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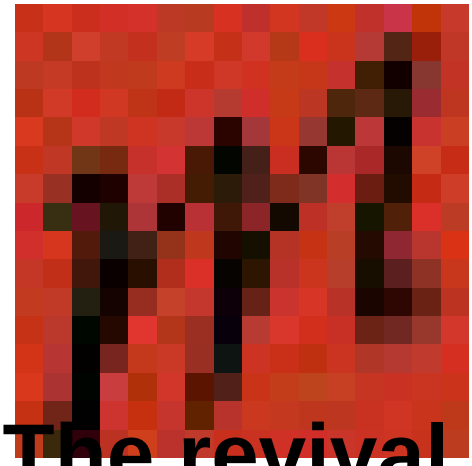

XXVIII.42 The revival of Roman law, and what resulted from it. Change in the tribunals

- 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

Justinian's Digest having been rediscovered around the year 1137, Roman law seemed to have a second birth. Schools were established in Italy where it was taught ; we already had the Justinian code and the *Novellæ*. I have already said that this law gained such favor there that it caused the law of the Lombards to be eclipsed.

Italian scholars brought Justinian's law to France, where we had known only the Theodosian code, [1] because it was only after the establishment of the barbarians in the Gauls that the laws of Justinian were made. [2] That law was opposed in some quarters, but it stood its ground despite the excommunications of popes who were protecting their canons. [3] St. Louis sought to accredit it through the translations which he had made of Justinian's works, which we still have in manuscript in our libraries ; and I have already said that great use was made of them in the *Establishments*. Philip the Fair had Justinian's laws taught, only as written reason, in the regions of France governed by customs, [4] and they were adopted as law in the regions where Roman law was the law.

I have said above that the manner of proceding by judicial combat required very little competence in those who judged ; matters were decided in each location according to the practice of each location, and following some simple customs that were accepted by tradition. There were in the time of Beaumanoir two different manners of dispensing justice [5] : in some places they judged by peers, [6] in others they judged by bailiffs ; when the first form was followed, peers judged according to the practice of their jurisdiction [7] ; in the second, it was experts or old men who indicated the same practice to the bailiff. All this required no literacy, no ability, no training. But when the obscure code of the *Establishments* appeared ; when Roman law was translated ; when it began to be taught in the schools ; when a certain art of procedure and a certain art of jurisprudence began to develop ; when practicians and jurisconsults sprang up, the peers and experts were no longer in a position to judge ; the peers began to withdraw from the lord's tribunals ; the lords were disinclined to assemble them, all the more so that judgments, instead of being an arresting event, agreeable to the nobility and attractive to men of war, were no longer anything but a practice that they neither knew nor wished to know. The practice of judging by peers became less common, [8] that of judging by bailiffs more common. The bailiffs did not judge [9] ; they conducted the procedure and pronounced the verdict of the experts ; but the experts no longer being in a position to judge, the bailiffs themselves judged.

That was done all the more readily that they had before their eyes the practice of the Church judges : canon law and the new civil law helped equally to abolish the peers.

Thus was lost the practice constantly observed in the monarchy that a judge would never judge alone, as we see from the Salic laws, the capitularies, and the first authors of practice of the third dynasty. [10] The contrary abuse, which occurs only in local justices, has been moderated and to some degree corrected by the introduction in several places of a judge's lieutenant, whom the judge consults, and who represents the former experts ; by the judge's obligation to take two graduates, in the cases that can deserve an afflictive punishment ; and finally it has become null through the extreme prevalence of appeals.

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[1] In Italy they followed the code of Justinian ; that is why pope John VIII in his bull given after the Synod of Troyes speaks of this code, not because it was known in France, but because he knew it himself ; and his bull was general.

[2] This emperor's code was published about the year 530.

[3] Decretals, book V, tit. *De privilegiis, capite super specula*.

[4] By a charter of the year 1312 in favor of the university of Orléans, related by Dutillet.

[5] Custom of Beauvaisis, ch. i of *Office des baillis*.

[6] In the commune, the bourgeois were judged by other bourgeois, as the fief holders judged each other. See La Thaumassiere, ch. xix.

[7] Thus all requests began with these words : "Your honor, it is the practice that in your jurisdiction, etc.," as appears from the formula recorded in Boutillier, *Somme rural*, book 1, tit. 21.

[8] The change was gradual ; we find peers being used still in the time of Boutillier, who was alive in 1402, date of his testament, who records this formula in book I, tit. 21 : "Sire Juge, en ma justice haute, moyenne et basse, que j'ai en tel lieu, cour, plaids, baillis, hommes féodaux, et Sergens," but it was no longer anything but feudal matters that were judged by peers (*ibid*., book I, tit. 1, p. 16).

[9] As it appears in the formula of the letters which the lord gave them, related by Boutillier (*Somme rural*, book 1, tit. 14), which is again proven by Beaumanoir (custom of Beauvaisis, ch. I of Baillis) ; they handled only the procedure : "le Bailli est tenu en la présence des hommes à penre les paroles des chaux qui plaident, and doit demander as parties se ils veulent avoir droit selon les raisons que ils ont dites, and se ils disent, Sire, oïl, le bailli doit contraindre les hommes, que ils fassent le jugement." See also the *Establishments of St. Louis*, book I, ch. cv, and book II, ch. xv. "Li Juge, si ne doit pas faire le Jugement."

[10] Beaumanoir, ch. lxvii, p. 336, and ch. lxi, p. 315-316 ; *Establishments*, book II, ch. xv.