Montesquieu
The Spirit of the Laws, Vol. II


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# The Spirit of the Laws

By

Baron de Montesquieu

Translated by Thomas Nugent
Revised by J. V. Prichard

With a General and Biographical Introduction

PRAYER OF GUSTAVUS ADOLPHUS BEFORE THE BATTLE OF LUTZEN.

Photogravure from a painting by Louis Braun.

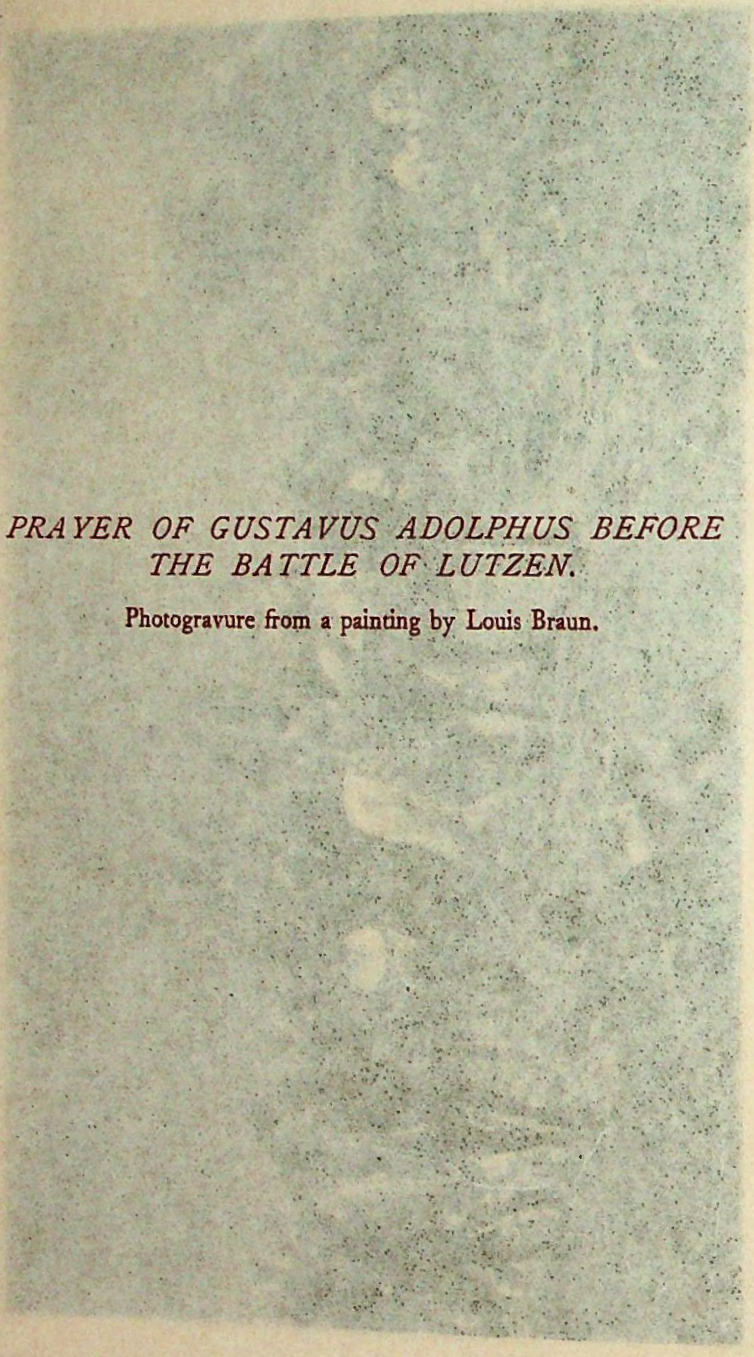
Illustrated

Volume II





New York
D. Appleton and Company
1900



*PRAYER OF GUSTAVUS ADOLPHUS BEFORE THE BATTLE OF LUTZEN.*

Photogravure from a painting by Louis Braun.

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By

Baron de Montesquieu

Translated by Thomas Nugent
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With a Critical and Biographical Introduction
by Oliver Wendell Holmes
(Chief Justice of Massachusetts)

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"Prolem sine matre creatam"



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# THE SPIRIT OF THE LAWS

## BOOK XXII

### OF LAWS IN RELATION TO THE USE OF MONEY

1. The reason of the use of money.—2. Of the nature of money.—3. Of ideal money.—4. Of the quantity of gold and silver.—5. The reason why interest was lowered one half after the conquest of the Indies.—6. How the price of things is determined in relation to money.—7. Of the relative scarcity of gold and silver.—8. Of exchange.—9. Of the proceedings of the Romans with respect to money.—10. The circumstances in which the Romans changed the value of their specie.—11. Proceedings with respect to money in the time of the emperors.—12. How the exchange is a constraint on despotic power.—13. The practice of some countries in Italy.—14. The assistance a state may derive from bankers.—15. Of public debts.—16. Of the payment of public debts.—17. Of lending upon interest.—18. Of maritime usury.—19. Of lending by contract, and the state of usury among the Romans.

I. People who have little merchandise, as savages, and among civilized nations those who have only two or three species, trade by exchange. Thus the caravans of Moors that go to Timbuctoo, in the heart of Africa, have no need of money, for they exchange their salt for gold. The Moor puts his salt in a heap, and the negro his dust in another; if there is not gold enough, the Moor takes away some of his salt, or the negro adds more gold, till both parties are agreed.

But when a nation traffics with a great variety of merchandise, money becomes necessary; because a metal easily

carried from place to place saves the great expenses which people would be obliged to be at if they always proceeded by exchange.

As all nations have reciprocal wants, it frequently happens that one is desirous of a large quantity of the other's merchandise, when the latter will have very little of theirs, though with respect to another nation the case is directly opposite. But when nations have money, and proceed by buying and selling, those who take most merchandise pay the balance in specie. And there is this difference, that in the case of buying, the trade carried on is in proportion to the wants of the nation that has the greatest demands; while in bartering, the trade is only according to the wants of the nation whose demands are the fewest; without which the latter would be under an impossibility of balancing its accounts.

II. Money is a sign which represents the value of all merchandise. Metal is taken for this sign as being durable,[1] because it consumes but little by use; and because, without being destroyed, it is capable by many divisions. A precious metal has been chosen as a sign, as being most portable. A metal is most proper for a common measure, because it can be easily reduced to the same standard. Every state fixes upon it a particular impression, to the end that the form may correspond with the standard and the weight, and that both may be known by inspection only. The Athenians, not having the use of metals, made use of oxen,[2] and the Romans of sheep; but one ox is not the same as another ox in the manner that one piece of metal may be the same as another.

[1] The salt made use of for this purpose in Abyssinia has this defect, that it is continually wasting away.

[2] Herodotus, in "Clio," tells us that the Lydians found out the art of coining money; the Greeks learned it from them; the Athenian coin had the impression of their ancient ox. I have seen one of those pieces in the Earl of Pembroke's cabinet.

As specie is the sign of the value of merchandise, paper is the sign of the value of specie; and when it is of the right sort, it represents this value in such a manner that as to the effects produced by it there is not the least difference.

In the same manner, as money is the sign and representative of a thing, everything is a sign and representative of money; and the state is in a prosperous condition when, on the one hand, money perfectly represents all things, and on the other all things perfectly represent money, and are reciprocally the sign of each other; that is, when they have such a relative value that we may have the one as soon as we have the other. This never happens in any other than a moderate government, nor does it always happen there; for example, if the laws favour the dishonest debtor, his effects are no longer a representative or sign of money. With regard to a despotic government, it would be a prodigy did things there represent their sign. Tyranny and distrust make every one bury his specie;[3] things therefore are not there the representative of money.

Legislators have sometimes had the art not only to make things in their own nature the representative of specie, but to convert them even into specie, like the current coin. Cæsar, when he was dictator, permitted debtors to give their lands in payment to their creditors, at the price they were worth before the civil war.[4] Tiberius ordered that those who desired specie should have it from the public treasury on binding over their land to double the value.[5] Under Cæsar the lands were the money which paid all debts; under Tiberius ten thousand sesterces in land be-

[3] It is an ancient custom in Algiers for the father of a family to have a treasure concealed in the earth. ("History of the Kingdom of Algiers," by Laugier de Tassis.)

[4] Cæsar, "On the Civil War," book iii.

[5] Tacitus, lib. vi.

came as current money equal to five thousand sesterces in silver.

The Magna Charta of England provides against the seizing of the lands or revenues of a debtor when his movable or personal goods are sufficient to pay, and he is willing to give them up to his creditors; thus all the goods of an Englishman represented money.

The laws of the Germans constituted money a satisfaction for the injuries that were committed, and for the sufferings due to guilt. But as there was but very little specie in the country, they again constituted this money to be paid in goods or chattels. This we find appointed in a Saxon law, with certain regulations suitable to the ease and convenience of the several ranks of people. At first the law declared the value of a sou in cattle;[6] the sou of two tremises answered to an ox of twelve months, or to a ewe with her lamb; that of three tremises was worth an ox of sixteen months. With these people money became cattle, goods, and merchandise, and these again became money.

Money is not only a sign of things; it is also a sign and representative of money, as we shall see in the chapter on exchange.

III. There is both real and ideal money. Civilized nations generally make use of ideal money only, because they have converted their real money into ideal. At first their real money was some metal of a certain weight and standard, but soon dishonesty or want made them retrench a part of the metal from every piece of money, to which they left the same name; for example, from a livre at a pound weight they took half the silver, and still continued to call it a livre; the piece which was the twentieth part of a pound of silver they continued to call a sou, though it is no more the twentieth part of this pound of silver.

[6] "The Laws of the Saxons," chap. xviii.

By this method the livre is an ideal livre, and the sou an ideal sou. Thus of the other subdivisions; and so far may this be carried that what we call a livre shall be only a small part of the original livre or pound, which renders it still more ideal. It may even happen that we have no piece of money of the precise value of a livre, nor any piece exactly with a sou; then the livre and the sou will be purely ideal. They may give to any piece of money the denomination of as many livres and as many sous as they please; the variation may be continual, because it is as easy to give another name to a thing as it is difficult to change the thing itself.

To take away the source of this abuse, it would be an excellent law for all countries who are desirous of making commerce flourish to ordain that none but real money should be current, and to prevent any methods from being taken to render it ideal.

Nothing ought to be so exempt from variation as that which is the common measure of all.

Trade is in its own nature extremely uncertain; and it is a great evil to add a new uncertainty to that which is founded on the nature of the thing.

IV. While civilized nations are the mistresses of the world, gold and silver, whether they draw it from among themselves, or fetch it from the mines, must increase every day. On the contrary, it diminishes when barbarous nations prevail. We know how great was the scarcity of these metals when the Goths and Vandals on the one side, and on the other the Saracens and Tartars, broke in like a torrent on the civilized world.

The bullion drawn from the American mines, imported into Europe, and thence sent to the East, has greatly promoted the navigation of the European nations; for it is merchandise which Europe receives in exchange from America, and which she sends in exchange to the In-

dies. A prodigious quantity of gold and silver is therefore an advantage, when we consider these metals as merchandise; but it is otherwise when we consider them as a sign, because their abundance gives an alloy to their quality as a sign, which is chiefly founded on their scarcity.

Before the first Punic War[7] copper was to silver as 960 to 1;[8] it is at present nearly as 73½ to 1. When the proportion shall be as it was formerly, silver will better perform its office as a sign.

V. Garcilaso informs us[9] that in Spain after the conquest of the Indies the interest, which was at ten per cent, fell to five. This was a necessary consequence. A great quantity of specie being all of a sudden brought into Europe, much fewer persons had need of money. The price of all things increased, while the value of money diminished; the proportion was then broken, and all the old debts were discharged. We may recollect the time of the System,[10] when everything was at a high price except specie. Those who had money after the conquest of the Indies were obliged to lower the price or hire of their merchandise—that is, in other words, their interest.

From this time they were unable to bring interest to its ancient standard, because the quantity of specie brought to Europe has been annually increasing. Besides, as the public funds of some states, founded on riches procured by commerce, gave but a very small interest, it became necessary for the contracts of individuals to be regulated by these. In short, the course of exchange having rendered the conveying of specie from one country to another remarkably easy, money can not be scarce in a place where

[7] See chap. x of this book.

[8] Supposing a mark of eight ounces of silver to be worth forty-nine livres, and copper twenty sols per pound.

[9] "History of the Civil Wars of the Spaniards in the West Indies."

[10] In France, Law's project was called by this name.

they may be so readily supplied with it by those who have it in plenty.

VI. Money is the price of merchandise or manufactures. But how shall we fix this price? or, in other words, by what piece of money is everything to be represented?

If we compare the mass of gold and silver in the whole world with the quantity of merchandise therein contained, it is certain that every commodity or merchandise in particular may be compared to a certain portion of the entire mass of gold and silver. As the total of the one is to the total of the other, so part of the one will be to part of the other. Let us suppose that there is only one commodity or merchandise in the world, or only one to be purchased, and that this is divisible like money; a part of this merchandise will answer to a part of the mass of gold and silver; the half of the total of the one to the half of the total of the other; the tenth, the hundredth, the thousandth part of the one, to the tenth, the hundredth, the thousandth part of the other. But as that which constitutes property among mankind is not all at once in trade, and as the metals or money which are the sign of property are not all in trade at the same time, the price is fixed in the compound ratio of the total of things with the total of signs, and that of the total of things in trade with the total of signs in trade also; and as the things which are not in trade to-day may be in trade to-morrow, and the signs not now in trade may enter into trade at the same time, the establishment of the price of things fundamentally depends on the proportion of the total of things to the total of signs.

Thus the prince or the magistrate can no more ascertain the value of merchandise than he can establish by a decree that the relation one has to ten is equal to that of one to twenty. Julian's lowering the price of provisions at Antioch was the cause of a most terrible famine.[11]

[11] "History of the Church," by Socrates, lib. ii.

The negroes on the coast of Africa have a sign of value without money. It is a sign merely ideal, founded on the degree of esteem which they fix in their minds for all merchandise, in proportion to the need they have of it. A certain commodity or merchandise is worth three macoutes; another, six macoutes; another, ten macoutes; that is, as if they said simply three, six, and ten. The price is formed by a comparison of all merchandise with each other. They have therefore no particular money; but each kind of merchandise is money to the other.

Let us for a moment transfer to ourselves this manner of valuing things, and join it with ours; all the merchandise and goods in the world, or else all the merchandise or manufactures of a state, particularly considered as separate from all others, would be worth a certain number of macoutes; and, dividing the money of this state into as many parts as there are macoutes, one part of this division of money will be the sign of a macoute.

If we suppose the quantity of specie in a state doubled, it will be necessary to double the specie in the macoute; but if in doubling the specie you double also the macoute, the proportion will remain the same as before the doubling of either.

If, since the discovery of the Indies, gold and silver have increased in Europe in the proportion of one to twenty, the price of provisions and merchandise must have been enhanced in the proportion of one to twenty. But if, on the other hand, the quantity of merchandise has increased as one to two—it necessarily follows that the price of this merchandise and provisions, having been raised in proportion of one to twenty, and fallen in proportion of one to two—it necessarily follows, I say, that the proportion is only as one to ten.

The quantity of goods and merchandise increases by an augmentation of commerce, the augmentation of com-

merce by an augmentation of the specie which successively arrives, and by new communications with freshly discovered countries and seas, which furnish us with new commodities and new merchandise.

VII. Besides the positive plenty and scarcity of gold and silver, there is still a relative abundance and a relative scarcity of one of these metals compared with the other.

The avaricious hoard up their gold and silver, for as they do not care to spend, they are fond of signs that are not subject to decay. They prefer gold to silver, because as they are always afraid of losing, they can best conceal that which takes up the least room. Gold, therefore, disappears when there is plenty of silver, by reason that every one has some to conceal; it appears again when silver is scarce, because they are obliged to draw it from its confinement.

It is then a rule that gold is common when silver is scarce, and gold is scarce when silver is common. This lets us see the difference between their relative and their real abundance and scarcity, of which I shall presently speak more at large.

VIII. The relative abundance and scarcity of specie in different countries forms what is called the course of exchange.

Exchange is a fixing of the actual and momentary value of money.

Silver as a metal has value like all other merchandise, and an additional value as it is capable of becoming the sign of other merchandise. If it were no more than mere merchandise, it would lose much of its value.

Silver, as money, has a value, which the prince in some respects can fix, and in others can not.

1. The prince establishes a proportion between a quantity of silver as metal, and the same quantity as money. 2. He fixes the proportion between the several metals

made use of as money. 3. He establishes the weight and standard of every piece of money. In fine, 4. He gives to every piece that ideal value of which I have spoken. I shall call the value of money in these four respects its positive value, because it may be fixed by law.

The coin of every state has, besides this, a relative value, as it is compared with the money of other countries. This relative value is established by the exchange, and greatly depends on its positive value. It is fixed by the general opinion of the merchants, never by the decrees of the prince, because it is subject to incessant variations, and depends on a thousand accidents.

The several nations, in fixing this relative value, are chiefly guided by that which has the greatest quantity of specie. If she has as much specie as all the others together, it is then most proper for the others to regulate theirs by her standard; and the regulation between all the others will pretty nearly agree with the regulation made with this principal nation.

In the actual state of the globe, Holland is the nation we are speaking of.[12] Let us examine the course of exchange with relation to her.

They have in Holland a piece of money called a florin, worth twenty sous, or forty half-sous or gros. But, to render our ideas as simple as possible, let us imagine that they have not any such piece of money in Holland as a florin, and that they have no other but the gros: a man who should have a thousand florins should have forty thousand gros; and so of the rest. Now, the exchange with Holland is determined by our knowing how many gros

[12] The Dutch regulate the exchange for almost all Europe by a kind of determination among themselves in a manner most agreeable to their own interests. In point of fact, however, if the Dutch undertook to regulate exchange for all Europe, it would be done in a manner most advantageous to themselves, which would not be permitted; and experience further contradicts Montesquieu's statement. (J. V. P.)

every piece of money in other countries is worth; and as the French commonly reckon by a crown of three livres, the exchange makes it necessary for them to know how many gros are contained in a crown of three livres. If the course of exchange is at fifty-four, a crown of three livres will be worth fifty-four gros; if it is at sixty, it will be worth sixty gros. If silver is scarce in France, a crown of three livres will be worth more gros; if plentiful, it will be worth less.

This scarcity or plenty, whence results the mutability of the course of exchange, is not the real but a relative scarcity or plenty. For example, when France has greater occasion for funds in Holland than the Dutch of having funds in France, specie is said to be common in France and scarce in Holland; and vice versa.

Let us suppose that the course of exchange with Holland is at fifty-four. If France and Holland composed only one city, they would act as we do when we give change for a crown: the Frenchman would take three livres out of his pocket, and the Dutchman fifty-four gros from his. But as there is some distance between Paris and Amsterdam, it is necessary that he who for a crown of three livres gives me fifty-four gros, which he has in Holland, should give me a bill of exchange for fifty-four gros payable in Holland. The fifty-four gros is not the thing in question, but a bill for that sum. Thus, in order to judge of the scarcity or plenty of specie,[13] we must know if there are in France more bills of fifty-four gros drawn upon Holland than there are crowns drawn upon France. If there are more bills from Holland than there are from France, specie is scarce in France, and common in Holland; it then becomes necessary that the exchange should rise, and that they give for my crown more than fifty-four gros; otherwise I will not part with it; and vice versa.

[13] There is much specie in a place when there is more specie than paper; there is little when there is more paper than specie.

Thus the various turns in the course of exchange form an account of debtor and creditor, which must be frequently settled, and which the state in debt can no more discharge by exchange than an individual can pay a debt by giving change for a piece of silver.

We will suppose that there are but three states in the world—France, Spain, and Holland; that several individuals in Spain are indebted to France, to the value of one hundred thousand marks of silver; and that several individuals of France owe in Spain one hundred and ten thousand marks; now, if some circumstance both in Spain and France should cause each to withdraw his specie, what will then be the course of exchange? These two nations will reciprocally acquit each other of a hundred thousand marks; but France will still owe ten thousand marks in Spain, and the Spaniards will still have bills upon France, to the value of ten thousand marks; while France will have none at all upon Spain.

But if Holland was in a contrary situation with respect to France, and in order to balance the account must pay her ten thousand marks, the French would have two ways of paying the Spaniards: either by giving their creditors in Spain bills for ten thousand marks upon their debtors in Holland, or else by sending specie to the value of ten thousand marks to Spain.

Hence it follows that when a state has occasion to remit a sum of money to another country, it is indifferent, in the nature of the thing, whether specie be conveyed thither or they take bills of exchange. The advantage or disadvantage of these two methods solely depends on actual circumstances. We must inquire which will yield most gros in Holland—money carried thither in specie, or a bill upon Holland for the like sum.[14]

When money of the same standard and weight in

[14] With the expenses of carriage and insurance deducted.

France yields money of the same standard and weight in Holland, we say that the exchange is at par. In the actual state of specie [15] the par is nearly at fifty-four gros to the crown. When the exchange is above fifty-four gros, we say it is high; when beneath, we say it is low.

In order to know the loss and gain of a state in a particular situation of exchange, it must be considered as debtor and creditor, as buyer and seller. When the exchange is below par, it loses as a debtor, and gains as a creditor; it loses as a buyer and gains as a seller. It is obvious it loses as debtor; suppose, for example, France owes Holland a certain number of gros, the fewer gros there are in a crown the more crowns she has to pay. On the contrary, if France is creditor for a certain number of gros, the less number of gros there are in a crown the more crowns she will receive. The state loses also as buyer, for there must be the same number of gros to purchase the same quantity of merchandise; and while the exchange is low, every French crown is worth fewer gros. For the same reason the state gains as a seller. I sell my merchandise in Holland for a crtain number of gros; I receive then more crowns in France, when for every fifty gros I receive a crown, than I should do if I received only the same crown for every fifty-four. The contrary to this takes place in the other state. If the Dutch are indebted a certain number of crowns to France, they will gain; if this money is owing to them, they will lose; if they sell, they lose; and if they buy, they gain.

It is proper to pursue this somewhat further. When the exchange is below par—for example, if it be at fifty instead of fifty-four, it should follow that France, on sending bills of exchange to Holland for fifty-four thousand crowns, could buy merchandise only to the value of fifty thousand; and that, on the other hand, the Dutch sending

[15] In 1744.

the value of fifty thousand crowns to France might buy fifty-four thousand, which makes a difference of $\frac{8}{54}$—that is, a loss to France of more than one seventh; so that France would be obliged to send to Holland one seventh more in specie or merchandise than she would do were the exchange at par. And as the mischief must constantly increase, because a debt of this kind would bring the exchange still lower, France would in the end be ruined. It seems, I say, as if this should certainly follow; and yet it does not, because of the principle which I have elsewhere established;[16] which is, that states constantly lean toward a balance, in order to preserve their independence. Thus they borrow only in proportion to their ability to pay, and measure their buying by what they sell; and taking the example from above, if the exchange falls in France from fifty-four to fifty, the Dutch who buy merchandise in France to the value of a thousand crowns, for which they used to pay fifty-four thousand gros, would now pay only fifty thousand, if the French would consent to it. But the merchandise of France will rise insensibly, and the profit will be shared between the French and the Dutch; for when a merchant can gain, he easily shares his profit; there arises then a communication of profit between the French and the Dutch. In the same manner the French, who bought merchandise of Holland for fifty-four thousand gros, and who, when the exchange was at fifty-four, paid for them a thousand crowns, will be obliged to add one seventh more in French crowns to buy the same merchandise. But the French merchant, being sensible of the loss he suffers, will take up less of the merchandise of Holland. The French and the Dutch merchant will then both be losers, the state will insensibly fall into a balance, and the lowering of the exchange will not be attended with all those inconveniences which we had reason to fear.

[16] See book xx, chap. xix.

A merchant may send his stock into a foreign country when the exchange is below par without injuring his fortune, because, when it returns, he recovers what he had lost; but a prince who sends only specie into a foreign country which never can return, is always a loser.

When the merchants have great dealings in any country, the exchange there infallibly rises. This proceeds from their entering into many engagements, buying great quantities of merchandise, and drawing upon foreign countries to pay for them.

A prince may amass great wealth in his dominions, and yet specie may be really scarce, and relatively common; for instance, if the state is indebted for much merchandise to a foreign country, the exchange will be low, though specie be scarce.

The exchange of all places constantly tends to a certain proportion, and that in the very nature of things. If the course of exchange from Ireland to England is below par, and that of England to Holland is also under par, that of Ireland to Holland will be still lower—that is, in the compound ratio of that of Ireland to England, and that of England to Holland; for a Dutch merchant who can have his specie indirectly from Ireland, by way of England, will not choose to pay dearer by having it in the direct way. This, I say, ought naturally to be the case; but, however, it is not exactly so. There are always circumstances which vary these things; and the different profit of drawing by one place, or of drawing by another, constitutes the particular art and dexterity of the bankers, which does not belong to the present subject.

When a state raises its specie, for instance, when it gives the name of six livres, or two crowns, to what was before called three livres, or one crown, this new denomination, which adds nothing real to the crown, ought not to procure a single gros more by the exchange. We

ought only to have for the two new crowns the same number of gros which we before received for the old one. If this does not happen, it must not be imputed as an effect of the regulation itself, but to the novelty and suddenness of the affair. The exchange adheres to what is already established, and is not altered till after a certain time.

When a state, instead of only raising the specie by a law, calls it in order to diminish its size, it frequently happens that during the time taken up in passing again through the mint there are two kinds of money—the large, which is the old, and the small, which is the new; and as the large is cried down as not to be received as money, and bills of exchange must consequently be paid in the new, one would imagine then that the exchange should be regulated by the new. If, for example, in France, the ancient crown of three livres, being worth in Holland sixty gros, was reduced one half, the new crown ought to be valued only at thirty. On the other hand, it seems as if the exchange ought to be regulated by the old coin; because the banker who has specie, and receives bills, is obliged to carry the old coin to the mint in order to change it for the new, by which he must be a loser. The exchange then ought to be fixed between the value of the old coin and that of the new. The value of the old is decreased, if we may call it so, both because there is already some of the new in trade, and because the bankers can not keep up to the rigour of the law, having an interest in letting loose the old coin from their chests, and being sometimes obliged to make payments with it. Again, the value of the new specie must rise, because the banker having this finds himself in a situation in which, as we shall immediately prove, he will reap great advantage by procuring the old. The exchange should then be fixed, as I have already said, between the new and the old coin; for then the bankers find it their interest to send the old out

of the kingdom, because by this method they procure the same advantage as they could receive from a regular exchange of the old specie—that is, a great many gros in Holland; and in return, a regular exchange a little lower, between the old and the new specie, which would bring many crowns to France.

Suppose that three livres of the old coin yield by the actual exchange forty-five gros, and that by sending this same crown to Holland they receive sixty, but with a bill of forty-five gros they procure a crown of three livres in France, which being sent in the old specie to Holland, still yields sixty gros; thus all the old specie would be sent out of the kingdom, and the bankers would run away with the whole profit.

To remedy this, new measures must be taken. The state which coined the new specie would itself be obliged to send great quantities of the old to the nation which regulates the exchange, and, by thus gaining credit there, raise the exchange pretty nearly to as many gros for a crown of three livres out of the country. I say to nearly the same, for while the profits are small the bankers will not be tempted to send it abroad, because of the expense of carriage and the danger of confiscation.

It is fit that we should give a very clear idea of this. Mr. Bernard, or any other banker employed by the state, proposes bills upon Holland, and gives them at one, two, or three gros higher than the actual exchange; he has made a provision in a foreign country, by means of the old specie, which he has continually been sending thither; and thus he has raised the exchange to the point we have just mentioned. In the meantime, by disposing of his bills, he seizes on all the new specie, and obliges the other bankers, who have payments to make, to carry their old specie to the mint; and, as he insensibly obtains all the specie, he obliges the other bankers to give him bills of

exchange at a very high price. By this means his profit in the end compensates in a great measure for the loss he suffered at the beginning.

It is evident that during these transactions the state must be in a dangerous crisis. Specie must become extremely scarce—1, because much the greatest part is cried down; 2, because a part will be sent into foreign countries; 3, because every one will lay it up, as not being willing to give that profit to the prince which he hopes to receive himself. It is dangerous to do it slowly; and dangerous also to do it in too much haste. If the supposed gain be immoderate, the inconveniences increase in proportion.

We see, from what has been already said, that when the exchange is lower than the specie, a profit may be made by sending it abroad; for the same reason, when it is higher than the specie, there is profit in causing it to return.

But there is a case in which profit may be made by sending the specie out of the kingdom, when the exchange is at par—that is, by sending it into a foreign country to be coined over again. When it returns, an advantage may be made of it, whether it be circulated in the country or paid for foreign bills.

If a company has been erected in a state with an immense number of shares, and these shares have in a few months risen twenty or twenty-five times above the original purchase value; if, again, the same state established a bank, whose bills were to perform the office of money, while the legal value of these bills was prodigious, in order to answer to the legal value of the shares (this is Mr. Law's System), it would follow, from the nature of things, that these shares and these bills would vanish in the same manner as they arose. Stocks can not suddenly be raised twenty or twenty-five times above their original value

without giving a number of people the means of procuring immense riches in paper; every one would endeavour to make his fortune; and as the exchange offers the most easy way of removing it from home, or conveying it whither one pleases, people would incessantly remit a part of their effects to the nation that regulates the exchange. A continual process of remittances into a foreign country must lower the exchange. Let us suppose that at the time of the system, in proportion to the standard and weight of the silver coin, the exchange was fixed at forty gros to the crown; when a vast quantity of paper became money, they were unwilling to give more than thirty-nine gros for a crown, and afterward thirty-eight, thirty-seven, etc. This proceeded so far that after a while they would give but eight gros, and at last there was no exchange at all.

The exchange ought in this case to have regulated the proportion between the specie and the paper of France. I suppose that, by the weight and standard of the silver, the crown of three livres in silver was worth forty gros, and that the exchange being made in paper, the crown of three livres in paper was worth only eight gros, the difference was four fifths. The crown of three livres in paper was then worth four fifths less than the crown of three livres in silver.

IX. How great soever the exertion of authority had been in our times, with respect to the specie of France, during the administration of two successive ministers, still it was vastly exceeded by the Romans; not at the time when corruption had crept into their republic, nor when they were in a state of anarchy, but when they were as much by their wisdom as their courage in the full vigour of the constitution, after having conquered the cities of Italy, and at the very time that they disputed for empire with the Carthaginians.

And here I am pleased that I have an opportunity of

examining more closely into this matter, that no example may be taken from what can never justly be called one.

In the first Punic War the as,[17] which ought to be twelve ounces of copper, weighed only two, and in the second it was no more than one. This retrenchment answers to what we now call the raising of coin. To take half the silver from a crown of six livres, in order to make two crowns, or to raise it to the value of twelve livres, is precisely the same thing.

They have left us no monument of the manner in which the Romans conducted this affair in the first Punic War; but what they did in the second is a proof of the most consummate wisdom. The republic found herself under an impossibility of paying her debts; the as weighed two ounces of copper, and the denarius, valued at ten ases, weighed twenty ounces of copper. The republic, being willing to gain half on her creditors, made the as of an ounce of copper,[18] and by this means paid the value of a denarius with ten ounces. This proceeding must have given a great shock to the state; they were obliged therefore to break the force of it as well as they could. It was in itself unjust, and it was necessary to render it as little so as possible. They had in view the deliverance of the republic with respect to the citizens; they were not therefore obliged to direct their view to the deliverance of the citizens with respect to each other. This made a second step necessary. It was ordained that the denarius, which hitherto contained but ten ases, should contain sixteen. The result of this double operation was, that while the creditors of the republic lost one half,[19] those of individuals lost only a fifth;[20] the price of merchandise was increased

[17] Pliny's "Natural History," lib. xxxiii, art. 13.
[18] Ibid.
[19] They received ten ounces of copper for twenty.
[20] They received sixteen ounces of copper for twenty.

only a fifth; the real change of the money was only a fifth. The other consequences are obvious.

The Romans then conducted themselves with greater prudence than we, who in our transactions involved both the public treasure and the fortunes of individuals. But this is not all; their business was carried on amid more favourable circumstances than ours.

X. There was formerly very little gold and silver in Italy. This country has few or no mines of gold or silver. When Rome was taken by the Gauls, they found only a thousand weight of gold.[21] And yet the Romans had sacked many powerful cities, and brought home their wealth. For a long time they made use of none but copper money; and it was not till after the peace with Pyrrhus that they had silver enough to coin money:[22] they made denarii of this metal of the value of ten ases,[23] or ten pounds of copper. At that time the proportion of silver was to that of copper as one to nine hundred and sixty; for as the Roman denarius was valued at ten ases, or ten pounds of copper, it was worth one hundred and twenty ounces of copper; and as the same denarius was valued only at one eighth of an ounce of silver,[24] this produced the above proportion.

When Rome became mistress of that part of Italy which is nearest to Greece and Sicily, by degrees she found herself between two rich nations—the Greeks and the Carthaginians. Silver increased at Rome, and as the proportion of one to nine hundred and sixty between silver and copper could be no longer supported, she made several regulations with respect to money, which to us are un-

[21] Pliny, lib. xxxiii, art. 5.

[22] Freinshemius, lib. v, decade 2.

[23] Freinshemius, lib. v, decade 2. They struck also, says the same author, half-denarii, called quinarii, and quarters, called sesterces.

[24] An eighth, according to Budæus; according to other authors, a seventh.

known. However, at the beginning of the second Punic War the Roman denarius was worth no more than twenty ounces of copper;[25] and thus the proportion between silver and copper was no longer but as one to one hundred and sixty. The reduction was very considerable, since the republic gained five sixths upon all copper money. But she did only what was necessary in the nature of things, by establishing the proportion between the metals made use of as money.

The peace which terminated the first Punic War left the Romans masters of Sicily. They soon entered Sardinia; afterward they began to know Spain; and thus the quantity of silver increased at Rome. They took measures to reduce the denarius from twenty ounces to sixteen,[26] which had the effect of putting a nearer proportion between the silver and copper; thus the proportion, which was before as one to one hundred and sixty, was now made as one to one hundred and twenty-eight.

If we examine into the conduct of the Romans, we shall never find them so great as in choosing a proper conjuncture for performing any extraordinary operation.

XI. In the changes made in the specie during the time of the republic, they proceeded by diminishing it; in its wants, the state intrusted the knowledge to the people, and did not pretend to deceive them. Under the emperors, they proceeded by way of alloy. These princes, reduced to despair even by their liberalities, found themselves obliged to degrade the specie; an indirect method, which diminished the evil without seeming to touch it. They withheld a part of the gift and yet concealed the hand that did it; and, without speaking of the diminution of the pay, or of the gratuity, it was found diminished.

We even still see in cabinets a kind of medals which are called plated, and are only pieces of copper covered

[25] Pliny's "Nat. Hist.," lib. xxxiii, art. 13. [26] Ibid.

with a thin plate of silver.[27] This money is mentioned in a fragment of the seventy-seventh book of Dio.[28]

Didius Julian first began to debase it. We find that the coin of Caracalla[29] had an alloy of more than half; that of Alexander Severus of two thirds;[30] the debasing still increased, till in the time of Gallienus nothing was to be seen but copper silvered over.[31]

It is evident that such violent proceedings could not take place in the present age; a prince might deceive himself, but he could deceive nobody else. The exchange has taught the banker to draw a comparison between all the money in the world, and to establish its just value. The standard of money can be no longer a secret. Were the prince to begin to alloy his silver, everybody else would continue it, and do it for him; the specie of the true standard would go abroad first, and nothing would be sent back but base metal. If, like the Roman emperors, he debased the silver without debasing the gold, the gold would suddenly disappear, and he would be reduced to his bad silver. The exchange, as I have said in the preceding book,[32] has deprived princes of the opportunity of showing great exertions of authority, or at least has rendered them ineffectual.

XII. Russia would have descended from its despotic power, but could not. The establishment of commerce depended on that of the exchange, and the transactions were inconsistent with all its laws.

In 1745 the Czarina[33] made a law to expel the Jews,

[27] See Father Joubert's "Science of Medals," Paris edit. of 1739, p. 59.

[28] "Extract of Virtues and Vices."

[29] See Savote, part ii, chap. xii, and "Le Journal des Savants" of the 28th of July, on a discovery of fifty thousand medals.

[30] See Savote, ibid.

[31] Ibid.

[32] Chap. xvi.

[33] Elizabeth, daughter of Peter I. (J. V. P.)

because they remitted into foreign countries the specie of those who were banished into Siberia, as well as that of the foreigners entertained in her service. As all the subjects of the empire are slaves, they can neither go abroad themselves nor send away their effects without permission. The exchange which gives them the means of remitting their specie from one country to another is therefore entirely incompatible with the laws of Russia.

Commerce itself is inconsistent with the Russian laws. The people are composed only of slaves employed in agriculture, and of slaves called ecclesiastics or gentlemen, who are the lords of those slaves; there is then nobody left for the third estate, which ought to be composed of mechanics and merchants.

XIII. They have made laws in some parts of Italy to prevent subjects from selling their lands, in order to remove their specie into foreign countries. These laws may be good, when the riches of a state are so connected with the country itself that there would be great difficulty in transferring them to another. But since, by the course of exchange, riches are in some degree independent of any particular state, and since they may with so much ease be conveyed from one country to another, that must be a bad law which will not permit persons for their own interest to dispose of their lands, while they can dispose of their money. It is a bad law, because it gives an advantage to movable effects, in prejudice to the land; because it deters strangers from settling in the country; and, in short, because it may be eluded.

XIV. The banker's business is to change, not to lend, money.[34] If the prince makes use of them to change his specie, as he never does it but in great affairs, the least profit he can give for the remittance becomes considerable;

[34] The mistake here is apparent, bankers and money-changers being by no means identical. (J. V. P.)

and if they demand large profits, we may be certain that there is a fault in the administration. On the contrary, when they are employed to advance specie, their art consists in procuring the greatest profit for the use of it, without being liable to be charged with usury.

XV. Some have imagined that it was for the advantage of a state to be indebted to itself: they thought that this multiplied riches by increasing the circulation.

Those who are of this opinion have, I believe, confounded a circulating paper which represents money, or a circulating paper which is the sign of the profits that a company has or will make by commerce, with a paper which represents a debt. The first two are extremely advantageous to the state; the last can never be so; and all that we can expect from it is that individuals have a good security from the government for their money. But let us see the inconveniences which result from it:

1. If foreigners possess much paper which represents a debt, they annually draw out of the nation a considerable sum for interest.

2. In a nation that is thus perpetually in debt the exchange must be very low.

3. The taxes raised for the payment of the interest of the debt are an injury to the manufactures, by raising the price of the artificer's labour.

4. It takes the true revenue of the state from those who have activity and industry, to convey it to the indolent—that is, it gives facilities for labour to those who do not work, and clogs with difficulties those who do work.

These are its inconveniences: I know of no advantages. Ten persons have each a yearly income of a thousand crowns, either in land or trade; this raises to the nation, at five per cent, a capital of two hundred thousand crowns. If these ten persons employed one half of their income—that is, five thousand crowns—in paying the interest of a

hundred thousand crowns, which they had borrowed of others, that still would be only to the state as two hundred thousand crowns—that is, in the language of the algebraists, 200,000 crowns—100,000 crowns + 100,000 crowns = 200,000.

People are thrown perhaps into this error by reflecting that the paper which represents the debt of a nation is the sign of riches; for none but a rich state can support such paper without falling into decay. And if it does not fall, it is a proof that the state has other riches besides. They say that it is not an evil, because there are resources against it; and that it is an advantage, since these resources surpass the evil.

XVI. It is necessary that there should be a proportion between the state as creditor and the state as debtor. The state may be a creditor to infinity, but it can only be a debtor to a certain degree, and when it surpasses that degree the title of creditor vanishes.

If the credit of the state has never received the least blemish, it may do what has been so happily practised in one of the kingdoms of Europe [35]—that is, it may require a great quantity of specie, and offer to reimburse every individual, at least if they will not reduce their interest. When the state borrows, the individuals fix the interest; when it pays, the interest for the future is fixed by the state.

It is not sufficient to reduce the interest; it is necessary to erect a sinking-fund from the advantage of the reduction, in order to pay every year a part of the capital; a proceeding so happy that its success increases every day.

When the credit of the state is not entire, there is a new reason for endeavouring to form a sinking-fund, because this fund being once established will soon procure the public confidence.

1. If the state is a republic, the government of which

[35] England.

is in its own nature consistent with its entering into projects of a long duration, the capital of the sinking-fund may be inconsiderable; but it is necessary in a monarchy for the capital to be much greater.

2. The regulations ought to be so ordered that all the subjects of the state may support the weight of the establishment of these funds, because they have all the weight of the establishment of the debt; thus the creditor of the state, by the sums he contributes, pays himself.

3. There are four classes of men who pay the debts of the state: the proprietors of the land, those engaged in trade, the labourers and artificers, and, in fine, the annuitants either of the state or of private people. Of these four classes the last, in a case of necessity, one would imagine, ought least to be spared, because it is a class entirely passive, while the state is supported by the active vigour of the other three. But as it can not be higher taxed, without destroying the public confidence, of which the state in general and these three classes in particular have the utmost need; as a breach in the public faith can not be made on a certain number of subjects without seeming to be made on all; as the class of creditors is always the most exposed to the projects of ministers, and always in their eye, and under their immediate inspection, the state is obliged to give them a singular protection, that the part which is indebted may never have the least advantage over that which is the creditor.

XVII. Specie is the sign of value. It is evident that he who has occasion for this sign ought to pay for the use of it, as well as for everything else that he has occasion for. All the difference is that other things may be either hired or bought, while money, which is the price of things, can only be hired, and not bought.[36]

[36] We do not speak here of gold and silver considered as a merchandise.

To lend money without interest is certainly an action laudable and extremely good; but it is obvious that it is only a counsel of religion, and not a civil law.

In order that trade may be successfully carried on, it is necessary that a price be fixed on the use of specie; but this should be very inconsiderable. If it be too high, the merchant who sees that it will cost him more in interest than he can gain by commerce will undertake nothing; if there is no consideration to be paid for the use of specie, nobody will lend it; and here too the merchant will undertake nothing.

I am mistaken when I say nobody will lend; the affairs of society will ever make it necessary. Usury will be established, but with all the disorders with which it has been constantly attended.

The laws of Mohammed confound usury with lending upon interest. Usury increases in Mohammedan countries in proportion to the severity of the prohibition. The lender indemnifies himself for the danger he undergoes of suffering the penalty.

In those eastern countries the greater part of the people are secure in nothing; there is hardly any proportion between the actual possession of a sum and the hopes of receiving it again after having lent it; usury, then, must be raised in proportion to the danger of insolvency.

XVIII. The greatness of maritime usury is founded on two things: the danger of the sea, which makes it proper that those who expose their specie should not do it without considerable advantage, and the ease with which the borrower, by means of commerce, speedily accomplishes a variety of great affairs. But usury, with respect to landsmen, not being founded on either of these two reasons, is either prohibited by the legislators, or, what is more rational, reduced to proper bounds.

XIX. Besides the loans made for the advantage of

commerce, there is still a kind of lending by a civil contract, whence results interest or usury.

As the people of Rome increased every day in power, the magistrates sought to insinuate themselves in their favour by enacting such laws as were most agreeable to them. They retrenched capitals; they first lowered, and at length prohibited, interest; they took away the power of confining the debtor's body; in fine, the abolition of debts was contended for whenever a tribune was disposed to render himself popular.

These continual changes, whether made by the laws or by the plebiscita, naturalized usury at Rome; for the creditors, seeing the people their debtor, their legislator, and their judge, had no longer any confidence in their agreements; the people, like a debtor who has lost his credit, could only tempt them to lend by allowing an exorbitant interest,[37] especially as the laws applied a remedy to the evil only from time to time, while the complaints of the people were continual, and constantly intimidated the creditors. This was the cause that all honest means of borrowing and lending were abolished at Rome, and that the most monstrous usury established itself in that city, notwithstanding the strict prohibition and severity of the law.[38] This evil was a consequence of the severity of the laws against usury. Laws excessively good are the source of excessive evil. The borrower found himself under the necessity of paying for the interest of the money, and for the danger the creditor underwent of suffering the penalty of the law.

The primitive Romans had not any laws to regulate the rate of usury.[39] In the contests which arose on this subject between the plebeians and the patricians, even in

[37] Cicero assures us that in his day money was lent at Rome at thirty-four per cent, and forty-eight per cent in the country. (J. V. P.)

[38] Tacit., "Annal.," lib. vi.

[39] Usury and interest among the Romans signified the same thing.

the sedition on the Mons Sacer, nothing was alleged, on the one hand, but justice, and on the other, the severity of contracts.[40]

They then only followed private agreements, which, I believe, were most commonly at twelve per cent per annum. My reason is, that, in the ancient language of the Romans, interest at six per cent was called half-usury, and interest at three per cent quarter-usury.[41] Total usury must, therefore, have been interest at twelve per cent.

But if it be asked how such great interest could be established among a people almost without commerce, I answer that this people, being very often obliged to go to war without pay, were under a frequent necessity of borrowing; and as they incessantly made happy expeditions, they were commonly well able to pay. This is visible from the recital of the contests which arose on this subject; they did not then disagree concerning the avarice of creditors, but said that those who complained might have been able to pay had they lived in a more regular manner.[42]

They then made laws which had only an influence on the present situation of affairs; they ordained, for instance, that those who enrolled themselves for the war they were engaged in should not be molested by their creditors; that those who were in prison should be set at liberty; that the most indigent should be sent into the colonies; and sometimes they opened the public treasury. The people, being eased of their present burdens, became appeased; and as they required nothing for the future, the senate was far from providing against it.

At the time when the senate maintained the cause of usury with so much constancy, the Romans were distin-

[40] See Dionysius Halicarnassus, who has described it so well.

[41] Usuræ semisses, trientes, quadrantes. See the several titles of the digests and codes on usury, and especially the seventeenth law, with the note ff. de Usuris.

[42] See Appius's speech on this subject, in Dionysius Halicarnassus.

guished by an extreme love of frugality, poverty, and moderation; but the constitution was such that the principal citizens alone supported all the expenses of government, while the common people paid nothing. How, then, was it possible to deprive the former of the liberty of pursuing their debtors, and at the same time to oblige them to execute their offices, and to support the republic amid its most pressing necessities?

Tacitus says that the law of the Twelve Tables fixed the interest at one per cent.[43] It is evident that he was mistaken, and that he took another law, of which I am going to speak, for the law of the Twelve Tables. If this had been regulated in the law of the Twelve Tables, why did they not make use of its authority in the disputes which afterward arose between the creditors and debtors? We find no vestige of this law upon lending at interest; and let us have ever so little knowledge of the history of Rome, we shall see that a law like this could not be the work of the decemvirs.

The Licinian law, made eighty-five years after that of the Twelve Tables,[44] was one of those temporary regulations of which we have spoken. It ordained that what had been paid for interest should be deducted from the principal, and the rest discharged by three equal payments.

In the year of Rome 398, the tribunes Duellius and Menenius caused a law to be passed, which reduced the interest to one per cent per annum.[45] It is this law that Tacitus confounds with that of the Twelve Tables,[46] and this was the first ever made by the Romans to fix the rate of interest. Ten years afterward[47] this usury was reduced

[43] "Annal.," lib. vi.

[44] In the year of Rome 379. (Tit. Liv., lib. vi.)

[45] Unciaria usura. (Tit. Liv., lib. vii. See the "Defence of the Spirit of Laws," article "Usury.")

[46] "Annal.," lib. vi.

[47] Under the consulate of L. Manlius Torquatus and C. Plautius,

one half,[48] and in the end entirely abolished;[49] and if we may believe some authors whom Livy had read, this was under the consulate of C. Martius Rutilius and Q. Servilius, in the year of Rome 413.[50]

It fared with this law as with all those in which the legislator carries things to excess: an infinite number of ways were found to elude it. They enacted, therefore, many others to confirm, correct, and temper it. Sometimes they quitted the laws to follow the common practice; at others, the common practice to follow the laws; but in this case, custom easily prevailed.[51] When a man wanted to borrow, he found an obstacle in the very law made in his favour; this law must be evaded by the person it was made to succour, and by the person condemned. Sempronius Asellus, the prætor, having permitted the debtors to act in conformity to the laws,[52] was slain by the creditors for attempting to revive the memory of a severity that could no longer be supported.[53]

I quit the city, in order to cast an eye on the provinces.

I have somewhere else observed that the Roman provinces were exhausted by a severe and arbitrary government.[54] But this is not all; they were also ruined by a most shocking usury.

Cicero takes notice that the inhabitants of Salamis wanted to borrow a sum of money at Rome, but could not,

according to T. Liv. lib. vii. This is the law mentioned by Tacitus, "Annal.," lib. vi.

[48] Semiunciaria usura.

[49] As Tacitus says, "Annal.," lib. vi.

[50] This law was passed at the instance of M. Genucius, tribune of the people. (Tit. Liv., lib. vii, toward the end.)

[51] Verteri jam more fœnus receptum erat. (Appian on the Civil War, lib. i.)

[52] Permisit eos legibus agere. (Appian on the Civil War, lib. i; and the "Epitome" of Livy, lib. lxiv.)

[53] In the year of Rome 663.

[54] Book xi, chap. xviii.

because of the Gabinian law.[55] We must, therefore, inquire into the nature of this law.

As soon as lending upon interest was forbidden at Rome, they contrived all sorts of means to elude the law;[56] and as their allies,[57] and the Latins, were not subject to the civil laws of the Romans, they employed a Latin, or an ally, to lend his name, and personate the creditor. The law, therefore, had only subjected the creditors to a matter of form, and the public were not relieved.

The people complained of this artifice, and Marius Sempronius, tribune of the people, by the authority of the senate, caused a plebiscitum to be enacted to this purport, that in regard to loans the laws prohibiting usury between Roman citizens should equally take place between a citizen and an ally, or a citizen and a Latin.[58]

At that time they gave the name of allies to the people of Italy properly so called, which extended as far as the Arno and the Rubicon, and was not governed in the form of a Roman province.

It is an observation of Tacitus,[59] that new frauds were constantly committed, whenever any laws were passed for the preventing of usury. Finding themselves debarred from lending or borrowing in the name of an ally, they soon contrived to borrow of some inhabitant of the provinces.

To remedy this abuse they were obliged to enact a new law; and Gabinius,[60] upon the passing of that famous law, which was intended to prevent the corruption of suffrages, must naturally have reflected that the best way to attain his end was to discourage the lending upon interest; these

[55] "Letters to Atticus," lib. v, ep. 21.
[56] Livy.
[57] Ibid.
[58] In the year 559 of Rome. (See Livy.)
[59] "Annal.," lib. vi.
[60] In the year 615 of Rome.

were two objects naturally connected; for usury always increased at the time of elections,[61] because they stood in need of money to bribe the voters. It is plain that the Gabinian law had extended the Senatus Consultum of Marcus Sempronius to the provinces, since the people of Salamis could not borrow money at Rome because of that very law. Brutus, under fictitious names, lent them some money[62] at four per cent a month,[63] and obtained for that purpose two Senatus Consultums; in the former of which it was expressly mentioned that this loan should not be considered as an evasion of the law,[64] and that the governor of Sicily should determine according to the stipulations mentioned in the bond of the Salaminians.

As lending upon interest was forbidden by the Gabinian law between provincials and Roman citizens, and the latter at that time had all the money of the globe in their hands, there was a necessity for tempting them with the bait of extravagant interest, to the end that the avaricious might thus lose sight of the danger of losing their money. And as they were men of great power in Rome, who awed the magistrates and overruled the laws, they were emboldened to lend, and to extort great usury. Hence the provinces were successively ravaged by every one who had any credit in Rome; and as each governor, at entering upon his province, published his edict[65] wherein he fixed the rate of interest in what manner he pleased, the legislature played

[61] See "Cicero to Atticus," lib. iv, ep. 15 and 16.

[62] "Cicero to Atticus," lib. vi, ep. 10.

[63] Pompey having lent 600 talents to King Ariobarzanes, made that prince pay him thirty Attic talents every thirty days. ("Cic. ad Att.," lib. iii, ep. 21, lib. vi, ep. 11.)

[64] "Ut neque Salaminiis, neque cui eis dedisset, fraudi esset." (Ibid.)

[65] Cicero's edict fixed it to one per cent a month, with interest upon interest at the expiration of the year. With regard to the farmers of the republic, he engaged them to grant a respite to their debtors; if the latter did not pay at the time fixed, he awarded the interest mentioned in the bond. ("Cic. ad Att.," lib. vi, ep. i.)

into the hands of avarice, and the latter served the mean purposes of the legislator.

But the public business must be carried on, and wherever a total inaction obtains, the state is undone. On some occasions the towns, the corporate bodies and societies, as well as private people, were under the necessity of borrowing—a necessity but too urgent, were it only to repair the ravages of armies, the rapacity of magistrates, the extortions of collectors, and the corrupt practices daily introduced; for never was there at one period so much poverty and opulence. The senate, being possessed of the executive power, granted, through necessity, and oftentimes through favour, a permission of borrowing from Roman citizens, so as to enact decrees for that particular purpose. But even these decrees were discredited by the law, for they might give occasion to the people's insisting upon new rates of interest, which would augment the danger of losing the capital, while they made a further extension of usury.[66] I shall ever repeat it, that mankind are governed not by extremes, but by principles of moderation.

He pays least, says Ulpian, who pays latest.[67] This decides the question whether interest be lawful—that is, whether the creditor can sell time, and the debtor buy it.

[66] See what Lucretius says, in the twenty-first letter to Atticus, lib. v. There was even a general Senatus Consultum, to fix the rate of interest at one per cent per month. See the same letter.

[67] Leg. 12 ff. de verb. signif.

# BOOK XXIII

## OF LAWS IN THE RELATION THEY BEAR TO THE NUMBER OF INHABITANTS

1. Of men and animals in respect to the multiplication of their species.—2. Of marriage.—3. Of the condition of children.—4. Of families.—5. Of the several orders of lawful wives.—6. Of bastards in different governments.—7. Of the father's consent to marriage.—8. Of young women.—9. What it is that determines marriage.—10. Of the severity of government.—11. Of the number of males and females in different countries.—12. Of seaport towns.—13. Of the productions of the earth which require a greater or less number of men.—14. Of the number of inhabitants with relation to the arts.—15. The concern of the legislator in the propagation of the species.—16. Of Greece and the number of its inhabitants.—17. Of the state and number of people before the Romans.—18. Of the depopulation of the globe.—19. That the Romans were under the necessity of making laws to encourage the propagation of the species.—20. Of the laws of the Romans relating to the propagation of the species.—21. Of the exposing of children.—22. Of the state of the world after the destruction of the Romans.—23. The changes that happened in Europe with regard to the number of the inhabitants.—24. Of the law made in France to encourage the propagation of the species.—25. By what means we may remedy depopulation.—26. Of hospitals.

"Delight of human kind,[1] and gods above;
Parent of Rome, propitious Queen of Love;
. . . . . .
For when the rising spring adorns the mead,
And a new scene of Nature stands displayed;
When teeming buds, and cheerful greens appear,
And western gales unlock the lazy year;
The joyous birds thy welcome first express,
Whose native songs thy genial fire confess:
Then savage beasts bound o'er their slighted food,
Struck with thy darts, and tempt the raging flood:
All Nature is thy gift—earth, air, and sea;
Of all that breathes the various progeny,
Stung with delight, is goaded on by thee.

[1] Dryden.

O'er barren mountains, o'er the flowery plain,
The leafy forest, and the liquid main,
Extends thy uncontrolled and boundless reign.
Through all the living regions thou dost move,
And scatterest where thou goest the kindly seeds of love."

I. THE females of brutes have an almost constant fecundity. But in the human species, the manner of thinking, the character, the passions, the humour, the caprice, the idea of preserving beauty, the pain of child-bearing, and the fatigue of a too numerous family, obstruct propagation in a thousand different ways.

II. The natural obligation of the father to provide for his children has established marriage, which makes known the person who ought to fulfil this obligation. The people [2] mentioned by Pomponius Mela [3] had no other way of discovering him but by resemblance.

Among civilized nations, the father is that person on whom the laws, by the ceremony of marriage, have fixed this duty, because they find in him the man they want.[4]

Among brutes this is an obligation which the mother can generally perform; but it is much more extensive among men. Their children indeed have reason; but this comes only by slow degrees. It is not sufficient to nourish them; we must also direct them; they can already live, but they can not govern themselves.

Illicit conjunctions contribute but little to the propagation of the species. The father, who is under a natural obligation to nourish and educate his children, is not then fixed; and the mother, with whom the obligation remains, finds a thousand obstacles from shame, remorse, the constraint of her sex and the rigour of laws; and besides, she generally wants the means.

Women who have submitted to public prostitution can not have the convenience of educating their children;

[2] The Garamantes. [3] Lib. i, cap. viii.
[4] Pater est quem nuptiæ demonstrant.

the trouble of education is incompatible with their station; and they are so corrupt that they can have no protection from the law.

It follows from all this that public continence is naturally connected with the propagation of the species.

III. It is a dictate of reason that when there is a marriage, children should follow the station or condition of the father; and that when there is not, they can belong to the mother only.[5]

IV. It is almost everywhere a custom for the wife to pass into the family of the husband. The contrary is without any inconvenience established at Formosa,[6] where the husband enters into the family of the wife.

This law, which fixes the family in a succession of persons of the same sex, greatly contributes, independently of the first motives, to the propagation of the human species. The family is a kind of property; a man who has children of a sex which does not perpetuate it is never satisfied if he has not those who can render it perpetual.

Names, whereby men acquire an idea of a thing which one would imagine ought not to perish, are extremely proper to inspire every family with a desire of extending its duration. There are people among whom names distinguish families; there are others where they only distinguish persons; the latter have not the same advantage as the former.

V. Laws and religion sometimes establish many kinds of civil conjunctions; and this is the case among the Mohammedans, where there are several orders of wives, the children of whom are distinguished by being born in the house, by civil contracts, or even by the slavery of the mother, and the subsequent acknowledgment of the father.

[5] For this reason, among nations that have slaves, the child almost always follows the station or condition of the mother.

[6] Du Halde, tome i, p. 165.

It would be contrary to reason that the law should stigmatize the children for what it approved in the father. All these children ought, therefore, to succeed, at least if some particular reason does not oppose it, as in Japan, where none inherit but the children of the wife given by the emperor. Their policy demands that the gifts of the emperor should not be too much divided, because they subject them to a kind of service, like that of our ancient fiefs. There are countries where a wife of the second rank enjoys nearly the same honours in a family as in our part of the world are granted to an only consort; there the children of concubines are deemed to belong to the first or principal wife. Thus it is also established in China. Filial respect,[7] and the ceremony of deep mourning, are not due to the natural mother, but to her appointed by the law.

By means of this fiction they have no bastard children; and where such a fiction does not take place, it is obvious that a law to legitimatize the children of concubines must be considered as an act of violence, as the bulk of the nation would be stigmatized by such a decree. Neither is there any regulation in those countries with regard to children born in adultery. The recluse lives of women, the locks, the inclosures, and the eunuchs render all infidelity to their husbands so difficult, that the law judges it impossible. Besides, the same sword would exterminate the mother and the child.

VI. They have, therefore, no such thing as bastards where polygamy is permitted; this disgrace is known only in countries in which a man is allowed to marry but one wife. Here they were obliged to stamp a mark of infamy upon concubinage, and consequently they were under a necessity of stigmatizing the issue of such unlawful conjunctions.

In republics, where it is necessary that there should be

[7] Du Halde, tome ii, p. 129.

the purest morals, bastards ought to be more degraded than in monarchies.

The laws made against them at Rome were perhaps too severe; but as the ancient institutions laid all the citizens under a necessity of marrying, and as marriages were also softened by the permission to repudiate or make a divorce, nothing but an extreme corruption of manners could lead them to concubinage.

It is observable that as the quality of a citizen was a very considerable thing in a democratic government, where it carried with it the sovereign power, they frequently made laws in respect to the state of bastards, which had less relation to the thing itself and to the honesty of marriage than to the particular constitution of the republic. Thus the people have sometimes admitted bastards into the number of citizens, in order to increase their power in opposition to the great.[8] Thus the Athenians excluded bastards from the privilege of being citizens, that they might possess a greater share of the corn sent them by the King of Egypt. In fine, Aristotle informs us that in many cities where there was not a sufficient number of citizens, their bastards succeeded to their possessions; and that when there was a proper number, they did not inherit.[9]

VII. The consent of fathers is founded on their authority—that is, on the right of property. It is also founded on their love, on their reason, and on the uncertainty of that of their children, whom youth confines in a state of ignorance and passion in a state of ebriety.

In the small republics, or singular institutions already mentioned, they might have laws which gave to magistrates that right of inspection over the marriages of the children of citizens which Nature had already given to fathers. The love of the public might there equal or surpass all other love. Thus Plato would have marriages

[8] Aristotle, "Polit.," lib. vi, cap. iv. [9] Ibid., lib. iii, cap. iii.

regulated by the magistrates; this the Lacedæmonian magistrates performed.

But in common institutions, fathers have the disposal of their children in marriage; their prudence in this respect is always supposed to be superior to that of a stranger. Nature gives to fathers a desire of procuring successors to their children, when they have almost lost the desire of enjoyment themselves. In the several degrees of progeniture, they see themselves insensibly advancing to a kind of immortality. But what must be done, if oppression and avarice arise to such a height as to usurp all the authority of fathers? Let us hear what Thomas Gage says in regard to the conduct of the Spaniards in the West Indies:[10]

"According to the number of the sons and daughters that are marriageable, the father's tribute is raised and increased, until they provide husbands and wives for their sons and daughters, who, as soon as they are married, are charged with tribute; which, that it may increase, they will suffer none above fifteen years of age to live unmarried. Nay, the set time of marriage appointed for the Indians is at fourteen years for the man and thirteen for the woman; alleging that they are sooner ripe for the fruit of wedlock, and sooner ripe in knowledge and malice, and strength for work and service, than any other people. Nay, sometimes they force those to marry who are scarcely twelve and thirteen years of age, if they find them well-limbed and strong in body, explaining a point of one of the canons, which alloweth fourteen and fifteen years, 'Nisi malitia suppleat ætatem.'"

He saw a list of these taken. It was, says he, a most shameful affair. Thus in an action which ought to be the most free, the Indians are the greatest slaves.

In England the law is frequently abused by the daugh-

[10] "A New Survey of the West Indies," by Thomas Gage, p. 345, third edit.

ters marrying according to their own fancy without consulting their parents. This custom is, I am apt to imagine, more tolerated there than anywhere else from a consideration that as the laws have not established a monastic celibacy, the daughters have no other state to choose but that of marriage, and this they can not refuse. In France, on the contrary, young women have always the resource of celibacy, and therefore the law which ordains that they shall wait for the consent of their fathers may be more agreeable. In this light the custom of Italy and Spain must be less rational; convents are there established, and yet they may marry without the consent of their fathers.

VIII. Young women who are conducted by marriage alone to liberty and pleasure, who have a mind which dares not think, a heart which dares not feel, eyes which dare not see, ears which dare not hear, who appear only to show themselves silly, condemned without intermission to trifles and precepts, have sufficient inducements to lead them on to marriage; it is the young men that want to be encouraged.

IX. Wherever a place is found in which two persons can live commodiously, there they enter into marriage. Nature has a sufficient propensity to it, when unrestrained by the difficulty of subsistence.

A rising people increase and multiply extremely. This is because with them it would be a great inconvenience to live in celibacy, and none to have many children. The contrary of which is the case when a nation is formed.

X. Men who have absolutely nothing, such as beggars, have many children. This proceeds from their being in the case of a rising people; it costs the father nothing to give his heart to his offspring, who even in their infancy are the instruments of this art. These people multiply in a rich or superstitious country, because they do not support the burden of society, but are themselves the burden.

But men who are poor only because they live under a severe government; who regard their fields less as the source of their subsistence than as a cause of vexation; these men, I say, have few children; they have not even subsistence for themselves. How, then, can they think of dividing it? They are unable to take care of their own persons when they are sick. How, then, can they attend to the wants of creatures whose infancy is a continual sickness?

It is pretended by some who are apt to talk of things which they have never examined that the greater the poverty of the subjects, the more numerous their families; that the more they are loaded with taxes, the more industriously they endeavour to put themselves in a station in which they will be able to pay them; two sophisms, which have always destroyed and will forever be the destruction of monarchies.

The severity of government may be carried to such an extreme as to make the natural sentiments destructive of the natural sentiments themselves. Would the women of America have refused to bear children had their masters been less cruel? [11]

XI. I have already observed that there are born in Europe rather more boys than girls.[12] It has been remarked that in Japan there are born rather more girls than boys; [13] all things compared, there must be more fruitful women in Japan than in Europe, and consequently it must be more populous.

We are informed that at Bantam there are ten girls to one boy.[14] A disproportion like this must cause the num-

[11] "A New Survey of the West Indies," by Thomas Gage, p. 97, third edit.

[12] Book xvi, chap. iv.

[13] See Kempfer, who gives a computation of the people of Meaco.

[14] "Collection of Voyages that contributed to the Establishment of the East India Company," vol. i, p. 347.

ber of families there to be to the number of those of other climates as one to five and a half, which is a prodigious difference. Their families may be much larger indeed, but there must be few men in circumstances sufficient to provide for so large a family.

XII. In seaport towns, where men expose themselves to a thousand dangers, and go abroad to live or die in distant climates, there are fewer men than women; and yet we see more children there than in other places. This proceeds from the greater ease with which they procure the means of subsistence. Perhaps even the oily parts of fish are more proper to furnish that matter which contributes to generation. This may be one of the causes of the infinite number of people in Japan [15] and China,[16] where they live almost wholly on fish.[17] If this be the case, certain monastic rules, which oblige the monks to live on fish, must be contrary to the spirit of the legislator himself.

XIII. Pasture-lands are but little peopled, because they find employment only for a few. Corn-lands employ a great many men, and vineyards infinitely more.

It has been a frequent complaint in England [18] that the increase of pasture-land diminished the inhabitants; and it has been observed in France that the prodigious number of vineyards is one of the great causes of the multitude of people.

Those countries where coal-pits furnish a proper substance for fuel have this advantage over others, that not

[15] Japan is composed of a number of islands, where there are many banks, and the sea is there extremely full of fish.

[16] China abounds in rivers.

[17] See Du Halde, tome ii, pp. 139–142.

[18] The greatest number of the proprietors of land, says Bishop Burnet, finding more profit in selling their wool than their corn, inclosed their estates; the commons, ready to perish with hunger, rose up in arms; they insisted on a division of the lands; the young king even wrote on this subject, and proclamations were made against those who inclosed their lands. ("Abridgment of the History of the Reformation.")

having the same occasion for forests, the lands may be cultivated.

In countries productive of rice, they are at vast pains in watering the land; a great number of men must therefore be employed. Besides, there is less land required to furnish subsistence for a family than in those which produce other kinds of grain. In fine, the land which is elsewhere employed in raising cattle serves immediately for the subsistence of man; and the labour which in other places is performed by cattle is there performed by men; so that the culture of the soil becomes to man an immense manufacture.

XIV. When there is an agrarian law, and the lands are equally divided, the country may be extremely well peopled, though there are but few arts; because every citizen receives from the cultivation of his land whatever is necessary for his subsistence, and all the citizens together consume all the fruits of the earth. Thus it was in some republics.

In our present situation, in which lands are unequally distributed, they produce much more than those who cultivate them are able to consume; if the arts, therefore, should be neglected, and nothing minded but agriculture, the country could not be peopled. Those who cultivate, or employ others to cultivate, having corn to spare, nothing would engage them to work the following year; the fruits of the earth would not be consumed by the indolent, for these would have nothing with which they could purchase them. It is necessary, then, that the arts should be established, in order that the produce of the land may be consumed by the labourer and the artificer. In a word, it is now proper that many should cultivate much more than is necessary for their own use. For this purpose they must have a desire of enjoying superfluities; and these they can receive only from the artificer.

The machines designed to abridge art are not always useful. If a piece of workmanship is of a moderate price, such as is equally agreeable to the maker and the buyer, those machines which would render the manufacture more simple, or, in other words, diminish the number of workmen, would be pernicious. And if water-mills were not everywhere established, I should not have believed them so useful as is pretended, because they have deprived an infinite multitude of their employment, a vast number of persons of the use of water, and great part of the land of its fertility.

XV. Regulations on the number of citizens depend greatly on circumstances. There are countries in which Nature does all; the legislator then has nothing to do. What need is there of inducing men by laws to propagation when a fruitful climate yields a sufficient number of inhabitants? Sometimes the climate is more favourable than the soil: the people multiply, and are destroyed by famine; this is the case of China. Hence a father sells his daughters and exposes his children. In Tonquin,[19] the same causes produce the same effects; so we need not, like the Arabian travellers mentioned by Renaudot, search for the origin of this in their sentiments on the metempsychosis.[20]

For the same reason, the religion of the isle of Formosa does not suffer the women to bring their children into the world till they are thirty-five years of age;[21] the priestess, before this age, by bruising the belly procures abortion.

XVI. That effect which in certain countries of the East springs from physical causes was produced in Greece by the nature of the government. The Greeks were a great nation, composed of cities, each of which had a distinct government and separate laws. They had no more the

[19] Dampier's "Voyages," vol. ii, p. 41.
[20] Ibid., p. 167.
[21] See the "Collection of Voyages that contributed to the Establishment of the East India Company," vol. i, part i, pp. 182, 188.

spirit of conquest and ambition than those of Switzerland, Holland, and Germany have at this day. In every republic the legislator had in view the happiness of the citizens at home, and their power abroad, lest it should prove inferior to that of the neighbouring cities.[22] Thus, with the enjoyment of a small territory and great happiness, it was easy for the number of the citizens to increase to such a degree as to become burdensome. This obliged them incessantly to send out colonies,[23] and, as the Swiss do now, to let their men out to war. Nothing was neglected that could hinder the too great multiplication of children.

They had among them republics, whose constitution was very remarkable. The nations they had subdued were obliged to provide subsistence for the citizens. The Lacedæmonians were fed by the helots, the Cretans by the Periecians, and the Thessalians by the Penestes. They were obliged to have only a certain number of freemen, that their slaves might be able to furnish them with subsistence. It is a received maxim in our days that it is necessary to limit the number of regular troops; now, the Lacedæmonians were an army maintained by the peasants; it was proper, therefore, that this army should be limited; without this the freemen, who had all the advantages of society, would increase beyond number, and the labourers be overloaded.

The politics of the Greeks were particularly employed in regulating the number of citizens. Plato fixes them at five thousand and forty,[24] and he would have them stop or encourage propagation, as was most convenient, by honours, shame, and the advice of the old men; he would even regulate the number of marriages in such a manner

[22] In valour, discipline, and military exercises.

[23] The Gauls, who were in the same circumstances, acted in the same manner.

[24] "Repub.," lib. v.

that the republic might be recruited without being overcharged.[25]

If the laws of a country, says Aristotle, forbid the exposing of children, the number of those brought forth ought to be limited.[26] If they have more than the number prescribed by law, he advises to make the women miscarry before the fœtus be formed.[27]

The same author mentions the infamous means made use of by the Cretans to prevent their having too great a number of children—a proceeding too indecent to repeat.

There are places, says Aristotle again,[28] where the laws give the privilege of being citizens to strangers, or to bastards, or to those whose mothers only are citizens; but as soon as they have a sufficient number of people this privilege ceases. The savages of Canada burn their prisoners; but when they have empty cottages to give them, they receive them into their nation.

Sir William Petty, in his calculations, supposes that a man in England is worth what he would sell for at Algiers.[29] This can be true only with respect to England. There are countries where a man is worth nothing; there are others where he is worth less than nothing.

XVII. Italy, Sicily, Asia Minor, Gaul, and Germany were nearly in the same state as Greece; full of small nations that abounded with inhabitants, they had no need of laws to increase their number.

XVIII. All these little republics were swallowed up in a large one, and the globe insensibly became depopulated; in order to be convinced of this, we need only consider the state of Italy and Greece before and after the victories of the Romans.

"You will ask me," says Livy,[30] "where the Volsci

[25] "Repub.," lib. v.
[26] "Polit.," lib. vii, cap. xvi.
[27] Ibid.
[28] Ibid., lib. iii, cap. iii.
[29] Sixty pounds sterling.
[30] Lib. vi.

could find soldiers to support the war, after having been so often defeated. There must have been formerly an infinite number of people in those countries, which at present would be little better than a desert, were it not for a few soldiers and Roman slaves."

"The Oracles have ceased," says Plutarch, "because the places where they spoke are destroyed. At present we can scarcely find in Greece three thousand men fit to bear arms."

"I shall not describe," says Strabo,[31] "Epirus and the adjacent places, because these countries are entirely deserted. This depopulation, which began long ago, still continues; so that the Roman soldiers encamp in the houses they have abandoned." We find the cause of this in Polybius, who says that Paulus Æmilius, after his victory, destroyed seventy cities of Epirus, and carried away a hundred and fifty thousand slaves.

XIX. The Romans, by destroying others, were themselves destroyed; incessantly in action, in the heat of battle, and in the most violent attempts, they wore out like a weapon kept constantly in use.

I shall not here speak of the attention with which they applied themselves to procure citizens in the room of those they lost,[32] of the associations they entered into, the privileges they bestowed, and of that immense nursery of citizens, their slaves. I shall mention what they did to recruit the number, not of their citizens, but of their men; and as these were the people in the world who knew best how to adapt their laws to their projects, an examination of their conduct in this respect can not be a matter of indifference.

XX. The ancient laws of Rome endeavoured greatly

[31] Lib. vii, p. 496.

[32] I have treated of this in the "Considerations on the Causes of the Rise and Declension of the Roman Grandeur."

to incite the citizens to marriage. The senate and the people made frequent regulations on this subject, as Augustus says in his speech related by Dio.[33]

Dionysius Halicarnassus[34] can not believe that after the death of three hundred and five of the Fabii, exterminated by the Veientes, there remained no more of this family than one single child; because the ancient law, which obliged every citizen to marry and to educate all his children, was still in force.[35]

Independently of the laws, the censors had a particular eye upon marriages, and according to the exigencies of the republic engaged them to it by shame and by punishments.[36]

The corruption of manners that began to take place contributed vastly to disgust the citizens with marriage, which was painful to those who had no taste for the pleasures of innocence. This is the purport of that speech which Metellus Numidicus, when he was censor, made to the people:[37] "If it were possible for us to do without wives, we should deliver ourselves from this evil, but as Nature has ordained that we can not live very happily with them, nor subsist without them, we ought to have more regard to our own preservation than to transient gratifications."

The corruption of manners destroyed the censorship, which was itself established to destroy the corruption of manners; for when this depravation became general, the censor lost his power.[38]

Civil discords, triumvirates, and proscriptions weak-

[33] Lib. lvi.
[34] Lib. ii.
[35] In the year of Rome 277.
[36] See what was done in this respect in Livy, lib. xlv; the "Epitome" of Livy, lib. lix; Aulus Gellius, lib. i, cap. vi; Valerius Maximus, lib. ii, cap. xix.
[37] It is in Aulus Gellius, lib. i, cap. vi.
[38] See what I have said in book v, chap. xvii.

ened Rome more than any war she had hitherto engaged in. They left but few citizens,[39] and the greatest part of them unmarried. To remedy this last evil, Cæsar and Augustus re-established the censorship, and would even be censors themselves.[40] Cæsar gave rewards to those who had many children.[41] All women under forty-five years of age who had neither husband nor children were forbidden to wear jewels or to ride in litters;[42] an excellent method thus to attack celibacy by the power of vanity. The laws of Augustus were more pressing:[43] he imposed new penalties on such as were not married,[44] and increased the rewards both of those who were married and of those who had children. Tacitus calls these Julian laws;[45] to all appearance they were founded on the ancient regulations made by the senate, the people, and the censors.

The law of Augustus met with innumerable obstacles, and thirty-four years after it had been made the Roman knights insisted on its being abolished.[46] He placed on one side such as were married, and on the other side those who were not; these last appeared by far the greatest number, upon which the citizens were astonished and confounded. Augustus, with the gravity of the ancient censors, addressed them in this manner:[47]

"While sickness and war snatch away so many citizens, what must become of this state if marriages are no longer

[39] Cæsar, after the Civil War, having made a survey of the Roman citizens, found there were no more than one hundred and fifty thousand heads of families. (Florus's "Epitome of Livy," seventeenth decade.

[40] See Dio, lib. xliii, and Xiphilinus in "Augusto."

[41] Dio, lib. xliii; Suetonius, "Life of Cæsar," chap. xx; Appian, lib. ii, of the Civil War.

[42] Eusebius, in his "Chronicle."

[43] Dio, lib. liv.

[44] In the year of Rome 736.

[45] Julias rogationes. ("Annal.," lib. iii.)

[46] In the year of Rome 762. (Dio, lib. lvi.)

[47] I have abridged this speech, which is of tedious length; it is to be found in Dio, lib. lvi.

contracted? The city does not consist of houses, of porticoes, of public places, but of inhabitants. You do not see men like those mentioned in fable starting out of the earth to take care of your affairs. Your celibacy is not owing to the desire of living alone, for none of you eats or sleeps by himself. You only seek to enjoy your irregularities undisturbed. Do you cite the example of the vestal virgins? If you preserve not the laws of chastity, you ought to be punished like them. You are equally bad citizens, whether your example has an influence on the rest of the world, or whether it be disregarded. My only view is the perpetuity of the republic. I have increased the penalties of those who have disobeyed; and with respect to rewards, they are such as I do not know whether virtue has ever received greater. For less will a thousand men expose life itself; and yet will not these engage you to take a wife and provide for children?"

He made a law, which was called after his name, Julia and Papia Poppæa, from the names of the consuls for part of that year.[48] The greatness of the evil appeared even in their being elected: Dio tells us that they were not married, and that they had no children.[49]

This decree of Augustus was properly a code of laws, and a systematic body of all the regulations that could be made on this subject. The Julian laws were incorporated in it, and received greater strength.[50] It was so extensive in its use, and had an influence on so many things, that it formed the finest part of the civil law of the Romans.

We find parts of it dispersed in the precious "Fragments of Ulpian,"[51] in the "Laws of the Digest," collected from authors who wrote on the Papian laws, in the his-

[48] Marcus Papius Mutilus and Q. Poppæus Sabinus. (Dio, lib. lvi.)
[49] Ibid.
[50] The fourteenth title of the "Fragments of Ulpian" distinguishes very rightly between the Julian and the Papian law.
[51] James Godfrey has made a collection of these.

torians and others who have cited them, in the Theodosian code which abolished them, and in the works of the fathers, who have censured them, without doubt from a laudable zeal for the things of the other life, but with very little knowledge of the affairs of this.

These laws had many heads,[52] of which we know thirty-five. But to return to my subject as speedily as possible, I shall begin with that head, which Aulus Gellius informs us was the seventh, and relates to the honours and rewards granted by that law.[53]

The Romans, who for the most part sprang from the cities of the Latins, which were Lacedæmonian colonies,[54] and had received a part of their laws even from those cities,[55] had, like the Lacedæmonians, such veneration for old age as to give it all honour and precedence. When the republic wanted citizens, she granted to marriage and to a number of children the privileges which had been given to age.[56] She granted some to marriage alone, independently of the children which might spring from it; this was called the right of husbands. She gave others to those who had any children, and larger still to those who had three children. These three things must not be confounded. These last had those privileges which married men constantly enjoyed; as, for example, a particular place in the theatre;[57] they had those which could only be enjoyed by men who had children, and which none could deprive them of but such as had a greater number.

These privileges were very extensive. The married men who had the most children were always preferred,

[52] The thirty-fifth is cited in the nineteenth law ff. de ritu nuptiarum.

[53] Lib. ii, cap. xv.

[54] Dionysius Halicarnassus.

[55] The deputies of Rome, who were sent to search into the laws of Greece, went to Athens, and to the cities of Italy.

[56] Aulus Gellius, lib. ii, cap. xv.

[57] Suetonius in "Augusto," cap. xliv.

whether in the pursuit or in the exercise of honours.[58] The consul who had the most numerous offspring was the first to receive the fasces;[59] he had his choice of the provinces;[60] the senator who had most children had his name written first in the catalogue of senators, and was the first in giving his opinion in the senate.[61] They might even stand sooner than ordinary for an office, because every child gave a dispensation of a year.[62] If an inhabitant of Rome had three children, he was exempted from all troublesome offices.[63] The freeborn women who had three children, and the freed women who had four, passed out of that perpetual tutelage[64] in which they had been held by the ancient laws of Rome.[65]

As they had rewards, they had also penalties.[66] Those who were not married could receive no advantage from the will of any person that was not a relative;[67] and those who, being married, had no children, could receive only half.[68] The Romans, says Plutarch, marry only to be heirs, and not to have them.[69]

The advantages which a man and his wife might receive from each other by will were limited by law.[70] If they

[58] Tacitus, lib. ii: "Ut numerus liberorum in candidatis præpolleret, quod lex jubebat."

[59] Aulus Gellius, lib. ii, cap. xv.

[60] Tacitus, "Annal.," lib. xv.

[61] See Law 6, § 5, de Decurion.

[62] See Law 2 ff. de minorib.

[63] Law 1st and 2d ff. de vacatione et excusat. munerum.

[64] "Frag. of Ulpian," tit. 29, § 3.

[65] Plutarch, "Life of Numa."

[66] See the "Fragments of Ulpian," tit. 14, 15, 16, 17, and 18, which compose one of the most valuable pieces of the ancient civil law of the Romans.

[67] Sozom., lib. i, cap. ix. They could receive from their relatives. ("Fragments of Ulpian," tit. 16, § 1.)

[68] Sozom., lib. i, cap. ix; and leg. unic. cod. Theod. de Infirm. pœnis cælib. et orbit.

[69] "Moral Works," "Of the Love of Fathers toward their Children."

[70] See a more particular account of this in the "Fragments of Ulpian," tit. 15 and 16.

had children of each other, they might receive the whole; if not, they could receive only a tenth part of the succession on the account of marriage; and if they had any children by a former venter, as many tenths as they had children.

If a husband absented himself from his wife on any other cause than the affairs of the republic, he could not inherit from her.[71]

The law gave to a surviving husband or wife two years to marry again,[72] and a year and a half in case of a divorce. The fathers who would not suffer their children to marry, or refused to give their daughters a portion, were obliged to do it by the magistrates.[73]

They were not allowed to betroth when the marriage was to be deferred for more than two years;[74] and as they could not marry a girl till she was twelve years old, they could not be betrothed to her till she was ten. The law would not suffer them to trifle to no purpose,[75] and under a pretence of being betrothed, to enjoy the privileges of married men.

It was contrary to law for a man of sixty to marry a woman of fifty.[76] As they had given great privileges to married men, the law would not suffer them to enter into useless marriages. For the same reason, the Calvisian Senatus Consultum declared the marriage of a woman

[71] Ibid., tit. 16, § 1.

[72] Ibid., tit. 14. It seems the first Julian laws allowed three years. ("Speech of Augustus," in Dio, lib. lvi; Suetonius, "Life of Augustus," cap. xxxiv.) Other Julian laws granted but one year; the Papian law gave two. ("Frag. of Ulpian," tit. 14.) These laws were not agreeable to the people; Augustus, therefore, softened or strengthened them as they were more or less disposed to comply with them.

[73] This was the thirty-fifth head of the Papian law. (Leg. 19 ff. de ritu nuptiarum.)

[74] See Dio, lib liv, anno 736; Suetonius, in "Octavio," cap. xxxiv.

[75] Dio, lib. liv; and in the same Dio, the speech of Augustus, lib. lvi.

[76] "Frag. of Ulpian," tit. 16, and the twenty-seventh law, cod. de nuptiis.

above fifty with a man less than sixty to be unequal;[77] so that a woman of fifty years of age could not marry without incurring the penalties of these laws. Tiberius added to the rigour of the Papian law,[78] and prohibited men of sixty from marrying women under fifty, so that a man of sixty could not marry in any case whatsoever, without incurring the penalty. But Claudius abrogated this law made under Tiberius.[79]

All these regulations were more conformable to the climate of Italy than to that of the North, where a man of sixty years of age has still a considerable degree of strength, and where women of fifty are not always past child-bearing.

That they might not be unnecessarily limited in the choice they were to make, Augustus permitted all the freeborn citizens who were not senators[80] to marry freedwomen.[81] The Papian law forbade the senators marrying freedwomen,[82] or those who had been brought up to the stage; and from the time of Ulpian,[83] freeborn persons were forbidden to marry women who had led a disorderly life, who had played in the theatre, or who had been condemned by a public sentence. This must have been established by a decree of the senate. During the time of the republic they had never made laws like these, because the censors corrected this kind of disorders as soon as they arose, or else prevented their rising.

Constantine made a law[84] in which he comprehended, in the prohibition of the Papian law, not only the senators,

[77] "Frag. of Ulpian," tit. 16, § 3.
[78] See Suetonius in "Claudio," cap. xxiii.
[79] Ibid., "Life of Claudius," cap. xxiii, and the "Frag. of Ulpian," tit. 16, § 3.
[80] Dio, lib. liv; "Frag. of Ulpian," tit. 13.
[81] Augustus's speech, in Dio, lib. lvi.
[82] "Frag. of Ulpian," cap. xiii, and the forty-fourth law ff. de ritu nuptiarum.
[83] "Frag. of Ulpian," tit. 13 and 16.
[84] See Law 1, in cod. de natur. lib.

but even such as had a considerable rank in the state, without mentioning persons in an inferior station; this constituted the law of those times. These marriages were therefore no longer forbidden, except to the freeborn comprehended in the law of Constantine. Justinian, however, abrogated the law of Constantine,[85] and permitted all sorts of persons to contract these marriages, and thus we have acquired so fatal a liberty.

It is evident that the penalties inflicted on such as married contrary to the prohibition of the law were the same as those inflicted on persons who did not marry. These marriages did not give them any civil advantage;[86] for the dowry[87] was confiscated after the death of the wife.[88]

Augustus having adjudged the succession and legacies of those whom these laws had declared incapable to the public treasury,[89] they had the appearance rather of fiscal than of political and civil laws. The disgust they had already conceived at a burden which appeared too heavy was increased by their seeing themselves a continual prey to the avidity of the treasury. On this account it became necessary, under Tiberius, that these laws should be softened;[90] that Nero should lessen the rewards given out of the treasury to the informers;[91] that Trajan should put a stop to their plundering;[92] that Severus should also moderate these laws;[93] and that the civilians should con-

[85] Novell. 177.

[86] Law 37 ff. de operib. libertorum, § 7; "Frag. of Ulpian," tit. 16, § 2.

[87] "Frag. of Ulpian," tit. 16, § 2.

[88] See book xxvi, chap. xi.

[89] Except in certain cases. See the "Frag. of Ulpian," tit. 18, and the only law in cod. de Caduc. tollend.

[90] Relatum de moderanda Papiâ Poppæâ. (Tacit., "Annal.," lib. iii, p. 117.)

[91] He reduced them to the fourth part. (Suetonius, in "Nerone," cap. x.)

[92] See Pliny's "Panegyric."

[93] Severus extended even to twenty-five years for the males, and to twenty for the females, the time fixed by the Papian law, as we see

sider them as odious, and in all their decisions deviate from the literal rigour.

Besides, the emperors enervated these laws[94] by the privileges they granted of the rights of husbands, of children, and of three children. More than this, they gave particular persons a dispensation from the penalties of these laws.[95] But the regulations established for the public utility seemed incapable of admitting an alleviation.

It was highly reasonable that they should grant the rights of children to the vestals,[96] whom religion retained in a necessary virginity; they gave, in the same manner, the privilege of married men to soldiers,[97] because they could not marry. It was customary to exempt the emperors from the constraint of certain civil laws. Thus Augustus was freed from the constraint of the law which limited the power of enfranchising,[98] and of that which set bounds to the right of bequeathing by testament.[99] These were only particular cases; but, at last, dispensations were given without discretion, and the rule itself became no more than an exception.

The sects of philosophers had already introduced in the empire a disposition that estranged them from business—a disposition which could not gain ground in the time of the republic,[100] when everybody was employed in the arts

by comparing the "Frag. of Ulpian," tit. 16, with what Tertullian says, "Apol.," cap. iv.

[94] P. Scipio, the censor, complains, in his speech to the people, of the abuses which were already introduced, that they received the same privileges for adopted as for natural children. (Aulus Gellius, lib. v, cap. xix.)

[95] See the thirty-first law ff. de ritu nuptiarum.

[96] Augustus in the Papian law gave them the privilege of mothers. See Dio, lib. lxvi. Numa had granted them the ancient privilege of women who had three children—that is, of having no guardian. (Plutarch, "Life of Numa.")

[97] This was granted them by Claudius. (Dio, lib. lx.)

[98] Leg. apud eum, ff. de manumissionib., § 1.

[99] Dio, lib. lv.

[100] See, in Cicero's "Offices," his sentiments on the spirit of speculation.

of war and peace. Hence arose an idea of perfection, as connected with a life of speculation; hence an estrangement from the cares and embarrassments of a family. The Christian religion coming after this philosophy fixed, if I may make use of the expression, the ideas which that had only prepared.

Christianity stamped its character on jurisprudence, for empire has ever a connection with the priesthood. This is visible from the Theodosian code, which is only a collection of the decrees of the Christian emperors.

A panegyrist of Constantine [101] said to that emperor: "Your laws were made only to correct vice and to regulate manners; you have stripped the ancient laws of that artifice which seemed to have no other aim than to lay snares for simplicity."

It is certain that the alterations made by Constantine took their rise either from sentiments relating to the establishment of Christianity or from ideas conceived of its perfection. From the first proceeded those laws which gave such authority to bishops, and which have been the foundation of the ecclesiastical jurisdiction; hence those laws which weakened paternal authority [102] by depriving the father of his property in the possessions of his children. To extend a new religion, they were obliged to take away the dependence of children, who are always least attached to what is already established.

The laws made with a view to Christian perfection were more particularly those by which the penalties of the Papian laws were abolished; [103] the unmarried were equally exempted from them, with those who, being married, had no children.

[101] Nazarius, in panegyrico Constantini, anno 321.

[102] See Laws 1, 2, 3, in the Theodosian code de bonis maternis, maternique generis, etc., and the only law in the same code, de bonis quæ filiis famil. acquiruntur.

[103] Leg. unic. cod. Theod. de Infirm. pœn. cælib. et orbit.

"These laws were established," says an ecclesiastical historian,[104] "as if the multiplication of the human species was an effect of our care, instead of being sensible that the number is increased or diminished according to the order of Providence."

Principles of religion have had an extraordinary influence on the propagation of the human species. Sometimes they have promoted it, as among the Jews, the Mohammedans, the Gaurs, and the Chinese; at others they have put a damp to it, as was the case of the Romans upon their conversion to Christianity.

They everywhere incessantly preached continency; a virtue the more perfect because in its own nature it can be practised but by very few.

Constantine had not taken away the decimal laws which granted a greater extent to the donations between man and wife, in proportion to the number of their children. Theodosius, the younger, abrogated even these laws.[105]

Justinian declared all those marriages valid which had been prohibited by the Papian laws.[106] These laws require people to marry again; Justinian granted privileges to those who did not marry again.[107]

By the ancient institutions, the natural right which every one had to marry and beget children could not be taken away. Thus when they received a legacy,[108] on condition of not marrying, or when a patron made his freedman swear[109] that he would neither marry nor beget children, the Papian law annulled both the condition and the oath.[110] The clauses on continuing in widowhood established among us contradict the ancient law, and descend

[104] Sozomenus, p. 27.
[105] Leg. 2 and 3, cod. Theod. de jur. liber.
[106] Leg. Sancimus, cod. de nuptiis.
[107] Novell. 127, cap. iii; Novell. 118, cap. v.
[108] Leg. 54 ff. de condit. et demonst.
[109] Leg. 5, § 4, de jure patronatus.
[110] Paul, in his "Sentences," lib. iii, tit. 4, § 15.

from the constitutions of the emperors, founded on ideas of perfection.

There is no law that contains an express abrogation of the privileges and honours which the Romans had granted to marriages, and to a number of children. But where celibacy had the pre-eminence, marriage could not be held in honour; and since they could oblige the officers of the public revenue to renounce so many advantages by the abolition of the penalties, it is easy to perceive that with yet greater ease they might put a stop to the rewards.

The same spiritual reason which had permitted celibacy soon imposed it even as necessary. God forbid that I should here speak against celibacy as adopted by religion; but who can be silent, when it is built on libertinism; when the two sexes, corrupting each other even by the natural sensations themselves, fly from a union which ought to make them better, to live in that which always renders them worse?

It is a rule drawn from Nature that the more the number of marriages is diminished, the more corrupt are those who have entered into that state; the fewer married men, the less fidelity is there in marriage; as when there are more thieves, more thefts are committed.

XXI. The Roman policy was very good in respect to the exposing of children. Romulus, says Dionysius Halicarnassus,[111] laid the citizens under an obligation to educate all their male children, and the eldest of their daughters. If the infants were deformed and monstrous, he permitted the exposing them, after having shown them to five of their nearest neighbours.

Romulus did not suffer them to kill any infants under three years old;[112] by which means he reconciled the law that gave to fathers the right over their children of life and death with that which prohibited their being exposed.

[111] "Antiquities of Rome," lib. ii. [112] Ibid.

We find also in Dionysius Halicarnassus[113] that the law which obliged the citizens to marry, and to educate all their children, was in force in the two hundred and seventy-seventh year of Rome; we see that custom had restrained the law of Romulus which permitted them to expose their younger daughters.

We have no knowledge of what the law of the Twelve Tables (made in the year of Rome 301) appointed with respect to the exposing of children, except from a passage of Cicero,[114] who, speaking of the office of tribune of the people, says that soon after its birth, like the monstrous infant of the law of the Twelve Tables, it was stifled; the infant that was not monstrous was therefore preserved, and the law of the Twelve Tables made no alteration in the preceding institutions.

"The Germans," says Tacitus,[115] "never expose their children; among them the best manners have more force than in other places the best laws." The Romans had therefore laws against this custom, and yet they did not follow them. We find no Roman law that permitted the exposing of children;[116] this was, without doubt, an abuse introduced toward the decline of the republic, when luxury robbed them of their freedom, when wealth divided was called poverty, when the father believed that all was lost which he gave to his family, and when this family was distinct from his property.

XXII. The regulations made by the Romans to increase the number of their citizens had their effect while the republic in the full vigour of her constitution had nothing to repair but the losses she sustained by her courage, by her intrepidity, by her firmness, her love of glory and

[113] Lib. ix.
[114] Lib. iii, de legib.
[115] "De Moribus Germanorum."
[116] There is no title on this subject in the "Digest"; the title of the "Code" says nothing of it, any more than the "Novels."

of virtue. But soon the wisest laws could not re-establish what a dying republic, what a general anarchy, what a military government, what a rigid empire, what a proud despotic power, what a feeble monarchy, what a stupid, weak, and superstitious court, had successively pulled down. It might, indeed, be said that they conquered the world only to weaken it, and to deliver it up defenceless to barbarians. The Gothic nations, the Getes, the Saracens, and Tartars by turns harassed them; and soon the barbarians had none to destroy but barbarians. Thus, in fabulous times, after the inundations and the deluge, there arose out of the earth armed men, who exterminated one another.

XXIII. In the state Europe was in one would not imagine it possible for it to be retrieved, especially when under Charlemagne it formed only one vast empire. But by the nature of government at that time it became divided into an infinite number of petty sovereignties, and as the lord or sovereign, who resided in his village or city, was neither great, rich, powerful, nor even safe but by the number of his subjects, every one employed himself with a singular attention to make his little country flourish. This succeeded in such a manner that notwithstanding the irregularities of government, the want of that knowledge which has since been acquired in commerce, and the numerous wars and disorders incessantly arising, most countries of Europe were better peopled in those days than they are even at present.

I have not time to treat fully of this subject, but I shall cite the prodigious armies engaged in the Crusades, composed of men of all countries. Puffendorf says that in the reign of Charles IX there were in France twenty millions of men.[117]

[117] Introduction to the "History of Europe," chap. v, of France. This is obviously a numerical blunder, since, according to the census of 1751, and France was never so populous as at that time, she did not possess twenty millions. (Voltaire.)

It is the perpetual reunion of many little states that has produced this diminution. Formerly, every village of France was a capital; there is at present only one large one. Every part of the state was a centre of power; at present all has a relation to one centre, and this centre is in some measure the state itself.

Europe, it is true, has for these two ages past greatly increased its navigation; this has both procured and deprived it of inhabitants. Holland sends every year a great number of mariners to the Indies, of whom not above two thirds return; the rest either perish or settle in the Indies. The same thing must happen to every other nation concerned in that trade.

We must not judge of Europe and of a particular state engaged alone in an extensive navigation. This state would increase in people, because all the neighbouring nations would endeavour to have a share in this commerce, and mariners would arrive from all parts. Europe, separated from the rest of the world by religion,[118] by vast seas and deserts, can not be repaired in this manner.

From all this we may conclude that Europe is at present in a condition to require laws to be made in favour of the propagation of the human species. The politics of the ancient Greeks incessantly complain of the inconveniences attending a republic, from the excessive number of citizens; but the politics of this age call upon us to take proper means to increase ours.

XXIV. Louis XIV appointed particular pensions to those who had ten children, and much larger to such as had twelve.[119] But it is not sufficient to reward prodigies. In order to communicate a general spirit, which leads to the propagation of the species, it is necessary for us to

[118] Mohammedan countries surround it almost on every side.
[119] The edict of 1666 in favour of marriages.

establish, like the Romans, general rewards or general penalties.

XXV. When a state is depopulated by particular accidents, by wars, pestilence, or famine, there are still resources left. The men who remain may preserve the spirit of industry; they may seek to repair their misfortunes, and calamity itself may make them become more industrious. This evil is almost incurable when the depopulation is prepared beforehand by interior vice and a bad government. When this is the case, men perish with an insensible and habitual disease; born in misery and weakness, in violence or under the influence of a wicked administration, they see themselves destroyed, and frequently without perceiving the cause of their destruction. Of this we have a melancholy proof in the countries desolated by despotic power, or by the excessive advantages of the clergy over the laity.

In vain shall we wait for the succour of children yet unborn to re-establish a state thus depopulated. There is not time for this; men in their solitude are without courage or industry. With land sufficient to nourish a nation, they have scarcely enough to nourish a family. The common people have not even a property in the miseries of the country—that is, in the fallows with which it abounds. The clergy, the prince, the cities, the great men, and some of the principal citizens insensibly become proprietors of all the land which lies uncultivated; the families who are ruined have left their fields, and the labouring man is destitute.

In this situation they should take the same measures throughout the whole extent of the empire that the Romans took in a part of theirs; they should practise in their distress what these observed in the midst of plenty—that is, they should distribute land to all the families who are in want, and procure them materials for clearing and cultivating it. This distribution ought to be continued

so long as there is a man to receive it, and in such a manner as not to lose a moment that can be industriously employed.

XXVI. A man is not poor because he has nothing, but because he does not work. The man who without any degree of wealth has an employment is as much at his ease as he who without labour has an income of a hundred crowns a year. He who has no substance, and yet has a trade, is not poorer than he who, possessing ten acres of land, is obliged to cultivate it for his subsistence. The mechanic who gives his art as an inheritance to his children has left them a fortune, which is multiplied in proportion to their number. It is not so with him who, having ten acres of land, divides it among his children.

In trading countries, where many men have no other subsistence than from the arts, the state is frequently obliged to supply the necessities of the aged, the sick, and the orphan. A well-regulated government draws this support from the arts themselves. It gives to some such employment as they are capable of performing; others are taught to work, and this teaching of itself becomes an employment.

The alms given to a naked man in the street do not fulfil the obligations of the state, which owes to every citizen a certain subsistence, a proper nourishment, convenient clothing, and a kind of life not incompatible with health.

Aurengzebe, being asked why he did not build hospitals, said, "I will make my empire so rich that there shall be no need of hospitals."[120] He ought to have said, "I will begin by rendering my empire rich, and then I will build hospitals."

The riches of the state suppose great industry. Amid the numerous branches of trade it is impossible but that

[120] See Sir John Chardin's "Travels through Persia," vol. viii.

some must suffer, and consequently the mechanics must be in a momentary necessity.

Whenever this happens, the state is obliged to lend them a ready assistance, whether it be to prevent the sufferings of the people or to avoid a rebellion. In this case hospitals, or some equivalent regulations, are necessary to prevent this misery.

But when the nation is poor, private poverty springs from the general calamity, and is, if I may so express myself, the general calamity itself. All the hospitals in the world can not cure this private poverty; on the contrary, the spirit of indolence, which it constantly inspires, increases the general and consequently the private misery.

Henry VIII,[121] resolving to reform the Church of England, ruined the monks, of themselves a lazy set of people, that encouraged laziness in others, because, as they practised hospitality, an infinite number of idle persons, gentlemen and citizens, spent their lives in running from convent to convent. He demolished even the hospitals, in which the lower people found subsistence, as the gentlemen did theirs in the monasteries. Since these changes, the spirit of trade and industry has been established in England.

At Rome, the hospitals place every one at his ease except those who labour, except those who are industrious, except those who have land, except those who are engaged in trade.

I have observed that wealthy nations have need of hospitals, because fortune subjects them to a thousand accidents; but it is plain that transient assistances are much better than perpetual foundations. The evil is momentary; it is necessary, therefore, that the succour should be of the same nature, and that it be applied to particular accidents.

[121] See Burnet's "History of the Reformation."

# BOOK XXIV

## OF LAWS IN RELATION TO RELIGION, CONSIDERED IN ITSELF, AND IN ITS DOCTRINES

1. Of religion in general.—2. A paradox of Mr. Bayle's.—3. That a moderate government is most agreeable to the Christian religion, and a despotic government to the Mohammedan.—4. Consequences from the character of the Christian religion, and that of the Mohammedan.—5. That the Catholic religion is most agreeable to a monarchy, and the Protestant to a republic.—6. Another of Mr. Bayle's paradoxes.—7. Of the laws of perfection in religion.—8. Of the connection between the moral laws and those of religion.—9. Of the Essenes.—10. Of the sect of Stoics.—11. Of contemplation.—12. Of penances.—13. Of inexpiable crimes.—14. In what manner religion has an influence on civil laws.—15. How false religions are sometimes corrected by the civil laws.—16. How the laws of religion correct the inconveniences of a political constitution.—17. How the laws of religion have the effect of civil laws.—18. That it is not so much the truth or falsity of a doctrine which renders it useful or pernicious to men in civil government, as the use or abuse of it.—19. Of the metempsychosis.—20. That it is dangerous for religion to inspire an aversion for things in themselves indifferent.—21. Of festivals.—22. Of the local laws of religion.—23. The inconvenience of transplanting a religion from one country to another.

I. As amid several degrees of darkness we may form a judgment of those which are the least thick, and among precipices which are the least deep, so we may search among false religions for those that are most conformable to the welfare of society; for those which, though they have not the effect of leading men to the felicity of another life, may contribute most to their happiness in this.

I shall examine, therefore, the several religions of the world, in relation only to the good they produce in civil society, whether I speak of that which has its root in heaven, or of those which spring from the earth.

As in this work I am not a divine but a political writer, I may here advance things which are not otherwise true, than as they correspond with a worldly manner of thinking, not as considered in their relation to truths of a more sublime nature.

With regard to the true religion, a person of the least degree of impartiality must see that I have never pretended to make its interests submit to those of a political nature, but rather to unite them; now, in order to unite, it is necessary that we should know them.

The Christian religion, which ordains that men should love each other, would, without doubt, have every nation blessed with the best civil, the best political laws; because these, next to this religion, are the greatest good that men can give and receive.

II. Mr. Bayle has pretended to prove[1] that it is better to be an atheist than an idolater—that is, in other words, that it is less dangerous to have no religion at all than a bad one. "I had rather," said he, "it should be said of me that I had no existence than that I am a villain." This is only a sophism founded on this, that it is of no importance to the human race to believe that a certain man exists, whereas it is extremely useful for them to believe the existence of a God. From the idea of his non-existence immediately follows that of our independence; or, if we can not conceive this idea, that of disobedience. To say that religion is not a restraining motive, because it does not always restrain, is equally absurd as to say that the civil laws are not a restraining motive. It is a false way of reasoning against religion to collect, in a large work, a long detail of the evils it has produced, if we do not give at the same time an enumeration of the advantages which have flowed from it. Were I to relate all the evils that have arisen in the world from civil laws, from monarchy,

[1] "Thoughts on the Comet."

and from republican government, I might tell of frightful things. Were it of no advantage for subjects to have religion, it would still be of some, if princes had it, and if they whitened with foam the only rein which can restrain those who fear not human laws.

A prince who loves and fears religion is a lion, who stoops to the hand that strokes, or to the voice that appeases him. He who fears and hates religion is like the savage beast that growls and bites the chain which prevents his flying on the passenger. He who has no religion at all is that terrible animal who perceives his liberty only when he tears in pieces and when he devours.

The question is not to know whether it would be better that a certain man or a certain people had no religion than to abuse what they have, but to know what is the least evil, that religion be sometimes abused, or that there be no such restraint as religion on mankind.

To diminish the horror of atheism, they lay too much to the charge of idolatry. It is far from being true that when the ancients raised altars to a particular vice, they intended to show that they loved the vice; this signified, on the contrary, that they hated it. When the Lacedæmonians erected a temple to Fear, it was not to show that this warlike nation desired that he would in the midst of battle possess the hearts of the Lacedæmonians. They had deities to whom they prayed not to inspire them with guilt; and others whom they besought to shield them from it.

III. The Christian religion is a stranger to mere despotic power. The mildness so frequently recommended in the gospel is incomparable with the despotic rage with which a prince punishes his subjects, and exercises himself in cruelty.

As this religion forbids the plurality of wives, its princes are less confined, less concealed from their subjects, and

consequently have more humanity; they are more disposed to be directed by laws, and more capable of perceiving that they can not do whatever they please.

While the Mohammedan princes incessantly give or receive death, the religion of the Christians renders their princes less timid, and consequently less cruel. The prince confides in his subjects, and the subjects in the prince. How admirable the religion which, while it only seems to have in view the felicity of the other life, continues the happiness of this!

It is the Christian religion that, in spite of the extent of the empire and the influence of the climate, has hindered despotic power from being established in Ethiopia, and has carried into the heart of Africa the manners and laws of Europe.

The heir to the empire of Ethiopia [2] enjoys a principality and gives to other subjects an example of love and obedience. Not far thence may we see the Mohammedan shutting up the children of the King of Sennar, at whose death the council sends to murder them, in favour of the prince who mounts the throne.

Let us set before our eyes, on the one hand, the continual massacres of the kings and generals of the Greeks and Romans, and, on the other, the destruction of people and cities by those famous conquerors Timour Beg and Genghis Khan, who ravaged Asia, and we shall see that we owe to Christianity, in government, a certain political law; and in war, a certain law of nations—benefits which human nature can never sufficiently acknowledge.

It is owing to this law of nations that among us victory leaves these great advantages of the conquered: life, liberty, laws, wealth, and always religion, when the conqueror is not blind to his own interest.

[2] "Description of Ethiopia," by M. Ponce, Physician. "Collection of Edifying Letters."

We may truly say that the people of Europe are not at present more disunited than the people and the armies, or even the armies among themselves were, under the Roman Empire when it had become a despotic and military government. On the one hand, the armies engaged in war against each other, and, on the other, they pillaged the cities, and divided or confiscated the lands.

IV. From the characters of the Christian and Mohammedan religions, we ought, without any further examination, to embrace the one and reject the other; for it is much easier to prove that religion ought to humanize the manners of men than that any particular religion is true.

It is a misfortune to human nature when religion is given by a conqueror. The Mohammedan religion, which speaks only by the sword, acts still upon men with that destructive spirit with which it was founded.

The history of Sabacon,[3] one of the pastoral kings of Egypt, is very extraordinary. The tutelar god of Thebes, appearing to him in a dream, ordered him to put to death all the priests of Egypt. He judged that the gods were displeased at his being on the throne, since they commanded him to commit an action contrary to their ordinary pleasure; and therefore he retired into Ethiopia.

V. When a religion is introduced and fixed in a state, it is commonly such as is most suitable to the plan of government there established; for those who receive it, and those who are the cause of its being received, have scarcely any other idea of policy than that of the state in which they were born.

When the Christian religion, two centuries ago, became unhappily divided into Catholic and Protestant, the people of the North embraced the Protestant, and those of the South adhered still to the Catholic.

The reason is plain: the people of the North have, and

[3] See Diodorus, lib. ii.

will forever have, a spirit of liberty and independence, which the people of the South have not; and therefore a religion which has no visible head is more agreeable to the independence of the climate than that which has one.

In the countries themselves where the Protestant religion became established, the revolutions were made pursuant to the several plans of political government. Luther, having great princes on his side, would never have been able to make them relish an ecclesiastical authority that had no exterior pre-eminence; while Calvin, having to do with people who lived under republican governments, or with obscure citizens in monarchies, might very well avoid establishing dignities and preferments.

Each of these two religions was believed to be perfect; the Calvinist judging his most conformable to what Christ had said, and the Lutheran to what the apostles had practised.

VI. Mr. Bayle, after having abused all religions, endeavours to sully Christianity; he boldly asserts that true Christians can not form a government of any duration. Why not? Citizens of this profession being infinitely enlightened with respect to the various duties of life, and having the warmest zeal to fulfil them, must be perfectly sensible of the rights of natural defence. The more they believe themselves indebted to religion, the more they would think due to their country. The principles of Christianity, deeply engraved on the heart, would be infinitely more powerful than the false honour of monarchies, than the humane virtues of republics, or the servile fear of despotic states.

It is astonishing that this great man should not be able to distinguish between the orders for the establishment of Christianity and Christianity itself; and that he should be liable to be charged with not knowing the spirit of his own religion. When the legislator, instead of laws, has

given counsels, this is because he knew that if these counsels were ordained as laws they would be contrary to the spirit of the laws themselves.

VII. Human laws, made to direct the will, ought to give precepts, and not counsels; religion, made to influence the heart, should give many counsels and few precepts.

When, for instance, it gives rules, not for what is good, but for what is better; not to direct to what is right, but to what is perfect; it is expedient that these should be counsels and not laws; for perfection can have no relation to the universality of men or things. Besides, if these were laws, there would be a necessity for an infinite number of others, to make people observe the first. Celibacy was advised by Christianity; when they made it a law in respect to a certain order of men it became necessary to make new ones every day, in order to oblige those men to observe it.[4] The legislator wearied himself, and he wearied society, to make men execute by precept what those who love perfection would have executed as counsel.

VIII. In a country so unfortunate as to have a religion that God has not revealed, it is necessary for it to be agreeable to morality, because even a false religion is the best security we can have of the probity of men.

The principal points of religion of the inhabitants of Pegu[5] are, not to commit murder, not to steal, to avoid uncleanliness, not to give the least uneasiness to their neighbour, but to do him, on the contrary, all the good in their power. With these rules they think they should be saved in any religion whatsoever. Hence it proceeds that those people, though poor and proud, behave with gentleness and compassion to the unhappy.

[4] Dupin's "Ecclesiastical Library of the Sixth Century," vol. v.

[5] "Collection of Voyages that contributed to the Establishment of the East India Company," vol. iii, part i, p. 36.

IX. The Essenes[6] made a vow to observe justice to mankind, to do no ill to any person, upon whatsoever account, to keep faith with all the world, to hate injustice, to command with modesty, always to side with truth, and to fly from all unlawful gain.

X. The several sects of philosophy among the ancients were a species of religion. Never were any principles more worthy of human nature, and more proper to form the good man, than those of the Stoics; and if I could for a moment cease to think that I am a Christian, I should not be able to hinder myself from ranking the destruction of the sect of Zeno among the misfortunes that have befallen the human race.

It carried to excess only those things in which there is true greatness—the contempt of pleasure and of pain.

It was this sect alone that made citizens; this alone that made great men; this alone great emperors.

Laying aside for a moment revealed truths, let us search through all Nature, and we shall not find a nobler object than the Antoninuses; even Julian himself—Julian (a commendation thus wrested from me will not render me an accomplice of his apostasy)—no, there has not been a prince since his reign more worthy to govern mankind.

While the Stoics looked upon riches, human grandeur, grief, disquietudes, and pleasures as vanity, they were entirely employed in labouring for the happiness of mankind, and in exercising the duties of society. It seems as if they regarded that sacred spirit, which they believed to dwell within them, as a kind of favourable providence watchful over the human race.

Born for society, they all believed that it was their destiny to labour for it; with so much the less fatigue, their

[6] "History of the Jews," by Prideaux.

rewards were all within themselves. Happy by their philosophy alone, it seemed as if only the happiness of others could increase theirs.

XI. Men being made to preserve, to nourish, to clothe themselves, and do all the actions of society, religion ought not to give them too contemplative a life.[7]

The Mohammedans become speculative by habit; they pray five times a day, and each time they are obliged to cast behind them everything which has any concern with this world; this forms them for speculation. Add to this that indifference for all things which is inspired by the doctrine of unalterable fate.

If other causes besides these concur to disengage their affections—for instance, if the severity of the government, if the laws concerning the property of land, give them a precarious spirit—all is lost.

The religion of the Gaurs formerly rendered Persia a flourishing kingdom; it corrected the bad effects of despotic power. The same empire is now destroyed by the Mohammedan religion.

XII. Penances ought to be joined with the idea of labour, not with that of idleness; with the idea of good, not with that of supereminence; with the idea of frugality, not with that of avarice.

XIII. It appears from a passage in the books of the pontiffs, quoted by Cicero,[8] that they had among the Romans inexpiable crimes;[9] and it is on this that Zosimus founds the narration so proper to blacken the motives of Constantine's conversion; and Julian, that bitter raillery on this conversion in his Cæsars.

The pagan religion, indeed, which prohibited only some of the grosser crimes, and which stopped the hand

[7] This is the inconvenience of the doctrine of Foe and Laockium.

[8] Lib. ii, of "Laws."

[9] Sacrum commissum, quod neque expiari poterit, impie commissum est; quod expiari poterit publici sacerdotes expianto.

but meddled not with the heart, might have crimes that were inexpiable; but a religion which bridles all the passions; which is not more jealous of actions than of thoughts and desires; which holds us not by a few chains but by an infinite number of threads; which, leaving human justice aside, establishes another kind of justice; which is so ordered as to lead us continually from repentance to love, and from love to repentance; which puts between the judge and the criminal a greater mediator, between the just and the mediator a great judge—a religion like this ought not to have inexpiable crimes. But while it gives fear and hope to all, it makes us sufficiently sensible that though there is no crime in its own nature inexpiable, yet a whole criminal life may be so; that it is extremely dangerous to affront mercy by new crimes and new expiations; that an uneasiness on account of ancient debts, from which we are never entirely free, ought to make us afraid of contracting new ones, of filling up the measure, and going even to that point where paternal goodness is limited.

XIV. As both religion and the civil laws ought to have a peculiar tendency to render men good citizens, it is evident that when one of these deviates from this end, the tendency of the other ought to be strengthened. The less severity there is in religion, the more there ought to be in the civil laws.

Thus the reigning religion of Japan having few doctrines, and proposing neither future rewards nor punishments, the laws to supply these defects have been made with the spirit of severity, and are executed with an extraordinary punctuality.

When the doctrine of necessity is established by religion, the penalties of the laws ought to be more severe, and the magistrate more vigilant; to the end that men who would otherwise become abandoned might be determined

by these motives; but it is quite otherwise where religion has established the doctrine of liberty.

From the inactivity of the soul springs the Mohammedan doctrine of predestination, and from this doctrine of predestination springs the inactivity of the soul. This, they say, is in the decrees of God; they must therefore indulge their repose. In a case like this the magistrate ought to waken by the laws those who are lulled asleep by religion.

When religion condemns things which the civil laws ought to permit, there is danger lest the civil laws, on the other hand, should permit what religion ought to condemn. Either of these is a constant proof of a want of true ideas of that harmony and proportion which ought to subsist between both.

Thus the Tartars under Genghis Khan,[10] among whom it was a sin and even a capital crime to put a knife in the fire, to lean against a whip, to strike a horse with his bridle, to break one bone with another, did not believe it to be any sin to break their word, to seize upon another man's goods, to do an injury to a person, or to commit murder. In a word, laws which render that necessary which is only indifferent have this inconvenience, that they make those things indifferent which are absolutely necessary.

The people of Formosa believe[11] that there is a kind of hell, but it is to punish those who at certain seasons have not gone naked, who have dressed in calico and not in silk, who have presumed to look for oysters, or who have undertaken any business without consulting the song of birds; while drunkenness and debauchery are not regarded as crimes. They believe even that the debauches of their children are agreeable to their gods.

[10] See the relation written by John Duplan Carpin, sent to Tartary by Pope Innocent IV, in the year 1246.

[11] "Collection of Voyages that contributed to the Establishment of the East India Company," vol. v, p. 192.

When religion absolves the mind by a thing merely accidental, it loses its greatest influence on mankind. The people of India believe that the waters of the Ganges have a sanctifying virtue.[12] Those who die on its banks are imagined to be exempted from the torments of the other life, and to be entitled to dwell in a region full of delights; and for this reason the ashes of the dead are sent from the most distant places to be thrown into this river. Little then does it signify whether they had lived virtuously or not, so they be but thrown into the Ganges.

The idea of a place of rewards has a necessary connection with the idea of the abodes of misery; and when they hope for the former without fearing the latter, the civil laws have no longer any influence. Men who think themselves sure of the rewards of the other life are above the power of the legislator; they look upon death with too much contempt. How shall the man be restrained by laws who believes that the greatest pain the magistrate can inflict will end in a moment to begin his happiness?

XV. Simplicity, superstition, or a respect for antiquity have sometimes established mysteries or ceremonies shocking to modesty; of this the world has furnished numerous examples. Aristotle says[13] that in this case the law permits the fathers of families to repair to the temple to celebrate these mysteries for their wives and children. How admirable the civil law which in spite of religion preserves the manners untainted!

Augustus[14] excluded the youth of either sex from assisting at any nocturnal ceremony, unless accompanied by a more aged relative; and when he revived the Lupercalia, he would not allow the young men to run naked.

[12] "Edifying Letters," collect. 15.
[13] "Polit.," lib. vii, cap. xvii.
[14] Suetonius, in "Augusto," cap. xxxi.

XVI. On the other hand, religion may support a state when the laws themselves are incapable of doing it.

Thus when a kingdom is frequently agitated by civil wars, religion may do much by obliging one part of the state to remain always quiet. Among the Greeks, the Eleans, as priests of Apollo, lived always in peace. In Japan,[15] the city of Meaco enjoys a constant peace, as being a holy city. Religion supports this regulation, and that empire, which seems to be alone upon earth, and which neither has nor will have any dependence on foreigners, has always in its own bosom a trade which war can not ruin.

In kingdoms where wars are not entered upon by a general consent, and where the laws have not pointed out any means either of terminating or preventing them, religion establishes times of peace, or cessation from hostilities, that the people may be able to sow their corn and perform those other labours which are absolutely necessary for the subsistence of the state.

Every year all hostility ceases between the Arabian tribes for four months; the least disturbance would then be an impiety.[16] In former times, when every lord in France declared war or peace, religion granted a truce, which was to take place at certain seasons.

When a state has many causes for hatred, religion ought to produce many ways of reconciliation. The Arabs, a people addicted to robbery, are frequently guilty of doing injury and injustice. Mohammed enacted this law:[17] "If any one forgives the blood of his brother,[18] he may pursue the malefactor for damages and interest; but he who shall injure the wicked, after having received satisfaction,

[15] "Collection of Voyages that contributed to the Establishment of the East India Company," vol. iv, p. 127.
[16] See Prideaux, "Life of Mohammed," p. 64.
[17] Koran, book i, chapter of the Cow.
[18] On renouncing the law of retaliation.

shall, in the day of judgment, suffer the most grievous torments."

The Germans inherited the hatred and enmity of their near relatives; but these were not eternal. Homicide was expiated by giving a certain number of cattle, and all the family received satisfaction; a thing extremely useful, says Tacitus, because enmities are most dangerous among a free people.[19] I believe, indeed, that their ministers of religion, who were held by them in so much credit, were concerned in these reconciliations.

Among the inhabitants of Malacca,[20] where no form of reconciliation is established, he who has committed murder, certain of being assassinated by the relatives or friends of the deceased, abandons himself to fury, and wounds or kills all he meets.

XVII. The first Greeks were small nations, frequently dispersed, pirates at sea, unjust on land, without government and without laws. The mighty actions of Hercules and Theseus let us see the state of that rising people. What could religion do more to inspire them with horror against murder? It declared that the man who had been murdered was enraged against the assassin, that he would possess his mind with terror and trouble, and oblige him to yield to him the places he had frequented when alive.[21] They could not touch the criminal, nor converse with him, without being defiled;[22] the murderer was to be expelled the city, and an expiation made for the crime.[23]

XVIII. The most true and holy doctrines may be attended with the very worst consequences, when they are not connected with the principles of society; and on the

[19] "De Moribus Germanorum."

[20] "Collection of Voyages that contributed to the Establishment of the East India Company," vol. vii, p. 303. See also "Memoirs" of the C. de Forbin, and what he says of the people of Macassar.

[21] Plato, "Of Laws," lib. ix.

[22] Tragedy of "Œdipus Coloneus."

[23] Plato, "Of Laws," lib. ix.

contrary, doctrines the most false may be attended with excellent consequences, when contrived so as to be connected with these principles.

The religion of Confucius disowns the immortality of the soul, and the sect of Zeno did not believe it. These two sects have drawn from their bad principles consequences, not just indeed, but most admirable as to their influence on society. Those of the religion of Tao, and of Foe,[24] believe the immortality of the soul; but from this sacred doctrine they draw the most frightful consequences.

The doctrine of the immortality of the soul falsely understood has, almost in every part of the globe and in every age, engaged women, slaves, subjects, friends, to murder themselves, that they might go and serve in the other world the object of their respect or love in this. Thus it was in the West Indies; thus it was among the Danes;[25] thus it is at present in Japan,[26] in Macassar,[27] and many other places.

These customs do not so directly proceed from the doctrine of the immortality of the soul as from that of the resurrection of the body, whence they have drawn this consequence, that after death the same individual will have the same wants, the same sentiments, the same passions. In this point of view, the doctrine of the immortality of

[24] A Chinese philosopher reasons thus against the doctrine of Foe: "It is said, in a book of that sect, that the body is our dwelling-place and the soul the immortal guest which lodges there; but if the bodies of our relatives are only a lodging, it is natural to regard them with the same contempt we should feel for a structure of earth and dirt. Is not this endeavouring to tear from the heart the virtue of love to one's own parents? This leads us even to neglect the care of the body, and to refuse it the compassion and affection so necessary for its preservation; hence the disciples of Foe kill themselves by thousands." (Work of an ancient Chinese philosopher, in the "Collection of Du Halde," vol. iii, p. 52.)

[25] See Tho. Bartholin's "Antiquities of the Danes."

[26] "An Account of Japan," in the "Collection of Voyages that contributed to the Establishment of the East India Company."

[27] Forbin's "Memoirs."

the soul has a prodigious effect on mankind, because the idea of only a simple change of habitation is more within the reach of the human understanding, and more adapted to flatter the heart, than the idea of a new modification.

It is not enough for religion to establish a doctrine; it must also direct its influence. This the Christian religion performs in the most admirable manner, particularly with regard to the doctrines of which we have been speaking. It makes us hope for a state which is the object of our belief; not for a state which we have already experienced or known; thus every article, even the resurrection of the body, leads us to spiritual ideas.

The sacred books [28] of the ancient Persians say, "If you would be holy, instruct your children, because all the good actions which they perform will be imputed to you." They advise them to marry betimes, because children at the day of judgment will be as a bridge, over which those who have none can not pass. These doctrines were false, but extremely useful.

XIX. The doctrine of the immortality of the soul is divided into three branches—that of pure immortality, that of a simple change of habitation, and that of a metempsychosis—that is, the system of the Christians, that of the Scythians, and that of the Indians. We have just been speaking of the first two, and I shall say of the last that, as it has been well or ill explained, it has had good or bad effects. As it inspires men with a certain horror against bloodshed, very few murders are committed in the Indies; and though they seldom punish with death, yet they enjoy a perfect tranquility.

On the other hand, women burn themselves at the death of their husbands; thus it is only the innocent who suffer a violent death.

XX. A kind of honour established in the Indies by

[28] Mr. Hyde.

the prejudices of religion has made the several tribes conceive an aversion against each other. This honour is founded entirely on religion; these family distinctions form no civil distinctions; there are Indians who would think themselves dishonoured by eating with their king.

These sorts of distinctions are connected with a certain aversion for other men, very different from those sentiments which naturally arise from difference of rank; which among us comprehends a love for inferiors.

The laws of religion should never inspire an aversion to anything but vice, and above all they should never estrange man from a love and tenderness for his own species.

The Mohammedan and Indian religions embrace an infinite number of people; the Indians hate the Mohammedans because they eat cows; the Mohammedans detest the Indians because they eat hogs.

XXI. When religion appoints a cessation from labour it ought to have a greater regard to the necessities of mankind than to the grandeur of the being it designs to honour.

Athens was subject to great inconveniences from the excessive number of its festivals.[29] These powerful people, to whose decision all the cities of Greece came to submit their quarrels, could not have time to despatch such a multiplicity of affairs.

When Constantine ordained that the people should rest on the Sabbath, he made this decree for the cities,[30] and not for the inhabitants of the open country; he was sensible that labour in the cities was useful, but in the fields necessary.

For the same reason, in a country supported by com-

[29] Xenophon on the Republic of Athens.

[30] Leg. 3, cod. de Feriis. This law was doubtless made only for the pagans.

merce, the number of festivals ought to be relative to this very commerce. Protestant and Catholic countries are situated in such a manner that there is more need of labour in the former than in the latter;[31] the suppression of festivals is therefore more suitable to Protestant than to Catholic countries.

Dampier observes that the diversions of different nations vary greatly, according to the climate.[32] As hot climates produce a quantity of delicate fruits, the barbarians easily find necessaries, and therefore spend much time in diversions. The Indians of colder countries have not so much leisure, being obliged to fish and hunt continually; hence they have less music, dancing, and festivals. If a new religion should be established among these people, it ought to have regard to this in the institution of festivals.

XXII. There are many local laws in various religions, and when Montezuma with so much obstinacy insisted that the religion of the Spaniards was good for their country, and his for Mexico, he did not assert an absurdity; because, in fact, legislators could never help having a regard to what Nature had established before them.

The opinion of the metempsychosis is adapted to the climate of the Indies. An excessive heat burns up all the country;[33] they can breed but very few cattle; they are always in danger of wanting them for tillage; their black cattle multiply but indifferently;[34] and they are subject to many distempers. A law of religion which preserves them is therefore more suitable to the policy of the country.

While the meadows are scorched, rice and pulse, by the assistance of water, are brought to perfection; a law of

[31] The Catholics lie more toward the south, and the Protestants toward the north.

[32] Dampier's "Voyages," vol. ii.

[33] See Bernier's "Travels," vol. ii, p. 137.

[34] "Edifying Letters," col. 12, p. 95.

religion which permits only this kind of nourishment must therefore be extremely useful to men in those climates.

The flesh of cattle in that country is insipid,[35] but the milk and butter which they receive from them serve for a part of their subsistence; therefore the law which prohibits the eating and killing of cows is in the Indies not unreasonable.

Athens contained a prodigious multitude of people, but its territory was barren. It was therefore a religious maxim with this people, that those who offered some small presents to the gods honoured them more than those who sacrificed an ox.[36]

XXIII. It follows hence that there are frequently many inconveniences attending the transplanting a religion from one country to any other.

"The hog," says M. de Boulainvilliers,[37] "must be very scarce in Arabia, where there are almost no woods, and hardly anything fit for the nourishment of these animals; besides, the saltness of the water and food renders the people most susceptible of cutaneous disorders." This local law could not be good in other countries,[38] where the hog is almost a universal, and in some sort a necessary, nourishment.

I shall here make a reflection. Sanctorius has observed that pork transpires but little,[39] and that this kind of meat greatly hinders the transpiration of other food; he has found that this diminution amounts to a third.[40] Besides, it is known that the want of transpiration forms or increases the disorders of the skin. The feeding on pork ought rather to be prohibited in climates where the people

[35] Bernier's "Travels," vol. ii, p. 187.
[36] Euripides, in "Athenæus," lib. ii.
[37] "Life of Mohammed."
[38] As in China.
[39] "Medicina Statica," sect. 3, aphor. 23.
[40] Ibid.

are subject to these disorders, as in Palestine, Arabia, Egypt, and Libya.

Sir John Chardin says [41] that there is not a navigable river in Persia, except the Kur, which is at the extremity of the empire. The ancient law of the Gaurs which prohibited sailing on rivers was not therefore attended with any inconvenience in this country, though it would have ruined the trade of another.

Frequent bathings are extremely useful in hot climates. On this account they are ordained in the Mohammedan law and in the Indian religion. In the Indies it is a most meritorious act to pray to God in the running stream; [42] but how could these things be performed in other climates?

When a religion adapted to the climate of one country clashes too much with the climate of another it can not be there established; and whenever it has been introduced it has been afterward discarded. It seems to all human appearance as if the climate had prescribed the bounds of the Christian and the Mohammedan religions.

It follows, hence, that it is almost always proper for a religion to have particular doctrines, and a general worship. In laws concerning the practice of religious worship there ought to be but few particulars; for instance, they should command mortification in general and not a certain kind of mortification. Christianity is full of good sense; abstinence is of divine institution; but a particular kind of abstinence is ordained by human authority, and therefore may be changed.

[41] "Travels into Persia," vol. ii.
[42] Bernier's "Travels," vol. ii.

# BOOK XXV

## OF LAWS IN RELATION TO THE ESTABLISHMENT OF RELIGION AND ITS EXTERNAL POLITY

1. Of religious sentiments.—2. Of the motives of attachment to different religions.—3. Of temples.—4. Of the ministers of religion.—5. Of the bounds which the laws ought to prescribe to the riches of the clergy.—6. Of monasteries.—7. Of the luxury of superstition.—8. Of the Pontificate.—9. Of toleration in point of religion.—10. Of changing a religion.—11. Of penal laws.—12. A most humble remonstrance to the inquisitors of Spain and Portugal.—13. Why the Christian religion is so odious in Japan.—14. Of the propagation of religion.

I. THE pious man and the atheist always talk of religion; the one speaks of what he loves, and the other of what he fears.

II. The different religions of the world do not give to those who profess them equal motives of attachment; this depends greatly on the manner in which they agree with the turn of thought and perceptions of mankind.

We are extremely addicted to idolatry, and yet have no great inclination for the religion of idolaters; we are not very fond of spiritual ideas, and yet are most attached to those religions which teach us to adore a spiritual being. This proceeds from the satisfaction we find in ourselves at having been so intelligent as to choose a religion which raises the deity from that baseness in which he had been placed by others. We look upon idolatry as the religion of an ignorant people, and the religion which has a spiritual being for its object as that of the most enlightened nations.

When with a doctrine that gives us the idea of a spiritual supreme being we can still join those of a sen-

sible nature and admit them into our worship, we contract a greater attachment to religion, because those motives which we have just mentioned are added to our natural inclinations for the objects of sense. Thus the Catholics, who have more of this kind of worship than the Protestants, are more attached to their religion than the Protestants are to theirs, and more zealous for its propagation.

When the people of Ephesus were informed that the fathers of the council had declared they might call the Virgin Mary the Mother of God, they were transported with joy, they kissed the hands of the bishops, they embraced their knees, and the whole city resounded with acclamations.[1]

When an intellectual religion superadds a choice made by the Deity, and a preference for those who profess it over those who do not, this greatly attaches us to religion. The Mohammedans would not be such good Mussulmans if, on the one hand, there were not idolatrous nations who make them imagine themselves the champions of the unity of God; and on the other Christians, to make them believe that they are the objects of his preference.

A religion burdened with many ceremonies[2] attaches us to it more strongly than that which has a fewer number. We have an extreme propensity to things in which we are continually employed; witness the obstinate prejudices of the Mohammedans and the Jews,[3] and the readiness with which barbarous and savage nations change their religion,

[1] St. Cyril' s "Letter."

[2] This does not contradict what I have said in the last chapter of the preceding book; I here speak of the motives of attachment to religion, and there of the means of rendering it more general.

[3] This has been remarked over all the world. See, as to the Turks, the "Missions of the Levant"; the "Collection of Voyages that contributed to the Establishment of the East India Company," vol. iii, p. 201, on the Moors of Bavaria; and Father Labat on the Mohammedan negroes, etc.

who, as they are employed entirely in hunting or war, have but few religious ceremonies.

Men are extremely inclined to the passions of hope and fear; a religion, therefore, that had neither a heaven nor a hell could hardly please them. This is proved by the ease with which foreign religions have been established in Japan, and the zeal and fondness with which they were received.[4]

In order to raise an attachment to religion it is necessary that it should inculcate pure morals. Men who are knaves by retail are extremely honest in the gross; they love morality. And were I not treating of so grave a subject I should say that this appears remarkably evident in our theatres: we are sure of pleasing the people by sentiments avowed by morality; we are sure of shocking them by those it disapproves.

When external worship is attended with great magnificence it flatters our minds and strongly attaches us to religion. The riches of temples and those of the clergy greatly affect us. Thus even the misery of the people is a motive that renders them fond of a religion which has served as a pretext to those who were the cause of their misery.

III. Almost all civilized nations dwell in houses; hence naturally arose the idea of building a house for God in which they might adore and seek him, amid all their hopes and fears.

And, indeed, nothing is more comfortable to mankind than a place in which they may find the Deity peculiarly present, and where they may assemble together to confess their weaknesses, and tell their griefs.

But this natural idea never occurred to any but such as cultivated the land; those who have no houses for themselves were never known to build temples.

[4] The Christian and the Indian religions; these have a hell and a paradise, which the religion of Sintos has not.

This was the cause that made Genghis Khan discover such a prodigious contempt for mosques.[5] This prince examined the Mohammedans;[6] he approved of all their doctrines, except that of the necessity of going to Mecca; he could not comprehend why God might not be everywhere adored. As the Tartars did not dwell in houses, they could have no idea of temples.

Those people who have no temples have but a small attachment to their own religion. This is the reason why the Tartars have in all times given so great a toleration;[7] why the barbarous nations who conquered the Roman Empire did not hesitate a moment to embrace Christianity; why the savages of America have so little fondness for their own religion, why, since our missionaries have built churches in Paraguay, the natives of that country have become so zealous for ours.

As the Deity is the refuge of the unhappy, and none are more unhappy than criminals, men have been naturally led to think temples an asylum for those wretches.[8] This idea appeared still more natural to the Greeks, where murderers, chased from their city and the presence of men, seemed to have no houses but the temples, nor other protectors than the gods.

At first these were only designed for involuntary homicides; but when the people made them a sanctuary for those who had committed great crimes they fell into a gross contradiction. If they had offended men they had much greater reason to believe they had offended the gods.

These asylums multiplied in Greece. The temples, says Tacitus,[9] were filled with insolvent debtors and wicked

[5] Entering the mosque of Bokhara, he took the Koran, and threw it under his horse's feet ("History of the Tartars," p. 273.)

[6] Ibid., p. 342.

[7] This disposition of mind has been communicated to the Japanese, who, as it may be easily proved, derive their origin from the Tartars.

[8] See Chardin, "Persia," vol. ii, 31, edit. of 1735.

[9] "Annal.," lib. ii.

slaves; the magistrate found it difficult to exercise his office; the people protected the crimes of men as the ceremonies of the gods; at length the senate was obliged to retrench a great number of them.

The laws of Moses were perfectly wise. The man who involuntarily killed another was innocent, but he was obliged to be taken away from before the eyes of the relatives of the deceased. Moses therefore appointed an asylum for such unfortunate people.[10] The perpetrators of great crimes deserved not a place of safety, and they had none;[11] the Jews had only a portable tabernacle, which continually changed its place; this excluded the idea of a sanctuary. It is true that they had afterward a temple; but the criminals who would resort thither from all parts might disturb the divine service. If persons who had committed manslaughter had been driven out of the country, as was customary among the Greeks, they had reason to fear that they would worship strange gods. All these considerations made them establish cities of safety, where they might stay till the death of the high priest.

IV. The first men, says Porphyry,[12] sacrificed only vegetables. In a worship so simple every one might be priest in his own family.

The natural desire of pleasing the Deity multiplied ceremonies. Hence it followed, that men employed in agriculture became incapable of observing them all and of filling up the number.

Particular places were consecrated to the gods; it then became necessary that they should have ministers to take care of them; in the same manner as every citizen took care of his house and domestic affairs. Hence the people who have no priests are commonly barbarians; such were

[10] Numb., xxxv. [11] Ibid.
[12] "De Abstinentia Animal.," ii, 5.

formerly the Pedalians,[13] and such are still the Wolgusky.[14]

Men consecrated to the Deity ought to be honoured, especially among people who have formed an idea of a personal purity necessary to approach the places most agreeable to the gods, and for the performance of particular ceremonies.

The worship of the gods requiring a continual application, most nations were led to consider the clergy as a separate body. Thus, among the Egyptians, the Jews, and the Persians,[15] they consecrated to the Deity certain families who performed and perpetuated the service. There have been even religions which have not only estranged ecclesiastics from business, but have also taken away the embarrassments of a family; and this is the practice of the principal branch of Christianity.

I shall not here treat of the consequences of the law of celibacy; it is evident that it may become hurtful in proportion as the body of the clergy may be too numerous; and, in consequence of this, that of the laity too small.

By the nature of the human understanding we love in religion everything that carries the idea of difficulty; as in point of morality, we have a speculative fondness for everything that bears the character of severity. Celibacy has been most agreeable to those nations to whom it seemed least adapted, and with whom it might be attended with the most fatal consequences. In the southern countries of Europe, where, by the nature of the climate, the law of celibacy is more difficult to observe, it has been retained; in those of the North, where the passions are less lively, it has been banished. Further, in countries where there are but few inhabitants it has been admitted;

[13] Lilius Giraldus, p. 726.

[14] A people of Siberia. See the account given by Mr. Everard Ysbrant Ides, in the "Collection of Travels to the North," vol. viii.

[15] Mr. Hyde.

in those that are vastly populous it has been rejected. It is obvious that these reflections relate only to the too great extension of celibacy, and not to celibacy itself.

V. As particular families may become extinct, their wealth can not be a perpetual inheritance. The clergy is a family that can not become extinct; wealth is therefore fixed to it forever, and can not go out of it.

Particular families may increase; it is necessary then that their wealth should also increase. The clergy is a family that ought not to increase; their wealth ought then to be limited.

We have retained the regulations of the Levitical laws as to the possessions of the clergy, except those relating to the bounds of these possessions; indeed, among us we must ever be ignorant of the limit beyond which any religious community can no longer be permitted to acquire.

These endless acquisitions appear to the people so unreasonable that he who should speak in their defence would be regarded as an idiot.

The civil laws find sometimes many difficulties in altering established abuses, because they are connected with things worthy of respect; in this case an indirect proceeding would be a greater proof of the wisdom of the legislator than another which struck directly at the thing itself. Instead of prohibiting the acquisitions of the clergy we should seek to give them a distaste for them; to leave them the right and to take away the deed.

In some countries of Europe a respect for the privileges of the nobility has established in their favour a right of indemnity over immovable goods acquired in mortmain. The interest of the prince has in the same case made him exact a right of amortization. In Castile, where no such right prevails, the clergy have seized upon everything. In Aragon, where there is some right of amortization, they have obtained less; in France, where this right and that of

indemnity are established, they have acquired less still; and it may be said that the prosperity of this kingdom is in a great measure owing to the exercise of these two rights. If possible, then, increase these rights, and put a stop to the mortmain.

Render the ancient and necessary patrimony of the clergy sacred and inviolable, let it be fixed and eternal like that body itself, but let new inheritances be out of their power.

Permit them to break the rule when the rule has become an abuse; suffer the abuse when it enters into the rule.

They still remember in Rome a certain memorial sent thither on some disputes with the clergy, in which was this maxim: "The clergy ought to contribute to the expenses of the state, let the Old Testament say what it will." They concluded from this passage that the author of this memorial was better versed in the language of the tax-gatherers than in that of religion.

VI. The least degree of common sense will let us see that bodies designed for a perpetual continuance should not be allowed to sell their funds for life, nor to borrow for life; unless we want them to be heirs to all those who have no relatives and to those who do not choose to have any. These men play against the people, but they hold the bank themselves.

VII. "Those are guilty of impiety toward the gods," says Plato,[10] "who deny their existence; or who, while they believe it, maintain that they do not interfere with what is done below; or, in fine, who think that they can easily appease them by sacrifices; three opinions equally pernicious." Plato has here said all that the clearest light of Nature has ever been able to say in point of religion. The magnificence of external worship has a principal con-

[10] "Of Laws," book x.

nection with the institution of the state. In good republics they have curbed not only the luxury of vanity, but even that of superstition. They have introduced frugal laws into religion. Of this number are many of the laws of Solon; many of those of Plato on funerals, adopted by Cicero; and, in fine, some of the laws of Numa on sacrifices.[17]

Birds, says Cicero,[18] and paintings begun and finished in a day are gifts the most divine. We offer common things, says a Spartan,[19] that we may always have it in our power to honour the gods.

The desire of man to pay his worship to the Deity is very different from the magnificence of this worship. Let us not offer our treasures to him if we are not proud of showing that we esteem what he would have us despise.

"What must the gods think of the gifts of the impious," said the admirable Plato, "when a good man would blush to receive presents from a villain?"

Religion ought not, under the pretence of gifts, to draw from the people what the necessity of the state has left them; but, as Plato says,[20] "The chaste and the pious ought to offer gifts which resemble themselves."

Nor is it proper for religion to encourage expensive funerals. What is there more natural than to take away the difference of fortune in a circumstance and in the very moment that makes equal all fortunes?

VIII. When religion has many ministers it is natural for them to have a chief and for a sovereign pontiff to be established. In monarchies, where the several orders of the state can not be kept too distinct, and where all powers ought not to be lodged in the same person, it is proper that the pontificate be distinct from the empire. The same

[17] Rogum vino ne respergito. (Law of the Twelve Tables.)

[18] Cicero derives these appropriate words from Plato. ("Laws," book xii.) (J. V. P.)

[19] Plutarch attributes this beautiful idea to Lycurgus. (J. V. P.)

[20] "Of Laws," book ii.

necessity is not to be met with in a despotic government, the nature of which is to unite all the different powers in the same person. But in this case it may happen that the prince may regard religion as he does the laws themselves, as dependent on his own will. To prevent this inconvenience, there ought to be monuments of religion, for instance, sacred books which fix and establish it. The King of Persia is the chief of the religion, but this religion is regulated by the Koran. The Emperor of China is the sovereign pontiff, but there are books in the hands of everybody to which he himself must conform. In vain a certain emperor attempted to abolish them; they triumphed over tyranny.

IX. We are here politicians, and not divines; but the divines themselves must allow that there is a great difference between tolerating and approving a religion.

When the legislator has believed it a duty to permit the exercise of many religions, it is necessary that he should enforce also a toleration among these religions themselves. It is a principle that every religion which is persecuted becomes itself persecuting; for as soon as by some accidental turn it arises from persecution, it attacks the religion which persecuted it; not as religion, but as tyranny.

It is necessary, then, that the laws require from the several religions not only that they shall not embroil the state, but that they shall not raise disturbances among themselves. A citizen does not fulfil the laws by not disturbing the government; it is requisite that he should not trouble any citizen whomsoever.

As there are scarcely any but persecuting religions that have an extraordinary zeal for being established in other places (because a religion that can tolerate others seldom thinks of its own propagation), it must therefore be a very good civil law, when the state is already satisfied with the

established religion, not to suffer the establishment of another.[21]

This is then a fundamental principle of the political laws in regard to religion: that when the state is at liberty to receive or to reject a new religion it ought to be rejected; when it is received it ought to be tolerated.

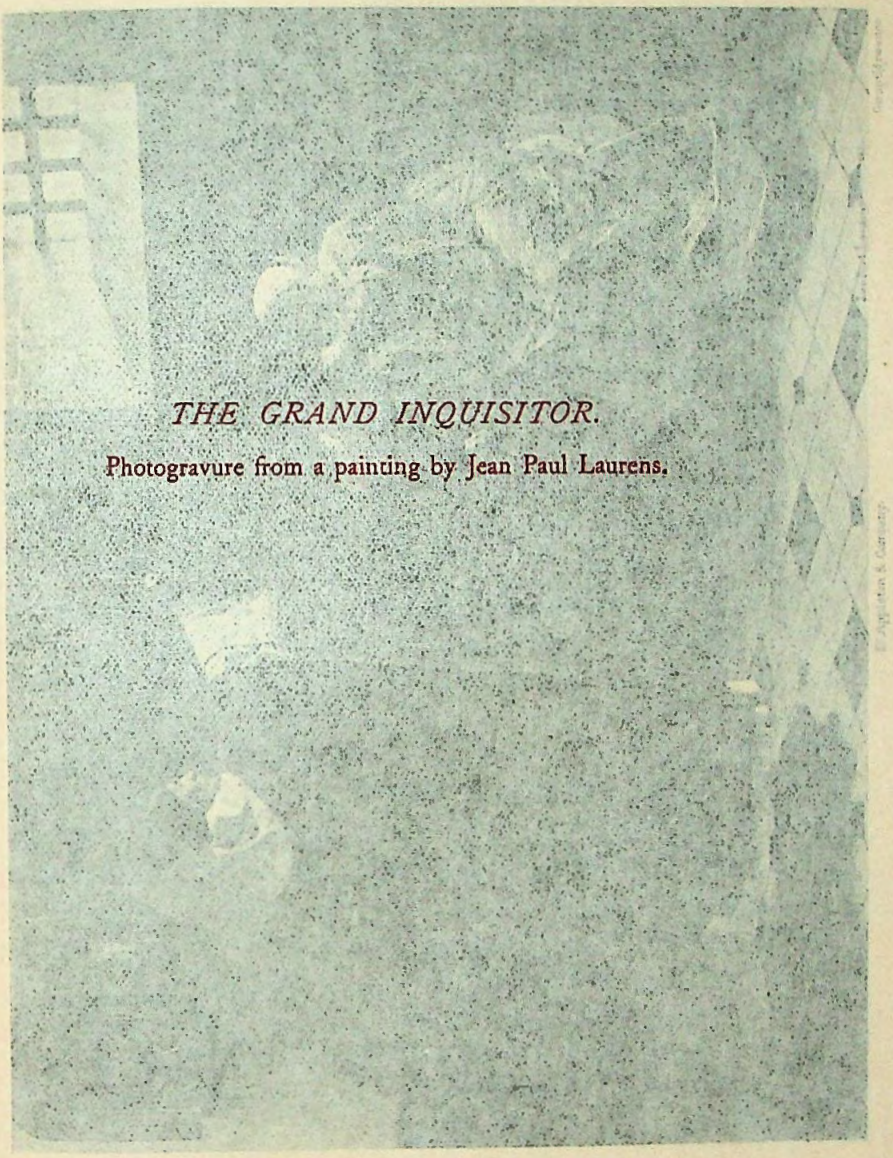
X. A prince who undertakes to destroy or to change the established religion of his kingdom must greatly expose himself. If his government be despotic, he runs a much greater risk of seeing a revolution arise from such a proceeding than from any tyranny whatsoever, and a revolution is not an uncommon thing in such states. The reason of this is that a state can not change its religion, manners, and customs in an instant, and with the same rapidity as the prince publishes the ordinance which establishes a new religion.

Besides, the ancient religion is connected with the constitution of the kingdom and the new one is not; the former agrees with the climate and very often the new one is opposed to it. Moreover, the citizens become disgusted with their laws, and look upon the government already established with contempt; they conceive a jealousy against the two religions, instead of a firm belief in one; in a word, these innovations give to the state, at least for some time, both bad citizens and bad believers.

XI. Penal laws ought to be avoided in respect to religion; they imprint fear, it is true; but as religion has also penal laws which inspire the same passion, the one is effaced by the other, and between these two different kinds of fear the mind becomes hardened.

The threatenings of religion are so terrible, and its promises so great, that when they actuate the mind, what-

[21] I do not mean to speak in this chapter of the Christian religion; for, as I have elsewhere observed, the Christian religion is our chief blessing. See the end of the preceding chapter, and the "Defence of the Spirit of Laws," part ii.



*THE GRAND INQUISITOR.*

Photogravure from a painting by Jean Paul Laurens.

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ever efforts the magistrate may use to oblige us to renounce it, he seems to leave us nothing when he deprives us of the exercise of our religion, and to bereave us of nothing when we are allowed to profess it.

It is not, therefore, by filling the soul with the idea of this great object, by hastening her approach to that critical moment in which it ought to be of the highest importance, that religion can be most successfully attacked; a more certain way is to tempt her by favours, by the conveniences of life, by hopes of fortune; not by that which revives, but by that which extinguishes the sense of her duty; not by that which shocks her, but by that which throws her into indifference at the time when other passions actuate the mind, and those which religion inspires are hushed into silence. As a general rule, in changing a religion the invitations should be much stronger than the penalties.

The temper of the human mind has appeared even in the nature of punishments. If we take a survey of the persecutions in Japan,[22] we shall find that they were more shocked at cruel torments than at long sufferings, which rather weary than affright, which are the more difficult to surmount, from their appearing less difficult.

In a word, history sufficiently informs us that penal laws have never had any other effect than to destroy.

XII. A Jewess of ten years of age, who was burned at Lisbon at the last auto-da-fé, gave occasion to the following little piece, the most idle, I believe, that ever was written. When we attempt to prove things so evident we are sure never to convince.

The author declares that though a Jew he has a respect for the Christian religion; and that he should be glad to take away from the princes who are not Christians a plausible pretence for persecuting this religion.

[22] In the "Collection of Voyages that contributed to the Establishment of the East India Company," vol. v.

"You complain," says he to the inquisitors, "that the Emperor of Japan caused all the Christians in his dominions to be burned by a slow fire. But he will answer: 'We treat you who do not believe like us, as you yourselves treat those who do not believe like you; you can only complain of your weakness, which has hindered you from exterminating us, and which has enabled us to exterminate you.'

"But it must be confessed that you are much more cruel than this emperor. You put us to death who believe only what you believe, because we do not believe all that you believe. We follow a religion which you yourselves know to have been formerly dear to God. We think that God loves it still, and you think that he loves it no more; and because you judge thus, you make those suffer by sword and fire who hold an error so pardonable as to believe that God still loves what he once loved.[23]

"If you are cruel to us, you are much more so to our children; you cause them to be burned because they follow the inspirations given them by those whom the law of Nature and the laws of all nations teach them to regard as gods.

"You deprive yourselves of the advantage you have over the Mohammedans, with respect to the manner in which their religion was established. When they boast of the number of their believers you tell them that they have obtained them by violence, and that they have extended their religion by the sword; why then do you establish yours by fire?

"When you would bring us over to you, we object to a source from which you glory to have descended. You reply to us that, though your religion is new, it is divine;

[23] The source of the blindness of the Jews is their not perceiving that the economy of the gospel is in the order of the decrees of God, and that it is in this light a consequence of his immutability.

and you prove it from its growing amid the persecutions of pagans, and when watered by the blood of your martyrs; but at present you play the part of the Diocletians, and make us take yours.

"We conjure you not by the mighty God whom both you and we serve, but by that Christ, who, you tell us, took upon him a human form, to propose himself as an example for you to follow; we conjure you to behave to us as he himself would behave were he upon earth. You would have us become Christians, and you will not be so yourselves.

"But if you will not be Christians, be at least men; treat us as you would if, having only the weak light of justice which Nature bestows, you had not a religion to conduct, and a revelation to enlighten you.

"If Heaven has had so great a love for you as to make you see the truth, you have received a singular favour; but is it for children who have received the inheritance of their father, to hate those who have not?

"If you have this truth, hide it not from us by the manner in which you propose it. The characteristic of truth is its triumph over hearts and minds, and not that impotency which you confess when you would force us to receive it by tortures.

"If you were wise, you would not put us to death for no other reason than because we are unwilling to deceive you. If your Christ is the son of God, we hope he will reward us for being so unwilling to profane his mysteries; and we believe that the God whom both you and we serve will not punish us for having suffered death for a religion which he formerly gave us, only because we believe that he still continues to give it.

"You live in an age in which the light of Nature shines more brightly than it has ever done; in which philosophy has enlightened human understandings; in which the mo-

rality of your gospel has been better known; in which the respective rights of mankind with regard to each other and the empire which one conscience has over another are best understood. If you do not therefore shake off your ancient prejudices, which, while unregarded, mingle with your passions, it must be confessed that you are incorrigible, incapable of any degree of light or instruction; and a nation must be very unhappy that gives authority to such men.

"Would you have us frankly tell you our thoughts? You consider us rather as your enemies than as the enemies of your religion; for if you loved your religion you would not suffer it to be corrupted by such gross ignorance.

"It is necessary that we should warn you of one thing: that is, if any one in times to come shall dare to assert that in the age in which we live the people of Europe were civilized, you will be cited to prove that they were barbarians; and the idea they will have of you will be such as will dishonour your age, and spread hatred over all your contemporaries."

XIII. We have already mentioned the perverse temper of the people of Japan. The magistrates considered the firmness which Christianity inspires when they attempted to make the people renounce their faith, as in itself most dangerous; they fancied that it increased their obstinacy. The law of Japan punishes severely the least disobedience. The people were ordered to renounce the Christian religion; thy did not renounce it; this was disobedience; the magistrates punished this crime; and the continuance in disobedience seemed to deserve another punishment.

Punishments among the Japanese are considered as the revenge of an insult done to the prince; the songs of triumph sung by our martyrs appeared as an outrage against him; the title of martyr provoked the magistrates; in their opinion it signified rebel; they did all in their power

to prevent their obtaining it. Then it was that their minds were exasperated, and a horrid struggle was seen between the tribunals that condemned and the accused who suffered; between the civil laws and those of religion.

XIV. All the people of the East, except the Mohammedans, believe all religions in themselves indifferent. They fear the establishment of another religion, no otherwise than as a change in government. Among the Japanese, where there are many sects, and where the state has had for so long a time an ecclesiastical superior, they never dispute on religion.[24] It is the same with the people of Siam.[25] The Calmucks[26] do more—they make it a point of conscience to tolerate every species of religion; at Calicut it is a maxim of the state that every religion is good.[27]

But it does not follow, hence, that a religion brought from a far-distant country, and quite different in climate, laws, manners, and customs, will have all the success to which its holiness might entitle it. This is more particularly true in great despotic empires: here strangers are tolerated at first because there is no attention given to what does not seem to strike at the authority of the prince. As they are extremely ignorant, a European may render himself agreeable by the knowledge he communicates; this is very well in the beginning. But as soon as he has any success, when disputes arise and when men who have some interest become informed of it, as their empire, by its very nature, above all things requires tranquility, and as the least disturbance may overturn it, they proscribe the new religion and those who preach it; disputes between the preachers breaking out, they begin to entertain a distaste for religion on which even those who propose it are not agreed.

[24] See Kempfer.
[25] Forbin's "Memoirs."
[26] "History of the Tartars," part v.
[27] Pirard's "Travels," chap. xxvii.

# BOOK XXVI

## OF LAWS IN RELATION TO THE NATURE OF THE THINGS THAT THEY DETERMINE

1. Idea of this book.—2. Of laws divine and human.—3. Of civil laws contrary to the law of Nature.—4. Cases, in which we may judge by the principles of the civil law in limiting the principles of the law of Nature.—5. That the order of succession or inheritance depends on the principles of political or civil law, and not on those of the law of Nature.—6. That we ought not to decide by the precepts of religion what belongs only to the law of Nature.—7. That we ought not to regulate by the principles of the canon law things which should be regulated by those of the civil law.—8. That things which ought to be regulated by the principles of civil law can seldom be regulated by those of religion.—9. In what case we ought to follow the civil law which permits, and not the law of religion which forbids.—10. That human courts of justice should not be regulated by the maxims of those tribunals which relate to the other life.—11. In what cases, with regard to marriage, we ought to follow the laws of religion; and in what cases we should follow the civil laws.—12. In what instances marriages between relatives should be regulated by the laws of Nature, and in what instances by the civil laws.—13. That we should not regulate by the principles of political laws those things which depend on the principles of civil law.—14. That we ought not to decide by the rules of the civil law when it is proper to decide by those of the political law.—15. That it is necessary to inquire whether the laws which seem contradictory are of the same class.—16. That we should not decide those things by the civil law which ought to be decided by domestic laws.—17. That we ought not to decide by the principles of the civil laws those things which belong to the law of nations.—18. That we should not decide by political laws things which belong to the law of nations.—19. The unhappy state of the Inca Atahualpa.—20. That when, by some circumstance, the political law becomes destructive to the state, we ought to decide by such a political law as will preserve it, which sometimes becomes a law of nations.—21. That the regulations of the police are of a different class from other civil laws.—22. That we should not follow the general disposition of the civil law in things which ought to be subject to particular rules drawn from their own nature.

I. MEN are governed by several kinds of laws: by the law of Nature; by the divine law, which is that of religion; by ecclesiastical, otherwise called canon law, which is that of religious polity; by the law of nations, which may be considered as the civil law of the whole globe, in which sense every nation is a citizen; by the general political law, which relates to that human wisdom whence all societies derive their origin; by the particular political law, the object of which is each society; by the law of conquest founded on this, that one nation has been willing and able, or has had a right to offer violence to another; by the civil law of every society, by which a citizen may defend his possessions and his life against the attacks of any other citizen; in fine, by domestic law, which proceeds from a society's being divided into several families, all which have need of a particular government.

There are therefore different orders of laws, and the sublimity of human reason consists in perfectly knowing to which of these orders the things that are to be determined ought to have a principal relation, and not to throw into confusion those principles which should govern mankind.

II. We ought not to decide by divine laws what should be decided by human laws, nor determine by human what should be determined by divine laws.

These two sorts of laws differ in their origin, in their object, and in their nature.

It is universally acknowledged that human laws are, in their own nature, different from those of religion; this is an important principle, but this principle is itself subject to others, which must be inquired into.

1. It is in the nature of human laws to be subject to all the accidents which can happen, and to vary in proportion as the will of man changes; on the contrary, by the nature of the laws of religion, they are never to vary. Human

laws appoint for some good; those of religion for the best; good may have another object, because there are many kinds of good; but the best is but one: it can not, therefore, change. We may alter laws because they are reputed no more than good; but the institutions of religion are always supposed to be the best.

2. There are kingdoms in which the laws are of no value, as they depend only on the capricious and fickle humour of the sovereign. If in these kingdoms the laws of religion were of the same nature as the human institutions, the laws of religion too would be of no value. It is, however, necessary to the society that it should have something fixed; and it is religion that has this stability.

3. The influence of religion proceeds from its being believed; that of human laws from their being feared. Antiquity accords with religion, because we have frequently a firmer belief in things in proportion to their distance; for we have no ideas annexed to them drawn from those times which can contradict them. Human laws, on the contrary, receive advantage from their novelty, which implies the actual and particular attention of the legislator to put them in execution.

III. If a slave, says Plato, defends himself, and kills a freeman, he ought to be treated as a parricide.[1] This is a civil law which punishes self-defence, though dictated by Nature.

The law of Henry VIII, which condemned a man without being confronted by witnesses, was contrary to self-defence. In order to pass sentence of condemnation, it is necessary that the witnesses should know whether the man against whom they make their deposition is he whom they accuse, and that this man be at liberty to say, "I am not the person you mean."

The law passed during the same reign, which con-

[1] Lib. ix, "On Laws."

demned every woman who, having carried on a criminal commerce, did not declare it to the king before she married him, violated the regard due to natural modesty. It is as unreasonable to oblige a woman to make this declaration as to oblige a man not to attempt the defence of his own life.

The law of Henry II which condemned the woman to death who lost her child, in case she did not make known her pregnancy to the magistrate, was not less contrary to self-defence. It would have been sufficient to oblige her to inform one of her nearest relatives, who might watch over the preservation of the infant.

What other information could she give in this situation, so torturing to natural modesty? Education has heightened the notion of preserving that modesty; and in those critical moments scarcely has she any idea remaining of the loss of life.

There has been much talk of a law in England which permitted girls seven years old to choose a husband.[2] This law was shocking in two ways: it had no regard to the time when Nature gives maturity to the understanding, nor to that in which she gives maturity to the body.

Among the Romans, a father might oblige his daughter to repudiate her husband, though he himself had consented to the marriage.[3] But it is contrary to Nature for a divorce to be in the power of a third person.

A divorce can be agreeable to Nature only when it is by consent of the two parties, or at least of one of them; but when neither consents it is a monstrous separation. In short, the power of divorce can be given only to those who feel the inconveniences of marriage, and who are sensible of the moment when it is for their interest to make them cease.

[2] Mr. Bayle, in his "Criticism on the History of Calvinism," speaks of this law, p. 263.

[3] See Law 5, in the code de repudiis et judicio de moribus sublato.

Gundebald, King of Burgundy, decreed that if the wife or son of a person guilty of robbery did not reveal the crime, they were to become slaves.[4] This was contrary to Nature: a wife to inform against her husband! a son to accuse his father! To avenge one criminal action they ordained another still more criminal.

The law of Recessuinthus permits the children of the adulteress, or those of her husband, to accuse her, and to put the slaves of the house to the torture.[5] How iniquitous the law which, to preserve a purity of morals, overturns Nature, the origin, the source of all morality!

With pleasure we behold in our theatres a young hero[6] express as much horror against the discovery of his mother-in-law's guilt as against the guilt itself. In his surprise, though accused, judged, condemned, proscribed, and covered with infamy, he scarcely dares to reflect on the abominable blood whence Phædra sprang; he abandons the most tender object, all that is most dear, all that lies nearest his heart, all that can fill him with rage, to deliver himself up to the unmerited vengeance of the gods. It is Nature's voice, the sweetest of all sounds, that inspires us with this pleasure.

IV. An Athenian law obliged children to provide for their fathers when fallen into poverty;[7] it excepted those who were born of a courtesan,[8] those whose chastity had been infamously prostituted by their father, and those to whom he had not given any means of gaining a livelihood.[9]

The law considered that, in the first case, the father being uncertain, he had rendered the natural obligation precarious; that in the second, he had sullied the life he

[4] "Law of the Burgundians," tit. 47.

[5] In the code of the Visigoths, lib. iii, tit. 4, § 13.

[6] Hippolyte. See the "Phèdre" of Racine, act iv, sc. 2. (J. V. P.)

[7] Under pain of infamy, another under pain of imprisonment.

[8] Plutarch, "Life of Solon."

[9] Plutarch, "Life of Solon," and Gallienus, in exhort. ad art., cap. viii.

had given, and done the greatest injury he could do to his children in depriving them of their reputation; that in the third, he had rendered insupportable a life which had no means of subsistence. The law suspended the natural obligation of children, because the father had violated his; it looked upon the father and the son as no more than two citizens, and determined in respect to them only from civil and political views; ever considering that a good republic ought to have a particular regard to manners. I am apt to think that Solon's law was a wise regulation in the first two cases, whether that in which Nature has left the son in ignorance with regard to his father, or that in which she even seems to ordain that he should not own him; but it can not be approved with respect to the third, where the father had only violated a civil institution.

V. The Voconian law ordained that no woman should be left heiress to an estate, not even if she had an only child. Never was there a law, says St. Augustine, more unjust.[10] A formula of Marculfus treats that custom as impious which deprives daughters of the right of succeeding to the estate of their fathers.[11] Justinian gives the appellation of barbarous to the right which the males had formerly of succeeding in prejudice to the daughters.[12] These notions proceeded from their having considered the right of children to succeed to their father's possessions as a consequence of the law of Nature, which it is not.

The law of Nature ordains that fathers shall provide for their children, but it does not oblige them to make them their heirs. The division of property, the laws of this division, and the succession after the death of the person who has had this division can be regulated only by the community, and consequently by political or civil laws.

True it is that a political or civil order frequently de-

[10] "De Civitate Dei," lib. iv. [11] Lib. ii, cap. xii. [12] Novell. 21.

mands that children should succeed to their father's estate; but it does not always make this necessary.

There may be some reasons given why the laws of our fiefs appoint that the eldest of the males, or the nearest relatives of the male side, should have all, and the females nothing, and why, by the laws of the Lombards,[13] the sisters, the natural children, the other relatives; and, in their default, the treasury might share the inheritance with the daughters.

It was regulated in some of the dynasties of China that the brothers of the emperor should succeed to the throne, and that the children should not. If they were willing that the prince should have a certain degree of experience, if they feared his being too young, and if it had become necessary to prevent eunuchs from placing children successively on the throne, they might very justly establish a like order of succession, and when some writers have treated these brothers as usurpers, they have judged only by ideas received from the laws of their own countries.[14]

According to the custom of Numidia,[15] Desalces, brother of Gala, succeeded to the kingdom, not Massinissa, his son. And even to this day, among the Arabs in Barbary, where each village has its chief, they adhere to this ancient custom, by choosing the uncle, or some other relative, to succeed.[16]

There are monarchies merely elective; and since it is evident that the order of succession ought to be derived from the political or civil laws, it is for these to decide in what cases it is agreeable to reason that the succession be granted to children, and in what cases it ought to be given to others.

In countries where polygamy is established, the prince

[13] Lib. ii, tit. 14, §§ 6, 7, and 8.
[14] Du Halde on the Second Dynasty.
[15] Livy, Decade 3, lib. vi.
[16] Shaw's "Travels," vol. i, p. 402.

has many children; and the number of them is much greater in some of these countries than in others. There are states[17] where it is impossible for the people to maintain the children of the king; they might therefore make it a law that the crown shall devolve, not on the king's children, but on those of his sister.

A prodigious number of children would expose the state to the most dreadful civil wars. The order of succession which gives the crown to the children of the sister, the number of whom is not larger than those of a prince who has only one wife, must prevent these inconveniences.

There are people among whom reasons of state, or some maxims of religion, have made it necessary that the crown should be always fixed in a certain family; hence, in India, proceeds the jealousy of their tribes,[18] and the fear of losing the descent; they have there conceived that, never to want princes of the blood royal, they ought to take the children of the eldest sister of the king.

A general maxim: it is an obligation of the law of Nature to provide for our children; but to make them our successors is an obligation of the civil or political law. Hence are derived the different regulations with respect to bastards in the different countries of the world; these are according to the civil or political laws of each country.

VI. The Abassines have a most severe lent of fifty days, which weakens them to such a degree that for a long time they are incapable of business; the Turks do not fail to attack them after their lent.[19] Religion ought, in favour

[17] See the "Collection of Voyages that contributed to the Establishment of the East India Company," vol. iv, part i, p. 114. And Mr. Smith's "Voyage to Guinea," part ii, p. 150, concerning the kingdom of Judia.

[18] See "Edifying Letters," letter 14, and the "Voyages that contributed to the Establishment of the East India Company," vol. iii, part ii, p. 644.

[19] "Collection of Voyages that contributed to the Establishment of the East India Company," vol. iv, pp. 35 and 103.

of the natural right of self-defence, to set bounds to these customs.

The Jews were obliged to keep the Sabbath; but it was an instance of great stupidity in this nation not to defend themselves when their enemies chose to attack them on this day.[20]

Cambyses, laying siege to Pelusium, set in the first rank a great number of those animals which the Egyptians regarded as sacred; the consequence was that the soldiers of the garrison durst not molest them. Who does not see that self-defence is a duty superior to every precept?

VII. By the civil law of the Romans[21] he who took a thing privately from a sacred place was punished only for the guilt of theft; by the canon law he was punished for the crime of sacrilege.[22] The canon law takes cognizance of the place; the civil laws of the fact. But to attend only to the place is neither to reflect on the nature and definition of a theft, nor on the nature and definition of sacrilege.

As the husband may demand a separation by reason of the infidelity of his wife, the wife might formerly demand it on account of the infidelity of the husband.[23] This custom, contrary to a regulation made in the Roman laws,[24] was introduced into the ecclesiastic court,[25] where nothing was regarded but the maxims of canon law; and, indeed, if we consider marriage as a thing merely spiritual, and as relating only to the things of another life, the violation is in both cases the same, but the political and civil laws of almost all nations have, with reason, made a distinction

[20] As they did when Pompey besieged the temple. (Dio. xxxvi.) (J. V. P.)

[21] Leg. ff. ad leg. Juliam peculatus.

[22] Capite quisquis 17, quæstione 4. Cujas observat., lib. xiii, cap. xix, tome iii.

[23] Beaumanoir on the ancient customs of Beauvoisis, chap. xviii.

[24] Law of the first Code, ad. leg. Juliam de adulteriis.

[25] At present they do not take cognizance of these things in France.

between them. They have required from the women a degree of reserve and continency which they have not exacted from the men; because in women a violation of chastity supposes a renunciation of all virtue; because women, by violating the laws of marriage, quit the state of their natural dependence; because Nature has marked the infidelity of women with certain signs; and, in fine, because the children of the wife born in adultery necessarily belong and are an expense to the husband, while the children produced by the adultery of the husband are not the wife's, nor are an expense to the wife.

VIII. The laws of religion have a greater sublimity; the civil laws a greater extent.

The laws of perfection drawn from religion have more in view the goodness of the person that observes them than of the society in which they are observed; the civil laws, on the contrary, have more in view the moral goodness of men in general than that of individuals.

Thus, venerable as those ideas are which immediately spring from religion, they ought not always to serve as a first principle to the civil laws; because these have another, the general welfare of society.

The Romans made regulations among themselves to preserve the morals of their women; these were political institutions. Upon the establishment of monarchy they made civil laws on this head, and formed them on the principles of their civil government. When the Christian religion became predominant, the new laws that were then made had less relation to the general rectitude of morals than to the holiness of marriage; they had less regard to the union of the two sexes in a civil than in a spiritual state.

At first, by the Roman law, a husband who brought back his wife into his house after she had been found guilty of adultery was punished as an accomplice in her de-

bauch.[26] Justinian, from other principles, ordained that during the space of two years he might go and take her again out of the monastery.[27]

Formerly, when a woman whose husband was gone to the war heard no longer any tidings of him, she might easily marry again, because she had in her hands the power of making a divorce. The law of Constantine obliged the woman to wait four years, after which she might send the bill of divorce to the general; and, if her husband returned, he could not then charge her with adultery.[28] But Justinian decreed that let the time be never so long after the departure of her husband, she should not marry unless by the deposition and oath of the general she could prove the death of her husband.[29] Justinian had in view the indissolubility of marriage; but we may safely say that he had it too much in view. He demanded a positive proof when a negative one was sufficient; he required a thing extremely difficult to give, an account of the fate of a man at a great distance, and exposed to so many accidents; he presumed a crime—that is, a desertion of the husband—when it was so natural to presume his death. He injured the commonwealth by obliging women to live out of marriage; he injured individuals by exposing them to a thousand dangers.

The law of Justinian, which ranked among the causes of divorce the consent of the husband and wife to enter into a monastery, was entirely opposite to the principles of the civil laws.[30] It is natural that the causes of divorce should have their origin in certain impediments which could not be foreseen before marriage; but this desire of preserving chastity might be foreseen, since it is in our-

[26] Leg. 11, § ult. ff. ad. leg. Juliam de adulteriis.
[27] Nov. 134, Col. 9, cap. x, tit. 170.
[28] Leg. 7, de repudiis, et judicio de morib. sublato.
[29] Auth. hodie quantiscumque cod. de repudiis.
[30] Auth. quod hodie cod. de repudiis.

selves. This law favours inconstancy in a state which is by its very nature perpetual; it shook the fundamental principle of divorce, which permits the dissolution of one marriage only from the hope of another. In short, if we view it in a religious light, it is no more than giving victims to God without a sacrifice.

IX. When a religion which prohibits polygamy is introduced into a country where it is permitted, we can not believe (speaking only as a politician) that the laws of the country ought to suffer a man who has many wives to embrace this religion; unless the magistrate or the husband should indemnify them, by restoring them in some way or other to their civil state. Without this their condition would be deplorable; no sooner would they obey the laws than they would find themselves deprived of the greatest advantages of society.

X. The tribunal of the Inquisition, formed by the Christian monks on the idea of the tribunal of penitence, is contrary to all good policy. It has everywhere met with a general dislike, and must have sunk under the oppositions it met with, if those who were resolved to establish it had not drawn advantages even from these oppositions.

This tribunal is insupportable in all governments. In monarchies it only makes informers and traitors; in republics it only forms dishonest men; in a despotic state it is as destructive as the government itself.

It is one abuse of this tribunal that, of two persons accused of the same crime, he who denies is condemned to die, and he who confesses avoids the punishment. This has its source in monastic ideas, where he who denies seems in a state of impenitence and damnation; and he who confesses, in a state of repentance and salvation. But a distinction of this kind can have no relation to human tribunals. Human justice, which sees only the actions, has but one compact with men—namely, that of innocence;

divine justice, which sees the thoughts, has two, that of innocence and repentance.

XI. It has happened in all ages and countries that religion has been blended with marriages. When certain things have been considered as impure or unlawful, and had nevertheless become necessary, they were obliged to call in religion to legitimate in the one case, and to reprove in others.

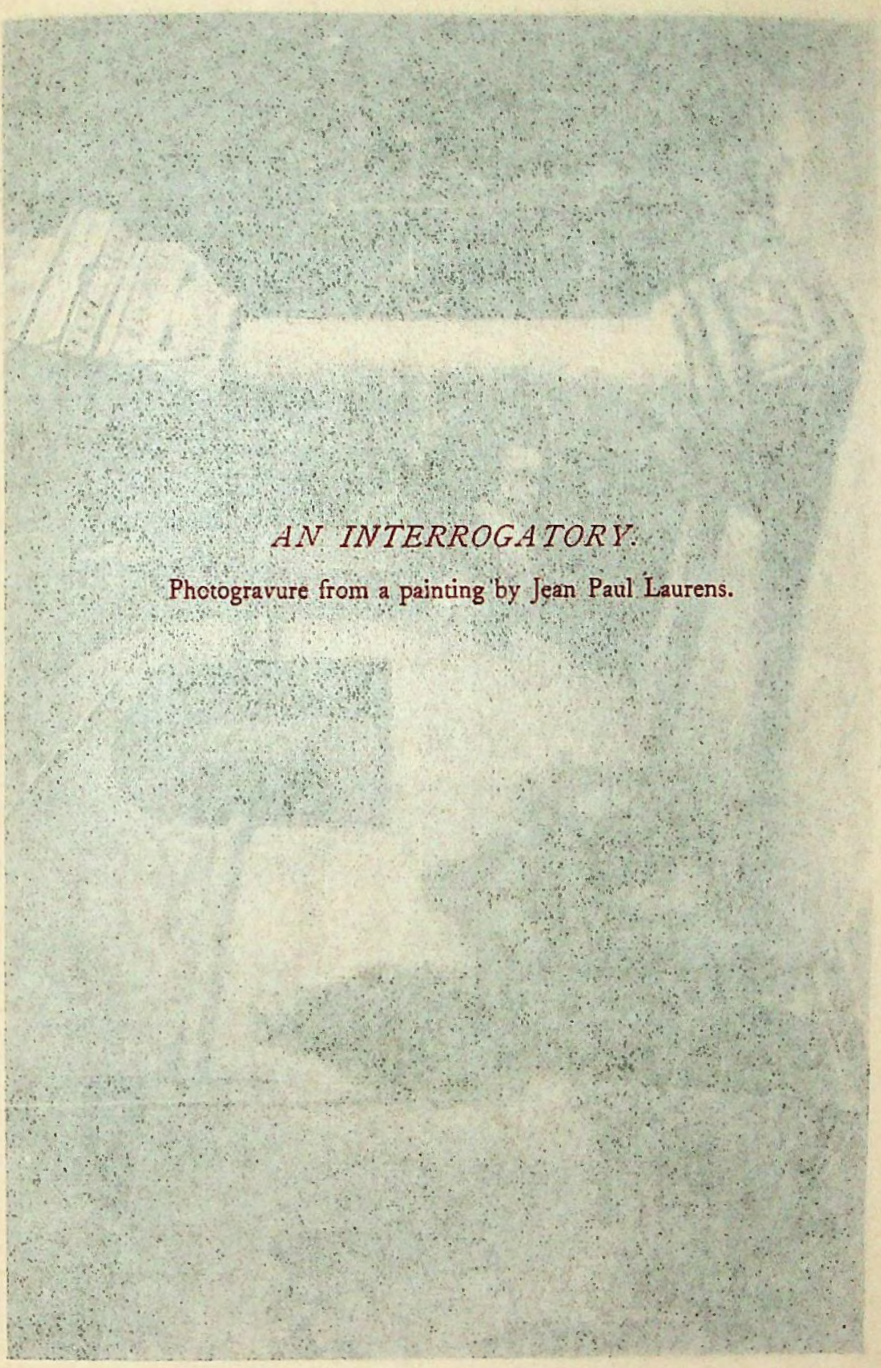
On the other hand, as marriage is of all human actions that in which society is most interested, it became proper that this should be regulated by the civil laws.

Everything which relates to the nature of marriage, its form, the manner of contracting it, the fruitfulness it occasions, which has made all nations consider it as the object of a particular benediction, a benediction which, not being always annexed to it, is supposed to depend on certain superior graces—all this is within the resort of religion.

The consequences of this union with regard to property, the reciprocal advantages, everything which has a relation to the new family, to that from which it sprang, and to that which is expected to arise—all this relates to the civil laws.

As one of the great objects of marriage is to take away that uncertainty which attends unlawful conjunctions, religion here stamps its seal, and the civil laws join theirs to it, to the end that it may be as authentic as possible. Thus, besides the conditions required by religion to make a marriage valid, the civil laws may still exact others.

The civil laws receive this power from their being additional obligations, and not contradictory ones. The law of religion insists upon certain ceremonies, the civil laws on the consent of fathers; in this case, they demand something more than that of religion, but they demand nothing contrary to it.



*AN INTERROGATORY.*

Photogravure from a painting by Jean Paul Laurens.

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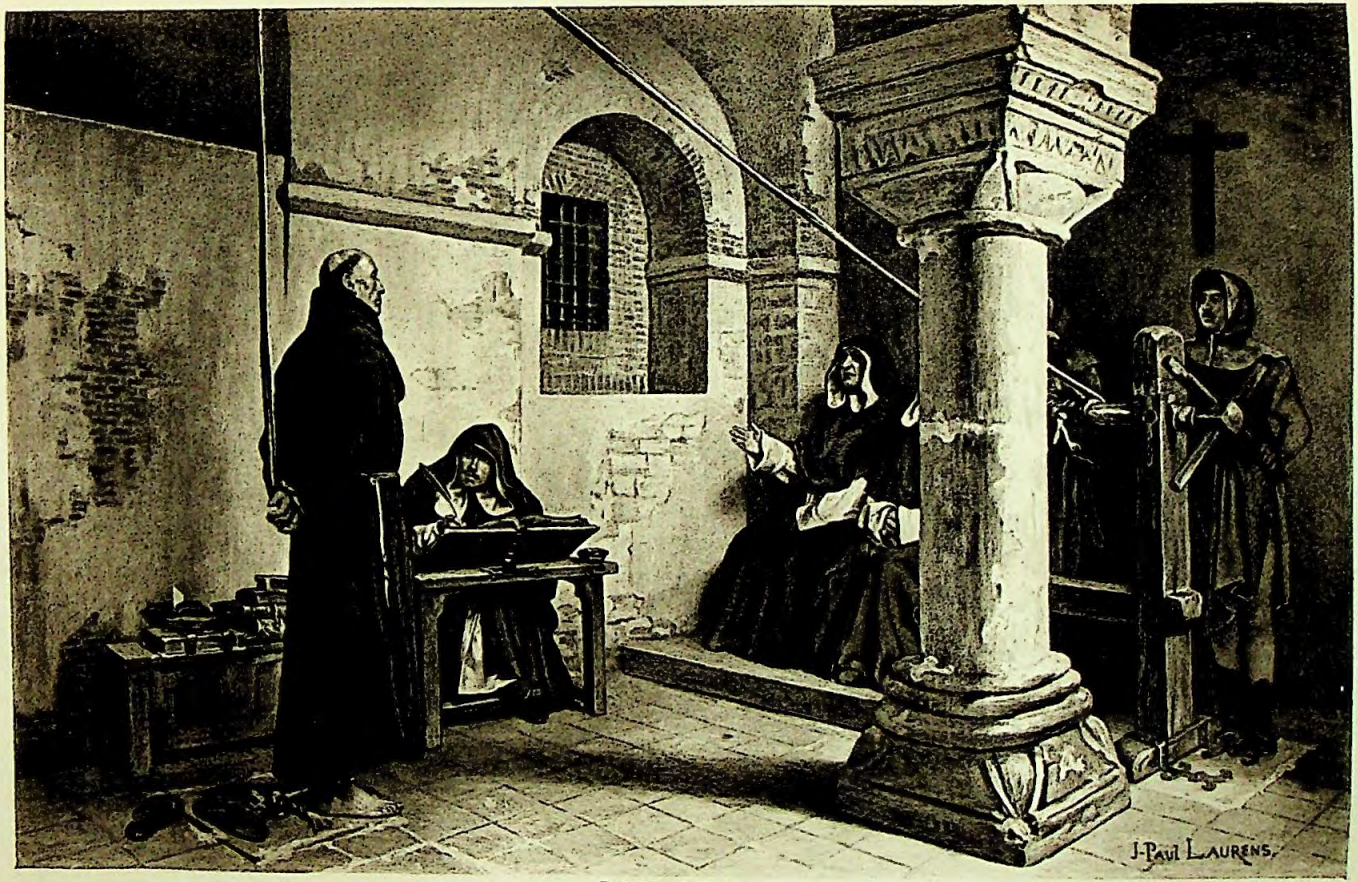


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It follows, hence, that the religious law must decide whether the bond be indissoluble or not; for if the laws of religion had made the bond indissoluble, and the civil laws had declared it might be broken, they would be contradictory to each other.

Sometimes the regulations made by the civil laws with respect to marriage are not absolutely necessary; such are those established by the laws which, instead of annulling the marriage, only punish those who contract it.

Among the Romans, the Papian law declared those marriages illegal which had been prohibited, and yet only subjected them to a penalty;[31] but a Senatus-Consultum, made at the instance of the Emperor Marcus Antoninus, declared them void; there then no longer subsisted any such thing as a marriage, wife, dowry, or husband.[32] The civil laws determine according to circumstances; sometimes they are most attentive to repair the evil; at others, to prevent it.

XII. With regard to the prohibition of marriage between relatives, it is a thing extremely delicate to fix exactly the point at which the laws of Nature stop and where the civil laws begin. For this purpose we must establish some principles.

The marriage of the son with the mother confounds the state of things; the son ought to have an unlimited respect for his mother, the wife an unlimited respect for her husband; therefore the marriage of the mother to her son would subvert the natural state of both.

Besides, Nature has forwarded in women the time in which they are able to have children, but has retarded it in men; and, for the same reason, women sooner lose this ability and men later. If the marriage between the mother

[31] See what has been said on this subject in book xxiii, chap. xx, in the relation they bear to the number of inhabitants.

[32] See Law 16, ff. de ritu nuptiarum; and Law 3, § 1, also Digest. de donationibus inter virum et uxorem.

and the son were permitted, it would almost always be the case that when the husband was capable of entering into the views of Nature, the wife would be incapable.

The marriage between the father and the daughter is contrary to Nature, as well as the other; but it is not less contrary, because it has not these two obstacles. Thus the Tartars, who may marry their daughters,[33] never marry their mothers, as we see in the accounts we have of that nation.[34]

It has ever been the natural duty of fathers to watch over the chastity of their children. Intrusted with the care of their education, they are obliged to preserve the body in the greatest perfection, and the mind from the least corruption; to encourage whatever has a tendency to inspire them with virtuous desires, and to nourish a becoming tenderness. Fathers, always employed in preserving the morals of their children, must have a natural aversion to everything that can render them corrupt. Marriage, you will say, is not a corruption; but before marriage they must speak, they must make their persons beloved, they must seduce; it is this seduction which ought to inspire us with horror.

There should be therefore an insurmountable barrier between those who ought to give the education, and those who are to receive it, in order to prevent every kind of corruption, even though the motive be lawful. Why do fathers so carefully deprive those who are to marry their daughters of their company and familiarity?

The horror that arises against the incest of the brother with the sister should proceed from the same source. The desire of fathers and mothers to preserve the morals of their children and families untainted is sufficient to inspire

[33] This law is very ancient among them. "Attila," says Priscus, "in his embassy stopped in a certain place to marry Esca his daughter." "A thing permitted," he adds, "by the laws of the Scythians," p. 22.

[34] "History of the Tartars," part iii, p. 326.

their offspring with a detestation of everything that can lead to the union of the two sexes.

The prohibition of marriage between cousins-german has the same origin. In the early ages—that is, in the times of innocence—in the ages when luxury was unknown, it was customary for children [35] upon their marriage not to remove from their parents, but settle in the same house; as a small habitation was at that time sufficient for a large family; the children of two brothers, or cousins-german,[36] were considered both by others and themselves as brothers. The estrangement then between the brothers and sisters as to marriage subsisted also between the cousins-german.[37] These principles are so strong and so natural that they have had their influence almost over all the earth, independently of any communication. It was not the Romans who taught the inhabitants of Formosa [38] that the marriage of relatives of the fourth degree was incestuous; it was not the Romans that communicated this sentiment to the Arabs; [39] it was not they who taught it to the inhabitants of the Maldivian islands.[40]

But if some nations have not rejected marriages between fathers and children, sisters and brothers, we have seen in the first book that intelligent beings do not always follow the law of Nature. Who could have imagined it! Religious ideas have frequently made men fall into these mistakes. If the Assyrians and the Persians married their mothers, the first were influenced by a religious respect

[35] It was thus among the ancient Romans.

[36] Among the Romans they had the same name; the cousins-german were called brothers.

[37] It was thus at Rome in the first ages, till the people made a law to permit them; they were willing to favour a man extremely popular, who had married his cousin-german. (Plutarch's treatise entitled "Questions concerning the Affairs of the Romans.")

[38] "Collection of Voyages that contributed to the Establishment of the East India Company," vol. v, part i. An account of the state of the isle of Formosa.

[39] Koran, chapter on "Women." [40] See Francis Pirard.

for Semiramis, and the second did it because the religion of Zoroaster gave a preference to these marriages.[41] If the Egyptians married their sisters, it proceeded from the wildness of the Egyptian religion, which consecrated these marriages in honour of Isis. As the spirit of religion leads us to attempt whatever is great and difficult, we can not infer that a thing is natural from its being consecrated by a false religion.

The principle which informs us that marriages between fathers and children, between brothers and sisters, are prohibited in order to preserve natural modesty in families will help us to the discovery of those marriages that are forbidden by the law of Nature, and of those which can be so only by the civil law.

As children dwell, or are supposed to dwell, in their father's house, and consequently the son-in-law with the mother-in-law, the father-in-law with the daughter-in-law, or wife's daughter, the marriage between them is forbidden by the law of Nature. In this case the resemblance has the same effect as the reality, because it springs from the same cause; the civil law neither can nor ought to permit these marriages.

There are nations, as we have already observed, among whom cousins-german are considered as brothers, because they commonly dwell in the same house; there are others where this custom is not known. Among the first the marriage of cousins-german ought to be regarded as contrary to Nature; not so among the others.

But the laws of Nature can not be local. Therefore, when these marriages are forbidden or permitted, they are, according to the circumstances, permitted or forbidden by a civil law.

It is not a necessary custom for the brother-in-law and

[41] They were considered as more honourable. See Philo, de specialibus legib. quæ pertinet ad præcepta decalogi. Paris, 1640, p. 778.

the sister-in-law to dwell in the same house. The marriage between them is not then prohibited to preserve chastity in the family; and the law which forbids or permits it is not a law of Nature, but a civil law, regulated by circumstances and dependent on the customs of each country; these are cases in which the laws depend on the morals or customs of the inhabitants.

The civil laws forbid marriages when by the customs received in a certain country they are found to be in the same circumstances as those forbidden by the law of Nature; and they permit them when this is not the case. The prohibitions of the laws of Nature are invariable, because the thing on which they depend is invariable; the father, the mother, and the children necessarily dwell in the same house.

But the prohibitions of the civil laws are accidental, because they depend on an accidental circumstance, cousins-german and others dwelling in the house by accident.

This explains why the laws of Moses, those of the Egyptians,[42] and of many other nations permitted the marriage of the brother-in-law with the sister-in-law; while these very marriages were disallowed by other nations.

In the Indies they have a very natural reason for admitting this sort of marriages. The uncle is there considered as the father, and is obliged to maintain and educate his nephew as if he were his own child; this proceeds from the disposition of this people, which is good-natured and full of humanity. This law or this custom has produced another: if a husband has lost his wife, he does not fail to marry her sister;[43] which is extremely natural, for his new consort becomes the mother of her sister's children, and not a cruel stepmother.

[42] See Law 8, of the "Code de incestis et inutilibus nuptiis."

[43] "Edifying Letters," 4th, 403.

XIII. As men have given up their natural independence to live under political laws, they have given up the natural community of goods to live under civil laws.

By the first, they acquired liberty; by the second, property. We should not decide by the laws of liberty, which, as we have already said, is only the government of the community, what ought to be decided by the laws concerning property. It is a paralogism to say that the good of the individual should give way to that of the public; this can never take place, except when the government of the community, or, in other words, the liberty of the subject, is concerned; this does not affect such cases as relate to private property, because the public good consists in every one's having his property, which was given him by the civil laws, invariably preserved.

Cicero maintains that the agrarian laws were unjust; because the community was established with no other view than that every one might be able to preserve his property.

Let us, therefore, lay down a certain maxim, that whenever the public good happens to be the matter in question, it is not for the advantage of the public to deprive an individual of his property, or even to retrench the least part of it by a law, or a political regulation. In this case we should follow the rigour of the civil law, which is the palladium of property.

Thus when the public has occasion for the estate of an individual, it ought never to act by the rigour of political law; it is here that the civil law ought to triumph, which, with the eyes of a mother, regards every individual as the whole community.

If the political magistrate would erect a public edifice, or make a new road, he must indemnify those who are injured by it; the public is in this respect like an individual who treats with an individual. It is fully enough that it can oblige a citizen to see his inheritance, and that it

can strip him of this great privilege which he holds from the civil law, the not being forced to alienate his possessions.

After the nations which subverted the Roman Empire had abused their very conquests, the spirit of liberty called them back to that of equity. They exercised the most barbarous laws with moderation; and if any one should doubt the truth of this, he need only read Beaumanoir's admirable work on jurisprudence, written in the twelfth century.

They mended the highways in his time as we do at present. He says that when a highway could not be repaired they made a new one as near the old as possible; but indemnified the proprietors at the expense of those who reaped any advantage from the road.[44] They determined at that time by the civil law; in our days, we determine by the law of politics.

XIV. Most difficulties on this subject may be easily solved by not confounding the rules derived from property with those which spring from liberty.

Is the demesne of a state or government alienable, or is it not? This question ought to be decided by the political law, and not by the civil. It ought not to be decided by the civil law, because it is as necessary that there should be demesnes for the subsistence of a state, as that the state should have civil laws to regulate the disposal of property.

If, then, they alienate the demesne, the state will be forced to make a new fund for another. But this expedient overturns the political government, because, by the nature of the thing, for every demesne that shall be established, the subject will always be obliged to pay more, and the

[44] "The lord appointed collectors to receive the toll from the peasant, the gentlemen were obliged to contribute by the count, and the clergy to the bishop." (Beaumanoir, chap. xxii.)

sovereign to receive less; in a word, the demesne is necessary, and the alienation is not.

The order of succession is, in monarchies, founded on the welfare of the state; this makes it necessary that such an order should be fixed to avoid the misfortunes which I have said must arise in a despotic kingdom, where all is uncertain, because all is arbitrary.

The order of succession is not fixed for the sake of the reigning family, but because it is the interest of the state that it should have a reigning family. The law which regulates the succession of individuals is a civil law, whose view is the interest of individuals; that which regulates the succession to monarchy is a political law, which has in view the welfare and preservation of the kingdom.

It follows, hence, that when the political law has established an order of succession in government, and this order is at an end, it is absurd to reclaim the succession in virtue of the civil law of any nation whatsoever. One particular society does not make laws for another society. The civil laws of the Romans are no more applicable than any other civil laws. They themselves did not make use of them when they proceeded against kings; and the maxims by which they judged kings are so abominable, that they ought never to be revived.

It follows also, hence, that when the political law has obliged a family to renounce the succession, it is absurd to insist upon the restitutions drawn from the civil law. Restitutions are in the law, and may be good against those who live in the law, but they are not proper for such as have been raised up for the law, and who live for the law.

It is ridiculous to pretend to decide the rights of kingdoms, of nations, and of the whole globe by the same maxims on which (to make use of an expression of

Cicero)[45] we should determine the right of a gutter between individuals.

Ostracism ought to be examined by the rules of politics, and not by those of the civil law; and so far is this custom from rendering a popular government odious, that it is, on the contrary, extremely well adapted to prove its lenity. We should be sensible of this ourselves, if, while banishment is always considered among us as a penalty, we are able to separate the idea of ostracism from that of punishment.

Aristotle[46] tells us it is universally allowed that this practice has something in it both humane and popular. If in those times and places where this sentence was executed they found nothing in it that appeared odious, is it for us who see things at such a distance to think otherwise than the accuser, the judges and the accused themselves?

And if we consider that this judgment of the people loaded the person with glory on whom it was passed; that when at Athens it fell upon a man without merit,[47] from that very moment they ceased to use it;[48] we shall find that numbers of people have obtained a false idea of it, for it was an admirable law that could prevent the ill consequences which the glory of a citizen might produce by loading him with new glory.

XV. At Rome the husband was permitted to lend his wife to another. Plutarch tells us this in express terms.[49] We know that Cato lent his wife to Hortensius,[50] and Cato was not a man to violate the laws of his country.

On the other hand, a husband who suffered his wife to be debauched, who did not bring her to justice, or who

[45] Lib. i, of "Laws."
[46] "Repub.," lib. iii, cap. xiii.
[47] Hyperbolus. See Plutarch, "Life of Aristides."
[48] It was found opposite to the spirit of the legislator.
[49] Plutarch in his comparison between Lycurgus and Numa.
[50] Plutarch, "Life of Cato."

took her again after her condemnation was punished.[51] These laws seem to contradict each other, and yet are not contradictory. The law which permitted a Roman to lend his wife was visibly a Lacedæmonian institution, established with a view of giving the republic children of a good species, if I may be allowed the term; the other had in view the preservation of morals. The first was a law of politics, the second a civil law.

XVI. The law of the Visigoths enjoins that the slaves of the house shall be obliged to bind the man and woman they surprise in adultery, and to present them to the husband and to the judge;[52] a terrible law, which puts into the hands of such mean persons the care of public, domestic, and private vengeance!

This law can be nowhere proper but in the seraglios of the East, where the slave who has the charge of the inclosure is deemed an accomplice upon the discovery of the least infidelity. He seizes the criminals, not so much with a view to bring them to justice, as to do justice to himself, and to obtain a scrutiny into the circumstances of the action, in order to remove the suspicion of his negligence.

But, in countries where women are not guarded, it is ridiculous to subject those who govern the family to the inquisition of their slaves.

This inquisition may, in certain cases, be at the most a particular domestic regulation, but never a civil law.

XVII. Liberty consists principally in not being forced to do a thing where the laws do not oblige; people are in this state only as they are governed by civil laws; and because they live under those civil laws they are free.

It follows, hence, that princes who live not among themselves under civil laws are not free; they are governed by force; they may continually force, or be forced. Hence

[51] Leg. 11 § ult. ff. ad. leg. Jul. de adulteriis.
[52] "Law of the Visigoths," lib. iii, tit. 4, § 6.

it follows that treaties made by force are as obligatory as those made by free consent. When we, who live under civil laws, are, contrary to law, constrained to enter into a contract, we may, by the assistance of the law, recover from the effects of violence; but a prince, who is always in that state in which he forces, or is forced, can not complain of a treaty which he has been compelled to sign. This would be to complain of his natural state; it would seem as if he would be a prince with respect to other princes, and as if other princes should be subjects with respect to him—that is, it would be contrary to the nature of things.

XVIII. Political laws demand that every man be subject to the natural and civil courts of the country where he resides, and to the censure of the sovereign.

The law of nations requires that princes shall send ambassadors; and a reason drawn from the nature of things does not permit these ambassadors to depend either on the sovereign to whom they are sent, or on his tribunals. They are the voice of the prince who sends them, and this voice ought to be free; no obstacle should hinder the execution of their office; they may frequently offend, because they speak for a man entirely independent; they might be wrongfully accused, if they were liable to be punished for crimes; if they could be arrested for debts, these might be forged. Thus a prince, who has naturally a bold and enterprising spirit, would speak by the mouth of a man who had everything to fear. We must then be guided, with respect to ambassadors, by reasons drawn from the law of nations, and not by those derived from political law. But if they make an ill use of their representative character, a stop may be put to it by sending them back. They may even be accused before their master, who becomes either their judge or their accomplice.

XIX. The principles we have just been establishing were cruelly violated by the Spaniards. The Inca Atahu-

alpa [53] could not be tried by the law of nations; they tried him by political and civil laws; they accused him for putting to death some of his own subjects, for having many wives, etc., and, to fill up the measure of their stupidity, they condemned him not by the political and civil laws of his own country, but by the political and civil laws of theirs.

XX. When that political law which has established in the kingdom a certain order of succession becomes destructive to the body politic for whose sake it was established, there is not the least room to doubt but another political law may be made to change this order; and so far would this law be from opposing the first that it would in the main be entirely conformable to it, since both would depend on this principle, that the safety of the people is the supreme law.

I have said [54] that a great state becoming accessory to another is itself weakened, and even weakens the principal. We know that it is for the interest of the state to have the supreme magistrate within itself, that the public revenues be well administered, and that its specie be not sent abroad to enrich another country. It is of importance that he who is to govern has not imbibed foreign maxims; these are less agreeable than those already established. Besides, men have an extravagant fondness for their own laws and customs; these constitute the happiness of every community; and, as we learn from the histories of all nations, are rarely changed without violent commotions and a great effusion of blood.

It follows, hence, that if a great state has for its heir the possessor of a great state, the former may reasonably exclude him, because a change in the order of succession

[53] See "Garcilaso de la Vega," p. 108.

[54] See book v, chap. xiii; book viii, chaps. xiv, xv, xvi, xvii, and xviii; book ix, chaps. iv, v, vi, and vii; and book x, chaps. vii and viii.

must be of service to both countries. Thus a law of Russia, made in the beginning of the reign of Elizabeth, most wisely excluded from the possession of the crown every heir who possessed another monarchy; thus the law of Portugal disqualifies every stranger who lays claim to the crown by right of blood.

But if a nation may exclude, it may with greater reason be allowed a right to oblige a prince to renounce. If the people fear that a certain marriage will be attended with such consequences as shall rob the nation of its independence, or dismember some of its provinces, it may very justly oblige the contractors and their descendants to renounce all right over them; while he who renounces, and those to whose prejudice he renounces, have the less reason to complain, as the state might originally have made a law to exclude them.

XXI. There are criminals whom the magistrate punishes, there are others whom he reproves. The former are subject to the power of the law, the latter to his authority; those are cut off from society, these they oblige to live according to the rules of society.

In the exercise of the police, it is rather the magistrate who punishes than the law; in the sentence passed on crimes, it is rather the law which punishes than the magistrate. The business of the police consists in affairs which arise every instant, and are commonly of a trifling nature; there is then but little need of formalities. The actions of the police are quick; they are exercised over things which return every day; it would be therefore improper for it to inflict severe punishments. It is continually employed about minute particulars; great examples are therefore not designed for its purpose. It is governed rather by regulations than laws; those who are subject to its jurisdiction are incessantly under the eye of the magistrate; it is therefore his fault if they fall into excess. Thus we ought not to

confound a flagrant violation of the laws with a simple breach of the police; these things are of a different order.

Hence it follows that the laws of an Italian republic,[55] where bearing firearms is punished as a capital crime, and where it is not more fatal to make an ill use of them than to carry them, is not agreeable to the nature of things.

It follows, moreover, that the applauded action of that emperor, who caused a baker to be impaled whom he found guilty of a fraud, was the action of a sultan who knew not how to be just without committing an outrage on justice.

XXII. Is it a good law that all civil obligations passed between sailors in a ship in the course of a voyage should be null? Francis Pirard tells us[56] that in his time it was not observed by the Portuguese, though it was by the French. Men who are together only for a short time, who have no wants, since they are provided for by the prince, who have only one object in view, that of their voyage, who are no longer in society, but are only the inhabitants of a ship, ought not to contract obligations that were never introduced but to support the burden of civil society.

In the same spirit was the law of the Rhodians made at a time when they always followed the coasts; it ordained that those who during a tempest stayed in a vessel should have ship and cargo, and those who quitted it should have nothing.

[55] Venice.

[56] Chap. xiv.

# BOOK XXVII

## OF THE ORIGIN AND REVOLUTIONS OF THE ROMAN LAWS ON SUCCESSIONS

THIS affair derives its establishment from the most distant antiquity, and to penetrate to its foundation, permit me to search among the first laws of the Romans for what I believe nobody yet has been so happy as to discover.

We know that Romulus[1] divided the land of his little kingdom among his subjects; it seems to me that hence the laws of Rome on successions were derived.

The law of the division of lands made it necessary that the property of one family should not pass into another; hence it followed that there were but two orders of heirs established by law, the children and all the descendants that lived under the power of the father, whom they called sui hæredes, or his natural heirs; and, in their default, the nearest relatives on the male side, whom they called agnati.[2]

It followed, likewise, that the relatives on the female side, whom they called cognati, ought not to succeed; they would have conveyed the estate into another family, which was not allowed.

Thence also it followed that the children ought not to succeed to the mother, nor the mother to her children; for this might carry the estate of one family into another. Thus we see them excluded by the law of the Twelve

[1] Dionys. Halicar., lib. ii, c. iii. Plutarch's comparison between Numa and Lycurgus.

[2] Ast si intestato moritur cui suus hæres nec extabit, agnatus proximus familiam habeto. (Fragment of the law of the Twelve Tables in Ulpian, the last title.)

Tables;[3] it called none to the succession but the agnati, and there was no agnation between the son and the mother.

But it was indifferent whether the suus hæres, or, in default of such, the nearest by agnation, was male or female; because, as the relatives on the mother's side could not succeed, though a woman who was an heiress should happen to marry, yet the estate always returned into the family whence it came. On this account the law of the Twelve Tables does not distinguish whether the person who succeeded was male or female.[4]

This was the cause, that though the grandchildren by the son succeeded to the grandfather, the grandchildren by the daughter did not succeed; for, to prevent the estate from passing into another family, the agnati were preferred to them. Hence the daughter, and not her children, succeeded to the father.[5]

Thus among the primitive Romans, the women succeeded, when this was agreeable to the law of the division of lands, and they did not succeed, when this might suffer by it.

Such were the laws of succession among the primitive Romans; and as these had a natural dependence on the constitution, and were derived from the division of lands, it is easy to perceive that they had not a foreign origin, and were not of the number of those brought into the republic by the deputies sent into the cities of Greece.

Dionysius Halicarnassus tells us[6] that Servius Tullius, finding the laws of Romulus and Numa on the division of lands abolished, restored them, and made new ones to give

[3] See the Frag. of Ulpian, § 8, tit. 26. Inst., tit. 3, in præmio ad S. C. Tertullianum.

[4] Paulus, lib. iv, sent., tit. 8, § 3.

[5] "Inst.," lib. iii.

[6] Lib. iv, p. 276.

the old a greater weight. We can not therefore doubt that the laws we have been speaking of, made in consequence of this division, were the work of these three Roman legislators.

The order of succession having been established in consequence of a political law, no citizen was allowed to break in upon it by his private will—that is, in the first ages of Rome he had not the power of making a testament. Yet it would have been hard to deprive him, in his last moments, of the friendly commerce of kind and beneficent actions.

They therefore found a method of reconciling, in this respect, the laws with the desires of the individual. He was permitted to dispose of his substance in an assembly of the people; and thus every testament was, in some sort, an act of the legislative power.

The law of the Twelve Tables permitted the person who made his will, to choose which citizen he pleased for his heir. The reason that induced the Roman laws so strictly to restrain the number of those who might succeed ab intestato was the law of the division of lands; and the reason why they extended so widely the power of the testator was that as the father might sell his children,[7] he might with greater reason deprive them of his substance. These were therefore different effects, since they flowed from different principles; and such is, in this respect, the spirit of the Roman laws.

The ancient laws of Athens did not suffer a citizen to make a will. Solon permitted it, with an exception to those who had children;[8] and the legislators of Rome, filled with the idea of paternal power, allowed the making a will even to the prejudice of their children. It must be

[7] Dionysius Halicarnassus proves, by a law in Numa, that the law which permitted a father to sell his son three times was made by Romulus, and not by the decemvirs. (Lib. ii.)

[8] See Plutarch's "Life of Solon."

confessed that the ancient laws of Athens were more consistent than those of Rome. The indefinite permission of making a will which had been granted to the Romans, ruined little by little the political regulation on the division of lands; it was the principal thing that introduced the fatal difference between riches and poverty; many shares were united in the same person; some citizens had too much, and a multitude of others had nothing. Thus the people being continually deprived of their shares were incessantly calling out for a new distribution of lands. They demanded it in an age when the frugality, the parsimony and the poverty of the Romans were their distinguishing characteristics; as well as at a time when their luxury had become still more astonishing.

Testaments being properly a law made in the assembly of the people, those who were in the army were thereby deprived of a testamentary power. The people therefore gave the soldiers the privilege of making before their companions[9] the dispositions which should have been made before them.[10]

The great assembly of the people met but twice a year; besides, both the people and the affairs brought before them were increased; they therefore judged it convenient to permit all the citizens to make their will before some Roman citizens of ripe age, who were to represent the body of the people;[11] they took five citizens,[12] in whose presence the inheritor purchased his family—that is, his inheritance—of the testator;[13] another citizen brought a

[9] This testament, called in procinctu, was different from that which they styled military, which was established only by the constitutions of the emperors. (Leg. 1, ff. de militari testamento.) This was one of the artifices by which they cajoled the soldiers.

[10] This testament was not in writing, and it was without formality, "sine librâ et tabulis," as Cicero says, lib. i, "De Oratore."

[11] "Instit.," lib. ii, tit. 10, § 1. Aulus Gellius, lib. xv, cap. xxvii. They called this form of testament "per æs et libram."

[12] Ulpian, tit. 10, § 2. [13] Theoph., "Inst.," lib. ii, tit. 10.

pair of scales to weigh the value, for the Romans, as yet, had no money.[14]

To all appearance these five citizens were to represent the five classes of the people; and they set no value on the sixth, as being composed of men who had no property.

We ought not to say, with Justinian, that these scales were merely imaginary; they became, indeed, imaginary in time, but were not so originally. Most of the laws, which afterward regulated wills, were built on the reality of these scales; we find sufficient proof of this in the fragments of Ulpian.[15] The deaf, the dumb, the prodigal, could not make a will: the deaf because he could not hear the words of the buyer of the inheritance; the dumb, because he could not pronounce the terms of nomination; the prodigal, because, as he was excluded from the management of all affairs, he could not sell his inheritance. I omit any further examples.

Wills being made in the assembly of the people were rather the acts of political than of civil laws, a public rather than a private right; whence it followed that the father, while his son was under his authority, could not give him leave to make a will.

Among most nations wills are not subject to greater formalities than ordinary contracts, because both the one and the other are only expressions of the will of him who makes the contract, and both are equally a private right.

But among the Romans, where testaments were derived from the public law, they were attended with much greater formalities than other affairs;[16] and this is still the case in those provinces of France which are governed by the Roman law.

[14] T. Livy, lib. iv, nondum argentum signatum erat. He speaks of the time of the siege of Veii.

[15] Tit. 20, § 13.

[16] "Instit.," lib. ii, tit. 10, § 1.

Testaments being, as I have said, a law of the people, they ought to be made with the force of a command, and in such terms as are called direct and imperative.[17] Hence a rule was formed that they could neither give nor transmit an inheritance without making use of the imperative words; whence it followed that they might very justly in certain cases make a substitution;[18] and ordain that the inheritance should pass to another heir, but that they could never make a fiduciary bequest[19]—that is, charge any one in terms of entreaty to restore an inheritance, or a part of it, to another.

When the father neither instituted his son his heir, nor disinherited him, the will was annulled; but it was valid, though he did not disinherit his daughter, nor institute her his heiress. The reason is plain: when he neither instituted nor disinherited his son, he did an injury to his grandson, who might have succeeded ab intestato to his father; but in neither instituting nor disinheriting his daughter, he did no injury to his daughter's children, who could not succeed ab intestato to their mother, because they were neither sui hæredes nor agnati.[20]

The laws of the ancient Romans concerning successions being formed with the same spirit which dictated the division of lands, did not sufficiently restrain the riches of women; thus a door was left open to luxury, which is always inseparable from this sort of opulence. Between the second and third Punic War they began to perceive the evil and made the Voconian law;[21] but as they were

[17] Let Titus be my heir.

[18] Vulgar, pupillary and exemplary.

[19] Augustus, for particular reasons, first began to authorize the fiduciary bequest, which, in the Roman law, was called fidei commissum. ("Instit.," lib. ii, tit. 23, in præmio.)

[20] Ad liberos matris intestatæ hæredit as, leg. 12 Tab., non pertinebat, quia, fœminæ suos hæredes non habent. (Ulpian, "Frag.," tit. 26, § 7.)

[21] It was proposed by Quintus Voconius, tribune of the people.

induced to this by the most important considerations; as but few monuments have reached us that take notice of this law, and as it has hitherto been spoken of in a most confused manner, I shall endeavour to clear it up.

Cicero has preserved a fragment which forbids the instituting a woman an heiress, whether she was married or unmarried.[22]

The epitome of Livy, where he speaks of this law, says no more;[23] it appears from Cicero[24] and St. Augustine,[25] that the daughter, though an only child, was comprehended in the prohibition.

Cato, the elder, contributed all in his power to get this law passed.[26] Aulus Gellius cites a fragment of a speech,[27] which he made on this occasion. By preventing the succession of women, his intent was to take away the source of luxury, as by undertaking the defence of the Oppian law he intended to put a stop to luxury itself.

In the "Institutes" of Justinian[28] and Theophilus[29] mention is made of a chapter of the Voconian law which limits the power of bequeathing. In reading these authors, everybody would imagine that this chapter was made to prevent the inheritance from being so exhausted by legacies as to render it unworthy of the heir's acceptance. But this was not the spirit of the Voconian law. We have just seen that they had in view the hindering of women from inheriting an estate. The article of this law

See Cicero's "Second Oration against Verres." In the "Epitome of T. Livy," lib. xli, we should read Voconius, instead of Voluminus.

[22] Sanxit . . . ne quis hæredem virginem neve mulierem faceret. (Cicero's "Second Oration against Verres."

[23] Legem tulit, ne quis hæredem mulierem institueret. (Lib. iv.)

[24] "Second Oration against Verres."

[25] "Of the City of God," lib. iii.

[26] "Epitome of Livy," lib. xl.

[27] Lib. xxvii, cap. vi.

[28] "Instit.," lib. iii, tit. 22.

[29] Ibid.

which set bounds to the power of bequeathing entered into this view; for if people had been possessed of the liberty to bequeath as much as they pleased, the women might have received as legacies what they could not receive by succession.

The Voconian law was made to hinder the women from growing too wealthy; for this end it was necessary to deprive them of large inheritances, and not of such as were incapable of supporting luxury. The law fixed a certain sum to be given to the women whom it deprived of the succession. Cicero,[30] from whom we have this particular, does not tell us what was the sum; but by Dio we are informed it was a hundred thousand sesterces.[31]

The Voconian law was made to regulate opulence, not to lay a restraint upon poverty; hence Cicero [32] informs us that it related only to those whose names were registered in the censors' books.

This furnished a pretence for eluding the law: it is well known that the Romans were extremely fond of set forms; and we have already taken notice that it was the spirit of the republic to follow the letter of the law. There were fathers who would not give in their names to be enrolled by the censors, because they would have it in their power to leave the succession to a daughter; and the prætors determined that this was no violation of the Voconian law, since it was not contrary to the letter of it.

One Anius Asellus had appointed his daughter his sole heir and executrix. He had a right to make this disposition, says Cicero;[33] he was not restrained by the Voconian law, since he was not included in the census.

[30] "Nemo censuit plus Fadiæ dandum, quam posset ad eam lege Voconia pervenire." ("De finibus boni et mali," lib. vi.)

[31] "Cum lege Voconia mulieribus prohiberetur, ne qua majorem centum millibus nummum hæreditatem posset adire." (Lib. lxvi.)

[32] Qui census esset. ("Second Oration against Verres.")

[33] Census non erat. (Ibid.)

Verres, during the time of his prætorship, had deprived Anius's daughter of the succession; and Cicero maintains that Verres had been bribed, otherwise he would not have annulled a disposition which all the other prætors had confirmed.

What kind of citizens then must those have been who were not registered in the census in which all the freemen of Rome were included? According to the institution of Servius Tullius, mentioned by Dionysius of Halicarnassus,[34] every citizen not enrolled in the census became a slave; even Cicero himself observes [35] that such a man forfeited his liberty, and the same thing is affirmed by Zonaras. There must have been therefore a difference between not being in the census according to the spirit of the Voconian law, and not being in it according to the spirit of Servius Tullius's institutions.

They whose names were not registered in the first five classes,[36] in which the inhabitants ranked in proportion to their fortunes, were not comprised in the census according to the spirit of the Voconian law; they who were not enrolled in one of these six classes, or who were not ranked by the censors among such as were called ærarii, were not included in the census according to the spirit of Servius's institutions. Such was the force of Nature, that to elude the Voconian law fathers submitted to the disgrace of being confounded in the sixth class with the proletarii and capite censi, or perhaps to have their names entered in the Cærites tabulæ.[37]

We have elsewhere observed that the Roman laws did not admit of fiduciary bequests. The hopes of evading the Voconian law were the cause of their being introduced;

[34] Lib. iv.
[35] In "Oratione pro Cæcina."
[36] These five classes were so considerable that authors sometimes mention no more than five.
[37] In Cæritum tabulas referri; ærarius fieri.

they instituted an heir qualified by the law, and they begged he would resign the succession to a person whom the law had excluded; this new method of disposition was productive of very different effects. Some resigned the inheritance, and the conduct of Sextus Peduccus on an occasion of this nature was very remarkable.[38] A considerable succession was left him, and nobody living knew that he was desired to resign it to another, when he waited upon the widow of the testator and made over to her the whole fortune belonging to her late husband.

Others kept possession of the inheritance; and here the example of P. Sextilius Rufus is also famous, having been made use of by Cicero in his disputations against the Epicureans.[39] "In my younger days," says he, "I was desired by Sextilius to accompany him to his friends, in order to know whether he ought to restore the inheritance of Quintus Fadius Gallus to his daughter Fadia. There were several young people present, with others of more maturity and judgment; and not one of them was of opinion that he should give more to Fadia than the lady was entitled to by the Voconian law. In consequence of this, Sextilius kept possession of a fine estate, of which he would not have retained a single sestertius had he preferred justice to utility. It is possible, added he, that you would have resigned the inheritance; nay, it is possible that Epicurus himself would have resigned it; but you would not have acted according to your own principles." Here I shall pause a little to reflect.

It is a misfortune inherent in humanity that legislators should be sometimes obliged to enact laws repugnant to the dictates of Nature; such was the Voconian law. The reason is, the legislature considers the society rather than the citizen, and the citizen rather than the man. The law sacrificed both the citizen and the man, and directed its

[38] Cicero, de finib. boni et mali, lib. ii. [39] Ibid.

views to the prosperity of the republic. Suppose a person made a fiduciary bequest in favour of his daughter; the law paid no regard to the sentiments of Nature in the father, nor to the filial piety of the daughter; all it had an eye to was the person to whom the bequest was made in trust, and who on such occasion found himself in a terrible dilemma. If he restored the estate he was a bad citizen; if he kept it he was a bad man. None but good-natured people thought of eluding the law; and they could pitch upon none but honest men to help them to elude it; for a trust of this kind requires a triumph over avarice and inordinate pleasure, which none but honest men are likely to obtain. Perhaps in this light to look upon them as bad citizens would have savoured too much of severity. It is not impossible but that the legislator carried his point in a great measure, since his law was of such a nature as obliged none but honest men to elude it.

At the time when the Voconian law was passed the Romans still preserved some remains of their ancient purity of manners. Their conscience was sometimes engaged in favour of the law; and they were made to swear they would observe it;[40] so that honesty in some measure was set in opposition against itself. But latterly their morals were corrupted to such a degree that the fiduciary bequests must have had less efficacy to elude the Voconian law than that very legislator had to enforce its observance.

The civil wars were the destruction of an infinite number of citizens. Under Augustus, Rome was almost deserted; it was necessary to repeople it. They made the Papian laws, which omitted nothing that could encourage the citizens to marry and procreate children.[41] One of the principal means was to increase, in favour of those who

[40] Sextilius said he had sworn to observe it. Cic. de finibus boni et mali, lib. ii.)

[41] See what has been said in book xxiii, chap. xx.

gave in to the views of the law, the hopes of being heirs, and to diminish the expectations of those who refused; and as the Voconian law had rendered women incapable of succeeding, the Papian law, in certain cases, dispensed with this prohibition.[42]

Women,[43] especially those who had children, were rendered capable of receiving in virtue of the will of their husbands; they even might, when they had children, receive in virtue of the will of strangers. All this was in direct opposition to the regulations of the Voconian law; and yet it is remarkable that the spirit of this law was not entirely abandoned. For example, the Papian law, which permitted a man who had one child[44] to receive an entire inheritance by the will of a stranger, granted the same favour to the wife only when she had three children.[45]

It must be remarked that the Papian law did not render the women who had three children capable of succeeding except in virtue of the will of strangers; and that with respect to the succession of relatives, it left the ancient laws, and particularly the Voconian, in all their force.[46] But this did not long subsist.

Rome, corrupted by the riches of every nation, had changed her manners; the putting a stop to the luxury of women was no longer minded. Aulus Gellius, who lived under Adrian,[47] tells us that in his time the Voconian law was almost abolished; it was buried under the opulence of the city. Thus we find in the sentences of Paulus,[48] who

[42] The same difference occurs in several regulations of the Papian law. See the "Fragments of Ulpian," §§ 4, 5, and 6.

[43] See "Frag." of Ulpian, tit. 15, § 16.

[44] "Quod tibi filiolus, vel filia nascitur ex me,
Jura Parentis habes; propter me scriberis hæres." (Juvenal. Sat. 9.)

[45] See Law 9, C. Theod., de bonis proscriptorum, and Dio, lib. v. See the "Frag. of Ulpian," tit. last, § 6, and tit. 29, § 3.

[46] "Fragments" of Ulpian, tit. 16, § 1. Sozomenus, lib. i, cap. ix.

[47] Lib. xx, cap. i.

[48] Lib. iv, tit. 8, § 3.

lived under Niger, and in the fragments of Ulpian,[49] who was in the time of Alexander Severus, that the sisters on the father's side might succeed, and that none but the relatives of a more distant degree were in the case of those prohibited by the Voconian law.

The ancient laws of Rome began to be thought severe. The prætors were no longer moved except by reasons of equity, moderation, and decorum.

We have seen that by the ancient laws of Rome mothers had no share in the inheritance of their children. The Voconian law afforded a new reason for their exclusion. But the Emperor Claudius gave the mother the succession of her children as a consolation for her loss. The Tertullian Senatus Consultum, made under Adrian,[50] gave it them when they had three children if free women, or four if they were freedwomen. It is evident that this decree of the senate was only an extension of the Papian law, which in the same case had granted to women the inheritance left them by strangers. At length Justinian favoured them with the succession independently of the number of their children.[51]

The same causes which had debilitated the law against the succession of women subverted that, by degrees, which had limited the succession of the relatives on the woman's side. These laws were extremely conformable to the spirit of a good republic, where they ought to have such an influence as to prevent this sex from rendering either the possession, or the expectation of wealth, an instrument of luxury. On the contrary, the luxury of a monarchy rendering marriage expensive and costly, it ought to be there encouraged, both by the riches which women may bestow,

[49] Tit. 26, § 6.

[50] That is, the Emperor Pius, who changed his name to that of Adrian by adoption.

[51] Lib. ii, cod. de jure liberorum. "Instit.," tit. 3, § 4, de senatus consult.

and by the hope of the inheritances it is in their power to procure. Thus when monarchy was established at Rome, the whole system of successions was changed. The prætors called the relatives of the woman's side in default of those of the male side, though by the ancient laws the relatives on the woman's side were never called. The Orphitian Senatus Consultum called children to the succession of their mother; and the Emperors Valentinian, Theodosius, and Arcadius called the grandchildren by the daughter to the succession of the grandfather.[52] In short, the Emperor Justinian[53] left not the least vestige of the ancient right of successions; he established three orders of heirs, the descendants, the ascendants, and the collaterals, without any distinction between the males and females; between the relatives on the woman's side, and those on the male side; and abrogated all of this kind, which were still in force; he believed that he followed Nature, even in deviating from what he called the embarrassments of the ancient jurisprudence.

[52] Lib. ix, Cod. de suis et legitimis hæredibus.
[53] Lib. xiv, Cod. de suis et legitimis hæredibus, et Nov. 118, and 127.

# BOOK XXVIII

## OF THE ORIGIN AND REVOLUTIONS OF THE CIVIL LAWS AMONG THE FRENCH [1]

"In nova fert animus mutatas dicere formas
Corpora——" (Ovid, "Metam.")

1. Different character of the laws of the several people of Germany.—2. That the laws of the barbarians were all personal.—3. Capital difference between the Salic laws and those of the Visigoths and Burgundians.—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.—5. How the Roman law kept its ground in the demesne of the Lombards.—6. How the Roman law came to be lost in Spain.—7. A false capitulary.—8. In what manner the codes of barbarian laws, and the capitularies came to be lost.—9. Other causes of the disuse of the codes of barbarian laws, as well as of the Roman law, and of the capitularies.—10. Of local customs. Revolution of the laws of barbarous nations, as well as of the Roman law.—11. Differences between the Salic law, or that of the Salian Franks, and that of the Ripuarian Franks and other barbarous nations.—12. Of the ordeal or trial by boiling water, established by the Salic law.—13. Particular notions of our ancestors.—14. In what manner the custom of judicial combats gained ground.—15. A new reason of the disuse of the Salic and Roman laws, as also of the capitularies.—16. Origin of the point of honour.—17. A new reflection upon the point of honour among the Germans.—18. Of the manners in relation to judicial combats.—19. Of the code of laws on judicial combats.—20. Rules established in the judicial combat.—21. Of the bounds prescribed to the custom of judicial combats.—22. On the judiciary combat between one of the parties and one of the witnesses.—23. Of the judicial combat between one of the parties and one of the lords' peers. Appeal of false judgment.—24. Of the appeal of default of justice.—25. Epoch of the reign of St. Louis.—26. Observations on appeals.—27. In what manner the proceedings at law became secret.—28. Of the costs.—29. Of the public prosecutor.—30. In what manner the institutions of St. Louis fell

[1] In a private letter Montesquieu, speaking of this book, says that it cost him so much labour that his hair turned gray on account of it. (J. V. P.)

into oblivion.—31. In what manner the judiciary forms were borrowed from the decretals.—32. Flux and reflux of the ecclesiastic and temporal jurisdiction.—33. The revival of the Roman law, and the result thereof. Change of tribunals.—34. Of the proof by witnesses.—35. Of the customs of France.

I. 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.[2] The tribe of the Ripuarian Franks having joined itself under Clovis[3] to that of the Salians, preserved its own customs; and Theodoric,[4] 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.[5] 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.[6] As the Frisians were subdued by Charles Martel and Pepin, their law can not be prior to those princes.[7] Charlemagne, the first to reduce 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.

[2] See the prologue to the Salic law. Mr. Leibnitz says, in his treatise on 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.

[3] See Gregory of Tours.

[4] See the prologue to the law of the Bavarians, and that to the Salic law.

[5] Ibid.

[6] Lex Angliorum Werinorum, hoc est Thuringorum.

[7] They did not know how to write.

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 can not 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 Sigismund, 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;[8] 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.[9] This can not be said of the laws of the Visigoths.

The laws of the Burgundians, and especially those of the Visigoths, admitted of corporal punishments; these

[8] 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.

[9] See the prologue to the "Law of the Bavarians."

were not tolerated by the Salic and Ripuarian laws;[10] 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;[11] but as the kings of the Franks had established their power, they had no such considerations.[12]

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,[13] 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.

[10] We find only a few in Childebert's decree.

[11] See the prologue to the "Code of the Burgundians," and the code itself, especially the twelfth tit. § 5, and tit. 38. See also Gregory of Tours, book ii, chap. xxxiii, and the "Code of the Visigoths."

[12] See lower down, chap. iii.

[13] See chap. ii, §§ 8 and 9, and chap. iv, §§ 2 and 7.

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.

II. It is a distinguishing characteristic 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 marches, lakes, and forests; and Cæsar observes[14] that 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 independency 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,[15] in the codes of the laws of the barbarians, but chiefly in the law of the Ripuarians[16] and the decrees of

[14] "De bello Gallico," lib. vi. [15] Lib. i, formul. 8. [16] Chap. xxvi.

the kings of the first race,[17] whence the capitularies on that subject in the second race were derived.[18] The children followed the laws of their father,[19] the wife that of her husband,[20] the widow came back to her own original law,[21] and the freedman was under that of his patron.[22] Besides, every man could make choice of what laws he pleased, but the constitution of Lotharius I[23] required that this choice should be made public.

III. 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 two hundred sols was to be paid to his relatives;[24] only one hundred upon the killing of a Roman proprietor,[25] 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 six hundred sols;[26] if a Roman, though the king's guest,[27] only three hundred.[28] 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

[17] That of Clotarius in the year 560, in the edition of the "Capitularies of Balusius," vol. i, art. 4, ib. in fine.

[18] Capitularies added to the "Law of the Lombards," lib. i, tit. 25, cap. lxxi, lib. ii, tit. 41, cap. vii, and tit. 56, caps. i and ii.

[19] Ibid.

[20] Ibid., lib. vi, tit. 7, cap. i.

[21] Ibid., cap. ii.

[22] Ibid., lib. ii, tit. 35, cap. ii.

[23] In the "Law of the Lombards," lib. ii, tit. 57.

[24] Salic law, tit. 44, § 1.

[25] "Qui res in pago ubi remanet proprias habet." (Salic law, tit. 44, sec. 15.)

[26] "Qui in truste dominicâ est." (Ibid., tit. 41, § 4.)

[27] "Si Romanus homo conviva regis fuerit." (Ibid., § 6.)

[28] 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.

assault a Frank in his house,[29] and he happened to be killed, the Salic law ordained a composition of six hundred sols; but if a Roman or a freedman was assaulted, only one half that composition.[30] By the same law,[31] if a Roman put a Frank in irons he was liable to a composition of thirty sols, but if a Frank had thus used a Roman he paid only fifteen. A Frank, stripped by a Roman, was entitled to the composition of sixty-two and a half sols, and a Roman stripped by a Frank received only thirty. Such unequal treatment must needs have been very grievous to a Roman.

And yet a celebrated author[32] 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![33] 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

[29] Salic law, tit. 45.

[30] Lidus, whose condition was better than that of a bondman. ("Law of the Alemans," chap. xcv.)

[31] Tit. 35, §§ 3 and 4.

[32] The Abbé du Bos.

[33] Witness the expedition of Arbogastes, in Gregory of Tours, "Hist.," lib. ii.

of parade and ostentation are improper foundations for building systems.

IV. 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,[34] who settled in those parts.

In the country subject to the Franks the Salic law was established for the Franks, and the Theodosian code[35] for the Romans. In that subject to the Visigoths, a compilation of the Theodosian code, made by order of Alaric,[36] regulated disputes among the Romans; and the national customs, which Euric caused to be reduced to writing,[37] 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; while 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,[38] 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,[39] as a change would be of no advantage

[34] The Franks, the Visigoths, and the Burgundians.

[35] It was finished in 438.

[36] The twentieth year of the reign of this prince, and published two years after by Anian, as appears from the preface to that code.

[37] The year 504, of the Spanish era, the "Chronicle of Isidorus."

[38] Francum, aut Barbarum, aut hominem qui Salica lege vivit. (Salic law, tit. 44, § 1.)

[39] "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 word "Lex Romana."

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[40] 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 the 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[41] 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.[42] 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 ap-

[40] 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, tome i, 462, where it is said that an ecclesiastic should receive a triple compensation; and the "Collection of the Capitularies," lib. v, art. 302, tome i. (Edition of Baluzius.)

[41] See that law.

[42] Of this I shall speak in another place, book xxx, chaps. v, vi, and vii.

pears by the famous letter which Agobard wrote to Louis the Pious.

Agobard[43] 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;[44] 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.[45]

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,

[43] Agobard, "Opera."

[44] See Gervaise de Tilbury, in Duchesne's "Collection," tome iii, p. 366. Facta pactione cum Francis, quod illic Gothi patriis legibus, moribus paternis vivant. Et sic Narbonensis provincia Pippino subjicitur. And a chronicle of the year 759, produced by Catel, "History 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," tome ii, p. 316.

[45] In illa terra in qua judicia secundum legem Romanam terminantur, secundum ipsam legem judicetur; et in illa terra in qua, etc., art. 16. See also art. 20.

as appears by the said edict;[46] 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?

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.

V. The facts all coincide with my principles. The law

[46] See arts. 12 and 16 of the edict of Pistes in Cavilono in Narbona, etc.

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.[47] 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?

VI. Things happened otherwise in Spain. The law of the Visigoths prevailed, and the Roman law was lost. Chaindasuinthus[48] and Recessuinthus proscribed the Ro-

[47] See what Machiavelli says of the ruin of the ancient nobility of Florence.

[48] He began to reign in the year 642.

man laws,[49] 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.[50] 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.[51] 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.[52] 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?

[49] We will no longer be harassed either by foreign or by the Roman laws. ("Law of the Visigoths," lib. ii, tit. 1, §§ 9 and 10.)

[50] Ut tam Gotho Romanam, quam Romano Gotham matrimonio liceat sociari. ("Law of the Visigoths," lib. iii, tit. i, chap. i.)

[51] See Liv., iv, 19 and 26.

[52] 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.

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.[53] 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.

VII. Did not that wretched compiler Benedictus Levita attempt to transform this Visigoth establishment, which prohibited the use of the Roman law, into a capitulary[54] 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.

VIII. 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,[55] 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 authorized. And, indeed, it would be impossible to see it observed. The custom no longer prevailed of send-

[53] "Gothi, qui cladi superfuerant, ex Gallia cum uxoribus liberisque egressi, in Hispaniam ad Teudim jam palam tyrannum se receperunt." ("De Bello Gothorum," lib. i, chap. xiii.)

[54] "Capitularies," lib. vi, chap. cclxix, of the year 1613, edition of Baluzius, p. 1021.

[55] M. de la Thaumassière has collected many of them. See, for instance, chaps. lxi, lxvi, and others.

ing extraordinary officers [56] 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; [57] a collection was made of the canons of councils, and of the decretals of popes; [58] and these the

[56] Missi Dominici.

[57] 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.

[58] 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.

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.

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.[59] 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.

IX. 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.[60] The unhappy reigns which

[59] See the edict of Pistes, art. 20.

[60] 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.

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," [61] 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.

X. 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," [62] of the "ancient usage," [63] of "custom," [64] of "laws," [65] 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

[61] Of this I shall speak elsewhere (book xxx, chap. xi).
[62] Preface to Marculfus's "Formulæ."
[63] "Law of the Lombards," book ii, tit. 58, sec. 3.
[64] Ibid., tit. 41, sec. 6.
[65] "Life of St. Leger."

were the Roman institutes. This can not possibly be. King Pepin ordained [66] 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

[66] "Law of the Lombards," book ii, tit. 41, sec. 6.

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.[67] 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

[67] See chap. iv.

law, whereas it was admitted only as written reason in the ancient demesne of the Franks.

XI. 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;[68] 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[69] increased in proportion to the importance of the affair; sometimes it amounted to seventy-two.[70] The laws of the Alemans, Bavarians, Thuringians, Frisians, Saxons, Lombards, and Burgundians were formed on the same plan as those of the Ripuarians.

I observed that the Salic law did not allow of negative proofs. There was one case, however, in which they were allowed;[71] but even then they were not admitted alone, and without the concurrence of positive proofs. The plaintiff caused witnesses to be heard,[72] 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.[73] This practice was vastly different from that of the Ripuarian and other barbarous laws,

[68] This relates to what Tacitus says, that the Germans had general and particular customs.

[69] "Law of the Ripuarians," tits. 6, 7, 8, and others.

[70] Ibid., tits. 11, 12, and 17.

[71] 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 tit. 76 of the "Pactus legis Salicæ."

[72] See tit. 76 of the "Pactus legis Salicæ."

[73] According to the practice now followed in England.

where it was customary for the party accused to clear himself by swearing that 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.

The Salic law did not admit of the trial by combat, though it had been received by the laws of the Ripuarians [74] and of almost all the barbarous nations.[75] 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,[76] 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 [77] and of the other barbarous nations [78] 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.[79] It was necessary, according to the language

[74] Tit. 32; tit. 57, sec. 2; tit. 59, sec. 4.

[75] See the following note.

[76] This spirit appears in the "Law of the Ripuarians," tit. 59, sec. 4, and tit. 67, sec. 5, and in the "Capitulary of Louis the Debonnaire," added to the "Law of the Ripuarians" in the year 803, art. 22.

[77] See that law.

[78] The law of the Frisians, Lombards, Bavarians, Saxons, Thuringians, and Burgundians.

[79] In the "Law of the Burgundians," tit. 8, secs. 1 and 2, on criminal affairs; and tit. 45, which extends also to civil affairs. See also the "Law of the Thuringians," tit. 1, sec. 31, tit. 7, sec. 6, and tit. 8;

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;[80] we shall presently see the mischiefs that arose from it, and how they were obliged to return to the ancient practice.

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.

XII. The Salic law[81] 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.[82] 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.

and the "Law of the Alemans," tit. 89; the "Law of the Bavarians," tit. 8, chap. ii, sec. 6, and chap. iii, sec. 1, and tit. 9, chap. iv, sec. 4; the "Law of the Frisians," tit. 2, sec. 3, and tit. 14, sec. 4; the "Law of the Lombards," book i, tit. 32, sec. 3, and tit. 35, sec. 1, and book ii, tit. 35, sec. 2.

[80] See chap. xiv, toward the end.

[81] As also some other laws of the barbarians.

[82] Tit. 55.

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,[83] 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.

XIII. 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,[84] enjoyed an excessive independence. Different families waged war with each other[85] 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.[86] This was far preferable to a general license 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

[83] Ibid., tit. 56.

[84] This appears by what Tacitus says, "Omnibus idem habitus."

[85] Velleius Paterculus, lib. ii, chap. cxviii, says that the Germans decided all their disputes by the sword.

[86] See the codes of barbarian laws, and in respect to less ancient times, Beaumanoir on the custom of Beauvoisis.

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.[87] 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,[88] 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 can not be obtained. Besides, in a military nation, where strength, courage, and prowess are

[87] "Law of the Burgundians," chap. xlv.
[88] See the works of Agobard.

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 afterward? 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.[89]

By the law of the Thuringians[90] 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[91] 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, were, 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

[89] See Beaumanoir on the custom of Beauvoisis, chap. lxi. See also the "Law of the Angli," chap. xiv, where the trial by boiling water is only a subsidiary proof.

[90] Tit. 14.

[91] Chap. xxxi, sec. 5.

the cause, that they were more contrary to equity than prejudicial to its rights, more unreasonable than tyrannical.

XIV. 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.[92] 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.[93]

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;[94] "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 Gospels 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[95] 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.[96] The Pope and the

[92] Si placeret Domino nostro ut eos transferret ad legem Francorum.

[93] See this law, tit. 59, sec. 4, and tit. 67, sec. 5.

[94] "Law of the Lombards," book ii, tit. 55, chap. 34.

[95] The year 962.

[96] Ab Italiæ proceribus est proclamatum, ut imperator sanctus mutatâ lege, facinus indignum destrueret. ("Law of the Lombards," book ii, tit. 55, chap. xxxiv.)

emperor were of opinion that the affair should be referred to the council which was to be shortly held at Ravenna.[97] 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,[98] they had a conference at Verona [99] with the Italian lords,[100] 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.

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

[98] Otho II's uncle, son to Rodolphus, and King of Transjurian Burgundy.

[99] In the year 988.

[100] Cum in hoc ab omnibus imperiales aures pulsarentur. ("Law of the Lombards," book ii, tit. 55, chap. xxxiv.)

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 that 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,[101] 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[102] that in the actual state of things it was extremely difficult for either the accuser or the accused to avoid perjuring himself, 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,[103] and the laws of Chaindasuinthus and Recessuinthus seemed as if they would abolish the very

[101] In the "Law of the Lombards," book ii, tit. 55, sec. 33. In the copy which Muratori made use of it is attributed to the Emperor Guido.

[102] In the "Law of the Lombards," book ii, tit. 55, sec. 23.

[103] Cassiod., iii, let. 23 and 24.

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.[104]

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.[105] Charlemagne,[106] 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 afterward 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,[107] 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.

[104] "In palatio quoque, Bera comes Barcinonensis, cum impeteretur a quodam vocato Sunila, et infidelitatis argueretur, cum eodem secundum legem propriam, utpote quia uterque Gothus erat, equestri prælio congressus est et victus." (The anonymous author of the "Life of Louis the Debonnaire.")

[105] See in the "Law of the Lombards," book i, tit. 4 and tit. 9, sec. 23, and book ii, tit. 35, secs. 4 and 5, and tit. 55, secs. 1, 2, and 3. The regulations of Rotharis; and in sec. 15, that of Luitprandus.

[106] Ibid., book ii, tit. 55, sec. 23.

[107] 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 the "Formulas of Marculfus," book i, chap. xxxviii. The "Laws of the Ripuarians," tit. 59, sec. 4, tit. 65, sec. 5. The "History of Gregory of Tours"; and the "Capitulary" of the year 803, added to the Salic law.

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 [108] 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 [109] limited this judgment to ecclesiastic affairs; his son Lotharius abolished it in all cases; nay, he suppressed even the trial by cold water.[110]

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,[111] but I affirm that they

[108] Chap. xxxix, p. 212.

[109] We find his "Constitutions" inserted in the "Law of the Lombards," and at the end of the Salic laws.

[110] In a constitution inserted in the "Law of the Lombards," book ii, tit. 55, sec. 31.

[111] In the year 1200.

were very seldom practised. Beaumanoir,[112] 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.

XV. 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 can not 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.[113]

I find that in the early years of the third race the jurisprudence of those times related entirely to prece-

[112] "Custom of Beauvoisis," chap. xxxix.
[113] Chap. lxi, pp. 309, 310.

dents, 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.[114] Louis the Fat reformed this custom.[115]

The custom of legal duels prevailed at Orleans, even in all demands of debt.[116] 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's time it was sufficient that the value was more than twelve deniers.[117] Beaumanoir[118] 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.

XVI. We meet with inexplicable enigmas in the codes of laws of the barbarians. The law of the Frisians[119] 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.

[114] "Charter of Louis the Fat," in the year 1145, in the "Collection of Ordinances."

[115] Ibid.

[116] "Charter of Louis the Young," in 1168, in the "Collection of Ordinances."

[117] See Beaumanoir, chap. lxiii, p. 325.

[118] See the custom of Beauvoisis, chap. xxviii, p. 203.

[119] "Additio sapientium Willemari," tit. 5.

The law of the Lombards established different compositions for one, two, three, four blows, and so on.[120] 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.[121] 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.[122] In process of time none but bondmen fought with the baston.[123]

Here I see the 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,[124] 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[125] he could not afterward 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;[126] villeins fought on foot and with bastons.[127] Hence it followed that the baston was looked

[120] Book i, tit. 6, sec. 3.
[121] Book ii, tit. 5, sec. 23.
[122] Added to the Salic law in 819.
[123] See Beaumanoir, lxiv, p. 323.
[124] Ibid., p. 329.
[125] See Beaumanoir, iii, pp. 25 and 329.
[126] See in regard to the arms of the combatants, Beaumanoir, chap. lxi, p. 308, and chap. lxiv, p. 328.
[127] Ibid., chap. lxiv, p. 328. See also the "Charters of St. Aubin of Anjou," quoted by Galland, p. 263.

upon as the instrument of insults and affronts,[128] because to strike a man with it was treating him like a villein.

None but villeins fought with their faces uncovered,[129] 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 villein.

The several peoples 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[130] 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;[131] 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.

XVII. "It was a great infamy," says Tacitus,[132] "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[133] allows a composition of fifteen sous

[128] Among the Romans, it was not infamous to be beaten with a stick, "Lege ictus fustium. De iis qui notantur infamia."

[129] They had only the baston and buckler. (Beaumanoir, chap. lxiv, p. 328.)

[130] Book i, tit. 6, sec. 1.

[131] Book i, tit. 6, sec. 2.

[132] "De Moribus Germanorum."

[133] In the "Pactus legis Salicæ."

to any person that had been injuriously reproached with having left his buckler behind him.

When Charlemagne amended the Salic law,[134] he allowed in this case no more than three sous in composition. As this prince can not 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.

XVIII. 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[135] 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

[134] We have both the ancient law and that which was amended by this prince.

[135] Book ii, tit. 55, sec. 11.

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 tranquility of the plains of Greece gave rise to the description of the sentiments of love.[136] 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.

[136] See the Greek romances of the middle age.

XIX. 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;[137] and the rest lived since his time. We must, therefore, look for the ancient practice in the amendments that have been made of it.

XX. 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.[138]

When a gentleman challenged a villein 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 villein.[139]

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 pen-

[137] In the year 1283.
[138] Beaumanoir, chap. vi, pp. 40 and 41.
[139] Ibid., chap. lxiv, p. 328.

alties; nay, even on pain of death if by this assistance either of the combatants should happen to be vanquished.[140]

The officers belonging to the civil magistrate[141] guarded the list or inclosure 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.[142]

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.[143]

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.[144]

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.[145]

When capital laws were made in the last century against duels, perhaps it would have been sufficient to have

[140] Beaumanoir, chap. lxiv, p. 330.

[141] Ibid.

[142] Ibid.

[143] The great vassals had particular privileges.

[144] Beaumanoir (chap. lxiv, 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, chap. xxi, art. 29.)

[145] This custom, which we meet with in the "Capitularies," was still subsisting at the time of Beaumanoir. See chap. lxi, p. 315.

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.[146]

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.[147]

XXI. 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 market-place—then there was neither a trial by witnesses nor by combat; the judge gave his decision from the notoriety of the fact.[148]

When the court of a lord had often determined after the same manner, and the usage was thus known,[149] 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.[150]

When the accused had been acquitted, another relative could not insist on fighting him; otherwise disputes would never be terminated.[151]

If a person appeared again in public whose relatives,

[146] Beaumanoir, chap. lxiv, p. 330.
[147] Ibid., chap. lxi, p. 309.
[148] Ibid., p. 308; chap. xliii, p. 239.
[149] Beaumanoir, chap. lxi, p. 314. See also Défontaines, chap. xxii, art. 24.
[150] Beaumanoir, chap. lxiii, p. 322.
[151] Ibid.

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.[152]

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.[153]

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.[154]

There were no duels in affairs decided by arbiters,[155] nor by ecclesiastical courts, nor in cases relating to women's dowries.

[152] Beaumanoir.
[153] Ibid., p. 323.
[154] Beaumanoir, chap. lxiii, p. 324.
[155] Ibid., p. 325.

"A woman," says Beaumanoir, "can not 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 authorized by her baron —that is, by her husband—to challenge; but she might be challenged without this authority.[156]

If either the challenger or the person challenged were under fifteen years of age, there could be no combat.[157] 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.[158] The bondman might by his lord's charter or by usage fight with any freeman;[159] and the Church claimed this right for her bondmen[160] as a mark of respect due to her by the laity.[161]

XXII. Beaumanoir informs us[162] 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.

[156] Beaumanoir.
[157] Ibid., chap. lxiii, p. 323. See also what I have said in the eighteenth book.
[158] Ibid., chap. lxiii, p. 322.
[159] Défontaines, chap. xxii, art. 7.
[160] Habeant bellandi et testificandi licentiam. ("Charter of Louis the Fat," in the year 1118.)
[161] Ibid.
[162] Chap. lxi, p. 315.

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 [163] 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,[164] 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 [165] and Burgundians [166] without any restriction.

I have already made mention of the constitution of Gundebald, against which Agobard [167] and St. Avitus [168] 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

[163] Chap. vi, pp. 39 and 40.

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

[165] Tit. 16, sec. 7.

[166] Tit. 45.

[167] "Letter to Louis the Debonnaire." [168] "Life of St. Avitus."

this king of every kind of subterfuge to avoid the judiciary combat.

XXIII. As the nature of judicial combats was to terminate the affair forever, and was incompatible with a new judgment and new prosecutions,[169] 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.[170]

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.[171]

Thus St. Louis in his "Institutions" 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,[172] 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,

[169] Beaumanoir, chap. ii, p. 22.
[170] Ibid., chap. lxi, p. 312, and chap. lxvii, p. 338.
[171] Book ii, chap. xv.
[172] Beaumanoir, chap. lxi, pp. 310 and 311, and chap. lxvii, p. 337.

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.[173] If the party waited till judgment was pronounced, he was obliged to fight them all when they offered to make good their judgment.[174] 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;[175] 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[176] 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.[177] But

[173] Beaumanoir, chap. lxi, p. 313.
[174] Ibid., p. 314.
[175] Ibid.
[176] Chap. xxii, arts. 1, 10, and 11, he says only, that each of them was allowed a small fine.
[177] Beaumanoir, chap. lxi, p. 314.

the peer who was challenged gave no security, because he was the lord's vassal, 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,[178] 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.[179]

When a person, strongly suspected of a capital crime, had been taken and condemned, he could make no appeal of false judgment,[180] 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.[181]

The judges or peers who were overcome forfeited neither life nor limbs,[182] but the person who challenged them was punished with death if it happened to be a capital crime.[183]

This manner of challenging the vassals with false judgment was to avoid challenging the lord himself. But if the lord had no peers,[184] or had not a sufficient number, he might at his own expense borrow peers of his lord paramount;[185] but these peers were not obliged to pronounce judgment if they did not like it; they might declare that

[178] Beaumanoir. Défontaines, chap. xxii, art. 9.

[179] Ibid.

[180] Ibid., chap. lxi, p. 316, and Défontaines, chap. xxii, art. 21.

[181] Ibid., chap. lxi, p. 314.

[182] Défontaines, chap. xxii, art. 7.

[183] See Défontaines, chap. xxi, 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.

[184] Beaumanoir, chap. lxii, p. 322. Défontaines, chap. xxii.

[185] The count was not obliged to lend any. Beaumanoir, chap. lxvii, p. 337.

they were come only to give their opinion; in that particular case the lord himself judged and pronounced sentence as judge,[186] 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,[187] 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;[188] for Défontaines says[189] 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 unanimous in their verdict, in cases relating to life and death.

[186] Nobody can pass judgment in his court, says Beaumanoir, chap. lxvii, pp. 336 and 337.
[187] Ibid., chap. lxii, p. 322.
[188] Défontaines, chap. xxi, arts. 27 and 28.
[189] Ibid., art. 28.

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 [190] that a peer could not excuse himself by saying that he would not sit in court if there were only four,[191] 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,[192] and imputing personal prevarications to his tenant.[193] 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 tranquility.

[190] Chap. xxi, art. 37.

[191] This number at least was necessary. Défontaines, chap. xxi, art. 36.

[192] Beaumanoir, chap. lxvii, p. 337.

[193] Ibid.

This distinction, which was necessary in that particular case, had afterward 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.[194] 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 twenty-first 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.[195] Thus King Philip, says Défontaines,[196] sent his whole council to judge an affair in the court of the Abbot of Corbey.

[194] Beaumanoir, pp. 337 and 338. [195] Défontaines, chap. xxii. [196] Ibid.

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.

XXIV. 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.[197]

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.[198] Such were the disputes between bishops, abbots, counts, and other grandees, which were determined by the king, together with the great vassals.[199]

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

[197] 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," book ii, art. 3.

[198] Third capitulary of the year 812, art. 3, edition of Baluzius, p. 497.

[199] Cum fidelibus. ("Capitulary of Louis the Debonnaire," edition of Baluzius, p. 667.)

the Missus had an equal jurisdiction, independent of each other.[200] The whole difference was that the Missus held his placita, or assizes, four months in the year,[201] 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 afterward cast, he paid a fine of fifteen sous, or received fifteen blows from the judges who had decided the affair.[202]

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 [203] 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 [204] 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 [205] 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,[206] 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 for-

[200] See the "Capitulary of Charles the Bald," added to the "Law of the Lombards," book ii, art. 3.

[201] Third capitulary of the year 812, art. 8.

[202] "Placitum."

[203] This appears by the formulas, charters, and the capitularies.

[204] 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.

[205] The officers under the count, Scabini.

[206] See the "Law of the Lombards," book ii, tit. 52, art. 22.

bidden 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;[207] 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[208] 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,[209] the witnesses might be challenged, and then neither the lord nor his court was offended.

In case the default was owing to the lord's tenants or

[207] There are instances of appeals of default of justice as early as the time of Philip Augustus. [208] Chap. lxi, p. 315. [209] Ibid.

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.[210] 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 room 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.[211]

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.[212] But if the default was proved, the penalty inflicted on him was, to lose the trial of the cause,[213] 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,[214] 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,[215] whose

[210] Défontaines, chap. xxi, art. 24.
[211] Défontaines, chap xxi, art. 32.
[212] Beaumanoir, chap. lxi, p. 312.
[213] Défontaines, chap. xxi, art. 1 and 29.
[214] 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.
[215] Défontaines, chap. xxi, art. 34.

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.[216]

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.[217]

The vassal who had wrongfully challenged his lord of default of justice was sentenced to pay a fine according to his lord's pleasure.[218]

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.[219] 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,[220] 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

[216] Défontaines, chap. xxi, art. 9.

[217] Beaumanoir, chap. lxi, p. 311.

[218] Beaumanoir, chap. lxi, p. 312. But he that was neither tenant nor vassal to the lord paid only a fine of sixty livres. (Ibid.)

[219] Beaumanoir, chap. lxi, p. 318.

[220] Chap. xxi, art. 35.

authors that to disentangle them from the chaos in which they were involved may be reckoned a new discovery.

XXV. St. Louis abolished the judicial combats in all the courts of his demesne, as appears by the ordinance he published thereupon,[221] and by the "Institutions."[222]

But he did not suppress them in the courts of his barons, except in the case of challenge of false judgment.[223]

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.[224]

He declared[225] 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[226] of the judgments passed in his courts; not because they were false or iniquitous, but because they did some prejudice.[227] On the contrary, he ordained that they should be obliged to make a challenge of false judgment against the courts of the barons,[228] 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;

[221] In the year 1260.

[222] Book i, chaps. ii and vii, and book ii, chaps. x and xi.

[223] As appears everywhere in the "Institutions," etc., and Beaumanoir, chap. lxi, p. 309.

[224] "Institutions," book i, chap. vi, and book ii, chap. xv.

[225] Ibid., book ii, chap. xv.

[226] Ibid., book i, chap. lxxviii, and book ii, chap. xv.

[227] Ibid., book i, chap. lxxviii.

[228] Ibid., book ii, chap. xv.

and in case the bailiff refused the amendment demanded, the king gave leave to make an appeal to his court;[229] or rather, interpreting the "Institutions" by themselves, to present him a request or petition.[230]

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,[231] or that of the lord paramount, not to be decided by duel,[232] but by witnesses, pursuant to a certain form of proceeding, the rules of which he laid down in the "Institutions."[233]

Thus, whether they could falsify the judgment, as in the courts 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[234] 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. Quintin, 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

[229] "Institutions," book i, chap. lxxviii.

[230] Ibid., book ii, chap. xv.

[231] But if they wanted to appeal without falsifying the judgment, the appeal was not admitted. ("Institutions," book ii, chap. xv.)

[232] Book i, chaps. vi and lxvii; and book ii, chap. xv; and Beaumanoir, chap. xi, p. 58.

[233] Book i, chaps. i, ii, and iii.

[234] Chap. xxii, arts. 16 and 17.

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 [235] 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 afterward have recourse to the other. He adds [236] 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 re-establish 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's "Institutions," into the country under obedience to the king, and the country out of his obedience.[237] 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,[238] or sealed

[235] Chap. lxi, p. 309.

[236] Ibid.

[237] See Beaumanoir, Défontaines, and the "Institutions," book ii, chaps. x, xi, xv, and others.

[238] See the ordinances at the beginning of the third race, in the collection of Laurière, 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, tome ii, book iii, p. 35, and ibid., the ordinance of Philip Augustus, p. 7.

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.

XXVI. 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,[239] "he loses his appeal, and the judgment stands good." This continued still in force, even after all the restrictions of judicial combat.[240]

The villein could not bring a challenge of false judgment against the court of his lord. This we learn from Défontaines,[241] and he is confirmed moreover by the "Institutions."[242] Hence Défontaines says,[243] "Between the lord and his villein there is no other judge but God."

It was the custom of judicial combats that deprived the villeins of the privilege of challenging their lord's court of false judgment. And so true is this that those villeins[244] who by charter or custom had a right to fight had also

[239] Chap. lxiii, p. 327; chap. lxi, p. 312.

[240] See the "Institutions of St. Louis," book ii, chap. xv, and the "Ordinances of Charles VII," in the year 1453.

[241] Chap. xxi, arts. 21 and 22.

[242] Book i, chap. cxxxvi.

[243] Chap. ii, art. 8.

[244] Défontaines, chap. xxii, art. 7. This article, and the twenty-first of the twenty-second 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 villein to him who had the privilege of fighting.

the privilege of challenging their lord's court of false judgment, even though the peers who tried them were gentlemen;[245] and Défontaines proposes expedients to gentlemen in order to avoid the scandal of fighting with a villein by whom they had been challenged of false judgment.[246]

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 villeins should not; hence the Parliament received their appeals all the same as those of freemen.

When a challenge of false judgment was brought against the lord's court, the lord apeared 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.[247]

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[248] 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.[249]

I took notice that in the appeal of default of justice[250] the lord lost only the privilege of having the cause tried

[245] Gentlemen may always be appointed judges. Défontaines, chap. xxi, art. 48.

[246] Chap. xxii, art. 14.

[247] Défontaines, chap. xxi, art. 33.

[248] In the year 1332.

[249] See the situation of things in Boutillier's time, who lived in the year 1402. "Somme Rurale," book i, pp. 19 and 20.

[250] See chap. xxvi.

in his own court. But if the lord himself was sued as party,[251] which became a very common practice,[252] 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.

In the practice of judicial combats, the person who had challenged one of the parties of false judgment might lose his cause by the combat, but could not possibly gain it.[253] 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 [254]—namely, that

[251] Beaumanoir, chap. lxi, pp. 312 and 318.
[252] Ibid.
[253] Défontaines, chap. xxi, art. 14.
[254] "Of the Parliaments of France," book xii, chap. xvi.

the chamber of inquiry could not use this form at the beginning of its existence.

XXVII. Duels had introduced a public form of proceeding so that both the attack and the defence were equally known. "The witnesses," says Beaumanoir,[255] "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[256] every time they held a court by what were called proceedings on record.[257] 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

[255] Chap. lxi, p. 315.

[256] As Beaumanoir says, chap. xxxix, p. 209.

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

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 [258] 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.

XXVIII. In former times no one was condemned in the lay courts of France to the payment of costs.[259] 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 afterward followed, there was no necessity of allowing costs to the parties.

The custom of appeals naturally introduced that of giving costs. Thus Défontaines says [260] 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 will not permit them to appear

[258] Chap. xxxix, p. 218.

[259] Défontaines in his counsel, chap. xxii, arts. 3 and 8; and Beaumanoir, chap. xxxiii. "Institutions," book i, chap. xc.

[260] Chap. xxi, art. 8.

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;[261] 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.[262]

XXIX. 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

[261] At present when they are so inclined to appeal, says Boutillier. ("Somme Rurale," book i, tit. 3, p. 16.)

[262] In the year 1324.

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.[263] 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 intrusted 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.[264] 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

[263] Advocatus de parte publicâ.

[264] See this constitution and this formula, in the second volume of the "Historians of Italy," p. 175.

robber, but had not brought him before the count;[265] against another who had raised an insurrection or tumult against the count;[266] against another who had saved a man's life whom the count had ordered to be put to death;[267] against the advocate of some churches, whom the count had commanded to bring a robber before him, but had not obeyed;[268] against another who had revealed the king's secret to strangers;[269] against another, who with open violence had attacked the emperor's commissary;[270] 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;[271] against another, who refused to accept of the prince's coin;[272] in fine, this advocate sued for things which by the law were adjudged to the exchequer.[273]

But in criminal causes we never meet with the advocate for the public prosecutor, not even where duels are used;[274] not even in the case of incendiaries;[275] not even when the judge is killed on his bench;[276] not even in causes relating to the conditions of persons,[277] to liberty and slavery.[278]

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

[265] "Collection of Muratori," p. 104, on the eighty-eighth law of Charlemagne, book i, tit. 26, sec. 48.
[266] Another formula, ibid., p. 87.
[267] Ibid., p. 104.
[268] "Collection of Muratori," p. 95.
[269] Ibid., p. 88.
[270] Ibid., p. 98.
[271] Ibid., p. 132.
[272] Ibid.
[273] Ibid., p. 137.
[274] Ibid., p. 147.
[275] Ibid.
[276] Ibid., p. 168.
[277] Ibid., p. 134.
[278] Ibid., p. 107.

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 sergeants. See the "Institutions,"[279] and Beaumanoir,[280] concerning the manner in which prosecutions were managed in those days.

I find in the laws of James II, King of Majorca,[281] 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.[282] It is manifest that this office was not instituted till we had changed the form of our judiciary proceedings.

XXX. 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's "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

[279] Book i, chap. i; and book ii, chaps. xi and xiii.

[280] Chaps. i and lxi.

[281] See these laws in the "Lives of the Saints," of the month of June, tome iii, p. 26.

[282] Qui continue nostram sacram curiam sequi teneatur, instituatur qui facta et causas in ipsa curia promoveat atque prosequatur.

in relation to the police, etc. 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.[283] 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

[283] Preface to the "Institutions."

was that it should not succeed. These were Matthew, Abbot of St. Denis, Simon of Clermont, Count of Nesle, and, in case of death, Philip, Bishop of Evreux, and John, Count of Ponthieu. We have seen above[284] 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's "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's "Institutions," quotes only some particular laws of that prince, and not this compilation. Défontaines,[285] 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.

What is this compilation, then, which goes at present under the name of St. Louis's "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

[284] Chap. xxv.

[285] See above, chap. xxv.

success that Beaumanoir, who wrote a little after the death of that prince, informs us[286] 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 tranquility 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.[287] 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

[286] Chap. lxi, p. 309.

[287] He says of himself, in his prologue, "Nus luy en prit onques mais cette chose dont j'ay."

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.[288]

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 an-

[288] 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.

other tribunal, the manner of pronouncing sentence by these words, "I condemn" or "I absolve,"[289] 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 afterward introduced by the emperor, in order to regulate, limit, correct, and extend the French jurisprudence.

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[290] it took cognizance only of disputes between the dukes, counts, barons,

[289] "Institutions," book ii, chap. xv.

[290] See Du Tillet on the court of peers. See also Laroche, Flavin, book i, chap. iii, Budeus and Paulus Æmilius.

bishops, abbots, or between the king and his vassals,[291] 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. John de Monluc, in the reign of Philip the Fair, made a collection which at present is known by the name of the Olim registers.[292]

XXXI. 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[293] and causes that were tried indifferently, in either court.[294] It seems[295] as if the temporal jurisdiction reserved no other cases exclusively to itself than the judgment of feudal matters,[296] and of such crimes committed by laymen as did not relate to religion. For[297] 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

[291] Other causes were decided by the ordinary tribunals.

[292] See the President Henault's excellent abridgment of the "History of France," in the year 1313.

[293] Beaumanoir, chap. xi, p. 58.

[294] Widows, croises, etc. (Beaumanoir, chap. xi, p. 58.)

[295] See the whole eleventh chapter of Beaumanoir.

[296] 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 Laurière.

[297] Beaumanoir, chap. xi, p. 60.

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 that they were strangers to it; for in point of practice people know only what is really practised.

XXXII. 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.[298] 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

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

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,[299] by Ragau, the decree which it published against the Bishop of Amiens.[300]

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.

XXXIII. Upon the discovery of Justinian's digest to-

[299] In the word "testamentary executors."
[300] The 19th of March, 1409.

ward 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;[301] because Justinian's laws were not made till after the settlement of the barbarians in Gaul.[302] This law met with some opposition; but it stood its ground notwithstanding the excommunications of the popes, who supported their own canons.[303] 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.[304]

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:[305] in some places they tried by

[301] 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.

[302] This emperor's code was published toward the year 530.

[303] Decretals, book v, tit. de privilegiis capite super specula.

[304] By a charter in the year 1312, in favour of the University of Orleans, quoted by Du Tillet.

[305] "Customs of Beauvoisis," chap. i, of the office of bailiffs.

peers,[306] 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.[307] 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;[308] that of trying by bailiffs to be more so; the bailiffs did not give judgment themselves:[309] they summed up the evidence and pronounced the judgment of the prud'hommes; but the

[306] Among the common people the burghers were tried by burghers, as the feudatory tenants were tried by one another. See La Thaumassière, chap. xix.

[307] Thus all requests began with these words: "My lord judge, it is customary that in your court," etc., as appears from the formula quoted by Boutillier, "Somme Rurale," book iv, tit. xxi.

[308] 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. He gives this formula, book i, tit. 21: "Sire Juge, en ma justice haute, moyenne et basse, qui j'ai en tel lieu, cour, plaids, baillis, hommes, feodaux et sergens." Yet nothing but feodal matters were tried any longer by the peers. (Ibid., book i, tit. i, p. 16.)

[309] As appears by the formula of the letters which their lord used to give them, quoted by Boutillier, "Somme Rurale," book i, tit. xiv, which is proved likewise by Beaumanoir, "Custom of Beauvoisis," chapter i, 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

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.[310] 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.

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.[311] 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

judgment." See also the "Institutions of St. Louis," book i, chap. cv, and book ii, chap. xv. "Li Juge si ne doit pas faire le jugement."

[310] Beaumanoir, chap. lxvii, p. 336, and chap. lxi, pp. 315 and 316. The "Institutions," book ii, chap. xv.

[311] It was published in the year 1287.

assigned in the ordinance: to the end that the bailiffs may be punished for their prevarications it is necessary that they be taken from the order of the laity.[312] 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.

XXXIV. 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;[313] 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 a hundred livres, except there was the beginning of a proof in writing.

[312] Ut si ibi delinquant, superiores sui possint animadvertere in eosdem.

[313] See in what manner age and parentage were proved. ("Institutions," book i, chaps. lxxi and lxxii.)

XXXV. 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,[314] 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;[315] 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 beginning 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

[314] Prologue to the "Custom of Beauvoisis." [315] Chap. x.

reasons which afterward 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.[316]

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

[316] See the "Collection of Ordinances," by Laurière.

preserved.[317] Thus our customs were characterized 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[318] who set out from his own country, arrived in Egypt, cast an eye on the Pyramids, and returned home.

[317] This was observed at the digesting of the customs of Berry and of Paris. See La Thaumassière, chap. iii.

[318] In the "Spectator."

# BOOK XXIX

## THE MANNER OF COMPOSING LAWS

1. Of the spirit of a legislator.—2. That the laws which seem to deviate from the views of the legislator are frequently agreeable to them. —3. Of the laws contrary to the views of the legislator.—4. The laws which appear the same have not always the same effect.— 5. Necessity of composing laws in a proper manner.—6. That laws which appear the same were not always made through the same motive.—7. That the Greek and Roman laws punished suicide, but not through the same motive.—8. That laws which seem contrary proceed sometimes from the same spirit.—9. How to compare two different systems of laws.—10. That laws which appear the same are sometimes really different.—11. That we must not separate laws from the end for which they were made: of the Roman laws on theft.—12. That we must not separate the laws from the circumstances in which they were made.—13. That sometimes it is proper that the law should amend itself.—14. Things to be observed in the composing of laws.—15. A bad method of giving laws.—16. Of the ideas of uniformity.—17. Of legislators.

I. I SAY it, and methinks I have undertaken this work with no other view than to prove it, the spirit of a legislator ought to be that of moderation; political, like moral good, lying always between two extremes.[1] Let us produce an example.

The set forms of justice are necessary to liberty, but the number of them might be so great as to be contrary to the end of the very laws that established them; processes would have no end; property would be uncertain; the goods of one of the parties would be adjudged to the other without examining, or they would both be ruined by examining too much.

The citizens would lose their liberty and security, the

[1] Aristotle, "Polit.," i.

accusers would no longer have any means to convict, nor the accused to justify themselves.

Cecilius, in Aulus Gellius,[2] speaking of the law of the Twelve Tables which permitted the creditor to cut the insolvent debtor into pieces, justifies it even by its cruelty, which hindered people from borrowing beyond their ability of paying.[3] Shall then the cruellest laws be the best? Shall goodness consist in excess, and all the relations of things be destroyed?

II. The law of Solon which declared those persons infamous who espoused no side in an insurrection seemed very extraordinary; but we ought to consider the circumstances in which Greece was at that time. It was divided into very small states; and there was reason to apprehend lest in a republic torn by intestine divisions the soberest part should keep retired, in consequence of which things might be carried to extremity.

In the seditions raised in those petty states the bulk of the citizens either made or engaged in the quarrel. In our large monarchies parties are formed by a few, and the people choose to live quietly. In the latter case it is natural to call back the seditious to the bulk of the citizens, and not these to the seditious; in the other it is necessary to oblige the small number of prudent people to enter among the seditious; it is thus that the fermentation of one liquor may be stopped by a single drop of another.

III. There are laws so little understood by the legislator as to be contrary to the very end he proposed. Those who made this regulation among the French, that when one of the two competitors died the benefice should de-

[2] Book xxii, chap. i.

[3] Cecilius says that he never saw nor read of an instance in which this punishment had been inflicted; but it is likely that no such punishment was ever established; the opinion of some civilians, that the law of the Twelve Tables meant only the division of the money arising from the sale of the debtor, seems very probable.

volve to the survivor, had in view, without doubt, the extinction of quarrels; but the very reverse falls out: we see the clergy at variance every day, and, like English mastiffs, worrying one another to death.

The law I am going to speak of is to be found in this oath preserved by Æschines:[4] "I swear that I will never destroy a town of the Amphictyones, and that I will not divert the course of its running waters; if any nation shall presume to do such a thing I will declare war against them and will destroy their towns." The last article of this law, which seems to confirm the first, is really contrary to it. Amphictyon is willing that the Greek towns should never be destroyed, and yet his law paves the way for their destruction. In order to establish a proper law of nations among the Greeks, they ought to have been accustomed early to think it a barbarous thing to destroy a Greek town; consequently they ought not even to ruin the destroyers. Amphictyon's law was just, but it was not prudent; this appears even from the abuse made of it. Did not Philip assume the power of demolishing towns, under the pretence of their having infringed the laws of the Greeks? Amphictyon might have inflicted other punishments; he might have ordained, for example, that a certain number of the magistrates of the destroying town, or of the chiefs of the infringing army, should be punished with death; that the destroying nation should cease for a while to enjoy the privileges of the Greeks; that they should pay a fine till the town was rebuilt. The law ought, above all things, to aim at the reparation of damages.

IV. Cæsar made a law to prohibit people from keeping above sixty sesterces in their houses.[5] This law was considered at Rome as extremely proper for reconciling the debtors to their creditors, because, by obliging the rich to lend to the poor, they enabled the latter to pay their

[4] "De falsa Legatione."

[5] Dio, lib. xli.

debts. A law of the same nature made in France at the time of the system proved extremely fatal, because it was enacted under a most frightful situation. After depriving people of all possible means of laying out their money, they stripped them even of the last resource of keeping it at home, which was the same as taking it from them by open violence. Cæsar's law was intended to make the money circulate; the French minister's design was to draw all the money into one hand. The former gave either lands or mortgages on private people for the money; the latter proposed in lieu of money nothing but effects which were of no value, and could have none by their very nature, because the law compelled people to accept of them.

V. The law of ostracism was established at Athens, at Argos,[6] and at Syracuse. At Syracuse it was productive of a thousand mischiefs, because it was imprudently enacted. The principal citizens banished one another by holding the leaf of a fig tree in their hands,[7] so that those who had any kind of merit withdrew from public affairs.[8] At Athens, where the legislator was sensible of the proper extent and limits of his law, ostracism proved an admirable regulation. They never condemned more than one person at a time; and such a number of suffrages were requisite for passing this sentence that it was extremely difficult for them to banish a person whose absence was not necessary to the state.[9]

The power of banishing was exercised only every fifth year; and, indeed, as the ostracism was designed against none but great personages who threatened the state with danger, it ought not to have been the transaction of every day.

[6] Aristotle, "Repub.," lib. v, chap. iii.

[7] Plutarch and Diodorus of Sicily say it was an olive leaf. See Diod., xi. (J. V. P.)

[8] Plutarch, "Life of Dionysius."

[9] Vide book xxvi, chap. xiv.

VI. In France they have received most of the Roman laws on substitutions, but through quite a different motive from the Romans. Among the latter the inheritance was accompanied with certain sacrifices[10] which were to be performed by the inheritor and were regulated by the pontifical law; hence it was that they reckoned it a dishonour to die without heirs, that they made slaves their heirs, and that they devised substitutions. Of this we have a very strong proof in the vulgar substitution, which was the first invented, and took place only when the heir appointed did not accept of the inheritance. Its view was not to perpetuate the estate in a family of the same name, but to find somebody that would accept of it.

VII. "A man," says Plato, "who has killed one nearly related to him—that is, himself, not by an order of the magistrate, not to avoid ignominy, but through pusillanimity—shall be punished."[11] The Roman law punished this action when it was not committed through pusillanimity, through weariness of life, through impatience in pain, but from a criminal despair. The Roman law acquitted where the Greek condemned, and condemned where the other acquitted.

Plato's law was formed upon the Lacedæmonian institutions, where the orders of the magistrate were absolute, where shame was the greatest of miseries, and pusillanimity the greatest of crimes. The Romans had no longer those refined ideas; theirs was only a fiscal law.

During the time of the republic there was no law at Rome against suicides; this action is always considered by their historians in a favourable light, and we never meet with any punishment inflicted upon those who committed it.

[10] When the inheritance was too much encumbered they eluded the pontifical law by certain sales, whence come the words "sine sacris hæreditas."

[11] Book ix "Of Laws."

Under the first emperors, the great families of Rome were continually destroyed by criminal prosecutions. The custom was then introduced of preventing judgment by a voluntary death. In this they found a great advantage: they had an honourable interment, and their wills were executed, because there was no law against suicides.[12] But when the emperors became as avaricious as cruel, they deprived those who destroyed themselves of the means of preserving their estates by rendering it criminal for a person to make away with himself through a criminal remorse.

What I have been saying of the motive of the emperors is so true that they consented that the estates of suicides should not be confiscated when the crime for which they killed themselves was not punished with confiscation.[13]

VIII. In our time we give summons to people in their own houses; but this was not permitted among the Romans.[14]

A summons was a violent action,[15] and a kind of warrant for seizing the body;[16] hence it was no more allowed to summon a person in his own house than it is now allowed to arrest a person in his own house for debt.

Both the Roman and our laws admit of this principle alike, that every man ought to have his own house for an asylum, where he should suffer no violence.[17]

IX. In France the punishment for false witnesses is capital; in England it is not. Now, to be able to judge which of these two laws is the best, we must add that in

[12] Eorum qui de se statuebant humabantur corpora, manebant testamenta, pretium festinandi. (Tacit.)

[13] Rescript of the Emperor Pius in the third law, secs. 1 and 2 ff. de bonis eorum qui ante sententiam mortem sibi consciverunt.

[14] Leg. 18 ff. de in jus vocando.

[15] See the law of the Twelve Tables.

[16] Rapit in jus, Horace, Satire 9. Hence they could not summon those to whom a particular respect was due.

[17] See the law 18 ff. de in jus vocando.

France the rack is used for criminals, but not in England; that in France the accused is not allowed to produce his witnesses, and that they very seldom admit of what are called justifying circumstances in favour of the prisoner; in England they allow of witnesses on both sides. These three French laws form a close and well-connected system; and so do the three English laws. The law of England, which does not allow of the racking of criminals, has but very little hope of drawing from the accused a confession of his crime; for this reason it invites witnesses from all parts, and does not venture to discourage them by the fear of a capital punishment. The French law, which has one resource more, is not afraid of intimidating the witnesses; on the contrary, reason requires that they should be intimidated; it listens only to the witnesses on one side, which are those produced by the attorney-general, and the fate of the accused depends entirely on their testimony.[18] But in England they admit of witnesses on both sides, and the affair is discussed in some measure between them; consequently false witness is there less dangerous, the accused having a remedy against the false witness which he has not in France. Wherefore, to determine which of those systems is most agreeable to reason, we must take them each as a whole and compare them in their entirety.

X. The Greek and Roman laws inflicted the same punishment on the receiver as on the thief;[19] the French law does the same. The former acted rationally, but the latter does not. Among the Greeks and Romans the thief was condemned to a pecuniary punishment, which ought also to be inflicted on the receiver; for every man that contributes in what shape soever to a damage is obliged to repair it. But as the punishment of theft is capital with

[18] By the ancient French law, witnesses were heard on both sides; hence we find in the "Institutions of St. Louis," book i, chap. vii, that there was only a pecuniary punishment against false witnesses.

[19] Leg. 1 ff. de Receptatoribus.

us, the receiver can not be punished like the thief without carrying things to excess. A receiver may act innocently on a thousand occasions; the thief is always culpable; one hinders the conviction of a crime, the other commits it; in one the whole is passive, the other is active; the thief must surmount more obstacles, and his soul must be more hardened against the laws.

The civilians have gone further; they look upon the receiver as more odious than the thief,[20] for were it not for the receiver the theft, say they, could not be long concealed. But this again might be right when there was only a pecuniary punishment; the affair in question was a damage done, and the receiver was generally better able to repair it; but when the punishment became capital, they ought to have been directed by other principles.

XI. When a thief was caught in the act this was called by the Romans a manifest theft; when he was not detected till some time afterward it was a non-manifest theft.

The law of the Twelve Tables ordained that a manifest thief should be whipped with rods and condemned to slavery if he had attained the age of puberty; or only whipped if he was not of ripe age; but as for the non-manifest thief he was only condemned to a fine of double the value of what he had stolen.

When the Porcian laws abolished the custom of whipping the citizens with rods, and of reducing them to slavery, the manifest thief was condemned to a payment of fourfold, and they still continued to condemn the non-manifest thief to a payment of double.[21]

It seems very odd that these laws should make such a difference in the quality of those two crimes, and in the punishments they inflicted. And, indeed, whether the thief was detected either before or after he had carried the

[20] Leg. 1 ff. de Receptatoribus.

[21] See what Favorinus says in "Aulus Gellius," book xx, chap. i.

stolen goods to the place intended, this was a circumstance which did not alter the nature of the crime. I do not at all question that the whole theory of the Roman laws in relation to theft was borrowed from the Lacedæmonian institutions. Lycurgus, with a view of rendering the citizens dextrous and cunning, ordained that children should be practised in thieving, and that those who were caught in the act should be severely whipped. This occasioned among the Greeks, and afterward among the Romans, a great difference between a manifest and a non-manifest theft.[22]

Among the Romans a slave who had been found guilty of stealing was thrown from the Tarpeian rock. Here the Lacedæmonian institutions were out of the question; the laws of Lycurgus in relation to theft were not made for slaves; to deviate from them in this respect was in reality conforming to them.

At Rome, when a person of unripe age happened to be caught in the act, the prætor ordered him to be whipped with rods according to his pleasure, as was practised at Sparta. All this had a more remote origin. The Lacedæmonians had derived these usages from the Cretans; and Plato,[23] who wants to prove that the Cretan institutions were designed for war, cites the following—namely, the power of bearing pain in individual combats, and in thefts which have to be concealed.

As the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law.

[22] Compare what Plutarch says in the "Life of Lycurgus" with the laws of the "Digest," title de Furtis; and the "Institutes," book iv, tit. 1, secs. 1, 2, and 3.

[23] "Of Laws," book i.

Thus when the Cretan laws on theft were adopted by the Lacedæmonians, as their constitution and government were adopted at the same time, these laws were equally reasonable in both nations. But when they were carried from Lacedæmonia to Rome, as they did not find there the same constitution, they were always thought strange, and had no manner of connection with the other civil laws of the Romans.

XII. It was decreed by a law at Athens that when the city was besieged, all the useless people should be put to death.[24] This was an abominable political law, in consequence of an abominable law of nations. Among the Greeks the inhabitants of a town taken lost their civil liberty and were sold as slaves. The taking of a town implied its entire destruction, which is the source not only of those obstinate defences, and of those unnatural actions, but likewise of those shocking laws which they sometimes enacted.

The Roman laws ordained that physicians should be punished for neglect or unskilfulness.[25] In those cases, if the physician was a person of any fortune or rank, he was only condemned to deportation, but if he was of a low condition he was put to death. By our institutions it is otherwise. The Roman laws were not made under the same circumstances as ours; at Rome every ignorant pretender intermeddled with physic; but among us physicians are obliged to go through a regular course of study, and to take their degrees, for which reason they are supposed to understand their profession.

XIII. The law of the Twelve Tables allowed people to kill a night-thief as well as a day-thief,[26] if upon being pursued he attempted to make a defence; but it required that

[24] Inutilis ætas occidatur. ("Syrian in Hermog.")

[25] The Cornelian law de Sicariis, "Institut.," lib. iv, tit. 3, de lege Aquilia, sec. 7.

[26] See the fourth law ff. ad leg. Aquil.

the person who killed the thief should cry out and call his fellow-citizens. This is indeed what those laws, which permit people to do justice to themselves, ought always to require. It is the cry of innocence which in the very moment of the action calls in witnesses and appeals to judges. The people ought to take cognizance of the action, and at the very instant of its being done; an instant when everything speaks, even air, countenance, passions, silence; and when every word either condemns or absolves. A law, which may become so opposed to the security and liberty of the citizens, ought to be executed in their presence.[27]

XIV. They who have a genius sufficient to enable them to give laws to their own, or to another nation, ought to be particularly attentive to the manner of forming them.

The style ought to be concise. The laws of the Twelve Tables are a model of conciseness; the very children used to learn them by heart.[28] Justinian's "Novellæ" were so very diffuse that they were obliged to abridge them.[29]

The style should also be plain and simple, a direct expression being better understood than an indirect one. There is no majesty at all in the laws of the lower empire; princes are made to speak like rhetoricians. When the style of laws is inflated, they are looked upon only as a work of parade and ostentation.

It is an essential article that the words of the laws should excite in everybody the same ideas. Cardinal Richelieu[30] agreed that a minister might be accused before the king, but he would have the accuser punished if the facts he proved were not matters of moment. This

[27] Ibid.; see the decree of Tassillon added to the "Law of the Bavarians," de popularib. Legib., art. 4.

[28] Ut carmen necessarium. (Cicero, de Legib., 2.) Aristotle avers that before the art of writing was discovered the laws were composed in verse and frequently sung, to prevent them being forgotten. (J. V. P.)

[29] It is the work of Irnerius.

[30] "Political Testament."

was enough to hinder people from telling any truth whatsoever against the minister, because a matter of moment is entirely relative, and what may be of moment to one is not so to another.

The law of Honorius punished with death any person that purchased a freedman as a slave, or that gave him molestation.[31] He should not have made use of so vague an expression; the molestation given a man depends entirely on the degree of his sensibility.

When the law has to impose a penalty it should avoid as much as possible the estimating it in money. The value of money changes from a thousand causes, and the same denomination continues without the same thing. Every one knows the story of that impudent fellow at Rome,[32] who used to give those he met a box on the ear, and afterward tendered them the five-and-twenty pence of the law of the Twelve Tables.

When the law has once fixed the idea of things, it should never return to vague expressions. The ordinance of Louis XIV [33] concerning criminal matters, after an exact enumeration of the causes in which the king is immediately concerned, adds these words, "And those which in all times have been subject to the determination of the king's judges"; this again renders arbitrary what had just been fixed.

Charles VII says [34] he has been informed that the parties appeal three, four, and six months after judgment, contrary to the custom of the kingdom in a country where custom prevailed; he therefore ordains that they shall appeal forthwith, unless there happens to be some fraud or

[31] Aut qualibet manumissione donatum inquietare voluerit. Appendix to the Theodosian code in the first volume of Father Sirmond's works, p. 737.

[32] Aulus Gellius, book xx, chap. i.

[33] We find in the verbal process of this ordinance the motives that determined him.

[34] In his "Ordinance of Montel-les-tours," in the year 1453.

deceit on the part of the attorney,[35] or unless there be a great or evident cause to discharge the appeal. The end of this law destroys the beginning, and it destroys it so effectually that they used afterward to appeal during the space of thirty years.[36]

The law of the Lombards does not allow a woman that has taken a religious habit,[37] though she has made no vow, to marry; because, says this law, "if a spouse who has been contracted to a woman only by a ring can not without guilt be married to another, for a much stronger reason the spouse of God or of the blessed Virgin." Now, I say that in laws the arguments should be drawn from one reality to another, and not from reality to figure, or from figure to reality.

A law enacted by Constantine[38] ordains that the single testimony of a bishop should be sufficient without listening to any other witnesses. This prince took a very short method: he judged of affairs by persons, and of persons by dignities.

The laws ought not to be subtle; they are designed for people of common understanding, not as an art of logic, but as the plain reason of a father of a family.

When there is no necessity for exceptions and limitations in a law it is much better to omit them; details of that kind throw people into new details.

No alteration should be made in a law without sufficient reason. Justinian ordained that a husband might be repudiated and yet the wife not lose her portion, if for the space of two years he had been incapable of consummating the marriage.[39] He altered his law afterward, and

[35] They might punish the attorney, without there being any necessity of disturbing the public order.

[36] The ordinance of the year 1667 has made some regulations upon this head.

[37] Book ii, tit. 37.

[38] In Father Sirmond's appendix to the Theodosian code, tome i.

[39] Leg. 1, code de Repudiis.

allowed the poor wretch three years.[40] But in a case of that nature two years are as good as three, and three are not worth more than two.

When a legislator condescends to give the reason of his law it ought to be worthy of its majesty. A Roman law decrees that a blind man is incapable to plead, because he can not see the ornaments of the magistracy.[41] So bad a reason must have been given on purpose, when such a number of good reasons were at hand.

Paul, the jurist, says[42] that a child grows perfect in the seventh month, and that the ratio of Pythagoras's numbers seems to prove it. It is very extraordinary that they should judge of those things by the ratio of Pythagoras's numbers.

Some French lawyers have asserted that when the king made an acquisition of a new country, the churches became subject to the Regale, because the king's crown is round. I shall not examine here into the king's rights, or whether in this case the reason of the civil or ecclesiastic law ought to submit to that of the law of politics; I shall only say that those august rights ought to be defended by grave maxims. Was there ever such a thing known as the real rights of a dignity founded on the figure of that dignity's sign?

Davila says[43] that Charles IX was declared of age in the Parliament of Rouen in the beginning of his fourteenth year, because the laws require every moment of the time to be reckoned, in cases relating to the restitution and administration of a ward's estate; whereas it considers the year begun as a year complete, when the case is concerning the acquisition of honours.[44] I am very far

[40] See the authentic "Sed hodie," in the code de Repudiis.
[41] Leg. 1 ff. de Postulando.
[42] In his "Sentences," book iv, tit. 9.
[43] "Della guerra civile di Francia," p. 96.
[44] See Dupuy, "Traité de la Majorité de nos rois," p. 364, edit. 1655. (J. V. P.)

from censuring a regulation which has been hitherto attended with no inconvenience; I shall only notice that the reason alleged is not the true one;[45] it is false that the government of a nation is only an honour.

In point of presumption, that of the law is far preferable to that of the man. The French law considers every act of a merchant during the ten days preceding his bankruptcy as fraudulent;[46] this is the presumption of the law. The Roman law inflicted punishments on the husband who kept his wife after she had been guilty of adultery, unless he was induced to do it through fear of the event of a lawsuit, or through contempt of his own shame; this is the presumption of the man. The judge must have presumed the motives of the husband's conduct, and must have determined a very obscure and ambiguous point; when the law presumes it gives a fixed rule to the judge.

Plato's law,[47] as I have observed already, required that a punishment should be inflicted on the person who killed himself not with a design of avoiding shame, but through pusillanimity. This law was so far defective that in the only case in which it was impossible to draw from the criminal an acknowledgment of the motive upon which he had acted, it required the judge to determine concerning these motives.

As useless laws debilitate such as are necessary, so those that may be easily eluded weaken the legislation. Every law ought to have its effect, and no one should be suffered to deviate from it by a particular exception.

The Falcidian law ordained among the Romans that the heir should always have the fourth part of the inheritance; another law suffered the testator to prohibit the heir from retaining this fourth part.[48] This is making a jest of

[45] The Chancellor de l'Hôpital. (Ibid.)
[46] It was made in the month of November, 1702.
[47] Book ix "Of Laws."
[48] It is the authentic "Sed cum testator."

the laws. The Falcidian law became useless; for if the testator had a mind to favour his heir, the latter had no need of the Falcidian law; and if he did not intend to favour him, he forbade him to make use of it.

Care should be taken that the laws be worded in such a manner as not to be contrary to the very nature of things. In the proscription of the Prince of Orange, Philip II promises to any man that will kill the prince to give him or his heirs five-and-twenty thousand crowns, together with the title of nobility; and this upon the word of a king, and as a servant of God. To promise nobility for such an action! to ordain such an action in the quality of a servant of God! This is equally subversive of the ideas of honour, morality, and religion.

There very seldom happens to be a necessity of prohibiting a thing which is not bad under pretence of some imaginary perfection.

There ought to be a certain simplicity and candour in the laws; made to punish the iniquity of men they themselves should be clad with the robes of innocence. We find in the law of the Visigoths [49] that ridiculous request, by which the Jews were obliged to eat everything dressed with pork, provided they did not eat the pork itself. This was a very great cruelty; they were obliged to submit to a law contrary to their own; and they were obliged to retain nothing more of their own than what might serve as a mark to distinguish them.

XV. The Roman emperors manifested their will like our princes, by decrees and edicts; but they permitted, which our princes do not, both the judges and private people to interrogate them by letters in their several differences; and their answers were called rescripts. The decretals of the popes are rescripts, strictly speaking. It is plain that this is a bad method of legislation. Those

[49] Book xii, tit. 2, sec. 16.

who thus apply for laws are improper guides to the legislator; the facts are always wrongly stated. Julius Capitolinus says [50] that Trajan often refused to give this kind of rescripts, lest a single decision, and frequently a particular favour, should be extended to all cases. Macrinus had resolved to abolish all those rescripts; [51] he could not bear that the answers of Commodus, Caracalla, and all those other ignorant princes, should be considered as laws. Justinian thought otherwise, and he filled his compilation with them.

I would advise those who read the Roman laws to distinguish carefully between this sort of hypothesis, and the Senatus Consulta, the Plebiscita, the general constitutions of the emperors and all the laws founded on the nature of things, on the frailty of women, the weakness of minors, and the public utility.

XVI. There are certain ideas of uniformity, which sometimes strike great geniuses (for they even affected Charlemagne), but infallibly make an impression on little souls. They discover therein a kind of perfection, which they recognise because it is impossible for them not to see it; the same authorized weights, the same measures in trade, the same laws in the state, the same religion in all its parts. But is this always right and without exception? Is the evil of changing constantly less than that of suffering? And does not a greatness of genius consist rather in distinguishing between those cases in which uniformity is requisite, and those in which there is a necessity for differences? In China the Chinese are governed by the Chinese ceremonial and the Tartars by theirs; and yet there is no nation in the world that aims so much at tranquility. If the people observe the laws, what signifies it whether these laws are the same?

XVII. Aristotle wanted to indulge sometimes his jeal-

[50] See Julius Capitolinus in Macrino. [51] Ibid.

ousy against Plato, and sometimes his passion for Alexander. Plato was incensed against the tyranny of the people of Athens. Machiavelli was full of his idol, the Duke of Valentinois. Sir Thomas More, who spoke rather of what he had read than of what he thought, wanted to govern all states with the simplicity of a Greek city.[52] Harrington was full of the idea of his favourite republic of England, while a crowd of writers saw nothing but confusion where monarchy is abolished. The laws always conform to the passions and prejudices of the legislator; sometimes the latter pass through, and only tincture them; sometimes they remain, and are incorporated with them.

[52] In his "Utopia."

# BOOK XXX

## THEORY OF THE FEUDAL LAWS AMONG THE FRANKS IN THE RELATION THEY BEAR TO THE ESTABLISHMENT OF THE MONARCHY

1. Of feudal laws.—2. Of the source of feudal laws.—3. The origin of vassalage.—4. Of the conquests of the Franks.—5. Of the Goths, Burgundians, and Franks.—6. Different ways of dividing the land.—7. A just application of the law of the Burgundians, and of that of the Visigoths, in relation to the division of lands.—8. Of servitudes.—9. That the lands belonging to the division of the barbarians paid no taxes.—10. Of taxes paid by the Romans and Gauls in the monarchy of the Franks.—11. Of what they called census.—12. That what they called census was raised only on the bondmen and not on the freemen.—13. Of the feudal lords or vassals.—14. Of the military service of freemen.—15. Of the double service.—16. Of compositions among the barbarous nations.—17. Of what was afterward called the jurisdiction of the lords.—18. Of the territorial jurisdiction of the churches.—19. That the jurisdictions were established before the end of the second race.—20. General idea of the Abbé du Bos's book on the establishment of the French monarchy in Gaul.—21. Of the French nobility.

I. I SHOULD think my work imperfect were I to pass over in silence an event which never again, perhaps, will happen; were I not to speak of those laws which suddenly appeared over all Europe without being connected with any of the former institutions; of those laws which have done infinite good and infinite mischief; which have suffered rights to remain when the demesne has been ceded; which by vesting several with different kinds of seigniory over the same things or persons have diminished the weight of the whole seigniory; which have established different limits in empires of too great extent; which have been productive of rule with a bias to

anarchy, and of anarchy with a tendency to order and harmony.

This would require a particular work to itself; but considering the nature of the present undertaking, the reader will here meet rather with a general survey than with a complete treatise of those laws.

The feudal laws form a very beautiful prospect. A venerable old oak raises its lofty head to the skies, the eye sees from afar its spreading leaves; upon drawing nearer, it perceives the trunk but does not discern the root; the ground must be dug up to discover it.[1]

II. The conquerors of the Roman Empire came from Germany. Though few ancient authors have described their manners, yet we have two of very great weight. Cæsar making war against the Germans describes the manners of that nation;[2] and upon these he regulated some of his enterprises.[3] A few pages of Cæsar upon this subject are equal to whole volumes.[4]

Tacitus has written an entire work on the manners of the Germans. This work is short, but it comes from the pen of Tacitus, who was always concise, because he saw everything at one glance.

These two authors agree so perfectly with the codes still extant of the laws of the barbarians that reading Cæsar and Tacitus we imagine we are perusing these codes, and perusing these codes we fancy we are reading Cæsar and Tacitus.

But if in this research into the feudal laws I should find myself entangled and lost in a dark labyrinth I fancy

[1] "Quantum vertice ad oras
Æthereas, tantum radice ad Tartara tendit." (Virgil.)

[2] "De Bello Gallico," book vi.

[3] For instance, his retreat from Germany. (Ibid.)

[4] M. Chabrit expresses his astonishment that Montesquieu dwells upon Cæsar's knowledge of the Germans, and quite ignores the Gauls, with their fund of information upon this subject. (J. V. P.)

I have the clew in my hand, and that I shall be able to find my way through.

III. Cæsar says[5] that "the Germans neglected agriculture; that the greatest part of them lived upon milk, cheese, and flesh; that no one had lands or boundaries of his own; that the princes and magistrates of each nation allotted what portion of land they pleased to individuals, and obliged them the year following to remove to some other part." Tacitus says[6] that "each prince had a multitude of men, who were attached to his service, and followed him wherever he went." This author gives them a name in his language in accordance with their state, which is that of companions.[7] They had a strong emulation to obtain the prince's esteem; and the princes had the same emulation to distinguish themselves in the bravery and number of their companions. "Their dignity and power," continues Tacitus, "consist in being constantly surrounded with a multitude of young and chosen people; this they reckon their ornament in peace, this their defence and support in war. Their name becomes famous at home, and among neighbouring nations, when they excel all others in the number and courage of their companions; they receive presents and embassies from all parts. Reputation frequently decides the fate of war. In battle it is infamy in the prince to be surpassed in courage; it is infamy in the companions not to follow the brave example of their prince; it is an eternal disgrace to survive him. To defend him is their most sacred engagement. If a city be at peace, the princes go to those who are at war, and it is thus they retain a great number of friends. To these they give the war horse and the terrible javelin. Their pay con-

[5] Book vi of the "Gallic Wars." Tacitus adds, "Nulli domus aut ager, aut aliqua cura; prout ad quem venere aluntur." ("De Moribus Germanorum.")

[6] "De Moribus Germanorum."

[7] Comites.

sists in coarse but plentiful repasts. The prince supports his liberality merely by war and plunder. You might more easily persuade them to attack an enemy and to expose themselves to the dangers of war, than to cultivate the land, or to attend to the cares of husbandry; they refuse to acquire by sweat what they can purchase with blood."

Thus, among the Germans, there were vassals, but no fiefs; they had no fiefs because the princes had no lands to give; or rather their fiefs consisted in horses trained for war, in arms, and feasting. There were vassals, because there were trusty men who being bound by their word engaged to follow the prince to the field, and did very nearly the same service as was afterward performed for the fiefs.

Cæsar says[8] that "when any of the princes declared to the assembly that he intended to set out upon an expedition and ask them to follow him, those who approved the leader and the enterprise stood up and offered their assistance; upon which they were commended by the multitude. But, if they did not fulfil their engagements, they lost the public esteem, and were looked upon as deserters and traitors."

What Cæsar says in this place, and the extract we have quoted from Tacitus, are the substance of the history of our princes of the first race.

We must not therefore be surprised that our kings should have new armies to raise upon every expedition, new troops to encourage, new people to engage; that to acquire much they were obliged to incur great expenses; that they should be constant gainers by the division of lands and spoils, and yet give these lands and spoils incessantly away; that their demesne should continually increase and diminish; that a father upon settling a kingdom on one of his children[9] should always give him a

[8] "De Bello Gallico," lib. vi. [9] See the "Life of Dagobert."

treasure with it; that the king's treasure should be considered as necessary to the monarchy; and that one king could not give part of it to foreigners, even in portion with his daughter, without the consent of the other kings.[10] The monarchy moved by springs, which they were continually obliged to wind up.

IV. It is not true that the Franks upon entering Gaul took possession of the whole country to turn it into fiefs. Some have been of this opinion because they saw the greatest part of the country toward the end of the second race converted into fiefs, rear-fiefs, or other dependencies; but such a disposition was owing to particular causes which we shall explain hereafter.

The consequence which sundry writers would infer thence, that the barbarians made a general regulation for establishing in all parts the state of villenage, is as false as the principle from which it is derived. If, at a time when the fiefs were precarious, all the lands of the kingdom had been fiefs, or dependencies of fiefs; and all the men in the kingdom vassals or bondmen subordinate to vassals; as the person that has property is ever possessed of power, the king, who would have continually disposed of the fiefs—that is, of the only property then existing—would have had a power as arbitrary as that of the Sultan is in Turkey, which is contradictory to all history.

V. Gaul was invaded by German nations. The Visigoths took possession of the province of Narbonne, and of almost all the south; the Burgundians settled in the east, and the Franks subdued very nearly all the rest.

No doubt but these barbarians retained in their respective conquests the manners, inclinations, and usages of their own country; for no nation can change in an instant their manner of thinking and acting. These people

[10] See Gregory of Tours, book vi, on the marriage of the daughter of Chilperic. Childebert sent ambassadors to tell him that he should

in Germany neglected agriculture. It seems by Cæsar and Tacitus that they applied themselves greatly to a pastoral life; hence the regulations of the codes of barbarian laws almost all relate to their flocks. Roricon, who wrote a history among the Franks, was a shepherd.[11]

VI. After the Goths and Burgundians had, under various pretences, penetrated into the heart of the empire, the Romans, in order to put a stop to their devastations, were obliged to provide for their subsistence. At first they allowed them corn;[12] but afterward chose to give them lands. The emperors, or the Roman magistrates, in their name, made particular conventions with them concerning the division of lands,[13] as we find in the chronicles and in the codes of the Visigoths[14] and Burgundians.[15]

The Franks did not follow the same plan. In the Salic and Ripuarian laws we find not the least vestige of any such division of lands; they had conquered the country, and so took what they pleased, making no regulations but among themselves.

Let us, therefore, distinguish between the conduct of the Burgundians and Visigoths in Gaul, of those same Visigoths in Spain, of the auxiliary troops under Augustulus and Odoacer in Italy,[16] and that of the Franks in

not give the cities of his father's kingdom to his daughter, nor his treasures, nor his bondmen, nor horses, nor horsemen, nor teams of oxen, etc.

[11] Nothing definite is known concerning this Roricon, and his works are rather reveries and fables than anything else. See the article in "Mercure" for October, 1741. (J. V. P.)

[12] The Romans obliged themselves to this by treaties. See Zosimus V upon the distribution of corn demanded by Alaric. (J. V. P.)

[13] Burgundiones partem Galliæ occuparunt, terrasque cum Gallicis senatoribus diviserunt. (Marius's "Chronicle," in the year 456.)

[14] Book x, tit. 1, secs. 8, 9, and 16.

[15] Chap. liv, secs. 1 and 2. This division was still subsisting in the time of Louis the Debonnaire, as appears by his capitulary of the year 829, which has been inserted in the "Law of the Burgundians," tit. 79, sec. i.

[16] See Procopius, "War of the Goths."

Gaul, as also of the Vandals in Africa.[17] The former entered into conventions with the ancient inhabitants, and in consequence thereof made a division of lands between them; the latter did no such thing.

What has induced some to think that the Roman lands were entirely usurped by the barbarians is their finding in the laws of the Visigoths and the Burgundians that these two nations had two thirds of the lands; but this they took only in certain quarters or districts assigned them.

Gundebald says, in the law of the Burgundians, that his people at their establishment had two thirds of the lands allowed them;[18] and the second supplement to this law notices that only a moiety would be allowed to those who should hereafter come to live in that country.[19] Therefore, all the lands had not been divided in the beginning between the Romans and the Burgundians.

In those two regulations we meet with the same expressions in the text, consequently they explain one another; and as the latter can not mean a universal division of lands, neither can this signification be given to the former.

The Franks acted with the same moderation as the Burgundians; they did not strip the Romans wherever they extended their conquests. What would they have done with so much land? They took what suited them, and left the remainder.

VII. It is to be considered that those divisions of land were not made with a tyrannical spirit, but with a view of relieving the reciprocal wants of two nations that were to inhabit the same country.

[17] See Procopius, "War of the Vandals."

[18] Licet eo tempore quo populus noster mancipiorum tertiam et duas terrarum partes accepit, etc. ("Law of the Burgundians," tit. 54, sec. 1.)

[19] Ut non amplius a Burgundionibus qui infra venerunt requiratur quam ad præsens necessitas fuerit, medietas terræ. (Art. 11.)

The law of the Burgundians ordains that a Burgundian shall be received in a hospitable manner by a Roman. This is agreeable to the manners of the Germans, who, according to Tacitus, were the most hospitable people in the world.[20]

By the law of the Burgundians it is ordained that the Burgundians shall have two thirds of the lands and one third of the bondmen. In this it considered the genius of two nations, and conformed to the manner in which they procured their subsistence. As the Burgundians kept herds and flocks, they wanted a great deal of land and few bondmen, and the Romans from their application to agriculture had need of less land, and of a greater number of bondmen. The woods were equally divided, because their wants in this respect were the same.

We find, in the code of the Burgundians,[21] that each barbarian was placed near a Roman. The division therefore was not general, but the Romans who gave the division were equal in number to the Burgundians who received it. The Roman was injured least. The Burgundians, as a martial people, fond of hunting and of a pastoral life, did not refuse to accept of the fallow grounds; while the Romans kept such lands as were most proper for culture: the Burgundian's flock fattened the Roman's field.

VIII. The law of the Burgundians notices[22] that when those people settled in Gaul they were allowed two thirds of the land and one third of the bondmen. The state of villenage was therefore established in that part of Gaul before it was invaded by the Burgundians.[23]

The law of the Burgundians, in points relating to the two nations, makes a formal distinction in both, be-

[20] "De Moribus Germanorum."
[21] And in that of the Visigoths.
[22] Tit. 54.
[23] This is confirmed by the whole title of the "Code de Agricolis et Censitis, et Colonis."

tween the nobles, the freeborn, and the bondmen.[24] Servitude was not therefore a thing peculiar to the Romans; nor liberty and nobility to the barbarians.

This very same law says [25] that if a Burgundian freedman had not given a certain sum to his master, nor received a third share of a Roman, he was always supposed to belong to his master's family. The Roman proprietor was therefore free, since he did not belong to another person's family; he was free, because his third portion was a mark of liberty.

We need only open the Salic and Ripuarian laws to be satisfied that the Romans were no more in a state of servitude among the Franks than among the other conquerors of Gaul.

The Count de Boulainvilliers [26] is mistaken in the capital point of his system; he has not proved that the Franks made a general regulation which reduced the Romans into a kind of servitude.

As this author's work is penned without art, and as he speaks with the simplicity, frankness, and candour of that ancient nobility whence he descends, every one is capable of judging of the good things he says, and of the errors into which he has fallen. I shall not, therefore, undertake to criticise him; I shall only observe that he had more wit than enlightenment, more enlightenment than learning; though his learning was not contemptible, for he was well acquainted with the most valuable part of our history and laws.

The Count de Boulainvilliers and the Abbé du Bos [27] have formed two different systems, one of which seems

[24] Si dentem optimati Burgundioni vel Romano nobili excusserit. Tit. 26, sec. 1, et si mediocribus personis ingenuis tam Burgundionibus quam Romanis. (Ibid., sec. 2.)

[25] Tit. 57.

[26] See "Mercure," March, 1784. (J. V. P.)

[27] See M. Thierry in the introduction to the "Récits Mérovingiens." (J. V. P.)

to be a conspiracy against the commons and the other against the nobility. When the Sun gave leave to Phaëton to drive his chariot, he said to him: "If you ascend too high, you will burn the heavenly mansions; if you descend too low, you will reduce the earth to ashes; do not drive to the right, you will meet there with the constellation of the Serpent; avoid going too much to the left, you will there fall in with that of the Altar; keep in the middle." [28]

What first gave rise to the notion of a general regulation made at the time of the conquest was our meeting with an immense number of forms of servitude in France, toward the beginning of the third race; and as the continual progression of these forms of servitude was not perceived, people imagined in an age of obscurity a general law which was never framed.

Toward the beginning of the first race we meet with an infinite number of freemen, both among the Franks and the Romans; but the number of bondmen increased to that degree that at the beginning of the third race all the husbandmen and almost all the inhabitants of towns had become bondmen; [29] and whereas, at the first period, there was very nearly the same administration in the cities as among the Romans—namely, a corporation, a senate, and courts of judicature—at the other we hardly meet with anything but a lord and his bondmen.

When the Franks, Burgundians, and Goths made their several invasions, they seized upon gold, silver, movables, clothes, men, women, boys, and whatever the army could

[28] "Nec preme, nec summum molire per æthera currum;
Altius egressus, cœlestia tecta cremabis;
Inferius terras: medio tutissimus ibis.
Neu te dexterior tortum declinet ad Anguem;
Neve sinisterior pressam rota ducat ad Aram;
Inter utrumque tene." (Ovid, "Metam.," lib. ii.)

[29] While Gaul was under the dominion of the Romans they formed particular bodies; these were generally freedmen, or the descendants of freedmen.

carry; the whole was brought to one place and divided among the army.[30] History shows that after the first settlement—that is, after the first devastation—they entered into an agreement with the inhabitants, and left them all their political and civil rights. This was the law of nations in those days; they plundered everything in time of war, and granted everything in time of peace. Were it not so, how should we find both in the Salic and Burgundian laws such a number of regulations absolutely contrary to a general servitude of the people?

But though the conquest was not immediately productive of servitude, it arose nevertheless from the same law of nations which subsisted after the conquest.[31] Opposition, revolts and the taking of towns were followed by the slavery of the inhabitants. And, not to mention the wars which the conquering nations made against one another, as there was this peculiarity among the Franks, that the different partitions of the monarchy gave rise continually to civil wars between brothers or nephews, in which this law of nations was constantly practised, servitudes, of course, became more general in France than in other countries; and this is, I believe, one of the causes of the difference between our French laws and those of Italy and Spain, in respect to the right of seigniories.

The conquest was soon over, and the law of nations then in force was productive of some servile dependences. The custom of the same law of nations, which obtained for many ages, gave a prodigious extent to those servitudes.

Theodoric,[32] imagining that the people of Auvergne were not faithful to him, thus addressed the Franks of his division: "Follow me, and I will carry you into a country

[30] See Gregory of Tours, book ii, chap. xxvii. Aimoin, book i, chap. xii.

[31] See the "Lives of the Saints," p. 703, below.

[32] See Gregory of Tours, book iii, for Montesquieu's deviation from the actual sense of the writer. (J. V. P.)

where you shall have gold, silver, captives, clothes, and flocks in abundance; and you shall remove all the people into your own country."

After the conclusion of the peace between Gontram and Chilperic the troops employed in the siege of Bourges, having had orders to return, carried such a considerable booty away with them that they hardly left either men or cattle in the country.[33]

Theodoric, King of Italy, whose spirit and policy it was ever to distinguish himself from the other barbarian kings, upon sending an army into Gaul, wrote thus to the general:[34] "It is my will that the Roman laws be followed, and that you restore the fugitive slaves to their right owners. The defender of liberty ought not to encourage servants to desert their masters. Let other kings delight in the plunder and devastation of the towns which they have subdued; we are desirous to conquer in such a manner that our subjects shall lament their having fallen too late under our government." It is evident that his intention was to cast odium on the kings of the Franks and the Burgundians, and that he alluded in the above passage to their particular law of nations.

Yet this law of nations continued in force under the second race. King Pepin's army, having penetrated into Aquitaine, returned to France loaded with an immense booty, and with a number of bondmen, as we are informed by the annals of Metz.[35]

Here might I quote numberless authorities;[36] and as the public compassion was raised at the sight of those miseries, as several holy prelates, beholding the captives

[33] Ibid., book vi, chap. xxxi.

[34] Letter 43, lib. iii, in Cassiod.

[35] In the year 763. Innumerabilibus spoliis et captivis totus ille exercitus ditatus, in Franciam reversus est.

[36] See the annals of Fuld, in the year 739, Paulus Diaconus, de Gestis Longobardorum, lib. iii, cap. xxx, and lib. iv, cap. i, and the "Lives of the Saints" in the next quotation.

in chains, employed the treasure belonging to the Church, and sold even the sacred utensils, to ransom as many as they could; and as several holy monks exerted themselves on that occasion, it is in the "Lives of the Saints" that we meet with the best explanations on the subject.[37] And, although it may be objected to the authors of those lives that they have been sometimes a little too credulous in respect to things which God has certainly performed, if they were in the order of his providence, yet we draw considerable light thence with regard to the manners and usages of those times.

When we cast an eye upon the monuments of our history and laws, the whole seems to be an immense expanse, a boundless ocean;[38] all those frigid, dry, insipid, and hard writings must be read and devoured in the same manner as Saturn is fabled to have devoured the stones.

A vast quantity of land which had been in the hands of freemen[39] was changed into mortmain. When the country was stripped of its free inhabitants those who had a great multitude of bondmen either took large territories by force, or had them yielded by agreement, and built villages, as may be seen in different charters. On the other hand, the freemen who cultivated the arts found themselves reduced to exercise those arts in a state of servitude; thus the servitudes restored to the arts and to agriculture whatever they had lost.

It was a customary thing with the proprietors of lands to give them to the churches, in order to hold them themselves by a quit-rent, thinking to partake by their servitude of the sanctity of the churches.

[37] See the lives of S. Epiphanius, S. Eptadius, S. Cæsarius, S. Fidolus, S. Porcian, S. Treverius, S. Eusichius; and of S. Leger, the miracles of S. Julian, etc.

[38] Deerant quoque littora ponto. (Ovid, lib. i.)

[39] Even the husbandmen themselves were not all slaves; see the eighteenth and twenty-third law in the "Code de Agricolis, et Censitis, et Colonis," and the twentieth of the same title.

IX. A people remarkable for their simplicity and poverty, a free and martial people, who lived without any other industry than that of tending their flocks, and who had nothing but rush cottages to attach them to their lands,[40] such a people, I say, must have followed their chiefs for the sake of booty, and not to pay or to raise taxes. The art of tax-gathering was invented later, and when men began to enjoy the blessings of other arts.

The temporary tax of a pitcher of wine for every acre,[41] which was one of the exactions of Chilperic and Fredegonda, related only to the Romans. And, indeed, it was not the Franks that tore the rolls of those taxes, but the clergy, who in those days were all Romans.[42] The burden of this tax lay chiefly on the inhabitants of the towns;[43] now these were almost all inhabited by Romans.

Gregory of Tours relates[44] that a certain judge was obliged, after the death of Chilperic, to take refuge in a church, for having under the reign of that prince ordered taxes to be levied on several Franks who in the reign of Childebert were ingenuii, or freeborn: "Multos de Francis, qui tempore Childeberti regis ingenui fuerant, publico tributo subegit." Therefore the Franks who were not bondmen paid no taxes.

There is not a grammarian but would turn pale to see how the Abbé du Bos has interpreted this passage.[45] He observes that in those days the freedmen were also called ingenui. Upon this supposition he renders the Latin word ingenui, by the words "freed from taxes"; a phrase which we indeed may use in French, as we say freed from cares,

[40] See Gregory of Tours, book ii.
[41] Ibid., book v.
[42] Ibid., book viii.
[43] Quæ conditio universis urbibus per Galliam constitutis summopere est adhibita. ("Life of St. Aridius.")
[44] Book vii.
[45] "Establishment of the French Monarchy," tome iii, chap. xiv, p. 515.

freed from punishments; but in the Latin tongue such expressions as ingenui a tributis, libertini a tributis, manumissi tributorum, would be quite monstrous.[46]

Parthenius, says Gregory of Tours,[47] had like to have been put to death by the Franks for subjecting them to taxes. The Abbé du Bos finding himself hard pressed by this passage,[48] very coolly assumes the thing in question; it was, says he, a surcharge.

We find, in the law of the Visigoths,[49] that when a barbarian had seized upon the estate of a Roman, the judge obliged him to sell it, to the end that this estate might continue to be tributary; consequently the barbarians paid no land taxes.[50]

The Abbé du Bos,[51] who would fain have the Visigoths subjected to taxes,[52] quits the literal and spiritual sense of the law, and pretends, upon no other, indeed, than an imaginary foundation, that between the establishment of the Goths and this law there had been an augmentation of taxes which related only to the Romans. But none but Father Harduin are allowed thus to exercise an arbitrary power over facts.

This learned author [53] has rummaged Justinian's code,[54]

[46] See Baluzius II, p. 187.

[47] Book iii, chap. cxxxvi.

[48] Tome iii, p. 514.

[49] Judices atque præpositi terras Romanorum, ab illis qui occupatas tenent, auferant, et Romanis suâ exactione sine aliquâ dilatione restituant, ut nihil fisco debeat deperire. (Lib. x, tit. 1, cap. xiv.)

[50] The Vandals paid none in Africa. (Procopius, "War of the Vandals," lib. i and ii. "Historia Miscella," lib. xvi, p. 106.) Observe that the conquerors of Africa were a mixture of Vandals, Alans, and Franks. ("Historia Miscella," lib. xiv, p. 94.)

[51] "Establishment of the Franks in Gaul," tome iii, chap. xiv, p. 510.

[52] He lays a stress upon another law of the Visigoths, book x, tit. 1, art. 11, which proves nothing at all; it says only that he who has received of a lord a piece of land on condition of a rent or service ought to pay it.

[53] Book iii, p. 511.

[54] Leg. iii, tit. 74, lib. xi.

in search of laws to prove, that among the Romans the military benefices were subject to taxes. Whence he would infer that the same held good with regard to fiefs or benefices among the Franks. But the opinion that our fiefs derive their origin from that institution of the Romans is at present exploded; it obtained only at a time when the Roman history, not ours, was well understood, and our ancient records lay buried in obscurity and dust.

But the Abbé is in the wrong to quote Cassiodorus, and to make use of what was transacting in Italy, and in the part of Gaul subject to Theodoric, in order to acquaint us with the practice established among the Franks; these are things which must not be confounded. I propose to show, some time or other, in a certain work, that the plan of the monarchy of the Ostrogoths was entirely different from that of any other government founded in those days by the other barbarian nations; and that so far from our being entitled to affirm that a practice obtained among the Franks because it was established among the Ostrogoths, we have, on the contrary, just reason to think that a custom of the Ostrogoths was not in force among the Franks.

The hardest task for persons of extensive erudition is to seek their proofs in such passages as bear upon the subject, and to find, if we may be allowed to express ourselves in astronomical terms, the position of the sun.

The same author makes a wrong use of the capitularies, as well as of the historians and laws of the barbarous nations. When he wants the Franks to pay taxes, he applies to freemen what can be understood only of bondmen;[55] when he speaks of their military service, he applies to bondmen what can never relate but to freemen.[56]

[55] "Establishment of the French Monarchy," tome iii, chap. xiv, p. 513, where he quotes the twenty-eighth article of the "Edict of Pistes." See further on.

[56] Ibid., tome iii, chap. iv, p. 298.

X. I might here examine whether, after the Gauls and Romans were conquered, they continued to pay the taxes to which they were subject under the emperors. But, for the sake of brevity, I shall be satisfied with observing that if they paid them in the beginning, they were soon afterward exempted, and that those taxes were changed into a military service. For, I confess, I can hardly conceive how the Franks should have been at first such great friends, and afterward such sudden and violent enemies, to taxes.

A capitulary [57] of Louis the Debonnaire explains extremely well the situation of the freemen in the monarchy of the Franks. Some troops of Goths or Iberians,[58] flying from the oppression of the Moors, were received into Louis's dominions. The agreement made with them was that, like other freemen, they should follow their count to the army; and that upon a march they should mount guard and patrol under the command also of their count; [59] and that they should furnish horses and carriages for baggage to the king's commissaries,[60] and to the ambassadors on their way to or from court; and that they should not be compelled to pay any further impost, but should be treated as the other freemen.

It can not be said that these were new usages introduced at the beginning of the second race. This must be referred at least to the middle or to the end of the first. A capitulary of the year 864 [61] says in express terms that

[57] In the year 815, chap. i, which is agreeable to the capitulary of Charles the Bald, in the year 844, arts 1 and 2.

[58] Pro Hispanis in partibus Aquitaniæ, Septimaniæ, et Provinciæ consistentibus. (Ibid.)

[59] Excubias et exploraciones quas Wactas dicunt. (Ibid.)

[60] They were not obliged to furnish any to the count. (Ibid., art. 5. See Marc. form vi, lib. i.)

[61] Ut Pagenses Franci, qui caballos habent, cum suis comitibus in hostem pergant. The counts are forbidden to deprive them of their horses, ut hostem facere, et debitos paraveredos secundum antequam consuetudinem exsolvere possint. ("Edict of Pistes," in Baluzius, p. 186.)

it was the ancient custom for freemen to perform military service, and to furnish likewise the horses and carriages above mentioned; duties particular to themselves, and from which those who possessed the fiefs were exempt, as I shall prove hereafter.

This is not all; there was a regulation which hardly permitted the imposing of taxes on those freemen.[62] He who had four manors was always obliged to march against the enemy;[63] he who had but three was joined with a freeman that had only one; the latter bore the fourth part of the other's charges, and stayed at home. In like manner they joined two freemen who had each two manors; he who went to the army had half his charges borne by him who stayed at home.

Again, we have an infinite number of charters, in which the privileges of fiefs are granted to lands or districts possessed by freemen, and of which I shall make further mention hereafter.[64] These lands are exempted from all the duties or services which were required of them by the counts, and by the rest of the king's officers; and as all these services are particularly enumerated without making any mention of taxes, it is manifest that no taxes were imposed upon them.

It was very natural that the Roman system of taxation should of itself fall out of use in the monarchy of the Franks; it was a most complicated device, far above the conception, and wide from the plan of those simple people. Were the Tartars to overrun Europe, we should find it very difficult to make them comprehend what is meant by our financiers.

[62] "Capitulary of Charlemagne," in the year 812, chap. i. "Edict of Pistes," in the year 864, art. 27.

[63] Quatuor mansos. I fancy that what they called Mansus was a particular portion of land belonging to a farm where there were bondmen; witness the capitulary of the year 853, apud Sylvacum, tit. xiv, against those who drove the bondmen from their Mansus.

[64] See chap. xvii of this book.

The anonymous author of the "Life of Louis the Debonnaire," [65] speaking of the counts and other officers of the nation of the Franks, whom Charlemagne established in Aquitania, says that he intrusted them with the care of defending the frontiers, as also with the military power and the direction of the demesnes belonging to the crown. This shows the state of the royal revenues under the second race. The prince had kept his demesnes in his own hands, and employed his bondmen in improving them. But the indictions, the capitations, and other imposts raised at the time of the emperors on the persons or goods of freemen had been changed into an obligation of defending the frontiers, and marching against the enemy.

In the same history [66] we find that Louis the Debonnaire, having been to wait upon his father in Germany, this prince asked him why he, who was a crowned head, came to be so poor; to which Louis made answer that he was only a nominal king, and that the great lords were possessed of almost all his demesnes; that Charlemagne, being apprehensive lest this young prince should forfeit their affection if he attempted himself to resume what he had inconsiderately granted, appointed commissioners to restore things to their former situation.

The bishops, writing [67] to Louis, brother of Charles the Bald, used these words: "Take care of your lands, that you may not be obliged to travel continually by the houses of the clergy, and to tire their bondmen with carriages. Manage your affairs," continue they, "in such a manner that you may have enough to live upon and to receive embassies." It is evident that the king's revenues in those days consisted of his demesnes.[68]

[65] In Duchesne, tome ii, p. 287.
[66] In Duchesne, tome ii, p. 89.
[67] See the capitulary of the year 858, art. 14.
[68] They levied also some duties on rivers, where there happened to be a bridge or a passage.

XI. After the barbarians had quitted their own country they were desirous of reducing their usages into writing; but as they found difficulty in writing German words with Roman letters, they published these laws in Latin.

In the confusion and rapidity of the conquest, most things changed their nature; in order, however, to express them, they were obliged to make use of such old Latin words as were most analogous to the new usages. Thus, whatever was likely to revive the idea of the ancient census of the Romans they called by the name of census tributum;[69] and when things had no relation at all to the Roman census, they expressed, as well as they could, the German words by Roman letters; thus they formed the word fredum, on which I shall have occasion to descant in the following chapters.

The words census and tributum having been employed in an arbitrary manner, this has thrown some obscurity on the signification in which these words were used under our princes of the first and second race. And modern authors[70] who have adopted particular systems, having found these words in the writings of those days, imagined that what was then called census was exactly the census of the Romans; and thence they inferred this consequence, that our kings of the first two races had put themselves in the place of the Roman emperors, and made no change in their administration.[71] Besides, as particular duties

[69] The census was so generical a word that they made use of it to express the tolls of rivers, when there was a bridge or ferry to pass. See the third capitulary, in the year 803, edition of Baluzius, p. 395, art. 1; and the fifth in the year 819, p. 616. They gave likewise this name to the carriages furnished by the freemen to the king, or to his commissaries, as appears by the capitulary of Charles the Bald, in the year 865, art. 8.

[70] The Abbé du Bos, and his followers.

[71] See the weakness of the arguments produced by the Abbé du Bos, in the "Establishment of the French Monarchy," tome iii, book vi, chap xiv; especially in the inference he draws from a passage of Gregory of Tours, concerning a dispute between his church and King Charibert.

raised under the second race were by change and by certain restrictions converted into others,[72] they inferred thence that these duties were the census of the Romans; and as, since the modern regulations, they found that the crown demesnes were absolutely unalienable, they pretended that those duties which represented the Roman census, and did not form a part of the demesnes, were mere usurpation. I omit the other consequences.

To apply the ideas of the present time to distant ages is the most fruitful source of error. To those people who want to modernize all the ancient ages, I shall say what the Egyptian priests said to Solon, "O Athenians, you are mere children!" [73]

XII. The king, the clergy, and the lords raised regular taxes, each on the bondmen of their respective demesnes. I prove it with respect to the king, by the capitulary "De Villis"; with regard to the clergy, by the codes of the laws of the barbarians[74] and in relation to the lords, by the regulations which Charlemagne made concerning this subject.[75]

These taxes were called census; they were economical and not fiscal claims, entirely private dues and not public taxes. I affirm that what they called census at that time was a tax raised upon the bondmen. This I prove by a formulary of Marculfus containing a permission from the king to enter into holy orders, provided the persons be freeborn,[76] and not enrolled in the register of the census. I prove it also by a commission from Charlemagne to a

[72] For instance, by enfranchisements.

[73] Apud Platonem, in Timæo, vel de natura. (J. V. P.)

[74] "Law of the Alemans," chap. xxii; and the "Law of the Bavarians," tit. I, chap. xiv, where the regulations are to be found which the clergy made concerning their order.

[75] Book v of the "Capitularies," chap. ccciii.

[76] Si ille de capite suo bene ingenuus sit, et in Puletico publico censitus non est. (Lib. i, formul. 19.)

count [77] whom he had sent into Saxony, which contains the enfranchisement of the Saxons for having embraced Christianity, and is properly a charter of freedom.[78] This prince restores them to their former civil liberty,[79] and exempts them from paying the census. It was, therefore, the same thing to be a bondman as to pay the census, to be free as not to pay it.

By a kind of letters patent of the same prince in favour of the Spaniards,[80] who had been received into the monarchy, the counts are forbidden to demand any census of them, or to deprive them of their lands. That strangers upon their coming to France were treated as bondmen is a thing well known; and Charlemagne being desirous that they should be considered as freemen, since he would have them be proprietors of their lands, forbade the demanding any census of them.

A capitulary of Charles the Bald,[81] given in favour of those very Spaniards, orders them to be treated like the other Franks, and forbids the requiring any census of them; consequently this census was not paid by freemen.

The thirtieth article of the edict of Pistes reforms the abuse by which several of the husbandmen belonging to the king or to the church sold the lands dependent on their manors to ecclesiastics or to people of their condition, reserving only a small cottage to themselves; by which means they avoided paying the census; and it ordains that things should be restored to their primitive situation; the census was, therefore, a tax peculiar to bondmen.

[77] In the year 789, edition of the "Capitularies," by Baluzius, vol. i, p. 250.

[78] Et ut ista ingenuitatis pagina firma stabilisque consistat. (Ibid.)

[79] Pristinæque libertati donatos, et omni nobis debito censu solutos. (Ibid.)

[80] "Præceptum pro Hispanis," in the year 812, edition of Baluzius, tome i, p. 500.

[81] In the year 844, edition of Baluzius, tome ii, arts. 1 and 2, p. 27.

Thence also it follows that there was no general census in the monarchy; and this is clear from a great number of passages. For what could be the meaning of this capitulary? [82] "We ordain that the royal census should be levied in all places where formerly it was lawfully levied." [83] What could be the meaning of that in which Charlemagne [84] orders his commissaries in the provinces to make an exact inquiry into all the census that belonged in former times to the king's demesne? [85] And of that [86] in which he disposes of the census paid by those [87] of whom they are demanded? What can that other capitulary mean [88] in which we read, "If any person has acquired a tributary land [89] on which we were accustomed to levy the census"? And that other, in fine,[90] in which Charles the Bald [91] makes mention of feudal lands whose census had from time immemorial belonged to the king.

Observe that there are some passages which seem at first sight to be contrary to what I have said, and yet confirm it. We have already seen that the freemen in the monarchy were obliged only to furnish particular carriages; the capitulary just now cited gives to this the name of census,[92] and opposes it to the census paid by the bondmen.

[82] Third capitulary of the year 805, arts. 20 and 23, inserted in the "Collection of Angezise," book iii, art. 15. This is agreeable to that of Charles the Bald, in the year 854, apud Attiniacum, art. 6.

[83] Undecunque legitime exigebatur. (Ibid.)

[84] In the year 812, arts. 10 and 11, edition of Baluzius, tome i, p. 398.

[85] Undecunque antiquitus ad partem regis venire solebant. (Capitulary of the year 812, arts. 10 and 11.)

[86] In the year 813, art. 6, edition of Baluzius, tome i, p. 508.

[87] De illis unde censa exigunt. (Capitulary of the year 813, art. 6.)

[88] Book iv of the "Capitularies," art. 37, and inserted in the "Law of the Lombards."

[89] Si quis terram tributariam, unde census ad partem nostram exire solebat, susceperit. (Book iv of the "Capitularies," art. 37.)

[90] In the year 805, art. 8.

[91] Unde census ad partem regis exivit antiquitus. (Capitulary of the year 805, art. 8.)

[92] Censibus vel paraveredis quos Franci homines ad regiam potestatem exsolvere debent.

Besides, the edict of Pistes[93] notices those freemen who are obliged to pay the royal census for their head and for their cottages,[94] and who had sold themselves during the famine. The king orders them to be ransomed. This is because those who were manumitted by the king's letters[95] did not, generally speaking, acquire a full and perfect liberty,[96] but they paid censum in capite; and these are the people here meant.

We must, therefore, waive the idea of a general and universal census, derived from that of the Romans, from which the rights of the lords are also supposed to have been derived by usurpation. What was called census in the French monarchy, independently of the abuse made of that word, was a particular tax imposed on the bondmen by their masters.

I beg the reader to excuse the trouble I must give him with such a number of citations. I should be more concise did I not meet with the Abbé du Bos's book on the establishment of the French monarchy in Gaul, continually in my way. Nothing is a greater obstacle to our progress in knowledge than a bad performance of a celebrated author; because, before we instruct we must begin with undeceiving.

XIII. I have noticed those volunteers among the Germans, who have followed their princes in their several expeditions. The same usage continued after the conquest. Tacitus mentions them by the name of companions;[97] the Salic law by that of men who have vowed fealty to the

[93] In the year 864, art. 34, edition of Baluzius, p. 192.

[94] De illis francis hominibus qui censum regium de suo capite et de suis recellis debeant. (Ibid.)

[95] The twenty-eighth article of the same edict explains this extremely well; it even makes a distinction between a Roman freedman and a Frank freedman; and we likewise see there that the census was not general; it deserves to be read.

[96] As appears by the capitulary of Charlemagne in the year 813, which we have already quoted.

[97] Comites.

king;[98] the formularies of Marculfus[99] by that of the king's Antrustios,[100] the earliest French historians by that of Leudes,[101] faithful and loyal; and those of later date by that of vassals and lords.[102]

In the Salic and Ripuarian laws we meet with an infinite number of regulations in regard to the Franks, and only with a few for the Antrustios. The regulations concerning the Antrustios are different from those which were made for the other Franks; they are full of what relates to the settling of the property of the Franks, but mention not a word concerning that of the Antrustios. This is because the property of the latter was regulated rather by the political than by the civil law, and was the share that fell to an army, and not the patrimony of a family.

The goods reserved for the feudal lords were called fiscal goods, benefices, honours, and fiefs, by different authors, and in different times.[103]

There is no doubt but the fiefs at first were at will.[104] We find in Gregory of Tours[105] that Sunegisilus and Gallomanus were deprived of all they held of the exchequer, and no more was left them than their real property. When Gontram raised his nephew Childebert to the throne, he had a private conference with him, in which he named the persons who ought to be honoured with, and those who ought to be deprived of, the fiefs.[106] In a formulary of

[98] Qui sunt in truste regis, tit. 44, art. 4.

[99] Book i, formulary 18.

[100] From the word trew, which signifies faithful among the Germans.

[101] Leudes, fideles.

[102] Vassalli, seniores.

[103] Fiscalia. See the fourteenth formulary of Marculfus, book i. It is mentioned in the "Life of S. Maur," dedit fiscum unum; and in the annals of Metz, in the year 747, dedit illi comitatus et fiscos plurimos. The goods designed for the support of the royal family were called regalia.

[104] See book i. tit. 1, of the fiefs; and Cujas on that book.

[105] Book ix, chap. xxxviii.

[106] Quos honoraret muneribus, quos ab honore depelleret. (Ibid., lib. vii.)

Marculfus[107] the king gives in exchange, not only the benefices held by his exchequer, but likewise those which had been held by another. The law of the Lombards opposes the benefices to property.[108] In this our historians, the formularies, the codes of the different barbarous nations, and all the monuments of those days are unanimous. In fine, the writers of the book of fiefs inform us[109] that at first the lords could take them back when they pleased, that afterward they granted them for the space of a year,[110] and that at length they gave them for life.

XIV. Two sorts of people were bound to military service: the great and lesser vassals, who were obliged in consequence of their fief; and the freemen, whether Franks, Romans, or Gauls, who served under the count and were commanded by him and his officers.

The name of freemen was given to those who on the one hand had no benefits or fiefs, and on the other were not subject to the base services of villenage; the lands they possessed were what they called allodial estates.

The counts assembled the freemen,[111] and led them against the enemy; they had officers under them who were called vicars;[112] and as all the freemen were divided into hundreds, which constituted what they called a borough, the counts had also officers under them, who were denomi-

[107] Vel reliquis quibuscumque beneficiis, quodcumque ille, vel fiscus noster, in ipsis locis tenuisse noscitur. (Lib. i, formul. 30.)

[108] Liv. iii, tit. 8, sec. 3.

[109] Antiquissimo enim tempore sic erat in Dominorum potestate connexum, ut quando vellent possent auferre rem in feudum a se datam; postea vero conventum est ut per annum tantum firmitatem haberent, deinde statutum est ut usque ad vitam fidelis produceretur. ("Feudorum," lib. i, tit. 1.)

[110] It was a kind of precarious tenure which the lord consented or refused to renew every year, as Cujas has observed.

[111] See the "Capitulary of Charlemagne," in the year 812, arts. 3 and 4, edition of Baluzius, tome i, p. 491; and the edict of Pistes in the year 864, art. 26, tome ii, p. 186.

[112] Et habebat unusquisque comes Vicarios et Centenarios secum. (Book ii of the "Capitularies," art. 28.)

nated centenarii, and led the freemen of the borough, or their hundreds, to the field.[113]

This division into hundreds is posterior to the establishment of the Franks in Gaul. It was made by Clotharius and Childebert, with a view of obliging each district to answer for the robberies committed in their division; this we find in the decrees of those princes.[114] A regulation of this kind is to this very day observed in England.

As the counts led the freemen against the enemy, the feudal lords commanded also their vassals or rear-vassals; and the bishops, abbots, or their advocates,[115] likewise commanded theirs.[116]

The bishops were greatly embarrassed and inconsistent with themselves;[117] they requested Charlemagne not to oblige them any longer to military service; and when he granted their request, they complained that he had deprived them of the public esteem; so that this prince was obliged to justify his intentions upon this head. Be that as it may, when they were exempted from marching against the enemy I do not find that their vassals were led by the counts; on the contrary, we see that the kings or the bishops chose one of their feudatories to conduct them.[118]

In a capitulary of Louis the Debonnaire[119] this prince distinguishes three sorts of vassals—those belonging to the king, those to the bishops, and those to the counts.

[113] They were called Compagenses.

[114] Published in the year 595, art. 1. See the "Capitularies," edition of Baluzius, p. 20. These regulations were undoubtedly made by agreement.

[115] Advocati.

[116] "Capitulary of Charlemagne," in the year 812, arts. 1 and 5, edition of Baluzius, tome i, p. 490.

[117] See the capitulary of the year 803, published at Worms, edition of Baluzius, pp. 408 and 410.

[118] "Capitulary of Worms" in the year 803, edition of Baluzius, page 409; and the council in the year 845, under Charles the Bald, in verno palatio, edition of Baluzius, tome ii, p. 17, art. 8.

[119] The fifth capitulary of the year 819, art. 27, edition of Baluzius, p. 618.

The vassals of a feudal lord were not led against the enemy by the count, except some employment in the king's household hindered the lord himself from commanding them.[120]

But who is it that led the feudal lords into the field? No doubt the king himself, who was always at the head of his faithful vassals. Hence we constantly find in the capitularies a distinction made between the king's vassals and those of the bishops.[121] Such brave and magnanimous princes as our kings did not take the field to put themselves at the head of an ecclesiastic militia; these were not the men they chose to conquer or to die with.

But these lords likewise carried their vassals and rear-vassals with them, as we can prove by the capitulary, in which Charlemagne ordains that every freeman who has four manors, either in his own property or as a benefice from somebody else, should march against the enemy or follow his lord.[122] It is evident that Charlemagne means that the person who had a manor of his own should march under the count, and he who held a benefice of a lord should set out along with him.

And yet the Abbé du Bos pretends[123] that when mention is made in the capitularies of tenants who depended on a particular lord, no others are meant than bondmen; and he grounds his opinion on the law of the Visigoths and the practice of that nation. It is much better to rely

[120] De Vassis Dominicis qui adhuc intra casam serviunt et tamen beneficia habere noscuntur, statutum est ut quicumque ex eis cum Domino Imperatore domi remanserint, vassallos suos casatos secum non retineant; sed cum comite, cujus pagenses sunt, ire permittant. (Second capitulary in the year 812, art. 7, edition of Baluzius, tome i, p. 494.)

[121] First capitulary of the year 812, art. 5, de hominibus nostris, et episcoporum et abbatum qui vel beneficia vel talia propria habent, etc., edition of Baluzius, tome i, p. 490.

[122] In the year 812, chap. i, edition of Baluzius, p. 490, ut omnis homo liber quatuor mansos vestitos de proprio suo, sive de alicujus beneficio habet, ipse se præparet, et ipse in hostem pergat, sive cum seniore suo.

[123] Tome iii, book vi, chap. iv, p. 299, "Establishment of the French Monarchy."

on the capitularies themselves; that which I have just quoted says expressly the contrary. The treaty between Charles the Bald and his brothers notices also those freemen who might choose to follow either a lord or the king; and this regulation is conformable to a great many others.

We may, therefore, conclude that there were three sorts of military services: that of the king's vassals, who had other vassals under them; that of the bishops or of the other clergy and their vassals; and, in fine, that of the count, who commanded the freemen.

Not but that the vassals might be also subject to the count; as those who have a particular command are subordinate to him who is invested with a more general authority.

We even find that the count and the king's commissaries might oblige them to pay the fine when they had not fulfilled the engagements of their fief. In like manner, if the king's vassals committed any outrage [124] they were subject to the correction of the count, unless they chose to submit rather to that of the king.

XV. It was a fundamental principle of the monarchy that whosoever was subject to the military power of another person was subject also to his civil jurisdiction. Thus the capitulary of Louis the Debonnaire,[125] in the year 815, makes the military power of the count and his civil jurisdiction over the freemen keep always an equal pace. Thus the placita [126] of the count who carried the freemen against the enemy were called the placita of the freemen; [127] whence undoubtedly came this maxim, that

[124] Capitulary of the year 882, art. 11, apud vernis palatium, edition of Baluzius, tome ii, p. 289.

[125] Arts. 1, 2, and the council in verno palatio of the year 845, art. 8, edition of Baluzius, tome ii, p. 17.

[126] Or assizes.

[127] "Capitularies," book iv of the "Collection of Angezise," art. 57; and the fifth capitulary of Louis the Debonnaire, in the year 819, art. 14, edition of Baluzius, tome i, p. 615.

the questions relating to liberty could be decided only in the count's placita, and not in those of his officers. Thus the count never led the vassals [128] belonging to the bishops or to the abbots, against the enemy, because they were not subject to his civil jurisdiction. Thus, he never commanded the rear-vassals belonging to the king's vassals. Thus the glossary of the English laws informs us [129] that those to whom the Saxons gave the name of Copies [130] were by the Normans called counts, or companions, because they shared the justiciary fines with the king. Thus we see that at all times the duty of a vassal toward his lord [131] was to bear arms,[132] and to try his peers in his court.

One of the reasons which produced this connection between the judiciary right and that of leading the forces against the enemy was because the person who led them exacted at the same time the payment of the fiscal duties, which consisted in some carriage services due by the freemen, and in general in certain judiciary profits, of which we shall treat hereafter.

The lords had the right of administering justice in their fief, by the same principle as the counts had it in their counties. And, indeed, the counties in the several variations that happened at different times always followed the variations of the fiefs; both were governed by the same plan and by the same principles. In a word, the counts in their counties were lords, and the lords in their seigniories were counts.

It has been a mistake to consider the counts as civil

[128] See the eighth note of the preceding chapter.

[129] It is to be found in the "Collection of William Lambard," de priscis Anglorum legibus.

[130] In the word Satrapia.

[131] This is well explained by the assizes of Jerusalem, chaps. ccxxi and ccxxii.

[132] The advowees of the church (advocati) were equally at the head of their placita and of their militia.

officers, and the dukes as military commanders. Both were equally civil and military officers;[133] the whole difference consisted in the duke's having several counts under him, though there were counts who had no duke over them, as we learn from Fredegarius.[134]

It will be imagined, perhaps, that the government of the Franks must have been very severe at that time, since the same officers were invested with a military and a civil power—nay, even with a fiscal authority—over the subjects; which in the preceding books I have observed to be distinguishing marks of despotism.

But we must not believe that the counts pronounced judgment by themselves, and administered justice in the same manner as the pashas in Turkey; in order to judge affairs they assembled a kind of assizes, where the principal men appeared.

To the end that we may thoroughly understand what relates to the judicial proceedings in the formulas, in the laws of the barbarians and in the capitularies, it is proper to observe that the functions of the count, of the grafio or fiscal judge and the centenarius were the same; that the judges, the rathimburghers and the aldermen were the same persons under different names. These were the count's assistants, and were generally seven in number; and as he was obliged to have twelve persons to judge,[135] he filled up the number with the principal men.[136]

But whoever had the jurisdiction, the king, the count, the grafio, the centenarius, the lords, or the clergy, they

[133] See the eighth formulary of Marculfus, book i, which contains the letters given to a duke, patrician, or count; and invests them with the civil jurisdiction, and the fiscal administration.

[134] "Chronicle," chap. lxxviii, in the year 636.

[135] See concerning this subject the "Capitularies of Louis the Debonnaire," added to the Salic law, art. 2, and the formula of judgments given by Du Cange in the word boni homines.

[136] Per bonos homines, sometimes there were none but principal men. See the appendix to the formularies of Marculfus, chap. li.

never tried causes alone; and this usage, which derived its origin from the forests of Germany, was still continued even after the fiefs had assumed a new form.

With regard to the fiscal power, its nature was such that the count could hardly abuse it. The rights of the prince in respect to the freemen were so simple that they consisted only, as we have already observed, in certain carriages, which were demanded of them on some public occasions.[137] And as for the judiciary rights, there were laws which prevented misdemeanours.[138]

XVI. Since it is impossible to gain any insight into our political law unless we are thoroughly acquainted with the laws and manners of the German nations, I shall, therefore, pause here awhile, in order to inquire into those manners and laws.

It appears by Tacitus that the Germans knew only two capital crimes: they hanged traitors and drowned cowards; these were the only public crimes among that people. When a man had injured another, the relatives of the person injured took share in the quarrel, and the offence was cancelled by a satisfaction.[139] This satisfaction was made to the person offended, when capable of receiving it; or to the relatives if they had been injured in common, or if by the decease of the party aggrieved or injured the satisfaction had devolved to them.

In the manner mentioned by Tacitus, these satisfactions were made by the mutual agreement of the parties; hence in the codes of the barbarous nations these satisfactions are called compositions.

[137] And some tolls on rivers, of which I have spoken already.

[138] See the "Law of the Ripuarians," tit. 89; and the "Law of the Lombards," book ii, tit. 52, sec. 9.

[139] Suscipere tam inimicitias, seu patris, seu propinqui, quam amicitias, necesse est: nec implacabiles durant; luitur enim etiam homicidium certo armentorum ac pecorum numero, recipitque satisfactionem universa domus. (Tacitus, "De Moribus Germanorum.")

The law of the Frisians[140] is the only one I find that has left the people in that situation in which every family at variance was in some measure in the state of Nature, and in which, being unrestrained either by a political or civil law, they might give freedom to their revenge till they had obtained satisfaction. Even this law was moderated; a regulation was made[141] that the person whose life was sought after should be unmolested in his own house, as also in going and coming from church and the court where causes were tried.

The compilers of the Salic law[142] cite an ancient usage of the Franks, by which a person who had dug a corpse out of the ground, in order to strip it, should be banished from society till the relatives had consented to his being readmitted. And as before that time strict orders were issued to every one, even to the offender's own wife, not to give him a morsel of bread, or to receive him under their roofs, such a person was in respect to others, and others in respect to him, in a state of savagery till an end was put to this state by a composition.

This excepted, we find that the sages of the different barbarous nations thought of determining by themselves what would have been too long and too dangerous to expect from the mutual agreement of the parties. They took care to fix the value of the composition which the party wronged or injured was to receive. All those barbarian laws are in this respect most admirably exact; the several cases are minutely distinguished,[143] the circumstances are weighed, the law substitutes itself in the place of the person injured and insists upon the same

[140] See this law in the second title on murders; and Vulemar's addition on robberies.

[141] Additio sapientum, tit. i, § 1.

[142] Salic law, tit. 57, sec. 5, tit. 17, sec. 2.

[143] The Salic laws are admirable in this respect; see especially the titles 3, 4, 5, 6, and 7, which related to the stealing of cattle.

satisfaction as he himself would have demanded in cold blood.

By the establishing of those laws, the German nations quitted that state of Nature in which they seem to have lived in Tacitus's time.

Rotharis declares, in the law of the Lombards,[144] that he had increased the compositions allowed by ancient custom for wounds, to the end that the wounded person being fully satisfied, all enmities should cease. And, indeed, as the Lombards from a very poor people had grown rich by the conquest of Italy, the ancient compositions had become frivolous, and reconcilements prevented. I do not question but that this was the motive which obliged the other chiefs of the conquering nations to make the different codes of laws now extant.

The principal composition was that which the murderer paid to the relatives of the deceased. The difference of conditions produced a difference in the compositions.[145] Thus in the law of the Angli there was a composition of six hundred sous for the murder of an adeling, two hundred for that of a freeman, and thirty for killing a bondman. The largeness, therefore, of the composition for the life of a man was one of his chief privileges; for besides the distinction it made of his person, it likewise established a greater security in his favour among rude and boisterous nations.

This we are made sensible of by the law of the Bavarians:[146] it gives the names of the Bavarian families who received a double composition, because they were the first after the Agilolfings.[147] The Agilolfings were of the

[144] Book i, tit. 7, sec. 15.

[145] See the "Law of the Angli," tit. i, secs. 1, 2, and 4; ibid., tit. v, sec. 6; the "Law of the Bavarians," tit. i, chaps. 8 and 9, and the "Law of the Frisians," tit. xv.

[146] Tit. 2, chap. xx.

[147] Hozidra, Ozza, Sagana, Habalingua, Anniena. (Ibid.)

ducal race, and it was customary with this nation to choose a duke out of that family; these had a quadruple composition. The composition for a duke exceeded by a third that which had been established for the Agilolfings. "Because he is a duke," says the law, "a greater honour is paid to him than to his relatives."

All these compositions were valued in money. But as those people, especially when they lived in Germany, had very little specie, they might pay it in cattle, corn, movables, arms, dogs, hawks, lands, etc.[148] The law itself frequently determined the value of those things; which explains how it was possible for them to have such a number of pecuniary punishments with so very little money.[149]

These laws were therefore employed in exactly determining the difference of wrongs, injuries, and crimes; to the end that every one might know how far he had been injured or offended, the reparation he was to receive, and especially that he was to receive no more.

In this light it is easy to conceive that a person who had taken revenge after having received satisfaction was guilty of a heinous crime. This contained a public as well as a private offence; it was a contempt of the law of itself; a crime which the legislators never failed to punish.[150]

There was another crime which above all others was considered as dangerous, when those people lost something of their spirit of independence, and when the kings

[148] Thus the law of Ina valued life by a certain sum of money, or by a certain portion of land. Leges Inæ regis, titulo de villico regio de priscis Anglorum legibus. (Cambridge, 1644.)

[149] See the "Law of the Saxons," which makes this same regulation for several people, chap. xviii. See also the "Law of the Ripuarians," tit. 36, sec. 11, the "Law of the Bavarians," tit. i, secs. 10 and 11. Si aurum non habet, donet aliam pecuniam, mancipia, terram, etc.

[150] See the "Law of the Lombards," book i, tit. 25, sec. 21; ibid., book i, tit. 9, secs. 8 and 34; ibid., sec. 38, and the capitulary of Charlemagne in the year 802, chap. xxxii, containing an instruction given to those whom he sent into the provinces.

endeavoured to establish a better civil administration; this was the refusing to give or to receive satisfaction.[151] We find in the different codes of the laws of the barbarians that the legislators were peremptory on this article.[152] In effect, a person who refused to receive satisfaction wanted to preserve his right of prosecution; he who refused to give it left the right of prosecution to the person injured; and this is what the sages had reformed in the institutions of the Germans, whereby people were invited but not compelled to compositions.

I have just now made mention of a text of the Salic law, in which the legislator left the party offended at liberty to receive or to refuse satisfaction; it is the law by which a person who had stripped a dead body was expelled from society till the relatives upon receiving satisfaction petitioned for his being readmitted.[153] It was owing to the respect they had for sacred things that the compilers of the Salic laws did not meddle with the ancient usage. It would have been absolutely unjust to grant a composition to the relatives of a robber killed in the act, or to the relatives of a woman who had been repudiated for the crime of adultery. The law of the Bavarians allowed no compositions in the like cases, but punished the relatives who sought revenge.[154]

[151] See in Gregory of Tours, book vii, chap. xlvii, the detail of a process wherein a party loses half the composition that had been adjudged to him, for having done justice to himself, instead of receiving satisfaction, whatever injury he might have afterward received.

[152] See the "Law of the Saxons," chap. iii, sec. 4; the "Law of the Lombards," book i, tit. 37, secs. 1 and 2; and the "Law of the Alemans," tit. 45, secs. 1 and 2. This last law gave leave to the party injured to right himself upon the spot, and in the first transport of passion. See also the "Capitularies of Charlemagne," in the year 779, chap. xxii, in the year 802, chap. xxxii, and also that of the year 805, chap. v.

[153] The compilers of the "Law of the Ripuarians" seem to have softened this. See the eighty-fifth title of those laws.

[154] See the decree of Tassillon, de popularibus legibus, arts. 3, 4, 10, 16, 19; the "Law of the Angli," tit. vii, sec. 4.

It is no rare thing to meet with compositions for involuntary actions in the codes of the laws of the barbarians. The law of the Lombards is generally very prudent; it ordained [155] that in those cases the compositions should be according to the person's generosity, and that the relatives should no longer be permitted to pursue their revenge.

Clotharius II made a very wise decree: he forbade the person robbed to receive any clandestine composition, and without an order from the judge.[156] We shall presently see the motive of this law.

XVII. Besides the composition which they were obliged to pay to the relatives for murders or injuries, they were also under a necessity of paying a certain duty which the codes of the barbarian laws called fredum.[157] I intend to treat of it at large, and in order to give an idea of it, I begin with defining it as a recompense for the protection granted against the right of vengeance. Even to this day, fred in the Swedish language signifies peace.

The administration of justice among those rude and unpolished nations was nothing more than granting to the person who had committed an offence a protection against the vengeance of the party offended, and obliging the latter to accept of the satisfaction due to him; insomuch that among the Germans, contrary to the practice of all other nations, justice was administered in order to protect the criminal against the party injured.

The codes of the barbarian laws have given us the cases in which the freda might be demanded. When the relatives could not prosecute, they allowed of no fredum;

[155] Book i, tit. ix, sec. 4.

[156] Pactus pro tenore pacis inter Childebertum et Clotarium, anno 593, et decretio Clotarii 2 regis, circa annum 595, chap. xi.

[157] When it was not determined by the law it was generally the third of what was given for the composition, as appears in the "Law of the Ripuarians," chap. lxxxix, which is explained by the third capitulary of the year 813. (Edition of Baluzius, tome i, p. 512.)

and, indeed, when there was no prosecution there could be no composition for a protection against it. Thus, in the law of the Lombards,[158] if a person happened to kill a freeman by accident, he paid the value of the man killed, without the fredum; because, as he had killed him involuntarily, it was not a case in which the relatives were allowed the right of prosecution. Thus in the law of the Ripuarians,[159] when a person was killed with a piece of wood, or with any instrument made by man, the instrument or the wood were deemed culpable, and the relatives seized upon them for their own use, but were not allowed to demand the fredum.

In like manner, when a beast happened to kill a man, the same law established a composition without the fredum, because the relatives of the deceased were not offended.[160]

In fine, it was ordained by the Salic law[161] that a child who had committed a fault before the age of twelve should pay the composition without the fredum; as he was not yet able to bear arms he could not be in the case in which the party injured, or his relatives, had a right to demand satisfaction.

It was the criminal that paid the fredum for the peace and security of which he had been deprived by his crime, and which he might recover by protection. But a child did not lose this security; he was not a man, and consequently could not be expelled from human society.

This fredum was a local right in favour of the person who was judge of the district.[162] Yet the law of the Ripuarians[163] forbade him to demand it himself; it or-

[158] Book i, tit. 9, sec. 17, edition of Lindembrock.
[159] Tit. 70.
[160] Tit. 46. See also the "Law of the Lombards," book i, chap. xxi, sec. 3, Lindembrock's edition, si caballus cum pede, etc.
[161] Tit. 28, sec. 6.
[162] As appears by the decree of Clotharius II in the year 595, fredus tamen judici in cujus pago est reservetur.
[163] Tit. 85.

dained that the party who had gained the cause should receive it and carry it to the exchequer, to the end that there might be a lasting peace, says the law among the Ripuarians.

The greatness of the fredum was proportioned to the degree of protection: thus the fredum for the king's protection was greater than what was granted for the protection of the count, or of the other judges.[164]

Here I see the origin of the jurisdiction of the lords. The fiefs comprised very large territories, as appears from a vast number of records. I have already proved that the kings raised no taxes on the lands belonging to the division of the Franks; much less could they reserve to themselves any duties on the fiefs. Those who obtained them had in this respect a full and perfect enjoyment, reaping every possible emolument from them. And as one of the most considerable emoluments was the justiciary profits (freda),[165] which were received according to the usage of the Franks, it followed thence that the person seized of the fief was also seized of the jurisdiction, the exercise of which consisted of the compositions made to the relatives, and of the profits accruing to the lord; it was nothing more than ordering the payment of the compositions of the law, and demanding the legal fines. We find by the formularies containing confirmation of the perpetuity of a fief in favour of a feudal lord,[166] or of the privileges of fiefs in favour of churches,[167] that the fiefs were possessed

[164] "Capitulare incerti anni," chap. lvii, in Baluzius, tome i, p. 515, and it is to be observed that what was called fredum or faida, in the monuments of the first race, is known by the name of bannum in those of the second race, as appears from the capitulary de partibus Saxoniæ, in the year 789.

[165] See the capitulary of Charlemagne, de villis, where he ranks these freda among the great revenues of what was called villæ, or the king's demesnes.

[166] See the third, eighth, and seventeenth formula, book i of Marculfus.

[167] See the second, third, and fourth formula of Marculfus, book i.

of this right. This appears also from an infinite number of charters[168] mentioning a prohibition to the king's judges or offices of entering upon the territory in order to exercise any act of judicature whatsoever, or to demand any judiciary emolument. When the king's judges could no longer make any demand in a district they never entered it; and those to whom this district was left performed the same functions as had been exercised before by the judges.

The king's judges are forbidden also to oblige the parties to give security for their appearing before them; it belonged, therefore, to the person who had received the territory in fief to demand this security. They mention also that the king's commissaries shall not insist upon being accommodated with a lodging; in effect, they no longer exercise any function in those districts.

The administration, therefore, of justice, both in the old and new fiefs, was a right inherent in the very fief itself, a lucrative right which constituted a part of it. For this reason it had been considered at all times in this light; whence this maxim arose, that jurisdictions are patrimonial in France.

Some have thought that the jurisdictions derived their origin from the manumissions made by the kings and lords, in favour of their bondmen. But the German nations, and those descended from them, are not the only people who manumitted their bondmen, and yet they are the only people that established patrimonial jurisdictions. Besides, we find by the formularies of Marculfus[169] that there were

[168] See the collections of those charters, especially that at the end of the fifth volume of the "Historians of France," published by the Benedictine monks.

[169] See the third, fourth, and fourteenth of the first book, and the charter of Charlemagne, in the year 771, in Martene, tome i, Anecdot. collect. 11, præcipientes jubemus ut ullus judex publicus . . . homines ipsius ecclesiæ et monasterii ipsius Morbacensis tam ingenuos quam et servos, et qui super eorum terras manere, etc.

freemen dependent on these jurisdictions in the earliest times: the bondmen were therefore subject to the jurisdiction, because they were upon the territory; and they did not give rise to the fiefs for having been annexed to the fief.

Others have taken a shorter cut: the lords, say they, and this is all they say, usurped the jurisdictions. But are the nations descended from Germany the only people in the world that usurped the rights of princes? We are sufficiently informed by history that several other nations have encroached upon their sovereigns, and yet we find no other instance of what we call the jurisdiction of the lords. The origin of it is, therefore, to be traced in the usages and customs of the Germans.

Whoever has the curiosity to look into Loyseau [170] will be surprised at the manner in which this author supposes the lords to have proceeded, in order to form and usurp their different jurisdictions. They must have been the most artful people in the world; they must have robbed and plundered, not after the manner of a military nation, but as the country justices and the attorneys rob one another. Those brave warriors must be said to have formed a general system of politics throughout all the provinces of the kingdom, and in so many other countries in Europe; Loyseau makes them reason as he himself reasoned in his closet.

Once more: if the jurisdiction was not a dependency of the fief, how come we everywhere to find that the service of the fief was to attend the king or the lord, both in their courts and in the army? [171]

XVIII. The churches acquired very considerable property. We find that our kings gave them great seigniories —that is, great fiefs; and we find jurisdictions established

[170] Treatise of village jurisdictions. (Loyseau.)
[171] See Mons. Du Cange on the word hominium.

at the same time in the demesnes of those churches. Whence could so extraordinary a privilege derive its origin? It must certainly have been in the nature of the grant. The church land had this privilege because it had not been taken from it. A seigniory was given to the church; and it was allowed to enjoy the same privileges as if it had been granted to a vassal. It was also subjected to the same service as it would have paid to the state if it had been given to a layman, according to what we have already observed.

The churches had, therefore, the right of demanding the payment of compositions in their territory, and of insisting upon the fredum; and as those rights necessarily implied that of hindering the king's officers from entering upon the territory to demand these freda and to exercise acts of judicature, the right which ecclesiastics had of administering justice in their own territory was called immunity, in the style of the formularies, of the charters, and of the capitularies.[172]

The law of the Ripuarians [173] forbids the freedom of the churches [174] to hold the assembly for administering justice in any other place than in the church where they were manumitted.[175] The churches had therefore jurisdictions even over freemen, and held their placita in the earliest times of the monarchy.

I find, in the "Lives of the Saints," [176] that Clovis gave to a certain holy person power over a district of six leagues, and exempted it from all manner of jurisdiction. This, I believe, is a falsity, but it is a falsity of a very ancient date; both the truth and the fiction contained in that life are in

[172] See the third and fourth formulary of Marculfus, book i.

[173] Ne aliubi nisi ad ecclesiam, ubi relaxati sunt, mallum teneant, tit. lviii, sec. 1. See also sec. 19. Lindembrock's edition.

[174] Tabulariis.

[175] Mallum.

[176] Vita S. Germeri, Episcopi Tolosani apud Bollandianos 16 Maii.

relation to the customs and laws of those times, and it is these customs and laws we are investigating.[177]

Clotharius II orders the bishops or the nobility who are possessed of estates in distant parts to choose upon the very spot those who are to administer justice, or to receive the judiciary emoluments.[178]

The same prince regulates the judiciary power between the ecclesiastic courts and his officers.[179] The capitulary of Charlemagne in the year 802 prescribes to the bishops and abbots the qualifications necessary for their officers of justice. Another capitulary of the same prince inhibits the royal officers [180] to exercise any jurisdiction over those who are employed in cultivating church lands, except they entered into that state by fraud, and to exempt themselves from contributing to the public charges.[181] The bishops assembled at Rheims made a declaration that the vassals belonging to the respective churches are within their immunity.[182] The capitulary of Charlemagne in the year 806 ordains that the churches should have both criminal and civil jurisdiction over those who live upon their lands.[183] In fine, as the capitulary of Charles the Bald [184] distinguishes between the king's jurisdiction, that of the

[177] See also the "Life of S. Melanius," and that of S. Deicola.

[178] In the council of Paris, in the year 615. Episcopi vel potentes, qui in aliis possident regionibus, judices vel missos discussores de aliis provinciis non instituant, nisi de loco qui justitiam percipiant et aliis reddant, art. 19. See also the twelfth art.

[179] Ibid., art. 5.

[180] In the "Law of the Lombards," book ii, tit. 44, chap. ii. Lindembrock's edition.

[181] Servi Aldiones, libellarii antiqui, vel alii noviter facti. (Ibid.)

[182] Letter in the year 858, art. 7 in the "Capitularies," p. 108. Sicut illæ res et facultates, in quibus vivunt clerici, ita et illæ sub consecratione immunitatis, sunt de quibus debent militare vassalli.

[183] It is added to the "Law of the Bavarians," art. 8. See also the third art., Lindembrock's edition, p. 444. Imprimis omnium jubendum est ut habeant ecclesiæ earum justitias, et in vitâ illorum qui habitant in ipsis ecclesiis et post, tam in pecuniis quam et in substantiis eorum.

[184] In the year 857, in synodo apud Carisiacum, art. 4, edition of Baluzius, p. 96.

lords, and that of the church, I shall say nothing further upon this subject.[185]

XIX. It has been pretended that the vassals usurped the jurisdiction in their seigniories, during the confusion of the second race. Those who chose rather to form a general proposition that to examine it found it easier to say that the vassals did not possess than to discover how they came to possess. But the jurisdictions do not owe their origin to usurpations; they are derived from the primitive establishment, and not from its corruption.

"He who kills a freeman," says the law of the Bavarians, "shall pay a composition to his relatives if he has any; if not, he shall pay it to the duke, or to the person under whose protection he had put himself in his lifetime."[186] It is well known what it was to put one's self under the protection of another for a benefice.

"He who had been robbed of his bondman," says the law of the Alemans, "shall have recourse to the prince to whom the robber is subject; to the end that he may obtain a composition."[187]

"If a centenarius," says the decree of Childebert, "finds a robber in another hundred than his own, or in the limits of our faithful vassals, and does not drive him out, he shall be answerable for the robber, or purge himself by oath."[188] There was therefore a difference between the district of the centenarii and that of the vassals.

[185] See the letter written by the bishops assembled at Rheims, in the year 858, art. 7, in the "Capitularies," Baluzius's edition, p. 108. Sicut illæ res et facultates, in quibus vivunt clerici, ita et illæ sub consecratione immunitatis sunt de quibus debent militare vassalli, etc.

[186] Tit. iii, chap. xiii, Lindembrock's edition.

[187] Tit. 85.

[188] In the year 595, arts. 11 and 12, edition of the capitularies by Baluzius, p. 19. Pari conditione convenit ut si una centena in alia centena vestigium secuta fuerit et invenerit, vel in quibuscunque fidelium nostrorum terminis vestigium miserit, et ipsum in aliam centenam minime expellere potuerit, aut convictus reddat latronem, etc.

This decree of Childebert[189] explains the constitution of Clotharius of the same year, which being given for the same occasion and on the same matter differs only in the terms; the constitution calling "in truste" what by the decree is styled "in terminis fidelium nostrorum." Messieurs Bignon and Du Cange, who pretend that "in truste" signified another king's demesne, are mistaken in their conjecture.[190]

Pepin, King of Italy, in a constitution that had been made as well for the Franks as for the Lombards,[191] after imposing penalties on the counts and other royal officers for prevarications or delays in the administration of justice, ordains that if it happens that a Frank or a Lombard, possessed of a fief, is unwilling to administer justice, the judge to whose district he belongs shall suspend the exercise of his fief, and in the meantime either the judge or his commissary shall administer justice.[192]

It appears, by a capitulary of Charlemagne,[193] that the kings did not levy the freda in all places. Another capitulary of the same prince shows the feudal laws[194] and feudal court to have been already established. Another of Louis the Debonnaire ordains that when a person possessed of a fief does not administer justice,[195] or hinders it from being

[189] Si vestigius comprobatur latronis tamen præsentia nihil longe mulctando; aut si persequens latronem suum comprehenderit, integram sibi compositionem accipiat. Quod si in truste invenitur, medietatem compositionis trustis adquirat, et capitale exigat a latrone, arts. 2 and 3.

[190] See the "Glossary" on the word trustis.

[191] Inserted in the "Law of the Lombards," book ii, tit. lii, sec. 14. It is the capitulary of the year 793, in Baluzius, p. 544, art. 10.

[192] Et si forsitan Francus aut Longobardus habens beneficium justitiam facere noluerit, ille judex in cujus ministerio fuerit, contradicat illi beneficium suum, interim dum ipse aut missus eus justitiam faciat. See also the same "Law of the Lombards," book ii. tit. 52, sec. 2, which relates to the capitulary of Charlemagne of the year 778, art. 21.

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

[194] The second of the year 813, Baluzius's edition.

[195] Capitulare quintum anni 819, art. 23, Baluzius's edition, p. 617. Ut ubicumque missi, aut episcopum, aut abbatem, aut alium quemlibet

administered, the king's commissaries shall live in his house, at discretion, till justice be administered. I shall likewise quote two capitularies of Charles the Bald, one of the year 861,[196] where we find the particular jurisdictions established, with judges and subordinate officers; and the other of the year 864,[197] where he makes a distinction between his own seigniories and those of private persons.

We have not the original grants of the fiefs, because they were established by the partition which is known to have been made among the conquerors. It can not, therefore, be proved by original contracts that the jurisdictions were at first annexed to the fiefs; but if in the formularies of the confirmations, or of the translations of those fiefs in perpetuity, we find, as already has been observed, that the jurisdiction was there established, this judiciary right must certainly have been inherent in the fief and one of its chief privileges.

We have a far greater number of records that establish the patrimonial jurisdiction of the clergy in their districts than there are to prove that of the benefices or fiefs of the feudal lords; for which two reasons may be assigned: The first, that most of the records now extant were preserved or collected by the monks, for the use of their monasteries. The second, that the patrimony of the several churches having been formed by particular grants, and by a kind of derogation from the order established, they were obliged to have charters granted to them; whereas the concessions made to the feudal lords being consequences

honore præditum invenerint, qui justitiam facere noluit vel prohibuit, de ipsius rebus vivant quamdiu in eo loco justitias facere debent.

[196] Edictum in Carisiaco in Baluzius, tome ii, p. 152, unusquisque advocatus pro omnibus de suâ advocatione . . . in conveniente ut cum ministerialibus de suâ advocatione quos invenerit contra hunc bannum nostrum fecisse . . . castiget.

[197] Edictum Pistense, art. 18, Baluzius's edition, tome ii, p. 181. Si in fiscum nostrum vel in quamcunque immunitatem aut alicujus potentis potestatem vel proprietatem confugerit, etc.

of the political order, they had no occasion to demand, and much less to preserve, a particular charter. Nay, the kings were oftentimes satisfied with making a simple delivery with the sceptre, as appears from the "Life of St. Maur."

But the third formulary of Marculfus sufficiently proves that the privileges of immunity, and consequently that of jurisdiction, were common to the clergy and the laity, since it is made for both.[198] The same may be said of the constitution of Clotharius II.[199]

XX. Before I finish this book it will not be improper to write a few strictures on the Abbé du Bos's performance, because my notions are perpetually contrary to his; and if he has hit on the truth I must have missed it.

This performance has imposed upon a great many because it is penned with art; because the point in question is constantly supposed; because the more it is deficient in proofs the more it abounds in probabilities; and, in fine, because an infinite number of conjectures are laid down as principles, and thence other conjectures are inferred as consequences. The reader forgets he has been doubting in order to begin to believe. And as a prodigious fund of erudition is interspersed, not in the system but around it, the mind is taken up with the appendages, and neglects the principal. Besides, such a vast multitude of researches hardly permit one to imagine that nothing has been found; the length of the way makes us think that we have arrived at our journey's end.

But when we examine the matter thoroughly we find an immense colossus with earthen feet; and it is the earthen feet that render the colossus immense. If the Abbé du Bos's system had been well grounded, he would not

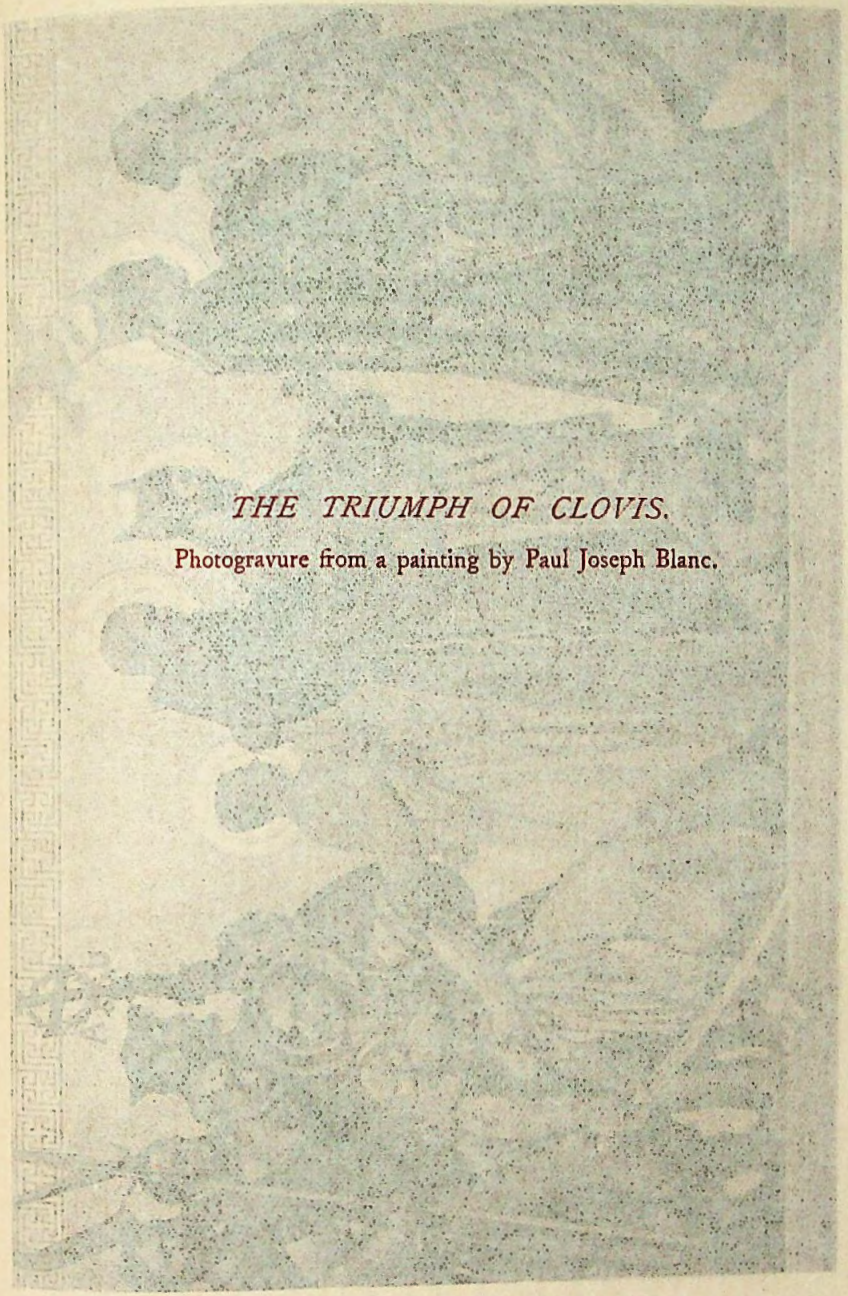
[198] Lib. i. Maximum regni nostri augere credimus monimentum, si beneficia opportuna locis ecclesiarum aut cui volueris dicere, benevola deliberatione concedimus.

[199] I have already quoted it in the preceding chapter, "Episcopi vel potentes."

have been obliged to write three tedious volumes to prove it; he would have found everything within his subject, and without wandering on every side in quest of what was extremely foreign to it; even reason itself would have undertaken to range this in the same chain with the other truths. Our history and laws would have told him, "Do not take so much trouble, we shall be your vouchers."

The Abbé du Bos endeavours by all means to explode the opinion that the Franks made the conquest of Gaul. According to his system, our kings were invited by the people, and only substituted themselves in the place and succeeded to the rights of the Roman emperors.

This pretension can not be applied to the time when Clovis, upon his entering Gaul, took and plundered the towns; neither is it applicable to the period when he defeated Syagrius, the Roman commander, and conquered the country which he held; it can, therefore, be referred only to the period when Clovis, already master of a great part of Gaul by open force, was called by the choice and affection of the people to the sovereignty over the rest. And it is not enough that Clovis was received, he must have been called; the Abbé du Bos must prove that the people chose rather to live under Clovis than under the domination of the Romans or under their own laws. Now, the Romans belonging to that part of Gaul not yet invaded by the barbarians were, according to this author, of two sorts: the first were of the Armorican confederacy, who had driven away the emperor's officers in order to defend themselves against the barbarians, and to be governed by their own laws; the second were subject to the Roman officers. Now, does the Abbé produce any convincing proofs that the Romans, who were still subject to the empire, called in Clovis? Not one. Does he prove that the republic of the Armoricans invited Clovis, or even concluded any treaty with him? Not at all. So far from



*THE TRIUMPH OF CLOVIS.*

Photogravure from a painting by Paul Joseph Blanc.

have been obliged to write three tedious volumes to prove it; he would have found everything within his subject, and without wandering on every side in quest of what was extremely foreign to it; even reason itself would have undertaken to range this in the same chain with the other truths. Our history and laws would have told him, "Do not take so much trouble, we shall be your vouchers."

The Abbé du Bos endeavours by all means to explode the opinion that the Franks made the conquest of Gaul. According to his system, our kings were invited by the people, and only substituted themselves in the place and succeeded to the rights of the Roman emperors.

This pretension can not be applied to the time when Clovis, upon his entering Gaul, took and plundered the towns; neither is it applicable to the period when he defeated Syagrius, the Roman commander, and conquered the country which he held; it can, therefore, be referred only to the period when Clovis, already master of a great part of Gaul by open force, was called by the choice and affection of the people to the sovereignty over the rest. And it is not enough that Clovis was received, he must have been called; the Abbé du Bos must prove that the people chose rather to live under Clovis than under the domination of the Romans or under their own laws. Now, the Romans belonging to that part of Gaul not yet invaded by the barbarians were, according to this author, of two sorts: the first were of the Armorican confederacy, who had driven away the emperor's officers in order to defend themselves against the barbarians, and to be governed by their own laws; the second were subject to the Roman officers. Does the Abbé produce any convincing proofs that the Romans, who were still subject to the empire, called in Clovis? Not one. Does he prove that the republic of the Armoricans invited Clovis, or even concluded any treaty with him? Not at all. So far from

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being able to tell us the fate of this republic he can not even so much as prove its existence; and notwithstanding he pretends to trace it from the time of Honorius to the conquest of Clovis, notwithstanding he relates with most admirable exactness all the events of those times, still this republic remains invisible in ancient authors. For there is a wide difference between proving by a passage of Zosimus [200] that under the Emperor Honorius the country of Armorica [201] and the other provinces of Gaul revolted and formed a kind of republic, and showing us that, notwithstanding the different pacifications of Gaul, the Armoricans formed always a particular republic, which continued till the conquest of Clovis; and yet this is what he should have demonstrated by strong and substantial proofs, in order to establish his system; for when we behold a conqueror entering a country and subduing a great part of it by force and open violence, and soon after find the whole country subdued, without any mention in history of the manner of its being effected, we have sufficient reason to believe that the affair ended as it began.

When we find he has mistaken this point, it is easy to perceive that his whole system falls to the ground; and as often as he infers a consequence from these principles that Gaul was not conquered by the Franks, but that the Franks were invited by the Romans, we may safely deny it.

This author proves his principle by the Roman dignities with which Clovis was invested; he insists that Clovis succeeded to Childeric his father in the office of magister militiæ. But these two offices are merely of his own creation. S. Remigius's letter to Clovis, on which he grounds his opinion, is only a congratulation upon his accession to the crown.[202] When the intent of a writing is so well known, why should we give it another turn?

[200] "Hist.," lib. vi.
[201] Totusque tractus Armoricus aliæque Galliarum provinciæ. (Ibid.)
[202] Tome ii, book iii, chap. xviii, p. 270.

Clovis, toward the end of the reign, was made consul by the Emperor Anastasius; but what right could he receive from an authority that lasted only one year? It is very probable, says our author, that in the same diploma the Emperor Anastasius made Clovis pro-consul. And, I say, it is very probable he did not. With regard to a fact for which there is no foundation the authority of him who denies is equal to that of him who affirms. But I have also a reason for denying it. Gregory of Tours, who mentions the consulate, says never a word concerning the pro-consulate. And even this pro-consulate could have lasted only about six months. Clovis died a year and a half after he was created consul; and we can not pretend to make the pro-consulate an hereditary office. In fine, when the consulate, and, if you will, the pro-consulate, were conferred upon him, he was already master of the monarchy, and all his rights were established.

The second proof alleged by the Abbé du Bos is the renunciation made by the Emperor Justinian in favour of the children and grandchildren of Clovis, of all the rights of the empire over Gaul. I could say a great deal concerning this renunciation. We may judge of the regard shown to it by the kings of the Franks from the manner in which they performed the conditions of it. Besides, the kings of the Franks were masters and peaceable sovereigns of Gaul; Justinian had not one foot of ground in that country; the Western Empire had been destroyed a long time before, and the Eastern Empire had no right to Gaul, but as representing the Emperor of the West. These were rights upon rights; the monarchy of the Franks was already founded; the regulation of their establishment was made; the reciprocal rights of the persons and of the different nations who lived in the monarchy were admitted, the laws of each nation were given and even reduced to writing. What, therefore, could that for-

eign renunciation avail to a government already established?

What can the abbé mean by making such a parade of the declamations of all those bishops, who, amid the confusion and total subversion of the state, endeavour to flatter the conqueror? What else is implied by flattering but the weakness of him who is obliged to flatter? What do rhetoric and poetry prove but the use of those very arts? Is it possible to help being surprised at Gregory of Tours, who, after mentioning the assassinations committed by Clovis, says that God laid his enemies every day at his feet because he walked in his ways? Who doubts but the clergy were glad of Clovis's conversion, and that they even reaped great advantages from it? But who doubts at the same time that the people experienced all the miseries of conquest and that the Roman government submitted to that of the Franks? The Franks were neither willing nor able to make a total change; and few conquerors were ever seized with so great a degree of madness. But to render all the Abbé du Bos's consequences true, they must not only have made no change among the Romans, but they must even have changed themselves.

I could undertake to prove, by following this author's method, that the Greeks never conquered Persia. I should set out with mentioning the treaties which some of their cities concluded with the Persians; I should mention the Greeks who were in Persian pay, as the Franks were in the pay of the Romans. And if Alexander entered the Persian territories, besieged, took and destroyed the city of Tyre, it was only a particular affair like that of Syagrius. But, behold the Jewish pontiff goes forth to meet him. Listen to the oracle of Jupiter Ammon. Recollect how he had been predicted at Gordium. See what a number of towns crowd, as it were, to submit to him, and how all the satraps and grandees come to pay him obeisance. He

put on the Persian dress; this is Clovis's consular robe. Does not Darius offer him one half of his kingdom? Is not Darius assassinated like a tyrant? Do not the mother and wife of Darius weep at the death of Alexander? Were Quintius Curtius, Arrian, or Plutarch, Alexander's contemporaries? Has not the invention of printing afforded us great light which those authors wanted? [203] Such is the history of the "Establishment of the French Monarchy in Gaul."

XXI. The Abbé du Bos maintains that at the beginning of our monarchy there was only one order of citizens among the Franks. This assertion, so injurious to the noble blood of our principal families, is equally affronting to the three great houses which successively governed this realm. The origin of their grandeur would not, therefore, have been lost in the obscurity of time. History might point out the ages when they were plebeian families; and to make Childeric, Pepin, and Hugh Capet gentlemen, we should be obliged to trace their pedigree among the Romans or Saxons—that is, among the conquered nations.

This author grounds his opinion on the Salic law.[204] By that law, he says, it plainly appears that there were not two different orders of citizens among the Franks; it allowed a composition of two hundred sous for the murder of any Frank whatsoever; [205] but among the Romans it distinguished the king's guest, for whose death it gave a composition of three hundred sous, from the Roman proprietor to whom it granted a hundred, and from the Roman tributary to whom it gave only a composition of forty-five. And as the difference of the compositions formed

[203] See the preliminary discourse of the Abbé du Bos.

[204] See the "Establishment of the French Monarchy," vol. iii, book vi, chap. iv, p. 304.

[205] He cites the forty-fourth title of this law, and the "Law of the Ripuarians," tits. 7 and 36.

the principal distinction, he concludes that there was but one order of citizens among the Franks, and three among the Romans.

It is astonishing that his very mistake did not set him right. And, indeed, it would have been very extraordinary that the Roman nobility who lived under the domination of the Franks should have had a larger composition, and been persons of much greater importance than the most illustrious among the Franks, and their greatest generals. What probability is there that the conquering nation should have so little respect for themselves, and so great a regard for the conquered people? Besides, our author quotes the laws of other barbarous nations which prove that they had different orders of citizens. Now, it would be a matter of astonishment that this general rule should have failed only among the Franks. Hence he ought to have concluded either that he did not rightly understand or that he misapplied the passages of the Salic law, which is actually the case.

Upon opening this law we find that the composition for the death of an Antrustio [206]—that is, of the king's vassal—was six hundred sous; and that for the death of a Roman, who was the king's guest, was only three hundred.[207] We find there likewise that the composition [208] for the death of an ordinary Frank was two hundred sous,[209] and for the death of an ordinary Roman was only one hundred.[210] For the death of a Roman tributary,[211] who was a kind of bondman or freedman, they paid a composition of forty-five sous; but I shall take no notice of this, any more than of the composition for the murder of

[206] Qui in truste dominicâ est, tit. 44, sec. 4, and this relates to the thirteenth formulary of Marculfus, de regis Antrustione. See also the title 66, of the Salic law, secs. 3 and 4, and the title 74; and the "Law of the Ripuarians," tit. 11, and the "Capitulary of Charles the Bald," apud Carisiacum, in the year 877, chap. xx.

[207] Salic law, tit. 44, sec. 6.

[208] Tit. 44, sec. 4.

[209] Tit. 44, secs. 1–7.

[210] Tit. 44, sec. 15.

[211] Tit. 44, sec. 7.

a Frank bondman or of a Frank freedman, because this third order of persons is out of the question.

What does our author do? He is quite silent with respect to the first order of persons among the Franks—that is, the article relating to the Antrustios; and afterward upon comparing the ordinary Frank, for whose death they paid a composition of two hundred sous, with those whom he distinguishes under three orders among the Romans, and for whose death they paid different compositions, he finds that there was only one order of citizens among the Franks, and that there were three among the Romans.

As the Abbé is of opinion that there was only one order of citizens among the Franks, it would have been lucky for him that there had been only one order also among the Burgundians, because their kingdom constituted one of the principal branches of our monarchy. But in their codes we find three sorts of compositions: one for the Burgundians or Roman nobility, the other for the Burgundians or Romans of a middling condition, and the third for those of a lower rank in both nations.[212] He has not quoted this law.

It is very extraordinary to see in what manner he evades those passages which press him hard on all sides.[213] If you speak to him of the grandees, lords, and the nobility, these, he says, are mere distinctions of respect, and not of order; they are things of courtesy, and not legal privileges; or else, he says, those people belonged to the king's council; nay, they possibly might be Romans; but still there was only one order of citizens among the Franks.

[212] Si quis quolibet casu dentem optimati Burgundioni vel Romano nobili excusserit, solidos viginti quinque cogatur exsolvere; de mediocribus personis ingenuis tam Burgundionibus quam Romanis si dens excussus fuerit, decem solidis componatur; de inferioribus personis, quinque solidos, arts. 1, 2, and 3, of tit. 26, of the "Law of the Burgundians."

[213] "Establishment of the French Monarchy," vol. iii, book vi, chaps. iv and v.

On the other hand, if you speak to him of some Franks of an inferior rank,[214] he says, they are bondmen; and thus he interprets the decree of Childebert. But I must stop here a little, to inquire further into this decree. Our author has rendered it famous by availing himself of it in order to prove two things: the one that all the compositions we meet with in the laws of the barbarians were only civil fines added to corporal punishments, which entirely subverts all the ancient records;[215] the other that all freemen were judged directly and immediately by the king,[216] which is contradicted by an infinite number of passages and authorities informing us of the judiciary order of those times.[217]

This decree, which was made in an assembly of the nation,[218] says that if the judge finds a notorious robber, he must command him to be tied, in order to be carried before the king, si Francus fuerit; but if he is a weaker person (debilior persona), he shall be hanged on the spot. According to the Abbé du Bos, Francus is a freeman, debilior persona is a bondman. I shall defer entering for a moment into the signification of the word Francus, and begin with examining what can be understood by these words, a weaker person. In all languages whatsoever, every comparison necessarily supposes three terms—the greatest, the less degree, and the least. If none were here meant but freemen and bondmen, they would have said a bondman, and not a man of less power. Therefore debilior persona does not signify a bondman, but a person

[214] Ibid., vol. iii, chap. v, pp. 319 and 320.

[215] Ibid., vol. iii, book vi, chap. iv, pp. 307 and 308.

[216] Ibid., p. 309, and in the following chapter, pp. 310 and 320.

[217] See the twenty-eighth book of this work, chap. xxiv; and the thirty-first book, chap. viii.

[218] Itaque colonia convenit et ita bannivimus, ut unusquisque judex, criminosum latronem ut audierit, ad casam suam ambulet et ipsum ligare faciat; ita ut si Francus fuerit, ad nostram præsentiam dirigatur; et si debilior persona fuerit, in loco pendatur. ("Capitulary," of Baluzius's edition, tome i, p. 19.)

of a superior condition to a bondman. Upon this supposition, Francus can not mean a freeman, but a powerful man; and this word is taken here in that acceptation, because among the Franks there were always men who had greater power than others in the state, and it was more difficult for the judge or count to chastise them. This construction agrees very well with many capitularies [219] where we find the cases in which the criminals were to be carried before the king, and those in which it was otherwise.

It is mentioned in the "Life of Louis the Debonnaire," [220] written by Tegan, that the bishops were the principal cause of the humiliation of that emperor, especially those who had been bondmen and such as were born among the barbarians. Tegan thus addresses Hebo, whom this prince had drawn from the state of servitude, and made Archbishop of Rheims: "What recompense did the emperor receive from you for so many benefits? He made you a freeman, but did not ennoble you because he could not give you nobility after having given you your liberty." [221]

This passage, which proves so strongly the two orders of citizens, does not at all confound the Abbé du Bos. He answers thus:[222] "The meaning of this passage is not that Louis the Debonnaire was incapable of introducing Hebo into the order of the nobility. Hebo, as Archbishop of Rheims, must have been of the first order, superior to that of the nobility." I leave the reader to judge whether this be not the meaning of that passage; I leave him to judge whether there be any question here concerning a preced-

[219] See the twenty-eighth book of this work, chap. xxiv; and the thirty-first book, chap. viii.

[220] Chaps. xliii and xliv.

[221] O qualem remunerationem reddidisti ei! fecit te liberum, non nobilem, quod impossibile est post libertatem. (Ibid.)

[222] "Establishment of the French Monarchy," vol. iii, book vi, chap. iv, p. 316.

ence of the clergy over the nobility. "This passage proves only," continues the same writer,[223] "that the freeborn subjects were qualified as noblemen; in the common acceptation, noblemen and men who are freeborn have for this long time signified the same thing." What! because some of our burghers have lately assumed the quality of noblemen, shall a passage of the life of Louis the Debonnaire be applied to this sort of people? "And perhaps," continues he still,[224] "Hebo had not been a bondman among the Franks, but among the Saxons, or some other German nation, where the people were divided into several orders." Then, because of the Abbé du Bos's "perhaps," there must have been no nobility among the nation of the Franks. But he never applied a "perhaps" so badly. We have seen that Tegan distinguishes the bishops,[225] who had opposed Louis the Debonnaire, some of whom had been bondmen, and others of a barbarous nation. Hebo belonged to the former and not to the latter. Besides, I do not see how a bondman, such as Hebo, can be said to have been a Saxon or a German; a bondman has no family, and consequently no nation. Louis the Debonnaire manumitted Hebo; and as bondmen after their manumission embraced the law of their master, Hebo had become a Frank, and not a Saxon or German.

I have been hitherto acting offensively; it is now time to defend myself. It will be objected to me, that indeed the body of the Antrustios formed a distinct order in the state from that of the freemen; but as the fiefs were at first precarious, and afterward for life, this could not form a nobleness of descent, since the privileges were not an-

[223] Ibid., p. 316.

[224] Ibid.

[225] Omnes episcopi molesti fuerunt Ludovico, et maxime ii quos e servili conditione honoratos habebat, cum his qui ex barbaris nationibus ad hoc fastigium perducti sunt. ("De gestis Ludovici Pii," caps. xliii and xliv.)

nexed to an hereditary fief. This is the objection which induced M. de Valois to think that there was only one order of citizens among the Franks; an opinion which the Abbé du Bos has borrowed of him, and which he has absolutely spoiled with so many bad arguments. Be that as it may, it is not the Abbé du Bos that could make this objection; for after having given three orders of Roman nobility, and the quality of the king's guest for the first, he could not pretend to say that this title was a greater mark of a noble descent than that of Antrustio. But I must give a direct answer. The Antrustios or trusty men were not such because they were possessed of a fief, but that they had a fief given them because they were Antrustios or trusty men. The reader may please to recollect what has been said in the beginning of this book. They had not at that time, as they had afterward, the same fief; but if they had not that they had another, because the fiefs were given at their birth, and because they were often granted in the assemblies of the nation; and, in fine, because as it was the interest of the nobility to receive them it was likewise the king's interest to grant them. These families were distinguished by their dignity of trusty men, and by the privilege of being qualified to swear allegiance for a fief. In the following book [226] I shall demonstrate how from the circumstances of the time there were freemen who were permitted to enjoy this great privilege, and consequently to enter into the order of nobility. This was not the case at the time of Gontram and his nephew Childebert, but so it was at the time of Charlemagne. But though in that prince's reign the freemen were not incapable of possessing fiefs, yet it appears, by the above-cited passage of Tegan, that the emancipated serfs were absolutely excluded. Will the Abbé du Bos, who carries us to Turkey to give us an idea of the ancient French nobil-

[226] Chap. xix.

ity;[227] will he, I say, pretend that they ever complained among the Turks of the elevation of people of low birth to the honours and dignities of the state, as they complained under Louis the Debonnaire, and Charles the Bald? There was no complaint of that kind under Charlemagne, because this prince always distinguished the ancient from the new families, which Louis the Debonnaire and Charles the Bald did not.

The public should not forget the obligation it owes to the Abbé du Bos for several excellent performances. It is by these works, and not by his "History of the Establishment of the French Monarchy," that we ought to judge of his merit. He committed very great mistakes, because he had more in view the Count of Boulainvillier's work than his own subject.

From all these strictures I shall draw only one reflection: if so great a man was mistaken, how cautiously ought I to read!

[227] "Establishment of the French Monarchy," vol. iii, book vi, chap. iv, p. 302.

# BOOK XXXI

## THEORY OF THE FEUDAL LAWS AMONG THE FRANKS IN THE RELATION THEY BEAR TO THE REVOLUTIONS OF THEIR MONARCHY

1. Changes in the offices and in the fiefs.—2. How the civil government was reformed.—3. Authority of the mayors of the palace.—4. Of the genius of the nation in regard to the mayors.—5. In what manner the mayors obtained the command of the armies.—6. Second epoch of the humiliation of our kings of the first race.—7. Of the great offices and fiefs under the mayors of the palace.—8. In what manner the allodial estates were changed into fiefs.—9. How the church lands were converted into fiefs.—10. Riches of the clergy.—11. State of Europe at the time of Charles Martel.—12. Establishment of the tithes.—13. Of the election of bishops and abbots.—14. Of the fiefs of Charles Martel.—15. Confusion of the royalty and mayoralty. The second race.—16. A particular circumstance in the election of the kings of the second race.—17. Charlemagne.—18. Louis the Debonnaire.—19. That the freemen were rendered capable of holding fiefs.—20. The principal cause of the humiliation of the second race. Changes in the allodia.—21. Changes in the fiefs.—22. Changes that happened in the great offices, and in the fiefs.—23. Of the nature of the fiefs after the reign of Charles the Bald.—24. In what manner the empire was transferred from the family of Charlemagne.—25. In what manner the crown of France was transferred to the house of Hugh Capet.—26. Some consequences of the perpetuity of fiefs.

I. THE counts at first were sent into their districts only for a year, but they soon purchased the continuation of their offices. Of this we have an example in the reign of Clovis's grandchildren. A person named Peonius was count in the city of Auxerre;[1] he sent his son Mummolus with money to Gontram, to prevail upon him to continue him in his employment; the son gave the money for himself, and obtained the father's place. The kings had already begun to spoil their own favours.

[1] Gregory of Tours, book iv, chap. xlii.

Though by the laws of the kingdom the fiefs were precarious, yet they were neither given nor taken away in a capricious and arbitrary manner; nay, they were generally one of the principal subjects debated in the national assemblies. It is natural, however, to imagine that corruption crept into this as well as the other case; and that the possession of the fiefs, like that of the counties, was continued for money.

I shall show in the course of this book [2] that, independently of the grants which the princes made for a certain time, there were others in perpetuity. The court wanted to revoke the former grants; this occasioned a general discontent in the nation, and was soon followed by that famous revolution in French history whose first epoch was the amazing spectacle of the execution of Brunehault.

That this queen, who was daughter, sister, and mother of so many kings, a queen to this very day celebrated for public monuments worthy of a Roman ædile or proconsul, born with an admirable genius for affairs, and endowed with qualities so long respected, should see herself of a sudden exposed to so slow, so ignominious and cruel a torture,[3] by a king whose authority was but indifferently established in the nation,[4] would appear very extraordinary, had she not incurred that nation's displeasure for some particular cause. Clotharius reproached her with the murder of ten kings; but two of them he had put to death himself; the death of some of the others was owing to chance, or to the villainy of another queen;[5] and a nation that had permitted Fredegunda to die in her bed,[6] that had even opposed the punishment of her flagitious

[2] Chap. vii.
[3] Fredegarius's "Chronicle," chap. xlii.
[4] Clotharius II, son of Chilperic, and the father of Dagobert.
[5] Fredegarius's "Chronicle," chap. xlii.
[6] See Gregory of Tours, book viii, chap. xxxi.

crimes, ought to have been very indifferent with respect to those of Brunehault.

She was put upon a camel and led ignominiously through the army; a certain sign that she had given great offence to those troops. Fredegarius relates that Protarius,[7] Brunehault's favourite, stripped the lords of their property, and filled the exchequer with the plunder; that he humbled the nobility, and that no person could be sure of continuing in any office or employment. The army conspired against him, and he was stabbed in his tent; but Brunehault, either by revenging his death or by pursuing the same plan,[8] became every day more odious to the nation.[9]

Clotharius, ambitious of reigning alone, inflamed moreover with the most furious revenge, and sure of perishing if Brunehault's children got the upper hand, entered into a conspiracy against himself; and whether it was owing to ignorance, or to the necessity of his circumstances, he became Brunehault's accuser, and made a terrible example of that princess.

Warnacharius had been the very soul of the conspiracy formed against Brunehault. Being at that time mayor of Burgundy, he made Clotharius consent that he should not be displaced while he lived.[10] By this step the mayor could no longer be in the same case as the French lords before that period; and this authority began to render itself independent of the regal dignity.

It was Brunehault's unhappy regency which had ex-

[7] Sæva illi fuit contra personas iniquitas, fisco nimium tribuens, de rebus personarum ingeniose fiscum vellens implere . . . ut nullus reperiretur qui gradum quem arripuerat potuisset adsumere. (Fredeg., "Chron.," cap. xxvii, in the year 605.

[8] Ibid., cap. xxviii, in the year 607.

[9] Ibid., cap. xli, in the year 613. Burgundiæ Farones, tam episcopi quam cæteri Leudes, timentes Brunechildem et odium in eam habentes, consilium inientes, etc.

[10] Ibid., cap. xlii, in the year 613. Sacramento a Clothario accepto ne unquam vitæ suæ temporibus degraderetur.

asperated the nation. So long as the laws subsisted in their full force, no one could grumble at having been deprived of a fief, since the law did not bestow it upon him in perpetuity. But when fiefs came to be acquired by avarice, by bad practices and corruption, they complained of being divested, by irregular means, of things that had been irregularly acquired. Perhaps if the public good had been the motive of the revocation of those grants, nothing would have been said; but they pretended a regard for order while they were openly abetting the principles of corruption; the fiscal rights were claimed in order to lavish the public treasure; and grants were no longer the reward or the encouragement of services. Brunehault, from a corrupt spirit, wanted to reform the abuses of the ancient corruption. Her caprices were not owing to weakness; the vassals and the great officers, thinking themselves in danger, prevented their own by her ruin.

We are far from having all the records of the transactions of those days; and the writers of chronicles, who understood very nearly as much of the history of their time as our peasants know of ours, are extremely barren. Yet we have a constitution of Clotharius, given in the council of Paris,[11] for the reformation of abuses,[12] which shows that this prince put a stop to the complaints that had occasioned the revolution. On the one hand, he confirms all the grants that had been made or confirmed by the kings his predecessors;[13] and on the other, he ordains that whatever had been taken from his vassals should be restored to them.[14]

This was not the only concession the king made in

[11] Some time after Brunehault's execution, in the year 615. See Baluzius's edition of the "Capitularies," p. 21.

[12] Quæ contra rationis ordinem acta vel ordinata sunt ne in antea, quod avertat divinitas, contingant, disposuerimus, Christo præsule, per hujus edicti nostri tenorem generaliter emendare. (Ibid., art. 16.)

[13] Ibid., art. 16.

[14] Ibid., art 17.

that council; he enjoined that whatever had been innovated, in opposition to the privileges of the clergy, should be redressed;[15] and he moderated the influence of the court in the election of bishops.[16] He even reformed the fiscal affairs, ordaining that all the new censuses should be abolished,[17] and that they should not levy any toll established since the deaths of Gontram, Sigebert, and Chilperic;[18] that is, he abolished whatever had been done during the regencies of Fredegunda and Brunehault. He forbade the driving of his cattle to graze in private people's grounds;[19] and we shall presently see that the reformation was still more general, so as to extend even to civil affairs.

II. Hitherto the nation had given marks of impatience and levity with regard to the choice or conduct of her masters; she had regulated their differences and obliged them to come to an agreement among themselves. But now she did what before was quite unexampled; she cast her eyes on her actual situation, examined the laws coolly, provided against their insufficiency, repressed violence, and moderated the regal power.

The bold and insolent regencies of Fredegunda and Brunehault had less surprised than roused the nation. Fredegunda had defended her horrid cruelties, her poisonings and assassinations by a repetition of the same crimes; and had behaved in such a manner that her outrages were rather of a private than a public nature. Fredegunda did more mischief: Brunehault threatened more. In this crisis

[15] Et quod per tempora ex hoc prætermissum est vel dehinc perpetualiter observetur.

[16] Ita ut episcopo decedente, in loco ipsius qui a Metropolitano ordinari debet cum provincialibus, a clero et populo eligatur; et si persona condigna fuerit, per ordinationem principis ordinetur; vel certe si de palatio eligitur, per meritum personæ et doctrinæ ordinetur. (Ibid., art. 1.)

[17] Et ubicumque census novus impie additus est, emendetur. (Art 8.)

[18] Ibid., art. 9.

[19] Ibid., art. 21.

the nation was not satisfied with rectifying the feudal system; she was also determined to secure her civil government. For the latter was rather more corrupt than the former; a corruption the more dangerous as it was more inveterate, and connected rather with the abuse of manners than with that of laws.

The history of Gregory of Tours exhibits, on the one hand, a fierce and barbarous nation; and on the other, kings remarkable for the same ferocity of temper. Those princes were bloody, iniquitous, and cruel, because such was the character of the whole nation. If Christianity appeared sometimes to soften their manners, it was only by the circumstances of terror with which this religion alarms the sinner; the Church supported herself against them by the miraculous operations of her saints. The kings would not commit sacrilege, because they dreaded the punishments inflicted on that species of guilt; but this excepted, either in the riot of passion or in the coolness of deliberation, they perpetrated the most horrid crimes and barbarities where divine vengeance did not appear so immediately to overtake the criminal. The Franks, as I have already observed, bore with cruel kings, because they were of the same disposition themselves; they were not shocked at the iniquity and extortions of their princes, because this was the national characteristic. There had been many laws established, but it was usual for the king to defeat them all, by a kind of letter called precepts,[20] which rendered them of no effect; they were somewhat similar to the rescripts of the Roman emperors; whether it be that our kings borrowed this usage from those princes, or whether it was owing to their own natural temper. We see in Gregory of Tours that they perpetrated murder in cool blood, and put the accused to death unheard; how

[20] They were orders which the king sent to the judges to do or to tolerate things contrary to law.

they gave precepts for illicit marriages;[21] for transferring successions; for depriving relatives of their right; and, in fine, marrying consecrated virgins. They did not, indeed, assume the whole legislative power, but they dispensed with the execution of the laws.

Clotharius's constitution redressed all these grievances; no one could any longer be condemned without being heard:[22] relatives were made to succeed, according to the order established by law;[23] all precepts for marrying religious women were declared null;[24] and those who had obtained and made use of them were severely punished. We might know perhaps more exactly his determinations with regard to these precepts if the thirteenth and the next two articles of this decree had not been lost through the injury of time. We have only the first words of this thirteenth article, ordaining that the precepts shall be observed, which can not be understood of those he had just abolished by the same law. We have another constitution by the same prince,[25] which is in relation to his decree, and corrects in the same manner every article of the abuses of the precepts.

True it is that Baluzius finding this constitution without date, and without the name of the place where it was given, attributes it to Clotharius I. But I say it belongs to Clotharius II, for three reasons: 1. It says that the king will preserve the immunities granted to the churches by his father and grandfather.[26] What immunities could the

[21] See Gregory of Tours, book iv, p. 227. Both our history and the charters are full of this, and the extent of these abuses appears especially in Clotharius's constitution, inserted in the edition of the "Capitularies" made to reform them. (Baluzius's edition, p. 7.)

[22] Art. 22.

[23] Ibid., art. 6.

[24] Ibid.

[25] In Baluzius's edition of the "Capitularies," tome i, p. 7.

[26] In the preceding book I have made mention of these immunities, which were grants of judicial rights, and contained prohibitions to the regal judges to perform any function in the territory, and were equivalent to the erection or grant of a fief.

churches receive from Childeric, grandfather of Clotharius I, who was not a Christian, and who lived even before the foundation of the monarchy? But if we attribute this decree to Clotharius II we shall find his grandfather to have been this very Clotharius I who made immense donations to the Church, with a view of expiating the murder of his son Cramne, whom he had ordered to be burned, together with his wife and children.

2. The abuses redressed by this constitution were still subsisting after the death of Clotharius I, and were even carried to their highest extravagance during the weak reign of Gontram, the cruel administration of Chilperic, and the execrable regencies of Fredegunda and Brunehault. Now, can we imagine that the nation would have borne with grievances so solemnly proscribed, without complaining of their continual repetition? Can we imagine she would not have taken the same step as she did afterward under Childeric II,[27] when, upon a repetition of the old grievances, she pressed him to ordain that law and customs in regard to judicial proceedings should be complied with as formerly? [28]

In fine, as this constitution was made to redress grievances, it can not relate to Clotharius I, since there were no complaints of that kind in his reign, and his authority was perfectly established throughout the kingdom, especially at the time in which they place this constitution; whereas it agrees extremely well with the events that happened during the reign of Clotharius II, which produced a revolution in the political state of the kingdom. History must be illustrated by the laws, and the laws by history.

III. I noticed that Clotharius II had promised not to deprive Warnacharius of his mayor's place during life; a

[27] He began to reign toward the year 670.
[28] See the "Life of St. Leger."

revolution productive of another effect. Before that time the mayor was the king's officer, but now he became the officer of the people; he was chosen before by the king, and now by the nation. Before the revolution Protarius had been made mayor by Theodoric, and Landeric by Fredegunda;[29] but after that the mayors[30] were chosen by the nation.[31]

We must not therefore confound, as some authors have done, these mayors of the palace with such as were possessed of this dignity before the death of Brunehault; the king's mayors with those of the kingdom. We see by the law of the Burgundians that among them the office of mayor was not one of the most respectable in the state;[32] nor was it one of the most eminent under the first kings of the Franks.[33]

Clotharius removed the apprehensions of those who were possessed of employments and fiefs; and when, after the death of Warnacharius,[34] he asked the lords assembled at Troyes, who is it they would put in his place, they cried out they would choose no one, but suing for his favour committed themselves entirely into his hands.

Dagobert reunited the whole monarchy in the same manner as his father; the nation had a thorough confi-

[29] Instigante Brunihault, Theodorico jubente, etc. (Fredegarius, chap. xxvii, in the year 605.)

[30] "Gesta regum Francorum," chap. xxxvi.

[31] See Fredegarius's "Chronicle," chap. liv, in the year 626, and his anonymous continuator, chap. ci, in the year 695, and chap. cv, in the year 715. Aimoin, book iv, chap. xv; Eginhard, "Life of Charlemagne," chap. xlviii. "Gesta regum Francorum," chap. xlv.

[32] See the "Law of the Burgundians" in præfat., and the second supplement to this law, tit. 13.

[33] See Gregory of Tours, book ix, chap. xxxvi.

[34] Eo anno Clotarius cum proceribus et leudibus Burgundiæ Trecassinis conjungitur, cum eorum esset sollicitus si vellent jam Warnachario discesso alium in ejus honoris gradum sublimare: sed omnes unanimiter denegantes se nequaquam velle majorem domûs eligere, regis gratiam obnixe petentes, cum rege transegere. (Fredegarius, "Chronicle," chap. liv, in the year 626.)

dence in him, and appointed no mayor. This prince, finding himself at liberty and elated by his victories, resumed Brunehault's plan. But he succeeded so ill that the vassals of Austrasia let themselves be beaten by the Slavonians, and returned home; so that the marches of Austrasia were left a prey to the barbarians.[35]

He determined then to make an offer to the Austrasians of resigning that country, together with a provincial treasure, to his son Sigebert, and to put the government of the kingdom and of the palace into the hands of Cunibert, Bishop of Cologne, and of the Duke Adalgisus. Fredegarius does not enter into the particulars of the conventions then made; but the king confirmed them all by charters, and Austrasia was immediately secured from danger.[36]

Dagobert, finding himself near his end, recommended his wife Nentechildis and his son Clovis to the care of Æga. The vassals of Neustria and Burgundy chose this young prince for their king.[37] Æga and Nentechildis had the government of the palace;[38] they restored whatever Dagobert had taken;[39] and complaints ceased in Neustria and Burgundy, as they had ceased in Austrasia.

After the death of Æga, Queen Nentechildis engaged the lords of Burgundy to choose Floachatus for their mayor.[40] The latter despatched letters to the bishops and chief lords of the kingdom of Burgundy, by which he promised to preserve their honours and dignities forever—that

[35] Istam victoriam quam Vinidi contra Francos meruerunt, non tantum Sclavinorum fortitudo obtinuit, quantum dementatio Austrasiorum, dum se cernebant cum Dagoberto odium incurrisse, et assidue expoliarentur. (Fredegarius's "Chronicle," chap. lxviii, in the year 630.)

[36] Deinceps Austrasii eorum studio limitem et regnum Francorum contra Vinidos utiliter defensasse noscuntur. (Fredegarius's "Chronicle," chap. lxxx, in the year 632.)

[37] Fredegarius's "Chronicle," chap. lxxix, in the year 638.

[38] Ibid.

[39] Ibid., chap. lxxx, in the year 639.

[40] Fredegarius's "Chronicle," chap. lxxxix, in the year 641.

is, during life.[41] He confirmed his word by oath. This is the period at which the author of the "Treatise on the Mayors of the Palace" fixes the administration of the kingdom by those officers.[42]

Fredegarius, being a Burgundian, has entered into a more minute detail as to what concerns the mayors of Burgundy at the time of the revolution of which we are speaking than with regard to the mayors of Austrasia and Neustria. But the conventions made in Burgundy were, for the very same reasons, agreed to in Neustria and Austrasia.

The nation thought it safer to lodge the power in the hands of a mayor whom she chose herself, and to whom she might prescribe conditions, than in those of a king whose power was hereditary.

IV. A government in which a nation that had an hereditary king chose a person to exercise the regal authority seems very extraordinary; but, independently of the circumstances of the times, I apprehend that the notions of the Franks in this respect were derived from a remote source.

The Franks were descended from the Germans, of whom Tacitus says[43] that in the choice of their king they were determined by his noble extraction, and in that of their leader, by his valour. This gives us an idea of the kings of the first race, and of the mayors of the palace; the former were hereditary, the latter elective.

No doubt but those princes who stood up in the na-

[41] Ibid., cap. lxxxix. Floachatus cunctis ducibus a regno Burgundiæ seu et pontificibus, per epistolam etiam et sacramentis firmavit unicuique gradum honoris et dignitatem, seu et amicitiam, perpetuo conservare.

[42] Deinceps a temporibus Clodovei qui fuit filius Dagoberti inclyti rejis, pater vera Theodorici, regnum Francorum decidens per majorem domûs cœpit ordinari. ("De Majoribus Domûs Regiæ.")

[43] Reges ex nobilitate, duces ex virtute sumunt. ("De Moribus Germanorum.")

tional assembly and offered themselves as the conductors of a public enterprise to such as were willing to follow them, united generally in their own person both the power of the mayor and the king's authority. By the splendour of their descent they had attained the regal dignity; and their military abilities having recommended them to the command of armies, they rose to the power of mayor. By the regal dignity our first kings presided in the courts and assemblies, and enacted laws with the national consent; by the dignity of duke or leader, they undertook expeditions and commanded the armies.

In order to be acquainted with the genius of the primitive Franks in this respect, we have only to cast an eye on the conduct of Argobastes,[44] a Frank by nation, on whom Valentinian had conferred the command of the army. He confined the emperor to his own palace; where he would suffer nobody to speak to him, concerning either civil or military affairs. Argobastes did at that time what was afterward practised by the Pepins.

V. So long as the kings commanded their armies in person the nation never thought of choosing a leader. Clovis and his four sons were at the head of the Franks, and led them on through a series of victories. Theobald, son of Theodobert, a young, weak, and sickly prince, was the first of our kings who confined himself to his palace.[45] He refused to undertake an expedition into Italy against Narses, and had the mortification of seeing the Franks choose for themselves two chiefs, who led them against the enemy.[46] Of the four sons of Clotharius I, Gontram was the least fond of commanding his armies;[47] the other kings

[44] See Sulpicius Alexander, in Gregory of Tours, book ii.

[45] In the year 552.

[46] Leutheres vero et Butilinus, tametsi id regi ipsorum minime placebat belli cum eis societatem inierunt. (Agathias, book i. Gregory of Tours, book iv, chap. ix.)

[47] Gontram did not even march against Gondovald, who styled himself son of Clotharius, and claimed his share of the kingdom.

followed this example; and, in order to intrust the command without danger into other hands, they conferred it upon several chiefs or dukes.[48]

Innumerable were the inconveniences which thence arose; all discipline was lost, no one would any longer obey. The armies were dreadful only to their own country; they were laden with spoils before they had reached the enemy. Of these miseries we have a very lively picture in Gregory of Tours.[49] "How shall we be able to obtain a victory," said Gontram,[50] "we who do not so much as keep what our ancestors acquired? Our nation is no longer the same. . . ." Strange that it should be on the decline so early as the reign of Clovis's grandchildren!

It was therefore natural they should determine at last upon an only duke, a duke invested with an authority over this prodigious multitude of feudal lords and vassals, who had now become strangers to their own engagements; a duke who was to establish the military discipline, and to put himself at the head of a nation unhappily practised in making war against itself. This power was conferred on the mayors of the palace.

The original function of the mayors of the palace was the management of the king's household. They had afterward, in conjunction with other officers, the political government of fiefs; and at length they obtained the sole disposal of them.[51] They had also the administration of military affairs, and the command of the armies; employments

[48] Sometimes to the number of twenty. See Gregory of Tours, book v, chap xxvii; book viii, chaps. xviii and xxx; book x, chap. iii. Dagobert, who had no mayor in Burgundy, observed the same policy, and sent against the Gascons ten dukes and several counts who had no dukes over them. (Fredegarius's "Chronicle," chap. lxxviii, in the year 636.)

[49] Gregory of Tours, book viii, chap. xxx, and book x, chap. iii. Ibid., book viii, chap. xxx.

[50] Ibid.

[51] See the second supplement to the "Law of the Burgundians," tit. 13, and Gregory of Tours, book ix, chap. xxxvi.

necessarily connected with the other two. In those days it was much more difficult to raise than to command the armies; and who but the dispenser of favours could have this authority? In this martial and independent nation it was prudent to invite rather than to compel; prudent to give away or to promise the fiefs that should happen to be vacant by the death of the possessor; prudent, in fine, to reward continually, and to raise a jealousy with regard to preferences. It was therefore right that the person who had the superintendence of the palace should also be general of the army.

VI. After the execution of Brunehault the mayors were administrators of the kingdom under the sovereigns; and though they had the conduct of the war, the kings were always at the head of the armies, while the mayor and the nation fought under their command. But the victory of Duke Pepin over Theodoric and his mayor[52] completed the degradation of our princes;[53] and that which Charles Martel obtained over Chilperic and his Mayor Rainfroy confirmed it.[54] Austrasia triumphed twice over Neustria and Burgundy; and the mayoralty of Austrasia being annexed as it were to the family of the Pepins, this mayoralty and family became greatly superior to all the rest. The conquerors were then afraid lest some person of credit should seize the king's person, in order to excite disturbances. For this reason they kept them in the royal palace as in a kind of prison, and once a year showed them to the people.[55] There they made ordinances, but these were such as were dictated by the mayor;[56] they answered am-

[52] See the "Annals of Metz," years 687 and 688.

[53] Illis quidem nomina regum imponens, ipse totius regni habens privilegium, etc. ("Annals of Metz," year 695.)

[54] "Annals of Metz," year 719.

[55] Sedemque illi regalem sub sua ditione concessit. (Ibid., anno 719.)

[56] Ex chronico Centulensi, lib. 2, ut responsa quæ erat edoctus vel potius jussus, ex sua velut potestate redderet.

bassadors, but the mayor made the answers. This is the time mentioned by historians of the government of the mayors over the kings whom they held in subjection.[57]

The extravagant passion of the nation for Pepin's family went so far that they chose one of his grandsons, who was yet an infant, for mayor;[58] and put him over one Dagobert—that is, one phantom over another.

VII. The mayors of the palace were little disposed to establish the uncertain tenure of places and offices; for, indeed, they ruled only by the protection which in this respect they granted to the nobility. Hence the great offices continued to be given for life, and this usage was every day more firmly established.

But I have some particular reflections to make here in respect to fiefs: I do not question but most of them became hereditary from this time.

In the treaty of Andeli,[59] Gontram and his nephew Childebert engage to maintain the donations made to the vassals and churches by the kings their predecessors; and leave is given to the wives, daughters, and widows of kings to dispose by will, and in perpetuity, of whatever they hold of the exchequer.[60]

Marculfus wrote his formularies at the time of the mayors.[61] We find several in which the kings make donations both to the person and to his heirs:[62] and as the

[57] "Annals of Metz," anno 691. Anno principatus Pippini super Theodoricum. . . . "Annals of Fuld," or of Laurishan, Pippinus dux Francorum obtinuit regnum Francorum per annos 27, cum regibus sibi subjectis.

[58] Posthæc Theudoaldus filius ejus (Grimoaldi) parvulus, in loco ipsius, cum prædicto rege Dagoberto, major-domus palatii effectus est. The anonymous continuator of Fredegarius in the year 714, chap. civ.

[59] Cited by Gregory of Tours, book ix. See also the edict of Clotharius II, in the year 615, art. 16.

[60] Ut si quid de agris fiscalibus vel speciebus atque præsidio pro arbitrii sui voluntate facere aut cuiquam conferre voluerint, fixa stabilitate perpetuo conservetur.

[61] See the twenty-fourth and the thirty-fourth of the first book.

[62] See the fourteenth formula of the first book, which is equally

formularies represent the common actions of life, they prove that part of the fiefs had become hereditary toward the end of the first race. They were far from having in those days the idea of an unalienable demesne; this is a modern thing, which they knew neither in theory nor practice.

In proof hereof we shall presently produce positive facts; and if we can point out a time in which there were no longer any benefices for the army, nor any funds for its support, we must certainly conclude that the ancient benefices had been alienated. The time I mean is that of Charles Martel, who founded some new fiefs, which we should carefully distinguish from those of the earliest date.

When the kings began to make grants in perpetuity, either through the corruption which crept into the government or by reason of the constitution itself, which continually obliged those princes to confer rewards, it was natural they should begin with giving the perpetuity of the fiefs, rather than of the counties. For to deprive themselves of some acres of land was no great matter; but to renounce the right of disposing of the great offices was divesting themselves of their very power.

VIII. The manner of changing an allodial estate into a fief may be seen in a formulary of Marculfus.[63] The owner of the land gave it to the king, who restored it to the donor by way of usufruct, or benefice, and then the donor nominated his heirs to the king.

In order to find out the reasons which induced them thus to change the nature of the allodia, I must trace the source of the ancient privileges of our nobility, a nobility which for these eleven centuries has been enveloped with dust, with blood, and with the marks of toil.

They who were seized of fiefs enjoyed very great advan-

applicable to the fiscal estates given direct in perpetuity, or given at first as a benefice, and afterward in perpetuity: Sicut ab illo aut a fisco nostro fuit possessa. See also the seventeenth formula, ibid.

[63] Book i, formulary 13.

tages. The composition for the injuries done them was greater than that of freemen. It appears by the formularies of Marculfus that it was a privilege belonging to a king's vassal, that whoever killed him should pay a composition of six hundred sous. This privilege was established by the Salic law,[64] and by that of the Ripuarians;[65] and while these two laws ordained a composition of six hundred sous for the murder of a king's vassal, they gave but two hundred sous for the murder of a person freeborn, if he was a Frank or barbarian, or a man living under the Salic law;[66] and only a hundred for a Roman.

This was not the only privilege belonging to the king's vassals. We ought to know that when a man was summoned in court, and did not make his appearance nor obey the judge's orders, he was called before the king;[67] and if he persisted in his contumacy, he was excluded from the royal protection,[68] and no one was allowed to entertain him, nor even to give him a morsel of bread. Now, if he was a person of an ordinary condition, his goods were confiscated;[69] but if he was the king's vassal, they were not.[70] The first by his contumacy was deemed sufficiently convicted of the crime, the second was not; the former for the smallest crimes was obliged to undergo the trial by boiling water,[71] the latter was condemned to this trial only in the case of murder.[72] In fine, the king's vassal could not be compelled to swear in court against another vassal.[73] These privileges were continually increasing, and the capitulary of Carloman does this honour to the king's vas-

[64] Tit. 44. See also tit. 66, secs. 3 and 4; and tit. 74.
[65] Tit. 11.
[66] See also the "Law of the Ripuarians," tit. 7; and the Salic law, tit. 44, arts. 1 and 4.
[67] Salic law, tits. 59 and 76.
[68] Extra sermonem regis. (Salic law, tits. 59 and 76.)
[69] Salic law, tit. 59, sec. 1.
[70] Ibid., tit. 76, sec. 1.
[71] Ibid., tits. 56 and 59.
[72] Ibid., tit. 76, sec 1.
[73] Ibid., tit. 76, sec. 2.

sals, that they should not be obliged to swear in person, but only by the mouth of their own vassals.[74] Moreover, when a person, having these honours, did not repair to the army, his punishment was to abstain from flesh-meat and wine as long as he had been absent from the service; but a freeman[75] who neglected to follow his count was fined sixty sous,[76] and was reduced to a state of servitude till he had paid it.

It is very natural, therefore, to believe that those Franks who were not the king's vassals, and much more the Romans, became fond of entering into the state of vassalage: and that they might not be deprived of their demesnes, they devised the usage of giving their allodium to the king, of receiving it from him afterward as a fief, and of nominating their heirs. This usage was continued, and took place especially during the times of confusion under the second race, when every man being in want of a protector was desirous of incorporating himself with the other lords, and of entering, as it were, into the feudal monarchy, because the political no longer existed.[77]

This continued under the third race, as we find by several charters;[78] whether they gave their allodium, and resumed it by the same act; or whether it was declared an allodium, and afterward acknowledged as a fief. These were called fiefs of resumption.

This does not imply that those who were seized of fiefs administered them as a prudent father of a family would; for though the freemen grew desirous of being possessed of fiefs, yet they managed this sort of estates as usufructs are

[74] Apud vernis palatium, in the year 883, arts. 4 and 11.

[75] "Capitulary of Charlemagne," in the year 812, arts. 1 and 3.

[76] Heribannum.

[77] "Non infirmis reliquit hæredibus," says Lambert d'Ardres in Du Cange, on the word alodis.

[78] See those quoted by Du Cange, in the word alodis, and those produced by Galland, in his treatise of allodial lands, p. 14, and the following.

managed in our days. This is what induced Charlemagne, the most vigilant and considerate prince we ever had, to make a great many regulations in order to hinder the fiefs from being demeaned in favour of allodial estates.[79] It proves only that in his time most benefices were but for life, and consequently that they took more care of the freeholds than of the benefices; and yet for all that they did not choose rather to be the king's vassals than freemen. They might have reasons for disposing of some particular part of a fief, but they were not willing to be stripped of their dignity likewise.

I know, likewise, that Charlemagne laments in a certain capitulary that in some places there were people who gave away their fiefs in property, and redeemed them afterward in the same manner.[80] But I do not say that they were not fonder of the property than of the usufruct; I mean only that when they could convert an allodium into a fief, which was to descend to their heirs, as is the case of the formulary above mentioned, they had very great advantages in doing it.

IX. The use of the fiscal lands should have been only to serve as a donation by which the kings were to encourage the Franks to undertake new expeditions, and by which on the other hand these fiscal lands were increased. This, as I have already observed, was the spirit of the nation, but these donations took another turn. There is still extant a speech of Chilperic,[81] grandson of Clovis, in which he complains that almost all these lands had been already given away to the Church. "Our exchequer," says he, "is impoverished, and our riches are transferred to the clergy;[82]

[79] Second capitulary of the year 802, art. 10; and the seventh capitulary of the year 803, art. 3; the first capitulary, incerti anni, art. 49; the fifth capitulary of the year 806, art. 7; the capitulary of the year 779, art. 29; the capitulary of Louis the Pious, in the year 829, art. 1.

[80] The fifth of the year 806, art. 8.

[81] In Gregory of Tours, book vi, chap. xlvi.

[82] This is what induced him to annul the testaments made in favour

none reign now but the bishops, who live in grandeur while we are quite eclipsed."

This was the reason that the mayors, who durst not attack the lords, stripped the churches; and one of the motives alleged by Pepin for entering Neustria [83] was his having been invited thither by the clergy to put a stop to the encroachments of the kings—that is, of the mayors—who deprived the Church of all her possessions.

The mayors of Austrasia—that is, the family of the Pepins—had behaved toward the clergy with more moderation than those of Neustria and Burgundy. This is evident from our chronicles,[84] in which we see the monks perpetually extolling the devotion and liberality of the Pepins. They themselves had been possessed of the first places in the Church. "One crow does not pull out the eyes of another," as Chilperic said to the bishops.[85]

Pepin subdued Neustria and Burgundy; but as his pretence for destroying the mayors and kings was the grievances of the clergy, he could not strip the latter without acting inconsistently with his cause, and showing that he made a jest of the nation. However, the conquest of two great kingdoms and the destruction of the opposite party afforded him sufficient means of satisfying his generals.

Pepin made himself master of the monarchy by protecting the clergy; his son, Charles Martel, could not maintain his power but by oppressing them. This prince, finding that part of the regal and fiscal lands had been given either for life or in perpetuity to the nobility, and that the Church by receiving both from rich and poor had ac-

of the clergy, and even the donations of his father; Gontram re-established them, and even made new donations. (Gregory of Tours, book vii, chap. vii.)

[83] See the "Annals of Metz," year 689. Excitor imprimis querelis sacerdotum et servorum Dei, qui me sæpius adierunt ut pro sublatis injuste patrimoniis, etc.

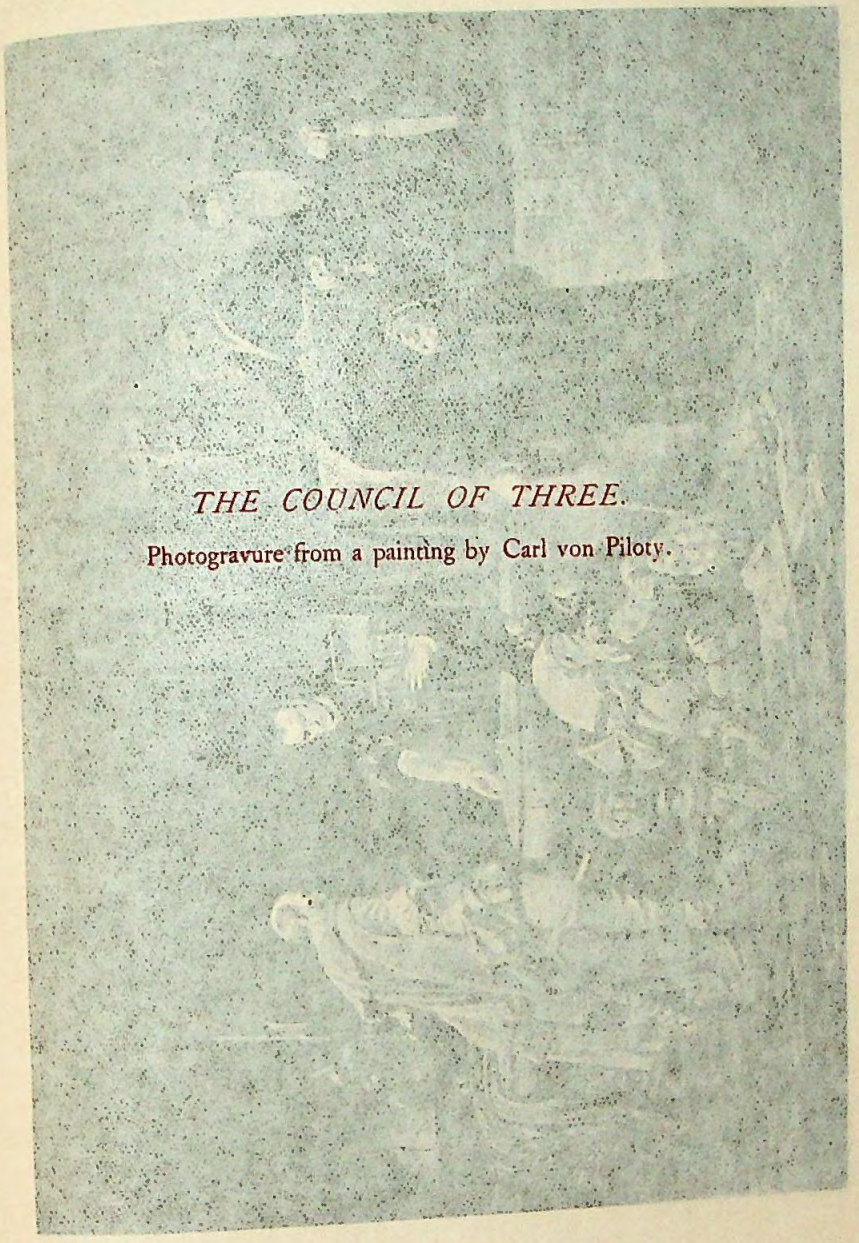
[84] See the "Annals of Metz."

[85] In Gregory of Tours.

quired a great part even of the allodial estates, he resolved to strip the clergy; and as the fiefs of the first division were no longer in being, he formed a second.[86] He took for himself and for his officers the Church lands and the churches themselves; thus he remedied an evil which differed from ordinary diseases, as its extremity rendered it the more easy to cure.

X. So great were the donations made to the clergy that under the three races of our princes they must have several times received the full property of all the lands of the kingdom. But if our kings, the nobility, and the people found the way of giving them all their estates, they found also the method of getting them back again. The spirit of devotion established a great number of churches under the first race; but the military spirit was the cause of their being given away afterward to the soldiery, who divided them among their children. What a number of lands must have then been taken from the clergy's mensalia! The kings of the second race opened their hands, and made new donations to them; but the Normans, who came afterward, plundered and ravaged all before them, wreaking their vengeance chiefly on the priests and monks, and devoting every religious house to destruction. For they charged those ecclesiastics with the destruction of their idols, and with all the oppressive measures of Charlemagne by which they had been successively obliged to take shelter in the North. These were animosities which the space of forty or fifty years had not been able to obliterate. In this situation what losses must the clergy have sustained! There were hardly ecclesiastics left to demand the estates of which they had been deprived. There remained, therefore, for the religious piety of the third race, foundations enough to make and lands to bestow. The opinions which

[86] Karolus plurima juri ecclesiastico detrahens prædia fisco sociavit, ac deinde militibus dispertivit. ("Ex Chronico Centulensi," lib. ii.)



*THE COUNCIL OF THREE.*

Photogravure from a painting by Carl von Piloty.

quired a great part even of the allodial estates, he resolved to strip the clergy; and as the fiefs of the first division were no longer in being, he formed a second.[86] He took for himself and for his officers the Church lands and the churches themselves; thus he remedied an evil which differed from ordinary diseases, as its extremity rendered it the more easy to cure.

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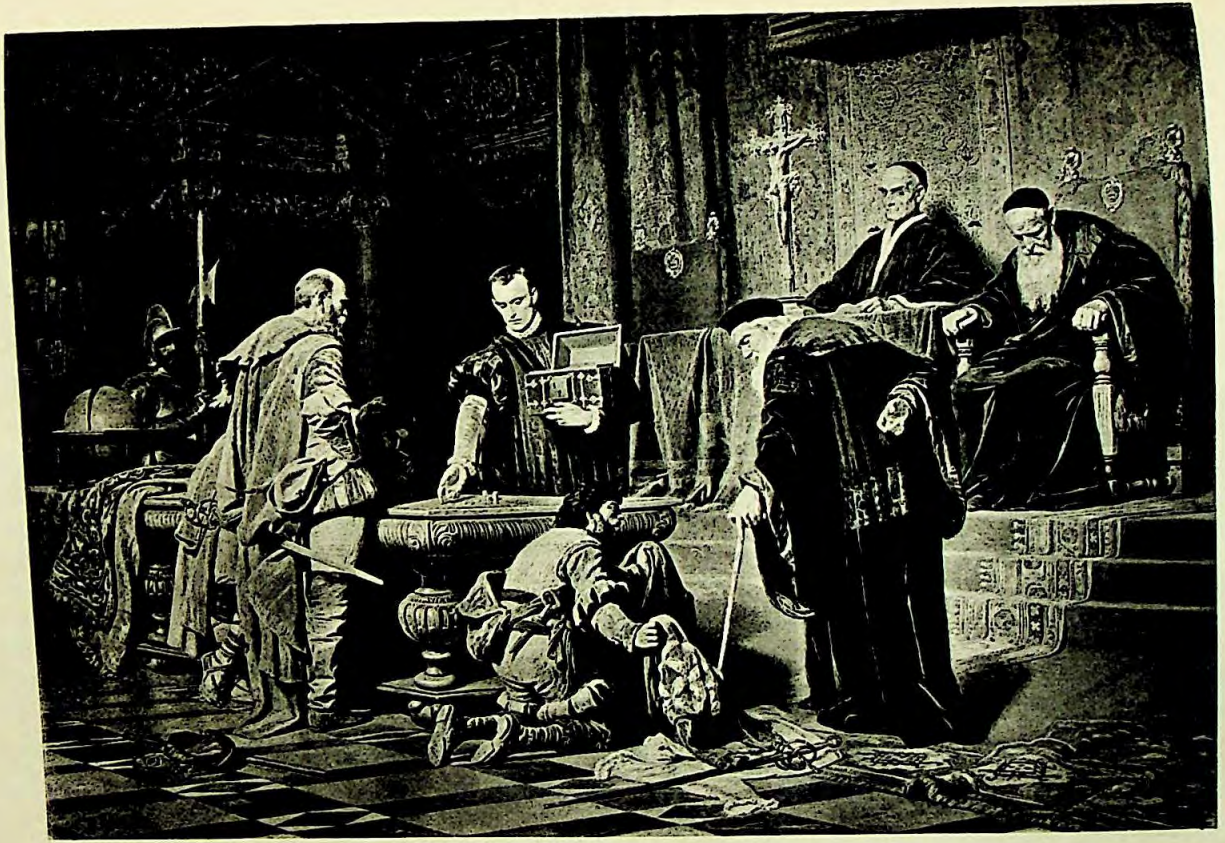

were spread abroad and believed in those days would have deprived the laity of all their estates if they had been but virtuous enough. But if the clergy were actuated by ambition, the laity were not without theirs; if dying persons gave their estates to the Church, their heirs would fain resume them. We meet with continual quarrels between the lords and the bishops, the gentlemen and the abbots; and the clergy must have been very hard pressed, since they were obliged to put themselves under the protection of certain lords, who granted them a momentary defence, and afterward joined their oppressors.

But a better administration having been established under the third race gave the clergy leave to augment their possessions; when the Calvinists started up, and having plundered the churches, they turned all the sacred plate into specie. How could the clergy be sure of their estates when they were not even safe in their persons? They were debating on controversial subjects while their archives were in flames. What did it avail them to demand back of an impoverished nobility those estates which were no longer in possession of the latter, but had been conveyed into other hands by different mortgages? The clergy have been long acquiring, and have often refunded, and still there is no end of their acquisitions.

XI. Charles Martel, who undertook to strip the clergy, found himself in a most happy situation. He was both feared and beloved by the soldiery, he worked for them, having the pretext of his wars against the Saracens. He was hated, indeed, by the clergy, but he had no need of their assistance.[87] The Pope, to whom he was necessary, stretched out his arms to him. Every one knows the famous embassy he received from Gregory III.[88] These

[87] See the "Annals of Metz."

[88] Epistolam quoque, decreto Romanorum principum, sibi præ-dictus præsul Gregorius miserat, quod sese populus Romanus, relicta imperatoris dominatione, ad suam defensionem et invictam clementiam

two powers were strictly united, because they could not do without each other: the Pope stood in need of the Franks to assist him against the Lombards and the Greeks; Charles Martel had occasion for the Pope, to humble the Greeks, to embarrass the Lombards, to make himself more respectable at home, and to guarantee the titles which he had, and those which he or his children might take. It was impossible, therefore, for his enterprise to miscarry.

St. Eucherius, Bishop of Orleans, had a vision which frightened all the princes of that time. I shall produce on this occasion the letter written by the bishops assembled at Rheims to Louis, King of Germany, who had invaded the territories of Charles the Bald;[89] because it will give us an insight into the situation of things in those times, and the temper of the people. They say[90] that "St. Eucherius, having been snatched up into heaven, saw Charles Martel tormented in the bottom of hell by order of the saints, who are to sit with Christ at the last judgment; that he had been condemned to this punishment before his time for having stripped the Church of her possessions and thereby charged himself with the sins of all those who founded these livings; that King Pepin held a council upon this occasion, and had ordered all the church lands he could recover to be restored; that as he could get back only a part of them, because of his disputes with Vaifre, Duke of Aquitaine, he issued letters called precaria[91] for the remainder, and made a law that the laity should pay a tenth

convertere voluisset. ("Annals of Metz," year 741.) Eo pacto patrato, ut a partibus imperatoris recederet. (Fredegarius.)

[89] Anno 858, apud Carisiacum; Baluzius's edition, tome i, p. 101.

[90] Ibid., p. 109.

[91] "Precaria, quod precibus utendum conceditur," says Cujas, in his notes upon the first book of fiefs. I find in a diploma of King Pepin, dated the third year of his reign, that this prince was not the first who established these precaria; he cites one made by the Mayor Ebroin, and continued after his time. See the diploma of the king, in the fifth tome of the "Historians of France," by the Benedictins, art. 6.

part of the church lands they possessed, and twelve deniers for each house; that Charlemagne did not give the church lands away; on the contrary, that he published a capitulary, by which he engaged both for himself and for his successors never to make any such grant; that all they say is committed to writing, and that a great many of them heard the whole related by Louis the Debonnaire, the father of those two kings."

King Pepin's regulation, mentioned by the bishops, was made in the council held at Leptines.[92] The Church found this advantage in it, that such as had received those lands held them no longer but in a precarious manner; and, moreover, that she received the tithe or tenth part, and twelve deniers for every house that had belonged to her. But this was only a palliative, and did not remove the disorder.

Nay, it met with opposition, and Pepin was obliged to make another capitulary,[93] in which he enjoins those who held any of those benefices to pay this tithe and duty, and even to keep up the houses belonging to the bishopric or monastery, under the penalty of forfeiting those possessions. Charlemagne renewed the regulations of Pepin.[94]

That part of the same letter which says that Charlemagne promised both for himself and for his successors never to divide again the church lands among the soldiery is agreeable to the capitulary of this prince, given at Aix-la-Chapelle in the year 803, with a view of removing the apprehensions of the clergy upon this subject. But the donations already made were still in force.[95] The bishops very

[92] In the year 743; see the fifth book of the "Capitularies," art. 3, Baluzius's edition, p. 825.

[93] That of Metz, in the year 736, art. 4.

[94] See his "Capitulary," in the year 803, given at Worms; Baluzius's edition, p. 411, where he regulates the precarious contract, and that of Frankfort, in the year 794, p. 267, art. 24, in relation to the repairing of the houses; and that of the year 800, p. 330.

[95] As appears by the preceding note, and by the "Capitulary of

justly add that Louis the Debonnaire followed the example of Charlemagne, and did not give away the church lands to the soldiery.

And yet the old abuses were carried to such a pitch that the laity under the children of Louis the Debonnaire preferred ecclesiastics to benefices, or turned them out of their livings [96] without the consent of the bishops. The benefices were divided among the next heirs,[97] and when they were held in an indecent manner the bishops had no other remedy left than to remove the relics.[98]

By the capitulary of Compiègne [99] it is enacted that the king's commissary shall have a right to visit every monastery, together with the bishop, by the consent and in presence of the person who holds it; [100] and this shows that the abuse was general.

Not that there were laws wanting for the restitution of the church lands. The Pope having reprimanded the bishops for their neglect in regard to the re-establishment of the monasteries, they wrote to Charles the Bald that they were not affected by this reproach, because they were not culpable; [101] and they reminded him of what had been promised, resolved, and decreed in so many national assemblies. In point of fact, they quoted nine.

Still they went on disputing, till the Normans came and made them all agree.

Pepin, King of Italy," where it says that the king would give the monasteries in fief to those who would swear allegiance for fiefs; it is added to the "Law of the Lombards," book iii, tit. i, sec. 30; and to the Salic laws, "Collection of Pepin's Laws in Echard," p. 195, tit. 26, art. 4.

[96] See the constitution of Lotharius I in the "Law of the Lombards," book iii, law 1, sec. 43.

[97] Ibid., sec. 44.

[98] Ibid.

[99] Given the twenty-eighth year of the reign of Charles the Bald, in the year 868. Baluzius's edition, p. 203.

[100] Cum consilio et consensu ipsius qui locum retinet.

[101] Concilium apud Bonoilum, the sixteenth year of Charles the Bald, in the year 856, Baluzius's edition, p. 78.

XII. The regulations made under King Pepin had given the Church rather hopes of relief than effectually relieved her; and as Charles Martel found all the landed estates of the kingdom in the hands of the clergy, Charlemagne found all the church lands in the hands of the soldiery. The latter could not be compelled to restore a voluntary donation; and the circumstances of that time rendered the thing still more impracticable than it seemed to be of its own nature. On the other hand, Christianity ought not to have been lost for want of ministers, churches, and instruction.[102]

This was the reason of Charlemagne's establishing the tithes,[103] a new kind of property which had this advantage in favour of the clergy, that as they were given particularly to the Church, it was easier in process of time to know when they were usurped.

Some have attempted to make this institution of a still remoter date, but the authorities they produce seem rather, I think, to prove the contrary. The constitution of Clotharius says[104] only that they shall not raise certain tithes on church lands;[105] so far then was the Church from exacting tithes at that time that its whole pretension was to be exempted from paying them. The second council of

[102] In the civil wars which broke out at the time of Charles Martel, the lands belonging to the church of Rheims were given away to laymen; "the clergy were left to shift as well as they could," says the "Life of Remigius Surius," tome i, p. 279.

[103] "Law of the Lombards," book iii, tit. 3, secs. 1 and 2.

[104] It is that on which I have descanted in the fourth chapter of this book, and which is to be found in Baluzius's edition of the "Capitularies," tome i, art. 11, p. 9.

[105] Agraria et pascuaria vel decimas porcorum ecclesiæ concedimus, ita ut actor aut decimator in rebus ecclesiæ nullus accedat. The "Capitulary of Charlemagne," in the year 800, Baluzius's edition, p. 336, explains extremely well what is meant by that sort of title from which the church is exempted by Clotharius; it was the tithe of the swine which were put into the king's forests to fatten; and Charlemagne enjoins his judges to pay it, as well as other people, in order to set an example; it is plain that this was a right of seigniory or economy.

Mâcon,[106] which was held in 585, and ordains the payment of tithes, says, indeed, that they were paid in ancient times, but it says also that the custom of paying them was then abolished.

No one questions but that the clergy opened the Bible before Charlemagne's time, and preached the gifts and offerings of Leviticus. But I say that before that prince's reign, though the tithes might have been preached, they were never established.

I noticed that the regulations made under King Pepin had subjected those who were seized of church lands in fief to the payment of tithes, and to the repairing of the churches. It was a great deal to induce by a law, whose equity could not be disputed, the principal men of the nation to set the example.

Charlemagne did more; and we find by the capitulary "De Villis"[107] that he obliged his own demesnes to the payment of the tithes; this was a still more striking example.

But the commonalty are rarely influenced by example to sacrifice their interests. The synod of Frankfort furnished them with a more cogent motive to pay the tithes.[108] A capitulary was made in that synod, wherein it is said that in the last famine the spikes of corn were found to contain no seed,[109] the infernal spirits having devoured it all, and that those spirits had been heard to reproach them with not having paid the tithes; in consequence of which it was ordained that all those who were seized of church lands should pay the tithes; and the next consequence was that the obligation extended to all.

[106] Canone 5, ex tomo I, conciliorum antiquorum Galliæ opera Jacobi Sirmundi.

[107] Art. 6, Baluzius's edition, p. 332. It was given in the year 800.

[108] Held under Charlemagne, in the year 794.

[109] Experimento enim didicimus in anno quo illa valida fames irrepsit, ebullire vacuas annonas a dæmonibus devoratas, et voces exprobrationis auditas, etc. (Baluzius's edition, p. 267, art. 23.)

Charlemagne's project did not succeed at first, for it seemed too heavy a burden.[110] The payment of the tithes among the Jews was connected with the plan of the foundation of their republic; but here it was a burden quite independent of the other charges of the establishment of the monarchy. We find by the regulations added to the law of the Lombards[111] the difficulty there was in causing the tithes to be accepted by the civil laws; and as for the opposition they met with before they were admitted by the ecclesiastic laws, we may easily judge of it from the different canons of the councils.

The people consented at length to pay the tithes, upon condition that they might have the power of redeeming them. This the constitution of Louis the Debonnaire,[112] and that of the Emperor Lotharius, his son, would not allow.[113]

The laws of Charlemagne, in regard to the establishment of tithes, were a work of necessity, not of superstition—a work, in short, in which religion only was concerned.

His famous division of the tithes into four parts—for the repairing of the churches, for the poor, for the bishop, and for the clergy—manifestly proves that he wished to give the Church that fixed and permanent status which she had lost.

His will shows that he was desirous of repairing the mischief done by his grandfather, Charles Martel.[114] He made three equal shares of his movable goods; two of

[110] See among the rest the "Capitulary of Louis the Debonnaire," in the year 829, Baluzius's edition, p. 663; against those who, to avoid paying tithes, neglected to cultivate the lands, etc., art. 5. Nonis quidem et decimis, unde et genitor noster et nos frequenter in diversis placitis admonitionem fecimus.

[111] Among others, that of Lotharius, book iii, tit. 3, chap. vi.

[112] In the year 829, art. 7, in Baluzius, tome i, p. 663.

[113] In the "Law of the Lombards," book iii, tit. 3, sec. 8.

[114] It is a kind of codicil produced by Eginhard, and different from the will itself, which we find in Goldastus and Baluzius.

these he would have divided each into one-and-twenty parts, for the one-and-twenty metropolitan sees of his empire; each part was to be subdivided between the metropolitan and the dependent bishoprics. The remaining third he distributed into four parts; one he gave to his children and grandchildren, another was added to the two thirds already bequeathed, and the other two were assigned to charitable uses. It seems as if he looked upon the immense donation he was making to the Church less as a religious act than as a political distribution.

XIII. As the Church had grown poor, the kings resigned the right of nominating to bishoprics and other ecclesiastic benefices.[115] The princes gave themselves less trouble about the ecclesiastic ministers; and the candidates were less solicitous in applying to their authorities. Thus the Church received a kind of compensation for the possessions she had lost.

Hence, if Louis the Debonnaire left the people of Rome in possession of the right of choosing their popes, it was owing to the general spirit that prevailed in his time;[116] he behaved in the same manner to the See of Rome as to other bishoprics.

XIV. I shall not pretend to determine whether Charles Martel, in giving the church lands in fief, made a grant of them for life or in perpetuity. All I know is that under Charlemagne[117] and Lotharius I[118] there were possessions of that kind which descended to the next heirs, and were divided among them.

[115] See the "Capitulary of Charlemagne," in the year 803, art. 2, Baluzius's edition, p. 379; and the "Edict of Louis the Debonnaire," in the year 834, in Goldast, "Constit. Impérial," tome i.

[116] This is mentioned in the famous canon, ego Ludovicus, which is a palpable forgery; it is Baluzius's edition, p. 591, in the year 817.

[117] As appears by his capitulary, in the year 801, art. 17, in Baluzius, tome i, p. 360.

[118] See his constitution, inserted in the code of the Lombards, book iii, tit. 1, sec. 44.

I find, moreover, that one part of them was given as allodia, and the other as fiefs.[119]

I noticed that the proprietors of the allodia were subject to service all the same as the possessors of the fiefs. This, without doubt, was partly the reason that Charles Martel made grants of allodial lands as well as of fiefs.

We must observe that the fiefs having been changed into church lands, and these again into fiefs, they borrowed something of each other. Thus the church lands had the privileges of fiefs, and these had the privileges of church lands. Such were the honorary rights of churches, which began at that time.[120] And as those rights have ever been annexed to the judiciary power, in preference to what is still called the fief, it follows that the patrimonial jurisdictions were established at the same time as those very rights.

XV. The connection of my subject has made me invert the order of time, so as to speak of Charlemagne before I had mentioned the famous epoch of the translation of the crown to the Carlovingians under King Pepin; a revolution which, contrary to the nature of ordinary events, is more remarked perhaps in our days than when it happened.

The kings had no authority; they had only an empty name. The regal title was hereditary, and that of mayor elective. Though it was latterly in the power of the mayors to place any of the Merovingians on the throne, they had not yet taken a king of another family; and the ancient

[119] See the above constitution, and the "Capitulary of Charles the Bald," in the year 846, chap. xx, in Villa Sparnaco, Baluzius's edition, tome ii, p. 31, and that of the year 853, chaps. iii and v, in the "Synod of Soissons," Baluzius's edition, tome ii, p. 54; and that of the year 854, apud Attiniacum, chap. x. Baluzius's edition, tome ii, p. 70. See also the first capitulary of Charlemagne, incerti anni, arts. 49 and 56. Baluzius's edition, tome i, p. 519.

[120] See the "Capitularies," book v, art. 44, and the "Edict of Pistes" in the year 869, arts. 8 and 9, where we find the honorary rights of the lords established, in the same manner as they are at this very day.

law which fixed the crown in a particular family was not yet erased from the hearts of the Franks. The king's person was almost unknown in the monarchy, but royalty was not. Pepin, son of Charles Martel, thought it would be proper to confound those two titles, a confusion which would leave it a moot point whether the new royalty was hereditary or not; and this was sufficient for him who to the regal dignity had joined a great power. The mayor's authority was then blended with that of the king. In the mixture of these two authorities a kind of reconciliation was made; the mayor had been elective, and the king hereditary; the crown at the beginning of the second race was elective, because the people chose; it was hereditary, because they always chose in the same family.[121]

Father Le Cointe, in spite of the authority of all ancient records,[122] denies that the Pope authorized this great change; and one of his reasons is that he would have committed an injustice.[123] A fine thing to see a historian judge of that which men have done by that which they ought to have done; by this mode of reasoning we should have no more history.

Be that as it may, it is very certain that immediately after Duke Pepin's victory the Merovingians ceased to be the reigning family. When his grandson, Pepin, was crowned king, it was only one ceremony more, and one phantom less; he acquired nothing thereby but the royal ornaments; there was no change made in the nation.

This I have said in order to fix the moment of the

[121] See the will of Charlemagne, and the division which Louis the Debonnaire made to his children in the assembly of the states held at Quierzy, related by Goldast, quem populus eligere velit, ut patri suo succedat in regni hæreditate.

[122] The anonymous "Chronicle," in the year 752; and "Chronic. Centul.," in the year 754.

[123] Fabella quæ post Pippini mortem excogitata est, æquitati ac sanctitati Zachariæ papæ plurimum adversatur. ("Ecclesiastic Annals of the French," tome ii, p. 319.)

revolution, that we may not be mistaken in looking upon that as a revolution which was only a consequence of it.

When Hugh Capet was crowned king at the beginning of the third race there was a much greater change, because the kingdom passed from a state of anarchy to some kind of government; but when Pepin took the crown there was only a transition from one government to another, which was identical.

When Pepin was crowned king there was only a change of name; but when Hugh Capet was crowned there was a change in the nature of the thing, because by uniting a great fief to the crown the anarchy ceased.

When Pepin was crowned the title of king was united to the highest office; when Hugh Capet was crowned it was annexed to the greatest fief.

XVI. We find by the formulary of Pepin's coronation that Charles and Carloman were also anointed[124] and blessed, and that the French nobility bound themselves, on pain of interdiction and excommunication, never to choose a prince of another family.[125]

It appears by the wills of Charlemagne and Louis the Debonnaire that the Franks made a choice among the king's children, which agrees with the above-mentioned clause. And when the empire was transferred from Charlemagne's family, the election, which before had been restricted and conditional, became pure and simple, so that the ancient constitution was departed from.

Pepin, perceiving himself near his end, assembled the lords, both temporal and spiritual, at St. Denis, and divided his kingdom between his two sons, Charles and Carloman.[126] We have not the acts of this assembly, but we find what was there transacted in the author of the ancient

[124] Vol. v of the "Historians of France," by the Benedictins, p. 9.

[125] Ut unquam de alterius lumbis regem in ævo præsumant eligere sed ex ipsorum. Vol. v of the "Historians of France," p. 10.

[126] In the year 768.

historical collection, published by Canisius, and in the writer of the annals of Metz,[127] according to the observation of Baluzius.[128] Here I meet with two things in some measure contradictory: that he made this division with the consent of the nobility, and afterward that he made it by his paternal authority. This proves what I said, that the people's right in the second race was to choose in the same family; it was, properly speaking, rather a right of exclusion than that of election.

This kind of elective right is confirmed by the records of the second race. Such is this capitulary of the division of the empire made by Charlemagne among his three children, in which, after settling their shares, he says[129] that "if one of the three brothers happens to have a son, such as the people shall be willing to choose as a fit person to succeed to his father's kingdom, his uncles shall consent to it."

This same regulation is to be met with in the partition which Louis the Debonnaire made among his three children—Pepin, Louis, and Charles—in the year 837, at the assembly of Aix-la-Chapelle;[130] and likewise in another partition, made twenty years before, by the same emperor, in favour of Lotharius, Pepin, and Louis.[131] We may likewise see the oath which Louis the Stammerer took at Compiègne at his coronation: "I, Louis, by the divine mercy, and the people's election, appointed king, do promise[132] . . . ." What I say is confirmed by the acts of the council of Valence, held in the year 890, for the election of

[127] Tome ii, lectionis antiquæ.

[128] Edition of the "Capitularies," tome i, p. 188.

[129] In the first capitulary of the year 806. Baluzius's edition, p. 439, art. 5.

[130] In Goldast, "Constit. Impérial," tome ii, p. 19.

[131] Baluzius's edition, p. 574, art. 14. Si vero aliquis illorum decedens legitimos filios reliquerit, non inter eos potestas ipsa dividatur, sed potius populus pariter conveniens, unum ex iis quem dominus voluerit eligat, et hunc senior frater in loco fratris et filii suscipiat.

[132] Capitulary of the year 877. Baluzius's edition, p. 272.

Louis, son of Boson, to the kingdom of Arles.[133] Louis was there elected, and the principal reason they gave for choosing him is that he was of the imperial family,[134] that Charles the Fat had conferred upon him the dignity of king, and that the Emperor Arnold had invested him by the sceptre, and by the ministry of his ambassadors. The kingdom of Arles, like the other dismembered or dependent kingdoms of Charlemagne, was elective and hereditary.

XVII. Charlemagne's intention was to restrain the power of the nobility within proper bounds, and to hinder them from oppressing the freemen and the clergy. He balanced the several orders of the state, and remained perfect master of them all. The whole was united by the strength of his genius. He led the nobility continually from one expedition to another, giving them no time to form conspiracies, but employing them entirely in the execution of his designs. The empire was supported by the greatness of its chief; the prince was great, but the man was greater. The kings, his children, were his first subjects, the instruments of his power and patterns of obedience. He made admirable laws; and, what is more, he took care to see them executed. His genius diffused itself through every part of the empire. We find in this prince's laws a comprehensive spirit of foresight, and a certain force which carries all before it. All pretexts for evading the duties are removed, neglects are corrected, abuses reformed or prevented.[135] He knew how to punish, but he understood much better how to pardon. He was great in his designs, and simple in the execution of them. No prince ever possessed in a higher degree the art of performing the

[133] In Father Labbe's "Councils," tome ix, col. 424; and in Dumont's "Corp. Diplomat.," tome ii, art. 36.

[134] By the mother's side.

[135] See his third capitulary of the year 811, p. 486, arts. 1, 2, 3, 4, 5, 6, 7, and 8; and the first capitulary of the year 812, p. 490, art. 1; and the capitulary of the year 812, p. 494, arts. 9 and 11, etc.

greatest things with ease, and the most difficult with expedition. He was continually visiting the several parts of his vast empire, and made them feel the weight of his hand wherever it fell. New difficulties sprang up on every side, and on every side he removed them. Never prince had more resolution in facing dangers; never prince knew better how to avoid them. He mocked all manner of perils, and particularly those to which great conquerors are generally subject—namely, conspiracies. This wonderful prince was extremely moderate, of a very mild character, plain and simple in his behaviour. He loved to converse freely with the lords of his court. He indulged, perhaps too much, his passion for the fair sex; a failing, however, which in a prince who always governed by himself, and who spent his life in a continual series of toils, may merit some allowance. He was wonderfully exact in his expenses, administering his demesnes with prudence, attention, and economy. A father might learn from his laws how to govern his family; and we find in his capitularies the pure and sacred source whence he derived his riches.[136] I shall add only one word more: he gave orders that the eggs in the bartons on his demesnes, and the superfluous garden-stuff, should be sold;[137] he distributed among his people all the riches of the Lombards, and the immense treasures of those Huns that had plundered the whole world.

Charlemagne and his immediate successors were afraid lest those whom they placed in distant parts should be inclined to revolt, and thought they should find more docility among the clergy. For this reason they erected a great number of bishoprics in Germany, and endowed

[136] See the "Capitulary de Villis," in the year 800; his second capitulary of the year 813, arts. 6 and 19; and the fifth book of the "Capitularies," art. 303.

[137] "Capitul. de Villis," art. 39. See this whole capitulary, which is a masterpiece of prudence, good administration, and economy.

them with very large fiefs.[138] It appears by some charters that the clauses containing the prerogatives of those fiefs were not different from such as were commonly inserted in those grants,[139] though at present we find the principal ecclesiastics of Germany invested with a sovereign power. Be that as it may, these were some of the contrivances they used against the Saxons. That which they could not expect from the indolence or supineness of vassals they thought they ought to expect from the sedulous attention of a bishop. Besides, a vassal of that kind, far from making use of the conquered people against them, would rather stand in need of their assistance to support themselves against their own people.

XVIII. When Augustus Cæsar was in Egypt he ordered Alexander's tomb to be opened; and upon their asking him whether he was willing they should open the tombs of the Ptolemies, he made answer that he wanted to see the king, and not the dead. Thus, in the history of the second race, we are continually looking for Pepin and Charlemagne; we want to see the kings, and not the dead.

A prince who was the sport of his passions, and a dupe even to his virtues; a prince who never understood rightly either his strength or his weakness; a prince who was incapable of making himself either feared or beloved; a prince, in fine, who, with few vices in his heart, had all manner of defects in his understanding, took the reins of the empire into his hands which had been held by Charlemagne.

At a time when the whole world is in tears for the death of his father, at a time of surprise and alarm, when the subjects of that extensive empire all call upon Charles

[138] See among others the foundation of the archbishopric of Bremen, in the capitulary of the year 789, Baluzius's edition, p. 245.

[139] For instance, the prohibition to the king's judges against entering upon the territory to demand the freda, and other duties. I have said a good deal concerning this in the preceding book.

and find him no more; at a time when he is advancing with all expedition to take possession of his father's throne, he sends some trusty officers before him in order to seize the persons of those who had contributed to the irregular conduct of his sisters. This step was productive of the most terrible catastrophes.[140] It was imprudent and precipitate. He began with punishing domestic crimes before he reached the palace; and with alienating the minds of his subjects before he ascended the throne.

His nephew, Bernard, King of Italy, having come to implore his clemency, he ordered his eyes to be put out, which proved the cause of that prince's death a few days afterward, and created Louis a great many enemies. His apprehension of the consequence induced him to shut his brothers up in a monastery, by which means the number of his enemies increased. These last two transactions were afterward laid to his charge in a judicial manner,[141] and his accusers did not fail to tell him that he had violated his oath and the solemn promises which he had made to his father on the day of his coronation.[142]

After the death of the Empress Hermengarde, by whom he had three children, he married Judith, and had a son by that princess; but soon mixing all the indulgence of an old husband with all the weakness of an old king, he flung his family into a disorder which was followed by the downfall of the monarchy.

He was continually altering the partitions he had made among his children. And yet these partitions had been confirmed each in their turn by his own oath, and by those of his children and the nobility. This was as if he wanted

[140] The anonymous author of the "Life of Louis the Debonnaire," in Duchesne's "Collection," tome ii, p. 295.

[141] See his trial and the circumstances of his deposition, in Duchesne's "Collection," tome ii, p. 133.

[142] He directed him to show unlimited clemency (indeficientem misericordiam) to his sisters, his brothers, and his nephews. (Tegan, in the "Collection" of Duchesne, tome ii, p. 276.)

to try the fidelity of his subjects; it was endeavouring by confusion, scruples, and equivocation, to puzzle their obedience; it was confounding the different rights of those princes, and rendering their titles dubious, especially at a time when there were but few fortresses, and when the principal bulwark of authority was the fealty sworn and accepted.

The emperor's children, in order to preserve their shares, courted the clergy, and granted them privileges till then unheard. These privileges were specious, and the clergy in return were made to warrant the revolution in favour of those princes. Agobard [143] represents to Louis the Debonnaire his having sent Lotharius to Rome, in order to have him declared emperor; and that he had made a division of his dominions among his children, after having consulted Heaven by three days' fasting and praying. What defence could such a weak prince make against the attack of superstition? It is easy to perceive the shock which the supreme authority must have twice received from his imprisonment, and from his public penance; they would fain degrade the king, and they degraded the regal dignity.

We find difficulty at first in conceiving how a prince who was possessed of several good qualities, who had some knowledge, who had a natural disposition to virtue, and who in short was the son of Charlemagne, could have such a number of enemies,[144] so impetuous and implacable as even to insult him in his humiliation and to be determined upon his ruin; and, indeed, they would have utterly completed it, if his children, who in the main were more honest than they, had been steady in their design, and could have agreed among themselves.

[143] See his letters.

[144] See his trial and the circumstances of his deposition, in Duchesne's "Collection," tome ii, p. 331. See also his life, written by Tegan. "Tanto enim odio laborabat, ut tæderet eos vita ipsius," says this anonymous author in Duchesne, tome ii, p. 307.

The strength and solidity for which the kingdom was indebted to Charlemagne still subsisted under Louis the Debonnaire in such a degree as enabled the state to support its grandeur, and to command respect from foreign nations. The prince's understanding was weak, but the nation was warlike. His authority declined at home, though there seemed to be no diminution of power abroad.

Charles Martel, Pepin, and Charlemagne were in succession rulers of the monarchy. The first flattered the avarice of the soldiers, the other two that of the clergy. Louis the Debonnaire displeased both.

In the French constitution, the whole power of the state was lodged in the hands of the king, the nobility, and the clergy. Charles Martel, Pepin, and Charlemagne joined sometimes their interest with one of those parties to check the other and generally with both; but Louis the Debonnaire could gain the affection of neither. He disobliged the bishops by publishing regulations which had the air of severity, because he carried things to a greater length than was agreeable to their inclination. Very good laws may be ill-timed. The bishops in those days, being accustomed to take the field against the Saracens and the Saxons, had very little of the spirit of religion.[145] On the other hand, as he had no longer any confidence in the nobility, he promoted mean people,[146] turning the nobles out of their employment at court to make room for strangers and upstarts.[147] By this means the affections of the two great bodies of the nobility and clergy were alienated from their prince, the consequence of which was a total desertion.

[145] The anonymous author of the "Life of Louis the Debonnaire," in Duchesne's "Collection," tome ii, p. 928.

[146] Tegan says that what seldom happened under Charlemagne was a common practice under Louis.

[147] Being desirous to check the nobility, he promoted one Bernard to the place of chamberlain, by which the great lords were exasperated to the highest pitch.

But what chiefly contributed to weaken the monarchy was the extravagance of this prince in alienating the crown demesnes.[148] And here it is that we ought to listen to the account of Nitard, one of our most judicious historians, a grandson of Charlemagne, strongly attached to Louis the Debonnaire, and who wrote his history by order of Charles the Bald.

He says that "one Adelhard for some time gained such an ascendant over the emperor that this prince conformed to his will in everything; that at the instigation of this favourite he had granted the crown lands to everybody that asked them,[149] by which means the state was ruined."[150] Thus he did the same mischief throughout the empire, as I observed he had done in Aquitaine;[151] the former Charlemagne redressed, but the latter was past all remedy.

The state was reduced to the same debility in which Charles Martel found it upon his accession to the mayoralty; and so desperate were its circumstances that no exertion of authority was any longer capable of saving it.

The treasury was so exhausted that in the reign of Charles the Bald no one could continue in his employments, nor be safe in his person without paying for it.[152] When they had it in their power to destroy the Normans, they took money to let them escape;[153] and the first advice which Hincmar gives to Louis the Stammerer is to ask of the assembly of the nation a sufficient allowance to defray the expenses of his household.

[148] Villas regias quæ erant sui et avi et tritavi, fidelibus suis tradidit eas in possessiones sempiternas; fecit enim hoc diu tempore. (Tegan, "De Gestis Ludovici Pii.")

[149] Hinc libertates, hinc publica in propriis usibus distribuere suasit. (Nitard, lib. iv, prope finem.)

[150] Rempublicam penitus annullavit. (Ibid.)

[151] See book xxx, chap. x.

[152] Hincmar, let. 1, to Louis the Stammerer.

[153] See the fragment of the "Chronicle of the Monastery of S. Sergius of Angers," in Duchesne, tome ii, p. 401.

The clergy had reason to repent the protection they had granted to the children of Louis the Debonnaire. This prince, as I have already observed, had never given any of the church lands by precepts to the laity;[154] but it was not long before Lotharius in Italy, and Pepin in Aquitaine, quitted Charlemagne's plan, and resumed that of Charles Martel. The clergy had recourse to the emperor against his children, but they themselves had weakened the authority to which they appealed. In Aquitaine some condescension was shown, but none in Italy.

The civil wars with which the life of Louis the Debonnaire had been embroiled were the seed of those which followed his death. The three brothers—Lotharius, Louis, and Charles—endeavoured each to bring over the nobility to their party and to make them their tools. To such as were willing, therefore, to follow them they granted church lands by precepts; so that to gain the nobility they sacrificed the clergy.

We find in the capitularies[155] that those princes were obliged to yield to the importunity of demands, and that what they would not often have freely granted was extorted from them; we find that the clergy thought themselves more oppressed by the nobility than by the kings. It appears that Charles the Bald[156] became the greatest

[154] See what the bishops say in the synod of the year 845, apud Teudonis villam, art. 4.

[155] See the synod in the year 845, apud Teudonis villam, arts. 3 and 4, which gives a very exact description of things; as also that of the same year held at the palaces of Vernes, art. 12, and the synod of Beauvais, also in the same year, arts. 3, 4, and 6, and the "Capitulary in Villa Sparnaco," in the year 846, art. 20, and the letter which the bishops assembled at Rheims wrote in 858 to Louis, King of Germany, art. 8.

[156] See the "Capitulary in Villa Sparnaco," in the year 846. The nobility had set the king against the bishops, insomuch that he expelled them from the assembly; a few of the canons enacted in council were picked out, and the prelates were told that these were the only ones which should be observed; nothing was granted them that could be refused. See arts. 20, 21, and 22. See also the letter which the

enemy of the patrimony of the clergy, whether he was most incensed against them for having degraded his father on their account, or whether he was the most timorous. Be that as it may, we meet with continual quarrels in the "Capitularies," [157] between the clergy who demanded their estates and the nobility who refused or deferred to restore them; and the kings acting as mediators.

The situation of affairs at that time is a spectacle really deserving of pity. While Louis the Debonnaire made immense donations out of his demesnes to the clergy, his children distributed the church lands among the laity. The same prince with one hand founded new abbeys and despoiled old ones. The clergy had no fixed state; one moment they were plundered, another they received satisfaction; but the crown was continually losing.

Toward the close of the reign of Charles the Bald, and from that time forward, there was an end of the disputes of the clergy and laity concerning the restitution of church lands. The bishops, indeed, breathed out still a few sighs in their remonstrances to Charles the Bald, which we find in the capitulary of the year 856, and in the letter they wrote to Louis, King of Germany, in the year 858; [158] but they proposed things, and challenged promises, so often eluded, that we plainly see that they had no longer any hopes of obtaining their desire.

bishops assembled at Rheims wrote in the year 858 to Louis, King of Germany, and the "Edict of Pistes," in the year 864, art. 5.

[157] See this very capitulary in the year 846, in Villa Sparnaco. See also the capitulary of the assembly held apud Marsnam, in the year 847, art. 4, wherein the clergy reduced themselves to demand only the restitution of what they had been possessed of under Louis the Debonnaire. See also the capitulary of the year 851, apud Marsnam, arts. 6 and 7, which confirms the nobility and clergy in their several possessions, and that apud Bonoilum, in the year 856, which is a remonstrance of the bishops to the king, because the evils, after so many laws, had not been redressed; and, in fine, the letter which the bishops assembled at Rheims wrote in the year 858 to Louis, King of Germany, art. 8.

[158] Art. 8.

All that could be expected, then, was to repair in general the injuries done both to Church and state.[159] The kings engaged not to deprive the nobility of their freemen, and not to give away any more church lands by precepts,[160] so that the interests of the clergy and nobility seemed then to be united.

The dreadful depredations of the Normans, as I have already observed, contributed greatly to put an end to those quarrels.

The authority of our kings diminishing every day, both for the reasons already given and those which I shall mention hereafter, they imagined they had no better resource left than to resign themselves into the hands of the clergy. But the ecclesiastics had weakened the power of the kings, and these had diminished the influence of the ecclesiastics.

In vain did Charles the Bald and his successors call in the Church to support the state and to prevent its ruin; in vain did they make use of the respect which the commonalty had for that body,[161] to maintain that which they should also have for their prince;[162] in vain did they endeavour to give an authority to their laws by that of the canons; in vain did they join the ecclesiastic with the civil punishments;[163] in vain to counterbalance the authority

[159] See the capitulary of the year 852, arts. 6 and 7.

[160] Charles the Bald, in the Synod of Soissons, says that "he had promised the bishops not to issue any more precepts relating to church lands." (Capitulary of the year 853, art. 11, Baluzius's edition, tome ii, p. 56.)

[161] See the "Capitulary of Charles the Bald," apud Saponarias, in the year 859, art. 3. "Venilon, whom I made Archbishop of Sens, has consecrated me, and I ought not to be expelled the kingdom by anybody," saltem sine audientia et judicio episcoporum, quorum ministerio in regem sum consecratus, et qui throni Dei sunt dicti, in quibus Deus sedet, et per quos sua decernit judicia, quorum paternis correctionibus et castigatoriis judiciis me subdere fui paratus et in præsenti sum subditus.

[162] See the "Capitulary of Charles the Bald," de Carisiaco, in the year 857, Baluzius's edition, tome ii, p. 88, secs. 1, 2, 3, 4, and 7.

[163] See the Synod of Pistes in the year 862, art. 4, and the "Capitulary of Louis II," apud vernis palatium, in the year 883, arts. 4 and 5.

of the count did they give to each bishop the title of their commissary in the several provinces;[104] it was impossible to repair the mischief they had done; and a terrible misfortune which I shall presently mention proved the ruin of the monarchy.

XIX. I said that the freemen were led against the enemy by their count, and the vassals by their lord. This was the reason that the several orders of the state balanced each other, and though the king's vassals had other vassals under them, yet they might be overawed by the count who was at the head of all the freemen of the monarchy.

The freemen were not allowed at first to do homage for a fief; but in process of time this was permitted;[105] and I find that this change was made during the period that elapsed from the reign of Gontram to that of Charlemagne. This I prove by the comparison which may be made between the Treaty of Andely,[106] by Gontram, Childebert, and Queen Brunehault, and the partition made by Charlemagne among his children, as well as a like partition by Louis the Debonnaire.[107] These three acts contain nearly the same regulations with regard to the vassals; and as they determine the very same points, under almost the same circumstances, the spirit as well as the letter of those three treaties in this respect are very much alike.

But as to what concerns the freemen there is a vital difference. The Treaty of Andely does not say that they might do homage for a fief; whereas we find in the divisions of Charlemagne and Louis the Debonnaire express clauses to empower them to do homage. This shows that a new usage had been introduced after the Treaty of An-

[104] Capitulary of the year 876, under Charles the Bald, in Synodo Pontigonensi, Baluzius's edition, art. 12.

[105] See what has been said already, book xxx, last chapter toward the end.

[106] In the year 587, in Gregory of Tours, book ix.

[107] See the following chapter, where I shall speak more diffusely of those partitions; and the notes in which they are quoted.

dely, whereby the freemen had become capable of this great privilege.

This must have happened when Charles Martel, after distributing the church lands to his soldiers, partly in fief, and partly as allodia, made a kind of revolution in the feudal laws. It is very probable that the nobility who were seized already of fiefs found a greater advantage in receiving the new grants as allodia; and that the freemen thought themselves happy in accepting them as fiefs.

XX. Charlemagne in the partition [168] mentioned in the preceding chapter ordained that after his death the vassals belonging to each king should be permitted to receive benefices in their own sovereign's dominion, and not in those of another; [169] whereas they may keep their allodial estates in any of their dominions.[170] But he adds [171] that every freeman might, after the death of his lord, do homage in any of three kingdoms he pleased, as well as he that never had been subject to a lord. We find the same regulations in the partition which Louis the Debonnaire made among his children in the year 817.

But though the freeman had done homage for a fief, yet the count's militia was not thereby weakened: the freeman was still obliged to contribute for his allodium, and to get people ready for the service belonging to it, at the proportion of one man to four manors; or else to procure a man that should do the duty of the fief in his stead. And when some abuses had been introduced upon this head they were redressed, as appears by the constitutions of

[168] In the year 806, between Charles, Pepin, and Louis, it is quoted by Goldast, and by Baluzius, tome ii, p. 439.

[169] Art. ix, p. 443, which is agreeable to the treaty of Andely, in Gregory of Tours, book ix.

[170] Art. 10, and there is no mention made of this in the treaty of Andely.

[171] In Baluzius, tome i, p. 174. Licentiam habeat unusquisque liber homo qui seniorum non habuerit, cuicumque ex his tribus fratribus voluerit, se commendandi, art. 9. See also the division made by the same emperor, in the year 837, art. 6, Baluzius's edition, p. 686.

Charlemagne,[172] and by that of Pepin, King of Italy, which explain each other.[173]

The remark made by historians that the battle of Fontenay was the ruin of the monarchy is very true; but I beg leave to cast an eye on the unhappy consequences of that day.

Some time after the battle the three brothers, Lotharius, Louis, and Charles, made a treaty,[174] wherein I find some clauses which must have altered the whole political system of the French Government.

In the declaration [175] which Charles made to the people of the part of the treaty relating to them, he says that every freeman might choose whom he pleased for his lord,[176] whether the king or any of the nobility. Before this treaty the freeman might do homage for a fief; but his allodium still continued under the immediate power of the king—that is, under the count's jurisdiction—and he depended on the lord to whom he vowed fealty, only on account of the fief which he had obtained. After that treaty every freeman had a right to subject his allodium to the king, or to any other lord, as he thought proper. The question is not in regard to those who put themselves under the protection of another for a fief, but to such as changed their allodial into a feudal land, and withdrew themselves, as it were, from the civil jurisdiction to enter

[172] In the year 811, Baluzius's edition, tome i, p. 486, arts. 7 and 8, and that of the year 812, ibid., p. 490, art. 1. Ut omnis liber homo qui quatuor mansos vestitos de proprio suo, sive de alicujus beneficio, habet, ipse se præparet, et ipse in hostem pergat sive cum seniore suo, etc. See also the capitulary of the year 807, Baluzius's edition, tome i, p. 458.

[173] In the year 793, inserted in the "Law of the Lombards," book iii, tit. 9, chap. ix.

[174] In the year 847, quoted by Aubert le Mire, and Baluzius, tome ii, p. 42. Conventus apud Marsnam.

[175] Adnunciatio.

[176] Ut unusquisque liber homo in nostro regno seniorem quem voluerit in nobis et in nostris fidelibus accipiat, art. 2, of the "Declaration of Charles."

under the power of the king, or of the lord whom they thought proper to choose.

Thus it was that those who formerly were only under the king's power, as freemen under the count, became insensibly vassals one of another, since every freeman might choose whom he pleased for his lord, the king or any of the nobility.

If a man changed an estate which he possessed in perpetuity into a fief, this new fief could no longer be only for life. Hence we see, a short time afterward, a general law for giving the fiefs to the children of the present possessor:[177] it was made by Charles the Bald, one of the three contracting princes.

What has been said concerning the liberty every freeman had in the monarchy, after the treaty of the three brothers, of choosing whom he pleased for his lord, the king or any of the nobility, is confirmed by the acts subsequent to that time.

In the reign of Charlemagne,[178] when the vassal had received a present of a lord, were it worth only a sou, he could not afterward quit him. But under Charles the Bald the vassals might follow what was agreeable to their interests or their inclination with entire safety:[179] and so strongly does this prince explain himself on the subject that he seems rather to encourage them in the enjoyment of this liberty than to restrain it. In Charlemagne's time

[177] Capitulary of the year 877, tit. 53, arts. 9 and 10, apud Carisiacum, similiter et de nostris vassallis faciendum est, etc. This capitulary relates to another of the same year, and of the same place, art. 3.

[178] "Capitulary of Aix-la-Chapelle," in the year 813, art. 16, quod nullus seniorem suum dimittat post quam ab eo acceperit valente solidum unum; and the "Capitulary of Pepin," in the year 783, art 5.

[179] See the "Capitulary de Carisiaco," in the year 856, arts. 10 and 13. Baluzius's edition, tome ii, p. 83, in which the king, together with the lords spiritual and temporal, agreed to this: Et si aliquis de vobis talis est cui suus senioratus non placet, et illi simulat ut ad alium seniorem melius quam ad illum acaptare possit, veniat ad illum, et ipse tranquillo et pacifico animo donet illi commeatum . . . et quod Deus illi cupierit et ad alium seniorem acaptare potuerit, pacifice habeat.

benefices were rather personal than real; afterward they became rather real than personal.

XXI. The same changes happened in the fiefs as in the allodia. We find by the capitulary of Compiègne,[180] under King Pepin, that those who had received a benefice from the king gave a part of this benefice to different bondmen; but these parts were not distinct from the whole. The king revoked them when he revoked the whole; and at the death of the king's vassal the rear-vassal lost also his rear-fief: and a new beneficiary succeeded, who likewise established new rear-vassals. Thus it was the person and not the rear-fief that depended on the fief; on the one hand, the rear-vassal returned to the king because he was not tied forever to the vassal; and the rear-fief returned also to the king, because it was the fief itself and not a dependence of it.

Such was the rear-vassalage, while the fiefs were during pleasure; and such was it also while they were for life. This was altered when the fiefs descended to the next heirs, and the rear-fiefs the same. That which was held before immediately of the king was held now mediately; and the regal power was thrown back, as it were, one degree, sometimes two; and oftentimes more.

We find in the books of fiefs[181] that though the king's vassals might give away in fief—that is, in rear-fief—to the king, yet these rear-vassals, or petty vavasors, could not give also in fief; so that whatever they had given, they might always resume. Besides, a grant of that kind did not descend to the children like the fiefs, because it was not supposed to have been made according to the feudal laws.

If we compare the situation in which the rear-vassalage was at the time when the two Milanese senators wrote those

[180] In the year 757, art. 6, Baluzius's edition, p. 181.
[181] Book i, chap. i.

books, with what it was under King Pepin, we shall find that the rear-fiefs preserved their primitive nature longer than the fiefs.[182]

But when those senators wrote, such general exceptions had been made to this rule as had almost abolished it. For if a person who had received a fief of a rear-vassal happened to follow him upon an expedition to Rome, he was entitled to all the privileges of a vassal.[183] In like manner, if he had given money to the rear-vassal to obtain the fief, the latter could not take it from him, nor hinder him from transmitting it to his son, till he returned him his money: in fine, this rule was no longer observed by the Senate of Milan.[184]

In Charlemagne's time they were obliged,[185] under great penalties, to repair to the general meeting in case of any war whatsoever; they admitted of no excuses, and if the count exempted any one he was liable himself to be punished. But the treaty of the three brothers [186] made a restriction upon this head which rescued the nobility, as it were, out of the king's hands, they were no longer obliged to serve him in time of war, except when the war was defensive.[187] In others, they were at liberty to follow their lord or to mind their own business. This treaty relates to another,[188] concluded five years before, between the two brothers, Charles the Bald and Louis, King of Germany, by which these princes release their vassals from serving them in war, in case they should attempt hostilities against

[182] At least in Italy and Germany.

[183] Book i, of fiefs, chap. i.

[184] Ibid.

[185] Capitulary of the year 802, art. 7, Baluzius's edition, p. 365.

[186] Apud Marsnam, in the year 847, Baluzius's edition, p. 42.

[187] Volumus ut cujuscumque nostrûm homo in cujuscumque regno sit, cum seniore suo in hostem, vel aliis suis utilitatibus, pergat, nisi talis regni invasio quam Lamtuveri dicunt, quod absit, acciderit, ut omnis populus illius regni ad eam repellendam communiter pergat, art. 5, ibid., p. 44.

[188] Apud Argentoratum, in Baluzius, "Capitularies," tome ii, p. 39.

each other; an agreement which the two princes confirmed by oath, and at the same time made their armies swear to it.

The death of a hundred thousand French at the battle of Fontenay made the remains of the nobility imagine that by the private quarrels of their kings about their respective shares their whole body would be exterminated, and that the ambition and jealousy of those princes would end in the destruction of all the best families of the kingdom. A law was therefore passed that the nobility should not be obliged to serve their princes in war unless it was to defend the state against a foreign invasion. This law obtained for several ages.[189]

XXII. The many changes introduced into the fiefs in particular cases seemed to spread so widely as to be productive of general corruption. I noticed that in the beginning several fiefs had been alienated in perpetuity; but those were particular cases, and the fiefs in general preserved their nature; so that if the crown lost some fiefs it substituted others in their stead. I observed, likewise, that the crown had never alienated the great offices in perpetuity.[190]

But Charles the Bald made a general regulation, which equally affected the great offices and the fiefs. He ordained, in his capitularies, that the counties should be given to the children of the count, and that this regulation should also take place in respect to the fiefs.[191]

We shall see presently that this regulation received a

[189] See the law of Guy, King of the Romans, among those which were added to the Salic law, and to that of the Lombards, tit. 6, sec. 2 in Echard.

[190] Some authors pretend that the county of Toulouse had been given away by Charles Martel, and passed by inheritance down to Raymond, the last count; but, if this be true, it was owing to some circumstances which might have been an inducement to choose the Counts of Toulouse from among the children of the last possessor.

[191] See his capitulary of the year 877, tit. 53, arts. 9 and 10, apud Carisiacum. This capitulary bears relation to another of the same year and place, art. 3.

wider extension, insomuch that the great offices and fiefs went even to distant relatives. Thence it followed that most of the lords who before this time had held immediately of the crown held now mediately. Those counts who formerly administered justice in the king's placita, and who led the freemen against the enemy, found themselves situated between the king and his freemen; and the king's power was removed farther off another degree.

Again, it appears from the capitularies[192] that the counts had benefices annexed to their counties, and vassals under them. When the counties became hereditary, the count's vassals were no longer the immediate vassals of the king; and the benefices annexed to the counties were no longer the king's benefices; the counts grew powerful because the vassals whom they had already under them enabled them to procure others.

In order to be convinced how much the monarchy was thereby weakened toward the end of the second race we have only to cast an eye on what happened at the beginning of the third, when the multiplicity of rear-fiefs flung the great vassals into despair.

It was a custom of the kingdom[193] that when the elder brothers had given shares to their younger brothers the latter paid homage to the elder; so that those shares were held of the lord paramount only as a rear-fief. Philip Augustus, the Duke of Burgundy, the Counts of Nevers, Boulogne, St. Paul, Dampierre, and other lords declared[194] that henceforward, whether the fiefs were divided by succession or otherwise, the whole should be always of the

[192] The third capitulary of the year 812, art. 7, and that of the year 815, art. 6, on the Spaniards. The collection of the "Capitularies," book v, art. 223, and the capitulary of the year 869, art. 2, and that of the year 877, art. 13, Baluzius's edition.

[193] As appears from Otho of Frissingue, of the actions of Frederic, book ii, chap. xxix.

[194] See the ordinance of Philip Augustus in the year 1209, in the new collection.

same lord, without any intermediation. This ordinance was not generally followed; for, as I have elsewhere observed, it was impossible to make general ordinances at that time; but many of our customs were regulated by them.

XXIII. We have observed that Charles the Bald ordained that when the possessor of a great office or of a fief left a son at his death the office or fief should devolve to him. It would be a difficult matter to trace the progress of the abuses which thence resulted, and of the extension given to that law in each country. I find in the books of fiefs [195] that toward the beginning of the reign of the Emperor Conrad II the fiefs situated in his dominions did not descend to the grandchildren: they descended only to one of the last possessor's children, who had been chosen by the lord: [196] thus the fiefs were given by a kind of election, which the lord made among the children.

In the sixteenth chapter of this book we have explained in what manner the crown was in some respects elective, and in others hereditary under the second race. It was hereditary, because the kings were always taken from that family, and because the children succeeded; it was elective, by reason that the people chose from among the children. As things proceed step by step, and one political law has constantly some relation to another political law; the same spirit was followed in the succession of fiefs as had been observed in the succession to the crown.[197] Thus the fiefs were transmitted to the children by the right of succession, as well as of election; and each fief became both elective and hereditary, like the crown.

This right of election [198] in the person of the lord was

[195] Book i, tit. 1.

[196] Sic progressum est, ut ad filios deveniret in quem Dominus hoc vellet beneficium confirmare. (Ibid.)

[197] At least in Italy and Germany.

[198] Quod hodie ita stabilitum est, ut ad omnes æqualiter veniat. (Book i, of the fiefs, tit. 1.)

not subsisting at the time of the authors [199] of the book of fiefs—that is, in the reign of the Emperor Frederick I.

It is mentioned in the books of fiefs that when the Emperor Conrad set out for Rome the vassals in his service presented a petition to him that he would please to make a law that the fiefs which descended to the children should descend also to the grandchildren; and that he whose brother died without legitimate heirs might succeed to the fief which had belonged to their common father.[200] This was granted.

In the same place it is said (and we are to remember that those writers lived at the time of the Emperor Frederick I) [201] that "the ancient jurists had always been of opinion [202] that the succession of fiefs in a collateral line did not extend further than to brothers-german, though of late it was carried as far as the seventh degree, and by the new code they had extended it in a direct line in infinitum." It is thus that Conrad's law was insensibly extended.

All these things being supposed, the bare perusal of the history of France is sufficient to demonstrate that the perpetuity of fiefs was established earlier in this kingdom than in Germany. Toward the beginning of the reign of the Emperor Conrad II, in 1024, things were upon the same footing still in Germany as they had been in France during the reign of Charles the Bald, who died in 877. But

[199] Gerardus Niger and Aubertus de Orto.

[200] Cum vero Conradus Romam proficisceretur, petitum est a fidelibus qui in ejus erant servitio, ut, lege ab eo promulgatâ, hoc etiam ad nepotes ex filio producere dignaretur, et ut frater fratri sine legitimo hærede defuncto in beneficio quod eorum patris fuit, succedat. (Book i, of fiefs, tit. 1.)

[201] Cujas has proved it extremely well.

[202] Sciendum est quod beneficium advenientes ex latere, ultra fratres patrueles non progreditur successione ab antiquis sapientibus constitutum, licet moderno tempore usque ad septimum geniculum sit usurpatum, quod in masculis descendentibus novo jure in infinitum extenditur. (Ibid.)

such were the changes made in this kingdom after the reign of Charles the Bald that Charles the Simple found himself unable to dispute with a foreign house his incontestable rights to the empire; and, in fine, that in Hugh Capet's time the reigning family, stripped of all its demesnes, was no longer in a condition to maintain the crown.

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

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

Besides, the kingdom of Germany was not laid waste and annihilated, as it were, like that of France, by that particular kind of war with which it had been harassed by the Normans and Saracens. There were less riches in Germany, fewer cities to plunder, less extent of coast to scour, more marshes to get over, more forests to penetrate. As the dominions of those princes were less in danger of being ravaged and torn to pieces they had less need of their vassals, and consequently less dependence on them. And in all probability if the Emperors of Germany had not been obliged to be crowned at Rome, and to make continual expeditions into Italy, the fiefs would have preserved their primitive nature much longer in that country.

XXIV. The empire, which, in prejudice to the branch of Charles the Bald, had been already given to the bastard line of Louis, King of Germany,[203] was transferred to a foreign house by the election of Conrad, Duke of Franconia,

[203] Arnold and his son Louis IV.

in 912. The reigning branch in France being hardly able to contest a few villages, was much less in a situation to contest the empire. We have an agreement entered into between Charles the Simple and the Emperor Henry I, who had succeeded to Conrad. It is called the compact of Bonn.[204] These two princes met on a vessel which had been placed in the middle of the Rhine, and swore eternal friendship. They used on this occasion an excellent middle term. Charles took the title of King of West France, and Henry that of King of East France. Charles contracted with the King of Germany, and not with the emperor.

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

The Normans ravaged the kingdom; they sailed in open boats or small vessels, entered the mouths of rivers, and laid the country waste on both sides. The cities of Orleans and Paris put a stop to those plunderers, so that they could not advance farther, either on the Seine or on

[204] In the year 926, quoted by Aubert le Mire, Cod. donationum piarum, chap. xxvii.

the Loire.[205] Hugh Capet, who was master of those cities, held in his hands the two keys of the unhappy remains of the kingdom; the crown was conferred upon him as the only person able to defend it. It is thus the empire was afterward given to a family whose dominions form so strong a barrier against the Turks.

The empire went from Charlemagne's family at a time when the inheritance of fiefs was established only as a mere condescendence. It even appears that this inheritance obtained much later among the Germans than among the French;[206] which was the reason that the empire, considered as a fief, was elective. On the contrary, when the crown of France went from the family of Charlemagne, the fiefs were really hereditary in this kingdom; and the crown, as a great fief, was also hereditary.

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

XXVI. From the perpetuity of fiefs it followed that the right of seniority or primogeniture was established among the French. This right was quite unknown under the first race;[207] the crown was divided among the brothers, the allodia were shared in the same manner; and as the fiefs, whether precarious or for life, were not an object of succession, there could be no partition in regard to those tenures.

Under the second race the title of emperor, which Louis the Debonnaire enjoyed, and with which he honoured his

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

[206] See above, chap. xxiii.

[207] See the Salic law, and the "Law of the Ripuarians," in the title of allodia.

eldest son, Lotharius, made him think of giving this prince a kind of superiority over his younger brothers. The two kings were obliged to wait upon the emperor every year, to carry him presents, and to receive much greater from him; they were also to consult with him upon common affairs.[208] This is what inspired Lotharius with those pretences which met with such bad success. When Agobard wrote in favour of this prince,[209] he alleged the emperor's own intention, who had associated Lotharius with the empire after he had consulted the Almighty by a three days' fast, by the celebration of the holy mysteries, and by prayers and almsgiving; after the nation had sworn allegiance to him which they could not refuse without perjuring themselves; and after he had sent Lotharius to Rome to be confirmed by the Pope. Upon all this he lays a stress, and not upon his right of primogeniture. He says, indeed, that the emperor had designed a partition among the younger brothers, and that he had given the preference to the elder; but saying he had preferred the elder was saying at the same time that he might have given the preference to his younger brothers.

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

As the fiefs descended to the children of the possessor, the lords lost the liberty of disposing of them; and, in order to indemnify themselves, they established what they

[208] See the capitulary of the year 817, which contains the first partition made by Louis the Debonnaire among his children.

[209] See his two letters upon this subject, the title of one of which is de divisione imperii.

called the right of redemption, whereof mention is made in our customs, which at first was paid in a direct line, and by usage came afterward to be paid only in a collateral line.

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

The right of redemption was to be paid at every change of heir, and at first was paid even in a direct line.[210] The most general custom had fixed it to one year's income. This was burdensome and inconvenient to the vassal, and affected in some measure the fief itself. It was often agreed in the act of homage that the lord should no longer demand more than a certain sum of money for the redemption, which, by the changes incident to money, became afterward of no manner of importance.[211] Thus the right of redemption is in our days reduced almost to nothing, while that of the lord's dues is continued in its full extent. As this right concerned neither the vassal nor his heirs, but was a fortuitous case which no one was obliged to foresee or expect, these stipulations were not made, and they continued to pay a certain part of the price.

When the fiefs were for life, they could not give a part of a fief to hold in perpetuity as a rear-fief; for it would have been absurd that a person who had only the usufruct of a thing should dispose of the property of it. But when they became perpetual, this was permitted,[212] with some

[210] See the ordinance of Philip Augustus, in the year 1209, on the fiefs.

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

[212] But they could not abridge the fiefs—that is, abolish a portion of it.

restrictions made by the customs, which was what they call dismembering their fief.[213]

The perpetuity of feudal tenures having established the right of redemption, the daughters were rendered capable of succeeding to a fief, in default of male issue. For when the lord gave the fief to his daughter he multiplied the cases of his right of redemption, because the husband was obliged to pay it as well as the wife.[214] This regulation could not take place in regard to the crown, for as it was not held of any one there could be no right of redemption over it.

The daughter of William V, Count of Toulouse, did not succeed to the county. But Eleanor succeeded to Aquitaine, and Matilda to Normandy; and the right of the succession of females seemed so well established in those days that Louis the Young, after his divorce from Eleanor, made no difficulty in restoring Guienne to her. But as these last two instances followed close on the first, the general law by which the women were called to the succession of fiefs must have been introduced much later into the county of Toulouse than into the other provinces of France.[215]

The constitution of several kingdoms of Europe has been directed by the state of feudal tenures at the time when those kingdoms were founded. The women succeeded neither to the crown of France nor to the empire, because at the foundation of those two monarchies they were incapable of succeeding to fiefs. But they succeeded in kingdoms whose foundation was posterior to that of the perpetuity of the fiefs, such as those founded by the Normans, those by the conquests made on the Moors, and

[213] They fixed the portion which they could dismember.

[214] This was the reason that the lords obliged the widow to marry again.

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

others, in fine, which were beyond the limits of Germany, and in later times received in some measure a second birth by the establishment of Christianity.

When these fiefs were at will they were given to such as were capable of doing service for them, and, therefore, were never bestowed on minors; but when they became perpetual, the lords took the fief into their own hands, till the pupil came of age, either to increase their own emoluments, or to train the ward to the use of arms.[216] This is what our customs call the guardianship of a nobleman's children, which is founded on principles different from those of tutelage, and is entirely a distinct thing from it.

When the fiefs were for life, it was customary to vow fealty for a fief; and the real delivery, which was made by a sceptre, confirmed the fief, as it is now confirmed by homage. We do not find that the counts, or even the king's commissaries, received the homage in the provinces; nor is this ceremony to be met with in the commissions of those officers which have been handed down to us in the capitularies. They sometimes, indeed, made all the king's subjects take an oath of allegiance;[217] but so far was this oath from being of the same nature as the service afterward established by the name of homage that it was only a ceremony, of less solemnity, occasionally used, either before or after that act of obeisance; in short, it was quite a distinct thing from homage.[218]

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

[217] We find the formula thereof in the second capitulary of the year 802. See also that of the year 854, art. 13, and others.

[218] M. Du Cange in the word hominium, p. 1163, and in the word fidelitas, p. 474, cites the charters of the ancient homages where these differences are found, and a great number of authorities which may

The counts and the king's commissaries further made those vassals whose fidelity was suspected give occasionally a security, which was called firmitas,[219] but this security could not be a homage, since kings gave it to each other.[220]

And though the Abbot Suger[221] makes mention of a chair of Dagobert, in which, according to the testimony of antiquity, the Kings of France were accustomed to receive the homage of the nobility, it is plain that he expresses himself agreeably to the ideas and language of his own time.

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

I should be apt to think that homages began to be established under King Pepin, which is the time I mentioned that several benefices were given in perpetuity, but I should not think thus without caution, and only upon a supposition that the authors of the ancient annals of the Franks were not ignorant pretenders,[222] who in describing the fealty professed by Tassillon, Duke of Bavaria, to King Pepin, spoke according to the usages of their own time.[223]

be seen. In paying homage, the vassal put his hand on that of his lord, and took his oath; the oath of fealty was made by swearing on the gospels. The homage was performed kneeling, the oath of fealty standing. None but the lord could receive homage, but his officers might take the oath of fealty. See Littleton, secs. 91, 92, faith and homage—that is, fidelity and homage.

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

[220] Ibid., art. 1.

[221] Lib. de administratione sua.

[222] Anno 757, chap. xvii.

[223] Tassilo venit in vassatico se commendans, per manus sacramenta juravit multa et innumerabilia, reliquis sanctorum manus imponens et fidelitatem promisit regi Pippino. One would think that here was an homage and an oath of fealty. See note 217, page 809.

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

When the fiefs became hereditary, the law relating to the order of succession must have been in relation to the perpetuity of fiefs. Hence this rule of the French law, "estates of inheritance do not ascend," [224] was established in spite of the Roman and Salic laws.[225] It was necessary that service should be paid for the fief; but a grandfather or a great-uncle would have been too old to perform any service; this rule thus held good at first only in regard to the feudal tenures, as we learn from Boutillier.[226]

When the fiefs became hereditary, the lords who were to see that service was paid for the fief insisted that the females who were to succeed to the feudal estate, and I fancy sometimes the males, should not marry without their consent; insomuch that the marriage contracts became in respect to the nobility both of a feudal and a civil regulation.[227] In an act of this kind under the lord's inspection, regulations were made for the succession, with the view that the heirs might pay service for the fief: hence none but the nobility at first had the liberty of disposing

[224] Book iv, de feudis, tit. 59.

[225] In the title of allodia.

[226] "Somme Rurale," book i, tit. 76, p. 447.

[227] According to an ordinance of St. Louis, in the year 1246, to settle the customs of Anjou and Maine, those who shall have the care of the heiress of a fief shall give security to the lord that she shall not be married without his consent.

of successions by marriage contract, as Boyer [228] and Aufrerius [229] have observed.

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

"Italiam, Italiam [230] . . ."

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

[228] Decision 155, Nos. 8 and 204; and No. 38.
[229] In "Capell. Thol.," decision 453.
[230] "Æneid," lib. iii, v. 523.

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