WITH AN EYE TOWARDS 2000

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JUDGE RUPERT BURSELL QC

Chancellor of the Dioceses of Durham and St Albans

I confess that I am not a natural early riser but it is still a great joy for me to celebrate at my parish's 8 o'clock Holy Communion service, especially when the rite is *the Holy Communion service from the Book of Common Prayer. I am not saying* that I do not enjoy, and do not see the worth of, the rites in the Alternative Service Book, but there is something very special about the rhythms and cadences of the old service and I personally want to see the continuation of all those services contained in the Book of Common Prayer. I therefore want to pose four questions:

(1) How has the Church of England (Worship and Doctrine) Measure 1974 attempted to ensure the continuing availability of the forms of service contained in the Book of Common Prayer?
(2) What are the 'occasions for which no provision has been made' embraced by the provisions of Canon B5, para 2?
(3) What, if any, is the legal status of a form of service once, but no longer, authorised?
(4) To what extent does the ecclesiastical law relating to the liturgy bind lay ministers?

Let me turn straight away to that first question: How has the Church of England (Worship and Doctrine) Measure 1974 attempted to ensure the continuing availability of the forms of service in the Book of Common Prayer? Section 1(1) makes it lawful for the General Synod:

> '(a) to make provision by Canon with respect to worship in the Church of England . . .', and
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> '(b) to make provision by Canon or regulations 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. . . .'.

However, the powers of the General Synod must be so exercised

> 'as to ensure that the forms of service contained in the Book of Common Prayer continue to be available for use in the Church of England'.[1]

In consequence of this provision the General Synod has promulgated Canon B1, paragraph 1(a) of which enacts *inter alia* that 'the forms of service contained in the Book of Common Prayer' shall 'be authorised for use in the Church of England'. Thus, any rite within the Book of Common Prayer may lawfully be used: the letter of the law seems to be fulfilled. But what in practice does this mean?

The preface to the Book of Common Prayer[2] itself recognised that 'doubts may arise in the use and practice of the same' and their resolution was therefore left to the diocesan bishops and to the archbishops. This has been called by the late Chancellor Garth Moore 'a faint echo of the *jus liturgicum*'[3] but, in spite of this,

> 'the bishop is subordinate to the statute law, and where the rubrics are express, he has no authority to release any minister from obedience to them, or to determine anything "that is contrary to what is contained in the service book" '.[4]

The courts therefore remain the final arbiter.

[1] Church of England (Worship and Doctrine) Measure 1974 (No. 3), s 1(1).
[2] In *Concerning the Service of the Church*.
[3] See Briden and Hanson, *Moore's Introduction to English Canon Law* (3rd edn) (Mowbray, 1992), p 57.
[4] Stephen, *The Book of Common Prayer* (Ecclesiastical Historical Society, 1849), vol I, p 123.

However, even in the days of the Ritual and Doctrine cases, the courts recognised that the rubrics were not all-embracing. The singing of hymns and psalms, including the *Agnus Dei*, was held to be legal even when not specifically authorised by rubric.[5] (I nonetheless always wonder what the legality might have been of *saying* the *Agnus Dei* rather than *singing* it? Would that still have been regarded as *de minimis*?)

Certainly some matters were to be regarded as *de minimis*. Indeed, only twenty-one years after the Act of Uniformity 1662, *An Admonition to all Ministers Ecclesiastical* contained within *Certain Sermons or Homilies appointed to be read in Churches in the time of Queen Elizabeth of famous memory and now thought fit to be reprinted by Authority from the King's most Excellent Majesty*[6] stated:

> 'And where it may so chance some one or other Chapter of the Old Testament to fall in order to be read upon Sundays or Holy-days, which were better to be changed with some other of the New Testament of more edification, it shall be well done to spend your time to consider well of such Chapters beforehand, whereby your prudence and diligence in your office may appear, so that your people may have cause to glorifie God for you, and be the readier to embrace your labours, to your better commendation, to the discharge of your Consciences and their own.'

I know of no occasion when this admonition has been considered by the courts but I presume it was a matter then considered to fall within the *de minimis* principle rather than as an example of an amendment 'by lawful authority'.[7] I presume, also, that it was aimed (primarily at least) at the lectionary rather than at the seven occasions when the set Epistle at Holy Communion according to the Book of Common Prayer is actually taken from the Old Testament.[8]

Yet there were still a number of pitfalls for the unwary. In 1842 the Reverend Mr Todd from the Diocese of Exeter found himself in serious trouble with his bishop, having deliberately made an omission from the collect in the burial service. The collect reads:

> 'We meekly beseech thee, O Father, to raise us from the death of sin unto the life of righteousness; that when we shall depart this life, we may rest in him, as our hope is this our *brother* doth. . . .'

However, Mr Todd omitted the words 'as our hope doth our *brother*', merely because he thought the deceased had died in a state of intoxication.[9] Moreover, twenty-eight years later Sir Robert Phillimore stated in relation to the description of a celebration of the eucharist in notices given out during divine service:

> 'It appears to me that the epithet "high" has no sanction from the rubric, and, though perhaps in itself not very material, cannot legally be used'.[10]

It is therefore very difficult to be sure what will be regarded as *de minimis* in any particular circumstance. However, let me now turn to the question of the rubrics.

Chancellor Garth Moore pointed out that the rubrics of the Book of Common Prayer were designed as:

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[5] *Hutchins v. Denziloe and Loveland* (1792) 1 Hag Con 170 at 175–180; *Read v. Bishop of Lincoln* [1892] AC 644, at 659–661, PC.

[6] Oxford, 1683.

[7] The rubric after the Creed in the Holy Communion according to the Book of Common Prayer states: 'Then shall follow the Sermon, or one of the Homilies already set forth, or hereafter to be set forth, by authority.' The Act of Uniformity 1662, s 25, also provided for limited amendments to collects and prayers concerning royalty 'according to the direction of lawful authority'. There is no suggestion that any such 'lawful authority' might delegate its discretion, even within narrow limits, to ecclesiastical ministers.

[8] Ash Wednesday: Joel 2: Monday before Easter: Isaiah 63: Tuesday before Easter: Isaiah 50: XXV after Trinity: Jeremiah 23: Presentation of Christ in the Temple: Malachi 3: Annunciation of the BVM: Isaiah 7: St John the Baptist: Isaiah 40.

[9] *Re Todd* (1844) 3 Notes of Cases, Supp li.

[10] *Elphinstone v. Purchas* (1870) 3 A & E 66 at 111.

> 'clerical directives, written in the seventeenth century by clerics for the guidance largely of clerics . . .',[11]

and this is basically true. In other words the rubrics help to give form to the actions of the rite. However, that is not to say that the clergy might nevertheless, for example, have included unbidden a Fraction in the Prayer of Consecration. There are those clergy even today who include an Elevation (in the sense of lifting) of the consecrated elements in the Prayer of Thanksgiving of Rite A in the Alternative Service Book even when not following the specially provided 'Order following the pattern of the Book of Common Prayer'.[12] Old habits die hard! Nevertheless, the physical actions of the celebrant not only punctuate, but also affect, the *character* of the celebration, whether on doctrinal or merely dramatic grounds.

Thus, the fact that the General Synod now has the power[13] to legislate in relation to (and therefore possibly to amend) all the rubrics in the Book of Common Prayer 'except the publication of banns of matrimony'[14] *may* be seen as permitting it entirely to alter the *character* of the Prayer Book services. Yet, if it did, would the Book of Common Prayer still truly be 'available for use'?

The contrary argument would seem to run as follows: section 1 of the Church of England (Worship and Doctrine) Measure 1974 does not merely enact that the Book of Common Prayer should be available for use, but that its 'forms of service' are to continue to be available. A 'form of service' is defined so as to include not only any order, service or prayer, but also 'any . . . rite or ceremony whatsoever'.[15] Moreover, as Sir Robert Phillimore said in *Martin v. Mackonochie*:[16]

> '. . . [T]here is a distinction between a rite and a ceremony; the former consisting in services expressed in words, the latter in gestures or acts preceding, accompanying, or following the utterance of these words'.

Thus, it *may* equally be argued that the Book of Common Prayer *together with the present rubrics* must remain available for use:[17] other rubrics may be provided in the alternative but the present rubrics cannot themselves be changed. As long as any new rubrics are *additional and alternative* to the present rubrics the Book of Common Prayer as it presently stands would thus still remain 'available' for use. Indeed, this latter argument seems, in part at least, to be the one left open by the Court of Appeal in *Ex parte Williamson*.[18]

Two further caveats nevertheless remain. First, even if the rubrics cannot be expunged wholly or in part, the rubrics do not now have to receive the rigorist statutory interpretation[19] that the old cases once ordained.[20] This is because of the repeal in 1969 of the relevant 1603 Canons and also because of the repeal of the relevant sections of the Act of Uniformity 1662 by the 1974 Measure itself. To put it another way, not only was the 1974 Measure enacted in the knowledge of the

[11] Briden and Hanson, *Moore's Introduction to English Canon Law* (3rd edn), p 50.

[12] See the Alternative Service Book (Clowes, SPCK, Cambridge University Press, 1980), pp. 130–149.

[13] Church of England (Worship and Doctrine) Measure 1974, s 1 (1).

[14] Ibid, s 1 (1) (b).

[15] Ibid, s 5 (2).

[16] (1868) LR 2 A & E 116 at 135, 136. Compare *Re Robinson, Wright v. Tugwell* [1897] 1 Ch 85, at 96, CA, per A L Smith LJ: 'What the exact meaning of the word "rite" is has not been decided. . .'.

[17] The Church of England (Worship and Doctrine) Measure 1974, s 1 (2), reads: 'Any Canon making any such provision as is mentioned in subsection (1) of this section, and any regulations made under any such Canon, shall have effect notwithstanding anything inconsistent therewith contained in any of the rubrics in the Book of Common Prayer'. However, this does not necessarily mean that the *present* rubrics may be altered: it may only mean that the present rubrics do not themselves limit the scope of any *alternative* rubric.

[18] *The Times*, 9 March 1994. For a fuller transcript see Hill, *Ecclesiastical Law* (Butterworths, 1995), p 77 *et seq*, especially at pp 80, 81. Here I would only add a comment that this argument, if valid, still does not affect the legal efficacy of the legislation as to women priests.

[19] *Kemp v. Wickes* (1809) 3 Phillim 264 at 269; *Newbery v. Goodwin* (1811) 1 Phillim 282 at 282f; *Martin v. Mackonochie* (1868) LR 2 PC 365 at 382f; *Combe v. De la Bere* (1881) LR 6 PD 157 at 173.

[20] *Re St Thomas, Pennywell* [1995] Fam 50 at 65 A–E; *Re St John the Evangelist, Chopwell* [1995] Fam 254 at 260 B–C.

new Canons, but its own provisions must be interpreted in the light of the repeals that it was itself bringing into force. I acknowledge that, if my previous arguments are accepted as to the effect of the rubrics on the whole character of a particular rite, there is now a greater flexibility than was at one time legal; on the other hand, it probably does no more than acknowledge a state of affairs that already existed in practice.

Secondly, the 1974 Measure itself provided for the possibility of ministers making 'minor variations in the forms of service' contained in the Book of Common Prayer.[21] This is now brought into effect by Canon B5, para 1:

> 'The minister who is to conduct the service may in his discretion make and use variations which are not of substantial importance in any form of service authorised by Canon B1 according to particular circumstances'.

In spite of provision for reference of questions of doubt to the diocesan bishop for 'pastoral guidance, advice or directions', the final arbiter remains the consistory court under the Ecclesiastical Jurisdiction Measure 1963.[22] Nevertheless, what those 'particular circumstances' may be is not clear.[23] It is, for example, possible that the previous rigorist interpretation of the rubrics still has a legacy in an expectation that variations in the Book of Common Prayer should not lightly be made.[24] Certainly, the Legal Advisory Commission of the General Synod has expressed the opinion that in the eucharistic rite according to the Book of Common Prayer the substitution of The Summary of the Law for the Ten Commandments, the omission of an Exhortation and, perhaps, the use of a revised Prayer for the Church *might* now be regarded as not being 'of substantial importance'.[25] However, would that be so if the celebration were, for example, a special one for members of the Prayer Book Society?

The second question that I want to turn to arises out of Canon B5, para 2. This reads:

> 'The minister having the cure of souls may on occasions for which no provision is made in the Book of Common Prayer or by the General Synod under Canon B2 or by the Convocations, archbishops, or Ordinary under Canon B4 use forms of service considered suitable by him for those occasions and may permit another minister to use the said forms of service'.

What do the words 'on occasions for which no provision is made' mean?

The Book of Common Prayer provides a special Collect, Epistle and Gospel for Good Friday. On the face of it, therefore, provision is made in the Book of Common Prayer for a Holy Communion service appropriate to that solemn occasion. It may not be seen as ideal by all but provision is nonetheless made for the occasion. Similarly, the Alternative Service Book authorised by the General Synod has special Sentences, Collects, Psalms, Readings and a Blessing for Good Friday. In addition, although not specified particularly for Good Friday, the Alternative Service Book makes provision for special Prefaces entitled 'The Cross' to be used in the Prayer of Thanksgiving. Again, on the face of it, the General Synod has made provision for the particular occasion.

In spite of this in the publication *Lent, Holy Week, Easter*[26] produced by the Liturgical Commission a special Good Friday Liturgy is provided. It is fair to say that this is divided into four parts: (A) the Ministry of the Word, (B) the

[21] Church of England (Worship and Doctrine) Measure 1974, s 1 (5) (b).

[22] Canon B5, para 4. *Quaere* whether this prevents other courts from considering the question?

[23] Some guidance is given in *Re St Thomas, Pennywell* [1995] Fam 50 at 67 F–H and *Re St John the Evangelist, Chopwell* [1995] Fam 254, *passim*.

[24] Cf *Re St Peter and St Paul, Leckhampton* [1968] P 495, where Chancellor Garth Moore stated that a rubric in The Alternative Services (second series) then had 'as much . . . force of law as the Rubric in the 1662 Book of Common Prayer'.

[25] *Legal Opinions concerning the Church of England* (Church House Publishing, 1994), p 235.

[26] Church House Publishing, Cambridge University Press, SPCK, 1986.

Proclamation of the Cross, (C) the Intercessions, and (D) Holy Communion. There are some minor variations in (A) the Ministry of the Word as compared with the Alternative Service Book itself although, no doubt, these would fall within those permitted by Canon B5, para 1; so, too, the suggested form of (C) the Intercessions probably falls within the same permission. However, (B) the Proclamation of the Cross has a very different form of Confession from the Alternative Service Book and there is no Absolution; indeed, if (as is a suggested alternative) the Proclamation of the Cross is omitted altogether, there is no Confession at all. This surely could not fall within Canon B5, para 1?

Lent, Holy Week, Easter therefore seems to set out a Good Friday liturgy alternative to those already provided by the Book of Common Prayer and the Alternative Service Book. In itself this would not matter, if the liturgy were no more than for general consideration within the Church's liturgical debates. However, *Lent, Holy Week, Easter* makes it clear[27] not only that the forms of service are commended by the House of Bishops, but that a priest 'remains free, subject to the terms of Canon B5, to make use of the Services as commended by the House'. In relation to the Good Friday liturgy this must refer to the provisions of Canon B5, para 2,[28] and the words 'subject to the terms of Canon B5' must refer to Canon B5, paras 3[29] and 4. In other words, the clergy are being encouraged by the House of Bishops to see this liturgy as one for an occasion for which no provision has already been made. If this is so, how are the words 'on occasions for which no provision is made in the Book of Common Prayer' etc actually to be interpreted in Canon B5, para 2?

Nor does the problem end there. Another interpretation of those words might be that other forms of service may be used on 'special' or 'particular' occasions,[30] that is, other than those which are already special Feasts or Fasts within the Church's Calendar. Such 'special' or 'particular' occasions might, for example, be when there is a celebration at a church school or at a retreat for women priests. Unfortunately, such an interpretation runs counter to the apparent view put forward by the Liturgical Commission in its more recent publication, *Patterns for*

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[27] See the Note by the Archbishop of Canterbury immediately before the Introduction.

[28] This is borne out by the fact that the Archbishop's Note also makes it clear that diocesan bishops may authorise its use under Canon B4.

[29] In a letter to the *Church Times* dated 17 November 1995, the Revd J M Kilpatrick argues: 'The use of the Roman Missal appears to be outside the spirit of the promise to adopt only forms of service authorised or allowed by canon. However, it is arguably within the letter of it: Canon B 5 allows variations on the authorised services not contrary to "the doctrine of the Church of England in any essential matter".

The notes and rubrics of the ASB Rite A accommodate most of the Roman Rite, with the exception of the eucharistic prayer (EP). EPII of the Missal is to be found in its entirety (save mention of the Pope) in the South African Rite. The Church of England is in full communion with these provinces. The Roman Canon itself (EPI) is inherited from the undivided Church, other than whose doctrine, according to Archbishop Fisher, the Church of England claims none as its own. . . .'

This argument is based on Canon B5, para 3, but, even without knowing what precise 'accommodation' within the notes and rubrics is envisaged, it seems to ignore the provisions of Canon B5, para 1, on which it also purports to rely. The wholesale adoption of an unauthorised eucharistic prayer would almost certainly be of 'substantial importance', especially if it were not 'according to particular circumstances'. Moreover, the form of service must be looked at in its entirety, not piecemeal. In addition, an amalgam of rites is unacceptable, whether of authorised (see *Legal Opinions concerning the Church of England* (Church House Publishing, 1994), p 234) or unauthorised rites.

[30] During the London conference it was suggested by Bishop Colin Buchanan that the words referred to an event, such as a Mother's Union service, for which no type of service has already been authorised. This may well point a further ambiguity but seems, at the least, to run counter to the commendation of the House of Bishops in *Lent, Holy Week, Easter*. If this suggestion were correct, the special Good Friday liturgy there set out could never be authorised by the minister having the cure of souls under Canon B5, para 2; this is because it could not be an 'event' for which no type of service has already been authorised.

Worship.[31] There, without apparent demur,[32] the Commission quotes a fictitious letter of advice from a bishop's legal advisor stating:

> 'Our common understanding is that Canon B5 cannot be stretched to cover services of Holy Communion even if they are for specific occasions, age groups, or places not specifically provided for in the BCP or Canons B2 and B 4. So a service of Holy Communion for St Swithun's Day should be regarded primarily as a service of Holy Communion . . . and not as a special liturgy of St Swithun (for which the BCP etc makes no provision, thus leaving the minister to his own discretion under Canon B5)'.

A fortiori, one might add, if a liturgy were already provided for St Swithun's Day! The end result on either view is unfortunate: one or other of these publications must be wrong, although both are publications of the Liturgical Commission. The liturgical texts within *Patterns of Worship*[33] are the subject of a similar commendation and recommendation by the House of Bishops as *Lent, Holy Week, Easter*, but the accompanying textual commentaries are not. It *may*, therefore, follow that the House of Bishops still abides by its commendation in *Lent, Holy Week, Easter*, although this is perhaps uncertain. At least we must hope that proper clarification is provided soon and at the latest by the year 2000 when new services are to be authorised by the General Synod.

My third question is also of importance—indeed, of *particular* importance—with an eye towards the year 2000. What, if any, is the legal status of a service once, but no longer, authorised? The question has more than mere academic interest: not only may parishes have no finances to keep buying new service books but they may have grown genuinely devoted to a post-1662 service and find it difficult to change. Indeed, the problem first arose after the authorisation of The Alternative Service Book 1980.

On 26 January 1988 the House of Bishops considered what were called 'customary variations' to the Book of Common Prayer which were not authorised for use but which had nevertheless been customary for a number of years.[34] Presumably this was an oblique reference to the changes wrought by the 1928 Prayer Book and, if so, the Legal Advisory Commission of the General Synod has now given an opinion on that very subject.[35] The House of Bishops, however, went on to pass a resolution which seems to go very much further than the question apparently then under debate. The resolution states:

> 'the House of Bishops is agreed in regarding the continued use, where well established, of any form of service which has, at any time since 1965, been canonically authorised (notwithstanding the fact that such authorisation was not renewed after it lapsed) as not being of 'substantial importance', within the meaning of Canon B5.4'.

(At the time Canon B5, para 4, was differently worded, but for the purposes of this argument it may be regarded as the same as the present Canon B5, para 4.) Of course, Canon B5, para 4, has always been expressly subject to the jurisdiction of the consistory court under the Ecclesiastical Jurisdiction Measure 1963.

In regard to this resolution it should be noted that the question of the 'continued use' of a form of service is not legally related to the question of 'substantial importance', as the latter is only concerned with variations within an actual form of service. Secondly, it is not immediately obvious to me how 'well established' use can be a correct legal criterion to apply in considering the question of 'substantial

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[31] Church House Publishing, 1995.

[32] *Patterns for Worship*, p 239. It should, however, be noted that the apparent advice is given by means of a quotation from a fictitious letter from a bishop's legal advisor rather than as specific guidance.

[33] See p x.

[34] I am indebted to Miss Ingrid Slaughter for this reference.

[35] *Legal Opinions concerning the Church of England* (Church House Publishing, 1994), p 235.

importance', at least within their true context. In effect, the House of Bishops seems to be saying that, if a parish continues to use a service that has ceased to be authorised, the bishops will not object. This seems to me to be worrying. First and foremost, although I have no doubt that there was *no* such intention, it would be possible to represent the resolution as being in complete disregard of the constitutional authority of the General Synod. This is because Canon B1, para. 2, states:

> 'Every minister shall use only the forms of service authorised by this Canon, except so far as he may exercise the discretion permitted by Canon B5'.

Moreover, where does it all end? Once the use of a form of service is well established, could its continued use ever become of 'substantial importance'? If not, a service once authorised (and well established in a particular parish) can for ever be used, thus leading to a never ending multiplicity of liturgies.

For a number of reasons the resolution, in fact, does not bear up to scrutiny. It would be far better in future to provide some transitional provisions so that parishes have a specific time in which to implement the new liturgies after the year 2000. Finally, even if the bishops were merely intending to state that they would not permit disciplinary procedures against a minister continuing such well established usages, the resolution can in law never fetter an individual bishop's discretion under section 23 of the Ecclesiastical Jurisdiction Measure 1963,[36] whether or not the particular bishop was a participant in the debate preceding that resolution.[37]

Now, you will appreciate that, so far, I have manfully endeavoured to obey Chancellor Quentin Edwards' strictures not to be controversial. I therefore turn to my fourth, and final, question with some gusto. Namely, to what extent does the law relating to the liturgy bind lay ministers? Indeed, avid readers of the *Ecclesiastical Law Journal* will be aware of the correspondence[38] on this question generated by the General Committee's Memorandum of Evidence to the General Synod's Working Party on Lay Office-Holders.[39] The question has particular significance here because, if lay ministers are not bound by the law relating to liturgy, the continuity of the forms of service contained in the Book of Common Prayer are not "*ensured*" in those parishes where many services are taken by the laity.

By the Prayer Book (Further Provisions) Measure 1968, section 1 (1) (now repealed), a rubric was added to those rubrics preceding the Order of Morning and Evening Prayer in the Book of Common Prayer. The new rubric states:

> 'Readers and such other lay persons as may be authorised by the Bishop of the diocese may, at the invitation of the Minister of the parish or, where the Cure is vacant, or the Minister is incapacitated, at the invitation of the Churchwardens, say or sing Morning or Evening Prayer (save for the Absolution); and in case of need, where no clerk in Holy Orders or Reader or lay person authorised as aforesaid is available, the Minister or (failing him) the Churchwardens shall arrange for some suitable lay person to say or sing Morning or Evening Prayer (save for the Absolution)'.

(See, too, Canon B11, para 1). I have chosen this scenario as it most conveniently points my argument, although the argument is in many respects the same whenever a lay person is duly invited to take part in any Anglican service.

What happens if the 'suitable lay person' takes it upon him (or her) self to use the Absolution when saying Morning or Evening Prayer according to the Book of Common Prayer? In the light of the specific prohibition in the rubric it is difficult

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[36] See *Halsbury's Laws of England* (4th edn), Vol 1 (1), para 30.

[37] It might, however, found an argument for staying any proceedings based on abuse of process: see Archbold, *Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, 1995), vol 1, paras 4–44 *et seq.*

[38] (1995) 3 Ecc LJ 441–443.

[39] (1994) 3 Ecc LJ 354. The Working Party has now reported back to the General Synod: see GS 1164–1166. See, too, (1996) 4 Ecc LJ 533.

to justify such a course of action by reference to Canon B5, para 1. The lay person would certainly be 'the minister who is to conduct the service', but in the circumstances the lay use of the Absolution cannot be regarded as 'not of substantial importance'. Therefore, if a lay minister does use the Absolution, does it mean that he or she ceases in future to be a 'suitable . . . person' to take such a service and, in addition, has he (or she) actually breached the ecclesiastical law?

By section 1 of the Act of Uniformity 1662:

> 'All and singular ministers in any cathedral, collegiate or parish church or chapel or other place of public worship . . . shall be bound to say and use the morning prayer, evening prayer, celebration and administration of both the sacraments and all other the public and common prayer *in such order and form* as is mentioned in . . . The Book of Common Prayer . . .' (emphasis supplied).

I entirely accept that in 1662 no lay person could lawfully 'say and use' Morning or Evening Prayer in public but, when in 1968 a lay person was statutorily enabled to take the same service, did not that lay person then become bound by the Act of Uniformity 1662, at least until it was repealed six years later by the Church of England (Worship and Doctrine) Measure, 1974? That lay person was certainly a 'minister',[40] although not (of course) an *ordained* minister to which the 1662 Act arguably may be taken to refer.

Even setting aside any argument based on the 1662 Act, particularly as the relevant part is now repealed, I find it inconceivable that a lay person is not as legally bound by the law relating to the liturgy as any other person taking an Anglican service. Mr Brian Hanson in a letter to the *Ecclesiastical Law Journal*[41] has put forward a feasible argument in this regard, although (if correct) it would mean that Canon B15, para 1, imposes a legal duty, for example, on:

> '. . . all who have been confirmed to receive Holy Communion regularly, and especially at the festivals of Christmas, Easter and Whitsun or Pentecost'.

(Indeed, this would be so whether or not the communicant had lapsed or joined another Church.) Yet another argument might be founded upon a consensual acceptance of liturgical law by the lay person evidenced by his taking on the role of minister for the particular service.[42] That would, at least, have the benefit (if benefit it be) of restricting the ambit of the Canons in so far as the laity is concerned.

There is, however, yet another argument that I want to put forward in relation to lay persons taking part in the Church's liturgy. Understandably, the Church does not permit an ordained person to make variations in a form of service which are irreverent or unseemly or which are:

> '. . . contrary to, [or] indicative of any departure from, the doctrine of the Church of England in any essential matter'.

This is therefore specifically made the subject of Canon B5, para 3. However, if this is a danger for the ordained clergy, it must be even more a danger for lay ministers, many of whom will have received no theological training whatsoever. It therefore seems to me that the undoubted pre-Reformation law that forbade alterations

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[40] Indeed, a lay person ministering at an emergency baptism after 1662 would legally have been bound not only to use the Trinitarian formula as set out in the Book of Common Prayer but, arguably, also to say the prayer beginning 'We yield thee hearty thanks . . .': see the Ministration of Private Baptism of Children in Houses. However, the use of the Trinitarian formula was also required by the pre-Reformation canon law: see Lyndwood, *Provinciale Angliae* (Oxford, 1679), p 245.

[41] (1995) 3 Ecc LJ 442, 443.

[42] See *Forbes v. Eden* (1867) LR 1 Sc & Div 568 at 576, 577, HL, per Lord Chelmsford; cf the Synodical Government Measure 1969, Sch 2, art 6(a)(ii). See, too, Brundage, *Medieval Canon Law* (Longman, 1995), p 187: 'Members of those Christian communions that maintain systems of canon law—Roman Catholics, Anglicans, and Eastern Orthodox—implicitly agree as a condition of membership in their churches that they will submit themselves and their disputes to canonical judges for adjudication and will comply with their decisions'.

to forms of service, as well as any irreverence in the taking of services,[43] must apply to *any* minister, whether ordained or lay. Even though prior to the Reformation a lay person could not minister at a service (save emergency baptism[44]), it was not the *ordained* status of the minister that was important. Rather, the thrust of the pre-Reformation canon law was to ensure good order in the celebration of the liturgy. If this is so, the present Canons, in so far as they reflect this aspect of the pre-Reformation canon law, must bind both ordained and lay ministers equally,[45] even if enforcement against the laity is particularly difficult. Thus *any* minister is under a legal duty to obey the law. Indeed, if this were not so, the ecclesiastical law loses much of its credibility.

[43] See the various Acts of Uniformity and Lyndwood, *Provinciale Angliae* (Oxford, 1679), p 226, as well as the Canons *passim*.

[44] When so doing the lay person was under a duty to use a specific form of words which the clergy were under a duty to teach them: see Bursell, *Liturgy, Order and the Law* (Oxford University Press, 1996), p 141, especially footnote 87. There is no reason to doubt that, if a different form of words were used, the lay person could at that time have been proceeded against in the ecclesiastical courts.

[45] See *Middleton v. Crofts* (1736) 2 Atk 650.