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XXVIII.27 On judicial combat between a party and one of the lord's peers. Appeal of false verdict

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

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The nature of the decision by combat being to end the matter forever, and being incompatible [1] with a new trial and new prosecutions, the appeal, such as it is established by Roman laws and Canon laws, which is to say to a superior court, for review of the judgment of another court, was unknown in France.

This form of proceeding was foreign to a warlike nation solely governed by the point of honor, and still following the same spirit, it took against judges the paths it could have used against the parties. [2]

The appeal, in this nation, was a challenge to armed combat, which had to end in blood, and not the invitation to a quarrel by pen that we came to know only later.

Thus does St. Louis say in his *Establishments* that the challenge entails rebellion and iniquity. [3] Thus does Beaumanoir tell us that if a man wished to complain of some attack committed against him by his lord, he had to declare to him that he was abandoning his fief, after which he challenged him before his overlord and proffered the gages of battle. [4] Likewise, the lord renounced his homage if he challenged his man before the count.

To challenge his lord for false judgment was to say that his judgment had been falsely and maliciously rendered ; now to advance such words against one's lord was to commit a sort of crime of rebellion.

Thus, instead of challenging for false judgment the lord who set up and ran the tribunal, one challenged the peers who made up the tribunal itself ; one avoided thereby the crime of rebellion, offending only one's peers, to whom one could always answer for the affront.

To belie the judgment of peers was greatly to expose oneself. [5] If you waited until the verdict was made and announced, you were obliged to fight them all when they offered to make good their verdict. [6] If you challenged before all the judges had entered their opinion, you had to fight all those who had agreed on the same opinion. [7] To avoid this danger, you entreated the lord to order each peer to state his opinion out loud ; and when the first had pronounced, and the second was about to do likewise, you told him that he was a liar, wicked and libellous, and then it was only against him that you had to fight. [8]

Défontaines [9] thought that before belying [10] you should let three judges pronounce, and he does not say that you had to fight all three of them, and even less that there were cases where you would have to fight all those who had declared for their opinion. These differences are owing to the fact that in those times there were virtually no practices that were precisely the same. Beaumanoir was accounting for what took place in the county of Clermont, Défontaines for what was practiced in Vermandois.

When one of the peers or a vassal had declared that he would maintain the verdict, the judge had gages of battle proffered, and besides required security from the challenger that he would maintain his challenge. [11] But the peer who was challenged gave no security because he was the lord's man, and had to defend the challenge or pay the lord a fine of sixty livres.

If the man who was challenging did not prove that the verdict was wrong, he paid the lord a fine of sixty livres, [12] the same fine to the peer he had challenged, [13] and as much again to each of those who had openly approved the verdict.

When a man strongly suspected of a crime that deserved death had been taken and condemned, he could not challenge for false judgment, [14] for he would always have challenged, either to prolong his life, or to make peace.

If someone said that the verdict was false and wrong, and did not offer to make it so, in other words to fight, he was sentenced to a fine of ten sous if he was a gentleman, and five if he was a serf, for the malicious words he had uttered. [15]

The judges or peers who had been defeated were to lose neither life nor members [16] ; but he who challenged them was punished with death when the matter was capital. [17]

This manner of challenging vassals for false verdict was to avoid challenging the lord himself. But if the lord had no peers, or not enough, [18] he could at his expense borrow [19] peers from his overlord ; but these peers were not obliged to judge if they did not wish to ; they could declare that they had come only to offer their counsel, and in this particular case, the lord judging and pronouncing the verdict himself, if he was challenged for false judgment it was up to him to answer the challenge. [20]

If the lord was so poor that he was not in a position to take peers from his overlord, or if he neglected to ask him for some, or the latter refused to give him any, the lord not being able to judge alone, and no one being obliged to plead before a tribunal which cannot render a judgment, the matter was taken to the overlord's court. [21]

I think this was one of the main causes of the separation of justice from the fief, whence was formed the rule of French jurisconsults : *The fief is one thing, and justice is another*. For there being an infinite number of vassals who had no men under them, they were not in a position to hold their court ; all contentions were taken to the court of their overlord ; they lost the right to dispense justice, because they had neither the power nor the will to claim it.

All the judges who had participated in the judgment had to be present when it was pronounced, so they could in turn say *aye* to the person who, hoping to belie, asked them whether they followed [22] ; for, says Défontaines, "it is a matter of courtesy and loyalty, and there is no fleeing nor deferring." [23] I think it is from this manner of thinking that we got the practice which is still followed today in England, that all the jurors be in agreement in order to condemn to death.

They therefore had to declare for the majority opinion ; and if it was divided, the verdict was pronounced, in case of crime, for the accused ; in case of debts, for the debtor ; in case of inheritances, for the defendant.

A peer, says Défontaines, [24] could not say that he would not judge if there were only four of them, [25] or if they were not all present, or if the wisest of them were not ; it is as if he had said, amidst the struggle, that he would not come to his lord's assistance because he had only part of his men with him. But it was for the lord to do honor to his court, and take his most valiant and wisest men. I cite this to show the vassals' duty to fight and judge ; and this duty was even such that to judge was to fight.

A lord who was pleading in his court against his vassal, and who lost there, could challenge one of his men for false judgment. [26] But given the respect which the vassal owed to his lord for fealty pledged, and the benevolence which the lord owed to his vassal for fealty received, a distinction was made : either the lord would say in general that the verdict was false and wrong, [27] or he imputed personal malpractice to his man. [28] In the first case he was offending his own court, and in a way himself, and there could be no gages of battle ; there were some in the second case, because he was attacking the honor of his vassal ; and whichever of the two was defeated lost his life and property to maintain the public peace.

This distinction, necessary in this particular case, was extended. Beaumanoir says that when the man who challenged for false judgment attacked one of the men with personal imputations, battle would ensue ; but if he was only attacking the verdict, whichever of the peers was challenged was free to have the matter judged by battle or by

law. [29] But as the spirit that reigned in the time of Beaumanoir was to restrain the practice of judicial combat, and as the freedom accorded the challenged peer to defend the verdict by combat or not is equally contrary to the notions of honor established in those times and to his obligations towards his lord to defend his court, I think this distinction of Beaumanoir's was a new jurisprudence among the French.

I am not saying that all the challenges of false judgment were decided by battle ; this appeal was like all the others. The reader may remember the exceptions I cited in chapter xxv. Here, it was up to the suzerain tribunal to see whether gages of battle should be dropped or not.

One could not belie verdicts handed down in the king's court, for there being no one who was equal to the king, there was no one who could challenge him ; and the king having no superior, there was no one who could appeal from his court.

This fundamental law, necessary as political law, further diminished as civil law the abuses of the judicial practice of those times. When a lord feared lest his court be belied, or saw someone coming forth to belie it, if it was in the cause of justice that it not be belied, he could request men from the king's court, whose verdict could not be belied [30] ; and king Philip, says Défontaines, sent his entire council to judge a case in the court of the abbé de Corbie. [31]

But if the lord could not obtain judges from the king, he could put his court within that of the king, if he held it directly from him ; and if there were intermediate lords, he would contact his overlord, going from lord to lord as far as the king.

Thus, although in those days they did not have the practice nor even the notion of today's appeals, they had recourse to the king, who was always the source from which all rivers flowed and the sea to which they returned.

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[1] "Car en la Cour où l'on va par la raison de l'appel pour les gages maintenir, se bataille est faite, la querelle est venue à fin, si que il n'y a métier de plus d'apiaux." (Beaumanoir, ch. ii, p. 22).

[2] *Ibid*., ch. lxi, p. 312, and ch. lxvii, p. 338.

[3] Book II, ch. xv.

[4] Beaumanoir, ch. lxi, p. 310-311, and ch. lxvii, p. 337.

[5] Beaumanoir, ch. lxi, p. 313.

[6] *Ibid*., p. 314.

[7] Who had agreed on the judgment.

[8] Beaumanoir, ch. lxi, p. 314.

[9] Ch. xxii, art. 1, 10, and 11, he says only that each was paid a fine.

[10] Appeal on false judgment.

[11] Beaumanoir, ch. lxi, p. 314.

[12] Beaumanoir, *ibid*., Défontaines, ch. xxii, art. 9.

[13] Défontaines, *ibid*.

[14] Beaumanoir, ch. lxi, p. 316, and Défontaines, ch. xxii, art. 21.

[15] Beaumanoir, ch. lxi, p. 314.

[16] Défontaines, ch. xxii, art. 7.

[17] See Défontaines, chap. xxi, art. 11-12, and following, who distinguishes the cases where the impeacher lost his life, the thing contested, or only the preliminary judgment.

[18] Beaumanoir, ch. lxii, p. 322, Défontaines, ch. xxii, art. 3.

[19] The count was not obliged to lend any (Beaumanoir, ch. lxvii, p. 337).

[20] None may dispense judgment in his court, says Beaumanoir, ch. lxvii, p. 336-337.

[21] *Ibid*., ch. lxii, p. 322.

[22] Défontaines, ch. xxi, art. 27-28.

[23] *Ibid*., art. 28.

[24] Ch. xxi, art. 37.

[25] At least this number were required (Défontaines, chap. xxi, art. 36).

[26] See Beaumanoir, ch. lxvi, p. 337.

[27] Which judgment is false and wrong (*ibid*., ch. lxvii, p. 337).

[28] "Vous avez fait ce jugement faux and mauvais comme mauvais que vous êtes, ou par lovier ou par pramesse" (Beaumanoir, ch. lxvii., p. 337).

[29] *Ibid*., p. 337-338.

[30] Défontaines, ch. xxii, art. 14.

[31] *Ibid*.