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978-0-521-87728-2 - Law, Marriage, and Society in the Later Middle Ages: Arguments About Marriage in Five Courts

Charles Donahue

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## Law, Marriage, and Society in the Later Middle Ages

### *Arguments About Marriage in Five Courts*

This is a study of marriage litigation (with some reference to sexual offenses) in the archiepiscopal court of York (1300–1500) and the episcopal courts of Ely (1374–1381), Paris (1384–1387), Cambrai (1438–1453), and Brussels (1448–1459). All these courts were, for the most part, correctly applying the late medieval canon law of marriage, but statistical analysis of the cases and results confirms that there were substantial differences in both the types of cases the courts heard and the results they reached. Marriages in England in the later Middle Ages, the book argues, were more often under the control of the parties to the marriage, whereas those in northern France and the southern Netherlands were more often under the control of the parties' families and social superiors. Within this broad generalization the book brings to light patterns of late medieval men and women manipulating each other and the courts to produce extraordinarily varied results.

Charles Donahue, Jr., is the Paul A. Freund Professor of Law at Harvard Law School and immediate past president of the American Society of Legal History. Among other books, he is the coauthor or coeditor of *Select Cases of the Ecclesiastical Courts of the Province of Canterbury, c. 1200–1301*; *Year Books of Richard II: 6 Richard II, 1382–1383*; *The Records of the Medieval Ecclesiastical Courts*; and *Cases and Materials on Property: An Introduction to the Concept and the Institution*. He is also the author of more than 70 articles in the fields of ancient, medieval, and early modern legal history. Donahue teaches legal history in both the Law School and the Faculty of Arts and Sciences at Harvard and has taught at the University of Michigan, the London School of Economics, the Vrije Universiteit te Brussel, Columbia University, the University of California at Berkeley, Boston College, and Cornell University. Donahue is vice-president and literary director of the Ames Foundation and a councillor of the Selden Society (UK). He is a Fellow of the Royal Historical Society and a previous Guggenheim Fellow.

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# Law, Marriage, and Society in the Later Middle Ages

## *Arguments About Marriage in Five Courts*

CHARLES DONAHUE, Jr.

*Harvard Law School*



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## Preface

This book had its origins in a remarkable seminar given by Stephan Kuttner and Peter Landau more than 40 years ago. At that time those of us in law schools were enamored of what we called ‘policy’, looking at legal doctrine from the point of view of the social objectives it was designed to achieve, or could be used to achieve. As we read Alexander III’s decisions on the topic of the formation of marriage in the seminar, it struck me that the policy of those decisions was to enhance the power and control of the couple over their choice of marriage partners at the expense of others (parents, lords, etc.) who might seek to dictate that choice. I wanted to study how Alexander’s decisions were used in actual cases in order to determine whether they had had this effect.

While I have not abandoned the notion that the classical canon law could have been used to enhance the freedom of a marrying couple and that it was, in some sense, designed to achieve this effect, I look back now on those initial thoughts as somewhat naïve. My understanding, and, I think, that of those who study law generally, of what goes into making an important legal change has deepened, but it has also become more incoherent. Rare is the important legal change that can be explained simply on the basis of ‘policy considerations’, as we understood them in the mid-1960s, and Alexander’s decisions are not among those that can. A full study of the context in which those decisions arose must await another book. The Introduction offers a survey of the work that has been done since the mid-1960s, tracing their effect in actual cases. As this book and the work of others show, it is a complicated story, one that reveals remarkable variations, variations that seem to be based on the type of institution that applied Alexander’s decisions, the types of people to whom they were applied, the period in which they were being applied, and – the factor that this book emphasizes (without, I hope, ignoring the others) – the place where the applications occurred.

Forty years is a long time, and one’s attitudes change over time. When I took the seminar I was in my early twenties; I had just married; I had written my bachelor’s essay on *Romeo and Juliet*, and I thought that Alexander’s decisions

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were unqualifiedly a Good Thing. I am now in my mid-60s and have just become a grandfather. *Romeo and Juliet* is no longer my favorite Shakespeare play, though I still prefer *As You Like It* to *King Lear*. I still think that Alexander's decisions were a good thing, but the story that this book tells is, in many ways, a story about how they did not work.

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## Acknowledgments

Forty years is a long time, and the debts that I have accumulated over those years cannot be repaid, certainly not with this book. The first is to Sheila, who had no idea what she was getting into when her new husband started mumbling about Alexander III in the spring of 1965 and who has tried to teach me over the years what marriage is all about. Archivists in England and on the Continent have been unfailingly generous to a grouchy American with a thick accent, none more so than David Smith of the Borthwick Institute for Archives in York. It is largely due to his efforts that the Institute's splendid collection of cause papers, which were virtually unusable when I first looked at them more than 30 years ago, are now easily accessible. Research assistants who have, or can learn, the skills necessary to help with this kind of project are rare. There have been a number, but four stand out: David Dasef (who was able to make sense of my handwritten notes because he, too, had worked on the cause papers at the Borthwick), Kate Gilbert (who will recognize some of her descriptions of late fourteenth- and early fifteenth-century York cases), Diana Moses (who corrected the translations and reminded me that a translation ought, in the first place, to be in English; those that are not are the result of my stubbornness), and Kyle Young (who helped to proofread the text and to normalize the footnotes in a book written over many years). Two anonymous readers for Cambridge University Press were both encouraging and helpful, in a dark moment. Marcia Stentz and Monique Vleeschouwers-van Melkebeek shared with me unpublished work on the courts of Ely and of Tournai, respectively. I am particularly grateful to a group too numerous to mention individually: friends and colleagues who offered comments on pieces of this book given as papers. I have tried to acknowledge specific assistance that I received on particular matters in the notes. One person must be named here: Jane Bestor read a draft of this book that was so long that I was ashamed to show it to anyone, and she told me that I had two books and where to divide them.

Thanks of a different sort are owing to Dunker & Humblot, GmbH, Berlin, for permission to use portions of Donahue, "English and French Marriage

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## *Acknowledgments*

Cases,” which appear in Chapters 7, 10, and 12; to the *Northern Kentucky Law Review*, for permission to use portions of Donahue, “A Legal Historian Looks at the Case Method,” which appears in Chapter 2, to the University of Michigan Press for permission to use portions of Donahue, “Female Plaintiffs” (© by the University of Michigan 1993), which appear in the Introduction and in Chapter 3; and to Oxford University Press for permission to use a portion of Donahue, “Comparative Law” (© by the editors 2006), in the Epilogue. In all cases, the material has been substantially rewritten. Unpublished material from the Borthwick Institute for Archives at the University of York appears with the kind permission of C. C. Webb, the Keeper of Archives, and that from the Ely Diocesan Records with that of P. M. Meadows, Keeper of Ely Diocesan Records, Cambridge University Library. The image on the dust jacket appears with the permission of Harry S. Martin, Librarian of the Harvard Law School Library.

I would like to express particular thanks to Dean Elena Kagan of the Harvard Law School not only for encouragement over the years, including a sabbatical leave that allowed the book to be completed, but also for the generous subvention of the publication costs of the book, provided from research funds of the School. Many years ago the John Solomon Guggenheim Foundation gave me a fellowship that it thought was going to result in this book. It did, though the length of time that intervened must have led the Foundation to wonder whether it would ever happen.

Neither Charles Donahue, Sr., nor Rosemary Spang Donahue lived to see this book. It is dedicated to their memory.

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## Notes About This Book

The original version of this book, even after the division, was half again as long as the printed version of the book. Most of the material that now appears only in this version of the book was in the footnotes: Latin quotations from the cases, discussions of alternative interpretations, references to primary sources that support the argument, and references to the literature on the cases, with discussions where I disagreed with it. They are now to be found in this version of the book under the label ‘Texts and Commentary’ (T&C), with a brief reference given in the footnotes and hyperlinks connecting them. The following forms are used: ‘T&C no.’ (followed by a number) within a case name means that a quotation from the case is to be found in the T&C under the number given; ‘Ref. T&C no.’ means that the item contains supporting references; ‘Lit. T&C no.’ means that the item contains references to the literature (and, normally, discussion of it); ‘Disc. T&C no.’ means that the item contains further discussion of the matter. This version of the book also contains a number of tables and appendices; the former are listed at the end of the list of tables at the beginning of the book, the latter in a separate list following the list of tables. The material that is only in this version of the book is also available on a website: [www.cambridge.org/9780521877282](http://www.cambridge.org/9780521877282).

The name and style of the parties given in the record is frequently telling. *Marjorie daughter of Simon Tailour and servant of William de Burton leather-dresser of York c John Beek saddler of York*<sup>1</sup> obviously tells us more about the parties (and perhaps what the case was about) than does the standard ‘short form’ *Tailour c Beek*. There are, however, more than a thousand cases cited in this book, and giving the full form of the name of every case, particularly where no use is made of it, would considerably increase its length. I have therefore used the short form in all the references except in those cases where I have used in the discussion information provided by the long form. Similarly, cross-references are given to other places where the case is discussed only where it is relevant

<sup>1</sup> (1372), CP.E.121.

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to the topic under discussion at the time. Dates and manuscript references (or references to the edition) are normally given only once, with cross-references in the other places where the case is cited. Where the references are unusually long, that fact is indicated by the note ‘refs. in TCas’, indicating that the references will be found in the full Table of Cases in this version of the book, which gives the long form of the name of the case and all the references to it. The key to the table (and to the cross-references in the book) is the short form of the case name. The short form omits all prefixes (*de*, *le*, *vander*, etc.) whether the clerk has separated them in his rendition of the name or not (e.g., ‘Deplatea’ has a short form, ‘Platea’).

Because of the nature of the surviving records, only the year of grace is given in the dates appended to the York case names, and even these must be regarded as only approximate. Beginning in Chapter 6, where we are relying on registers, the dating can be more precise. Here, I have used the form ‘1.i.85’ or ‘1.i.1385’ (for 1 January 1385), which has the advantage of being concise and unambiguous across dating conventions.

Unpublished material at the Borthwick Institute for Archives in York is cited by the archive reference number (in most cases, ‘CP’, followed by a letter and a number).<sup>2</sup> Unpublished material in the Cambridge University Library (Ely) is cited by the folio number of the Ely Act Book (Ely Diocesan Records D2/1). Paris material edited in Petit, *Registre* is cited by column number. Material from Cambrai diocese is cited to the two editions of the Vleeschouwers by document number, the two works being distinguished, as indicated in the next paragraph, by the language of the name of the case.<sup>3</sup>

In descriptions of cases I refer to parties by their Christian names, as the records normally do, except in cases where that would create an ambiguity (a case, for example, that has two Johns or two Joans). I have also named the parties and the cases in the language that is now spoken in the area. That created some problems in the case of Cambrai, and here I followed the practice of the editors of the *Liber sentenciarum* and the *Registres de sentences* of using French for the court at Cambrai and Dutch for that at Brussels. I have translated *pars actrix* and *pars rea* as ‘plaintiff’ and ‘defendant’, but have kept the Latin *actor*, *actrix*, *reus*, *rea* (which is found in the records, though less often in the academic procedural writing) where it was necessary to distinguish the parties’ genders.

Cross-references are given by footnote number rather than page number. Where they are preceded by ‘at’, the reference is to the text, as well as, or in lieu of, the note. Where there is no chapter number given before the reference, the reference is internal to the chapter. Cross-references to footnotes also include the T&C cited in the note.

<sup>2</sup> The number refers to a file containing from as few as one to more than 50 documents (see Ch 3, n. 5). The individual documents are, for the most part, not numbered, but the researcher familiar with the diplomatic of medieval court records should be able to find the particular document to which I am referring on the basis of my description of it.

<sup>3</sup> The Table of Cases gives both page number and document number.



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In translations, *dictus*, *antedictus*, and so on, are left out, and the definite article substituted where appropriate. With one exception in Chapter 2, I have not tried to translate direct quotations in the Latin of the depositions into the vernacular of the time. I have, however, kept the distinction between ‘thou/thee’ and ‘ye/you’ that the English clerks preserve with various forms of ‘tu’ and ‘vos’. As is well known, English preserved the distinction between the familiar and polite forms of the second person singular well into the seventeenth century, and the usage tells us something about the relations between the people speaking, most notably where a man exchanges words of marital consent with a woman using the ‘thou’ form, and she replies using the ‘ye’ form.

Translation of technical legal terms is always problematical. I would prefer not to translate them at all, but I hoped for a book that would be comprehensible to those who are not familiar with the terminology of the *ius commune*, the law taught in the medieval universities, and, for the most part, applied in the ecclesiastical courts that are featured in this book. Most of the technical terminology of the law discussed in this book is defined in Chapter 1, and that used or implied in the registers of the courts is discussed at the beginning of Chapter 6 (at nn. 4–6), where we introduce our first register.

In transcriptions (now mostly in the T&C), extension of standard abbreviations and correction of obvious errors are done silently. Editorial additions are marked in square brackets ([ ]). Ellipses in square brackets ([. . .]) mean that something is missing or illegible in the manuscript; without square brackets, they simply mean that I did not reproduce the full document. Diamond brackets (< >) indicate something that is in the text that should be omitted. Carats (^) mean that what is within the carats is interlined; ‘x-[word]-x’ means that a word or words are crossed out or deleted. Doubtful readings are preceded by a question mark (?). Where necessary, the end of a line in the manuscript is indicated by a slash (/). In quotations from modern and early modern editions I have normalized spelling (e.g., substituting ‘i’ for ‘j’) and punctuation.

References in the footnotes are radically abbreviated. Except in the case of the Bible (cited by standard short forms) and English statutes (cited by regnal year and chapter), full references are given in the Bibliography. I have tried to provide in the margin (as noted, the ‘margin’ is for the most part in the T&C section) the original of everything that I have quoted in translation in the text. In the case of Paris and the two courts of Cambrai diocese, I have been considerably fuller in providing the original Latin text. I have done so both because there are more inferences that need to be drawn from these cryptic records and because the amount of editing that would have been required to provide comparable quotations from the unpublished records of York and Ely would have delayed the production of this book considerably. In the case of York and Ely, a number of previous works have contained transcriptions of the material, and where they have I have normally referred to, but not reproduced, those transcriptions. By contrast, the Paris and Cambrai editions are not easily available to English-speaking readers, and that fact is another reason why more from them is included here.