*Bruce Kercher**

ESTABLISHMENT, FREEDOM OF SPEECH AND THE CHURCH OF ENGLAND: PEW DISPUTES IN EARLY NINETEENTH-CENTURY NEW SOUTH WALES

In June 1828, the Reverend Thomas Hobbes Scott ordered the eviction of Edward Smith Hall and his six daughters from the pew they had been accustomed to occupying at St James' Church in King Street, Sydney for the past 12 months.[1] The church's officials were rearranging the seating in the church, and the ostensible reason for the eviction was that they wanted to move Hall and his family to another pew so that some government officials could take their place. Hall resisted, claiming that he would not be satisfied with a 'cold, comfortless pew'. As a result of the eviction, he said, he and his family had to stand like paupers in the aisle.[2] Hall subsequently took matters into his own hands. Four times he tried to get into the pew, over the opposition of beadles and constables. The church authorities placed a lock on the door of the pew and boarded it over to keep him out. Eventually he forced the lock, and stayed in the pew for three hours.

Hall was the editor of the more radical of the two pro-convict newspapers, *The Monitor*, and his opponent, Scott, was the first

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* Professor of Law, Macquarie University. The author wishes to thank Mr Justice McPherson, Professor Michael Tilbury, Professor Margaret Ogilvie and an anonymous referee for their comments on this paper.

1 The most reliable contemporary source of these events appears to be an article in *The Australian*, 23 September 1829; and the evidence given in *Hall v Scott* (unreported, Supreme Court of New South Wales, Darling J, 6 April 1830). See also C H Currey, *Sir Francis Forbes: the First Chief Justice of the Supreme Court of New South Wales* (1968) 311–12; Brian Fletcher, *Ralph Darling: A Governor Maligned* (1984) 271. The eviction notice was written by James Norton, Registrar of the Archdeacon's Court: see *Hall v Scott*, ibid.

The full text of all unreported cases cited here is available online at www.law.mq.edu.au/scnsw/.

2 See *R v Hall (No 1)* (unreported, Supreme Court of New South Wales, Forbes CJ, 25 September 1828).

Archdeacon of the Church of England in New South Wales. Each was heavily involved in colonial politics. Scott had held office since 1825, and in that time had developed a close association with the irascible conservative, John Macarthur. Macarthur, in turn, was a strong opponent of Chief Justice Forbes and the reformist press, and a regular visitor at Government House.[3] Hall's *Monitor* was Governor Darling's strongest critic, regularly accusing him of military autocracy.

Like the eviction of another of Scott's enemies from his pew,[4] the real reasons for Hall's eviction were personal and political: Scott had previously accused Hall of fraud, treachery, blasphemy and a love of anarchy because of his attacks on government policy, education and religion.[5] The case of the pew was thus caught up in the colony's most ferocious political debate, between the emancipist (former convict) and exclusive factions. Emancipists and their newspapers, *The Australian* and *The Monitor*, pressed for trial by jury and ultimately a representative legislature. These institutions, the touchstone of Britishness according to their advocates, seemed to be utterly contradicted by the autocratic approach of Governor Darling, and those who cheered him on from the sidelines, the exclusives. Was New South Wales a place of British liberty, or was it still essentially a penal colony? Darling was at the centre of continuing controversy over his harsh policies towards convicts in particular. This conflict was fought out in the law, both through litigation[6] and in a campaign for constitutional reform. The eviction of Hall from his

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3 On Scott, see Stephen Judd and Kenneth Cable, *Sydney Anglicans: A History of the Diocese* (1987) ch 1; K Grose, 'Thomas Hobbes Scott's Background, 1783–1823' (1982) 68 *Journal of the Royal Australian Historical Society* 49; and on his relationship, and that of Hall, with Governor Darling, see Fletcher, above n 1. On the links between Macarthur and Darling: see Fletcher, ibid 211. See also Currey, above n 1, 180.

4 Dr Halloran, the coroner. See the correspondence at *Historical Records of Australia*, series 1, vol 14, 391–4.

5 Fletcher, above n 1, 271.

6 See, for example, *Ex parte Wentworth, in re Mansfield* (unreported, Supreme Court of New South Wales, 30 September 1829); *R. v. Mansfield (No 1)* (unreported, Supreme Court of New South Wales, Forbes CJ, 3 June 1830).

pew also cast light on the relationship between the Church of England and the colonial government.

The close links between the Church of England and the colonial state are shown by the fact that it was the Crown, not a church official, who sued Hall for trespass for his actions in occupying and damaging the pew.[7] The Solicitor General, John Sampson, claimed that Hall had made repeated attempts to reoccupy the pew and that the action was taken to test Hall's title to it. Implicitly, the action also tested the Crown's title to the church. In defence, Hall denied that Scott, purporting to act as the church's ordinary, had power to evict him. Hall said that he had paid rent for his pew, and thus was entitled to occupy it whenever church services were held.

St James' was the second church in Sydney and the better of the two, socially. Its parishioners included official Sydney, whereas St Phillip's, the older church, was closer to the convicts at the Rocks and to the military barracks. St James' was opened only in 1824, built to a design of the convict architect Francis Greenway and placed between the elegant Supreme Court building and the convict barracks. Being close to the Supreme Court, even now St James' remains the spiritual home of Anglican lawyers. In each church, the box pews and galleries were rented out, while the poor occupied free seats.[8]

Hall's first trial for the civil action of trespass was heard before Francis Forbes, the founding Chief Justice of New South Wales, and two lay assessors. It ended unsatisfactorily, with the assessors delivering a special verdict that was later found to be inadequate to resolve the problem. They found that the church had been built by the governor at public expense. In 1823, Governor Brisbane made a proclamation appointing a committee to rent out its pews by the year, payable in advance. This became the accepted arrangement in St James, although the collectors did not always enforce payment of the rents. The assessors' finding concerning Hall was unclear, but it seems that at the end of June 1828 he paid rent in arrears

7 *R v Hall (No 1)* (unreported, Supreme Court of New South Wales, Forbes CJ, 25 September 1828).

8 Judd and Cable, above n 3, 11–12.

while his tender of money for future rent was rejected. Some of their findings were apparently against the evidence, and the full court (Forbes CJ, and Stephen and Dowling JJ) granted a *venire de novo*. (This was a new trial granted when matters on the face of the record showed some irregularity or impropriety.) The judges were of the view that the case had been wrongly argued on the powers of the archdeacon as ordinary, rather than on the point of a contract between the Crown and the defendant, Hall.[9]

By now, the case had been through several hearings, and one more was held before the end of 1828. Hall moved for a mandamus against the committee empowered to enter into the contracts, to order them to reinstate him in the pew until the retrial of the trespass action could take place. The three judges quickly rejected the application, finding it to be wholly without precedent. The court refused to interfere on this basis because the matter was sub judice, and because it had no power to do so. The judges held that the defendant had no inchoate right to perfect, and it was only where there was no other remedy open to enforce a legal right that a mandamus lies.

In delivering judgment on the new trial application, Forbes CJ said

> that the case was one of extreme novelty; as, in fact, he had not been able, as far as he had looked into his books, to find one at all like it—all the reported cases being where the actions had been brought by the parson of the parish, or by individuals claiming a parochial right to pews in the parish churches.[10]

In fact Forbes had heard a similar case when he was Chief Justice in Newfoundland, before travelling to New South Wales.[11] The plaintiff in *Colonel Fitzherbert v Williams and Gill*[12] was the commanding officer of

9 *Sydney Gazette*, 22 December 1828.

10 Ibid.

11 On the church in Newfoundland, see Stewart MacNutt, *The Atlantic Provinces: The Emergence of Colonial Society, 1712–1857* (1965) 104–7, 159–61.

12 (1818) 1 Nfld LR 115.

the military forces in St John's, the island's main town. Like Hall, he claimed that he had a right to occupy a pew in the church. When the church fell into disrepair, its rebuilding was partly funded by a public subscription and partly by the governor. After the rebuilding was finished in 1802, no express reservation was made to the Crown of any particular pews, but some of them came to be occupied by the Crown's officers. The central seat in the gallery was appropriated to the governor, and the commanding military officer sat with him. The governor subsequently moved to another location, but the commanding officer remained there until a few months before the trial, when a new organ was built in that location. The governor agreed to Colonel Fitzherbert being moved to a new pew, but the colonel objected. He referred to the sacrifice he had made in losing his pew, and of his expectation of every liberality on the part of the church's proprietors and their representatives, the church wardens.

Forbes first examined whether he had jurisdiction to determine such a matter. He thought that he could have indemnified the plaintiff had he simply been dispossessed by the church wardens of a seat belonging to the Crown. In this case, however, there had been an exchange of the old pew for another, the old one being passed over to the general rights of the church. Forbes held that all property in the church was 'in virtue of subscription', and the Crown had subscribed very liberally. As such, the Crown was as entitled to those parts occupied by its servants as any individual subscriber. No Crown servant could claim any government pew as of right. Like their rooms at the barracks, they held at the discretion of the king. The case against the church wardens failed.

In this church, then, the right to occupy pews was limited to subscribers including the Crown. In some circumstances that would extend to limited rights of Crown servants. The colonel would have been able to sue the church wardens had they simply evicted him from a Crown pew, but the Crown had given up his pew. He had to negotiate with the Crown for a replacement. He had no rights against the Crown and, the Crown having given up his pew, none against the church wardens.

Another Newfoundland case, *Church-Wardens v Rendell*,[13] showed the reverse side of Forbes' declaration that individuals and the Crown held interests in the pews. Forbes held that the individuals were also liable for the cost of repairs to the church. Contributions to repairs were 'conventional', he said, and could not be demanded as rates. Those who held pews impliedly made themselves liable for the maintenance of the church. Every person who purchased or became possessed of a pew knew, or ought to know, of this obligation. When a meeting of pew holders approved of the repairs and the church wardens spent the money, they had a right to proportionate recovery of any necessary and indispensable expenses.

This decision was typical of Forbes' judicial method both in New South Wales and Newfoundland. In it, he made no reference to English case law. Instead, he decided the claim by reference to local practice. He elevated this into formal law via an implied term of the agreement. He sometimes used the same technique of implied terms to give effect to local Newfoundland commercial usages such as those concerning bills of exchange.[14] Forbes often adapted English law to colonial circumstances, whether by this means or via the broad discretion he felt appropriate to the principles of reception of English law.[15]

In these two cases, Forbes CJ had held that churches in Newfoundland operated in quite different ways from the traditions of the established church in England. Whether the same applied in New South Wales was one of the underlying questions in Hall's litigation concerning his right to occupy the pew in Greenway's lovely church of St James, in Sydney. Was it the property of the Crown, the property of the parish and its people, or a mixture of the two as in Newfoundland?

Before the action against Hall for trespass and damage to the pew in St James could be reheard, he was faced with much more serious litigation. In September 1828, just four days after the first trial for trespass

13 (1821) 1 Nfld LR 264.

14 *Meehan v Brine* (1817) 1 Nfld LR 5.

15 For the most notable example of the latter, see *Macdonald v Levy* (1833) 1 Legge 39.

concerning the pew, he was also tried for criminal libel.[16] He had allegedly defamed Scott in an article he published in *The Monitor* of 5 July 1828 about the pews affair and about Scott's general character. According to the rival *Australian* newspaper, the worst allegation *The Monitor* made against Scott was that he 'was not a man of peace'.[17] That was not quite true: the article satirised Scott's attitude to his salary of £3000 a year, attacked his attitude to religion, and criticised him for becoming involved in politics. The article also implied that Scott had evicted him from his pew as part of a general desire to exclude supporters of the emancipist cause from the better parts of the church.

Acting for himself in the criminal trial, Hall claimed that the Attorney-General had brought the case on so quickly that the jury was unable to know the final outcome of the trespass action. As he said, if he won that action, his supposed libel would be seen in a very different light. The jury found him guilty of libel, but Scott intervened and pleaded for a light sentence. Hall was sentenced to a fine of 20 shillings with imprisonment until it was paid, and entry into a £500 recognisance to be of good behaviour for twelve months. As Governor Darling's principal critic, this sum hung over his head. By the end of 1829, he was in prison for multiple further convictions of criminal and seditious libel, not that this stopped him from continuing to edit *The Monitor*.[18] The governor's harassment of

16 *R v Hall (No 2)* (unreported, Supreme Court of New South Wales, Dowling J, 29 September 1828). See Currey, above n 1, 312.

17 *The Australian*, 23 September 1829.

18 See *R v Hall (No 2)* (unreported, Supreme Court of New South Wales, 9 April 1829); *R v Hall (No 4)* (unreported, Supreme Court of New South Wales, 12 June 1829); *R v Hall (No 6)* (unreported, Supreme Court of New South Wales, Stephen J, 21 December 1829); *R v Hall (No 7)* (unreported, Supreme Court of New South Wales, Dowling J, 23 December 1829); *R v Hall (No 8)* (unreported, Supreme Court of New South Wales, Dowling J, 23 December 1829). Hayes, the editor of *The Australian*, was also imprisoned on the same grounds. Hall and Hayes both continued to edit their newspapers while in prison: see R B Walker, *The Newspaper Press in New South Wales, 1803–1920* (1976) 15–16. In his desperate attempts to ward off press criticism, Governor Darling also tried to muzzle the press by legislation. This failed due to the judicial decisions of the Supreme Court: see *R v Hall (No 3)* (unreported, Supreme Court of New South Wales, 5 September 1829); *Newspaper Acts*

Hall also included the removal of some of his convict workers at the newspaper.[19] Other newspaper editors were also harassed and there was even a threat to impeach the governor.[20] A liberal bar, judiciary and press were in conflict with a conservative governor. The case of Hall's trespass to a church pew went on relentlessly against a background of the colony's greatest crisis since the coup against Governor Bligh in 1808.

The pew case was retried before Dowling J in March 1829.[21] In his charge to the jury, Dowling stressed that the case turned on whether Hall had legal title to the pew to justify the actions he had taken. Like Forbes CJ, he thought that the case was unprecedented in any place where British law was in force. He said:

> It is to me perfectly *sui generis*. This singularity may be attributable to the peculiar foundation of the Church Establishment in this Colony, which appears to me to be in no degree analagous [sic] to the other religious institution of the Church Establishment in the Mother Country, so far as the disposition of Pews or Seats in a Church are concerned.

Operating according to general principle, as he said, Dowling J held that the case turned on a matter of contract or convention between the Crown or its representatives and the defendant. He continued his jury charge with an

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Opinion (unreported, Supreme Court of New South Wales, Forbes CJ, April 1827); and see B Edgeworth, 'Defamation Law and the Emergence of a Critical Press in Colonial New South Wales (1824–1831)' (1990) 6 *Australian Journal of Law and Society* 50; Currey, above n 1, chh 19, 20, 22, 23 and 35.

19 *In re Tyler; R v Rossi* (unreported, Supreme Court of New South Wales, 15 April 1829); *Hall v Hely* (unreported, Supreme Court of New South Wales, Dowling J, 17 March 1830); *Hall v Rossi* (unreported, Supreme Court of New South Wales, Dowling J, 15 March 1830); and see Fletcher, above n 1, 283.

20 See *Ex parte Wentworth, in re Mansfield* (unreported, Supreme Court of New South Wales, 30 September 1829); *R. v. Mansfield (No 1)* (unreported, Supreme Court of New South Wales, Forbes CJ, 3 June 1830).

21 *R v Hall (No 1)* (unreported, Supreme Court of New South Wales, Dowling J, 12 March 1829).

extensive examination of the right to occupy pews in England, in order to contrast it with the position in New South Wales. In this, he was doing much more than deciding a petty case about the wrongful occupation of a church pew: he was defining the powers of Archdeacon Scott and the nature of church government in the penal colony.

In English law, Dowling J found, all the pews in a parish church were the common property of the parish.[22] They were for the use in common of the members of the parish. The distribution of the seats was determined by the church wardens, under the control of the ordinary. The parishioners had a right to be seated according to their rank and station, but the wardens were required to see that everyone was seated, if possible. The higher classes were not to be granted more than their real wants to the exclusion of their poorer neighbours. The right to accommodation in a church was a temporal easement, attached to the houses or tenements in the parish. As soon as a person gave up occupation of a house, the right went to the next occupant. The only exceptions to this were a non-parishioner's right to a pew by a faculty, by prescription or by immemorial custom. The rationale for the connection between the right to a pew and residence was that residents paid towards the repairs of the church and support of the minister.

Turning to New South Wales, Dowling J found that the colony had never been divided into parishes. St James' Church had never been dedicated to the people of any particular district. Tellingly, he said:

> Indeed, in a Colony like New South Wales, considering the origin and purpose of its foundation, it would be unreasonable to expect that it should, at once and from its commencement, assume in its Institutions the Order, regularity and symmetry of a Country, whose system of municipal and Ecclesiastical Government has been the result of ages. ... It follows, as a consequence, from there being no parochial Divisions in this part of the Settlement (which in the Mother Country are purely of Ecclesiastical origin) that none of the well known incidents of parochial Government in England apply to this Country. We

22 For the present law, see *Halsbury's Laws of England* (4th ed) vol 14, paras 1086–95.

> have here no Church Wardens, properly so called, no Church Rates, no tithes, in short none of the institutions, which have been adopted and exist in the Mother Country for the maintenance of the Church and its ministration. The whole foundation of our Church Establishment has been adapted to the maiden condition (if I may so express myself) of this newly found Country.[23]

St James' Church, Dowling J found, had been built by the Crown and maintained by the treasury. Consequently the freehold of the church was in the Crown. It was consecrated in 1824 and had never been dedicated to a parish, or vested in church wardens. Instead, Governor Brisbane's proclamation appointed a committee to let the pews by the year, whether or not the person was a householder. There was no precedent for this in any parish church in England. The current of authority of the Ecclesiastical Courts there was against the letting of church pews. Here it was necessary to do so because of the peculiarities of the place and circumstances of the erection of the church. The case had to be decided without any reference at all to English precedents. The letting had to be seen as a mere temporal contract, with some slight analogy to that between landlord and tenant. The king had the freehold, and he delegated power to certain persons to let the pews on an annual basis.

Unlike landlord and tenancy, Dowling continued, these payments were generally to be made in advance rather than on the completion of the period of lease. This allowed payments to come in as needed for maintenance, and ensured that it would not be necessary to chase money from those who had left the area. Payments in advance were also appropriate because, unlike tenancy law, there were no tenant's goods on which to levy distress in the event of default. On expiry of the period for which rent had been paid in advance, the defendant would become a trespasser. The right ended at the expiry of each year.

Justice Dowling then told the jury that it had to decide whether the letting to Hall had expired or been renewed. This required them to consider whether

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23 *R v Hall (No 1)* (unreported, Supreme Court of New South Wales, Dowling J, 12 March 1829).

there had been an agreement to allow him to stay on after the payment period ended, and to pay in arrears later. If they found the latter, then Hall was entitled to a period of notice of termination. Otherwise, those who entered into the contracts on behalf of the Crown had a right to accept or reject the tender of future rent. Churches required decorum, and their officers had the right to accept or reject the tender of further rent from those whose tenancy had expired.

This did not derogate from the power or authority of the archdeacon, according to Dowling J. This case in a temporal court turned on a mere temporal right, removed from the archdeacon's spiritual powers and duties. That is, the archdeacon had the powers of an ordinary to take cognisance of spiritual causes. In England, the ordinary also had power over the church wardens and allocation of pews, but not in New South Wales. Justice Dowling hoped that the colonial legislature would clarify the matter of the occupation of pews.

The jury found a verdict for the Crown, with nominal damages of only one shilling. (The Crown had claimed £100, and that Hall had caused damage to the pew of £10.) The jury found against Hall on both points in issue, finding that there had been a joint letting rather than a letting to him alone, as he had stated in his defence, and that it had been for a fixed period of one year. Hall's subsequent application to have this verdict set aside was rejected by all three judges.

Although Hall lost the action, Archdeacon Scott was unhappy about the result of the case. Justice Dowling had declared that Scott had less powers than he thought a man in his position would have had in England. The Crown, rather than church authorities, had power over the seating in church. Scott argued that Dowling's charge to the jury was inconsistent with the archdeacon's patent, and that under this decision he did not feel authorised to interfere with any irregularities which may happen in any of the churches. At Scott's request, Governor Darling sent this report of the case to the British government for advice.[24] The British government replied to

24 Scott first wrote to the governor on this matter on 25 March 1829, and Dowling did not sign the report until 18 July. The governor sent it to

Darling on 20 May 1830, upholding the views of Dowling J. Sir George Murray said that the judge had not denied the archdeacon's character of commissary or ordinary, but had merely found that pews in the church, which was not parochial but a mere royal foundation, were not subject to the disposition of the ordinary. Instead, they remained vested in the Crown and could only be let under that power. The ordinary in England only had the right of disposing of pews in parish churches.[25]

Nor was Hall happy with the result of the Crown's trespass action against him. Despite all his other legal troubles and his lengthy spell in gaol, he persisted with his claims concerning the pew. In April 1830, he sued Scott for trespass, both for the eviction and for assault in having him evicted from the pew. He served the writ on the day of Scott's departure from the colony.[26] This time, Hall obtained the trial by jury that he had previously sought unsuccessfully.[27] Scott's counsel, Therry, argued self-defence. He claimed that the pew offered to Hall in replacement for the one taken from him was 'suitable to his station in society', and that the rearrangement of pews had been necessary to meet the needs of all applicants. Despite the judicial statements in the two trials of the action brought by the Crown against Hall, Therry cited English law for the proposition that the legal possession of pews was in the ordinary. Hall had attacked the church with a 'burglarous instrument' (a screwdriver). Nor had Scott had anything to do with the eviction, Therry claimed. There was no case for calling Scott a 'tyrant and oppressor; as a person who sought to convert the house of God

Murray, in London, on 25 August 1829: *Historical Records of Australia*, series 1, vol 15, 131–40.

25 *Historical Records of Australia*, series 1, vol 15, 475–6. See also 635–6 for Hall's view of this case.

26 *Hall v Scott* (unreported, Supreme Court of New South Wales, Darling J, 6 April 1830). See Currey, above n 1, 312.

27 On 2 March 1829, Mr Keith, acting for Hall, moved for trial by jury in the second trespass action brought by the Crown, *R v Hall (No 1)* (unreported, Supreme Court of New South Wales, Dowling J, 12 March 1829). The legislation authorising trial by jury in civil cases, (1828) 9 Geo 4, c 83, had only come into force the day before, on 1 March. The court informed him, however, that the Act required the passage of a local Act prescribing the qualification of jurors before it could be put into effect. See *Sydney Gazette*, 5 March 1829.

into a den of theives [sic]', as Hall's counsel, W C Wentworth, had asserted. These were 'harsh epithets to apply to a dignitary of the established religion of the Country', Therry said. He concluded that it would bring shame to the colony if the jury found for Hall.

This time there was no confusion about whether Hall had a sole or joint tenancy. Justice Dowling told the jury that this case was very different from the trials of the Crown's claims. As this was a trespass action, a bare right of possession was sufficient to maintain it, without strict legal title being shown by the plaintiff. This action could not have been taken in England, where the possession resided in the parson; 'the churches of this country stand upon a very different footing and principle from the churches of the mother country'. Dowling then stated the law in England, as he had done previously, once again noting the different principles in the colony. This time he noted that the church's ministers were appointed and paid by the Crown, and that they were removable at pleasure under certain circumstances. They had a fixed annual stipend, and their duties were not confined to one church or parish.

Although the initial period of Hall's tenancy had expired, Dowling J said, he was entitled to notice before his tenancy could be terminated. In the absence of any notice to quit, Hall had sufficient right of possession to entitle him to bring an action for trespass. It was also clear, the judge said, that Scott had no right to interfere with the contract between the commissioners and Hall, whatever authority he might have had in spiritual matters. The only question for the jury was whether the acts against Hall were done with Scott's direction or authority. It did not matter that Scott took no physical part in the eviction if he authorised the eviction. In advising the jury on the assessment of possible damages, Dowling J stated that Scott's motive was relevant. He had not acted wantonly or needlessly, the judge told them, but bona fide as part of a reorganisation of the seating which gained twenty additional pews.

Contrary to the verdict of the assessors in the action brought by the Crown, the special jury in this case found in favour of Hall. They awarded him damages of £25. Governor Darling later sent a dispatch to the British

government requesting that it should pay these damages.[28] In his mind, the interests of Crown and church were tightly interwoven.

This was not the only time that Scott had been defeated in the civil courts on a matter that he thought important to his ecclesiastical powers. Soon after he arrived in New South Wales in 1825, Scott acted on a disciplinary matter against the master of the Female Orphan School at Parramatta, in purported exercise of the visitor's jurisdiction. The master, William Walker, a Wesleyan missionary, sought prohibition against Scott's summons. The Attorney-General, Saxe Bannister, acted for Scott.[29] He argued that prohibition should not lie against the summons issued by Scott from the 'Spiritual Court' because the common law courts had only limited powers over a visitor. (The court was officially known as the Archdeacon's Court.[30]) W C Wentworth, on behalf of Walker, replied that Scott had to show that he had been properly appointed as a visitor. In the absence of that, he had no jurisdiction.

The judgment of Forbes CJ was similar to the charges to the jury and assessors in the pews cases. He pointed out that the school was founded and paid for by the Crown, and that the governor was thus the visitor unless special provision were made otherwise: '[a]s an eleemosynary foundation, it was the creature of the founder, and became subject to his visitorial power. He might either reserve such power or delegate it; and in delegating it, he might either make a general or special visitor.' Forbes found that Scott had not yet been properly appointed as a visitor, so he and Stephen J issued the prohibition against the summons.

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28 Darling to Murray, 7 February 1831, *Historical Records of Australia*, series 1, vol 16, 75–6.

29 *Walker v Scott (No 1)* (unreported, Supreme Court of New South Wales, Forbes CJ and Stephen J, 21 December 1825); *Walker v Scott (No 2)* (unreported, Supreme Court of New South Wales, Forbes CJ and Stephen J, 19 January 1826). On this and the *Broadbear* cases (see below, n 33), see Currey, above n 1, 181–5.

30 See (1825) 6 Geo 4, c 21, s 5; and see Darling to Huskisson, 6 September 1828, *Historical Records of Australia*, series 1, vol 14, 391. It was also given this title by its Registrar, James Norton, Mr Therry and Dowling J in *Hall v Scott* (unreported, Supreme Court of New South Wales, Darling J, 6 April 1830).

Scott was purporting to act as king's visitor through an ecclesiastical court, but no-one mentioned this dual capacity. This suggests that no-one thought that there was any conflict between the two roles, even though it appears that the two roles were meant to be separate. In reporting the appointment of Scott as archdeacon, Earl Bathurst told Governor Brisbane that Scott was to exercise the powers of visitor of all schools maintained by the Crown revenue. That paragraph made no reference to his ecclesiastical role, unlike the next which referred to his obligation to make public visitations of all the churches in the colony.[31] In reporting this decision to London, Governor Darling stated that he had delayed issuing a formal patent to Scott on the advice of Bannister, the Attorney-General. Now that the case had been decided, he would do so.[32]

This was not the end of the controversy over the orphan school. Scott later initiated a prosecution of two of its emancipist servants, Richard and Mary Broadbear, under master and servant law. Like Walker, they had decided to leave the school as a result of Scott's actions. The Broadbears were convicted by magistrates for leaving their service without giving due notice. They were sentenced to three months in Parramatta gaol, but this was set aside by the Supreme Court. The Broadbears then obtained substantial damages against the magistrates for 'malicious conviction'.[33] The defendant magistrates included members of the 'Parramatta party', those close to John Macarthur. Once again, Scott protested about the result of the litigation, and this time included a complaint against one of the Supreme Court judges, Stephen J. He argued that Stephen J had acted impropery towards him, and that the result in the malicious conviction case was wrong.[34] This, too, was sent to London, but the British

31 The document is reproduced in H L Clarke, *Constitutional Church Covernment in the Dominions Beyond the Seas and in other Parts of the Anglican Communion* (1924) 94.

32 Darling to Bathurst, 5 February 1826, *Historical Records of Australia*, series 1, vol 12, 161.

33 *R v Broadbear and Broadbear* (unreported, Supreme Court of New South Wales, Forbes CJ, 5 June 1826); *Broadbear v McArthur* (unreported, Supreme Court of New South Wales, Stephen J, 14 March 1827).

34 *The Australian*, 23 May 1827; and see Enclosure with Governor Darling's Despatch No 73, 1827, Mitchell Library A 1199 (CY 524), 1289–1304.

government once again supported the judges.[35] This correspondence ended in an increasingly bitter series of letters between Forbes CJ and Governor Darling about the separation of powers.[36]

Like St James' Church, the school had been constructed by the Crown. This showed that the colonial government was deeply involved in charitable as well as religious activities. In turn, Scott was equally involved in the increasingly bitter exchanges between the governor, the conservatives, the judges and the reformers such as Edward Smith Hall. Church and state were closely connected.

In sentencing Hall for criminal libel upon Scott in *R v Hall (No 2)*,[37] Dowling J described Scott as 'the very Head of the Church Establishment in the Colony', but did he mean that the Church of England was the colony's established church in the same sense that it was in England? The structure of the church in New South Wales at this time was based on a report by Scott himself.[38] He had used a Canadian model to recommend extensive land endowments, a regular ecclesiastical establishment under an archdeacon, and a school system overseen by the archdeacon. Scott's recommendations were followed and he was appointed to the post of archdeacon. The colonial church was to be financed by the Church and School Lands Corporation which was to be endowed by one-seventh of the colony's surveyed lands. The Church Corporation was composed of the governor, the archdeacon, the chaplains, the Attorney-General and the

35 See Huskisson to Darling, 11 February 1828, *Historical Records of Australia*, series 1, vol 13, 768–78. The irascible Scott also engaged in a heated debate with Rev and Mrs Wilton, later Master and Matron of the Female Orphan School: see D O'Donnell, 'Archdeacon v. Chaplain: the Nature of the Friction between Scott and Wilton, 1827–1829' (1976) 62 *Journal of the Royal Australian Historical Society* 189.

36 The correspondence is detailed in the footnotes to *Broadbear v McArthur* (unreported, Supreme Court of New South Wales, Stephen J, 14 March 1827).

37 *R v Hall (No 2)* (unreported, Supreme Court of New South Wales, Dowling J, 29 September 1828).

38 See K Grose, 'Why was Hobbes Scott Chosen Archdeacon of New South Wales?' (1984) 69 *Journal of the Royal Australian Historical Society* 251.

Solicitor-General, but there were no church wardens.[39] As the authors of a history of the Sydney diocese said, under this plan the 'colonial Church came as close as it ever would to the status of formal Establishment'.[40] But they also point out that the church was vulnerable to criticism from landholders who resented the size of its potential holdings, from nonconformists and Roman Catholics, and from liberals who opposed its conservatism.[41]

Among those critics, the most prominent was Hall. In the article that led to his conviction for the criminal libel of Scott,[42] Hall urged the Archbishop of Canterbury not to impose the Church of England's hierarchy on New South Wales. 'We like not such images and representations of Europe's ancient ecclesiastical pomp and authority.' Like America, whose people were the most religious on the face of the earth, he said, Australia had no need of an established church. Hall attacked the links between the colonial government and the Church of England, and argued that there should be no government payments to any particular church. He concluded with a further argument for religious tolerance in New South Wales, and for not adopting the Church of England as its established church: two thirds of the population belonged to other churches, and their taxes should not pay so highly for the religion of the other one third. Other denominations received some government money, but the bulk, all but £400 out of a total of over £20 000, went to the Church of England.

Hall had pursued the same themes in an earlier *Monitor* article.[43] He argued there that the Church of England was a reformed Church of Rome, and retained its ancient hierarchies and paraphernalia. Dissenters in England, nearly half the population, thought that an established church

39 Evidence of James Norton, Registrar of the Archdeacon's Court, and Rev Hill, in *Hall v Scott* (unreported, Supreme Court of New South Wales, Darling J, 6 April 1830).

40 Judd and Cable, above n 3, 8. On the delay in setting up the church's finances, and the abandonment of the corporation idea, see Fletcher, above n 1, 195–7.

41 Judd and Cable, above n 3, 8–9.

42 *The Monitor*, 5 July 1828.

43 *The Monitor*, 27 January 1827.

was contrary to the express command of Jesus. Given the even greater spread of religious views in New South Wales, which also had Scottish and Irish people with their own faiths, the laws that established the Church of England in that country did not form part of the law of New South Wales. The only part of English ecclesiastical laws to satisfy Blackstone's version of the common law rules on reception were those concerned with property. The Christian religion was part of the law of both England and New South Wales, but not the rest of the laws establishing one church as a state church. The Church Corporation was of no more significance to the people of New South Wales than the Australian Agricultural Company. Despite these arguments, Hall the dissenter was passionate about retaining his prominent pew in the most prominent of the officially favoured religion's churches.

Dowling's colleague Burton J, who commenced hearing cases in the Supreme Court of New South Wales in 1833, strongly held the view that the Church of England was an established church in New South Wales. He passionately argued this in 1840. By then, the reception of English law was on a statutory basis. Under (1828) 9 Geo 4, c 83, s 24, English law was received in New South Wales 'so far as the same can be applied' to the colony. This meant, Burton usually argued, that a judge had only to see whether the relevant law was capable of application in the colony. In this case, the argument would be that there was no obstacle to the application of the laws governing the establishment of the church. He did not feel it was necessary to put it that way in this case, merely saying that he thought that the reception of the established status of the church was clear by the 'express terms of the statute'.[44]

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44 William Westbrooke Burton, *The State of Religion and Education in New South Wales* (1840) 43. He put the argument about the established nature of the church in chapter 3. Elsewhere in the book, he described the history of the Church Corporation, including the notification of its dissolution in a dispatch dated 28 May 1829. On Burton's argument as to establishment, see Ross Border, *Church and State in Australia, 1788–1872: A Constitutional Study of the Church of England in Australia* (1962) 57–8; and on Burton's general approach to the reception of English law in New South Wales, see *Macdonald v Levy* (unreported, Supreme Court of New South Wales, Burton J, 8 March 1833). Justice Willis was even stronger in his views on religion: he accused Roman

Under the common law rule on the reception of English law (which was in force in New South Wales until 1828), Burton thought that the result was the same. The established nature of the Church of England was a fundamental law of England, and as such was automatically received on settlement of the new colony. He argued that the establishment of the church was the most important of those fundamental laws. That is, the Church of England became the established church of the colony from its beginning. For nearly fifty years after then, no other denomination of Christians was acknowledged by the government as an object of its support, beyond mere charitable toleration. He concluded that 'every act of the government, every colonial record, shows that not only in law, but also in fact, the Church of England was from the foundation of the colony, up to and at the time of the adoption of the measure under review, the established church of the colony'.[45]

The 'measure' he referred to was an 1836 New South Wales Act, 9 Geo 4, c 3. This Act provided for the provision of colonial treasury money for the construction of churches and for stipends for the ministers of those churches. The government could make payment up to any amount raised by private contributions for the buildings. There was no mention of preferential treatment for the Church of England. Under s 9, at least one sixth of the pews in these churches were to be provided free of charge to the public. This Act was precipitated by a letter written by Governor Bourke in 1833 which (wrongly, claimed Burton) assumed that the foundations of the church had yet to be settled. This letter, and the reply by Lord Glenelg in 1835, were against any notion that the Church of England should monopolise the government's funding of religion in New South Wales. This was the cause of Burton's passionate response. He thought that this correspondence and the local Act which put it into effect admitted 'much which is false religion to an equal encouragement with that which is true'.[46] His view on church establishment matched his strong general belief in the superiority of English law in all its variety over any of its rivals, and his strong attachment to the Church of England.

Catholics of idolatrous worship: *Historical Records of Australia*, series 1, vol 19, 587.

45 Burton, above n 44, 44.

46 Ibid 62.

One historian of the Anglican Church in Australia, Ross Border, also argues that the church was established in Scott's period at least.[47] He pointed to Burton and his contemporaries who argued that way, as well as to Dixon J in *Wylde v Attorney General*.[48] Border did note, however, that the members of other religions often argued the opposite. Even within the Church of England, there were sharp differences about the meaning of 'established'. Did it mean, for instance, a church created by law, or a pre-existing church reinforced and supported by law such that it became a state church?[49] In either case, the answer required an examination of the links between church, state and law. These included the state's role in appointing the clergy, and the common law courts' roles in supervising church courts, as apparently happened in *Walker v Scott*.[50]

In *Wylde v Attorney General*[51] Dixon J expressed the view that the Church of England was an established church from the beginning of the colony of New South Wales. He pointed out that Governor Phillip's instructions obliged him to enforce the observance of religion and that the earliest chaplains formed part of the civil establishment. He thought it crucial that the colony fell within the jurisdiction of the Bishop of Calcutta, which meant that an ecclesiastical jurisdiction existed over the colony. This was reinforced by the 1824 Order in Council which created the archdeaconry.

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47 Border, above n 44, ch 4.

48 (1949) 78 CLR 224.

49 On the deep divisions within the Church of England as to the meaning of 'established', see R Ely, 'The View from the Statute: Statutory Establishments of Religion in England Ca 1300 to Ca 1900' (1984) 8 *University of Tasmania Law Review* 225. Ely's article was inspired by the High Court's decision in *Attorney-General (Victoria); ex rel Black v Commonwealth* (1981) 146 CLR 559. In a recent article, Justice McPherson argues that the Crown could not invest a bishop with coercive power once a colony obtained representative government: B H McPherson, 'The Church as Consensual Compact, Trust and Corporation' (2000) *Australian Law Journal* 159, 161–2. This leaves open the question of whether the Church of England was established in New South Wales before then, although the article assumes not.

50 As above, n 29. See *Halsbury's Laws of England* (4th ed) vol 14, paras 303–4, 306, stating that ecclesiastical law is as much part of the law of England as any other part of the law.

51 (1949) 78 CLR 224.

The Archdeacon's Court received local legislative recognition by (1825) 6 Geo 4, c 21, s 5. Dixon stated that its discontinuance was noted in 1839 (by 3 Vict, c 23, s 2), following the reorganisation of the church. There was thus an ecclesiastical jurisdiction 'to administer the ecclesiastical law for the correction of ecclesiastical offences and for the enforcement of the discipline of the clergy'.[52] Over time, Dixon J argued, the Church of England lost its established status in New South Wales, and came to be considered, like other churches, to be established on a consensual basis. It is here that he stated his test for deciding whether a church was established: the recognition of the ecclesiastical courts by Acts of the Legislative Council had showed that it was an institution established by law.

Dixon's primary historical source was Clarke's *Constitutional Church Government in the Dominions Beyond the Seas* (1924). Clarke's evidence for establishment status is even stronger than Dixon indicated. He showed that, even during Scott's archdeaconry, the governor issued special proclamations for ecclesiastical ceremonies in the Church of England, and that until the archdeacon arrived the governors had administrative control over the chaplains.[53] Clarke also reproduced the dispatch in which Earl Bathurst told Governor Brisbane of Scott's appointment. This made clear that both the creation of the office of archdeacon and Scott's appointment were made by the king. It also stated that in the event of legal questions arising, particularly concerning the ecclesiastical jurisdiction vested in him by the Letters Patent of appointment, Scott was to obtain the advice of the New South Wales Attorney-General. The Attorney-General was also to act as Assessor of the Archdeacon's Court, to assist the archdeacon with questions of law. The archdeacon was also to take rank and precedence next after the lieutenant governor.[54]

In an article on the established status of the churches in Canada,[55] Professor Margaret Ogilvie shows that there are conflicting definitions of 'established church'. It is not a legal term of art, she says. Her summary

52 Ibid 285.
53 Clarke, above n 31, 77–8.
54 Ibid 93–6.
55 M H Ogilvie, 'What is a Church by Law Established?' (1990) 28 *Osgoode Hall Law Journal* 179.

of the position is that the phrase means a single church within the country recognised by the state as the truest expression of the Christian faith, and that this recognition places a legal duty on the state to protect, preserve and defend that church, if necessary to the exclusion of all others. This meant the identification of the nation-state and the national church.[56] Three of Canada's maritime colonies or provinces, Nova Scotia, New Brunswick and Prince Edward Island, met this test, she argues, largely on the basis of specific imperial statutes for each place. In each case, the pre-existing Church of England was declared to be a 'national' church.[57] There was no such declaration of one church being the truest expression of Christianity for Upper Canada (Ontario), although an imperial Act richly endowed the Church of England alone. That and other links with the state led to its status, according to Ogilvie, as quasi-established in Upper Canada. (The article does not examine the position in Newfoundland.)

Although there were no imperial statutes declaring in such strong terms that only one church was officially recognised in New South Wales, and although its structure was modelled on that of colonial Canada, the links between church and state were so very strong that Dixon J was right to declare the Church of England was established in New South Wales in the period of the troubles of Edward Smith Hall. Hall's arguments to the contrary were expressed more as ought than is. The archdeaconry was established by an Order in Council of the king; the Archdeacon's Court was recognised by statute, overseen by the civil judiciary, and assisted by the Attorney-General; the church's buildings were funded by the Crown; its ministers were appointed and paid by the Crown; it was uniquely well funded by the Crown; and there was a uniquely close relationship between church and colonial administration. Some of this special treatment was abolished by the 1836 colonial Act, 9 Geo 4, c 3, the Act which so worried Burton J.

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56 Ibid 198, 200.

57 Ibid 235. In a letter to the author dated 10 July 2000, Professor Ogilvie stated that her view was that the church in New South Wales was quasi-established as there was no legislative or formal constitutional declaration of establishment. It was, however, a stronger example of quasi-establishment than that prevailing in Upper Canada at the time.

In the pews cases in New South Wales and Newfoundland, Forbes and Dowling JJ were less concerned by the kind of strict reception favoured by Burton than they were with matching colonial experience to legal problems to be solved. English law was a guide to them, rather than a strict body of rules to be followed without question. In many cases, including these, they gave effect to local customs. The church buildings in St John's, Newfoundland and in Sydney, New South Wales were funded differently from one another and from the parish churches in England. This had consequences for the right to occupy their pews but, more importantly, it also showed that the colonies were not England. These cases show how very directly the colonial governments were involved in matters of the church. As a consequence, Archdeacon Scott suffered under a greater degree of judicial interference than he would have received in England. If the Church of England were 'by law established' in New South Wales and Newfoundland, then it was not in the same way as in England. It was as impossible to reproduce English law exactly in the colonies as it was to reproduce England there.