Recollections of Sir Frederick Jordan

Sir Maurice Byers, CBE QC, reveals some vignettes of the late Chief Justice.

If you look at Volume 42 of the State Reports you will see that the Supreme Court for the period comprised in the Volume consisted of eleven judges, the Chief Justice, the Honourable Sir Frederick Richard Jordan KCMG and ten puisne judges. For the period comprised in Volume 43 the team was unchanged. For the period comprised in Volume 44 the Honourable John Sydney James Clancy (Acting) is added. There are now forty judges including the Chief Justice.

My purpose is not to emphasise that change - it is obvious enough - in any event one would expect massive changes between this country when desperately at war and now after extensive immigration and over forty years of peace. What I propose is a record of my recollections of Sir Frederick Jordan. I should state my credentials. I was admitted to the Bar, so the Law Almanac tells me, on 26 May, 1944 and have practised as a barrister, in one capacity or another, ever since. For approximately two years before admission I was associate to the Honourable K.W. Street and an undergraduate of the Law School which then occupied a number of floors of the then University Chambers.

During the years of my associateship, Sir Kenneth's chambers were on the first floor of the old Supreme Court building in King Street and the Chief Justice's were on the ground floor. The Chief Justice and I passed in the corridor from time to time and occasionally I acted as associate to the judges comprising the Full Court where the Chief Justice usually presided and on at least one occasion appeared before him.

He was a tall, broad shouldered man who wore rimless glasses and, usually, a brown suit. His expression was remote and unsmiling. His moustache was grey and close clipped, his face pale and oblong, his forehead high. His eyes were distant - as if he was engaged in the solution of a particularly abstruse problem of quantum mechanics. He moved with an air of icy authority. He embodied, in short, a jury advocate's conception of the most formidable and unfathomable type of equity lawyer.

When presiding, he dominated the Court. Not only was he taller than his colleagues, he was also more erudite and intelligent and his brethren recognised his superiority, as did most lawyers. He gave one the impression of being engaged upon what was to him a simple and rather boring task and of enduring with a patience, at once weary and not unkind, the bumbling endeavours of counsel as well as those of his brethren. I don't mean to suggest that this is how he felt in fact. Undoubtedly he so appeared to a young and admiring barrister.

He is reputed to have said to an earnest King's Counsel who persisted in argument after being told it was unnecessary:

"Mr X, the Court has already informed you that we are with you, subject, of course to anything you may say to cause us to change our opinion."

His dominance I may illustrate with anecdote. I was arguing an appeal from a false pretences conviction. I had one good point supported by much old law and a 1936 decision of the Victorian Supreme Court. The point was that a statement of the accused's intention to perform a contract was not a statement of fact. After expressing doubt that my Victorian case really so decided, he said having had the relevant passage read:

"Very well then, we shall not follow it."

At no stage did he consult his colleagues. The Court did not follow the decision. I must say he listened to my bad points with admirable patience and patent disbelief.

The judges frequently consulted him on difficulties arising during the course of trials. That, of course, was Associates' gossip but these consultations imply no wrong. It is frequently alluded to in the older reports and assists the smooth running of justice. Judges do talk about their cases among themselves just as barristers do. The experience of others can often reveal what not to do as well as sometimes what should be done. And it is natural to consult the eminent.

The New South Wales Bench has always had an air of congenial brutality. Perhaps this was encouraged by the long reign of the Common Law system of pleading, though candour compels me to say that an occasional Equity judge, and I speak of those days, was no mean performer with bludgeon and knife. There was something about a declaration pleading, say, a cause of action in tort or contract that excited the bloodlust of the mildest of men. Sir Frederick could not be so described though he could when moved, exhibit a silky rudeness that was the envy of many.

The Bar was firmly convinced that he had no human passions and that he was only at home when plumbing the depths of Equity or when writing judgments replete with citation of authority and exposition of legal principle. Their sense of his remoteness is illustrated by the anecdote that after pronouncing a sentence of death, he went on to order that the costs of all parties be paid out of the estate.

It is amusing to compare with this Sir Owen Dixon's remarks on his retirement:

"As far as Chief Justice Sir Frederick Jordan is concerned, I really do not know what, if anything happened; but at all events he was not appointed [to the High Court] and by one of those curious twists which seem to touch the finest natures, this highly scholarly man and a very great lawyer eventually took some queer views about federation. But I do not think he would have taken them if he had been living amongst us." (1964) 110 CLR P XI.

The last sentence is not only in all probability true, it is a recognition by a Judge of a Court of ultimate appeal of out-

standing ability of the purer air and wider horizons they inhabit, an empyrean denied to those whose decisions they set right. The High Court's character as a national court, the different State origins of the Justices and the peripatetic life they led and still lead contribute to this attribute, at least so it has seemed to me.

Sir Frederick had scant regard for the moral hypocrisy with which judges felt it necessary to adorn the bare language of the Matrimonial Causes Act. By some quaint stroke of fortune, the authorities had appointed a patent lawyer to be Judge in Divorce. This led on occasions to decisions which were difficult to follow and undesirable to apply.

Suits for restitution of conjugal rights were a recognised means for obtaining divorce by consent. For the Judge in Divorce's decision to the effect that a petitioner needed to establish a subjective wish for the return of his wife or her husband, the Full Court substituted the readiness, willingness and ability that Equity required of a Plaintiff in a suit for specific performance.

Finally, I am indebted to Bruce McClintock for locating the following remarks with which Sir Frederick Jordan dismissed a husband's plea that his wife's suit failed on the ground that she had condoned his matrimonial offence.

"It was only after he had joined the Army, and had represented to her that he had obtained ten days final leave after which she would see no more of him, that she consented to be in his company for this period, although not to allow him to share her home or her bed; and it was only at the eleventh hour of what she was led to suppose would be the last day, that he succeeded in inducing her to have intercourse with him not in a matrimonial home as an incident of a general resumption of matrimonial relations, but al fresco in a motor car, as the final, and on her part unpremeditated, incident of a day's outing at the moment when all further association between them was about to be severed." *Spilsted v Spilsted* (1944) 44 SR (NSW 242 at p.245). ❑

Backsheets

(If all else fails ...)

BRIEF TO ADVISE AND TO GIVE EVIDENCE

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Stars and Stripes Invasion

Barristers in particular may have noticed how the Australian news media's reporting of legal matters has acquired an American flavour. Witnesses are now reported to 'take the stand' in Australian courts instead of going into a witness box. Virtually every TV station and news journal uses a picture of a gavel to illustrate an item about an Australian court case. However a photographer from the Fairfax organisation went too far last month when he was called to give evidence in a criminal trial at Bathurst. After he went into the witness box the sheriff's officer tried to hand him the bible with the usual instruction: "Take the Bible in your right hand." He had some difficulty grasping the Bible and the instruction because he was standing rigidly to attention, right hand raised at shoulder level, palm outwards, just as he'd seen all witnesses do in *'Perry Mason'* or *'L.A. Law'* no doubt.

It took Judge Nash's growled reminder "This is Australia, son" to bring the young man back to the reality of the District Court at Bathurst. ❑