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SIR OWEN DIXON : HIS JUDGMENTS IN PRIVATE LAW

BY H. A. J. FORD*

In an ideal system of law comparisons of such judges as might exist would be not so much odious as otiose. But as C. H. S. Fifoot has said: 'A tincture of humanity will stain the law reports until the courts are manned by Robots.'[1] Even given a legal system dependent on human decision, is it appropriate to single out a particular judge and to comment upon his or her work? Some people hold that society gains from treating the interpreters of the law as an institution rather than as a collection of individuals with differing personal attributes. However, where, as in Australia, judges are drawn from the legal profession, it is at least understandable that in that profession the work of particular judges should be discussed. It is in that frame of reference that this contribution should be viewed.

The present study is, perforce, confined to Sir Owen's work as a writer of judgments. As might be expected, there are differences between judgments he gave at first instance and those delivered by him as an appellate judge. There are reports of some cases in which Sir Owen sat alone as a trial judge having to analyse evidence and make inferences. On such occasions his analysis and findings were models of clarity. For an example, one has only to read *James Patrick and Company Limited v. The Union Steamship Company of New Zealand Limited,*[2] a case brought in the original jurisdiction of the High Court. A shipowner sought an order limiting its liability under merchant shipping legislation for loss or damage resulting from a collision between its ship and another vessel. The shipowner had to show that the loss or damage occurred without its fault or privity. Sir Owen's judgment, in which he concluded that the shipowner was entitled to a limitation decree, contains a masterly analysis of the facts informed by a full appreciation of the practicalities of sea navigation and the administration of a fleet of cargo ships. The judgment is couched in language which lay clients would understand. The style is not dissimilar from that of the narratives of facts for which Lord Denning is justly celebrated.

But when the reader turns to Sir Owen's appellate judgments another impression is gained. A judgment in an appellate court is normally addressed to lawyers rather than litigants. We have lately been reminded that the history

* Professor Emeritus of Commercial Law, The University of Melbourne.

[1] *English Law and its Background* (1932) 249.

[2] (1938) 60 C.L.R. 650.

of correction of errors in lower courts was one of review rather than appeal. In the 1986 Southey Memorial Lecture Mr. J. A. Jolowicz advanced the thesis that in the modern organization of appellate courts in England and other common law countries there had been ill-considered departures from the historical position that the function of the highest courts was to act as a court of review rather than to hear appeals *de novo*. The old procedure of appeal by writ of error was not so much for the benefit of the parties as for the benefit of the public, being designed to ensure that the judicial system operated correctly. This view, as well as having implications for the rate at which cases flow to the higher appellate courts, would also mean that the judges of those courts could be seen to be addressing lower courts and lawyers rather than litigants.

There are many indications in his appellate judgments that Sir Owen expected members of a learned profession to be learned not only in the sense of being familiar with legal doctrine, its history and its current influence but also in the sense of sharing a broad intellectual heritage. It was the ancient polite learning. Lawyers educated only in Benthamite Useful Knowledge would have had to consult their dictionaries when they encountered 'amphibolous'[3], 'epexegetical'[4] and a description of a badly prepared objects clause as 'analects'[5].

A student of law in Australia soon learns that when faced with multiple judgments of a court of which Sir Owen was a member it pays to read his judgment at an early stage. His judgment is likely to be especially rewarding to the student of any age because rather than simply stating a rule, Sir Owen would refer to the underlying basis of the rule thus assisting the reader to a better understanding of the limits of the rule. There are many examples. In *McDonald v. Dennys Lascelles Limited*[6] the Court had to consider the circumstances in which a surety's liability would disappear when the principal debtor's liability disappeared. Various members of the Court referred to the proposition that a discharge of the principal debtor's liability by bankruptcy does not discharge the surety'[7]. One was content to say that that was because a release in bankruptcy is the act of the law. But Sir Owen went deeper to show that the survival of the surety's liability turned not on the question whether the principal debtor's obligation had been extinguished but rather whether the creditor retained a claim in law against a fund although the personal claim against the debtor had ended. Another example is to be found in *Royal North Shore Hospital v. Crichton-Smith*[8] where, in dealing with the equitable doctrine of satisfaction, Sir Owen drew attention to the foundation

[3] *Martin v. Martin* (1959) 110 C.L.R. 297, 305.
[4] *Dey v. Victorian Railways Commissioners* (1949) 78 C.L.R. 62, 99.
[5] *H.A. Stephenson & Son Ltd (In Liquidation) v. Gillanders, Arbuthnot & Company* (1931) 45 C.L.R. 476, 490.
[6] (1933) 48 C.L.R. 457, 480.
[7] See now Bankruptcy Act 1966 (Cth) s. 153(4).
[8] (1938) 60 C.L.R. 798.

of the doctrine which had previously been obscured by an overlay of detailed rules. In doing so he was fulfilling one of the important functions of an appellate tribunal in loosening up a part of legal doctrine.

Sometimes Sir Owen would refer to matters going a little beyond what was needed to decide the particular case. To a reader interested in obtaining a full understanding of the applicable doctrine, these excursions can be most stimulating. However, he often used 'epithets charged with calculated implication'[9] and it is not always easy to spell out his intent. An example is in *Birmingham v. Renfrew*[10]. The facts made it necessary for the High Court to examine the basis on which the equitable doctrine of mutual wills operated. A husband made an agreement with his wife that, in consideration of the wife undertaking to leave her property by will to him, should he survive her, he would make a will whereby, should he survive her, all his property would pass to certain named relations of the wife and that he would not alter that will. Each made a will pursuant to the agreement. The wife died first. The husband made a new will mainly in favour of his own relations. After his death beneficiaries under his first will sought a declaration that the executors under the husband's last will held his estate on trust for them. The plaintiffs succeeded at first instance and the High Court dismissed an appeal. The executors were compellable in equity to act consistently with the husband's agreement and equity, in order to provide specific relief, would treat them as constructive trustees for the beneficiaries contemplated by the agreement. The question arose after the surviving husband's death and it was unnecessary for the High Court to consider what the position would have been if the husband were still alive. But Sir Owen said that the purpose of an agreement for mutual wills must often be 'to enable the survivor to deal as absolute owner with the property passing under the will of the party first dying.' When that was so the survivor could convert the property and expend the proceeds if he chose. But when he died he was to bequeath what was left in the manner agreed upon. He went on:

> It is only by the special doctrines of equity that such a floating obligation, suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallize into a trust. No doubt gifts and settlements, *inter vivos,* if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, *inter vivos,* is, therefore, not unqualified.[11]

If there is no trust until the survivor dies, what is the equitable basis for impugning a gift or settlement calculated to defeat the compact? Is it too fanciful that Sir Owen saw an analogy with the floating charge in company law? Since there has been so much uncertainty as to the theoretical basis of a floating charge and as to whether the chargee obtains a proprietary interest

[9] Words used by Sir Owen with reference to the judgments of Frankfurter J., *Jesting Pilate* (1965) 183.
[10] (1937) 57 C.L.R. 666.
[11] *Ibid.* 689.

before crystallization,[12] any analogy with a floating charge would have deepened the enigma.

In many of Sir Owen's judgments there is evidence of that 'wonderful accomplishment' of knowing the history of a point, without which, it is said that a lawyer cannot be accounted learned in the law. Profound knowledge of older methods of conveyancing assisted him to decide a nice question in the Tasmanian case of *Wright v. Gibbons*[13] which posed a conundrum about severance of joint tenancies. Two unmarried sisters together with their sister-in-law were joint tenants of some land under the Torrens system. The two sisters by a single memorandum of transfer, duly registered, each in consideration of the transfer to her of the undivided one-third share of the other, transferred her own one third share to that other. Their intention was that all three should become tenants in common in equal shares. The underlying reasons for their transfer do not appear from the report. Possibly, behind all the technicality there was a familiar human problem in the form of some family conflict. When both sisters had died, the sister-in-law claimed to be entitled by survivorship. That claim depended upon whether there had been a severance of the joint tenancy. At first instance it was held that there was no severance. The decision was based on the view that in contemplation of law joint tenants are jointly seised for the whole estate they take in land and no one of them has a distinct or separate title, interest or possession. The conclusion was drawn that an attempt on the part of two of three joint tenants mutually to assure each to the other his or her undivided share in the hope that each of their two shares would be taken by a new title and so enure as a several undivided interest, would fail because it could accomplish nothing. In the arguments in the High Court ancient authority was cited. The High Court allowed the appeal. Sir Owen and the other judges pointed to qualifications on the principle that joint tenants should not be spoken of as having undivided shares. The true position was that joint tenants held the whole estate for the purpose of tenure and survivorship while for the purpose of immediate alienation, each had only a particular part. But only certain special methods of alienation were available as between joint tenants. One joint tenant could not have alienated his part to another of the joint tenants by livery of seisin because the alienee was already seised by the original transaction which created the joint tenancy. However, alienation by release by one joint tenant to another was possible and severance would then follow. In this case, however, difficulty arose from the fact that there was only one document which operated at the time of registration. Sir Owen found a way around the difficulty. Cross-transfers of interests as between joint tenants could

[12] Recent decisions affirm that a chargee before crystallization has a proprietary interest in the category of assets charged: *Hamilton v. Hunter* (1982) 7 A.C.L.R. 295; *Re Margart Pty Ltd (In Liquidation)* (1984) 9 A.C.L.R. 269, 2 A.C.L.C. 709.

[13] (1949) 78 C.L.R. 313.

have been carried out simultaneously under old conveyancing by the two joint tenants granting their shares to a third person, as a grantee to uses, to the use of the two former joint tenants and their respective heirs as tenants in common in equal shares. That would have made the two who conveyed tenants in common not only as between themselves but also with the third co-owner who had not acted. The next step was to consider the effect of the Tasmanian Torrens legislation. Sir Owen found that the Real Property Acts introduced an exclusive method of assuring the share of a joint tenant holding the legal estate in Torrens system land by registration of a memorandum of transfer and that method superseded the old methods. Accordingly, the registration of the transfer had effected a severance to make the three co-tenants hold as tenants in common in equal shares.

A belief that Sir Owen derived great satisfaction from dealing with fine points such as that raised by *Wright v. Gibbons* would be confirmed by a reading of his paper on Sir Roger Scatcherd's will in Anthony Trollope's 'Doctor Thorne'.[14] By some refined reasoning he reconciled two lines of decision. One line was against the validity of a provision in a will to the effect that any doubt as to the identity of a beneficiary should be decided by trustees whose decision should be conclusive. The other allowed that a testator or settlor may confer a discretionary power of disposition over property. The first line involved attempts to oust the jurisdiction of the court to determine the effect of a completed disposition. The second recognized that testators and settlors could leave incompletely defined dispositions to be defined by others.[15]

These two instances, one in the line of duty, the other recreational, exemplify Sir Owen's liking for that 'strict logic and high technique' of the common law that Maitland[16] praised in terms endorsed more than once by Sir Owen.[17]

Sir Owen had a view of the substantive law as being 'flexible in application and capable of governing every contingency of human affairs'.[18] In *Wirth v. Wirth*[19] we find a reminder from him that the categories of relationship that attract the equitable presumption of advancement are not closed. Nor was he oblivious to the impact of technological change on the operation of legal principle. In *Burns Philp and Company Limited v. Gillespie Brothers Proprietary Limited*[20] he noted that the occasions for invoking a shipmaster's

[14] Prepared for delivery during the first convention of the Law Council of Australia and read at Melbourne on 31 October 1935. Reproduced in *Jesting Pilate* (1965) 71; (1935) 9 *Australian Law Journal Supplement* 72.

[15] Later cases in the area are *Re Wynn* [1952] Ch. 271; *Re Davis* [1953] V.L.R. 639; *Re Mitchell* [1955] V.L.R. 120.

[16] Maitland saw the strength of the common law as lying in 'not vulgar common sense and the reflection of the layman's unanalyzed instincts; rather ... strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries': *Selden Society Year Book Series,* vol.I, Introduction xviii.

[17] *Jesting Pilate* (1965) 153, 228.

[18] *Ibid.* 11

[19] (1956) 98 C.L.R. 228, 238.

[20] (1947) 74 C.L.R. 148, 191.

authority of necessity had diminished with the increase in facilities of communication.

On occasion Sir Owen, though believing that an earlier decision of the High Court should be followed, felt it necessary to state his preference for a different view and to argue for it at length. This was at a time when an appeal to the Privy Council from the High Court was possible. In *A.-G. (N.S.W.) v. The Perpetual Trustee Company Limited*[21] the High Court had to decide whether the Crown in right of New South Wales could bring an action for damages for loss of the services of a police constable against a person whose negligence had injured and disabled the police constable. The relationship between the Crown and police constable was not the ordinary relationship of master and servant but was a special relationship existing under the Police Regulation Act. Eight years before, the High Court had held by a majority in *Commonwealth v. Quince*[22] that the Crown in right of the Commonwealth could not bring an action for the loss of the services of a member of the Royal Australian Air Force. This was because the relationship of the Crown to a member of the armed forces was not that of master and servant and the action was at least confined to the master-servant relationship. Sir Owen did not believe that *Quince's* case should be overruled but he indicated that in the absence of *Quince's* case he would have held that the Crown had a right of action. He provided a full examination of the authorities going back to the fourteenth century to support the view that he felt foreclosed from adopting. Doubtless, when an appeal was taken to the Privy Council the appellant's counsel were greatly assisted. However, the appeal was dismissed. Subsequently, after the English Court of Appeal in *Inland Revenue Commissioners v. Hambrook*[23] held that the action was available only in respect of menial or domestic employees, a majority of the High Court in *Commissioner for Railways (N.S.W.) v. Scott*[24] refused to follow and allowed the action where the services of another type of employee were lost. In a dissenting judgment, noteworthy not only for a quotation from Chaucer but also for concepts expressed in classical Greek, Sir Owen felt bound by implications in the Privy Council opinion to accept the limitation of the action to a menial or domestic employee. But he argued that the limitation was ill-founded. He criticised historical investigations of law which led too readily to a contrast of considerations of a remote past and modern considerations. He said:

> In examining any of our legal institutions which can be traced back in changing forms into the indefinite past it is always possible to fix on a period remote in time and thought from our own and bring into contrast considerations of then and now. It is however a contrast which seldom has any relevance in a legal system the growth of which has been gradual and has proceeded in no small degree by reasoning from accepted notions about remedies and rights to rules thus evolved to govern new or changed

[21] (1952) 85 C.L.R. 237.
[22] (1944) 68 C.L.R. 227.
[23] [1956] 2 Q.B. 641.
[24] (1959) 102 C.L.R. 392.

> situations to which an ever developing social order gives rise. The resources of the law for superseding or avoiding the obsolescent have for the most part proved sufficient, even if occasionally theoretical survivals have been exhumed to the discredit perhaps of the system, as in *King v. Williams*[25] (compurgation) and *Ashford v. Thornton*[26] (appeal of murder and battle).[27]

A recent development in company law illustrates how the common law has moved on from its position even as it appeared to Sir Owen. It concerns the test of propriety of decisions made by a board of directors, a subject to which Sir Owen made a notable contribution in *Mills v. Mills*.[28] It is a widely accepted interpretation of the principle that directors must exercise their powers for the benefit of the company as a whole that they must consider the interests of the company's shareholders. When Sir Owen participated in *Richard Brady Franks Limited v. Price*[29] he stressed that where a transaction of directors is impeached on the ground that the directors were acting in their own interests it would not be enough that 'they preferred their own interest or those of some other persons to the interests of strangers to the company, as, for instance, to those of the creditors of the company'.[30] Recently there has been a recognition that as a company nears insolvency it becomes the duty of the directors to have regard to the interests of creditors and to prefer the interests of creditors over those of shareholders.[31] Shareholders do not have power to relieve directors of their duty to the company to consider creditors' interests.[32] Various factors account for the development. Since 1937 there has been a change in the public's expectations of what is required of directors. Statutory formulations of standards for the conduct of directors have been introduced. There has been a gradual widening in statute law of the liability of directors to pay company debts which they recklessly incur. Although it is not acceptable to develop the common law by direct analogy to a statute, legislative innovation still has a subtle influence. Doubtless, if he were sitting today, Sir Owen would have found ways to mould the common law to new views as to accountability.

It is of interest to note the views of Sir Owen, a great common lawyer, as to the relationship of legislation to the common law. In extra-curial comment he expressed an attitude of conservatism when he asked: 'Would it be within the capacity of a Parliamentary Draftsman to frame, for example, a provision replacing a deep-rooted legal doctrine with a new one?'[33] This remark should not be taken too far for at least in private law he was more prepared than some other judges to recognize a legislative intention to depart from the logic of the unenacted law. In *English Scottish and Australian Bank Limited v.*

[25] (1824) 2 B. & C. 538, 107 E.R. 483.
[26] (1818) 1 B. & Ald. 405, 457, 106 E.R. 149, 168.
[27] (1959) 102 C.L.R. 392, 399-400.
[28] (1938) 60 C.L.R. 150.
[29] (1937) 58 C.L.R. 112.
[30] (1937) 58 C.L.R. 112, 143.
[31] *Walker v. Wimborne* (1976) 137 C.L.R. 1, 7 *per* Mason J.
[32] *Kinsela v Russell Kinsela Pty Ltd* (1986) 10 A.C.L.R. 395, 4 A.C.L.C. 215.
[33] Sir Owen Dixon 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240.

Phillips[34] a question arose as to whether a mortgage of land under the Real Property Act 1886 (S.A.) was destroyed by the mortgagor becoming registered proprietor of the mortgage. A majority of the High Court (Dixon, Evatt and McTiernan JJ.) held that despite the mortgagor becoming the registered proprietor of the mortgage, a personal covenant of the mortgagor was not extinguished and subsequent transferees of the mortgage could enforce it against the mortgagor. The majority judgment found a legislative intention to treat the transfer of obligations as if they were estates. The majority said:

> It must, of course, be true that where the person under a liability to another acquires the other's correlative right he cannot thus incur or come under a liability to himself. But the legislature is not obliged to respect theories of jurisprudence and, when it proceeds to deal with obligations on the analogy of property, it is not likely to do so.[35]

A similar readiness to accept that conveyancing legislation might create novel rights is seen in Sir Owen's judgment in *Brunker v. Perpetual Trustee Company Limited*[36]. He there put forward the possiblity that the system of the Real Property Act of New South Wales allowed a volunteer transferee in possession of a registrable transfer to acquire an indefeasible right to the registration of the instrument in his favour even though he had no previous legal or equitable interest in the land. That would be a 'right of a new description' arising under the statute by the exercise of which the volunteer could vest the legal estate in himself despite any attempted countermand by the transferor. The right might appear anomalous but the anomaly would be no obstacle to the existence of the right. The case was decided against the volunteer because the majority found that the transfer in question was not in registrable form. But the implications of the suggestion of the statutory right to obtain registration have not yet been fully worked out.[37]

In his judgments Sir Owen occasionally pointed to defects in the law. In *The Royal North Shore Hospital of Sydney v. A.-G.(N.S.W.)*[38] he observed that the case law dealing with the distinction between charitable and political objects was in an unsatisfactory condition.[39] But he did not, as some judges would, invite the legislature to act. It was a matter that could, presumably, be remedied when the appropriate case reached the High Court.

Sir Owen did not see lawyers as 'ardent law reformers'. He thought 'that lawyers may be forgiven if they regard themselves as absolved from any attempt at a scientific or philosophical reconstruction of the legal system'. He thought that others would acquiesce in that view if on the one hand, they reflected 'that the substantive law is, and must be, a reasoned body of principle, flexible in application, and capable of governing every contingency of human affairs' and on the other hand, they considered 'the methods of a modern

[34] (1937) 57 C.L.R. 302.
[35] *Ibid. 324.*
[36] (1937) 57 C.L.R. 555.
[37] Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (2nd ed. 1984) par. 624.
[38] (1938) 60 C.L.R. 396, 426.
[39] For recent consideration of this matter, see *Re Koeppler Will Trusts* [1985] 3 W.L.R. 765.

representative legislature and its preoccupations'. Those sentiments were uttered in 1933.[40] Fifty years later, representative legislatures are no better than they were then but legislative methods have changed. There are now voluntary and statutory law reform agencies in which lawyers usually have a strong influence. The common law could hardly have re-moulded itself to meet the social changes of the last few decades.

This study has drawn upon only a small part of Sir Owen's work. A lawyer reading his judgments cannot escape the impression of him as a polymath in law. If one seeks to identify what it was in his judgments that gave him such a high reputation in the common law world it is the conjunction of a mastery of common law principle, a wide range of legal reference, a scholarly inclination, a sense of the worth of history and the capacity to include in a judgment material on which others could build. What emerges most clearly is his strong faith in the worth of the common law.

[40] 'Science and Judicial Proceedings' in *Jesting Pilate* (1965) 11.