
The Clerical Declaration of Assent

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Following the Reformation, uniformity was a key principle undergirding worship in the Church of England. The Crown claimed the prerogative to order the use of, and to alter, Church services in spite of the provisions of any Act of Uniformity, the Canons or any Declaration of Assent. This caused confusion among the clergy and others as to who had 'lawful authority' to permit such usages or changes. This confusion was exacerbated by episcopal claims to a jus liturgicum. Statute and case law, as well as the wording of the Declaration, also ensured rigidity in doctrinal adhesion. Since the Church of England (Worship and Doctrine) Measure 1974 and recent amendments to the Canons and the Declaration of Assent, this rigidity has been relaxed and clarity provided as to who may authorise services or permit departure from otherwise authorised forms of service.

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HISTORICAL INTRODUCTION²

The Thirty-nine Articles of Religion were among a number of doctrinal statements that were produced during the sixteenth century.³ They reached their present form through a revision of Archbishop Cranmer's Forty-two Articles of 1553. This was carried through in all essentials by the Convocation of 1563 and finally amended in a few small details by the Convocation in 1571.⁴ In the same year their subscription was made mandatory for all deacons and those presented to benefices.⁵ Nor did the matter end there, as section 2 of the Act for the Ministers of the Church to be of Sound Religion 1571 enacted:

- 1 I am grateful for comments made by Professor Norman Doe on an earlier draft of this article and to Stephen Slack for information as to current practice. Any mistakes or omissions are mine alone.
- 2 See M Davie, *Our Inheritance of Faith: a commentary on the Thirty Nine Articles* (Malton, North Yorkshire, 2013), pp 72 ff; C Podmore, *Aspects of Anglican Identity* (London, 2005), pp 44 ff.
- 3 See Davie, *Inheritance of Faith*, pp 22 ff.
- 4 *Subscription and Assent to the Thirty-nine Articles: a report of the Archbishops' Commission on Christian Doctrine* (London, 1968), para 1.
- 5 An Act for the Ministers of the Church to be of Sound Religion 1571, ss 3 and 5; see also A Stephens, *The Statutes Relating to the Ecclesiastical and Eleemosynary Institutions*, 2 vols (London, 1845), vol 1, p 432, n 2. The 1571 Canons provided: 'Subscribet omnibus Articulis de Religione Christiana, in quos consensus est in Synodo; et publice ad populum, ubicunque Episcopus jusserit, patefaciet conscientiam suam, quid de illis Articulis et universa doctrina sentiat' ('... subscribe to all the articles of the Christian religion agreed to in Synod and (wherever the bishop directs) shall publicly make known to the people his adherence to those Articles and to the whole of Christian doctrine'); E Gibson, *Codex Juris Ecclesiastici Anglicani*, 2 vols (Oxford, 1761), vol 1, p 148, note bb.

And that if any person ecclesiastical, or which shall have ecclesiastical living, shall advisedly maintain or affirm⁶ any doctrine directly contrary or repugnant to any of the said articles,⁷ and having convented before the bishop of the diocese or the ordinary, or before the queen's highness' commissioners in causes ecclesiastical, shall persist therein, or not revoke his error,⁸ or after such revocation eftsoon affirm untrue doctrine, such maintaining or affirming and persisting, or such eftsoon affirming, shall be just cause to deprive such person of his ecclesiastical promotions . . .

Thereafter Canon 36 of the *Constitutions and Canons Ecclesiastical* 1603 required that all those about to be ordained should 'for the avoiding of all ambiguities' make and subscribe to three Articles: the first acknowledged the King's supremacy; the second acknowledged that the *Book of Common Prayer* and the Ordinal contained 'nothing contrary to the Word of God' and that the minister would 'use the Form in the said Book prescribed in Publick Prayer and the Administration of the Sacraments and none other'; and the third acknowledged that each and every one of the Thirty-nine Articles was 'agreeable to the Word of God'. The subscription read: 'I N N do willingly and *ex animo* subscribe to these three Articles . . . and to all things that are contained in them.' In addition, Canon 72 stated:

No Minister or Ministers shall, without the licence and direction of the Bishop of the diocese first obtained and had under his hand and seal, appoint or keep any solemn Fasts, either publicly or in any private houses, other than such as by law are or by public authority shall be appointed . . .⁹

In 1628 Charles I added a Royal Declaration to precede the Thirty-nine Articles; this was issued as a preface to a reprint of those Articles and was instigated by

- 6 See *HM Procurator General v Stone* (1808) 1 Hag Con 421; *Sanders v Head* (1843) 3 Curt 565; *Hodgson v Oakley* (1845) 1 Rob Ecc 322; *Gorham v Bishop of Exeter* (1849) 2 Rob Ecc 1, on appeal (1850) 7 Notes of Cases 157; *Re Dennison* (1856) 27 LTOS 300; *Heath v Burder* (1862) 15 Moo PCC 1; *Fendall v Wilson* (1862) 7 LT 474; *Williams v Bishop of Salisbury* (1864) 2 Moo PCCNS 375; *Voysey v Noble* (1871) LR 3 PC 357; *Sheppard v Bennet* (1871) LR 4 PC 371.
- 7 As to which articles, see Stephens, *Statutes*, vol 1, p 430, n 1.
- 8 It was decided in *HM Procurator General v Stone* (1808) 1 Hag Con 424 at 432 that a mere promise of future silence 'is no revocation; and that is the demand of the statute. It might be satisfied, if mere future silence was all that is required; but that is no revocation of the past.'
- 9 N Mears, A Raffé, S Taylor and P Williamson with L Bates (eds), *National Prayers: special worship since the Reformation*, 3 vols (Woodbridge, 2013), vol 1, p lxii, says: 'As canon 72 made clear, a lawful authority included the "ordinary", that is (normally) the diocesan bishops, who could order special acts of worship and even fasts in parishes under their jurisdiction.' However, the Canon does no more than refer to solemn fasts and, indeed, may not go so far as to permit a direction without a prior application from the relevant minister.

Archbishop Laud.¹⁰ The Royal Declaration, while stating that some differences had been ‘ill raised’ on some ‘curious points’, nonetheless reaffirmed the Thirty-nine Articles and insisted that ‘no man hereafter shall either print, or preach, to draw the Article aside any way, but shall submit to it in the plain and literal meaning of the Article, but shall take it in the literal and grammatical sense’.

In 1662 the Act of Uniformity enacted by sections 3 and 4 that every minister should make a declaration in specified words ‘and no other’,¹¹ namely:

I A.B. do hereby declare my unfeigned Assent and Consent¹² to all and every thing contained and prescribed in and by the Book, Entituled, *The Book of Common Prayer and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the Use of the Church of England; together with the Psalter or Psalms of David, Pointed as they are to be sung or said in Churches; and the Form or Manner of Making, Ordaining, and Consecrating of Bishops, Priests, and Deacons.*

However, section 25 of the Act provided that in all relevant prayers which related in any way to the King, Queen or royal progeny the names might be ‘altered and changed from time to time, and fitted to the present occasion according to the direction of lawful Authority’. According to practice this was the authority of the King or Queen in Council.¹³

- 10 *Subscription and Assent to the Thirty-nine Articles*, para 22: ‘The ends in view were to restrain domestic controversy about the five anti-Arminian Articles which were decreed by the Synod of Dort in 1619, and to curb the claim of Parliament to settle matters of the Church’s doctrine and discipline by its own actions’. The Articles were not regularly bound up with the Prayer Book until after the Restoration: *ibid*, para 22, n 1, para 72e.
- 11 The Act of Uniformity 1558 had made provision for the ornaments of the Church and its ministers to be altered by the Queen with the advice of the High Commissioners or the Metropolitan (s 25). Section 26 further provided that ‘if there shall happen any contempt or irreverence to be used in the Ceremonies or Rites of the Church, by the misusing of the Orders appointed in [the Elizabethan Prayer Book], the Queen’s Majesty may, by the advice of the said Commissioners or Metropolitan, ordain and publish such further Ceremonies or Rites as may be most for the advancement of God’s glory, the edifying of his Church, and due reverence of Christ’s holy Mysteries and Sacraments.’ It was under this latter provision that a new Kalendar was published (Gibson, *Codex*, vol 1, p 271, note g). It was also under this provision that the minor alterations to the then Prayer Book were made at the Hampton Court Conference in 1604: Gibson, *Codex*, vol 1, p 273, note h; E Daniel, *The Prayer Book: its history, language and contents*, twentieth edition (London, 1901), pp 44–45; C Hefling and C Shattuck (eds), *The Oxford Guide to The Book of Common Prayer* (Oxford, 2006), pp 48–49. See, especially, the Proclamation made by King James I in which the King nonetheless spoke of ‘that Duty which is the chieffest of all kingly Duties, that is, to settle the Affairs of Religion and the Service of God before our own’ (*ibid*). W Phillimore, *Ecclesiastical Law*, second edition (London, 1895), vol 1, p 746, speaks of the King’s ‘assumption . . . which is very questionable in point of law’ that he was so empowered by these statutory provisions.
- 12 The difference in emphasis between these two words is clearly aimed at those clergy who did not want to give entire agreement to the Articles.
- 13 Gibson, *Codex*, vol 1, p 280, note p.

Special worship

A manuscript note¹⁴ at the end of the Act of Uniformity, 1662, stated that three additional services were to be printed at the end of the *Book of Common Prayer*, namely, services to commemorate the frustration of the Gunpowder Plot (5 November), the execution of Charles I (30 January) and the restoration of Charles II (29 May)¹⁵ and such services were later authorised by Act of Parliament.¹⁶ Nevertheless, the actual contents of these services were never authorised by Parliament but only by the Convocations and the Crown, and for 200 years a royal warrant was issued at the commencement of every reign authorising their use (sometimes with alterations made by the Crown alone).¹⁷

A fourth service was also printed at the end of the *Book of Common Prayer*, but this had no statutory authority, namely a service for thanksgiving for the anniversary of the Sovereign's accession.¹⁸ Until 1859 this service, too, was the subject of a royal warrant or proclamation at the commencement of each sovereign's reign. Although Canon 2 of the 1640 Canons had previously enjoined the use of 'a particular form of prayer appointed by authority' for the accession of Charles I, this Canon was no longer in force.¹⁹ After 1859 new forms of service for the accession day were prepared by Convocation,²⁰ although this has not been the case since at least 23 June 1910, when a specific form of service was provided by royal warrant. At the present day the accession service is that authorised by royal warrant dated 26 July 1958.

At the time the authority for such a royal warrant must necessarily have been the same as for all previous such services, namely the royal prerogative.²¹ Fortunately its legality has now been put beyond doubt by the present Canon B 1, paragraph 1(c), which authorises for use 'the form of service authorized by Royal Warrant for use upon the anniversary of the day of the accession of the reigning Sovereign'.²²

14 I have been unable to discover who made this manuscript note.

15 Hefling and Shattuck, *Oxford Guide*, p 73; F Proctor and W Frere, *A New History of the Book of Common Prayer* (London, 1962), p 645.

16 These were 3 Jac I c 1; 12 Car II c 14; 12 Car II c 30.

17 Hefling and Shattuck, *Oxford Guide*, p 73; Proctor and Frere, *New History*, p 646; B Cummings (ed), *The Book of Common Prayer: The Texts of 1549, 1559 and 1662* (Oxford, 2011), pp 790–791. These services were printed together with the *Book of Common Prayer* until they were removed by the similar authority of a royal warrant on 17 January 1859; Proctor and Frere, *New History*, p 647.

18 The earliest recorded instance in the Church of England of special prayers on behalf of a new sovereign is that of Richard II in 1377: Daniel, *Prayer Book*, p 535.

19 For the 1640 Canons, see G Bray (ed), *The Anglican Canons 1529–1947* (Woodbridge, 1998), pp 560–561. In 1661 the statute 13 Car II c 12 forbade the enforcement of these Canons.

20 Proctor and Frere, *New History*, p 647.

21 There is no other possible legal basis, in spite of the limits to the royal prerogative in relation to legislation set in *AG v De Keyser's Royal Hotel* [1920] AC 508 (see also below).

22 Despite the wording of the royal warrant and of the title of the service itself (which may be seen as ambiguous), the service's use is authorised but not compulsory.

In addition to the four services just referred to, from the time of Henry VIII various days of what are variously called ‘special worship’, ‘days of special service’, ‘state services’ or ‘special services’ were ordered for use within, instead of or in addition to services prescribed by the *Book of Common Prayer* whether locally or more widely.²³ Between 1533 and 1688, save for the period from 1642 to 1660, orders for special worship with national significance were made only by the public authority of the state;²⁴ in England and Wales this was either by the sovereign or the government (by royal mandate, proclamation, order-in-council, statute ordinance, parliamentary order or declaration).²⁵ It is these services and prayers, together with the accession service, that have caused controversy as to their legality by reason of the wording of Canons 36 and 72 of the 1603 Canons and also of sections 3 and 4.²⁶ In particular, the limits of the royal prerogative were questioned.²⁷

In a book entitled *A Clergyman's Vade Mecum* the Reverend John Johnson, Vicar of Cranbrook, argued that the observance of the various special services rested in the fact that the Houses of Parliament

have, and do own this Power to be lodged in the Crown; as they do, by always submitting to these Royal Commands in observing these Days in

- 23 ‘Special worship’ is the phrase used in Mears et al, *National Prayers*, vol 1, p xlvi: “‘Special worship’ is an awkward phrase, which was not used by contemporaries and for which there is no historical authority . . . [I]t is a phrase which embraces the full range of occasions for which the civil and religious authorities in the British Isles ordered a departure from normal religious observance. These ranged from special services, such as those for the 1563 fast [in relation to a plague epidemic] or the 2012 thanksgiving [in relation to Elizabeth II’s Diamond Jubilee], to occasions when a single prayer was added to the normal daily liturgy. They also included annual religious commemorations such as the observance of the anniversary of the gunpowder plot on 5 November. Second, the phrase avoids the privileging of any of the terms used by contemporaries, whether fast and thanksgiving days, days of humiliation or intercession or national days of prayer, terms which have particular chronological associations and which often express important changes in the nature of these occasions across five centuries.’ Phillimore *Ecclesiastical Law*, vol 1, p 809, speaks of ‘days of special service’; Hefling and Shattuck, *Oxford Guide*, p 73, refer to ‘state services’ and Proctor and Frere, *New History*, p 646, use the term ‘special services’. These forms of worship might be a special prayer or prayers, a special service or services, a fast day or a day of thanksgiving: see Mears et al, *National Prayers*, vol 1, pp lv–lvi and lxii. Although the numbers must be treated conservatively, between 1533 and 2012 there were some 866 ‘particular occasions of worship and . . . nine annual commemorations’; such special worship included the issue of a special homily against disobedience (ibid, p lxxx).
- 24 Mears et al, *National Prayers*, vol 1, p lxi, n 10: ‘Partial exceptions occurred in the mid-nineteenth century, as ideas on ecclesiastical authority began to change’.
- 25 Ibid, vol 1, pp lvi–lviii; N Mears, ‘Special nationwide worship and the Book of Common Prayer in England, Wales and Ireland, 1533–1642’ in N Mears and A Ryrie, *Worship and the Parish in Early Modern Britain* (Farnham, 2013), pp 31–72.
- 26 See *The Canon Law of the Church of England* (London, 1947), p v. See also Mears et al, *National Prayers*, p lxi, n 10: ‘The grounds and expression of the crown’s authority over special worship . . . are not entirely clear, partly because they evolved through the period [1533–1688] and partly because orders have not survived for several occasions’. On the wording of the Canons, see ibid, pp lxi–lxii; but also see what is said above in relation to Canon 72.
- 27 W Adam, *Legal Flexibility and the Mission of the Church* (Farnham, 2011), pp 51–52; see also E Stillingfleet, *The Second Part of Ecclesiastical Cases* (London, 1704), pp 61 ff. As to the clerical oath of allegiance, see R Bursell, ‘The clerical oath of allegiance’, (2015) 17 *Ecc LJ* 295–305.

the manner prescrib'd by Proclamation, and sometimes petitioning the King or Queen to order these Religious Solemnities.²⁸

However, in 1715 the same author was cited before the ordinary to account for his failure to celebrate the service of the King's inauguration. In response he argued that the King's proclamation did not have the force of law in England; that the King was only supreme in ecclesiastical causes only as he is so in temporal matters (that is, in his courts); and that he knew of no supremacy which could be exercised without the authority of Parliament or Convocation, or the court of delegates, or the courts in Westminster Hall. Johnson also argued that he was bound by the restrictions of Canon 36 to use no other service than that in the *Book of Common Prayer* and that he was further bound by the Act of Uniformity.²⁹ It seems that there the matter rested until 1721 when the prosecution was resurrected; however, Johnson apparently then made a groveling apology and the matter proceeded no further.³⁰

The attitude to the position in 1865 was summed up in the *Report of Her Majesty's Commissioners appointed to consider the Subscriptions, Declarations, and Oaths Required to be Made and Taken by the Clergy*, where it is pointed out that the clergy were bound by the provisions of Canon 36 whereas the laity were not.³¹ It then proceeded to consider the Articles that required the clergy to use the prescribed forms of service 'and none other':

It has sometimes been thought that these words preclude the use of any other prayers excepting those which are contained in the Prayer Book, and therefore that the occasional prayers as well as the occasional services which have been enjoined from time to time cannot be read without a violation of the Clergyman's pledge. The better opinion however, which has been confirmed, at least as regards the occasional prayers, both by authority and long published usage, is that the words *none other* do not apply to 'additional prayers', but to prayers substituted *instead* of those which are prescribed by the Legislature. Thus an indictment for using other prayers and in other manner than is mentioned in the said Book has been judged insufficient, because it was agreed, the prayers used may be upon some extraordinary occasion, and so no crime; and it was said that the indictment ought to have alleged that the defendant used other

28 J Johnson, *A Clergyman's Vade Mecum* (London, 1709), vol 2, pp 198–199.

29 Phillimore, *Ecclesiastical Law*, vol 1, p 810.

30 *Ibid*, vol 1, pp 810–812. Phillimore suggests that the prosecution may have proceeded because of the publication by Johnson of his book *The Case of Occasional Days and Prayers*.

31 *Report of Her Majesty's Commissioners Appointed to Consider the Subscriptions, Declarations, and Oaths Required to be Made and Taken by the Clergy of the United Church of England and Ireland* (London, 1865), appendix 7, para 28.

forms and prayers *instead* of those enjoined, which were neglected by him, for otherwise every person may be indicted that uses prayers before the sermon other than such as are required by the Book of Common Prayer.³² The question with regard to the occasional services is certainly more difficult, because in these cases other prayers are used *instead* of those appointed in the Rubric.

Having referred to the case against the Reverend John Johnson, it then comments that it did not appear that thereafter the power of the Crown to order 'these special services' had since been questioned.

Interpretation

Questions about the interpretation of the Royal Declaration remained. In 1721, for example, Daniel Waterland condemned an argument by Arians and Deists that they were entitled to give only a minimal assent to the Articles:

These Articles (The 39. Articles) may lawfully and conscientiously be subscribed in Any Sense in which They Themselves, by their own Interpretation, can reconcile Them to Scripture (i.e. What They call Scripture; or their own Sense of Scripture) without regard to the Meaning and Intention, either of the Persons who first compiled Them or who now impose Them.³³

In the nineteenth century, too, the subscription continued to cause at least some of the clergy difficulties of conscience. For example, Arthur Clark, later to be Dean of Westminster, objected to the damnatory clauses in the Athanasian Creed and raised the issue during his examination prior to his ordination.³⁴ One clergyman resigned his living because he accepted the theory of evolution, while another resigned his orders

according to his own exaggerated account, because he could not believe in a universal flood, and at a time more than forty years after Canon Buckland taught that they must jettison belief in such a flood. But this picture of his own mind was a caricature. He did not lose his faith because he could no longer believe in a universal flood. His feelings revolted from reading a

32 The appendix here cites the case of *R v Sparkes* (1621) Win 6; 124 ER 5.

33 D Waterland, *The Case of Arian-subscription considered: and the several pleas and excuses for it particularly examined and confuted*, second edition (Cambridge, 1721, reprinted by ECCO Print Editions), p 7. Referred to in *Subscription and Assent to the Thirty-nine Articles*, para 11.

34 G Faber, *Jowett: a portrait with background* (London, 1957), p 147. Article 8 of the Thirty-nine Articles reads: 'The Three Creeds, Nicene Creed, Athanasius's Creed, and that which is called the Apostles' Creed, ought thoroughly to be received and believed: for they may be proved by most certain warrants of Holy Scripture.'

lesson or a liturgy where a universal flood was somehow assumed to be true though many of the worshippers had their reservations.³⁵

Indeed, Stanley was to say

Press these subscriptions in their rigid and literal sense and . . . there is not one clergyman in the church who can venture to cast a stone at another . . . they must all go out, from the greatest to the least, from the archbishop in his palace at Lambeth to the humblest curate in the wilds of Cumberland.³⁶

As a result the proper approach to the Thirty-nine Articles came before the courts on a number of occasions.³⁷ In *Burder v Heath*, Dr Lushington stated in the Court of Arches:

I apprehend that the course to be followed is, first, to endeavour to ascertain the plain grammatical sense of the Articles of Religion said to be contravened, and if that Article admit of several meanings, without any violation of the ordinary rules of construction or the plain grammatical sense, then I conceive that the Court ought to hold that any such opinion might be lawfully avowed and maintained. If, indeed, any controversy arise whether any given meaning is within the plain grammatical construction, the Court must form the best judgment it can, with this assistance, as I have already said, that if the doctrine in question has been held without offence by eminent divines of the Church, then, though perhaps difficult to reconcile with the plain meaning of the Articles of Religion, still a judge in my position ought not to impute blame to those who hold it. That which has been allowed or tolerated in the Church ought not to be questioned by this Court.³⁸

35 O Chadwick, *The Victorian Church Part II 1860–1901* (London, 1972), p 135.

36 Quoted in *ibid*, p 132.

37 See, eg, *HM Procurator General v Stone* (1808) 1 Hag Con 424; *Hodgson v Oakley* (1845) 1 Rob Ecc 322; *Gorham v Bishop of Exeter* (1849) 2 Rob Ecc 1; *Re Denison* (1856) 27 LTOS 300; *Burder v Heath* (1862) 15 Moo PCC 1; *Fendall v Wilson* (1862) 7 LT 474; *Williams v Bishop of Salisbury* (1864) 2 Moo PCCNS 375; *Voysey v Noble* (1871) LR 3 PC 357; *Sheppard v Bennett* (1871) LR 4 PC 371. See, generally, R Rodes, *Law and Modernization in the Church of England* (Notre Dame, IN, 1991), pp 250 ff; T Briden, *Moore's Introduction to English Canon Law*, fourth edition (London, 2013), p 145, n 24. It is surprising, at least to a lawyer, that in *Subscription and Assent to the Thirty-nine Articles*; Davie, *Inheritance of Faith*, pp 90–94; G Bray, *The Faith We Confess: an exposition of the Thirty-nine Articles* (London, 2009), appendix I; and Podmore, *Aspects of Anglican Identity*, ch 4, there is little discussion of the fact that the Articles have been given a legal interpretation by the courts.

38 *Burder v Heath* at p 45.

Then in *Williams v Bishop of Salisbury* the Judicial Committee of the Privy Council decided:

With respect to the legal tests of the doctrine of the Church of England, by the application of which the court is to try the soundness of the passages libelled, it is the province of that court, on the one hand, to ascertain the true construction of the Articles of Religion and Formularies referred to in each charge, according to the legal rules of interpretation of statutes and written instruments; and, on the other hand, to ascertain the plain grammatical meaning of the passages which are charged as being contrary to, or inconsistent with, the doctrines of the church.³⁹

‘Lawful authority’

It was against this background that a Royal Commission was appointed in 1864 to consider the subscriptions, declarations and oaths required to be taken by the clergy. As a result Parliament passed the Clerical Subscription Act 1865 which repealed the 1571 Act in part and made a solemn Declaration mandatory. In this declaration all ministers assented to the Thirty-nine Articles of Religion, the *Book of Common Prayer* and the Ordinal, and affirmed their belief in the Doctrine of the Church of England ‘as therein set forth’ to be agreeable to the Word of God. Ministers also had to declare that in public prayer and administration of the sacraments they would use ‘the Form in the said Book prescribed and none other, except as shall be ordained by lawful Authority’.

In the same year Canon 36 was replaced by a Canon, made and published by the Convocations of Canterbury and York and confirmed by Royal Letters Patent, which incorporated the new Declaration of Assent.⁴⁰ Nonetheless, the proper interpretation of the Thirty-nine Articles remained unaffected. In particular, neither the Royal Commission nor the Act itself attempted any definition of what the Act called ‘lawful authority’; in addition, the Act did not address the problem recognised by the Commission itself regarding the conflict between the wording of the Act of Uniformity and any ‘special services’ authorised by ‘lawful authority’, unless somehow the new declarations (based as they were on the Clerical Subscription Act 1865 itself) were intended to iron out the problem.⁴¹ Indeed, as Bullard commented: ‘Nothing could be better on paper.

39 *Williams v Bishop of Salisbury* at 375. In applying the rules of statutory interpretation the courts were usually disposed to allow a reasonable latitude in the interpretation of the Church’s formularies: 34 *Halsbury’s Laws of England*, fifth edition (London, 2011), para 1131, n 7.

40 J Bullard, *Constitutions and Canons Ecclesiastical 1604* (London, 1934), p 40.

41 Strangely, Phillimore, *Ecclesiastical Law*, does not give any guidance as to the meaning of the phrase ‘lawful authority’ although he comments (vol 1, p 810): ‘Some have questioned by what authority of law this solemnity [namely, the service of thanksgiving for the Sovereign’s inauguration], as also the other occasional thanksgivings and fasts appointed by the king are kept. Upon which Mr Johnson

The trouble arises from the fact that, as Lord Hugh Cecil once pointed out in another context, “Nothing is so permanent as a temporary adjustment.”⁴²

In so far as the duty to use the *Book of Common Prayer* ‘and none other’ is concerned, that book, unlike the Thirty-nine Articles, was actually annexed to a statute, namely the Act of Uniformity 1662.⁴³ As important, however, was Canon 14, which left the clergy little room for manoeuvre:

All Ministers ... shall observe the Orders, Rites, and Ceremonies prescribed in the Book of Common Prayer, as well in reading the holy Scriptures, and saying of Prayers, as in administration of the Sacraments, without either diminishing in regard of preaching, or in any other respect, or adding any thing in the matter or form thereof.⁴⁴

It is therefore not so surprising that the Judicial Committee gave as its opinion in *Martin v Machonochie* that

it is not open to a Minister of the Church ... to draw a distinction, in acts which are a departure from or violation of the Rubric, between those that are important and those that appear trivial. The object of a *Statute of Uniformity* is, as its preamble expresses, to produce ‘an universal agreement in the public worship of Almighty God’, an object which would be wholly frustrated if each Minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, to add to, or to alter any details of those details. The rule upon this subject has been

observes, that it is sufficient in this case (as he thinks) that the two houses of parliament have and do own this power to be lodged in the crown, as they do by submitting to these royal commands in observing such days, and sometimes petitioning him to order these religious solemnities.’ Nevertheless, the words ‘as he thinks’ seem to distance Phillimore somewhat from Johnson’s argument. *Lambeth Opinions on Incense and Processional Lights of the Archbishops at Lambeth Palace* (July 1899) states: ‘the only authority which can bind or authorise the clergyman to make any variation whatever from what is contained in the Book [of Common Prayer] is either an Act of Convocation, legalised when necessary by Parliament, or the order of the Crown, issued with the advice and consent of the metropolitan under the Act of 1559 or a direction of the ordinary under the Act of Uniformity Amendment Act 1872.’ Bullard, *Constitutions and Canons*, p 183, states: ‘Behind Canon 36, beside Convocations and Royal Letters Patent, is the authority of the Act of Royal Supremacy’. Halsbury’s *Laws of England*, third edition (London, 1957), in the volume *Ecclesiastical Law*, p 328, note o, having set out the provisions of section 21 of the Act of Uniformity 1662, states: ‘In other cases not expressly provided for by the statute the *ius liturgicum* of the archbishops and bishops is now often invoked, but it is very doubtful whether this has any legal basis.’

42 Bullard, *Constitutions and Canons*, p 183.

43 ‘Exact observance of the Prayer Book is enjoined by the Act of Uniformity, and to fail to observe it is an offence not only against that statute, but against the Queen’s ecclesiastical laws’: *Combe v De la Bere* (1881) 6 PD 157 at 173 *per* Lord Penzance.

44 ‘In this unmistakable manner have the canons of the Church added their sanction and authority to that of the Legislature for the strict observance of the forms prescribed by the Prayer Book, to the exclusion of all other forms not so prescribed’: *Combe v De la Bere* (1881) 6 PD 157 at 173 *per* Lord Penzance.

already laid down in *Westerton v Liddell*,⁴⁵ and their Lordships are disposed entirely to adhere to it: ‘In the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted.’⁴⁶

Problems nonetheless remained. Some, for example, suggested that the new form of subscription only required a ‘general’ assent – that is, ‘in the sense of an incomplete assent’ – although this was clearly not the legal position.⁴⁷ Equally, after Parliament rejected the attempt in 1928 to revise the 1662 Prayer Book, problems arose because both Convocations had given their assent to those revisions; a number of clergy thereafter used the 1928 Prayer Book instead of the *Book of Common Prayer*.⁴⁸ Therefore, in 1939 the Lower House of the Convocation of Canterbury requested the Archbishop of Canterbury in conjunction with the Archbishop of York to appoint a Commission ‘to consider the whole question of the revision and codification of the Canon Law’.⁴⁹ Unsurprisingly, the Commission did not report until May 1946. In an addendum to its report, *The Canon Law of the Church of England*, entitled “‘Lawful authority’: a memorandum’, Mr Justice Vaisey gave as his opinion:

What was apparently recognized in 1865 (at any rate by the Dean of Ely) has been consistently overlooked since . . . that the precise definition of ‘lawful authority’ is impossible. It is true in a sense to say that nobody can be sure what the words mean, either to himself or to anybody else, and that their effect has been to convert an obligation which was impossible to perform into one which is impossible to understand.⁵⁰

45 (1857) Moore’s Special Report 1 at 188.

46 (1868) LR 2 PC 365 at 382–383. Surprisingly, perhaps, there were nonetheless a few exceptions. In *Hutchins v Denziloe and Loveland* (1792) 1 Hag Con 170 at 175–180, it was decided by Sir William Scott that by reason of liturgical practice, both ancient and at the Reformation, the singing of psalms and hymns during a service according to the *Book of Common Prayer* was legal. The singing of the *Agnus Dei* in English during the reception of the elements during Holy Communion was also held to be legal in *Read v Bishop of London* [1892] AC 644 at 659–661 (in effect overruling *Elphinstone v Purchas* (1870) LR 3 A & E 66 and *Martin v Machonochie* (No 2) (1874) LR 4 A & E 279). Another exception was the changing of a name at confirmation: *In re Parrott, Cox v Parrott* [1946] Ch 183 at 186 *per* Vaisey J. See, too, R Bursell, ‘Consecration, *ius liturgicum* and the Canons’ in N Doe, M Hill and R Ombres, *English Canon Law* (Cardiff, 1998), pp 71–81.

47 Podmore, *Aspects of Anglican Identity*, p 45, points out: ‘At the time, it was thought by some (including speakers in the parliamentary debates) that the replacement of subscription “willingly and from the heart” with “assent” somehow made the assent required only “general”. However, against this view it was held, both in 1865 and subsequently, that “in law”, “assent” must be taken to mean “complete legal acceptance”.’ See, too, *Subscription and Assent to the Thirty-nine Articles*, paras 1–8; Davie, *Our Inheritance of Faith*, p 77.

48 See R Bursell, *Liturgy, Order and the Law* (Oxford, 1996), pp 1, 273–274.

49 *Canon Law of the Church of England*, p viii.

50 This led Chancellor Garth Moore to comment in *An Introduction to English Canon Law* (Oxford, 1967), pp 62–63: ‘Much ink has been spilt and many words poured forth in an attempt to discover

However, in spite of its chairman, the Archbishop of York, expressing concerns about ‘very different interpretations [being] given to the meaning of the “lawful authority” to which the Declaration refers’, no alteration was suggested to the Declaration of Assent.⁵¹ Instead, a new Canon XIII was proposed.⁵²

Of Lawful Authority

The following shall be deemed to have been, and to be, ordered by lawful authority within the meaning of the Declaration of Assent . . . that is to say

- (A) Public Services from time to time enjoined or authorized by Royal Warrant or Proclamation with the sanction or approval of the Archbishops of Canterbury and York;
- (B) such changes in the form prescribed by the Book of Common Prayer as are required or sanctioned by the [specified] enactments;
- (C) such deviations (whether by way of addition, omission, alternative use, or otherwise) from the said form as the Convocations of the respective Provinces of Canterbury and York may respectively order, allow, or sanction within the said respective Provinces . . . ;
- (D) any form of service which (when there is occasion for a form of service for which no provision is made in the Book of Common Prayer) shall have been sanctioned by the Ordinary . . .⁵³

Nonetheless, this approach meant that (without such a definition or repeal) the door was still open for an argument that other possible ‘authorities’ might authorise other services or alterations.⁵⁴

the meaning of lawful authority, and it is now clear that the meaning is elusive and that no interpretation is likely to meet with general acceptance. By far the most workable explanation is that provided by Mr Justice Vaisey. He suggests that lawful authority can be determined only by reference to the context of the occasion on which the deviation is made. Thus, at one end of the scale, the addition of prayers of thanksgiving by the whole nation for deliverance from some national catastrophe might be lawfully authorized by royal proclamation with the approval of the two archbishops; lower in the scale, prayers for the success of some diocesan venture might be lawfully authorized by the bishop of the diocese concerned; and, lower still, intercessions in respect of some sudden, local disaster (in, for example, a mining village) could be lawfully authorized by the parish priest. It is by no means universally accepted that the learned Judge’s explanation is the right one.’

51 See the foreword in *Canon Law of the Church of England*, p v, and *ibid*, pp 160–161. The Clerical Subscription Act 1865 was still in force but no suggestion was made as to its amendment.

52 The proposed Canon was not to the prejudice of the episcopal right to appease diversity and resolve doubts pursuant to the Preface to the *Book of Common Prayer*: see *Canon Law of the Church of England*, p 113.

53 *Ibid*, pp 112–113.

54 Such as the parish priest in the example given by Chancellor Garth Moore (see above, n 50). The words ‘shall be deemed to have been, and to be’ seem in retrospect to have been an admission of defeat.

Episcopal authority

During the reign of Elizabeth I bishops ordered prayers for use which were not authorised by the then Act of Uniformity, but both before and after the 1604 Canons uncertainty remained. Indeed,

After the Restoration in 1660, and probably by the 1630s (with the obvious exception of 1642–60), it had become accepted that crown orders were required for fasts, thanksgivings and prayers observed not just throughout the kingdom, but also in the ecclesiastical provinces, in dioceses, and in parishes. Archbishops and bishops ceased to order special worship on their own authority for their provinces and dioceses, in England and Wales . . . these orders became a crown monopoly.⁵⁵

There were, however, partial exceptions in the mid-nineteenth century as ideas on ecclesiastical authority began to change.⁵⁶ Nevertheless, the long discontinuance might be the basis for an argument that there can be no legal basis for this or any subsequent such exercise of episcopal authority (save as might be granted by legislative authority) as, even if there were any pre-Reformation legal basis for such an authority, it has not been ‘recognised, continued and acted upon in England since the Reformation’.⁵⁷ Yet this would be to ignore the fact that the bishops *did* exercise such authority in areas other than fast days and so forth, although primarily in relation to services not included in the *Book of Common Prayer*, such as the consecration of churches.⁵⁸ In addition, after 1919 national days of prayer, although announced by the King’s wish, were organised not

55 Mears et al, *National Prayers*, vol 1, pp lxii–lxiii.

56 *Ibid*, vol 1, p lxi. (Volumes 2 and 3 of this work, dealing with the years from 1689 to 2012, have yet to be published but the legal principle remains the same. See, however, P Williamson, ‘National days of prayer: the churches, the state and public worship in Britain, 1899–1957’, (2013) 128 *English Historical Review* 323–366.) The discontinuance by the episcopal authority may possibly be explained by the bishops’ bowing to the pressures of the royal prerogative.

57 *Bishop of Exeter v Marshall* (1868) LR 3 HL 17 at 53–54; *Re St Mary’s, Westwell* [1968] 1 WLR 513; 34 *Halsbury’s Laws of England*, para 9.

58 Bursell, ‘Consecration, *ius liturgicum* and the Canons’, p 73, n 17: ‘Consecration . . . provides one of the rare occasions when it is possible to demonstrate that a usage of pre-Reformation canon law has been recognized, continued and acted upon since the Reformation’. As to the legality of such services see *ibid*, pp 72–76. E Stopford, *A Handbook of Ecclesiastical Law and Duty for the Use of the Irish Clergy* (Dublin, 1861), p 291, said: ‘The use of such service is in no way contrary to the Acts of Uniformity, which have not touched the matter of consecration of churches.’ However, Phillimore, *Ecclesiastical Law*, vol 2, p 1390 says: ‘Consecration services therefore rest, as originally all services rested, on the authority of the bishop. It is to be supposed (in the view of the editor) that either consecration services are outside the scope of the acts of uniformity, or that bishops (notwithstanding the decision in *Read v Bp. of Lincoln* [1899] 14 PD 148) are, when officiating, outside its scope. Otherwise it would be difficult to find legal warrant either for these well established services or for those of dedicating sacred vessels, or bells, or lifeboats, or colours or ships about to be launched.’ (Subsequently, however, *Read v Bishop of Lincoln* was affirmed on appeal: [1892] AC 644.) As to the *ius liturgicum*, see also 34 *Halsbury’s Laws of England*, para 732, n 10.

only by the ecclesiastical authorities of the Church of England but also by those of the other churches.⁵⁹

THE PRESENT DAY

As a result of the Report of the Archbishops' Commission, when the revised Canons were first promulgated by the Convocations from 1964 to 1969, the new Canon C 15, paragraph 2, continued the same requirement as before: namely, an assent to the Thirty-nine Articles and a declaration that 'the doctrine of the Church of England as therein set forth to be agreeable to the Word of God'.⁶⁰ However, in 1967 the Archbishops of Canterbury and York appointed a Commission on Christian Doctrine, the first task of which was 'to consider the place of the Thirty-nine Articles in the Anglican tradition and the question of Subscription and Assent to them'. Two years later, the Ordination of Ministers Act 1571 was repealed.⁶¹

In 1965 the Prayer Book (Alternative and Other Services) Measure had been enacted in order to legalise a variety of the liturgical practices then current in the Church of England and in an attempt to identify which authorities could authorise specified departures from the *Book of Common Prayer*.⁶² Thereafter the General Synod passed the Church of England (Worship and Doctrine) Measure 1974,⁶³ section 1(t) of which, while continuing to enshrine the use of 'the forms of service contained in the Book of Common Prayer', gave the Synod power

- (a) to make provision by Canon with respect to worship in the Church of England, including provision for empowering the General Synod to approve, amend, continue or discontinue forms of service;⁶⁴

59 Williamson, 'National days of prayer', p 330. It is necessary to bear in mind that the limits of the royal prerogative in relation to legislation were set in *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508.

60 *The Canons of the Church of England*, seventh edition (London, 2012), xi.

61 By the Statute Law (Repeals Act) 1969, s 1, Sch. Part II.

62 J Simpson, 'The new alternative services', (1966) 80:1 *The Churchman* 26–33, available at <biblicalstudies.org.uk/pdf/churchman/080-01_026.pdf>, accessed 2 February 2016; Moore, *Introduction to English Canon Law*, p 63.

63 The Measure also repealed, inter alia, the Act of Uniformity 1548, the Act of Uniformity 1558 (in so far as previously unrepealed), the Act of Uniformity 1662 (save for ss 10 and 15) and various parts of the Clerical Subscription Act 1865, as well as the Prayer Book (Alternative and Other Services) Measure 1965.

64 Section 4 is concerned with the safeguarding of doctrine. Any provision must be 'such as in the opinion of the General Synod is neither contrary to, nor indicative of any departure from, the doctrine of the Church of England in any essential matter' (s 4(t)). However, 'the final approval by the General Synod of any such Canon or regulation or form of service or amendment thereof shall conclusively determine that the Synod is of such opinion with respect to the matter approved'. Therefore, although the provision in n 2 annexed to the *Common Worship* service of Emergency Baptism (*Common Worship: Pastoral Services*, second edition (London, 2005)) in relation to ultimate salvation seems to indicate a change of doctrine from that in the *Book of Common Prayer* (see Bursell, *Liturgy, Order and the Law*, pp 131–132; N Doe, 'Obedience to doctrine in canon law: the legal duty of intellectual assent', (1992) 7 *Denning Law Journal* 23–40 at 33; 34 *Halsbury's Laws of England*, paras

- (b) to make provision by Canon or regulation made thereunder for any matter, except the publication of banns of matrimony to which any of the rubrics contained in the Book of Common Prayer relate.

Section 1(7) specifically states that

In the prayers for or referring to the Sovereign or other members of the Royal Family contained in any form of service⁶⁵ authorised for use in the Church of England, the names may be altered, and any other necessary alterations made, from time to time, as the circumstances require by Royal Warrant, and those prayers as so altered shall be used thereafter.⁶⁶

In addition, section 2(1) enacted that

It shall be lawful for the General Synod to make provision by Canon with respect to the obligations of the clergy, deaconesses and lay officers of the Church of England to assent or subscribe to the doctrine of that Church and the forms of assent or subscription which may include any explanatory preface.

The results were twofold: first, the provision of *Alternative Services* and now of *Common Worship*; second, the amendment of the provisions as to the Declaration of Assent.

As a consequence of the new provisions regarding liturgy and worship the previous rigorist interpretation of the *Book of Common Prayer* has been swept aside⁶⁷ and all rubrics in all authorised services are now to be regarded as having a similar force.⁶⁸ Nevertheless, in spite of the fact that Canon B 1 is headed 'Of the conformity of worship' rather than 'Uniformity of worship', it makes clear that 'Every minister shall use only the forms of service authorized by this Canon, except so far as he may exercise the discretion permitted by Canon B 5.'⁶⁹ Paragraphs 1 and 2 of Canon B 5 respectively give the minister conducting a service a discretion 'to make and use variations which are not of

40, n 3, and 733, n 3), s 4(t) ensures that the change of doctrine has been made even though the procedural rules of the General Synod as to such a change were apparently not adhered to.

65 Section 5(t) defined 'Form of service' as meaning 'any order, service, prayer, rite or ceremony whatsoever, including the services for the ordination of priests and deacons and the consecration of bishops and the catechism or form of instruction before confirmation'.

66 These words cannot give the Crown authority to create new forms of service.

67 *In re St Thomas, Pennywell* [1995] Fam 50 at 62–67; *In re St John the Evangelist* [1995] Fam 254 at 258; *Re St Nicholas, Arundel* [2001] All ER (D) 382 (Jun) at 12–15; Bursell, *Liturgy, Order and the Law*, pp 11–13.

68 *Re St Peter and St Paul, Leckhampton* [1968] P 495; *In re St Thomas, Pennywell* at 62–65; Bursell, *Liturgy, Order and the Law*, p 14; 34 *Halsbury's Laws of England*, para 752.

69 Canon B 1, para 2. The first paragraph sets out those forms of service which are authorised and the third paragraph gives a very wide definition of the words 'forms of service'.

substantial importance' and the minister having the cure of souls authority to use forms of service considered suitable by him for those occasions 'for which no other provision is made'.⁷⁰

The provisions as to subscription and the Declaration of Assent were likewise replaced.⁷¹ Canon C 15 was amended in 1975, 1992 and 2005.⁷² Canon C 15, paragraph 1, now states:

The Declaration of Assent to be made under this Canon shall be in the form set out below:

PREFACE

The Church of England is part of the One, Holy, Catholic and Apostolic Church worshipping the one true God, Father, Son and Holy Spirit. It professes the faith uniquely revealed in the Holy Scriptures and set forth in the catholic creeds, which faith the Church is called upon to proclaim afresh in each generation. Led by the Holy Spirit, it has borne witness to Christian truth in its historic formularies, the Thirty-nine Articles of Religion, *The Book of Common Prayer* and the Ordering of Bishops, Priests and Deacons. In the declaration you are about to make will you affirm your loyalty to this inheritance of faith as your inspiration and guidance under God in bringing the grace and truth of Christ to this generation and making him known to those in your care?

Declaration of Assent

I, A B, do so affirm, and accordingly declare my belief in the faith which is revealed in the Holy Scriptures and set forth in the catholic creeds and to which the historic formularies of the Church of England bear witness; and in public prayer and administration of the sacraments, I will use only the forms of service which are authorized or allowed by Canon.

70 Any such variations or forms of service must be 'reverent and seemly and shall be neither contrary to, nor indicative of any departure from, the doctrine of the Church of England in any essential matter': Canon B 5, para 3.

71 Podmore, *Aspects of Anglican Identity*, p 43, comments: 'When representatives of the Church of England are asked in ecumenical discussions for a definition of the Church's position, it is to the Declaration of Assent and its Preface that they increasingly turn.' He goes on to emphasize that the Declaration of Assent is 'a defining text for the Church's identity'. See, too, the Report to the Church of England Synod by the House of Bishops entitled *The Nature of Christian Belief* (published April 1986) and the discussion in Doe, 'Obedience to doctrine', in relation to the debates in the General Synod about doctrinal offences.

72 By Amending Canons 4, 15 and 24 (promulgated 4 July 1975, 11 July 1992 and 16 November 2005 respectively). Although the form of the last amendment was approved by the General Synod in 2000, it was not formally enacted until 2005.

The result of this new wording is that ‘the Articles of Religion are no longer seen as definitive arbiters of the doctrine of the Church of England’.⁷³ Indeed, this view of the law has now been confirmed by the Court of Arches in *re St Alkmund, Duffield*.⁷⁴

Moreover, the declaration that the cleric will ‘use only the forms of service which are authorized or allowed by Canon’ is also a change from the previous Declaration, which stated: ‘in Public Prayer and Administration of the Sacraments I will use the Form in the said Book [of Common Prayer] prescribed and none other, except as shall be ordained by lawful Authority’. Not only does the new Declaration provide for the new forms of service that are additional to those still authorised in the *Book of Common Prayer* and the shortened forms of Morning and Evening Prayer,⁷⁵ but the words ‘ordained by lawful Authority’ were replaced by specific provisions as to which authority may authorise what forms of service.⁷⁶ The wording of the new Declaration of Assent which refers to the use of ‘the forms of service which are authorized or allowed by Canon’⁷⁷ is not a discrepancy from the wording of Canon B 1, paragraph 2, as the word ‘allowed’ refers to the additional matters permitted by Canon B 5.

In addition, Canon B 1, paragraph 1, specified which forms of service are authorised for use in the Church of England, namely:

- (a) the forms of service contained in *The Book of Common Prayer*;⁷⁸
- (b) the shortened forms of Morning and Evening Prayer which were set out in the Schedule to the Act of Uniformity Amendment Act 1872;
- (c) the form of service authorized by Royal Warrant for use upon the anniversary of the day of the accession of the reigning Sovereign;
- (d) the form of service approved under Canon B 2 subject to any amendments so approved, to the extent of such approval;

73 *Re Christ Church, Waltham Cross* [2002] Fam 51 at para 24 per Bursell Ch. See, too, *Re St Thomas, Pennywell* [1995] Fam 50 at 58; Davie, *Our Inheritance of Faith*, pp 78–79. This does not mean that there has been a change in doctrine within the Articles but, rather, that the scope of doctrine is wider than the Articles: see *Re St Michael the Archangel, Warfield* (2013) 16 Ecc LJ 247. In commenting on the wording of the Declaration of Assent, Bray, *The Faith We Confess*, pp 223–224, states: ‘By this form of words, the Church of England has been able to satisfy those who still uphold the authority and integrity of the Thirty-nine Articles (not to mention the other sources of doctrine and worship listed in the Preface) without allowing them to hold other members of the church accountable for their failure to do the same.’

74 [2013] Fam 158 at para 24. In *Shergill v Kaira* [2014] UKSC 33 at para 59, the Supreme Court emphasised that the court ‘may have to adjudicate upon matters of religious doctrine and practice’; *a fortiori* this is true in relation to Anglican ecclesiastical law, which is as much the law of the land as any other part of the law (*Edes v Bishop of Oxford* (1667) Vaugh 18 at 21; *Mackonochie v Lord Penzance* (1881) App Cas 424 at 446). See, too, The Ecclesiastical Jurisdiction Measure 1961, ss 6(1)(a), 7(1)(b), 10(1)(a), 14(1)(a); Faculty Jurisdiction Rules 2015 rr 7(3)(i), 22(2)–(4), 23(3)(a).

75 Canon B 1, para 1(a)(b).

76 See Canon B 1, para 1(c)–(f). The words ‘lawful authority’ had previously led to very many different interpretations: *Canon Law of the Church of England*, p v.

77 Emphasis added.

78 The words ‘form of service’ are given a wide definition by Canon B 1, para 3.

- (e) any form of service approved under Canon B 4 subject to any amendments so approved, to the extent permitted by such approval;
- (f) any form of service authorized by the archbishops under Canon B 5A, to the extent permitted by such authorization.

These provisions specify a hierarchy of authorities which may authorise forms of service and in what circumstances. Save for Canon B 1, paragraph 1(c), no mention is made of any power in the Crown to authorise services. Indeed, in the light of the fact that the Crown has not attempted to exercise any such wider authority since 1919, and of the decision in *Attorney-General v De Keyser's Royal Hotel*,⁷⁹ it is highly unlikely that the royal prerogative could or would be called in aid by any sovereign in order either to dispense from any forms of service otherwise authorised or separately to authorise any additional form of service. What is more, any *ius liturgicum* which might still be argued to reside in the bishops is now either wholly ruled out or abrogated in the light of the decision in *Read v Bishop of Lincoln*⁸⁰ or is entirely subsumed within the provisions of the Canons themselves.

Who must make the Declaration

Every person who is to be ordained priest or deacon must make the Declaration before his or her ordination,⁸¹ as must every person who is to be consecrated bishop on the occasion of his or her consecration.⁸² Every clerk in Holy Orders who is to be instituted, installed, admitted or licensed to any office in the Church of England or otherwise licensed to serve in any place must first make the Declaration unless he or she has been ordained the same day and has made it then.⁸³ It must also be made by every archbishop and bishop on the occasion of his or her enthronement in the cathedral church of the relevant

79 [1920] AC 508. Although it might be argued that this case is concerned with non-ecclesiastical matters and that the Sovereign is in a different position vis-à-vis the Church by reason of the royal supremacy (see Canon A 7), any Measure passed by the General Synod has the force and effect of an Act of Parliament once it has received the royal assent, and that in itself makes it probable that the Crown is in a similar position in both jurisdictions, at least in so far as ecclesiastical legislation is concerned: Church of England Assembly (Powers) Act 1919, s 4; Synodical Government Measure 1969, s 2(2), Sch II, para 6(a)(i). It also means, for example, that the Crown cannot (at least now) dispense from any provisions of the *Book of Common Prayer* which are enshrined by the Church of England (Worship and Doctrine) Measure 1974, s 1, proviso. Moreover, as a Canon made under the 1974 Measure only has 'the same legislative force as Canons heretofore made, promulgated and executed by the Convocations of Canterbury and York' (Synodical Government Measure 1969, 1(1)(3)(5a), Sch I, para 1, Sch II, para 6(a)(ii)) and cannot be 'contrary or repugnant to the Royal prerogative' (Submission of the Clergy Act 1533, ss 1, 3; Synodical Government Measure 1969, s 1(3)(b)), it is nevertheless highly improbable that the Crown would now attempt to dispense from any forms of service authorised only under Canon.

80 [1892] AC 644.

81 Canon C 15, para 1(4).

82 Canon C 15, para 1(3).

83 Canon C 15, para 1(5).

province or diocese;⁸⁴ it must similarly be made by any suffragan bishop on the occasion of his or her investiture.⁸⁵ Once made, the Declaration is binding unless and until a cleric formally renounces his or her Orders.⁸⁶ As Canon C 15, paragraph 1(6), states:

Where any bishop, priest or deacon ceases to hold office in the Church of England or otherwise ceases to serve in any place the Declaration made under this Canon shall continue to have effect in so far as he continues to minister in the Church.

A deaconess must make a similar Declaration before the bishop or commissary admitting her to the order of deaconesses,⁸⁷ as must a reader on admission to the office of reader.⁸⁸ Diocesan chancellors and their deputies who are lay persons, as well as the Dean of the Arches and Auditor, any deputy Dean, any person appointed to hold office as a judge in those courts and any diocesan registrar, must first make a declaration of his or her belief 'in the faith which is revealed in the Holy Scriptures and set forth in the catholic creeds and to which the historic formularies of the Church of England bear witness'.⁸⁹

The making of the Declaration

The preface which precedes the Declaration of Assent must be spoken by the archbishop or bishop or commissary in whose presence the Declaration is to be made, before the making of the Declaration.⁹⁰ In the case of the investiture of a suffragan bishop the preface must be spoken by the archbishop.⁹¹ Where a minister has been instituted, installed, licensed or admitted in some place other than the place where he or she is to serve, the preface is to be spoken by the incumbent or another priest having the care of souls.⁹² On the enthronement of an archbishop or bishop the preface is spoken by the dean or, if the dean is absent abroad or incapacitated through illness or the office is vacant, by such one of the residentiary canons as those canons may select.⁹³

84 Canon C 15, para 2.

85 Canon C 15, para 3.

86 Clerical Disabilities Act 1870, ss 3 and 4. See 'Crematorium funerals and parochial fees', issued by the Legal Office of the Church of England, <<https://www.churchofengland.org/about-us/structure/churchlawlegis/guidance.aspx>>, accessed 21 January 2015.

87 Canon D 2, para 5.

88 Canon E 5, para 4.

89 Canon G 2, para 3(b); Canon G 3, paras 5 and 6.

90 It must be made in each case with such adaptations as are appropriate: Canon C 15, para 1(2).

91 Canon C 15, para 3.

92 Canon C 15, para 4. In such a case the minister must make the Declaration either on the first Lord's Day on which he or she officiates in the church or one of the churches in which he or she is to serve, or, in the case of a minister instituted or licensed to serve in a guild church, in that church on such weekday as the bishop may approve.

93 Canon C 15, para 2.

A person to be ordained priest or deacon must make the Declaration in the presence of the archbishop or bishop by whom he or she is to be ordained⁹⁴ and every clerk in Holy Orders who is to be instituted, installed, admitted or licensed must first make the Declaration in the presence of the bishop by whom he or she is instituted, installed, admitted or licensed or of the bishop's commissary.⁹⁵ In all other cases the Declaration must be made 'publicly and openly' in the presence of the assembled congregation⁹⁶ and, in the case of a diocesan or suffragan bishop, in the presence of the relevant archbishop.⁹⁷

Deaconesses and readers make their declarations in the presence of the bishop by whom they are being admitted or his or her commissary and the preface is first read by the bishop or his or her commissary.⁹⁸ There is a similar provision for those lay persons being made chancellors, save that the declaration is made before the bishop in the presence of the diocesan registrar or in open court in the presence of the registrar.⁹⁹ The Dean of the Arches and Auditor, his or her deputy and other lay judges of that court must make and (unlike deaconesses and readers) subscribe their declarations either before the archbishop in the presence of the provincial registrar or in open court in the presence of that registrar.¹⁰⁰ A provincial or diocesan registrar makes and subscribes the declaration in the presence of the relevant archbishop or bishop.¹⁰¹

Effect of a breach by a cleric¹⁰²

Professor Norman Doe has argued that

In the Church of England, though there are ... duties of assent to the church's doctrines, the basic legal principle is that any statement of doctrine not *clearly* offensive to the church's legally approved doctrines, or upon which the church's doctrines are silent, is not actionable in the ecclesiastical courts. The church possesses legal power to institute doctrinal proceedings ... But, as a matter of fact, the ecclesiastical courts have not entertained such proceedings in recent years, even when these have

94 Canon C 15, para 1(4). Any person who in pursuance of a request and commission from a bishop of any diocese in England is ordained by an overseas bishop within the meaning of the Overseas and Other Clergy (Ministry and Ordination) Measure 1967, or of a bishop in a Church not in communion with the Church of England whose orders are recognised or accepted by the Church of England, shall be deemed to be ordained by a bishop of a diocese in England and accordingly shall make the Declaration of Assent: Canon C 15, para 5.

95 Canon C 15, para 1(5). This does not apply if the clerk has been ordained on the same day and made the Declaration.

96 Canon C 15, paras 1(3), 2, 3 and 4.

97 Canon C 15, para 1(3). See Podmore, *Aspects of Anglican Identity*, pp 54–56.

98 Canons D 2, para 5; Canon E 5, para 4.

99 Canon G 2, para 3.

100 Canon G 3, paras 5 and 6.

101 Canon G 4, para 3.

102 As to enforcement against the laity, see 34 *Halsbury's Laws of England*, para 10, nn 11 and 12.

seemed likely. For this reason it is tempting to conclude that something like an ecclesiastical convention has developed, fettering the use of these legal powers, giving the Synod rather than the courts the function of resolving such questions. Whatever the role of the difficulty in identifying whether a statement is offensive to ecclesiastical doctrine, an essentially theological problem, or whether inaction by the church authorities is now explicable by means of an ecclesiastical convention, in the final analysis, it is the canon law which, in the Church of England, . . . supplies the right to the individual's private and public withholding of assent to ecclesiastical doctrine.¹⁰³

However, he later conceded:

It would be foolish to say that there can never be a situation in which it would be right (or, more likely, unavoidable as a last resort) to take such a step. But such cases as there have been in modern times are not encouraging.¹⁰⁴

Indeed, these second thoughts must be correct, as it is difficult to see, even if such a convention were to exist, how it could prevent proceedings being brought in accordance with the provisions of the 1963 Measure, especially as such proceedings in some cases may be brought by members of the laity alone and therefore not by any 'church authorities'.¹⁰⁵

The second question to be answered is whether the alleged breach is one 'involving matter of doctrine, ritual or ceremonial', as such cases do not fall within the ambit of the Clergy Discipline Measure 2003 and remain within that of the 1963 Measure.¹⁰⁶ In most cases involving an alleged breach of the Declaration of Assent such matters will indeed be involved but that is not necessarily so. For example, a failure to follow the provisions of Canon C 15 in relation to the actual administration of the Declaration would fall within the 2003 Measure. Other matters may not be so simple. For example, in *Bland v Archdeacon of Cheltenham*¹⁰⁷ it was alleged that the incumbent had refused to baptise, or had delayed baptising (except for the purpose of preparing or

103 Doe, 'Obedience to doctrine', p 40 (emphasis in original). See also N Doe, *The Legal Framework of the Church of England* (Oxford, 1996), p 267.

104 Doe, *Legal Framework*, p 267. See also N Doe, *Christian Law* (Cambridge, 2012), pp 209 ff.

105 Ecclesiastical Jurisdiction Measure 1963, ss19(b) and 20.

106 Clergy Discipline Measure 2003 s 7(2). See also *Re St Alkmund, Duffield* [2002] Fam 51; *Re St Michael the Archangel, Warfield* (2013) 16 Ecc LJ 247. See, generally, R Bursell, 'Turbulent priests: clerical misconduct under the Clergy Discipline Measure 2003', (2007) 9 Ecc LJ 250–263 at 252–255. There seems to be no appreciable difference between an offence 'involving matter of doctrine, ritual or ceremonial' (the wording used in the 1963 Measure) and an allegation that an act or omission 'relates to matters of doctrine, ritual or ceremonial' (the wording of the 2003 Measure).

107 [1972] 1 All ER 1012.

instructing the parents or godparents), an infant within his cure, contrary to Canon B 22, paragraph 4. Indeed, the incumbent admitted to having demurred at baptising the child ‘on grounds of doctrine and conscience’. In particular he stated that to administer the sacrament of baptism would have been an instance of indiscriminate infant baptism, which he believed to be contrary to the true doctrine of the Christian faith and to Holy Scripture.¹⁰⁸ However, the Court of Arches stated:

Certain offences clearly involve a matter of doctrine, eg a public statement (as in a sermon or book) denying the doctrine of the Trinity or of the deity of Christ. These offences would be charged as such . . . This alleged offence is of a different nature. The act of refusal to baptise a child is not a doctrinal offence as such and is not charged as such. It is concerned with pastoral work and activity. The motive behind the refusal might be partly connected with a doctrinal view held by the person refusing but the act of refusing to baptise cannot be called an offence against doctrine nor was it charged as such in this case.¹⁰⁹

The use of a form of service which is not ‘authorised or allowed by Canon’ could clearly ground a complaint under the Clergy Discipline Measure 2003 but each case will require careful analysis. An allegation that a minister having a cure of souls has permitted the use of a form of service which was contrary to, or indicative of a departure from, the doctrine of the Church of England is likely to be brought under the 1963 Measure, whereas an allegation that a variation from an authorised form of service was not ‘reverent and seemly’ would seemingly be the ground of a complaint under the 2003 Measure.¹¹⁰

If an allegation does, indeed, involve a matter of doctrine, a question of the interpretation of the Thirty-nine Articles might again be raised but, bearing in mind the new wording of the Declaration of Assent, it is unlikely that much, if anything, would turn upon questions of interpretation.¹¹¹

¹⁰⁸ Ibid, at 1016(g)–(h).

¹⁰⁹ Ibid, at 1017(c)–(e).

¹¹⁰ See Bursell, ‘Turbulent priests’, p 254. Canon B 5, para 4, states: ‘If any question is raised concerning the observance of the provisions of this Canon it may be referred to the bishop in order that he may give such pastoral guidance, advice or directions as he may think fit, but such reference shall be without prejudice to the matter in question being made the subject matter of proceedings under the Ecclesiastical Jurisdiction Measure 1963.’ In spite of this, it is suggested that in appropriate circumstances a complaint may be laid under the 2003 Measure. This is particularly so in the example given, as the provision in Canon B 1, para 2, that ‘[the minister] shall endeavour to ensure that the worship offered glorifies God and edifies the people’ is not subject to a similar (possible) restraint.

¹¹¹ 34 *Halsbury’s Laws of England*, para 1131: ‘the general effect of recent legislation has clearly been to give the clergy, among others, a greater liberty of interpretation than the law had allowed in the past with respect to the church’s formularies’. It is true that only the Court of Ecclesiastical Causes Reserved and Commissions of Review are no longer bound by ‘any decisions of the Judicial Committee of the Privy Council in relation to matter of doctrine, ritual or ceremonial’ (Ecclesiastical Jurisdiction

It should, of course, also be borne in mind that where any bishop, priest or deacon ceases to hold office in the Church of England or otherwise ceases to serve in any place the Declaration of Assent continues to have effect in so far as he or she continues to minister in the Church.¹¹²

Finally, although there have been no proceedings for the offence of heresy for many years, it may be noted that the theoretical possibility of such proceedings against members of the clergy still remains. Nevertheless, any proceedings would nowadays almost certainly be brought in relation to a breach of the Declaration of Assent rather than as heresy.¹¹³

Measure 1963, ss 45(3) and 48(5)) but, in the light of so many alterations to the law upon which those cases were based, it is likely that no other court or tribunal will now be bound by them as a matter of precedent: see *Re St Thomas, Pennywell* [1995] Fam 50 at 70; *Re St Nicholas, Arundel* [2001] All ER (D) 382 (Jun).

- 112 Canon C 15, para 1(6). Although an archbishop is not specifically mentioned, and in spite of the legal maxim *expressio unius est exclusio alterius* ('the expression of one thing excludes all others'), it is inconceivable that an archbishop is not on this occasion embraced within the word 'bishop'.
- 113 In *Pilling v Whiston* (1714) 1 Hag Con 433 n, a suit was promoted for heresy in publishing doctrines contrary to the Articles of Religion; the Elizabethan statute was not mentioned. After a number of procedural actions it was decided that the case might proceed. However, the suit was dropped after there had been full arguments on the merits. In *Williams v Bishop of Salisbury* the defendant was prosecuted for publishing heretical doctrines in contravention of the Thirty-nine Articles.