

<http://montesquieu.ens-lyon.fr/spip.php?article3089>



XXVIII.24 Rules established in judicial combat

- 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

When there were multiple accusers, [1] they had to concur so the matter would be pursued by just one of them ; and if they could not agree, the man before whom the suit was brought would name one of them who would pursue the quarrel.

When a gentleman challenged a commoner, he was to present himself on foot, with his shield and staff ; and if he came on horseback and with the weapons of a gentleman, they took away his horse and weapons ; he remained in his shirt and was obliged to fight in that state against the commoner. [2]

Before the combat, justice had three bans published. [3] By one, the families of the parties were ordered to withdraw ; by another, the people were cautioned to keep their peace ; by the third, it was forbidden to provide assistance to one of the parties, under heavy penalties and even that of death, if through that assistance one of the combatants had been defeated.

Constabularies guarded the enclosure [4] ; and in the case where one of the parties had mentioned peace, they noted carefully the present position of each of them at that moment, so they could be replaced in that identical situation if peace was not made. [5]

When the gages were received for crime or for false judgment, peace could not be made without the lord's consent ; and when one of the parties had been defeated, there could no longer be a peace except with permission of the count, [6] which had some similarity to our letters of clemency.

But if it was a capital crime, and the lord, corrupted by presents, consented to the peace, he paid a fine of sixty livres ; and his right to have the malefactor punished devolved to the count. [7]

There were many who were not in a position to offer nor to accept combat. They were permitted, when cause was shown, to choose a champion ; and so that he would have the keenest interest in defending his party, his hand was cut off if he was defeated. [8]

When in the last century capital laws were made against duels, it might have sufficed to deprive a warrior of his warrior status by the loss of his hand, since there is usually nothing sadder for men than to survive the loss of their identity.

When in a capital crime the combat was fought by champions, the parties were placed where they could not see the battle ; each of them was bound by the chord that would serve for his execution if his champion was defeated. [9]

The one who succumbed in the combat did not always lose the cause contested : if, for example, they were fighting over a preliminary judgment, he lost only the preliminary judgment. [10]

[1] Beaumanoir, ch. vi, p. 40-41

[2] Beaumanoir, ch. lxiv, p. 328.

[3] *Ibid.*, p. 330.

[4] *Ibid.*

[5] *Ibid.*

[6] The great vassals had particular rights.

[7] Beaumanoir, ch. lxiv, p. 330, says : "He would lose his justice" ; these words in the writers of those times do not have a general signification, but one restricted to the matter in question (Défontaines, ch. xxi, art. 29).

[8] This practice which we find in the capitularies subsisted in the time of Beaumanoir. See ch. lxi, p. 315.

[9] Beaumanoir, ch. lxiv, p. 330.

[10] *Ibid.*, ch. lxi, p. 309.