THE FALL AND RISE OF DOCTORS' COMMONS?

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1. INTRODUCTION

The historic new LLM degree in Canon Law from the University of Wales College of Cardiff means that there now exists a body of Canon Law graduates, the first 'home-grown' canonists in this country since the King's Vicar-General, Thomas Cromwell, suppressed the faculties of Canon Law at Cambridge and Oxford in 1535. It was for a gathering of the first such graduates that the original version of this paper was prepared.[1]

2. THE ORIGINS OF DOCTORS COMMONS

The institution which we know as 'Doctors' Commons' may have had links with, or modelled itself on, an older college of priests known as Jesus Commons which existed near St Paul's Cathedral in the 15th Century, but the society itself probably came into existence shortly before 1494[2] and the name 'Doctors' Commons' was in use by 1532.[3] Doctors' Commons was originally a voluntary society, similar to the Inns of Court, where those who practised in the Ecclesiastical and Civil Law courts in London could live, eat and practise together. Unlike the Inns, however, Doctors' Commons was not a teaching institution and did not award degrees. This was unnecessary, as, unlike the common law, both civil and canon law were university subjects.

It is useful to point out that there is a clear distinction (which at this early stage appears more clearly) between members of the two legal professions involved (the Proctors and the Advocates) and members of Doctors' Commons. The two are closely related, and therefore often confused.

Unlike the Inns, Doctors' Commons did not control entry to either of the legal professions concerned. The society came about because of a need felt by those members of those professions practising principally in the provincial courts of Canterbury and those of the Diocese of London (as well as the Civil Law courts) which were all located near St. Paul's Cathedral in London. As a result, it probably never contained all the members of either profession, small though they were. Indeed, the Proctors (of which there were only ever a handful) disappeared from Doctors' Commons completely over the first century or so, and for most of its history Doctors' Commons remained irrelevant to those Advocates practising in the much smaller provincial courts of York.

On the other hand, in common with the Inns of Court, Doctors' Commons at times opened its doors to members other than those practising in the courts, and a cross section of the membership at an early date illustrates this. In 1511 Doctors' Commons consisted of: 60 Doctors of Law (presumably most, if not all, of whom were also Advocates), 10 Proctors (3 of whom were Bachelors of Law), 5 Bishops (4 of whom were Diocesans), 11 Heads of Religious Houses, 7

[1] I wish to express my thanks to all those who made helpful comments on earlier drafts of this paper, especially Professor J. H. Baker and the present President of Doctors' Commons, Sir John Owen. Any remaining mistakes are my own.

[2] G. D. Squibb, Q.C., *Doctors' Commons: A History of the College of Advocates and Doctors of Law* (Clarendon Press, Oxford, 1977) (hereafter 'Squibb'), p. 7.

[3] Squibb, p. 56.

Doctors of Theology, 2 Bachelors of Theology, 2 Bachelors of Law (not being Proctors), 2 Papal Collectors, 1 Priest, 1 Doctor of Medicine and 9 unclassified, giving a total membership of 113, of which only 70 (about 62%) were members of either of the legal professions.[4]

3. ADVOCATES AND PROCTORS

As Doctors' Commons was closely related to the Proctors and Advocates, I shall briefly outline how formal admission to these professions worked. Most of the Ecclesiastical and Civil Law courts came to recognise as a qualification for admission as a Proctor or Advocate in that court the prior admission as a Proctor or Advocate in the Court of Arches,[5] and most courts in the Province of Canterbury seem to have considered such admission to include admission in the lower courts of the Province.[6] However, rights of audience and of appearance in these courts remained a matter for the regulation of the court concerned, and courts followed their own customs, some (particularly those in the Province of York) admitting those who had not been admitted in the Court of Arches. Some diocesan courts also gave rights of audience as well as appearance to Proctors (usually because there were no Advocates around).

For admission to the Court of Arches[7] as an Advocate, the candidate petitions the Archbishop of Canterbury praying to be admitted and, if the petition is successful, the Archbishop issues his fiat to his Vicar-General who thereupon prepares a rescript addressed to the Dean of the Arches empowering and requiring him to admit the candidate as an Advocate of the Court.[8] The candidate is then usually admitted at the next session of the Arches Court.[9] Whilst it was a normal requirement that the candidate be a Doctor of Civil or Canon Law, this was not always the case, for instance, Richard Zouche was admitted as an Advocate in 1618 whilst only a Bachelor of Law.[10]

The admission of Proctors, or more properly Procurators-General in the Court of Arches is regulated by statute made by the Archbishop of Canterbury. The current statute was made on 30th June 1696,[11] and states that admission is dependant on serving seven years as an articled clerk to one of the 34 senior Proctors (as opposed to the other Proctors, who were called 'supernumeraries'). The articling of clerks or the admission of Proctors is done before the Judge of the Court of Arches or his surrogate, and registered in that Court.[12]

4. INCORPORATION OF DOCTORS' COMMONS

In 1768, as a result of considerable problems they had encountered in renewing the lease of their buildings through trustees, the society petitioned the Crown for

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[4] *ibid.*, p. 18.

[5] That is, the Metropolitan Court for the Province of Canterbury, as opposed to the original Court of Arches which dealt with the Archbishop of Canterbury's Peculiar Parishes in the City of London.

[6] I.e. they did not require separate admission, see Parliamentary Papers 1844 (282). Other courts did (e.g. The High Court of Chivalry) although this was automatic after admission in the Court of Arches.

[7] Admission as an Advocate in the Consistory Court of York followed a similar pattern, and was considered to include admission into all of the Archbishop of York's courts: Parliamentary Papers 1844 (282).

[8] See *R. v. The Archbishop of Canterbury* (1807) 8 East 212 for a fuller description of the normal practice of admission (case of a deacon refused admittance because he was in Holy Orders, as was the practice at that time). Examples of petitions and fiats, and the resulting rescripts or commissions covering *c.*1690–1855 can be seen in Lambeth Palace Library (LPL) class Kkk 1–12, 14 & 17.

[9] Parliamentary Papers 1844 (282).

[10] Squibb, p. 31. This did not stop him rising to become President by 1660, *ibid.* p. 117. Similarly, degrees from any University in the world were recognised, e.g. Julius Caesar was admitted as Advocate in 1586 with a DCL from Paris without incorporating at Oxford or Cambridge: *ibid.* p. 31.

[11] The statute, which is in latin, is reproduced in Parliamentary Papers 1826–1827 (439).

[12] Parliamentary Papers 1844 (327). For petitions, rescripts and testimonials, see LPL class Kkk.

a Charter of Incorporation. The Royal Charter was granted by George the Third on 22nd June 1768 incorporating the society as 'The College of Doctors of Law, exercent in the Ecclesiastical and Admiralty Courts'[13]. The Charter provided for a President (the Dean of the Arches[14] for the time being) and other fellows who had regularly taken the degree of doctor of law at Oxford or Cambridge,[15] had been admitted as Advocates in pursuance of the rescript of the Archbishop of Canterbury and were elected by a majority of those fellows present at a meeting which in turn consisted of a majority of the fellows of the College. There is no express objects clause in the body of the Charter, but the implied objects of the Charter can be gleaned from the recitals:

> 'WHEREAS . . . [the petitioners] have devoted themelves to the study of the civil and canon law . . . and that the petitioners have, for centuries past, been formed into a voluntary society, and lived together in one place, by means of which the business of the publick has been more commodiously carried on . . .'

and then, just before the operative words of the Charter:

> 'We having taken the said petition into our royal consideration, and being willing to give all fitting encouragement to the said study, KNOW YE therefore . . .'

5. THE FALL OF DOCTORS' COMMONS

On 25th August 1857, the Court of Probate Act[16] received Royal Assent, creating a new Court of Probate open, in contentious matters, to serjeants and barristers (s.40). By s.41, Advocates admitted in *any* of the ecclesiastical courts were given rights of audience in any Court in England, and eligibility for appointments as if they had been called to the Bar on the days on which they had been admitted as Advocates.[17] Provision was made to enable Proctors to enrol as Proctors in the Court of Probate, and as Solicitors of the Court of Chancery (ss. 42 & 43).

Section 116 gave the College the power to dispose of its assets as it saw fit, including sharing out the proceeds between the members, and s.117 empowered the College to surrender its Charter to the Crown, whereby the Corporation would be dissolved, and any residual property would belong to the members in equal shares as tenants in common for their own use and benefit.

On 28th August 1857, the Matrimonial Causes Act[18] received Royal Assent, setting up the Court of Divorce and Matrimonial Causes, and providing by s.15 that all Advocates, Proctors, Barristers, Attorneys and Solicitors could practise therein.

In 1858, s.2 of the Court of Probate Act[19] removed the Advocates' monopoly of non-contentious business in that Court, and an Act of 1859[20] allowed Serjeants, Barristers, Attorneys and Solicitors to practise in the High Court of Admiralty.

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[13] The text of the Charter is given in full in Squibb, Appendix V, pp. 210–214.

[14] That is, strictly speaking, the Official Principal of the Arches Court of Canterbury.

[15] Thus enshrining in the Charter what had been the practice of the College for nearly a hundred years. The President was the only member who was not required to possess such qualifications, as he was a fellow *ex-officio* and was therefore never 'a candidate for admission as a fellow . . .' to which the strict qualifications applied: see the Charter, *loc. cit.* p. 213.

[16] 20 & 21 Vict. cap. 77.

[17] Although in the early nineteenth century, many advocates had started to become members of the Bar as well: Sir Herbert Jenner-Fust, (President 1834–52) had been called to the Bar at Lincoln's Inn in 1800 (three years before admission as an advocate) and every subsequent Dean of the Arches has been a Barrister.

[18] 20 & 21 Vict. cap. 85.

[19] 21 & 22 Vict. cap. 95.

[20] 22 & 23 Vict. cap. 6.

The Professions had seen their monopolies effectively ended, and those who were members of the College had been effectively 'bought off' by ss. 116 & 117 of the Court of Probate Act.[21] But the College did not go quietly, as two members at least disagreed with the dissolution of the College: Dr. John Lee and the College's newest fellow, Dr. Thomas Tristram.

On 13th January 1858 notice was given of a meeting to be held two days later, at which motion would be made for surrendering the Charter and the disposition of the College's property for the common benefit of its members. Dr. Lee wrote immediately to Dr. Waddilove, the College Treasurer, and extracts from his letter are given here:

> 'My dear Sir,
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> I have received from you this morning the notice of a motion to be brought forward to-morrow at a meeting of the members of the College of Advocates, and I take leave to make the following remarks upon its contents:
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> 1. I do not admit the truth of the first statement of the notice, namely, 'that the position of the society is so essentially altered that it is no longer desirable that the society should continue to remain a corporate body.' On the contrary, I consider that by judicious measures the College of Advocates may be preserved and handed down to a race of successors for as many years as it has by the prudence and wisdom of our predecessors already existed.'[22]

Having stated his opposition to the rest of the notice, and stating what he would have agreed to, Dr. Lee continued:

> 'But to the four objects contained in the notice which I have now received, I protest, as I consider myself to be merely a trustee for life to the corporation, and I feel myself at liberty to oppose them by any fair, legal, social, or moral measures of a public or private character which may occur to me.'[23]

The motion was withdrawn at the meeting, but it was agreed to put in hand arrangements to have the College's property transferred to the members of the College. Such arrangements were put in hand, despite Dr Lee's best efforts. However, Dr Lee proved as good as his word. Supported by Dr Tristram, he appealed to the Visitors of the College, presenting them with a lengthy memorial in which every conceivable legal or moral argument against the dissolution of the College was set out. Lee believed that the power of dissolution had been given to the members of the College, not for their personal benefit, but to enable the College:

> '. . . to dissolve its present body, and to reorganise itself upon a new foundation, so as to preserve as nearly as might be the original objects of the Charter, though with liberty to adopt such modifications and re-arrangement as the altered circumstances of the case might require; and as evidence thereof, your memorialist shows that public opinion has for some years past promoted the idea of importing into our national seminaries of law a foundation available for all graduates in law, from any university or college having a power to confer degrees in jurisprudence within the United Kingdom; and when it is considered how largely the Roman civil law is blended with our system of common law, and how desirable it is still to cultivate the study of such principles, your memorialist would urge that the destruction of the said college would induce a serious inconvenience, by withdrawing qualified professors from the litigation of the courts, and thereby deprive graduates in the several Universities of an hon-

[21] An entry fee of £20 brought the members about £4000 as proceeds of the sale.
[22] Approximately 364 years!
[23] Parliamentary Papers 1859 Sess.1 (16), pp. 9–10.

> ourable means of distinction; and who, without such inducement, would entirely neglect the study of the Roman system.
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> Your memorialist also shows that the necessity of cultivating the study of the Roman, canon, and international law still exists, and while the Ecclesiastical Courts remain the fitting tribunals for suits relating to ecclesiastical matters, the Roman civil law must continue to form part of legal education.
>
> Your memorialist also shows that the wants of the age point to the necessity of a collegiate institution for furnishing the means of education in those branches of jurisprudence, which are the sources and contain the principles of maritime and international law.'[24]

The Visitors declined to exercise jurisdiction, and so Dr Lee applied to the Court of Queen's Bench for a writ of mandamus to compel them to do so. He also petitioned the House of Commons on the matter. Both of these attempts proved fruitless, and, having spent in excess of £425 of his own money opposing the dissolution, Dr Lee had seemingly failed. The assets of the College were sold and the proceeds distributed amongst the members. From our point of view, perhaps the greatest loss was the dispersal of the College's library—a collection of books on civil and canon law unrivalled in the English-speaking world. The last meeting of the College took place on 10th July 1865, at which meeting the power given by s.117 of the Court of Probate Act 1857 to surrender the Charter to the Crown could have been exercised, but it was not.[25]

George Squibb, in his book on Doctors' Commons, ends the story on 8th March 1912, on the death of Dr Tristram, (as Squibb has it, the sole surviving member) thereby bringing the legal existence of the College to an end.

It is with hesitation that I disagree with an authority on these matters such as Squibb, but having read the Charter and the case which Squibb cites as authority for his proposition, I find myself convinced that Doctors' Commons did not dissolve in 1912, but remains in existence to this day.

Squibb states that, before his death, Dr Tristram was the sole survivor of the College.[26] He was certainly the last living elected fellow of the College, but the Charter provided that one of the fellows, namely the President, was to be The Dean of the Arches for the time being. Therefore when Lord Penzance succeeded Sir Robert Phillimore as Dean of the Arches on 10th October 1875, the charter makes it quite clear that he automatically became a member,[27] and the *ex-officio* President, of the College.[28] The same is true of Sir Arthur Charles in 1899, and Sir Lewis Tonna Dibdin in 1903. Dibdin remained in office for over twenty years after Tristram died. Tristram's death therefore reduced the membership of the College to one: the holder of the office of Dean of the Arches for the time being.

It is now necessary to look at the law relating to the dissolution of corporations. This is a rather confused area of law, consisting largely of old cases concerning (usually complex) municipal corporations. Some principles can, however, be

[24] Dr Lee's Memorial to the Visitors, reproduced in Parliamentary Papers 1859 Sess.1 (16), pp. 13–14.

[25] It seems that even at this stage not everyone felt this was the end. Minutes of the College's penultimate meeting record a resolution that the Register of Doctors' Commons 'be presented to the Lambeth Registry'. At the next meeting, this was subtly corrected to 'be deposited for safe custody with the Lambeth Registry': Minute Book, LPL DC2.

[26] Squibb, p. 108.

[27] Just to confuse things, the members of the College are called 'fellows' in the Charter.

[28] Squibb makes this mistake on p. 117 when he describes Phillimore as 'The last member of the College to hold the offices of Official Principal and Dean of the Arches.' See the Charter: '. . . And that the said college shall consist of a PRESIDENT; namely, the Dean of the Arches for the time being, *and* of such Doctors of Law of either of the Universities of Oxford or Cambridge, who have been admitted advocates in pursuance of the rescript of the Archbishop of Canterbury, and who have been elected fellows of the said college in the manner hereafter mentioned; . . .' (my italics).

drawn out. Principally, there appear to be three positive acts by which a chartered corporation may be dissolved, namely: surrender of the charter to the Crown,[29] forfeiture of the charter for misuse or abuse of its powers and privileges,[30] or by revocation by Act of Parliament or the acceptance of an inconsistent subsequent charter.[31] The College was not dissolved in any of these ways.

Are there then any ways in which a dissolution can occur without a positive act? Texts talk variously of dissolution due to a lack of numbers, but often when they use the phrase 'dissolution' they mean something less than true dissolution.[32] First of all, the effect of an insufficiency of numbers in a corporation to do what is necessary for the carrying out of the objects for which it was created does not dissolve, but merely suspends the corporation.[33] The authority cited for Squibb's proposition is the case of *R.* v. *Hughes*[34] which concerned a much larger corporation than the College: that of the borough of Stafford. Stafford was a corporation which had several definite bodies within the corporation (mayor, aldermen and capital burgesses, as well as burgesses). Lord Tenterden C.J. in his judgment stated that if these definite bodies became so much reduced in numbers, that they were no longer capable of performing any corporate acts, then the government of the borough was dissolved and gone, but without *quo warranto* proceedings by the Crown, the corporation would continue in existence until the natural death of all its members.[35]

Doctors' Commons, unlike Stafford, consisted of only one body of persons, the fellows of the College.[36] The College therefore consists of only one integral part. Because of this, the death of Tristram, although reducing the membership to one, did not dissolve the College. Moreover, because, unlike Stafford, the provisions for the government of the College are extremely simple (decisions being taken by all the fellows) the situation cannot be reached that the College is incapable of performing any corporate acts as long as it has at least one fellow.

The College therefore survived the death of Tristram, and continued in existence until at least 1934 with Sir Lewis Dibdin as its sole member: fellow and President. What then happened to the corporation when Dibdin resigned as Dean of the Arches?[37] Most of the texts state in some form the rule that a corporation will dissolve, *without any positive act*, on the natural death of all its members, and indeed, that principle was enunciated, *obiter*, by Lord Tenterden CJ in the Stafford case (see above).

It is necessary to look at this rule more closely. As Willcock points out, no court has ever ruled that a corporation has been dissolved in that way,[38] but this fact is also a clue in itself to the rule's purpose and effect. To my mind the rule becomes obvious when explained in Grant, where he says: 'Nor is any legal proceeding

[29] Halsbury, Vol. 9, para. 1390; Grant, *Law of Corporations*, (Butterworths, 1850) 46.

[30] Halsbury, Vol. 9, para. 1391; *Eastern Archipelago Co.* v. *R.* (1853) 2 E & B 856 at 869, Ex Ch, *per* Martin B.

[31] Halsbury, Vol. 9, para. 1393; Grant, *Law of Corporations*, 10.

[32] See Wilcock, *The Law of Municipal Corporations*, (London 1827) 852 (p. 325): 'The frequent use of the word Dissolution in law books is no ground for argument; for at different times it has been held in all instances to which the expression has been applied, that the body was not *ipso facto* dissolved; . . .' See also Grant.

[33] *Colchester Corporation* v. *Brooke* (1846) 7 QB 339; *Colchester Corporation* v. *Seaber* (1766) 3 Burr 1866.

[34] (1828) 7 B & C 708.

[35] *R.* v. *Hughes* (1828) 7 B & C 708, at p. 717.

[36] That the President is one of the fellows is shown clearly in the Charter when the fellows other than the President are nominated, finishing thus: '. . . to be, together with the said President, the first and modern members or fellows of the said college . . .'

[37] 1 May 1934, LPL Lang papers. Dibdin did not die until 1938.

[38] *The Law of Municipal Corporations*, 852 (p. 325) 'When the question has been closely pressed on the Court, they have avoided it, by finding that in the particular cases urged, the Corporation was in a state of suspension . . .' and *R.* v. *Hughes* is an excellent example of that.

necessary to ascertain the fact, or to effect the complete annihilation of the body politic. Indeed, any such proceeding would be both useless and absurd; for it is obvious that there is nothing in existence upon which any proceeding could operate . . .'[39] This rule, then, is no more than a statement of the obvious. In the circumstances of many of the old municipal corporations, such as Stafford, where the mechanisms in the original charter have failed to supply new members and are now incapable of doing so, the corporation still exists to be dissolved or revived by a positive act until such time as every member, as well as the mechanisms have gone. Only at that stage is there nothing left.

Such is not, in my view, the case with the College. At least one of the members of the College (and of its one and only 'integral part') is supplied by a mechanism which is entirely external to the College. The College's position is closer to that of a corporation sole (which will always have an external mechanism for supplying membership). During the vacancy of the office of Dean of the Arches, therefore, the government of the College would have been merely suspended awaiting the appointment of a successor to that office contained within the College, in the same way as must necessarily be the case in any corporation sole. The crux of the matter is that all the time the College needs nothing supplying for its government by way of a new charter, its government is not dissolved, but as that mechanism and possibility for supplying the *ex-officio* member still exists, there continues to be an entity upon which *quo warranto* proceedings could act. The College is not therefore dissolved without such proceedings, and so continues into existence to this day.

Much of my conclusion relies on an interpretation of the Charter, and the Charter itself provides that it:

> '. . . shall be taken, construed and adjudged in the most favourable and beneficial sense for the best advantage of the said corporation, as well in all our courts of record as elsewhere, by all and singular judges, justices, officers, ministers, and subjects whatsoever, of us, our heirs and successors, any nonrecital, misrecital, or any other omission, imperfection, defect, matter, cause or thing whatsoever to the contrary thereof in any wise notwithstanding.'

If there remains doubt as to the interpretation of the Charter, the College is provided with Visitors, being the Archbishop of Canterbury, the Lord Chancellor, the Lord Privy Seal, and the two principal Secretaries of State, with power for three or more of them to act.

6. THE RISE OF DOCTORS' COMMONS?

Is it possible, then, that the old Doctors' Commons could once again serve a useful purpose as a body of lawyers who have 'devoted themselves to the study of the civil and canon law'? My answer would be in the affirmative, but there are some practical problems.

The first, and most obvious problem, is the current shortage of candidates to be elected as fellows of the College: none in fact. The first task must therefore be to revive the practice of admission of Advocates in the Court of Arches, and to ensure that there are some holders of the Degrees of LLD (Cantab:) and DCL (Oxon:)[40] in that number, who could subsequently be elected fellows.[41]

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[39] *Law of Corporations*, 303.

[40] The use of these initials is relatively modern. The register of Doctors' Commons (1511–1855) LPL: DC1 makes no distinction between universities. The initials used for the various law doctorates are: *d.d.* or *dec.d.* (*decretorum doctor*—Doctor of Canon Law); *ll.d.* (*legii doctor*—Doctor of Laws) and *u.j.d.* (*utriusque juris doctor*—Doctor of both Laws).

[41] This nearly happened in the 1984, when Professor David McClean DCL successfully petitioned the Archbishop for admission as an Advocate. The admission, however, did not take place.

But what about the rest of the canon lawyers? With the current Charter, they are not eligible for election as fellows unless they hold either of the above degrees. However, the Charter gives the fellows full power to make statutes and bye-laws, and there is no reason why this power should not be used, as it is in many other chartered corporations, to create a second class of membership of non-corporators. In keeping with the historical membership of Doctors' Commons, this class of member could be drawn largely from those practitioners admitted as Advocates or Proctors in the Arches or other Courts, plus perhaps one or two other types of member.

Is it possible that an already historic new body of graduates might revive an ancient legal profession and revitalise what was once considered to be a College of the 'Third University of England'? Is it possible that another generation might see Doctor's Scarlet in the Ecclesiastical Courts (together, of course, with the new hood from Cardiff)? And is it possible that Dr Lee's £425 was, after all a good investment because it saved Doctors' Commons from dissolution and provided the basis for the reformed College of Canon and Civil Law of which he spoke? Let's hope so!

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