[HIGH COURT OF AUSTRALIA.]

WYLDE . . . . . APPELLANT;
DEFENDANT,

AND

ATTORNEY-GENERAL FOR NEW SOUTH WALES (AT THE RELATION OF ASHELFORD AND OTHERS) . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 11-13, 16, 17. *Dec.* 6.

Latham C.J., Rich, Dixon and Williams JJ.

Charities—Charitable trusts—Churches vested in Church of England Property Trust, Diocese of Bathurst—Sacrament of Holy Communion—Administered otherwise than in accordance with Prayer Book of 1662*—Deviations and variations—Authorization—Act of Uniformity* 1662 (13 & 14 Car. II., c. 4)*—Church of England Constitutions Act Amendment Act of* 1902 (*N.S.W.*), *ss.* 4, 5, *Schedule arts.* 3, 24*—Church of England Property Trust Act* 1917 (*N.S.W.*) (*No.* 21 *of* 1917), *ss.* 4, 5, 19, 24.

Upon an information presented by the Attorney-General for New South Wales alleging breaches of charitable trusts by the bishop of a diocese, the Supreme Court, in its equitable jurisdiction, held: (1) that the Church of England in New South Wales was part of the Church of England, in England, both by reason of its history in New South Wales and of the provisions of the *Church of England Constitutions Act Amendment Act of* 1902 (N.S.W.); (2) that the order of administration of the Sacrament of Holy Communion contained in the Book of Common Prayer annexed to the *Act of Uniformity* 1662 was the only lawful administration of that Sacrament according to the rules of the Church of England in New South Wales; (3) that the use in churches of the Church of England of New South Wales of any order of administration of the Sacrament other than that contained in the said Book of Common Prayer and the practice of the above-mentioned ceremonies were breaches of trusts on which churches held in trust for purposes of the Church of England in New South Wales were held; the Supreme Court also declared that the ceremonies of the making of the Sign of the Cross *coram populo* and

of the ringing of a *sanctus* bell were illegal ceremonies according to the rules of the Church of England in New South Wales. Consequential injunctions were granted. On appeal,

Held,

(1) by *Latham* C.J. and *Williams* J. that the appeal should be allowed to the extent of making certain variations therein limiting the decree to breaches of trust proved, namely, the use of a certain Red Book, of the Sign of the Cross and of the *sanctus* bell in the churches of the diocese which were subject to the trust proved, but that otherwise the appeal should be dismissed;

(2) by *Rich* and *Dixon* JJ. that the appeal should be allowed and the decree appealed from set aside;

(3) Subject to the said variations of the decree the appeal was dismissed in accordance with s. 23 (2) (*b*) of the *Judiciary Act* 1903-1947.

Decision of the Supreme Court of New South Wales: *Attorney-General* v. *Wylde*, (1948) 48 S.R. (N.S.W.) 147, varied and otherwise affirmed pursuant to s. 23 (2) (*b*) of the *Judiciary Act* 1903-1947.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the equitable jurisdiction of the Supreme Court of New South Wales on the information, as re-amended, of the Attorney-General in and for the State of New South Wales on the relation of Henry Norman Ashelford and twenty-two other relators, members of the Church of England, Diocese of Bathurst. The defendants were Arnold Lomas Wylde, Bishop of the Diocese of Bathurst, and the Church of England Property Trust, Diocese of Bathurst.

The information was substantially as follows:—

1. The defendant Arnold Lomas Wylde (referred to as the defendant Bishop) was and had at all times material to this suit been Bishop of the Diocese of Bathurst in the State of New South Wales and Dean of the Cathedral Church at Bathurst in that diocese. As such Dean of that Cathedral Church the defendant Bishop had full charge and ordering of all such services in that Cathedral Church as were connected with episcopal and diocesan functions with the right at all times therein to celebrate Divine Service, administer the Sacraments and perform all other rites and ordinances of the Church of England.

2. The defendant The Church of England Property Trust Diocese of Bathurst was the body corporate of that name mentioned in the *Church of England Property Trust Act* 1917 (N.S.W.). All churches of the Church of England in the diocese (including the Cathedral Church) were Church Trust property within the meaning of that Act and had duly and in accordance with the provisions of that

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Act been vested in that defendant for the use benefit and purposes of the Church of England in the diocese. The defendant Bishop was and is a member of that body corporate.

3. According to the law and use of the Church of England it was illegal for any bishop or priest of the Church of England to use or employ any order of administration of the Sacrament of Holy Communion other than that set forth in a certain book annexed and joined to a certain Act of the Parliament of England enacted in 1662 and known as the *Act of Uniformity* 1662 which said book was entitled " The Book of Common Prayer and Administration of the Sacraments and other rites and ceremonies of the Church according to the use of the Church of England together with the Psalter or Psalms of David pointed as they are to be sung or said in Churches and the form and manner of making ordaining and consecrating of Bishops Priests and Deacons." Such book was commonly known and referred to as the " Prayer Book." Such Prayer Book had been in regular and common use in the churches of the Church of England in the diocese ever since the constitution of the diocese and contained the only order or administration of the Sacrament of Holy Communion which was legal and permissible in churches of the Church of England in the diocese.

4. The defendant Bishop had for some time past habitually and frequently administered and still did so administer in the Cathedral Church the Sacrament of Holy Communion and in such administration used an order of administration of the Sacrament other than that contained in the Prayer Book. The order of administration of the Sacrament so used by the defendant Bishop was contained in a book entitled " The Holy Eucharist " and commonly known in the diocese and referred to as " the Red Book."

5. The defendant Bishop as Dean of the Cathedral Church had authorized and permitted and still authorized and permitted the use by other priests in the Cathedral Church of the order of administration of the Sacrament of Holy Communion set forth in the Red Book.

6. The defendant Bishop in the course of his episcopal prerogatives duties and functions celebrated services in other churches of the Church of England throughout the diocese. In such churches he frequently administered the Sacrament of Holy Communion and in such administration used the order contained in the Red Book.

7. The defendant Bishop had also authorized and encouraged and still authorized and encouraged the rectors and incumbents of such respective churches and other priests celebrating services in these respective churches to administer the Sacrament of Holy

Communion according to the order of administration contained in the Red Book and pursuant to such authorization and encouragement many priests used such order of administration in many churches of the Church of England in the diocese.

8. The Red Book also contained a prayer known as "The Epiklesis" and a rubric on page 20 thereof which were illegal additions to the Book of Common Prayer.

9. The Red Book also prescribed the practice by the celebrant of the Sacrament during the Absolution and Benediction respectively of the ceremony of making the sign of the cross which ceremony at each such time was unlawful according to the law of the Church of England.

10. The Red Book also prescribed the ringing during the administration of the Sacrament of a *sanctus* bell which ringing was an illegal ceremony according to the law of the Church of England.

11. The defendant Bishop while administering the Sacrament in churches of the Church of England in the diocese frequently practised the ceremonies mentioned in the two last preceding paragraphs.

12. Each respective use of the order of administration of the Sacrament contained in the Red Book and each respective authorization and encouragement of such use by the defendant Bishop and other priests while administering the Sacrament of the ceremonies mentioned in pars. 9 and 10 constituted breaches of the trusts upon which the Cathedral Church and the other respective churches of the diocese in which the order of administration and the ceremonies complained of were used and were respectively held and all members of the Church of England in the diocese who constituted a very large section of His Majesty's subjects in the State were by such illegal use and practices as were complained of deprived of the benefits of the trusts on which the Cathedral Church and other churches of the Church of England in the diocese were respectively held.

13. The defendant Bishop threatened and intended to continue to use and to authorize and encourage the use of the order of administration of the Sacrament contained in the Red Book.

The informant claimed :—

(1) A declaration that the use in the churches of the Church of England in the Diocese of Bathurst of the order of administration of the Sacrament of Holy Communion set forth in the Red Book and the practice of the ceremonies complained of and each of them constituted breaches and a breach of the trusts on which the churches were respectively vested in the defendant corporate body.

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(2) That the defendant Bishop be restrained and enjoined from using or authorizing the use in the Cathedral Church of any order of administration of the Sacrament of Holy Communion other than that contained in the Prayer Book, and in particular from using the order of administration of the Sacrament contained in the Red Book.

(3) That the defendant Bishop be restrained and enjoined from practising during his administration of the Sacrament of Holy Communion in the diocese the ceremonies complained of.

(4) That the defendant Bishop be restrained and enjoined from using and from authorizing and encouraging the use of any order of administration of the Sacrament of Holy Communion other than that set forth in the Prayer Book in any churches of the Church of England in the Diocese of Bathurst, and in particular the use of the order of administration of the Sacrament contained in the Red Book.

(5) That the costs of the suit be provided for.

In his statement of defence, dated 14th June 1944, and so far as material to this report, the defendant Bishop, by par. 1, in answer to par. 2 of the information, did not admit that all the churches of the Church of England in the Diocese of Bathurst were church trust properties within the meaning of the *Church of England Trust Property Act* 1917, or that all those churches had duly or in accordance with that Act or otherwise vested in the Church of England Property Trust Diocese of Bathurst, or that the said churches were vested in that corporate body for the use benefit or purposes of the Church of England in the Diocese of Bathurst, or that the trusts upon which those churches were held were accurately or sufficiently set forth in par. 2.

In answer to par. 3 of the information the defendant Bishop (*a*) denied, by par. 2, the allegations that according to the law or use of the Church of England or at all it was illegal for any bishop or priest of the Church of England to use or employ any order of administration of the Sacrament of Holy Communion other than that set forth in the Book of Common Prayer of 1662 ; and, by par. 3, that the said Prayer Book contained the only order of administration of that Sacrament which was legal or permissible in churches of the Church of England in the said diocese ; and (*b*) said, by par. 4, that for many years past the order of administration of the Sacrament set forth in the Prayer Book had not been strictly followed and used in many of the churches in the diocese and that many deviations from and variations of the said order and form and of the order of other services set forth in the Prayer Book had existed

and had been permitted to exist in the diocese and that such deviations and variations had consisted of departures from the sanctions and directions contained in the rubrics in the said order of administration of the Sacrament and from the sequence of things said and done contained in that order and from the words of the prayers and other spoken portions of the order and that such deviations and variations had for many years been accepted without objection by the members of the Church of England attending such churches in the diocese. Save as aforesaid it was admitted that the Prayer Book had been in regular and common use in the diocese ever since the constitution of the diocese; by par. 5, that for many years deviations from and variations of the said order of administration of the Sacrament had been made with permission in many dioceses of the Church of England in Australia other than the diocese of Bathurst and in many churches of the Church of England in Canada, South Africa, New Zealand and elsewhere and it was submitted that by reason of the long existence of those deviations and variations it was not the fact that the Prayer Book contained the only order for the administration of the Sacrament of Holy Communion which was legal or permissible in the churches of the Church of England in the diocese of Bathurst; by par. 6, that in many churches of the Church of England for many years past deviations from and variations of the said order of administration in the Prayer Book had been made with permission by competent authority in the Church of England in England and it was submitted that by reason of the long existence of those deviations and variations in England the said order of administration was not the only legal or permissible order of administration of the Sacrament in the churches of the Church of England in the diocese; and by par. (7), that by an Act of the Parliament of England, entitled *The Public Worship Regulation Act* 1874, procedure was and still is regulated in England in respect of complaints and charges relating to unlawful ritual against an incumbent of any parish in the observance of the services rites and ceremonies ordered by the Prayer Book and by that Act it was provided that a complainant or complainants might if he or they thought fit represent the same in writing to the bishop of the diocese in which the parish was, accompanied by a declaration made by him or them affirming the truth of the statements contained in the representation and that if the bishop after considering the whole circumstances of the case was of opinion that proceedings should not be taken on the representation he might state in writing the reason for his opinion to be deposited in the registry of the diocese and transmit a copy to the person or persons complaining

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and to the person complained of and thereupon the proceedings on such representation should come to an end. A bishop in England has an unfettered discretion in the exercise of the veto and if he exercised it no appeal or mandamus lay. In 1928 the National Assembly of the Church of England in England approved of a new Book of Common Prayer known as the Book of 1928 providing therein for an order of the administration of the Sacrament of Holy Communion alternative to that contained in the Prayer Book and Parliamentary sanction was sought for the use of such Book of 1928 and sanction was given by the House of Lords and refused by the House of Commons and thereupon the Upper House of the Convocation of Canterbury being the bishops of the Province of Canterbury in 1929 resolved: "That in the exercise of their administrative discretion they will in their respective diocese consider the circumstances and needs of parishes severally and give counsel and direction in conformity with the following principles: (1) That during the present emergency and until further order be taken the Bishops having in view the fact that the Convocations of Canterbury and York gave their consent to the proposals for deviations from and additions to the Book of 1662, as set forth in the Book of 1928, being laid before the National Assembly of the Church of England for Final Approval and that the National Assembly voted Final Approval to these proposals, cannot regard as inconsistent with loyalty to the principles of the Church of England the use of such additions or deviations as fall within the limits of these proposals. For the same reason they must regard as inconsistent with Church Order the use of any other deviations from or additions to the Forms and Orders contained in the Book of 1662. (2) That accordingly the Bishops, in the exercise of that legal or administrative discretion, which belongs to each Bishop in his own Diocese will be guided by the proposals set forth in the Book of 1928, and will endeavour to secure that the practices which are consistent neither with the Book of 1662 nor with the Book of 1928 shall cease. (3) That the Bishops, in the exercise of their authority, will only permit the ordinary use of any of the Forms and Orders contained in the Book of 1928 if they are satisfied that such use would have the good will of the people as represented on the Parochial Church Council and that in the case of the Occasional Offices the consent of the parties will always be obtained." Thereafter the said deviations and additions from and to the Prayer Book including the deviations and additions appearing in the order of administration of the Sacrament of Holy Communion contained in the Book of 1928 have been frequently and continuously used and

followed in churches in the Province of Canterbury and the defendant Bishop claimed that the order of administration of the Sacrament authorized by him for use and permitted by him to be used in the Diocese of Bathurst fell within the limits of the proposals referred to above and that such order was not inconsistent with the order of administration of the Sacrament of Holy Communion permitted in the Church of England in England.

By par. 8 of the statement of defence the defendant Bishop said that so far as pars. 4, 5 and 6 of the information were intended to allege that the order of administration of the Sacrament which he used or permitted to be used in the Cathedral Church or in any other church of the diocese was different from the order of administration contained in the Prayer Book in any essential feature or was opposed in substance to the religious teaching of that Book he denied each and every such allegation.

In answer to par. 7 the defendant Bishop, by par. 9, denied that he encouraged or still encouraged any rector or incumbent of any church in the diocese to administer the Sacrament according to the order of administration contained in the Red Book, and, by par. 10, said that as Bishop of the diocese and by virtue of his office he had authorized and permitted the use of the order of administration of the Sacrament contained in the Red Book in the diocese as a comprehensive order for the administration of that Sacrament in an endeavour to overcome and put to an end the said many long existing deviations and variations in the diocese from the order of administration contained in the Prayer Book.

In answer to par. 8, the defendant Bishop, by par. 11 denied that the Red Book contained a prayer known as " The Epiklesis " and further denied that any prayer contained in the Red Book or any rubric on page 20 thereof or anything contained on that page was or were in direct or any conflict with the doctrines of the Church of England as expressed, *inter alia*, in article 28 of the Articles of Religion or elsewhere; and, by par. 12, submitted that the said par. 8 raised matters of faith or doctrine and further submitted that the court had no jurisdiction to determine matters of faith or doctrine of the Church of England in connection with such matters in dispute as were raised in these proceedings or to determine therein that the matters so complained of were in conflict with such matters of faith or doctrine of the Church of England; and, by par. 13, further submitted that the Supreme Court of New South Wales in Equity had no ecclesiastical jurisdiction.

In answer to par. 9, the defendant Bishop, by par. 14, denied that the Red Book prescribed the practice by the celebrant of the

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Sacrament during Absolution or Benediction respectively of the ceremony of making the Sign of the Cross; and said, by par. 15, that the making of the Sign of the Cross as indicated by the text of the Red Book was not a ceremony in the administration of the Sacrament; and, by par. 16, that the making of the Sign of the Cross at the time of Absolution and Benediction in the administration of the Sacrament whether it be by priest or by a member of the congregation was not unlawful according to the law or custom of the Church of England or opposed to its teaching or practice and that the making of the Sign of the Cross at such times and at other times during the services of the Church of England had been observed by very many of the clergy and laity of the Church of England from time immemorial.

In answer to par. 10, the defendant Bishop denied, by par. 17, that the Red Book prescribed the ringing of a *sanctus* bell; and, by par. 18, that the ringing of the *sanctus* bell was an illegal ceremony according to the law of the Church of England in New South Wales.

In answer to par. 11, the defendant Bishop, by par. 19, admitted that while administering the Sacrament in the Cathedral Church and other churches of the diocese he made the Sign of the Cross during Absolution and Benediction and that in certain churches in the diocese where a *sanctus* bell was ordinarily rung at the sanctus and at certain times during the Prayer of Consecration in the order of administration of the Sacrament such bell had been rung when he had been the celebrant of the Sacrament, and he repeated that such acts were not illegal ceremonies in the Church of England in New South Wales, and said that the making of the Sign of the Cross and the ringing of a *sanctus* bell during the order of administration of the Sacrament had been done and performed for many years in many churches of the Church of England in New South Wales, in England and elsewhere.

In answer to par. 12, the defendant Bishop, denied, by par. 20, that any of the matters therein alleged constituted a breach of the trusts upon which the Cathedral Church or other churches of the diocese in which the order of administration or the alleged ceremonies complained of were used were respectively held; and, by par. 21, that all members of the Church of England in the diocese who constituted a very large section of His Majesty's subjects in New South Wales were by the uses and practices complained of (the illegality of which uses and practices he denied) deprived of the benefits of the trusts upon which the Cathedral Church and other

churches of the Church of England in the diocese were respectively held.

The defendant Bishop, by par. 22, denied the allegation in par. 13 of the information.

In further answer to all the matters complained of the defendant Bishop, by par. 23, said that by the rules and ordinances of the Synod of the diocese duly made and promulgated under the *Church of England Constitutions Act Amendment Act of* 1902 (N.S.W.), and by that Act made binding upon all members of the Church of England in New South Wales, there was provided a complete and adequate means of remedy and redress in respect of all the matters complained of, and said that the informant and the relators had not as they were bound to do resorted to and exhausted those means before filing the information; by par. 24, said that in so far as the matters so complained of related exclusively to acts permissions or teachings of himself as bishop, by a determination of the General Synod of the Church of England in Australia and Tasmania duly accepted by the Synod of the diocese complete and adequate means of remedy and redress were provided and that prior to the filing of the information these means had not been resorted to and exhausted by the informant and the relators; and, by par. 25, submitted that they were matters of internal regulation and management of the Church of England in the diocese and that no steps were taken by the informant or the relators before filing the information to bring the matters so complained of before the body, that is the Synod, constituted by the *Church of England Constitutions Act Amendment Act of* 1902, empowered by that Act to make ordinances upon and in respect of all matters and things concerning the order and good government of the Church of England in the diocese and the regulation of its affairs so that such matters of complaint might be considered by the Synod and if it should see fit so to do be regulated or otherwise dealt with by it.

On behalf of the defendant Church of England Property Trust Diocese of Bathurst, the secretary admitted the allegations contained in pars. 1 and 2 of the information but the various matters alleged in pars. 3 to 13 inclusive, not being known, were not admitted. In answer to the information the secretary said that the legal title to the churches of the Church of England in the diocese, including the Cathedral Church at Bathurst, and to the church grounds in and upon which the churches were erected was vested in the defendant trust and the defendant trust was the custodian of the legal estate in those churches and grounds for and for the use benefit and purposes of the Church of England in the diocese and

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not otherwise and the custody care and control of the fabric of those respective churches, including the Cathedral Church, and the maintenance and repair thereof and the care and control of the grounds and the keeping of order in those respective churches during services held therein were at all material times duly vested in and entrusted to the churchwardens of the respective churches by ordinance of the Synod of the diocese and there was no duty or obligation imposed upon the defendant trust by law or otherwise and it had no power or authority to prohibit forbid prescribe or in any way interfere with the ordering of services and the order of administration of the Sacrament of Holy Communion in the respective churches or any of them. The defendant trust submitted to such order as the court saw fit to make and it would act in accordance with such directions as the court saw fit to give.

Issue was joined on pars. 1 to 11 inclusive, 14 to 18 inclusive, part of par. 19, pars. 20 to 24 inclusive and the matters of fact alleged in par. 25 of the statement of defence. The informant submitted (*a*) that the matters of fact alleged in pars. 7, 23, 24 and 25 respectively of the statement of defence did not afford any ground of defence to any of the matters complained of, and (*b*) that since it was not alleged in the statement of defence that the use of the order of administration of the Sacrament of Holy Communion contained in the Red Book was authorized by ordinance of the Synod of the diocese the matters pleaded in par. 10 did not nor did any of them afford any ground of defence to any of the matters complained of.

Other than in respect of allegations admitted issue was joined with the defendant trust on its statement of defence.

Particulars were furnished by the informant to the defendant Bishop in respect of the following paragraphs in the information: pars. 7 and 13, that the encouragement complained of was contained in the presidential address of the Bishop to the Synod of the diocese on 12th May 1943; par. 8, (i) that the prayer known as "The Epiklesis" was printed in red on page 11 of the Red Book, (ii) that the words "when the bread and wine become the body of Our Lord Jesus Christ" printed on page 20 were in conflict with the doctrine of the Church of England, and (iii) that apart from article 28 of the Articles of Religion statements of the doctrine of the Church of England with which that prayer and/or that rubric were or was in conflict could be found in article 31 of the Articles of Religion and the rubric at the end of the order of administration of the Lord's Supper contained in the Prayer Book commonly known as the "black rubric"; par. 9, that the ceremony

of making the Sign of the Cross in the Absolution and the Benediction was prescribed in the Red Book by the sign or mark of a cross appearing at pages 17 and 30 respectively ; par. 10, the ringing of a *sanctus* bell was prescribed in the Red Book (*a*) at page 20, by the words " here a bell may be rung," (*b*) at page 21, by the words " the bell rings once to prepare us for our Lord's coming," and (*c*) twice at page 22, by the words " the bell rings three times to call us to adoration " ; and generally, that the matters complained of were all matters within pages 3 to 32 (both inclusive) of the Red Book which differed from the order of administration in the Prayer Book contained either by additions to or omissions from the form of service or the rubrics or directions in the Prayer Book contained or by the alteration of the order in which the various parts of the service occurs.

Admissions by or on behalf of the informant were substantially as follows :—

1. That since 1911 and prior to the commencement of this suit and before the publication of the Red Book the order of administration of the Sacrament of Holy Communion set forth in the Prayer Book had not been strictly followed and used in many of the churches in the diocese of Bathurst and that deviations from and variations of that order existed and the same consisted of departures from the sanctions and directions contained in the rubrics in the order and from the sequence of things said and done contained in the order and from the words in the prayers and other spoken portions of the order.

2. That the deviations from and variations of the order were not prohibited or restrained by the bishop of the diocese for the time being even when known to him.

3. That at various times over a period of years deviations from and variations of the order had existed in many churches of the Church of England in all the dioceses of the Province of New South Wales and such deviations and variations were not prohibited by the bishops of the respective dioceses even when known to them.

4. That the order of administration of the Sacrament of Holy Communion as set forth in the Prayer Book was not and had not for some years been the order of administration of that Sacrament in the Church of England in the Dominion of Canada, or in the Church of The Province of South Africa, or in the Episcopal Church of Scotland and that each and every of such churches, though not part of, or in connection with, the Church of England, was recognized by the Church of England in England and in Australia as being in full communion with it.

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5. That the ringing of a *sanctus* bell at the times and places indicated in the Red Book were and had at various times over a period of years been done in some churches of the Church of England in New South Wales.

7 (*a*). That prior to 2nd October 1824 the Church of England in Australia its chaplains and members were subject to the ecclesiastical jurisdiction of the Bishop of London and to the consistory court of that Bishop. (*b*) That on 2nd October 1824 the Church of England in Australia by Royal Letters Patent under the Great Seal was constituted an Archdeaconry and part of the Diocese of Calcutta and over that Archdeaconry the Bishop of Calcutta by virtue of Royal Letters Patent under the Great Seal issued on 2nd May 1814 pursuant to an Act of the British Parliament, George III., c. 155, had full power and authority and jurisdiction spiritual and ecclesiastical in accordance with the Ecclesiastical Laws of England. (*c*) That on 18th January 1836 by Royal Letters Patent the territories comprised within the said Archdeaconry were constituted a Bishopric of the Church of England styled the Bishopric of Australia. (*d*) That by Royal Letters Patent the See of Australia was subsequently divided into five dioceses—Sydney, Tasmania, Melbourne, Adelaide and Newcastle. (*e*) That in 1869 the Diocese of Bathurst was established by the surrender of portions of the See of Sydney and the See of Newcastle and that surrender was validated by *The Bathurst and Grafton and Armidale Bishoprics Act* 1877 (N.S.W.).

8. That a certain book contains an order of administration of the Sacrament of Holy Communion permitted by the former Bishop of Riverina to be used in that diocese while he was Bishop thereof, but that the further use of the said Book was prohibited by his successor.

9. That a certain other book contains an order of administration of the Sacrament permitted by the Archbishop of Brisbane to be used in the diocese of Brisbane and is used in many churches in that diocese.

The informant also admitted that the Lambeth Conference was a conference of all Bishops of the Church of England throughout the world and of Bishops of Churches in full communion with the Church of England and that, *inter alia*, the said Conference in 1920 passed the following resolutions :—" While maintaining the authority of the Book of Common Prayer as the Anglican standard of doctrine and practice, we consider that liturgical uniformity should not be regarded as a necessity throughout the Church of the Anglican Communion. The conditions of the Church in many parts of the Mission Field render inapplicable the retention of that Book as the

one fixed liturgical model," and " Although the inherent right of a Diocesan Bishop to put forth or sanction liturgical forms is subject to such limitations as may be imposed by higher synodical authority, it is desirable that such authority should not be too rigidly exercised so long as those features are retained which are essential to the safeguarding of the unity of the Anglican Communion." The informant however did not admit that any Lambeth Conference had any power to pass any legislation binding on the Church of England either in England or New South Wales, or that any of the resolutions of any such conference could affect the law and use of the Church of England in New South Wales.

Admissions made by or on behalf of the defendant Bishop were substantially as follows :—

1. That the church at Canowindra was erected on land granted in August 1878 to trustees upon trust for the erection of a church in connection with the United Church of England and Ireland and subject to the conditions contained in the grant and that on 17th January 1895 the said land was transferred to the Church of England Property Trust Diocese of Bathurst; 2. that nineteen specified churches of the diocese were erected on lands vested since 1920 in the defendant trust upon trusts " for the erection of a church " (twelve churches, including the Cathedral Church), " for erection of a church " (three churches), " for the church erected thereon " (one church), " for the erection of a church and also burial ground " (one church), " for the erection of a church, site of a School House and a Parsonage " (one church), and " to permit or suffer a church or building to be erected " (one church) (details being set out in Exhibit " J "); and 3. that the defendant Bishop had celebrated Holy Communion according to the Red Book in the principal churches of about one-half of the parishes of the diocese.

The suit was, in the absence of the Attorney-General, commenced upon the information of the Solicitor-General. After certain points of law had been argued in March 1945 on the motion of the informant, and before they had been adjudicated upon, the informant, the Solicitor-General, took out a summons to amend the information by substituting the name of the Attorney-General for that of the Solicitor-General as informant. An order made on 23rd April 1945, granting the application was, on appeal, confirmed by the Full Court of the Supreme Court (*Solicitor-General* v. *Wylde* (1)).

The information originally contained a charge of heresy but this charge was withdrawn and the information amended after the taking of evidence on commission in England during December 1946 and January 1947.

(1) (1945) 46 S.R. (N.S.W.) 83; 62 W.N. 246.

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Roper, C.J. in Equity, made a decree (*a*) declaring that the use in the churches of the Church of England in the Diocese of Bathurst of the order of administration of the Sacrament of Holy Communion set forth in a book entitled " The Holy Eucharist " and commonly known as " The Red Book " and the practice of administering the Sacrament of Holy Communion in accordance with that order and the making of the Sign of the Cross by the celebrant of the said Sacrament of Holy Communion during the Absolution and Benediction respectively and the ringing during the administration of the Sacrament of a *sanctus* bell constituted breaches of the trusts on which the churches of the diocese were respectively vested in the defendant corporate body, and (*b*) restraining and enjoining the defendant Bishop from (i) using or authorizing the use in the Cathedral Church at Bathurst of any order of administration of the Sacrament of Holy Communion other than that contained in the Book of Common Prayer of 1662 and in particular from using the order of administration of the Sacrament contained in the Red Book; (ii) practising during his administration of the Sacrament of Holy Communion in the diocese the ceremonies thereinbefore mentioned; and (iii) using and authorizing and encouraging the use of any order of administration of the Sacrament of Holy Communion other than that set forth in the Book of Common Prayer in any churches in the diocese and in particular the use of the order contained in the Red Book.

The defendant Bishop was ordered to pay to the relators their taxed costs, including the taxed costs of the defendant trust as of a submitting defendant ordered to be paid by the relators to that defendant, and also half of the costs of the writ of commission to take evidence in England and of the taking of the evidence thereunder.

From that decision the defendant Bishop appealed to the High Court.

Further facts and relevant statutory provisions are set forth in the judgments hereunder.

Kitto K.C. (with him *Kerrigan*) for the appellant. The court below held that any deviation from the order of service contained in the Book of Common Prayer of 1662 constituted a breach of the trusts upon which certain Church properties of the Church of England in the diocese of Bathurst were held, and that in particular a service conducted in accordance with a manual published and used by the appellant, the Bishop of Bathurst, constituted a breach of such trusts. Consequential injunctions were granted. It was

necessary for the informant to satisfy the court that, properly construed, the trusts of those church properties forbade any departures from the order of the Prayer Book, and, in particular, from the order of the Sacrament contained in the Prayer Book, and that such departures were appropriate to be restrained by the court in the exercise of its discretionary power to grant injunctions on pain of imprisonment. The history of the Book of Common Prayer of 1662 and its observance by the Church of England both in England and in New South Wales shows that meticulous adherence to the Prayer Book has never been given by the Church, nor has the Church a domestic rule requiring such adherence. The decree as granted puts the appellant into a special category—he must not deviate by omission, addition or alteration. The decree is oppressive and unreasonable even if the facts and the law as found by the judge of first instance are correct. The trusts are trusts " for the erection of a church." Properly construed those trusts mean the erection, and, doubtless, maintenance, of a church for the use of the Church of England in New South Wales, and do not mean the erection of a church wherein there shall be no deviation from the Book of Common Prayer of 1662. The question thus raised is not whether the Prayer Book is *an* accepted ritual or liturgy, or even whether it is *the* accepted ritual or liturgy of the Church of England in New South Wales, but whether (*a*) that liturgy must be written into the trusts, and (*b*) a variation thereof constitutes a diversion of the user of the properties from the Church of England. A diversion of the property does not necessarily follow from a breach of the ritual. To be successful the respondent must prove that though a service is conducted by a duly ordained and authorized clergyman of the Church of England for persons who are members of the Church of England, a departure from the strict order of the Prayer Book diverts the use of the property from the Church. It has not been decided in any case that a breach of ritual in the Church of England constitutes a breach of trust, but reports of cases in respect of other churches in England do show that that the adoption of a different doctrine or the control of the property by an unauthorized person attracts the equitable jurisdiction to protect the trusts (*Milligan* v. *Mitchell* (1) ; *Attorney-General* v. *Munro* (2) ; *Attorney-General* v. *Murdoch* (3) and *Attorney-General* v. *Pearson* (4)). The

(1) (1833) 1 My. & K. 446 [39 E.R. 750] ; (1837) 3 My. & Cr. 72 [40 E.R. 852].
(2) (1848) 2 De G. & Sm. 122, at pp. 201-203 [64 E.R. 55, at pp. 89, 90].
(3) (1849) 7 Hare 445, at pp. 469, 470 [68 E.R. 183, at pp. 193, 194].
(4) (1817) 3 Mer. 353, at pp. 417-419 [36 E.R. 135, at pp. 156, 157].

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withdrawal of the charge of heresy, or false doctrine, took away the ground upon which diversion of trust in this case could be based. The only thing left is whether there is a rule of the Church of England in New South Wales that a service of Holy Communion not strictly in conformity with the Prayer Book is a non-user of the church building for that Church, or, in other words, is there a rule which makes a service in which a departure occurs a non-Anglican user of that Church. Extreme difficulty would arise if it were sought to read into a trust of the nature now under consideration a requirement that the rules of the incorporated body shall be completely observed. The Church of England in New South Wales is a voluntary association (*Bishop of Natal* v. *Gladstone* (1) ; *Fielding* v. *Houison* (2)). In many cases the court has taken the view that a court of equity will not interfere to enforce rules of such an association unless to protect the right of the plaintiff in respect of the enjoyment of property (*Cameron* v. *Hogan* (3)). Even if it is a rule of the Church as a voluntary association that the Prayer Book must be rigidly observed such a rule is not necessarily read into the trusts relating to its property. Such a rule would be a rule of procedure in worship for and among the members and if internal rules of this character were read into the trusts then, by allegations of trust, difficulties which members of voluntary associations have encountered as plaintiffs seeking injunctions where they have not been deprived of proprietary interests could be overcome (*Cameron* v. *Hogan* (4) ; *Rigby* v. *Connol* (5) ; *Watt* v. *MacLaughlin* (6)). The Attorney-General suing to enforce a charitable trust cannot enforce any higher rights than a member of the association concerned could himself enforce. There is no right of property which exists under the rules of the Church in relation to the ritual to be observed in performing the services. The construing of a trust instrument does not extend to requiring complete adherence to all the internal rules which the association sets up for itself. The question is whether the enjoyment of the property is being allowed to other than the objects of the trust. The subject properties were being used for the purpose designated by the relevant trust. Rules such as a rule relating to forms of service are not contractual and confer no juridical rights on members of the Church. The Attorney-General stands in no better position ; he must show that the objects of the charity are being deprived of beneficial rights in such a way that the property is diverted from its trusts. The court below did

(1) (1866) L.R. 3 Eq. 1.
(2) (1908) 7 C.L.R. 393, at p. 406.
(3) (1934) 51 C.L.R. 358.
(4) (1934) 51 C.L.R., at pp. 370, 371, 376, 378.
(5) (1880) 14 Ch. D. 482, at p. 487.
(6) (1923) 1 I.R. 112, at pp. 115-120.

not deal with this difficulty in the respondent's case. It concluded that the observance of the Prayer Book was a fundamental rule of the Church in New South Wales. This begs the question. The rule may be fundamental if departure from it is a breach of trust; but the basis for finding a breach of trust is not established merely by calling a rule fundamental. However obligatory as an internal rule it may be, such a rule does not create juridical rights in property. On the evidence it was not open to the court below to find that the Church of England in New South Wales had a rule to the effect that whenever there was a deviation from the Prayer Book the property on which the deviation occurred was used otherwise than as a church of the Church of England in New South Wales within the meaning of the trusts proved in this case. Nor was it open to that court to conclude that there was any rule of the Church of England in New South Wales requiring adherence, strict or otherwise, to the Prayer Book in the public services. The constitution of the Church in New South Wales may be ascertained from the *Church of England Property Management Act* 1866, *Church of England Trust Property Incorporation Act* 1881 and the *Church of England Constitutions Act Amendment Act of* 1902. From 1866 onwards there has been legislative recognition of the Church of England in New South Wales by that name as a Church. The important provisions of the last-mentioned statute are ss. 3-5 and articles 3 and 24 of the schedule to that Act. By article 3 the Synod of each diocese was given a very full power of legislation on all matters relating to order and good government of the churches in the diocese; it was in that sense that Synod could deal with matters of ritual. Article 24 recognizes that the Church has articles or formularies and that those may be subject to alteration by somebody described as a competent authority of the Church of England in England, and it limits the power of regulation by Synod to conforming with regulations made in England. Article 24, assuming that "liturgy" means Book of Common Prayer 1662, leaves open two things: (*a*) can a Bishop permit a departure?, and (*b*) is such a departure, or is an alteration made by Synod, a diversion of property from trusts established in this case? That article recognizes a "liturgy" but whether it must be followed literally and whether departure constitutes non-user of property for the Church are questions left to be answered from sources *aliunde*. It is only the broad prohibition against the legislative power of the Synod being so exercised as to make an alteration binding upon all members so as to create a new and different liturgy from anything previously adopted. It cannot be inferred from the history of the

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Church that there is a rule of the Church of England to the effect that breach of ritual involves diversion of something from the Church. Section 5 of the *Church of England Constitutions Act Amendment Act of* 1902 takes the church trust for the use of the Church and provides that the Church in using the property can regulate its own affairs. The citation in the judgment of the court below (1) of *Bishop of Natal* v. *Gladstone* (2) stops short of the important passage. Whatever rules may be found to be adopted by an unincorporated religious body are binding within the body itself (*Bishop of Natal* v. *Gladstone* (3)). The *Act of Uniformity* 1662 did state that the rites of the Church of England in regard to certain services shall be as stated in the Prayer Book, which showed that it applied only to England. There are no exhaustive writings setting forth the consensual agreements of the Church in New South Wales. The Church of England was established between 597 A.D. and 686 A.D. During the long period preceding the Reformation the Church had no stereotyped ritual at all. The Church of England in England, until the *Acts of Uniformity* had no rule of rigidity in liturgy (*Kemp* v. *Wickes* (4)). Uniformity was part of the establishment of the Church: see *Acts of Uniformity* 1548; 1551-1552; 1558-1559 and *Halsbury's Statutes of England*, vol. 6, pp. 509, 515, 517. In 1645 A.D. the Book of Common Prayer, the fourth of such Books, then existing was abolished and the Directory imposed on England. The fifth Book of Common Prayer was prepared by Convocations and was annexed by Parliament to the *Act of Uniformity* 1662. The geographical limitation of that Act is most important. It did not apply to the Church in Scotland, the American Colonies or the Isle of Man. It was an Act laying personal obligations on the clergy of the Church in England, and providing certain personal penalties. It did not speak to the Church as a whole or impress statutory trusts on its properties. It imposed on the Church *ab extra* an obligation to observe the Book of Common Prayer so far as its clergy were concerned. Since the settlement of New South Wales other Acts have been passed in England relating to uniformity of services and the clerical obligation to adhere to the Book of Common Prayer: see *Prayer Book* (*Table of Lessons*) *Act* 1871, *Act of Uniformity Amendment Act* 1872, *Public Worship Regulation Act* 1874, *Revised Tables of Lessons Measure* 1922, and *Halsbury's Statutes of England*, vol. 6, pp. 543, 561, 567, 575. There is a

(1) (1948) 48 S.R. (N.S.W.), at p. 382.
(2) (1866) L.R. 3 Eq., at pp. 35, 36.
(3) (1866) L.R. 3 Eq., at p. 35.
(4) (1809) 3 Phill. Ecc. 264, at pp. 268, 269 [161 E.R. 1320, at pp. 1321, 1322].

distinction between a requirement imposed by statute and a rule that is adopted at an assembly. The Church as an unincorporated association never had a rule of its own; its members as citizens had the statute. The mutual contract between people who constitute themselves a Church of the Church of England in New South Wales must be based upon the Thirty-nine Articles of Religion and it must have regard to rites and ceremonies as being matters to which article 20 and article 24 are applicable. The Church did not adopt any internal rule that departure from the Prayer Book should be regarded as an user of the property not for the purposes of the Church of England. The Church, as a voluntary association, has shown mainly by its history that it never did adopt as a rule of its own a rule which Parliament prescribed for its citizens, consequently upon that Church coming to New South Wales, assuming identity with the Church in New South Wales, it cannot be accepted that the Church in New South Wales had the statutory rule which was never had by the Church in England. A plaintiff who takes upon himself the onus of proving a trust of the nature now under consideration, even conceding he could discharge it, does not discharge his onus by merely saying there is a departure from ritual. Upon a consideration of the identity of one body with another it is necessary to resort to fundamental doctrines (*Free Church of Scotland* v. *Overtoun* (1)). The obligation of uniformity imposed upon the clergy was not universally obeyed. In fact there have been continuous, various and wide-spread deviations as shown by the Report of the Royal Commission 1906, the evidence given herein by Canon R. C. Mortimer, Bishop Batty, Mr. N. C. Armitage and Dr. A. C. Don, the admissions made by the informant herein, and the resolutions of the Lambeth Conferences. It cannot be asserted that when the Church was founded in New South Wales it must be assumed to have brought here a submission to the many literal requirements which it had always repudiated in England. The Church in England claimed and exercised a right to deviate and particularly in its daughter churches. The evidence shows that in 1928 a revised Book of Common Prayer was rejected by the House of Commons, but, nevertheless, it has been widely used in England: see also the preface to the Shorter Book of Common Prayer 1946. The history of the Church in England shows that the Church as a voluntary association has never shown that in a case of deviation it regards the property as being not used for itself, and that the Church, in the teeth of the *Act of Uniformity* 1662, achieved a measure of elasticity in its ritual. Prior to the *Act of Uniformity*

(1) (1904) A.C. 515.

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that elasticity was under the control of the Diocesan Bishop—his *jus liturgicum*—the Act suspended it, but its exercise was, in a sense, again permitted by the *Public Worship Regulation Act* 1874 and thereafter the Bishop's " veto " has been freely and publicly used. The resolutions of the Lambeth Conferences must be taken as strong evidence as to the attitude of the internal organization of the Church upon matters of ritual, and particularly as to whether conformity with ritual is a *sine qua non*. Although the resolutions contain some words approving of alterations and some words disapproving of them, every word, whether of approval or disapproving of them, is consistent with the view that these matters of liturgical conformity or disconformity were matters which the Church was prepared to regard as being within its own organization. The conferences did not concern themselves with the peculiar legal constitution in England but with its own organization. It follows that it cannot be said that the Church of England in New South Wales regards a diversion from the Prayer Book as a diversion of property. Even the Parliament seems to have recognized that adherence to the liturgy was not regarded so strictly and to have recognized an authority other than itself entitled to make exceptions to the Prayer Book: see *Clerical Subscription Act* 1865 (Imp.), *Colonial Clergy Act* 1874 (Imp.), *Halsbury's Statutes of England*, vol. 6, pp. 232, 1158, and the memorandum by *Vaisey* J. That memorandum points out that there was a *jus liturgicum* in bishops to direct rites and services. That right existed in England until the *Act of Uniformity* 1662 was enacted, and when the Church came to New South Wales, not bringing the *Act of Uniformity*, it would be logical that the Church brought its own rules. The *Act of Uniformity* never applied in New South Wales (*Ex parte Rev. George King* (1); *Ex parte Ryan* (2); *Ex parte Thackeray* (3); *Fielding* v. *Houison* (4); cf. *Nelan* v. *Downes* (5)). No local statute ever applied the *Act of Uniformity* though ample opportunity occurred when the various Church Acts were enacted. It is made plain in the evidence that throughout the history of the Church in New South Wales there has been the like consistency in refusing to follow the Book of Common Prayer of 1662 as there has been in England since the Act was passed in 1662: see various Books produced by Bishops of various dioceses, and pamphlets showing forms of Divine Service for special occasions and authorized by the bishops, some of them being so authorized by the Archbishop of

(1) (1861) 2 Legge (N.S.W.) 1307, at pp. 1314, 1325, 1327.
(2) (1855) 2 Legge (N.S.W.) 876.
(3) (1874) 13 S.C.R. (N.S.W.) 1, at p. 64.
(4) (1908) 7 C.L.R., at pp. 423, 438.
(5) (1917) 23 C.L.R. 546, at p. 550.

Sydney. There is no writing relating to the consensual agreement that indicates rigidity of compliance with the Act was a rule of the voluntary association. The name Church of England in New South Wales only implies identity of doctrine and a general intention to proceed with the Church in England. It is inconceivable that the members of the voluntary association agreed, or must be deemed to have agreed, that they would adopt a rigidity in form of worship which did not apply to them by statute and which the Church in England had never perfectly observed. As shown by the evidence the conduct of the services of the Church in New South Wales excludes the possibility of such an implication. Article 24 of the schedule to the *Church of England Constitutions Act Amendment Act of* 1902 is indecisive; it does not expressly adopt the Book of Common Prayer; it relates only to powers of Synod to create a *binding* alteration. It is really a clear example that the Church both in 1866 and 1902 avoided any express statement that the Book of Common Prayer must be rigidly followed, the inference being that it did not recognize any such obligation. The Church in New South Wales is in the same position as the Church in England minus the *Act of Uniformity*, that is the same as the *de facto* position of that Church. None of its services exactly follows the Book of Common Prayer, and the user of its property is not governed by a rule of liturgical rigidity as part of the trust. Trust obligations are obligations imposed on trustees; those trustees are bare trustees and are not required to police the services held in the churches; that is left to the clergy, the Diocesan Bishop and the Synod. As shown by the evidence of Chancellor K. M. Macmorran, Mr. N. C. Armitage and Dr. A. C. Don, the " Red Book " is a composition taken from the Books of Common Prayer of 1662 and 1928. In England the use of such a book would not be corrigible. The identity of the Church is not destroyed by the use of the book, there not having been any departure from doctrine (*Free Church of Scotland* v. *Overtoun* (1); *Halsbury's Laws of England*, 2nd ed., vol. 11, p. 412, note (*u*)). The property on which the book was used was being used for and by the Church of England in New South Wales. The trusts proved take the Church as they find it, that is as an unincorporated voluntary association with rules not enforceable at law or in equity except so far as a breach of them may deprive a member of a right to the enjoyment of the property. A rule as to liturgy is not within the exceptions. The trusts cannot be construed as turning rules not legally enforceable as between the members into rules legally enforceable as against the trustees. The trust,

(1) (1904) A.C., at p. 612.

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therefore, does not incorporate the rules of the Church as to liturgy. The *Church of England Constitutions Act Amendment Act of* 1902 takes the trusts as it finds them and super-adds, so far as consistent with them, the provisions of the schedule. It would not be consistent with the trusts to turn rules not legally enforceable into rules legally enforceable, nor would the schedule do so in regard to liturgy even if transcribed in its entirety into the trust instrument. It gives a limited power of legislation as to liturgy but it leaves the existing rules as to liturgy as unenforceable as they ever were unless and until legislation by Synod otherwise provides. Even if there is a rule of rigid observance which is a term of the trusts, the whole of the facts in this case make it inappropriate that an injunction should go. It is not desirable in the public interest and the Court could not police it. The acts of the appellant are in accord with the acts of other bishops in England. The Church has means of correction and has not used them: see article 3 of the schedule to the *Church of England Constitutions Act Amendment Act of* 1902. The matter of the discretion of the Court in granting injunctions was dealt with in *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board* (1) and *Attorney-General* v. *Dean and Chapter of Ripon Cathedral* (2).

[WILLIAMS J. referred to *Attorney-General* v. *North Shore Gas Co. Ltd.* (3).]

Although questions of doctrine are within the cognizance of the Court, the Court would consider it undesirable, in the exercise of its discretion, to intervene at all in a dispute as to liturgy. In considering the exercise of discretion in relation to a particular case the Court must look at the particular circumstances and not attempt to generalize. This is a case which by reason of the type of thing complained of and of the type of acquiescence the Court will stay its hand on the ground, *inter alia*, that these matters have been for three hundred years left to the Church Courts and can now well be left to those Courts. The order made is too rigorous. It seeks to compel what history shows to be impossible of performance. In any event the appellant should not be required to pay any part of the respondent's costs of evidence taken on commission in England. That evidence was taken with the charge of heresy as its prime object. In fact the charge was withdrawn by the respondent after the return of the commission, and at the trial the evidence of one of the respondent's witnesses was not read.

(1) (1910) 1 Ch. 48, at pp. 53, 60, 61.
(2) (1945) Ch. 239, at pp. 248-251.
(3) (1930) 10 L.G.R. (N.S.W.) 30.

Teece K.C. (with him *Henry*), for the respondent. The appellant has misconceived the nature of the suit. This is not a suit by a member of an unincorporated association to enforce rules against trustees or other members of the association, but it is a suit by the Attorney-General, not a member, for the administration of a charitable trust. The nature of the jurisdiction of the court in suits of this kind is shown in *Ludlow Corporation* v. *Greenhouse* (1) and *Attorney-General* v. *Dublin Corporation* (2). The suit is one in which the Attorney-General on behalf of His Majesty informs the court there is an abuse in the administration and use of property devoted to charitable trusts (*Solicitor-General* v. *Wylde* (3)). In England where the Church of England is established there never has been an appeal to the court of equity to restrain a breach of trust regarding property devoted to the use of the Church of England but there are many decisions of the court in respect of non-conformist bodies (*Attorney-General* v. *Pearson* (4); *Attorney-General* v. *Welsh* (5); *Milligan* v. *Mitchell* (6); *Attorney-General* v. *Munro* (7); *Free Church of Scotland* v. *Overtoun* (8)). Where the court is informed by the Attorney-General of a breach of a charitable trust it is its duty to correct the administration and it has not a mere discretion (*Attorney-General* v. *Pearson* (9); *Free Church of Scotland* v. *Overtoun* (10); *Shore* v. *Wilson* (11)). The fundamental rules of the Church of England in New South Wales must be ascertained in order to determine whether or not there has been a breach of trust. There is no distinction in the Church of England in England between the rules of the Church and rules imposed upon it by law. The fact that the Church of England in England is established by law and the resultant difference between rules of the Church and rules of ordinary voluntary associations were referred to in *Roffe-Silvester* v. *King* (12). The rules of the Church are all rules of law and are all enforceable by the court. Not only is a departure from doctrine a breach of trust but so also is a departure from ritual or form of service; such a departure is not a mere breach of internal rules. Courts have continually granted injunctions against the use of a form of service: *Tudor* on *Charities*, 4th ed. (1906), p. 248; 5th ed. (1929), p. 235. A breach of trust

(1) (1827) 1 Bligh N.S. 17, at p. 48 [4 E.R. 780, at p. 791].
(2) (1827) 1 Bligh N.S. 312, at p. 347 [4 E.R. 888, at pp. 901, 902].
(3) (1945) 46 S.R. (N.S.W.) 83, at p. 97.
(4) (1817) 3 Mer. 353 [36 E.R. 135].
(5) (1844) 4 Hare 572 [67 E.R. 775].
(6) (1837) 3 My. & Cr. 72 [40 E.R. 852].
(7) (1848) 2 De G. & Sm. 122 [64 E.R. 55].
(8) (1904) A.C. 515.
(9) (1817) 3 Mer., at pp. 401, 403 [36 E.R., at pp. 150, 151].
(10) (1904) A.C., at p. 644.
(11) (1842) 9 Cl. & F. 355, at p. 390 [8 E.R. 450, at p. 466].
(12) (1939) P. 64, at p. 71.

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cannot be sanctioned by practice (*Drummond* v. *Attorney-General* (1)). A form of worship may be a breach of trust restrained by a court if the court is satisfied that the trust is for adherence to the church (*Attorney-General* v. *Munro* (2)). Although *obiter dicta*, observations made in *Free Church of Scotland* v. *Overtoun* (3) concerning the identity of the Church are very pertinent to this case. The things that are important are the formularies of the Church. These include its forms of religious service: see definition of "formulary" in the *Oxford Dictionary*. Where churches are held in trust for the use and purpose of the Church of England observance is required of not only the doctrine of the Church but also of all the rites of the Church: see *Church of England Constitutions Act Amendment Act of* 1902, ss. 4, 5, schedule, articles 3, 24. The "property of the Church" as referred to in s. 4 of that Act includes property held in trust for the Church. The word "liturgy" as used in article 24 refers to the Book of Common Prayer. That Act, read as a whole, and in conjunction with the *Church of England Property Management Act* 1866, shows that the observance of the liturgy is not a matter of mere internal regulation and that it is a fundamental rule of the Church. A departure from such a fundamental rule is not permissible (*Westerton* v. *Liddell* (4); *Martin* v. *Mackonochie* (5); *Sheppard* v. *Bennett* (6)) and that is so whether the liturgy be of the Church of England in England or of the Church of England in New South Wales. The mere fact that the law has not been enforced does not alter the law. Any question of alteration or amendment of liturgy is a departure from the rules of the Church. Serious results would follow if the appellant were allowed to introduce at his own will variations in the ritual (*Sheppard* v. *Bennett* (7)). There was no written consensual compact in New South Wales prior to the *Church of England Property Management Act* 1866. The relation between the Church of England in England and the Church of England in New South Wales, and whether the Church of England in New South Wales was or was not part of the Church in England is provable by the evidence of experts. Opinions by eminent counsel, as contained in a book entitled *Legal Nexus*, are admissible as part of the evidence of experts.

Kitto K.C. Opinions of counsel on questions of law which the court has to decide are inadmissible in evidence. The counsel

(1) (1849) 2 H.L.C. 837 [9 E.R. 1312].
(2) (1848) 2 De G. & Sm., at p. 196 [64 E.R., at p. 87].
(3) (1904) A.C., at p. 612.
(4) (1857) 29 L.T. O.S. 54.
(5) (1868) L.R. 2 P.C. 365.
(6) (1870) L.R. 4 P.C. 350.
(7) (1871-72) L.R. 4 P.C. 371, at pp. 403, 404.

concerned cannot be regarded as experts in the sense in which that word is now used.

Teece K.C. The book is admissible. The opinions are not really opinions on law but they embody the view which the counsel concerned respectively took as to consensual compact.

[After further argument it was agreed that the book should be available for purposes of reference and information.]

Teece K.C. The domestic law of the Church in New South Wales is ascertainable by the court in the same way as the court ascertains the common law or the law of a foreign country. The procedure adopted in this case was in conformity with authoritative cases as to proof of foreign law (*Buerger* v. *New York Life Assurance Co.* (1)). Where persons go to a colony and found there a voluntary association they, by implied agreement, would be bound in the government of their Church by the rules of the Church in England (*Bishop of Natal* v. *Gladstone* (2)). Evidence in this case shows that according to the law of the Church of England from the date of the settlement in New South Wales, that is 1788, until the enacting of the *Church of England Property Management Act* 1866, the rules of the Church demanded that the Book of Common Prayer should be strictly observed. The history of the Church in Australia is important. The law as to the power of the Crown to appoint bishoprics is stated in *Halsbury's Laws of England*, 2nd ed., vol. 11, p. 576 : see also *Jenk's History of the Australasian Colonies*, p. 160 ; *Lowther Clarke* on *Constitutional Church Government*, pp. 33-36 ; and *Oliver's Statutes of Practical Utility*, vol. 1, pp. 163, 166, 167. Evidence is before the court of facts in the history of the Church of England in New South Wales which establish the position that exact conformity with the law of the Church of England is part of the domestic law of the Church in New South Wales and that this cannot be changed, especially since the enacting of the *Church of England Property Management Act* 1866 and the *Church of England Constitutions Act Amendment Act of* 1902. There is no power in laymen to initiate a motion for the trial of a bishop by a tribunal set up by General Synod (*Solicitor-General* v. *Wylde* (3)). The *Public Worship Regulation Act* 1874, giving to bishops a power of veto, only applies to complaints against a bishop himself and the discretion conferred upon him as to whether he shall allow anyone other than himself

(1) (1927) 96 L.J. K.B. 930, at pp. 940-943.

(2) (1866) L.R. 3 Eq., at pp. 35, 36.

(3) (1945) 46 S.R. (N.S.W.), at p. 99.

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to prosecute does not apply to proceedings against himself for illegal practices (*Read* v. *Bishop of Lincoln* (1)).

[DIXON J. referred to *Read* v. *Bishop of Lincoln* (2).]

There is no evidence that the *jus liturgicum* has been restored to the Church in New South Wales by the rules of the Church. All the experts who gave evidence agreed that both the Receptionist doctrine and the doctrine of the Real Presence are permissible in the Church of England. The " Red Book " is instinct throughout with the Anglo-Catholic doctrine of Real Presence and is distasteful to Receptionists. There is an important distinction between the expressing of views outside the Church and embodying them in the public service (*Sheppard* v. *Bennett* (3)). The services must be such as can be wholeheartedly entered into by people who hold the doctrines which the Church of England permits them to hold. The "Red Book " is not merely a combination of the Book of Common Prayer of 1662 and the Book of Common Prayer of 1928. It is impliedly, perhaps expressly, based upon doctrines which are permitted to be held but which many members of the Church do not hold ; those members are entitled to attend in England and should not be excluded in Australia. All the rubrics in the " Red Book " inform the congregation as to the meaning of the services. The evidence of some members of the Church in the diocese was that by reason of the " Red Book " they had been compelled to remain away from the communion service (*R.* v. *Dibdin* (4) ; on appeal, *sub nom Thompson* v. *Dibdin* (5)). The making of the Sign of the Cross is an illegal ceremony in the Church of England (*Read* v. *Bishop of Lincoln* (1)). In at least three instances the words relating to the ringing of the *sanctus* bell are directory. The ringing of the *sanctus* bell also is an illegal ceremony (*Rector and Churchwarden of Capel St. Mary, Suffolk* v. *Packard* (6) ; *Herbert* v. *Purchas* (7)). There is direct evidence before the Court that a large number of churches within the diocese are vested in the defendant Trust for the uses and purposes of the Church of England. As to how far it can be contended that because there has been a history of medieval practices in the Church of England this strict law of the land has not been observed, see *Tudor* on *Charities*, 4th ed. (1906), p. 248 ; *Halsbury's Laws of England*, 2nd ed., vol. 4, pp. 177, 188 ; *Drummond* v. *Attorney-General* (8) ; *Shore* v. *Wilson* (9) and *Attorney-General* v. *St. Cross Hospital* (10). The discretion of the Court should be

(1) (1891) P. 9 ; (1892) A.C. 644.
(2) (1889) 14 P.D. 88, at p. 148.
(3) (1872) L.R. 4 P.C., at p. 403.
(4) (1910) P. 57, at p. 120.
(5) (1912) A.C. 533.
(6) (1927) P. 289, at p. 305.
(7) (1872) L.R. 4 P.C. 301, at pp. 302, 303, 307.
(8) (1849) 2 H.L.C. 837 [9 E.R. 1312].
(9) (1842) 9 Cl. & F. 355 [8 E.R. 450].
(10) (1853) 17 Beav. 435 [51 E.R. 1103].

exercised in favour of the respondent. This is not a case where all that is asked is an injunction against the appellant. The Court is asked also to declare that the only lawful service to be used in the Church of England is according to the Book of Common Prayer of 1662, and for consequential directions. The Court should declare that any other form of service is a breach of trust. This is a suit by the Attorney-General asking for proper administration of the charitable trust and his only remedy is by way of injunction (*Attorney-General* v. *Wimbledon House Estate Co. Ltd.* (1)). The corporate trust in this case is a bare trustee. A breach of trust is not limited to the embodiment in the service of false doctrine (*Merriman* v. *Williams* (2)). *Attorney-General* v. *Munro* (3) shows that if the uses include a certain form of worship then it is a breach of trust to depart from that form. " Being part of the Church of England," or " in connection with the Church of England " are one and the same thing (*Merriman* v. *Williams* (2)). The evidence on commission was not confined to the matter of false doctrine but included also evidence on questions of departure from the liturgy and whether the " Red Book " was or was not an illegal book. In the circumstances the order as to costs should not be disturbed.

Kitto K.C., in reply. The failure on the part of the respondent to furnish admissions or adequate admissions rendered it necessary to take evidence on commission in regard to the charge of false doctrine. The respondent should be ordered to pay the whole of the costs of the commission, or, at worst, there should not be any order as to those costs. The cases like *Attorney-General* v. *Munro* (3) and *Attorney-General* v. *Pearson* (4) are of two types—schism or intrusion of unauthorized persons. There is no case where a trust for the performance of particular rites has been implied: see *Halsbury's Laws of England*, 2nd ed., vol. 11, p. 412, on *Free Church of Scotland* v. *Overtoun* (5). The first part of the headnote in that case is misleading. No decision of the Privy Council on Church of England cases has held that property must be used in a particular way. Even breaches of discipline and order in the Church leave the user of the church as property unaffected. Vesting in the corporate trustee did not enlarge the trusts as created. If the properties are used by the Church of England in New South Wales the trusts are satisfied. Identity of formularies is not necessary to preserve identity with the Church of England (*Merriman*

(1) (1904) 2 Ch. 34.
(2) (1882) 7 App. Cas. 484.
(3) (1848) 2 De G. & Sm. 122 [64 E.R. 55].
(4) (1817) 3 Mer. 353 [36 E.R. 135].
(5) (1904) A.C. 515.

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v. *Williams* (1)). The only acts authorized by the " Red Book " are the Sign of the Cross and the ringing of the *sanctus* bell. The Court will not grant injunctions for these alone. As to the " Red Book " propounding one theory of the Sacrament, there is nothing in the text of the order which does this ; the doctrine of the Real Presence is advocated only in the rubrical directions which are in the same category as a sermon. There has not been any exclusion of members. Unpalatability of the form of service is not exclusion. Settlors settled the properties on the Church knowing that the Church had its own means of keeping the forms of worship within limits. The power of Synod to legislate the " Red Book " out of use is conferred by article 3 of the Schedule to the *Church of England Constitutions Act Amendment Act of* 1902. It must not be presumed that the appellant, as Bishop, would not assent. If he did it would be a matter for the Provincial Synod under articles 6 and 23 of the schedule. Further, the Metropolitan of New South Wales has authority, not coercive, but in such an organization as the Church his influence is based upon strong considerations, including his Suffragan's canonical oath of obedience. The position of the Metropolitan in England by virtue of his office is shown in *Ex parte Read* (2) ; *Read* v. *Bishop of Lincoln* (3) and *Marshall* v. *Graham* (4)). " Church " is the crucial word in the trust. If, in the Anglican communion, it means a place where Divine service is held according to the doctrine and worship of the Church of England there still remains the question : What is the ambit of the word " worship " ? It means worship in accordance with the usages of the Church of England in New South Wales, or, put in another way, " worship in the manner from time to time allowed in the Church of England, that is permitted within the framework of the Church". The settlors of the properties by using the terse phrase of the trust did not mean a static worship set up in 1662. That would be opposed to the admitted practice of the Church. It must be presumed that they knew that the Book of Common Prayer of 1662 had not been strictly observed ; that the obligation to use it was personal to the clergy ; that the Church in future would persist in deviation ; and that the Church was wider than the Established Church in England. It cannot be supposed that the settlors intended to impose a fetter on the Church which it had never accepted. The fact that the Book of Common Prayer 1662 was prepared by Convocations is irrelevant. Uniformity was the

(1) (1882) 7 App. Cas., at p. 507.
(2) (1888) 13 P.D. 221.
(3) (1889) 14 P.D., at p. 128.
(4) (1907) 2 K.B. 112, at pp. 126, 127.

creature of statute imposed as law with penalties. The preface to the Book of Common Prayer pre-supposed variations in the future—this the statute prevented. Either all or none of the Book of Common Prayer must be written into the trusts. Many of the directions in that Book, and also some of the prayers, are inappropriate to the Church in Australia at the time when the voluntary association was formed, e.g. daily services; prayer during sessions of the English Parliament. Even if there is an internal rule and that rule creates rights non-justiciable and non-contractual it cannot be supposed that a trust is written into the properties so that the rule becomes justiciable and enforceable. Very clear and cogent reasons would be required to achieve such a result.

Cur. adv. vult.

Dec. 6.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decree of *Roper* C.J., in Eq., New South Wales, in a suit brought by information of the Attorney-General on the relation of twenty-three relators against Arnold Lomas Wylde, Bishop of the Diocese of Bathurst, and the Church of England Property Trust Diocese of Bathurst. The defendant corporation (which entered an appearance but took no part in the proceedings and submitted to any judgment of the Court) holds church property of the Church of England in the diocese upon trust: *Church of England Trust Property Act* 1917, s. 4; definitions of "Church of England" and "church trust property": s. 5.

His Honour made a decree declaring that the use in churches of the Church of England in the Diocese of Bathurst of the order of administration of the Sacrament of Holy Communion set forth in a book entitled "The Holy Eucharist" and commonly known as "The Red Book" and the practice of administering the Sacrament of Holy Communion in accordance with that order and the making of the Sign of the Cross by the celebrant of the said Sacrament of Holy Communion during the Absolution and Benediction respectively and the ringing during the administration of the Sacrament of a *sanctus* bell, constitute breaches of the trusts on which the churches of the diocese are held. Consequential injunctions against the Bishop were granted. An injunction was also granted restraining the Bishop from using or authorizing or encouraging the use of any order of administration of the Sacrament of Holy Communion other than that set forth in the Book of Common Prayer of 1662 in any churches of the Church of England in the diocese of Bathurst.

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The decree was based upon his Honour's conclusion, reached after a careful examination of the evidence and of the history of the Church of England in New South Wales, expressed in the following words :—" it is a fundamental rule of the Church of England in New South Wales that public services conducted in its churches should, subject to the possible application of the Shortened Services Act, a consideration which does not affect the matter in issue in this suit, be conducted in accordance with the form and order prescribed by the Prayer Book. Consequently, the use of a church for the conduct of a service not in that form and order, even though the service is consistent in its doctrine with beliefs and teaching proper to be held by and given to members of the church, is, in my view, the use of the church otherwise than for or for the use benefit or purposes of the Church of England in New South Wales and necessarily involves a breach of trust " (1).

In the first place, it is necessary to determine the trusts upon which the church property in the diocese is held. As to the actual terms of the trusts no difficulty arises. They are set out in admissions made by the defendant Bishop. In the case of the church at Canowindra, where the controversy as to the form of service was most vigorous, the Crown grant of the land is expressed to be " upon trust for erection of a church in connection with the United Church of England and Ireland." (The name " Church of England " was substituted for the name " United Church of England and Ireland " in this grant by the *Church of England Constitutions Act Amendment Act of* 1902, s. 3). In the case of other churches in the diocese the trusts are either upon trust for the erection of a church or to permit or suffer a church or a building or a school-house or parsonage to be erected. The churches are held upon trust for the use, benefit or purposes of the Church of England within New South Wales.

The terms of the trusts make it necessary in the second place to determine what is the Church of England in New South Wales—what determines its identity. In this connection it is necessary to consider in this case only whether there is any standard of ritual which is binding upon the Church in New South Wales. No question of church discipline arises and questions of doctrine arise only indirectly. In the information in its original form a charge of teaching false doctrine was made against the Bishop, but, after evidence had been given on commission in England from persons highly qualified in ecclesiastical matters, this charge was withdrawn. It is necessary, however, to consider an argument that the Red Book which has been authorized by the Bishop for use in the diocese

(1) (1948) 48 S.R. (N.S.W.), at p. 388.

contains material which is objectionable from the point of view of many members of the Church of England who hold a particular doctrine as to the true nature of the Sacrament of Holy Communion.

In the third place, if a standard of ritual is ascertainable, it is necessary to determine whether there have been departures by the Bishop from that standard.

Finally, it will be necessary to decide whether, if there are such departures, they constitute breaches of trust in respect of which the Court should afford a remedy.

The suit is brought for the purpose of securing the performance of charitable trusts. The trusts upon which the church property is held are religious trusts and are therefore plainly charitable in character. Property devoted to a charitable trust must be used for the purposes, and only for the purposes, of the trust. Changes in circumstances may make it probable that the founder of the trust would, if he had been able to do so, have varied the terms of the trust for the purpose of meeting conditions created by such new circumstances. But when proceedings are instituted in a court for the purpose of securing the performance of such a trust there is no authority in the court to " vary the original foundation, and to apply the charity estates in a manner which it conceives to be more beneficial to the public, or even such as the Court may surmise that the founder would himself have contemplated could he have foreseen the changes which have taken place by the lapse of time " (*Attorney-General* v. *Sherborne Grammar School* (1)).

There is but little dispute as to the facts of the case. Indeed, it is necessary to add little to the admissions made by the Bishop for determining the case in relation to the claims made against him. It is admitted or proved that the Bishop has authorized the use in churches in the diocese and that he himself uses in those churches the book which he has compiled, which is entitled " The Holy Eucharist " and is commonly referred to as the " Red Book." This book is prefaced by the following statement :—" The main object of this little book is to help our people to take their part more easily and more fully as they come to worship in the one Service which our Lord appointed. The order of the Communion Service herein is authorised for use, provided that copies of this book are made available for the worshippers, and that the permission of the Bishop of the Diocese has been obtained." In an address delivered in the church at Canowindra on 5th December 1943 the Bishop explained his purpose in authorizing the use of the book. He said, *inter alia* :—" The Church of England provides us with one, and

(1) (1854) 18 Beav. 256, at pp. 280, 281 [52 E.R. 101, at p. 111].

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only one, official and legally authorised Book of Common Prayer. This has remained the norm of our Church's worship since the year 1662, nearly three hundred years ago. We have all of us undertaken in public worship to use this book and no other except so far as shall be permitted by lawful authority. An intelligent interpretation of this means that we will not use in its place a different service book of some other Church, or one of our own devising. The Book of Common Prayer shall for us be the standard, until it is changed by the joint action of Church and State." The Bishop then proceeded to say that " An unintelligent interpretation of this would make it mean that we neither added to nor omitted anything directed in that book." He gave illustrations of changed circumstances which had made the Book of Common Prayer inapplicable in certain modern circumstances, and said that it was as impossible for the church to live by rules three hundred years old as it would be to run the army by regulations dating from the reign of Charles II. He said that the law of Church and State was too narrow to be workable and the alteration of it had proved too difficult of accomplishment. In the interests of amity, however, he then withdrew his authority for the use of the book in the church at Canowindra, but, as already stated, he himself uses the book and it is in use in a number of churches in the diocese.

This address of the Bishop indicates the real difficulty which lies behind the controversies which the promulgation and use of the Red Book have created in the Church. On the one hand the Church in New South Wales is still a Church of England, not a Church of New South Wales or Australia, but of England. The Church of England is not a congregational church. The members of a congregation worshipping in a particular church building are not at liberty to adopt any doctrine or ritual which commends itself to them and still to describe themselves as members of the Church of England. On the other hand, there are members of the Church who regard some changes as desirable, though others may consider them to involve an abandonment or repudiation of vital and binding principles. This case illustrates the difficulties of a Church being what is called a " living church " and at the same time being a Church the doctrines and ritual of which have been fixed by statutes which it has proved impossible to amend. However great these difficulties may be, when it becomes necessary for a court of law to determine rights with respect to church trust property, the court is obviously bound by the law and cannot be affected by past or present breaches of the law, however widespread and tolerated these breaches may have been or may be, nor can the court presume

to alter trusts by acceding to the desire of some or many members of the communion to change with the times. There are many who have the strongest objection in matters of doctrine and also in matters of ritual to "changing with the times." If the terms upon which trust property is held require adherence to particular doctrines or observance of a certain ritual, then no practice, however long-continued, and no wish of a majority which is not expressed in a manner to which the law attaches binding force can affect the duty of the court: *Tudor* on *Charities*, 5th ed. (1929), p. 235; *Milligan* v. *Mitchell* (1); *Drummond* v. *Attorney-General* (2); *Attorney-General* v. *St. Cross Hospital* (3) (cf. "*The Warden*"—Anthony Trollope).

In the reasons for judgment of *Roper* C.J. in Eq. the history of the Church of England in New South Wales is set out. When New South Wales was occupied the Church of England was recognized and treated as teaching the State religion, and the chaplains of the church were paid from public funds. Originally the local clergy were subject to the jurisdiction of the Bishop of Calcutta, but in 1836 Bishop Broughton was appointed as Bishop of Australia by letters patent, subject to the Archiepiscopal See of Canterbury. But by the year 1862, when State aid to religion was withdrawn, the church had plainly become that which it now is, namely a voluntary association organized on a consensual basis. In *Long* v. *Bishop of Capetown* (4), Lord *Kingsdown* said:—"The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them." In *Bishop of Natal* v. *Gladstone* (5), Lord *Romilly* M.R., referring to the words which I have quoted, said:—"They do not mean, as some persons seem to have supposed, that, because the members of such a church constitute a voluntary association, they may adopt any doctrines and ordinances they please, and still belong to the Church of England. All that really is meant by these words is, that where there is no state religion established by the Legislature in any colony, and in such a colony is found a number of persons who are members of the Church of England, and who establish a church

(1) (1837) 3 My. & Cr. 72, at p. 83 [40 E.R. 852, at p. 856].
(2) (1849) 2 H.L.C. 837, at p. 861 [9 E.R. 1312, at p. 1321].
(3) (1853) 17 Beav. 435, at pp. 464, 465 [51 E.R. 1103, at p. 1114].
(4) (1863) 1 Moore N.S. 411, at p. 461 [15 E.R. 756, at p. 774].
(5) (1866) L.R. 3 Eq. 1, at pp. 35, 36.

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there with the doctrines, rites, and ordinances of the Church of England, it is a part of the Church of England, and the members of it are, by implied agreement, bound by all its laws. In other words, the association is bound by the doctrines, rights [?rites], rules, and ordinances of the Church of England, except so far as any statutes may exist which (though relating to this subject) are confined in their operation to the limits of the United Kingdom of England and Ireland." And, "But if certain persons constitute themselves a voluntary association in any colony as members of the Church of England, then, as I apprehend, they are strictly brethren and members of that church, though severed by a great distance from their native country and their parent church. They are bound by the same doctrines, the same rules, ordinances, and discipline. If any recourse should needs be had to the civil tribunals, the questions at issue must be tried by the same rules of law which would prevail if the question were tried in England—with this exception only, that the tribunal would probably be different, and that, as the statutes which constitute certain ecclesiastical tribunals in England do not extend to the colonies, the question would have to be determined by the ordinary civil courts which administer justice in the colonies." (1). I take these principles as the basis of my judgment.

In the year 1902 the *Church of England Constitutions Act Amendment Act* was passed. It substantially reproduced an Act of 1866. Section 4 provided that the constitutions contained in the Schedule to the Act and any ordinances or rules to be made in pursuance thereof "shall be for all purposes connected with or in any way relating to the property of the Church of England within the State of New South Wales binding upon the members of the said Church." Section 5 provided that all persons holding any property in trust for or in any way on behalf or for the use of the Church of England (subject, however, to the terms of any express trust) and except lands as to which other specified provision had been made, should hold that property subject to the provisions of the constitutions and of any ordinances or rules made thereunder. Section 5 also provided that all such trustees should be bound by such constitutions, ordinances and rules as if the same were contained in a deed of conveyance and trust of the said property. The Churches of England in the Diocese of Bathurst fall within the description of real estate held "in trust for or in any way for or on behalf or for the use of the Church of England." Accordingly, the present trustee, the defendant corporation, holds those churches subject

(1) (1866) L.R. 3 Eq., at p. 38.

to the provisions of the constitutions and ordinances or rules made under the constitutions. Thus the constitutions and such ordinances or rules have become actual terms of the trusts upon which the churches are held.

The schedule of constitutions provides in article 3 that the "Synod of each Diocese may make ordinances upon and in respect of all matters and things concerning the order and good government of the Church of England and the regulation of its affairs within the Diocese, including the management and disposal of all Church property, moneys and revenues (not diverting any specifically appropriated, or the subject of any specific trust, nor interfering with any vested rights, except in accordance with the provisions of any Act of Parliament and for the election or appointment of churchwardens and trustees." Article 3 also provides that ordinances of the Synod should be "binding upon the Bishop and his successors, and all other members of the Church within the Diocese, but only so far as the same may concern their respective rights, duties, and liabilities as holding any office in the said Church within the Diocese." It must, I think, be considered doubtful whether article 3 would enable the Synod to make any change in doctrine or ritual of the Church. Article 3 accepts the Church of England as being the Church of England in New South Wales and provides for the good government thereof. If adherence to certain doctrine and observance of certain ritual is an essential feature of the Church of England the Synod would have no power, by making an ordinance on the matter, to alter either the doctrine or the ritual. However, the Synod has not attempted to make any relevant ordinance.

Article 24 of the constitution is important as showing that it was intended that the Church of England in New South Wales should continue to be governed in respect of articles of doctrine, liturgy and formularies, by the same rules as those which apply in the Church of England in England. Article 24 is in the following terms:—"No rule, ordinance, or determination of any Diocesan or Provincial Synod shall make any alteration in the article, liturgy, or formularies of the Church, except in conformity with any alteration which may be made therein by any competent authority of the Church of England in England." This article prevents any alteration in the articles of faith or in the liturgy or in the formularies of the Church of England in New South Wales by either a diocesan or provincial Synod unless that alteration is made in conformity with an alteration made in the Church of England in England. The article therefore assumes that the Church of England in New South Wales is, in respect of articles of religion, liturgy and formularies,

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in conformity with the Church of England in England, and it provides that that conformity is to be continued. The Church of England in New South Wales is not within the province of Canterbury or the province of York and it is not governed by the Archbishops of those provinces. But it is the same Church—the Church of England—in Australia as it is in England, the identity being established by identity of doctrine and ritual: see passage cited hereafter from the *Free Church of Scotland* v. *Overtoun* (1).

Argument was heard upon the meaning of the words "any competent authority of the Church of England in England." It was urged that this phrase showed that it was assumed that there was some competent authority of the Church itself in England which could alter articles, liturgy or formularies. But we have not been referred to any such authority. Such alterations as have been made in England have been made by parliamentary statute. The *Act of Uniformity* of 1662 established by law uniformity in the Church of England in respect of doctrine and ritual by adopting the Book of Common Prayer of 1662 as the standard. Parliament has since made some modifications, as, for example, by the *Shortened Services Act* 1872, and there is no other authority in England which can alter the doctrines or ritual of the Church of England in England. The words "any competent authority of the Church of England" may be compared with the words to be found in the *Clerical Subscription Act* 1865, s. 1, whereby the declaration of assent required from the clergy of the established Church of England is a declaration of assent to the thirty-nine Articles of Religion in the Book of Common Prayer and to the doctrine of the Church of England as therein set forth. It includes the following declarations:—"In public prayer and administration of the sacraments I will use the form in the said book prescribed, and none other, except so far as shall be ordered by lawful authority." There has been much argument as to the meaning of the words "except so far as shall be ordered by lawful authority." The defendants tendered in evidence a memorandum by the Honourable Mr. Justice *Vaisey* upon this subject in which, after a careful examination of the question, the writer reached the opinion that the effect of introducing these words into the declaration of assent has been "to convert an obligation which it was impossible to perform into one which it is impossible to understand." It at least can safely be said that the words used in the *Clerical Subscription Act* cannot be utilized for the purpose of throwing any light upon the words "any competent

(1) (1904) A.C. 515, at p. 612.

authority of the Church of England " in article 24 of the constitution of the Church of England in New South Wales.

Whatever these words may mean, no attempt was made to show that any alterations in the articles, liturgy or formularies of the Church in New South Wales had been made, either in conformity with an alteration made by some competent authority of the Church of England in England, or otherwise.

The trusts which the Court is asked to enforce in the present case are trusts for the purposes of the Church of England where that Church exists in the Diocese of Bathurst in New South Wales. In order to determine whether a particular church is used for the purposes of the Church of England, it is therefore necessary to ascertain the distinctive features of the Church of England. In *Free Church of Scotland* v. *Overtoun* (1) Lord *Halsbury* said :— " Speaking generally, one would say that the identity of a religious community described as a Church must consist in the unity of its doctrines. Its creeds, confessions, formularies, tests, and so forth are apparently intended to ensure the unity of the faith which its adherents profess, and certainly among all Christian Churches the essential idea of a creed or confession of faith appears to be the public acknowledgment of such and such religious views as the bond of union which binds them together as one Christian community." A church without a religion cannot be called a church. The religion of the Church of England is prescribed by law in respect of both doctrine and ritual. The Church of England is established by law and its members are incapable of altering the doctrine and the ritual of the Church upon which the identity of the Church depends. The *Act of Uniformity* of 1662, 13 & 14 Car. II., c. 4 (*Halsbury's Statutes*, vol. 6, p. 523), is still the law in England. Section 1 is in the following terms :—" All and singular ministers in any cathedrall collegiate or parish church or chappell or other place of publique worship within this realme of England dominion of Wales and town of Berwick upon Tweed shall be bound to say and use the morning prayer evening prayer celebracõn and administracõn of both the sacraments and all other the publique and cõmon prayer in such order and forme as is mencõned in the booke annexed and joyned to this present Act and entituled the Booke of Cõmon Prayer and administracõn of the Sacraments and other rites and ceremonies of the Church according to the use of the Church of England togeather with the Psalter or Psalmes of David pointed as they are to be sung or said in churches and the

(1) (1904) A.C., at pp. 612, 613.

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form or manner of making ordaining and consecrating of bishops preists & deacons. And that the morning and evening prayers therein contained shall upon every Lords day and upon all other dayes and occasions and att the times therein appointed be openly and solemnly read by all and every minister or curate in every church chappell or other place of publique worshipp within this realme of England and places aforesaid." The *Act of Uniformity* was enacted nearly three centuries ago, and it is still law in England. The Church of England in England has remained as an established church, that is to say as a religious body teaching a religion which is supported and encouraged by the State: see cases cited in *Halsbury's Laws of England*, 2nd ed., vol. 11, p. 413, notes (*b*) and (*c*). Parliament has continued to control the services of the Church. Reference may be made to the *Church Discipline Act* 1840, *The Prayer Book* (*Table of Lessons*) *Act* 1871, the *Act of Uniformity Amendment Act* 1872, which permitted the use " of shortened forms of Morning and Evening Prayer " and of certain additional services, and the *Public Worship Regulation Act* 1874. The *Act of Uniformity* is not in force as a statute in New South Wales, but it is a statute which prescribes both the doctrine and ritual of the Church of England in England, and therefore equally determines the doctrine and ritual of the Church of England as it exists in New South Wales.

Many clergy of the Church of England have at all times objected to the imposition of uniformity in respect of both doctrine and ritual. Leading ecclesiastics, including the Rev. Dr. A. C. Don, the Dean of Westminster, and Canon R. C. Mortimer, Regius Professor of Moral and Pastoral Theology and Canon of Christ Church in the University of Oxford, gave evidence that in many churches in England there were deviations from the order of service as prescribed in the Prayer Book of 1662. Mr. N. C. Armitage, barrister, Chancellor of the Diocese of Leicester, said that it was common knowledge that every clergyman departed from the Book of Common Prayer. The evidence of these and other witnesses called for the defendant showed the difficulty of allowing any development in doctrine or ritual while those matters were regulated by statute. But, whatever may be the views of the clergy and of many members of the Church of England as to the desirability of introducing elasticity into church services, the fact is that the form of those services is actually prescribed by law, and the further fact that the law has been and frequently is broken does not repeal the law.

When a civil court is called upon to administer trusts for the purpose of maintaining and promoting religious worship it is not for the court to determine the soundness of any particular doctrine

or the wisdom of a particular ritual. As Lord *Halsbury* said in the *Free Church Case* (1), where it was alleged that church property was being used in breach of trust because it was being utilized for the purposes of preaching doctrines inconsistent with those intended by the founders of the trust to be promoted :—" In the controversy which has arisen, it is to be remembered that a court of law has nothing to do with the soundness or unsoundness of a particular doctrine. Assuming there is nothing unlawful in the views held— a question which, of course, does not arise here—a court has simply to ascertain what was the original purpose of the trust." Lord *Davey* said :—" My Lords, I disclaim altogether any right in this or any other civil court of this realm to discuss the truth or reasonableness of any of the doctrines of this or any other religious association, or to say whether any of them are or are not based on a just interpretation of the language of Scripture, or whether the contradictions or antinomies between different statements of doctrine are or are not real or apparent only, or whether such contradictions do or do not proceed only from an imperfect and finite conception of a perfect and infinite Being, or any similar question. The more humble, but not useless, function of the civil court is to determine whether the trusts imposed upon property by the founders of the trust are being duly observed. I appreciate, and if I may properly say so, I sympathise with the effort made by men of great intelligence and sound learning to escape from the fetters forged by an earlier generation. But sitting on appeal from a court of law, I am not at liberty to take any such matter into consideration " (2).

Further, it is not proper for the court to distinguish between what is important and unimportant in a matter of doctrine or ritual where property has been given in trust for a particular church which can be identified by the doctrines in association with which ritual is prescribed. In *Martin* v. *Mackonochie* (3) it was said by Lord *Cairns* in delivering judgment on behalf of the Privy Council :—" Their Lordships are of opinion, that it is not open to a Minister of the Church, or even to their Lordships in advising Her Majesty as the highest Ecclesiastical Tribunal of appeal, to draw a distinction, in acts which are a departure from or violation of the Rubric, between those which are important and those which appear to be trivial. The object of a *Statute of Uniformity* is, as its preamble expresses, to produce ' an universal agreement in the public worship of Almighty God,' an object which would be wholly

(1) (1904) A.C., at p. 613.
(2) (1904) A.C., at pp. 644, 645.
(3) (1868) L.R. 2 P.C. 365, at pp. 382, 383.

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frustrated if each Minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, to add to, or to alter any of those details. The rule upon this subject has been already laid down by the Judicial Committee in *Westerton* v. *Liddell* (1) and their Lordships are disposed entirely to adhere to it: 'In the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted'."

This rule was restated in identical words in *Sheppard* v. *Bennett* (2), and the following was added :—" If the Minister be allowed to introduce at his own will variations in the rites and ceremonies that seem to him to interpret the doctrine of the service in a particular direction, the service ceases to be what it was meant to be, common ground on which all Church people may meet, though they differ about some doctrines."

These authorities relate not only to doctrine, but also to ritual —to rites and ceremonies. The standard of faith and doctrine in the Church of England is " the formularies of the Church as judicially interpreted " (*Merriman* v. *Williams* (3)).

At this point it is proper to refer to article 34 of the Thirty Nine Articles. It is in the following terms :—" It is not necessary that Traditions and Ceremonies be in all places one, or utterly like; for at all times they have been divers, and may be changed according to the diversities of countries, times, and men's manners, so that nothing be ordained against God's Word. Whosoever through his private judgment, willingly and purposely, doth openly break the traditions and ceremonies of the Church, which be not repugnant to the Word of God, and be ordained and approved by common authority, ought to be rebuked openly, (that others may fear to do the like,) as he that offendeth against the common order of the Church, and hurteth the authority of the Magistrate, and woundeth the consciences of the weak brethren. Every particular or national Church hath authority to ordain, change, and abolish, ceremonies or rites of the Church ordained only by man's authority, so that all things be done to edifying."

It is argued that this article, contained as it is in the Prayer Book, gives authority to alter the ceremonies and rites thereby prescribed—" every particular or national Church hath authority to ordain, change, and abolish, ceremonies or rites."

(1) (1855) Moore's Special Rep. 187.
(2) (1872) L.R. 4 P.C., at p. 404.
(3) (1882) 7 App. Cas., at pp. 510, 511.

But, in the first place, even if this article could justify the making of changes in rites and ceremonies by a "particular or national Church," the Church in New South Wales has not in fact made any such changes. In the second place, no changes can be made which are prohibited by an applicable Act of Parliament. This article cannot be relied upon for the purpose of ignoring the *Act of Uniformity* in England, or, if the conclusion already stated as to the legal status of the church in New South Wales is correct, for the same purpose in New South Wales. Further, article 34 could not be relied upon to justify a departure from the liturgy of the church which was not permitted by article 24 of the Constitution contained in the *Church of England Constitutions Act Amendment Act of* 1902. Finally, article 34 has been contained in the Prayer Book of 1662 at all times, and, notwithstanding its terms, the authoritative decisions of the Privy Council have declared the law in the manner which has been set forth. Each separate one of these reasons provides an answer to the defendant's contention based on article 34. I refer hereafter to the argument that each Bishop of the Church of England has power to change the liturgy in his diocese as he may think proper.

It has been argued that the rigidity imposed upon the church by the decisions of the Privy Council has been removed by the *Public Worship Regulation Act* 1874. That Act relates, *inter alia*, to cases where persons responsible for the performance of Divine Service have failed to observe or cause to be observed the directions of the Book of Common Prayer "as to the performance of the services, rites and ceremonies thereby ordered or have made or permitted to be made an unlawful addition to or alteration or omission of such services, rites or ceremonies." It is provided that a representation in the form of a statutory declaration that an offence has been committed may be made to the Bishop of a Diocese. It is provided (s. 98) that "unless the Bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation" he shall follow a prescribed procedure for trial of the offence. It has been held that if the Bishop is of opinion that proceedings should not be taken his opinion is final (*Allcroft* v. *Lord Bishop of London* (1)). The evidence shows that bishops in England have under this statute declined to institute proceedings for widespread and numerous deviations from the Prayer Book of 1662. It is therefore argued that these deviations have become lawful in the Church of England in England. (It is not suggested that this statute applies as part of the law of

(1) (1891) A.C. 666.

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New South Wales). But there is, in my opinion, a very clear answer to this argument, namely, that the statute applies to prosecutions for acts or omissions which are offences and because they are offences. The statute does not remove them from the category of offences, but provides a means of enabling the bishop lawfully to abstain from enforcing the law in cases in which he is of opinion that proceedings should not be taken. The statute therefore does not diminish the obligation to observe the Book of Common Prayer of 1662, but, on the contrary, assumes that that obligation still exists.

The next question which arises is whether the use of the Red Book in the churches of the Diocese of Bathurst is in accordance with the Prayer Book of 1662.

The evidence showed that many of the changes in the service in the Red Book as compared with the 1662 Prayer Book were in accordance with the 1928 Prayer Book. The latter book was approved by Convocations of the archdioceses of Canterbury and York and by the Church Assembly in England. But legislation for the purpose of authorizing its use was rejected by Parliament. Nevertheless it has been used in the Church of England, both in England and in New South Wales. For reasons which have been stated, this fact cannot affect the terms of the trusts of property of the Church of England. Similar considerations apply to decisions of the Lambeth Conference, which consists of bishops of the Church of England and of churches in communion with that church. The Conference is an important and influential ecclesiastical body, but it has no authority to change the law.

The plaintiff relies particularly upon three grounds of objection to the order of service and the directions for conducting public worship set forth in the Red Book.

In the first place, objection is taken to a direction or rubric in the following terms :—

"*The Consecration*

when the bread and wine become the Body and Blood of our Lord Jesus Christ, by the power of the Holy Ghost. This prayer is said in a low voice, to express the silence of Christ at his passion, and to show the reverence and awe which priest and people ought to feel at such a time."

It was agreed by witnesses who were versed in theology that these words expressed what is known as the doctrine of the Real Presence, which is to be distinguished from the doctrine of transubstantiation. Transubstantiation is condemned by the articles of the Church of England : see the Prayer Book, Articles of

Religion 28. In that article it is declared that the Lord's Supper is a Sacrament and that " to such as rightly, worthily, and with faith, receive the same, the Bread which we break is a partaking of the Body of Christ ; and likewise the Cup of Blessing is a partaking of the Blood of Christ." It is further declared in this article that " The Body of Christ is given, taken, and eaten, in the Supper, only after an heavenly and spiritual manner. And the mean whereby the Body of Christ is received and eaten in the Supper is Faith." The article expressly condemns as repugnant to scripture the doctrine of transubstantiation. The evidence of the learned ecclesiastics in this case shows that the doctrine of the Real Presence can properly be held by members of the Church of England. It is not necessary in the present case to examine the doctrine of the Real Presence. Much information with respect to it may be found in the case of *Sheppard* v. *Bennett* (1). The effect of the evidence with respect to this matter is well summarized in the evidence of Dr. Don, where he says that the practices adopted by the Bishop of Bathurst " imply what is often called the doctrine of the Real Presence ; that is to say they would not be accepted by what is called a Receptionist . . . I have no doubt whatever that it is a perfectly legitimate doctrine for Anglicans to hold and that there is nothing whatever disloyal in holding a belief in the Real Presence in the spiritual gift of the Body and Blood of Christ."

But the Receptionist doctrine of Holy Communion is also consistent with the Thirty Nine Articles and can properly be maintained, and is maintained, by large numbers of members of the Church of England. Receptionism is the view that the bread and wine remain only bread and wine after consecration : but that, together with them, the faithful communicant really receives the body and blood of Christ (*Oxford English Dictionary*). This doctrine denies the Real Presence.

The position therefore is that the Red Book adopts and asks the worshippers to worship in accordance with a doctrine which, as members of the Church of England, they are entitled to hold, but which members of the Church of England are not bound to hold and which they are entitled to reject. Accordingly, a member of the church who accepted the Receptionist doctrine would find himself engaged in a service which was based upon a doctrine which was objectionable and repugnant to him. The articles of the Church and the services in the Prayer Book of 1662 are so expressed as to enable communicants accepting either view to join in the service. The Red Book is so expressed as to make participation in the

(1) (1872) L.R. 4 P.C., at pp. 404-411.

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service, if not impossible, at least most objectionable to those holding the Receptionist view. Accordingly, the latter members would, if they were earnest in their opinions, find themselves excluded from the services of their church. There is evidence in the case that some members of the church in the diocese have in fact ceased to attend church on this account. The directions in the Red Book are a deviation (and, it may be added, though it is not necessary to add, an important deviation) from the Book of Common Prayer of 1662.

It has been argued that the words upon which this objection is based, namely, "the bread and wine become the Body and Blood of our Lord Jesus Christ, by the power of the Holy Ghost," are not actually uttered by the priest in the service and that therefore a member of the church might attend the service hear all that the priest said and take his part in the service without there being room for any objection on the ground of exclusion of the Receptionist doctrine. But the Red Book is introduced by the statement that the object of the book " is to help our people to take their part more easily and more fully as they come to worship in the one Service which our Lord appointed." The first words in the book, in small italics, are a direction to the worshipper " When you come into Church, kneel down and say . . . ". So all the directions in small italics contained in the book (like the directions in the Book of Common Prayer) are either directions to the priest or to the worshipper, and it would be an unreal view to take of the Red Book to say that these directions do not help to determine the character of the service. The Red Book is meant to be read and to be used and when a question arises as to the lawfulness of its use an objection is not met by the contention that the worshipper need not read or use the book, but need only listen to the service and take his part in the responses. Indeed, the Red Book is stated in its introduction to be " authorized for use, provided that copies of this book are made available for the worshippers."

Thus, in my opinion, the incorporation in the Red Book of directions which assume and are based upon the doctrine of the Real Presence is an infringement of the rules laid down for the service of Holy Communion in the 1662 Prayer Book and it is based upon a particular interpretation of the Articles of Religion which, while lawful within the church, should not be represented as stating a doctrine adherence to which is involved in taking part in the service and therefore binding upon all members of the church.

The next ground of objection to the Red Book is based upon the fact that in several places in the order of service a symbol in the

form of a cross is introduced. There is no such symbol in the Prayer Book. The introduction of this symbol is not intended to be meaningless and, in my opinion, the learned trial judge was right in forming the conclusion that it was not intended as a direction to the minister to make the Sign of the Cross as an act of private devotion. The whole of the book is concerned with acts of public worship. The Sign of the Cross is to be made over the people. The Sign of the Cross is directed by the book in (*inter alia*) the Absolution and the Benediction. It was decided in the court of the Archbishop of Canterbury in *Read* v. *Bishop of Lincoln* (1) that making the Sign of the Cross during the Absolution and the Benediction was a ceremony additional to the ceremonies of the church and was unlawful: see the report (2). Upon appeal to the Privy Council (3) this part of the decision of the Archbishop was not challenged. Accordingly, the making of the Sign of the Cross as directed by the Red Book must be held to be an unlawful addition to the service of Holy Communion in the Church of England as prescribed by law.

The remaining objection depends upon the directions as to the use in the churches of the diocese of a *sanctus* bell. Before "The *Sanctus* and *Benedictus*" the words "Here a bell may be rung" appear. During the Consecration there are the words "The bell rings once to prepare us for our Lord's coming" and later at this stage of the service "The bell rings three times to call us to adoration." Even if the first reference to the bell is permissive, the other directions are plainly, I think, mandatory in character.

In *Rector and Churchwardens of Capel St. Mary, Suffolk* v. *Packard* (4), it was held that the use of a *sanctus* bell at Holy Communion during the consecration is unlawful, and reference is made to several decisions in which it has been so held. Accordingly, the directions in the Red Book as to the use of a *sanctus* bell must be held to be unlawful.

The only matter remaining for decision is whether these infringements of the order of service prescribed in the Prayer Book of 1662 constitute breaches of trust, or whether they are matters for internal regulation by local church authorities.

It was claimed on behalf of the defendants that bishops in olden times possessed, and still possess, a *jus liturgicum*, that is to say, a right of determining the liturgies to be used in the church. The evidence that ecclesiastical authorities believe that such a right exists to-day was very weak, but this is not a question which depends

(1) (1891) P. 9.
(2) (1891) P., at pp. 90-94.
(3) (1892) A.C. 644.
(4) (1927) P. 289, at p. 305.

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upon evidence. The statutes to which reference has already been made prescribe a liturgy for the Church of England and the quotations which have been made from decisions of the Privy Council show that the bishops of the Church of England have not since the *Act of Uniformity* possessed any *jus liturgicum*.

It is contended, however, that the Church is a voluntary association and that a breach of the rules of the Church cannot properly be described as a breach of trust. In the case of a club which owned property in which the members of the club had an interest it could not be contended that there was a breach of trust simply because some members of the club broke the rules of the club. The case, however, is quite different where property has been given in trust for the purposes of a particular church the doctrine and ritual of which is ascertainable. This matter was discussed in interlocutory proceedings in this case and it was expressly held by the Full Court of the Supreme Court (1) that (I quote from the head-note) "the matters complained of by the information were not matters of internal regulation and management of the Church of England in the Diocese of Bathurst." As *Jordan* C.J. said (2):— "At the hearing of the suit, the onus will be on the informant to make good his allegations; but there is nothing in the information, or in such of the documents referred to in the schedule of points of law as have been relied upon in argument, which shows that it will then necessarily appear that the matter complained of is only a permissible variation of a ceremony provided for by the rules governing the church, or a mere irregularity in the performance of such a ceremony, capable of being dealt with and if thought fit adopted and approved by a church authority provided by its rules, so that its authorisation would prevent the user complained of from constituting a breach of trust. If authority is required for the proposition that the court will intervene by injunction to restrain such a breach of trust if established, it is supplied by such cases as *Milligan* v. *Mitchell* (3); *Attorney-General* v. *Pearson* (4); *Attorney-General* v. *Munro* (5); *Attorney-General* v. *Murdoch* (6). There are no ecclesiastical courts of law in New South Wales, and hence doctrinal questions, if they have to be determined for the purposes of litigation, must be determined by the ordinary courts of justice:

(1) (1946) 46 S.R. (N.S.W.) 83.
(2) (1945) 46 S.R., at pp. 99, 100.
(3) (1833) 1 My. & K. 446, at pp. 447, 448 [39 E.R. 750, at p. 751].
(4) (1817) 3 Mer. 353, at pp. 417-419 [36 E.R. 135, at pp. 156, 157].
(5) (1848) 2 De G. & Sm. 122, at pp. 157, 201-203 [64 E.R. 55, at pp. 70, 89, 90].
(6) (1849) 7 Hare 445, at pp. 469, 470 [68 E.R. 183, at pp. 193, 194]; (1852) 1 De G.M. & G. 86, at pp. 88, 111, 112 [42 E.R. 484, at pp. 486, 495].

Bishop of Natal v. *Gladstone* (1). Hence, *Attorney-General* v. *Dean and Chapter of Ripon Cathedral* (2), is of no assistance in New South Wales." I agree with the reasons given in the Supreme Court in reaching this conclusion. I have given my reasons for my opinion that the Church of England in New South Wales, so long as it is a Church of England, is bound to observe the ritual, as well as the doctrine, prescribed by the Book of Common Prayer, and that the divergencies therefrom proved in this case are not " permissible variations " of ceremonies, or " mere irregularities in the performance " of ceremonies which can be adopted or approved by the Church. In the *Free Church Case* (3), the Privy Council applied what was said in *Craigdallie* v. *Aikman* (4), where it was held that the use of church property for purposes other than worshipping in accordance with the doctrine for the maintenance and furtherance of which trust property was given constituted a breach of trust. The Lord Chancellor said in delivering the judgment of the Privy Council (5): " You " (i.e. the court) " may direct that land and those buildings to be enjoyed for the purposes to which they were originally directed." Accordingly, in my opinion *Roper* C.J. in Eq. was right in holding that breaches of trust have been established.

It was finally contended for the defendants that there has been a long-continued and accepted practice of altering the forms of service as laid down in the Prayer Book and that the Court should for this reason exercise its discretion by abstaining from giving any of the relief claimed. In the State of New South Wales there are no ecclesiastical courts and a member of a church complaining of breaches of trust, as in the present case, must resort to the civil tribunal. There are obvious objections to the determination of questions of doctrine and ritual by a civil court. But, as pointed out in the *Free Church Case* (6), no other remedy is available in the absence of the ecclesiastical courts which are associated with the establishment of a State religion. If a plaintiff comes into a court of equity and establishes a breach of a religious trust his only method of enforcing the trust in this country is to obtain a decree from a civil court. As Lord *Halsbury* L.C. said in the *Free Church Case* (7): " there is nothing in calling an associated body a Church that exempts it from the legal obligations of insisting that money given for one purpose shall not be devoted to another." In my opinion no reason has been shown for refusing to afford the only remedy which can prevent the continuance of the breaches of trust

(1) (1866) L.R. 3 Eq. 1, at p. 38.
(2) (1945) Ch. 239.
(3) (1904) A.C., at pp. 613-617.
(4) (1820) 2 Bligh 529 [4 E.R. 435].
(5) (1820) 2 Bligh, at p. 545 [4 E.R., at p. 441].
(6) (1904) A.C. 515.
(7) (1904) A.C., at p. 627.

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of which the informant complains. If the defendant and his supporters, like many others in the Church, are not content with the law as it stands, it is for them to use their efforts to obtain an alteration of the law, and not to break the law.

The decree of the court of equity, however, goes beyond the particular breaches of trust which were proved. It contains an injunction restraining the defendant Bishop from using or authorizing or encouraging the use of any order of administration of the Sacrament of Holy Communion other than that set forth in the Book of Common Prayer of 1662. This part of the decree goes beyond the necessities of the case. The decree should, in my opinion, be limited to the breaches of trust which were proved by evidence, viz. the use of the Red Book, of the Sign of the Cross and of the *sanctus* bell in the churches of the diocese which are subject to the trust proved. The decree should be varied accordingly. Subject to this variation the judgment of *Roper* C.J. in Eq. (1) should be affirmed.

A question was raised as to the order made by the Supreme Court with respect to the costs of the commission to take evidence in England. The defendants applied for this commission because, in the information as it originally stood, there was a charge of heresy against the bishop. The result of the evidence given upon the commission was that the charge of heresy was withdrawn. Evidence was given, however, with respect to other matters arising in the case and *Roper* C.J. in Eq., in making an order for costs against the defendant Bishop, relieved him of one-half of the informants' costs of the commission. It has been urged that the defendant Bishop should, even if the appeal were unsuccessful, have his costs of the commission, but no satisfactory reason has been adduced for disturbing what seems to be a fair order as between the parties. The defendant Bishop should pay the respondents' costs of the appeal.

My brother *Williams* and I are of opinion that the appeal should be allowed to the extent of making the variations of the order which have been stated, but that otherwise the appeal should be dismissed. My brothers *Rich* and *Dixon* are of opinion that the appeal should be allowed and the judgment of the Supreme Court set aside. On the footing of the contrary view to theirs, however, they agree that the decree ought to be varied in the manner stated.

Subject to these variations of the decree, therefore, the appeal must be dismissed in accordance with the *Judiciary Act*, s. 23 (2) (*b*).

(1) (1948) 48 S.R. (N.S.W.) 366; 65 W.N. 147.

RICH J. 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." One would think that the fatherly mediation of the Metropolitan—the Chief Pastor of the Province of New South Wales—and an appeal to the Canonical Oath of the Chief Pastor of the Diocese would have composed differences of the parties which concern merely ritual and ceremonial differences, particularly in view of the fact that the advisers of the relators, who had made a charge of heresy against the defendant Bishop somewhat recklessly, withdrew the charge when better informed by the evidence taken on commission in this case.

The appeal is from the decision and judgment of *Roper* C.J. in Eq., in which his Honour held that any deviation from the order of service of Holy Communion contained in the Book of Common Prayer 1662 constituted a breach of the trusts upon which properties of the Church of England in the Diocese of Bathurst, New South Wales, are held, and that in particular a service of Holy Communion conducted in accordance with a manual known as the Red Book published and used by the Bishop of that Diocese constituted a breach of trust. The trusts upon which the Church properties are held are as follows. As to the greater number of churches trusts expressed in general terms for the erection of a Church of England. As to the church at Canowindra, a grant of land (dated 1st August 1878) upon trust for erection of a church in connection with the United Church of England and Ireland. This land was transferred on the 17th January 1895 to the Church of England Property Trust Diocese of Bathurst. In 1902 the *Church of England Constitutions Act Amendment Act* altered the name to Church of England. This Act was in substitution for an Act of 1866. Section 4 provided that the constitutions in the schedule to the Act should be for all purposes connected with or in any way relating to the property of the Church of England within the State of New South Wales binding upon the members of the said Church. Section 5 provided that all persons holding any property in trust for or in any way on behalf or for the use of the Church of England (subject, however, to the terms of any express trust) or except lands as to which other specified provision had been made, should hold that property subject to the provisions of the constitutions and of any ordinance or rules made thereunder and that all such trustees should be bound by such constitutions,

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ordinances and rules as if the same were contained in a deed of conveyance and trust of the said property. There was no evidence before the Court of any more definite conditions under which these lands were held by the Church of England in the Diocese of Bathurst. As to the churches other than that at Canowindra I shall assume that the lands are held upon trust for the erection of a church or upon trust for the church erected thereon or to permit or suffer a church or building to be erected. These properties too are vested in the defendant corporate Trustees: s. 19 of the *Church Trust Property Act* 1917. Section 4 of that Act contains the following definitions of Church of England and Church Trust Property:— "Church of England" means Church of England within New South Wales. "Church trust property" includes all or any part of any real and personal property which may for the time being be subject to any trust whether by dedication, consecration, trust instrument, or otherwise, for or for the use, benefit, or purposes of the Church of England in any diocese, and each such diocese is referred to as the diocese for which the church trust property in question is held.

Thus the task of the informant in this suit, albeit the Attorney-General, or perhaps I should say of the relators, is to satisfy the Court that, properly construed, these very general trusts of the Church properties in question, because of what is inherent or implied in them, forbid any departure from the order of services in the Book of Common Prayer 1662, and in particular from the Office of Holy Communion set out in that book. Moreover they must show that it is proper that such departures should be enjoined by the court of equity in the exercise of its discretionary jurisdiction to grant an injunction. The question then for our determination is primarily what is the meaning of trusts for the use, benefit or purposes of "the Church of England within New South Wales." They must, to succeed, show that the trust is for a Church wherein there shall be no deviations from the order of the service of the Book of Common Prayer 1662. The question is not whether that Prayer Book is an accepted ritual or liturgy or even whether it is the accepted ritual or liturgy of the Church of England in New South Wales, but it is whether that liturgy must be embodied in or deemed to be written into the trusts and that any variation thereof or departure therefrom constitutes a breach of trust and a diversion of the user of the properties from the Church of England. If that were the case it would follow no doubt that, although a service is conducted by a duly consecrated bishop or duly ordained and licensed clergyman of the Church of England for members of that Church, a variation of or departure from the strict order of the

Prayer Book has this effect. But unless substantial compliance with or adherence to the Book of Common Prayer is part of the purpose of the trust, it is impossible to treat the variations from the rubrics found in the present case, as amounting to a breach of trust.

No case was cited to us, and I know of none, which has ever decided that a deviation of ritual in the Church of England constitutes a breach of trust. There are cases in the books relating to nonconformist or dissenting bodies other than the established Church which decide that the adoption of a doctrine different from that prescribed by the particular trust or the control of the property by an unauthorized person enables a court exercising the equitable jurisdiction to protect the prescribed trusts, e.g. *Milligan* v. *Mitchell* (1); *Attorney-General* v. *Munro* (2); *Attorney-General* v. *Murdoch* (3); *Attorney-General* v. *Pearson* (4). But as already stated the charge of heresy was withdrawn. I know of no case where a trust for the performance of particular rites has been implied. And no decision of the Privy Council in the Church of England cases has held that property must be used in any particular way. Commonsense unassisted by a knowledge of ecclesiastical law or practice distinguishes between the diversion of the use of property to a different Church or faith and an irregularity or departure within the church itself in the observance of the prescribed liturgy. Breaches of discipline and order in the church do not affect the user of the church as property. If it were otherwise it would mean that there is a rule of " the Church of England within New South Wales " that a service of Holy Communion not strictly in conformity with the Book of Common Prayer 1662 is a non-user of the church building for that Church. The earlier legal history of the Church has been obscured by lapse of time and declining knowledge and perhaps interest. It has been doubted whether the Church at the date of the settlement of Australia or at any time was part of the established Church of England or was an established Church. Be this as it may at all relevant times it was a voluntary association and for the purposes of this case it must be treated as such (*Bishop of Natal* v. *Gladstone* (5); *Fielding* v. *Houison* (6); *Ex parte Rev. George King* (7)). It would appear to fall within the category of churches described in a resolution of the Lambeth Conference of 1930 as a " regional, particular or national Church

(1) (1837) 3 My. & Cr. 72 [40 E.R. 852].
(2) (1848) 2 De G. & S. 122 [64 E.R. 55].
(3) (1849) 7 Hare 445, at pp. 469, 470 [68 E.R. 183, at pp. 193, 194].
(4) (1817) 3 Mer. 353, at pp. 417-419 [36 E.R. 135, at pp. 156, 157].
(5) (1866) L.R. 3 Eq. 1.
(6) (1908) 7 C.L.R. 393, at p. 406
(7) (1861) 2 Legge (N.S.W.) 1307, at p. 1314.

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and as such, promotes within its territories a national expression of the Christian faith, life and worship." It is, from a legal point of view, a self-governing Church in communion with the See of Canterbury and not, I venture to think, as suggested by the learned primary Judge, an integral part legally of the Church of England. It is not now an established Church (cf. *In re The Colonial Bishopprics Fund* 1841 (1)). Its spiritual conception is another matter. The *Act of Uniformity* does not apply to New South Wales. This Act had other geographical limitations. It did not apply to the Church in Scotland or in the American Colonies or in the Isle of Man. It was an Act which imposed personal obligations on the clergy of the Church in England and provided personal penalties, but did not impress any statutory trusts on the properties of the Church. It imposed on the Church an obligation to observe the Prayer Book as far as the clergy were concerned. This obligation was never observed punctually and from the time when the Act was passed there have been various and continuous departures or deviations from the Prayer Book. The Church in Australia is in the same position as the Church in England would be if it were disestablished and the *Act of Uniformity* ceased to be a paramount law. Then the legal position of the Church would be the same as the *de facto* position of that Church in England in all the matters which concern the case. None of its services exactly follows the Prayer Book. Identity of formularies is not necessary here or in England to preserve identity with the Church of England (*Merriman* v. *Williams* (2)). The user of its property is not governed by a rule of liturgical rigidity as part of the trusts. The vesting of the church lands in the defendant corporate trustees did not enlarge the original trusts so as to include a trust obligation in the nature of non-deviation from the use of the text of the Book of Common Prayer. The obligation of rigid adherence under the *Act of Uniformity* in England was a personal obligation imposed on the clergy upon pain of personal penalties. Any such obligation, if existing, could not have been transmuted into a trust obligation by the consensual pact which provides the legal foundation of the Church as a voluntary association. And trust obligations are obligations imposed on trustees. But it is apparent that the defendant the Church of England Property Trust of the Diocese of Bathurst is a bare trustee and is not required to supervise the services held in the Churches in the Diocese.

I should have thought that the trusts were for the Church of England as a living Church, for the institution in New South Wales

(1) (1935) Ch. 148.

(2) (1882) 7 App. Cas. 484, at p. 507.

constituted and governed by its bishops, synods and its forms of spiritual government which, of course, are founded upon a faith of a known character. But let it be supposed that they are trusts of a place where divine service is to be held according to the doctrine and worship of the Church of England as prescribed, there remains the question what is the ambit of the word " worship." It means " worship according to the usage of the Church of England allowed in the Church." The settlors of the various properties by using the vague phrases of the trusts did not mean that the forms of worship prescribed in 1662 should be literally and scrupulously followed in every respect. That was opposed to the admitted practice of the Church. It was known that the Prayer Book of 1662 had not been rigidly adhered to. The obligation to use it was personal to the clergy. Deviations would occur in the future. The settlors never intended to impose a fetter on the Church for all time which it had never accepted at any time.

The defendant Bishop in his address at All Saints Church Canowindra explained that the Red Book is not a public service book or a substitute for or alternative to the Book of Common Prayer, but is a manual of Devotions, and its rites, ceremonies and rubrics do not connote any heretical doctrine. Indeed the amendment of the information by the withdrawal of the charge of heresy so admits. Similar manuals have been issued in other dioceses in the Province of New South Wales and are in general use in the dioceses and parishes in England. The rubrics or directions in the Red Book are not binding on any member of a congregation and do not positively infringe the Prayer Book. The evidence of the well-known authorities on ecclesiastical matters in the Church of England in England taken on commission satisfies me that the Red Book, which is composed of the 1662 and 1928 Books, is a communicant's book and not a Service Book. It is a manual for use by the devout laity and contains help for devotion on the part of the communicant. For instance the manual says " Listen while the Priest says "—an exhortation to the communicant who is using the manual. Similarly the *sanctus* bell, " a not uncommon practice," is used to attract the wandering minds of the communicants to the solemn ceremony. " Some clergymen do it by turning round and saying a sentence which is not in the Prayer Book." Nor is there anything in the Red Book of a public nature which constitutes an Epiklesis. To use an Epiklesis is not inconsistent with the doctrine of the Church of England although it has been rejected by the Church of Rome. In particular the Dean of Westminster Abbey when giving evidence on the commission said

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emphatically that so far as the text in the manual of the Communion Service itself is concerned, it contains nothing in the way of doctrine which goes beyond that which is permissible in the 1662 and 1928 Books. The Prayer of Consecration is the same as in the 1662 Book. And as far as his experience went, the Dean said that all of the various practices that are suggested in the rubrics (the *sanctus* bell and the Sign of the Cross) are in quite common use. These practices imply a belief in the doctrine of the Real Presence—and he had no doubt whatever that it is a perfectly legitimate doctrine for Anglicans to hold and that there is nothing whatever disloyal to its faith in so doing. So far as the Communion Service goes and the rubrics attached to it, he saw nothing that he should regard as disloyal to the teaching of the Church of England.

Canon Mortimer considered that the gesture of the Sign of the Cross was a devotional act on the part of the minister and the members of the congregation. These acts were merely devotional and not additional ceremonies. Even as a ceremony he did not think the making of the Sign of the Cross was contrary to any doctrine of the Church of England. Nor did he think that the ringing of the *sanctus* bell was contrary to the doctrine of the Church of England. It is, he said, very difficult to import any doctrinal significance into it at all. Nothing is said about it in the Book of Common Prayer. He thought that the Red Book was well within the limits of the 1928 Book and he supposed that it would be very difficult to argue that the 1928 Book, with the approval of both Convocations, goes outside the doctrine of the Church of England. Canon Mortimer, when referred to *Halsbury's Laws of England*, 2nd ed., vol. 11, p. 794, suggested that ceremonies which were held to be additional and important at one date might now be held to have been perhaps prevalent at an earlier date and possibly allowable or of no importance. "The Words of Administration enable those who respectively hold the doctrine of the Real Objective Presence and the Receptionists to kneel side by side and hear these words without any violation of their conscientious belief"; *Claims of the Church of England* (1947) by the Archbishop of York. The Rev. D. B. Knox, who was put forward as an expert on behalf of the plaintiffs, stated that either the Anglo-Catholic or Receptionist theory might be "held consistently with membership of the Church." In so far as the Red Book provides exhortations and warnings to the communicants, it cannot, I think, be regarded as a manual affecting the ceremonies and doctrines of the Church of England: cf. the statement in *Read* v. *Bishop of Lincoln* (1):—

(1) (1892) A.C. 644, at p. 660.

" We have a custom among us, that during the time of administering the Blessed Sacrament of the Lord's Supper, there is some Psalm or Hymn sung the better to keep the thoughts of the communicants from wandering after vain objects." In England prosecution would not follow the use of such a book (see the judgment of *Roper* C.J. in Eq. (1), and the evidence of Mr. K. M. MacMorran). The identity of the Church is not destroyed by the use of the book. There is no departure from any doctrine (*Free Church of Scotland* v. *Overtoun* (2)).

The properties on which the book was used were being used for and by the Church of England in New South Wales. It will be observed that s. 4 of the *Church of England Constitutions Act Amendment Act of* 1902 provides that the several articles and provisions of the constitutions contained in the schedule to the Act shall be binding on the members of the Church, but the practices complained of in these proceedings are not, in my opinion, dealt with by the provisions of the constitutions. Although the provisions are to be binding, there is no prohibition of other practices which may be deemed advisable in any territory where a Church of England is set up. " It is a matter of moral necessity that there should be deviations of greater or less importance " : Canon Mortimer. Mr. N. C. Armitage, Chancellor of the Diocese of Leicester, said that it is common knowledge that every clergyman departs from the Order of Service in the Prayer Book 1662, and speaking of the deviations in the Red Book he thought that " the whole thing was not very important. It is difficult to weigh the relative importance or unimportance." There is no written document with respect to any consensual agreement declaring or providing that rigidity or compliance with the Act is a rule of this voluntary association. The members did not agree, nor can it be inferred that they were deemed to have agreed, that they had adopted or would adopt a rigidity in form of worship which no statute imposes *ab extra* and which was not observed by the Church in England. The evidence of Bishop Batty, Canon Hammond and the Rev. D. B. Knox and the exhibits in the case of forms of Occasional Services exclude any such implication. Clause 24 of the Constitutions of 1902 is obscure and meaningless. It reads :— " No rule, ordinance, or determination of a Diocesan or Provincial Synod shall make any alteration in the article (*sic.*), liturgy, or formularies of the Church, except in conformity with any alteration which may be made therein by any competent authority of the

(1) (1948) 48 S.R. (N.S.W.), at p. 387.

(2) (1904) A.C. 515.

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Church of England in England." The statute "was drawn up with a very inadequate knowledge of the Establishment of the Church of England and it has in fact been drafted with a phrase that is meaningless." Phrases such as "lawful authority" and "competent authority" are in the context so difficult to understand or interpret that I think one should apply to them the Aristotelian precept not to seek in anything a greater certainty than its nature admits. Section 4 of the *Church of England Constitutions Act Amendment Act of* 1902 provides that the several articles and provisions of the constitutions contained in the schedule to the Act shall be binding on the members of the Church, but the practices complained of in these proceedings are not, in my opinion, within the provisions of the constitutions. And there is no prohibition of other practices which may be deemed advisable in any territory where a Church of England is set up.

Article 34 of the Thirty Nine Articles recognizes the right of a particular or national Church to make its own arrangements for public worship. Rites and ceremonies being things in their own nature alterable the special needs of time and place may require the use of *ex tempore* prayers instead of or in addition to the prayers in the Book of Common Prayer. And it has been held that where the trusts of a deed of endowment provided that services should be conducted in strict and literal accordance with the order of the Book of Common Prayer, daily service was not required (*In re Hartshill Endowment* (1)). Resolutions of the Lambeth Conference recognize the *jus liturgicum* of the diocesan bishop and the right of each bishop to put forth or sanction additional services for use within his jurisdiction, subject to such conditions as may be imposed by the Provincial or other lawful authority, and of adapting the service in the Book of Common Prayer to local circumstances.

"At the beginning of this century uniformity had vanished as a practical policy. There was hardly any Church in which there was not some departures. Men of all ecclesiastical parties are making changes in the services to meet pastoral needs. Under these circumstances it appears that the only course will be for the Diocesan Bishop to authorize services for optional and temporary use which previously have been approved by the Houses of Convocation", *Claims of the Church of England* (1947), by the Archbishop of York. This power appears to be authorized by the *Act of Uniformity Amendment Act*, 1872. Canon Hammond, who is Principal of the Sydney Theological College, Canon of St. Andrew's Cathedral and incumbent of a city church, admitted that he made omissions from the services,

(1) (1861) 30 Beav. 130 [54 E.R. 838].

for instance to suit the convenience of his parishioners living at a distance. He was not aware that a shortened form of the Order of Confirmation had been authorized for use by the Metropolitan. He distinguished omissions or deviations as significant and non-significant.

The evidence in this case proves that the Church in England, in spite of the *Act of Uniformity*, achieved a great measure of elasticity in its ritual and also that there is no rigidity of services or practices in churches in New South Wales. In England, where the Act is in force, similar services to that the subject of this suit are regularly held. If corrigible the clergyman performing them might be punished in an ecclesiastical court. The penalty inflicted would not in any way affect the church or the lands on which the church is built. But in fact the Diocesan would have vetoed the action.

The effect of the decree in equity now under appeal is to enjoin the conduct of services in Australia which are held all over England. It appeared that at one time it was found that, out of 559 churches investigated, a *sanctus* bell was used in 212, and that the Sign of the Cross was made regularly in 298 churches.

The primary judge, *Roper* C.J. in Eq., held that the observance of the Prayer Book was a fundamental rule of the Church in New South Wales. This begs the question. The rule may be fundamental if departure from it is a breach of trust. But a breach of trust is not established merely by calling a rule fundamental. Rules relating to mere forms of service confer no juridical rights in property on members of the Church. The relators have failed, in my opinion, to establish that the objects of the charity, the purposes of the trust have not been fulfilled or that the members of the Church—the *cestuis que trust* if you like—have been deprived of their rights with reference to the property by reason of the properties being diverted from the trusts imposed. The information and suit were based originally on a charge of heresy, constituting a diversion of the property to purposes foreign to the trust. When that was withdrawn then I think the remaining allegations in the pleadings as to the making of the Sign of the Cross and the ringing of the *sanctus* bell plainly appeared to be no more than ceremonies without any doctrinal significance and wholly insufficient to constitute a breach of trust or a diversion of the use of the properties from the Church of England. If the decision and order of the learned judge were held to be right it would follow that the omissions and variations from the Services in the Prayer Book made by Canon Hammond and other clergy in the conduct of worship in their respective churches in the diocese of Sydney and the conduct of

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the Occasional Services and the Order of Confirmation authorized and used by the Metropolitan in the Cathedral Church of St. Andrew and the use of that Church by the Dean for the purpose of public lectures on secular subjects constitute and necessarily involve a breach of trust upon which such churches are held. Such may be the result of this mischievous suit.

In my opinion the evidence in the case did not justify the learned judge in holding that the practices alleged in the information constitute breaches of trust or that properties on which the practices occurred were used otherwise than as churches of "the Church of England within New South Wales." I am therefore unable to agree in the view of *Roper* C.J. in Eq. On the contrary I consider that this suit is lacking in its necessary foundation, namely, a breach of a charitable trust.

I might stop here, but I come now to questions of procedure and form. The jurisdiction of the Supreme Court exercising its jurisdiction in equity proceeds from the fact that the property held by trustees upon certain trusts has been dealt with or sought to be dealt with for purposes outside the original trust. It has no jurisdiction in a matter forming part of ecclesiastical law. Abstract questions involving religious dogma, and resulting in no civil consequences do not justify the interposition of a civil court. Save for the due disposal and administration of property there is no authority in the courts either in England or Scotland to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs: *Forbes* v. *Eden* (1); *Free Church of Scotland* v. *Overtoun* (2). The court is not concerned "with contradictions and antinomies between statements of doctrine."

Where no property is affected, abstruse questions would have to be determined (*Watt* v. *MacLaughlin* (3)). The grant of an injunction to restrain a person from doing a particular thing is an act dependent on the discretion of the court, and in exercising that discretion a court of equity will refrain from granting an injunction when the matters involved are vague, uncertain or indefinite and involve supervision from time to time of continuous services (cf. *Ryan* v. *Mutual Tontine Westminster Chambers Association* (4)), and continuous supervision means continuous applications to see whether the acts enjoined are being done. The fact that the Attorney-General is the informant and plaintiff in this case does not prevent the Court from exercising its usual discretion: *Attorney-*

(1) (1867) 1 H.L. Scr.D. 568.
(2) (1904) A.C. 515.
(3) (1923) 1 I.R. 112, at pp. 116, 117.
(4) (1893) 1 Ch. 116, at p. 123.

General v. *Dean and Chapter of Ripon Cathedral* (1). In that case *Uthwatt* J., as he then was, held that the question before him relating to certain services in the cathedral was part of the ecclesiastical law and his Lordship held that, assuming the High Court had any jurisdiction, it was a jurisdiction over the ecclesiastical courts by mandamus and prohibition and as to any remedy in another jurisdiction he refused to make any order. I quote the following passage from his Lordship's judgment which I respectfully adopt and apply to the facts of this case. I have already pointed out that the Supreme Court's jurisdiction is temporal only and not ecclesiastical. " The question then arises whether this court has any jurisdiction to entertain these proceedings at all. There is much to be said for the view that in light of the history of the law, of the source from which the measure and scheme came, and the particular subject matter under consideration, the jurisdiction of the High Court is impliedly excluded for all purposes, saving, of course, the jurisdiction over the ecclesiastical courts by mandamus and prohibition. If that be so, this action is not maintainable at all: see *Barraclough* v. *Brown* (2). The point is open to doubt and I have not come to any certain conclusion on it. But I have come to the conclusion that, assuming there is jurisdiction in the High Court, this is not a case in which the jurisdiction ought to be exercised, and I propose to deal with this case on those lines " (3). " It is against the practice of the court, as I understand it, to grant a mandatory order for the performance of a continuous series of operations, and the holding and conduct of services in a cathedral are a singularly inapt subject for such an order. The plaintiff at the trial, indeed, abandoned the claim for the injunction, but that abandonment was not an abandonment of anything to which, on any view of the case, he was entitled. The inclusion of an unsustainable claim for an injunction cannot, I think, alter the nature of the action. Regard must be paid to the reality of the case " (4). Further I find it difficult to understand how any parties to these proceedings can be charged with a breach of trust other than the defendant corporate trustees who are the trustees of the properties in respect of which the breaches of trust are charged.

Finally I would add that in my opinion no reliance ought to be placed upon the dicta of *Jordan* C.J. in his judgment in *Solicitor-General* v. *Wylde* (5). His Honour was dealing with certain interlocutory questions in this suit. His Honour's information concerning the facts of the case was confined to the allegations in the

(1) (1945) Ch., at pp. 250, 251.
(2) (1897) A.C. 615.
(3) (1945) Ch., at p. 248.
(4) (1945) Ch., at p. 249.
(5) (1945) 46 S.R. (N.S.W.) 83, at pp. 99, 100; 62 W.N. 246.

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pleadings. The relators' pleadings contain a definite allegation that the practices complained of constituted breaches of trust. The general statements with which his Honour concluded his judgment were made, so to speak, in the air in relation to the facts of the case and of course assumed that the relators would establish their averments. I feel sure that his Honour would not have used the same language if he had been aware of the real questions upon which the decision now must turn. The language is inappropriate to the question. But there is nothing in the passage which gives me any assurance or even ground for conjecture as to what his Honour would have thought of the case as it now appears had he considered the material which has been laid before us.

In my opinion the appeal should be allowed with costs in this Court and in the Supreme Court together with all the costs of the commission. The decree should be set aside and the suit dismissed.

DIXON J. Notwithstanding judicial statements of a contrary tendency, the better opinion appears to be that the Church of England came to New South Wales as the established Church and that it possessed that status in the colony for some decades. The first chaplain and all the early chaplains formed part of the civil establishment. The governor's instructions made it his duty to enforce a due observance of religion and to take steps for the due celebration of public worship as circumstances would permit. Australia lay within the limits of the East India Company's charter. By the *East India Company's Act of* 1813 (53 Geo. III., c. 155, ss. 49-52) provision was made for the erection of a bishopric for the territories within those limits and for the granting to the bishop of such ecclesiastical jurisdiction as the Crown might think necessary for the administering of holy ceremonies and for the superintendence and good government of the church establishment within the territories. In the following year the bishopric of Calcutta was founded and, though it can hardly be supposed that the bishop could effectively exert any authority in New South Wales, it meant that in the colony an ecclesiastical jurisdiction existed.

In 1824 by an Order in Council an Archdeaconry was set up in New South Wales. The Archdeacon was established as a corporation sole. He was appointed to be Commissary of the Bishop of Calcutta within the settlements with power to exercise jurisdiction in all ecclesiastical matters, excepting causes testamentary or matrimonial, according to the duty and functions of a Commissary by the ecclesiastical laws: *Clark's Colonial Law*, 1st ed. 1834, p. 618. In 1825 an Act in Council of New South Wales recognized

and made use of this jurisdiction by requiring that the registers of baptisms, marriages and burials should be transmitted to the Archdeacon's Court of the Colony : 6 Geo. IV., No. 21, s. 5 and s. 8. In 1835 the Colonies of New South Wales and Van Diemen's Land were dis-severed from the Diocese and See of Calcutta and shortly afterwards those colonies and that of Western Australia were by letters patent under the great seal constituted a bishop's see or diocese to be styled the Bishopric of Australia under the authority of the Archiepiscopal See of the province of Canterbury. The letters patent granted the Bishop ecclesiastical jurisdiction according to the ecclesiastical laws of England lawfully made and received in England in the several causes or matters specified and no others. Among the matters specified were the behaviour in their stations of chaplains, ministers, priests and deacons in holy orders and their correction and punishment. The letters patent gave to persons aggrieved by any judgment or sentence pronounced by the bishop or his commissary an appeal to the Archbishop of Canterbury : Dr. *Clarke, Constitutional Church Government in the Dominions* (1924), pp. 33-39, 77-79. In 1836 an Act of Council of the Colony dealing with clandestine marriages referred to suits in an Ecclesiastical Court (7 Wm. IV., No. 6, ss. 3 and 4) and in 1839 another Act of Council recited that the Archdeacon's Court had been discontinued since the establishment of the Archbishopric of Australia and directed that register books of baptisms &c. be sent to the registrar of the Bishop instead of that court (3 Vict. No. 23, s. 2.).

It thus appears that an ecclesiastical jurisdiction did exist in New South Wales. The duty of the Ecclesiastical Court was to administer the ecclesiastical law for the correction of ecclesiastical offences and for the enforcement of the discipline of the clergy. As to the actual exercise of the jurisdiction there is no information. Matters of liturgy, ritual and ornament would, just as in England, be governed by ecclesiastical law. If the Bishop of Australia had himself offended in any such matter, he could not, of course, have been dealt with in his own court. But he was a bishop of the province of Canterbury and presumably he might have been cited before the Archbishop or his Vicar General : *Ex parte Read* (1) ; *Bishop of St. David* v. *Lucy* (2).

But although in the beginning and for a not inconsiderable period the position of the Church of England in New South Wales appears to have been that of the Church established by law, time changed its relation to the law. It is not easy to trace the steps by which

(1) (1888) 13 P.D. 221.

(2) (1699) 1 Ld. Raym. 447 [91 E.R. 1197].

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the result was reached but eventually it came to be considered as a body like other Churches established upon a consensual basis. The Ecclesiastical Court was disused and forgotten, the Acts of Council referring to it ceased to be law as did other early legislation in which might be seen a recognition of the Church as an institution established by law. But the chief reason doubtless is to be found in the grant of representative government and the separation of the colonies. The Church itself resolved in effect upon the principle of voluntary association and a measure was actually proposed in parliament at Westminister to enable the Church of England overseas so to organize itself.

In 1863 the Privy Council decided that after constitutional government had been granted in a colony, the Crown, by letters patent appointing a bishop, could no longer grant any coercive ecclesiastical jurisdiction to him : *Long* v. *Bishop of Capetown* (1); *Re the Bishop of Natal* (2); cf. *Bishop of Natal* v. *Gladstone* (3). After that date no further letters patent were issued appointing bishops in Australia : Dr. *Clarke op. cit.*, p. 60. and pp. 83-86

In 1866 at a general conference of bishops and clerical and lay representatives of the Diocese of New South Wales constitutions were agreed to and adopted for the management and good government of the Church of England in New South Wales. Taking the view that such agreement could not as regards the management of the property of the Church be carried into effect without the aid of the legislature an Act of the Colonial Parliament was promoted. By this Act the constitutions and any rules or ordinances made in pursuance thereof were made binding upon the members of the Church for all purposes connected with or in any way relating to the property of the Church within New South Wales : *Church of England Property Management Act* (30 Vict. 1866). The constitutions having been amended another statute was applied for and passed called the *Church of England Constitutions Act Amendment Act of* 1902. This Act is in much the same form as the earlier statute, which it repealed. Section 4 provides that the several articles and provisions of the constitutions, which are scheduled, and any ordinances and rules to be made in pursuance thereof shall be, for all purposes connected with or in any way relating to the property of the Church of England within the State of New South Wales, binding upon the members of the Church. Section 5 provides that persons holding any real or personal estate in trust for or in any way on behalf or

(1) (1863) 1 Moo. (N.S.) 411. at p. 460 [15 E.R. 756, at p. 774].

(2) (1864) 3 Moo. P.C.C. (N.S.) 115 [16 E.R. 43].

(3) (1866) L.R. 3 Eq. 1.

for the use of the Church of England (except so far as an express trust or an ordinance or statute shall extend) shall hold the real and personal estate subject to the provisions of the constitutions and of any ordinances or rules made thereunder and shall be bound thereby as fully as if the constitutions and rules were contained in a deed of conveyance and trust of the real and personal estate. The constitutions provide for the election and convening of synods in every diocese and empower them to make ordinances upon and in respect of all matters and things concerning the order and good government of the Church of England within the diocese. The constitutions also provide for a provincial synod. The synod of a diocese is authorized to establish a tribunal for the trial of clergymen licensed by the bishop within the diocese for offences and also to define such offences, among which are to be included breaches of discipline and questions of doctrine and of ritual. There is no express reference to charges against bishops but the authority of the provincial synod rests upon articles and provisions made by the provincial synod itself and assented to by the dioceses (article 18). No rule, ordinance or determination of any diocesan or provincial synod is to make any alteration in the article(s), liturgy or formularies of the Church except in conformity with any alteration which may be made therein by any competent authority of the Church of England in England (article 24). The meaning of the reference to any competent authority of the Church of England in England is a matter of much doubt and difficulty, because of the extent to which legally such matters are governed in England by the *Acts of Uniformity*, which only the Legislature can alter.

It will be noticed that with respect to property the statute gives these constitutions the same effect as if they were contained in a trust deed. In other respects, however, they stand as the provisions of a consensual compact. The grant and acquisition of Church property has its own history but of that it is not necessary to speak. It is enough to say that under the arrangements which now obtain Church property is vested in corporate trustees constituted by or under the *Church of England Trust Property Act* 1917, a consolidating statute. The trustees with which we are concerned are a body called the Church of England Property Trust Diocese of Bathurst (s. 5). Church trust property is an expression defined by the statute to include property subject to any trust for or for the use, benefit or purposes of the Church of England in any diocese (s. 4). Church trust property may be vested in the corporate trustees of a diocese (s. 19). The churches in the diocese of Bathurst have been so vested. The synod for the diocese is empowered to provide by

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ordinance for governing and controlling the management and user of such property for the purposes for which the same is for the time being held in trust (s. 24). The property is to be held, managed and used under and in accordance with such ordinance accordingly, the provisions of the trust instruments notwithstanding (s. 24). In the diocese of Bathurst there is a cathedral church and about nineteen other churches held by the corporate trustees for the diocese. The trusts of the land are expressed very generally. In one case it is a trust for the erection of a church in connection with the Church of England. In others simply for the erection of a church or for the church erected on the land.

The foundation of the suit in which the decree under appeal was made is the administration of these trusts. It is a suit by the Attorney-General for New South Wales on the relation of a number of members of the Church of England against the corporate trustees and the bishop of the diocese of Bathurst. The suit was successful and the purpose as well as the result of the suit is shown by the decree. The decree contains a declaration that (1) the use in churches of the diocese of the order of administration of the Sacrament of Holy Communion of a book entitled the Holy Eucharist commonly known as the Red Book; (2) the practice of administering the Sacrament in accordance with that order; (3) the making of the Sign of the Cross by the celebrant during the Absolution and Benediction; (4) the ringing during the administration of the Sacrament of a *sanctus* bell constitute breaches of the trust, and each of them constitutes a breach of the trust on which the churches are vested in the corporate trustees. The decree proceeds to restrain the bishop from using or authorizing the use in the Cathedral Church at Bathurst of any order of administration of the Sacrament of Holy Communion other than that contained in the Book of Common Prayer (of 1662) and in particular from using the order contained in the Red Book. Next the decree restrains the bishop from practising during his administration of the Sacrament of Holy Communion the ceremonies thereinbefore mentioned. It may be remarked that, at all events in terms, this injunction has no relation to the use of the churches the subject of the trusts and restrains the bishop wherever in the diocese he may administer the sacrament, a matter significant perhaps of the remoteness from any question of property of the practice restrained. Lastly, the bishop is restrained by the decree from authorizing and encouraging the use of any order of the administration of the Sacrament of Holy Communion but that of the Book of Common Prayer in any churches in the diocese and in particular the use of the order contained in the

Red Book. This injunction must be based upon the view that the bishop by authorizing the use of the manual which the decree calls the Red Book instigates a breach of trust.

In my opinion this decree goes beyond and outside the administration of the charitable trusts and undertakes the completely different function of determining questions of ritual and ecclesiastical practice, of correcting the bishop for a failure or supposed failure to observe the liturgy of the Church and of enforcing its observance in the future. In England such a function belonged to the ecclesiastical tribunals and depended upon ecclesiastical law. It did not belong to the Court of Chancery. " It cannot be doubted that the obligation to hold the services as prescribed by the Prayer Book . . . is part of the ecclesiastical law and part of the ecclesiastical law alone " (per *Uthwatt* J., *Attorney-General* v. *Dean and Chapter of Ripon Cathedral* (1)). There are parish churches in England held upon public charitable trusts, but the administration of the trusts has not involved the superintendence of the forms of divine service, where there is no diversion of the trust property to a purpose foreign to the trust.

In Australia the function undertaken by the decree belonged during the period I have described in the earlier part of this judgment to the Ecclesiastical Court of the Archdeaconry of New South Wales or the Bishopric of Australia. It would have been outside the jurisdiction in equity which the letters patent of 1814 purported to confer on the Supreme Court that they assumed to create or the jurisdiction in equity conferred by 4 Geo. IV., c. 96, s. 9, upon the Supreme Court created by or under that statute : *Webb's Imperial Law*, 2nd ed. (1892), pp. 26-27, 44.

The transition of the Church to an institution not established by law did not in my opinion mean that the enforcement of the observance of the liturgy, ritual and ceremonies of the Church ceased to be an ecclesiastical matter and came to be a matter concerning the use and application of property, a matter of the administration of public charitable trusts. It meant only that the determination of such questions in the manner appointed by the Church now rested upon a consensual compact imputed to those who submitted to the authority of the Church and not upon ecclesiastical law as part of the positive legal system of the country. Ultimately of course the question whether strict adherence to the formularies and ceremonies of the Church is involved in the performance of the trusts of property must depend upon the trusts themselves. These are to be ascertained from the trust instruments

(1) (1945) Ch., at p. 247.

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and from an examination of the history, doctrines and organization of the community or body whose religious purposes they serve. My conclusion is that none of the practices complained of involves any diversion of property from the purposes to which the trusts, so ascertained, devote it. But I am disposed to go further and to say that, even if the matter were considered not as a matter of property but as a question whether the bishop has failed to observe the liturgical rules imposed upon him by the consensual compact, I am not satisfied that he has done so.

I shall now state as shortly as I can my reasons for these conclusions. To do so involves a preliminary examination of the basis of the charge against the bishop and of the considerations governing the matter in England. The book or manual entitled The Holy Eucharist, the use of which he has authorized, contains an order departing in a number of particulars from the order of the administration of the Lord's Supper or Holy Communion of the Book of Common Prayer. The departures were made the subject of repeated and minute discussion in the evidence led at the hearing and in that taken before an examiner in England. It is unnecessary, however, to say more about them than this. In the first place it must be conceded that, if the service of the Book of Common Prayer was meant to be common ground on which all Church people may meet though they differ about some doctrine, as is stated by Lord *Hatherley* (*Sheppard* v. *Bennett* (1)), then the attainment of that object is defeated or impaired by the use of the order contained in the manual. In the second place the manual does appear to imply that the Sign of the Cross may or shall be made by the celebrant, so that the action is a distinct ceremony additional to the ceremonies of the Church, " according to the use of the Church of England," with the consequence that it is an offence against ecclesiastical law in England (*Read* v. *Bishop of Lincoln* (2)). In the third place the order does imply that a *sanctus* bell may or shall be rung at the Benediction and during the Consecration. This is an illegal ornament (*scil.* in the sense of ecclesiastical law) not being included in the ornaments of the Church mentioned in the First Prayer Book and Edward VI. and its use has been more than once prohibited (i.e. by an ecclesiastical court) as unlawful (i.e. as contrary to ecclesiastical law) : Sir *Lewis Dibdin*, Dean of Arches, in *The Rector and Churchwardens of Capel St. Mary, Suffolk* v. *Packard* (3); *Elphinstone* v. *Purchas* (4). These, however, are all matters of ecclesiastical discipline. It is because of the *Acts of Uniformity*

(1) (1871) L.R. 4 P.C. 371, at p. 404.
(2) (1891) P. 9, at pp. 88-95.
(3) (1927) P., at p. 305.
(4) (1870) L.R. 3 A. & E. 66, at p. 98; (1870) L.R. 3 P.C. 245.

that they are illegal in England. The *Act of Uniformity* of 1662 (13 & 14 Car. II., c. 4) imposed upon ministers in all places of public worship in England and Wales an obligation "to say and use the morning-prayer, evening-prayer, celebration and administration of both the sacraments and all other the publick and common prayer in such order and form as is mentioned in the said book annexed and joined to" the Act, that is the Book of Common Prayer of 1662. But this strict obligation appears never to have been widely observed. The Report of the Royal Commission on Ecclesiastical Discipline of 1906 gives a brief history of the wide divergences between the practice of the clergy and the requirements of the *Acts of Uniformity*. "As a matter of history, deviations from the standard set up by the Acts of Uniformity can be shown not only to have existed but also to have been tolerated in every period since the *Act of Uniformity of* 1559" (par. 38). "Thus, from the sixteenth century down to the present time there has existed a contrast between the theory of the law clearly expressed in the Acts of Uniformity and the practice of the clergy in the conduct of public worship. These deviations from the legal standard have varied greatly in their causes, their nature, and their importance. Some have been common for a time and have then ceased. Some have become prevalent in comparatively recent years. Some were additions to the ceremonies or ornaments connected with public worship; some were omissions. Some have been changes demanded by general convenience, if not necessity; some have been the outcome of mere negligence. Some, especially in the sixteenth and seventeenth centuries, were the expression of theological and ecclesiastical differences resembling those which, in our own day, divide churchmen" (pars. 39 and 40).

The report dealt specifically with the Sign of the Cross and the *sanctus* bell. The Commission heard evidence as to services conducted in 559 churches. Of these it appeared that in 298 the officiating clergy made the Sign of the Cross, for the most part, at the Absolution and the Benediction in the Communion service. In 212 churches a *sanctus* bell was rung. That was in 1906. No doubt the forty years intervening have seen a further spread of these practices. "It will be seen," the report says in a later paragraph, "from what has already been stated that the theory on which the Acts of Uniformity were based, namely that the public worship of the Church of England should be regulated by one fixed standard, laid down once for all, and to be maintained in all places and for all time without excess or defect has never been carried out in practice" (par. 355). This being so it may seem remarkable that

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the Acts of Uniformity have to such a substantial extent remained unrepealed. One reason why it is so is to be found in a characteristically English use of the law of remedies to mitigate the effect of a substantive law. More than a hundred years ago the *Church Discipline Act* 1840 provided an exclusive procedure for a complaint against a clerk in holy orders for any offence against the laws ecclesiastical: s. 23. As the Act was construed, this procedure confided to the bishop a full discretion to issue or decline to issue the commission by which the proceedings were commenced. "Even the pains and penalties prescribed by the *Act of Uniformity*, 1662, disappeared in 1840" (per *Uthwatt* J., *Attorney-General* v. *Dean and Chapter of Ripon Cathedral* (1).

The *Public Worship Regulation Act* 1874 provided another procedure for certain complaints against incumbents. They include complaints that the incumbent has failed to observe the directions contained in the Book of Common Prayer relating to the service or that he has made unlawful additions thereto (s. 8.). Again the bishop has a full discretion to decline to allow the proceedings to go on. The result has been the exercise by the bishops of what is called their veto in such a way that only in the case of extreme practices can prosecutions go forward for offences against the ecclesiastical law concerning the liturgy and ceremonies of the Church. In 1929 the Upper House of the Convocation of Canterbury, the Bishops of the Province, adopted resolutions that meant in effect that the use of the forms and orders contained in the Prayer Book proposed in 1928 would be protected by the exercise of their veto.

The Bishop who is defendant in this suit claims that the order in the manual falls within the limits of the proposed Prayer Book of 1928. It is not necessary to go into this claim, which was examined in the course of the evidence; it is enough to say that in England the Bishop would be secure in following the practices he has adopted and in authorizing the use of the manual. He would be secure because under the ecclesiastical law, notwithstanding any formal breach of the *Act of Uniformity*, no proceedings against him would be allowed and the matter is entirely one of ecclesiastical law and jurisdiction.

If the matter is looked at broadly and substantially, it will be seen that under colour of securing the due application of property the civil court by this decree has ascribed to the Church in Australia a formal rigidity and an inflexible uniformity in the use of the liturgy prescribed by the *Acts of Uniformity* which in England the Church herself never practised; one which the ecclesiastical law,

(1) (1945) Ch., at p. 247.

entrusting, as it does, the use of its remedies to the bishops, is no longer designed to enforce; and one which is quite foreign to the rule that has long prevailed. Surely this cannot be right. There are many reasons why in my opinion it is wrong. To begin with it overlooks the consideration that all questions of liturgical practice have been dealt with as matters of Church discipline. Where the Church is not established and its organization is consensual it still remains a matter of discipline, although the ecclesiastical tribunals or authorities by which the discipline is administered derive their authority from the consensual compact and not from the ecclesiastical law as part of the legal system of the country. The fact that the Church is not established means only that the basis of ecclesiastical authority is different, not that the whole conception of Church government is changed and that which belonged to the spiritual power is transmuted to a matter of proprietary right. Clearly enough, during the early period when in New South Wales the Church of England was still in the situation of a Church established by law and an ecclesiastical court existed, it was not within the province of a court of equity to determine the matters which are the subject of this decree. Doubtless the Crown grants of Church land were to much the same effect. But liturgy was a matter of ecclesiastical law for an ecclesiastical court; not a matter of trust for equity. How came it that the same questions assumed the shape of things controlled by decrees in equity for the administration of trusts? Ecclesiastical law is, of course, as much a part of the law of England as is equity. When ecclesiastical law ceased to run in New South Wales the Church, it might have been supposed, became more, not less, autonomous. It is because of these, among other considerations, that I thought it well to begin by an account of the legal position of the Church of England in Australia at first.

In the next place the terms and nature of the trust do not warrant the conclusion that liturgical questions are within their scope. Ascertained from the trust instruments, from statutory provisions and from the history and nature of the subject of the trusts, they are in substance trusts to serve the purposes of churches of the Church of England in New South Wales in accordance with the constitutions for the management and good government thereof, the constitutions scheduled to the Act of 1902. The only reference to liturgy is in article 24 of the constitutions and that amounts to no more than a limitation on the power of synod imposed in order to ensure that changes in the liturgy follow those made in England. The constitutions are directed in the main to the setting up of diocesan and provincial synods and to what belongs to that subject. They are

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the constitutions of a communion forming part of the Church of England submitting to the episcopal and synodical government of that Church. The very reference in article 18 to tribunals for the trial of offending clergyman, including breaches of discipline and questions of ritual, shows that such things are matters of Church government.

The purposes of the trusts are to ensure that the lands and edifices upon them are used or available for use as churches by and under the authority of the Church of England considered as a communion or spiritual body so governed. The tests by which to determine the identity of a religious communion deriving from some faith or tenets once held in common may be difficult, at all events dialectically, when a schism raises the question. It may be hard to say whether the continuity of the communion under its form of government is to be weighed against adherence to doctrine. But here there is no such difficulty. The trust is for the purposes of a Church, the identity and continuity of which has been preserved. The Church itself by its appointed ecclesiastical and other officers is in full possession and control of the trust property and is using the buildings for the spiritual purpose for which they were erected.

At this point a further reason arises, a third reason, for saying that the decree is misconceived in dealing with questions concerning the rites, ceremonies and ornaments of the Church as depending on the administration of the trusts. That reason is that, supposing the Bishop, by his use of the order contained in the manual, by his making the Sign of the Cross and by his causing the *sanctus* bell to be rung, has offended against the rubric and the laws of the Church concerning ornaments and so has gone outside the service of the Church of England, nevertheless there is no breach of trust.

In *Attorney-General* v. *Gould* (1) the question before Lord *Romilly* M.R. arose from the administration by a Baptist minister, of Communion to unbaptized persons, a thing challenged as opposed to the doctrine of the religious body, and therefore a breach of trust. Lord *Romilly* formulated the question for his decision. He said (2): "I have to determine whether the employment of the building by the minister for this purpose is such a perversion of the objects and trusts for which it was established, that is, whether it is a violation of those trusts which this Court will interfere to prevent."

In my opinion, before the Court finds that the manner in which a religious service is conducted amounts to a breach of trust, it must

(1) (1860) 28 Beav. 485 [54 E.R. 452].

(2) (1860) 28 Beav., at p. 495 [54 E.R., at p. 456].

be satisfied that the forms of worship depart so completely from those of the faith for which the property is held that the use of the building for the purpose is in truth a diversion of the property to another object.

The case presents no resemblance to that of *Free Church of Scotland* v. *Overtoun* (1), which arose out of the union of the Free Church with the United Presbyterian Church and involved the appropriation of the property of the former Church to the United Free Church of Scotland which the two bodies formed. Nor does it in any way resemble *Craigdallie* v. *Aikman* (2), which also depended upon a schism and a secession. A schism, a secession, or an appropriation of property to another body or to an extraneous authority will be found to be the basis of *Attorney-General* v. *Pearson* (3); *Milligan* v. *Mitchell* (4); *Attorney-General* v. *Welsh* (5); *Attorney-General* v. *Murdoch* (6).

Shore v. *Wilson* (7) and *Drummond* v. *Attorney-General* (8), which arose from the diversion of churches from a Trinitarian faith to Unitarianism, if they do not involve schism at all events they involve an appropriation of the property to purposes inconsistent with the fundamental objects of the trusts.

If in the reported cases an analogy to this can be found it is in *Forbes* v. *Eden* (9), in which it was held that because no property right was involved an ordained minister of the Episcopal Church of Scotland could not maintain a suit for relief against the adoption by the general synod of a canon imposing the obligation of using the Book of Common Prayer in public prayer and the administration of the Sacraments. He said that he was unable conscientiously to fulfil the obligation and complained that the adoption of the canon was *ultra vires* of the General Assembly.

The jurisdiction of the Supreme Court is founded upon property, that is upon the necessity of enforcing the trust. In my opinion a bishop or clerk in holy orders conducting a service under the authority of the Church cannot be said to invade a right of property, to commit a breach of trust because he departs from the order prescribed by the Book of Common Prayer.

There is still another matter. The basal reason for treating strict observance of the order of the administration of the Sacrament given in the Book of Common Prayer as obligatory and by consequence as a purpose of the trusts, is to be found in the authority

(1) (1904) A.C. 515.
(2) (1820) 2 Bligh 529 [4 E.R. 435].
(3) (1817) 3 Mer. 353 [36 E.R. 135].
(4) (1837) 3 My. & Cr. 72 [40 E.R. 852].
(5) (1844) 4 Hare 572 [67 E.R. 775].
(6) (1852) 1 De G.M. & G. 86 [42 E.R. 484].
(7) (1842) 9 Cl. & F. 355 [8 E.R. 450].
(8) (1849) 2 H.L.C. 837 [9 E.R. 1312].
(9) (1867) L.R. 1 Sc. & D. 568.

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of the Acts of Uniformity. That is to say, while it is conceded that the Acts of Uniformity are not laws applicable to Australia so as to be in operation here in pursuance of 9 Geo. IV. c. 83, yet an obligation of obedience to the actual provisions of the Act of 1662 is conceived as both an implied term of the consensual compact and as a necessary part of the full effectuation of the trusts. But the *Act of Uniformity* of 1662 is very careful to lay the obligation of full and strict conformity with the Book of Common Prayer only upon ministers in places of public worship " within this realm of England, dominion of Wales and town of Berwick upon Tweed."

The reference in the Thirty-fourth Article of Religion to its not being necessary that traditions and ceremonies be in all places one or utterly alike, and indeed the whole article, may perhaps be used also in support of the view that it was only in England and Wales that the policy of liturgical uniformity was considered essential. But at all events if an obligation of strict adherence to the requirements of the *Act of Uniformity* 1662 is to be imported into the consensual compact and the trust deed, it must be done by an implication which applies requirements of the Act to the Church where the Act itself intended that they should not operate. This would perhaps involve no great difficulty if the Church itself had applied the *Act of Uniformity* outside England and if it had observed its rubrics with any consistency in England and elsewhere. But in fact the Church has consistently failed to conform with them in many and diverse respects both in England and abroad. Indeed, it is generally agreed that strict conformity is impossible.

In these circumstances I am not satisfied that the basal implication should be made, that is the implication that the *Act of Uniformity* must be obeyed here. A fuller investigation than has been made in this case of the consensual compact ascribed to the Church of England as its legal foundation and of the factors from which the compact is to be constituted, might perhaps show that such an implication must be made. But in my opinion so far it has not been established.

It is hardly necessary to add that this suit is not framed as a proceeding by one or more members against other members of the Church considered as a voluntary association for the enforcement of the rules adopted for the good order and government of the communion. It is a suit by the Attorney-General for relief against breaches of a public charitable trust. In the view I take, our decision in *Cameron* v. *Hogan* (1) would make it impossible for members of the Church to maintain either an action or a suit for

(1) (1934) 51 C.L.R. 358.

the enforcement against the Bishop of any term implied in the consensual compact imputed to the communion, if there were such a term requiring him to conform strictly with the order of the ministration of the Holy Communion prescribed by the Book of Common Prayer. In other words I do not think that the purpose of the present suit could have been achieved by any other form of proceeding. But in my opinion the present suit lacks a foundation and should fail.

I would allow the appeal, discharge the decree and dismiss the suit.

Dixon J.

WILLIAMS J. I have found this appeal difficult and distasteful, difficult because a civil court has to adjudicate in a suit which involves questions of ecclesiastical law with which it is not familiar, and distasteful because it is unfortunate that a suit of this sort should have reached a civil court at all. After giving the appeal the best consideration that I can, I am of opinion that *Roper* C.J. in Eq. was right in declaring that the use in churches of the Church of England in the Diocese of Bathurst of the order of administration of the Sacrament of Holy Communion set forth in a certain book entitled the "Holy Eucharist" and commonly known in that diocese as "The Red Book", the practice of administering the Sacrament in accordance with the order contained in that book, the making of the Sign of the Cross by the celebrant of the Sacrament during the Absolution and Benediction respectively, and the ringing during the administration of the Sacrament of a *sanctus* bell and each of them constitute and constitutes breaches or a breach of the trusts on which those churches are respectively vested in the defendant corporate body. Since it is clear that the defendant, Arnold Lomas Wylde, the Bishop of the Diocese of Bathurst, who is the appellant, was at the date of the information habitually using the order contained in the Red Book and performing those ceremonies when personally administering the Sacrament of Holy Communion in the Cathedral Church at Bathurst of which he is the Dean and in other Churches in the Diocese, and was authorizing and encouraging his clergy to do the same, I am also of opinion that his Honour was right in granting an injunction restraining the Bishop from using the order of administration of the Sacrament of Holy Communion contained in the Red Book, and from practising during his administration of the Sacrament the ceremonies hereinbefore mentioned. But I am of opinion that his Honour went further than was necessary in restraining the Bishop from using or authorizing the use in the Cathedral Church at Bathurst of any

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order of administration of the Sacrament of Holy Communion other than that contained in the Book of Common Prayer and that the decree should be modified by restricting the injunction to an injunction against the use of the order contained in the Red Book and the practice of the above ceremonies. Otherwise I am of opinion that the appeal should be dismissed.

I do not propose to set out my reasons at great length for arriving at this conclusion. The nature and circumstances of the suit have been fully explained in the proceedings before the Full Court of New South Wales reported as *Solicitor-General* v. *Wylde* (1), and before *Roper* C.J. in Eq. on the hearing below reported as *Attorney-General* v. *Wylde* (2). The authorities cited by the Full Court and by *Roper* C.J. in Eq. show that at the date of the information the Church of England in New South Wales was in law an unincorporated body consisting of a number of persons who had voluntarily associated themselves together for the purposes of practising a particular form of lawful religion. The association has no written constitution so that its rules, except so far as they have been embodied in statutes of the New South Wales legislature, must be inferred from all the circumstances of the case. I see no reason to differ from his Honour's finding that the Church of England in New South Wales is not a separate and autonomous association but an integral part of the Church of England. I agree with his statement (3) that "the history of the Church is important as it shows that in the beginning it was simply part of the Church of England as established in England, and I have found nothing in its subsequent history which had the effect of altering its constitution in that respect." His Honour cited passages from the *Bishop of Natal* v. *Gladstone* (4), to the effect that where there is no State religion established by the legislature in any colony, and in such a colony there is found a number of persons who are members of the Church of England and who establish a church there with the doctrines, rights and ordinances of the Church of England, it is a part of the Church of England, and the members of it are, by implied agreement, bound by all its laws. They are bound by the same doctrines, the same rules, ordinances and discipline, and the only distinction is that, in the absence of the ecclesiastical tribunals which exist in England, questions which would be determined by such tribunals must be determined by the ordinary civil courts which administer justice in the colonies.

(1) (1945) 46 S.R. (N.S.W.) 83; 62 W.N. 246.
(2) (1948) 48 S.R. (N.S.W.) 366; 65 W.N. 147.
(3) (1948) 48 S.R. (N.S.W.), at p. 382.
(4) (1866) L.R. 3 Eq., at pp. 35, 36, 38.

His Honour then proceeded to discuss the two relevant statutes of the New South Wales legislature relating to the Church of England in New South Wales passed in both instances at the request of representative bodies of that Church. The first Act 30 Victoria was intituled an Act to enable the members of the United Church of England and Ireland in New South Wales to manage the property of that Church and was repealed by the Act at present in force which may be cited as the *Church of England Constitutions Act Amendment Act of* 1902 (which I shall hereinafter refer to as the Act of 1902). It is to be noted that the first Act referred to the United Church of England and Ireland in New South Wales, which was then and continued to be the name of the Church until the Church of Ireland was dis-established in 1869. Section 3 of the Act of 1902 provides that the name " Church of England " shall be substituted and read in all statutes, acts, grants, deeds, ordinances, and rules of Synod, and other instruments now in force or in existence for and instead of the name United Church of England and Ireland whenever occurring in any such statute, act, grant, deed, ordinance, rule, or other instrument. This change of name in itself indicates an accepted view that the Church in New South Wales is a part of the Church of England, and the heading of the schedule to the Act of 1902 is " Constitutions for the Management and Good Government of the Church of England within the State of New South Wales." The whole Act is framed on the basis that the Church in New South Wales is an integral part of the Church of England. There is for instance article 24 of the constitutions, which is headed " Prohibition in respect to alterations of Church doctrines and liturgy " and provides that no rule, ordinance, or determination of any Diocesan or Provincial Synod shall make any alterations in the article, liturgy, or formularies of the Church, except in conformity with any alteration which may be made therein by any competent authority of the Church of England in England. There is also article 28 which provides that a copy of ordinances passed by the synod of each diocese shall be sent by the bishop thereof to the Metropolitan, who shall send the same, together with all ordinances passed by the synod of his own diocese, and the ordinances and determinations passed by any Provincial Synod to the Archbishop of Canterbury.

Section 4 of the Act of 1902 provides that the several articles and provisions of the constitutions contained in the schedule, and any ordinances and rules to be made under or by virtue or in pursuance thereof, are and shall be for all purposes connected with or in any way relating to the property of the Church of England

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within the State of New South Wales binding upon the members of that Church. Section 5 provides, so far as material, that "all persons . . . holding any real or personal estate in trust for or in any way on behalf or for the use of the Church of England, except in so far as such real or personal estate may be the subject of an express trust, and then so far as such express trust shall not extend . . . shall hold the said real and personal estate subject to the provisions of the said constitutions and of any ordinances or rules made thereunder, and shall be bound thereby as fully in all respects as if the said constitutions, ordinances and rules were contained in a deed of conveyance and trust of the said real and personal estate." The constitutions provide for the constitution, election and summoning of a synod in each diocese which is to be held once a year and is to consist of clergymen and representatives of the laity. Article 3 provides that "the Synod in each diocese may make ordinances upon and in respect of all matters and things concerning the order and good government of the Church of England and the regulation of its affairs within the diocese, including the management and disposal of all Church property . . . (not diverting any specifically appropriated, or the subject of any specific trust . . . except in accordance with the provisions of any Act of Parliament) . . . and all ordinances of the Synod shall be binding upon the Bishop and his successors, and all other members of the Church within the diocese, but only so far as the same may concern their respective rights, duties and liabilities as holding any office in the said Church within the diocese." Article 6 provides that no rule or ordinance made by Synod shall take effect or have any validity unless within one month after passing of the same the Bishop shall signify his assent thereto in writing: provided also that any such rule or ordinance to which the Bishop shall not assent may be the subject of reference to and determination by any Provincial Synod composed of the representatives of the Diocesan Synods of the State of New South Wales. Article 17 provides that each lay representative shall, before taking part in or voting at any Diocesan Synod sign and deliver to the President the following declaration:—"I, the undersigned A.B., do declare that I am a communicant of the Church of England." Articles 18 and 19 provide for the establishment of a tribunal for the trial of clergymen licensed by the Bishop within the diocese for offences, and that the Provincial Synod may define such offences, among which shall be included breaches of discipline and questions of doctrine or ritual, but that no sentence shall be pronounced other than suspension or deprivation of licence or office, and of the rights and emoluments

thereto pertaining. Article 23 provides for the holding of Provincial Synods. Section 6 of the Act and article 27 of the schedule provide that no ordinance, rule or determination of any Diocesan or Provincial Synod shall be made in contravention of any law or statute in force for the time being in the State.

The trusts of the churches in the Diocese of Bathurst in suit are in the case of the church at Canowindra a trust for the erection of a church in connection with the United Church of England and Ireland, in the case of other churches including the Cathedral upon trust for the erection of a Church of England, in the case of other churches a trust to permit or suffer a Church of England to be erected and other similar trusts. There does not appear to me to be any real distinction between the meaning of these various trusts, and I shall take the trust of the Cathedral, that is a trust for the erection of a Church of England, as the basis of discussion. This is a trust for or on behalf of or for the use of the Church of England within the meaning of those words in s. 5 of the Act of 1902. It is also a trust for the use, benefit or purposes (which include religious purposes) of the Church of England in the Diocese of Bathurst within the meaning of the *Church of England Trust Property Act* 1917, s. 4. The trust must be read as directed by s. 5 of the Act of 1902 as though the trust instrument, so far as the express trust shall not extend, contained a provision that the constitutions, ordinances and rules referred to in the Act were contained in the trust instrument. In *Attorney-General* v. *St. John's Hospital* (1), *Turner* L.J. said :—" That this Court has no power over property simply and purely ecclesiastical, and not affected by any trust, any more than it has power over lay property not so affected, cannot, as I conceive, be doubted ; but as little as I think can it be doubted, that if ecclesiastical property be affected by a trust, the power and jurisdiction of this Court to enforce and execute the trust attaches equally as it would attach upon lay property similarly circumstanced." A trust for the erection of a Church of England means, in my opinion, that a church is to be erected in which services which are authorized by the law of the Church of England for public worship are to be performed. In the case of some churches any services whatever their order and form might be authorized services which gave outward expression to the fundamental religious faith and doctrines of the particular religious sect, but the Church of England is an established Church which is required by law to use one uniform order and form of divine service and common prayer and of the administration of the sacraments,

(1) (1865) 2 De G. J. & S. 621, at p. 635 [46 E.R. 516, at p. 522].

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rites and ceremonies of the Church of England set forth in the book entituled the Book of Common Prayer and Administration of Sacraments and other Rites and Ceremonies in the Church of England. The first *Act of Uniformity* was that of 1551-1552, 5 & 6 Edw. VI. c. 1. This Act was repealed in the first year of the reign of Queen Mary but this repeal was made null and of no effect by the second *Act of Uniformity* of 1558-1559, 1 Eliz. c. 2, which is referred to in the recitals to the third *Act of Uniformity* of 1662, 13 & 14 Car. II. c. 4. The Act of 1662 was amended by the *Act of Uniformity Amendment Act* 1872 which authorizes certain shortened forms of service for morning and evening prayer but this Act did not alter the order and form of the service of Holy Communion and is not therefore relevant on this appeal. The *Act of Uniformity* of 1662 is intituled "an Act for the uniformity of Publique Prayers and Administracon of Sacraments & other Rites & Ceremonies and for establishing the Form of making ordaining and consecrating Bishops, Preists and Deacons in the Church of England." The Act recites that in the first year of the late Queen Elizabeth there was one uniform order of common service and prayer and of the administration of sacraments, rites and ceremonies in the Church of England . . . compiled by the reverend bishops and clergy set forth in one book entituled the Book of Common Prayer and Administration of Sacraments and other rites and ceremonies in the Church of England and enjoined to be used by Act of Parliament in the first year of the late Queen . . . and whereas by the great and scandalous neglect of ministers in using the order or liturgy so set forth and enjoined as aforesaid great mischiefs and inconveniences . . . have arisen and grown up and many people have been led into factions and schisms to the great decay and scandal of the reformed religion of the Church of England . . . that nothing conduceth more to the settling of the peace of this nation . . . nor to the honour of our religion and the propagation thereof than a universal agreement in the public worship of Almighty God and that the Act is enacted to the intent that every person within the realm may certainly know the rule to which he is to conform in public worship and administration of sacraments and other rites and ceremonies of the Church of England. Section 1 provides, so far as material, that all and singular ministers in any cathedral, collegiate or parish church or chapel or other place of public worship within this realm of England, Dominion of Wales and Town of Berwick upon Tweed shall be bound to say and use the morning prayer, evening prayer, celebration and administration of both the sacraments and all

other public and common prayer in such order and form as is mentioned in the book annexed and joined to this present Act and entituled the Book of Common Prayer and administration of the sacraments and other rites and ceremonies of the Church according to the use of the Church of England. Section 13 provides, so far as material, that no form or order of common prayers, administration of sacraments, rites or ceremonies shall be openly used in any church, chapel or other public place . . . than what is prescribed and appointed to be used in and by the Book of Common Prayer. For centuries therefore the Church of England has been a Church which has been by law required to observe a particular order and form of public worship prescribed by Act of Parliament, and therefore an order and form of public worship which can only lawfully be altered by statute. In *Kemp* v. *Wickes* (1) Sir *John Nicholl* said :—" Anciently, and before the Reformation, various liturgies were used in this country ; and it should seem as if each bishop might in his own particular diocese direct the form in which the public service was to be performed ; but after the Reformation, in the reigns of Edward the Sixth and Queen Elizabeth, acts of uniformity passed, and those acts of uniformity established a particular liturgy to be used throughout the kingdom." In *Martin* v. *Mackonochie* (2) Lord *Cairns* L.C., delivering the judgment of, the Privy Council, said : " The object of a *Statute of Uniformity* is as its preamble expresses, to produce ' an universal agreement in the public worship of Almighty God', an object which would be wholly frustrated if each Minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, to add to, or to alter any of those details."

The *Act of Uniformity* of 1662 is not in force in New South Wales but this is, I think, immaterial for I agree with his Honour that the liturgy prescribed by the Act is made by the Act a fundamental law of the Church of England and that it follows necessarily that this liturgy is a fundamental rule of the voluntary association in New South Wales. Otherwise I fail to see how the Church of England in New South Wales can be an integral part of the Church of England. The prohibition contained in article 24 of the schedule to the Act of 1902 could have been included in the constitutions for the management and good government of the Church of England within the State of New South Wales on one assumption and one assumption only, namely, that it was an implied rule of the voluntary association in New South Wales that the doctrine and liturgy of the

(1) (1809) 3 Phill. Ecc. 264, at p. 268 [161 E.R. 1320, at p. 1322].

(2) (1868) L.R. 2 P.C. 365, at p. 383.

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Church of England in New South Wales should be the same as the doctrine and liturgy of the Church of England in England, and that this doctrine and liturgy should remain the same and only be altered by a rule, ordinance or determination of a Diocesan or Provincial Synod if it becomes necessary or convenient to make alterations to conform with alterations which might subsequently be made by any competent authority of the Church of England in England. It is not easy to give a meaning to the expression "any competent authority of the Church of England in England." It is ambulatory in form and seems to contemplate that there was in 1902 or thereafter might be an authority of the Church in England competent, that is to say having the legal power, to alter the doctrines and liturgy of the Church.

The expression raises difficulties of construction of a similar nature to those which arise with respect to the expression "except so far as shall be ordered by lawful authority" which occurs at the end of the declaration to be made by the clergy of the Church of England prescribed by s. 1 of the *Clerical Subscription Act* 1865 (see also the *Colonial Clergy Act* 1875, s. 3). The declaration is that "I assent to the Thirty-nine Articles of Religion, and to the Book of Common Prayer and of the ordering of bishops, priests, and deacons. I believe the doctrine of the Church of England as therein set forth, to be agreeable to the Word of God; and in public prayer and administration of the sacraments I will use the form in the said book prescribed, and none other, except so far as shall be ordered by lawful authority." But only the English Parliament or some person to whom it has delegated its authority can alter the *Act of Uniformity* of 1662 and Parliament is not a competent authority of the Church. The King in Council is a lawful authority for certain purposes under s. 21 of the *Act of Uniformity*. Otherwise the English Parliament does not appear to have delegated its authority to alter the liturgy of the Book of Common Prayer to any person. The preface to the Book of Common Prayer states that "it hath been the wisdom of the Church of England, ever since the first compiling of her Publick Liturgy, to keep the mean between the two extremes, of too much stiffness in refusing, and of too much easiness in admitting any variation from it. For, as on the one side common experience sheweth, that where a change hath been made of things advisedly established (no evident necessity so requiring) sundry inconveniences have thereupon ensued; and those many times more and greater than the evils, that were intended to be remedied by such change: So on the other side, the particular Form of Divine worship, and the Rites and Ceremonies appointed

to be used therein, being things in their own nature indifferent, and alterable, and so acknowledged; it is but reasonable, that upon weighty and important considerations, according to the various exigency of times and occasions, such changes and alterations should be made therein, as to those that are in place of Authority should from time to time seem either necessary or expedient." Article 34 of the Articles of Religion which is headed "Of the Traditions of the Church" provides that "it is not necessary that Traditions and Ceremonies be in all places one, and utterly like; for at all times they have been divers, and may be changed according to the diversities of countries, times, and men's manners, so that nothing be ordained against God's Word . . . every particular or national Church hath authority to ordain, change, and abolish, ceremonies or rites of the Church ordained only by man's authority, so that all things be done to edifying."

All these provisions recognize that the outward forms of public worship may be changed from time to time without destroying the identity of the Church. They also recognize that such changes would ordinarily originate in the Church itself or would only be made with the approval of the Church. The competent authority of the Church of England in England referred to in article 24 was probably at the time of the Act of 1902 the Convocation of the Province of Canterbury. But the expression is of an ambulatory nature and would probably refer, since the *Church of England Assembly (Powers) Act* 1919, to the National Assembly of the Church of England. That Act, generally called the *Enabling Act*, now gives the Church Assembly as defined by that Act power to legislate touching matters concerning the Church of England to the extent that a measure passed by that Assembly with respect to which both Houses of Parliament pass resolutions that the measure be presented to his Majesty has the force and effect of an Act of Parliament on receiving the Royal Assent. The order and form of worship prescribed by the *Act of Uniformity* could therefore only be lawfully altered by any competent authority of the Church of England in England within the meaning of article 24 if the alteration was sanctioned by an Act of the English Parliament. The only alterations which have been so sanctioned have been those introduced by the *Act of Uniformity Amendment Act* 1872. These, as I have already said, do not apply to the order and form of the Administration of Holy Communion in the Book of Common Prayer, and the alterations made by the Act of 1872 have not, so far as I am aware, been adopted by any rule, ordinance or determination of any Diocesan or Provincial Synod in New South Wales.

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The order of administration of Holy Communion in the Red Book departs in several respects from the order of Holy Communion in the Book of Common Prayer. It also introduces the ringing of a *sanctus* bell, once on two occasions and thrice on two other occasions and the ceremony of the priest making the Sign of the Cross *coram populi* in the Absolution and Benediction. These introductions have been held to be illegal (*Rector and Churchwardens of Capel St. Mary, Suffolk* v. *Packard* (1); *Read* v. *Bishop of Lincoln* (2)). The Bishop pleaded that for many years the order of administration of the Sacrament of Holy Communion set forth in the Book of Common Prayer has not been strictly followed and used and that many deviations and variations from this order and the order of other services set forth in that Book have been permitted to exist in the Diocese of Bathurst and in other dioceses in Australia and in many churches of the Church of England in England. He submitted that by reason of the long existence of these deviations and variations from the order of administration of the Sacrament in England, the order of administration in the Book of Common Prayer is not the only legal or permissible order of administration of the Sacrament in Churches of the Church of England in the Diocese of Bathurst. The evidence establishes that there have been many such deviations and variations in Churches of England in other dioceses in Australia, and the evidence taken on commission establishes that such deviations and variations are very prevalent in the Churches of England in England. In England this would appear to be due to the right conferred on a bishop by the *Public Worship Regulation Act* 1874 to veto proceedings in the ecclesiastical courts against incumbents who have failed to observe the directions contained in the Book of Common Prayer relating to the performance in churches in his diocese of the services, rites and ceremonies ordered by that Book or have made or permitted to be made any unlawful addition to, alteration of, or omission from such services, rites or ceremonies. In this way the bishops in England have been able by the use of what has been described in the evidence as a negative *jus liturgicum* to sanction many deviations and variations from the order and form of service in the Book of Common Prayer.

In particular in 1928 the National Assembly of the Church of England approved of a new Book of Common Prayer known as the Book of 1928 which provided for an order of the administration of

(1) (1927) P., at p. 305.

(2) (1891) P., at pp. 88-94; (1892) A.C. 644.

the Sacrament of Holy Communion alternative to that contained in the Book of Common Prayer and Parliamentary sanction was sought for the use of the new Book under the *Enabling Act*. Sanction was given by the House of Lords but refused by the House of Commons and thereupon the Upper House of the Convocation of Canterbury in the year 1929 resolved that in the exercise of their administrative discretion they would in their respective dioceses consider the circumstances and needs of parishes severally and give counsel and direction in conformity with the following principles: (1) That during the present emergency and until further order be taken the Bishops, having in view the fact that the Convocations of Canterbury and York gave their consent to the proposals for deviations from and additions to the Book of 1662, as set forth in the Book of 1928, being laid before the National Assembly of the Church of England for Final Approval and that the National Assembly voted Final Approval to these proposals, cannot regard as inconsistent with loyalty to the principles of the Church of England the use of such additions or deviations as fall within the limits of these proposals. For the same reason they must regard as inconsistent with Church Order the use of any other deviations from or additions to the Forms and Orders contained in the Book of 1662. (2) That accordingly the Bishops, in the exercise of that legal or administrative discretion, which belongs to each Bishop in his own Diocese, will be guided by the proposals set forth in the Book of 1928, and will endeavour to secure that the practices which are consistent neither with the Book of 1662 nor with the Book of 1928 shall cease. (3) That the Bishops, in the exercise of their authority, will only permit the ordinary use of any of the Forms and Orders contained in the Book of 1928 if they are satisfied that such use would have the good-will of the people as represented in the Parochial Church Council and that in the case of the Occasional Offices the consent of the parties concerned will always be obtained. The pleading then alleged that thereafter these deviations and additions from and to the Book of Common Prayer including the deviations and additions appearing in the order of administration of the Sacrament of Holy Communion contained in the said Book of 1928 have been frequently and continuously used and followed in churches in the Province of Canterbury.

The Bishop claims that the order of administration of Holy Communion in the Red Book falls within the limits of these proposals and that such order is not inconsistent with the order of administration of Holy Communion permitted in the Church of England in

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England. The evidence of high dignitaries of the Church of England taken on commission in England establishes that the text of the service in the Red Book contains nothing in the way of doctrine which differs in any essentials from that permitted in the 1662 and 1928 books. It is said to be a combination of these two Books. The three introductions into the Red Book which are particularly objected to however are the rubric which refers to the consecration "when the bread and wine become the Body and Blood of our Lord Jesus Christ, by the power of the Holy Ghost. This prayer is said in a low voice, to express the silence of Christ at his passion, and to show the reverence and awe which priest and people ought to feel at such a time", the ringing of the *sanctus* bell, and the making of the Sign of the Cross by the priest in the course of the Absolution and Benediction. None of these introductions are sanctioned by the book of 1662 or the book of 1928, so that the order of administration of Holy Communion in the Red Book is not authorized by the resolutions of the Upper House of the Convocation of Canterbury in 1929 and seems to fall within the declaration that it is inconsistent with Church order to use any deviations from or additions to the form and order contained in the book of 1662 other than those which appear in the book of 1928.

But none of these circumstances pleaded, in my opinion, afford any defence to the present suit. It is not a proceeding against the Bishop for an ecclesiastical offence for failing to observe the directions contained in the Book of Common Prayer relating to the administration of Holy Communion. It is a suit for the administration of the charitable trusts of property in which the Bishop is charged with committing breaches of those trusts. If a synod were to legislate under articles 18 and 19 of the schedule to the Act of 1902 to set up a tribunal for the trial of clergyman licensed by the bishop within the diocese for offences, it might well be that the ordinance could provide that such clergy should only be prosecuted for offences against doctrine or ritual with the permission of the bishop. But the use of the veto would not prevent violations of doctrine or ritual being breaches of the trusts of Church property if such violations were in law breaches of such trusts. The general power of legislation conferred on a synod of a diocese by article 3 of the schedule to the Act of 1902 does not permit the synod to divert property the subject of any specific trust. Under s. 5 of the Act the constitutions in the schedule are subject to such trusts. If a clergyman in the Diocese of Bathurst commits an offence against doctrine or ritual in a church which is not trust property,

the only question is whether he has committed an offence for which he can be prosecuted personally. But if he commits such an offence in a church which is subject to a charitable trust, then the question is whether he has committed a breach of that trust. The court of equity is not concerned with the personal offences of clergymen against ecclesiastical laws but it is concerned with the acts and omissions of clergymen or any other members of the community which are breaches of trust of property. The deviations and variations from the Book of Common Prayer introduced by the Book of 1928 have not been sanctioned by the English Parliament and are therefore illegal deviations and variations in England. It was recognized, as needs it had to be, by the Church Assembly that these alterations could only be lawfully made if they were sanctioned by both Houses of Parliament in accordance with the *Enabling Act* and received the Royal Assent. When the House of Commons refused its sanction the Convocation of the Upper House of Canterbury decided to break the law. But it is the duty of a court of law to uphold the law and the only service which, in my opinion, is a lawful service of the Church of England in England and therefore in the diocese of Bathurst is a service which in order and form complies with the Book of Common Prayer with such amendments as are allowed by the *Act of Uniformity Amendment Act* of 1872.

The crucial question is whether it is a breach of trust to conduct a service of public worship in a church erected on land subject to a trust to erect a Church of England which is not a lawful service of the Church of England. It was contended that it would not be a breach of such a trust to hold divine services in the church which were not in the order and form prescribed by the *Act of Uniformity* provided there was no departure from the fundamental doctrines of faith of the Church or as it was put provided the church was not used for a non-Anglican purpose. I cannot accept this contention. In *Gore-Booth* v. *Bishop of Manchester* (1), Lord *Coleridge* said : " It may be that some inference as to doctrine may be inferred from the practice. But if the practice be legal, the fact that some heretical opinion may be inferred from it does not make it illegal. And if the practice be illegal, the fact that only an orthodox doctrine can be inferred from it will not make it legal." In *Combe* v. *De La Bere* (2) Lord *Penzance* said :—" Exact observance of the Prayer Book is enjoined by the Act of Uniformity, and to fail to

(1) (1920) 2 K.B. 412, at pp. 419, 420.

(2) (1881) 6 P.D. 157, at p. 173.

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observe it is an offence not only against that statute, but against the Queen's ecclesiastical laws . . . But it is also an offence against the canons of the Church. The 14th Canon declares that 'All ministers likewise shall observe the orders, rites, and ceremonies prescribed in the Book of Common Prayer: as well in reading the Holy Scriptures, and saying of prayers as in ministration of the Sacraments; without either diminishing in regard of preaching, or in any other respect, or adding anything in the matter or form thereof,' and in further pursuance of the same object, the 36th Canon provides in imperative language that every clergyman about to be admitted by institution to any ecclesiastical living shall sign a declaration amongst other things, that he 'will use the form in the said book prescribed, in public prayer and administration of the Sacraments and none other.' In this unmistakeable manner have the canons of the Church added their sanction and authority to that of the Legislature for the strict observance of the forms prescribed by the Prayer Book, to the exclusion of all other forms not so prescribed." It is to be noted that the English *Gifts for Churches Act* 1803 and the *Gifts for Churches Act* 1811, which are intituled Acts to promote *inter alia* the building of churches and which authorize in the case of the first Act private persons and in the case of the second Act the Crown to give land for the purposes of the Acts, authorize gifts for or towards erecting any churches where the liturgy and rites of the United Church of England and Ireland are or shall be used or observed.

The purpose of erecting a church is to provide a building for public worship. If it is a fundamental rule of the Church of England that the public worship of that Church shall be conducted in a particular order and form, then the conduct of public worship in a church of that Church otherwise than in accordance with that order and form is not a lawful service of the Church of England and is a misuse of the church. The church is not being used for the purpose and therefore not in accordance with the trust for which it was erected. The misuse may be restrained by an appropriate injunction (*Milligan* v. *Mitchell* (1); *Attorney-General* v. *Welsh* (2); *Attorney-General* v. *Murdoch* (3)). The court has a discretion and would only grant an injunction in respect of substantial deviations or variations from the order and form in the Book of Common Prayer. But it cannot be said that the deviations and variations from the proper order and form of administration of Holy Com-

(1) (1837) 3 My. & Cr. 72 [40 E.R. 852].

(2) (1844) 4 Hare 572 [67 E.R. 775].

(3) (1849) 7 Hare 445 [68 E.R. 183].

munion complained of in the Red Book are not substantial. The evidence establishes that communicants of the Church of England may believe either in the doctrine of the Real Presence or in the Receptionist theory and that the order and form of service in the Red Book would be acceptable to believers in the former but unacceptable to believers in the latter doctrine. In *Sheppard* v. *Bennett* (1), Lord *Hatherley* L.C., in delivering the judgment of the Privy Council, said :—" In the public or common prayers and devotional offices of the Church all her members are expected and entitled to join ; it is necessary, therefore, that such forms of worship as are prescribed by authority for general use should embody those beliefs only which are assumed to be generally held by members of the Church. . . . If the Minister be allowed to introduce at his own will variations in the rites and ceremonies that seem to him to interpret the doctrine of the service in a particular direction, the service ceases to be what it was meant to be, common ground on which all Church people may meet, though they differ about some doctrines."

Exception was taken to his Honour's order that the Bishop should pay to the relators half of the costs of the writ of commission to take evidence in England and of the taking of evidence thereunder, but I can see no reason for interfering with the exercise of his Honour's discretion.

For these reasons, subject to modifying the decree in the manner about to be mentioned, I would dismiss the appeal with costs.

Decree varied—

(1) *by inserting in the declaration thereby made after the words " the Diocese of Bathurst " the following words " specified in the schedule to this decree " ;*

(2) *omitting the order with respect to the use in the Cathedral Church at Bathurst of any order of administration of the Sacrament of Holy Communion other than that therein mentioned ;*

(3) *inserting in the next succeeding order after the words " Sacrament of Holy Communion " the following words " in the said churches " ;*

(4) *substituting for the injunctions contained therein the following—" that the defendant Arnold Lomas Wylde be and he is hereby restrained and enjoined from using and from authorizing and encouraging the use in the*

(1) (1872) L.R. 4 P.C., at pp. 403, 404.

H. C. OF A. 1948. WYLDE v. ATTORNEY-GENERAL (N.S.W.) (AT THE RELATION OF ASHELFORD).

said churches of the said Red Book and from making the Sign of the Cross and ringing or causing to be rung a Sanctus Bell during his administration in the said churches of the Sacrament of Holy Communion;

(5) *adding a schedule containing the names of the churches in exhibit "J" and that of All Saints Church of England at Canowindra.*

Appeal otherwise dismissed with costs.

Solicitors for the appellant, *R. C. Roxburgh & Co.*
Solicitors for the respondent, *Allen, Allen & Hemsley.*

J. B.