Sir Frederick Jordan – Fire under the frost, by Keith Mason, 2019, The Federation Press, 260pp

Review by David Ash, Frederick Jordan Chambers, published in the Forbes Flyer – No 41 – Autumn 2020.

Our job is to tell the truth about stuff. It's a responsibility but it is also a wonderful thing… The disregard for truth founders on the fact that no one trusts expert opinion… It's not only invention which is a wicked thing but also the fact that they don't trust people's authority. It's a very, very messy time.

Irving Finkel, Assistant Keeper of the Department of the Middle East at the British Museum,

Sydney Morning Herald, 5 December 2019.

Lawyers are often criticized because their work is not constructive. It is not their business to contribute to the constructive activities of the community, but to keep the foundations and framework steady.

Owen Dixon, on the occasion of his swearing in, 21 April 1952,

85 CLR, xv.

Finkel was visiting Australia to deliver the *Sir Charles Nicholson Lecture, at the University of Sydney.* His entertaining address explained his idea that the story of Noah was lifted from Babylonian writings by Jewish scholars during their captivity.

The bad news for mankind is that the cleansing of the Flood did not last. Noah's descendant Nimrod ruled over much, including the Tower of Babel. That tower, of course, was intended to reach heaven; an irritated God confounded the builders' speech and scattered them so that they could no longer understand each other.

The tower as a metaphor for modern democracy – both in its aspirations and its failings – is not new. But when we come to consider a liberal humanist such as Jordan, we are confronted with the reality that law is far older than democracy and that the two often do not gel.

Frederick Jordan was the acme of the expert lamented over by Finkel; Jordan's expertise was the identification of and delivery of a particular type of received or authorized truth, the forensic truth. The forum was the courtroom and the pages of the reports, a forum which was very much part of the rubric of the "foundations and framework" spoken of by Dixon.

Keith Mason's book is excellent for three peculiar reasons.

First, it is a full biography of a judge written by a judge. This of itself is not new. Lord Campbell's two series of Lives are obvious examples. However, the practice is

comparatively rare. Perhaps this is because a judge's professional writing is based on a two-pronged fiction that there is an irrational and a rational and that the probative is wholly a subset of the later. Also, they are inculcated with the belief that privilege is the property not of the author but of the subject.

Mason overcomes these handicaps. He is clearly in awe of his subject, but this does not prevent some chipping at clay toes. Importantly, he has sat on the same bench two generations removed. This provides the author and therefore the reader with the advantage of a temporal and spatial context which another author must lack.

Secondly, the book does not follow a usual course. As any good advocate knows, a chronological narrative is the default position. It is not the best position, but something only to be rejected after due consideration. For example, a biography may better be set into themes, and autobiographers especially do this.

Mason does something different. He begins with a metaphor centred on two portraits of Jordan, delivers two complementary chronologies ("Family and Married Life" and "Milestones of Life and Career"), then moves to themes (Jordan's interests, his attitudes, his impact on particular areas of the law, and the like), still interspersing chronology (Jordan's war years and his travails as the piggy in the middle of vice regal maneuverings).

One result of this course is a need to cross-reference, as subthemes find context in particular events, and conversely events are coloured by themes. The alternative would be unnecessary and undesirable repetition.

On the whole, I think Mason's choice works. In a foreword to Graham Fricke's 1986 *Judges of the High Court*, Sir Harry Gibbs said:

> *The writer of the biography of a member of the High Court who has not engaged in politics has no easy task. The life of such a judge has not usually been an adventurous one, except in the field of the intellect, and a scholarly analysis of judgments on legal topics, and an examination of the development of legal topics, and an examination of the development of legal principles, does not make exciting reading for the layman.*

Jordan was not on the High Court. And, as Mason demonstrates, his intellect travelled far beyond legal topics. This admitted, he was nonetheless a man of letters whose vitality was bound up in what he read and wrote. A merely thematic study of Jordan's reading and writing, even including the non-legal side of things, would not have given us any flesh of the man. And if the book was merely chronological, it would have been impossible to sustain interest in the flesh.

The final peculiarity rests in the author and not in the subject. Mason was the President of the New South Wales Court of Appeal, the busiest of the nation's intermediate courts. An intermediate court is always a place of tension in the judicature, and more so in a federal system. The court is the final court for all state tribunals, and conversely the filtering point for matters which get to the High Court. As a place of finality, it pronounces both on the issues before it and for all tribunals below it. As one of a number of intermediate courts, it has an obligation to reflect upon decisions on like matters before other courts. And as a court inferior to the High Court, it has an obligation to apply that Court's rulings on matters before it.

Mason presided over the Court of Appeal when two not unrelated tensions came to the fore. The first is the nature of any duty to other intermediate courts. A reader of our constitution without more, might have supposed that the duty does not rise above comity. Each state is a sovereign entity, and to create a more onerous duty would be to work against that sovereignty.

The second is the nature of the obligation of application of the High Court's rulings. The second is a complex area, involving as only a starting point determining the ratio of a given High Court decision. There is a solid argument that during Mason's tenure, the High Court became both rather too insistent that its decisions where binding were incapable of exploration by an intermediate court, and rather prone to the relentless bracket creep of centralism. Lipohar is a good example.

It is sufficient for current purposes to mention a US authority. One intermediate judge, later appointed to the Supreme Court, stated in one decision:

> *Vertical stare decisis is absolute and requires lower courts to follow applicable Supreme Court rulings in every case. The Constitution vests Judicial Power in only one Supreme Court. U.S. CONST. art. III, § 1. We are subordinate to that one Supreme Court, and we must decide cases in line with Supreme Court precedent.*

A colleague on the same bench retorted:

> *Pursuing that approach, lower courts would look more like lower officials seeking to discern the intent of their superiors than like judges engaged in discerning and applying rules of law. Courts are still, or should be, institutions of reason, not will.*

There is a solid argument that Mason regarded the court over which he presided as an institution of reason and as a result received unwarranted and personalized criticism. The protagonists in that argument can speak for themselves, but the reader of this work can be satisfied that Mason's experience provides a visceral perspective of the NSW institution.

I can't pretend that Jordan has ever appealed to me as a person. In particular, his wit, or our record of it, is the traditional wit of the lawyer, a wit which depends largely upon exclusivity and not upon warmth. For all that, this accessible and entertaining book permits a different conclusion. It is well worth reading.