Famous English Canon Lawyers: IX

STEPHEN LUSHINGTON, D.C.L. († 1873)

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In the first half of the nineteenth century, Doctors' Commons enjoyed a final flowering before its eradication in the 1860s, and its leading members once again achieved a reputation for scholarship and intellectual distinction. Lord Eldon's brother, William Scott (1745–1836), Lord Stowell, undoubtedly bears a considerable part of the credit for raising the public standing of the Civilian profession. Scott was a remarkable man, and his career was not a conventional one. Fellow and Tutor of University College, Oxford, at the age of nineteen—in the very year that his neighbour Blackstone across the High became Vinerian Professor—he was called to the Bar by the Middle Temple the year after taking his D.C.L., and by 1794 was a bencher of his Inn and a distinguished ecclesiastical judge. Yet not only was Dr Scott a Civilian and a barrister, he also taught for several years at Oxford as Reader in Ancient History, and served as a member of Parliament. In law and politics, Stowell shared the conservative instincts of his brother. While professing to value the principle of religious toleration, he was strenuously opposed to Roman Catholic emancipation in Ireland, which he felt would be 'setting fire to the country', while in the Commons in 1815 he urged that sectarians should not be excused from contributing to the maintenance of the established Church. In a letter to Joseph Story in 1820 he explained his opposition to all manner of reform, including moderate reform; the latter he considered particularly dangerous, because a modest reform was easily made and then the violent reformers would rush into the breach.[1]

Stowell was not a gifted extempore speaker. An American visitor to his court in 1819 was surprised to find that 'his elocution did not appear to me the best; his manner was hesitating; his sentences more than once got entangled, and his words were sometimes recalled that others might be substituted.'[2] Yet his prepared lectures at Oxford were accounted brilliant, and his written judgments met with universal praise. We know that the choice of words and phrases plagued him beyond the moment of delivery, because the same American writer was informed that 'not only would he change words while the opinion was in the press, but reconstruct whole sentences,' and that on one occasion, 'after an anxious correction of the proof sheet, and a revise after that, the type was nearly all pulled down to be set up again for some better transposition of the sentences'.[3] Lord Brougham—a political adversary—said of his judicial work, 'His judgment was of the higher caste, endowed with all the learning and capacity which can accomplish, as well as the graces which can embellish, the judicial character. It was calm, firm, enlarged, penetrating, profound. If ever the praise of being luminous could be bestowed on human composition, it was upon his judgments.'[4] Stowell is nowadays remembered primarily as an Admiralty judge,[5] but many of his judgments in ecclesiastical cases were reported, including that in *Dalrymple* v. *Dalrymple* on the validity

[1] Quoted in H. J. Bourguignon, *Sir William Scott, Lord Stowell, Judge of the High Court of Admiralty 1798–1828* (Cambridge, 1987), at p. 52. The information about Scott is taken from Bourguignon, and from the article of 1897 in 51 *DNB* 108 by J. A. Hamilton (later Lord Sumner).

[2] R. Rush, *Residence at the Court of London: comprising incidents, official and personal, from 1819 to 1825* (1845), vol. I, p. 15.

[3] Ibid., pp. 15–16.

[4] *Statesmen of the Time of George III* (1872 ed.), vol. IV, p. 67.

[5] E. S. Roscoe, *Lord Stowell: his life and the development of English prize law* (1916); Bourguignon, *Lord Stowell, Judge of the High Court of Admiralty* (above).

of a secret marriage contracted informally in Scotland,[6] and that in *Gilbert* v. *Buzzard* which settled the physical requirements of lawful burial.[7] In these cases the institutions of marriage and burial were characteristically traced from the earliest Classical times, and comparisons drawn from different countries and religious persuasions. Such learning could not be left to evaporate in the memory, and it can hardly be a mere coincidence that the practice of publishing reports of admiralty and ecclesiastical cases was belatedly started around this time. The Civilian profession during the time of Stowell's dominance attracted men of the quality of Christopher Robinson (1796), Joseph Phillimore (1804), Jesse Addams (1811), John Haggard (1818) and William Curteis (1826), all of whom became law reporters,[8] Herbert Jenner (1803) (later Sir Herbert Jenner-Fust) and John Dodson (1808), who each became Dean of Arches, and John Lee (1816), who was to lead the fight to save Doctors' Commons in the 1860s.

Dr Stephen Lushington (1782–1873) entered this select group in 1808.[9] A fellow of All Souls since 1801, he had at first intended a political career and was called to the Bar by the Inner Temple in 1806. (Like Stowell, he was to become a bencher of his Inn, a distinction rare for Civilians.) He did indeed serve in Parliament, but he lacked the subservience necessary to attain place, and turned instead to the study and practice of the Civil law. This turn in his career was no doubt suggested by his father, Sir Stephen Lushington, Bt., who had been a proctor before becoming Chairman of the East India Company.[10] He succeeded in due course of time to Stowell's offices of Judge of the Consistory Court of London (1828) and Judge of the Admiralty Court (1838), becoming finally Dean of the Arches (1858). Though he was a great admirer of Stowell, before whom he practised for many years, a more different personality can hardly be imagined.

As a keen supporter of religious toleration and Roman Catholic emancipation,[11] a campaigner against the slave trade and against capital and corporal punishment, Lushington was generally as warm in the cause of reform as Stowell was in resisting it. Moreover, his reforming zeal did not stop short at the end of Knightrider Street. He was deeply sensitive to the manifold criticisms of the spiritual jurisdiction, which reached their climax in 1846 with the formation of a Society for the Abolition of Ecclesiastical Courts as 'a source of oppression and hardship, and a national dishonour'. Lushington did not accept the wildest of these censures, but he was not a man to bestow his talents upon the defence of any institution which upon reflection he found wanting, out of mere professional loyalty. To permit perceived defects to continue could only harm the Church of England itself. And, as things turned out, Lushington's destiny was indirectly to facilitate the extinction of the profession he had himself chosen in 1808.

In 1830, as one of the most senior ecclesiastical judges in the country, Dr Lushington was appointed to the Ecclesiastical Courts Commission. The appointment was doubtless owed to Lord Brougham, the new Lord Chancellor, whose reforming views were largely shared by Lushington and who remained a

[6] *Dalrymple* v. *Dalrymple* (1811) 2 Hag. Con. 54.

[7] *Gilbert* v. *Buzzard* (1821) 3 Phillim. 335, 2 Hag. Con. 333.

[8] Robinson's reports, however, were confined to Admiralty cases.

[9] The following essay on Dr Lushington is based almost entirely on S. M. Waddams, *Law, Politics and the Church of England: the career of Stephen Lushington 1782–1873* (Cambridge, 1992), to which the present writer is heavily indebted and to which the reader is referred for further and better particulars. Professor Waddams is now engaged on a general history of the ecclesiastical courts in the 19th century.

[10] G. D. Squibb, *Doctors' Commons* (1972), 198; *DNB*. The name Stephen was widely used in the family. There was another contemporary M.P. called Stephen Lushington (d. 1868), who was given an honorary D.C.L. (Oxon.) in 1839, and another Sir Stephen Lushington (d. 1877), who commanded the naval brigade at Sevastopol and became an admiral: *DNB*.

[11] This was one of the reasons for his support of the founding of London University (i.e. what is now University College London). He was a proprietor, and member of the Council.

correspondent throughout his life.[12] Lushington was the prime mover behind the Commission's proceedings, preparing the questions to be put to witnesses, and drafting most or all of its main report (1832).[13] The commissioners proposed a number of sweeping reforms, which Lushington seems to have supported. It first recommended—in a special interim report of 1831—the abolition of the 'Court' of Delegates.[14] The procedure for issuing *ad hoc* commissions to delegates had proved dilatory and expensive, and they were commonly issued to junior practising advocates or persons with insufficient expertise.[15] Parliament responded immediately by transferring the final appellate jurisdiction in English ecclesiastical law to the Privy Council, which was given a Judicial Committee—a tribunal on which Lushington himself sat from 1838. At the other end of the judicial system, the Commission drew attention to the problems arising from the existence of myriad local peculiars, which were inadequately staffed with either judges or counsel. Lushington and the Commission favoured the consolidation of all ecclesiastical courts—including abolition even of the Provincial Court of York—the introduction of oral evidence and jury trial, the extension of rights of audience to barristers, and the abolition of the Church's criminal and defamation jurisdiction. On the other hand, Lushington urged the retention of the probate and matrimonial jurisdiction, the former in particular because its removal would ruin the 130 or more proctors and clerks without any corresponding public benefit. The future of the profession became a major issue from 1833, when the Real Property Commissioners actually recommended the transfer of the testamentary jurisdiction from the Church courts to the courts of common law and equity. This was a bombshell which rocked Doctors' Commons to the verge of collapse, since it was 'tantamount to a proposal to annihilate the whole race of Doctors and Proctors at a blow'.[16] Another commission was appointed, taking the Admiralty within its purview, and Lushington testified that the removal of probate jurisdiction would be 'the ruin of the profession'.[17] The Commission reacted by recommending the retention of a Civilian profession—albeit opened to Bachelors of Law[18] and even Masters of Arts—on grounds of the national interest in maintaining a body of expertise in international Admiralty law for use in time of war. This argument was put forward by Lushington himself. But, as a contemporary commentator sardonically pointed out, preserving a monopoly on testamentary business to the ecclesiastical courts was a somewhat circuitous way of securing expertise in international law:[19]

> Surely they cannot expect to persuade the public that the study of the law of nations will be neglected unless the doctors have a monopoly of testamentary law conferred upon them, or that the common law and equity bar are unequal to questions involving the construction of treaties or general considerations of expediency. If this be so, how is it that the doctors appear so seldom before the privy council when appeals involving questions of national right are to be discussed?

[12] They had both acted as counsel for Queen Caroline, and collaborated in the founding of London University and the Society for the Diffusion of Useful Knowledge.

[13] Report of the Commission appointed to enquire into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales.

[14] The practice whereby Delegates were appointed to hear ecclesiastical appeals by commission from the Chancery had been introduced in 1533 to replace appeals to the pope and papal delegates: Submission of the Clergy Act 1533 (25 Hen. VIII, c. 19).

[15] See G. I. O. Duncan, *The High Court of Delegates* (Cambridge, 1971), pp. 28–31.

[16] Anon., 'The Admiralty and Ecclesiastical Courts' (1834) 11 *Law Mag.* 447, 448.

[17] Ibid., p. 452.

[18] The written English canons required only the LL.B., and the doctorate was still not required for practice in the province of York.

[19] 'The Admiralty and Ecclesiastical Courts' (1834), at p. 454.

It was not the most cogent defence of the Civilian profession, and from 1833 onwards the Civilians were, for good or ill, condemned to extinction.

The recent researches of Professor Waddams have shown that Lushington agonised considerably over his support for these reforms, knowing the effect they would have upon Doctors' Commons. In a surviving draft paper, perhaps prepared for the Commissioners, he wrote:[20]

> I apprehend that . . . with the exception of the profits arising from the office of King's Advocate, the whole gains of the profession amount to scarcely more than one half the income derived by a single eminent counsel at other bars; that the inevitable consequence of this state of things is that the profession must decline, not only in public estimation but in real talent and acquirements, for I must think that there is no present inducement and little future prospect to bring men of ability and industry to the Civil law bar . . . I think it is injurious to the public that this state of things should continue . . . Notwithstanding the effects upon the bar in Doctors' Commons, not long able (as I believe) even without a change to sustain itself, and which for many reasons I sincerely regret, I must add that the [proposed reforms] appear to me advantages to the public of the greatest value, calculated to render justice more speedy and less expensive, and to destroy a large portion of litigation, the very profitability of which will be removed, the subject-matter no longer existing.

In a letter around the same time to Lord Brougham, Lushington confessed, 'My own opinion is and long has been that the profession must fall; it is vain, I think, to expect that talent will now come in on the bare hope of war.'[21] Rather surprisingly, given that the measure had bipartisan support, the Bill introduced by the Conservative government in 1835 to implement the main recommendations of the Commission did not pass, and the ecclesiastical courts continued in their unreformed state until the legislation of 1857. Lushington's judicial career, thus prolonged by the failure of his own proposals, was to bring torments of another kind.

In the first place, he was compelled to administer and enforce aspects of ecclesiastical law which he thought deeply unsatisfactory. The most glaring example of his split legal personality is provided by the litigation over church rates, which was made a political issue by Dissenters in the 1830s. Lushington's personal view was that the Church could only damage itself by seeking to enforce the payment of church rates against those who refused on grounds of conscience to pay them. He said in 1837 that 'the Church stood by the will of the majority; when the majority was in its favour it reigned paramount, but as the minority who were against it began to increase in number, so it must decline in power, and if it did not give way to their wishes would run a risk of being overturned.'[22] Yet, at the very same time that he was campaigning in Parliament for an amendment of the law, he was being called upon as a judge to enforce the law against Dissenters. It was Lushington who found himself in the painful position of having to incarcerate John Thorogood, the 'church-rate martyr', who had arranged to have himself cited in the Consistory Court for the very purpose of putting himself in contempt and thereby gaining publicity. Lushington had little option but to oblige Thorogood by certifying his contempt to the Chancery, where the order was made for his committal. But in doing so he pointed out that there was no law

[20] Waddams, pp. 19–20 (punctuation modernised).

[21] Ibid., p. 20. The reference to war is to the lucrative prize jurisdiction, which was dormant in times of peace, but had provided some buoyancy during the Napoleonic wars when Lushington was first admitted to practice.

[22] Speech in the House of Commons, quoted in Waddams, p. 251.

enabling him to release Thorogood unless and until his contempt was purged; he might therefore have found himself in the invidious position of having sent a man to prison for life for failing to pay five shillings and sixpence. The outcome was an Act of Parliament empowering a judge to release a prisoner after six months even if he had not purged his contempt.[23] Lushington continued to be plagued throughout his career by church-rate cases, which constituted the largest single category of suit coming before him as Dean of the Arches. They were not abolished till 1868, the year after his retirement.

As Judge of the Consistory Court, Lushington presided over numerous matrimonial causes. Although he held traditional views on the subjection of wives to their husbands, and on the duty of husbands to control their wives, he was genuinely sympathetic to wronged wives, and in his career at the bar his two most famous clients were Lady Byron and Queen Caroline. He urged Parliament to accord women the same rights to divorce as men, and favoured the introduction of secular judicial divorce on the ground that it might help to achieve equal access to the law. As a judge, however, he had inherited Lord Stowell's conservative policy towards matrimonial litigation and showed little inclination to modify it. Divorce *a mensa et thoro* was available only in the case of physical danger,[24] and Dr Lushington continued to apply this principle himself, proclaiming that it was no part of the judicial function to interfere in marriages to ensure the personal happiness—as opposed to the safety—of the parties.[25] In a case of divorce *a vinculo*, he declared in the same vein, 'It may be true that . . . if the marriage could be set aside it might be productive of happiness and comfort to all parties concerned; but true it also is that I am to decide the question as if no such considerations belonged to it . . .'.[26] The reforms of 1857, when matrimonial causes were removed to a secular court, were not intended to change and in fact did little to change the substance of the law of divorce and separation. Indeed, the bishops continued to oppose equality for wives until the present century, and it was not achieved until 1923.

In the field of probate, Lushington advocated the imposition of formal requirements in order to reduce the amount of tedious, expensive and often unpredictable litigation, and the case was accepted by Parliament in passing the Wills Act 1837. However, as with the Statute of Frauds 1677, which had had a similar object, the introduction of compulsory formalities had the serious side-effect of causing injustice when they had for some reason been omitted or mistaken. Lushington found himself on more than one occasion obliged by virtue of his own reforms to render a judgment which he admitted would cause hardship, in order to preserve the greater public interest which he believed would follow from insistence on form.[27]

Perhaps the most painful of the judicial predicaments in which Dr Lushington found himself were those which did at least belong more naturally to the spiritual jurisdiction. But they were problems for which a court of law, and a judge of Dr Lushington's qualities, were ill suited to resolve. It might even be maintained that the famous series of test cases in which Lushington played such a central part served in the end to weaken the relationship between the Church and the Law. Nevertheless it is easy to feel sympathy for him as he struggled to impose legal logic

[23] Ecclesiastical Courts Act 1840 (3 & 4 Vict., c. 93); Waddams, pp. 254–256.

[24] *Evans* v. *Evans* (1790) 1 Hag. Con. 35; *Harris* v. *Harris* (1813) 2 Phillim. 111; 2 Hag. Con. 148; followed by Dr Lushington in the Consistory Court in *Kenrick* v. *Kenrick* (1831) 4 Hag. Ecc. 114, 129; *Neeld* v. *Neeld* (1831) ibid. 263; *Evans* v. *Evans* (1843) 1 Notes of Cas. 570.

[25] *Dysart* v. *Dysart* (1844) 1 Rob. Ecc. 106. Lushington's judgment was reversed (on the facts) by the Court of Arches: ibid., p. 470.

[26] *Ray* v. *Sherwood* (1836) 1 Curt. 173, 193.

[27] E.g., *Croker* v *Marquess of Hertford* (1844) 4 Moo. PCC 339; *Hudson* v. *Parker* (1844) 1 Rob. Ecc. 14; Waddams, pp. 189–193.

upon highly contentious religious issues under the fierce scrutiny of the new and increasingly fervent opposing factions in the Church. Lushington was an old-fashioned churchman, with essentially eighteenth-century tastes in liturgy and ceremonial, and a firm believer in the constitutional position of the established Church, preserved (as he saw it) by the sixteenth-century martyrs from the superstitious idolatry of Rome. On the other hand, as a strong liberal he favoured the extension not merely of toleration but of full civil privileges to Dissenters, Roman Catholics and Jews, and he spoke and voted accordingly in Parliament. He also supported the reform embodied in the Marriage Act 1836, which introduced the civil form of marriage, and would indeed have gone further than the legislation by requiring a civil form of marriage in all cases and leaving it to the parties to decide what religious rites they would observe subsequently. His liberal opinions inspired his political career. But was it the task of an ecclesiastical judge to hold the balance impartially between differing interpretations of the Christian faith, or to preserve the Church of England as he found it? Should the courts try to ease the growing tensions in the Church, or should they adhere steadfastly to the status quo? These had probably not been burning issues in Doctors' Commons when Lushington was first admitted in 1808. But in the Indian summer of that ancient profession, a Doctor of Civil Law found himself at the centre of dire religious controversy.

The first battle opened in 1849 when the Rev. George Cornelius Gorham brought suit against Henry Phillpotts, bishop of Exeter,[28] for refusing to institute him to a benefice to which he had been presented by the patron.[29] Gorham was a clergyman of forty years standing, formerly a fellow of Queens' College, Cambridge, but the bishop had taken exception to him for his allegedly Calvinist leanings. It was hardly the act of a neutral bishop to subject Gorham to an extraordinary 52-hour long interrogation on the doctrine of baptismal regeneration, a gruelling examination which the candidate was doubtless intended to fail and therefore did fail. The Dean of the Arches, Dr Jenner Fust, decided against Gorham,[30] but the decision was reversed by the Privy Council,[31] and Lushington played a major role in the appellate proceedings. The case provoked over 140 pamphlets, and the legal arguments alone ran to hundreds of pages. It was perhaps the nearest the Church of England had come to a heresy trial since the Reformation, and it was upon a question so subtle and complex that the theology could hardly be resolved to anyone's satisfaction by a court of law. The courts indeed struggled to keep the theology at arm's length, and concentrated on the fairness of the examination and the absence of any specific statement by the bishop of the points on which Gorham was deemed to be in error. Lord Langdale, in announcing the resolution of the Judicial Committee, said that the role of the court was simply to interpret the Articles of Religion and the Liturgy according to the same principles of construction as were applied to all written instruments. The decision nevertheless prompted a number of Tractarians, including Archdeacon Manning, to defect to Rome. For both sides, it seemed at the least inappropriate that such a question should be settled in the end by a secular body.[32]

A few years later a controversy of similar gravity was begun by the Ven. George Anthony Denison,[33] archdeacon of Taunton, who as examining chaplain to the

[28] Not to be confused with the more staid Henry Philpott, bishop of Worcester 1860–90, formerly Master of St Catharine's College, Cambridge.

[29] Waddams, pp. 271–280.

[30] *Gorham* v. *Bishop of Exeter* (1849) 2 Rob. Eccl. 1.

[31] *Gorham* v. *Bishop of Exeter* (1850) Br. & Fr. 64; more fully reported in E. F. Moore ed., *The Case of Gorham against the Bishop of Exeter* (1852).

[32] Lushington had in 1847 drafted a bill for adding bishops and even professors of divinity to the Judicial Committee: Waddams, p. 279.

[33] Waddams, pp. 280–288.

bishop of Bath and Wells had been requiring ordinands to indicate their assent to the doctrine that even an unfaithful or unworthy communicant actually received the Body and Blood of Christ. This was a theological position little short of papistical, and proceedings were commenced before the archbishop—the bishop being patron of his living—to deprive Denison under the provisions of the Church Discipline Act 1840. The archbishop (Sumner) was disinclined to sit, and had to be compelled to do so by *mandamus*; in the event, he is said to have slept in court each day and—more properly—to have left the conduct of the proceedings entirely to Dr Lushington as his chief assessor. The judgment was that Denison be deprived, though the Court of Arches restored him, and the Privy Council sidestepped the issue by holding that the proceedings had been out of time in the first place.[34] Thus did the courts of law tackle the vexed question of the Real Presence. Lushington suffered a good deal of criticism for his part in this decision, and was accused of allowing personal religious sympathies to affect his judgment. If the Gorham decision could be said to represent toleration of diversity in opinions, Lushington's decision in the Denison case would have made it difficult for High Churchmen to remain in the Church of England. Gladstone, indeed, wrote that it made 'the cup of disgust overflow' to recollect that the same set of canons and principles could be used to produce such different results.[35] Lushington's defence was that in Gorham's case the charges of unsoundness were too imprecise to be made out, whereas in Denison's case the doctrine which he preached was unambiguously contrary to the Articles.

Before this case had been finally determined, the more mundane but equally explosive question of ornament had been raised by the case of St Barnabas, Pimlico.[36] The church had been built in 1850 and decorated in the Gothic style pioneered by Pugin and now regarded as typical of Victorian churches. So far in fact has the Victorian Gothic taste come to control our image of a typical church that it is easy to forget what a great and controversial change the introduction of neo-medieval ornament and colour wrought at the time. Of course, there was nothing new about medieval church architecture and no conceivable objection to emulating the early English style of building. But the medieval churches of Lushington's youth had plain interiors and sparse decoration, without crosses, changing liturgical colours, or large altar candlesticks. So shocking, in the 1850s, was the appearance of the new church in Pimlico that proceedings were commenced to outlaw the stone altar, the credence table, the cross and candles, and the use of liturgical colours. The case came before Dr Lushington as Judge of the Consistory Court, and he tried again to defuse the situation by declaring that the matter required 'a dry and tedious inquiry into doubtful propositions of positive law'.[37] He nevertheless did not manage, and perhaps did not see it as necessary, to preserve an open mind as between the status quo and the new Roman tendency which had already led a hundred clergymen to secede from the Church of England and which threatened to create splinter parishes. He referred in his judgment to the 'just abhorrence' felt at any usage which had 'the remotest leaning to the Church of Rome', whose usages were characterised by 'a meretricious display of fantastic and unnecessary ornament'. The ornaments were insignificant in themselves, but by association they amounted to 'a servile imitation of the Church of Rome' and were therefore dangerous. 'Chastity and simplicity are not at variance with grandeur

[34] *Ditcher* v. *Denison* (1858) 11 Moo. PCC 324. The decision of the Court of Arches is reported in Deane 334.

[35] Passage quoted in Waddams, pp. 286–287.

[36] Waddams, pp. 288–297.

[37] *Westerton* v. *Liddell* (1855), reported in a separate volume edited by A. F. Bayford: (1857) Br. & Fr 117 (P.C.). Note also *Flamank* v. *Simpson* (1866) L.R. 1 A & E 276 (prosecution for using candles on the communion table when not needed for illumination).

and beauty; but they are not reconcilable with jewels, lace, variegated cloths, and embroidery.' All that is missing from the judgment is a reference to the Whore of Babylon.[38] It brought still more obloquy on Lushington, who was upheld by the Court of Arches but reversed by the Privy Council on every point except that concerning the stone altar. The dispute was the first in a long series of well-known cases on ornament which continued until the end of the century, and which cumulatively rejected Lushington's position. One result, as he predicted, was the creation of more or less Roman parishes which failed to cater for parishioners who wished to follow the more familiar ways: but this was a less serious problem in Pimlico than in a country village.

The next legal controversy to arise, in 1859, concerned the practice of confession and absolution, which had recently been reintroduced by some High Churchmen.[39] A complaint had been laid by two women against the Rev. Alfred Poole, the stipendiary curate of the same St Barnabas, Pimlico, for asking them lewd questions during confession, and the bishop of London had revoked his licence. Archbishop Sumner tried to dispose of the case by correspondence, but was again compelled by *mandamus* to provide a formal hearing. Lushington once more sat as assessor and conducted the proceedings. He was now aged seventy-seven, and both he and the archbishop—two years his senior—fought a desperate struggle against slumber during the arguments. The complainants' submission was not that confession and absolution were illegal, but that young priests ought not to subject women to disgusting and improper questions about their sexual conduct.[40] There was some reticence about discussing the exact nature of the questions, and the accusations against Poole do not seem to have been any more precise than those against Gorham, but Dr Lushington nevertheless decided against him. In this case the Privy Council declined jurisdiction to hear an appeal.[41]

As if all these problems were not enough, the 1860s brought a great debate over the authority of the Bible.[42] In the highly controversial *Essays and Reviews* (1860) it was daringly claimed that the Bible could be subjected to textual criticism on the basis that not everything which it contained was literally true or even divinely inspired. This was an assertion quite unacceptable to the High Church, which was still smarting from Darwin's blasphemous scientific attack on *The Book of Genesis*. Two of the essayists—the Rev. Dr Rowland Williams, vicar of Broad Chalk, and the Rev. Henry Bristow Wilson, vicar of Great Slaughton—were cited before the consistory courts for what the law reports refer to as heresy,[43] and the cases were removed into the Court of Arches. Once more Lushington emphasised that his court was not a court of Divinity but of Ecclesiastical Law, though he acknowledged that no court could be asked to decide a more important question than 'what was sufficient for the salvation of the human race'. According to Article VI, 'Holy Scripture containeth all things necessary to salvation . . .', but nowhere in the Articles is it stated that everything in Holy Scripture is to be believed literally or that every word was written down by direct divine interposition. Lushington nevertheless decided that the two clergymen should be deprived. The principal charge against Dr Williams was that he had declared the Bible to be an 'expression of devout reason', which was held to be inconsistent with the necessary implication of the expression 'God's word written' in Article XX. Mr Wilson was deprived

[38] Cf. Waddams, p. 293.

[39] Waddams, pp. 297–302.

[40] In *R.* v. *Hicklin* (1868) L.R. 3 Q.B. 360, some language in a confessional manual was actually held to be criminally obscene.

[41] *Poole* v. *Bishop of London* (1861) 14 Moo. PCC 262. The decision at first instance is reported in *The Times* (references in Waddams).

[42] Waddams, pp. 310–346.

[43] I.e. setting forth doctrines contrary to the doctrines of the Church of England contained in the Articles of Religion, the Book of Common Prayer, and the Formularies.

principally for expressing the hope that even the wicked would find 'refuge in the bosom of the Universal Parent', a sentiment which Lushington considered inconsistent with the mention of everlasting fire in the Athanasian Creed. The decisions were reversed by the Privy Council. In the case of Dr Williams, it was held that his expressions did not on a reasonable construction support a criminal charge of maintaining that the Bible was not the word of God. As to Mr Wilson, although the Board did not doubt that God might condemn the wicked to eternal misery, they could find nothing in the Formularies to render it illegal for a clergyman to express the hope that God might ultimately grant them pardon.[44] Lushington's decision on the authority of Scripture is particularly difficult to follow, since he had dismissed some of the charges against Dr Wilson—for instance, that relating to the historical truth of the Flood—on the ground that parts of the Bible were more historical and less sacred than others, that the text must contain copying errors and mistranslations, and also that some passages were allegories not meant to be taken as literal truth. For these latter propositions, which were not the subject of appeal, Lushington's judgment was praised as liberal; but it was said by counsel that neither party was satisfied by the result. Lord Westbury L.C. for his part earned the jocular rebuke that he had 'dismissed hell with costs and taken away from orthodox members of the Church of England their last hope of everlasting damnation'.[45]

Whether it was right for questions of such a character to be resolved by lawyers, with appeal to such an essentially secular body as the Judicial Committee of the Privy Council, was a matter of legitimate debate and was a major factor in the decision of clergymen such as Manning to remove themselves to a Church in which the ultimate authority was spiritual. But this was not Lushington's fault, and he always disclaimed any jurisdiction over purely theological questions. The proper toleration which the law accorded to those of diverse religious persuasions, and which Lushington actively supported in Parliament, could not be extended by an English court to ministers of the Church of England. The clergy of the established Church were by law bound to maintain the doctrine and worship of the Church as settled in the sixteenth century. This was a matter of law rather than freedom of religion, since no one was compelled to be a Church of England priest, and Dr Lushington maintained that such questions could and ought to be decided on purely legal grounds, by construing the relevant Articles and Formularies of Faith, and avoiding theological or political issues. It is, however, still perhaps an open question how far he succeeded in keeping the law insulated from the realms of theological controversy, and how far the Victorian Church benefitted from having these burning issues filtered through courts of law dominated (in the Privy Council) by politicians.

At the same time as these great debates were placing Dr Lushington and his brother Civilians briefly at the centre of the national stage, they were having to make agonising decisions of a more domestic nature concerning their own divorce and separation. Upon the passage of the 1857 legislation, which permitted serjeants and barristers at law to appear in the new probate and divorce courts, it was obvious that the end had come for the profession of Civilian advocates. There was provision in the Court of Probate Act 1857, section 117, for the College of Doctors of Law to surrender their charter to the Crown, whereupon the corporation would be dissolved and all the real and personal estate would belong to the members in equal shares as tenants in common for their own use. After a rearguard action to prevent it, the property—including the magnificent library—was sold, and the proceeds

[44] *Williams* v. *Bishop of Salisbury* (1864) 2 Moo. PCC NS 375. The decision at first instance is reported *sub nom Bishop of Salisbury* v. *Williams* (1862) 1 New Rep. 196 (not in the *English Reports*), and in a separate volume printed in 1862.

[45] J. B. Atlay, *The Victorian Chancellors* (1908), vol. II, p. 264, quoted in Waddams, p. 331.

shared among the members, apart from the colours of the Civilian volunteer corps, which were presented to the Inner Temple.[46] But the divorce was *a mensa et thoro* and not *a vinculo*, for the charter was not in the event surrendered, and the corporation was not therefore dissolved under the terms of section 117. The last meeting of the College was held on 10 July 1865, when Dr Lushington (as Dean of the Arches) was still President. His prediction of professional extinction had come to pass, albeit thirty eventful years later than he had anticipated.

[46] The Military Association was formed in 1798 to protect the English Civilians against Napoleon.