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## Case law in Portuguese *decisiones* in the Early Modern Age: Antonio da Gama's *Decisiones Supremi Senatus Lusitaniae*

### Abstract

The purpose of this paper is to discuss the role of case law in António da Gama's (15-15) *Decisiones Supremi Senatus Lusitaniae*, the first Portuguese book classified as *decisiones* literature. It is also an object of this paper to clarify how case law was used and its relevance to the structure of the book, as well as describing the information about lawsuits, which was always seen as part of Portuguese and continental European legal framework in the Early Modern Age, is also an objective of this paper.

### 1 Introduction

The main purpose of this paper is to discuss the role of case law in António da Gama's *Decisiones Supremi Senatus Lusitaniae*. Published in 1578, the work was the first and one of the most important examples of *decisiones* literature in Portugal in the Early Modern Age. The impact of the *decisiones* in *ius commune* tradition was notable. A huge number of editions in different European cities during a long period of time, the large circulation in a wide continental area and the impact and influence on practical matters are some examples of the role of *decisiones* in European legal framework during that moment. 1

In a previous and more complex work<sup>1</sup>, whose reception among legal historians was very positive<sup>2</sup>, the discussion about Portuguese *decisiones* was wider and deeper, with the analysis of six books of this genre in Portugal. Highlighting the name of António da Gama is a natural option because he was a pioneer in the area. Notwithstanding the existence of that monographic work, whose definitive version was not yet published, the discussion about the *decisiones* in Portugal is far from an end; consequently, this seems to be an appropriate moment for more specific research. Following this tendency, we could mention not only some papers about Criminal Law issues that will be published this year<sup>3</sup>, but also this contribution. Highlighting case law among many possibilities is a fundamental step to go further into the understanding of *decisiones* as a genre of juridical literature in the Early Modern Age. 2

Starting from a brief discussion about the *decisiones* in the context of *ius commune*, this paper goes on with some information about the author and his *Decisiones* until his main part, when case law, in 3

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<sup>1</sup> G. C. M. CABRAL, Os decisionistas portugueses entre o direito comum e o direito pátrio, São Paulo 2013.

<sup>2</sup> A. M. HESPANHA, Die neuere Rechtsgeschichte in Portugal, in: ZNR 36 (2014), p. 113-127, here p. 125.

<sup>3</sup> G. C. M. CABRAL, Jurisdição e competência em matéria criminal na literatura de *decisiones* em Portugal, séculos XVI e XVII, in: Revista de Informação Legislativa 205 (2015), p. 7-22; G. C. M. CABRAL, Direito penal na literatura de *decisiones* em Portugal (1578-1660) (in the press).

its multiples perspectives, receives specific attention. Case law was essential for both the structure and the content of the *decisiones*. To demonstrate that is also an aim of this paper.

## 2 *Decisiones*: Law Reports in *ius commune* tradition

Case law has a fundamental role in common law tradition, which is largely based on rules designed by courts and applied to similar posterior cases decided by an inferior court or even the same. In other words, case law in common law tradition is a source of law that can be directly applied<sup>4</sup>. The English system is truly the classical model of common law since the late Middle Age and precisely since the publications of official records and reports of the highest courts' decisions. These collections of decisions were known as Year Books in the middle of 13<sup>th</sup> century and Legal Reports since the middle of 15<sup>th</sup> century, and the authority of the decisions reported, named precedents, was the center of the system<sup>5</sup>.

On the other hand, case law had different features in *ius commune* tradition<sup>6</sup>. Everybody should obey a court's decision because it had force of law, as some Portuguese jurists have expressly said<sup>7</sup>, but it did not mean an equivalent meaning to common law tradition. Notwithstanding Gama's opinion on the enforcement of some rule established in a previous decision<sup>8</sup>, the majority of *decisiones* literature's authors were against that possibility<sup>9</sup>.

<sup>4</sup> Among many others, cf. T. F. T. PLUCKNETT, *A concise History of the Common Law*, London 1956, p. 268-278; G. CRISCUOLI, *Introduzione allo studio del Diritto Inglese*, Milano 2000, p. 383-395

<sup>5</sup> J. H. BAKER, *Records, reports and the origins of case-law in England*, in: J. H. BAKER, *Judicial records, law reports and the growth of case law*, Berlin 1989, p. 15-46.

<sup>6</sup> In this paper, *ius commune* tradition is not identified with the entire continental Europe, as Helmut Coing seems to defend, but a reduced area that comprehended Portugal, Spain, France, Italian States, Holy Roman Empire and its states, Dutch Republic and Scotland. To this traditional view, cf. H. COING, Helmut, *Die europäische Privatrechtsgeschichte der neuren Zeir als einheitliches Forschungsgebiet: Probleme und Aufbau*, in *Ius commune* 1 (1967), p. 1-33. To a critical opinion, cf. D. OSLER, *The myth of European Legal History*, in *Rechtshistorisches Journal* 16 (1997), p. 393-410; T. DUVE, *Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive*, in *Rechtsgeschichte* 20 (2012), p. 18-71.

<sup>7</sup> A panorama of this discussion in Portugal can be seen in A. P. B. HOMEM, *Judex perfectus: função jurisdiccional e estatuto judicial em Portugal, 1640-1820*, Coimbra 2003, p. 296-307.

<sup>8</sup> "Et quia sententia senatus facit jus quoad omnes similes casus". A. GAMA, *Decisionum supremi Senatus Lusitaniae, Antuerpiae 1683, Dec. XXXIII, 2*, p. 68.

<sup>9</sup> "Nec obstant item praedictis, aliquot sententiae latae in hoc Regno, contra patruos, pro nepotibus ex primogenitis mortuis in bello, quasi ij per gloriam viuere existimentur, quas refert D. Gama. decis. 307. quia primum dici potest, exemplis non esse iudicandum, l. nemo, C. de sententijs, & interlocution. nec ita latae sunt illae sententiae, ut vim legis coactuae haberent, infinitas enim leges haberemus si omnes sententiae latae in nostro senatu, vim legum haberent, & licet sint latae, & scriptae sub nomine Regis, illud est ad auctoritatem earum & ut illis omnino pareatur, & omnino exequantur, inter partes inter quas latae sunt, & quoad hoc dicuntur ius, & veritatem facere, l. res iudicata, ff. de statu hominum, non vero ut p legibus generalibus, & generaliter obligantibus habeantur, nam noster senatus non habet auctoritatem leges condendi, nec ius nostrum Regum illi hoc tribuit, quemadmodum À iure communi tribuitur senatus consultis Romanorum". A. VALASCO, *Alvaro, Decisionum, consultationum, ac rerum iudicatarum in Regno Lusitaniae, tomus II, Lisboa 1601, Cons. CXLVIII, II, 26-27, p. 127v. "Deo iuuante: nihil refert, an Princeps lege condita in forma legis, seu sententia lata, & per illum signata, quae in vim legis profertur, voluntatem suam declaret, super casu proposito, est enim Princeps lex animata in terris. (...) Si autem sententiae senatus proferantur per se, sine praesentia Regis, eo modo, ut supra diximus, quamuis sub nomine Regis exeanti ut de stylo nostri regni sit. veluti". J. CABEDO, *Practicarum observationum sive decisionum Supremi Senatus Regni Lusitaniae, Antuerpiae 1620, Dec. CCXII, I, 3-4*, p. 208.*

Denying the identification of these two different traditions and studying specifically *ius commune*, we must clarify which role played case law in this perspective. It was not properly a source of law in a formal sense, but an argumentative element used to convince someone about the correctness of his reasoning. Plaintiffs and defendants used case law to convince the judge of their point of view and, in a court; justices used case law to convince their peers about their reasoning. In *ius commune* tradition, including Portugal<sup>10</sup>, judges and courts should not reason their final decisions, although the references to case law during the discussions were very common. In Alain Wijffels' opinion, "case Law' in the modern sense could not and did not play the same role in ancient continental European law as it does today. Very few judgments were published verbatim and in any case, judgments usually did not include any legal reasoning or any legal grounds justifying the decision"<sup>11</sup>. Thus, the access of the content of final decisions of a court was not easy in continental Europe.

In this context, legal literature was particularly useful to unveil case law in *ius commune* tradition, and, in the very rich variety of genres which includes commentaries, monographs or treaties, *allegationes* and *practica, decisiones* have played a relevant role because in no other one case law had a comparable importance. A comparison is often made between *decisiones* and Reports, in the attempt to connect both European traditions. The result is the usual reference to *decisiones* in English language as Legal Reports, despite the awareness about differences<sup>12</sup>. I prefer not to use them as synonyms and maintain the expression "*decisiones* literature" already used previously<sup>13</sup>.

There are many common aspects to *decisiones* and Reports, especially the relevance of case law for both. But the use of case law is precisely what separates them: *decisiones* literature was not just collections of judicial decisions, but actually a juridical book which contained real and concrete situations that referred to previous judicial decisions and also reasoned opinions to these particular inquiries. The questions proposed were selected from real lawsuits decided by high courts, but the decisions were not the only element in the reasoning expressed by the authors, who also quoted statute law and especially legal doctrine. Case law acted in two perspectives: it inspired the selection of questions and also helped with their solutions. While in Reports the decisions were literally transcribed, in *decisiones* literature that rarely happened and, when it did, only the judicial opinion was quoted and not its reasoning.

The general features of *decisiones* literature were already discussed in a previous work<sup>14</sup>, as well as the panorama of the European production, which includes names from France (Aegidius de Bellemeire, Jean Le Coq, Joannes Corserius, Guido Papa and Nicolaus Boerius), German

<sup>10</sup> Cf. G. C. M. CABRAL, Os decisionistas portugueses (cit. 1), p. 74-76.

<sup>11</sup> A. WIJFFELS, Orbis exiguous. Foreign legal authorities in Paulus Christianaeus's Law Reports, in: S. DAUCHY, W. H. BRYSON, M. C. MIROW, Ratio decidendi: guiding principles of judicial decisions, volume 2: 'Foreign' Law, Berlin 2010, p. 37-62, here p. 53.

<sup>12</sup> A. WIJFFELS, Orbis exiguous (cit. 10), p. 37-62.

<sup>13</sup> G. C. M. CABRAL, Os decisionistas portugueses (cit. 1); G. C. M. CABRAL, Direito penal e direito processual (cit. 3); G. C. M. CABRAL, Direito penal na literatura (cit. 3).

<sup>14</sup> G. C. M. CABRAL, Os decisionistas portugueses (cit. 1), p. 80-88.

States (Joachim Mysinger von Frundeck, Andreas Gail and Benedikt Carpzov), Spain (Jose de Sesse y Pinol, Miguel de Cortiada and Juan Pedro Fontanella), Dutch Republic (Count Wynants, Johannes à Sande and Paulus Christianaeus) and especially from Italian States (Matthaeus de Afflictis, Thomas Grammaticus, Vincenzo de Franchis, Octavianus Cacheranus d’Osasco, Josephus Ludovicus, Johanes Petrus Surdus, among others)<sup>15</sup>. A panorama of Portuguese legal literature and its genres<sup>16</sup> must include *decisiones* literature and some of its most important authors. Six of them were object of my monograph study: António da Gama, Álvaro Valasco, Jorge de Cabedo, Belchior Phaebo, Gabriel Pereira de Castro and António de Sousa de Macedo<sup>17</sup>, and it is to the first that this paper is dedicated.

### 3 António da Gama’s life and work

Antonio da Gama was born in 1520 in Funchal, Madeira Island, where his father, Lourenço Vaz da Gama Pereira, who had also studied Law, was that time *Provedor dos Ausentes*. Like the vast majority of Portuguese legal scholars, Gama gained his degree at Coimbra University in 1543, but, different from most of his contemporaries, he spent some years at the University of Bologna, precisely at the *Collegium Hispanicum*. This Spanish institution was established by the Cardinal Gil Albornoz (1310-1367) with the purpose to help Spanish young men interested in studying at that prestigious university. Gama had that opportunity because of the available places that were directed to Portuguese scholars provided by the Archbishop of Lisbon.

After returning to Portugal in 1549 Gama was appointed to some of the most highest offices in the Kingdom, such as Professor of the Faculty of Law at the Coimbra University, Justice of the Portuguese High Court (*Desembargador da Casa da Suplicação*) and, a few years later, also Justice of the *Desembargo do Paço*, a court whose functions were directly connected to the extraordinary powers of the Portuguese Kings<sup>18</sup>. Until his death in 1595, Gama was an influent member on the Portuguese high courts, and his career – until he became a member of the *Casa da Suplicação* – was not exactly similar to what normally happened, according Nuno Camarinhas<sup>19</sup>: while the majority of jurists had a long way until the nomination to high courts, Gama was appointed to the Court since his coming back from Italy, according to Barbosa Machado<sup>20</sup>. The already mentioned study of Camarinhas statistically showed that cases like Gama’s were exceptional, especially after the Restoration in 1640.

<sup>15</sup> G. C. M. CABRAL, Os decisionistas portugueses (cit. 1), p. 93-100.

<sup>16</sup> Among others, cf. G. C. M. CABRAL, Os decisionistas portugueses (cit. 1), p. 40-45.

<sup>17</sup> G. C. M. CABRAL, Os decisionistas portugueses (cit. 1), p. 116-331.

<sup>18</sup> About the functions of the *Desembargo do Paço*, cf. A. M. HESPANHA, *As vésperas do Leviathan: instituições e poder político, Portugal – século XVII*, Coimbra 1994, p. 250-251; J. M. L. L. SUBTIL, *O Desembargo do Paço (1750-1833)*, Lisboa 1996.

<sup>19</sup> N. CAMARINHAS, *Juízes e administração da justiça no Antigo Regime: Portugal e o império colonial, séculos XVII e XVIII*, Lisboa 2010, p. 266-312.

<sup>20</sup> D. B. MACHADO, *Bibliotheca Lusitana*, Tomo 1, Lisboa 1747, p. 286-287.

It is not my aim to provide a definitive explanation for that, although thinking about some hypotheses is not a difficult exercise<sup>21</sup>. If the available information tells us that his family was not a traditional jurists family in the first half of the 16<sup>th</sup> century, since António da Gama that changed. Luís da Gama Pereira, his son, was also educated at Coimbra University and, just like his father, was *Desembargador dos Agravos* at the *Casa da Supplicação* and also a member of the *Desembargo do Paço*. Having three generations of judges, two of them High Court's Justices, was not a special case of the Gama Pereira family, but of course it was not a common situation.

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## 4 Gama's *Decisiones*: general features

### 4.1 An overview

The *Decisiones Supremi Senatus Lusitaniae* was first published in Lisbon in 1578 by the typographer Emanuel Ioannes. There is some information about many other editions in different parts of Europe in the following years, but it is difficult to confirm the veracity of these data. One of the most trustful lists of publications, even with some problems<sup>22</sup>, is the one presented by Johannes-Michael Scholz, who has found nineteen different editions, most of them in Antwerp<sup>23</sup>.

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Gama wrote this book in only one volume, originally with 390 *decisiones*, which were, as it was already mentioned, the argumentative unity of the book. This number of *decisiones* was only found in the publication of 1578, and the later editions also consulted (1610, 1683 and 1735) have three more (393). As we could not consult the editions published between 1578 and 1610, it is not possible to affirm precisely which one was the first with 393 *decisiones*. Gama did not explain how he had organized his book, probably because an organization in a modern way did not occur to him. Around 84% of the *decisiones* dealt with Private Law matters<sup>24</sup>, but Gama did not intend to write about these questions in a systematic way. Thus, frequent themes like contracts, marriage and

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<sup>21</sup> I can figure out at least two possible reasons: 1) personal relations, the most probable one, although the importance of Gama Pereira family seems not to be huge; Gama's father did not have an important judicial office according to the available information, but this improbable power of direct influence on the appointment of his son does not exclude the existence of some connections among the family and the Crown or other important families or people; 2) technical qualities of António da Gama, what was not enough to an appointment of this kind in the 16<sup>th</sup> century, but could have helped someone whose family was not properly influent that time.

<sup>22</sup> One example of errors in the list is the reference to an edition from 1610 published in Venice with *additiones* made by Flores de Mena and another, from 1735 and published in Antwerp, without them. Actually, after consulting directly both editions, we verified that it was exactly the opposite: the *additiones* were found in the edition from 1735 and not in the one from 1610. G. C. M. CABRAL, *Os decisionistas portugueses* (cit. 1), p. 118.

<sup>23</sup> Here the complete list elaborated by Scholz: a) Lisbon: 1578, 1603, 1610, b) Barcelona: 1597, c) Frankfurt: 1598, 1599, d) Cremona: 1598, e) Vallisoleti: 1599, f) Venice: 1600, 1610, g) Madrid: 1621, h) Hamburg: 1655, i) Antwerp: 1622, 1650, 1652, 1683, 1731, 1735. J. M. SCHOLZ, *Portugal*, in: H. COING, *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, zweiter Band: *Neuere Zeit (1500-1800)*, das Zeitalter des Gemeinen Rechts, zweiter Teilband: *Gesetzgebung und Rechtsprechung*, München 1977, p. 1319-1342, here p. 1335.

<sup>24</sup> An overview of the matters in this book can be found in G. C. M. CABRAL, *Os decisionistas portugueses* (cit. 1), p. 151-159.

donation, even though they were of central relevance in many *decisiones*, appeared in different parts of the book and not only in a sequence.

The introductory elements are useful to comprehend the process of making this book. Examining the required licenses in the first *folios* of the 1578 edition, we can conclude that the book's final version was ready probably in the end of 1576. Just after the license of Holy Office, from 15/01/1577, and King's printing license, from 15/03/1577, a king's act (*alvará régio*) from 7/3/1578 prohibiting impressions and sales without licenses during the following fifteen years is an important source to understand the process of producing and selling books in the 16<sup>th</sup> century, especially in what was related to the rigid control not only by the Church, but also by the Crown.

Francisco Caldas Pereira wrote the preface to the first edition. He was a Justice of the *Casa da Supplicação* and his book *Syntagma tripartitum de iure emphyteutico* probably was the most influential work about emphyteusis in *ius commune*. Gama did not write any preface or introduction to the readers. But a very useful way to clarify this objectives with the book that can be found, for instance, in Jorge de Cabedo's *Practicarum observationes*. Caldas Pereira's text is the only part of the book where we could find a reflection on the work itself. Caldas Pereira believed in the book's usefulness in solving practical controversies on secular jurisdiction mainly because of the references on the Highest Court judicial decisions<sup>25</sup>. The *Decisiones Supremi Senatus Lusitani* was not an isolated book, and so Caldas Pereira mentioned other works with similar perspectives such as the volumes based on *Capela Tholosana's*, *Sacro Regio Consilio Neapolitano's*, *Parlement of Bordeaux's* and *Paris's* and *Piemonte's Senate's decisions*<sup>26</sup>, and, at this moment, because of Caldas Pereira's words, I perceive clearly Gama's own awareness of doing something connected to the European juridical production. In the end, after talking about the author's prestigious and successful career<sup>27</sup>, Caldas Pereira exalted the necessity of finding justice not in the rigid rules, but in concrete situations and with an imperative flexibility, just like the Lesbos's rule<sup>28</sup>.

<sup>25</sup> “(...) è Republicaque jurgia, dissidia & contentiones expellere nituntur, diligenter regnorum mores, consuetudines, curiarum stylum, tribunalium decreta, & senatum placita, consultaque observarunt: ut quo civitas aut regnum, in quo degebant retro usa fuerit in decidendis causarum controversia, id jus quasi moribus constitutum & iudicio populi receptum, & suffragio magistratum iudicatum, comprabatum, in posterum inviolabiliter custodiretur”.

<sup>26</sup> “Quae res exiguis initiata cunabulis, innumeras Reipubl. utilitates attulit; & infinitam litium materiam occasionemque contemtionum amputavit, ac compescuit: ita ut jam deinceps certus ordo, certa forma, & denique certa regula, in causarum emergentium decisionibus observaretur. Hinc alij Tholosanae Capellae: alij Neapolitani Senatus decreta: alij Burdegalensis consilij: alij Pedemontani: alij Parlamenti Parisiensis arrestra, diligenter collegerunt”.

<sup>27</sup> “Gratulandum est igitur Doct. Antonj de Gamma, qui inter tot gravissimos Iurec. jam plures annos in amplissimo ordine, maximus honoribus functus, & in consiliis rerum maximarum, ac totius Lusitaniae administratione Reipubl. praeclarissime versatus, quae in rebus arduis, in hoc nobilissimo jurisprudentia senatu ab ipsis & sapienter dicta, & prudenter decreta fuerunt, licet aliarum rerum occupatione districtus summis vigiliis, & industria collegerit, & non invidus tantarum divitiarum, ingenij sui opes e vulgare non dubitaverit. Quo beneficio singulari non parum auctam, aplicatamque rem literariam, & nostri senatus auctoritatem secure arbitror”.

<sup>28</sup> “Hi enim saepissime fomitem materiamque accendendarum litium subministrant, & causis legis, non legibus causas, accommodantes: veluti sabri Lesbij normam habentes flexibilem, & subinde mutabilem arbitrato suo, structuras erigunt: ita & ij, plerique inanis gloriae stimulis concitati, vel ingenti ostentatione superbientes, vel quaestus spe allecti, aliter plerumque, quam veritas postulat, sentiunt, & consulunt”.

## 4.2 Additiones

One especial information about the formal aspects of this book is related to the continuity of its use in the following decades. A first evidence is the high number of editions printed for almost one hundred and fifty years, but there is another one: the *additiones*. If the relevance of *decisiones* literature is quite related to the possibility of maintaining its readers updated, the book's success cannot be separated from its capacity of convincing the jurists that the arguments there found were still accepted as valid. Works of some of the most important Italian authors, such as Matthaeus De Afflictis, Antonius Capicius and Vincenzo De Franchis, were frequently updated. According to Marco Nicola Miletti, the *additiones* ' contribution could be noticed either in the valuing of the original text or in its role as an autonomous contribution printed in the same volume of an already successful work, probably for commercial reasons. However, in all cases the *additiones* became part of the previous work at the same time they were consulted and cited autonomously<sup>29</sup>.

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In Portuguese *decisiones* only the works of António de Sousa de Macedo and António da Gama were added. Bartolomeu Flores de Mena was the responsible for the *additiones* on Gama in some editions (1699 and 1735, for example). After each *decision*, there was an *additio* that operated as a critical comment to the *decisio*'s matter. Mena intended to go further in some insufficient discussions with references to new books or titles unknown to the original author<sup>30</sup>, often to reinforce Gama's opinion. However, in other cases like the *Decisiones* VIII and XXIII, Flores de Mena supported opposite views. Albeit the recognition of Gama's authority, Flores de Mena said directly that his opinions were not mandatory, in particular to the *Casa da Suplicação*<sup>31</sup>.

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Included in many editions of the *Decisiones Supremi Senatus Lusitaniae*, the *additiones* of Flores de Mena were also published in an autonomous volume in 1601<sup>32</sup>, what proves its relevance as an independent work.

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## 5 Case Law

The reference of Portuguese *decisiones* literature as a compilation of sentences and cases decided by the *Casa da Suplicação* is common among Portuguese legal historians<sup>33</sup>, and that is exactly the reason why this theme have never been relevant to Legal History studies. Actually, these books were misunderstood, especially in what concerns the role of Case Law.

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<sup>29</sup> M. N. MILETTI, *Stylus judicandi: le raccolte di "decisiones" del Regno di Napoli in Età Moderna*, Napoli 1998, p. 71.

<sup>30</sup> An interesting example is Jacobus Menochius, cited only three times by Gama, but very often mentioned by Flores de Mena. The Portuguese Alvaro Valasco was an important authority on emphyteusis in Gama's time, but when Flores de Mena wrote his *additiones* Valasco's book on *partitiones* was very famous and therefore used in many *additiones*.

<sup>31</sup> "Ex quibus omnibus percipere potes, bene judicasse Senatum Lusitanum contra opinionem Gammae, excludendo filiam naturalem, etiam legitimatam ab emphyteosi non concurrentibus rationibus dictis in additionibus". A. GAMA, *Decisionum Supremi* (cit. 7.), Dec. II, add., p. 10.

<sup>32</sup> B. F. MENA, *In decisiones in Supremo Lusitaniae Senatus olim decretas, & per Antonium à Gama doctissimum Senatorem digestas*, Lisboa 1601.

<sup>33</sup> To a panorama of that discussion, cf. G. C. M. CABRAL, *Os decisionistas portugueses* (cit. 1), p. 113-115.

## 5.1 General importance of Case Law in the book (a concrete problem)

The real importance of case law to *decisiones* literature was to serve as a source, and source here has two meanings: on the one hand, a source to construct and to base the argument presented in each *decisio*, just like other sources of law, especially statute law, costume and authority of jurists<sup>34</sup>; on the other, source as reference to concrete questions decided by an important court, which serves as the *decisio*'s theme. Gama and other authors discussed not only concrete but also doubtful questions; in other words, the center of a *decisio* was a specific and unclear problem whose answer was not evident. However, the particular characteristic of *decisiones* was the origin of these concrete problems: these cases were already decided by the courts often mentioned in the book's title<sup>35</sup>.

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It is true that some *decisiones* were not based on concrete questions. That is clearer, for example, in Jorge de Cabedo's *Practicarum observationum*<sup>36</sup> than in the book here analyzed, but it does not correspond to the majority of the work. In Gama's book, each *decisio* has at least one concrete problem that must be solved; the *decisio* was the fundamental unit of the book, a problematic unity and an argumentative *topos* with a final solution. In this sense, case law was exactly the source of the problems: they were not created by the author's mind; among many problematic situations faced in court's practice, some of them were picked out to be discussed. A practical question was the elementary problem described and answered in the end of the *decisio*.

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## 5.2 Case Law and the structure of the work

If the starting point of *decisiones* literature was a problem faced in the courts and all the following discussion intended to give this question a solution with the best and more persuasive arguments, it is not difficult to understand the relevance of case law, including the structure of the *decisiones*.

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A description of the concrete and real situation which inspired Gama's writings was usually found in the beginning of the *decisio*. The *Decisio* XCII is an example with its direct references to the parties (petitioner and respondent) and to detailed information about the juridical question<sup>37</sup>, as well as

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<sup>34</sup> Cf. the point 2 of this work.

<sup>35</sup> In Portugal, for example, the titles of all books had expressly mentioned courts' names: *Decisiones Supremi Senatus Lusitaniae* (1578), António da Gama; *Decisionum, consultationum ac rerum judicatarum in Regno Lusitaniae* (1588-1601), Álvaro Valasco; *Practicarum observationum sive decisionum Supremi Senatus Regni Lusitaniae* (1602-1604), Jorge de Cabedo; *Decisiones Senatus Regni Lusitaniae* (1619-1623), Belchior Febo; *Decisiones Supremi Senatus Portugaliae* (1621), Gabriel Pereira de Castro; *Decisiones et quaestiones Senatus Archiepiscopalis Metropol. Ulyssiponensis Regni Portugalliae* (1643), Manuel Themudo da Fonseca; *Decisiones Supremi Senatus Justitiae Lusitaniae et Supremi Consilii Fisci* (1660), António de Sousa de Macedo; and *Decisiones seu quaestiones forenses ad amplissimo integerrimoque Portuensi Senatu decisae* (1738), Diogo Guerreiro Camacho de Aboim.

<sup>36</sup> In Cabedo's work, many *decisiones* were not dedicated to concrete problems, but actually to abstract questions, such as the description of offices' functions or the role of a noble title. Among many others, cf. J. CABEDO, *Practicarum observationum* (cit. 8), Dec. XI, I, p. 30-33; Dec. XCVIII, I, p. 165; Dec. CIV, I, p. 169-170; Dec. CXV, II, p. 181-183.

<sup>37</sup> "In causa D. Garcie Antiquez per tutorem suum, contra Ferdinandum à Sylva de Meneses, eiusque uxorem D. Eleonoram Anriquez, aviandicti Garciae, ea ventilata est quaestio, utrum valuerit donatio facta per dictam D. Eleonoram & maritum Ferdinandum a Sylva, D. Eduardo patri dicti Garciae, filioque dicta Eleonora ex primo matrimonio, de majoratu quodam instituto per Henricum Leme, cui praefata Eleonora sperabat successura post obitum D. Annae Lemae possessorius viventis tempore donationis, quae quidem donatio facta fuit Eduardo,

*Decisiones* XXXIX<sup>38</sup>, CCXI<sup>39</sup> and CCXXIX<sup>40</sup>, whose first paragraph includes a direct inquiry, or inquiries in the case of *Decisio* LXXI<sup>41</sup>, that shall be answered within the *decision*. But Gama began some *decisiones* with direct inquiries just after a very quick description of the situation and without references to the real litigation<sup>42</sup> or, far more used, a structure telling about the existence of doubtful controversies<sup>43</sup>.

Even when there was no literal reference to a case decided by a court, the guiding role of case law was unquestionable. In the few *decisiones* where Gama did not mention cases decided by the *Casa da Suplicação*, he has used structures that confirm *decisiones* as a case law-born argumentative unit: related cases were truly doubtful<sup>44</sup>, justices were not sure about how they would decide<sup>45</sup> or Gama himself and some of his colleagues at the court disagreed about how should they decide<sup>46</sup>.

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### 5.3 Quotation and direct references

Gama has used quotation in many moments, although not particularly often. The quotes were direct references to important sources, such as Portuguese Laws (*Ordenações* or other royal acts), documents filed in the lawsuit which had based the *decisio* (contracts or testaments, for example) and, what is more interesting now, other juridical decisions, all of them in the original language, different from the Latin written text of this book.

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tempore quo uxorem ducebat D. Beatricem Pereira? Judex in prima instantia nullius fore momenti donationem iudicavit, tum quia in ea vertebatur renuntiatio hereditatis viventis, tum quia pactum fiebat de futura successione. Senatores autem civilis curiae sententiam revocant putantes donationem fore validam". A. GAMA, Decisionum Supremi (cit. 7), Dec. XCII, p. 136.

<sup>38</sup> A. GAMA, Decisionum Supremi (cit. 7), Dec. XXXIX, p. 79.

<sup>39</sup> A. GAMA, Decisionum Supremi (cit. 7), Dec. CCXI, 1, p. 286.

<sup>40</sup> A. GAMA, Decisionum Supremi (cit. 7), Dec. CCXXIX, p. 299.

<sup>41</sup> "De tribus contigit dubitari in causa Christophori Doliveira, cum Christophoro Freire an. 1572. Primum *an mortua D Beatrice de Gamboa uxore Christophori Freire, sorore Christophori Doliveira, quae fratrem suum heredem institueras, vestes quas maritus ante matrimonium contractum sponsae miserat restituere teneatur, vel maneat apud maritum?* Secundum, *an fructus, quos maritus percepit ex annuo reddito in dotem dato post solutum matrimonium, sint heredi uxoru restituendi?* Tertium, *an quatitas, quam maritus expendere dabit in Africa ut tempus à Rege praefixum persiceret, inserviendo ad Comendam consequendam, restituenda sit, tanquam quid promissum extra dotem?*" A. GAMA, Decisionum Supremi (cit. 7), Dec. LXXI, 1, p. 116.

<sup>42</sup> "In venditione bonorum immobilium facta per maritum requirit lex Regia lib. 4. tit. 161. in princ. expressum consensum uxoris. Dubitari contingit, *an uxore per longum tempus sciente venditionem esse factam & tacente satisfactum sit legi Regia?*" A. GAMA, Decisionum Supremi (cit. 7), Dec. CLXVIII, p. 220.

<sup>43</sup> "Difficilis admodum fuit causae decisio controversae inter (...)". A. GAMA, Decisionum Supremi (cit. 7), Dec. CLXXVIII, p. 232. "Vide pluries in controuersis causarum dubitatum (...)". A. GAMA, Decisionum Supremi (cit. 7), Dec. CCXVI, p. 278.

<sup>44</sup> "Solet multoties dubitari (...)". A. GAMA, Decisionum Supremi (cit. 7), Dec. CCXIX, p. 284. "Fuit olim apud antiquos dubitatio orta in causis criminalibus iudicandis (...)". A. GAMA, Decisionum Supremi (cit. 7), Dec. CCLXXX, p. 361.

<sup>45</sup> "Dubitatum fuit in senatu in causa maximi ponderis (...)". A. GAMA, Decisionum Supremi (cit. 7), Dec. CCV, p. 257. "Solet passim apud senatores in dubium verti (...)". A. GAMA, Decisionum Supremi (cit. 7), Dec. CCXXVIII, p. 299.

<sup>46</sup> "Vide pluries in controuersis causarum dubitatum (...)". A. GAMA, Decisionum Supremi (cit. 7), Dec. CCXVI, p. 278.

Only in 10 of 390 *decisiones* has Gama quoted literally a decision of the Casa da Suplicação<sup>47</sup>. These references were complete, announcing the most important lawsuit's data (names of the parties and of the notary responsible for writing the decision, the city where the litigation took place, the complete date when the justices decided and very often the name of the justices). As previously said, the quotation comprehends only the dispositive part of the sentence, but not the debates to construct the final decision. In other words, the quote refers to the conclusions and not to how the justices had reached the conclusions. Here is an example of a *Casa da Suplicação's* decision quotation: 27

Acordamos do desembargo del Rey nosso Senhor, que o supricante he agravado pollo corregedor, & corregendo seu agravo. Visto como se prova Diogo Pinto irmano do A. ser vivo ao tempo quo sua avo, ultima possesora deste morgado falaceo & ser mais velho que o Reo Belchior Botelho, & como tal aceitou o dito fideicommisso & dereito delle, no qual por sua morte sucedeo o A. seu irmano Francisco Pinto: o que todo visto, & a disposicano da ley nova, que admite o parente mais chegado ao ultimo possuidor na sucessano dos morgados & o mais dos autos, condenado ao R. que abra mano do morgado da contenda & proprietades delle, com os fructos & rendimentos da lide, contestada em diante, & a condenado nas custas dos autos Ao primeiro Dagosto de 1573<sup>48</sup>. 28

## 5.4 Case law and reasoning

### 5.4.1 Detailed information

#### 5.4.1.1 Overview

As I already pointed out, *decisiones* literature was not only a collection of decisions settled by a court. Case law was used by the author as an argument to reason the issue on discussion, as well as other sort of arguments with the same function, such as statute law and legal doctrine. Different from other books with equal proposes, Gama's *Decisiones* was absolutely concerned about concrete matters, resulting in the absence of generic and descriptive *decisiones* like some found, for instance, on the second volume of Cabedo's *Practicarum observationum*<sup>49</sup>. It did not mean that Gama had expressly mentioned case law in all the 390 *decisiones*, but, even when there was no literal mentioning, case law was very important, at least to the description of the concrete question that must be resolved. 29

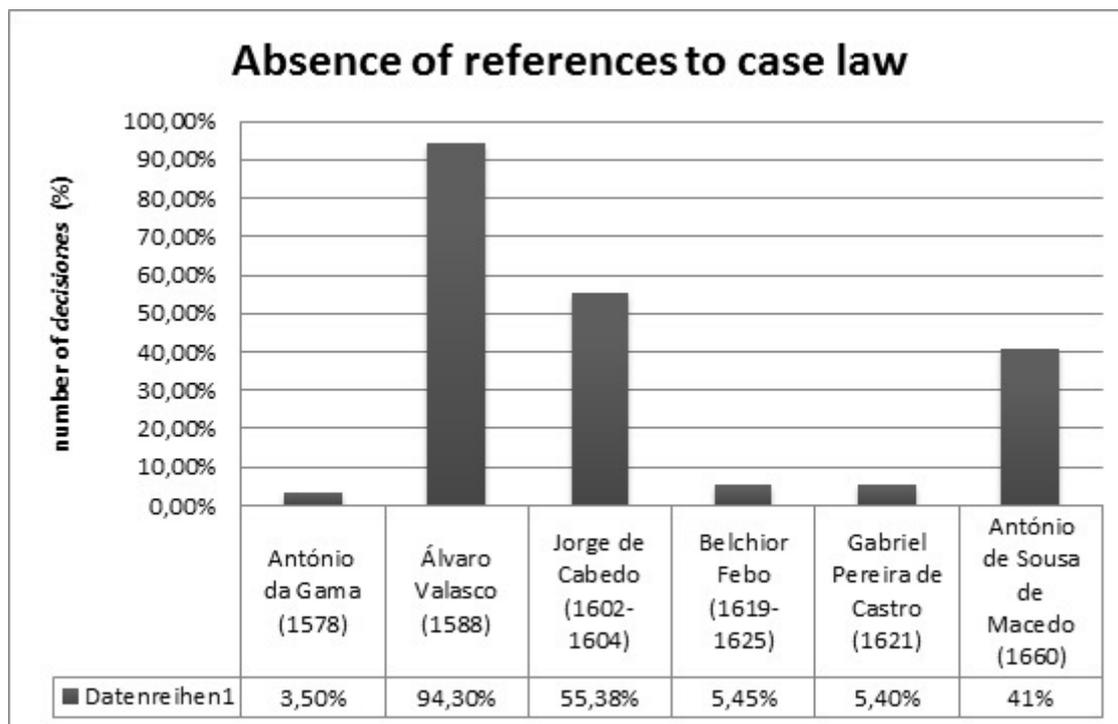
The real importance of case law on Gama's work can be better understood by looking at numbers. Only 14 (3,5%) *decisiones* in this book had no reference to case law, a high number if compared with the 169 (44%) *decisiones* that did not refer to the *Ordenações do Reino* (Portuguese general statute law). When we compare with the use of legal doctrine, the level is not different, because only 19 (4,8%) 30

<sup>47</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. XXXIII, p. 67; Dec. XCI, 5, p. 135; Dec. CXXXV, p. 189; Dec. CLXXXV, p. 238; Dec. CCXXIV, 14, p. 294; Dec. CCLXXXVIII, p. 368; Dec. CCCVII, 3, p. 391; Dec. CCCXXXV, 8, p. 443; Dec. CCCXLIX, 12, p. 465; Dec. CCCLXXXV, 3, p. 509.

<sup>48</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. CCCLXXXV, p. 509.

<sup>49</sup> Cf. Footnote 36.

did not refer to the authority of at least one author. A comparison with the other books of *decisiones* literature makes clear the relevance of case law in Gama's work:



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Mentioning case law means that the perception of single cases is possible, or, in other words, that there are some individual features on the case cited that allow identifying the lawsuit described. A complete reference to case law would have information about the names of the litigants, the city where the lawsuit began, the justices acting in the case, the notary responsible for writing the decision and the year when it was decided by the court. Complete references like that are not very often found in *decisiones* literature<sup>50</sup>, even in a book like Gama's. However, the relevance of these data is impressive because of another function of *decisiones* literature: the possibility of knowing some details on the jurisdiction in Portugal of the 16<sup>th</sup> and 17<sup>th</sup> centuries.

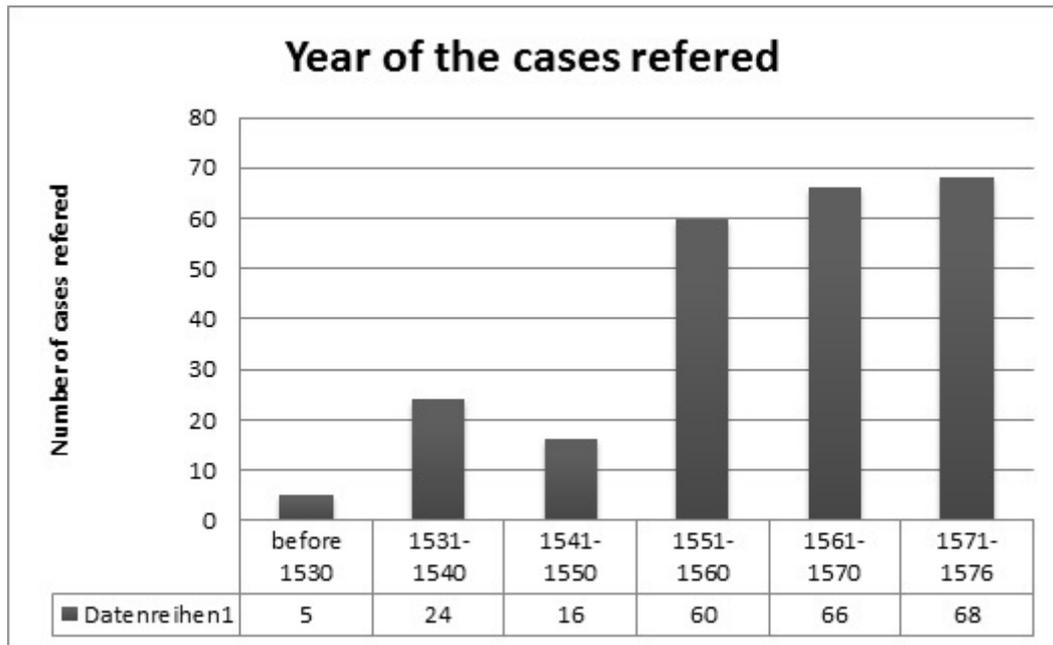
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#### 5.4.1.2 Date

Names of the litigants and the date when the lawsuit was decided by the *Casa da Supplicação* were the most common information about case law. Among the 379 *decisiones* that have mentioned case law, the majority (198 or 52,65%) did not refer to the date of the decision. However, the number of *decisiones* mentioning the date is very high (181 or 48,13%), and we could organize them in the following way:

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<sup>50</sup> To an example of complete reference with all these information, A. GAMA, *Decisionum Supremi* (cit. 7), Dec. XI, 9, p. 38.



There is no doubt about the predominance of cases from the last years before the book's preparation. Knowing that Gama was appointed to the *Casa da Suplicação* in 1549, it is easier to understand why the last three groups are so higher than the others.

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#### 5.4.1.3 Location

Information about the origin of the case referred is important to comprehend the dynamics of the royal jurisdiction in the time when Gama was a justice. Despite its small territory, the access to the highest courts of the kingdom was particularly difficult to litigants coming from distant and isolated regions of Portugal. The following list could help the understanding of this matter:

36

<i>Location</i>	<i>Number of cases referred</i>
Lisboa	25
Coimbra	14
Évora	13
Porto	13
Santarém	13
Ilha da Madeira	9
Guimarães	8
Viana do Castelo	7
Abrantes	5
Tomar	5
Portalegre	4

Setúbal	4
Torres Novas	4
Barcelos	3
Entre Douro e Minho	3
Golegã	3
Moura	3
Oliveira	3
Portel	3
Vila Viçosa	3
Alhandra	2
Almada	2
Almeirim	2
Azamburja	2
Campo Maior	2
Chaves	2
Elvas	2
Estremoz	2
Funchal	2
Ilha de São Miguel	2
Ilha de São Tomé	2
Ilha Gratiosa	2
Lagos	2
Lamacensis	2
Pombal	2
Ponte de Lima	2
Serpa	2
Sesimbra	2
Alcobaça	1
Alenquer	1
Arcos de Valdevez	1
Arruda	1

Avis	1
Beja	1
Borba	1
Castelo Branco	1
Colares	1
Colos	1
Coulã/Índia	1
Coruche	1
Dagrela	1
Alchouchete	1
Aldeia Galega	1
Alvor	1
Ançã	1
Aveiras	1
Freixo	1
Góis	1
Govilhão	1
Iuliae Pacis	1
Landroal	1
Lanhoso	1
Marmelos/Trás-os-Montes	1
Monforte	1
Monsaraz	1
Óbidos	1
Oeiras	1
Pedrógão	1
Pinhel	1
Redondo	1
Salaciae	1
São Tiago de Cacém	1
Silves	1

Tavira	1
Torres Vedras	1
Valença	1
Valhelhas	1
Viana da Foz	1
Viana da Foz de Lima	1
Viana de Lima	1
Vila do Conde	1
Vila Franca de Xira	1
Vila Nova do Portimão	1
Vila Real	1
Vimeiro	1
Viseu	1

The majority (229 or 58,71%) of the almost four hundred *decisiones* have mentioned the location of the lawsuit. As expected, the frequency of cases whose origins were the most important cities of the Kingdom was higher. But the frequently encountered presence of Madeira Island and other areas located in the oversee territories of the Kingdom shows the progressive, but still slowly, penetration of the royal justice in further regions of the Empire. **37**

We must be careful with the results of this specific point, because they represent only a part of the jurisdiction in Portugal during the 16<sup>th</sup> and 17<sup>th</sup> centuries. The high number of *decisiones* clearly based on case law but with no literal references to lawsuits is a signal of this necessary attention. Gama and the other authors did not reason why they have chosen specifically these cases to mention, and probably this selection was not based in proportional and representative criteria. Notwithstanding the conscience of the relative importance of the data, it is clear that they could be pretty useful to the above-mentioned objectives. **38**

#### 5.4.1.4 Litigants

Gama brought no detailed information about the litigants, and that is a barrier to investigate the profile of plaintiffs and defendants in his book. The themes of the issues discussed are also a very interesting way to understand this point, especially because some questions are typically related to the elites, such as succession, heritage, emphyteusis and other patrimonial problems. We are not concerned about tracing an economic or social profile of the litigants, but some available data are useful to understand, at least partially, who had access to royal jurisdiction in the Early Modern Age. **39**

There is no difficulty to perceive the social position of some litigants. Cardinal D. Henrique, son, brother and he himself King of Portugal took part in a lawsuit in 1564 about a sale contract with a third party possessor<sup>51</sup>. Other members of the Portuguese nobility were mentioned by Gama: the Duke of Coimbra, who was also the Master of Santiago Order, and Pedro Cunha, the son of India's Governor Nuno da Cunha<sup>52</sup>; the Count of Castanheira and the Marquis of Vila Real<sup>53</sup>; Martim Afonso de Sousa, one of the central figures in the beginning of Brazilian colonization, and the Duke of Bragança, who was the chief of the most important Portuguese noble house that became, after 1640, the Royal House<sup>54</sup>; the Count of Portalegre and his sister-in-law against the *Santa Casa de Misericórdia* of Évora in a discussion about emphyteusis<sup>55</sup>; among others.

Only by genealogical and Economic History research it is possible to achieve a broad comprehension of the phenomenon of litigation in the Early Modern Age, especially about the profile of the litigants. The here-found information, despite its incompleteness and insufficiency, is helpful on a preliminary stage.

#### 5.4.1.5 Justices

References to the justices acting in the cases mentioned were not uncommon in Gama's *Decisiones*, especially in a kind of celebrative mood. Gama was justice of the *Casa da Supplicação* for more than forty years, and often referred to other justices as his colleges. In *Decisio XVI*, he related to the "opinion fuero college nostril doctissimi" Álvaro de Quintal, Mem de Sá, Luís Afonso and Antônio Soares<sup>56</sup>, while, in other situations, he mentioned the "doctissimi college" Mem de Sá and Álvaro de Quintal<sup>57</sup>, the "doctissimos Senatores" Sebastião de Matos, Antônio Sanches Brandão, Rodrigo Gomes Pinheiro, Antônio de Mota and Antônio de Leão<sup>58</sup> and the "collegae nostri" Francisco de Leiria, João de Melo and Diogo Roinz<sup>59</sup>. Probably the most cited justice was João de Melo e Souza (-1575)<sup>60</sup>, very often mentioned as "college eruditissimus"<sup>61</sup>.

<sup>51</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. XXI, p. 50.

<sup>52</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. XXXI, p. 64.

<sup>53</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. XLVII, p. 93-94.

<sup>54</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. CXXVIII, p. 182-183.

<sup>55</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. CCXVII, 2, p. 279.

<sup>56</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. XVI, 5, p. 44

<sup>57</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. CCXXXIII, 10, p. 306.

<sup>58</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. XVI, 4, p. 44.

<sup>59</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. XLI, 8, p. 86.

<sup>60</sup> About João de Melo e Souza, see D. B. MACHADO, *Bibliotheca Lusitana*, Tomo 2, Lisboa 1747, p. 699-700. Mentions: A. GAMA, *Decisionum Supremi* (cit. 7), Dec. III, 2, p. 13; Dec. VII, 1, p. 21; Dec. XL, p. 79; Dec. XLVI, p. 92; Dec. LXXII, 4, p. 118; Dec. LXXVII, p. 123; Dec. LXXXII, 2, p. 127; Dec. LXXXIV, p. 128; Dec. LXXXVI, p. 130; Dec. CXXIII, p. 177; Dec. CXLIX, 7, p. 201; Dec. CL, 2, p. 202; Dec. CLXVIII, 1, p. 220; Dec. CLXXXVII, 1, p. 237; Dec. CXCI, p. 243; Dec. CC, 2, p. 252; Dec. CCIX, p. 272; Dec. CCXVII, p. 280; Dec. CCXI, 1, p. 286; Dec. CCXXXV, 1, p. 309; Dec. CCXXXVII, 2, p. 311; Dec. CCXLIV, p. 316; Dec. CCXLVII, 3, p. 321; Dec. CCLXII, p. 336; Dec. CCLXXXII, 1, p. 363; Dec. CCXCIX, 4, p. 381; Dec. CCCI, 1, p. 383; Dec. CCC, 1, p. 381; Dec. CCCXIV, 6, p. 414; Dec. CCCXV, p. 416; Dec. CCCXXIII, 3, p. 426; Dec. CCCXXXV, 13, p. 447; Dec. CCCXLV, 2, p. 457; Dec. CCCLXXXIII, 3, p. 504.

<sup>61</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. CXXIII, p. 177.

Self-references as justice were also very common, notably in an indirectly way by conjugating the verbs in the first person, as he did in *Decisio* CLXXXIV<sup>62</sup>. In other situations, we can find notices of what he and his colleges have decided<sup>63</sup> or even that his opinion was followed by the other justices<sup>64</sup>. Although not frequent, there are some mentions to Gama's opinion as justice when in an opposite way to the final decision, when his opinions were defeated in the court<sup>65</sup>.

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#### 5.4.2 Foreign case law

References to cases decided by other European courts were not common, but they can be found when we look for direct references in indirect sources. In other words: Gama mentioned literally that a court had decided in some way, but his knowledge about these decisions depended not on reports or equivalent, but on *decisiones* literature from other countries. Mentions to decisions of the *Sacro Regio Consiglio* of Naples in the *Decisiones* I and IX depended on the work of Matthaeus De Afflictis<sup>66</sup>, as well as a reference to a case from the *Parlement de Paris* mentioned in *Decisio* CCCLVII thanks to the use of Boerius' work<sup>67</sup>. Exceptions were the references to the Law Reports of the Rota Romana<sup>68</sup>.

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## 6 Final Comments

In this final part, I am not concerned about bringing new information, because the central ideas were expressed during the entire text. The role of case law is exactly what makes the *decisiones* literature a special genre in juridical doctrine in the Modern Age: its double function (creating concrete issues and reasoning the decision to the problem) is not observed in any other kind of juridical book of that time. With the analysis of Antonio da Gama's *Decisiones Supremi Senatus Lusitani*, as well as the other Portuguese authors in my above mentioned work, I could conclude that. On the other hand, in a time when Legal Reports did not exist in *ius commune* tradition,

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<sup>62</sup> "At nos in causa Gasparis Riscado scribae camerarij civitatis Portuensis contrarium judicavimus in mense Ianuarij 1557". A. GAMA, *Decisionum Supremi* (cit. 7), Dec. CLXXXIV, p. 237.

<sup>63</sup> "Et ita iudicatum fuit per me cum collegis doctissimis in processu agitato inter Antoniam de Lemos actricem, Licentiatum Franciscum Vaz in mense novembris 1571". A. GAMA, *Decisionum Supremi* (cit. 7), Dec. LVII, 4, p. 104.

<sup>64</sup> "Et ex superioribus confirmandam esse iudicis sententiam dixere college doctissimi Georgius Cabral, Mendus de Saa, qui se voto meo subscripsere". A. GAMA, *Decisionum Supremi* (cit. 7), Dec. CXLVII, 5, p. 199.

<sup>65</sup> "Et quam vis ut dixi multi à Rip. opinione discesserint, pluries fuisset iudicatum contra eam, non sum immemor sententiae latae in processu Francisci de Betancor contra Christophorum Smeragdum insulae de Madeira in favorem majoratus, latae, ut constitui possit in re emphyt. perpetuae, ut contraria opinio praevalcat in emphyteut. ad vitas, concessa, dixi supra, in decision. 70". A. GAMA, *Decisionum Supremi* (cit. 7), Dec. CCXIV, 5, p. 276. In the same way: A. GAMA, *Decisionum Supremi* (cit. 7), Dec. XIX, 6, p. 63; A. GAMA, *Decisionum Supremi* (cit. 7), Dec. CCXXV, 12, p. 295.

<sup>66</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. I, 11, p. 3; A. GAMA, *Decisionum Supremi* (cit. 7), Dec. IX, 2, p. 32.

<sup>67</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. CCCLVII, p. 475.

<sup>68</sup> A. GAMA, *Decisionum Supremi* (cit. 7), Dec. XIV, p. 42; A. GAMA, *Decisionum Supremi* (cit. 7), Dec. CCCXLI, 3, p. 453.

particularly in Portugal, the access to information about lawsuits through these books is very important to understand the legal practice of that time, which can be reconstructed at least partially, notwithstanding the incomplete data.