When Dixon Nodded: Further Studies of Sir Owen Dixon's Contracts Jurisprudence

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Abstract

Discussion of Sir Owen Dixon's judging to date has been superficial. Both supporters and opponents of Dixon's method have simply asserted their positions, without providing a sustained analysis of his judgments to back up claims made about Dixon's fidelity to a 'strict and complete legalism'. To remedy this lack, in a series of articles the author has examined four of Dixon's contract decisions with the aim of advancing the debate over Dixon's strict and complete legalism by providing a detailed analysis, concentrating on his judicial method, of several of his judgments. The articles also examined Dixon's understanding of strict and complete legalism and showed that superficial comparisons to mechanical jurisprudence misrepresented the sophisticated form of bounded creativity that was at the essence of the judicial practice of Dixon. This article will examine two other of Dixon's contract decisions in detail and show that in these cases Dixon did not decide them in conformity with his self-described judicial method. This will show that, while Dixonian strict legalism does not and cannot have the intellectual rigour of an academic discipline, it nevertheless describes a method that allows us to identify judgments that are not made in accordance with an honest best-reading of the authorities and principles of the common law.

Introduction

The debate over the nature of judging has been at the centre of legal and jurisprudential debate in Australia (and elsewhere) for some time now. In a celebrated lecture given in 1977, Hart characterised this question in terms of either a nightmare (that judges have become de facto legislators) or a dream (that despite periods of judicial aberrations and mistakes judges can and should apply existing law to the disputes before them).[1] In Australia the decision in *Mabo*[2] ignited a popular and political debate over the role of judges that has not subsided

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1 H L A Hart, 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream' (1977) 11 *Georgia Law Review* 969.

2 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

to this day. Indeed, the recent debate over the creation of a Bill of Rights in Australia was dominated by accusations that such an instrument would give more power to an already politicised judiciary.

In Australia, one particularly influential view on this issue was that expressed by Sir Owen Dixon in his address given upon taking the oath of office as Chief Justice of the High Court of Australia, when he called for a 'strict and complete legalism' for judges.[3] Dixon clearly saw the judicial role as bounded and, as will be shown, believed that the rules and principles of the law acted as a restraint on judges and limited their capacity to decide cases other than on what might be called legal grounds. Dixon's strict legalism no longer commands the respect that it once did and it would be fair to say that it is an unfashionable view, especially amongst academics. Indeed, for some commentators, Dixon's legalism can be either seen as naïve, reflecting an unsophisticated understanding of judging, or as a form of paternalism intended to hide from a credulous public the obvious freedom open to judges when they decide cases.[4]

Was Dixon either naïve or being patronising when he claimed to be a strict legalist? The answer to this will be of some significance to the debate over judging. If Dixon is shown not to be a strict legalist one would have good cause to wonder whether any judge has ever been a strict legalist. If, on the other hand, it is shown that he did judge in this fashion this will amount to evidence that at least one important judge could and did judge as a strict legalist. This in turn will mean that the debate over judging can move beyond a 'yes he did, no he didn't' impasse. Showing that Dixon, and other judges,[5] did decide some cases at least as strict legalists will then turn attention to questions of appropriateness and practicality. In other words, if strict legalism is shown to be a realistic style of judging, the debate over judging can move on to consider whether and to what extent other judges have adopted this style; whether this style is still used; and whether other forms of judging are, for any number of reasons, more appropriate today.

Discussion of Dixon's judging to date has, unfortunately, been rather superficial. With some honourable exceptions,[6] it has been characterised more by claim and counterclaim than by close analysis of what judges have actually said and done in their judgments and extrajudicial writing. Both supporters and opponents of Dixon's method have simply asserted their positions without providing a sustained analysis of his judgments to back up claims made about

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3 Sir Owen Dixon, 'Address upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952' in Judge S Woinarski (ed), *Jesting Pilate and other Papers and Addresses* (Lawbook, 1965) 245, 247.

4 See, eg, Frank Carrigan, 'A Blast from the Past: The Resurgence of Legal Formalism' (2003) 27 *Melbourne University Law Review* 163; Allan C Hutchinson, '"*Heydon"* Seek: Looking for Law in the Wrong Places' (2003) 29 *Monash University Law Review* 85; Michael Coper, 'Concern about Legal Method' (2006) 30 *Melbourne University Law Review* 554.

5 The reference to other judges includes, eg, all those judges on the High Court who wrote joint judgments with Dixon J in the cases examined, as well as to Fullagar J, whose judgment in *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43 has been used as a proxy for Dixon CJ's judgment in that case: see John Gava, 'Dixonian Strict Legalism, *Wilson v Darling Harbour Stevedoring* and Contracting in the Real World' (2010) 30 *Oxford Journal of Legal Studies* 519, 519–43.

6 See, eg, Carrigan, above n 4.

Dixon's fidelity to his self-proclaimed legal method.[7] To remedy this lack, in a series of articles the author has examined four of Sir Owen Dixon's contract decisions to see if his reasoning was in conformity with his self-proclaimed strict and complete legalism.[8] This was part of a larger project in which, with the same purpose in mind, all of Dixon's contract decisions (102) were examined.[9] These articles aimed to advance the debate over Dixon's strict and complete legalism by providing a detailed analysis, concentrating on his judicial method, of several of his judgments. They also examined Dixon's understanding of strict and complete legalism and showed that superficial comparisons to mechanical jurisprudence and the like completely misrepresented the sophisticated form of bounded creativity that was at the essence of the judicial practice of Dixon.

The basis of the argument in these articles was that Dixon's judicial method should be understood as a form of practice and not the equivalent of an academic discipline along the lines of, for example, philosophy. Nevertheless, despite the inevitable 'slippage' contained in Dixon's judicial method ('slippage' in comparison to the rigour demanded of academic philosophy) it was possible to distinguish cases where Dixon (and other judges) genuinely attempted to give effect to their best reading of the principles and authorities which applied to the particular dispute before them, from cases in which they did not do this, deciding instead in accordance with preconceived judgments or to give effect to their personal preferences. Indeed, in one of these articles clear examples were given of several English and Australian judges who had decided cases in this non-legalistic fashion.[10]

Dixon clearly saw the judicial role as bounded and believed that the rules and principles of the law acted as a restraint on judges and limited their capacity to decide cases other than on what might be called legal grounds. He was not, however, a 'dreamer', to use Hart's term.[11] He did not see judging as a form of divination with judges merely declaring an already existing law. Neither did he believe in any form of mechanical jurisprudence whereby a judge's role is

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7 For the former, see, eg, Sir John Young's speech launching Philip Ayres' *Owen Dixon* (Miegunyah Press, Melbourne, 2003) <http://www.mup.com.au/uploads/files/pdf/978-0-522-85426-8.pdf>; see also Gerard Carney and Jim Corkery, *Owen Dixon* <http://epublications.bond.edu.au/law_pubs/151>; and Sir Daryl Dawson and Mark Nicholls, 'Sir Owen Dixon and Judicial Method' (1985–86) 15 *Melbourne University Law Review* 543; Colin Howard, 'Sir Owen Dixon: Giant who Enriched the Law' (1985–86) 15 *Melbourne University Law Review* 575; HAJ Ford, 'Sir Owen Dixon: His Judgments in Private Law' (1985–86) 15 *Melbourne University Law Review* 582. For another critic in addition to those listed above n 4, see David Ritter, 'The Myth of Sir Owen Dixon' (2004) 9 *Australian Journal of Legal History* 249.

8 See John Gava, 'Dixonian Strict Legalism, *Wilson v Darling Harbour Stevedoring* and Contracting in the Real World' (2010) 30 *Oxford Journal of Legal Studies* 519; 'Another Study in Judging: Sir Owen Dixon and *Yerkey v Jones*' (2010) 26 *Journal of Contract Law* 248; 'Sir Owen Dixon, Strict Legalism and *McRae v Commonwealth Disposals Commission*' (2009) 9 *Oxford University Commonwealth Law Journal* 141; and 'A Study in Judging: Sir Owen Dixon and *McDonald v Dennys Lascelles*' (2009) 32 *Australian Bar Review* 77.

9 Deciding whether or not a case is a contract case is not an exact science. Not all cases that involved contracts have been examined, only those where issues of contract law or interpretation were raised and in which Sir Owen Dixon sat as a judge.

10 John Gava, 'Dixonian Strict Legalism, *Wilson v Darling Harbour Stevedoring* and Contracting in the Real World', above n 8.

11 Hart, above n 1.

equivalent to an umpire who merely applies rules and does not create them.[12] Dixon accepted that there was a creative aspect to strict legalism but that it was a *bounded* creativity far removed from the actions of political actors. This creative role was driven by the ultimate impossibility of mastering the untidy, sometimes incoherent and often contradictory mass of cases and principles which made up the common law. Dixon also recognised the limited capacity of any one individual to master this unruly mass of cases and principles and of being able to identify the ensuing legal consequences of any particular ruling. Dixon preferred to rely on the arguments of counsel raised in the context of concrete disputes and avoided the temptation of deciding that which had not been the subject of argument or was not necessary for the resolution of the dispute before the court.[13]

This article will examine two other of Dixon's contract decisions in detail and show that in these cases Dixon did *not* decide them in conformity with his self-described judicial method. While this will show that Dixon was human and capable of departing from his normal standards, it will also illustrate that, while Dixonian strict legalism does not and cannot have the intellectual rigour of an academic discipline, it nevertheless describes a method that allows us to identify judgments that are not made in accordance with an honest best-reading of the authorities and principles of the common law. That the judgments are in this case two of Dixon's own shows that the description given of Dixon's strict legalism provides a form of 'testable hypothesis' against which evidence, that is judgments, can be evaluated.

These two cases are the only cases of the 102 that have been examined of Sir Owen Dixon's contract decisions that show him judging other than as a strict and complete legalist.[14]

II Dixonian Strict Legalism

Sir Owen Dixon is most often remembered (and criticised) for his call, in his address given upon taking the oath of office as Chief Justice of the High Court of Australia, for a 'strict and complete legalism'.[15] In his essay, 'Concerning Judicial Method', Sir Owen outlined in a comprehensive fashion his understanding of the common law method and, in doing so, refuted claims that this method was a fairytale. He did, however, acknowledge that it was under

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12 This analogy was made by the soon to be Chief Justice of the US Supreme Court, John Roberts, in his confirmation hearing before the US Senate in 2005: Charles Babington and Jo Becker, '"Judges Are Not Politicians," Roberts Says', *The Washington Post* (Washington), 13 September 2005 <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/12/AR2005091200642.html>.

13 See, eg, *McDonald v Dennys Lascelles* (1933) 48 CLR 457, 480–1 (Dixon J); *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd* (1935) 53 CLR 618, 637 (Dixon J); *Ballas v Theophilos* (1957) 98 CLR 193, 195 (Dixon CJ), cf 207, 209 (Williams J); *Cooper v Ungar* (1958) 100 CLR 510, 516 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ); *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644, 653 (Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ); *Hall v Busst* (1960) 104 CLR 206, 215–7 (Dixon CJ), cf 220–3 (Fullagar J) and 231–5 (Menzies J); *South Australia v Commonwealth* (1962) 108 CLR 130, 146–7 (Dixon CJ), cf 148–9 (McTiernan J).

14 In a forthcoming article, the author intends to examine other cases of Dixon's which, at least at first, might be considered to be further examples of departures from strict and complete legalism by Dixon, but which on analysis show that such beliefs are misplaced.

15 Sir Owen Dixon, 'Address upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952' in Woinarski, above n 3.

threat and that even in his own time it was unfashionable to argue that common law rules and techniques were real and bound judges.[16] In other words, rather than being a constraint on judges these rules and principles were seen as catalysts driving judicial decision-making in essentially unbounded ways. For Dixon, this attitude was foreign to the common law method. He saw the rules and principles of the common law as binding and constituting an external constraint on judges by imposing an external standard of legal correctness.

Dixon accepted that the answers to legal problems before the courts were not as certain as mathematical proofs. The common law method of interpreting and applying cases, and the principles to be derived from them helped judges to find and develop the law, but this method and these principles could not always provide clear answers. The common law method was not an exact science and this meant that not every judge would or could come to the same answer. This in turn also meant that the answers given by any one judge could and should be analysed to see if they did comport best with the existing materials.

> It is no doubt unsafe to generalize about judicial process. … But it is a safe generalization that courts proceed upon the basis that the conclusion of the judge should not be subjective or personal to him but should be the consequence of his best endeavour to apply an external standard. The standard is found in a body of positive knowledge which he regards himself as having acquired, more or less imperfectly, no doubt, but still as having acquired.[17]

Once common law legal reasoning is understood in this fashion it becomes apparent that it is inevitably provisional. There can be no absolutely right answer to contested legal issues because reasonable practitioners of that method can and do vary in applying their understanding of a vast and unruly body of legal rules and principles to an essentially infinite set of fact situations. Indeed, given the immensity of the legal materials, it is unrealistic to expect judges to have a mastery of the law. There are just too many rules and doctrines with too many competing lines of authority (as well as inconsistencies) for the law to be reduced to the equivalent of an algorithm.[18] Because of this, common law judging is best seen as a craft tradition rather than a rigorous intellectual discipline along the lines of, say, philosophy or mathematics. The sheer mass of unruly precedents and the relentless need to decide cases expeditiously mean that judges do not have the time and freedom accorded to university academics to try to solve problems perfectly, irrespective of the time and effort needed. Nevertheless, Dixon believed that despite these inescapable hurdles, the judges were expected, as far as humanly possible, to be faithful to the common law tradition, and their reasoning and decision-making should not be understood as giving licence to freewheeling choice and innovation.

> It is one thing for a court to seek to extend the application of accepted principles to new cases, or to reason from the more fundamental of

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16 Sir Owen Dixon, 'Concerning Judicial Method' in Woinarski, above n 3, 152, 154.

17 Ibid 157–8.

18 As Brian Tamanaha has shown, judges have accepted this and have been open about it for a very long time: see Brian Tamanaha, 'The Realism of Judges Past and Present' (2009) *Cleveland State Law Review* 77.

> settled legal principles to new conclusions, or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long-accepted legal principle, deliberately to abandon the principle in the name of justice, or of social necessity, or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content. The latter means an abrupt and almost arbitrary change.[19]

The recent series of articles on judging by the then Justice McHugh of the Australian High Court illustrates this point very clearly. McHugh J showed that he, too, valued the importance of a command of the rules, principles and techniques of the common law. But he also indicated that in appropriate circumstances the judge could and should overturn decisions that were clear and long-standing if the judge disagreed with a particular decision or series of decisions on policy grounds. For McHugh J the existing authorities and principles act to control judges—until the judges decide these authorities and principles should no longer be held to be binding.[20] By way of contrast, for Dixon, the authorities, rules and techniques of the common law were not *optional* constraints on judges, they were binding.

Dixon accepted, indeed embraced, the fact that change—or development, to use another term—was inevitable in the law. But implicit in his acknowledgment of the creative aspect of judging was the belief that change should be cautious. The caution was not caution for its own sake. Judges would tread cautiously because the nature of the law required many years of study and practice to achieve some command of the details and problems within any area of the law. Changes in the law could have unintended consequences and repercussions in other areas of the law that might only come to light some time later. In these circumstances, caution in making change was not a sign of timidity but, rather, of wisdom in light of the limited capacity of any one judge or even bench of judges to foresee the implications of changes to the law. Further, any change should be limited to what was necessary to decide the legal issue before the court. Limiting change to the smallest amount necessary was not driven by an abstract belief that minimal change provided a constraint on otherwise unbounded judges.[21] Rather, it was consistent with a general belief that judges should decide only what was necessary because this way they could minimise the risks of unintended consequences while attempting to do justice to the particular case before them, in accordance with their best understanding of the applicable law.[22]

Four features of Dixon's understanding of the judicial role stand out. The first is his attitude to the legal authorities. For Dixon, a legalist judge starts his or her legal reasoning by first establishing what the authorities say about the particular legal question before them. Given the nature of the law with its often conflicting

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19 Dixon, 'Concerning Judicial Method', above n 16, 158.

20 Michael McHugh, 'The Law-making Function of the Judicial Process – Part 1' (1988) 62 *Australian Law Journal* 15, 116; M H McHugh, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37.

21 Cass Sunstein's call for minimalism in judging can be so characterised: see, eg, Cass Sunstein, 'Testing Minimalism: A Reply' (2005–06) 104 *Michigan Law Review* 123.

22 For examples, see above n 13.

lines of authority or, frankly, poorly reasoned decisions, this search is not always going to provide an easy and clear answer. Nevertheless, it was by anchoring a judge's reasoning to that of his or her predecessors that one avoided the law becoming the personal plaything of individual judges.

Secondly, strict legalism does not entail any notion of mechanical jurisprudence. Of course, if the law is clear and the facts fit within that law, Dixonian strict legalism would mandate the straightforward application of the law to the facts. This would be, in the parlance of the jurisprudes, an easy case. But Dixon is not arguing that all or even most cases are like this. At the appellate level neither the cases nor the law will always be so easy.

Thirdly, because of the imperfect nature of the common law, there is a *creative* element to legalist judging. When presented with conflicting lines of authority, legalist judges will have to use their judgment and overall command of the legal materials to make a choice that would best comport, in their judgment, with the existing materials within the wider scheme of the common law. When presented with poorly or inadequately reasoned decisions, legalist judges must do their best to draw from the materials principles that are consistent with the decisions and then attempt to formulate them in more convincing and usable ways. When faced with such a situation, the strict legalist judge recognises the creative yet bounded role demanded of her or him.

Finally, Dixonian strict legalism is distinctively legal and not a form of philosophy, or even of legal theory.[23] For Dixon, judging is a practice, not an application of a theory. This difference cannot be overemphasised. From the *outside* legal philosophers formulate comprehensive theories describing what judges do and sophisticated theories about precedent and how it operates. But from the *inside* judges do not have the training, inclination or, most importantly, the time to master these theories and decide cases in accordance with them. From the *outside* judges can seem to display a selection of sometimes inconsistent theoretical positions in their judging. But, as Richard Posner argues, to expect a judge to be theoretically pure and consistent when facing real-world problems, with litigants who want an answer to *their* problem (and not an abstract scholarly treatise) in real-world time, is to misunderstand totally the judicial function and the constraints operating on judges. Judges are not and cannot be theorists. They do not have the time or expertise to be genuine theorists. Indeed, a judge trying to decide cases in strict accord with a particular economic or social theory, or indeed a particular jurisprudential theory, would quickly find out how impractical such a tactic would be. No judge has the time to master theories, as well as the common law, and apply a theory comprehensively within the time frame allowed by a busy docket. Not only would a judge who attempted to decide cases according to a theoretical position not be a legalist judge, he or she would be attempting the impossible.

Good judges use logic, analogy, common sense and consequentialist reasoning, but they are not philosophers and their reasoning does not and cannot

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[23] This claim has been discussed in greater detail in John Gava, 'The Audience for Rick Bigwood's Exploitative Contracts' (2007) 32 *Australian Journal of Legal Philosophy* 140, 140–52; see also Stanley Fish, 'Dennis Martinez and the Uses of Theory' (1987) 96 *Yale Law Journal* 1773.

match the rigour expected of logicians and philosophers.[24] Alone, the need to decide expeditiously means that a judge can never approach the strictness of a philosopher who has the time to squeeze all the possible implications out of an idea. But it is more than pressure of time; judges have to deal with their often imperfect predecessors and accord them respect in ways that intellectuals do not have to do when dealing with other intellectuals. Legal reasoning is a craft tradition that is validated by experience and practice as much as by logic and argumentative rigour. Compared with debates in classrooms or learned journals, the judges' fidelity to logic and consistency in reasoning and their *general* but inevitably rough and ready application of precedent will look messy. There is, however, sufficient rigour in the reasoning of practising lawyers to distinguish genuine attempts to reason logically and to apply precedents from those judgments where judges hide instrumentalist decision-making behind a veneer of legal reasoning.

In other words, Dixonian strict legalism is a hypothesis that is testable by examining closely the reasoning given by judges. It is a major argument of this article that the reasoning of Sir Owen Dixon can be clearly differentiated from transparent attempts to cloak policy preferences behind unconvincing and unpersuasive legal reasoning. Indeed, it will be suggested that Dixon, too, succumbed to this temptation in two cases and that such instances can in turn be clearly and easily identified.

III *Neal v Ayers*

In *Neal v Ayers* ('*Neal*'),[25] the plaintiff Neal brought an action against Ayers, who had sold her a hotel with licence, goodwill and furniture. Neal alleged that she was induced to buy the property upon Ayers' fraudulent misrepresentation that the hotel takings were about £100, of which 15 to 20 per cent was derived from after-hours (illegal) trading. Neal discovered that her weekly takings were not less than £100 a week but that at least 40 per cent of that came from trading during illegal hours. Neal did not want an after-hours hotel but carried out the purchase knowing that a significant proportion of the takings were due to illegal trading. She also acknowledged that it had been her intention to continue to trade illegally after purchase, but that it had also been her intention to reduce and ultimately terminate such trading. Expert evidence tendered at the trial suggested that a hotel which traded 80 per cent legally and 20 per cent illegally, as represented by Ayers, was at least 25 per cent more valuable than one which traded 60 per cent legally and 40 per cent illegally.

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[24] In Richard Posner's recent book, *How Judges Think*, while he is scathing of what he understands legalism to be, he does show that his conception of pragmatic judging is similarly broad-ranging in its use of materials and is similarly a-theoretical. Posner believes pragmatic judging is the predominant judicial style in the federal court system in the United States: Richard Posner, *How Judges Think* (Harvard University Press, 2008).

[25] (1940) 63 CLR 524. In both *Neal* and *Slee v Warke* (1949) 86 CLR 271 (discussed below), Dixon's judgment was part of a joint judgment. There is no way of establishing to what extent, if any, Dixon contributed to each judgment. But, given that High Court judges are not obliged to participate in judgments of the court or joint judgments, it is reasonable to assume that a judge of Dixon's stature would not append his name to a joint judgment unless he was in substantial agreement with its legal reasoning. In the absence of evidence to the contrary, it will be the assumption of this article that the joint judgments given in the two cases which are the focus of the article accurately reflect Dixon J's view on the legal issues before him.

The trial judge found that the contract was based on illegality to which both parties were *in pari delicto*, and directed a nonsuit even though illegality had not been pleaded. This was affirmed by a majority on appeal to the Full Court of the Supreme Court of New South Wales. The High Court (Starke J, Dixon and Evatt JJ in a joint judgment) allowed the appeal and ordered a new trial.

Justice Dixon described the issue before the court as being whether the element of illegality entering into the value of the hotel and the plaintiff's willingness to continue the illegal trading prevented her from pursuing her claim of fraudulent misrepresentation.[26] He noted that the illegality in the transaction could potentially affect a claim in deceit in three ways.

First, if the representation could be material as an inducement only to a representee who contemplated some unlawful course of conduct, it would seem that the law would not countenance a complaint by him that it had operated as a fraudulent inducement. If, for instance, the misrepresentation had consisted not in understating but in overstating the profits from unlawful trading, it might be said that the overstatement would be material only to the mind of a purchaser intent on conducting an unlawful business. But in the present case the misrepresentation has the opposite tendency. It would operate as an inducement to a person who wanted a hotel rather for its lawful business.[27]

While one can see the point being made by Dixon J, nevertheless it was quite clear that the plaintiff was not only buying a business which conducted illegal trading (and therefore illegally furnished part of the value of the business), she had also admitted that she would continue the illegal trade.

The second possible way in which illegality could affect a claim in deceit would be where the subject matter of the contract was itself unlawful. This would then prevent any of the money expended for the purchase being recovered, even against a fraudulent wrongdoer. However, Dixon J did not characterise the contract of sale as being unlawful or as relating to an unlawful subject matter. It was a sale of a hotel, licence, goodwill and furniture, and this was not intrinsically unlawful.[28] It was the third possibility that raises some doubts about Dixon J's reasoning in this case.

> In the third place, if the common purpose of the parties in entering into a contract is that the subject matter should be used for an unlawful purpose, the transaction may be unlawful and it may follow that an action of deceit may not be maintained to recover any part of the consideration paid, in the guise of damages.[29]

Dixon J referred to five authorities in support of this proposition. The first was *Gas Light and Coke Co v Turner* ('*Gas Light*').[30] There the parties had entered into a lease of premises to enable the defendant tenants to distil oil from tar

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[26] (1940) 63 CLR 524, 530 (Dixon and Evatt JJ). For the purposes of this article, reference to the joint judgment will only mention Dixon J.
[27] Ibid 530–1 (Dixon and Evatt JJ).
[28] Ibid 531 (Dixon and Evatt JJ).
[29] Ibid (Dixon and Evatt JJ).
[30] (1840) 6 Bing NC 324; 133 ER 127.

purchased from the plaintiff landlords. The defendant refused to purchase the tar and claimed in defence that the contract to lease the property breached a statute which prohibited the distilling of oil from tar in industrial quantities in any place nearer than 75 feet from the nearest other building. Abinger CJ stated the following:

> All the decisions shew, that, at common law, a contract entered into to effect an illegal purpose is void, and cannot be enforced. … According to the cases … where a party has granted a lease providing for the execution of an unlawful thing, it makes no difference as to the illegality of the contract that the unlawful act has not been carried into effect.[31]

In *Neal,*[32] the unlawful act of after-hours trading was carried out by Neal, who knew that that would continue when she purchased the property. However, in *Neal*,[33] the proportion of illegal as compared to legal activities was less than half of the total activity envisaged in the contract. In *Gas Light*,[34] by comparison, all the activity envisaged under the contract would have been illegal. On the other hand, as the quote immediately above makes clear, the judges in *Gas Light*[35] would have been happy to treat the contract as unlawful even if the illegal activity had not been carried into effect. In *Neal*[36] the unlawful activity had been carried out. The facts in *Neal*[37] seem to fit comfortably into the principle enunciated in *Gas Light*.[38]

The second authority relied upon was *Pearce v Brooks* ('*Pearce*').[39] Brooks, a prostitute, had bought a carriage on hire from the plaintiff to use as part of her activities. She returned the carriage in a damaged state before she had paid her first instalment, and failed to pay a forfeiture as spelt out in the agreement. Pearce brought an action claiming the forfeiture and damages but the trial judge found for the defendant on the ground that the carriage had been purchased to carry out an unlawful and immoral act. Pearce appealed to the Court of Exchequer but the judges upheld the trial verdict.[40] The principle articulated by Pollock CB was supported by the other judges (Martin, Pigott and Bramwell BB):

> I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied … the rule which is applicable to the matter is, *Ex turpi causa non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it

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31 Ibid 327–8; 133 ER 127, 129 (Abinger CJ). Littledale, Patteson, Coleridge JJ and Parke and Gurney BB agreed with these sentiments.

32 (1940) 63 CLR 524.

33 Ibid.

34 (1840) 6 Bing NC 324; 133 ER 127.

35 Ibid.

36 (1940) 63 CLR 524.

37 Ibid 524.

38 (1840) 6 Bing NC 324; 133 ER 127.

39 [1861–73] All ER 102 (decided 1866).

40 Reference is made to an appeal although, of course, the nature of litigation in 19th century England makes the use of this term anachronistic. However, for the purposes of this paper the use of the term appeal is not substantively inaccurate.

> comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other.[41]

Baron Martin expressed doubts that this principle would apply when it was not certain that the money or goods the object of the contract would be used for an illegal purpose.[42] Of course, this disclaimer would not apply to *Neal*[43] where both parties knew that illegal trading would continue. In other words, Neal contributed to the performance of an illegal act.

In *Upfill v Wright* ('*Upfill*'),[44] similar sentiments were expressed about a claim for rent from the defendant Wright, who had taken a flat as a mistress in full knowledge of the plaintiff landlord. In *Alexander v Rayson* ('*Rayson*'),[45] a dodgy landlord, Alexander, manipulated the lease documents in order to reduce his exposure to tax. Rayson, the tenant, refused to pay elements of the rent because of the failure of the landlord to comply with his obligations and, in defence to a claim for the money owing, relied on the unlawfulness of the contract. The tenant was not aware of the landlord's illegality at the time of the making of the contract and this ignorance continued until after the action commenced. At trial, the defence of illegality failed and Rayson appealed to the Court of Appeal (Greer, Romer and Scott LJJ) which upheld her appeal. After considering a number of authorities, including those relied upon by Dixon J in *Neal*,[46] the Court pronounced the following:

> It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral or contrary to public policy, is unlawful and therefore void. But it often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject matter for an unlawful purpose … The most common instance of this is an agreement for the sale or letting of an object, where the agreement is unobjectionable on the facet of it, but where the intention of both or one of the parties is that the object shall be used by the purchaser or hirer for an unlawful purpose. In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. Ex turpi causa non oritur actio. The action does not lie because the Court will not lend its help to such a plaintiff.[47]

The agreement to buy a hotel is unobjectionable on its face, but in *Neal* both parties knew that it was intended that the new owner would carry on with the illegal trading.[48] In *Rayson*,[49] the judges also rejected a plea that the law would allow the landlord a *locus poenitentiae*: 'Where the illegal purpose has been wholly or partly effected the law allows no locus poenitentiae.'[50]

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41 [1861–73] All ER 102, 103 (decided 1866) (Pollock CB).
42 Ibid 104 (Martin B).
43 (1940) 63 CLR 524.
44 [1911] 1 KB 506.
45 [1936] 1 KB 169.
46 (1940) 63 CLR 524.
47 [1936] 1 KB 169, 182 (Greer, Romer and Scott LJJ).
48 (1940) 63 CLR 524.
49 [1936] 1 KB 169.
50 Ibid 190 (Greer, Romer and Scott LJJ).

In *Neal*,[51] the purchaser carried on with the illegal trading before seeking damages for deceit and this would seem to have denied the possibility of being able to claim a *locus poenitentiae*.

The last case referred to by Dixon J is *Harry Parker Ltd v Mason* ('*Harry Parker*').[52] This case involved a purported betting scam. Mason was a racehorse owner who agreed with Harry Parker, a bookmaker, that illegal bets would be placed by the latter on one of Mason's racehorses. The illegal betting was designed to allow large bets to take place without affecting the odds of the horse winning the race. Harry Parker took the money, but being confident that the horse would not win, failed to place the bets and simply pocketed the money. The horse failed to win, but Mason discovered that Harry Parker had kept the money and brought an action to recover the money. The trial judge, Stable J, found that the contract between the parties was illegal and that neither side could recover on the contract.

The Court of Appeal affirmed Stable J's decision and agreed with his reasoning. MacKinnon LJ was at pains to illuminate the underlying principle in such cases:

> The rule ex turpi causa non oritur actio is, of course, not a matter by way of defence. One of the earliest and clearest enunciations of it is that of Lord Mansfield, in *Holman v Johnson*.[53] "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, potior est conditio defendants." The Court drives both parties from its presence: Procul este profani.[54]

Now, of course, in both *Neal*[55] and *Harry Parker*,[56] it could be said that both parties were equally at fault because in both cases all parties were happy to break the law. It could also be said that one party in each case was more crooked than the other (the vendor-publican by understating admitted illegal trading and the

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51 (1940) 63 CLR 524.

52 [1940] 2 KB 590. In his judgment, Dixon J refers to the decision of the trial judge, Stable J. The case went to the Court of Appeal but in the war conditions of 1940 the judgment of that court (handed down on 1 August 1940) was apparently not available to the High Court when it handed down its decision on 2 September 1940.

53 (1775) 1 Cowp 343; 98 ER 1120 ('*Holman*').

54 [1940] 2 KB 590, 601–2 (MacKinnon LJ). Luxmoore and Du Parcq LJJ expressed similar sentiments at 608–9 and 611–12, respectively.

55 (1940) 63 CLR 524.

56 [1940] 2 KB 590.

bookmaker by double-crossing his partner in crime). In *Harry Parker*,[57] both Stable J and the Court of Appeal understood the legal principle as giving effect to the first interpretation, namely that both parties were equally at fault because both were happy to enter into a contract which would involve illegal activity. What of the consideration that in *Neal*[58] only part of the price for the hotel reflected the illegal purpose of after-hours trading while the majority of the value associated with the contract dealt with legal trading? Does this amount to a legally significant difference? In *Harry Parker*,[59] Du Parcq LJ considered such a claim and suggested that if part of the contract dealt with legal bookmaking and part with illegal bookmaking the offending part might have been severed. However, since the whole contract before him was tainted with illegality, severance was not an option.[60] It is difficult to see how the contract in *Neal*[61] could have been severed as the transaction was a unity and not split into different sections.

So how did Dixon J apply the principles to be derived from these cases to the facts in *Neal*?

> But in our opinion the present case cannot be brought within such a doctrine. The substantial purpose of the contract was to transfer the property on which a business was carried on and was to be continued. The fact that on and from the property the purchaser intended for a time to exceed the limits within which she could lawfully trade, could not invalidate the whole transaction, notwithstanding the vendor's knowledge of her intention. Her intention to continue for a time the practice of unlawful trading does not go to the substance of the transaction. It is an incident which provided none of the inducement for her to enter into it, if her evidence is to be believed. It appears to us to be extrinsic to the dealing which forms the foundation of the contract and of the inducing causes and therefore not to corrupt the contract.[62]

This reasoning is not persuasive and, in any event, does not give effect to the authorities that Dixon J relied on. The purpose of the contract was to transfer a trading concern whose trading was partly legal and partly illegal. The intrinsic value of the concern, accepted and acknowledged by the purchaser, was inextricably linked to its legal and illegal trading. The illegal trading was not an incident, easily desisted from, to the contract. It was part and parcel of the going concern and Neal was aware of this from the beginning. Nor was the illegal trading a neatly packaged part of a greater transaction and severable if necessary. Neal herself admitted that the illegal trading would need to be continued after the purchase. To sever in such circumstances would be to create a radically different contract from the one entered into by the parties and this the courts should not do.

Neither does this reasoning show fidelity to the authorities discussed by Dixon J. All of the cases referred to by Dixon J emphasise that the courts will not aid parties in their actions if these actions are brought on a contract whose subject

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57 Ibid.
58 (1940) 63 CLR 524.
59 [1940] 2 KB 590.
60 Ibid 612 (Du Parcq LJ).
61 (1940) 63 CLR 524.
62 Ibid 531–2 (Dixon and Evatt JJ).

matter is for an unlawful purpose. Neal and Ayers were both aware that illegal trading was an essential attribute of the hotel that was the object of the transaction between them, and Neal openly admitted that she had intended to carry on illegal trading when she entered into the contract. As the cases show, in such circumstances the courts will not aid persons who bring actions that rely on such illegal purposes. Indeed, as suggested above, it is difficult to distinguish *Neal*[63] from *Harry Parker*.[64] In both cases both parties knew that the contract would involve an illegal purpose, and in both cases one party tried to take advantage of the other in illegitimate fashion. In both cases the respective transactions were inextricably linked to an unlawful purpose, and in both cases there was no act of repentance by either party before the contract was given effect to. The only difference between the two cases is that in *Harry Parker*[65] the whole transaction was tainted by illegality, whereas in *Neal*[66] the major part of a whole transaction was legitimate.

It is difficult to avoid the conclusion that Dixon J was determined to allow Neal to bring an action of deceit against a clearly untruthful vendor. Just as clearly, however, Dixon J has not explained how, on the facts, *Neal*[67] could be distinguished from the authorities which, if relied upon, would not have allowed Neal to bring the action that she did. In other words, Dixon J has *not* explained how the fact that illegal trading made up less than half of the value of the transaction meant that the principles enunciated in the authorities did not apply. To be blunt, Dixon J has not acted as a strict legalist in this case because he has not followed the authorities, which were quite clear, and his attempted ground of distinction, whilst possibly potentially fruitful, is pure assertion without any real attempt at legal analysis. It is not as if, for example, Neal had entered into the contract with an express aim of *not* continuing the illegal trading,[68] or that it was only a possibility that Neal would continue the illegal trading,[69] or that the contract was not complete before Neal commenced her action.

IV *Slee v Warke*

In *Slee v Warke* ('*Slee*'),[70] the defendant/appellant, Slee, who was the owner of a hotel, entered into negotiations with Warke for the lease of the hotel to the latter. Negotiations took place with lawyers. Slee was interested in selling the hotel but problems in financing meant that the parties initially settled for a lease but with the intention of giving Warke the option to purchase the property within the first year of the three-year lease. Slee desired to ensure that the lease ran for at least one year even if Warke exercised the option within that time. However, Slee's solicitor misinterpreted his instructions and formulated a lease/option agreement

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63 Ibid.
64 [1940] 2 KB 590.
65 Ibid.
66 (1940) 63 CLR 524.
67 Ibid.
68 This is the interpretation, contrary to the facts, given in J Carter, E Peden and G Tolhurst, *Contract Law in Australia* (Lexis Nexis, 5th ed, 2007,) 559–60.
69 This is the interpretation, again contrary to the facts, given in D Greig and J Davis, *The Law of Contract* (Lawbook, 1987) 1131.
70 (1949) 86 CLR 271.

which gave Warke the option to purchase *after* the passage of one year for the remainder of the three-year term of the lease. Slee did not examine the lease and signed it even though it did not embody his wishes.

Warke brought an action in the Supreme Court of Victoria seeking a declaration that she was entitled to require Slee to sell the property to her or pay damages in lieu. Slee had refused to sell, arguing that the lease and option had not given effect to the intention of the parties as originally conveyed during negotiations. Justice Martin made the declaration sought and Slee appealed to the High Court. In a joint judgment (Rich, Dixon and Williams JJ) the High Court affirmed the trial judge's decision.

Justice Dixon commenced his analysis by noting that Slee's counsel rested his defence on the sole ground that the evidence established that the only option the appellants were ever prepared to grant was an option the exercise of which was limited to the first year of the lease, and that they executed the contract and indenture in the mistaken belief that these documents contained this option, and that they would not have executed either of these documents but for this mistake. He relied on the statement of Sir W Page Wood V-C in *Wood v Scarth*: '[T]hat a person shall not be compelled by this Court specifically to perform an agreement which he never intended to enter into, if he has satisfied the Court that it was not his agreement, is well established.'[71]

Justice Dixon's response to this is a non-controversial piece of legal analysis which shows that *Wood v Scarth*[72] had been misinterpreted and that in any event subsequent decisions in both the Court of Appeal and the High Court established that the hardship necessary to enliven the jurisdiction of the court could not be satisfied by the circumstances established by Slee, whose own carelessness was responsible for the mistake that had occurred.[73] In these circumstances, Dixon J held that Warke was entitled to have the contract containing the option specifically enforced as that remedy, and not a declaration, had been, in substance, the remedy at the centre of the dispute. There is no suggestion that Dixon J's analysis of the facts and the law was anything other than orthodox and in line with strict legalist methods.

However, Dixon J did not stop there. Despite having come to a decision which resolved the dispute, Dixon J went on to discuss the defence of mutual mistake even though this had been dropped by counsel for the appellants during the hearing of the appeal. As noted above, Dixon J was usually careful to avoid answering unnecessary legal issues, preferring to answer those that were necessary to the resolution of the legal dispute before the court and leaving what would be obiter for another day.[74] It appears, however, that *Slee*[75] presented Dixon J with an opportunity to tidy up an area of law that he now believed himself to have been

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71 (1855) 2 K & J 33, 42; 69 ER 682, 686 (Page Wood V-C), quoted in *Slee* (1949) 86 CLR 271, 274 (Rich, Dixon and Williams JJ). For the purposes of this article, reference to the joint judgment will only mention Dixon J.

72 (1855) 2 K & J 33; 69 ER 682.

73 (1949) 86 CLR 271, 274–80 (Rich, Dixon and Williams JJ).

74 See the cases listed in above n 13.

75 (1949) 86 CLR 271, 274–80 (Rich, Dixon and Williams JJ).

mistaken about, despite the fact that in doing so he acted contrary to what he believed to be good judicial method.

Justice Dixon expressed the legal issue he was determined to clarify in the following terms:

> It has sometimes been said that the power of the Court to rectify a contract on the ground of mutual mistake is confined to cases where there was an actual concluded contract antecedent to the instrument which is sought to be rectified.[76]

In support of this proposition was the seminal judgment of James V-C in *MacKenzie v Coulson* ('*Coulson*')[77] and the High Court decision (in which Dixon J participated) in *Australian Gypsum Ltd v Hume Steel Ltd* ('*Australian Gypsum*').[78] Both of these cases clearly embody the proposition enunciated in the quote above. But in a subsequent case, *Shipley Urban District Council v Bradford Corporation*,[79] Clauson J provided a detailed examination of the authorities to show that *Coulson*,[80] and by implication *Australian Gypsum*,[81] should be read as applying only to cases where the mutual mistake is sought to be established by reference to the terms of a previous contract.[82] Justice Dixon noted that the Court of Appeal, although deciding the appeal on another point, endorsed Clauson J's judgment,[83] and he was happy to do the same.[84] In the context of the facts in *Slee*,[85] Dixon J accepted that there was no concurrent intention of the parties that any option would be exercisable only in the first year, with the proviso that the lease itself would need to run for at least one year. This was a belief only of the appellant Slee. Therefore, even on the revised understanding of a court's power to rectify an instrument, there was no mutual mistake upon which to ground such a jurisdiction. In other words, there had been no need for Dixon J to discuss the legal issues surrounding mutual mistake.

Viewed from the perspective of a strict and complete legalist, this part of Dixon J's judgment in *Slee*[86] is extraordinary. Here we have an example of Dixon J discussing in great detail a legal argument that had been abandoned by counsel and which, had it been a live argument, would not have applied as the facts did not support its operation. It is quite clear that Dixon J did *not* need to examine and then pronounce on this legal issue to decide the matter before the court. This is not an example of strict legalism in action.

Does the fact that the appeal was from a judgment making a declaration challenge this analysis of Dixon J's reasoning? It is uncontroversial, after all, to

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76 Ibid 280 (Rich, Dixon and Williams JJ).
77 (1869) LR 8 Eq 368.
78 (1930) 45 CLR 54.
79 [1936] Ch 375 ('*Shipley*').
80 (1869) LR 8 Eq 368.
81 (1930) 45 CLR 54. This case was not discussed by Clauson J in *Shipley*.
82 [1936] Ch 375, 394–8 (Clauson J). In other words, Clauson J argued that even if there was no antecedent contract, an instrument that would otherwise record a contract but which did not give effect to the concurrent intention of the parties at the time of its execution could be rectified by a court—in appropriate circumstances.
83 (1949) 86 CLR 271, 281 (Rich, Dixon and Williams JJ).
84 Ibid 280–1 (Rich, Dixon and Williams JJ).
85 Ibid.
86 Ibid.

accept that in making declarations judges are mindful of avoiding further litigation arising from the same set of facts. Reasonable minds might differ on whether or not Dixon J's discussion of an argument that had been abandoned by counsel, and which would not have applied to the facts even if it were a live issue, was an attempt to ensure that the litigation ended with the handing down of the decision in the case before the court. For two reasons, however, the author thinks that the fact that the appeal involved a declaration does not absolve Dixon J of failing to reason as a strict legalist in this aspect of the case.

First, Dixon J did not treat the fact that the decision appealed against was a declaration as being of central importance in this case:

> We have discussed the defence on the basis that this is in substance an action for specific performance although there is only a judgment for a declaration. As we are of opinion that the defence fails in any event it is unnecessary to decide whether it would be a defence to an action for a mere declaration of right ... *The purpose of the present action is not to obtain a construction of a contract which will determine the future rights and obligations of the parties, but to enforce the completion of a sale pursuant to the exercise of an option of purchase*, and it does not appear to us to be a case in which a declaration of right should have been made except as incidental to the enforcement of the contract either by way of specific performance or damages.[87]

This suggests that for Dixon J concerns about finality of litigation associated with the making of the declaration were not relevant to his reasoning. Secondly, in discussing the abandoned defence of mutual mistake (which then led to the discussion of *Shipley*[88] and *Australian Gypsum*[89] analysed above) Dixon J found that there was no basis for a claim of mutual mistake:

> We can find no concurrent intention of the parties existing at the date of the contract of 12th March 1946 that the option was to be an option exercisable at any time during the first year of the lease but only to be completed at the end of that year. At the date of the contract that intention was at most only the intention of the appellants. *The respondent never had such an intention.*[90]

There was no need for Dixon J to consider what the law was in the case of mutual mistake because, on the facts, he held that there was no such mistake. Any discussion of the applicable law was unnecessary in these circumstances and at variance with his own practice and beliefs.

Indeed, the best reading of Dixon J's discussion of the law in this part of his judgment in *Slee*[91] is as an example of agenda-judging—in other words, it appears that Dixon J approached his reasoning in this case with preconceived ideas about what the law should say. It seems that he accepted that the formulation in *Australian Gypsum*,[92] to which he had contributed, was not as convincing as it

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87 Ibid 279–80 (Rich, Dixon and Williams JJ) (emphasis added).
88 [1936] Ch 375.
89 (1930) 45 CLR 54.
90 (1949) 86 CLR 271, 281 (Rich, Dixon and Williams JJ) (emphasis added).
91 Ibid.
92 (1930) 45 CLR 54.

might have been and that the subsequent treatment of this topic by Clauson J in *Shipley*[93] provided a superior understanding of the authorities and formulation of the rule. While it is, of course, impossible to read the mind of a long-dead judge, it seems likely that Dixon J used the 'opportunity' provided by *Slee*,[94] an illegitimate opportunity by the standards of a strict and complete legalist, to correct what he would have perceived as a long-standing error in the law; indeed, a long-standing error which he had helped to perpetuate some 19 years earlier.

V Conclusion

These two case studies show that Dixon did not decide them in accordance with his self-described judicial method. Before addressing the lessons to be learnt from this exercise, the limitations of what this and the author's earlier articles show need to be acknowledged.

First, even if Dixon did decide the overwhelming majority of his contract cases in conformity with his strict legalist beliefs, this does not show that his decision-making was the same in other areas of law. It might be that contract law is especially appropriate to Dixonian judging and that other areas of law are not. Tort law, for example, might be more susceptible to instrumental, policy-based reasoning. Further, given the fact that Australia's Constitution only came into effect some 28 or so years before Dixon was appointed to the High Court, it would be interesting to undertake a study of his constitutional decisions to see what strict legalism would mean in such a context and whether those judgments did give effect to this judicial method in what were often highly charged and politically sensitive cases. Dixon's fidelity to strict legalism in other areas of law can only be determined if and when studies comparable to the one carried out in this and the author's other case studies of his contracts jurisprudence are made in these other areas of law.

Secondly, showing that Dixon and other judges did decide a number of contract cases as strict legalists does not, of course, necessarily show that all or most judges at other times and in other jurisdictions have judged as strict legalists. There is no necessary correlation between what one influential Australian judge did in the middle decades of the 20th century and what other judges in this and other countries have done at that and other times.

Thirdly, in this and other articles no general claim about the appropriateness of Dixonian strict legalism has been made. While it can be accepted that judges can or could judge in this manner, it can still be argued that for Australia in 2010 there are better, more appropriate judicial styles. Thus, for example, one could compare Judge Posner's call for a pragmatic style of judging[95] to more explicitly welfarist concerns argued by former Justice Thomas,[96] or the very explicit suggestions by

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93 [1936] Ch 375.
94 (1949) 86 CLR 271.
95 Posner, *How Judges Think,* above n 24.
96 Edward Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005).

feminist scholars for judging to be more openly feminist.[97] There are, of course, other judicial styles that have been promoted from time to time.

Fourthly, to show that Dixon decided as a strict legalist in the overwhelming majority of his contract cases is not to suggest that in doing so he was, somehow, totally immune from the biases and prejudices that affect everyone. A strict legalist judge is not someone who is without human instincts and flaws. Rather, strict legalism as understood and practised by Dixon is the adoption of a method to *minimise* the effects of ordinary human limitations when acting as a judge.

Finally, in this and previous articles the author has not responded to what appear to be justified criticisms of Dixon. Revelations made in Philip Ayres' recent biography of Dixon show that Dixon had written 'substantial' parts of a judgment that came out under Rich J's name (with Dixon J then sitting on an appeal from that judgment).[98] Leeser's characterisation of this as hypocrisy on Dixon's part is valid.[99] Nor have I responded to justifiable questions about the close relationship between Dixon and Sir Robert Menzies, questions that raise real concerns about Dixon's having crossed the invisible but very real line that separates judging from politics, at least in the eyes of a strict legalist.[100] These are serious criticisms and are worthy of examination and analysis, but the focus of this article and of previous articles has been on Dixon's *judging* in contract cases.

Nevertheless, even with such limitations, this series of articles has established something significant. It is clear that Sir Owen Dixon (and several other High Court judges) did judge as strict legalists in a number of significant contract cases spanning the period from 1929 to 1964. Any debate about judging should now treat Dixonian strict legalism as a real and practicable judicial method that has been used in the very recent past. Discussion on judging today should not revolve around unexamined suggestions that Dixonian strict legalism was an unsophisticated myth believed in by self-delusional judges or, indeed, that it was an outright lie. Rather, Dixonian strict legalism deserves recognition and should be judged on its merits to see whether it is an appropriate form of judging for the needs of today.

One only has to be exposed to Sir Owen Dixon's judgments to appreciate the skill and mastery of the law that he brought to bear in deciding cases. After having read over a 100 of his contract decisions and compared them to the standards and methods contained in his call for a complete and strict legalism, it is also clear that in the overwhelming majority of these cases Dixon did decide as a strict legalist. Nevertheless, Dixon was as human as the next person and it should not surprise that he failed to live up to his standards occasionally. Both *Neal*[101] and

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97 See, eg, Rosemary Hunter, Claire McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010).

98 Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003) 93.

99 Julian Leeser, 'Review of *Owen Dixon*, by Philip Ayres' (2003) 26 *University of New South Wales Law Journal* 335, 339–40.

100 See, eg, Ritter, 'The Myth of Sir Owen Dixon' above n 7, 255.

101 (1940) 63 CLR 524.

Slee[102] clearly fail to satisfy the method that Dixon advocated and, in the main, followed.

However, by any standards, Dixon's adherence to strict legalism in judging is overwhelming and the two departures from this standard, whilst important, do not challenge the overall assessment that Dixon did decide in accordance with his self-proclaimed judicial method. But the most important feature of the identification of the two cases where he did not follow his own precepts is to show that it is possible to identify departures from what he advocated. Dixonian strict legalism is, indeed, a testable hypothesis.

[102] (1949) 86 CLR 271.