# 'The Word of the Oath':[1] Church Society's Application for Judicial Review of General Synod's Vote of 1992 permitting the Ordination of Women to the Priesthood

MALCOLM BARKER

## Introductory Note

The legal action of the Church Society against the legislation on women priests is easily misunderstood as mainly directed towards that particular issue, on which it did not have any immediate effect. In reality, however, it was designed to defend the doctrinal formularies of the Church of England (to which the Society is, of course, committed) against the consequences of high-handed decisions by the General Synod in doctrinal matters, of which the legislation on women priests was simply a prominent example. By raising the question whether the General Synod does have any power to promote changes of doctrine, and by establishing that measures of the General Synod and decisions made about them by the Ecclesiastical Committee of Parliament are open to judicial review, the Church Society's action may have important long-term results of many kinds. Malcolm Barker, who was the main agent of the Society in pursuing its action, has written a careful record, in two parts. This is part one.

**Roger Beckwith**
*Chairman, Editorial Board*

## Dramatis Personae

CHURCH SOCIETY

| | |
|---|---|
| The Revd D.A. Streater | Director |
| M.J.W. Barker | Assistant Secretary |
| The Revd J.A. Cheeseman | Chairman of Council (Vicar of Westgate) |
| The Revd G.R. Curry | Council Member (Vicar of St Stephen, Low Elswick, Newcastle-upon-Tyne) |

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|---|---|
| The Revd Preb J.F.D. Pearce | Vice President and former Chairman of Council (Rector, Limehouse, London E14) |
| Trevor Stevenson | Council Member (retired actuary) |
| PARLIAMENT | |
| Lord Templeton | Chairman of the Ecclesiastical Committee of Parliament (ECP) |
| Patrick Cormack MP | Member of ECP |
| Peter Pike MP | Member of ECP |
| Roger Evans QC MP | Member of ECP |
| Lord Robertson | Member of ECP |
| Lady Saltoun | Member of ECP |
| C.A.J. Mitchell | Secretary of ECP |
| LAWYERS—CHURCH SOCIETY | |
| Mrs Hazel Wright | Solicitor |
| Peter Boydell QC | Counsel |
| Philip Petchey | Counsel |
| Charles George QC | Counsel |
| LAWYER TO THE ARCHBISHOPS | |
| Miss Sheila Cameron QC | Counsel |
| OTHER | |
| The Revd Dr R.T. Beckwith | Warden of Latimer House, Oxford; Chairman of Churchman Editorial Board |
| Mark Birchall | Chairman of the Evangelical Group in General Synod |
| C.A.A. Kilmister | Chairman of the Prayer Book Society |
| Philip Mawer | Secretary General of General Synod |

## Introduction

The 11th day of November 1992 was the day chosen for the decisive vote on the Priests (Ordination of Women) Measure in the Church of England General Synod. Unlike the ending of the First World War exactly 74 years earlier on 11 November 1918, it heralded a period of great turmoil in the Church of England. In retrospect it is clear that the opponents of the Priests (Ordination of Women) Measure expected to cast more than a third of the votes and thereby defeat the Measure. Those in favour thought their chances of winning were slight, although they were convinced that women priests in the Church of England would one day become a reality.

This paper is a personal account of events since that date. It is written by a layman who has never sought election to the General Synod but who has been active in the Church of England since 1960 and who has served without a break since then in some capacity or other, from parochial church councils to diocesan synods and boards. It is his view that the day which should have been observed as a day of peacemaking has proved to be a day when the Church of England declared war on herself.

## Preliminary Observations

As on 3 September 1939, within the writer's memory, the United Kingdom was ill-prepared for war when the moment for decision came, so on 11 November 1992, the opponents of the Measure were largely unprepared to face up to the consequences of losing the vote. There had been an enormous amount of literature produced by both sides but neither side had carried out much forward planning about what to do if their side were to lose the vote. The proponents had no need to plan beyond 11 November as their attitude was that victory, if not achieved then, would be theirs a few years later; all their efforts were directed at optimizing their arguments and timing their public relations programme to obtain exposure, not only within the Church of England but also nationally. In contrast their opponents were divided in their purpose. Some wished to argue against women priests on biblical grounds, some on traditional grounds, some on financial grounds and some on 'Domesday' grounds. Proponents sank any differences of doctrine or tradition and united in a single-minded endeavour which appealed to Liberals in the Church because of their sense of sexual equality, fairness and justice, and to many Evangelicals, because they had experienced women's service in the Church, particularly in overseas mission, and were either less focused on the need for frequent Holy Communion, or held a thought-out, non-sacerdotal view of that sacrament. A further weakness of the opposition forces was that some were prepared to stay in the Church of England while others, often the more vociferous and hard-line, were prepared to contemplate joining the Church of Rome. It was this possibility more than any other which made it difficult to unite the forces of opposition. On the one hand there were conservative or classical Evangelicals, who in looking at the biblical evidence, had come to the conclusion that ordaining women as priests would be contrary to Scripture, or that on balance, there was more scriptural evidence against than for. They therefore could not accept women's ordination to the presbyterate on biblical grounds; on the other hand, there were Anglo-Catholics who held in many instances just as firmly to God's written word but whose interpretation of the Lord's Supper was consonant with that upheld by the Roman Church and therefore unacceptable to Evangelicals of every shade. Despite this obvious difficulty the proprietors of this journal, Church Society, decided through their governing council that they would attempt to make common cause with others opposed to the proposed ordination of women, undeterred by serious differences between them in their understanding of the sacrament of the Lord's Supper.

In retrospect it is possible to be critical of the Society's Council in not reaching a common mind about women's ordination to the diaconate when that was first proposed. The so-called 'ratchet effect' has been well studied in post-war U.K. politics; little steps in legislation, which in isolation have little in them to which sustainable exception may be taken but which inevitably lead to an unacceptable end. Even though many of the Council

could accept women deacons, citing the example of Phoebe,[2] they should have realized that the ratchet process had started and that the easiest moment to stop the ratchet would have been before the first move was made. Some still clung to the view that ordaining women as priests would not command the necessary two-thirds majority in each of the three Houses of General Synod, Bishops, Clergy and Laity. What they apparently failed to anticipate was that if women were allowed to be ordained as deacons, the House of Clergy in the General Synod elections of 1990 would be open to women for the first time and that their numbers would eventually grow to the point where a two-thirds majority there was obtainable. There was some support, too, for the view in the 1980s that the House of Bishops would not reach a two-thirds majority in favour; but that hope became unrealistic as more appointments were made to the bench of younger, more progressive men in tune with the times and 'open to God'. The last hope of the House of Bishops rejecting the Measure was subtly destroyed when the draft legislation incorporated a binding provision (Clause 2) that women would be prohibited by the legislation from becoming bishops—again an instance of the ratchet effect in practice. Had that prohibition not been included, it is doubtful whether the Measure would have reached a final vote in 1992: it would have been rejected at an earlier stage in its synodical journey. Although much was made of Clause 2 in the Parliamentary debates—that it was discriminatory, illogical and unjust—it was readily accepted on the adage that half a loaf was better than no bread and that the ratchet process would once again within a few years produce amending legislation to remove Clause 2.

As the final stages of the synodical process drew to their climax on 11 November, Church Society's Council reached unanimity on the central objection to women's ordination to the presbyterate, *viz.* the question of authority. This happily comprehended those who had no objection to women deacons, those prepared to accept lay celebration and those who could not accept ordination of any kind for women. What was less obvious was that the question of authority was not a self-evidently-true principle. It had academic overtones—there had been numerous articles and letters in the church press about the meaning of the Greek word for 'head'—*kephale*—but to the person in the pew, what practical difference was there if the curate took a church service in the absence of his vicar? Was not the person taking the service the person in authority at that time? How many in today's congregations could explain the concept of the 'cure of souls'? And yet that is the Church's distinguishing mark between a man who has authority in a parish and a man who has not. To be given the cure of souls a man must be instituted as an incumbent or licensed as a priest-in-charge; either way requires the act of a bishop exercising his own cure of souls. A deacon is expressly disqualified in law from being given a cure of souls and it is a scandal that in many dioceses (prior to final approval of the Canon) women deacons were licensed as 'ministers-in-charge'—a title

unknown in law—but a subterfuge to cloak the appointment of women deacons to an office to which they could only become eligible after the promulgating of the Canon on 22 February 1994 and the determination of the date for it to come into force. Had the Society won its case in October 1993 a considerable number of women deacons would have had to give up such posts in order to legalize their ministry, yet no word of criticism has been heard from any quarter about this widespread and flagrant disregard of the law of England. The absence of criticism is further evidence that the concept of authority and the cure of souls are little understood in the Church of England at large.

## Church Society's Council in the Ten Years before the Vote

It is of some interest at this point to trace briefly the course of the Council's deliberations on the question of women's ministry over the last ten years. It first appeared as an agenda item in May 1983 and the Minute reads as follows:

> Ordination of Women
> Following a brief discussion this matter was referred back to the Doctrine Group for further consideration. It was felt that it was difficult to isolate the ordination of women from the whole question of ministry and also lay celebration. It was agreed that this matter should be dealt with before establishment.
> It was agreed that when discussing major topics such as those in item 1000 and 1001 [the ordination of women] care should be taken to see that the group includes people with differing views.

Two years later we have the following at the Council meeting on 25 March 1985:

> Ordination of Women
> A paper entitled 'Should women be ordained to the presbyterate in the Church of England' was submitted by Rev J Cheeseman for debate. After the debate the following resolution was proposed by Rev R T Beckwith seconded by Rev G R Curry and carried unanimously:
>
> > "The Council of Church Society believes that the ordination of women to the presbyterate or episcopate would reverse the created relationship of the sexes which the New Testament gives as the basis of Church Order and would therefore be contrary to the revealed will of God in Holy Scripture".
>
> It was agreed that the resolution be released to the press immediately. There was no wish to seek collaboration with the Church Union at the present time.

At that date the Revv. J. A. Cheeseman and G. R. Curry were newly elected to the Council and it is significant that both played major parts in the

Council's recent debates on the subject; Mr Cheeseman having been elected Chairman of the Council in 1990 and Mr Curry, elected to the Council's 'Think Tank' in November 1993. Dr Beckwith, too, played a prominent role in many discussions with Church Union members and in particular with certain traditionalist groups in the United States of America.

On 24 October 1989 a Minute refers to a proposal 'to seek a legal opinion on the present legal status of the Thirty-nine Articles' but the Council was divided on the grounds that if an adverse opinion were obtained it might prove impossible to preserve confidentiality. The idea, which with hindsight would have been of material assistance in the legal case, was not pursued.

Fears about the marginalization of prospective ordinands, if against the ordination of women to the presbyterate, were expressed at the Council Meeting held on 26 November 1991, just a year before the vote. Arising from a discussion, a resolution was passed authorizing the drafting of a leaflet 'spelling out the practical issues raised by the prospective legislation'. When this came up again at the following meeting on 28 January 1992 in the form of a draft leaflet, it was reported that the Revd Prebendary J. F. D. Pearce (Chairman of the Council from 1980 to 1986, and an Hon. Vice President from 1987) had convened a meeting on 19 March 1992 to discuss issues of conscience which would arise from the proposed legislation and 'there was general agreement that it would be better to await the outcome of that meeting before publishing a leaflet'. (The group subsequently formed from that first meeting came to be known as 'Evangelicals against the Ordination of Women' referred to in note 6 below.) Amongst other action agreed, the draft of the leaflet was to be sent to Cost of Conscience (an *ad hoc* clerical alliance of all opposed to the legislation, but composed in the main of Anglo-Catholics rather than Evangelicals) for 'comments and suggestions for inclusion'. Six members of the Council, it transpired, attended Mr Pearce's meeting and it was reported to the Council on 31 March 1992 that 'the Director . . . had offered the services of the Society in facilitating its work'.

## After the Vote

The next Council discussion took place on 24 November 1992, shortly after the enabling vote of 11 November. This vote scraped through in the House of Laity by a margin of two above the minimum required for a two-thirds vote in favour.

The first item in a long discussion was a report of the debate in General Synod by Mr Trevor Stevenson (see *Churchman* Vol. 107 p. 267), a lay member for Chichester, first elected in 1985. 'In his view', he said, 'the pressure on evangelicals to drop their opposition was enormous and a number had wilted at the last. He had learnt subsequently that a number were now prepared to admit that they had made a tragic mistake.'

The Chairman referred to a paper tabled by the Assistant Secretary [the writer] in which:

> he had attempted to set out grounds on which the Ecclesiastical Committee of Parliament could deem the Measure not expedient to pass on for approval by the Commons and the Lords.

Later it was agreed that the paper [*sc.* that tabled by the Assistant Secretary] should form 'the basis for a briefing document[3] to be left with a sympathetic Member of Parliament, Mr Patrick Cormack'. The discussion ended with a number of specific decisions, the first five of which were as follows:

1. A press statement would be drafted for the approval of the Council by correspondence. It would emphasize the Society's support for the ministry of women but its commitment to the supreme authority of Scripture which excluded women presbyters in the Church, and its adherence to the Thirty-nine Articles of Religion, which also excluded them from the presbyterate. The Director would write the draft in consultation with the Chairman.
2. The Director would write to the Archbishop of Sydney conveying the grief of the Council and enclosing a copy of the statement.
3. The Director would include in his letter in the next mailing a call for a national day of prayer. In it he would stress the Council's hope that the Measure might not proceed through Parliament.
4. Prayers would be offered for the meeting in two days' time with Mr. Cormack.
5. A delegation from the Society to meet the Archbishop of Canterbury would be organized as soon as possible by the Chairman in consultation with the Director.

Events thereafter moved at an ever increasing speed. The meeting with Mr Cormack was reported to the following Council meeting on 26 January 1993 and during a very long debate the broad principles of action were laid down by the Council. Throughout the rest of 1993 not one decision was reversed. The solidarity of the Council was remarkable despite occasions when funds ran perilously short and threatened to circumscribe our campaign.

The groundwork was undoubtedly laid at the first meeting with Mr Cormack MP in his private office at the House of Commons on 26 November 1992. He thought that if a formal application were made to the Ecclesiastical Committee of Parliament (E.C.P.) for the Society to present its evidence that the Synod's vote on 11 November 1992 had been *ultra vires*, it should be granted, since there was a recent precedent where evidence had been called before the E.C.P. in addition to that given by the General Synod's representatives. During the course of that first exploratory meeting I raised the question about the Queen's eventual assent to the Measure if duly passed by Parliament, as it seemed to me that she would be breaking her Coronation Oath if she sanctioned the introduction of a controversy of the faith. I suggested that she might at an early

stage communicate her misgivings to the Prime Minister and I was assured by Mr Cormack that, if that were to happen, the E.C.P. would be made aware of the problem besetting the Queen and that in consequence the Committee would deem the Measure not expedient.

Mr Cormack went on to suggest that the Society should send a letter of enquiry to each of the thirty members of the E.C.P., the purpose of which was to gauge the strengths of the respective sides. That we promptly did. Thereupon Mr Cormack offered to convene a group of E.C.P. members opposed to the Measure at which the findings of our projected survey could be tabled and to which we could invite a selected deputation of our supporters. That meeting was held on 19 January 1993 and was attended by 29 members and supporters of the Society and three members of the E.C.P. with Mr Cormack taking the chair.

The results of our questionnaire were as follows. Of eighteen replies received to our thirty letters, ten supported the proposed legislation, although two were hesitant, two were against and six undecided. Of those who had not replied, four were known to be definitely against.

We could see from this that about five or six of the Committee would have to be influenced to change their initial point of view in our direction. It soon became clear that the Society's high-principled approach based on the General Synod's powers to change doctrine, though undoubtedly soundly and properly based, was not likely to be persuasive with the E.C.P.. Much of the meeting was taken up with other issues such as the costs of the proposed financial compensation for any men who for conscience' sake felt unable to remain in the Anglican ministry. However, we were given a lot of valuable guidance about the probable timetable for the E.C.P's. work on the Measures. (There were two Measures involved: the first permitted the ordination of women to the presbyterate and the second laid down provisions for the financial security and retirement of those who decided to resign office if the first Measure became law; in effect they passed or fell together, and for brevity's sake the second Measure will be largely excluded from further consideration in this paper, albeit it, too, contained serious flaws.) Two impressions of that meeting were left with us. First, opposition to the Measures in Parliament was unlikely to succeed on theological or doctrinal grounds—Parliament being much more concerned about social justice. It was therefore imperative for the Measures to be stopped during their consideration by the E.C.P.. Secondly some E.C.P. members opposed to the Measures were prepared to contemplate becoming Roman Catholics. They were in a less desperate position than classical Evangelicals or committed Protestants. In fact Mr Cormack admitted that he had not fully appreciated that there were significant numbers of Evangelicals who would have nowhere else to go and who constituted 'the very heart of the Church of England'.

It thus became clear to us that the most determined opposition would have to come from Evangelicals rather than from Anglo-Catholics. That

became the burden of my report of that meeting with members of the E.C.P. which I gave to the Council at its meeting on 26 January 1993.

At the end of a very long debate, preceded by prayer, the following decisions were reached:

1. To seek leading Counsel's Opinion as to whether the Society had a winnable case for a grant of Judicial Review of the decision taken by General Synod on 11 November, 1992 to permit the ordination of women to the presbyterate on the grounds that it was *ultra vires* or neglected the probable financial consequences, or failed to act prudently in respect of any of the reasons specified in the [*sc.* my] paper dated 16 January, 1993.
2. To proceed forthwith with the application for Judicial Review if the Opinion is that the case is winnable.
3. To apply to Lord Templeman, Chairman of the E.C.P.,[4] for the Society to give evidence to the E.C.P.
4. To organize a national clergy petition to Parliament opposing the Measure.[5]
5. To adopt the strategy contained in papers from the Director (7/12/92) and the Revd G. R. Curry (18/12/92) should the Royal Assent be given to the Measures in due course.[6]

At the same time as the Council was trying to come to terms with the vote, it became clear that opposition was, if anything, more determined than had been expected. The House of Bishops therefore decided to make a positive conciliatory gesture. After their meeting on 14 January 1993, they issued a statement which became known as the First Manchester Statement. It contained proposals 'which might have involved synodical action' aimed at securing toleration of clerical opponents who remained in the Church. These proposals were detailed more fully in a later Act of Synod. It was admitted subsequently that this Act could be rescinded by a simple majority; nonetheless it was effective as a tactic in reassuring waverers on the E.C.P.. The vote of the bishops to adopt the Statement was unanimous.[7]

Suspicion amongst opponents that they would be marginalized after the Measure became law was considerable and with some justification. Let one example suffice—an extract from a memorandum dated 23 December 1988 from the Archbishop of Canterbury in his previous role as Bishop of Bath & Wells. He had written it to reassure clergy who had signed an Open Letter expressing reservations about the proposed ordination of women. It read:

> It will NOT be a question of bishops DISCIPLINING [*sic*] clergy but rather the realistic situation that clergy will have to work in a church (after the legislation has been passed) where women are now priests and where there is ONE ministry. Although for a time it will be possible for bishops, clergy and laity (even dioceses) to resist recognising women as ordained priests, this state cannot last for ever and therefore the onus is on the clergy who resist because for them the problem will present them with a choice, either

> to stay within a church which has accepted the Validity of Women in the Presbyterate or to resign their Orders.[8]

The E.C.P. held its first meeting on 22 March, 1993[9] and resolved to meet General Synod Representatives[10] on 19 April. Its deliberations took place in two stages. During the first, from 22 March until 12 July, it met on ten occasions. On 19 April, 11, 17 and 24 May the General Synod Representatives were present and on 5 July the Legislative Committee of General Synod.[11] The second stage was held to draft the Committee's *Report*, and it met on 19 July. Its agreed draft was then passed to the Legislative Committee and the E.C.P. adjourned. Members of the Legislative Committee had the option of convening a further meeting of their committee if not satisfied with the final draft of the E.C.P's. *Report*, but no objection was raised. The *Report*, in consequence, was laid before both Houses of Parliament on 27 July 1993.

## Church Society's Council Meeting 23 March 1993

A letter was reported from a member of the Society, Mr M. D. Birchall,[12] who had invited the Director of the Society to convene a meeting of Evangelicals to coordinate a response to the First Manchester Statement from the House of Bishops. The Director informed the meeting that he favoured a cautious reaction to the invitation and it was agreed that a decision should be deferred until after a further debate at the next Meeting. That decision was undoubtedly wise as the Director was under considerable pressure in dealing with our legal action and it was prudent to make no decisions or announcements which could prejudice or circumscribe the development of our case.

I reported that our Counsel had advised us that we would be unsuccessful in seeking Judicial Review of the General Synod's vote of 11 November 1992[13] but that, if the E.C.P. denied the Society a hearing, that decision would be open to an Application to seek leave to apply for Judicial Review. After a 'lively debate' the following resolution was passed, *nem. con.*

> Having taken note of Counsel's Opinion that there are strong grounds for arguing that the G.S's. approval of the Priests (Ordination of Women) Measure, 1992 on 11 November, 1992 was ultra vires; and that despite repeated requests to the E.C.P. for our Counsel to present our case our requests have been denied, this Council recognizes that it has a duty as trustee to safeguard the Society's Objects and hereby resolves to seek Judicial Review of the E.C.P's. decision not to take evidence from the Society, provided that, in our Counsel's Opinion, there is a winnable case for a grant of Judicial Review on such grounds.

In view of rumours that the E.C.P. might move unexpectedly quickly to deem the Measures expedient, a further Resolution to bring Judicial

Review proceedings against the E.C.P. if it voted them expedient, was also passed, *nem. con.*

The Council judged it advisable for its members to be issued with a short rationale for the Society's decision to take legal action. This was not for publication as such, but to be used 'to counter any adverse misinterpretation by the media once news of the Society's legal action becomes public knowledge'. As the situation at that point of time was rapidly developing I quote the rationale in full as it presents a precise picture of the state of play at that date (23 March 1993):

> After G.S. passed the Measure to ordain women as priests in November Church Society felt that it had to take advice about the legal implications for its future activities.
> In its (*the Society's*) legal advisers' opinion, G.S. had exceeded the powers given to it by Parliament when it had passed the Measure last November. That being the case, the Society was further advised that seeking judicial review was the only remedy open to it after the E.C.P. had repeatedly refused to let Church Society or its legal advisers on its behalf present its evidence that in passing the Measure the G.S. had acted unlawfully by exceeding its powers. For that reason alone, the E.C.P. has no alternative but to reject the Measure.

## The Development of the Case

During the month of April there was a considerable volume of correspondence flowing between ourselves, our Solicitors (Cumberland Ellis Piers, represented by Mrs Hazel Wright) and our Counsel (Mr Peter Boydell, Q.C., and Mr Philip Petchey). By the beginning of April the final draft of our case was ready for our approval. It took (on Counsel's advice) the form of an eight page Summary of five reasons why the Measure was not expedient, together with a set of Appendices containing supporting evidence for each of the reasons. These were that:

the Measure is unlawful.

the enactment of the Measure would be contrary to earlier assurances given by the Church of England.

some of the practical consequences of the implementation of the Measure are so grave as to be unacceptable.

if the Measure were to be enacted the Society would be prevented from carrying out the terms of its trusts.

the Measure does not provide adequately for the continuing ministry within the Church of England by and to those opposed to the ordination of women to the priesthood.

We continued to press the Secretary of the E.C.P., Mr C.A.J. Mitchell, for a formal answer to our request to give evidence and we were advised by letter of 14 April from our Solicitor who had consulted Mr. Mitchell's Secretary, not to expect a decision until (if at all) 'the meeting with the Archbishops in May'. No such meeting was recorded in the E.C.P's. *Report*: we presume that the projected meeting was that which took place on 5 July but no further reference to it was ever made.

While this was going on we were encouraging our supporters in General Synod (and any others who offered to help) to write to individual members of the E.C.P. with copy letters to their own Members of Parliament. We soon received a number of copies of interesting replies.

By the end of April, in the continuing absence of any sign that we might be invited to give evidence, our Counsel advised us to send our written representations to each member of the E.C.P., and as a first step a complete set was sent by me to its Secretary, Mr Mitchell, on 4 May 1993. This was acknowledged on 5 May. On the fourteenth we wrote to the Member of Parliament for Watford, the Rt. Hon. Tristan Garel-Jones, suggesting that he ought to be briefed when next in Watford. His reply was predictable—to do with equality of treatment.[14] I replied in return, pointing out the injustice of excluding women from the episcopate![15]

Having heard nothing further from the E.C.P. since 5 May, I wrote again to Mr. Mitchell asking if he had circulated copies of our papers to members and if it had decided whether or not to exclude our giving evidence. The reply from him, dated 28 May was brief and to the point:

Public Bill Office
House of Lords

Dear Sir

Ecclesiastical Committee

In reply to your letter of 25 May 1993 I can inform you that at the Committee's request papers received by the secretary are made available to members; they are not circulated. As I have said before, should the Committee wish to take evidence from the Church Society I will so inform you. Yours etc.

What escaped us all at the time we received this (including our legal advisers) was that the letter contained no undertaking to advise us if the decision were *not* to allow us to give evidence. It was not until 8 July that we were told by Mr Mitchell that a vote to exclude us had been taken on 14 June.

## Council Meeting 26 May 1993

Our next Council Meeting took place on 26 May, and it was not unexpectedly a meeting for reflection and a degree of reassessment. Substantial financial support had been offered. Reassurance was sought about the lia-

bility of individual Council members in the event of the Society's action being dismissed, but after a long, and at times tense debate, the Chairman asked if there was any desire for a rescinding resolution to be placed on the next agenda whereby the previous decision to seek Judicial Review could be overturned and none was forthcoming.

On the fourth of June, having again been advised by our Counsel that it was still too early to seek Judicial Review, we decided to send a copy of our full written submission (without the Appendices but with an offer to supply any of them on request by return of post) to each member of the E.C.P.. Of the letters we received, the one from Mr Peter Pike, MP, dated 8 June, was particularly revealing. It contained the following sentence:

> It would not be my intention to get involved in any debate as to whether or not Synod acted *ultra vires* or not.

That reaction was probably prevalent, though unexpressed, amongst a majority of the Committee. It accords with the Chairman's views recorded in its Report to both Houses of Parliament and with the attitude of the judges in our case. There appeared to be no forum in which *vires* could be seriously examined since the question of *vires* intimately depended upon the doctrine of the Church of England, and that was assumed to be a matter exclusively reserved to the General Synod or its House of Bishops.

There was no recognition of the fact that the law is supreme; however strong the sentiment against it, however inconvenient it may be to the plans of Church and State, it must be upheld if our society is not to break down and accept anarchy and eventually tyranny.

One letter proved to be highly significant. The Lord Robertson of Oakridge wrote on 14 June to us[16] as follows:

> Priests (Ordination of Women) Measure
> Thank you for your letter of 4th June. The Committee decided this afternoon not to take evidence from your Society, partly because they had received no details of the Counsel's Opinion. I think that it is too late now, but if you were able to send me a summary of what Counsel built his Opinion upon, I would try to use it at our meeting on 5th July.

His postscript read:

> PS Our legal advice was that the lawyers did not see how your Counsel even started to build up a case for saying that the Measure was unlawful.

This letter confirmed that our views were being ignored. What he was saying was that, despite our submission appearing in the names of our Counsel, it was not being taken seriously and needed further legal back-up. There was no time for us to argue. Throughout we had acted upon Mrs Wright's advice and so we instructed her by letter dated 17 June to obtain an Opinion on our submission with all speed.

Lord Robertson had written that he could use the Opinion at the E.C.P. meeting scheduled for 5 July but as he said that he would be out of the country until 2 July we decided to write again to all members of the E.C.P. with a copy of the latest Opinion and the reasons why we were sending it to them. We are particularly appreciative of Lord Robertson's help.

On 16 June we had been told by our Solicitor that Counsel advised against applying for Judicial Review of the E.C.P. if it decided not to hear us. Interestingly, we received (*via* the Revd Dr R. T. Beckwith's letter of 16 June to the Revd D. A. Streater, Director of the Society) the views of Mr Roger Evans, Q.C., M.P.. I quote:

> I am told that he [*sc.* Roger Evans] strongly urged that legal action should be taken by you and your legal advisers, and that it should begin without delay.

Dr Beckwith also informed us that the clergy petition containing some 2,200 signatures had been delivered to Mr Patrick Cormack, M.P. on 14 June for subsequent presentation in the House of Commons.

On the 17 June the Director wrote to all diocesan bishops expressing the Society's grave concern for the future of the Church of England. (The House of Bishops was due to meet again in July to discuss a revision to its First Manchester Statement.) Mr Streater pointed out 'the need for further legislation to safeguard the two integrities'. *By the two integrities is meant that the Church of England holds the two schools of thought about the ordination of women are both valid and no member of the church is to be penalised as a result of holding either one of them.*

He went on to refer to the impending financial crisis with these words:

> Apart from the schismatic danger of the present course of events, there is also the practical problem of finance. If the figures which have been given to me are correct then the financial future is bleak indeed. The forecast that I have is that by the year 1996 the Church Commissioners' reserves will stand at £3.8m and there will be a deficit of £14.2m on the Income and Expenditure Account. These figures do not take into account payments from the Financial Provisions Measure. Any Board of Directors facing such a forecast must take steps to safeguard their company's interests. The fact is that the present Church of England may totally collapse apart from the large and economically viable parishes.

In a reply dated 28 June the Bishop of Winchester wrote: ". . . I have always regretted that the legislation is far from satisfactory . . ."

## Council Meeting 29 June 1993

The next day, 29 June, our Council met for its last meeting before the Summer recess (it was not due to meet again until 28 September). Reference was made to offers of money to support our case from two different groups, and the Chairman affirmed:

> that the Council had already decided that it could properly accept donations from any quarter provided that the Society's position was not thereby compromised and that was noted.

The Council also received reports from the Reform group and the Third Province Movement. It then went on to discuss its response to the First Manchester Statement. Agreement was reached to supplement the Society's regular contact with its constituency by the publication of a news bulletin three or four times a year, to be edited by the Revd George Curry.

## Considerations

On 30 June we received a Joint Opinion from our Counsel, the final paragraph of which read as follows:

> In our view, the Church Society are correct to state that a fundamental doctrine of the Church of England can be changed only by an Act of Parliament. On the basis that the Priests (Ordination of Women) Measure does seek to effect such a change, in our view the draft Measure is unlawful. Further it seems to us that even if the proposal were held not to be contrary to fundamental doctrine it nevertheless represents so fundamental a change that it should be effected (if at all) only by Act of Parliament. It is exactly the kind of proposal referred to by the Archbishop of Canterbury as not being capable of being effected by Measure.

My covering letter dated 30 June to the Lord Robertson, enclosing the Opinion, contained this final sentence:

> You will be interested to learn that Mr Mitchell has to date not informed us of the Committee's decision taken on 14th June not to allow our Counsel to make oral representations.

By this time we were beginning to feel that events were running ahead of us. A well-intentioned friend had suggested to us that, if the E.C.P. were able to deem the Measures expedient and to lay its Report before Parliament, the opportunity for Judicial Review might be lost on the grounds that once laid before Parliament it could be protected from attack by Parliamentary Privilege. I therefore wrote again to Mr Mitchell, Secretary to the E.C.P., on 6 July and received a reply dated 7 July, the first two paragraphs of which read:

> Thank you for your letter of 6 July.
>
> As has been explained to you earlier, I undertook to inform you if the Committee wished to hear representations from the Church Society. The Committee has in fact decided against doing so.

Over the whole period since November 1992 the Society's own members had been conducting their own letter-writing and we were sent many

examples of the responses elicited. One of the M.Ps. Mr. Peter Pike had a standard reply (sent on 8 July to one of our members) which made it clear that all that mattered was that General Synod had approved the Measures. He had obviously adopted Lord Templeman's interpretation of 'expediency'.[17]

It was about this time that our Counsel began to draw a clear distinction between two strands of our legal argument on the *ultra vires* point. The first they designated 'the broad argument' and the second 'the narrow argument'.

Briefly, the broad argument stated that the proposed admission of women to the presbyterate would contravene certain passages of Scripture and that by virtue of Article 20 such a course was prohibited. In other words, in order for General Synod to be within its powers in passing such legislation, either Article 20 (and arguably Article 6) would have to be rescinded, or amended appropriately by Parliament; or Parliament would have to amend the Enabling Act of 1919 which had prescribed the limits of the powers of Church Assembly: either or both of such events had necessarily to take place before a vote in General Synod could legally be taken to permit the ordination of women to the priesthood of the Church of England.

The narrow argument was that the Measure was *ultra vires* of General Synod but Parliament, being sovereign, had the power to pass an Act of Parliament (as opposed to a Measure of General Synod) permitting the ordination of women.

What our Counsel appeared to be doing was to move little by little from the broad to the narrow argument and in our meetings with them we did our very utmost to keep our action on its original broad front. However, at our crucial meeting on 16 July it gradually become clear that Mr Boydell was not prepared to go forward to Court on the broad front. The main weakness of the narrow argument was that the granting of Judicial Review is always a discretionary act, so that even if a Court satisfied itself that the General Synod had acted *ultra vires*, it could nevertheless refuse to grant Judicial Review on the grounds that if legalizing women priests had been attempted by Bill and not by Measure, its subsequent passing into law would, through the sovereignty of Parliament, have overridden any illegality along the way. Hence if Judicial Review were granted it would have only a delaying effect on the proposal, since it could be assumed that a Bill would soon be brought before the Commons, the effect of which ultimately would be indistinguishable from that of the proposed Measure under legal challenge.

The next fortnight was hectic in the extreme; we needed to obtain a number of affidavits to accompany our submissions to the Court, each endeavouring to approach our case from a slightly different point of view. I quote from the concluding paragraph in that sworn by the Revd Stephen Trott[18] (author of a paper in *Churchman* Vol. 107, pp. 6–23):

> 16 Because it is part of the New Testament, St Paul's doctrine as to the headship of men within the Church stands as the authoritative Christian teaching on this matter, which is not susceptible to alteration by the Church. The Church of England expressly acknowledges the authority of the Scriptures in Article 20 of the Thirty-nine Articles of Religion: 'it is not lawful for the Church to ordain any thing that is contrary to God's Word written, neither may it so expound one place of Scripture that it be repugnant to another'.

Having lost the vote in the E.C.P.,[19] some of those voting against issued a press release, the aim of which was to explain that the proposed Act of Synod would not carry the force of law and should therefore be enshrined in matching legislation.[20] Dated 12 July, this statement read as follows:

> Naturally we regret this decision, particularly because we do not believe that the safeguards for those who hold orthodox Anglican views are adequate: especially in the light of the Archbishop of Canterbury's most recent statements in which he appears to regard this as an interim measure, and anticipates a reasonably early move to the consecration of women as bishops. We know from the thousands of letters we have received that there is deep unease in the Church of England and it is clear from November's vote that we reflect the views of at least a third of those who are active Church members.
>
> Although we welcome the Bishops' affirmation that those opposed to the ordination of women to the priesthood will continue to be regarded as holding to a legitimate doctrine, and although we note their pledge to respect this position without discrimination we must point out that an Act of Synod can never, of itself, be a sufficient safeguard since it can be amended or rescinded at any time by a simple majority and without reference to Parliament.
>
> We remain convinced, therefore, that if the Church of England is to survive as a broadly based national Church, matching legislation is essential, and we hope that our colleagues in both Houses will reflect on these things when the measure comes before them.

Then came a bombshell. Lord Rees-Mogg brought an Application to seek leave for Judicial Review of Parliament's approval of the Maastricht Treaty. He was granted leave to apply but eventually he lost his case without seeking leave to appeal, and the press were so informed by him on 2 August. Why his action was so relevant to our own case was that it brought the Bill of Rights into current prominence. It was called in aid by both sides! His case was disposed of before our own Application for leave was heard on 21 and 22 October and it was quoted by Counsel for the Archbishops.[21]

Another most interesting development was a contribution from Mr J. Enoch Powell who had been invited to deliver the address to the Annual General Meeting of the Prayer Book Society.[22] He argued against the ordination of women on the grounds that Parliament governs by consent of the people:

> . . . a Measure implementing the resolution of the General Synod in favour of altering the natural meaning of the Ordinal would be legislation lacking the necessary consent that ought to be attendant upon all new law.
>
> . . . We can legitimately urge them (our elected Members of Parliament) to advise that in a matter of such great moment the circumstances do not exist in which legislation will carry the necessary consent. To do that is fully in accordance with our constitutional rights and consistent with our respect, as members of the Church of England, for the authority of the law of England, duly made.

About this time we were alerted to a vital point of law which appeared to have escaped consideration by our lawyers. Mr C. A. A. Kilmister[23] telephoned me to say that it was his understanding that if the E.C.P. laid its *Report* in the Commons before our writ had been served it could be argued that it would have completed its business at that point (*functus officio*) and that the Measures would once again be at a stage in a legislative process and not therefore reviewable, the very argument used by the Lord Chief Justice in 1928.[24] This explained recent actions by the E.C.P's. secretariat. I raised it immediately with our lawyers and was categorically advised at a conference with Counsel soon afterwards that our Application for Judicial Review of the E.C.P. could not be frustrated by its *Report* being simply laid before Parliament.[25]

The remaining work of the E.C.P. consisted in the detailed consideration of its Draft Report and we must here pay tribute to the valiant attempts of Mr Evans to amend it to include a much more comprehensive statement of Church Society's arguments that the Measure was unlawful.[26]

## Lodging the Papers

Our lawyers had endeavoured to be ready to lodge our papers at the High Court on Thursday afternoon, 5 August, but in the event Mrs Wright's assistant arrived as the Court opened for business at 10 a.m. the following morning. To her amazement service of the papers was refused on the pretext that the Court had no jurisdiction. She stood her ground. It being still only 10 o'clock and the time for the first cases being normally 10.30 a.m., it was possible for the functionary to find a judge to look at the paper. That judge found them properly served and the crisis passed. Had the papers been ready late on Thursday as planned the chances of finding a judge willing to be inconvenienced after his court had risen would have been far less.

Our case now slipped into a jurisdictional limbo. We had lodged an Application for leave to apply for Judicial Review.[27] It was now for a judge in chambers to read our papers and decide, without the appearance of the plaintiff before him, whether or not we had a *prima facie* case for a grant of Judicial Review. We knew that Parliament was proposing to debate the Measures before Christmas and that if we were ultimately suc-

cessful, it would render the 11 November vote and all the proceedings of the E.C.P. null and void. We could thus expect our case to be heard at some time in August or September, but when, and what notice we would be given, were unpredictable.

I now had to make an appeal for funds. At this stage it is worth saying how good God was in providing resources for Church Society's legal action. Total costs were around £103,500, and this was more than covered by the proceeds from the appeal (£18,800) and unexpected legacies (£93,800). Church Society's financial situation was not weakened as a result of this case.[28]

We are greatly indebted to the Prayer Book Society for the publicity it so generously gave to our appeal and for the many donations which were given by its members. A letter to *The Times* dated 10 August from the Chairman of Church Society's Council, the Revd John Cheeseman, was rejected for publication.

There were yet more surprises in store. Our proceedings had cited the E.C.P. and specifically sought the quashing of its decision to deem the Measures expedient. We now learnt that the E.C.P. and the Archbishops, in their capacities as Presidents of General Synod, had applied to the judge reviewing our papers to be heard regarding their view that the Court had no jurisdiction to hear our Application. On 2 September Mr Justice Turner adjourned our Application to open court and he gave permission for the E.C.P. and the Archbishops to be represented. This was not an unwelcome development as it meant that they would have to pay their own costs, our case being still *ex parte*, no writ having yet been issued against the E.C.P. If the Society was denied a hearing our own costs would be small. But on 16 September we received a Joint Memorandum [unsolicited] from our Counsel placing on the record 'that our views as to the Society's prospects of success in these proceedings have not been sought'!

## A Change of Counsel

Space does not permit me the luxury of a point-by-point narration of what happened over the next few days. Suffice it to say that our Solicitors and ourselves came to the same conclusion independently of each other. Our leading Counsel Mr Boydell appeared to be unwilling to take our case. He required us to come up with arguments to rebut the sovereignty of Parliament. All we as laymen could do was to reiterate the position that we had taken very much earlier—that Parliament governs by the consent of the people and was not omnipotent—that it could not abolish the Gospel of Mark from the Bible was the example which we gave when pressed. Mr Boydell decided to take no further part in the case and left on friendly terms and with our thanks. Fortunately we were able to retain the services of his junior Counsel, Mr Philip Petchey, who had assisted throughout in the preparation of our case and who had been present at every conference. On 11 October we were able to have our first conference with Mr Charles

George, Q.C., of the same Chambers and to our great encouragement he let us brief him virtually from scratch. By the end of that first meeting he had agreed to attempt to put both the broad and the narrow arguments. We left feeling more hopeful about the prospects than at any time in the previous six months.

In the meantime, of course, we had held a further Council Meeting and at the end of a review of events since the previous meeting in June, the Director summed up the agreed plan in these words:

> If the court were to decide that it had no jurisdiction in the matter the Society would not appeal against that decision but would endeavour to bring the grave implications of that decision to the notice of the general public as vigorously as possible, it being manifestly intolerable and unjust for there to be no avenue open to any individual to protect himself against injustice occasioned against him by a vote in General Synod.

An Affidavit was now filed by the Secretary General of General Synod, Mr Philip Mawer, and on 14 October an Affidavit in response was filed by the Director.

One of the points made by Mr Mawer was that the Society's case had been brought far too late and that all the procedures laid down by Parliament in regulating General Synod had been followed. He described the Society's Application as:

> an honest but misconceived attempt to thwart the procedures of General Synod, the Ecclesiastical Committee and Parliament.

The Director in his Affidavit in reply disposed of this 'far-too-late' argument[29] by showing that the Society had brought its Application as soon as it could after the E.C.P. had deemed the Measures expedient. He went on to make the far more important point that the Society's concern was wider than simply the ordination of women: the second of the Society's Objects was 'to maintain the character of the Church of England as the National Church'. If that could be changed by Measure then the Church of England was undergoing a process of 'disestablishment by stealth'. The scene was now set.

## The First Hearing

The judges hearing our Application for leave to apply for a Judicial Review were Lord Justice Simon Brown and Mr Justice Buckley, and the relief sought by the Society was 'the quashing of the E.C.P,'s decision to deem the Measure expedient, and, secondly, a Declaration that the Measures are *ultra vires* of the Enabling Act, 1919.'

The reader will recall that our Application had been made *ex parte* but that the Archbishops and the E.C.P. had made application to the Court to appear and that the request had been granted. We therefore had expected two sets of Counsel to be arrayed against ours, only to find that the E.C.P. had by then informed the Court that it did not intend to appear. We had

heard that the House of Commons was scheduled to debate the Measures on Tuesday 26 October and we wondered what the E.C.P's. last minute decision meant.

The first hurdle to be tackled by our leading Counsel, Mr George, was to show that a Measure of General Synod was judicially reviewable[30] and he expatiated brilliantly on the difference between primary and delegated legislation, arguing that a Measure of General Synod could 'never possess the characteristics of primary legislation'.[31] What the Society argued was that if General Synod wished to permit the ordination of women to the presbyterate it would have to be legislated by Act of Parliament, not by Measure. His five observations were that:

1. there was no conflict with the Bill of Rights 1688;[32] no intention to question the powers and privileges of Parliament;
2. the Society sought no declaration as to the appropriateness of theology of the Measure;
3. the Society was not seeking to assert that no matter of doctrine could be dealt with by Measure, but that a fundamental change of doctrine or constitution could not be introduced, except by Act of Parliament;
4. a Measure was not susceptible to amendment—it came to Parliament on a 'take-it-or-leave-it' basis;[33]
5. the hearing was no more than an Application for leave.

To comply with the Court's procedures Mr George had had to submit a copy of his 'skeleton' argument before the case began and this ran as follows:

> First, that the 1919 Enabling Act, properly interpreted, is subject to limitation. The case of Pepper *v.* Hart (1993) now permits the Court to look at *Hansard* to see what was in the mind of Parliament when it approved a Bill. Archbishop Davidson had made it clear in his speech in the House of Lords when promoting the Bill in 1919 that changes in doctrine would be excluded from the proposed Measure procedure.
>
> Secondly, if it is accepted that there is a limitation on what matters may be decided by Measure, we say that women's ordination falls on the wrong side of such a line of limitation, and is thus *ultra vires*.
>
> Thirdly, that the correct legislative route for what was proposed should be by Act of Parliament.
>
> Fourthly, that the Society had no intention of interfering with the sovereignty of Parliament and thereby contravening the Bill of Rights.
>
> Fifthly, that a Measure passed by General Synod must be open to challenge at some point in its legislative process, and (it being more akin to subordinate as opposed to primary legislation) that the timing chosen by the Society for its Application was in all the circumstances the least objectionable to the Court.

Mr George had completed his main submissions by 4.30p.m. and the Court was adjourned to the following morning when he dealt with the case

in 1928 which had been cited by our own Counsel at our very first conference as a fatal objection to an Application for leave to seek Judicial Review of the 11 November 1992 vote by General Synod.[34]

In the course of his submission a Court usher was seen to enter and hand a paper to the presiding Judge. It transpired that the Crown Office were making enquiries about rearranging the Commons debate schedule for the following Tuesday, if leave were granted.

Miss Sheila Cameron, Q.C., rose to reply on behalf of the Archbishops. Her main point was that the Measures were primary legislation about to be considered by Parliament and the Courts had a duty to be sensitive to the relation between the Courts and Parliament. At the least, she asserted, it would be undesirable for the Courts to accept jurisdiction and at the worst, if it did, it would breach Article 9 of the Bill of Rights 1688. The Court adjourned to 2.15 p.m. for the Judgment.

## The First Judgment

Lord Justice Simon Brown began delivering his long Judgment and at the outset made it clear that he had had a strong initial reaction against granting leave, not through any particular objection, but because of a combination of factors:

> not least that the Measure is due to be debated in the House of Commons on 29 October and in the Lords on 2 November and that there could be no substantive hearing until well after that time. During the luncheon adjournment, however, I've come to a different view which is shared, that we should grant leave, not least because we discovered this morning that it is possible for the Divisional Court to hear a substantive Judicial Review application on Tuesday and Wednesday of next week.

Unusually he went on to give reasons, as he thought it might help. He summarized the main argument in these words:

> This Measure is primary, not subordinate legislation: it is before Parliament. The Court should decline to intervene (as for a Bill). That it would be regarded as primary, after the Royal Assent, we would accept. Mr. George submitted to the contrary. If Miss Cameron is right, then it follows that there can be no challenge to the Measure in any way. Does it follow that at this stage—before it is passed by Parliament—it has all the characteristics of a Bill, i.e. exemption from challenge: a Bill is immune. It is otherwise with this Measure. The *vires* is the very question sought to be challenged . . . In my judgement therefore at this stage this Measure is more closely akin to subordinate legislation than a Bill. If it were delegated there would be no bar to its challenge.[35]

He went on to refer to the Speaker's warning in the Commons on 21 July 1993 in reference to the Application for Judicial Review brought by Lord Rees-Mogg in connexion with the Maastricht Treaty. She had warned

against breaching Article 9 of the Bill of Rights[36] but he made it clear that there would be no offence against the Bill of Rights as not even a substantive hearing (in favour of the Society) 'would bring an inhibition on Parliament's processes' . . . though he recognized:

> of course that were the Court to pronounce upon the legality of the Measure, Parliament would take note. Were it impossible to reach a decision before Friday's debate, Parliament might wish to postpone that, but that was a matter for Parliament save only this: we would hope (as in Smedley) that Parliament may be assisted by the *vires* challenge.[37]

Clearly the Judge was now against Miss Cameron on the sovereignty point. He had formed the view that the proposed legal challenge was directed less to the E.C.P.[38] than to the *vires* of the Measure. The case he thought seemed to be arguable.[39] These were his words:

> I believe that there is a positive advantage in its being argued—not that I have any view about its theological merits, I do not, but rather because it seems to me that those who oppose the Measure, given at least a respectable argument to advance, should have the opportunity. If the Measure is found unlawful then they should proceed by conventional legislation. Parliament could then amend the proposed legislation through the House. At present it is before the House on a take-it-or-leave-it basis.[40]

He ended his Judgment with 'one final matter'. This is so important for the future that I quote it in full:

> The Applicants seek to argue the substantive challenge on the narrow basis that this Measure proposes a fundamental change of doctrine which is not properly within Section 3 of the 1919 Enabling Act, properly construed.
>
> Miss Cameron accepts that the Measure proposes fundamental change, but suggests that the change is one of practice, not of doctrine, but clearly with doctrinal implications. Her central argument is that whether the change is doctrinal or not, the 1919 Act allows any Measure, however fundamental, concerning the Church of England. Her argument, if correct, will dispose of this challenge however one characterizes the change sought by this Measure. I would deprecate any attempt on either side to put before the Court an essentially theological, doctrinal dispute. This Court is mercifully ill-equipped to determining such disputes.[41] As it seems to me, this challenge can perfectly well be determined without entering into such an area of argument. There is therefore no objection to this challenge going forward either with regard to the sensitivity of Court *versus* Parliament or this Court and matters of Church rather than State. I grant leave.

Mr Justice Buckley concurred in these words:

> I agree. I see formidable arguments against the Judicial Review of the E.C.P. having regard to the E.C.P. as set out in the 1919 Act. However, even

> accepting that it is primary legislation, it is at least arguable for a court to say that General Synod exceeded its powers in passing the Measure. I add nothing to what he said, but agree in this very exceptional case the Court should hear the argument.[42]

Miss Cameron in response agreed that no further evidence need be filed before the substantive hearing, but she hinted that the E.C.P. might wish to appear and therefore would need to file its own Affidavits. The Judge, having been assured that the E.C.P. would be notified of the proceedings, ruled that it must file by close of business on Monday 25 October.[43] Costs were reserved. The time was 4.30 p.m. on a Friday afternoon. The first skirmish had been won.

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

## NOTES

1 Heb. 7:28. '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.'

2 Romans 16:1.

3 Dated 16 January, the document was designed to include all the possible arguments known at that time in order for the members of the E.C.P. to give their opinion as to those with the greatest force. Eight reasons were adduced, *viz.*, discrimination, schism, further decline, non-representational character of General Synod (G.S.), validity of the vote in terms of the *vires* of G.S., the narrowness of the vote, and absence of any demonstrable benefit to the Church of England, and a proper interpretation of the word 'expedient'.

4 The E.C.P. has no powers to amend Measures from G.S.. It must accept or reject them *in toto*. Similarly, once the E.C.P. has delivered its Report on any Measure, it cannot be amended by the Commons or the Lords, and must be accepted or rejected as tabled. To argue that G.S. is the parliament of the Church (as the Archbishops did in our case) overlooks the fact that amending powers are restricted to G.S. where the rules of debate are interpreted by the person happening to occupy the Chair at the time, and not by a Speaker steeped in procedure, assisted by a phalanx of officials and guided by hundreds of years of tradition in order to produce legislation of the highest possible clarity and effect.

5 At the following Council Meeting the two members who had offered to organize the petition (the Society's office staff being unable to handle the extra work entailed), having explored what was involved, had come to the conclusion that it was prohibitively expensive. However it was also reported that 'Forward in Faith' (a coalition of those opposed to the ordination of women) had decided to launch a petition and it was agreed that the Director would write to all clerical members of the Society soliciting interest in participation in a petition. The names only of those expressing interest were to be sent to Forward in Faith. The petition was duly presented to the House of Commons by Patrick Cormack, M.P., on 25 June 1993.

6 The Director suggested (if the Measures received Royal Assent) co-operation with other Evangelical groups, specifically, Reformation Church Trust, Evangelicals Against the Ordination of Women, and possibly the Free Church of England; followed by a separate synod loyal to the Queen and subject to the 39 Articles, the *Book of Common Prayer* 1662's doctrine and the Canons in force prior to 11 November, 1992; limited communion with Canterbury; existing parishes to retain financial assistance from the Church Commissioners; own elected bishops; own selection of ordinands and own training.

George Curry recommended that 'every legitimate attempt should be made to ensure that the Code of Practice [governing implementation] enshrines those safeguards that are necessary for orthodox Christians to remain within the C. of E. with a clear conscience'.

7 Other provisions included the possible appointment of not more than three bishops to act as Provincial Visitors to assist the diocesan bishop in the provision of appropriate ministry. The Statement also looked forward to a further meeting in June at which the Code of Practice would be finalised.

8 This is one of a number of such statements received by Church Society.

9 The members of the E.C.P. were, from the House of Lords: Lords Beaumont of Whitley, Cawley, Fanshawe of Richmond, Holderness, Baroness Nicol, Lords Robertson of Oakridge, Terrington, Templeman, Salisbury, Saltoun of Abernethy, Baroness Seear, Lords Strabolgi, Teviot, Westbury and Williams of Elvel; from the Commons: Michael Alison, Donald Anderson, John Blackburn, Sydney Chapman, Patrick Cormack, Roger Evans, Frank Field, John Selwyn-Gummer, Peter Hardy, Simon Hughes, John McWilliam, Peter Pike, William Powell, Stuart Randall and Roger Sims.

10 The G.S. was represented by the Bishop of Guildford, Prof. David McClean, the Revd John Broadhurst, Mr Peter Bruinvels, Mr Brian Hanson, Mr Philip Mawer, Mr John Packenham-Walsh, C.B., Q.C., Mr Patrick Locke and Mr Roger Radford.

11 The Legislative Committee of G.S. is the body which prepares the presentation of Measures to the E.C.P. and which decides whether the E.C.P.'s Report is acceptable before it is laid before both Houses of Parliament. Members of the Legislative Committee were: the Archbishops of Canterbury and York, the Ven. R. D. Silk, the Revd Canon J. A. Stanley, Prof. J. D. McClean, Mr P.J.C. Mawer, Mr P.N.E. Bruinvels, the Ven. J. E. Burgess, the Bishop of Chelmsford, Mr B. E. Henry, Miss J. A. Price, Dr C.A. Baxter and Mr B.J.T. Hanson.

12 The Chairman of the Evangelical Group in G.S.

13 Counsel advised that the case of R. *v.* Legislative Committee of the Church Assembly, *ex parte* Haynes-Smith (1928) would be cited against us. It was a ruling by the Lord Chief Justice, who decided that a vote of Church Assembly was not open to a writ of *Certiorari* (the equivalent then of Judicial Review today), the grounds being that the approval of a Measure in Church Assembly was but a stage in the legislative process.

14 His reply, dated 18 May, read:

> I would be very happy to meet you at any time—but I am bound to tell you that I am a supporter of the Ordination of Women Priests.
>
> Worse than that, it is an issue that I find quite difficult to take seriously at all—and my reason for supporting the Ordination of Women Priests is nothing to do with religion but simply that I support equality of treatment for women on any occasion I can.

15 My reply read:

> We are delighted to hear from you. Rest assured that we expected that your views would be as you have expressed them.
>
> However it is clear, with the greatest of respect that you are unaware of the central unacceptability of the Measure, *viz.*, that Clause 2 debars women priests from becoming bishops. This is the main reason why people on the E.C.P. like Frank Field are unhappy: they see no reason why women should not be bishops if they become priests and neither do we. The point is that the Measure would never have been passed in the first place if this exclusion had not been included. Shades of the Social Chapter!
>
> We would be so grateful of the chance to go through such points as these if you can spare us the time.

16 It was only after the Report of the E.C.P. had been published that we were to realize that the E.C.P. had voted not to hear our evidence on the same day as Lord Robertson's letter. The voting was 11 in favour with 13 against.

17 The Committee has to decide whether the proposal is expedient or not. Different members will decide this on different factors but in my opinion it is not for the House or the Committee to decide the theological basis for the Measure. Obviously we do have a duty to examine the Measure to ensure it does what it is designed to do and it is on that basis I shall consider the Measure and hopefully we will find the Measure expedient.

18 Other affidavits were sworn by the Revd Dr R. T. Beckwith and Revd Dr M. D. Burkill.

19 On 12 July the E.C.P. voted by 16 votes to 11 that the Measure was expedient. The votes were cast as follows:

| CONTENT, 16 | | NOT CONTENT, 11 |
|---|---|---|
| Beaumont of Whitley | Michael Alison | Fanshawe of Richmond |
| Cawley | Sydney Chapman | Holderness |
| Nicol | Frank Field | Robertson of Oakridge |
| Strabolgi | Peter Hardy | Salisbury |
| Teviot | Simon Hughes | Saltoun of Abernethy |
| Westbury | Peter Pike | Terrington |
| Williams of Elvel | Stuart Randall | John Blackburn |
| | Roger Sims | Patrick Cormack |
| | | Roger Evans |
| | | John Selwyn-Gummer |
| | | William Powell |

20 We are indebted to Lady Saltoun for a letter dated 19th July incorporating this statement. The signatories were Lord Fanshawe, the Marquess of Salisbury, Lady Saltoun, Lord Terrington, Patrick Cormack, Roger Evans, John Selwyn-Gummer and William Powell.

21 Miss Sheila Cameron, Q.C., Vicar General of the Province of Canterbury, an ex-officio member of the General Synod.

22 Quoted in full in *Churchman*, Vol. 107, pp. 269–272. I telephoned Mr. Powell, on first seeing a copy of his address, and he said he would consider giving us an affidavit if our Counsel were to approach him, and I so instructed our Solicitors. Sadly, nothing came of it.

23 Chairman of the Prayer Book Society.

24 See note 13 *supra*.

25 Subsequent events suggested that the lawyers advising the E.C.P. took the opposite view (thus vindicating Mr Kilmister's warning *supra*). The Report was laid before Parliament on 27 July in draft form, we believe, and it was ordered to be printed that afternoon. We understand that the latest draft of the Report (which had been settled by the E.C.P. on 19 July) had been sent to members of the Legislative Committee of G.S. who were given a few days in which to call for a further meeting with the E.C.P., or to accept it in that form. The draft was laid in the Commons the very same day on which the time period for objection expired.

26 See pp. 57 and 58 of the *Report*.

27 Our writ had taken the form of an *ex parte* application and it was given the official title of R. *v.* The Ecclesiastical Committee of Both Houses of Parliament *ex parte* the Church Society (Crown Office Ref. 2248/93).

28 C/o Barclays Bank P.L.C., 32 Clarendon Road, Watford: account no. 80246913. The fund remains open. Any eventual surplus may only be used to fund any further legal actions to defend the Society's Constitution.

29 This argument was repeatedly raised by Counsel for the Archbishops in the subsequent cases brought in person by the Revd Paul S. Williamson, priest-in-charge of St. George's, Hanworth, diocese of London. See Note 35 of part 2.

30 Note that earlier, Counsel's Opinion had been decidedly that a Measure was not susceptible to Judicial Review.

31 For example, there is no power of amendment exercisable either by the E.C.P. or by the Houses of Parliament.
32 Article 9, specifically.
33 He instanced the fact that there was no provision for future bishops to make declarations under the Measure.
34 See note 13 *supra*.
35 This is in my view as a layman in both its theological and legal senses, the most important and far-reaching point of law to emerge from the case. Measures from G.S. are amenable to the Judicial Review procedure.
36 Echoed by Miss Cameron. See the passage in part 2 to which Note 35 applies.
37 At this point he referred to the fact that the E.C.P. had been invited by the Court to appear but had decided not to do so—presumably because the E.C.P. was in a stronger position than Miss Cameron to put forward the Bill of Rights argument for the sovereignty of Parliament. The case of Smedley referred to here was R. *v.* H.M. Treasury *ex parte* Smedley (1985).
38 The Judge had clearly taken Mr George's point that the E.C.P. was a statutory Parliamentary body more akin to the Boundary Commission (which had been subject to Judicial Review in 1983) than to any other body.
39 The test which must be satisfied before an application for leave to apply for Judicial Review can be granted.
40 The Society had argued that the 1919 Enabling Act permitted the G.S. to decide matters affecting the Church's housekeeping and administration. For such secondary matters it was acceptable for Parliament to reserve no powers of amendment, but matters of doctrine were too important and should be subject to normal Parliamentary legislative procedures whereby successful Bills had the benefit of independent scrutiny and amendment.
41 He cited R. *v.* The Chief Rabbi, *ex parte* Wachmann (1992).
42 This concurring Judgment in my view completely vindicated the Society in bringing its case to court.
43 The E.C.P. took no further part in the proceedings. That meant that the Society's case had been greatly simplified. It had been granted leave to seek Judicial Review of the G.S's. vote on 11 November, 1992, to approve the draft Measures—long past the three months' time limit for Judicial Review proceedings to be initiated. Also the sole Respondents were to be the Archbishops of Canterbury and York—a great saving on costs. The E.C.P. if it had remained a party could have applied for separate papers to be served on each of its thirty members!