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## The Court of Arches: Jurisdiction to Jurisprudence – ‘Entirely settled’?

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*This article is the text, with footnotes added, of a lecture on the history of the Court of Arches delivered at the church of St Mary-le-Bow, Cheapside, City of London, 20 November 2019. The Arches Court, the court of appeal of the Province of Canterbury in the Church of England, has existed for over seven hundred years. Its evolution - driven by principle, politics, and pragmatism - is a fascinating reflection of a key tribunal in the court-system of the English Church, and the site of major historical and often contentious developments within the church. Its appellate status has not changed, it still has jurisdiction over faculties and clergy discipline, its judge is still appointed by the archbishop, and its jurisprudence has contributed much to the development of English ecclesiastical law. However, over the centuries: its jurisdiction has contracted; the courts to which appeals against its decisions lie have changed; its historical lawyers of civilian advocates and proctors have been replaced by common law barristers and solicitors; the title for its judge, Dean of Arches, has survived by accident; its procedure has been simplified; and its decisions have throughout its history been respected but today have the authority of binding precedents. The article takes the story up to 2018 when Measure provided that a decision of the Arches and of the provincial Chancery Court of York is today to be followed as if it were a decision of the other Court.*

**Keywords:** Church of England, Court of Arches, jurisdiction, judiciary, jurisprudence

The Court of Arches is today the court of appeal of the Province of Canterbury in the Church of England. The Court has existed for over seven hundred years. The words ‘entirely settled’, in the title for this lecture, are from a judgement of Sir George Lee, Dean of Arches (1751-58); he said: ‘The jurisdiction of the Court of Arches was entirely settled by the statute 23 Hen. 8, c. 9’. I explore here whether the jurisdiction, jurisprudence and other aspects of the Court of Arches, in its long history, have ever been ‘entirely settled’. The court’s evolution is, actually, a fascinating reflection of a key tribunal in the court-system of the English Church, and the site of major historical and often contentious developments within the church. I look at five areas: jurisdiction; personnel; records; process; and its jurisprudence in some landmark cases over the centuries. What follows uses literature on the Arches Court from the Reformation to today.<sup>1</sup>

### ORIGIN AND JURISDICTION

It has been known as the Court of Arches since medieval times when the Roman Church in England was governed by papal law and native church law. Of course, it was so named for the place where it sat: here in the Church of Sancta Maria de Arcubus – St. Mary-le-Bow. With 12 other London churches this church was a ‘peculiar’ of the Archbishop, outside the jurisdiction of the Bishop of London. John Godolphin wrote in 1678 that the Court is so called: ‘by reason of the Steeple or Clochier thereof raised at the top with Stone-pillars in fashion like a Bow-bent Arch-wise’.<sup>2</sup> Henry Consett in 1685 says it was also called ‘*Alma Curia Cantuariensis de Arcubus*...which probably receives its Name from the Effects, or by a Metaphor, being the

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<sup>1</sup> I am grateful to the Dean of Arches, the Right Worshipful Charles George QC for helping me write this article.

<sup>2</sup> J. Godolphin, *Repertorium Canonicum or An Abridgement of the Ecclesiastical Laws* (1678) 106-107; see also Thomas Oughton, *Ordo Judiciorum* (1728), translated from the Latin in James Law, *Forms of Ecclesiastical Law* (1831) Introduction, Ch. II at x: the church was also called ‘St. Mary Arches’ or ‘New Mary of Arches’.

Channel whence Justice flows like a Crystalline Stream'.<sup>3</sup> By 1728, Thomas Oughton explains that this 'title of *Alma*...fair, pure, and nourishing' was used to signify how it was held in 'high estimation and honour' as 'the most celebrated court of...the Archbishop of Canterbury'.<sup>4</sup>

The Court sat in a room over the north aisle of the eleventh-century crypt; the room was later rebuilt, enlarged, and used as a vestry. The Court sat here until the church was destroyed by the Great Fire of 1666 when it moved to Exeter House in the Strand till 1672,<sup>5</sup> and then to the premises of Doctors' Commons, Knight-riding Street.<sup>6</sup> On occasion, it also sat at Number 1, The Sanctuary, Westminster, and St. Paul's Cathedral.<sup>7</sup> The Archbishop had 3 church courts in London - the Arches Court, the Court of Audience, and, dealing with wills, the Prerogative Court. At Canterbury was his diocesan court, 'commissary' court, for ordinary litigation there.

Scholars have not found a precise date for its establishment, but there was a medieval practice for archbishops to have provincial courts for appeals from local courts in the dioceses. Yet, in 1685, Henry Consett said the origin of the Court is 'uncertain', but he relates how Pope Alexander III (who died in 1181) ordered the Archbishop of Canterbury (in the reign of Henry II, who died in 1189) to abolish all the 'obsolete law' of the Court and legislate afresh. But Richard Burn, in 1763, claims the Court 'subsisted long before the time of' Henry II. Thomas Oughton in 1728 says 'it is impossible' to state the date it was set up, 'partly by the loss of ancient records, partly by their wilful destruction, partly by the negligence of librarians'.<sup>8</sup>

Certainly, by 1279 it is well established. It had appellate jurisdiction throughout the Province of Canterbury - its equivalent for the York Province was (and is) the Chancery Court. Its appellate jurisdiction was to hear appeals at the instance of a party against a decision of a lower court. It also had an original jurisdiction - as a court of first instance - in matters relating to the 13 peculiars of the Archbishop of Canterbury in London; over causes sent to it from lower courts by letters of request; and over *ex officio* suits promoted on behalf of the Dean of Arches.<sup>9</sup>

Its jurisdiction was wide: marriage causes, probate-testamentary disputes, defamation, church property (rates, tithes), and the discipline and morals of clergy and laity. Appeals from the Arches went to papal courts in Rome. But the auditors of the archbishop's Court of Audience - which had authority as extensive as the Arches' - thought they too could hear appeals from

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<sup>3</sup> Godolphin, *Repertorium* (1678) 103; H. Consett, *The Practice of the Ecclesiastical Courts* (1685) (London: 1728) 2. For a brief overview see also John Ayliffe, *Parergon Juris Canonici Anglicani* (1726) 192.

<sup>4</sup> T. Oughton, *Ordo* (1728) x-xi: Oughton was a proctor till c. 1740.

<sup>5</sup> R.B. Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500-1860* (Cambridge: Cambridge University Press, 2006) 4 n.13, citing M.D. Slatter, 'The records of the Court of Arches', 4 *JEH* (1953) 142.

<sup>6</sup> Samuel Hallifax, *The Roman Civil Law* (1772 and 1795 editions) III.X: in a discussion of the Arches Court, 'all the principal courts are now holden in Doctors Commons'; see also Oughton, *Ordo* (1728) xi.

<sup>7</sup> D.J. Keene and V. Harding, 'St. Mary le Bow 104/0', in *Historical Gazetteer of London Before the Great Fire Cheapside; Parishes of All Hallows Honey Lane, St Martin Pomary, St Mary Le Bow, St Mary Colechurch and St Pancras Soper Lane* (London, 1987), 199-212. *British History Online* <http://www.british-history.ac.uk/no-series/london-gazetteer-pre-fire/pp199-212> [accessed 5 September 2019]

<sup>8</sup> H. Consett, *Practice* (1685), op cit., 4; R. Burn, *Ecclesiastical Law* (1763, 1775 ed) Vol. I, 91: he cites Consett but gives no other authority. Oughton, *Ordo* (1728) xi repeats the narrative about Alexander and Kilwardby; however, James Law, in his translation of Oughton states at xii n. 3: 'According to Conset, chap. 2.1.1, it was Pope Alexander III, and not Archbishop Kilwarby, who "abrogated and abolished all the ancient and obsolete laws of the Court of Arches, and set up others in their stead." Dr. Burn, in his Eccl. Law, vol. I, p. 98, states, that the ancient statutes were abrogated by the pope and the archbishop - Ed.'

<sup>9</sup> See I.J. Churchill, *Canterbury Administration* (London: SPCK, 1933) vol. 1 pp.424ff for a discussion of the origins and early history of the court.

the Arches. Yet, the Arches outlived the Court of Audience which by 1728, was quite obsolete.<sup>10</sup>

The Archbishops of Canterbury made statutes for the Arches Court from time to time about its work and personnel. For example, statutes were made by Pecham in 1281, Winchelsey in 1295, Stratford in 1342, and on the eve of the English Reformation by Archbishop Warham, 1528.<sup>11</sup>

The Arches Court survived the Reformation, jurisdiction intact. However, whereas before the Reformation the Court enforced the canon law made by the church, after it, it enforced the ‘ecclesiastical law’ of the realm - the common law (caselaw), parliamentary statute, and (under parliament’s Clergy Submission Act 1533) pre-Reformation Roman canon law and native English church law, which was to continue to apply if not inconsistent with the law of the land. The Ecclesiastical Jurisdiction Act 1531 fixed its original jurisdiction (as to letters of request), and the Act Against Appeals to Rome 1533 recognised it as the provincial appellate court. Now, an appeal against an Arches’ decision was to the new High Court of Delegates, an *ad hoc* royal tribunal of civil and common lawyers. From 1670-1750, 81 appeals went from the Arches to the Delegates - but the Delegates Court itself was replaced in 1833 by the Judicial Committee of the Privy Council.<sup>12</sup> Still, after the Reformation, the Archbishops of Canterbury continued to make statutes for the Arches Court, such as those of Parker 1573 and Whitgift 1583.

By the Restoration in 1660,<sup>13</sup> as Godolphin says, the Court has power ‘in all matters and causes Spiritual...annexed [to] the Peculiar Jurisdiction of the thirteen parishes’ (part of its original jurisdiction) and ‘all Ordinary Jurisdiction in Spiritual causes of the first instance with power of Appeal, as the superior Ecclesiastical Consistory, through the whole [Canterbury] Province’; and the Dean may ‘call any person for any cause out of any part of the Province within the Diocese of any Bishop’. In 1685, Consett specifies; it hears: ‘all manner of Appeals whatsoever from any Bishops, Deans and Chapters of Cathedrals or Collegiate Churches; Archdeacons, their Officials and Commissaries, or other Ecclesiastical Judges whatsoever (except some...peculiar Jurisdictions...which belong to the [King])...within...any Diocese’; the Court also hears ‘all Complaints whatsoever against any of the aforesaid Judges (except as before excepted) for denying or delaying of Justice to be administered’ and all cases about benefices.<sup>14</sup>

Its original jurisdiction to hear cases sent by a diocesan court by way of letters of request was contentious in that it could override the wishes of bishops and the parties. Dean of Arches Sir George Lee recognised this in *Butler v. Dolben* from the 1750s, the case where he said its jurisdiction ‘was now entirely settled by [the statute] 23 Hen. 8. c. 9’. He explains: ‘the Arches is by that statute empowered to take original cognisance, by virtue of letters of request, of such

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<sup>10</sup> R.H. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, *The Oxford History of the Laws of England* (Oxford: Oxford University Press, 2004) 213; Godolphin, *Repertorium* (1678) 106-107: ‘it be not now in use as heretofore’; T. Oughton, *Ordo* (1728) 80-81: a party could elect between the two courts.

<sup>11</sup> Godolphin, *Repertorium* (1678) 103-104: ‘The Statutes and Ordinances of [the] Court are very Ancient’.

<sup>12</sup> W.H. Bryson, ed., *Miscellaneous Reports of Cases in the Court of Delegates* (Richmond, 2016) 4. See also G.I.O. Duncan, *The High Court of Delegates* (Cambridge: Cambridge University Press, 1971).

<sup>13</sup> After the Restoration the jurisdiction of the Arches Court was in all matters concerning the jurisdiction of ecclesiastical courts in general. It heard ‘instance’ cases between two parties (e.g. defamation, matrimonial and testamentary cases (until 1858)); and ‘ex officio’ cases prosecuted by or on behalf of the judge (e.g. cases of lay and clerical ‘correction’, and parish affairs (i.e. church fabric, faculties, church rates, tithes etc). There are also some cases of officials of lower courts being sued for illegal practices, and proctors suing for their fees.

<sup>14</sup> Godolphin, *Repertorium* (1678), op cit., 100-101; he cites Coke’s *Institutes*, par. 4, ‘Court of Arches’; H. Consett, *Practice* (1685) 5: this is presented directly as the authority of the Dean of Arches; for the proposition that the Court has jurisdiction in ‘all Ecclesiastical Causes whatsoever’, he cites Lyndwood.

causes as the civil and canon law allowed *the inferior judge* to devolve to the superior [i.e.] *arduous causes*, of which matrimonial were always the chief'; the statute 'vested the power of *devolving* in the [lower] judge *without mentioning consent either of the bishop or parties*...the bishop's consent was never required'; also: if the parties' consent had ever been necessary, 'there hardly could be a cause commenced here by request, for the defendant almost constantly desires as many opportunities of appealing as possible for delay'. Also, whether the Arches accepts or refuses letters of request, the Dean 'was bound to receive them *ex debito justitiae*', but 'it was in the discretion of the inferior judge whether he would grant them'.<sup>15</sup> Lee's decision was still good law in 1848, and Phillimore in 1895 was still writing about letters of request.<sup>16</sup>

During the eighteenth century, the Arches was a busy court. From 1725-1745, it heard 601 appeals: 211 appeals in 1725-31; 242 in 1732-38; and 148 in 1739-45. Three observations: the appeal rate across the period is fairly stable; most were testamentary and disciplinary appeals; and some dioceses generated more appeals than others – for instance, there was 1 appeal from Rochester, 9 from Bangor, 59 from Exeter, and 92 from London. It was also busier than the Chancery Court - in the same period, the York court heard 130 appeals, though its province was less populated than Canterbury.<sup>17</sup> We might note the business of the Court of Peculiars - this Samuel Hallifax in 1772 describes as 'a branch of the Court of Arches' with jurisdiction throughout the province over those entities exempt from the jurisdiction of the ordinary.<sup>18</sup>

However, profound changes in the jurisdiction of the Arches and church courts in general were soon to come. They were criticised heavily with calls for reform. By the mid-nineteenth century, public attitudes had changed, dissenters resented them, and the common law courts were flexing their muscles. So, parliament abolished their jurisdiction over defamation (in 1855) and probate and matrimonial causes (removed in 1857 to new secular courts), resulting in a fall in numbers of cases heard in the Arches - from 1800-58 it heard 860 cases; and 1859-1900, 136. Parliament also abolished their jurisdiction over church rates (1868) and tithes.<sup>19</sup>

Driven largely by the ritualist controversies, there were also changes as to clergy discipline. For instance, under the Clergy Discipline Act 1892 appeal now lay from the diocesan court to the Arches *or* to the Privy Council. But it retained its original jurisdiction in discipline cases by way of letters of request. However, it lost its entire jurisdiction over the four Welsh dioceses in 1920, when the Church of England in Wales was disestablished. So, most cases remaining within the Arches jurisdiction were cases of disputed faculties and cases of clerical discipline.<sup>20</sup>

<sup>15</sup> *Butler v. Dolben*, 2 Lee R 316.

<sup>16</sup> A.J. Stephens, *A Practical Treatise* (1848) 53. The Court of Delegates so held, says George Lee, in 'the case of *Dr. Pelling v Whiston*', n. 3 cites '1 Com. 199'; R. Phillimore, *Ecclesiastical Law* (2<sup>nd</sup> ed., 1895) 942.

<sup>17</sup> T.L. Harris, 'The work of the English Ecclesiastical Courts, 1725-1745', in T.L. Harris, ed., *Studies in Canon Law and Common Law in Honor of R.H. Helmholz* (Berkeley: Robbins Collection Publications, 2015) 251-279.

<sup>18</sup> Samuel Hallifax, *The Roman Civil Law* (1772) III.X. See also R. Burn, *Ecclesiastical Law* (1775, 3<sup>rd</sup> ed) Vol. I, 90: the Dean is also 'judge of the peculiars', that is, 'all those parishes, fifty seven in number, which tho' lying in other dioceses, yet are no way subject to the bishop or archdeacon, but to the archbishop'; and A.J. Stephens, *Practical Treatise* (1848) 56: i.e. parishes 'dispersed through the province of Canterbury'.

<sup>19</sup> See e.g. R.B. Outhwaite, *The Rise and Fall* (2006). After the Restoration, between one third and one quarter of cases came from London and the Home Counties. Up to 1800 nearly one third related to probate, about 11% to defamation, 4% to clerical discipline, divorce or separation 4%, and non-payment of rates or tithes 5% and 4%. After 1800 cases of defamation are down to 1%, testamentary cases decline to 14% but cases of divorce are up to 25% and cases of clerical discipline up to 20%:

<http://archives.lambethpalacelibrary.org.uk/calmview/Record.aspx?src=CalmView.Catalog&id=arches>

<sup>20</sup> Halsbury's Laws, Vol. 14, *Ecclesiastical Law* (London: Butterworths, 4<sup>th</sup> ed., 1975), par. 1285, n. 1: Church Discipline Act 1840, s. 13 (letters of request); and Public Worship Regulation Act 1874, s. 9 (ornaments); Benjamin Whitehead, *Church Law* (London: Stevens and Sons, 2<sup>nd</sup> ed., 1899) 22.

A landmark change for the Arches Court in the twentieth century came with the Ecclesiastical Jurisdiction Measure 1963. The Measure abolished its original jurisdiction because, mainly, it was obsolete. The Measure allowed only its appellate jurisdiction to continue - that is as before, to hear appeals in discipline and faculty cases not involving doctrine, ritual or ceremony. The Clergy Discipline Measure 2003 also preserved its ancient appellate disciplinary jurisdiction.<sup>21</sup>

Today, the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 provides: ‘For each province there is to continue to be a court of the archbishop’, and ‘The court for the province of Canterbury is to continue to be known as the Arches Court of Canterbury’. The Court hears appeals in faculty cases (not involving doctrine, ritual or ceremony) and from consistory courts and the Vicar-General’s court of Canterbury. And under the Clergy Discipline Measure 2003, an appeal lies to it from a determination of a disciplinary tribunal (or vicar general’s court).<sup>22</sup>

The Arches’ medieval and post-Reformation jurisdiction was policed by the secular courts and the writ of prohibition; Godolphin in 1678 lists ‘in what Cases it hath been granted [and] denied’; now it is under the supervisory jurisdiction of the High Court. That is another story.<sup>23</sup>

## THE PERSONNEL OF THE COURT

For centuries, there were: the judge – the Dean of Arches; those who practised in the Court – advocates (like barristers today) and proctors (similar to solicitors today); and officers such as the registrar and the apparitors who summoned parties/witnesses and executed court orders. We know there was a community of ‘advocates of the Arches’ in this area of London from at least the fifteenth century which became Doctors Commons with premises at Paternoster Row and then at Mountjoy House in Knightrider Street. In 1768 a royal charter incorporated the society as ‘The College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts’. Its President was the Dean of the Arches. Doctors of law from Oxford/Cambridge could be admitted as advocates by the Archbishop, and elected fellows of the college. But its days were numbered with the mid-nineteenth century reforms. Advocates merged with barristers in 1857. Its assets were sold in 1865. It was to be wound up by surrendering the royal charter which was never done. It is said the society ceased to exist with the death of its last member in 1912.<sup>24</sup>

### *The Dean of Arches*

From its earliest days, the judge was styled ‘Dean of the Arches, or the Official of the Arches Court’. Actually, these were two separate offices, held by two people. Under its 1342 statutes,

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<sup>21</sup> Halsbury’s Laws, Vol. 34, *Ecclesiastical Law* (London: LexisNexis, 2011) par. 1045. See also, today, Canon G 1: Ecclesiastical Courts and Commissions.

<sup>22</sup> M. Hill, *Ecclesiastical Law* (Oxford: Oxford University Press, 4<sup>th</sup> ed., 2018) par. 260.

<sup>23</sup> Edward Coke, the common lawyer, found a ‘a very Ancient Record of Prohibition, *In Curia Christianitatis coram Decano de Arcubus London*’ in a case from 1279, cited by Godolphin, *Repertorium*, op cit., 103: H 7; the writ continued to be available after the Reformation – and Godolphin in 1678 has extensive lists ‘in what Cases it hath been granted’ and lists ‘in what Cases [it] hath been denied’: *ibid.*, Index, ‘Prohibition’) as does R. Grey, *Ecclesiastical Law* (1730) 385; see 383 for a summary of the nature of prohibition.

<sup>24</sup> J.H. Baker, *Introduction to English Legal History* (Oxford: Oxford University Press, 4<sup>th</sup> ed., 2007) 169; see also 43, 59: there was no requirement in the Province of York to belong to Doctors Commons, nor for a doctorate, and no corresponding society in York. See also R. Grey, *A System of Ecclesiastical Law* (1730) 371-372; P. Floyer, *The Proctor’s Practice* (1746) 6. See generally G.D. Squibb, *Doctors Commons: A History of the College of Advocates and Doctors of Law* (1977) and P. Barber, ‘Fall and rise of Doctors Common’, 4 *Ecclesiastical Law Journal* (1996) 462.

the ‘official principal’ was ‘bound’ whenever absent ‘to appoint the dean of the church of...St. Mary Arches to preside for him in his court, by a general commission’. The title ‘dean’ was used because the 13 peculiars in London over which the Court had original jurisdiction were ‘called a Deanery’. The title ‘official’ is the medieval style for a church judge. Godolphin explains in 1678: ‘It is supposed that the Judge...was originally styled the Dean of the Arches, by reason of his substitution to the Archbishop’s Official, when he was employed abroad in Foreign Embassies; whereby both...styles became at last in common understanding, as it were, synonymous’. The Official and the Dean had ‘the *same* Juridical Authority, though with distinct styles *in several persons*’; and: ‘For he that was the Archbishop’s Official in this Court was...obliged to Constitute the Dean of Arches as his Commissary General in his absence’.<sup>25</sup>

So, when the Court’s president, the ‘official’, was not in London, the ‘dean’ of the ‘deanery’ of the 13 London peculiars acted as his substitute, deputy, or surrogate. So, Consett in 1685 says it is ‘by vulgar Error, he (as also the Official himself, whilst at leisure to dispatch Business) is called the Dean of the Arches’. Oughton too, in 1728: ‘The Dean of Arches thus continuing for a length of time to sit as judge...for the official principal, and to discharge the functions of both offices, by degrees a custom grew up, and prevailed, of calling the official himself...in his judicial capacity, indiscriminately official and dean...Dean of Arches’. Oughton also says: ‘*At length* the two offices of dean and official *became united in the same person*, and were given to the official’. According to Richard Grey in 1730: ‘that these two Offices are at any Time joined in the same Person is accidental’; they ‘have been in many Instances united in one and the same Person, *as they now remain*’. Yet, in 1848 Stephens states: ‘The office of Dean of the Arches and Official Principal of the Court of Arches are usually, but not necessarily, held by the same person’ – they have ‘been for a long time united’. By 1873, Phillimore says only ‘the official principal of the Arches’ may hear appeals and that ‘In fact, no dean is now appointed’. To confuse further, in 1775 Burn styled him ‘vicar general of the archbishop’.<sup>26</sup>

In any event, from the start, the judge was appointed by the Archbishop of Canterbury, someone different from the person appointed as Auditor of the York Chancery: two courts, two offices, two persons. This was settled for centuries, as were the requisite qualifications, which included learning and being of ‘sound doctrine, good morals, and purity of conscience’.<sup>27</sup> However, the Public Worship Regulation Act 1874 (s.7) made further changes: both archbishops (Canterbury and York) jointly were to appoint one person, a barrister or judge, as *both* Dean and Auditor (subject to royal approval). The Ecclesiastical Jurisdiction Measure 1963 continued this joint

<sup>25</sup> Oughton, *Ordo* (1728) xii-xiv: the dean became ‘commissary general’ of the official when the latter was engaged in ‘momentous affairs of government...not only at home, but also abroad, by reason of his professional studies having drawn his attention to the law of nations, and by...a superior acquaintance with the customs which govern the intercourse of states’; Godolphin, *Reportorium* (1678) 100-103; Consett, *Practice* (1685) 4.

<sup>26</sup> Consett, *Practice* (1685) 5: ‘The Official of tis Court is at this Day (as he has wont so to be) called Dean of the Arches, being for the most part employed in this Kingdom (as well as in Part beyond the Seas) in the King’s Affairs, and therefore seldom resident within the City of London. But, he [the Official] being absent, the Dean of the Deanery of the Arches (whose Jurisdiction is terminated by the Limits or Bounds of Thirteen Parishes in London, which are belonging to the Ecclesiastical Jurisdiction of the Archbishops of Canterbury) is often substituted, as the Surrogate of that Official (and that be Prescript of the ancient Statutes of the said Court) in which State he hears and determines Causes as Official: Whence by Error...’; Oughton, *Ordo* (1728) xiv; see also 18: 18: the judge was styled ‘official’ because ‘in those days the Archbishop of Canterbury had no other official within his province’; Grey, *A System of Ecclesiastical Law* (1730) 363; see also 375-6: ‘Official Principal of the Archbishop’; see also R. Burn, *Ecclesiastical Law* (1775, 3<sup>rd</sup> ed) Vol. I, 90; A.J. Stephens, *A Practical Treatise of the Law Relating to the Clergy* (London, 1848) 52: he cites the reports of John Haggard (d. 1856), namely, ‘1 Hagg. 48.n’; R. Phillimore, *Ecclesiastical Law* (1895) 214: he cites the Godolphin passage; R. Burn, *Ecclesiastical Law* (1775, 3<sup>rd</sup> ed) Vol. I, 90; he cites E. Gibson, *Codex* (1713), op cit., 104.

<sup>27</sup> R. Phillimore, *Ecclesiastical Law* (1895) 924: he is styled ‘Official Principal of the Court of Arches’.



archiepiscopal appointment; the candidate had to be a barrister of at least 10 years or one who held high judicial office, and a communicant; the oaths to be taken also continued; and there was no time limit on the appointment; but provision was made for resignation, and removal by the two archbishops jointly if the Upper House of each Convocation resolved that the judge was incapable of acting or unfit to act. The Dean was by virtue of that office ‘the Official Principal of the Archbishop of Canterbury’, and Master of the Faculties (itself an old office).<sup>28</sup>

The 1963 Measure also brought in a development in disciplinary cases. As well as the Dean, there were to be 4 other judges: 2 clergy (appointed by the prolocutor of the Lower House of Canterbury Convocation) and 2 lay of such judicial experience as the Lord Chancellor thought fit, appointed by the chair of the Church Assembly (now General Synod) House of Laity after consulting the Lord Chancellor. Their appointment too had no time limit, but provision was made for resignation/removal. An appeal from a consistory court in a misconduct case had to be disposed of by all the judges, and other proceedings were heard and disposed of by the Dean.

There were more changes to the 1963 Measure over the following decades. The candidate for Dean had to be either a person with a ten-year High Court qualification or one who held high judicial office, and the office was held until the age of 75. Further provision was made for a Deputy. In appeals under the Clergy Discipline Measure 2003, from the disciplinary tribunal or vicar general’s court, the Dean continued to sit with 4 judges, 2 clergy, 2 lay. In faculty appeals, the Dean sits with 2 chancellors - ‘by custom’ one is chosen from each province.<sup>29</sup>

Today, the 2018 Measure provides that judge is ‘to continue’ to be known as the Dean of the Arches and Auditor, styled as Dean of the Arches for the Canterbury province, and Auditor for York – and the Measure continue use of the style ‘Official Principal’ (no change). The person appointed must hold or have held high judicial office, or be qualified to be a Lord Justice of Appeal (change). But the Measure does not change the rules as to joint appointment and royal approval, communicant status, retirement, resignation and removal, Deputy Dean, or oaths.<sup>30</sup>

### *The Lawyers*

By the end of the thirteenth century, the advocates and proctors had become a regulated body of professional lawyers, mainly law graduates. Archbishop Pecham’s 1281 statutes required 3 years’ study of civil and canon law; the 1295 statutes, 4 years; and those of 1342, the degree of bachelor of canon or civil law. The requirement of a doctorate for advocates was customary not statutory – by 1768 it was required by the royal charter for admission to Doctors Commons.

There were also norms on professional ethics. Advocates swore oaths to work honestly and expeditiously; under a constitution of 1273, they could not take contingent fees; and under the 1295 statutes, advocates and proctors were not to enter taverns, keep concubines, wander at night, or attend public entertainments.<sup>31</sup> After the Reformation, the 1603 Canons forbade proctors to conclude any cause without the counsel of an advocate, and they required them to behave ‘quietly and modestly’ under pain of silence for two terms or removal from practice – because their ‘the loud and clamorous Cries and Clamours...are not only troublesome and

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<sup>28</sup> Ecclesiastical Jurisdiction Measure 1963, ss. 3 and 13.

<sup>29</sup> C. Mynors, *Changing Churches: A Practical Guide to the Faculty System* (London: Bloomsbury, 2016) 182 (par. 8.1.2). The current Dean of Arches has always chosen one chancellor from each diocese.

<sup>30</sup> M. Hill, *Ecclesiastical Law* (4<sup>th</sup> ed., 2018) par. 260. See also Canon G2.

<sup>31</sup> J.H. Baker, *Monuments*, op cit., 6. See also W. Senior, ‘The advocates of the Court of Arches’, 46 *Law Quarterly Review* (1923) 493.



offensive to the Judges and Advocates, but also give occasion to the Standers by, of contempt and calumny towards the Court'.<sup>32</sup> In 1690, King's Bench held that if the Dean suspended a proctor from practising, no appeal lay to the Archbishop of Canterbury because the Dean was the Archbishop's deputy – there could be no appeal from the archbishop to the archbishop.<sup>33</sup>

Numbers were also regulated. The 1295 statutes allowed 16 advocates and 10 proctors. By the 1530s, 21 proctors were allowed in the London courts, including the Arches.<sup>34</sup> In the 1560s, there were 22 proctors, increased in 1583 to 28. By 1746, Philip Floyer lists as 'officers of the court', the Dean, 'diverse Advocates', 2 registrars, 34 proctors, and supernumerary proctors. A nineteenth-century manuscript at Lambeth Palace Library records there were 34 proctors.<sup>35</sup>

As with the advocates, so too the proctors withered. With the abolition in 1857 of ecclesiastical jurisdiction over marriage and wills, the proctors were compensated and allowed to practise in the probate and divorce courts and those of equity and common law. An Act of 1870 entitled attorneys and solicitors to practise in church courts, except the provincial courts of Canterbury and York, and the diocesan or consistory court of London – but this ban was removed in 1877. The Solicitors Act 1974 allowed solicitors to appear in ecclesiastical courts, like barristers.

## THE RECORDS OF THE COURT

Until 1733 most of the formal records of the Court were in Latin, but some were in English. Parliament forbade the use of Latin for records in all courts by a statute coming into force in 1733. Today, the Arches records are mostly held at Lambeth Palace Library. The archive dates from after the Restoration 1660. Records from the reign of Edward VI were destroyed in the Great Fire 1666. The archive includes over 2,250 process books (transcripts of proceedings in the lower court sent up to Arches on appeal), over 150 volumes of act books, depositions, personal answers, sentences, muniment books, and over a thousand nineteenth-century files. It also includes various exhibits, court books, probate accounts, churchwardens' accounts, rate books, letters, and plans. The records have been stored in various places in their long history: from 1674, at Doctors Commons; after 1857, in a well in St. Paul's Churchyard; and in 1865 at Morton's Tower at Lambeth Palace. In 1939-45, they were held at the Bodleian Library, Oxford, and in 1953 they were deposited in Lambeth Palace Library where they still remain.<sup>36</sup>

The office of registrar was responsible for record-keeping in the Arches Court. It is an ancient office. After the Reformation, registrars were regulated by the 1603 Canons; and in a case of 1606, it was held that the registrar had to be a notary public.<sup>37</sup> By 1746, it had two registrars.<sup>38</sup> Today, the Provincial Registrar of Canterbury serves as the registrar for the Arches Court.

## THE PROCEDURE AND PRACTICE OF THE COURT

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<sup>32</sup> Canons Ecclesiastical 1603/4: Canons 129, 131 and 133.

<sup>33</sup> G.I.O. Duncan, *The High Court of Delegates* (Cambridge: Cambridge University Press, 1971) 10 n. 5.

<sup>34</sup> F.D. Logan, 'The medieval Court of Arches', 95 *Canterbury and York Society* (2005).

<sup>35</sup> P. Floyer, *The Proctor's Practice* (1746) 4; at 9-11 he names 23 advocates and over 50 proctors including those 'allowed to practise as such' – Floyer himself appears on the list of proctors.

<sup>36</sup> M. Barber, 'Records of the Court of Arches in Lambeth Palace Library', 3 *Ecclesiastical Law Journal* (1993) 10-19.

<sup>37</sup> Canons Ecclesiastical 1603, Canons 123 and 124; *Earl of Hertford v Lord Mounteagle* (1606): see G.I.O. Duncan, *Delegates*, 191, n. 2.

<sup>38</sup> Floyer, *The Proctor's Practice* (1746) op cit., 4.

The medieval archiepiscopal statutes regulated aspects of process – indeed, an official of Archbishop Winchelsey complained early in the fourteenth century that diocesan officials were making too many errors in processing appeals to the Canterbury court.<sup>39</sup> Arches’ work was seen *then* in part as a spiritual exercise: ‘such was the devotion of those days in that Consistory’, says Godolphin 1678, that to implore ‘the Divine assistance on their proceedings in Judgment, it was...Ordained, That Divine Service should be celebrated in Bow-Church immediately before the first, and after the last Cession of every Term, the Judge, Advocates, Proctors, and other Officers...to be present thereat’.<sup>40</sup> This continued when it moved to Doctors Commons: judge and advocates would ‘offer up prayers to the God of mercy, and wisdom and justice’.<sup>41</sup>

The 1603 Canons also regulated aspects of process.<sup>42</sup> Slowness was often an issue. The case of *Jackson v Mag* was not untypical: the cause was in the Arches from 1666-69, then introduced in the Court of Delegates and sentence was not given there till 1674.<sup>43</sup> Court process was also regulated by Act of Parliament, such as one of 1694 under which the fee for the document with an appeal from the Arches was 40s.<sup>44</sup> Court practice also regulated, for example, the admission of advocates and proctors; dress; sittings; the dignity of the Dean; and the stages in appeals.

First, admitting advocates and proctors. As to advocates, Floyer explains in 1746: ‘on Petition to the Archbishop, and his Fiat obtained, they are admitted by the Judge on Condition that they practise not for one whole Year after Admission (which is called the silent Year)’. The process: ‘the two senior Advocates...with the Mace carried before them, conduct them up to the Court with three low Bows, and present them with a Latin Speech, and produce a Rescript from the Archbishop; and after taking the Oaths appointed...the Judge admits them, and assigns them Seats in Court, on his Right or Left Hand, which they always keep when they plead. The Stamps of...Admission are [£6] the other Fees are [£2 2s]’. Proctors were admitted similarly and practised immediately.<sup>45</sup> A register of advocates and proctors was kept from 1512-1855.<sup>46</sup>

Second, Floyer describes the ‘habits’ worn in Court: ‘The Judge and Advocates wear Scarlet Robes and Hoods lined with Taffety (if bred at Oxford) or white Miniver (if at Cambridge) and round black Velvet Caps. The Proctors wear black Prunella Gowns with Hoods lined with Fur in this Court only, in other Courts the Doctors, etc, wear only black Gowns’ – very colourful.<sup>47</sup>

Third, from 1728 the Court used to start sitting in Michaelmas on 25 October each year. Hilary term began on 13 January, Easter term began on the Monday a fortnight after Easter Day, and in the Trinity term ‘the custom is to open the court on the day following the Feast of the Holy Trinity’. When ‘in the seat of justice’, the Dean of Arches was sometimes addressed as *Domine Judex*, but more frequently as *Domine Decane*, and when spoken of as ‘Mr. Dean’. Indeed, Oughton writes: ‘Great deference has been justly paid to...the [Dean], both as of right, and by custom, not only among the members of our own...calling, but...among others unconnected

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<sup>39</sup> D.M. Owen, *The Medieval Canon Law: Teaching, Literature and Transmission* ((Cambridge: Cambridge University Press, 1990) 1.

<sup>40</sup> Godolphin, *Reportorium*, op cit., 104; he cites Lyndwood in this passage.

<sup>41</sup> Oughton, *Ordo* (1728) xvii.

<sup>42</sup> Canons Ecclesiastical 1603/4: Canon 130.

<sup>43</sup> G.I.O. Duncan, *Delegates*, op cit., 169 n. 6.

<sup>44</sup> 5, 6 Will. & Mary, c. 21: Gibson, *Codex* (1713) 1084.

<sup>45</sup> Floyer, *The Proctor's Practice* (1746), op cit., 5-6: ‘Their Fees for Admission are the same as the Advocates, but they usually treat the whole Profession upon their Admission, which is very expensive to them’.

<sup>46</sup> C. Crawley, *Trinity Hall: The History of a Cambridge College*, second edition enlarged by G. Storey (Cambridge: Cambridge University Press, 1992) 71.

<sup>47</sup> Floyer, *The Proctor's Practice* (1746), op cit., 6.

with the profession'. All the advocates on a stated day would attend on the Dean in procession to Court 'according to their seniority' and afterwards 'to his own house'. All public documents had to distinguish him by 'the titles of Venerable, and Excellent', as the Dean was on 'an equal footing with the archbishop'.<sup>48</sup> At a hearing, senior advocates took their places opposite the judge, the others on each side depending on seniority; and the proctors observed 'like Order'.<sup>49</sup>

Fourth, from the Restoration, a suit in the Arches Court was initiated by: (1) an appeal at the instance of a party; or (2) by letters of request from the ordinary responsible for the inferior court, asking for the case to be heard directly by the Arches Court; or (3) by direct transmission from the Prerogative Court of Canterbury (in the case of wills); or (4) on the Court's own initiative – that is, *ex officio* suits promoted on behalf of the judge, e.g. clergy discipline cases.

For example, in appeals, on receiving an application, an *inhibition* was directed to the lower court to stop any further litigation in the case. Then came the *citation*, requiring the parties to appear on a specified day to *present* or to *answer* through their proctors. All *allegations* and *evidence* were given in writing. A proctor produced the *libel* for the appellant in an instance case or *articles* in an *ex officio* discipline case setting out the facts/charges – and the defendant answered by submitting allegations in defence. Subsequent allegations could be submitted by either party. The evidence of witnesses other than the two parties was recorded in the written *depositions*, in answer to *interrogatories* based on the libel.<sup>50</sup> The judge might require original documents or copies to be exhibited in Court. The judge pronounced *sentence* (the judgment), assigning costs payable by the loser. If there was no *definitive sentence*, an *interlocutory decree* (temporary sentence) might be issued, or the case might be referred to the Court of Delegates (or after 1833, Privy Council), or stopped by writ of prohibition in the secular courts. More detailed norms applied to each stage.<sup>51</sup> In immorality cases, a penance or an excommunication may be imposed; in marriage cases, a divorce or annulment pronounced; and in testamentary cases, the payment of legacies ordered. However, the Act Books show that a large number of cases never reached sentence: for example, a party died, or the case was settled/abandoned.<sup>52</sup>

Procedures changed, of course, after the nineteenth century reforms. The deposited canons of 1874 required the Dean to frame orders to regulate the practice and proceedings of all the courts within the province.<sup>53</sup> By 1895, Phillimore has a table of 'procedure rules' for the Arches (and others) on e.g. Security for Costs, 1830; General Procedure, 1867; Cases under the Clergy Discipline Act 1892; and Scales of Fees and Costs, 1893.<sup>54</sup> Faculty rules issued in 1867 were updated in 1903 and lasted till 1936.<sup>55</sup> Later came the Ecclesiastical Jurisdiction (Faculty Appeals) Rules 1965 and 1998, the latter revoked by the Faculty Jurisdiction Rules 2015. An appeal from a consistory court is to the Arches – but if it concerns doctrine, ritual or ceremonial, to the Court of Ecclesiastical Causes Reserved. Permission to appeal to the Arches may be

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<sup>48</sup> Oughton, *Ordo* (1728) xiii, 19-10; see also Appendix VI and Appendix VII; xiv-xv: e.g. 'Behold! how solemn, how awakening the aspect of justice! How beautiful her form, how graceful her proportions, how dignified her carriage! How illustrious her descent!'.  
<sup>49</sup> Godolphin, *Reportorium* (1678) 104; he cites Lyndwood in this passage.

<sup>50</sup> If the parties or witnesses were unable to give their evidence to the proctors in London, commissions *in partibus* were issued to local clergy to take answers and return the answers and depositions to the Court.

<sup>51</sup> For a full account of these norms, see Oughton, *Ordo* (1728): e.g. citations and citation certificate, 79-107.

<sup>52</sup> See: <http://archives.lambethpalacelibrary.org.uk/calmview/Record.aspx?src=CalmView.Catalog&id=arches>

<sup>53</sup> See G. Bray, *The Anglican Canons 1529-1947* (London: Boydell Press and Church of England Record Society, 1998) cxii: Canon 79 of the deposited canons of 1874.

<sup>54</sup> R. Phillimore, *Ecclesiastical Law* (1895) 998; see also 1023.

<sup>55</sup> H.W. Cripps, *A Practical Treatise of the Law relating to the Church and Clergy* (London: Sweet & Maxwell, 8<sup>th</sup> ed., 1937) 156.

given by the diocesan chancellor concerned or, if refused, by the Dean. There are rules on conducting the appeal; for example, the Dean may order the appeal to be determined on written representations if all the parties agree to it; and the whole of the diocesan court file must be sent to the Arches registrar; and proceedings must be conducted in such manner as ‘rules’ may specify - the Dean is on the Rule Committee. There are also rules on the orders the Court may make. Appeals from the Arches are to the Privy Council Judicial Committee if it consents. The Faculty Jurisdiction (Amendment) Rules 2019 remove the need for all parties to agree to an appeal before it is dealt with by written representations – they come into force 1 April 2020.

## THE JURISPRUDENCE OF THE COURT

The Arches’ judges, advocates and proctors, and their successors, gave much to ecclesiastical jurisprudence. First, their commentaries and opinions. Of the medieval Deans, William Lyndwood (d. 1446) is perhaps best known: his *Provinciale* 1436 is a systematic account of the domestic English church law (and it is still cited today). After the Reformation, Richard Cosin, Dean 1583-97, robustly defended the church courts and attacked the invasive use of the common law writ of prohibition in his *Apology* of 1591. The temporal courts frequently called on the doctors to assist them; *Grendon v Dean and Chapter of Worcester* (1575), in the Court of Common Pleas, was typical: ‘Note by six civilians, doctors of the Arches [all named] that such an appropriation...is good in law’.<sup>56</sup> But the advocates still invoked the learning of the continental civilians and canonists, including pre-Reformation jurists - as in *Fowle c. Maycote* c. 1587: use was made of Lanfrancus de Orianio (1398-1488), and Jacobus Menochius (1532-1607).<sup>57</sup> Likewise, in the seventeenth century, we read in the Arches’ court record: ‘On this the doctors of the...Arches were consulted’; or, ‘some doctors of the Arches were of [such and such an] opinion’; or X was ‘resolved by the doctors of the Court of Arches’.<sup>58</sup> And throughout this study I have used works by those associated with the Arches Court - from Philip Floyer, the proctor, and his 1746 book, to Dean Phillimore’s monumental *Ecclesiastical Law* of 1873.

Second, there is their practice of writing reports, digests, and summaries of Arches’ decisions.<sup>59</sup> A Bodleian manuscript has Arches Court decisions 1597-1604. Sir George Lee produced judgments when he was Dean in the 1750s, in manuscript till 1855 when Joseph Phillimore had them published. But the nineteenth century was the heyday for reporting Arches judgments - they were collected and published e.g. by Jesse Adams 1822-26, John Haggard 1827-33 and later by Thomas Spinks 1853-55 and W.E. Browning 1867-75. These were all republished in *The English Reports* (1900-32). There were also ‘digests of cases’ with case summaries, such as those by Edwin Maddy in 1835 and Alfred Waddilove in 1849 - and Robert Phillimore collected the Arches’ judgments 1867-75. Today, its decisions are available on the website of the Ecclesiastical Law Association, and they are summarised in the *Ecclesiastical Law Journal*.

Third, the *reasoning* used by the Dean has over the centuries been both positivist (relying solely on law) and moral (using ideas of justice etc). This is captured in two decisions of John Nicholl, Dean 1809-34. In one, on whether the Court had jurisdiction, he says: ‘if it clearly has no jurisdiction, the Court would not suffer the parties to proceed and to incur unnecessary expense’ – ‘but, if the point be at all doubtful, the Court would be bound to proceed, for to refuse the exercise of a jurisdiction...is a “sort of denial of justice”’ - and the Court would have to find a

<sup>56</sup> J.H. Baker, *Reports from the Lost Notebooks of Sir James Dyer*, Vol. II (London: Selden Society) 1994 318.

<sup>57</sup> R.H. Helmholz, ed., *Three Civilian Notebooks: 1580-1640* (London: Selden Society) 38.

<sup>58</sup> R.H. Helmholz, ed., *Three Civilian Notebooks: 1580-1640* (London: Selden Society) 56, 63, 110, 143.

<sup>59</sup> For medieval cases, see *Select Cases from the Ecclesiastical Courts of the Province of Canterbury Cases*, ed. N. Adams and C. Donahue, 95 Sel. Soc. (London: Selden Society, 1978).

‘sound principle or authority clearly showing that [it] cannot and ought not to entertain the case’; in this case, about a legacy, he found none and so accepted jurisdiction.<sup>60</sup> But in another, Nicholl refused jurisdiction as to accept it meant flying in the face of positive law: the 1603 Canons forbade depriving a cleric by anyone other than the bishop - but it was debated whether the Dean could. He said the Court ‘would be extremely unwilling’ to deprive - the canon seems ‘expressly to exclude it’ and he would not deprive on ‘the mere dicta of counsel, however respectable, in the absence of any, or, at most, upon the strength of one (blind) precedent’.<sup>61</sup>

Fourth, there have been many landmark Arches’ decisions contributing to the development of the law of the Church of England. Some examples. In 1628 it held that an ecclesiastical judge ‘cannot compel an executor to produce an inventory and render account before a will has been proved...where any controversy exists’.<sup>62</sup> In 1753 it required church courts to apply common law rules to determine whether an ecclesiastical custom exists.<sup>63</sup> In 1758 it held a parishioner as a right to be married in the parish church – a decision routinely cited today.<sup>64</sup> In 1809 it held that any lay person could administer baptism.<sup>65</sup> In 1824 it held no parishioner may interrupt a service to call a vestry meeting after the churchwardens had failed to do so; in 1830 that the incumbent is custodian of the keys of the church; and in 1837 that a temporal conviction is not required before the deprivation of a cleric.<sup>66</sup> In *Phillimore v Machon* (1876) it recognised the loss of the church courts’ jurisdiction over the laity: and: ‘the punishment of the laity for the good of their souls by the ecclesiastical courts would not be in harmony with modern ideas’.<sup>67</sup>

In 1908, the Court held that parties ‘lawfully married’ under civil law cannot be denied Holy Communion on the basis that church law and teaching forbade their marriage. In 1972 it held that refusing ‘to baptize a child is not a doctrinal offence [but one] concerned with pastoral work’ – a minister must make ‘a clear and final intention not to baptize’ to be disciplined; and a conscientious objection would not provide a general defence. And in 1992, the Dean, Sir John Owen said: ‘we must decide that fairness and justice demand that the verdicts against [the cleric in question] cannot stand. Of course, it is a matter of regret that the Church has been put to considerable wasted expense, but justice is more important than financial considerations’.<sup>68</sup>

Finally, central to the jurisprudence and reasoning of the Arches Court is the use of precedent, earlier cases. This has been the position for centuries. For instance, in 1756, the Dean decided the matter on the basis of six earlier decisions of the Court of Delegates and the Arches itself; the following year, Lee used five common law cases and one from the Prerogative Court.<sup>69</sup> By

<sup>60</sup> *Grignon v Grignon*, 1 Hag. 536; A.J. Stephens, *Practical Treatise* (1848) 53.

<sup>61</sup> *Saunders v Davies*, 1 Add. 296; the precedent rejected was the argument of counsel, Dr. Swaby, in *Watson v. Thorp*, 1 Phill. 277; A.J. Stephens, *Practical Treatise* (1848) 54-55.

<sup>62</sup> *Mullincheape and Cooke c. Jones*: R.H. Helmholz, ed., *Three Civilian Notebooks*, op cit., 121.

<sup>63</sup> *Patten v Castleman* (1753) 1 Lee 387; 161 ER 143.

<sup>64</sup> (1758) 2 Lee 515; 161 ER 424. See N. Doe, *The Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996): this argued that the case decided a much narrower point; for support of this view, see also M.G. Smith, ‘An interpretation of *Argar v Holdsworth*’, 22 *EccLJ* (1998) 34-41; compare J. Humphreys, ‘The right to marry in church: a rehabilitation of *Argar v Holdsworth*’, 7 *EccLJ* (2004) 405.

<sup>65</sup> *Kemp v Wickes* (1809) 3 Phillimore 264 at 276, per Nicholls.

<sup>66</sup> *Dawe v Williams* (1824) 162 ER 243; *Lee v Matthews* (1830) 3 Hag. Ecc. 169; 162 ER 1119; *Taylor v Morley* (1837) 1 Curt 470; 163 ER 165: see Rodes, op cit., 391.

<sup>67</sup> (1876) 1 PD 481 per Lord Penzance.

<sup>68</sup> *Bannister v Thompson* (1908) P 362: see also *R v Dibdin* [1912] AC 533 (HL); see also [1910] P 57 (CA); *Bland v Archdeacon of Cheltenham* [1972] 1 All ER 1012: for conscientious objection, the Court used the unreported Arches decision, *Watkins-Grubb v Hilder* (1965); *Re Tyler* [1992] 1 All ER 437 at 442.

<sup>69</sup> R.H. Helmholz, *Ecclesiastical Lawyers* (2019), op cit., 179; *Hughes v Herbert* (1756) 2 Lee 287; 161 ER 343 (Court of Arches); *Robins v Wolseley* (1757) 2 Lee 421, 443; 161 ER 391, 398 (Court of Arches).

the nineteenth century, the binding force of precedent was fully accepted in church courts. A diocesan court was bound by its own previous decisions, but these did not bind other diocesan courts. An Arches' decision bound the lower courts in the Province of Canterbury, and those of the Chancery Court bound lower courts in the Province of York. But an Arches' decision did not bind the Chancery Court, and *vice versa* – though they had great persuasive value for each other (the Dean and Auditor were after all one and the same person after 1874). Decisions of the Court of Delegates and then Privy Council bound lower courts, including the Arches. Elements of the doctrine were recognised in the Ecclesiastical Jurisdiction Measure 1963.<sup>70</sup>

In the case *Re St Nicholas Sevenoaks* (2005) Sheila Cameron, Dean, said: 'So far as decisions of the Arches Court and the Chancery Court of York are concerned, we...approve the approach of the chancellor...of Newcastle in [2002 who] said...that having regard to the fact that all chancellors are judges of each court and the offices of Dean...and Auditor are by statute held by the same person it is realistic to treat "the Arches Court...and the Chancery Court...as being, for the purposes of the doctrine of precedent, two divisions of a single court". Accordingly, said Sheila Cameron: 'consistory courts in each Province should have regard to decisions of the appellate court, whether or not given in their Province, and a later decision should prevail if it differs from that given in an earlier decision irrespective of the Province concerned'.<sup>71</sup>

A new rule appears in a Measure of 2018: a decision of the Arches or of the Chancery Court is to be treated by the other Court, and by the lower ecclesiastical courts in the province of the other Court, as if it were a decision which the other Court had itself taken. Lower ecclesiastical courts are the Vicar-General's court of the province (including under the Clergy Discipline Measure 2003), the consistory court for a diocese in the province, or a disciplinary tribunal in the province. This new rule applies to a decision of the Arches or the Chancery Court made before the commencement of the rule as well as to decisions made after its commencement.<sup>72</sup>

On 9 February 2018 at General Synod the Dean of Arches, the Right Worshipful Charles George QC, welcomed this. He explained: 'Where there is a previous decision of the same appeal court, the appeal court will normally follow it, thus providing a measure of certainty to the law'; and 'the lower courts will also normally follow the previous decisions of the Province's own appeal court or risk being overturned on appeal'. Also: 'In the very rare cases where there is a conflict between previous decisions of the two appeal courts, it has generally been assumed that the most recent decision by whichever appeal court will be followed' (as stated *obiter* in the *Sevenoaks* case: see above). However, in 2016, 'doubt was cast as to the correctness of this approach' - the only relevant precedent in each Province was that of its own appeal court.<sup>73</sup> So, the 2018 Measure simply affirms the *Sevenoaks* approach. Moreover:

The benefit of the revised wording [in the 2018 Measure] is that it omits any express reference to decisions being binding so that the effect of previous decisions, whether they be persuasive, highly persuasive or binding, together with the approach where there are conflicting decisions of appeal courts, can be worked out in case law, but on

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<sup>70</sup> Halsbury, *Laws of England*, Volume 14, *Ecclesiastical Law* (London: 4<sup>th</sup> ed., 1975) par. 1271. See also N. Doe, *The Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996) 156.

<sup>71</sup> *In Re St Nicholas Sevenoaks* [2005] 1 WLR 1011 at 1015.

<sup>72</sup> Church of England (Miscellaneous Provisions) Measure 2018, s. 7 (inserting a new section 14A in the Ecclesiastical Jurisdiction and Care of Churches Measure 2018); this applies to its jurisdiction under s. 14 of the Ecclesiastical Jurisdiction Measure and Care of Churches Measure 2018 and s. 7 (discipline) of the Ecclesiastical Jurisdiction Measure 1963.

<sup>73</sup> See *Sam Thai Chan* [2016] ECC Dur 2.

a basis set by this Measure that it matters not whether the previous decision is a case decided in the Court of Arches or one decided in the Chancery Court of York. Normally, it would be the more recent decision that would be followed, but there may be cases where this would not be appropriate, for example if there were material factors considered in the earlier decision but not taken into account in the later decision'.<sup>74</sup>

In 2019, the Consistory Court of Leeds Diocese pointed out that, as a result, in exhumation cases: 'In dioceses of the Northern Province (of which Leeds is one) it is no longer necessary to consider the test propounded by the Chancery Court of York in *Re Christ Church, Alsager* [1999]...to the extent that such test was revisited and re-framed by the subsequent decision of the Court of Arches in *Re Blagdon Cemetery* [2002]'. In *Blagdon* the Arches favoured the straightforward principle that a faculty for exhumation will only be exceptionally granted. The petitioner must show special circumstances which justify the making of an exception from the norm that Christian burial is final. Chancellor Hill concluded: 'The somewhat sterile question of whether the *Alsager* and *Blagdon* tests might lead to different outcomes is now entirely academic'.<sup>75</sup> In his *Ecclesiastical Law*, he recognises the change reflects (1) 'the pragmatic approach which has generally been adopted by most ecclesiastical judges when applying the ecclesiastical common law in the light of the [available] judgments'; (2) the change in the composition of the Arches and Chancery Courts into a single appellate court of appeal; and (3) 'to a lesser extent, the benign adoption of the reasoning of one consistory court by another'.<sup>76</sup>

## CONCLUSION

Needless to say, this study is an incomplete picture of the Court of Arches. Sir George Lee, in the 1750s, may well have been correct that its jurisdiction was 'entirely settled' – but that can be said at any moment in the Court's history – jurisdiction is settled by the creation of a new law, for the life of that law. It is by a long perspective we see that, across the centuries, the jurisdiction and other aspects of the life of the Court have been anything but 'entirely settled'.

Its story is one of evolution - driven by principle, politics, and pragmatism. On the one hand: its status has remained settled – it began life as a provincial appellate court – it still is. It always had jurisdiction over faculties and clergy discipline – it still does. Its judge was always appointed by the Archbishop; It has always kept records. Its processes were for centuries subject to the secular writ of prohibition – and today it is subject to supervision by the High Court. And its jurisprudence was always respected but became the basis of binding precedent.

On the other hand, it has had an unsettled history. Before the Reformation it enforced Roman canon law, but after it, it enforced the ecclesiastical law of the realm. Its jurisdiction originally was wide, but over the centuries it contracted, especially in the 19th century – but it was not until 1963 that it lost its original jurisdiction. Appeal from the Arches was originally to Rome, then to the Court of Delegates, then to the Privy Council. Its judge was originally the 'official' and the 'dean' his deputy – the office of dean disappeared but the title 'dean' continues today. One person sat as judge in the Arches, and another in the York Chancery – but after 1874, one person held both offices. Arches procedure was always complex, and today it is on a statutory footing. Arches' decisions have throughout its history been consulted and respected – but after the 18th century they were reported systematically and became binding precedents. And a

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<sup>74</sup> General Synod Record (Feb. 2018) 144-145.

<sup>75</sup> *In the matter of Clayton Cemetery, Bradford* (and of Colin David Berry, Deceased) [2019] ECC Lee 2.

<sup>76</sup> M. Hill, *Ecclesiastical Law* (2018) par. 1.32.



decision of the Arches and Chancery Court are today to be followed as if it were a decision of the other Court. The Arches is a micro-world in which so much English church law has grown.

There's no better way to end than with Oughton's words in 1728 20 years before Lee was Dean: 'Long may this useful, this illustrious, this splendid court, the Arches Court of his Grace of Canterbury, continue to shine effulgent, and may its glory extend far and wide to distant ages'.<sup>77</sup>

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<sup>77</sup> T. Oughton, *Ordo* (1728) xviii.