BOOK XXVIII

OF THE ORIGIN AND REVOLUTIONS OF THE CIVIL LAWS AMONG THE FRENCH [a]

In nova fert animus mutatas dicere formas
Corpora———— —OVID, METAM.

I.—*Different Character of the Laws of the several Peoples of Germany*

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

a In a private letter Montesquieu, speaking of this book, says that it cost him so much labor that his hair turned gray on account of it.—Ed.

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

c See Gregory of Tours.

d See the prologue to the law of the Bavarians, and that to the Salic law.

e Ibid.

f "Lex Angliorum Werinorum, hoc est Thuringorum."

g They did not know how to write.

vanquished nations to conform to their customs, but with a design of following them themselves.

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

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

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

The laws of the Burgundians, and especially those of the Visigoths, admitted of corporal punishments; these were not tolerated by the Salic and Ripuarian laws;[j] 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;[k] but

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

i See the prologue to the law of the Bavarians.

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

k See the prologue to the code of the Burgundians, and the code itself, especially the 12th tit. sec. 5, and tit. 38. See also Gregory of Tours, book II. chap. xxxiii., and the code of the Visigoths.

as the kings of the Franks had established their power, they had no such considerations.[l]

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

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

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

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

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

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

2.—*That the Laws of the Barbarians were all personal*

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

The original of this I find in the manners of the Germans.

l See lower down, chap. 3.

m See chap. ii. secs. 8 and 9, and chap. iv. secs. 2 and 7.

These people were parted asunder by marshes, lakes, and forests; and Cæsar observes,[n] they were fond of such separations. Their dread of the Romans brought about their reunion; and yet each individual among these mixed people was still to be tried by the established customs of his own nation. Each tribe apart was free and independent; and when they came to be intermixed, the independency still continued; the country was common, the government peculiar; the territory the same, and the nations different. The spirit of personal laws prevailed therefore among those people before ever they set out from their own homes, and they carried it with them into the conquered provinces.

We find this custom established in the formulas of Marculfus,[o] in the codes of the laws of the barbarians, but chiefly in the law of the Ripuarians [p] and the decrees of the kings of the first race,[q] whence the capitularies on that subject in the second race were derived.[r] The children followed the laws of their father,[s] the wife that of her husband,[t] the widow came back to her own original law,[u] and the freedman was under that of his patron.[v] Besides, every man could make choice of what laws he pleased; but the constitution of Lotharius I [w] required that this choice should be made public.

3.—*Capital Difference between the Salic Laws and those of the Visigoths and Burgundians*

We have already observed that the laws of the Burgundians and Visigoths were impartial; but it was otherwise with regard to the Salic law, for it established between the Franks and Romans the most mortifying distinctions. When a Frank, a barbarian, or one living under the Salic law happened to be killed, a composition of 200 sols was to be paid to his relatives;[x] only 100 upon the killing of a Roman proprietor,[y] and no more than forty-five for a Roman tributary. The composition for the murder of one of the king's vassals, if a Frank, was 600

n "De bello Gallico," lib. VI.
o Lib. I. formul. 8.
p Chap. xxxi.
q That of Clotarius in the year 560, in the edition of the Capitularies of Balusius, vol. i. art. 4, ib. "in fine."
r Capitularies added to the law of the Lombards, lib. I. tit. 25, cap. lxxi. lib. II. tit. 41, cap. vii. and tit. 56, cap. i. and ii.
s Ibid.
t Ibid. lib. VI. tit. 7, cap. i.
u Ibid. cap. ii.
v Ibid. lib. II. tit. 35, cap. ii.
w In the law of the Lombards, lib. II. tit. 57.
x Salic law, tit. 44, sec. 1.
y "Qui res in pago ubi remanet proprias habet."—Salic law, tit. 44, sec. 15.

sols;[z] if a Roman, though the king's guest,[a] only 300.[b] The Salic law made therefore a cruel distinction between the Frank and Roman lord, and the Frank and Roman commoner.

Further, if a number of people were got together to assault a Frank in his house,[c] and he happened to be killed, the Salic law ordained a composition of 600 sols; but if a Roman or a freedman was assaulted, only one-half that composition.[d] By the same law,[e] if a Roman put a Frank in irons, he was liable to a composition of 30 sols; but if a Frank had thus used a Roman, he paid only 15. A Frank, stripped by a Roman, was entitled to the composition of 62½ sols, and a Roman stripped by a Frank received only 30. Such unequal treatment must needs have been very grievous to a Roman.

And yet a celebrated author[f] forms a system of the establishment of the Franks in Gaul, on a supposition that they were the best friends of the Romans. The Franks then, the best friends of the Romans, they who did, and they who suffered from the Romans such an infinite deal of mischief![g] The Franks, the friends of the Romans, they who, after subduing them by their arms, oppressed them in cold blood by their laws! They were exactly the friends of the Romans as the Tartars who conquered China were the friends of the Chinese.

If some Catholic bishops thought fit to make use of the Franks in destroying the Arian kings, does it follow that they had a desire of living under those barbarous people? And can we hence conclude that the Franks had any particular regard for the Romans? I should draw quite different consequences; the less the Franks had to fear from the Romans, the less indulgence they showed them.

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

z "Qui in truste dominicâ est."—Ibid. tit. 41, sec. 4.

a "Si Romanus homo conviva regis fuerit."—Ibid. sec. 6.

b 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.

c Salic law, tit. 45.

d Lidus whose condition was better than that of a bondsman.—Law of the Alemans, chap. xcv.

e Tit. 35, secs. 3 and 4.

f The Abbé du Bos.

g Witness the expedition of Arbogastes, in Gregory of Tours, "Hist." lib. II.

4.—*In what manner the Roman Law came to be lost in the Country subject to the Franks, and preserved in that subject to the Goths and Burgundians*

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

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

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

My answer is, that the Roman law came to be disused among the Franks because of the great advantages accruing from being a Frank, a barbarian,[l] or a person living under the Salic law; everyone, in that case, readily quitting the Roman to live under the Salic law. The clergy alone retained it,[m] as a change would be of no advantage to them. The difference of conditions and ranks consisted only in the largeness of the composition, as I shall show in another place. Now particular laws[n] allowed the clergy as favorable compositions as those of the Franks, for which reason they retained the Roman law. This law brought no hard-

h The Franks, the Visigoths, and Burgundians.

i It was finished in 438.

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

k The year 504, of the Spanish era, the "Chronicle of Isidorus."

l "Francum, aut Barbarum, aut hominem qui Salica lege vivit."—Salic law, tit. 44, sec. 1.

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

n See the Capitularies added to the Salic law in Lindembrock, at the end of that law, and the different codes of the laws of the barbarians concerning the privileges of ecclesiastics in this respect. See also the letter of Charlemagne to his son Pepin, King of Italy, in the year 807, in the edition of Baluzius, tom. i. 462, where it is said, that an ecclesiastic should receive a triple compensation: and the "Collection of the Capitularies," lib. V. art. 302, tom. i., edition of Baluzius.

ships upon them; and in other respects it was properest for them, as it was the work of Christian emperors.

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

This is still further confirmed in proportion as we proceed in our inquiry. The law of Gundebald was extremely impartial, not 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 the latter case the judges were equally divided of a side. This was necessary for particular reasons, drawn from the political regulations of those times.*p* The Roman law was continued in Burgundy, in order to regulate the disputes of Romans among themselves. The latter had no inducement to quit their own law, as in the country of the Franks; and rather as the Salic law was not established in Burgundy, as appears by the famous letter which Agobard wrote to Louis the Pious.

Agobard *q* 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;*r* this, in spite of the usages of those times, when all laws were personal, soon made the Roman law to be considered as a real and territorial law in those countries.

This appears by the edict of Charles the Bald, given at Pistes

o See that law.

p Of this I shall speak in another place, book XXX. chaps. 6, 7, 8, and 9.

q Agob. "Opera."

r See Gervaise de Tilbury, in Duchesne's "Collection," tom. iii. p. 366. Facta pactione cum Francis, quod illic Gothi patriis legibus, moribus paternis vivant. Et sic Narbonensis provincia Pippino subjicitur. And a chronicle of the year 759, produced by Catel, "Hist. of Languedoc." And the uncertain author of the "Life of Louis the Debonnaire," upon the demand made by the people of Septimania, at the assembly in Carisiaco, in Duchesne's "Collection," tom. ii. p. 316.

in the year 864, which distinguishes the countries where causes were decided by the Roman law from where it was otherwise.*s*

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

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

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

5.—*The same Subject continued*

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

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

s "In illa terra in qua judicia secundum legem Romanam terminantur, secundum ipsam legem judicetur; et in illa terra in qua," etc., art 16. See also art. 20.

t See art. 12 and 16 of the "Edict of Pistes," "in Cavilono," "in Narbona." etc.

6.—*How the Roman Law kept its Ground in the Demesne of the Lombards*

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

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

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

7.—*How the Roman Law came to be lost in Spain*

Things happened otherwise in Spain. The law of the Visigoths prevailed, and the Roman law was lost. Chaindasuinthus[v] and Recessuinthus proscribed the Roman laws,[w] and even forbade citing them in their courts of judicature. Recessuinthus was likewise author of the law which took off the pro-

[u] See what Machiavel says of the ruin of the ancient nobility of Florence.

[v] He began to reign in the year 642.

[w] We will no longer be harassed either by foreign or by the Roman laws.—Law of the Visigoths, lib. II. tit. 1, secs. 9 and 10.

hibition of marriage between the Goths and Romans.[x] It is evident that these two laws had the same spirit; this king wanted to remove the principal causes of separation which subsisted between the Goths and the Romans. Now it was thought that nothing made a wider separation than the prohibition of intermarriages, and the liberty of living under different institutions.

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

8.—*A false Capitulary*

Did not that wretched compiler Benedictus Levita attempt to transform this Visigoth establishment, which prohibited the use

[x] "Ut tam Gotho Romanam, quam Romano Gotham matrimonio liceat sociari."—Law of the Visigoths, lib. III. tit. I. chap. i.

[y] See Liv. IV. 19 and 26.

[z] The revolt of these provinces was a general defection, as appears by the sentence in the sequel of the history. Paulus and his adherents were Romans; they were even favored by the bishops. Vamba durst not put to death the rebels whom he had quelled. The author of the history calls Narbonne Gaul the nursery of treason.

[a] "Gothi, qui cladi superfuerant, ex Gallia cum uxoribus liberisque egressi, in Hispaniam ad Teudim jam palam tyrannum se receperunt."—"De Bello Gothorum," lib. I. chap. xiii.

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

9.—*In what manner the Codes of Barbarian Laws and the Capitularies came to be lost*

The Salic, the Ripuarian, Burgundian, and Visigoth laws came, by degrees, to be disused among the French in the following manner:

As fiefs became hereditary, and *arrière*-fiefs extended, many usages were introduced, to which these laws were no longer applicable. Their spirit, indeed, was continued, which was, to regulate most disputes by fines. But as the value of money was, doubtless, subject to change, the fines were also changed; and we see several charters,[c] where the lords fixed the fines, that were payable in their petty courts. Thus the spirit of the law was followed, without adhering to the law itself.

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

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

Under the first and second race, the nation was often assembled; that is, the lords and bishops; the commons were not yet thought of. In these assemblies, attempts were made to regulate the clergy, a body which formed itself, if I may so speak,

b Capitularies, lib. VI. chap. cclxix. of the year 1613, edition of Baluzius, p. 1021.

c M. de la Thaumassière has collected many of them. See, for instance, chaps lxi., lxvi., and others.

d "Missi Dominici."

under the conquerors, and established its privileges. The laws made in these assemblies are what we call the Capitularies. Hence four things ensued: the feudal laws were established and a great part of the church revenues was administered by those laws; the clergy effected a wider separation, and neglected those decrees of reformation where they themselves were not the only reformers; [e] a collection was made of the canons of councils and of the decretals of popes; [f] and these the clergy received, as coming from a purer source. Ever since the erection of the grand fiefs, our kings, as we have already observed, had no longer any deputies in the provinces to enforce the observance of their laws; and hence it is, that, under the third race, we find no more mention made of Capitularies.

10.—*The same Subject continued*

Several Capitularies were added to the law of the Lombards, as well as to the Salic and Bavarian laws. The reason of this has been a matter of inquiry; but it must be sought for in the thing itself. There were several sorts of Capitularies. Some had relation to political government, others to economical, most of them to ecclesiastical polity, and some few to civil government. Those of the last species were added to the civil law, that is, to the personal laws of each nation; for which reason it is said in the Capitularies, that there is nothing stipulated therein contrary to the Roman law.[g] 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.

e 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.

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

g See the Edict of Pistes, art. 20.

11.—*Other Causes of the Disuse of the Codes of Barbarian Laws, as well as of the Roman Law, and of the Capitularies*

When the German nations subdued the Roman Empire, they learned the use of writing; and, in imitation of the Romans, they wrote down their own usages, and digested them into codes.[h] The unhappy reigns which followed that of Charlemagne, the invasions of the Normans, and the civil wars, plunged the conquering nations again into the darkness out of which they had emerged, so that reading and writing were quite neglected. Hence it is, that in France and Germany the written laws of the barbarians, as well as the Roman law and the Capitularies fell into oblivion. The use of writing was better preserved in Italy, where reigned the popes and the Greek emperors, and where there were flourishing cities, which enjoyed almost the only commerce in those days. To this neighborhood of Italy it was owing, that the Roman law was preserved in the provinces of Gaul, formerly subject to the Goths and Burgundians; and so much the more, as this law was there a territorial institution, and a kind of privilege. It is probable, that the disuse of the Visigoth laws in Spain proceeded from the want of writing, and, by the loss of so many laws, customs were everywhere established.

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

12.—*Of local Customs. Revolution of the Laws of barbarous Nations, as well as of the Roman Law*

By several memorials it appears, that there were local customs, as early as the first and second race. We find mention made of the "custom of the place," [j] of the "ancient usage," [k]

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

[i] Of this I shall speak elsewhere (chap. 14, book XXX.).

[j] Preface to Marculfus's "Formulæ."

[k] Law of the Lombards, book II. tit. 58, sec. 3.

of "custom," [l] of "laws," [m] and of "customs." It has been the opinion of some authors, that what went by the name of customs were the laws of the barbarous nations, and what had the appellation of law were the Roman institutes. This cannot possibly be. King Pepin ordained,[n] that wherever there should happen to be no law, custom should be complied with; but that it should never be preferred to the law. Now, to pretend that the Roman law was preferred to the codes of the laws of the barbarians is subverting all memorials of antiquity, and especially those codes of barbarian laws, which constantly affirm the contrary.

So far were the laws of the barbarous nations from being those customs, that it was these very laws, as personal institutions, which introduced them. The Salic law, for instance, was a personal law; but generally, or almost generally, in places inhabited by the Salian Franks, this Salic law, how personal soever, became, in respect to those Salian Franks, a territorial institution, and was personal only in regard to those Franks who lived elsewhere. Now if several Burgundians, Alemans, or even Romans should happen to have frequent disputes, in a place where the Salic law was territorial, they must have been determined by the laws of those people; and a great number of decisions agreeable to some of those laws must have introduced new customs into the country. This explains the constitution of Pepin. It was natural that those customs should affect even the Franks who lived on the spot, in cases not decided by the Salic law; but it was not natural that they should prevail over the Salic law itself.

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

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

[l] Law of the Lombards, book II. tit. 41, sec. 6.

[m] "Life of St. Leger."

[n] Law of the Lombards, book II. tit. 41, sec. 6.

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

What has been said sufficiently explains the manner in which the Roman law began so very early to become territorial, as may be seen in the edict of Pistes; and how the Gothic law continued still in force, as appears by the synod of Troyes above mentioned.[o] The Roman had become the general personal law, and the Gothic the particular personal law; consequently the Roman law was territorial. But how came it, some will ask, that the personal laws of the barbarians fell everywhere into disuse, while the Roman law was continued as a territorial institution in the Visigoth and Burgundian provinces? I answer, that even the Roman law had very nearly the same fate as the other personal institutions; otherwise we would still have the Theodosian code in those provinces where the Roman law was territorial, whereas we have the Institutes of Justinian. Those provinces retained scarcely anything more than the name of the country under the Roman, or written law, than the natural affection which people have for their own institutions, especially when they consider them as privileges, and a few regulations of the Roman law which were not yet forgotten. This was, however, sufficient to produce such an effect, that when Justinian's compilation appeared, it was received in the provinces of the Gothic and Burgundian demesne as a written law, whereas it was admitted only as written reason in the ancient demesne of the Franks.

13.—*Difference between the Salic law, or that of the Salian Franks, and that of the Ripuarian Franks and other barbarous Nations.*

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

o See chap. v.

The law of the Ripuarian Franks had quite a different spirit;[p] it was contended 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[q] increased in proportion to the importance of the affair; sometimes it amounted to seventy-two.[r] The laws of the Alemans, Bavarians, Thuringians, Frisians, Saxons, Lombards, and Burgundians were formed on the same plan as those of the Ripuarians.

I observed, that the Salic law did not allow of negative proofs. There was one case, however, in which they were allowed:[s] but even then they were not admitted alone, and without the concurrence of positive proofs. The plaintiff caused witnesses to be heard,[t] in order to ground his action, the defendant produced also witnesses on his side, and the judge was to come at the truth by comparing those testimonies.[u] This practice was vastly different from that of the Ripuarian, and other barbarous laws, where it was customary for the party accused to clear himself by swearing he was not guilty, and by making his relatives also swear that he had told the truth. These laws could be suitable only to a people remarkable for their natural simplicity and candor; we shall see presently that the legislators were obliged to take proper methods to prevent their being abused.

14.—*Another Difference*

The Salic law did not admit of the trial by combat; though it had been received by the laws of the Ripuarians[v] and of almost all the barbarous nations.[w] 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

p This relates to what Tacitus says, that the Germans had general and particular customs.

q Law of the Ripuarians, tits. 6, 7, 8, and others.

r Ibid. tits. 11, 12, and 17.

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

t See 76th tit. of the "Pactus legis Salicæ."

u According to the practice now followed in England.

v Tit. 32; tit. 57, sec. 2; tit. 59, sec. 4.

w See the following note.