(2016) 18 Ecc LJ 216–221 © Ecclesiastical Law Society

NOTABLE ECCLESIASTICAL LAWYERS: XI

Clement Colmore (1550–1619)

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Clement Colmore, chancellor and official principal of the Diocese of Durham from 1582 until his death in 1619, has attracted little attention among chroniclers of the English Church. No entry for him appears in the *Oxford Dictionary of National Biography*. He was not included in Coote's *Sketches of English Civilians*. Nor does his name figure in ecclesiastical histories of the period. There has been a single exception. Colmore came to the notice of Brian Levack, the author of an admirable study of the English civilians during the run-up to the Civil Wars in 1641. After giving his readers the basic biographical details, Professor Levack compiled a list of the offices and benefices his subject held. It turned out to be a quite long list, and he concluded by describing Colmore as 'the fourth-wealthiest clergyman of the entire diocese'.[1] Of course, the greater part of that fortune would not have been the fruits of judicial office: it would have come from the lands he held and the benefices he enjoyed.[2] Still, he was rich – perhaps too rich to be taken for a model civilian. However, Colmore also has a quite different claim to the attention of English ecclesiastical lawyers, one not discussed by Professor Levack. He was the compiler of a large manuscript Notebook, one filled with useful information about the realities of legal practice in the ecclesiastical courts during the reigns of the early Stuarts.[3]

COLMORE'S LIFE AND CAREER

Born in Birmingham, the second son of William Colmore and his wife, Joan, the daughter of Henry Hunt of Tamworth, Colmore matriculated at Brasenose College, Oxford and proceeded BA in 1570 and MA three years later. He moved to the civil law faculty at Cambridge, where he proceeded BCL in 1580 and DCL in 1581. His appointment as judge in the most important ecclesiastical

1 B Levack, *The Civil Lawyers in England 1603–1641: a political study* (Oxford, 1973), p 67.
2 Colmore's career was noted as an example of a common pattern in R O'Day, *The English Clergy: the emergence and consolidation of a profession 1558–1642* (Leicester, 1979), p 157.
3 The manuscript is now kept in the University of Durham's Palace Green Library (or at No 5, The College, on my last visit) as MS DDR/EJ/CCG/2/1 (hereafter simply 'MS').

https://doi.org/10.1017/S0956618X16000107 Published online by Cambridge University Press

court in the Diocese of Durham then followed, almost immediately upon receipt of his last degree. It was not an unusual career move for a promising graduate of one of the civil law faculties in England. Colmore did also later take a step towards admission at Doctors' Commons in London, but his motives for doing so remain uncertain, and little seems to have come of this effort.[4]

He remained in Durham, holding the same judicial office until his death in 1619; Act book entries from the period have survived which show him presiding.[5] Twice married, he was the father of ten children and was proud enough to have listed them all, together with their baptismal sponsors, in the Notebook. Colmore also served as a JP for Durham, and he took part in an English delegation to meet with the Scottish king in 1594 in an effort to find remedies for the troubles that were endemic to the region. When he died, his will was proved at York. He was buried in Durham Cathedral in accordance with his own wishes 'between my two wives'.[6] He had enjoyed a successful but not an exceptional career.

COLMORE'S NOTEBOOK

Although Colmore himself might not have claimed any special distinction for it, to historians his most notable contribution to understanding the law of the post-Reformation English Church is the double-folio Notebook he compiled. Its 386 folios are a mine of informative material. They included opinions of counsel in disputed matters, forms for use in the ecclesiastical courts, comments about current events and legal problems, an alphabetical dictionary of terms and concepts found in the civil and canon laws, and many reports of cases heard in the ecclesiastical courts of the northern province. It is not a unique survival: several such notebooks from the period remain, and a much larger number must once have existed.[7] By comparison with most of the survivors, however, Colmore's is particularly full and informative.

Perhaps most valuable are the first of the contents mentioned above: opinions of counsel, which are scattered throughout the Notebook. One from Henry Swinburne dealt with rights to erect and maintain pews; one from Thomas Talbot covered a dispute over payment of tithes; and two from Richard Hudson dealt with clerical dues and a question of testamentary law.[8] Colmore

4 See G Squibb, *Doctors' Commons: a history of the college of advocates and doctors of law* (Oxford, 1977), p 205. His name was not mentioned in C Coote, *Sketches of the Lives and Characters of Eminent English Civilians* (London, 1804).

5 See eg the Durham court's Act book for 1608–1610, DDR/EJ/CCA/1/7, f 9v, describing him as vicar general as well as official principal.

6 E White (transcriber), *Baptismal, Marriage, and Burial Registers of the Cathedral Church of Christ … at Durham 1609–1896*, ed G Armytage, Publications of the Harleian Society 23 (London, 1897), p 83.

7 Some of these are described in R Helmholz, *Roman Canon Law in Reformation England* (Cambridge, 1990) pp 121–157.

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even added an opinion or two of his own.[9] They all contain both questions of fact and law. An example of their character is found in the first entry in the Notebook, an opinion of Henry Swinburne dealing with the law of defamation.[10] Exactly who the parties were or who the person seeking Swinburne's opinion was we are not told. However, the facts of the case and the legal point at issue were stated clearly. The question was: were words spoken in response to a verbal provocation actionable under the church's law? According to Swinburne, the answer depended on the intent with which they had been uttered. The specific words involved – 'Thou liest like a bawde' – had been spoken to the plaintiff 'in defence of [the speaker] and her maid'. Swinburne's opinion did not invoke the *mitior sensus* doctrine. He concluded instead that, unless the speaker had uttered them with a malicious intent, they were not actionable, his reason being that their primary intent had been to deny a prior accusation against the defendant or her maid. In his opinion, the determinative question – whether malicious intent had been present in the cause – could be settled by the defendant's compurgatory oath.

Of equal interest and of much greater frequency in the Notebook are Colmore's reports of cases heard in the ecclesiastical courts. How they had come to his attention is not entirely clear. Some, probably even the majority, must have come from his own court. He probably indicated that by giving them familiar titles (as 'Master Barker's Case' at folio 229) or identifying subjects that had come before him (as 'administration of the goodes of James Suerties his kinsman intestate' at folio 165v). Some clearly concerned local questions, such as the effect of a verbal devise of property held by burgage tenure in the city of Durham (folio 140) or the status of parochial taxation in a parish within the Diocese of Durham (folio 218) A few included the formal sentence that Colmore had himself given (eg 'Master Dent's Case' at folio 153). However, at least some of his cases came from elsewhere, as Carlisle (Skelton c Saunderson at folio 160) or London (Bevers' Will at folio 232v), and occasionally no location at all can be recovered from his notes. The English civilians across the realm shared professional information, and some of the cases that interested Colmore may have been the product of that sort of exchange.

Information about the realities of practice in the ecclesiastical courts is a particularly valuable addition to the Notebook. The frequency of testamentary matters is noteworthy; it not only confirms Brian Outhwaite's conclusions

8 They are found at MS, f 217r–v (Swinburne); f 218 (Talbot); ff 210–211, 235 (Hudson). For biographies of Talbot, see Levack, *Civil Lawyers in England*, p 274; for Hudson, see Squibb, *Doctors' Commons*, p 165.

9 MS, ff 235–236.

10 MS, f 2. Another example is found in J Derrett, *Henry Swinburne (?1551–1624): civil lawyer of York* (York, 1973), pp 29–31. See also J Baker, *Monuments of Endlesse Labours: English canonists and their work 1300–1900* (London, 1998), pp 59–60.

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about the lasting importance of that aspect of the English Church's jurisdiction but also helps to reveal some of the realities of practice that have not been clear to historians.[11] One of them illuminates the details involving the northern province's preservation of the child's right to a portion of his parent's estate, the so-called *legitim*.[12] Another involves the dominant role in the decision of cases played by the complex law of evidence drawn from the fonts of the European *ius commune*.[13] A third involves a question not answered by the formal law: the priority and order in which debts and legacies were paid by executors under the ecclesiastical law of the time.[14]

COLMORE'S INTERESTS AND CONCERNS

The particular topics that interested Colmore are evident throughout the Notebook. He did not hide them: he had no hesitation in recording the names and numbers of his own family, and he was not shy about expressing his own attitudes and opinions. Three general conclusions about those attitudes stand out as of particular interest to historians of the English Church's law.

The first is his habitual reliance on the traditional sources of authority in the church's law – the texts and commentaries found in the storehouses of the *ius commune*. When a disputed question in a case on the law of tithes arose, it was to the interpretation of the Gregorian Decretals and the treatise by Pierre Rebuffi (1487–1557), *De decimis*, that Colmore turned.[15] In a marriage case where a question about the level of proof that had to be established came up, it was around the opinion of the great canonist Nicolò de' Tudeschi, called Panormitanus (1386–1445/1453), that the discussion in the Notebook revolved.[16] Similarly, one defendant's refusal to take what common lawyers called the 'ex officio' oath was supported by the authority of the *Consilia* of Joachim Mynsinger (1514–1588), not by authority drawn from the common law.[17] English statutes enacted in Parliament did come into play in some of the cases Colmore recorded – the Edwardian statutes on the law of tithes, for instance – but cases heard in the royal courts

11 See R Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860* (Cambridge, 2006), pp 33–39.

12 MS, ff 235–236 (dealing with the requisite size of the estate, the problems raised by inter vivos transfers and the ambiguous status for jurisdictional purposes of leases of land).

13 MS, f 223 (difficulties of proof raised by the objection that witnesses to the exchange of matrimonial consent heard the spoken words imperfectly and slightly differently).

14 MS, f 254v (According to the entry the debts were to be paid with the following priority: debts to the crown, debts provable by official records; debts evidenced by a speciality; servants' wages, rents and similar obligations; all others).

15 Slingsbie c Urpath, MS, f 211 (reference to X 2.26.7 and Rebuffi's treatise ad Quaest 13, nos 64 et seq).

16 Clesasbye c Collingwood, MS, f 231r–v (reference was to his *Commentaria* ad X 2.24.36). The entry is enlivened by the remark, at f 121v, that one of the lawyers involved in the case 'offered to laie 100s. to 4d. [that] Panormitanus had no such place'.

17 Harrison c Brigges, MS, f 258 (reference to his *Responsa iuris sive consilia decades sex*, Dec 1, no 22).

https://doi.org/10.1017/S0956618X16000107 Published online by Cambridge University Press

virtually never did.[18] When a show of learned authority was needed, he used the commentaries on the civil and canon laws – the opinions of jurists such as Panormitanus, Filippo Decio (1454–1536), Dominicus de Sancto Geminiano (fl c 1450), Philippus Franchus (d 1471), Guillaume Durand (c 1230–1296) and William Lyndwood (1375–1446).[19]

The second point of special interest that comes from perusal of the Notebook – one slightly at odds with the first – is Colmere's interest in the English common law. He raised repeated queries about it, often seeking ways around rules when they restricted the scope of ecclesiastical jurisdiction. He worried about the future on this account, but his interests were broader than self-protection. An instance of simple curiosity occurs at a point in the Notebook where he raised the question of whether the common lawyers meant the same thing by 'the equity of a statute' as civil lawyers did by 'the mind of a statute'.[20] His answer was tentative: 'So it seems'. He did not say how he reached that conclusion, but the similarity in the use made of both concepts must have made their rough equivalence obvious.

An example of his search for ways around the common law's restrictions occurred when he was confronted by a writ of prohibition from the royal courts. The writ's words prevented him from proceeding in the case before him. However, he asked, could he nonetheless remit the case to the archbishop's court, where it might continue? He concluded that he could, since the writ only forbade him from proceeding in the case, and 'I am so far from proceeding in the cause that I utterly rid my hands of it'.[21] Many examples of a source of interest caused by disagreements between common lawyers and the civilians came from testamentary law. To Colmore, statutes and judicial decisions seemed to interfere with orderly process of administering estates. Did the statute 28 Hen VIII c 5 inhibit probate judges from requiring litigants to provide sureties for faithful performance of legitimate orders? He concluded that it did not. Rightly understood, the statute left the judge free to do 'as he might have done before the making of this act'.[22] That was not, however, the conclusion towards which the common law judges were tending. The future therefore seemed uncertain to him.

The third point of particular interest in the Notebook is an aspect of law practice that will be familiar to modern lawyers, although it often surprises others. Despite the huge number of precedents that exist in today's case law, it often happens that lawyers find no clear answer in them. They produce no definitive solution. We share this experience with Colmore, who often faced questions that

18 Master Dent's Case, MS, f 153r–v (dealing with 2 & 3 Edw VI, c 13).
19 Skelton c Saunderson, MS, f 160 (an opinion of Colmore's dealing with the law of proof).
20 MS, f 137v. The Roman law on this point is at Cod. 1.14.5 and DD ad id.
21 Swifte c Johnson, MS, f 125.
22 MS, f 138v.

https://doi.org/10.1017/S0956618X16000107 Published online by Cambridge University Press

he could not answer. Who was entitled to administer the estate of a man who had died intestate, when his widow had died after him without having sought to claim the right to do so? Should it be her children or should it be someone related to the deceased husband? The Notebook raised the question, and immediately after stating it, Colmore added the word 'Solutio', followed by a blank space.[23] He hoped that an answer would soon be evident. When it was, he would fill in the blank. In the end, however, he had to leave it blank. No answer was forthcoming. No doubt this indecision was exacerbated by the actions of contemporary common lawyers, who had thrown many long-settled jurisdictional questions into doubt. But his uncertainty was not limited to contentious cases: it recurred throughout the Notebook. Were Colmore alive today, it might be a comfort to him to know that something like the same situation remains common four centuries later.

doi:10.1017/S0956618X16000107

23 Hudson's case: MS, f 255.

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