

Famous English Canon Lawyers: VI
 FRANCIS CLARKE, B.C.L. (fl. 1590)
 and
 THOMAS OUGHTON (fl. 1720)
 Proctors of the Court of Arches

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It would surely give no great offence to the departed doctors of the Arches if a series devoted to famous Canon lawyers were to include a passing tribute to a few members of the lower branch of the profession, the proctors. It is true that they have not received as much public recognition as their precursors in the series; of the two we have selected, Clarke earned but a few anonymous lines in the *Dictionary of National Biography*, Oughton none at all.¹ Even their dates of death have eluded discovery. Yet among ecclesiastical lawyers they have a lasting place of honour as the principal writers on the procedure of the Church courts in England in its traditional form. As Clarke pointed out in the preface to his book, addressed to the law students at Oxford and Cambridge, the university law faculties were wont to teach the substance but to overlook the practice. Law graduates intending to earn a living from their subject therefore had to start virtually from the beginning. No doubt the age-old method of acquiring a mastery of the procedural forms, as in the common-law courts, was to serve as clerk in an office and copy out precedents. There are plenty of surviving collections of precedents of forms used in ecclesiastical litigation and administration to bear witness to this method of information. Yet until the end of the sixteenth century there were no written guides to procedure. There is some evidence that Dr John Hammond (d. 1589) prepared an outline guide, called a *Brief for judiciary practice*,² but this does not seem to have circulated widely or to have been very substantial. It is hardly surprising, therefore, that when Francis Clarke produced his full-length treatise in the 1590s it soon gained a wide circulation, albeit in manuscript.

Francis Clarke (or Clerke) remains an obscure personage, despite recent efforts to find out more about him.³ He may have been related to Bartholomew Clerke (d. 1590), Dean of Arches, but this is no more than a guess.⁴

1. Oughton did, however, achieve a brief entry (by Professor Stein) in the *Biographical Dictionary of the Common Law*, ed. A. W. B. Simpson (1984), p. 394, from which Clarke was excluded.
2. There are two late copies in Cambridge Univ. Archives: MS. Collect. Admin. 30(2) (prefaced to a copy of Clarke); MS. Collect. Admin. 35(2). Dr Hammond was admitted as an advocate in the Court of Arches in 1569; G. D. Squibb, *Doctors' Commons* (1977), 157. For some similar but anonymous tracts, see R. H. Helmholtz, *Roman Canon Law in Reformation England* (1990), pp. 131-133.
3. The principal study is by Professor J. D. M. Derrett, 'The Works of Francis Clerke, Proctor', 40 *Studia et Documenta Historiae et Iuris* (Rome, 1974), pp. 52-66. Most of the information given here is derived from Professor Derrett's helpful paper.
4. Professor Derrett conjectures that they were brothers. But Francis would have to have been an elder brother, which would have been odd. Dr Clerke's father was a Somerset notary. There were two advocates called Clerke at this period, both Cambridge doctors of law.

Without attending university, or at any rate without staying to take a degree, he went straight into practice in the 1550s and was admitted a proctor of the Arches in 1564. He acted for the University of Oxford, and in 1594 received from that university the degree of Bachelor of Civil Law by special grace. In his supplication for the degree, Clarke stated that he wished to adorn his name on the title-page of a book which he had just written. This is evidently the treatise on practice in the ecclesiastical courts, although in most versions (including that printed in 1666) the preface is dated 1596. The treatise begins with a discussion of judges and jurisdictions; it then deals with process (citations and excommunication), pleading (from *libel* to *litiscontestatio*), proofs, and sentence; then with summary causes and appeals; and finally with specific subjects such as marriage, divorce, tithes, defamation, patronage, dilapidations, and wills (including inventories and accounts). Clarke wrote a companion treatise on the practice of the Court of Admiralty, in which he also worked as a proctor, and this (for want of any serious competitor) enjoyed an even longer life than its ecclesiastical counterpart.⁵

It is evident from the preface, as well as from the Oxford supplicat, that Clarke intended the work to be published for the use of students. What is not known is whether he sought to have it printed. It was not, in fact, printed in his lifetime, but it was effectively published in manuscript. Books of the common law were widely circulated in manuscript at this time, and since the users of Clarke would not have been numerous it may have been felt that printing was too uncertain a venture. On the other hand, copying may have been thought to possess some educational value.

Whatever the original plan, manuscripts of the book on the Church courts were made in large numbers. Over fifty survive, many of them in diocesan registries,⁶ and they bear a number of differing titles. The commonest is *De curiis ecclesiasticis quae celebrantur auctoritate reverendi patris Cantuariensis archiepiscopi infra civitatem Londoniensem*,⁷ but we also find, for instance, *Praxis causarum Curiae de Arcubus*,⁸ *Practica celeberrima ac quotidiana observata et usitata in curiis reverendissimi Cantuariensis archiepiscopi*,⁹ or the more generalised *Practica clericorum seu adolescentium ad scienciam via de causis et curiis ecclesiasticis*,¹⁰ and *Procuratorium ad modum postulandi in causis et curiis ecclesiasticis*.¹¹ There are some signs of successive recensions in the manuscripts, most notably in the list of judges and officials in tit. 2, which was updated several times down to the mid-1620s, but also in a number of additions and emendations. Copies were still being taken in the 1660s.¹² Some manuscripts have marginal references to authorities, including contemporary works by continental authors, and it may be that these were added by successive owners.¹³ Through constant copying, however, many of the texts became quite corrupt.

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5. *Praxis Curiae Admiralitatis Angliae* (1st ed. 1667). Reprinted in 1679, 1722, 1743, 1829. An English translation by J. E. Hall was included in his *Law and practice of the Admiralty* (Baltimore 1809).
 6. Helmholtz adds over 30 MSS. to Derrett's list: *Roman Canon Law in Reformation England*, pp. 128-129, 196-197.
 7. Cambridge Univ. Lib. MS. Dd.2.31; MS. Hh.3.12; MS. Mm.4.30; MS. Add. 4469; Cambridge Univ. Archives MSS. Collect. Admin. 30(6), 31 and 32; Harvard Law School MS. 1050, 1214.
 8. Catholic University of America MS. 180.
 9. H. E. Huntington Library, San Marino, California, MS. HM 35072.
 10. Harvard Law School MS. 1037.
 11. Cambridge Univ. Lib. MS. Add. 4469, fo. iv (separate title-page).
 12. E.g. Harvard Law School MS. 1037 (copy dated 1666).
 13. See Helmholtz, *Roman Canon Law in Reformation England*, pp. 129-131.

It was, alas, a corrupt text which was put into print. The edition appeared in 1666, in Dublin, under the editorship of Thomas Bladen D.D. (d. 1686), Dean of Ardfert. The title of this edition is: *Praxis Francisci Clarke, Tam jus dicentibus quam aliis omnibus qui in Foro Ecclesiastico versantur apprimè utilis*.¹⁴ The editor was not a lawyer, and he seems to have taken little trouble to make sense of the text by comparing manuscripts or correcting obvious blunders. No scholarly apparatus was included. The edition was dedicated to James Margetson, Archbishop of Armagh, Primate of all Ireland, and Michael Boyle, Archbishop of Dublin, Primate and Lord Chancellor of Ireland, but the editor's purpose in producing it is not apparent. It was reprinted in 1684 in London, but, although the title-page claimed that it had been much corrected, this was essentially the same corrupt text. No further printing was undertaken, and no modern scholar has accepted Professor Derrett's challenge to produce a satisfactory edition. The reason for the eclipse of Clarke was twofold: it was overtaken firstly by a more accessible work for beginners, and then by a far superior work for practitioners.

The book for beginners was Henry Consett's *The Practice of the Spiritual or Ecclesiastical Courts* (1685), to which was added (pp. 401-408) 'A brief discourse of the structure and manner of forming the declaration'. This guide was written in English and, without being a word by word translation, it was heavily based on Clarke and in many places exactly the same. Indeed, Consett acknowledged in his preface his own 'small experience . . . in these concerns', and hoped the reader would not 'quarrel that I use Mr. Clarke's words'. Here, then, was something approaching a vernacular edition of Clarke, with some references added; and it proved sufficiently useful for it to be reprinted three times (in 1685, 1700 and 1708). Nothing is known of Consett, who would seem from the tone of his preface not to have been a practitioner.¹⁵

The next advance was made by another proctor, Thomas Oughton. Oughton is as obscure personally as Clarke, though Professor Stein has made the persuasive suggestion that he was the son of another Thomas Oughton, registrar of the Court of Delegates. The younger Oughton was a deputy registrar of the same court until about 1720, but remained on the list of proctors until his death around 1740.¹⁶ In 1713, Oughton completed a manuscript entitled *Processus judiciarius*, which he handed over to a printer, but the entire stock was destroyed by fire.¹⁷ With an enviable display of determination and self-composure, he set about to rewrite the book, a task which occupied a further fifteen years. It finally appeared in 1728, in two volumes, as *Ordo Judiciorum; sive, Methodus procedendi in Negotiis et Litibus in Foro Ecclesiastico-Civili Britannico et Hibernico*.¹⁸ It was reprinted in 1738. According to Oughton, he took his new title from a book by a sixteenth-century Italian procedural writer, Roberto Maranta.¹⁹

14. The printer was Nathaniel Thompson, for the bookseller John Leach of Castle Street.

15. Cf. W. S. Holdsworth, *History of English Law*, vol. XII (1938), p. 617, who points out that Consett dates the preface from York and suggests that he practised in the northern province. Consett does not appear to have been a university graduate.

16. *Biographical Dictionary of the Common Law*, ed. A. W. B. Simpson (1984), p. 394; lists of proctors in Chamberlayne's *Ancient State*.

17. Preface to the 1728 ed. The date (1713) is not given, but may be precisely calculated from the list of judges who subscribed.

18. The printer was J. Hooke at the sign of the Golden Rainbow ('ad Insignem Auratae-Iridis') in Fleet Street.

19. *De ordine judiciorum* (Venosa, 1570). Maranta died in 1530 or 1540.

Oughton's work, having been seen through the press by its author, is a far more elegant and accurate account of the subject than the garbled remains of Clarke. Dedicated to the judges and advocates of Doctors' Commons, it begins with a detailed account of the Civilian profession and its customs, including the various processions in which the advocates and proctors take part with the Dean of Arches. Oughton informs us that doctors wear scarlet in the Court of Arches;²⁰ but whereas the Oxford advocates wear their festal robes, the Cambridge advocates use the more formal congregation habit furred with miniver. The doctors take precedence of all barristers, but not of serjeants at law;²¹ the King's Advocate precedes even the Attorney-General. The author then describes the procedure of the Church courts, following a similar scheme to Clarke. Although we are now in Georgian England, over 150 years since Clarke was admitted as a proctor, we seem to be in a remarkable time-warp. The proceedings in the Church courts might still have been perfectly comprehensible to a visitor from Rome or Salamanca, or to the ghost of Lyndwode, but were probably quite incomprehensible to a country clergyman, let alone a warring couple or a harassed executor. Not only the written documents²² but the oral proceedings are still in Latin and highly ritualistic. Oughton's account of the procedure for swearing witnesses to their depositions furnishes a taste of the atmosphere,²³ for which perhaps the only parallel in modern England is in some of the formalities of the ancient universities. When the witnesses appear, the plaintiff's proctor says: *Produco hos in testes super libello, quos peto recipi et juramento onerari de fideliter deponendo omnem veritatem quam noverint super eodem libello*. If no objection is taken by the other side, the judge responds: *Admittimus hos testes*. They then place their hands on the Book, and the judge gives them the oath: *Jurabitis, et quilibet vestrum jurabit, quod tempore vestrae in hac parte examinationis testificabimini et deponetis, ac quilibet vestrum testificabitur et deponet, omnem et omnimodem veritatem quam noveritis sive noveris; omnibus amore, favore et affectione, necnon omnibus inimicitia, malicia et odio, quae geritis vel gerit quilibet in hac parte litigantibus seu eorum alteri, ac etiam corruptionem generibus quibuscunque penitus semotis; sicut vos et quemlibet vestrum Deus adjuvet et sancta ejus evangelia*. The witnesses then kiss the Book, to indicate that they accept the oath. Their testimony has previously been taken down in Latin, a language which (as Clarke had remarked in the 1590s) few witnesses understand.²⁴ This outlandish legal world was a far cry from the common-law assizes, where the presence of juries required at least the oral procedure to be accommodated to the understanding of intelligent laymen. Only a few years after Oughton published his first edition, Parliament abolished the use of Latin in all the courts.²⁵ Although this was not reflected in the second edition of Oughton, all the forms were thereupon converted, somewhat uncomfortably, into the vernacular. Even after this, however, the cumbersome procedure for taking down written evidence, with no oral cross-examination, was one of the principal reasons for dissatisfaction with the ecclesiastical judicial system.

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20. Black gowns were worn in all the lower courts: P. Floyer, *The Proctor's Practice* (1746 ed.), p. 6.
 21. This had been a subject of some controversy. But preaudience was only a practical issue in the Court of Delegates, where members of both professions appeared: J. H. Baker, *The Order of Serjeants at Law* (1984), pp. 54-55.
 22. The writs and records of the common law were still in Latin also.
 23. *Ordo Judiciorum*, vol. I, p. 123, tit. lxxx.
 24. Preface to the *Praxis* ('quos communiter testes (praesertim rustici) non intelligunt'). The duty was cast on the registrar to make sure that the witnesses understood every word that was taken down in Latin.
 25. 4 Geo. II, c.26. which took effect from 25 March 1733.

The new vernacular spirit generated two elementary guides to the practice of the Church courts in the middle of the eighteenth century. The first was *The Proctor's Practice in the Ecclesiastical Courts* (1744; 2nd ed. 1746)²⁶ by Philip Floyer, another proctor of the Arches. This was an independent work, with some interesting information about the practical workings of the courts, including the first description of the ceremony of admitting an advocate, and a disciplinary order made in Doctors' Commons (1742) concerning proctors' clerks; but it was essentially an outline introduction, not a substitute for Oughton. Of even lighter weight was the Revd. Dr. William Cockburn's *The Clerk's Assistant in the Practice of the Ecclesiastical Courts* (1753), though it evidently enjoyed some popularity as preparatory reading, reaching a fifth edition in 1800. Nevertheless, in the early nineteenth century, Oughton still held pride of place as the acknowledged 'oracle of practice' in the ecclesiastical courts.²⁷

An attempt was made in 1831 to render Oughton itself more widely accessible. A considerable part of it was translated into English by James Thomas Law, M.A.,²⁸ Chancellor of Lichfield and Coventry, and printed as *Forms of Ecclesiastical Law; or, the mode of conducting suits in the consistory courts*. It included material inserted at the appropriate points from Clarke, Consett and later authors, rendering further recourse to the Latin authors largely unnecessary. But Chancellor Law lamented in the preface that the editorial labour had been so prolonged that 'I can scarcely suffer myself to look forward with any confidence to the completion of the work'. His lack of self-confidence was not misplaced, for the work never was completed. Even so, the first part completely covered procedure in general, and could properly stand alone. For those fortunate enough to find a copy, Chancellor Law's translation, which enjoyed a second edition in 1844, remains the most accessible guide to the classical procedure of the ecclesiastical courts and to the professional traditions passed on by assiduous proctors such as Clarke and Oughton. Those traditions were largely destroyed by the drastic reforms of the mid-nineteenth century, which extended to procedure as well as to jurisdiction.

26. There was a Dublin edition in 1795, reprinted 1798.

27. A style bestowed on him by Sir William Scott (later Lord Stowell): *Briggs v Morgan* (1820) 3 Phill. Ecc. 325 at 329, where he said that Oughton and Godolphin were 'the oracles of our practice'.

28. Law was not a lawyer. He was the son of George Henry Law (d. 1845), bishop of Bath and Wells, to whom the book was dedicated.