because of the great advantages accruing from being a Frank, a Barbarian,[37] or a person living under the Salic law; every one, in that case, readily quitting the Roman to live under the Salic law.

The clergy alone retained it,[38] as a change would be of no advantage to them. The difference of conditions and ranks consisted only in the largeness of the composition, as I shall show in another place. Now particular laws[39] allowed the clergy as favourable compositions as those of the Franks, for which reason they retained the Roman law. This law brought no hardships upon them; and in other respects it was most proper for them, as it was the work of Christian emperors.

On the other hand, in the patrimony of the Visigoths, as the Visigoth law[40] gave no civil advantages to the Visigoths over the Romans, the latter had no reason to discontinue living under their own law in order to embrace another. They retained therefore their own laws without adopting those of the Visigoths.

This is still further confirmed in proportion as we proceed in our inquiry. The law of Gundebald was extremely impartial, not favouring the Burgundians more than the Romans. It appears by the preamble to that law that it was made for the Burgundians, and to regulate the disputes which

might arise between them and the Romans; and in the latter case the judges were equally divided of a side. This was necessary for particular reasons, drawn from the political regulations of those times.[41] The Roman law was continued in Burgundy, in order to regulate the disputes of Romans among themselves. The latter had no inducement to quit their own law, as in the country of the Franks; and rather as the Salic law was not established in Burgundy, as appears by the famous letter which Agobard wrote to Louis the Pious.

Agobard[42] desired that prince to establish the Salic law in Burgundy; consequently it had not been established there at that time. Thus the Roman law did, and still does subsist in so many provinces, which formerly depended on this kingdom.

The Roman and Gothic laws continued likewise in the country of the establishment of the Goths, where the Salic law was never received. When Pepin and Charles Martel expelled the Saracens, the towns and provinces which submitted to these princes petitioned for a continuance of their own laws and obtained it;[43] this, in spite of the usages of those times, when all laws were personal, soon made the Roman law to be considered as a real and territorial law in those countries.

This appears by the edict of Charles the Bald, given at Pistes in the year 864, which distinguishes the countries where causes were decided by the Roman law from where it was otherwise.[44]

The edict of Pistes shows two things; one, that there were countries where causes were decided by the Roman law, and others where they were not; and the other, that those countries where the Roman law obtained were precisely the same where it is still followed at this very day, as appears by the said edict:[45] thus the distinction of the provinces of France under custom and those under written law was already established at the time of the edict of Pistes.

I have observed that in the beginning of the monarchy all laws were personal; and thus when the edict of Pistes distinguishes the countries of the Roman law from those which were otherwise, the meaning is that, in countries which were not of the Roman law, such a multitude of people had chosen to live under some or other of the laws of the Barbarians that there were scarcely any who would be subject to the Roman law; and that in the countries of the Roman law there were few who would choose to live under the laws of the Barbarians.

I am not ignorant that what is here advanced will be reckoned new; but if the things which I assert be true, surely they are very ancient. After all, what great matter is it, whether they come from me, from the Valesiuses, or from the Bignons?

5. The same Subject continued. The law of Gundebald subsisted a long time among the Burgundians, in conjunction with the Roman law; it was still in use under Louis the Pious, as Agobard's letter plainly evinces. In like manner, though the edict of Pistes calls the country occupied by the Visigoths the country of the Roman law, yet the law of the Visigoths was always in force there; as appears by the synod of Troyes held under Louis the Stammerer, in the year 878, that is, fourteen years after the edict of Pistes.

In process of time the Gothic and Burgundian laws fell into disuse even in their own country, which was owing to those general causes that everywhere suppressed the personal laws of the Barbarians.

6. How the Roman Law kept its Ground in the Demesne of the Lombards. The facts all coincide with my principles. The law of the Lombards was impartial, and the Romans were under no temptation to quit their own for it. The motive which prevailed with the Romans under the Franks to make choice of the Salic law did not take place in Italy; hence the Roman law maintained itself there, together with that of the Lombards.

It even fell out that the latter gave way to the Roman institutes, and ceased to be the law of the ruling nation; and though it continued to be that of the principal nobility, yet the greatest part of the cities formed themselves into republics, and the nobility mouldered away of themselves, or were destroyed.[46] The citizens of the new republics had no inclination to adopt a law which established the custom of judiciary combats, and whose institutions retained much of the customs and usages of chivalry. As the clergy of those days, a clergy even then so powerful in Italy, lived almost all under the Roman law, the number of those who followed the institutions of the Lombards must have daily diminished.

Besides, the institutions of the Lombards had not that extent, that majesty of the Roman law, by which Italy was reminded of her universal dominion. The institutions of the Lombards and the Roman law could be then of no other use than to furnish out statutes for those cities that were erected into republics. Now which could better furnish them, the institutions of the Lombards that determined on some particular cases, or the Roman law which embraced them all?

7. How the Roman Law came to be lost in Spain. Things happened otherwise in Spain. The law of the Visigoths prevailed, and the Roman law was lost. Chaindasuinthus[47] and Recessuinthus proscribed the Roman laws,[48] and even forbade citing them in their courts of judicature. Recessuinthus was likewise author of the law which took off the prohibition of marriage between the Goths and Romans.[49] It is evident that these two laws had the same spirit; this king wanted to remove the principal causes of separation which subsisted between the Goths and the Romans. Now it was thought that nothing made a wider separation than the prohibition of intermarriages, and the liberty of living under different institutions.

But though the kings of the Visigoths had proscribed the Roman law, it still subsisted in the demesnes they possessed in South Gaul.[50] These countries being distant from the centre of the monarchy lived in a state

of great independence. We see from the history of Vamba, who ascended the throne in 672, that the natives of the country had become the prevailing party.[51] Hence the Roman law had greater authority and the Gothic less. The Spanish laws neither suited their manners nor their actual situation; the people might likewise be obstinately attached to the Roman law, because they had annexed to it the idea of liberty. Besides, the laws of Chaindasuinthus and of Recessuinthus contained most severe regulations against the Jews; but these Jews had a vast deal of power in South Gaul. The author of the history of King Vamba calls these provinces the brothel of the Jews. When the Saracens invaded these provinces, it was by invitation; and who could have invited them but the Jews or the Romans? The Goths were the first that were oppressed, because they were the ruling nation. We see in Procopius, that during their calamities they withdrew out of Narbonne Gaul into Spain.[52] Doubtless, under this misfortune; they took refuge in those provinces of Spain which still held out; and the number of those who in South Gaul lived under the law of the Visigoths was thereby greatly diminished.

8. A false Capitulary. Did not that wretched compiler Benedictus Levita attempt to transform this Visigoth establishment, which prohibited the use of Roman law, into a capitulary[53] ascribed since to Charlemagne? He made of this particular institution a general one, as if he intended to exterminate the Roman law throughout the universe.

9. In what manner the Codes of Barbarian Laws and the Capitularies came to be lost. The Salic, the Ripuarian, Burgundian, and Visigoth laws came, by degrees, to be disused among the French in the following manner:

As fiefs became hereditary, and arrière-fiefs extended, many usages were introduced, to which these laws were no longer applicable. Their spirit indeed was continued, which was to regulate most disputes by fines. But as the value of money was, doubtless, subject to change, the fines were also changed; and we see several charters,[54] where the lords fixed the

fines, that were payable in their petty courts. Thus the spirit of the law was followed, without adhering to the law itself.

Besides, as France was divided into a number of petty lordships, which acknowledged rather a feudal than a political dependence, it was very difficult for only one law to be authorised. And, indeed, it would be impossible to see it observed. The custom no longer prevailed of sending extraordinary officers[55] into the provinces to inspect the administration of justice and political affairs; it appears, even by the charters, that when new fiefs were established our kings divested themselves of the right of sending those officers. Thus, when almost everything had become a fief, these officers could not be employed; there was no longer a common law because no one could enforce the observance of it.

The Salic, Burgundian, and Visigoth laws were, therefore, extremely neglected at the end of the second race; and at the beginning of the third, they were scarcely ever mentioned.

Under the first and second race, the nation was often assembled; that is, the lords and bishops; the commons were not yet thought of. In these assemblies, attempts were made to regulate the clergy, a body which formed itself, if I may so speak, under the conquerors, and established its privileges. The laws made in these assemblies are what we call the Capitularies. Hence four things ensued: the feudal laws were established and a great part of the church revenues was administered by those laws; the clergy effected a wider separation, and neglected those decrees of reformation where they themselves were not the only reformers;[56] a collection was made of the canons of councils and of the decretals of popes;[57] and these the clergy received, as coming from a purer source. Ever since the erection of the grand fiefs, our kings, as we have already observed, had no longer any deputies in the provinces to enforce the observance of their laws; and hence it is that, under the third race, we find no more mention made of Capitularies.

10. The same Subject continued. Several capitularies were added to the law of the Lombards, as well as to the Salic and Bavarian laws. The reason of this has been a matter of inquiry; but it must be sought for in the thing itself. There were several sorts of capitularies. Some had relation to political government, others to economical, most of them to ecclesiastical polity, and some few to civil government. Those of the last species were added to the civil law, that is, to the personal laws of each nation; for which reason it is said in the Capitularies that there is nothing stipulated therein contrary to the Roman law.[58] In effect, those capitularies regarding economical, ecclesiastical, or political government had no relation to that law; and those concerning civil government had reference only to the laws of the barbarous people, which were explained, amended, enlarged, or abridged. But the adding of these capitularies to the personal laws occasioned, I imagine, the neglect of the very body of the Capitularies themselves; in times of ignorance, the abridgment of a work often causes the loss of the work itself.

11. Other Causes of the Disuse of the Codes of Barbarian Laws, as well as of the Roman Law, and of the Capitularies. When the German nations subdued the Roman empire, they learned the use of writing; and, in imitation of the Romans, they wrote down their own usages, and digested them into codes.[59] The unhappy reigns which followed that of Charlemagne, the invasions of the Normans and the civil wars, plunged the conquering nations again into the darkness out of which they had emerged, so that reading and writing were quite neglected. Hence it is, that in France and Germany the written laws of the Barbarians, as well as the Roman law and the Capitularies fell into oblivion. The use of writing was better preserved in Italy, where reigned the Popes and the Greek Emperors, and where there were flourishing cities, which enjoyed almost the only commerce in those days. To this neighbourhood of Italy it was owing that the Roman law was preserved in the provinces of Gaul, formerly subject to the Goths and Burgundians; and so much the more, as this law was there a territorial institution, and a kind of privilege.

It is probable that the disuse of the Visigoth laws in Spain proceeded from the want of writing, and by the loss of so many laws, customs were everywhere established.

Personal laws fell to the ground. Compositions, and what they call Freda,[60] were regulated more by custom than by the text of these laws. Thus, as in the establishment of the monarchy, they had passed from German customs to written laws; some ages after, they came back from written laws to unwritten customs.

12. Of local Customs. Revolution of the Laws of barbarous Nations, as well as of the Roman Law. By several memorials it appears, that there were local customs, as early as the first and second race. We find mention made of the "custom of the place,"[61] of the "ancient usage,"[62] of "custom,"[63] of "laws,"[64] and of "customs." It has been the opinion of some authors that what went by the name of customs were the laws of the barbarous nations, and what had the appellation of law were the Roman institutes. This cannot possibly be. King Pepin ordained[65] that wherever there should happen to be no law, custom should be complied with; but that it should never be preferred to the law. Now, to pretend that the Roman law was preferred to the codes of the laws of the Barbarians is subverting all memorials of antiquity, and especially those codes of Barbarian laws, which constantly affirm the contrary.

So far were the laws of the barbarous nations from being those customs, that it was these very laws, as personal institutions, which introduced them. The Salic law, for instance, was a personal law; but generally, or almost generally, in places inhabited by the Salian Franks, this Salic law, how personal soever, became, in respect to those Salian Franks, a territorial institution, and was personal only in regard to those Franks who lived elsewhere. Now if several Burgundians, Alemans, or even Romans should happen to have frequent disputes, in a place where the Salic law was territorial, they must have been determined by the laws of those

people; and a great number of decisions agreeable to some of those laws must have introduced new customs into the country. This explains the constitution of Pepin. It was natural that those customs should affect even the Franks who lived on the spot, in cases not decided by the Salic law; but it was not natural that they should prevail over the Salic law itself.

Thus there were in each place an established law and received customs which served as a supplement to that law when they did not contradict it.

They might even happen to supply a law that was in no way territorial; and to continue the same example, if a Burgundian was judged by the law of his own nation, in a place where the Salic law was territorial, and the case happened not to be explicitly mentioned in the very text of this law, there is no manner of doubt but that judgment would have been passed upon him according to the custom of the place.

In the reign of King Pepin, the customs then established had not the same force as the laws; but it was not long before the laws gave way to the customs. And as new regulations are generally remedies that imply a present evil, it may well be imagined that as early as Pepin's time, they began to prefer the customs to the established laws.

What has been said sufficiently explains the manner in which the Roman law began so very early to become territorial, as may be seen in the edict of Pistes; and how the Gothic law continued still in force, as appears by the synod of Troyes above-mentioned.[66] The Roman had become the general personal law, and the Gothic the particular personal law; consequently the Roman law was territorial. But how came it, some will ask, that the personal laws of the Barbarians fell everywhere into disuse, while the Roman law was continued as a territorial institution in the Visigoth and Burgundian provinces? I answer that even the Roman law had very nearly the same fate as the other personal institutions;

otherwise we would still have the Theodosian code in those provinces where the Roman law was territorial, whereas we have the institutes of Justinian. Those provinces retained scarcely anything more than the name of the country under the Roman, or written law, than the natural affection which people have for their own institutions, especially when they consider them as privileges, and a few regulations of the Roman law which were not yet forgotten. This was, however, sufficient to produce such an effect that, when Justinian's compilation appeared, it was received in the provinces of the Gothic and Burgundian demesne as a written law, whereas it was admitted only as written reason in the ancient demesne of the Franks.

13. Difference between the Salic law, or that of the Salian Franks, and that of the Ripuarian Franks and other barbarous Nations. The Salic law did not allow of the custom of negative proofs; that is, if a person brought a demand or charge against another, he was obliged by the Salic law to prove it, and it was not sufficient for the second to deny it, which is agreeable to the laws of almost all nations.

The law of the Ripuarian Franks had quite a different spirit;[67] it was contented with negative proofs, and the person) against whom a demand or accusation was brought, might clear himself, in most cases, by swearing, in conjunction with a certain number of witnesses, that he had not committed the crime laid to his charge. The number of witnesses who were obliged to swear[68] increased in proportion to the importance of the affair; sometimes it amounted to seventy-two.[69] The laws of the Alemans, Bavarians, Thuringians, Frisians, Saxons, Lombards, and Burgundians were formed on the same plan as those of the Ripuarian.

I observed that the Salic law did not allow of negative proofs. There was one case, however, in which they were allowed:[70] but even then they were not admitted alone, and without the concurrence of positive proofs. The plaintiff caused witnesses to be heard,[71] in order to ground his action, the defendant produced also witnesses on his side,

and the judge was to come at the truth by comparing those testimonies.[72] This practice was vastly different from that of the Ripuarian, and other barbarous laws, where it was customary for the party accused to clear himself by swearing he was not guilty, and by making his relatives also swear that he had told the truth. These laws could be suitable only to a people remarkable for their natural simplicity and candour; we shall see presently that the legislators were obliged to take proper methods to prevent their being abused.

14. Another Difference. The Salic law did not admit of the trial by combat, though it had been received by the laws of the Ripuarians[73] and of almost all the barbarous nations.[74] To me it seems that the law of combat was a natural consequence and a remedy of the law which established negative proofs. When an action was brought, and it appeared that the defendant was going to elude it by an oath, what other remedy was left to a military man,[75] who saw himself upon the point of being confounded, than to demand satisfaction for the injury done to him: and even for the attempt of perjury? The Salic law, which did not allow the custom of negative proofs, neither admitted nor had any need of the trial by combat; but the laws of the Ripuarians[76] and of the other barbarous nations[77] who had adopted the practice of negative proofs, were obliged to establish the trial by combat.

Whoever will please to examine the two famous regulations of Gundebald, King of Burgundy, concerning this subject will find they are derived from the very nature of the thing.[78] It was necessary, according to the language of the Barbarian laws, to rescue the oath out of the hands of a person who was going to abuse it.

Among the Lombards, the law of Rotharis admits of cases in which a man who had made his defence by oath should not be suffered to undergo the hardship of a duel. This custom spread itself further:[79] we shall presently see the mischiefs that arose from it, and how they were obliged to return to the ancient practice.

15. A Reflection. I do not pretend to deny that in the changes made in the code of the Barbarian laws, in the regulations added to that code, and in the body of the Capitularies, it is possible to find some passages where the trial by combat is not a consequence of the negative proof. Particular circumstances might, in the course of many ages, give rise to particular laws. I speak only of the general spirit of the laws of the Germans, of their nature and origin; I speak of the ancient customs of those people that were either hinted at or established by those laws; and this is the only matter in question.

16. Of the Ordeal or Trial by boiling Water, established by the Salic Law. The Salic law[80] allowed of the ordeal, or trial by boiling water; and as this trial was excessively cruel, the law found an expedient to soften its rigour.[81] It permitted the person, who had been summoned to make the trial with boiling water, to ransom his hand, with the consent of the adverse party. The accuser, for a particular sum determined by the law, might be satisfied with the oath of a few witnesses, declaring that the accused had not committed the crime. This was a particular case, in which the Salic law admitted of the negative proof.

This trial was a thing privately agreed upon, which the law permitted only, but did not ordain. The law gave a particular indemnity to the accuser, who would allow the accused to make his defence by a negative proof: the plaintiff was at liberty to be satisfied with the oath of the defendant, as he was at liberty to forgive him the injury.

The law contrived a middle course,[82] that before sentence passed, both parties, the one through fear of a terrible trial, the other for the sake of a small indemnity, should terminate their disputes, and put an end to their animosities. It is plain, that when once this negative proof was completed, nothing more was requisite; and, therefore, that the practice of legal duels could not be a consequence of this particular regulation of the Salic law.

17. Particular Notions of our Ancestors. It is astonishing that our ancestors should thus rest the honour, fortune and life of the subject, on things that depended less on reason than on hazard, and that they should incessantly make use of proofs incapable of convicting, and that had no manner of connection either with innocence or guilt.

The Germans, who had never been subdued,[83] enjoyed an excessive independence. Different families waged war with each other[84] to obtain satisfaction for murders, robberies or affronts. This custom was moderated by subjecting these hostilities to rules; it was ordained that they should be no longer committed but by the direction and under the eye of the magistrate.[85] This was far preferable to a general licence of annoying each other.

As the Turks in their civil wars look upon the first victory as a decision of heaven in favour of the victor, so the inhabitants of Germany in their private quarrels considered the event of a combat as a decree of Providence, ever attentive to punish the criminal or the usurper.

Tacitus informs us that when one German nation intended to declare war against another, they looked out for a prisoner who was to fight with one of their people, and by the event they judged of the success of the war. A nation who believed that public quarrels could be determined by a single combat might very well think that it was proper also for deciding the disputes of individuals.

Gundebald, King of Burgundy, gave the greatest sanction to the custom of legal duels.[86] The reason he assigns for this law is mentioned in his edict, "It is," says he, "in order to prevent our subjects from attesting by oath what is uncertain, and perjuring themselves about what is certain." Thus, while the clergy declared that an impious law which permitted combats,[87] the Burgundian Kings looked upon that as a sacrilegious law which authorized the taking of an oath.

The trial by combat had some reason for it, founded on experience. In a military nation, cowardice supposes other vices; it is an argument of a person's having deviated from the principles of his education, of his being insensible of honour, and of having refused to be directed by those maxims which govern other men; it shows that he neither fears their contempt, nor sets any value upon their esteem. Men of any tolerable extraction seldom want either the dexterity requisite to co-operate with strength, or the strength necessary to concur with courage; for as they set a value upon honour, they are practised in matters without which this honour cannot be obtained. Besides, in a military nation, where strength, courage and prowess are esteemed, crimes really odious are those which arise from fraud, artifice, and cunning, that is, from cowardice.

With regard to the trial by fire, after the party accused had put his hand on a hot iron, or in boiling water, they wrapped the hand in a bag and sealed it up; if after three days there appeared no mark, he was acquitted, Is it not plain, that among people inured to the handling of arms, the impression made on a rough or callous skin by the hot iron or by boiling water could not be so great as to be seen three days afterwards? And if there appeared any mark, it showed that the person who had undergone the trial was an effeminate fellow. Our peasants are not afraid to handle hot iron with their callous hands; and, with regard to the women, the hands of those who worked hard might be very well able to resist hot iron. The ladies did not want champions to defend their cause; and in a nation where there was no luxury, there was no middle state.[88]

By the law of the Thuringians[89] a woman accused of adultery was condemned to the trial by boiling water only when there was no champion to defend her; and the law of the Ripuarians admits of this trial[90] only when a person had no witnesses to appear in justification. Now a woman that could not prevail upon any one relative to defend her cause, or a man that could not produce one single witness to attest his

honesty, was, from those very circumstances, sufficiently convicted.

I conclude, therefore, that under the circumstances of time in which the trial by combat and the trial by hot iron and boiling water obtained, there was such an agreement between those laws and the manners of the people, that the laws were rather unjust in themselves than productive of injustice, that the effects were more innocent than the cause, that they were more contrary to equity than prejudicial to its rights, more unreasonable than tyrannical.

18. In what manner the Custom of judicial Combats gained Ground. From Agobard's letter to Louis the Debonnaire, it might be inferred that the custom of judicial combats was not established among the Franks; for having represented to that prince the abuses of the law of Gundebald, he desires that private disputes should be decided in Burgundy by the law of the Franks. But as it is well known from other quarters that the trial by combat prevailed at that time in France, this has been the cause of some perplexity. However, the difficulty may be solved by what I have said; the law of the Salian Franks did not allow of this kind of trial and that of the Ripuarian Franks did.[91]

But, notwithstanding the clamours of the clergy, the custom of judicial combats gained ground continually in France; and I shall presently make it appear that the clergy themselves were in a great measure the occasion of it.

It is the law of the Lombards that furnishes us with this proof. "There has been long since a detestable custom introduced," says the preamble to the constitution of Otho II:[92] "this is, that if the title to an estate was said to be false, the person who claimed under that title made oath upon the Gospel that it was genuine; and without any preceding judgment he took possession of the estate; so that they who would perjure themselves were sure of gaining their point." The Emperor Otho I having caused himself to be crowned at Rome[93] at the very time that a

council was there under Pope John XII, all the lords of Italy represented to that prince the necessity of enacting a law to reform this horrible abuse.[94] The Pope and the Emperor were of opinion that the affair should be referred to the council which was to be shortly held at Ravenna.[95] There the lords made the same demands, and redoubled their complaints; but the affair was put off once more, under pretence of the absence of particular persons. When Otho II and Conrad, King of Burgundy, arrived in Italy,[96] they had a conference at Verona[97] with the Italian lords,[98] and at their repeated solicitations, the Emperor, with their unanimous consent, made a law, that whenever there happened any disputes about inheritances, while one of the parties insisted upon the legality of his title and the other maintained its being false, the affair should be decided by combat; that the same rule should be observed in contests relating to fiefs; and that the clergy should be subject to the same law, but should fight by their champions. Here we see that the nobility insisted on the trial by combat because of the inconvenience of the proof introduced by the clergy; that notwithstanding the clamours of the nobility, the notoriousness of the abuse which called out loudly for redress, and the authority of Otho who came into Italy to speak and act as master, still the clergy held out in two councils; in fine, that the joint concurrence of the nobility and princes having obliged the clergy to submit, the custom of judicial combats must have been considered as a privilege of the nobility, as a barrier against injustice and as a security of property, and from that very moment this custom must have gained ground. And this was effected at a time when the power of the Emperors was great, and that of the popes inconsiderable; at a time when the Othos came to revive the dignity of the empire in Italy.

I shall make one reflection which will corroborate what has been above said, namely, that the institution of negative proofs entailed that of judicial combats. The abuse complained of to the Othos was, that a person who was charged with having a false title to an estate, defended himself by a negative proof, declaring upon the Gospels it was not

false. What was done to reform the abuse of a law which had been mutilated? The custom of combat was revived.

I hastened to speak of the constitution of Otho II, in order to give a clear idea of the disputes between the clergy and the laity of those times. There had been indeed a constitution of Lotharius I[99] of an earlier date, a sovereign who, upon the same complaints and disputes, being desirous of securing the just possession of property, had ordained that the notary should make oath that the deed or title was not forged; and if the notary should happen to die, the witnesses should be sworn who had signed it. The evil, however, still continued, till they were obliged at length to have recourse to the remedy above-mentioned.

Before that time I find that, in the general assemblies held by Charlemagne, the nation represented to him[100] that in the actual state of things it was extremely difficult for either the accuser or the accused to avoid perjuring themselves, and that for this reason it was much better to revive the judicial combat, which was accordingly done.

The usage of judicial combats gained ground among the Burgundians, and that of an oath was limited. Theodoric, King of Italy, suppressed the single combat among the Ostrogoths;[101] and the laws of Chaindasuinthus and Recessuinthus seemed as if they would abolish the very idea of it. But these laws were so little respected in Narbonne Gaul, that they looked upon the legal duel as a privilege of the Goths.[102]

The Lombards who conquered Italy after the Ostrogoths had been destroyed by the Greeks, introduced the custom of judicial combat into that country, but their first laws gave a check to it.[103] Charlemagne,[104] Louis the Debonnaire, and the Othos made divers general constitutions, which we find inserted in the laws of the Lombards and added to the Salic laws, whereby the practice of legal duels, at first in criminal, and afterwards in civil cases, obtained a greater extent. They knew not what to do. The negative proof by oath had its inconveniences; that of

legal duels had its inconveniences also; hence they often changed, according as the one or the other affected them most.

On the one hand, the clergy were pleased to see that in all secular affairs people were obliged to have recourse to the altar,[105] and, on the other, a haughty nobility were fond of maintaining their rights by the sword.

I would not have it inferred that it was the clergy who introduced the custom so much complained of by the nobility. This custom was derived from the spirit of the Barbarian laws, and from the establishment of negative proofs. But a practice that contributed to the impunity of such a number of criminals, having given some people reason to think it was proper to make use of the sanctity of the churches in order to strike terror into the guilty, and to intimidate perjurers, the clergy maintained this usage and the practice which attended it: for in other respects they were absolutely averse to negative proofs. We find in Beaumanoir[106] that this kind of proof was never allowed in ecclesiastic courts, which contributed greatly, without doubt, to its suppression, and to weaken in this respect the regulation of the codes of the Barbarian laws.

This will convince us more strongly of the connection between the usage of negative proofs and that of judicial combats, of which I have said so much. The lay tribunals admitted of both, and both were rejected by the ecclesiastic courts.

In choosing the trial by duel the nation followed its military spirit; for while this was established as a divine decision, the trials by the cross, by cold or boiling waters, which had been also regarded in the same lights, were abolished.

Charlemagne ordained that, if any difference should arise between his children, it should be terminated by the judgment of the cross. Louis

the Debonnaire[107] limited this judgment to ecclesiastic affairs; his son Lotharius abolished it in all cases; nay, he suppressed even the trial by cold water.[108]

I do not pretend to say that, at a time when so few usages were universally received, these trials were not revived in some churches, especially as they are mentioned in a charter of Philip Augustus,[109] but I affirm that they were very seldom practised. Beaumanoir,[110] who lived at the time of St. Louis and a little after, enumerating the different kinds of trial, mentions that of judicial combat, but not a word of the others.

19. A new Reason of the Disuse of the Salic and Roman Laws, as also of the Capitularies. I have already mentioned the reasons that had destroyed the authority of the Salic and Roman laws, as also of the Capitularies; here I shall add that the principal cause was the great extension given to judiciary combats.

As the Salic laws did not admit of this custom, they became in some measure useless, and fell into oblivion, In like manner the Roman laws, which also rejected this custom, were laid aside; their whole attention was then taken up in establishing the law of judicial combats, and in forming a proper digest of the several cases that might happen on those occasions. The regulations of the Capitularies became likewise of no manner of service. Thus it is that such a number of laws lost all their authority, without our being able to tell the precise time in which it was lost; they fell into oblivion, and we cannot find any others that were substituted in their place.

Such a nation had no need of written laws; hence its written laws might very easily fall into disuse.

If there happened to be any disputes between two parties, they had only to order a single combat. For this no great knowledge or abilities were

requisite.

All civil and criminal actions are reduced to facts. It is upon these facts they fought; and not only the substance of the affair, but likewise the incidents and imparlances were decided by combat, as Beaumanoir observes, who produces several instances.[111]

I find that, towards the commencement of the third race, the jurisprudence of those times related entirely to precedents; everything was regulated by the point of honour. If the judge was not obeyed, he insisted upon satisfaction from the person that contemned his authority. At Bourges, if the provost had summoned a person and he refused to come, his way of proceeding was to tell him, "I sent for thee, and thou didst not think it worth thy while to come; I demand therefore satisfaction for this thy contempt." Upon which they fought.[112] Louis the Fat reformed this custom.[113]

The custom of legal duels prevailed at Orleans, even in all demands of debt.[114] Louis the Young declared that this custom should take place only when the demand exceeded five sous. This ordinance was a local law; for in St. Louis' time it was sufficient that the value was more than twelve deniers.[115] Beaumanoir[116] had heard a gentleman of the law affirm that formerly there had been a bad custom in France of hiring a champion for a certain time to fight their battles in all causes. This shows that the custom of judiciary combat must have prevailed at that time to a wonderful extent.

20. Origin of the Point of Honour. We meet with inexplicable enigmas in the codes of laws of the Barbarians. The law of the Frisians[117] allows only half a sou in composition to a person that had been beaten with a stick, and yet for ever so small a wound it allows more. By the Salic law, if a freeman gave three blows with a stick to another freeman, he paid three sous; if he drew blood, he was punished as if he had wounded him with steel, and he paid fifteen sous: thus the punishment was

proportioned to the greatness of the wound. The law of the Lombards established different compositions for one, two, three, four blows, and so on.[118] At present, a single blow is equivalent to a hundred thousand.

The constitution of Charlemagne, inserted in the law of the Lombards, ordains that those who were allowed the trial by combat should fight with bastons.[119] Perhaps this was out of regard to the clergy; or probably, as the usage of legal duels gained ground, they wanted to render them less sanguinary. The capitulary of Louis the Debonnaire allows the liberty of choosing to fight either with the sword or baston.[120] In process of time none but bondmen fought with the baston.[121]

Here I seethe first rise and formation of the particular articles of our point of honour. The accuser began by declaring in the presence of the judge that such a person had committed such an action, and the accused made answer that he lied,[122] upon which the judge gave orders for the duel. It became then an established rule that whenever a person had the lie given him, it was incumbent on him to fight.

Upon a man's declaring that he would fight,[123] he could not afterwards depart from his word; if he did, he was condemned to a penalty. Hence this rule ensued, that whenever a person had engaged his word, honour forbade him to recall it.

Gentlemen fought one another on horseback, and armed at all points;[124] villains fought on foot and with bastons.[125] Hence it followed that the baston was looked upon as the instrument of insults and affronts,[126] because to strike a man with it was treating him like a villain.

None but villains fought with their faces uncovered,[127] so that none but they could receive a blow on the face. Therefore, a box on the ear

became an injury that must be expiated with blood, because the person who received it had been treated as a villain.

The several people of Germany were no less sensible than we of the point of honour; nay, they were more so. Thus the most distant relatives took a very considerable share to themselves in every affront, and on this all their codes are founded. The law of the Lombards ordains[128] that whosoever goes attended with servants to beat a man unawares, in order to load him with shame and to render him ridiculous, should pay half the composition which he would owe if he had killed him;[129] and if through the same motive he tied or bound him, he would pay three-quarters of the same composition.

Let us then conclude that our forefathers were extremely sensible of affronts; but that affronts of a particular kind, such as being struck with a certain instrument on a certain part of the body, and in a certain manner, were as yet unknown to them. All this was included in the affront of being beaten, and in this case the amount of violence determined the magnitude of the outrage.

21. A new Reflection upon the Point of Honour among the Germans. "It was a great infamy," says Tacitus,[130] "among the Germans for a person to leave his buckler behind him in battle; for which reason many after a misfortune of this kind have destroyed themselves." Thus the ancient Salic law[131] allows a composition of fifteen sous to any person that had been injuriously reproached with having left his buckler behind him.

When Charlemagne amended the Salic law,[132] he allowed in this case no more than three sous in composition. As this prince cannot be suspected of having had a design to enervate the military discipline, it is manifest that such an alteration was due to a change of weapons, and that from this change of weapons a great number of usages derive their origin.

22. Of the Manners in relation to judicial Combats. Our connections with the fair sex are founded on the pleasure of enjoyment; on the happiness of loving and being loved; and likewise on the ambition of pleasing the ladies, because they are the best judges of some of those things which constitute personal merit. This general desire of pleasing produces gallantry, which is not love itself, but the delicate, the volatile, the perpetual simulation of love.

According to the different circumstances of every country and age, love inclines more to one of those three things than to the other two. Now I maintain that the prevailing spirit at the time of our judicial combats must have been that of gallantry.

I find in the law of the Lombards,[133] that if one of the two champions was found to have any magic herbs about him, the judge ordered them to be taken from him, and obliged him to swear he had no more. This law could be founded only on the vulgar opinion; it was fear, the alleged inventor of much that made them imagine this kind of prestige. As in single combats the champions were armed at all points, and as with heavy arms, both of the offensive and defensive kind, those of a particular temper and strength gave immense advantages, the notion of some champions having enchanted arms must certainly have turned the brains of a great many people.

Hence arose the marvellous system of chivalry. The minds of all sorts of people quickly imbibed these extravagant ideas, In romances are found knights-errant, necromancers, and fairies, winged or intelligent horses, invisible or invulnerable men, magicians who concerned themselves in the birth and education of great personages, enchanted and disenchanted palaces, a new world in the midst of the old one, the usual course of nature being left only to the lower class of mankind. Knights-errant ever in armour, in a part of the world abounding in castles, forts, and robbers, placed all their glory in punishing injustice, and in protecting weakness. Hence our romances are full of gallantry founded on

the idea of love joined to that of strength and protection.

Such was the origin of gallantry, when they formed the notion of an extraordinary race of men who at the sight of a virtuous and beautiful lady in distress were inclined to expose themselves to all hazards for her sake, and to endeavour to please her in the common actions of life.

Our romances of chivalry flattered this desire of pleasing, and communicated to a part of Europe that spirit of gallantry which we may venture to affirm was very little known to the ancients.

The prodigious luxury of that immense city of Rome encouraged sensuous pleasures. The tranquillity of the plains of Greece gave rise to the description of the sentiments of love.[134] The idea of knights-errant, protectors of the virtue and beauty of the fair sex, led to that of gallantry.

This spirit was continued by the custom of tournaments, which, uniting the rights of valour and love, added still a considerable importance to gallantry.

23. Of the Code of Laws on judicial Combats. Some perhaps will have a curiosity to see this abominable custom of judiciary combat reduced to principles and to find the groundwork of such an extraordinary code of laws. Men, though reasonable in the main, reduce their very prejudices to rule. Nothing was more contrary to good sense, than those combats, and yet when once this point was laid down, a kind of prudential management was used in carrying it into execution.

In order to be thoroughly acquainted with the jurisprudence of those times, it is necessary to read with attention the regulations of St. Louis, who made such great changes in the judiciary order. Défontaines was contemporary with that prince; Beaumanoir wrote after him,[135] and the rest lived since his time. We must, therefore, look for the ancient

practice in the amendments that have been made of it.

24. Rules established in the judicial Combat. When there happened to be several accusers, they were obliged to agree among themselves that the action might be carried on by a single prosecutor; and, if they could not agree, the person before whom the action was brought, appointed one of them to prosecute the quarrel.[136]

When a gentleman challenged a villain, he was obliged to present himself on foot with buckler and baston; but if he came on horseback and armed like a gentleman, they took. his horse and his arms from him and, stripping him to his shirt, they compelled him to fight in that condition with the villain.[137]

Before the combat the magistrates ordered three bans to be published. By the first the relatives of the parties were commanded to retire; by the second the people were warned to be silent; and the third prohibited the giving of any assistance to either of the parties, under severe penalties, nay, even on pain of death if by this assistance either of the combatants should happen to be vanquished.[138]

The officers belonging to the civil magistrate[139] guarded the list or enclosure where the battle was fought; and in case either of the parties declared himself desirous of peace, they took particular notice of the actual state in which they mutually stood at that very moment, to the end that they might be restored to the same situation in case they did not come to an understanding.[140]

When the pledges were received either for a crime or for false judgment, the parties could not make up the matter without the consent of the lord; and when one of the parties was overcome, there could be no accommodation without the permission of the count, which had some analogy to our letters of grace.[141]

But if it happened to be a capital crime, and the lord, corrupted by presents, consented to an accommodation, he was obliged to pay a fine of sixty livres, and the right he had of punishing the malefactor devolved upon the count.[142]

There were a great many people incapable either of offering, or of accepting battle. But liberty was given them, on cause being shown, to choose a champion; and that he might have a stronger interest in defending the party in whose behalf he appeared, his hand was cut off if he lost the battle.[143]

When capital laws were made in the last century against duels, perhaps it would have been sufficient to have deprived a warrior of his military capacity by the loss of his hand; nothing in general being a greater mortification to mankind than to survive the loss of their character.

When, in capital cases, the duel was fought by champions, the parties were placed where they could not behold the battle; each was bound with the cord that was to be used at his execution in case his champion was overcome.[144] The person overcome in battle did not always lose the point contested; if, for instance, they fought on an imparlance, he lost only the imparlance.[145]

25. Of the Bounds prescribed to the Custom of judicial Combats. When pledges of battle had been received upon a civil affair of small importance, the lord obliged the parties to withdraw them.

If a fact was notorious; for instance, if a man had been assassinated in the open marketplace, then there was neither a trial by witnesses, nor by combat; the judge gave his decision from the notoriety of the fact.[146]

When the court of a lord had often determined after the same manner, and the usage was thus known,[147] the lord refused to grant the parties the

privilege of duelling, to the end that the usages might not be altered by the different success of the combats.

They were not allowed to insist upon duelling but for themselves, for some one belonging to their family, or for their liege lord.[148]

When the accused had been acquitted, another relative could not insist on fighting him; otherwise disputes would never be terminated.[149]

If a person appeared again in public whose relatives, upon a supposition of his being murdered, wanted to revenge his death, there was then no room for a combat; the same may be said if by a notorious absence the fact was proved to be impossible.[150]

If a man who had been mortally wounded had exculpated before his death the person accused and named another, they did not proceed to a duel; but if he had mentioned nobody his declaration was looked upon as a forgiveness on his death-bed; the prosecution was continued, and even among gentlemen they could make war against each other.[151]

When there was a conflict, and one of the relatives had given or received pledges of battle, the right of contest ceased; for then it was thought that the parties wanted to pursue the ordinary course of justice; therefore he that would have continued the contest would have been sentenced to make good all the losses.

Thus the practice of judiciary combat had this advantage, that it was apt to change a general into an individual quarrel, to restore the courts of judicature to their authority, and to bring back into the civil state those who were no longer governed but by the law of nations.

As there are an infinite number of wise things that are managed in a very foolish manner; so there are many foolish things that are very wisely conducted.

When a man who was challenged with a crime visibly showed that it had been committed by the challenger himself, there could be then no pledges of battle; for there is no criminal but would prefer a duel of uncertain event to a certain punishment.[152]

There were no duels in affairs decided by arbiters,[153] nor by ecclesiastical courts, nor in cases relating to women's dowries.

"A woman," says Beaumanoir, "cannot fight." if a woman challenged a person without naming her champion, the pledges of battle were not accepted. It was also requisite that a woman should be authorised by her baron, that is, by her husband, to challenge; but she might be challenged without this authority.[154]

If either the challenger or the person challenged were under fifteen years of age, there could be no combat.[155] They might order it, indeed, in disputes relating to orphans when their guardians or trustees were willing to run the risk of this procedure.

The cases in which a bondman was allowed to fight are, I think, as follows. He was allowed to fight another bondman; to fight a freedman, or even a gentleman, in case he were challenged; but if he himself challenged, the other might refuse to fight; and even the bondman's lord had a right to take him out of the court.[156] The bondman might by his lord's charter or by usage fight with any freeman;[157] and the church claimed this right for her bondmen[158] as a mark of respect due to her by the laity.[159]

26. On the judiciary Combat between one of the Parties and one of the Witnesses. Beaumanoir informs us[160] that a person who saw a witness going to swear against him might elude the other by telling the judges that his adversary produced a false and slandering witness; and if the witness was willing to maintain the quarrel, he gave pledges of battle. The inquiry was no longer the question; for if the witness was overcome,

it was decided that the adversary had produced a false witness, and he lost his cause.

It was necessary that the second witness should not be heard; for if he had made his attestation, the affair would have been decided by the deposition of two witnesses. But by staying the second, the deposition of the first witness became void.

The second witness being thus rejected, the party was not allowed to produce any others, but he lost his cause; in case, however, there had been no pledges of battle, he might produce other witnesses.

Beaumanoir observes[161] that the witness might say to the party he appeared for, before he made his deposition: "I do not care to fight for your quarrel, nor to enter into any debate; but if you are willing to stand by me, I am ready to tell the truth." The party was then obliged to fight for the witness, and if he happened to be overcome, he did not lose his cause,[162] but the witness was rejected.

This, I believe, was a modification of the ancient custom; and what makes me think so is that we find this usage of challenging the witnesses established in the laws of the Bavarians[163] and Burgundians[164] without any restriction.

I have already made mention of the constitution of Gundebald, against which Agobard[165] and St. Avitus[166] made such loud complaints. "When the accused," says this prince, "produces witnesses to swear that he has not committed the crime, the accuser may challenge one of the witnesses to a combat; for it is very just that the person who has offered to swear, and has declared that he was certain of the truth, should make no difficulty of maintaining it by combat." Thus the witnesses were deprived by this king of every kind of subterfuge to avoid the judiciary combat.

27. Of the judicial Combat between one of the Parties and one of the Lords' Peers. Appeal of false Judgment. As the nature of judicial combats was to terminate the affair for ever, and was incompatible with a new judgment and new prosecutions,[167] an appeal, such as is established by the Roman and Canon laws, that is, to a superior court in order to rejudge the proceedings of an inferior, was a thing unknown in France.

This is a form of proceeding to which a warlike nation, governed solely by the point of honour, was quite a stranger; and agreeably to this very spirit, the same methods were used against the judges as were allowed against the parties.[168]

An appeal among the people of this nation was a challenge to fight with arms, a challenge to be decided by blood; and not that invitation to a paper quarrel, the knowledge of which was reserved for succeeding ages.

Thus St. Louis, in his Institutions,[169] says that an appeal includes both felony and iniquity. Thus Beaumanoir tells us that if a vassal wanted to make his complaint of an outrage committed against him by his lord,[170] he was first obliged to announce that he quitted his fief; after which he appealed to his lord paramount, and offered pledges of battle, In like manner the lord renounced the homage of his vassal, if he challenged him before the count.

For a vassal to challenge his lord of false judgment was as much as to say to him that his sentence was unjust and malicious; now to utter such words against his lord was in some measure committing the crime of felony.

Hence, instead of bringing a challenge of false judgment against the lord who appointed and directed the court, they challenged the peers of whom the court itself was formed, by which means they avoided the crime of felony, for they insulted only their peers, with whom they could

always account for the affront.

It was a very dangerous thing to challenge the peers of false judgment.[171] If the party waited till judgment was pronounced, he was obliged to fight them all when they offered to make good their judgment.[172] If the appeal was made before all the judges had given their opinion, he was obliged to fight all who had agreed in their judgment. To avoid this danger, it was usual to petition the lord to direct that each peer should give his opinion aloud;[173] and when the first had pronounced, and the second was going to do the same, the party told him that he was a liar, a knave and a slanderer, and then he had to fight only with that peer.

Défontaines[174] would have it that, before a challenge was made of false judgment, it was customary to let three judges pronounce; and he does not say that it was necessary to fight them all three; much less that there was any obligation to fight all those who had declared themselves of the same opinion. These differences arose from this, that in those times there were few usages exactly in all parts the same; Beaumanoir gives an account of what passed in the county of Clermont; and Défontaines of what was practised in Vermandois.

When one of the peers or a vassal had declared that he would maintain the judgment, the judge ordered pledges of battle to be given, and likewise took security of the challenger that he would maintain his case.[175] But the peer who was challenged gave no security, because he was the lord's vasal, and was obliged to defend the challenge, or to pay the lord a fine of sixty livres.

If he who challenged did not prove that the judgment was bad,[176] he paid the lord a fine of sixty livres, the same fine to the peer whom he had challenged, and as much to every one of those who had openly consented to the judgment.[177]

When a person, strongly suspected of a capital crime, had been taken and condemned, he could make no appeal of false judgment:[178] for he would always appeal either to prolong his life, or to get an absolute discharge.

If a person said that the judgment was false and bad and did not offer to prove it so, that is, to fight, he was condemned to a fine of ten sous if a gentleman, and to five sous if a bondman, for the injurious expressions he had uttered.[179]

The judges or peers who were overcome forfeited neither life nor limbs,[180] but the person who challenged them was punished with death, if it happened to be a capital crime.[181]

This manner of challenging the vassals with false judgment was to avoid challenging the lord himself. But if the lord had no peers,[182] or had not a sufficient number, he might at his own expense borrow peers of his lord paramount;[183] but these peers were not obliged to pronounce judgment if they did not like it; they might declare that they were come only to give their opinion: in that particular case, the lord himself judged and pronounced sentence as judge;[184] and if an appeal of false judgment was made against him, it was his business to answer to the challenge.

If the lord happened to be so very poor as not to be able to hire peers of his paramount,[185] or if he neglected to ask for them, or the paramount refused to give them, then, as the lord could not judge by himself, and as nobody was obliged to plead before a tribunal where judgment could not be given, the affair was brought before the lord paramount.

This, I believe, was one of the principal causes of the separation between the jurisdiction and the fief, whence arose the maxim of the French lawyers, "The fief is one thing, and the jurisdiction is

another." For as there were a vast number of peers who had no subordinate vassals under them, they were incapable of holding their court; all affairs were then brought before their lord paramount, and they lost the privilege of pronouncing judgment, because they had neither power nor will to claim it.

All the judges who had been at the judgment were obliged to be present when it was pronounced, that they might follow one another, and say aye to the person who, wanting to make an appeal of false judgment, asked them whether they followed;[186] for Défontaines says[187] that it is an affair of courtesy and loyalty, and there is no such thing as evasion or delay. Hence, I imagine, arose the custom still followed in England of obliging the jury to be all unanimous in their verdict in cases relating to life and death.

Judgment was therefore given, according to the opinion of the majority; and if there was an equal division, sentence was pronounced, in criminal cases, in favour of the accused; in cases of debt, in favour of the debtor; and in cases of inheritance, in favour of the defendant.

Défontaines observes[188] that a peer could not excuse himself by saying that he would not sit in court if there were only four,[189] or if the whole number, or at least the wisest part, were not present. This is just as if he were to say, in the heat of an engagement, that he would not assist his lord because he had not all his vassals with him. But it was the lord's business to cause his court to be respected, and to choose the bravest and most knowing of his tenants. This I mention, in order to show the duty of vassals, which was to fight, and to give judgment: and such, indeed, was this duty, that to give judgment was all the same as to fight.

It was lawful for a lord, who went to law with his vassal in his own court, and was cast, to challenge one of his tenants with false judgment. But as the latter owed a respect to his lord for the fealty he

had vowed, and the lord, on the other hand, owed benevolence to his vassal for the fealty accepted, it was customary to make a distinction between the lord's affirming in general that the judgment was false and unjust,[190] and imputing personal prevarications to his tenant.[191] In the former case he affronted his own court, and in some measure himself, so that there was no room for pledges of battle. But there was room in the latter, because he attacked his vassal's honour; and the person overcome was deprived of life and property, in order to maintain the public tranquillity.

This distinction, which was necessary in that particular case, had afterwards a greater extent. Beaumanoir says that when the challenger of false judgment attacked one of the peers by personal imputation, battle ensued; but if he attacked only the judgment, the peer challenged was at liberty to determine the dispute either by battle or by law.[192] But as the prevailing spirit in Beaumanoir's time was to restrain the usage of judicial combats, and as this liberty, which had been granted to the peer challenged, of defending the judgment by combat or not is equally contrary to the ideas of honour established in those days, and to the obligation the vassal lay under of defending his lord's jurisdiction, I am apt to think that this distinction of Beaumanoir's was a novelty in French jurisprudence.

I would not have it thought that all appeals of false judgment were decided by battle; it fared with this appeal as with all others. The reader may recollect the exceptions mentioned in the 25th chapter. Here it was the business of the superior court to examine whether it was proper to withdraw the pledges of battle or not.

There could be no appeal of false judgment against the king's court, because, as there was no one equal to the king, no one could challenge him; and as the king had no superior, none could appeal from his court.

This fundamental regulation, which was necessary as a political law,

diminished also as a civil law the abuses of the judicial proceedings of those times. When a lord was afraid that his court would be challenged with false judgment, or perceived that they were determined to challenge, if the interests of justice required that it should not be challenged, he might demand from the king's court men whose judgment could not be set aside.[193] Thus King Philip, says Défontaines,[194] sent his whole council to judge an affair in the court of the Abbot of Corbey.

But if the lord could not have judges from the king, he might remove his court into the king's, if he held immediately of him; and if there were intermediate lords, he had recourse to his suzerain, removing from one lord to another till he came to the sovereign.

Thus, notwithstanding they had in those days neither the practice nor even the idea of our modern appeals, yet they had recourse to the king, who was the source whence all those rivers flowed, and the sea into which they returned.

28. Of the Appeal of Default of Justice. The appeal of default of justice was, when the court of a particular lord deferred, evaded, or refused to do justice to the parties.

During the time of our princes of the second race, though the count had several officers under him, their person was subordinate, but not their jurisdiction. These officers in their court days, assizes, or Placita, gave judgment in the last resort as the count himself; all the difference consisted in the division of the jurisdiction. For instance, the count had the power of condemning to death, of judging of liberty, and of the restitution of goods, which the centenarii had not.[195]

For the same reason there were greater cases which were reserved to the king; namely, those which directly concerned the political order of the state.[196] Such were the disputes between bishops, abbots, counts, and

other grandees, which were determined by the king together with the great vassals.[197]

What some authors have advanced, namely, that an appeal lay from the count to the king's commissary, or Missus Dominicus, is not well-grounded. The count and the Missus had an equal jurisdiction, independent of each other.[198] The whole difference was that the Missus held his Placita, or assizes, four months in the year,[199] and the count the other eight.

If a person, who had been condemned at an assize, demanded to have his cause tried over again, and was afterwards cast, he paid a fine of fifteen sous, or received fifteen blows from the judges who had decided the affair.[200]

When the counts, or the king's commissaries did not find themselves able to bring the great lords to reason, they made them give bail or security[201] that they would appear in the king's court: this was to try the cause, and not to rejudge it. I find in the capitulary of Metz[202] a law by which the appeal of false judgment to the king's court is established, and all other kinds of appeal are proscribed and punished.

If they refused to submit to the judgment of the sheriffs[203] and made no complaint, they were imprisoned till they had submitted, but if they complained, they were conducted under a proper guard before the king, and the affair was examined in his court.

There could be hardly any room then for an appeal of default of justice. For instead of its being usual in those days to complain that the counts and others who had a right of holding assizes were not exact in discharging this duty,[204] it was a general complaint that they were too exact. Hence we find such numbers of ordinances, by which the counts and all other officers of justice are forbidden to hold their assizes

above thrice a year. It was not so necessary to chastise their indolence, as to check their activity.

But, after an infinite number of petty lordships had been formed, and different degrees of vassalage established, the neglect of certain vassals in holding their courts gave rise to this kind of appeal;[205] especially as very considerable profits accrued to the lord paramount from the several fines.

As the custom of judicial combats gained every day more ground, there were places, cases, and times, in which it was difficult to assemble the peers, and consequently in which justice was delayed. The appeal of default of justice was therefore introduced, an appeal that has been often a remarkable era in our history; because most of the wars of those days were imputed to a violation of the political law; as the cause, or at least the pretence, of our modern wars is the infringement of the laws of nations.

Beaumanoir says[206] that, in case of default of justice, battle was not allowed: the reasons are these: 1. They could not challenge the lord himself, because of the respect due to his person; neither could they challenge the lord's peers, because the case was clear, and they had only to reckon the days of the summons, or of the other delays; there had been no judgment passed, consequently there could be no appeal of false judgment: in fine, the crime of the peers offended the lord as well as the party, and it was against rule that there should be battle between the lord and his peers.

But as the default was proved by witnesses before the superior court,[207] the witnesses might be challenged, and then neither the lord nor his court were offended.

In case the default was owing to the lord's tenants or peers, who had delayed to administer justice, or had avoided giving judgment after past

delays, then these peers were appealed of default of justice before the paramount; and if they were cast, they paid a fine to their lord.[208] The latter could not give them any assistance; on the contrary, he seized their fief, till they had each paid a fine of sixty livres.

2. When the default was owing to the lord, which was the case whenever there happened not to be a sufficient number of peers in his court to pass judgment, or when he had not assembled his tenants or appointed somebody in his place to assemble them, an appeal might be made of the default before the lord paramount; but then the party and not the lord was summoned, because of the respect due to the latter.[209]

The lord demanded to be tried before the paramount, and if he was acquitted of the default, the cause was remanded to him, and he was likewise paid a fine of sixty livres.[210] But if the default was proved, the penalty inflicted on him was to lose the trial of the cause,[211] which was to be then determined in the superior court. And, indeed, the complaint of default was made with no other view.

3. If the lord was sued in his own court,[212] which never happened but upon disputes in relation to the fief, after letting all the delays pass, the lord himself was summoned before the peers in the sovereign's name,[213] whose permission was necessary on that occasion. The peers did not make the summons in their own name, because they could not summon their lord, but they could summon for their lord.[214]

Sometimes the appeal of default of justice was followed by an appeal of false judgment, when the lord had caused judgment to be passed, notwithstanding the default.[215]

The vassal who had wrongfully challenged his lord of default of justice was sentenced to pay a fine according to his lord's pleasure.[216]

The inhabitants of Gaunt had challenged the Earl of Flanders of default

of justice before the king, for having delayed to give judgment in his own court.[217] Upon examination it was found that he had used fewer delays than even the custom of the country allowed. They were therefore remanded to him; upon which their effects to the value of sixty thousand livres were seized. They returned to the king's court in order to have the fine moderated; but it was decided that the earl might insist upon the fine, and even upon more if he pleased. Beaumanoir was present at those judgments.

4. In other disputes which the lord might have with his vassal, in respect to the person or honour of the latter, or to property that did not belong to the fief, there was no room for a challenge of default of justice; because the cause was not tried in the lord's court, but in that of the paramount: vassals, says Défontaines,[218] having no power to give judgment on the person of their lord.

I have been at some trouble to give a clear idea of those things, which are so obscure and confused in ancient authors that to disentangle them from the chaos in which they were involved may be reckoned a new discovery.

29. Epoch of the Reign of St. Louis. St. Louis abolished the judicial combats in all the courts of his demesne, as appears by the ordinance he published thereupon,[219] and by the Institutions.[220]

But he did not suppress them in the courts of his barons, except in the case of challenge of false judgment.[221]

A vassal could not challenge the court of his lord of false judgment, without demanding a judicial combat against the judges who pronounced sentence. But St. Louis introduced the practice of challenging of false judgment without fighting, a change that may be reckoned a kind of revolution.[222]

He declared[223] that there should be no challenge of false judgment in the lordships of his demesnes, because it was a crime of felony. In reality, if it was a kind of felony against the lord, by a much stronger reason it was felony against the king. But he consented that they might demand an amendment[224] of the judgments passed in his courts; not because they were false or iniquitous, but because they did some prejudice.[225] On the contrary, he ordained that they should be obliged to make a challenge of false judgment against the courts of the barons,[226] in case of any complaint.

It was not allowed by the Institutions, as we have already observed, to bring a challenge of false judgment against the courts in the king's demesnes. They were obliged to demand an amendment before the same court; and in case the bailiff refused the amendment demanded, the king gave leave to make an appeal to his court;[227] or rather, interpreting the Institutions by themselves, to present him a request or petition.[228]

With regard to the courts of the lords, St. Louis, by permitting them to be challenged of false judgment, would have the cause brought before the royal tribunal,[229] or that of the lord paramount, not to be decided by duel[230] but by witnesses, pursuant to a certain form of proceeding, the rules of which he laid down in the Institutions.[231]

Thus, whether they could falsify the judgment, as in the court of the barons; or whether they could not falsify, as in the court of his demesnes, he ordained that they might appeal without the hazard of a duel.

Défontaines[232] gives us the first two examples he ever saw, in which they proceeded thus without a legal duel: one, in a cause tried at the court of St. Quentin, which belonged to the king's demesne; and the other, in the court of Ponthieu, where the count, who was present, opposed the ancient jurisprudence: but these two causes were decided by

law.

Here, perhaps, it will be asked why St. Louis ordained for the courts of his barons a different form of proceeding from that which he had established in the courts of his demesne? The reason is this: when St. Louis made the regulation for the courts of his demesnes, he was not checked or limited in his views: but he had measures to keep with the lords who enjoyed this ancient prerogative, that causes should not be removed from their courts, unless the party was willing to expose himself to the dangers of an appeal of false judgment. St. Louis preserved the usage of this appeal; but he ordained that it should be made without a judicial combat; that is, in order to make the change less felt, he suppressed the thing, and continued the terms.

This regulation was not universally received in the courts of the lords. Beaumanoir says[233] that in his time there were two ways of trying causes; one according to the king's establishment, and the other pursuant to the ancient practice; that the lords were at liberty to follow which way they pleased; but when they had pitched upon one in any cause, they could not afterwards have recourse to the other. He adds,[234] that the Count of Clermont followed the new practice, while his vassals kept to the old one; but that it was in his power to reestablish the ancient practice whenever he pleased, otherwise he would have less authority than his vassals.

It is proper here to observe that France was at that time divided into the country of the king's demesne, and that which was called the country of the barons, or the baronies; and, to make use of the terms of St. Louis' Institutions, into the country under obedience to the king, and the country out of his obedience.[235] When the king made ordinances for the country of his demesne, he employed his own single authority. But when he published any ordinances that concerned also the country of his barons, these were made in concert with them,[236] or sealed and subscribed by them: otherwise the barons received or refused them,

according as they seemed conducive to the good of their baronies. The rear-vassals were upon the same terms with the great-vassals. Now the Institutions were not made with the consent of the lords, though they regulated matters which to them were of great importance: but they were received only by those who believed they would redound to their advantage. Robert, son of St. Louis, received them in his county of Clermont; yet his vassals did not think proper to conform to this practice.

30. Observation on Appeals. I apprehend that appeals, which were challenges to a combat, must have been made immediately on the spot. "If the party leaves the court without appealing," says Beaumanoir,[237] "he loses his appeal, and the judgment stands good." This continued still in force, even after all the restrictions of judicial combat.[238]

31. The same Subject continued. The villain could not bring a challenge of false judgment against the court of his lord. This we learn from Défontaines,[239] and he is confirmed moreover by the Institutions.[240] Hence Défontaines says,[241] "between the lord and his villain there is no other judge but God."

It was the custom of judicial combats that deprived the villains of the privilege of challenging their lord's court of false judgment. And so true is this, that those villains[242] who by charter or custom had a right to fight had also the privilege of challenging their lord's court of false judgment, even though the peers who tried them were gentlemen;[243] and Défontaines proposes expedients to gentlemen in order to avoid the scandal of fighting with a villain by whom they had been challenged of false judgment.[244]

As the practice of judicial combats began to decline, and the usage of new appeals to be introduced, it was reckoned unfair that freemen should have a remedy against the injustice of the courts of their lords, and the villains should not; hence the parliament received their appeals all

the same as those of freemen.

32. The same Subject continued. When a challenge of false judgment was brought against the lord's court, the lord appeared in person before his paramount to defend the judgment of his court. In like manner, in the appeal of default of justice, the party summoned before the lord paramount brought his lord along with him, to the end that if the default was not proved, he might recover his jurisdiction.[245]

In process of time as the practice observed in these two particular cases became general, by the introduction of all sorts of appeals, it seemed very extraordinary that the lord should be obliged to spend his whole life in strange tribunals, and for other people's affairs. Philip of Valois ordained[246] that none but the bailiffs should be summoned; and when the usage of appeals became still more frequent, the parties were obliged to defend the appeal: the deed of the judge became that of the party.[247]

I took notice that in the appeal of default of justice,[248] the lord lost only the privilege of having the cause tried in his own court. But if the lord himself was sued as party,[249] which became a very common practice,[250] he paid a fine of sixty livres to the king, or to the paramount, before whom the appeal was brought. Thence arose the usage, after appeals had been generally received, of making the fine payable to the lord upon the reversal of the sentence of his judge; a usage which lasted a long time, and was confirmed by the ordinance of Rousillon, but fell, at length, to the ground through its own absurdity.

33. The same Subject continued. In the practice of judicial combats, the person who had challenged one of the judges of false judgment might lose his cause by the combat, but could not possibly gain it.[251] And, indeed, the party who had a judgment in his favour ought not to have been deprived of it by another man's act. The appellant, therefore, who had gained the battle was obliged to fight likewise against the adverse

party: not in order to know whether the judgment was good or bad (for this judgment was out of the case, being reversed by the combat), but to determine whether the demand was just or not; and it was on this new point they fought. Thence proceeds our manner of pronouncing decrees, "The court annuls the appeal; the court annuls the appeal and the judgment against which the appeal was brought." In effect, when the person who had made the challenge of false judgment happened to be overcome, the appeal was reversed: when he proved victorious, both the judgment and the appeal were reversed; then they were obliged to proceed to a new judgment.

This is so far true that, when the cause was tried by inquests, this manner of pronouncing did not take place: witness what M. de la Roche Flavin says,[252] namely, that the chamber of inquiry could not use this form at the beginning of its existence.

34. In what Manner the Proceedings at Law became secret. Duels had introduced a public form of proceeding, so that both the attack and the defence were equally known. "The witnesses," says Beaumanoir,[253] "ought to give their testimony in open court."

Boutillier's commentator says he had learned of ancient practitioners, and from some old manuscript law books, that criminal processes were anciently carried on in public, and in a form not very different from the public judgments of the Romans. This was owing to their not knowing how to write; a thing in those days very common. The usage of writing fixes the ideas, and keeps the secret; but when this usage is laid aside, nothing but the notoriety of the proceeding is capable of fixing those ideas.

And as uncertainty might easily arise in respect to what had been adjudicated by vassals, or pleaded before them, they could, therefore, refresh their memory[254] every time they held a court by what were called proceedings on record.[255] In that case, it was not allowed to

challenge the witnesses to combat; for then there would be no end of disputes.

In process of time a private form of proceeding was introduced. Everything before had been public; everything now became secret; the interrogatories, the informations, the re-examinations, the confronting of witnesses, the opinion of the attorney-general; and this is the present practice. The first form of proceeding was suitable to the government of that time, as the new form was proper to the government since established.

Boutillier's commentator fixes the epoch of this change to the ordinance in the year 1539. I am apt to believe that the change was made insensibly, and passed from one lordship to another, in proportion as the lords renounced the ancient form of judging, and that derived from the Institutions of St. Louis was improved. And indeed, Beaumanoir says[256] that witnesses were publicly heard only in cases in which it was allowed to give pledges of battle: in others they were heard in secret, and their depositions were reduced to writing. The proceedings became, therefore, secret, when they ceased to give pledges of battle.

35. Of the Costs. In former times no one was condemned in the lay courts of France to the payment of costs.[257] The party cast was sufficiently punished by pecuniary fines to the lord and his peers. From the manner of proceeding by judicial combat it followed, that the party condemned and deprived of life and fortune was punished as much as he could be: and in the other cases of the judicial combat, there were fines sometimes fixed, and sometimes dependent on the disposition of the lord, which were sufficient to make people dread the consequences of suits. The same may be said of causes that were not decided by combat. As the lord had the chief profits, so he was also at the chief expense, either to assemble his peers, or to enable them to proceed to judgment. Besides, as disputes were generally determined at the same place, and almost always at the same time, without that infinite multitude of

writings which afterwards followed, there was no necessity of allowing costs to the parties.

The custom of appeals naturally introduced that of giving costs. Thus Défontaines says,[258] that when they appealed by written law, that is, when they followed the new laws of St. Louis, they gave costs; but that in the ordinary practice, which did not permit them to appeal without falsifying the judgment, no costs were allowed. They obtained only a fine, and the possession for a year and a day of the thing contested, if the cause was remanded to the lord.

But when the number of appeals increased from the new facility of appealing;[259] when by the frequent usage of those appeals from one court to another, the parties were continually removed from the place of their residence; when the new method of procedure multiplied and prolonged the suits; when the art of eluding the very justest demands became refined; when the parties at law knew how to fly only in order to be followed; when plaints were ruinous and defence easy; when the arguments were lost in whole volumes of words and writings; when the kingdom was filled with limbs of the law, who were strangers to justice; when knavery found encouragement at the very place where it did not find protection; then it was necessary to deter litigious people by the fear of costs. They were obliged to pay costs for the judgment and for the means they had employed to elude it. Charles the Fair made a general ordinance on that subject.[260]

36. Of the public Prosecutor. As by the Salic, Ripuarian, and other barbarous laws, crimes were punished with pecuniary fines; they had not in those days, as we have at present, a public officer who had the care of criminal prosecutions. And, indeed, the issue of all causes being reduced to the reparation of injuries, every prosecution was in some measure civil, and might be managed by any one. On the other hand, the Roman law had popular forms for the prosecution of crimes which were inconsistent with the functions of a public prosecutor.

The custom of judicial combats was no less opposite to this idea; for who is it that would choose to be a public prosecutor and to make himself every man's champion against all the world?

I find in the collection of formulas, inserted by Muratori in the laws of the Lombards, that under our princes of the second race there was an advocate for the public prosecutor.[261] But whoever pleases to read the entire collection of these formulas will find that there was a total difference between such officers and those we now call the public prosecutor, our attorneys-general, our king's solicitors, or our solicitors for the nobility. The former were rather agents to the public for the management of political and domestic affairs, than for the civil. And, indeed, we did not find in those formulas that they were entrusted with criminal prosecutions, or with causes relating to minors, to churches, or to the condition of any one.

I said that the establishment of a public prosecutor was repugnant to the usage of judicial combats. I find, notwithstanding, in one of those formulas, an advocate for the public prosecutor, who had the liberty to fight. Muratori has placed it just after the constitution of Henry I, for which it was made.[262] In this constitution it is said, "That if any man kills his father, his brother, or any of his other relatives, he shall lose their succession, which shall pass to the other relatives, and his own property shall go to the exchequer." Now it was in suing for the estate which had devolved to the exchequer, that the advocate for the public prosecutor, by whom its rights were defended, had the privilege of fighting: this case fell within the general rule.

We see in those formulas the advocate for the public prosecutor proceeding against a person who had taken a robber, but had not brought him before the count;[263] against another who had raised an insurrection or tumult against the count;[264] against another who had saved a man's life whom the count had ordered to be put to death;[265] against the advocate of some churches, whom the count had commanded to

bring a robber before him, but had not obeyed;[266] against another who had revealed the king's secret to strangers;[267] against another, who with open violence had attacked the emperor's commissary;[268] against another who had been guilty of contempt to the emperor's rescripts, and he was prosecuted either by the emperor's advocate or by the emperor himself;[269] against another who refused to accept of the prince's coin;[270] in fine, this advocate sued for things which by the law were adjudged to the exchequer.[271]

But in criminal causes, we never meet with the advocate for the public prosecutor; not even where duels are used;[272] not even in the case of incendiaries;[273] not even when the judge is killed on his bench;[274] not even in causes relating to the conditions of persons,[275] to liberty and slavery.[276]

These formulas are made, not only for the laws of the Lombards, but likewise for the capitularies added to them, so that we have no reason to doubt of their giving us the practice observed with regard to this subject under our princes of the second race.

It is obvious that these advocates for a public prosecutor must have ended with our second race of kings, in the same manner as the king's commissioners in the provinces; because there was no longer a general law nor general exchequer, and because there were no longer any counts in the provinces to hold the assizes, and, of course, there were no more of those officers whose principal function was to support the authority of the counts.

As the usage of combats became more frequent under the third race, it did not allow of any such thing as a public prosecutor. Hence Boutillier, in his Somme Rurale, speaking of the officers of justice, takes notice only of the bailiffs, the peers and serjeants. See the Institutions[277] and Beaumanoir[278] concerning the manner in which prosecutions were managed in those days.

I find in the laws of James II, King of Majorca,[279] a creation of the office of king's attorney-general, with the very same functions as are exercised at present by the officers of that name among us. It is manifest that this office was not instituted till we had changed the form of our judiciary proceedings.

37. In what Manner the Institutions of St. Louis fell into Oblivion. It was the fate of the Institutions that their origin, progress, and decline were comprised within a very short period.

I shall make a few reflections upon this subject. The code we have now under the name of St. Louis' Institutions was never designed as a law for the whole kingdom, though such a design is mentioned in the preface. The compilation is a general code, which determines all points relating to civil affairs, to the disposal of property by will or otherwise, the dowries and privileges of women, and emoluments and privileges of fiefs, with the affairs in relation to the police, &c. Now, to give a general body of civil laws, at a time when each city, town, or village, had its customs, was attempting to subvert in one moment all the particular laws then in force in every part of the kingdom. To reduce all the particular customs to a general one would be a very inconsiderate thing, even at present when our princes find everywhere the most passive obedience. But if it be true that we ought not to change when the inconveniences are equal to the advantages, much less should we change when the advantages are small and the inconveniences immense. Now, if we attentively consider the situation which the kingdom was in at that time, when every lord was puffed up with the notion of his sovereignty and power, we shall find that to attempt a general alteration of the received laws and customs must be a thing that could never enter into the heads of those who were then in the administration.

What I have been saying proves likewise that this code of institutions was not confirmed in parliament by the barons and magistrates of the kingdom, as is mentioned in a manuscript of the town-hall of Amiens,

quoted by M. Du Cange.[280] We find in other manuscripts that this code was given by St. Louis in the year 1270, before he set out for Tunis. But this fact is not truer than the other; for St. Louis set out upon that expedition in 1269, as M. Du Cange observes: whence he concludes that this code might have been published in his absence. But this I say is impossible. How can St. Louis be imagined to have pitched upon the time of his absence for transacting an affair which would have been a sowing of troubles, and might have produced not only changes, but revolutions? An enterprise of that kind had need, more than any other, of being closely pursued, and could not be the work of a feeble regency, composed moreover of lords, whose interest it was that it should not succeed. These were Mathieu, Abbot of St. Denis, Simon of Clermont, Count of Nesle, and, in case of death, Philip, Bishop of Evreux, and Jean, Count of Ponthieu. We have seen above[281] that the Count of Ponthieu opposed the execution of a new judiciary order in his lordship.

Thirdly, I affirm it to be very probable that the code now extant is quite a different thing from St. Louis' Institutions, It cites the Institutions; therefore it is a comment upon the Institutions, and not the institutions themselves. Besides, Beaumanoir, who frequently makes mention of St. Louis' Institutions, quotes only some particular laws of that prince, and not this compilation. Défontaines,[282] who wrote in that prince's reign, makes mention of the first two times that his Institutions on judicial proceedings were put in execution, as of a thing long since elapsed. The institutions of St. Louis were prior, therefore, to the compilation I am now speaking of, which from their rigour, and their adopting the erroneous prefaces inserted by some ignorant persons in that work, could not have been published before the last year of St. Louis or even not till after his death.

38. The same Subject continued. What is this compilation then which goes at present under the name of St. Louis' Institutions? What is this obscure, confused, and ambiguous code, where the French law is continually mixed with the Roman, where a legislator speaks and yet we

see a civilian, where we find a complete digest of all cases and points of the civil law? To understand this thoroughly, we must transfer ourselves in imagination to those times.

St. Louis, seeing the abuses in the jurisprudence of his time, endeavoured to give the people a dislike to it. With this view he made several regulations for the court of his demesnes, and for those of his barons. And such was his success that Beaumanoir, who wrote a little after the death of that prince, informs us[283] that the manner of trying causes which had been established by St. Louis obtained in a great number of the courts of the barons.

Thus this prince attained his end, though his regulations for the courts of the lords were not designed as a general law for the kingdom, but as a model which every one might follow, and would even find his advantage in it. He removed the bad practice by showing them a better. When it appeared that his courts, and those of some lords, had chosen a form of proceeding more natural, more reasonable, more conformable to morality, to religion, to the public tranquillity, and to the security of person and property, this form was soon adopted, and the other rejected.

To allure when it is rash to constrain, to win by pleasing means when it is improper to exert authority, shows the man of abilities. Reason has a natural, and even a tyrannical sway; it meets with resistance, but this very resistance constitutes its triumph; for after a short struggle it commands an entire submission.

St. Louis, in order to give a distaste of the French jurisprudence, caused the books of the Roman law to be translated; by which means they were made known to the lawyers of those times. Défontaines, who is the oldest law writer we have, made great use of those Roman laws.[284] His work is, in some measure, a result from the ancient French jurisprudence, of the laws or Institutions of St. Louis, and of the Roman law. Beaumanoir made very little use of the latter; but he

reconciled the ancient French laws to the regulations of St. Louis.

I have a notion, therefore, that the law book known by the name of the Institutions was compiled by some bailiffs, with the same design as that of the authors of those two Works, and especially of Défontaines. The title of this work mentions that it is written according to the usage of Paris, Orleans, and the court of Barony; and the preamble says that it treats of the usage of the whole kingdom, of Anjou and of the court of Barony. It is plain that this work was made for Paris, Orleans and Anjou, as the works of Beaumanoir and Défontaines were framed for the counties of Clermont and Vermandois; and as it appears from Beaumanoir that divers laws of St. Louis had been received in the courts of Barony, the compiler was in the right to say that his work related also to those courts.[285]

It is manifest that the person who composed this work compiled the customs of the country together with the laws and Institutions of St. Louis. This is a very valuable work, because it contains the ancient customs of Anjou, the Institutions of St. Louis, as they were then in use; and, in fine, the whole practice of the ancient French law.

The difference between this work and those of Défontaines and Beaumanoir is its speaking in imperative terms as a legislator; and this might be right, since it was a medley of written customs and laws.

There was an intrinsic defect in this compilation; it formed an amphibious code, in which the French and Roman laws were mixed, and where things were joined that were in no relation, but often contradictory to each other.

I am not ignorant that the French courts of vassals or peers; the judgments without power of appealing to another tribunal; the manner of pronouncing sentence by these words "I condemn" or "I absolve,"[286] had some conformity to the popular judgments of the Romans. But they made

very little use of that ancient jurisprudence; they rather chose that which was afterwards introduced by the emperor, in order to regulate, limit, correct, and extend the French jurisprudence.

39. The same Subject continued. The judiciary forms introduced by St. Louis fell into disuse. This prince had not so much in view the thing itself, that is, the best manner of trying causes, as the best manner of supplying the ancient practice of trial. The principal intent was to give a disrelish of the ancient jurisprudence, and the next to form a new one. But when the inconveniences of the latter appeared, another soon succeeded.

The Institutions of St. Louis did not, therefore, so much change the French jurisprudence as they afforded the means of changing it; they opened new tribunals, or rather ways to come at them. And when once the public had easy access to the superior courts, the judgments which before constituted only the usages of a particular lordship formed a universal digest. By means of the Institutions, they had obtained general decisions, which were entirely wanting in the kingdom; when the building was finished, they let the scaffold fall to the ground.

Thus the Institutions produced effects which could hardly be expected from a masterpiece of legislation. To prepare great changes whole ages are sometimes requisite; the events ripen, and the revolutions follow.

The parliament judged in the last resort of almost all the affairs of the kingdom. Before,[287] it took cognizance only of disputes between the dukes, counts, barons, bishops, abbots, or between the king and his vassals,[288] rather in the relation they bore to the political than to the civil order. They were soon obliged to render it permanent, whereas it used to be held only a few times in a year: and, in fine, a great number were created; in order to be sufficient for the decision of all manner of causes.

No sooner had the parliament become a fixed body, than they began to compile its decrees. Jean de Monluc, in the reign of Philip the Fair, made a collection which at present is known by the name of the Olim registers.[289]

40. In what Manner the judiciary Forms were borrowed from the Decretals. But how comes it, some will ask, that when the Institutions were laid aside, the judicial forms of the canon law should be preferred to those of the Roman? It was because they had constantly before their eyes the ecclesiastic courts, which followed the forms of the canon law, and they knew of no court that followed those of the Roman law. Besides, the limits of the spiritual and temporal jurisdiction were at that time very little understood; there were people who sued indifferently[290] and causes that were tried indifferently, in either court.[291] It seems[292] as if the temporal jurisdiction reserved no other cases exclusively to itself than the judgment of feudal matters,[293] and of such crimes committed by laymen as did not relate to religion. For[294] if on the account of conventions and contracts, they had occasion to sue in a temporal court, the parties might of their own accord proceed before the spiritual tribunals; and as the latter had not a power to oblige the temporal court to execute the sentence, they commanded submission by means of excommunications. Under those circumstances, when they wanted to change the course of proceedings in the temporal court, they took that of the spiritual tribunals, because they knew it; but did not meddle with that of the Roman law, by reason they were strangers to it: for in point of practice people know only what is really practised.

41. Flux and Reflux of the ecclesiastic and temporal Jurisdiction. The civil power being in the hands of an infinite number of lords, it was an easy matter for the ecclesiastic jurisdiction to gain daily a greater extent. But as the ecclesiastic courts weakened those of the lords, and contributed thereby to give strength to the royal jurisdiction, the latter gradually checked the jurisdiction of the clergy. The parliament, which in its form of proceedings had adopted whatever was good and

useful in the spiritual courts, soon perceived nothing else but the abuses which had crept into those tribunals; and as the royal jurisdiction gained ground every day, it grew every day more capable of correcting those abuses. And, indeed, they were intolerable; without enumerating them I shall refer the reader to Beaumanoir, to Boutillier and to the ordinances of our kings.[295] I shall mention only two in which the public interest was more directly concerned. These abuses we know by the decrees that reformed them; they had been introduced in the times of the darkest ignorance, and upon the breaking out of the first gleam of light, they vanished. From the silence of the clergy it may be presumed that they forwarded this reformation: which, considering the nature of the human mind, deserves commendation. Every man that died without bequeathing a part of his estate to the church, which was called dying "without confession," was deprived of the sacrament and of Christian burial. If he died intestate, his relatives were obliged to prevail upon the bishop that he would, jointly with them, name proper arbiters to determine what sum the deceased ought to have given, in case he had made a will. People could not lie together the first night of their nuptials, or even the two following nights, without having previously purchased leave; these, indeed, were the best three nights to choose; for as to the others, they were not worth much. All this was redressed by the parliament: we find in the glossary of the French law,[296] by Ragau, the decree which it published against the Bishop of Amiens.[297]

I return to the beginning of my chapter. Whenever we observe in any age or government the different bodies of the state endeavouring to increase their authority, and to take particular advantages of each other, we should be often mistaken were we to consider their encroachments as an evident mark of their corruption. Through a fatality inseparable from human nature, moderation in great men is very rare: and as it is always much easier to push on force in the direction in which it moves than to stop its movement, so in the superior class of the people, it is less difficult, perhaps, to find men extremely virtuous, than extremely

prudent.

The human mind feels such an exquisite pleasure in the exercise of power; even those who are lovers of virtue are so excessively fond of themselves that there is no man so happy as not still to have reason to mistrust his honest intentions; and, indeed, our actions depend on so many things that it is infinitely easier to do good, than to do it well.

42. The Revival of the Roman Law, and the Result thereof. Change of Tribunals. Upon the discovery of Justinian's digest towards the year 1137, the Roman law seemed to rise out of its ashes. Schools were then established in Italy, where it was publicly taught; they had already the Justinian code and the Novellæ. I mentioned before that this code had been so favourably received in that country as to eclipse the law of the Lombards.

The Italian doctors brought the law of Justinian into France, where they had only the Theodosian code;[298] because Justinian's laws were not made till after the settlement of the Barbarians in Gaul.[299] This law met with some opposition: but it stood its ground notwithstanding the excommunications of the popes, who supported their own canons.[300] St Louis endeavoured to bring it into repute by the translations of Justinian's works, made according to his orders, which are still in manuscript in our libraries; and I have already observed that they made great use of them in compiling the Institutions. Philip the Fair ordered the Laws of Justinian to be taught only as written reason in those provinces of France that were governed by customs; and they were adopted as a law in those provinces where the Roman law had been received.[301]

I have already noticed that the manner of proceeding by judicial combat required very little knowledge in the judges; disputes were decided according to the usage of each place, and to a few simple customs received by tradition. In Beaumanoir's time there were two different ways of administering justice;[302] in some places they tried by

peers,[303] in others by bailiffs: in following the former way, the peers gave judgment according to the practice of their court; in the latter, it was the prud'hommes, or old men, who pointed out this same practice to the bailiffs.[304] This whole proceeding required neither learning, capacity, nor study. But when the dark code of the Institutions made its appearance; when the Roman law was translated and taught in public schools; when a certain art of procedure and jurisprudence began to be formed; when practitioners and civilians were seen to rise, the peers and the prud'hommes were no longer capable of judging: the peers began to withdraw from the lords' tribunals; and the lords were very little inclined to assemble them; especially as the new form of trial, instead of being a solemn proceeding, agreeable to the nobility and interesting to a warlike people, had become a course of pleading which they neither understood, nor cared to learn. The custom of trying by peers began to be less used;[305] that of trying, by bailiffs to be more so; the bailiffs did not give judgment themselves,[306] they summed up the evidence and pronounced the judgment of the prud'hommes; but the latter being no longer capable of judging, the bailiffs themselves gave judgment.

This was effected so much the easier, as they had before their eyes the practice of the ecclesiastic courts; the canon and new civil law both concurred alike to abolish the peers.

Thus fell the usage hitherto constantly observed in the French monarchy, that judgment should not be pronounced by a single person, as may be seen in the Salic laws, the capitularies, and in the first law-writers under the third race.[307] The contrary abuse which obtains only in local jurisdictions has been moderated, and in some measure redressed, by introducing in many places a judge's deputy, whom he consults, and who represents the ancient prud'hommes by the obligation the judge is under of taking two graduates in cases that deserve a corporal punishment; and, in fine, it has become of no effect by the extreme facility of appeals.

43. The same Subject continued. Thus there was no law to prohibit the lords from holding their courts themselves; none to abolish the functions of their peers; none to ordain the creation of bailiffs; none to give them the power of judging. All this was effected insensibly, and by the very necessity of the thing. The knowledge of the Roman law, the decrees of the courts, the new digest of the customs, required a study of which the nobility and illiterate people were incapable.

The only ordinance we have upon this subject is that which obliged the lords to choose their bailiffs .from among the laity.[308] It is a mistake to look upon this as a law of their creation; for it says no such thing. Besides, the intention of the legislator is determined by the reasons assigned in the ordinance: "to the end that the bailiffs may be punished for their prevarications, it is necessary they be taken from the order of the laity." The immunities of the clergy in those days are very well known.

We must not imagine that the privileges which the nobility formerly enjoyed, and of which they are now divested, were taken from them as usurpations; no, many of those privileges were lost through neglect, and others were given up because, as various changes had been introduced in the course of so many ages, they were inconsistent with those changes.

44. Of the Proof by Witnesses. The judges, who had no other rule to go by than the usages, inquired very often by witnesses into every cause that was brought before them.

The usage of judicial combats beginning to decline, they made their inquests in writing. But a verbal proof committed to writing is never more than a verbal proof; so that this only increased the expenses of law proceedings. Regulations were then made which rendered most of those inquests useless;[309] public registers were established, which ascertained most facts, as nobility, age, legitimacy, and marriage. Writing is a witness very hard to corrupt; the customs were therefore

reduced to writing. All this is very reasonable; it is much easier to go and see in the baptismal register whether Peter is the son of Paul than to prove this fact by a tedious inquest. When there are a number of usages in a country, it is much easier to write them all down in a code, than to oblige individuals to prove every usage. At length the famous ordinance was made which prohibited the admitting of the proof by witnesses for a debt exceeding an hundred livres, except there was the beginning of a proof in writing.

45. Of the Customs of France. France, as we have already observed, was governed by written customs, and the particular usages of each lordship constituted the civil law. Every lordship had its civil law, according to Beaumanoir,[310] and so particular a law, that this author, who is looked upon as a luminary; and a very great luminary of those times; says he does not believe that throughout the whole kingdom there were two lordships entirely governed by the same law.

This prodigious diversity had a twofold origin. With regard to the first, the reader may recollect what has been already said concerning it in the chapter of local customs:[311] and as to the second, we meet with it in the different events of legal duels, it being natural that a continual series of fortuitous cases must have been productive of new usages.

These customs were preserved in the memory of old men, but insensibly laws or written customs were formed.

1. At the commencement of the third race, the kings gave not only particular charters, but likewise general ones, in the manner above explained; such are the institutions of Philip Augustus and those made by St. Louis. In like manner the great vassals, in concurrence with the lords who held under them, granted certain charters or establishments, according to particular circumstances at the assizes of their duchies or counties; such were the assize of Godfrey, Count of Brittany, on the

division of the nobles; the customs of Normandy, granted by Duke Ralph; the customs of Champagne, given by King Theobald; the laws of Simon, Count of Montfort, and others. This produced some written laws, and even more general ones than those they had before.

2. At the beginning of the third race, almost all the common people were bondmen; but there were several reasons which afterwards determined the kings and lords to enfranchise them.

The lords by enfranchising their bondmen gave them property; it was necessary therefore to give them civil laws, in order to regulate the disposal of that property. But by enfranchising their bondmen, they likewise deprived themselves of their property; there was a necessity, therefore, of regulating the rights which they reserved to themselves, as an equivalent for that property. Both these things were regulated by the charters of enfranchisement; those charters formed a part of our customs, and this part was reduced to writing.[312]

3. Under the reign of St. Louis, and of the succeeding princes, some able practitioners, such as Défontaines, Beaumanoir, and others, committed the customs of their bailiwicks to writing. Their design was rather to give the course of judicial proceedings, than the usages of their time in respect to the disposal of property. But the whole is there, and though these particular authors have no authority but what they derive from the truth and notoriety of the things they speak of, yet there is no manner of doubt but that they contributed greatly to the restoration of our ancient French jurisprudence. Such was in those days our common law.

We have come now to the grand epoch. Charles VII and his successors caused the different local customs throughout the kingdom to be reduced to writing, and prescribed set forms to be observed to their digesting. Now, as this digesting was made through all the provinces, and as people came from each lordship to declare in the general assembly of the

province the written or unwritten usages of each place, endeavours were made to render the customs more general, as much as possible, without injuring the interests of individuals, which were carefully preserved.[313] Thus our customs were characterised in a threefold manner; they were committed to writing, they were made more general, and they received the stamp of the royal authority.

Many of these customs having been digested anew, several changes were made either in suppressing whatever was incompatible with the actual practice of the law, or in adding several things drawn from this practice.

Though the common law is considered among us as in some measure opposite to the Roman, insomuch that these two laws divide the different territories, it is, notwithstanding, true that several regulations of the Roman law entered into our customs, especially when they made the new digests, at a time not very distant from ours, when this law was the principal study of those who were designed for civil employments, at a time when it was not usual for people to boast of not knowing what it was their duty to know, and of knowing what they ought not to know, at a time when a quickness of understanding was made more subservient to learning than pretending to a profession, and when a continual pursuit of amusements was not even the characteristic of women.

I should have been more diffuse at the end of this book, and, entering into the several details, should have traced all the insensible changes which from the opening of appeals have formed the great corpus of our French jurisprudence. But this would have been ingrafting one large work upon another. I am like that antiquarian[314] who set out from his own country, arrived in Egypt, cast an eye on. the pyramids and returned home.

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1. See the prologue to the Salic Law. Mr. Leibnitz says, in his treatise of the origin of the Franks, that this law was made before the reign of Clovis: but it could not be before the Franks had quitted Germany, for at that time they did not understand the Latin tongue.

2. See Gregory of Tours.

3. See the prologue to the Law of the Bavarians, and that to the Salic Law.

4. Ibid.

5. Lex Angliorum Werinorum, hoc est Thuringorum.

6. They did not know how to write.

7. They were made by Euric, and amended by Leovigildus. See Isidorus's chronicle. Chaindasuinthus and Recessuinthus reformed them. Egigas ordered the code now extant to be made, and commissioned bishops for that purpose; nevertheless the laws of Chaindasuinthus and Recessuinthus were preserved, as appears by the sixth council of Toledo.

8. See the prologue to the Law of the Bavarians.

9. We find only a few in Childebert's decree.

10. See the prologue to the Code of the Burgundians, and the code itself, especially tit. 12, § 5, and tit. 38. See also Gregory of Tours, ii. 33, and the code of the Visigoths.

11. See lower down, chapter 3.

12. See cap. ii. §§ 8 and 9, and cap. iv. §§ 2 and 7.

13. De Bello Gall., vi.

14. Book i, formul. 8.

15. Chapter 31.

16. That of Clotarius in the year 560, in the edition of the Capitularies of Baluzius, i, art. 4, ib. in fine.

17. Capitularies added to the Law of the Lombards, i, tit. 25, 71, ii, tit. 41, 7, and tit. 56, 1, 2.

18. Ibid., ii, tit. 5.

19. Ibid., ii, tit. 7, 1.

20. Ibid., 2.

21. Ibid., ii, tit. 35, 2.

22. In the Law of the Lombards, ii, tit. 37.

23. Salic Law, tit. 44, § 1.

24. Ibid., tit. 44, §§ 15, 7.

25. Ibid., tit. 41, § 4.

26. Ibid., § 6.

27. The principal Romans followed the court, as may be seen by the lives of several bishops, who were there educated; there were hardly any but Romans that knew how to write.

28. Salic Law, tit. 45.

29. Lidus whose condition was better than that of a bondman. -- Law of the Alemans, 95.

30. Tit. 35, §§ 3, 4.

31. The Abbé du Bos.

32. Witness the expedition of Arbogastes, in Gregory of Tours, History, ii.

33. The Franks, the Visigoths, and Burgundians.

34. It was finished in 438.

35. The 20th year of the reign of this prince, and published two years after by Anian, as appears from the preface to that code.

36. The year 504 of the Spanish era, the Chronicle of Isidorus.

37. Francum, aut Barbarum, aut hominem qui Salica lege vivit. -- Salic Law, tit. 45, § 1.

38. "According to the Roman law under which the church lives," as is said in the law of the Ripuarians, tit. 58, § 1. See also the numberless authorities on this head pronounced by Du Cange, under the words Lex Romana.

39. See the Capitularies added to the Salic law in Lindembrock, at the end of that law, and the different codes of the laws of the Barbarians concerning the privileges of ecclesiastics in this respect. See also the letter of Charlemagne to his son Pepin, King of Italy, in the year 807, in the edition of Baluzius, i, 462, where it is said, that an

ecclesiastic should receive a triple compensation; and the Collection of the Capitularies, v, art. 302, i. Edition of Baluzius.

40. See that law.

41. Of this I shall speak in another place, xxx. 6-9.

42. Agobard, Opera.

43. See Gervais of Tilbury, in Duchesne's Collection, iii, p. 366. And a chronicle of the year 759, produced by Catel, Hist. of Languedoc. And the uncertain author of the Life of Louis the Debonnaire, upon the demand made by the people of Septimania, at the assembly in Carisiaco, in Duchesne's Collection, ii, p. 316.

44. Art. 16. See also art. 20.

45. See arts. 12 and 16 of the edict of Pistes in Cavilono, in Narbona, &c.

46. See what Machiavelli says of the ruin of the ancient nobility of Florence.

47. He began to reign in the year 642.

48. "We will no longer be harassed either by foreign or by the Roman laws." -- Law of the Visigoths, ii, tit. 1, §§ 9, 10.

49. Law of the Visigoths, iii, tit. 1, 1.

50. See Book iv. 19, 26.

51. The revolt of these provinces was a general defection, as appears by the sentence in the sequel of the history. Paulus and his adherents were

Romans; they were even favoured by the bishops. Vamba durst not put to death the rebels whom he had quelled. The author of the history calls Narbonne Gaul the nursery of treason.

52. De Bello Gothorum, i. 13.

53. Capitularies, vi, 343, year 1613, edition of Baluzius, i, p. 981.

54. M. de la Thaumassière has collected many of them. See, for instance, chapters 41, 46, and others.

55. Missi Dominici.

56. Let not the bishops, says Charles the Bald, in the Capitulary of 844, art. 8, under pretence of the authority of making canons, oppose this constitution, or neglect the observance of it. It seems he already foresaw the fall thereof.

57. In the collection of canons a vast number of the decretals of the popes were inserted; they were very few in the ancient collection. Dionysius Exiguus put a great many into his; but that of Isidorus Mercator was stuffed with genuine and spurious decretals. The old collection obtained in France till Charlemagne. This prince received from the hand of Pope Adrian I the collection of Dionysius Exiguus, and caused it to be accepted. The collection of Isidorus Mercator appeared in France about the reign of Charlemagne; people grew passionately fond of it: to this succeeded what we now call the course of canon law.

58. See the edict of Pistes, art. 20.

59. This is expressly set down in some preambles to these codes: we even find in the laws of the Saxons and Frisians different regulations, according to the different districts. To these usages were added some particular regulations suitable to the exigency of circumstances; such

were the severe laws against the Saxons.

60. Of this I shall speak elsewhere (xxx. 14).

61. Preface to Marculfus, Formulæ.

62. Law of the Lombards, ii, tit. 58, § 3.

63. Ibid., tit. 41, § 6.

64. Life of St. Leger.

65. Law of the Lombards, ii, tit. 41, § 6.

66. See chapter 5.

67. This relates to what Tacitus says. De Moribus Germanorum, 28, that the Germans had general and particular customs.

68. Law of the Ripuarians, tit. 6, 7, 8, and others.

69. Ibid., tit. 11, 12, 17.

70. It was when an accusation was brought against an Antrustio, that is, the king's vassal, who was supposed to be possessed of a greater degree of liberty. See Pactus legis Salicæ, tit. 76.

71. Ibid.

72. According to the practice now followed in England.

73. Tit. 32; tit. 57, § 2; tit. 59, § 4.

74. See the following note.

75. This spirit appears in the Law of Ripuarians, tit. 59, § 4, and tit. 67, § 5, and in the Capitulary of Louis the Debonnaire, added to the law of the Ripuarians in the year 803, art. 22.

76. See that law.

77. The law of the Frisians, Lombards, Bavarians, Saxons, Thuringians, and Burgundians.

78. In the Law of the Burgundians, tit. 8, §§ 1 and 2, on criminal affairs; and tit. 45, which extends also to civil affairs. See also the law of the Thuringians, tit. 1, § 31; tit. 7, § 6; and tit. 8; and the law of the Alemans, tit. 89; the law of the Bavarians, tit. 8, cap. ii, § 6, and cap. iii, § 1, and tit. 9, cap. iv, § 4; the law of the Frisians, tit. 2, § 3, and tit. 14, § 4; the law of the Lombards, i, tit. 32, § 3, and tit. 35, § 1, and ii, tit. 35, § 2.

79. See cap. xviii, towards the end.

80. As also some other laws of the Barbarians.

81. Tit. 56.

82. Ibid.

83. This appears by what Tacitus says, Omnibus idem habitus. -- De Moribus Germanorum, 4.

84. Velleius Paterculus, ii. 118, says that the Germans decided all their disputes by the sword.

85. See the codes of Barbarian laws, and in respect to less ancient times, Beaumanoir, Ancient Custom of Beauvoisis.

86. Law of the Burgundians, cap. xlv.

87. See the works of Agobard.

88. See Beaumanoir, Ancient Customs of Beauvoisis, 61. See also the Law of the Angli, cap. xiv, where the trial by boiling water is only a subsidiary proof.

89. Tit. 14.

90. Cap. xxxi, § 5.

91. See this law, tit. 59, § 4, and tit. 67, § 5.

92. Law of the Lombards, ii, tit. 55, cap. xxxiv.

93. The year 962.

94. Law of the Lombards, ii, tit. 55, cap. xxxiv.

95. It was held in the year 967, in the presence of Pope John XIII and of the Emperor Otho I.

96. Otho II's uncle, son to Rodolphus, and King of Transjurian Burgundy.

97. In the year 988.

98. Law of the Lombards, ii, tit. 55, cap. xxxiv.

99. Ibid., § 33. In the copy that Muratori made use of it is attributed to the Emperor Guido.

100. Ibid., § 23.

101. Cassiodorus, iii. 23, 24.

102. The anonymous author of the life of Louis the Debonnaire.

103. See in the Law of the Lombards, i, tit. 4, and tit. 9, § 23, and ii, tit. 35 §§ 4 and 5, and tit. 55 §§ 1,2,3. The regulations of Rotharis; and in § 15, that of Luitprandus.

104. Ibid., ii, tit. 55, § 23.

105. The judicial oaths were made at that time in the churches, and during the first race of our kings there was a chapel set apart in the royal palace for the affairs that were to be thus decided. See Marculfus, Formulæ i. 38. The Law of the Ripuarians, tit. 59, § 4, tit. 65, § 5. The History of Gregory of Tours; and the Capitulary of the year 803, added to the Salic Law.

106. Chapter 39, P. 212.

107. We find his Constitutions inserted in the Law of the Lombards, and at the end of the Salic Laws.

108. In a constitution inserted in the Law of the Lombards, ii, tit. 55, § 31.

109. In the year 1200.

110. Ancient Custom of Beauvoisis, 39.

111. Ibid., 61, pp. 309, 310.

112. Charter of Louis the Fat in the year 1145, in the Collection of Ordinances.

113. Ibid.

114. Charter of Louis the Young, in 1168, in the Collection of Ordinances.

115. See Beaumanoir, 63, p. 325.

116. See the Ancient Custom of Beauvoisis, 28, p. 203.

117. Additio sapientium Wilemari, tit. 5.

118. Book i, tit. 6, § 3.

119. Book ii, tit. 5, § 23.

120. Added to the Salic law in 819.

121. See Beaumanoir, 64, p. 328.

122. Ibid., p. 329.

123. See Beaumanoir, 3, p. 25 and 329.

124. See in regard to the arms of the combatants, Beaumanoir, 61, p. 308, and 64, p. 328.

125. Ibid., 74, p. 328. See also the Charters of St. Aubin of Anjou, quoted by Galland, p. 263.

126. Among the Romans, it was not infamous to be beaten with a stick.

127. They had only the baston and buckler. -- Beaumanoir, 64, p. 328.

128. Book i, tit. 6, § 1.

129. Ibid.; § 2.

130. De Moribus Germanorum, 6.

131. In the Pactus legis Salicæ, 6.

132. We have both the ancient law and that which was amended by this prince.

133. Book ii, tit. 55, § 11.

134. See the Greek romances of the middle age.

135. In the year 1283.

136. Beaumanoir, 6, pp. 40, 41.

137. Ibid., 64, p. 328.

138. Ibid., p. 330.

139. Ibid.

140. Ibid.

141. The great vassals had particular privileges.

142. Beaumanoir, 64, p. 330, says he lost his jurisdiction: these words in the authors of those days have not a general signification, but a signification limited to the affair in question. Défontaines, 21, art. 29.

143. This custom, which we meet with in the Capitularies, was still subsisting at the time of Beaumanoir. See 61, p. 315.

144. Beaumanoir, 64, p. 330.

145. Ibid., 61, p. 309.

146. Ibid., p. 308; 43, p. 239.

147. Ibid., 61, p. 314. See also Défontaines, 22, art. 24.

148. Beaumanoir, 63, p. 322.

149. Ibid.

150. Ibid.

151. Ibid., p. 323.

152. Ibid., 63, p. 324.

153. Ibid., p. 325.

154. Ibid.

155. Ibid., p. 323. See also what I have said in book

156. Ibid., p. 327.

157. Défontaines, 22, art. 7.

158. Charter of Louis the Fat, in the year 1118.

159. Ibid.

160. Chapter 61, p. 315.

161. Chapter 6, p. 40.

162. But if the battle was fought by champions, the champion that was overcome had his hand cut off.

163. Tit. 16, § 2.

164. Tit. 45.

165. Letter to Louis the Debonnaire.

166. Life of St. Avitus.

167. Beaumanoir, 2, p. 22.

168. Ibid., 61, p. 312, and 67, p. 338.

169. Book ii. 15.

170. Beaumanoir, 61, pp. 310 and 311, and 67, p. 337.

171. Ibid., 61, p. 313.

172. Ibid., p. 314.

173. Ibid.

174. Chapter 22, art. 1, 10, and 11, he says only that each of them was allowed a small fine.

175. Beaumanoir, 61, p. 314.

176. Ibid. Défontaines, 22, art. 9.

177. Ibid.

178. Beaumanoir, 61, p. 316, and Défontaines, 22, art. 21.

179. Beaumanoir, 61, p. 314.

180. Défontaines, 22, art. 7.

181. See Défontaines, 21, arts. 11 and 12, and following, who distinguishes the cases in which the appellant of false judgment loses his life, the point contested, or only the imparlance.

182. Beaumanoir, 62, p. 322. Défontaines, 22, art. 3.

183. The count was not obliged to lend any. Beaumanoir, 67, p. 337.

184. Nobody can pass judgment in his court. Ibid., pp. 336, 337.

185. Ibid., 62, p. 322.

186. Défontaines, 21, arts. 27 and 28.

187. Ibid., art. 28.

188. Chapter 21, art. 37.

189. This number at least was necessary. Défontaines, 21, art. 36.

190. Beaumanoir, 67, p. 337.

191. Ibid.

192. Ibid., pp. 337, 338.

193. Défontaines, 22, art. 14.

194. Ibid.

195. Third capitulary of the year 812, art. 3, edition of Baluzius, p. 497, and of Charles the Bald, added to the law of the Lombards, ii, art. 3.

196. Third capitulary of the year 812, art. 2, edition of Baluzius, p. 497.

197. Capitulary of Louis the Debonnaire, edition of Baluzius, p. 667.

198. See the Capitulary of Charles the Bald, added to the law of the Lombards, ii, art. 3.

199. Third capitulary of the year 812, art. 8.

200. Placitum.

201. This appears by the formulas, charters, and the capitularies.

202. In the year 757, edition of Baluzius, p. 180, arts. 9 and 10, and the Synod apud Vernas, in the year 755, art. 29, edition of Baluzius, p. 175. These two capitularies were made under King Pepin.

203. The officers under the count, Scabini.

204. See the Law of the Lombards, ii, tit. 52, art. 22.

205. There are instances of appeals of default of justice as early as the time of Philip Augustus.

206. Chapter 61, p. 315.

207. Ibid.

208. Défontaines, 21, art. 24.

209. Ibid., art. 32.

210. Beaumanoir, 61, p. 312.

211. Défontaines, 21, art. 29.

212. This was the case in the famous difference between the Lord of Nesle and Joan, Countess of Flanders, during the reign of Louis VIII. He called upon her to have it tried within forty days, and thereupon challenged her at the king's court with default of justice. She answered that she would have it tried by her peers in Flanders. The king's court determined that it should not be sent there and that the countess should be cited.

213. Défontaines, 21, art. 34.

214. Ibid., art. 9.

215. Beaumanoir, 61, p. 311.

216. Ibid., 61, p. 312. But he that was neither tenant nor vassal to the lord paid only a fine of sixty livres. -- Ibid.

217. Ibid., p. 318.

218. Chapter 21, art. 35.

219. In the year 1260.

220. Book i. 2, 7, and ii. 10, 11.

221. As appears everywhere in the Institutions, &c., and Beaumanoir, 61, p. 309.

222. Institutions, i. 6, ii. 15.

223. Ibid., ii. 15.

224. Ibid., i. 78, ii. 15.

225. Ibid., i. 78.

226. Ibid., ii. 15.

227. Ibid., i. 78.

228. Ibid., ii. 15.

229. But if they wanted to appeal without falsifying the judgment, the appeal was not admitted. -- Ibid.

230. Ibid., i. 6, 67; ii. 15; and Beaumanoir, 11, p. 58.

231. Book i. 1-3.

232. Chapter 22, arts. 16, 17.

233. Chapter 61, p. 309.

234. Ibid.

235. See Beaumanoir, Défontaines, and the Institutions, ii. 10, 11, 15, and others.

236. See the ordinances at the beginning of the third race, in the

collection of Lauriére, especially those of Philip Augustus, on ecclesiastic jurisdiction; that of Louis VIII concerning the Jews; and the charters related by Mr. Brussel; particularly that of St. Louis, on the release and recovery of lands, and the feodal majority of young women, ii, book iii, p. 35, and ibid., the ordinance of Philip Augustus, p. 7.

237. Chapter 63, p. 327: chapter 61, p. 312.

238. See the Institutions of St. Louis, ii. 15, and the Ordinance of Charles VII in the year 1453.

239. Chapter 21, arts. 21, 22.

240. Book i. 136.

241. Chapter 2, art. 8.

242. Ibid., 22, art. 7. This article, and the 21st of the 22nd chapter of the same author, have been hitherto very badly explained. Défontaines does not oppose the judgment of the lord to that of the gentleman, because it was the same thing; but he opposes the common villain to him who had the privilege of fighting.

243. Gentlemen may always be appointed judges. Ibid., 21, art. 48.

244. Ibid., 22, art. 14.

245. Ibid., 21, art. 33.

246. In the year 1332.

247. See the situation of things in Boutillier's time, who lived in the year 1402. -- Somme Rurale, i, pp. 19, 20.

248. See chapter 30.

249. Beaumanoir, 61, pp. 312 and 318.

250. Ibid.

251. Défontaines, 21, art. 14.

252. Of the Parliaments of France, i. 16.

253. Chapter 61, p. 315.

254. As Beaumanoir says, chapter 39, p. 209.

255. They proved by witnesses what had been already done, said, or decreed in court.

256. Chapter 39, p. 218.

257. Défontaines in his counsel, chapter 22, arts. 3, 8; and Beaumanoir, 33. Institutions, i. 90.

258. Chapter 22, art. 8.

259. At present when they are so inclined to appeal, says Boutillier -- Somme Rurale, i, tit. 3, p. 16, Paris, 1621.

260. In the year 1324.

261. Advocatus de parte publicâ.

262. See this constitution and this formula, in the second volume of the Historians of Italy, p. 175.

263. Collection of Muratori, p. 104. on the 88th law of Charlemagne, i, tit. 26, § 78.

264. Another formula, ibid., p. 87.

265. Ibid., p. 104.

266. Ibid., p. 95.

267. Ibid., p. 88.

268. Ibid., p. 98.

269. Ibid., p. 132.

270. Ibid.

271. Ibid., p. 137.

272. Ibid., p. 147.

273. Ibid.

274. Ibid., p. 168.

275. Ibid., p. 134.

276. Ibid., p. 107.

277. Book i, 1; ii, 11, 13.

278. Chapters 1,61.

279. See these laws in the Lives of the Saints, of the month of June,

iii, p. 26.

280. Preface to the Institutions.

281. Chapter 29.

282. See above, chapter 29.

283. Chapter 61, p. 309.

284. As he says himself, in his prologue.

285. Nothing so vague as the title and prologue. At first they are the customs of Paris, Orleans, and the court of Barony; then they are the customs of all the lay courts of the kingdom, and of the provostships of France; at length, they are the customs of the whole kingdom, Anjou, and the court of Barony.

286. Institutions, ii. 15,

287. See Du Tillet on the court of peers. See also Laroche, Flavin, Budeus and Paulus Æmilius, i. 3.

288. Other causes were decided by the ordinary tribunals.

289. See the President Henault's excellent abridgment of the history of France in the year 1313.

290. Beaumanoir, 11, p. 58.

291. Widows, croises, &c. -- Ibid.

292. See the whole eleventh chapter of Beaumanoir.

293. The spiritual tribunals had even laid hold of these, under the pretext of the oath, as may be seen by the famous Concordat between Philip Augustus, the clergy, and the barons, which is to be found in the ordinances of Lauriére.

294. Beaumanoir, 11, p. 60.

295. See Boutillier, Somme Rurale, tit. 9, what persons are incapable of suing in a temporal court; and Beaumanoir, 11, p. 56, and the regulations of Philip Augustus upon this subject; as also the regulation between Philip Augustus, the clergy, and the barons.

296. In the word "testamentary Executors."

297. March 19, 1409.

298. In Italy they followed Justinian's code; hence Pope John VIII, in his constitution published after the Synod of Troyes, makes mention of this code, not because it was known in France, but because he knew it himself, and his constitution was general.

299. This emperor's code was published towards the year 530.

300. Decretals, v. tit. de privilegiis, cap. 28, super specula.

301. By a charter in the year 1312, in favour of the university of Orleans, quoted by Du Tillet.

302. Ancient Custom of Beauvoisis, 1, "Of the Office of Bailiffs."

303. Among the common people the burghers were tried by burghers, as the feudatory tenants were tried by one another. See La Thaumassière, 19.

304. Thus all requests began with these words: "My lord judge, it is

customary that in your court," &c, as appears from the formula quoted by Boutillier,Somme Rurale, i, tit. xxi.

305. The change was insensible: we meet with trials by peers, even in Boutillier's time, who lived in the year 1402, which is the date of his will: Yet nothing but feodal matters were tried any longer by the peers. Ibid., i, tit. i, p. 16.

306. As appears by the formula of the letters which their lord used to give them, quoted by Boutillier, Somme Rurale, I, tit. xiv, which is proved likewise by Beaumanoir, Ancient Custom of Beauvoisis, 1, of the bailiffs: they only directed the proceedings. "The bailiff is obliged in the presence of the peers to take down the words of those who plead, and to ask the parties whether they are willing to have judgment given according to the reasons alleged; and if they say, yes, my lord; the bailiff ought to oblige the peers to give judgment." See also the Institutions of St. Louis, i. 105, ii. 15.

307. Beaumanoir, 67, p. 336, and 61, pp. 315 and 316. The Institutions, ii. 15.

308. It was published in the year 1287.

309. See in what manner age and parentage were proved. -- Institutions, i. 71, 72.

310. Prologue to the Ancient Custom of Beauvoisis.

311. Chapter 12.

312. See the Collection of Ordinances, by Laurière.

313. This was observed at the digesting of the customs of Berry and of Paris. See La Thaumassière, 3.

314. In the Spectator.