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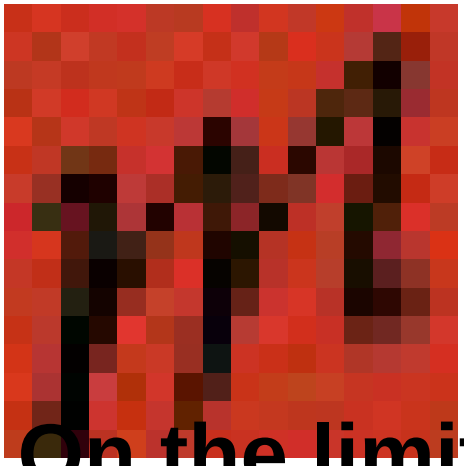

# XXVIII.25 On the limits placed on the practice of judiciary combat

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

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When the gages of battle had been received over a civil matter of little importance, the lord obliged the parties to take them back.

If a fact was notorious, [1] for exemple if a man had been murdered in the market place, neither proof by witnesses nor proof by combat was prescribed : the judge pronounced based on common knowledge.

When in the lord's court the same judgment had often been rendered, and thus the procedure was known, [2] the lord would refuse combat to the parties so the customs would not be changed by different outcomes of the combats.

One could demand combat only for oneself [3] or for someone of one's lineage, or for one's liege lord.

When an accused person had been absolved, [4] another relative could not demand combat ; otherwise disputes would have no end.

If a man whose death the family wished to avenge should chance to reappear, the whole combat was dropped ; the same was true if, through a notarial absence, it could not be carried out. [5]

If a man who had been killed had, before his death, exculpated the person who was accused, and had named another, they did not proceed to combat [6] ; but if he had named no one, his declaration was regarded simply as a pardon for his death ; the prosecution was continued, and even among gentlemen they could wage war.

When there was a war, and one of the family gave or received the gages of battle, the right of war ceased ; it was assumed that the parties meant to follow the ordinary course of justice ; and were there one who continued the war, he would have been sentenced to repair all the losses.

Thus the practice of judiciary combat had the advantage that it could change a general quarrel into an individual quarrel, restore their strength to the law courts, and restore to the civil state those who were now governed only by the law of nations.

As there are an infinite number of wise things which are pursued in a very foolish manner, there are also follies which are conducted in a very wise manner.

When a man challenged for a crime showed visibly that it was the challenger himself who had committed it, there were no more gages of battle [7] : for there is no guilty party who would not have preferred a doubtful combat to certain punishment.

There was no combat in matters that were decided by arbiters or by the ecclesiastical courts [8] ; nor was there any in disputes over women's dowries.

"One cannot fight with a woman," says Beaumanoir. If a woman challenged someone without naming her champion, gages of battle were not accepted. Even then the woman had to be authorized by her baron, [9] that is, her husband, to challenge ; but without this authority she could be challenged.

If the challenger [10] or the challenged was under fifteen years of age, there was no combat. It could, however, be

prescribed in affairs concerning pupils, when the tutor or trustee was willing to run the risks of this procedure.

It seems to me that these are the cases where a serf was allowed to fight : he fought against another serf ; he fought against a free person, and even against gentleman, if he was challenged ; but if he challenged him, the other could refuse the combat, [11] and even the serf's lord had the right to withdraw him from the court. The serf could, by a charter from the lord, [12] or by custom, fight against all free persons ; and the Church [13] claimed this same right for serfs as a mark [14] of respect for itself.

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[1] *Ibid*., p. 308. *Ibid*., ch. xliii, p. 239.

[2] Beaumanoir, ch. lxi, p. 314. See also Défontaines, ch. xxii, art. 24.

[3] Beaumanoir, ch. lxiii, p. 322.

[4] *Ibid*.

[5] *Ibid*.

[6] *Ibid*., p. 323.

[7] Beaumanoir, ch. lxiii, p. 324.

[8] Beaumanoir, ch. lxiii, p. 325.

[9] *Ibid*., p. 325.

[10] *Ibid*., p. 323. See also what I have said in book XVIII.

[11] Beaumanoir, ch. lxiii, p. 322.

[12] Défontaines, ch. xxii, art. 7.

[13] *Habeant bellandi and testificandi licentiam*, Charter of Louis the Fat, year 1118.

[14] *Ibidem*.