Famous English Canon Lawyers: X

SIR ROBERT PHILLIMORE, QC, DCL († 1885) AND THE LAST PRACTISING DOCTORS OF LAW

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At the time of the sale of Doctors' Commons in 1865, there were twenty-seven surviving members of the Society of Doctors of Law, some of whom were retired from practice.[1] Five of them (Adams, Deane, Harding, Phillimore and Twiss) had been given silk in 1858, after the loss of their monopoly of audience, and in the case of Dr Adams this set a precedent for granting that rank to a law graduate who was not a barrister. (The precedent was followed in the case of Dr Tristram in 1881.) The other Civilian silks had long before taken the precaution of being called to the common-law Bar[2]—as had fourteen of the twenty-seven advocates mentioned above—and a few were benchers of their inns. Dr Spinks had been admitted and called to the Bar by the Inner Temple in 1858,[3] but did not take silk until 1866. A partial assimilation had thus began, as a prelude to extinction.

The last doctors of law

The last generation of doctors were a diverse body of men. While far from being an exclusive caste, three of their number (Jenner-Fust, Phillimore and Robinson) were the sons of advocates, and another (Swabey) a grandson; Dr Robinson was actually born in Doctors' Commons. Some of them were best known for their non-legal activities and achievements. Dr Lee, a Fellow of the Royal Society and a founding member of the Royal Astronomical Society, was interested in science, numismatics and archaeology, and possessed a large manuscript collection (mainly derived from Chief Justice Lee and Sir George Lee).[4] Sir Travers Twiss, another Fellow of the Royal Society, was Professor of International Law at King's College London, and then Regius Professor of Civil Law at Oxford. He was an amateur historian, and produced editions of *The Black Book of the Admiralty* and *Bracton* for the Rolls Series. The edition of *Bracton* was badly received by the experts, and Maitland wrote scathing comments into his own copy, now in the Squire Law Library. Undeterred, Twiss completed an edition of *Glanvill* for the Rolls Series, and several copies were printed off after his death; however, on Maitland's advice, the edition was suppressed and most of the copies destroyed.[5] Another professor at King's College London was Sir George Dasent, who was at various times an assistant editor of *The Times*, a civil service commissioner, and a distinguished Norse scholar. Sir John Harding was also a philologist, and published *An Essay on the Influence of the Welsh Tradition upon European Literature*

[1] Dr Trenchard had retired as long ago as 1835, and Sir Howard Elphinstone had retired in 1846 on succeeding to his baronetcy. Dr Matcham had resigned his membership in 1835. Unless otherwise stated, biographical details are from *Dictionary of National Biography, Who was Who 1897–1915*; T. S. R. Boase, *Modern English Biography* (1892–1921); G. Squibb, *Doctors' Commons* (1977).

[2] In addition to those mentioned in the text, Dr Lee (a bencher of Gray's Inn) took silk in 1864; he died in 1866.

[3] He was admitted and called in the same month, by special dispensation.

[4] There is a brief account of his life by H. A. Hanley, *Dr John Lee of Hartwell* (Buckinghamshire Record Office, 1983), with a guide to his papers.

[5] G. D. G. Hall ed., *Glanvill* (1965), pp. lxiii–lxiv.

(1840). Nor were the non-vocational achievements of our doctors confined to literary endeavour. Dr Jenner-Fust, if we are to credit the entry in *Who was Who*, was as well known for his contribution to cricket as for his legal expertise,[6] having captained Cambridge in the first inter-university cricket match in 1827, he became president of the M.C.C. in 1833. His Trinity Hall colleague Dr Bayford had rowed for Cambridge in the first university boat race.

Several of the group (Adams 1822–26, Curteis 1834–44, Robertson[7] 1844–53, Spinks 1853–55, Deane and Swabey 1855–57, Swabey and Tristram 1858–65) continued the tradition of reporting ecclesiastical cases,[8] and others reported admiralty cases (Robinson 1838–52, Swabey 1858–59, and Lushington 1860–65). When this Civilian tradition was absorbed into the mainstream upon the foundation of *The Law Reports* in 1865, the reporting of ecclesiastical cases continued for a time to be carried on by doctors of law (Tristram 1869; Middleton 1869–78, and Pritchard[9] 1878–86). Very few of the last generation of advocates, however, contributed in any more substantial way to Civilian literature. Mention might be made of Twiss's works on international law, especially *The Law of Nations* (1861–63), and of the lesser known work on matrimonial law by Dr Waddilove,[10] though the palm for novelty must go to Dr Pratt for his *Essay on the Use of Lights by Seagoing Vessels* (1857), a subject of considerable importance in litigation arising from collisions at sea.[11] Even Pratt's dry treatise has a more appealing title than Dr Swabey's *Duties of Parish Officers in electing Guardians under the Poor-Law Amendment Act* (1835). Books of this type, however useful, were in the category of guides rather than juristic literature. For a contribution to the literature of ecclesiastical law which deserves a place alongside the famous English Canon lawyers of previous generations, only one author stands out.

Sir Robert Phillimore[12]

Sir Robert Phillimore, as we have noted, was born to the law. His father Joseph Phillimore (1775–1855), the son of a country vicar,[13] had been admitted as an advocate in 1804. Old Dr Phillimore had two sons. The elder, John George Phillimore (1808–65), was called to the Bar, took silk, and became a bencher of Lincoln's Inn in 1851; but he bore the Civilian gene, and wrote on Roman and Canon law.[14] Indeed, according to Holdsworth, he took the view—distinctly eccentric for a practising silk—that many of the contemporary defects in English law were due to neglect of the study of Roman law.[15] The second son,

[6] He is not to be confused with his more distinguished father, Sir Herbert, who was King's Advocate.

[7] Rob. Ecc. Dr Robertson is not to be confused with Dr Robinson, the Admiralty reporter.

[8] In addition, Dr Waddilove produced a *Digest of Cases* (1849).

[9] Dr Pritchard was not, however, a member of Doctors' Commons. He was the author of *A Digest of the Law and Practice of the Court for Divorce and Matrimonial Causes* (1864; new ed. 1874). This was a revised version of the *Handbook* which he had written in conjunction with W. T. Pritchard, proctor and solicitor, in 1859. It was merely a digest of case law and legislation.

[10] A. Waddilove, *The Laws of Marriage and the Laws of Divorce of England* (1864). He also wrote *Church Patronage historically, legally and morally considered in Connection with the Offence of Simony* (1854).

[11] Dr Pratt also wrote *The Law of Contraband of War* (1856).

[12] There is a brief life by Lord Sumner in *DNB*. See also E. Manson, *The Builders of our Law during the Reign of Queen Victoria* (1895), pp. 163–168; Holdsworth, *History of English Law*, vol. XVI, pp. 146–150. Several boxes of his draft papers and offprints are preserved at Christ Church, Oxford, where he was a Student.

[13] The family had originally spelt its name Fynamore, or Phinimore, and changed to the later spelling in the 17th century: *Burke's Peerage and Baronetage* (105th ed., 1980), pp. 2114–2116.

[14] *Introduction to the Study and History of Roman Law* (1848); 'Influence of the Canon Law' (in *Oxford Essays*, 1858); *Private Law among the Romans from the Pandects* (1863). He also delivered a 'reading' on Canon law in the Middle Temple in 1851.

[15] Holdsworth, *History of English Law*, vol. XV, p. 360. See J. G. Phillimore, *Principles and Maxims of Jurisprudence* (1856), which is primarily an exercise in comparative law.

Robert Joseph (1810–85), followed his father to Westminster School and Christ Church and was admitted to Doctors' Commons in 1839. An early interest in politics was revealed in a pamphlet of 1837, in which he defended the constitutional monarchy against the so-called 'democratic'—meaning republican—notions which had been cultivated in radical circles since the Reform Act 1832.[16] His dislike of extremes led him to the middle ground, and in 1852 he was actually elected to the Commons as a Liberal-Conservative. In his Coventry election manifesto of 1857, preserved in Christ Church, he declared himself 'opposed to all violent and organic changes in the framework of our Constitution', yet in favour of wise reforms, and concluded that he was both Conservative and Liberal. On this occasion his admirable political centrality did not secure him a seat; he never returned to Parliament, and he is not remembered as a politician, though he became a long-standing friend and correspondent of Gladstone,[17] who conferred a baronetcy upon him in 1881. After leaving the Commons he continued to be active in public life, and served on numerous royal commissions: Royal Courts of Justice (1859), Judicature (1867), Ritual (1867), Naturalisation (1868) and Neutrality (1868). His professional interest in international law, developed as a law officer during the American civil war, and reflected in an important treatise,[18] led him in 1875 to chair the Alberico Gentili Committee;[19] and in 1879 to become president of the Association for the Reformation and Codification of the Law of Nations.[20]

Phillimore was the last of the great Civilian practitioners, receiving the appointment of Admiralty Advocate in 1855 and of Queen's Advocate-General in 1862,[21] and was the last major Civilian judge, as the final holder of the ancient office of Judge of the Admiralty, and as Dean of Arches from 1867. He also served as Judge of the Cinque Ports, an office his father had held before him, from 1855 to 1875. The office of Dean of Arches by itself was more a professional honour than a position of profit, and Phillimore made a public complaint in 1872 that his remuneration in that office was insufficient to cover his expenses. He had accepted the office because of the 'crisis' caused by the resignation of Dr Lushington, but the latter had clung to the lucrative office of Master of the Faculties, traditionally the principal source of remuneration for the Dean of Arches.[22] Phillimore obtained the latter office on Lushington's death in 1873, but his position was about to be transformed by the Judicature Acts. The Judge of the Admiralty became automatically a Judge of the new High Court in 1875, but by virtue of section 11 of the Judicature Act 1873 he would have retained his former rank and salary, which was lower than that of other puisne judges. Before the first Act came into force, the Judicature Act 1875 provided that 'the existing Judge of the High Court of Admiralty' (meaning Phillimore) should have the same rank, salary and pension as if he had been newly appointed to the High Court, provided that he resigned all offices of emolument except the office of Judge of the Admiralty.[23] Phillimore thereupon resigned the office of Dean of Arches and Master of the Faculties, and

[16] *The Constitution as it is or Democracy?* (1837).

[17] Mrs Gladstone was godmother to Sir Robert's eldest daughter Catherine.

[18] *Commentaries upon International Law* (1854–61), 4 volumes. There were three editions.

[19] The principal purposes were to erect a memorial tablet in St Helen's, Bishopsgate, and to print a new edition of *De Jure Belli et Pacis*: papers in Christ Church.

[20] See *International Law: inaugural lecture delivered by Sir Robert Phillimore* [to the Association] (1879).

[21] He was succeeded as Queen's Advocate by Sir Travers Twiss, who was not replaced upon his resignation in 1872; the office has been in abeyance since then. The last Admiralty Advocate was Dr Deane (following Twiss).

[22] *Clergy Discipline: a letter to His Grace the Archbishop of Canterbury from Sir R. Phillimore* (1872), p. 8. See also S. M. Waddams, *Law, Politics and the Church of England* (Cambridge, 1992), p. 9.

[23] Supreme Court of Judicature Act 1873 (36 & 37 Vict c. 66), ss. 5, 11; Supreme Court of Judicature Act 1875 (38 & 39 Vict c. 77), s. 8.

served as a High Court judge until his retirement in 1883,[24] sitting chiefly—as it seems from the Law Reports—in Admiralty.[25] He was the only member of Doctors' Commons ever appointed to the High Court,[26] though he was qualified in the traditional way as a Queen's Counsel and bencher of the Middle Temple (1858).[27]

Phillimore had joined Doctors' Commons, perhaps out of filial piety, at a time when it was already doomed. As a young advocate, in 1843, he published an impassioned plea for the retention of the advocates' monopoly of audience as it faced a renewed threat.[28] To his conservative disposition, it was an affront that an institution which had survived for so many centuries should be threatened when there were no serious complaints against it. It was an age, he lamented, in which every existing institution was called upon to show cause why it should not be destroyed, whereas in the past the burden of proof had been on those advocating reform. In this age, he said, 'every possessor of a few current phrases, easily learnt and glibly enunciated, and every retailer of a few resuscitated fallacies (innocently believed to be new truths), entertains no doubt as to his full competency to criticise and condemn what the wise and learned of former times have cherished and upheld'. Admission as an advocate required a longer period after the first degree than reading for the Bar, a period in which aspiring advocates could acquire a broader knowledge of history and foreign law than barristers would normally think appropriate. 'The Bar,' he lamented, 'has not escaped the predominant vice, which unhappily characterizes our times, a feverish haste to grow rich, at the expense of bodily health, of general knowledge, and of all due and equal cultivation of the mental faculties, while the anxiety to practise before every Court and in every kind of law, tends to substitute a specious smattering in all, for real proficiency in any single branch of jurisprudence'. Quite apart from the special qualifications of the doctors, and their expertise in ecclesiastical and international law, there was the matter of justice: it was no more just to deprive the doctors of their ancient rights than it was to deprive the serjeants, whose monopoly in the Common Pleas had recently been upheld by the judges against the illegal warrant of 1834.[29] That last argument was ill-judged and was soon answered, since Parliament showed no concern for historical titles. The serjeants' monopoly—under constant attack from Lord Brougham—was abolished by an Act of Parliament rushed through in the Long Vacation of 1846.[30] Specialist bars were no longer acceptable to the powers that be. Phillimore objected in the same pamphlet to the modern practice of appointing diocesan chancellors who were not doctors of law, despite the statute of 1545 which required that lay chancellors should have the doctorate.[31] The Civilian, 'being both necessarily versed in this law, and neces-

[24] J. Sainty, *The Judges of England 1272–1990* (1993), p. 220.

[25] Lord Penzance, President of the Division, had succeeded Phillimore as Dean of Arches in 1875.

[26] It is notable that none of the judges of the statutory probate and divorce courts between 1858 and 1875 were Civilians.

[27] His manuscript reading in the Middle Temple (1861) is at Christ Church. It was said to have been a revival of readings there, albeit in the form of a simple lecture: J. B. Williamson, *The Middle Temple Bench Book* (1937), p. 227. However, his elder brother had given a reading in 1851: above, note 14.

[28] *The Study of the Civil and Canon Law considered in its Relation to the State, the Church, and the Universities, and its Connection with the College of Advocates* (1843), 71 pp. A similar discourse was printed as *The Practice and Courts of Ecclesiastical Law . . . in a letter to The Rt Hon. W. E. Gladstone* (1848), responding to charges made in the Commons by Mr E. Pleydell-Bouverie. See also *Speech of Robert Phillimore, Esq., M.P., in the House of Commons, Tuesday, March 1, 1853 on the motion of Mr Collier* (1853), extracted from Hansard.

[29] J. Manning, *Servientes ad Legem* (1840) (in the Privy Council); *Re the Serjeants at Law* (1839) 6 Bing. N.C. 235 (in the Common Pleas); J. H. Baker, *Order of Serjeants at Law* (1984), pp. 118–122.

[30] County Courts Act 1846 (9 & 10 Vict c. 95); Baker, *Serjeants at Law*, p. 122.

[31] Ecclesiastical Jurisdiction Act 1545 (37 Hen. VIII c. 17) ('so that they be Doctors of the Civil Law'); this applied only to laymen. The statute was repealed in 1863.

sarily being a member of the Church of England,[32] combines that admixture of clerical and secular learning which has been wisely held peculiarly to qualify him for the judge, assessor or adviser of the bishop'. This was, of course, another lost cause. The following year Phillimore mounted a defence of the ecclesiastical courts. Their proceedings were less adversarial than trials by jury, and more suited to family disputes. Written evidence, though open to some objections, could sometimes be more reliable than oral testimony given in the heat of a trial.[33] This opinion, as we have seen, was rejected by Dr Lushington, and it was Lushington who prevailed.[34] Dr Phillimore was not opposed to oral evidence in appropriate cases, and himself introduced a Bill in 1855 to permit viva voce testimony to be given in ecclesiastical courts; he later took some pride in the 'almost total change which the working of this little Statute has produced in the whole procedure of the Courts'.[35]

Phillimore is best remembered by lawyers today for his monumental *Ecclesiastical Law of the Church of England* (1873), which contains no less than 2,466 pages including the preliminaries and index. He had apparently conceived the idea as a result of his labours as the last editor of Burn's *Ecclesiastical Law* (1842).[36] Although he had introduced various alterations in that edition,[37] Phillimore concluded that Burn's alphabetical arrangement was 'fatal to any attempt to produce the law in the form of a system arranged according to the principles of a science'.[38] His new scheme was certainly more systematic, and yet the book could better be characterised as a typical Victorian practitioner's textbook than a work of intellectual coherence. The historical statements in the treatise are often based on modern judgments in the courts rather than a first-hand assessment of the evidence, an approach which would soon be condemned for ever by Maitland. But Phillimore belonged to the old school, and was not in any case writing history for its own sake. He evidently saw the book as a compilation for practical use rather than as the historical or jurisprudential monograph which it might have been in the hands of a Maitland. No doubt this is why Maitland did not see fit to criticise or notice it; unlike the works of Twiss or Stubbs it could not be mistaken for serious historical scholarship.

Ecclesiastical Law was divided into ten sections: (1) an introduction dealing with the Church and its law; (2) the orders and offices of the Church, including benefices and advowsons; (3) 'The Church in relation to the general life of the Members', meaning the sacraments and liturgy (including a transcript of Queen Victoria's coronation service); (4) discipline, including the procedure of the Church courts; (5) the property of the Church, including tithes; (6) fabric, including the duties of churchwardens; (7) councils of the Church, including Convocation; (8) charities and education, including the universities; (9) 'Church extension', dealing with augmentations, Queen Anne's bounty, and related topics; and (10) the Church of England in relation to other churches (meaning the churches of the Anglican Communion throughout the world). The author was uncertain whether to include

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[32] Only a doctorate from Oxford or Cambridge was acceptable.

[33] R. Phillimore, *Thoughts on the Law of Divorce in England* (1844), pp. 40–41, cited in S. M. Waddams, *Law, Politics and the Church of England* (1992), p. 14. In *The Practice and Courts of Ecclesiastical Law* (1848), pp. 53–59, he pointed out that the popularity of trial by judge alone had been proved by the free choice of litigants using the new county courts. He also argued (ibid., pp. 50–51) that detailed positions and articles rendered a party less open to surprise than common-law pleadings.

[34] Stephen Lushington, D.C.L. (1996) 4 Ecc. LJ 556, at p. 558.

[35] *Clergy Discipline: a letter to His Grace the Archbishop of Canterbury from Sir R. Phillimore* (1872), p. 6.

[36] He had also written, in the interim, *The Law of Domicil* (1847); *Practice of Ecclesiastical and Civil Law* (1848).

[37] See 'John Godolphin and Richard Burn' (1994) 3 Ecc. L.J. 214, at p. 221.

[38] *Ecclesiastical Law of the Church of England* (1873), preface, p. v.

the universities and colleges in his eighth section, since recent legislation had removed so much of their ecclesiastical character; another consequence of the changes, he thought, had been 'to reduce the colleges to somewhat of their old position as societies in, but not constituent parts of, the university'.[39] The book avowedly incorporated a good deal of Burn, and it followed the same abridgmental style in listing more or less unconnected propositions with lavish quotations from judgments and other authorities. Like its precursors, its principal value lay, and—for those seeking the older authorities—still lies, in its comprehensiveness as a collection of materials. Most of its constituent sources were in print, though occasional use was made of manuscript sources: for instance, an opinion of Dr Scott (later Lord Stowell) in 1809, that a vestry could lawfully by a majority vote authorise payment of an organist,[40] and that of Dr French Lawrence in 1806 that a minister could not refuse to baptise the child of a Dissenter on the grounds that the child would be brought up to dissent from the principles of the Church of England.[41]

Notwithstanding the massive proportions of the treatise, Phillimore's principal contributions to ecclesiastical jurisprudence are his judgments as Dean of Arches, which often deal in minute detail with the historical authorities. Like Dr Lushington, he was obliged to deal with some highly contentious disputes concerning ornament and ritual, but he did so in a manner calculated to heal differences. Not that he had any sympathy with Rome. Phillimore adhered to the orthodox view of the Church of England as the true catholic Church, descended directly from the privitive Church, with independent rights which had been recognised in the middle ages—the *ecclesia anglicana* of Magna Carta (1215).[42] The schism between the Eastern and Western Churches was attributable to 'the arrogance, ambition and un-catholic conduct of Rome', and further divisions had been 'aggravated by the new dogmas which Rome has recently promulgated, founded upon a new theory of development which shakes the stability of all Christian faith'. The Vatican Council of 1870, indeed, was in Phillimore's view of dubious canonical validity, and its doctrine of papal infallibility 'at variance with all sound catholic teaching and principle'.[43] Rome had, in short, left the catholic Church and set up on its own. But that did not mean that practices current before the Reformation were wrong or unlawful merely because they had been discontinued: there was a shared catholic inheritance.

Phillimore was engaged in most of the important cases on ritual and ornament in the 1850s and 1860s[44], and in 1866 advised the English Church Union on the lawfulness of the recent revival of 'some ancient Ecclesiastical Usages'.[45] He held that:

'It is a mistake in law, as well as in history, to conceive that the position of the Church of England with respect to the Roman Church can be ascertained by cita-

[39] *Ecclesiastical Law*, p. 1991 (and pp. 2000 2001). This opinion was ignored by the University Commissioners in 1993, who decided contrary to general understanding and without any sound reason that the colleges at Oxford and Cambridge were 'constituent colleges' of those universities for the purposes of the Education Reform Act 1988.

[40] *Ecclesiastical Law*, pp. 928 929. Nevertheless, he cited authorities showing that an organ was not necessary in a parish church.

[41] Ibid., pp. 647 648. Dr Lawrence pointed out that ministers were obliged to baptise papists' children under the Presentation of Benefices Act 1605 (3 Jac I c 5), s. 14 (repealed in 1843).

[42] In addition to the next work cited, see also his judgment in *Martin v Mackonochie* (1868) LR 2 A & E 116 at 150 174, Ct of Arches.

[43] R. Phillimore, *The Ecclesiastical Law of the Church of England* (1873), pp. 2, 1922.

[44] Eg *Liddell v Westerton* (1856), printed as *Argument of Robert Phillimore D.C.L. in the Court of Arches in the Matter of the Ornaments of St Paul and St Barnabas, Knightsbridge (1856): Speech of Robert Phillimore D.C.L. Q.C., in the Case of The Office of the Judge Promoted by the Bishop of Salisbury against Williams* (1862).

[45] G. H. Brooks, *Dispute, Ritual Ornaments and Usages. A Case submitted on behalf of the English Church Union, with the opinions of Her Majesty's Advocate (Sir R. Phillimore Q.C.) & Sir Fitzroy Kelly Q.C. . . .* (1866), which was a response to *The Ornaments of the Minister* (1866).

tions of the violent vituperations to be found during the heat of religious conflict in the writings of some extreme reformers—some of whom, upon examination, will be found to be just as hostile to the present doctrines and ceremonies of England as they were at that time to those of Rome'.[46]

In deciding on the lawfulness of ceremonies, it was necessary to distinguish between those which were immutable and 'those which it is competent to mould according to the varying necessities and exigencies of each particular church'.[47] This distinction, as he said in the same case, 'divested the issue of the case before me of that importance which has been, not unnaturally, perhaps, ascribed to it by the excited feelings of both parties'.[48] In assessing mutable usages, when they were not expressly prohibited by English authorities, 'the true criterion is conformity with primitive and catholic use, and not antagonism to Rome'.[49] Mere disuse was not a fatal objection, since some of the catholic usages of the early Church which had become disused were perfectly lawful, but it was necessary to distinguish truly catholic usages from 'the novelties and additions which the Curia of Rome had from time to time imposed upon its subjects'.[50] Phillimore, here as elsewhere, was careful to distinguish between the innovations of the Roman Curia—preferring not to refer to the Roman church as a distinct entity—and the true catholic usages of the Church of England, which were based on ancient tradition. He was less careful about defining the chronological turning point, if there was one, when Rome began to break away from the catholic tradition. Clearly it had done so since the Council of Trent; but to some extent it had done so prior to the sixteenth century, for otherwise the Reformation would hardly have been necessary. In his treatise, he indicates that he considered the problem to have begun at least as far back as the Lateran Council of 1215—'untruly styled the twelfth general or ecumenical council'—which introduced the novel doctrine of transubstantiation.[51]

In approaching the contentious theological issues which came before him as a judge, Phillimore was somewhat more liberal than the Privy Council towards practices widely perceived as Roman, and as a consequence he was frequently reversed. He took the view that 'The basis of the religious establishment in this realm was, I am satisfied, intended by the constitution and the law to be broad, and not narrow', and that 'within its walls there is room, if they could cease from litigation' for both the Tractarian and the traditional wings of the Church of England.[52] The first major test came in *Martin v Mackonochie* (1868), in which he held unlawful the elevation of the consecrated elements, the use of incense as a ceremony associated solely with Holy Communion, and the practice of adding water to the wine during the consecration, because these all amounted to new and unauthorised ceremonies; but in the same case he held it not to be a criminal offence for the priest to indulge in excessive kneeling or prostration, for lighted candles to be placed on the altar though not needed for illumination, or for the wine to be mingled with water before the Communion service. On all these three last points, though with some doubts as to the last, he was reversed by the Privy Council,[53] but the parties dragged the dispute on for another fifteen years until Mackonochie was finally deprived for contempt.[54] In the second of the

[46] *Elphinstone v Purchas* (1870) LR 3 A & E 66 at 80. Ct of Arches.
[47] *Martin v Mackonochie* (1868) LR 2 A & E 116 at 136. Ct of Arches.
[48] Ibid., at 146.
[49] Ibid., at 149, 174 (put as a proposition, which he later accepts).
[50] *Elphinstone v Purchas* (1870) LR 3 A & E 66 at 79. Ct of Arches.
[51] *Ecclesiastical Law*, at p. 676.
[52] *Martin v Mackonochie* (1866) LR 2 A & E 116 at 245. Ct of Arches.
[53] *Martin v Mackonochie* (1868) LR 2 PC 365. Privy Council.
[54] *Martin v Mackonochie (No 3)* (1882) 7 PD 94. Privy Council; *Martin v Mackonochie (No 3)* (1883) 8 PD 191. Ct of Arches.

Mackonochie cases, Phillimore held it unlawful to sing the *Agnus Dei* between the consecration and the reception of the Communion, and for the priest to make the sign of the cross in the air to the congregation.[55] He acknowledged and followed the Privy Council decision as to candles and incense in a similar case in 1870.[56] But in the same year Phillimore reiterated his doctrine as to the mingling of water and wine *before* the consecration, and held in the same case that it was lawful for the priest to wear a chasuble, tunic and alb, for wafer bread to be used for Communion, and for the priest to stand with his back to the congregation during the consecration. On all these points, he was again reversed by the Privy Council. The only concession to 'Roman' tendencies which the Privy Council accepted was that it was not necessarily unlawful for a priest to wear, or at least to carry, a biretta.[57]

Also in the year 1870, Phillimore was asked to decide a case concerning the doctrine of transubstantiation. A clergyman had been prosecuted for heresy, and the essential question concerned the nature of the 'real' or objective presence in the consecrated elements. After reviewing a mass of historical authorities, including a text set out in the Law Reports in Greek, Phillimore decided that it was lawful to assert a real presence, which could be understood in a mystic or spiritual sense, and to speak of the Communion as a sacrifice, but that it was unlawful to teach that there was a visible presence of Our Lord at the time of celebration, or to indulge in a superstitious adoration of the elements.[58]

In 1874, Phillimore reversed a judgment of the Bishop of Exeter, given on the advice of Keating J as assessor, that the new reredos with images in Exeter Cathedral was illegal; in justification of his more liberal approach, he was able to cite an unreported sentence of the Court of Arches in 1684.[59] But he remained conservative with respect to the legal status of Hell, which was raised in a novel manner in 1875:[60] could a parish priest deny Communion to someone who had denied the doctrine of eternal punishment, as being a heretic? Phillimore decided that such a person was an 'evil liver' and could lawfully be turned away, but the Privy Council reversed the decision on the ground that evil living referred to moral rather than theological delinquency.[61]

Not all decisions of the Court of Arches during Phillimore's deanship were as contentious as these, though some interesting legal issues of different kinds were brought before him. For example, in 1868, thirty years before Parliament extended the principle to ordinary criminal cases, Phillimore held that as a consequence of the Evidence Act 1851 a defendant in a criminal suit under the Church Discipline Act 1840 was both competent and compellable to give evidence.[62] And in 1873 it was held that solicitors were not entitled to practise in the Court of Arches unless they were also proctors. Phillimore stated *obiter* in this case that in so far as barristers had been allowed to argue in the court it was out of courtesy

[55] *Martin v Mackonochie (No 2)* (1874) LR 4 A & E 279, Ct of Arches.

[56] *Sumner v Wix* (1870) LR 3 A & E 58, Ct of Arches.

[57] *Elphinstone v Purchas* (1870) LR 3 A & E 66, Ct of Arches, continued as *Hebbert v Purchas* (1871) LR 3 PC 605, 19 WR 898. The dispute over these matters continued to rage when Lord Penzance was Dean of Arches: see *Ridsdale v Clifton* (1877) 2 PD 276, Ct of Arches; and *Combe v Edwards* (1877) 2 PD 354, Ct of Arches.

[58] *Sheppard v Bennett* (1870) LR 3 A & E 167, Ct of Arches. A preliminary issue is reported as *Sheppard v Bennett* (1868) LR 2 A & E 335, Ct of Arches.

[59] *Boyd v Phillpotts* (1874) LR 4 A & E 296, Ct of Arches, citing *Cocke v Tallants* (1684) from the records of the Arches.

[60] The leading case on Hell was *Fendall v Wilson* (1863) 2 Moo PCNS 375. See 'Stephen Lushington' 4 Ecc L J 556 at 564.

[61] *Jenkins v Cook* (1875) LR 4 A & E 463, Ct of Arches; *Jenkins v Cook* (1876) 1 PD 80, Privy Council.

[62] *Bishop of Norwich v Pearse* (1868) LR 2 A & E 281, Ct of Arches. This was because the exception in the Evidence Act 1851 referring to criminal cases was not drawn widely enough to include such proceedings.

rather than as of right.[63] If he was correct on this latter point, it may still be the case that only doctors of law have a *right* of audience in the Court of Arches, barristers being admitted out of necessity for want of practising doctors. Among the less portentous cases which came before him, Sir Robert had to consider in 1875 who was entitled to the style 'Reverend'. He pointed out that the style had formerly been used for laymen and even women, and that it could not be regarded as confined to clergymen of a particular denomination; it was nevertheless proper for a faculty to be refused where it was proposed to be used in a monumental inscription to describe a Wesleyan minister.[64] The decision as to the refusal was reversed by the Privy Council, which nevertheless confirmed Phillimore's principal holding; the style 'Reverend' is not a title but merely a complimentary epithet.[65] It follows, of course, that it is a piece of conceit for a clergyman so to describe himself.

Sir Robert Phillimore died in 1885, and with him—it might have seemed—a challenging period in the history of English ecclesiastical law also came to a close. By 1895 such controversies as whether 'a clergyman is to be criminally proceeded against for remaining too long on his knees' were described as 'happily dead and buried'.[66] Phillimore's successors could again devote their full attention to civil litigation, to the staple business of probate, divorce, and admiralty.

Those successors included Sir Robert's only son Walter George Frank (1845–1929), who carried on the family tradition in the new legal world. He read Law at Oxford, taking the D.C.L. as a fellow of All Souls (1867–71), and in due course became chancellor of the diocese of Lincoln; but instead of joining the virtually defunct Doctors' Commons—which had by then ceased to admit new members—he was called to the Bar by the Middle Temple in 1868, practised in Admiralty and ecclesiastical matters, and received a Patent of Precedence in 1883.[67] Walter served as secretary to his father as Judge of the Admiralty, practised in front of him, and also helped him write *Ecclesiastical Law*,[68] it was the son who prepared the second edition of that work in 1895. He was to enjoy further promotion than his father, becoming a Lord Justice of Appeal in 1913, and (after his retirement) was created Lord Phillimore in 1918. Sir Robert's great-nephew, Sir Henry Josceline Phillimore (1910–74) also began his judicial career as a judge of the Probate, Divorce and Admiralty Division, in 1959, but he was translated to the Queen's Bench Division in 1962; and in 1968 he too became a Lord Justice of Appeal.

[63] *Burch v Reid* (1873) LR 4 A & E 112, Ct of Arches, followed by Lord Penzance in *Crisp v Martin* (1876) 1 PD 302, Ct of Arches.

[64] The minister was the father of the person to be commemorated.

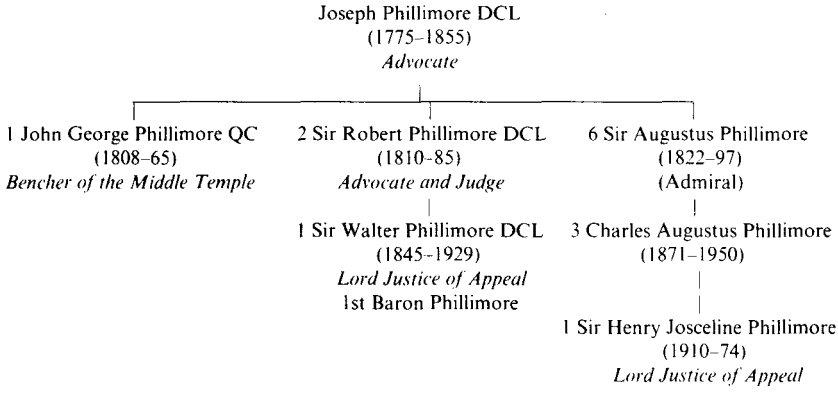
[65] *Keet v Smith* (1875) LR 4 A & E 398, Ct of Arches (on appeal from Sir Robert's son, Walter, as Chancellor of Lincoln); *Keet v Smith* (1876) 1 PD 73, Privy Council.

[66] Manson, *Some Builders of our Law*, p. 167.

[67] It was the last patent of precedence ever granted: J. Sainty, *A List of English Law Officers, King's Counsel and Holders of Patents of Precedence* (1987), pp. 276, 282. It is not clear why Phillimore was unable or unwilling to accept a patent as Q.C.

[68] His assistance is recorded in the dedication.

PEDIGREE OF THE LAWYER PHILLIMORES



Dr Tristram

Phillimore was not the very last advocate of note, and we should in fairness end the story with a brief notice of Dr Tristram. Thomas Hutchinson Tristram was the last doctor of law admitted to Doctors' Commons—in 1855—and in the event the last surviving advocate. He pursued a conventional Civilian career, becoming commissary of the diocese of Canterbury and chancellor of Hereford, Ripon and London. In the last position, he was obliged to continue the work of Lushington and Phillimore in dealing with the goings on at St Barnabas, Pimlico, and other questions of like nature[69]. On the curtailment of the ecclesiastical jurisdiction, he continued his practice in the new statutory courts and took silk in 1881. He was a reporter under the old order in Doctors' Commons until its dissolution, and later published a selection of consistory cases from 1872 to 1890. Dr Tristram's name is familiar at the present day as a result of his *Treatise on Contentious Probate Practice in the High Court of Justice* (1881), which in 1888 was combined with H. C. Coote's long-established *Practice of the Court of Probate* (1858; 9th ed. 1883) to form 'Tristram and Coote', now in its twenty-eighth edition (1995). Of course, no one today would think of probate as a branch of ecclesiastical law, and indeed the first of these books had been conceived at the moment when it ceased to be so; the authors were consciously making the old learning of Doctors' Commons, in its new statutory context, available to a wider legal profession.

The End

When the matrimonial, probate and admiralty courts were merged into the new High Court of Justice in 1875, as the Probate, Divorce and Admiralty Division, only eleven doctors were still nominally in practice[70]. A quarter of a century later, in 1899, when the last practising serjeant at law died[71], there remained four doctors (Stonestreet, Deane, Fust and Tristram). The last of the

[69] It is enough to cite *White v Bowron* (1874) LR 4 A & E 207, Consistory Ct. in which he held the baldacchino in St Barnabas to be unlawful. For this troublesome church, see above, 'Dr Lushington'. 4 Ecc LJ at p. 562.

[70] C. Shaw, *The Inns of Court Calendar* (1877), p. 19, lists thirteen, but includes two (Curteis and Twiss) who had officially retired. When Phillimore became a Justice of the High Court in 1875, he was thereby disqualified from practice.

[71] Serjeant Spinks died on 27 December 1899. By a curious coincidence, Dr Thomas Spinks of Doctors' Commons died on 14 January 1899. They were not brothers, and it is not known whether they were otherwise related.

four, Dr Tristram KC, died on 8 March 1912. As a practising profession, or at least as a body entitled to practise, they had just outlived the serjeants. However, the Order of Serjeants lingered on in the person of Lord Lindley, the retired Master of the Rolls, until his death in 1921. It could be maintained that Doctors' Commons technically continued in existence even longer, at least until the retirement of Sir Lewis Dibdin KC (died 1938) as Dean of Arches in 1934[72], and perhaps even beyond[73]. But the scarlet gowns of the doctors and serjeants were to be seen at the Bar no more. They belonged to the rapidly forgotten era before the Royal Courts of Justice were built in the Strand, before the reforms in judicature which had made them in their several ways otiose. In the case of the doctors of law, it must be a matter of personal opinion and speculation whether the legal world has lost anything of importance with the disappearance of their special expertise. If we look only at the last phase of their history, a generous answer to the question may be difficult to afford. But they were men who for various reasons had entered a doomed profession, whose only hope was to merge with the common law Bar. Phillimore shone out as an exception. Lord Sumner remarked that 'he belonged to a class of lawyers that has now passed away. He was a scholar both in classical and in modern languages, and a jurist of wide reading . . .'[74]. If we turn back to the previous generation, we find such qualities more widely spread, but the doctoral intellects were working within an unreformed legal system which could hardly hope to survive much longer. In an age when, as Phillimore put it, every existing institution was required to make out a convincing case against abolition, the extinction seemed more or less inevitable. And yet something of value was lost in the process, not least the cosmopolitan frame of learning which made Doctors' Commons a centre of European legal culture long before the troubled attempts at economic and political integration.

[72] Dibdin had not been a practising member of Doctors' Commons, but would have become *ex officio* president (under the terms of the charter of 1768) when he was appointed in 1903, since at that date there were still two members of the Society alive (Jenner-Fust and Spinks). Upon his retirement, however, there would have been no members at all.

[73] See P. Barber, 'The Fall and Rise of Doctors' Commons' (1996) 4 Ecc. LJ 462.

[74] *DNB*.