

1973-1974

THE

COMMONWEALTH LAW REPORTS

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. (died
29th November 1974).

THE RIGHT HONOURABLE SIR CYRIL AMBROSE WALSH, K.B.E. (died
28th November 1973).

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

THE HONOURABLE SIR NINIAN MARTIN STEPHEN, K.B.E.

THE HONOURABLE SIR ANTHONY FRANK MASON, K.B.E.

THE HONOURABLE KENNETH SYDNEY JACOBS (from 8th February
1974).

ATTORNEY-GENERAL :

SENATOR THE HONOURABLE LIONEL KEITH MURPHY, Q.C.

MEMORANDA

1974

February 8 —Appointment of THE HONOURABLE KENNETH SYDNEY JACOBS, a Judge of the Supreme Court of New South Wales (President, Court of Appeal Division) to the office of a Justice of the High Court of Australia.

November 29—Death of THE RIGHT HONOURABLE SIR DOUGLAS IAN MENZIES, K.B.E., a Justice of the High Court of Australia.

THE LATE SIR DOUGLAS MENZIES.

On 11th December 1974, at a sitting of the Full High Court at Melbourne, McTIERNAN J. said:—

We have come from Sydney where the Court has been sitting to express our great sorrow occasioned by the death of SIR DOUGLAS MENZIES and the deep sympathy we feel for his relatives and friends.

The Court is pleased that the Chief Justice of Victoria has taken a place on our Bench this afternoon and that Sir Frank Kitto who sat with SIR DOUGLAS for twelve years and Sir Victor Windeyer who sat with SIR DOUGLAS for fourteen years have been able to join us.

My brother Gibbs on behalf of the Chief Justice and of the Court will read our tribute to SIR DOUGLAS which has been prepared by members of the Court in close consultation with Sir Garfield Barwick who deeply regrets his inability to sit with us today.

GIBBS J.: SIR DOUGLAS MENZIES died suddenly in Sydney on Friday, 29th November 1974. He had taken his place on the Bench that day, as he had throughout the sittings of the Court in Sydney. In the evening he had just arrived, smiling as ever, at the Annual Dinner of the Bar Association of New South Wales when he collapsed. The presence here today of many members of the judiciary, the Attorney-General of Victoria, the Solicitors-General of Australia, New South Wales and Victoria, of representatives of the Law Council of Australia, the Australian Bar Association, the Victorian Bar Council, the New South Wales Bar Association, the Law Institute of Victoria and the Law Society of New South Wales, and of so many other members of the profession and of the public, recognizes the esteem and affection in which SIR DOUGLAS was so widely held.

DOUGLAS IAN MENZIES was born at Ballarat in Victoria on 7th September 1907. He was the eldest son of the Reverend Frank Menzies who, after being ordained in the Congregational Church, became Pastor at Geeveston, in Tasmania. DOUGLAS, being in Tasmania with his parents, won a bursary to Clemes School, later known as The Friends' School, Hobart. Thereafter he continued his education at the Hobart High School and at the Devonport High School of which he became dux.

When the time came for him to commence his tertiary education he returned to Victoria to study law within the University of Melbourne. He lived first with his uncle, James Menzies, later in city lodgings and ultimately in Queen's College. During his studies in the Law School, which commenced in 1925, he proved himself an outstanding student. He won the Jessie Leggatt Scholarship in 1927, the E. J. B. Nunn Scholarship and the Supreme Court Prize in 1928 and graduated LL.B. in 1928 and LL.M. early in 1929.

During 1928 he was chosen as Orator at Queen's College, an award endowed by the William Quick Club of which he subsequently became the patron. Many years later, when the funds of the original endowment had been exhausted, SIR DOUGLAS himself again endowed the award which is still made at Queen's College.

After serving articles with Mr. E. C. Rigby of Rigby & Fielding, solicitors, of Melbourne, he was admitted to the legal profession of Victoria on 1st May 1930 and signed the Roll of Counsel on 16th February 1932. He read in the chambers of Mr. E. H. Hudson, later Mr. Justice Hudson of the Supreme Court of Victoria, and later still his host and mentor on fishing trips in Victoria's Howqua Valley.

It was not long before he was practising law over a wide field. The solicitors of the State soon recognized not only his grasp of the law but his quality as an advocate. Accordingly his practice grew. His interest lay principally in commercial law and in constitutional law. In those two areas particularly he developed a large practice, appearing in the courts in commercial and constitutional cases and engaging extensively in conference on commercial matters, including those involving questions of taxation.

He was co-author with Bernard O'Dowd of a text book on Victorian company law and practice which was published in the year 1940 and which became a standard work.

With the onset of war he became secretary to the Australian Defence Committee and the Chiefs of Staff Committee, a position he retained during the years 1941 to 1945. Here he gained a close insight into the operations of the war effort and into the workings of some aspects of the public service. Those under whom he served regarded him as a talented and efficient secretary.

Returning to practice at the close of the war his services were soon in demand in a varied range of litigious and advising work. His practice, particularly in appellate work, became extensive so that by 1949 he was ready for silk, which was granted to him on 22nd November of that year.

The narrative of his progress in the law must be interrupted at this point to mention his marriage on 18th December 1936 to Helen Borland, a marriage that was to last in mutual affection through their joint lives. They have left four children, three daughters and one son. SIR DOUGLAS constantly participated in and derived much pleasure and satisfaction from the family life. He was a kind, loving and generous husband and father. Since his wife died in 1966, after some years of considerable strain to both of them, SIR DOUGLAS has remained close to his children and their families. His pride in their achievements and his great affection for them were always present.

In 1948 and 1949 he represented the State of Victoria in the *Bank Case* in which he appeared both in the High Court in Melbourne and in the Privy Council in London. During the ensuing nine years during which SIR DOUGLAS practised, he appeared with great frequency in the Supreme Court of Victoria, in this Court and in the Privy Council in London. His appearances in London, in a series of important constitutional and commercial cases, were almost annual. His evident knowledge of the law, his notable skill as an advocate, shrewd and courageous, and the constant application of all his effort and talent to the matter in hand, earned for him the respect and confidence of the solicitors of Victoria and indeed of solicitors in other States of Australia. It also gained for him the respect and affection of barristers throughout Australia. SIR DOUGLAS had a capacity for making friends and perhaps what is more important, for retaining friendship, with a very large number of people, both within and outside the profession. He was an entertaining conversationalist, able to discuss a wide and varied range of topics both of current and historical interest. His memory for persons and events was phenomenal and contributed much to the pleasure of a discussion with him. Whenever he was present at a gathering of members of the profession he would be the centre of an admiring group, often including many of the younger members, enjoying his conversation, punctuated as it would be by his characteristic laugh.

He was president of the Law Council of Australia from 1956 to 1958 and chairman of the Victorian Bar Council in 1958. Through 1957 to the middle of 1958 he was the president of the Victorian Medico-Legal Society. The holding of these offices was not merely indicative of the opinion held of him by his fellow practitioners; it was a symptom of the interest he maintained in the profession and in its affairs.

In 1948 he accepted a directorship of the Temperance and General Mutual Life Assurance Company, an office which he retained until his appointment to this Bench. He was also, between the years 1954 and 1957, an honorary area commissioner of Toc H, Victoria.

SIR DOUGLAS had a considerable knowledge of English literature with a singular power to recall a great deal of its poetry at will. He delighted in its recital. He had a mastery of the authorized version of the Bible, gathered no doubt from his close association with his father, and was thus able readily to draw upon and appropriately use its splendid English. He was a man who enjoyed the culture of the past and also the warmth of family life, the simple things and events of daily experience equally with the complexity of current affairs.

In 1958, when at the height of his practice, he was appointed to this Bench. He was sworn in in this court-room on 25th July 1958. On 27th October of that year he was created a Knight Commander of the Order of the British Empire. Having had the breadth of experience upon which I have but briefly touched, he came to the office of a Justice of this Court well equipped by training, by experience, by character and by disposition to perform its exacting functions. His temperament was well suited to judicial work. He was kind and fair-minded. He retained a lively appreciation of the difficulties of practising in court. He displayed a willingness to ensure his own understanding of the argument being put before him. With his quick perception and penetrating intellect he readily reached the heart of any problem posed for solution by the Court, and in discussion, whether on the Bench in the course of a hearing or thereafter, always had a substantial contribution to make to that solution. He could refine a case to its elements, exclude inessentials and clearly and tersely state his conclusions on the central issues.

His exchanges with counsel across the well of the court were high in intellectual quality, penetrating in interrogation, graced with accuracy and clarity of expression, enlivened by good humour and accompanied by understanding. The sobriety of the court-room and the importance of the matter under discussion were never able to repress the brightness of his personality and the apparent enjoyment he had in performing the daily task. Those of us who were favoured to hear his eloquent and moving speech in Perth this year at the Annual Dinner of the Law Society of Western Australia then realized, if we had not realized before, SIR DOUGLAS'S intense love of life and his abiding gratitude for the gift of each succeeding day and its experiences. He spoke then of the great good fortune he had had in being called to the service of the law and how much enjoyment he had had and still derived from walking in its paths. He also spoke of the duty which he felt he owed to the law and to the loyal performance of its administration. He revealed himself as he was in truth, a humble man, yet proud of his achievements and exhilarated by doing the things which duty brought to his hands each day.

He had had the good fortune to sit for a period of some six years with Sir Owen Dixon, which he found stimulating and enlarging in his understanding of the work of the Court. In spite of a severe cardiac and vascular experience in 1959, from which he made a remarkable recovery, he performed to the full his duties on the Court. With the death or retirement of many of those who had been senior to him on the Bench, SIR DOUGLAS increasingly entered into the administrative work of the Court, always willing to play his part and always co-operative in the decisions which have had to be made. He served on the Court in all for some sixteen years, during which time he had but one short period of leave. Even in that time, he sat as a member of the Judicial Committee in the hearing of cases in London.

He had been appointed in 1963 a member of Her Majesty's Privy Council and in 1964, having been sworn of the Council, he sat in London on a number of important cases. He made for himself a reputation amongst English lawyers, both by his work as counsel appearing before the Privy Council and by his participation as a Privy Councillor in the work of the Judicial Committee. In 1972 the members of the Inner Temple recognized his place in the law by making him an honorary Bencher of their Society.

From 1965 to 1966 he was president of the National Heart Foundation of Australia.

In 1966 he was elected a member of the Council of Monash University and in March 1969 he became its Chancellor. He has been described as an ideal Chancellor—wise, urbane, dignified and influential; detached from day to day affairs but deeply concerned with the long-term development of the university. Disturbed as he must have been at times by the student unrest he had to encounter, he never failed to deal objectively and justly with the problems which it raised.

SIR DOUGLAS'S knowledge of the law and his capacity for its clear exposition are well evidenced in his recorded judgments in the Commonwealth Law Reports. These are a memorial to his knowledge and to his wisdom. His independence of mind, resolution and courage in judgment are apparent as is that capacity of recognizing the essentials to which reference has already been made. He was outstanding as a lawyer and as a judge, with a strong sense of justice and of duty.

Those who sit here will greatly miss his assistance in the work of the Court. He was an untiring worker. But what each of the members of the Court will miss most is the warm friendship which each enjoyed with him. We will miss the cheerfulness with which he entered, each morning he sat with us, the assembly room with his bright and pungent quips either about some topical event of the day or about some aspect of a case we had heard or yet might hear, charmingly accompanied by his infectious laughter. Throughout the day's hearings, monotony could not long survive his contributions which I have earlier described. His co-operative attitude in the work of the Court, combining with the exuberance of his nature and his joy in living, endeared him to each one of us. He was to each a good companion, a helpful and understanding friend. The words are trite but true, a brother in the law and a great servant of his country has passed from us.

The Chief Justice, who is detained at The Hague by his duties as judge ad hoc of the International Court of Justice, has asked me to say that he joins in all that has been said and also that he joins with the Court in extending, as on behalf of the Court I now extend, to SIR DOUGLAS'S children and grandchildren and to his brother and sister our sincerest sympathy on the loss of their father, grandfather and brother.

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

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Tooth & Co. Ltd. <i>v.</i> Tillyer (1956) - - -	332 (13), 333 (2), 338 (2)	World's Water Show Syndicate Ltd. <i>v.</i> Employers' Liability Assurance Corporation Ltd. (1895) - - - - -	10 (1)
Traders & General Insurance Co. <i>v.</i> Rudco Oil & Gas Co. (1942) - - - - -	32 (1)	Wytcherly <i>v.</i> Andrews (1871) - - - - -	456 (2)
Travinto Nominees <i>v.</i> Vlattas (1973) -	583 (1), 585 (1)	Y.	
Tuckwood <i>v.</i> Rotherham Corporation (1921) - - - - -	327 (2), 332 (10)	Y.Z. Finance Co. Pty. Ltd. <i>v.</i> Cummings (1964) - - - - -	60 (2)
Twimahene Adjeibi Kojo II <i>v.</i> Opanin Kwandwo Bonsie (1957) - - - - -	373 (1)	Young, <i>Ex p.</i> ; <i>In re</i> Kitchin (1881) -	531 (6)

CORRIGENDUM.

129 C.L.R. page 50, line 15 : for " par. 262, p. 262 " read " par. 262, pp. 143-144 ".