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XXVIII.18 How proof by combat was extended

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

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It could be concluded from Agobard's letter to Louis the Debonaire that proof by combat was not practiced among the Franks, since after pointing out to that prince the abuses of the law of Gundebald, he asks that disputes be judged in Burgundy by the law of the Franks. [1] But as we know from elsewhere that in that time judicial combat was the practice in France, we have been in a quandary. It is explained by what I have said : the law of the Salian Franks did not allow that proof, and the law of the Ripuarian Franks did. [2]

But despite the clamors of the ecclesiastics, the practice of judicial combat spread every day in France, and I am going to prove presently that it was they themselves who in large part who made it happen.

It is the law of the Lombards that furnishes us this proof. "a detestable custom had long since been introduced" (says the preamble of the constitution of Otho II), "which is that if the charter of some estate was attacked as a forgery, he who was presenting it swore on the Gospels that it was authentic, and with no preceding judgment he became owner of the estate : thus perjurers were sure to acquire." [3] When the emperor Otho I had himself crowned in Rome, [4] with Pope John XII holding a council, all the lords of Italy exclaimed that the emperor must make a law to correct this unworthy abuse. [5] The pope and the emperor judged that the matter had to be deferred to the council that was to be held soon thereafter in Ravenna. [6] There the lords made the same demands, and redoubled their outcries ; but pretexting the absence of some persons, they once more deferred the matter. When Otho II and Conrad king of Burgundy [7] arrived in Italy, they held a conference in Verona [8] with the lords of Italy, [9] and upon their repeated solicitations, the emperor with unanimous consent issued a law stating that when there was some contestation over inheritances, and one of the parties intended to invoke a charter, and the other maintained that it was false, the matter would be decided by combat ; that the same rule would be observed in disputes pertaining to fiefs ; and that the churches would be subject to the same law, and would combat through their champions. We see that the nobility demanded proof by combat because of the inconvenience of the proof introduced in the churches ; that despite the outcries of this nobility, despite abuse that itself cried out, and despite the authority of Othon, who arrived in Italy to speak and act as master, the clergy held firm in two councils ; that the combination of the nobility and the princes having forced the ecclesiastics to yield, the practice of judicial combat had to be regarded as a privilege of nobility, as a rampart against injustice, and an assurance of its property, and that from that moment this practice must have been extended. And this took place in a time when the emperors were large and the popes small ; in a time when the Othos came to restore the dignity of the empire in Italy.

I will make an observation which will confirm what I have said above : that the establishment of proofs by negation brought with it the jurisprudence of combat. The abuse which they were protesting before the Othos was that a man whose charter was objected to as false would defend himself by a proof of negation, declaring on the Gospels that it was not. What did they do to correct the abuse of a law that had been truncated ? They restored the practice of combat.

I have hastened to speak of the constitution of Otho II in order to give a clear notion of the quarrels of those times between the clergy and the laity. There had previously been a constitution of Lotharius I [10] which upon the same protests and the same quarrels, intending to assure the possession of property, had prescribed that the notary would swear that his charter was not false ; and that if he was dead, the witnesses who had signed it would be made to swear. But the malady still remained ; they had to resort to the remedy I have just described.

I find that before that time, in the general assemblies held by Charlemagne, the nation argued before him that in the state of things it was very hard to avoid having the accuser or the accused perjure himself, and that it would be better to restore judicial combat, which he did. [11]

The practice of judicial combat spread to the Burgundians, and that of the oath was limited. Among the Goths, the laws of Chaindasuinthus and of Recessuinthus left no trace of singular combat : the ecclesiastics inhibited this

custom. Subsequently, these peoples put an end to the violence done to them in this respect. [12]

The early kings of the Lombards restrained the practice of combat. [13] Charlemagne, [14] Louis the Debonaire, and the Othos made various general constitutions which we find inserted into the laws of the Lombards and appended to the Salic laws, which extended the duel, first in criminal matters and then in civil matters. They were unsure how to proceed. Proof by negation under oath had disadvantages, proof by combat as well ; they changed as one set of disadvantages or the other seemed to prevail.

On the one hand, the ecclesiastics enjoyed seeing that recourse was had in all secular matters to the churches and the altars [15] ; and on the other, a proud nobility liked to maintain its rights by the sword.

I am not saying that it was the clergy that had introduced the practice which the nobility was protesting. That custom derived from the spirit of the barbarian laws and from the establishment of proofs by negation. But a procedure that could procure impunity for so many criminals having provoked the thought that they should use the sanctity of the churches to strike the guilty with terror and perjurers with awe, the ecclesiastics supported this process and the practice to which it was tied ; for otherwise they were opposed to proofs by negation. We see in Beaumanoir that these proofs were never accepted in ecclesiastical courts, [16] which no doubt contributed greatly to their decline and to weakening the provision of the barbarian codes of laws in this respect.

This will also make evident the link between the practice of proofs by negation and that of judicial combat which I have discussed so extensively. Lay courts allowed both, and both were rejected by clerical courts.

In its choice of proof by combat, the nation followed its warlike genius : for while they were establishing combat as a judgment of God, they were abolishing proofs by the cross, cold water, and boiling water, which also had been regarded as judgments of God.

Charlemagne ordered that should any disputes arise among his children, it should be ended by the judgment of the cross. Louis the Debonaire [17] limited this judgment to ecclesiastical matters ; his son Lotharius abolished it in all cases ; he likewise abolished proof by cold water. [18]

I am not saying that in a time when there were so few universally accepted practices, these proofs were not reproduced in some churches, all the more so that one charter of Philip Augustus mentions them [19] ; but I am saying that they were little used. Beaumanoir, who lived in the time of St. Louis and a little after, enumerating the different kinds of proofs, mentions proofs of judicial combat and nothing of the others. [20]

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[1] *Si placeret Domino nostro ut eos transferret ad Legem Francorum*.

[2] See this law, tit. 59, §4, and tit. 67, §5.

[3] *Leges Langobardoroum*, book II, tit. 55, ch. xxxiv.

[4] In the year 962.

[5] *Ab Italiæ Proceribus est proclamatum, ut Imperator Sanctus, mutatâ lege, facinus indignum destrueret*. *Leges Langobardoroum*, book II, tit. 55, ch. xxxiv.

[6] It was held in the year 967 in the presence of Pope Jean XIII and the emperor Otho I.

[7] Uncle of Otho II, son of Rodolphe, and king of Transjurane Burgundy.

[8] *Cum in hoc ab omnibus imperiales aures pulsarentur*, *Leges Langobardoroum*, book II, tit. 55, ch. xxxiv.

[9] In the year 988.

[10] In *Leges Langobardoroum*, book II, tit. 55, §33. In the copy which Mr. Muratori used, it is attributed to the emperor Guy.

[11] In *Leges Langobardoroum*, book II, tit. 55, §23.

[12] *In Palatio quoque Bera Comes Barcinonensis, cum impeteretur a quodam Sunila and infidelitatis argueretur, cum eodem secundum legem propriam, utpote quia uterque Gothus erat, equestri prælio congressus est and victus*. I no longer know from where I have taken this passage.

[13] See *Leges Langobardoroum*, book I, tit. 4, and tit. 9, §23, and book II, tit. 35, §4-5 and tit. 55, §1, 2, and 3, the statutes of Rotharis ; and §15, that of Luitprand.

[14] *Ibid*., book II, tit. 55, §23.

[15] The judicial oath was at that time taken in the churches, and in the first dynasty there was a chapel in the palace of the kings dedicated to matters being judged there. See formulas of Marculfus, book I, ch. xxxviii, the laws of the Ripuarians, tit. 59, §4, tit. 65, §5, the Hist. of Gregory of Tours, the capitulary of the year 803 appended to the Salic law.

[16] Chapter xxxix, p. 212.

[17] His constitutions are to be found inserted into *Leges Langobardoroum* and after the Salic laws.

[18] In his constitution inserted into *Leges Langobardoroum*, book II, tit. 55, §31.

[19] In the year 1200.

[20] Custom of Beauvaisis, ch. xxxix.