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XXVIII.17 Our fathers' manner of thinking

- The Spirit of Law - Book XXVIII. On the origin and transformations of the civil laws among the French -

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It will come as a surprise that our fathers thus made the honor, the fortune and the life of citizens depend on things that had less to do with reason than with chance, and that they constantly made use of proofs that proved nothing, and which had no connection either with innocence or with the crime.

The Germans who had never been subjugated [1] enjoyed extreme independence. Families warred with each other over murders, thefts, and affronts. [2] This custom was modified by subjecting these wars to rules : they were waged by the order, and before the eyes, [3] of the magistrate, which was preferable to a general licence to inflict harm on each other.

As today the Turks in their civil wars regard the first victory as a judgment of God who decides, so the German peoples in their individual conflicts took the outcome of combat as a decree of Providence, always careful to punish the criminal or usurper.

Tacitus says that among the Germans, when a nation wished to enter into war with another, it tried to take some prisoner who could duel with one of his own, and that the result of the war was judged by the outcome of that duel. Peoples who believed that single combat would settle public affairs could well think that it could equally settle private disputes.

Gundebald, king of Burgundy, was of all kings the one who most authorized the practice of combat. [4] This prince justifies his law within the law itself : "It is so that our subjects will no longer take an oath over obscure facts, and will not perjure themselves over certain facts." Thus, while ecclesiastics were declaring the law authorizing combat impious, [5] the king of the Burgundians was considering the law establishing the oath as sacrilegious.

There was for proof by singular combat some reason based on experience. In a uniquely warlike nation, cowardice supposes other vices : it proves that one has not imbibed the education he has received, and has not been jealous of honor nor guided by the principles which have governed other men ; it shows that he does not fear their disdain, and cares little about their esteem. Any man of good breeding will not ordinarily be wanting in that the skill that must join with strength, nor the strength that must reinforce courage, because, holding honor high, he will have been exercised his whole life in things without which it cannot be obtained. Moreover, in a warlike nation, where strength, courage, and prowess are in honor, truly loathsome crimes are those which come from treachery, artifice, and cunning, in other words cowardice.

As to proof by fire, after the accused had put his hand onto a hot iron or into boiling water, it was wrapped in a bag which was sealed ; if three days later there was no sign of a burn, he was declared innocent. Who does not see that among a people accustomed to handling weapons, rough and callous skin should not be so marked by a hot iron or boiling water as to be visible three days later ? And if it could be seen, it was a sign that the man who underwent the ordeal was effeminate. Our peasants with their callous hands handle hot iron at will ; and as for women, the hands of those who worked could stand a hot iron. Ladies did not want for champions to defend them, [6] and in a nation where there was no luxury, there was scarcely any intermediate state.

By the law of the Thuringians, a woman accused of adultery was sentenced to the ordeal by boiling water only when no champion came forward for her [7] ; and the law of the Ripuarians allows this ordeal only when one can find no witnesses to justify oneself. [8] But a woman whom none of her family wanted to defend, a man who could allege no testimony to his probity, were by that token already convicted.

So I say that in the circumstances of the times when proof by combat and proof by hot iron and boiling water were in use, there was such harmony between these laws and their ways that the laws did not so much produce injustices as

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they were unjust, that the effects were more innocent than the causes, that they clashed more with equity than they violated its rights, and that they were more unreasonable than tyrannical.

[1] This appears in what Tacitus says : *omnibus idem habitus*. [*De moribus Germanorum*, ch. iv, paraphrase]

[2] Velleius Paterculus, book II, ch. cxviii, says that the Germans decided all disputes by combat.

[3] See the law codes of the barbarians, and for more modern times Beaumanoir on the custom of Beauvaisis.

[4] *Law of the Burgundians*, ch. xlv.

[5] See the works of Agobard.

[6] See Beaumanoir, custom of Beauvaisis, ch. lxi. See also the law of the Angles, ch. xiv, where the proof by boiling water is only subsidiary.

[7] Title 14.

[8] Chapter xxxi, §5.