

German law is followed only in the punishment of crimes committed beyond the extent of their own territory.

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

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

In other respects the laws of Gundebald for the Burgundians seem pretty judicious, and those of Rotharis and of the other Lombard princes are still more so. But the laws of the Visigoths, those for instance of Reccessuinthus, Chaintasuinthus, 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.

C H A P. II.

That the laws of the Barbarians were all personal.

IT is a distinguishing character of these laws of the Barbarians, that they were not confined to a certain district; the Frank was tried by the law of the Franks, the Alleman by the law of the Allemans, the Burgundian by that of the Burgundians, the Roman by the Roman law; nay, so far were the conquerors in those days from reducing their laws to an 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 German people. These nations were parted asunder by marshes, lakes, and forests; and Cæsar † observes, they were fond of such separations. Their dread of the Romans brought about their re-union; and yet each

† De bello Gallico, b. 6.

individual among these mixed people was still to be tried by the established customs of his own nation. Each people apart was free and independent, and when they came to be intermixed, the independency still continued; the country was common, and the government peculiar; the territory the same, and the nations different. The spirit of personal laws prevailed therefore among these people before ever they set out from their own homes, and they carried it with them into their conquests.

We find this custom established in the formulas of Marculfus *, in the codes of the laws of Barbarians, but chiefly in the law of the Ripuarians †, and in the decrees of the kings of the first race ‡, from whence the capitularies made on that subject in the second || race were derived. The children § followed the law of their father, the wife * that of the husband, the widow † came back to her own original law, and the freedman ‡ was under that of his patron. Besides, every man could make choice of what laws he pleased; but the constitution of || Lotharius I. required this choice should be made public.

C H A P. III.

Capital difference between the Salic laws, and those of the Visigoths and Burgundians.

WE have already observed, that the laws of the Burgundians and Visigoths were impartial; not so 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

* Lib. i. formul. 8.

† Chap. 31.

‡ That of Clotarius in 560. Balusius's edit. of the capitularies, tome i. art. 4. *ibid.* in fine.

|| Capitul. added to the law of the Lombards, lib. i. tit. 25. cap. 71. lib. ii. tit. 41. cap. 7. et tit. 56. cap. 1. et 2.

§ *Ibid.* lib. ii. tit. 5.

* *Ibid.*

† *Ibid.* chap. 2.

‡ *Ibid.* lib. ii. tit. ii. 35. cap. 2.

|| In the law of the Lombards, lib. ii. tit. 57.

be killed, a composition of two hundred sols was to be paid to his relations *; only one hundred upon the killing of a Roman possessor †, 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; if a Roman, though the king's guest §, only three hundred §. The Salic law made therefore a cruel distinction between the Frank and Roman lord, and the Frank and Roman commoner.

Farther, if a number of people were got together to assault a Frank in his house *, 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 half that composition. By the same law ‡, 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 a composition of sixty-two sols and one half, 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 § forms a system of *the establishment of the Franks in Gaul*, on a supposition that they were the best friends of the Romans; they who did, and they who suffered § from, the Romans such an infinite deal of mischief! The Franks, the friends of the

* Salic law; tit. 44. sect. 1.

† “Qui res in pago ubi remanent proprias habit.” *Salic law*, tit. 44. sect. 15. See also sect. 7.

‡ “Qui in truste dominica est.” *Ibid.* tit. 44. sect. 4.

§ “Si Romanus homo conviva regi fuerit.” *Ibid.* sect. 6.

§ 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.

* *Ibid.* tit. 45.

† “Lydus, whose condition was better than that of a bond-man.” *Law of the Allemans*, chap. 95.

‡ Tit. 35. sect. 3. et 4.

§ The Abbé du Bos.

§ Witness the expedit. of Arbogastes in Greg. of Tours, history, lib. ii.

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 from 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 had for them.

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

C H A P. IV.

In what manner the Roman law came to be lost in the country subject to the Franks, and preserved in that subject to the Goths and Burgundians.

WHAT has been above said will throw some light upon other things, which have hitherto been involved in great obscurity.

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

In the country subject to the Franks, the Salic law was established for the Franks, and the † Theodosian code for the Romans. In that subject to the Visigoths, a compilement of the Theodosian code, made by order of Alaric ‡, regulated disputes among the Romans;

* The Franks, Visigoths and Burgundians.

† It was finished in 438.

‡ The 10th year of the reign of this prince, and published two years after by Anian, as appears by the preface to that code.

the national customs, which Euric* caused to be reduced into writing, determined those among the Visigoths. But how comes it, some will say, that the Salic laws gained almost a general authority in the country of the Franks, and the Roman law gradually declined, whilst in the jurisdiction of the Visigoths the Roman law spread itself, and obtained at last a general sway?

My answer is, that the Roman law came to be disused among the Franks, because of the great advantages accruing from being a Frank, a barbarian †, 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, as a change would be of no advantage to them. The difference of conditions and ranks consisted only in the largeness of the compositions, as I shall show in another place. Now || particular laws 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 properest for them, as it was the work of the Christian emperors.

On the other hand, in the patrimony of the Visigoths, as the Visigoth law § 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 live

* The year 504 of the Spanish æra, the chronicle of Isidorus.

† “ Francum, aut barbarum, aut hominem qui sub Salica lege vivit.” *Salic law, tit. 44. sect. 1.*

‡ According to the Roman law under which the church lives, as is said in the law of the Ripuarians, tit. 58. sect. 1. See also the numberless authorities on this head produced by Du Cange, under the word *Lex Romana*.

|| See the capitularies added to the Salic law in Lindembroke 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 Balusius, tome i. page 462. where it is said, that an ecclesiastic should receive a triple composition: and the collection of the capitularies, lib. v. art. 302. tome i. edition of Balusius.

§ See that law.

under another. They retained therefore their own laws, without adopting those of the Visigoths.

This is still further confirmed, in proportion as we proceed. 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 this last case the judges were equally divided of a side. This was necessary for particular reasons, drawn from the political regulations of those times †. 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 the rather as the Salic law was not established in Burgundy, as appears by the famous letter which Agobard wrote to Lewis le Debonnaire.

Agobard ‖ 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: 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.

† Of this I shall speak in another place, book xxx. chap. 6, 7, 8, et 9.

‖ Agob. opera.

* Catel. hist. of Languedoc, produces to the purpose a chronicle of the year 759. "Franci Narbonam obsident, datoque sacramento Gothi. ut si civitatem traderent partibus Pepini, permitterent eos legem suam habere: quo facto, Gothi Saracenos occiderunt, et civitatem partibus Pepini reddiderunt."

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.

The edict of Pistes shews two things; one, that there were countries where causes were decided by the Roman law, and others where they were not; and the other, that those countries where the Roman law obtained, were precisely † the same where it is still followed at this very day, as appears by the same edict. 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 not; 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 scarce any who would live under the Roman law, and that, in the countries of the Roman law, there were few who would chuse 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 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?

C H A P. V.

The same subject continued.

THE law of Gundebald subsisted a long time among the Burgundians, in conjunction with the Roman law; it was still in use under Lewis le Debonnaire, as

* "In illa terra in qua judicia secundum legem Romanam terminantur, secundum ipsam legem judicetur; et in illa terra in qua." &c. Art. 16. See also art. 20.

† See art. 12. et 16. of the edict of Pistes in Cvilono, in-Narbona, &c.

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 Lewis 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 every where dispelled the personal laws of the barbarians.

C H A P. VI.

How the Roman law kept its ground in the demesne of the Lombards.

EVERY thing gives way now to my principles. The law of the Lombards was impartial, and the Romans were under no temptation to quit their own for it. The motive that prevailed with the Romans under the Franks to make choice of the Salique 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 law, 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 †. 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 law of the Lombards must have daily diminished.

† See what Machiavel says of the ruin of the ancient nobility of Florence.

Besides, the law of the Lombards had not that majesty of the Roman law, which revived to Italy the idea of her universal dominion, neither had it that extent. The law 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 law of the Lombards that determined on some particular cases, or the Roman law which embraced them all?

C H A P. VII.

How the Roman law came to be lost in Spain.

THINGS happened otherwise in Spain. The law of the Visigoths prevailed, and the Roman law was lost. Chindasuinthus * and Reccesuinthus † proscribed the Roman laws, and even forbade citing them in their courts of judicature. Reccesuinthus was likewise author ‡ of the law which took off the prohibition of marriages between the Goths and Romans. 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 laws.

But though the kings of the Visigoths had proscribed the Roman law, it still subsisted in the demesnes they possessed in South Gaul. These countries being distant from the centre of the monarchy, lived in a state of great independence. We see from the history of Vamba,

* He began to reign in the year 642.

† We will no longer be harassed either by foreign or by the Roman laws. *Law of the Visigoths, lib. ii. tit. i. sect. 9. et 10.*

‡ “Ut tam Gotho Romanam, quam Romano Gotham matrimonio liceat sociari.” *Law of the Visigoths, lib. iii. tit. i. chap. i.*

who ascended the throne in 672, that the natives of the country were become the prevailing party *. Hence the Roman law had greater authority, and the Gothic less. The Spanish laws neither suited their manners, nor their actual situation; it was possible too that the people adhered obstinately to the Roman law, because they had annexed to it the idea of liberty. Besides, the laws of Chindasuinthus and of Recesuinthus 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 given it but the Jews or the Romans? the Goths were the first that were oppressed, because they were the ruling nation. We see in Procopius †, that during their calamities they withdrew out of Narbonne Gaul into Spain. Doubtless, under this misfortune, they took refuge in these 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.

C H A P. VIII.

A false capitulary.

DID not that wretched compiler Benedictus Levita attempt to transform this Visigoth establishment, which prohibited the use of the Roman law, into a

* The revolt of these provinces was a general defection, as appears by the judgment which is in the sequel of the history. Paulus and his adherents were Romans; they were even favoured by the bishops. Vamba dared not put to death the seditious whom he had conquered. The author of the history calls Narbonne Gaul the nursery of treachery.

† “Gothi. qui cladi superfuertant, ex Gallia cum uxoribus librisque egressi in Hispaniam, ad Teudim jam palam tyrannum se receperunt.” *De bello Gotthorum, lib. i. cap. 13.*

capitulary *, ascribed since to Charlemagne? He made of this particular law a general one, as if he intended to exterminate the Roman law throughout the universe.

C H A P. IX.

In what manner the codes of the Barbarian laws, and the capitularies came to be lost.

THE Salic, the Ripnarian, Burgundian, and Visigoth laws came by degrees to be diffused among the French in the following manner.

As fiefs were become hereditary, and arriere-fiefs extended, many usages were introduced, to which these laws were no longer applicable. Their spirit indeed was preserved, 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 †, where the lords fixed the fines that were payable in their petty courts. Thus the spirit of the law was followed without following 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. In fact, it would be impossible to see it observed. The custom no longer prevailed of sending extraordinary officers ‡ into the provinces, to inspect into 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 every thing

* Capitularia, l. vi. c. 269. anno 1613 edit. Baluz. p. 1021.

† M. de la Thaumassier has collected many of them. See for instance chap 61, 66, and others.

‡ Missi Dominici.

was become a fief, these officers could no longer 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 scarce 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 on. 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 prerogatives. The laws made in these assemblies are what we call the Capitularies. Hence four things ensued; the laws of fiefs were established, and a great part of the church-revenues was administered by the laws of fiefs; the clergy made a wider separation, and neglected * those laws of reformation, where they themselves were not the only reformers; a collection † was made of the canons of councils and of the decretals of Popes; and these laws the clergy received as coming from a purer source. Ever since the erection of the grand fiefs, our kings, as we have already observed, had no longer any deputies in the provinces to enforce the observance of their laws: and hence it is, that under the third race we find no more mention made of capitularies.

* 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.

† In the collection of canons, a vast number of the decretals of popes were inserted: there 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 was in use in France till Charlemagne. This prince received from the hands 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.

C H A P. X.

The same subject continued.

SEVERAL capitularies were added to the law of the Lombards, as well as to the Salic and Bavarian laws. The reason of this has been a matter of inquiry; but it must be sought for in the thing itself. There were several sorts of capitularies. Some had relation to political government, others to æconomical, 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. In effect, those capitularies regarding æconomical, 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 abridgement of a work often causes the loss of the work itself.

C H A P. XI.

Other causes of the disuse of the codes of Barbarian laws, as well as of the Roman law, and of the capitularies.

WHEN the German nations subdued the Roman empire, they learned the use of writing, and, in imitation of the Romans, they wrote down their own usages †, and digested them into codes. The unhappy

* See the edict of Pistes, art. 20.

† 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 according to the exigency of circumstances; such were the severe laws against the Saxons.

reigns which followed that of Charlemagne, the invasions of the Normans, and the civil wars, plunged the conquering nations again into the darkness out of which they had emerged: 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, where there were flourishing cities, and almost the only commerce that was carried on in those days. To this neighbourhood of Italy it was owing that the Roman law was better preserved in the provinces of Gaul, formerly subject to the Goths and the Burgundians: and so much the more as this law was there a territorial law, 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 fall of so many laws, customs were every where established.

Personal laws fell to the ground. Compositions, and what they called *Freda* *, 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.

C H A P. XII.

Of local customs. Revolution of the laws of barbarous nations, as well as of the Roman law.

BY several monuments 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* †, of the *ancient usage* ‡, of the *custom* ||, of the *laws* §, and of

* Of this I shall speak elsewhere.

† Preface to Marculfus's Formulae.

‡ Law of the Lombards, book ii. tit. 58. sect 3.

|| Ibid. tit. 41. sect. 6.

§ Life of S. Leger.

the *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 was the Roman law. This cannot possibly be. King Pepin ordained *, 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 monuments of antiquity, and especially those codes of barbarian laws that 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, that 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 law, and was personal only in regard to those Franks that lived elsewhere. Now, if several Burgundians, Allemans, or even Romans, should have happened 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 determinations, agreeable to some of those laws, must have introduced new customs into the country. This explains extremely well 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 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

* Law of the Lombards, book ii. tit. 41. sect. 6.

text of this law, there is no manner of doubt but 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 general 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. The Roman was 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 every where into disuse, while the Roman was continued as a territorial law in the Visigoth and Burgundian provinces? I answer, that even the Roman law had very near the same fate as the other personal laws; otherwise we should still have the Theodosian code in those provinces where the Roman law was territorial, whereas we have the laws of Justinian. Those provinces retained scarce any thing more than the name of the country under the Roman or written law, than the natural affection which people have for their laws, especially when they consider them as privileges, and a few regulations of the Roman law which were not yet forgotten. This was however sufficient to produce such an effect, that, when Justinian's compilation appeared, it was received in the provinces of the Gothic and Burgundian demesne as a written law, whereas it was received only as written reason in the ancient demesne of the Franks.

* See chap. 5.

C H A P. XIII.

Difference between the Salic law, or that of the Salian Franks, and that of the Ripuarian Franks, and other barbarous nations.

THE Salic law did not allow of the custom of negative proofs; that is, if a person brought a demand or charge against another, he was obliged by the Salic law to prove it, and it was not sufficient for the accused to deny it; which is agreeable to the laws of almost all the nations in the universe.

The law of the Ripuarian Franks had quite a different spirit*; 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, increased in proportion to the importance of the affair; sometimes it amounted to ‡ seventy-two. The laws of the Allemans, 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; but even then they were not admitted alone, and without the concurrence of positive proofs. The plaintiff* caused witnesses to be heard, in order to

* This relates to what Tacitus says, that the Germans had common customs and particular customs.

† Law of the Ripuarians, tit. vi. vii. viii. and others.

‡ Ibid tit xi. xii. et xvii.

|| 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. lxxvi. of the *Pactus legis Salicæ*.

* See the lxxvi. tit. of the *Pactus legis Salicæ*.

ground his action; the defendant produced also witnesses on his side, and the judge was to come at the truth by comparing these testimonies †. This practice was vastly different from that of the Ripuarian and other barbarous laws, where it was customary for the party accused to clear himself by swearing he was not guilty, and by making his relations 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.

C H A P. XIV.

Another difference.

THE Salic law did not admit of the trial by combat, though it had been received by the laws of the Ripuarians ‡ and of almost all the || barbarous nations. 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 unjustly by an oath, what other remedy was left to a war-like man *, who saw himself upon the point of being confounded, than to demand satisfaction for the wrong done to him, and even for the attempt of perjury? the Salic law, which did not allow of the custom of negative proofs, neither allowed nor had any need of the trial by combat: but the laws of the Ripuarians † and of the

† According to the practice now followed in England.

‡ See the following note.

|| Tit. xxxii. tit. lvii. sec. 5. tit. lix. sec. 4.

* This spirit appears in the law of the Ripuarians, tit. lxi. sec. 4. and tit. lxvii. sec. 5. and in the capitulary of Louis le Debonnaire. added to the law of the Ripuarians in the year 805. art. xxii.

† See that law.

other barbarous nations †, who allowed the practice of negative proofs, were obliged to establish the trial by combat.

Whosoever 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. It was necessary, according to the language of the barbarian laws, to rescue the oath out of the hands of a person who was going to abuse it.

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

C H A P. XV.

A reflection.

I DO not pretend to deny, but 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 text, where in fact 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

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

‖ In the law of the Burgundians, tit. viii. sect. 1. et 2. on criminal affairs, and tit. xlv. which extends also to civil affairs. See also the law of the Thuringians, tit. i. sect. 31. tit. vii. sect. 6. and tit. viii. and the law of the Allemans, tit. lxxxix. the law of the Bavarians, tit. viii. chap. ii. sect. vi. and chap. iii. sect. 1. and tit. ix. chap. 4. sect. 4. the law of the Frisians, tit. xi. sect. 3. and tit. xiv. sect. 4. the law of the Lombards, book i. tit. 32. sect. 3. and tit. xxxv. sect. 1. and book ii. tit. 35. sect. 2.

* See chapter xviii. towards the end.

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.

C H A P. XVI.

Of the ordeal or trial by boiling water, established by the Salic law.

THE Salic law * 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. It permitted the person, who had been summoned to make the trial with boiling water, to ransom his hand with the consent of the adverse party. The accuser, for a particular sum determined by the law, might be satisfied with the oath of a few witnesses, declaring that the accused had not committed the crime. This was a particular case in which the Salic law admitted of the negative proof.

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

The law ‡ contrived a medium, 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 over, 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.

* As also some other laws of the barbarians.

† Tit. lvi.

‡ Ibid. tit. lvi.

C H A P. XVII.

Particular notions of our ancestors.

IT is astonishing that our ancestors should rest the honour, fortune, and life of the subject, on things that depend 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 *, enjoyed an excessive independence. Different families waged war † with each other, to obtain satisfaction for murder, 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. 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 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 endeavoured to take some person prisoner whom they obliged to fight with one of their people, and by the event of this combat they judged of the success of the war. A nation, who believed that public quarrels could be regulated by a single combat, might very well think that it was proper also for deciding the disputes of individuals.

* This appears by what Tacitus says, "omnibus idem habitus."

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

‡ See the codes of barbarian laws, and in respect to less ancient times, Beaumanoir on the custom of Beauvoisis.

Gundebald * king of Burgundy was the prince who gave the greatest sanction to the custom of legal duels. The reason he gives for his sanguinary law is mentioned in his edict. "It is," says he, "in order to prevent our subjects from attesting by oath what they are not certain of, nay, what they know to be false." Thus, while the clergy † declared that an impious law which permitted combats, 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 as an argument of a person's having resisted 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 accompany strength, or the strength necessary to concur with courage; because, as they set a value upon honour, they are practised of course in things without which this honour cannot be obtained. Besides, in a military nation, where strength, courage and prowess are esteemed, crimes really odious are those which arise from imposture, finesse, 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 wrapt 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 a people inured to the handling of arms, the impression made on a rough or callous skin by the hot iron, or by boiling water, could not be so great as to be seen three days afterwards? and if there appeared any mark, it shewed that the person who had undergone the trial was an effeminate fellow. Our peasants handle hot iron with their callous hands as much as they please; and, with regard

* Law of the Burgundians, chap. xlv.

† See the works of Agobard.

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.

By the law of the Thuringians †, 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 ‡, only when a person had no witnesses to appear in his justification. Now, a woman that could not prevail upon any one relation 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 not so productive of injustice as they were in themselves unjust, that the effects were more innocent than the cause, that they were more contrary to equity than prejudicial to its rights, more unreasonable than tyrannical.

C H A P. XVIII.

In what manner the custom of judicial combats gained ground.

FROM Agobard's letter to Lewis le Debonnaire, it might be inferred, that the custom of judicial combats was not established among the Franks; for after having

* See Beaumanoir, 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.

† Tit. xiv.

‡ Chap. xxxi. sect. 5.

represented to this prince the abuses of the law of Gundebald, he desires || that private disputes should be decided in Burgundy by the law of the Franks. But as it is well known from other quarters, that the trials 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 *.

But, notwithstanding the clamours of the clergy, the custom of judicial combats gained ground continually in France; and I shall make it appear presently, that the clergy themselves were in great part 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. †. This is, that if the title to an estate was said to be false, the person who claimed under that title made oath upon the gospel that it was genuine; and without any further 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 ‡, at the very time that a council was held there under Pope John XII. all the lords || of Italy represented to the Emperor the necessity of enacting a law to reform this horrid abuse. The Pope and the Emperor were of opinion, the affair should be referred to the council, which was to be shortly held at Ravenna*. There the lords

|| "Si placeret Domino nostro ut eos transferret ad legem Francorum."

* See this law, tit. 59. sect. 4. and tit. 67. sect. 5.

† Law of the Lombards, book ii. tit. 55. chap. 34.

‡ In the year 962.

|| "Ab Italiz proceribus est proclamatum, ut imperator sanctus, mutata lege, facinus indignum destrueret." Law of the Lombards, book ii. tit. 55. cap. 34.

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

made the same representations, and repeated their instances; 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, they had a conference at Verona †, with the Italian lords ‡; and, at their repeated remonstrances, the Emperor, with their unanimous consent, made a law, that whenever there happened any disputes about inheritances, and 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 inconveniency 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. This was effected at a time when the power of the Emperors was great, and that of the Popes inconsiderable; at a time when the Othos came to revive the dignity of the empire in Italy.

I shall make one reflection which will corroborate what has been above said, namely, that the custom of negative proofs produced that of judicial combat. 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

* Otho the Second's uncle, son to Rodolphus, and king of Transjuran Burgundy.

† In the year 988.

‡ "Cum in hoc ab omnibus imperiales aures pulsarentur."
Law of the Lombards, book ii. tit. 55. chap. 34.

gospel it was not false. What was it they did to reform this abuse? they revived the custom of judicial combats.

I was in a hurry 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. *, of an earlier date, 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 witness 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 †, that, in the actual state of things, it was extremely difficult but that either the accuser or the accused must forswear themselves; and that for this reason it was much better to revive the judicial combat; which was accordingly done.

The usage of judicial combats gained ground among the Burgundians, and that of the oath was limited. Among the Goths, the laws of Chindasuinthus and Recessuinthus left not the least vestige of the trial by combat; this custom had been restrained by the clergy; but, in process of time ‡, those people put a stop to the violence which they had suffered in this respect.

The first kings of the Lombards gave a check to the || custom of judicial combat. Charlemagne, Lewis

* In the law of the Lombards, book ii. tit. 55. sect 33. In the copy which Muratori made use of it is attributed to the Emperor Guido.

† In the law of the Lombards, book ii. tit. 55. section 23.

‡ "In palatio quoque, Bera comes Barcinonensis, cum impeteretur a quodam Sunila. & infidelitatis argueretur, cum eodem secundum legem propriam, utpote quia uterque Gothus erat, equestri praelio congressus est & victus." I cannot recollect from whom I had this passage.

|| See in the law of the Lombards, book i. tit. 4. and tit. 9.

le Debonnaire, and the Othos † made divers general constitutions, which we find inserted in the laws of the Lombards, and added to the Salic laws, whereby the practice of legal duels, at first in criminal, and afterwards in civil affairs, 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 altars ||; and, on the other, a haughty nobility were fond of maintaining their rights by the sword.

I would not have it inferred, that it was the clergy who introduced the custom so much complained of by the nobility. This custom was derived from the spirit of the barbarian laws, and from the establishment of negative proofs. But a practice that contributed to the impunity of such a number of criminals, having given some people reason to think that 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 that attended it; for in other respects they were absolutely averse to negative proofs. We find in Beumanoir *, 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.

sect. 23. and book ii. tit. 35. sect. 4, and 5. and tit. 55. sect. 7. 2. and 3. the regulations of Rotharis: and in sect. 15. that of Luitprandus.

† Ibid. book ii. tit. 55. sect. 23.

|| 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. 38. the laws of the Ripuarians, tit. 59. sect. 4. tit. 65. sect. 5.; the history of Gregory of Tours, the capitulary of the year 803. added to the Salic law.

* Chap. 39. p. 212.

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 chusing the trial by duel, the nation followed its military spirit; for while the trial by duel was established as a divine decision, the trials by the cross, by cold or boiling water, which had been also regarded as divine decisions, were abolished.

Charlemagne ordained, that if any differences should arise between his children, they should be terminated by the judgment of the cross. Lewis le Debonnaire † confined this judgment to ecclesiastic affairs; his son Lotharius abolished it in all cases; nay, he abolished ‡ even the trial by cold water.

I do not pretend to say, that at a time when so few usages were universally received, these trials were not received in some churches; especially as they are mentioned in a charter || of Philip Augustus; but I affirm they were very little used. Beaumanoir §, who lived at the time of St. Lewis, and a little after, enumerating the different kinds of trials, mentions that of judicial combat, but not a word of the others.

C H A P. XIX.

A new reason of the disuse of the Salic and Roman laws, as also of the capitularies.

I HAVE already mentioned the reasons that occasioned the disuse of the Salic and Roman laws, as also of the capitularies; here I shall add, that the principal cause was the great extent given to judiciary combats.

† We find his constitutions inserted in the law of the Lombards, and at the end of the Salic laws.

‡ In a constitution inserted in the law of the Lombards, book ii. tit. 55. sect. 31.

|| In the year 1200.

§ Custom of Beauvoisis, chap. 39.

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 also 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 it was lost; they fell into oblivion, and we cannot find any others that were substituted in their place.

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

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

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

I find that towards the commencement of the third race, the jurisprudence of those times related entirely to personal quarrels, and was governed by the point of honour. If the judge was not obeyed, he insisted upon satisfaction from the person that had 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 contempt." Upon which they fought. Lewis the Fat reformed this custom ‡.

The custom of legal duels prevailed || at Orleans, even in all demands of debt. Lewis the Young declared,

* Chap. 61. page 309, 310.

† Charter of Lewis the Fat, in the year 1145, in the collection of ordinances.

‡ Ibid.

|| Charter of Lewis the Young, in the year 1168, in the collection of ordinances.

that this custom should take place only when the demand exceeded five sous. This ordinance was a local law; for in St. Lewis's time * it was sufficient that the value was more than twelve deniers. Beaumanoir † 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 shews, that the usage of judiciary combats must have had at that time a prodigious extent.

C H A P. XX.

Origin of the point of honour.

WE meet with inexplicable enigmas in the codes of the laws of the barbarians. The law of ‡ the Frisians allows only half a sou in composition to a person that had been beaten with a stick; and yet for ever so small a wound it allows more. By the Salic law, if a freeman gave three blows with a stick to another freeman, he paid three sous; if he drew blood, he was punished as if he had wounded him with steel, and he paid fifteen sous: thus the punishment was proportioned to the greatness of the wound. The law of the Lombards § established different compositions for one, two, three, four blows; and so on. 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 batons. 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

* See Beaumanoir, chap. 63. page 325.

† See the custom of Beauvoisis, chap. 28. page 203.

‡ Additio sapientum Willemari, tit. 5.

§ Book i. tit. 6. sect. 3.

§ Book ii. tit. 5. sect. 23.

capitulary § of Lewis le Debonnaire allows the liberty of choosing to fight either with the sword or baton. In process of time none but bondmen fought with the baton §.

Here I see the first rise and formation of the particular articles of our point of honour. The accuser began with declaring in the presence of the judge, that such a person had committed such an action; and the accused made answer, that he lied †, 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 he would fight, he could not afterwards depart from his word; if he did, he was condemned to a penalty. Hence this rule ensued, that whenever a person had engaged his word, honour forbade him to recall it.

Gentlemen † fought one another on horseback, and armed at all points; villains ‡ fought on foot, and with batons. Hence it followed, that the baton was looked upon as the instrument of insults and affronts; § because to strike a man with it, was treating him like a villain.

None but villains fought with their § faces uncovered; so that none but they could receive a blow on the face. Therefore a box on the ear became an injury that must be expiated with blood, because the person who received it had been treated as a villain.

The several people of Germany were no less sensible than we of the point of honour; nay, they were more

|| Added to the Salic law, in 189.

§ See Beaumanoir, chap. 64, p. 328.

† Ibid.

* See Beaumanoir, chap. 3, p. 25 and 329.

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

‡ Ibid. chap. 64, p. 328. See also the charters of St. Aubin of Anjou, quoted by Galland, p. 263.

|| Among the Romans it was not infamous to be beaten with a stick, *leg. Illus fustium, de iis qui notantur infamia.*

§ They had only the baton and buckler, *Beaumanoir, chap. 64. p. 328.*

so. Thus the most distant relations took a very considerable share to themselves in every affront, and on this all their codes are founded. The law * of the Lombards ordains, that whosoever goes attended with servants to beat a man by surprise, in order to load him thereby with shame, and to render him ridiculous, should pay half the composition which he would owe if he had killed him †; and if through the same motive he tied or bound him, he should 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 proportion of the excess constituted the greatness of the outrage.

C H A P. XXI.

A new reflection upon the point of honour among the Germans.

“ IT was a great infamy, says Tacitus ‡, among the Germans, for a person to leave his buckler behind him in battle; for which reason a great many after a misfortune of this kind have destroyed themselves.” Thus the ancient Salic law || allows a composition of fifteen sous to any person that had been injuriously reproached with having left his buckler behind him.

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

* Book i. tit. 6. sect. 1.

† Book i. tit. 6. sect. 2.

‡ De moribus Germanorum.

|| In the *Pactus legis Salicae*.

§ We have both the ancient law, and that which was amended by that prince.

C H A P. XXII.

Of the manners relative to judicial combats.

OUR connection with the fair sex is founded on the happiness attending the pleasure of enjoyment; on the charms of loving and being beloved; and likewise on the desire of pleasing the ladies, because they are most penetrating judges in respect to part of those things which constitute personal merit. This general desire of pleasing produces gallantry, which is not indeed love itself, but the delicate, the volatile, the perpetual dissembler 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 naturally been that of gallantry.

I find in the law of the Lombards ||, that if one of the two champions was found to have any herbs fit for enchantment 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 (which has been said to have invented so many things) that made them imagine this kind of prestigies. As in the single combats, the champions were armed at all points; and as with heavy arms, both of the offensive and defensive kind, those of particular temper and force were of infinite advantage; the notion of some champions having enchanted arms, must certainly have turned the brains of a great many people.

Hence arose the marvellous system of chivalry. The minds of all sorts of people quickly imbibed these extravagant ideas. Then it was that in romances they beheld knights-errant, necromancers, fairies, winged or intelligent horses, invisible or invulnerable men,

|| Book ii. tit. 55. sect. 11.

magicians who concerned themselves in the birth and education of great personages, enchanted and disenchanting palaces, a new world in the midst of the old one, and the ordinary course of nature left only to the lower class of mankind.

Knights-errant always in armour, in a part of the world full of castles, forts, and robbers, found honour in punishing injustice, and in protecting weakness. Hence our romances abound with gallantry founded on the idea of love, joined with that of strength and protection.

Such was the original of gallantry, when they formed to their imaginations an extraordinary set of men, who, at the sight of virtue joined with beauty and distress, were inclined to expose themselves to all hazards for their sake, and to endeavour to please them 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 Rome, flattered the idea of sensible pleasures. A certain notion of tranquillity in the fields of Greece, gave rise to the description || of soft and amorous sentiments. The idea of knights-errant, protectors of the virtue and beauty of the fair sex, led people to that of gallantry.

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

C H A P. XXIII.

Of the code of laws on judicial combats.

SOME perhaps will have a curiosity to see this monstrous custom of judiciary combat reduced to principle, and to find a code of such extraordinary laws.

|| See the Greek romances of the middle age.

Men, 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. Lewis, who made such great changes in the judiciary order. Defontaines was contemporary with that prince: Beaumanoir wrote after * him; and the rest lived since his time. We must therefore look for the ancient practice in the amendments that have been made of it.

C H A P. XXIV.

Rules established in the judicial combat.

WHEN there happened † to be several accusers, they were obliged to agree among themselves, that the action might be carried on by a single prosecutor; and if they could not agree, the person before whom the action was brought, appointed one of them to prosecute the quarrel.

When ‡ a gentleman challenged a villain, he was obliged to present himself on foot with buckler and baton; 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 obliged him to fight in that condition with the villain.

Before the combat the || magistrates ordered three banns to be published. By the first the relations of the parties were commanded to retire; by the second, the people were warned to be silent; and the third prohibited the giving any assistance to either of the parties,

* In the year 1283.

† Beaumanoir, chap. 6, page 40 and 41.

‡ Ibid. chap. 64, page 318.

|| Ibid. page 330.

under severe penalties; nay, even on the pain of death, if by this assistance either of the combatants should happen to be vanquished.

The officers belonging to the civil magistrate 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 things 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 accommodation †.

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.

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 to the count.

There were a great many people incapable either of offering or of accepting battle. But liberty was given them in trial of the cause to chuse 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 §.

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

* Beaumanoir, page 330.

† Ibid.

‡ The great vassals had particular privileges.

§ Beaumanoir, chap. 64, page 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. Desfontaines, chap. 21, art. 29.

§ This custom, which we meet with in the capitularies, was still subsisting at the time of Beaumanoir. See chap. 61, page 315.

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.

The person that succumbed in battle did not always lose the point contested; if, for instance †, they fought on an imparlance, he lost only the imparlance.

C H A P. XXV.

Of the bounds prescribed to the custom of judicial combats.

WHEN pledges of battle had been received upon a civil affair of small importance, the lord obliged the parties to withdraw them.

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

When the court of a lord had often determined after the same manner, and the usage was thus known, the || lord refused to grant the parties the privilege of duelling, to the end that the usages might not be altered by the different events 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.

When the accused had been acquitted †, another relation could not insist on fighting him; otherwise disputes would never be terminated.

* Beaumanoir, chap. 64, page 330.

† Ibid. chap. 61, page 309.

‡ Ibid. chap. 61, page 308. chap. 43, page 239.

|| Ibid. chap. 61, page 114. See also Defontaine, chap. 22, art. 24.

* Ibid. chap. 63, page 322.

† Ibid.

If a person appeared again in public, whose relations, upon a supposition of his being murdered, wanted to avenge 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.

If a man † who had been mortally wounded, had disculpated 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 only as a forgiveness on his death-bed; the prosecution was continued, and even among gentlemen they could make war against each other.

When there was a war, and one of the relations had given or received pledges of battle, the right of war ceased ; for then, it was thought, that the parties wanted to pursue the ordinary course of justice, wherefore he that continued the war would have been sentenced to repair all damages.

Thus the practice of judiciary combat had this advantage, that it was apt to change a general into a particular quarrel, to restore the courts of judicature to their authority, and to reduce to a 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 for a crime, visibly shewed that it had been committed by the appellant 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.

There were no duels § in affairs decided by arbiters, or by ecclesiastic courts ; nor in cases relating to women's dowries.

A woman, says Beaumanoir, *cannot fight*. If a woman appealed a person without naming her champion, the pledges of battle were not accepted. It was also

* Beaumanoir, chap. 63, page 322.

† Ibid. page 323.

‡ Ibid. page 324.

§ Ibid. page 325.

requisite, that a woman should be authorized * by her baron, that is, by her husband, to appeal; but she might be appealed without this authority.

If either the appellant † or the appellee were under fifteen years of age, there could be no combat. 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; he was allowed to fight a freeman, or even a gentleman, in case they were appellants; but if he was the appellant ‡ himself, the other might refuse to fight; and even the bondman's lord had a right to take him out of the court. The bondman might, by his lord's charter §, or by usage, fight with any freeman; and the church * pretended to this right for her bondmen, as a mark of respect † due to her by the laity.

C H A P. XXVI.

Of the judiciary combat between one of the parties and one of the witnesses.

BEAUMANOIR informs us †, that a person who saw a witness going to swear against him, might elude the second, by telling the judges, that his adversary produced a false and slanderous witness; and if the witness was willing to maintain the quarrel, he gave

* Beaumanoir, chap. 63, page 325.

† Ibid. page 323. See also what I have said in the 18th book.

‡ Ibid. page 322.

§ Defontaines, chap. 22. art. 7.

* "Habeant bellandi et testificandi licentiam." *Charter of Lewis the Fat, in the year 1118.*

† Ibid.

‡ Chap. 61, page 315.

pledges of battle. They troubled themselves no farther about the inquest; for if the witness was overcome, it was decided, that the party had produced a false witness, and he lost his cause.

It was necessary the second witness should be prevented from swearing; 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 was of no manner of use.

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 *, 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 †, but the witness was rejected.

This, I believe, was a limitation of the ancient custom; and what makes me think so, is, that we find this usage of appealing the witnesses, established in the laws of the ‡ Bavarians and || Burgundians, without any restriction.

I have already made mention of the constitution of Gundebald, against which § Agobard and * St. Avitus 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

* Chap. 6, page 39 and 40.

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

‡ Tit. 16, sect. 2.

|| Tit. 45.

§ Letter to Lewis le Debonnaire.

* Life of St. Avitus.

“declared that he was certain of the truth, should make “no difficulty to maintain it.” Thus the witnesses were deprived by this king of every kind of subterfuge to avoid the judiciary combat.

C H A P. XXVII.

Of the judicial combat between one of the parties, and one of the Lord's peers. Appeal of false judgment.

AS the nature of judicial combats was to terminate the affair for ever, and was incompatible with * a new judgment and new prosecutions; an appeal, such as is established by the Roman and Canon laws, that is, to a superior court, in order to rejudge the proceeding of an inferior court, was a thing unknown in France.

This is a form of proceeding to which a warlike nation, entirely governed 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.

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

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

* Beaumanoir, chap. 2, page 22.

† Ibid. chap. 61, page 312, and chap. 67, page 338.

‡ Ibid. book 2, chap. 15.

|| Ibid. chap. 61, page 310 and 311, and chap. 67, page 337.

A vassal to appeal his lord of false judgment, was telling 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 an appeal of false judgment against the lord who established and directed the court, they appealed the peers, of whom the court itself was formed: By this means they avoided the crime of felony; for they insulted only their peers, with whom they could always account for the insult.

It was a very * dangerous thing to appeal the peers of false judgment. If the party waited till judgment was pronounced, he was obliged to fight them all †, when they offered to make good their judgment. If the appeal was made before all the judges had given their opinion, he was obliged to fight all those who had agreed in their judgment. In order to avoid this danger, it was usual to petition the lord ‡ to give orders, that each peer should give his opinion out aloud; 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.

Defontaines § would have it, that before an appeal 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, and much less that there was any obligation to fight all those who had declared themselves of the same opinion. These differences arise from this, that there were very few usages exactly in all parts the same. Beaumanoir gives an account of what passed in the county of Clermont; and Defontaines of what was practised in Vermandois.

* Beaumanoir, chap. 61, page 313.

† Ibid. page 314.

‡ Ibid.

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

When * one of the peers had declared that he would maintain the judgment, the judge ordered the pledges of battle to be given, and likewise took security of the appellant that he would maintain his appeal. But the peer who was appealed gave no security, because he was the lord's vassal, and was obliged to defend the appeal, or to pay the lord a fine of sixty livres.

If the † appellant did not prove that the judgment was false, he paid the lord a fine of sixty livres, the same fine to ‡ the peer whom he had appealed, and as much to every one of those who had openly consented to the judgment.

When a person violently suspected of a capital crime had been taken and condemned, he could make no appeal || of false judgment: 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 make his words good, that is, to fight, he was condemned to a fine of six sous if a gentleman, and to five sous if a bondman, for the injurious expressions he had uttered.

The judge or peers * who were overcome, forfeited neither life nor limbs; but the person who appealed them was punished with death, if it happened to be a capital crime †.

This manner of appealing the peers of false judgment, was to avoid appealing the lord himself. But if ‡ the lord had no peers, or had not a sufficient number,

* Beaumanoir, chap. 61, page 314.

† Ibid. Defontaines, chap. 22, art. 9.

‡ Ibid.

|| Ibid. chap. 61, page 316.

§ Ibid. chap. xli. page 314. Defontaines, chap. xxii. art. 21.

* Defontaines, chap. xxii. art. 7.

† See Defontaines, chap. xxi. art. 11 and 12, and following, who distinguishes the causes in which the appellant of false judgment loses his life, the point contested, or only the imparlance.

‡ Beaumanoir, chap. xlii. page 322. Defontaines, chap. xxii. art. 3.

he might at his own expence hire * peers of his lord paramount; but these peers were not obliged to judge, if they did not like it; they might declare that they were come only to give their opinion: In that particular † case, the lord himself pronounced sentence as judge; and if an appeal of false judgment was made against him, it was his business to stand the appeal.

If the lord happened ‡ to be so very poor as not to be able to hire peers of his paramount, 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, from whence arose that maxim of the French lawyers. "The fief is one thing, and the jurisdiction 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 the lord paramount, and they lost the privilege of judging, because they had neither power nor will to claim it.

All the || peers who had agreed to the judgment, were obliged to be present when it was pronounced, that they might follow one another, and say Yes to the person who, wanting to make an appeal of false judgment, asked them whether they followed; for Defontaines says §, "that it is an affair of courtesy and loyalty, and "there is no such thing as evasion or delay." From hence, I imagine, arose the custom still followed in England, of obliging the jury to be all unanimous in their verdict in cases relating to life and death.

* The count was not obliged to lend any. Beaumanoir, chap. lxvii. p. 337.

† No body can pass judgment in his court, says Beaumanoir, chap. lxvii. p. 336 et 337.

‡ Beaumanoir, chap. lxii. p. 322.

|| Defontaines, chap. xxi. art. 37 and 38,

§ 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.

Defontaines observes *, that a peer could not excuse himself by saying, that he would not sit in court if there were only four †, or if the whole number, or at least the wisest part, were not present. This is just as if he was to say in the heat of 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 chuse the bravest and most knowing of his tenants. This I mention in order to shew the duty of vassals, which was to fight and to judge; and such indeed was this duty, that to judge was the same as to fight.

It was lawful for a lord who went to law with his vassals in his own court, and was cast, to appeal one of his tenants of 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; hence it was customary to make a distinction between the lord's affirming in general, that the judgment ‡ was false and unjust, and imputing personal || prevarications to his tenant. In the first 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 second, because he attacked his vassal's honour; and the person overcome was deprived of life and property, in order to maintain the public tranquillity.

This distinction, which was necessary in that particular case, had afterwards a great extent. Beaumanoir says, that when the appellant of false judgment attacked

* Chap xxi. art. 37.

† This number at least was necessary. Defontaines, chap. xxi. art. 36.

‡ Beaumanoir, chap. lxvii. p. 437.

|| Ibid.

one of the peers by personal imputations, then battle ensued; but if he attacked only the judgment, the peer appealed was at liberty * to determine the dispute either by battle or by law. 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 appealed, 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 owing to a new regulation among the French.

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 in the twenty-fifth 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 appeal 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 appealed of false judgment, or perceived that they were determined to appeal; if justice required there should be no appeal, he might petition for peers from the king's court, who could not be appealed of false judgment. Thus King Philip, says Defontaines ‡, sent his whole council to judge an affair in the court of the abbot of Corbey.

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: but if there were intermediate lords,

* Beaumanoir, chap. lxvii. page 337 and 338.

† Defontaines, chap. xxii. art. 14.

‡ Ibid.

he had recourse to his paramount, going 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 from whence all those rivers flowed, and the sea into which they returned.

C H A P. XXVIII.

Of the appeal of default of justice.

THE appeal of default of justice was when the court of a particular lord deferred, evaded, or refused to do justice to the parties.

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

For the same reason, there were higher causes † reserved to the king; namely, those which directly concerned the political order of the state. Such were the disputes between bishops, abbots, counts, and other grantees, whom the king judged together with the great vassals §.

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

* Third capitulary of the year 812. art. 3. edition of Balusius, page 497. and of Charles the Bald, added to the law of the Lombards, book ii. article 3.

† Third capitulary of the year 812, article 4. edition of Balusius, page 497.

§ Cum fidelibus. Capitulary of Lewis le Debonnaire, edition of Balusius, page 667.

the *missus* had an equal jurisdiction * independent of each other: The whole difference was †, that the *missus* held his *placita* or assizes four months in the year, and the count the other eight.

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

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 *, 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 † a law, by which the appeal of false judgment to the king's court is established, and all other kinds of appeal prescribed and punished.

If they refused to submit to the judgment of the sheriffs §, 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 so far was it from 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; that ¶ on the contrary, 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 whatsoever, are forbid to

* See the capitulary of Charles the Bald, added to the law of the Lombards, book ii. article 3.

† Third capitulary of the year 812, article 8.

‡ Placitum.

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

† In the year 757, edition of Balusius, page 180 art. 9 and 10. and the synod apud Vernas in the year 755. art. 29. edition of Balusius, page 175. These two capitularies were made under king Pepin.

§ The officers under the Count Scabini.

¶ See the law of the Lombards, book ii. tit. 52. article 22.

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

But, after an innumerable multitude 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 *, 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 æra 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 law of nations.

Beaumanoir says †, that, in the case of default of justice, battle was not allowed. The reasons are these :
1. They could not challenge the lord, 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, the witnesses might be challenged, and then neither the lord nor his court were offended.

In case the default was owing to the lord's tenants or peers by deferring justice, or by evading judgment after

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

† Chap. 61. page 315.

‡ Beaumanoir, chap. 61. page 315.

past delays, then these peers were appealed of default of justice before the paramount; and, if they were callt, they * paid a fine to their lord. The latter could not give them any assistance; on the contrary, he seized their sief 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.

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 ‡. But, if the default was proved, the penalty inflicted || on him was to lose the judgment of the cause, which was to be then tried in the superior court. In fact, the complaint of default was made with no other view.

3. If the lord was sued in his own court §, which never happened but upon disputes relating to the sief, after letting all the delays pass, the lord himself * was summoned before the peers in the sovereign's name, whose permission was necessary on that occasion. The peers did not make the summons in their own name,

* Defontaines, chap. 21. article 24.

† Ibid. article 31.

‡ Beaumanoir, chap. 62. page 311.

|| Defontaines, chap. 21. article 29.

§ This was the case in the famous difference between the lord of Nelle and Joan Countess of Flanders, under the reign of Lewis VIII. He sued her in her own court of Flanders, and summoned her to give judgment within forty days, and afterwards appealed in default of justice to the king's court. She answered, he should be judged by his peers in Flanders. The king's court determined that he should not be remanded, and that the Countess should be summoned.

* Beaumanoir, chap. 34.

because they could not summon their lord, but they could summon for their lord *.

Sometimes† the appeal of default of justice was followed with an appeal of false judgment, when the lord had caused judgment to be passed, notwithstanding the default.

The vassal‡, who had wrongfully appealed his lord of default of justice, was sentenced to pay a fine according to his lord's pleasure.

The inhabitants of Gaunt || had appealed the Earl of Flanders of default of justice before the king, for having delayed to give judgment in his own court. Upon examination it was found, that he had used less 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 this fine moderated; but it was decided, that the Earl might insist upon this fine, and even 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 body or honour of the latter, or to goods that did not belong to the fief, there was no room for an appeal of default of justice, because the cause was not tried in the lord's court, but in that of the paramount; vassals, says Defontaines §, having no power to give judgment on the body of their lord.

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

* Defontaines, chap. 21. art. 9.

† Beaumanoir, chap. 61. page 34.

‡ Beaumanoir, chapter 61. page 312. But he that was neither tenant nor vassal to the lord paid only a fine of sixty livres. lb.

|| Beaumanoir, chap. lxi. page. 318.

§ Chap. xxi. art. 35.

C H A P. XXIX.

Epoch of the reign of St. Lewis.

ST. Lewis abolished the judicial combats in all the courts of his demesne, as appears by the ordinance he * published on that account, and † by the institutions.

But he did not suppress them in the courts of his barons ‡, except in the case of appeal of false judgment.

A vassal could not appeal the court of his lord of false judgment, without demanding a judicial combat against the judges who had pronounced sentence. But St. Lewis § introduced the practice of appealing of false judgment without fighting, a change that may be reckoned a kind of revolution.

He declared ¶ that there should be no appeal of false judgment in the lordships of his demesne, because it was a crime of felony. In fact, if it was a kind of felony against the lord, by a much stronger reason it was felony against the king. But he consented they might demand an amendment * of the judgments passed in his courts, not because they were false or iniquitous, but because they did some prejudice †. On the contrary, he ordained, that they should be obliged to make an appeal of false judgment against the courts of the barons §, in case of any complaint.

It was allowed by the institutions, as we have already observed, to bring an appeal of false judgment against the courts of the king's demesnes. They were obliged to demand an amendment before the same court; and, in

* In the year 1260.

† Book i. chap. 2. and 7. and book ii. chap. 10. and 11.

‡ As appears every where in the institutions, &c. and Beaumanoir, chap. 61. page 309.

§ Institutions, book i. chap. 6. and book ii. chap. 15.

§ 1b. book ii. chap. 15.

* 1b. book i. chap. 78. and book ii. chap. 15.

† 1b. book i. chap. 78.

§ 1b. book ii. chap. 15.

case the bailiff refused the amendment demanded, the king gave leave to make an appeal * to his court, or rather, interpreting the institutions by themselves, to present him a † request or petition.

With regard to the courts of the lords, St. Lewis, by permitting them to be appealed of false judgment, would have the cause brought ‡ before the royal tribunal, or that of the Lord paramount, not § to be decided by duel, but by witnesses, pursuant to a form of proceeding, the rules of which he laid down in the institutions §.

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

Defontaines * gives us the two first 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. Lewis 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. Lewis made the regulations for the courts of his demesnes, he was not checked nor confined in his views: but he had measures to keep with the lords who enjoyed this ancient prerogative, that causes should not be removed from their courts, unless the party was willing to expose himself to the dangers of an appeal of false judgment. St. Lewis preserved the usage of this appeal; but he ordained that it should be made without a judicial combat; that is, in

* Ibid. chap. lxxviii.

† Ibid. chap. xv.

‡ But, if they wanted to appeal without falsifying the judgment, the appeal was not admitted. Institutions, book ii. chap. 15.

§ Book ii. chap. 6 and 47. and book ii. chap. 15. and Beaumanoir, chap. xi. page 58.

§ Book i. chap. 1, 2, and 3.

* Chap. xxii. art. 16. and 17.

order to render the change more insensible, he suppressed the thing, and continued the terms.

This regulation was not universally received in the courts of the lords. Beaumanoir * says, that in his time there were two ways of judging; one according to the king's establishment, and the other pursuant to the ancient practice; that the lords were at liberty to follow which way they pleased; but, when they had pitched upon one in any cause, they could not afterwards have recourse to the other. He adds †, 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. Lewis's institutions, into the country under obedience to the king, and the country out of his obedience. When the kings made ordinances for the country of their own demesne, they employed their own single authority: but, when they published any ordinances that concerned also the country of their barons, they were made § in concert with them, or sealed and subscribed by them; otherwise the barons received or refused them, according as they seemed conducive to the good of their baronies. The rear vassals were upon the same terms with the great vassals. Now, the institutions were not made with the consent of the lords, though they regulated matters which to them were of great importance: but they

* Chap. lxi. page 309.

† Ibid.

|| See Beaumanoir, Defontaines, and the Institutions, book ii. chap. 10, 11, 15. and others.

§ See the ordinances at the beginning of the third race in the collection of Lauriere, especially those of Philip Augustus on ecclesiastic jurisdiction, and that of Lewis VIII. concerning the Jews, and the charters related by Mr Bruffels, particularly that of St. Lewis, on the lease and recovery of lands, and the feudal majority of young women, tome ii. book 32. page 35. and *ibid.* the ordinance of Philip Augustus, page 7.

were received only by those who believed they would redound to their advantage. Robert, son of St. Lewis, received them in his country of Clermont; yet his vassals did not think proper to conform to this practice.

C H A P. XXX.

Observations on appeals.

I APPREHEND, that appeals, which were challenges to a combat, must have been made immediately on the spot. "If the party leaves the court without appealing," says Beaumanoir *, "he loses his appeal, and the judgment stands good." This continued still in force, even after all the restrictions of † judicial combats.

C H A P. XXXI.

The same subject continued.

THE villain could not bring an appeal of false judgment against the court of his lord. This we learn from Defontaines ‡, and is confirmed moreover by the institutions §. Hence Defontaines § says, "Between the lord and his villain there is no other judge but God."

It was the custom of judicial combats that had deprived the villains of the privilege of appealing their lord's court of false judgment *. And so true is this, that those villains †, who by charter or custom had a

* Chap. lxiii. page 327. Ibid. chap. lxi. page 312.

† See the institutions of St. Lewis, book ii. chap. 15. the ordinance of Charles VII. in 1453.

‡ Chap. xxi. art. 21 and 22.

§ Book i. chap. 136.

§ Chap. ii. art. 8.

* Chap. xxii. art. 14.

† Defontaines, chap. xxii. art. 7. This article and the 21st of the 22d chapter of the same author have been hitherto very ill explained. Defontaines does not oppose the judgment of the lord to that of the gentleman, because it was the same thing; but he opposes the common villain to him who had the privilege of fighting.

right to fight, had also the privilege of appealing their lord's court of false judgment, even though the peers who judged them were gentlemen *: and Defontaines proposes expedients to gentlemen in order to avoid the scandal of fighting with a villain, by whom they had been appealed of false judgment.

As the practice of judicial combats began to decline, and the usage of new appeals to be introduced, it was reckoned unjust that freemen should have a remedy against the injustice of the court of their lords, and the villains should not; hence the parliament received their appeals as well as those of freemen.

C H A P. XXXII.

The same subject continued.

WHEN an appeal of false judgment was brought against the lord's court, the lord appeared in person before his paramount to defend the judgment of his court. In like manner † in the appeal of default of justice, the party summoned before the lord paramount brought his lord along with him, to the end that, if the default was not proved, he might recover his jurisdiction.

In process of time, as the practice observed in these two particular cases was become 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, 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 fact || of the judge became that of the party.

* Gentlemen may be always appointed judges. *Defontaines, chap. xxi. art. 48.*

† *Defontaines, chap. xxi. art. 33.*

‡ In the year 1332.

|| See the situation of things in Boutillier's time, who lived in the year 1402. *Somme Rurale, book i. pages 19 and 20.*

I took * notice that, in the appeal of default of justice, the lord lost only the privilege of having the cause tried in his own court. But if the lord himself was sued as a party †, which was become a very common practice ‡, he paid a fine of sixty livres to the king, or to the paramount before whom the appeal was brought. From thence arose the usage, after appeals had been generally received, of fining the lord upon the amendment of the sentence of his judge; an usage which lasted a long time, and was confirmed by the ordinance of Roussillon, but fell at length to the ground through its own absurdity.

C H A P. XXXIII.

The same subject continued.

IN the practice of judicial combats, the person who had appealed one of the judges of false judgment, might lose || his cause by the combat, but could not possibly gain it. In fact, 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. From thence proceeds our manner of pronouncing arrests, "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 appeal of false judgment happened to be overcome, the appeal was

* See chap. 30.

† Beaumanoir, chap. lxi. page 312 and 318.

‡ Ibid.

|| Defontaines, chap. xxi. art. 14.

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 inquest, this manner of pronouncing did not take place: witness what M. de la Roche Flavin * says, namely, that the Chamber of Inquests could not use this form at the beginning of its creation.

C H A P. XXXIV.

In what manner the proceedings at law became secret.

DUELS had introduced a public form of proceeding, so that both the attack and the defence were equally known. "The witnesses," says Beaumanoir †, "ought to give in 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 preserves the secret; but when this usage is laid aside, nothing but the publicness of the proceeding is capable of fixing those ideas.

And as uncertainty ‡ might easily arise in respect to what had been judged by vassals, or pleaded before vassals, they could therefore refresh their memory, every time they held a court, by what was called proceedings on record ||. In that case it was not allowed to challenge the witnesses to combat; for then there would be no end of disputes.

* Of the parliament of France, book i. chap. 16.

† Chap. 61, page 315.

‡ As Beaumanoir says, chap. 39, page 209.

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

In process of time a secret form of proceeding was introduced. Every thing before had been public; every thing now became secret; the interrogatories, the informations, the re-examinations, the confronting of witnesses, the opinion of the public prosecutor; 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 this 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. Lewis was improved. In fact, Beaumanoir says †, 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.

C H A P. XXXV.

Of the costs.

IN former times no one was condemned in France to the payments of costs † in temporal courts. The party cast was sufficiently punished by sentences of pecuniary fines to the lord and his peers. From the manner of proceeding by judicial combat it followed, that the party who was 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 events of suits. The same may be said of

† Chap. 39. 218.

‡ Defontaines in his counsel, chap. 22, art. 3 and 8, and Beaumanoir, chap. 33. Institutions, book i. chap. 90.

causes that were not decided by combat. As the lord had the chief profits, so he was also at the chief expence, either to assemble his peers, or to enable them to proceed to judgment. Besides, as disputes were generally determined on the spot, and without that infinite multitude of writings which afterwards followed, there was no necessity of allowing costs to the parties.

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

But when the number of appeals increased from the new facility of appealing †; when by the frequent usage of these appeals from one court to another, the parties were continually removed from the place of their residence; when the new method of proceeding multiplied and eternized the suits; when the art of eluding the very justest demands was refined; when the parties at law knew how to fly only in order to be followed; when actions proved destructive, and pleas easy; when the reasons were lost in whole volumes of writings; when the world was filled with members of the law, who were strangers both to law and justice; when knavery found advice where it found no support; 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 ‡.

* Chap. 22, art. 8.

† At present when they are so inclined to appeal, says Bouteiller, *Somme Rurale*, book i. tit. 3, page 16.

‡ In the year 1324.

C H A P. XXXVI.

Of the public prosecutor.

AS by the Salic, Ripuarian, and other barbarous laws, crimes were punished with pecuniary fines; they had not in those days, as we have at present, a public officer who has the care of criminal prosecutions. In effect, the issue of all causes being reduced to the reparation of damages, 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 office of a public prosecutor.

The custom of judicial combats was no less opposite to this idea; for who is it that would chuse 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 of the public prosecutor *. But whosoever pleases to read the entire collection of these formulas will find, there was a total difference between those officers and what we now call the public prosecutor, our attorney-generals, our king's solicitors, or our solicitors of the nobility. The former were rather agents of the public for the management of political and domestic affairs, than for the civil. In fact, we do not find in these formulas that they were intrusted with criminal prosecutions, or with causes relating to minors, to churches, or to the condition of persons.

I said that the establishment of a public prosecutor was repugnant to the usage of judicial combats. I find notwithstanding, in one of these formulas, an advocate of the public prosecutor who had the liberty to fight. Muratori has placed it just after the constitution of

* *Advocatus de parte publica.*

Henry I. * for which it was made. In this constitution it is said, "That if any man kills his father, his brother, " or any of his other relations, he shall lose their succession, which shall pass to the other relations, and his " own shall go to the Exchequer." Now, it was in suing for the succession which had devolved to the Exchequer, that the advocate of 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 of the public prosecutor proceeding against † a person who had taken a robber, but had not brought him before the count; against another ‡ who had raised an insurrection or tumult against the count; against another § who had saved a man's life whom the count had ordered to be put to death; against the advocate of some churches ¶, whom the count had commanded to bring a robber before him, but had not obeyed; against * another who had revealed the king's secret to strangers; against another † who with open violence had attacked the emperors commissary; 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; against another § who refused to accept of the prince's coin. In fine, this advocate sued for things, which by the law were adjudged to the Exchequer ¶.

But in criminal causes, we never meet with the advocate of the public prosecutor; not even where duels are used; * not even in the case of incendiaries; † not even

* See this constitution and this formula in the second volume of the historians of Italy, page 175.

† Collection of Muratori, page 104, on the 88th law of Charlemagne, book i. tit. 26. sect. 78.

‡ Another formula, ib. page 87.

§ Ibid. page 104.

¶ Ibid. page 95.

* Ibid. page 88.

† Ibid. page 98.

‡ Ibid. page 113.

§ Ibid.

¶ Ibid. page 137.

* Ibid. page 147.

† Ibid.

when the judge is killed ‡ on his bench; not even in causes relating to the condition of persons ||, to liberty and slavery §.

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 at all to doubt of their giving us the practice observed under our princes of the second race upon this subject.

As the usage of combats was become more frequent under the third race, it did not allow of any such thing as a public prosecutor. Hence Boutillier, in his *Somme Rurale*, speaking of the officers of justice, takes notice only of the bailiffs *, the peers, and serjeants.

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

C H A P. XXXVII.

In what manner the institutions of St. Lewis fell into oblivion.

IT was the fate of the Institutions, that their origin, progress, and decline, were comprised within a very short period.

I shall make a few reflections upon this subject. The code we have now under the name of St. Lewis's Institutions was never designed as a law for the whole kingdom,

‡ Ibid. page 168. || Ibid. 134. § Ibid. page 107.

* See also the Institutions, book i. chap. 1. book ii. chap. 11 and 13. and Beaumanoir, chap. 61, page 308. concerning the manner in which prosecutions were managed in those days.

† See these laws in the lives of the saints of the month of June, tome iii. page 26.

‡ "Qui continue nostram sacram curiam sequi teneatur, insti-
tuatur qui facta et causus in ipsa curia promoveat atque prefe-
quatur."

though such a design is mentioned in the preface to this code. This compilement is a general code, which determines all points relating to civil affairs, to the disposal of property by will or otherwise, the dowries and advantages of women, the profits and prerogatives of fiefs, and the affairs relating to the police, &c. Now, to give a general body of civil laws, at a time when each city, town, or village had its customs, was attempting to subvert in one moment all the particular laws that were 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 in all parts the most passive obedience. But if it be a rule, that we ought not to change when the inconveniences are equal to the advantages, much less ought we to 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 change 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-house of Amiens, quoted by Mons. Ducange *. We find in other manuscripts, that this code was given by Saint Lewis in the year 1270, before he set out for Tunis. But this fact is not truer than the other; for St. Lewis set out upon that expedition in 1269, as Mons. Ducange observes; from whence he concludes, that this code might have been published in his absence. But this, I say, is impossible. How can St. Lewis be imagined to have pitched upon the time of his absence for transacting an affair which would have been the seed of troubles, and might have produced not only changes but revolutions? An enterprise of that kind had need, more than any other,

* Preface to the Institutions.

of being closely pursued, and could not be the work of a feeble regency, composed moreover of lords *, whose interest it was that it should not succeed

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

C H A P. XXXVIII.

The same subject continued.

WHAT is this complement then which goes at present under the name of St. Lewis'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,

* Matthew abbot of St. Dennis, Simon of Clermont Count of Nelle, and in case of death, Philip bishop of Evreux, and John Count of Ponthieu. We have seen above in the thirtieth chapter, that the Count of Ponthieu opposed the execution of a new judiciary order in his Lordship. This fact is related by Defontaines.

† See above, chap. 30.

St. Lewis, 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 courts of his demesnes, and for those of his barons. And such was his success, that Beaumanoir *, who wrote a little after the death of that prince, informs us, that the manner of judging, established by St. Lewis, 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 an interest in following. He removed the evil by rendering them sensible of the good. When it appeared that his courts, and those of some lords, had chosen a form of proceeding more natural, more reasonable, more conformable to morality; to religion, to the public tranquillity, and to the security of person and property; this form was soon adopted, and the other rejected.

To invite when it is improper to constrain, to lead when it is improper to command, is the highest point of ability. Reason has a natural, nay, it has even a tyrannical sway; it meets with resistance, but this very resistance forms its triumph; for after a short struggle it forces an entire submission.

St. Lewis, 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. Defontaines, who is the oldest † law-writer we have, made great use of those Roman laws. His work is in some measure a result of the ancient French jurisprudence, of the laws or institutions of St. Lewis, and of the Roman law. Beaumanoir made very little use of the latter; but he reconciled the ancient French laws with the regulations of St. Lewis.

I have a notion, therefore, that the law-book, known by the name of *the Institutions*, was compiled by some

* Chap. 61, page 309.

† He says of himself in his prologue, "Nus lui en prit onques
"mois cette chose dont j'ai."

bailiffs with the same design as that of the authors of those two works, and especially of Defontaines. The title of this work mentions, that it is wrote according to the usage of Paris, of Orleans, and of the court of barony; and the preamble says, that it treats of the usages of the whole kingdom, and 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 Defontaines were made for the countries of Clermont and Vermandois; and as it appears from Beaumanoir, that divers laws of St. Lewis had been received in the courts of barony, the compiler was in the right to say, that this work related also to those courts.

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

Nothing can be so vague as the title and prologue to those institutions, which must certainly have been foisted in by some ignorant hand. At first, they are the usages of Paris, of Orleans, and of the courts of barony; afterwards they are the usages of all the temporal courts of the kingdom, and of the provostship of France; at length they are the usages of the whole kingdom, and of Anjou, and of the courts of barony.

I fancy that St. Lewis caused this work to be undertaken, and that it was finished by his successor. One or both of those princes ordered some customs of their demesnes to be reduced into writing; and, because these customs were there confounded with the laws lately made by St. Lewis, the work was called *St. Lewis's Institutions*. In fact, so great a name must naturally have given it a sanction. All this was published under a general form, and the whole affair was most prudently managed. By reducing them into writing, they became more known, and by giving them a general form, their use was more extended. The laws of the kingdom were at that time nothing else but the customs of each place

retained in the memories of old men. In this general insufficiency, every one might find in the new code what was wanting in those laws; this was a source from whence they might all draw. The difference between this work, and those of Desfontaines and Beaumanoir, is its speaking in imperative terms as a legislator; and this might be right, as it was a mixture of written customs and laws,

C H A P. XXXIX.

The same subject continued.

THERE was an intrinsic defect in this compilement; it formed an amphibious code, where the French and Roman laws were mixed, and where things were joined that were no way relative, but often contradictory to each other. It is impossible to form a good system of laws from two contrary digests.

I am not ignorant that the French courts of vassals or peers, the judgments without power of appealing to another tribunal, the manner of pronouncing sentence by these words, *Je condamn* †, or, *I absolve*, had some conformity to the popular judgments of the Romans. But they made very little use of that ancient jurisprudence; they rather chose that which was afterwards introduced by the emperors, and employed it through the whole compilement, in order to regulate, limit, correct and extend the French jurisprudence.

St. Lewis, as we have already observed, had caused the works of Justinian to be translated, in order to give credit to the Roman law. It was soon taught in the schools; for they liked it better in its natural form, than in the disfigured shape in which it appeared in the new code.

Besides, this compilement made by decrees in respect to several things that no longer existed, such as the

† Institutions, book ii. chap. 15.

judgment of peers, judicial combats, private wars, the slavery of the Jews, the crusades, and bondmen. And as the following ages were remarkable for changes, the more changes they made, the more they had occasion to make; so that this code was always less fitted to the actual state of things, especially as the local dispositions contained therein were also changed.

Farther, the judiciary forms introduced by St. Lewis fell into disuse. This prince had not so much in view the thing itself, that is, the best manner of judging, as the best manner of supplying the ancient practice of judging. The principal intent was to give a disrelish of the ancient jurisprudence, and the next to form a new one. But when the inconveniencies of the latter appeared, another soon succeeded.

The institutions of St. Lewis 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 access was easy to that which was vested with the general authority, the judgments, which before constituted only the usages of a particular lordship, formed an 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 master-piece of legislation. To prepare great changes, sometimes whole ages are requisite; the events ripen, and then the revolutions succeed.

The parliament judged in the last resort of almost all the affairs of the kingdom. Before *, it took cognisance only of disputes between the dukes, counts, barons, bishops, abbots, or between the king and his vassals †, rather in the relation they had to the political,

* See Du Tillet on the court of peers. See also La roche Flavin, book 1. chap. 3. Budæus and Paulus Æmilius.

† Other causes were decided by the ordinary tribunals.

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 was the parliament become a fixed body, than they began to compile its decrees. John de Monluc, under the reign of Philip the Fair, made a collection which at present is known by the name of the *Olim* registers.

C H A P. XL.

In what manner the judiciary forms were borrowed from the decretals.

BUT how comes it, some will say, 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 no court that followed those of the Roman law. Besides, the limits of the spiritual and temporal jurisdiction were at that time very little known: there were ‡ people || who sued indifferently, and causes that were tried indifferently in either court. It seems § as if the temporal jurisdiction reserved no other causes exclusively to itself than the judgment of feudal matters *, and of crimes committed by laymen in cases not relating to religion. For † if, on the account of conventions and

‡ Beaumanoir, chap. II. page 458.

|| Widows, croises, &c. Beaumanoir, chap. II, page 58.

§ See the whole eleventh chapter of Beaumanoir.

* The spiritual courts 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 found in the ordinances of Lauriere.

† Beaumanoir, chap. xi. page 60.

contracts, they had occasion to sue in a temporal court, the parties might of their own accord proceed before the spiritual courts; and as the latter had not a power to oblige the temporal court to execute the sentence, they made people obey by means of excommunications. Under those circumstances, when they wanted to change the courts of proceedings in the temporal courts, they took that of the spiritual courts, because they knew it, and did not meddle with that of the Roman law, because they were strangers to it; for, in point of practice, people know only what is practised.

C H A P. XLI.

Flux and reflux of the ecclesiastic and temporal jurisdiction.

THE civil power being in the hand of an infinite number of lords, it was an easy matter for the ecclesiastic jurisdiction to gain every day 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 courts; and, as the royal jurisdiction gained ground every day, it grew every day more capable of correcting those abuses. In fact, they were intolerable; and, without enumerating them, I shall refer * the reader to Beaumanoir, to Boutillier, and to the ordinances of our kings. I shall mention only two, in which the public interest was more directly concerned. These abuses we know by the decrees that

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

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. By the ſilence of the clergy it may be preſumed, that they forwarded this reformation, which, conſidering the nature of the human mind, deſerves commendation. Every man that died without bequeathing a part of his eſtate to the church, which was called *dying without confeſſion*, was deprived of the ſacrament, and of the Chriſtian burial. If he died without making a will, his relations 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, nor even the two following nights, without having previously purchaſed leave: theſe indeed were the three beſt nights to chuſe; 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, by Ragau, the arret which it publiſhed ‡ againſt the biſhop of Amiens.

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

† In the word Teſtamentary executors.

‡ The 19th of March 1409.

C H A P. XLII.

*The revival of the Roman law, and the result thereof.
Change in the tribunals.*

UPON the discovery of Justinian's digest towards the year 1137, the Roman law seemed to rise out of its ashes. Schools were then established in Italy, where it was publicly taught: they had already the Justinian code, and the *Novels*. 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; because Justinian's laws were not made † till after the settlement of the Barbarians in Gaul. This law met with some opposition; but it stood its ground, notwithstanding the excommunications of the popes, who supported ‡ their own canons. St. Lewis endeavoured to bring it into repute by the translations made by his orders of Justinian's works, 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.

* In Italy they followed Justinian's code: hence Pope John the Eighth, 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.

† This Emperor's code was published towards the year 530.

‡ Decretals, book 5, tit. de privilegiis, capite super speculo.

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

I have already taken notice, 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 pursuant to a few simple customs received by tradition. In Beaumanoir's time † there were two different ways of administering justice; in some places they tried by peers ‡, in others by bailiffs; in following the first way, the peers gave judgment || according to the usage of their court; in the second it was the *prodes homines*, or old men, who pointed out this same usage to the bailiffs. 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 *prodes homines*, 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 pompous action agreeable to the nobility, and interesting to a warlike people, was become a course of pleading, which they neither understood nor cared to learn. The custom of trying by peers began to § be less used; that of trying by bailiffs to be more so: the bailiffs did not give *

† Customs of Beauvoisis, chap. i. of the office of bailiffs.

‡ Among the common people the burghers were tried by burghers, and the feudatory tenants were tried by one another. See la Thaumassiere, chap. 19.

|| Thus all requests began with these words: "My Lord Judge, it is customary that in your court," &c, as appears from the formula quoted by Boutillier, *Somme Rurale*, book i. tit. 31.

§ The change was insensible; we meet with trials by peers even in Boutillier's time, who lived in the year 1403, which is the date of his will; but nothing but feudal matters were tried any longer by the peers. *Boutillier*, book i. tit. 1, page 16.

* As appears by the formula of the letters which their lord used to give them, quoted By Boutillier, *Somme Rurale*, book i. tit. 24. Which is proved likewise by Beaumanoir, custom of Beauvoisis, chap. 1. of the bailiffs; they only directed the proceedings

judgment themselves, they summed up the evidence, and pronounced the judgment of the *prodes homines*; but the latter being no longer capable of judging, the bailiffs themselves gave judgment.

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

Thus fell the usages hitherto constantly observed in the French monarchy, that judgment should not be pronounced by a single person, as may be seen in the Salic law, the Capitularies, and in the first † law-writers under the third race. 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 *prodes homines*; by the obligation the judge is under of taking two graduates, in case that deserve a corporal punishment; and, in fine, it is become of no manner of effect by the extreme facility of appeals.

"The bailiff is obliged, in the presence of the peers, to take down
"the words of those who plead, and to ask the parties whether
"they are willing to have judgment given according to the reasons
"alleged; and if they say, Yes, my Lord; the bailiff ought to
"oblige the peers to give judgment." See also the institutions of
St. Lewis, book i. chap. 105, and book ii. chap. 15.

† Beaumanoir, chap. 67. page 336, and chap. 61, page 315 and 316. The Institutions, book ii. chap. 15.

C H A P. XLIII.

The same subject continued.

THUS there was no law to inhibit the lords from holding their courts themselves; no law to abolish the functions of their peers; no law to ordain the creation of bailiffs; no law 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 arrets 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 chuse their bailiffs from among the laity. It is a mistake to look upon this as the law of their creation; for it says no such thing. Besides, it fixes what it prescribes, by the reason it gives: "To the end that the bailiffs may be punished † for their prevarications, it is necessary they be taken from the order of the laity." The immunities of the clergy in those days are 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.

C H A P. XLIV.

Of the proof by witnesses.

THE judges, who had no other rule to go by than the usages, enquired very often by witnesses into every cause that was brought before them.

* It was published in the year 1287.

† "Ut si ibi delinquant, superiores, sui possunt animadvertere in eosdem."

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 expences of law-proceedings. Regulations were then made, which rendered most of those inquests * useless; 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 great number of usages in a country, it is much easier to write them all down in a code, than to oblige individuals to prove every usage. At length the famous ordinance was made, which prohibited the admitting of the proof by witnesses, for a debt exceeding an hundred livres, except there was the beginning of a proof in writing.

C H A P. XLV.

Of the customs of France.

FRANCE, as we have already observed, was governed by unwritten customs; and the particular usages of each lordship constituted the civil law. Every lordship had its civil law, according to Beaumanoir †, 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 first and second origin. With regard to the first, the reader may recollect what has been already said concerning it in the ‡ chapter of

* See in what manner age and parentage were proved. Institution, book i. chap. 71, 72.

† Prologue to the custom of Beauvoisis.

‡ Chap. 120

local customs; and, as to the second, we meet with it in the different events of legal duels; it being natural that a continual series of fortuitous cases must have been productive of new usages.

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

1. At the commencement * of the third race, the kings gave not only particular charters, but likewise general ones, in the manner above explained; such are the institutions of Philip Augustus, and those made by St. Lewis. In like manner the great vassals, in concurrence with the lords who held under them, granted certain charters or establishments, according to particular circumstances, at the assizes of their duchies or counties: Such were the assize of Godfrey Count of Brittany, on the division of the nobles; the customs of Normandy, granted by Duke Ralph; the customs of Champagne, given by King Theobald; the laws of Simon Count of Montfort, and others. This produced some written laws, and even more general ones than those they had before.

2. At the beginning of the third race, almost all the common people were bondmen; but there were several reasons which determined afterwards 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. The lords, by enfranchising their bondmen, 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.

3. Under the reign of St. Lewis, and of the succeeding princes, some able practitioners, such as Defontaines, Beaumanoir, and others, committed the customs of their bailiwicks to writing. Their design was rather to give

* See the collection of ordinances by Laurière.

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 they contributed greatly to the restoration of our ancient French law. Such was in those days our common law.

We are come now to the grand epocha. 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 at 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 used to render the customs more general, as much as possible, without injuring the interests of individuals, which were carefully * preserved. Thus our customs assumed three characters; 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 amongst us as in some measure opposite to the Roman, inasmuch 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 period of time not very distant from ours, when this law was the principal study of all 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

* This was observed at the digesting of the customs of Berry and of Paris. See la Thaumassiere, chap. 3.

towards learning than pretending to a profession, and when a continual pursuit of amusements was not even the characteristic of women.

What has been hitherto said of the formation of our civil laws, seems to lead me naturally to give also the theory of our political laws; but this would be too great a work. I am like that antiquarian who set out from his own country, arrived in Egypt, cast an eye on the pyramids, and returned home.

B O O K XXIX.

Of the Manner of composing Laws.

C H A P. I.

Of the spirit of the legislator.

I SAY it, and methinks I have undertaken this work with no other view than to prove it: The spirit of moderation ought to be that of the legislator; political, like moral evil, lying always between two extremes. 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 accusers would no longer have any means to convict, nor the accused to justify themselves,

C H A P. II.

The same subject continued.

CÆCILIOUS, in Aulus Gellius *, 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 abilities. Shall then the cruellest laws be the best? Shall goodness consist in excess, and all the relations of things be destroyed?

C H A P. III.

That the laws which seem to deviate from the views of the legislator, are frequently agreeable to them.

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 be kept retired, and things by this means should 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 quiet. 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 the fermentation of one liquor may be stopped by a single drop of another.

* Book xx. Chap. i.

† Cæcilius 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.

C H A P. IV.

Of the laws that are contrary to the views of the legislator.

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 devolve 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.

C H A P. V.

The same subject continued.

THE law I am going to speak of, is to be found in this oath preserved by Æschines §: "I swear that
 "I will never destroy a town of the Amphictyons, 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 the destruction of these towns. 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 destroy the destroyers. Amphictyon's law was just; but it was not prudent: This appears even from the abuse made of it. Did not Phillip assume the power of destroying towns,

§ De falsa legatione.

under the pretence of their having infringed the laws of the Greeks? Amphioyou 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.

C H A P. VI.

The laws which appear the same, have not always the same effect.

CÆSAR made a law † to prohibit people from keeping above sixty sesterces in their houses. This law was considered at Rome as extremely proper for reconciling the debtors to their creditors; because by obliging the rich to lend the poor, they enabled the latter to pay their 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 circumstance. 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 thing as taking it from them by open violence. Cæsar's law was designed 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.

† Dio, Lib. 47.

C H A P. VII.

The same subject continued. The necessity of composing laws in a proper manner.

THE law of ostracism was established at Athens, at Argos *, 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; so that those who had any kind of merit withdrew from public affairs. At Athens, where the legislator was sensible of the proper extent and limits of his law, ostracism proved an admirable thing. 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.

The power of banishing was exercised only every fifth year: In fact, as the ostracism was designed against none but great personages who threatened the state with danger, it ought not to be the transaction of every day.

C H A P. VIII.

The laws which appear the same were not always made through the same motive.

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 which were to be performed by the inheritor, and were regulated by the

* Aristot. rep. lib. v. cap. 3.

† Plutarch, life of Dionysius.

‡ When the inheritance was too much incumbered, they eluded the pontifical law by certain sales, from whence comes the word *sine sacris hereditas*.

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.

C H A P. IX.

That the Greek and Roman laws punished suicide, but not through the same motive.

A MAN, says Plato *, who has killed one nearly related to him, that is, himself, not by an order of the magistrate, nor to avoid ignominy, but through faint-heartedness, shall be punished. The Roman law punished this action when it was not committed through faint-heartedness, through weariness of life, through impatience in pain, but through a criminal despair. The Roman law acquitted where the Greek condemned, and condemned where the other acquitted.

Plato's law was formed upon the Laecedæmonian institutions, where the orders of the magistrate were absolute, where shame was the greatest of miseries, and faint-heartedness the greatest of crimes. The Romans had no longer those fine ideas; theirs was only a fiscal law.

During the time of the republic there was no law at Rome against suicide: 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.

Under the first emperors, the great families of Rome were continually destroyed by criminal prosecutions. The custom was then introduced of preventing judgement by a voluntary death. In this they found a great

* Book ix. Of laws.

advantage: They had * an honourable interment, and their wills were executed; because there was no law against suicides. But when the emperors became as avacious 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.

C H A P. X.

That laws which seem contrary, proceed sometimes from the same spirit.

IN our times we give summons to people in their own houses; but this was not permitted ‡ among the Romans.

A summons was a violent § action, and a kind of warrant for seizing the § body; 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.

* "Eorum qui de se statuebant humanitater corpora, manebant testamenta, pretium scilicet mandandi." *Tacit.*

† Rescript of the emperor Pius in the third law, sect. 1. & 2. *De bonis eorum qui ante sent. mortem sibi conseruerunt.*

‡ Leg. 18. ff. *De in ius vocando.*

§ See the law of the twelve tables.

§ *Rapit in ius*, Horace, Sat. 9. Hence they could not summon those to whom a particular respect was due.

† See the law 18. ff. *De in ius vocando.*

C H A P. XI.

How we are to judge of the difference of laws.

IN France, the punishment against 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 France the rack is used against 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 is called justifying facts: 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 hopes to draw 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 witnesses: on the contrary, reason requires 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. 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 witnesses, which he has not in France. Wherefore, to determine which of those laws are most agreeable to reason, we must not consider them singly, but compare the whole together.

* By the ancient French law, witnesses were heard on both sides; hence we find in the institutions of St. Lewis, Book i. Chap. 7, that there was only a pecuniary punishment against false witnesses.

C H A P. XII.

That laws which appear the same are sometimes really different.

THE Greek and Roman laws inflicted the same * punishment on the receiver as on the thief: 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 us, the receiver cannot 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; 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.

C H A P. XIII.

That we must not separate the laws from the end for which they were made: Of the Roman laws on theft.

WHEN a thief was caught with the stolen thing, before he had carried it to the place where he designed to hide it, this was called by the Romans an

* Leg. 1. De receptatoribus.

† See what Favorinus says in Aulus Gellius, Book xx. Chap. 8.

open theft; when he was not detected till some time afterwards, it was a private theft.

The law of the twelve tables ordained, that an open thief should be whipt with rods, and condemned to slavery, if he had attained the age of puberty; or only whipt, if he was not of ripe age; but as for the private thief, he was only condemned to a recompense of double the value of what he had stolen.

When the Portian law abolished the custom of whipping the citizens with rods, and of reducing them to slavery, the open thief was condemned to * a recompense of fourfold, and they still continued to condemn the private thief to a recompense of double.

It seems very odd, that the laws should make such a difference in the quality of those two crimes, and in the punishments they inflicted. In fact, whether the thief was detected either before or after he had carried the 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 but 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 dexterous and cunning, ordained that children should be practised in thieving, and that those who were caught in the fact should be severely whipped: This occasioned among the Greeks, and afterwards among the Romans, a great difference between an open and a private theft †.

Among the Romans, a slave who had been 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 fact, the prætor ordered him to be

* Favorinus in Aulus Gellius, Book xx. Chap. 1.

† 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, sect. 2 & 3.

whipped with rods according to his pleasure, as was practised at Sparta. All this had a remoter origin. The Lacedæmonians had derived these usages from the Cretans; and Plato *, who wants to prove that the Cretan institutions were designed for war, cites the following, namely the faculty of bearing pain in private combats, and in punishments inflicted for open thefts.

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.

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 Lacedæmon 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.

C H A P. XIV.

That we must not separate the laws from the circumstances in which they were made.

IT was decreed by a law at Athens, that when the city was besieged, all the useless people should be put to death †. 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.

* Of laws, Book I.

† "In utilis ætas occidatur." *Syrta in Hermog.*

The Roman laws * ordained that physicians should be punished for neglect or unskilfulness. 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 laws it is otherwise. The Roman laws were not made under the same circumstances as ours: At Rome every ignorant pretender intermeddled with physic; but amongst 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 art.

C H A P. XV.

That sometimes it is proper the law should amend itself.

THE law of the twelve tables † allowed people to kill a night-thief as well as a day-thief, if upon being pursued he attempted to make a defence: But it required, that the person who killed the thief ‡ should cry out, and call his fellow-citizens; this is 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 every thing speaks, the air, the countenance, the passions, silence; and when every word either condemns or absolves. A law which may become so contrary to the security and liberty of the citizens, ought to be executed in their presence.

* The Cornelian law *de sicariis*, Institut. lib. iv. tit. 3. *de lege Aquilia*, sect. 7.

† See the 4th law, ff. ad leg. Aquil.

‡ Ibidem. See the decrees of Tassillon, added to the law of the Bavarians *de popularib. legib.* art. 4.

C H A P. XVI.

Things to be observed in the composing of laws.

THOSE 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. Justinian's Novels were so very diffuse, that they were obliged to abridge them †.

The style should also be plain and simple; a direct expression being always 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 tumid, 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 every body the same ideas. Cardinal Richlieu ‡ 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 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. He should not have made use of so vague an expression: The molestation given to a man depends entirely on the degree of his sensibility.

* " Ut carmen necessarium." Cicero de legib. lib. ii.

† It is the work of Irnerius. ‡ Political Testament.

|| " Aut qualibet manumissione donatum inquietate voluerit." Appendix to the Theodosian code, in the first volume of Father Sirmond's works, p. 737.

When the law wants to fix a set rate upon things, it should avoid as much as possible the valuing 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, who used to give those he met a box on the ear, and afterwards tendered them the five and twenty pence of the law of the twelve tables.

When a law has once fixed the ideas of things, it should never return to vague expressions. In the criminal ordinances of Lewis XIV. † after an exact enumeration of the causes in which the king is immediately concerned, follows these words; “and those which in all “times have been subject to the determination of the “king’s judges,” which renders the thing again arbitrary, after it had been fixed.

Charles VII. ‡ says, he has been informed that the parties appeal three, four, and six months after judgment, contrary to the custom of the kingdom in the country governed by custom: he therefore ordains, that they shall appeal forthwith, unless there happens to be some fraud or deceit in the attorney ||, or unless there be a great or evident cause to sue the appeal. The end of this law destroys the beginning, and it destroys it so effectually, that they used afterwards to appeal during the space of thirty years §.

The law of the Lombards * does not allow a woman that has taken a religious habit, 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; by a much

* Aulus Gellius, book xx. chap. i.

† We find in the verbal process of this ordinance the motives that determined him.

‡ In his ordinance of Montel-les-tours, in the year 1453.

|| They might punish the attorney, without there being any necessity of disturbing the public order.

§ The ordinance of the year 1667, had made some regulations upon this head.

* Book ii. tit. 37.

"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 * 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, without the wife's losing her portion, if for the space † of two years he had been incapable of consummating the marriage. He altered this law afterwards, and allowed the ‡ poor wretch three years. 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 cannot see the ornaments of the magistracy. So bad a reason must have been given on purpose, when such a number of good reasons were at hand.

Paul the civilian § says, that a child grows perfect in the seventh month, and that the proportion of Pythagoras's numbers seems to prove it. It is very extraordinary that they should judge of those things by the proportion of Pythagoras's numbers.

* In Father Simon's appendix the Theodosian code, tome I.

† Leg. I. code *de repudiis*.

‡ See the authentic *Sed bodie*, in the code *de repudiis*.

|| Leg. I. ff. *de postulando*.

§ In his sentences, book I. tit. 9.

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 ecclesiastical 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, that Charles IX. was declared of age in the parliament of Rouen at fourteen years commenced, because the laws require every moment of the time to be reckoned, in cases relating to the restitution and administration of an orphan's estate; whereas it considers the year commenced as a year complete, when the case is concerning the acquisition of honours. I am very far from censuring a regulation which has been hitherto attended with no inconveniency; I shall only take notice, that the reason alleged * is not the true one; 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: 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 it through fear of the event of a law-suit, 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, as I have observed already, required that a punishment should be inflicted on the person that killed

|| Della guerra civile di Francia, page 96.

* The Chancellor de l' Hôpital, ib.

† It was made in the month of November, 1702.

himself, not with a design of avoiding shame, but through faint-heartedness. This law was defective in this respect, 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 ever suffered to deviate from it by a particular convention.

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. This is making a jest of 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 the Falcidian law.

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 ought to have the most spotless innocence. We find in the law of the Visigoths that ridiculous request †, by which the Jews were obliged to eat every

* It is the authentic *Sed cum testator.*

† Book xii. tit. 2. sect. 16.

thing 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 allowed to retain nothing more of their own, than what might serve as a mark to distinguish them.

C H A P. XVII.

A bad method of giving laws.

THE Roman emperors manifested their will, like our princes, by decrees and edicts; but they permitted, which our princes do not do, 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 who thus apply for laws are bad guides to the legislator; the facts are always wrong stated. Julius Capitolinus † says, 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; 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 complement with them.

I would advise those who read the Roman laws to distinguish carefully between this kind of hypotheses, and the *senatusconsulta*, 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.

† See Julius Capitolinus in Macrine.

‡ Ibid.

C H A P. XVIII.

Of the ideas of uniformity.

THERE are certain ideas of uniformity which some times strike great geniuses, (for they even affected Charlemagne), but infallibly make an impression on little souls. They discover therein a kind of perfection, because it is impossible for them not to discover it; the same weights in the police, the same measures in commerce, 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 always 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 tranquillity. If the people observe the laws, what signifies it whether these laws are the same?

C H A P. XIX.

Of legislators.

ARISTOTLE wanted to satisfy sometimes his jealousy against Plato, and sometimes his passion for Alexander. Plato was incensed against the tyranny of the people of Athens. Machiavel was full of his idol, the Duke of Valentinois. Sir Thomas Moor, who spake rather of what he had read than of what he thought, wanted ‡ to govern all states with the simplicity of a Greek city. Harrington was full of the idea

‡ In his Utopia.

of his favourite republic of England, whilst a croud of writers saw nothing but confusion where they saw no crown. The laws always meet the passions and prejudices of the legislator; sometimes they pass through, and imbibe only a tincture; sometimes they stop, and are incorporated with them.

B O O K XXX.

Theory of the feudal Laws among the Franks, in the Relation they bear to the establishment of the Monarchy.

C H A P. I.

Of feudal laws.

I SHOULD think my work imperfect were I to pass over in silence an event which happened once, and never perhaps will happen more: Were I not to speak of those laws which appeared of a sudden all over Europe, without having any connection with those hitherto known; of those laws which have done infinite good and infinite mischief; which have left rights when the demesne has been ceded; which, by vesting several persons with different kinds of seignory over the same things or persons, have diminished the weight of the whole seignory; which have established different limits in empires of too great an extent; which have been productive of rule with an inclination 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.

C H A P. II.

Of the source of feudal laws.

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, described the manners † of that nation; and upon these he regulated ‡ some of his enterprizes. A few pages of Cæsar upon this subject are equal to whole volumes.

Tacitus has wrote 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 every thing 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 reading these codes, and, in reading these codes, we fancy we are reading Cæsar and Tacitus.

But, if in the research of the feudal laws I find myself in a dark labyrinth full of windings and detours, I think I have the clue in my hand, and that I shall be able to find my way through.

* ————— “Quantum vertice ad oras
“Æthereas, tantum radice ad Tartara tendit.”

Virg.

† Book vi.

‡ For instance, his retreat from Germany. *Ibid.*

C H A P. III.

The origin of vassalage.

CÆSAR * says, " 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 their own ; that the princes and magistrates of each nation allotted what portion of land they pleased, and where they pleased, to every individual, and obliged them the year following to remove elsewhere." Tacitus says †, " 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 relative to their state, which is that of companions ‡. They had a strong emulation to distinguish themselves in the princes 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, " consists in being constantly surrounded with a multitude of young and chosen people: this they reckon an ornament in peace, a 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 is at peace the princes go to those who are at war; and it is by this means they

* Book vi. of the Gallic wars. Tacitus adds, " Nulli domus aut ager, aut aliqua cura; prout ad quem venere alunt." *De morib. German.*

† *De morib. German.*

‡ *Comites.*

“ retain a great number of friends. To these they give
 “ the war-horse and the terrible javelin. Their pay
 “ consists in coarse, but large repasts. The prince sup-
 “ ports his liberality merely by war and plunder. You
 “ might easier persuade them to challenge the enemy,
 “ and to expose themselves to wounds, than to cultivate
 “ the land, and to attend the care of husbandry; they
 “ refuse to acquire by sweat what they can purchase by
 “ 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, be-
 cause there were trusty men who were bound by their
 word, who were engaged to follow the prince to the
 field, and performed very near the same service as was
 afterwards performed for the fiefs.

C H A P. IV.

The same subject continued.

CÆSAR || says, that, “ when any of the princes
 “ declared to the assembly that he intended to set
 “ out upon some expedition, and asked them to follow
 “ him; those who approved the leader, and the enter-
 “ prise, 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 what we have
 extracted in the preceding chapter from Tacitus, is the
 foundation 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 persuade, new people to engage; that to
 acquire much they were obliged to spend a great deal;
 that they should incessantly acquire by the division of

|| De bello Gallico, lib. vi.

lands and spoils, and give these lands and spoils incessantly away; that their demesne should continually increase and diminish; that a father, upon giving a kingdom * to one of his children, should always accompany it with a treasure; that the king's treasure should be considered as necessary to the monarchy; and that one † king could not give part of it to a stranger, even in portion with his daughter, without the consent of the other kings. The monarchy moved by springs, which they were constantly obliged to wind up.

C H A P. V.

Of the conquest of the Franks.

IT is not true, that the Franks, upon entering Gaul, took possession of all the country to turn it into fiefs. This has been the opinion of some people, because they saw almost all the country, towards the end of the second race, converted into fiefs, rear-fiefs, or other dependencies; but this was owing to particular causes, which we shall explain hereafter.

The consequence which some would infer from thence, that the barbarians made a general regulation for establishing in all parts the state of villanage, is not less false than the principle. 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 always possessed of power, the king, who continually disposed of the fiefs, that is, of the only property then existing, would have been possessed of as arbitrary a power as the Grand Seignior is in Turkey; which is absolutely contradictory to all history.

* See the life of Dagobart.

† See Gregory of Tours, book vi. on the marriage of the daughter of Chilperic. Childbert sends ambassadors to tell him, that he should 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, &c.

C H A P. VI.

Of the Goths, Burgundians, and Franks.

GAUL was invaded by German nations. The Visigoths took possession of the province of Narbonne, and of almost all the south: Burgundians settled in the east, and the Franks subdued very near 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 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 are almost all relating to their flocks. Roricorn, who wrote a history among the Franks, was a shepherd.

C H A P. VII.

Different ways of dividing lands.

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; but, afterwards, they chose to give them lands. The emperors, or the Roman † magistrates in their name, made particular conventions with them concerning the division of lands, as we find by the chronicles and in the codes of the Visigoths ‡ and Burgundians ||.

* The Romans obliged themselves to this by treaties.

† “Burgundiones partem Galliæ occuparunt, terrasque cum Gallicis senatoribus diviserunt.” *Marius’s chronicle, in the year 456.*

‡ Book x. tit. 1. sect. 8, 9. and 16.

|| Chap. liv. sect. 1. and 2. This division was still subsisting in the time of Lewis le Debonnaire, as appears by his capitulary of the year 829. which has been inserted in the law of the Burgundians, tit. lxxix, sect. 1.

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 amongst 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, and that of the Franks in Gaul, and of the Vandals † in Africa. 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.

C H A P. VIII.

The same subject continued.

WHAT has induced some people to think that the Roman lands were entirely usurped by the barbarians, is their finding in the laws of the Visigoths and Burgundians, that these two nations had two thirds of the lands; but this they took only in certain quarters assigned them.

Gundebald ‡ says, in the law of the Burgundians, that his people at their establishment had two thirds of the lands allowed them; and the second supplement || to this law takes notice, that only a moiety would be allowed to those who should hereafter come to live in that country. Therefore all the lands had not been divided in the beginning between the Romans and the Burgundians.

* See Procopius, war of the Goths.

† See Procopius, war of the Vandals.

‡ "Licet eo tempore quo populus noster mancipiorum tertiam et duas terrarum partes accept," &c. *Law of the Burgundians*, tit. liv. sess. I.

|| "Ut non amplius a Burgundionibus qui infra venerunt requiratur, quam ad præsens necessitas fuerit, medietas terræ." *Art. xi.*

In the texts of those two regulations we meet with the same expressions; consequently they explain one another; and as the second cannot be understood to mean an universal division of lands, neither can this signification be given to the first.

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 rest.

CHAP. IX.

A just application of the law of the Burgundians, and of that of the Visigoths, in relation to the division of lands.

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.

The law of the Burgundians ordains that a Burgundian shall be received in an 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.

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 the two nations, and conformed to the manner in which they procured their subsistence. As the Burgundians dealt chiefly in cattle, 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.

§ De morib. German.

We find in the code of the Burgundians *, that each Barbarian was placed near to 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 the least possible: 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.

CHAP. X.

Of servitudes.

THE law of the Burgundians † takes notice, that when those people settled in Gaul, they were allowed two thirds of the land, and one third of the bondmen. The state of villanage was therefore established in that part of Gaul before it was invaded by the Burgundians ‡.

The law of the Burgundians, in points relating to the two nations, makes a formal distinction || in both between the nobles, the free-born, and the bondmen. Servitude was not therefore a thing particular to the Romans, nor liberty and nobility particular to the Barbarians.

This very same law says §, that, if a Burgundian freedman had not given a particular 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

* And that of the Visigoths.

† Tit. 54.

‡ This is confirmed by the whole title of the code *de agricolis, et censitis, et colonis*.

§ "Si deitem optimati Burgundioni vel Romano nobili excus-
"serit." Tit. 26. sect. 1. "Et si mediocribus personis ingenuis,
"tam Burgundionibus quam Romanis." Ibid. sect. 2.

§ Tit. 57.

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 is mistaken in the capital point of his system: he has not proved that the Franks made a general regulation to reduce 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 from whom he descends, every one is capable of judging of the fine things he says, and of the errors into which he is fallen. I shall not therefore undertake to criticise him; I shall only observe, that he had more wit than understanding, more understanding than knowledge, though his knowledge was not contemptible, for he was well acquainted with the most valuable part of our history and laws.

The Count de Boulainvilliers, and the Abbe du Bos, have formed two different systems; one of which seems to be a conspiracy against the commons, and the other against the nobility. When the Sun gave leave to Phaeton 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 ||."

|| "Nec preme, nec summum molire per æthera currus;

"Altius egressus, cœlestia tecta cremabis;

"Inferius, terras; medio tutissimus ibis.

"Non te dexterior tortum declinat in anguem,

"Neve sinisterior pressam rota ducat ad aram.

"Inter utramque tene."

Ovid's Metam. lib. ii.

C H A P. XI.

The same subject continued.

WHAT first gave rise to the notion of a general regulation made at the time of the conquest, is our meeting with a prodigious number of servitudes in France towards the beginning of the third race; and, as the continual progression of these servitudes was not attended to, people imagined in an age of obscurity a general law which was never made.

Towards the commencement 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 were become bondmen*; and, whereas at the first period there was very near the same administration in the cities as among the Romans, namely, bodies of citizens, a senate, and courts of judicature; at the other we hardly meet with any thing but a lord and his bondmen.

When the Franks, Burgundians, and Goths made their several invasions, they took gold, silver, moveables, clothes, men, women, boys, and whatever the army could carry; the whole was brought to one place, and divided amongst the army†. History shews, that after the first settlement, that is, after the first devastations, 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 every thing in time of war, and granted every thing in time of peace. Were it not so, how should we find both in the

* While Gaul was under the domination of the Romans, they formed particular bodies; these were generally freedmen, or the descendants of freedmen.

† See Gregory of Tours, book ii. chap. 27. Almoir, book 2. chap. 12.

Salic and Burgundian laws such a number of regulations absolutely contrary to a general servitude of the people?

But that which was not effected by the conquest, was effected by the same law of nations * which subsisted after the conquest. Opposition, revolts, and the taking of towns, were followed with the servitude of the inhabitants. And, not to mention the wars which the different conquering nations made against one another, as there was this particularity among the Franks, that the different divisions 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 lordships.

The conquest was soon over, and the law of nations then in force was productive of some servitudes. The custom of the same law of nations, which obtained for many ages, gave a prodigious extent to these servitudes.

Theodoric †, 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 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 peace ‡, which was concluded between Gontram and Chilperic, the troops employed in the siege of Bourges, having had orders to return, carried such a large booty away with them, that they hardly left either men or cattle in the country.

I might quote here § authorities without number; and, as the bowels of human compassion were moved at

* See the lives of the saints in the next page.

† Gregory of Tours, book iii.

‡ Ibid. book vi. chap. 31.

§ See the chronicle of Fredegarus in the year 600; and his continuator in the year 741; the annals of Euld in the year 720, and the lives of the saints in the next quotation.

those miseries, as several holy prelates, beholding the captives bound two and two, 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 eclairsissements on this subject. And, notwithstanding what may be objected to the authors of those lives, namely, their having been sometimes a little too credulous in respect to things which God has certainly performed, if they were necessary for the execution of his designs, yet we draw considerable lights from thence, in respect 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 a vast † boundless ocean: all those frigid, dry, insipid, and crude writings must be 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 ‡, 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.

* See the lives of St. Epiphanius, St. Eptadius, St. Casarius, St. Fidolus, St. Porcian, St. Treverius, St. Eusychius, and of St. Leger, the miracles of St. Julian, &c.

† ——— "Decrant quoque litora ponto." *Ovid. lib. 1.*

‡ Even the husbandmen themselves were not all slaves. See the 18th and 33d law in the code *De agricolis, et censitis, et colonis*, and the 20th of the same title.

C H A P. XII.

That the lands belonging to the division of the barbarians paid no taxes.

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; 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 is always invented too late, and when men begin to enjoy the felicity of other arts.

The transient † tax of a pitcher of wine for every acre, which was one of the exactions of Chilperic and Fredegonda, related only to the Romans. In fact, it was not the Franks that tore the rolls of those taxes, but the clergy, who in those days were all Romans. The burthen of this tax lay chiefly on the inhabitants ‡ of the towns; now these were almost all inhabited by Romans.

Gregory of Tours || relates, 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 *ingenui* 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 be ashamed to see how the Abbé du Bos § has interpreted this passage.

* See Gregory of Tours, book ii.

† Ibid. book v.

‡ “*Quæ conditio universis urbibus per Galliam constitutis sum-
mopere est adhibita.*” *Life of St. Aridens.*

|| Book vii.

§ Establishment of the French monarchy, tome iii. chap. xiv.
p. 315.

He observes, that in those days the freemen were called also *ingenui*. Upon this supposition he renders the Latin word *ingenui* by freed from taxes, a phrase which we indeed may use, as freed from cares, freed from punishments; but in the Latin tongue, such expressions as *ingenui a tributis*, *libertini a tributis*, *manumissi tributorum*, would be quite monstrous.

We find in the law of the Visigoths*, 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 taxes.

The Abbé du Bos †, who, to support his system, would fain have the Visigoths subject to taxes ‡, 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 Hardouin are allowed to exercise thus an arbitrary power over facts.

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; when he speaks of their military service, he applies to § bondmen what can never relate but to freemen.

* "Judices atque præpositi tertias Romanorum, ab illis qui occupatus tenent, auferant, et Romanis sua exactione sine aliqua dilatione restituant, ut nihil fisco debeat deperire." *Lib. x. tit. i. cap. 14.*

† Establishment of the Franks in Gaul, tome iii. chap. xiv. p. 510.

‡ He lays a stress upon another law of the Visigoths, book. x. tit. i. 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.

|| Establishment of the French monarchy, tome iii. chap. xiv. p. 513. where he quotes the edict. of Pistos, art. 28. See below, chap. xvii.

§ *Ibid.* tome iii. chap. iv. p. 298.

C H A P. XIII.

Of taxes paid by the Romans and Gauls in the monarchy of the Franks.

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, in order to proceed with greater expedition, I shall be satisfied with observing, that, if they paid them in the beginning, they were soon after exempted, and that those taxes were changed into a military service: for I confess I cannot conceive how the Franks should have been at first such great friends, and afterwards such sudden and violent enemies, to taxes.

A capitulary* of Lewis le Debonnaire explains extremely well the situation of the freemen in the monarchy of the Franks. Some troops† of Goths or Iberians, flying from the oppression of the Moors, were received in Lewis's dominions. The agreement made with them was, that, like other freemen, they should follow their count to the army; that upon a march they should mount guard‡, and patrol under the command also of their count; and that they should furnish horses and carriages for baggage to the king's || commissaries and to the ambassadors in their way to and from court; and that they should not be compelled to pay any farther acknowledgement, but should be treated as the other freemen.

It cannot be said that these were new usages introduced towards the commencement of the second race. This must be referred at least to the middle, or to the

* In the year 815, chap. i. which is agreeable to the capitulary of Charles the Bald in the year 844. art. 1. and 2.

† "Pro Hispanis in partibus Aquitanie, Septimie et provinciis consistentibus." *Ibid.*

‡ "Excubias et explorationes quas *Wallas* dicunt." *Ibid.*

|| They were not obliged to furnish any to the count. *Ibid.* art. 5.

end of the first. A capitulary of the year 864.* says in express terms, that 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 we shall prove hereafter.

This is not all; there was a regulation † which hardly permitted the imposing of taxes on those freemen. He who had four manors ‡ was always obliged to march against the enemy; he who had but three, was joined with a freeman that had only one; the latter bore the fourth part of the others charges, and staid at home. In like manner, they joined two freemen who had each two manors; he who went to the army had half his charges bore by him who staid 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. 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 art of tax-gathering should fall of itself in the monarchy of the Franks: it was a most complicate art, far above the conception, and wide from the plan, of those simple people. Were the Tartars to over-run Europe, we should find it very

* "Ut pageses Franci, qui caballos habent, cum suis comitibus in hostem pergant." The counts are forbid to deprive them of their horses, "ut hostem facere, et debitos paraveredos secundum antiquam consuetudinem exsolvere possint." *Edict of Pîtres in Baluzius*, p. 186.

† Capitulary of Charlemagne, in the year 812, chap. i. *Edict of Pîtres* in the year 864, art. 27.

‡ *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*.

difficult to make them comprehend what is meant by one of our financiers.

The * anonymous author of the life of Lewis le Debonnaire, 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 intendency of the demesnes belonging to the crown. This shews 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.

The bishops, writing † to Lewis brother to Charles the Bald, use 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 their demesnes.

C H A P. XIV.

Of what they called Census.

AFTER the barbarians had quitted their country, they were desirous of reducing their usages into writing; but as they found a difficulty in writing German words with Roman letters, they published these laws in Latin.

* In Pithou, part ii. p. 157.

† See the capitulary of the year 858, art. 14.

‡ They levied also some duties on rivers, where there happened to be a bridge or passage.

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*; 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, who had 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 from thence they inferred this consequence, that our kings of the two first races had put themselves in the place of the Roman emperors, and made no change in their ‡ administration. Besides, as particular duties raised under the second race were by chance and by certain § restrictions converted into others, they inferred from 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

* The *census* was so general 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 5th in the year 829, 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.

† The Abbe du Bos, and his followers.

‡ See the weakness of the arguments produced by the Abbe du Bos, in the establishment of the French monarchy, tome iii. book vi. chap. 14. especially in the inference he draws from a passage of Gregory of Tours, concerning a dispute between his church and King Charibert.

§ For instance, by *infranchisementa*.

E c 2

represented the Roman *census*, and did not form a part of the demefnes, were mere usurpations. I omit the other consequences.

To apply the ideas of the present time to distant ages, is a most fruitful source of error. To those people who want to modernise all the ancient ages, I shall say what the Egyptian priest said to Solon, "O Athenians, you are *mere* children!"

CHAP. XV.

That what they call Census was raised only on the bondmen, and not on the freemen.

THE king, the clergy, and the lords, raised regular taxes each, on the bondmen of their respective demefnes. 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; and with relation to the lords, by the regulations † which Charlemagne made concerning this subject.

These taxes were called *census*; they were economical and not fiscal duties, mere private services, and not public services.

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 person be ‡ freeborn, and not inrolled in the register of the *census*. I prove it also by a commission from Charlemagne to a count §, whom he had sent into Saxony; which contains

* Law of the Allemans, chap. 22. and the law of the Bavarians, tit. 1. chap. 14. where the regulations are to be found which the clergy made concerning their order.

† Book v. of the capitularies, chap. 303.

‡ "Si ille de capite suo bene ingenuus sit, et in Puletica publico coactus non est." *Lib. 1. formul. 19.*

§ In the year 789. edition of the capitularies by Balusius, vol. i. p. 250.

the enfranchisement of the Saxons for having embraced Christianity, and is properly a charter of freedom *. This prince restores them to their former † civil liberty, 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, who had been received into the monarchy, the counts are forbid 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 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 ||, 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.

From 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

* "Et ut ista ingenuitatis pagina firma stabilisque consistat."
Lib. 1. formul. 19.

† "Præsumque libertati donatæ; & omni nobis debito censu solutos." Ibid.

‡ *Præceptum pro Hispanis*, in the year 812; edition of Baluzius tom. i. p. 500.

|| In the year 844; edit. of Baluzius, tom. ii. art. 1 & 2, p. 27.

this capitulary *, “ We ordain that the royal *census* shall “ be levied in all places, where formerly it was † lawful- “ ly levied?” What could be the meaning of that in which Charlemagne ‡ orders his commissaries in the provinces to make an exact inquiry into all the censuses that belonged in former times § to the king’s demesne? And of that § in which he disposes of the censuses paid by those * of whom they are demanded? What can that other capitulary † mean, in which we read, “ If any “ person ‡ has acquired a tributary land, on which we “ were accustomed to levy the *census*?” And that other, in fine §, in which Charles the Bald § makes mention of the censual 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 they 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*, and opposes it to the *census* paid by the bondmen.

* Third capitulary of the year 805, art. 20. & 13. inserted in the collection of Ansegise, book iii. art 15. This is agreeable to that of Charles the Bald, in the year 854, apud Attiniacum art. 6.

† “ Undecunque legitime exigebatur.” *Ibid.*

‡ In the year 812, art. 10. & 11. edit. of Balusius, tom. i. p. 498.

§ “ Undecunque antiquitus ad partem regis venire solebant.” *Capitulary of the year 812, art 10, 11.*

§ In the 813. art. 6. edition of Balusius, tom. i. p. 508.

* “ De illis unde *censa* exigant.” *Capitulary of the year 813, art. 6.*

† Book iv. of the capitularies, art. 37. and inserted in the law of the Lombards.

‡ “ Si quis terram tributariam, unde *census* ad partem nostram exire solebat, suscepit.” *Book iv. of the Capitularies. art. 37.*

§ In the year 805, art. 8.

§ “ Unde *census* ad partem regis exivit antiquitus.” *Capitulary of the year 805 art. 8.*

* “ Censibus vel paraveredis quos franci homines ad regiam potestatem exsolvere debent.”

Besides, the edict * of Pistes takes notice of those freemen who were obliged to pay the royal census for their † head, for their cottages, 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, did not, generally speaking, acquire a full and perfect liberty ||, but they paid *censum in capite*; and these are the people here meant.

We must therefore explode the idea of a general and universal *census*, derived from the Roman policy, from which *census* 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 Abbè 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.

C H A P. XVI.

Of the feudal lords or vassals.

I HAVE taken notice of those volunteers among the Germans, who followed their princes in their several expeditions. The same usage continued after

* In the year 864, art. xxxiv. edition of Balassus, p. 192.

† "De illis francis hominibus qui censum regium de suo capite et de suis recellis debeant." *Ibid.*

‡ The 28th 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.

|| As appears by a capitulary of Charlemagne in the year 813, which we have already quoted.

the conquest. Tacitus mentions them by the name of *Companions* *; the Salic law by that of men who have vowed fealty † to the king; the formularies of ‡ Marculfus, by that of the king's *antrusties* ||; the earliest French historians by that of *leudes* §, faithful and loyal; and those of latter date by that of vassals * and lords.

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 Antrustions. The regulations concerning the Antrustions 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 Antrustions. This is because the property of the latter was regulated rather by the political than by the civil law, and this 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.

There is no doubt but the fiefs at first were at will ‡. We find in Gregory of Tours ||, that Suintgisilus and Gallomanus were deprived of all they held of the exchequer, and no more left than what was 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,

* *Comites.* † “*Qui sunt in truste regis.*” *Tit. xlv. art. 41.*

‡ Book i. formul. 18.

|| From the word *trew*; which signifies faithful among the Germans.

§ *Leudes, fidelis.*

* *Vassalli, seniores.*

† *Fiscalia.* See the 14. formulary of Marculfus, book i. It is mentioned in the life of St. 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*.

‡ See the first book, tit. i. of the fiefs; and Cujas on that book.

|| Book ix. chap. 38.

§ “*Quos honoraret muneribus, quos vellet depellere.*”

Ibid. lib. vii.

and those who ought to be deprived of the fiefs. In a formulary * of Marculfus, 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. In this our historians, the formularies, the codes of the different barbarous nations, and all the monuments extant of those days, are unanimous. In fine, the writers of the book of fiefs ‡ inform us, that at first the lords could take them back when they pleased, that afterwards they granted them for the space of a year §, and that at length they gave them for life.

C H A P. XVII.

Of the military service of freemen.

TWO sorts of people were bound to military services: 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 benefices or fiefs, and, on the other, were not subject to the base services of villanage; the lands they possessed were what they called allodial estates.

The count § assembled the freemen, and led them against the enemy; they had officers under them, who

* “ Vel reliquis quibuscumque beneficiis, quodcumque ille, vel fiscus noster, in ipsis locis tenuisse noscitur.” *Lib. i. formul. 30.*

† *Lib. iii. tit. 8. sect. 3.*

‡ “ Antiquissimo enim tempore sic erat in dominorum potestate, connexum, ut quando vellent possent auferre rem in feudum a sedatam: postea vero conventum est, ut per annum tantum firmitatem haberent; deinde statutum est, ut usque ad vitam fidelis produceretur. *Feudorum, lib. i. tit. 1.*

§ It was a kind of a precarious tenure, which the lord consented or refused to renew every year; as Cujas has observed.

§ See the capitulary of Charlemagne in the year 812, art. iii. and iv. edition of Baluzius, tome i. p. 494. and the edict of Pilsen in the year 864, art. xxvi. tome ii. p. 186.

were called * vicars: and as all the freemen were divided into hundreds, which formed what was called a borough, the counts had also officers under them, who were called *centenarii*, and carried the freemen † of the borough, or their hundreds, to the field.

This division into hundreds is posterior to the establishment of the Franks in Gaul. It was made by Clotarius 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. A regulation of this kind is to this very day observed in England.

As the counts carried the freemen against the enemy, the feudal lords carried also their vassals or rear-vassals; and the bishops, abbots, or their || advocates carried likewise theirs §.

The bishops were greatly embarrassed, and * inconsistent with themselves; they requested of Charlemagne not to oblige them any longer to a military service; and when he had 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.

* “Et habeat unusquisque comes vicarios et centenarios secum.”
Book ii. of the capitularies, art. 28.

† They were called *compagenses*.

‡ Published in the year 595. art. i. See the capitularies, edition of Balusius, p. 20. These regulations were undoubtedly made by agreement.

|| Advocati.

§ Capitulary of Charlemagne in the year 812, art. i. et 3 edition of Balusius, tome i. p. 490.

* See the capitulary of the year 803, published at Worms, edition of Balusius, p. 408, et 410.

† Capitulary of Worms, in the year 803, edition of Balusius, p. 409, and the council in the year 845, under Charles the Bald, in *Verna palatio*, edition of Balusius, tome ii. p. 17. art. 8.

In a capitulary * of Lewis le Debonnaire, this prince distinguishes three sorts of vassals, those belonging to the king, those to the bishops, and those to the counts. The vassals † of a fensual lord were not led against the enemy by the count, except some employment in the king's household hindered the lord himself from leading them.

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. Such brave and magnanimous princes as our kings did not take the field to put themselves at the head of an ecclesiastical militia; these were not the men they chose to conquer or die with.

But these lords 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. 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, that, when mention is made in the capitularies of tenants who de-

* The fifth capitulary of the year 819. art. 27. edition of Balusius, p. 618.

† "De vassis dominiis, quæ adhuc intra casam serviunt, et tamē 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." *Capitulary 2. in the year 812. art. 7. edition of Balusius, tom. i. p. 494.*

|| Capitulary 1. of the year 812. art. 5. "de hominibus nostris, et Episcoporum et Abbatum, qui vel beneficia vel talia proprio habent," &c. edition of Balusius, tome i. p. 490.

§ In the year 812, chap. 1. edition of Balusius, p. 490. "Ut omnis homo liber, quæ quator mansos vestitus de proprio suo, sive de alicujus beneficio habet, ipse se præparet, et ipse in hostem pergat, sive cum seniore suo."

* Tome iii. book 6. chap. 4. p. 299. establishment of the French monarchy.

pendent 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 on the capitularies themselves; that which I have just quoted says expressly the contrary. The treaty between Charles the Bald and his brothers, takes notice also of freemen, who might chuse 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 clergy, and their vassals; and, in fine, that of the count, who commanded the freemen.

Not but 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, they were subject to the correction of the count, unless they chose to submit rather to that of the king.

C H A P. XVIII.

Of the double service.

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 Lewis le Debonnaire, in the year 815, makes the military power of the count, and his civil jurisdiction over the freemen, keep always an-

† Capitulary of the year 882, art. 11. "Apud Vernis palatium," edition of Balusius, tome ii. p. 289.

‡ Art. 1, 2. and the council in *Verno palatio* of the year 845. art. 8. edition of Balusius, tome ii. p. 17.

equal pace. Thus the *placita* * of the count, who carried the freemen against the enemy, were † called the *placita* of the freemen; from whence undoubtedly came this maxim, that 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 ‡ belonging to the bishops or to the abbots against the enemy, because they were not subject to the civil jurisdiction. Thus he never commanded the rear-vassals belonging to the king's vassals. Thus the glossary || of the English laws informs us, that those to whom the § Saxons gave the name of *coples*, were by the Normans called *counts*, or, *companions*, because they shared the judiciary fines with the king. Thus we see, that at all times the duty of a vassal * towards his lord, was to bear arms †, 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 fol-

* Or assizes.

† Capitularies, book 4. of the collection of Ansegise, art. 57, and the 5th capitulary of Lewis le Debonnaire in the year 819. art. 14. edition of Balusius, tome I. p. 615.

‡ See the 8th note of the preceding chapter.

|| It is to be found in the collection of William Lambard, *de prisce Anglorum legibus*.

§ In the word *Satrapia*.

* This is well explained by the assizes of Jerusalem, chap. 221 et 222.

† The advowees of the church (*advocati*) were equally at the head of their *placita*, and of their militia.

lowed the variations of the fiefs; both were governed on the same plan, and by the same principles. In a word, the counts in their counties were lords, the lords in their signories were counts.

Those have been mistaken who considered the counts as civil officers, and the dukes as military commanders. Both were equally civil * and military officers; the whole difference consisted in the dukes having several counts under him, though there were counts who had no duke over them, as we learn from Fredegarius †.

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 civil power, nay, even with a fiscal power, over the subjects; which in the preceding books I have observed to be distinguishing marks of despotic authority.

But it is not to be believed that the counts pronounced judgment by themselves, and administered justice in the same manner as the bashaws do in Turkey: In order to judge affairs, they assembled a kind of assizes, where the principal men appeared.

In order to understand thoroughly 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 sheriffs, 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 ‡, he filled up the number with the principal men ||.

* See the 8th 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.

† Chronicle, chap. 78. in the year 636.

‡ See concerning this subject the Capitularies of Lewis le Debonnaire, added to the Salic law, art. 2. and the formula of judgments given by Du Cange in the word "boni homines."

|| "Per bonos hominis," sometimes there were none but principal men. See the appendix to the formularies of Marculfus, chap 51.

But who had the jurisdiction, the king, the count, the *grafio*, the *centenarius*, the lords, or the clergy, they never judged 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. And as for the judiciary rights, there were laws which prevented † misdemeanours.

C H A P. XIX.

Of compositions among the barbarous nations.

SINCE it is impossible to have any tolerable notion of our political law, unless we are thoroughly acquainted with the laws and manners of the German nations, I shall therefore stop here a while, 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 those people. When a man ‡ had injured another, the relations of the person injured took share in the quarrel, and the offence was cancelled by a satisfaction. This satisfaction was made to the person offended, when capable of receiving it; or to the relations, if they had been injured in common, or if by the decease of the party injured, the satisfaction had devolved to them.

* And some tolls on rivers, of which I have spoke already.

† See the law of the Ripuarians, tit. 89. and the law of the Lombards, book 2. tit. 51. sect. 9.

‡ “Suscipere tam inimicitias, seu patris, seu propinqui, quam amicitias necesse est; nec implacabiles durant; luitur enim etiam homicidium certo armamentorum ac pecorum, numero, recipit- que me satisfactionem univ[er]sa domus.” *Tacit de morib. Germ.*

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.

The law * of the Frisians is the only one I find that has left the people in this 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 loose to their revenge, till they had obtained satisfaction. Even this law was moderated; a regulation was made † that the person whose life was sought after should be unmolested in his own house, as also in going and coming from church, and from the court where causes were tried.

The compilers of the Salic laws 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 relations had consented to his being re-admitted. And as before that time a prohibition was made to every one, even to his own wife, not to give him a morsel of bread, or to receive him under their roof; such a man was, in respect to others, and others in respect to him, in a state of nature, 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 injured was to receive. All those barbarian laws are in this respect most admirably exact; the several causes are minutely || distinguished, the circumstances are weighed, the law substitutes itself in the place of the per-

* See this law in the 2d title on murderers; and Vulemar's addition on robberies.

† Additio sapientum, tit. 1. sect. 1.

‡ Salic law, tit. 58. sect. 1. tit. 17.

|| The Salic laws are admirable in this respect; see especially the titles 2, 3, 4, 5, 6. & 7. which related to the stealing of cattle.

son injured, and insists upon the same 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 †, that he had increased the compositions anciently accustomed for wounds, to the end that the wounded person being fully satisfied, all enmities should cease. In fact, as the Lombards, from a very poor people, were grown rich by the conquest of Italy, the ancient compositions were become frivolous, and reconcilements were prevented. I do not question but 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 relations of the deceased. The difference of stations ‡ produced a difference in the compositions: 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 greatness therefore of the composition fixed on the life of a man, was one of his principal prerogatives; for, besides the distinction it made of his person, it likewise established a greater security in his favour among rude and violent nations.

This we are made sensible of by the law of the || Bavarians: It gives the names of the Bavarian families who received a double composition, because they were the first § after the Agilolfings. The Agilolfings were of the ducal race, and it was customary with that nation to chuse a duke out of that family; these had a quadruple composition. The composition for the Duke exceeded

† Book i. tit. 7, sect. 15.

‡ See the law of the Angli, tit. i. sect. 1, 2. and 4, *ibid.* tit. 3, sect. 6. the law of the Bavarians, tit. i. chap. 8. and 9. and the law of the Frisians, tit. 15.

|| Tit. ii chap. 20.

§ Hozidra, Ozza, Sagana, Habilingua, Aniena. *Ibid.*

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 relations."

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, moveables, arms, dogs, hawks †, lands, &c. Very often the law itself 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.

These laws were therefore employed in determining exactly the differences of wrongs, injuries, and crimes; to the end that every one might know precisely 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 very great crime. This crime contained a public, as well as a private offence, it was a contempt of the very law itself: A crime which the legislators ¶ never failed to punish.

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

† Thus the law of Ina valued life by a certain sum of money, or by a certain portion of land. "Legis Inæ regis, titulo de viltico regio, de pñcis Anglorum legibus." *Cambridge*, 1644.

‡ See the law of the Saxons, which makes this same regulation for several people, chap. 18. See also the law of the Ripuarians, tit. xxxvi. sect. 11. the law of the Bavarians, tit. i. sect. 10, 11. "Si aurum non habet, donet aliam pecuniam, mancipia, terram, &c."

¶ See the law of the Lombards, book i. tit. 25, sect. 21, *ibid.* book i. tit. 9. sect. 8. and 34. *ibid.* sect. 38. and the capitulary of Charlemagne in the year 802, chap 32, containing an instruction given to those whom he sent into the provinces.

§ See in Gregory of Tours, book 7, chap. 47, 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 afterwards received.

kings endeavoured to establish a better civil administration: This was the refusing to give or to receive satisfaction. We find in the different codes of the laws of the barbarians, that the legislators obliged them to it *. In fact, a person who refused to receive satisfaction, wanted to preserve his right of revenge; he who refused to give it, left the right of taking revenge 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 this law † by which a person who had stripped a dead body was expelled from society, till the relations, upon receiving satisfaction, petitioned for his being re-admitted. 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 relations of a robber killed in the fact, or to the relations of a woman who had been repudiated for the crime of adultery. The law ‡ of the Bavarians allowed no composition in the like cases, but punished the relations who sought for revenge.

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 §, that in those cases the compositions should be according to the person's generosity; and that

* See the law of the Saxons, chap. 3 and 4. the law of the Lombards, book i. tit. 37. sect. 1 and 2. and the law of the Allemans, tit. xlv. sect. 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. 22. in the year 802. chap. 32 and also that of the year 805. chap. 5.

† The compilers of the laws of the Ripuarians seem to have softened this. See the 85th title of those laws.

‡ See the decree of Tassillon, *de popularibus legibus*, art 3, 4, 10, 16, 19. the law of the Angli, tit. 7.

§ Book i. tit. 9, sect. 4.

the relations should no longer be permitted to pursue their revenge.

Clotarius the Second made a very wise decree; he forbade * the person robbed to receive any clandestine composition, and without an order from the judge. We shall see presently the motive of this law.

CH A P. XX.

Of what was afterwards called the jurisdiction of the lords.

BESIDE the composition which they were obliged to pay to the relations for murders or injuries, they were also under a necessity of paying a certain duty, which the codes of the barbarous laws call *fredum* †. We have no term in our modern languages to express it; yet I intend to treat of it at large; and in order to give an idea of it, I begin with defining it A recompence for the protection granted against the right of revenge.

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 revenge 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 these *freda* might be demanded. When the relations could not prosecute, they allow of no *fredum*; in fact, when there was no prosecution, there could be no composition for a protection against it. Thus, in

* "Pactus pro tenore pacis inter Childebertum et Clotarium," anno 593, et decreto Clotarii II regis circa annum 595, cap. 11.

† When it was not determined by law, it was generally the third of what was given for the composition, as appears in the law of the Ripuarians, chap. 89. which is explained by the third capitulary of the year 813, edition of Ealufius, tome i page 312.

the law of the Lombards *, if a person happened to kill a freeman by chance, he paid the value of the man killed, without the *fredum*; because, as he had killed him involuntarily, it was not the case in which the relations were allowed the right of revenge. Thus in the law of the Ripuarians †, when a man was killed with a piece of wood, or with any instrument made by man, the instrument or the piece of wood was deemed culpable, and the relations 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 relations of the deceased were not offended.

In fine, it was ordained by the Salic law ||, that a child who had committed a fault before the age of twelve, should pay a 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 relations, 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 *. Yet the law of the Ripuarians † forbade him to demand it himself; it ordained, that the party who had gained the cause should receive it, and carry it to the Exchequer, to the end that there might be an eternal peace, says the law, among the Ripuarians.

* Book i. tit. 9. sect. 17, edition of Lindembrock.

† Tit. 70.

‡ Tit. 46. See also the law of the Lombards, book i. chap. 21. sect. 3. Lindembrock's edition; "Si caballus cum pede." &c.

|| Tit. 28. sect. 6.

* As appears by the decree of Clotarius II, in the year 595. "*fredus tamen judici in cujus pago est reservetur.*"

† Tit. 89.

The greatness of the *fredum* was proportioned to the greatness of the 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.

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 fruit and possible emolument from them. And as one of the most considerable emoluments || was the judiciary profits (*freda*), which were received according to the usage of the Franks, it followed from 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 relations, 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 law-fines.

We find by the formularies containing a confirmation of the perpetuity of the fief, in favour of a feudal lord § or of the privileges of fiefs in favour of the churches * that the fiefs were possessed of this right. This appears also from an infinite number of charters †, containing a prohibition of the king's judges or officers of entering

‡ *Capitulaire incerti anni*, chap. 57. in Baluzius, tome i. p. 515. and it is to be observed, that what was called *fredum* or *fraida*, in the monuments of the first race, is called by the name of *bannum* in those of the second race; as appears from the capitulary *de partibus Saxonie*, in the year 789.

|| See the capitulary of Charlemagne *de villis*, where he ranks these *freda* among the number of the great revenues of what was called *villa*, or the king's demesnes.

§ See the 3d, 4th, and 17th formula, book i. of Marculfus.

* See the 2d, 3d, and 4th formula of Marculfus, book i.

† See the collections of those charters, especially that at the end of the 5th volume of the historians of France, published by the Benedictine Monks.

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 demand any thing in a district, they never entered it; and those to whom this district was left, exercised 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 kings commissaries shall no longer insist upon being accommodated with a lodging; in effect, they no longer exercised 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 has been considered at all times in this light; from 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 || that there were freemen dependent on the 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 comprised in 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 others nations

|| See the 3d, 4th, and 14th of the first book, and the charter of Charlemagne, in the year 771, in Mar:enne, tome i. anecdot. collect. II. "Præcipientes jubemus, ut nullus iudex publicus—
"homines ipsius ecclesiæ & monasterii ipsius Morbacensis, tam inge-
"nuos quam et servos, et qui super eorum terras manere," &c.

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 *, 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 cunning people in the world; they must have robbed and plundered, not after the manner of a military people, but as the judges of a village and the attornies rob one another. Those brave warriors must be said to have formed throughout all the particular provinces of the kingdom, and in so many kingdoms, a general system of politics: Loyseau makes them reason as he himself reasoned in his closet.

Once more: If the jurisdiction was not a dependance of the fief, how come we every where to find †, that the service of the fief was to attend the king or the lord, both in their courts and in the army?

* Treatise of village jurisdictions.

† See Mons. du Cange on the word *hominium*.

C H A P. XXI.

Of the territorial jurisdiction of the churches.

THE churches acquired a very considerable property. We find that our kings gave them great feignories, that is, great fiefs; and we find jurisdictions established at the same time in the demesnes of those churches. From whence could so extraordinary a privilege derive its origin? It must certainly have been in the nature of the thing given: the church land had this privilege, because it had not been taken from it. A feignory was given to the church; and it was allowed to enjoy the same privileges, as if it had not been given to a vassal. It was also subjected to the same service as it would have paid to the state, if it had been granted 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 the 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.

The law of the Ripuarians † forbids the freedmen of ‡ the churches to hold the assembly || for administering justice in any other place than in the church where they were manumitted. The churches had therefore jurisdictions even over freemen, and held their *placita* in the earliest times of the monarchy.

* See the third and fourth formulary of Marculfus, book i.

† "Ne alicubi, nisi ad ecclesiam ubi relaxati sunt, malum teneant." Tit. lxviii. sect. i. See also sect. xix. Lindembrock's edition.

‡ Tabulariis.

|| Mallum.

I find in the lives of the saints *, that Clovis gave to a certain holy person a 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 relative to the customs and laws of those times, and it is these customs † and laws we are investigating.

Clotarius II. orders the ‡ bishops or the nobility, who are possessed of estates in distant parts, to chuse upon the very spot those who are to administer justice, or to receive the judiciary emoluments.

The same || prince regulates the judiciary power between the ecclesiastic courts and his officers. 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 to exercise any jurisdiction over * those who are employed in manuring churchlands, except they entered into that state by fraud, and to exempt themselves from contributing to the public charges. Another † ordains, that the churches should have both criminal and civil jurisdiction over those who live upon their lands. In fine, as the capitulary of ‡

* Vita St. Germeri Episcopi Tolosani apud Bollandianos, 16. Maii.

† See also the life of St. Mellanious, and that of St. Deicola.

‡ In the council of Paris, in the year 615. "Episcopi vel potentes, qui in aliis possident regionibus, iudices vel missos diffusores de aliis provinciis non instituunt, nisi de loco qui iustitiam percipiant et aliis reddant." Art. xix. See also art. xii.

|| Ibid. art. v.

§ In the law of the Lombards, book ii. tit 44. c. 2. Lindembrock's edition.

* "Servi Aldiones, libellarii antiqui, vel alii noviter facti." Ibid.

† A capitulary of the year 806; it is added to the law of the Bavarians, art. vii. See also part iii. Lindembrock's edition, p. 444. "Imprimis omnium jubendum est, ut habeant ecclesie earum iustitias et in vita illorum qui habitant in ipsis ecclesiis, et post eam in pecuniis quam et in substantiis earum."

‡ In the year 857, in synodo apud Carisiacum, art iv. edition of Balusius, p. 96.

Charles the Bald distinguishes between the king's jurisdiction, that of the lords, and that of the church, I shall say nothing further * upon this subject.

C H A P. XXII.

That the jurisdictions were established before the end of the second race.

IT has been pretended, that the vassals usurped the jurisdiction in their seignories, during the disorders of the second race. Those who chuse rather to form a general proposition than 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 relations, 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.” It is well known what it was to put one's self under the protection of another for a benefice.

“He who has been robbed of his bondmen,” says the law of the Allemans ‡, “shall have recourse to the prince to whom the robber is subject, to the end that he may obtain a composition.”

“If a centenarius,” says * the decree of Childebert,

* See the letter written by the bishops assembled at Rheims in the year 858, art. vii. in the capitularies, Balusius'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.” &c.

† Tit. iii. chap. 13. Lindembroek's edition. ‡ Tit. lxxxv.

* In the year 595, art. xi. and xii. edition of the capitularies by Balusius, p. 19. “Pari conditione convenit, ut si uno centena in alia centena vestigium secuta fuerit et invenerit, vel in quibuscunque fideliū nostrorum terminis vestigium miserit, et ipsum in aliam centenam minime expellere potuerit, aut convictus reddat latronem,” &c.

“ 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 represent the robber, or purge him by oath.” There was therefore a difference between the district of the centenarii and that of the vassals.

This decree † of Childebert explains the constitution of Clotarius in the same year, which, being given for the same case and fact, differs only in the terms, the constitution calling *in truste*, what by the decree is called *in terminis fidelium nostrorum*. Messieurs Bignon and Ducange ‡, who pretend that *in truste* signified another king’s demesne, are mistaken in their conjecture.

But, to finish the dispute at once, the second race was neither in disorder nor in its decline under Charlemagne; during his reign there were no usurpations. If then the patrimonial jurisdictions were established in his time, this convenient system falls of itself to the ground.

Pepin, king of Italy, in a constitution || that had been made as well for the Franks as for the Lombards, 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 mean time either the judge or his commissary shall administer justice.

† “ Si vestigium comprobatur latronis, tamen presentia nihil longe mulcendo; aut si persequens latronem suum comprehenderit, integram sibi compositionem accipiat. Quod si in truste invenitur, medietatem compositionis trustis adquirit, et capitale exigat a latrone,” Art. ii. and iii.

‡ See the glossary on the word *trustis*.

|| Inserted in the law of the Lombards, book ii. tit. 52. sect. 14. It is the capitulary of the year 793 in Baluzius, page 544. art. 10.

§ “ Et si forsitan Francus aut Longobardus habens beneficium justitiam facere noluerit, ille iudex in cujus ministerio fuerit, concedat illi beneficium suum, interim dum ipse aut missus ejus justitiam faciat.” See also the same law of the Lombards, book ii. tit. 52. sect. 2. which relates to the capitulary of Charlemagne in the year 779, art. xxi.

It appears by a capitulary * of Charlemagne, that the kings did not levy the *freda* in all places. Another † capitulary of the same prince repeals several articles of the Salic, Burgundian, and Roman law, to the end that his ‡ vassals may observe an uniformity in the administration of justice. By another || of the same prince we find the feudal laws, and feudal court already established. Another of Lewis le Debonnaire ordains, that when a person possessed of a fief does not administer justice §, or hinders it from being administered, the king's commissaries shall live upon him at discretion, till justice be administered. I shall likewise quote two * capitularies of Charles the Bald; one of the year 861, where we find the particular jurisdictions established, with judges and subordinate officers; and the other † of the year 864, where he makes a distinction between his own seignories and those of private people.

We have not the original grants of the fiefs, because they were established by the division which is known to have been made among the conquerors. It cannot 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

* The third of the year 813, art. x.

† The second of the year 813. Balusius's edition, page. 506.

‡ "Unusquisque fidelis justitias ita faceret." *Ibid.*

|| The second capitulary of the year 819.

§ Capitulare quintum anni 817, art. xxiii. Balusius's edition, p. 617. "Ut ubicunque missi, aut episcopum, aut abatem, aut aliam quemlibet honore præditum invenerint, qui justitiam facerit noluit vel prohibuit, de ipsius rebus vivant quamdiu in eo loco justitias facere debent."

* Edictum in Carisiaco in Balusius, tome ii page 152. "Unusquisque advocatus pro omnibus de sua advocacione—in convenientia, ut cum ministerialibus de sua advocacione quos invenerit contra hunc bannum nostrum fecisse—castiget."

† Edictum Pistense, art. 18. Balusius's edition, tome ii. p. 181. "Si in fiscum nostrum, vel in quamcunque immunitatem, aut alius cujus potentis potestatem vel proprietatem confugerit," &c.

siefs 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 sief, and one of its chief prerogatives.

We have a far greater number of records that establish the patrimonial jurisdiction of the clergy in their districts, than we have to prove that of the benefices or siefs of the feudal lords, for which there are two reasons: 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 exception to the order established, they were obliged to have charters granted to them; whereas the concessions made to the feudal lords being consequences 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 by the life of St. Maur.

But the third formulary * of Marculfus sufficiently proves, that the privilege of immunity, and consequently that of jurisdiction, were common to the clergy and the laity, since it is made for both.

C H A P. XXIII.

General idea of the Abbé du Bos's book on the establishment of the French monarchy in Gaul.

BEFORE I finish this book, it will not be improper to inquire a little into the Abbé du Bos's work, because my notions are perpetually contrary to his; and, if he has hit on the truth, I must have missed it.

This work has imposed upon a great many people, because it is written with a vast deal of art; because the

* Lib. i. "Si beneficia opportuna locis ecclesiarum, aut cui voluerit decerne."——

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 from 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 are arrived at our journey's end.

But when we examine 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 have been obliged to write three huge volumes to prove it; he would have found every thing 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."

C H A P. XXIV.

The same subject continued. Reflections on the main part of the system.

THE Abbé du Bos endeavours by all means to explode the received 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 cannot be applied to the time when Clovis, upon his entering Gaul, took and plundered

the towns; neither is it applicable to the time when he defeated Syagrius the Roman commander, and conquered the country which he held: it can therefore be referred only to the time 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 of the country. 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 this gentleman produce any convincing proof 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 being able to tell us the fate of this republic, he cannot 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 a 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 Zozimus *, that under the emperor Honorius the † country of Armorica and the other provinces of Gaul revolted, and formed a kind of republic, and shewing us that, notwithstanding the different pacifications of Gaul, the Armoricans always formed a particular republic, which continued till the conquest of Clovis; and yet this is what he should have shown by strong and substantial proofs, in order to establish his system: for

* Hist. lib. vi.

† "Totusque tractatus Armoricus aliasque Galiarum provinciarum." *Ibid.*

when we behold a conqueror entering a country, and subduing a great part of it by force and open violence, and soon after we 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 Chilperic his father in the office of *magister militum*. But these two offices are merely of his own creation. St. Remigius's letter to Clovis, on which he grounds his opinion §, is only a congratulation upon his accession to the crown. When the intent of a writing is so well known, why should we give it another turn?

Clovis, towards the end of his 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 proconsul: 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 proconsulate. And even this proconsulate could have lasted only about six months. Clovis died a year and a half after he was made consul; and we cannot pretend to make the proconsulate an hereditary office. In fine, when the consulate, and if you will the proconsulate, were conferred upon him, he was already master of the monarchy, and all his rights were established.

The second proof alledged 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 shewn to it by the kings of the Franks, from the manner in which they performed the condition 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 to 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 agreed on; the laws of each nation were given, and even reduced into writing. What could therefore that foreign renunciation avail to a government already established?

What can the Abbé du Bos mean by making such a parade of the declamations of all those bishops, who in the midst of the disorder, confusion, and total subversion of the state, as well as in the ravages of conquest, endeavour to flatter the conqueror? What else is implied by flattering, but the weakness of him who is obliged to flatter? What does rhetoric and poetry prove, but the use of those very arts? Is it possible to help being surpris'd 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 amongst the Romans, but they must have even changed themselves.

- I could undertake to prove, by following this author's method, that the Greeks never conquered Persia. I would set out with mentioning the treaties which some of their cities concluded with the Persians: I would 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 out to meet him. Listen to the oracle of Jupiter Hammon. Recollect how he had been predicted at Gordium. See what a number of towns croud, as it were, to submit to him, and how all the satraps and grandees come to pay him obeisance. He puts 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 Quintus Curtius, Arrian, or Plutarch, Alexander's contemporaries? Has not the invention of § printing afforded us great lights, which those authors wanted? Such is the history of the "establishment of the French monarchy in Gaul."

C H A P. XXV.

Of the French nobility.

THE Abbe du Bos maintains, that, at the commencement 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

§ See the preliminary discourse of the Abbé du Bos,

grandeur would not therefore be lost in oblivion, night and time. History would point out the ages when they were common 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. By this 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; 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 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. In fact, it would have been vastly extraordinary that the Roman nobility, who lived under the domination of the Franks, should have a larger composition, and been persons of much greater importance than the most illustrious among the Franks, and their greatest general. 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 very extraordinary indeed, that this general rule should have failed only among the Franks: This ought to have made him conclude either that he did not rightly understand, or that he misapplied the passages of the Salic law; which is actually the case.

* See the establishment of the French monarchy, vol. iii. book 6. chap. 4. p. 304.

† He cites the 44th title of this law, and the law of the Ripuarians, tit. 7 and 36.

Upon opening this law, we find that the composition for the death of an antrustio *, 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. We find there that ‡ the composition for the death of an ordinary Frank || was two hundred sous, and for the death of an ordinary Roman § only one hundred. For the death of a Roman * tributary, who was a kind of bondman or freeman, they paid a composition of forty five sous: But I shall take no notice of this, no more than of the composition for the murder of 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 in respect to the first order of persons among the Franks; that is, the article relating to the antrustio; and afterwards, 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 the Romans.

As this gentleman 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 parts of our monarchy. But

* "Qui in truste dominica est," tit. 44. sect. 4. and this relates to the 13th formulary of Marculfus *de regis antrustione*. See also tit. 66. of the Salic law, sect. 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. 20.

† Salic law tit. 44. sect. 6.

‡ Salic law, tit. 44. sect. 4.

|| Tit. 44. sect. 1.

§ Tit. 44. sect. 15.

• Salic law, tit. 44. sect. 7.

in their codes † we find three sorts of compositions, one for the Burgundian 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. 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. 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 prerogatives of law; 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. On the other hand, if you speak to him of some Franks of an inferior rank †, he says they are bondmen; and thus he interprets the decree of Childebert. But I must stop here a little, to enquire 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 interests added to corporal punishments, which entirely subverts all the ancient records; the other, that all freemen were judged directly and immediately by the king ||, which is contradicted by an infinite number of passages and authorities that inform us of the § judiciary order of those times.

† “ 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 solidis.” *Art. 1. 2. and 3. tit. 26. of the law of the Burgundians.*

* Establishment of the French monarchy, vol. iii. book 6. chap. 4. and 5.

† lb. chap. v. p. 319. and 320.

‡ lb. chap. iv. p. 307. and 308.

|| lb. p. 309. and in the following chapter, p. 319. and 320.

§ See book xxviii. of this work, chap. 28. and book xxxi. chap. 2.

This decree, which was made in an assembly * of the nation, 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 upon 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 comparative necessarily supposeth three terms, the greatest, the lesser and the smallest. If none were here meant but freemen and bondmen, they would have said *a bondman*, and not *a man of lesser power*. Wherefore *debilior persona* does not signify a bondman, but a person of superior condition to a bondman. Upon this supposition, *Francus* cannot 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 a greater power in the state, and it was more difficult for the judge or count to chastise them. This explication agrees very well with a great number of capitularies †, where we find the cases in which the criminals were to be carried before the king, and those in which it was otherwise.

We find in the life of Lewis le Debonnaire ‡, written by Tegan, that the bishops were the principal cause of the humiliation of this emperor, especially those who had been bondmen, and those who were born among the Barbarians. Tegan thus addresses Hebo, whom this prince had drawn from the state of servitude, and made

* “Itaque colonia convenit et ita bannivimus, ut unusquisque judex criminofum latronem ut audierit, ad casam suam ambulet ipsum ligare faciat; ita ut si Francus fuerit, ad nostram præsentiam dirigatur; et si debilior persona fuerit, in loca pendatur.” *Capitulary of Balusius's edition, tome i. p. 19.*

† See book xxviii. of this work, chap. 28. and book xxi. chap. 8.

‡ Chap. 43 and 44.

Archbishop of Rheims. "What recompence † 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."

This discourse, which proves so strongly the two orders of citizens, does not at all confound the Abbé du Bos. He answers thus *: "The meaning of this passage is not, that Lewis le Debonnaire was incapable of introducing Hebo into the order of nobility. Hebo, as archbishop of Rheims, must have been of the first order, superior to that of the nobility." But I leave the reader to judge whether this be not the meaning of that passage; I leave him to judge whether there can be any question here concerning a precedence of the clergy over the nobility. "This passage proves only," continues the same writer †, "that the free-born 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 Lewis le Debonnaire be applied to this sort of people? "And perhaps," continues he still †, "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, who had opposed Lewis le Debonnaire, some of whom had been bond-

† "O qualem remunerationem reddidisti ei! fecit te liberum non nobilem, quod impossibile est post libertatem." *Ibid.*

* Establishment of the French monarchy, vol. iii. book vi. chap. 4. page 3, 6.

† *Ibid.*

‡ *Ibid.*

§ "Omnes episcopi molesti fuerunt Lodovico, et maxime ii quos e servili conditione honoratos habebat, cum his qui ex barbaris nationibus ad hoc fastigium perducti sunt." *De gestis Lodovici Pii. cap. 43 et 44.*

men, and others of a barbarous nation. Hebo belonged to the first, and not to the second. 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. Lewis le Debonnaire manumitted Hebo; and, as bondmen after their manumission embraced the law of their masters, Hebo was 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 afterwards for life, this could not form a nobleness of descent, since the prerogatives were not annexed 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 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 afterwards, the same fief; but, if they had not that, they had another, because the fiefs were given on account of their birth, and because they were often given in the assemblies of the nation; and in fine, because, as it was the interest of the nobility to have them, it was likewise the king's interest to give them. These families were distinguished by their dignity of trusty men, and by the prerogative of being qualified to vow fealty for a fief. In the following book *, I shall

shew, that by the circumstances of time there were freemen, who were permitted to enjoy this great prerogative, and consequently to enter into the order of nobility. It was not so 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 freedmen were absolutely excluded. Will the Abbé du Bos *, who carries us to Turkey to give us an idea of the ancient French nobility; will he, I say, pretend that they ever complained in Turkey of the elevation of people of low birth to the honours and dignities of the state, as they complained under Lewis le Debonnaire and Charles the Bald? There was no complaint of this kind under Charlemagne, because this prince always distinguished the ancient from the new families; which Lewis le Debonnaire and Charles the Bald did not.

The public should not forget the obligation it has 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, we ought to judge of his merit. He fell into very great mistakes, because he had more in view the Count of Boulanvillier's works than his own subject.

From all these criticisms I shall draw only one reflection: If so great a man was mistaken, what ought not I to fear?

† Establishment of the French monarchy, vol. iii. book vi. chap. 4. page 302.

B O O K XXXI.

Theory of the Feudal Laws among the Franks, in the relation they bear to the revolutions of their Monarchy.

C H A P. I.

Changes in the offices and in the fiefs. Of the mayors of the palace.

THE counts at first were sent into the district, 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; he sent his son Mommulus 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.

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 had seized this, as well as the other article, 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 †, that, independently of the grants which the princes made for a certain time, there were others in perpetuity. The court wanted to revoke the grants that had been made:

* Gregory of Tours, book iv. chap. 42.

† Chap. 7.

This occasioned a general discontent in the nation, and was soon followed with that revolution famous in the French history, whose first epoch was the amazing spectacle of the execution of Brunehild.

It appears at first extraordinary, that this queen, who was daughter, sister, and mother to so many kings, a princess to this very day famous for works worthy of an ædile or a Roman proconsul, born with an admirable genius for affairs, endowed with qualities so long respected, should see herself of a sudden * exposed to so tedious, so shameful, so a cruel a punishment, by a king † whose authority was but indifferently established in the nation, if she had not incurred that nation's displeasure for some particular cause. Clotarius 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, and a nation that had permitted Fredegunda § to die in her bed, that had even opposed the punishment of her flagitious crimes, ought to have been very indifferent in respect to those of Brunehild.

She was put upon a camel, and led ignominiously through the army; a certain sign that she had given great offence to that army. Fredegarius relates, that Protarius §, Brunehild'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 Brunehild, either by revenging his

* Fredegarius's chronicle, chap. 43.

† Clotarius II. son of Chilperic, and father of Dagobert.

‡ Fredegarius's chronicle, chap. 44.

§ See Gregory of Tours, book viii. chap. 31.

§ "Sæva illi fuit contra personas iniquitas, fisco nimium tribuens, de rebus personarum ingeniose fisco velle implere—ut nullus reperiretur qui gradum quem arripuerat potuisset adincre." *Fredeg. chron. chap. 27. in the year 605.*

death *, or by pursuing the same plan, became every day more odious to the nation †.

Clotarius, ambitious of reigning alone, inflamed moreover with the most furious revenge, and sure of perishing if Brunechild'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 Brunechild's accuser, and made a terrible example of that princefs.

Warnacharius had been the very soul of the conspiracy formed against Brunechild, being at that time mayor of Burgundy, he made Clotarius consent ‡ that he should not be displaced while he lived. By this means the mayor could no longer be in the same case, as the French lords before that time; and this authority began to render itself independent of the regal dignity.

It was Brunechild's unhappy regency which had exasperated the nation. As long as the laws subsisted in their full force, no one could complain for 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 deprived, by irregular means, of things that had been irregularly acquired. Perhaps, if the public good had been the motive of the revocation of these grants, nothing would have been said; but they made a show of order, without concealing the 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. Brunechild, through a corrupt spirit, wanted to reform the abuses of the ancient corruption. Her caprices did not proceed from weakness; the vassals and the great officers, thinking themselves in danger, prevented their own by her ruin.

* Ibid. cap. 28. in the year 607.

† Ibid. cap. 41. in the year 613. "*Burgundia arones, tam episcopi quam ceteri leudes, timentes Brunichildum, et odium in eum habentes, consilium inientes, &c.*"

‡ Ibid. chap. 42. in the year 613. "*Sacramento a Clotario accepto, ne unquam vitæ suæ temporibus degradaretur.*"

We are far from having all the records of what was transacted in those days; and the writers of chronicles, who understood very near as much of the history of their time, as our country clowns know of ours, were extremely barren. And yet we have a constitution of Clotarius, given in the council * of Paris for the reformation of abuses †, 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, and on the other, he ordains || that whatever had been taken from his vassals should be restored to them.

This was not the only concession the king made in this council; he enjoined, that whatever had been innovated, in opposition to the privileges of the clergy, should be corrected *, and he moderated the influence of the court in the elections † of bishops. He even reformed the fiscal affairs, ordaining that all the new censuses ‡ should be abolished, and that they should not levy any toll || established since the death of Gontram, Sigebert, and Chilperic; that is, he abolished whatever had been done during the regencies of Fredegunda and Brune-

* Some time after Brunchild's execution in the year 615. See Balufius's edition of the capitularies, page 21.

† “ Quæ contra rationis ordinem acta vel ordinata sunt, ne in antea, quod avertat divinitas, contingant, disposuerimus, Christo præsule, per hujus edicti tenorem generaliter emendare.” *Ibid.* art. 16.

‡ *Ibid.* art. 16.

|| *Ibid.* art. 17.

* “ Et quod per tempora ex hoc prætermisum est, vel dehinc perpetualiter observetur.”

† “ Ita ut episcopo decedente, in loco ipsius, qui a metropoli tano ordinari debet, cum principalibus a clero et populo eligatur; et si persona condigna fuerit, per ordinationem principis ordinetur: vel certe si de palatio eligitur, per meritum personæ et doctrine ordinetur.” *Ibid.* art. 1.

‡ “ Ut ubicunque census novus impie additus est, emendetur.” *Art.* 8.

|| *Ibid.* art. 9.

child. He forbade the driving of his cattle * to graze in private people's grounds; and we shall presently see that the reformation was still more general, and extended even to civil affairs.

C H A P. II.

How the civil government was reformed.

HITHERTO the nation had given marks of impatience and levity, in respect to the choice or conduct of her masters; she had regulated their differences, and obliged them to come to an agreement amongst 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, put a stop to violence, and moderated the regal power.

The masculine, bold, and insolent regencies of Fredegunda and Brunechild, had less surprised than warned the nation. Fredegunda had defended her villainies by new villainies; she had justified her poisonings and assassinations by poisonings and assassinations, and had behaved in such a manner, that her outrages were rather of a private than public nature. Fredegunda did more mischief; Brunechild threatened more. In this crisis, the nation was not satisfied with setting the feudal government to rights, she was also determined to secure her civil government; for the latter was rather more corrupt than the former; and this corruption was so much the more dangerous, as it was more ancient, and depended more, in some measure, on the abuse of manners than on that of laws.

The history of Gregory of Tours shews us, on the one hand, a fierce and barbarous nation, and, on the other, kings of as bad a character. These princes were bloody, unjust, and cruel, because all the nation were so. If

* Ibid. art. 21.

Christianity seemed sometimes to soften them, it was only by the terror which this religion imprints on the guilty; the church supported herself against them by the miracles and prodigies of her saints. The kings were not addicted to sacrilege, because they dreaded the punishments inflicted on sacrilegious people; but this excepted, they committed, either in their passion or in cool blood, all manner of crimes and injustice, because in these the revengeful hand of the Deity did not appear so visible. The Franks, as I have already observed, bore with bloody kings, because they were fond of blood themselves; they were not affected with the wickedness and extortions of their princes, because this was their own character. There had been a great many laws established, but the king rendered them all useless by a kind of letters called precepts *, which subverted those laws: These were in the nature of the rescripts of the Roman Emperors, whether it be that our kings borrowed this usage of them, or derived it from their own natural disposition. We see in Gregory of Tours, how they committed murders in cool blood, and put the accused to death, who had not been so much as heard; they gave precepts † for illicit marriages; they gave them for depriving relations of their rights; and they gave them, in fine, to qualify men to marry consecrated virgins. They did not indeed make laws of their own authority, but they suspended the execution of those that had been already made.

Clotarius's constitution redressed all these grievances: no one ‡ could any longer be condemned without being heard; relations || were made to succeed according to the

* They were orders which the king sent to the judges to do or to tolerate things contrary to law.

† See Gregory of Tours, book iv. page 227. Both our history and the charters are full of this; and the extent of these abuses appears especially in Clotarius's constitution, inserted in the edition of the capitularies made to reform them. Baluzius's edition, page 7.

‡ Article 22.

|| Ibid. article 6,

order established by law; all precepts for marrying religious women were made null *, 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 two next 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 cannot be understood of those he had just abolished by the same law. We have another constitution † by the same prince, which is relative to his decree, and corrects in the same manner every article of the abuses of the precepts.

True it is that Balufius, finding this constitution without date, and without the name of the place where it was given, attributes it to Clotarius I. But I say it belongs to Clotarius II. for three reasons. 1. It says that the king will preserve the immunities granted ‡ to the churches by his father and grandfather. What immunities could the churches receive from Childeric grandfather of Clotarius I. who was not a Christian, and who lived even before the foundation of the monarchy? But if we attribute this decree to Clotarius II. we shall find his grandfather to have been this very Clotarius 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 burnt, together with his wife and children.

2. The abuses redressed by this constitution were still subsisting after the death of Clotarius I. and were even carried to their highest extravagance during the weakness of Gontram's reign, the cruelty of that of Chilperic, and the execrable regencies of Fredegunda and Brunechild. Now, is it possible that the nation could have bore with

* Ibid. article 18.

† In Balufius's edition of the capitularies, tome i. page 7.

‡ 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.

grievances so solemnly proscribed, without ever complaining of the continual repetition of those grievances? It is possible that she could forbear doing at that time what she did afterwards, when Childeric II. renewing the old oppressions *, she pressed him to ordain † that the law and customs should be complied with as formerly in judicial proceedings.

In fine, as this constitution was made to redress grievances, it cannot relate to Clotarius I. since there were no complaints of this kind in his reign, and his authority was well established throughout the kingdom, especially at the time in which they place this constitution; whereas it agrees very well with the events which happened during the reign of Clotarius II. which produced a revolution in the political state of the kingdom. We must clear up history by the laws, and the laws by history.

C H A P. III,

Authority of the mayors of the palace.

I TOOK notice that Clotarius II. had promised not to deprive Warnacharius of his mayor's place during life. This revolution had another effect; before this 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; but § after that, the mayors were chosen by the nation *.

* He began to reign towards the year 670.

† See the life of St. Leger.

|| "Instigante Brunechilde, Theodorica jubente." *Fredegarius*, chap. 27. in the year 605.

§ *Gesta rerum Francorum*, cap. 36.

* See *Fredegarius's* chronicle, chap. 54. in the year 616, and his anonymous continuator, chap. 101. in the year 695. and chap. 105, in the year 715. *Aimoin*, book iv. chap. 15. *Eginhard*, life of Charlemagne, chap. 48. *Gesta rerum Francorum*, chap. 45.

We must not therefore confound, as some authors have done, these mayors of the palace with those who were possessed of this dignity before the death of Brunechild; 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 first in the state *, nor was it one of the most eminent under the first kings of the Franks †.

Clotarius removed the apprehensions of those who were possessed of employments and fiefs; and, when after the death of Warnacharius || he asked the lords assembled at Troyes, who is it they would put in his place? they cried out they would chuse no one; and, petitioning for his favour, they entrusted themselves entirely into his hands.

Dagobert reunited the whole monarchy in the same manner as his father; the nation had a thorough confidence in him, and appointed no mayor. This prince, finding himself at liberty, and elated by his victories, resumed Brunechild's plan. But this 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.

He determined then to make an offer to the Austrasians of resigning Austrasia to his son Sigibert, together with a treasure, and to put the government of the kingdom and of the palace into the hands of Cunibert

* See the law of the Burgundians in præf. and supplement 2. to it, tit. 13.

† See Gregory of Tours, book ix. chap. 36.

|| "Eo anno Clotarius cum proceribus et leudibus Burgundiæ Trecaffinis conjungitur; Cum eorum esset sollicitus, si vellent, jam Warnacharia discesso, alium in ejus honoris gradum sublimare. Sed omnes unanimiter denegantes se nequaquam velle majorem domus eligere, regis gratiam obnixè petentes, cum rege transgere." *Fredegarius's chronicle*, chap. 54. in the year 626.

§ "Istam victoriam quam Winidi contra Francos meruerunt, non tantum Slavonorum fortitudo obtinuit, quantum dementatio Austrasiorum, dum se cernebant cum Dagoberto odium incurrisse, et assidue expoliarentur." *Fredegarius's chronicle*, chap. 68. in the year 630.

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 *.

Dagobert, finding himself near his last 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 †. Æga and Nentechildis had the government of ‡ the palace; they restored whatever Dagobert had taken ||; and complaints ceased in Neustria and Burgundy, as they had ceased before in Austrasia.

After the death of Æga, the queen Nentechildis § engaged the lords of Burgundy to chuse Floachatus for their mayor. The latter dispatched letters to the bishops and chief lords of the kingdom of Burgundy, by which he promised to preserve their honours and dignities * for ever, that is, during life. He confirmed his word by oath. This is the period †, at which the author of the treatise of the mayors of the palace fixes the administration of the kingdom by those officers.

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 as to what relates to the mayors of Austrasia and Neustria. But the conventions made in

* “Deinceps Austrasii, eorum studio, limitem et regnum Francorum contra Winidos utiliter defensasse noscuntur.” *Fredegarius's chronicle*, chap. 75. in the year 632.

† Fredegarius's chronicle, chap. 79. in the year 638.

‡ Ibid.

|| Ibid. chap. 80. in 639.

§ Ibid. chap. 89. in the year 641.

* Ibid. cap. 89. “Floachatus cunctis ducibus a regno Burgundix seu et pontificibus, per epistolam etiam et sacramentis firmavit unicuique gradum honoris et dignitatem, seu et amicitiam, perpetuo conservare.”

† “Deinceps a temporibus Clodovei, qui fuit filius Dagoberti inelyti regis, pater vero Theodorici, regnum Francorum decedens, per majores domus cepit ordinarii.” *De majoribus domus regia*,

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.

CHAP. IV.

Of the genius of the nation in regard to the mayors.

A GOVERNMENT, in which a nation that had an hereditary king, chose a person who was to exercise the royal authority, seems very extraordinary; but, independently of the circumstances of those times, I find that the notions of the Franks in this respect were derived from a higher source.

They were descended from the Germans, of whom Tacitus says *, that in the choice of their king they were determined by his nobility, 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 assembly of the nation, and offered themselves as the conductors of an enterprise to such as were willing to follow them, united generally in their own person both the king's authority and the mayor's power. By their noble blood they had attained the royal dignity; and, their valour having procured them several followers who pitched upon them for their leaders, this gave them the power of mayor. By the royal dignity our first kings presided in the courts and assemblies, and gave laws with the consent of those assemblies; by the dignity of Duke or leader they entered upon 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

* "Reges ex nobilitate, duces ex virtute sumunt." *De morib. Germ.*

the conduct * of Argobastes, a Frank by nation, on whom Valentinian had conferred the command of the army. He shut the Emperor up in his own palace, where he would not suffer any person whomsoever to speak to him concerning either civil or military affairs. Argobastes did at that time what was afterwards practised by the Pepins.

C H A P. V.

In what manner the mayors obtained the command of the armies.

AS long as the kings commanded their armies in person, the nation never thought of chusing a leader. Clovis and his four sons were at the head of the Franks, and led them on through a long series of victories. Theobald son of Theodobert, a young, weak, and sickly prince, was the first † of our kings that confined himself to his palace: He refused to engage in an expedition in Italy against Narſes, and he had the mortification to see the Franks ‡ chuse themselves two chiefs, who led them against the enemy. Of the four sons of Clotarius I. Gontram || was the least fond of commanding his armies; the other kings followed this example, and, in order to intrust the command without danger into other hands, they conferred it upon several chiefs or dukes §.

Innumerable were the inconveniences which thence arose; all discipline was lost, no one would any longer

* See Sulpicius Alexander, in Gregory of Tours, book ii.

† In the year 552.

‡ "Leutharis vero et Butilinus, tametsi id regi ipsorum minime placebat, belli cum eis societatem inierunt." *Agathias*, book i. *Gregory of Tours*, book iv. chap. 9.

|| Gontram did not even march against Gondovald, who styled himself son of Clotarius, and claimed his share of the kingdom.

§ Sometimes to the number of twenty. See Gregory of Tours, book v. chap. 27 book viii. chap. 18. and 30. book x. chap. 3. 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. *Fredegar's chronicle*, chap. 78. in the year 636.

obey. The armies were dreadful only to their own country; they were loaden with spoils, before they had reached the enemy. Of these miseries we have a very lively picture in Gregory of Tours *. “How shall we “be able to obtain a victory,” said Gontram †, “we “who do not so much as keep what our ancestors ac- “quired? 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 that they should determine at last upon an only duke, a duke who was to be vested with an authority over this prodigious multitude of feudal lords and vassals, who were 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 afterwards, in conjunction ‡ with other officers, the political government of the fiefs, and at length they obtained the sole disposal of them. They had also the administration of military affairs, and the command of the armies; and these two employments were 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 cause preferences to be dreaded. It was therefore right that the person, who had the superintendency of the palace, should also be general of the army.

* Greg. of Tours, book viii. ch. 30. & book x. ch. 3.

† Ibid.

‡ See the second supplement to the law of the Burgundians, tit. xiii. and Gregory of Tours, book ix. chap. 36.

C H A P. VI.

Second epocha of the humiliation of our kings of the first race.

AFTER the execution of Brunchild, the mayors were administrators of the kingdom under the kings; and though they had the management of the war, yet the kings were always at the head of the armies, and the mayor and the nation fought under their command. But the victory * of Duke Pepin over Theodoric and his mayor completed † the degradation of our kings, and that ‡ which Charles Martel obtained over Chilperic and his mayor Rainfroy confirmed it. 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 they showed them to the people. There they made ordinances, but § these were such as were dictated by the mayor; they answered ambassadors, 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.

* See the annals of Metz in the year 687 and 688.

† "Illis quidem nomina regum imponens, ipse totius regni habens, privilegium," &c. *Annals of Metz in the year 695.*

‡ Annals of Metz in the year 719.

|| "Sedemque illi regalem sub sua ditione concessit." *Ibid.* anno 719.

§ Ex chronico Centulesi, lib. ii. "Ut responsa quæ erat doc-tus, vel potius iustus, ex sua velut potestate, redderet."

* Annals of Metz, anno 691. "Anno principatus Pipini super Theodoricum."——Annals of Fuld, or of Laurishan. "Pippinus dux Francorum obtinuit regnum Francorum per annos 27 cum regibus sibi subiectis."

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; they put him over one Dagobert, that is, one phantom over another.

C H A P. VII.

Of the great offices and fiefs under the mayors of the palace.

THE mayors of the palace were far from reviving the precariousness of posts and employments; for indeed their power was owing to the protection which in this respect they had granted to the nobility. Hence the great offices were 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; and in the first place, I do not question but most of them became hereditary from this time.

In the treaty of Andeli †, Gontram and his nephew Childebert engage to maintain the donations made to the vassals and churches by the kings his 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.

Marculfus wrote his formularies at the time || of the mayors. We find several § in which the kings made

* "Posthæc Theudoaldus filius ejus (Grimoaldi) parvulus in loco ipsius, cum prædicto rege Dagoberto, majordomus palatii effectus est." *The anonymous continuator of Frédegarius in the year 714, ch. cxliv.*

† Cited by Gregory of Tours, book ix. See also the edict of Clotarius II. in 615. art. xvi.

‡ "Ut si quid de agris fiscalibus vel speciebus atque præsidio, pro arbitri sui voluntate, facere aut cuiquam conferre voluerint, fixa stabilitate, perpetuo conservetur."

|| See the 24th and the 34th of the first book.

§ See the 14th formulary of the first book, which is equally applicable to the fiscal estates given directly and in perpetuity, or given at first as a benefice and afterwards in perpetuity, "sicut ab illo aut a fisco nostro fuit possessio." See also the 17th formula. *ib.*

donations both to the person and to his heirs; and, as the formularies are images of the common actions of life, they prove that part of the fiefs were become hereditary towards 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 no less than positive facts; and, if I can show 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 the kings to confer rewards; it was natural that 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.

C'H A P. VIII.

In what manner the allodial estates were changed into fiefs.

THE manner of changing an allodial estate into a fief may be seen in a formulary of Marculfus*. 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 latter 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

* Book i. formulary 13.

the source of the ancient prerogatives of our nobility ; a nobility who, for these eleven centuries, have been covered with dust, sweat, and blood.

Those who were seized of fiefs enjoyed very great advantages. 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 the king's vassal, that whoever killed him should pay a composition of six hundred sous. This privilege was established by the Salic law *, and by that of the Ripuarians †; and, at the same time that these two laws ordained a composition of six hundred sous for the murder of the king's vassal, they gave but ‡ two hundred for the murder of a person freeborn, if he was a Frank or barbarian living under the Salic law, and only one hundred for a Roman.

This was not the only privilege belonging to the king's vassals. When || a man was summoned in court, and did not make his appearance, nor obey the judges orders, he was appealed before the king ; and, if he persisted in his contumacy, he was excluded from § the king's protection, and no one was allowed to entertain him, or even to give him a morsel of bread. Now, if he was a person of an ordinary condition, his goods * were confiscated ; but, if he was the king's vassal, they were not †. 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, the latter || was condemned to this

* Tit. xlv. See also tit. lxvi. sect. 3 and 4, and tit. lxxiv.

† Tit. ii.

‡ See also the law of the Ripuarians, tit. vii. and the Salic law, tit. xlv. art. 1 and 4.

|| Salic law, tit. 59 & 76.

§ Extra sermonem regis. *Salic law, tit. 59 and 76,*

* lb. tit. 59. sect. 1.

† lb. tit. 76. sect. 1.

‡ lb. tit. 56 & 59.

|| lb. tit. 76. sect. 1.

trial only in the case of murder; in fine, the king's vassal † could not be compelled to swear in court against another vassal. These privileges augmented daily, and the capitulary of Carlomanus ‡ does this honour to the king's vassals, that they shall not be obliged to swear in person, but only by the mouth of their own vassals. Besides, when a person who had 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 §, who neglected to follow his count, paid a composition § of sixty sous, and was reduced to a state of servitude till he paid it.

It is very natural therefore to think 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 afterwards as a fief, and of nominating him to their heirs. This usage was always continued, and took place especially during the disorders of the second race, when every body stood in need of a protector, and wanted to incorporate himself with * the other lords, and to enter as it were into the feudal monarchy, because the political no longer existed.

This continued under the third race, as we find by several † charters: whether they gave their *allodium*, and resumed it by the same act, or whether it was declared an *allodium*, and afterwards acknowledged as a fief. These were called *fiefs of resumption*.

† Ib. tit. 76. sect. 2.

‡ *Apud Vernis Palatium*, in the year 883, art. 4 & 11.

§ Capit. of Charlam anno 812. art. 1 & 31.

§ Heribannum.

* *Non infirmis reliquet heredibus*, says Lambert d'Ardres in Du Cange on the word *Alodis*.

† 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.

This does not imply, that those who were seized of fiefs administered them like prudent fathers of families; for though the freemen grew desirous of being possessed of fiefs, yet they managed this sort of estates as usufructs are managed in our days. This is what induced Charlemagne, the most vigilant and attentive prince we ever had, to make a great many regulations * to hinder the fiefs from being degraded in favour of allodial estates. This proves only that in his time most benefices were still only for life, and consequently that they took more care of the *allodia*, than of the benefices; but it is no argument that they did not chuse rather to be the king's bondmen than freemen. They might have reasons for disposing of a particular portion of a fief, but they were not willing to be stripped even of their dignity.

I know likewise that Charlemagne complains in a certain capitulary †, that in some places there were people who gave away their fiefs in property, and redeemed them afterwards in property. 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, and is the case of the formulary above-mentioned, they had very great advantages in doing it.

C H A P. IX.

How the church-lands were converted into fiefs.

THE use of the fiscal lands should have been only to serve as donations, by which the kings were to encourage the Franks to undertake new expeditions, and

* Second capitulary of the year 802. art. 10. and the 7th capitulary of the year 803. art. 3. the 1st capitulary *incerti anni*, art. 49. the 5th capitulary of the year 806. art. 7. the capitulary of the year 779, art. 29. & the capitulary of Lewis le Debonnaire, in the year 829, art. 1.

† The 5th of the year 806, art. 8.

by which, on the other hand, these fiscal lands were increased. This, as I have already observed, was the spirit of the nations; but these donations took another turn. There is still extant * a speech of Chilperic, 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 †; none reign now but bishops, who live in grandeur, while our grandeur is over."

This was the reason that the mayors, who durst not attack the lords, stripped the churches; and one of the ‡ motives alledged by Pepin for entering Neustria, was his having been invited thither by the clergy to put a stop to the incroachments of the kings, that is, of the mayors, who stripped the church of all her possessions.

The mayors of Austrasia, that is, the family of the Pepins, had behaved towards the clergy with more moderation than those of Neustria and Burgundy. This is evident by our chronicles ||, in which we see the monks eternally admiring 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.

Pepin subdued Neustria and Burgundy: but, as his pretence for destroying the mayors and kings was the oppression of the clergy, he could not strip them without contradicting his own title, and shewing 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.

* In Gregory of Tours, book vi. chap. 46.

† This is what induced him to annul the testaments made in favour of the clergy, and even the donations of his father. Gontram re-established them, and made even new donations, *Gregory of Tours, book vii. chap. 7.*

‡ See the annals of Metz, in the year 687. "Excitor impiis querelis sacerdotum et servorum Dei, qui me sæpius adierunt, ut pro sublatiis injuste patrimoniiis," &c.

|| See the annals of Metz.

§ In Gregory of Tours,

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 clergy, by receiving both from rich and poor, had acquired a great part even of the allodial estates, he stripped the church; and as the fiefs of the first division were no longer in being, he formed a second division *. He took for himself and for his officers the church-lands and the churches themselves, and put a stop to an evil which differed in this respect from ordinary evils, that, by being extreme, it was so much the more easy to cure.

C H A P. X.

Riches of the clergy.

SO great were the donations made to the clergy, that under the three races of our princes they must have possessed several times 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 religion founded a great number of churches under the first race; but the military spirit was the cause of their being given away afterwards to the soldiery, who divided them amongst 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 afterwards, plundered and ravaged all before them, persecuting especially the priests and monks, and continually searching out for abbeys and other religious foundations.

* "Karlus plurima juri ecclesiastico detrahens prædia, fisco se-
"ciavit, ac deinde militibus dispertivit." *Ex chronico Gentulensi*,
lib. ii.

In this situation, what a loss 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 were broached and spread in those days would have deprived the laity of all their estates, if they had been but honest enough. But, if the clergy were full of ambition, the laity were not without theirs; if they gave their estates upon their death-bed to the church, their successors wanted to resume them. We meet with nothing but continual quarrels between the lords and the bishops, the gentlemen and the abbots; and the clergy must have been very hard set, since they were obliged to put themselves under the protection of certain lords, who defended them for a moment, and afterwards oppressed them.

But now a better administration, which had been established under the third race, gave the clergy leave to augment their possessions; when the Calvinists sallied forth, and coined money of all the gold and silver they found in the churches. How could the clergy be sure of their estates, when they were not even sure of their persons? They were treating of controversial subjects, while their archives were burning. What did it avail them to demand again of a ruined nobility what these were no longer possessed of, or what they had mortgaged a thousand ways? The clergy have constantly acquired, constantly refunded, and yet are still acquiring.

C H A P. XI.

State of Europe at the time of Charles Martel.

CHARLES Martel, who undertook to strip the clergy, found himself in a most happy situation. He was both feared and loved by the soldiery, whose interest he promoted, having the pretence of his wars against the Saracens. He was hated indeed by the

clergy, but * he had no need of them. The Pope, to whom he was necessary, stretched out his arms to him. Every one knows the famous embassy † he received from Gregory III. These two powers were strictly united, because they could not do one without the other; the Pope stood in need of the Franks to support him against the Lombards and the Greeks; the Franks had occasion for the Pope to serve for a barrier against the Greeks, and to embarrass the Lombards. It was impossible therefore for the enterprize of Charles Martel to miscarry.

St. Eucherius, bishop of Orleans, had a vision which frightened all the princes of that time. I must produce to this purpose the letter ‡ written by the bishops assembled at Rheims to Lewis king of Germany, who had invaded the territories of Charles the Bald, because it will show us the state of things in those times, and the disposition of peoples minds. They say ||, “ That St. Eucherius, having been snatched up into heaven, he saw Charles Martel tormented in the bottom of hell by order of the saints, who are to assist with Jesus Christ at the last judgment; that he had been condemned to this punishment before his time for having stripped the churches of their possessions, and thereby rendered himself guilty of the sins of all those who had endowed them; that king Pepin had held a council upon this occasion; that he had ordered all the church-lands he could recover to be restored to the church; that, as he could get back only a part of them, because of his disputes with *Veirfre* duke of Aquitaine, he issued out

* See the annals of Metz.

† “ Epistolam quoque, decreto Romanorum principum, sibi prædictus præsul Gregorius miserat, quod sese populus Romanus, relicta imperatoris dominatione, ad suam defensionem et victurna clementiam convertere voluisset.” *Annals of Metz, year 741.* “ Eo pacto patrato, ut a partibus imperatoris recederet.” *Fredegarius.*

‡ Anno 858, apud Carisiacum; Balus. edit. tome i. p. 101.

|| lb. art. vii. p. 109.

“ letters called *precaria* * in favour of the churches for
 “ the remainder, and made a law, that the laity should
 “ pay a tenth 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 made a capitulary, by which he engaged, both for
 “ himself and for his successors, never to give them away;
 “ that all they say is committed to writing, and that a
 “ great many of them heard the whole related by Lewis
 “ le Debonnaire, the father of those two kings.”

King Pepin's regulation mentioned by the bishops, was made in the council held at Leptines †. 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, which did not remove the disorder.

This even met with opposition, and Pepin was obliged to make another capitulary ‡, 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.

That part of the same letter, which says that Charlemagne promised, both for himself and for his successors,

* “ *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 3d 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 deploma of this king in the 5th tome of the historians of France by the Benedictines, art. vi.

† In the year 743. See the 5th book of the capitularies, art. 3 Balusius's edition, page 825.

‡ That of Metz in the year 756, art. 4.

|| See his capitulary in the year 893, given at Worms, Balusius's edition, page 411, where he regulates the precarious contract; and that of Frankfort in the year 794, page 267. art 24, in relation to the repairing of the houses; and that of the year 800, page 330.

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 continued *. The bishops very justly add, that Lewis le 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 Lewis le Debonnaire introduced priests into their churches †, or drove them away, without the consent of the bishops. The churches were divided amongst the next heirs ‡, and when they were held in an indecent manner, the bishops had no other remedy left || than to remove the relics.

But by the capitulary of Compiègne §, it is enacted, that the 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; and this general rule shows that the abuse was general.

Not that there were laws wanting for the restitution of the church-lands. The Pope having reproached 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 with this reproach, because

* As appears by the preceding note, and by the capitulary of Pepin king of Italy, where it says, that the king would give the monasteries in fief to those who would vow fealty for fiefs, it is added to the law of the Lombards, book iii. tit. I. sect. 3. to the Salic laws, collection of Pepin's laws in Echard, page 195, tit. 26. art. 4.

† See the constitution of Lotarius I. in the law of the Lombards, book iii. law I. sect. 43.

‡ Ibid. sect. 44.

§ See the constitution of Lotarius I. in the law of the Lombards, book ii. law I. sect. 44.

§ Given the 28th year of the reign of Charles the Bald in the year 868. Balusius's edition, page 203.

* "Cum consilio et consensu ipsius qui locum retinet."

† Concilium apud Bonoilum, the 16th year of Charles the Bald, in the year 856, Balusius's edition, page 78.

they were not culpable, and they reminded him of what had been promised, resolved, and decreed, in so many national assemblies. In fact, they quoted nine.

Still they went on disputing, till the Normans came and made them all agree.

C H A P. XII.

Establishment of the tithes.

THE regulations made under King Pepin had given the church rather hopes of relief, than effectively relieved her; and as Charles Martel found all the landed estates in the hands of the clergy, Charlemagne found all the church-lands in the hands of the soldiery. The latter could not be forced to restore what had been given them; and the circumstances of that time rendered the thing still more impracticable than it was of its own nature. On the other hand, Christianity ought not to perish for want of ministers *, churches and instructions.

This was the reason of Charlemagne's establishing the tithes †; 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 establishment of an earlier date; but the authorities they produce seem rather, I think, to prove the contrary. The constitution of Clotarius ‡ says only, that they shall not raise certain

* 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 St. Remigius, Surius, tome i. page 279.

† Law of the Lombards, book iii. tit. 3. sect. 1. and 2.

‡ It is that on which I have descanted in the 4th chapter of this book, and is to be found in Baluzius's edition of the capitularies, tome i. art. II. page 9.

tithes || on church-lands; 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 Macon *, 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 the Leviticus. But I say, that before that prince's reign, though the tithes might have been preached up, yet they were never established.

I took notice, that the regulations made under king Pepin had subjected those who were seized of the church-lands in fief to the payment of tithes, and to the repairing of the churches. It was a great point to oblige by a law, whose justice 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*, that he obliged his own demesnes to the payment of the tithes: this was still a greater example.

But the common people are hardly capable of being induced by examples to give up their own interests. The synod of Frankfort ‡ furnished them with a more cogent motive to pay the tithes. A capitulary was made in that synod, wherein it is said, that in the last famine || the

|| “Agraria et pascua, vel decimas porcorum, ecclesiæ concedimus, ita ut actor aut decimator in rebus ecclesiæ nullus accedat.” The capitulary of Charlemagne in the year 800, Balusius's edition, page 336, explains extremely well what is meant by that sort of tithe from which the church is exempted by Clotarius; it was the tithe of the hogs 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 seignior or œconomy.

* Canone 5, tomo i. conciliorum antiquorum Galliæ, opera Jacobi Sirmundi.

† Art. 6. Balusius's edition, page 332, it was given in 800.

‡ Held under Charlemagne, in the year 794.

|| “Experimento enim didicimus, in anno quo illa valida fames irrepfit, ebullire vacuas annonas a dæmonibus devoratas, et voces, exprobrationis auditas, &c. Balusius's edition, page 267. art. 23.

ears of corn were found empty, having been devoured by devils, and that the voices of those infernal spirits had been heard, reproaching 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 was extended to all.

Charlemagne's project did not succeed at first; for it seemed too heavy a burthen *. The payment of the tithes among the Jews was connected with the plan of the foundation of their republic: but here the payment of tithes was a burthen quite independent of the other charges of the establishment of the monarchy. We find, by the regulations † added to the law of the Lombards, the difficulty there was in causing the tithes to be accepted by the civil laws; and how difficult it was to get them admitted by the ecclesiastical laws, we may easily judge from the different canons of the council.

The people consented at length to pay the tithes, upon condition that they might have a power of redeeming them. This the constitution of Lewis le Debonnaire ‡, and that of the Emperor Lotharius || his son would not allow.

The laws of Charlemagne, in regard to the establishment of tithes, were a work of necessity; a work in which religion only, and not superstition, 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 wanted to restore the church to that fixed and permanent state which she had lost.

* See amongst the rest the capitulary of Lewis le Debonnaire, in the year 849, Balusius's edition, p. 663. against those who, to avoid paying tithes, neglected to cultivate the lands, &c. art. 5. "Nonis quidem et decimis unde et genetor noster et nos frequenter in diversis placitis admonitionem fecimus."

† Among others, that of Lotarius, book iii. tit. 3. chap. 6.

‡ In the year 829. art. 7. in Balusius, tome i. p. 663.

|| In the law of the Lombards, book iii. tit. 3. sect. 8.

His will shows *, that he was desirous of repairing the mischief done by his grandfather Charles Martel. He made three equal shares of his moveable goods; two of these he divided each into one-and-twenty parts, for the one-and-twenty metropolitan churches of his empire; each part was to be subdivided between the metropolitan and the suffragan bishops. The remaining third he divided into four parts; one he gave to his children and grandchildren, another was added to the two thirds already given, and the other two were bequeathed 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.

C H A P. XIII.

Of the elections of bishops and abbots.

AS the churches were become poor, the kings resigned the right of nominating † to bishoprics, and other ecclesiastical benefices. The princes gave themselves less trouble about the ministers of the church: and the candidates were less solicitous in applying to their authority. Thus the church received a kind of compensation for the possessions she had lost.

Hence if Lewis le Debonnaire ‡ left the people of Rome in possession of the right of chusing their Popes, it was owing to the general spirit that prevailed in his time: He behaved in respect to the See of Rome, the same as to other bishoprics.

* It is a kind of codicil produced by Eginhard, and different from the will itself, which we find in Goldastus and Balusius.

† See the capitulary of Charlemagne in the year 803. art. 2. Balusius's edition, p. 379. and the edict of Lewis le Debonnaire in the year 834. in Goldast. constit. Imperial. tome i.

‡ This is mentioned in the famous canon, *Ego Lodovicus*, which is visibly supposititious; it is in Balusius's edition, page 591. in 817.

C H A P. XIV.

Of the fiefs of Charles Martel.

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 *, and Lotharius I. † there were possessions of this kind which descended to the next heirs, and were divided amongst them.

I find moreover that one part of them ‡ was given as *allodia*, and the other as fiefs.

I took notice, that the proprietors of the *allodia* were subject to the service as well as the possessors of the fiefs. This, without doubt, was partly the reason that Charles Martel made grants of the allodial lands, as well as of fiefs.

C H A P. XV.

The same subject continued.

WE must observe, that the fiefs having been changed into church-lands. and these again into fiefs, they both borrowed something of one another's nature. Thus

* As appears by the capitulary, in the year 801. art. 17. in Balusius's tome i. p. 360.

† See his constitution inserted in the code of the Lombards, book iii. tit. 1. sect. 44.

‡ See the above constitution, and the capitulary of Charles the Bald, in the year 846, chap. xx. in villa Sparnaco, Balusius's edition, tome ii. p. 31. and that of the year 853, chap. iii. and v. in the synod of Soissons, Balusius's edition, tome ii. p. 54. and that of the year 854. apud Attiniacum, chap. x. Balusius's edition, tome ii. p. lxx. See also the first capitulary of Charlemagne, *incerti anni*, art. 49 and 56. Balusius's edition, tome i. p. 519.

the church-lands had the privileges of fiefs, and these had the privileges of church-lands: such were the * honourable rights of the churches, established in those days.

C H A P. XVI.

Confusion of the royalty and mayoralty. The second race.

THE order of my subject has made me break through the order of time, so as to speak of Charlemagne before I had made mention of the famous epocha of the translation of the crown to the Carlovingians under king Pepin: A revolution which, contrary to the nature of common events, is more remarked perhaps in our days than when it happened.

The kings had no authority; they had only an empty name. The title of king was hereditary, and that of mayor elective. Though the mayors in the latter times set whom they pleased of the Merovingians on the throne, they had not yet taken a king of another race; and the ancient law which fixed the crown in a particular family, was not yet effaced out of the hearts of the Franks. The king's person was almost unknown in the monarchy; but the royalty was well known. Pepin, son of Charles Martel, thought it would be proper to confound these two titles, a confusion which would leave it uncertain 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

* See the capitularies, book v. art. 44. and the edict of Pistes the year 899. art. 8 and 9. where we find the honourable rights of the lords established in the same manner as they are at this very day.

elective, because people chose; it was hereditary, because they always chose in the same family *.

Father le Cointe, in opposition to the authority of all ancient records †, denies ‡ that the Pope authorised this great change; and one of his reasons is, that he would have committed an injustice. A fine thing to see an historian judge of what men have done, by what they ought to have done! At this rate we should have no history at all.

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 a ceremony the more, and a phantom the 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 revolution, to the end 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 a government; but when Pepin ascended the throne, there was only a transition from one government to another of the same nature.

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 united to the greatest fief.

* See the will of Charlemagne, and the division which Lewis le Debonnaire made to his children in the assembly of the states held at Quiercy, produced by Goldast. "Quem populus eligere velit ut patri suo succedat in regni hereditate."

† The anonymous chron. in the year 752, and chronic. Centul. in the year 754.

‡ "Fabella que post Pippini mortem excogitata est, æquitati ac sanctitati Zachariæ Papæ plurimum adversatur."—*Ecclesiasticæ annals of the French*, tom. ii. page 319.

C H A P. XVII.

A particular thing in the election of the kings of the second race.

WE find by the formulary * of Pepin's consecration, that Charles and Carloman were also anointed and blessed; and that the French nobility bound themselves, on pain of interdiction and excommunication, never to chuse a prince † of another family.

It appears, by the wills of Charlemagne and Lewis le 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 conditional, became simple and absolute; so that the ancient constitution was altered.

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. We have not the acts of this assembly; but we find what was there transacted, in the author of the ancient historical collection, published by Canisius, and in the || writer of the annals of Metz, according to § the observation of Balusius. Here I meet with two things in some measure contradictory; that he made this division with the consent of the nobility, and afterwards that he made it by his paternal authority. This proves what I said, that the people's right in the second race was to chuse in the same family; it was, properly speaking, rather a right of exclusion, than of election.

* Vol. v. of the historians of France, by the Benedictines, p. 9.

† "Ut nunquam de alterius lumbis regem in ævo præsument eligere sed ex ipso." Vol. v. of the historians of France, p. 10.

‡ In the year 768.

|| Tome ii. lectionis antiquæ.

§ Edition of the capitularies, tome i. p. 188.

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 division, he says *, “That if one of the three brothers happens to have a son, such as the people shall be willing to chuse 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 division † which Lewis le Debonnaire made among his three children, Pepin, Lewis and Charles, in the year 837, at the assembly of Aix-la-Chapelle; and likewise in another ‡ division, made twenty years before, by the same emperor, between Lotarius, Pepin and Lewis. We may likewise see the oath which Lewis the Stammerer took at Compeigne, at his coronation. “I Lewis, by the divine mercy, and the people’s election ||, appointed king, do promise”———What I say is confirmed by the acts of the council of Valence § held in the year 890, for the election of Lewis son of Boson to the kingdom of Arles. Lewis was there elected; and the principal reason they gave for chusing him is, that he was of the Imperial family *, 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.

* In the 1st capitulary of the year 806, Balusius’s edition, page 439. art. 5.

† In Goldast. Imperial. Constitut. tome ii. p. 19.

‡ Balusius’s edition, p. 574. art. 14. “Si vero aliquis illorum descensus 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.”

§ Capitulary of the year 877, Balusius’s edition, p. 272.

§ In father Labbe’s councils, tome ix. col. 424. and in Dumont’s corp. diplomat. tome i. art. 36.

* By the mother’s side.

C H A P. XVIII.

C H A R L E M A G N E.

CHARLEMAGNE's attention 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 designs of their own, but employing them entirely in following his. 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 regulations; and, what was still more admirable, 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 spirit of fore-cast and sagacity that comprises every thing, and a certain force that makes every thing give way. All pretexts * for evading the performance of duties are removed, neglects are corrected, abuses reformed, or prevented. 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 was ever possessed in a higher degree of the art of performing the greatest things with ease, and the most difficult with expedition. He was continually traversing the several parts of his vast empire, and made them feel the weight of his hand wherever it fell. New difficulties sprung up on every side, and on every side he removed

* See his 3d capitulary of the year 811. p. 486. art. 1, 2, 3, 4, 5, 6, 7 and 8, and the 1st capitulary of the year 812. p. 490. art. 1. and the capitulary of the year 812. p. 494. art. 9, 11. and others.

them. Never prince had more resolution in facing dangers; never prince knew better how to shun them. He mocked all manner of perils, and particularly those to which great conquerors are generally subject, namely conspiracies. This surprising prince was extremely moderate, of a very mild character, and of a plain simple behaviour. He loved to converse freely with the lords of his court. He gave way perhaps too much to 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 succession of toils, may merit some indulgence. He was wonderfully exact in his expences; administering his demesnes with prudence, attention, and œconomy. A father * might learn from his laws how to govern his family; and we find in his capitularies the pure and sacred source from whence he derived his riches. I shall add only one word more! He gave orders that † the eggs of the barons of his demesnes, and the superfluous herbs of his gardens, should be sold; a most wonderful œconomy in a prince who had distributed among his people all the riches of the Lombards, and the immense treasures of those Huns who had plundered the universe.

C H A P. XIX.

The same subject continued.

THIS great prince was afraid lest those whom he intrusted in different parts with the command should be inclined to revolt; and thought he should find more docility among the clergy. For this reason he erected a great number of bishoprics in Germany ‡, and endowed

* See the capitulary *de villis*, in the year 800, his 2d capitulary of the year 813. art. 6. and 19. and the 5th book of the capitularies, art. 303.

† Capitul. *de villis*, art. 39. See this whole capitulary, which is a masterpiece of prudence, good administration, and œconomy.

‡ See among others the foundation of the archbishopric of Bremen, in the capitulary of the year 789. Balusius's edition, page 245.

them with very large fiefs. It appears by some charters, that the clauses containing the prerogatives of those fiefs, were not different from those which were commonly inserted in those grants * ; 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 he used against the Saxons. That which he could not expect from the indolence and supineness of a vassal, he thought he might promise himself from the sedulous attention of a bishop. Besides, a vassal of that kind, far from making use of the conquered people against him, would rather stand in need of his assistance to support himself against his people.

C H A P. XX.

The successors of Charlemagne.

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 Ptolomies, he answered, 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 own strength or 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 hand which had been held by Charlemagne.

* For instance, the prohibition to the king's judges against entering upon the territory to demand the *fredo*, and other duties. I have said a good deal concerning this in the preceding book.

Lewis le Debonnaire mixing all the indulgence of an old husband, with all the weakness of an old king, flung his family into disorder, which was followed with the downfall of the monarchy. He was continually altering the divisions he had made among his children. And yet these divisions 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 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 strong holds, and when the principal bulwark of authority was the fealty sworn and accepted.

The emperor's children, in order to preserve their divisions, courted the clergy, and granted them privileges till then unheard. These privileges were specious; the clergy were induced to warrant a thing which those princes would have been glad they had authorised. Agobard * represents to Lewis le Debonnaire, his having sent Lotarius 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 a superstitious prince make against the attack of superstition! It is easy to perceive what a shock the supreme authority must have twice received from the imprisonment of this prince, and from his public penance; they wanted to degrade the king, and they degraded the royal dignity.

* See his letters.

C H A P. XXI.

The same subject continued.

THE strength which the nation had derived from Charlemagne, lasted well enough under Lewis le Debonnaire, to enable the state to support its grandeur, and to command respect from strangers. This prince's understanding was weak, but the nation was warlike. The royal authority declined at home, though there seemed to be no diminution of power abroad.

Charlemagne, his father, and his grandfather, were successive rulers of the monarchy. The first flattered the avarice of the soldiers; the other two that of the clergy; and the children of Lewis le Debonnaire, excited the ambition of both.

In the French constitution, the whole power of the state was lodged in the hands of the king, the nobility, and clergy. Charles Martel, Pepin, and Charlemagne, joined sometimes their interest with one of those parties to check the other, and generally with both: But the children of Lewis le Debonnaire disjoined both those bodies from the king, by which means the royal authority was too much debilitated.

C H A P. XXII.

The same subject continued.

THE clergy had reason to repent the protection they had given to Lewis le Debonnaire's children. This prince, as I have already observed, had never given * any of the church-lands by precepts to the laity; but it was not long before Lotarius in Italy, and Pepin in Aquitaine, quitted Charlemagne's plan, and resumed

* See what the bishops say in the synod of the year 845, *apud Teudonis villam*, art. iv.

that of Charles Martel. The clergy had recourse to the emperor against his children, but they themselves had weakened the authority they sued. In Aquitaine some condescension was shewn, but none in Italy.

The civil wars with which the life of Lewis le Debonnaire had been embroiled, were the seed of those which followed his death. The three brothers, Lotarius, Lewis, and Charles, endeavoured each to bring over the nobility to their party. To those therefore who were willing to follow them, they granted the church-lands by precepts: so that to gain the nobility, they sacrificed the clergy.

We find in the capitularies * that those princes were obliged to yield to the importunity of so many demands, and that what they would not often have freely granted, was extorted from them: we see that the clergy thought themselves more oppressed by the nobility than by the kings. It appears also, that Charles the Bald † became the greatest enemy of the patrimony of the clergy, whether he has most incensed against them for having degraded his father on their account, or whether he was the most timorous. Be this as it may, we meet with ‡ continual quarrels in the capitularies between the clergy

* See the synod in the year 845, *apud Teudonis villam*, art. iii. and iv. which gives a very exact description of things; as also, that of the same year, held at the palace of Vernes, art. xii. and the synod of Beauvois also in the same year, art. iii. iv. and vi. and the capitulary in *villa Sparnaco*, in the year 846, art. xx. and the letter which the bishops assembled at Rheims wrote in 858, to Lewis king of Germany, art. viii.

† 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; some canons of the synod were picked out, and they were told that these were the only ones which should be observed; nothing was granted them but what was impossible to be refused. See art. xx. xxi. xxii. See also the letter which the bishops assembled at Rheims wrote, in the year 858, to Lewis king of Germany, and the edict of Pîtres, in the year 864, art. v.

‡ 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. iv. wherein the clergy reduced themselves to

who demanded their lands, and the nobility who refused, evaded, or deferred to restore them; and the kings between both.

The situation of things at that time is a spectacle really deserving of pity. While Lewis le Debonnaire made immense donations out of his demesnes to the church, his children distributed the possessions of the clergy among the laity. The same hand which founded new abbeys, often pulled down the old ones. The clergy had no fixed state: one moment they were stripped, another they received satisfaction; but the crown was continually losing.

Towards 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 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 Lewis king of Germany in the year 858: but they proposed things and challenged promises so often eluded, that we plainly see they had no longer any hopes of obtaining their desire.

All that could be expected then was † to repair in general the injuries done both to church and state. The kings engaged not to deprive their vassals of their freedom, and not to give away the church-lands any more by precepts ‡; so that the interests of the clergy and nobility seemed then to be united.

demand only the restitution of what they had been possessed of under Lewis le Debonnaire. See also the capitulary of the year 851. *apud Marfnam*, art. vi. and vii. 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 remedied; and, in fine, the letter which the bishops assembled at Rheims wrote, in the year 858, to Lewis king of Germany, art. viii.

* Art. viii.

† See the capitulary of the year 853, art. vi. and vii.

‡ Charles the Bald in the synod of Soissons says, that he had

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 give hereafter, they thought they had no better resource left, than to put themselves in the hands of the clergy. But the clergy had weakened the power of the kings, and the kings had weakened the influence of the clergy.

In vain did Charles the Bald and his successors call in the church to support the state, and to prevent its fall; in vain did they avail themselves of the * respect the people had for that body, to maintain that which they should have also for their prince; 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; in vain, to counterbalance the authority of the count ||, did they give to each bishop the title of their commissary in the several provinces: It was impossible for the clergy to repair the mischief they had done; and a terrible misfortune of which I shall speak anon, tumbled the crown to the ground.

promised the bishops not to issue out any more precepts relating to church-lands. *Capitularies of the year 853, art. xi. Balus. edition, tome ii. p. 56.*

* See the capitulary of Charles the Bald *apud Saponarias*, in the year 859, art. iii. "Venilon, whom I made archbishop of Sens, has consecrated me; and I ought not to be expelled the kingdom by any body; 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 presenti sum subditus."

† See the capitulary of Charles the Bald, *de Carisiaco*, in the year 857. Balusius's edition, tome ii. page 88. art. 1, 2, 3, 4, and 7.

‡ See the synod of Pistes in the year 862, art. iv. and the capitulary of Carloman and of Lewis II. *apud Vernis palatiam*, in the year 883, art. iv. and v.

|| Capitulary of the year 876, under Charles the Bald, *in synodo Pontigonensi*, Balusius's edition, art. xii.

C H A P. XXIII.

That the freemen were rendered capable of holding fiefs.

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 vow fealty for a fief, but in process of time this was permitted; and I find that this change was made during the time that elapsed from the reign of Gontram to that of Charlemagne. This I prove by the comparison that may be drawn between the treaty of Andely †, signed by Gontram, Chilbert, and Queen Brunchild, and the ‡ division made by Charlemagne among his children, as well as a like division made by Lewis le Debonnaire. These three acts contain pretty near the same regulations with regard to the vassals; and, as they regulate the very same points under almost the same circumstances, the spirit, as well as the letter, of those three treaties, are very near the same in this respect.

But as to what concerns the freemen there is a capital difference. The treaty of Andely does not say that they might vow fealty for a fief; whereas we find, in the divisions of Charlemagne and Lewis le Debonnaire, express clauses to empower them to vow fealty. This shews that a new usage had been introduced after the treaty of Andely, whereby the freemen were become capable of this great privilege.

* See what has been said already, book xxx. chap. ult. towards the end.

† In the year 587. in Gregory of Tours, book ix.

‡ See the following chapter, where I shall speak more diffusively of those divisions; and the notes in which they are quoted.

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.

C H A P. XXIV.

THE PRINCIPAL CAUSE OF THE HUMILIATION OF THE SECOND RACE.

Changes in the allodia.

CHARLEMAGNE, in the division * 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 prince's dominions, and not in those † of another; whereas they ‡ might keep their allodial estates in any of their dominions. But he adds ||, that every freeman might, after the death of his lord, vow fealty in any of the three kingdoms to whom he pleased, as well as he that never had had a lord. We find the same regulations in the division which Lewis le Debonnaire made among his children in the year 817.

* In the year 806, between Charles, Pepin, and Lewis; it is quoted by Goldast, and by Balusius, tome i, page 439.

† Art. ix. page 453. which is agreeable to the treaty of Andely in Gregory of Tours, book ix,

‡ Art. x. and there is no mention made of this in the treaty of Andely.

|| In Balusius, tome i. page 574. "Licentiam habeat unusquisque liber homo qui seniore non habuerit, cuicumque ex his tribus fratribus voluerit se commendandi," art. ix. See also the division made by the same emperor in the year 837, art. vi. Balusius's edition, page 686.

But, though the freemen had vowed fealty 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 serve the fief in his stead: and, when some abuses had been introduced upon this head, they were redressed, as appears by the constitutions * of Charlemagne, and by that † of Pepin king of Italy, which explain each other.

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 that battle, the three brothers, Lotarius, Lewis, and Charles, made a treaty ‡, wherein I find some clauses which must have altered the whole political system of the French government.

In the declaration || which Charles made to the people of that part of the treaty relating to them, he says, that § every freeman might chuse whom he pleased for his lord, whether the king or any of the nobility. Before this treaty the freeman might vow fealty 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 had vowed fealty, only on account of the fief which he had obtained. After that

* In the year 811, Balusius's edition, tome i. page 486. art. 7. and 8 and that of the year 812. ib. page 490. art. i. " Ut omnis liber homo qui quatuor manfos vestitos de proprio suo, sive de alicujus beneficio, habit, ipse se præparet, et ipse in hostem pergat, sive cum seniore suo," &c. See also the capitulary of the year 807. Balusius's edition, tome i. page 458.

† In the year 793, inserted in the law of the Lombards, book iii. tit. 9. chap. 9.

‡ In the year 847, quoted by Aubert Lemire, and Balusius, tome ii. page 42. *Conventus apud Marsnam.*

|| Adnunciatio.

§ " Ut unusquisque liber homo in nostro regno seniores quem voluerit in nobis, et in nostris fidelibus, accipiat." Art. ii. of the declaration of Charles.

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 concerning those who put themselves under the protection of another for a fief, but about those who changed their allodium into a fief, and withdrew themselves, as it were, from the civil jurisdiction, to enter under the feudal power of the king, or of the lord whom they thought fit to chuse.

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 chuse whom he pleased for his lord, the king, or any of the nobility.

2. 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 after, a * general law for giving the fiefs to the children of the present possessor: 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 chusing 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, when a vassal had received a thing of a lord, were it worth only a sol, he could not afterwards quit him. But, under Charles the Bald, the vassals ‡ might follow their interests or their

* Capitulary of the year 877, tit. liii. art. 9. and 10. *apud Carisiacum*, "similiter et de nostris vassallis faciendum est," &c. This capitulary relates to another of the same year, and of the same place, art. iii.

† Capitulary of Aix-la-Chapelle in the year 813, art. xvi. "Quod nullus seniore suum, demittat, postquam ab eo acceperit 'valente solidum unum;' and the capitulary of Pepin in the year 783, art. v.

‡ See the capitulary de Carisiaco, in the year 856, art. x. and 13. Baluzius's edition, tome ii. page 83, in which the king, together with the lords spiritual and temporal, agreed to this: "Et si aliquis de vobis sit, cui suus senioratus non placet, et illi simulat ad alium seniore melius quam ad illum accipere possit, veniat ad

caprice with impunity; and this prince explains himself so strongly on this subject, that he seems rather to encourage them to enjoy this liberty, than to restrain it. In Charlemagne's time, benefices were rather personal than real; afterwards they became rather real than personal.

C H A P. XXV.

Changes in the fiefs.

THE same changes happened in the fiefs, as in the allodia. We find by the capitulary * of Compeigne, 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 for ever 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 the fiefs, 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 vassals

* illam, et ipse tranquille et pacifico animo donetilli comestum—
 "et quod Deus illi cupierit ad alium seniore[m] acaptare potuerit,
 "pacifice habeat."

* In the year 757, art. vi. Balassus's edition, page 181.

† Book i. chap. 1.

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 law of the fiefs.

If we compare the situation in which the rear-vassalage was at the time when the two Milanese senators wrote that book, to what it was under king Pepin, we shall find that the rear-fiefs preserved * their primitive nature longer than the fiefs.

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 any expedition to Rome, he was intitled to all the privileges of a vassal. 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 in the senate of Milan.

C H A P. XXVI.

Another change which happened in the fiefs.

IN Charlemagne's time § they were obliged, 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 * made a restriction † upon this head, which rescued

* At least in Italy and Germany.

‡ Book i. of fiefs, chap. i.

|| Book i. of fiefs, chap. i.

§ Capitulary of the year 802, art. vii. page 365.

* *Apud Marsnam*, in the year 847. Baluzius's edition, p. 42.

† "Volumus ut cujuscunque nostrum homo in cujuscunque regno sit, cum seniore suo in hostem, vel aliis suis utilitatibus, pergat, nisi talis regni invasio quam Lamtveri dicunt, quod absit accederit, ut omnis populus illius regni ad eam repellendam communiter pergat." *Art. v. ibid. page 44.*

the nobility, as it were, out of the king's hands; they were no longer obliged to serve in time of war, but when the war was defensive. In others, they were at liberty to follow their lord, or to mind their business.

The death of one hundred thousand French at the battle of Fontenay made the few remains of the nobility imagine, that by the private quarrels of their kings about their respective shares, they should be utterly exterminated, and that their ambition and jealousy would cause the effusion of what little blood was left. A law was therefore passed, that the nobility should not be obliged to serve their princes in the wars, unless it was to defend the state against a foreign invasion. This law * obtained for several ages.

C H A P. XXVII.

Changes which happened in the great offices, and in the fiefs.

EVERY thing seemed to be infected with a particular vice, and to be corrupted at one and the same time. I took notice, 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, she had substituted others in their stead. I likewise took notice, that the crown had never alienated the great offices in perpetuity †.

But Charles the Bald made a general regulation, which equally affected the great offices and the fiefs. He or-

* 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. vi. sect. 2. in Echard.

† 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 chuse the counts of Toulouse from among the children of the last possessor.

drained in his capitularies, that the ‡ counties should be given to the count's children, and that this regulation should also take place in respect to the fiefs.

We shall see presently that this regulation received a much greater extent, inasmuch that the great offices and fiefs went even to more distant relations. From thence it followed, that the greatest part of the lords, who held immediately of the crown, held now only immediately. 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 further off another degree.

Again, it appears by the capitularies †, 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 kings, and the benefices annexed to the counties were no longer the king's benefices: the counts grew powerful, because the vassals they had already under them enabled them to procure others.

In order to be convinced how much the monarchy was thereby weakened towards the end of the second race, we have only to turn our eyes to 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, that, when the elder brothers had given shares to their younger brothers, the latter paid homage to the elder; so that the reigning lord held them only as a rear-fief. Philip Augustus, the Duke of Burgundy, the counts of Nevers, Boulogne,

‡ See his capitulary of the year 877, tit. lxx. art. 9. and 10. *apud Carisiacum*; this capitulary is relative to another of the same year and place, art. iii.

† The 3d capitulary of the year 812, art. vii. and that of the year 815, art. vi. on the Spaniards. The collection of the capitularies, book v. art. 228. and capitulary of the year 869, art. ii. and that of the year 877, art. xiii. Baluzius's edition.

* As appears from Otho of Frisingen, of the actions of Frederic, book ii. c. 29.

St. Paul, Dampierre, and other lords, declared † that henceforward, whether the fief was divided by succession or otherwise, the whole should be held always of the 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.

C H A P. XXVIII.

Of the nature of the fiefs after the reign of Charles the Bald.

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 from thence resulted, and of the extension given to that law in each country. I find in the books ‡ of the fiefs, that, towards 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; thus the fiefs were given by a kind of election, which the lord made among the children.

We have explained, in the 17th chapter of this book, 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 the people chose from amongst the children. As things of a similar nature move generally.

† See the ordinance of Philip Augustus in the year 1209, in the new collection.

‡ Book i. tit. 1.

|| " Sic progressum est, ut ad filios deveniret in quem dominus hoc vellet beneficium confirmare." *Ibid.*

alike, and one political law is constantly relative to another, the same spirit was followed * in the succession of fiefs, as had been followed in the succession to the crown. Thus the fiefs were transmitted to the children by the right of succession, as well as of election; and each fief was become both elective and hereditary, like the crown.

This right of election in the person of the lord was not subsisting † at the time of the authors ‡ of the books of fiefs, that is, in the reign of the emperor Frederic I.

C H A P. XXIX.

The same subject continued.

IT is mentioned in the books of the fiefs, that when § the emperor Conrad set out for Rome, the vassal 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: 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 Frederic I.), that the ancient civilians had † always

* At least in Italy and Germany.

† “Quod hodie ita stabilitum est, ut ad omnes aequaliter veniat.” *Book i. of the fiefs, tit. i.*

‡ Gerardus Niger and Aubertus de Orto.

§ “Cum vero Conradus Romam proficisceretur, petitum est a fidelibus qui in ejus erant servitio, ut, lege ab eo promulgata, hoc etiam ad nepotes ex filio producere dignaretur; et ut fratri sine legitimo herede defuncto, in beneficio quod eorum frater patris fuit succedat.” *Book i. of fiefs, tit. i.*

* Cujas has proved it extremely well.

† “Sciedum est, quod beneficium advenientes ex latere ultra fratres patruelles non progreditur successione ab antiquis sapientibus constitutum, licet moderno tempore usque ad septimum geniculum sit usurpatum, quod in masculis descendantibus, nove jure ad infinitum extenditur.” *Ibid.*

been of opinion, that the succession of fiefs in a collateral line did not extend further than to cousin-germans by the father's side; though of late it was carried as far as the seventh degree, as 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 supposed, the bare reading of the history of France is sufficient to show, that the perpetuity of fiefs was established earlier in France than in Germany. Towards the commencement of the reign of the emperor Conrad II. in 1024, things were upon the same footing still in Germany, as they had been in France under the reign of Charles the Bald, who died in 877. But such were the changes made in France after the reign of Charles the Bald, that Charles the Simple found himself unable to dispute with a foreign house his incontestible rights to the empire; and, in fine, that in Hugh Capet's time the reigning family, stripped of all its demesnes, was no longer able to maintain the crown.

The weak understanding of Charles the Bald produced an equal weakness in the French monarchy. But, as Lewis king of Germany his brother, and some of his successors, were men of better parts, their government preserved its vigour much longer.

But what do I say? perhaps the flegmatic temper, and, if I dare use the expression, the immutability of spirit peculiar to the German nation, made a longer stand than that of the French nation against this 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 coasts to scour, more marshes to get over, more forests to penetrate. The princes, who did not see every instant their dominions ready to fall to pieces, had less need of their vassals, and consequently had 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.

C H A P. XXX.

In what manner the empire was transferred from the family of Charlemagne.

THE empire, which, in prejudice to the branch of Charles the Bald, had been already given to the * bastard line of Lewis king of Germany, was transferred to a foreign house by the election of Conrad duke of Franconia in 912. The reigning branch in France, which was hardly able to dispute a few villages, was much less in a situation to dispute the empire. We have an agreement which passed between Charles the Simple and the emperor Henry I. who had succeeded to Conrad. It is called *the compact of Bonn* †. These two princes met in a vessel, which had been placed in the middle of the Rhine, and swore eternal friendship. They used on this occasion an excellent middle term. Charles took the title of King of West France, and Henry that of King of East France. Charles contracted with the king of Germany, and not with the emperor.

* Arnold and his son Lewis IV.

† In the year 926, quoted by Aubert le Mire, *code donationum piarum*, Chap. 27.

C H A P. XXXI.

In what manner the crown of France was transferred to the house of Hugh Capet.

THE inheritance of the fiefs, and the general establishment of rear-fiefs, extinguished the political, and formed a feudal government. Instead of that prodigious multitude of vassals who were formerly under the king, there were now a few only, on whom the others depended. The kings had scarce any longer a direct authority; a power which was to pass through so many, and through such great powers, either stopt 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 came in a kind of 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 further, either on the Seine or on the Loire. Hugh Capet, who was master of those cities, held in his hand the two keys of the unhappy remains of the kingdom; the crown was conferred upon him as the only person able to defend it. It is thus the empire was afterwards given to a family whose dominions form so strong a barrier against the Turks,

* 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.

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 it obtained much later among the Germans than among the French; 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 had already happened, or happened afterwards. The whole was reduced to two events; the reigning family changed, and the crown was united to a great fief.

CH A P. XXXII.

Some consequences of the perpetuity of fiefs.

FROM the perpetuity of the fiefs it followed, that the right of seniority or primogeniture, was established among the French. This right was quite unknown under the first race †; the crown was divided among the brothers, the *allodial* were divided in the same manner; and as the fiefs, whether precarious or for life, were not an object of succession, neither could they be of division.

Under the second race, the title of Emperor, which Lewis le Debonnaire enjoyed, and with which he honoured his eldest son Lotarius, 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 to consult with

† See the Salic law, and the law of the Ripuarians in the title of *allodia*.

* See the capitulary of the year 817, which contains the first division made by Lewis le Debonnaire among his children.

him upon common affairs. This is what inspired Lotarius with those pretences which met with such bad success. When Agobard † wrote in favour of this prince, he alledged the Emperor's own regulation, who had associated Lotarius to the empire, after he had consulted the Almighty by a three days fast, and by the celebration of the holy sacrifices; after the nation had sworn allegiance to him, which they could not refuse without perjuring themselves, and after he had sent Lotarius to Rome to be confirmed by the Pope. He lays a stress upon all this and not upon his right of primogeniture. He says indeed, that the Emperor had designed a division 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 preferred his younger brothers.

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

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 on that account, they established what they called the right of redemption, whereof mention is made in our customs, which at first was paid in a direct line, and by usage came afterwards to be paid only in a collateral line.

The fiefs were soon rendered transferable to strangers, as a patrimonial estate. This gave rise to the right of fines of alienation, which were established almost throughout the whole kingdom. These rights were arbitrary in the beginning; but when the practice of granting

† See his two letters upon this subject, the title of one of which is *de divisione imperii*.

these permissions was become general, they were fixed in every district.

The right of redemption was to be paid at each change of heir, and at first was paid even in a direct line *. The most general custom had fixed it to one year's income. This was burthenfome and inconvenient to the vassal, and affected, in some measure, the fief itself. It was often agreed in the act of homage †, that the lord should no longer demand more than a certain sum of money for the redemption, which, by the changes incident to money, became afterwards of no manner of importance. Thus the right of redemption is in our days reduced almost to nothing, while that of the fines of alienation 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 kinds of 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 as soon as they became perpetual this was permitted ‡, with some restrictions made by the customs ||, which was what they call dismembering of their fief.

The perpetuity of the fiefs 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 *. This regulation

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

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

‡ But they could not abridge the fief, that is abolish a portion of it.

|| They fixed the portion which they could dismember.

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

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. Afterwards, Eleanor succeeded to Aquitaine, and Mathildis to Normandy: and the right of the succession of females seemed so well established in those days, that Lewis the Young, after his divorce from Eleanor, made no difficulty in restoring Guyenne to her. But as these two last instances followed close to 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 the kingdom.

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

When the fiefs were at will, they were given to such people as were capable of doing service for them, wherefore they were never bestowed on minors; but when they became perpetual *, the lords took the fief into their own

† Most of the great families had their particular laws of succession. See what M. de la Thaumassiere says concerning the families of Berry.

* We see in the capitulary of the year 877. *apud Carisiacum* art. 123. Balusius'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.

hands, till the pupil came of age, either to increase their own profits, or to bring up the pupil in the military exercise. 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 the life, people vowed fealty for a fief, and the real delivery which was made by a sceptre secured the fief, as it is now by homage. We do not find that the counts, or even the king's commissaries, received the homages in the provinces; nor is this function 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 †; but this oath was so far from being an homage of the same nature as those afterwards established, that in the latter the oath of allegiance was an action ‡ joined to homage, which sometimes followed and sometimes preceded it, but did not take place in all homages, was less solemn than homage, and quite a distinct thing from it.

The counts and the king's commissaries made those vassals || whose fidelity was suspected, give occasionally a security which was called *firmitas*; but this security could not be an homage, since the kings § gave it to one another.

† We find the formula thereof in the second capitulary of the year 802. See also the year 854, 13, and others.

‡ M. du Cange, in the word *hominum*, p. 1163. and in the word *fideltas*, p. 474. cites the charters of the ancient homages, where these differences are found, and a great number of authorities which may be seen. In paying homage, the vassal put his hand into 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, sect. 91. and 92. of homage, that is, fidelity and homage.

|| Capitularies of Charles the Bald, in 860, *post reditum a Com-
fuentibus*, art. 3, Baluzius's edition, page 145.

§ Ibid. article 3.

And if the abbot Suger * 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 employs here the notions 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 thing, became a regular action. It was made in a more solemn manner, and was attended with formalities, because it was to be a monument of the reciprocal duties of the lord and vassal through all succeeding ages.

I should be apt to think, that the 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 precaution, and only upon a supposition that the authors of the ancient annals † of the Franks were not ignorant pretenders, who, in describing the act of fealty performed by Tassilon duke of Bavaria to king Pepin, spoke ‡ according to the usages of their own time.

* Lib. de administratione sua.

† Anno 757. chap. 17.

‡ "Tassilo venit in vassatico se commendans, per manus sacramenta juravit multa et innumerabilia, reliquiis sanctorum manus imponens, et fidelitatem promisit regi Pippino." One would think that there was here an homage and an oath of fealty. See the capitularies of Charles the Bald, Baluzius's edition.

C H A P. XXXIII.

The same subject continued.

WHEN the fiefs were either precarious or for life, they seldom had a relation to any other than the political laws; for which reason in the civil laws of those two times there is very little mention made of the laws of fiefs. But when they were become hereditary, when there was a power of giving, selling, and bequeathing them, they had a relation then both to the political and the civil laws. The fief, considered as an obligation to the 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 laws concerning fiefs.

When the fiefs were become hereditary, the laws relating to the order of successions must have been relative to the law of the perpetuity of fiefs. Thus this rule of the French law, *estates of inheritance do not ascend* * was established in spite of the Roman and Salic † laws. It was necessary that the fief should be served: but a grandfather, or a great-uncle would have been very bad vassals to give to the lord: wherefore this rule took place at first only in regard to the fiefs, as we learn of Boutillier ‡.

When the fiefs were become hereditary, the lords who were to see that the fief was served, insisted that the ‖ daughters who were to succeed to the fief, and I fancy sometimes the males, should not marry without their consent; insomuch that the marriage-contracts became,

* Book iv. de feudis, tit. 59.

† In the title of *allodia*.

‡ Somme Rurale, book i. title 96. page 447.

‖ According to an ordinance of St. Lewis 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.

in respect to the lords, both a feudal and a civil regulation. In an act of this kind, under the lord's inspection, regulations were made for the future succession, with a view that the fief might be served by the heirs: hence none but the nobility at first had the liberty of disposing of the future successions by marriage-contract, as * Boyer and † Aufrelius have justly observed.

It is needless to mention, that the power of redemption founded on the old right of the relations, a mystery of our ancient French jurisprudence which I have not now time to unfold, could not take place with regard to the fiefs till they were become hereditary.

Italiam! Italiam! †——

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

* Decision 155. No. 8. and 104. and No. 38.

† In Capell. Theod. decis. 453.

[‡ The Author concludes his elaborate work with an allusion to the joyful acclamations of Æneas's follower's upon coming in sight of the land of Italy, they so much desired, after so long wanderings, great dangers, and furious storms undergone in quest of it.

—————“ *Humilemque videmus*

“ *Italiam! Italiam! primus conclamat Achates;*

“ *Italiam læto socii clamore salutant.*”

Æneid. lib. 3. ver. 522.]

THE END.

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