FACULTY OFFICE

Master's Speech to the Society of Scrivener Notaries and to the International Union of Notaries ("UINL"), London, 26th September 2023

It is a great privilege to be invited to speak at this event and to welcome so many visiting notaries from other jurisdictions to the UK so I want to start by thanking the organising committee for asking me to do so. On behalf of all of us, I would like to extend those thanks to the Society of Scrivener Notaries who are hosting this event, very much within their centre of operations, here in the heart of the City of London. It is fortuitous that we are coinciding with the 650th anniversary of the Company of Scriveners. This is a historic moment indeed.

Guests from overseas may well wonder who or what the Master of the Faculty Office of the Archbishop of Canterbury is and what she is doing here. Most British lawyers would be equally baffled. The short, and perhaps surprising answer, is that I am the statutory regulator of notaries public in England, Wales, the Channel Islands, Gibraltar, New Zealand, Queensland, Norfolk Island and Papua New Guinea.

A fuller – and I hope more interesting – answer requires us to go into a little history, some of which will be familiar to many of you. As we know, the *notarius* or *tabellio* was an important figure in Roman law; there are frequent references to him and his work in the great legal writings of the Emperor Justinian. When the Empire fell, much Roman law was forgotten but it was rediscovered in around the eleventh century and, in the twelfth century, formed the basis for the development of a system of canon (church) law, focussed on the University of Bologna. As such, the importance of the notary was, once again, recognised, especially as the ecclesiastical courts developed a procedure which largely depended on the reliability of documents, rather than oral evidence. Successive popes and their legates, as well as the Holy Roman Emperor, therefore, granted licences to individuals to act as notaries public. These notaries were particularly associated with the work of the ecclesiastical courts which, at that time, all looked to the papal court at Rome as the ultimate court of appeal throughout the western church. 'Added value' is not a medieval term, but it is fair to say that notaries were fundamental to the functioning of the western canon legal system at this time. This remains the case in the Roman Catholic Church to this day, since acts of a judicial hearing are null if they have not been signed by the notary[1].

We now need to focus specifically on the situation in England for a few moments. English secular law did not develop in the same way as many of the equivalent jurisdictions on the Continent and, in particular, different methods of verifying documents and receiving evidence in court meant that notaries public did not have the same role as elsewhere. In 1237, the papal legate Otto reported that, in England, 'publicii notarii non existunt'. Things were to change, however, as the 13th century advanced. In 1279, John Pecham was appointed Archbishop of Canterbury and he brought with him an Italian notary public, Johannes quondam Jacobi de Bononia. He was the author of a 'Summa' on notarial practice in the church courts which became very influential.

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[1] Code of Canon Law c.1437 [1]. See also Eamonn G Hall, *Reflections of a Common Law Lawyer on the Canon Law*, An Irish Quarterly Review, Spring 2013, 81-94, 91-2.

Archbishop Pecham obtained a faculty – or permission – from the Pope to appoint 3 suitable men to the office of notary public and from then on, faculties continued to be granted for such appointments by papal authority, directly or via the Popes' legates to this country. They became numerous and performed important functions in the ecclesiastical courts and, to some extent, in other walks of life too. In 1320, King Edward II issued a decree banning imperial notaries from working in England, but he simultaneously applied to the Pope for faculties to create more notaries: the issue at this date was about temporal, not ecclesiastical, power.

The 16th century Reformation of the English church took a different course from the development of Protestant churches in Germany and other parts of Europe. The English Reformation settlement was of profound constitutional, as well as religious, significance. In the legal sphere, it coincided with important developments in the common law and secular courts. The Reformation Settlement instituted a *'fundamental identification of the Church of England with the State, the monarch being the head of each*[2]*'*. Because English law no longer recognised the authority of the Pope in England and Wales and the monarch became the Supreme Governor of the Church of England, all courts, including the courts ecclesiastical, became the King's courts presided over by judges appointed, or at least approved by, the monarch. Nevertheless, the Church of England is not a *'department of State*[3]*'*.

It was necessary to develop a new system for the appointment of notaries. The Ecclesiastical Licences Act 1533 (25 Hen.VIII, c.21 1533) was passed to deal with *'licences, dispensations, faculties, compositions, rescripts, delegacies, instruments and other writings'*. Provision was made for the Archbishop of Canterbury, who is the spiritual leader of the Church of England, to appoint a Master of Faculties to issue dispensations in the same fashion as papal delegates had done before the Reformation. The first recorded Master was Dr Nicholas Wotton, who was appointed in 1538 and there have been 22 subsequent Masters. Since 1874[4], the Master has always been the same person as the senior permanent ecclesiastical judge, the Dean of the Arches. In my case, for the first time, there was a structured recruitment process and I came into office as Dean and Master in June 2020, during the Covid lockdown. I am the second woman to occupy the post.

Before our visitors conclude that the regulation of notaries in this country is hopelessly stuck in the peculiarities of English history, I should complete the picture. In 2007, the Legal Services Act set up the Legal Services Board as a '*super regulator'* of all the providers of relevant legal services in England and Wales. The LSB describes itself as being *'independent both of government and the profession…While the LSB is part of the public sector, it operates independently of government. This was important as maintenance of the rule of law was thought to depend on the regulation of lawyers being handled independently of government.*[5] '

The 2007 Act recognizes the Master of the Faculties as a the *'approved regulator'* of, amongst others, notarial activities[6]. As such, I am bound to pursue the statutory regulatory objectives which are:

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[2] N Doe, *The Legal Framework of the Church of England* (Oxford 1996) , p.9.

[3] *Marshall v Graham* [1907] 2KB 112 at 126, per Phillimore J.

[4] Public Worship Regulation Act s.7

[5] //legalservicesboard.org.uk/about-us/who-we-are#question-7, accessed 25.9.2023. See also Sir David Clementi's 2004 *Report of the Review of the Regulatory Framework for Legal Services in England and Wales*, paragraph 60: *'International bodies should welcome a model where the oversight function would come from an Independent Regulator with clear objectives, rather than as at present a model where much of the oversight rests with Government Departments.'*

[6] Legal Services Act 2007, Sched.4, Part 1(1)

- protecting and promoting the public interest;

- supporting the constitutional principle of the rule of law;

- improving access to justice;

- protecting and promoting the interests of consumers;

- promoting competition in the provision of legal services;

- encouraging an independent, strong, diverse and effective legal profession;

- increasing public understanding of the citizen's legal rights and duties;

- promoting and maintaining adherence to the professional principles.

These objectives underpin my Priorities and the Business Plan which supports them. My office is wholly separate from the representative functions performed on behalf of the profession by the Society of Scrivener Notaries and the Notaries Society. The regulatory work which the Faculty Office team and I undertake is entirely related to the admission, regulation, discipline and supervision for the purposes of Anti-Money Laundering legislation of notaries, primarily in England and Wales. As such, by ensuring the upholding of professional standards, we assist in ensuring that notarial acts continue to add value, particularly in the sphere of private international relations between citizens and entities. I realise that regulation of the profession by two entities, neither of which is a *'department of State'* and both of which are independent of government, may seem curious to some of our colleagues from overseas. This does not mean that regulation is weak or ineffective, nor that the work of English and Welsh notaries should be valued any the less. It is, in part the product of history, in part an outworking of the largely unwritten British constitution which at once accords a constitutional position to the Church of England as a *'church by law established'* and places a high value on the existence of legal professions independent of government who are, nevertheless, regulated in the public interest.

I and my colleagues from the Faculty Office are greatly looking forward to learning from all the delegates here, especially those from other parts of the world where, doubtless, notarial regulation is organised differently.

MORAG ELLIS KC

Master of the Faculties

26th September 2023