

THE COURT OF ARCHES: JURISDICTION TO JURISPRUDENCE –

“ENTIRELY SETTLED”?

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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. Sir George Lee, Dean of Arches (1751-58), said in one judgement: ‘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 Arches Court in its long history have ever been ‘entirely settled’. Its 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 life of the church. I look at five areas: jurisdiction; personnel; records; process; and its jurisprudence in some landmark cases over the centuries. In preparing for this talk, I’ve used literature about the Court from the Reformation to today.

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 others in London, this church was a ‘peculiar’ of the Archbishop, outside the jurisdiction of the Bishop of London. John Godolphin wrote in 1678 that the Court was 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’. 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 Channel whence Justice flows like a Crystalline Stream’. 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’.

The Court sat in a room over the north aisle of the 11th 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, and then to the premises of Doctors’ Commons, Knight rider Street. On occasion, it also sat at Number 1, The Sanctuary, Westminster, and at St. Paul’s Cathedral. The Archbishop of Canterbury 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 date for its establishment. Yet, in 1685, Henry Consett said the origin of the Court is ‘uncertain’, but he relates how Pope Alexander III (who died 1181) ordered the Archbishop of Canterbury (in the reign of Henry II, who died 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’.

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. The Arches could hear appeals at the instance of a party against a decision of a lower court. It also had an original jurisdiction - as first instance court - over cases relating to the 13 peculiars of the Archbishop in London; over those sent to it by lower courts in 'letters of request'; and over *ex officio* discipline suits promoted on behalf of its judge the Dean of Arches.

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 the Arches. Yet the Arches outlived the Court of Audience which by 1728 was effectively obsolete.

The Archbishops of Canterbury made statutes for the Arches Court from time to time about its work and personnel - its domestic law, as it were. For example, statutes were made by Peckham in 1281, Winchelsey in 1295, Stratford in 1342, and on the eve of the English Reformation by Archbishop Warham, 1528.

The Court survived the Reformation. But before the Reformation it enforced the canon law made by the church, after it, it enforced the 'ecclesiastical law' of the realm. The Ecclesiastical Jurisdiction Act 1531 fixed its original jurisdiction, 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 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 itself was replaced in 1833 by the Judicial Committee of the Privy Council. Still, after the Reformation, the Archbishops of Canterbury also continued to make domestic statutes for the Arches Court, such as those of Parker 1573 and Whitgift 1583.

By the Restoration in 1660, as Godolphin says, the Court has power 'in all matters and causes Spiritual...annexed [to] the Peculiar Jurisdiction of the [13] 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 in appeals it 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 [these] Judge for denying or delaying of Justice'.

Its original jurisdiction over cases sent by a diocesan court in letters of request was contentious: it could override the wishes of bishops and the parties. Dean of Arches George Lee recognised this in *Butler v. Dolben* in the 1750s. He explains: by statute of 1531 the Arches is 'empowered to take original cognisance, by...letters of request, of such 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'. The Arches 'was bound to receive [letters of

request] *ex debito justitiae*', but 'it was in the discretion of the inferior judge whether [to] grant them'. Lee's decision was still good law in 1848.

The Arches Court was busy. From 1725-45, it heard 601 appeals - 211 in 1725-31; 242 in 1732-38; and 148 in 1739-45. The rate is fairly stable; most were testamentary and disciplinary appeals; and some dioceses generated more than others – for instance, there was 1 appeal from Rochester, 9 from Bangor, 59 from Exeter, and 92 from London. It was busier than the Chancery Court York with 130 appeals in the same period - but York was less populated than Canterbury.

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-19th century, public attitudes had changed, dissenters resented them, and 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 the number of cases heard in the Arches – from 1800-58 it had 860 cases; and 1859-1900, 136. Parliament also abolished their jurisdiction over church rates (1868) and later over tithes.

Driven largely by the ritualist controversies, there were also changes as to clergy discipline. While it retained original jurisdiction in such cases by way of letters of request, under the Clergy Discipline Act 1892 discipline appeals now lay from a diocesan court to the Arches *or* to the Privy Council. 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 clerical discipline.

A landmark change came with the Ecclesiastical Jurisdiction Measure 1963. It abolished the Arches' original jurisdiction, which was obsolete. The Measure allowed only its appellate jurisdiction to continue - as before, to hear appeals in discipline and faculty cases not involving doctrine, ritual or ceremony. And the Clergy Discipline Measure 2003 preserved its appellate disciplinary jurisdiction.

Today, the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 states: 'For each province there is to continue to be a court of the archbishop' and, for Canterbury, this is 'to continue to be known as the Arches Court of Canterbury'. As before, the Court hears and determines appeals in faculty cases (not involving doctrine, ritual or ceremony) from consistory courts and from 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).

The Arches' medieval and post-Reformation jurisdiction was policed by the secular courts and the writ of prohibition; now it and other church courts are under the supervisory jurisdiction of the High Court. But that's another story.

THE PERSONNEL OF THE COURT

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, the 'official principal' was 'bound' whenever absent 'to appoint the dean of...St. Mary Arches to preside for him in his court'. The title 'dean' was used because the 13 peculiars in London were 'called a Deanery'. The title 'official' is the medieval style for

a church judge. Godolphin again: '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: 'the Archbishop's Official in this Court was...obliged to Constitute the Dean of the Arches as his Commissary General in his absence'.

So, Consett in 1685 says it is 'by vulgar Error, [that] the Official himself...is called the Dean of the Arches'. Oughton too, in 1728: 'The Dean...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...indiscriminately official and dean'. And: '*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...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'. In 1775, Burn styled the judge 'vicar general of the archbishop'.

Anyway, from the beginning, the Archbishop appointed the judge, someone different from the person appointed as Auditor of York Chancery: two courts, two offices, two persons. This was settled law, like the requisite qualifications, which included legal learning and being of 'sound doctrine, good morals, and purity of conscience'. However, the Public Worship Regulation Act 1874 changed things: both archbishops (Canterbury and York) jointly were to appoint one person, a barrister or judge, as *both* Dean *and* Auditor. Under the Ecclesiastical Jurisdiction Measure 1963, this joint act was subject to royal approval; the candidate had to be a barrister of at least 10 years or one who held high judicial office, and a communicant; the oaths taken also continued; there was no time limit for tenure; but the Dean could resign and be removed by the two archbishops if the Upper House of each Convocation resolved he 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 Faculties, itself an old office of course.

The 1963 Measure also innovated in discipline cases. With 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 appropriate, appointed by the chair of (hen) the Church Assembly House of Laity after consulting the Lord Chancellor. Their appointment had no time limit, but provision was made for resignation/removal. Discipline appeals from consistory courts were decided by all the judges - and other cases by the Dean.

There were further changes to the 1963 Measure in coming decades. The candidate for Dean had to be either a person with a 10-year High Court qualification or one who held high judicial office, and the office was held until the age of 75. Provision was made for a Deputy Dean. In appeals under the Clergy Discipline Measure 2003, now from the disciplinary tribunal or vicar general's court, the Dean continued to sit with 4 judges as before. In faculty appeals, the Dean sat with 2 chancellors - some say that 'by custom' one is chosen from each province.

The 2018 Measure retains these rules, but the person appointed must now hold or have held high judicial office, *or* be qualified to be a Lord Justice of Appeal.

The Lawyers: By the end of the 13th century, advocates and proctors had become a regulated body of professional lawyers, mostly law graduates. The 1281 archiepiscopal 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. Requiring 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. The 1295 statutes forbade advocates and proctors to enter taverns, keep concubines, wander at night, or attend public entertainments. After the Reformation, the 1603 Canons forbade proctors to conclude any cause without an advocate, and required them to behave ‘quietly and modestly’ under pain of silence for two terms or removal – because their ‘loud and clamorous Cries’ are ‘not only troublesome and offensive to the Judges and Advocates, but also give occasion to the Standers by, of contempt towards the Court’. In 1690, King’s Bench held that if the Dean of Arches suspended a proctor from practising no appeal lay to the Archbishop because the Dean was the archbishop’s deputy.

Numbers? The 1295 statutes allowed 16 advocates, 10 proctors. By the 1530s, 21 proctors were allowed, by the 1560s, 22, increasing to 28 in 1583. By 1746, Floyer lists as court officers, the Dean, Advocates, 2 registrars, and 34 proctors.

With abolition in 1857 of jurisdiction over marriage and wills, and the resultant demise of Doctors Commons, the advocates and proctors withered. Barristers took over from the advocates, and proctors were compensated and allowed to practise in the probate, divorce, and other courts. An Act of 1870 entitled attorneys and solicitors to practise in church courts, except the provincial courts and the London diocesan court, a ban removed in 1877. Today, barristers and solicitors manage cases before the Arches.

THE RECORDS OF THE COURT

The formal records of the Court were in Latin until Parliament forbade its use in 1733. Today, the Arches records are mostly held at Lambeth Palace Library. The archive dates from after the Restoration. It includes over 2,250 process books (transcripts of cases in lower courts sent to the Arches), over 150 volumes of act books, depositions, sentences, and over a thousand 19th-cent. files. There are also exhibits, churchwardens’ accounts, rate books, and letters. The records were 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 World War II, they were held at the Bodleian Library, Oxford, and in 1953 they were deposited in Lambeth Palace Library where they remain.

THE PROCEDURE AND PRACTICE OF THE COURT

The medieval domestic statutes regulated aspects of process – indeed, an official of Archbishop Winchelsey complained early in the 14th century that diocesan officials made too many errors in processing appeals. Its work was seen *then* in part as a spiritual exercise: ‘such was the devotion of those days in that Consistory’, says Godolphin, that for ‘Divine assistance on their proceedings...it was...Ordnained That Divine Service....be celebrated in Bow-Church immediately before the first, and after the last Cession of every Term, the Judge, Advocates, Proctors, and other Officers’ present. This continued at Doctors Commons where the Court was to ‘offer up prayers to the God of mercy, wisdom and justice’.

The 1603 Canons also regulated aspects of process. 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 until 1674: 8 years! 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 set at 40s. Court *practice* also regulated, e.g., admission of advocates and proctors; dress; sittings; the dignity of the Dean; and the stages in appeals.

Admission. For advocates, Philip 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' 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'; after taking the Oaths appointed 'the Judge admits them, and assigns them Seats in Court, on his Right or Left Hand'. The Stamps of Admission were £6 and other Fees £2 2s. Proctors were admitted similarly but practised immediately. A register was kept till 1855.

Floyer also describes dress: '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. Proctors wear black Prunella Gowns with Hoods lined with Fur in this Court only, in other Courts the Doctors, wear only black Gowns'.

From 1728, each year the Court opened in Michaelmas on 25 October. Hilary term began on 13 January, Easter term on the Monday a fortnight after Easter Day, and Trinity term the day after the Feast of Holy Trinity. When 'in the seat of justice', the Dean was sometimes addressed as *Domine Judex*, but more often as *Domine Decane*, and when spoken of, as 'Mr. Dean'. Indeed, Oughton says: '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 with the profession'. All the advocates on a stated day attended on the Dean in procession to Court according to seniority - and afterwards 'to his own house'. All public documents distinguished him by the titles of 'Venerable, and Excellent', as the Dean was on 'an equal footing with the archbishop'.

Processing cases. From the Restoration, in appeals, on receiving an application, an *inhibition* issued to the lower court to stop further litigation there. Then came the *citation*, requiring the parties to appear to *present* or to *answer* through their proctors. *Allegations* and *evidence* were given in writing. A proctor produced the *libel* for the appellant in instance cases or *articles* in *ex officio* discipline cases setting out the facts/charges - and the defendant answered. The evidence of witnesses other than the parties was recorded in *depositions*, answering *interrogatories* based on the libel. The judge pronounced *sentence* (judgment), assigning costs payable by the loser. If there was no *definitive sentence*, an *interlocutory decree* might issue, or the case referred to the Court of Delegates, or stopped by writ of prohibition. In discipline cases, a penance or excommunication could be imposed; in marriage cases, a divorce or annulment pronounced; and with wills, payment of legacies ordered. But the Act Books show many cases never reached sentence: parties died, settled, or abandoned the case.

Procedures changed again, after the nineteenth century reforms. The deposited canons of 1874 required the Dean to frame orders to regulate the practice and proceedings of all courts in the province. 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. Faculty rules issued in 1867 were updated in 1903 and lasted till 1936. Later came the Ecclesiastical Jurisdiction (Faculty Appeals) Rules 1965 and 1998, the latter revoked by the Faculty Jurisdiction Rules 2015.

Now, permission to appeal may be given by the diocesan chancellor concerned or, if refused, by the Dean. There are rules on conducting an appeal. For example, the Dean may order it to be determined on written representations if all the parties agree. And proceedings must be conducted as ‘rules’ specify - the Dean is on the Rule Committee. Appeals from the Arches are to the Privy Council Judicial Committee if it consents. Under the present Dean, the Faculty Jurisdiction (Amendment) Rules 2019 remove the need for all parties to agree to an appeal before it’s dealt with by written representations as from 1 April 2020.

THE JURISPRUDENCE OF THE COURT

The Arches’ judges, advocates and proctors, and their successors, have contributed much to ecclesiastical jurisprudence. First, their commentaries and opinions. Of the medieval Deans, William Lyndwood (d. 1446) is perhaps best known: his *Provinciale* 1436 discussed domestic English church law (and is still cited today). After the Reformation, Richard Cosin, Dean, in his *Apology* of 1591, robustly defended the church courts and attacked invasive uses of the writ of prohibition. Temporal courts often called on the doctors for assistance; the *Grendon* case 1575, in Common Pleas, was typical: ‘Note by six civilians, doctors of the Arches’, all named, that a proposition was ‘good in law’. But the advocates still invoked continental learning, as in *Fowle c. Maycote* c.1587 citing Lanfrancus de Oriano (15th cent. jurist) and Jacobus Menochius (16th cent). Likewise, in the 17th century, we read in the Arches’ records: ‘On this the doctors of the...Arches were consulted’; or such and such was ‘resolved by the doctors’. And throughout this study I have used works Arches staff - 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 up Arches’ decisions. A Bodleian manuscript has Arches decisions 1597-1604. Sir George Lee collected his judgments as Dean in the 1750s and they were published in 1855. Reporting Arches judgments went up a gear in the 19th century – such as those by Jesse Adams, John Haggard, and Thomas Spinks. These were all republished in *The English Reports* (1900-32). There were also ‘digests’ with case summaries, like those by Edwin Maddy in 1835 and Alfred Waddilove in 1849 - and Robert Phillimore collected Arches’ judgments 1867-75. Today, its decisions appear in the *Weekly Law Reports* (e.g.), on the Ecclesiastical Law Association website, and 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 ‘sound principle or authority clearly showing that [it] cannot entertain the case’; so he accepted jurisdiction. But in another, Nicholl refused jurisdiction as to accept would contravene positive law. The 1603 Canons forbade depriving a cleric by anyone other than the bishop - could the Dean too deprive? He said the Court ‘would be extremely unwilling’ to do so - 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...upon the strength of one (blind) precedent’.

Fourth, so many landmark Arches' decisions have developed English ecclesiastical law. Some examples. In 1628 it held that a judge 'cannot compel an executor to produce an inventory and render account before a will has been proved'. In 1753, church courts must apply common law rules to determine whether a custom exists. In 1758, parishioners have a right to be married in the parish church. In 1809, any lay person could administer baptism. In 1830, the incumbent is custodian of the keys of the church. In 1876 it held that punishing the laity 'for the good of their souls would not be in harmony with modern ideas'.

Last century, in 1908, it held that parties 'lawfully married' under civil law cannot be denied Holy Communion even if church teaching forbade their marriage. In 1972, refusing 'to baptize a child is not a doctrinal offence [but one] concerned with pastoral work' – to be disciplined, a minister must make 'a clear and final intention not to baptize'; and a conscientious objection provides no general defence. And in 1992, the Dean, Sir John Owen decided that 'fairness and justice demand that the verdicts against [the cleric] cannot stand' – the trial expenses were regrettable but 'justice is more important than financial considerations'.

Finally, central to Arches' practice is judicial precedent. This has been so for centuries. For instance, in 1756, the Dean relied on 6 earlier decisions of the Arches and Court of Delegates; the next year, he used 5 common law cases and 1 from the Prerogative Court. By the 19th century, the *binding* force of precedent was fully accepted. An Arches' decision bound lower courts in Canterbury Province, as did a decision of the Chancery Court in the York Province. But an Arches' decision did not bind the Chancery Court, nor *vice versa* – it was persuasive, even though the Dean and Auditor were the same person after 1874.

However, in *Re St Nicholas Sevenoaks* (2005) the Dean, held as to Arches and Chancery decisions, because 'all chancellors are judges of each court and the offices of Dean and Auditor are...held by the same person, it is realistic to treat the Arches Court and Chancery Court...as being, for the purposes of the doctrine of precedent, two divisions of a single court'. Accordingly: 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'.

A new rule appears in the 2018 Measure: a decision of the Arches or of the Chancery Court is to be treated by the other Court, and by the lower courts in the province of the other Court, as if it were a decision which the other Court had itself taken. Lower courts are the Vicar-General's court of the province (including under the Clergy Discipline Measure 2003), and the consistory court for a diocese or a disciplinary tribunal. This rule applies to a decision of the Arches or Chancery made before or after the commencement of this rule. It was enacted to combat a 2016 decision of Durham Consistory Court.

In 2019, Leeds Consistory Court pointed out that, as a result, in exhumation cases: 'In dioceses of the Northern Province...it is no longer necessary to consider the test propounded by the Chancery Court...in *Alsager* [1999]...to the extent that such test was revisited and re-framed by the *subsequent* [Arches] decision...in *Re Blagdon* [2002]'. In *Blagdon* the Arches favoured the principle that a faculty to exhume will only be exceptionally granted, because of the norm that Christian burial is final. Chancellor Hill concludes: 'The somewhat sterile question of whether the *Alsager* and *Blagdon* tests might lead to different outcomes is now entirely academic'. In his book *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'.

CONCLUSION

Needless to say, I have given 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 his deputy was the 'dean' – 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 decision of the Arches and Chancery Court is today followed as if a decision of the other Court.

The Arches is a micro-world in which so much English church law has grown. So:

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'.

REPLY BY THE DEAN OF ARCHES (THE RT WORSHIPFUL CHARLES GEORGE QC)
TO THE LECTURE OF PROFESSOR NORMAN DOE

Mindful of Norman's closing reference to Oughton's invocation, I start with a loud Amen.

Personally, I am feeling both buoyed up, and also a bit deflated, as a result of Norman's lecture (and the accompanying Ecclesiastical Law Journal article, to which the Lecture is just an hors d'oeuvre). Buoyed up that, according to Oughton's treatise of 1728, in the seat of justice the Dean should be addressed as *Domine Judex* or more frequently *Domine Decane*. Either will do splendidly for the future! Deflated because whilst Dean Phillimore's Letters Patent as Dean of the Arches recognised his "sound doctrine, good morals, purity of conscience", my own were, probably rightly, considerably less effusive.

First a word of thanks to the organisers of this event, and particularly George Bush and Stephen (soon I hope to be Dr Stephen) Coleman, along with Matthew Power, Mark Hill and the ELS, and to all of you who have attended this evening for what, by any standards, was a splendid lecture on a splendidly arcane topic, ranging from before the reign of Henry II to 1 April 2020 when the recent amendments to the Faculty Jurisdiction Rules will come into force.

The audience includes several who have served as occasional members of the Court of Arches over the past 20 years, and some of them, as well as others here, have appeared as advocates at the court's sadly infrequent sittings. I trust that advocates in the future, will abide by Archbishop Winchelsey's statutes of 1295 and not keep concubines or wander at night, though it is perhaps too much to expect them never to enter taverns or attend public entertainments.

I shall respond to Norman's lecture in a moment. For now, can I just say how much I welcome the renaissance of academic ecclesiastical law which we have seen in the last twenty-five years, very different from the ecclesiastical wilderness of my own student days when Eric Kemp in Oxford and Garth Moore in Cambridge were reviled John the Baptists in an unwelcomingly secular world.

In large part this renaissance is due to the prodigious output of our speaker tonight and to his Cardiff course, which has appealed so widely to clergy and laity. Indeed, it is a remarkable feature of General Synod, of which as Dean I am an ex officio member, that the legal knowledge of clergy members several of whom are Norman's proteges from the Cardiff course tends far to exceed that of representatives of the laity,

As Norman has explained, the court over which I have now presided for ten years has the strongest of links with St Mary-le-Bow.. As an advocate I only twice appeared before this court, both times sitting in this church, on the first occasion in the basement where the café now operates, on the second occasion here in the main church, where I disgraced myself by failing to remember that for the court's luncheon adjournment, I had shed my wig and gown in the chapel of the Holy Sacrament, hence my predecessor's courteous but initially perplexing admonition to me when the court resumed, "Mr George, the court cannot hear you".

During my time as Dean we have sat here in the main body of the church whenever possible, most recently at the end of last year, and I am pleased to say that the acoustic problems which were always a feature in the past have now been resolved.

The best history of the early Court of Arches is that by Donald Logan, professor emeritus of History at Emmanuel College Boston, and well summarised by him in chapter 8 of the admirable *History of St Mary-le-Bow*, first published in 2007 and co-edited by the Rector. Some years ago I had the pleasure of meeting Professor Logan on one of his frequent visits to London, and he delighted in the fact that the court which had played so major a part in his researches over an academic's lifetime was still alive and well, and more particularly still officiating at St Mary le Bow. Mystery surrounds what happened to the court's early records prior to the reign of Edward VI, which were no longer extant at the time the Great Fire destroyed this church in 1666, along with its records from the mid-c.16th. Happily two fragments of the Act Book of Arches, dealing with court sessions for late 1445 and early 1446, were discovered a few years ago by Professor Eckhardt of Pennsylvania State University, used in the late seventeenth or eighteenth century as endleaves, when a medieval English-language chronicle at the university of Gottingen was rebound (apparently the binder's opportunistic choice among available pieces of parchment). Those of you who read the admirable journal of the Pontifical Institute of Mediaeval Studies, will know the article by Professors Logan and Eckhardt in vol 17 (2015), with the text of the court record converted from illegible into readily readable medieval Latin., though sadly absent a translation.

By 1850, when Dickens' *David Copperfield* was published, the Court of Arches was sitting at Doctor's Commons in the building it shared with the Admiralty Court in Knightrider Street near St Paul's, and its proceedings were memorably described by him as "a cosy, dosey, old-fashioned, time-forgotten, sleepy-headed little family party".

Of course as Norman has explained the court's jurisdiction is now only a shadow of what it once was. But its history lives on, since significant reported consistory court and appellate court decisions, which from the late c.19th were reported in the Probate Divorce and Admiralty reports, now find their way into the reports of the Family Division, though this court has not, as Norman explained, exercised a family jurisdiction since 1857. Norman's lecture is primarily concerned with the court's illustrious history, rather than the present. What perhaps is worth drawing attention to is the relative frequency with which the judgments of this court are thought worthy, by today's court reporters, of inclusion in vols 2 or 3 of the WLR, en route to the Family Reports. That series began in 1972, and since then no fewer than 16 decisions of this court have been so reported, 3 in the 1970s, 1 only in each of the 1980s and 1990s, and then 5 in the period 2000-2009, and 6 in the period 2010-2019. Let this mini-boom be celebrated!

The court's fare today is in effect confined to appeals in faculty cases, and also, as Norman has rightly mentioned, appeals from bishops' disciplinary tribunals in CDM cases, when the court sits in an unwieldy five-person formation, including two clergy and two laity. The details of the last reported disciplinary appeal were so salacious that the court retreated south of the river to Southwark for the hearing, and it would be improper to recite them from the pulpit of this august church.

In addition to faculty cases but not specifically mentioned by Norman, the Court of Arches has jurisdiction in appeals in proceedings for an injunction or a restoration order, including most recently the difficult but sad case of Christ Church, Spitalfields, in this very diocese of London, of which Sir Christopher Howes, writing this February in the Sacred Mysteries column in Daily Telegraph, and having cited Dickens' description, said that "In any case the Court of Arches is not sleepy today", which I think was meant as a compliment of sorts.

Section 14(1)(b) of the 2018 Measure also confers jurisdiction in respect of appeals "in proceedings of the kind mentioned in section 7(1) (h)", a category consisting of "any other proceedings which immediately before the passing of EJM 1963 on 31 July, the [consistory] court had power to determine (except proceedings the jurisdiction of which was expressly abolished by that Measure)". Others in this audience more learned the law will know what that mysterious category embraces. Suffice to say that it has never come my way, whether as chancellor or Dean.

Well, Norman, "wow". I believe that is the appropriate first response to your lecture, typical for your inventiveness in identifying the topic, scholarship in developing your themes, and the characteristic panache with which you delivered what might in others' hands have been indigestible gruel to this hungry audience.

In responding I simply highlight four matters:

First, you rightly describe the EJM 1963 as marking a landmark change. I would add another landmark change: Sch 4 para 8 of the CCM 1991, whereby in its civil jurisdiction the Court of Arches became a 3-person court, a change requested by Sir John Owen, and which has added markedly in my view to the respect afforded to this court's judgments.

Second, I cannot let you get away unchallenged with your aside that nowadays the Court of Arches is under the supervisory jurisdiction of the High Court. I appreciate that Sir Edward Coke unearthed "a very Ancient Record of prohibition, In Curia Christianitas coram Decano de Arcubus London" in a case from 1279. But the position is entirely unsettled. Whilst George Newsom was clear that the ecclesiastical courts are "subject to the control of those of the temporal courts which now make orders of judicial review to the extent", this was "only to the extent, that prohibition will issue to an ecclesiastical court which entertains a matter not within its jurisdiction, and perhaps also mandamus to such a court if it refuses to deal with a matter which is within its jurisdiction. But certiorari [that is today's quashing order] can never issue to an ecclesiastical court and the only way in which its errors can be corrected is by appeal").

I accept that In *Cart v Upper Tribunal* (2011) the Supreme Court held that even decisions of the Upper Tribunal were subject to judicial review, notwithstanding the existence of a right of appeal, such as there is also from the Court of Arches to the Privy Council, last exercised in 2015. But if the Court of Arches were subject to judicial review more generally, there would surely be a need for an equivalent of CPR 54.7A(7), with which you will all be familiar, and by which judicial review from the Upper Tribunal is only available where the case raises an important point of principle or practice or there is some other compelling reason to hear it.

Third, there remains an element of uncertainty as to how far the Court of Arches (and its sister court in York) may venture into doctrinal matters, given that s.14(1) of the 2018 Measure excludes an appeal which “to any extent relates to matter involving doctrine, ritual or ceremonial” – as you mentioned, such appeals go to the Court of Ecclesiastical Causes Reserved which has been eagerly awaiting such an appeal since 1987. You referred in a different context to *Blagdon* (2002), an appeal in which I was myself a winger in the Court of Arches, where undoubtedly part of the reasoning related to a matter of doctrine, namely the alleged Anglican doctrine of the one-off nature of burial and the importance of maintaining, save most exceptionally, its permanence. Was the evidence of Bishop Christopher Hill in that case inadmissible? Once the relevance of the issue became clear, should the court have referred the matter to the two three bishops and two senior secular judges of the Court of Ecclesiastical Causes Reserved? In *Sam Tai Chan* reported in [2017] Fam 68, Chancellor Bursell, sitting in the other Province, boldly described the Court of Arches’ “active consideration of the theology of burial” in *Blagdon* as having been ultra vires. and to “raise questions as to the overall authority of that decision”. For like reasons, in our judgment in Spitalfields we declined an invitation to determine a particular issue by reference to the precise nature of a funeral service conducted by the Rector, despite a theological analysis which we set out and described as “intriguing”.

Fourth, I turn to the doctrine of judicial precedent. And here it is important to be clear of the distinction between strict *stare decisis*, and a looser recognition that great weight ought to be given to certain previous decisions in certain circumstances.

The dictum of Sir George Lee which gives the title to your lecture was narrowly confined, namely that the jurisdiction was entirely settled on the particular issue in that case, and not more generally. I want to refer to two areas on which the jurisprudence of this court in relation to precedent remains very far from settled:

First, to what extent is the Ct of Arches bound by decisions of the Court of Ecclesiastical Causes Reserved? In *Duffield* this court escaped the possible strictures of a test of necessity in listed building cases, propounded by the Court of Arches in *St Mary’s, Banbury* (1987), because that test had been expressly rejected by the CECR in *St Stephen’s Walbrook*. (1987). But was it bound to do so?

Second, even more important, and Court of Ecclesiastical Causes Reserved apart, to what extent is the Court of Arches bound by its own previous decisions? And if so, is there a *Young v Bristol Aeroplane* (1944) exception? This goes unmentioned in Norman’s lecture, although Norman described to us the use of precedent as “central to Arches’ practice”, and told us that “by the nineteenth century, the binding force of precedent was fully accepted”. You may recall that in *Duffield* (2013) the Court of Arches departed quite considerably from the approach to listed buildings in *St Luke the Evangelist, Maidstone* (1994) which had endorsed the *Bishopsgate* principles. What we said (para 85) was this:

“Because this court stated in *Maidstone* that it was merely “setting out certain guidelines, emphasising that they are not rules of law”, we are not constrained by the doctrine of judicial

precedent (in so far as, if at all, that doctrine is strictly applicable in this court, a point we do not have to decide: see *In re Lapford (Devon) Parish Council* [1955])”.

In *Lapford* the Dean of Arches, Sir Philip Wilbraham-Baker, declined to hold that he was bound by a previous decision of the Court of Arches. What he said was this:

“Sitting in this court I am perhaps less strictly bound [than the consistory court]. The question of re-opening previous decisions of ecclesiastical courts was discussed in *Read v Bishop of Lincoln* [a Privy Council decision of 1892]; but although some latitude may be allowable it would need strong reason to justify me in departing from Sir Lewis Dibdin’s decision in the *Capel St Mary* case.”

Read v Bishop of Lincoln (to which the Dean was referring) is instructive as showing that the Privy Council is not strictly bound by its previous ecclesiastical decisions. As Lord Halsbury LC said at 655:

“whilst fully sensible of the weight to be attached to such [previous] decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest and to give effect to their own view of the matter” (something quite different from a strict doctrine of *stare decisis*).

But Norman in his *The Legal Framework of the Church of England* (1996) is clear that “The Arches Ct is bound by its own previous decisions”. In *Sam Tai Chan* (2017) Chancellor Bursell endorsed this view, but made no mention of *Lapford*, notwithstanding, I may playfully add, that he had himself been a member of this court in *Duffield*!

Careful readers of s.7 of the Church of England (Miscellaneous Provisions) Measure 2018 to which Norman referred in his lecture will have noticed the absence of any reference to precedent, binding or otherwise. That oversight was deliberate.

The various matters I have mentioned suggest to me that quite plainly today, whatever may have been the case in times past on one particular matter in the mid-eighteenth century, the jurisdiction and jurisprudence of this court is not finally settled!

Norman, very many thanks, and I would invite you all to join me in a further round of applause.