

BOOK REVIEWS

Marriage, Separation, and Divorce in England, 1500–1700

K. J. Kesselring and Tim Stretton
Oxford University Press, Oxford, 2022, 195 pp (hardback
£70), ISBN: 9780192849953

Charles George KC

Former Dean of the Arches and Auditor, UK

Finely researched and meticulously documented, this book demonstrates that, despite all that has been previously written on its subject by Laurence Stone and others, there is still much new to be said. Regrettably its price will put it beyond the budget of most would-be readers, although OUP have in other respects excelled in its production.

The authors, who both hold positions at Canadian Universities, have already each written on coverture, the unfair but dominant concept in the law and practice of marriage in the early modern period and beyond. As Blackstone described in his Commentaries, ‘the legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband’. Marriage was then ‘at least as much about wealth as it was about salvation or sexuality’ (p 3). The concentration here is not on the formalities and conveyancing devices preceding marriage but rather on the problems created by coverture for wives seeking financial support when they separated from their husbands. Effectively deprived by coverture of their possessions, including rental income which the previously wealthy had brought to the marriage, wives were unable to remarry (and thus obtain financial support) because (save exceptionally) divorce was not permissible before the Divorce Act 1857, and especially so after the declaratory resolution of Archbishop Whitgift’s meeting of divines at Lambeth in 1602 and the Bigamy Act 1604. Wives faced destitution unless machinery existed or could be crafted to compel husbands to pay alimony. Inevitably the book concentrates on the elite, and even when the very occasional Parliamentary divorce began to be permitted at the end of the period covered by the book, wealth was a pre-requisite.

The novel focus of Part 1, on regulation of marriage, is not on the ecclesiastical courts (although their critical part in licensing separations and providing some form of alimony continued after the Reformation). Rather, it is on the role of

'such secular venues as the Privy Council and two of its offshoots, Chancery and the Court of Requests, where [litigants] could appeal to principles of "equity" rather than common or canon law ... to bypass the restrictions of both ecclesiastical settlements and common law coverture in ways that let them live apart' (p 27). The book introduces us to many colourful characters, such as 'the much-married Hercules Foljambe', trigger of Whitgift's Lambeth resolution 1622, or the resolute Jane Tyrrell whose teenage marriage to her cousin, Humphrey Tyrrell, occasioned 'strifes, discords and dissension diverse and [sic] sundry times', occasioning multiple litigation, ultimately coming before Lord Chancellor Audley. By their various examples the authors amply justify their conclusion that, despite coverture, 'parties to some defunct unions were able to find ways to live largely independently, thanks to private deeds of separation and Chancery interventions – and did so well before the 1650s' (p 45). When the Court of Requests, another equity court, began to involve itself in marital disputes, including issuing injunctions to stay proceedings in the common law courts, as well as writs of attachment and arrests to enforce its financial orders, a dispute arose with the Court of Common Pleas questioning its powers, pre-cursor to its demise in 1642.

Surprising – to this reviewer at any rate – is the complementary role of Star Chamber and the High Commission for Ecclesiastical Causes, the subject of chapters 2 and 4, in matrimonial disputes. The Grand Remonstrance of 1641 referred to the oppressive behaviour of Star Chamber in 'violat[ing] that near union which God hath established between men and their wives'. Star Chamber's focus was on young heiresses who 'by force or sleight' were taken from their parents or guardians (p 52), tending to leave the question of validity of the marriage to the ecclesiastical courts. Its powers were, however, limited by coverture, in that a wife could not sue a spouse, being a *feme covert* (p 55). The authors present a benign interpretation of the High Commission's dealing with marriage and separation, acting, 'in the equivalent of an appeal capacity to force parties to observe the terms of separation orders [and] making order to allow women to live apart from violent husbands for their own protection' (p 90). This differs from the critique of Sir Edward Coke, which was provoked by High Commission's proactive use of its powers to fine and imprison offenders straying beyond its 'primary focus ... on ensuring religious conformity and uniformity' (p 89). High Commission's 'vibrancy' in the 1630s led to its abolition in 1641.

Part 2 of the book starts with a perceptive account of developments in 1640–1660 when 'to renew the stalled reformation of the country ... reformers and radicals of all sorts pressed for changes' (p 115), achieving the abolition of the ecclesiastical courts, and also the Adultery Act 1650 (death for adulterers) and the Marriage Act 1653 (providing for its civil registration, although not the liberty enjoyed by continental reformers of full divorce with remarriage). Means needed to be found to replace the beneficial matrimonial jurisdiction of the ecclesiastical court and of High Commission, Requests and Star Chamber. This resulted in an immediate expansion of parliament's jurisdiction over marriage, separation and alimony, culminating in the Alimony Act 1649 which gave an enhanced, and highly contentious with husbands, role for the Lords

Commissioners, 'effectively, Chancery' (p 128). The authors include detailed and often salacious accounts of several cases which came before the court, some heard in the privacy of Middle Temple's parliament chamber rather than in Westminster Hall (p 132). Their persuasive conclusion to the most readable chapter of the book is that "[E]quitable" provision of alimony ... based on the woman's financial contribution to the union and her sexual conduct within it could now moderate the woman's continuing coverture in ways backed by parliamentary authority' (p 139).

The penultimate chapter deals with the period c. 1660–1700, marked by the return of the ecclesiastical courts. In a demonstration of male vindictiveness, the Alimony Act was eventually held to be excluded from the parliamentary confirmation of other judicial proceedings since the execution of Charles I, so that the only provision available was from the ecclesiastical courts, although Chancery showed a 'growing willingness to support existing provision for married women's maintenance ... including enforcement of private contractual agreements made by spouses' (p 151), circumventing the strictures of coverture and reducing the workload of the ecclesiastical courts. Meanwhile, parliament from 1670 'came to pass not a general public act but a few hundred specific, private acts that allowed full divorce in select cases, in ways carefully crafted to punish run-away wives and protect their husband's property' (p 156), and for the most part following judicial separations in the ecclesiastical courts. (Perhaps surprisingly the parliamentary advocate of more general divorce legislation was John Cosin, Bishop of Durham.) The identities of the subjects of the first private bills tells a clear tale—Lord Roos, the Duke of Norfolk, the Earl of Macclesfield ... such parliamentary divorces were few (only about 325 between 1700 and 1857) (p 166).

The concluding Afterword is a brisk summary of what happened post-1700 with growing secular control over marriage, from Hardwicke's Marriage Act 1753 through to the provision of judicial divorce in 1857, which 'effectively ended coverture for separated, divorced or deserted wives: thereafter, from the date of any such judicial declaration, their earnings and property would have the same protections ... as those of single women' (p 173). Vitaly important for the less wealthy, '[i]n 1878 women in violent marriages obtained the ability to petition local magistrates for separation decrees that gave them custody of young children and weekly maintenance', and 'in 1891, judges even decided that husbands did not ... have the right to beat or confine their wives' (pp 173–174). Although, as the authors remind us, there is still work to do to deal with 'continuing inequalities within marriage and related partnerships' (p 174), the position was hugely worse in the two centuries with which this intriguing book is concerned.