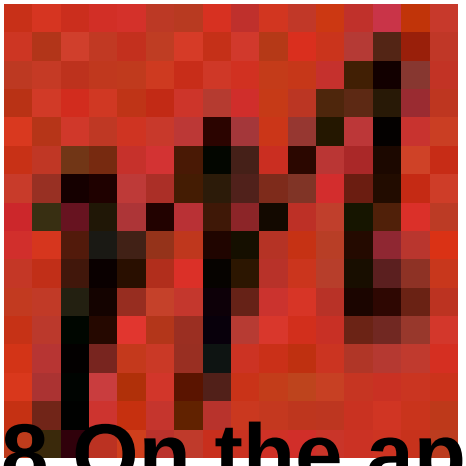
http://montesquieu.ens-lyon.fr/spip.php?article3093



XXVIII.28 On the appeal for default of justice

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

Date de mise en ligne : vendredi 7 septembre 2018

Copyright © Montesquieu - Tous droits réservés

One appealed on grounds of default of justice when, in the court of a lord, the dispensing of justice to the litigants was postponed, avoided, or refused.

In the second dynasty, although the count had several officers under him, their person was subordinate, but their jurisdiction was not. These officers, in their open courts, assizes, or placita, judged in the last resort as the count himself ; the whole difference lay in the sharing of the jurisdiction : for example, the count could sentence to death, decide on freedom or the restitution of property, [1] and the centenier could not.

For the same reason, there were major causes that were reserved to the king [2] : they were those that directly concerned the political order. Such were the discussions that were between bishops, abbés, counts and other great lords, which the kings judged with the great vassals. [3]

What some authors have said, that one appealed from the count to the king's envoy, or *missus domenicus*, is unfounded. The count and the *missus* had equal jurisdiction, independent of each other [4] ; the whole difference was that the *missus* held his placita four months of the year, and the count the eight others. [5]

If someone sentenced in an assize [6] asked there to be retried, and again lost, he paid a fine of fifteen sous, or received fifteen blows at the hands of the judges who had decided the case. [7]

When the counts or the king's envoys did not feel strong enough to bring the great lords to reason, they would have them give bail that they would come before the king's tribunal, to try the matter, and not to retry it. [8] I find in the capitulary of Metz the appeal for false judgment to the established court of the king, and all other sorts of appeals banned and punished. [9]

If they did not acquiesce to the judgment of the échevins, [10] and if they made no protest, they were imprisoned until they had acquiesced ; and if they protested, they were conducted under secure guard before the king, and the matter was argued at his court.

It could hardly be a matter of appeal for default of justice. For far from it being the custom in those times of objecting that the counts and others who were entitled to hold assizes did not hold their court faithfully, they objected on the contrary that they were too faithful [11] ; and there are ordinances everywhere forbidding the counts and other officers of justice whatsoever from holding more than three assizes per year. The problem was less to correct their negligence than to halt their activity.

But when a countless number of petty seigniories came into being, and different degrees of vassalage were instituted, the negligence of certain vassals in holding their court gave birth to these sorts of appeals, [12] all the more so that considerable fines flowed from them to the overlord.

With the practice of judicial combat extending farther and farther, there were places, cases, and times when it was difficult to assemble the peers, and where consequently they neglected to dispense justice. The appeal for default of justice was introduced, and these sorts of appeals have often been notable points in our history, because most of the wars of those times were imputed to the violation of political law, as the cause or pretext of our wars today is usually the violation of the law of nations.

Beaumanoir says that in the case of default of justice, there was never a battle [13] : here are the reasons. The lord himself could not be challenged to combat because of the respect due to his person ; the lord's peers could not be

Copyright © Montesquieu

challenged, because the thing was clear, and you could just count the days of the summonses or other delays : there was no verdict and one could belie only a verdict ; finally, the crime of the peers offended the lord as well as the plaintiff, and it was contrary to order that there should be a combat between the lord and his peers.

But since before the suzerain tribunal the default was proven by witnesses, it was possible to challenge the witnesses to combat, and thereby offend either the lord or his tribunal. [14]

In cases where the default was due to the vassals or peers of the lord who had deferred the dispensing of justice or avoided holding the trial after the deadlines were past, it was the lord's peers who were challenged before the overlord for default of justice ; and if they were defeated, they paid a fine to their lord. [15] He could do nothing to help his men ; on the contrary, he would seize their fief until each of them had paid him a fine of sixty livres.

2nd. When the default was due to the lord, which happened when there were not enough men in his court to hold a trial, or when he had not assembled his men or put someone in his place to assemble them, one petitioned for default before the overlord ; but because of the respect due to the lord, it was the plaintiff who was summoned, and not the lord. [16]

The lord would demand his court before the suzerain tribunal, and if he won the appeal, the case was sent back to him, and he was paid a fine of sixty livres [17] ; but if the default was proven, the penalty against him was to lose the judgment of the thing contested [18] ; the substance was judged in the suzerain tribunal ; indeed, that was the whole reason for petitioning for the default.

3rd. If one pleaded against one's lord in his court, [19] which happened only for matters that concerned the fief, after allowing all the delays to pass, one subpoenaed the lord himself before good persons, and had him subpoenaed by the sovereign, which required permission. [20] The summons was not made by peers, because peers could not summon their lord ; but they could summon [21] for their lord.

Sometimes [22] the appeal for default of justice was followed by an appeal of false judgment when the lord, despite the default, had had the verdict pronounced.

The vassal who wrongly challenged his lord for default of justice was sentenced to pay him a fine at his pleasure. [23]

The people of Ghent had challenged the count of Flanders before the king for default of justice, because he had put off holding the trial in his court. [24] As it happened, he had taken fewer delays than the custom of the country allowed. The delegates from Ghent were sent back to him ; he had as much as sixty thousand livres' worth of their properties seized. They returned to the king's court to have this fine reduced ; it was decided that the count could take this fine, and even more, if he wished. Beaumanoir had attended these hearings.

4th. In the disputes which the lord could have against the vassal for reason of his body or honor, or the property which did not belong to the fief, there was no possibility of appeal for default of justice, since they did not judge at the lord's court but at the court of the man from whom he held it, men according to Défontaines having no right to make a judgement on the body of their lord. [25]

I have striven to give a clear notion of these things, which in the writers of those times are so confused and so obscure that in truth to extract them from the chaos they are in is to discover them.

Copyright © Montesquieu

[1] Capitulary III of the year 812, art. 3, ed. Baluze, p. 497, and of Charles the Bald, appended to the *Leges Langobardoroum*, book II, art. 3.

[2] Capitulary III of the year 812, art. 2, ed. Baluze, p. 497.

[3] *Cum fidelibus* : capitulary of Louis the Debonaire, Baluze ed., p. 667.

[4] See capitulary of Charles the Bald appended to *Leges Langobardoroum*, book II, art. 3.

[5] Capitulary III of the year 812, art. 8.

[6] *Placitum*.

[7] Capitulary appended to *Leges Langobardoroum*, book II, tit. 59.

[8] That appears from the formulas, charters and capitularies.

[9] Of the year 757, ed. Baluze, p. 180, art. 9 and 10, and the *Synode apud Vernas*, of year 755, art. 29, ed. Baluze, p. 175. These two capitularies were made under king Pépin.

[10] Officiers under count Scabini.

[11] See *Leges Langobardoroum*, book II, tit. 52, art. 22.

[12] Appeals for default of justice are seen as early as the time of Philip Augustus.

[13] Ch. lxi, p. 315.

[14] Beaumanoir, ch. lxi, p. 315.

[15] Défontaines, ch. xxi, art. 24.

[16] Défontaines, ch. xxi, art. 32.

[17] Beaumanoir, ch. lxi, p. 312.

[18] Défontaines, ch. xxi, art. 29.

[19] This was the case of the famous quarrel between Sir de Nelle and Jeanne, countess of Flanders, in the reign of Louis VIII. He sued her in her court in Flanders ; he summoned her to hold a trial in forty days, and then appealed for default of justice to the king's court. She replied that she would have him judged by the peers in Flanders. The king's court pronounced that he would not be sent back, and that the countess would be summoned.

[20] Défontaines, ch. xxi, art. 34.

[21] *Ibid*., art. 9.

[22] Beaumanoir, ch. lxi, p. 311.

[23] *Ibid*., p. 312. But he who was neither a man nor a tenant of the lord paid him only a fine of 60 livres (*ibid*.).

Copyright © Montesquieu

[24] *Ibid*., p. 318.

[25] Ch. xxi, art. 35.

Copyright © Montesquieu