

**Speech in honour of the
Right Honourable Sir Owen Dixon OM GCMG 1886-1972**

Antiques and Decorative Arts Annual Dinner
Australian Club
Sydney, 15 August 2019

Mark Leeming*

Occasions such as these are to commemorate: which is to say, to preserve in memory by some solemnity or celebration. It is very difficult to capture the essence of a man who has not been with us for two generations; Sir Owen retired as Chief Justice of the High Court of Australia 55 years ago. He died when I was three years old. He was the greatest judge Australia has produced. And he was much, much greater than that. He well merits a dinner such as this. It is a great honour, but no small thing, to speak of him tonight. I shall say something of his words, and something of his deeds.

It is most appropriate that we are in this Club, with which Dixon had a special connection, as Mr Mackrell has reminded me – and not merely for the 1964 dinner which is recreated here tonight. In the 1950s when in Sydney he lived in rooms at Macleay St, Potts Point, and apparently was to be found, after dinner walking from Clay's Bookstore through Kings Cross most weeknights.¹ The High Court then sat in the court complex at Darlinghurst, and he was returning to chambers after dinner, night after night, until 11pm. In late 1956 that changed and he stayed in this Club, which had made him an honorary life member. In those days men wore hats, and Dixon invariably wore his Homberg. Murray Gleeson has recently referred to the tribute paid by this club's members: Peg No 92 in the cloakroom was always kept available in case Dixon needed it. Section 92 was the most famous provision in the Constitution, at least until recently – it is probably now s 44.²

Dixon's diaries reveal a man who worked night after night. There was no wine at his

* Judge of Appeal; Supreme Court of New South Wales. I am grateful to the National Archives of Australia and Mr Tom Danby for permission to reproduce the letters between Dixon and Lord Casey mentioned in this speech.

1 According to his former Associate, Richard Searby: see P Ayres, *Owen Dixon*, Melbourne University Press, 2003, p 260.

2 Speech at the launch of *Jesting Pilate* (3rd ed), Banco Court, Sydney, 31 July 2019.

dinner table. There is little evidence of any regard for popular literature still less cinema. But it should not be thought that he lacked humour. One example is a Queensland appeal from 1956.³ The Queensland Literature Board of Review had determined that certain periodicals were “objectionable” because they unduly emphasised matters of sex, and one judge had said that they were also likely to be injurious to morality. The titles of the periodicals were “Real Love”, “Romance Story”, “Real Story”, “Real Romances” and “Love Experiences”.

The judgment is of Dixon CJ, Kitto and Taylor JJ, but it is surely written by Sir Owen. It contains this passage, which recalls what occasionally happens in appellate courts today, when the appellant is reluctant to get into the detail of the evidence.

In the present case it happened that owing to the course the argument took in this Court we did not turn to the actual publications in question until we had listened to a discussion of the Act, the judgments of the Supreme Court, and parts of the evidence, where the terms that are commonly employed with reference to impure literature constantly recur, obscenity, tendency to deprave, to corrupt, to encourage depravity, matters of sex, injurious to morality, moral debasement and so on. When we did turn to the publications their actual character proved quite unexpected and produced almost a sense of contrast. The theme of them all nearly is love, courtship and marriage. Virtue never falters and right triumphs. Matrimony is the proper end and if you are not told that happiness ensues it is the constant assumption. They are, of course, intended for feminine readers.

...

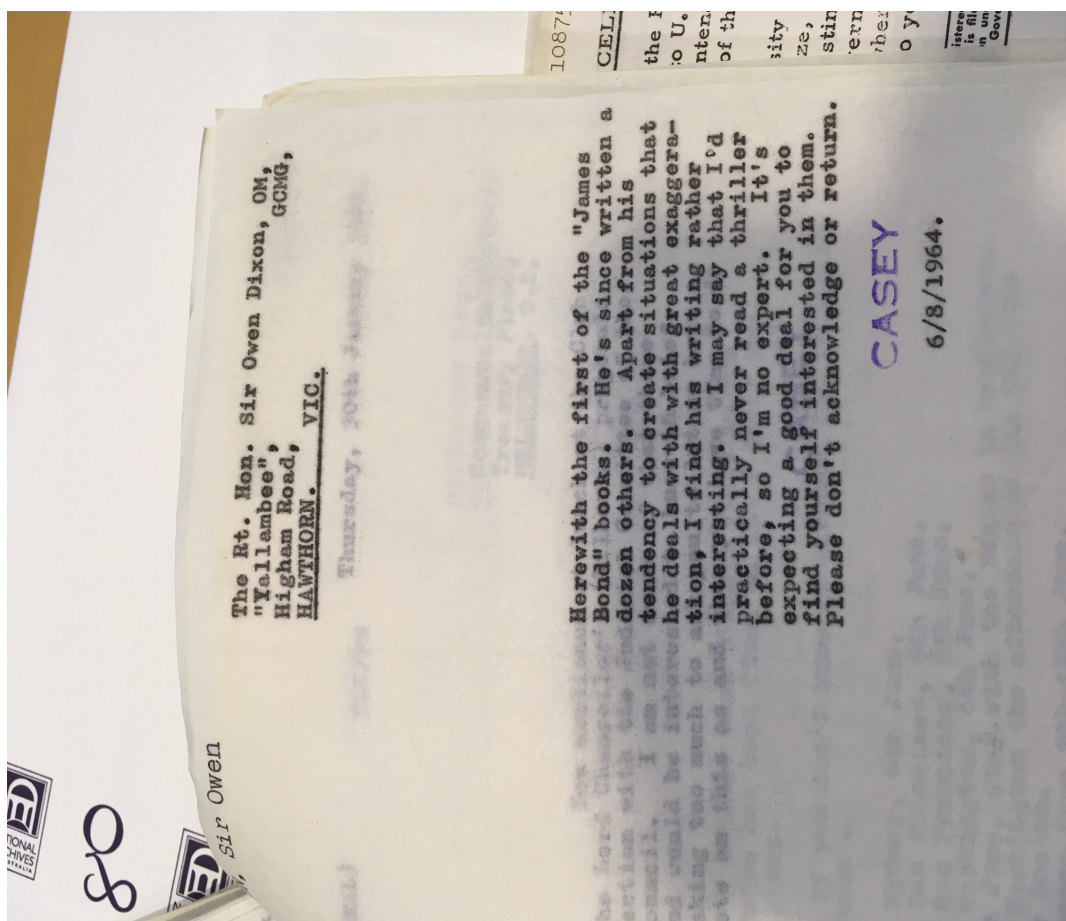
The stories and the pictures bear every mark of American origin. The drug store and the campus may be the place of meeting and the scenes through which the story takes the lovers thence are American and so is the idiom of the simple speech in which it is told. The whole atmosphere resembles that of the American cinema. The reason why these otherwise virtuous narratives have been held unduly to emphasise matters of sex and to be likely to be injurious to morality is because again and again they depict or describe love scenes in which the parties kiss and embrace and display an ardent passion one for another.

This does not appear to us to be within the range of any reasonable application of what is meant, in the definition of “objectionable”, by the phrases “unduly emphasises matters of sex” and “likely to be injurious to morality”. ... [P]ublications of the kind here in question seem to be quite outside its scope. What they contain is an affront to the intelligence of the reader but hardly a real threat to her morals. The stories are extremely silly, the letter press is stupid, the drawings are artless and crude and the situations are absurd. But we are not concerned with the damage done to the intellect or for that matter to the eyesight of the readers of these foolish periodicals.

The appeal was heard in Brisbane over what must have seemed like three very long days,

³ *Transport Publishing Co Pty Ltd v Literature Board of Review* (1956) 99 CLR 111 at 117-118.

but handed down in Sydney in November 1956. It is likely that Dixon was staying in this Club when judgment was delivered. It is just possible that it may have been with this in mind that Lord Casey sent him a copy of a not dissimilar work, although not confined to feminine readers, Ian Fleming's "Casino Royale". It is far more likely that no one has looked at Casey's note since it was deposited in the National Archives in Melbourne half a century ago.⁴



The lawyers in this room have a special relationship with Dixon's words. It would be an unusual week indeed that I did not read his judgments, doing so because one litigant or another said that those words, written 60, 70, 80 or even 93 years ago, controlled or ought to control the outcome of an appeal. As Chief Justice Bathurst said at a memorial service last night,⁵ the words of some lawyers live on in their judgments after they have left the world. So it is with Dixon.

I mean precisely 93 years ago. Dixon was appointed as an Acting Judge of the Supreme

⁴ M1129 DIXON/O (National Archives of Australia, Melbourne, 31500483).

⁵ For the Hon David Hunt, a judge of the Supreme Court of New South Wales 1976 – 1998.

Court of Victoria in 1926, and sat for 5 months from 22 July until the end of that year.⁶ Only a small minority of courts' judgments are reported, because they have value beyond resolving the particular case. Ordinarily the neophyte judge takes a little while to start writing judgments, let alone reportable judgments. Not so Dixon. Looking at the relevant volume of the Victorian Reports for the second half of 1926, there are 160 pages of first instance judgments.⁷ No less than 79 of those pages are judgments of Acting Justice Dixon. *Half* of the pages are the words of the newest judge. There were in fact six other judges, sitting full time and deciding cases, all of whom were immensely senior to Dixon. There is nothing like this anywhere in the Australian law reports, or in the common law world, so far as I am aware. And some of those judgments – notably *McKenzie v McDonald*⁸ on the law of agency and fiduciary obligations – have enjoyed a lasting influence. It was cited earlier this year in the Commercial Court in London,⁹ and in 2017 by the Court of Appeal of England and Wales.¹⁰ Australian judgments, even those of the High Court, are rarely cited in the United Kingdom. Still less judgments at first instance.

They do not read as the judgments of a neophyte judge. Dixon's careful attention to the law and facts is quite different from the judgments of the other members of that Court. So too, when he became a judge of the High Court a few years later, his judgments remarkably changed the style of the court. Time and time again, one sees the same appeal decided in the same way in one or two or three pages by Sir Frank Gavan Duffy and Sir George Rich, but with Dixon reaching the same conclusion much more carefully and with a close attention to all aspects of the problem in 20 or 30 pages.

We lawyers know the famous judgments. One aspect of Dixon's legacy is the way he wrote the large majority of judgments, which are of primary concern to the parties alone, and may not have been well argued. He heard the case *Nagrint v The Ship Regis* in late 1938.¹¹ On 13 February, the brand new 30 ton launch “Rodney”, built in Lavender Bay, capsized with passengers watching the departing US cruiser, the *Louisville*.¹² Miss Lorna Nagrint of Rockdale was a passenger. She said that it was negligently navigated causing it to capsize. She ended up in the water, and claimed £400 for damage to herself and her

6 See P Ayres, *Owen Dixon*, Melbourne University Press, 2003, p 48.

7 See [1926] VLR pp 369-569, excluding appellate judgments. Ayres undertakes a similar analysis by number of judgments rather than pages; the result is the same.

8 [1927] VLR 134.

9 *Marme Inversiones 2007 SL v Natwest Markets Plc & Ors* [2019] EWHC 366 at [413].

10 *UBS AG (London Branch) & Anor v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567 at [90].

11 (1939) 61 CLR 688. It was a trial in the original jurisdiction of the High Court.

12 See Sydney Morning Herald, 14 February 1938, “Harbour Disaster”, p 12.

clothes. The ship's owner denied there was jurisdiction in admiralty. Dixon J's judgment grapples with some of the most difficult legal questions imaginable – whether the High Court was a colonial court of admiralty, the nature of admiralty jurisdiction as at 1890 (because an imperial Act required him to do so), whether a claim for personal injury was a claim in admiralty, and whether a federal law applied assuming it was valid. It is heavy reading for lawyers – but illustrates an approach of attending to and engaging with all aspects of the problem, even in an unprepossessing case, and even in 1939. The American cruiser was a presage of what was to come.

In the last two months, there have been two books published about Dixon. One is a collection of essays, *Sir Owen Dixon's Legacy*. Chief Justice Kiefel wrote in her foreword that “It is one thing to acknowledge Sir Owen Dixon as a great jurist. It is another to comprehend the breadth and depth of his influence on our law”.¹³ The essays attempt to do just that. The other is a reprint of his selected papers, known enigmatically as *Jesting Pilate*. It is the third edition.¹⁴ The first and second editions have long been unobtainable. It has been edited by two former Justices of the High Court. How many books of papers by Australians have been republished, twice, by such distinguished editors? As well as substantial appreciations, they have unearthed unpublished writings, including a paper on Roosevelt, which reflects the personal relations between the men – a matter to which I shall return.

In no small measure, law is backwards-looking. One litigant – and sometimes both – will say that they should win because something analogous had been determined by some other court years ago in the past. Thus law gains a measure of certainty, whilst retaining a suppleness for future development. And thus litigants and their lawyers and the judges who decide their disputes are taken back, time and again, to Dixon's judgments. This constant close reading of a man who sought precision but disdained plain English let alone short sentences, paragraphing and subheadings creates a relationship not dissimilar from that between author and reader. Dixon does not read easily. He is difficult and requires time and effort. Think of Patrick White, rather than Austen or Trollope. He is constantly looking ahead to the next problem, or qualifying the general proposition, because he has looked hard at the problem. His sentences are long and difficult, because the facts and the law are not simple.

¹³ J Eldrige and T Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press 2019), p vii.

¹⁴ S Crennan and W Gummow (eds), *Jesting Pilate And Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (Federation Press 2019).

But far too commonly, when lawyers are invited to a convivial gathering, does their profession dominate the conversation. Let me turn to what is less well known – Dixon the non-lawyer.

Dixon wrote – in the essay titled “Jesting Pilate” - that he presided over “more than one body whose purposes were as antithetical to those of the courts as could be imagined”. He chaired the Central Wool Committee – the body charged with selling Australia's largest export, the annual woolclip – in the 1930s. His biographer records that by 1942, it was hard to overstate the degree to which Dixon was now being kept informed about the most secret aspects of the war effort.¹⁵ Shortly thereafter he was despatched to the United States, as Minister, of which more later. He attempted to mediate the dispute between India and Pakistan over Kashmir. Sadly, he failed at the latter, but was held in the highest regard. Mountbatten told Sir Richard Casey that Dixon was “about the only individual who would be acceptable to Nehru as an arbitrator in the Kashmir problem”.¹⁶ Nehru and Dixon were familiar enough to discuss the quality of the United States Supreme Court, as may be seen on his letter to Lord Casey which I have circulated.¹⁷ Highly characteristically, it ranges widely – from a question of the construction of the United Nations Charter, to the quality of the United States courts, the qualities of Learned Hand, and the etymology of copper – did copper come from Cyprus or vice versa?

But let me return to the year after Miss Nagrint was rescued from Sydney Harbour. Menzies announced Australia was at war. The second Australian Imperial Force – we call it the AIF but the word “Imperial” is revealing – was to fight overseas. Shortly after being appointed, Blamey wished to ensure that the Australian government retained command of the “AIF”. Blamey went to Edmund Herring, who led Australian forces in Africa and later in New Guinea. Herring was a good choice – he was a barrister who later became a distinguished Chief Justice of Victoria. Herring passed the request on to Dixon. We know from Dixon's diary entry for Sunday 14 January 1940, that he worked on the problem and advised how to do so (the lawyers may be interested to know that it was by an exercise of prerogative power by an Order in Council as opposed to under Statutory Regulations). He saw his former pupil Menzies, with Blamey and Herring the following day, and his proposal was adopted.

¹⁵ Ayres p 135.

¹⁶ Ayres, p 217 (Casey diary 27 November 1951).

¹⁷ It is also contained in M1129 DIXON/O (National Archives of Australia, Melbourne, 31500483).

That small piece of legal work may have had large consequences. It gave Curtin legal authority to withdraw the 2nd AIF closer to home after Pearl Harbour. The first major battle of the war in the Pacific in which Allied forces defeated Japanese land forces was Milne Bay in August 1942. I do not wish to downplay the fighting on Kokoda – where there were war correspondents – but Milne Bay was first, despite being less well known.¹⁸ Those troops had been reinforced by veterans from the 2nd AIF, withdrawn by Curtin pursuant to the structure proposed by Blamey and established by Dixon. They might not have been there but for Dixon's work in January 1940. They had been sent there because of Allied success in decrypting Japanese signals, another subject less well known than it ought to be, and with an Australian connection too, but that strays beyond tonight's topic.

Dixon was also trusted by Curtin. He was appointed Minister to the United States in 1942, apparently without the knowledge of Evatt.¹⁹ To my mind that speaks volumes – there could be no more important Australian diplomatic mission in 1942, to which Curtin appointed Dixon without consulting his unpredictable Minister for External Affairs. In the United States he dealt directly with the decision makers. He had enormous difficulties. This was before Alamein, before Milne Bay and Kokoda, when Australian forces had fled Darwin and thousands further north had been captured by the Japanese. And was Australia a separate country in any event? Its soldiers fought in the “Australian Imperial Force”. We lawyers know that the *Statute of Westminster* was only adopted by Australia in October 1942. Dixon understood, as a primary participant on the international stage, the reality of Australia's nascent nationhood.

Dixon's diary records a momentous meeting with General George Marshall, of Marshall Plan fame, on 3 July 1942:²⁰

at one stage the Australian Government had nearly destroyed Australia because they had said publicly that the Japanese forces had congregated in the Marshall Islands, “a thing known only through breaking the Jap cypher as the Japs must have been aware”. Repeatedly the Australian Government had broken secrecy and he was very frightened of them, knowing he could not tell them anything with safety.

Astonishingly, before saying these things, Marshall insisted upon a promise that Australia's Minister would not tell his government. It is plain from many accounts, not merely that remarkable afternoon, that Dixon gained the respect and trust of the highest decision

¹⁸ See for example <https://www.abc.net.au/radio/programs/worldtoday/lachlan-grant-kokoda-australian-war-memorial-museum/8842766>. Contrast the *Oxford Companion to Australian Military History* (2nd ed 2008), which has no separate entry for Milne Bay.

¹⁹ See Watt, *Australian Diplomat* p 51, cited by Ayres at p 136.

²⁰ Reproduced in Ayres, p 147.

makers here and abroad.

I have drawn heavily on his diary. It is in the National Library in Canberra. We know much of the man's activities from it. It is nothing like Virginia Woolf's. It is terse, factual – Aristotelian in fact. His associate James Merralls said that Dixon had read all of Aristotle's surviving works, in the original Greek.²¹ Indeed in December 1942 he gave a learned talk at the Lawyers' Club in New York on judicial power and how unitary notions formed in England had been applied in federations in more modern times, commencing with Aristotle.²² It is difficult to know how it went down in 1942. It illustrates the breadth of a man who knew and dealt with the leaders and also the most important decision-makers in the English speaking world. It was, perhaps, a time of elites – but even so, Dixon shone amongst them.

Dixon would not have enjoyed this evening, if he had been with us. He was a lifelong teetotaler. His father was an alcoholic, and he kept a vow made to his mother that he would not drink. He did not seek attention. When he lunched with Roosevelt and Hopkins, he made sure to enter and leave through the back gate, unattended by the press who ensured Evatt's meeting had been well reported.²³ He was hard-working and close to austere – indeed, a fatalist. The work closest to his soul was Aeschylus' Agamemnon.²⁴ There is nothing in what I have read to suggest he had any interest in antiques or objets d'art.

“What is truth?”, said jesting Pilate, and would not stay for an answer. Thus Francis Bacon commenced his essay “On Truth”, 400 years ago. Bacon assumed the lines from St John's Gospel were familiar to all readers. Bacon challenged the reader to think that there was an answer, but that Pilate did not want to hear it, before pronouncing judgment. It says much of the man that Dixon assumed his listeners knew their Bacon. Dixon believed in hearing the argument in full, and for the most part thinking about it further. He said that after every hearing, a judge has a choice: to decide the case, or to decide it correctly. His judgments are thoughtful, penetrating, and grapple with the entirety of the dispute. They continue to speak to disputes in the 21st century.

21 See *Jesting Pilate* (3rd ed 2019), p 45.

22 The paper was unpublished until a couple of months ago: see now *Jesting Pilate* (3rd ed) at 225.

23 Interview of Sir Peter Heydon by Mel Pratt, part of the NLA oral history project, available at <http://nla.gov.au/nla.obj-221544977/listen>. I am grateful to the Hon J D Heydon AC for the reference.

24 According to James Merralls, n 21 above.

He was one of the greatest Australians our country has produced. He rose to pre-eminence in a very Australian way, through talent and hard work. It is right that we should dine tonight in his honour.

HIGH COURT OF AUSTRALIA.

CHIEF JUSTICE'S CHAMBERS

27th January, 1953.

My dear Casey,

Many thanks for the copy of your diary from 10th October to 17th November last which I now return.

I read it with very great interest indeed.

There is one matter to which importance seems to have been attached, in reference to South Africa's objection, on which I have a comment to make. I see that the view appears to have been accepted generally that Art.2(7) of the United Nations' Charter forbidding intervention in matters of domestic jurisdiction is in conflict with Art.1.(3) and (4) which make it an object of U.N.O. to achieve among other things racial freedom. Even Dean Acheson acquiesced as I gather in this view. But I think that it is wrong and that Art.2(7) is designedly framed to make any conflict between it and other clauses impossible. For it is expressed as an overriding provision, - "Nothing contained in the present charter shall authorize etc.". If Art.1(3) and (4) standing by themselves would, in any given case, as for example in the case of the present South African question, result in the U.N. intervening in a matter essentially within the domestic jurisdiction of a State (South Africa), Art.2(7) says that nevertheless no such operation is to be given to Art.1.(3) and (4). In other words, from the general operation which any and every clause of the charter might otherwise have, matters of domestic jurisdiction are specially withdrawn by Art.2(7).

I noticed one or two points having no bearing on international affairs that you mention because they seem to have interested you in passing and they may still be worth mentioning.

You refer to the quality of the U.S. Supreme Court. Its loss of prestige is a warning against the appointment of men as judges who have not made a high place for themselves as technical experts in their own profession. When I came to the

2.

But the decisions of the U.S. Supreme Court were studied and discussed with the greatest respect in our High Court as a source of guidance in our problems. I still continue the practice of reading the reports of their decisions and of course it is not unprofitable to do so: for the judges are by no means all bad. But throughout the English speaking world the Court has now lost all authority and rightly so. Many of the men are just no good and in any case there is no confidence in their integrity of mind. In the circumstances the appointment of Vinson was a tragedy, not to say a crime. Although directly the fact that the prestige of the Court has gone has no bearing on the foreign relations of the United States, indirectly it operates as a factor against the acceptance of American leadership. Nehru, for instance, understands all th

You mention the name Learned Hand. He was appointed thirty years ago to the circuit court of appeals (the federal appellate court) for New York and made an immense reputation. He was said to be the best lawyer and greatest judge the U.S. has produced in two generations. But all efforts to get him to the Supreme Court in Washington failed, presumably because the White House liked political judges better.

There are two questions of names or words in the diary. One relates to "Menon". In India this name is, I believe, as common as Jones or Smith with us, but it does happen that it occurs in ancient history. There was for instance a general from Thessaly of that name in the army of Alexander the Great.

The other word is "Cuprum". This Latin word comes from Cyprus, not vice versa. Copper was in Roman classical times the metal from Cyprus. The Department of Archaeology in the University of Sydney has maintained a special interest in Cyprus because a member of their staff was concerned in excavation and research there. Do they know anything of the investigations you caused the C.S.I.R.O. to make?

With kind regards,

Yours sincerely,

The Right Honourable R.G. Casey, C.H.,
Minister of External Affairs,
159, Gipps Street,
EAST MELBOURNE.

