

MEDIATION BETWEEN KING HENRY VIII OF ENGLAND AND POPE CLEMENT VII FOR A DIVORCE FROM CATHERINE OF ARAGON

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Henry, the second son of King Henry VII and Elizabeth of York, was born on June 28, 1491.¹ After his older brother Arthur's death in 1502, Henry became heir to the English throne. When King Henry VII died in 1509, the then 18-year-old prince became King Henry VIII. Soon after, Henry gained papal dispensation from Rome to marry his brother's widow, Catherine of Aragon.²

It is not known when Henry VIII decided that he had had enough of his wife. Despite its adverse beginnings, his union with Catherine of Aragon was an unusually good marriage.³ At the hunts, the jousts, the feasts and the religious observances that filled their time, the royal couple was always together.⁴ Henry's extramarital affairs were, for a king, very few. Henry had two or three known affairs, one illegitimate offspring and another rumored.⁵ So far as such things can be established, it looks pretty certain that Henry loved his queen.⁶ In eight years of marriage, Catherine produced one daughter, Mary, five infants that did not survive, and suffered several miscarriages.⁷ But she was seven years older than he and, as women who suffered so many pregnancies did at that age, lost her physical attraction quite early.⁸ Moreover, Catherine's failure to produce the litter of children demanded of queens even more than of wives in general preyed on her mind.⁹

¹ BBC History, http://www.bbc.co.uk/history/people/henry_viii (last visited Nov. 23, 2013).

² Id.

³ G.R. Elton, *Reform and Reformation* 103 (2005).

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id at 104.

⁹ Id.

In the early 1520's Henry became very worried about the succession to the throne.¹⁰ With only his daughter Mary in the line of succession, Henry had cause to worry. After the German Peasants' War of 1525,¹¹ the Queen stood in a very precarious position; she was permanently linked to an ex-ally, her cousin the Holy Roman Emperor Charles V, who jilted her daughter Mary out of marriage, and to make matters worse, she was no longer acceptable to her husband due to her lack of producing a male heir.¹²

Around 1525, Henry became infatuated with Anne Boleyn, the sister of an earlier mistress and daughter of courtier Sir Thomas Boleyn. Warned by her sister Mary's example, Anne wanted all or nothing from the king.¹³ She would be Henry's lawful queen; until that was assured, he would never enter her bed.¹⁴ With Anne Boleyn as a motivating factor, Henry initiated a quest for a divorce from Catherine of Aragon, or some other way to legally put her aside, so he could marry Anne and produce a male heir.

After some research, the King eventually "discovered" that his marriage to Catherine was invalid from its inception because it contravened the divine injunctions against marriage to a brother's widow.¹⁵ Henry believed that God's wrath at the sin of the marriage had manifested itself in the deaths of the fruits of the

¹⁰ Id.

¹¹ At the time of the Peasant War, Charles V, King of Spain, held the position of Holy Roman Emperor (elected in 1519). Noble dynasties ruled hundreds of largely independent secular and ecclesiastical territories within the framework of the empire, and several dozen others operated as semi-independent city-states. A German church under the control of the princes would not be able to tax them as the Roman church did. The princes could only gain, economically, by breaking away. Most German princes broke with Rome using the nationalistic slogan of "German money for a German church." Bainton, Roland H. (1978). *Here I Stand: A Life of Martin Luther*. Nashville: Pierce & Smith Company. pp. 76, 202, 214–221.

¹² See G.R. Elton at 105.

¹³ Id.

¹⁴ Id.

¹⁵ "And if a man shall take his brother's wife, it is an unclean thing: he hath uncovered his brother's nakedness; they shall be childless." Current bible quote of *Leviticus 20:21*. "And if a man shall take his brothers wife, it is an unclean thing: hee hath vncovered his brothers nakednesse, they shall be childlesse." 1611 bible quote of *Leviticus 20:21*.

union.¹⁶ The obstacle of prohibited affinity created by Prince Arthur's earlier marriage to Catherine had, of course, been recognized at the time and had received the requisite solution, a bull of dispensation issued by Pope Julius II.¹⁷ Henry now insisted that the Levitical law could not be overridden by any human authority; the bull was invalid and so, therefore, was his marriage. In fact, he was and always had been a bachelor free to marry whenever he liked, though the marriage still needed formal pronouncing in the processes of canon law.¹⁸ He therefore asked Cardinal Wosley to take the necessary steps and appeal to Pope Clement VII for an annulment, while Henry sat back in confidence that the business would be quickly settled. The Pope, however, was unwilling to anger Charles V, the Holy Roman Emperor – the most powerful man in Europe – and Catherine of Aragon's nephew, and therefore refused to grant the annulment. Henry, instead, found that he had embarked on a troubled seven-year journey that swallowed up not only Catherine and Cardinal Wosley, but the whole world to which they belonged.¹⁹

After years of King Henry VIII's fighting the Roman Catholic Church for a divorce, he finally reached a point where it was either give up the fight and stay married to Catherine, or break from Rome. We all know what happened in reality,²⁰ but this is the point in time where the mediation would begin. The two parties to the mediation would be King Henry VIII and Pope Clement VII, the pope of the Roman Catholic Church at the time. The selection of the mediator and the mediation venue are crucial to the outcome to this case. The King is sovereign in all of England, but the Pope is sovereign in much of Europe at this time. Relations with foreign monarchs, particularly in the reforming protestant kingdoms, are also tenuous. It would therefore be very

¹⁶ See G.R. Elton at 106.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ "In rapid succession from 1532, legislation was passed through Parliament curbing the influence of the papacy in England and appointing the King as Supreme Head of the Church. Once this and the divorce were achieved, the king moved to take control over much of the Church's property through the dissolution of the monasteries." BBC History, http://www.bbc.co.uk/history/british/tudors/english_reformation_01.shtml (last visited Nov. 26, 2013).

hard to find a venue that would truly be neutral between the two parties. I would therefore propose a church, such as Westminster Abbey, where both the Pope is sovereign because it is the property of the Roman Catholic Church, and the King is sovereign because it is located in England as a venue for the mediation. One other possible mediation location would be the Isle of Man. Although the Isle of Man during the time of King Henry VIII was technically part of the English kingdom, it has always been internally self-governing.²¹ Therefore, the King doesn't have as much power there as he would in other parts of the kingdom. Because King Henry would still technically be the sovereign on the Isle of Man and the isle would be difficult to access in the 1500's, Westminster Abbey is probably the best location for the mediation and is therefore my selection.

If the selection of a neutral location is difficult, the selection of a neutral mediator with enough authority to command the respect of both the Pope and the King is nearly impossible. The most basic requirement to command the respect of the King is that the mediator be of noble birth and English, while the most basic requirement to command the respect of the Pope is that the mediator be a practicing Catholic.

The present-day pope, Pope Francis, may be a valid mediator candidate, as he is pope of the Roman Catholic Church and much more lenient on divorce issues than his 16th century predecessors. His Argentine nationality and lack of noble birth, however, are probably things that could not be overlooked by Henry, as he never truly trusted outsiders.

Lady Margaret Beaufort is another possible mediator candidate. As the chief advisor to Henry VII, King Henry VIII's father, and a devout Catholic who opened many religious institutions across the kingdom, Lady Margaret is certainly religious enough to meet the Pope's requirement. Her Tudor

²¹ The Isle of Man entered the control of England in 1341. After allowing a succession of feudal lords to rule the island, the British parliament purchased sovereignty over the island in 1765 – thus, before this point, the Isle maintained some sovereignty over its own affairs. See Infoplease, Isle of Man, <http://www.infoplease.com/country/isle-of-man.html> (last visited Nov. 24, 2013).

affinity, as the founding matriarch of the family (she's Henry VIII's grandmother) and her female gender, however, also count against her. The Pope would probably object on the grounds that she could never be neutral enough to go against Henry, and there may be ethical issues as well when acting as mediator if a family member is a party to the mediation.

Charles V, the Holy Roman Emperor, could be a candidate as well. Like Margaret Beaufort, however, his relation to Catherine of Aragon would also be likely to raise the objections of Henry.

The final mediator candidate would be Pope Julius II, the pope who granted the original dispensation for King Henry to marry Catherine of Aragon. Although he is not English, he has a power to agree to retract his own dispensation that subsequent popes do not; for that reason, Henry would likely be willing to overlook his nationality. He also satisfies the Roman Catholic requirement of Pope Clement VII. Of the four candidates, Pope Julius II is probably the most qualified for the position and would therefore be my mediator selection.

Pope Julius's strategy as mediator will be to establish an open, honest dialogue between the parties because he suspects that both King Henry and Pope Clement have ulterior motives. He also knows that it will be very important to maintain control of the process. Both Henry and the Pope are accustomed to absolute authority in any situation. The parties may therefore be unwilling to listen to each other and may even begin to argue. If that should happen, the mediator will have the parties break into individual caucus immediately before any fighting can escalate. It will also be very important for the mediator to not treat either party with more respect or deference than the other. Any suspicion that either Pope Clement or King Henry may have that the other party is in higher favor with the mediator would immediately bring an end to the process.

On the day of mediation, Pope Julius II, Pope Clement VII and King Henry VIII would meet in Westminster Abbey and share a meal, as would have been customary during this time, before getting down to business. Pope Clement and Henry would have to sit in chairs of equal height, with neither at the head of the table, so

neither Henry nor the Pope would be in a position of authority over the other. Pope Julius would then initiate the mediation with a prayer, followed by his opening statement explaining his role as the mediator, his neutrality, the confidentiality of the mediation process, and his commitment to helping the parties reach a settlement.

After the mediator's statement, both Pope Clement II and King Henry VIII would give their opening statements. Henry, as the party seeking an action, would begin. Henry's position is the following: 1) the law of Scripture prohibited the marriage to Catherine, and from that 2) the pope had no power to dispense. After Henry answered any follow-up questions from the mediator, Pope Clement would give his statement. The pope's position is the following: 1) the requisite papal dispensation for the marriage was already granted by a former pope, and 2) divorce from a valid marriage is against Catholic doctrine. The dialogue between the mediator, Pope Clement VII and King Henry VIII would then go something like this:

Mediator Pope Julius II ("M"): Henry, why do you wish to set aside your marriage to Catherine of Aragon now, after many years of good marriage?

King Henry VIII ("H"): I have been living in sin. I now realize that my marriage is not recognized in the eyes of God, for she is my brother's widow.

M: Henry, did you know she was your brother's widow when you married her?

H: Yes, but she said the marriage was never consummated. I no longer believe her.

M: Why do you no longer believe her?

H: The proof of her lie is in the lack of a male heir. The bible states that those who marry their brother's widow shall be childless. As Catherine and I have only produced one living female child and no male heirs, I am childless.

M: Why do you not consider Mary to be a child?

H: Only male children count for a king. Mary cannot inherit my throne.

M: Henry, how did your marriage to Catherine of Aragon come to be if she was your brother Prince Arthur's widow?

H: We received a papal dispensation for you, Pope Julius.

M: Yes, I remember granting the dispensation. Now let me ask a question of you, Pope Clement. Do you, as current Pope, recognize my dispensation?

Pope Clement ("C"): Yes, the Catholic Church accepts the dispensation without reservation.

M: Henry, what is it that you are requesting for Pope Clement to do?

H: Overturn the dispensation by accepting the proof of a lack of male child produced by the union as evidence of Catherine's lie that her marriage to Arthur was unconsummated.

M: Pope Clement, do you accept this evidence as proof that Catherine of Aragon lied and that her marriage to Arthur had indeed been consummated?

C: Absolutely not! Although female, Princess Mary is indeed *issue* from the union.

H: Mary is a *girl*! How can she be considered issue? Can she go to war? Can she become king? I have no *sons*! No further proof is necessary! If an *Englishman* were pope, we wouldn't even be having this conversation.

C: Do you not accept my *authority*, Henry?

H: I am *King*! I bow down to no one. Not even *you*. We are on my land!

C: We are in my church! You may be king Henry, but I am *pope*. I am closer to God than any king!

M: Pope Clement, King Henry, I think perhaps we should break into a private caucus. This joint session seems to no longer be productive to reaching a settlement. We'll break into separate rooms where you each can relax, take a few breaths, have a glass of small ale, and then we will continue the mediation separately for a while.

[*Now in private caucus with King Henry VIII*]

M: King Henry, I would like you to know that anything you say to me in this private caucus will remain confidential, unless you give me express authority to relay the information to Pope Clement. I am here today to help facilitate an agreement, and I have not given up hope yet. Now tell me, what troubles you?

H: I am living a sin. Living a lie! In the eyes of God, I should be a free man.

M: What do you mean by "a free man"?

H: Free to marry, if I should wish to.

M: Do you wish to marry again?

H: I wish to enter into my first *legitimate* marriage, yes.

M: With whom?

H: Lady Anne Boleyn, a former lady-in-waiting to Catherine. She is quite learned, and passionate about many things, including religious reformation.

M: What kind of reformation?

H: She spent a time with the court in France before she returned to England, where she learned a great deal about the protestant reformation that is taking place in Europe – and the teachings of Martin Luther.

M: But King Henry, were you not named “Defender of the Faith” in 1521 for your writings in *Assertio Septem Sacramentorum*?²²

H: I was, but the Church is now failing me. How can I support an institution that *fails* me?

M: If the Pope does not grant your divorce or overturn the dispensation, what action will you take?

H: This information will remain confidential, correct?

M: Yes, of course.

H: Then I will start a new church, and call it “The Church of England.”

M: You would be willing to break from Rome?

H: Yes. I *must* remarry and produce a male heir to secure my line. There is no question about it. And I, King Henry VIII, would be the head of the new Church of England. No more pope, no more lack of total authority for me. I will answer to *no one*.

M: Well thank you, King Henry. I believe I now have a better understanding of your position. I’m going to have a brief conversation with Pope Clement, and then I will return.

[Now in private caucus with Pope Clement VII]

M: Pope Clement, I would like you to know that anything you say to me in this private caucus will remain confidential, unless you give me express authority to relay the information to Henry. I am here today to help facilitate an agreement, and I have not given up hope yet. Now what troubles you?

²² In 1521 Pope Leo X conferred the title of Defender of the Faith on Henry for his book 'Assertio Septem Sacramentorum', which affirmed the supremacy of the Pope in the face of the reforming ideals of the German theologian, Martin Luther. BBC History, http://www.bbc.co.uk/history/people/henry_viii (last visited Nov. 25, 2013).

C: The Church *cannot* grant Henry a divorce. It is against our doctrine and it would create a simply unacceptable precedent.

M: Divorces, or annulments, have been granted before, have they not?

C: Yes, but an annulment cannot be granted in this case. There is more at stake here than the succession to Henry's throne.

M: What are you referring to, Pope Clement?

C: Charles V, the Holy Roman Emperor. He is the most powerful man in all of Christendom, and he is Catherine of Aragon's nephew. I cannot risk angering him.

M: I understand your position. But what is your view on the dispensation?

C: The dispensation to marry Catherine of Aragon was granted by a reigning pope. One pope cannot overturn the rulings of another.

M: Pope Clement, what do you think will happen if Henry does not get a divorce or an annulment or an overturning of the dispensation?

C: Henry will just have to stay married to Catherine and deal with it.

M: I would like to speak frankly with you, Pope Clement. I shouldn't be telling you this, but I don't think you understand how precarious this situation is.

C: What do you mean? Do you know something for certain?

M: Henry is willing to break from Rome, willing to start his own church – the Church of England.²³

²³ Were this mediation taking place in Florida, Pope Julius II, as mediator, would be violating Rule 10.360(b) by revealing information obtained during caucus.

Rule 10.360 Confidentiality

(a) Scope. A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required by law.

C: That would create unacceptable precedent. With the protestant movements around Europe, England breaking away from the Church could create a domino effect.

M: I have a suggestion. If the dispensation I granted in 1509 were to be determined “insufficient,” then this whole mess could go away quite easily. Henry could remarry, because of course that is what he really wants, and you won’t create bad divorce precedent in the church. A determination of insufficiency is not the same as overturning the dispensation.²⁴

(b) Caucus. Information obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party.

(c) Record Keeping. A mediator shall maintain confidentiality in the storage and disposal of records and shall not disclose any identifying information when materials are used for research, training, or statistical compilations.

²⁴ Were this mediation taking place in Florida, Pope Julius would be violating Rule 10.420(a)(2) by imposing a resolution on the parties.

Rule 10.420 Conduct of Mediation

(a) Orientation Session. Upon commencement of the mediation session, a mediator shall describe the mediation process and the role of the mediator, and shall inform the mediation participants that:

(1) mediation is a consensual process;

(2) the mediator is an impartial facilitator without authority to impose a resolution or adjudicate any aspect of the dispute; and

(3) communications made during the process are confidential, except where disclosure is required by law.

(b) Adjournment or Termination. A mediator shall:

(1) adjourn the mediation upon agreement of the parties;

(2) adjourn or terminate any mediation which, if continued, would result in unreasonable emotional or monetary costs to the parties;

(3) adjourn or terminate the mediation if the mediator believes the case is unsuitable for mediation or any party is unable or unwilling to participate meaningfully in the process;

C: I think that solution may be best, given the circumstances. Do you think Henry would accept it?

M: I don't believe Henry to be a revolutionary. He ultimately just wants to remarry. I will present it to him, and if he accepts, we will meet back in a joint session.

[Now enter private caucus with Henry]

M: Henry, how are you feeling?

H: I'm anxious. I'd like for this to be over already.

M: Well, I have a suggestion that I think will please you.

H: Please, I'm listening.

M: If the dispensation I granted in 1509 were determined to be insufficient, the pope could issue a decree of nullity. It wouldn't be the same as a divorce, of course, but the end result would be the same. You would be a free man in the eyes of God and the Church, and be free to marry Anne Boleyn if you wish, and you wouldn't have to break from the Church.

H: I think that is the perfect solution. Everyone gets what they want. Even Charles V's feathers won't be ruffled if the dispensation isn't explicitly overturned. Lets have the scribe put the agreement in writing.

(4) terminate a mediation entailing fraud, duress, the absence of bargaining ability, or unconscionability; and

(5) terminate any mediation if the physical safety of any person is endangered by the continuation of mediation.

(c) Closure. The mediator shall cause the terms of any agreement reached to be memorialized appropriately and discuss with the parties and counsel the process for formalization and implementation of the agreement.

At this point in the mediation, the parties would meet back in a joint session, draft the appropriate paperwork, and sign the mediation agreement. Both Henry and Clement entered into the mediation entrenched in their positions. Through the use of principled or interest-based negotiation, the mediator was able to extract the underlying problems on each side. Henry's real motivation for the divorce was to marry Anne Boleyn, and Clement's real reason for not granting it was to maintain relations with Charles V. Although he crossed ethical boundaries, the mediator was able to devise a solution once he knew all of the relevant information. Even if Henry were to find out the mediator violated ethical rules, he would likely not overturn the mediation agreement. Henry would be happy because he ultimately got what he really wanted – and coming from a gossiping court – Henry knows that nothing said aloud ever remains confidential, anyway.