‘The Word of the Oath’:
Church Society’s Application for judicial Review of General Synod’s Vote of 1992 permitting the Ordination of Women to the Priesthood

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Malcolm Barker

This second part concludes Malcolm Barker’s record of Church Society’s application in 1993 for Judicial Review of General Synod’s vote of 1992 permiting the ordination of women to the priesthood. *(Churchman* Vol 108 No 2, pp. 154-180.)

The Second Hearing

The full hearing was summarized in our skeleton argument in these words:

> The Applicants contend that the proposed Measure is a fundamental change, whether of doctrine, custom, convention or practice, in the constitution of the Church of England and as such outwith the enabling act.

The reliefs sought by our Application were:

1. *Certiorari* to quash the E.C.P.’s decision of 12 July; [44]
2. Declaration that the Measure is *ultra vires* the 1919 Act.

Excluding argumentation about the Court’s jurisdiction (for the sake of space) our other submissions ran as follows:

1. Self-evidently there is the limitation that ‘a measure must relate to any matter concerning the Church of England’. But this does riot mean ‘any matter whatsoever provided it has some connexion with the Church of England’.

2. This matter is a fundamental change excluded from the powers of General Synod.

3. Although there could be grey areas between fundamental and less fundamental changes it would be perfectly proper and possible for the Court to determine on the facts that this Measure was fundamental enough to lie outwith the 1919 Act.

4. A proper approach to statutory interpretation as developed in a long series of cases permits us to rely on the Preamble to the 1919 Act and to the Archbishop’s speech when introducing the Bill in the House of Lords.

5. Had Parliament contemplated handing over full powers of doctrinal change to the Church of England through the 1919 Act it would have ensured that the intent was made explicit in the wording of the Bill.

   [There is no record of any amendment being debated during the course of the Bill’s passage which would have sought to make any doctrinal change possible – my addition]

We were now facing an acute problem of time. Although we had won our right to be heard at a full hearing we were tied to the Parliamentary timetable. It was already Friday 22

October and the full hearing was to begin on Tuesday 26 October. Our Counsel, Mr George, explained his predicament to us. He was convinced that the Court would not listen to doctrinal arguments. It was impracticable for us to hold a further consultation with him which could assist our case because of the deadline for the filing of our skeleton argument with the Court by Monday night. Mr George clearly needed to spend as much time as he could assembling our case in the way in which he felt he could present it with its greatest force. David Streater and I took the view, endorsed by our Solicitor, that Mr George, as our advocate, was best placed to prepare the case without the complication of a further conference with us. We therefore wished him well and left him to prepare to do battle as he thought best.

On Tuesday 26 October we assembled for the hearing to begin at 10.30, only to find that other business before the Court had delayed the beginning of our case until after lunch. So once again time was lost and the tension on our side began to mount.

Lord Justice McCowan, at the opening of the hearing, explained that there were two matters before the Court-the question of jurisdiction and the full hearing of the *ultra wires* case. The earlier Court had accepted jurisdiction but that decision did not bind the present bench .[45] He expressed his concern at the shortness of time before Parliament's own debate and the risk of not having sufficient Court time for the substantive hearing if the Bench took the jurisdictional point first. The Bench had therefore decided to hear the Society's full Application first. If that failed there would be no necessity to decide the question of jurisdiction at all.[46]

This now meant that our main case consisted of showing that upon a proper interpretation of the 1919 Act General Synod could not properly have passed the Measure. Having done that it would then have to persuade the Bench to exercise its discretionary[47] power to invalidate the passing of
the Measure of 11 November 1992.

Our case, simply put, was that 'upon a proper interpretation of the 1919 Act the enabling power is a limited rather than an absolute one'. Changes may be made by Measure but in many cases such changes have no doctrinal significance. Such can extend to matters of doctrinal significance but only to ones which are subordinate – not to ones which are fundamental, whether of doctrine, custom, convention or practice, in the Church of England.

Mr George proceeded to show that the Measure was a fundamental change.[48] *Inter alia* he cited the 1948 Lambeth Conference Resolution on women's ordination, [49] the 1988 House of Bishops' Report[50] and the E.C.P.'s Report on pp.70[51] and 80.[52] Nor did he confine his sources to the Measure's opponents: Professor McClean had told the E.P.C. that 'this is such a central matter, so high profile a matter in the life of the Church of England';[53] the Archbishop of Canterbury had addressed the E.C.P. on 5 July 1993 about 'the fundamental issues which are raised by the proposal to ordain women to the priesthood',[54] and had said that 'there are theological issues involved in this'.[55] The theoretical possibility of there being a difficulty in deciding what matters constituted fundamental change and what did not, Mr George effectively disposed of by reference to the Ecclesiastical Courts.[56] There were two Courts of Appeal, he explained, to which references may be made from a Consistory Court – those involving doctrine, ritual or ceremonial were heard by the Court of Ecclesiastical Causes Reserved; those involving disciplinary and lesser matters were heard

by the Court of Arches in the Province of Canterbury and by the Chancery Court of York in the Province of York.[57] Mr George proceeded to the heart of the matter, the statutory construction of the 1919 Enabling Act.[58]

'The proper approach to statutory construction is not', Mr George conceded, 'just to approach words literally and particularly not so when powers are being conferred to act by delegated legislation in an area of constitutional significance'.

Quoting the first Lord Birkenhead:

> A long stream of cases has established that general words are to be construed so as, in an old phrase, 'to pursue the intent of the makers of statutes' . . . and so as to import all those implied exceptions which arise from a close consideration of the mischiefs sought to be remedied and of the state of the law at the moment, when the statute was passed'. This involves considering 'the cause and Necessity of making the Act' and being guided 'by the Intent of the Legislature . . . according to the Necessity of the Matter, and according to that which is consonant to Reason and good Discretion'.[59]

Where what is alleged is that a statute has made a far-reaching, fundamental change, a cautionary approach is the correct one:

> It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process. It is a dangerous assumption to suppose that the Legislature foresees every possible result that may ensue from the unguarded use of a single word'.[60]

Furthermore it is conventional to construe statutes so as to accord with the constitutional framework established by the Bill of Rights, save in so far as there are express words to the contrary.[61]

It is also a canon of construction that, where general words of a statute create rights and involve also 'words of particular application', special regard should be had to the 'constraining effect of the particular words'.[62]

Mr George then applied these principles to the interpretation of the Enabling Act 1919. He argued that:

> It is inherently improbable that Parliament in 1919 contemplated conferring a power to make fundamental changes, whether of doctrine, convention or practice, subject only to the affirmative resolution procedure.

Referring to the mischief[63] which the Act was designed to remedy he cited the *Report of the Archbishops' Committee on Church and State 1916,* to show that the mischief aimed at was the wasting of Parliamentary time on minor matters such as administrative procedures and regulations.

The Promoters of the 1919 Bill were committed to 'the basis of establishment' and to the maintenance of 'the existing connexion between Church and State'.[64] He goes on to conclude that neither Promoters[65] nor Parliament intended to provide a disestablishment mechanism and that there was an implicit limitation to exclude that. Had the Promoters aspired to 'spiritual independence' there was no evidence that the 1919 Bill was intended to achieve that or that Parliament intended to assist that end. The subject matter of Measures would primarily be 'in terms of the drains and the buildings and so on, aspects of Church life'.[66] He cited cases where the approach adopted by the Courts had been towards a restrictive interpretation excluding the possibility of fundamental changes. Thus the proper interpretation of the 1919 Act should serve to uphold the Church of England and not permit any fundamental change.

Nor could any evidence be provided of any 'agreement' between Church and Parliament to transfer to the Church of England the power to make fundamental change.[61]

One of the most important legal cases cited by Mr George and dissected at length was that brought by Sir William Haynes-Smith against the Prayer Book Measure, 1927.[68] He had attacked the Measure on two grounds, first, that the correct procedures for debating doctrinal issues had not been followed by the Church Assembly, and, of particular relevance to the instant case, that the Measure was outwith Section 3 of the 1919 Act. He had argued that the Measure

> invaded or purposes to invade, the right of members of the Church of England to have the Prayer Book as settled and authorized in 1662, used in the church which they attend, without alteration or amendment of any kind.

Mr George argued that if the Church Assembly's defence were to be that the Measure allowed the *Book of Common Prayer* 1662 to remain available for use as an option (and therefore that no fundamental changes were being made) it was obvious that Church Assembly was conceding that its powers under the 1919 Act were insufficient to pass a Measure involving 'fundamental changes'. That understanding and concession of Church Assembly in 1927 were, Mr George submitted, correct and 'entirely compatible with the arguments advanced in the instant Application'. He then turned to the Preamble of the 1919 Enabling Act and cited an important case where the Preamble had been of material importance in assisting the Court to interpret a Statute.'[69]

The Preamble to the 1919 Act contained the phrase 'powers in regard to legislation touching matters concerning the Church of England'. A case decided in 1904[70] in the House of Lords had demonstrated a significant distinction in meaning between 'touching' and 'altering' or 'changing'. The National Assembly's Constitution (as set up by the 1919 Act), Article 14, used 'touching' by reference to doctrine, formulae or . . . services or ceremonies', and it was clear that minimal, not fundamental, alteration was envisaged under the powers to be conveyed by the 1919 Enabling
Act .[71] This same point was picked up in General Synod's present Constitution.[72]

By prior exchange of skeleton arguments, Mr George, of course, knew what line the other side would take, notably that they would rely upon the words in the 1919 Act that the National Assembly could approve Measures about 'any matter concerning the Church of England' and to meet that point he cited one authority[73] and two cases where the word 'any' had been narrowed by reference to the Preamble,[74] and several other cases where statutory powers had been held to be subject to implied limitations.[75,76]

Mr George concluded by summarizing the case as follows:

1 . The correct interpretation of the 1919 Act is a narrow one, excluding the power to make fundamental changes;
2. The proposed Measure is conceded by the Archbishops to be a 'fundamental change with doctrinal implications'. It involves what the Bishops have described as a 'matter intimately related to the "centre" of the faith of the Church of England';
3. It is therefore *ultra vires* the 1919 Act;
4. Therefore the Applicants are entitled to the Declaration sought;
5. Therefore the E.C.P.'s decision that the Measure was lawful was erroneous and its decision thereby vitiated;
6. Therefore the E.C.P.'s decision should be quashed by *Certiorari;*

7 It will then be for Parliament to make its own decision about the E.C.P.'s Report, since the Court must not quash Parliament's proceedings;
8 If the General Synod wishes to proceed with the ordination of women it must seek to secure the passing of a new primary Act, either specific to this issue or amending the l9l9 Act.

By the time Mr George sat down we had reached the middle of the following morning.

The case for the Archbishops rested essentially on the words of the 1919 Act, that the Assembly had the power to approve Measures dealing with 'any matter concerning the Church of England'; but to make this simplistic argument stick the words had to be lifted from their historical context; the speech of Archbishop Davidson, the Promoter of the Bill had to be ignored[77] and the words of its Preamble interpreted disingenuously. The rest of Miss Cameron's submission amounted to saying, first, that Church Society had brought its case too late[78] – it should have acted before 11 November, 1992 when the Measure was finally approved[79] –and, secondly, that as the Measure would rank as primary legislation,[80] once it received Royal Assent it was immune from challenge altogether, since legislative procedures laid down by the 1919 Act had been followed meticulously. It must be noted at this point that neither in this case, nor in any of the subsequent cases brought by the Revd Paul S. Williamson, did the Archbishops make any attempt to defend the Measure on grounds of sound doctrine. It was taken as self-evidently true that the House of Bishops was incapable of promoting false doctrine. The fact that the doctrine behind the ordination of women had been debated by the General Synod over many years prior to the Measure was sufficient evidence in itself that the doctrine involved was in accordance with Canon Law.[81]

The Second Judgment

Lord Justice McCowan began his Judgment by explaining the Court's decision to hear the main submission without considering jurisdiction, there being no time before the Commons debate to conclude both. What is interesting is that the Court considered the main issue to be the shorter and simpler of the two!

After the customary review of the background to the case, Lord McCowan went straight to Section 3(6) of the Enabling Act 1919:

> 'A Measure may relate to any matter concerning the Church of England.'

He then quoted Miss Cameron's arguments in favour of taking this sentence in its literal sense, quoting Halsbury:

> If the words of a statute are clear and unambiguous, they themselves indicate what must have been taken to have been the intention of Parliament and there is no need to look elsewhere to discover their function or their meaning.[82]

He dismissed the Preamble's reference to 'touching' in these words:

> What, however, is it that he [Mr George] principally relies upon in the preamble? It appears to be the word 'touching' in the phrase 'in regard to legislation touching matters concerning the Church of England'. Mr George argued that there is a significant distinction between touching and altering or changing. I have no difficulty

> in accepting that. But Miss Cameron has not argued that the Preamble should be read as meaning 'in regard to legislation changing matters concerning the Church of England'. I read 'touching' in the preamble as meaning no more than 'relating or pertaining to'. Indeed the draftsman could have said 'concerning matters concerning the Church of England', but no doubt would have regarded that as unattractively repetitive. Accordingly the preamble, if looked at, does not in my judgment assist Mr. George's case.[83]

He next dealt with the 1919 Act's requirement that the E.C.P., after considering the Measure,

> shall draft a report thereon to Parliament stating the nature and legal effect of the measure and its views as to the expediency thereof, especially with relation to the constitutional rights of all His Majesty's subjects.

At this point I should cite the definition of 'expediency' as given in the Second Edition of the *Oxford English Dictionary 1989*. There are four adjectival meanings of 'expedient'.

1. Hasty, expeditious. (Obsolete)
2. Conducive to advantage in general or to a definite purpose; fit, proper, or suitable to the circumstances of the case.
3. In depreciative sense, 'useful' or 'politic' as opposed to what is 'just' or 'right'.
4. Studious of 'expediency'.

('Expediency' means 'The consideration of what is expedient, as a motive or rule of action; 'policy', prudential considerations as distinguished from those of morality or justice. Considerations of what is merely politic ((especially with regard to self-interest)) to the neglect of what is just or right.)

It seems to me to be self-evidently correct to deduce from the authoritative definition above that determining something as being just or right is a prerequisite of something being held to be expedient: what cannot first be demonstrated to be either just or right (or both) cannot, by definition, then be classified as either expedient or not expedient. It follows, therefore, it seems to me, that Lord Templeman was in error when he ruled that it was not the job of his Committee to decide whether the Measure was lawful or unlawful but simply whether it was expedient. [84] If unlawful it could not justly be described as expedient. It follows, therefore, that it was the duty of the E.C.P. under the 1919 Act, as I see it, to decide first, that it was lawful, and then secondarily, whether or not it was 'conducive to advantage in general . . .'

Let me resume Lord McCowan's Judgment after that digression:
'In my judgment', he asserted,

> expediency does not cover lawfulness.[85] True, when one looks at paragraph 37 of the E.C.P.'s Report one reads this: 'The majority of the Committee emphatically reject the suggestion that the measure is unlawful. Having regard to the unambiguous terms of section 3(6) of the 1919 Act – under which a measure 'may relate to any matter concerning the Church of England' they have no doubt that there is no foundation for that suggestion. They equally reject the view that, even if the measure is unlawful, the matter should have been dealt with by Act of Parliament. On the contrary, it seems to the majority [of the Committee] that the more important a matter is within the Church the more important it is to adhere to the convention that matters concerning the Church should be dealt with by measure."
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> In my judgment it was strictly unnecessary for the Committee to say what it did in that passage, but in fairness they did it because of what was argued before them, for which I turn to paragraph 17 of the report. This reads:

> "The last objection which the Committee thinks it right to record is the most basic one. Some opponents of the measure have argued that the ordination of women priests is unlawful because it is contrary to the fundamental doctrine of the Church of England. They have further argued that even if the measure is lawful it was never intended that the 1919 Act should be used in a matter of this kind and that the matter should have been dealt with by Act of Parliament. The response to this argument, briefly, has been as follows. First, that the ordination of women to the priesthood is not a matter of fundamental doctrine but of ecclesiological order. Second, that there could be no question of the measure being unlawful because, under the 1919 Act, a measure 'may relate to any matter concerning the Church of England' and if passed by Parliament and given Royal Assent, has the force and effect of an Act of Parliament. Third, that to have proceeded by way of Act of Parliament would have been contrary to the long established convention that legislation for the Church of England should be enacted by way of measure."

It was, to say the least, surprising that the E.C.P., having described the Church Society's objection as 'the most basic one', then goes on to dismiss it by denying altogether that it is a matter of fundamental doctrine and by arguing that the 1919 Enabling Act empowered the Synod to put forward a Measure to Parliament on any matter concerning the Church of England. This latter point amounts to saying that the concept of lawfulness cannot be applied to a draft Measure – it is the passing of the draft Measure by Parliament that makes it lawful, whatever its contents. If that argument were good in law, judicial review of the 1992 vote could never have been entertained for a moment, let alone been considered by the Court for a couple of days. It is easy to see how specious such an argument is. If a draft Measure contained a provision contrary to common law, for example, permitting churchwardens to appropriate church collections for their own personal use, Parliament would have to pass an Act to legalize that form of theft before the draft Measure could lawfully be given approval by General Synod. It could not, surely, be argued that it was 'expedient' for Parliament to approve the draft Measure on the sole grounds that approval alone would legalize such an obviously criminal act. His next point is as weak. Mr George had argued that the Measure affected constitutional rights and therefore was 'inexpedient' in the terms of the 1919 Act. Against him Lord Justice McCowan asserted that all that was meant was that if a Measure contained anything which affected constitutional rights the E.C.P. had a duty to draw Parliament's attention to it, and the fact that there was a reference to constitutional rights demonstrated that a Measure could indeed have such an effect [!]

The Judgment continued with a diversion into the Synodical Govemment Measure 1969 which had been prayed in aid by Miss Cameron, but he ruled against her in these words:

> Mr. George, on the other hand, says, as it seems to me with some force, that this Measure passed in 1969 cannot assist the interpretation of the 1919 Act.

The final section of the Judgment dealt with Mr George's submissions about the proper interpretation of the 1919 Act. He had referred to 'the mischief which the statute was intended to overcome'. This point had been clearly anticipated in the *Archbishops' Committee on Church and State Report, 1916,* Chapter 5, p. 39:

> The main defect of the present situation, as will be obvious from the preceding portions of this report is, that whereas no considerable reform can be achieved without Parliamentary action, Parliament has neither the leisure, fitness or inclination, to perform efficiently the function of an ecclesiastical legislature. The remedy which recommends itself to your Committee is to give the Church the right to legislate, and at the same time to provide a means by which full powers of scrutiny, criticism and veto are reserved to the State. By this means the Church would be provided with such organs and with such a procedure in its relation to the State as would leave it free to determine its own requirements, and, under the sanction of the State, to give effect to its wishes, while the due authority of the State would be safeguarded, and the bases of its historic relationship with the Church would remain undisturbed.

Having quoted this, Lord McCowan continued:

> Then at page 49, 1 read:
> "We have already stated our view that the Church Council should be given full power to legislate on ecclesiastical affairs, even if this legislation would be doubly operative, binding those concerned both as churchmen and as citizens."
> Miss Cameron stresses the words 'full power'.
> Finally, on page 50, I read this:
> "After careful consideration we do not think that it would be found possible to delimit with any precision the sphere within which the Church Council is to be recognised as having power to legislate. We believe that the Church of England has inherent authority to deal with all matters of doctrine, worship, and ritual, as affecting its own members, and to determine all questions of membership. If it attempted to exceed those limits, and make legislative proposals on matters not properly the affairs of the Church, the checks on the part of the State which we suggest would restrain it very speedily and easily."
> Miss Cameron stresses 'the Church of England has inherent authority to deal with all matters of doctrine worship and ritual as affecting its own members.'

Mr George had argued that 'the mischief that was aimed at was merely the shortage of Parliamentary time.' 'But even if that were right', pronounced Lord Justice McCowan, '(and I do not think it is), the shortage of Parliamentary time was for all changes required by the Church and not merely non-fundamental rules. The mischief and the intention were clearly announced. I see nothing furtive about the process.'

The Last two paragraphs of his Judgment are so important for the understanding of the whole case as to make any abridgement inappropriate and I therefore provide them for the reader exactly as they were delivered in Court.

> Finally, Mr George sought to answer the point put to him by the Court, namely, if he is right, what could have been easier in 1919 than to add some words to subsection (6) such as 'other than a fundamental change', if it were the intention of Parliament that that was how subsection (6) should read. His answer was that it was so obvious that it did not need stating. Parliament could not, he says, have conceived that a fundamental change would be made under the 1919 Act. Despite his valiant endeavours, I have to say that I find that argument wholly unconvincing.
> Who would decide whether a change, say in doctrine, was fundamental? The Courts, he answered. He said it would not be impractical for the Courts to do this and pointed out that they have to turn their hand, for example, to what constitutes 'any material change in the use of any buildings or other land' under the Town and Country Planning Act 1990. Miss Cameron, on the other hand, said that the Church before proceeding with any Measure would have to come to the Courts to say whether it would effect a fundamental change or not, which, she said, would be an unhappy waste of Church money. I have every confidence that if this task were thrust upon the Courts they would find it possible to form a view on what was fundamental, though with very great reluctance, particularly in the area of doctrine. I do not, however, believe that such a task has in fact been placed upon them by the 1919 Act.
> I would, accordingly, dismiss the application.

Fortunately for the future of the Church of England Mr George was quite right to submit that adding the words 'other than a fundamental change' was 'so obvious it did not need stating'. An Originating Summons and a number of Applications for leave to apply for Judicial Review were subsequently brought in person by the Revd Paul S Williamson, in which he was able to show by reference to the Act of Union 1707 (in full force in 1919 and 1993) that the Church of England's doctrine was fixed by reference to the *Book of Common Prayer* 1662, the 1662 Ordinal and the 39 Articles of Religion: the doctrine was declared in the Act of the Union' unalterable for ever'. Regrettably, the relevance of the Act of Union to our case was never brought to our notice by any of our legal advisers at that time.

Mr Justice Tuckey in a brief statement agreed with his colleague in dismissing our Application, but thought it appropriate to give his own detailed reasons.
He said:

> What is the ordinary and natural meaning of the words 'a measure may relate to any matter concerning the Church of England'? There is no dispute that the proposed Ordination of Women Measure is a measure 'concerning the Church of England'. 'The words 'any matter' are wide enough to include any and all matters; that is their ordinary, natural and quite unambiguous meaning in my judgment. Secondly, is there anything in the rest of the statute which leads to the conclusion that the words should be given a more restricted meaning? The answer to that question is, I think, no. Section 3(3) makes it clear that measures may affect people's constitutional rights. Section 3(6) makes it clear that a measure may amend or repeal any Act of Parliament, including the 1919 Act itself [!], subject to the entrenched position of the E.C.P. These provisions do not support the contention that the Act's enabling provisions were only intended to cover minor changes. The Constitution of the Church Assembly, which was annexed to the Act and the 1969 Synodical Government Measure which replaced it, strongly support the contention that the words 'any matter' meant just what they said. Confining oneself to the position in 1919, one can see that the Assembly was empowered to discuss *any* proposal concerning the Church and make provision for it by seeking Parliamentary sanction in the way laid down by the Act, provided that any measure concerning doctrine, or the services or ceremonies of the Church, had first to be approved by a majority of each of the three houses of the Assembly, that is to say, the Parliament of the Church. This procedure allowed the Church to consider, debate and decide what it wanted, but recognised the State's pre-eminent position by giving Parliament the right of veto. There is no reason to suppose from this legislation that any restriction was intended to be placed upon the uses to which this procedure could be put.

Notice the use of the words 'Parliament of the Church'. Very subtly he has introduced the loaded idea that General Synod is the Church of England's 'Parliament'. But we had argued, through Mr George, with all our evidence, that this is a seriously misleading analogy. General Synod is much more like a Finance and General Purposes Committee of the Church. The word 'Parliament' carries the notion of sovereignty. Had the Enabling Act allowed General Synod (the successor to Church Assembly) to submit Measures directly to the Queen in her capacity as Supreme Governor the word 'Parliament' would have been analogically fair enough.

The key words in this passage are 'concerning doctrine'. Obviously the Act could not have intended that doctrine could not be discussed. If one were to substitute for 'concerning' the word 'changing' it immediately becomes clear what Mr George had so very valiantly attempted to prove, namely that changing doctrine was so obviously excluded in 1919, given the fact that no doctrinal changes had been authorized since 1662: hence it had not been expressly excluded.

Miss Cameron rose to make an application for costs for three junior counsel on an indemnity basis[86] and this was promptly challenged by Mr. George who correctly argued that the Society had won the first hearing (for which most of the Archbishops' costs would have been incurred) and that he himself had been served by one junior. He also correctly disposed of the indemnity argument on the grounds that the Archbishops were not acting as trustees and that the Society had acted throughout 'in a wholly honest way', citing Mr Mawer's Affidavit for the Respondents. Eventually, Miss Cameron lost all her points save one, the extra junior.

In the light of subsequent events which must remain outside the scope of this paper, Lord Justice McCowan's final words are particularly important:

> Lastly the question arises of whether the costs, which we do indeed grant, should cover the application for leave. It is unnecessary for us to go into the authorities. It is sufficient to say that we doubt very much whether we have any power to grant the costs of that application. But, in any event, we do not think it an appropriate case to do so because the respondents were not under any obligation to attend. They chose to do so. They strongly resisted the question of jurisdiction and argued that no leave should be given, and on that point they lost. It seems to us, therefore, the costs should not include the application for leave or anything that happened before that but should include everything that has happened since that.
>
> Does that deal with all the points?

In reply, Mr George gave notice of appeal in these terms:

> My Lord, the other matter is the question of leave. I should have wished to apply for a certificate to leap-frog[87] to the House of Lords but, my Lord, although in my submission, subject to your Lordship's certificate, we probably satisfied the conditions, unfortunately my learned friend on behalf of the Archbishops is not prepared to consent. I am left with the new provisions which came into force on the 1st October whereby one now needs leave in judicial review to go to the Court of Appeal. My Lord, I do apply for leave. Your Lordships know that this is a matter of considerable public interest and, my Lords, in my submission it is a proper case for the Court of Appeal to be able to consider.

Back came the response from the Bench: 'If we do not give leave you can seek leave from the Court of Appeal.' to which Mr George responded 'That is correct, my Lord.' The two judges then swivelled their chairs towards each other and conferred for what seemed an age. Lord Justice McCowan then pronounced: 'No, we do not grant leave. Does that complete it, or have you anything else up your sleeve?' Mr George did not rise.

That was the end of our case and we left the Court to confer with our lawyers. Mrs Wright had made provisional arrangements for the Court of Appeal to sit later that afternoon, if required. Because leap-frogging had been denied by the Archbishops, even if we had won in the Court of Appeal it would still have been taken to the House of Lords by the Archbishops.

Our lawyers considered that if an appeal were to be made against the Court's refusal to grant leave to appeal, it would be better heard that same day than left to take its place in the appeals queue, since there was a significant risk that Parliament might not delay its debate on the Measures the next day pending the outcome, in which case any subsequent appeal would stand less chance of success than an immediate appeal, if it took place after Parliamentary approval had been given.

The decision facing the Director (there being no possible opportunity for consulting the Council) was simply this. Proceeding to appeal would have hazarded a sum broadly equivalent to what had already been spent or committed. Whilst we had enough to cover our costs to date, including the Court's award against us, he could not put at risk the very solvency of the Society. Substantial monies promised in support had not been paid.

We had won a partial victory in that we had established that a Measure of General Synod was susceptible to the Judicial Review procedure. Had we lost in the House of Lords, even that victory could have been swept away. We had fulfilled the Society's requirements in accordance with its *Memorandum and Articles of Association*. Our duty had clearly been done and been seen to be done. The Director's decision not to appeal was the proper one in all the circumstances.

Conclusion

It is indeed a catastrophe that the exclusion of doctrinal change was not specifically written into the 1919 Act. A glance at the current Constitution of the General Synod reveals the phrase used there is 'touching', rather than 'concerning', and it can only be special pleading to argue that 'concerning' and 'touching' are synonymous and that the word 'touching' was preferred by the Parliamentary draftsmen of the 1919 Act simply to avoid the inelegant repetition of 'concerning'. No such consideration appears to have weighed with the drafters of the General Synod's Constitution when they adopted the word 'touching'. This special pleading formed the crux of the Respondents' defence. It may be for a future Court to rule upon the matter differently, but for a case of this gravity to be decided upon such threadbare and selective reasoning at a Court of first instance leads one to conjecture whether the Judgment in this case was presumed by its deliverers to be but the opening salvo in a long battle in which Church Society had been confidently expected to appeal[88] against this first Judgment and to win that appeal, and for the case to be decided finally in the House of Lords – all this before ever reaching a debate in the House Of Commons. That indeed is the most charitable conclusion one could reach.

I am reminded of Sir Thomas Bingham, Master of the Rolls, in Regina *v.* the Archbishops *ex parte* Williamson, interpreting Miss Cameron who was in train to plead that 'this is all too late', and saying: 'We will have no more of that, Miss Cameron; we are dealing here with matters of eternity'. He might have added, 'and the supremacy of God's Word written'.

> For the law maketh men high priests which have infirmity but the word of the oath, which was since the law, maketh the Son, who is consecrated for evermore.

MALCOLM BARKER served as Assistant Secretary of Church Society during the whole of these two cases.

Endnotes:

44) The term used to describe proceedings similar to Judicial Review prior to 11 January 1978 when an amendment in the Rules of the Supreme Court came into force which introduced the procedure for Judicial Review. Since that date the number of such applications has risen greatly, and they now account for a significant proportion of all High Court actions. It is important to appreciate that the grant by a Bench of Judicial Review is a discretionary power, there have been cases where, despite the Bench having been satisfied that injustice or impropriety have occurred, it nonetheless decided to dismiss the application and to let matters which were the subject of proper challenge take their course.

45) Lord Justice McCowan and Mr Justice Tuckey.

46) In the event this decision of the Bench proved to be of the greatest importance as the Judgment of the previous Court in accepting jurisdiction was never reversed. Had the second Court decided against the Society first on the question of jurisdiction the whole case would have become an unmitigated disaster, whereas the result of the Society losing the main case without being denied jurisdiction meant that future Measures from G.S. would be susceptible to challenge from Judicial Review, despite repeated and energetic attempts by Counsel for the Archbishops to have the point determined to the contrary – yet another example of God's providence'

47) The arguments we used to persuade the Bench to exercise its discretion in our favour were complex and involved detailed examination of case law. My impression, having been present in Court, is that they are of interest only to lawyers specializing in Judicial Review. They did not affect the outcome, as the Bench found against us on the interpretation of the Enabling Act. I have therefore omitted our arguments on discretion.

48) Quoting Sheila Cameron, Q.C., in the first hearing. Lord Justice Simon Brown, in his Judgment, had said 'Miss Cameron accepts that the Measure proposes fundamental change but suggests that the change is of practice, not of doctrine but clearly with arguably doctrinal implications.'

49) '. . . such an experiment (the ordination of women) would be against the tradition and order and would gravely affect the internal and external relations of the Anglican Communion.'

50) The question of the ordination of women is 'intimately related to the "centre" of the faith'.

51) The Revd John Broadhurst, a member of the Legislative Committee of the G.S., is quoted as saying '… this is the first time since the 1662 prayer book that one group in the Church has prosecuted an issue which has the effect of outlawing the views of their opponents, and effectively that is what it does to the traditional view of ministry…'

52) Mr. Patrick Cormack, M.P., a member of the E.C.P., said:

… we are playing for exceptionally high stakes, nothing less than the working out of a new Elizabethan Settlement in a new Elizabethan Age.

53) Professor David McClean of the House of Laity of G.S. (*Ibid*., p.85).

54) *Ibid*., p. 125.

55) *Ibid*., p. 127.

56) Recourse to which was subsequently made by the Revd P. S. Williamson who sought Ecclesiastical Jurisdiction Measure 1963, Section 10.

57) Ecclesiastical Jurisdiction Measure 1963, Section 10.

58) I have included this in some detail as on its face the matter is one of such common sense that the Society's case was self-evidently unchallengeable – but we were to find out that the simplest words do not mean to lawyers what they mean to laymen. In a dispute between Christians we were surely entitled to expect a higher standard of forensic charity?

59) Lord Chancellor, 1922, Viscountess Rhondda's Claim.

60) Naim *v*. University of St. Andrew's, 1909, cited in Viscountess Rhondda's Claim, *supra prox*.

61) Attorney General *v*. Wilts. United Dairies, 1922.

62) Lord Phillimore, Viscountess Rhondda's Claim, note 59, *supra*.

63) This 'mechanical' mischief is almost identical to the mischief which has led to the creation of the procedure replacing Private Bills under the Transport and Works Act 1992. For the relevant

passage, see Chap. 5, P. 39 (quoted in Lord Justice McCowan's Judgment below) of the 1916 Report.

64) 'The due authority of the State would be safeguarded, and the bases of its historic relationship with the Church would remain undisturbed.'

65) The Archbishop of Canterbury, the Most Revd Randall Davidson, being its Promoter in the House of Lords.

66) One could argue with considerable justification that what Randall Davidson said in his speech to the House of Lords when promoting the 1919 Bill was decisively in our favour. Our deep gratitude goes to Mr Roger Evans who brought this to the E.C.P.'s attention on 11 May, 1993. As it is so important, I cite it *verbatim* from pp. 90 & 91 of the E.C.P.'s *Report:*

What I am suggesting to you, Professor McClean, in this series of questions is that what you propose [*sc.* permitting the ordination of women] must be done by Bill. if it is to be done at all, cannot be done by Measure because Parliament in 1919 never intended that the Church of England Assembly, as it then was, should have the power in law to totally overturn fundamental points of doctrine and principle of this sort. I would summarize this with a statement made in the Second Reading in the House of Lords when the then Archbishop of Canterbury was introducing this Bill: 'May I say at once in order to clear the ground that we are not dealing at all with deeper spiritual things, doctrines of our faith, the duties of a Christian ministry, the help we can render publicly or privately to the souls of men these are spiritual fundamental things, the very essence of our work, and with them we are not dealing directly. I think hardly even indirectly in this Bill in any way. We are speaking here of the framework, the outer secular rules within which our work has to be done.'

Space does not afford me the opportunity of continuing the quotation from the E.C.P.'s *Report;* suffice it to say that Prof. McClean accepted what Mr Evans had said but relied upon the Synodical Government Measure 1969 to justify ignoring what Archbishop Davidson had said. (By implication the Court found against Prof. McClean on this important point. See note 85 *infra*.) Revealingly, the Chairman closed Mr Evans's cross-examination of the Professor with these disturbing words:

I do not think, if I may say so, that the Committee is really in a position to say that this Measure is unlawful or will be unlawful. I think it is our duty to say whether it is expedient or not expedient.

(Readers who are able to obtain a copy of the *Report* for themselves should note that there is a serious printer's error in its extract of the Archbishop's speech. The quotation marks have been inadvertently inserted prematurely after the word 'directly' in the third line from the end.)

67) Compelling support for the narrower interpretation of the 1919 Act is found in the Preface to the 1928 Prayer Book: 'let them not think that we mean thereby any change in doctrine'. Had the Church been truly given the power in 1919 it is inconceivable, given the pace of spiritual and moral change in English society since 1919, that seventy four years could pass before a wider interpretation permitting fundamental doctrinal change would be tested in the Courts!

68) The 1928 Prayer Book, though rejected by Parliament largely through the campaigning work of the Rt Hon. Sir William Joynson-Hicks (the first Lord Brentford) eventually reappeared in the guise of the *Alternative Services: First Series (1965).*

69) Attorney – General *v.* Prince Ernest Augustus of Hanover (1957).

70) General Assembly of Free Church of Scotland *v*. Lord Overtoun and Others (1904).

71) This very point was confirmed by Prof. McClean when apologizing to Mr Evans at the E.C.P.'s meeting on 17 May 1993. In referring to the Constitution of the Church Assembly he cited this proviso:

> Provided that it does not belong to the functions of the Assembly to issue any statement purporting to define the doctrine of the Church of England on any question of theology and no such statement shall be issued by the Assembly.

With such a proviso it is easy to see why no similar proviso was ever thought appropriate in the 1919 Enabling Act.

72) Synodical Government Measure 1969, Schedule 2. Article 7(l).

73) Maxwell, *Interpretation of Statutes* 12th Ed., (1976), pp. 8-9.

74) Emanuel *v*. Constable (1827); R. *v*. Bateman (1858).

75) R. v. Dibdin 1909; Viscountess Rhondda's Claim (1922); Anomey-General *v*. Wilts. United Dairies Ltd. (1922); and Bishop of Gloucester *v*. Cunnington (1943).

76) What our case boiled down to was this: the 1919 Act did not carry an express prohibition against matters of fundamental doctrine being decided or changed by Measure simply because that exclusion was so obviously implied that it would have been superfluous, particularly in the light of Archbishop Davidson's own remarks and the use of the word 'touching' (as opposed to 'concerning') in the Preamble.

77) Contrary to the recent case of Pepper v. Hart (1992) which decided that speeches in Parliament recorded in *Hansard* could be adduced in aid in the interpretation of what was in the mind of Parliament when legislation was approved. Nor must it be forgotten that a law means what it was meant to mean when it was passed and not what its words may come to mean through passage of time.

78) In a subsequent case, R. *v*. The Archbishops of Canterbury and York *ex parte* Williamson, before the Court of Appeal, the Master of the Rolls interrupted Miss Cameron when making an identical point that 'it was all too late' with these refreshing and memorable words:

> We are dealing here, Miss Cameron, with matters of eternity. I do not wish to hear that argument again.

79) Ignoring the fact that G.S. is an elected body without any corporate membership or representation. Its members in G.S. were all independent and there were many who supported the Measure.

80) As the Act says: 'having the force and effect of an Act of Parliament'.

81) One of the charges brought against the Society by the Respondents was that it had not challenged the ordination of women as deacons, but the weakness of that is that had the meaning of ordination and ministry been property dealt with before women were permitted to be made deacons it would have become abundantly clear that there need be no functional differentiation between deaconesses (for which there is some scriptural support) and deacons. That point having been reached, all that would have been needed would have been a G.S.

decision to change the name of deaconess to 'woman deacon', without the need for ordination ceremonies at all.

82) Perhaps the moment of supreme irony. Miss Cameron pleaded in aid the literal and plain meaning of the 1919 Act as opposed to the Society which preferred the literal and plain words of Scripture as excluding women from ordination.

83) This pronouncement upon the choice of one word as against another in an Act of Parliament as being taken to avoid 'unattractive repetition', in the absence of any evidence whatsoever as to the draftsman's state of mind and in the full knowledge of what was said by Archbishop Davidson, led us to the conviction that the Judgment was flawed and could have been overturned in the House of Lords. An eight page review of the Society's case is available from the Society free on application. It forms a useful adjunct to the present study as it contains extracts from the Parliamentary debates and reaches important conclusions outside the scope of this paper.

84) Furthermore, Lord Templeman is condemned by his own words in his speech in the subsequent House of Lords debate on 2 November:

> At one of the first meetings of the Committee [E.C.P.] it was agreed that when each Member came to decide for himself or herself whether or not a Measure was expedient, then he or she could do no better than decide whether in his or her view the Measure was a good thing or a bad thing. The word 'expediency' is so slippery that one can attribute any meaning to it [!] That was the principle on which we worked. We had to make up our individual minds whether we thought it was good for Church and State or bad.
>
> Interestingly, he made no reference at all to our case in his speech. A notable exception was the Lord Sudeley who complained that the transcript of the Judgment had not been made available before the debate. (The reader will recall Lord Justice Simon Brown stating in his Judgment that hearing our case before Parliament discussed the Measure might benefit the debate; in the event it could not, because the Judgment transcript was not released by the Court until after the debates had been held.) Lord Sudeley's brave speech contained this startling passage:
>
> I cannot suggest to a Chamber of legislators that the judges [in our case] there to interpret the law, bent it owing to the imminence of the Measure coming before Parliament which makes the law.

85) Vindicating Mr Evans's cross-examination of Prof. McClean, note 66 *supra*.

86) Costs are usually awarded on a standard or an indemnity basis where there are special circumstances such as trusteeship or bad faith. Indemnity is intended to cover all incurred costs. On a standard basis only two thirds are allowed.

87) In certain circumstances, provided the Court and both sides consent, the Court of Appeal may be by-passed and an appeal taken direct to the House of Lords. Consequentially there is a great saving in time and costs. We had not expected the Archbishops to withhold their consent. What lay behind that surprising decision we can only conjecture but it would not be the first time that financial scare tactics (if that is what they were) have been used by parties to improve their chances of ultimate success!

88) The Master of the Rolls, in R. *v*. The Archbishops of Canterbury and York *ex parte* Williamson (1993), in his Judgment, referred to Church Society's lost appeal. He was interrupted immediately by Mr Williamson after I had jogged his arm (in my role as his McKenzie's

Friend) and to the effect that the Society had never lodged an appeal. ‘Oh yes, I remember now’, he said apologetically, ‘we were all expecting Church Society to appeal’.