THE

SPIRIT

OF

LAWS.

TRANSLATED FROM THE FRENCH OF

M. DE SECONDAT,

BARON DE MONTESQUIEU.

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CONTENTS.

BOOK XXV.—*Of Laws as Relative to the Eſtabliſhment of Religion, and its external Polity.*

BOOK XXVI.—*Of Laws as Relative to the Order of Things on which they determine.*

BOOK XXIX.—*Of the Manner of compoſing Laws.*

BOOK XXX.—*Theory of the Feudal Laws among the Franks, in the Relation they bear to the Eſtabliſhment of the Monarchy.*

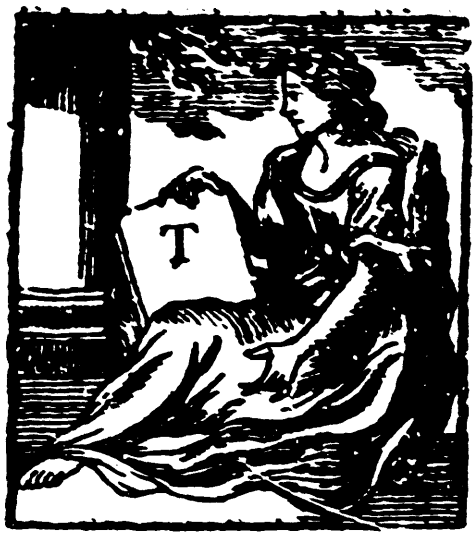
THE SPIRIT OF LAWS.

BOOK XX.

OF LAWS IN RELATION TO COMMERCE CONSIDERED IN ITS NATURE AND DISTINCTIONS.

CHAP. I.

Of Commerce.



THE following ſubjects deſerve to be treated in a more extenſive manner: But the nature of this work will not allow it. Fain would I glide down a gentle river; but I am carried away by a torrent.

Commerce is a cure for the moſt deſtructive prejudices; for it is almoſt a general rule, that wherever we find agreeable manners, there commerce flouriſhes; and that wherever there is commerce, there we meet with agreeable manners.

Let us not be aſtoniſhed, then, if our manners are now leſs ſavage than formerly. Commerce has every where diffuſed a knowledge of the manners of all nations; theſe are compared one with another, and from this compariſon ariſe the greateſt advantages.

Commercial laws, it may be ſaid, improve manners, for the ſame reaſon as they deſtroy them. They corrupt the pureſt manners;* this was the ſubject of Plato's com-

plaints:

* Cæſar ſaid of the Gauls, that they were ſpoiled by the neighborhood and commerce of Marſeilles; inſomuch that they who formerly always conquered the Germans, were now become inferior to them. *War of the Gauls, lib.* 6.

plaints: And we every day ſee that they poliſh and refine the moſt barbarous.

CHAP. II.

Of the Spirit of Commerce.

PEACE is the natural effect of trade. Two nations who traffic with each other, become reciprocally dependent; for if one has an intereſt in buying, the other has an intereſt in ſelling; and thus their union is founded on their mutual neceſſities.

But if the ſpirit of commerce unites nations, it does not in the ſame manner unite individuals. We ſee, that in* countries where the people move only by the ſpirit of commerce, they make a traffic of all the humane, all the moral virtues: The moſt trifling things, thoſe which humanity would demand, are there done, or there given, only for money.

The ſpirit of trade produces in the mind of man a certain ſenſe of exact juſtice, oppoſite on the one hand to robbery, and on the other to thoſe moral virtues which forbid our always adhering rigidly to our own private intereſt, and ſuffer us to neglect it for the advantage of others.

The total privation of trade, on the contrary, produces robbery, which Ariſtotle ranks in the number of means of acquiring: Yet it is not at all inconſiſtent with certain moral virtues. Hoſpitality, for inſtance, is moſt rare in trading countries, while it is found in the moſt admirable perfection among nations of robbers.

It is a ſacrilege, ſays Tacitus, for a German to ſhut his door againſt any man whomſoever, whether known or unknown. He who haſt behaved with hoſpitality to a ſtranger, goes to ſhew him another houſe where this hoſpitality is alſo practiſed; and he is there received with the ſame humanity. But when the Germans had founded kingdoms,

* Holland.

† Et qui modo hoſpes fuerat, monſtrator hoſpitii. *De morib. Germ.* Vid Cæſar, de bello Gal. lib. 6.

kingdoms, hoſpitality was become burthenſome. This appears by two laws of the* code of the Burgundians; one of which inflicted a penalty on every barbarian, who preſumed to ſhew a ſtranger the houſe of a Roman; and the other decreed, that whoever received a ſtranger ſhould be indemnified by the inhabitants, every one being obliged to pay his proper proportion.

CHAP. III.

Of the Poverty of the People.

THERE are two ſorts of poor; thoſe who are rendered ſuch by the ſeverity of the government; theſe are indeed incapable of performing almoſt any great action, becauſe their indigence is a part of their ſlavery. Others are poor, only becauſe they either deſpiſe, or know not the conveniences of life; and theſe are capable of accompliſhing great things, becauſe their poverty conſtitutes a part of their liberty.

CHAP. IV.

Of Commerce in different Governments.

TRADE has ſome relation to forms of government. In a monarchy it is founded on luxury; and the ſingle view with which it is carried on, is to procure every thing that can contribute to the pride, the pleaſure and the capricious whimſies of the nation. In republics it is commonly founded on economy. Their merchants having an eye to all the nations of the earth, bring from one what is wanted by another. It is thus that the republics of Tyre, Carthage, Athens, Marſeilles, Florence, Venice and Holland, engaged in commerce.

This kind of traffic has a natural relation to a republican government; to monarchies it is only occaſional. For as

* Tit. 38.

it is founded on the practice of gaining little, and even less than other nations, and of making up for this by gaining inceſſantly; it can hardly be carried on by a people ſwallowed up in luxury, who ſpend much, and ſee nothing but objects of grandeur.

Cicero was of this opinion, when he ſo juſtly ſaid,* "that he did not like that the ſame people ſhould be at once both the lords and factors of the univerſe." For this would indeed be to ſuppoſe, that every individual in the ſtate, and the whole ſtate collectively, had their heads conſtantly filled with grand views, and at the ſame time with ſmall ones, which is a contradiction.

Not but that the moſt noble enterpriſes are completed alſo in thoſe ſtates that ſubſiſt by economical commerce: They have even an intrepidity not to be found in monarchies. And the reaſon is this:

One branch of commerce leads to another, the ſmall to the moderate, the moderate to the great; thus he who has had ſo much deſire of gaining a little, raiſes himſelf to a ſituation in which he is not leſs deſirous of gaining a great deal.

Beſides, the grand enterpriſes of merchants are always neceſſarily connected with the affairs of the public. But in monarchies, theſe public affairs give as much diſtruſt to the merchants, as in free ſtates they appear to give ſafety. Great enterpriſes therefore in commerce are not ſuited to monarchical, but to republican governments.

In ſhort, an opinion of greater certainty, as to the poſſeſſion of property in theſe ſtates, makes them undertake every thing. They flatter themſelves with the hopes of receiving great advantages from the ſmiles of fortune, and therefore boldly expoſe what they have already acquired, in order to acquire more; riſking nothing but as the means of obtaining.

A GENERAL RULE.—A nation in ſlavery labors more to preſerve than to acquire; a free nation, more to acquire than to preſerve.

CHAP.

* Nolo eundem populum imperatorem, & portitorem eſſe terrarum.

CHAP. V.

Of Nations that have entered into an Economical Commerce.

MARSEILLES, a neceſſary retreat in the midſt of a tempeſtuous ſea: Marſeilles, a harbor which all the winds, the ſhelves of the ſea, the diſpoſition of the coaſts, point out for a landingplace, became frequented by mariners; while the ſterility* of the adjacent country determined the citizens to an economical commerce. It was neceſſary that they ſhould be laborious, to ſupply what nature had refuſed; that they ſhould be juſt, in order to live among barbarous nations, from whom they were to derive their proſperity; that they ſhould be moderate, that they might always enjoy the ſweets of a tranquil government; in fine, that they ſhould be frugal in their manners, that they might perpetually enjoy a trade, the more certain, as it was leſs advantageous.

We every where ſee violence and oppreſſion give birth to a commerce founded on economy, while men are conſtrained to take refuge in marſhes, in iſles, in the ſhallows of the ſea, and even on rocks themſelves. Thus it was that Tyre, Venice and the cities of Holland, were founded. Fugitives found there a place of ſafety. It was neceſſary that they ſhould ſubſiſt; they drew therefore their ſubſiſtence from the whole univerſe.

CHAP. VI.

The Spirit of England with reſpect to Commerce.

THE tariff or cuſtoms of England, are very unſettled, with reſpect to other nations; they are changed, in ſome meaſure, with every parliament, either by taking off particular duties, or by impoſing new ones. They endeavor by this means ſtill to preſerve their independence. Supremely jealous with reſpect to trade, they bind themſelves, but little by treaties, and depend only on their own laws.

* Juſtin, l. 43. c. 3.

Other nations have made the intereſts of commerce yield to thoſe of politics; the Engliſh, on the contrary, have always made their political intereſts give way to thoſe of commerce.

They know better than any other people upon earth, how to value at the ſame time, theſe three great advantages, religion, commerce and liberty.

CHAP. VII.

In what manner the Economical Commerce has been ſometimes reſtrained.

In ſeveral kingdoms laws have been made, extremely proper to humble the ſtates that have entered into the economical commerce. They have forbid their importing any merchandiſes, except the product of their reſpective countries; and have permitted them to traffic only in veſſels built in the kingdom to which they brought their commodities.

It is neceſſary that the kingdom which impoſes theſe laws, ſhould itſelf be able eaſily to engage in commerce; otherwiſe it will, at laſt, be an equal ſufferer. It is much more advantageous to trade with a commercial nation, whoſe profits are moderate, and who are rendered in ſome ſort dependent by the affairs of commerce; with a nation, whoſe larger views and whoſe extended trade enables them to diſpoſe of their ſuperfluous merchandiſes; with a wealthy nation, who can take off many of their commodities, and make them a quicker return in ſpecie; with a nation under a kind of neceſſity to be faithful, pacific from principle, and that ſeeks to gain, and not to conquer; it is much better, I ſay, to trade with ſuch a nation, than with others, their conſtant rivals, who will never grant ſuch great advantages.

CHAP. VIII.

On the Probibition of Commerce.

It is a true maxim, That one nation ſhould never exclude another from trading with it, except for very great

great reaſons. The Japaneſe trade only with two nations, the Chineſe and the Dutch. The* Chineſe gain a thouſand *per cent.* upon ſugars, and ſometimes as much by the goods they take in exchange. The Dutch make nearly the ſame profits. Every nation that acts upon Japaneſe principles muſt neceſſarily be deceived; for it is competition which ſets a juſt value on merchandiſes, and eſtabliſhes the rate between them.

Much leſs ought a ſtate to lay itſelf under an obligation of ſelling its manufactures only to a ſingle nation, under a pretence of their taking all at a certain price. The Poles, in this manner, diſpoſe of their corn to the city of Dantzic; and ſeveral Indian princes have made a like contract for their ſpices with the Dutch.† Theſe agreements are proper only for a poor nation, whoſe inhabitants are ſatisfied to forego the hopes of enriching themſelves, provided they can be ſecure of a certain ſubſiſtence; or for nations, whoſe ſlavery conſiſts either in renouncing the uſe of thoſe things which nature has given them, or in being obliged to ſubmit to a diſadvantageous commerce.

CHAP. IX.

An Inſtitution adapted to Economical Commerce.

IN ſtates that carry on an economical commerce, they have luckily eſtabliſhed banks, which by their credit have formed a new ſpecies of wealth; but it would be quite wrong to introduce them into governments whoſe commerce is founded only in luxury. The erecting of banks in countries governed by an abſolute monarch, ſuppoſes money on the one ſide, and on the other power; that is, on the one hand the means of procuring every thing without any power, and on the other the power, without any means of procuring at all. In a government of this kind, none but the prince ever had, or can have a

☞ 4 treaſure;

* Du Halde, vol. 2. p. 70.

† This was firſt eſtabliſhed by the Portugueſe. *Fr. Pirard's voyages, chap. 15. part 2.*

treaſure; and wherever there is one, it no ſooner becomes great, than it becomes the treaſure of the prince.

For the ſame reaſon, all aſſociations of merchants, in order to carry on a particular commerce, are improper in abſolute governments. The deſign of theſe companies is to give to the wealth of private perſons, the weight of public riches. But in thoſe governments, this weight can be found only in the prince. Nay, they are not even always proper in ſtates engaged in economical commerce; for if the trade be not ſo great as to ſurpaſs the management of particular perſons, it is much better to leave it open, than by excluſive privileges, to reſtrain the liberty of commerce.

CHAP. X.

The ſame ſubject continued.

A FREE port may be eſtabliſhed in the dominions of ſtates whoſe commerce is economical. That economy in the government, which always attends the frugality of individuals, is, if I may ſo expreſs myſelf, the ſoul of its economical commerce. The loſs it ſuſtains with reſpect to cuſtoms, it can repair by drawing from the wealth and induſtry of the republic. But in a monarchy, an eſtabliſhment of this kind muſt be oppoſite to reaſon; for it could have no other effect than to eaſe luxury of the weight of taxes. This would be depriving itſelf of the only advantage that luxury can procure, and of the only curb which, in a conſtitution like this, it is capable of receiving.

CHAP. XI.

Of the freedom of Commerce.

THE freedom of commerce is not a power granted to the merchants to do what they pleaſe: This would be

be more properly ſlavery. The conſtraint of the merchant is not the conſtraint of commerce. It is in the freeſt countries that the merchant finds innumerable obſtacles; and he is never leſs croſſed by laws, than in a country of ſlaves.

England prohibits the exportation of her wool; coals muſt be brought by ſea to the capital; no horſes, except geldings, are allowed to be exported; and the veſſels* of her colonies, trading to Europe, muſt take in water in England. The Engliſh conſtrain the merchant, but it is in favor of commerce.

CHAP. XII.

What it is that deſtroys this freedom.

WHEREVER commerce ſubſiſts, cuſtoms are eſtabliſhed. Commerce is the exportation and importation of merchandiſes with a view to the advantage of the ſtate: Cuſtoms are a certain right over this ſame exportation and importation, founded alſo on the advantage of the ſtate. From hence it becomes neceſſary, that the ſtate ſhould be neuter between its cuſtoms and its commerce, that neither of theſe two interfere with each other; and then the inhabitants enjoy a free commerce.

The farming of the cuſtoms deſtroys commerce by its injuſtice and vexations, as well as by the exceſs of the impoſts: But independent of this, it deſtroys it even more by the difficulties that ariſe from it, and by the formalities it exacts. In England, where the cuſtoms are managed by the king's officers, buſineſs is negotiated with a ſingular facility; one word of writing accompliſhes the greateſt affairs. The merchant needs not loſe an infinite deal of time; he has no occaſion for a particular commiſſioner, either to obviate all the difficulties of the farmers, or to ſubmit to them.

CHAP.

* Act of navigation, 1660. It is only in time of war, that the merchants of Boſton and Philadelphia ſend their veſſels directly to the Mediterranean.

CHAP. XIII.

The Laws of Commerce concerning the Confiſcation of Merchandiſes.

THE Magna Charta of England forbids the ſeizing and confiſcating, in caſe of war, the effects of foreign merchants, except by way of repriſals. It is very remarkable, that the Engliſh have made this one of the articles of their liberty.

In the late war between Spain and England, the former made a *law which puniſhed with death thoſe who brought Engliſh merchandiſes into the dominions of Spain; and the ſame penalty on thoſe who carried Spaniſh merchandiſes into England. An ordinance like this cannot, I believe, find a precedent in any laws but thoſe of Japan. It equally ſhocks humanity, the ſpirit of commerce, and the harmony which ought to ſubſiſt in the proportion of penalties; it confounds all our ideas, making that a crime againſt the ſtate, which is only a violation of civil polity.

CHAP. XIV.

Of ſeizing the Perſons of Merchants.

SOLON †made a law, that the Athenians ſhould no longer ſeize the body for civil debts. This law he ‡ received from Egypt. It had been made by Boccoris, and renewed by Seſoſtris.

This law is extremely good, with reſpect to the generality of civil‖ affairs; but there is ſufficient reaſon for its not being obſerved in thoſe of commerce. For, as merchants are obliged to entruſt large ſums, frequently for a very ſhort time, and to pay money as well as to receive it, there is a neceſſity, that the debtor ſhould conſtantly fulfil his

* Publiſhed at Cadiz, in March, 1740.

† Plutarch, in his treatiſe againſt lending upon uſury.

‡ Diodorus, book i. part 2. chap 3.

‖ The Greek legiſlators were to blame, in preventing the arms and plough of any man from being taken in pledge, and yet permitted the taking of the man himſelf. *Diodorus, book i. part 2. chap. 3.*

his engagements at the time prefixed; and from hence it becomes neceſſary to lay a conſtraint on his perſon.

In affairs relating to common civil contracts, the law ought not to permit the ſeizure of the perſon; becauſe the liberty of one citizen is of greater importance to the public, than the caſe and proſperity of another. But in conventions derived from commerce, the law ought to conſider the public proſperity, as of greater importance than the liberty of a citizen; which, however, does not hinder the reſtrictions and limitations that humanity and good policy demand.

CHAP. XV.

An excellent Law.

ADMIRABLE is that law of Geneva which excludes from the magiſtracy, and even from the admittance into the great council, the children of thoſe who have lived or died inſolvent, except they have diſcharged their father's debts. It has this effect; it gives a confidence in the merchants, in the magiſtrates, and in the city itſelf. There the credit of the individual has alſo all the weight of public credit.

CHAP. XVI.

Of the Judges of Commerce.

XENOPHON, in his book of revenues, would have rewards given to thoſe overſeers of commerce, who deſpatched the cauſes brought before them with the greateſt expedition. He was ſenſible of the need of our modern juriſdiction of a counſel. The Romans, in the lower empire,* had this kind of tribunal for their mariners.

The

* Leg. 7. cod. Theod. *de navicul.*

The affairs of commerce are but little ſuſceptible of formalities. Theſe are actions of a day, and are every day followed by others of the ſame nature. Hence it becomes neceſſary, that every day they ſhould be decided. It is otherwiſe with thoſe actions of life which have a principal influence on futurity, but rarely happen. We ſeldom marry more than once: Deeds and wills are not the work of every day: We are but once of age.

Plato* ſays, that in a city where there is no maritime commerce, there ought not to be above half the number of civil laws: This is very true. Commerce brings into the ſame country different kinds of people: It introduces alſo a great number of contracts, and of ſpecies of wealth, with various ways of acquiring it.

Thus in a trading city, there are fewer judges and more laws.

CHAP. XVII.

That a Prince ought not to engage himſelf in Commerce.

THEOPHILUS† ſeeing a veſſel laden with merchandiſes for his wife Theodora, ordered it to be burnt. "I am Emperor," ſaid he, "and you make me the maſter of a galley: By what means ſhall theſe poor men gain a livelihood, if we take their trade out of their hands?" He might have added, who ſhall ſet bounds to us, if we monopolize all to ourſelves? Who ſhall oblige us to fulfil all our engagements; Our courtiers will follow our example; they will be more greedy and more unjuſt than we; The people have ſome confidence in our juſtice, they will have none in our opulence: All theſe numerous duties, which are the cauſe of their wants, are certain proofs of ours.

CHAP.

* On laws, book 8. † Zonaras.

CHAP. XVIII.

The ſame ſubject continued.

WHEN the Portugueſe and Caſtilians bore ſway in the Eaſtindies, commerce had ſuch opulent branches, that their princes did not fail to ſeize them. This ruined their ſettlements in thoſe parts of the world.

The viceroy of Goa granted excluſive privileges to particular perſons. The people had no confidence in theſe men, and the commerce declined by the perpetual change of thoſe to whom it was entruſted; nobody took care to improve it, or to leave it entire to his ſucceſſor. In ſhort, the profit centered in a few hands, and was not ſufficiently extended.

CHAP. XIX.

Of Commerce in a Monarchy.

IT is contrary to the ſpirit of commerce, that any of the nobility ſhould be merchants in a monarchical government. *This*, ſaid the emperors* Honorius and Theodoſius, *would be pernicious to cities; and would remove the facility of buying and ſelling between the merchants and the plebeians.*

It is contrary to the ſpirit of monarchy to admit the nobility into commerce. The cuſtom of ſuffering the nobility of England to trade, is one of thoſe things which has there greatly contributed to weaken the monarchical government.

CHAP.

* Leg. nobilioris cod. de comm. et leg. ult. de reſcind. vendit.

CHAP. XX.

A ſingular Reflection.

PERSONS ſtruck with the practice of ſome ſtates, imagine, that in France they ought to make laws to engage the nobility to enter into commerce. But theſe laws would be the means of deſtroying the nobility, without being of any advantage to trade. The practice of this country is extremely wiſe; merchants are not nobles, though they may become ſo: They have the hopes of obtaining a degree of nobility, unattended with its actual inconveniences. There is no ſurer way of being advanced above their profeſſion, than to manage it well, or with ſucceſs, which is generally the conſequence of ſuperior ability.

Laws which oblige every one to continue in his profeſſion, and to devolve it to his children, neither are, nor can be of uſe in any but* deſpotic kingdoms; where nobody either can or ought to have emulation.

Let none ſay, that every one will ſucceed better in his profeſſion, when he cannot change it for another. I ſay a perſon will ſucceed beſt when thoſe who have excelled, hope to ariſe to another.

The poſſibility of purchaſing honor with gold, encourages many merchants to put themſelves in circumſtances by which they may attain it. I do not take upon me to examine the juſtice of thus bartering for money, the reward of virtue. There are governments where this may be very uſeful.

In France, the dignity of the long robe, which places thoſe who wear it between the great nobility and the people, and without having ſuch ſhining honors as the former, has all their privileges; a dignity, which, while this body, the depoſitary of the laws, is encircled with glory, leaves the private members in a mediocrity of fortune; a dignity in which there is no other means of diſtinction, but by a ſuperior capacity and virtue, but which ſtill leaves

* This is actually very often the caſe in ſuch governments.

leaves in view one much more illuſtrious: The warlike nobility likewiſe, who conceive that whatever degree of wealth they are poſſeſſed of, they may ſtill increaſe their fortunes, but who are aſhamed of augmenting, if they begin not with diſſipating their eſtates; who always ſerve their prince with their whole capital ſtock, and when that is ſunk, make room for others, who follow their example; who go to war that they may never be reproached with not having been there; who, when they can no longer hope for riches, live in expectation of honors, and when they have not obtained the latter, enjoy the conſolation of having acquired glory: All theſe things together have neceſſarily contributed to augment the grandeur of this kingdom; and if for two or three centuries it has been inceſſantly increaſing in power, this muſt be attributed not to fortune, who was never famed for conſtancy, but to the goodneſs of its laws.

CHAP. XXI.

To what Nations Commerce is prejudicial.

RICHES conſiſt either in lands, or in moveable effects. The lands of every country are commonly poſſeſſed by the natives. The laws of moſt ſtates render foreigners unwilling to purchaſe their lands; and nothing but the preſence of the owner improves them: This kind of riches therefore belongs to every ſtate in particular. But moveable effects, as money, notes, bills of exchange, ſtocks in companies, veſſels, and in fine, all merchandiſes, belong to the whole world in general; which in this reſpect is compoſed of but one ſingle ſtate, of which all the ſocieties upon earth are members. The people who poſſeſs more of theſe moveable effects than any other in the univerſe, are the moſt rich. Some ſtates have an immenſe quantity, acquired by their commodities, by the labor of their mechanics, by their induſtry, by their diſcoveries, and even by chance. The avarice of nations makes them quarrel for the moveables of the whole univerſe. If we could

could find a ſtate ſo unhappy, as to be deprived of the effects of other countries, and at the ſame time of almoſt all its own, the proprietors of the lands would be only planters to foreigners. This ſtate, wanting all, could acquire nothing; wherefore it would be much better for the inhabitants not to have the leaſt commerce with any nation upon earth; for commerce in theſe circumſtances, muſt neceſſarily lead them to poverty.

A country that conſtantly exports fewer manufactures, or commodities, than it receives, will ſoon find the balance ſinking; it will receive leſs and leſs, till, falling into extreme poverty, it will receive nothing at all.

In trading countries, the ſpecie which ſuddenly vaniſhes, quickly returns; becauſe thoſe nations that have received it, are its debtors; but it never returns into thoſe ſtates of which we have juſt been ſpeaking, becauſe thoſe who have received it, owe them nothing.

Poland will ſerve us for an example. It has ſcarcely any of thoſe things which we call the moveable effects of the univerſe, except corn, the produce of its lands. Some of the lords poſſeſs entire provinces; they oppreſs the huſbandmen, in order to have greater quantities of corn, which they ſend to ſtrangers, to procure the ſuperfluous demands of luxury. If Poland had no foreign trade, its inhabitants would be more happy. The grandees, who would have only their corn, would give it to their peaſants for ſubſiſtence; as their too extenſive eſtates would become burthenſome, they would therefore divide them amongſt their peaſants; every one would find ſkins or wool in their herds or flocks, ſo that they would no longer be at an immenſe expenſe in providing clothes; the great, who are always fond of luxury, not being able to find it but in their own country, would encourage the labor of the poor. This nation, I affirm, would then become more flouriſhing, at leaſt if it did not become barbarous; and this the laws might eaſily prevent.

Let us next conſider Japan. The vaſt quantity of what they can receive, is the cauſe of the vaſt quantity of merchandiſes they are capable of ſending abroad. Things are thus in as nice an equilibrium, as if the importation and exportation were but ſmall. Beſides, this kind of exu-

berance

berance in the ſtate is productive of a thouſand advantages: There is a greater conſumption, a greater quantity of thoſe things on which the arts are exerciſed; more men employed, and more numerous means of acquiring power; exigencies may alſo happen, that may require a ſpeedy aſſiſtance, which ſo opulent a ſtate can better afford than any other. It is difficult for a country to avoid having ſuperfluities. But it is the nature of commerce to render the ſuperfluous uſeful, and the uſeful neceſſary. The ſtate will be therefore able to afford neceſſaries to a much greater number of ſubjects.

Let us ſay, then, that it is not thoſe nations who have need of nothing, that muſt loſe by trade; it is thoſe who have need of every thing. It is not ſuch people as have a ſufficiency within themſelves, but thoſe who are moſt in want, that will find an advantage in putting a ſtop to all commercial intercourſe.

BOOK XXI.

OF LAWS RELATIVE TO COMMERCE, CONSIDERED IN THE REVOLUTIONS IT HAS MET WITH IN THE WORLD.

CHAP. I.

Some general Conſiderations.

THOUGH commerce be ſubject to great revolutions, yet it is poſſible that certain phyſical cauſes, as the qualities of the ſoil or the climate, may fix its nature forever.

We at preſent carry on the trade of the Indies merely by means of the ſilver which we ſend thither. The* Romans carried annually thither about fifty millions of ſeſterces;

* Pliny, lib. 6. cap. 23.

terces; and this ſilver, as ours is at preſent, was exchanged for merchandiſes which were brought to the weſt. Every nation that ever traded to the Indies, has conſtantly carried bullion, and brought merchandiſes in return.

It is nature herſelf that produces this effect. The Indians have their arts adapted to their manner of living. Our luxury cannot be theirs; nor their wants ours. Their climate neither demands nor permits hardly any thing which comes from us. They go in a great meaſure naked; ſuch clothes as they have, the country itſelf furniſhes; and their religion, which is deeply rooted, gives them an averſion for thoſe things that ſerve for our nouriſhment. They want therefore nothing but our bullion, to ſerve as the medium of value, and for this they give us merchandiſes in return, with which the frugality of the people, and the nature of the country, furniſhes them in great abundance. Thoſe ancient *authors who have mentioned the Indies, deſcribe them juſt as we now find them, as to their policy, cuſtoms and manners. The Indies have ever been, they will ever be, the ſame Indies they are at preſent; and in every period of time thoſe who trade to that country, muſt carry ſpecie thither, and bring none in return.

CHAP. II.

Of the People of Africa.

THE greateſt part of the people on the coaſt of Africa are ſavages and barbarians. The principal reaſon, I believe, of this is, becauſe the ſmall countries capable of being inhabited, are ſeparated from each other by large and almoſt uninhabitable tracts of land. They are without induſtry or arts. They have gold in abundance, which they receive immediately from the hand of nature. Every civilized ſtate is therefore in a condition to traffic with them to advantage, by raiſing their eſteem for things of no value, and receiving a very high price in return.

CHAP.

* See Pliny, book vi. chap. 19, and Strabo, book 15.

CHAP. III.

That the Wants of the People in the South are different from those of the North.

IN Europe there is a kind of balance between the ſouthern and northern nations. The firſt have every convenience of life, and few of its wants: The laſt have many wants and few conveniences. To one, nature has given much, and demands but little; to the other ſhe has given but little, and demands a great deal. The equilibrium is maintained by the lazineſs of the ſouthern nations, and by the induſtry and activity which ſhe has given to thoſe in the north. The latter are obliged to undergo exceſſive labor, without which they would want every thing, and degenerate into barbarians. This has naturalized ſlavery to the people of the ſouth; as they can eaſily diſpenſe with riches, they can more eaſily diſpenſe with liberty. But the people of the north have need of liberty; for this can beſt procure them the means of ſatisfying all thoſe wants which they have received from nature. The people of the north, then, are in a forced ſtate, if they are not either free or barbarians. Almoſt all the people of the ſouth are in ſome meaſure in a ſtate of violence, if they are not ſlaves.

CHAP. IV.

The principle difference between the Commerce of the Ancients and the Moderns.

THE world has found itſelf, from time to time, in different ſituations, by which the face of commerce has been altered. The trade of Europe is at preſent carried on principally from the north to the ſouth; and the difference of climates is the cauſe that the ſeveral nations have great occaſion for the merchandiſes of each other. For example, the liquors of the ſouth, which are carried to the north,

form a commerce little known to the ancients. Thus the burden of veſſels, which was formerly computed by meaſures of corn, is at preſent determined by tons of liquor.

The ancient commerce, as far as it is known to us, was carried on from one port in the Mediterranean to another; and was almoſt wholly confined to the ſouth. Now the people of the ſame climate, having nearly the ſame things of their own, have not the ſame need of trading amongſt themſelves as with thoſe of a different climate. The commerce of Europe was therefore formerly leſs extended than at preſent.

This does not at all contradict what I have ſaid of our commerce to the Indies: For here the prodigious difference of climate deſtroys all relation between their wants and ours.

CHAP. V.

Other Differences.

COMMERCE is ſometimes deſtroyed by conquerors, ſometimes cramped by monarchs; it traverſes the earth, flies from the place where it is oppreſſed, and ſtays where it has liberty to breathe: ▼ reigns at preſent where nothing was formerly to be ſeen but deſerts, ſeas and rocks; and where it once reigned, now there are only deſerts.

To ſee Colchis in its preſent ſituation, which is no more than a vaſt foreſt, where the people are every day decreaſing, and only defend their liberty to ſell themſelves by piecemeal to the Turks and Perſians; one could never imagine that this country had ever, in the time of the Romans, been full of cities, where commerce convened all the nations of the world. We find no monument of theſe facts in the country itſelf; there are no traces of them, except in *Pliny and †Strabo.

The hiſtory of commerce is that of the communication of people. Their numerous defeats, and the flux and reflux of populations and devaſtations, here form the moſt extraordinary events.

CHAP.

* Lib. 6. † Lib. 2.

CHAP. VI.

Of the Commerce of the Ancients.

THE immenſe treaſures of Semiramis,* which could not be acquired in a day, give us reaſon to believe, that the Aſſyrians themſelves had pillaged other rich nations, as other nations afterwards pillaged them.

The effects of commerce is riches; the conſequence of riches luxury; and that of luxury, the perfection of arts.

We find that the arts were carried to great perfection in the time of Semiramis;† which is a ſufficient indication, that a conſiderable commerce was then eſtabliſhed.

In the empires of Aſia there was a great commerce of luxury. The hiſtory of luxury would make a fine part of that of commerce. The luxury of the Perſians was that of the Medes, as the luxury of the Medes was that of the Aſſyrians.

Great revolutions have happened in Aſia. The north-eaſt parts of Perſia, *viz.* Hyrcania, Margiana, Bactria, *&c.* were formerly full of flouriſhing cities‡ which are now no more; and the north of this§ empire, that is, the iſthmus which ſeparates the Caſpian and the Euxine ſeas, was covered with cities and nations, which are now deſtroyed.

Eratoſthenes¶ and Ariſtobulus learn from Patroclus, that the merchandiſes of India paſſed by the Oxus, into the ſea of Pontus. Marcus Varro‖ tells us, that the time when Pompey commanded againſt Mithridates, they were informed that people went in ſeven days from India to the country of the Bactrians, and to the river Icarus, which falls into the Oxus; that by this means they were able to bring the merchandiſes of India acroſs the Caſpian ſea, and to enter the mouth of the Cyrus; from whence it was only five days journey to the Phaſis, a

☞ 3 river

* Diodorus, lib. 2. † Ibid.

‡ Pliny, lib. 6. chap. 16. and Strabo, lib. 11.

§ Strabo, lib. 11. ¶ Strabo, ibid.

‖ See Pliny, lib. 6. chap. 17. See alſo Strabo, lib. 11, upon the paſſage by which the merchandiſes were conveyed from the Phaſis to the Cyrus.

river that diſcharges itſelf into the Euxine ſea. There is no doubt but it was by the nations inhabiting theſe ſeveral countries, that the great empires of the Aſſyrians, Medes and Perſians, had a communication with the moſt diſtant parts of the eaſt and weſt.

An entire ſtop is now put to this communication. All theſe countries have been laid waſte* by the Tartars, and are ſtill infeſted by this deſtructive nation. The Oxus no longer runs into the Caſpian ſea; the Tartars, for ſome private† reaſons have changed its courſe, and it now loſes itſelf in the barren ſands.

The Jaxartes, which was formerly a barrier between the polite and the barbarous nations, has had its courſe turned in the ſame manner by the Tartars, and it no longer empties itſelf into the ſea.

Seleucus Nicator formed‡ the project of joining the Euxine to the Caſpian ſea. This project, which would have greatly facilitated the commerce of thoſe days, vaniſhed at his‖ death. We are not certain it could have been executed in the iſthmus which ſeparates the two ſeas. This country is at preſent very little known; it is depopulated and full of foreſts; indeed water is not wanting, for an infinite number of rivers roll into it from mount Caucaſus: But as this mountain forms the north of the iſthmus, and extends like two arms§ towards the ſouth, it would have been a grand obſtacle to ſuch an enterpriſe, eſpecially in thoſe times when they had not the art of making ſluices.

It may be imagined that Seleucus would have joined the two ſeas in the very place where Peter I, has ſince joined them; that is, in that neck of land where the Tanais approaches the Volga: But the north of the Caſpian ſea was not then diſcovered.

While

* This is the reaſon why thoſe who have deſcribed this country, ſince it has been in the poſſeſſion of the Tartars, have entirely diſfigured it. The chart made of the Caſpian ſea, by order of the late Czar Peter I, has diſcovered the egregious errors of our modern ones; and by this it appears, that this ſea is conformable to the repreſentations of the ancients. See Pliny, lib 6. chap. 12.

† See Jenkinſon's account of this, in the collection of voyages to the north, vol. 4.

‡ Claudius Cæſar, in Pliny, lib 6. chap. 12.

‖ He was ſlain by Ptolemy Ceraunus.

§ See Strabo, lib. 11.

While the empires of Aſia enjoyed the commerce of luxury, the Tyrians had the commerce of the economy, which they extended through the world. Bochard has employed the firſt book of his Canaan, in enumerating the colonies which they ſent into all the countries bordering upon the ſea; they paſſed the pillars of Hercules, and made eſtabliſhments* on the coaſt of the ocean.

In thoſe times their pilots were obliged to follow the coaſts, which were, if I may ſo expreſs myſelf, their compaſs. Voyages were long and painful. The laborious voyage of Ulyſſes has been the fruitful ſubject of the fineſt poem in the world, next to that which alone has the preference.

The little knowledge which the greateſt part of the world had of thoſe who were far diſtant from them, favored the nations engaged in the economical commerce. They managed trade with as much obſcurity as they pleaſed: They had all the advantages which the moſt intelligent nations could take over the moſt ignorant.

The Egyptians, a people, who by their religion and their manners, were averſe to all communication with ſtrangers, had ſcarcely at that time any foreign trade. They enjoyed a fruitful ſoil, and great plenty. Their country was the Japan of thoſe times; it poſſeſſed every thing within itſelf.

So little jealous were thoſe people of commerce, that they left that of the Red Sea to all the petty nations that had any harbors in it. Here they ſuffered the Idumæans, the Syrians, and the Jews to have fleets. Solomon† employed in this navigation, the Tyrians, who knew theſe ſeas.

Joſephus‡ ſays, that his nation being entirely employed in agriculture, knew little of navigation; the Jews therefore traded only occaſionally in the Red Sea. They took from the Idumeans, Eloth and Eziongeber, from whom they received this commerce; they loſt theſe two cities, and with them loſt this commerce.

It was not ſo with the Phœnicians; theirs was not a commerce of luxury; nor was their trade owing to conqueſt; their frugality, their abilities, their induſtry, their

 perils,

* They founded Tarteſſus, and made a ſettlement at Cadiz.
† Kings, lib. 1. chap. 9. Chron. lib. 2. chap. 8.
‡ Againſt Apion.

perils, and the hardſhips they ſuffered, rendered them neceſſary to all the nations of the world.

Before Alexander, the people bordering on the Red Sea, traded only in this ſea, and in that of Africa. The aſtoniſhment which filled the univerſe at the diſcovery of the Indian Sea, under that conqueror, is of this a ſufficient proof. I have obſerved* that bullion was always carried to the Indies, and never any brought from thence; now the jewiſh fleets, which brought gold and ſilver by the way of the Red Sea, returned from Africa, and not from the Indies.

Beſides, this navigation was made on the eaſtern coaſt of Africa; for the ſtate of navigation at that time is a convincing proof, that they did not ſail to a very diſtant ſhore. I am not ignorant that the fleets of Solomon and Jehoſaphat returned only every three years; but I do not ſee that the time taken up in the voyage is any proof of the greatneſs of the diſtance.

Pliny and Strabo inform us that the junks of India and the Red Sea were twenty days in performing a voyage, which a Greek or Roman veſſel would accompliſh† in ſeven. In this proportion, a voyage of one year made by the fleets of Greece or Rome, would take very near three, when performed by thoſe of Solomon.

Two ſhips of unequal ſwiftneſs do not perform their voyage in a time proportionate to their ſwiftneſs. Slowneſs is frequently the cauſe of much greater ſlowneſs. When it becomes neceſſary to follow the coaſts, and to be inceſſantly in a different poſition, when they muſt wait for a fair wind to get out of a gulf, and for another to proceed; a good ſailor takes the advantage of every favorable moment, while the other ſtill continues in a difficult ſituation, and waits many days for another change.

This ſlowneſs of the Indian veſſels, which in an equal time could make but the third of the way of thoſe of the Greeks and Romans, may be explained by what we every day ſee in our modern navigation. The Indian veſſels, which were built with a kind of ſearuſhes, drew leſs water than thoſe of Greece and Rome, which were of wood, and joined with iron.

We may compare theſe Indian veſſels to thoſe at preſent made uſe of in ports of little depth of water. Such are

* Chap. 1. of this book.

† See Pliny, lib. 6. chap. 22. and Strabo, lib. 15.

are thoſe of Venice, and even of all* Italy in general, of the Baltic, and of the province of† Holland. Their ſhips which ought to be able to go in and out of port, are built round and broad at the bottom; while thoſe of other nations, who have good harbors, are formed to ſink deep into the water. This mechaniſm renders theſe laſt mentioned veſſels able to ſail much nearer the wind; while the firſt can hardly ſail, except the wind be nearly in the poop. A ſhip that ſinks deep into the water ſails towards the ſame ſide with almoſt every wind; this proceeds from the reſiſtence which the veſſel, whilſt driven by the wind meets with from the water, from which it receives a ſtrong ſupport; and from the length of the veſſel, which preſents its ſide to the wind, while from the form of the helm, the prow is turned to the point propoſed; ſo that ſhe can ſail very near to the wind, or in other words, very near to the point from whence the wind blows. But when the hull is round and broad at the bottom, and conſequently draws little water, it no longer finds this ſteady ſupport; the wind drives the veſſel, which is incapable of reſiſtence, and can run then but with a ſmall variation from the point oppoſite to the wind. From whence it follows, that broad bottomed veſſels are longer in performing voyages.

1. They loſe much time in waiting for the wind, eſpecially if they are obliged frequently to change their courſe. 2. They ſail much ſlower, becauſe, not having a proper ſupport from a depth of water, they cannot carry ſo much ſail. If this be the caſe at a time when the arts are every where known, at a time when art corrects the defects of nature, and even of art itſelf; if at this time, I ſay, we find this difference, how great muſt that have been in the navigation of the ancients?

I cannot yet leave this ſubject. The Indian veſſels were ſmall, and thoſe of the Greeks and Romans, if we except their machines built for oſtentations much leſs than ours. Now, the ſmaller the veſſel, the greater danger it encounters from foul weather. A tempeſt that would ſwallow up a ſmall veſſel, would only make a large one roll. The more

* They are moſtly ſhallow; but Sicily has excellent ports.

† I ſay the province of Holland; for the ports of Zealand are deep enough.

more one body is ſurpaſſed by another in bigneſs, the more its ſurface is relatively ſmall. From whence it follows, that in a ſmall ſhip there is a leſs proportion, that is, a greater difference as to the ſurface of the veſſel, and the weight or lading ſhe can carry, than in a large one. We know that it is a pretty general practice, to make the weight of the lading equal to that of half the water the veſſel is able to contain. Suppoſe a veſſel will contain eight hundred tons, her lading then muſt be four hundred; and that of a veſſel which would hold but four hundred tons of water, would be two hundred tons. Thus the largeneſs of the firſt ſhip will be to the weight ſhe carries, as 8 to 4; and that of the ſecond as 4 to 2. Let us ſuppoſe then, that the ſurface of the greater is to the ſurface of the ſmaller as 8 to 6; the ſurface of this will be to her weight as 6 to 2, while the ſurface of the former will be to her weight only as 8 to 4. Therefore, as the winds and waves act only upon the ſurface, the large veſſel will by her weight reſiſt their impetuoſity much more than the ſmall. We find from hiſtory, that before the diſcovery of the mariner's compaſs, four attempts were made to ſail round the coaſt of Africa. The Phœnicians ſent by* Necho and Eudoxus† flying from the wrath of Ptolemy Lathyrus, ſet out from the Red Sea, and ſucceeded. Sataſpes‡ ſent by Xerxes, and Hanno by the Carthaginians, ſet out from the pillars of Hercules, and failed in the attempt.

The capital point in ſurrounding Africa, was to diſcover and double the Cape of Good Hope. Thoſe who ſet out from the Red Sea, found this cape nearer by half, than it would have been in ſetting out from the Mediterranean. The ſhore from the Red Sea is not ſo ſhallow as that from the Cape§ to Hercules' pillars. The diſcovery of the Cape by Hercules' pillars was owing to the invention of the compaſs, which permitted them to leave the coaſt of Africa, and to launch out‖ into the vaſt ocean, in order to ſail

* He was deſirous of conquering it, *Herodotus, lib.* 4.

† Pliny, lib. ii. cap. 67. Pomponius Mela, lib. iii. cap. 9.

‡ Herodotus in Melpomene.

§ Add to this what I ſhall ſay in chap. 8. of this book, on the navigation of Hanno.

‖ In the months of October, November, December and January, the wind in the Atlantic ocean is found to blow northeaſt; our ſhips there-

ſail towards the iſland of St. Helena, or towards the coaſt of Braſil. It was therefore very poſſible for them to ſail from the Red Sea into the Mediterranean, but not to ſet out from the Mediterranean to return by the Red Sea.

Thus, without making this grand circuit, after which they could hardly ever hope to return, it was moſt natural to trade to the eaſt of Africa, by the Red Sea, and to the weſtern coaſts by Hercules' pillars.

CHAP. VII.

Of the Commerce of the Greeks, and that of Egypt, after the Conqueſt of Alexander.

THE firſt Greeks were all pirates. Minos, who enjoyed the empire of the ſea, was only more ſucceſsful, perhaps, than others in piracy; for his maritime dominion extended no farther than round his own iſle. But when the Greeks became a great people, the Athenians obtained the real dominion of the ſea; becauſe this trading and victorious nation gave laws to the potent monarch* of that time; and humbled the maritime powers of Syria, of the iſle of Cyprus and Phœnicia.

But this Athenian lordſhip of the ſea deſerves to be more particularly mentioned. "Athens," ſays Xenophon,† "rules the ſea; but as the country of Attica is joined to the continent, it is ravaged by enemies, while the Athenians are engaged in diſtant expeditions. Their leaders ſuffer their lands to be deſtroyed, and ſecure their wealth by ſending it to ſome iſland. The populace, who are not poſſeſſed of lands, have no uneaſineſs. But if the Athenians inhabited an iſland, and beſides this, enjoyed the empire of the ſea, they would, as long as they were poſſeſſed of theſe advantages, be able to annoy others, and at the ſame time be out of all danger of being annoyed." One would imagine that Xenophon was ſpeaking of England.

The

fore either croſs the line, and, to avoid the wind which is there generally at eaſt, they direct their courſe to the ſouth; or elſe they enter into the torrid zone, in thoſe places where the wind is at weſt.

* The king of Perſia. † On the Athenian republic.

The Athenians, a people whoſe heads were filled with ambitious projects; the Athenians, who augmented their jealouſy, inſtead of increaſing their influence; who were more attentive to extend their maritime power than enjoy it; whoſe political government was ſuch that the common people diſtributed the public revenues among themſelves, while the rich were in a ſtate of oppreſſion; the Athenians, I ſay, did not carry on ſo extenſive a commerce as might be expected from the produce of their mines, from the multitude of their ſlaves, from the number of their ſeamen, from their influence over the cities of Greece, and above all, from the excellent inſtitutions of Solon. Their trade was almoſt wholly confined to Greece, and to the Euxine ſea; from whence they drew their ſubſiſtence.

Corinth ſeparated two ſeas, and opened and ſhut the Peloponneſſus: It was the key of Greece, and a city, in fine, of the greateſt importance, at a time when the people of Greece were a world, and the cities of Greece nations. Its trade was very extenſive, having a port to receive the merchandiſes of Aſia, and another thoſe of Italy: For the great difficulties which attended the doubling cape Malea, where the *meeting of oppoſite winds cauſes ſhipwrecks, induced every one to go to Corinth, and they could even convey their veſſels over land from one ſea to the other. Never was there a city, in which the works of art were carried to ſo high a degree of perfection. But here religion finiſhed the corruption, which their opulence began. They erected a temple to Venus, in which more than a thouſand courteſans were conſecrated to that deity; from this ſeminary came the greateſt part of thoſe celebrated beauties, whoſe hiſtory Athenæus has preſumed to commit to writing.

Four great events happened in the reign of Alexander, which entirely changed the face of commerce; the taking of Tyre, the conqueſt of Egypt, that likewiſe of the Indies, and the diſcovery of the ſea which lies ſouth of that country. The Greeks of Egypt found themſelves in an excellent ſituation for carrying on a prodigious commerce. They were maſters of the ports of the Red Sea: Tyre, the rival of all the trading nations, was no more; they were not conſtrained by the ancient† ſuperſtitions of the country;

* See Strabo, lib. 8.

† Which inſpired an averſion for ſtrangers.

country ; and Egypt was become the centre of the univerſe.

The empire of Perſia extended to the Indus.* Darius, long before Alexander, had ſent† ſome veſſels which ſailed down this river, and paſſed even into the Red Sea. How then were the Greeks the firſt who traded to the Indies by the ſouth? Had not the Perſians done this before? Did they make no advantage of ſeas which were ſo near them; of the very ſeas that waſhed their coaſts? Alexander, it is true, conquered the Indies; but was it neceſſary for him to conquer a country, in order to trade with it? This is what I ſhall now examine.

Ariana,‡ which extended from the Perſian gulf as far as the Indus, and from the South ſea to the mountains of Paropamiſus, depended indeed in ſome meaſure on the empire of Perſia: But in the ſouthern part it was barren, ſcorched, rude and uncultivated. Tradition§ relates, that the armies of Semiramis and Cyrus periſhed in theſe deſerts; and Alexander, who cauſed his fleet to follow him, could not avoid loſing in this place a great part of his army. The Perſians left the whole coaſt to the Ichthyophagi,‖ the Oritæ, and other barbarous nations. Beſides, the Perſians were no¶ great ſailors, and their very religion debarred them from entertaining any ſuch notion as that of a maritime commerce. The voyage undertaken by Darius's direction upon the Indus, and the Indian ſea, proceeded rather from the capriciouſneſs of a prince, vainly ambitious of ſhewing his power, than from any ſettled regular project. It was attended with no conſequence, either to the advantage of commerce or of navigation. They emerged from their ignorance, only to plunge into it again.

Beſides, it was a received opinion¶ before the expedition of Alexander, that the ſouthern parts of India were uninhabitable.

* Strabo, lib. 15. † Herodotus in Melpomene.
‡ Strabo, lib. 15. § Strabo, lib. 15.
‖ Pliny, lib. 6. cap. 23 —Strabo, lib. 16.
¶ They ſailed not upon the river, leſt they ſhould defile the element. Hyde's religion of the Perſians. Even to this day they have no maritime commerce. Thoſe who take to the ſea are treated by them as atheiſts.
* Strabo, lib. 15.

uninhabitable.* This proceeded from a tradition that †Semiramis had brought back from thence only twenty men, and Cyrus but ſeven.

Alexander entered by the north. His deſign was to march towards the eaſt: But having found a part of the ſouth full of great nations, cities and rivers, he attempted to conquer it, and ſucceeded.

He then formed the deſign of uniting the Indies to the weſtern nations by a maritime commerce, as he had already united them by the colonies he had eſtabliſhed by land.

He ordered a fleet to be built on the Hydaſpes, and then fell down that river, entered the Indus, and ſailed even to its mouth. The fleet followed the coaſt from the Indus, along the banks of the country of the Oritæ, of the Ichthyophagi, of Carmania and Perſia. He built cities, and would not ſuffer the Ichthyophagi to ‡live on fiſh, being deſirous of having the borders of the ſea inhabited by civiliſed nations. Oneſicritus and Nearchus wrote§ a journal of this voyage, which was performed in ten months. They arrived at Suſa, where they found Alexander, who gave an entertainment to his whole army. He had left the fleet at Patala,‖ to go thither by land.

This prince had founded Alexandria with a view of ſecuring his conqueſt of Egypt; this was a key to open it in the very place where the kings, his ¶predeceſſors, had a key to ſhut it; and he had not the leaſt thought of a commerce, of which the diſcovery of the Indian ſea could alone give him the idea.

The kings of Syria left the commerce of the ſouth to thoſe of Egypt, and attached themſelves only to the northern trade, which was carried on by means of the Oxus and the Caſpian ſea. They then imagined that this ſea was part

* Herodotus (in Melpomene) ſays, that Darius conquered the Indies; this muſt be underſtood only to mean Ariana; and even this was only an ideal conqueſt. † Strabo, lib. 15.

‡ Pliny, book vi. chap. 23. § Ibid.

‖ A city in the iſland of Patalena, at the mouth of the Indus.

¶ Alexandria was founded on a flat ſhore, called Rhacotis, where, in ancient times, the kings had kept a garriſon, to prevent all ſtrangers, and more particularly the Greeks, from entering the country. *Pliny, lib.* v. *cap.* 10. *Strabo, lib.* 17.

part of the *northern ocean. Seleucus and Antiochus applied themſelves to make diſcoveries in it, with a particular attention; and with this view they ſcoured it with their fleets.† That part which Seleucus ſurveyed, was called the Seleucidian ſea; that which Antiochus diſcovered, received the name of the ſea of Antiochus. Attentive to the projects they might have formed of attacking Europe from hence on the back of Gaul and Germany, they neglected the ſeas on the ſouth; whether it was that the Ptolemies, by means of their fleets on the Red Sea, were already become the maſters of it; or that they had diſcovered an invincible averſion in the Perſians againſt engaging in maritime affairs; or, in fine, that the general ſubmiſſion of all the people in the ſouth, left no room for them to flatter themſelves with the hopes of further conqueſts.

I am ſurpriſed, I confeſs, at the obſtinacy with which the ancients believed that the Caſpian ſea was a part of the ocean. The expeditions of Alexander, of the kings of Syria, of the Parthians and the Romans, could not make them change their ſentiments; notwithſtanding theſe nations deſcribed the Caſpian ſea with a wonderful exactneſs: But men are generally ſo tenacious of their errors, that they acquieſce to truth as late as poſſible. When only the ſouth of this ſea was known, it was at firſt taken for the ocean; in proportion as they advanced along the banks of the northern coaſt, inſtead of imagining it a great lake, they ſtill believed it to be the ocean, that here made a ſort of a bay; when they had almoſt finiſhed its circuit, and had quite ſurveyed the northern coaſt, though their eyes were then opened, yet they ſhut them once more; and took the mouth of the Volga for a ſtrait, or a prolongation of the ocean.

The land army of Alexander had been on the eaſt only as far as the Hyphaſis, which is the laſt of thoſe rivers that fall into the Indus: Thus the firſt trade which the Greeks carried on to the Indies was confined to a very ſmall part of the country. Seleucus Nicanor penetrated as far as the Ganges,‡ and by that means diſcovered the ſea into which this river falls, that is to ſay, the bay of Bengal.

* Pliny, lib. ii. cap. 67.
† Pliny, lib. vi. cap. 12. and Strabo, lib. 2. page 507.
‡ Pliny, lib. vi. cap. 17.

Bengal. The moderns diſcover countries by voyages at ſea; the ancients diſcovered ſeas by conqueſts at land.

Strabo,* notwithſtanding the teſtimony of Appollodorus, ſeems to doubt whether the Grecian† kings of Bactria proceeded farther than Seleucus and Alexander. I am apt to think they went no farther to the eaſt, and that they did not paſs the Ganges: But they went farther towards the ſouth: They diſcovered ‡Siger, and the ports in the Gazarat and Malabar, which gave riſe to the navigation I am going to mention.

Pliny§ informs us, that the navigation of the Indies was ſucceſſively carried on by three different ways. At firſt they ſailed from the Cape of Siagre, to the iſland of Patalena, which is at the mouth of the Indus. This we find was the courſe that Alexander's fleet ſteered to the Indies. They took afterwards ‖a ſhorter and more certain courſe, by ſailing from the ſame cape or promontory to Siger: This can be no other but the kingdom of Siger, mentioned by Strabo,¶ and diſcovered by the Grecian kings of Bactria. Pliny, by ſaying that this way was ſhorter than the other, can mean only that the voyage was made in leſs time: For as Siger was diſcovered by the kings of Bactria, it muſt have been farther than the Indus: By this paſſage they muſt therefore have avoided the winding of certain coaſts, and taken advantage of particular winds. The merchants at laſt took a third way; they ſailed to Canes, or Ocelis, ports ſituated at the entrance of the Red Sea; from thence, by a weſt wind, they arrived at Muziris, the firſt ſtaple-town of the Indies, and from thence to the other ports.

Here we ſee that inſtead of ſailing to the mouth of the Red Sea, as far as Siagre, by coaſting Arabia Felix to the northeaſt, they ſteered directly from weſt to eaſt, from one ſide to the other, by means of the trade winds, whoſe regular courſe they diſcovered by ſailing in theſe latitudes. The ancients never loſt ſight of the coaſts, but when they took advantage of theſe winds, which were to them a kind of compaſs.

Pliny

* Lib. 15. † The Macedonians of Bactria, India and Ariana, having ſeparated themſelves from Syria, formed a great ſtate.

‡ Appollonius Adramittenus in Strabo, lib. ii.

§ Lib. 6. cap. 23. ‖ Pliny, lib. vi. cap. 23.

¶ Lib. 11. Siger urbis regnum.

Pliny* ſays, that they ſet ſail for the Indies in the middle of ſummer, and returned towards the end of December, or in the beginning of January. This is entirely conformable to our naval journals. In that part of the Indian ſea, which is between the peninſula of Africa, and that on this ſide the Ganges, there are two monſoons; the firſt, during which the winds blow from weſt to eaſt, begins in the month of Auguſt or September; and the ſecond, during which the wind is in the eaſt, begins in January. Thus we ſet ſail from Africa for Malabar, at the ſeaſon of the year that Ptolemy's fleet uſed to ſet out from thence; and we return too at the ſame time as they.

Alexander's fleet was ſeven months in ſailing from Patala to Suſa. It ſet out in the month of July, that is, at a ſeaſon when no ſhip dares now put to ſea to return from the Indies. Between theſe two monſoons there is an interval of time, during which the winds vary; when a north wind, meeting with the common winds, raiſes, eſpecially near the coaſts, the moſt terrible tempeſts. Theſe continue during the months of June, July and Auguſt. Alexander's fleet therefore ſetting ſail from Patala in the month of July, muſt have been expoſed to many ſtorms, and the voyage muſt have been long, becauſe they ſailed againſt the tradewind.

Pliny ſays that they ſet out for the Indies at the end of ſummer; thus they ſpent the time proper for taking advantage of the tradewind, in their paſſage from Alexandria to the Red Sea.

Obſerve here, I pray, how navigation has by little and little, arrived at perfection. Darius's fleet was two years and a half† in ſailing down the Indus, and going to the Red Sea. Afterwards the fleet of Alexander,‡ deſcending the Indus, arrived at Suſa in ten months, having ſailed three months on the Indus, and ſeven on the Indian ſea: At laſt the paſſage from the coaſt of Malabar to the Red Sea was made in forty days.§

Strabo,‖ who accounts for their ignorance of the countries between the Hypanis and the Ganges, ſays that there were very few of thoſe who ſailed from Egypt to the Indies,

* Lib. vi. cap. 23. † Herodotus, Melpomene.
‡ Pliny, lib. vi. cap. 28. § Ibid. ‖ Lib. 15.

that ever proceeded ſo far as the Ganges. Their fleets, in fact, never went thither: They ſailed with the weſtern tradewinds, from the mouth of the Red Sea to the coaſt of Malabar. They caſt anchor in the ports along that coaſt, and never attempted to get round the peninſula on this ſide the Ganges by Cape Comorin and the coaſt of Coromandel. The plan of navigation laid down by the kings of Egypt and the Romans was, to ſet out and return the ſame year.*

Thus it is demonſtrable, that the commerce of the Greeks and Romans to the Indies, was much leſs extenſive than ours. We know immenſe countries which to them were entirely unknown; we traffic with all the Indian nations; we even manage their trade, and in our bottoms carry on their commerce.

But this commerce of the ancients was carried on with far greater facility than ours. And if the moderns were to trade only to the coaſt of Guzarat and Malabar, and without ſeeking for the ſouthern iſles, were ſatisfied with what theſe iſlanders brought them, they would certainly prefer the way of Egypt to that of the Cape of Good Hope.† Strabo informs us that they traded thus with the people of Taprobane.

I ſhall finiſh this chapter with a reflection. Ptolemy the‡ geographer extends the eaſtern part of known Africa to Cape Praſium, and Arrian§ bounds it by Cape Raptum. Our beſt maps place Cape Praſſum at Moſſambique, in 14 degrees and a half ſouth latitude, and Cape Raptum at about ten degrees of the ſame latitude. But as the country extending from the kingdom of Aian, (a kingdom that indeed produces no merchandiſes) becomes richer in proportion as it ſtretches towards the ſouth, as far as the country of the Sofala, where lies the ſource of riches; it appears at firſt view aſtoniſhing, that they ſhould have thus retrogaded towards the north, inſtead of advancing to the ſouth.

In proportion as their knowledge increaſed, navigation and trade deſerted the coaſt of Africa for that of India. A rich and eaſy commerce made them neglect one leſs lucrative, and more full of difficulties. The eaſtern coaſt of Africa

* Pliny the younger. † Pliny. ‡ Lib. iv. cap. 7. and lib. vi. cap. 30. § In the periplus of the Erythrean ſea.

Africa was leſs known than in the time of Solomon; and though Ptolemy ſpeaks of Cape Praſſum, it is rather as of a place that had been formerly known, than of one known at that time. Arrian* bounds the known country at Cape Raptum, becauſe at that time they went no further. And though †Marcian of Heraclea extends it to Cape Praſſum, his authority is of no weight: For he himſelf confeſſes,‡ that he copies from Artemidorus, and Artemidorus from Ptolemy.

CHAP. VIII.

Of Carthage and Marſeilles.

CARTHAGE increaſed her power by her riches, and afterwards her riches by her power. Being miſtreſs of the coaſts of Africa, which were waſhed by the Mediterranean, ſhe extended herſelf along the ocean. Hanno, by order of the ſenate of Carthage, diſtributed thirty thouſand Carthaginians from Hercules' pillars, as far as Cerne. This place, he ſays, is as far from Hercules' pillars, as the latter from Carthage. This ſituation is extremely remarkable. It lets us ſee that Hanno limited his ſettlements to the 25th degree of north latitude, that is, to two or three degrees ſouth of the Canaries.

Hanno being at Cerne, undertook another voyage, with a view of making further diſcoveries towards the ſouth. He took but little notice of the continent. He followed the coaſt for twenty ſix days, when he was obliged to return for want of proviſions. The Carthaginians, it ſeems, made no uſe of this ſecond enterpriſe. Scylax§ ſays that the ſea is not‖ navigable beyond the Cerne, becauſe it is ſhallow, full of mud and ſea weeds: And, in fact,

* Ptolemy and Arrian were nearly contemporaries.

† His work is to be found in a collection of the ſmall pieces of the Greek geographers, printed at Oxford in 1698. vol. 1. p. 10.

‡ See the ſame, page 1. 2.

§ See his Periples, under the article of Carthage.

‖ See Herodotus in Melpomene on the obſtacles which Sapiens encountered.

there are many of theſe in thoſe* latitudes. The Carthaginian merchants mentioned by Scylax might find obſtacles, which Hanno, who had ſixty veſſels of fifty oars each, had ſurmounted. Difficulties are at moſt but relative; beſides, we ought not to confound an enterpriſe, in which bravery and reſolution muſt be exerted, with things that require no extraordinary conduct.

The relation of Hanno's voyage is a fine fragment of antiquity. It was written by the very man that performed it. His recital is not mingled with oſtentation. Great commanders write their actions with ſimplicity; becauſe they receive more glory from facts than from words. The ſtyle is agreeable to the ſubject; he deals not in the marvellous. All he ſays of the climate, of the ſoil, the behavior, the manners of the inhabitants, correſpond with what is every day ſeen on this coaſt of Africa; one would imagine it the journal of a modern ſailor.

He obſerved from his fleet, that in the daytime there was a prodigious ſilence on the continent, that in the night he heard the ſound of various muſical inſtruments, and that fires might then be every where ſeen, ſome larger than others. Our relations are conformable to this; it has been diſcovered, that in the day the ſavages retire into the foreſts to avoid the heat of the ſun, that they light up great fires in the night, to diſperſe the beaſts of prey, and that they are paſſionately fond of muſic and dancing.

The ſame writer deſcribes a volcano with all the phenomena of Veſuvius; and relates, that he took two hairy women, who choſe to die rather than follow the Carthaginians, and whoſe ſkins he carried to Carthage. This has been found not void of probability.

This narration is ſo much the more valuable as it is a monument of Punic antiquity; and from hence alone it has been regarded as fabulous. For the Romans retained their hatred to the Carthaginians, even after they had deſtroyed them. But it was victory alone that decided whether we ought to ſay, *the Punic* or *the Roman faith*.

Some

* See the charts and narrations in the firſt volume of voyages that contributed to the eſtabliſhment of an Eaſt-India company, part 1. page 201. Dampier ſays, that the turtles of the ſea in ſuch a manner, that it can ſcarcely be perceived, and veſſels can eaſily paſs through it with a full gale.

Some moderns* have imbibed theſe prejudices. What is become, ſay they, of the cities deſcribed by Hanno, of which, even in Pliny's time, there remained no veſtiges? But it would have been a wonder indeed, if any ſuch veſtiges had remained. Was it a Corinth or Athens that Hanno built on theſe coaſts? He left Carthaginian families in ſuch places as were moſt commodious for trade, and ſecured them as well as his hurry could permit againſt ſavages and wild beaſts. The calamities of the Carthaginians put a period to the navigation of Africa; theſe families muſt neceſſarily then either periſh or become ſavages. Beſides, were the ruins of theſe cities even ſtill in being, who is it that would venture into the woods and marſhes to make the diſcovery? We find however, in Scylax and Polybius, that the Carthaginians had conſiderable ſettlements on theſe coaſts. Theſe are the veſtiges of the cities of Hanno; there are no other, from the ſame reaſon that there are no other of Carthage itſelf.

The Carthaginians were in the high road to wealth, and had they gone ſo far as four degrees of north latitude, and fifteen of longitude, they would have diſcovered the gold coaſt. They would then have had a trade of much greater importance than that which is carried on at preſent on that coaſt, at a time when America ſeems to have degraded the riches of all other countries. They would there have found treaſures, of which they could never have been deprived by the Romans.

Very ſurpriſing things have been ſaid of the riches of Spain. If we may believe Ariſtotle,† the Phœnicians, who arrived at Tarteſſes, found ſo much ſilver there, that their ſhips could not hold it all; and they made of this metal their meaneſt utenſils. The Carthaginians, according to Diodorus,‡ found ſo much gold and ſilver in the Pyrenean mountains, that they adorned the anchors of their ſhips with it. But no foundation can be built on ſuch popular reports. Let us therefore examine into the facts themſelves.

We find in a fragment of Polybius cited by Strabo,§ that the ſilver mines at the ſource of the river Bætis, in which forty thouſand men were employed, produced to

* Mr. Bochart, &c. in his diſſertation on Hanno's Periplus.
† Of wonderful things. ‡ Lib. 5. § Lib. 3.

the Romans twentyfive thouſand drachms a day, that is, about five millions of livres a year, at fifty livres to the mark. The mountains that contained theſe mines were called the **ſilver mountains*, which ſhows they were the Potoſi of thoſe times. At preſent the mines of Hanover do not employ a fourth part of the workmen, and yet they yield more. But as the Roman had not many copper mines, and but few of ſilver; and as the Greeks knew none but the Attic mines, which were of little value, they might well be aſtoniſhed at their abundance.

In the war that broke out for the ſucceſſion of Spain, a man called the Marquis of Rhodes, of whom it was ſaid that he was ruined in golden mines, and enriched in hoſpitals,† propoſed to the court of France to open the Pyrenæan mines. He alleged the example of the Tyrians, the Carthaginians and the Romans. He was permitted to ſearch, but ſought in vain; he ſtill alleged, and found nothing.

The Carthaginians being maſters of the gold and ſilver trade, were willing to be ſo of the lead and pewter. Theſe metals were carried by land from the ports of Gaul upon the ocean, to thoſe of the Mediterranean. The Carthaginians were deſirous of receiving them at the firſt hand; they ſent Himilco‡ to make a §ſettlement in the iſles called Caſſiterides, which are imagined to be thoſe of Scilly.

Theſe voyages from Bætica into England have made ſome perſons imagine that the Carthaginians knew the compaſs: But it is very certain, that they followed the coaſts. There needs no other proof than Himilco's being four months in ſailing from the mouth of the Bætis to England: Beſides the famous piece of hiſtory of the Carthaginian‖ pilot, who, being followed by a Roman veſſel, ran aground that he might not¶ ſhow her the way to England,

* Mons argentarius.

† He had ſome ſhare in their management.

‡ It appears from Pliny, that this Himilco was ſent at the ſame time with Hanno: as in the time of Agathocles, there was an Hanno and an Himilco, both chief of the Carthaginians. Mr. Dodwel conjectures that theſe were the ſame: more eſpecially as the republic was then in its flouriſhing ſtate. See his diſſertation on Hanno's Periplus.

§ See Feſtus Avienus.

‖ Strabo, lib. 3. towards the end.

¶ He was ordered by the maſter of Carthage.

land, plainly intimates that those vessels were very near the shore, when they fell in with each other.

The ancients might have performed voyages that would make one imagine they had the compass, though they had not. If a pilot was far from land, and during his voyage had such serene weather, that in the night he could always see a polar star, and in the day the rising and setting of the sun, it is certain he might regulate his course as well as we do now by the compass; but this must be a fortuitous case, and not a regular method of navigation.

We see in the treaty which put an end to the first Punic war, that Carthage was principally attentive to preserve the empire of the sea, and Rome that of the land. Hanno,* in his negotiation with the Romans, declared that they should not be suffered even to wash their hands in the sea of Sicily; they were not permitted to sail beyond the *promontorium pulchrum*; they were forbid to trade in Sicily,† Sardinia and Africa, except at Carthage; an exception that lets us see there was no design to favor them in their trade with that city.

In early times there had been very great wars between Carthage and Marseilles,‡ on the subject of fishing. After the peace they entered jointly into the economical commerce. Marseilles at length grew jealous, especially as being equal to her rival in industry, she was become inferior to her in power. This is the motive of her great fidelity to the Romans. The war between the latter and the Carthaginians in Spain, was a source of riches to Marseilles, which was now become their magazine. The ruin of Carthage and Corinth still increased the glory of Marseilles; and had it not been for the civil wars, in which this republic ought on no account to have engaged, she would have been happy under the protection of the Romans, who had not the least jealousy of her commerce.

CHAP.

* Freinshemius's Supplement to Livy, decad. 2d. lib. 6.

† In the parts subject to the Carthaginians.

‡ Carthaginiensium quoque exercitus, cum bellum captis piscatorum navibus ortum esset, saepe fuderunt, pacemque victis dederunt. Justin. lib. 43. cap. 5.

CHAP. IX.

Of the Genius of the Romans as to maritime affairs.

THE Romans laid no ſtreſs on any thing but their land forces, who were diſciplined to ſtand always firm, to fight on one ſpot, and there bravely to die. They could not like the practice of ſeamen, who firſt offer to fight, then fly, then return; conſtantly avoid danger, often make uſe of ſtratagems, and ſeldom of force. This was not ſuitable to the genius of the *Greeks, much leſs to that of the Romans.

They deſtined therefore to the ſea only thoſe citizens who were not† conſiderable enough to have a place in their legions. Their marines were commonly freedmen.

At this time, we have neither the ſame eſteem for land-forces, nor the ſame contempt for thoſe of the ſea. In the firſt,‡ art is decreaſed; in the ſecond,§ it is augmented; now things are generally eſteemed in proportion to the degree of ability requiſite to diſcharge them.

CHAP. X.

Of the Genius of the Romans with reſpect to Commerce.

THE Romans were never diſtinguiſhed by a jealouſy for trade. They attacked Carthage as a rival, not as a trading nation. They favored trading cities, though they were not ſubject to them. Thus they increaſed the power of Marſeilles by the ceſſion of a large territory. They were vaſtly afraid of barbarians; but had not the leaſt apprehenſion from a trading people. Their genius, their

* As Plato has obſerved, lib. iv. of laws.

† Polybius, lib. iv.

‡ See the conſiderations on the cauſes of the riſe and decienſion of the Roman grandeur.

§ Ibid.

their glory, their military education, and the very form of their government, eſtranged them from commerce.

In the city they were employed about war, elections, factions and lawſuits; in the country about agriculture; and as for the provinces, a ſevere and tyrannical government was incompatible with commerce.

But their political conſtitution was not more oppoſite to trade, than their law of nations. "The people," ſays* Pomponius the civilian "with whom we have neither friendſhip nor hoſpitality, nor alliance, are not our enemies; however, if any thing belonging to us fall into their hands, they are proprietors of it; freemen become their ſlaves; and they are upon the ſame terms with reſpect to us."

Their civil law was not leſs oppreſſive. The law of Conſtantine, after having ſtigmatiſed as baſtards, the children of perſons of a mean rank, who had been married to thoſe of a ſuperior ſtation, confounds women who keep a ſhop for vending merchandiſes, with ſlaves, with women who keep taverns, with actreſſes, with the daughters of thoſe who keep public ſtews, or who had been condemned to fight in the amphitheatre: This had its original in the ancient inſtitutions of the Romans.

I am not ignorant that men prepoſſeſſed with theſe two ideas, that commerce is of the greateſt ſervice to a ſtate, and that the Romans had the beſt regulated government in the world, have believed that they greatly honored and encouraged commerce; but the truth is, they ſeldom troubled their heads about it.

CHAP. XI.

Of the Commerce of the Romans with the Barbarians.

THE Romans having erected Europe, Aſia and Africa into one vaſt empire; the weakneſs of the people and the tyranny of their laws united all the parts of this immenſe body. The Roman policy was then to avoid all communication

* Leg. 5. ff. de captivis.

† Quæ matrimoniis publice præſuit. *Leg. 5. cod. de natural. liberis.*

communication with thoſe nations whom they had not ſubdued; the fear of carrying to them the art of conquering, made them neglect the art of enriching themſelves. They made laws to hinder all commerce with barbarians. "Let nobody," ſaid *Valens and Gratian, "ſend wine, oil or other liquors to the barbarians, though it be only for them to taſte. Let no one carry gold to them,"† adds Gratian, Valentinian and Theodoſius; "rather, if they have any, let our ſubjects deprive them of it by ſtratagem." The exportation‡ of iron was prohibited on pain of death.

Domitian, a prince of great timidity, ordered the vines in Gaul§ to be pulled up; from a fear, no doubt, leſt their wines ſhould draw thither the barbarians. Probus and Julian, who had no ſuch fears, gave orders for their being planted again.

I am ſenſible, that upon the declenſion of the Roman empire, the barbarians obliged the Romans to eſtabliſh ſtaple towns,‖ and to trade with them. But even this is a proof that the minds of the Romans were averſe to commerce.

CHAP. XII.

Of the Commerce of the Romans with Arabia and the Indies.

THE trade to Arabia Felix, and that to the Indies, were the two branches, and almoſt the only ones of their foreign commerce. The Arabs were formerly what they are at this day, equally addicted to trade and robbery. Their immenſe deſerts on the one hand, and the riches which ſtrangers went thither in ſearch of, produced theſe two effects. Theſe riches the Arabs found in their ſeas and foreſts; and as they ſold much and purchaſed little, they

* Leg. ad barbaricum cod. quæ res exportari non debeant.

† Leg. 2. cod. de commerce. et mercator.

‡ *Leg.* 2. *quæ res exportari non debeant*, and Procopius, war of the Perſians, book 1.

§ See the chronicles of Euſebius and Cedienus.

‖ See the conſiderations on the cauſes of the riſe and declenſion of the Roman grandeur.

they drew to *themſelves the gold and ſilver of the Romans. The Europeans trade with them ſtill in the ſame manner; the caravans of Aleppo, and the royal veſſel of Suez, carry thither immenſe ſums.†

Their commerce to the Indies was very conſiderable. Strabo‡ had been informed in Egypt, that they employed in this navigation, one hundred and twenty veſſels: This commerce was carried on entirely with bullion. They ſent thither annually fifty millions of ſeſterces. Pliny§ ſays, that the merchandiſes brought from thence were ſold at Rome at *cent. per cent.* profit. He ſpeaks, I believe, too generally: if this trade had been ſo vaſtly profitable, every body would have been willing to engage in it, and then it would be at an end.

It will admit of a queſtion, whether the trade to Arabia and the Indies was of any advantage to the Romans? They were obliged to export their bullion thither, though they had not, like us, the reſource of America, which ſupplies what we ſend away. I am perſuaded that one of the reaſons of their increaſing the value of their ſpecie by eſtabliſhing baſe coin, was the ſcarcity of ſilver, owing to the continual exportation of it to the Indies: And though the commodities of this country were ſold at Rome at the rate of *cent. per cent.* this profit of the Romans, being obtained from the Romans themſelves, could not enrich the empire.

It may be alleged, on the other hand, that this commerce increaſed the Roman navigation, and of courſe their power; that new merchandiſes augmented their inland trade, gave encouragement to the arts, and employment to the induſtrious; that the number of ſubjects multiplied in proportion to the new means of ſupport; that this new commerce was productive of luxury, which I have proved to be as favorable to a monarchical government, as fatal to a commonwealth; that this eſtabliſhment was of the ſame date as the fall of their republic; that the luxury of Rome was become neceſſary; and that it

* Pliny, lib. 6. cap. 28.

† The caravans of Aleppo and Suez carry thither annually to the value of about two millions of livres, and as much more clandeſtinely; the royal veſſel of Suez carries thither alſo two millions.

‡ Lib 2. page 81. of the edition printed 1587.

§ Lib. 6. cap. 23.

it was extremely proper, that a city which had accumulated all the wealth of the univerſe ſhould refund it by its luxury.

We ſhall ſay but one word on their inland trade. Its principal branch was the corn brought to Rome for the ſubſiſtence of the people: But this was rather a political affair than a point of commerce. On this account the ſailors were favored with ſome privileges,* becauſe the ſafety of the empire depended on their vigilance.

CHAP. XIII.

Of Commerce after the Deſtruction of the Weſtern Empire.

COMMERCE was yet more undervalued after the invaſion of the Roman empire. The barbarous nations at firſt regarded it only as an opportunity for robbery; and when they had ſubdued the Romans, they honored it no more than agriculture, and the other profeſſions of a conquered people.

Soon was the commerce of Europe almoſt entirely loſt. The nobility, who had every where the direction of affairs, were in no pain about it.

The laws of the †Viſigoths permitted private people to occupy half the beds of great rivers, provided the other half remained free for nets and boats. There muſt have been very little trade in countries conquered by theſe barbarians.

In thoſe times were eſtabliſhed the ridiculous rights of eſcheatage and ſhipwrecks. Theſe men thought that ſtrangers not being united to them by any civil law, they owed them on the one hand no kind of juſtice, and on the other no ſort of pity.

In the narrow bounds which nature had originally preſcribed to the people of the north, all were ſtangers to them, and in their poverty they regarded all only as contributing to their riches. Being eſtabliſhed, before their conqueſts, on the coaſts of a ſea of very little breadth, and full

* Suet. in Claudio. leg. 7. cod. Theodoſ. de naviculariis.
† Lib. 8. Tit. 4. § 9.

full of rocks, from theſe very rocks they drew their ſubſiſtence.

But the Romans, who made laws for all the univerſe, had eſtabliſhed the moſt* humane ones with regard to ſhipwrecks. They ſuppreſſed the rapine of thoſe who inhabited the coaſts; and what was more ſtill, the rapaciouſneſs of their treaſurers.†

CHAP. XIV.

A particular Regulation.

THE law‡ of the Viſigoths made however one regulation in favor of commerce. It ordained that foreign merchants ſhould be judged, in the differences that aroſe amongſt themſelves, by the laws, and by judges of their own nation. This was founded on an eſtabliſhed cuſtom among all theſe mixed people, that every man ſhould live under his own law; a cuſtom of which I ſhall ſpeak more at large in another place.

CHAP. XV.

Of Commerce after the decay of the Roman power in the Eaſt.

THE Mahometans appeared, conquered, extended and diſperſed themſelves. Egypt had particular ſovereigns; theſe carried on the commerce of India, and being poſſeſſed of the merchandiſes of this country, drew to themſelves the riches of all other nations. The Sultans of Egypt were the moſt powerful princes of thoſe times. Hiſtory informs us with what a conſtant and well regulated force they ſtopped the ardor, the fire and the impetuoſity of the cruſades.

CHAP.

* Toto titulo ff. de incend. ruin. et naufrag. et cod. naufragiis. et leg. 3. ff ad leg. Cornel de ſicariis.

† Leg. 1. cod. de naufragiis. ‡ Lib. 2. tit. 3. § 2.

CHAP. XVI.

How Commerce broke through the Barbariſm of Europe.

ARISTOTLE's philoſophy being carried to the weſt, pleaſed the ſubtile geniuſes, who were the virtuoſi of thoſe times of ignorance. The ſchoolmen were infatuated with it, and derived from hence* their doctrine upon lending upon intereſt; this they confounded with uſury, and condemned. Hence commerce, which was the profeſſion only of mean perſons, became that of knaves: For whenever a thing is forbidden, which nature permits or neceſſity requires, it is only making thoſe who do it diſhoneſt.

Commerce was transferred to a nation covered with infamy; and was ſoon ranked with the moſt ſhameful uſury, with monopolies, with the levying of ſubſidies, and with all the diſhoneſt means of acquiring wealth.

The Jews,† enriched by their exactions, were pillaged by the tyranny of princes; which pleaſed indeed, but did not eaſe the people.

What paſſed in England may ſerve to give us an idea of what was done in other countries. King‡ John having impriſoned the Jews, in order to obtain their wealth; there were few who had not at leaſt one of their eyes plucked out. Thus did that king influence his court of juſtice. A certain Jew who had a tooth pulled out every day for ſeven days ſucceſſively, gave ten thouſand marks of ſilver for the eighth. Henry III, extorted from Aaron a Jew, at York, fourteen thouſand marks of ſilver, and ten thouſand for the queen. In thoſe times they did by violence, what is now done in Poland with ſome ſemblance of moderation. As princes could not dive into the purſes of their ſubjects, becauſe of their privileges, they put the Jews to the torture, who were not conſidered as citizens.

At laſt a cuſtom was introduced of confiſcating the effects

* See Ariſtot. polit. lib. 1. cap. 9 and 10.

† See in Marca Hiſpanica the conſtitutions of Arragon in the years 1228 and 1353; and in Bruſſel, the agreement in the year 1206, between the King, the Counteſs of Champagne and Guy of Dampierre.

‡ Stowe's ſurvey of London, book 3, page 54.

ſects of thoſe Jews who embraced Chriſtianity. This ridiculous cuſtom is known only by the* law, which ſuppreſſed it. The moſt vain and trifling reaſons were given in juſtification of that proceeding: It was alleged, that it was proper to try them, in order to be certain that they had entirely ſhook off the ſlavery of the devil. But it is evident, that this confiſcation was a ſpecies of the right of †amortiſation, to recompenſe the prince, or the lords, for the taxes levied on the Jews, which ceaſed on their embracing Chriſtianity. In thoſe times, men like land, were regarded as property. I cannot help remarking by the way, how this nation has been ſported with from one age to another: At one time, their effects were confiſcated, when they were willing to become Chriſtians; and at another, if they refuſed to turn Chriſtians, they were ordered to be burnt.

In the mean time, commerce was ſeen to ariſe from the boſom of Vexation and Deſpair. The Jews, proſcribed by turns from every country, found out the way of ſaving their effects. By this means they rendered their retreats for ever fixed; for though princes might have been willing to get rid of their perſons, yet they did not chooſe to get rid of their money.

The ‡Jews invented letters of exchange; commerce, by this means, became capable of eluding violence, and of maintaining every where its ground; the richeſt merchant having none but inviſible effects, which he could convey imperceptibly, wherever he pleaſed.

The theologians were obliged to limit their principles: And commerce, which they had before connected by main force with knavery, reentered, if I may ſo expreſs myſelf, the boſom of Probity.

Thus we owe to the ſpeculations of the ſchoolmen, all the misfortunes which accompanied the deſtruction of commerce; and to the avarice of princes, the eſtabliſh-

ment

* The edict paſſed at Baville, April 4, 1392.

† In France the Jews, were ſlaves in mortmain, and the Lords their ſucceſſors. Mr. Bruſſel mentions an agreement made in the year 1206, between the king and Thibaut count of Champagne, by which it was agreed, that the Jews of the one ſhould not lend in the land of the other.

‡ It is known, that under Philip Auguſtus, and Philip the Long, the Jews, who were chaſed from France, took refuge in Lombardy, and that there they gave to foreign merchants and travellers, ſecret letters, drawn upon thoſe to whom they had intruſted their effects in France, which were accepted.

ment of a practice which puts it in some measure out of their power.

From this time it became necessary that princes should govern with more prudence, than they themselves could ever have imagined: For great exertions of authority were in the event found to be impolitic; and from experience it is manifest, that nothing but the goodness and lenity of a government can make it flourish.

We begin to be cured of Machiavelism, and recover from it every day. More moderation is become necessary in the councils of princes. What would formerly have been called a master stroke in politics, would be now, independent of the horror it might occasion, the greatest imprudence.

Happy is it for men, that they are in a situation, in which, though their passions prompt them to be wicked, it is however for their interest to be humane and virtuous.

CHAP. XVII.

The Discovery of two new Worlds, and in what manner Europe is affected by it.

THE compass opened, if I may so express myself, the universe. Asia and Africa were found, of which only some borders were known; and America, of which we knew nothing.

The Portuguese, sailing on the Atlantic ocean, discovered the most southern point of Africa; they saw a vast sea, which carried them to the Eastindies. Their dangers upon this sea, the discovery of Mozambique, Melinda and Calicut, have been sung by Camoens, whose poems make us feel something of the charms of the Odyssey, and the magnificence of the Æneid.

The Venetians had hitherto carried on the trade of the Indies through the Turkish dominions, and pursued it in the midst of oppressions and discouragements. By the discovery of the Cape of Good Hope, and those which were made some time after, Italy was no longer the centre of the trading world; it was, if I may be permitted the

the expreſſion, only a corner of the univerſe, and is ſo ſtill. The commerce, even of the Levant, depending now on that of the great trading nations to both the Indies, Italy can be no more than an acceſſory.

The Portugueſe traded to the Indies in right of conqueſt. The* conſtraining laws, which the Dutch at preſent impoſe on the commerce of the little Indian princes, had been eſtabliſhed before by the Portugueſe.

The fortune of the houſe of Auſtria was prodigious. Charles V ſucceeded to the poſſeſſion of Burgundy, Caſtile and Arragon; he arrived afterwards at the Imperial dignity; and, to procure him a new kind of grandeur, the univerſe extended itſelf, and there was ſeen a new world paying him obeiſance.

Chriſtopher Columbus diſcovered America; and though Spain ſent thither only a force ſo ſmall that the leaſt prince in Europe could have ſent the ſame, yet it ſubdued two vaſt empires, and other great ſtates.

While the Spaniards diſcovered and conquered the weſt, the Portugueſe puſhed their conqueſts and diſcoveries in the eaſt. Theſe two nations met each other; they had recourſe to Pope Alexander VI, who made the celebrated line of partition, and adjudged the great proceſs.

But the other nations of Europe would not ſuffer them quietly to enjoy their ſhares. The Dutch chaſed the Portugueſe from almoſt all their ſettlements in the Eaſtindies; and ſeveral other nations planted colonies in America.

The Spaniards conſidered theſe new diſcovered countries, as the ſubject of conqueſt; while others, more refined in their views, found them to be the proper ſubjects of commerce, and upon this principle directed their proceedings. Hence ſeveral nations have conducted themſelves with ſo much wiſdom, that they have given a kind of ſovereignty to companies of merchants, who governing theſe far diſtant countries only with a view to trade, have made a great acceſſory power, without embarraſſing the principal ſtate.

The colonies they have formed, are under a kind of dependence, of which there is ſcarcely an inſtance in all the colonies of the ancients; whether we conſider them as

* See the relation of Fr. Pirard, part. ii. chap. 15.

holding of the ſtate itſelf, or of ſome trading company eſtabliſhed in the ſtate.

The deſign of theſe colonies is, to trade on more advantageous conditions, than could otherwiſe be done with the neighboring people, with whom all advantages are reciprocal. It has been eſtabliſhed, that the* *metropolis*, or mother country, alone ſhall trade in the colonies, and that from very good reaſon: Becauſe the deſign of the ſettlement was the extenſion of commerce, not the foundation of a city, or of a new empire.

Thus it is ſtill a fundamental law of Europe, that all commerce with a foreign colony ſhall be regarded as a mere monopoly, puniſhable by the laws of the country; and in this caſe we are not to be directed by the laws and precedents of the† ancients, which are not at all applicable.

It is likewiſe acknowledged, that a commerce eſtabliſhed between the mother countries does not include a permiſſion to trade in the colonies; for theſe always continue in a ſtate of prohibition.

The diſadvantage of a colony that loſes the liberty of commerce, is viſibly compenſated by the protection of the mother country, who defends it by her arms, or ſupports it by her laws.

From hence follows a third law of Europe, that when a foreign commerce with a colony is prohibited, it is not lawful to trade in thoſe ſeas, except in ſuch caſes as are excepted by treaty.

Nations who are with reſpect to the whole univerſe what individuals are in a ſtate, like theſe, are governed by the law of nature, and by particular laws of their own making. One nation may reſign to another the ſea, as well as the land. The Carthaginians forbade‡ the Romans to ſail beyond certain limits, as the Greeks had obliged the king of Perſia to keep as far diſtant from the ſeacoaſt§ as a horſe could gallop.

The great diſtance of our colonies is not an inconvenience that affects their ſafety; for if the mother country,

on

* This, in the language of the ancients, is the ſtate which founded the colony.

† Except the Carthaginians, as we ſee by the treaty which put an end to the firſt Punic war. ‡ Polybius, lib. 3.

§ The king of Perſia obliged himſelf by treaty not to ſail with any veſſel of war beyond the Cyanean rocks, and the Chelidonian iſles, *Plutarch in the life of Cimon.*

on whom they depend for their defence, is far diſtant, no leſs diſtant are thoſe nations by whom they may be afraid of being conquered.

Beſides, this diſtance is the cauſe that thoſe who are eſtabliſhed there, cannot conform to the manner of living in a climate ſo different from their own; they are obliged therefore to draw from the mother country all the conveniences of life. The *Carthaginians, to render the Sardinians and Corſicans more dependent, forbade their planting, ſowing, or doing any thing of the like kind under pain of death; ſo that they ſupplied them with neceſſaries from Africa. The Europeans have compaſſed the ſame thing, without having recourſe to ſuch ſevere laws. Our colonies in the Caribbee iſlands are under an admirable regulation in this reſpect; the ſubject of their commerce is what we neither have, nor can produce; and they want what is the ſubject of ours.

A conſequence of the diſcovery of America was the connecting Aſia and Africa with Europe; it furniſhed materials for a trade with that vaſt part of Aſia, known by the name of the Eaſtindies. Silver, that metal ſo uſeful as the medium of commerce, became now as a merchandiſe; the baſis of the greateſt commerce in the world. In fine, the navigation to Africa became neceſſary, in order to furniſh us with men to labor in the mines, and to cultivate the lands of America.

Europe is arrived to ſo high a degree of power, that nothing in hiſtory can be compared to it. Whether we conſider the immenſity of its expenſes, the grandeur of its engagements, the number of its troops, and the regular payment even of thoſe that are leaſt ſerviceable, and which are kept only for oſtentation.

Father Du Halde ſays,† that the interior trade of China is much greater than that of all Europe. That might be, if our foreign trade did not augment our inland commerce. Europe carries on the trade and navigation of the other three parts of the world; as France, England and Holland, do nearly that of Europe.

☞ 2 CHAP.

* Ariſtotle on wonderful things, lib. viii. dec 2.
† Tome ii. pag. 170.

CHAP. XVIII.

Of the Riches which Spain drew from America.

IF Europe* has derived ſo many advantages from the American trade, it ſeems natural to imagine, that Spain muſt have derived much greater. She drew from the newly diſcovered world ſo prodigious a quantity of gold and ſilver, that all we had before could not be compared to it.

But (what one could never have expected) this great kingdom was every where baffled by its misfortunes. Philip II, who ſucceeded Charles V, was obliged to make the celebrated bankruptcy known to all the world. There never was a prince who ſuffered more from the murmurs, the inſolence, and the revolt of troops conſtantly ill paid.

From this time the monarchy of Spain has been inceſſantly declining. This has been owing to an interior and phyſical defect in the nature of theſe riches, which renders them vain; a defect which increaſes every day.

Gold and ſilver are either a fictitious, or a repreſentative wealth. The repreſentative ſigns of wealth are extremely durable, and, in their own nature, but little ſubject to decay. But the more they are multiplied, the more they loſe their value, becauſe the fewer are the things which they repreſent.

The Spaniards, after the conqueſt of Mexico and Peru, abandoned their natural riches, in purſuit of a repreſentative wealth which daily degraded itſelf. Gold and ſilver were extremely ſcarce in Europe; and Spain becoming all of a ſudden miſtreſs of a prodigious quantity of theſe metals, conceived hopes to which ſhe never before aſpired. The wealth ſhe found in the conquered countries, great as it was, did not however equal that of their mines. The Indians concealed part of them; and beſides, theſe people who made no other uſe of gold and ſilver than to give magnificence

* This has been already ſhewn in a ſmall treatiſe, written by the author about twenty years ago; which has been almoſt entirely incorporated in the preſent work.

nificence to the temples of their gods, and to the palaces of their kings, ſought not for it with an avarice like ours. In ſhort, they had not the ſecret of drawing theſe metals from every mine; but only from thoſe in which the ſeparation might be made with fire; they were ſtrangers to the manner of making uſe of mercury, and perhaps to mercury itſelf.

However, it was not long before the ſpecie of Europe was doubled; this appeared from the price of commodities, which every where was doubled.

The Spaniards raked into the mines, ſcooped out mountains, invented machines to draw out water, to break the ore and ſeparate it; and, as they ſported with the lives of the Indians, they forced them to labor without mercy. As the ſpecie of Europe ſoon doubled, the profit of Spain diminiſhed in the ſame proportion, and they had every year but the ſame quantity of a metal which was become by one half leſs precious.

In double the time the ſpecie ſtill doubled, and the profit ſtill diminiſhed another half.

It diminiſhed even more than half; Let us ſee in what manner.

To extract the gold from the mines, to give it the requiſite preparations, and to import it into Europe, muſt be attended with ſome certain expenſe; I will ſuppoſe this to be as 1 to 64. When the ſpecie was once doubled, and conſequently became by one half leſs precious, the expenſe was as 2 to 64. Thus the galleons which brought to Spain the ſame quantity of gold, brought a thing which really was of leſs value by one half, though the expenſes attending it had been one half higher.

If we proceed doubling and doubling, we ſhall find in this progreſſion the cauſe of the impotency of the wealth of Spain. It is about two hundred years ſince they have begun to work their Indian mines. I ſuppoſe the quantity of ſpecie at preſent in the trading world is to that before the diſcovery, of the Indies, as 32 is to 1; that is, it has been doubled five times: In two hundred years more the ſame quantity will be to that before the diſcovery, as 64 is to one; that is, it will be doubled once more. Now, at preſent, fifty* quintals of ore yield four, five and ſix ounces of gold; and when it yields only two, the

* See Frezier's voyages.

miner receives no more from it than his expenſes. In two hundred years, if it yields only four, this too will only defray his charges. There will then be but little profit to be drawn from the gold mines. The ſame reaſoning will hold good of ſilver, except that the working of the ſilver mines is a little more advantageous than thoſe of gold.

But, if mines ſhould be diſcovered ſo fruitful as to give a much greater profit, the more fruitful they will be, the ſooner the profit will ceaſe.

The Portugueſe in Braſil have found mines of gold ſo rich, that they muſt neceſſarily very ſoon make a conſiderable diminution in the profits of thoſe of Spain, as well as in their own.

I have frequently heard people deplore the blindneſs of the court of France, who repulſed Chriſtopher Columbus, when he made the propoſal of diſcovering the Indies. Indeed they did, though perhaps without deſign, an act of the greateſt wiſdom. Spain has behaved like the fooliſh king, who deſired that every thing he touched might be converted into gold, and who was obliged to beg of the gods to put an end to his miſery.

The companies and banks eſtabliſhed in many nations, have put a finiſhing ſtroke to the lowering of gold and ſilver, as a ſign or repreſentation of riches; for by new fictions they have multiplied in ſuch a manner the ſigns of wealth, that gold and ſilver, having this office only in part, are become leſs precious.

This public credit ſerves inſtead of mines, and diminiſhes the profit which the Spaniards draw from theirs.

True it is, that the Dutch trade to the Eaſtindies has increaſed, in ſome meaſure, the value of the Spaniſh merchandiſe; for, as they carry bullion, and give it in exchange for the merchandiſes of the eaſt, they eaſe the Spaniards of part of a commodity, which in Europe abounds too much.

And this trade, which may indirectly be regarded as that of Spain, is as advantageous to that nation, as to thoſe who are directly employed in carrying it on.

From what has been ſaid, we may form a judgment of the laſt order of the council of Spain, which prohibits the making uſe of gold and ſilver in gildings and other ſuperfluities;

fluities: A decree as ridiculous as it would be for the ſtates of Holland to prohibit the conſumption of ſpices.

My reaſoning does not hold good againſt all mines; thoſe of Germany and Hungary, which produce little more than the expenſe of working them, are extremely uſeful. They are found in the principal ſtate; they employ many thouſand men, who there conſume their ſuperfluous commodities; and they are properly a manufacture of the country.

The mines of Germany and Hungary promote the culture of land; the working of thoſe of Mexico and Peru deſtroys it.

The Indies and Spain are two powers under the ſame maſter; but the Indies are the principal, while Spain is only an acceſſory. It is in vain for politics to attempt to bring back the principal to the acceſſory; the Indies will always draw Spain to themſelves.

Of the merchandiſes to the value of about fifty millions of livres annually ſent to the Indies, Spain furniſhes only two millions and a half: The Indies trade for fifty millions, the Spaniards for two and a half.

That muſt be a bad kind of riches which depends on accident, and not on the induſtry of a nation, on the number of its inhabitants, and on the cultivation of its lands. The king of Spain, who receives great ſums from his cuſtomhouſe at Cadiz, is in this reſpect only a rich individual in a ſtate extremely poor. Every thing paſſes between ſtrangers and himſelf, while his ſubjects have ſcarcely any ſhare in it: This commerce is independent both of the good and bad fortune of his kingdom.

Were ſome provinces of Caſtile able to give him a ſum equal to that of the cuſtomhouſe of Cadiz, his power would be much greater: His riches would be the effect of the wealth of the country: Theſe provinces would animate all others, and they would be altogether more capable of ſupporting their reſpective charges: Inſtead of a great treaſury, he would have a great people.

CHAP. XIX.

A Problem.

IT is not for me to decide the queſtion, Whether if Spain be not herſelf able to carry on the trade of the Indies, it would not be better to leave it open to ſtrangers? I will only ſay, that it is for her advantage to load this commerce with as few obſtacles as politics will permit. When the merchandiſes which ſeveral nations ſend to the Indies are very dear, the inhabitants of that country give a great deal of their commodities, which are gold and ſilver, for very little of thoſe of foreigners: The contrary of this happens when they are at a low price. It would perhaps be of uſe, that theſe nations ſhould underſell each other, that by this means the merchandiſe carried to the Indies might be always cheap. Theſe are principles which deſerve to be examined, without ſeparating them however from other conſiderations; the ſafety of the Indies, the advantages of one only cuſtomhouſe, the danger of making great alterations, and the foreſeen inconveniences, which are often leſs dangerous than thoſe which cannot be foreſeen.

BOOK XXII.

OF LAWS IN RELATION TO THE USE OF MONEY.

CHAP. I.

The Reaſon of the Uſe of Money.

PEOPLE who have few merchandiſes, as ſavages, and amongſt civilized nations, thoſe who have only two or three ſpecies, trade by exchange. Thus the caravans of

of Moors who go to Tombocton, in the heart of Africa, have no need of money, for they exchange their ſalt for gold. The Moor puts his ſalt in a heap, and the Negro his duſt in another; if there is not gold enough, the Moor takes away ſome of his ſalt, or the Negro adds more gold, till both parties are agreed.

But when a nation traffics with a great variety of merchandiſes, money becomes neceſſary; becauſe a metal, eaſily carried from place to place, ſaves the great expenſes which people would be obliged to be at, if they always proceeded by exchange.

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

CHAP. II.

Of the Nature of Money.

MONEY is a ſign which repreſents the value of all merchandiſes. Metal is taken for this ſign as being durable;* becauſe it conſumes but little by uſe; and becauſe, without being deſtroyed, it is capable of many diviſions. A precious metal has been choſen as a ſign, as being moſt portable. A metal is moſt proper for a common meaſure, becauſe it can be eaſily reduced to the ſame ſtandard. Every ſtate fixes upon it a particular impreſſion, to the

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

the end, that the form may correſpond with the ſtandard and the weight, and that both may be known by inſpection only.

The Athenians, not having the uſe of metals, made uſe of oxen,* and the Romans of ſheep: But one ox is not the ſame as another ox, in manner that one piece of metal may be the ſame as another.

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

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

Legiſlators have ſometimes had the art, not only to make things, in their own nature, the repreſentative of ſpecie, but to convert them even into ſpecie, like the current coin. Cæſar, when he was‡ a dictator, permitted debtors to give their lands in payment to their creditors, at the price they were worth before the civil war.§ Tiberius ordered, that thoſe who deſired ſpecie ſhould have it from

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

† It is an ancient cuſtom in Algiers, for the father of a family to have a treaſure concealed in the earth. *Hiſt. of the kingdom of Algiers, by Logie de Taſſis.*

‡ Cæſar on the civil war, book 3. § Tacitus, lib. vi.

from the public treaſury, on binding over their lands to double the value. Under Cæſar, the lands were the money which paid all debts: Under Tiberius, ten thouſand ſeſterces in land became as current money, equal to five thouſand ſeſterces in ſilver.

The magna charta of England provides againſt the ſeizing the lands or revenues of a debtor, when his moveable or perſonal goods are ſufficient to pay, and he is willing to give them up to his creditors: By this means all the goods of an Engliſhman repreſented money.

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

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

CHAP. III.

Of ideal Money.

THERE is both real and ideal money. Civilized nations generally make uſe of ideal money, only becauſe they have converted their real money into ideal. At firſt their real money was ſome metal of a certain weight and ſtandard: But ſoon diſhoneſty or want made them retrench a part of the metal from every piece of money, to which they left the ſame name; for example, from a livre at a pound weight they took half the ſilver, and ſtill continued to call it a livre; the piece which was the twentieth part of

* The laws of the Saxons, chap. 18.

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

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

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

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

CHAP. IV.

Of the Quantity of Gold and Silver.

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

CHAP.

CHAP. V.

The ſame Subject continued.

THE bullion drawn from the American mines, imported into Europe, and from thence ſent to the eaſt, has greatly promoted the navigation of the European nations; for it is a merchandiſe which Europe receives in exchange from America, and which ſhe ſends in exchange to the Indies. A prodigious quantity of gold and ſilver is therefore an advantage, when we conſider theſe metals as a merchandiſe: But it is otherwiſe when we conſider them as a ſign; becauſe their abundance gives an allay to their quality as a ſign, which is chiefly founded on their ſcarcity.

Before the firſt Punic war, copper was to *ſilver as 960 to 1;† it is at preſent nearly as 73 and a half to one. When the proportion ſhall be as it was formerly, ſilver will better perform its office as a ſign.

CHAP. VI.

The Reaſon why Intereſt was lowered one half after the Conqueſt of the Indies.

GARCILASSO informs us,‡ that in Spain, after the conqueſt of the Indies, the intereſt which was at ten *per cent.* fell to five. This was a neceſſary conſequence. A great quantity of ſpecie being all of a ſudden brought into Europe, much fewer perſons had need of money. The price of all things increaſed, while the value of money diminiſhed: The proportion was then broken, and all the old debts were diſcharged. We may recollect the time of the ſyſtem,§ when every thing was at a high price except ſpecie.

* See chap. 12. of this book.

† Suppoſing a mark, or eight ounces of ſilver, to be worth fortynine livres, and copper twenty ſols per pound.

‡ Hiſtory of the civil wars of the Spaniards in the Weſtindies.

§ In France, Mr. Laws's project was called by this name.

ſpecie. Thoſe that had money after the conqueſt of the Indies, were obliged to lower the price or hire of their merchandiſe; that is, in other words, their intereſt.

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

CHAP. VII.

How the Price of Things is fixed in the Variation of the Sign of Riches.

MONEY is the price of merchandiſes or manufactures. But how ſhall we fix this price? or, in other words, by what piece of money is every thing to be repreſented?

If we compare the maſs of gold and ſilver in the whole world, with the quantity of merchandiſes therein contained, it is certain, that every commodity or merchandiſe in particular, may be compared to a certain portion of the entire maſs of gold and ſilver. As the total of the one is to the total of the other, ſo part of the one will be to part of the other. Let us ſuppoſe, that there is only one commodity or merchandiſe in the world, or only one to be purchaſed, and that this is diviſible like money: A part of this merchandiſe will anſwer to a part of the maſs of gold and ſilver; the half of the total of the one, to the half of the total of the other; the tenth, the hundredth, the thouſandth part of the one, to the tenth, the hundredth, the thouſandth part of the other. But as that which conſtitutes property amongſt mankind, is not all at once in trade; and as the

the metals or money, which are the ſign of property, are not all in trade at the ſame time; the price is fixed in the compound ratio of the total of things with the total of ſigns, and that of the total of things in trade with the total of ſigns in trade alſo: And as the things which are not in trade today may be in trade tomorrow, and the ſigns not now in trade may enter into trade at the ſame time, the eſtabliſhment of the price of things always fundamentally depends on the proportion of the total of things to the total of ſigns.

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

CHAP. VIII.

The ſame Subject continued.

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

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

If

* Hiſtory of the church by Socrates.

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

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

The quantity of goods and merchandiſes increaſes by an augmentation of commerce, the augmentation of commerce by an augmentation of the ſpecie, which ſucceſſively arrives, and by new communications, with freſh diſcovered countries and ſeas, which furniſh us with new commodities and new merchandiſes.

CHAP. IX.

Of the relative Scarcity of Gold and Silver.

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

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

It is then a rule, That gold is common when ſilver is ſcarce, and gold is ſcarce when ſilver is common. This

leſs

lets us see the difference between their relative and their real abundance and scarcity, of which I shall presently speak more at large.

CHAP. X.

Of Exchange.

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

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

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

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

The prince establishes a proportion between a quantity of silver as metal, and the same quantity as money. 2. He fixes the proportion between the several metals made use of as money. 3. He establishes the weight and standard of every piece of money. In fine, 4. He gives to every piece that ideal value, of which I have spoken. I shall call the value of money in these four respects, its *positive value*, because it may be fixed by law.

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

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

In the actual ſtate of the univerſe, *Holland is the nation we are ſpeaking of. Let us examine the courſe of exchange with relation to her.

They have in Holland a piece of money called a florin, worth twenty ſous, or forty halfsous or gros. But to render our ideas as ſimple as poſſible, let us imagine that they have not any ſuch piece of money in Holland as a florin, and that they have no other but the gros: A man who ſhould have a thouſand florins, would have forty thouſand gros; and ſo of the reſt. Now the exchange with Holland is determined by our knowing how many gros every piece of money in other countries is worth; and as the French commonly reckon by a crown of three livres, the exchange makes it neceſſary for them to know how many gros are contained in a crown of three livres. If the courſe of exchange is at fifty-four, a crown of three livres will be worth fifty-four gros; if it is at ſixty, it will be worth ſixty gros. If ſilver is ſcarce in France, a crown of three livres will be worth more gros; if plentiful, it will be worth leſs.

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

Let us ſuppoſe that the courſe of exchange with Holland is at fifty-four. If France and Holland compoſed only one city, they would act as we do when we give change for a crown: The Frenchman would take three livres out of his pocket, and the Dutchman fifty-four gros from his. But as there is ſome diſtance between Paris and Amſterdam, it is neceſſary that he who for my crown of three livres, gives me fifty-four gros which he has in Holland, ſhould give me a bill of exchange for fifty-four gros payable in Holland. The fifty-four gros is not the thing in queſtion; but a bill for that ſum. Thus, in order to judge of the †ſcarcity or plenty of ſpecie, we muſt know if there

* The Dutch regulate the exchange for almoſt all Europe, by a kind of determination amongſt themſelves, in a manner moſt agreeable to their own intereſts.

† There is much ſpecie in a place, when there is more ſpecie than paper; there is but little, when there is more paper than ſpecie.

there are in France more bills of fiftyfour gros drawn upon Holland, than there are crowns drawn upon France. If there are more bills from Holland than there are from France, ſpecie is ſcarce in France, and common in Holland; it then becomes neceſſary that the exchange ſhould riſe, and that they give for my crown more than fiftyfour gros; otherwiſe I will not part with it, and *vice verſa*.

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

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

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

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

* A mark is a weight of eight ounces.

† With the expenſe of carriage and inſurance deducted.

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

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

It is proper to purſue this ſomething farther. When the exchange is below par; for example, if it is at fifty inſtead of fiftyfour, it ſhould follow, that France on ſending bills of exchange to Holland for fiftyfour thouſand crowns, could buy merchandiſes only to the value of fifty thouſand, and that, on the other hand, the Dutch ſending the value of fifty thouſand crowns to France, might buy fiftyfour thouſand, which makes a difference of 8-54; that is a loſs to France of more than 1-7; ſo that France would be obliged to ſend to Holland 1-7 more in ſpecie or merchandiſe, than ſhe would do was the exchange at par. And as the miſchief muſt conſtantly increaſe, becauſe a debt of this kind

* In 1744.

kind would bring the exchange ſtill lower, France would in the end be ruined. It ſeems, I ſay, as if this ſhould certainly follow; and yet it does not, becauſe of the principle which I have* elſewhere eſtabliſhed, which is, that ſtates conſtantly lean towards a balance, in order to preſerve their independency. Thus they borrow only in proportion to their ability to pay, and meaſure their buying by what they ſell: And taking the example from above, if the exchange falls in France from fiftyfour to fifty, the Dutch who buy merchandiſes in France to the value of a thouſand crowns, for which they uſed to pay fiftyfour thouſand gros, would now pay only fifty thouſand, if the French would conſent to it. But the merchandiſe of France will riſe inſenſibly, and the profit will be ſhared between the French and the Dutch; for when a merchant can gain, he eaſily ſhares his profit: There ariſes then a communication of profit between the French and the Dutch. In the ſame manner the French who bought merchandiſes of Holland for fiftyfour thouſand gros, and who when the exchange was at fiftyfour paid for them a thouſand crowns, will be obliged to add 1-7 more in French crowns, to buy the ſame merchandiſes. But the French merchant, being ſenſible of the loſs he ſuffers, will take up leſs of the merchandiſe of Holland. The French and the Dutch merchant will then be both lofers, the ſtate will inſenſibly fall into a balance, and the lowering of the exchange will not be attended with thoſe inconveniences which we had reaſon to fear.

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

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

A prince may amaſs great wealth in his dominions, and yet ſpecie may be really ſcarce, and relatively common; for inſtance, if this ſtate is indebted for many merchan-

* See book 20. chap. 21.

diſes to a foreign country, the exchange will be low, though ſpecie be ſcarce.

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

When a ſtate raiſes its ſpecie, for inſtance, when it gives the name of ſix livres, or two crowns, to what was before called three livres, or one crown, this new denomination, which adds nothing real to the crown, ought not to procure a ſingle gros more by the exchange. We ought only to have for the two new crowns, the ſame number of gros which we before received for the old one. If this does not happen, it muſt not be imputed as an effect of the regulation itſelf, but to the novelty and ſuddenneſs of the affair. The exchange adheres to what is already eſtabliſhed, and is not altered till after a certain time.

When a ſtate, inſtead of only raiſing the ſpecie by a law, calls it in, in order to diminiſh its ſize, it frequently happens that, during the time taken up in its paſſing again through the mint, there are two kinds of money; the large which is the old, and the ſmall which is the new; and as the large is cried down, and is not to be received, but at the mint, and bills of exchange muſt be conſequently paid in the new, one would imagine then that the exchange ſhould be regulated by the new. If, for example, in France the ancient crown of three livres being worth in Holland ſixty gros, were reduced one half, the new crown ought to be valued only at thirty. On the other hand, it ſeems as if the exchange ought to be regulated by the old coin; becauſe the banker who has ſpecie, and receives bills,

bills, is obliged to carry the old coin to the mint, in order to change it for the new; by which he muſt be a loſer. The exchange then ought to be fixed between the value of the old coin and that of the new. The value of the old is decreaſed, if we may call it ſo, both becauſe there is already ſome of the new in trade, and becauſe the bankers cannot keep up to the rigor of the law; having an intereſt in letting looſe the old coin from their cheſts, and being even ſometimes forced to make payments with it. Again, the value of the new ſpecie muſt riſe; becauſe the banker having this, finds himſelf in a ſituation, in which as we ſhall immediately prove, he will reap great advantage by procuring the old. The exchange ſhould then be fixed, as I have already ſaid, between the new and the old coin. For then the bankers find it for their intereſt, to ſend the old out of the kingdom; becauſe by this means they procure the ſame advantage as they could receive from a regular exchange of the old ſpecie, that is, a great many gros in Holland, and in return a regular exchange a little lower, between the old and the new ſpecie, which will bring many crowns in France.

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

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

It is fit that we ſhould give a very clear idea of this. M. Bernard, or any other banker employed by the ſtate, propoſes bills upon Holland, and gives them at one, two, or three gros higher than the actual exchange; he has

made a provision in a foreign country by means of the old ſpecie which he has continually been ſending thither; and thus he has raiſed the exchange to the point we have juſt mentioned. In the mean time, by diſpoſing of his bills, he ſeizes on all the new ſpecie, and obliges the other bankers who have payments to make, to carry their old ſpecie to the mint, and, as he inſenſibly obtains all the ſpecie, he obliges the other bankers in their turn to give him bills at a very high exchange. By this means, his profit in the end compenſates in a great meaſure for the loſs he ſuffered at the beginning.

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

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

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

If a company has been erected in a ſtate with a prodigious ſtock, and this ſtock has in a few months been raiſed twenty or twentyfive times above the original purchaſe; if again the ſame ſtate eſtabliſhed a bank, whoſe bills were to perform the office of ſpecie, while the numerary value of theſe bills was prodigious in order to anſwer to the numerary value of the ſtocks, (this is Mr. Law's ſyſtem) it would follow from the nature of things, that theſe ſtocks and theſe bills would vaniſh in the ſame manner as they aroſe. Stocks cannot ſuddenly be raiſed twenty or twentyfive

tyfive times above their original value, without giving a number of people the means of procuring immenſe riches in paper: Every one would ſeek to ſecure his fortune; and as exchange offers the moſt eaſy way of removing it from home, or conveying it whither one pleaſes, people would inceſſantly remit a part of their effects to the nation that regulates the exchange. A project for making continual remittances into a foreign country, muſt lower the exchange. Let us ſuppoſe, that at the time of the ſyſtem, in proportion to the ſtandard and weight of the ſilver coin, the exchange was fixed at forty gros to the crown; when a vaſt quantity of paper became money, they were unwilling to give more than thirtynine gros for a crown, and afterwards thirtyeight, thirtyſeven, &c. This proceeded ſo far, that after a while they would give but eight gros, and at laſt, there was no exchange at all.

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

CHAP. XI.

Of the Proceedings of the Romans with Reſpect to Money.

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

And

And here I am pleaſed that I have an opportunity of examining more cloſely into this matter, that no example may be taken from what can never juſtly be called one.

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

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

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

CHAP.

* Pliny's natural hiſtory, l. xxxiii. art. 13.
† They received ten ounces of copper for twenty.
‡ They received ſixteen ounces of copper for twenty.

CHAP. XII.

The Circumſtances in which the Romans changed the Value of their Specie.

THERE was formerly very little gold and ſilver in Italy. This country has few or no mines of gold or ſilver. When Rome was taken by the Gauls, they found only a thouſand* weight of gold: And yet the Romans had ſacked many powerful cities, and brought home their wealth. For a long time they made uſe of none but copper money; and it was not till after the peace with Pyrrhus, that they had ſilver enough to make† money; they made denarii of this metal of the value of ten aſſes,‡ or ten pounds of copper. At that time the proportion of ſilver was to that of copper, as 1 to 960. For as the Roman denarius was valued at ten aſſes, or ten pounds of copper, it was worth one hundred and twenty ounces of copper; and as the ſame denarius was valued only at one eighth of an ounce of ſilver,§ this produced the above proportion.

When Rome became miſtreſs of that part of Italy which is neareſt to Greece and Sicily, by degrees ſhe found herſelf between two rich nations, the Greeks and the Carthaginians. Silver increaſed at Rome; and as the proportion of 1 to 960 between ſilver and copper could be no longer ſupported, ſhe made ſeveral regulations with reſpect to money, which to us are unknown. However, at the beginning of the ſecond Punic war, the ‖Roman denarius was worth no more than twenty ounces of copper; and thus the proportion between ſilver and copper was no longer but as 1 to 160. The reduction was very conſiderable, ſince the republic gained five ſixths upon all copper money. But ſhe did only what was neceſſary in the nature of things, by eſtabliſhing the proportion between the metals made uſe of as money.

The

* Pliny, l. xxxiii. art. 5. † Freinſhemius, lib. v. dec. 2.

‡ Freinſhemius, lib. v. decad. 2. They ſtruck alſo, ſays the ſame author, half denarii, called quinarii, and quarters, called ſeſterces.

§ An eighth, according to Budæus; according to other authors, a ſeventh.

‖ Pliny's nat. hiſt. l. xxxiii. art. 13.

The peace which terminated the firſt Punic war, left the Romans maſters of Sicily. They ſoon entered Sardinia; afterwards they began to know Spain; and thus the quantity of ſilver increaſed at Rome. They took meaſures to reduce the *denarius from twenty ounces to ſixteen, which had the effect of putting a nearer proportion between ſilver and copper; by this means the proportion which was before as 1 to 160, was now made as 1 to 128.

CHAP. XIII.

Proceedings with Reſpect to Money in the Time of the Emperors.

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

We even ſtill ſee† in cabinets a kind of medals, which are called plated; and are only pieces of copper covered with a thin plate of ſilver. This money is mentioned in a fragment of the 77th book of Dio.‡

Didius Julian firſt began to debaſe it. We find that the coin of §Caracalla had an allay of more than half; that of Alexander Severus,‖ of two thirds: The debaſing ſtill increaſed, till under Gallienus,¶ nothing was to be ſeen but copper ſilvered over.

It is evident, that ſuch violent proceedings could not take place in the preſent age; a prince might deceive himſelf,

* Pliny's nat. hiſt. l. xxxiii. art. 13.

† See Father Jourbat's ſcience of medals, Paris, 1739, p. 59.

‡ Extract of virtues and vices.

§ See Savotte, part 2. chap. 12. and Le Journal des Scavans of the 28th of July, 1681, on a diſcovery of fifty thouſand medals.

‖ See Savotte, ibid. ¶ Ibid.

ſelf, but he could deceive nobody elſe. The exchange has taught the banker to draw a compariſon between all the money in the world, and to eſtabliſh its juſt value. The ſtandard of money can no longer be a ſecret. Were the prince to begin to allay his ſilver, every body elſe would continue it, and do it for him; the ſpecie of the true ſtandard would go abroad firſt, and nothing would be ſent back but baſe metal. If, like the Roman Emperors, he debaſed the ſilver, without debaſing the gold, the gold would ſuddenly diſappear, and he would be reduced to his bad ſilver. The exchange, as I have ſaid in the preceding book,* has deprived princes of the opportunity of ſhewing great exertions of authority, or at leaſt has rendered them ineffectual.

CHAP. XIV.

How the Exchange is a Reſtraint on deſpotic Power.

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

In 1745, the Czarina made a law to expel the Jews, becauſe they remitted into foreign countries the ſpecie of thoſe who were baniſhed into Siberia, as well as that of foreigners entertained in her ſervice. As all the ſubjects of the empire are ſlaves, they can neither go abroad themſelves, nor ſend away their effects without permiſſion. The exchange which gives them the means of remitting their ſpecie from one country to another, is therefore entirely incompatible with the laws of Muſcovy.

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

CHAP.

* Chap. 16.

CHAP. XV.

The Practice of ſome Countries in Italy.

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

CHAP. XVI.

The Aſſiſtance a State may Derive from Bankers.

THE banker's buſineſs is to change, not to lend money. If the prince makes uſe of them to exchange his ſpecie, as he never does it but in great affairs, the leaſt profit he can give for the remittance, becomes conſiderable; and if they demand large profits, we may be certain that there is a fault in the adminiſtration. On the contrary, when they are employed to advance ſpecie, their art conſiſts in procuring the greateſt profit for the uſe of it, without being liable to be charged with uſury.

CHAP.

CHAP. XVII.

Of Public Debts.

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

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

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

2. A nation that is thus perpetually in debt, muſt have the exchange very low.

3. The taxes raiſed for the payment of the intereſt of the debt, are a hurt to the manufacturers, by raiſing the price of the artificers labor.

4. It takes the true revenue of the ſtate from thoſe who have activity and induſtry, to convey it to the indolent; that is, it gives the conveniences of labor to thoſe who do not labor, and clogs with difficulties the induſtrious artiſt.

Theſe are its inconveniences: I know of no advantages. Ten perſons have each a yearly income of a thouſand crowns, either in land or trade; this raiſes to the nation at five *per cent.* a capital of two hundred thouſand crowns. If theſe ten perſons employed the half of their income, that is five thouſand crowns, in paying the intereſt of an hundred thouſand crowns, which they had borrowed of others, that would be only to the ſtate as two hundred thouſand crowns; that is, in the language of the Algebraiſts,

Algebraiſts, 200,000 crowns—100,000 crowns×100,000 crowns=200,000 crowns.

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

CHAP. XVIII.

Of the Payment of Public Debts.

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

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

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

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

If the ſtate is a republic, the government of which is in its own nature conſiſtent with its entering into projects of a long duration, the capital of the ſinking fund may be inconſiderable: But it is neceſſary in a monarchy for the capital to be much greater.

2. The

* England.

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

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

CHAP. XIX.

Of lending upon Intereſt.

SPECIE is the ſign of value. It is evident, that he who has occaſion for this ſign ought to pay for the uſe of it, as well as for every thing elſe that he has occaſion for. All the difference is, that other things may be either hired or bought; whilſt money, which is the price of things, can only be hired, and not bought.*

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

* We ſpeak not here of gold and ſilver conſidered as a merchandiſe.

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

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

The laws of Mahomet confounded uſury with lending upon intereſt. Uſury increaſes in Mahometan countries, in proportion to the ſeverity of the prohibition. The lender indemnifies himſelf for the danger he undergoes of ſuffering the penalty.

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

CHAP. XX.

Of Maritime Uſury.

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

CHAP. XXI.

Of lending by Contract, and the State of Uſury among the Romans.

BESIDES the loans made for the advantage of commerce, there is ſtill a kind of lending by a civil contract, from whence reſults intereſt or uſury.

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

Theſe continual changes, whether made by the laws, or by the plebiſcita, naturalized uſury at Rome: For the creditors ſeeing the people their debtor, their legiſlator and their judge, had no longer any confidence in their agreements; the people, like a debtor who has loſt his credit, could only tempt them to lend by allowing an exorbitant intereſt; eſpecially as the laws applied a remedy to the evil only from time to time, while the complaints of the people were continual, and conſtantly intimidated the creditors. This was the cauſe that all honeſt means of borrowing and lending were aboliſhed at Rome, and that the moſt monſtrous uſury eſtabliſhed* itſelf in that city, notwithſtanding the ſtrict prohibition and ſeverity of the law.

Cicero tells us, that in his time intereſt at Rome was at thirtyfour *per cent.* and in the †provinces at fortyeight. This evil was a conſequence of the ſeverity of the laws againſt uſury. Laws exceſſively good are the ſource of exceſſive evils. The borrower found himſelf under a neceſſity of paying for the intereſt of the money, and for the danger the creditor underwent of ſuffering the penalty of the law

* Tacit. annal. lib. 5. † Letters to Atticus, lib 5. let. 21.

CHAP. XXII.

The ſame Subject continued.

THE primitive Romans had not any laws to regulate the rate of uſury.* In the conteſts which aroſe on this ſubject between the plebeians and the patricians, even in the †ſedition on the *Mons Sacer*, nothing was alleged on the one hand but promiſe, and on the other but the ſeverity of contracts.

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

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

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

At

* Uſury and intereſt among the Romans ſignified the ſame thing.

† See Dionyſius Halic. who has deſcribed it ſo well.

‡ Uſuræ ſemiſſes, trientes, quadrantes. See the ſeveral titles of the digeſts and codes on uſury, and eſpecially the 17th law, with the note ff. de uſuris.

§ See Appius' ſpeech on this ſubject in Dionyſius Halicarnaſſus.

At the time when the ſenate maintained the cauſe of uſury with ſo much conſtancy, the Romans were diſtinguiſhed by an extreme love of frugality, poverty and moderation: But the conſtitution was ſuch, that the principal citizens alone ſupported all the expenſes of government, while the common people paid nothing. How then was it poſſible to deprive the former of the liberty of purſuing their debtors, and at the ſame time to oblige them to execute their offices, and to ſupport the republic amidſt its moſt preſſing neceſſities?

Tacitus ſays, that the law of the twelve tables fixed the intereſt at one *per cent.* It is evident that he was miſtaken, and that he took another law, of which I am going to ſpeak, for the law of the twelve tables. If this had been regulated in the law of the twelve tables, why did they not make uſe of its authority in the diſputes which afterwards aroſe between the creditors and debtors? We find not any veſtige of this law upon lending at intereſt; and let us have but ever ſo little knowledge of the hiſtory of Rome, we ſhall ſee that a law like this could never be the work of the decemvirs.

The Licinian law, made *eightyfive years after the law of the twelve tables, was one of thoſe temporary laws of which we have ſpoken. It ordained, that what had been paid for intereſt ſhould be deducted from the principal, and the reſt diſcharged by three equal payments.

In the year of Rome 398, the tribunes Duillius and Menenius cauſed a law to be paſſed, which reduced the intereſt tot one *per cent. per annum.* It is this law which Tacitus‡ confounds with the law of the twelve tables, and this was the firſt ever made by the Romans to fix the rate of Intereſt. Ten years after,§ this uſury was reduced one half;‖ and in the end entirely aboliſhed;¶ and if we may believe ſome authors whom Livy had read, this was under the conſulate of *C. Marcius Rutilius and P. Servilius, in the year of Rome 413.

☞ 3 It

* In the year of Rome 388. *Tit. Liv. lib.* 6.

† Uniciaria uſura. *Tit. Liv. lib.* 7. ‡ Annal lib. 6.

§ Under the conſulate of L. Manlius Torquatus and C. Plautius, according to T. Liv. lib. 7. This is the law mentioned by Tacitus, Annal. lib. 6.

‖ Semiunciaria uſura. ¶ As Tacitus ſays, Annal. lib. 6.

* This law was paſſed at the inſtance of M. Gennucius, tribune of the people. *Tit. Liv. lib.* 7. *towards the end.*

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

Under Sylla, L. Valerius Flaccus made a law, which ſuffered intereſt to be at three *per cent. per annum*. This law the moſt moderate, the moſt equitable ever made on this account by the Romans, is diſapproved by Paterculus.§ But if this law was neceſſary for the advantage of the republic, if it was of ſervice to every individual, if it formed an eaſy communication between the debtor and the creditor, it could not be unjuſt.

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

BOOK

* Veteri jam more fœnus receptum erat. *Appian on the civil war, lib.* i.

† Permiſit eos legibus agere. *Appian, on the civil war, lib.* 1. and *the epitome of Livy, lib.* 64.

‡ In the year of Rome, 663.

§ *Turpiſſime legis autor, qua creditoribus quadrantem ſolvi juſſerat, lib.* 2. Some authors have interpreted this paſſage, as if the law of Flaccus had ordained that they ſhould only pay a fourth of the principal; but, in my opinion, this was not the language of the Latin authors. When the queſtion was in relation to the reducing of debts, they made uſe of the words *quadrans, triens*, &c. to ſignify the uſury; and *tertia pars*, and *quarta pars*, to point out the capital. 2. They made the conſul Valerius the author of a law, which would ſcarcely have been made by a ſeditious tribune. 3. This was in the heat of a civil war, at a time when it was neceſſary to maintain the public credit, not to deſtroy it; a civil war, in ſhort, that had no relation to the abolition of debts.

‖ Leg. 12. ff. de verb ſignif.

BOOK XXIII.

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

CHAP. I.

Of Men and Animals with reſpect to the Multiplication of their Species.

DELIGHT of human kind,* and gods above,
Parent of Rome, propitious Queen of Love!
* * * * *
For when the riſing ſpring adorns the mead,
And a new ſcene of nature ſtands diſplay'd;
When teaming buds, and cheerful greens appear,
And weſtern gales unlock the lazy year;
The joyous birds the welcome firſt expreſs,
Whoſe native ſongs thy genial fire confeſs:
Then ſavage beaſts bound o'er their ſlighted food,
Struck with thy darts, and tempt the raging flood:
All nature is thy gift, earth, air and ſea;
Of all that breathes the various progeny,
Stung with delight, is goaded on by thee.
O'er barren mountains, o'er the flowery plain,
The leafy foreſts, and the liquid main,
Extends thy uncontrol'd, and boundleſs reign.
Through all the living regions thou doſt move,
And ſcatter'ſt where thou go'ſt, the kindly ſeeds of love.

The females of brutes have an almoſt conſtant fecundity. But in the human ſpecies, the manner of thinking, the character, the paſſions, the humor, the caprice, the idea of preſerving beauty, the pain of childbearing, and the fatigue of a too numerous family, obſtruct propagation a thouſand different ways.

* Dryden's Lucr.

CHAP. II.

Of Marriage.

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

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

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

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

Women who have ſubmitted to a public proſtitution, cannot have the conveniency of educating their children: The trouble of education is incompatible with their ſtation; and they are ſo corrupt, that they have no protection from the law.

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

CHAP. III.

Of the Condition of Children.

IT is a dictate of reaſon, that when there is a marriage, children ſhould follow the ſtation or condition of the

* The Garamantes. † Lib. 1. cap. 8. ‡ Pater eſt quem nuptiæ demonſtrant.

the father; and that when there is not, they can belong to the mother only.*

CHAP. IV.

Of Families.

IT is almoſt every where a cuſtom for the wife to paſs into the family of the huſband. The contrary is without any inconveniency eſtabliſhed at Formoſa,† where the huſband enters into the family of the wife.

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

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

CHAP. V.

Of the ſeveral Orders of lawful Wives.

LAWS and religion ſometimes eſtabliſh many kinds of civil conjunctions; and this is the caſe amongſt the Mahometans, where there are ſeveral orders of wives, the children of whom are acknowledged by being born in the houſe, by civil contracts, or even by the ſlavery of the mother, and the ſubſequent gratitude of the father.

It would be contrary to reaſon, that the law ſhould ſtigmatize the children for what it approved in the father. All theſe children ought therefore to ſucceed, at leaſt if ſome reaſon does not oppoſe it, as in Japan, where none ſucceed but

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

† Du Halde, tome i. p. 165.

but the children of the wife given by the emperor. Their policy demands that the gifts of the emperor ſhould not be too much divided, becauſe they ſubject them to a kind of ſervice, like that of our ancient fiefs.

CHAP. VI.

Of Laws in Relation to Baſtards.

IN republics, where it is neceſſary that there ſhould be the pureſt morals, baſtards ought to be more degraded than in monarchies.

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

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

CHAP. VII.

Of the Father's Conſent to Marriage.

THE conſent of fathers is founded on their authority, that is, on their right of property. It is alſo founded

* Ariſtotle's Politics, lib. 6. † Ibid. lib. 3. cap. iii.

founded on their love, on their reaſon, and on the uncertainty of that of their children, whom youth confines in a ſtate of ignorance, and paſſion in a ſtate of ebriety.

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

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

"According to the number of the ſons and daughters that are marriageable, the father's tribute is raiſed and increaſed, until they provide huſband and wives for their ſons and daughters, who, as ſoon as they are married, are charged with tribute; which that it may increaſe, they will ſuffer none above fifteen years of age to live unmarried. Nay, the ſet time of marriage, appointed for the Indians, is at fourteen years for men, and thirteen for the women, alleging that they are ſooner ripe for the fruit of wedlock, and ſooner ripe in knowledge and malice, and ſtrength for work and ſervice, than any other people. Nay, ſometimes they force them to marry, who are ſcarce twelve and thirteen years of age, if they find them well limbed and ſtrong in body, explaining a point of one of the canons, which alloweth fourteen and fifteen years, *niſi malitia ſuppleat ætatem.*" He ſaw a liſt of theſe taken. It was, ſays he, a moſt ſhameful affair. Thus in an action which ought to be the moſt free, the Indians are the greateſt ſlaves.

CHAP.

* A new ſurvey of the Weſtindies by Thomas Gage. p. 345; edit. 3.

CHAP. VIII.

The ſame Subject continued.

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

CHAP. IX.

Of young Women.

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

CHAP. X.

What it is that determines to Marriage.

WHEREVER a place is found in which two perſons can live commodiouſly, there they enter into marriage.

riage. Nature has a ſufficient propenſity to it, when unreſtrained by the difficulty of ſubſiſtence.

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

CHAP. XI.

Of the Severity of Government.

MEN who have abſolutely nothing, ſuch as beggars, have many children. This proceeds from their being in the caſe of a riſing people: It coſts the father nothing to give his art to his offspring, who even in their infancy are the inſtruments of this art. Theſe people multiply in a rich or ſuperſtitious country, becauſe they do not ſupport the burthen of ſociety; but are themſelves the burthen. But men who are poor, only becauſe they live under a ſevere government; who regard their fields leſs as the ſource of their ſubſiſtence, than as a cauſe of vexation; theſe men, I ſay, have few children: They have not even ſubſiſtence for themſelves, how can they think of dividing it? they are unable to take care of themſelves, when they are ſick, how then can they attend to the wants of creatures whoſe infancy is a continual ſickneſs?

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

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

CHAP.

* A new ſurvey of the Weſtindies by Thomas Gage, page 97. 3d edit.

CHAP. XII.

Of the Number of Males and Females in different Countries.

I HAVE already obſerved,* that there are born in Europe rather more boys than girls. It has been remarked, that in †Japan there are born rather more girls than boys: All things compared, there muſt be more fruitful women in Japan than in Europe, and conſequently it muſt be more populous.

We are informed,‡ that at Bantam there are ten girls to one boy. A diſproportion like this muſt cauſe the number of families there to be to the number of thoſe of other climates, as 1 to $5\frac{1}{2}$; which is a prodigious difference. Their families may be much larger indeed; but there muſt be few men in circumſtances ſufficient to provide for ſo large a family.

CHAP. XIII.

Of Seaport Towns.

IN ſeaport towns, where men expoſe themſelves to a thouſand dangers, and go abroad to live or die in diſtant climates, there are fewer men than women: And yet we ſee more children there than in other places. This proceeds from the greater eaſe with which they procure the means of ſubſiſtence. Perhaps even the oily parts of fiſh are more proper to furniſh that matter which contributes to generation. This may be one of the cauſes of the infinite

* Book xvi. chap. 4.

† See Kempfer, who gives a computation of the people of Meaco.

‡ Collection of voyages that contributed to the eſtabliſhment of the Eaſt-India company, vol. 1. p. 147.

infinite number of people in *Japan and China,† where they live almoſt wholly on ‡fiſh. If this be the caſe, certain monaſtic rules, which oblige the monks to live on fiſh, muſt be contrary to the ſpirit of the legiſlator himſelf.

CHAP. XIV.

Of the Productions of the Earth which requires a greater or a leſs Number of Men.

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

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

Thoſe countries where coal pits furniſh a proper ſubſtance for fewel, have this advantage over others, that not having the ſame occaſion for foreſts, the lands may be cultivated.

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

CHAP.

* Japan is compoſed of a number of iſles, where there are many banks, and the ſea is there extremely full of fiſh. † China abounds in rivers.

‡ See Du Halde, tom. 22. p. 139, 142.

§ The greateſt number of the proprietors of land, ſays Biſhop Burnet, finding more profit in ſelling their wool than their corn, encloſed their eſtates: The commons, ready to periſh with hunger, roſe up in arms; they inſiſted on a diviſion of the lands: The young King even wrote on this ſubject: And proclamations were made againſt thoſe who encloſed their lands. *Abridg. of the hiſt. of the reformation.*

CHAP. XV.

Of the Number of Inhabitants with Relation to the Arts.

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

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

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

CHAP.

CHAP. XVI.

The Concern of the Legislator in the Propagation of the Species.

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

For the same reason, the religion of the isle of Formosa ‡ does not suffer the women to bring their children into the world, till they are thirtyfive years of age: The priestess before this age, by bruising the belly, procures abortion.

CHAP. XVII.

Of Greece, and the Number of its Inhabitants.

THAT effect which in certain countries of the east springs from physical causes, was produced in Greece, by the nature of the government. The Greeks were a great nation, composed of cities, each of which had a distinct government and separate laws. They had no more the spirit of conquest and ambition, than those of Switzerland,

* Dampiere's voyages, vol. 2. p. 41. † Ibid. p. 167.

‡ See the collection of voyages that contributed to the establishment of the Eastindia company, vol. 1. part 1 page 182. and 188.

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

They had amongſt them republics, whoſe conſtitution was very remarkable. The nations they had ſubdued were obliged to provide ſubſiſtence for the citizens. The Lacedæmonians were fed by the Helotes, the Cretans by the Periecians, and the Theſſalians by the Prænesteans. They were obliged to have only a certain number of freemen, that their ſlaves might be able to furniſh them with ſubſiſtence. It is a received maxim in our days, that it is neceſſary to limit the number of regular troops: Now the Lacedæmonians were an army, maintained by the peaſants: It was proper therefore that this army ſhould be limited; without this the freemen, who had all the advantages of ſociety, would increaſe beyond number, and the laborers be overloaded. The politics of the Greeks were particularly employed in regulating the number of citizens. Plato in his republic fixes them at five thouſand and forty, and he would have them ſtop or encourage propagation, as was moſt convenient, by honors, ſhame, and the advice of the old men; he would even† regulate the number of marriages, in ſuch a manner, that the republic might be recruited without being overcharged.

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

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

There are places, ſays Ariſtotle‖ again, where the laws give baſtards the privilege of being citizens: But as ſoon as

* In valor, the diſcipline, and military exerciſes. † Republic, lib. 5.
‡ Polit. lib. vii. cap. 16. § Ibid. ‖ Polit. lib. iii. cap. 3.

as they have a ſufficient number of people, this privilege ceaſes. The ſavages of Canada burn their priſoners, but when they have empty cottages to give them, they receive them into their nation.

Sir William Petty, in his calculations, ſuppoſes that a man in England is worth what he would ſell for at Algiers.* This can be true only with reſpect to England.

There are countries where a man is worth nothing, there are others where he is worth leſs than nothing.

CHAP. XVIII.

Of the State and Number of People before the Romans.

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

CHAP. XIX.

Of the Depopulation of the Univerſe.

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

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

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

☞ 2 "I ſhall

* Sixty pounds Sterling. † Lib. 6.

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

CHAP. XX.

That the Romans were under a Neceſſity of making Laws to encourage the Propagation of the Species.

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

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

CHAP. XXI.

Of the Laws of the Romans relating to the Propagation of the Species.

THE ancient laws of Rome endeavored greatly to incite the citizens to marriage. The ſenate and the people made

* Lib. vii. page 496.

† A modern author has treated of this in his conſiderations on the cauſes of the riſe and declenſion of the Roman grandeur.

made frequent regulations on this ſubject, as Auguſtus ſays in his ſpeech related by Dio.*

Dionyſius Halycarnaſſus† cannot believe, that after the death of three hundred and five of the Fabii, exterminated by the Veientes, there remained no more of this family but one ſingle child; becauſe the ancient law which obliged every citizen to marry, and to educate all his children, was‡ ſtill in force.

Independently of the laws, the cenſors had a particular eye upon marriage, and according to the exigencies of the republic engaged them to it by§ ſhame and by puniſhments.

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

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

Civil diſcords, triumvirates, and proſcriptions, weakened Rome more than any war ſhe had hitherto engaged in. They left but few citizens, and the greateſt part of them unmarried. To remedy this laſt evil, Cæſar and Auguſtus reeſtabliſhed the cenſorſhip, and would even be *cenſors themſelves. Cæſar gave† rewards to thoſe who had many children. All‡ women under fortyfive years of age, who had neither huſband nor children were forbid to wear

☞ 3 jewels,

* Lib. 56. † Lib. 2. ‡ In the year of Rome 277.

§ See what was done in this reſpect in T. Livius, lib. 45; the epitome of T. Livy, lib. 56; Aulus Gellius, lib. 1. cap. 6; Valerius Maximus, lib. ii. cap. 19. ‖ It is in Aulus Gellius, lib. 1. cap. 6.

¶ See what I have ſaid in book 5. chap. 19.

* See Dio, lib. 43. and Xiphilinus in Auguſt.

† Dio, lib. 43. Suetonius, life of Cæſar, cap. 20. Appian, lib. 2. of the civil war. ‡ Euſebius in his chronicle.

jewels, or to ride in litters; an excellent method thus to attack celibacy by the power of vanity. The laws of Auguſtus* were more preſſing: He impoſed† new penalties on thoſe who were not married, and increaſed the rewards both of thoſe who were married and of thoſe who had children. Tacitus calls theſe Julian laws;‡ to all appearance they were founded on the ancient regulations made by the ſenate, the people, and the cenſors.

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

"While ſickneſs and war ſnatch away ſo many citizens, what muſt become of the city if marriages are no longer contracted? The city does not conſiſt of houſes, of porticoes, of public places; men alone conſtitute a city. You do not ſee men, like thoſe mentioned in fable, ariſing out of the earth to take care of your affairs. Your celibacy is not owing to the deſire of living alone; every one of you have both table and bed companions. You only ſeek to enjoy your irregularities undiſturbed. Do you here cite the example of the Veſtal virgins? if you preſerve not the laws of chaſtity, you ought to be puniſhed like them. You are equally bad citizens, whether your example has an influence on the reſt of the world, or whether it be diſregarded. My only view is the perpetuity of the republic. I have increaſed the penalties of thoſe who have diſobeyed; and with reſpect to rewards they are ſuch as I do not know whether virtue has ever received greater. For leſs will a thouſand men expoſe life itſelf; and yet will not theſe engage you to take a wife, and provide for children?"

He made a law, which was called after his name Julia, and Papia Poppæa from the names of the conſuls for¶ part of

* Dio, lib. 54.

† In the year of Rome 736. ‡ Julias rogationes, *Annal. lib.* 3.

§ In the year of Rome 736. *Dio, lib.* 56.

‖ I have abridged this ſpeech, which is of a tedious length; it is to be found in Dio, lib. 56.

¶ Marcus Paupius Mutius, and Q. Popæus Sabinus. *Dio, lib.* 56.

of that year. The greatneſs of the evil appeared in their being elected: Dio* tells us, that they were not married, and that they had no children.

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

We find‡ parts of it diſperſed in the precious fragments of Ulpian, in the laws of the Digeſt, collected from authors who wrote on the Papian laws, in the hiſtorians and others who have cited them, in the Theodoſian code which aboliſhed them, and in the works of the fathers who have cenſured them, without doubt from a laudable zeal for the things of the other life, but with very little knowledge of the affairs of this.

Theſe laws had many heads,§ of which we know thirty-five. But to return to my ſubject as ſpeedily as poſſible, I ſhall begin with that head, which Aulus Gelius‖ informs us was the ſeventh, and which relates to the honors and rewards granted by that law. The Romans, who for the moſt part ſprung from the cities of the Latins, which were Lacedæmonian¶ colonies, and who had received a part of their laws even from thoſe cities,* had, like the Lacedæmonians, ſuch veneration for old age, as to give it all honor and precedency. When the republic wanted citizens, they granted to marriage, and to a number of children, the privileges which had been given to age† They granted ſome to marriage alone, independently of the children which might ſpring from it: This was called the right of huſbands. They gave others to thoſe who had any children, and larger ſtill to thoſe who had three children.

 Theſe

* Ibid. † The 14th title of the fragments of Ulpian diſtinguiſhes very rightly between the Julian and the Papian law.

‡ James Godfrey has made a collection of theſe.

§ The 35th is cited in the 19th law, ff. *de ritu nuptiarum.*

‖ Lib. ii. cap. 15. ¶ Dionyſ. Halicarnaſſus.

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

† Aulus Gellius, lib. ii. cap. 15.

Theſe three things muſt not be confounded. Theſe laſt had thoſe privileges which married men conſtantly enjoyed, as for example, a particular place in the theatre ;* they had thoſe which could only be enjoyed by men who had children ; and which none could deprive them of but thoſe who had a greater number.

Theſe privileges were very extenſive. The married men who had the moſt children, were always preferred,† whether in the purſuit, or in the exerciſe of honors. The conſul, who had the moſt numerous offspring, was the‡ firſt who received the faſces ; he had his choice of the §provinces ; the ſenator who had moſt children, had his name wrote firſt in the catalogue of ſenators, and was the firſt in giving his opinion‖ in the ſenate. They might even ſtand ſooner than ordinary for an office, becauſe every child gave a diſpenſation of a year.¶ If an inhabitant of Rome had three children, he was exempted from all troubleſome offices.* The freeborn women who had three children, and the freed women who had four, paſſed† out of that perpetual tutelage, in which they had been held‡ by the ancient laws of Rome.

As they had rewards, ſo they had alſo penalties.§ Thoſe who were not married, could receive no advantage from the will of any perſon that was not a near relation‖ and thoſe who being married, had no children, could receive only half.¶ The Romans, ſays Plutarch,* marry to *be* heirs, and not to *have* them.

The advantages which a man and his wife might receive from each other† by will, were limited by law. If they had children of each other, they might receive the whole;

* Suetonius in Auguſto, cap. 44.

† Tacitus, lib. ii. Ut numerus liberorum in candidatis præpolleret, quod lex jubebat. ‡ Aulus Gellius, lib. ii. cap. 15.

§ Tacitus, annal. lib. 15. ‖ See law 6. § 5. de decurion.

¶ See law 2. ff. de minorib.

* Law 1. and 2. ff. de vacatione et excuſat. munerum.

† Fragm. of Ulpian, tit. 29. § 3. ‡ Plutarch, life of Numa.

§ See the fragments of Ulpian, tit. 14, 15, 16, 17, & 18. which compoſe one of the fineſt pieces of the ancient civil law of the Romans.

‖ Sozom, lib. 1. cap. 9. they could receive from their relations. Fragm. of Ulpian, tit. 16. § 1.

¶ Sozom. lib. 1. cap. 9. et leg. unic. cod. Theod. de infirm. pœnis cœlib. et orbit.

* Moral works, of the love of fathers towards their children.

† See a more particular account of this in the fragm. of Ulpian, tit. 15. et 16.

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

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

The law gave to a ſurviving huſband or wife two years† to marry again, and a year and a half in caſe of a divorce. The father who would not ſuffer their children to marry, or refuſe to give their daughters a portion, were obliged to do it by the magiſtrates.‡

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

It was contrary to law, for a man of ſixty to ¶marry a woman of fifty. As they had given great privileges to married men, the law would not ſuffer them to enter into uſeleſs marriages. For the ſame reaſon, the Calviſian ſenatuſconſultum declared the marriage of a woman of above fifty, with a man leſs than ſixty, to be *unequal: So that a woman of fifty years of age could not marry without incurring the penalties of theſe laws. Tiberius added† to the rigor of the Papian law, and prohibited men of ſixty from marrying women under fifty; ſo that a man of ſixty could not marry in any caſe whatſoever, without

* Fragm. of Ulpian. tit. 16. § 1.

† Fragm. of Ulpian, tit. 14. It ſeems the firſt Julian laws allowed three years: Speech of Auguſtus in Dio, lib. 56. Suetonius, life of Auguſtus, cap. 34. Other Julian laws granted but one year: The Papian law gave two. Fragm. of Ulpian, tit. 14. Theſe laws were not agreeable to the people; Auguſtus therefore ſoftened or ſtrengthened them, as they were more or leſs diſpoſed to comply with them.

‡ This was the 35th head of the Papian law. *Leg.* 19. *ff. de ritu nuptiarum.*

§ See Dio, lib. 54. anno 736. Suetonius in Octavio, cap. 34.

‖ Dio, lib. 54. and in the ſame Dio, the ſpeech of Auguſtus, lib. 56.

¶ Fragm. of Ulpian. tit. 16. and the 27th law, *cod. de nuptiis.*

* Fragm. of Ulpian, tit. 16. § 3.

† See Suetonius in Claudio, cap. 23.

without incurring the penalty. But Claudius abrogated* this law made under Tiberius.

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

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

Conſtantine¶ made a law, in which he comprehended in the prohibition of the Papian law, not only the ſenators, but even thoſe who had a conſiderable rank in the ſtate, without mentioning perſons in an inferior ſtation: This conſtituted the law of thoſe times. Theſe marriages were therefore no longer forbidden, but to the freeborn comprehended in the law of Conſtantine. Juſtinian* however abrogated the law of Conſtantine, and permitted all ſorts of perſons to contract theſe marriages: And by this means we have acquired ſo fatal a liberty.

It is evident, that the penalties inflicted on thoſe who married contrary to the prohibition of the law, were the ſame as thoſe inflicted on perſons who did not marry. Theſe marriages did not give them any civil advantage;† and the dowery‡ was confiſcated after§ the death of the wife.

Auguſtus

* See Suetonius, life of Claudius, cap. 23. and the fragm. of Ulpian tit. 16. § 3.

† Dio, l. 54. fragm. of Ulpian, tit. 13. ‡ Auguſtus' ſpeech in Dio, lib. 56.

§ Fragm. of Ulpian, cap. 13. and the 44th law ff. *de ritu nuptiarum.*

‖ Fragm. of Ulpian, tit. 13. § 16.

¶ See law 1 in cod. *de natur. lib.* * Novel. 177.

† Law 37. ff. de operib. libertorum, § 7. fragm. of Ulpian, tit. 16. § 2.

‡ Fragm. of Ulpian, tit. 16. § 2. § See book xxvi. chap. 13.

Auguſtus having adjudged the ſucceſſion and legacies of thoſe whom theſe laws had declared incapable to the public treaſury,* they had the appearance rather of fiſcal, than of political and civil laws. The diſguſt they had already conceived at a burthen which appeared too heavy, was increaſed by their ſeeing themſelves a continual prey to the avidity of the treaſury. On this account, it became neceſſary under Tiberius, that† theſe laws ſhould be ſoftened, that Nero ſhould leſſen the rewards given out of the treaſury to the‡ informers, that Trajan ſhould§ put a ſtop to their plundering, that Severus‖ ſhould alſo moderate theſe laws, and that the civilians ſhould conſider them as odious, and in all their deciſions deviate from the literal rigor.

Beſides, the Emperors enervated¶ theſe laws, by the privileges they gave, of the rights of huſbands, of children, and of three children. They did more than this, they gave* particular perſons a diſpenſation from the penalties of theſe laws. But regulations eſtabliſhed for the public utility, ſeemed incapable of admitting an alleviation.

It was highly reaſonable, that they ſhould grant the rights of children to the Veſtals,† whom religion retained in a neceſſary virginity: They gave in the ſame manner the privilege of‡ married men to ſoldiers, becauſe they could not marry. It was cuſtomary to exempt the Emperors from the conſtraint of certain civil laws. Thus Auguſtus was freed from the conſtraint of the law which limited the power of §enfranchiſing, and of that which ſet bounds

* Except in certain caſes. See the fragm. of Ulpian. tit. 28. and the only law in cod. de caduc. tollend.

† Relatum de moderanda, Pappiæ Poppæa. *Tacit. annal. lib.* iii. *page* 117.

‡ He reduced them to the fourth part. *Suetonius in Nerone, cap.* 10.

§ See Pliny's panegyric.

‖ Severus extended even to 25 years for the males, and to twenty for the females, the time fixed by the Papian law, as we ſee by comparing the fragment of Ulpian, tit. 16. with what Tertullian ſays, apol. cap. 4.

¶ P. Scipio, the cenſor, complains, in his ſpeech to the people, of the abuſes which were already introduced, that they received the ſame privileges for adopted as for natural children. *Aulus Gellius, lib.* v. *cap.* 19.

* See the 31ſt law *de ritu nuptiarum*.

† Auguſtus in the Papian law, gave them the privilege of mothers. See Dio, lib. 56. Numa had given them the ancient privilege of women who had three children, that is, of having no guardian. *Plutarch, life of Numa*

‡ Thus was granted them by Claudius. Dio, lib. 60.

§ Leg. apud cum ff. de manumiſſionib. § 2.

bounds to the right of *bequeathing by teſtament. Theſe were only particular caſes: But at laſt diſpenſations were given without diſcretion, and the rule itſelf became no more than an exception.

The ſects of philoſophers had already introduced in the city, the empire a diſpoſition that eſtranged them from buſineſs; a diſpoſition which could not gain ground in the time of the †republic, when every body was employed in the arts of war and peace. From hence aroſe an idea of perfection, as connected with a life of ſpeculation; from hence an eſtrangement from the cares and embarraſſments of a family. The Chriſtian religion coming after this philoſophy, fixed, if I may make uſe of the expreſſion, the ideas which that had only prepared.

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

A panegyriſt‡ of Conſtantine ſays to that Emperor, "Your laws were made only to correct vice, and to regulate manners; you have ſtripped the ancient laws of that artifice, which ſeemed to have no other aim than to lay ſnares for ſimplicity."

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

The laws made with a view to Chriſtian perfection, were more particularly thoſe by which the ‖penalties of the

* Dio, lib. 55.

† See in Cicero's offices, his ſentiments on this ſpirit of ſpeculation.

‡ Nazarius in panegyrico Conſtantini, anno 321.

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

‖ Leg. unic. cod. Theod. de infirm. pœn. cælib. et orbit.

the Papian laws were aboliſhed; thoſe who were not married, were equally exempted from them, with thoſe who, being married, had no children.

"Theſe laws were eſtabliſhed, ſays an eccleſiaſtic* hiſtorian, as if the multiplication of the human ſpecies was an effect of our care; inſtead of being ſenſible that the number is increaſed or diminiſhed, according to the order of providence."

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

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

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

Juſtinian declared all thoſe marriages‡ valid, which had been prohibited by the Papian laws. Theſe laws required people to marry again: Juſtinian granted§ privileges to thoſe who did not marry again.

By the ancient laws, the natural right which every one had to marry and beget children, could not be taken away. Thus when they received a ‖legacy on condition of not marrying, or when a patron made his ¶freedman ſwear, that he would neither marry nor beget children, the Papian law annulled both the *condition and the oath. The clauſes, *on continuing in widowhood*, eſtabliſhed amongſt us, contradict the ancient law, and deſcend from the conſtitutions of the emperors, founded on ideas of perfection.

There is no law that contains an expreſs abrogation of the privileges and honors which the Romans had granted to marriages, and to a number of children. But where celibacy

* Sozomenus, p. 27. † Leg. 2. et 3. cod. Theod. de jur. liber.
‡ Leg. Sancimus, cod. de nuptiis. § Novel. 127. cap. 3. Novel. 118. cap. 5. ‖ Leg. 45. ff. de condit. et demonſt.
¶ Leg. 5. § 4. de jure patronatus. * Paul in his ſentences, lib. iii. tit. 4. § 15.

libacy had the preeminence, marriage could not be held in honor; and ſince they could oblige the officers of the public revenue to renounce ſo many advantages by the abolition of the penalties, it is eaſy to perceive that with yet greater eaſe they might put a ſtop to the rewards.

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

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

CHAP. XXII.

Of the Expoſing of Children.

THE Roman policy was very good in reſpect to the expoſing of children. Romulus, ſays Dionyſius Halicarnaſſus,* laid the citizens under an obligation to educate all their male children, and the eldeſt of their daughters. If the infants were deformed and monſtrous, he permitted the expoſing them, after having ſhewn them to five of their neareſt neighbors.

Romulus did not ſuffer† them to kill any infant under three years old: By this means he reconciled the law which gave to fathers the right over their children of life and death, with that which prohibited their being expoſed.

We find alſo in Dionyſius Halicarnaſſus‡ that the law which obliged the citizens to marry, and to educate all their children, was in force in the 277th year of Rome: We ſee that cuſtom had reſtrained the law of Romulus, which permitted them to expoſe their younger daughters.

We

* Antiquities of Rome, lib. 2. † Ibid. ‡ Lib. 9.

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

"The Germans," ſays Tacitus,† "never expoſe their children; amongſt them the beſt manners have more force, than in other places the beſt laws." The Romans had therefore laws againſt this cuſtom, and yet they did not follow them. We find not any ‡Roman law, that permitted the expoſing of children: This was, without doubt, an abuſe introduced towards the decline of the republic, when luxury robbed them of their freedom, when wealth divided was called poverty, when the father believed that all was loſt which was given to his family, and when this family was diſtinct from his property.

CHAP. XXIII.

Of the State of the Univerſe after the Deſtruction of the Romans.

THE regulations made by the Romans to increaſe the number of their citizens, had their effect, while the republic, in the full vigor of its conſtitution, had nothing to repair but the loſſes they ſuſtained by their courage, by their intrepidity, their firmneſs, their love of glory, and of virtue. But ſoon the wiſeſt laws could not reeſtabliſh what a dying republic, what a general anarchy, what a military government, what a rigid empire, what a proud deſpotic power, what a feeble monarchy, what a ſtupid, weak and ſuperſtitious court had ſucceſſively pulled down. It might indeed be ſaid, that they conquered the world only to weaken it, and to deliver it up defenceleſs to barbarians.

The

* Lib. 3. de legib. † De morib. German.

‡ There is not any title on this ſubject in the Digeſt; the title of the code ſays nothing of it, no more than the Novels.

The Gothic nations, the Getes, the Saracens and Tartars, by turns, harraſſed them: Soon the barbarians had none to deſtroy but barbarians. Thus, in fabulous times, after the inundations and the deluge, there aroſe out of the earth armed men, who exterminated one another.

CHAP. XXIV.

The Changes which happened in Europe, with Regard to the Number of Inhabitants.

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

I have not time to treat fully of this ſubject. But I ſhall cite the prodigious armies engaged in the cruſades; compoſed of men of all countries. Puffendorf* ſays, that in the reign of Charles IX, there were in France twenty millions of men.

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

CHAP.

* Introduction to the hiſtory of Europe, cap. 5. of France.

CHAP. XXV.

The ſame Subject continued.

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

We muſt not judge of Europe as of a particular ſtate engaged alone in an extenſive navigation. This ſtate would increaſe in people, becauſe all the neighboring nations would endeavor to have a ſhare in this commerce; and mariners would arrive from all parts. Europe, ſeparated from the reſt of the world by religion,* by vaſt ſeas and deſerts, cannot be repaired in this manner.

CHAP. XXVI.

Conſequences.

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

CHAP. XXVII.

Of the Law made in France to encourage the Propagation of the Species.

LOUIS XIV appointed† particular penſions to thoſe who had ten children, and much larger to thoſe who

* Mahometan countries ſurround it almoſt on every ſide.

† The edict of 1666, in favor of marriages.

had twelve. But it is not ſufficient to reward prodigies. In order to communicate a general ſpirit which leads to the propagation of the ſpecies, it is neceſſary for us to eſtabliſh, like the Romans, general rewards, or general penalties.

CHAP. XXVIII.

By what Means we may remedy a Depopulation

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

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

In

In this ſituation they ſhould take the ſame meaſures throughout the whole extent of the empire, which the Romans took in a part of theirs: They ſhould practiſe in their diſtreſs, what theſe obſerved in the midſt of plenty; that is, they ſhould diſtribute land to all the families who are in want, and procure them the materials for clearing and cultivating it. This diſtribution ought to be continued as long as there is a man to receive it; and in ſuch a manner, as not to loſe a moment, that can be induſtriouſly employed.

CHAP. XXIX.

Of Hoſpitals.

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

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

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

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

The riches of a ſtate ſuppoſe great induſtry. Amidſt the numerous branches of trade, it is impoſſible but ſome muſt ſuffer; and conſequently the mechanics muſt be in a momentary neceſſity.

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

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

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

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

I have obſerved, that wealthy nations have need of hoſpitals, becauſe fortune ſubjects them to a thouſand accidents: But it is plain, that tranſient aſſiſtances are much better than perpetual foundations. The evil is momentary;

* See Sir John Chardin's travels through Perſia, vol. 8.

† See Burnet's hiſt. of the reformation.

tary; it is neceſſary therefore, that the ſuccor ſhould be of the ſame nature, and that it be applied to particular accidents.

BOOK XXIV.

OF LAWS AS RELATIVE TO RELIGION, CONSIDERED IN ITSELF AND IN ITS DOCTRINES.

CHAP. I.

Of Religion in general.

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

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

As in this work I am not a divine, but a political writer, I may here advance things which are no otherwiſe true, than as they correſpond with a worldly manner of thinking, not as conſidered in their relation to truths of a more ſublime nature.

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

The Chriſtian religion, which ordains that men ſhould love each other, would without doubt have every nation

bleſt with the beſt civil, the beſt political laws; becauſe theſe, next to this religion, are the greateſt good that men can give and receive.

CHAP. II.

A Paradox of Mr. Bayle's.

MR. *Bayle has pretended to prove, that it is better to be an atheiſt than an idolater; that is, it is leſs dangerous to have no religion at all than a bad one. "I had rather, ſaid he, it ſhould be ſaid of me, that I had no exiſtence than that I am a villain." This is only a ſophiſm, founded on this, that is of no importance to the human race to believe that a certain man exiſts; whereas it is extremely uſeful for them to believe the exiſtence of a God. From the idea of his nonexiſtence, immediately follows that of our independence; or, if we cannot conceive this idea, that of diſobedience. To ſay that religion is not a reſtraining motive, becauſe it does not always reſtrain, is equally abſurd as to ſay that the civil laws are not a reſtraining motive. It is a falſe way of reaſoning againſt religion, to collect in a large work a long detail of the evils it has produced, if we do not give at the ſame time an enumeration of the advantages which have flowed from it. Were I to relate all the evils that have ariſen in the world from civil laws, from monarchy, and from republican government, I might tell of frightful things. Was it of no advantage for ſubjects to have religion, it would ſtill be of ſome if princes had it, and if they whitened with foam the only rein which can reſtrain thoſe who fear not human laws. A prince who loves and fears religion, is a lion, who ſtoops to the hand that ſtrokes, or to the voice that appeaſes him. He who fears and hates religion, is like the ſavage beaſt, that growls and bites the chain which prevents his flying on the paſſenger. He who has no religion at all, is that terrible animal who perceives his liberty only when he tears in pieces, and when he devours.

The

* Thoughts on the comet.

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

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

CHAP. III.

That a moderate Government is moſt agreeable to the Chriſtian Religion, and a deſpotic Government to the Mahometan.

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

As this religion forbids the plurality of wives, its princes are leſs confined, leſs concealed from their ſubjects, and conſequently have more humanity; they are more diſpoſed to be directed by laws, and more capable of perceiving that they cannot do whatever they pleaſe.

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

It is the Chriſtian religion, that, in ſpite of the extent of the empire, and the influence of the climate, has hindered

deſpotic power from being eſtabliſhed in Ethiopia, and has carried into the heart of Africa the manners and laws of Europe.

The heir to the empire of Ethiopia enjoys a principality, and gives to other ſubjects an example of love and obedience. Not far from thence may be ſeen the Mahometan ſhutting up the children of the king* of Sennar; at whoſe death the council ſends to murder them, in favor of the prince who mounts the throne.

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

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

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

CHAP. IV.

Conſequences from the Character of the Chriſtian Religion, and that of the Mahometan.

FROM the characters of the Chriſtian and Mahometan religions we ought, without any further examination, to embrace the one, and reject the other: For it is much eaſier to prove that religion ought to humanize the manners of men, than that any particular religion is true.

It

* Deſcription of Ethiopia by M. Pruce, a phyſician. *Coxedition of editing letters.*

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

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

CHAP. V.

That the Catholic Religion is moſt agreeable to a Monarchy, and the Proteſtant to a Republic.

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

When the chriſtian religion, two centuries ago, became unhappily divided into Catholic and Proteſtant, the people of the north embraced the Proteſtant, and thoſe of the ſouth adhered ſtill to the Catholic.

The reaſon is plain: The people of the north have, and will forever have, a ſpirit of liberty and independence, which the people of the ſouth have not; and therefore a religion which has no viſible head, is more agreeable to the independency of the climate than that which has one.

In the countries themſelves, where the proteſtant religion became eſtabliſhed, the revolutions were made purſuant to the ſeveral plans of political government. Luther having great princes on his ſide, would never have been able to make them reliſh an eccleſiaſtic authority that had no exterior preeminence; while Calvin, having to do with people who lived under republican governments, or with obſcure citizens

* See Diodorus, lib. 2.

citizens and monarchies, might very well avoid eſtabliſhing dignities and preeminence.

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

CHAP. VI.

Another of Mr. Bayle's Paradoxes.

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

It is aſtoniſhing, that this great man ſhould not be able to diſtinguiſh between the orders for the eſtabliſhment of Chriſtianity, and Chriſtianity itſelf; and that he ſhould be liable to be charged with not knowing the ſpirit of his own religion. When the legiſlator, inſtead of laws, has given counſels, this is becauſe he knew, that if theſe counſels were ordained as laws, they would be contrary to the ſpirit of the laws themſelves.

CHAP. VII.

Of the Laws of Perfection in Religion.

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

When, for inſtance, it gives rules not for what is good, but for what is better; not to direct to what is right, but

to

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

CHAP. VIII.

Of the Connexion between the Moral Laws and those of Religion.

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

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

CHAP. IX.

Of the Essenes.

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

CHAP.

* Dupin's ecclesiastical library of the sixth century, vol. v.

† Collection of voyages that contributed to the establishment of the East-India company, vol. 3. part 1. page 63.

‡ Hist. of the Jews by Prideaux.

CHAP. X.

Of the Sect of Stoics.

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

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

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

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

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

Born for ſociety, they all believed that it was their deſtiny to labor for it; with ſo much the leſs fatigue, as their rewards were all within themſelves. Happy by their philoſophy alone, it ſeemed as if only the happineſs of others could increaſe theirs.

CHAP.

CHAP. XI.

Of Contemplation.

MEN being made to preſerve, to nouriſh, to clothe themſelves, and do all the actions of ſociety, religion ought not to give them too contemplative a life.*

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

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

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

CHAP. XII.

Of Penance.

PENANCES ought to be joined with the idea of labor, not with that of idleneſs; with the idea of good, not with that of ſupereminent; with the idea of frugality, not with that of avarice.

CHAP. XIII.

Of inexpiable Crimes.

IT appears from a paſſage of the books of the pontiffs, quoted by Cicero,† that they had amongſt the ‡Romans

* This is the inconvenience of the doctrine of Foe and Laokium.

† Lib. 2. of laws.

‡ Sacrum commiſſum, quod neque expiari poterit, impie commiſſum eſt; quod expiari poterit, publici ſacerdotes, expianto.

mans inexpiable crimes; and it is on this, that Zozimus founds the narration ſo proper to blacken the motives of Conſtantine's converſion; and Julian, that bitter raillery on this converſion in his Cæſars.

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

CHAP. XIV.

In what Manner Religion has an Influence on Civil Laws.

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

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

When

When the doctrine of neceſſity is eſtabliſhed by religion, the penalties of the laws ought to be more ſevere, and the magiſtrate more vigilant; to the end that men, who would otherwiſe become abandoned, might be determined by theſe motives: But it is quite otherwiſe, where religion has eſtabliſhed the doctrine of liberty.

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

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

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

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

When religion abſolves the mind by a thing merely accidental, it loſes its greateſt influence on mankind. The people of India believe that the waters of the Ganges have a ſanctifying virtue.‡ Thoſe who die on its banks are imagined to be exempted from the torments of the other life, and

* See the relation written by John Dupian Carpin, ſent to Tartary by Pope Innocent IV, in the year 1247.

† Collection of voyages that contributed to the eſtabliſhment of the Eaſt-India company, vol. 5. page 192. ‡ Edifying Letters, collect. 15.

and to be entitled to dwell in a region full of delights; and for this reaſon the aſhes of the dead are ſent from the moſt diſtant places to be thrown into this river. Little then does it ſignify whether they have lived virtuouſly or not, ſo they be but thrown into the Ganges.

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

CHAP. XV.

How falſe Religions are ſometimes corrected by the Civil Laws.

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

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

CHAP. XVI.

How the Laws of Religion correct the inconveniences of a Political Conſtitution.

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

Thus when a kingdom is frequently agitated by civil wars, religion may do much by obliging one part of the ſtate to remain always quiet. Among the Greeks, the Eleans, as prieſts of Apollo, enjoyed a perpetual peace. In Japan‡ the

* Polit. lib. 7. cap. 17. † Suetonius, in Auguſto, cap. 31.

‡ Collection of voyages made to eſtabliſh an India company, vol. 4, p. 127.

the city of Meaco enjoys a conſtant peace, as being a holy city; religion ſupports this regulation, and that empire which ſeems to be alone upon earth, and which neither has nor will have any dependence on foreigners, has always in its own boſom a trade which war cannot ruin.

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

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

CHAP. XVII.

The ſame Subject continued.

WHEN a ſtate has many cauſes for hatred, religion ought to produce many ways of reconciliation. The Arabs, a people addicted to robbery, are frequently guilty of doing injury and injuſtice. Mahomet† enacted this law: "If any one forgives‡ the blood of his brother, he may purſue the malefactor for damages and intereſt; but he who ſhall injure the wicked, after having received ſatisfaction, ſhall, in the day of judgment, ſuffer the moſt grievous torments."

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

* See Prideaux's life of Mahomet, page 64.——† Koran, book 2, chap. of the cow.——‡ On renouncing the law of retaliation.——§ De Moeb. Germanorum.

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

CHAP. XVIII.

How the Laws of Religion have the Effect of Civil Laws.

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

CHAP. XIX.

That it is not ſo much the Truth or Falſity of a Doctrine which renders it uſeful or pernicious to Men in Civil Government, as the Uſe or Abuſe which is made of it.

THE moſt true and holy doctrines may be attended with the very worſt conſequences, when they are not connected with the principles of ſociety; and, on the contrary, doctrines the moſt falſe may be attended with excellent conſequences, when contrived ſo as to be connected with theſe principles.

The

* Collection of voyages that contributed to the eſtabliſhment of the Eaſt-india company, vol. 7. page 303. See alſo memoirs of the C. de Fourbin, and what he ſays of the people of Macaſſar.

† Plato, of laws, lib. 9. ‡ Tragedy of Œdipus Coloneus.

§ Plato, of laws, lib. 9.

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

The doctrine of the immortality of the ſoul falſely underſtood, has, almoſt throughout the whole world, and in every age, engaged women, ſlaves, ſubjects, friends to murder themſelves, that they might go and ſerve in the other world the object of their reſpect or love in this. Thus it was in the Weſtindies; thus it was amongſt the Danes;† thus it is at preſent in Japan,‡ in Macaſſar,§ and many other places.

Theſe cuſtoms do not ſo directly proceed from the doctrine of the immortality of the ſoul, as from that of the reſurrection of the body, from whence they have drawn this conſequence, that after death the ſame individual will have the ſame wants, the ſame ſentiments, the ſame paſſions. In this point of view the doctrine of the immortality of the ſoul, has a prodigious effect on mankind; becauſe the idea of only a ſimple change of habitation is more within the reach of the human underſtanding, and more adapted to flatter the heart, than the idea of a new modification.

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

☞ 2 CHAP.

* A Chineſe philoſopher reaſons thus againſt the doctrine of Foe. "It is ſaid in a book of that ſect, that the body is our dwelling place, and the ſoul the immortal gueſt which lodges there; but if the bodies of our relations are only a lodging, it is natural to regard them with the ſame contempt we ſhould feel for a ſtructure of earth and dirt. Is not this endeavoring to tear from the heart the virtue of love to one's own parents? This leads us even to neglect the care of the body, and to refuſe it the compaſſion and affection ſo neceſſary for its preſervation: Hence the diſciples of Foe kill themſelves by thouſands." *Work of an ancient Chineſe philoſopher in the collection of Du Halde, vol. 3. p. 52.* † See Tho. Bartholin's Ant. of the Danes.

‡ An account of Japan, in the collection of voyages that contributed to eſtabliſh an Eaſtindia company. § Fourbin's memoirs.

CHAP. XX.

The ſame Subject continued.

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

CHAP. XXI.

Of the Metempſychoſis.

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

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

CHAP.

* Mr. Hyde.

CHAP. XXII.

That it is dangerous for Religion to inſpire an averſion for Things in themſelves indifferent.

A KIND of honor eſtabliſhed in the Indies by the prejudices of religion, has made the ſeveral tribes conceive an averſion againſt each other. This honor is founded entirely on religion; theſe family diſtinctions form no civil diſtinctions; there are Indians who would think themſelves diſhonored by eating with their king.

Theſe ſorts of diſtinctions are connected with a certain averſion for other men, very different from thoſe ſentiments which ought to proceed from difference of rank; which amongſt us comprehend a love for inferiors.

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

The Mahometan and Indian religions have in their boſom an infinite number of people; the Indians hate the Mahometans becauſe they eat cows; the Mahometans deteſt the Indians, becauſe they eat hogs.

CHAP. XXIII.

Of Feſtivals.

WHEN religion appoints a ceſſation from labor, it ought to have a greater regard to the neceſſities of mankind, than to the grandeur of the being it deſigns to honor.

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

When Conſtantine ordained that the people ſhould reſt on the ſabbath, he made this decree for the cities,† and

* Xenophon on the republic of Athens.

† Leg. 3 code de feriis. This law was doubtleſs made only for the Pagans.

not for the inhabitants of the open country; he was ſenſible that labor in the cities was uſeful, but in the fields neceſſary.

For the ſame reaſon, in a country ſupported by commerce, the number of feſtivals ought to be relative to this very commerce. Proteſtant and Catholic countries are ſituated* in ſuch a manner, that there is more need of labor in the former than in the latter; the ſuppreſſion of feſtivals is therefore more ſuitable to Proteſtant than to Catholic countries.

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

CHAP. XXIV.

Of the Local Laws of Religion.

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

The opinion of the metempſychoſis is adapted to the climate of the Indies. An exceſſive heat burns up all the country‡; they can breed but very few cattle; they are always in danger of wanting them for tillage; their black cattle multiply but indifferently;§ and they are ſubject to many

* The Catholics lie more towards the ſouth, and the Proteſtants towards the north. † Dampierre's voyages, vol. 2.

‡ See Bernier's travels, vol. 2. page 137.

§ Edifying letters, collect. xii. p. 95.

many distempers: A law of religion which preserves them, is therefore most suitable to the policy of the country.

While the meadows are scorched up, rice and pulse, by the assistance of water, are brought to perfection: A law of religion which permits only this kind of nourishment, must therefore be extremely useful to men in these climates.

The flesh* of cattle in that country is insipid, but the milk and butter which they receive from them, serves for a part of their subsistence: Therefore the law which prohibits the eating and killing of cows, is in the Indies not unreasonable.

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

CHAP. XXV.

The inconveniency of Transplanting a Religion from one Country to another.

IT follows from hence, that there are frequently many inconveniences attending the transplanting a religion from one country to another.

"The hog," says Mr. Boulainvillers,‡ "must be very scarce in Arabia, where there are almost no woods, and hardly any thing fit for the nourishment of these animals: Besides, the saltness of the water and food renders the people most susceptible of cutaneous disorders." This local law could not be good in other§ countries, where the hog is almost an universal, and in some sort, a necessary nourishment.

I shall here make a reflection. Sanctorius has observed that pork transpires but little|| and that this kind of meat greatly hinders the transpiration of other food; he has found that this diminution amounts to a third.¶ Besides,

it

* Bernier's travels, vol. 2. p. 187.

† Euripides in Athenaeus, lib. 2.

‡ Life of Mahomet. § As in China.

|| Medicina Statica. [illegible] aphor. [illegible] ¶ Ibid.

it is known, that the want of tranſpiration forms or increaſes the diſorders of the ſkin. The feeding on pork ought therefore to be prohibited in climates where the people are ſubject to theſe diſorders, as in Paleſtine, Arabia, Egypt and Lybia.

CHAP. XXVI.

The ſame Subject continued.

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

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

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

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

BOOK

* Travels into Perſia, vol. 2. † Bernier's Travels, vol. 2.

BOOK XXV.

OF LAWS AS RELATIVE TO THE ESTABLISHMENT OF RELIGION, AND ITS EXTERNAL POLITY.

CHAP. I.

Of Religious Sentiments.

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

CHAP. II.

Of the Motives of Attachment to Different Religions.

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

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

When

When with a doctrine that gives us the idea of a ſpiritual ſupreme being, we can ſtill join thoſe of a ſenſible nature, and admit them into our worſhip, we contract a greater attachment to religion; becauſe thoſe motives which we have juſt mentioned, are added to our natural inclination for the objects of ſenſe. Thus the Catholics, who have more of this kind of worſhip than the Proteſtants, are more attached to their* religion, than the Proteſtants are to theirs.

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

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

A religion burthened with many‡ ceremonies, attaches us to it more ſtrongly than that which has a fewer number.

We have an extreme propenſity to things in which we are continually employed: Witneſs the obſtinate prejudices of the §Mahometans and the Jews; and the readineſs with which barbarous and ſavage nations change their religion, who, as they are employed entirely in hunting or war have but few religious ceremonies.

Men are extremely inclined to the paſſions of hope and fear; a religion, therefore, that had neither a heaven nor a hell,

* They are more zealous for its propagation. † St. Cyril's letter.

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

§ This has been remarked over all the world. See as to the Turks, the miſſions of the Levant; the collection of voyages that contributed to the eſtabliſhment of an Eaſtindia company, vol. 3. p. 201. on the Moors of Barbaria, and Father Labat on the Mahometan negroes, &c.

hell, could hardly pleaſe them. This is proved by the eaſe with which foreign religions have been eſtabliſhed in Japan, and the zeal and fondneſs with which they were received.*

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

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

CHAP. III.

Of Temples.

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

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

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

This was the cauſe that made Jenghiz Khan diſcover ſuch a prodigious contempt for moſques.† This prince‡ examined

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

† Entering the moſque of Bochara, he took the Koran, and threw it under his horſe's feet. *Hiſt. of the Tartars*, p. 373. ‡ Ibid. p. 414.

examined the Mahometans; he approved of all their doctrines, except that of the neceſſity of going to Mecca: He could not comprehend why God might not every where be adored. As the Tartars did not dwell in houſes, they could have no idea of temples.

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

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

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

Theſe aſylums multiplied in Greece. The temples, ſays Tacitus,† were filled with inſolvent debtors, and wicked ſlaves; the magiſtrate found it difficult to exerciſe his office; the people protected the crimes of men as the ceremonies of the gods; at length the ſenate was obliged to retrench a great number of them.

The laws of Moſes were perfectly wiſe. The man who involuntarily killed another, was innocent; but he was obliged to be taken away from before the eyes of the relations of the deceaſed: Moſes therefore appointed an aſylum‡ for ſuch unfortunate people. Great criminals deſerved not a place of ſafety, and they had none;§ the Jews

* This diſpoſition of mind has been communicated to the Japaneſe, who as is eaſily proved, derive their original from the Tartars.

† Annal. lib. 2. ‡ Numb. xxxv. § Ibid.

Jews had only a portable tabernacle, which continually changed its place. This excluded the idea of a ſanctuary. It is true that they had afterwards a temple; but the criminals who would reſort thither from all parts, might diſturb the divine ſervice. If perſons who had committed manſlaughter, had been driven out of the country, as was cuſtomary among the Greeks, they had reaſon to fear that they would worſhip ſtrange gods. All theſe conſiderations made them eſtabliſh cities of refuge, where they might ſtay till the death of the high prieſt.

CHAP. IV.

Of the Miniſters of Religion.

THE firſt men, ſays Porphyry, ſacrificed only vegetables. In a worſhip ſo ſimple, every one might be prieſt in his own family.

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

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

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

The worſhip of the gods requiring a continual application, moſt nations were led to conſider the clergy as a ſeparate body. Thus, amongſt the Egyptians, the Jews and the Perſians,‡ they conſecrated to the Deity certain families

* Liſius Giraldus, p. 726.

† A people of Siberia. See the account given by Mr. Everard Yſbrantides, in the Collection of Travels to the North, vol. 8.

‡ See Mr. Hyde.

families who performed and perpetuated the ſervice. There have even been religions, which have not only eſtranged eccleſiaſtics from buſineſs, but have alſo taken away the embarraſſments of a family; and this is the practice of the principal branch of Chriſtianity.

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

By the nature of the human underſtanding, we love in religion every thing which carries the idea of difficulty; as in point of morality we have a ſpeculative fondneſs for every thing which bears the character of ſeverity. Celibacy has been moſt agreeable to thoſe nations to whom it ſeemed leaſt adapted, and with whom it might be attended with the moſt fatal conſequences. In the ſouthern countries of Europe, where by the nature of the climate, the law of celibacy is more difficult to obſerve, it has been retained; in thoſe of the north, where the paſſions are leſs lively, it has been baniſhed. Further, in countries where there are but few inhabitants, it has been admitted; in thoſe that are vaſtly populous, it has been rejected. It is obvious that theſe reflections relate only to the too great extenſion of celibacy, and not to celibacy itſelf.

CHAP. V.

Of the Bounds which the Laws ought to preſcribe to the Riches of the Clergy.

AS particular families may be extinct, their wealth cannot be a perpetual inheritance. The clergy is a family which cannot be extinct; wealth is therefore fixed to it forever, and cannot go out of it.

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

We have retained the regulations of the Levitical laws, as to the poſſeſſions of the clergy, except thoſe relating to the

the bounds of theſe poſſeſſions: Indeed, amongſt us we muſt ever be ignorant of the bounds, beyond which any religious community can no longer be permitted to acquire.

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

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

In ſome countries of Europe, a reſpect for the privileges of the nobility, has eſtabliſhed in their favor a right of indemnity over immoveable goods acquired in mortmain. The intereſt of the prince has in the ſame caſe, made him exact a right of amortization. In Caſtile, where there is no ſuch right, the clergy have ſeized upon every thing. In Arragon, where there is ſome right of amortization, they have obtained leſs: In France, where this right and that of indemnity are eſtabliſhed, they have acquired leſs ſtill; and it may be ſaid, that the proſperity of this kingdom is in a great meaſure owing to the exerciſe of theſe two rights. If poſſible then, increaſe theſe rights, and put a ſtop to the mortmain.

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

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

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

CHAP.

CHAP. VI.

Of Monaſteries.

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

CHAP. VII.

Of the Luxury of Superſtition.

"THOSE are guilty of impiety towards the gods," ſays Plato,* "who deny their exiſtence; or who, while they believe it, maintain that they do not interfere with what is done here below; or, in fine, who think that they can eaſily appeaſe them by ſacrifices: Three opinions equally pernicious." Plato has here ſaid all that the cleareſt light of nature has ever been able to ſay, in point of religion.

The magnificence of external worſhip has a principal connexion with the conſtitution of the ſtate. In good republics, they have curbed not only the luxury of vanity, but even that of ſuperſtition. They have introduced frugal laws into religion. Of this number are many of the laws of Solon, many of thoſe of Plato on funerals adopted by Cicero; and in fine, ſome of the laws of Numa† on ſacrifices.

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

The

* On laws, lib. 10.

† Rogum vino ne reſpergito. *Law of the twelve tables.*

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

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

Religion ought not, under the pretence of gifts, to draw from the people what the neceſſities of ſtate have left them, but, as Plato* ſays, "the chaſte and the pious ought to offer gifts, which reſemble themſelves."

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

CHAP. VIII.

Of the Pontificate.

WHEN religion has many miniſters, it is natural for them to have a chief, and for a ſovereign pontiff to be eſtabliſhed. In monarchies, where the ſeveral orders of the ſtate cannot be kept too diſtinct, and where all powers ought not to be lodged in the ſame perſon; it is proper that the pontificate be diſtinct from the empire. The ſame neceſſity is not to be met with in a deſpotic government, the nature of which is to unite all the different powers in the ſame perſon. But in this caſe, it may happen, that the prince may regard religion as he does the laws themſelves, as dependent on his own will. To prevent this inconvenience, there ought to be monuments of religion, for inſtance, ſacred books which fix and eſtabliſh it. The king of Perſia is the chief of the religion; but this religion is regulated by the Koran. The emperor of China is the ſovereign pontiff; but there are books in the hands of every body, to which he himſelf muſt conform. In vain a certain emperor attempted to aboliſh them; they triumphed over tyranny.

* On Laws, lib. 2.

CHAP. IX.

Of Toleration in point of Religion.

WE are here politicians, and not divines: But the divines themſelves muſt allow that there is a great difference between tolerating and approving a religion.

When the legiſlator has believed it a duty to permit the exerciſe of many religions, it is neceſſary that he ſhould enforce alſo a toleration amongſt theſe religions themſelves.

It is a principle, that every religion which is perſecuted, becomes itſelf perſecuting: For as ſoon as by ſome accidental turn it ariſes from perſecution, it attacks the religion which perſecuted it; not as a religion, but as a tyranny.

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

CHAP. X.

The ſame Subject continued.

AS there are ſcarce any but perſecuting religions that have an extraordinary zeal for being eſtabliſhed in other places, becauſe a religion that can tolerate others, ſeldom thinks of its own propagation: It muſt therefore be a very good civil law, when the ſtate is already ſatisfied with the eſtabliſhed religion, not to ſuffer the eſtabliſhment of another.

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

CHAP.

CHAP. XI.

Of changing a Religion.

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

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

CHAP. XII.

Of Penal Laws.

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

The threatenings of religion are ſo terrible, and its promiſes ſo great, that when they actuate the mind, whatever efforts the magiſtrate may uſe to oblige us to renounce it, he ſeems to leave us nothing when he deprives us of the exerciſe of our religion, and to bereave us of nothing, when we are freely allowed to profeſs it.

It is not therefore by filling the ſoul with the idea of this great object, by haſtening her approach to that critical moment in which it ought to be of the higheſt importance, that ſhe can be moſt effectually detached from any particular religion: A more certain way is to tempt her by favors, by the conveniences of life, by the hopes of fortune: Not by that which warns her of danger, but by that which makes her forget it; not by that which ſhocks her, but by that which throws her into indifference, at the time when other paſſions actuate the mind, and thoſe which the religion inſpires are huſhed into ſilence. A general rule in changing a religion; the invitations ſhould be much ſtronger than the penalties.

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

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

CHAP. XIII.

A moſt humble Remonſtrance to the Inquiſitors of Spain and Portugal.

A JEWESS of eighteen years of age, who was burnt at Liſbon at the laſt *Autodafé*, gave occaſion to the following little piece; the moſt idle, I believe, that ever was wrote. When we attempt to prove things ſo evident, we are ſure never to convince.

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

"You complain," ſays he to the inquiſitors, "that the Emperor of Japan cauſed all the Chriſtians in his dominions

* In the collection of voyages that contributed to the eſtabliſhment of an Eaſtindia company, vol. 5.

ſions to be burnt by a ſlow fire. But he will anſwer, We treat you who do not believe like us, as you yourſelves treat thoſe who do not believe like you: You can only complain of your weakneſs, which has hindered you from exterminating us, and which has enabled us to exterminate you.

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

If you are cruel to us, you are much more ſo to our children; you cauſe them to be burnt, becauſe they follow the inſpirations given them by thoſe whom the law of nature, and the laws of all nations teach them to regard as God's.

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

When you would bring us over to you, we object a ſource from which you glory to deſcend. You reply to us, that though your religion is new, it is divine; and you prove it from its growing amidſt the perſecution of Pagans, and when watered by the blood of your martyrs: But at preſent you play the part of the Dioclefians, and make us take yours.

We conjure you, not by the mighty God whom both you and we ſerve, but by that Chriſt, who, you tell us, took upon him a human form, to propoſe himſelf for an example for you to follow; we conjure you to behave to us, as he himſelf would behave, was he upon earth.

* The ſource of the blindneſs of the Jews is, their not perceiving that the economy of the goſpel is in the order of the deſigns of God; and that it is in this light a conſequence of his immutability itſelf.

You would have us to be Chriſtians, and you will not be ſo yourſelves.

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

If Heaven has had ſo great a love for you, as to make you ſee the truth, you have received a great favor: But is it for children who have received the inheritance of their father, to hate thoſe who have not?

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

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

You live in an age in which the light of nature ſhines more bright than it has ever done; in which philoſophy has enlightened human underſtandings; in which the morality of your Goſpel has been more known; in which the reſpective rights of mankind, with regard to each other, and the empire which one conſcience has over another, are beſt underſtood. If you do not therefore ſhake off your ancient prejudices, which, whilſt unregarded, mingle with your paſſions, it muſt be confeſſed, that you are incorrigible, incapable of any degree of light or inſtruction; and a nation muſt be very unhappy that gives authority to ſuch men.

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

It is neceſſary that we ſhould advertiſe you of one thing, that is, if any one in times to come ſhall dare to aſſert, that

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in the age in which we live the people of Europe were civilized, you will be cited to prove that they were barbarians; and the idea they will have of you, will be ſuch as will diſhonor your age, and ſpread hatred over all your contemporaries."

CHAP. XIV.

Why the Chriſtian Religion is ſo odious in Japan.

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

Puniſhments among the Japaneſe are conſidered as the revenge of an inſult done to the Prince. The ſongs of triumph ſung by our martyrs appeared as an outrage againſt him; the title of martyr provoked the magiſtrates; in their opinion it ſignified rebel: They did all in their power to prevent their obtaining it. It was then that their minds were exaſperated, and a horrid ſtruggle was ſeen between the tribunals that condemned, and the accuſed who ſuffered; between the civil laws, and thoſe of religion.

CHAP. XV.

Of the Propagation of Religion.

ALL the people of the eaſt, except the Mahometans, believe all religions in themſelves indifferent. They fear

* Book vi. chap. 24.

fear the eſtabliſhment of another religion, no otherwiſe than as a change in government. Amongſt the Japaneſe, where there are many ſects, and where the ſtate has had for ſo long a time an eccleſiaſtic ſuperior, they* never diſpute on religion. It is the ſame with the people of Siam.† The Calmucs‡ do more, they make it a point of conſcience to tolerate every ſpecies of religion: At Calicut§ it is a maxim of the ſtate, that every religion is good.

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

BOOK

* See Kempfer.

† Fourbin's memoirs.

‡ Hiſt. of the Tartars, part 5.

§ Pirard's travels, chap. 27.

BOOK XXVI.

OF LAWS AS RELATIVE TO THE ORDER OF THINGS ON WHICH THEY DETERMINE.

CHAP. I.

Idea of this Book.

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

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

CHAP.

CHAP. II.

Of Laws Divine and Human.

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

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

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

1. It is in the nature of human laws to be ſubject to all the accidents which can happen, and to vary in proportion as the will of man changes: On the contrary, by the nature of the laws of religion, they are never to vary. Human laws appoint for ſome good; thoſe of religion for the beſt: Good may have another object, becauſe there are many kinds of good: But the beſt is but one, it cannot therefore change. We may change laws, becauſe they are reputed no more than good; but the inſtitutions of religion are always ſuppoſed to be the beſt.

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

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

CHAP.

CHAP. III.

Of Civil Laws contrary to the Law of Nature.

IF a ſlave, ſays Plato,* defends himſelf, and kills a freeman, he ought to be treated as a parricide. This is a civil law which puniſhes ſelfdefence, though dictated by nature.

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

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

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

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

There has been much talk of a law in ‡England which permitted girls ſeven years old to chooſe a huſband. This law was ſhocking two ways; it had no regard to the time when

* Lib. 9. on laws.

† Law of the Burgundians. tit. 47.

‡ Mr. Bayle, in his criticiſm on the hiſtory of Calviniſm, ſpeaks of this law, page 263.

when nature gives maturity to the underſtanding, nor to the time when ſhe gives maturity to the body.

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

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

CHAP. IV.

The ſame Subject continued.

THE law of †Receſſuinthus permits the children of the adultereſs, or thoſe of her huſband, to accuſe her, and to put the ſlaves of the houſe to the torture. How iniquitous the law, which, to preſerve a purity of morals, everturns nature, the origin, the ſource of all morality!

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

CHAP.

* See law 5, in the code de repudiis et judicio de moribus ſublato.

† In the code of the Viſigoths, lib. iii. tit. 4, § 13.

CHAP. V.

Caſes in which we may judge by the Principles of the Civil Law, in limiting the Principles of the Law of Nature.

AN Athenian law obliged* children to provide for their fathers, when fallen into poverty; it excepted thoſe who were born of a †courtezan, thoſe whoſe chaſtity had been infamouſly proſtituted by their father, and thoſe whom he ‡had not learned any trade by which they might gain a livelihood.

The law conſidered that in the firſt caſe the father being uncertain, he had rendered the natural obligation precarious; that, in the ſecond, he had ſullied the life he had given, and done the greateſt injury he could do to his children, in depriving them of their reputation; that in the third, he had rendered inſupportable a life which had no means of ſubſiſtence. The law ſuſpended the natural obligation of children, becauſe the father had violated his; it looked upon the father and the ſon as no more than two citizens, and determined in reſpect to them only from civil and political views; ever conſidering, that a good republic ought to have a particular regard to manners. I am of opinion that Solon's law was good in the two firſt caſes; that in which nature leaves the ſon ignorant who is his father, and that where it in a manner directs he ſhould not know him: But I cannot approve of it in the third, where the father has only violated an obligation of the civil law.

CHAP.

* Under pain of infamy, another under pain of impriſonment.
† Plutarch, life of Solon.
‡ Plutarch, life of Solon, and Gallienus in exhort. ad art. c. 8.

CHAP. VI.

That the Order of Succeſſion or Inheritance depends on the Principles of Political or Civil Law, and not on thoſe of the Law of Nature.

THE Voconian law ordained, that no woman ſhould be left heireſs to an eſtate, not even if ſhe was an only child. Never was there a law, ſays St. Auguſtine,* more unjuſt. A formula of Marculfus† treats that cuſtom as impious, which deprives daughters of the right of ſucceeding to the eſtate of their fathers. Juſtinian‡ gives the appellation of Barbarous, to the right which the males had formerly of ſucceeding in prejudice to the daughters. Theſe notions proceed from their having conſidered the right of children to ſucceed to their father's poſſeſſions, as a conſequence of the law of nature; which it is not.

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

It is true, that a political or civil order frequently demands that children ſhould ſucceed to their father's eſtate; but it does not always make this neceſſary.

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

It was regulated in ſome of the dynaſties of China, that the brothers of the emperor ſhould ſucceed to the throne, and that the children ſhould not. If they were willing that the prince ſhould have a certain degree of experience, if

* De civitate Dei, lib. 3. † Lib. 2. cap. 12
‡ Novel. 21. § Lib. 2. tit. 14. §§ 6, 7, & 8.

if they feared his being too young, and if it was become neceſſary to prevent eunuchs from placing children ſucceſſively on the throne, they might very juſtly eſtabliſh ſuch an order of ſucceſſion; and when ſome* writers have treated theſe brothers as uſurpers, they have judged only from ideas received from the laws of their own countries.

According to the cuſtom of Numidia,† Deſalces, brother of Gala, ſucceeded to the kingdom; not Maſſiniſſa, his ſon.

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

In a kingdom of ‡Arabia, the day the ſovereign mounted the throne, they ſet guardians over all the pregnant women of the country, and the child who came firſt into the world was the heir apparent.

In countries where Polygamy is eſtabliſhed, the prince has many children; the number of them is much greater in ſome of theſe countries than in others. There are§ ſtates where it is impoſſible for the people to maintain the children of the king: They might therefore make it a law, that the crown ſhall devolve, not on the king's children but on thoſe of his ſiſter.

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

There are people amongſt whom reaſons of ſtate, or ſome maxims of religion, have made it neceſſary that the crown ſhould be always fixed in a certain family: From hence, in India, proceeds the jealouſy of their ‖tribes, and the fear of loſing the deſcent: They have there conceived that

* Du Halde on the 2d dynaſty.

† Livy, decad. 3. lib. 9. ‡ Strabo, lib. 16.

§ As at Lovengo in Africa. See the collection of voyages that contributed to the eſtabliſhment of an Eaſtindia company, vol. 4. part 1. p. 114.

‖ See edifying letters, col. 14. and the voyages that contributed to the eſtabliſhment of an Eaſtindia company, vol. 3. part 2. p. 644.

that never to want princes of the blood royal, they ought to take the children of the elder ſiſter of the king.

A general maxim: It is an obligation of the law of nature to provide for our children; but to make them our ſucceſſors, is an obligation of the civil or political law.

From hence are derived the different regulations with reſpect to baſtards, in the different countries of the world; theſe are according to the civil or political laws of each country.

CHAP. VII.

That we ought not to decide by the Precepts of Religion what belongs only to the Law of Nature.

THE Abyſſines have a moſt ſevere Lent of fifty days, which weakens them to ſuch a degree, that for a long time they are incapable of buſineſs; the *Turks do not fail to attack them after their Lent. Religion ought, in favor of the natural right of ſelfdefence, to ſet bounds to theſe cuſtoms.

The Jews were obliged to keep the ſabbath; but it was an inſtance of great ſtupidity in this nation, not to defend themſelves when their enemies choſe to attack them on this day. Cambyſes laying ſiege to Peluſium, ſet in the firſt rank a great number of thoſe animals which the Egyptians regard as ſacred; the conſequence was, that the ſoldiers of the garriſon durſt not moleſt them. Who does not ſee that ſelfdefence is a duty ſuperior to every precept?

CHAP.

*Collection of voyages that contributed to the eſtabliſhment of an Eaſtindia company, vol. 4. p. 35 and 103.

CHAP. VIII.

That we ought not to regulate by the Principles of the Canon Law, things which ſhould be regulated by thoſe of the Civil Law.

BY the *civil law of the Romans, he who took a thing privately from a ſacred place, was puniſhed only for the guilt of theft; by the †canon law, he is puniſhed for the crime of ſacrilege. The canon law takes cogniſance of the place, the civil law of the fact. But to attend only to the place, is neither to reflect on the nature and definition of a theft, nor on the nature and definition of ſacrilege.

As the huſband may demand a ſeparation, by reaſon of the infidelity of his wife: The wife might formerly‡ demand it, on account of the infidelity of the huſband. This cuſtom, contrary to a regulation made in the §Roman laws, was introduced into the eccleſiaſtic courts,‖ where nothing was regarded but the maxims of canon law; and indeed, if we conſider marriage as a thing merely ſpiritual, and as relating only to the things of another life, the violation is in both caſes the ſame. But the political and civil laws of almoſt all nations, have with reaſon made a diſtinction between them. They have required from the women a degree of reſerve and continency, which they have not exacted from the men; becauſe, in women, a violation of chaſtity ſuppoſes a renunciation of all virtue; becauſe women, by violating the laws of marriage, quit the ſtate of their natural dependence, becauſe nature has marked the infidelity of women with certain ſigns; and, in fine, becauſe the children of the wife born in adultery, neceſſarily belong, and are an expenſe to the huſband, while the children produced by the adultery of the huſband, are not the wife's, nor an expenſe to the wife.

* Leg. 5. ff. ad leg. Juliam peculatus.
† Capite quiſquis 17. queſtione 4. Cujus obſervat. lib. 13. cap. 19. tom. 3.
‡ Beauſmanoir on the ancient cuſtom of Beauvoiſis, chap. 18.
§ Law of the firſt code. *ad leg. Juliam de adulteriis.*
‖ At preſent they do not take cogniſance of theſe things in France.

CHAP. IX.

That Things which ought to be regulated by the Principles of Civil Law, can ſeldom be regulated by thoſe of Religion.

THE laws of religion have a greater ſublimity, the civil laws a greater extent.

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

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

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

At firſt, by the *Roman law, a huſband, who brought back his wife into his houſe, after ſhe had been found guilty of adultery, was puniſhed as an accomplice in her debauch. Juſtinian,† from other principles, ordained that during the ſpace of two years he might go and take her again out of the monaſtery.

Formerly, when a woman whoſe huſband was gone to war, heard no longer any tidings of him, ſhe might eaſily marry again, becauſe ſhe had in her hands the power of making a divorce. The law of ‡Conſtantine obliged the woman to wait four years, after which ſhe might ſend the bill of divorce to the general; and if her huſband returned, he could not then charge her with adultery. But Juſtinian

* Leg. 11. § ult. ff. ad leg. Juliam de adulteriis.

† Nov. 134. col. 9. cap. 10. tit. 170.

‡ Leg. 7. cod. de repudiis & judicio de morib. ſublato.

Juſtinian* decreed, that let the time be ever ſo long after the departure of her huſband, ſhe ſhould not marry, unleſs by the depoſition and oath of the general, ſhe could prove the death of her huſband. Juſtinian had in view the indiſſolubility of marriage; but we may ſafely ſay, that he had it too much in view. He demanded a poſitive proof, when a negative proof was ſufficient; he required a thing extremely difficult, to give an account of the fate of a man at a great diſtance, and expoſed to ſo many accidents; he preſumed a crime, that is, a deſertion of the huſband, when it was ſo natural to preſume his death. He injured the commonwealth, by obliging women to live out of marriage; he injured individuals by expoſing them to a thouſand dangers.

The law of Juſtinian,† which ranked amongſt the cauſes of divorce, the conſent of the huſband and wife to enter into a monaſtery, was entirely oppoſite to the principles of the civil laws. It is natural that the cauſes of divorce ſhould have their origin in certain impediments, which could not be foreſeen before marriage; but this deſire of preſerving chaſtity might be foreſeen, ſince it is in ourſelves. This law favors inconſtancy in a ſtate, which is by its very nature perpetual; it ſhocks the fundamental principle of divorce, which permits the diſſolution of one marriage only from the hope of another. In ſhort, if we view it in a religious light, it is no more than giving victims to God without a ſacrifice.

CHAP. X.

In what Caſe we ought to follow the Civil Law which permits, and not the Law of Religion, which forbids.

WHEN a religion which prohibits polygamy is introduced into a country, where it is permitted, we cannot believe, (ſpeaking only as a politician) that the laws of the country ought to ſuffer a man who has many wives, to embrace this religion; unleſs the magiſtrate or the huſband ſhould indemnify them, by reſtoring them ſome way or other to their civil ſtate. Without this their condition

☞ 2 would

* Auth. hodie quantitcumque, cod. de repudiis.

† Auth. quod hodie, cod. de repudiis.

would be deplorable; no ſooner would they obey the laws, than they would find themſelves deprived of the greateſt advantages of ſociety.

CHAP. XI.

That Human Courts of Juſtice ſhould not be regulated by the Maxims of thoſe Tribunals which relate to the other Life.

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

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

CHAP. XII.

The ſame Subject continued.

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

CHAP.

CHAP. XIII.

In what Caſes, with regard to Marriages, we ought to follow the Laws of Religion, and in what Caſes we ſhould follow the Civil Laws.

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

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

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

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

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

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

It follows from hence, that the religious law muſt decide whether the bond be indiſſoluble, or not; for if the

laws of religion had made the bond indiſſoluble, and the civil laws had declared it might be broken, they would be contradictory to each other.

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

Amongſt the Romans the Papian law declared thoſe marriages illegal which had been prohibited, and yet only ſubjected them to a penalty;* but a *ſenatuſconſultum* made at the inſtance of the emperor Marcus Antoninus, declared them void; there then no longer ſubſiſted† any ſuch thing as a marriage, wife, dowery or huſband. The civil laws determine according to circumſtances; ſometimes they are moſt attentive to repair the evil; at others to prevent it.

CHAP. XIV.

In what inſtances Marriages between Relations ſhould be regulated by the Laws of Nature; and in what inſtances by the Civil Laws.

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

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

Beſides, nature has forwarded in women the time in which they are able to have children, but has retarded it in men; and for the ſame reaſon, women ſooner loſe this ability, and men later. If the marriage between the mother and the ſon was permitted, it would almoſt always be the caſe, that when the huſband was capable of entering into the views of nature, the wife would be incapable.

The

* See what hath been ſaid on this ſubject in book 23. chap. 21.

† See law 16. *ff. de ritu nuptiarum*; and law 3. § 1. alſo Digeſt. *de donationibus inter virum & uxorem.*

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

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

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

The horror that ariſes againſt the inceſt of the brother with the ſiſter ſhould proceed from the ſame ſource. The deſire of fathers and mothers to preſerve the morals of their children and families untainted, is ſufficient to inſpire their offſpring with a deteſtation of every thing that can lead to the union of the two ſexes.

The prohibition of marriage between couſin germans has the ſame original. In the early ages, that is, in the times of innocence; in the ages when luxury was unknown, it was cuſtomary for children‡ upon their marriage, not to remove from their parents, but to ſettle in the ſame houſe, as a ſmall habitation was at that time ſufficient for a large family; the children§ of two brothers, or couſin germans

☞ 4 were

* This law is very ancient amongſt them. Attila, ſays Priſcus in his embaſſy, ſtopt in a certain place to marry Elca his daughter. A thing permitted, he adds, by the laws of the Scythians, p. 22.——† Hiſt. of the Tartars, part 3. p. 236.——‡ It was thus amongſt the ancient Romans.

§ Amongſt the Romans they had the ſame name, the couſin germans were called brothers.

were conſidered both by others and themſelves, as brothers. The eſtrangement then between the brothers and ſiſters, as to marriage,* ſubſiſted alſo between the couſin germans.

Theſe principles are ſo ſtrong and ſo natural, that they have had their influence almoſt all over the earth, independently of any communication. It was not the Romans who taught the inhabitants of Formoſa,† that the marriage of relations of the fourth degree was inceſtuous; it was not the Romans that communicated this ſentiment to the Arabs ;‡ it was not they who taught it to the inhabitants of the Maldivian iſlands.§

But if ſome nations have not rejected marriages between fathers and children, ſiſters and brothers; we have ſeen in the firſt book, that intelligent beings do not always follow the law of nature. Who could have imagined it! Religious ideas have frequently made them fall into theſe miſtakes. If the Aſſyrians and the Perſians married their mothers, the firſt were influenced by a religious reſpect for Semiramis, and the ſecond did it becauſe the religion of Zoroaſter gave a preference‖ to theſe marriages. If the Egyptians married their ſiſters, it proceeded from the wildneſs of the Egyptian religion, which conſecrated theſe marriages in honor of Iſis. As the ſpirit of religion leads us to attempt whatever is great and difficult, we cannot infer that a thing is natural from its being conſecrated by a falſe religion.

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

As children dwell, or are ſuppoſed to dwell in their father's houſe, and conſequently the ſtepſon with the ſtepmother, the ſtepfather with the ſtepdaughter, or wife's daughter;

* It was thus at Rome in the firſt ages, till the people made a law to permit them; they were willing to favor a man extremely popular, who had married his couſin german. *Plutarch's treatiſe, intitled, Queſtions concerning the affairs of the Romans.*

† Collection of voyages to the Indies, vol. 5. part 1. An account of the ſtate of Formoſa.

‡ Koran, chap. of women. § See Francis Pirard.

‖ They were conſidered as more honorable. See Philo *de ſpecialibus legib. quæ pertinent ad præcepta decalogi.* Paris, 1640. *p.* 778.

daughter; the marriage between them is forbidden by the law of nature. In this caſe the reſemblance has the ſame effect as the reality, becauſe it ſprings from the ſame cauſe: The civil law neither can, nor ought to permit theſe marriages.

There are nations, as we have already obſerved, amongſt whom couſin germans are conſidered as brothers, becauſe they commonly dwell in the ſame houſe; there are others, where this cuſtom is not known. Among the firſt, the marriage of couſin germans ought to be regarded as contrary to nature; not ſo among the others. But the laws of nature cannot be local. Wherefore, when theſe marriages are forbidden or permitted, they are, according to the circumſtances, permitted or forbidden by a civil law.

It is not a neceſſary cuſtom for the brotherinlaw and the ſiſterinlaw to dwell in the ſame houſe. The marriage between them is not then prohibited to preſerve chaſtity in the family; and the law which forbids or permits it, is not a law of nature, but a civil law, regulated by circumſtances, and dependent on the cuſtoms of each country: Theſe are caſes on which the laws depend on the morals or cuſtoms of the inhabitants.

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

This explains why the laws of Moſes, thoſe of the Egyptians,* and of many other nations, permitted the marriage of the brotherinlaw with the ſiſterinlaw; whilſt theſe very marriages were diſallowed by other nations.

In the Indies they have a very natural reaſon for admitting this ſort of marriage. The uncle is there conſidered as the father, and is obliged to maintain and educate his nephew, as if he was his own child: This proceeds from

* See law 8. of the code *de inceſtis et inutilibus nuptiis.*

from the diſpoſition of theſe people, which is good natured and full of humanity. This law, or this cuſtom, has produced another; if a huſband has loſt his wife, he does not fail to marry her ſiſter: And this is extremely natural, for his new conſort becomes the mother of her ſiſter's children, and not a cruel ſtepmother.

CHAP. XV.

That we ſhould not regulate by the Principles of Political Law, thoſe things which depend on the Principles of Civil Law.

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

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

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

Let us therefore lay it down as a certain maxim, that whenever the public good happens to be the matter in queſtion, it is never for the advantage of the public to deprive an individual of his property, or even to retrench the leaſt part of it by a law, or a political regulation. In this caſe we ſhould follow the rigor of the civil law, which is the palladium of property.

Thus, when the public has occaſion for the eſtate of an individual, it ought never to act by the rigor of political law: It is here that the civil law ought to triumph, who with

with the eyes of a mother regards every individual as the whole community.

If the political magiſtrate would erect a public edifice, or make a new road, he muſt indemnify thoſe who are injured by it; the public is in this reſpect like an individual, who treats with an individual. It is full enough, that it can oblige a citizen to ſell his inheritance, and that it can ſtrip him of this great privilege which he holds from the civil law, they not being forced to alienate his poſſeſſions.

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

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

CHAP. XVI.

That we ought not to decide by the Rules of the Civil Law, when it is proper to decide by thoſe of the Political Law.

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

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

* The lord appointed collectors to receive the toil from the peaſant, the gentlemen were obliged to contribute by the count, and the clergy by the biſhop. *Beaumanoir, chap.* 22.

ſhould have civil laws to regulate the diſpoſal of property.

If then they alienate the demeſne, the ſtate will be forced to make a new fund for another. But this expedient overturns the political government, becauſe, by the nature of the thing, for every demeſne that ſhall be eſtabliſhed, the ſubject will always be obliged to pay more, and the ſovereign to receive leſs; in a word, the demeſne is neceſſary, and the alienation is not.

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

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

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

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

It is ridiculous to pretend to decide the rights of kingdoms, of nations, and of the univerſe, by the ſame maxims

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on which (to make uſe of an expreſſion of *Cicero) we ſhould decide the right of a gutter between individuals.

CHAP. XVII.

The ſame Subject continued.

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

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

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

CHAP. XVIII.

That it is neceſſary to inquire whether the Laws which ſeem contradictory, are of the ſame Claſs.

AT Rome the huſband was permitted to lend his wife to another. Plutarch tells us this‖ in expreſs terms. We

* Lib. i. of laws. † Repub. lib. iii. cap. 13.
‡ Hyperbolus. See Plutarch, life of Ariſtides.
§ It was found oppoſite to the ſpirit of the legiſlator
‖ Plutarch in his comparison between Lycurgus and Numa.

We know that Cato lent his *wife to Hortenſius, and Cato was not a man to violate the laws of his country.

On the other hand, a huſband who ſuffered his wife to be debauched, who did not bring her to juſtice, or who took her again after her †condemnation, was puniſhed. Theſe laws ſeem to contradict each other, and yet are not contradictory. The law which permitted a Roman to lend his wife was viſibly a Lacedæmonian inſtitution, eſtabliſhed with a view of giving the republic children of a good ſpecies, if I may be allowed the term: The other had in view the preſervation of morals. The firſt was a law of politics, the ſecond a civil law.

CHAP. XIX.

That we ought not to decide thoſe things by the Civil Law, which ought to be decided by Domeſtic Laws.

THE law of the Viſigoths enjoins, that the ‡ſlaves of the houſe ſhall be obliged to bind the man and woman they ſurpriſe in adultery, and to preſent them to the huſband and to the judge: A terrible law, which puts into the hands of ſuch mean perſons the care of public, domeſtic, and private vengeance!

This law can be nowhere proper but in the ſeraglios of the eaſt, where the ſlave who has the charge of the incloſure, is deemed an accomplice upon the diſcovery of the leaſt infidelity. He ſeizes the criminals, not ſo much with a view to bring them to juſtice, as to do juſtice to himſelf, and to obtain a ſcrutiny into the circumſtances of the action, in order to remove the ſuſpicion of his negligence.

But, in countries where women are not guarded, it is ridiculous to ſubject thoſe who govern the family, to the inquiſition of their ſlaves.

This inquiſition may, in certain caſes, be at the moſt a particular domeſtic regulation, but never a civil law.

CHAP.

* Plutarch, life of Cato.
† Leg. 11. § ult. ff. ad leg. Jul. de adulteriis.
‡ Lib. iii. tit. 4. § 6.

CHAP. XX.

That we ought not to decide by the Principles of the Civil Laws thoſe things which belong to the Law of Nations.

LIBERTY conſiſts principally in not being forced to do a thing where the laws do not oblige. People are in this ſtate, only as they are governed by civil laws; and becauſe they live under thoſe civil laws, they are free.

It follows from hence, that princes who live not among themſelves under civil laws, are not free; they are governed by force; they may continually force or be forced. From hence it follows, that treaties made by force, are as obligatory as thoſe made by free conſent. When we who live under civil laws, are, contrary to law, conſtrained to enter into a contract, we may, by the aſſiſtance of the law recover from the effects of violence: But a prince, who is always in that ſtate in which he forces or is forced, cannot complain of a treaty which he has been obliged by violence to enter into. This would be to complain of his natural ſtate; it would ſeem as if he would be a prince with reſpect to other princes, and as if other princes ſhould be ſubjects with reſpect to him; that is, it would be contrary to the nature of things.

CHAP. XXI.

That we ſhould not decide by Political Laws, things which belong to the Law of Nations.

POLITICAL laws demand that every man be ſubject to the criminal and civil courts of the country where he reſides, and to the cenſure of the ſovereign.

The law of nations requires, that Princes ſhall ſend ambaſſadors; and a reaſon drawn from the nature of things does not permit theſe ambaſſadors to depend either on the ſovereign to whom they are ſent, or on his tribunals. They are the voice of the prince who ſends them, and this voice ought

ought to be free; no obſtacle ſhould hinder the execution of their office: They may frequently offend, becauſe they ſpeak for a man entirely independent; they might be wrongfully accuſed of crimes, if they were liable to be puniſhed for crimes; if they could be arreſted for debts, theſe might be forged. Thus a prince who has naturally a bold and enterpriſing ſpirit, would ſpeak by the mouth of a man who had every thing to fear. We muſt then be guided, with reſpect to ambaſſadors, by reaſons drawn from the law of nations, and not by thoſe derived from political law. But if they make an ill uſe of their repreſentative character, a ſtop may be put to it by ſending them back. They may even be accuſed before their maſter, who by this means becomes either their judge or their accomplice.

CHAP. XXII.

The unhappy State of the Ynca Athualpa.

THE principles we have juſt been eſtabliſhing, were cruelly violated by the Spaniards. The Ynca Athualpa* could only be tried by the law of nations; they tried him by political and civil laws; they accuſed him for putting to death ſome of his own ſubjects, for having many wives, &c. and to fill up the meaſure of their ſtupidity, they condemned him, not by the political and civil laws of his own country, but by the political and civil laws of theirs.

CHAP. XXIII.

That when, by ſome Circumſtance, the Political Law becomes deſtructive to the State, we ought to decide by ſuch a Political Law as will preſerve it, which ſometimes becomes a Law of Nations.

WHEN that political law which has eſtabliſhed in the kingdom a certain order of ſucceſſion, becomes deſtructive to the body politic, for whoſe ſake it was eſtabliſhed, there is not the leaſt room to doubt but another political law may be made to change this order; and ſo far would this

* See Garcillaſſo de la Vega.

this law be from oppoſing the firſt, it would in the main be entirely conformable to it, ſince both would depend on this principle, that *The ſafety of the people is the ſupreme law.*

I have ſaid* that a great ſtate becoming acceſſory to another, is itſelf weakened, and even weakens the principal. We know that it is for the intereſt of the ſtate to have the ſupreme magiſtrate within itſelf, that the public revenues be well adminiſtered, that its ſpecie be not ſent abroad to enrich another country. It is of importance, that he who is to govern has not imbibed foreign maxims: Theſe are leſs agreeable than thoſe already eſtabliſhed. Beſides, men have an extravagant fondneſs for their own laws and cuſtoms: Theſe conſtitute the happineſs of every community; and, as we learn from the hiſtories of all nations, are rarely changed without violent commotion, and a great effuſion of blood.

It follows from hence, that if a great ſtate has to its heir the poſſeſſor of a great ſtate, the firſt may reaſonably exclude him, becauſe a change in the order of ſucceſſion muſt be of ſervice to both ſtates. Thus a law of Ruſſia made in the beginning of the reign of Elizabeth, moſt wiſely excluded from the poſſeſſion of the crown, every heir who poſſeſſed another monarchy; thus the law of Portugal diſqualifies every ſtranger who lays claim to the crown by right of blood.

But if a nation may exclude, it may with greater reaſon be allowed a right to oblige a prince to renounce. If the people fear that a certain marriage will be attended with ſuch conſequences, as ſhall rob the nation of its dependence or diſmember ſome of its provinces, it may very juſtly oblige the contractors and their deſcendants to renounce all right over them; while he who renounces, and thoſe to whoſe prejudice he renounces, have the leſs reaſon to complain, as the ſtate might originally have made a law to exclude them.

* Book viii. chap. 17. et ſeq.

CHAP. XXIV.

That the Regulations of the Police are of a different Claſs from other Civil Laws.

THERE are criminals, whom the magiſtrate puniſhes, there are others whom he reclaims. The firſt are ſubject to the power of the law, the others to his authority: Thoſe are cut off from ſociety; theſe they oblige to live according to the rules of ſociety.

In the exerciſe of the police, it is rather the magiſtrate who puniſhes than the law; in the ſentence paſſed on crimes, it is rather the law which puniſhes than the magiſtrate. The buſineſs of the police conſiſts of affairs which ariſe every inſtant, and are commonly of a trifling nature. There is then but little need of formalities. The actions of the police are quick, they are exerciſed over things which return every day; it would be therefore improper for it to inflict ſevere puniſhments. It is continually employed about minute particulars; great examples are therefore not deſigned for its purpoſe. It is governed rather by regulations than laws; thoſe who are ſubject to its juriſdiction, are inceſſantly under the eye of the magiſtrate: It is therefore the fault of the magiſtrate if they fall into exceſs. Thus we ought not to confound a flagrant violation of the laws, with a ſimple breach of the police: Theſe things are of a different order.

From hence it follows, that the laws of that Italian* republic, where bearing fire arms is puniſhed as a capital crime, and where it is not more fatal to make an ill uſe of them, than to carry them, is not agreeable to the nature of things.

It follows moreover, that the applauded action of that emperor, who cauſed a baker to be impaled whom he found guilty of a fraud, was the action of a Sultan, who knew not how to be juſt, without committing an outrage on juſtice.

CHAP.

* Venice.

CHAP. XXV.

That we ſhould not follow the general Diſpoſitions of the Civil Law, in things which ought to be ſubject to particular Rules drawn from their own Nature.

IS it a good law, that all civil obligations paſſed between ſailors in a ſhip in the courſe of a voyage ſhould be null? Francis Pirard* tells us, that in his time it was not obſerved by the Portugueſe, though it was by the French. Men who are together only for a ſhort time; who have no wants, ſince they are provided for by the prince, who have only one object in view, that of their voyage; who are no longer in ſociety, but are only the inhabitants of a ſhip, ought not to contract obligations that were never introduced, but to ſupport the burthen of civil ſociety.

In the ſame ſpirit was the law of the Rhodians, made at a time when they always followed the coaſts; it ordained that thoſe who during a tempeſt ſtaid in a veſſel, ſhould have a ſhip and cargo, and thoſe who quitted it ſhould have nothing.

* Chap. xiv. p. 12.

BOOK XXVII.

OF THE ORIGIN AND REVOLUTIONS OF THE ROMAN LAWS ON SUCCESSIONS.

CHAP. I.

Of the Roman Laws on Succeſſions.

THIS affair derives its eſtabliſhment from the moſt diſtant antiquity; and to penetrate to its foundation, permit me to ſearch among the firſt laws of the Romans, for what, I believe, nobody has yet been ſo happy as to diſcover.

We know that Romulus* divided the land of his little kingdom among his ſubjects; it ſeems to me, that from hence the laws of Rome on ſucceſſions were derived.

The law of the diviſion of lands made it neceſſary that the property of one family ſhould not paſs into another: From hence it followed, that there were but two orders of heirs eſtabliſhed by law,† the children and all the deſcendants that were not emancipated, but lived under the power of the father, whom they called *ſui heredes*, or his natural heirs: And in their default, the neareſt relations on the male ſide, whom they call *agnati*.

It followed likewiſe, that the relations on the female ſide whom they call *cognati*, ought not to ſucceed; they would have conveyed the eſtate into another family, which was not allowed.

From thence alſo it followed, that the children ought not to ſucceed to the mother, nor the mother to her children;

* Dionyſ. Halicar. lib. ii. c. 3. Plutarch, compariſon between Numa and Lycurgus.

† Ai ſi inteſtato moritur cui ſuus heres nec extabit, agnatus proximus familiam habeto. *Fragment of the law of the twelve tables in Ulpian, the laſt title.*

dren; for this might carry the eſtate of one family into another. Thus we ſee them excluded* by the law of the twelve tables; it called none to the ſucceſſion but the *agnati*, and there was no agnation between the ſon and the mother.

But it was indifferent whether the *ſuus heres*, or, in default of ſuch, the neareſt by agnation, was male or female; becauſe, as the relations on the mother's ſide could not ſucceed, though a woman who was an heireſs ſhould happen to marry, yet the eſtate always returned into the family from whence it came. On this account the law of the twelve tables does not diſtinguiſh, whether the perſon† who ſucceeded was male or female.

This was the cauſe, that though the grandchildren by the ſon ſucceeded to the grandfather, the grandchildren by the daughter did not ſucceed; for, to prevent the eſtate from paſſing into another family, the *agnati* were preferred before them. Hence the daughter, and not her ‡children, ſucceeded to the father.

Thus amongſt the primitive Romans, the women ſucceeded, when this was agreeable to the law of the diviſion of lands; and they did not ſucceed when this law might ſuffer by it.

Such were the laws of ſucceſſion among the primitive Romans; and as theſe had a natural dependence on the conſtitution, and were derived from the diviſion of lands, it is eaſy to perceive that they had not a foreign original, and were not of the number of thoſe brought into the republic by the deputies ſent into the cities of Greece.

Dionyſius Halicarnaſſus§ tells us, that Servius Tullius finding the laws of Romulus and Numa on the diviſion of lands aboliſhed, he reſtored them and made new ones, to give the older a greater weight. We cannot therefore doubt, but that the laws we have been ſpeaking of, made in conſequence of this diviſion, were the work of thoſe three Roman legiſlators.

The order of ſucceſſion having been eſtabliſhed in conſequence of a political law, no citizen was allowed to break

* See the frag. of Ulpian, § 8. tit. 26. Inſt. tit. 3. in proœmio ad S. C. Tertullianum.

† Paulus, lib. iv. ſent. tit. 8. § 3. ‡ Inſt. lib. iii. § 1[illegible].

§ Lib. iv. p. 276.

in upon it by his private will; that is, in the firſt ages of Rome, he had not the power of making a teſtament. Yet it would have been hard to deprive him, in his laſt moments, of the friendly commerce of kind and beneficent actions.

They therefore found a method of reconciling, in this reſpect, the laws with the deſires of the individual. He was permitted to diſpoſe of his ſubſtance in an aſſembly of the people, and thus every teſtament was, in ſome ſort, an act of the legiſlative power.

The law of the twelve tables permitted the perſon who made his will, to chooſe which citizen he pleaſed for his heir. The reaſon that induced the Roman laws ſo ſtrictly to reſtrain the number of thoſe who might ſucceed *ab inteſtato*, was the law of the diviſion of lands; and the reaſon why they extended ſo widely the power of the teſtator, was, that as the father might ſell* his children, he might with greater reaſon deprive them of his ſubſtance. Theſe were therefore different effects, ſince they flowed from different principles; and ſuch is, in this reſpect, the ſpirit of the Roman laws.

The ancient laws of Athens did not permit a citizen to make a will. Solon† permitted it, with an exception to thoſe who had children: And the legiſlators of Rome, filled with the idea of paternal power, permitted the making a will even to the prejudice of their children. It muſt be confeſſed, that the ancient laws of Athens were more conſiſtent than thoſe of Rome. The indefinite permiſſion of making a will, which had been granted to the Romans, ruined by little and little the political regulation on the diviſions of lands: It was the principal thing that introduced the fatal difference between riches and poverty: Many ſhares were united in the ſame perſon; ſome citizens had too much, and a multitude of others had nothing. Thus the people being continually deprived of their ſhares, were inceſſantly calling out for a new diſtribution of lands. They demanded it in an age when the frugality, the parſimony, and the poverty of the Romans were their diſtinguiſhing

* Dionyſius Halicarnaſſus proves by a law of Numa, that the law which permitted a father to ſell his ſon three times, was made by Romulus, and not by the Decemvirs. *Lib.* 2.

† See plutarch, life of Solon.

guiſhing characteriſtic; as well as at a time when their luxury was become ſtill more aſtoniſhing.

Teſtaments being properly a law made in the aſſembly of the people, thoſe who were in the army were thereby deprived of a teſtamentary power. The people therefore gave the ſoldiers the privilege* of making before their companions, the diſpoſitions which† ſhould have been made before them.

The great aſſembly of the people met but twice a year; beſides, both the people and affairs brought before them were increaſed: They therefore judged it convenient to permit all the citizens to make their‡ will before ſome Roman citizens of ripe age, who were to repreſent the body of the people: They took five§ citizens, before whom the inheritor‖ purchaſed his family, that is, his inheritance, of the teſtator; another citizen brought a pair of ſcales to weigh the value; for the Romans¶ as yet had no money.

To all appearance theſe five citizens were to repreſent the five claſſes of the people; and they ſet no value on the ſixth, as being compoſed of men who had no property.

We ought not to ſay, with Juſtinian, that theſe ſales were merely imaginary; they became, indeed, imaginary in time, but were not ſo originally. Moſt of the laws which afterwards regulated wills, were built on the reality of theſe ſales: We find ſufficient proof of this in the Fragments of Ulpian.* The deaf, the dumb, the prodigal, could not make a will; the deaf, becauſe he could not hear the words of the buyer of the inheritance; the dumb, becauſe he could not pronounce the terms of nomination; the prodigal, becauſe, as he was excluded from the management of all affairs, he could not ſell his inheritance. I omit any further examples.

* This teſtament, called *in procinctu*, was different from that which they called *military*, which was eſtabliſhed only by the conſtitutions of the emperors, *leg. 1. ff. de milit. teſt.* This was one of the artifices by which they cajoled the ſoldiers.

† This teſtament was not in writing, and it was without formality, *nuncupata et tabulis*, as Cicero ſays, *lib. 1. de oratore.*

‡ Inſtitut. lib. 2. tit. 10. § 1. Aulus Gellius, lib. 15. cap. 27. They called this form of teſtament *per as & libram.*

§ Ulpian, tit. 20. § 2. ‖ Theoph. inſt. lib. 2. tit. 10.

¶ T. Livy, lib. 4 *nondum argentum pignatum erat.* He ſpeaks of the time of the ſiege of Veii. * Tit. 20. § 13.

Wills being made in the aſſembly of the people, were rather the acts of political, than of civil laws, a public rather than a private right; from whence it followed that the father, while his ſon was under his authority, could not give him leave to make a will.

Wills among moſt nations, are not ſubject to greater formalities than ordinary contracts; becauſe both the one and the other are only the expreſſions of the will of him who makes the contract, and both are equally a private right. But among the Romans, where teſtaments were derived from the public law, they were attended with much greater formalities* than other affairs; and this is ſtill the caſe in thoſe provinces of France which are governed by the Roman law.

Teſtaments being, as I have ſaid, a law of the people, they ought to be made with the force of a command, and in ſuch terms as are called *direct and imperative*.† Hence a rule was formed, that they could neither give or tranſmit an inheritance, without making uſe of the imperative words: From whence it followed that they might very juſtly in certain caſes make a ſubſtitution;‡ and ordain that the inheritance ſhould paſs to another heir; but that they could never make a fiduciary bequeſt,§ that is, charge any one in terms of intreaty to reſtore an inheritance, or any part of an inheritance to another.

When the father neither inſtituted the ſon his heir, nor diſinherited him, the will was annulled; but it was valid, though he did not diſinherit his daughter, nor inſtitute her his heireſs. The reaſon is plain; when he neither inſtituted nor diſinherited his ſon, he did an injury to his grandſon, who might have ſucceeded *ab inteſtato* to his father; but in neither inſtituting nor diſinheriting his daughter, he did no injury to his daughter's children, who could not ſucceed *ab inteſtato* to their mother;‖ becauſe they were neither *ſui heredes* nor *agnati*.

The

* Inſtit. lib. 2. tit. 10. § 1. † Let Titius be my heir.

‡ Vulgar, pupillary, and exemplary.

§ Auguſtus, for particular reaſons, firſt began to authorize the fiduciary bequeſt, which in the Roman law was called *fidei commiſſum*. Inſtit. lib. ii. tit. 23. in proœmio.

‖ Ad liberos matris inteſtatæ hereditas, *lib.* 12. *tab.* non pertinebat quia fœminæ ſuos heredes non habent. *Ulpian. fragm. tit.* 26. § 7.

The laws of the ancient Romans concerning ſucceſſions being formed with the ſame ſpirit which dictated the diviſion of lands, did not ſufficiently reſtrain the riches of women; by this means a door was left open to luxury, which is always inſeparable from this ſort of riches. Between the ſecond and third Punic war, they began to perceive the evil, and made the Voconian* law; but as they were induced to this by the moſt important conſiderations, moreover as but few monuments have reached us that take notice of this law, and as it has hitherto been ſpoken of in a moſt confuſed manner, I ſhall endeavor to clear it up.

Cicero has preſerved a fragment, which forbids the inſtituting a woman an †heireſs, whether ſhe was married or unmarried.

The epitome of Livy, where he ſpeaks of this law, ſays not‡ more: It appears from §Cicero and St. Auguſtine,‖ that the daughter, though an only child, was comprehended in the prohibition.

Cato the elder¶ contributed all in his power, to get this law paſſed. Aulus Gellius cites a fragment* of a ſpeech which he made on the occaſion. By preventing the ſucceſſion of women, his intent was to take away the ſource of luxury; as, by undertaking the defence of the Oppian law, he intended to put a ſtop to luxury itſelf.

In the inſtitutes of Juſtinian† and Theophilus‡ mention is made of a chapter of the Voconian law, which limits the power of bequeathing. In reading theſe authors, every body would imagine that this chapter was made to prevent the inheritance from being ſo exhauſted by legacies, as to make it unworthy of the heir's acceptance. But this was not the ſpirit of the Voconian law. We have juſt ſeen that they had in view the hindering women from inheriting an eſtate. The articles of this law, which ſet bounds to

* It was propoſed by Quintus Voconius, tribune of the people. See Cicero's ſecond oration againſt Verres. In the epitome of T. Livy, lib. 41, we ſhould read *Voconius*, inſtead of *Voluminius*.

† Sanxit . . . . ne quis heredem virginem neve mulierem faceret. *Cicero's ſecond oration againſt Verres.*

‡ Legem tulit, ne quis heredem mulierem inſtitueret. *lib.* 41.

§ Second oration againſt Verres.

‖ Of the city of God, lib. 3. ¶ Epitome of Livy, lib. 41.

* Lib. 17. cap. 6. † Inſtit. lib. 3. tit. 22. ‡ Ibid.

to the power of bequeathing, entered into this view: For if the people had been poſſeſſed of the liberty to bequeath as much as they pleaſed, the women might have received as legacies, what they could not receive by ſucceſſion.

The Voconian law was made to hinder the women from growing too wealthy; for this end it was neceſſary to deprive them of large inheritances, and not of ſuch as could not give riſe to luxury. Thus we find in Cicero,* that women were rendered incapable of ſucceeding to none but thoſe who were rated high in the cenſor's books.†

The civil wars were the deſtruction of an infinite number of citizens. Under Auguſtus, Rome was almoſt deſerted: It was neceſſary to repeople it. They made the Papian laws, which omitted nothing that could encourage ‡ the citizens to marry, and procreate children. One of the principal means was to increaſe,§ in favor of thoſe who gave into the views of the law, the hopes of being heirs, and to diminiſh the hopes of thoſe who refuſed; and as the Voconian law had rendered women incapable of ſucceeding, the Papian law, in certain caſes, diſpenſed with this prohibition.

Women,‖ eſpecially thoſe who had children, were rendered capable of receiving in virtue of the will of their huſbands; they even might, when they had children, receive in virtue of the will of ſtrangers. All this was in direct oppoſition to the regulations of the Voconian law: And yet it is remarkable, that the ſpirit of this law was not entirely abandoned. For example, the Papian law, which permitted a man who had one child¶ to receive an entire inheritance by the will of a ſtranger, granted the ſame favor to the wife only when ſhe had three children.*

It

* Second oration againſt Verres.

† *Qui cenſus eſſet*, which Dio, lib. 56. explains of him who had an hundred thouſand, that is, of him who had the firſt cenſus, as we may ſee in Livy, lib. 1. and Dionyſius Halicarnaſſus.

‡ See what has been ſaid in book 23. chap. 21.

§ The ſame difference occurs in ſeveral regulations of the Papian law. See the fragments of Ulpian, § 4. 5. & 6.

‖ See frgm. of Ulpian, tit. 15 § 16.

¶ Quod tibi filiolus, vel filia naſcitur, ex me
Jura parentis habes, propter me ſcriberis heres. — *Juvenal. ſat.* 9.

* See law 9. c. Theod. *de bonis proſcriptorum*, & Dio, lib. 55. See the frgm. of Ulpian, tit. laſt, § 6 and tit. 29 § 3.

It muſt be remarked, that the Papian law did not render the woman who had three children capable of ſucceeding, except in virtue of the will of ſtrangers; and that, with reſpect to the ſucceſſion of relations, it left the ancient laws, and particularly the *Voconian, in all their force. But this did not long ſubſiſt.

Rome, corrupted by the riches of every nation, had changed her manners; the putting a ſtop to the luxury of women was no longer minded. Aulus Gellius, who lived under †Adrian, tells us, that in his time the Voconian law was almoſt aboliſhed; it was buried under the opulence of the city. Thus we find in the ſentences of ‡Paulus, who lived under Niger, and in the fragments of Ulpian,§ who was in the time of Alexander Severus, that the ſiſters on the father's ſide might ſucceed, and that none but the relations of a more diſtant degree were in the caſe of thoſe prohibited by the Voconian law.

We find|| by the proceedings of Verres, that the prætors extended or reſtrained the Voconian law at pleaſure. The ancient laws of Rome began to be thought ſevere. The prætors, moved by nothing but reaſons of equity, moderation, and decorum, enervated all theſe laws. This is becauſe the great advantages reſulting from laws, lie often cloſely concealed, while the little inconveniencies that attend them are moſt ſenſibly felt.

We have ſeen that by the ancient laws of Rome mothers had no ſhare in the inheritance of their children. The Voconian law afforded a new reaſon for their excluſion. But the emperor Claudius gave the mother the ſucceſſion of her children as a conſolation for their loſs. The Tertulian *ſenatuſconſultum*, made under Adrian¶ gave it them when they had three children, if free women, or four, if they were freedwomen. It is evident, that this decree of the ſenate was only an extenſion of the Papian law, which in the ſame caſe had granted to women the inheritances left them by ſtrangers. At length Juſtinian* granted them

* Fragm. of Ulpian, tit. 16. § 1. Sozomenus, lib. 1. cap. 6.
† Lib. 20. cap. 1. ‡ Lib. iv. tit. 8. § 3.
§ Tit. 26. § 6. || Cicero, ſecond oration againſt Verres.
¶ That is, the Emperor Pius, who changed his name to that of Adrian by adoption.
* Lib. ii. cod. de jure liberorum. Inſtit. tit. 3. § 4. de ſen. conſult.

them the ſucceſſion independently of the number of their children.

The ſame cauſes which had debilitated the law that prevented the ſucceſſion of women, ſubverted that by degrees which had limited the ſucceſſion of the relations of the woman's ſide. Theſe laws were extremely conformable to the ſpirit of a good republic, where they ought to have ſuch an influence as to prevent this ſex from taking a pride in luxury, in riches, or in the hopes of obtaining riches. On the contrary, the luxury of a monarchy rendering marriage expenſive and coſtly, it ought to be there encouraged, both by the riches which women may beſtow, and by hope of the inheritances it is in their power to procure. Thus when monarchy was eſtabliſhed at Rome, the whole ſyſtem of ſucceſſions was changed. The prætors called the relations of the woman's ſide in default of thoſe of the male ſide, though by the ancient laws, the relations of the woman's ſide were never called. The Orphitian *ſenatuſconſultum* called children to the ſucceſſion of their mother; and the emperors Valentinian,* Theodoſius and Arcadius, called the grandchildren by the daughter to the ſucceſſion of the grandfather. In ſhort, the emperor Juſtinian† left not the leaſt veſtige of the ancient rights of ſucceſſions; he eſtabliſhed three orders of heirs, the deſcendants, the aſcendants and the collaterals, without any diſtinctions between the males and the females, between the relations on the woman's ſide, and thoſe on the male ſide, and abrogated all of this kind, which were ſtill in force; he believed that he followed nature even in deviating from what he called the embarraſſments of the ancient juriſprudence.

BOOK

* Lib. 9. cod. de ſuis et legitimis hæredibus.

† Lib. 14. cod. de ſuis et legitimis hæredibus, et Nov. 118 et 127.

BOOK XXVIII.

OF THE ORIGIN AND REVOLUTIONS OF THE CIVIL LAWS AMONG THE FRENCH.

In nova fert animus mutatas dicere formas.
Corpora——— OVID. METAM.

CHAP. I.

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

AFTER the Franks had quitted their country, they made a compilement of the Salic laws, with the aſſiſtance of *the ſages of their own nation. The tribe of Ripurian Franks having joined itſelf under Clovis† to that of the Salians, preſerved its own cuſtoms; an ‡Theodoric king of Auſtraſia ordered them to be reduced into writing, he collected likewiſe§ the cuſtoms of thoſe Bavarians and Germans who were dependent on his kingdom. For Germany having been weakened by the migration of ſuch a multitude of people, the Franks, after conquering all before them, turned back their victorious arms, and extended their dominion into the foreſts of their anceſtors. Very likely the Thuringian code‖ was given by the ſame Theodoric, ſince the Thuringians were alſo his ſubjects. As the Friſians were ſubdued by Charles Martel and Pepin, their¶ law

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

† See Gregory of Tours.

‡ See the prologue to the law of the Bavarians, and that to the Salic law.

§ Ibid.

‖ Lex Anciorum Werinorum, hoc eſt, Thuringorum.

¶ They did not know how to write.

law cannot be prior to thoſe princes. Charlemagne, the firſt that reduced the Saxons, gave them the law ſtill extant; and we need only read theſe two laſt codes, to be convinced they came from the hands of conquerors. As ſoon as the Viſigoths, the Burgundians, and the Lombards, had founded their reſpective kingdoms, they reduced their laws into writing, not with an intent of obliging the vanquiſhed nations to conform to their cuſtoms, but with a deſign of following them themſelves.

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

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

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

The

* They were made by Euric, and amended by Leovigildus. See Iſidorus's chronicle. Chaindaſuinthus and Receſſuinthus reformed them, Egi... ...ured the code now extant to be made, and commiſſioned biſhop... ...uet purpoſe; nevertheleſs, the laws of Chaindaſuinthus and Re... ...nus were preſerved, as appears by the ſixth council of Tole...

† See the prologue to the ... ...ne Bavarians.

The laws of the Burgundians, and eſpecially thoſe of the Viſigoths, admitted of corporal puniſhments: Theſe were not tolerated* by the Salic and Ripuarian laws; they preſerved their character much better.

The Burgundians and Viſigoths, whoſe provinces were greatly expoſed, endeavored to conciliate the affections of the ancient inhabitants, and to give them the moſt impartial civil laws;† but as the kings of the Franks had eſtabliſhed their power, they had no ſuch‡ conſiderations.

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

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

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

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

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

In other reſpects the laws of Gundebald for the Burgundians ſeem pretty judicious; and thoſe of Rotharis, and of the other Lombard princes, are ſtill more ſo. But the laws of the Viſigoths, thoſe, for inſtance, of Receſſuinthus, Chaindaſuinthus, and Egigas, are puerile, ridiculous, and fooliſh;

* ... and a few only in Childebert's decree.

† See the prologue to the code of the Burgundians, and the code itſelf, eſpecially tit. 12. § 5. and tit. 38. See alſo Gregory of Tours, book 9. chap. 33. and the code of the Viſigoths.

‡ See lower down, chap. 3.

§ See chap. 2. § 8 and 9, and chap 4. § 2 and 7,

fooliſh; they attain not their end; they are ſtuffed with rhetoric, and void of ſenſe, frivolous in the ſubſtance, and bombaſtic in the ſtyle.

CHAP. 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 reunion; and yet each 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 the 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.

* De bello Gallico, lib. 6.

† Lib. i. formul. 8. ‡ Chap. 31.

§ That of Clotarius in 560. Baluſius' edit. of the capitularies, tome. 1. 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.

ed. 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.

CHAP. 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 be killed, a composition of 200 sols was to be paid to his relations;¶ only one hundred upon the killing of a Roman possessor,* and no more than 45 for a Roman tributary. The composition for the murder of one of the king's vassals, if a Frank,† was 600 sols; if a Roman, though the king's guest,‡ only 300.§ 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 600 sols; but if a Roman or a freedman¶ was assaulted, only half that composition.

* Capitul. added to the law of the Lombards, lib. ii. tit. 25.

† Ibid. ‡ Ibid. chap. 2.

§ Ibid. lib. ii. tit. ii. 35. cap. 2.

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

¶ Salic law, tit. 44. § 1.

* Qui res in pago ubi remanent proprias habet. *Salic law, tit.* 44. § 15 *see also* § 7. † Qui in truste dominica est. *Ibid. tit.* 44. § 4.

‡ Si Romanus homo conviva regis fuerit. *Ibid.* § 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 bondman. *Law of the Alemans, chap.* 95.

tion. By the ſame law,* if a Roman put a Frank in irons, he was liable to a compoſition of 30 ſols; but if a Frank had thus uſed a Roman, he paid only 15. A Frank ſtript by a Roman was entitled to a compoſition of 62½ ſols, and a Roman ſtript by a Frank received only 30. 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 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 Arrian 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 Abbe du Bos has conſulted but indifferent authorities for his hiſtory, ſuch as poets and orators: Works of parade and oſtentation are an improper foundation for building ſyſtems upon.

CHAP. 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

* Tit. 35. § 3. et 4. † The Abbe Du Bos.

‡ Witneſs the expedition of Arbogaſtes in Gregory of Tours, hiſt. lib. 2.

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 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 diffuſed 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 favorable 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

☞ 2 was

* The Franks, Viſigoths and Burgundians.

† It was finiſhed in 438.

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

§ The year 504 of the Spaniſh era, the chronicle of Iſidorus.

‖ Francum, aut barbarum, aut hominem qui ſub Salica lege vivit. *Salic Law*, tit. 44. § 1.

¶ According to the Roman law under which the church lives, as is ſaid in the law of the Ripuarians, tit. 58. § 1. See alſo the numberleſs articles 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. p. 462, where it is ſaid, that an eccleſiaſtic ſhould receive a triple compoſition; and the collection of the capitularies, lib. v. art. 302. tome 1. edition of Baluſius.

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 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 favoring 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.

This

* See that law.

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

‡ Agob. opera.

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

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 chooſe to live under the laws of the barbarians.

I am not ignorant that what is here advanced will be reckoned new; but if the things 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?

CHAP. 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 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

* In illa terra in qua judicia secundum legem Romanam terminantur, secundum ipsam legem judicetur; et in illa terra in qua, &c. judicetur. See also art. 10.

† See art. 12. & 16. of the edict of Piſtes, in Cavillono, in Narbona, &c.

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.

CHAP. 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 Salic law, did not take place in Italy; hence the Roman law maintained itſelf there together with that of the Lombards.

It even fell out, that the latter gave way to the Roman 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.

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

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

furniſh them, the law of the Lombards that determined on ſome particular caſes, or the Roman law, which embraced them all ?

CHAP. 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. Chaindaſuinthus* and Receſſuinthus† proſcribed the Roman laws, and even forbade citing them in their courts of judicature. Receſſuinthus 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, 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 Chaindaſuinthus, and of Receſſuinthus,

☞ 4

* He began to reign in the year 642.

† We will no longer be harraſſed either by foreign or by the Roman laws. *Law of the Viſigoths, lib.* ii. *tit.* 1. § 9. *et* 10.

‡ Ut tam Gotho Romanam, quam Romano Gothan matrimonio liceat ſociari. *Law of the Viſigoths, lib.* iii. *tit.* 1. *cap.* 1.

§ 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 favored 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.

ceſſuinthus, 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.

CHAP. 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 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.

CHAP. IX.

In what Manner the Codes of the Barbarian Laws, and the Capitularies came to be loſt.

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

As fiefs were become hereditary, and arrierefiefs extended, many uſages were introduced, to which theſe laws were no longer applicable. Their ſpirit indeed was preſerved, which

* Gothi, qui cladi ſuperfuerunt, ex Gallia cum uxoribus liberiſque egreſſi in Hiſpaniam, ad Teudim jam palam tyrannum ſe receperunt. *De bello Gothorum, lib.* i. *cap.* 13.

† Capitularia, l. vi. c. 269. anno 1613, edit. Baluſ. p. 1021.

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 authoriſed. 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 charter, that when new fiefs were eſtabliſhed, our kings diveſted themſelves of the right of ſending thoſe officers. Thus when almoſt every thing 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

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

† Miſſi Dominici.

‡ 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

the canons of councils and of the decretals of popes; and theſe laws the clergy received as coming from a pure ſource. Ever ſince the creation of the grand fiefs, our kings, as we have already obſerved, had no longer and 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.

CHAP. 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 economical, moſt of them to eccleſiaſtical polity, and ſome few to civil government. Thoſe of the laſt ſpecies were added to the civil law, that is, to the perſonal laws of each nation; for which reaſon it is ſaid in the capitularies, that there is nothing ſtipulated* therein contrary to the Roman law. In effect, thoſe capitularies regarding economical, eccleſiaſtical, or political government, had no relation to that law; and thoſe concerning civil government had reference only to the laws of the barbarous people, which were explained, amended, enlarged, or abridged. But the adding of theſe capitularies to the perſonal laws, occaſioned, I imagine, the neglect of the very body of the capitularies themſelves: In times of ignorance, the abridgment of a work often cauſes the loſs of the work itſelf.

CHAP.

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.

* See the edict of Piſtes, art. 20.

CHAP. 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 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 neighborhood 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.

CHAP.

* This is expreſsly ſet down in ſome preambles to the codes. We even find in the laws of the Saxons and Frisians different regulations, according to the different diſtricts. To theſe codes were added ſome particular regulations, according to the exigency of circumſtances; ſuch were the ſeveral laws againſt the Saxons. † Of this I ſhall ſpeak elſewhere.

CHAP. 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 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

* Preface to Marculfus' Formulæ.
† Law of the Lombards, book ii. tit. 38 § 9.
‡ [illegible] of Pepin's Leges.
§ [illegible] book ii. tit. 41 § 6.

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 laws of his own nation, in a place where the Salic law was territorial, and the caſe happened not to be explicitly mentioned in the very text of this law, there is no manner of doubt but 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 law 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* abovementioned. 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

* See chap. 5.

was however ſufficient to produce ſuch an effect, that when Juſtinian's compilement 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.

CHAP. 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 ‡ſeventytwo. 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

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

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

‡ Ibid. tit. 11, 12, et 17.

§ It was when an acculation was brought againſt an antruſtio, that is, the King's vaſſal, who was ſuppoſed to be poſſeſſed of a greater degree of liberty. See tit. 76, of the Pactus legis Salicæ.

plantiff* cauſed witneſſes to be heard, in order to ground his action; the defendant produced alſo witneſſes on his ſide; and the judge was to come at the truth by comparing 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 ſwear that he had told the truth. Theſe laws could be ſuitable only to a people remarkable for their natural ſimplicity and candor; we ſhall ſee preſently that the legiſlators were obliged to take proper methods to prevent their being abuſed.

CHAP. 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 warlike 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 other barbarous nations,* who allowed the

* See the 76th tit. of the Pactus legis Salicæ.

† According to the practice now followed in England.

‡ Tit. 32. tit. 57. § 2. tit. 59. § 4.

§ See the following note.

‖ This ſpirit appears in the law of the Ripuarians, tit. 61. § 4. and tit. 67. § 5. and in the capitulary of Louis le Debonnaire, added to the law of the Ripuarians in the year 805. art 22.

¶ See that law.

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

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.

CHAP. 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 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.

CHAP.

* In the law of the Burgundians, tit. 8. ſect. 1. & 2. on criminal affairs: and tit. 45 which extends alſo to civil affairs. See alſo the law of the Thuringians, tit. 1. ſect. 31. tit. 7. ſect. 6. and tit. 8; and the law of the Allemans, tit. 89; the law of the Bavarians, tit. 8. chap. 2. ſect. 6. and chap 3 ſect. 1. and tit. 9. chap. 4. ſect. 4; the law of the Friſians, tit. 11. ſect. 3 and tit. 14. ſect 4: the law of the Lombards, book i. tit. 32 ſect. 3 and tit. 35. ſect. 1 and book ii. tit. 55. ſect. 2.

† See chap. xviii. towards the end

CHAP. 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 rigor. 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.

CHAP. XVII.

Particular Notions of our Anceſtors.

IT is aſtoniſhing that our anceſtors ſhould reſt the honor, fortune and life of the ſubject, on things that depend leſs on reaſon than on hazard; and that they ſhould inceſſantly

* As alſo ſome other laws of the barbarians

† Lex Sa

inceſſantly make uſe of proofs incapable of convicting, and that had no manner of connexion 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 favor 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 endeavored 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.

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

* 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.

§ Law of the Burgundians, chap. 45.

‖ See the works of Agobard.

the principles of his education, of his being inſenſible of honor, 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 honor, they are practiſed of courſe in things without which this honor 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 amongſt 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 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.

☞ 2 I conclude

* See Beaumanoir, cuſtom of Beauvoiſis, chap. 61. See alſo the law of the Angli, chap. 14. where the trial by boiling water is only a ſubſidiary proof.

† Tit. 14. ‡ Chap. 31. § 5.

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 unreaſonale than tyrannical.

CHAP. 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 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 Ripurian Franks† did.

But, notwithſtanding the clamors 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.

* Si placeret Domino noſtro ut eos transferret ad legem Francorum.

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

‡ Law of the Lombards, book 2. tit. 55. chap. 34.

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 that the affair ſhould be referred to the council, which was ſhortly to be held at Ravenna.‡ There the lords 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 clamors 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

☞ 3 popes

* In the year 962.

† Ab Italiæ proceribus eſt proclamatum, ut imperator inſectus, mutata lege, facinus indignum deſtrueret. Law of the Lombards, book 2. tit. 55. cap. 34.

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

§ Otho the ſecond's uncle, ſon to Rodolphus, and king of Transjoran Burgundy.

‖ In the year 988.

¶ Cum in hoc ab omnibus imperiales, aures pulſarentur. Law of the Lombards, book 2 tit. 55. chap 34.

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 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 complaint 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 abovementioned.

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 Chaindasuinthus 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

* In the law of the Lombards, book 2. tit. 55. § 33. In the copy which Muratori made use of, it is attributed to the emperor Guido.

† In the law of the Lombards, book 2. tit. 55. § 23.

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

The firſt kings of the Lombards gave a check to the* cuſtom of the judicial combat. Charlemagne,† Lewis 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 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 in 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 Beaumanoir,§ that this kind of proof was never allowed in eccleſiaſtic courts; which contributed greatly without doubt to its ſuppreſſion, and to weaken in this reſpect the regulation of the codes of the barbarian laws.

This will convince us more ſtrongly of the connexion between the uſage of negative proofs, and that of judicial combats, of which I have ſaid ſo much. The lay tribu-

* See in the Law of the Lombards, Book 1. tit. 4. and tit. 9. § 23. and book 2. tit. 35. § 4 and 5. and tit. 55. §. 1. 2. and 3. The regulations of Rotharis: And in § 15. that of Luitprandus.

† Ibid. book 2. tit. 55. § 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 1. chap. 39; the laws of the Ripuarians, tit. 59. § 4. tit. 65. § 5; the hiſtory of Gregory of Tours, the capitulary of the year 803. added to the Salic law.

§ Chap. 38. page 212.

nals admitted of both; and both were rejected by the eccleſiaſtic courts.

In chooſing the trial by duel, the nation followed its military ſpirit; for while 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 revived 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.

CHAP. XIX.

A New Reaſon for 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.

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

* 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 2. tit. 55. ſect. 31.

‡ In the year 1200.

§ Cuſtom of Beauvoiſis, chap. 39.

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 honor. 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, 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 derniers. 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

* Chap. 61. page 309 and 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.

‖ See Beaumanoir, chap. 63. page 325.

¶ See the cuſtom of Beauvoiſis, chap. 28. page 303.

their battles in all cauſes. This ſhews, that the uſage of judiciary combats muſt have had at that time a prodigious extent.

CHAP. XX.

Origin of the Point of Honor.

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 batoons. Perhaps this was out of regard to the clergy, or probably, as the uſage of legal duels gained ground, they wanted to render them leſs ſanguinary. The capitulary§ of Lewis le Debonnaire allows the liberty of chooſing to fight either with the ſword or batoon. In proceſs of time none but bondmen fought with the batoon.‖

Here I ſee the firſt riſe and formation of the particular articles of our point of honor. 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

* Additio ſapientum Willemari, tit. 5.
† Book 1. tit. 6. § 3. ‡ Book 2 tit. 5. § 23.
§ Added to the Salic law, in 189.
‖ See Beaumanoir, chap. 64. page 328. ¶ Ibid.

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, honor forbade him to recall it.

Gentlemen† fought one another on horſeback, and armed at all points; villains‡ fought on foot and with batoons. Hence it followed, that the batoon 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 honor; nay, they were more 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

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

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

‡ Ibid. chap. 64. page 328. See alſo the charters of St. Aubin of Anjou, quoted by Galland, page 203.

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

‖ They had only the batoon and buckler. *Beaumanoir, chap.* 64. *page* 328.

¶ Book 1. tit. 8. § : * Book 1. tit. 6. § 2.

front of being beaten; and, in this caſe, the proportion of the exceſs conſtituted the greatneſs of the outrage.

CHAP. XXI.

A new Reflection upon the Point of Honor 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.

CHAP. XXII.

Of the Manners relative to Judicial Combats.

OUR connexion 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

* De moribus Germanorum.

† In the *Pactus legis Salicæ*.

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

ing ſpirit, at the time of our judicial combats, muſt naturally have 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 preſtiges. 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, magicians who concerned themſelves in the birth and education of great perſonages, enchanted and diſenchanted palaces, a new world in the midſt of the old one, and the ordinary courſe of nature left only to the lower claſs of mankind.

Knights errant always in armor, in a part of the world full of caſtles, forts and robbers, found honor 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 endeavor 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

* Book 2. tit. 55. § 11.

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 valor and love, added ſtill a greater importance to gallantry.

CHAP. 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. 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. Deſfontaines was cotemporary 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.

CHAP. 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

* See the Greek romances of the middle age.

† In the year 1258.

‡ Beaumanoir, chap. 63. page 400 and 401.

them 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 batoon; 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, 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 encloſure where the battle was fought; and in caſe either of the parties declared himſelf deſirous of peace, they took particular notice of the actual ſtate in which 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 chooſe a champion; and that

* Beaumanoir, chap 64. page 328.
† Ibid. page 330. ‡ Ibid.
§ Ibid. ‖ The great vaſſals had particular privileges.
¶ Beaumanoir, chapter 64. p 330. ſays he loſt his juriſdiction: Theſe

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 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 imparlance, he lost only the imparlance.

CHAP. 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 marketplace, 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

words, in the authors of those days, have not a general signification, but a signification limited to the affair in question. [illegible]

* This custom, which we meet with in the capitularies, was still subsisting at the time of [illegible]. See chap. [illegible] p. [illegible]

† Beaumanoir, chap. [illegible] p. [illegible]

‡ Ibid. chap. [illegible] p. [illegible]

§ Beaumanoir, chap. [illegible] p. [illegible] Ibid. chap. [illegible] p. [illegible]

‖ Beaumanoir, chap. [illegible] p. [illegible] See [illegible]

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.

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 deathbed, 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 doweries.

* Beaumanoir, chap. 63. p. 322.
† Ibid. ‡ Ibid.
§ Ibid. p. 323. ‖ Ibid. chap. 63. p. 324. ¶ Ibid. p 325.

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 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 follow. 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.

CHAP. 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 ſlandering witneſs; and if the witneſs was willing to maintain the quarrel, he gave pledges of battle. They troubled themſelves no further 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

* Beaumanoir, chap 63. p. 325.

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

‡ Ibid. chap. 63 p. 322. § Deſontaines, chap. 22. art. 7.

‖ Habeant bellandi et teſtificandi licentiam. *Charter of Louis the Fat, in the year* 1118. ¶ Ibid.

* Chap. 61. p. 315.

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 ſlaying 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.

Beumanoir 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 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.

☞ 2 CHAP.

* Chap. 6. p. 39 and 40.

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

‡ Tit. 16. § 2. § Tit. 45.

‖ Letter to Lewis le Debonnaire.

¶ Life of St. Avitus.

CHAP. 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 forever, 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 honor, 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 deferred to ſucceeding ages.‡

Thus St. Louis in his inſtitutions ſays, that an appeal includes both felony and iniquity. Thus Beaumanoir tells us, that if a vaſſal§ wanted to make his complaint of 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 court.

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

* Beaumanoir, chap. 2. p. 12.

† Ibid. chap. 61. p. 310, and chap. 67. p. 338.

‡ Book ii. chap. 15.

§ Beaumanoir, chap. 61. p. 310 and 311, and chap. 67. p. 337.

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 loud; 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.

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

* 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.

‖ Beaumanoir, chap. 61. page 314.

¶ Beaumanoir, chap. 67. page 340 and 337. Defontaines, chap. 22. art. 9.

* Defontaines, ib.

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, he might at his own expenſe 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 a 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

* Beaumanoir, chap. 61. page 316.

† Ib. page 314. Defontaines, chap. 22. art. 21. ‡ Ib. art. 7.

§ See Defontaines, chap 21. 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. 62 p. 322. Defontaines, chap. 22 art. 3.

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

* Nobody can paſs judgment in his court, ſays Beaumanoir, chap. 67. page 336 and 337. † Beaumanoir, chap. 62. page 322.

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.

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 favor of the accuſed; in caſes of debt, in favor of the debtor; and in caſes of inheritance, in favor 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 an engagement, that he would not aſſiſt his lord, becauſe he had not all his vaſſals with him. But it was the lord's buſineſs to cauſe his court to be reſpected, and to chooſe the braveſt and moſt knowing of his tenants. This I mention in order to ſhew the duty of vaſſals, which was to fight and to judge; and ſuch indeed was this duty, that to judge was all the ſame as to fight.

It was lawful for a lord who went to law with his vaſſal in his own court, and was caſt, to 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

* Defontaines, chap. 21. art. 27. and 28.

† Ibid. art. 28.

‡ Chap. 21. art. 37.

§ This number at leaſt was neceſſary. Defontaines, chap. 21. art. 36.

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 honor; and the perſon overcome was deprived of life and property, in order to maintain the public tranquillity.

This diſtinction which was neceſſary in that particular caſe, had afterwards a greater extent. Beaumanoir ſays, that when the appellant of falſe judgment attacked 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 honor 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 mentioned in the 25th chapter. Here it was the buſineſs of the ſuperior court, to examine whether it was proper to withdraw the pledges of battle or not.

There could be no appeal of falſe judgment againſt the king's court; becauſe as there was no one equal to the king, no one could 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,

* Beaumanoir, chap. 67. page 337.
† Ibid. chap. 67. page 337.
‡ Ib. page 337 and 338.
§ Defontaines, chap. 22. art. 14.

taines,* 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, he had recourſe to his paramount, going from one lord to another, till he came to the ſovereign.

Thus notwithſtanding they had not 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.

CHAP. 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 grandees, whom the kings judged together with great vaſſals.§

What

* Deſfontaines, chap. 22. art. 14.

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

‡ Ib. art 2. edit. of Baluſ. page 497.

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

What ſome authors have advanced, namely, that an appeal lay from the count to the king's commiſſary, or *miſſus dominicus*, is not well grounded. The count and the *miſſus* had an equal juriſdiction* independent of each other: 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 proſcribed 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 hold their aſſizes above thrice a year. It was not ſo neceſſary to chaſtiſe their indolence, as to check their activity.

But,

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

† Third capitulary of the year 812. art. 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, p. 175. Theſe two capitularies were made under king Pepin.

¶ The officers under the count Scabini.

* See the law of the Lombards, book 2. tit. 52. art. 22.

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 era in our hiſtory; becauſe moſt of the wars of thoſe days were imputed to a violation of the political law; as the caſe, 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 a 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 paſt delays, then theſe peers were appealed of default of juſtice before the paramount; and if they were caſt, they §paid a fine to their lord. The latter could not give them any aſſiſtance; on the contrary, he ſeized their fief till they had each paid a fine of ſixty livres.

2. When

* 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.

§ Deſontaines, chap. 21. art. 24.

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 fief; 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, 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

* Defontaines, art. 31.

† Beaumanoir, chap. 61. page 312.

‡ Defontaines, chap. 21. art. 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 appeal'd 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. ¶ Defontaines, chap. 21. art. 9.

* Beaumanoir, chap. 61. page 34.

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

The inhabitants of Ghaunt* 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 honor 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.

CHAP. 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

* Beaumanoir. chap 61. page 318.
† Chap. 21. art. 35.
‡ In the year 1202
§ Book i. chap. 2. & 7. and book ii. chap. 10. & 11.
‖ As appears every where in the inſtitutions, &c. and Beaumanoir, chap. 61. page 309.

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 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.

Deſontaines

* Inſtitutions, book i. chap. 6. and book ii. chap. 15.
† Ib. book ii. chap. 15.
‡ Ib. book i. chap. 78, and book ii. chap. 15.
§ Ib. book i. chap. 78. ‖ Ib. book ii. chap. 15.
¶ Ib. chap. 78. * Ib. chap. 15
† But if they wanted to appeal without falſifying the judgment, the appeal was not admitted. Inſtitutions, book ii. chap. 15.
‡ Book ii. chap. 6, & 47. and book ii. chap. 15. & Beaumanoir, chap. 11. page 58.
§ Book i. chap. 1, 2, and 3.

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 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 reeſtabliſh the ancient practice whenever he pleaſed, otherwiſe he would have leſs authority than his vaſſals.

It is proper here to obſerve, that France was at that time§ divided into the country of the king's demeſne, and that which was called the country of the barons, or the baronies, and, to make uſe of the terms of St. 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

* Chap. 22. art. 16. and 17. † Chap. 61. page 309. ‡ Ibid.

§ See Beaumanoir, Defontaines, and the inſtitutions, book ii. chap. 10, 11, 35. and others

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

CHAP. 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.

CHAP. 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

* 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. Bruſſels, particularly that of St. Lewis, on the leaſe and recovery of lands, and the feodal majority of young women, tome 2. book xxxii. page 35, et ibid. the ordinance of Philip Auguſtus, page 7.

† Chap. 63. page 327. Ibid. chap. 61. page 312.

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

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 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 all the ſame as thoſe of freemen.

CHAP. 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

* Chap. 21. art. 21 and 22.

† Book i. chap. 136. ‡ Chap. 2. art. 8. § Chap. 22. art. 14.

‖ Defontaines, chap. 22. art. 7. This article and the firſt 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.

¶ Gentlemen may be always appointed judges. *Defontaines, chap.* 21. *art.* 48. * Defontaines, chap. 21. art. 33.

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.

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 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 ordinances of Rouſſillon, but fell at length to the ground through its own abſurdity.

CHAP. 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 favor, 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

* 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.

‡ See chap. 30. § Beaumanoir, chap. 61. page 312, and 318.

‖ Ibid ¶ Defontaines, chap. 21. art. 14

In effect, when the perſon who had made the appeal of falſe judgment, happened to be overcome, the appeal was reverſed; when he proved victorious, both the judgment and the appeal were reverſed: Then they were obliged to proceed to a new judgment.

This is ſo far true, that when the cauſe was tried by 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.

CHAP. 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 of 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.

In proceſs of time a ſecret form of proceeding was introduced. Every thing before had been public; every

☞ 2 thing

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

† Chap. 61. page 315.

‡ As Beaumanoir ſays, chap. 39. page 200.

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

thing now became ſecret; the interrogatories, the informations, the reexaminations, 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.

CHAP. 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 cauſes that were not decided by combat. As the lord had the chief profits, ſo he was alſo at the chief expenſe, either to aſſemble his peers, or to enable them to proceed to judgment. Beſides, as diſputes were generally determined on the ſpot, and without that infinite

* Chap. 30. page 218.

† Defontaines, in his counſel, chap. 22. art. 3 and 8, and Beaumanoir, chap. 33. Inſtitutions, book 1. chap. 90.

nite 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 fear of the 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. 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

☞ 3 might

* Chap. 22. art. 8.

† At preſent when they are ſo inclined to appeal, ſays Boutillier, Somme Rurale, book i. tit. 3. p. 16. ‡ In the year 1324

might be managed by any one. On the other hand, the Roman law had popular forms for the profecution of crimes, which were inconfiftent with the office of a public profecutor.

The cuftom of judicial combats was no lefs oppofite to this idea: For who is it that would chooſe to make himſelf every man's champion againſt all the world.

I find in the collection of formula, inſerted by Muratori in the laws of the Lombards, that under our princes of the ſecond race there was an advocate of the public* profecutor. 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 profecutor, 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 profecutions, or with cauſes relating to minors, to churches, or to the condition of perſons.

I ſaid that the eſtabliſhment of a public profecutor was repugnant to the uſage of judicial combats. I find notwithſtanding, in one of thoſe formulas, an advocate of the public profecutor, who had the liberty to fight. Muratori has placed it juſt after the conſtitution† of 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 profecutor, 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 profecutor 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 he count; againſt another‖ who had ſaved a man's life whom

* Advocatus de parte publica.

† 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 of Charlemagne, book 1. tit. 26. ſect. 78.

§ Another formula, ib. page 87. ‖ Ibid. page 104.

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 emperor's 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 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 Bontillier, 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 manifeſted that this office was not inſtituted till we had changed the form of our judiciary proceedings.

* See this conſtitution and this formula in the ſecond volume of the hiſtorians of Italy, p. 95. † Ibid. page 88.
‡ Ibid. page 98. § Ibid. page 113.
‖ Ibid. ¶ Ibid. page 137. * Ibid. page 147. † Ibid.
‡ Ibid. page 168. § Ibid. page 134. ‖ Ibid. page 107.
¶ See alſo the Inſtitutions, book 1. chap 1. book 2. chap. 11. & 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, tom. 3. page 26.

† Qui continue noſtram ſacram curiam ſequi teneatur, inſtituatur qui facta & cauſas in ipſa curia promoveat atque proſequatur

CHAP. 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, 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 doweries 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 townhouſe of Amiens, quoted by Monſ. Ducange.* We find in other manuſcripts, that this code was given by St. Lewis in the year 1270, before he ſet out

* Preface to the Inſtitutions.

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, 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 St. Lewis's inſtitutio[n]. 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 compilement. 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 St. Lewis were prior therefore to the compilement I am now ſpeaking of, which in rigor, 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.

CHAP. XXXVIII.

The ſame Subject continued.

WHAT is this compilement then which goes at preſent under the name of Lewis's inſtitutions? What is this

* Matthew abbot of St. Denys, 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 30th 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.

this obſcure, confuſed, and ambiguous code, where the French law is continually mixed with the Roman, where a legiſlator ſpeaks, and yet we ſee a civilian, where we find a complete digeſt of all caſes and points of the civil law! To underſtand this thoroughly, we muſt transfer ourſelves in imagination to thoſe times.

St. Lewis, ſeeing the abuſes in the juriſprudence of his time, endeavored 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

* Chap. 61. page 309.

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

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 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 of St. Lewis, the work was called St. Lewis' 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.

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 Defontaines 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.

CHAP. 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, *I condemn*,* 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 judgment of peers, judicial combats, private wars, the ſlavery of the Jews, the cruſades and bondmen. And as the following ages

* Inſtitutions, book ii. chap. 15.

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 inconveniences 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 maſterpiece 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, 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

* See Du Tillet on the court of peers. See alſo Leroche Flavin, book 20. chap. 3. Budæus and Paulus Æmilius.

† Other cauſes were decided by the ordinary tribunals

the reign of Philip the Fair, made a collection which at preſent is known by the name of the *Olim* regiſters.

CHAP. 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 caſes 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 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 knew only what is practiſed.

CHAP.

* Beaumanoir, chap. 11. p. 458.

† Widows, croiſes, &c. *Beaumanoir, chap.* 11. *p.* 58.

‡ See the whole 11th chap. 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. 11. page 60.

CHAP. XLI.

Flux and Reflux of the Eccleſiaſtic and Temporal Juriſdiction.

THE civil power being in the hands of an infinite number of lords, it was an eaſy matter for the eccleſiaſtic juriſdiction to gain every day a greater extent. But as the eccleſiaſtic courts weakened thoſe of the lords, and contributing 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 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 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 chooſe; for as to the others, they were not worth much.

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

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 endeavoring 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 ſtill to have 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.

CHAP. 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 favorably 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

* In the word *Teſtamentary executors*.

† The 19th of March, 1329.

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

cauſe 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 endeavored 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.

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 hommes*, 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 hommes* were no longer capable of judging: The peers began to withdraw from the lords' tribunals; and the lords were very little inclined to aſſemble them; eſpecially as the new form of trial, inſtead of being a pompous action agreeable to the nobility, and intereſting

* 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 favor of the univerſity of Orleans, quoted by Du Tillet.

§ Cuſtoms of Beauveiſis, chap. 1. 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 le 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 1. tit. 31.

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 †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 eccleſiaſtic 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 caſes that deſerve a corporal puniſhment; and, in fine, it is become of no manner of effect by the extreme facility of appeals.

CHAP.

* 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 1. tit. 1. p. 16.

† As appears by the formula of the letters which their lord uſed to give them, quoted by Boutillier, Somme Rurale, book 1. tit. 14. Which is proved likewiſe by Beaumanoir, cuſtom of Beauvoiſis, chap. 1. of the bailiffs; they only directed the proceedings: "The bailiff is obliged in the preſence of the peers to take down the words of thoſe who plead, and to aſk the parties whether they are willing to have judgment given according to the reaſons alleged: And if they ſay, Yes, my Lord; the bailiff ought to oblige the peers to give judgment." See alſo the inſtitutions of St. Lewis, book 1. chap. 105. and book 2. chap. 15.

‡ Beaumanoir, chap. 67. page 336. & chap. 61. & page 5. & 316. The inſtitutions, book 2. chap. 15.

CHAP. 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 chooſe 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 reaſons it gives: *To the end that the bailiffs may be puniſhed† for their prevarications, it is neceſſary that they be taken from the order of the laity.* 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.

CHAP. XLIV.

Of the Proof by Witneſſes.

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

* It was publiſhed in the year 1287.

† Ut ſi ibi delinquant, ſuperiores tui poſſint 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 expenſes 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.

CHAP. 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 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

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

† Prologue to the cuſtom of Beauvoiſis. ‡ Chap. 12.

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 explanied; 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 aſſizes of Godfrey Count of Britanny, 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 bailiwics to writing. Their deſign was rather to give the courſe of judicial proceedings, than the uſages of their time, in reſpect to the diſpoſal of property. But the whole is there; and though theſe particular authors have no authority but what they derive from the truth and notoriety of the things they ſpeak of, yet there is no manner of doubt but they contributed greatly to the reſtoration of our ancient French law. Such was in thoſe days our common law.

* See the collection of ordinances by Lauriere

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, endeavors were uſed to render the cuſtoms more general, as much as poſſible, without injuring the intereſt 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, inſomuch that theſe two laws divide the different territories; it is, notwithſtanding, true that ſeveral regulations of the Roman law entered into our cuſtoms, eſpecially when they made the new digeſts at a 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 to 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.

BOOK

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

BOOK XXIX.

OF THE MANNER OF COMPOSING LAWS.

CHAP. 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.

CHAP. II.

The ſame Subject continued.

CÆCILIUS, 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,

* Book xx. chap. 1.

cruelty, which* hindered people from borrowing beyond their abilities. Shall then the cruelest laws be the best? Shall goodness consist in excess, and all the relations of things be destroyed?

CHAP. 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 keep 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.

CHAP. 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

* 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.

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.

CHAP. 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 Philip aſſume the power of deſtroying towns, under the pretence of their having infringed the laws of the Greeks? Amphictyon might have inflicted other puniſhments; he might have ordained, for example, that a certain number of the magiſtrates of the deſtroying town, or 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.

CHAP.

* De falſa legatione.

CHAP. 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 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 land 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.

CHAP. 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

* Dio, lib. 41.
† Ariſtot. rep. lib. v. cap. 3.
‡ Plutarch. life of Dionyſius.

ble 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.

CHAP. VIII.

That Laws which appear the ſame were not always made through the ſame Motives.

IN France they have received moſt of the Roman laws on ſubſtitutions, but through a quite different motive from the Romans. Among the latter, the inheritance was accompanied with certain *ſacrifices, which was to be performed by the inheritor, and were regulated by the pontifical law; hence it was that they reckoned it a diſhonor 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.

CHAP. 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,

* When the inheritance was too much incumbered, they eluded the pontifical law by certain ſales, from whence comes the word "Sine ſacris hæredita."

† Book 9. of laws.

neſs, ſhall be puniſhed. The Roman law puniſhed this action when it was not committed through faintheartedneſs, 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 Lacedæmonian inſtitutions, where the orders of the magiſtrate were abſolute, where ſhame was the greateſt of miſeries, and faintheartedneſs 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 favorable 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 judgment by a voluntary death. In this they found a great advantage: They had* an honorable interment, and their wills were executed; becauſe there was no law againſt ſuicides. But when the emperors became as avaricious as cruel, they deprived thoſe who deſtroyed themſelves of the means of preſerving their eſtates, by rendering it criminal for a perſon to make away with himſelf through a criminal remorſe.

What I have been ſaying of the motive of the emperors, is ſo true, that they conſented† that the eſtates of ſuicides ſhould not be confiſcated, when the crime for which they killed themſelves was not puniſhed with confiſcation.

CHAP. 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

* Eorum qui de ſe ſtatuebant humabantur corpora, manebant teſtamenta, pretium feſtinandi. *Tacit.*

† Reſcript of the emperor Pius in the 3d law, § 1, and 2. ff. de bonis eorum qui ante ſent. mortem ſibi conſciverunt.

‡ Leg. 18. ff. de in jus vocando.

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.

CHAP. 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 the 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

* See the law of the twelve tables.

† "Ropit in jus." Horace, lib. 2. Hence they could not ſummon a thoſe to whom a particular reſpect was due.

‡ See the law 18 ff. de in jus vocando.

§ By the ancient French law, witneſſes were heard on both ſides, as we find in the inſtitutions of St Lewis, book 2. chap. 7. that there was even a pecuniary puniſhment againſt falſe witneſſes.

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.

CHAP. XII.

The 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.

CHAP.

* Leg. 1. de receptatoribus

† See what Favorinus ſays in Aulus Gellius, book xx. chap. 1.

CHAP. 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 open theft; when he was not detected till ſometime 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 Porcian 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 theſe 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 whipt: 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

* See what Favorinus ſays 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. i. § 2 and 3.

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 whipt 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 connexion with the other civil laws of the Romans.

CHAP. 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 beſiged, 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 laws, book i.

† Inutilis ætas occidatur. Syrian. in Hermog

only of thoſe obſtinate defences, and of thoſe unnatural actions, but likewiſe of thoſe ſhocking laws which they ſometimes enacted.

The Roman laws* ordained that phyſicians ſhould be puniſhed for neglect or unſkilfulneſs. In the firſt caſe, 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.

CHAP. XV.

That ſometimes it is proper that the Law ſhould ſtand 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 cogniſance 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. §. 7.

† See the 4th law, ff. ad. leg. Aquil.

‡ Ibidem. See the decree of Taillon, added to the law of the Bavarians de popularib. legib. art. 4.

CHAP. 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 concife. 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 Richelieu‡ 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.

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,

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

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

§ Aut quilibet manumiſſione donatum inquietare voluerit. Appendix to the Theodoſian code, in the firſt volum. of Father Simond's works, p. 737

‖ Aulus Gellius, book xx. chap 1.

Rome, who uſed to give thoſe he met a box in 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 ordinance of Lewis XIV,* after an exact enumeration of the cauſes in which the king is immediately concerned, follow 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, cannot without guilt be married to another; by a much ſtronger reaſon the ſpouſe of God, or of the bleſſed Virgin.*——Now I ſay, that in laws the arguments ſhould be drawn from one reality to another, and not from reality to figure, or from figure to reality.

A law enacted by Conſtantine¶ ordains, that the ſingle teſtimony of a biſhop ſhould be ſufficient without attending 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 ſubtile; they are deſigned for

* 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.

¶ In Father Simon's appendix to the Theodoſian code, tome 1.

people of common underſtanding, not as an art of logic, but as the plain reaſon of the 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' numbers ſeems to prove it. It is very extraordinary that they ſhould judge of thoſe things by the proportion of Pythagoras' numbers.

Some French lawyers have aſſerted, that when the king made an acquiſition of a new country, the churches became ſubject to the *regale*, becauſe the king's crown is round. I ſhall not examine here into the king's rights, or whether in this caſe the reaſon of the civil or eccleſiaſtic law ought to ſubmit to that of the law of politics: I ſhall only ſay, that thoſe auguſt rights ought to be defended by grave maxims. Was there ever ſuch a thing known, as the real rights of a dignity, founded on the figure of that dignity's ſign?

Davila‖ ſays, 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

* Law 1. code de repudiis.

† See the authentic ſed hodie, in the code de repudiis.

‡ Law 1. [illegible] § In his ſentences, book 3. tit. 6.

‖ Hiſt. guerres civile de France, page 90.

year commenced as a year complete, when the caſe is concerning the acquiſition of honors. I am very far from cenſuring a regulation which has hitherto been attended with no inconvenience: I ſhall only take notice, that the reaſon alledged* is not the true one; it is falſe that the government of a nation is only an honor.

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 lawſuit, or through contempt of his own ſhame; this is the preſumption of the man. The judge muſt have preſumed the motives of the huſband's conduct, and muſt have determined a very obſcure and ambiguous point: When the law preſumes, it gives a fixed rule to the judge.

Plato's law, as I have obſerved already, required that a puniſhment ſhould be inflicted on the perſon who killed himſelf, not with a deſign of avoiding ſhame, but through faintheartedneſs. 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 favor his heir, the latter had no need of the Falcidian law; and if he did not intend to favor him, he forbade him to make uſe of the Falcidian law.

Care ſhould be taken that the laws be worded in ſuch a manner,

☞ 3

* The chancellor de l'Hopital, ib.

† It was made in the month of November, 1700.

‡ It is the act. Sed cum teſtator.

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 honor, 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 candor 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 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.

CHAP. 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 favor, ſhould be

* Book xi. tit. 2. § 16.

† See Julius Capitolinus in Macrino.

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 compilement 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.

CHAP. XVIII.

Of the Ideas of Uniformity.

THERE are certain ideas of uniformity, which ſometimes ſtrike great geniuſes, (for they even affected Charlemagne) but infallibly make an impreſſion on little ſouls. They diſcover therein a kind of perfection, 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?

CHAP.

* See Julius Capitolinus in Macrino.

CHAP. 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 ſimplity of a Greek city. Harrington was full of the idea of his favorite republic of England, whilſt a crowd 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.

BOOK XXX.

THEORY OF THE FEUDAL LAWS AMONG THE FRANKS, IN THE RELATION THEY BEAR TO THE ESTABLISHMENT OF THE MONARCHY.

CHAP. 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

* In his Utopia.

without having any connexion 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 ſeigniority over the ſame things or perſons, have diminiſhed the weight of the whole ſeigniority; 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.

CHAP. 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 enterpriſes. 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

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

† Book vi. ‡ For inſtance, his retreat from Germany. Ibid.

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.

CHAP. 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 neighboring 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.

* Book 6, of the Gallic wars. Tacitus adds, Nulli domus aut ager, aut aliqua cura; prout ad quemque venere alimenta. De moribus German.

† De moribus German. ‡ Comites.

ment. If a city is at peace, the princes go to thoſe who are at war; and it is by this means they retain a great number of friends. To theſe they give the warhorſe and the terrible javelin. Their pay conſiſts in coarſe, but large repaſts. The prince ſupports 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 cares of huſbandry; they refuſe to acquire by ſweat what they can purchaſe with blood.

Thus, among the Germans there were vaſſals, but no fiefs; they had no fiefs, becauſe the princes had no lands to give; or rather their fiefs conſiſted in horſes trained for war, in arms and feaſting. There were vaſſals, becauſe there were truſty men who 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.

CHAP. 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 enterpriſe, ſtood up and offered their aſſiſtance. Upon which they were commended by the multitude. But if they did not fulfil their engagements, they loſt the public eſteem, and were looked upon as deſerters and traitors."

What Cæſar ſays in this place, and 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 lands and ſpoils, and give theſe lands and ſpoils inceſſantly away; that

* De bello Gallico, lib. 6

that their demeine 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 ſtrangers, 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.

CHAP. 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 Turky; which is abſolutely contradictory to all hiſtory.

CHAP.

* See the life of Dagobert.

† See Gregory of Tours, book 6, on the marriage of the daughter of Chilperic. Childebert ſends ambaſſadors to tell him, that he ſhould not give the cities of his mother's kingdom to his daughter, nor his treaſures, nor his bondmen, nor horſes, nor herſeman, nor teams of oxen, &c.

CHAP. 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; the 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. Roricon, who wrote a hiſtory among the Franks, was a ſhepherd.

CHAP. 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 Franks did not follow the ſame plan. In the Salic and

* The Romans obliged themſelves to this by treaties.

† Burgundiones partem Galliæ occuparunt, terrasque cum Gallicis ſenatoribus diviſerunt. Marius' chronicle in the year 456.

‡ Book x. tit. 1. § 8. 9 and 16.

§ Chap. 54. § 1 and 2. This diviſion was ſtill ſubſiſting in the time of Lewis le Debonnaire, as appears by his capitulary of the year 819, which has been inſerted in the law of the Burgundians, tit. 54. § 1.

and Ripuarian laws we find not the leaſt veſtige of any ſuch diviſion of lands; they had conquered the country, and ſo took what they pleaſed, making no regulations but among themſelves.

Let us therefore diſtinguiſh between the conduct of the Burgundians and Viſigoths in Gaul, of thoſe ſame Viſigoths in Spain, of the* auxiliary troops under Auguſtulus and Odoacer in Italy, 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.

CHAP. VIII.

The ſame Subject continued.

WHAT has induced ſome people to think that the Roman laws 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.

In the texts of thoſe two regulations we meet with the ſame expreſſions; conſequently they explain one another, and as the ſecond they 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

* See Procopius, war of the Goths.

† See Procopius, war of the Vandals.

‡ Licet eo tempore quo populus noſter mancipiorum tertiam et duas terrarum partes accepit, &c. Law of the Burgundians, tit. 54. § 1.

§ Ut non amplius a Burgundionibus qui intra venerunt requiratur, quam ad præſens neceſſitas fuerit, medietas terræ. Art. 1.

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 Laws 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.

We find in the codet 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 propereſt for culture; the Burgundian's flock fattened the Roman's field.

CHAP.

* De morib. German.

† And that of the Viſigoths.

CHAP. X

Of Servitude.

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 freeborn 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 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 Boulanvilliers 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 candor 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

* Tit. 54.

† This is confirmed by the whole title of the code de agricolis, & cenſitis, & colonis.

‡ Si dentem optimati Burgundioni vel Romano nobili excuſſerit. Tit. 26. § 1; & ſi mediocribus perſonis ingenuis, tam Burgundionibus quam Romanis. Ibid. § 2.

§ Tit. 5.

take to criticife 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 abbé 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."*

CHAP. 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†

* Nec preme, nec ſummum molire per æthera currum;
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 Metam. lib. 2.

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

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 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 thoſe 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*

* See Gregory of Tours, book 2. chap. 27. Almoin, book 1. chap. 12.

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

‡ Gregory of Tours, book 3.

in ab[illegible]lance; 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 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 eclairciſſements 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§ bound'ſs 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

☞ 2 themſelves

* Gregory of Tours. book 6. chap. 31.

† See the chronicle of Fredegarius. in the year 600, and his continuator, in the year 741; the annals of Fuld, in the year 739, and the lives of the ſaints in the next quotation.

‡ See the lives of St. Epiphanius, St. Eptadius, St. Cæſarius, St. Fidolus, St. Portian, St. Treverius, St. Euſychius, and of St. Leger, the miracles of St. Julian, &c.

§ ———Deerant quoque littora 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.

themſelves reduced to exercile 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.

CHAP. 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. He

* See Gregory of Tours, book 2.

† Ibid. book 5.

‡ Quæ conditio univerſis urbibus per Galliam conſtitutis ſemper erat inhibita. Life of St. Aridius. § Book 7.

‖ Eſtabliſhment of the French monarchy, tom. 2. chap. 14. p. 515.

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 abbè 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 occupatas tenent, auferant, & Romanis ſua exactione ſine aliqua dilatione reſtituant, ut nihil fiſco debeat deperire. Lib. 10. tit. 1. cap. 14.

† Eſtabliſhment of the Franks in Gaul, tom. 3. cap. 14. p. 510.

‡ He lays a ſtreſs upon another law of the Viſigoths, book 10. tit. 1. art. 11. which proves nothing at all; it ſays only, that he who has received of a lord a piece of land on condition of a rent or ſervice, ought to pay it.

‖ Eſtabliſhment of the French monarchy, tom. 3. chap. 14. p. 513, where he quotes the edict of Piſtes, art. 28. See below, chap. 17.

¶ Ibid tom 3. chap. 4. p. 208

CHAP. 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' 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 acknowledgment, 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 end of the firſt. A capitulary of the year ‖864 ſays, in expreſs terms,

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

† Pro Hiſpanis in partibus Aquitaniæ, Septimaniæ & provinciæ conſiſtentibus. Ibid.

‡ Excubias & explorationes quas Wactas dicunt. Ibid.

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

‖ Ut pagenſes Franci, qui caballos habent, cum ſuis comitibus in hoſtem pergant. The counts are forbid to deprive them of their horſes, ut hoſtem facere & debitos paravedos ſecundum antiquam conſuetudinem exſolvere poſſint. Edict of Piſtes in Baluſius, p. 186.

terms, that it was the ancient cuſtom for freemen to perform military ſervice, and to furniſh likewiſe the horſes and carriages abovementioned; 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 other's 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 kings 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 overrun Europe, we ſhould find it very difficult to make them comprehend what is meant by one of our financiers.

The ‡anonymus 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 intendancy of the demeſnes belonging to the crown.

* Capitulary of Charlemagne, in the year 812, c. 1. Edict of Piſtes 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. 14. againſt thoſe who drove the bondmen from their manſus.

‡ In Pithou, part 2. p. 157.

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.

CHAP. 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 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

* 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.

‡ 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 Baluſius, 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.

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 repreſented the Roman *cenſus*, and did not form a part of the demeſnes, 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 prieſts 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 demeſnes. I prove it with reſpect to the king, by the capitulary *de villis*; with regard to the clergy, by the codes of the laws

* 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, tom. 3. book 6. 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 enfranchiſements.

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 obligations.

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 ‡free-born, 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 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 favor 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 that they ſhould be conſidered as freemen, ſince he would have them be proprietors of their lands, forbade the demanding any *cenſus* of them.

A capitulary of Charles the Bald,† given in favor 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

* 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 Puletico publico cenſitus non eſt. Lib. 1 formula 19.

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

‖ Et ut iſta ingenuitatis pagina firma ſtabiliſque conſiſtat. Lib i. form. 19.

¶ Priſtinaeque libertati donatos, et omni nobis debito cenſu ſolutos. Ib.

* Praeceptum pro Hiſpanis, in the year 812, edition of Baluſius, tom. i. p. 500.

† In the year 844, editon of Baluſius, tom. ii. art. 1, and 2. p. 17.

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 this* capitulary, *We ordain that the royal cenſus ſhall be levied in all places where formerly it was* †*lawfully 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 cenſus's that belonged in former times§ to the king's demeſne? And of that‖ in which he diſpoſes of the cenſus's 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 the 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.

Beſides, the edict¶ of Piſtes takes notice of thoſe freemen

* Third capitulary of the year 805, art. 20 and 23, inſerted in the collection of Anſegiſe, book 3. 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 and 11, edition of Baluſius, tom. i. p. 498.

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

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

¶ De illis unde cenſa exigunt. Capitulary of the year 813, art. 6.

* Book 4 of the capitularies, art. 37, and inſerted in the law of the Lombards.

† Si quis terram tributariam, unde cenſus ad partem noſtram exire ſolebat, ſuſceperit. Book 4 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 ac regiam poteſtatem exſolvere debent. ¶ In the year 864, art. 24, edit. of Baluſius, p. 192.

men 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 abbé du Bos' 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.

CHAP. 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 the conqueſt. Tacitus mentions them by the name of companions;§ the Salic law by that of men who have vowed fealty‖ to the king;

* De illis francis hominibus qui cenſum regium de ſuo capite et de ſuis re-cellis 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 813, which we have already quoted.

§ Comites.

‖ Qui ſunt in truſte regis. Tit. 44. art. 4.

king; the formularies of *Marculfus by that of the king's *antruſtios*,† the earlieſt French hiſtorians by that of *leudes*‡ faithful and loyal; and thoſe of later 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 Antruſtios. The regulations concerning the Antruſtios are different from thoſe which were made for the other Franks; they are full of what relates to the ſettling of the property of the Franks, but not a word concerning that of the Antruſtios. This is becauſe the property of the latter was regulated rather by the political than by the civil law, and was the ſhare that fell to an army, and not the patrimony of a family.

The goods reſerved for the feudal lords were called fiſcal ‖goods, benefices, honors 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 Sunegiſilus 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 honored with, 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

* Book 1. formul. 18.

† From the word "trew," which ſignifies "faithful" among the Germans.

‡ Leudes, fidles. § Vaſſali, ſeniores.

‖ Fiſcalia. See the 14th formulary of Marculfus, book 2. 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 & fiſcos plurimos. The goods deſigned for the ſupport of the royal family were called "regalia."

¶ See the 1ſt book, tit. 1. of the fiefs; and Cujas on that book.

* Book ix. chap. 38.

† Quos honoraret muneribus, quos ab honore depelleret. Ib. lib. 7.

‡ Vel reliquis cujuſcunque beneficiis, quodcunque illis, vel fiſcus noſter in quibuſlocis tenuiſſe noſcitur. Lib. 1. formul. 20.

§ Lib. iii. tit. 8. § 3.

‖ Antiquiſſimo enim tempore ſic erat in dominorum poteſtate conſtitutum,

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.

CHAP. XVII.

Of the military Service of Freemen.

TWO ſorts of people were bound to military ſervice; the great and leſſer vaſſals, who were obliged in conſequence of their fief; and the freemen, whether Franks, Romans, or Gauls, who ſerved under the count, and were commanded by him and his officers.

The name of freemen was given to thoſe, who on the one hand had no 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 were called ‡vicar; 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

ut quando vellent poſſent auferre rem in feudam a ſe datam: Poſtea vero conventum eſt, ut per annum tantum firmitatem haberent; deinde ſtatutum eſt, ut uſque ad vitam fidelis produceretur. Feudorum, lib. 1. tit. 1

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

† See the capitulary of Charlemagne in the year 812, art. 3, and 4. edition of Baluſius, tom. 1. p. 491, and the edict of Piſtes in the year 864, art. 26. tome ii. p. 186.

‡ Et habeat unuſquiſque comes vicarios et contenarios ſecum. Book 2. of the capitularies, art. 28.

§ They were called "compagenſes."

‖ Publiſhed in the year 595, art. 1. See the capitularies, edition of Baluſius, p. 20. Theſe regulations were undoubtedly made by agreement.

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.

In a capitulary‖ of Lewis le Debonnaire, this prince diſtinguiſhes three ſorts of vaſſals, thoſe belonging to the king, thoſe belonging to the biſhops, and thoſe to the counts. The vaſſals¶ of a feudal lord were not led againſt the enemy by the count, except ſome employment in the king's houſehold hindered the lord himſelf from 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 eccleſiaſtic militia; theſe were not the men they choſe to conquer or die with.

But

* Advocati.

† Capitulary of Charlemagne in the year 812, art. 1, and 5. edition of Baluſius, tome 1. p. 490.

‡ See the capitulary of the year 803, publiſhed at Worms, edition of Baluſius, p. 408 and 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.

‖ The 5th capitulary of the year 819, art. 27. edition of Baluſius, p. 618.

¶ De vaſſis dominicis, qui adhuc intra calam ſerviunt, et tamen beneficia habere noſcuntur, ſtatutum eſt, ut quicunque ex eis cum domino imperatore domi remanſerint, vaſſalos ſuos caſatos ſecum non retineant; ſed cum comite, cujus pagenſes ſunt, ire permittant. Capitulary 2. in the year 812, art. 7. edition of Baluſius, tome 1. p. 494.

* Capitulary 1. of the year 812, art. 5. De hominibus noſtris, et Epiſcoporum et Abbatum, qui vel beneficia vel talia propria habent, &c. Edition of Baluſius, tome 1. p. 490.

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 Boſt† pretends, that when mention is made in the capitularies of tenants who depended on a particular lord, no others are meant than bondmen; and he grounds his opinion on the law of the Viſigoths, and the practice of that nation. It is much better to rely 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 chooſe to follow either a lord or the king; and this regulation is conformable to a great many others.

We may therefore conclude, that there were three ſorts of military ſervices; that of the king's vaſſals who had other vaſſals under them; that of the biſhops, or of the other clergy, and their vaſſals; and in fine, that of the count who commanded the freemen.

Not but 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 fiefs.

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.

CHAP.

* In the year 812, chap. 1. edition of Baluſius, p. 493. Ut omnis homo liber, qui quatuor manſos veſtitos de proprio ſuo, ſive de alicujus beneficio habet, ipſe ſe præparet, & ipſe in hoſtem pergat, ſive cum ſenioris ſui.

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

‡ Capitulary of the year 862, art. 11. Apud Veris palatium. edit. of Baluſius, tome ii. p. 289.

CHAP. 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 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 *copies*, 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 connexion 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 free-

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

† 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. edit. of Baluſius, tome i. p. 615.

§ See the 5th note of the preceding chapter.

‖ It is to be found in the collection of William Lambard, de priſcis Anglorum legibus.

¶ In the word Satrapia.

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

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

men, and in general in certain judiciary profits, of which we ſhall treat hereafter.

The lords had the right of adminiſtering juſtice in their fief, by the ſame principle as the counts had it in their counties. And indeed, the counties, in the ſeveral variations that happened at different times, always followed the variations of the fiefs; both were governed on the ſame plan, and by the ſame principles. In a word, the counts in their counties were lords, the lords in their ſeigniories 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 duke's 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.§ But

* 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 fiſcal adminiſtration.

† Chronicle, chap. 78. in the year 626.

‡ 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.

§ For ſometimes, 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† miſdemeanors.

CHAP. 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 awhile, in order to inquire into thoſe manners and laws.

It appears by Tacitus, that the Germans knew only two capital crimes; they hanged traitors, and drowned cowards; theſe were the only public crimes among 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.

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.

☞ 2 The

* 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 ii. tit. 52. § 9.

‡ Suſcipere tam inimicitias, ſeu patris ſeu propinqui, quam amicitias neceſſe eſt, nec implacabiles durant; luitur enim etiam homicidium certo armamentorum ac pecorum numero, recipitque ſatisfactionem univerſa domus. TACIT. de morib. Germ.

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 readmitted. 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 perſon 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' 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,

* See this law in the 3d title on murders; and Vulcaran's addition on robberies.

† Addito ſapientum, tit. 1. § 1.

‡ Salic law, tit. 58. § 1. tit. 17.

§ The Salic laws are admirable in this reſpect: ſee eſpecially the titles 2. 3. 4. 5. 6 and 7. which relate to the ſeveral ſorts of cauſes.

‖ Book 1. tit. 7. § 15.

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, beſide the diſtinction it made of his perſon, it likewiſe eſtabliſhed a greater ſecurity in his favor 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 chooſe a duke out of that family; theſe had a quadruple compoſition. The compoſition for the duke exceeded by a third, that which had been eſtabliſhed for the Agilolfings: *Becauſe he is a duke*, ſays the law, *a greater honor 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

☞ 3 explains

* See the law of the Angli, tit. 1. § 1, 2 and 4. ibid. tit. 5. § 6. the law of the Bavarians, tit. 1. chap. 8 and 9, and the law of the Friſians, tit. 15.

† Tit. 2. chap. 20.

‡ Hoſidra, Ozza, Sagana, Habilingua, Aniena. Ibid.

§ 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 villico regio, de priscis 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. 36. § 11. the law of the Bavarians, tit. 1. ſect. 10, 11. Si aurum non habet, donet aliam pecuniam, mancipia, terram, &c.

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 kings endeavored 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

* 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 vii. 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.

‡ 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. 45. 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.

titioned for his being readmitted. 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 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.

CHAP. 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 recompenſe 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

* 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.

‡ 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 Baluſius, tome 1. page 512.

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 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 the compoſition without the *fredum:* As he was not yet able to bear arms, he could not be in the caſe in which the party injured, or his 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 favor of the perſon who was ‖judge of the diſtrict. Yet the law of the ¶Ripuarians

* Book i. tit. 9. ſect. 17. edit. of Lindembrock. † Tit. 70.

‡ Tit. 46. See alſo the law of the Lombards, book i. chap. 21. ſect. 3. Lindembrock's edit. Si ex ballus cum pede, &c.

§ Tit. 28 ſect. 6.

‖ As appears by the degree of Clotarius II, in the year 595; Fredus tamen judici in cujus pago eſt reſervatur. ¶ Tit. 89.

puarians 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.

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 comprized 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 judicary 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 a fief, in favor of a feudal lord,‡ or of the privileges of fiefs in favor 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 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

* Capitulare incerti anni, chap. 57. in Baluſius, tome 1. page 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 Saxoniæ, 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 villæ, 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.

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 king's 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 favor of their bondmen. But the German nations, and thoſe that deſcended from them, are not the only people who manumiſed 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 other nations have encroached upon their ſovereigns, and yet we find no other inſtance of what we call the juriſdiction of the lords. The origin of it is therefore to be traced in the uſages and cuſtoms of the Germans.

Whoever has the curioſity to look into Loyſeau,† will be

* See the 3d, 4th, and 14th of the firſt book, and the charter of Charlemagne, in the year 771, in Martenne, tome 1. anecdot. collect. 11. Præcipientes jubemus, ut ullus judex publicus——homines ipſius eccleſiae et monaſterii ipſius Morbacenſis, tam ingenuos quam et ſervos, & qui ſuper eorum terras manere, &c.

† Treatiſe of village juriſdictions.

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 dependence 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?

CHAP. XXI.

Of the Territorial Juriſdiction of the Churches.

THE churches acquired a very conſiderable property. We find that our king's gave them great ſeigniories, 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 ſeigniory 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

* See Mon. du Cange on the word Herbaticum.

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 manumiſed. The churches had therefore juriſdictions even over freemen, and held their *placita* in the earlieſt times of the monarchy.

I find in the lives of the ſaints,‖ 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 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 chooſe 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 church lands, 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

* See the 3d and 4th formulary of Marculfus, book 1.

† Ne alicubi, niſi ad eccleſiam ubi relaxati ſunt, malum teneant. Tit. 68. § 1. See alſo § 19. Lindembrock's edition.

‡ Tabulariis. § Mallum.

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

¶ See alſo the life of St. Meilanius, and that of St. Deicola.

* In the council of Paris, in the year 615. Epiſcopi vel potentes, qui in aliis poſſident regionibus, judices vel miſſos diſcuſſores de aliis provinciis non inſtituant, niſi de loco qui juſtitiam percipiant & aliis reddant. Art. 19. See alſo art. 12. † Ibid. art. 5.

‡ In the law of the Lombards, book 2. 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. 7. See alſo part 3. Lindembrock's edition, p. 444. Imprimis omnium jubendum eſt, ut habeant eccleſiæ earum juſtitias, & in vita illorum qui habitant in ipſis eccleſiis, et poſſ tam in pecuniis quam et in ſubſtantiis earum.

civil juriſdiction over thoſe who live upon their lands. In fine, as the capitulary of *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.

CHAP. 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 ſeigniories, during the diſorders of the ſecond race. Thoſe who chooſe 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 had been robbed of his bondman," 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, "finds

* In the year 857, in ſynodo apud Cariſiacum, art. 4 Edition of Baluſius, p. 96.

† See the letter written by the biſhops aſſembled at Rheims in the year 858. art. 7. 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 vaſſali, &c.

‡ Tit. 3. chap. 13. Lindembroek's edition. § Tit. 85.

‖ In the year 595, art. 11 and 12. edition of the capitularies by Baluſius, p. 19. Pari conditione convenit, ut ſi una centena in alia centena veſtigium ſecuta fuerit et invenerit, vel in quibuſcuque fidelium 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.

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

* Si veſtigium comprobatur latronis tamen præſentia nihil longe muldando; aut ſi perſequens latronem ſuum comprehenderit, integram ibi compoſitionem accipiat. Quod ſi in truſte inventus, medietatem compoſitionis truſtis adquirat, et capitale exigat a latrone. Art. 2, et 3.

† See the gloſſary on the word Truſtis.

‡ Inſerted in the law of the Lombards, book 2. tit. 52. ſect. 14. it is the capitulary of the year 793, in Baluſius, p. 544. art. 10.

§ Et ſi forſitan Francus aut Longobardus habens beneficium juſtitiam facere noluerit, ille judex in cujus miniſterio fuerit, contradicat illi beneficium ſuum, interim dum ipſe aut miſſus ejus juſtitiam faciat. See alſo the ſame law of the Lombards, book 2. tit. 52. § 2. which relates to the capitulary of Charlemagne in the year 779. art. 21.

|| The third of the year 813. art. 10.

¶ The ſecond of the year 813. Baluſius' edition, p. 505.

* Ut unuſquiſque fidelis ſuſtitias ſua faceret. Ibid.

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 ſeigniories 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 fiefs in perpetuity, we find, as already has been obſerved, that the juriſdiction was there eſtabliſhed; this judiciary right muſt certainly have been inherent in the fief, and one of its chief prerogatives.

We have a far greater number of records that eſtabliſh the patrimonial juriſdiction of the clergy in their diſtricts, than we have prove that of the benefices or fiefs 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.

* The ſecond capitulary of the year 813.

† Capitulare quintum anni 817. art. 23. Baluſius' edition, p. 617. Ut ubicunque miſſi, aut epiſcopum aut abbatem, aut alium quemlibet honore praeditum invenerint, qui juſtitiam facere noluit vel prohibuit, de ipſius rebus vivant quamdiu in eo loco juſtitias facere debent.

‡ Edictum in Carliaco in Baluſius, tome 2. p. 152. Unuſquiſque advocatus pro omnibus de ſua advocatione——in convenientia, ut cum miſſi noſtri de ſua advocatione quos invenerit contra hunc bannum noſtrum feciſſe——caſtiget.

§ Edictum Pitenſe, art. 18. Baluſius' edition, tome 2. p. 181. Si in fiſcum noſtrum, vel in quamcunque immunitatem, aut alicujus potentis poteſtatem vel proprietatem confugerit, &c.

ter. 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.

CHAP. XXIII.

General Idea of the Abbe du Bos' 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' 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 point in queſtions 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 earthern feet; and it is the earthern feet that render the coloſſus immenſe. If the abbé du Bos' 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

* Lib. 1. "Si beneficia opportuna locis eccleſiarum, aut cui voluerit decone" . . . .

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.*

CHAP. XXIV.

The ſame Subject continued.—Reflections on the Main Part of the Syſtem.

THE abbé du Bos endeavors 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 are 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 shewn by strong and substantial proofs, in order to establish his system. For when we behold a conqueror entering a country, and subduing a great part of it by force and open violence, and soon after 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 *magister militiæ*. But these two offices are merely of his own creation. St. Remigius' 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

* Hist. lib. 6.

† Totumque tractum Armoricum, aliæque Galliarum provinciæ. Ibid.

‡ Tome 2. book 3. ch. 18. p. 270.

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 alleged by the abbé du Bos, is the renunciation made by the emperor Justinian, in favor 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 conditions of it. Besides, the kings of the Franks were masters, and peaceable sovereigns of Gaul: Justinian had not one foot of ground in that country; the western empire had been destroyed a long time before; and the eastern empire had no right to Gaul, but as representing the emperor of the west. These were rights 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, endeavor 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 surprised at Gregory of Tours, who, after mentioning the assassinations committed by Clovis, says, that God laid his enemies every day at his feet, because he walked in his ways? Who doubts but the clergy were glad of Clovis' 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' 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 crowd, 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' conſular robe. Does not Darius offer him one half of his kingdom? Is not Darius aſſaſſinated like a tyrant? Do not the mother and the wife of Darius weep at the death of Alexander? Were Quintus Curtius, Arrian or Plutarch, Alexander's cotemporaries? 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.*

CHAP. XXV.

Of the French Nobility.

THE abbé 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 grandeur would not therefore be loſt in oblivion, night and time.

History

* See the preliminary diſcourſe of the abbé du Bos.

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 fortyfive. 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 proves 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.

Upon opening this law, we find that the compoſition for the death of an antruſtio,‡ that is, of the king's vaſſal, was

* See the eſtabliſhment of the French monarchy, vol. 3, book 6, chap. 4, p. 304.

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

‡ Qui in truſte dominica eſt, tit. 44. ſect. 4; and this relates to the 13th formulary of Marculfus, de regis antruſtione. See alſo title 60, of the Salic law, 3 and 4, and the title 70; and the law of the Ripuarians, tit. 11; and the capitulary of Charles the Bald apud Carliacum, in the year 857, chap. 13.

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 freedman, 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 antruſtios; 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 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 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;

* Salic law, tit. 44. § 6.

† Salic law, tit. 44. ſect. 4.

‡ Tit. 44. ſect. 1.

§ Tit. 44. ſect. 15. || Salic law, tit. 44. ſect. 7.

¶ 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, & 3. tit. 26. of the law of the Burgundians.

* Eſtabliſhment of the French monarchy, vol. 3. book vi. chap. 4, and 5.

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 inquire further into this decree. Our author has rendered it famous by availing himſelf of it, in order to prove two things: The one,† that all the compoſitions we meet with in the laws of the Barbarians were only civil 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.

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 a leſſer power*. Wherefore *debilior perſona* does not ſignify a bondman, but a perſon of a 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

* Eſtabliſhment of the French monarchy, vol. 3. book vi. chap. 5. page 319, & 320.

† Ib. chap. 4. page 307, & 308.

‡ Ib. page 309. and in the following chapter, page 319, & 320.

§ See the 28th book of this work, chap. 28. and the 31ſt book, chap. 8.

‖ Itaque colonia convenit & ita bannivimus, ut unuſquiſque judex criminoſum latronem ut audierit, ad caſam ſuam ambulet. & ipſum ligare faciat; ita ut ſi Francus fuerit, ad noſtram præſentiam dirigatur; & ſi debilior perſona fuerit, in loco pendatur. Capitulary of Baluſius' edition, tome 1. page 13.

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 Hebe, whom this prince had drawn from the ſtate of ſervitude, and made archbiſhop of Rheims. "What recompenſe‡ did the emperor receive from you for ſo many benefits? He made you a freeman, but did not ennoble you, becauſe he could not give you nobility after having given you your liberty."

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 the 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 precedency of the clergy over the nobility. "This paſſage proves only, *continues the ſame writer*,‖ that the freeborn ſubjects were qualified as noblemen; in the common acceptation, noblemen, and men who are freeborn, have, for this long time, ſignified the ſame thing." What! becauſe ſome of our burghers have lately aſſumed the quality of noblemen, ſhall a paſſage of the life of Lewis le Debonnaire be applied to this ſort of people? "And perhaps, *continues he ſtill*,¶ Hebe had not been a bondman among the Franks, but among the Saxons, or ſome other German nation,

* See the 28th book of this work, chap. 28; and the 31ſt book, chap. 8.

† Chap. 43 and 44.

‡ O qualem nimirum rependionem reddidiſti ei! fecit te liberum, non nobilem, quod impoſſibile eſt poſt libertatem. Ibid.

§ Hiſtabliſhment of the French monarchy, vol. 3, book vi. chap. 4. p. 3. 6.

‖ Ibid. ¶ Ibid.

nation, where the people were divided into ſeveral orders." Then becauſe of the abbé du Bos' *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 bondmen, 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 manumiſed 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 gueſts 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

* Omnes epiſcopi moleſti fuerunt Ludovico, et maxime ii quos e ſervili conditione honoratos habebat, cum his qui ex barbaris nationibus ad hoc fidelitatis perducti fuit. De geſtis Ludovici Pii, cap. 43. & 44.

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 the people of low birth to the honors 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 Boulainvillier'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?

BOOK

* Chap. 23.

† Eſtabliſhment of the French monarchy, vol. 3. book vi. chap. 1. p. 304.

BOOK XXXI.

THEORY OF THE FEUDAL LAWS AMONG THE FRANKS, IN THE RELATION THEY BEAR TO THE REVOLUTIONS OF THEIR MONARCHY.

CHAP. 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 had an example in the reign of Clovis' grandchildren. A perſon named Peonius* was count in the city of Auxerre; he ſent his ſon Mommolus 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 favors.

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: This occaſioned a general

* Gregory of Tours, book 4. chap. 42. † Chap. 7.

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 Brunechild.

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 and 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 villany 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 Brunechild.

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,‖ Brunechild's favorite, 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 Brunechild, either by revenging¶ his death, or by purſuing the ſame plan, became every day more odious* to the nation.

Clotarius,

* Fredegarius' chronicle, chap. 43.

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

‡ Fredegarius' chronicle, chap. 44.

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

‖ Sæva illi fuit contra perſonas iniquitas, fiſco nimium tribuens, de rebus perſonarum ingeniole fiſcum vellens implere——ut nullus reperiretur qui gradum quem arripuerat poſſidere adſumere. Fredeg. chron. chap. 27. in the year 605.

¶ Ibid. chap. 28. in the year 607.

* Ibid. chap. 41. in the year 613. Burgundiæ farones, tam epiſcopi quam ceteri leudes, timentes Brunichildem, & odium in eam habentes, conſilium. inientes, &c.

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 princeſs.

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 come 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.

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.

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

† Some time after Brunechild's execution, in the year 615. See Baluze [illegible] page 21.

abuſes,* which ſhows that this prince put a ſtop to the complaints that had occaſioned the revolution. On the one hand, he confirmst 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 *tolls eſtabliſhed ſince the death of Gontram, Sigebert and Chilperic; that is, he aboliſhed whatever had been done during the regencies of Fredegunda and Brunechild. 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.

CHAP. 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

* Quæ contra rationis ordinem acta vel ordinata ſunt, ne in antea, quod averat divinitas, contingant, diſponerimus, Chriſto propitio, per hujus edicti tenorem generaliter emendare. Ibid. art. 16.

† Ibid. art. 16. ‡ Ib. art. 17.

§ Et quod per tempora ex hoc prætermiſſum eſt, vel deinceps perpetualiter obſervetur.

‖ Ita ut epiſcopo decedente in loco ipſius, qui a metropolitano ordinari debet, cum principalibus, a clero et populo eligatur; & ſi perſona condigna fuerit, per ordinationem principis ordinetur; vel certe ſi de palatio eligitur, per meritum perſonæ & doctrinæ ordinetur. Ibid. art. 1.

¶ Ut ubicunque census novus impoſitus eſt, emendetur. Art. 8.

* Ibid. art. 9 † Ib. art. 11.

The maſculine, bold and inſolent regencies of Fredegunda and Brunechild, had leſs ſurpriſed than warned the nation. Fredegunda had defended her villanies by new villanies; 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 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

* They were orders from the king ſent to the judges to do or tolerate things contrary to law.

† See Gregory of Tours, book 4. p. 227. Both our hiſtory and the char-

gave them for transferring successions; 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' constitution redressed all these grievances; no one* could any longer be condemned without being† heard; relations‡ were made to succeed according to the 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 Baluzius 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;

ters are full of this; and the extent of these abuses appears especially in Clotarius' constitution, inserted in the edition of the capitularies made to reform them, Baluzius' edition, p. 7.

* Art. 22. † Ib. art. 6. ‡ Ibid. art. 18.

§ In Baluzius' edition of the capitularies, tome 1. p. 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.

ſifting 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 Childeric, and the execrable regencies of Fredegunda and Brunechild. Now, is it poſſible that the nation could have bore with grievances ſo ſolemnly proſcribed, without ever complaining of the continual repetition of thoſe grievances? Is it 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.

CHAP. 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, Theodorico jubente, &c. Fredegarius, chap. 27. in the year 605.

§ Geſta regum Francorum. cap. 36.

‖ See Fredegarius, chronicle, chap. 54. in the year 626. and his anonymous continuator, chap. 101, in the year 695. and chap. 105, in the year 715. Aimoin, book 4. chap. 15. Eginhard, life of Charlemagne, chap. 48. Geſta regum Francorum. chap. 46.

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 chooſe no one, and petitioning for his favor, 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 Sclavonians, 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 Sigebert, together with a treaſure, and to put the government of the kingdom and of the palace, into the hands of Cunibert, biſhop of Cologne, and of the Duke Adalgiſus. Fredegarius does not enter into the particulars of the conventions then made; but the king confirmed them all by charters, and ‖Auſtraſia was immediately ſecured from danger.

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

* See the law of the Burgundians in Præf. and Supplement 2. to it. tit. 1.

† See Gregory of Tours, book 9. chap. 36.

‡ Eo anno Clotarius cum proceribus et leudibus Burgundiæ Trecaſſinis conjungitur: Cum eorum eſſet ſolicitus, ſi velient, jam Warnacharia diſceſſo, alium in ejus honoris gradum ſublimare: Sed omnes unanimiter denegantes ſe nequaquam velle majorem domus eligere, regis gratiam obnixe petentes, cum rege tranſegere. Fredegarius' chronicle, chap. 54. in the year 626.

§ Iſtam victoriam quam Winidi contra Francos meruerunt, non tantum Sclavinorum fortitudo obtinuit, quantum dementatio Auſtraſiorum, dum ſe cernebant cum Dagoberto odium incurriſſe, et aſſidue expoliarentur. Ibid. chap. 68. in the year 630.

‖ Deinceps Auſtraſii, eorum ſtudio, limitem et regnum Francorum contra Winidos utiliter defenſaſſe noſcuntur. Ibid. chap. 75. in the year 632.

¶ Fredegarius' chronicle, chap. 79. in the year 638.

young prince for their king. Ægа 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 Ægа, the queen Nentechildis‡ engaged the lords of Burgundy to chooſe 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 honors and dignities§ forever, 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 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

☞ 2

* Ib. † Ib. chap. 80. in 639.

‡ Ibid. chap. 89. in the year 641.

§ Ibid. chap. 89. Floachatus cunctis ducibus a regno Burgundiæ ſeu et pontificibus, per epiſtolam etiam et ſacramentis firmavit unicuique gradum honor' & dignitatem, ſeu et amicitiam, perpetuo conſervare.

|| Deinceps a temporibus Clodovei, qui fuit filius Dagoberti inclyti regis, pater vero Theoderici, regnum Francorum decidens, per majores domus caepit ordinarii. De majoribus domus regiæ.

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 valor. 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 valor 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 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.

CHAP. 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 chooſing 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:

* Reges ex nobilitate, duces ex virtute ſumunt. De moribus Germ.

† See Sulpicius Alexander in Gregory of Tours, book 2.

‡ In the year 5[illegible]

ace: He refuſed to engage in an expedition in Italy againſt Narſes, and he had *the mortification to ſee the Franks chooſe 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 obey. The armies were dreadful only to their own country; they were laden with ſpoils, before they had reached the enemy. Of theſe miſeries we have a very lively picture in Gregory of Tours.§ *How ſhall we be able to obtain a victory*, ſaid Gontram,‖ *we who do not ſo much as keep what our anceſtors acquired? Our nation is no longer the ſame.* . . . . Strange, that it ſhould be on the decline ſo early as the reign of Clovis' 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

* Leutharis vero & Butilinus, tametſi id regi ipſorum minime placebat, belli cum eis ſocietatem inierunt. Agathias, book 1. Gregory of Tours, book 2. 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 5. chap. 27. book 8. chap. 18 and 30. book 10. 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. Fredegarius' chronicle, chap. 78. in the year 636.

§ Gregory of Tours, book 8. chap. 30. and book 10. chap. 3.

‖ Ibid.

¶ See the 2d ſupplement to the law of the Burgundians, tit. 13. and Gregory of Tours, book 9. chap. 36.

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 favors 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.

CHAP. VI.

Second Epocha of the Humiliation of our Kings of the firſt Race.

AFTER the execution of Brunechild, 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

* 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. 2. Ut reſponſa quæ erat doctus, vel potius juſſus, ex ſua velut proteſtate, redderet.

This is the time mentioned by* hiſtorians of the government of the mayors over the kings, whom they held in ſubjection.

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.

CHAP. VII.

Of the Great Officers and Fiefs under the Mayors of the Palace.

THE mayors of the palace were far from reviving the precarioufneſs 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 do-

☞ 4 nations

* Annals of Metz, anno 691. Anno principatus Pippini ſuper Teodoricum———Annals of Fuld, or of Laurisham, Pippinus dux Francorum obtinuit regnum Francorum per annos 27 cum regibus ſibi ſubjectis.

† Poſthæc Theudoaldus filius ejus (Grimoaldi) parvulus, in loco ipſius, cum prædicto rege Dagoberto, majordomus palatii effectus eſt. The anonymous continuator of Fredegarius in the year 714, chap. 144.

‡ Cited by Gregory of Tours, book 9. See alſo the edict of Clotarius II, in 615, art. 16.

§ Ut ſi quid de agris fiſcalibus vel ſpeciebus atque præſidio, pro arbitrii 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. Ibid.

nations 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.

CHAP. 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 the ſource of the ancient prerogatives of our nobility, a nobility, which for theſe eleven centuries, have been covered with duſt, ſweat, and blood.

Thoſe who were ſeized with fiefs, enjoyed very great advantages. The compoſition for the injuries done them was greater than that of freemen. It appears by the formularies

* Book 1. formulary 12.

mularies 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 a 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 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 honor 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 honors 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,

* Tit. 44. See alſo titles 66. ſect. 3 and 4, and tit. 74. † Tit. 2.
‡ See alſo the law of the Ripuarians, tit. 7. and the Salic law, tit. 44. art. 1 and 4. § Salic law, tit. 59 and 76.
‖ Extra ſermonem regis. Salic law, tit. 59 and 76.
¶ Ibid. tit. 59. ſect. 1.
* Ibid. tit. 76. ſect. 1. † Ibid. tit. 56 and 59.
‡ Ibid. tit. 76. ſect. 1. § Ibid. tit. 76. ſect. 2.
‖ Apud vernis Palatium, in the year 883 art. 4 and 11.
¶ Capitulary of Charlemagne, in the year 81[illegible], art. 1 and 31.
* Heribannum.

mans, 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*.

This does not imply, that thoſe who were ſeiſed of fiefs, adminiſtered them like prudent fathers of families; for though the freemen became 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 favor 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 chooſe 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 afterwads 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

* Non infirmis reliquit heredibus, ſays Lambart 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.

‡ 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. and the capitulary of Lewis le Debonnaire, in the year 829. art. 1.

§ The 5th of the year 806. art. 8.

to a fief, which was to deſcend to their heirs, and is the caſe of the formulary abovementioned, they had very great advantages in doing it.

CHAP. 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 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 alleged by Pepin for entering Neuſtria, was his having been invited thither by the clergy, to put a ſtop to the encroachments of the kings, that is, of the mayors, who 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

* In Gregory of Tours, book 6. chap. 46.

† This is what induced him to annul the teſtaments made in favor of the clergy, and even the donations of his father: Gontram reeſtabliſhed them, and made even new donations. Gregory of Tours, book 7. chap. 7.

‡ See the annals of Metz, in the year 687. Excitor imprimis querelis ſacerdotum et ſervorum Dei, qui me ſæpius adierunt, ut pro ſublatis injuſte patrimoniis, &c. § See the annals of Metz. ‖ In Gregory of Tours.

ſion of the clergy, he could not ſtrip them without contradicting his own title, and ſhowing that he made a jeſt of the nation. However, the conqueſt of two great kingdoms, and the deſtruction of the oppoſite party, afforded him ſufficient means of ſatisfying his generals.

Pepin made himſelf maſter of the monarchy, by protecting the clergy; his ſon Charles Martel could not maintain his power, but by oppreſſing them. This prince finding that part of the regal and fiſcal lands had been given either for life, or in perpetuity to the nobility, and that the 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.

CHAP. 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. In this ſituation what a loſs muſt the

* Karlus plurima juri eccleſaſtico detrahens prædia, fiſco ſociavit, ac deinde militibus deſperavit. Ex chronico Centulenſi, lib. 2.

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 deathbed 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.

CHAP. 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

* See the annals of Metz.

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 the 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 enterpriſe of Charles Martel to miſcarry.

St. Eucherius, biſhop of Orleans, had a viſion which frightened all the princes of th · 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 people's 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 ſtript 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 part of them, becauſe of his diſputes with Veirfre duke of Aquitaine, he iſſued out letters called *præcaria*§ in favor 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

* Epiſtolam quoque, decreto Romanorum principium, ſibi prædictos præſul Gregorius miſerat, quod ſeſe populus Romanus, relicta imperatoris dominatione, ad ſuam defenſionem et invictum clementiam convertere voluiſſet. Annals of Metz, year 741. Eo pacto patrato, ut a partibus imperatoris recederet. Fredegarius.

† Anno 858, apud Cariſiacum; Baluſ. edit. tome 1. p. 101.

‡ Ibid. art. 7. p. 109.

§ Præcaria, quod precibus utendum conceditur, ſays Cujas in his notes upon the firſt book of fiefs. I find in a diploma of king Pepin, dated the third year of his reign, that this prince was not the firſt who eſtabliſhed theſe Præcaria; he cites one made by the mayor Ebroin, and continued after his time. See the diploma of this king, in the 5th tome of the hiſtorians of France by the Benedictines, art. 6.

which he engaged, both for himſelf and 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 a 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, 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

* In the year 743. See the 5th book of the capitularies, art. 3. Baluſius' edition, p. 825.

† That of Metz in the year 756, art. 4.

‡ See his capitulary in the year 893, given at Worms, Baluſius' edition, p. 411. where he regulates the precarious contract: And that of Francfort, in the year 794, p. 267. art. 24. in relation to the repairing of the houſes; and that of the year 800, p. 330.

§ 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 3. tit. 1. ſect. 3. to the Salic laws, collection of Pepin's laws in Echard, p. 195. tit. 26. art. 4.

‖ See the conſtitution of Lotarius I, in the law of the Lombards, book 3. law 1. ſect. 43. ¶ Ibid. ſect. 44.

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 Compiegne, it is enacted, that the commiſſary ſhall have a right to viſit every monaſtery, together with the biſhops, by the conſent‡ and in preſence of the perſon who holds it; and his 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 reeſtabliſhment of the monaſteries, they wrote to Charles the Bald§ that they were not affected with this reproach, becauſe 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.

CHAP. 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,

* See the conſtitution of Lotarius I, in the law of the Lombards, book ii. law 1. ſect. 44.

† Given the 28th year of the reign of Charles the Bald, in the year 868, Baluſius' 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' edition, page 78.

‖ 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 1. p. 279.

¶ Law of the Lombards, b. iii. tit. 3. § 1 &c.

tithes, a new kind of property, which had this advantage in favor 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 †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 mo-

* It is that on which I have deſcanted in the 4th chapter of this book, and is to be found in Baluſius' edition of the capitula. tome 1. art. 11. page 9.

† Agraria et paſcuria vel decimas porcorum, eccleſiæ concedimus, ita ut ſtor aut decimator in rebus eccleſiæ nullius accedat. The capitulary of Charlemagne in the year 800. Baluſius' edit. p. 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 ſeigniory or economy.

‡ Canone 5. ex tome 1 conciliorum antiquorum Galliæ, opera Jacobi Sirmundi. § Art. 6, Baluſius' edition, page 332; it was given in 800.

‖ Held under Charlemagne, in the year 794.

tive to pay the tithes. A capitulary was made in that ſynod, wherein it is ſaid, that in the laſt* famine the 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 councils.

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 Lotarius‖ 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 biſhops, and for the clergy, manifeſtly proves, that he wanted to reſtore the church to that fixt and permanent ſtate which ſhe had loſt.

His will¶ ſhows that he was deſirous of repairing the miſchief

* Experimento enim didicimus, in anno quo illa valida fames irrepſit, ebullire vacuas aruras à dæmonibus deveratas, et voces exprobrationis auditas, &c. Baluzius' edition, page 267. art. 23.

† See amongſt the reſt the capitulary of Lewis le Debonnaire, in the year 829. Baluzius' edition, page 663, againſt thoſe who, to avoid paying tithes, neglected to cultivate the lands, &c. art. 5. Nonis quidem & decimis, unde & genitor noſter & nos frequenter in diverſis placitis admonitionem fecimus.

‡ Among others, that of Lotarius, book iii. tit. 3. chap. 6.

§ In the year 829. art. 7. Baluzius, tome i. page 663.

‖ In the law of the Lombards, book iii. tit. 3. ſect. 8.

¶ It is a kind of codicil produced by Eginhard, and different from the will itſelf, which we find in Goldaſtus and Baluzius.

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 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.

CHAP. 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 chooſing 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.

CHAP. 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,

☞ 2 that

* See the capitulary of Charlemagne in the year 803, art. 2. Baluſius' edition, page 379, and the edict of Lewis le Debonnaire, in the year 834, in Goldaſt conſtit. Imperial. tome 1.

† This is mentioned in the famous canon, Ego Ludovicus, which is viſibly ſuppoſititious: it is in Baluſius' edition, page 591, in 817.

that under Charlemagne* and Lotarius 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 other as fiefs.

I took notice that the proprietors of the *allodia* were ſubject to the ſervice all the ſame as the poſſeſſors of the fiefs. This, without doubt, was partly the reaſon that Charles Martel made grants of allodial lands, as well as of fiefs.

CHAP. 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 the church lands had the privileges of fiefs, and theſe had the privileges of church lands: Such were the §honorable rights of the churches, eſtabliſhed in thoſe days.

CHAP. XVI.

Conſeſſion 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

* As appears by his capitulary, in the year 801, art. 17. in Baluſius, tome 1. 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. 20. in villa Sparnaco, Baluſius' edition, tome 2. page 31. and that of the year 853, chap. 3 and 5, in the ſynod of Soiſſons, Baluſius' edition, tome 2. page. 54. and that of the year 854. apud Attuariacum, chap. 10. Baluſius' edit. tome 2. page 70. See alſo the firſt capitulary of Charlemagne, incerti anni, art. 49 and 56. Baluſius' edition, tome 1. page 519.

§ See the capitularies, book v. art. 44, and the edict of Piſtes in the year 806. art. 8 and 9. where we find the honorable rights of the lords, eſtabliſhed in the ſame manner as they are to this very day.

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; 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, confuſion which would render 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 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 authorized 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.

☞ 3 This

* 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 quæ poſt Pippini mortem excogitata eſt, æquitati ac ſanctitati Zachariæ Papæ plurimum adverſatur.—Eccleſiaſtic annals of the French, tome 3, page 370.

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.

CHAP. 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 chooſe a princeſ 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 abovementioned 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

* Vol. 5 of the hiſtorians of France, by the Benedictines, page 9.

** Ut nunquam de alterius lumbis regem in ævo præſumant eligere, ſed ex ipſorum. Vol 5 of the hiſtorians of France, page 10.

‡ In the year 768.

what was there tranſacted, in the author of the ancient hiſtorical collection, publiſhed by Canifius, 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 chooſe in the ſame family; it was, properly ſpeaking, rather a right of excluſion than that of election.

This kind of elective right is confirmed by the records of the ſecond race. Such is this capitulary of the diviſion of the empire made by Charlemagne among his three children, in which, after ſettling their diviſion, he ſays,‡ "That if one of the three brothers happens to have a ſon, ſuch as the people ſhall be willing to chooſe as a fit perſon to ſucceed to his father's kingdom, his uncles ſhall conſent to it."

This ſame regulation is to be met with in the 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 give for chooſing him is, that he was of the Imperial family,† that Charles the Fat had conferred on him the dignity of king, and that the emperor Arnold had inveſted him by the ſceptre, and by the

* Tom. 2. lectionis antiquæ.

† Edition of the capitularies, tom. 1. page 188.

‡ In the 18th capitulary of the year 806, Baluzius' edition, p. 439. art. 5.

§ In Goldaſt Imperial. Conſtitut. tome 2. page 19.

‖ Baluzius' edition, page 374. art. 14. Si vero aliquis illorum decedens legitimos filios reliquerit, non inter eos potestas ipsa dividatur, sed potius populus pariter consentiens, unum ex iis quem dominus voluerit eligat; & hunc honor frater in loco patris et filii suscipiat.

¶ Capitulary of the year 877, Baluzius' edition, page 272.

* In the first Labbe's councils, tome 9. col. 424. and in Dumont's corps diplomat. tome 1. part 2. † By the mother's ſide.

the miniſtry of his ambaſſadors. The kingdom of Arles, like the other diſmembered or dependent kingdom of Charlemagne, was elective and hereditary.

CHAP. XVIII.

Charlemagne.

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 forecaſt 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 them. Never prince had more reſolution in facing dangers; never prince knew better how to ſhun them. He mocked all manner of

* See his 3d capitulary of the year 811, page 486. art. 1, 2, 3, 4, 5, 6, 7 and 8, and the firſt capitulary of the year 812, page 490. art. 1. and the capitulary of the year 812, page 494. art. 9, 11 and others.

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 plain ſimple behavior. 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 expenſes; adminiſtering his demeſnes with prudence, attention and economy. A father* might learn from his laws how to govern his family; and we find in his capitularies the pure and ſacred ſource 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 economy 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.

CHAP. 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 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

* See the capitulary de villis in the year 800, and 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 economy.

‡ See among others the foundation of the archbiſhopric of Bremen, in the capitulary of the year 789, Baluſius' edition, page 245.

§ For inſtance, the prohibition to the king's judges againſt entering upon the territory to demand the freda, and other duties. I have ſaid a good deal concerning this in the preceding book.

aſſics of Germany inveſted with a ſovereign power. Be that as it may, theſe were ſome of the contrivance 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.

CHAP. 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 Ptolemies, 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 reigns of the empire into his hand which had been held by Charlemagne.

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 downfal 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 endeavoring 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

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 prayer. 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 regal dignity.

CHAP. 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 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.

CHAP.

* See his letters

CHAP. 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 that of Charles Martel. The clergy had recourſe to the emperor againſt his children, but the 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, endeavored 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

* See what the biſhops ſay in the ſynod of the year 845, apud Teudonis villam, art. 4.

† See the ſynod in the year 845, apud Teudonis villam, art. 3 and 4, which gives a very exact deſcription of things; as alſo that of the ſame year, held at the palace of Vernes, art. 12. and the ſynod of Beauvois alſo in the ſame year, art. 3, 4 and 6. and the capitulary in villa Sparnaco, in the year 846, art. 20. and the letter which the biſhops aſſembled at Rheims wrote, in 858 to Lewis king of Germany, art. 8.

‡ 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 ſynods 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. 20, 21, 22. See alſo the letter which the biſhops aſſembled at Rheims wrote, in the year 858, to Lewis king of Germany, and the edict of Piſtes, in the year 864, art. 5.

he was 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 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 abbies, 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 that they had no longer any hopes of obtaining their deſire.

All that could be expected then, was‡ to repair in general injuries done both to church and ſtate. The kings engaged not to deprive their vaſſals of their freemen, 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.

The

* See this very capitulary in the the year 846, in villa Sparnaco. See alſo the capitulary of the aſſembly held apud Marſnam, in the year 847. art. 4 wherein the clergy reduced themſelves to demand only the reſtitution of what they had been poſſeſſed of under Lewis le Debonnaire. See alſo the capitulary of the year 851, apud Marſnam, art. 6 and 7. which confirms the nobility and clergy in their ſeveral poſſeſſions; and that apud Remoſtam 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. 8.

† Art. 8.

‡ See the capitulary of the year 853. art. 6 and 7.

§ Charles the Bald, in the ſynod of Soiſſons, ſays that he had promiſed the biſhops not to iſſue out any more precepts relating to the church lands. Capitularies of the year 853. art. 11. Baluſius' edition, tome 2. p. 65.

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 into 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 endeavor† to give an authority to their laws by that of the canons; in vain did they join the eccleſiaſtic‡ with the civil puniſhment; in vain to counterbalance the authority of the county 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.

CHAP. 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

* See the capitulary of Charles the Bald, apud Saponarias, in the year 859, art. 3. "Venilon, whom I made archbiſhop of Sens, has conſecrated me: and I ought not to be expelled the kingdom by any body," ſalvam fore audientiam et judicium epiſcoporum, quorum manibus in regem fuit conſecratus, et qui throni Dei fuit dictus, in quibus Deus reſidet, et per quos ura decernit judicia, quorum paternis correctionibus et caſtigatoriis judiciis me ſubdere mi paratus, et in preſenti ſum ſubditus.

† See the capitulary of Charles the Bald, de Carliaco, in the year 857, Baluſius' edition, tome 2, page 83, art. 1, 2, 3, 4 and 7.

‡ See the ſynod of Pitles, in the year 862, art. 4, and the capitulary of Carloman and of Lewis II, apud Vernis palatium, in the year 883, art. 4. and 5.

§ Capitulary of the year 856, under Charles the Bald, in ſynodo Pontigonenſi, Baluſius' edition, art. 12.

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, Childebert, and Queen Brunechild, 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 theſe 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.

This muſt have happened when Charles Martel, after diſtributing the church lands to his ſoldiers, partly in fief, and partly as *alleuia*, 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 *alleuia*; and that the freemen thought themſelves happy in accepting them as fiefs.

CHAP.

* See what has been ſaid already, book xxx. laſt chapter towards the end.

† In the year 587, in Gregory of Tours, book ix.

‡ See the following chapter, where I ſhall ſpeak more diſtinctly of theſe diviſions; and the rules by which they are to be

CHAP. 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.

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

* In the year 806, between Charles, Pepin and Lewis: it is quoted by Goldaſt, and by Baluſius, tome 1. page 439.

† Art. 9. page 453, which is agreeable to the treaty of Andely of Gregory of Tours, book ix.

‡ Art. 10, and there is no mention made of this in the treaty of Andely.

§ In Baluſius, tome 1. page 574. Licentiam habeat unuſquiſque liber homo qui ſeniorem non habuerit, cuicumque ex his tribus fratribus voluerit, ſe commendandi, art. 9. See alſo the diviſion made by the ſame emperor, in the year 837, art. 6. Baluſius' edition, page 686.

‖ In the year 811. Baluſius' edition, tome 1. page 486, art. 7 and 8, and that of the year 812. Ibid. page 490, art. 1. Ut omnis liber homo qui quatuor manſos veſtitos de proprio ſuo, ſive de alicujus beneficio, habet ipſe ſe præparet, et ipſe in hoſtem pergat, ſive cum ſeniore ſuo, &c. See alſo the capitulary of the year 807, Baluſius' edition, tome 1. page 458.

¶ In the year 793, inſerted in the law of the Lombards, book iii. tit. 9. chap. 9

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 chooſe whom he pleaſed for his lord, whether the king, or any of the nobility. Before this treaty, the freeman might avow fealty for a fief; but his *alleadum* 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 treaty every freeman had a right to ſubject his *alleadum* 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 *alleadum* 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 chooſe.

Thus it was that thoſe who formerly were only under the king's power, as freemen under the count, became inſenſibly vaſſals one of another, ſince every freeman might chooſe whom he pleaſed for his lord, the king, or any of the nobility.

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

* In the year 847, quoted by Aubert Lemire, and Baluſius, tome 2, page 42. Conventus apud Marſnam. † Adnunciatio.

‡ Ut unuſquiſque liber homo in noſtro regno ſeniorem quem voluerit ſibi, nobis, et in noſtris fidelibus, accipiat. Art. 2 of the declaration of Charles.

§ Capitulary of the year 877. tit. 53. art. 9 and 10. apud Carliacum. Similiter & de noſtris vaſſallis faciendum eſt, &c. This capitulary relates to another of the ſame year, and of the ſame place, art. 3.

brothers, of chooſing whom he pleaſed for his lord, the king, or any of the nobility, is confirmed by the act 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 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.

CHAP. 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 forever to the vaſſal; and the rear fief returned alſo to the king, becauſe it was the fief itſelf, and not a dependence of it.

Such was the rear vaſſalage, while the fiefs were during pleaſure;

* Capitulary of Aix la Chapelle, in the year 813. art. 16. Quod nullus ſenioren ſuum dimittat, poſtquam ab eo acceperit valente ſolidum unum; and the capitulary of Pepin, in the year 783. art. 5.

† See the capitulary de Carliſtadio, in the year 877. art. 10 and 13. Baluſius' edition, tome 2. page 93. in which the king, together with the lords ſpiritual and temporal, agreed to this: Et ſi aliquis de vobis ſit, cui hujus conventus non placet & ille dixerit ad alterum ſenioren melius quam ad illum a nobis poſitum, veniat ad illum, et ipſe tranquille et pacifico animo donet illi conſentum — et quod Deus illi ſuperit ad alium ſenioren acceptare poſſet, licenciam habeat.

‡ In the year 757. art. 6. Baluſius' edition, page 181.

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 vavaſors could not give alſo in fief; ſo that whatever they had given, they might always reſume. Beſides, a grant of that kind did not deſcend to the children like the fiefs, becauſe it was not ſuppoſed to have been made according to the 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 entitled 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.

CHAP. 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

☞ 2 caſe

* Book i. chap. 1. † At leaſt in Italy and Germany.
‡ Book i. of fiefs, chap. 1. § Ibid.
‖ Capitulary of the year 802, art. 7. page 360.

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 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.

CHAP. 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

* Apud Marſnam, in the year 847. Baluſius' edition, page 42.

† Volumus ut cujuscumque noſtrum homo, in cujuscumque regno ſit, cum ſeniore ſuo in hoſtem, vel aliis ſuis utilitatibus, pergat, nisi tolis regni invaſio quam LANDWERI dicunt, quod abſit accederit, ut omnis populus illius regni ad eam repellendam communiter pergat. Art. 5. ibid. page 45.

‡ 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. 0. § 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 chooſe the counts of Toulouſe from among the children of the laſt poſſeſſor.

But Charles the Bald made a general regulation, which equally affected the great offices and the fiefs. He ordained in his capitularies, that the *counties should be given to the 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, insomuch 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 mediately. Those counts who formerly administered justice in the king's *placita*, and who led the freemen against the enemy, found themselves situated between the king and his freemen; and the king's power was removed farther off another degree.

Again, it appears 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 king; 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, St. Paul, Dampierre, and other lords, declared §that henceforward, whether the fief was divided by succession,

* See his capitulary of the year [illegible] art. 9 and 10. apud Carisiacum; this capitulary is relative to [illegible] year and place, art. [illegible].

† The 3d capitulary of the year [illegible] on the Spaniards. The collection [illegible] and capitulary of the year [illegible] and that of the year [illegible] art. 13. Baluzius's edition.

‡ As appears from Otho of [illegible]

§ See the ordinance of [illegible]

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.

CHAP. XXVIII.

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 his 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 ſeventeenth 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 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

* Book 1. tit. 1.

† See progreſſus eſt, ut ad filios deveniret in quem dominus hoc velit beneficium confirmare. Otto

‡ As it is in Italy and Germany.

subsisting * at the time of the authors † of the books of fiefs, that is, in the reign of the emperor Frederic I.

CHAP. 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 been of opinion, that the succession of fiefs in a collatural 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

* Quod hodie ita stabilitum est, ut ad omnes aequaliter veniat. Book 1. of the fiefs, tit. 1. † 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; & ut frater fratri sine legitimo herede defuncto, in beneficio quod eorum patris fuit, succedat. Book 1. of fiefs, tit. 1.

§ Cujas has proved it extremely well.

‖ Sciendum est, quod beneficium adveniens ex latere, ultra fratres patrueles non progreditur successione ab antiquis sapientibus constitutum, licet moderno tempore usque ad septimum geniculum sit usurpatum, quod in masculis descendentibus novo jure in infinitum extenditur. Ibid.

ſelf unable to diſpute with a foreign houſe his inconteſtable rights to the empire; and, in fine, that, in Hugh Capet's time, the reigning family, ſtripped of all its demeſnes, was no longer 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 vigor much longer.

But, what do I ſay? perhaps the ſlegmatic 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 harraſſed 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.

CHAP. 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

* Arnulph, ſon of Carloman, ſon of Lewis I.

ed between Charles the Simple and the Emperor Henry I, who had ſucceeded to Conrad. It is called the compact of Boun.* 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.

CHAP. 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 theſe cities, held

* In the year 918, quoted by Aubert le Mire, code donationem piarum, chap. 17.

† See the capitulary of Charles the Bald, in the year 877, apud Carliſtadium, [illegible] cities of Paris, St. Denis, and the cities on the Loire, in their

held in his hands the two keys of the unhappy remains of the kingdom; the crown was conferred upon him as the only perſon able to defend it. It is thus the empire was afterwards given to a family whoſe dominions form ſo ſtrong a barrier againſt the Turks.

The empire went from Charlemagne's family, at a time when the inheritants 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.

CHAP. XXXII.

Some Conſequences of the Perpetuity of Fiefs.

FROM the perpetuity of the fiefs it followed, that the right of ſeigniority, 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 honored his eldeſt ſon Lotarius, made him think of giving this prince a kind of a 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 him upon common

* See the Salic law, and the law of the Ripuarians in the title of the allodia.

† See the capitulary of the year 817, which contains the firſt diviſion made by Lewis le Debonaire among his children.

common affairs. This is what inſpired Lotarius with thoſe pretences which met with ſuch bad ſucceſs. When Agobard* wrote in favor of this prince, he alleged 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 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

* See his two letters upon this ſubject, for the ſake of one of which Je[illegible] [illegible]

† See the ordinance of Philip Auguſtus, in the year 1209, on the [illegible]

moſt general cuſtom had fixed it to one year's income. This was burthenſome 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 redemptions, 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 waſt† 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 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,

* We find a world of theſe conventions in the charters as in the register book of Ventadour, and that of the abbey of St. Cyprian, in Poitou, of which Mr. Galland has given us extracts.

† Waſt could not ſignify the fief, that is, abolish a portion of it.

‡ The cuſtoms fixed the portion which they could dismember.

§ This was the reaſon why the lords obliged the widow to marry again.

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 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 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 hom-

age

* Moſt of the great families had their particular law 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. 12, Baluſius' edition, tome 2, p. 269, the moment in which the kings called 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.

‡ We find the formula thereof in the 2d capitulary of the year 802. See alſo that of the year 854, art. 13 and others.

age 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.

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.

CHAP.

* M. du Cange, in the word hominum, p. 1163. and in the word fidelitas, p. 471. 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 Confluentibus, art. 3. Baluſius' edition, page 145.

‡ Ibid. art. 3. § Lib. de adminiſtratione ſua.

‖ Anno 757, chap. 17.

¶ Taſſilo venit in vaſtico ſe commendans, per manus ſacramenta juravit multa et innumerabilia, reliquiis ſanctorum manus imponens, et fidelitatem promittit regi Pippino. One would think that there was here an homage and an oath of fealty. See the capitularies of Charles the Bald, Baluſius's edit.

CHAP. 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 inheritants 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, in reſpect to the lords, both a feudal and a civil regulation. In an act of this kind under the lords 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

* Book 4. de feudis, tit. 59. † In the title of allodia.

‡ Somme Rurale, book 1, tit. 96. p. 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.

ceſſions by marriage contract, as *Boyer and †Aufrerius 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 on fiefs, at a period where moſt authors commence theirs.

* Deciſion 155. No. 8 and 204. No. 38. † In Capell. Theod. deciſ. 453.

[‡ The author concludes his elaborate work with an allusion to the joyful acclamations of Æneas' followers 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.

——————*Hanc omnes ardemus Italiam.*

Italiam! prima conclamat puppibus Alethes:

Italiam laeto ſocii clamore ſalutant.——Æneid. lib. 3. ver. 522.]