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# The Devil's Law Cases

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*There exists a substantial body of legal and historical research on the case of Fendall v Wilson, in which the Privy Council famously 'dismissed Hell with costs'. However, the case has never been examined in the context of Anglican debate over Hell and the Last Judgment in the second half of the nineteenth century. Despite its remarkable parallels with Fendall, Jenkins v Cook has been forgotten by most modern lawyers and has never been examined in parallel with Fendall. This article analyses the parts of the two cases that deal with Hell, the Last Judgment, and the Devil in the context of mid-nineteenth-century Anglican doctrinal litigation, and of the controversy over Hell in general and Essays and Reviews in particular. It also reconstructs some of the important factual elements of Jenkins that were not recorded in the first instance or appellate judgments. The contextual analysis of the judgments and unrecorded facts shows some surprising and evasive judicial responses to the doctrinal questions of whether Hell and the Devil exist and if so in what form. The article suggests that religious politics, rather than ecclesiastical jurisprudence, are the likelier cause of those responses. The article provides a historical contribution to the growing body of research and comment on the interplay of law and religion, in particular exemplifying some of the difficulties that arise when issues of religious doctrine are brought before purportedly secular courts.*

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Hell and the Devil have featured from time to time in English law in the post-mediaeval period. Traditional witchcraft, with its associations of dealing with the Devil, was decriminalised in 1735 in England, but the Devil was regularly invoked in English courts for a long time thereafter.<sup>1</sup> Nevertheless, on the face of it, it is surprising to find these subjects turn up as central features in litigation in the latter part of the nineteenth century; yet turn up they did in *Fendall v Wilson* (1864) and *Jenkins v Cook* (1876).<sup>2</sup>

The purpose of this article is to examine the two cases in their historical context. That context includes the contemporary Anglican controversy over the doctrine of eternal punishment, the religious and political debates about the

- 1 O Davies, 'Talk of the Devil: crime and satanic inspiration in eighteenth-century England', <[http://www.academia.edu/224811/Talk\\_of\\_the\\_Devil\\_Crime\\_and\\_Satanic\\_Inspiration\\_in\\_Eighteenth-Century\\_England](http://www.academia.edu/224811/Talk_of_the_Devil_Crime_and_Satanic_Inspiration_in_Eighteenth-Century_England)>, accessed 11 October 2012.
- 2 *Fendall v Wilson* (1862) 1 New Rep 213 (hereafter 'Wilson Arches'); *Wilson v Fendall*; *sub nom Williams v Bishop of Salisbury* (1863) 11 Moore New Series 375 ('Wilson PC'); *Jenkins v Cook* (1872–75) LR 4 A & E 463 ('Jenkins Arches'), (1875–76) LR 1 PD 80 ('Jenkins PC').

proper role and authority of the ecclesiastical courts, and the rise of Anglican doctrinal litigation, all of which will be examined, albeit briefly. In particular, it will be suggested that the judgment in *Fendall v Wilson* and the people who played a part in that litigation were important, both directly and indirectly, for what later happened in *Jenkins v Cook*. The cases are remarkable not only for their subject matter but also for involving two decisions of the highest court on the same and related doctrinal issues. The historical narrative of the two cases and their context seeks to illustrate more general issues about the relationship of ecclesiastical law and the ecclesiastical courts to religious doctrine.

## HELL, THE DEVIL AND THE NINETEENTH-CENTURY CHURCH OF ENGLAND

Belief in Hell as an actual place of fiery torment was more prominent in the first half of the nineteenth century than in the previous century, but was probably decreasing by the 1860s and 1870s.<sup>3</sup> Hell continued to be a subject of genuine and serious, albeit limited, debate among English theologians during the nineteenth century, but denial of the existence of Hell by Christian thinkers was rare. Hell was traditionally perceived as Christianity's chief sanction against wrongdoing: denial was regarded as subversive because of the consequences for personal morality.<sup>4</sup> The secular consequences of denial could be severe. In 1853, the Anglican theologian Frederick Denison Maurice was dismissed as a professor at King's College, London, for suggesting in his *Theological Essays* that Hell was merely a state of unrighteousness and a lack of knowledge of God.<sup>5</sup>

Hell is part of traditional Christian eschatology, involving the final judgment of God on individual lives and the apparently binary allocation of reward and punishment to the good and the bad. Jesus is depicted in the Gospels making strong statements about eternal punishment, including prophesies that 'the hour is coming, in which all that are in the graves shall hear his voice, and shall come forth; they that have done good, unto the resurrection of life; and they that have done evil, unto the resurrection of damnation' (John 5:28–29), that the son of man shall 'say also unto them on the left hand, Depart from me, ye cursed, into everlasting fire, prepared for the devil and his angels' (Matthew 25:41) and that 'these [on the left hand] shall go away into everlasting punishment: but the righteous into life eternal' (Matthew 25:46).<sup>6</sup> But the moral conundrum of Hell, insofar as it represents an idea or a place of eternal punishment, is that while it deters immorality it also undermines the notion of the

3 F Knight, *The Nineteenth-century Church and English Society* (Cambridge, 1995), pp 48, 56.

4 G Rowell, *Hell and the Victorians* (Oxford, 1974), p 29.

5 F Maurice, 'On eternal life and eternal death', in *Theological Essays* (second edition, Cambridge, 1853), pp 442–478.

6 All references are to the Authorised Version of the Bible.

loving and merciful attitude of God towards his creation. Hell is thus difficult to reconcile to any scheme of divine justice which is essentially humane.

The Church of England appeared to endorse traditional eschatology in the *Book of Common Prayer*, the forms and services first prescribed for Anglican worship in the sixteenth century and given statutory force and protection by the various Acts of Uniformity. Most importantly, the *Book of Common Prayer* included the Athanasian Creed, a translation from Latin of an early Christian doctrinal statement attributed, probably erroneously, to Bishop Athanasius of Alexandria (c 296–373). The Creed states ‘Christ . . . will come to judge the quick and the dead . . . And they that have done good shall go into life everlasting; and they that have done evil, into everlasting fire’ (the so-called ‘damnatory clauses’) and concludes ‘This is the Catholic Faith; which except a man believe truly and firmly, he cannot be saved’. In the nineteenth century, the *Book of Common Prayer* prescribed that the Athanasian Creed be said or sung at morning prayer on 13 feasts, including Christmas, Easter, Ascension Day, and Trinity Sunday. In a similar vein, the Prayer Book includes the Communion Service (A service to be used on Ash Wednesday and on other appointed days), which states:

Then shall it be too late to knock when the door shall be shut; and too late to cry for mercy when it is the time of justice. O terrible voice of most just judgement, which shall be pronounced upon them, when it shall be said unto them, ‘Go, ye cursed, into the fire everlasting, which is prepared for the devil and his angels’.

The damnatory clauses of the Athanasian Creed were a major point of controversy for the nineteenth-century Church of England, and were subject to vast amounts of comment and debate. This Creed’s place in the *Book of Common Prayer* made it at least in theory an obligatory part of Anglican acts of worship and the clergy were bound to declare their belief in it when being ordained or on taking up new posts. Some expressed the desire, often only privately, to be rid of it, while others wished to make its use in public worship optional. Even the extreme view espoused by Benjamin Jowett (an Anglican priest) that ‘if the damnatory clauses are true, God is worse than the devil. Better far to be an atheist than to believe them’ was not an isolated opinion – many Anglicans abhorred the Creed’s condemnation of the majority of the world’s population, who, through no fault of their own, had no knowledge of or exposure to Christian precepts, and of Eastern Orthodox Christians, who did not subscribe to the ‘Catholic’ faith.<sup>7</sup> However, the Creed’s apparently ancient

7 E Abbott and L Campbell, *The Life and Letters of Benjamin Jowett, M.A. Master of Balliol* (London, 1897), vol 2, p 90.

provenance and the other doctrines which it espoused led to its vigorous defence by a minority of High Church conservatives, in particular the leading Tractarian Edward Bouverie Pusey among other Oxford theologians.

As the removal of the Athanasian Creed from the *Book of Common Prayer* was potentially schismatic, some theological liberals adopted a strategy of non-literal interpretation instead. For example, Maurice, in *Theological Essays*, concluded that the language of the Athanasian Creed was consistent with his theory of eternal punishment as an absence of knowledge of God.<sup>8</sup> Cambridge theologians argued that the Latin manuscript from which the English translation had been made was corrupt, and that the translation itself was erroneous, while Edmund Ffoulkes argued that the Latin manuscript was a deliberate forgery. Others tried to avoid the problem of textual interpretation altogether, viewing it as insoluble.

Unlike Hell, Satan existed as, at most, an object of doctrinal speculation, but had limited if any acceptability as a serious academic topic: there appears to be no dedicated nineteenth-century English work on Satan before 1876.<sup>9</sup> Satan was no longer a fearful reality for many English Christians. In the nineteenth century, a belief in a corporeal Satan present in the world was rare except among Evangelicals, Methodists and Millinarians; belief in an internalised Satan who inspired sinful behaviour was also declining.<sup>10</sup> In the Bible, there are of course numerous references to Satan and the Devil. In particular, the Synoptic Gospels show Satan tempting Jesus in the wilderness and entering Judas in order to betray Jesus. However, although the *Book of Common Prayer* refers to the Devil, his angels and everlasting fire in the Communion Service and invokes the Devil in passing in many other places, Satan was in practice no more than incidental to the mainstream of nineteenth-century Anglican teachings. As will be seen, however, the Devil was still a topic that could cause doctrinal controversy.

## ECCLESIASTICAL LAW AND ECCLESIASTICAL CAUSES

After the end of the Napoleonic Wars in 1815 came a period of religious revival, but also a period of upheaval in historic relations between the established Church, the state and the nation and, in particular, an erosion of monopolistic rights previously afforded to the Church of England as an institution.<sup>11</sup>

8 Maurice, 'On eternal life', p 481.

9 D Brown, 'The devil in the details: a survey of research on Satan in biblical studies' (2011) 9(2) *Currents in Biblical Research* 200–201.

10 Davies, 'Talk of the Devil', p 8.

11 The last parliamentary grant for church building was made in 1824. In 1828, the Anglican monopoly on public offices was repealed with the Test and Corporation Acts. In 1829, the Catholic Emancipation Act permitted Catholics to sit in Parliament. In 1837, the Births and Deaths Registration Act gave people the right to opt out of Anglican rites at birth and marriage. See also

Ecclesiastical law reform, particularly in relation to the ecclesiastical courts, appeared regularly in the legislative programme from the 1830s onwards. This trend was part of a more fundamental debate about the relationship between Church and state, the authority of the Church, its law and courts, and to what extent ecclesiastical law and the courts which interpreted and enforced it were secular or spiritual in character.<sup>12</sup>

In 1833 the ecclesiastical court system was altered by removing the jurisdiction in final appeals from the High Court of Delegates (a mixed body composed of secular and ecclesiastical lawyers and, potentially at least, bishops), and vesting it in the newly constituted Judicial Committee of the Privy Council, composed primarily of lay and legally qualified peers, with bishops being asked to attend ecclesiastical hearings in an advisory, non-judicial capacity only by convention.<sup>13</sup> Moreover, ecclesiastical law was a branch of civil law whose practice was limited to a very small body of specially qualified professionals.<sup>14</sup> While judges in ecclesiastical courts of first instance tended to be civilians by training and therefore were experienced if not expert in ecclesiastical law, few legally qualified Privy Councillors came out of ecclesiastical practice (though Stephen Lushington and Herbert Jenner-Fust were notable exceptions). The weakness of the legal and theological components of the Judicial Committee led to challenges by High Church members to its expertise, authority and constitutional position in ecclesiastical matters throughout the rest of the century. The Church Discipline Act 1840 sought among other things to meet some of the complaints about the Judicial Committee's lack of spiritual authority by requiring at least one bishop to sit as a judge of the Judicial Committee on appeals under the Act. In practice, the Act did not prevent continued attacks on the authority of the court of final appeal in ecclesiastical causes, and the very notion of the episcopal judge brought with it the risk of conflict between a bishop's pastoral and judicial responsibilities. Full episcopal membership of the Judicial Committee was revoked in November 1876, but bishops thereafter remained entitled to sit at the hearings of ecclesiastical appeals as assessors without rights to vote at subsequent deliberations – a practice that continued until 1928.<sup>15</sup>

C Smith, 'Ridsdale v Clifton: representations of the Judicial Committee of the Privy Council in ecclesiastical appeals', (2009) 19(3) *King's Law Journal* 554.

12 C Smith, 'Martin v Mackonochie / Mackonochie v Penzance: a crisis of character and identity in the Court of Arches?', (2003) 24 *JLH* 257–259.

13 C Smith, 'The quest for an authoritative court of final appeal in ecclesiastical causes: a study of the difficulties, c. 1830–1876', (2011) 32 *JLH* 189–213.

14 For some comic representations of practice in the ecclesiastical courts in the Victorian period, see Charles Dickens' *Sketches by Boz* and *David Copperfield*.

15 Appellate Jurisdiction Act 1876; W Cornish, *Oxford History of the Laws of England*, vol 11 (1820–1914) (Oxford, 2010), p 397; P Howell, *The Judicial Committee of the Privy Council 1833–1876* (Cambridge, 1979), pp 71, 217. The last reported Privy Council judgment involving episcopal assessors was *Rector and Churchwardens of the Parish of St Nicholas Acons v London County Council* [1928] AC 469.

Substantive ecclesiastical law also underwent significant evolution. The Church Discipline Act 1840 created a new system for disciplining Anglican clergy, under which suits could be brought against clerks in holy orders for offences against ecclesiastical law. In general, the ecclesiastical courts' jurisdiction over the morality of the laity was declining, but controlling the behaviour of the clergy was still an important part of their functions. While disciplinary suits against clergy had technically been possible prior to the 1840 Act, in practice the costs of such suits prevented Church officials from bringing them.<sup>16</sup> Under the new, more formal procedures put in place by the 1840 Act, clerical indiscipline attracted significantly greater publicity and public attention than it had done previously.<sup>17</sup> In the second half of the century, it was increasingly common to find Anglican doctrine, practice and ceremony the subject of disciplinary suits. Such litigation was encouraged and sponsored by Anglican pressure groups, primarily the Church Association, an Evangelical group founded in 1865, which aggressively sponsored private prosecutions against clergy who favoured 'Romish' ceremonial, and the English Church Union, the champion of the Ritualist clergy – 'bodies whose primary objective was to wage legal warfare'.<sup>18</sup> Disciplinary suits were a forum in which competing Anglican interests struggled to establish the legality and therefore authority and correctness of their opposing doctrinal positions. These suits repeatedly required the resolution of doctrinal issues by judges who were not in holy orders and had no formal theological training. This trend intensified High Church calls for strengthening the spiritual characteristics of and increasing clerical personnel in the ecclesiastical courts, and for alternative methods of doctrinal adjudication.

The juridical approach to doctrinal issues was reassessed in the landmark decision of the Judicial Committee in *Gorham v Bishop of Exeter* (1850). This was a case on baptism decided outside the regime of the Church Discipline Act 1840, and as a result no episcopal judges sat on the appeal to the Judicial Committee (although three bishops were asked to attend the hearings in a non-judicial role).<sup>19</sup> The judgment of the Judicial Committee was in part a statement of the essentially secular character of its jurisdiction. The court declared that it was only permitted to consider 'that which is by law established to be the doctrine of the Church of England, upon the true and legal construction of her

<sup>16</sup> Knight, *Nineteenth-century Church*, p 165.

<sup>17</sup> *Ibid.*

<sup>18</sup> Smith, 'Ridsdale', p 555. For accounts of this trend, see J Baker 'Famous English canon lawyers, part 9: Stephen Lushington, DCL', (1996) 4 *Ecc LJ* 556; J Baker, 'Famous English canon lawyers, part 10: Sir Robert Phillimore, QC, DCL and the last practising doctors of law', (1997) 4 *Ecc LJ* 709; Smith, 'Martin'.

<sup>19</sup> *Gorham v Bishop of Exeter* (1850) Brod & F 64, Cripps' Church Cas 266, 14 Jur 443. Edmund Moore edited a special report of the judgment (London, 1852). A printed version of the judgment (published by Seeleys) is available at <<http://www.archive.org/details/a62220760ogreaufit>>, accessed 11 October 2012. References to the judgment are to the pdf copy available on that website, unless otherwise stated.

Articles and Formularies' and not 'to settle matters of faith, or to determine what ought in any particular to be the doctrine of the Church of England'.<sup>20</sup> In other words, ecclesiastical tribunals were to confine themselves to carrying out what amounted to a legal task, namely the interpretation of the language of doctrinal statements. The approach would essentially be one of narrow literal interpretation. As the Judicial Committee stated,

If there be any doctrine on which the Articles are silent or ambiguously expressed, so as to be capable of two meanings, we must suppose that it was intended to leave that doctrine to private judgment, unless the Rubrics and Formularies clearly and distinctly decide it.<sup>21</sup>

The consequence of such an interpretive approach was, of course, to limit the number of firm doctrinal positions of the Church, particularly as the sixteenth-century prescriptions were for the most part broadly worded compromises.<sup>22</sup> By extension, therefore, the decision increased the space for lawful clerical debate on doctrine. Conservatives saw *Gorham* as effectively legalising heretical views, and the decision caused a number of Tractarians to convert to Roman Catholicism in protest. It was not the only doctrinal suit that proved to be schismatic.

### ESSAYS AND REVIEWS

*Essays and Reviews* (published in March 1860) was a disparate collection of seven essays by six clergymen and one layman who were, or at least became, associated with the Anglican 'Broad Church' movement that emerged in the mid-nineteenth century. While not having any strictly defined doctrinal position, the Broad Church was in favour of liberal toleration and emerged as a group distinct from the two main Anglican parties, the Evangelicals (Low Church) and the Anglo-Catholics (High Church). Although *Essays and Reviews* did not have any single unifying principle or common issue that all essayists addressed, the essayists all claimed, directly or indirectly, that the Bible should be interpreted critically with reference to its various historical and cultural contexts, like any other ancient writing. These hermeneutics challenged the doctrine that the entirety of the Bible is divinely inspired. In this respect, *Essays and Reviews*

20 *Gorham*, p 15. Cited by Lushington in his judgment in Williams' case ((1862) 1 New Rep 196, at 199) and by the Privy Council on appeal: *Wilson* PC, at 424.

21 *Wilson* Arches, at 219 – possibly inaccurate. Seeleys' version of the *Gorham* judgment reads (p 8): 'If there be any doctrine on which the Articles are silent or ambiguously expressed, so as to be capable of two meanings, we must suppose that it was intended to leave that doctrine to private judgment, unless the Rubrics and Formularies clearly and distinctly decide it'.

22 Cornish et al, *Oxford History*, pp 395–397.

followed Darwin's *Origin of Species* (published in November 1859), which is specifically approved in one of the essays and which contained an implicit attack on the literal truth of parts of the Old Testament.<sup>23</sup> *Essays and Reviews* led to a polarised, long-running and very public controversy between liberal and conservative Anglicans.<sup>24</sup> The book was a bestseller, going through 13 editions in under ten years.<sup>25</sup>

The Reverend Henry Bristow Wilson collected the essays for the book. He had been Professor of Anglo-Saxon at the University of Oxford from 1839 to 1844, a fellow of St John's College, Oxford, between 1825 and 1850, and a prominent opponent of John Henry Newman and the Tractarians in the early 1840s. He left St John's in 1850 to become vicar of Great Staughton in Cambridgeshire; the college was patron of the living. His own contribution was an article entitled '*Séances historiques de Genève: the national church*' ('*Séances*'). The essay was a plan for a more inclusively or comprehensively 'national' Church of England, which could be accomplished, he argued, by widening the Anglican 'formularies' – the Thirty-Nine Articles of Religion (the historic defining statement of Anglican doctrine in relation to the controversies of the English Reformation) and the *Book of Common Prayer*.

The Reverend Rowland Williams, an academic and the vicar of Broad Chalk in Wiltshire, contributed an essay entitled 'Bunsen's biblical researches', which was primarily a review of theological writings of the nineteenth-century German diplomat and scholar Baron Christian Charles Josias von Bunsen.

The views expressed in *Essays and Reviews* by the two authors were alleged to be heretical and they were prosecuted under the Church Discipline Act. The final paragraph of '*Séances*', which had little direct connection with the general scheme of the essay, was as follows:

The Christian Church can only tend on those who are committed to its care, to the verge of that abyss which parts this world from the world unseen. Some few of those fostered by her are now ripe for entering on a higher career; the many are but rudimentary spirits – germinal souls. What shall become of them? If we look abroad in the world, and regard the neutral character of the multitude, we are at a loss to apply to them either the promises or the denunciations of revelation. So the wise heathens could anticipate a reunion with the great and good of all ages; they could represent to themselves, at least in a figurative manner, the punishment and purgatory of the wicked; but they could not expect the

23 B Powell, 'On the study of the evidences of Christianity', in H Wilson, *Essays and Reviews* (seventh edition, London, 1861), p 139.

24 For a summary of the publications in the *Essays and Reviews* debate, see J Altholz, 'The mind of Victorian orthodoxy: Anglican responses to *Essays and Reviews*', (1982) 51 *Church History* 186.

25 V Shea and W Whitla, *Essays and Reviews: the 1860 text and its reading* (London, 2000), pp 14–20.



re-appearance in another world, for any purpose, of a Thersites or an Hyperbolos – social and poetical justice had been sufficiently done upon them.<sup>26</sup> Yet there are such as these, and no better than these, under the Christian name – babblers, busybodies, livers to get gain, and mere eaters and drinkers. The Roman Church has imagined a limbus infantium;<sup>27</sup> we must rather entertain a hope that there shall be found, after the great adjudication, receptacles suitable for those who shall be infants, not as to years of terrestrial life, but as to spiritual development – nurseries, as it were, and seed grounds, where the undeveloped may grow up under new conditions – the stunted may become strong, and the perverted be restored. And when the Christian Church in all its branches shall have fulfilled its sublunary office, and its Founder shall have surrendered His Kingdom to the Great Father – all, both small and great, shall find a refuge in the bosom of the Universal Parent, to repose, or be quickened into higher life, in the ages to come, according to His will.<sup>28</sup>

One can see perhaps most clearly in Wilson's inability to apply 'the promises or the denunciations of revelation' to 'rudimentary spirits' or 'germinal souls' a rejection of traditional binary allocation of individuals to Heaven or Hell. In an anonymous review, the leading High Churchman Samuel Wilberforce, Bishop of Oxford, criticised this passage as 'a poor Buddhist dream of re-absorption into the Infinite', 'a dreamy vagueness of pantheistic pietism, which is but the shallow water leading on to a profounder and darker atheism'.<sup>29</sup>

A meeting of bishops was held in London in February 1861, to consider complaints about the book from the clergy, including in particular a complaint that some members of the clergy had publicly denied the doctrines of the atonement and the divine inspiration of the Bible.<sup>30</sup> The meeting resulted in a public letter, published in *The Times* on 16 February 1861, responding to the particular complaint and endorsed by the Archbishops of Canterbury and York (John Bird

26 In the *Illiad*, Thersites was a rank-and-file soldier of the Greek army during the Trojan War, who was punished for mocking Agamemnon and Achilles: see Shea and Whitla, *Essays*, p 343. Hyperbolos, an Athenian demagogue and one of the first Athenian political leaders who was not an aristocrat, was represented as dishonourable by the comic writers of ancient Greece; he was assassinated by oligarchic revolutionaries. Wilson uses Thersites and Hyperbolos as examples of petty criminals or sinners: see H Wilson, *A Speech Delivered before the Judicial Committee of Her Majesty's Most Honourable Privy Council in the Cause of Wilson v Fendall on Appeal from the Arches Court of Canterbury* (London, 1863), p 145.

27 A theory about the status of the unbaptised who die in infancy, too young to have committed personal sins but not having been freed from original sin.

28 H Wilson, 'Séances historiques de Genève: the national church', in Shea and Whitla, *Essays*, p 309. In the final sentence, Wilson paraphrases 1 Corinthians 15:28.

29 (1861) 110 *Quarterly Review* 273.

30 R Davidson and W Benham, *The Life of Archibald Campbell Tait: Archbishop of Canterbury* (London, 1891), vol 1, pp 281–283.

Sumner and Charles Longley respectively) and by 25 other bishops, including Archibald Campbell Tait, Bishop of London. The letter stated:

We cannot understand how [such] opinions can be held [by clergy] consistently with an honest subscription to the formularies of our Church, with many of the fundamental doctrines of which they appear to us essentially at variance.

Whether the language in which these views are expressed is such as to make their publication an act which could be visited in the ecclesiastical courts, or to justify the synodical condemnation of the book which contains them is still under our gravest consideration.

Longley and Tait would judge Wilson's appeal to the Privy Council.

On 13 March, a petition was presented to the Archbishop of Canterbury signed by over 8,000 clergy, requesting the bishops to take legal action. The Archbishop is reported as having said to the people who had assembled that the tendency of *Essays and Reviews* was to undermine the very foundations of Christianity.<sup>31</sup>

### Heresy charges against Wilson and Williams

In the growing furore over *Essays and Reviews*, the threat of legal action in the letter to *The Times* was carried out. Suits were brought against Williams and Wilson in relation to their essays under the 1840 Act. It is not entirely clear why Williams and Wilson were singled out, since there were other clerical authors who could have been prosecuted under the Act.<sup>32</sup> As Wilson and Williams were the only essayists who held benefices, they alone were liable to deprivation of their parishes and livings; and, as clergy with cures of souls, it was at least ostensibly their delinquency that might prove the greatest risk to the morality of the laity.

The suit against Wilson was promoted by the Reverend James Fendall, Rector of Harlton (about ten miles from Wilson's parish), and proctor in Convocation (ie the representative in the lower house of the Church's assembly for the Province of Canterbury) for the clergy of the Diocese of Ely.<sup>33</sup> The suit against Williams was promoted by the senior High Churchman Walter Hamilton, Bishop of Salisbury. Fendall had secret financial backing from another senior High Churchman, Bishop Wilberforce.<sup>34</sup> Donations to an 'Essays and Reviews

31 *The Times*, 14 March 1861.

32 See section 3 of the Act: a commission of inquiry could be laid against 'any Clerk in Holy Orders of the United Church of England and Ireland'.

33 *The Guardian*, 17 January 1862.

34 Shea and Whitla, *Essays*, p 688; Lincoln's Inn Papers, Privy Council Ecclesiastical and Admiralty Appeals, vol 69 (1863), pp 719–786 (hereafter 'Wilson Lincoln's Inn'), p 770.

Defence Fund' were sought from the 'friends of religious liberty' to meet the costs of Wilson's and Williams' defences.<sup>35</sup>

Both suits came before the Arches Court of Canterbury (the principal court for the ecclesiastical Province of Canterbury) by letters of request from the bishops of the dioceses in which the defendants' parishes were located. Fendall alleged generally that Wilson had 'advisedly maintained and affirmed certain erroneous, strange and heretical doctrines, positions and opinions contrary and repugnant to the doctrine and teaching of the . . . Church of England'.<sup>36</sup> Eight specific charges were made against Wilson, in which various passages from '*Séances*' were quoted verbatim and were alleged to contain doctrines contrary to, or inconsistent with, the doctrines of the Church of England as contained in the Thirty-Nine Articles of Religion and the *Book of Common Prayer*.<sup>37</sup> Paragraph 14 of the articles of charge ('article 14') quoted the concluding passage from '*Séances*' set out above and alleged that Wilson

did advisedly declare and affirm, in effect, that after this life, and at the end of the existing order of things on this earth, there will be no judgment of God, awarding to those men whom He shall then approve everlasting life or eternal happiness, and to those men whom He shall then condemn everlasting death or eternal misery . . .<sup>38</sup>

The alleged views were said to be contrary to, or inconsistent with, five passages in the *Book of Common Prayer*, including the specific parts of the Athanasian Creed and the Communion Service quoted above.

### ***Fendall v Wilson*: Decision at First Instance**

The admission of the charges was opposed by both Williams and Wilson, who were legally represented at this stage. Leading counsel appearing for the promoters of the charges was Robert Phillimore QC, the Queen's Advocate (a law officer who represented the crown in ecclesiastical causes). The case came before the Dean of Arches, Dr Stephen Lushington, for an 11-day hearing on the formulation of the charges.<sup>39</sup> Lushington was well acquainted with Anglican legal controversy, having been a judge in the *Gorham* appeal. He gave judgment on the question of the admissibility of the charges on 25 June 1862. With respect to Wilson, he rejected five of the eight specific charges,

<sup>35</sup> *The Times*, 7 August 1861.

<sup>36</sup> *Wilson* PC, at 377.

<sup>37</sup> Although formally the articles of charge made 19 separate 'charges', only 8 of the charges (articles 7–14 inclusive) dealt with specific parts of '*Séances*'.

<sup>38</sup> *Wilson* Lincoln's Inn, p 783.

<sup>39</sup> *Ibid*, p 758.

ordered two charges to be 'reformed' (amended) and admitted the remaining charge.

The principles that Lushington held he was bound to apply were to be found in *Gorham*. He described his task of construing the passages of the Anglican liturgy cited in article 14 in accordance with *Gorham* as one which

[e]ven the most learned divines of our Church would not . . . undertake . . . without feeling its difficulty and weight; more especially as in this case it involves questions of the most momentous character, – the future destiny of mankind. To a certain extent I cannot escape the task, and I will not evade it.<sup>40</sup>

Lushington referred to the controversies that had arisen over the damnatory clauses of the Athanasian Creed, but held that he must construe them in their plain, literal and grammatical sense without reference to theologians' opinions. His interpretation of the relevant part of the Creed was that 'eternal life shall be the portion of the good, and everlasting fire the destiny of the bad'.<sup>41</sup> He proceeded to find that '*Séances*' 'declares that a hope must be entertained of an intermediate state, and that finally all, both great and small, will escape everlasting condemnation', an opinion that was irreconcilable with the liturgy cited in article 14.<sup>42</sup> The charge was thus allowed to be tried.

Wilson filed an answer to article 14 in which he denied that '*Séances*' had said that there will be no judgment of God awarding everlasting life and everlasting death or that there shall be an intermediate state. No witness evidence was adduced. On 15 December 1862, Lushington held that article 14 and the two amended charges against Wilson, and the remaining charges against Williams, were proved. In giving sentence, he stated that his primary object was deterrent and that the two defendants' cases were indistinguishable.<sup>43</sup> He suspended Wilson and Williams from their benefices for one year, and ordered them to pay costs.

### Appeal to the Privy Council

Appeals against Lushington's decisions were heard before the Judicial Committee of the Privy Council in June 1863. The seven-man committee consisted of four lawyers and three bishops. The lawyers of the appellate committee were Lords Westbury LC, Cranworth, Chelmsford, and Kingsdown. The bishops were Longley, now Archbishop of Canterbury, William Thomson, Archbishop of

40 *Wilson Arches*, at 219.

41 *Ibid.*

42 *Ibid.*, at 220.

43 *Wilson Lincoln's Inn*, pp 759 and 761.

York, and Tait, Bishop of London. None of the judges had a background in ecclesiastical law, though as a politician Westbury was an active ecclesiastical law reformer, while Chelmsford had an honorary doctorate in civil law. Thomson had edited an important volume of orthodox Anglican responses to *Essays and Reviews*, entitled *Aids to Faith*.

Wilson and Williams each represented himself at the appeal hearing. Phillimore again appeared for the promoters. Wilson in essence argued that the Athanasian Creed's treatment of the subject of divine judgment and human responsibility was figurative and that, in adopting the Creed as an article of faith, the Church had not prevented its members from believing that those cast into the 'everlasting fire' might eventually be delivered from it. Phillimore argued that the final passage of '*Séances*' maintained as a truth (rather than as a hope) that there will be no future punishment at all and that such a view was incompatible with the passages cited in article 14.<sup>44</sup>

The reserved judgment of the Privy Council was delivered on 8 February 1864. Though the judgment was delivered by Lord Westbury LC, it was Bishop Tait (who was personally sympathetic to the Broad Church) who took the lead role in drafting the judgment.<sup>45</sup> The Privy Council allowed the appeals, acquitted Williams and Wilson on all charges and ordered the respondents to pay the costs of the appeal but not costs in the court below. Archbishops Longley and Thomson dissented in relation to parts of the judgment (without giving any separate reasons), but not in relation to the decision on article 14. Bishop Tait did not dissent at all.

The Privy Council was plainly concerned about further inflaming the controversy over *Essays and Reviews*: the judgment begins and ends with a strong disclaimer and a narrowing of the issues in the appeal:

These appeals do not give to this Tribunal the power, and, therefore, it is no part of its duty, to pronounce any opinion on the character, effect, or tendency of [*Essays and Reviews*]. Nor are we at liberty to take into consideration, for the purposes of the prosecution, the whole of the Essay of Dr Williams or of the Essay of Mr Wilson. A few short extracts only are before us, and our judgment must by law be confined to the matter which is therein contained. If, therefore, the Book, or these two Essays, or either of them as a whole, be of a mischievous and baneful tendency, as weakening the foundation of Christian belief, and likely to cause many to offend, they will retain that character, and be liable to that

44 *Wilson PC*, at 419.

45 Shea and Whitla, *Essays*, p 756. As to Tait's sympathies, see S Booth, '*Essays and Reviews*: the controversy as seen in the correspondence and papers of Dr EB Pusey and Archbishop Archibald Tait', (1969) 38(3) *Historical Magazine of the Protestant Episcopal Church* 270.

condemnation, notwithstanding this our judgment . . . On the design and general tendency of [*Essays and Reviews*] and on the effect or aim of the whole Essay of Dr Williams, or the whole Essay of Mr Wilson, we neither can nor do pronounce any opinion.<sup>46</sup>

Turning to the legal tests that had to be applied, the Privy Council agreed with Lushington that the correct test was derived from *Gorham* and repeated the *Gorham* line on the limits of the court's jurisdiction in determining matters of Anglican doctrine, observing:

It is obvious that there may be matters of doctrine on which the Church has not given any definite rule or standard of faith or opinion – there may be matters of religious belief on which the requisition of the Church may be less than Scripture may seem to warrant – there may be very many matters of religious speculation and inquiry on which the Church may have refrained from pronouncing any opinion at all. On matters on which the Church has prescribed no rule, there is so far freedom of opinion that they may be discussed without penal consequences. Nor in a proceeding like the present are we at liberty to ascribe to the Church any rule or teaching which we do not find expressly and distinctly stated, or which is not plainly involved in or to be collected from that which is written.<sup>47</sup>

The Privy Council quickly dismissed Phillimore's and Lushington's interpretation of the eschatological passage of '*Séances*':

. . . we find nothing in the passages extracted which in any respect questions or denies that at the end of the world there will be a judgment of God awarding to those men whom He shall approve everlasting life or eternal happiness; but with respect to a judgment of eternal misery, a hope is encouraged by Mr Wilson that this may not be the purpose of God.<sup>48</sup>

Equally quickly, it dismissed the allegation made in article 14:

. . . it is not competent to a Clergyman of the Church of England to teach or suggest that a hope may be entertained of a state of things contrary to what the Church expressly teaches or declares will be the case; but the charge is

<sup>46</sup> *Wilson* PC, at 423 and 433.

<sup>47</sup> *Ibid*, at 424–425.

<sup>48</sup> *Ibid*, at 431.

that Mr Wilson advisedly declares that after this life there will be no judgment of God awarding either eternal happiness or eternal misery, – an accusation which is not warranted by the passage extracted.<sup>49</sup>

The Privy Council then moved on to the central issue: the compatibility of the passage of ‘*Séances*’ as properly construed with the liturgy referred to in article 14. In relation to the Athanasian Creed, it noted that no interpretation is given in the Formularies of the words ‘everlasting fire’. It concluded:

We are not required, or at liberty, to express any opinion upon the mysterious question of the eternity of final punishment, further than to say that we do not find in the Formularies, to which this Article refers, any such distinct declaration of our Church upon the subject, as to require us to condemn as penal the expression of hope by a clergyman that even the ultimate pardon of the wicked, who are condemned in the day of judgment, may be consistent with the will of Almighty God.<sup>50</sup>

The implicit conclusion is that the Athanasian Creed and the Communion Service do not clearly teach that the punishment of the wicked endures eternally. In writing the first formal draft of the Judicial Committee’s judgment, Lord Cranworth remarked that the Athanasian Creed does not say that ‘those who shall be doomed to everlasting fire will be kept everlastingly alive, or even that they will be kept everlastingly in the everlasting fire’.<sup>51</sup> Those words were removed from later drafts of the judgment in favour of the comment that there was no definition of ‘everlasting fire’ in the Formularies. Presumably the judges accepted that explicit literal analysis of the Creed’s language was a minefield into which the court should not stray or be seen to be straying.

### Aftermath

The Judicial Committee’s judgment led to a storm of Anglican indignation, most memorably the description of the Judicial Committee by Robert Gray, Bishop of Cape Town, as ‘that masterpiece of Satan for the overthrow of the faith’.<sup>52</sup> Lord Westbury LC was immortalised in a mock epitaph published shortly after the judgment: ‘He dismissed hell with costs/And took away from orthodox members of the Church of England/Their last hope of everlasting damnation’.<sup>53</sup>

49 Ibid.

50 Ibid, at 432–433.

51 Found in the private papers of the appeal committee, quoted in Shea and Whitla, *Essays*, p 755. A very similar argument was made by Wilson at the hearing: Wilson, *Speech*, p 92.

52 T Nash, *The Life of Richard Lord Westbury, Formerly Lord Chancellor* (London, 1888), vol 2, p 79.

53 J Atlay, *The Victorian Chancellors*, vol 2 (London, 1908), p 264. Atlay attributes the lines to Charles (later Lord Justice) Bowen. They have also been attributed to Philip Rose, a leading solicitor: see Nash, *Westbury*, p 78.

The episcopal judges issued public statements which contain elements that are strikingly like individual judgments on the issue of eternal punishment raised in Wilson's appeal. In a letter to *The Guardian* dated 4 March 1864, Longley endorsed the traditional eschatological view:

I wish it to be generally understood that, in assenting to the reversal of the Judgment of Dr Lushington on the subject of Eternal Punishment in the case of Mr Wilson, I did so solely on technical grounds; insomuch as the charge against him on this point was so worded that I did not think it could be borne out by the facts. The Eternity of Punishment rests, according to my mind, exactly on the same ground as the Eternity of Blessedness; they must both stand or fall together; and the Church of England, as I maintain, holds both doctrines clearly and decidedly.<sup>54</sup>

In April 1864, Thomson used a pastoral letter to express his personal position on the textual interpretation of the Creed:

The charge against one Appellant on the subject of Eternal Punishment did not seem to me to be sustained. On the one hand the Church in adopting the word everlasting to express the word that may also be rendered eternal, has cut off, for all purposes of law, some metaphysical speculations to which the *aeternum* has been subjected. Everlasting must mean lasting for ever, never coming to an end. The Church of England believes in a life that lasts for ever for the good, and in an everlasting punishment of the wicked.<sup>55</sup>

In the preface to a volume of sermons in 1864, Tait publicly stated that he was 'glad' that the hope expressed by Wilson was not punishable by law, describing the result of the appeal as 'wise forbearance', but nevertheless asserted that 'there is nothing in the revelation of the Gospel on which such a hope . . . can legitimately rest'.<sup>56</sup> Perhaps teasingly, he commented that 'On the [subject of the eternity of hell fire] I have expressed my opinion in [*The Dangers and Safeguards of Modern Theology*]', a work in which he pointedly refused to express an opinion on either Matthew 25:46 or the meaning of the word 'eternal'.<sup>57</sup>

The Church of England more generally quickly re-asserted its doctrinal position following the result in the Wilson appeal. A declaration of support and

54 Quoted in H Liddon, *Life of Edward Bouverie Pusey*, vol 4 (London, 1894), p 49.

55 A Tait, 'A pastoral letter to the clergy and laity of the Province of York' (London, 1864), p 18.

56 A Tait, *The Word of God and the Ground of Faith: part II* (London, 1864), vi–vii.

57 *Ibid.*, vi; A Tait, *The Dangers and Safeguards of Modern Theology* (London, 1861), p 238.



thanks addressed to Archbishops Longley and Thomson for their dissents was signed by 137,000 lay members of the Church of England.<sup>58</sup> Another declaration – stating that the Church of England teaches ‘that the ‘punishment’ of the ‘cursed’, equally with the life of the ‘righteous’, is ‘everlasting’ – was drawn up at Oxford, circulated to the 24,800 clergy of Britain and Ireland and signed by nearly 11,000 of them.<sup>59</sup> The Convocation at Canterbury passed a ‘synodical condemnation’ of *Essays and Reviews* on 24 June 1864. Tait voted against the motion in the upper house of Convocation; Fendall, the unsuccessful litigant against Wilson, voted for it in the lower house.<sup>60</sup>

The synodical condemnation led to personal attacks on each other by Lord Westbury as Lord Chancellor and Bishop Wilberforce in parliamentary debate in July 1864. Controversy over *Essays and Reviews* ended soon thereafter, but debate over the place of the Athanasian Creed in the authorised Anglican liturgy continued for decades and became particularly fierce in the early 1870s. A discussion of that debate is beyond the scope of this article, but it is worth noting that Tait, who became Archbishop of Canterbury in November 1868, publicly expressed his view that the Athanasian Creed should not be retained as part of the public service of the Church in 1870,<sup>61</sup> and asserted in 1872 that nobody in the Church of England took the damnatory clauses in their literal sense.<sup>62</sup>

### JENKINS V COOK: THE GENESIS OF THE SECOND DISPUTE

Wilson’s and Williams’ appeals were a high-water mark of Victorian public interest in doctrinal litigation, rivalled only by the Ritual litigation of the 1870s. The particular notoriety of the decision about eternal punishment is illustrated by the fact that, over 60 years later, Bertrand Russell could make a facetious reference to it in a speech to the Secular Society and assume (or appear to assume) some audience familiarity:

Belief in eternal hell-fire was an essential item of Christian belief until pretty recent times. In this country, as you know, it ceased to be an essential item because of a decision of the Privy Council, and from that decision the Archbishop of Canterbury and the Archbishop of York dissented; but in this country our religion is settled by Act of Parliament, and therefore

58 Shea and Whitla, *Essays*, p 665.

59 I Ellis, *Seven Against Christ: a study of ‘Essays and Reviews’* (Leiden, 1990), p 193.

60 J Altholz, *Anatomy of a Controversy: the debate over Essays and Reviews, 1860–1864* (Aldershot, 1994), p 124.

61 *Fourth Report of the Royal Commission on Ritual* (September 1870), viii.

62 *Chronicle of Convocation*, 9 February 1872, p 94, quoted in Davidson and Benham, *Life of Tait*, vol 2, p 142.

the Privy Council was able to override their Graces and hell was no longer necessary to a Christian.<sup>63</sup>

It therefore cannot be a coincidence that the same doctrinal issue of eternal punishment came back before the courts, in another suit under the Church Discipline Act, a mere 11 years after the final judgment in *Wilson's* case in *Jenkins v Cook*. This time, it was clerical support for the doctrine of eternal punishment that was alleged to amount to misconduct.

The promoter, Henry Jenkins, was a parishioner of Christ Church, Clifton, in Bristol. In the pleadings in his case, he made several assertions, which were not challenged, as to the nature and depth of his Christian beliefs. He lived with his wife and children in the parish from about 1868; according to Mrs Jenkins they had 50 copies of the Bible in the house.<sup>64</sup> Proby asserts that he was a barrister, though the records of the Inns of Court appear not to support this.<sup>65</sup> In 1865 Jenkins had published a book entitled *Selections from the Old and New Testaments* ('*Selections*').<sup>66</sup> As a heavily expurgated version of the Authorised Version of the Bible, *Selections* represents a rather extreme application of the principles of critical reading of the Bible espoused by the authors of *Essays and Reviews*. The book had no preface or commentary and made no real editorial changes to the text other than omission of various passages and the deletion of verse numbering. Some omitted passages were about, or explicitly or implicitly referred to, subjects including Satan, Hell, devils, demonic possession, evil spirits, sorcery, the violence of God's justice, everlasting punishment of sin after death and predestination. In particular, John 5:29 and Matthew 25:41–46 (the apparent Scriptural sources of the Athanasian Creed's damnatory clauses) were omitted. Other passages appear to have been deleted not because of the subjects they referred to but because they supported archaic customs – such as Paul's advice (in 1 Corinthians 14:34) that women should not be allowed to speak in church. Still other passages – for example, about sexual immorality and drunkenness – appear to have been deleted for reasons of taste or paternal censorship. About 15% in total of the New Testament was omitted, including Gospel narrative of Jesus' words, and well in excess of 30% of the Old Testament.<sup>67</sup> Given *Selections'* publication date, Jenkins was probably preparing

63 Originally a talk given on 6 March 1927 at Battersea Town Hall, published in B Russell, *Why I Am Not a Christian: and other essays on religion and related subjects* (London, 1996), p 3.

64 Lincoln's Inn Papers, Cases on Appeal to the Privy Council, Admiralty and Ecclesiastical, vol 205 (1876), pp 783–888 (hereafter *Jenkins Lincoln's Inn*), at pp 833 and 856.

65 W Proby, *Annals of the Low-Church Party in England, Down to the Death of Archbishop Tait* (London, 1888), vol 2, p 313.

66 H Jenkins, *Selections from the Old and New Testaments* (London, 1865).

67 For a detailed analysis of the omissions from Matthew's Gospel, see *Jenkins Arches*, at 479–480. According to the calculations of Dr Archibald James Stephens QC (leading counsel for the defendant in *Jenkins v Cook*), *Selections* omitted 215 chapters of the Old Testament entirely, and 25 chapters of the New Testament entirely: *Jenkins Arches* at 472. In fact, only eight chapters of the New Testament are

the text for publication during or shortly after *Fendall v Wilson*. It seems likely that the public controversy over the final passage of 'Séances' inspired some of the omissions in *Selections* or at least encouraged him to publish the book.

In February 1872, the Reverend Flavel Smith Cook was appointed as vicar of Christ Church, Clifton.<sup>68</sup> He lived on the same street as Jenkins, who gave him a copy of *Selections* shortly after his institution.<sup>69</sup> Cook did not examine the book at that stage. On Sunday 5 July 1874, Cook preached a sermon to Jenkins and the rest of his congregation on 'Rationalism', at least some of which was devoted to the topic of eternal punishment.<sup>70</sup> It was not the first sermon that he had preached at Christ Church on eternal punishment. Cook's enthusiasm for the subject is illustrated by the volume of six lectures he published on 'future punishment' in 1878.<sup>71</sup>

The day after the sermon Jenkins wrote to Cook:

As one of your parishioners who accepts his conscience as the voice of God speaking within him, I beg to protest most emphatically against the irreligious tendency of your sermon of last night. I quite believe that you would not willingly deceive others, but it is my opinion that no difficulties as to language or books should stifle what is imprinted in every man's breast by his Maker, that is to say, the knowledge of right and wrong.<sup>72</sup>

Giving their judgment in the case some two years later, the Privy Council criticised this letter as 'uncalled for' and 'uncourteous'.<sup>73</sup> The letter is interesting, however, in that it seems to dismiss arguments about eternal punishment based on the interpretation or content of religious texts.

After receiving the letter, Cook examined *Selections* in detail for the first time and discovered the scheme of the omissions. He visited Jenkins to discuss the book and the letter (or, as Jenkins claimed, just the letter), but Jenkins refused to speak to him on the subject or subjects.<sup>74</sup> Mrs Jenkins gave evidence that Jenkins was abrupt with Cook and left the room when Cook pressed the discussion, and that Cook threatened her husband at the meeting.<sup>75</sup> Though she did

entirely omitted (Matthew 1 and 25, Romans 7, and Revelation 6, 9, 12, 13 and 18). 218 chapters of the Old Testament are entirely omitted, including all of Esther and Ruth.

68 *Jenkins* Lincoln's Inn, p 833.

69 *Ibid*, p 792.

70 The title of the sermon is referred to in Jenkins' printed case for the Privy Council: *ibid*, p 784. Cook averred in his defence that the sermon was on eternal punishment: *ibid*, p 792. It is therefore difficult to accept the Privy Council's statement that '[w]hat was the subject or substance of this sermon ... their Lordships have no means whatever of knowing': *Jenkins* PC, at 97.

71 F Cook, *Righteous Judgment: six lectures on future punishment* (London, 1878).

72 *Jenkins* Arches, at 478.

73 *Jenkins* PC, at 107.

74 See paragraph 4 of Cook's 'Responsive plea' and paragraph 4 of Jenkins' 'Allegation in reply': *Jenkins* Lincoln's Inn, pp 836 and 842.

75 *Ibid*, pp 854–856.

not specify the nature of the threat, it seems likely that Cook threatened to refuse to give Communion to Jenkins.

Mrs Jenkins met with Cook at his house on 20 July 1874 in order, she said, to find out whether he was going to carry out his threat.<sup>76</sup> In the meeting, according to Mrs Jenkins, she confirmed to Cook that Jenkins did not believe in the personality of the Devil.<sup>77</sup> Mrs Jenkins' account of Cook's response was that he said 'he [shall] not have the Sacrament in my church', and he stretched out his arms and said 'let him keep at arms' length from me, he is a regular infidel'.<sup>78</sup>

On the same day, Jenkins again wrote to Cook. As will be seen, this letter became central to the ensuing dispute. Once again, the key issue is the interpretation of a religious text:

Mrs Jenkins has kindly called upon you in order to arrange matters, with, I am afraid, very poor success. With regard to my book, *Selections from the Old and New Testament*, the parts I have omitted, and which has enabled me to use the book morning and evening in my family, are in their present generally received sense quite incompatible with religion or decency (in my opinion). How such ideas have become connected with a book containing everything that is necessary for a man to know I really cannot say, and can only sincerely regret it.<sup>79</sup>

Cook replied on 24 July:

... the conclusion I cannot but form from your letters, words, and [*Selections*], is that, of set purpose, you reject very many portions of Holy Scripture. That you have, for instance, cut out as you have from the Bible what is therein written concerning Satan and evil spirits is to me terrible evidence of how far you have allowed yourself to go in mutilating the word of God.

Large differences of opinion concerning scriptural matters no prudent or charitable minister of the Gospel would condemn, but there are perversions and denials which no faithful minister will sanction, lest he allow unbelief a recognised place in the Church of Christ. With such perversions and denials I grieve to say I am driven to connect yourself. While they remain not retracted or disavowed you cannot be received at the Lord's table in my church. I hope you will feel that my course is directed by conscience, and not by resentment. I quite forgive your behaviour when

<sup>76</sup> *Ibid.*, p 856.

<sup>77</sup> *Ibid.*, p 855.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Jenkins Arches*, at 479.

I called, and, although you would then listen to nothing, if you will converse quietly with me, my time shall willingly be given for that purpose. May the Spirit of Truth deliver you from the errors you have adopted . . .<sup>80</sup>

Jenkins responded: 'Thinking as you do, I do not see what other course you could consistently have taken. I shall, nevertheless, come to the Lord's Table as usual at "your" church, which is also mine.'

Cook then contacted the bishop of his diocese, Charles Ellicott of Gloucester and Bristol. Ellicott had contributed to *Aids to Faith*, the volume of Anglican responses to *Essays and Reviews* (though his essay was not an answer to 'Séances'). Cook wrote to Ellicott on 31 July, notifying him of Jenkins' 'very serious opposition to the word of God', his 'rejection of belief in the existence of Satan and evil spirits' and his own refusal of Communion to Jenkins.<sup>81</sup> Ellicott replied on 2 August:

As you notify a fact rather than ask advice about a contemplated course, I cannot obtrude what is not asked, but I may still properly intimate to you my serious doubt whether, under the circumstances specified, repulsion would be sustained by a court of law.<sup>82</sup>

Perhaps indiscreetly, Ellicott later expressed the same doubts to Jenkins.<sup>83</sup>

On 2 August 1874, at the service at Christ Church, the Reverend Grant Thomas (the curate), rather than Cook, administered Communion to the congregation. He refused to give it to Jenkins. Thomas wrote a detailed letter to the Bishop dated 10 August 1874, justifying the refusal.<sup>84</sup>

The Church of England's law undoubtedly conferred a right or duty on a priest to exclude a member of the congregation from Communion, but in limited circumstances. First, the Rubrics prefixed to the Communion Service in the *Book of Common Prayer* stated

if any of those [who signify their names to the curate before the Communion that they intend to take Communion] be an open and notorious evil liver . . . the curate, having knowledge thereof, shall call him and advertise him that in any wise he presume not to come to the Lord's table until he hath openly declared himself to have truly repented and amended his former naughty life.

80 Ibid, at 480.

81 Ibid, at 481.

82 Ibid, at 482.

83 Ibid, at 487.

84 *Jenkins* Lincoln's Inn, pp 862–864.

Second, a rather obscure passage of Canon 27 of 1603/4 provided that ‘No minister, when he celebrateth the Communion, shall wittingly administer the same to any . . . that are common and notorious depravers of the *Book of Common Prayer* . . . and of the orders, rites, and ceremonies therein prescribed’.

Jenkins was aware of these provisions and, after Thomas had refused him Communion, he wrote to the bishop that same day, recounting the course of the dispute between him and Cook and asserting his right to Communion. Jenkins again raised and dismissed questions of doctrinal interpretation:

Some time ago, Mr Cook preached two sermons, with the special object of supporting the doctrine of eternal punishment. As a parishioner, I wrote to protest against the irreligious tendency of these sermons. In the course of the controversy, my disbelief in the devil was discovered, and also that in my book, *Selections from the Old and New Testament*, I had omitted those passages which seemed to favour those remarkable doctrines. I very much regret the necessity for omitting those passages, and should be delighted if some more wholesome meaning could be attached to them. I have thought it my duty to write this letter, but from what I have said your lordship will perceive that Mr Cook very probably considers that in treating me thus he only carries out the principles of the Church of England to their legitimate conclusion; for I believe Mr. Cook’s opinions, however extraordinary, are perfectly orthodox.<sup>85</sup>

In a letter to Jenkins on 13 August, Bishop Ellicott stated that ‘I do not feel that I can personally further interpose in the matter, but should you desire it, I shall be quite willing to entertain the question if brought before me in my court’.<sup>86</sup>

Thomas again refused Communion to Jenkins at the service on 6 September. Jenkins again wrote to the Bishop on the same day:

Mr Thomas has this morning again refused to give me the Sacrament. Now, whatever a ‘common and notorious depraver of the *Book of Common Prayer*’ may mean as applied to a man who values the book only second to the Bible itself, the reason why I am debarred from partaking of the Holy Communion is sufficiently ‘notorious’. It is because, forsooth, I ventured to protest against the disgusting and impious doctrines set forth by Mr Cook in the two sermons to which I have referred. My Lord, it is a grievous misfortune if your power will not indeed allow you to check such unjustifiable and scandalous proceedings on the part of your subordinates.<sup>87</sup>

<sup>85</sup> *Jenkins* Arches, at 482.

<sup>86</sup> *Ibid*, at 484.

<sup>87</sup> *Ibid*, at 485.

On 28 September Jenkins gave notice to Cook of his intention to present himself to receive Communion at the service on the following Sunday. On 2 October, Cook had a meeting with Ellicott and the two collaborated on the terms of a letter that was sent to Jenkins in Cook's name on the same day, warning that Cook would refuse Jenkins Communion if he presented himself again, and inviting Jenkins 'voluntarily to withdraw from my congregation, and not to put me to the melancholy and painful necessity of acting'.<sup>88</sup> Jenkins did not heed the warning. At the service on Sunday 4 October, Cook, who was administering the bread at the Communion, and Thomas, who was administering the cup, both refused to give the sacrament to Jenkins.<sup>89</sup> As a result, Jenkins wrote to Bishop Ellicott on 19 October making a formal complaint as a precursor to proceedings against Cook.<sup>90</sup>

On 29 October 1874, Ellicott notified Jenkins of his intention to issue a commission of inquiry under the Church Discipline Act 1840. The commission was issued on 18 November to inquire into and report upon a charge against Cook for illegally refusing to administer Communion. For reasons that are not clear no proceedings were brought against Thomas, Cook's assistant. On 8 December 1874, the commissioners reported that the majority of them considered that there were sufficient grounds for instituting further proceedings against Cook.<sup>91</sup> Jenkins then obtained Ellicott's permission to promote his office by letters of request and charges were filed against Cook in the Court of Arches. The charges took issue only with the refusal of Communion on 4 October 1874 and not the two prior occasions. The admission of the charges was not opposed.

### Decision at First Instance

The case came before Sir Robert Phillimore (leading counsel for the promoter in *Wilson's* case), who had become Dean of Arches in 1867. Evidence was given at the hearing by Bishop Ellicott and Mrs Jenkins, but not by Cook or, most significantly, by Jenkins. Phillimore records in his judgment that during the hearing he urged more than once that Jenkins should withdraw his letter of 20 July 1874, if Cook would agree to give him Communion. Cook said he was willing; Jenkins refused.

Cook had to prove that he was entitled to refuse Jenkins Communion. Cook argued that even if he could not show Jenkins was an 'open and notorious evil liver' or a 'common and notorious depraver of the *Book of Common Prayer*', Bishop Ellicott had authorised him to refuse Communion, which gave him a complete defence to the charges. That argument, which has nothing in common with the issues in *Fendall v Wilson*, is not analysed here. As to his personal entitlement to

<sup>88</sup> *Ibid.*, at 488.

<sup>89</sup> Articles of charge, para 4: *Jenkins* Lincoln's Inn, p 834.

<sup>90</sup> Letter of request: *Jenkins* Lincoln's Inn, p 827.

<sup>91</sup> Archdeacon Randall (president), Canon Girdlestone, Canon Cooper and Canon Mather; Bishop David Anderson dissenting. See H Jenkins, *Jenkins v Cook* (London, 1880), p 28.

refuse Communion to Jenkins under the Rubrics and Canon 27, Cook argued that Jenkins had 'depraved' the *Book of Common Prayer* through a combination of the choice of omissions from the Bible in *Selections* and the letter of 20 July 1874, and that in so doing he had 'hindered and slandered' the word of God, which made him an 'open and notorious evil liver'.<sup>92</sup> Jenkins argued that 'common and notorious depraver' as a term was directed only against those who rejected the *Book of Common Prayer* altogether. Further, the letter of 20 July 1874, which was a private letter, was no evidence that he was an open and notorious evil liver.<sup>93</sup> There was no evidence, he argued, that he had led an immoral life.

Phillimore heard the case in June 1875 and handed down his judgment on 16 July. He dismissed the charge against Cook, and ordered Jenkins to pay costs. He accepted that Cook was immune from prosecution for an ecclesiastical offence, since he had been acting with the authorisation of a superior. However, he went on to give an extensive *obiter* judgment in which he held that Jenkins was an open and evil liver and a depraver of the *Book of Common Prayer*.

The following is a short summary of the *obiter* part of the judgment. Phillimore quoted Canons 26 and 27, the relevant Rubric, and the exhortation in the Communion Service itself. He then explained what he perceived to be the purpose behind those provisions:

... on the one hand to impress on the parishioners the obligation of receiving the Sacrament of the Lord's Supper; on the other, to guard against the reception of it by those whose lives were not in conformity with the precepts of Christianity. It intended to secure the right of the worthy parishioner and to protect the clergyman in the execution of his duty to repel the unworthy parishioner.<sup>94</sup>

The conclusion that Phillimore reached on the facts was that Jenkins had 'in terms, denied the eternity of punishment and the existence of the devil' and that he had

expunged from the Bible, on the ground of their indecent and irreligious tendency, large portions, many of which relate to other grave and important doctrines of Christianity, and among which are to be enumerated several passages containing our Saviour's own words and precepts.<sup>95</sup>

Phillimore then distinguished *Fendall v Wilson* on the ground that Wilson had merely expressed a hope that punishment after death would not in all cases be

92 *Jenkins* Arches, at 470–473.

93 *Ibid.*, at 474–475.

94 *Ibid.*, at 492.

95 *Ibid.*, at 494.



eternal, whereas Jenkins maintained an absolute denial, a position 'at variance with the plain teaching of the Church of England, expressed in her formularies, and especially in the Communion Service and the Athanasian Creed'. However, given that it was decided in *Wilson* that the Athanasian Creed and the Communion Service do not make distinct declarations upon the subject of the eternity of final punishment, it seems doubtful whether it was open to a lower court to reach such a conclusion.<sup>96</sup>

Next, Phillimore analysed whether or not the Church of England taught that Satan existed. He set out an extensive number of extracts from the Book of Common Prayer and the New Testament, all of which make reference to Satan or the Devil. Turning in a remarkable section of the judgment to the secondary literature on the subject, he made extensive reference to the opinions of theologians (John Henry Blunt's *Dictionary of Doctrinal and Historical Theology*, William Smith's *Dictionary of the Bible*, RC Trench's *Notes on the Parables* and William Cardwell's *The Two Books of Common Prayer Set Forth by Authority of Parliament in the Reign of King Edward the Sixth*), without explicitly saying what bearing these opinions had on the questions he was obliged to decide.<sup>97</sup> He concluded:

I think it unnecessary to travel further into a statement of the other passages of Scripture, grave and important as some of them are, which do not immediately relate to the eternity of punishment or the existence of the devil, and which are rejected by the promoter; because I am of opinion that the avowed and persistent denial of the existence and personality of the devil did, according to the law of the Church, as expressed in her canons and rubric, constitute the promoter 'an evil liver,' and 'a depraver of the *Book of Common Prayer and Administration of the Sacraments*' in such sense as to warrant the defendant in refusing to administer the Holy Communion to him until he disavowed or withdrew his avowal of this heretical opinion; and that the same consideration applies to the absolute denial by the promoter of the doctrine of the eternity of punishment, and of course still more to the denial of all punishment for sin in a future state, which is the legitimate consequence of his deliberate exclusion of the passages of Scripture referring to such punishment.<sup>98</sup>

96 The binding force of precedent was recognised by ecclesiastical judges in the nineteenth century: see N Cox 'The influence of the common law on the decline of the ecclesiastical courts of the Church of England', (2001–2002) 3(1) *Rutgers Journal of Law and Religion* 1.

97 *Jenkins* Arches, at 495–498.

98 *Ibid*, at 498–499.

### Appeal to the Privy Council

Jenkins appealed. The appeal came before a committee of seven lawyers and two bishops over three days in January 1876. The lawyers were Lord Cairns LC, Lord Hatherley, Lord Penzance (all lords of appeal), Sir Fitzroy Kelly (the Lord Chief Baron, head of the Exchequer Division of the High Court), James LJ, Sir Barnes Peacock (former head of the Supreme Court of Calcutta) and Sir James Hannen (president of the Probate, Divorce and Admiralty Division of the High Court). The bishops were Tait (now Archbishop of Canterbury) and Thomson (still Archbishop of York), who, unlike the lawyers, had judged the *Wilson* appeal. Jenkins' appeal was one of the last times that bishops would sit as judges of the Privy Council. As in *Wilson*, none of the judges had a background in ecclesiastical law, but Cairns was an exceptionally devout Evangelical, while Hatherley was devoutly High Church.

The Lord Chancellor delivered the unanimous opinion of the Privy Council on 16 February 1876, allowing the appeal. Perhaps most importantly in the context of this article, the judgment set out a strong disclaimer reminiscent of the judgment in *Wilson's* case:

... if [their lordships] had here to examine whether the appellant has in point of fact either entertained or expressed the opinions attributed to him by the learned judge, or if they were called upon to decide that those opinions, or any of them, could be entertained or expressed by a member of the Church, whether layman or clergyman, consistently with the law and with his remaining in communion with the Church, they would have looked upon this case with much greater anxiety than they now feel in its decision. They desire to state in the most emphatic manner, both that there is not before them any evidence that the appellant entertains the doctrines attributed to him by the Dean of Arches, and that they do not mean to decide that those doctrines are otherwise than inconsistent with the formularies of the Church of England. This is not the subject for their lordships' present consideration ...<sup>99</sup>

This passage is controversial, as it cannot be reconciled with the evidence that was before the court. Jenkins' letter of 2 August 1874 to Bishop Ellicott (to which the Privy Council omitted to refer in the judgment) stated in terms that he did not believe in the Devil and expressed regret that no wholesome meaning could be attached to passages in the Bible which seemed to support the doctrine of eternal punishment. Furthermore, Mrs Jenkins gave oral

99 Quotations from the appeal case are from *Jenkins PC*, at 102–105, unless otherwise specified.

evidence (again, unmentioned in the judgment, though there was a transcript) that she had told Cook that her husband did not believe in the Devil.

The Judicial Committee went on to find that Phillimore had misread or misapplied the law, since he had not taken into account the full words (applying 'evil liver' instead of 'open and notorious evil liver' and 'depraver' instead of 'common and notorious depraver').<sup>100</sup> As Phillimore had misapplied the law, the Privy Council considered the charges against Cook afresh.

The court first found that there was no evidence that Cook was an open and notorious evil liver, since evil living was limited to the morality of conduct not the propriety of beliefs.

Against the moral character of the appellant there is no evidence, and no imputation; and it appears, from statements which are uncontroverted, to have been irreproachable. Their lordships, therefore, put aside this justification of the respondent as wholly inapplicable to the case, and they can only express their regret that, through an inaccuracy in the use of words, an imputation so misplaced and so irksome in its nature should have been made.

It then addressed the argument that Jenkins was a common and notorious depraver of the *Book of Common Prayer*:

... it was admitted in the Court below, and in the argument before their lordships, that the publishing and circulation of the book termed 'Selections' could not possibly amount of itself to a depravation of the *Book of Common Prayer*, and could not, indeed, be construed to be an offence of any kind. But it was contended that these selections, coupled with the expressions in the letter of the 20th of July, 1874, amounted to the offence in question.

That letter must be construed with reference to the interview between the respondent and Mrs Jenkins, which took place on the same day, and out of which interview the writing of the letter arose. It is obvious that the words, 'the parts I have omitted,' cannot refer to all the portions of the Bible not printed in the selections; but must be limited to those parts which were more particularly referred to by the respondent at the interview [which were, according to Mrs Jenkins, the passages relating to the Devil and evil spirits].<sup>101</sup> Construing the letter in connection with what passed at the interview, the expressions in it, which are not very distinct or intelligible, do not go farther than this, that the construction which

<sup>100</sup> Ibid, at 101.

<sup>101</sup> *Jenkins* Lincoln's Inn, p 855; *Jenkins* PC, at 98.

the appellant placed upon certain parts of the Bible not being the same as the construction which, in his opinion, was generally placed upon those parts, he omitted them from his family reading. What his own construction is, or what he supposes to be the generally received construction, is not stated, and it would not be allowable, even if it were necessary, to arrive at either construction by surmise or suspicion.

If one accepts, however, that the omissions in *Selections* being referred to in the letter were passages in the Bible relating to the Devil and evil spirits, then it is fairly clear, particularly in the light of Jenkins' later comments about the orthodoxy of Cook's views, that the letter was saying that the Church of England's teachings on those passages were irreligious and indecent and that Jenkins rejected them.

Putting the construction of the letter to one side, the Judicial Committee held that the letter was a private communication and concluded:

even were there anything in the letter which could amount to a depravation of the *Book of Common Prayer*, which [we] do not suggest or think there is, still it would be impossible to hold that the writing of such a letter, under the circumstances which they have mentioned, could make the appellant 'a common and notorious depraver'.

The Judicial Committee reversed the judgment of the Court of Arches, remitted the case for sentencing of Cook and ordered Cook to pay costs.

It was reported some years later that Cook's admirers paid all his legal expenses and gave him a 'handsome' sum of money as a token of gratitude, while Jenkins, though he was awarded his costs, ultimately lost a considerable sum in the litigation.<sup>102</sup> Cook continued to refuse to give Jenkins Communion and Jenkins refused to attend another church for Communion; Cook therefore resigned his position in the parish of Clifton.<sup>103</sup> He preached his farewell sermon at Christ Church on the morning of 20 February 1876 to a congregation including Jenkins; Cook gave his blessing to 'those who had troubled him', asking 'the God of all comforts [to] give unto them and theirs as many days of gladness and nights of peace as they had given him days of trouble and nights of anxiety'.<sup>104</sup>

As a precedent, the Privy Council's decision has not attracted much modern attention and even in its time the case did not have nearly as high a profile as *Wilson*. Nevertheless, it did attract some satirical commentary, one article

102 *The Times*, 26 May 1881 (obituary of Henry Jenkins).

103 Jenkins, *Jenkins v Cook*, pp 316–317.

104 *The Times*, 21 February 1876.

noting that, since Canon 27 only permits refusal of Communion to a 'common and notorious' depraver, a man can deprave the *Book of Common Prayer* as much as he pleases in private conversation and letters, and would only lose the right to Communion by, for instance, a deprecation repeatedly published in a newspaper or persistently proclaimed by the town crier.<sup>105</sup> The *Jenkins* decision demonstrated that the Canons and the Rubrics would require a minister of the Church of England to give Communion to those whose beliefs were entirely inconsistent with the teachings of that Church. This uncomfortable result was the topic of at least two judicial questions during oral argument before the Privy Council.<sup>106</sup> The defects and obscurities of Canon 27 and the Rubric to the Communion Service have to some extent been cured: what is now Canon B 16 and the present Rubrics speak of a person who ought not to be admitted to Communion by reason of 'malicious and open contention with his neighbours, or other grave and open sin without repentance'. Now as then, the legal grounds for refusing Communion remain narrow.

## CONCLUSION

The enduring issues in the *Wilson* and *Jenkins* cases are freedom of belief and freedom of expression. *Wilson* was prosecuted for, among other things, expressing at least equivocal views about eternal punishment. *Jenkins* was prevented from participating in acts of worship for denying the doctrine of eternal punishment and the existence of the Devil (as manifestly he did).

In every system of organised religion, beliefs and the freedom to express and teach beliefs are both defined and circumscribed by doctrinal statements. The court's task, set by the Church Discipline Act 1840 and refined in the *Gorham* case, was to interpret and apply the doctrinal statements of the Church of England. Such a task raises fundamental questions, particularly where the doctrinal statement being interpreted is controversial. Who has the right and the authority to interpret doctrinal statements: the parishioner, a vicar, a bishop or bishops, Convocation or a secular judiciary? Is there only one correct interpretation? Is the interpretation influenced by the religious views of the interpreter, and if so to what extent does the act of interpretation become creative? The significance of the two cases discussed in this article lies in the differences in the answers that they provide to these questions.

The Deans of Arches in both cases made clear statements about the content of Anglican doctrine: in negative terms in *Wilson*, in positive terms in *Jenkins*. On the other hand, the Privy Council in *Wilson* said as little as it possibly could about the interpretation of the Athanasian Creed and the Communion Service and

105 J Thomson, 'The Devil in the Church of England', in *Satires and Profanities* (London, 1884), pp 11–12.

106 *Jenkins* PC, at 85–86; the judge was Sir Fitzroy Kelly.

said nothing about the doctrine of eternal punishment other than that it was 'mysterious', while the Privy Council in *Jenkins* suggested, rather unconvincingly, that doctrinal questions were not matters for its consideration. Paradoxically, therefore, it was the tribunal with the better claim to authority in matters of Anglican doctrine (by virtue of its episcopal judges) that seems on both occasions to have felt the greater anxiety about saying what were or were not the doctrines of the Church of England. By contrast, Lushington and Phillimore were ecclesiastical law specialists who had been among the most successful practitioners in the ecclesiastical courts. Phillimore in particular was a busy Dean of Arches, having been reported in 19 ecclesiastical cases prior to *Jenkins*. One can only speculate about the ultimate cause of the greater self-confidence of the Deans of Arches, but it is tentatively suggested it lies in their professional experience. As veterans of ecclesiastical litigation, it seems likely that Lushington, one of the judges in the *Gorham* case, and Phillimore would have believed that they were deciding questions of law not doctrine.

Longley, Thomson and Tait, on the other hand, would surely have found it much more difficult to believe that the interpretation of the Athanasian Creed was a matter of legal analysis. As their extra-judicial writing shows, Longley and Thomson had conservative views about the doctrine of eternal punishment. Yet one sees no trace of those views in the *Jenkins* judgment. The stark contrast between silence in the judgment and publication of opinions almost immediately afterwards appears to illustrate the doubts that Thomson expressed about the propriety of 'a Committee with a majority of eminent laymen' pronouncing on matters of doctrine.<sup>107</sup> It is plain from Thomson's pastoral letter that he felt a much greater freedom to describe Anglican doctrine in his purely episcopal capacity than he had done as a contributor to the judgment of the Judicial Committee.<sup>108</sup> Tait, on the other hand, seems to have been unwilling to make his doctrinal position clear even extra-judicially. But this self-imposed limitation on doctrinal exegesis ultimately defeats the purpose of having an episcopal judiciary. An ecclesiastical court cannot claim spiritual authority if it refuses to assert its spiritual authority because it feels itself to be in essence a secular institution or because it believes that any firm judicial statement of doctrinal position may have undesirable ecclesiastical consequences.

This article does not seek to argue that the Privy Council in *Wilson* and *Jenkins* should have been more assertive. Indeed, the judgments of the more doctrinally confident Deans of Arches show the risks of such an approach. Both judges were High Church Anglicans with doctorates in civil law who took oaths of

107 Thomson, 'The Devil', p 5.

108 Ibid, pp 5–6: 'in the discharge of my spiritual office I am bound to speak upon those theological topics as to which the minds of Christian people are from any cause disquieted, and to point out what is the effect of the "Judgment" upon the position of the Church'.

subscription to the Thirty-Nine Articles and the *Book of Common Prayer* as a condition of entering the University of Oxford. Phillimore in his *Jenkins* judgment (as in many of his other ecclesiastical judgments) approached the task of defining and applying doctrine with obvious zeal, at the expense of legal and factual accuracy. Moreover, he was obviously influenced by his own High Church beliefs on eternal punishment and the Devil, though it is an open question whether he ignored the words 'common', 'open' and 'notorious' in the Canon and the Rubrics so as to find against Jenkins. Similarly, Lushington's *Wilson* judgment seems likely to have been influenced by his personal belief that the Church maintained the doctrine of eternal punishment, notwithstanding the professed diffidence with which he approached the task of having to define and apply that doctrine. Lushington was plainly aware of the theological debate over the interpretation of the Athanasian Creed and was rather quick in deciding that going into everlasting fire amounted to 'everlasting condemnation'.

Lord Carey has suggested that today's English judiciary is basically ignorant of Christian precepts, but judges who have deep personal commitment to religious beliefs may also be unsatisfactory when religious issues are before the court, for precisely the reasons just identified.<sup>109</sup> Whether a specialist judiciary with 'a proven sensitivity to and understanding of religious issues' (per Lord Carey) is, as Laws LJ recently stated in *McFarlane v Relate Avon Ltd*, deeply inimical to the interests of today's religiously plural public and predominantly secular state, is an issue that was as intractable in Victorian times as it is today.<sup>110</sup>

109 *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1.

110 *Ibid*, at para 26.