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THE

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CASES DETERMINED IN THE

HIGH COURT OF AUSTRALIA

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JUSTICES OF THE HIGH COURT
OF AUSTRALIA

DURING THE CURRENCY OF THIS VOLUME

THE RIGHT HONOURABLE SIR GARFIELD EDWARD JOHN BARWICK,
G.C.M.G., CHIEF JUSTICE.

THE RIGHT HONOURABLE SIR EDWARD ALOYSIUS McTIERNAN, K.B.E.

THE RIGHT HONOURABLE SIR DOUGLAS IAN MENZIES, K.B.E.

THE RIGHT HONOURABLE SIR WILLIAM JOHN VICTOR WINDEYER,
K.B.E., C.B., D.S.O. (retired 29th February 1972).

THE RIGHT HONOURABLE SIR WILLIAM FRANCIS LANGER OWEN,
K.B.E. (died 31st March 1972).

THE RIGHT HONOURABLE SIR CYRIL AMBROSE WALSH, K.B.E.

THE RIGHT HONOURABLE SIR HARRY TALBOT GIBBS, K.B.E.

THE HONOURABLE SIR NINIAN MARTIN STEPHEN, K.B.E. (from 1st
March 1972).

ATTORNEY-GENERAL :

SENATOR THE HONOURABLE IVOR JOHN GREENWOOD, Q.C.

MEMORANDA

1972

- February 4 —THE HONOURABLE SIR HARRY GIBBS, K.B.E., was appointed a Member of Her Majesty's Most Honourable Privy Council.
- February 29—Resignation of THE RIGHT HONOURABLE SIR WILLIAM JOHN VICTOR WINDEYER, K.B.E., C.B., D.S.O. of the office of a Justice of the High Court of Australia.
- March 1 —Appointment of THE HONOURABLE MR. JUSTICE NINIAN MARTIN STEPHEN, a Judge of the Supreme Court of Victoria, to the office of a Justice of the High Court of Australia.
- March 31 —Death of SIR WILLIAM FRANCIS LANGER OWEN, K.B.E., a Justice of the High Court of Australia.
- April 20 —THE HONOURABLE NINIAN MARTIN STEPHEN, one of the Justices of the High Court of Australia, was appointed a Knight Commander of the Most Excellent Order of the British Empire.

THE LATE SIR OWEN DIXON

On 25th July 1972, at a sitting of the Full High Court at Melbourne, BARWICK C.J. said :

We are assembled here in Melbourne this morning as the Court to pay our tribute to my great predecessor in the office of Chief Justice of Australia, the late SIR OWEN DIXON. We are very pleased that Sir Victor Windeyer has been able to be present and that Sir Henry Winneke, Chief Justice of Victoria, has paid Sir Owen's memory and us the compliment of sitting with us this morning. The Attorney-General of the Commonwealth is present. Judges of the Supreme Court of Victoria have attended. The Solicitor-General of Victoria, representing the Attorney-General who is unable to be present and who has sent his regrets, the President of the Law Council of Australia, the Chairman of the Australian Bar Association, the Chairman of the Bar Council of Victoria and the Chairman of the Law Society of Victoria are also present. We welcome their attendance and that of so many of both branches of the legal profession. We are also pleased that SIR OWEN's family is represented here by his daughters, Mrs. Danby and Mrs. Reid. I should also mention that Mr. Gregory, who is acting as attendant in the Court this morning, was assistant to SIR OWEN for a number of years. The presence of all these people adds great emphasis to the tribute which I shall make on behalf of the Court.

SIR OWEN DIXON was a Justice of this Court for some twenty-three years from 1929 to 1952 before being appointed, in the latter year, Chief Justice, which office he occupied for twelve years, retiring on 13th April 1964. That span of thirty-five years was notable in the history of Australia and in that time SIR OWEN played a remarkable part in that history, as judge, diplomat and administrator. But principally SIR OWEN devoted his life to the law and it is of his career as a lawyer that we chiefly think this morning.

SIR OWEN was born in Hawthorn, Victoria, on 28th April 1886. He was the son of J. W. Dixon, a solicitor of the Supreme Court of Victoria. He was educated at Hawthorn College and thereafter at the University of Melbourne. He first studied classical languages and literature under Professor Tucker taking his Bachelor's degree in Arts in 1906 and his Master's degree in 1909. This study of the classics had a profound effect upon him. All his work as a judge was marked by habits of scholarship in no small part derived from

these early studies, though undoubtedly the natural bent of his mind was scholarly. He habitually exhibited what he called "the scholar's instinct to verify". As well, his scholarship is seen in his mastery of prose and expression. In a paper entitled "The Teaching of Classics and the Law" delivered by him in 1963 to the Classical Association of Victoria, of which he was a foundation member, he said—"... whatever else may be the result of a classical training, it does implant what is a very useful thing in the law—a fear of error, a fear which leads a man to verify his references and his recollection". Throughout his life he retained his interest in the classics, and their influence upon him continued. In his tribute to Sir Wilfred Fullagar upon Sir Wilfred's death in 1961, recorded in volume 103 of the *Commonwealth Law Reports*, will be found SIR OWEN'S OWN view of the enrichment of the mind which he regarded as coming from classical scholarship. Our generation has radically changed educational curricula. It remains yet to be seen whether the changed methods, given equal intellectual capacity and inclination, will produce as rich a mind as that which SIR OWEN developed over the long years of his life and experience.

After taking his Bachelor's degree in Arts, SIR OWEN turned to the study of the law. In 1908 he obtained his degree as Bachelor of Laws. He was called to the Victorian Bar on 13th June 1910. He very soon developed a very considerable practice, rising rapidly in the estimation of solicitors, of his contemporaries at the Bar and of the Judiciary, both of the Supreme Court of Victoria and of the High Court of Australia, because of his evident skill and capacity. In his speech of farewell to SIR OWEN on his retirement from the office of Chief Justice, Sir Robert Menzies, who had been SIR OWEN'S first pupil and had practised with him over the years, addressing his Honour, said of SIR OWEN'S career at the Bar: "I had the great pleasure of knowing your Honour at the Bar and . . . those who are of a newer generation will, I think, never quite understand the absolute dominance that your Honour exercised at the Bar. Even at the Bar you were not only a point of reference but also a voice of authority. To appear with you was a liberal education; to appear against you was calculated to reduce any normal human being like me to the depths of despair." SIR OWEN was a most skilful advocate, able to employ the art and skill of the advocate against the background of, and with the inestimable advantage of, a lawyer's knowledge of the relevant law. By 1922, a bare twelve years from his admission SIR OWEN'S practice had grown to the point where he

was ready for silk. Accordingly on 2nd March 1922 he was appointed King's Counsel. In the following two years, 1922-1923, and 1924, Sir Owen appeared before the Judicial Committee of the Privy Council in London. For six months from 21st July 1926 he acted as a Judge of the Supreme Court of Victoria, returning to practice in the year of 1927. But he was not destined to practise at the Bar for much longer. On 4th February 1929 SIR OWEN was appointed a Justice of this Court upon the death of the Honourable Mr. Justice Henry Bournes Higgins. He had practised for a little more than eighteen years. In that time he had appeared with great frequency in all jurisdictions in Victoria, in the High Court of Australia and, as well, in the Privy Council. He was the acknowledged leader of the Bar, its outstanding lawyer and its greatest advocate. He enjoyed practice and was loath to leave it. In responding to the farewell speech on his retirement Sir Owen said : "The work at the Bar I did for some years and enjoyed it. It is work which at all events to the young—and I was young—is extremely enjoyable. You think you are really doing some good in the world when you win a case, even when you are told you ought not to have won." When acknowledging the Victorian Bar's welcome on his appointment as Chief Justice, SIR OWEN had 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 administering of justice according to law." In this spirit he practised and succeeded. He was not anxious to leave practice to accept a permanent seat on the Bench. In Sir John Latham's presence he publicly recalled that Sir John as Attorney-General of the Commonwealth had had to plead with him to accept an appointment to this Court. When he retired SIR OWEN said that he came on the Bench because he was told he ought and that he was going off because he believed he ought.

He said of the work on the Bench that he found it "hard and unrewarding". But of his life at the Bar he said that it was the most enjoyable time of his life. Perhaps this is small wonder when one reflects on his great competence in the work and his dominance of the profession of his day.

It is difficult adequately to express an appreciation of SIR OWEN'S work on the Court during the thirty-five years he occupied a seat on this Bench. Before his appointment as Chief Justice in 1952 he sat in turn with each Chief Justice other than Sir Samuel Griffith, that is to say, with Sir Adrian Knox, Sir Isaac Isaacs, Sir Frank Gavan

Duffy and Sir John Latham. Of his impressions of each of those but the last he has left us brief sketches in his farewell speech from the Bench. To recount the names of those Chief Justices is to underline both the length and the influence of SIR OWEN's service as a member of this Court.

SIR OWEN's influence in and through this Court was present throughout his judicial life and was not confined to his period as Chief Justice. His judicial work in co-operation with those who sat with him was always stimulating and enlightening. He illustrated his own remark that a man's influence on the Court did not depend upon where he sat. But his influence as Chief Justice was marked by quite subtle but yet noticeable changes in the atmosphere in which cases were argued. Also, as Chief Justice, he endeavoured to achieve a coherence in the Court which would comprehend the differences of approach likely to exist in an appellate Court of five or seven members, without diminishing the desirable strong individuality of those members. SIR OWEN's influence on the law and the direction of its development as a Justice and as Chief Justice was profound and will I am sure be lasting.

SIR OWEN was a man of very exceptional talents and of superb intellectual capacity and attainment. He had a deep, penetrating and precise knowledge of the law throughout its entire gamut. He had great mastery of legal principle as well as an extensive and accurate recollection of the literature of the law, including the reported decisions of the United Kingdom, those of the United States of America and of this country. He read widely in the legal journals. His ready recall of material from this literature germane to a case on hand was indeed remarkable. To this knowledge, he added great industry and unsparing effort in the pursuit of truth. The formation of a definite opinion later to be expressed in judgment was deferred until exhaustive inquiries and careful consideration were complete. He preferred not to work towards a conclusion during the argument of an appeal, but to use that period as but a phase of his inquiry for the right conclusion. In speaking of his appearances in this Court as counsel SIR OWEN said in the Syme Oration of 1957, of his elevation to this Bench : " Next followed some years on the Bench with little ' rest from long debate of wrong and right ' . It was in a Court which I had watched even as a student and with which I had grown familiar. 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 work their way to a conclusion rather than to stop to inquire." This revealing passage explains much of his own approach to decision-making in the appellate work of a court placed at the head of the judicial system of each of the states of a federation, such as this Court, having as well its task of constitutional interpretation. Patient and scholarly inquiry was the path he preferred.

Notwithstanding his great talents, his knowledge of and experience in the practice of the law, SIR OWEN, as he himself said, did not find the work of the Court easy. He said it was the most difficult, least satisfying of any work he had had to attempt. This was said after his administrative work and his mediation for the United Nations to which I shall later make brief reference. However, these expressions, it seems to me, stemmed from the standard of excellence which he set himself and the standard of scholarship which he desired in the decisions and judgments of the Court. But if the work was as he said "hard, unrewarding work" he invariably performed it with extreme care resulting in judgments of great quality, the consequence of the application of his clear and penetrating mind to the law and the facts of the case.

By this course he won for himself universal acclaim throughout the English-speaking world as a great master of the common law and as a leading jurist in the British Commonwealth. In his lifetime he was described by highly placed lawyers on either side of the Atlantic as the greatest judicial lawyer of his time in the English-speaking world. This eminence, recognized and acclaimed wherever the common law holds sway or influence, was instrumental in the High Court of Australia being regarded as one of the greatest and most authoritative courts of the western world. His lustre was shed upon this Court. As a result, the reports of its judgments are to be found in legal libraries through the British Commonwealth and the United States of America, and are referred to in argument and judgment with increasing frequency. This, as I have said, we so largely owe to the international reputation which SIR OWEN earned for himself.

As I have mentioned, the thirty-five years of his judicial career were important years in the history of Australia. We suffered a serious economic depression and a major war, each of which raised

many problems to be solved by the judgment of this Court. SIR OWEN participated in the resolution of practically all the constitutional cases brought to the Court in that time. His judgments in these cases, illustrating his profound knowledge and understanding of the Australian Constitution, had a notable and far reaching influence on the development of Australian constitutional law. The more than seventy volumes of the *Commonwealth Law Reports* which were published during his term of office form in themselves a tremendous reservoir of his contribution towards the growth of the law of the Constitution as well as of the growth of the general law. For it must be remembered that the largest part of the work of this Court is in the field of the general law. Over the whole field of the law, criminal as well as civil, SIR OWEN exercised his mastery and made most significant contributions to its clarification and growth. It yet remains for a biographer to gather together the advancing threads of his judgments as they progressively expose both his mastery of the records of the past and his willingness and ability to step forward projecting in new decisions developing concepts and applications of the common law.

Of his work in the field of constitutional law, I ought to say that he insisted upon and maintained the approach of the lawyer to the construction and application of the Constitution, applying to it with judicial impartiality and objectivity legal principles appropriate to the interpretation of an organic instrument intended to function in a developing nation and in changing circumstances. His legalism in this field was not narrow but in the tradition of the common law, the law of the Constitution thus serving the present and Australia's nationhood though built on the foundations of the past. Amongst SIR OWEN's judgments in constitutional cases are many which are beacons in the navigation of what are mostly stormy waters.

I should at this point diverge briefly to mention SIR OWEN's service in the diplomatic field and in the administrative field. It will be for others in other places to detail these activities and their particular significance in the life of this country. Here I mention them as indicative of the width of his mind and of his adaptability, springing no doubt from his intellectual stature and his capacity for application to a task. Between 1942 and 1944 SIR OWEN was Australian Minister to Washington. During that time events occurred critical in the country's history. He earned the respect of those with whom he had to deal for his sagacity in the handling of affairs.

In 1940 he had been appointed Chairman of the Central Wool Committee which had charge of the implementation of the Wool Agreement between Australia and the United Kingdom, and he was appointed as well between 1940 and 1942 to the Australian Shipping Control Board and Marine War Risks Insurance Board, the Commonwealth Marine Salvage Board and Allied Consultative Shipping Council in Australia.

To each of these tasks he brought the same immense capacity for work, the same integrity and conspicuous ability that he brought to all his legal work. In his activities on these committees he showed himself and became widely recognized as a very practical administrator. Later in 1950 SIR OWEN was chosen by the United Nations Organization to mediate in the dispute between India and Pakistan over Kashmir and spent some months in an endeavour to find an answer for a problem that still eludes solution. His service in all these areas, national and international, brought credit to himself and through him to Australia.

SIR OWEN believed profoundly that it is our duty as lawyers to maintain the authority of the courts and to administer justice according to law in the tradition which has come down to us. He believed in the fundamental importance of the courts of justice in sustaining the whole edifice of civilized life in a society. He had a highly developed sense of the dignity of judicial office and jealously guarded the reputation of this Court as an independent organ of constitutional government. He believed in the essential contribution which the profession makes to the maintenance of the courts of justice. He believed in the supremacy of the law.

In responding to the welcome given him on first presiding as Chief Justice at Melbourne, SIR OWEN said : “. . . the prestige which the proud tradition of English law gives to the Bench combines with the professional challenge which judicial work lays down to make it possible to recruit the Bench from those leading at the Bar. That is a consideration which in itself is enough to show the importance of maintaining the status and prestige of the courts of law. They are the essential foundations of society, whatever form a free society may take. What greater safeguard can there be for our judicial system than the combined strength of the whole legal profession behind it. And the strength of the legal profession is great and could be made greater. But it is a strength which must be sustained by a sufficient standard of learning, of general education,

of legal equipment and of useful and efficient service to the community. It must arise, too, from a pride in the profession as one that has a great part to play in this torn world. It is essentially the part of those who are concerned with the stability of the social system and the social structures, rather than the contentions which arise amongst dwellers within it." This and other quotations I have made from his own utterances speak more eloquently than I can of the standards by which SIR OWEN lived and worked throughout his occupancy of this Bench.

He was most honoured in his time. He became a Knight Commander of the Most Distinguished Order of St. Michael and St. George in 1941, and Knight Grand Cross of that Order in 1954, a Member of Her Majesty's Privy Council in 1951 and in 1963 Her Majesty of her own motion conferred upon him the rare distinction of the Order of Merit. Oxford admitted him to the Degree of Civil Law, *honoris causa*, and Harvard to the Degree of Doctor of Laws, *honoris causa*, and Yale awarded him the singular distinction of the Howland Prize in 1955.

From his retirement in 1964 till his death on Friday, 7th July, SIR OWEN had been in indifferent health, confined for almost the whole of that time to his home in Hawthorn, and for some considerable part of that time to his chair. He greatly enjoyed and was immensely supported by the presence and company of his wife whom, as Alice Brooksbank, he had married in 1920. Throughout their married life she was a great support for him in all his activities as well as sharing with him the responsibilities and the happiness of family life. He bore her death in September 1971 with great fortitude. After so active and useful life, these years of retirement, so confined, with loss of access to literature by reading himself, must have been hard to bear. Yet, to those who visited him he had no complaint nor showed any loss of capacity to participate in discussion of matters in which he retained interest.

Of those who sat with SIR OWEN only Sir Edward McTiernan and Sir Douglas Menzies remain members of the Court. Sir Victor Windeyer, but recently retired, is with us this morning. Those of us who did sit with Sir Owen practised before him and felt the impact of his mind and knowledge. All join in paying tribute this day to him as the most outstanding lawyer this country has produced, and one of the greatest judges to sit upon a bench in Australia. As scholar, lawyer, judge, administrator and diplomat, he must rank

with Australia's greatest sons. By unremitting pursuit of excellence he brought fame to himself, authority to this Court and distinction to Australia.

The Court expresses its deepest sympathy to Sir Owen's four children, Mr. Franklin Dixon, Mr. Edward Dixon, Mrs. Danby, Mrs. Reid and their respective families.

THE mode of citation of this volume of the COMMONWEALTH LAW REPORTS will be as follows :—

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CORRIGENDUM.

123 C.L.R. page xviii : line 11, for "is" substitute "will".