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."

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]][7]. 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].[8]

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 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].[9] 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

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[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–**Error! Bookmark not defined.**.

[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–**Error! Reference source not found.Error! Bookmark not defined.**, which, in turn, is a paraphrase ofJI.1.9.1, above p. I–**Error! Bookmark not defined.**. 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 inJI.1.10pr. The reference is probably toJI.1.9.1, above p. I–**Error! Bookmark not defined.**, 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] 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. …"

[8] 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.

[9] Above, p. VIII–**Error! Bookmark not defined.**.

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[10] 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)].[11]

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 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 ... .

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.

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

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

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 lead, 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.

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

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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–**Error! Bookmark not defined.**.

[7] Above, p. VIII–**Error! Reference source not found.Error! Bookmark not defined.**, which, in turn, is a paraphrase ofJI.1.9.1, above p. I–**Error! Bookmark not defined.**.

[8] See above, § D.1, note 6.

[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's time, but do not seem to have been the requirements in Justinian's time.

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 lead 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]

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 lead. 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

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[10] Above, § D.1, note 8.

[11] Above, p. VIII–**Error! Bookmark not defined.**.

[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–**Error! Bookmark not defined.**. 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.

[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

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 not verified in her, especially because she did not cause the fact that she had not been lead. 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

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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.

[21] Above, p. VIII–**Error! Bookmark not defined.**. Cf. above, text and note 13.

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 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

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[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*.

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 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 … .

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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.