Sir Owen Dixon: a Strict and Complete Legalist?

His Contract Decisions Examined

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Chapter One — Sir Owen Dixon’s legalism

Sir Owen Dixon is most often remembered (and criticised) for his call for a ‘strict and complete legalism’ made in his address given upon taking the oath of office as Chief Justice of the High Court of Australia.\(^\text{14}\) 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 threat and that even in his own time it was unfashionable to argue that common law rules and techniques were real and bound judges.\(^\text{15}\) 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.\(^\text{16}\)

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


\(^{15}\) Dixon, ‘Concerning Judicial Method’, in Woinarski, above n 1, 152, 154.

\(^{16}\) Ibid 157–8.
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. 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 is 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 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.

The recent series of articles on judging by the then Justice McHugh of the Australian High Court illustrates this point very clearly. McHugh 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

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17 As Brian Tamanaha has shown, judges have accepted this and have been open about it for a very long time. See B Tamanaha, ‘The realism of judges past and present’ (2009) Cleveland State Law Review 77.
18 Dixon, ‘Concerning Judicial Method’, above n 2, 158.
McHugh 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.\textsuperscript{19} By way of contrast, for Dixon the authorities, rules and techniques of the common law were not \textit{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.\textsuperscript{20} 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.

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 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 jurisprudences, 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. 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 totally misunderstand 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

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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 to 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 and analogy and common sense and consequentialist
reasoning but they are not philosophers and their reasoning does not and cannot
match the rigour expected of logicians and philosophers.22 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 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 classroom 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 will be a major argument of this
paper that the reasoning of Sir Owen Dixon can be clearly differentiated from the
transparent attempts of other judges to cloak their policy preferences behind
unconvincing and unpersuasive legal reasoning. Indeed, it will be suggested that
Dixon too succumbed to this temptation in a small number of cases and that such
instances can in turn be clearly and easily identified.

22 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. R
Chapter Two — McDonald v Dennys Lascelles

In 2008 Chief Justice Murray Gleeson described Dixon J’s judgment in Dennys Lascelles as a distinctive contribution to the common law. According to the Chief Justice, Dixon J had written:

a leading judgment clarifying the consequences of acceptance of a repudiatory breach of contract and drawing attention to the need to avoid confusing two different kinds of rescission: one on the ground of some vitiating element in the contract; the other by acceptance of repudiatory breach.

The Chief Justice noted that the influence of Dixon J’s formulation had extended to the highest courts in the United Kingdom.

In 1980, in Johnson v Agnew [1980] AC 367, Lord Wilberforce, speaking for the House of Lords, referred to the English authorities on the question as ‘weak and unconvincing in principle’ and preferred the Australian authorities, which he said offered ‘a more attractive and logical approach from another bastion of the common law’ (at 396).

It will be the argument of this chapter that, important though it is for contract law, the real significance of Dixon J’s judgment is that it provides a detailed example of a strict legalist in action. Justice Dixon’s analysis of the consequences of accepting a repudiatory breach of contract and of the differences between rescission and termination for breach, as well as his examination of the implications of assignment in such circumstances, is carried out in complete conformity with his extrajudicial descriptions of the common law method.

Dennys Lascelles — the facts

Dennys Lascelles involved an attempted sale of 1,876 acres of land near Rye in Victoria. The facts surrounding the case are, unfortunately, somewhat complicated.

The four Johnson brothers entered into a contract for sale with C, A and E Besley (‘the Besleys’) and one Wills on 9 March 1925. The purchase price was

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1 (1933) 48 CLR 457 (‘Dennys Lascelles’).
2 Ibid.
4 Ibid 251.
5 Ibid 252.
£19,238\(^6\) with £3,000 deposit, and yearly instalments of £1,000 payable on 1 April of 1926, 1927, 1928, 1929 and 1930. The balance of £11,238 was due on 1 April 1931. At the time of hearing the deposit and instalments up to and including that of 1 April 1929 had been paid. The money due on 1 April 1930 and 1 April 1931 had not been paid.

On 23 June 1927 the Besleys and Wills entered into a contract of sale with the Rye Grazing Co Pty Ltd (‘Rye Grazing Co’) and one Dunkley. The purchase price was £23,462, with £6,000 as a deposit, and yearly instalments of £1,000 instalments payable on 24 January 1928, 1929 and 1930 with the balance of £14,462 due on 24 January 1931. The deposit and instalments up to and including the one due on 24 January 1929 had been paid but the money due on 24 January 1930 and 1931 had not been paid. McDonald and Holdsworth, the defendants at trial and the appellants before the High Court, were directors of the Rye Grazing Co.

On 14 August 1929 the Besleys and Wills entered into a deed of assignment with Dennys Lascelles Ltd (‘Dennys Lascelles’), which for £2,000 assigned their interest in the 23 June 1927 contract between the Besleys and Wills on the one hand and Dunkley and the Rye Grazing Co on the other. Notice of the assignment was given to the latter by the contracting parties. The assignment did not contain any express requirement that Dennys Lascelles should apply the money receivable under the second contract (the one dated 23 June 1927) to the discharge of the first (the one dated 9 March 1925) or that it should indemnify the assignors (the Besleys and Wills) in respect of the obligations incurred by them under the first contract.

The 21 January 1930 instalment due under the 23 June 1927 contract (owed by the Rye Grazing Co and Dunkley to the assignee of the Besleys and Wills — Dennys Lascelles) — was not paid on the due date and on 19 February McDonald and Holdsworth, both directors of the Rye Grazing Co, signed an agreement with Dennys Lascelles under which they would jointly and severally guarantee the payment of the instalment in consideration for Dennys Lascelles allowing, in effect, the Rye Grazing Co and Dunkley to postpone the overdue instalment to 24 January 1931.

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\(^6\) In all the money quantities given the figures refer only to pounds and ignore any shillings and pence.
On 24 January 1931 the Rye Grazing Co and Dunkley defaulted in the payment of money owing to Dennys Lascelles and on 1 April 1931 the Besleys and Wills defaulted on the instalment and balance payable to the Johnsons under the 9 March 1925 contract. On 16 April 1931 the Johnsons gave notice to the Besleys and Wills that they rescinded the 9 March 1925 contract. To finish matters, on 19 June 1931 the Rye Grazing Co informed the Besleys and Wills that it proposed to treat the contract of 23 June 1927 as repudiated and at an end and a similar notice was given by Dunkley on 26 June 1931.

A writ was issued on 5 June 1931 by Dennys Lascelles claiming the sum of £1,000 from McDonald and Holdsworth under the guarantee of 19 February 1931. The matter was heard before Cussen ACJ who found for the plaintiffs. Cussen ACJ’s recital of the facts included the following summary of the reason for the failure of this complicated transaction. In it he refers to the Rye Grazing Co as C.

As I understand the facts and figures, C was not only the original cause of the breakdown but was the one party who (whatever might be the result of a claim on the guarantee) would substantially gain from the breakdown. This results from the great fall in the value of the land as compared with what C agreed to give for it ... If C had completed his bargain, he would have lost in addition some thousands of pounds. At law, therefore, C has suffered no damages by the breach ... Here, as I have shown, defendants and C, with whom they were associated, have taken an active part in bringing about the events which have happened.7

In the context of the Great Depression it was likely that the failure by the Rye Grazing Co and Dunkley to pay the outstanding instalments and the balance due on its contract with the Besleys and Wills (which had been assigned to Dennys Lascelles) on 24 January 1931 contributed to the failure of the Besleys and Wills in making their payment of instalment and balance due on 1 April 1931. The default by the Besleys and Wills in the 1925 contract meant that the Rye Grazing Co was able to claim that its contract with the Besleys and Wills and their assignee, Dennys Lascelles, had come to an end because the Besleys and Wills were not able and willing to complete the contract. Because of the behaviour of the defendants outlined above, Cussen ACJ did not think it appropriate to apply equitable remedies to relieve the defendants of their obligations — remedies that in other circumstances would have been available to them.

7 (1933) 48 CLR 457, 462–3.
On appeal to the High Court a majority (Rich, Starke, Dixon and McTiernan JJ, Evatt J dissenting) found for the defendants (McDonald and Holdsworth), on the ground that the termination of the contract between the Rye Grazing Co and Dunkley on the one hand and the assignee Dennys Lascelles on the other had the effect of discharging the obligation of the principal debtor and thus discharged the obligation of the guarantor.

Justice Dixon’s analysis proceeded along the following lines. He saw the defence of the defendants as raising two questions. First, did the collapse or failure of the 23 June 1927 contract entirely relieve the purchasers from paying the instalment of £1,000 and, second, if this were the case, were the defendants liable under their guarantee? In answering these questions Dixon J noted that it would be necessary ‘to consider with some degree of exactness’ what were the rights and obligations of vendor and purchaser in a contract providing for payment through instalments. In doing so he noted that in an executory contract for the sale of land the general rule that the vendor cannot sue for the price is excluded whenever a contrary intention is shown by express terms in a contract. Such a contrary intention would be shown by an express term that all or part of the purchase money is to be paid on a fixed day, other than the day fixed for the completion of the contract by conveyance.\(^8\) The instalments due on the contract of 23 June 1927 manifested such a contrary intention. What Dixon J then had to consider was what effect, if any, the subsequent discharge of that contract had on the obligation of the purchasers under their contract of sale to pay the instalment. It is at this stage that Dixon J makes what Gleeson CJ depicts as an influential contribution to the common law of contract.

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When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party

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\(^8\) (1933) 48 CLR 457, 474–5 (Dixon J).
\(^9\) Ibid 475 (Dixon J).
\(^10\) Ibid 476 (Dixon J, citing Salmond J in Ruddenklau v Charlesworth (1925) NZLR 161,164–5).
because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.\textsuperscript{11}

This is an admirably clear description of the effect of termination on a contract and of the different consequences that attach to two different contractual situations that used the same word — ‘rescission’ — to describe them. If we accept the Chief Justice’s characterisation of this case as an influential contribution to the common law it is fair to ask if the reasoning adopted by Dixon J adhered to his self-proclaimed understanding of the common law method. This question will answered by concentrating on three aspects of Dixon J’s judgment in turn. First, how did Dixon J clarify the concept of rescission in contract? Second, did Dixon J reform the law dealing with the ability of an innocent party to claim damages for breach? And, third, what did Dixon J say about the different types of rights (unconditionally versus conditionally accrued) that survive termination after breach?

**Rescission and termination for breach**

Once we consider what Starke J said in this very case\textsuperscript{12} (and the authorities cited by Dixon J are examined) it becomes clear that he is doing nothing other than putting in felicitous language the commonly accepted understanding of the effects of the termination of a contract by either breach or matters going to its formation.

Justice Starke described the effect of the renunciation of the contract by the parties in this case as follows:

The rescission of the contract, however, did not operate to extinguish it \textit{ab initio}, but \textit{in futuro}, so as to discharge obligations under it unperformed … [A]part from any special stipulations of the contract, I apprehend that a purchaser who is not himself in default is discharged from further performance of the contract and is entitled to recover any money paid or property transferred by him thereunder; he is entitled to take proceedings in equity to assert his right and secure restitution, or to sue at law … On the other hand, a vendor who is not himself in default is discharged from further performance of the contract, and is entitled to the return of the land the subject matter of the contract, or his interest therein, but is bound to restore any moneys paid or property transferred to him thereunder.\textsuperscript{13}

\textsuperscript{11} (1933) 48 CLR 457, 476–7 (Dixon J).
\textsuperscript{12} Rich and McTiernan JJ agreed with Dixon J while Evatt J agreed with the judgment of Cussen ACJ in the Supreme Court of Victoria. Starke J was the only other judge in the High Court who discussed the matters raised by Dixon J which are central to the issues discussed in this paper.
\textsuperscript{13} (1933) 48 CLR 457, 469–70 (Starke J).
Unlike Dixon J, Starke J does not contrast the effects of the termination in this case from rescission arising from matters associated with the formation of a contract. One can assume that since no issues of formation arose Starke J did not feel it necessary to discuss this. But there is no indication that he would have disagreed with Dixon J. Another difference is that Starke J deals specifically with contracts for the sale of land whereas Dixon J’s formulation deals with contract in general. But, again, this is consistent with Starke J concentrating on the contract before him and there is no indication that he would think that the general position was not as Dixon J had described it. Certainly, Starke J’s formulation fits comfortably within the general position described by Dixon J.

If we examine the authorities cited by Dixon J we find that his formulation is grounded firmly in the earlier law. For example, in *Boston Deep Sea Fishing and Ice Co v Ansel*\(^{14}\) the English Court of Appeal was faced with a dispute over the dismissal of an agent for gross breach of duty (the taking of a profit from a client of the principal). The agent’s contract was yearly but the company’s articles of association provided for quarterly payment. On a claim for wrongful dismissal and quarterly payment the court held that his dismissal was justified and that his contract did not provide for quarterly payment, even if this had been the practice of the company. In his examination of the contractual rights of the agent, Bowen LJ, whom Dixon J cites in his judgment,\(^ {15}\) had the following to say:

Some confusion always arises from treating these cases between master and servant as a rescission of the original contract. It is not a rescission of the contract in the ordinary sense in which that term is used — that you relegate the parties to the original position they were in before the contract was made. That cannot be, because half the contract [in this case] has been performed. It is only a rescission in the sense that it determines the relation for the future, and you may regard that determination in two ways. It is either a determination in conformity with the rights of the master which arise under the contract. … Or you may treat it under the more general law, which is not applicable to contracts of service alone. You may treat it if you like as the wrongful repudiation of the contract being accepted by the other, as a determination of the contract from the time the party who is sinned against elects to treat the wrongful act of the other as a breach of the contract which emancipates himself from continuing it further. It is not a rescission of the contract in an ordinary sense in which the term is used in common law.\(^ {16}\)

\(^{14}\) [1886–90] All ER 65 ("Boston Deep Sea Fishing").
\(^{15}\) (1933) 48 CLR 457, 477, n 1.
\(^{16}\) [1886–90] All ER 65, 73–4 (Bowen LJ). Of the other judges sitting, Cotton LJ’s analysis is consistent with Dixon J’s formulation (71) while Fry LJ did not deal with this issue.
While not as succinct as Dixon J’s formulation, this description of the effect of rescission arising from repudiation of a contract and rescission which results in the parties being restored to their original positions is consistent with that formulation.

In Hirji Mulji v Cheong Yue Steamship Co\textsuperscript{17} (the other case cited by Dixon J) the Privy Council had to determine the jurisdiction of an arbitrator appointed pursuant to a charterparty. The charterparty had provided that the ship which was the object of the charterparty would be available from 1 March 1917. However, because of the war it had been requisitioned by the British government in 1917 and had not been released until 1919. The shipowners had then offered the ship but this had not been taken up by the charterers. The shipowners then appointed an arbitrator pursuant to the contract but the charterers declined to participate in the arbitration. An award in favour of the shipowners was made by the arbitrator. When the matter reached the Privy Council Lord Sumner held that the contract had been frustrated in the latter part of 1917 when expectations of a speedy release of the ship had been dashed. Lord Sumner, for the Privy Council, emphasised that in cases of ‘repudiation or rescission\textsuperscript{18} (thus clearly dealing with contractual repudiation arising from breach and not from problems of formation) of a contract, ‘a party may exercise his right to treat the contract as at an end, as regards obligations de futuro, [though] it remains alive for the purpose of vindicating rights already acquired under it on either side’.\textsuperscript{19}

In this case, because the contract was still wholly executory when the frustrating event occurred, no contractual rights had accrued and the arbitrator had no jurisdiction to deal with the dispute between the parties.\textsuperscript{20} While not as comprehensive as Dixon J’s formulation, these statements of law are totally consistent with what Dixon J had to say in Dennys Lascelles.

The remaining authorities cited by Dixon J are two textbooks. The first is Sir John Salmond’s \textit{Law of Contracts}.\textsuperscript{21} Dixon J refers to pages 284–9 and it is clear that his formulation in \textit{Dennys Lascelles} is a brilliantly executed summary of the careful

\textsuperscript{17} [1926] All ER 51.
\textsuperscript{18} Ibid 58.
\textsuperscript{19} Ibid 59 (Lord Sumner).
\textsuperscript{20} Ibid.
\textsuperscript{21} Sir John Salmond and Sir Percy Winfield, \textit{Law of Contract} (London, Sweet & Maxwell, 1927). (The incomplete manuscript was completed on Salmond’s death by Sir Percy Winfield. The text’s authorship is commonly cited as Salmond & Winfield).
treatment of the question in Salmond & Winfield. As Winfield makes clear in his introduction, both he and Sir John Salmond wrote with clear deference to legal authority.\textsuperscript{22} Thus we have a text with claims to describing and analysing the law (and, doubtless, ‘tidying up’ certain areas) by distilling the law to be found in the cases. The authors certainly did not claim to be creating an innovative or speculative study.

The other legal text cited by Dixon J is Charles Morison’s \textit{Rescission of Contracts}.\textsuperscript{23} The pages cited give a short and neat description of the matters covered in Dixon J’s formulation, with Morison distinguishing between conventional rescission and rescission by agreement, rescission arising from repudiation and discharge by breach.\textsuperscript{24} It also contains an acknowledgment that rescission was a confusing term because it covered fundamentally different situations: ‘The rule, that there cannot be rescission of a contract unless the subject-matter of the contract can be restored in substantially its former condition, has application to some only of the classes of cases which are conventionally treated as cases of ‘rescission’.\textsuperscript{25}

Justice Dixon was not, it is evident, the first to realise that use of ‘rescission’ in this area of contract caused some confusion and that there was need for different labels for what were essentially different ways in which contracts come to an end.

This examination of the authorities cited by Dixon J shows that his contribution in this part of the law was a matter of clarity and conciseness of language and not one of innovation. His treatment of the law is based on a deep respect for the authorities and his formulation is deeply embedded within them.

\textbf{Damages and termination for breach}

Justice Dixon recognised the ability of the innocent party to claim damages after termination for breach when he said that ‘the party in default is liable for damages for its breach’.\textsuperscript{26} Was Dixon J postulating a distinctly new understanding of the rights

\begin{itemize}
\item\textsuperscript{22} Ibid iv.
\item\textsuperscript{24} Ibid 179–80.
\item\textsuperscript{25} Morison, above n 23, 179.
\item\textsuperscript{26} \textit{Dennys Lascelles} (1933) 48 CLR 457, 477 (Dixon J).
\end{itemize}
of innocent parties to bring actions for damages in cases of contracts that had been repudiated after breach? I think not.

Justice Dixon himself cited Salmond J for the proposition that in contracts for the sale of land where the purchase money became a debt (in cases where through express terms or necessary implication the purchase money or any part thereof is made payable on a fixed day not the day for the completion of the contract by conveyance) and the purchaser repudiates the contract, notwithstanding such repudiation, ‘the vendor is not bound to sue for damages or specific performance, but may recover the agreed purchase money’. 27

For Salmond J the ability to sue for damages in this situation is taken for granted. Thus, if there were any innovation here it is the creation of Sir John Salmond. But, as noted above, in his extrajudicial treatment of contract Sir John Salmond made it quite clear that his was a work of synthesis and not one of deliberate innovation. It is likely that he carried out his judicial role with the same attitude in mind.

It is true that in Boston Deep Sea Fishing28 Bowen LJ does not specifically refer to the right of the innocent party to claim damages in a contract repudiated following breach. But that was understandable given that in that case the innocent party had not made any claim for damages. Instead, it was the party in default, Ansell (the agent of the Boston Sea Fishing Co), who had made a claim for wages under a mistaken understanding of his entitlements. There was no need for Bowen LJ to discuss the right to claim for damages when the situation did not arise. But in Hirji Mulji v Cheong Yue Co29 Lord Sumner accepted that damages could be claimed in such a situation. In his analysis of the difference between frustration on the one hand and rescission or repudiation on the other, he considered the situation where one party makes clear that because of the breach by the other he or she (the innocent party) will no longer be bound by the contract. In such circumstances the innocent party has ‘a

29 [1926] All ER 51.
right to treat the contract as at an end, if he chooses, and to claim damages for its total breach’. 30

Similar sentiments were expressed by Sir John Salmond in his Law of Contracts. He notes that the innocent party has the right to rescind/repudiate the contract and ‘the cumulative right of suing for damages for the loss of the entire contract’. 31

As we have seen above, Dixon J’s reference to Morison’s analysis of rescission dealt with that author’s intent to distinguish between competing usages of the term ‘rescission’; Morison was not led, in that part of his book, to discuss the right of an innocent party to claim damages. 32

Here again we have a fine example of Dixon J giving effect to existing rules and principles in the law of contract. His treatment of this area of the law is entirely consistent with previous authority and gives no evidence of any deliberate innovation.

**Unconditionally and conditionally accrued rights**

At first impression it might appear that Dixon J’s conclusion that the accrued rights which are protected after termination include only those that ‘have been unconditionally acquired’, 33 shows Dixon J in an activist or creative light. But when his judgment is considered it becomes clear that even here Dixon J is working within his self-imposed method.

Requiring the accrued rights that are protected to be unconditionally acquired would restrict the types of rights which continue after termination. When the authorities and texts relied upon by Dixon J are examined it becomes apparent that none expressly limits the accrued rights that survive termination after breach to those which have been unconditionally accrued. Does this change to the law bring into question Dixon J’s fidelity to the common law method as he described it?

30 Ibid 58 (Lord Sumner).
31 Salmond & Winfield, above n 21, 287.
32 Morison, above n 23. The pages referred to by Dixon J are 179–80.
33 (1933) 48 CLR 457, 477 (Dixon J) (emphasis added). I would like to thank Dr Greg Tolhurst for clarifying my analysis of this part of Dixon J’s judgment. Needless to say, it should not be assumed that he agrees with everything that is written here.
The difference between what Dixon J described as conditionally and unconditionally acquired rights had been recognised in *Boston Deep Sea Fishing*[^34] which, as discussed above,[^35] involved the dismissal of an agent for gross abuse of his position, with the rights of the dismissed agent to recover part of his salary being at issue. The agent’s claim for one quarter of his salary was based on the company’s articles of association which provided for payment each quarter. The Court of Appeal rejected that contention because it found that the agreement between the parties was for annual payment. In doing so Cotton LJ made the following point: ‘Nothing which I say must be considered as expressing any opinion in favour of the view that, if there had been a quarter’s salary then actually due for which he could have sued, his dismissal would have deprived him of that right’.[^36]

It is apparent here that Cotton LJ recognises the potential for different treatment for rights that have been unconditionally accrued and for those that are conditional upon some aspect of the contract being carried out. Although Cotton LJ does not commit himself it seems obvious that he saw unconditionally accrued rights as surviving the termination of a contract for breach. Lord Justice Bowen in the same case was more circumspect, while at the same time recognising the distinction between the two types of accrued rights.

The only question therefore is whether the salary in question was current salary ... Was it money any portion of which had accrued due at the time of the dismissal, even though it was not payable till afterwards, or was it a salary which had not accrued due at all? If it had accrued due, but was not payable till afterwards, a question might have arisen whether Ansell [the agent] was entitled to it, but, as it does not necessarily arise in this case, I desire to express no opinion on that point.[^37]

In *Dennys Lascelles* Dixon J faced the question whether or not guarantors were liable for the unpaid instalments due at the time of the termination of the contract. Following Salmond J in *Ruddenklau v Charlesworth*[^38] and Cussen J (for the Victorian Supreme Court) in *Reynolds v Fury*[^39] he held that:

> instalments of purchase money, which, by the conditions of a contract of sale of land are payable at fixed times before conveyance, become immediately recoverable as

[^34]: [1886–90] All ER 65.
[^35]: See discussion associated with n 14 above.
[^37]: [1886–90] All ER 65, 74 (Bowen LJ).
debts or liquidated demands, notwithstanding that the sale has not yet been completed by conveyance.\textsuperscript{40}

So, for Dixon J each instalment becomes a debt which is an unconditionally accrued obligation to pay. In reaching this conclusion he was building upon earlier cases; but whereas Cotton and Bowen LJJ in \textit{Boston Deep Sea Fishing} had merely referred to the distinction without pronouncing on it, Dixon J formulated the distinction as central to the identification of which rights continued after termination of a contract for breach. (As will be shown below, this did not mean that the seller could keep the money or request its payment if unpaid).\textsuperscript{41}

Characterising the instalments payments as debts has, of course, significant legal implications for those obligations. Yet it is clear that Dixon J did not just pluck this idea out of thin air. Rather, he based it firmly on existing authority. This is an example of the principled development of the law from established doctrines, while remaining as faithful as possible to the existing authorities. Dixonian innovation could be bold but it was always firmly based on what came before and was driven by the necessities of the legal system, not the agenda of any particular judge.

To sum up so far: There is no evidence that Dixon J, in his discussion of the differences between rescission and termination for breach, was doing anything more than providing a neatly packaged summary of what judges and jurists had been saying (and doing) for at least 40 years before him. Indeed, while it is appropriate to recognise the felicity of language and the economy and precision of his analysis of the law, it is also appropriate to acknowledge that Dixon J’s formulation is clearly a superb summary of a fine piece of analysis by Sir John Salmond. Neither can it be claimed that Dixon J added anything new to the existing law on the right of an innocent party to claim damages after termination for breach. It is clear, however, that Dixon J built on the existing law to generate a general proposition about the nature of the rights that survive termination.

\textsuperscript{40} (1933) 48 CLR 457, 476.
\textsuperscript{41} For a discussion of this point see text associated with nn 70–75 below.
But what of Gleeson CJ’s invocation of Lord Wilberforce’s judgment in *Johnson v Agnew*, where the latter had seemed to imply that Dixon J’s judgment in *Dennys Lascelles* amounted to a creative and bold reformulation of the law?

**Johnson v Agnew**

*Johnson v Agnew* involved a dispute between vendors and a purchaser. A contract of sale for a house and some grazing property was made on 1 November 1973. There were several mortgages on both properties and the vendors had on the same day entered into a contract to purchase another property. However, the purchase price of £117,000 was large enough to cover the extinguishment of both the charges over the property and the purchase price of the new property. The completion date was fixed at 6 December 1973 and before that date the purchaser had accepted the vendors’ title. The purchaser did not complete on that date. The vendors’ solicitors served a notice on 21 December 1973 that time was of the essence in the contract and fixed 21 January 1974 as the final date for completion. On 8 March 1974 the vendors issued a writ seeking specific performance and on 20 May 1974 they sought summary judgment for specific performance. An order to this effect was made on 27 June 1974 but it was not drawn up and entered until 26 November 1974.

In the meantime the vendors’ mortgagees had acted. One mortgagee had obtained an order for possession of the house on 22 August 1974 and had sold it on 20 June 1975 with completion on 18 July 1975. The other had done the same with the land, selling it on 3 April 1975 with completion taking place on 11 July 1975. Thus, according to Lord Wilberforce, by 3 April 1975 specific performance of the contract for sale had become impossible.* The vendors took no action on the order for specific performance until 5 November 1975 when they issued a notice of motion seeking, in the alternative, either that the purchaser pay the balance of the purchase price with an enquiry as to damages or that the vendors were entitled to treat the contract as repudiated by the purchaser, who would forfeit the deposit with an enquiry as to damages.

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42 [1979] 1 All ER 883.
43 Ibid.
44 Ibid 888.
The motion was dismissed by Megarry V-C on the grounds that the first claim failed because specific performance was no longer possible and the second because of the authority of Capital and Suburban Properties Ltd v Swycher. On appeal to the Court of Appeal Megarry V-C’s decision was affirmed except that damages pursuant to Lord Cairns Act were allowed. The case then went on appeal to the House of Lords.

After stating what he thought to be basic and uncontroversible propositions about the law of contract in land dealings Lord Wilberforce stated the problem, as he saw it, facing the court:

If, as is clear, the vendor is entitled (after and notwithstanding that an order for specific performance has been made) if the purchaser still does not complete the contract, to ask the court to permit him to accept the purchaser’s repudiation and to declare the contract to be terminated, why, if the court accedes to this, should there not follow the ordinary consequences, undoubted under the general law of contract, that on such acceptance and termination the vendor may recover damages for breach of contract?

It is clear that Lord Wilberforce thought that the answer was yes but he had to respond to authorities that supported the opposite conclusion. The principal authority was Henty v Schröder where Jessel MR was reported as saying that a vendor could not at the same time obtain an order to have the agreement rescinded and claim damages against the defendant for breach of the agreement. It was this decision that the Court of Appeal affirmed in Swycher, which in turn was followed by Megarry V-C at first instance in Johnson v Agnew. It is in his analysis of the persuasiveness of this line of authority that Lord Wilberforce appeals to Dixon J’s judgment in Dennys Lascelles.

Lord Wilberforce examined the line of authority emanating from Jessel MR’s judgment and showed that it started from the equivalent of a throwaway line by that judge and proceeded through a number of precedents which he described as

45 [1976] Ch 319 (‘Swycher’).
46 Chancery Amendment Act 1858.
47 [1979] 1 All ER 883, 890 (Lord Wilberforce).
48 (1879) 12 Ch D 666.
49 [1979] 1 All ER 883, 891 (Lord Wilberforce, quoting Jessel MR in Henty v Schröder (1879) 12 Ch D 666, 667).
51 [1979] 1 All ER 883.
‘wavering’,\(^{52}\) and was, in any event, totally inconsistent with the general contract principles that he had earlier described in his judgment. In these circumstances he was unwilling to endorse these cases, especially given the existence of an alternative approach: ‘Fortunately, there is support for a more attractive and logical approach from another bastion of the common law whose courts have adopted a robuster attitude’.\(^{53}\)

This bastion is Australia and Lord Wilberforce gives three citations to Australian authority as well as a reference to Voumaid’s *Sale of Land in Victoria*.\(^{54}\) The first reference is to Dixon J’s formulation from *Dennys Lascelles* but it is difficult to see what it adds to Lord Wilberforce’s position. Justice Dixon’s formulation adds nothing to what Lord Wilberforce had said about the positions of parties to a contract when the breach by one entitles the other to treat the contract as repudiated. Indeed, Lord Wilberforce’s discussion of this very point had included a reference to *Boston Deep Sea Fishing*,\(^{55}\) which, as was shown above, made essentially the same analysis of rescission in contract law as made by Dixon J.

The second citation is to the High Court decision of *Holland v Wiltshire*.\(^{56}\) Lord Wilberforce reproduces from Dixon CJ’s judgment an extract where the Chief Justice explained that upon a purchaser failing to complete and the vendor treating the contract as discharged for breach, the vendor was able to claim unliquidated damages for breach. This situation, as Dixon CJ made clear, was different from that arising where rescission for some invalidating cause resulted in the contract being void ab initio.\(^{57}\) Again, it is not immediately apparent how this discussion does anything other than to repeat the sentiments that Lord Wilberforce had expressed in his opening statement of general contractual principles relevant to the situation in front of him. The reference to *Voumaid’s Sale of Land in Victoria* seems to support what was said by Dixon CJ but adds nothing otherwise.

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\(^{52}\) Ibid, 892 (Lord Wilberforce).

\(^{53}\) Ibid.

\(^{54}\) (Law Book, 1939)

\(^{55}\) [*1886–90*] All ER 65. See discussion associated with nn 14–16 above.

\(^{56}\) (1954) 90 CLR 409.

\(^{57}\) [*1979*] 1 All ER 883, 893 (Lord Wilberforce, quoting Dixon CJ in *Holland v Wiltshire* (1954) 90 CLR 409, 416).
The final citation is to a judgment of O’Bryan J of the Supreme Court of Victoria in McKenna v Richey.\textsuperscript{58} In that case O’Bryan J held that where a plaintiff had succeeded in obtaining an order for specific performance that in the event could not be carried into effect (even when this failure resulted from the actions of the plaintiff), the plaintiff could still then come to the court and ask for damages on the basis of an accepted repudiation.\textsuperscript{59} It is this case that deals directly with the issue presented in Johnson v Agnew,\textsuperscript{60} as it is authority that directly challenges Henty v Schröder\textsuperscript{61} and the effect of Swycher.\textsuperscript{62} Lord Wilberforce’s conclusion should be read in this light: ‘My Lords, I am happy to follow the latter case [McKenna v Richey]. In my opinion Henty v Schröder\textsuperscript{63} cannot stand against the powerful tide of logical objection and judicial reasoning’.\textsuperscript{64}

Despite Gleeson CJ’s suggestion that Dixon J’s formulation in Dennys Lascelles was central to the reasoning of Lord Wilberforce, it seems that this is not the case. The analysis provided in Dennys Lascelles fits seamlessly into what Lord Wilberforce describes as the general position in contract. It is the exception raised by Henty v Schröder,\textsuperscript{65} dealing with the particular issue of whether after an order for specific performance has been made and which cannot be given effect to, the plaintiff can then sue for damages for breach, which is the problem faced by Lord Wilberforce. Had this issue arisen in Dennys Lascelles Dixon J would have had to deal with it.\textsuperscript{66} But the issue did not arise and, therefore, he did not deal with it. By way of contrast the decision and reasoning of O’Bryan J in McKenna v Richey\textsuperscript{67} are central to Lord Wilberforce’s reasoning, as the case provides an authority and a discussion of the relevant authorities that supports his position. So, in other words, Lord Wilberforce was right to include O’Bryan J’s judgment as part of ‘the powerful

\textsuperscript{58} [1950] VLR 360.
\textsuperscript{60} [1979] 1 All ER 883.
\textsuperscript{61} (1879) 12 Ch D 666.
\textsuperscript{62} [1976] Ch 319.
\textsuperscript{63} (1879) 12 Ch D 666.
\textsuperscript{64} [1979] 1 All ER 883, 894 (Lord Wilberforce).
\textsuperscript{65} (1879) 12 Ch D 666.
\textsuperscript{66} It is interesting to speculate what Dixon J might have done if faced with such a question. A clue might be found in Morison’s treatment of it. Morison, in essence, limits Henty v Schröder to its facts and describes the law in virtually identical terms as Lord Wilberforce. See Morison, above n 23, 199–204.
\textsuperscript{67} [1950] VLR 360.
tide of logical objection and judicial reasoning but there is no good reason to include Dixon J’s comments in Dennys Lascelles as part of this tide. Justice Dixon’s formulation added nothing to the general discussion of contractual principles provided by Lord Wilberforce and his judgment had nothing to say about the specific issue before the House of Lords.

Once Lord Wilberforce’s judgment in Johnson v Agnew is considered in detail it becomes clear that Dixon J’s formulation was not central to Lord Wilberforce’s decision and that the praise given to that formulation seems misplaced. Dennys Lascelles really had little to offer Lord Wilberforce in the problem before him.

As we have seen in the discussion of the differences that flow from whether a right has been unconditionally or conditionally accrued, Dixon J’s judgment in Dennys Lascelles shows the capacity for principled development that he recognised and welcomed. The legal issue raised in Dennys Lascelles provided another example of such principled and disciplined development in the law, an example that was not dealt with by either Gleeson CJ or Lord Wilberforce.

**Unpaid instalments — recoverable or not?**

As noted above Dennys Lascelles raised two questions which Dixon J saw as crucial for deciding the case. First, did the collapse or failure of the 23 June 1927 contract entirely relieve the purchasers from paying the instalment of £1,000 and, second, if this were the case, were the defendants liable under their guarantee? In other words, the liability of the guarantors rested, if they were to be liable, on the liability of the purchasers to pay the instalment. Dixon J’s analysis proceeded as follows.

First, citing a long list of authorities starting with Palmer v Temple to the two Privy Council decisions of Steedman v Drinkle and Brickles v Snell, Dixon J noted that the authorities made it clear that:

> instalments already paid may be recovered by a defaulting purchaser when the vendor elects to discharge the contract ... Although the parties might by express agreement give the vendor an absolute right at law to retain the instalments in the

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68 [1979] 1 All ER 883, 894 (Lord Wilberforce).
69 [1979] 1 All ER 883.
70 (1839) 9 Ad & E 508; 112 ER 1304.
71 [1916] 1 AC 275.
72 [1916] 2 AC 599.
event of the contract going off, yet in equity such a contract is considered to involve a forfeiture from which the purchaser is entitled to be relieved.\footnote{1933} 48 CLR 457, 478 (Dixon J), footnotes omitted.

Would the situation be different if there were no express agreement to forfeit instalments?

[W]here there is no express agreement excluding the implication made at law, by which the instalments become repayable upon the discharge of the obligation to convey and the purchaser has a legal right to the return of the purchase money already paid which makes it needless to resort to equity and submit to equity as a condition of obtaining relief, the vendor appears to be unable to deduct from the amount of the instalments the amount of his loss occasioned by the purchaser’s abandonment of the contract. A vendor may, of course, counter-claim for damages in the action in which the purchaser seeks to recover the instalments.\footnote{Ibid 478–9 (Dixon J).}

But the problem was that the instalment due on 24 January 1930 had not been paid, which in turn raised the issue of whether the guarantors were liable to pay that sum. Dixon J was emphatic in stating that if the instalment had been paid by the purchasers they would have been entitled in law, because of the absence of an express provision for the forfeiture of instalments, to recover them. So what was the situation when instalments were due, but not paid? ‘It appears to me inevitably to follow from the principles upon which instalments paid are recoverable that an unpaid overdue instalment ceases to be payable by the purchasers when the contract is discharged.’\footnote{Ibid 479.}

Justice Dixon’s reasoning here appears to adopt the following strategy. First, if the instalment had been paid it was recoverable. Second, to make the purchaser pay the instalment would impose upon the purchaser the additional need to bring an action to recover it. And, third, why then impose such an unnecessary step? Justice Dixon provides no authority for his direct claim that an overdue instalment ceases to be payable. The authorities that he had examined dealt with situations where instalments had already been paid. So, clearly, he is innovating here by developing the law. But his position follows, if not in strict logic, then at least in common sense. It is an incremental change that fits within the existing principles derived from the authorities in the area but it is a change nevertheless. It is not a monumental change; it is not, perhaps, a significant contribution to the common law of contract. But, it is
a change that is consistent with Dixon J’s understanding of judicial method in the common law.

This change in the law was not identified by Gleeson CJ and Lord Wilberforce. It is a change that resulted from the fact that the existing law did not provide a determinate answer to the problem before the court. It is also a legal change that fits seamlessly within the existing authorities and yet changes the law to the minimum extent necessary to decide the legal issue before the court as consistently as possible with the flow of authorities and the ‘logic’ of the rules in this area of contract.

Dennys Lascelles also shows that while Dixon J was happy to innovate where that was necessary, he was not an activist judge looking to change the law at the slightest provocation.

Sir Owen Dixon and caution in the judicial role

Justice Dixon’s strict legalism is again on display when he considers the effect of the assignment made on 14 August 1929 between Dennys Lascelles and the Besleys and Wills by which Dennys Lascelles took on the rights of the former in the contract of 23 June 1927, when the Besleys and Wills resold the property to the Rye Grazing Co and Dunkley. Did the fact of assignment have any impact on the obligations of McDonald and Holdsworth, the guarantors for the Rye Grazing Co and Dunkley?

Justice Dixon did not think so. The ultimate answer was to be found in the civil law principle which had been adopted by the common law, namely, that the ‘extinction of the principal obligation necessarily induces that of the surety’.76 So, in this case, since the principal (the Rye Grazing Co and Dunkley) was not liable to pay the instalment, neither was the surety, McDonald and Holdsworth. Did the assignment change this?

In the present case, not only is the principal debtor relieved from personal liability to pay the instalments but the vendor’s just title both to obtain and to retain the instalment altogether ceases. If there had been no assignment and if the instalments had been duly paid, it would have become the vendors’ duty to repay it. It is, perhaps, uncertain whether, if the payment of the instalment had been duly made to the plaintiff, as assignee, the liability to repay it would have fallen upon it or upon its assignors, the vendors, because it is not clear that the obligation to repay it does not arise out of contractual implications by which the assignee would not be bound.

76 (1933) 48 CLR 457, 479–80 (Dixon J), citing Poitier on Obligations (Evans, trans) (1806), vol 1, 235.
as distinguished from an independent duty springing simply from the receipt of the money and the subsequent discharge of the contract. But, when the money has not been reduced into possession, the assignee’s right to recover it is precisely that of the vendor and is affected by exactly the same considerations.\textsuperscript{77}

Here we have a fine example of Dixon J’s legalism in action. He recognised a legal issue that was unclear and susceptible, at a first glance, to several possible answers. But, since it was not necessary to resolve that issue in answering the immediate legal question before the court, he left it alone. Of course, Dixon J was as open to temptation as the rest of us and the above quotation does contain hints about what he would do if the issue came before him in an appropriate case. But, tempted as he may have been, Dixon J adhered to the caution that is at the heart of the common law approach and avoided dealing with that which was not necessary for the solution of the legal dispute before him.

\section*{Conclusion}

Justice Dixon in \textit{Dennys Lascelles} was no deliberate innovator. His judgment does not make a significant change to the common law in his formulation of the differences between rescission arising from fundamental flaws in the framing of a contract and termination following breach. He also pointed carefully and in very clear terms to the authorities, judicial and academic, that spelled out the law in this area. Nothing in his formulation was not to be found in previous decisions that he cites and the immediate source of his formulation is a particularly well-crafted analysis of this area of law by Sir John Salmond. Neither did Dixon J innovate in his discussion of the right of the innocent party to claim damages after breach.

Justice Dixon did, however, build on earlier judgments to consolidate in general terms the rule that only unconditionally accrued rights, such as those attaching to a deposit in a sale of land, survived the termination of a contract upon breach. This was a significant contribution to the common law but it was also one that was based firmly on the existing case law and the more general principles underlying the position of the parties after breach. This was change that was Dixonian in motivation and execution. Although of less significance, Dixon J also developed the law by deciding that unpaid instalment payments ceased to be payable after the discharge of a contract. Finally, the mixture of creativity and restraint that is central to Sir Owen’s

\textsuperscript{77} Ibid 480–81 Dixon J) (emphasis added).
understanding of proper and traditional legal reasoning is exemplified in his treatment of the uncertain effects of assignment in this case where he makes clear that when a legal issue is noticed but does not require resolution in the case at hand, it will be left for another day.

Once the judgment of Dixon J in Dennys Lascelles is examined in detail it becomes apparent that it rests comfortably with his understanding of the common law method. Dixon J took much care to take his bearings from the existing authorities but yet, when necessary, he was able to develop the law in a principled way.
Chapter Three — Yerkey v Jones

In Garcia v National Australia Bank Kirby J suggested that the ‘equitable principle expressed by Dixon J’ in Yerkey v Jones (that there was a special married woman’s equity) amounted only to ‘his individual opinion’ which had not attracted ‘the support, express or implied, of a majority of the participating judges’ in that case. In Barclays Bank v O’Brien Lord Browne-Wilkinson, effectively speaking for the House of Lords, claimed that the special equity theory embodied in Dixon J’s judgment in Yerkey v Jones, while not inconsistent with later decisions, was derived from the Privy Council decision in Turnbull & Co v Duval, a decision which he described as ‘obscure’, as proceeding on a ‘mistaken basis’ and providing an ‘unsure foundation’ for the special equity applied by Dixon J.

In this chapter it will be argued that in Yerkey Dixon J distilled from Duval and subsequent cases that followed it a general formulation that was consistent with the decisions in all these cases and the somewhat scanty reasoning provided in some of them. But Dixon J was not only faithful to the body of law that dealt with the issue before him. His formulation shows the creative aspect of legalism because his formulation not only coheres with this body of law; it gives effect to the underlying premise upon which this body of law had developed — the belief that in a relationship of confidence and trust such as marriage, husbands in particular could take advantage of their wives in ways that were not necessarily actionable in the courts — in a much more convincing fashion than the competing formulation proposed by Lord Browne-Wilkinson and adopted by Kirby J.

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1 (1939) 63 CLR 649 (‘Yerkey’).
2 (1998) 194 CLR 395 (‘Garcia’).
3 (1939) 63 CLR 649.
5 Ibid 418 (Kirby J).
6 [1994] 1 AC 180 (‘O’Brien’).
7 Lord Templeman, Lowry, Slyn and Woolf all agreed with Lord Browne-Wilkinson’s judgment.
8 (1939) 63 CLR 649.
9 [1902] AC 42 (‘Duval’).
11 (1939) 63 CLR 649.
12 [1902] AC 429.
Yerkey v Jones — the facts

The central facts in the case were as follows. At the centre of the case was the sale of a property in Payneham, in suburban Adelaide, which consisted of a house and three acres of land fitted up as a poultry farm. The Yerkeys, John and Mary, were the vendors and the property was purchased by Estyn Jones, the husband of the defendant Florence Jones. Estyn Jones was a clerk on a small salary with no savings but, apparently, big ideas about poultry farming and dog-breeding who saw the Payneham property as a good business opportunity. Unfortunately, especially for Mrs Jones, he was, in the words of Latham CJ, to make ‘a complete failure of the poultry farm’.  

The price of the property was £3,500 with a nominal deposit. £200 was to be paid at the end of two years and £3,200 after three years. However, the Yerkeys made it a condition of sale that £1,000 of the final payment would be secured by a second mortgage over Mrs Jones’s house at Walkerville, another suburb of Adelaide. There was already a mortgage for £700 over this house. Mr and Mrs Jones went into possession of the Payneham property on 17th August 1936 when Mr Jones signed a document detailing the purchase and a promise to secure the execution of a mortgage over his wife’s property. It seems that this promise was made without the knowledge of Mrs Jones. The mortgage document was signed by Mrs Jones on 21st August 1936 when the Yerkeys and the Joneses met at the Yerkeys’ solicitor’s office. The various documents, including the mortgage over Mrs Jones’s house, were read by Mr and Mrs Jones and the solicitor for the Yerkeys went through the clauses of the mortgage with them. In particular he pointed out that there was a joint and several covenant entered into by Mrs Jones and her husband to pay £1,000 and that this imposed a personal liability on Mrs Jones. He also explained that if default occurred in payment the Walkerville property would be sold but if this did not raise the necessary funds the money owing would have to be found by either or both of Mr and Mrs Jones. He further explained that the effect of the mortgage was that the mortgagee could sue either or both of Mr and Mrs Jones.

The poultry business was a failure, interest payments soon fell into arrears and within a year Mr and Mrs Jones left the property. On 9 December 1937 the Yerkeys began legal proceedings against both the Joneses for recovery of the principal and

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13 (1939) 63 CLR 649, 656 (Latham CJ).
14 All sums have been rounded to the nearest pound.
interest under the £1,000 mortgage. Judgment was awarded against Estyn Jones but the action against Mrs Jones was dismissed. The trial judge, Napier J of the Supreme Court of South Australia, decided as follows.

I think that that she [Mrs Jones] executed the mortgage without understanding the effect of the personal covenant, and that she did so without due deliberation or advice, in circumstances of pressure and of confidence misplaced, which make it inequitable that the plaintiffs, who obtained the covenant by these means, should now be allowed to enforce it.\(^5\)

The High Court, Latham CJ and Rich, Dixon and McTiernan JJ, in separate judgments, set aside the trial judge’s judgment and allowed the appeal by the Yerkeys, rendering Mrs Jones liable to pay £1,068, which included money owing under the mortgage as well as the Yerkeys’ costs.

**Justice Dixon’s judgment**

Justice Dixon commenced his analysis by outlining the historical origin of the equitable principles surrounding a married woman’s right to have an otherwise valid agreement set aside. He noted that, until the passage of the *Married Women’s Property Acts*,

the capacity of a wife to undertake the obligations of a surety for her husband depended entirely upon the equitable doctrines which enabled her to bind her separate estate by contract. As her separate estate was her equitable property and as her power to deal with it rested on equitable principles, the question whether a contract or dealing was efficacious stood in quite a different position from the question whether a contract or disposition, valid at law, should be set aside by a court of equity on the ground of undue influence or unconscientious dealing.

The question whether a married woman might bind her separate property by a contract made with her husband or for his benefit or dispose of it in his favour did not present itself as a matter depending upon the application to the relationship of husband and wife of the presumption of influence. It was regarded as turning upon the degree to which the Court of Chancery was to carry its doctrine that with respect to her separate estate a married woman was to be considered a *feme sole* of full legal capacity.\(^6\)

Justice Dixon noted that by the mid-eighteenth century *in equity* a ‘married woman could deal with her husband as freely as with others\(^7\) although, as stated by Lord Hardwicke in the 1750 case of *Grigsby v Cox*,\(^8\) in such a case ‘a court of equity will

\(^5\) (1938) SASR 201, 213.
\(^6\) (1939) 63 CLR 649, 670 (Dixon J).
\(^7\) Ibid 670–71 (Dixon J).
\(^8\) (1750) 1 Ves Sen 517; 27 ER 1178.
have more jealousy over it ...’.\textsuperscript{19} Lord Eldon in \textit{Parkes v White}\textsuperscript{20} commented that while a married woman could deal with her property ‘the particular act ought to be looked at with jealousy’.\textsuperscript{21} Justice Dixon quoted also from Story’s \textit{Equity Jurisprudence} of 1835:

The doctrine is now firmly established in equity that she may bestow her separate property … upon her husband as well as upon a stranger. But at the same time, courts of equity examine every such transaction between husband and wife with an anxious watchfulness and caution, and dread of undue influence.\textsuperscript{22}

For Dixon J the passage of the \textit{Married Women’s Property Acts} did not, in substance, effect any change to the position as outlined by Lords Hardwicke and Eldon and by Story.\textsuperscript{23} How did the ‘anxious watchfulness’ which both judges and commentators had alluded to manifest itself?

Justice Dixon accepted that, while the relationship of husband and wife was not one where a presumption of undue influence existed, ‘it has never been divested completely of what may be called equitable presumptions of an invalidating tendency.’\textsuperscript{24} What were these presumptions?

In the first place, there is the doctrine, which may now perhaps be regarded as a rule of evidence, that, if a voluntary disposition in favour of the husband is impeached, the burden of establishing that it was not improperly or unfairly procured may be placed upon him by proof of circumstances raising any doubt or suspicion. In the second place, the position of strangers who deal through the husband with the wife in a transaction operating to the husband’s advantage may, by that fact alone, be affected by any equity which as between the wife and the husband might arise from his conduct. In the third place, it still is or may be a condition of the validity of a voluntary dealing by the wife for the advantage of her husband that she really obtained an adequate understanding of the actual nature and consequences of the transactions.\textsuperscript{25}

Before considering in more detail the effect of these presumptions and giving his analysis of modern case law to show their contemporary relevance, Dixon J highlighted the care that was necessary when relying on some of the older authorities. This care was necessary because of what might be called Lord Romilly’s heresy. In

\textsuperscript{19} (1939) 63 CLR 649, 671, citing Lord Hardwicke (1750) 1 Ves Sen 517; 27 ER 1178.
\textsuperscript{20} (1805) 11 Ves 209.
\textsuperscript{21} (1939) 63 CLR 649, 674, citing Lord Eldon in (1805) 11 Ves 209, 222.
\textsuperscript{22} Ibid, citing J Story, \textit{Equity Jurisprudence} (1835), sec. 1395.
\textsuperscript{23} Ibid 674–7 (Dixon J).
\textsuperscript{24} Ibid 675 (Dixon J).
\textsuperscript{25} Ibid.
Houghton v Houghton\(^{26}\) Lord Romilly had argued that when any person has made a large voluntary gift or similar transaction and that transaction is impeached, the burden is thrown upon the donee or the person benefiting to show that he or she had fairly obtained it from the other party and that that other party had understood the nature and consequences of the transaction.\(^{27}\) Justice Dixon noted that while Lord Romilly’s more general formulation did attract some adherents, by the turn of the 20th century it had been rejected. Nevertheless, even though a narrower formulation dealing with married women had currency, the ‘abandonment of the general doctrine makes it necessary to use care in relying upon dicta even when expressed as having a narrower application’.\(^{28}\)

This caution was important for Dixon J because as he says, ‘most of what follows in this judgment is no more than an echo and discussion\(^{29}\) of the views of Cussen J in Bank of Victoria v Mueller\(^{30}\). In that case Cussen J was to formulate propositions about the equitable principles surrounding transactions between married women and their husbands upon which, as indicated by the above quotation, Dixon J relied. But, since Cussen J’s analysis included reference to Lord Romilly’s judgment in Houghton,\(^{31}\) Dixon J was keen to emphasise that Cussen J’s formulation was not dependant on Lord Romilly’s broad conception of the rights of donees generally.\(^{32}\)

Dixon J then looked in more detail at the most important recent cases in which a wife’s surety for her husband’s obligations had been set aside, Turnbull & Co v Duval\(^{33}\), Chaplin & Co Ltd v Brammall\(^{34}\) and Shears & Sons Ltd v Jones,\(^{35}\) to illustrate how these cases embodied the invalidating principles that he had previously described. These cases and some other authorities that he relied upon will be discussed in more detail lower down in this chapter. As a result of this examination Dixon J was willing to accept that the ‘development which the rules of equity governing the voidability of instruments of suretyship entered into by married women

\(^{26}\) (1852) 15 Beav 275; 51 ER 545 (‘Houghton’).

\(^{27}\) (1939) 63 CLR 649, 678 (Dixon J), citing (1852) 15 Beav 275, 298; 51 ER 545, 553.

\(^{28}\) Ibid 680 (Dixon J).

\(^{29}\) Ibid 680 (Dixon J).

\(^{30}\) [1925] VLR 642 (‘Mueller’).

\(^{31}\) (1852) 15 Beav 275; 51 ER 545.

\(^{32}\) (1939) 63 CLR 649, 680 (Dixon J).

\(^{33}\) [1902] AC 429 (‘Duval’).

\(^{34}\) [1908] 1 KB 233 (‘Chaplin’).

\(^{35}\) (1922) 128 LT 218 (‘Shears’).
for debts of their husbands have followed has left the state of the law somewhat indefinite, if not uncertain.’ \(^{36}\)

So what was the result of this?

[I]t is clearly necessary to distinguish between, on the one hand, cases in which a wife, alive to the nature and effect of the obligation she is undertaking, is procured to become her husband’s surety by the exertion by him upon her of undue influence, affirmatively established, and on the other hand, cases where she does not understand the effect of the document or the nature of the transaction of suretyship. \(^{37}\)

In the first case Dixon J made it clear that nothing less than independent advice or relief from the ascendancy of her husband over her judgment and will would protect the creditor who has sought the suretyship. \(^{38}\) On the facts presented Dixon J found that there was no undue influence on the part of Mr Jones over Mrs Jones. \(^{39}\) It was the second ground alluded to by Dixon J that was central to the case at hand. Because of this it is important to outline Dixon J’s formulation in some detail.

In the second case, that where the wife agrees to become surety at the instance of her husband though she does not understand the effect of the document or the nature of the transaction, her failure to do so may be the result of the husband’s actually misleading her, but in any case it could hardly occur without some impropriety on his part even if that impropriety consisted only in his neglect to inform her of the exact nature of that to which she is willing blindly, ignorantly or mistakenly to assent. But, where the substantial or only ground for impeaching the instrument is misunderstanding or want of understanding of its contents or effect, the amount of reliance placed by the creditor upon the husband for the purpose of informing his wife of what she was about [to do] must be of great importance. \(^{40}\)

On the facts Dixon J found that Mrs Jones understood the effect of what she was signing and that her husband had not exercised any influence over her which could be considered undue or as a ground for interference by a court. \(^{41}\) With varying degrees of enthusiasm the other members of the Court agreed that there were no grounds to set aside the dealing. \(^{42}\)

\(^{36}\) (1939) 63 CLR 649, 683 (Dixon J).
\(^{37}\) Ibid 684 (Dixon J).
\(^{38}\) Ibid.
\(^{39}\) Ibid 686 (Dixon J).
\(^{40}\) Ibid 685 (Dixon J). The words ‘to do’ have been inserted as they appear to have been omitted in the report.
\(^{41}\) Ibid 686–8 (Dixon J).
\(^{42}\) Ibid 663–5 (Latham CJ), 665–6 (Rich J), 690 (McTiernan J).
To sum up. Dixon J came to his formulation of the special equity affecting married women by a process of analysis of the general position of married women in equity and a distillation, owing much to Cussen J, of the modern case law in this area.

**Justice Kirby on Yerkey v Jones**

Although Kirby J’s analysis of *Yerkey*\(^\text{43}\) ranged widely over several areas (including the role of intermediate appellate courts) the part of his judgment which is relevant to the purposes of this chapter concerns his suggestion that Dixon J’s judgment was an ‘individual opinion’\(^\text{44}\) and did not represent the view of the Court.

Justice Kirby’s analysis proceeded as follows. First, he endorsed Sheller AJ’s conclusion, in the Court of Appeal, that ‘in none of the other judgments of the other three justices’ in *Yerkey*\(^\text{45}\) (Latham CJ, Rich and McTiernan JJ) ‘is there support for the principles which have been said to flow from Dixon J’s decision’.\(^\text{46}\) In Justice Kirby’s words:

> Missing from the analysis of the applicable principle in the reasons of Latham CJ, Rich J and the short statement of McTiernan J, was any endorsement of the notion that the law adopted a universal presumption that a wife as such, because she was a married woman, was under a special disadvantage needing the protection of a special equity.\(^\text{47}\)

In addition, Kirby J characterised Dixon J’s formulation as an ‘historical anachronism’ and cited from Holmes’ famous dictum that it was ‘revolting’ to follow a rule of law because of its age, especially when ‘the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past’.\(^\text{48}\)

Finally, Kirby J accepted Lord Browne-Wilkinson’s analysis of *Yerkey*\(^\text{49}\) where the latter described the authorities upon which Dixon J based his judgement as ‘obscure and possibly mistaken’.\(^\text{50}\)

\(^{43}\) (1939) 63 CLR 649.

\(^{44}\) (1998) 194 CLR 395, 414 (Kirby J).

\(^{45}\) (1939) 63 CLR 649.

\(^{46}\) (1996) 39 NSWLR 577, 598.

\(^{47}\) (1998) 194 CLR 395, 419 (Kirby J).


\(^{49}\) (1939) 63 CLR 649.

Although Kirby J is not precise in his condemnation of Dixon J’s judgment in *Yerkey*\(^{51}\) it seems fair to summarise his criticism in the following way. First, Dixon J’s formulation in *Yerkey*\(^{52}\) did not attract the support of the other members of the Court. Second, Dixon J’s formulation was, at best, an interpretation of the existing case law which was idiosyncratic and probably out-dated. This suggests that Kirby J understood the existing case law in 1939 as being open to several interpretations and that Dixon J had adopted the least desirable if not, indeed, the least satisfactory, interpretation for his time. Third, Kirby J accepted the analysis in *O’Brien*\(^{53}\) that Dixon J’s analysis of the case law before 1939 was tainted by reliance on mistaken and unconvincing authorities.

Let us take these criticisms in order. Is Kirby J correct in claiming that Dixon J’s judgment in *Yerkey*\(^{54}\) stands on its own? Answering this question is not easy because of the somewhat opaque reasons given by the other judges.\(^{55}\) Chief Justice Latham gave a judgment which was consistent with the agency theory discussed by Lord Browne-Wilkinson\(^{56}\) but he also noted that Cussen J had examined the law ‘most elaborately’\(^{57}\) in *Mueller*.\(^{58}\) While the matter is not entirely clear, it is open to Kirby J to claim that the judgment of Latham CJ differs from the formulation proposed by Dixon J in *Yerkey*\(^{59}\) even if the reference to Cussen J is suggestive of agreement with his analysis (and, therefore, that of Dixon J).

The judgment of Rich J is another matter, however. In the course of agreeing with the other judges that the appeal should be allowed, thus denying Mrs Jones a defence against the execution of the mortgage which she signed, Rich J said:

I do not wish to derogate in the least degree from the judgment of Cussen J in the case of *Bank of Victoria Ltd v Mueller*, which contains a valuable exposition of

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\(^{51}\) (1939) 63 CLR 649.
\(^{52}\) Ibid.
\(^{54}\) (1939) 63 CLR 649.
\(^{55}\) In the Court of Appeal decision Scott LJ states that there were five judges sitting in *Yerkey* but, of course, there were only four — Latham CJ and Rich, Dixon and McTierman JJ: [1993] QB 109, 124 (Scott LJ).
\(^{57}\) (1939) 63 CLR 649, 664 (Latham CJ).
\(^{58}\) [1925] VLR 642.
\(^{59}\) (1939) 63 CLR 649.
equitable doctrine and a discussion and explanation of authorities which have caused much confusion.\textsuperscript{60}

Since Dixon J was quite open in his reliance on that very judgment of Cussen J and since Rich J did not challenge any of the principles covered by Cussen J it is difficult to see how Rich J’s judgment is in any way inconsistent with the position adopted by Dixon J.

The judgment of McTiernan J is both brief and unhelpful: ‘I agree with some doubt that the facts do not raise an equity entitling the respondent, Mrs Jones, to be relieved of her covenant. I concur in the order that the appeal be allowed’.\textsuperscript{61} Whilst one could not claim that this judgment supports Dixon J’s formulation, neither could it be said that it disagrees with it.

Justice Kirby’s inference that Dixon J’s was an isolated voice in \textit{Yerkey}\textsuperscript{62} is not correct. Justice Rich’s judgment is at least consistent with Dixon J, while McTiernan J’s judgment cannot be said to challenge Dixon J’s formulation. Only Latham CJ can be said to be clearly different but even there his reliance on Cussen J’s analysis in \textit{Mueller}\textsuperscript{63} shows some affinity between his judgment and that of Dixon J. In other words, Dixon J was not off on a frolic of his own in \textit{Yerkey}.\textsuperscript{64}

Second, what of the implication that can be derived from Kirby J in \textit{Garcia}\textsuperscript{65} that in 1939 the case law in this area was open to a number of possible interpretations and that Dixon J’s choice was undesirable and unsatisfactory? This can be best considered when the third of Kirby J’s criticisms, that Lord Browne-Wilkinson in \textit{O’Brien}\textsuperscript{66} has shown that that Dixon J’s analysis of the case law in 1939 was based on mistaken and obscure foundations, is considered in the next section.

\begin{footnotes}
\item[60] Ibid 665–6 (Rich J) (footnote omitted).
\item[61] Ibid 690 (McTiernan J).
\item[62] Ibid.
\item[63] [1925] VLR 642.
\item[64] (1939) 63 CLR 649. Belinda Fehlberg’s analysis of \textit{Yerkey}, which is consistent with the argument made in this article about the relationship between the judgments of Dixon J and the other judges, was cited by Kirby J in support of his contention that Dixon J’s judgment \textit{Yerkey} stood on its own. See \textit{Garcia} (1998) 194 CLR 395, 419 (Kirby J), citing B Fehlberg, ‘Women in “Family” Companies: English and Australian Experiences’ (1997) 15 \textit{Companies and Securities Law Journal} 348, 355.
\item[65] (1998) 194 CLR 395.
\item[66] [1994] 1 AC 180.
\end{footnotes}
Justice Dixon and Lord Browne-Wilkinson

Lord Browne-Wilkinson’s analysis of the ‘special equity theory’ which he associates with Dixon J and Yerkey,\(^{67}\) is based on the belief that *Turnbull & Co v Duval*,\(^{68}\) a 1902 case which ‘provides the foundation of the modern law’,\(^{69}\) was based on ‘obscure and possibly mistaken foundations’.\(^{70}\) So what happened in *Duval*?\(^{71}\) As his Lordship described it, Mr Duval owed three separate debts to the firm of Turnbull & Co, including a debt of £1,000 for beer to the Jamaican branch of the firm. Turnbull’s Jamaican manager was Mr Campbell who also happened to be the executor and trustee of a will under which Mrs Duval had a beneficial interest. Mr Campbell threatened to stop supplying Mr Duval with beer unless the latter provided some security and it was agreed between them that a document would be presented for Mrs Duval’s signature, to the effect that she would charge her beneficial interest under the will to secure payment of all the debts owed by Mr Duval to the company. Mrs Duval signed under pressure from her husband but she was under the impression that the charge secured only the beer debt, not all the debts owed to Turnbull & Co by her husband.\(^{72}\)

The trial judge set aside the security document on the ground the Mr Campbell was in a fiduciary relationship with her and that the company could not rely on the security document unless they could show that Mrs Duval understood the effect of the document and entered into it freely.\(^{73}\) The company’s appeal to the Privy Council was dismissed for the following reasons given by Lord Lindley, who delivered the judgment of the Privy Council.

In the face of such evidence, their Lordships are of opinion that it is quite impossible to uphold the security given by Mrs Duval. It is open to the double objection of having been obtained by a trustee from his cestui que trust by pressure through her husband and without independent advice, and of having been obtained by a husband from his wife by pressure and concealment of material facts. Whether the security could be upheld if the only ground for impeaching it was that Mrs Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it. It is, in their Lordships’ opinion, quite clear that Mrs Duval was

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67 (1939) 63 CLR 649.
68 [1902] AC 429.
71 [1902] AC 429.
pressed by her husband to sign, and did sign, the document, which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Co are unaffected by such pressure and ignorance. They left everything to Duval, and must abide the consequences.74

For Lord Browne-Wilkinson this judgment presented serious problems.

Thanks to the industry of counsel, we have seen the case lodged on the appeal to the Privy Council. The pleadings contain no allegation of undue influence or misrepresentation by Mr Duval. Mrs Duval did not in evidence allege actual or presumptive undue influence. The sole ground of decision in the courts below was Campbell’s fiduciary position. There is no finding of undue influence against Mr Duval. No one appeared for Mrs Duval before the Privy Council. Therefore the second ground of decision sprung wholly from the Board and Lord Lindley’s speech gives little insight into their reasoning.75

In Lord Browne-Wilkinson’s eyes the case can only be understood either as relying on a ‘mistaken’76 basis that a presumption of influence applied between Mr and Mrs Duval or that it was an application of Lord Romilly’s heresy concerning voluntary dispositions.77 Here he referred to Lord Romilly’s claim that when a person had made a large voluntary disposition the burden was thrown on the party benefiting to show that the disposition was made fairly and honestly and in full understanding of the consequences of the transaction.78 Because of this Lord Browne-Wilkinson argued that there was no ground for holding that Mrs Duval was entitled to set aside the transaction as against her husband and even less ground to set it aside as against the company.79

Is it true that Lord Lindley gave little insight into his reasoning? In his judgment Lord Lindley explained that Campbell, acting for Turnbull & Co, arranged with Duval that the latter obtain a security for his wife to sign, that the security was prepared by Campbell’s solicitors and that Campbell’s chief clerk accompanied Duval and witnessed Mrs Duval’s signature.80 Of her dealings with her husband Lord Lindley had the following to say.

She knew that he was in difficulties about the beer business, and believed that [$1000] would get him out of his troubles. She knew that he had a brick factory and

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76 Ibid.
78 See, eg, Hoghton v Hoghton (1852) 15 Beav 278.
80 [1902] AC 429, 432 (Lord Lindley).
machinery, but not that he was in difficulties with reference to this. She knew nothing about any document she was to sign until it was brought to her by her husband. She had no advice about it; she did not read it; it was not explained to her. She signed it because her husband pressed her to do so, and told her he was being pressed by Campbell, and because she believed that if she would sign it for £1000 it would enable her husband to settle the beer contract. She meant to lend him £1000 to get him out of his trouble. …

Mrs Duval’s statements as to what she knew of her husband’s affairs, of what he told her, and of the pressure under which she signed the security, were all corroborated by her husband. 81

For Lord Browne-Wilkinson the problem with this decision is that there is no indication that Mr Duval had committed a wrongful act against his wife. In the absence of a wrongful act by the husband why, asks Lord Browne-Wilkinson, should Mrs Duval have been entitled to set aside the contract with the creditor? Indeed, Lord Browne-Wilkinson further asks, would she have been entitled to set aside the transaction as against Mr Duval? His answer was an emphatic no. 82

This is the crux of the difference between the approach of Dixon J in Yerkey 83 and Lord Browne-Wilkinson in O’Brien. 84 For Dixon J the ‘wrong’ committed by a husband does not have to be a recognised cause of action; rather, the mere failure of the wife to understand what she had signed was enough, if the third party creditor failed to ensure that either it or an independent third party had advised the wife about the contents of the contract. 85 This is clearly his understanding of Duval 86 and just as clearly it is a fair reading of that case. For Lord Browne-Wilkinson failure to understand by itself is not enough; the husband must have committed a legal or equitable wrong and the creditor must have failed to ensure that the wife was adequately informed about the contents of the agreement. 87 There is no significant difference between the two judges on what needs to be done for the third party creditor to avoid the effects of having notice. Both judges agree, in general terms, that notice will be sheeted home to the third party creditor if the creditor fails to advise the

81 Ibid 432–3 (Lord Lindley).
83 (1939) 63 CLR 649.
85 (1939) 63 CLR 649, 683 (Dixon J).
86 [1902] AC 429.
wife to obtain independent advice or to see that she is made aware of the risk that she is running.\textsuperscript{88}

Can Dixon J be criticised on legalist grounds for his formulation? I don’t think so. He was presented with a binding Privy Council decision and, given that there was no evidence that Mr Duval had committed either a legal or an equitable wrong against Mrs Duval, the formulation that Dixon J espoused in \textit{Yerkey}\textsuperscript{89} is the only one that is consistent with the decision in \textit{Duval}.\textsuperscript{90} Had Dixon J adopted a formulation that was consistent with that provided by Lord Browne-Wilkinson in \textit{O’Brien},\textsuperscript{91} this could hardly be characterised as the action of a legalist judge trying to conform as best he could to the legal precedents governing the situation before him.

Justice Dixon’s strategy in dealing with \textit{Duval}\textsuperscript{92} provides a wonderful illustration of how strict legalism incorporates a creative role for judges but with an acceptance that this creativity is to be performed with fidelity to the existing case law. As outlined above, Dixon J first explained the somewhat unusual position of married women in the common law before and after the passage of the \textit{Married Women’s Property Acts}: married women were entitled to deal with their property and marriage was not seen as a relationship where the law would presume undue influence. Nevertheless, the common law recognised the potential for the marriage relationship to lead to exploitation by one spouse of the other. In the context of the times this was almost invariably going to be husbands exploiting wives in some way. The marriage relationship was not a business relationship but one of trust and confidence. Given this general position, Dixon J was then faced with a clear Privy Council decision, \textit{Duval},\textsuperscript{93} which was not, unfortunately, elaborately reasoned. \textit{Duval}\textsuperscript{94} did not present Dixon J with a ready-made formula which he could apply to the facts before him. Rather, \textit{Duval}\textsuperscript{95} presented Dixon J with the task of elaborating or constructing a formulation which was consistent with the decision in that case, which gave effect to the general attitude of the law to married women and which recognised the potential

\textsuperscript{88} (1939) 63 CLR 649, 685–6 (Dixon J); [1994] 1 AC 180, 196–7 (Lord Browne-Wilkinson).
\textsuperscript{89} (1939) 63 CLR 649.
\textsuperscript{90} [1902] AC 429.
\textsuperscript{91} [1994] 1 AC 180.
\textsuperscript{92} [1902] AC 429.
\textsuperscript{93} ibid.
\textsuperscript{94} ibid.
\textsuperscript{95} ibid.
for spousal exploitation (especially of women) presented by a relationship of trust and confidence. And this is exactly what he did.

But the matter does not end there. Not only was Dixon J’s response to Duval\(^96\) that of a legalist, it should also be seen as the response of a good legalist.

Despite their disagreement with Dixon J’s special equity for married women both Kirby J and Lord Browne-Wilkinson nevertheless accept that married women should attract special treatment and the grounds that they give explain why Dixon J’s special equity can be seen as the work of a good legalist. In Kirby J’s eyes, while Dixon J’s formulation was based on ‘out-dated stereotypes’ and perpetuated a ‘paternalistic approach to women,’\(^97\) the application of a slightly modified O’Brien\(^98\) principle was appropriate because that principle recognised:

> the fact that in a substantial proportion of marriages or analogous relationships it is still the husband (or the principal male partner) who has the business experience and the wife (or subordinate partner) who is willing to follow his advice without bringing a truly independent mind and will to bear on such financial decisions.\(^99\)

Lord Browne-Wilkinson also accepted that,

> in practice, many wives do repose in their husbands trust and confidence in relation to their financial affairs. Moreover, the informality of business dealings between spouses raises a substantial risk that the husband has not accurately stated to the wife the nature of the liability she is undertaking, ie, he has misrepresented the position, albeit negligently.\(^100\)

Once the rationale for the formulations proposed by Kirby J and Lord Browne-Wilkinson are seen to repose on this understanding of the relationship between partners to a marriage,\(^101\) the appositeness of Dixon J’s reasoning becomes apparent. As both Kirby J and Lord Browne-Wilkinson recognise, a marriage is a relationship of a fundamentally different kind to ordinary business relationships. Married couples do not, normally, operate with the degree of caution and reserve that is the hallmark of business relationships. As both judges also recognise, the intimacy and informality of the relationship between marriage partners renders it particularly susceptible to one

\(^{96}\) Ibid.
\(^{97}\) (1998) 194 CLR 395, 433 (Kirby J).
\(^{100}\) [1994] 1 AC 180, 196 (Lord Browne-Wilkinson).
\(^{101}\) The issue of extension of these formulations to relationships beyond marriage will be considered below.
partner taking advantage of the other without necessarily acting in a way that amounts to being either a legal or equitable wrong. The majority joint judgment in Garcia\textsuperscript{102} puts it rather well:

The marriage relationship is such that one, often the woman, may well leave many, perhaps all, business judgments to the other spouse. In that kind of relationship, business decisions may be made with little consultation between the parties and with only the most abbreviated explanation of their purport or effect. Sometimes, with not the slightest hint of bad faith, the explanation of a particular transaction given by one to the other will be imperfect and incomplete, if not simply wrong. That that is so is not always attributable to intended deception, to any imbalance of power between the parties, or, even, the vulnerability of one to exploitation because of emotional involvement. It is, at its core, often a reflection of no more or less than the trust and confidence each has in the other.\textsuperscript{103}

The problem with the formulation given in O'Brien\textsuperscript{104} is that it ignores that a marriage relationship is qualitatively different to business relationships. If the law were only to intervene when an equitable or legal wrong has been committed by the husband, the law would only imperfectly respond to the very real possibility of a wife’s contractual commitment being obtained in ways that, while not illegal, nevertheless should not attract the enforcement of the courts. As Dixon J recognised, the failure of a wife to understand the nature of her commitment need not only arise from actual deception on the part of the husband but would involve some ‘impropriety on his part even if that impropriety consisted only in his neglect to inform her of the exact nature of that to which she is willing blindly, ignorantly or mistakenly to assent’.\textsuperscript{105}

Justice Dixon, in other words, recognises that the marriage relationship, based as it is on trust and confidence, will allow for impropriety on the part of the husband in ways that do not amount to a legal or equitable wrong even while he suggests that, usually, there will be some sort of improper or exploitative behaviour on the part of the husband. But suspicion about the actions of husbands in such situations does not lead Dixon J, as it seems to have led Lord Browne-Wilkinson, to unwisely narrow in an artificial and inappropriate way the types of behaviour by the husband that would attract the ameliorative attention of the courts.

\textsuperscript{102} (1998) 194 CLR 395.
\textsuperscript{103} Ibid 404 (Gaudron, McHugh, Gummow and Hayne JJ). See also, Felhberg, above n 64.
\textsuperscript{104} [1994] 1 AC 180.
\textsuperscript{105} (1939) 63 CLR 649, 685 (Dixon J).
Once the special nature of the marriage relationship, based on trust and confidence, is recognised, and both Kirby J and Lord Browne-Wilkinson do recognise this, it becomes apparent that the legal resolution to problems of wives becoming sureties for their husbands (and other related or similar forms of transactions) offered by Dixon J is superior to that offered by Kirby J and Lord Browne-Wilkinson. So, not only was Dixon J acting in conformity with his self-proclaimed legalism in formulating his special equity in *Yerkey* because this formulation coheres and follows the Privy Council decision in *Duval*, he was also displaying the attributes of an able legalist by constructing this formulation in a way that most accurately responds to the potential improprieties that might be carried out by husbands. By contrast, the test proposed by Lord Browne-Wilkinson leaves open the possibility that common improprieties carried out by husbands will not attract the corrective jurisdiction of the courts. Rather than being idiosyncratic, as suggested by Kirby J, Dixon J’s judgment provides a well-crafted formulation that, in Dixon J’s words ‘improved in content’ the law as presented in *Duval* and its successor cases.

But, of course, the law facing Dixon J in *Yerkey* did not stop at *Duval*. Other authorities had applied *Duval*. Does Dixon J’s formulation give effect to this line of authority in conformity with his self-proclaimed legalism?

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106 Ibid.
107 [1902] AC 429.
108 Although Kirby J and Lord Browne-Wilkinson dealt at some length with the issue of whether and to what extent their formulation would apply to relationships other than married couples the failure to do so by Dixon J in *Yerkey* can hardly be source of criticism for his judgment. In *Yerkey* Dixon J was presented with a problem arising between a husband and wife. In line with the legalist caution that no more than necessary should be dealt with in a court case, there was no need or call for him to discuss any relationships other than the marital one. Indeed, given the heritage of the special equity in principles developed by equity to protect married women, it is not surprising that Dixon J did not go beyond the marital relationship in deciding the case before him and establishing his general formulation. But, as the majority joint judgment in *Garcia* shows, it is quite consistent with the underlying concern about the trust and confidence that underpins the marriage relationship to accept that Dixon J’s special equity could be extended to include similar, emotionally based relationships: (1998) 194 CLR 395, 404 (Gaudron, McHugh, Gummow and Hayne JJ). Since this problem did not arise before Dixon J and since he had not had the benefit of legal argument about it, he quite properly did not deal with what would have been seen as a hypothetical issue if it had been argued by the parties.
110 [1902] AC 429.
111 [1939] 63 CLR 649.
112 [1902] AC 429.
113 Ibid.
In *Chaplin* a husband who was starting up as a wine and spirits merchant sought credit from the plaintiffs, who were dealers in wine and spirits. They would only provide credit on security and it was agreed that this security would be procured from the wife, Mrs Brammall. On the evidence accepted by the trial judge Mrs Brammall signed a document, which was a guarantee for her husband’s purchases up to the amount of £300, having signed it in a rush without knowing what it was and without any explanation by her husband about the nature of the document. Lord Justice Vaughan Williams (with whom Sir Gorell Barnes and Bigham J concurred) found for Mrs Brammall on two grounds. One ground was that the facts brought the case within *Duval*. After quoting Lord Lindley in that case Vaughan Williams LJ said the following:

So here the plaintiffs left everything to the defendant’s husband; they furnished him with the document that he might get his wife’s signature to it, and they must take the consequences of his having obtained it without explaining it to her or her understanding what she was signing.

This is entirely consistent with Dixon J’s formulation of the special equity.

The second ground saw Vaughan Williams LJ citing *Bischoff's Trustee v Frank*. In his exhaustive analysis of the case law in this area in *Mueller*, Cussen J explains that in *Bischoff’s Trustee* Wright J, the trial judge, not only decided that the wife in that case did not fully understand the document, which is perfectly consistent with *Duval*, but also suggested that the marital relationship was one in which there was a presumption of undue influence. He reports that the case went on appeal to the Court of Appeal, which reversed the case *on its facts* and corrected Wright J on his mistaken belief that there was a presumption of undue influence between husband and wife.

Justice Dixon, following Cussen J’s lead, justifiably analyses this case as supporting his formulation.

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114 [1908] 1 KB 233.
115 Ibid.
116 [1902] AC 429.
117 [1908] 1 KB 233, 238 (Vaughan Williams LJ).
118 (1903) 89 LT 188 (*Bischoff’s Trustee*).
119 [1925] VLR 642.
120 (1903) 89 LT 188.
121 [1902] AC 429.
122 [1925] VLR 642, 652 (Cussen J).
Howes v Bishop\textsuperscript{123}

In Howes\textsuperscript{124} the plaintiff had obtained a judgment against a debtor and that debtor and the defendants Dr and Mrs Bishop agreed to give the plaintiff a joint and several promissory note for the amount of the judgment. Dr Bishop was in business relations with the debtor. In an action against Mrs Bishop (Dr Bishop did not appear and default judgment was entered against him) for the unpaid instalments due on the note Mrs Bishop claimed that she had signed the document ignorant of its nature, without any explanation being given to her about it and that she signed the document under pressure and owing to the undue influence of her husband. The jury found that Mrs Bishop had in fact known what she was signing, that there was no duress or fraudulent misrepresentation, but they were unclear about whether or not the document was obtained by undue influence. As Cussen J shows, Howes\textsuperscript{125} is at best only indirectly relevant to an analysis of whether or not a wife is bound by a voluntary disposition in favour of her husband when she does not understand her commitment and it has not been adequately explained to her. In Howes\textsuperscript{126} it was found as a matter of fact that Mrs Bishop did indeed understand her commitment.\textsuperscript{127} Justice Cussen also noted that Alverstone LCJ and Farwell LJ both agreed that the basis of Chaplin\textsuperscript{128} was concluded by the finding that the wife’s signature to the document was obtained without sufficient explanation, and that she did not understand it.\textsuperscript{129}

Justice Dixon was, therefore, justified in endorsing this analysis of Howes\textsuperscript{130} and treating it as supporting his formulation of the special equity.\textsuperscript{131}

Talbot v Von Boris and Wife\textsuperscript{132}

In Talbot\textsuperscript{133} the plaintiff brought an action on joint and several promissory notes signed by a husband and wife. At trial Phillimore J found that the substance of the transaction had been sufficiently explained to the wife and added, ‘The broad and

\textsuperscript{123} [1909] 2 KB 390 (‘Howes’).
\textsuperscript{124} Ibid.
\textsuperscript{125} Ibid.
\textsuperscript{126} Ibid.
\textsuperscript{127} [1925] VLR 642, 654 (Cussen J).
\textsuperscript{128} [1908] 1 KB 233.
\textsuperscript{129} [1925] VLR 642, 654 (Cussen J).
\textsuperscript{130} [1909] 2 KB 390.
\textsuperscript{131} [1939] 63 CLR 649, 683 (Dixon J).
\textsuperscript{132} (1910) 27 TLR 95; [1911] 1 KB 854 (Talbot).
\textsuperscript{133} (1910) 27 TLR 95.
sound principle to follow in a case where a wife becomes a surety for her husband ... is to make it necessary that the nature of the transaction and what she was doing should have been explained to her'. 134

Justice Cussen reports that in the Court of Appeal the defence of the wife that the transaction had not been sufficiently explained to her was unsuccessful on the facts and that the appeal was centred on a discussion about the presumptions and onus of proof related to duress. 135 Justice Dixon accepted the analysis of Talbot 136 given by Cussen J, an analysis which is consistent with the facts and reasoning of the judges, both at first instance and on appeal, in that case.

Shears & Sons Ltd v Jones 137

In Shears 138 Jones, the husband of the defendant, had a judgment debt for £1,000 entered against him in favour of the plaintiff company. Jones, who had a fear of bankruptcy, agreed to ask his wife to sign, with him, a joint and several obligation giving, in effect, a bill of sale over their furniture which would come into operation if Jones failed to honour the judgment debt. Most of the furniture was owned by the wife and it would have been enough to cover the debt owing by Jones. Jones failed to pay and the plaintiff company brought an action for specific performance of the agreement. Justice Russell found that the agreement was a bill of sale which did not comply with the requirements of Bills of Sale Act (1878) and was therefore void on that ground. 139 Although he thought that this resolved the dispute he considered Mrs Jones’s further claims, which he characterised as follows. First, did Mrs Jones substantially understand the document that she signed? Secondly, was the absence of independent advice fatal to the plaintiff’s claim?

On the first point Russell J is somewhat unclear. He suggests that Mrs Jones had a general idea of the nature of the transaction. But he then added that he was ‘satisfied that the case falls a long way short of the facts’ 140 in Chaplin. 141 Justice Dixon reads

134 (1910) 27 TLR 95, 96 (Phillimore J).
135 [1925] VLR 642, 655 (Cussen J).
136 (1910) 27 TLR 95; [1911] 1 KB 854.
137 (1922) 128 LT 218.
138 Ibid.
140 Ibid 221 (Russell J).
141 [1908] 1 KB 233.
this as meaning that Mrs Jones did not sufficiently understand the nature of the transaction but because the facts in the case fell short of those in *Chaplin*\(^{142}\) Russell J was not willing to rest his decision on that ground.\(^{143}\)

It is the second question raised by Russell J that poses some difficulties for Dixon J, difficulties which he either did not appreciate or felt to be unimportant. This second question dealt with the absence of independent advice for Mrs Jones. Justice Russell answered this question by referring to the authorities, *Howes*,\(^{144}\) *Chaplin*,\(^{145}\) *Duval*,\(^{146}\) and *Bischoff's Trustee*,\(^{147}\) and concluded as follows:

I cannot extract from them any simple principle but I understand that the mere relationship of husband and wife does not render necessary separate independent advice in order to validate a gift by the wife to the husband. ... But the circumstances may be such that in the absence of independent advice such a gift cannot stand.\(^{148}\)

It is the relationship between the possible lack of understanding and the failure to proffer independent advice that is unclear here. Justice Russell seems ready to accept that the plaintiffs could have won on the former question — namely, that Mrs Jones did sufficiently understand the transaction — but then added that ‘the absence of independent advice is fatal to the claim’\(^{149}\) of the plaintiffs. This suggests that the mere absence of independent advice, irrespective of the understanding of the wife, will be a defence. If this is what Russell J meant, and it is arguable that he did not, it would amount to a significantly higher burden on creditors and married women. Such a standard would be higher than that proposed by Dixon J in *Yerkey.*\(^{150}\) Justice Dixon’s treatment of *Shears*\(^{151}\) is somewhat unsatisfactory because there is at least one plausible reading of that case that challenges to some degree Dixon J’s formulation of the special equity. *Shears*\(^{152}\) is not an insurmountable hurdle for Dixon J’s position. Indeed, it seems unlikely that Russell J did intend to suggest that failure to understand and absence of independent advice were separate tests, and that the wife

\(^{142}\) Ibid.

\(^{143}\) (1939) 63 CLR 649, 682–3 (Dixon J).

\(^{144}\) [1909] 2 KB 390.

\(^{145}\) [1908] 1 KB 233.

\(^{146}\) [1902] AC 429.

\(^{147}\) (1903) 89 LT 188.

\(^{148}\) (1922) 128 TLR 218.

\(^{149}\) Ibid 221 (Russell J).

\(^{150}\) (1939) 63 CLR 649, 685–6 (Dixon J).

\(^{151}\) (1922) 128 TLR 218.

\(^{152}\) Ibid.
could defend a claim even if she understood the purport of the transaction. Nevertheless, Dixon J has either missed this possible problem or has skirted around it.

Needless to say, had Dixon J considered this issue it should not have been difficult for him to respond. Given what the special equity is designed to do — protect against improprieties in a relationship whose very nature allows them free reign — independent advice can only be seen as a means, not as a necessary thing in itself. As long as there is understanding on the part of the wife, the means by which it is obtained is unimportant.

*The Bank of Victoria v Mueller*[^53]

As we have seen *Mueller*[^54] was relied upon by Dixon J in formulating his special equity. We have also seen that Lord Browne-Wilkinson in *O'Brien*[^55] described it as not good authority because of Cussen J's supposed reliance on the Romilly heresy.

In *Mueller*[^56] the defendant’s husband, Mr Mueller, was indebted to a bank for £336 and was being pressed for payment. He came to an arrangement with his bank manager that in return for a guarantee signed by Mrs Mueller the bank would forebear bringing immediate action on the debt and allow Mr Mueller to borrow further money up to a limit of £1000. Mr Mueller told his wife that he would only borrow enough money to pay off his debt and that the guarantee would only be called upon after his death. In fact, the document had no such temporal limit and the obligation of Mrs Mueller under the guarantee amounted to £1604. Mrs Mueller claimed in her defence that she had relied on her husband’s misrepresentations, that she had not read the document before she signed it, that she had not understood it and that she did not receive any advice about the guarantee.

Justice Cussen began his analysis of the authorities with what he called some very general principles and the first of these was that, ‘the Court will not as a rule recognize a voluntary deed of gift when it appears that it was not understood by the donor’.[^57]

[^53]: [1925] VLR 642.
[^54]: Ibid.
[^56]: [1925] VLR 642.
[^57]: Ibid 650 (Cussen J).
This is the Romilly heresy and is commonly traced to *Hoghton v Hoghton*\(^ {158}\) and, in particular, to Lord Romilly’s judgment in that case in which he placed upon the donee the burden of supporting the validity of a transaction in which he or she will obtain by a voluntary donation a pecuniary benefit. But Cussen J commented on this as follows.

Disregarding any question as to the onus of proof, which may be a doubtful matter — see *Henry v Armstrong*\(^ {159}\) — and disregarding any question as to undue influence, I shall ... show ... that this doctrine as to the necessity for fully understanding the transaction is extended to transactions of a commercial nature, such as guarantees given to a creditor by a wife for the benefit of her husband, particularly if there is a heavy past indebtedness to be secured. In such cases the relation of husband and wife and the past indebtedness may put the creditor in such a position that, if he does not take care to fully explain the transaction, he may find himself defeated by proof that the wife did not fully understand it.\(^ {160}\)

Two things should be noted about this extract. First, Cussen J makes it clear that he is aware of the criticism of Lord Romilly’s position, criticism whose acme has always been the judgment of Kay J in *Henry v Armstrong*.\(^ {161}\) Dixon J is quite clear on this matter; Lord Romilly’s position is wrong and the excerpt from his judgment which is reproduced in Cussen J’s judgment\(^ {162}\) is wrong and should not be considered sound law.\(^ {163}\) But in 1914\(^ {164}\) Cussen J was presented with two conflicting Court of Appeal decisions and was in no position to do anything other than try to make the two work together. He certainly was not blindly following Lord Romilly’s lead. The second thing to note is that Cussen J is very careful to limit his decision to situations where the failure of a creditor to fully explain a transaction to a wife might lead to the wife’s defeating the claim *if she did not fully understand the transaction*. As Dixon J makes clear, Cussen J’s formulation is not reliant on Lord Romilly’s ‘heresy’ and is not, therefore, tainted by Cussen J’s endorsement of the wide principle favoured by Lord Romilly and subsequently disowned by the courts.\(^ {165}\) Therefore it seems that Dixon J was on solid ground in relying on Cussen J’s judgment and that Lord Browne-Wilkinson’s dismissal of Cussen J’s judgment is unpersuasive.

\(^{158}\) (1852) 15 Beav 278.
\(^{159}\) (1881) 18 Ch D 668.
\(^{160}\) [1925] VLR 642, 651 (Cussen J).
\(^{161}\) (1881) 18 Ch D 668.
\(^{162}\) [1925] VLR 642, 650 (Cussen J).
\(^{163}\) (1939) 63 CLR 649, 680–1 (Dixon J).
\(^{164}\) *Mueller* was decided in 1914 but only reported in 1925.
\(^{165}\) (1939) 63 CLR 649, 680 (Dixon J).
One other matter about Cussen J’s judgment ought to be addressed. In the statement of law that he derived from his analysis of the authorities Cussen J referred to the procuring by the husband of the wife’s consent in such a way that ‘misrepresents in a material aspect what is proposed to be the nature of her liability as guarantor’. At first glance this might seem, in a nice irony, to be the same as the position adopted by Lord Browne-Wilkinson in O’Brien — that the wife’s consent has to have been obtained as a result of a recognised wrong by the husband and that it is not enough merely for the wife’s consent to be based on a misunderstanding of the transaction. But one only has to consider Cussen J’s detailed analysis of the authorities to see that his stated proposition of the law applicable to the case before him is consistent with Dixon J’s formulation of the special equity.

Justice Cussen’s judgment in Mueller apart, it is apparent from the analysis of the cases that followed Duval that the reasoning in all them is somewhat scanty. Justice Dixon’s careful analysis of the authorities that had applied Duval illustrates that this line of authority was consistent with both that case and his formulation in Yerkey.

Conclusion

The judgment of Dixon J in Yerkey v Jones shows the fidelity to authority and the insistence on clear principles that seem to characterise Dixon J’s judging.

Implicit in the judgments of Kirby J in Garcia and of Lord Browne-Wilkinson in O’Brien are suggestions that Dixon J had gone off on a frolic of his own without any support from the other judges in Yerkey. As shown above, this is not true. In any event, evaluations of Dixon J’s own judging must rest on what he said, not what was decided by other members of his Court. Of much more importance is the claim of Lord Browne-Wilkinson, endorsed by Kirby J, that the authorities that Dixon J relied

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168 See eg, [1925] VLR 642, 651, 652, 653, 654, 655, 656, 657 (Cussen J).
169 [1925] VLR 642.
170 [1902] AC 429.
171 Ibid.
172 (1939) 63 CLR 649.
173 Ibid.
176 (1939) 63 CLR 649.
on to formulate his special equity, especially *Duval*,\(^{177}\) are confused and mistaken and cannot, therefore, present a solid foundation for Dixon J’s formulation.

As shown above, this claim is wrong and unconvincing. Apart from anything else *Duval*\(^{178}\) presented Dixon J with a clear and binding decision of the Privy Council which he was bound to follow. But Dixon J’s judgment cannot be seen as merely applying an applicable precedent. Instead, it should be seen as an example of judicial craft at its highest level. *Duval*\(^{179}\) and the cases that applied it did not provide a general principle which Dixon J could take down from the shelf, so to speak. Justice Dixon built on the analysis of Cussen J to create a general principle that was consistent with these decisions, that was broad enough to be applied to similar cases and, perhaps most importantly, responded effectively to the premise upon which all these earlier cases (and the subsequent ones, for that matter) were founded. This premise is, of course, the idea that marriage is a relationship of trust and confidence which allows one spouse, usually the male, to take advantage of the other in ways that are not necessarily actionable.

Lord Lindley’s decision in *Duval*,\(^{180}\) as elaborated and developed by Dixon J into his formulation of the special equity in *Yerkey*,\(^{181}\) most satisfactorily provides for protection for married women who need it. By way of contrast, Lord Browne-Wilkinson in *O’Brien*,\(^{182}\) by requiring that a husband commit a common law or equitable wrong, formulates a principle that ignores the fact that a relationship of trust and confidence such as marriage provides a myriad of opportunities for unscrupulous spouses to defraud or mislead their partners in ways that do not easily or necessarily come within recognised legal categories of wrong.

But, as must be emphasised, the creativity that Dixon J recognised as central to the judicial craft of a legalist was not the same as unbounded choice. Justice Dixon could not, for example, have simply decided that married couples should come within the range of presumptive relationships where undue influence was presumed. The authorities were clear on this point and for Dixon J to have decided otherwise would

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\(^{177}\) [1902] AC 429.

\(^{178}\) Ibid.

\(^{179}\) Ibid.

\(^{180}\) Ibid.

\(^{181}\) (1939) 63 CLR 649.

have been an exercise in individual choice, not an attempt to apply his best understanding of the law. But when presented with a none too clear set of precedents, each focusing on its own facts, a legalist must — as best he or she can — draw from them an applicable and coherent principle. In *Yerkey v Jones*\(^{183}\) Dixon J did this with skill and crafted a formulation of the law in this area that is as convincing today as it was in 1939.

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\(^{183}\) (1939) 63 CLR 649.