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–**Error! Bookmark not defined.**)? How would these exceptions have been treated under the procedure described in Maranta's *Speculum aureum* (above, p. XII–**Error! Bookmark not defined.**)? under the *Ordonnance pour la procédure civile* (below, p. XVI–**Error! Bookmark not defined.**).

(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–**Error! Bookmark not defined.**)? by the *Ordonnance of Blois* 2 (below, p. XVI–**Error! Bookmark not defined.**).

(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?

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[24] co. Beds.

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 living on the verge of death [*vivens ad mortem*] 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 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.pr–1],[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, 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.24.1.31] 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 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,

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[1] "Where, however, a husband makes clothing for his wife out of his own wool, although this is done for the wife and through solicitude for her, the clothing, nevertheless, will belong to the husband; nor does it make any difference whether the wife assisted in preparing the wool and attended to the matter for her husband. (1) Where a wife uses her own wool, but makes garments for herself with the aid of female slaves belonging to her husband, the garments will be hers, and she will owe her husband nothing for the labor of the slaves; but where the clothing is made for the husband, it will belong to him, if he paid his wife the value of the wool. Where, however, the wife did not make the clothing for her husband, but gave it to him, the donation will not be valid; as it will only be valid when the clothing is made for her husband, and she will never be permitted to render a bill for the labor of her husband's female slaves."

[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."

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]

[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. Most 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

[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. 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, § I**Error! Reference source not found.**], 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."