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BOOK REVIEW

“A COSEY, DOSEY, OLD-FASHIONED, TIME-FORGOTTEN, SLEEPY-HEADED LITTLE FAMILY PARTY”*

*Frederick Bernays Wiener***

Probably few among today's youth ever read the novels of Charles Dickens. But most of those who are now seniors at the bar did so when they were young and thus first became acquainted with the courts and lawyers of Dickens' time, before the Judicature Acts reshaped virtually all English tribunals in 1875.

Pickwick Papers dealt with the Court of Common Pleas and with the serjeants and attorneys. *Bleak House* described the unreformed High Court of Chancery and its barristers and solicitors. *David Copperfield* portrayed the third branch of English law, the realm of the civil law courts, whose jurisprudence was founded on Roman law and where counsel were advocates holding doctors' degrees and, in the lower branch, were proctors.

Those of us who devoured *David Copperfield* while still in our teens will recall that young Master David became articled to a firm of proctors and that he early had a glimpse of the civilians in action. Dickens' description of the courtroom scene that David witnessed in the hall of Doctors' Commons, the home of the advocates, where the ecclesiastical courts as well as the Court of Admiralty held their sessions, has become classic:

* Reviewing *DOCTORS' COMMONS: A HISTORY OF THE COLLEGE OF ADVOCATES AND DOCTORS OF LAW*. By G. D. Squibb. Clarendon Press, Oxford, England, 1977. Pp. XV, 244. £10.

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The upper part of this room was fenced off from the rest; and there, on the two sides of a raised platform of the horse-shoe form, sitting on easy old-fashioned dining-room chairs, were sundry gentlemen in red gowns and grey wigs, whom I found to be the Doctors aforesaid. Blinking over a little desk like a pulpit-desk, in the curve of the horseshoe, was an old gentleman, whom, if I had seen him in an aviary, I should certainly have taken for an owl, but who, I learned, was the presiding judge. In the space within the horse-shoe, lower than these, . . . were sundry other gentlemen of Mr. Spenlow's rank [of proctor], and dressed like him in black gowns with white fur upon them, sitting at a long green table. . . . The languid stillness of the place was only broken by the chirping of [a] fire [in a stove in the center of the court] and by the voice of one of the Doctors, who was wandering slowly through a perfect library of evidence, and stopping to put up, from time to time, at little roadside inns of argument on the journey. Altogether, I have never, on any occasion, made one at such a cosy, dosey, old-fashioned, time-forgotten, sleepy-headed little family-party in all my life . . .¹

According to Holdsworth,² this was indeed an accurate description of a court hearing a dull case—as well it might have been, since Dickens for a time earned his living as a shorthand reporter in Doctors' Commons.³ Nonetheless, Holdsworth was impelled to add a caveat:

But it is well to remember that it was at these little family parties that the foundations of our modern Admiralty law were laid, that our modern prize law was created, that much international law was made, and that many of the principles of our modern probate and divorce law were worked out. And though the small number of the advocates, and their collegiate life in Doctors' Commons,

1. C. DICKENS, *THE PERSONAL HISTORY AND EXPERIENCE OF DAVID COPPERFIELD* ch. XXIII (1850).

2. 12 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 50 (1938).

3. W. HOLDSWORTH, *CHARLES DICKENS AS A LEGAL HISTORIAN* 9 (1928); 1 E. JOHNSON, *CHARLES DICKENS: HIS TRAGEDY AND TRIUMPH* 57-61 (1952).

helped to give their meetings the characteristics of a little family party, let us not forget that it was a talented little family.⁴

What exactly was Doctors' Commons? When and for what purpose was it founded? What were the qualifications for admission? Who were its members over the more than three and a half centuries of its existence? How did it operate? And why and when did it ultimately cease to exist? The answers to these questions, and to many more subsidiary queries, are set forth in a recent fascinating and beautifully researched book from the learned and graceful pen of Mr. G. D. Squibb, Q.C.⁵

Before he retired from practice, Mr. Squibb had established in litigation⁶ the continued existence of another civil law court, the supposedly abolished High Court of Chivalry, after which he wrote an equally fascinating book on that tribunal's history.⁷ But, as his new volume demonstrates, he continues to be active in historical and heraldic studies, in addition to serving on government commissions, and for nearly twenty years he has been Norfolk Herald of Arms Extraordinary.⁸

Earlier writers, Holdsworth included,⁹ had fixed the establishment of Doctors' Commons in 1511. But Mr. Squibb, drawing on both printed and manuscript materials, shows pretty conclusively that, certainly as early as 1496 and possibly even in 1494, there was, in Paternoster Row just north of London's St. Paul's Cathedral, an inn where lodged the doctors of law who had been admitted to practice in the court held by the Official Principal of the Court of the Archbishop of Canterbury, better known as the Court of Arches.

In those pre-Reformation days, the only legal studies available at Oxford and Cambridge were exclusively in civil and

4. 12 W. HOLDSWORTH, *supra* note 2, at 50.

5. G. SQUIBB, *DOCTORS' COMMONS: A HISTORY OF THE COLLEGE OF ADVOCATES AND DOCTORS OF LAW* (1977).

6. *Manchester Corp. v. Manchester Palace of Varieties, Ltd.*, [1955] P. 133.

7. G. SQUIBB, *THE HIGH COURT OF CHIVALRY* (1959), *reviewed in* 45 A.B.A.J. 957 (1959).

8. The College of Arms in England, which grants all coats of arms, consists of the Earl Marshal, three Kings of Arms, six Heralds, and four Pursuivants. From time to time there are appointed additional (*i.e.*, Extraordinary) Heralds and Pursuivants.

9. 4 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 235 (1924).

canon law. There was ample work for these academic lawyers, in litigation over ecclesiastical matters as well as over lay affairs relating to marriage, legitimacy, and wills. And legal training, even without practice, opened a path to preferment. Mr. Squibb remarks that,

Of the two archbishops and thirteen diocesan bishops in office in England and Wales in 1500 who are known to have had degrees, ten had degrees in canon law or civil law or both. Of the seven cathedral deans with degrees in office in the same year, four had degrees in law. Of fifty-eight archdeacons, thirty had such degrees.¹⁰

Just as the common lawyers gathered in the Inns of Court, so the civil lawyers grouped themselves for board and lodging in Doctors' Commons. At first the membership was almost entirely composed of practitioners in the Court of Arches, both advocates and proctors. Later some non-practicing persons were admitted. But, in due course, the proctors disappeared, none being admitted after 1569, while a number of non-practitioners continued to be received, essentially on an honorary basis.

With the Reformation, and the prohibition in 1535 of all further study of the canon law, the laicization of Doctors' Commons began. "By 1600 the advocates had become a lay profession of civil lawyers instead of a clerical sub-profession of canon lawyers."¹¹ Gradually the clerical advocates disappeared. The last admission of an ordained man came in 1609, and, ultimately, ordination prior to membership became a basis for refusing admission. Similarly, subsequent ordination required a member to resign. Bishops and archbishops became honorary members only and were expected to, and did, contribute to the society upon becoming such; but no non-practicing members were admitted after 1634.

Contrary to popular supposition, admission to Doctors' Commons was not the step that entitled the new member to practice in the civil law courts. Rather, admission to practice

10. G. SQUIBB, *supra* note 5, at 2.

11. *Id.* at 25.

required as a prerequisite a doctorate in law from Oxford or Cambridge, after which it was a fiat from the Archbishop of Canterbury to the Dean of the Arches to admit as an advocate the individual thus qualified that conferred the right to practice. This was however subject to "a year of silence" during which the new advocate could only listen and not be heard, a restriction that obviously eliminated the civil law as a career for those of limited means. Whether the newly admitted advocate then became a member of Doctors' Commons was a matter of individual choice and personal convenience; those who did not join, numbering about sixty-four, are duly listed by Mr. Squibb,¹² but there are no more such instances after 1682.

Unlike the Inns of Court, which remain unincorporated today, Doctors' Commons received a royal charter in 1768, primarily to enable it to purchase the freehold on which its premises had been located since the Great Fire of 1666, south of St. Paul's off Great Knightrider Street. The Crown was indeed under obligation to the doctors, whose hall provided accommodation both for the Court of Admiralty and for many of the ecclesiastical tribunals as well. The charter, which named the new corporate body "The College of Doctors of Law, Exercent in the Ecclesiastical and Admiralty Courts," listed, characteristically enough, only seventeen incorporators.

The President of the College was invariably the Dean of the Arches, *i.e.*, the Judge of the Court of Arches; but in his other capacity, he was also Official Principal of the Court of Canterbury. During the Commonwealth and Protectorate, when the ecclesiastical courts were abolished, the Presidency was held by the senior judge of the Court of Admiralty, as that tribunal then had several judges. Next in precedence after the President, as the 1768 charter shows, were the Judge of the Court of Admiralty and the King's Advocate; the latter enjoyed, until 1862, precedence over both the Attorney General and the Solicitor General. The senior office holders within the College were, in order, the Treasurer and the Librarian.

Just as the judges of the superior courts on both sides of the Atlantic are referred to as "Mr. Justice X," so, prior to the

12. *Id.* at 204-09.

Judicature Acts, the judges of the Court of Exchequer in England were "Mr. Baron Y," while the members of the Order of the Coif were properly designated as "Mr. Serjeant Z." Similarly, advocates frequently appear in the records as "Mr. Dr. A." Interestingly enough, advocates ranked above barristers though below serjeants.

That the civil law courts indeed constituted a "family party" is amply borne out by the records. Fathers were followed by sons—and by sons-in-law; advocates and proctors were regularly related by blood and marriage; and the same was true of the officials of the courts, among whom relationships could easily be traced.

Mr. Squibb calls his list of those who were members of Doctors' Commons "A Register" rather than "The Register," as there remain gaps and omissions in the records that even his own massive researches did not succeed in filling. Truly famous names, it must be conceded, are few. Polydore Virgil, a papal collector and Archdeacon of Wells, is better known as historian and humanist than as a legal figure. Perhaps Dr. Richard Zouche in international law¹³ and Dr. William Scott (later Lord Stowell) in prize law¹⁴ were the best known because the most learned. Holdsworth says of the latter that he was "[t]he greatest of all civilians in the whole history of English law."¹⁵ Dr. William Scott was indeed the only member of Doctors' Commons ever to receive a peerage; his brother John, successively Chief Justice of the Common Pleas and Lord Chancellor, is of course widely known as Lord Eldon.

Numerous members, more familiar as historical figures than as civilian jurists, became victims of religious strife. Thus, Sir Thomas More and Archbishop Laud were both beheaded. Others met similar fates. Mr. Squibb lists as executed, Dr. Marcyall in 1539, Dr. Povel in 1540, Dr. Stoye in 1571; as hanged, Hugh Abbot of Reading in 1539; and as burned for heresy, Dr. Taylor in 1555. Two members died in prison, Dr. London in 1544 and James Bishop of Gloucester in 1560.

13. 5 W. HOLDSWORTH, *supra* note 9, at 17-20, 58-60.

14. 13 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 668-89 (1952).

15. *Id.* at 668.

Prior to the restoration of the Stuarts in 1660, the domain of the civilians included military law, no doubt because of its Roman origins. Dr. Sutcliffe, admitted in 1580/82, was "Judge Martial" with the English Army in the Low Countries in 1587-88. Thereafter, in 1593, he published the first English book on this branch of law, entitled *The Practice, Proceedings, and Lawes of Armes*. He stressed that

the first care of those that purpose to proceed orderly, is to find out the authours of offences, and persons culpable. This is by examination and othe both of the parties principall, as farre as they are bounde by lawe to answer, and of witnesses also: *further where presumptions are sufficient and the matter heinous: by racke or other paine.*¹⁶

The italics have been added to emphasize that Dr. Sutcliffe was the first of a long line of no-nonsense military lawyers whom today we generally characterize as iron-pants judge advocates.

In the English Civil War in the following century, members of Doctors' Commons acted as judge advocates on both sides. Drs. Dorislaus and Mylles served with the Parliamentary forces; the former, later one of the prosecutors of King Charles I and then Ambassador to Holland, was murdered there by English royalists in 1649. Drs. Lewin, Lewyn, and Peirce were legal officers with the King's armies. The last-named became the first post-Restoration Advocate-General to the Forces, a position for which he applied, facilitating his appointment thereto by annexing to his application the form of warrant requested.¹⁷

After the middle of the Eighteenth Century, the same position, then formally known as the Advocate-General and Judge Martial of all H. M.'s Land Forces, was regularly conferred upon common lawyers. But, strangely enough, the old civilian precedent would not down. In 1871-72, the office of Judge Advocate General was temporarily entrusted to Sir Robert Phillimore while he was simultaneously Judge of the High Court of

16. M. SUTCLIFFE, *THE PRACTICE, PROCEEDINGS, AND LAWES OF ARMES* 340 (1593).

17. F. B. WIENER, *CIVILIANS UNDER MILITARY JUSTICE* 166-67 n.7 (1967), as corrected by J. CHILDS, *THE ARMY OF CHARLES II* at 83, 261 (1976).

Admiralty and Dean of the Arches. And from 1892 to 1905, a period that included the whole of the Boer War, when Doctors' Commons had disappeared and the Judicature Acts had long been in force, the Judge Advocate Generalship was held by the President of the Probate, Divorce and Admiralty Division of the High Court of Justice, Sir Francis Jeune.¹⁸

One member of Doctors' Commons who was active not in the law martial but in diplomacy that sought to end a war actually merits a footnote in the history of the United States. This was Dr. William Adams, admitted in 1799, who was one of the three British delegates to the peace conference that, with the Treaty of Ghent signed on Christmas Eve 1814, ended the War of 1812 between Britain and the United States.

It was not, in all conscience, a very prepossessing delegation. Its chief, Admiral Lord Gambier, had no training whatsoever for the task, while his next in line, Under-Secretary of State Goulbourn, was a brash and obviously unpleasant young man. All too plainly, neither was up to dealing with the very much more talented American commission, which included John Quincy Adams, Henry Clay, and Albert Gallatin. And Henry Adams' *History of the United States* effectively consigned to everlasting deprecation the third delegate, poor Dr. Adams, "whose professional knowledge was doubtless supposed to be valuable to the commission, but who was an unknown man, and remained one."¹⁹ Mr. Squibb's Register shows that, because of ill health, Dr. Adams resigned from Doctors' Commons in 1825, although he lived on until 1851.

A well-known international lawyer in the later years of Doctors' Commons was Sir Travers Twiss, Q. C., the last Queen's Advocate (1867-72) and the author of works on international and prize law that had some reputation in their day.²⁰ But Twiss's later career was notably unhappy, following, late in life, his marriage to a foreign lady. When, soon thereafter, defamatory gossip about her began to circulate, mingled with intimations of blackmail, the outraged husband instituted a

18. F. B. WIENER, CIVILIANS UNDER MILITARY JUSTICE 207.

19. 9 H. ADAMS, HISTORY OF THE UNITED STATES (1890) 13-14.

20. 15 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 331-32, 334.

prosecution for malicious libel. But after the cross-examination of Lady Twiss was concluded, the prosecution collapsed. In consequence, Twiss immediately resigned his offices and retired from practice.²¹ Thereafter he edited the Rolls Series edition of Bracton, a poor performance that Maitland castigated as "six volumes of rubbish."²² Unfortunately this was followed by an edition of Glanvill even worse, so bad in fact that it was physically destroyed after printing. In Sir Percy Winfield's words, "This has given the surviving copies a value to the book-collector which they never had for the reader. A remarkable consolation for literary damnation!"²³

Let us recur to the history of Doctors' Commons. Under the Commonwealth, as has been seen, ecclesiastical jurisdiction was abolished, though courts of probate and of admiralty were continued. Hence Doctors' Commons functioned as before and continued to admit new members.

The Restoration brought back the church courts; however, the Glorious Revolution produced problems. After Parliament had recognized William III and Mary II as joint sovereigns, men-of-war sailing under commissions issued by the deposed King James II were, from the government point of view, necessarily pirates. But High Tory members of Doctors' Commons, who believed in the Divine Right of anointed kings, could not accept that notion. A few accordingly lost their public offices.

With the coming of the Eighteenth Century, a period of sleepiness set in. Sir Robert Walpole's long administration affirmatively followed a policy of not disturbing any feature of the established order, and so the existing system of civil law courts functioned as before. Neither ecclesiastical nor admiralty decisions were reported, hence knowledge of the actual rules in force remained the close and exclusive secret of the advocates and proctors. Ecclesiastical judges might practice as

21. 19 *DICTIONARY OF NATIONAL BIOGRAPHY* 1321.

22. Letter from Frederic William Maitland to Dean M. W. Bigelow (Oct. 31, 1885), 1 *SELDON SOCIETY SUPP. SERIES, THE LETTERS OF FREDERIC WILLIAM MAITLAND* 16 (C.H.S. Fifoot ed. 1965).

23. P. WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* 258 n.2 (1925). For the facts regarding the physical destruction of Twiss's edition of Glanvill, see *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL* lxiii-lxiv & n.6 (G.D.G. Hall ed. 1965).

advocates in admiralty, while deputy admiralty judges could be counsel in ecclesiastical causes.

Appeals to Rome had been abolished when Henry VIII broke with the Pope and Parliament lodged the former appellate jurisdiction in the High Court of Delegates. But this body, with its shifting membership, was unsatisfactory, the more so since its judges included young advocates recently admitted plus old ones without a practice. Here was Dickens' description in a passage from *David Copperfield* which, curiously enough, was never quoted by Holdsworth either in his *History of English Law* or in his *Charles Dickens as a Legal Historian*. The speaker is Mr. Spenlow, of the firm of proctors to which David had just been articled, the father of Dora, David's dream girl:

What was to be particularly admired in the Commons, was its compactness. It was the most conveniently organised place in the world. It was the complete idea of snugness. It lay in a nut-shell. For example: You brought a divorce case, or a restitution case, into the Consistory. [That was the court of the bishop of the diocese, normally the Bishop of London.] Very good. You tried it in the Consistory. You made a quiet little round game of it, among a family group, and you played it out at leisure. Suppose you were not satisfied with the Consistory, what did you do then? Why, you went into the Arches [the appellate court of the Archbishop of Canterbury for such cases.] What was the Arches? The same court, in the same room, with the same bar, and the same practitioners, but another judge, for there the Consistory judge could plead any court-day as an advocate. Well, you played your round game out again. Still you were not satisfied. Very good. What did you do then? Why, you went to the Delegates. Who were the Delegates? Why, the Ecclesiastical Delegates were the advocates without any business, who had looked on at the round game when it was playing in both courts, and had seen the cards shuffled, and cut, and played, and had talked to all the players

about it, and now came fresh, as judges, to settle the matter to the satisfaction of everybody!²⁴

This was undoubtedly the position at the time of the events narrated in *David Copperfield*, but it had been remedied well before 1849-50 when that book was published.

For the winds of reform had been blowing long since. Brougham's 1828 speech on law reform had criticized both the composition of the High Court of Delegates and of the committees of the Privy Council that then heard appeals from the colonies. In 1832 Parliament abolished the High Court of Delegates and in 1833 transferred its jurisdiction to a reconstituted and regularized Judicial Committee of the Privy Council.

The sun was sinking also for other ecclesiastical courts and for Doctors' Commons itself. In 1857, all jurisdiction over testamentary matters was taken from the church and transferred to the state, to a new Court of Probate. The Act of Parliament effecting that change also doomed Doctors' Commons, for it provided that serjeants and barristers were authorized to practice in the new court, at the same time giving advocates the right to be heard in all other courts. The same Court of Probate Act of 1857 empowered Doctors' Commons to surrender its charter, whereupon that corporation would be dissolved and all the property of the College would belong to its members in equal shares as tenants in common. Three days later, Parliament created the Court for Divorce and Matrimonial Causes and made all advocates and barristers eligible to practice there. Finally, two years after that, by virtue of still another statute, the advocates lost their old monopoly in the Court of Admiralty.

From then on, the civilians were no longer a separate branch of the legal profession. Accordingly, the advocates last dined in Doctors' Commons at the end of 1859; their library was sold at auction and dissipated in 1861; their premises were sold in June 1865; and on July 10 of that year the fellows of the College held their last meeting, the minutes of which were never signed.

24. C. DICKENS, *supra* note 1, at ch. XXVI.

But, since the 1768 charter of the College was never surrendered, the corporation continued in existence, and its remaining members' names continued to appear in the *Law List*. Thus it was not until March 8, 1912 when the last survivor died, that "the Society which first gathered in Paternoster Row under the presidency of Richard Blodwell in the closing years of the fifteenth century"²⁵ came to an end.

This last survivor was Dr. Thomas H. Tristram, co-editor of Swabey & Tristram's probate reports (Sw. & Tr.) and of the first volume of their immediate sequel, L. R. P. & D.²⁶ He was also co-author of Tristram & Coote's *Probate Practice*, a long-lived work that attained a 25th edition in 1978.

Dr. Tristram had been the last person admitted to Doctors' Commons, in 1855. His entrance fee, the regulation £20, proved in the end to be a superb investment, for within ten years he received, as his share of the liquidation, a tidy £4000. But, to his eternal honor, he was one of the small minority of doctors who contended, under the leadership of Dr. John Lee, but without success despite the expenditure of £425 in legal fees, that the College's fine library should be preserved in trust for the study of the Roman civil law and that the vesting of the property in the members of private spoil constituted "a palpable breach of trust."²⁷

As is well known, the three lay courts of civil law were, by the Judicature Act, combined in 1875 into the Probate, Divorce, and Admiralty Division of the High Court of Justice. The old records were preserved, the old personnel transferred. And there, wrote Holdsworth, "we can sense the last faint reminiscence of the atmosphere of the old ecclesiastical courts."²⁸

Change, however, is inevitable, and the common law has always displayed an infinite capacity for smothering its rivals. In 1970, by virtue of the Administration of Justice Act of that year, jurisdiction over all admiralty matters was transferred to the Queen's Bench Division, while all contested Probate mat-

25. G. SQUIBB, *supra* note 5, at 109.

26. *Id.* at 104, 108-09, 203. For the reports edited by Dr. Tristram, see J. WALLACE, *THE REPORTERS* 535, 539 (Heard's 4th ed. 1882).

27. G. SQUIBB, *supra* note 5, at 106.

28. 15 W. HOLDSWORTH, *supra* note 20, at 208.

ters went to the Chancery Division. And what for 95 years had been known as the Probate, Divorce, and Admiralty Division was renamed the Family Division.

On our side of the Atlantic, also, admiralty was similarly and almost simultaneously downgraded. Effective July 1, 1966, the Supreme Court rescinded the last Admiralty Rules, a series it had long prescribed, and substituted in their stead, within the Federal Rules of Civil Procedure, a number of "Supplemental Rules for Certain Admiralty and Maritime Claims."²⁹ Thus there are presently no more libels, only complaints. And although on my own initial admission to a federal bar, in the District of Rhode Island in 1932, I was duly constituted among other titles, a Proctor and Advocate, were I to seek similar admission today, it would only be as Attorney and Counsellor.

Of course the old invariably lament the passing of the familiar. But everyone, old or young, who has any feeling for the formative stages of our present laws and institutions, will find not only interest but also much pleasure in Mr. Squibb's *Doctors' Commons*.

29. 383 U.S. 1029, 1029-32, 1071-85 (1966).

