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Divorce in Medieval England

From One to Two Persons in Law

Sara M. Butler

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Divorce in Medieval England

Divorce in Medieval England is intended to reorient scholarly perceptions concerning divorce in the medieval period. Divorce, as we think of it today, is usually considered to be a modern invention. This book challenges that viewpoint, documenting the many and varied uses of divorce in the medieval period and highlighting the fact that couples regularly divorced on the grounds of spousal incompatibility. Because the medieval church was determined to uphold the sacrament of marriage whenever possible, divorce in the medieval period was a much more complicated process than it is today. Thus, this book steps readers through the process of divorce, including: official and unofficial grounds for divorce, the fundamentals of the process, the risks involved, financial implications for wives who were legally disabled thanks to the rules of coverture, the custody and support of children, and finally, what happens after a divorce. Readers will gain a much greater appreciation of marriage and women's position in later medieval England.

Sara M. Butler is Associate Professor of Medieval History at Loyola University New Orleans. Her first book was *The Language of Abuse: Marital Violence in Later Medieval England* (2007). She has published also on suicide, violence against children, abortion, and medical practitioners at law.

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Sara M. Butler

Abbreviations

C	Chancery
Canterbury	Canterbury Cathedral Archives
CCR	*Calendar of Close Rolls*
CP	Court of Common Pleas
CPMRCL	*Calendar of the Plea and Memoranda Rolls of the City of London*
CPR	*Calendar of Patent Rolls*
CPRRGBI	*Calendar of Papal Registers Relating to Great Britain and Ireland*
GL	London, Guildhall Library
KB	King's Bench
LAO	Lincolnshire Archives Office
PP	*Petitions to the Pope*
REQ	Court of Requests
SC	Special Collections
TNA PRO	The National Archives, Public Record Office
Y.B.	Year Book
YBI CP	York Borthwick Institute, Cause Papers

Acknowledgments

This book is evidence that research and teaching are meant to go hand in hand. In large part, the impetus for this book comes from the confusion and indignation voiced by students in various incarnations of the course entitled "Between Eve and Mary: Women in Medieval Europe," a class I have been teaching regularly for the past ten years. Students in this class have persistently returned to questions that I had a great deal of difficulty answering. Many of those queries focused on the lot of medieval wives. This book is my attempt, finally, to provide definitive answers to those outstanding questions.

I am indebted to a number of institutions for the funding that produced this research. Although I did not realize it at the time, the project was begun on a Social Sciences and Research Council of Canada post-doctoral fellowship. Since that time, I have had a variety of internal research grants from Loyola University New Orleans to continue my archival research. The staff at the National Archives and the J. Edgar and Louise S. Monroe Library's Interlibrary Loan Department both deserve heartfelt thanks for facilitating the research for this study. I would also like to single out a number of new electronic initiatives that I found helpful for locating relevant material. David J. Seipp is responsible for the creation of an online index of the English Year Books that was enormously valuable: David J. Seipp, "Seipp's Abridgement," School of Law, Boston University, http://www.bu.edu/law/seipp/. G.R. Boynton's "Calendar of Patent Rolls Search," hosted by the University of Iowa at http://www.uiowa.edu/~acadtech/patentrolls/, is very user friendly and was also of great assistance. And, finally, the digital library "British History Online," created by the Institute of Historical Research and the History of Parliament Trust, http://www.british-history.ac.uk/, was absolutely vital to my research.

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Please note: all quotations have been translated into modern English for accessibility. Unless otherwise indicated, the translations are my own.

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Introduction

The thirteenth-century dispute over the validity of the marriage of William and Alice de Cardunville is a potent reminder of the ways in which views of marriage have evolved since the Middle Ages. Alice probably believed she had done quite well for herself when she married William, one of the king's tenants-in-chief and thus a man of some authority, owning substantial landed estates in Southampton. The two were married solemnly at church door, as both law and custom dictated. They lived together for the next sixteen years, during which time they had several children, although only one four-year-old son, Richard, was still living when the marriage came under fire. Despite the lengthy period that William and Alice cohabited as husband and wife, William's former lover, Joan, abruptly reappeared in his life. Joan purported to have borne William a son, sharing the same name as his young son with Alice, twenty-four years previously. She also alleged to be his wife and was determined to prove that claim in the court Christian. Although the two had never had a proper wedding, Joan asserted that he had at one time pledged his faith to her, and thus the court ruled that intent made a marriage: it declared Alice and William's subsequent union invalid, and the church mandated William to return to Joan. With such a disturbing upheaval in his life, it is no wonder that William passed away the following year. William's death breathed new life into the question of just who actually was his valid wife and thus the mother of his heir. Although the ecclesiastical court had confidently upheld the first relationship, the royal inquisition held at Salisbury in the year 1254 doubted that Joan was his valid wife, because she and William had not been "solemnly espoused at the church door." Nor were the king's officials willing to endorse the marriage to Alice over that of Joan. Ultimately, officials settled on making Robert de Cardunville, William's brother, his heir, thus denying the legality of both marriages and both sons as heirs.[1]

The plight of Alice, Joan and William reveals that, even at a time when marriage was thought to be indissoluble, marital bonds were easily broken. Misconception largely perpetuates the myth of the modernity of divorce. Although the medieval world also employed the word divorce (*divorcium*), because it was not regularly granted at the will of the couple

simply because they no longer wished to be married, it is assumed to be another beast altogether.[2] In reality, no matter how loudly the medieval church proclaimed the indissolubility of marriage, the real issue at stake was "the prerogative of the church to decide"; divorce was indeed attainable, providing the church approved it and the couple paid for it.[3] The medieval church's loyalty to the permanence of the marital union (however inconsistent) meant that "divorce" as a formal category in the era encompassed a greater subset of variables than it does today. Specifically, medieval divorce entailed two distinct scenarios when sanctioned by the church. First, divorce implied a judicial separation (*divorcium a mensa et thoro*) in which the couple remained married but was no longer required to live together or to render the conjugal debt (that is, to have intercourse). The English church rarely condoned separations but theoretically might grant them on the grounds of heresy, adultery and cruelty. Second, divorce also signified an annulment (*divorcium a vinculo*)—that is, a formal statement issued by the church that the marriage had never been valid. Impediments that laid the groundwork for an annulment were numerous: among others, non-age, force and fear, impotence, bigamy (known in the Middle Ages as pre-contract) and various forms of incest (consanguinity, affinity, sponsorship).[4] Given the greater strictures involved, undoubtedly a formalized divorce was rarer in the medieval era and required much more perseverance and ingenuity to present a lawsuit that conformed to the church's rhetoric of divorce. William's relationship with Joan above, however, confirms that not all couples carried out their divorces through official channels; self-divorce, as Richard Helmholz has dubbed it, was the inexpensive and less-public alternative.[5] In the case of William and Joan, the informality of their divorce mirrored that of their marriage; cohabitation without a formal declaration of marriage may have even been the norm for those lacking significant property. As James Brundage has suggested, "[f]ormal proceedings were far more common when the parties were socially prominent and when large amounts of property were at issue"; clandestine marriage was thus quite appropriate for those lower down on the social scale.[6] In general, the medieval church wanted no superfluous ceremony or criteria to stand in the way of marriage; as St. Paul pronounced, "it is better to marry than burn."[7] A valid marriage might be contracted anywhere, without witnesses, and using any language as long as the couple expressed their intent in the present tense (*verba de presenti*); the future tense (*verba de futuro*), of course, was reserved for betrothals. If a couple followed an exchange of vows in the future tense with sexual intercourse, however, the union was equally binding (the act confirmed the intention).[8] With such minimalist guidelines, some couples differed significantly in perceptions of their relationship status; while a man might believe he was only betrothed because he had said he "wants to marry her," the woman might interpret those same words as a valid marriage. Misunderstandings of this nature were the reason why the church strenuously advocated (and even

punished those who did not participate in) the publication of the banns three Sundays in a row, followed by an exchange of vows in the presence of a priest and witnesses at the church door (a process the church referred to as "solemnization").[9] England also stands out from its continental counterparts because of the lack of written record in terms of marriage agreements. Elsewhere in Europe, families hired a notary public to record the exchange of property that took place upon marriage; in contrast, English contracts were oral.[10] Often the only hard evidence of a marriage was the exchange of a gift, such as a ring, to affirm and publicize one's commitment.[11] Given the highly casual nature of medieval English marriages, that their marriages sometimes ended in an equally relaxed manner should come as no surprise.

The perquisite to clandestine marriage, as the church referred to such informal unions, was that "[a] marriage contract which was unknown to the church authorities could also be dissolved without their knowledge."[12] Self-divorce comes closest to our modern usage of divorce to dissolve the marriages of incompatible individuals. Granted, self-divorce was not easily accomplished: Philippa Maddern's most recent study on serial monogamy not only confirms the regularity of informal divorces but contends that geographic mobility was central to assisting couples in remarrying without worrying about the legal implications of bigamy.[13] Not all couples were capable of moving households, though, so formal divorce was a vital option despite the burden of paperwork and lawyers' fees.

Because marriage significantly altered the status of a woman in law and society, the process of divorce was more challenging to bring about. Drawing inspiration from scripture, medieval English law adopted the fiction of coverture, treating the husband and wife as one person in law, represented in the person of the husband. Hence, the husband became the couple's financial manager, responsible for the governance of all property (both landed and movable). As a *feme covert*, the wife became a dependant of the husband at law and might not appear in court singly unless it was to sue for the death of her husband or personal injury. An ecclesiastical decree of divorce, of either kind, obviously entailed changes to a couple's status with respect to coverture. In a judicial separation, the legal fiction of unity of person still existed, but a woman had to discover the means to support herself and exist in society apart from her husband. In an annulment, the couple did indeed transition from being one person in law to two. Although coverture was a legal fiction, it had a very real impact on the ability of a wife to act independently within medieval society. The goal of this book is to answer many of those questions outstanding about the experience of divorce, such as, how did a couple transition from being one person to two in the process of divorce? What difficulties did individuals encounter during and after the process of divorce? Given the limitations of coverture, how did a wife regain her personhood? Finally, what challenges did she face when she asserted her newfound independence?

It is imperative to clarify from the beginning that this study examines the practice, not the theory, of divorce. Brundage, Connor McCarthy and Charles Reid, Jr., among others, have studied in profound depth the canonical views concerning the dissolubility of marriage.[14] Although their findings act as a guide in the absence of more definitive evidence of the practice of English law, there is no need to rehearse those arguments here once more. Rather, this study sides with Helmholz's view that "[t]he English Church courts did not put into practice every part of the medieval canon law."[15] Divorce was a very normative, human experience that cannot be conveyed adequately by the legislation of celibate clergy, many of whom lived in a "world without women."[16] Admittedly, the records of divorce proceedings offer evidence of marital breakdown at its worst. Those couples appearing in court, generally, were at the end of their ropes, determined to separate whatever the cost. Thus, the more typical divorce—that is, self-divorce—is not as visible. However, the legal record more generally captures snapshots of marital life when couples appeared before the courts in cases tangential to, or arising from, divorce. Property disputes, disciplinary actions for adultery, fornication, non-cohabitation and litigation concerning restitution of conjugal rights all contribute in different ways to gaining a more profound understanding of the medieval process of divorce.

A word of caution: historians are necessarily constrained by the curial process. Most royal records, and many ecclesiastical, are short and formulaic and lack the intimate detail that might allow us great insight into the process of marital breakdown. Even in chancery or in instance litigation in the consistory courts where litigants had much more leeway in the writing of bills and depositions, a paid clerk drafted all the documentation, just as a paid lawyer advised the litigants.[17] Mediation by a scribe or lawyer was only one obstacle. Litigants who appeared in court were there with a mission: lawyers coached their stories precisely to achieve their objective of obtaining (or thwarting) a divorce. This is not to blacken the character of all litigants by implying that they were invariably dishonest. Although some prevarication should be expected, we need to take into account that filtering took place: litigants presented their stories from their own unique perspectives. Faulty or favorable memories, as well as a degree of desperation, may lead to a very one-sided explanation of marital breakdown. What is more, as with divorces today, when the accusations start to fly, angry and resentful spouses defend themselves with their own mud-slinging. All allegations made in a divorce suit, thus, must be taken with a grain of salt.

LOOKING FOR EVIDENCE OF DIVORCE

In Helmholz's seminal study on marriage litigation in 1974, he notes that "[t]he most striking fact about divorce litigation in medieval England is how little of it there was."[18] In the strictest sense, this is true. However, as

Alice, Joan and William above demonstrate, not all couples sued for divorce as such. Their circumstances involved not one, but two divorces. Joan and William participated in a self-divorce decades before Joan resurfaced. The second divorce most likely was sued as multi-party litigation over the validity of a marriage. The decision had the incidental effect of divorcing Alice and William. If we were to look at rates of divorce, those rates would probably only include one of the two divorces, and yet, it is impossible to deny the experiences of both divorces in their lives. The frequency of self-divorce undercuts our efforts to count cases; so many of the suits for restitution of conjugal rights (that is, a request to resume cohabitation and payment of the conjugal debt), disciplinary actions for non-cohabitation and adultery and pre-contract suits mask the fact that couples long ago divorced themselves. The rates can only be so helpful in this respect. It is clear that only those couples whose separations had become notorious appear in the records of the church courts. Separated spouses who went on to engage in adulterous relationships or even other marriages were the chief offenders. It is not hard to imagine that husbands and wives who led chaste lives or moved to new communities may have easily escaped notice. When a wife took the initiative to self-divorce, the records are particularly obscure. Spurned husbands were probably unwilling to confess publicly that their wives had left them. Abandonment by a wife was explicit evidence of a husband's inability to govern his household properly. Accordingly, many husbands were most likely too embarrassed to inform the courts upon their wives' departures (or, they may also have been too busy celebrating over their absence).

Helmholz's observation also reflects the nature of the ecclesiastical records. To date, those who have studied marriage and divorce have set their sights primarily on the courts Christian. This study does not intend to replicate the fine work of Helmholz, Frederik Pedersen or Charles Donahue, Jr.[19] Although the church courts were capable of addressing the spiritual side of the equation, many of the grievances couples had about their divorces (either formal or informal) were matters for the king's courts. Any issues relating to the conveyance of property (through dowry, dower, curtesy or inheritance) fell squarely into the jurisdiction of the common law courts. Because the church was so vehemently pro-marriage, some couples preferred to avoid them altogether and go to the English chancellor in the hopes of convincing him to address their grievances equitably. The court of Chancery existed for those cases that did not fit neatly into the rubric of the common law courts (as was the case with many of the unusual grievances arising from marital dissolution). This court was also ideal to bring truces to matrimonial wars in which individuals manipulated the courts to harass unwitting spouses. Petitions to the court of Chancery have much to offer in terms of highlighting especially the role of women in medieval England. Recent studies have demonstrated that medieval women felt most comfortable in this legal setting. In an examination of bills of complaint sent to chancery between 1461 and 1515 by petitioners living in

Yorkshire, Emma Hawkes notes that fully 15 percent of the litigants were female. These figures have led her to argue "that women were significantly more likely to participate in legal activities in equity than in common law courts." Moreover, chancery bills appealed to notions of chivalry, "calling on the idea that the king should be the friend to the friendless, caring for widows and children. The use of this ideology may have made chancery a more attractive jurisdiction for women." [20] The versatility and effectiveness of chancery made it the ideal venue for resolution of marital disputes. For example, although late medieval common law justices were able to award damages for the non-performance of an oral or written agreement, this was the limit of their abilities. Chancery, on the other hand, was capable of both awarding damages and ordering the performance of the agreement.[21] In spousal disputes, this provision meant that the courts might effectively enforce maintenance contracts for separated wives. Although the church courts were capable of addressing this issue (and often did), chancery was more expedient. Chancery could have the delinquent husband arrested and cast in prison (without waiting the forty days required by the law of caption) and compel performance of the agreement. To a woman without any immediate support, chancery undoubtedly offered the most expeditious solution. The records of the court of Chancery, however, demonstrate that English medieval society was still not comfortable with wives suing their husbands (or vice versa) and chose instead to keep within the rules of coverture in which husband and wife were considered one person in law.[22] Hence, for example, there are no identifiable cases of medieval wives using the court of Chancery to plead suits against their husbands for violent trespass.[23] What the records do demonstrate is a shrewd use of the courts by both husbands and wives to maneuver around the rules of coverture and dictate the terms of marital separation. No study of marital disharmony in the medieval period, then, would be complete without an investigation of the records of the court of Chancery.

Because divorce and issues relating to divorce might appear in such a wide variety of courts, this study casts a broad net in the hopes of reconstructing an overall perspective of the dissolution of marriage in medieval England. Ecclesiastical materials, such as papal petitions, Episcopal registers, cause papers and some *ex officio* (that is, disciplinary actions), are combined with those of the royal courts (coroners' and eyre rolls), but also chancery bills. In order to flesh out the perspective also for the highest and lowest ranks of society, both of whom frequently bypassed the courts because of publicity or expense, royal communications (both close and patent) as well as manorial and mayor's courts' papers also contribute to this analysis. Finally, in order to get a better sense of the role played by the courts in their approach to cases of divorce, the Year Books are also included. The Year Books provide valuable insight into the process of law, an aspect that is hidden in the formulaic accounts of the eyre rolls. The Year Books record series of dialogues between king's justices and pleaders (an early

form of barristers) relating to lawsuits that came before the king's courts. Thus, their discussions, although not binding, offer some perspective of how jurists sometimes approached specific situations. Moreover, because the Year Books played an important role in the education of lawyers and justices, the deliberations they record probably had a greater impact on the courtroom process than can be measured. The result of this investigation is, in essence, a hotchpotch of records that is not, in any way, intended to produce a thorough study of rates of divorce; rather, it hopes to offer an overall perspective on the ways in which medieval couples, at all levels of society, might approach the cumbersome problem of dissolving supposedly indissoluble unions.

WHY IS THIS STUDY IMPORTANT?

Scholars of the medieval family would generally agree that the lot of the medieval wife was not an easy one. Medieval husbands held the upper hand in the power relationship, both legally and socially. Although Lawrence Stone's view of married life in the Middle Ages as "brutal and often hostile, with little communication, [and] much wife-beating" has since been called into question, historians who have written more recently have still painted a somewhat unflattering picture.[24] Judith Bennett writes, "[m]edieval people thought of conjugality as a hierarchy headed by a husband who not only controlled his wife's financial assets and public behavior, but also freely enforced his will through physical violence."[25] Indeed, she argues that wife-beating was "a normal part of marriage."[26] Even Barbara Hanawalt, who has optimistically described peasant marriage in medieval England as a partnership (although not of equals), still concedes that occasional violence was accepted and expected in marriage.[27] The rules of coverture also left a wife economically vulnerable. Because all real and movable property legally belonged to the husband as head of the household, a wife who fell out of favor with her husband might well find herself expelled from the family home, without any resources to fall back on.[28] From a modern perspective, marital practices hardly provided any sense of reassurance. At a time when families more often than individuals took the lead in spousal selection and the chief criteria were inheritance and status, strong bonds of affection were not guaranteed to develop. Up against all these factors, some medieval wives might have found their fates difficult to accept. That is not to say that all medieval marriages were prisons instead of playgrounds; certainly, some medieval marriages have provided great evidence of marital affection. However, to quote Robert Palmer, "[m]arriage was a time for bargaining."[29] It was all too easy for a daughter's feelings to be "sacrifice[d] on the altar of the family's ambitions."[30] Thus, the potential for prolonged marital discontent was notably higher then than it is now.

Despite this dreary image of medieval marriage, wives generally accepted their positions—and not just passively. Some women actually fought to hold on to their wretched marriages, even when it was clear that their husbands were desperate for annulments. In examining the records of marriage litigation at the consistory court of York in the fourteenth and fifteenth centuries, Donahue makes a number of striking observations. He notes that not only were women more persistent in suing their cases, but they were far more likely to sue to enforce marriages than were men (even when the financial benefits "were not obvious") and far less likely to dissolve marriages than were men.[31] Andrew Finch, in his comparison of the dioceses of Hereford and Cerisy, makes a similar observation.[32] Findings of this nature would seem to suggest that women would do almost anything for the security of marriage, even if it meant staying in an unhealthy marriage or with a man who would really rather be married to someone else, as was often the case in multi-party litigation where pre-contract was the issue at contest. At any rate, Donahue's portrayal of the church courts as overwhelmingly pro-plaintiff reveals that many women got what they wanted.[33] Because the medieval church was even more determined to uphold the sacrament of marriage, female plaintiffs found a powerful ally in the courts and were often successful in their suits.

The reluctance of wives to divorce stemmed from legitimate concerns. Countless different factors explain their aversion. As a rule, most wives were too financially vulnerable to see divorce as a viable option; with children, in particular, the possibility of supporting a family as a single mother must have been daunting. Although alimony and child support both existed in the Middle Ages, the church lacked the manpower to enforce their payment effectively.[34] Economics were not the only concern: social stigma also played an immeasurable role. For much of the modern era, the stigma associated with divorce was sufficient to persuade many wives to remain in discontented and even abusive marriages for fear that family and society alike might ostracize them. In the Middle Ages, when marriage was a much more public institution, initiated and overseen by families, friends and neighbors, the disgrace of divorce was significantly more meaningful.[35] Petitions to the pope requesting dispensations for marriages where couples belatedly discovered they were related within prohibited degrees (and therefore risked being divorced by court order against their wills) furnish insight into the anxiety divorce produced. Both Robert Urswick and his wife, Margaret, in 1366 and Helen de Witmay and Roger de Donyngton in 1450 alluded to the "scandal" of divorce.[36] Some couples, admittedly being overly dramatic in the hopes of gaining sympathetic approval of their requests, went to much greater extremes. In 1460, the petition of Henry Drew and Joan Hamely depicted a crisis of near-fatal proportions, warning "dissension and scandals might probably arise between their kindred and affinity. . . . Henry would run danger of death, and Joan would be defamed and perhaps remain forever unwed."[37] Although it was certainly overstated, Joan