it by an oath, what other remedy was left to a military man,[x] who saw himself upon the point of being confounded, than to demand satisfaction for the injury done to him: and even for the attempt of perjury? The Salic law, which did not allow the custom of negative proofs, neither admitted nor had any need of the trial by combat; but the laws of the Ripuarians[y] and of the other barbarous nations[z] who had adopted the practice of negative proofs, were obliged to establish the trial by combat.

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

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

15.—*A Reflection*

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

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

y See that law.

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

a In the law of the Burgundians, tit. 8, secs. 1 and 2, on criminal affairs; and tit. 45, which extends also to civil affairs. See also the law of the Thuringians, tit. 1, sec. 31, tit. 7, sec. 6, and tit. 8; and the law of the Alemans, tit. 89; the law of the Bavarians, tit. 8, chap. ii. sec. 6, and chap. iii. sec. 1, and tit. 9, chap. iv. sec. 4; the law of the Frisians, tit. 2, sec. 3, and tit. 14, sec. 4; the law of the Lombards, book I. tit. 32, sec. 3, and tit. 35, sec. 1, and book II. tit. 35, sec. 2.

b See chap. xviii., towards the end.

16.—*Of the Ordeal or Trial by boiling Water, established by the Salic Law*

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

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

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

17.—*Particular Notions of our Ancestors*

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

The Germans, who had never been subdued,[f] enjoyed an excessive independence. Different families waged war with each other[g] to obtain satisfaction for murders, robberies, or affronts. This custom was moderated by subjecting these hostilities to rules; it was ordained that they should be no longer committed

c As also some other laws of the barbarians. *d* Tit. 55. *e* Ibid. tit. 56.

f This appears by what Tacitus says, "Omnibus idem habitus."

g Velleius Paterculus, lib. II. chap. cxviii., says that the Germans decided all their disputes by the sword.

but by the direction and under the eye of the magistrate.[h] 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 looked out for a prisoner who was to fight with one of their people, and by the event they judged of the success of the war. A nation who believed that public quarrels could be determined by a single combat might very well think that it was proper also for deciding the disputes of individuals.

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

The trial by combat had some reason for it, founded on experience. In a military nation, cowardice supposes other vices; it is an argument of a person's having deviated from the principles of his education, of his being insensible of 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 co-operate with strength, or the strength necessary to concur with courage; for as they set a value upon honor they are practised in matters 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 fraud, artifice, and cunning, that is from cowardice.

With regard to the trial by fire, after the party accused had

h See the codes of barbarian laws, and, in respect to less ancient times, Beaumanoir on the "Customs of Beauvoisis."

i Law of the Burgundians, chap. xlv

j See the works of Agobard.

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

By the law of the Thuringians[l] 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[m] only when a person had no witnesses to appear in justification. Now a woman that could not prevail upon any one relative to defend her cause, or a man that could not produce one single witness to attest his honesty were, from those very circumstances, sufficiently convicted.

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

18.—*In what manner the Custom of judicial Combats gained Ground*

From Agobard's letter to Louis the Debonnaire it might be inferred that the custom of judicial combats was not established among the Franks; for having represented to that prince the abuses of the law of Gundebald, he desires that private disputes should be decided in Burgundy by the law of the Franks.[n]

k See Beaumanoir on the "Custom of Beauvoisis," chap. lxi. See also the law of the Angli, chap. xiv., where the trial by boiling water is only a subsidiary proof.

l Tit. 14.

m Chap. xxxi. sec. 5.

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

But as it is well known from other quarters that the trial by combat prevailed at that time in France, this has been the cause of some perplexity. However, the difficulty may be solved by what I have said; the law of the Salian Franks did not allow of this kind of trial and that of the Ripuarian Franks did.[o]

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

It is the law of the Lombards that furnishes us with this proof. "There has been long since a detestable custom introduced," says the preamble to the constitution of Otho II:[p] "this is, that if the title to an estate was said to be false, the person who claimed under that title made oath upon the Gospel that it was genuine; and without any preceding judgment he took possession of the estate; so that they who would perjure themselves were sure of gaining their point." The Emperor Otho I having caused himself to be crowned at Rome[q] at the very time that a Council was there under Pope John XII all the lords of Italy represented to that prince the necessity of enacting a law to reform this horrible abuse.[r] The Pope and the Emperor were of opinion that the affair should be referred to the Council which was to be shortly held at Ravenna.[s] There the lords made the same demands, and redoubled their complaints; but the affair was put off once more under pretence of the absence of particular persons. When Otho II and Conrad, King of Burgundy, arrived in Italy,[t] they had a conference at Verona[u] with the Italian lords;[v] and at their repeated solicitations, the Emperor, with their unanimous consent, made a law, that whenever there happened any disputes about inheritances while one of the parties insisted upon the legality of his title and the other maintained its being false, the affair should be decided by combat; that the same rule should be observed in contests relating to fiefs; and that the clergy should be subject to the

o See this law, tit. 59, sec. 4, and tit. 67, sec. 5.

p Law of the Lombards, book II. tit. 55, chap. 34.

q The year 962.

r "Ab Italiæ proceribus est proclamatum, ut imperator sanctus mutatâ lege, facinus indignum destrueret."—Law of the Lombards, book II. tit. 55, chap. xxxiv.

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

t Otho II's uncle, son to Rodolphus, and King of Transjurian Burgundy.

u In the year 988.

v "Cum in hoc ab omnibus imperiales aures pulsarentur."—Law of the Lombards, book II. tit. 55, chap. xxxiv.

same law, but should fight by their champions. Here we see, that the nobility insisted on the trial by combat, because of the inconvenience of the proof introduced by the clergy, that notwithstanding the 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. And this was effected at a time when the power of the emperors was great, and that of the popes inconsiderable; at a time when the Othos came to revive the dignity of the empire in Italy.

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

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

Before that time I find that, in the general assemblies, held by Charlemagne, the nation represented to him,[x] that in the actual state of things it was extremely difficult for either the accuser or the accused to avoid perjuring themselves, and that for this

w In the law of the Lombards, book II. tit. 55, sec. 33. In the copy which Muratori made use of it is attributed to the Emperor Guido.

x Ibid., sec. 23.

reason it was much better to revive the judicial combat, which was accordingly done.

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

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

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

I would not have it inferred that it was the clergy who introduced the custom so much complained of by the nobility. This custom was derived from the spirit of the barbarian laws, and from the establishment of negative proofs. But a practice that contributed to the impunity of such a number of criminals, having given some people reason to think it was proper to make use of the sanctity of the churches in order to strike terror into the guilty, and to intimidate perjurers, the clergy maintained this

y Cassiod, iii., let. 23 and 24.

z "In palatio quoque, Bera comes Barcinonensis, cum impeteretur a quodam vocato Sunila, et infidelitatis argueretur, cum eodem secundum legem propriam, utpote quia uterque Gothus erat, equestri prælio congressus est et victus."—The anonymous author of the "Life of Louis the Debonnaire."

* See in the law of the Lombards, book I. tit. 4 and tit. 9, sec. 23, and book II. tit. 35, secs. 4 and 5, and tit. 55, secs. 1, 2, and 3. The regulations of Rotharis; and in sec. 15, that of Luitprandus.

a Ibid. book II. tit. 55, sec. 23.

b The judicial oaths were made at that time in the churches, and during the first race of our kings there was a chapel set apart in the royal palace for the affairs that were to be thus decided. See the formulas of Marculfus, book I. chap. xxxviii. The laws of the Ripuarians, tit. 59, sec. 4, tit. 65, sec. 5. The history of Gregory of Tours; and the Capitulary of the year 803, added to the Salic law.

usage and the practice which attended it: for in other respects they were absolutely averse to negative proofs. We find in Beaumanoir[c] that this kind of proof was never allowed in ecclesiastic courts, which contributed greatly without doubt to its suppression, and to weaken in this respect the regulation of the codes of the barbarian laws.

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

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

Charlemagne ordained, that if any difference should arise between his children, it should be terminated by the judgment of the cross. Louis the Debonnaire,[d] limited this judgment to ecclesiastic affairs; his son Lotharius abolished it in all cases; nay, he suppressed even the trial by cold water.[e]

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,[f] but I affirm that they were very seldom practised. Beaumanoir,[g] who lived at the time of St. Louis and a little after, enumerating the different kinds of trial, mentions that of judicial combat, but not a word of the others.

19.—*A new Reason of the Disuse of the Salic and Roman Laws, as also of the Capitularies*

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

As the Salic laws did not admit of this custom, they became in some measure useless, and fell into oblivion. In like manner the

c Chap. xxxix. p. 212.

d We find his Constitutions inserted in the law of the Lombards and at the end of the Salic laws.

e In a constitution inserted in the law of the Lombards, book II. tit. 55, sec. 31.

f In the year 1200.

g "Custom of Beauvoisis," chap xxxix.

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

Such a nation had no need of written laws; hence its written laws 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.[h]

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

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

[h] Chap. lxi. pp. 309, 310.
[i] Charter of Louis the Fat, in the year 1145, in the Collection of Ordinances.
[j] Ibid.
[k] Charter of Louis the Young, in 1168, in the Collection of Ordinances.
[l] See Beaumanoir, chap. lxiii. p. 325.
[m] See the " Custom of Beauvoisis," chap. xxviii. p. 203.

that the custom of judiciary combat must have prevailed at that time to a wonderful extent.

20.—*Origin of the Point of Honor*

We meet with inexplicable enigmas in the codes of laws of the barbarians. The law of the Frisians [n] 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.[o] At present, a single blow is equivalent to a hundred thousand.

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

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

Upon a man's declaring that he would fight [t] 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; [u] villeins fought on foot and with bastons.[v] Hence it

[n] " Additio sapientium Willemari," tit. 5.
[o] Book I. tit. 6, sec. 3.
[p] Book II. tit. 5, sec. 23.
[q] Added to the Salic law in 819.
[r] See Beaumanoir, lxiv. p. 323.
[s] Ibid. p. 329
[t] See Beaumanoir, iii. pp. 25 and 329.
[u] See in regard to the arms of the combatants, Beaumanoir, chap. lxi. p. 308, and chap. lxiv. p. 328.
[v] Ibid. chap. lxiv. p. 328. See also the Charters of St. Aubin of Anjou, quoted by Galland, p. 263.

followed that the baston was looked upon as the instrument of insults and affronts,[w] because to strike a man with it was treating him like a villein.

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

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

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

21.—*A new Reflection upon the Point of Honor among the Germans*

"It was a great infamy," says Tacitus,[a] "among the Germans for a person to leave his buckler behind him in battle; for which reason many after a misfortune of this kind have destroyed themselves." Thus the ancient Salic law [b] 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,[c] 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 mili-

w Among the Romans, it was not infamous to be beaten with a stick, "lege ictus fustium. De iis qui notantur infamia."

x They had only the baston and buckler.—Beaumanoir, chap. lxiv. p. 328.

y Book I. tit. 6, sec. 1.

z Book I. tit. 6, sec. 2.

a "De Moribus Germanorum."

b In the "Pactus legis Salicæ."

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

tary discipline, it is manifest that such an alteration was due to a change of weapons, and that from this change of weapons a great number of usages derive their origin.

22.—*Of the Manners in relation to judicial Combats*

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

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

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

Hence arose the marvellous system of chivalry. The minds of all sorts of people quickly imbibed these extravagant ideas. In romances are found knights-errant, necromancers, and fairies, winged or intelligent horses, invisible or invulnerable men, magicians who concerned themselves in the birth and education of great personages, enchanted and disenchanted palaces, a new world in the midst of the old one, the usual course of nature being left only to the lower class of mankind.

Knights-errant ever in armor, in a part of the world abounding in castles, forts, and robbers, placed all their glory in punishing injustice, and in protecting weakness. Hence our romances

d Book II. tit. 55, sec. 11.

are full of gallantry founded on the idea of love joined to that of strength and protection.

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

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

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

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

23.—*Of the Code of Laws on judicial Combats*

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

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

24.—*Rules established in the judicial Combat*

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

[e] See the Greek romances of the Middle Ages.

[f] In the year 1283.

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

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

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

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.[l]

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

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

[g] Beaumanoir, chap. vi. pp. 40 and 41.
[h] Ibid. chap. lxiv. p. 328.
[i] Ibid. chap. lxiv. p. 330.
[j] Ibid.
[k] Ibid.
[l] The great vassals had particular privileges.
[m] Beaumanoir, chap. lxiv. p. 330, says, he lost his jurisdiction: these words in the authors of those days have not a general signification, but a signification limited to the affair in question. Défontaines, chap. xxi. art. 29.
[n] This custom, which we meet with in the Capitularies, was still subsisting at the time of Beaumanoir. See chap. lxi. p. 315.

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.[o]

The person overcome in battle did not always lose the point contested; if, for instance, they fought on an imparlance, he lost only the imparlance.[p]

25.—*Of the Bounds prescribed to the Custom of judicial Combats*

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

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

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

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

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

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

o Beaumanoir, chap. lxiv. p. 330.
p Ibid. chap. lxi. p. 309.
q Ibid. p. 308; chap. xliii. p. 239.
r Ibid., chap. lxi. p. 314. See also Défontaines, chap. xxii. art 24.
s Beaumanoir, chap. lxiii. p. 322.
t Ibid.
u Ibid.

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

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

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

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

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

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

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

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

The cases in which a bondman was allowed to fight are, I think, as follows. He was allowed to fight another bondman; to fight a freed-man, or even a gentleman, in case he were challenged; but if he himself challenged, the other might refuse to

v Beaumanoir, chap. lxiii. p. 323.
w Ibid. p. 324.
x Ibid. p. 325.
y Ibid.
z Ibid. p. 323. (See also what I have said in book XVIII.)