Equity

The Equity of Sir Frederick Jordan

W M C GUMMOW*

Perhaps the most striking feature of the history of the teaching of equity in the Sydney University Law School has been the involvement of practitioners who later joined the Bench, themselves then to deliver judgments which may have served to instruct subsequent generations of students. I mention, in particular, Sir George Rich, Mr Justice Roper, Sir Victor Windeyer, Sir Kenneth Jacobs and Sir Anthony Mason. But the strongest mark left upon the teaching of equity has been that of Sir Frederick Jordan. It was as Challis Lecturer in Equity (from 1909) that Mr Jordan prepared the first two editions of his *Chapters in Equity*, being, as he wrote, portions of the notes of lectures on the principles of equity delivered at the Law School in the University of Sydney. There followed four further editions, under other hands, which were used until some twenty years ago as the foundation of the equity course at the Law School.

Sir Frederick Jordan also prepared for publication portions of his notes of lectures upon *Administration of Estates of Deceased Persons*. The third (and last) edition was prepared by the author in 1948. The teaching of that subject for over thirty years was profoundly associated with the late Mr Justice Hutley, whose dedication to the teaching of the law will, one hopes, long be remembered.

Sir Frederick Jordan was appointed Chief Justice of the Supreme Court of New South Wales on 1 February 1934 and died, in office, on 4 November 1949. In the intervening period, he delivered judgments in the Full Court dealing with subjects which ranged far beyond the realm of equity. One is, for example, struck by the number, even then, of demurrers and appeals in defamation matters. In the war period, came a number of judgments dealing with the interpretation and the validity of Commonwealth regulations, deriving their validity from the defence power. It was perhaps in an oblique reference to these decisions that Sir Owen Dixon, in his retirement address in 1964, described Jordan, C.J. as having taken some curious views about federalism.[1]

* QC BA LL.M. (Syd). Judge, Federal Court of Australia; Lecturer (part-time) in Industrial and Commercial Property from 1965 to 1986 at the University of Sydney and Lecturer (part-time) in Equity since 1970.

[1] "The Retirement of Sir Owen Dixon" (1964) 38 *A.L.J.* 3 at 6.

As one would expect, when Jordan, C.J. spoke upon a matter of equity, it was with an authority well beyond that of his office. Upon the occasion of his retirement, Sir Owen Dixon also spoke of the failure of the governments of the day to appoint Sir Frederick Jordan to the High Court, as one of the tragedies in the life of the High Court. Sir Owen Dixon, who has not left to posterity a reputation for exaggeration in such matters, described him as a highly scholarly man and a very great lawyer.[2] The equity Bar, from which he had come, whilst small in number, had been particularly strong. On his retirement in 1939, Long Innes, C.J. in Eq. spoke of the tedious life, even then, of common lawyers concerned with "an endless succession of running-down cases", whilst in equity, although nearly every case was difficult, each was different. His Honour continued:

> The Equity Bar in this State is an extremely able one, and would not suffer in comparison with the Chancery Bar in England, which is the same as saying that it would not suffer in comparison with the Bar of any country . . .

Sir Frederick Jordan's lecture notes were republished in 1983 under the title *Select Legal Papers*, thereby ensuring their accessibility to the present generation. The Foreword contains an account by Mr Justice Meagher of Sir Frederick's life and personal idiosyncrasies. The remaining members of the New South Wales Bar who practised before him affirm the sharpness of his intellect, somewhat austere judicial demeanour, and his apparently awesome influence upon his judicial brethren.[3]

It has been said in recent years that equity has gained added vitality from various Australian decisions. Certainly it is true that, for example, the Australian decisions upon estoppel, fiduciary duties, so-called "unconscionability", and the remedial constructive trust have altered the legal landscape in matters of contract and commercial law. Whether the changes are wholly beneficial and the criteria by which'the benefit would be assessed are matters for debate. The particular purpose of this paper is to assess the significance for equity, as it has developed since Sir Frederick Jordan's death, of his judicial and non-judicial writings upon the subject.

One is struck in both the lecture notes and the judgments by the succinct language in which they are expressed. Sir Frederick Jordan regarded the "general principles" of equity as well settled, and in the way equity lawyers have had of exasperating those not of the elect, as being *in gremio*. The Chief Justice was not one to produce judgments which required an afternoon to read and even longer to digest. He is not inviting the reader to join him on a picaresque adventure through large tracts of legal writing upon the subject in hand. Nor does he set

[2] *Ibid.*

[3] The writer is grateful for the recollections of Sir Garfield Barwick, Sir Nigel Bowen and Sir Maurice Byers.

out lengthy extracts from other judgments; the doubting or curious reader is left to pursue the citations given for a tersely expressed proposition.

In fairness to those judges who have followed him and who labour today under the tyranny of reserved judgments, several points should be made. Jordan, C.J. was preparing judgments for a Full Court which was subject, in a large proportion of civil cases, to further appeal as of right, whether to the High Court or to the Privy Council. Thus the primary task was to state the law as it appeared to have been settled by reference to binding authority, rather than to consider further development of the law. Today, the so-called courts of intermediate appeal in this country are in the vast majority of cases courts of final appeal, given the need for special leave to take cases to the High Court. Secondly, the break in the direct link to British judges sitting on the Judicial Committee has encouraged Australian judges to look for guidance not more narrowly but more widely and to other common law jurisdictions. Authorities and learned writings from New Zealand, Canada and the United States are routinely cited in argument, certainly in the Federal Court, in a way that is a striking departure from past practice. But this brings with it longer judgments. Thirdly, a perusal of the State Reports indicates that even in Sir Frederick Jordan's term as Chief Justice, the Full Court spent much time on statutory construction, including delegated legislation in that expression; that is even more so today in appellate courts. Statutes appear to have become more complex, and certainly longer. Fifty years ago, the canons of statutory construction appeared relatively stable, but that cannot be said to be so today. The rise of the so-called purposive method of construction and frequent recourse to extra statutory materials as aids to construction has added to the necessary complexity of judgments.

In this century, the occasion for much of the development in basic equitable concepts has been provided by the interpretation of revenue and regulatory legislation which has operated upon private property by criteria drawn from those equitable concepts. That is, if anything, more the case now than it was fifty years ago.

Consider the position of the residuary beneficiary in an unadministered deceased estate. In *McCaughey v. The Commissioner of Stamp Duties*,[4] the Full Court had to consider the *situs* of the rights of such a beneficiary on his death because the New South Wales death duties legislation taxed "property" of the beneficiary which was situated in that State at his death. Jordan, C.J. regarded the problem as one of choosing between two apparently irreconcilable decisions of the House of Lords, *Cooper v. Cooper*,[5] and *Lord Sudeley v. The Attorney-General*.[6] His Honour preferred the speech of Lord Cairns in the former case, saying[7] of the reasoning in the latter case:

[4] (1945) 46 S.R. (N.S.W.) 192; see also *Horton v. Jones* (1934) 34 S.R. (N.S.W.) 359 at 365-367, per Jordan, C.J.
[5] (1874) L.R. 7 H.L. 53.
[6] [1897] A.C. 11.
[7] *Id* 204.

> The idea that beneficiaries in an unadministered or partially administered estate have no beneficial interest in the items which go to make up the estate is repugnant to elementary and fundamental principles of equity.

Alas, he was not to know that when the same issue reached the Privy Council, Lord Cairns would be stigmatised by Viscount Radcliffe as having used language picturesque but inexact.[8] This marks perhaps the most striking instance where Jordan C.J.'s views upon a fundamental issue in equity doctrine have not prevailed.

But three things should be remembered. First, the actual decision in *McCaughey's Case* was that when questions of income tax or *locus* of property in relation to death duty had to be determined, the beneficiary under a partially administered estate would be regarded as having nothing but a chose in action in the nature of a right *in personam* against the personal representative of the head estate; the decision thus was in conformity with the outcome in the *Livingston* litigation. Secondly, Jordan, C.J. recognised, in a significant passage,[9] that this outcome gave rise to a situation which "bristles with difficulties"; as later decisions, such as *In re Leigh's Will Trusts*,[10] and *Costa & Duppe Properties Pty Ltd v. Duppe*,[11] illustrate, the difficulties have by no means been resolved. Thirdly, the discussion of the concept of "property" in the opening passage of the report of Jordan, C.J.'s judgment still retains its vitality and utility, as is illustrated by the recent recourse to it by the Full Federal Court in *Hepples v. Commissioner of Taxation*,[12] when dealing with the definition of "asset" in the capital gains tax legislation.

The law as to resulting trusts, after re-statement in *Calverley v. Green*,[13] in terms readily referable to fundamental principle, may have been, at least as regards property dealings between unmarried co-habitees, thrown in the shade by the re-emergence in *Baumgartner v. Baumgartner*,[14] of what, in essence, appears to be a variant of Lord Denning's "constructive trust of a new model". Of that legal institution, Sir Frederick Jordan has no claim to be a progenitor. But in areas away from domestic discord, where resulting trusts properly understood still play a part, his judgment in *In re Kerrigan; Ex parte Jones*,[15] remains important. That again was a death duty case. It had been submitted that when property is bought by one person and put into the name of another, there are only two possible alternatives; either the property wholly results to the buyer or is wholly an advancement and there is no middle course. The Full Court

[8] *Commissioner of Stamp Duties (Queensland) v. Livingston* [1965] AC 694 at 711.
[9] *Supra* at 205-206.
[10] [1970] Ch. 277.
[11] [1986] V.R. 90.
[12] (1990) 90 A.T.C. 4,497 at 4,504, 4,515.
[13] (1984) 155 C.L.R. 242.
[14] (1987) 164 C.L.R. 137.
[15] (1946) 47 S.R. (N.S.W.) 76.

held that there was no principle to that effect. In *Napier v. Public Trustee (Western Australia)*,[16] Aickin, J. (with the agreement of Gibbs, A.C.J., Mason, Murphy and Wilson, JJ.), relied upon that decision as authority that a resulting trust need not necessarily relate to the entire interest in the property in question so that, for example, the presumption may be rebutted as to a life interest but still operate in respect of the interest in remainder.

The essential difference in character between rescission at law and in equity of contracts induced by such things as fraudulent misrepresentation is well established. Nevertheless, in modern times the distinction has not always been readily appreciated, as is apparent from the decision of no less a person than Megarry, J. in *Horsler v. Zorro*.[17] In *Johnson v. Agnew*,[18] the situation in England was corrected by Lord Wilberforce, with reference to Australian authority. What is not so readily appreciated is the significance of the jurisdiction of equity in cases of fraud to provide for an indemnity in aid of rescission, independently of any action in tort for damages, involving as that action does affirming the contract in question. This aspect of the equity jurisdiction is recently discussed in *Munchies Management Pty Ltd. v. Belperio*,[19] but it is apparent from what is there said that great reliance was placed upon the analysis by Jordan, C.J. in *McAllister v. Richmond Brewing Company (N.S.W.) Pty Ltd.*[20]

The judgment of Jordan, C.J. in that case illustrates the point recently made by the High Court in *Chan v. Cresdon Proprietary Limited*,[21] that it may have been the delay in the introduction in New South Wales of the Judicature system which has assisted in the continued appreciation of the difference in nature between legal and equitable concepts as they apply to the same dispute. The series of decisions in England in this century, concerning the development of the rule in *Walsh v. Lonsdale*,[22] which includes *Industrial Properties (Barton Hill) Ltd v. Associated Electrical Industries Ltd*,[23] shows a marked difference in approach to the significance of equitable concepts to that in the Australian decisions. The difference, it should be said immediately, is apparent not only to those with their roots in New South Wales. In *McMahon v. Ambrose*,[24] McGarvie, J. dealt, with respect, persuasively with the meaning of *Walsh v. Lonsdale*. It is a matter of regret that this decision of the Victorian Full Court does not appear to have been cited to the High Court in the argument on the Queensland appeal in *Chan's Case*.

[16] (1980) 32 A.L.R. 153 at 158-159.
[17] [1975] Ch. 302.
[18] [1980] A.C. 367 at 395-397.
[19] (1988) 84 A.L.R. 700 at 708-711.
[20] (1942) 42 S.R. (N.S.W.) 187 at 192.
[21] (1989) 168 C.L.R. 242 at 251.
[22] (1882) 21 Ch. D. 9.
[23] [1977] QB. 580 at 609-610.
[24] [1987] V.R. 817 at 836-837.

In *Dockrill v. Cavanagh*,[25] Jordan, C.J. put his view of the correct understanding of the English authorities as follows:

> After the passing in England of the Judicature Acts, which invested the superior courts with jurisdiction in both equity and common law, it was held that in a court which possessed the combined jurisdictions (although not in a court which had only a common law jurisdiction: *Foster v. Reeves* [1892] 2 QB 255), a party to an agreement for a lease, if the lease was specifically enforceable (but not if it was not; *Coatsworth v. Johnson* (1886) 54 LT 520; *Inland Revenue Commissioners v. Derby* [1914] 3 K.B. 1186), could obtain against the other all the remedies which would be available to him if a proper lease had actually been executed: *Walsh v. Lonsdale* (1882) 21 Ch D 9, although the agreement was not thereby converted into an actual lease: *Borman v. Griffith* [1930] 1 Ch 493 at 497-8.

The passage from *Dockrill v. Cavanagh* was adopted by Mason, J. in *The Progressive Mailing House Proprietary Limited v. Tabali Proprietary Limited.*[26] The correctness of those views has since been placed beyond doubt by the decision in *Chan's Case*, subject to an important qualification to which I refer later.

One of the vexed questions in the law of mortgages concerns the legal standards of conduct which control the mortgagee *vis-a-vis* the mortgagor in the exercise of the mortgagee's power of sale. The applicable principles are clearly explained by Jordan, C.J. in *Coroneo v. Australian Provincial Assurance Association, Ltd.*[27] These are that the power of sale in a legal mortgage is not a common law power, but an equitable power inserted to enable the mortgagee to convey a title which is good, not only at common law, but good in equity to defeat the equitable rights of the mortgagor to the equity of redemption. That level of analysis was not approached by the English Court of Appeal in *Cuckmere Brick Co. Ltd v. Mutual Finance Ltd*,[28] which preferred to see the relationship of mortgagor and mortgagee as one of "neighbours". The difficulty is that Australian courts are then invited to apply the English decision, being a decision reached in ignorance of the earlier Australian authority. So far, the High Court has left open the question of the correctness of the *Cuckmere Brick Case.*[29] But it has been held by Needham, J.[30] not to

[25] (1944) 45 S.R. (N.S.W.) 78 at 83. See also *Carberry v. Gardiner* (1936) 36 S.R. (N.S.W.) 559 at 566-570.

[26] (1985) 157 C.L.R. 17 at 26-27.

[27] (1935) 35 S.R. (N.S.W.) 391 at 394-395.

[28] [1971] Ch. 949.

[29] See *The Australia and New Zealand Banking Group Limited v. Bangadilly Pastoral Co. Pty Limited* (1978) 139 C.L.R. 195 at 222; *Commercial and General Acceptance Limited v. Nixon* (1981) 152 CLR 491 at 494-495, 502-505, 515-516, 521, 522-523.

[30] In *Expo International Pty Ltd v. Chant* [1979] 2 N.S.W.L.R. 820 at 834-836. See also *Wenham v. General Credits Limited* (McLelland, J., 16 December 1988, unrep.)

represent the law in New South Wales, and by Zelling, J.[31] not to represent the law in South Australia.

Jordan, C.J. dealt on a number of occasions with the thorny question of the doctrine of estoppel in its various branches. Such has been the pace of development in this subject, that there must be very few lawyers who can confidently assert familiarity with all the relevant authorities, even at appellate level. There are signs of coalescence of estoppel as previously understood in its various branches into one sweeping doctrine. That would not be consistent with Jordan, C.J.'s judgments in this field.

In *Reece v. Pearl Assurance Co. Ltd,*[32] his Honour dealt with the distinction between election, waiver and estoppel as they apply to the situation after one party to a contract has committed a breach which entitles the other to treat the contract as at an end. His Honour used waiver of breach to describe the consequence of the exercise of a right of election and distinguished from the effective making of such an election, an estoppel which prevents the other party setting up the breach. Jordan, C.J. spoke further to the same effect in *Franklin v. Manufacturers Mutual Insurance Ltd.*[33] But in that passage, the Chief Justice went on to distinguish estoppel by representation which he regarded as having become definitely established in the common law in *Pickard v. Sears.*[34] In reading what is there said, it is to be remembered that Jordan, C.J. is speaking at a time when it was regarded as necessary, however difficult, to draw a clear line between a representation of fact and an expression of intention. The significance of that distinction is now much diminished since the grip of *Jorden v. Money,*[35] was loosened by *Waltons Stores (Interstate) Limited v. Maher.*[36]

One of the striking features of the development of equity in recent years has been the reliance placed upon the cases of *Ramsden v. Dyson,*[37] and *Dillwyn v. Llewelyn.*[38] In *New South Wales Trotting Club Limited v. Glebe Municipal Council,*[39] Jordan, C.J. described the principles in these cases as "entirely different". He placed the *Dillwyn v. Llewelyn* class of case in the category of express or implied contract and apparently limiting it to real property. Neither of those propositions would be regarded today as persuasive.

However, one should bear in mind the facts of the *New South Wales Trotting Club Case.* The case was concerned not with private rights, but

[31] In *Citicorp Australia Limited v. McLoughney* (1984) 35 S.A.S.R. 375 at 381. Recent English developments (including *Parker-Tweedale v. Dunbar Bank plc (No. 1)* [1990] 2 All E.R. 577) are discussed in a Note (1990) 64 *A.L.J.* 209; it now appears that whilst the mortgagee owes the mortgagor a duty to take reasonable care to obtain a proper price, this duty is equitable not tortious in character.

[32] (1934) 34 S.R. (N.S.W.) 124 at 128-129.

[33] (1935) 36 S.R. (N.S.W.) 76 at 81-82.

[34] (1837) 6 Ad. & E. 469; 112 ER 179.

[35] (1854) 5 H.L.C. 185; 10 E.R. 868.

[36] (1988) 164 C.L.R. 387.

[37] (1866) L.R. 1 H.L. 129.

[38] (1862) 4 De. G.F. & J. 517; 45 E.R. 1285.

[39] (1937) 37 S.R. (N.S.W.) 288 at 308-309.

with the question of whether a local Council could bind itself, whether by contract or any form of estoppel, not to withdraw a consent given under statutory power to the closing of a public road. Jordan, C.J. took the view[40] that when the council had given its consent to a particular proposal for the closing of a road, it was *functus officio*; in essence, the problem was one of statutory construction. His Honour's approach to the applicability of doctrines of estoppel to the repeated exercise of statutory powers and discretions is consistent with that which emerges from the treatment of the subject in the recent High Court authorities.[41]

Finally, in *Discount & Finance Ltd v. Gehrig's N.S.W. Wines Ltd*,[42] Jordan, C.J. described estoppel by representation along with estoppel by deed and estoppel by judgment, all as cases illustrating the character of estoppel as a rule of evidence. That proposition, as regards estoppel by representation, must require revision in the light of the facts and the result in *Waltons Stores (Interstate) Limited v. Maher*. What perhaps is of more significance is the failure by Jordan, C.J. in this series of decisions to perceive in the judgments of Dixon, J. in *Thompson v. Palmer*,[43] *Newbon v. City Mutual Life Assurance Society Limited*,[44] and *Grundt v. The Great Boulder Proprietary Gold Mines Limited*,[45] what apparently was a considered disregard of the distinction (then generally seen as critical) between an assumption founded upon a representation of existing fact, and an assumption founded upon a representation as to future conduct. The significance of these judgments of Sir Owen Dixon is only now being appreciated.[46]

In Chapter V of the *Chapters on Equity*, the learned author dealt with "Equitable estates and interests" and with equitable assignments. After considering the assignment for value of property to be acquired in the future, he turned to the topic of equitable assignments for valuable consideration. He then propounded the (uncontroversial) principle that an agreement for valuable consideration for the present assignment of any form of property whatsoever, assuming it to be assignable at all, operates in equity to transfer the equitable title to the property from the promisor to the promisee. The learned author continued (at p. 52):

> This result is to be ascribed to the maxim that equity considers that done which ought to be done; and the principle is effective only in so far as the Court of Equity would, in all the circumstances of the case, grant specific performance of the agreement . . .

[40] *Id.* 307.

[41] *Attorney-General (NSW) v. Quin* (1990) 93 A.L.R. 1 at 10-12 per Mason, C.J.; *Haoucher v. Minister of State for Immigration and Ethnic Affairs* (1990) 93 A.L.R. 51 at 72 per McHugh, J.

[42] (1940) 40 S.R. (N.S.W.) 598 at 602-603.

[43] (1933) 49 C.L.R. 507 at 547.

[44] (1935) 52 C.L.R. 723 at 734.

[45] (1937) 59 C.L.R. 641 at 674-675.

[46] See, for example, the discussion by Priestley, J.A. in *Waltons Stores (Interstate) Limited v. Maher* (1986) 5 N.S.W.L.R. 407 at 416-420.

In a footnote to this sentence, it was said:

> Specific performance in this sense means not merely specific performance in the primary sense of the enforcing of an executory contract by compelling the execution of an assurance to complete it, but also the protection by injunction or otherwise of rights acquired under a contract which defines the rights of the parties: *Tailby v. Official Receiver* (13 AC at 547-9); *Redman v. Permanent Trustee Co.* (22 CLR at 96); *Hoystead v. Federal Commissioner of Taxation* (27 CLR at 423); *Pakenham Upper Fruit Co. Ltd v. Crosby* (35 CLR at 396); *Sydney Consumers v. Hawkesbury Dairy, etc.*(31 SR 458); Ashburner, 2nd ed., 257-260.

This footnote has been referred to in the High Court with approval on four recent occasions: *Hewett v. Court*;[47] *Legione v. Hateley*;[48] *Stern v. McArthur*[49] and *Chan v. Cresdon Proprietary Limited.*[50] It is instructive to consider the use made in these cases of what had been said in the above passages from the *Chapters In Equity*, but this cannot be done with as much brevity as one might wish in a paper of this nature.

The first issue concerns the sense in which Sir Frederick Jordan was referring to specific performance. He was not doing so in relation to the efficacy given in equity to assignments for value of "future property". The subject was presently effective assignments in equity for value of existing property. *Tailby v. The Official Receiver*[51] was concerned with an assignment by way of security of, *inter alia*, all the present and future book debts and stock in trade of Mr Izon's business as Birmingham packing case manufacturer. The issue was whether the assignment of book debts was too vague, with the result that the assignee did not gain a title to the debts as they came into existence. The case is most famous for the analysis by Lord Macnaghten of the operation in equity of an assignment for value of future property. But it is apparent[52] that his Lordship was dealing also with present assignments where the consideration has passed, and nothing remains to be done in order to define the rights of the parties. In such a situation, equity regards as done that which ought to be done, and treats the assignee as having taken, without more, an equitable assignment of the subject matter. A court of equity will protect the rights of the assignee by injunction, appointment of a receiver, or by adjudicating upon issues as to priority between several claimants. Thus, insofar as the efficacy of a present equitable assignment for value rests upon the availability of "specific performance", it does so in a looser sense of that term than in its primary sense of a decree to effect a conveyance

[47] (1983) 149 C.L.R. 639 at 665.
[48] (1983) 152 C.L.R. 406 at 446.
[49] (1988) 165 C.L.R. 489 at 522.
[50] *Supra.* n.21 at 253.
[51] (1888) 13 App. Cas. 523.
[52] *Id.* 547-548.

of legal title. Hence, the terms used by Sir Frederick Jordan in the passages set out above.

In *Hewett v. Court*,[53] this reasoning was considered by Deane, J., but put to one side, when dealing with a related but distinct field of equity. The majority of the High Court (Gibbs C.J., Murphy, Deane, JJ.) held, in relation to a contract for the provision of work and materials to build a transportable house, that an equitable lien may arise to secure to a party to the contract the indebtedness thereunder, even though that party might not be able to obtain specific performance in any sense; the equitable lien arises independently of any express or implied promise to grant it. Then, in *Stern v. McArthur*,[54] in which the earlier decision in *Legione v. Hateley* was further considered, Deane and Dawson, JJ. referred to the particular passage in question from Sir Frederick Jordan's notes, in the course of identifying two kinds of equitable relief given purchasers against the consequences of the termination of contracts for the sale of land. Their Honours said:

> The first is relief against the retention by the vendor of both the land and any instalments of purchase price (other than a genuine deposit), irrespective of any damage suffered by him. The second is relief against the loss of the purchaser's equitable interest in the land. Relief of this kind is a necessary step to enable an order for specific performance of the contract to be made. These two categories of relief [have] not in the past always been kept distinct, both being spoken of as relief against a penalty or a provision in the nature of a penalty.

What had been written by Sir Frederick Jordan was relied upon[55] by their Honours to describe the nature of the equitable interest against loss of which equity granted relief.

As Brennan, J. had pointed out in his dissenting judgment in *Legione v. Hateley*,[56] the contract had been discharged at law, thus rendering it insusceptible of specific performance in the strict sense, and the loss of the right to a decree to enforce the contract carried with it the loss of the interest in the land. The effect of reliance by other members of the High Court upon the statement of Sir Frederick Jordan is to find some wider basis for the intervention of equity in such a case.[57]

A critical turn of events thus has occurred in the application of Sir Frederick Jordan's statement. First, he was not, on the face of what was said, dealing with more than the reasoning in *Tailby's Case* as indicative of the nature of present equitable assignments for value. The author did

[53] *Supra*. n.47 at 665-666.
[54] *Supra*. n.49 at 524.
[55] *Id.* 522-523.
[56] *Supra* n.48 at 456-457.
[57] See Gummow, W.M.C. "Forfeiture and Certainty: The High Court and the House of Lords" in Finn (ed.), *Essays in Equity*, 1985, at 31-34.

not express his remarks with reference to the relationship between vendor and purchaser of land. Secondly, there was a considerable body of other authority upon that subject which proceeded upon different reasoning.

It may well be true to say that upon receipt of the purchase price, the vendor is trustee of the land for the purchaser. Further, before that stage has been reached, the purchaser may acquire an equitable interest in the land, and it has often been said that the interest is to be measured by the availability to the purchaser of specific performance, being a decree to compel conveyance. In *McMahon v. The Sydney County Council*,[58] McMahon had contracted to sell certain land to Liu and the parties had been ready to complete when the land was resumed. Did Liu have, at the date of the resumption, an estate or interest in the land for which the applicable legislation gave him a right to compensation? Jordan, C.J. held that Liu had held the equitable estate in the land, subject to the obligation to pay the purchase price and the right thereupon to receive a conveyance of the legal estate; "[t]his was because he had agreed to purchase the land by a contract of which a Court of Equity would decree specific performance . . . ".[59]

However, it is said in a number of authorities that the purchaser will not acquire such an equitable interest so long as the obligation of the vendor to complete the sale is subject to an unfulfilled condition, not being a condition which the vendor is obliged himself to fulfil. Examples of such conditions are those requiring the consent to a transfer to the purchaser by the responsible Minister under applicable Crown Lands legislation, and the approval by local Councils of subdivisions under local government legislation. In such a case, to use the words of McTiernan and Taylor, JJ. in *McWilliam v. McWilliams Wines Pty Limited*,[60] it cannot be contended that the purchaser "became entitled by force of the contract to an equitable interest in the land". In *Brown v. Heffer*,[61] an ademption case, Windeyer, J. said that the rights of the purchaser to have the vendor do nothing to the prejudice of the purchaser are enforceable in equity by injunction, but they do not create an equitable interest in the land before fulfilment of the necessary condition.[62]

Thus, the appropriate form of equitable relief for a purchaser seeking to enforce the contract against the vendor, where the condition in question has not yet been fulfilled, is a declaration that the contract should be carried into execution together with an order that to that end the vendor do whatever may be reasonably required of him by the purchaser to bring

[58] (1940) 40 S.R. (N.S.W.) 427.
[59] *Id.* 436.
[60] (1964) 114 C.L.R. 656 at 661.
[61] (1967) 116 C.L.R. 344 at 351.
[62] See also In re *Rudge, Curtin v. Rudge* [1949] N.Z.L.R. 752; *Brown v. Heffer, supra* n.61 at 349-350 per Barwick, C.J., McTiernan, Kitto, Owen, JJ.; *Perri v. Coolangatta Investments Proprietary Limited* (1982) 149 CLR 537 at 565-566 per Brennan, J.; *Booker Industries Proprietary Limited v. Wilson Parking (Qld) Proprietary Limited* (1982) 149 C.L.R. 600 at 605-606 per Gibbs, C.J., Murphy, Wilson, JJ.

about fulfilment of the condition, together with an order that upon satisfaction of the condition, the contract be specifically performed by the vendor.[63] As Brennan, J. has expressed the position, the decree must be limited to the performance of any promise affecting the occurrence of the contingency and further performance decreed only subject to the contingency.[64]

In the case of a contract for the sale of land subject to a condition of the description presently relevant, the vendor may, until payment of the purchase moneys in full, exercise such rights with regard to the land as are consistent with the contractual rights of his purchaser; the creation of a mortgage or charge by the vendor need not of itself be inconsistent with the contractual rights of the purchaser.[65]

In *Stern v. McArthur*,[66] Deane and Dawson, JJ., after referring to the passage in question from Sir Frederick Jordan's notes, and after dealing with the decision in *Brown v. Heffer*,[67] a case of a contract where the Minister's consent was necessary, said:

> Entitlement to specific performance in the strict sense was necessary before the purchaser could be regarded as the owner in equity for the purpose of ademption. But that did not mean that, even if that remedy was unavailable, the purchaser could not have an interest under [the] contract which equity would protect regardless of whether he could, in a manner of speaking, be called the equitable owner. In appropriate circumstances equity would have directed that proper steps be taken to obtain the Minister's consent and, consent having been obtained, that the land be transferred to the purchaser.

The same reasoning now appears to have been applied in *Chan v. Cresdon Proprietary Limited* to the doctrine in *Walsh v. Lonsdale*. Mason, C.J., Brennan, Deane and McHugh, JJ. said[68] that the authorities established two propositions:

> First, the court's willingness to treat the agreement as a lease in equity, on the footing that equity regards as done what ought to be done and equity looks to the intent rather than the form, rests upon the specific enforceability of the agreement. Secondly, an agreement for a lease will be treated by a court administering equity as an equitable lease for the term agreed upon and, as between the parties, as the equivalent of a lease at law, though the lessee does not have a lease at law in the sense of having a legal interest in the term.

[63] See *Butts v. O'Dwyer* (1952) 87 C.L.R. 267 at 289-290; *Kennedy v. Vercoe* (1960) 105 C.L.R. 521 at 529-531.
[64] *Perri v. Coolangatta Investments Proprietary Limited* (1982) 149 C.L.R. 537 at 565-566.
[65] *Shanahan v. Fitzgerald* [1982] 2 N.S.W.L.R. 513.
[66] (1988) 165 C.L.R. 489 at 522-524.
[67] *Supra*. n.61.
[68] (1989) 168 C.L.R. 242 at 252.

The Court then said that the first proposition required some elaboration or qualification. Their Honours referred to the passage in question from Sir Frederick Jordan's notes, and said that the references to specific performance in this context should be understood in the way in which it was there described, that is to say as including equitable intervention short of a decree.

I have earlier referred to the adoption by Mason, J. in *The Progressive Mailing House Proprietary Limited v. Tabali Proprietary Limited* of the treatment of the subject by Jordan, C.J. in *Dockrill v. Cavanagh.* Mason, J. there summarised the position as follows:[69]

> In equity, however, a written lease not under seal was regarded as evidencing an agreement for lease. As an agreement for lease was capable of specific performance equity would decree specific performance of the written lease by ordering the execution of a lease under seal. In the meantime, in accordance with the doctrine of *Walsh v. Lonsdale* (1882) 21 Ch. D. 9, the relationship between the parties in equity was that of landlord and tenant: *Carberry v. Gardiner* (1936) 36 SR (NSW) 559 at 569. The landlord could, if necessary, be restrained by injunction from acting on the footing that the other party was merely a tenant at will or a tenant from year to year: *Walsh v. Lonsdale*; *Dockrill v. Cavanagh* (1944) 45 SR (NSW) 78 at 83. It was otherwise where the agreement had been terminated. Then equity would not allow one party to allege that any tenancy, even a tenancy at common law, existed: *Dimond v. Moore* (1931) 45 CLR 159.

What was said by Mason, J. on this previous occasion, with the reference to specific performance in the sense of the execution of a lease under seal, is, one might think, consistent with Sir Frederick Jordan's view on the subject. What Sir Frederick Jordan said in his notes concerning *Tailby's Case* and present equitable assignments for value, does not readily appear as having been designed by the author for the use to which it was put in *Chan v. Cresdon Proprietary Limited.*

In particular, in *Dockrill v. Cavanagh,* Jordan, C.J. cited *Inland Revenue Commissioners v. Earl of Derby*[70] for the proposition that the doctrine in *Walsh v. Lonsdale* had no application if the agreement for lease was not specifically enforceable. In the English case, the question was whether the doctrine applied upon the coming into effect of certain legislation on 29 April 1910, in relation to an agreement for lease made on 5 April 1910. The agreement provided for the grant of a lease upon the performance of certain conditions by the tenant. It was held that as the tenant had not performed the conditions before 29 April 1910, he was not entitled at that date to specific performance of the agreement to grant

[69](1985) 157 C.L.R. 17 at 26-27.

[70] [1914] 3 K.B. 1186. See also O'Keefe, "Sir George Jessel and the Union of Judicature" (1982) 26 *Am. J.L.H.* 227 at 243-246.

the lease, and therefore could not be treated as being in the same position as if the lease had been granted. His reliance upon this judgment indicates that, as one might expect, in his understanding of the doctrine in *Walsh v. Lonsdale*, Jordan, C.J. adopted that reasoning which treated the equitable interest of a purchaser as commensurate with the availability to the purchaser of the remedy of specific performance in the strict sense.

In the period of Sir Frederick Jordan's Chief Justiceship, there were a number of decisions of the Full Court which went on further appeal to the High Court so that the High Court judgments provided the leading case on the point in issue. The result is that the judgment of Jordan, C.J. in the Full Court is now overlooked, although it was affirmed by the High Court. In *Cowell v. The Rosehill Racecourse Company Limited*,[71] the Full Court had held that the case was covered by *Naylor v. The Canterbury Park Racecourse Company Limited*.[72] The High Court dismissed the appeal in *Cowell's Case*. Thus, the result Jordan, C.J. had supported was reached in the High Court. The judgment of Jordan, C.J. in *Naylor's Case* still repays study. In particular, it is apparent that the Chief Justice was well alive to the possibility that in a suitable case, of which a contract to enter a place of entertainment to view a spectacle was not one, a licence might be enforced in equity at least to the extent of an injunction to restrain a breach of the contract.[73]

Finally, one should note that some judgments of Jordan, C.J. retain particular value, not because their subject matter is still at the forefront of development in the case law, but because they contain the best available treatment of an obscure area not often the subject of judicial discussion. Thus, *Ex parte Patience; Makinson v. The Minister*[74] explains the nature of the equitable right of a solicitor to recoup his costs from a judgment, award or compromise for the payment of money to his client. *Wilson v. Frost*[75] is authority that in equity an obligor may be relieved from a deed executed by him if he executed the deed on the understanding that the other parties would also do so, and one of the other parties has repudiated the deed or is incapable of being bound by it.

It will be apparent that the contribution by Sir Frederick Jordan, judicial and extra-judicial, to the understanding of equity, remains a significant one. Of course, much has changed, but there is an element of universality in equitable principle which enables it to adjust to fresh circumstances whilst retaining its essential characteristics. Hence, the continued guidance to be found in Sir Frederick Jordan's writings.

[71] (1937) 56 C.L.R. 605.
[72] (1935) 35 S.R. (N.S.W.) 281.
[73] *Id.* 286.
[74] (1940) 40 S.R. (N.S.W.) 96 at 100-101.
[75] (1935) 35 S.R. (N.S.W.) 521 at 525. See also *The Federal Commissioner of Taxation v. Taylor* (1929) 42 C.L.R. 80 at 87 88.