PART XIV. CASES AND CASE REPORTS —13TH THROUGH 18TH CENTURIES

CONTENTS *Page*

A. WILLIAM SMITH C. ALICE DOLLING

(Court of Canterbury, 1271–72) in N. Adams & C. Donahue, eds.,
Select Cases from the Ecclesiastical Courts of the Province of Canterbury (Selden Soc'y no. 95, 1981) 127–38 [CD trans.]

Alice Dolling of Winterbourne Stoke (Wilts) complained to the official[1] of the bishop of Salisbury that a certain William Smith had married her and should be adjudged her husband. The case was heard by the official in the consistory court, and he gave sentence for the plaintiff. William appealed to the Court of Canterbury.[2] We have the *processus* sent to the higher court by the official of Salisbury, giving a brief summary of the proceedings, depositions of witnesses, and the original sentence. We also have various entries from the rolls of acta of the Court, and a separate document which contains the report of the examiners of the Court who examine the *processus* from Salisbury. The final entry in the case contains the definitive sentence reversing the judgment of the lower court. Translated below are the original *processus* (no. 1) and the examiners' report (no. 4). The final *acta* in the Court of Canterbury (no. 5) indicate that the commissary of the official of Canterbury reversed the Salisbury decision on 31 October 1272.

No. 1

Processus before the official of Salisbury, 10 July, 1271 — 11 May, 1272

A.D. 1271, Friday after the feast of the translation of St. Thomas, martyr [10 July], Alice of Winterbourne Stoke appeared against William Smith saying against him that he contracted marriage with her, wherefore she asked that he be adjudged her husband by sentence; she says this, etc. The man, joining issue, denies the contract; the parties sworn to tell the truth say the same thing as before. The reception and examination of witnesses is committed to the dean of Amesbury.

Thursday next after the feast of St. Peter in chains [30 July], the parties appeared personally and the woman asked for a second production and got it.

Wednesday next after the feast of St. Matthew the apostle [23 September], the parties appeared personally; the woman renounced further production; the attestations were published with the consent of the parties; the parties were given a copy; a day was given for sentencing if it was clear. The woman constituted her brother Roger her proctor in the acts to hear the definitive sentence.

Monday next after the feast of the apostles Simon and Jude [26 October], the parties appeared personally; the man under interrogation confessed in court that he had carnal knowledge of the said Alice a half a year ago. The same man proposed an exception in the following form: "Before you, sir judge, I, William of Winterbourne Stoke, peremptorily excepting propose against the witnesses of Alice Dolling that they depose falsely because from the ninth hour of the day on which her witnesses depose that I contracted marriage with her until the first hour of the subsequent day I was continuously at Bulford, so that it would have been impossible for me at the hour about which the witnesses depose to have contracted marriage at Winterbourne Stoke. And this I offer to prove." The reception of the witnesses produced by the man on his exception and their examination is committed to the dean of Amesbury.

Wednesday next before the feast of St. Edmund, king and martyr [28 October], the parties appeared personally; the woman made a replication of presence; let the woman produce her witnesses before the rectors of Berwick and Orcheston, however many she wishes to produce before the next consistory; let the man also produce however many witnesses he wishes to produce about his absence before the said dean and the chaplain of Amesbury before the next consistory.

Tuesday after the feast of St. Lucy the virgin [15 December, 1271], the parties appeared personally; the woman excepting proposed that it was not her fault that her witnesses had not been examined and asked that they be admitted in court; they were sworn, their examination committed to the dean of

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[1] The word in this context means "judge." He was appointed by the bishop.

[2] The Court of Canterbury was the appellate court for the province of Canterbury. The province included the diocese of Salisbury.

Amesbury and Richard de Rodbourne, and the way of further production precluded for her. On the same day the attestations both on absence and presence were published with the consent of the parties; copies of the attestations were offered to and obtained by the parties, and a day was given for doing what law shall dictate.

Wednesday next after the octave of St. Hilary [27 January, 1271/2], the parties appeared personally, and when there had been some dispute among the parties about the attestations of the parties, a day was given for sentencing if it was clear.

The day after St. Scholastica the virgin [11 February, 1271/2] the parties appeared personally. It was decreed that the aforesaid W. produce in the next consistory all his witnesses whom he had previously produced on his exception so that it might be inquired more fully about the continuity of absence.

Production of Alice Dolling on the principal

Celia daughter of Richard Long sworn and carefully examined about the contract of marriage between William Smith of Stoke Winterbourne and Alice Dolling says that she saw and was present when the said William gave his faith in the hand of the said Alice by these words: “I William will have you Alice as wife so long as we both live, and thereto I give you my faith.” And she replied, “And I Alice will have you as husband, and thereto I give you my faith.” Asked about the hour, she says it was at the hour of sunset. Asked about the place, she says in the house of John le Ankere before the bed of the said women, Celia and Alice, on the west side of the house. Asked if they were standing or sitting, she says sitting. Asked about their clothes, she says that the man was dressed in a black tunic of Irish, an overtunic of russet, and a hood of the same color, and the woman was dressed in a tunic of white and a blue hood, and on her feet she had strapped shoes. Asked how she knows this, she says that she was present in the house when all this happened. Asked why the said William came there, she says to have carnal intercourse with her if he could. Asked if she ever saw them having intercourse, she says no, but she saw them naked in one bed. Asked who were present at the said contract, she says the contracting parties, she herself, Margaret, her sister, and no more.

Margaret, sister of the said Celia, sworn and carefully examined about the aforesaid contract says that she saw and was present when the said William gave his faith to the said Alice by these words: “I William will have you Alice as wife as long as we shall live, and thereto I give you my faith.” And she replied, “And I Alice will have you William as husband by such a pact.” About the year, the day, the hour and the place, she agrees with the said Celia, her cowitness. Asked about their clothing, she says that the man was wearing a gray tunic of Irish cloth, and an overtunic of gray and a hood of gray. About the clothes of the woman she agrees with her cowitness. About her knowledge, she agrees with the said Celia. Asked why the said W. came there, she says that she does not know, unless it was to have carnal intercourse with her. Concerning those in the house, she agrees with the said Celia. Asked if she ever saw them having intercourse, she says no, nor did she see them together in one bed.

Margaret daughter of Michael sworn and carefully examined about the marriage contract between William Smith of Stoke Winterbourne and Alice Dolling, says that on St. Stephen martyr’s day at Christmas, two years ago, she was present and saw that William Smith whom the case is about gave his faith to the said Alice by these words: “I William take you Alice as my wife if holy church permits, and thereto I give you my faith.” And Alice replied by these words. “And I Alice will have you as husband and will hold you as my husband.” Asked about the hour she says that this was done before the hour of sunset. Asked about the place, she says in the house of John le Ankre in the southern part before the bed of the said Alice. Asked who were present, she says Celia daughter of Richard Long and Margaret the sister of Alice whom the case is about and the contracting parties and no more. Asked why the said William came there, she says she does not know. Asked if she ever saw them having intercourse, she says no. Asked in what garments they were clothed, she says that the said William was wearing an overtunic of russet and a hood and a tunic of grey Irish, and Alice was wearing a white tunic and a blue hood.

Production of the said Alice about the presence of the said William

Edith of Winterbourne Stoke sworn and carefully examined about the presence of William Smith says that she saw the aforesaid William Smith in the eastern part of the church of St. Peter of Winterbourne Stoke, leading a crowd of women[3] after him on the day of St. Stephen martyr there were three years past. Asked about the hour of the day, she says that it was after dinner before the hour of sunset. Asked about clothing, she says the she does not recall. Asked where he went, she says she does not know. Asked how she remembers the lapse of time, she gives no cause of her knowledge. Asked if she saw him many times, she says only once. Asked who saw him with her, she says Edith, Alice and Agnes, her cowitnesses and many others of the parish.

Edith Dolling, the sister of her whom the case is about, sworn and carefully examined about the presence of William Smith, says the same as the aforesaid Edith in all things, adding that she saw him many times that day and that the man was dressed in a cloak of russet and a hood of blue, and that she herself went in his hand.[4]

Agnes Grey sworn and examined says the same in all things as Edith the next previously sworn, except that she gives the reason for her knowledge of the lapse of time that she was pregnant at the time.

Alice daughter of William Chaplain sworn and carefully examined says the same in all things as the aforesworn Edith Dolling.

Production of William Smith on his exception of absence previously proposed

John Chaplain, sworn and carefully examined, asked for what he was produced, says to prove a certain exception proposed by William Smith against Alice Dolling of Winterbourne in court. Asked what the exception is, he says that the said William proposed by way of exception that he was not present on St. Stephen's day on which the witnesses of the said woman depose that he ought to have contracted marriage with her. Asked where the said William was on the said day, he says that he well knows and that he saw him and spoke with him on the day of St. Stephen martyr, at Christmas there will be three years passed, at Bulford from the ninth hour of the aforesaid day of St. Stephen and for the entire night following up to midday on the following St. John's day [26–27 December, 1268 or 1269; see below fn. 3]. Asked how he knows this, he says that they serve[d] a guild of parishioners in the said town of Bulford finding food and other things necessary for those serving, as is customary, along with Alice his mother. Asked where he was at table that day, he says in the house of Alice his mother at Bulford. Asked if he left at any hour of the aforesaid day or night, he says no. Asked how he knows this, he says that both of them were together at the said guild and in eating at the house of Alice the mother of the aforesaid William from the ninth hour until midnight, and immediately afterwards they went to the house of the mother of the aforesaid William where the said William spent the night. Asked who were at the guild, he says the guild brothers. Asked who the guild brothers are, he says almost all the better men of the parish. Asked if all his cowitnesses were present, he says yes. Asked if he knows Alice whom the case is about, he says no. Asked how far Winterbourne Stoke is from the town of Bulford, he says four miles. Asked how he recalls such a lapse of time, he says by this: that in the same year, the guild ceased.

Richard Sturre sworn, examined and carefully asked, says that William Smith whom the case is about was present in the town of Bulford from the ninth hour of St. Stephen, at Christmas there will be three years passed, continuously for the whole day and the night following and St. John's day until noon. Asked how he knows this he says by this that he saw him at the guild of Bulford and spoke with him and saw him serving as butler at the said guild until midnight. And the same day, along with Alice his mother, he found food and other necessaries for the guild, as is customary, for each guild bother in his course when he came to him. About the rest he agrees with John, previously sworn.

Walter de Ponte, sworn, examined and carefully asked, agrees in all things with the previously sworn John and Richard, adding however that they lay in one bed in the house of his mother at Bulford. Asked

[3] Textual problem here. This may mean "leading a lewd woman".

[4] An obscure phrase.

who spent the night in that house that night, he says the witness himself, William whom the case is about, and their mother and a serving maid and no more.

John le Devenes sworn and carefully examined agrees in all things and through all things with the previously sworn John and Richard.

Hugh Baghe sworn and carefully examined agrees in all things and through all things with the previously sworn.

Peter son of Alice sworn and carefully examined says that he well knows and it well comes to his memory that William Smith whom the case is about was continuously in the town of Bulford on St. Stephen's day from the ninth hour through the whole day and the following night until the third hour of the next day, this year there will be three years elapsed. Asked how he knows this, he says that he saw him on the said St. Stephen's day eating and drinking at the table of the mother of the said William. Asked where the said W. went after dinner, he says to the guild at the hour of sunset and he stayed there with many others drinking until almost midnight, and afterwards he went to the home of his mother to bed and lay there until morning. Asked how he knows this, he says that he was in his company and is his next-door neighbor. Asked how he remembers when so much time has elapsed, he says by this that in the same year the guild ceased. Asked how far Bulford is from Maiden Winterbourne, he says three leagues. Asked if the said William left Bulford any hour of the day or night between the ninth hour of the aforesaid St. Stephen's day and the third hour of the following St. John's day, he says no.

John son of the weaver sworn and carefully examined agrees in all things and through all things with the previously sworn Peter.

Roger de Cowland sworn and carefully examined agrees in all things and through all things with the previously sworn P. and J. except that he does not give the reason for his knowledge.

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Tuesday after the feast of St. Mathias the apostle, continued until Wednesday, Thursday, Friday, Saturday next following [1–5 March, 1271/2], the parties appeared personally. The same man alleged that he could not produce his witnesses before us because some of them did not exist in the nature of things and some of them had left the province for a pilgrimage and for other necessary cause. And when the parties had disputed for a while about the processus, the same William demanded that a copy of the entire processus be made for him, which decreed and obtained, a day was given for doing what law shall dictate in the next consistory after Easter. Wednesday after 'Misericordia' Sunday [11 May], A.D. 1272, the parties appeared personally and concluding the case asked that sentence be given. We the official of Salisbury proceeded to definitive sentence in this way: "In the name of the Father, amen. We the official of Salisbury having examined the merits of the aforesaid cause and having gone over the acts of court carefully, because we find the claim of the said Alice sufficiently proven, notwithstanding the exception proposed on the part of William, which is not proved clearly in its form, as it ought to be, adjudge William by sentence and definitively to be husband to the same Alice."

No. 4

[An initial long paragraph in this document recites the procedural steps in the Salisbury court and those taken in the Court of Canterbury. The only thing worth noting is that the woman at no time appears in the proceedings at Canterbury.]

Item, having examined the statements of the witnesses of the said Alice on the *de presenti* marriage contract that she proposed, the first two witnesses seem to depose that they contracted between themselves by words of the future tense. And these witnesses were sisters of each other, as the second witness seems to depose. Item, the third witness seems to depose that the man contracted by words of the present tense and the woman by words of the future tense, and she says that the second witness is the sister of Alice.

Item, having examined the witnesses of William produced on his exception of absence it seems that he proved by ten witnesses his absence at the same hour about which the witnesses of the said woman

depose. Item, having inspected the statements of the witnesses produced on the replication of presence, they do not seem to obviate the statements of the witnesses on the exception of absence nor do they help the claim of the woman because they seem to speak of the previous year,[5] and even if they are speaking about the same year they seem to depose less fully, and they are only four in number and the witnesses of the man are ten.

No. 5

Acta, etc., on the Monday next after the feast of the apostles Simon and Jude [31 October 1272], continued and prorogued from the next preceding Saturday [29 October], in the year, etc., before us, brother Henry [Depham],[6] etc., in a marriage case which is pending between Alice Dolling of Winterbourne Stoke, plaintiff, in no way appearing on the one side, and William Smith of Bulford, defendant, personally appearing on the other: to wit, since it appeared to us by the previous *acta* that that various iniquities had been proposed by the party of this W. against the *processus* held before the official of Salisbury between the same parties and transmitted by him under his seal and against the sentence that the same official rendered against this W., and that it had been decreed that the *processus* be handed over to masters P. le Conte and J. de Meriton, examiners of the said court, along with the aforesaid sentence and the mentioned iniquities, to be examined by them, and what they found to be referred to us in writing on the said Saturday, and that the same said Saturday had been fixed by us for the party of the said W. for doing and receiving what justice might persuade and to hear sentence, if the matter was clear, in the said case, and it also appeared that it had been decreed that the said Alice Dolling should be peremptorily cited by the said official of Salisbury that she appear before the said official or his commissary on the said Saturday and in the said place to proceed, do, and receive what justice might persuade and to hear sentence, if it was clear, and it also appeared by certifying letters of the lord official of Salisbury that the said Alice had been peremptorily cited for the said day and place to do and receive the aforesaid things, at length the said Alice long awaited, and, as is customary, many times called for by the crier's voice, did not care to appear. The party of this William charged this Alice with absence and contumacy and immediately asked that as a penalty for her contumacy the cause proceed as it ought to proceed. Whence, we, after waiting a long time, making reference [to the *acta*], there having also been recited before us in court that entire *processus* held before the mentioned official between the same parties, having fully understood this, we proceeded to sentencing in this manner:

"In the name of God, amen. Having heard and fully understood the merits of a marriage case formerly moved before the official of Salisbury, hearing the case by ordinary authority, between Alice Dolling of Winterbourne Stoke, Salisbury diocese, woman, plaintiff on the one side, and William called 'Smith' of Bulford, of the same diocese, defendant on the other, and afterwards lawfully devolved on the Court of Canterbury by appeal of the said William from the same official of Salisbury as from an iniquitous definitive sentence, and in the said court long litigated, there being recited before us in court the whole *processus* had before the official of Salisbury in the said cause between the same parties and the said sentence of the official of Salisbury, having uncovered the iniquities of them, because it lawfully appears to us that the said official of Salisbury rendered a rash sentence in the said case and the said William Smith has well appealed, we, brother Henry Depham, penitentiary of Christ Church Canterbury and commissary of the official, etc., with the counsel of legal experts sitting with us, pronounce the aforesaid sentence of the official of Salisbury rendered against the before-mentioned William in the said case to be unjust, and we quash the same sentence by the authority of the see of Canterbury, absolving the same William from the petition of the said Alice by sentence and definitively by the authority of the aforesaid

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[5] A neat point—Alice's witnesses on the principal claim speak of an event on St. Stephen's day, there were two years passed; William's witnesses on his absence speak of period on St. Stephen's day, there will be three years passed, i.e., on next St. Stephen's day; Alice's witnesses in replication speak of a period on St. Stephen's day, there were three years passed. We cannot exclude the possibility of scribal error ('erant' for 'erunt'), nor, it seems, could the examiners. The explanation may be, however, that Alice's replication witnesses were examined after 26 December, 1271.

[6] Brother Henry, a monk of Christ Church, Canterbury, served as commissary of the official of the Court of Canterbury, *sede vacante*. For vacancy jurisdiction, see below § XIVB, note 9.

see, decreeing that the aforesaid official of Salisbury be required by the lord official of Canterbury aforesaid to hold the said William as thus absolved and public and solemnly and to declare him thus absolved or have him [so] declared at times and places which the party of the said William might require in this matter.".

B. ADAM ATTEBURY C. MATILDA DE LA LEYE

(Court of Canterbury, 1271–72) in N. Adams & C. Donahue, eds.,
Select Cases from the Ecclesiastical Courts of the Province of Canterbury (Selden Soc'y no. 95, 1981) 118–23 [CD trans.]

Unlike *Smith c. Dolling*, above p. XIV–2, this case first appears in the Court of Canterbury[1] as an appeal to the apostolic see in which the aid of the Court of Canterbury is sought to protect the appellant against action by the court below pending the appeal (a so-called "tuitorial appeal"). Subsequent to proving his appeal in the Court of Canterbury, Adam agreed to abandon the appeal to the pope and have the Court of Canterbury hear the appeal. The first document translated below (No. 2) is the depositions of Adam's witnesses on the tuitorial appeal. The second document is the *processus* in the case below transmitted by the official of the archdeacon of Huntingdon[2] (No. 4) after the parties had agreed "to proceed with the principal [case]." in the Court of Canterbury. Other than two brief certificates by the official of the archdeacon of Huntingdon, no other documents survive from the case.

No. 2

Examination of witnesses produced on behalf of Adam Attebury.

Robert Crips, unlettered, sworn and examined, says that he was present in the church of All Saints', at Hertford, Lincoln diocese, on the day of st Denis the martyr (9 October), around the third hour of the aforesaid day, A.D. 1271, before the official of the archdeacon of Huntingdon, hearing cases by ordinary authority, in a case of matrimony which was pending between Matilda de la Leye, plaintiff on one said, and Adam Attebury, defendant on the other, where on the said day and at the said hour the said official in the said case proceeding rashly, rendered an inequitable[3] definitive sentence for the said woman against the aforesaid Adam, as he says.[4] From this sentence as from an inequitable sentence, the same (Adam) appealed to the Holy See and to the see of Canterbury for protection of his appeal[5] in English and without writing, as he says. Immediately afterwards master Thomas Pollard[6] in writing and in Latin and afterwards orally in French, similarly appealed and asked for apostoli,[7] as he says. These apostoli the said official refused to grant him, as he says. Asked how he knows this, he says he knows it because he was present and saw and heard these things done. Asked how he knows that the official was hearing the case by ordinary authority, he says he knows this because the same day the official held a full chapter openly, and this was one of the cases argued in this chapter. Asked why the said A. was called to judgment against the said woman, he says because the said woman asked that this A. be adjudged her husband because he contracted marriage [with her] by words expressing mutual consent, as he says, and he saw and heard this, as he says. Asked how he knows that the said official rashly proceeding rendered an

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[1] The Court of Canterbury was the appellate court for the province of Canterbury. The province included the diocese of Lincoln.

[2] The archdeacon of Huntingdon was subordinate to the bishop of Lincoln. As can be seen from this case, the area of jurisdiction of this archdeacon extended in this period beyond the small county of Huntingdon into the county of Hertfordshire. It will be noted that the appeal omits the intermediate court in the hierarchy, that of the bishop of Lincoln.

[3] *iniquam*. The word can also mean "wicked," not in the colloquial sense of that word.

[4] The style of this deposition differs from that of the subsequent ones in that, among other things, this one is sprinkled with a large number of "as he says." Before we draw the conclusion, however, that this examiner was skeptical of the veracity of this witness, we should remember that this deposition was taken in a different court. It may have been the style of the Court of Canterbury to use a large number of "as he says," whereas it was not the style of the court of the official of the archdeacon of Huntingdon to do so.

[5] As indicated above, Adam subsequently abandoned his appeal to the Holy See, and the parties agreed to have the case determined in the Court of Canterbury.

[6] Not otherwise identified, the title "master" suggests, but not quite prove, that Pollard was a university graduate.

[7] These were letters of protection that were routinely granted to appellants. The fact that the official did not grant them (if the witness is to be believed) suggests that the official thought that the appeal was frivolous or that he was being a bully.

inequitable definitive sentence against the mentioned A., he says that he knows this because he (the official) followed what was said by some witnesses produced against the aforesaid A. One of them was and is the sister of her who produced her. Alice the witness is noted[8] as infamous for witchcraft and theft, and is commonly regarded as a prostitute in those parts. Asked who was present at the appeal thus taken, he says that he and his co-witness, John, and many others both clerk and lay, as he says.

[John de Raddeburne, also unlettered, testifies to the same effect, except that he does not know whether *apostoli* were granted or not.]

Processus *before the official of the archdeacon of Huntingdon, 14 November, 1270 —* (*9 October*), 1271.

To the venerable man of discretion the lord official of Canterbury constituted by the prior and chapter of Canterbury, sede vacante,[9] the official of the archdeacon of Huntingdon greeting, and due and honorable reverence and obedience. At your mandate I transmit the processus held before my predecessor, that was pending between Matilda de la Leye, on one side, and Adam Attebury of Berkhamstead,[10] on the other:

The aforesaid Adam was cited at the instance of the aforesaid Matilda for the Friday after the feast of st Martin in winter (14 November), A.D. 1270, at Harpenden.[11] The said woman issued a libel against the same Adam: "Matilda de la Leye says and proposes before you lord judge against Adam Attebury of Berkhamstead that the same A. contracted marriage with her, which having been proved, she asks that he be adjudged her husband by way of sentence." When the libel was recited, Adam immediately joined issue (litem contestando) and said that what was told in the libel is not true and therefore what was asked for should not happen. Both parties having been sworn to tell the truth, the woman spoke as she had before, and the man persisted in denying it. When they were asked whether they had had sexual intercourse, both confessed the carnal coupling. A day was given to the woman to produce witnesses and to the man to see the witnesses swear and [to both parties] to do further what the law would require, to wit, the Friday just before the feast of st Lucy the virgin (12 December), in the place as before, in the aforesaid year. On the said day and in the said place, the said M. personally appeared, but the said A. in no way appeared. As a penalty for the contumacy of the said A., the judge admitted two witnesses who were sworn and examined and deposed as follows:

Lucy, wife of Richard the ploughman, sworn and examined, says that she saw and heard Adam Attebury contract with Matilda de la Leye in these words: "I give you my faith that I will have you[12] as my wife from this day forward." She replied, "And I to have you as husband from henceforth, my sister Alice and Lucy wife of Richard the ploughman being witnesses." Asked how she happened to see and hear this, she says that she came with them from Luton.[13] Asked about the place, she says it was in the middle of a field called 'le Riding'.[14] Asked about the day and the hour, she says it on the vigil of st Hugh the bishop (16 November) seven years had passed; it was after dinner[15] before the evening hour. Asked who were present, she said the contracting parties; she, Lucy, who had sworn, and Alice, sister of Matilda, and no more. Asked about the clothes, she says that the man was dressed in a tunic of russet[16]

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[8] *notatur*. The word frequently implies a formal charge brought in an ecclesiastical court. It will be noticed that Adam's exception in the archdeacon's court focused on Lucy, whereas this witness focuses on Alice.

[9] Between the death of an archbishop and the appointment of another, the cathedral chapter of Canterbury (the prior and chapter) exercised the archbishop's judicial and administrative functions. The vacancy of the see here is the one between the death of Archbishop Boniface of Savoy (18 July, 1270) and the consecration of Archbishop Robert Kilwardby (February, 1273).

[10] co. Herts.

[11] co. Herts.

[12] *volo te habere*. This is "I will have you," not "I shall have you," i.e., it is not unambiguously words of the future tense.

[13] co. Beds., about 8 miles northeast of Berkhamstead.

[14] Unidentified.

[15] Medieval dinner tended to be in the early afternoon.

[16] A coarse, home-spun woolen of reddish brown.

and an overtunic of hauberget,[17] and the woman in a dress of burnet.[18] Asked if she says these things out of fear or love or for money or a bribe, she says no, only that she might remain without peril from the oath she had sworn.

Alice, sworn and examined, says that she was present when Adam Attebury gave his faith to Matilda de la Leye in these words, "Matilda, I give you my faith that I shall have you[19] henceforth as wife." She replied, "Thank you, and I you as husband, my sister Alice and Lucy here present being witnesses." Asked about the place, the lapse of time, the day, the hour, and the clothes of the contracting parties, she agrees in all things with Lucy, who had previously sworn. Asked who were present at the contract, she says the contracting parties and two witnesses.

The named parties having been peremptorily called and personally appearing at the chapter[20] held in the church of Great Gaddesden[21] on the Friday next after the feast of st Vincent (23 January), [1271], the said M. renounced further production [of witnesses], the aforesaid attestations (depositions) were published at the request of the parties, and a copy was decreed for the parties and obtained. And after the parties had disputed about the aforesaid attestations for a while, the often-said A. at the chapter celebrated at Berkhamstead on the Thursday next after the feast of sts Perpetua and Felicity (5 March), in the aforesaid year, excepted against the witnesses of the said Matilda in this way:

"I Adam Attebury standing before you lord official of the lord archdeacon of Huntingdon, except against the person of Lucy, witness of Matilda de la Leye produced to testify against me in a marriage case, and propose that no faith is to be given to her because she is of ill fame, suspect life and opinion, and accused[22] of theft and persevering in that crime. Again, because she is a pauper and without goods, and on account of her poverty strongly suspect, and on account of this to be repelled from testimony. These exceptions I propose in the alternative, and I ask that they be admitted and received, asking that one or the other of them having been proved, which can and should be enough to win the case for me, the testimony of the said Lucy should be annulled and pronounced null, and I should be absolved from the petition of the said Matilda. … ."

And after solemn dispute was held many times about the said exception, the parties being present, at length the judge in the chapter held at Berkhamstead on Thursday next before the feast of st Botolph (11 June), A.D. 1271, quashed the aforesaid exception with the advice of the legal experts sitting with him and asked the parties if they wished to propose anything other than what had previously been proposed in the said case. And because they proposed nothing lawful, the case was concluded, and the parties were assigned a day, to wit, the Friday next after the feast of st James the apostle (31 July), in the church of st Peter, Berkhamstead, in the aforesaid year. On this day and in this place, because the judge wanted to examine the processus, he set for the parties the day after the synod of Hertford in the church of All Saints to hear the definitive sentence precisely.[23] On which day and in this place, the parties appearing personally, the judge, with the counsel of prudent men, pronounced sentence in the marriage case in this form:

"In the name of God, amen. Having heard and fully understood the merits of a marriage case which is pending between Matilda de la Leye, on one side, and Adam Attebury, on the other, a libel having been offered, issue having been lawfully joined in the negative, an oath having been taken by each party to tell the truth, the woman asserting the marriage contract, the man denying and confessing carnal coupling with her, an exception proposed against the witnesses of the woman having lawfully been quashed,

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[17] This was a kind of cloth, not further identified, that frequently appears in conjunction with russet. O.E.D, s.v. *haberjet*.

[18] A cloth of some dark color.

[19] *habebo te*. These are unambiguously words of the future tense.

[20] Sessions of lower ecclesiastical courts tended to be called "chapters."

[21] co. Herts.

[22] *irretita*. The word normally implies a formal criminal charge.

[23] "Synods" were more important ecclesiastical gatherings than "chapters" and tended to be held once or twice a year. This one probably took place on 8 October 1271. See the first set of depositions.

because we find the complaint of the said Matilda was lawfully proven by the aforesaid witnesses, the subsequent carnal coupling adding support (*adminiculum prestante*), we by sentence and definitively adjudge the said Adam to be the husband of the said Matilda.

Farewell. Given at Shillington[24] on the morrow of st Mathias the apostle (26 February), A.D. 1272.

NOTES AND QUESTIONS

This case appeared on the exam that I gave in this course in 2003. Here are the "guide questions" that were offered on the exam.

(1) What institutions are evidenced by this case? Briefly, sketch out the prior and subsequent history of these institutions. (This is a question about framework; don't spend a lot of time on it.)

(2) What is the form of procedure being used by these institutions? Briefly sketch out the prior and subsequent history of this form of procedure. (This is a question about framework; don't spend a lot of time on it.)

(3) What is the nature of the exception that Adam makes to the testimony of Lucy? Why does Adam's exception say that if he proves either of his exceptions against Lucy he will have won his case? How does the exception suggested by Adam's witness, Robert, differ? To what extent are these exceptions supported by Tancred (above, p. IX–4)? How would these exceptions have been treated under the procedure described in Maranta's *Speculum aureum* (above, p. XII–19)? under the *Ordonnance pour la procédure civile* (below, p. XVI–7).

(4) What do your answers to question (3) tell you about how the law about witnesses developed between the thirteenth and the seventeenth centuries.

(5) Have Matilda's witnesses (assuming that we believe them) said enough to allow her to prevail in the case under Alexander III's rules about marriage formation? Have they said enough to allow her to prevail in the case in a jurisdiction that had adopted the rules about marriage formation prescribed by the council of Trent (below, p. XVI–2)? by the *Ordonnance of Blois* 2 (below, p. XVI–3).

(6) Does this case tell you anything about why the council of Trent adopted the rules that it did? why the French adopted the *Ordonnance of Blois*?

(7) What does the ruling of the archdeacon of Huntingdon's official tell us about the role of the judge as he interacts with the social situation of the parties?

(8) Considering how the Court of Canterbury ruled in *Smith c. Dolling* (above, p. XIV–2), how do you think that same court is going to rule in this case?

(9) What do your answers to the previous questions tell you about the relationship of procedural and substantive law in the history of Western legal development?

C. DECISION (HOLY ROMAN ROTA, 1360 X 1365)

in Bernardus de Bosqueto, *Decisiones Antiquiores*, in [Catholic Church. Rota Romana], *Do[minorum] de Rota Decisiones, Novae, Antiquae et Antiquiores* (Cologne 1581) 627–8 [CD trans.]

Peter, being married to Anna his wife, made many and various clothes and furniture [*arnesia*] for her, and he also gave her many and various jewels, saying "You may hold this [*teneas istud*]." It is true that the said Anna, while she was married, acquired money in various ways, some of which she handed over to the said Peter her husband, and she acquired with the notice of her husband nine florins for the fur edging of her cloaks, more or less, on one occasion or a number, and also many jewels, silver cups and spoons, and much cloth both for her cloaks and dresses, given her by her in-laws and friends of her husband to do with as she would [*ad beneplacitum sibi*]. At length Peter, approaching death, made his testament in which he made their common children heirs, and constituted his wife, the said Anna, tutor, governor and administratrix both of the children and of the goods, but with benefit of inventory. Now it is asked whether the said Anna, the aforesaid wife, is held to put her above-written furniture and jewels in the inventory she is making, and also, since the said Peter her husband made no mention of this in his

[24] co. Beds.

testament nor made a legacy of them to her, what is the law so far as the clothing and furniture made or bought by the man?

It seems that it ought to be said that he did not seem to give them to her, because the necessity of supporting and administering such things for her falls on the husband, and therefore the laws favor the husband, so that he is understood to have handed them over to her only for current use, as is proved in [D.24.1.31],[1] with what is noted there at the beginning, and in [D.24.1.53.1] at the end, and [D.24.3.66.1] supports. Oldradus and Cynus are of this opinion in that place, and [D.24.1.31] is commonly held to say this.

So far as what was acquired by her industry and diligence is concerned, it seems that it ought to be said that if they were acquired by her efforts [*operis*], they ought to pertain to the husband or to the man and his heirs after him, because the wife is held to work for the husband, as in [D.38.1.48] and note [C.6.46.5.1 v^{o} *potestate*] at the end, and the said law [D.24.1.31pr] supports, and for this note what Innocent says in [X 3.26.6] near the end of the first column.[2] What is said of the wife is also relevant to this point: when he adds a little after, "for whatever the wife acquires by her effort is acquired for the man." If however she acquires other things otherwise and can show whence and from whom or in what way, then they ought to pertain to her and not to the husband, even if she acquired with the money of the man, for example, in trading or in keeping it in the bank [*cambiis*]. Argument: [D.24.1.15.1] for the woman is free, except as to the carnal debt and working, as the law [C.6.46.5.1] says and ones like it.

So far as the vessels and jewels and clothing and other ornaments are concerned, which of necessity the man is not held to minister to her, if it appears that they were handed over to her with the intention of making a gift, although the gift is not valid, as one made between husband and wife, then, because the husband did not expressly revoke it, I would say that it was confirmed by the death of the man, and that

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[1] POMPONIUS, Sabinus, book 14: But if a husband makes clothing for his wife out of his own wool, although this is done for the wife and out of concern for her, it will still belong to the husband. The fact that the wife helped in the preparation of the wool here and acted on her husband's behalf in it makes no difference. **1**. Where a wife uses her own wool to make women's clothes on her own behalf with the help of her husband's female slaves, the clothes will be hers, and she will owe her husband nothing for the slaves' work. But if men's clothes are made on behalf of her husband, they will be his if he paid his wife for the wool. But where the wife did not make men's clothes on behalf of her husband but gave them to him, the gift will not be valid, since it is only valid if they were made on her husband's behalf, and he will not be able to sue for the cost of the work done by his female slaves. **2**. If a husband gives his wife a building-site so that she can build a block of apartments on it, there is no doubt that the block will belong to the husband. But it is settled that the woman can have the expenses she incurred. For if the husband claims the block as his, the wife can retain the expenses. **3**. If there were two slaves each worth five gold pieces, but both of them were sold for five by a husband to his wife or vice versa as a gift, the better view is that they will be owned jointly in proportion to the price. For the important question is not what the slaves are worth, but how much of the price has been remitted as a gift. There is no doubt that the husband and wife can buy property from each other for less than it is worth if they do not intend to do this as a gift. **4**. If a husband sells property to his wife for its true value or vice versa, and so as to make a gift, they enter into a pact that the seller will not guarantee the property, we must see exactly what the agreement on the sale says. Is the property to pass, in which case the whole transaction will be valid, or is the pact alone to be void, as is the case if, after the sale, this pact was made because of a change of mind? The better view is that only the pact is invalid. **5**. We hold that the same is true where the parties, in order to make a gift, enter into a pact that the seller need not give a guarantee against the slave running away or wandering off, that is, that any actions under the edict of the aediles or the contract of sale will be unaffected. **6**. The money a man owes his wife, which is payable at a certain time, can be paid at once without fear that it will be considered a gift, although by keeping it for the agreed period he might have had the advantage of using it. **7**. Where you are about to leave me property as a legacy or because you have made me your heir, you can leave it to my wife if I ask you to, and this will not be considered as a gift, because my property is not diminished. According to Proculus, the main reason why our ancestors came to a donor's assistance here was to prevent one of the parties losing his property because of his love for the other, not to prevent out of spite, as it were, one of them from being enriched. **8**. If a husband gives his wife an excessively valuable present on the Kalends of March or on her birthday, this is a gift. But if he pays the expenses which a wife incurred to maintain herself in a better way, the opposite is true. **9**. A wife is not held to have been enriched if she spends the money given to her on banquets, perfume, or food for her slaves. **10**. Provisions which a husband supplies for his wife's slaves or horses which are used by them both cannot be recovered by a condictio. But if he supports his wife's household slaves or those she keeps for sale, I think that the opposite rule applies.

[2] The reference is to Sinibaldus Fliscus [Innocent IV], *Commentary in X 3.26.6* (Venice 1570), fol. 239rb, discussing the presumption that what a beneficed clergyman acquires, he acquires from the goods of his church: "And support this with what is said of the wife, that whatever she acquires during the marriage, she is presumed to have acquired from the goods of her husband."

they ought to pertain to her and not to the heirs of the husband, as [D.24.1.32.1]. But in the aforesaid case of handing over, I do not believe that by these words which the husband said to the wife, "You may hold this," he seems to have made a gift, but rather that she keep it and to commend it to her use indiscriminately, because in a doubtful matter someone is not presumed to have made a gift nor to have cast aside what is his (argument [D.22.3.25] and [D.39.5.7]) especially lest in so presuming they despoil themselves by mutual love, and because a gift between husband and wife is prohibited by law, and in a doubtful matter one is not presumed to have done something against the disposition and prohibition of law.

So far as the other things given to the wife by others with the man looking on are concerned, I believe that a distinction ought to be made, whether these intended chiefly to give to the man and wanted them to be his acquests, although they handed them over to the wife, and then I believe that such things ought to pertain to the man and to his heirs and not to the wife, because what the man acquires by the ministry of the wife he acquires for himself, even when he ratifies such a gift (argument: [D.3.5.23]), unless the man, when it was credited to the wife, intended to make a gift to her, for then, although at that time of the gift between husband and wife it was not valid, nonetheless it was confirmed by the death of the man [D.24.1.3.13, 1.4; 24.1.32.1], although I would not presume this in a doubtful case, to wit that the man wanted to make a gift to the wife (argument: what I said in the preceding section using [D.22.3.25]). If, however, those who gave to the wife with the man looking on intended principally to give to the wife, and they wanted the things given to be acquired by her and not by the man, although they did this with him looking on, then I would believe that such gifts were acquests of the wife and not of the man, for she is a free person who can acquire for herself, nor are they acquired for him, because they are not acquired by her efforts, as is noted by Cynus. [C.6.2.22] in the last question at "However this argument is removed." Nor is she held to put such things in the in the inventory. In a doubtful case I would believe that recourse must be had to conjecture and to the type of thing given, whether it is more fitting for a man than for a wife and vice versa, so that according to this it may be presumed whether the givers wanted it to be acquired by the man or by the wife. And for this proposition Johannes Adreae's notes in the Novel. [VI 2.15] *in fine super verbo ad eundem* do well. And if nothing can be presumed from these things I would believe that in a doubtful case the givers wanted it to be acquired by the husband, because they gave while he was looking on. Argument [D.28.6.10.5] with what is noted there [D.24.3.64.5] with the laws that are in agreement. About those things given to the wife with the wife looking on and not the man, there is no doubt that without doubt they ought to pertain to her by the argument of the aforesaid laws. In a doubtful case, however, if the wife cannot prove whence, how and from whom she acquired, everything is presumed to be of the man's goods, as [C.5.16.6] and l. quamvis. ff. eod tit. [i.e., *De donationibus inter virum et uxorem*].[3]

And therefore it would be safer for the wife to put everything in the inventory, protesting her right that on account of this she does not intend to confess that these things pertained to the husband or his heirs or ought to pertain, and protesting that the things appear to pertain to her by right, as she wishes to obtain her own things, lest without protestation by simply placing them in the inventory she might seem to confess that they pertained to the man or to his heirs or ought to pertain, as [C.5.51.13], which she will not seem to confess with the aforegiven protestation which will keep her right for the future. Argument [D.20.6.4.1] and [11.7.14.7]. Note about the matter of protestation in [X 1.2.9] and by [Johannes Monachus and Johannes Andreae] in [VI 5.[13].81].[4]

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[3] This appears to be a "bum cite."

[4] VI 5.[13].81: "In a general grant are not included those things which someone is unlikely to grant specifically."

D. NICHOLAUS DE TUDESCHIS (ABBAS PANORMITANUS), *CONSILIA*

1. CONSILIUM LXXIX (*Stante statuto*)

in Nicholaus de Tudeschis, *Consilia* (Venice 1569) 2.79, fol. 162v–163v
[CD trans. Some citations omitted.]

The case of the following *consilium*:

There is a statute that provides that a man is enriched with a third part of his wife's dowry if she dies before him without children, if a man leads a wife to his house and lives with her or goes to live with her. It is asked if he who led a wife by words of the present tense and brought her to the house of his usual habitation and had her there in his family enjoys the benefit of the statute, the aforesaid consort or spouse dying in the house of the same man before the marriage was consummated by carnal coupling.

Having invoked the name of Christ and of his mother. It seems first that not: because the statute makes mention of a wife and man, but the name "wife and man" sometimes is understood to be only those who have consummated the marriage by carnal coupling, as is proved in [X 3.32.7].[1] For then a marriage is perfected as to its essence and is signified as in [X 1.21.5, 4].[2] … Sometimes, however, it is understood to be those who have contracted by words of the present tense even without carnal coupling as is proven in [D.35.1.15],[3] and [D.24.1.3[.1] v° *concubine*][4]. And there the good gloss proves by many canon laws in which it is provided that consent *de presenti* alone makes a marriage as to its essence and that they can be called husband and wife. The very definition of marriage proves it, which is had in the gloss at the beginning of [C.27 q.2][5] and in [JI.1.10pr][6]]. where there is a good text with a gloss. Sometimes, however, these words, "husband and wife," are applied to spouses *de futuro*, although by benign interpretation, as it is in the notable text [C.6.61.5].[7]

From this you can infer that these words "husband and wife" are sometimes taken in a strict sense and signify man and consort, as in the marriage. There was true [marriage] between Joseph and Mary, although there never intervened carnal coupling ... . This clearly was the intent of this statute, in which she is called "wife" before she is led, and thus before the succeeding carnal coupling ... . And she cannot be called a *sponsa* from the time that present consent intervenes, because a *sponsa* is said of one who is

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[1] In this decretal, Alexander III holds that a *sponsa de presenti* who had not had intercourse with her *sponsus* could dissolve the *sponsalia* by entering the religious life. It closes with the following ringing phrase: "Clearly, what the Lord said in the gospel, that it was not permissible for a man to dismiss his wife except by reason of fornication [above, § IB], is to be understood, in accordance with the interpretation of sacred speech, of those whose marriage is consummated by carnal coupling, without which it cannot be consummated."

[2] The issue in the first decretal is whether a man who marries a woman who has been espoused to another but with whom she had no carnal relations can later become a priest (i.e., is not a "bigamist"). The decretal holds that he is not a "bigamist." The second decretal is less relevant. It holds that those who being in holy orders contract with and have sexual relations with a second woman, are to be treated as "bigamists," even though they are not in fact such.

[3] D.35.1.15: "Where a legacy is left to a woman under the condition 'if she marries within the family', the condition is treated as fulfilled as soon as she is taken to wife [*ducta*, literally "led"], even though she has not entered her husband's bedchamber, for it is consent, not sleeping together, that makes a marriage." The last phrase of this fragment = D.50.17.30, above p. VIII–24.

[4] D.24.1.3[.1] v° *concubine* (Lyon, 1604), col. 2179: " … Again I ask, if gifts are impeded when a marriage has been contracted by words of the present tense before the leading into the house [of the husband], for according to the canons they are husband and wife. Azo replies that they are. …"

[5] Above, p. VIII–2, which, in turn, is a paraphrase of JI.1.9.1, above p. I–6. The reference to the "gloss" is probably to the *dictum Gratiani*, because there is no definition marriage in the formal glosses.

[6] There is no definition of marriage in JI.1.10pr. The reference is probably to JI.1.9.1, above p. I–6, in which case the gloss is probably that v° *coniunctio* (Torelli ed.), col. 59: "*Joining.* Of souls not of bodies, as [D.50.17.30], and this joining signifies the union exists between God and the just soul, whence the Apostle: 'Who adheres to God is one spirit with him'. [1 Cor. 6:17] The rest, that is the joining of bodies, designates the conformity that exists between Christ and the holy church, whence the evangelist: 'The Word was made flesh'. [Jn. 1:14]."

[7] C.6.61.5. The text treats a *sponsa* the same as an *uxor* for purposes of applying the rule that what is given to wife by way of testament from her husband is not acquired by her father, even if she is in his power, but, rather, is acquired directly by the wife.

promised. For spousals are said by *spondeo* and *spondes*, which is the same as "I promise" and "Do you promise" ... . But from the time matrimony is contracted, she cannot be called promised, but married [*coniugata*] and wife ... .

Second, the woman was led to the house.

Third, she lived with her husband, even though she was not carnally known. For the signification of this word "lived with" carnal coupling is not required, but consort of a common dwelling, as is expressly proved in our matter in [C.27 q.2 c.42].[8] Since therefore the words bear this interpretation and the contrary intent of the makers of the statute does not appear, we should not depart from the words. ...

Indeed, if we wish to conjecture the reason and mind of the statute, it will not deviate from the above-written interpretation but will corroborate it. Although no reason is expressed in the said statute, nonetheless it is permissible to conjecture the natural reason which could move the makers of the statute and according to that conjecture we can and should extend or restrict the statute ... . [Citations to Baldus, Cynus and Dinus] where natural justice is alleged for conjecturing the mind of him who laid it down, and that ought to be presumed the reason of the law, by which similarly the mind of him who laid it down moved ... . But the reason of the statute deferring gain to the man and to the wife upon the dissolution of the marriage cannot be because of carnal coupling, because this reason is found equally in both. Not that the carnal debt should be judged equally ... but rather there ought to be gain for the wife, who has lost her virginity, which is another dowry, and performed many services for the man, particularly with regard to children ... . Nor can it be conjectured that it was on account of conjugal affection or the relics of the dissolved marriage, for this reason also militates in favor of the wife. Hence it is that the law will not validate any pact for taking gain that is not common to both spouses ... . There cannot therefore be assigned any good reason to the law unless it be that the husband in sustaining the burdens of the marriage incurs many losses, and although he has dowry for supporting them, the expenses for clothing and ornaments are so great that the dowry is consumed in them. This is the reason Baldus puts ... and Bartolus in the treatise on the two brothers, where by this reason he says the notable phrase that if the father sustains the burdens of the marriage, that gain which the husband acquires by reason of the statute, cedes to the father, because it seems to arise on account of the paternal goods, out of which the burdens of the marriage were sustained. And thus you see that respect is not had for coupling; otherwise the father would gain nothing, which is not found in our case. For, as is presumed in our case, the man led the woman to his house and made all the expenditures, as a husband normally does for a wife living with him. He had prepared, as I hear, much clothing, and had made many preparations, so that he might consummate a marriage with a wedding feast[9] with her with the usual solemnity. He ought therefore to enjoy the benefit of the statute, since the words and the natural mind of the statute persuade. To the same effect is Baldus on [C.1.3.54(56)].[10]

The statute does not require handing over with solemnity, but contents itself that she be led and that he live with her, because by cohabitation he sustains the burdens of the marriage. Indeed the statute says more, that is, it suffices that the man go to live with her. These words ought be weighed much, for they imply that even though he has not cohabited much, nonetheless, from the time he goes with the intent of living with her, he enjoys the benefit of the statute. And thus it is not required that he have made many expenditures in leading and living with her. For if the husband goes to live with her, there is no need of a solemn handing over, and nonetheless the statute defers the gain to the husband. Therefore the preceding part that says that when the woman is led to the house of the husband to live with him ought to be understood also to be without solemn handing over. For the statute is satisfied with effect and does not

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[8] Above, p. VIII–10.

[9] *conviviorum matrimonium*. Read *convivio matrimonii*.

[10] See below, next section, note 9.

care about the means. This last consideration is indeed the best in favor of the man. For the reason of the statute ought to be uniform [X 3.42.3].[11]

The argument to the contrary mentioned above does not stand in the way. It works in the situation where the inquiry is about a marriage in its perfected significance, in which case it ought to be understood as one that is consummated. For then it has its perfected significance, as in the laws alleged above. Otherwise when mention is made of marriage or of husband and wife for another end, as is the case in our case, then the words are taken properly, for there is no underlying reason for taking that most strict significance. For if the reason of that most strict signification ceases, the signification itself ought to cease ... and in our case mention is not made of husband and wife on account of the signification "perfected matrimony," but on account of the burdens of matrimony, as I said above. And this is enough.

[11] X 3.42.23 is a very complicated decretal. In order to figure out how Panormitanus is getting this principle out of this decretal, one should look at his commentary on the decretal.

2. CONSILIUM I (*Facti contingentia*)

in Nicholaus de Tudeschis, *Consilia* (Lyon 1562) 1.1, fol. 2ra–vb
[CD trans. Most citations omitted]

The factual circumstances are as follows: A certain A. contracted spousals by words of the present tense with B. and received from her a dowry of 1000 [*lire*]. It happened that the espoused woman died before she was led to [A's] house or the marriage was otherwise consummated. Now it is asked whether the said espoused man is entitled to one-half of the dowry in light of the following statute: "If any woman dies without children from the man to whom she is married (*viro cui nupta est*), a half of the dowry at the time of her death shall remain with the husband (*apud maritum*) not counting in the said half the profit from the man's marital gift (*donationis propter nuptias*), of which part the husband cannot be deprived." Afterwards some additions were made to the statute in which it was always mentioned whether children existed or not.

And, invoking the name of Christ and his mother, it is argued first that the truth shines greater on the affirmative part in this way: The statute in deferring this profit to the husband requires only two things: that the woman be married (*nupta*) and that she die without children. But these two things come together on the facts proposed, as I will immediately prove. The major premise is obvious by itself; the minor is proven as follows:[1] For it is true to say that she died without children by her husband, since none appeared, and facts are not presumed. … That she was married I prove most plainly by a text most notable in my judgment in [D.35.1.15],[2] where it is plainly said that a woman is called married, even though she is not known. And, what is more, even if she was not led, it suffices that there intervened consent to marriage *de presenti*, which alone makes marriage and not carnal mingling, as is proven in the end of that law, and more fully the gloss and Bartolus hold this in the same place.

Secondly, it is proved by [D.24.1.3[.1] v° *concubine*],[3] where it is noted that it is said to be marriage, and [the couple] are called husband and wife, so long as there is a contract of espousals *de presenti*, and although the gloss says there that this is a matter of canon law, I say the same of civil law, as is proved in [Nov. 22.3][4] and in the good gloss there.[5] And this text applies very well to this point, where it is proven, particularly in the gloss, that marriages are contracted by consent alone, that is to say, of the man and the woman, although nothing else intervenes.

Thirdly, it is proved by many canon laws (*iura*) which say in common that marriage is a true one by the by present consent alone, although nothing else intervenes, to the extent that a second [marriage], even with intercourse, does not take away [the first], because it [the first] already had its essence in the consent, as is proven in [X 4.4.5][6] … . The definition of marriage is relevant, the one that is posed at the beginning of [C.27 q.2][7] and of [JI.1.10pr][8] where there is a good text with a gloss.

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[1] I may not have this right. "conn'a de se satis est nota, maior etiam probatur."

[2] Above, § D.1, note 3.

[3] Above, § D.1, note 4.

[4] Nov. 22.3: "Affect on either side makes a marriage, without any addition of dowry. Once they have agreed with each other either by pure marital affect or also with an offering of dowry and a marital gift, it is necessary that a cause attend the dissolution, whether without punishment or with penalty … ."

[5] Authen. 4.1 (=Nov. 22.3), v° *affectus* (Lyon, 1604), col. 163: "[D.50.17.30] is on point. And this is so if there intervene words of the present tense, such as these: 'Will you be my wife [now]?' and she responds, 'I will'. And she, on her side, asks [the same question]. It is otherwise if [the words are] of the future tense: 'Will you be my wife [in the future]?' For she will then be a wife when she is led to the house of her husband as in [D.23.2.5, 1]. …"

[6] Above, p. VIII–19.

[7] Above, p. VIII–2, which, in turn, is a paraphrase ofJI.1.9.1, above p. I–6.

[8] See above, § D.1, note 6.

Fourthly, this question seems to be [resolved] at first blush by the *casus* particularly with the joined commentary of Baldus on [C.1.3.54(56)][9] where it is said to be proven that that a pact which provides for a [person] to be awarded a particular part of the dowry in the event of death takes its effect when one of the spouses enters religion, and nonetheless it is certain that after the consummation of the marriage it is not permissible for either of the spouses to enter religion. … Thus, it would seem that this text is to be understood when one or the other enters religion, the marriage having been contracted and not consummated. … And according to this, this text seems to prove that the said pact of awarding a part of the dowry in the case of death also applies even in the situation where death intervenes after the spousals have been contracted by words of the present tense, the marriage having not yet been consummated, as happened in our case. And for this proposition the things that are read in [C.6.61.5][10] are relevant.

But notwithstanding these things I think the contrary is the law, that is that the said man should be awarded nothing under the statute. And first I take a fundamental two propositions: First, the word "marriage" (*nuptie*) is taken in law in multiple senses. Sometimes it is taken for the very pure essence of marriage, which is caused by the intervention of *de presenti* consent alone, as is proven in the said [D.35.1.15], the said [Nov. 22.3], [C.27 q.2 c.10][11] and like texts. Sometimes it is taken for the very carnal mingling that intervenes after the marriage has been contracted as is proven in [?X 4.17.4],[12] and is proven more clearly than light in [C.27 q.2 c.40] and the third gloss there[13] … . Sometimes it is taken for the accompaniments and festivities that take place at the time when the wife is led to the house of the man, as is proven in [C.30 q.5 cc.3, 5],[14] and in this way it is taken in the Gospel where it is said that a marriage was made in Cana of Galilee, when Jesus made wine of water there. [Jn. 2:1–11] And this last explanation seems most appropriate and conforming to the popular usage (*consantanea vulgo*), whence it is the common usage in certain places to speak of *le nozze*, and this is what Gaspar de Calderinis thinks in his commentary on the rubric *de sponsa*[*libus*] [X 4.1].

The second proposition is that the word "matrimony" (*matrimonium*) or "marriage" (*coniugium*) is sometimes verified in a marriage contracted by words of the present tense where carnal coupling has not yet intervened. And espousals by the present tense are commonly said [to be marriage], and they are so called by many people, [even] when the wife has not been transferred (*traducta*) to the house of the husband, as most clearly appears in [X 4.1.22],[15] and more clearly in [X 2.23.13],[16] and similar texts. Sometimes the word "matrimony" or the words "wife and husband" are verified, only in a marriage that is consummated, as is proven in [X 1.21.5].[17]

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[9] C.1.3.54(56), a rescript of Justinian's which provides, as Panormitanus indicates, for division of the property of spouses, when one of them enters the religious life. There is nothing in the text to suggest that the couple had not yet had sexual intercourse nor, as Panormitanus will argue below, that both are entering the religious life, or that they had both consented to one of them entering the religious life. These were requirements in Panormitanus' time, but do not seem to have been the requirements in Justinian's time.

[10] Above, § D.1, note 8.

[11] Above, p. VIII–4.

[12] The ed. omits the title, but if this text is being referred to, it is probably to the statement at the end: "she cannot be a wife who staining the bed of her husband presumes, while he is living, to couple with another." In the context (which is a question of the legitimacy of the child born of the adulterous union), it seems clear that the statement means that she cannot be the wife of the man by whom she had the child.

[13] Above, p. VIII–9. The ordinary gloss on "nuptials" (Venice, 1572), p. 999a, reads: "I.e., carnal mingling, because she did not know his carnal coupling."

[14] Both of these texts describe customary marriage ceremonies of the times in which they were written, and they, or the accompanying commentary, suggest that this is what is meant by "nuptials" (*nuptie*).

[15] This is one of a number of decretals that holds espousals *de presenti* to be a valid marriage, although the focus of the decretal is not on the absence of a *ductio* for those espousals.

[16] The phrase in the decretal that seems to provoke this remark is "whether a young man ought to have as wife the espoused woman to whom he consented by words of the present tense."

[17] Above, § D.1, note 2.

Under these propositions I proceed to the decision of our question in this manner, under the assumption that (*cum*) the word "wife" and the word "husband" are verified and found verified after the marriage has been consummated, and not before, and particularly the word marriage (*nuptie*) [is verified] because it is properly applied only (*saltem*) to a woman who has been solemnly led. The antecedent was plainly proven above; the consequent, however, I plainly prove here in this way: There is just cause for restricting a statute when if it were taken simply and in a broad sense someone would take a gain that is not owed and another would suffer harm. The first is proven in … . The second is proven in … . And both are far better proven than elsewhere in [X 1.4.8].[18] There a custom is approved which does not prejudice the *ius commune* where the words of the statute are not only confined to an understanding, as it were, far from the usual (*quodammodo extraneum*) but also far from what the words mean (*multum a longe verbis adptabile*), whence the word "election" is taken to mean "confirmation" by those to whom it is referred, and Bartolus approves this procedure (*theoricam*) … .

To the same point, wherever statutes are penal (and it suffices to call them penal in that they diminish someone's patrimony …), the words should be confined so that they are not understood as they would be understood if they were broadly interpreted. … But in our case all these things intervene not only singly but collectively; therefore there ought to be a restitution, as is apparent. For this man unlawfully and without just cause took the half of the dowry, although he had not consummated the marriage nor had he solemnly led the wife to his house. Again, the heirs of the girl would suffer grave harm form this broad interpretation. Again, it would prejudice the *ius commune*, since [under the *ius commune*] a dowry should be restored to the woman upon dissolution of the marriage, as in [X 4.20.1],[19] with many similar texts. And this interpretation ought to be applied to the aforesaid statute, since all deviations from the *ius commune* are odious and ought to be restrained. … To this point there is a notable saying of Innocent III in [X 3.24.6],[20] where he says that we broadly interpret privileges insofar as they concern the rights of those who grant them … but in so far they concern the rights of others they are strictly interpreted. … Therefore this statute, since it is such [that it concerns the rights of third-parties], even if it is privileged, ought to be strictly interpreted insofar as it prejudices the heirs of the girl. This is especially so if we consider that in this case, the statute is odious and not motivated by the common (*vagum*) understanding [of the purpose of dowry], the disparity between the espoused man and the espoused woman or husband and wife, since with the woman (*viro*) having predeceased, especially before the transferal and consummation of the marriage, she gained no advantage, nor did the man sustain any burdens, contrary to the intention [of dowry] … .

The second thing that principally moves me to this sentence is the intent of the statute, which can be derived in many ways. First from its very beginning, when it says "died without children, which words have reference to the time at which she died without children … . From these words it seems that those who made the statute were thinking of woman who was at the time of her death in the position of and had the possibility of having children, for these words "without children" include within themselves the privation of children and including within themselves the position and possibility of children. … But in our case this woman was not at the time of her such a position and possibility, because she had not been led to the house of her husband. Therefore it is most clearly apparent that these words of the statute are

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[18] A complicated case in which both the *ius commune* of the church and a privilege granted by Alexander III had given the power to elect an abbot to the monks of a particularly monastery but a statute promulgated by the local bishop had required that the election take place at another monastery, that the person elected be a monk of that monastery, and, apparently, that the monks of that monastery participate in the election. Innocent III interprets the statute as requiring only that the other monastery confirm the election and gives the electing monastery the power to choose whomever they wish as abbot and to do it at their own monastery.

[19] X 4.20.1 (a canon of an unidentified early church council): "We command that when women are separated from their husbands for any lawful cause, their entire dowry be given back to them."

[20] In interpreting a charter of gift that granted a number of pieces of property to a monastery, Innocent III applies a restrictive clause found at the end of the grant to apply only to the last piece of property granted and not to all of them, "because in contracts full, testaments fuller, and benefices fullest interpretation is to be given." Hence, the decretal does not say quite what Panormitanus says it says, but one can see how it could be so interpreted.

not verified in her, especially because she did not cause the fact that she had not been led. It is also to be noted that the intent of the makers of the statute can be presumed from the fact that all the additions to the statute mention [the absence] of children.

Third, I consider chiefly those words "to the man to whom she was married." For properly according the common manner of speech, he who contracts marriage by words of the present tense is not said to be the husband of that woman until he has led her to his house, except by [special] custom of certain places, as in [C. 27 q. 2 c.40],[21] where Jerome says, when you hear "Joseph the husband of Mary" you should not think that he had undergone marriage, that is to say carnal coupling, but you should recall the custom of scripture that espoused men are called "husbands" and espoused women "wives." Further on it becomes clear, where Jerome says that one who contracts by words of the present tense, as the blessed virgin contracted with Joseph, he is properly called an espoused man rather than a husband, because she was not yet led, but Joseph was called husband on account of the custom of scripture. In support of the this proposition are [X 4.1.22; X 4.1.32][22] where they are called "espousals of the present tense." In support of this proposition is the fact that before transferal one can enter religion even if the other is unwilling, as I said above. Therefore he [the man in the case] can not be strictly called her husband, that is, in the proper significance of the word. This is a true proposition in the circumstances of the case: These words, "husband and wife," are frequently taken for those who have consummated their marriage, and especially by the common custom of our time. Therefore this understanding ought to be taken strictly in our consideration (*in animo nostro*) for the reasons that I mentioned above, by the rule that odious things are to be restrained … and because statutes should be reduced to the *ius commune* whenever that can be done.

Again, the statute says "a married woman" (*nupta*). I spoke very fully about this word in the beginning, above. Again, it says "with her husband" (*apud maritum*). But in many places and writings he is called an espoused man before he has led her and not a husband. … Particular attention should be paid to the custom of this city and practically all the places in which I have been, by which he is called "an espoused man" even on that day on which solemnly led [her] to his house, until the marriage is consummated. And the common usage of speech is to be observed even in statutes, because in whatever matter the common usage of speech is to be preferred to the precise significance of the words where the interpretation is to be a restrictive one (*etiam in materia restringibili*).

Finally, I adduce a pretty argument which I have taken from the statements of Peter [probably Pierre de Belleperche] and Cynus principally on [C.1.14.5][23] … . This is the argument: We should draw back from the words of the statute and keep its intention not only where the intention is expressed but also where the intention or reason is not expressed in law, so long as that reason is defined as natural, and naturally and commonly can be shown from similar cases. By which reason, even if the law is to the contrary, the contrary [to the law] can be imagined and can notably be proven … from natural justice itself. On this point is *l. mulier* with the joined gloss *ff. solu. mat.*[24] where an intent is found contrary to the words of the [law]. … For, as Baldus notably says,[25] as man consists not only of a soul, but also of a body, so a law consists of intention or reason and words. And the words are taken like the body or the superstructure (*superficies*). The reason, however, is taken as the spirit and the soul, and this ought to restrain[26] more than the superstructure of words. To determine the reason of the law where it is not expressed, we ought to determine why a wise man made it or by what reason he made it, since a legislator is presumed to be such a person. For the law ought to be rational. … And to the doctor or the judge is given the power of interpretation. … But certainly in our case it cannot be presumed that the cause of the

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[21] Above, p. VIII–9. Cf. above, text and note 13.

[22] The citation of X 4.1.22 is more on point here than it is above, text at note 15; X 4.1.32 is less apt, but the general point is well supported..

[23] This is a major text on interpreting statutes according to their intention, not just their words, and it gave rise to considerable commentary.

[24] There is no *lex mulier* in D.24.3 or in C.5.18. Other *leges mulier* should be checked.

[25] No reference is given. It may be on the same unidentified law.

[26] Reading *restringere* for *restringi*.

award [of the dowry] was the disposition to marry (*affectus coniugii*) or the religion of espousals *de presenti*, for by the same reason a similar award extends to the woman, because man and wife ought not be adjudged unequal in such matters. … Nor can we determine that the reason was that the man is the head of his wife, for this reason does not suffice. … We can therefore determine no other good and sufficient reason for this disparity between husband and wife other than that the man in transferring [her] to his house and in sustaining the burdens of marriage incurs many expenses. For he expends almost the entire dowry in ornaments and feasting, so that if he wished to sell these ornaments he would not recover half of what he expended. Again, the expenses made in an extraordinary feast, as the man in no way recovers them from the woman, the statute properly wanted to provide for him in the award of half the dowry, so that the man not remain charged with these expenses (*in sumptibus*), just as in a similar situation it provided for the restitution of the dowry. … In the case of the wife, however, these reasons do not apply; [hence] the statute did not give an award to her. Since therefore this and not another is the reasonable and sufficient reason of the statute, it ought not to apply in our case, where the reason of the law ceases. And although he did make some expenditures, he did not however make those excessive ones that are accustomed to be had in a solemn transferal. The law does not care for trifles. … For the espoused woman also made some expenditures among her relatives and at least to honoring herself on the first occasion [presumably when the consent was exchanged], about which, however, the statute does not seem to have taken account.

From this clearly follows the decision of this case: the man should gain nothing by virtue of this statute.

It remains now to consider the first and last arguments [given above for the contrary conclusion], because the answer to the others is apparent from what has been said. And first [D.35.1.15][27] I say as I said above, that the word *nuptie* is sometimes verified in marriage contracted by consent alone, and sometimes not, as is plainly proved above. For in the said law it suffices to contract by consent alone, for there we are dealing with testaments where there is a broad interpretation … . Properly this large sense is taken [there], but in our case we are dealing with narrow matter. Properly another stricter understanding ought to be taken [here]. This is [not] unusual that the same word be taken one way in a broad matter and otherwise in a narrow matter; indeed, it is expressly proven that this can and ought to done in [X 1.4.8][28] … and we do this every day. …

It remains to reply to [C.1.3.54(56)].[29] To this I respond in two ways: First, that in that case it is by no means to be gathered that the marriage was not consummated and that what was done afterwards with the consent of the other was not valid. … And that law can be understood to be such a case. Second, I respond, and more subtly to this point, that the pact of award was common to both the man and the woman, as it says in the text and the gloss, so that if there were any disparity it would be reduced by operation of the law to equality, as there according to the understanding of the gloss, in which case it cannot be said that the award was granted on account of expenses or the burdens of marriage, because that has no place in the case of the woman, as we have said. If by necessary operation it is understood by reason of that equality that they gave that award on account of the marital affection, which affection arises out of the essence of matrimony alone … then the [award] has a place even before the transferal and consummation, especially because each of them could be in a position to gain or lose. And thus the same disposition of the law is operative in our case, for if the reason of the statute ceases, the disposition of the statute ought to cease in popular rights. See the good gloss in a similar case about the replication of fraud, which is sometimes granted and sometimes denied, the same reason always remaining., as is noted in [X 2.25.10].[30] As for [C.6.61.5][31] I say that it does not stand in the way, because it speaks about a

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[27] Above, note 2.

[28] Above, text and note 18.

[29] Above, text and note 9

[30] Something is wrong here. X 2.25.10 and its accompanying glosses deal with the exception of excommunication not the exception of fraud, though it could be taken to illustrate the same point.

[31] Above, text and note 10.

favorable disposition, otherwise in an odious one, as is commonly noted there and especially by Baldus who seems to contradict what he said about [C.1.3.54(56)]. And finally laying aside all prejudice (*affectione*), I think this view is the truest, nor should the contrary opinion of any other individual [texts or authors] move the judge, because either all the aforesaid elements do not come together in their terms, or, although apparently proven, they are not to be followed on account of the aforesaid; sometimes it [the contrary opinion] is evidently false, or it can be overturned by probable reasons, as a good judge of sharp intelligence will determine … .

E. LISBON. MATRIMONY. MONDAY (15 MARCH, 1574)

in Caesare de Grassis, *Decisiones Sacrae Rotae* (Rome 1590) 79–80 [CD trans.]

The lords [of the Rota] said that diminished faith, at the discretion [*arbitrio*] of the lords, was to be given to Helena de Conto and Catharina Gundisalvi, witnesses examined for donna Maria. And some of the lords thought that absolutely no faith was to be given to the aforesaid Helena, because she is a slave [*serva*], as all the witnesses both of don Pedro and of donna Maria seemed to confess in deposing that she is the daughter of Maria Roderici, a half-black slave,[1] and the rule is undoubted that the offspring follows the womb. [CJ.3.32.7]

Nor was it pleasing, what was urged on the other side, that servitude is not one of those things that are perceived by the senses, for the witnesses further deposed that she was treated like a slave and was taken for one at home and outside, that she served and that in effect she was called a slave. From which things it is clearly to be inferred that she is in the status of servitude. That seems to suffice that she not be admitted as a witness. [CJ.4.20.11pr.][2]

Nor do the witnesses of donna Maria stand in the way when they say that the aforesaid Helena was very well treated in that house, and that it was said by many that she was the sister of the same Maria. For it is said, and the witnesses confirm it, that she is a slave, insofar as it is said that her father left her liberty, her father still being alive. Whence she cannot be free by this, because a testament is confirmed by death, as is generally held.

Nor does it stand in the way that she is the slave or freedwoman of the father and not of Maria, for as soon as she is the slave or freedwoman of the father, she is also the slave or freedwoman of the daughter, and thus also of Maria. [D.50.16.58.1].

Further it is said that she is an *aya* or a *cuitos*.[3] Whence it seems to be in her great interest to act so as not to be said to be engaged in bawdry, in which case a witness is repelled. [Cites a *consilium* of Philippus Decius, and three of Aymon Cravetta.] And let her not only try to exonerate herself but also her mother [Cites a consilim of Aymon Cravetta.]. Since all these things came together, it seemed to some of the lords that she ought be entirely repelled. [Cites three *consilia.*] Which proceeds even where the truth cannot otherwise be had. [Cites a *consilium* of Johnnes Cephalus.] On the part of some, as I have said, it seemed that she ought to be repelled entirely.

Some said that she ought not be entirely repelled, since some of the witnesses seemed to depose of her reputation and of a certain sort of treatment as a freedwoman, and since the matter is favorable. When there is a case about proof of marriage, in the proof of it witnesses not greater than any exception seem to be admitted, as is handed down to us in [X 4.18.3; Panormitanus *ad* X 2.20.22] in 3 not., more clearly in [Philippus Decius, *Consilium*] 163. col. 4. sub. numer. 7. vers. *octavo oppono.*, after [Alexander Tartagnus, *Consilium*] 146. col. 6. vers. *nec obstat si aliquis*, vol. 5.

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[1] The Latin in both printed editions reads *seminigtae servae*, but *seminigtae* is not a Latin word, all you have to do is change one letter to get *seminigrae*, which is. Thanks to Danny Jacobs for coming up with this emendation.

[2] The text does not seem quite on point, but De Grassis also cites the authentic that follows it in the Vulgate edition.

[3] Both words apparently mean “nanny.” “Aya” is today a Spanish word and “cuitos” Portugese, but in this period the distinction between the two languages was not that great.

Even those who felt this way agreed that her faith should be reserved for discretion, with not a little diminution.

As to the second witness, Catherina Gundisalvi, since she is [Maria's] nurse and her familiarity remains [i.e., she is a member of Maria's *familia*] and consequently she still is a domestic, both of which things normally repel a nurse [cites a commentary of Baldus on a Codex text that is hard to find and the treatise of Albericus on witnesses] and because she desires that the marriage be effectuated, which desire similarly in marriage cases totally rejects a witness [cites two *consilia*], on this account the lords wanted equally to reserve her faith also for discretion with considerable diminution. So much the more so because between the first and second examination there are certain variations, which although it seemed possible that it [the testimony] could be saved on account of the lapse of time that intervened between the first and second examinations, nonetheless they displeased the lords.

[The case went through numerous additional proceedings. Despite the difficulties, however, a final judgment was rendered in favor of donna Maria and of the marrriage on 16 January 1576. Caesare de Grassis, *Decisiones Sacrae Rotae* (Rome 1590) 205–208.]

F. GINO GORLA, A DECISION OF THE *ROTA FIORENTINA* OF 1780 ON LIABILITY FOR DAMAGES CAUSED BY THE "BALL GAME"[†]

Tulane Law Review 49 (1975) 346–57

GINO GORLA[*]

INTRODUCTION

The purpose of this article is to present, with some comments, a decision of the *Rota Fiorentina* of 1780 which is of both historical and contemporary interest. Historically, the decision constitutes a mirror of the mores of the time and the methods used for deciding cases as well as of certain basic principles of the law in Tuscany. From the contemporary standpoint, the problems dealt with in the decision are important ones: immunity from liability in tort; a limitation of freedom of action for the owners of houses or property surrounding the place where a sport or game spectacle is *usually* played for the public; and the burden for those owners of suffering the inconvenience or *small* damages derived from the ordinary or "natural" course of the game.

The *Rota Fiorentina*[1] was one of the highest courts in the Grandduchy of Tuscany under the rule of the Medicis (until 1737) and the Lorenas. It was the most authoritative Court in the Grandduchy and enjoyed great prestige and authority in the world of the *ius commune*. The *Rota* acted at times on the commission of another Supreme Court, *Il Magistrato Supremo*, where the lieutenant of the Grandduke sat. The decision discussed probably echoes the policy of the Medicis and the Lorenas to protect the middle and lower classes against overwhelming pretensions of the nobility. The decision is given in appeal on a commission[2] by the *Magistrato Supremo* to a judge of the *Rota Fiorentina.*

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[1] For more information about the *Rota Fiorentina* and other Tuscan and Italian Supreme Courts see Gorla, *Il Museo Guarnacci di Volterra, la Fabrica di Porcellane Ginori e i Palazzi di Firenze—dall'aurea giurisprudenza della Rota Fiorentina al codice civile del 1942*, 5 Foro Italiano 1 (1972) [hereinafter cited as *Il Museo Guarnacci*], and *I tribunali supremi degli Stati italiani, fra i secoli XVI a XIX, quali fattori dell'unificazione e del diritto nello Stato e della sua uniformazione fra Stati*, which is my report (*Relazione*) to the *International Conference* (*Congresso*) *of History of Law* held in Florence in April, 1973 [hereinafter cited as *Relazione Firenze*]. This report will be published in the volumes of the "Atti del Congresso."

[2] The Commission might be given also to a collegiate body of the *Rota*, composed of three members.

The judge was Giuseppe Vernaccini, a prominent personage in the Rota and the council of the Grandduke.[3] He enjoyed the trust of the Grandduke, Peter Leopold of Lorena, the enlightened reformer of Tuscany and later the emperor of the Austrian empire. In various instances Vernaccini, by judicial decisions, assisted the Grandduke in bringing forward his reform policies, especially in the field of abating hindrances to transferability of property and promoting the progress of commerce and industry.[4]

Judicial decisions at that time were given a title. The decision discussed in this article is entitled *Marradiensis Praetensae Refectionis Damnorum*.[5] There are difficulties in the presentation of this decision due to the judicial style of the *Rotae*,[6] to the language,[7] and to the fact that we have lost the art of reading a case of those times.

I have tried to overcome these difficulties by paraphrasing the text of the decision, occasionally abridging it. However, on the whole I have tried to follow the text of the decision.[8] Similarly, I have tried to reproduce Vernaccini's narration of the "facts of the case," since it is important to comprehend how the judge visualizes facts and where he puts emphasis or color; this seems to be particularly interesting in this case. The courts of the Grandduchy of Tuscany, as many other Italian courts (not all of them), had the duty to give "motives" or "grounds" for a judgment. The judgment had to be grounded ("motivated") on the basis of *auctoritates et rationes*, *i.e.*, authorities and reasons. The latter were displayed especially when the former were lacking or when they were not binding.

The authorities were, in order of importance:[9]

(1) Roman texts (which had the force of law), statutes, and legal customs. These authorities were binding (*auctoritates necessariae*) only when the provision was precisely on point and clear. If the provision considered a case similar to the case at stake, then it was a matter of an *argumentum a similibus*;

(2) judicial precedents of the Supreme Courts of the State, whose decisions, if on point, were binding as law, where there were a series of them constituting a *consuetudo iudicandi*, ie., a judicial custom;[10]

(3) judicial precedents of the Supreme Courts of other States (Italian or European), and especially the *Rota Romana*, which, besides being one of the Supreme Courts of the Pope's temporal State, was the Supreme Court of the Catholic Church legal order;

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[3] For a short biography of Vernaccini see *Il Museo Guarnacci*, *supra* note 1, at 31. Vernaccini is the author of the decision on the *Fabbrica di Porcellane Ginori*, which I reported and commented on there.

[4] The Grandduke entrusted him with important tasks, such as the drafting of a project of codification that was interrupted by Vernaccini's death in 1789.

[5] 2 Collezione Completa Delle Decisioni Dell'Auditore Giuseppe Vernaccini 279 (1824).

[6] On the style of the Italian *Rotae* and other Italian Supreme Courts of those times see Gorla, *Civilian Judicial Decisions—An Historical Account of Italian Style*, 44 Tul. L. Rev. 740 (1970) [hereinafter cited as *Italian Style*]. For some peculiarities of the style of the *Rota Fiorentina* and other Tuscan Supreme Courts see *Il Museo Guaracci*, *supra* note 1, at 9.

[7] The decision is written in Italian. However, this is the Italian of the 18th century, or rather the Tuscan language of those times. It is interesting that most decisions of Tuscan Supreme Courts were written in Latin.

[8] I have also maintained the italics where I have found them in the decision, taking into account the fact that Vernaccini wanted to stress the bearing of the words put in italics by him.

[9] On the duty to give "motives" see *Italian Style*, *supra* note 6, at 741; *Il Museo Guarnacci*, *supra* note 1, at 8, 16. On *auctoritates et rationes* and the order or rank of *auctoritates* see Gorla, *I precedenti storici dell'art. 12 disposizioni preliminari del codice civile del 1942—un problema di diritto costituzionale*, 5 Foro Italiano 3, 4 (1969). *See also Relazione Firenze*, *supra* note 1, §§ VI, VII.

For the purpose of the present article the description of authorities and their order has been rather simplified. Indeed, canon law, foreign statutes, and custom. also had to be taken into account. See Gorla, Il ricorso alla legge di un "luogo vicino" nell'ambito del diritto comune europeo, 5 Foro Italiano 89 (1973).

[10] In some Italian States, like Piedmont and Naples, a single decision of the Supreme Court was binding as law. However, in Tuscany and other States, two decisions (*binae judicaturae*) were sufficient to create a *consuetudo iudicandi*. On the *binae judicaturae* see *Il Museo Guarnacci*, *supra* note 1, at 10–11; *Relazione Firenze*, *supra* note 1, at § VI.

(4) the *Doctores* in their legal writings, *i.e.*, *Glossae* (of the famous *Glossa*), commentaries and treatises, *Consilia* (legal advices), and *Allegationes* or advocates' briefs when published in volumes.[11]

Authorities mentioned in (3) and (4) were not binding, i.e., they were only persuasive, even when they were on point.[12]

All authorities, binding and not binding, had to be on point, in order that they could be alleged as (pure) authorities. If they considered a case similar to the case at stake, then they were a matter of an *argumentum a similibus*, which could be a matter of discussion according to the degree of similarity. The *argumentum a similibus* was middle way between *auctoritates and rationes*, because maintaining similarity and drawing an argument from it involved a certain reasoning. In the absence of authorities on point, the *argumentum a similibus* was a way of developing or creating law. It was used largely by the Glossators and Commentators of the 12th to the 15th centuries, to adapt Roman texts to the times. Thus, *argumenta a similibus* were often artificially stretched. During the 16th to 18th centuries, Supreme Courts were at work in the various Italian States, and they used the same method of *argumenta a similibus* to develop or create the law according to the changing times. The Supreme Courts applied that method not only to Roman texts but also to judicial decisions and *Doctores*. The *jurisprudentia* of Italian Supreme Courts of the 16th to 18th centuries is filled with *argumenta a similibus* that were often stretched, artificial, and acrobatic. In Vernaccini's decision that method is applied in many instances[13] because there was no authority on point. The same method was used by courts of the European States belonging to the world of the *ius commune* or civil law, and by the English courts even during the 19th century.[14]

In addition to presenting the decision, I have tried to offer some explanation and comment. For this purpose I have followed a mixed method. Most of the explanations and comments are given in footnotes to the decision; this seems to be the appropriate method to clarify or comment immediately on the pertinent points and to be brief. Other comments will be made in the conclusion, especially on the method of reasoning and the *ratio decidendi* of the decision, its bearing, and its background.[15]

THE DECISION[16]

The Facts of the Case

In the Tuscan town of Marradi since time immemorial, it was customary during the summer for a team of amateurs (*dilettanti*) to play a ball game[17] in the public square. According to a similar usage existing in other towns of Italy, the game was played mostly as an amusement or public feast for the citizens,

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[11] *See Italian Style*, *supra* note 6. Generally, *consilia* were preferred because they were casuistic and used the same style as adopted by court decisions.

[12] However, when a *unifomis opinio* of all the Supreme Courts of the civil law world had been formed, that opinion was considered as binding, at least in some circumstances. *See Relazione Firenze*, *supra* note 1, § VII.

[13] The method of such artificial *argumenta* is used by Vernaccini also in his decision on the "*Fabbrica di Porcellane Ginori*" and other decisions, which are presented and commented upon in *Il Museo Guarnacci*, *supra* note 1.

[14] *See*, *e.g.*, Rylands v. Fletcher, L.R. 3 H.L. 330 (1868).

[15] Also in *Il Museo Guarnacci*, *supra* note 1, and other essays, I have had to follow that method of footnotes comments, followed by a final comment.

[16] As I have pointed out, here I am trying to reproduce, with some paraphrase and abridgment, the text of Vernaccini's decision in its narration of the facts of the case and its "motives."

Now a problem arises concerning citations of authorities in presentation of Vernaccini's decision. According to the style of those times, each step of the reasoning is accompanied by citation of a long list of authorities to support that step; this style, notwithstanding some reactions, was used even in the presence of a Roman text or other text of a law, or of a binding *consuetudo iudicandi*. *See Italian Style*, *supra* note 6. In my presentation or paraphrase of Vernaccini's decision, I have not indicated the various authorities cited in it. However, in many instances, I have mentioned, in my footnotes, their contents and sometimes also the authorities. I have done this especially to point out when Vernaaccini was using the *argumentum a similibus* to reach the result of creating the law for the case at stake.

[17] The game known as *gioco del pallone* was not football. From the authorities cited in the opinion, the ball was launched by hand or by an appropriate gadget (*sagibulo*). *See* note 25 *infra*.

rather than as an athletic exercise for the local youth. The owners of houses surrounding the square never opposed the use of the area for the game. It was also customary that the team would notify the owners of the day during the summer on which the games would be commenced, in order that they might adopt measures to avoid damages to their houses, especially to the windows.[18]

At the beginning of the season of 1778, the team, as usual, gave formal notice to the homeowners that the games would commence on July 24. The Fabronis, a noble family of Marradi, having restored the facade of their house located in the public square, asked the Community Magistrate for an injunction prohibiting the game or for a *cautio de damno infecto*.[19] The team, resenting the fact that one family would oppose the public games, claimed that the game had to be absolutely free and "immune" from any liability for damages as it had been in the past.

On July 20, 1778, the Community Magistrate, composed of seven members, unanimously rendered a decree that:

> The amateurs' team can continue giving such *licit* amusement in the public square; however, the question of damages is to be left open and discussed in the ordinary course of justice.[20]

On the same date, the Community Magistrate issued a decree stating that in the territory of Marradi there was no place, other than the public square, where the ball game could be conveniently played. This decree was given at the request of the *Auditore Fiscale*,[21] who asked, at the solicitation of the Fabronis, whether it was possible to find another place "adaptable" to the game without inconvenience to neighbors and the "ornament" of their houses.

No appeal or recourse was taken by the Fabronis from the two decrees. They did, however, file an action before the ordinary local court of the "*Vicario*," for a *cautio de damno infecto* and for the payment of any damages caused by the games. The *cautio* was also sought for future damages that would result from games during subsequent summer seasons. On July 26, 1778, the team gave the *cautio* by way of a personal suretyship of one citizen of Marradi, in order to avoid delay of the public amusement. However, the *cautio* was given "without any prejudice of the question of liability for damages, to be examined in the subsequent course of procedure." During the games of that season, damages of eight lire were caused to the windows and shutters of the Fabronis' house.[22] Further, the facade was soiled by the ball being dirtied in sand and lime on the ground that was used to restore the Fabronis' house, and damages were estimated at forty lire.

On January 20, 1779, the *Vicario* gave a judgment for payment of the former damages, but acquitted the team for the latter damages, since the ball was dirty due to the sand and lime heaped on the ground by order of the Fabronis. Both parties appealed to the *Magistrato Supremo* in Florence: the Fabronis asked

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[18] Although the decision is not clear on this point, it is reasonable to assume that the windows and other parts of the houses had to be protected only during the hours of the game, which were known to the owners. The games season involved a certain burden of conduct for them, since they were required to adopt appropriate measures to avoid damages.

[19] In the *ius commune*, the *cautio de damno infecto* dealt with in the Digest 32.9 had become a kind of suretyship or warranty to be given for a person building or making a work on his land from which damages could result to neighboring property, or where it is probable that damages would result from an existing building, work, or situation of the property of that person. *See* the present articles 1171 and 1172 of the Italian Civil Code. In the Digest, the *cautio* was not a suretyship; it was a solemn promise (*stipulatio*) to be made by that person, that he shall pay those damages. Further, from Vernaccini's decision it seems that the *cautio de damno infecto* could be extended to damages probably resulting from acts other than building or making a work on land, *i.e.*, in the instant case from playing a ball game.

[20] The Community Magistrate seems to have been mainly a type of administrative body, which had the power of deciding administrative controversies by a "hearings" procedure. Therefore, the Community Magistrate, while denying the injunction, renvoyed the parties, for the question of damages, before the competent local court of the *Vicario*.

[21] The *Auditore Fiscale* sitting in Florence was one of the highest agents or officers of the Grandduke, who had agents in every important town. It is not clear whether the *Auditore Fiscale* considered in the decision is the main office in Florence or its agent in Marradi.

[22] The Fabrionis left the shutters open, so that damage was caused to the windows. However, it is not clear from the decision exactly what damage was caused. It might be that the shutters were freshly painted or varnished during the restoration of the house, and the ball had soiled the fresh paint or varnish.

for the payment of damages for soiling the facade, the team to be acquitted for damages caused to the windows and shutters of the Fabronis' house.[23]

The Motives[24]

(1) According to the common opinion of *Doctores* interpreting the *Lex Aquilia*, the basic Roman law on torts, the act causing damage must be committed with *dolus*, or, at least, with *culpa* in order to constitute an *iniuria* or wrong, and thereby give rise to liability for damages. There is no *iniuria* without at least *culpa*.

(2) Further, there is no *culpa* and, therefore, no *iniuria* and no liability when the act causing damage is "*licit and permitted by law*."

(3) According to the *communis opinio* of the *Doctores*, the ball game is considered a licit and permitted act which cannot be prohibited: *est de iure permissus, nec potest de iure prohiberi*.[25] Further, in the particular case the game is to be considered licit and permitted precisely[26] in the public square of Marradi, since there was an immemorial custom of playing it in the public square and, more importantly, because it was authorized by the Community Magistrate's decree of July 20, 1778, that there was no other place where the game could be conveniently played; this decree, for lack of appeal, has become a *res iudicata*.

(4) Therefore, since the game is an act *licit and permitted*, which in the particular case was *licit and permitted precisely* in the square of Marradi, the team was not liable for damages caused by the game to the houses surrounding the square.[27]

(5) Moreover, as was customary, the team notified the owners of the houses surrounding the square of the day on which the games would begin in order to allow them to adopt measures to protect items likely to suffer harm from blows by the ball. This notification represents an act of "diligence," to avoid

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[23] At this point, Vernaccini, after his narration of the "facts of the ease" and before exposing the "Motives," says that he has given his decision in favor of the team, after "a serious and mature study of the case as required by its *exemplarity*," meaning a new and important precedent. It is interesting to note that in other cases Vernaccini had occasion to say that even one single precedent could be binding when the decision is the product of serious and mature study of the case and is thoroughly "motivated"; if so the *binae judicaturae* are not necessary.

[24] The following paragraphs present the "motives" of Vernaccini's decision, in the order that they appear in the decision, and as they have been numbered by the reporter in the *Collezione* mentioned *supra* note 5.

[25] *See Il Museo Guarnacci*, *supra* note 1, at 16. The *Doctores* cited in the decision, in support of this principle, describe the *Ludus Pilae flatu plenae*, the game of the ball inflated with air, as was played by hands or by the *sagibulo*. Amongst the *Doctores* cited is Franciscus A. Bonfini, a great judge of the *Rota Fiorentina*, during the first half of the 18th century, who wrote on the subject in his two works, *Ad Bannimenta* and *De Fideicommissis*. In the latter work, at *Disputatio* 93 of 1733, Bonfini, at the request of the *Magistrato Supremo*, gives a kind of inventory of the various games and plays, licit and prohibited, which were in use in Italy and in the world of the *ius commune*. Amongst the licit games, beside the "*gioco del pallone*," he mentions the "*gioco del calcio*," a kind of football which was played in Florence and Lucca.

[26] The principles stated in paragraphs (1) and (2) as being of a general character were insufficient to eliminate liability, because it was also necessary to explain the legal reason why in the particular case the owners of the houses surrounding the public square had to suffer the inconvenience or the burden of conduct deriving from the games. On the other hand, if the ball game had been prohibited by law, there would have been no immunity from liability, even if the ball game bad been authorized by the local custom or the decree of the Community Magistrate of July 20, 1778. In other words, the motives alleged in paragraphs (2) and (3) are interdependent.

[27] Here the decision, besides citing again the authorities cited in paragraph (2), cites other authorities. First of all, it cites the Digest 9.2 (on *Lex Aquilia*, 7, § 4 (*si quis*). This text says that there is no *iniuria* in the case of boxing or other fighting in a public game when one of the parties is killed, because the harm is caused for the sake of glory and virtue, and not to commit an *iniuria*. Then, the decision cites *Doctores* interpreting that text; among them it again cites Bonfini. This author says that such custom (*consuetudo*) of boxing or fights excuses the fighting party (*ludentem*) from punishment for assault and battery or homicide, if the game is done without fraud (*sine dolo*) in a place established for that purpose (*in loco ordinato et consueto*); however, he adds, if harm or death is caused *in loco non ordinato*, and in an illicit game, then according to the *Lex Aquilia*, there is punishment. This citation of the Roman text, the *Doctores*, and Bonflni is an instance of Vernaccini using the *argumentum a similibus*. *See* note 13 *supra* and accompanying text. Indeed, the harm or death considered by the Roman text, the *Doctores*, and Bonfini is caused to the other party of the game and not to the public or to property close to or surrounding the place where the game is played.

damages ensuing from a licit and permitted act. Indeed, some of the *Doctores* require that even in the case of a *licit and permitted act, diligentia* (care) must be used to avoid damages.[28]

(6) The Fabronis ignored the notice and left exposed to possible damage items that could have been protected from harm. Similarly, they had embellished the facade of their house located where they knew the game was customarily played.[29] Thus, the Fabronis willingly exposed themselves to the damages which could derive from the game. Therefore, the text of the Digest 11 *ad legem Aquiliam* is to be applied.[30]

(7) The Fabronis raised two objections to these arguments. First, they argued that the rules of immunity from liability in case of an act licit and permitted is applicable only when, as a consequence of that act, nothing is introduced onto the neighbor's property: *nihil in alienum immittitur*.[31] This objection must be rejected. While this is true where a work to be done is new and unusual, it does not apply, however, to a work already *pre-existing and usual*.[32] Thus, the rule is not applicable in the instant case, since the ball game was not introduced *for the first time* in the public square of Marradi, nor played in a *new and unusual manner*, but rather was played in the public square since time immemorial, and it was intended that the game would continue there in the *ancient and usual* manner.

(8–11) Secondly, the Fabronis objected that future damages and the *cautio de damno infecto* for such damages were the main object of their action.[33] Therefore, they argued that the pertinent law was not the *Lex Aquilia*, concerning damages already caused and requiring *culpa*; rather, the applicable law was *cautio de damno infecto*, under which the *cautio* has to be given also for future damages deriving from a licit and permitted act even if no *culpa* occurs. This objection too must be rejected. While this might be

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[28] Here again, Vernaccini gives an example of an *argumentum a similibus* in his citation of authorities. Among the *Doctores* cited is Menochius (16th century), that when a person in a public game, permitted in a certain place, kills one of the spectators, there is no punishment, if any *culpa* is lacking. It is to be noted, first, that Vernaccini introduces here the idea that the game has to be played without *culpa*, *i.e.*, according to the ordinary or natural course of such games, and, second, that here a closer similarity is introduced, *i.e.*, the case of harm caused to one of the spectators. *See* note 27 *supra*. However, the *argumentum a similibus* is still stretched. Indeed, that spectator is a person who *willingly* puts himself in a position where he can suffer some harm deriving from the game in its ordinary course, while the owners of the houses did not put their houses willingly in such a position. However, there is a special similarity when the conduct of the Fabronis is considered, since they decided to restore the facade of their house knowing that the games were to be played in the square.

[29] This does not seem to mean that the Fabronis could never restore or embellish the facade of their house. Thus, they had the burden of doing that work during a proper time, after the season's games and not in their imminence. If the work had been done in the proper time, it would have allowed ample time for the paint on the facade and the shutter to dry. Therefore, the blows of the ball would have dirtied the facade and the shutters only with that small quantity of dust that ordinarily adheres to the ball and which could be easily cleaned after the game. This was the usual and relatively small inconvenience that all the owners of the houses surrounding the square had to suffer, in good peace, *in buona pace*.

[30] The text of Digest 9.2 (*Ad Legem Aquiliam*), 11, is a case involving the following facts: In the course of a ball game, the ball was pitched with great force striking the hand of a barber shaving a customer whose throat was cut. The *jureconsult* Proculus held that the barber, not the player, was at fault (*culpa*), because the barber conducted his business near an area where it was customary (*ex consuetudine*) to play the ball game, or where people passed frequently. Thus the barber is liable for damages toward his client, although it would not be wrong to say that the client couId not complain if he permitted the barber, who keeps his shaving chair (*sellam*, not a shop) in a dangerous place, to shave his face. Here the *argumentum a similibus* seems to be nearer to the case in Vernaccini's decision. The barber had *willingly* put his trade chair in a place where it was customary to play the ball game, and in a similar manner the Fabronis did not protect the windows and embellished the facade of their house in a place where it was customary to play the ball games. Despite that fact, there are some differences between the two situations.

[31] The text invoked by the Fabronis was Digest 8.5 (*si Servitus Vindicetur*), 8, § 5. According to the Fabronis' objection, in the ball game what is introduced in the neighbor's property is the ball launched by the players. The Roman text deals with quite different cases of "immission," *i.e.*, "immission" of smoke or water from a factory or a land onto the neighbor's property, whereas here the ball is "immitted" by a group of persons. Here we find an *argumentum a similibus* adopted by the Fabronis' lawyer and discussed as such by Vernaccini.

[32] Here Vernaccini cites *Doctores* and decisions of the *Rota Romana* in their comments of the Digest 8.5 (*si Servitus Vindicetur*), 8, § 5. However, these authorities deal with the case of a building, construction, or other similar work. Here again we find an *argumetum a similibus*: such building or work is considered similar to the ball game.

[33] It is to be understood that the Fabronis asked for a *cautio de damno infecto* as a safeguard for damages deriving from the games during the summer seasons following the year 1778.

true in the case of future damages that one fears would derive from a *new and unusual* work it is not true in the case of damages which one fears would derive from a *pre-existing and usual* work. In the latter case, the obligation of giving the *cautio de damno infecto* presupposes *culpa*, if not a *culpa in committing* something, at least a *culpa in omitting* something, that is *negligentia*.[34]

(12) Moreover, the law of the *cautio de damno infecto* has no bearing on the present case, since the object of the *cautio* is that of safeguarding against future damages deriving from *extrinsic and accidental* defects of the work, and not against future damages deriving from *natural and intrinsic* defects such as wind.[35]

(13) Because the ball cannot always be directed by the players precisely where they want and, therefore, may strike surrounding houses, this constitutes a *natural and intrinsic* defect of the ball game.[36] Thus, damages deriving from such a game cannot be the subject matter of the *cautio de damno infecto*. On the contrary, this is a damage that the owners of houses located in a public square, where a game is played, have to suffer in good peace (*in buona pace*) as a natural and inevitable consequence of the location of their houses, similar to that suffered by the owner of inferior land from the natural and inevitable flow of water from the superior land of a neighbor.[37]

SOME FINAL CONMENTS

What is the *ratio decidendi* of the case? It is interesting to reproduce here the *ratio decidendi* (the so called *Argomento*), as it was seen by the reporter of Vernaccini's decisions:

> There is no liability for damages, when the ball game, which is licit in itself, is played in a place where playing such game is equally licit, and a previous notice has been given to the owners of the surrounding houses. The harm that these houses may suffer, derives from a defect merely intrinsic and natural of the ball game.

However, something seems to be missing in this *Argomento*, that is, the fact that the ball games were played mainly as a public spectacle (*divertimento*).

Vernaccini's decision[38] imposes on the owners of the houses surrounding the place of the ball games a burden similar to a legal servitude (*i.e*., deriving from the law). The contents of it are:

(1) a burden of conduct to avoid damages, thereby substantialIy limiting the owners' freedom of action, and

(2) the sufferance of the small harms deriving to those houses from the ordinary (*i.e.*, natural and intrinsic) course of the game.

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[34] Here the decision cites Donellus (a French author of the 16th century) in a work where, *inter alia*, he deals with cases of a house or similar work which was badly built, built with bad materials, or which the owner neglected or omitted to repair (i.e., three cases of *culpa* or *negligentia*). For this *argumentum a similibus* see note 32 *supra*. [In 2003, Maggie Wickes suggested that the distinction that Vernaccini draws is ultimately based on D.39.2.43pr. This is worth pursuing. CD]

[35] Here Vernaccini cites *Doctores* and decisions of the *Rota Romana* concerning buildings or other similar works. *See* note 32 *supra*.

[36] Here again we find an *argumentum a similibus*: that is, the *natural and intrinsic* inconveniences (so called "defects"!) of the ball game are considered as similar to the *intrinsic and natural defects* of a building or other work or to the fact that the exceptional blow of the winds may disrupt some part of that building (*e.g.*, the tiles) and cause that part to fall on the neighbor's property.

[37] For this rule, Vernaccini cites *Doctores* in their treatises on the law of waters. *See also* C. civ. art. 640; La. Civil Code art. 660 (1870); Italian Civil Code art. 913 (M. Beltramo, G. Longo & J. Merryman transl. 1969). This is one of the "servitudes" deriving from the situation of lands or neighbor's relations, the so called "legal servitudes" (*i.e.*, deriving from the law). Here we find the last and most significant *argumentum a similibus*, which can be considered as a metaphoric way of saying that on the houses surrounding the square there was a burden or legal servitude to suffer the inconveniences deriving from the public spectacles or "amusement" (*divertimento*) of the ball game. *See* notes 18, 29 *supra*. It is not a question of establishing which of the two, the customary spectacle or the building of the houses, preceded the other in order of time. Even if the houses were built before the establishment of the games, the owners had to suffer that servitude. On the notion of servitude see note 44 *infra*.

[38] *See* notes 18, 29, 37 *supra*.

It is important to determine the reason or policy underlying such legal servitude, as imposed in Vernaccini's decision. It seems to be the fact that the ball games were played mainly as a public amusement (*divertimento*) of the people of Marradi.[39] There seems to be a policy of public interest underlying Vernaccini's decision.[40]

The *ratio decidendi* does not appear to be that the custom of playing the ball games in the square of Marradi was a *legal* custom (*i.e.*, binding as a law), because the case would have been decided on that sole basis cutting at the root any question. Further, Vernaccini's decision invokes the second decree of the Community Magistrate in order to establish the *place* where the games could be played.

I do not know of any Italian decision of present times dealing with a case similar to the one discussed in Vernaccini's decision.[41] If such a case would arise, it seems doubtful that it will be decided in the same way. Article 2050 of the Italian Civil Code is to be taken into consideration.

> *Liability arising from exercise of dangerous activities*. Whoever causes injury to another in the performance of an activity dangerous by its nature or by reason of the instrumentalities employed, is liable for damages, unless he proves that he has taken all suitable measures to avoid the injury.[42]

The ball game is described in Vemaccini's decision as one having "*a natural and intrinsic defect*," inasmuch as "the ball cannot always be directed by the players precisely where they want," and may therefore cause some damage to the surrounding houses. A game of this type would be defined as a dangerous activity within the meaning of article 2050. It seems that this article would lead to a decision different from that adopted by Vernaccini.

On the one hand, article 2050 imposes a liability for damages deriving from dangerous activities, although they are *licit and permitted*; and that liability, from a practical (if not from a theoretical) standpoint, may be considered as a liability without fault (*culpa*).[43] This is so because of an extremely difficult burden of proof imposed on the defendant by article 2050, whereas in Vernaccini's decision the plaintiff has the burden of proving the defendant's fault.

On the other hand, to impose a burden or a legal servitude, similar to that imposed by Vernaccini's decision, would require today a statute, since it could not be imposed by judicial decisions or precedents,[44] and today the *argumenta a similibus* of the kind used by Vernaccini could not be used to reach the result of imposing such a legal servitude or burden.

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[39] This rationale was also stressed by the decree of the Community Magistrate of July 20, 1778, that "the amateurs' team can continue giving such licit *amusement*." Further, it was stressed in Vernaccini's narration of the facts of the case, that "on July 26, 1778, the team gave the cautio ... in order to avoid delay *of the public amusement*."

[40] *See generally Il Museo Guarnacci*, *supra* note 1.

[41] There are decisions dealing, in the frame of article 2050, with sport games and competitions, like football, bowling, snow and water skiing, bicycle and motor car races, etc. Most of them deal with damages caused to participants in the game or race, or the public. At any rate, none of them deals with a case similar to that decided by Vernaccini.

[42] Italian Civil Code art. 2050 (M. Beltramo, G. Longo & J. Merryman transl. 1969).

[43] On the theoretical question see De Cupis, *Fatti illeciti* in Commentario del codice civile a cura di A. Scialoja e G. Branca, art. 2050, at 79 n.1 (1971), and the authors cited there.

[44] Moreover, in modern times, as a principle, a "servitude" can be imposed only on land for the utility of other land, and not for the utility or benefit of a person or a group of persons (in the instant case, the ball game team or the community of Marradi for its amusement). *See* Italian Civil Code art. 1027 (M. Beltramo, G. Longo & J. Merryman transl. 1969). *See also* C. civ. art. 637; Italian Civil Code art. 531 (1865); La. Civil Code art. 646 (1870) (where "*personal servitudes*," *i.e*., for the benefit of a person, can be only usufruct, use, and habitation).