

# Sir Frederick Jordan's brushes with 'degenerate art'

By Keith Mason<sup>1</sup>

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At Dr John Bennett's urging, I am re-searching the life of Sir Frederick Jordan who was Chief Justice of New South Wales between 1934 and 1949.

When I started, I knew something about the man's brilliant judgments that are more widely cited than any other of his generation, with the possible exception of Sir Owen Dixon. But I had grossly underestimated Jordan's humanity. Sir Maurice Byers once wrote that 'the Bar was firmly convinced that [Jordan] had no human passions'.<sup>2</sup> In like vein, my legal miscellany *Lawyers Then and Now* recycled old stories about 'Frigidaire Freddie', the man who could be relied upon to deliver a few 'well-frozen words' on official occasions; and who was said to give his wife a cold whenever he got into bed.

As Jordan's enthusiastic biographer, I have now gained entre into many of his intimately-shared experiences on literature, music and art. Jordan is almost certainly the most widely read judge to have occupied the bench of any Australian Court. He had a vast knowledge of the English classics, but he also read literature in Greek, Latin, French, German and Italian. He collected or borrowed books voraciously and returned to his favourites many times over.

Not overlooking World War II, the pressures of judicial life in the 1930s and 40s appear very different to nowadays. The caseload was a lot smaller. Chief justices were not expected to attend law conferences or give speeches and papers. Jordan used to catch the 5.15pm tram from Queens Square, and he took it



Arthur Fleischmann's life-size sculpture of Sir Frederick Jordan in an exhibition.

going west towards its terminal so as to guarantee a seat on the way back to Vacluse, allowing him to plunge into a beloved book. Sir Frederick and Lady Jordan were not blessed with children and television lay yet in the future. Jordan did not wear his heart on his sleeve. But his opinions on art, music, literature and popular culture were strong by any standards. Unlike some judges, he kept them largely to himself. But fortunately for his biographer, he shared a

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lot in writing with his intimate friend Lionel Lindsay. At Lindsay's urging, Jordan resolved to go into print after retirement from the bench, but he died in office. So Lindsay then took up the task and produced the book called *Appreciations*<sup>3</sup> that contains Jordan's insightful pieces on many topics. I have also accessed the correspondence of the two men, at the State Library of New South Wales where Jordan worked as he put himself through university as a part

time student. It is unlikely that biographers of modern judges will have such advantages in the world of the ephemeral email.

### The 'modern art' controversies of Jordan's era

In the 1930s and 40s there were huge controversies about 'modern art'. Paintings that were abstract or non-representational were decried because they shunned beauty and promoted often unpleasant messages. Galleries were chided for their readiness to display such unpatriotic trash. Artists maligned each other and their works. Politicians and press magnates weighed into the conflict. Art prizes like the Archibald became the stuff of bruising litigation.

A typical remark from one public figure of this era was:

Perhaps...the Art Gallery is accumulating a Chamber of Horrors, in which to display the sort of rubbish that managed to attract attention through incompetent criticism.<sup>4</sup>

As we shall see, these words might have come from Robert Menzies, or Lionel Lindsay, or Josef Goebbels, or Adolf Hitler. But it was Sir

Art' (*Entarte Kunst*). In it, artists including Klee and Kandinsky were chaotically hung, accompanied by text labels deriding their works. Movements such as Bauhaus, Cubism, Dada, Expressionism, Impressionism and Surrealism were panned. The *Degenerate Art* exhibition attracted the bigger crowds, probably because Hitler drew such attention to it when opening the parallel event. In his speech, the failed artist turned Fuhrer condemned galleries that had had the effrontery to display:<sup>6</sup>

pictures submitted for exhibition [by men whose eye] shows them things different from the way they really are. There really are men who can see in the shapes of our people only decayed cretins: who feel that meadows are blue, the heavens green, clouds sulphur-yellow...

In the name of the German people I only want to prevent these pitiable

*...our national galleries are controlled by men who suffer from an intense abhorrence of anything that has been done since 1880.*

too the giants of the media as well as leading artists and art teachers. None more vigorously than Lionel Lindsay, the confidante of both Menzies and Jordan.

Menzies had been greatly disappointed with an exhibition of cubist and surrealist art that he visited in London in 1935. He recorded in his diary:<sup>8</sup>

Do they really reject anybody's work?

Fifty per cent of the stuff on the walls looked like the efforts of untrained inebriates.

The following year the attorney-general ignited a smouldering controversy in the Melbourne art world between a traditionalist establishment and artists who were seeking inspiration from 'modernist' work abroad.<sup>9</sup> He spoke out decriing 'the singularly ill-drawn pictures of 'modern' art, described by their authors as having a symbolic value unintelligible to

the unilluminated mind.' Menzies set about founding a 'Royal' Australian Academy of Art. This project would be announced in 1936 by Sydney Ure Smith, himself a close friend of the Jordans.

Rather than establishing an accepted medium for promoting art in Australia, these moves exacerbated tensions within the art world. According to Menzies' biographer, Professor A W Martin:<sup>10</sup>

...by early 1937 a variety of dissensions had become evident. The conservative-modernist controversy lay behind some but by no means all of them. A tangle of personal, institutional and interstate jealousies was also involved. The Sydney committee resented what it saw as Melbourne's arrogance.

The Contemporary Art Society would be founded in Melbourne in 1938, in reaction to Menzies' proposal.

These activities would open a new front in the long war between Robert Gordon Menzies and Herbert Vere Evatt.

In retrospect, the years up to the end of World War II were Evatt's glory days, before his many reverses stemming from the ALP/DLP split and Menzies' skill at exploiting his political naivete. But in the 1930s Evatt the jurist had the upper hand. Never more so than when repeatedly thwarting Menzies' efforts to exclude Egon Kisch from landing on these shores.<sup>11</sup> Kisch was a Jewish communist who had already suffered under Hitler. In 1934, he came to Australia with a message of world peace and warnings about the threat of Nazism. But the Melbourne establishment was not yet ready for such views. Indeed, their chief spokesman Menzies would return from Germany in late 1938 with admiration for what he had seen there.<sup>12</sup>



Arthur Fleischmann working inside his Sydney studio during the 1940s surrounded by many of his sculptures. In the centre of the image is a small version of the sculpture of Sir Frederick Jordan.

Frederick Jordan in a letter written in 1940. He too used the term 'degenerate' to describe those who practised this modern art.<sup>5</sup>

Nazi Germany witnessed an extreme version of the phenomenon when the works of particular artists - some Jewish, many not - were attacked for being unpatriotic. Two exhibitions were organised simultaneously in Munich in 1937. *The Great German Art Exhibition* was designed to show works approved of by Hitler and Goebbels. The two men also organised a concurrent exhibition, down the road, labelling it 'Degenerate

unfortunates, who clearly suffer from defective vision, from attempting with their chatter to force on their contemporaries the results of their faulty observations, and indeed from presenting them as 'art'.

Australia experienced a parallel controversy in the 1930s and 40s<sup>7</sup> with leading public figures enlisting in the culture war. Robert Menzies, when federal attorney-general, and Herbert Vere Evatt, when a High Court justice, entered the fray on competing sides. So

Mr Justice Evatt was as strong a supporter of modern art as Attorney-General Menzies was its opponent. When opening an exhibition of paintings by Adrian Lawlor in June 1936, Evatt proclaimed that 'Australia lagged far behind the standard of art in England, America and Europe'. This he attributed 'chiefly to the fact that our national galleries are controlled by men who suffer from an intense abhorrence of anything that has been done since 1880'.<sup>13</sup> Evatt's wife Mary Alice was herself an accomplished artist of the 'modern' bent and her brother in law, Clive Evatt KC<sup>14</sup> would appoint her a trustee of the New South Wales Art Gallery just in time to cast a favourable vote in the controversial Archibald prize competition of 1943 to which I shall return.

Menzies would stick to his anti-modernist guns both publicly and privately. In 1946 he told Lionel Lindsay that he entirely favoured the abolition of the Archibald Prize.<sup>15</sup> He regarded 'ninety percent [of the competitors] as rank imposters; some of them refugees who have discovered the art racket since their arrival in Australia and have become executives without first being students'.

Incidentally, Menzies (as prime minister) wanted Jordan to take Evatt's position when the latter retired from the High Court in 1940 to re-enter politics. But we learn from Sir Owen Dixon's diary that, when sounded out by his former pupil master, Sir George Rich, at Menzies' request, he turned down the proposal in emphatic terms.<sup>16</sup> The disruption of travelling around Australia may have been a reason, but I suspect that the baleful presence of Sir Hayden Starke on the High Court had a lot to do with Jordan's decision not to leave a happy band of Supreme Court colleagues for a very unhappy one in the High Court.<sup>17</sup> Whatever Jordan's reasons, Menzies had consulted with his revered pupil master Owen Dixon, then senior puisne justice on the High Court, before making the indirect approach to Jordan. And he would have learnt the response before turning to Jordan's former pupil, Dudley Williams, to fill the Evatt vacancy. At his retirement as chief justice in 1964, Dixon (in Menzies' presence) chose to publish a different story about Jordan's non-appointment, gently chiding the government for the appointment not taking place.<sup>18</sup> Since it is very unlikely that Dixon would have misremembered the critical detail of something he chose to speak about, I suspect that he was fibbing. But why he would have done so in Menzies' presence remains a mystery.

### Lionel Lindsay on modern art

Lindsay had first encountered Jordan at the State Library of New South Wales where Jordan worked as a library assistant during his university days. Jordan was a Balmain boy, the immigrant son of a shopkeeper. He

got to Sydney Boys High School on a public scholarship and then studied both Arts and Law part-time at Sydney University. Lionel Lindsay was an accomplished artist and an art critic who wrote for *The Bulletin*. He and Jordan shared their views on literature, religion and art over many years. (So too Lindsay and Menzies who frequently corresponded and dined together during Menzies' fallow years in the 1940s.)

Lindsay had a horror of Surrealism, Expressionism or any art that explored what he called 'the dark night of the soul'.<sup>19</sup> It was this art that he described as 'Modern' and he felt it was being foisted on a gullible Australian public especially by the Fairfax family through their publications and support. Lindsay's continuing dislike of the *Sydney Morning Herald* was encouraged by Menzies, who had his own reasons, both political and personal, for resenting Warwick Fairfax.<sup>20</sup> In October 1940, the *Sydney Morning Herald* published a letter from Lindsay in which he attacked the aesthetic influence of 'the German degenerates'. He proclaimed that:<sup>21</sup>

The Australian public is perhaps yet unaware that modernism was organised in Paris by Jew dealers, whose first care was to corrupt criticism, originate propaganda – in this infinitely superior to Goebbels, for it worked – and undermined accepted standards so that there should be ample merchandise to handle.

This sentence was edited out by *The Daily Telegraph* when it published the same letter. It has been speculated that the *Sydney Morning Herald* included the offending sentence in order to set Lindsay up for the fire storm that ensued. There was certainly a strong reaction in letters published in response, accompanied by an editorial probably penned by Warwick Fairfax himself.<sup>22</sup> The secretary of the Contemporary Art Society, Peter Bellew, suggested that, whatever Lindsay's purposes in writing:<sup>23</sup>

it is unlikely to achieve any more than an enthusiastic 'heil' from the inmates of our internment camps, and maybe an autographed watercolour from Hitler.

Less than three months later, Lindsay would receive a knighthood, on Menzies' recommendation, in the New Year's honours of 1941. Jordan was present at the investiture, as New South Wales' lieutenant-governor, but not before he warned Lindsay to avoid greeting him as 'Fred'.

In 1944, Vic O'Connor published a piece called 'Art and Fascism' in *Australian New Writing*.<sup>24</sup> In it he attacked Lindsay for thinking and speaking like Hitler and for being both a 'vague historian [and] also a very dishonest one' who attempted to 'cover his racial prejudice [against Jews] with the inno-

cent garb of 'defending his art'.

Much of Lindsay's vomit was also spewed out in his letters to Jordan. Whatever his personal views on Lindsay's outpourings, Jordan assisted Lindsay in the project that came to light in 1942 with the publication of a book called *Addled Art*. In it Lindsay attacked 'modernism' in all its forms, including cubism, fauvism and surrealism, describing them all as 'pretentious inventions deliberately practised and marketed for their sensation value.' Lindsay described modernism as 'the exploitation of novelty, a demented reaction to academic art, a refuge of charlatans who cannot draw and disdain to study.'<sup>25</sup> One chapter of *Addled Art* decried *The Cult of Ugliness*.

Another chapter was entitled *The Jew in Modern Painting* and in it Lindsay focussed on 'who' was organising the whole deception, especially in France. Picasso got special attention in a diatribe against the Jewish domination of the art market, that Lindsay labelled a 'racket'. The chapter ended with a flourish: 'Art, bow your diminished head to the only true god, the Calf of Gold.'

Lindsay also attacked the work of female modernists on the additional ground that 'they have more leisure, and the superficial nature of modern living attracts their light hands; picture or hat, all is one.'<sup>26</sup>

Although published in Sydney by Angus & Robertson, *Addled Art* was strangely silent about the Australian scene with which Lindsay had embroiled himself over many years. The closest he came was in the Preface asserting that for over 40 years he had seen Australian art as 'undefended, threatened by the same aliens, the same corrupting influences that undermined French art, both supported by powerful propaganda'. This lacuna was reluctant but deliberate, because the chapter on modernism in Australia was dropped on Jordan's strong recommendation. Jordan warned his friend not to put his fate in the hands of jurors in a likely defamation action. For good measure, he added that the offending portions seemed 'to give some miserable individuals an importance which they have not got and do not deserve'.<sup>27</sup>

After examining a second draft of the whole book, Jordan opined that it contained nothing defamatory.<sup>28</sup> He also tendered some copyright advice. Lindsay was so grateful for this assistance that he gave Jordan a Rembrandt etching entitled *Adoration*,<sup>29</sup> telling him that 'if [*Addled Art*] annoys the Herald and all the modernists I shall be gratified'.<sup>30</sup> Publication of *Addled Art* at a time when Australians were discovering the horrors of the Holocaust would cement Lindsay's reputation for anti-semitism and lose him many supporters even in an art milieu used to extreme language. (Incredibly, Lindsay republished *Addled Art* in England after the War without in any way tempering its message or language.)

On 28 August 1942 Jordan sent Lindsay the galley proofs of his recent judgment in *Gardiner v John Fairfax & Sons Pty Ltd* on the subject of fair comment. The acerbic art critic might have been less than pleased to see a significant win by the Fairfax company. But one passage in the reasons seems almost to have been written for his benefit. Jordan wrote that:<sup>31</sup>

Whistler obtained his verdict, not because Ruskin had accused him of 'flinging a pot of paint in the public's face', but because he was injudicious enough to call him a coxcomb into the bargain and to suggest that he was guilty of wilful imposture....A critic is entitled to dip his pen in gall for the purpose of legitimate criticism; and no one need be mealy-mouthed in denouncing what he regards as twaddle, daub or discord. English literature would be the poorer if Macaulay had not been stirred to wrath by the verses of Mr Robert Montgomery....

Lindsay wrote back saying that he was 'fascinated by [Jordan's] wisdom and delicate discriminations and particularly rare humour.'

#### Jordan's own attitude to modern art

I am not suggesting that Jordan held all of the views that his friend Lindsay shared with him. But, in a letter to his friend, Jordan called *Addled Art* 'a most important contribution to the history of the pathology of art' and he labelled the current artistic era as decadent, and populated by 'degenerates'.<sup>32</sup> While omitting any whiff of the Jewish art conspiracy theory, Jordan's reasons for attacking modernism root and branch closely mirrored the views of contemporaries I have already mentioned.

In a note on modern art later published in *Appreciations*, Jordan recorded that:<sup>33</sup>

The chief reason for the decadence of the artistic period through which we are now passing is unwillingness of many who profess the arts to submit themselves to the discipline necessary to acquire an adequate technique. They want the prize without the toil.

For Jordan, it was 'no new thing' to abandon form and structure if one recognised that writers such as Carlyle and Joyce had chosen formless styles.<sup>34</sup> But while they had also written to attract attention, a talent to write properly had been demonstrated in their earlier works. By contrast, 'Modern Art' was, to Jordan:<sup>35</sup>

the work partly of young men desirous of attracting attention to themselves as artists but who, being either too incompetent or too idle to learn the elements of drawing, colour or

perspective, are content to exhibit shapeless daubs, and partly of artists who, conscious that they will never be more than second-rate, seek to distract attention from their technical deficiencies by deliberate distortion or craziness of subject.

To Jordan, the greater part of 'Modern Art' was the product of 'people who are mentally unstable, and by charlatans who, being either too incompetent or too idle to learn the alphabet of artistry, prefer to mimic the off-scourings of imaginations which are mentally diseased.' Their work was nevertheless 'welcomed for public exhibition by... fellow degenerates in company with similar productions of their own.'<sup>36</sup>

These words might have tripped from the tongue of Goebbels or Hitler.

But Jordan never descended to Lindsay's anti-Semitism poured out in the correspondence between the two men and in *Addled Art*. Though not a religious believer, Jordan was very familiar with the Old and New Testaments and he shared with Lindsay his views and readings on the origins of Christianity, adding 'Needless to say, this does not represent my official views on the matter.'<sup>37</sup> Much of Lindsay's vomit against Jews was spewed out in his letters to Jordan. But, to mix metaphors, Jordan tended to return service with a straight bat. The closest he came, in my researches to date, was to describe the book and song *The Last Time I Saw Paris* as 'the worst types of American-Jewish greasy sentimentality.'<sup>38</sup>

Jordan described as 'meretricious rubbish' the *Herald* Exhibition of Contemporary Art of 1939 that was on display in Sydney at the David Jones department store.<sup>39</sup> This was the Melbourne *Herald* newspaper run by Keith Murdoch, Rupert's father. There were paintings by Picasso, Cezanne, Gauguin and Dali and the exhibition toured Australia during the war, because it was too unsafe to return the exhibits to Europe. This event re-stoked the fires of the modernist controversy. For example, J S MacDonald, the director of the National Gallery of Victoria who would offer the strongest of evidence against William Dobell in the Archibald litigation, declared that the work was that of 'degenerates and perverts'.<sup>40</sup> Jordan's response to the *Herald* exhibition was: 'It may be Contemporary, but why call it Art? You might as well call sleeping in a ditch 'contemporary architecture''.<sup>41</sup>

I have already set out Jordan's remark that 'Perhaps...the Art Gallery is accumulating a Chamber of Horrors, in which to display the sort of rubbish that managed to attract attention through incompetent criticism.' Lindsay in reply<sup>42</sup> agreed heartily, adding that 'the truth is that the *Herald* has done immense

harm to Australian art, and the public in Melbourne – We can thank Murdoch for his three years propaganda of Modernist follies for this.'

#### The two portraits of Jordan and their linkage with the Archibald Prize controversies

There are two portraits of Sir Frederick Jordan as he appeared late in his life. Both were commissioned by the New South Wales Bar Association but that is about all they have in common.

The official portrait displayed in the Banco Court, along with that of all other chief justices of New South Wales, was commissioned



Photo: Fairfaxphotos

Mary Edwards, Victoria Square Courts, 23 October 1944.

after Jordan's death (for 700 guas) and painted from a photograph. The artist was Sir William Dargie CBE who also painted Jordan's successor, Sir Kenneth Whistler Street.<sup>43</sup> The painting depicts a robed judge, seated and looking intently past the artist into the middle distance. The spectacled eyes betoken self-assurance without arrogance. There is no smile, but certainly more warmth than Jordan's caricatures. The featured long-fingered hands justify the comment made by Jordan's associate and private secretary John (later Mr Justice) Slatery: 'He had long fingers and he might have been a pianist I suppose, a certain softness about them.'<sup>44</sup>

Painting from a photograph, rather than from life, would have disqualified Dargie from entering the portrait in the prestigious Archibald Prize that he would win eight times. At least, that was the controversial ruling of Justice Helsham, CJ in Eq, in 1983 in one of four court cases<sup>45</sup> involving the contested scope of the Archibald trust. Helsham's decision<sup>46</sup> was tellingly criticised by the editor of the *Australian Law Journal*

on the basis that 'If a live sitting were the primary criterion, there would be difficulty in accepting as portraits the self-portraits of Rembrandt and Rubens [which] must have been painted on the basis of images in a mirror: is there any distinction of significance between a photographic image and a mirror image?'<sup>47</sup>

Had Jordan been sitting on appeal from Helsham, posthumously and in breach of the rules of ostensible bias, there might have been the additional issue whether a painting based on a photo of a living person effected after that person's decease would have involved a 'live sitting'. But in those days Equity judgments in the Supreme Court were almost invariably taken on appeal to the High Court or Privy Council.

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There were, however, several actual links between Jordan and the Archibald Prize. Most of them are associated with Mary Edwards, the woman who painted the earlier portrait of Jordan that currently sits in the back corridor that the judges pass through before entering the Banco

Court. That portrait depicts Jordan, robed and standing, with more than a hint of a smile on his face. Unlike Dargie, Edwards had the advantage of a living 'sitter' to produce her portrait of the (standing) judge. She chose to locate him out of doors, *al fresco* as Jordan would say in the famous *Spilstead* divorce case.<sup>48</sup> Her means of portraying this would cause a big kerfuffle.

In August 1947, Edwards was commissioned by the Bar Association to paint Jordan for an agreed fee of £750.<sup>49</sup> When the artist enquired whether a judge ever appeared outside the courtroom in his red robes, she was told that this might occur on ceremonial occasions, presumably during circuits. So she added the sprig of greenery that traverses the bottom left of the picture. The Bar Association objected to this addition and, when the artist dug in her heels, refused to take the portrait or pay the agreed price. I have it on the authority of two chief justices of the High Court (Garfield Barwick, who told Murray Gleeson) that Jordan himself rejected the portrait because the greenery suggested a laurel wreath, with the connotation of a Roman triumph.

Edwards had been put in touch with the Bar Association by one of its members, Mrs Ann Bernard. Back in the 1920s, Bernard had gone to Fiji to work for the governor there. But after her husband died from a war injury, she went to England to study law at Oxford and then qualify as a barrister at the Inns of Court. She was admitted to the Sydney

Bar in 1941 and practised there through the 1940s.<sup>50</sup>

One of several notable cases in which she appeared was *Ex parte Walsh*.<sup>51</sup> The former suffragette Adela Pankhurst Walsh had been detained under the National Security Regulations by order of the minister for the army who recited his satisfaction that this was necessary to prevent her acting in a manner prejudicial to the public safety or the defence of the Commonwealth. Speaking for the Full Court, Jordan CJ reluctantly upheld the validity of the detention and refused *habeas corpus*. But he declined to award the Commonwealth its costs. This would be a comparatively rare win for the Commonwealth in Jordan's court in a National Security Act case and the chief justice made it clear that his freedom to decide otherwise was reluctantly curtailed by High Court and House of Lords precedents. When engaged to do Jordan's portrait, Mary Edwards was already a controversial figure in the Sydney art scene. Jordan (who would have endorsed the choice of artist) and the Bar Association were playing with fire right from the beginning. Edwards had been the Archibald runner-up in 1942, losing out to William Dargie. In those days, there was what lawyers call a reasonable expectation that the runner-up one year would win the next.<sup>52</sup> In the meantime, however, Mary Alice Evatt had been appointed to the trustees of the New South Wales Art Gallery by her brother-in-law. Described by Lionel Lindsay as 'an ardent supporter of modernism in every shape', Mary Alice Evatt in 1943 would vote (with Lindsay) for Dobell in what would be a seven to three vote decision that preferred Dobell's portrait of Joshua

Smith to Joshua Smith's own portrait of Dame Mary Gilmore. (In the following year, Edwards' entry would get to the shortlist of nine, but no further. The normal pattern of events would be resumed the following year when Joshua Smith got the prize.)

Edwards and Joseph Wolinski went to Equity to challenge the trustees' decision, suing as 'relators' in the name of the attorney-general. They engaged Garfield Barwick KC, leading Ann Bernard. It was asserted that Dobell's startling exaggeration and distortion of Joshua Smith was a caricature, thereby (it was contended) precluding the picture from being a 'portrait'. The painting was described by one witness as representing 'the body of a man who had died in the position and [had] remained in that position for a period of some months and had dried up'.<sup>53</sup>

Roper J would, however, recognise a sufficient likeness and unsurprisingly conceded considerable (artistic?) licence to the trustees as judges of the prize. Most commentators see the case as doomed from the outset, but

Edwards had several supporters in the divided art world. The case was lost with a blaze of negative publicity. Both William Dobell and Joshua Smith were scarred for life over their painful brush with the law.

When Edwards and Wolinski appealed to the High Court the proceedings in the attorney-general's name were discontinued. Solicitor-General Weigall KC advised that there was no question of general public importance and that the appeal was devoid of merits. The relators protested mightily, asserting 'political intervention' and claiming to have a favourable opinion on prospects from Barwick KC.<sup>54</sup> Ann Bernard picked up the tab for the costs awarded against her client.



The portrait of Ann Bernard

Writing privately to Jordan, Lindsay described Dobell's portrait of Smith as 'admirable, although a work of extreme decadence, a sort of belated rococo statement – Rembrandt emasculated and a cocaine addict!'.<sup>55</sup> Lindsay was, in his own words, 'extremely exercised' about Roper's decision, but the ever proper Jordan did not respond on this topic.

It is, nevertheless, fascinating to speculate what might have happened if Jordan had himself heard the case or sat on an appeal from the decision of his close friend David Roper.<sup>56</sup> In March 1946, after a walk to the Art Gallery 'to get a little sun', Jordan announced that he was 'depressed by the systematic ugliness of the Dobells and the Russell Drysdales'.<sup>57</sup> He told Lindsay that:<sup>58</sup>

I can't understand how the Art Gallery allows itself to be bluffed into buying the rubbish of Drysdale and Dobell. Drysdale's pictures haven't even got bad drawing, there is no attempt at drawing at all, and the colouring is

lurid and hideous. Dobell's stuff is mere caricature and rather indifferent caricature.

Coming, as it did, a little over a year after Roper J's still controversial ruling, Jordan's use of the phrase 'mere caricature' was extremely pregnant. Had Jordan been the trial judge, it is far from clear that he would have taken the position adopted by Roper. But it is equally clear to me that he would have recused himself anyway in light of his own hostility towards Dobell's paintings. Scarred like almost every other participant in the Archibald controversy, Edwards made another of her many name changes.<sup>59</sup>

She later retreated to the Pacific islands, where (dubbed 'the painter of the South Pacific') she executed many portraits of the native people of Fiji, Java, New Caledonia and Tahiti. Further unhappy distancing from the Australian artistic establishment ensued in 1945 when her portrait of Dame Enid Lyons was rejected as 'unsatisfactory' by the federal government's Historic Memorials Committee. As would later occur with the Jordan portrait, that commission would be transferred to William Dargie.

But back to Edwards' portrait of Sir Frederick himself that the Bar Association refused to accept or pay for. Jordan certainly knew of Edwards' role in prosecuting the case against Dobell whose paintings he (Jordan) detested. So, was his initial endorsement of Edwards as his portraitist a message of support for the battered loser in her litigious tilt against modernism? Quite likely, in my opinion.

When the standoff occurred, Mrs Bernard paid the artist the agreed fee and acquired the picture for herself. Edwards entered the portrait for the Archibald Prize and it was exhibited in early 1948. But it did not win. For a time the painting was displayed at the Sydney University Law Library. It was then taken to Fiji by Bernard when she returned there in 1954. As a barrister, she gained a reputation for taking on unpopular causes. She would return to Sydney in retirement in the 1960s and died in 1973. Her own portrait by Mary Edwards now hangs in the Bar Common Room.

In art circles, Kenneth Handley is best known as the father of David Handley, the entrepreneur behind *Sculptures by the Sea*. But in legal circles, Ken is revered for his service as an outstanding and longstanding appellate judge, both here and in the South Pacific. Ken grew up in Fiji and served on that country's Supreme Court for several years. Eager to recover the Jordan portrait for posterity, Handley contacted Ann Bernard's adopted daughter, Angela Davis, in about 2003. She put him in touch with her mother's



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executor Karam Ramrahka, a Sydney solicitor of Fijian origin. After failing to persuade Handley to buy the painting, Ramrahka yielded to the judge's request to *donate* it to the Supreme Court. (To date this transaction has not been challenged as the outcome of undue influence by a person in authority; and the Limitation Act has now added its protective embrace. My capacity to express any opinion as to the application of the recipient limb of *Barnes v Addy* is further compromised by me being one of the original recipients, as a member of the Supreme Court at the time, not to mention some well-known 'seriously considered' dicta of the High Court.) In recognition of Jordan's service in the Full Court that had been the predecessor to the Court of Appeal, the portrait was unveiled in the President's Court at a celebratory event in 2003.<sup>60</sup> On this occasion, Mr Justice Roddie Meagher, himself a prolific art collector never shy of making controversy, conceded that the painting was not without merit. But, in customary voice, he added that 'it was a touch too pretty and feminine, but better than the usual academic rubbish which passed muster in Sydney portrait painting circles'. Roddie's chief objection, however, was that the Edwards' work did not 'portray, or even hint at, Sir Frederick's notorious iciness'.

That iciness may have been Jordan's public persona, but it was by no means his true personality. For further particulars of this statement readers will have to await the publication of my biography of Jordan.

### Jordan sculpted by Arthur Fleischmann

Fleischmann was a Slovak-born sculptor who left Central Europe in 1937. Spending two years in Bali en route to Australia, he converted from Judaism to Catholicism with

the encouragement of a Dutch missionary. Between 1939 and 1948 he was a tenant at 'Merioola', a Victorian-era mansion in Woollahra. It hosted a bohemian artistic centre occupied by what was variously called the 'Merioola Group' or the 'Sydney Charm School'. Mary Edwards was another tenant there.

During his stint in Sydney, Fleischmann sculpted several prominent public figures including Cardinal Gilroy, Governor-General Lord Gowrie, Sir Percy Spender, Clive Evatt and Jordan himself. At some stage, the small Jordan sculpture was acquired by the lawyer-cum-politician, Edward St John QC. When he retired

in about 1972, the sculpture passed to Rick Burbidge QC when he bought St John's 12th Selborne chambers 'lock, stock and barrel'. Burbidge's move to State Chambers atop the State Bank Building would, ironically, put Sir Frederick back into the face of another art controversy – a really bitter one, in which the word 'degenerate' may have been the only harsh word not uttered by either side.



Sir Frederick Jordan

Throughout the 1990s the New South Wales Bar Association was wracked by a brawl about a Geoffrey Proud painting that its principal donor, Roderick Pitt Meagher QC (as he then was),<sup>61</sup> called 'an untitled Renoiresque lady'. It portrayed a woman sitting naked, legs apart, with her right hand either resting or moving (depending on one's imagination or sensibilities) near her dark panties. Clive Evatt Jnr described the sitter as 'unaware of section 576 of the Crimes Act, dealing with

indecent exposure'.<sup>62</sup>

Years of controversy within the Bar Council would deeply affect three of its presidents (each of whom shared the Court of Appeal Bench with me for a stretch). Roddie Meagher resigned his membership of the Bar Association for a time in protest against what he saw as feminist-induced political correctness; Murray Tobias threatened to sue the ABC for defamation in a 'mockumentary' called *The Naked Lady Vanishes*; and Ruth McColl led a finally successful push that saw a majority of the Bar Council voting to remove the painting from Bar Common Room.<sup>63</sup> This occurred not long before Mary Edwards' painting of Ann Bernard would become the first but not the last true heroine of the New South Wales Bar to be honoured by being hung in the Common Room.

But what was the Bar Council now to do with Geoffrey Proud's controversial 'naked lady'? After coming down from public display, she was stored in a basement. But howls of protest saw her partial restoration, at least so far as the office occupied by Babette Smith, the chief executive officer. Then, for several years, Rick Burbidge generously agreed to let her sojourn in his State Bank Chambers. There the naked lady was positioned so that she and Sir Frederick eyed each other. I wonder what each of them thought about this? All we know for certain is neither of them blinked. According to Sir Garfield Barwick, Jordan always 'liked a warm joke'. So perhaps he would have been amused at the whole situation, whatever he thought about the Renoiresque, Modernist artwork.

## ENDNOTES

- 1 The Hon Keith Mason AC QC is currently a visiting professorial fellow at the University of New South Wales. A version of this paper was presented on behalf of the Francis Forbes Society for Australian Legal History in the Banco Court on 10 October 2017.
- 2 Sir Maurice Byers, 'Recollections of Sir Frederick Jordan' *Bar News*, Winter 1991, p 13.
- 3 A limited edition of the book (150 copies) was published by Ure Smith in 1950.
- 4 Letter from Jordan to Lionel Lindsay 24 October 1940.
- 5 See text associated with fn 32 below.
- 6 Hitler's speech at the Opening of the House of German Art in Munich (18 July 1937). English translation from Benjamin Sax and Dieter Kunz eds, *Inside Hitler's Germany: A Documentary History of Life in the Third Reich*, Heath & Co, 1992.
- 7 See generally Bernard Smith, *Place, Taste and Tradition A Study of Australian Art since 1788*, 2nd ed rev, 1979, OUP, chap 8; Joanna Mendelsohn, *Lionel Lindsay An Artist and His Family*, Chatto & Windus, 1988, pp 189-205 ('The Great Modernist Debate 1936-1943'); Eileen Chanin and Steven Miller, *Degenerates and Perverts. The 1939 Exhibition of French and Contemporary Art*, The Miegunyah Press, Melbourne, 2005; Ann Stephen, Andrew McNamara and Philip Goad, *Modernism & Australia. Documents on Art, Design and Architecture 1917-1967*, The Miegunyah Press, 2006. James McDonald, appointed Director of the National Gallery of Victoria in 1936 with the active support of conservative politicians, described all non-academic art as 'gangrened stuff which attracts the human blowflies of the world who thrive on putrid fare' (Notebook, quoted in Mendelsohn, *op cit*, p 192).
- 8 Menzies's Diary, 3 May 1935 (see Martin, *Robert Menzies A Life*, vol

- 1, p 195).
- 9 Mendelsohn suggests (*op cit*, pp 194-5) that Menzies 'saw himself as a cultural leader as much as a political one.... Menzies wished to encourage the same association with the conservative tastemakers. He ultimately failed in this objective because he did not understand the complex network of loyalties, rivalries and enmities that made up the politics of Australian art.'
- 10 Martin, *op cit*, p 196.
- 11 See Keith Mason, *Old Law, New Law A Second Australian Legal Miscellany*, The Federation Press, 2014, pp 154-9.
- 12 In a letter to his sister Belle dated 6 August 1938 Menzies noted that 'this modern abandonment by the Germans of individual liberty and of the easy and pleasant things of life has something rather magnificent about it....The Germans may be pulling down the churches, but they have erected the State, with Hitler as its head, into a sort of religion which produces spiritual exaltation that one cannot but admire.'
- 13 AW Martin, *Robert Menzies A Life*, pp 195-6, quoting Argus, 3 June 1936. See also Evatt's Opening Address, First Exhibition of the Contemporary Art Society, 1939, reproduced in Stephen, McNamara and Goad, *op cit*, pp 392-6.
- 14 The father of 'Young Clive' Evatt who still practises at the Sydney Bar in his 80s.
- 15 Menzies' lengthy letter is set out in Stephen, McNamara and Goad, *op cit*, p 483 ff. Menzies also told the secretary of Sydney's Contemporary Art Society: 'I never liked French art, it was always decadent and the fall of France proved it' (Richard Haese, *Rebels and Precursors: The Revolutionary Years of Australian Art*, Penguin, 1988, p 110).
- 16 See Philip Ayres, *Owen Dixon*, 2003, The Miegunyah Press, citing Owen Dixon, Diary 5 September 1940.
- 17 See Clem Lloyd, 'Not Peace But a Sword – The High Court under J G Latham' (1987) 11 *Adel L Rev* 175. See also Starke's gratuitous insult of Dixon, Evatt and McTiernan JJ in *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 550. In 1935, Dixon himself declined an invitation to dine with the Jordans when he learnt that Starke had been invited (see Ayres, *op cit*, p 69 ('He had invited Starke so I wrote I hoped to go to Melb for the week end')).
- 18 See 110 CLR x, xi.
- 19 Mendelsohn, *op cit*, p 192.
- 20 Mendelsohn, *op cit*, p 193.
- 21 *Sydney Morning Herald*, 16 October 1940. See further 'On Prejudice (Modern and Not So)' *New Matilda* 24 September 2007.
- 22 Mendelsohn, *op cit*, p 202.
- 23 Letter from Peter Bellew, Hon Sec of the Contemporary Art Society, *Sydney Morning Herald*, 17 October 1940.
- 24 *Australian New Writing*, no 2, 1944, pp 47-52, reproduced in Stephen, McNamara and Goad, *op cit*, p 458 ff.
- 25 *Addled Art*, flyleaf.
- 26 *Addled Art*, p 53. The chapter is reproduced in Stephen, McNamara and Goad, *op cit*, at p 417 ff.
- 27 Letter from Jordan to Lindsay 19 December 1941.
- 28 Letter from Jordan to Lindsay 18 August 1942.
- 29 Lindsay gave Jordan a second Rembrandt etching and it was later gifted by Jordan or Lady Jordan to Mr and Mrs Vrisakis.
- 30 Letter from Lindsay to Jordan 29 April 1943.
- 31 *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171 at 174.
- 32 Letter from Jordan to Lindsay 19 December 1941.
- 33 *Appreciations*, p 44.
- 34 Carlyle had adopted a 'formless style, composed of jerks, squawks and ejaculations' and Joyce had produced in *Ulysses* 'a work which in structure and content resembles nothing so much as a dunghill' (*Appreciations*, p 45).
- 35 *Appreciations*, p 45.
- 36 *Appreciations*, p 49.
- 37 Letter from Jordan to Lindsay 24 June 1941.
- 38 Letter from Jordan to Lindsay 28 August 1942.
- 39 See generally Eileen Chanin and Steven Miller, *Degenerates and Perverts. The 1939 Exhibition of French and Contemporary Art*, The Miegunyah Press, Melbourne, 2005. See also Mendelsohn, *op cit*, p 197.
- 40 Chanin and Miller, *op cit*, p 88.

- 41 Letter from Jordan to Lindsay 24 October 1940.
- 42 Letter from Lindsay to Jordan 23 August 1943.
- 43 J M Bennett, *Portraits of the Chief Justices of New South Wales 1824-1977*, pp 5, 42 (where the Jordan portrait is reproduced), 46 (where the Street portrait is reproduced).
- 44 The Hon John Patrick Slattery AO QC, interview by Justice Kenneth Carruthers, 20 September 1993, transcript in Supreme Court Library, p 41.
- 45 See further Keith Mason, *Lawyers Then and Now*, pp 205-8.
- 46 *Bloomfield v Art Gallery of New South Wales*, unreported, 23 September 1983. The case involved a 'portrait' of John Bloomfield by Tim Burstall.
- 47 J G Starke, 'Literary and Artistic Competitions' (1984) 58 *Aust Law Jo* 52.
- 48 See *Spilstead v Spilstead* (1944) 44 SR (NSW) 242 at 245-6.
- 49 Information about the commissioning and rejection of Edwards' portrait of Jordan and the later travels of the painting comes from *The Merriola Group, David Jones Art Gallery Catalogue*, 1947; *Sydney Morning Herald* 28 May 1948 (Column 8) and 2 June 1948 (Column 8); Karam Ramrahka, 'Memoir of Ann Bernard', transcribed 19 July 2010 and accessible via the NSW Bar Association Women Barristers Forum mentioned in the next footnote; Michael Pelly, 'The picture of a perfect Sydney gentleman' *Sydney Morning Herald* 29 August 2003; *Bar News* 2003/2004 p67 (which contains a picture) and from the writer's interview with the Hon Kenneth Handley AO QC.
- 50 There is a lot of fascinating biographical material about Bernard accessible online at *NSW Bar Association, Women Barristers Forum, Pioneering Women of the NSW Bar*.
- 51 (1942) 42 SR (NSW) 125.
- 52 According to Joanna Mendelsohn, *Lionel Lindsay An Artist and His Family*, p 209.
- 53 See Scott Bevan, *Bill. The Life of William Dobell*, Simon & Schuster, 2014; David Marr, *Barwick*, pp 38-42; Keith Mason, *op cit*, pp 205-8 for further details about the Joshua Smith portrait litigation.
- 54 *Sydney Morning Herald* 3 March 1945.
- 55 Letter to Jordan 28 January 1944. See also letter to James McGregor 24 January 1944.
- 56 Dixon's Diary records Jordan telling him on 7 April 1941 that 'Kitto not strong personality Roper best – he thought, if a vacancy occurred or Judiciary Act enlarged [the number of High Court justices, as would occur in 1945].'
- 57 Letter from Jordan to Lindsay 19 March 1946. Jordan was also highly critical of Dobell's portrait of Lord Wakehurst in a letter to Lindsay dated 22 December 1944 with which the latter agreed in spades.
- 58 Letter to Lindsay 20 August 1943.
- 59 According to the online lists of Archibald entrants, she was also known as Edwell Burke, Mary Edwell and Mary Edwell-Burke.
- 60 See Pelly, *op cit*.
- 61 The painting was gifted in 1975. Much later, Meagher JA spoke at the hanging of the Edwards' portrait of Jordan in the President's Court (see above). He also 'judged' the 'retrial' of the Dobell Case, delivering reasons that were more amusing than those of Roper J, but with the same outcome (see (1999) 73 *Aust L J* 710).
- 62 Clive Evatt, 'The Artful Bar', *Bar News*, Summer 1988.
- 63 I give an account of the controversy in Keith Mason, *Lawyers Then and Now*, An Australian Legal Miscellany, The Federation Press, 2012, pp 208-212.