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the Hon. Justice R P Meagher**

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Address on the Occasion of the Retirement of the Honourable Justice R P Meagher

**ADDRESS ON THE OCCASION OF THE RETIREMENT OF
THE HONOURABLE JUSTICE R P MEAGHER
AS A JUDGE AND A JUDGE OF APPEAL OF THE
SUPREME COURT OF NEW SOUTH WALES
15 MARCH 2004**

We gather here today to mark the departure from full-time involvement in the administration of justice of one of the intellectual giants of our legal history. The Honourable Roderick Pitt Meagher, known universally as Roddy, is the most widely loved judge of his time. There are some exceptions to that proposition but they need not detain us.

The source of the esteem in which your Honour is held is your combination of immense personal charm with an extraordinary intellect, reinforced by the wickedness of your tongue, the sparkle of your wit and the relentlessness of your intellectual honesty, not least with yourself. Throughout your career in the law, as lecturer, author, barrister and judge, you have followed the law where it led, whatever the consequences may be. On no occasion did anyone suspect that you fudged either the law or the facts to achieve a convenient, let alone a popular decision.

Often the confidence you exude, together with your extraordinary command both of the law and of the language to explain it, leaves the rest of us surprised, even anxious. That, however, is not your problem but ours.

As everyone in this courtroom knows your major contribution is found in that magnificent text *Equity: Doctrines and Remedies*, a joint work which is the product of a massive scholarly endeavour.

Justice Heydon said of this publication:

"It has extremely strong claims to be placed on, indeed at the top of, a short list of the greatest legal works written in the English language in the 20th century."^[1]

It is a different kind of text to any that had come before. It spoke without the diffidence characteristic of legal texts; it exuded, and sometimes luxuriated in, its own confidence and mastery of the subject; its style was irreverent, witty and disrespectful, including strongly expressed opinions about the inadequacies of judgments by judges of high repute. It heralded a new and distinctive voice in Australian legal discourse, a voice which would enrich the intellectual endeavour of a generation of lawyers in numerous further publications, speeches, judgments and, for those of us privileged to have experienced them, in conversations with you. I am confident you will, one day, find your Boswell. In the Court of Appeal and in the Court of Criminal Appeal, your Honour dealt with matters across the full range of this Court's jurisdiction, travelling well beyond equity jurisprudence. Chief Justice Gleeson, who is overseas and has asked me to apologise for his absence today, informs me that he was careful to ensure that you sat with him on your first appearance as a judge in the Court of Criminal Appeal. Immediately after the bench sat you turned to the Chief Justice and said:

"You only have to look at him to know that he is guilty."

Chief Justice Gleeson felt obliged to point out:

"The Appellant hasn't been brought up from the cells yet. You're looking at the court officer."

Throughout your years on the bench of this Court you have conducted yourself with unfailing courtesy to counsel and litigants. In hearings you have manifested an ability to direct attention to the real issues upon which the outcome of the case would depend, distilling the facts into their simplest form, before applying the precise principles of law required to determine the case. Your judgments are written concisely, accurately and with humour, encapsulating within a few pages what others take dozens to express. This is not the style fashionable amongst your judicial contemporaries, including myself.

There are many of us who yearned for more. We are, however, most grateful for what we received.

All of us cherish the memory of your many witticisms, your mischievous inventions, your flaunting of unfashionable opinions - some of which you probably hold - and your eloquent turns of phrase. Even those who have been the object of your most pointed barbs, many of which must have been hurtful, seem to accept that they were devoid of malice. I am sure they were. For no-one was exempt from a rapier like thrust at the heart of their reputation.

Sir Frederick Jordan was one for whom you have the highest intellectual respect. Nevertheless, with respect to a particular footnote in his Chapters in Equity in New South Wales you once observed, in a judgment:

"Great as is the homage we all owe to Sir Frederick Jordan, one must state that the footnote is nonsense. It has, of course, been approved by the High Court on about four occasions ... but that does not convert it into sense."^[2]

This was 1998, when your Honour had served on the Court for about a decade. In 1983, when your Honour wrote the Foreword to the republication of Sir Frederick Jordan's Papers^[3], the High Court judgments, to which you would later refer with such scorn, were mentioned in that Foreword. Far from being critical of those judgments, your Honour referred to them as an indication of the "current utility" of Sir Frederick's great work. Perhaps you were teasing. Your Honour was of course then counsel. This may have been an uncharacteristic display of tact, or at least discretion. You would rise above tact on the bench.

As you move into the entirely tact free zone of post judicial life, we look forward to continuing enrichment from your wit and your intellect. The fact that it will no longer be available to me on a virtually daily basis is a loss which I will feel deeply. So will many other members of this Court. I and we will miss you.

1 Heydon "The Role of the Equity Bar in a Judicature Era" in G Lindsay (ed) No Mere Mouthpiece: Servants of All, Yet of None Sydney (2002).

2 See Chief Commissioner of Stamp Duties v ISVT Pty Limited (1998) 45 NSWLR 639 at [64]; "Sir Frederick Jordan's footnote" (1999) 15 Journal of Contract Law 1.

3 Sir Frederick Jordan Select Legal Papers Sydney 1983 Foreword p2

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The Inaugural John Lehane Memorial Lecture

The Inaugural John Lehane Memorial Lecture

Tuesday, 24 September 2002

Ladies and Gentlemen:

I am honoured to be invited to address you on the subject of John Lehane on the eve of Lord Steyn's speech on *"The Intractable Problem of the Interpretation of Legal Texts"*. I hope he will unlock the key of our minds to the true meaning of **s12(6)** of the English Rent Act 1920 which provides that *"where this Act has become applicable to any dwelling-house or any mortgage thereon, it shall continue to apply thereto whether or not the dwelling-house continues to be one to which the Act applies."* Black J said of it *"Counsel have many times invoked it; but there seems to be no recorded instance of this having done so successfully. Its only practical effect appears to have been to waste time in its abortive discussion."*

He may even attempt to expound some Australian texts. A good place to start would be s22A of the West Australian Dog Act 1928. That provides, in case Lord Steyn has forgotten, *"Subject to the regulations, it shall not be lawful for the owner or occupier of any field, paddock, yard or other place in or on which any sheep or cattle are confined or depasturing, or any person not being an aboriginal or half-caste, except with the consent of the nearest Protector of Aborigines acting under the authority of the Minister to lay poison upon such field, paddock, yard or other place for the destruction of dogs wandering at large and trespassing on any such place."* It seems to suggest that in Western Australia it is the practice for persons, cattle and aboriginal natives to depasture on the same property, and to do so with the consent of the Minister. If they have consent it would seem they cannot depasture, but if they don't have consent they can depasture. But they have to be acting under the Minister's authority. So they have to have his authority to have consent. If they have his consent and are acting under his authority they cannot be there at all. "Lord Steyn will doubtless find it very easy; the late John Lehane could have written an elegant and merry little article on it. Would he were here to do so. But he can't. He is dead. Dead ere his time. Who will not weep for Lycidas.

One of the many fields in which he excelled was statutory interpretation. Any person interested in legal expertise should read – or reread – chapters 6 & 7 of Meagher, Gummow & Lehane on Equity and savour the subtlety and depth of those two chapters. If he does so he will read a masterly performance by John Lehane on the interpretation of s23C of the NSW Conveyancing Act 1919, which is the equivalent of s53 of the English Law of Property Act 1925. It is impossible to believe that so much ambiguity could lurk behind such an innocent collection of short words, and yet John Lehane displayed immense skill in teasing out every nuance of each word with such delicacy that one can only marvel. I do hope Lord Steyn will take a copy back with him and show it to his judicial colleagues. It might stop them from making fools of themselves in this area of the law the way Arden LJ recently did in *Pennington v Waine*.

And the interpretation of statutes was one only of his great attributes. He was a brilliant scholar, with a University Medal or two; a gifted classicist, an outstanding solicitor; a distinguished chairman of the Council of this College; a very fine person. He was also a great judge. He was appointed to the Federal Court in October 1995 by the Keating Government, arguably the only wise decision it ever made. Although he had almost never seen the inside of a Court, knew nothing of practice and procedure and very little of the law of evidence, he was a triumphant success as a judge, both in the eyes of his fellow and in the estimation of the Bar.

His learning was profound – in the Bible, in Greek and Latin, in English Literature and in Law. And from that learning he honed the skills of precise thinking. To read the observations which accompanied any brief which he sent you was a delight: his analytical formulation of whatever question he was nominally asking you both outlined a problem which had probably escaped your attention and also enabled you to answer it. His precision of thought enabled him to draft enormously complex documents like mining joint ventures and leveraged leases of aircraft. And he also possessed great skills of verbal elegance even when at his most Jamesian. When he committed pen to paper each word had its own precise and accurate meaning, no superficiality or inexactness being tolerated. I can remember marking one of his examination questions ten out of ten although it consisted of no more than six lines.

To say all that, however, might suggest a rather more severe person than he actually was. He had a grand, but concealed and impish, sense of humour. I cannot remember any Voltairean epigrams or Wildean paradoxes bursting from his lips, but I distinctly do remember him often exploding with laughter. He was intrigued by the wording of an easement in South Australia which was expressed to last for "a term of perpetuity less one day"; he was delighted when I showed him a will in which a testatrix (inevitably a testatrix) left her residuary estate "to all the people in Australia, or failing that to their children." In the first edition of Meagher, Gummow Lehane it was said of s98 of the amended Common Law Procedure Act that "Myers J had no hand in begetting it", and John became convulsed with laughter when Glass JA observed that the sentence betrayed an elementary ignorance of biology.

He was rarely cross, and when he was it was in the gentlest possible manner. He said of Sir Gerard Brennan's judgment in *Corin v Patton* that it was "mischievous". Nobody else would have stopped there.

Constant Lambert, in his book *Music Ho*, said that if you tried to describe Richard Strauss's music you would stress the brilliance of his orchestration, if it was Sibelius you would stress the austerity of his bleak Nordic melodies, but if it was Mozart all you could say was, accurately but dully, that his music was wonderful. In a way, one has a similar problem talking of John Lehane. He did not utter any famous statements, he never got violently angry, he never got drunk, he did nothing outrageous, he was not colourful yet he was one of the greatest lawyers and one of the nicest men any of us will ever meet. He had great fastidiousness and was one of those rare people, sincere and unostentatious, to whom the conduct of life was *ars artium*.

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G K Chesterton Society Annual Conference

G K CHESTERTON 14/9/02

Ladies and Gentlemen:

I am most honoured to be asked to address you on G K Chesterton. I have always been a fan of his. As you know he wrote literally hundreds of books, and some are still appearing. This year, for example, appeared in print for the first time an early novel called Basil Howe, for decades hiding in a suitcase in some London suburb. Nor can I tell you that I have read the whole of what he wrote, but I have, I think, read more than half of it.

I wish to assess, so far as I can, what he looks like now, nearly 70 years after his death.

He was extremely popular in his lifetime – not quite with everyone, but with most. That old bore, Henry James, when asked by an American journalist “What do you think of Chesterton in England?” replied “We do not think of Chesterton in England.” There were doubtless a handful of prissy old drears like that.

As usually happens, his popularity reached its zenith about the time of his death in 1936. Shortly thereafter, the inevitable decline set in: In 1943 Mr L A G Strong wrote: “Lately his reputation has been in decline.” That decline bottomed in about 1945 when Maisie Ward published her biography of him. Since then, he has remorselessly been climbing back into favour. New biographies are appearing, new essays about him, new anthologies of his work. What is his current standing? That is the question.

The area in which he is most highly rated, the area in which he is still read avidly and still widely respected is religion and philosophy. His books in this field – and, in particular, *Orthodoxy*, *The Everlasting Man*, *St Francis of Assisi* and *St Thomas Aquinas* – should still be compulsory reading for every thinking person. Considering that his book on Aquinas was written by someone who had no formal training in philosophy, it is a great compliment indeed that a philosopher of the stature of Etienne Gilson admired it so enthusiastically. His stance was a traditionalist one. He admired religion, and had no time for attacks on Christianity. He admired Reason and Liberty, but for him religion was the guarantor of both. A life of unrestrained irrationality was not a life at all. The enemies of traditional Christianity were all disasters: socialism, Soviet communism, unrestrained capitalism, Atheism, Spiritualism, nationalism, liberalism. One by one they were weighed and found wanting in his argument, as they have subsequently been in practice. Whereas Tradition was entirely admirable. In this regard, might I remind you of 3 great things he said: One was: “Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the deal.” Another was: “Democrats object to men being disqualified by the accident of birth; tradition objects to their being disqualified by the accident of death.” And the third: “When men stop believing in God they don't believe in nothing: they believe in anything.”

But as great as he was in these fields, he does not now seem as impressive when it comes to politics. Insofar as he stood for conservative liberalism, there can hardly be any complaint, although it must be said he did not say anything of significance in that field. But he deviated seriously from intellectually respectable standards in at least four respects. First, having rejected Socialism and Unrestrained Capitalism as the path to the future, he alighted on distributism as the only other available set of beliefs. All men should own property, all men should be independent, all men should be self-supporting. This led to the view that each of us should own 2 or 3 acres, a sheep and a pig, grow our own vegetables, and belong to no political organisation except a guild. These views fitted in with his enthusiasm for Merrie England and his respect for the Vatican Social Encyclicals. However, it did not strike him that it was a mere fairy-tale view of the world; nor did it strike him that a moderate and civilized capitalism was both more practical and more desirable. Secondly, he failed to denounce the evils of fascism. Clearly, it would be hard to call him a fascist. He was not a fan of Oswald Mosely; and he denounced Hitler as soon as it was possible to do so. But he did not denounce the evil side of Mussolini. (Nor, might it be said, did Churchill). As Orwell pointed out, he lambasted any infraction of people's liberties in England; he kept quiet about the Italian experience. He admired Mussolini's notions about the corporate state, which tallied with his “one sheep one pig” views, and he was captivated when Il Duce assured him that he had read Chesterton's books. Thirdly – and perhaps

most unattractively – he was virulently anti-semitic. His defenders point out that he had many personal friends who were Jews, that he never deteriorated into the vicious Jew-baiting of L'Action Française, and that there is a river of anti-semitism in English literature: look at Dickens, Thackeray, Trollope, Shaw, Wells, Kipling. All true enough, but it is also true that Chesterton's brand of grotesque, schoolboy anti-semitism is unacceptable in a post-Auschwitz world. An unpleasant example of it occurs in his Autobiography. He says that when he was in Poland in 1929 he met that monster Pilsudski. When Pilsudski was taunted with believing in a Jewish God he replied: "No. My religion derives from Jesus Christ, who was murdered by the Jews." Chesterton respects this aphorism with apparent approbation. Fourthly, it would be nice if one could forget his championing of the movement to deny women the right to vote in elections. In many respects he was sound in his attitude to feminism: he was vastly amused that the fashionable women of his day cried "We will not be dictated to" and then became stenographers. He was equally amused that women who were not married demanded to be divorced. But, on the question of the vote, he was neither amusing nor sane. His theory was that women should not be allowed to vote because the experience was too demeaning for them; he did not regard the vote as beyond their reach but below their dignity. One would say no more.

Forget politics; how does he stand in the world of literature? I am happy to say, very highly. Take his least effort in that field, for example – the novel. He wrote a handful of novels, all of them now in print and well worth reading. My favourite (but not everyone's) is The Napoleon of Notting Hill, a great comic novel, full of humour, fantasy, high spirits and congenial absurdity. Then, again, there are the short stories, and in particular the Father Brown stories. I must confer to a dislike of detective stories, and hence am no good judge of the matter. But people who do not share my aversions would award the Father Brown stories ten out of ten. For example, the Prince of Lampedusa, author of the Leopard, who was a great connoisseur of English literature and lecturer on the subject at the University of Palermo, placed the Father Brown stories on the highest pedestal. So I should advise you to follow his opinion, not mine.

His essays, particularly the more trivial ones, are an outstanding delight. Looking back at the not undistinguished history of the English essay, Chesterton and Belloc easily take their respective places beside Bacon, Addison, Steele and Charles Lamb. Read "On a Piece of Chalk" and see if you could improve upon such belle lettres. They are full of high spirits – consider:

"Man is a biped, but fifty men are not a centipede.

The word 'good' has many meanings. For example, if a man were to shoot his grandmother at a range of five hundred yards, I should call him a good shot, but not necessarily a good man.

I would tell a man who was drinking too much 'Be a man', but I would not tell a crocodile who was eating too many explorers 'Be a crocodile'."

But, perhaps, it is in the field of literary criticism he shines more brightly than anywhere else. If you read the feeble attempts at literary criticism you see so highly esteemed today by the chattering classes you will notice the difference. Today's scribblers wish to demonstrate that Jane Austen was a victim of male chauvinism, or that religion prevented Tennyson from being a Marxist; whilst critics like Leavis splash out with dogmatic evaluations which they neither explain nor justify; or structuralists that a book – sorry, "Text" – has no meaning. Note Chesterton's modus operandi:

"The function of criticism, if it has a legitimate function at all, can only be one function – that of dealing with the subconscious part of the author's mind which only the critic can express and not with the conscious part of the author's mind which the author himself can express. Either criticism is no good at all (a very defensible position) or else criticism means saying about an author the very things that would have made him jump out of his boots."

And consider some of his judgments in The Victorian Age in Literature. On Ruskin he said:

"Ruskin had a strong right hand that wrote of the great mediaeval Ministers in tall harmonies and traceries as splendid as their own; and also, so to speak, a weak and feverish left hand that was always fidgeting and trying to take the pen away – and write an evangelical tract about the immorality of foreigners ... it is not quite unfair to say of him that he seemed to want all parts of the Cathedral except the altar."

On Tennyson:

“Tennyson was a provincial Virgil ... he tried to have the universal balance of all the ideas at which the great Roman had aimed: but he hadn't got hold of all the ideas to balance. Hence his work was not a balance of truths, like the universe. It was a balance of whims; like the British Constitution ... he could not think up to the height of his own towering style.”

Read his books on Browning, Stevenson, Chaucer or, best of all, on Dickens. Read his introduction to each of Dickens' novels in the Everyman series. No one has evaluated Dickens' work with such insight. No wonder William James, Henry's less stitched-up brother, wrote to him on reading Dickens: “Oh, Chesterton, but you're a darling! I've just read your Dickens – it's as good as Rabelais”. Can any of you think of a critic who got more perfectly into Dickens's soul?

Of his poetry, it is more difficult to judge. His serious verse is often mired by bombast, sentimentality or loggarhoeia. It would be dangerous to exalt it too highly. On the other hand, it would be difficult to dismiss many of his lines. Leaving aside “Lepanto” for a moment – is not “The Ballad of the White House” a magnificent effort? After all, Kingsley Amis said he would prefer to read it than T S Eliot's “Waste Land”. This is part of it:

‘It is good to sit where the good tales go,
To sit as our fathers sat;
But the hour shall come after his youth,
When a man shall know not tales but truth,
And his heart shall fail thereat.

‘When he shall read what is written
So plain in clouds and clods,
When he shall hunger without hope
Even for evil gods.

‘For this is a heavy matter,
And the truth is cold to tell;
Do we not know, have we not heard,
The soul is like a lost bird,
The body a broken shell.

‘And a man hopes, being ignorant,
Till in white woods apart
He finds at last the lost bird dead;
And a man may still lift up his head
But never more his heart.

But of his comic verse – a most difficult medium - it is impossible to speak too highly. What great comic poets exist in the English tongue apart from Lear, Lewis Carroll and Gilbert? Surely only Belloc and Chesterton.

Here is Chesterton on the simple-living millionaire:

“Mr. Mandragon was most refined and
quietly, neatly dressed,
Say all the American newspapers that
know refinement best;
Quiet and neat the hat and hair and the
coat quiet and neat,
A trouser worn upon either leg, while
boots adorn the feet;
And not, as any one would expect,
A Tiger's Skin all striped and specked,
And a Peacock Hat with the tail erect,
A scarlet tunic with sunflowers decked,
Which might have had a more marked
effect,
And pleased the pride of a weaker man
that yearned for wine or wife;

But Fame and the Flagon, for Mr.
Mandragon
– obscured the Simple Life.

Mr Mandragon, the Millionaire, I am
happy to say, is dead;
He enjoyed a quiet funeral in a
Crematorium shed.
And he lies there fluffy and soft and grey
and certainly quite refined;
When he might have rotted to flowers and
fruit with Adam and all mankind,
Or been eaten by wolves athirst for blood,
Or burnt on a good tall pyre of wood,
In a towering flame, as a heathen should,
Or even sat with us here at food,
Merrily taking twopenny ale and pork
with a pocket-knife;
But this was luxury not for one that
went for the Simple Life.”

Here is the opening stanza of the “Ballade of suicide”:
“The gallows in my garden, people say,

Is new and neat and adequately tall.
I tie the noose on in a knowing way
As one that knots his necktie for a ball;
But just as all the neighbours – on the wall –
Are drawing a long breath to shout “Hurray!”
The strangest whim has seized me After all
I think I will not hang myself to-day.”

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Justice Priestley's Farewell Dinner

BILL PRIESTLEY

19th April, 2002

We are gathered to celebrate the extinction of Bill Priestley, whom it was once our privilege to have as a colleague.

He was born in the early twenties. Of rich but honest parents. He has preserved the riches, and frequently buys large chunks of Wollstonecraft, which we all know is a suburb of Sydney, and builds spacious houses on them.

His Christening was a notable event. His father wanted to call him Charles, his mother wanted to call him Thomas. They compromised their differences by having him Christened Lancelot, which – naturally – became abbreviated to Bill.

He was educated at Sydney High School, a school which has been the nursery of much judicial talent – including Mr Justice Madgwick and Mr Justice Einfield. He was a good scholar, but I doubt if one can say the same about them. He was a keen Latinist, and I can remember my Classics Master at Riverview heaping praise on the Classics Master of Sydney High. And, he has to this day maintained and expanded his interest in Latin. Unlike Madgwick and Einfield – and, I might add, unlike the Pope.

At the University he studied Arts before Law, and became a leading light in the Libertarian Society, as befits a devoted student of the late Professor Anderson. Simultaneously he became devoted to communism, so that even in his advanced age one can see in his study well-thumbed editions of Marx, Proud'hon, Gramsci and all those other creeps. He later added to this intellectual pantheon a passion for linguistic structuralists and deconstructionalists so that Derrida and Foucault have edged in beside the Marxists.

Another of his heroes was, for some reason, that arch-criminal Oliver Cromwell, whose portrait he carries around with him as if it were a sacred icon. Another cause to which he has devoted himself is feminism. Queen Victoria on that subject:

"The Queen is most anxious to enlist anyone who can speak or write to join in checking this mad, wicked folly of Women's Rights, with all its attendant horrors, on which her poor feeble sex is bent, forgetting every sense of womanly feeling and propriety." (This comes from a letter she wrote to Margaret Beazley on Margaret's first unsuccessful attempt to become a member of the Australian Club.)

A rather more reputable facet to his intellectual interests in his enormous knowledge of America, its history, politics and literature. In fact none of us can understand Chancellor Santow's persistent refusal to appoint him to a Personal Chair of American History and Literature at Sydney University.

At the Bar he was a conspicuous success, particularly in the field of Income Tax Law, an area to which he has now returned. He may well be the only person in Australia who understands it.

Then he went to the Bench, where he was an equally conspicuous success. He was a model of courtesy, efficiency, kindness, compassion, tact and moderation. This is, I am told, an association called the Plaintiff's Association or some such. If it exists, I am sure he is the patron of it.

And it is a worthy patronage. Plaintiffs, at least in motor vehicle and industrial accidents work do really excite one's sympathy, and it is a disgrace that neither the Bar Association nor the Law Society nor for that matter the Trade Unions have prevented the Government, in association with the Media Magnates and the insurance companies, from abolishing their traditional Common Law rights. So one can quite appreciate Bill's sympathy for these plaintiffs; it is only when he transferred that interest to plaintiffs like Mr Radski and Miss Wentworth that one begins to demur.

It is a shame to see him slip into decrepitude. I am myself feeling that state coming on. I remember in the late sixties having lunch with Marlene Dietrich, who said to me "Rod, you are too old to cut the mustard", and I felt "What would she think if she saw Bill Priestley?" And every time I see Simon Sheller I shudder, he seems so tottering.

But, as Bill slips away from us, he is secure in the knowledge that he is, and has always been recognised as, a perfect gentleman. He fits Cardinal Newman's remark: "It is almost a definition of a gentleman to say that he is one who never inflicts pain."

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Medico-Legal Annual Dinner

Ladies & Gentlemen

When I was musing on the subject of Law and Medicine, I remembered a lawyer's cross-examination of a doctor who had performed an autopsy. It went something like this:

L: Doctor, before you performed the autopsy did you check the pulse?

D: No

L: Did you check the blood pressure?

D: No

L: So it is possible that the patient was alive when you began the autopsy?

D: No

L: How can you be so sure doctor?

D: Because his brain was sitting in a jar on my desk.

L: But could the patient have been alive nonetheless?

D: It is possible that he could have been alive and practising law somewhere.

But, as Chekhov (himself a doctor) said: "Doctors and lawyers are the same, they both rob you, but the doctors are different, because they will always get paid". So also La Bruyère: "A physician will always be made fun of but he will always be paid". He gives you medicine and he cures your disease; you give him gold and you cure his.

This is the greatest difference between doctors and lawyers. I know, from having practiced law for nearly 30 years, that we lawyers have to live in grinding poverty; and when I went to the Bench things changed and I had to live in total destitution. Some lawyers have even been driven to the point where they no longer file income tax returns. Doctors, on the other hand, wallow in obscene wealth. Every year when the list of the 200 richest people in Australia is published, you will notice that there are no lawyers on the list, but many doctors, particularly pathologists and radiologists. (By the way, I have noticed that heavy industry, like Mayne Nickless, the trucking barons, have now purchased the practices – and also, I suspect, the souls – of the pathologists.)

Then I turn to the performances of doctors in the average industrial

accident case. They are always predictable. The doctors who furnish reports for the defendant always say something like: "Although the plaintiff fell 9 metres on his head on a concrete floor, there is no need to suggest he suffered an injury". This reminds one of GB Shaw's dictum "Optimistic lies have such an immense practical value that a doctor who cannot tell them convincingly has mistaken his profession".

The plaintiff's doctors are a little different. They will say something like this: "Although the plaintiff appears to be perfectly well, is not in pain, and is still capable of leading his normal life, it is clear that his vertebrae have been shattered at all levels, non-symptomatic arthritis is about to strike and psychiatric advice is necessary.

Then, the psychiatrist's report, when it turns up, will read something like this (and I quote from a case which was before us a week ago): "Mr Jones was observed independently mobilising through his home and yard environment. He was independent walking on carpet, linoleum, grass and concrete ground surfaces." In other words, he walked on the floor, just like you and me, and not – as you might expect – on the ceiling. And later: "When standing from a kitchen chair, Mr Jones was observed to use his upper limbs on the table and the rear of the chair to assist in lowering himself to the chair." Well, heavens to Betsy.

Again, consider another topic: madmen. Time was when they were all locked up safely in loony bins. The whole of Victoria Road was set aside for this purpose. Then all the loony bins were closed down by the doctors and the madmen let loose. You could see little knots of them standing at bus stops in Victoria Road, slobbering and gibbering. They were told to meld into the people, and this they apparently did. That is why we must all be careful to see who is sitting on our right and our left. Now I heard on the wireless the other day that a survey has recorded that 40% of the patients in a doctor's waiting room are mad. What goes round comes round again.

Another comparison: women. What interesting women has medicine produced recently? Very few. There is the Robespierrean Marilyn Walton, the sea-green incorruptible prosecutor; and there is Winnie Child, the Leninist agitator. But these are small beer compared to what Law can throw up. Medicine has not got the equivalent of Pat O'Shane. She is formidable. In fact, there is a strong feeling at the Bar that she will beat David Bennett for the next HC vacancy. And that vacancy will soon occur. Only yesterday Mr Justice Gummow was carted off to a hospital kicking and screaming, after having suffered a serious heart attack. She is certainly more qualified for that job than he is: he is not a woman, he is a Leftie but not markedly so, and he is just a touch less black than she. If either of them were a whale his future would be assured.

I do hope that no epidemic of good health will now break out. I propose the toast of Medicine.

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The Kitto Lecture: Sir Fredrick Jordan's Footnote

**The Hon. Justice Meagher
Judge, NSW Supreme Court
The Kitto Lecture
University of New England
Armidale, NSW, Australia
27 May 1999**

Sir Frank Kitto is venerated amongst lawyers for many qualities: intelligence, learning, judgment and clarity amongst them. Today I wish to essay a topic which Sir Frank never, alas, dealt with at length; and to examine some of the unfortunate results of those who have dealt with it. The topic is what happens in equity when there is a contract for sale of property. Sir Frederick Jordan, whom we all revere, attempted the question. In his "*Chapters on Equity in New South Wales*" he formulated a number of propositions. One, which we shall call the First Proposition, is as follows:

"An agreement for valuable consideration for the present assignment of any form of property whatsoever, assuming it to be assignable, operates in equity to transfer the equitable title to the property from the promisor to the promisee; 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."

Another, which we shall call the Second Proposition, is as follows:

"Thus, when a contract is entered into for the Sale of Land although no proprietary interest passes at common law, the ownership of the estate sold is in equity transferred to the purchaser by the contract...;and the vendor becomes a constructive trustee for the purchaser."

As a footnote to the first proposition, Sir Frederick said in a footnote, which has since become famous:

"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 parties."

Reading these extracts together, what Sir Frederick is saying is that a total equitable assignment takes place after a contract of sale if the purchaser is entitled to any equitable relief whatsoever. It is my thesis that this contention is nonsense. But, before I embark on any elaboration of this thesis, I should like to make some general observations on the first and second propositions. The first proposition is carefully framed to describe the present assignment of existing property, presumably equitable as well as legal. It is talking the language of total, not partial assignments. It is not dealing with "future property", with which Sir Frederick has already dealt, some pages earlier in his book. It is not dealing with executed consideration (which is critical in the "future property" cases), but with executory consideration (which in the normal situation in cases of "present property"). The second proposition is, rightly, framed as a logical and necessary consequence of the first. In the case of legal property, a total assignment of the equitable estate must necessarily lead to the legal estate remaining in the assignor and the equitable estate being transferred to the assignee: i.e., a trust. It also follows that any lack of validity in either proposition must signal an equal invalidity in the other proposition.

I shall now proceed to examine the correctness of these propositions. The first, which almost in terms is derived from a statement of Lord Westbury L.C. in *Holroyd v Marshall* (1862) 10 HLC 191, (a case, incidentally, which dealt with the assignment of future property, not the assignment of present

property) has often received general deference, but rarely detailed analysis. The first proposition, read in conjunction with the footnote appended to it, would require the conclusion that if one found an assignment of present property which, for some reason, did not attract the remedy of specific performance in its primary sense, there would be a complete equitable assignment of that property if any other form of equitable protection were available. This precise situation arose in New South Wales in the case of *Butts v O'Dwyer* (1952) 87 CLR 267. It concerned the sale by contract of realty in that state. In effect the purchaser sought specific performance of the contract. The High Court held he was not entitled to that remedy, because the Minister's consent was required but had not been obtained. Instead he was given a declaration that the vendor was obliged to do all things necessary to enable the plaintiff purchaser to apply to the Minister for his consent. Fourteen years later, in *Brown v Heffer* (1966) 116 CLR 340, a case which relevantly, involved the same facts, Windeyer J spelt out the consequences of that decision. He said (at 351):

“Here consent was never finally refused. In fact it was given but not until after the testator's death. Immediately before his death he still held the land. At no time before he died could he have been compelled by an order for specific performance to transfer the land to the purchaser, because up till then the Minister had not consented. While the question whether the Minister would consent was still pending, the testator or his executor was not at liberty to enter into any transaction inconsistent with an obligation to perform his contract with the purchaser. The Purchaser's rights to have the testator and his executor do nothing to his prejudice were enforceable in equity by injunction. But they did not create an equitable interest in the land.”

A majority of the Court, of whom Kitto J was one, came to the same result, but did not spell out so explicitly what was involved. It would therefore follow if *Brown v Heffer* were correct, that a contract of sale does not effect an assignment of the vendor's beneficial interest when the purchaser is entitled to no more than an equitable remedy less than specific performance.

A further demonstration that the first proposition lacks universal validity arises from any attempt to apply it to the sale of a purely equitable interest. The first proposition would require the passage of all a vendor's equitable interest at the moment of contract, and since the vendor is selling nothing but an equitable interest, the result would be that a vendor has no interest at all in the property thereafter, even if no payment has been made to him. That much emerges from *Oughtred v IRC* [1960] AC 206, when the house of Lords wrestled without conspicuous success with this concept.

The second proposition, that immediately on execution of a contract the Vendor becomes a trustee for the purchaser, has attracted more attention in the courts. It has been considered in the following, amongst other, cases: *Chang v Registrar of Titles* (1976) 137 CLR 177; *Howard v Miller* [1915] AC 318; *Central Trust and Safe Deposit Co v Snider* [1916] 1 AC 266; *McMahon v Sydney County Council* (1940) 40 SR (NSW) 427; *Austin v Sheldon* [1974] 2 NSWLR 656; *Haque v Haque* (1965) 114 CLR 98; *Legione v Hateley* (1983) 152 CLR 406; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604.

The result of that judicial activity has been summarized, correctly, in an Australian Textbook, as follows:

“The position of the assignee after contract, but before consideration is paid or executed, is rather more obscure. It has been said that he has, even then, an equitable interest in the property, and that the assignor holds the property as constructive trustee for the assignee. But statements of this kind must be immediately qualified...it is defeasible, because the contract may be voided or rescinded; it is conditional, at least upon performance by the assignee of his obligation to pay the price; and the trust is unusual, in that it is difficult if not impossible, to point to any duties of a fiduciary character which the assignor owes to the assignee.”

But the matter goes further than that: if the “trust” is of such a precarious nature the complete equitable assignment on which it rests must be equally delicate. If there were a complete equitable assignment the “trust” would be more robust. It is to be noted that in one of the cases I have cited, *Haque v Haque* (1965) 114 CLR 98 at 124-5 Kitto J expressed his view that on contract the beneficial

ownership was transferred from vendor to purchaser "to an extent" and the vendor became "in progress towards" a trusteeship, both observations contradicting the more absolutist propositions of Sir Frederick Jordan.

From all the above it would seem that both the first and the second propositions need some narrowing in the interest of precision; instead, what the footnote seems to do is widen their ambit. It is worth looking at one authority from outside Australia. I refer to *Howard v Miller* [1915] AC 318 per Lord Parker of Waddington, who asserted in a famous speech that the interest of a purchaser was "an interest commensurate with the ruling which equity would give by way of specific performance." In this context it is clear enough that his Lordship, in using the term "specific performance" was talking of specific performance in its primary sense. In other words, his Lordship was saying that if you have an immediate right to specific performance in the primary sense you have complete equitable ownership; if you do not, and whether or not you have other rights, you do not have complete equitable ownership. This cannot be reconciled with Sir Frederick Jordan's propositions.

What, then, caused Sir Frederick to frame the footnote in the way he has? The reason can, I think, be perceived. He is endeavouring to telescope the equitable learning about the assignment of future property and insert it into his proposition about the assignment of present property, although he has already dealt with future property and passed on. This much is clear from his citation of authorities in support of his footnote: *Tailby v Official Receiver* (1888) 13 App Cases 523, and the cases following it. *Tailby v Official Receiver* was a case which clarified what was said by the House of Lords in *Holroyd v Marshall*. It was not a case dealing with the assignment of present property. It is authority for the following proposition: (a) when A for valuable consideration agrees to assign, or purports presently to assign, an expectancy, or future property, to B, and (b) the consideration has been paid or executed, and (c) A acquires property which falls within the description of that which was agreed to be assigned or purportedly was assigned, then that property vests in equity in B as soon as it is acquired by A. What *Tailby v Official Receiver* did was to correct a statement made by Lord Westbury in *Holroyd v Marshall*, when Lord Westbury was endeavouring to lay down the same principles. That eminent judge had added a proviso that "the contract is one of which a Court of Equity will decree specific performance." This was the remark which led to the famous correction of Lord Westbury by Lord Watson, who said:

"It is possible that the learned Judges [*scil* in the Court of Appeal] were misled by the reference which [Lord Westbury] makes to specific performance, an illustration not selected with his usual felicity."

And by Lord Macnaghten who said:

"It is difficult to suppose that Lord Westbury intended to lay down as a rule to guide or perplex the Court, that considerations applicable to cases of specific performance, properly so called, where the contract is executory, are to be applied to every case of equitable assignment dealing with future property."

The House of Lords repudiated any notion of specific performance. Thus, the ratio of the case is that the assignment of future property has nothing to do with specific performance either in the primary sense of that term or in its secondary sense. An assignment takes place when an event occurs, when property comes into existence; no curial assistance is required. The speech of Lord Macnaghten does illustrate that a variety of equitable remedies are, according to circumstances, available to the assignee of future property both before and after the assignment has taken place; but that is hardly remarkable, and in any event has nothing to do with "specific performance" in any of its senses, and has nothing to do with the present assignment of existing property for an executory consideration.

The result therefore is that Sir Frederick Jordan has relied upon authorities dealing with future property and executed consideration to support a proposition dealing with present property and executory consideration, and being authorities which negated the importance of any form of specific performance in "future property" assignments.

If matters rested there, one could consign the footnote to the dustbin of legal theory, as a curiosity

which has never misled anyone. But matters have not rested there. The matter has surfaced as least four times in the High Court recently, in a context where approval has been accorded by some judges to this very footnote.

The first of the High Court cases in question is *Hewett v Court* (1983) 149 CLR 639. In that case a builder contracted to construct a house and transfer it to the purchaser on practical completion. The price was to be paid by instalments, the last of which being on the date of practical completion. The contract provided that the house was to be at the builder's risk until practical completion, and property in the house was to remain with the builder until the price was paid in full. The builder became insolvent. Shortly before the commencement of the winding up the builder entered into an agreement with the purchaser, whereby the latter could take the house on payment for all work done to date in addition to all instalments already paid. The liquidator sought to set that agreement aside as a preference, the purchaser claiming an equitable lien to secure paid instalments. The purchaser won by a majority (Gibbs, Murphy and Deane JJ, Wilson and Dawson JJ dissenting). All members of the majority held that the purchaser was correct and the lien arose out of the general equities between the parties. Indeed Deane J put it clearly (at p.665) as follows:

“Nor, in my view, is there any valid reason in principle why the mere existence of any one of the recognized grounds for refusing specific performance of, for example, a contract for the sale of land should automatically preclude a lien arising over that land to secure the purchaser's right to be paid instalments of the purchase price of that property. The basis of specific performance lies in the equitable doctrine that personal obligations under a contract should be enforced where damages would be an inadequate remedy. The basis of equitable lien between parties to a contract lies in an equitable doctrine that the circumstances are such that the subject property is bound by the contract so that a sale may be ordered not in performance of the contract but to secure the payment or repayment of money. In the ordinary case of a purchaser who desires the actual performance of his contract with a defaulting vendor, an equitable lien to secure payment of instalments of purchase price is only of real value if specific performance of the contract would not be decreed.”

But his Honour added:

“The suggested requirement that equity would grant specific performance of the contract is usually propounded as being derived from the principle that an agreement for valuable consideration for the present assignment of property operates to transfer the equitable estate in the property if equity would, in all the circumstances, grant specific performance of the agreement (see, eg., *Howard v Miller* [1915] AC 318 at 316; *Central Trust and Safe Deposit Co v Snider* [1916] 1 AC 266 at pp 271-272). In the statement of that principle however, the reference to specific performance must be understood as meaning 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 (see *Tailby v Official Receiver* (1888) 13 App. Cas. 523 at pp 546-548; *Redman v Permanent Trustee Co of New South Wales Ltd.* (1916) 22 CLR 84 at p96; Jordan, *Chapters on Equity*, 6th ed. (Stephen) (1945), p.52 n.(e)). So understood, the test of availability of specific performance of the contract to determine whether an equitable estate has passed amounts to little more than an assertion that equitable rights are commensurate with the protection which equity will afford them (see *Hoysted v Federal Commissioner of Taxation* (1920) 27 CLR 400 at p423.) *Currey v Federal Building Society* (1929) 42 CLR 421 at pp. 448-449). That assertion, if applied to equitable lien, would involve not a requirement that specific performance be available of some associated contract but the uncontroversial - and unhelpful - proposition that an equitable lien will only exist to the extent that it will be enforceable in equity (see *King v Greig* [1931] VLR 413 at p.435; *Palmer v Carey* [1926] AC 703, at pp 7-6-707; but cf. Dean “Equitable Assignments of Chattels”, *Australian Law Journal* vol. 5 (1932), 289, at p.292).”

So that the only member of the Court who resorted to the Jordanian footnote did so for the purpose of pointing out that it, whilst of critical importance, was both irrelevant and inapplicable.

The second of those cases is *Legione v Hately* (1982) 152 CLR 406, a case where a vendor had stipulated in the contract of sale for a provision making time of the essence, and where the vendor had exercised the right of rescission when the purchaser did not comply with a notice to complete. In this case the High Court permitted the purchaser to reverse the forfeiture and obtain specific performance of the contract. The joint judgment of Mason and Deane JJ dealt with the Jordanian footnote; no other judge mentioned it. But Mason and Deane JJ said:

“In this Court it has been said that the purchaser’s equitable interest under a contract of sale is commensurate only with her ability to obtain specific performance of the contract (*Brown v Heffer* (1967) 116 CLR 344 at p.349). On this view the loss of the respondent’s equitable interest, from which she presently seeks to be relieved, was occasioned by her failure to comply with an essential condition of the contract, payment of the balance of the purchase price on 10 August 1979, the date fixed for completion by the appellant’s rescission notice, time being of the essence by virtue of condition 5. Upon the expiration of the time fixed by the notice the contract came to an end.

A competing view - one which has much to commend it - is that the purchaser’s equitable interest under a contract for sale is commensurate, not with her ability to obtain specific performance in the strict or primary sense, but with her ability to protect her interest under the contract by injunction or otherwise (*Tailby v Official Receiver* (supra); *Redman v Permanent Trustee Co. of New South Wales Ltd.* (1916) 22 CLR 84 at p.96; *Hoysted v Federal Commissioner of Taxation* (supra); *Pakenham Upper Fruit Co Ltd. v Crosby* (1924) 35 CLR 386; Jordan, *Chapters in Equity*, 6th ed. (1945), p.52, n. (e)). If this view were to be adopted and applied, the respondent’s inability to obtain specific performance in the primary sense would not entail the loss of her equitable interest. She would retain that interest so long as she was entitled to make out a case for relief against forfeiture.

However, for the purposes of this case we are prepared to accept the correctness of the statement in *Brown v Heffer*.”

In other words, their Honours say that Sir Frederick Jordan’s distinction exists, but does not matter, because specific performance (in its primary form) will be decreed whenever a vendor’s rescission is unconscionable.

The third case is *Chan v Cresdon Pty Limited* (1989) 168 CLR 242. It involved a lease of land under the Real Property Act (Qld) 1861, containing a provision by which a guarantor, who was a party to the lease, guaranteed the performance by the lessee of its obligations “under this lease”. The lease was not registered under the Act. The lessee entered into possession and paid rent. On default by the lessee the lessor sought to recover the amount of the rent from the guarantor. The High Court found against the lessor, because the rent arose under an agreement for lease, not under a lease. This is what is meant by preferring substance to form.

The lessor, naturally, kept arguing that an agreement for lease in equity was as good as a lease. He relied on *Walsh v Lonsdale* (1882) 21 Ch D 9, a view which is only valid if the agreement was specifically performable. The Court, having reviewed some of the authorities, said:

“For present purposes these authorities establish two propositions. First, the Court’s willingness to treat the agreement as a lease in equity, on the footing that equity regards as done that 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 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.

The first proposition requires some elaboration or qualification in order to accommodate what has been said in later cases. Although it has been stated sometimes that the equitable interest is commensurate with what a court of equity would decree to enforce the contract, whether by way of specific performance (*Connolly v Ryan* (1922) 30 CLR

498, at pp. 506-507; *Brown v Heffer* supra at p.349; *Chang v Registrar of Titles* supra at pp. 184-185, 189-190; injunction or otherwise (*Tailby v Official Receiver* supra; *Redman v Permanent Trustee Co* supra; *Legione v Hateley* supra), the references in the earlier cases to specific performance should be understood in the sense of Sir Frederick Jordan's explanation adopted by Deane and Dawson JJ. in *Stern v McArthur*, supra."

Many things might be said about this decision, for relevant purposes. But perhaps the principal one is that it has nothing to do with the equitable effect of a Contract of Sale, and thus nothing to do with the footnote we are discussing. One could also suggest that no case, in England or Australia, has extended the footnote's meaning of "specific performance" into the realm of *Walsh v Lonsdale*, supra. One could even wonder why the agreement in *Chan v Cresdon* was not specifically enforceable by either (or both) the lessee and the guarantor.

The fourth of the cases is *Stern v McArthur* (1988) 165 CLR 489 where the High Court, by majority, again allowed a purchaser to be relieved against forfeiture and have specific performance. The basic reason was that the vendor's behaviour was seen to be unconscionable. Sir William Deane returned to the hunt, this time in the company of Dawson J. This is Deane J's longest pronouncement on the problem, and hence deserves most attention. Time does not permit me to set out the whole text of his Honour's judgment on the point, but I shall quote three extracts. The first is:

"The extent of the purchaser's interest is to be measured by the protection which equity will afford to the purchaser. That is really what is meant when it is said that the purchaser's interest exists only so long as the contract is specifically enforceable by him. Specific performance in this context does not mean specific performance in the strict or technical sense of requiring the contract to be performed in accordance with its terms. Rather it encompasses all of those remedies available to the purchaser in equity to protect the interest which he has acquired under the contract. In appropriate cases it will include other remedies, such as relief by way of injunction as well as specific performance in the strict sense. As Sir Frederick Jordan put it: "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": Jordan, "Chapters on Equity in New South Wales", *Select Legal Papers*, 6th ed (1947), p.52 n.(e).

The second is:

"To put the matter in this way is to say little more than that the equitable interest of a purchaser under a contract for the sale of land is that which equity recognizes and protects: *Hewett v Court* (supra), per Deane J. The relationship of trustee and beneficial owner will certainly be in existence when the purchase money specified in the contract has been paid, title has been made or accepted and the purchaser is entitled to a conveyance or transfer. At that point the purchaser is entitled in equity to the land and the vendor is the bare trustee: *McWilliam v McWilliam Wines Pty Limited* (1964) 114 CLR 656 AT P.660, per McTiernan and Taylor JJ. Otherwise there is not unanimity upon when the relationship of trustee and beneficial owner arises: *Chang v Registrar of Titles* (1976) 137 CLR 177, per Mason J. But that does not mean that before that time has arrived the purchaser may not be entitled to a lesser equitable interest than ownership."

The third is:

"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 either 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 upshot of these passages is this: if no real specific performance is available, equity could grant relief in favour of a purchaser to some extent; and this betokens some form of equitable interest in the purchaser, not full ownership indeed, but an equitable interest nonetheless. Three matters of significance deserve mention about these passages; the first is that they mark a return to *Brown v Heffer*; there is no equitable ownership in the purchaser, but no reason why contractual remedies should not exist as long as the contract does. The second is that they mark an abandonment of Sir Frederick Jordan's footnote. The footnote says that a purchaser disentitled to specific performance in the primary sense of the term, has a complete equitable assignment if any equitable remedy is available to him. Deane J says there is no equitable ownership, but some "lesser equitable interest", a very different proposition. Thus the false becomes true, and the true false.

The third matter of significance is that they imply a belief that if one were, actually or potentially, entitled in equity to any form of remedy in relation to an asset, one has, by virtue of that fact, an equitable interest in that asset. This cannot be correct. In *Commissioners of Stamp Duty v Livingston* [1965] AC 694 the Privy Council on appeal from the High Court held that a residuary beneficiary had no proprietary interest in the residue of the estate, despite being entitled to limited equitable rights with regard to that residue. In so doing it specifically upheld the judgment of Kitto J in the High Court. Similarly, a beneficiary in a discretionary trust has no interest in the trust assets, although possessing limited equitable rights against the trustee: *Gartside v IAC* [1968] AC 553, even if he be the only beneficiary: *Re Weir's Settlement Trusts* [1971] Ch 145. In *The Queen v Toohey & Anor; ex parte Meneling Station Pty Limited* (1983) 158 CLR 327 at 342, Mason J said: "No one who has a merely personal right in relation to land can be said to have an "estate or interest" in that land."

Sir Frank Kitto was famous for the lucidity of his thought and clarity of expression. One wonders what he would have thought of the turgidity of expression and apparent lack of meaning in some of the cases I have been discussing. It is no wonder that recently Wordsworth wrote: "Kitto! Thou shouldns't be living at this hour".