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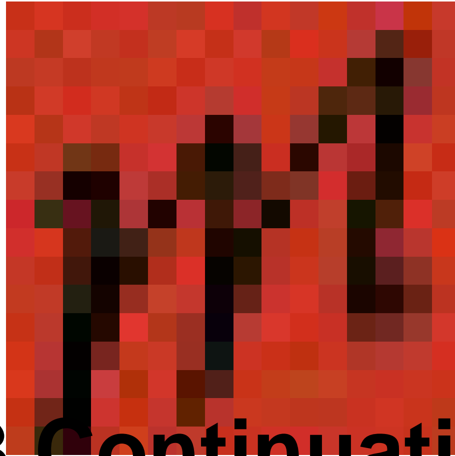

XXVIII.33 Continuation of the same subject

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

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In the practice of judicial combat, the appellant who had challenged one of the judges could lose his suit by combat, and could not win it. [1] Indeed, the party which had a judgement in his favor was not to be deprived of it by the action of another. Therefore, the appellant who had won had to fight again against his adversary, not to see whether the judgment was right or wrong - that judgment was no longer at issue, since the combat had annulled it - but to decide whether the demand was legitimate or not, and it was over this new point that the combat was held. Whence, no doubt, our manner of pronouncing decrees : *The court annuls the appeal ; the court annuls the appeal and that which was appealed.* Indeed, when he who had appealed for false judgment was defeated, the appeal was annulled ; when he had won, the judgment was annulled and even the appeal : they had to proceed to a new judgment.

This is so true that when the matter was being judged by inquiry, this manner of pronouncing did not apply : witness what M. de la Roche-Flavinsays, that the chamber of inquiry could not make use of this form in the early times of its creation. [2]

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[1] Défontaines, ch. xxi, art. 14.

[2] *Of the parlements of France*, book I, ch. xvi.

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