**BELIEVERS IN COURT: Sydney Anglicans Going to Law**

Justice Keith Mason[1]
Cable Lecture
9 September 2005

Ken Cable was a gentle scholar with an eye for detail. His interest in Anglican history never lost sight of the human interactions. He would look beneath rules, forms and ceremonies to discern the Church's true impact upon the society in which it was embedded, and which it was called to serve. Ken was a fine lecturer and I was fortunate to study English Reformation history at his feet in 1964. It is a privilege to be given this opportunity for sustained reflection on a topic that has long interested me.

According to Sir Owen Dixon in the ***Red Book Case***, the Church of England in New South Wales was an established church for some decades after the foundation of the colony.[2] It depends a bit on one's definition of "establishment", but there is much support for Dixon's view.

Thomas Hobbes Scott first came to New South Wales as secretary to Commissioner Bigge. Subsequently ordained, he returned as Archdeacon in 1825, nominally accountable to the Bishop of Calcutta in which diocese New South Wales then lay. Anglican establishment reached its apogee under Scott's five-year tenure. Scott was appointed by the Crown and became an ex officio member of the Legislative Council. An Act in Council of 1825 recognised the jurisdiction of an Archdeacon's Court. The Church and School Corporation, founded in 1826 for the support of the Anglican Church and an educational system under its control, was endowed with 1/7 of the surveyed land of the colony.

The special relationship between the Anglican Church and the State had some fierce critics. One of the most outspoken was Edward Smith Hall, who worshipped here in St James'.[3] After an unsuccessful attempt at farming, he turned to journalism and became the editor of the more radical of the two "emancipist" or pro-convict newspapers, **The Monitor**. He frequently attacked Governor Darling, who regarded him as a *"revolutionary scribbler"* and a *"fellow without principles, an apostate missionary"*.[4]

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1 Member, Appellate Tribunal of the Anglican Church of Australia; President, New South Wales Court of Appeal.

2 ***Wylde v Attorney-General (NSW) (at the relation of Ashelford & Ors)*** (1948) 78 CLR 224 at 284. See also Latham CJ at 257, Rich J at 275.

3 See Erin Ihde, **Edward Smith Hall and the Sydney Monitor**, Australian Scholarly, Melbourne, 2004 pp51-6.

4 **Historical Records of Australia (HRA)** Series 1, vol 12 p762; vol 15, p53.

Hall and Archdeacon Scott were at loggerheads on several fronts. Scott accused Hall of fraud, treachery, blasphemy and a love of anarchy because of his attacks on government policy, education and religion. Hall returned the compliment with an article published in 1828 satirising Scott's attachment to his annual salary of £2000. Scott, who was close to John Macarthur and other "exclusives", was also criticised for being involved in politics. Worst of all, Hall alleged that Scott was not a man of peace.

For his attack on Scott, Hall was prosecuted for criminal libel of a public official. After he was found guilty, Scott intervened, pleading for a light sentence. Dowling J imposed a fine of 20 shillings, also requiring Hall to enter into a £500 recognisance to be of good behaviour for 12 months. The judge ordered Hall to be gaoled until the fine was paid and the security provided. Hall appears to have raised the bond, but the following April he was sent to gaol for 12 months, this time for libelling Governor Darling whom he accused of making a partisan choice of jurors in the earlier proceedings involving Scott. Hall continued to publish the **Monitor** while in gaol, committing further criminal libels that saw his imprisonment extended to three years. The litigation against Scott described below was conducted from prison.[5]

A squabble between Scott and Hall over occupation of a pew in St. James Church erupted into two notable trials in the fledgling Supreme Court. Determined individuals went to law over issues that seem trivial in retrospect. The litigation would titillate the public, harm the mission of the Church and produce unexpected outcomes. A pattern of Sydney Anglicans going to law would be set that would be repeated in later years.

My principal source for information about Hall-Scott struggles is a paper by Professor Bruce Kercher entitled **Establishment, freedom of speech and the Church of England: Pew disputes in the early 19th century New South Wales and Newfoundland**. In Professor Kercher's words, *"St James' was the second church in Sydney and the better of the two, socially. Its parishioners included official Sydney, whereas St Phillip's, the older church, was closer to the convicts at the Rocks and to the military barracks."*

St James' was built on Crown land, at Crown expense. In 1823 Governor Brisbane had issued a proclamation appointing a committee to let pews by the year. Hall, who was a widower responsible for eight children, including six daughters, leased a pew and wished to continue the arrangement. But on 25 June 1828 he was informed by the incumbent, the Rev Richard Hill, that as from 1 July he was to move to a less desirable part of the church. Ostensibly, the pew was needed for government officials. When Hall refused to move, Hill (acting on the directions of the registrar of the Archdeacon's Court) ordered his eviction. Hall resisted and subsequently took matters into his own hands. Four times he tried to get into the pew, over the opposition of beadles and constables. The church authorities placed a lock on the door of the pew and even had it boarded over with decking to keep him out. Eventually Hall forced the lock and, as an assertion of right, remained in the pew for three hours with his hapless daughters.

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5 **HRA** xv pp53-61.

Scholars including Professor Kercher and Professor Brian Fletcher, who gave last year's Cable lecture, have concluded that the real reasons for Hall's eviction were personal and political, traceable directly to the Archdeacon.[6] This probably explains the vehemence of Hall's resistance.

Two sets of proceedings followed in the Supreme Court.

The first was a claim by the Crown against Hall for damages for trespass when Hall broke into the pew and remained there. The trial took place before Forbes CJ and assessors. The Crown was represented by the Solicitor General. Hall represented himself and argued that Scott had no power to dispossess him of his pew according to *"mere capricious whim"*.[7] Hall said that he would not accept a *"cold, comfortless pew"* while his own pew was barred against him, forcing him and his family *"to stand like paupers in the aisle; from motives which were too notoriously known to need … farther explanation or comment"*.

The assessors found the facts in the form of a special verdict, an outcome that left it to the Supreme Court to determine the legal consequences. Three months later the Crown obtained an order for a new trial on the ground that there was uncertainty as to whether St James' Church was to be considered parochial or government property.

Dowling J's summing up in the new trial contains a masterly survey of the non-existent state of ecclesiastical law in the Colony.[8] The Judge commenced by expressing *"deep regret that such a question should have been presented to the consideration of a Court of Justice"*. He then proceeded to explain the law in a manner that would have been quite shocking to Archdeacon Scott. The case was described as no more than *"a question of Contract"*. The *"peculiar foundation of the Church Establishment in this Colony"* was said to be *"in no degree analogous to the other religious institution of the Church Establishment in the Mother Country, so far as the disposition of pews and seats in a Church are concerned"*.

In England, the ultimate disposition of pews rested with the Church Wardens, subject to the control of the Ordinary (ie the Bishop, or his delegate the Archdeacon). But according to Dowling J, in New South Wales *"none of the well known incidents of parochial Government in England apply …. We have here no Church Wardens, properly so called, no Church Rates, no tithes, in short none of the institutions which … exist in the Mother Country …."* Since St James' had been built by the Crown on Crown land and since the pews had been let at St James' under contractual arrangements entered into by a committee appointed by the Governor, the ordinary rules of contract applied.

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6 Kercher **op cit**; Brian H Fletcher, **Ralph Darling: A Governor Maligned**, Melbourne, OUP, 1984 p271.

7 ***R v Hall (No 1)***, Supreme Court of New South Wales, Forbes CJ, 25 September 1828 as reported in the **Australian**, 26 September 1828. See http://www.law.mq.edu.au/scnsw/Cases 1827-28/html/r_v_hall_no_1.

8 ***R v Hall (No 1)***, Supreme Court of New South Wales, Dowling J, 12 March 1829, **HRA**, Series 1, vol 15, pp132-140.

At this point the case descended into technical contract law with Hall losing because the pew had been originally let to himself and another person jointly. Nevertheless, the assessors made it clear where their sympathies lay by awarding derisory damages in the sum of one shilling, instead of the £110 claimed by the Crown.

Scott was most unhappy. He requested Governor Darling to send a report of the case to the British government for advice. He thought that Dowling's charge to the assessors was inconsistent with the rights conferred on him by letters patent from the Crown appointing him Archdeacon. The authorities in England backed Dowling, pointing out that St James' was not a parish church but *"a mere Royal Foundation, … not subject to the disposition of the Ordinary"*.[9]

Scott's fingers were badly burnt, but Hall was not finished. In 1829 he launched his own action against the Archdeacon, claiming £100 damages in trespass for having been wrongly ejected from the pew. The writ was served on the morning Scott departed finally from the Colony.

The action was tried in April 1830 before Dowling J and a jury.[10] The first witness for the defence was James Norton who had been the Registrar of the Archdeacon's Court in 1828. Norton gave equivocal evidence about whether letters requiring Hall to vacate the pew were written on Scott's instructions, vaguely hinting that it was the Church Corporation and not Scott that had been the moving party. A juror chimed in with a question that forced Norton to admit the Archdeacon's high status in that body. Later evidence established that Scott presided at Corporation meetings unless the Governor was present. In any event, the letters did not come from the Corporation, but were written by Norton in his capacity as Registrar of the Archdeacon's Court.

Mr Hill, the incumbent at St James', then endeavoured to take responsibility for putting Hall out of his pew. But he was forced to concede under cross-examination that he had acted with the sanction of the Archdeacon, believing at the time that the Archdeacon alone had power to apportion the seats in the church.

A constable named Hamilton gave evidence about Hall's many attempts to assert his rights, including one occasion when Hall turned up with a large screw-driver to force open the pew.

In his address to the jury, Scott's counsel Therry accused Hall of having brought the case out of spite, effectively after Scott's back was turned. Turning a blind eye to the law expounded by Dowling J in the previous St James' case, Therry asserted that the Archdeacon had legal possession of the pews and the power to assign and reassign them. Appealing to sentiment, he told the jurors that he did not know why the law for the people of England should not be good enough for

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9 **HRA**, Series 1, vol 15, pp475-6.

10 ***Hall v Scott***, Supreme Court of New South Wales, Dowling J, 6 April 1830; **Sydney Gazette**, 10 April 1830. See http://www.law.mq.edu.au/scnsw/Cases 1829-30/html/hall_v_scott.

people in the Colony. Counsel then waxed lyrical in an attempt to blacken Hall's character:

> *"Gentlemen, look at the plaintiff's conduct …. Forcing his way, with a burglarious instrument, gentlemen - seeking to provoke a contest, and make the Church of God, the Waterloo of his fame!"*

The jury were warned that a verdict against the Archdeacon would be seen as a scandal in the English newspapers and put the infant institution of trial by jury at risk.

Dowling J told the jury that the ecclesiastical law of the mother country concerning the interior arrangements of churches did not apply in New South Wales. The real issue was whether the acts were done with Scott's privity, consent or advice. The judge said that the verdict in the earlier trial was irrelevant, because in the present case Hall did not claim any title to the pew, simply a right not to be disturbed in his possession of it without lawful authority. After a short retirement the jury returned a verdict for Hall in the sum of £25. These substantial damages were later paid by the government.

Bishop Barker arrived in Sydney in 1855. In their book **Sydney Anglicans**, Judd and Cable describe him as *"a plain Evangelical"*,[11] explaining this term in its mid-nineteenth century context. Barker's nickname, *"the High Priest",* was as much a comment on his low churchmanship as on his great height, 6ft 5½ ins.

Like his predecessor Broughton, Barker was appointed to the bishopric by letters patent from Queen Victoria. The instrument declared him entitled to exercise full power and authority to call his clergy before him *"to inquire as well concerning their morals as their behaviour".*[12] Barker's evidence to the Select Committee of the Legislative Council appointed to report on the **"Church of England Synods Bill"** shows that he saw the colonial Church as an integral part of the Church in the Mother Country. Dr Bruce Kaye has described Barker's position as:[13]

> *"… closely reflecting the English situation, where ecclesiastical law was part of the law of the land. He [showed] the disposition of the English evangelical churchman to maintain the connection of the Church with the State."*

The problem was, in Kaye's words, that *"in England, ecclesiastical law, including the canons which dealt with the discipline of clergy, had the same force as Crown law. The decisions of the ecclesiastical courts could be imposed because they*

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11 Stephen Judd & Kenneth Cable, **Sydney Anglicans**, Anglican Information Office, Sydney, NSW, 2000, p70.

12 Set out in ***Ex parte the Rev George King*** (1861) 2 Legge 1307 at 1308.

13 Bruce N Kaye, "The Role of Tradition in Church State Relations in Mid-Nineteenth Century N.S.W. The Cases of Bishops Broughton and Barker" in D Dockrill and R Tanner (ed), **Tradition and Traditions**, Prudentia, 1994.

*were part of the law of the land."*[14] The rulings in the Hall litigation showed that this was not the situation here in New South Wales.

Barker was not the last Anglican in Sydney to hold these attitudes. The notion that "the law of the land" in New South Wales gave direct *entré* to English ecclesiastical law has been a persisting legal heresy. In early days it stemmed from attitudes about Anglican Church establishment. When the establishment crutch was knocked away by rulings of the Privy Council in the mid-nineteenth century, many would turn to the law of contract for a legal prop or nexus that might allow the English law to be summoned up against non-conformity. It would be argued that members of the Church of England in a particular place had (at some mystical time) impliedly bound themselves to a contract or "compact" to be governed as if the ecclesiastical law in England applied, at least to the clergy, or at least in church trust property.

Bishop Barker's belief about the application of English ecclesiastical law was to get him and his Chancellor into trouble with the Supreme Court of New South Wales in 1861.

Barker's predecessor Broughton had licensed the Rev George King as the minister in the Church of St Andrew here in Sydney. King swore canonical obedience to the Bishop of his diocese. By the 1850s St Andrews had become the Cathedral Church. Mr King, a staunch and combative Ulsterman, took objection to Barker's decision to appoint the Rev William Cowper as Dean. King decided on direct action when his remonstrations fell on deaf ears. In September 1860 there was an ordination service at St Andrews, on a day when it was not required for parochial purposes. King deliberately locked the door, barring his Bishop from entering the cathedral church.

Bishop Barker requested the Chancellor, Sir William Burton (a former Supreme Court judge), to cite King to appear before the Chancellor and four licensed incumbents of the diocese in order that King's behaviour might be inquired into and reported to the Bishop. King was to be allowed to nominate two of the four incumbents. This was all very fair, and strictly according to Hoyle as things were done in England. But the ungrateful Mr King went off to the Supreme Court and obtained a writ of prohibition, based upon findings that Bishop Barker had no power to proceed in the manner proposed.

Dickinson ACJ pointed out that the Queen's letters patent did not validly confer the powers of a bishop in England. Barker was *"a bishop … here only over those who voluntarily submit to his jurisdiction"*.[15]

The Judge demonstrated that English statute and common law had force in New South Wales only to the extent spelt out in s24 of **The Australian Courts Act 1828** (9 Geo IV c83). That provision adopted English law *"so far as the same can be applied"* in the colony. This did not include the Ecclesiastical Law of England, because it was incapable of ready application to a colony without statutory

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14 **Id**, p236.

15 ***Ex parte The Rev George King*** (1861) 2 Legge 1307 at 1311.

parishes, a system of tithes and the many other badges of Church establishment in England. His Honour boldly declared that local enactments had never given Anglicans any precedence over members of other denominations and faiths. This was an overstatement, but the tide of religious equality had been running strongly for decades. Dickinson's language generally mirrors that of Dowling J who had delivered a similar lecture to Archdeacon Scott in the Hall litigation 30 years earlier.

Wise J was equally firm in declaring that English ecclesiastical law was no part of the common law in New South Wales. Adverting to the contrasting positions of Presbyterians and Anglicans, he asked rhetorically:[16]

> *"… how could a colony, open alike to Englishmen and Scotchmen be governed by a law which should be applicable only to a portion of its inhabitants? Just as a Scotchman, on his arrival in the colony, ceased to enjoy any rights peculiarly Scotch – so an Englishman, being a member of the Church of England, loses all legal rights which are incapable of being shared by his fellow colonists."*

Bishop Barker's attempt to establish what Wise J described as a *"jurisdiction by usurpation"*[17] by *"the holding of a pretended Court"*[18] brought down a writ of prohibition because the Bishop and his Chancellor were invading the exclusive patch of the Supreme Court itself. In my opinion, this is the most problematic part of the Court's reasoning in ***King's Case***, because it is hard to see what skin was taken from the Court's nose by essentially private proceedings. Intervention occurred because courts were striving to demonstrate that the local Anglican Church had to stop thinking and acting as if it were established. By the twentieth century pretended establishment was no longer an issue, and courts in Australia began to apply to the Anglicans doctrines they had developed for all churches to avoid getting embroiled in church disputes if humanly possible.

Poor Bishop Barker. He had bent over backwards to be fair, only stumbling because he resorted to English procedures instead of simply revoking Mr King's licence. The Supreme Court said he had power to do so, subject to the dictates of natural justice. King later appeared before Barker under protest and his licence was revoked. Barker subsequently restored the licence and appointed King to St Peter's, Cook's River.[19]

St Paul's **First Epistle to the Corinthians** contains one of the key texts invoked by those who are opposed to women exercising authority within the Church. A passage in Chapter 11 refers to man being *"the head of the woman"*. Conservative biblical scholars view this as a timeless proscription against equality within the Church.

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16 At 1324.
17 At 1391.
18 At 1330.
19 **Australian Dictionary of Biography** "King, George (1813-1899)".

Earlier in the same Epistle, the Apostle tendered strong reproof about what is referred to in the King James Bible as *"go[ing] to law before the unjust and not before the saints"*. Let me set out the passage in the New Revised Standard Version:[20]

> *When any of you has a grievance against another, do you dare to take it to court before the unrighteous, instead of taking it before the saints? Do you not know that the saints will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? Do you not know that we are to judge angels – to say nothing of ordinary matters? If you have ordinary cases, then, do you appoint as judges those who have no standing in the church? I say this to your shame. Can it be that there is no one among you wise enough to decide between one believer and another, but a believer goes to court against an unbeliever – and before unbelievers at that?*
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> *In fact, to have lawsuits at all with one another is already a defeat for you. Why not rather be wronged? Why not rather be defrauded? But you yourselves wrong and defraud – and believers at that.*

There are echoes of Christ's injunction to turn the other cheek, and of the Lord's Prayer reference to the need for forgiveness as we would have others forgive us. But the main thrust is the scandal of washing dirty linen in public.

Commentators are generally agreed that St Paul was not casting doubt on the fundamental impartiality of Roman law courts. The famous **Romans** 13 passage shows his attitude to the God-given institutions of government. Rather, Paul was drawing on a tradition that lives on to this day in Jewish orthodoxy. Believers should resort to the mediation and (if necessary) adjudication of the rabbis or wise men in the religious community and not display their disharmonies in public.[21]

On my reading the message from **Corinthians** is clear, indicated by the eschatological rhetoric and the explicit sermonising about the two-fold nature of the evil, namely the ultimate irrelevance of injustice to a victim who should turn the other cheek and the shame that public vaunting of disputation brings upon the Church. The language of disapproval is indignant and sarcastic. The believer who as plaintiff seeks public vindication of legal rights against a fellow Christian is saying that he or she does not believe God can work in the circumstances to accomplish His will.

Some would confine the passage to litigation over personal disputes and see no scriptural impediment to taking religious disputes to secular courts. This was the view expressed by Archbishop Robinson in an *ad clerum* letter published during the height of the public relations crisis precipitated by the interlocutory injunction in

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20 1 Corinthians 6:1-7.

21 See Jean Hering, **The First Epistle of Saint Paul to the Corinthians**, London, Epworth Press, 1962 pp39-40; Ben Witherington III, **Conflict and Community in Corinth**. **A Socio-Rhetorical Commentary on 1 and 2 Corinthians** Wm B Eerdmans Publishing Co, 1995 pp162-5.

***Scandrett v Dowling*** that temporarily stopped Bishop Dowling from ordaining women priests on 5 February 1992. It was also the exegesis provided to Standing Committee that was published in **Southern Cross** in April 1992 by the Rev Dr Peter O'Brien, vice principal of Moore Theological College. Each scholar drew support from St Paul's own appeals as a Roman citizen to the magistrates at Philippi and to Caesar in his own defence and for the sake of his mission.[22]

Like Donald Robinson and Peter O'Brien, I was involved in the dispute, never a good position to be called upon for dispassionate judgment. Nevertheless, I respectfully disagree with their narrow interpretation of the **Corinthians** passage, in light of the reasons so strongly advanced by the Apostle. It is difficult to see why concerns about "pagan courts" are not heightened in the context of disputes over matters of doctrine and church order. And there is a world of difference between a defendant invoking legal process in self-defence against a non-believer and a believer taking a fellow believer to a secular court.

I respectfully agree with the exegesis of Mr Michael Orpwood QC, currently Chancellor of this Diocese, who gave an excellent paper entitled **The Christian and Litigation** in September 2001.[23] Mr Orpwood concludes his analysis of many Biblical texts in the Old and New Testament as follows:[24]

> *Paul does not advocate a total absence of redress for Christians who are in dispute with one another. He does not leave the problem without a solution. In fact, he offers two. First, like Jesus before him, he suggests that disputes between believers are to be resolved before believers. As well as the words of Jesus, Paul may have had Moses and the judges of Israel in mind as a precedent. Second, Paul advocates the voluntary forfeiture of legal rights.*

You will not have missed the irony of lawyers challenging clergy over the interpretation of Holy Scripture touching the invocation of legal rights. Fortunately, the widespread doctrine in this diocese of the headship of the (male) priest has not yet quenched the great Reformation principle of the priesthood of all believers. While none of us is free from error, all of us need to be critically aware of the scriptural guidance that is on offer. The laity are at the frontline of engagement with society. Yet their need to keep up to speed is, if anything, increased in an environment where more and more younger clergy in this diocese subscribe to Dr Broughton Knox's teaching that the "real Church" on earth is confined to the physical gatherings for "fellowship" in the local congregations.[25]

The framers of our Church's Constitution that came into effect on 1 January 1962 had the Apostle's words firmly in mind when they established a system of Church Tribunals for resolving internal disagreements that threaten order in our shared

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22 **Acts** 16:37, 25:11.

23 It is published in Sarah Buckle-Dykes (ed) **First Century Answers to Twenty-first Century Questions**, Croydon, NSW: Sydney Missionary and Bible College 2002.

24 Citing Exodus 18:24-26; Deuteronomy 16:18-20; Matthew 18:15-17; 19:28; Luke 22:30; 2 Timothy 2:12; Revelation 3:21 and 20:4.

25 Cf Knox's role as a witness for the plaintiffs in the ***Red Book Case*** discussed below.

belief system. At the apex is the Appellate Tribunal, a body consisting of three diocesan bishops and four laypersons with significant legal qualifications. The members are appointed by the General Synod as follows: a bishop and a layperson on the nomination of the House of Bishops, a bishop and a layperson on the nomination of the House of Clergy, and a bishop and two laypersons on the nomination of the House of Laity. The Appellate Tribunal has jurisdiction to hear and determine appeals from all inferior church tribunals. This appellate jurisdiction enables charges brought against clergy for misconduct or breaches of obligations in matters of faith, ritual, ceremonial or discipline to be taken on appeal (by both the person bringing the charge and the person charged). This is a mechanism for resolving constitutional and other disputes within the Church.

The Appellate Tribunal has also a broad original jurisdiction to resolve constitutional disputes. It may determine the validity of canons or proposed canons of General Synod. It may also provide what are described as determinations or opinions in all manner of constitutional issues if questions are referred to it by the Primate at his discretion or if requested to do so by 25 members of General Synod or a provincial synod affected thereby.[26] The decision of the Appellate Tribunal may extend to questions of doctrine, faith, ritual, ceremonial or discipline as well as the interpretation of the Constitution itself. Unless unanimous, the Tribunal is required to consult with the House of Bishops and a board of priestly assessors in matters of doctrine.[27]

In matters involving any question of faith, ritual ceremonial or discipline the consensus of at least two bishops and two laypersons and in any other matter the consensus of at least four members shall be necessary for the determination of the appeal or the giving of the opinion.[28]

The Constitution declares the decisions of the Appellate Tribunal concerning the validity of canons and proposed canons of General Synod to be final, effectively resolving any controversy as to contravention of the Fundamental Declarations, Ruling Principles or constitutional procedures for the due enactment of canons.[29]

By clearest implication, the Constitution also treats all other determinations and opinions of the Appellate Tribunal as binding on members of the Church. Indeed, there is a provision that treats "opinion" and "determination" interchangeably.[30] There is one minor exception that really makes the rule. Section 73[31] distinguishes between "permissive" and "obligatory" determinations: determinations that are inconsistent with or at variance with decisions of judicial authorities in England having jurisdiction in relation to the ecclesiastical law of England are said to be permissive, not obligatory or coercive unless they concern canons.[32]

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26 See ss29, 63.

27 Section 58.

28 See s29(7), 59(1).

29 Section 29(9).

30 Section 29(6)(a).

31 Cf s29(9).

32 It has been pointed out that one of the arguments presented by me on behalf of the defendants in the Court of Appeal in ***Scandrett*** raised the contention that the Constitution does not treat Appellate Tribunal Opinions as determinative except as provided in s73(3).

Regrettably, some senior churchmen within this diocese do not appear to hold these views about the role of the Appellate Tribunal or the status of its decisions. Such attitudes encourage the notion that only a secular court can provide definitive rulings in doctrinal and constitutional disputes. Let me instance two matters.

Some proclaim the view that "opinions" of the Tribunal are no more than provisional, personal utterances that are open to be disregarded by any member of the Church who is not happy to abide with them. I have frequently heard this expressed in debate within the Synod of the Diocese of Sydney. With the utmost respect, it is quite contrary to the fair reading of the Constitution and it also flies in the teeth of the scriptural principles I have referred to. The Constitution distinguishes between determinations and opinions, but it treats each as the "decision" of the Tribunal. The difference between determinations and opinions relates only to the procedure whereby the question is posed for the Tribunal's decision. Determinations are the outcome of appeals, opinions are the outcome of references. There is simply no point in giving jurisdiction to the Tribunal if the outcome of its solemn and costly deliberations can be disregarded if it is unsatisfactory to a bishop or a group within the Church.[33]

A second problem lies in the fact that not all members of the Appellate Tribunal have regarded earlier Tribunal decisions as determinative. What I am about to describe is a species of judicial activism that has occurred within the High Court of Australia in times past, with similar problematic consequences.[34] Once an appellate body has spoken on an issue (by majority, only if need be), its decision is final and binding for all purposes unless and until it decides as a body to change its collective mind. That, to my understanding, is an aspect of the rule of law, a principle that binds individual members of appellate courts as well as the general citizenry. It follows that, if the Appellate Tribunal (or the High Court for that matter) makes a ruling, then such ruling should also be applied faithfully by every member of the Tribunal or Court itself until the Tribunal or Court departs collectively from it. Naturally there may be disputes about the meaning or scope of an earlier ruling, but this qualification may be placed aside for present purposes. Without this

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Counsel may not advance arguments that they believe to be untenable, but there is a difference between an advocate's submission and an opinion of a lawyer which necessarily comes down on one side of a line. Advocates frequently find that what they think are their least worthy arguments find acceptance and *vice versa*. Views can also change over time, with further opportunity for reflection. (Sometimes, of course, the earlier view may be the better one.) From time to time judges are confronted with their earlier opinions expressed in written advices as counsel or in earlier judgments. There are collections of judicial palinodes written in such circumstances (see ***McGrath v Kristensen*** 340 US 16 (1950) at 177-8). My favourite, which I would adopt here, is Bramwell B's statement that *"the matter does not appear to me now as it appears to have appeared to me then"*. In the unlikely event that, as a member of the Appellate Tribunal, I had to address a submission on the topic of the bindingness of earlier Opinions I would, of course, approach the matter with an open, though not empty, mind.

33 A bishop who ignored the Opinion of the Tribunal relevant to the operation of the Constitution could be exposed to a charge before the Special Tribunal for the offence of wilful violation of the Constitution: see **Offences Canon 1962**, s2(1).

34 See Keith Mason, "The Rule of Law" in P D Finn (ed), **Essays on Law and Government**, **Vol 1, Principles and Values**, Law Book Co Ltd, 1995 at pp135-9.

attitude to the bindingness of earlier decisions, the voting in a later proceeding will be skewed if the individualist sticks to his or her own guns and decides not to address other critical issues presented for determination in that proceeding.

During the 1980s, the Appellate Tribunal repeatedly determined that the ordination of women to the priesthood would not contravene either the Fundamental Declarations or the Ruling Principles set out in our Church Constitution. Sometimes these decisions were by majority, at times they were unanimous. When the issue came yet again to the Tribunal in the late 1980s one member of the Tribunal refused to accept this consensus. Acting out of conscience, but still sitting and voting as a member of the Tribunal, the Archbishop of Sydney decided constitutional issues on the basis of holding that the Fundamental Declarations and/or Ruling Principles were contravened.

The case of the Rev George King referred to above shows that the courts of the land will never concede to any other body their asserted monopoly of determining legal disputes conclusively. But this does not mean that secular courts relish getting involved in religious disputes. Quite the contrary. Nearly every case discussed in this lecture contains unusually strong statements by the judges condemning the parties for not resolving their differences privately. There are also many legal principles that enable courts to defer to the rulings of private arbitrators and tribunals of voluntary associations, including churches.

Secular courts do not approach matters with the **Corinthians** passage uppermost in their minds. But they do endeavour to respect the true intent of members of voluntary associations. If that intent is to give finality to certain types of private dispute resolution or to treat constitutions as binding in honour only, then the courts will strive to respect this as the upholders and not the destroyers of contracts and trusts. It is only when a dispute spills into the public domain, as it will if property rights are involved, for example if a sacked clergyman refuses to vacate the rectory, that courts will reluctantly get involved. These principles have been stated over and over again in cases in the Privy Council and the High Court of Australia over the last 150 years, as demonstrated in the detailed reasons of Mahoney JA and Priestley JA in ***Scandrett v Dowling***.[35]

Of course, the rules about when the secular law gets involved in church disputes should not be the measure of what is right for a Christian who is thinking of suing a fellow believer.

The ***Red Book Case*** refers to protracted litigation that took place in this State in the late 1940s before Roper J, twice before the Full Court, and before the High Court of Australia. The litigation takes its name from a service book entitled **The Holy Eucharist** that was issued for use in the Diocese of Bathurst by its bishop, Arnold Lomas Wylde. It owed much to the 1928 Prayer Book approved in England within the Church, but rejected by the English Parliament that exercises ultimate temporal control over the established Church in that country. Those opposed to Bishop Wylde's Red Book detected endorsement of the Anglo-

[35] (1992) 27 NSWLR 483 at 491, 554-562.

Catholic doctrine of the Real Presence.[36] The introduction of the book in All Saints Canowindra in 1943 provoked immediate opposition from some parishioners and led to a relator suit that was continued after Bishop Wylde withdrew permission for the use of the Book in the particular parish.

A relator suit is the means whereby allegations of breach of charitable trust are tried. A charitable trust does not have a beneficiary, but the property is devoted to a purpose that the law recognises to be deserving of protection. One such purpose is a trust for religion. The relators, who were 13 men from various parishes in the Bathurst Diocese, charged that to conduct a service in accordance with the Red Book in church buildings constituted a breach of the charitable trusts upon which some, but not all, church property was held in the Diocese. The defendants were Bishop Wylde and the Church of England Property Trust in the Diocese of Bathurst.

A brief excursus to nineteenth century England is required to set the scene. In 1832 supreme ecclesiastical jurisdiction in the Church of England was transferred to the Privy Council. According to Desmond Bowen, **The Idea of the Victorian Church,** the result was that ecclesiastical law was:[37]

> *… placed upon the shoulders of a group of amateurs. The members of the new court had not usually, and were not obliged to have, any legal training in the law they were expected to administer. They were acquainted with some matters that were of concern in ecclesiastical law, property, revenues, and personal freedom; and perhaps statutory legislation was the best way to regulate them. But other matters such as the administration of the sacraments, the conduct of public worship, and the outward pattern of devotional life required a different approach. Admonition was of more use here than the imposing of ecclesiastical discipline upon tender consciences. The long history of the Church had taught … that any attempt to enforce the strict letter of the law by coercive measures had usually proved disastrous.*

Matters came to a head in the Gorham Controversy. Bishop Philpotts refused to institute Rev George Gorham to his new benefice because of unhappiness with his Calvinistic ideas regarding the sacrament of baptism. The Privy Council's ruling that Gorham's opinions were not *"contrary or repugnant to the declared doctrine of the Church of England as by law established"*[38] caused great consternation to the many High Churchmen who thought they were indeed repugnant in this sense. Many Anglicans of every persuasion were also troubled about a civil court being the supreme arbiter in matters of church doctrine. The ***Gorham*** decision stimulated the spread of the Oxford Movement in the late nineteenth century in England and elsewhere.

The Evangelicals in England were generally content with the relationship between Church and State illustrated in the ***Gorham*** judgment. In the 1870s they pressed

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36 See the submissions in 78 CLR at 250 and 252 for the oppositing positions as to whether the Real Presence doctrine was endorsed or merely recognised.

37 McGill University Press, Montreal, 1968 at p94.

38 ***Gorham v Bishop of Exeter*** (1850) 7 Not Cas 413 at 434.

on, launching several prosecutions of clergy under the **Church Discipline Act 1840**. A body called the Church Association collected funds and organised the prosecution of ritualists, hoping to establish conformity through coercion. These efforts had precisely the opposite effect. Many observers unsympathetic to ritualism were indignant that the heavy hand of the secular law would be used to coerce those who deviated in good faith and with the general support of their local congregations. The ancient lessons of Christendom – that persecution begets martyrs and martyrdom begets followers – were to be learnt afresh.

In the second half of the nineteenth century English courts resolved complex theological issues in favour of one warring church party against another if they found themselves unable to give innovators the benefit of the doubt or were forced to address property disputes. The most famous of all such cases, ***General Assembly of the Free Church of Scotland v Overtoun,***[39] was said by the legal historian F W Maitland to have seen *"the dead hand [of the law fall] with a resounding slap upon the living body of the Church"*.[40]

The English Parliament responded to the wave of prosecutions with the **Public Worship Regulation Act** of 1874. It was introduced by Disraeli as a bill *"to put down Ritualism"* and its showpiece was the creation of a court whose single judge was appointed by the two English Archbishops with power to try ritual cases, subject to a right of appeal to the Privy Council. But the key provision became the bishop's right of veto to individual prosecutions.

Priests were prosecuted and imprisoned when they refused to acknowledge the legitimacy of the new court, continuing ritualistic practices with the assent of their flocks. In the upshot, the bishops started using the new veto to block prosecutions. In 1888 the Church Association responded by prosecuting the bishop himself. The Bishop of Lincoln was charged with using the eastern position, lighting candles on the altar, using the sign of the cross at absolution and blessing, and other ritualist practices. Most of the charges failed all the way up to the Privy Council, although the use of the sign of the cross during the absolution and the benediction and the mixing of water and wine as part of the service were held to be unlawful.[41]

This was virtually the last of the prosecutions. The promoters were disappointed that several ritualist practices were not declared illegal, thereby becoming safe to adopt. But the bigger damage to the evangelical cause came from their occasional successes. One priest, Sidney Faithorn Green was imprisoned for a year and seven months as he refused to submit. His plight attracted widespread sympathy. According to Owen Chadwick,[42] *"the evangelical party was more damaged by [the case against the Bishop of Lincoln] than by any other circumstance in the entire controversy over ritual, even the imprisonments of clergymen…. Almost all evangelicals now disapproved of the policy of prosecution."*

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39 [1904] AC 515.

40 Professor Maitland, "Moral Personality and Legal Personality" (1905) 6 **J Soc Comp Legis** 192 at p200.

41 ***Read v The Bishop of Lincoln*** [1891] P 9, [1892] AC 644.

42 **The Victorian Church** 1966, OUP, Oxford, p354.

This message never reached Sydney, or if it did, the lessons of history were forgotten or overlooked. In the ***Red Book*** and ***Scandrett*** litigation, leading churchmen in this diocese were to encourage resort to civil courts for compulsive orders designed to resolve theological disputation and coerce uniformity.

I return to the ***Red Book Case***. After protracted interlocutory disputes and the taking of evidence in England, judgment at first instance was given in favour of the relators by Roper J, who issued injunctions restraining any departure of the Service of Holy Communion according to the Prayer Book and specifically declaring that the making of the sign of the cross and the use of the sanctus bell constituted breaches of the trusts of church lands. Bishop Wylde appealed directly to the High Court and the appeal was heard over five days in August 1948.

By the time the case got to the High Court the central issues were (1) whether strict compliance with the Book of Common Prayer was required generally within the Diocese, or at least in churches subject to charitable trusts *"for the erection of a church"*; (2) whether certain ritualist practices including the use of the sanctus bell and the making of the sign of the cross at absolution and benediction were contrary to the Thirty Nine Articles and the Book of Common Prayer; (3) whether, if they were, this constituted a breach of trust in properties devoted to the purposes of the Church of England; (4) whether the bishop had authority to licence deviations and variations of the type involved (the so-called *ius liturgicum*); and (5) whether it was appropriate for an Equity Court to issue injunctions where breaches of ritual, but not doctrine, were alleged.

There was much evidence that the Book of Common Prayer was no longer adhered to strictly in England or anywhere else. According to the Chancellor of the Diocese of Leicester, it was common knowledge that every clergyman departed from the Book of Common Prayer.[43] Bishop Wylde also pointed to forms of divine service departing from BCP that had been authorised by the Archbishop of Sydney.[44]

Originally a charge of heresy or false doctrine was preferred against Bishop Wylde, but it was withdrawn after evidence taken in England revealed widespread acceptance there of the practices objected to.

Four judges heard the case in the High Court, the other members being unable to sit due to illness or absence abroad. The justices were evenly divided as to the outcome. Latham CJ and Williams J would have dismissed the appeal subject to varying Roper J's orders in a significant respect. Rich J and Dixon J would have upheld the appeal and dismissed the suit entirely. The **Judiciary Act** gave the Chief Justice a casting vote in those circumstances, so his orders prevailed.

Latham CJ had accepted jurisdiction on the basis that a breach of trust had been alleged. He considered that it was not for the court *"to determine the soundness*

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43 ***Wylde*** at 262.

44 Canon Hammond (referred to below) admitted that he made his own omissions from BCP services, claiming that they were insignificant: see 78 CLR at 280-1.

*of any particular doctrine or the wisdom of a particular ritual"*,[45] but he held that the practices in question were deviations from the Book of Common Prayer and hence unlawful. The injunctions granted in the Supreme Court of New South Wales were however to be formulated more narrowly in order to confine them to proven deviations restricted to identified church properties in Bathurst diocese. Williams J agreed, describing the adjudication as *"distasteful"*. In contrast, Dixon J held that courts of Equity lacked any jurisdiction to deal with matters of liturgy, the present case being no more than that. The fourth judge, Rich J, saw the controversy as unfit for a civil court once what he described as the *"recklessly"*[46] advanced charge of heresy had been withdrawn. He would have declined on discretionary grounds to deal with what he described as *"abstract questions involving religious dogma"*.[47] He pointed out that, if the relators were correct, one likely result of the *"mischievous suit"* would be that several services conducted regularly at St Andrews Cathedral could be restrained by injunction.

In the High Court, the case was limited to the enforcement of trusts said to stem from the dedication of particular properties for use as a Church of England. No one challenged the nineteenth century cases already referred to that rejected Anglican establishment in New South Wales. And, as later pointed out in ***Scandrett v Dowling***, all four High Court justices rejected any notion that all Anglicans in New South Wales were linked by a legally enforceable contract.

In my view, the reasoning of Rich and Dixon JJ is clearly the more compelling. The **Act of Uniformity** of 1662 imposed personal obligations on Church of England clergy, but it was expressly confined to England, Wales and the town of Berwick-upon-Tweed. It never applied to New South Wales. Trust law had never been the vehicle for enforcing ritual uniformity[48] in England or elsewhere. And, even in England, not every addition to or departure from the liturgy prescribed in the **Book of Common Prayer** was treated as a personal breach of the **Act of Uniformity**.

If Latham CJ was correct, the position in Australia was radically different to that in the home country. For him, the law of charitable trusts did the same work as the **Act of Uniformity**, without the mollifying influence of the English nineteenth century statute law permitting the use of shortened BCP services. But Latham's uniformity was even more stringent than in England, where the nineteenth century legislation gave bishops an effective veto of any prosecution to enforce liturgy or doctrine said to be mandated by the Book of Common Prayer.[49] I cannot refrain from pointing to the irony that Sir John Latham was for some years the President of the Rationalist Society of Victoria.

The two-all split robs the High Court decision of precedential force even in the religious charitable trust area. But the standing of Sir Owen Dixon and the cogency of his reasoning makes it likely, in my opinion, that his view would prevail

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45 78 CLR at 262-3.

46 At 273.

47 At 282.

48 See ***Attorney-General v Dean and Chapter of Ripon Cathedral*** [1945] Ch 239 at 7, cited by Rich J at 283 and Dixon J at 289.

49 For Dixon J's withering riposte, see 78 CLR at 292-6.

in the unlikely event that the same matter went again to the High Court. If there are trends in these matters, the tide is also flowing swiftly in the direction of judicial non-interference in ecclesiastical disputes.[50]

Regardless of how a modern High Court would react to a repeat of ***Red Book***, one lesson clearly drawn from it is that doctrinal and liturgical uniformity is most efficiently enforced through the episcopal licensing and disciplining of clergy. But there are drawbacks with such a system. For the laity, this keeps them out of the loop if the bishop is too harsh, too gentle or too lawless in his interpretation of what is sound doctrine, ritual and order. The problem for bishops is that this puts them directly into the loop. In one sense, this goes with the episcopal territory in a Church one of whose Fundamental Declarations commits to preserve the three-fold orders in the sacred ministry. However, it is not easy for a bishop to combine pastoral and disciplinary roles where the right to discipline turns upon charges first being laid and established.

The Archbishop of Canterbury intervened more than once during the ***Red Book*** litigation to urge settlement, fearing that an appeal from Australia to the Privy Council would expose the English Church to unpleasant fresh judicial interpretations of the Book of Common Prayer, thereby reopening the wounds of the Gorham controversy. A threatened appeal to the Privy Council was not proceeded with in return for the defendants being released from the crippling costs orders pronounced by Roper J and upheld in the High Court.

Thus far, I have described the ***Red Book Case*** in cold, formal terms. The litigation was anything but that. The inside story is revealed in the doctoral thesis of David Galbraith aptly entitled **Just Enough Religion to Make us Hate. An Historical Legal Study of the Red Book Case**. Dr Galbraith's title picks up on the opening remarks in the judgment of Rich J who said:[51]

> *The subject of this unhappy controversy is only fit for a domestic forum and not for a civil court. Unfortunately it is not an example of "charity" in the New Testament sense or of the command to love one another. The dispute illustrates a saying of Dean Swift that "we have just enough religion to make us hate, but not enough to make us love one another".*

Those opposed to the Red Book within Bathurst made early contact with Archbishop Mowll who promptly referred them to Canon T C Hammond. On behalf of the Bathurst laymen, Hammond engaged the Sydney firm of Allen Allen & Hemsley whose senior partner, H Minton Taylor, was a member of the Sydney, Provincial and General Synods and had been in the centre of the church constitutional debates for the past 30 years.[52]

As was to happen 35 years later in the ***Scandrett*** litigation, leading figures within this diocese were to support litigation touching events within another diocese

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50 For a contrary view, see Hon Mr Justice B H McPherson CBE, "The Church as Consensual Compact, Trust and Corporation" (2000) 74 **ALJ** 159.

51 78 CLR at 273.

52 Judd & Cable, **op cit**, p253.

because they feared that developments elsewhere would impact on their perception about where to draw the limits of Anglican diversity. It is not easy to see the links of reasoning that demonstrated that Sydney was affected by liturgical innovations in Bathurst or the ordination of women priests in Canberra-Goulburn. It is even harder to discern how it was thought by those supporting the plaintiffs in ***Scandrett*** that the interests of this diocese would be furthered by obtaining a declaration that cut down the legislative powers of diocesan synods in this State. But the links were definitely drawn, in good faith, fired up with the heat of righteous indignation about the plight of evangelical minorities elsewhere. In ***Red Book*** and ***Scandrett***, leading Sydney Anglicans were prepared to promote litigation for the enforcement of liturgical and doctrinal lines they confidently drew, while asserting liberty to act according to their own conscience in other matters.

To those on both sides who saw doctrinal issues represented by what a priest did with his hands during the Communion Service, the issues behind the Red Book dispute were important. But the chosen field of battle strikes us as strange in modern times. It is difficult to think that today's Anglican Church League would be at the vanguard of insistence upon following the liturgy of the Book of Common Prayer to the letter. On its face, the ***Red Book*** fight was about liturgy (at least after the heresy charge was abandoned). At a deeper level it was about church order. But, as with most of the other disputes considered in tonight's lecture, the real fight was over **who** decided things. Bishop Wylde was not prepared to compromise on matters of his episcopal authority. The Hammond-led laymen were not prepared to allow the clergy to depart from their vision of the Reformation settlement.

I agree with Judd & Cable's assessment that the ***Red Book Case*** *"highlight[ed] the fact that the laity were as much part of the Church of England as the clergy and the bishop".*[53] But the direct and indirect costs of the struggle and its uncertain outcome did nothing to displace the wisdom or authority of the Apostle Paul's own injunctions. Bishop Wylde's leading counsel was F W Kitto KC, later a High Court Justice. He endorsed the compromise promoted by the Archbishop of Canterbury in a letter written from London where he was appearing before the Privy Council in the ***Bank Nationalisation Case***. Kitto observed that the litigation left the Church right where it was when the litigation had started because the two-all split in the High Court meant that legal uncertainty prevailed except for the certainty that any fresh litigation would be cripplingly costly.[54]

The uncertainty generated by the ***Red Book Case*** was a factor that drove the warring dioceses to submit to the national Constitution of the Church that came into effect in 1962. I have already discussed the Tribunal system that it established. The Constitution also prescribed substantive rules about the inheritance of the law of the Church of England[55] and the limits upon the law-making powers of synods.[56] Statutory backing for the Constitution was sought in

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53 **Sydney Anglicans** p254.
54 Galbraith, **op cit**, p 269.
55 Sections 71-73.
56 See Chapter I (Fundamental Declarations) and II (Ruling Principles).

every jurisdiction upon the clearest of assurances that it was required only for property purposes.[57]

This brings me to ***Scandrett v Dowling & Ors***, litigation in which I disclose that I was one of a team representing the defendants. In a series of Opinions given in the 1980s, the Appellate Tribunal decided that the ordination of women as priests would not be contrary to the Fundamental Declarations or the Ruling Principles of the Constitution of our church. On the basis of these Opinions, the power to act lay with the Church in Australia.

This statement requires one important qualification to which I have already alluded. Some Anglicans were on record as not accepting the constitutional rulings embodied in these Opinions. In this group were leading clergy and laity of this diocese, including its Archbishop who sat as a member of the Appellate Tribunal. Archbishop Robinson declared himself (both judicially and extra-judicially) unwilling to accept the Tribunal's earlier rulings about the Fundamental Declarations and Ruling Principles.

There was also widespread uncertainty as to who had the authority to change the inherited situation of a male priesthood. Some thought the power resided in the episcopal breast. Others believed that synodical authority was required, in turn disagreeing as to whether the triggering power resided exclusively in the General Synod. If it did, this meant that a Bill for a canon had to achieve two-thirds majorities in each House of General Synod before it could pass; and that the canon would thereafter come into force only in those dioceses that adopted it for their own. Those strongly opposed to women priests hoped that they had more than one-third of the votes in at least one of the Houses of General Synod.

In 1989 the Synod of the Diocese of Canberra-Goulburn enacted an **Ordination of Women to the Office of Priest Ordinance**. Without the springboard of a General Synod canon, it purported to authorise the Bishop of that diocese to ordain a woman to the office of priest. Bishop Dowling was later persuaded by his episcopal brethren to hold his hand until the Appellate Tribunal addressed a series of questions referred for its Opinion by the Primate at the instigation of opponents of women's ordained ministry. Bishop Dowling indicated to his synod that he would respect the Tribunal's ruling, but that if it was not adverse to validity then he would proceed.

There was a protracted hearing in the Appellate Tribunal. Several dioceses intervened to put submissions. The Tribunal consulted with the bishops and assessors, according to the Constitutional procedures. On 6 December 1991 it published an Opinion in the form of answers to the several questions raised in the Reference. Some of the questions could not, however, be answered for want of a constitutional majority of two bishops and two laymen as required by s59 of the Constitution. While the answers that were provided ruled out the possibility of a bishop acting lawfully merely in reliance upon his episcopal powers, no answer was given by the Tribunal to the questions addressing the powers of Bishop Dowling as affected by his diocese's Ordinance of 1989.

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[57] See ***Scandrett*** at 546-552, 563 for the situation in New South Wales.

Noting that the Appellate Tribunal had not declared the Ordinance invalid, nor stated that the ordination of women was contrary to the Fundamental Declarations, Bishop Dowling announced that he intended to proceed with the ordination of a number of women on 2 February 1992.

The Metropolitan, Archbishop Robinson, requested and later directed Bishop Dowling not to proceed with his stated intention. Bishop Dowling informed the Archbishop that he intended to proceed. In his letter, Owen Dowling noted: [58]

> *It is an ironical position for us to be in. You from the reformed tradition, delivering me an episcopal injunction in the prelatical and catholic tradition, and me, from a more catholic background, saying, as I do: 'Here I stand, I cannot do otherwise'."*

On 16 January 1992 three plaintiffs commenced proceedings in the Equity Division of the Supreme Court of New South Wales against Bishop Dowling. The Court later required the proceedings to be amended by joining the affected female deacons.

When Bishop Dowling declined to undertake not to proceed, there were contested interlocutory proceedings during the Court Vacation. Initially they were dismissed by Rogers J, but the Court of Appeal granted an injunction two days before the proposed Service. The appeal court emphasised that it was acting to maintain the status quo and not deciding any issue in the main proceedings. The last minute injunction caused significant disruption, expense and sadness to the ordinands and their supporters.

Later, there was a full hearing before the Court of Appeal, differently constituted. Those with an eye for providence or irony might have observed that one of the three judges was called PRIESTLEY and another called HOPE. The priestly hopes of Bishop Dowling and his eleven deacons were realised on 3 July 1992 when the Court of Appeal dismissed the proceedings with costs, dissolving the interlocutory injunction.[59]

In opening the case before the Court of Appeal, counsel for the plaintiffs Mr David Jackson QC had said that the case was

> *"in truth, a case about the location of a power to change. In connection with that, the claimants accept that there is power within the governing bodies of the Anglican Church to change the present position so that it would then be possible to ordain women as priests.*

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58 Annexure "U" to affidavit of L A Scandrett sworn 23 January 1992. I imply no view either way as to the legal or moral propriety of Bishop Dowling's decision in the circumstances to refuse canonical obedience to his Metropolitan. Nor am I aware whether there was any attempt at mediation between the two men. A clergyman in the Diocese contacted me to inquire about the possibility of mediation. This, however, to my firm recollection, was after the injunction had been obtained and the Ordination Service had had to be postponed.

59 ***Scandrett v Dowling*** (1992) 27 NSWLR 483.

> *The ultimate question in the proceedings, however, is which body in the Church has the power to effect the change. We contend that it is the General Synod and only the General Synod which has that power ….”* [60]

It therefore became common ground in the proceedings between the three plaintiffs and the twelve defendants that ordination of women to the priesthood was not contrary to the Fundamental Declarations in Chapter I of the Constitution. For the third judge, Mahoney JA, this was to prove a critical matter, enabling him to decline relief as a matter of discretion.

The three plaintiffs were prepared to make such a concession. But those backing them were not stepping forward with any similar commitment. Based on their publicly stated doctrinal positions and their consistent voting patterns in synod, one is driven to infer that they were seeking to reserve to themselves a right to act according to their conscience that they and the ***Scandrett*** plaintiffs were not prepared to accede to Bishop Dowling. The proceedings attempted to enforce the Constitution against twelve defendants, yet (despite warning) there was no claim for a representative order that would have made the Court's ruling binding on all members of the Church.

Although the plaintiffs invoked no doctrinal impediment to Bishop Dowling's threatened action, the defendants tendered in their pleadings the contention that the Phillimore rule supposedly banning women priests was incapable of adoption by the Anglican Church of Australia because of the Church's commitment in the Fundamental Declarations ever to obey the commands of Christ.[61] This assertion, based on **Galatians** 3:28, had been announced by Bishop Dowling to his Synod and advanced on his behalf in the proceedings before the Appellate Tribunal. Although (if correct) it would have been determinative in his favour, all but one member of the Appellate Tribunal refused to address the issue.[62]

My excursion about the parties to the ***Scandrett*** proceedings may strike some as an exercise in technicality. But the point I am seeking to make is that it was ultimately impossible to place a contract-based or trust-based dispute in the hands of the Supreme Court of New South Wales without yielding to that tribunal the power, indeed the duty, to go if necessary to the heart of the vexing doctrinal disagreements within the Church about women's ministry, including those based on competing views of Scriptural exegesis and hermeneutics. One can only speculate about the Gorham-like screams that would have followed a secular court's binding determination either way on such delicate and divisive issues.

Unlike the ***Red Book Case***, the plaintiffs in ***Scandrett*** did not invoke the law of charitable trusts that would have forced the court to take a position on the very issue that split the High Court 2-all. In any event, relief based on the reasoning of

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60 Court of Appeal transcript of argument, p2.

61 See Defence, para 9(c). See also ***Scandrett*** at 517G.

62 Bishop Holland found in favour of Bishop Dowling on the point. The Tribunal's attention was drawn to this apparent oversight in correspondence. However the Tribunal declined to revisit the issue, without conceding that it had been overlooked.

Latham CJ and Williams J would have stopped at the door of churches subject to charitable trusts in favour of the Anglican Church, trusts that may possibly have been within the power of the Synod of the Diocese of Canberra & Goulburn to vary. Instead, Dr Scandrett and his fellow plaintiffs pressed for declaratory and injunctive relief that would, if granted, have prevented Bishop Dowling from ordaining women anywhere, on pain of contempt. It was contended that, if he did so, he would be breaching a contract binding him as a member of the Anglican Church of Australia as well as breaching the statute in this State that gave force of law to the Church's national Constitution *"for all purposes connected with or in any way relating to the property of"* the Church.[63] The words quoted were to prove decisive, because the plaintiffs did not suggest that any right of property was affected by Bishop Dowling's threatened actions.[64]

In the final hearing the plaintiffs put their case on two alternative bases, described by Priestley JA as the "statutory argument" and the "contractual argument".[65] The two arguments, and his response to them in summary form, were stated at the beginning of his judgment:[66]

> *"The first is that because the Constitution is a Schedule to an Act of the New South Wales Parliament, Act 16 of 1961, it had legally binding effect on all members of the Church in New South Wales not only in regard to Church property, but also in regard to the organisation of the Church. Therefore the obligations and duties it creates are enforceable in the same way as those created by any statute.*
>
> *I do not agree with this. Section 2 of Act 16 of 1961 in my opinion makes it as clear as words can make it that the binding* **legal** *effect of the Constitution is limited to purposes connected with or in any way relating to the property of the Church. Matters of faith and organisation not connected or related to Church property are not made any more binding at law than they were before the Act was passed.*
>
> *Secondly, it was said that all members of the Church in New South Wales were parties to a consensual compact embodied in the Constitution and that this compact had contractually binding legal effect on every member.*
>
> *I do not agree with this either. In my opinion the parties to the consensual compact upon which the plaintiffs rely are bound to it by their shared faith, not the availability of the secular sanctions of the judgments, orders or decrees of State courts of law. The belief of Church members is that they*

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63 **Anglican Church of Australia Constitution Act 1961, (NSW)**, s2.

64 I should point out that, within the Diocese of Canberra and Goulburn all clergy of whatever order had identical salary rights, affected only by years of service. In argument before the Court of Appeal the plaintiffs did not press a case based on property rights beyond submitting that membership of a church that owned property (including, given that ordinations were proposed to be effected in the name of a church, goodwill attaching to the name of the church) was sufficient. No claim based on a more concrete interference with property rights was pleaded. This was noted by the Court in the final judgment (at 500, 564).

65 At 520.

66 At 512-3.

*are all one in Christ Jesus; an acceptable way of describing the Church, as I understand it, is that it is constituted by this unity.*

*The consensual compact is thus based on religious, spiritual and mystical ideas, not on common law contract. It has the same* **effect** *as a common law contract when matters of church property become involved with the other matters dealt with by the consensual compact. I do not think the claims made in this case get out of the area of the consensual compact which does not have the legally binding effect here relied on.*

*It follows, in my opinion, that the claims made in this case must be resolved by the Church's internal procedures, and these proceedings must be dismissed."*

Much of Priestley JA's lengthy judgment is devoted to explaining these conclusions. His Honour also observed[67] that the answer to each argument had been given by the reasoning of all four of the High Court judges in the ***Red Book Case***.[68] In my opinion, the position was arguably stronger for the defendants in the ***Scandrett*** case, because the so-called contract sought to be enforced was not the consensual compact relating to doctrine and liturgy, based on the perceived nexus between the Church in Australia and the Church in England. Rather, the relief that was sought was directed at enforcing the plaintiffs' perception of an entirely different contract embodying the terms of the Constitution that came into existence in 1962.[69] I do not, however, recall much attention being given to how, for example, Dr Scandrett (a layman) was a party to the contract embodying the 1961 Constitution that was averred against Bishop Dowling and his eleven deacons.

Priestley JA (Hope AJA concurring) saw s2 of the 1961 New South Wales Act as **negating** the argument that the 1961 Act gave effect to the Constitution outside property-related matters or those matters of detail covered by ss7-9 of that Act.[70] For him, this was reinforced by s70 of the Constitution itself,[71] and by the historical material which showed the intention of the promoters of the 1961 statute as represented to the New South Wales Parliament to be limited in the way he interpreted the Act.[72]

Time prevents me from expounding at length the reasons of the third member of the Court of Appeal in ***Scandrett v Dowling***. Mahoney JA effectively agreed with Priestley JA in holding that the rules of the Church embodied in its 1961 Constitution did not have the general force of statute and, even if broken by the threatened ordination, would not attract the remedy of injunction. Furthermore, the

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67 At 521 B-G.

68 At 560-2.

69 See esp Mahoney JA at 489, 494-5.

70 ***Scandrett*** at 562-3.

71 See at 562-3.

72 See at 563. Interestingly, the person who wrote to the Attorney General on behalf of the promoters of the 1961 Act had been counsel for the relators in the ***Red Book Case*** (see reference to Mr Clive Teece KC at 563G).

concession about no doctrinal breach of the Fundamental Declarations or Ruling Principles meant that there was no basis for concluding that any relevant breach would occur in any event. That concession meant that the case was reduced to a dispute about constitutional procedure.[73] The point at which Mahoney JA diverged from the majority concerned the issue whether the constitutional and other rules of the Church as a whole were intended to have any binding effect beyond matters of property. His Honour thought that they did in matters of doctrine. But beyond that, they were not of such a nature as to attract equitable relief in the form of declaration or an injunction in the particular dispute before the Court.[74]

If the plaintiffs had been prepared to wait, there may well have been an available mechanism for addressing the issue internally. It might not necessarily have had everything that the plaintiffs or Bishop Dowling wanted, but it might nevertheless have been more consonant with the **Corinthians** directives. A charge could have been laid against Bishop Dowling under s2(1) of the **Offences Canon 1962** for wilful violation of the Constitution or under s56(2) of the **Constitution** for breach of *"faith ritual ceremonial or discipline"*. (I imply nothing as to the outcome of such charges had they been laid.) The charge would have been heard and determined in the first instance by the Special Tribunal constituted under s56 of the **Constitution**. That Tribunal would have had jurisdiction to determine any constitutional or other issues necessary to be addressed. From its decision an appeal would have lain to the Appellate Tribunal and the latter body's capacity to determine such appeal would have been subject to the requirement that, if the matter involved any question of faith ritual ceremonial or discipline, the concurrence of at least two bishops and two laypersons was necessary.[75] The issues in such putative proceedings would not necessarily have been identical to those previously tendered to the Appellate Tribunal in the abovementioned reference. If, however, the Appellate Tribunal had remained constitutionally impotent, then this would have left in place the determination of the Special Tribunal (whichever it was). It is of course conceivable that either Tribunal might have given Bishop Dowling the benefit of the doubt in such prosecution, but the nineteenth century history of prosecutions in England to which I have already referred shows that liberty stemming from an outcome of this nature is both traditional and inevitable.

Several of the cases I have discussed were horrendously costly. Sometimes unwilling defendants raised technical and procedural points designed to block access to the civil court for what was seen as inappropriate litigation. Sometimes the plaintiffs' own lawyers got them into terrible tangles. This was the fate of the relators from Christ Church St Lawrence who in 1933 attempted unsuccessfully to invalidate an ordinance passed by Standing Committee designed to reallocate outside that parish trust funds that were no longer required for a school. The case ran for eleven days with senior and junior counsel on both sides and the relators

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73 See at 487, 488.

74 See esp at 505-8.

75 **Constitution**, s59(1).

were left paying most of their own costs. [76] The reasons for judgment contain the recurring judicial reproof about the *"unedifying"* nature of the dispute.[77]

For the ***Red Book Case***, fighting funds were drummed up for both sides from sympathetic parishioners in Bathurst and Sydney. After ***Scandrett v Dowling*** was launched, the Archbishop of Sydney with the approval of a divided Standing Committee offered $50,000 from the Endowment of the See to each side for assistance in meeting legal costs. Standing Committee was warned at the outset that Bishop Dowling would never accept money from such a source for such a purpose, and thus it turned out. When he declined the offer, his $50,000 was then added to the sum provided to the plaintiffs.[78]

This action shows that the majority of those in leadership in this diocese in 1992 formed the view that litigation in the civil court against Christian brothers and sisters was appropriate and that the claims of the plaintiffs raised issues relevant to this Diocese. I can only say that, for me personally, this act of formal endorsement and funding was the most heartbreaking event in a generally sad and painful experience.

I would not want you to think that the diocese of Sydney has always been the aggressor or that every Supreme Court case involving this diocese was an attempt to enforce doctrinal or ritual uniformity by resort to secular courts.

There have been two cases involving property in which opposing views were presented to the Supreme Court for the purpose of ensuring full argument and satisfying the law's need for a "proper contradictor". Each case involved Moore College. The first occurred in the 1890s. Proceedings before the Chief Judge in Equity and later the Full Court resolved, at least in the eyes of the law, a long-standing dispute as to whether Sydney Diocese alone was the beneficiary of Thomas Moore's bequest in favour of *"William Grant Broughton, Lord Bishop of Australia, and to his successor and successors"*. It was held that the country dioceses that were carved out of the original diocese of Australia did not share in this benefaction.[79]

More recently, there was litigation of a similar type to determine whether various funds held on trust to provide scholarships for students at Moore Theological College were "church trust property", thereby falling subject to the extraordinary powers to vary such trusts conferred by the **Anglican Church of Australia Trust Property Act 1917.** The name of this case is ***Gotley v Robinson***, the leading participants being the Diocesan Secretary and the Archbishop.[80] Neither of these

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76 ***Attorney General v Church of England Property Trust Diocese of Sydney*** (1933) 34 SR(NSW) 36.

77 Per Long Innes J at 51.

78 The plaintiffs' costs, the costs ordered to be paid to the defendants and the defendant's losses flowing from the interlocutory injunction that had to be reimbursed in consequence of the plaintiffs' undertaking as to damages would have exceeded $100,000 by a large margin. It is understood that the greater part of this excess was borne by Dr Scandrett personally.

79 See Report received by the 9th Provincial Synod held in July 1898 (copy made available by Mr Mark Payne); Report in **Sydney Morning Herald**, 18 November 1896, 3 May 1897.

80 Supreme Court (NSW), McLelland J, unreported, 22 March 1989.

matters engage the matters addressed in tonight's lecture. They involved property issues untouched by theology; they were "friendly suits"; and no injunctive or coercive relief or crushing order for costs was sought by the plaintiff against the defendant.

***Baker v Gough***[81] were proceedings brought by the Reverend H W Baker against the Archbishop of Sydney and the Council of the Kings School. Mr Baker was the Chaplain and a teacher there. Incidentally, he taught me history in the middle school. A sub-committee of the school council formed the view that he was too strong a personality for the younger headmaster that the school was hoping to appoint after the long tenure of the inimitable H D Hake. If the members of the school council had particular objections about Mr Baker they kept them close to their chest. When Baker declined an invitation to resign, a resolution for his dismissal was carried by the majority of councillors. None of the councillors who voted for dismissal gave evidence in the lengthy trial in which Baker was represented by his brother-in-law Edward St John QC and Mr W P Deane, who later became a member of the High Court and a distinguished Governor General. Jacobs J held that the Chaplain was entitled to procedural fairness and that this required the council to specify the particular matters of character, conduct or personality that were truly involved in the decision. The case illustrates that courts will become involved in intra-church disputes where matters of property including the right to paid employment are involved. The legal issues did not turn upon any point of religious doctrine.

Family disputes that go to court are usually disastrous for all concerned. Unless the litigants are terribly rich or terribly poor the monetary costs are prohibitive and quickly outstrip the value of what is in dispute. But the real costs can be totally destructive. Litigation has a way of hardening hearts, if only because the original matter in dispute becomes overlaid with layers of additional slights and misunderstandings. Intimate bystanders are forced to take sides. The employment of lawyers creates walls of separation and ever-widening zones of secrecy and misunderstanding.

Family disputes may concern relationships (such as guardianship or custody), but more often than not they relate to money. Behind both categories there will usually lie questions of power and control as people convince themselves that taking a firm stance in the litigation is the right or necessary thing to do.

Disputes within a congregation or a wider church may relate to property or the right to control property. Each warring party may be utterly convinced that holding a position reflects the intentions of a founder or scriptural principle to whom all profess total allegiance. Yet Article XX of the **Thirty Nine Articles** proclaims that Churches can err in matters of faith. Scripture and human experience convince us that we are all capable of immense self-deception and that many things we take to be fundamental are in truth ephemeral.

It may be extremely vexing to see a Christian brother or sister saying or doing things that are thought wrong or not doing things that are thought right. This is

81 (1962) 80 WN(NSW) 1263 (Jacobs J).

particularly so, if the offending conduct is perceived to be driven by doctrines that strike at the fundamentals of a supposedly shared belief system. Thus, the ***Red Book*** liturgical practices were viewed by some as challenging the doctrine of the atonement. The disputes over women's ordination included, or were ratcheted up by, disagreements over scripture and fidelity to scripture, latterly exacerbated by allegations and counter-allegations involving the doctrine of the Trinity.

Tolerance is never an easy virtue, and it is severely tested in such contexts. Quiet departure or open secession are available options. So too is perseverance in faith. This said, every church and voluntary organisation needs to patrol its boundaries if it is to pursue its mission. The law recognises this and will assist to preserve public order. It will brook no alsatias, being prepared (if necessary) to assist even the Flat Earth Society in expelling its own heretics. The law's standards do not however necessarily represent best practice for the Christian.

It is easy to look back and condemn Hall for his obstreperousness, Scott for his spite, King for his insubordination, Wylde for his stubbornness, Hammond for his meddling combativeness. Each man acted out of conviction for truth, for justice, for the gospel as he saw it. But it is debatable whether his actions in the particular matters I have addressed were truly consistent with the gospel of love as expounded in Scripture.

None of the men would have claimed to be free of fault and each would have wished further opportunity to explain his actions. These matters can be acknowledged, without yielding the historian's right to address the past, holding our forebears accountable. In doing so, the historian may seek to apply timeless values. But time *"bears all its sons away"* and we too will in turn be judged by later sojourners on earth and by a higher Authority than ourselves.[82]

[82] This is a longer and slightly revised version of the lecture as delivered. Some of the additions were prompted by helpful observations from some who attended the lecture.