written law, that is, when they followed the new laws of St. Louis, they gave costs; but that in the ordinary practice, 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;[z] when by the frequent usage of those appeals from one court to another, the parties were continually removed from the place of their residence; when the new method of procedure multiplied and prolonged the suits; when the art of eluding the very justest demands became refined; when the parties at law knew how to fly only in order to be followed; when plaints were ruinous and defence easy; when the arguments were lost in whole volumes of words and writings; when the kingdom was filled with limbs of the law, who were strangers to justice; when knavery found encouragement at the very place where it did not find protection; then it was necessary to deter litigious people by the fear of costs. They were obliged to pay costs for the judgment and for the means they had employed to elude it. Charles the Fair, made a general ordinance on that subject.[a]

36.—*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 had the care of criminal prosecutions. And, indeed, the issue of all causes being reduced to the reparation of injuries, every prosecution was in some measure civil, and might be managed by anyone. On the other hand, the Roman law had popular forms for the prosecution of crimes which were inconsistent with the functions of a public prosecutor.

The custom of judicial combats was no less opposite to this idea; for who is it that would choose to be a public prosecutor and to make himself every man's champion against all the world?

I find in the collection of formulas, inserted by Muratori in the laws of the Lombards, that under our princes of the second race there was an advocate for the public prosecutor.[b] But who-

[z] At present when they are so inclined to appeal, says Boutillier.—"Somme Rurale," book I. tit. 3, p. 16.

[a] In the year 1324.

[b] "Advocatus de parte publicâ."

ever pleases to read the entire collection of these formulas will find that there was a total difference between such officers and those we now call the public prosecutor, our attorneys-general, our king's solicitors, or our solicitors for the nobility. The former were rather agents to the public for the management of political and domestic affairs, than for the civil. And, indeed, we did not find in those formulas that they were intrusted with criminal prosecutions, or with causes relating to minors, to churches, or to the condition of anyone.

I said that the establishment of a public prosecutor was repugnant to the usage of judicial combats. I find, notwithstanding, in one of those formulas, an advocate for the public prosecutor, who had the liberty to fight. Muratori has placed it just after the constitution of Henry I, for which it was made.[c] In this constitution it is said, "That if any man kills his father, his brother, or any of his other relatives, he shall lose their succession, which shall pass to the other relatives, and his own property shall go to the exchequer." Now it was in suing for the estate which had devolved to the exchequer, that the advocate for the public prosecutor, by whom its rights were defended, had the privilege of fighting: this case fell within the general rule.

We see in those formulas the advocate for the public prosecutor proceeding against a person who had taken a robber, but had not brought him before the count;[d] against another who had raised an insurrection or tumult against the count;[e] against another who had saved a man's life whom the count had ordered to be put to death;[f] against the advocate of some churches, whom the count had commanded to bring a robber before him, but had not obeyed;[g] against another who had revealed the king's secret to strangers;[h] against another, who with open violence had attacked the emperor's commissary;[i] 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;[j] against another, who refused to accept of the prince's coin;[k] in fine, this advocate sued for things, which by the law were adjudged to the exchequer.[l]

[c] See this constitution and this formula, in the second volume of the "Historians of Italy," p. 175.

[d] Collection of Muratori, p. 104, on the 88th law of Charlemagne, book I. tit. 26, sec. 48.

[e] Another formula, ibid. p. 7.

[f] Ibid. p. 104.

[g] Collection of Muratori, p. 95.

[h] Ibid. p. 88.

[i] Ibid. p. 98.

[j] Ibid. p. 132.

[k] Ibid.

[l] Ibid. p. 137.

But in criminal causes, we never meet with the advocate for the public prosecutor; not even where duels are used;[m] not even in the case of incendiaries;[n] not even when the judge is killed on his bench;[o] not even in causes relating to the conditions of persons,[p] to liberty and slavery.[q]

These formulas are made, not only for the laws of the Lombards, but likewise for the capitularies added to them, so that we have no reason to doubt of their giving us the practice observed with regard to this subject under our princes of the second race.

It is obvious, that these advocates for a public prosecutor must have ended with our second race of kings, in the same manner as the king's commissioners in the provinces; because there was no longer a general law nor general exchequer, and because there were no longer any counts in the provinces to hold the assizes, and, of course, there were no more of those officers, whose principal function was to support the authority of the counts.

As the usage of combats became more frequent under the third race, it did not allow of any such thing as a public prosecutor. Hence Boutillier, in his "Somme Rurale," speaking of the officers of justice, takes notice only of the bailiffs, the peers, and sergeants. See the Institutions,[r] and Beaumanoir,[s] concerning the manner in which prosecutions were managed in those days.

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

37.—*In what Manner the Institutions of St. Louis 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. Louis's Institutions was never designed as a law for the whole kingdom, though such a

m Collection of Muratori, p. 147.
n Ibid.
o Ibid. p. 168.
p Ibid. p. 134.
q Ibid. p. 107.
r Book I. chap. i.; and book II. chaps. xi. and xiii.
s Cap. i. and lxi.

t See these laws in the "Lives of the Saints," of the month of June, tom. iii. p. 26.
u "Qui continue nostram sacram curiam sequi teneatur, instituatur qui facta et causas in ipsa curia promoveat atque prosequatur."

design is mentioned in the preface. The compilation is a general code, which determines all points relating to civil affairs, to the disposal of property by will or otherwise, the dowries and privileges of women, and emoluments and privileges of fiefs, with the affairs in relation to the police, etc. Now, to give a general body of civil laws, at a time when each city, town, or village, had its customs, was attempting to subvert in one moment all the particular laws then in force in every part of the kingdom. To reduce all the particular customs to a general one would be a very inconsiderate thing, even at present when our princes find everywhere the most passive obedience. But if it be true that we ought not to change when the inconveniences are equal to the advantages, much less should we change when the advantages are small and the inconveniences immense. Now, if we attentively consider the situation which the kingdom was in at that time, when every lord was puffed up with the notion of his sovereignty and power, we shall find that to attempt a general alteration of the received laws and customs must be a thing that could never enter into the heads of those who were then in the administration.

What I have been saying proves likewise that this code of institutions was not confirmed in parliament by the barons and magistrates of the kingdom, as is mentioned in a manuscript of the town-hall of Amiens, quoted by M. Ducange.[v] We find in other manuscripts that this code was given by St. Louis in the year 1270, before he set out for Tunis. But this fact is not truer than the other; for St. Louis set out upon that expedition in 1269, as M. Ducange observes: whence he concludes, that this code might have been published in his absence. But this I say is impossible. How can St. Louis be imagined to have pitched upon the time of his absence for transacting an affair which would have been a sowing of troubles, and might have produced not only changes, but revolutions? An enterprise of that kind had need, more than any other, of being closely pursued, and could not be the work of a feeble regency, composed moreover of lords, whose interest it was that it should not succeed. These were Matthew, Abbot of St. Denis, Simon of Clermont, Count of Nesle, and, in case of death, Philip, Bishop of Evreux, and John, Count of Ponthieu. We have seen above *w*

v Preface to the "Institutions."

w Chap. xxix.

that the Count of Ponthieu opposed the execution of a new judiciary order in his lordship.

Thirdly, I affirm it to be very probable, that the code now extant is quite a different thing from St. Louis's Institutions. It cites the Institutions, therefore it is a comment upon the Institutions, and not the Institutions themselves. Besides, Beaumanoir, who frequently makes mention of St. Louis's Institutions, quotes only some particular laws of that prince, and not this compilation. Défontaines,[x] who wrote in that prince's reign, makes mention of the first two times that his Institutions on judicial proceedings were put in execution, as of a thing long since elapsed. The Institutions of St. Louis were prior, therefore, to the compilation I am now speaking of, which from their rigor, and their adopting the erroneous prefaces inserted by some ignorant persons in that work, could not have been published before the last year of St. Louis or even not till after his death.

38.—*The same Subject continued*

What is this compilation then which goes at present under the name of St. Louis's Institutions? What is this obscure, confused, and ambiguous code, where the French law is continually mixed with the Roman, where a legislator speaks and yet we see a civilian, where we find a complete digest of all cases and points of the civil law? To understand this thoroughly, we must transfer ourselves in imagination to those times.

St. Louis, seeing the abuses in the jurisprudence of his time, endeavored to give the people a dislike to it. With this view he made several regulations for the court of his demesnes, and for those of his barons. And such was his success that Beaumanoir, who wrote a little after the death of that prince, informs us [y] that the manner of trying causes which had been established by St. Louis obtained in a great number of the courts of the barons.

Thus this prince attained his end, though his regulations for the courts of the lords were not designed as a general law for the kingdom, but as a model which everyone might follow, and would even find his advantage in it. He removed the bad practice by showing them a better. When it appeared that his courts, and those of some lords, had chosen a form of proceeding more

[x] See above, chap. xxix.

[y] Chap. lxi. p. 309.

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 allure when it is rash to constrain, to win by pleasing means when it is improper to exert authority, shows the man of abilities. Reason has a natural, and even a tyrannical sway; it meets with resistance, but this very resistance constitutes its triumph; for after a short struggle it commands an entire submission.

St. Louis, in order to give a distaste of the French jurisprudence, caused the books of the Roman law to be translated; by which means they were made known to the lawyers of those times. Défontaines, who is the oldest law writer we have, made great use of those Roman laws.[z] His work is, in some measure, a result from the ancient French jurisprudence, of the laws or Institutions of St. Louis, and of the Roman law. Beaumanoir made very little use of the latter; but he reconciled the ancient French laws to the regulations of St. Louis.

I have a notion, therefore, that the law book, known by the name of the Institutions, was compiled by some bailiffs, with the same design as that of the authors of those two works, and especially of Défontaines. The title of this work mentions that it is written according to the usage of Paris, Orleans, and the court of barony; and the preamble says that it treats of the usage of the whole kingdom, of Anjou, and of the court of barony. It is plain that this work was made for Paris, Orleans, and Anjou, as the works of Beaumanoir and Défontaines were framed for the counties of Clermont and Vermandois; and as it appears from Beaumanoir that divers laws of St. Louis had been received in the courts of barony, the compiler was in the right to say that his work related also to those courts.[a]

It is manifest that the person who composed this work compiled the customs of the country together with the laws and Institutions of St. Louis. This is a very valuable work, because it contains the ancient customs of Anjou, the Institutions of St.

[z] He says of himself, in his prologue, "Nus luy en prit onques mais cette chose dont j'ay."

[a] Nothing so vague as the title and prologue. At first they are the customs of Paris, Orleans, and the court of barony; then they are the customs of all the lay courts of the kingdom, and of the provostships of France; at length, they are the customs of the whole kingdom, Anjou, and the court of barony.

Louis, as they were then in use; and, in fine, the whole practice of the ancient French law.

The difference between this work, and those of Défontaines and Beaumanoir is, its speaking in imperative terms as a legislator; and this might be right, since it was a medley of written customs and laws.

There was an intrinsic defect in this compilation; it formed an amphibious code, in which the French and Roman laws were mixed, and where things were joined that were in no relation, but often contradictory to each other.

I am not ignorant that the French courts of vassals or peers, the judgments without power of appealing to another tribunal, the manner of pronouncing sentence by these words, "I condemn" or "I absolve," [b] 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 emperor, in order to regulate, limit, correct, and extend the French jurisprudence.

39.—*The same Subject continued*

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

The Institutions of St. Louis did not, therefore, so much change the French jurisprudence, as they afforded the means of changing it; they opened new tribunals, or rather ways to come at them. And when once the public had easy access to the superior courts, the judgments which before constituted only the usages of a particular lordship formed a universal digest. By means of the Institutions, they had obtained general decisions, which were entirely wanting in the kingdom; when the building was finished, they let the scaffold fall to the ground.

Thus the Institutions produced effects which could hardly be expected from a masterpiece of legislation. To prepare great

[b] "Institutions," book II. chap. xv.

changes whole ages are sometimes requisite; the events ripen, and the revolutions follow.

The Parliament judged in the last resort of almost all the affairs of the kingdom. Before,[c] it took cognizance only of disputes between the dukes, counts, barons, bishops, abbots, or between the king and his vassals,[d] rather in the relation they bore to the political than to the civil order. They were soon obliged to render it permanent, whereas it used to be held only a few times in a year: and, in fine, a great number were created, in order to be sufficient for the decision of all manner of causes.

No sooner had the Parliament become a fixed body, than they began to compile its decrees. John de Monluc, in the reign of Philip the Fair, made a collection which at present is known by the name of the Olim registers.[e]

40.—*In what Manner the judiciary Forms were borrowed from the Decretals*

But how comes it, some will ask, that when the Institutions were laid aside the judicial forms of the canon law should be preferred to those of the Roman? It was because they had constantly before their eyes the ecclesiastic courts, which followed the forms of the canon law, and they knew of no court that followed those of the Roman law? Besides, the limits of the spiritual and temporal jurisdiction were at that time very little understood; there were people who sued indifferently [f] and causes that were tried indifferently, in either court.[g] It seems [h] as if the temporal jurisdiction reserved no other cases exclusively to itself than the judgment of feudal matters,[i] and of such crimes committed by laymen as did not relate to religion. For [j] if, on account of conventions and contracts, they had occasion to sue in a temporal court, the parties might of their own accord proceed before the spiritual tribunals; and as the latter had not a power to oblige the temporal court to execute the sentence, they com-

[c] See Du Tillet on the court of peers. See also Laroche, Flavin, book I chap. iii., Budeus and Paulus Æmilius.

[d] Other causes were decided by the ordinary tribunals.

[e] See the President Henault's excellent abridgment of the "History of France" in the year 1313.

[f] Beaumanoir, chap. xi. p. 58.

[g] Widows, croises, etc.—Beaumanois, chap. xi. p 58.

[h] See the whole eleventh chapter of Beaumanoir.

[i] The spiritual tribunals had even laid hold of these, under the pretext of the oath, as may be seen by the famous Concordat between Philip Augustus, the clergy, and the barons, which is to be found in the Ordinances of Laurière.

[j] Beaumanoir, chap. xi. p. 60.

manded submission by means of excommunications. Under those circumstances, when they wanted to change the course of proceedings in the temporal court, they took that of the spiritual tribunals, because they knew it; but did not meddle with that of the Roman law, by reason they were strangers to it: for in point of practice people know only what is really practised.

41.—*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 daily a greater extent. But as the ecclesiastic courts weakened those of the lords, and contributed thereby to give strength to the royal jurisdiction, the latter gradually checked the jurisdiction of the clergy. The Parliament, which in its form of proceedings had adopted whatever was good and useful in the spiritual courts, soon perceived nothing else but the abuses which had crept into those tribunals; and as the royal jurisdiction gained ground every day, it grew every day more capable of correcting those abuses. And, indeed, they were intolerable; without enumerating them I shall refer the reader to Beaumanoir, to Boutillier, and to the ordinances of our kings.[k] I shall mention only two, in which the public interest was more directly concerned. These abuses we know by the decrees that reformed them; they had been introduced in the times of the darkest ignorance, and upon the breaking out of the first gleam of light, they vanished. From the silence of the clergy it may be presumed that they forwarded this reformation: which, considering the nature of the human mind, deserves commendation. Every man that died without bequeathing a part of his estate to the church, which was called dying without confession, was deprived of the sacrament and of Christian burial. If he died intestate, his relatives were obliged to prevail upon the bishop that he would, jointly with them, name proper arbiters to determine what sum the deceased ought to have given, in case he had made a will. People could not lie together the first night of their nuptials, or even the two following nights without having previously purchased

k See Boutillier, "Somme Rurale," tit. 9, what persons are incapable of suing in a temporal court; and Beaumanoir, chap. xi. p. 56, and the regulations of Philip Augustus upon this subject; as also the regulation between Philip Augustus, the clergy, and the barons.

leave; these, indeed, were the best three nights to choose; for as to the others, they were not worth much. All this was redressed by the Parliament: we find in the glossary of the French law,[l] by Ragneau, the decree which it published against the Bishop of Amiens.[m]

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 enroachments as an evident mark of their corruption. Through a fatality inseparable from human nature, moderation in great men is very rare: and as it is always much easier to push on force in the direction in which it moves than to stop its movement, so in the superior class of the people, it is less difficult, perhaps, to find men extremely virtuous, than extremely prudent.

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

42.—*The Revival of the Roman Law, and the Result thereof. Change of 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 *Novellæ*. 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;[n] because Justinian's laws were not made till after the settlement of the barbarians in Gaul.[o] This law met with some opposition: but it stood its ground notwithstanding the excommunications of the popes,

l In the words "testamentary executors."

m The 19th of March, 1409.

n 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.

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

who supported their own canons.*p* St. Louis endeavored to bring it into repute by the translations of Justinian's works, made according to his orders, which are still in manuscript in our libraries; and I have already observed, that they made great use of them in compiling the Institutions. Philip the Fair ordered the laws of Justinian to be taught only as written reason in those provinces of France that were governed by customs; and they were adopted as a law in those provinces where the Roman law had been received.*q*

I have already noticed that the manner of proceeding by judicial combat required very little knowledge in the judges; disputes were decided according to the usage of each place, and to a few simple customs received by tradition. In Beaumanoir's time there were two different ways of administering justice;*r* in some places they tried by peers,*s* in others by bailiffs: in following the former way, the peers gave judgment according to the practice of their court; in the latter, it was the *prud'hommes*, or old men, who pointed out this same practice to the bailiffs.*t* This whole proceeding required neither learning, capacity, nor study. But when the dark code of the Institutions made its appearance; when the Roman law was translated and taught in public schools; when a certain art of procedure and jurisprudence began to be formed; when practitioners and civilians were seen to rise, the peers and the *prud'hommes* were no longer capable of judging: the peers began to withdraw from the lords' tribunals; and the lords were very little inclined to assemble them; especially as the new form of trial, instead of being a solemn proceeding, agreeable to the nobility and interesting to a warlike people, had become a course of pleading which they neither understood, nor cared to learn. The custom of trying by peers began to be less used;*u* that of trying by bailiffs to be more so; the bailiffs did not give judgment themselves,*v* they summed up the evidence

p Decretals, book V. tit. "de privilegiis," capite "super specula."

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

r "Customs of Beauvoisis," chap. i., of the office of bailiffs.

s Among the common people the burghers were tried by burghers, as the feudatory tenants were tried by one another. See La Thaumassière, chap. xix.

t Thus all requests began with these words: "My lord judge, it is customary that in your court," etc., as appears from the formula quoted by Boutillier, "Somme Rurale," book IV. tit. xxi.

u The change was insensible; we meet with trials by peers, even in Boutillier's time, who lived in the year 1402, which is the date of his will. He gives this formula, book I. tit. 21, "Sire Juge, en ma justice haute, moyenne et basse, qui j'ai en tel lieu, cour, plaids, baillis, hommes, feodaux et sergens." Yet nothing but feodal matters were tried any longer by the peers. Ibid. book I. tit. i. p. 16.

v As appears by the formula of the

and pronounced the judgment of the *prud'hommes;* 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 usage hitherto constantly observed in the French monarchy, that judgment should not be pronounced by a single person, as may be seen in the Salic laws, the Capitularies, and in the first law-writers under the third race.*w* The contrary abuse which obtains only in local jurisdictions has been moderated, and in some measure redressed, by introducing in many places a judge's deputy, whom he consults, and who represents the ancient *prud'hommes* by the obligation the judge is under of taking two graduates in cases that deserve a corporal punishment; and, in fine, it has become of no effect by the extreme facility of appeals.

43.—*The same Subject continued*

Thus there was no law to prohibit the lords from holding their courts themselves; none to abolish the functions of their peers; none to ordain the creation of bailiffs; none to give them the power of judging. All this was effected insensibly, and by the very necessity of the thing. The knowledge of the Roman law, the decrees of the courts, the new digest of the customs, required a study of which the nobility and illiterate people were incapable.

The only ordinance we have upon this subject is that which obliged the lords to choose their bailiffs from among the laity.*x* It is a mistake to look upon this as a law of their creation; for it says no such thing. Besides, the intention of the legislator is determined by the reasons assigned in the ordinance: "to the end that the bailiffs may be punished for their prevarications it is

letters which their lord used to give them, quoted by Boutillier, "Somme Rurale," book I. tit. xiv., which is proved likewise by Beaumanoir, "Custom of Beauvoisis," chapter i., of the bailiffs; they only directed the proceedings. "The bailiff is obliged in the presence of the peers to take down the words of those who plead, and to ask the parties whether they are willing to have judgment given according to the reasons alleged; and if they say, yes, my lord; the bailiff ought to oblige the peers to give judgment." See also the "Institutions" of St. Louis, book I. chap. cv., and book II. chap. xv. "Li Juge si ne doit pas faire le jugement."

w Beaumanoir, chap. lxvii. p. 336, and chap. lxi. pp. 315 and 316. The "Institutions," book II. chap. xv.

x It was published in the year 1287.

necessary they be taken from the order of the laity." [y] The immunities of the clergy in those days are very well known.

We must not imagine that the privileges which the nobility formerly enjoyed, and of which they are now divested, were taken from them as usurpations; no, many of those privileges were lost through neglect, and others were given up, because as various changes had been introduced in the course of so many ages they were inconsistent with those changes.

44.—*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.

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; [z] public registers were established which ascertained most facts, as nobility, age, legitimacy, and marriage. Writing is a witness very hard to corrupt; the customs were therefore reduced to writing. All this is very reasonable; it is much easier to go and see in the baptismal register, whether Peter is the son of Paul than to prove this fact by a tedious inquest. When there are a number of usages in a country it is much easier to write them all down in a code, than to oblige individuals to prove every usage. At length the famous ordinance was made, which prohibited the admitting of the proof by witnesses for a debt exceeding an hundred livres, except there was the beginning of a proof in writing.

45.—*Of the Customs of France*

France, as we have already observed, was governed by written customs, and the particular usages of each lordship constituted the civil law. Every lordship had its civil law, according to Beaumanoir,[a] and so particular a law, that this author, who is

[y] "Ut si ibi delinquant, superiores sui possint animadvertere in eosdem."

[z] See in what manner age and parentage were proved.—"Institutions," book I. chaps. lxxi. and lxxii.

[a] Prologue to the "Custom of Beauvoisis."

looked upon as a luminary, and a very great luminary of those times, says he does not believe that throughout the whole kingdom there were two lordships entirely governed by the same law.

This prodigious diversity had a twofold origin. With regard to the first, the reader may recollect what has been already said concerning it in the chapter of local customs: [b] and as to the second we meet with it in the different events of legal duels, it being natural that a continual series of fortuitous cases must have been productive of new usages.

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

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

2. At the beginning of the third race, almost all the common people were bondmen; but there were several reasons which afterwards determined the kings and lords to enfranchise them.

The lords by enfranchising their bondmen gave them property; it was necessary therefore to give them civil laws, in order to regulate the disposal of that property. But by enfranchising their bondmen, they likewise deprived themselves of their property; there was a necessity, therefore, of regulating the rights which they reserved to themselves, as an equivalent for that property. Both these things were regulated by the charters of enfranchisement; those charters formed a part of our customs, and this part was reduced to writing. [c]

3. Under the reign of St. Louis, and of the succeeding princes, some able practitioners, such as Défontaines, Beaumanoir, and

[b] Chap. xii. [c] See the "Collection of Ordinances," by Laurière.

others, committed the customs of their bailiwicks to writing. Their design was rather to give the course of judicial proceedings, than the usages of their time in respect to the disposal of property. But the whole is there, and though these particular authors have no authority but what they derive from the truth and notoriety of the things they speak of, yet there is no manner of doubt but that they contributed greatly to the restoration of our ancient French jurisprudence. Such was in those days our common law.

We have come now to the grand epoch. Charles VII and his successors caused the different local customs throughout the kingdom to be reduced to writing, and prescribed set forms to be observed to their digesting. Now, as this digesting was made through all the provinces, and as people came from each lordship to declare in the general assembly of the province the written or unwritten usages of each place, endeavors were made to render the customs more general, as much as possible, without injuring the interests of individuals, which were carefully preserved.[d] Thus our customs were characterized in a threefold manner; they were committed to writing, they were made more general, and they received the stamp of the royal authority.

Many of these customs having been digested anew, several changes were made either in suppressing whatever was incompatible with the actual practice of the law, or in adding several things drawn from this practice.

Though the common law is considered among us as in some measure opposite to the Roman, insomuch that these two laws divide the different territories, it is, notwithstanding, true that several regulations of the Roman law entered into our customs, especially when they made the new digests, at a time not very distant from ours, when this law was the principal study of those who were designed for civil employments, at a time when it was not usual for people to boast of not knowing what it was their duty to know, and of knowing what they ought not to know, at a time when a quickness of understanding was made more subservient to learning than pretending to a profession, and when a continual pursuit of amusements was not even the characteristic of women.

[d] This was observed at the digesting of the customs of Berry and of Paris. See La Thaumassière, chap. iii.

I should have been more diffuse at the end of this book, and, entering into the several details, should have traced all the insensible changes, which from the opening of appeals have formed the great *corpus* of our French jurisprudence. But this would have been ingrafting one large work upon another. I am like that antiquarian [e] who set out from his own country, arrived in Egypt, cast an eye on the Pyramids and returned home.

[e] In the "Spectator."