fight; and even the bondman's lord had a right to take him out of the court.[a] The bondman might by his lord's charter or by usage fight with any freeman;[b] and the church claimed this right for her bondmen[c] as a mark of respect due to her by the laity.[d]

26.—*On the judiciary Combat between one of the Parties and one of the Witnesses*

Beaumanoir informs us,[e] that a person who saw a witness going to swear against him might elude the other, by telling the judges that his adversary produced a false and slandering witness; and if the witness was willing to maintain the quarrel, he gave pledges of battle. The enquiry was no longer the question; for if the witness was overcome, it was decided that the adversary had produced a false witness, and he lost his cause.

It was necessary that the second witness should not be heard; for if he had made his attestation, the affair would have been decided by the deposition of two witnesses. But by staying the second, the deposition of the first witness became void.

The second witness being thus rejected, the party was not allowed to produce any others, but he lost his cause; in case, however, there had been no pledges of battle he might produce other witnesses.

Beaumanoir observes,[f] that the witness might say to the party he appeared for, before he made his deposition: "I do not care to fight for your quarrel, nor to enter into any debate; but if you are willing to stand by me, I am ready to tell the truth." The party was then obliged to fight for the witness, and if he happened to be overcome, he did not lose his cause,[g] but the witness was rejected.

This, I believe, was a modification of the ancient custom; and what makes me think so is, that we find this usage of challenging the witnesses established in the laws of the Bavarians[h] and Burgundians[i] without any restriction.

I have already made mention of the constitution of Gundebald,

a Beaumanoir, chap. lxiii. p. 322.
b Défontaines, chap. xxii. art. 7.
c "Habeant bellandi et testificandi licentiam."—Charter of Louis the Fat, in the year 1118.
d Ibid.
e Chap. lxi. p. 315.
f Chap. vi. pp. 39 and 40.
g But if the battle was fought by champions, the champion that was overcome had his hand cut off.
h Tit. 16, sec. 7.
i Tit. 45.

against which Agobard[j] and St. Avitus[k] made such loud complaints. "When the accused," says this prince, "produces witnesses to swear that he has not committed the crime, the accuser may challenge one of the witnesses to a combat; for it is very just that the person who has offered to swear, and has declared that he was certain of the truth, should make no difficulty of maintaining it by combat." Thus the witnesses were deprived by this king of every kind of subterfuge to avoid the judiciary combat.

27.—*Of the judiciary Combat between one of the Parties and one of the Lords' Peers. Appeal of false Judgment*

As the nature of judicial combats was to terminate the affair forever, and was incompatible with a new judgment and new prosecutions,[l] an appeal, such as is established by the Roman and Canon laws, that is, to a superior court in order to rejudge the proceedings of an inferior, was a thing unknown in France.

This is a form of proceeding to which a warlike nation, governed solely by the point of honor, was quite a stranger; and agreeably to this very spirit, the same methods were used against the judges as were allowed against the parties.[m]

An appeal among the people of this nation was a challenge to fight with arms, a challenge to be decided by blood; and not that invitation to a paper quarrel, the knowledge of which was reserved for succeeding ages.[n]

Thus St. Louis in his Institutions says, that an appeal includes both felony and iniquity. Thus Beaumanoir tells us, that if a vassal wanted to make his complaint of an outrage committed against him by his lord,[o] he was first obliged to announce that he quitted his fief; after which he appealed to his lord paramount, and offered pledges of battle. In like manner the lord renounced the homage of his vassal, if he challenged him before the count.

For a vassal to challenge his lord of false judgment, was as much as to say to him, that his sentence was unjust and malicious; now to utter such words against his lord was in some measure committing the crime of felony.

Hence, instead of bringing a challenge of false judgment

j Letter to Louis the Debonnaire.
k "Life of St. Avitus."
l Beaumanoir, chap. ii. p. 22.
m Ibid., chap. lxi. p. 312, and chap. lxvii. p. 338.
n Book II. chap. xv.
o Beaumanoir, chap. lxi. pp. 310 and 311, and chap. lxvii. p. 337.

against the lord who appointed and directed the court, they challenged the peers of whom the court itself was formed, by which means they avoided the crime of felony, for they insulted only their peers, with whom they could always account for the affront.

It was a very dangerous thing to challenge the peers of false judgment.[p] If the party waited till judgment was pronounced, he was obliged to fight them all when they offered to make good their judgment.[q] If the appeal was made before all the judges had given their opinion, he was obliged to fight all who had agreed in their judgment. To avoid this danger, it was usual to petition the lord to direct that each peer should give his opinion aloud;[r] and when the first had pronounced, and the second was going to do the same, the party told him that he was a liar, a knave, and a slanderer, and then he had to fight only with that peer.

Défontaines[s] would have it, that before a challenge was made of false judgment, it was customary to let three judges pronounce; and he does not say that it was necessary to fight them all three, much less that there was any obligation to fight all those who had declared themselves of the same opinion. These differences arose from this, that in those times there were few usages exactly in all parts the same; Beaumanoir gives an account of what passed in the county of Clermont; and Défontaines of what was practised in Vermandois.

When one of the peers or a vassal had declared that he would maintain the judgment, the judge ordered pledges of battle to be given, and likewise took security of the challenger, that he would maintain his case.[t] But the peer who was challenged gave no security, because he was the lord's vassal, and was obliged to defend the challenge, or to pay the lord a fine of sixty livres.

If he who challenged did not prove that the judgment was bad,[u] he paid the lord a fine of sixty livres, the same fine to the peer whom he had challenged, and as much to every one of those who had openly consented to the judgment.[v]

When a person, strongly suspected of a capital crime, had been taken and condemned, he could make no appeal of false

[p] Beaumanoir, chap. lxi. p. 313.
[q] Ibid. p. 314.
[r] Ibid.
[s] Chap. xxii. art. 1, 10, and 11, he says only, that each of them was allowed a small fine.
[t] Beaumanoir, chap. lxi. p. 314.
[u] Ibid. Défontaines, chap. xxii. art. 9.
[v] Ibid.

judgment:[w] for he would always appeal either to prolong his life, or to get an absolute discharge.

If a person said that the judgment was false and bad, and did not offer to prove it so, that is to fight, he was condemned to a fine of ten sous if a gentleman, and to five sous if a bondman, for the injurious expressions he had uttered.[x]

The judges or peers who were overcome, forfeited neither life nor limbs;[y] but the person who challenged them was punished with death, if it happened to be a capital crime.[z]

This manner of challenging the vassals with false judgment was to avoid challenging the lord himself. But if the lord had no peers,[a] or had not a sufficient number, he might at his own expense borrow peers of his lord paramount;[b] but these peers were not obliged to pronounce judgment if they did not like it; they might declare that they were come only to give their opinion: in that particular case, the lord himself judged and pronounced sentence as judge;[c] and if an appeal of false judgment was made against him, it was his business to answer to the challenge.

If the lord happened to be so very poor as not to be able to hire peers of his paramount,[d] or if he neglected to ask for them or the paramount refused to give them, then, as the lord could not judge by himself, and as nobody was obliged to plead before a tribunal where judgment could not be given, the affair was brought before the lord paramount.

This, I believe, was one of the principal causes of the separation between the jurisdiction and the fief, whence arose the maxim of the French lawyers, "The fief is one thing, and the jurisdiction is another." For as there were a vast number of peers who had no subordinate vassals under them, they were incapable of holding their court; all affairs were then brought before their lord paramount, and they lost the privilege of pronouncing judgment, because they had neither power nor will to claim it.

All the judges who had been at the judgment were obliged

[w] Beaumanoir, chap. lxi. p. 316, and Défontaines, chap. xxii. art. 21.
[x] Ibid. chap. lxi. p. 314.
[y] Défontaines, chap. xxii. art. 7.
[z] See Défontaines, chap. xxi. art. 11 and 12, and following, who distinguishes the cases in which the appellant of false judgment loses his life, the point contested, or only the imparlance.
[a] Beaumanoir, chap. lxii. p. 322. Défontaines, chap. xxii.
[b] The count was not obliged to lend any. Beaumanoir, chap. lxvii. p. 337.
[c] Nobody can pass judgment in his court, says Beaumanoir, chap. lxvii. pp. 336 and 337.
[d] Ibid. chap. lxii. p. 322.

to be present when it was pronounced, that they might follow one another, and say aye to the person who, wanting to make an appeal of false judgment, asked them whether they followed;[e] for Défontaines says,[f] "that it is an affair of courtesy and loyalty, and there is no such thing as evasion or delay." Hence, I imagine, arose the custom still followed in England, of obliging the jury to be all unanimous in their verdict, in cases relating to life and death.

Judgment was therefore given, according to the opinion of the majority; and if there was an equal division, sentence was pronounced, in criminal cases, in favor of the accused; in cases of debt, in favor of the debtor; and in cases of inheritance, in favor of the defendant.

Défontaines observes,[g] that a peer could not excuse himself by saying that he would not sit in court if there were only four,[h] or if the whole number, or at least the wisest part, were not present. This is just as if he were to say in the heat of an engagement, that he would not assist his lord, because he had not all his vassals with him. But it was the lord's business to cause his court to be respected, and to choose the bravest and most knowing of his tenants. This, I mention, in order to show the duty of vassals, which was to fight, and to give judgment: and such, indeed, was this duty, that to give judgment was all the same as to fight.

It was lawful for a lord, who went to law with his vassal in his own court, and was cast, to challenge one of his tenants with false judgment. But as the latter owed a respect to his lord for the fealty he had vowed, and the lord, on the other hand, owed benevolence to his vassal for the fealty accepted; it was customary to make a distinction between the lord's affirming in general that the judgment was false and unjust,[i] and imputing personal prevarications to his tenant.[j] In the former case he affronted his own court, and in some measure himself, so that there was no room for pledges of battle. But there was room in the latter, because he attacked his vassal's honor; and the person overcome was deprived of life and property, in order to maintain the public tranquillity.

e Défontaines, chap. xxi. art. 27 and 28.
f Ibid. art. 28.
g Chap. xxi. art. 37.
h This number at least was necessary. Défontaines, chap. xxi. art. 36.
i Beaumanoir, chap. lxvii. p. 337.
j Ibid.

This distinction, which was necessary in that particular case, had afterwards a greater extent. Beaumanoir says, that when the challenger of false judgment attacked one of the peers by personal imputation, battle ensued; but if he attacked only the judgment, the peer challenged was at liberty to determine the dispute either by battle or by law.[k] But as the prevailing spirit in Beaumanoir's time was to restrain the usage of judicial combats, and as this liberty which had been granted to the peer challenged of defending the judgment by combat or not is equally contrary to the ideas of honor established in those days, and to the obligation the vassal lay under of defending his lord's jurisdiction, I am apt to think, that this distinction of Beaumanoir's was a novelty in French jurisprudence.

I would not have it thought that all appeals of false judgment were decided by battle; it fared with this appeal as with all others. The reader may recollect the exceptions mentioned in the 25th chapter. Here it was the business of the superior court to examine whether it was proper to withdraw the pledges of battle or not.

There could be no appeal of false judgment against the king's court; because, as there was no one equal to the king, no one could challenge him; and as the king had no superior, none could appeal from his court.

This fundamental regulation, which was necessary as a political law, diminished also as a civil law the abuses of the judicial proceedings of those times. When a lord was afraid that his court would be challenged with false judgment, or perceived that they were determined to challenge, if the interests of justice required that it should not be challenged, he might demand from the king's court, men whose judgment could not be set aside.[l] Thus King Philip, says Défontaines,[m] sent his whole Council to judge an affair in the court of the Abbot of Corbey.

But if the lord could not have judges from the king, he might remove his court into the king's, if he held immediately of him; and if there were intermediate lords, he had recourse to his *suzerain*, removing from one lord to another till he came to the sovereign.

Thus, notwithstanding they had in those days neither the practice nor even the idea of our modern appeals, yet they had

k Beaumanoir, chap. lxvii. pp. 337 and 338. *l* Défontaines, chap. xxii. *m* Ibid.

recourse to the king, who was the source whence all those rivers flowed, and the sea into which they returned.

28.—*Of the Appeal of Default of Justice*

The appeal of default of justice was, when the court of a particular lord deferred, evaded, or refused to do justice to the parties.

During the time of our princes of the second race, though the count had several officers under him, their person was subordinate, but not their jurisdiction. These officers in their court days, assizes, or *placita*, gave judgment in the last resort as the count himself; all the difference consisted in the division of the jurisdiction. For instance, the count had the power of condemning to death, of judging of liberty, and of the restitution of goods, which the *centenarii* had not.*n*

For the same reason there were greater cases which were reserved to the king; namely, those which directly concerned the political order of the state.*o* Such were the disputes between bishops, abbots, counts, and other grandees, which were determined by the king, together with the great vassals.*p*

What some authors have advanced, namely, that an appeal lay from the count to the king's commissary, or *missus dominicus*, is not well grounded. The count and the *missus* had an equal jurisdiction, independent of each other.*q* The whole difference was, that the *missus* held his *placita*, or assizes, four months in the year,*r* and the count the other eight.

If a person, who had been condemned at an assize, demanded to have his cause tried over again, and was afterwards cast, he paid a fine of fifteen sous, or received fifteen blows from the judges who had decided the affair.*s*

When the counts, or the king's commissaries did not find themselves able to bring the great lords to reason, they made them give bail or security *t* that they would appear in the king's court: this was to try the cause, and not to rejudge it. I find in

n Third Capitulary of the year 812, art. 3, edition of Baluzius, p. 497, and of Charles the Bald, added to the law of the Lombards, book II. art. 3.

o Ibid., p. 497.

p "Cum fidelibus."—Capitulary of Louis the Debonnaire, edition of Baluzius, p. 667.

q See the Capitulary of Charles the Bald, added to the law of the Lombards, book II. art. 3.

r Third Capitulary of the year 812, art. 8.

s "Placitum."

t This appears by the formulas, charters, and the capitularies.

the Capitulary of Metz *u* a law by which the appeal of false judgment to the king's court is established, and all other kinds of appeal are proscribed and punished.

If they refused to submit to the judgment of the sheriffs *v* and made no complaint, they were imprisoned till they had submitted, but if they complained, they were conducted under a proper guard before the king, and the affair was examined in his court.

There could be hardly any room then for an appeal of default of justice. For instead of its being usual in those days to complain that the counts and others who had a right of holding assizes were not exact in discharging this duty,*w* it was a general complaint that they were too exact. Hence we find such numbers of ordinances, by which the counts and all other officers of justice are forbidden to hold their assizes above thrice a year. It was not so necessary to chastise their indolence, as to check their activity.

But, after an infinite number of petty lordships had been formed, and different degrees of vassalage established, the neglect of certain vassals in holding their courts gave rise to this kind of appeal; *x* especially as very considerable profits accrued to the lord paramount from the several fines.

As the custom of judicial combats gained every day more ground, there were places, cases, and times, in which it was difficult to assemble the peers, and consequently in which justice was delayed. The appeal of default of justice was therefore introduced, an appeal that has been often a remarkable era in our history; because most of the wars of those days were imputed to a violation of the political law; as the cause, or at least the pretence, of our modern wars is the infringement of the laws of nations.

Beaumanoir says *y* that, in case of default of justice, battle was not allowed: the reasons are these: 1. They could not challenge the lord himself, because of the respect due to his person; neither could they challenge the lord's peers, because the case was clear,

u In the year 757, edition of Baluzius, p. 180, arts. 9 and 10, and the synod "apud Vernas," in the year 755, art. 29, edition of Baluzius, p. 175. These two capitularies were made under King Pepin.

v The officers under the count, "scabini."

w See the law of the Lombards, book II. tit. 52, art. 22.

x There are instances of appeals of default of justice as early as the time of Philip Augustus.

y Chap. lxi. p. 315.

and they had only to reckon the days of the summons, or of the other delays; there had been no judgment passed, consequently there could be no appeal of false judgment: in fine, the crime of the peers offended the lord as well as the party, and it was against rule that there should be battle between the lord and his peers.

But as the default was proved by witnesses before the superior court: [z] the witnesses might be challenged, and then neither the lord nor his court were offended.

In case the default was owing to the lord's tenants or peers, who had delayed to administer justice, or had avoided giving judgment after past delays, then these peers were appealed of default of justice before the paramount; and if they were cast, they paid a fine to their lord.[a] The latter could not give them any assistance; on the contrary, he seized their fief till they had each paid a fine of sixty livres.

2. When the default was owing to the lord, which was the case whenever there happened not to be a sufficient number of peers in his court to pass judgment, or when he had not assembled his tenants or appointed somebody in his room to assemble them, an appeal might be made of the default before the lord paramount; but then the party and not the lord was summoned, because of the respect due to the latter.[b]

The lord demanded to be tried before the paramount, and if he was acquitted of the default, the cause was remanded to him, and he was likewise paid a fine of sixty livres.[c] But if the default was proved, the penalty inflicted on him was, to lose the trial of the cause,[d] which was to be then determined in the superior court. And, indeed, the complaint of default was made with no other view.

3. If the lord was sued in his own court,[e] which never happened but upon disputes in relation to the fief, after letting all the delays pass, the lord himself was summoned before the peers in the sovereign's name,[f] whose permission was necessary on that occasion. The peers did not make the summons in their

[z] Beaumanoir, chap. lxi. p. 315
[a] Défontaines, chap. xxi. art. 24.
[b] Ibid., art. 32.
[c] Beaumanoir, chap. lxi. p. 312.
[d] Défontaines, chap. xxi. arts. 1 and 29.
[e] This was the case in the famous difference between the Lord of Nesle and Joan, Countess of Flanders, during the reign of Louis VIII. He called upon her to have it tried within forty days, and thereupon challenged her at the king's court with default of justice. She answered that she would have it tried by her peers in Flanders. The king's court determined that it should not be sent there and that the countess should be cited.
[f] Défontaines, chap. xxi. art. 34.

own name, because they could not summon their lord, but they could summon for their lord.[g]

Sometimes the appeal of default of justice was followed by an appeal of false judgment, when the lord had caused judgment to be passed, notwithstanding the default.[h]

The vassal who had wrongfully challenged his lord of default of justice was sentenced to pay a fine according to his lord's pleasure.[i]

The inhabitants of Ghent had challenged the Earl of Flanders of default of justice before the king, for having delayed to give judgment in his own court.[j] Upon examination it was found, that he had used fewer delays than even the custom of the country allowed. They were therefore remanded to him; upon which their effects to the value of sixty thousand livres were seized. They returned to the king's court in order to have the fine moderated; but it was decided that the earl might insist upon the fine, and even upon more if he pleased. Beaumanoir was present at those judgments.

4. In other disputes which the lord might have with his vassal, in respect to the person or honor of the latter, or to property that did not belong to the fief, there was no room for a challenge of default of justice; because the cause was not tried in the lord's court, but in that of the paramount: vassals, says Défontaines,[k] having no power to give judgment on the person of their lord.

I have been at some trouble to give a clear idea of those things, which are so obscure and confused in ancient authors that to disentangle them from the chaos in which they were involved may be reckoned a new discovery.

29.—*Epoch of the Reign of St. Louis*

St. Louis abolished the judicial combats in all the courts of his demesne, as appears by the ordinance he published thereupon,[l] and by the Institutions.[m]

But he did not suppress them in the courts of his barons, except in the case of challenge of false judgment.[n]

[g] Défontaines, chap. xxi. art. 9.
[h] Beaumanoir, chap. lxi. p. 311.
[i] Ibid., p. 312. But he that was neither tenant nor vassal to the lord paid only a fine of sixty livres.—Ibid.
[j] Ibid., p. 318.
[k] Chap. xxi. art. 35.
[l] In the year 1260.
[m] Book I. chaps. ii. and vii., and book II. chaps. x. and xi.
[n] As appears everywhere in the "Institutions," etc., and Beaumanoir, chap. lxi. p. 309.

A vassal could not challenge the court of his lord of false judgment, without demanding a judicial combat against the judges who pronounced sentence. But St. Louis introduced the practice of challenging of false judgment without fighting, a change that may be reckoned a kind of revolution.[o]

He declared [p] that there should be no challenge of false judgment in the lordships of his demesnes, because it was a crime of felony. In reality, if it was a kind of felony against the lord, by a much stronger reason it was felony against the king. But he consented that they might demand an amendment [q] of the judgments passed in his courts; not because they were false or iniquitous, but because they did some prejudice.[r] On the contrary, he ordained, that they should be obliged to make a challenge of false judgment against the courts of the barons,[s] in case of any complaint.

It was not allowed by the Institutions, as we have already observed, to bring a challenge of false judgment against the courts in the king's demesnes. They were obliged to demand an amendment before the same court; and in case the bailiff refused the amendment demanded, the king gave leave to make an appeal to his court; [t] or rather, interpreting the Institutions by themselves, to present him a request or petition.[u]

With regard to the courts of the lords, St. Louis, by permitting them to be challenged of false judgment, would have the cause brought before the royal tribunal,[v] or that of the lord paramount, not to be decided by duel [w] but by witnesses, pursuant to a certain form of proceeding, the rules of which he laid down in the Institutions.[x]

Thus, whether they could falsify the judgment, as in the court of the barons; or whether they could not falsify, as in the court of his demesnes, he ordained that they might appeal without the hazard of a duel.

Défontaines [y] gives us the first two examples he ever saw, in which they proceeded thus without a legal duel: one, in a cause

[o] "Institutions," book I. chap. vi., and book II. chap. xv.
[p] Ibid. book II. chap. xv.
[q] Ibid. book I. chap. lxxviii., and book II. chap. xv.
[r] Ibid. book I. chap. lxxviii.
[s] Ibid. book II. chap. xv.
[t] Ibid. book I. chap. lxxviii.
[u] Ibid. book II. chap. xv.
[v] But if they wanted to appeal without falsifying the judgment, the appeal was not admitted.—"Institutions," book II. chap. xv.
[w] Book I. chaps. vi. and lxvii.; and book II. chap. xv.; and Beaumanoir, chap. xi. p. 58.
[x] Book I. chaps. i., ii., and iii.
[y] Chap. xxii. arts. 16 and 17.

tried at the court of St. Quentin, which belonged to the king's demesne; and the other, in the court of Ponthieu, where the count, who was present, opposed the ancient jurisprudence: but these two causes were decided by law.

Here, perhaps, it will be asked why St. Louis ordained for the courts of his barons a different form of proceeding from that which he had established in the courts of his demesne? The reason is this: when St. Louis made the regulation for the courts of his demesnes, he was not checked or limited in his views: but he had measures to keep with the lords who enjoyed this ancient prerogative, that causes should not be removed from their courts, unless the party was willing to expose himself to the dangers of an appeal of false judgment. St. Louis preserved the usage of this appeal; but he ordained that it should be made without a judicial combat; this is, in order to make the change less felt, he suppressed the thing, and continued the terms.

This regulation was not universally received in the courts of the lords. Beaumanoir says,[z] that in his time there were two ways of trying causes; one according to the king's establishment, and the other pursuant to the ancient practice; that the lords were at liberty to follow which way they pleased; but when they had pitched upon one in any cause, they could not afterwards have recourse to the other. He adds,[a] that the Count of Clermont followed the new practice, while his vassals kept to the old one; but that it was in his power to re-establish the ancient practice whenever he pleased, otherwise he would have less authority than his vassals.

It is proper here to observe, that France was at that time divided into the country of the king's demesne, and that which was called the country of the barons, or the baronies; and, to make use of the terms of St. Louis's Institutions, into the country under obedience to the king, and the country out of his obedience.[b] When the king made ordinances for the country of his demesne, he employed his own single authority. But when he published any ordinances that concerned also the country of his barons, these were made in concert with them,[c] or sealed and

[z] Chap. lxi. p. 309.
[a] Ibid.
[b] See Beaumanoir, Défontaines, and the "Institutions," book II. chaps. x., xi., xv., and others.
[c] See the ordinances at the beginning of the third race, in the collection of Laurière, especially those of Philip Augustus, on ecclesiastic jurisdiction; that of Louis VIII concerning the Jews; and the charters related by Mr. Brussel; particularly that of St. Louis,

subscribed by them: otherwise the barons received or refused them, according as they seemed conducive to the good of their baronies. The rear-vassals were upon the same terms with the great-vassals. Now the Institutions were not made with the consent of the lords, though they regulated matters which to them were of great importance: but they were received only by those who believed they would redound to their advantage. Robert, son of St. Louis, received them in his county of Clermont; yet his vassals did not think proper to conform to this practice.

30.—*Observation on Appeals*

I apprehend that appeals which were challenges to a combat, must have been made immediately on the spot. "If the party leaves the court without appealing," says Beaumanoir,[d] "he loses his appeal, and the judgment stands good." This continued still in force, even after all the restrictions of judicial combat.[e]

31.—*The same Subject continued*

The villein could not bring a challenge of false judgment against the court of his lord. This we learn from Défontaines,[f] and he is confirmed moreover by the Institutions.[g] Hence Défontaines says,[h] "between the lord and his villein there is no other judge but God."

It was the custom of judicial combats that deprived the villeins of the privilege of challenging their lord's court of false judgment. And so true is this, that those villeins[i] who by charter or custom had a right to fight had also the privilege of challenging their lord's court of false judgment, even though the peers who tried them were gentlemen;[j] and Défontaines proposes expedients to gentlemen in order to avoid the scandal of fighting with a villein by whom they had been challenged of false judgment.[k]

As the practice of judicial combats began to decline and the

on the release and recovery of lands, and the feodal majority of young women, tom. ii. book III. p. 35, and ibid., the Ordinance of Philip Augustus, p. 7.

d Chap. lxiii. p. 327; chap. lxi. p. 312.

e See the "Institutions" of St. Louis, book II. chap. xv., and the Ordinance of Charles VII in the year 1453.

f Chap. xxi. arts. 21 and 22.

g Book I. chap. cxxxvi.

h Chap. ii. art. 8.

i Défontaines, chap. xxii. art. 7. This article, and the 21st of the 22d chapter of the same author, have been hitherto very badly explained. Défontaines does not oppose the judgment of the lord to that of the gentleman, because it was the same thing; but he opposes the common villain to him who had the privilege of fighting.

j Gentlemen may always be appointed judges.—Défontaines, chap. xxi. art. 48

k Chap. xxii. art. 14.

usage of new appeals to be introduced, it was reckoned unfair that freedmen should have a remedy against the injustice of the courts of their lords, and the villeins should not; hence the Parliament received their appeals all the same as those of freemen.

32.—*The same Subject continued*

When a challenge of false judgment was brought against the lord's court, the lord appeared in person before his paramount to defend the judgment of his court. In like manner in the appeal of default of justice, the party summoned before the lord paramount brought his lord along with him, to the end that if the default was not proved, he might recover his jurisdiction.[l]

In process of time as the practice observed in these two particular cases became general, by the introduction of all sorts of appeals, it seemed very extraordinary that the lord should be obliged to spend his whole life in strange tribunals, and for other people's affairs. Philip of Valois ordained[m] that none but the bailiffs should be summoned; and when the usage of appeals became still more frequent, the parties were obliged to defend the appeal: the deed of the judge became that of the party.[n]

I took notice that in the appeal of default of justice[o] the lord lost only the privilege of having the cause tried in his own court. But if the lord himself was sued as party,[p] which became a very common practice,[q] he paid a fine of sixty livres to the king, or to the paramount, before whom the appeal was brought. Thence arose the usage after appeals had been generally received, of making the fine payable to the lord upon the reversal of the sentence of his judge; a usage which lasted a long time, and was confirmed by the ordinance of Rousillon, but fell, at length, to the ground through its own absurdity.

33.—*The same Subject continued*

In the practice of judicial combats, the person who had challenged one of the judges of false judgment might lose his cause by the combat, but could not possibly gain it.[r] And, indeed, the party who had a judgment in his favor ought not to have been

l Défontaines, chap. xxi. art. 33.

m In the year 1332.

n See the situation of things in Boutillier's time, who lived in the year 1402.—"Somme Rurale," book I. pp. 19 and 20.

o See chap. xxx.

p Beaumanoir, chap. lxi. pp. 312 and 318.

q Ibid.

r Défontaines, chap. xxi. art. 14.

deprived of it by another man's act. The appellant, therefore, who had gained the battle was obliged to fight likewise against the adverse party: not in order to know whether the judgment was good or bad (for this judgment was out of the case, being reversed by the combat), but to determine whether the demand was just or not; and it was on this new point they fought. Thence proceeds our manner of pronouncing decrees. "The court annuls the appeal; the court annuls the appeal and the judgment against which the appeal was brought." In effect, when the person who had made the challenge of false judgment happened to be overcome the appeal was reversed: when he proved victorious both the judgment and the appeal were reversed; then they were obliged to proceed to a new judgment.

This is so far true, that when the cause was tried by inquests this manner of pronouncing did not take place: witness what M. de la Roche Flavin says,[s] namely, that the chamber of enquiry could not use this form at the beginning of its existence.

34.—*In what Manner the Proceedings at Law became secret*

Duels had introduced a public form of proceeding so that both the attack and the defence were equally known. "The witnesses," says Beaumanoir,[t] "ought to give their testimony in open court."

Boutillier's commentator says he had learned of ancient practitioners, and from some old manuscript law books, that criminal processes were anciently carried on in public, and in a form not very different from the public judgments of the Romans. This was owing to their not knowing how to write; a thing in those days very common. The usage of writing fixes the ideas, and keeps the secret; but when this usage is laid aside, nothing but the notoriety of the proceeding is capable of fixing those ideas.

And as uncertainty might easily arise in respect to what had been adjudicated by vassals, or pleaded before them, they could, therefore, refresh their memory[u] every time they held a court by what were called proceedings on record.[v] In that case, it was not allowed to challenge the witnesses to combat; for then there would be no end of disputes.

[s] Of the Parliaments of France, book XII. chap. xvi.
[t] Chap. lxi. p. 315.
[u] As Beaumanoir says, chap. xxxix. p. 209.
[v] They proved by witnesses what had been already done, said, or decreed in court.

In process of time a private form of proceeding was introduced. Everything before had been public; everything now became secret; the interrogatories, the informations, the re-examinations, the confronting of witnesses, the opinion of the attorney-general; and this is the present practice. The first form of proceeding was suitable to the government of that time, as the new form was proper to the government since established.

Boutillier's commentator fixes the epoch of this change to the ordinance in the year 1539. I am apt to believe that the change was made insensibly, and passed from one lordship to another, in proportion as the lords renounced the ancient form of judging, and that derived from the Institutions of St. Louis was improved. And, indeed, Beaumanoir says[w] that witnesses were publicly heard only in cases in which it was allowed to give pledges of battle: in others they were heard in secret, and their depositions were reduced to writing. The proceedings became, therefore, secret, when they ceased to give pledges of battle.

35.—*Of the Costs*

In former times no one was condemned in the lay courts of France to the payment of costs.[x] The party cast was sufficiently punished by pecuniary fines to the lord and his peers. From the manner of proceeding by judicial combat it followed, that the party condemned and deprived of life and fortune was punished as much as he could be: and in the other cases of the judicial combat, there were fines sometimes fixed, and sometimes dependent on the disposition of the lord, which were sufficient to make people dread the consequences of suits. The same may be said of causes that were not decided by combat. As the lord had the chief profits, so he was also at the chief expense, either to assemble his peers, or to enable them to proceed to judgment. Besides, as disputes were generally determined at the same place, and almost always at the same time, without that infinite multitude of writings which afterwards followed, there was no necessity of allowing costs to the parties.

The custom of appeals naturally introduced that of giving costs. Thus Défontaines says,[y] that when they appealed by

[w] Chap. xxxix. p. 218.
[x] Défontaines in his counsel, chap. xxii. arts. 3 and 8; and Beaumanoir, chap. xxxiii. "Institutions," book I. chap. xc.
[y] Chap. xxii. art. 8.