

BOOK REVIEWS

LAW, POLITICS AND THE CHURCH OF ENGLAND

The career of Stephen Lushington 1782-1873

By S. M. WADDAMS

Cambridge University Press, Cambridge, 1992, xxii + 370pp.

(Hardback £40.00)

A review by Peter Stein

Regius Professor of Civil Law in the University of Cambridge

Stephen Lushington was the most prominent judge of the civil law courts in their last phase before the bulk of their jurisdiction was removed. He sat for twenty-nine years (1838-1867) as the Judge of the Court of Admiralty and was ex officio a member of the Privy Council, of which he was usually the only civilian. He was also Judge of the Consistory Court of the Diocese of London (1828-1858) and then Dean of Arches (1858-1867). At the age of eighty-five he gave up his main judicial offices but, to the annoyance of his successor as Dean (Phillimore), he retained the Mastership of the Faculties until his death.

Lushington was certainly an establishment figure. The son of a director of the East India Company, he was educated at Eton and Christ Church and became a Fellow of All Souls and a Member of Parliament (as a Whig). He was recognised early in his career as the rising star of Doctors' Commons. At the age of thirty-four he was retained by Lady Byron in the proceedings for separation from her husband, but never revealed the advice he gave her. Five years later he was the main civilian in the team that represented Queen Caroline at her trial before the House of Lords. Yet he was a liberal and a reformer. He took an active part in the movement for the abolition of slavery and was opposed both to capital punishment (mainly on the ground that it induced a reluctance to prosecute) and also to corporal punishment. He was a founder member of the Society for the Diffusion of Useful Knowledge and active in the foundation of London University as an institution open to all parties and denominations. He consistently advocated the removal of the disabilities of Dissenters, Catholics and Jews and the extension of the franchise.

Despite his success at the civil law bar, he did shrink from facing up to the reform of the ecclesiastical courts themselves. Although anxious to preserve the profession of civil lawyers, which depended on the probate work in the consistory courts, yet, as the principal draftsman of the Report of the Ecclesiastical Courts Commission in 1832, he recommended substantial reforms. They were necessary, in his view, 'to remove that bitterness of spirit which tends, day after day, to desecrate, debase and discourage true religion in this country.' He stopped short, however, of recommending abolition.

The present study, by a professor of law in the University of Toronto, is based on rigorous use of the sources, many still in manuscript. After a general survey of Lushington's career, he devotes each subsequent chapter to a particular aspect of his work (anti-slavery, Lady Byron, Queen Caroline, etc.). The most interesting chapters for legal historians are those devoted to the various types of judicial work in which Lushington was engaged. As Admiralty court judge he developed the principles of salvage laid down by Lord Stowell, gave some

important prize decisions during the Crimean War and, by his advice to Palmerston, helped to defuse the *Trent* incident during the American Civil War.

In Lushington's time the London Consistory Court sat about twenty days a year and dealt mainly with matrimonial cases, the majority instituted by women. Probate cases of any substance went to the Prerogative Court of the Province of Canterbury. Lushington, who was a glutton for work, was not a member of that court but often sat as a substitute and took the opportunity to clear up arrears. He was active in ensuring the enactment of the Wills Act of 1837, although he failed to foresee the difficulties it created. Since the Privy Council heard appeals in all areas of civil law until 1858, he sat in almost every case in which he had not been involved at a lower level.

He consistently asserted his duty to administer the law as it stood and not to let himself be influenced by his personal feelings. However, as Waddams shows, he fully exercised his considerable discretion in favour of those who engaged his sympathies, such as women. He was concerned to reduce delay and expense, and refused to enforce an order for penance, which he considered obsolete. In the more secular aspects of his work, this flexible approach was acceptable, but not so in the affairs of the Church. In the controversy over the payment of Church Rates for the upkeep of parish church naves, he was subjected to great criticism. He favoured a political solution that would alleviate the burden of dissenters, whose case he had represented in Parliament. Yet it fell to him to commit Thorogood, the most prominent of the 'Church Rate Martyrs', to prison for contempt.

The most fascinating chapters of the book are probably the last two, devoted to the theological issues, which came to the ecclesiastical courts from 1840 and with which Lushington struggled manfully. His views on the nature of the established church had been formed in the eighteenth century and he found it difficult to come to terms with the Tractarian controversy. In the Gorham case, he decided against the Bishop of Exeter, who had sought to avoid instituting an evangelical priest of forty years standing, after examining him for fifty-two hours on the doctrine of baptism. In the Denison case, an aggressive high churchman, who had trailed his coat in a series of sermons on the Real Presence in the Eucharist, was deprived of his benefice by Lushington (sitting as assessor to Archbishop Sumner), although the decision was later reversed by the Privy Council. In Liddell, he came down in favour of stone altars but condemned the use of coloured coverings, reflecting the liturgical seasons, as contrary to the relevant canon (on which point he was again over-ruled). He strongly supported the right of the Crown to insist on the election of the controversial Dr Hampden to the see of Hereford.

The greatest *cause célèbre* was the Essays and Reviews case in 1863 on the extent of permissible biblical criticism. The Bishop of Salisbury was represented by the future Lord Chief Justice Coleridge and the authors of the offending articles by J. F. Stephen, the criminal lawyer. Lushington, as Dean of Arches, protested that his court was 'not a court of Divinity; it is a court of ecclesiastical law.' The test was conformity with 'the formularies' of the Thirty-nine Articles. He threw out most of the charges but felt that in those remaining what had been written could not be so reconciled and so he convicted. Waddams shows that he was influenced by his own decision in the earlier, more obscure, case of the eccentric Heath. The Privy Council reversed him, despite the dissent of both Archbishops.

Waddams should be congratulated on providing what must be the definitive study of an influential lawyer and a very decent man, who upheld the good name of ecclesiastical law as it was understood in his time. The work also sheds much light on the great controversies that afflicted church and state in the mid-nineteenth century. A less detailed, but in some ways more comprehensive (since not confined to one man), analysis of the theological cases may be found in the last chapter of R. E. Rodes's recent study, *Law and Modernisation in the Church of England* (Notre Dame, 1991).

BLASPHEMY ANCIENT AND MODERN

by NICOLAS WALTER

The Rationalist Press Association, London, 1990, 96pp.
(Paperback £3.95)

A review by Peter M. Smith,
Faculty of Law, University of Exeter.

In this monograph published by the Rationalist Press Association, Nicolas Walter expresses the views of the British Freethought movement in its campaign for the abolition of the law against blasphemy. As such it may be seen to be very much in the tradition of the political and religious tracts of former ages, which were designed to influence opinion rather than engage in objective academic discussion. Here the author clearly and openly attempts to persuade the reader to the conclusion that 'the most desirable single thing to do with the common law of blasphemy is surely to abolish it. . .'

Walter starts with the premise that blasphemy may be seen as having originated and developed within a long tradition of religious persecution. The laws of blasphemy and heresy, he argues, were formulated to suppress all forms of religious dissent, whether as at first coming from beliefs in another religious faith or later emanating from divergence within the Christian religion itself. Blasphemy, he suggests, also came to be used to protect Christianity from the demands of a secular society for freedom of thought and speech. He enumerates many occasions in which the laws of blasphemy have been invoked in what he clearly sees as a repressive and sometimes cruel way against those who dared to criticise the established religious views of their time. The *Lemon* case is described in some detail. This case, as no doubt many will remember, resulted from the private prosecution for blasphemous libel brought by Mary Whitehouse against *Gay News* and its editor Denis Lemon in 1977 concerning a poem published in the magazine. The success of the prosecution despite an appeal by the defendants to the House of Lords (*R. v Lemon* [1979] AC 617) established the continued existence of the offence of blasphemy after a period of just over half a century during which no successful prosecutions had been brought.

It is perhaps in the bringing together of the many and varied cases involving the prosecution of blasphemy that the book is at its best and of most interest to ecclesiastical lawyers. The selection of cases is comprehensive and a number of examples of the alleged blasphemous material are set out at some length.