Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte

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was well-known and loved and which was there in his writing too. Pointing to these interests brings out a dimension of what made his voice distinctive. This was that legal enquiry was for him a response to things in the world. Fully to explore in what ways this was the case would require considering also his work on insurance, and his work as a general historian, and as a legal historian, neither of which are within the scope of this essay. Suffice it to say that historical study for him when it came to considering modern law was not used as a tool for supporting a particular taxonomy or rule. But it further confirmed his feeling that all sorts of legal responses to things have always occurred. The law being in a messy state was, therefore, always likely. Words of his about the modern law of insurance in the fullest of his historical treatments of the topic are implied everywhere else in his work on the law of obligations as his default position: 'We need to take stock of the state of the law and to admit there are problems with some of the rules we apply. We need to question some of the basic premises upon which these rules are based.'

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Footnotes:

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Motives for Murder:
The Role of Sir Ralph Paynel in the Murder of William Cantilupe (1375)

Frederik Pedersen

Introduction
On the evening of Friday 23 March 1375, the young nobleman William Cantilupe was attacked and murdered by his cook and squire at his manor in Scotton in North-East Lincolnshire. After the murder William's assassins cleaned his corpse with warm water, put the naked body into a sack and carried it on horseback seven miles east of Scotton to a field near the village of Grayingham. Here they dressed the body in a set of clothes, spurs and a belt and left it by the side of the road in the hope that it would appear as if highwaymen had killed William. While later juries identified Roger Cook and Richard Gyse, William's cook and squire, as the actual murderers there is a strong circumstantial case to be made that they were acting under the direction of William's wife, Maud Nevil, who was also indicted in early stages of the investigations into the murder, together with William's chambermaid, Agatha Lovell. In fact, the records of the subsequent murder trials show that fifteen members of William's household were initially indicted for the murder, but only the cook and squire were convicted and put to death. The records also show that Sir Ralph Paynel, a local magnate and royal retainer, was accused of siding the criminals after the deed in his manor in Caythorpe more than ninety miles away from the crime scene.

This spectacular crime was first discussed by Rosamund Sillen in the introduction to her 1936 edition of the *Lincolnshire Peace Rolls*, and her outline and conclusions concerning the case have been repeated regularly in subsequent academic literature. It is generally agreed that Maud or William's maid, Agatha

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Footnotes:
Lovell, let the two assassins into William’s bedroom. Sillem speculated that William’s wife, Maud Nevil, planned the murder with the Lincoln sheriff, Thomas Kydale, whom she married soon after the trials. Sillem noted that the four main suspects - Maud, Agatha, and the assassins Roger Cook and Richard Gysye - took a lengthy escape route from the manor of Scotton. They travelled across more than ninety miles of open country to seek refuge near Sir Ralph Paynel in Caythorpe in Kesteven in southwest Lincolnshire.

The fact that Sir Ralph Paynel was indicted for aiding the assassins led Sillem to speculate that he was, in fact, if not the mastermind behind the whole crime then at least deeply involved in the planning of a long-planned and expertly executed murder. Sillem suggested that Paynel’s motivation might be found in an incident that had taken place some years earlier. Entries in the Calendar of Patent Rolls show that William’s older brother, Nicholas, accused Sir Ralph Paynel on 15 March 1366 of having led an armed attack on the Cantilupe seat, Gresley Castle in Nottinghamshire, some forty miles from Caythorpe, during which Paynel had ‘ravished’ Nicholas’ wife. The calendars of the King’s Bench records indicate that a commission of oyer et terminer was established, but Sillem was unable to find any further evidence concerning this case in the King’s Bench records and concluded that the commission never met. Sillem subsequently suggested that the Lincoln sheriff Thomas Kydale and his lover Maud Nevil had planned the murder of William Cantilupe and that Ralph Paynel also played a prominent, if undefined, role. Though she had no problem presenting evidence of a romantic liaison between Thomas Kydale and Maud Nevil that satisfied her that they ruthlessly planned William’s murder so they might marry, Sillem found it difficult to account for Paynel’s involvement. Clearly the Calendar of Patent Rolls showed that there had been tension between the two families, but Sillem was unable to identify the nature of their quarrel.

Sille’s lack of success is due to the fact that the Calendar of Patent Rolls gave the wrong date for the attack: the original King’s Bench record shows that Sir Ralph Paynel attacked Gresley castle on 15 February 1366. Nicholas’ inability to defend his castle against assailants armed with ‘sticks, bows and arrows’ may have been acutely embarrassing, but in his libel before the King’s Bench Nicholas claimed that the attack also had serious financial consequences: in addition to abducting his wife, the raiders had taken away 2000 Pounds worth of silverware and jewellery. However, when Ralph Paynel ‘ravished’ Nicholas’ wife, he was in fact liberating his own daughter whom Nicholas had incarcerated in Gresley castle to force her to abandon her case to have their marriage annulled because of his impotence. Nicholas’ wife was Katherine Paynel, the daughter of Sir Ralph Paynel, and Ralph Paynel was thus Nicholas’ father in-law.

Nicholas Cantilupe died aged 27 or 28 in 1370, approximately 24 months after the attack on Gresley Castle and was succeeded by his younger brother William. On his succession to Nicholas’ Cantilupe estates William successfully claimed several manors that were initially granted to Katherine Paynel as dower when she married Nicholas. At first glance it would therefore seem that Ralph Paynel and his daughter therefore had good reason to wish revenge on William Cantilupe. However, the evidence of the York annulment case initiated by the Paynels alleging Nicholas’ permanent impotence in 1368 implies that the Paynels had accepted the loss of these castles: the lands were held by Nicholas in fee tail, which meant they could only be handed down to the heirs of his body. When the Paynels initiated annulment proceedings it would therefore have been clear to them that the lands would be lost to their family.

However, there are other reasons why the relationship between Nicholas Cantilupe and the Paynels is pivotal for an understanding of William Cantilupe’s
murder. These include events leading up to the attack on Greasley Castle—in particular Nicholas’ abduction and six-month incarceration of Katherine—and the fact that there was such enmity between Katherine Paynel and Nicholas Cantilupe that the consistory court in York annulled their marriage in April 1369 after more than a year of acrimonious litigation. Nicholas was related to St Thomas of Hereford being the grandson of Sir Nicholas, third baron Cantilupe who on several occasions served as a judge in Northern England, so there can be little doubt that Nicholas was intimately acquainted with legal procedure and that he knew the relevant laws and how to use them. The annulment was granted against Nicholas’ wishes after Nicholas had exhausted all avenues open to him. Nicholas exploited legal procedure to gain time and ultimately secured an appeal to the Curia, most likely on procedural grounds. But he also went against the letter and the spirit of canon law by his extra-judicial abduction of Katherine. His clever use of canon law procedure—i.e. that he secured an appeal against the York decision because he had not been subject to a physical examination in York—ultimately did not help him: he died in early 1370 pursuing his appeal against the ruling of the York court at the papal court in Avignon.

The Cantilupe And The Payneps
This is not the place for a history of the fourteenth-century fortunes of the Cantilupe family, but a brief outline is in order. Neither of the two Cantilupe brothers, William and Nicholas, lived a long life: William was murdered in 1375 when he was around 30 years of age, and, though foul play was initially suspected, Nicholas died of natural causes when he was around 27 in early 1370. Had the two brothers lived longer they would have been wealthy landowners with substantial holdings bequeathed to them by their grandfather, Nicholas, who had come into biis inheritance as third Lord Cantilupe around 1321 and who added such substantial tracts of land to his patrimony by a combination of royal favour and clever marriage that by the end of his life he was one of England’s largest landholders.

Nicholas Cantilupe, the third Lord Cantilupe, died on 31 July 1355 in possession of lands stretching from the Irish Sea to the Lincolnshire coast. He arranged to be succeeded by his grandson, also called Nicholas, then aged thirteen and under-age. The older Nicholas therefore left half his estate to his widow, Joan Kymas, to be passed on to his grandson, Nicholas, on her death, while the other half of his lands was granted in fee tail to both his grandsons

Nicholas and William (the latter of whom was around ten years of age in 1355). Until their step-grandmother’s death seven years later in 1362, the under-age children thus shared possession of the Cantilupe lands with her.9 Towards the end of her life, this arrangement may have created a difficult situation for the twice-widowed Joan Kymas. It must have been increasingly difficult for her to protect their wide-ranging lands and a wish for peace and security may have motivated her to arrange a marriage between her step-grandson Nicholas and Katherine, the daughter of her neighbour, Sir Ralph Paynel.

Nicholas’ prospective father-in-law, Ralph Paynel, was a well-connected and influential northern magnate. In the first half of the 1360s Paynel served as the Black Prince’s surveyor of game in Yorkshire and he remained a retainer until the Prince’s death in 1376. However, Paynel also seems to have been a bit of a loose cannon and was cited to answer for his excesses before the King’s Council in 1355 and 1360.10 With his combination of wealth, connections and general bravado Paynel may have appeared to Joan Kymas as the ideal protector of her step-grand-children’s interests if she should die before either of them reached maturity. An agreement for a future marriage between Paynel’s daughter Katherine and Nicholas Cantilupe was reached sometime before Joan Kymas died. On her death in 1362 the twenty-year-old Nicholas Cantilupe gained possession of her half of the inheritance and thus held the majority of his grandfather’s lands. These grants of land were made in fee tail and succession was thus secured for Nicholas’ “heirs of his body”. In addition to Nicholas’ extensive ancestral lands, which gave him wealth, his influence was strengthened by the fact that he counted several chancellors, bishops and even a saint among his recent kin, which would have given him added political influence and social status.

However, discord arose between Nicholas and Ralph Paynel quite soon after Joan’s death and, as we have seen, in 1368 Paynel and Cantilupe crossed swords in a confrontation that culminated in Paynel’s armed storming of Nicholas’ ancestral stronghold, Greasley Castle. We know details about this attack because of the commission of eyre et terminer that convened in late
April 1369. The work of the commission had been delayed from February 1368 until April 1369 by the fact that Nicholas was already engaged in litigation against the Paynels at the ecclesiastical court in York. Because spiritual cases took precedence over secular cases it was not until late April 1369 that the commission concerning the attack on Greasley Castle interrogated three witnesses. They gave evidence to a conflict that had lasted for at least two years.

Paynel Versus Cantilupe: A Quarrel Over A Small Thing With Large Consequences
The King's Bench heard Nicholas Cantilupe's complaint against Ralph Paynel, Robert Raufcumberdavayn Paynel, John de Hewere, and Margaret Halton of Holland during Trinity Term 1369.11 Nicholas Cantilupe argued that they had participated in an unlawful attack on Greasley Castle on 15 February 1368 during which they took away Nicholas' wife and goods to the value of more than 2000 Pounds. When heard by King's Bench the defendants made it clear that the case was not as simple as appeared from Nicholas' libel.

Sir Ralph Paynel, who organised the attack, had a good reason to attack Nicholas' caste. Although he never appeared before the court the other defendants made it clear that Nicholas Cantilupe wrongly accused them of unlawfully attacking Greasley and ravishing Katherine Paynel: Robert Raufcumberdavyn argued that Katherine Paynel had left Greasley of her own free will because she did not consent to her marriage to Nicholas.12

The aforesaid Katherine when she was underage was espoused to the aforesaid Nicholas, and this Katherine when she came of age did not consent to this matrimonio since the same Katherine had cause for pursuing divorce against the same Nicholas; for which reason the same Katherine left the said Nicholas of her own free will to pursue the said divorce and she went to the aforesaid Ralph Paynel her father at Castorpe in the county of Lincoln. And that divorce was prosecuted before the official of the archbishop of York at York and the process continued therein until the said divorce was proclaimed between them there, namely on the Saturday next after the feast of St George (i.e. 28 April) last past.

The court subsequently allowed the release of the three accused under mainprise until another meeting of the court to be convened on 15 September 1369. At this meeting Robert Raufcumberdavyn presented the reason why Ralph Paynel did not appear before the court: a royal letter of protection for Ralph Paynel stated that Paynel was abroad on royal business and therefore was to be quit of all suits at court. The court therefore dismissed the case and took no further action. Nicholas subsequently pursued an alternative route to preserve his honour: since the royal court would not hear his case and the consistory court in York had annulled his marriage without following proper procedure, he travelled to France to pursue an appeal against his divorce at the papal court.

The Paynel C. Cantilupe Case Before The Consistory Court In York
The King's Bench record leaves out many details of the dispute between Paynel and Cantilupe but it also directs us to the consistory court in York where we find the records of the annulment case between Katherine Paynel and Nicholas Cantilupe. Katherine had indeed been in a difficult situation that caused her family considerable embarrassment and Ralph Paynel's attack on Greasley was the culmination of a long series of events. The evidence presented before the King's Bench is silent about the surprising reason for the marital discord that had arisen between Nicholas Cantilupe and his wife - a problem of such a nature that the annulment of the marriage had been announced by the official of the archbishop of York only a few days before the three witnesses were interrogated by the King's Bench.

12 *predicta Katherina domino exstisit minoris status desponsata fuit prejnae Nicholae que quoddam Katherina cum ad statum eam promissa ad matrimonium ipsius se non consensit et quod satum Katherina hactenus causa sequentem divorcium erga ipsum Nicholae quam per quod nemini Katherina ab eodem Nicholae receivit se voluntate sua ad dictum divorcium proposuerunt et non ad predictionumRadolphum Paynel, patronum eam, apud Castorpe in consisto Lincolnensic Et diversorum illud understande archi episcopi Eboracensis apud Eboracum prescripti fuit et processus inde continuato quamquam dictum divorcium in eos obruisset, scilicet dii Sabbath prodestus post festum sancti Georgii ultima prodestus, celebratione fuit* KB 27/434/50.
13 I have used the medieval spelling of Castorpe in this translation. Arnold, Select Trespass Cases, Vol.1, 83-4 erroneously identifies Castorpe as Castorpe, which is a town in Norfolk.
Frederick Pederson

The annulment case between Katherine Paynel and Nicholas Cantilupe is now kept at The Borthwick Institute of Archives in York, where it is designated Cause Paper E 259. The transcripts show that Ralph Paynel's patience would have been sorely tested and that he had good reasons for his attack on Greasley: as a consequence of Katherine Paynel's plea for a grant of annulment of her marriage to Nicholas Cantilupe on the grounds of Nicholas' impotence he had abducted Katherine Paynel from her father's manor in Caythorpe and had forced her for six months to stay with him against her will and compelled her to publicly swear to his sexual potency, threatening to keep her in chains in a cell furnished with manacles and ancle irons within the precinct of Greasley Castle. These threats were made because Katherine alleged to the consistory court in York that her husband Nicholas had 'insufficient' genitals and that he had fraudulently married her knowing that he would never be able to consummate their marriage.

The first dated document in the York cause paper shows that the case was initiated before 23 March 1368, about a year before Paynel's attack on Greasley castle. The surviving documentation consists of 16 documents of varying length, including ten depositions by seven witnesses.13 The Cause Paper documents show that the consistory court examined the case between March 1368 and 21 April 1369 and that a combination of depositions and strenuous

13 The case files consist of the following documents (They do not have individual reference numbers and therefore are listed in chronological order): Letter of excommunication of Nicholas Cantilupe for non-attendance before the court in York (this document is dated 20 October 1367 which is most likely a mistake for 1368), Plaintiff's libel (no date); plaintiff's libel (with acts on dorse) (no date), Plaintiff's articles (no date), Constitution of John de Stanton as procurator for plaintiff (25 March 1368), Plaintiff's application for the court's protection sic pendente (22 April 1369), Exceptions by the defendant (24 April 1368), Plaintiff's positions and articles (26 April 1368), Replications against plaintiff's case by defendant (26 April 1368), Seven depositions for plaintiff (4 of them taken down on 25 June 1368, three of them taken down on 25 June 1368), Three witnesses to the abduction to Greasley Castle (15 July 1368), Positions and articles against Nicholas' replications to the witnesses of 15 July (28 July 1368), Mandate to Robert Bekeby peremptorily to compel Nicholas to appear in the York Minister on Wednesday before St. Michael for a physical examination of his genitals (31 July 1368), endorsed on 5 August 1368 with the information that summons was delivered in the church of Banyngton in the presence of two witnesses, Katherine's brother, John Paynel, and John Auncell (who subsequently became Katherine Paynel's husband) (sealed with the seal of the Ecclesiastics of Lincoln and endorsed by John Colby, esuary public). Letter from Lincoln confirming the delivery of summons to Nicholas (4 August 1368), Letter from Lincoln stating that Nicholas appeared in Lincoln on 19 September 1368. Sentence granting annulment to the plaintiff Katherine Paynel (29 April 1369).

attempts by Nicholas to avoid a physical examination of his genitals led the court in York to annul the marriage on 21 April and the provision of a written copy of the sentence on 28 April 1369. Nicholas Cantilupe appealed the case to the Papal Curia where he was contesting when he died at Avignon in early 1370. However, the conflict between the couple began several years earlier, only a few days after Nicholas Cantilupe and Katherine Paynel confirmed their marriage by exchanging vows.

We cannot say exactly when that marriage had originally been agreed, but Robert Rauschaumberly said the King's Bench record that a marriage had been agreed while Katherine Paynel was still under age. If we take Robert Rauschaumberly's testimony to the King's Bench to refer to the canonical age of twelve for girls, these negotiations would have been concluded around 1358, in the final years of Joan Kymas' life. I suggested above that Kymas may have tried to protect her lands with the help of her powerful neighbour Ralph Paynel. But it is equally possible that Ralph Paynel was trying to force Kymas and her adopted grandchildren to give up lands owned by the recently deceased third Lord Cantilupe. If that is the case, Kymas may have been trying to secure peace by negotiating a marriage between her adopted grandson, who — if the medical diagnosis suggested below is correct — at that time would have appeared to be a healthy teenage boy, and Ralph Paynel's daughter, Katherine. We will never know for certain what motivated Kymas to agree the marriage, but when she died in 1362 Nicholas had secured the promise of Katherine as his wife, and in 1364 at the age of 24 he confirmed his marriage with the eighteen-year-old Katherine Paynel, endowing her with the manors of Withcull, Kingthorpe and Lenton in Lincolnshire.

In her first deposition — which seems to have deliberately obscured the fact that Nicholas had abducted Katherine and incarcerated her in his castle — Margaret Halton, who, in her own words, was privy to Katherine's inner secrets because she was Katherine's "suis in lebas", explained to the court that for the first year the couple had lived in the Paynel household in Caythorpe in Lincolnshire and the following year they lived in Nicholas' castle, Greasley in Nottinghamshire. Katherine then returned to Caythorpe to live with her parents for six months. During that time she was persuaded by several people — Margaret Halton, the Official of the archdeacon of Stow, Thomas Waus, 'and others' — to return to Nicholas in Greasley in the company of these two and master Robert Bekeby. Katherine lived with Nicholas until the feast of the Purification of the Virgin.
But Margaret also explained that three days after the initial solemnisation of the marriage, Margaret had to console Katherine because Nicholas could not go through with intercourse, not having ‘sufficient natural members because his testicles were missing’. Katherine even swore that she was willing to be burnt at the stake if anyone could disprove her statement. Katherine’s story gains some extra credence through the reported taunt of one of Nicholas’ kin - possibly a sister - whom Margaret Halton identified only as ‘the wife of Sampson de Strellay, knight, a kinswoman of said Nicholas in the first degree of consanguinity’ who said to Katherine ‘my lady, I shall give you a penny if you ever have joy from your husband’.15

Katherine’s claim that her husband had no genitals caused disbelief and consternation. Katherine’s father initially refused to believe that there was anything wrong with Nicholas. He ascribed their marital problems to the fact that Katherine was young and inexperienced and added that ‘she was stupid and she did not understand what she should do’.16 Despite this initial paternal outburst, Katherine persevered and in the end her mother arranged for her to see master Thomas Waus, who was well acquainted with canon law, being the official to the Archdeacon of Stow. Waus listened to the young girl describing her attempts to consummate the marriage. Persuaded by her story, he arranged for her to speak on several occasions to the Bishop of Lincoln, John Buckingham, who interrogated Katherine in the comforting all-female presence of Katherine’s mother and Margaret Halton. Bishop Buckingham and Waus explained canon law governing annulments of marriage – in particular the requirement for intent to procreate and cohabitation for three years – to Katherine, and she returned to Nicholas to comply with the law’s demands. But as soon as the necessary period was over, she returned to her parents announcing that she had been told in confession18 that she could now proceed to a church court to have the marriage annulled.

In response, her husband defied the ecclesiastical court, reacted with violent threats, endured excommunication, and initiated proceedings at the

14 ‘pro fundis Nicholas non cognovit et omnino nus habuit membra naturalia sufficien, quia duravit ibi testiculi’.
16 ‘good fat fowes et quod non mett.contribued quod cat’ (CP B 259, 1368–9).
17 Waus was also the penman of Burton outside Lincoln, one of the benefices in the gift of the Paynels.
18 ‘in foro consuetudinis’.

Motives for Murder

King’s Bench, culminating in an appeal to the Papal Curia in Avignon, all done in an attempt to avoid a decision by a legal institution that confirmed his impotence.

The Canon Law Procedure In Cases Of Annulment For Impotence

Unlike today, medieval spouses enjoyed no access to divorce, i.e. the dissolution of a valid marriage leaving the parties free to marry a different spouse. Instead they faced two options: separation or annulment. In the case of separation, the parties were allowed to live apart, but had to remain celibate for the duration of their partner’s life. In the case of annulment, the parties had to prove the existence of an impediment to the marriage which was therefore deemed never to have been legally valid. One such impediment was *impotencia cohabendi*, literally: ‘the impossibility of coming together’. This phrase and its corollary *frigiditas* referred equally to men and women, and in theory women could find themselves as the defendants in suits for annulment of marriage because of impotence. However, in practice, these phrases referred to *male* impotence. For practical reasons the courts focused on the man and his erectile function which provided the easiest way to demonstrate the likelihood that the marriage had not been and was not going to be consummated. Focusing on the man allowed for fewer problems of interpretation.

Canon law distinguished between two kinds of impotence, which created different impediments to marriage. One was *permanent impotence* caused by a congenital incapacity for sex that had been concealed from the contracting party at the time of the celebration of marriage; if proven this led to an annulment. The second was *temporary impotence*, which was generally supposed to have been caused by *maleficia* or ‘sorcery’. Pope Alexander III (1159–81) allowed marriages to be dissolved for this reason, but the practice was discontinued by Pope Innocent III (1198–1216), possibly as a consequence of his encounter with this argument in his confrontation with Philip II of France over his Danish consort, Queen Ingeborg.19

Three methods of proof were generally required in the legal discussions of impotence: a physical examination of the parties, the sworn testimony of witnesses and the evidence of two full years of cohabitation. In his recent investigation of courts on the continent Charles Donahue, Jr., found only two impotence cases from Paris to illustrate this point in practice. Donahue concluded that the Parisian courts dealt effectively with these kinds of cases and seemed to follow the canon law more literally than the English courts. In one case the court passed sentence based on the evidence of two doctors, the sworn testimony of the wife, and the oaths of six men who swore that they believed the testimony of the wife and that they had no knowledge of the man having intercourse with another woman. In the other case, both the man and the woman swore to the impotence and their statements were confirmed by a master of medicine, a surgeon and the oaths of five men.

The practice of the English courts on the other hand involved a different group of experts. The English courts generally conducted a physical examination of the man’s erectile function with the help of varying numbers of ‘honest women’, who attempted to stimulate the impotent man, often (but not always) by baring their breasts and kissing and fondling him. Only one fifteenth-century man under investigation ‘passed’ such an examination (and that was after a second try), a failure (or should that be ‘success’) rate of one-sixth.

Thus European church courts seem to have applied roughly similar standards of proof and a physical examination of the man’s sexual capacity was necessary. However, this statement must be taken with the important proviso that the courts encountered the problem only rarely: the dossiers of only six pre-Reformation cases survive from the consistory court in York (making up only 3 per cent of the total marriage case-load); two have been identified among the diocesan archives in Canterbury; and another two are found in the episcopal court act book in Ely. It is clear that these cases were few in number and that the accusation of impotence was rarely made frivolously. The rules of canon law—which made it impossible for the impotent partner to remarry and demanded that he or she return to their spouse if the dysfunction disappeared—would create a deterrent from bringing this kind of suit without good cause.

The Cantilupe Case At The York Consistory Court

Donahue points to an intriguing jurisdictional problem with the Payne c. Cantilupe case. By rights, the consistory court in Canterbury should have heard the case, but it was examined in York. The plaintiff lived in the jurisdiction of Canterbury and initial steps in the case were taken in Lincoln, which also fell under Canterbury’s jurisdiction. However, the York consistory court heard the case. Although initially confusing, the explanation behind this unusual choice of forum may be influenced by two factors: firstly that Nicholas held the manor of Little Lavington by knight’s service from the archbishop of York, and secondly that the case took its legal beginnings during the chaotic last eight months of the reign of Archbishop Simon Langham of Canterbury. Langham, a former chancellor of the realm, only occupied the


X 4.15.1.

X 4.15.1.


Lavington is called Lamon today. It is located in south Kesteven in Lincolnshire.

seat of Canterbury briefly, beginning his reign on 24 July 1366 and ending it when he took up the office of cardinal of St Sixtus on 22 September 1368. Because he accepted this appointment without consulting Edward III the king seized Canterbury’s revenues in November 1368 arguing that Langham had forfeited the see by his acceptance of the cardinal’s hat. The uncertainty of the situation in Canterbury may thus have made litigation in Canterbury cumbersome and difficult.\(^{30}\)

The earliest surviving dated procedural document in the case is a commission dated 25 March 1368 which established Master John Stanton as the proctor of Katherine Paynel. Stanton applied to the court for protection for his client on 22 April 1368 and within a week she was not only given the court’s permission to live separately from Nicholas while the case lasted, but from 1 May 1368 she stayed in the care of Lady Margaret, wife of Sir Edmund Hastings,\(^{31}\) in the fortified Roxby castle, near Pickering in Yorkshire.

In her (undated) libel which is roughly contemporary with the establishment of John Stanton as her proctor, Katherine told the court that she had married 22 year-old Nicholas Cantilupe four years earlier\(^{32}\) and that he had not yet had intercourse with her. She claimed that the reason behind the non-consummation was that he had ‘insufficient’ genitals and was unable to emit semen. Seven witnesses in support of Katherine’s case were interrogated on 7 June and 27 June 1368. To a modern historian interested in the construction of gender it is frustrating that by requesting an annulment on the grounds of her husband’s permanent impotence, Katherine ensured that the court at York could only focus on the question of whether or not Nicholas was able to consummate marriage and effectively shut down any discussion of his construction of gender. This practical outcome of the rules of legal procedure thus forces the historian to make the pragmatic choice to focus exclusively on the medical aspects of the case.

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32 i.e. in 1364 when Katherine was eighteen years old.

Medical Aspects Of The Case
Katherine’s startling claim that Nicholas did not have sufficient genitals to perform intercourse was the lynchpin of her case. Given that it would have been extremely easy to disprove and that Nicholas seems to have gone to extreme lengths to avoid a physical examination, it is likely that this allegation was true. Katherine’s allegation is unexpected and does not conform to any standard impotence ‘narrative’, and it is also so easy to disprove that we must take it seriously, particularly because though it is uncommon it is not impossible.

Katherine produced seven witnesses in the York consistory court who all swore to having heard about the impotence, either directly from Katherine or from neighbourhood rumour. Master Thomas Waus related to the court that Katherine had sworn:\(^{33}\)

That she often tried to find the place of said Nicholas’ genitals with her hands when she lay in bed with said Nicholas and he was asleep, and that she could not stroke nor find anything there and that the place in which Nicholas’ genitals ought be is as flat as the hand of a man.

Margaret Halton, who had been Katherine’s serva in loco since childhood, explained that Katherine had told her about Nicholas’ impotence three days after the solemnisation of their marriage. Five other witnesses confirmed the existence of neighbourhood rumour to Nicholas’ impotence.

Although Katherine’s accusation may sound surprising, the physical deformity that she alleged indicates that Nicholas suffered from a real physical defect. Among the possible diagnoses are Aphallia (which is extremely rare), Leydig cell hypoplasia, Klinefelter syndrome\(^{35}\) and congenital adrenal hyperplasia (C.A.H.). Because the circumstances of Nicholas’ death in Avignon

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33 ‘Et dicit quaestio Katarinae referre quaestis templo templa suis cum jactus in loco cum dicit Nicholas et quaereret humum genitalia dicit Nicholas et quod nulla pahpare nec inventi fuerit idoneo et quod loco e qua genitalia sua deterre esse est in plano quod non manet lemnis’ (CP E.269, 1368-9).
led the English authorities to arrest his brother on suspicion of murder. C.A.H., which is well known in the medical literature, if somewhat rare in real life, appears to be the most likely diagnosis.

C.A.H. is a non-hereditary congenital condition that affects both boys and girls. Those born with C.A.H. lack an enzyme needed by the adrenal gland to make two hormones, cortisol and aldosterone. Without these hormones, the body produces more androgen, a type of male sex hormone. This causes male characteristics to appear early or inappropriately in both male and female children. Neonate boys will present a large penis with a mature colouring, while female children will present varying degrees of virilisation ranging from an enlarged clitoris which can look remarkably like a penis — to a total absence of external genitalia. Though their internal reproductive organs may be complete and they thus may have a vagina, fallopian tubes and ovaries, they can also suffer fused labia and present a flat mons veneris. Because of the thickening of the skin in the genital area, they can present like boys with a penis-like appendage and upon examination appear even to an experienced midwife to have undescended testes.

Although at least one modern commentary on this case expected Nicholas to display typically feminine characteristics, such as a high voice, the opposite would almost certainly have been the case. Indeed, it is likely that at the time of his engagement, when clothed, Nicholas would have long since shown most of the traits of a boy well past his puberty with a high muscle mass, clear beginnings of a beard and a normal male voice. Of course, had he been unclothed his lack of an adult penis would have been obvious upon examination. But Nicholas was also later to show evidence of other traits that are characteristic of C.A.H. When Katherine was abducted from her father's

37 See text accompanying note 53 below.

38 The tentative diagnosis that I am proposing here was first suggested to me at Clare Hall, Cambridge, by Dr. Richard G. Mackenzie (now at the University of Southern California), I subsequently discussed the case with Professor Lewis Hughes (Professor of Paediatrics, Addenbrooke's Hospital, Cambridge) and the C.L.M C.A.H. Support Group in the U.K.

39 That it is possible to live an entire lifetime unaware of C.A.H. is demonstrated by the recent case of a Chinese virilised woman who only found out about his condition at the age of 66. K. F. Lee, et al., "Late Presentation of Simple Virilising 21-Hydroxylase Deficiency in a Chinese Woman with Turner's Syndrome", Hong Kong Medical Journal, 19 (2013), 268–71. I find it unlikely that Nicholas Canitape suffered from Turner's Syndrome as the court did not comment on his height or muscular abnormality as it did in the case of William Aulger e Johanna Maleke (Borthwick Institute for Archives, York CP E 76).


41 Songra Pang and Anastasia Clark, 'Congenital Adrenal Hyperplasia Due to 21-


The Case against Nicholas Cantilupe in York, his Reaction, and his Death

The fact that Nicholas might not be a man was never an issue in this case. Following canon law’s understanding of the legality of marriage bonds the York consistory court took it for granted that he was male. Thus, the court only needed to establish whether there was sufficient evidence that intercourse could never take place and, if proven, whether this fact had been unknown to the plaintiff at the time of the marriage contract. Katherine therefore only needed to produce evidence concerning the alleged impotence and demonstrate her adherence to the rules of the Church in cases of impotence, i.e., she wished for and intended to have children and that she had cohabited with her putative husband for two full years.

However, in his responses to Katherine’s witnesses, whose depositions were submitted to the court after 27 June 1368, Nicholas claimed that Katherine had sworn in front of witnesses that he had known her carnally. This allegation made the court recall three witnesses – Thomas Waas, the official of the archdeacon of Stow; Margaret Halton, Katherine’s tota in lecto; and Robert Bekeby, Ralph Payne’s chaplain – on 15 July 1368 to be re-examined to learn more about the oath that had allegedly been freely sworn by Katherine. Katherine’s witnesses did not contest Nicholas’ contention that Katherine had sworn an oath, but they provided compelling evidence that Katherine’s oath had been produced under duress and presented a narrative in which Nicholas actively twisted the law to his own purpose. From their accounts Ralph Payne’s reasons for attacking Gresley Castle become clear: Nicholas had abducted Katherine from Cawthorpe; he had threatened her with life-long incarceration; and had kept her as a prisoner for six months. The three witnesses had indeed witnessed an oath affirming Nicholas’ potency sworn by Katherine. Wau argued that the oath had been brought about by force. Nicholas had his men abduct her ‘weeping and wailing’ to his castle in Gresley on the Wednesday after the Assumption of the Virgin (i.e. 18 August) 1367 and Robert Bekeby added that Nicholas did not ride with his men but met Katherine and her other abduced companions at the castle gate, where: 44

44 CPE259, 1368-9: [Quidem est solummodo in mittens] secundum continentiam processus accusatorum, habens instrumenta ad obviationem, habens instrumenta naturale, ut promitterit, et quod ut de eis non revinit a commissa

with a grim face [he said]: “you are a cursed woman among all women.” And he led her and this witness and the other aforementioned fellow witnesses into a certain chapel situated within that castle, and there he spoke to said Katherine in these words: “You know well that I am sufficiently potent to copulate with you having genitals that are good enough.” She answered: “yes.” Said Nicholas added: “I wish that you swear that I am able to have intercourse, having sufficient natural instruments (as he said) and that you henceforth do not leave my company without my special permission and that you do not reveal this counsel in any way.” To which Katherine answered: “I will swear to whatever was said by you.”

Wau had been abducted with Katherine and his two fellow witnesses and he emphasised that the oath was produced under severe duress: Nicholas showed Katherine a room he had made as a prison for her where he intended to keep her if she did not comply with his wishes. 45 Margaret Halton, Katherine’s servant, added that he had ankle-irons and hand-cuffs ready if she refused to swear his oath. 46 Six months later, in February 1368, Ralph Payne attacked

45 Interrogato quodamum compalsum fuerat ad jurandum dicit quod dicit nisi sic dictum nisi sic factum

46 Margaret Halton agreed with the other witnesses: “Hic addito quod haec compalsum fuerat in quibus poterat audirem Keristium nisi sic in omnibus acquiescere et promittere factum juramentos” (CPE 259, 1368-9).
Greasley Castle to liberate Katherine and thus enabled her to pursue the annulment case in York. 49

The York consistory court accepted this narrative as proof of the fact that the oath sworn by Katherine had been produced under duress. The York consistory court therefore sent Robert Bekeby a mandate to cite and compel Nicholas to appear in York for a physical examination on the Monday before the feast of St. Michael (i.e. 25 September 1368). The summons was read out to Nicholas when he attended mass on Sunday 6 August, but he strenuously (and deviously) resisted a physical examination: when the assigned day arrived, Nicholas appeared in Lincoln for his physical examination. 45

49 When considering the veracity of this second narrative of the relations between Nicholas and Katherine it is worth remembering that the witnesses had to convince the court that force that induced ‘fear that can fall upon a constant man’ had been brought to bear on Katherine and that their stories probably should be approached with a certain amount of scepticism.

45 The cause paper file contains a letter from Lincoln stating that Nicholas did appear there on 19 September 1368.

46 The document gives the year as 1367, a likely scribal error for 1368.

47 This date is initially surprising. Nothing seems to have happened in the case between October 1368 and April 1369, but the date is clearly not a scribal error: the scribe copied out the last part of the year in full as ‘mccc lxix’. However, it would have allowed for Nicholas to have missed three consecutive meetings of the court, after which canon law procedure allowed the court to proceed to sentencing.

48 ‘...qua per allegata proposita, confessata et in se ab probatione generalis inventa...’

49 Nicholas Cantilupe was present in person when Paynel's letter of safe conduct was presented at a meeting of the King's Bench in October 1369 (KB 27/414/50). The

Initially, Nicholas' death seemed to the English authorities to be highly suspicious, but it is in tune with the medical diagnosis of C.A.H. proposed above. Both Ralph Paynel and Nicholas' brother William were in Aquitaine at the time of Nicholas' death - Ralph Paynel with John of Gaunt and William as a soldier. At the final meeting in the case at the King's Bench Robert Rauffmankreuz Paynel presented a royal letter of safe conduct that granted Ralph Paynel immunity against any legal proceedings. But William Cantilupe (who stood to gain from his brother's death) was immediately apprehended for having murdered his brother. John Vendour of Newark was later paid for bringing William Cantilupe to the Tower of London for the death of Nicholas Cantilupe, his brother, slain'. The suspicion had clearly been strong enough for the King to provide an expensive armed guard to ensure that William answered for his alleged crime in London. From the same source we learn that Vendour had been instructed to keep Cantilupe in the Tower until the King and Council had decided what to do in his case. 50 This royal expense adds further circumstantial weight to the suggestion above that Nicholas suffered from C.A.H.: the final stages of C.A.H. present symptoms that are remarkably similar to acute arsenic poisoning, in particular the cardiovascular symptoms of hypotension, shock, ventricular arrhythmia, congestive heart failure, and irregular pulse. 51

Subsequent inquisitions post-mortem into Nicholas' possessions most likely took place after William had been released from the tower. William's subsequent plea in the court of Chancery from December 1370 claiming the rights to the three castles that the inquisitions had identified as being in Katherine's possession indicate that he was most likely released before May or June 1370, but at any rate certainly before December of that year. Thus, the English authorities appear to have quickly accepted the fact that, despite his young age, Nicholas had died from natural causes.


The Inquisition Post Mortem: A Final Insult?

At the time of his death Nicholas was between 27 and 28 years of age. Inquisitions post mortem were taken in May and July 1370. They showed him to have been in possession of Little Claydon and Eiselbergh (Buckingham), Ilkeston (Derby), Greasley Castle and Kynmerley (Nottinghamshire) and Hemsill (of the honour of Peverel, in Lincolnshire). Greasley was the Cantilupe family's largest manorial holding at over 5,500 acres, incorporating towns, villages and hamlets from Selston to Nuthall and Eastwood. The adjoining manor of Ilkeston in Derbyshire increased that holding to cover a huge swathe of land straddling the River Erewash. Nicholas also died in possession of three further manors in Lincolnshire: Withcull, Kingthorpe and Lavington. Nicholas held the manor of Lavington by knight's service, from the archbishop of York. Although some of the inquisitions after Nicholas' death say that he held these manors jointly with Katherine, his wife, which indicates that the secular justices correctly regarded the annulet case as pending, by the time William died these estates had been transferred into his possession.

Katherine wasted no time in getting married again and on 3 December 1371 she contested the rights to the manors of Withcull, Kingthorpe and Lavington with her new husband, John Auncell, knight. Auncell had already met Katherine and her brother John when Auncell and John Paynel appeared as witnesses to the citation to appear for a physical examination that was read out to Nicholas on 6 August 1368. Auncell was indicted in 1375 for having attacked a royal judge in connection with a long-running dispute in Kesteven, but the accusation was not severe enough to prevent him from representing Lincolnshire in Parliaments in 1377, 1378 and 1379. In 1379 Auncell represented Lincolnshire together with William Bussy, who was later to marry William Cantilupe's widow Maud when her second husband...

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54 A second inquisition concerning Greasley and Ilkeston was taken 12 July 1370. The manors of Withcull, Kingthorpe and Lavington were contested by Katherine who claimed that she held them jointly with Nicholas. Three inquisitions were made: on 8 May, on 14 June and on 28 June. Both of these had fourteen juries, while the calendar does not inform us how many swore to the last inquisition held 28 June. IPM 44-47 Edward III, 76-8.
60 Frederik Pedersen, 'Privates on Parade' in Per Andersen, Mia Münster-Swenden and Helle Vogt (eds), Law and Private Life Proceedings of the Sixth Carlsberg Conference on Medieval Legal History (Copenhagen, 2011).
and motivations of Ralph Paynel have been more obscure. The literature has accepted that he probably played a crucial role in the murder, and that he was pivotal in ensuring that most of the persons involved in the crime avoided the censure of the law. But his reasons for becoming involved in the first place have been unclear. This article has added new evidence from the King’s Bench and the consistory court in York and has shown that Paynel had reason to dislike the Cantilupe family for the appalling treatment meted out to his daughter Katherine. An additional, but weaker, motive may have been the loss of several castles previously in the possession of the Paynells.

By combining the evidence of the York annulment case with current medical knowledge it has become possible to suggest a medical diagnosis that explains why Nicholas Cantilupe could not consummate his marriage and thus brought embarrassment and notoriety to both families. However, ultimately, it is impossible to show that this condition motivated Ralph Paynel to plot the murder of Nicholas’ brother. In addition, when initiating divorce proceedings against Nicholas Cantilupe, the Paynells would have been aware that this meant losing possession of the castles that had been given to Katherine as dower. Nicholas held them in fee tail, which meant that they could only be handed down to the heirs of his body. The events of the case have been outlined and we have seen how Katherine Paynel’s claim that her husband had no genitals was initially rejected, even by her own family, but that her perseverance meant that the case progressed by the required steps from the archdeacon of Sow to the bishop of Lincoln, to the archbishop of York. Ralph Paynel may have been forced to contend with the unusual and embarrassing nature of his daughter’s reasons for pleading for an annulment of her marriage, but on balance it is probably not likely that on its own this would have motivated him to plan the murder of Nicholas’ brother. If he did do so it is more likely to have been due to his distress over the incarceration of his daughter. Nicholas’ condition may be one of the earliest recorded – but not recognised – examples of a rare congenital disorder that today affects one in 18,000 children. However, it is unlikely that Ralph Paynel would ever have understood the condition or sympathised with Nicholas’ predicament.

Though the case followed the proper steps, Nicholas tried to stop it becoming public knowledge and, though he should have known better, he eventually snapped and had his wife abducted with her retinue to his ancestral seat in Gresley. In response, Ralph Paynel attacked Gresley from whence he liberated his daughter. Paynel’s attack on Gresley castle enabled his daughter to pursue her case at the consistory court in York where she was granted the protection of the court and provided with shelter in Roxby Castle. Changing tack, Nicholas Cantilupe subsequendy tried to delay and obstruct the case. Ultimately, because of his non-cooperation with the court, he was able to appeal the case to the Papacy. However, before the case could be heard, he died and left his brother William to continue the bloodline.

William was not minded to let his ancestral lands pass on to the Paynells through his brother’s unsuccessful marriage and therefore he challenged Katherine for possession of three Cantilupe castles that had been left in her possession by the death of his brother. Thus in this earlier case and its aftermath we find several possible motives for Ralph Paynel’s involvement in the murder of William Cantilupe. Paynel was no doubt acutely aware of the multitude of insults he had suffered at the hands of the Cantilupes. Leaving aside what he may have thought about Nicholas’ condition (which he most likely did not understand), Nicholas had challenged the honour of the Paynells by dishonouring Katherine through his abduction and her long imprisonment in Greasley Castle, by subsequently claiming that Paynel had attacked Greasley castle without just cause, by his delaying and obstructing tactics and by his appeal to the papacy. He had subjected Ralph Paynel’s daughter to degrading treatment and threatened to hold her prisoner chained to a wall in his castle until she complied with his demands, demanding that she reveal his threats to no one and that she stay in his castle unless expressly permitted to leave by him.

Nicholas’ actions may have been enough to turn Ralph Paynel against the Cantilupes. But his brother William added insult to injury by reclaiming the three castles from the Paynells, by arguing that the castles with which Nicholas had endowed Katherine would only have come into her possession if she had borne Nicholas an heir, an event that Nicholas must have known could not happen when he celebrated his marriage to Katherine in 1366.

Ultimately, none of the parties in these two cases came out particularly well: William Cantilupe paid a heavy price for his brother’s (and his own) challenge to Ralph Paynel. William would have felt secure in the knowledge that he and his family were magnates of the realm and that, in addition to their powerful patrons, they were under the special protection of William’s great-great uncle, the recently sainted Thomas of Hereford. Ralph Paynel had good reason to detest the Cantilupes, but whether he took time to prepare his revenge with dedication and skill must remain uncertain.

Nicholas Cantilupe is perhaps the person who is most intriguing in these cases. When he was born there would have been little reason for his mother
or the midwife to doubt that he was the son and heir of William Cantilupe, the son of Nicholas, third Lord Cantilupe. His condition would not become noticeable until his early teens, and by then social convention meant that it was impossible to change his gender since outwardly he would have been a short but masculine boy, who, his family could testify, had entered puberty early. Though he must have been increasingly aware that he was not like other men, he was promised in marriage to Katherine Paynel and when they celebrated their marriage it became impossible for him to hide his condition. His wife’s horrified reaction to his physical appearance, which made her flee his company within days, and her reluctant cohabitation with him for the canonically required period ultimately led her to pursue her case in the court in York. Consequently he reacted with a series of increasingly desperate and violent measures, at first attempting to force her publicly to acknowledge their marriage and subsequently by evading the law, and finally taking his case to the papacy. Nicholas’ life was brief, but the details of his story and the aftermath of his death may still provide much information. Future studies of this case can provide information not only about late fourteenth-century English history, but also about the construction of late medieval gender and the obstacles faced by those who did not conform to the expectations of their society.

Procedures for Dealing with Robbery in Scotland before 1400

Andrew R. C. Simpson

Introduction
This study will examine the law concerning robbery in medieval Scotland. As will be explained in more detail below, ‘robbery’ may be defined as the theft of goods with force or violence. Three objectives will be pursued here. First, the article will reconstruct the legal procedures that dealt with robbery prior to 1400. One already existed in the twelfth century, and others were introduced in later periods. Secondly, it will be demonstrated that each of these new procedures became increasingly draconian, at least from the perspective of those accused of robbery. Such individuals had at first been granted various legal protections and defences, but these safeguards were gradually omitted in the later forms of process. Thirdly, the paper will seek to explain these developments. It will be argued that successive periods of political disorder gave rise to practical problems in the administration of justice, and these in turn resulted in the introduction of ever more severe measures that could facilitate the quick identification and punishment of wrongdoers. And yet it would be wrong to suggest that the laws that will be examined here were simply shaped by such pragmatic concerns. Drawing in part upon the work of other historians, this article will show that the responses of law-makers to contemporary political problems were heavily indebted to existing traditions of legal ideas found in the Scottish common law, the English common law and the canon law of the Catholic Church.

The paper will begin by briefly considering the definition of ‘robbery’ given above. It will then examine the procedures used to provide redress for this wrong in the historical order in which they were established. The study will halt at 1400 because during the first half of the fifteenth century several existing procedures that dealt with robbery were reworked and combined with other legal rules to create a new form of action, known as spuillzie. The