Famous English Canon Lawyers: VII
JOHN GODOLPHIN, D.C.L. († 1678)
and
RICHARD BURN, D.C.L. († 1785)

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With the cessation of formal instruction in Canon law at the time of the Reformation, and the consequent slow decline in general familiarity with the older Latin sources of Canon law, there was a corresponding increase in the need for systematisation of English ecclesiastical law in a form which could be comprehended by members of the clergy and others – including common lawyers – whose professions brought them into contact with questions of Church law. It is noticeable that the advocates of Doctors' Commons did not play a major part in supplying that need. The common lawyers had begun to make a contribution, especially in areas which straddled the lay and spiritual jurisdictions, though their handbooks for parsons do not really deserve to be regarded as legal classics.[1] Their best contributions to learning in the ecclesiastical sphere were in the inns of court readings on benefices, a subject which had of course always been within the province of the common law.[2] First and foremost among the unprinted readings on benefices was that delivered in the Middle Temple in 1619 by James Whitelock, B.C.L., subsequently a King's Bench judge, who had the unusual distinction for a common lawyer of having taken some legal education at Oxford.[3] However, the next figures in our survey were neither advocates nor barristers. Though separated by a century, and barely comparable in terms of their individual careers, they belong together in representing what might be called the abridgment phase' of writing on English ecclesiastical law.

John Godolphin (1617-78)[4] was descended from the ancient Cornish family of that name, though his father was seated in the Isles of Scilly. He read Law at Gloucester Hall, Oxford, fated to become in the next century the only college at Oxford or Cambridge ever to be dissolved by the death of all its members.[5] He took his Doctorate of Civil Law in 1643, but it is unlikely that he became a practising advocate at that troubled period, and his name does not appear in the register of Doctors' Commons until 1655. Unlike the majority of advocates on the eve of civil war, who allied themselves with the royalist cause

1. E.g. W. Hughes, *Parson's Law* (1641); W. Sheppard, *Parson's Guide* (1654); S. Degge, *The Parson's Counsellor* (1676; 7th ed., 1820); G. Meriton, *The Parson's Monitor* (1681); W. Nelson, *The Rights of the Clergy* (1709); W. Bohun, *The Law of Tithes* (1730). These are principally about tithes. W. Watson, *Clergyman's Law* (1701), though published under the name of a clergyman, is said to have been written by a barrister of Gray's Inn called Place: see 1 Bl. Comm. 391n.
2. An advowson being a species of real property recoverable in the royal courts by writ of right of advowson or *quare impedit*. A reading on advowsons by John Dodderidge (Middle Temple, 1603) was printed as *A Compleat Parson* (1630).
3. At least 18 MSS. are known. Comparable in its display of erudition was Francis's Tate's Middle Temple reading (1607) on tithes, which survives in a unique, possibly autograph, text: CUL/MS. Oo.6.92(1) (anonymous, but identifiable with some confidence at Tate's).
4. There is a brief biography in *DNB*.
5. It was refounded as Worcester College.

and the Laudian Church, Godolphin was a fervent Puritan, and he first burst into print as a religious writer shortly after the execution of Charles I. His *Holy Limbec* (1650) purported to be a distillation of the spirit from the letter of the scriptures, and it was followed by another metaphorical title, *The Holy Arbor* (1651), whose contents were 'collected from many orthodox laborers in the Lord's vineyard'. In 1653, still in his 30s, he obtained the appointment of Judge of the Admiralty, and it was in recognition of this important post – doubly important to the Civilian world after the abolition of episcopal jurisdiction under Cromwell – that he was in 1655 admitted to Doctors' Commons and forthwith elected President of that society.[6] His judgeship was, of course, declared void at the Restoration, though he is said to have received some legal office from the king in compensation.[7] At any rate, he seems to have entered private practice as a Civilian advocate, presumably in the Church courts as well as in Admiralty. He was obviously a considerable scholar and bibliophile. The sale catalogue of his library shows that, besides a large general collection, he possessed over 350 volumes of Canon or Civil law, including pamphlets, and nearly 200 volumes of English law, with manuscripts including two versions of Clarke's *Praxis*.[8]

In the Restoration year he published his *View of the Admiral Jurisdiction,* essentially a polemical defence of the jurisdiction against encroachments from the common law, but which has recently been given modified acclaim as 'the first attempt in published, literary form to state the case of the Admiralty jurisdiction'.[9] Our reason for including him among our famous Canon lawyers is rather that he wrote two well known books on Canon law in the 1670s. The first was *The Orphan's Legacy, or a Testamentary Abridgement* (1674; reprinted 1677, 1681, 1701), dealing with the law of testate and intestate succession, followed by his *Repertorium Canonicum* (1678; reprinted 1680, 1687), covering the remainder of the Canon law.

The former of these works received its *imprimatur* from Lord Shaftesbury, the Lord Chancellor, on 26 April 1673. According to its title-page, the subject was treated of 'as well according to the Common and Temporal, as Ecclesiastical and Civil Laws of this Realm'. In paying tribute to Swinburne, the author pointed that, 'having been pleas'd to confine himself to the incomparable Lawes of his own Profession, [he] hath left the fairer Latitude for Variation, admitting him to have transcended all possibilities of Imitation'. On the very first page, Justinian jostles with Plowden and Brooke, and the author continuously fulfils his promise to provide a comprehensive treatment from the standpoint of both systems of law. There are three sections. The first, 'Of last wills and testaments', is the shortest (46 pages), and deals with capacity and form in much the same manner as Swinburne, but with greater attention to the common law. Godolphin

6. G. D. Squibb, *Doctors' Commons* (1977), p. 177.
7. According to *DNB* and Squibb he became king's advocate; but he does not appear in the list of king's advocates-general in J. Sainty, *A List of English Law Officers* (1987), p. 77. Perhaps he was king's advocate in Admiralty causes.
8. *Catalogus Variorum et Insignium Librorum . . . D. Johannis Godolphin, J.U.D., et D. Oweni Phillips, A.M.*, sold by William Cooper on 11 Nov. 1678 (copy in CUL, Fff. 79[11]). It is assumed that the law books were all Godolphin's, but there is no way of separating the remaining lots. The count includes 38 legal tracts listed on p. 36.
9. M. J. Prichard and D. E. C. Yale, *Hale and Fleetwood on Admiralty Jurisdiction* (108 Selden Soc., 1993), p. cxiii. See also D. Coquillette, *The Civilian Writers of Doctors' Commons, London* (Berlin 1988), pp. 186-189. *DNB* also records a treatise by Godolphin on *Laws of the Admiralty*, not published until 1746.

renders the scholastic Latin of the canonists in a homely manner, reminiscent of the avowedly inimitable Swinburne, as when he points out (citing Vasquez) that drunkenness does not invalidate a testament if the mind is merely clouded or obscured by drink; the testator must be, 'according to the Flaggon-phrase, as it were dead-drunk' (p. 13). The second and much longer section (134 pages) is 'Of executors and administrators', and draws heavily on common-law materials. In the final and longest section (250 pages), 'Of legacies and devises', there is more emphasis on the Canon law, ending (ch. 26) with a distillation of rules from the later Canonical authors.

The full title of the larger work is *Repertorium Canonicum; or an abridgment of the ecclesiastical laws of this realm, consistent with the temporal,* though the *imprimaturs* (from Chief Justice North and the bishop of London) referred to it under its English title of *An Abridgment of the Ecclesiastical Laws.* The book begins with a lengthy introduction, in 88 pages, surveying the history of the Church and ecclesiastical jurisdiction in England since the time of the Anglo-Saxons and before,[10] in the same order as the abridgment. Godolphin is careful to remove any doubts about his political and religious sympathies. The royal supremacy, he declares on the first page, is so fundamental that without it 'all that follows would be but insignificant and disfigured cyphers'; the authority of bishops and clergy is defended, even with approving reference to the Council of Trent; and an allusion is made to the 'late unnatural war in this kingdom ' as a cause of the desolation of many churches (p. 26). The abridgment itself consists of 44 non-alphabetical titles, filling 653 pages. The first thirteen titles concern office-holders in the Church, from the supreme governor (ch. 1) down to the 'sidemen' (ch. 13),[11] and including *en passant* forty pages on the Church courts and their jurisdiction (ch. 11). Chancellors, we learn, must be knowledgeable in the Civil and Canon law, and for this reason a reverend chancellor of Gloucester, being a divine but not a law graduate, was lawfully deprived by the High Commission in the time of Charles I.[12] However, the degree of Bachelor of Civil Law will suffice – at any rate for a commissary – as was ruled on demurrer in the 1590s.[13] The archdeacon (ch. 8) has an ecclesiastical dignity and 'by the Canon law' a jurisdiction 'of a far larger extent than is now practicable with us'; also 'by the Canon law' he must be at least 25 years old and a licentiate in Law or Divinity. It seems that, here and elsewhere, 'the Canon law' is not necessarily to be equated with current English ecclesiastical law. Godolphin merely sets out the authorities, often without indicating whether, how or when a particular rule ceased to bind in England. He does, however, as in *The Testamentary Abridgment,* bring

10. E.g. on p. 24-25 he discusses speculations that St Paul's was built on the site of a Roman temple of Diana and Westminster Abbey on the site of the temple of Apollo.
11. On p. 167 he asserts that the churchwardens may not dispose of goods in their custody without the assent of 'the sidemen or vestry', and that 'the parishioners are a corporation to dispose of such personal things as appertain to the Church.' He derives the word sidemen from 'Synods-men' (p. 163).
12. *Dr Sutton's Case* (1626) Litt. Rep. 2, 22; Cro. Car. 65 (prohibition denied by the Common Pleas). Litt. Rep. 2 says he was deprived 'pur ceo que il ne fuit Batchelor ou Doctor del Civil Ley de officio'. In 1627, Dr Sutton applied to the King's Bench for a prohibition, but with the same result; Noy 91; Latch 228; Godb. 390; Wm Jones 393. The judges in the second case included Dodderidge and Whitelock JJ. (mentioned above).
13. *Pratt v Stocke* (1594), cited as Hil. 35 Eliz., rot 181; reported in Poph. 37 (cited as Mich. 33 & 34 Eliz., rot. 181); Cro. Eliz. 315 (plaintiff counts on administration by Thomas Tayler LL.B., commissary to the bishop of London; defendant pleads 37 Hen. VIII, c. 17; plaintiff demurs). The case was followed by the King's Bench in *Walker v Lamb* (1632) Wm Jones 263; Cro. Car. 258 (William Walker LL.B. appointed official of the archdeacon of Leicester and commissary of the bishop of Lincoln).

together the common law and the Latin authors. Indeed, there are far more common-law cases (from the year books down to the seventeenth century) than canonical texts. The common-law influence is especially dominant in his next nineteen chapters (ch. 14-32), dealing with benefices and incumbents, advowsons, and tithes. The last twelve chapters (ch. 33-44) deal with miscellaneous matters within the ecclesiastical jurisdiction, including banns, adultery, bastardy, divorce, defamation, sacrilege, simony, blasphemy and heresy, councils and synods, and excommunication. There is an obvious omission in that the abridgment contains no extended discussion of wills or intestate succession; but that is because *The Testamentary Abridgement* was evidently intended to serve as a companion volume.

The treatment veers, according to subject-matter, from the practical to the speculative. The chapter on tithes (ch. 32) is highly practical and includes an 80-page abridgment-within-an-abridgment, in the form of an alphabetical list of subjects related to tithing, from *Abbylands* (p. 383) to *Wool* (p. 464), including such unusual legal headings as *Bricks, Turkeys* and *Vetches* (none of which were tithable). Godolphin's treatment of adultery is less practically focused and ranges widely over severe punishments inflicted in other laws. The author criticises the opinion, allegedly held by some in the Church of Rome, that it is 'far more repugnant to the Law of Nature that one woman should be joyned to two men than *e contra*' (p. 475): 'the feminine sex,' he predicts, 'will give them but little thanks for this opinion.' Divorce is taken already to bear the primary meaning of dissolution of marriage, though of course in earlier texts (as Godolphin points out) it more often means nullity. The 'Civil and Canon Law do allow of divorce after a long absence,' but this opinion is denied; again, we apparently see a distinction between 'Canon law' and current English law. Dr Godolphin discusses at length the lawfulness of remarriage after divorce, which is treated as a matter of considerable controversy, since the Bible appears to countenance divorce *a vinculo* for adultery. The defamation jurisdiction was severely limited by the requirement that the accusation be of a spiritual rather than a temporal wrong. This rule would let in an accusation of being a witch's son, since this might be a reason for refusing ordination (p. 524), but not one of a common-law offence. However, the author reveals no regrets at the decline of this jurisdiction. In the preface (p. 63), he observes that, 'such ill-scented suits do favour worse being kept alive in a tribunal than they would be being buried in oblivion, especially if the defamed considered, that to forget injuries is the best use we can make of a bad memory.' The chapters on sacrilege and heresy are more historical than practical,and in the latter there is another alphabetical sub-abridgment (pp. 565-580) containing a curious list of heresies from *Acatiani* to *Vigilantinus,* followed by some non-Christian heresies (including, for the sake of absolute completeness, frog-worshipping). The conclusion (p. 583) is that 'the Prince of Darkness and the father of lyes hath in all ages, nations and Churches, his emissaries to infect them with heretical and blasphemous errors, but the gates or power of Hell to this day never could, nor to eternity ever shall prevail against the Truth.' The chapter on councils and synods includes a calendar of councils, based on Prideaux. The final two chapters (ch. 43-44) are perhaps afterthoughts; ch 43 contains notes on the medieval statutes concerning ecclesiastical jurisdiction, and the last chapter treats of various common-law writs concerning benefices.

Godolphin's pair of abridgments represent the first substantial attempt to merge the canonical authorities with those of the common law, and thereby provide a comprehensive survey of English ecclesiastical law as a whole. They share the general defect of all abridgments, in that the matter is not fully organised beyond the headings; and in his case they do not even have the benefit

of the alphabet as a means of overall arrangement. They are, nevertheless, superior to the older common-law abridgments both in terms of the range of contents and the quality of exposition, and still offer a valuable short-cut for finding the ecclesiastical law of the seventeenth century. Moreover, they deserve much of the credit for the later systematic works which built upon their foundation.

The next major advance in the process of systematisation and Anglicisation was made by the second author in our title, but between Godolphin and Burn should be mentioned the sad figure of Dr John Ayliffe (1676-1732), sometime Fellow of New College, Oxford.[14] After reading Law, taking his D.C.L. in 1719, Ayliffe based himself in Oxford rather than Doctors' Commons, and transacted some business as proctor in the University court.[15] A passionate Whig, he seems to have been a man of strong religious opinions and an unwillingness to keep quiet about matters which offended him. In what purported to be a history of Oxford University, which he published in 1714, he took the opportunity to criticise the Clarendon Press and successive vice-chancellors for misappropriation of funds, and his own college for allowing its reputation to decline as a result of internal quarrels and the 'supine negligence' of 'a late warden'. There was not much enthusiasm for such robust freedom of expression in the Oxford of 1714, and Ayliffe paid a heavy price when he was deprived of his degrees and driven out of his fellowship – which he chose to resign rather than withdraw his criticisms. Whether Ayliffe was right on these questions is a matter for historians of Oxford University to determine. He is, however, less controversially remembered by posterity for his book, *Parergon Juris Canonici Anglicani: or, a commentary, by way of supplement to the Canons and Constitutions of the Church of England,* which was printed in large folio in 1726 (2nd edition, 1734).[16] This was an alphabetical compendium of English Canon law, with a historical preface, which he wrote for his own use as a practitioner and in the hope of some preferment. In the tradition of Lyndwode and Swinburne, Ayliffe allows his personality some free rein in places, especially in his prolonged attack (pp. 231-233) on excessive drinking by the clergy. The book is written in a rather ornate style of English, and suffers from a failure to analyse or draw conclusions from the heaps of material which he piles into each heading. Viewed simply as a mine of information it is useful, especially since the compiler used authorities ranging from Justinian and classical authors down to recent reported decisions of the English courts, though it has to be admitted that a good deal of the material was derived directly from Godolphin.

Let us turn, then, to our second major figure, Richard Burn (1709-85).[17] Although Burn is better known today than Godolphin, chiefly through his *Ecclesiastical Law,* in legal terms he was at the time of writing the first edition a

14. Biography in *DNB* (by G. P. Macdonell).
15. Not proctor of the University.
16. He also wrote on ancient Roman law. In the year of his death (1732) was published his *The Law of Pledges, or Pawns, as it was in use among the Romans.* Ayliffe was also the author of an uncompleted *New Pandect of Roman Civil Law,* published in 1734, two years after his death: as to which, see Coquillette, *Civilian Writers,* pp. 209-214. Professor Coquillette praises the latter (p. 212) as 'a formidable treasure house of scholarship'.
17. Brief biography in *DNB; Biographical Dictionary of the Common Law,* 89-90 (by D. E. C. Yale). See also Holdsworth H.E.L. XII: 332-334, 612-613.

layman. He graduated from The Queen's College, Oxford, but instead of reading Law took Orders and became a parish priest as vicar of Orton in Westmorland, where he remained for the rest of his life. He was a native of Westmorland and took a keen interest in its history, on which he helped to write a book.[18] In what must have been ample time for leisure by modern standards,[19] he also turned to private legal study, perhaps prompted by his service as a country justice. Certainly he was best known in his day as the author of *Justice of the Peace,* which was first published in 1755. Burn's *Justice* rapidly became the standard manual for magistrates. It was arranged alphabetically, for ready reference, but was far superior to an abridgment. Within each heading, the treatment was discursive and explanatory. The book enjoyed a deserved success, and reached a thirtieth (and last) edition in 1869. Burn was so highly thought of, as a result of this success, that he was engaged to edit the first posthumous edition of Blackstone; this appeared in 1783, but Burn's only additions were those necessitated by recent acts of parliament.[20] It was doubtless the success of his *Justice,* coupled with his ecclesiastical interests, which led Burn to apply the same technique to ecclesiastical law. *Ecclesiastical Law,* the second of his best-sellers, appeared in 1763.[21] In both endeavours, he acknowledged the help and instruction of Dr Waugh, dean of Worcester, and Thomas Simpson, clerk of the peace for Cumberland.[22] John Waugh's influence is easy to account for; he was likewise a member of The Queen's College, slightly senior to Burn, and had been Burn's predecessor as chancellor of Carlisle.[23] The only professional ecclesiastical lawyer whose help he acknowledged was Dr Topham, judge of the Prerogative Court at York (and, as such, successor to Swinburne).[24] Burn took the D.C.L. in 1762, doubtless on the strength of the manuscript of *Ecclesiastical Law,* and three years later, armed with this legal qualification, became chancellor of Carlisle. But the work had been written without benefit of law degree or court experience, and perhaps the clarity of an outsider's vision was an advantage, at any rate when that outsider was a careful scholar with a lawyer's attention to distinctions of principle.

With the publication of Burn's *Ecclesiastical Law* in 1763, the law of the English Church finally becomes elegant literature. Indeed, the style is almost Blackstonian in its classical grace and clarity, though it can hardly be supposed that either writer had much opportunity to influence the other. The original edition is in two quarto volumes,[25] with a dedication to King George III. The

18. *The History and Antiquities of the Counties of Westmorland and Cumberland* (1777), 2 volumes, was written jointly with Joseph Nicolson.
19. He was not the only learned clergyman in the 18th century to write on ecclesiastical law. Notice should be made of H. Prideaux, *Directions to Churchwardens* (1701; 10th ed., 1835) and J. Johnson, *The Clergyman's Vade Mecum* (1706). Prideaux was a D.D., but is best remembered as an orientalist *(DNB).* For W. Watson, *Clergyman's Law* (1701),. see note 1, above; the editor, Dr Watson, possessed the LL.D. degree, which he had taken with a view to practice, but went into the Church instead.
20. His name was retained on the 10th and 11th editions (1786 and 1791), but by then he was himself dead and the editing was done by John Williams (later Serjeant Williams).
21. Some reference books (including *DNB*) mention a first edition of 1760, but this seems to be a ghost. Burn also published a *Digest of the Militia Laws* in 1760, and a *History of the Poor Laws* in 1764. A posthumous publication of little merit, edited by his son John, was *A New Law Dictionary* (1792); this has an engraved portrait of Dr Burn.
22. End of preface to *Ecclesistical Law.* John Waugh (d. 1765) was dean of Worcester 1751-65. Thomas Simpson, clerk of the peace 1728-68, was an attorney (adm. 1730): E. Stephens, *The Clerks of the Counties 1360-1960* (1961), p. 72.
23. J. Foster, *Alumni Oxonienses 1715-1886,* p. 1513.
24. Francis Topham (d. 1770) was a Cambridge man, having taken his LL.D. from Sidney Sussex College; he was admitted an advocate of the Arches in 1747.
25. From 1767, it was published in four octavo volumes.

preface treats of the sources of ecclesiastical law, which Burn says (p. i) is compounded of 'four main ingredients': the Civil law of Rome, the Canon law (meaning the pre-Reformation *Corpus Iuris Canonici,* together with the legatine and provincial constitutions, and the canons of 1603), the common law and statute law. The mention of Civil law may seem rather anachronistic. Burn, though not himself a Civilian, asserts (p. v) that 'there is no understanding the canon law without being very well versed in the civil law'. However, there is little further reference to it. The four kinds of source followed the same order of precedence: in case of conflict, 'The Civil Law submitteth to the Canon law both of these to the Common law; and all three to the Statute law.' Burn added (p. xix) that courts of equity sometimes touched upon matters of Canon law, as in matrimonial and testamentary matters. Of his authorities, Burn says (pp. xx-xxi):

> In citing authorities, the author hath deemed it indispensable, to attribute to every man what is his own; having often observed, not without some degree of indignation, authors of great name borrowing from others without acknowledging the debt. Therefore he alledgeth his vouchers upon all occasions, of what credit soever they be; endeavouring at the same time, not to lay more burden upon any one than he can very well bear . . .
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> A work composed of such a variety of materials, cannot in any respect be satisfactory, without searching the foundations; consequently, it hath been endeavoured to represent not only the law, but the history of that law, in its several gradations, from its first beginning under the christian emperors till its arrival in England, from thence, during the Danish and Saxon periods, to the Norman conquest; from the Norman conquest to the reformation; and from the reformation to the present time. . .
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> It is to be lamented, that amongst the professors of the civil and canon law on the one hand, and of the common law on the other, so little of candour is to be found; inasmuch that it may be laid down as one good general rule of interpretation, that what a common lawyer voucheth for the church, and a canonist or civilian voucheth against it, is for that reason of so much the greater authority.
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> Contrary judgments, according to the different measures of right in the several courts, are another cause of regret. And not seldom the determinations in the same court have been various. For tho' truth is still the same, yet the apprehensions of men concerning it are different. And this must unavoidably, so far, be the parent of uncertainty.
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> One thing further is to be noted, that in all the books of this kind there is a distasteful intermixture of latin and english throughout; occasioned by the Roman civil and canon laws . . . being written in the latin tongue. These the author hath taken the liberty to exhibit in an english literal translation. . .

The body of the work is alphabetically arranged, from *Abbot* to *Wills,* with entries of widely varying lengths. Burn made considerable use of previous works, particularly that of Edmund Gibson (to be considered in our next essay).

Since attention has been drawn to a passage in Godolphin concerning the office of chancellor, it is instructive to compare Burn on the subject (tit. 'Chancellors, &c.'). Burn sets out the previous learning, and mentions Dr Sutton's case, but adds that that case was more recently denied to be law, in the case of Dr Jones, chancellor of Llandaff. He then quotes Bishop Stillingfleet on the distinction between contentious and 'voluntary' jurisdiction, as bearing on the question how far a bishop retains powers of jurisdiction in his own person, and also on the tenure of the office of chancellor. This essay owes much to Gibson, and makes no reference to writers on Canon law before the eighteenth century. Nevertheless, there is nothing of substance in the earlier writers which is not here touched upon and elegantly disposed of. This is characteristic of the work as a whole. Very few sources are cited which were published before 1700, and even in the common-law sphere the plethora of new reports furnished illustrations of most points without recourse to the older black-letter books; on the other hand, little is omitted which might conceivably be of current value, except of the more intensely practical nature. In addition to titles which had become conventional by his time, Burn included some new topics, including an extensive survey of university law (tit. 'Colleges'; and cf. 'Schools'), sections on Church property (e.g. 'Leases'), essays on 'Holidays', the 'Kalendar', and divine service (e.g. 'Public Worship'), and notes on other churches (e.g. 'Dissenters', 'Jews', 'Popery', and even 'Mahometans'). In accordance with the decision to concentrate on matters of current utility, the largest single title, containing over 250 pages, is the last: 'Wills'.

The work was extremely successful, and passed through a number of editions. In the sixth edition (1797), by Simon Fraser (d. 1803), barrister of the Inner Temple, it was embellished with some references to the *Corpus Juris Canonici;* in the seventh (1809) some notes by Mr Serjeant Hill were inserted. After an eighth edition (1824) by Robert Philip Tyrwhitt (1798-1836), student of the Middle Temple,[26] and an epitome (1840) by Francis James Newman Rogers K.C. (1791-1851), bencher of the Inner Temple,[27] it reached its final form in 1842. The ninth edition by Dr (later Sir Robert) Phillimore was a considerably enlarged version of Fraser's, augmented not only with extensive notes but with a number of new chapters – including sections on the legal status of the Church in Ireland and Scotland, and in the colonies and foreign dominions, the practice of the courts in Doctors' Commons, the ecclesiastical commissioners, the Marriage Acts, chaplains, and the councils of the Church. Some statutes and judgments were inserted verbatim, for ease of reference. Dr Phillimore expressed the hope that the book would be useful to clergy as well as lawyers, and that both would profit from the historical notes he had added. The 1842 edition was beginning to take on a new character, and may indeed be regarded as a transitional exercise towards the well known works which Phillimore later composed in his own right.

In places Burn is no more than an abridgment, with strings of only loosely related authorities. But usually the author has imposed some continuity on the materials, and has made them readable in sequence. Though conceived as

26. Tyrwhitt was not called to the Bar until the following year (1825). He was subsequently a metropolitan magistrate, and is better remembered for his Exchequer reports.

27. *A Practical Arrangement of Ecclesiastical Law* (1840; 2nd ed., 1849). This was, as Phillimore remarked (preface to 9th ed., p.vii) 'destined for the circuit', and was no independent value. Rogers was Deputy Judge Advocate-General 1842-51.

a reference book, it is a book in which each title can be read through as a coherent piece. Holdsworth justly summarised Burn's achievement by saying that his learning 'and his gift of clear exposition, enabled him to write the clearest and most successful of all the great treatises upon English ecclesiastical law'.[28] Its success may, indeed, have contributed indirectly to the decline of Doctors' Commons. Burn's own doctorate should not mislead us into thinking of him as a Civilian. He had learned his law in the first instance as a serving magistrate, and had learned his ecclesiastical law largely from printed books in English and the law reports of the common law. His methodology, therefore, was in essence that of a common lawyer. He wanted modern cases rather than antiquated Latin texts, and he lamented the absence of reports of cases in the ecclesiastical courts. The effect of this gap in legal literature is apparent in his emphasis on the case-law of the common-law courts and the techniques which it enshrined.

In fact, some of the advocates in Doctors' Commons had been keeping reports of cases for their own private use,[29] but they did not print them and as a result the specialist jurisprudence to which they contributed made little impact on the printed books of ecclesiastical law. Perhaps the advocates thought their specialist knowledge would be more valued if it was not generally available. But we should be slow to blame the doctors – whether for indolence or for a conscious decision to withhold publication – since it was unclear at that period whether there was a large enough market to justify printing ecclesiastical law reports at all.[30] Their learning may well have surpassed Burn's in that they apparently continued to preserve in their practice the cosmopolitan traditions of earlier centuries; but, in the absence of any printed record of their arguments and decisions, their jurisprudence was destined to fade as human memories evaporated and greater reliance was placed on the printed word. To many outside their world, including the practitioners of the common law, printed books of the calibre of Burn, referring them to accessible English cases and authorities, may have seemed adequate in themselves. Anybody with legal acumen could now be a passable ecclesiastical lawyer when occasion arose, and the raison d'être of a separate profession of canonists became less obvious. The old kind of ecclesiastical law thus suffered a mortal infection from the common law and its methodology well before the catastrophic reforms of the 1850s.

28. Holdsworth H. E. L. XII:613.
29. E.g. Dr Trumbull's (*c.* 1668-73) in CUL MS. Add. 8866 (succession cases); Dr Sayer's (1714-28) in Lincoln's Inn MS. Misc. 147; Dr Lee's (1752-58), printed in 1832-33; Dr Burrell's (1765-69) in Kansas Univ. MS. E181. For some pre-1640 anonymous reports, see R. H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge, 1990), 198-199.
30. The first venture of this kind was Dr Joseph Phillimore's (1818), rapidly followed by Haggard and Addams.