Sir Owen Dixon

The End of a Period in Australian Legal History

I.

Professional opinion, conclusive in its universality, has long accepted the Right Honourable Sir Owen Dixon as the greatest living judge in the common law world, and, in any reasonable forecast, his name appears likely to endure for some centuries in the Anglo-American legal tradition amongst the slowly increasing number whose fame does not fade with their withdrawal from active labour. Since legal historians commonly link great developmental trends with the names of famous lawyers, it is likely also that future Australian writers will identify the twentieth century as the age of Dixon. The life of such a man is, therefore, the preserve of the authoritative biographer, and the elucidation and appraisal of his judicial contribution to the fabric of the law must be left to successive generations of lawyers. In such circumstances, the content of any brief commemorative note must necessarily be in the form of disconnected comments, at once superficial and subjective in their nature, and its publication can be justified only as the formal discharge of a duty of homage due on the occasion of retirement from office.

It is probably impossible to overstate the debt owed by the people of Australia to Sir Owen Dixon for his sustained and successful efforts to enhance the dignity of the judicial office by the impeccable pattern of his long life of public service. Any reference to this would be an unnecessary impertinence if it were not for the purpose of emphasising the strength of his influence, both in Australia and beyond, and its effect upon the many who knew him. The present respect in which the High Court is held by the Australian people became very apparent in the attitude of all sections of the community when his distinguished successor left active political life to become Chief Justice at a time when partisan political feelings were otherwise being violently expressed. Sir Owen's influence overseas may be illustrated by a small incident vividly remembered by the writer arising out of a conversation with Justice Frankfurter in Washington in 1954 at a time when the latter had just received an advance copy of the Privy Council judgment in *Hughes and Vale* v. *N.S.W.*(1). Finding that the writer was still ignorant of the decision, the learned justice pointed out, with some emotion, that the whole course of the litigation was a great tribute to the Australian judge, firstly in respect of his personal decision to follow the majority of his brethren in the interests of certainty when the case was before the High Court(2), and secondly, because the net result was the vindication of his earlier dissenting judgment in *McCarter* v. *Brodie*(3). To those who had the privilege of either protracted association or personal friendship, respect and affection became mixed to the point of veneration, and they learned the lesson that greatness cannot exist without the virtue of humility. This last quality appears consistently in his judgments and throughout his address, *Concerning Judicial Method*(4), delivered in 1955 at Yale on receiving the Howland Memorial Prize. Although it is difficult to single out any single piece of work from Sir Owen's pen, this last is, in the writer's opinion, a work of outstanding quality, historical, legal and intellectual. When linked with his judgments, it explains and justifies Sir Owen Dixon's right to a place amongst the great jurists of all time, even if it is read merely as an *Apologia pro sua vita.* But its importance goes far beyond this, and its nature is such as to merit gloss and comment, paragraph by paragraph, and word for word, in the scholastic tradition. Within the space of eight pages it contains an exposition of the judicial technique which has dominated the common law process in Australia for thirty-five years, and, although this is one of the ironies of history in view of his consistently expressed intention to maintain the unity of the common law, it clearly sets out the basic assumptions upon which an Australian common law, differing both from the parent English stock and the American common law, has been constructed in terms of a pattern which will last for many decades in the foreseeable future. In addition, it is full of insights into a wide variety of matters. It illuminates the nature of the common law, its history, and the peculiar nature of its technique in terms of its historical and political roots. There is a penetrating appreciation of the effect of the introduction of some American federal concepts into Australian federal law, in which their role is necessarily subordinate by reason of the dominance of English political and legal concepts, and with this there is a clear recognition of the inevitable differences between Australian and American public and private law, between their respective legal techniques, and between the respective roles of the Australian High Court and the American Supreme Court. Sometimes, the discussion deals with the common law technique in a way which recognizes that its validity rests upon assumptions derived from local history and local problems, but at the same time its validity is asserted in terms of such universals as are applicable to any applied science, and the discussion then touches the ultimate problems of law and of logic itself. A great sense of unity is maintained throughout, partly by an insistence that legal technique is a valid exercise in applied logic and partly because the argument is felicitously developed in terms of the traditional reasoning which English, and later, American common lawyers have used since the days of Coke.

(1) 93 C.L.R. 1.
(2) *Vide* 87 C.L.R. 49, at p. 70.
(3) 80 C.L.R. 432.

(4) Published in 29 A.L.J. 468.

Here, it is observed that, in this respect, Sir Owen himself may be the last surviving representative of a great race of common lawyers who, by virtue of their particular form of education, established a consistent intellectual pattern in the common law, the roots of which are found in the mediaeval universities and the culmination in the great period of rationalisation and systemization beginning with Blackstone and ending in many ways with the English Judicature Acts. It is a fact of great importance that the formal education of these men and their predecessors was primarily in the high classical tradition, in which logic played an integral part in conjunction with a study of the humanities. Legal training followed on this and was in many cases unsystematic and, in the latter portion of this period in England, was based largely on practice. Its effect can be seen at critical periods in English legal history—in the struggles of Bracton with the rapidly developing native material and the largely inapplicable concepts of the Roman law, in the birth of the modern common law in terms of the principles boldly selected by Coke from mediaeval tradition and current judicial practice, in the bolder innovations of Mansfield under the influence of the post-mediaeval Romanistic tradition, in the brilliantly facile generalisations of Blackstone, in Austin's superb intellectual failure in legal science, and in the works of outstanding 19th century judges like Parke. Sir Owen's personal sympathies are shown by his tribute to Parke, one of the greatest of English judges(5), and his publicly expressed respect for Australian judges like Jordan C.J. and Cussen J. It seems that this race has ended with social and educational changes which include the development of the modern type of University law schools, but the magnitude of the cultural debt should be acknowledged, especially as it probably goes far to explain the liberal intellectual attitude which made the common law receptive at all critical times to outside influences. Well-known illustrations of this can be found in the use of the civil law by Mansfield, Pollock, Anson and Blackburn, and in the profound understanding of American law by Sir Owen himself. Further discussion of this question however, is excluded here, if only for the reason that the writer may find himself arguing against interest, and in the next issue of this journal the writer, with the hesitation proper in the case of a great historical subject, will attempt some comments on Sir Owen's consistent use, over a period of thirty-five years, of the "strict logic and high technique, rooted in Inns of Court, rooted in the Year Book, rooted in the centuries".(6)

K. O. Shatwell*

(5) *Vide* 29 A.L.J., at p. 472.

(6) Selden Society Y.B. Series Vol. I, (Maitland's Introduction p. xviii, quoted by Sir Owen in the Howland Address at Yale).

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International Law Association

Some eighty Australian lawyers and their wives have made arrangements to attend the Fifty-first Biennial Conference of the International Law Association, which will be held in Tokyo from 13th to 22nd August, 1964.

The subjects which will be discussed at the Conference will be—(1) A Compulsory Jurisdiction of the International Court of Justice; (2) Uses of the Waters of International Rivers; (3) Legal Aspects of Problems of Asylum; (4) Extra-territorial Application of Restrictive Trade Legislation (including anti-trust legislation); (5) Enforcement of Foreign Judgments; (6) Space Law; (7) Juridical Aspects of Co-existence; (8) Family Relations (adoption of children); and (9) International Medical Law.

During and after the Conference, an extensive programme of social events and tours has been arranged for visitors.