

Jesting Pilate and other Papers and Addresses by the Right Honourable Sir OWEN DIXON, O.M., G.C.M.G., D.C.L. (Hon.) Oxon., LL.D. (Hon.) Harv., LL.D. (Hon.) Melb., LL.D., (Hon.) A.N.U., a Justice of the High Court of Australia 1929-52; Chief Justice 1952-63; Collected by His Honour Judge WOJNARSKI, M.A., LL.D. (Melb.).

Judge Woinarski has placed the legal profession in particular in his debt for selecting and arranging for publication papers and addresses of Sir Owen Dixon during the years when he graced the High Court bench. This attractively bound volume gets its title *Jesting Pilate* from the first of the papers which appropriately enough is much concerned with the search for truth.

The author of these papers agreed with reluctance to their publication, but in the end their selection for publication had his approval. No doubt his real work and outstanding contributions to legal thought and development must be sought in the pages of the law reports but much of his massive learning, wisdom and experience shines through this collection of his extra-curial papers and addresses, which we could have ill afforded to let lie scattered in a variety of publications.

Of Sir Owen Dixon it may truly be said that in his own lifetime he has been accepted, both at home and abroad, as a legend. His contributions to the subject of his chosen profession have not been surpassed in his generation, and this has been fully recognized by that most critical of the professions. In formal recognition of his services to the law the highest honours have been conferred upon him not only in his own country but in England and the United States as well, culminating in what for a lawyer must surely be the supreme distinction of the Order of Merit bestowed by his Sovereign.

Jesting Pilate contains some 29 occasional papers and addresses. Inevitably in the circumstances there is some repetition, but covering as they do views expressed over a period of some twenty years or more the very consistency in such views proves how firmly they were held.

Words of praise for such an author may seem out of place, but a reviewer is entitled to his privileges. As to be expected each of the papers is scholarly and wise, revealing what he admired in George Adlington Syme (page 1)—‘a strong and active mind accustomed to definite thought precisely expressed’. The characteristic Dixonian style stamps these papers from first to last. To get full value from them, they must be read, re-read, and read again, for in precise expression much thought is compressed and there is so much ore to be mined.

I would think that Dixon took personal delight in the address which he gave upon receiving the degree of Doctor of Laws from his old University in 1959 (page 188). This provided an occasion for him to repay his debt to two men to whom he owed much. The one was Tucker—the great classical scholar; the other Harrison Moore—that great and beloved law teacher. To the one can be traced a lifelong love of the classics and all this entails not least, the strength, precision and subtlety of Dixon’s prose; to the other, a love and profound grasp of common law principles, and a lively interest in constitutional and legal development.

Naturally enough most of these collected papers are concerned with things of the law, although some of the papers show how far his interests ranged beyond that field. The more absorbing, I think, contain the author’s tributes to the achievements and characters of great men—not necessarily lawyers. From his life in the United States, as Australian Minister to Washington in the war years, the author took away vivid personal im-

pressions of Roosevelt and his remarkable confidant Harry Hopkins. Each of them had borne with fortitude prolonged physical suffering, so it seemed not unnatural that Dixon conveyed his personal impressions of each of them, with penetrating observations on their lives, in an address to the Royal Australian College of Physicians (page 135).

His unfeigned admiration and affection for Mr Justice Frankfurter has yielded a striking tribute (page 180) which incidentally evidences the close attention which he paid to anything that fell from that great judge. That this admiration was mutual, I can bear personal testimony. When some years ago I paid the Supreme Court at Washington a fleeting visit, reluctant court officials denied me an interview with Frankfurter without an appointment. They agreed, however, to take to him a note from me which said 'Dixon says I'm not to come back home if I don't see you'. In an instant, the great man came scurrying down the corridors—'You've used the magic word'—and all was well. Many a shrewd, albeit brief, observation about judges of the past emerged on the memorable occasion of Sir Owen's retirement from the office of Chief Justice (page 255). It is not in Dixon's nature to be uncritical where criticism is called for. In his paper in praise of the search for truth, and the need for the most careful inquiry and investigation in judicial work, the author said of an earlier High Court bench (page 5): 'No very profound study of the court as I first saw it was necessary to teach the lesson that the real weakness of powerful and confident minds strengthened by dialectical gifts and at the same time accustomed to the responsibility of decision lies in the tendency to write their way to a conclusion rather than to stop to inquire.

A recurring theme in many of the addresses is the decisive role played by the advocate in the due administration of justice. In his address, when first taking his seat as Chief Justice, in Melbourne (page 250) Dixon said 'For my part I have never wavered in the view that the honourable practice of the profession of advocacy affords the greatest opportunity of contributing to the administration of justice according to law. There is no work in the law which admits of a greater contribution' and then upon a similar occasion in Perth (page 252): 'The dependency, in our system of justice, of the bench upon the bar can hardly be exaggerated.' There follows in this address a striking tribute to the help which he had, in every case without exception, received from the bar. Many of the papers give wise advice to counsel in the practice of advocacy (*e.g.* pages 131-34)—not least perhaps that 'good advocacy avoids the error of underrating any tribunal however high' (page 12).

In a notable paper delivered at Yale on the occasion of his receiving the Henry E. Howland Prize (page 152) he discusses judicial method—the processes of judicial reasoning leading to decision. Development of the law to meet the changing needs of a modern society is the mark of a great judge, but such development may be achieved by differing methods. The legal realist 'discontented with a result held to flow from a long accepted legal principle' is ready 'deliberately to abandon the principle in the name of justice or of social convenience'. The deliberate judicial innovator is clearly anathema to Dixon for to him it is 'basal' that the correctness or incorrectness of the judgments of a court must be ascertained according to an external standard, not one personal to the judges themselves. In the application of the traditional common law method of 'strict logic and high technique rooted in the Inns of Court, rooted in the year books, rooted in the centuries' he achieved 'the combined purposes of developing the law, maintaining its continuity and pre-

servicing its coherence'. Dixon frankly confessed to being a legalist. In his address upon taking the oath of office as Chief Justice (page 247) he announced 'It may be thought that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safe guide to judicial decisions in great conflicts than a strict and complete legalism'. Legalism rather suggests slavish adherence to established rules however outdated, absurd or unjust with inevitable obstruction to all legal development. But not so for Dixon. For him the common law was no mere collection of arid inflexible principles and rules to be applied mechanically and regardless of consequences, but a unified, living and flexible system inherently capable, for the most part, of providing just solutions to any problem arising from the changing conditions of the modern world. As a penetrating observer has said, 'In the Dixon judgments, rules and concepts never operate mechanically. He cuts through literal legalism and circuitous legal fiction to seek a concept's underlying (and sometimes quite buried) significance'.¹ A profound knowledge of the law and legal history, a unique grasp of legal principles with the ability to perceive what is fundamental and what unessential combined with an acute and powerful intellect, an unquenchable thirst for truth and an instinct for justice, do much to explain Dixon's masterly achievements in at once developing the law in striking fashion, and preserving unimpaired the continuity and coherence of the *corpus juris* which came into his keeping.

Many practitioners, judges and counsel alike, oppressed by the complexities of the law have been tempted 'to stand no nonsense from the facts'. Dixon's complete mastery of the law serves perhaps to explain his concern to emphasize so often that the elucidation of the facts in the particular case is the major difficulty in decision, and his continuing interest in the problems so raised. On this topic the first three of the papers will repay close study.

Sir Edward Coke once said (page 25): 'Our students will observe that the knowledge of the law is like a deep well out of which each man draweth according to the strength of his understanding. He that reacheth deepest, he seeth the amiable and admirable secrets of the law.' Only one who had reached 'the deepest' could have discovered the 'amiable and admirable secrets' disclosed to us in the paper *The Law and the Constitution* (page 38), in which the three apparently irreconcilable juristic conceptions—the supremacy of the law; the supremacy of the Crown and the supremacy of Parliament—are reconciled and the common law seen as the ultimate constitutional foundation. See too the paper commencing at page 203. As related to the thesis maintained in these papers and to his analysis of our Federal Constitution, the author more than once advances the suggestion that the courts of justice throughout Australia should be 'independent organs . . . neither Commonwealth nor State' on the ground that, as the basis of our Federal system is the supremacy of the common law, the courts administering the law 'should all derive an independent existence and authority from the Constitution' (page 53, see too page 201).

A subject of perennial interest to the author, intensified no doubt by his American experience and developed in some half dozen or so of the papers, concerns the two constitutions—Australian and American—their points of resemblance and, more significantly, their points of divergence. The full implications to be drawn from the circumstances that the American Constitutions were a new beginning grounded 'in the will of the people', whereas the Australian Constitution derived from an Act of the British

¹ A. R. Blackshield in *Sydney Morning Herald*.

Parliament whose authority in turn derived from an antecedently existing common law, await perhaps the genius of another Dixon for exposition. In his address delivered at Harvard on the occasion of the bicentenary of Chief Justice Marshall (page 166), the author, in the course of a generous tribute to that great American judge and his influence on Australian constitutional interpretation, has provided an interesting study in the exposition of our constitution by the High Court in its earlier years.

The technique of a master steeped in legal history is well exemplified in the papers 'A Legacy of Hadfield, M'Naghten and Maclean' (page 214) and 'The Development of the Law of Homicide' (page 59). In the former—an essay on the law of insanity—he by his researches has shown that M'Naghten's case, which is responsible for much deserved criticism of the legal tests of insanity, had the unforeseen result of imprisoning the common law in a formula and depriving it of an antecedent flexibility which could have done much to meet such criticism. In the second of these papers he has demonstrated in scholarly fashion the weakness of the judicial reasoning in the famous *Woolmington case*² but concludes significantly 'We should be grateful for it and not inquire too closely whether it was reached by the trodden paths of the law'. *De Facto Officers* (page 229) is another paper which displays characteristic depth of learning and research embracing English, American, New Zealand, and Australian decisions, over many centuries.

In lighter vein there is the whimsical paper on Sir Roger Scatcherd's will in Anthony Trollope's *Doctor Thorne* (page 71). The interpretation of that will provided a legal puzzle, uncovered by authority, and involved basic principles in the law of wills.

For a happy ending to the novel a particular interpretation was essential. Fortunately four leading counsel unanimously confirmed that interpretation. With this, most readers would have been content to let things be. No so Dixon. With characteristic ingenuity and a display of legal virtuosity, aided by two centuries of case law, he proved how wrong leading counsel can be. Had counsel given a different opinion and so shattered the happiness of Dr Thorne's beloved niece, one suspects that Dixon would, no less convincingly, have exposed their error.

The foregoing selection of topics from these collected papers fails to do justice to the wider interests of the author evidenced by other papers dealing with lawyers' professional etiquette, the functions and obligations of other professions, and problems in administration and international relations. Last, however, but not least, these collected papers show abundantly that lofty thought and true wit are not ill wedded companions.

While, for the time being, we must be grateful for the publication of this collection, is it too much to hope that, as a more enduring memorial to a judge and jurist unsurpassed in his generation, we shall ere long welcome an edited selection of those great judgments upon which his reputation so securely rests?

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Human Law and Human Justice, by JULIUS STONE (Maitland Publications Pty. Ltd., Sydney, 1965), pp. i-xxiii, 1-415. Price \$8.00.

Professor Stone, who twenty years ago published a major survey of the whole field of jurisprudence, under the title *The Province and Function of Law*, has now returned to the task which he then set himself and

² (1935) A.C. 462.

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