

FIFTH WILFRED FULLAGAR MEMORIAL LECTURE “LET JUSTICE BE DONE”

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Chancellor, Chief Justice, Judges of the Supreme Court of the State of Victoria, and friends all.

It is a great honour for me to come to you at Monash. Sir Wilfred Fullagar served as a judge here in Victoria and in the High Court of Australia. It was the “Golden Age” of the High Court. He ranked amongst the greatest of its judges. During his period, the High Court established a reputation which overtopped even that of the House of Lords. I well remember the case of *Scruttons Ltd. v. Midland Silicones Ltd.*¹ The question was whether stevedores could claim exemption under a clause to which they were not a party. Mr Justice Fullagar had delivered a judgment in the High Court of Australia which was directly in point. Lord Simonds who presided in the House on that occasion paid this tribute to him:

“The late Fullagar J. delivered a judgment with which Dixon J. said that he entirely agreed. So do I—its every line and every word of it, and having read and re-read it with growing admiration, I cannot forbear from expressing my sense of the loss which not only his colleagues in the High Court of Australia but all who anywhere are concerned with the administration of the common law have suffered by his premature death.”²

This evening I have taken as my subject “Let Justice be Done”. Those words are part of one of the most famous sentences in our law books. “Let justice be done even though the Heavens fall.” Let me remind you of it. John Wilkes, sometime Lord Mayor of London was an outlaw. He was cast into prison, and applied to be released. His writ of error came before Lord Mansfield in Westminster Hall. There was public clamour for his release. Great crowds thronged Westminster Hall, pamphlets were issued in the name of the people, dictating to the Judges the way they should decide. This is how Lord Mansfield answered them:

“The Constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences, how formidable soever they may be: if rebellion was the

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The footnotes were prepared by the editors and are not the responsibility of the author.

¹ [1962] A.C. 446.

² Ibid. 472.

certain consequence we are bound to say '*Fiat justitia, ruat coelum*' [let justice be done even though the Heavens fall] . . . Once for all let it be understood, 'that no endeavours of this kind will influence any man who at present sits here'.³

Those are fine words, but let me go on to say that Lord Mansfield did find a flaw on which to reverse the outlawry. The Sheriff's warrant had used just the words 'My County Court'. That was a technical mistake. There ought to have been added the two words 'of Middlesex'. For want of those two words the outlawry verdict was reversed and John Wilkes was set free.⁴ It would be *lésé majesté* for me to suggest that Lord Mansfield was influenced by the public clamour! It is said that the crowd did not know which to admire the most, the eloquence by which he silenced the people or the subtlety by which he let their hero free.

I return to my theme "Let Justice be Done". The doing of justice is needed more today than at any time in our history. I speak not only of England but of Australia. We are living in the Scientific Age. It is commonplace for man in an aircraft to cross the earth at twice the speed of sound. Today one man with a computer can, in an instant, solve a problem which a short time ago, would have taken a hundred men a hundred years to solve. We are entering the Space Age. Man has set his foot on the moon and all the world watched and all the world wondered.

Come back to earth again, and what do we see? Crime, violent crime increasing everywhere; sin, shameful sin, increasing everywhere; pollution, noisome pollution, increasing everywhere; corruption, corroding corruption, increasing everywhere. Surely we may say as it was said two thousand years ago "What doth it profit a man if he gain the whole world and lose his own soul".

In organized society man's soul finds its expression, or should find it, in justice. The frustrations which we see today, the frustrations of students, of workmen, and others are symptoms of their complaints against organized society. They feel that injustice is being done. How is it to be remedied? Here we come back to the rule of law. It must be founded on justice. Men will obey and acknowledge just laws justly administered, but not unjust laws or laws unjustly administered.

I will for a moment go back in history to the day when the rule of law was just established. Let me paint the picture. It was the year 1215 A.D., over 750 years ago. There was a King named John, who oppressed the people, he extorted money contrary to law. On 15th June 1215 A.D. he came from his castle, the Great Keep at Windsor. The barons came from their camp on the other side of the river at Staines. They met in a meadow which is called Runnymede. They spoke in Norman French. They agreed on the great charter. My predecessor, the Master of the Rolls,

³ (1770) 4 *Burr.* 2527 reproduced in Howell, 19 *State Trials* 1075, 1112, 1114.

⁴ *Ibid.* 1114.

wrote down the words in Latin, which were sent to the castles and cathedrals of England. It was sealed by the King—he did not sign it, he couldn't write. We have no record of his handwriting. These are the words which have come down the centuries.⁵ The first guarantees freedom under the law:

“No free man shall be taken, imprisoned, disseized, outlawed, banished or in any way destroyed nor will we proceed against him or prosecute him except by the lawful judgment of his peers and by the law of the land.”⁶

The next guarantees the due administration of justice:

“To none will we sell, to no one will we delay or deny right or justice.”⁷

Those words have come down the centuries. They have done much to form the character of the English people. They were taken by the settlers from England to the great countries overseas. If you should read the original charters of Virginia and Massachusetts you will find the very words of the Great Charter, set down as part of their constitutions. In the constitution of the United States, they are summarized in words which still hold fast there:

“No person shall be deprived of life, liberty or property without due process of law.”⁸

The rule of law was carried not only to the United States, but also to Canada, Australia, New Zealand, India and the many countries of the British Commonwealth of Nations. How is the rule of law to be maintained? In England we have no written Constitution. In Australia you have no written Bill of Rights.

They are to be maintained by the principles laid down by the judges. Their viewpoints are precedents which we follow. I could say of Australia what the poet Alfred Tennyson said of England, that it is a land where

“A man may speak the thing he will;
A land of settled government,
A land of just and old renown,
Where Freedom slowly broadens down
from precedent to precedent.”⁹

There are discussions here as to whether Australia should have a written Bill of Rights, setting out in detail the rights of person's freedom, the freedom of the press, and so forth. We have got on very well in England without one—I should think you will do equally as well as long as you have judges of the calibre whom I have met here on my visit to

⁵ An English translation may be found in Stephenson and Marcham, *Sources of English Constitutional History* (Harper and Row, 1937) p. 115.

⁶ *Ibid.* p. 121 paragraph 39.

⁷ *Ibid.* p. 121 paragraph 40.

⁸ 14th Amendment to the Constitution of the United States (1868).

⁹ “You ask me why . . .” from *Poems by Alfred Lord Tennyson* (London: Everyman 1949) p. 126.

you. But the freedoms which have been established by the judges are being threatened today. I will take some English instances. Mr Enoch Powell went to a University to address the students. The students did not give him a hearing. A small minority shouted him down, they refused to let him be heard because they disagreed with his views. Those students have a great deal to learn. Freedom of speech means not only freedom for the views of which you approve but also freedom for the views which you most wholeheartedly detest. Take another instance. A group of students of the University of Aberystwyth felt very strongly that the Welsh language should be preserved. It is beautiful. It is the language of the poets and the bards. They decided to demonstrate in favour of its preservation. They hired a coach. They drove up the two hundred miles and more to London. They invaded the Court where Mr Justice Lawton was sitting with a jury to try an important libel case. They swarmed into the well of the Court. They filled the public gallery. They shouted slogans. They sang songs, all in Welsh. But they did no violence. The Judge had the court closed. Those who apologized he fined £50. Those who did not, he sentenced to prison for three months. They appealed to the Court of Appeal where I was sitting. Whenever the liberty of a subject is concerned we deal with it at once. We heard it within five days. We held that imprisonment was not appropriate. They promised to be of good behaviour. We sentenced them only to five days imprisonment. That meant they were to be released at once. The decision got a mixed reception. From England I received anonymous communications. One postcard said "You lousy coward". Another said, "You ought to resign". But from Wales I received several letters from Doctors of Divinity and heads of universities, all agreeing that justice had been done. Those young people too had a great deal to learn. By striking at the court of justice, they were striking at the roots of society itself.

The last instance is of the Cambridge students who took objection to the Greek colonels taking over in Greece. To show that they detested this regime, they entered a hotel in Cambridge. They overthrew the tables. They frightened the women dining there. They assaulted the men. They broke windows and shattered the place. They too had not learnt the elementary lesson that, by resorting to violence, they were destroying the rule of law which is the foundation of our civilization. Even though you believe strongly in a cause and it is a just cause, you must support it and only support it, by lawful means.

I turn next to the trade unions. They dominate the lives of everyone. Sometimes I feel that the rule of law is threatened today more than it has been for hundreds of years. In England, Parliament set up an industrial court in the hope of bringing trade unions within the rule of law. Five dockers were imprisoned for picketing premises contrary to the order of the court. The unions threatened to close the power stations, to

stop the transport, to bring the country to a standstill if those men continued to be imprisoned. Again the Industrial Court awarded damages of £40,000 against the union. The union did not pay. The Court made an order to sequestrate the union funds. The union threatened again to bring the country to a halt and to ruin everyone if the order of the Court was enforced. It was Shakespeare who said—"O it is excellent To have a giant's strength; but it's tyrannous To use it like a giant".¹⁰ When I look at such actions I would recall Kipling's words "Whenever mob or monarch lays, too rude a hand on English ways, A whisper wakes, a shudder plays, Across the reeds at Runnymede".¹¹ Note the word "monarch". In those days it was King John. In these days, the equivalent of the King is a President. We have had Kings who claimed to be above the law, there was a maxim that "the King could do no wrong". We have seen in our day a President who claimed to be above the law. Let me go back in history once more; for there we find the lessons of the past applicable to today. There is a great case in our law books where King James I claimed to have the right to try cases himself. He called Archbishop Bancroft to witness, who said it was clear in Divinity. The King addressed Lord Coke and the judges "I've often heard the boast that your English law is founded on reason, then why haven't I reason, as well as you the Judges?" To which Coke replied—"True it is, Your Majesty has great gifts of science and of nature but the law is a study which requires long years to attain the cognizance of. The law is the golden metwand by which the rights of Your Majesty's subjects are measured. And it is by law that Your Majesty is kept in security and peace." The King was furious. He said "Then I am to be under the law? It is treason to affirm it". Coke replied, quoting Bracton 300 years before "The King is under no man save under God and the law".¹² That was the watchword by which in England we fought a Civil War. It was quoted at the trial of King Charles I. He lost his head by seeking to put himself above the law. A President has lost his position in our days by seeking to put himself above the law. Incidentally it is said that King James did afterwards seek to try a case himself. His comment was "I could get on very well after hearing one side only but after hearing both sides I know not what way to decide".

The lesson from this is important today. The executive branch of government is under the law. The courts have inherent power to see that the executive keep within the law.

Turning to the events of today, we see the results of ambition. President Nixon wished to be re-elected for another term. He had tapes installed in the White House so that there would be a permanent record of all that

¹⁰ "Measure for Measure" (1604-1605) Act 2 Sc. 2.

¹¹ Kipling, "The Reeds of Runnymede".

¹² Lord Coke's record of this historic encounter may be found in Coke, *Twelfth Report* (ed. 1777) 64 quoted in Stephenson and Marcham, *op. cit.* 438. Bracton's famous statement was *quod rex non debet esse sub homine, sed sub Deo et lege*.

he said and did. This led to his downfall. I will remind you of what Shakespeare said of ambition. He put in the mouth of Cardinal Wolsey:

“I charge thee fling away ambition: By that sin fell the angels . . .
Be just and fear not: Let all the ends thou aim'st at be thy country's,
Thy God's and truth's . . .”¹³

Then after his fall, Wolsey said:

“Had I but serv'd my God with half the zeal I served my King, he would
not in mine age Have left me naked to mine enemies.”¹⁴

There is a further lesson to be drawn from the United States. It is to preserve the freedom of the press. It was the disclosure by the newspapers such as the *Washington Post* that brought the misdeeds to light. I doubt whether in England a newspaper would have been permitted to publish the material which the *Washington Post* did.

Let me just for a moment, trace our history about freedom of the press. About 200 years ago there was a letter-writer called Junius—that was a *nom de plume*. His true identity is not known. He wrote an article in the *London Evening Post* which was very critical of the King—he was King George III. Junius said the King had never known the language of truth until he heard it in the complaints of his subjects. On that account the printers and publishers were charged before Lord Mansfield with a seditious libel. For once Lord Mansfield got his law wrong. He said the question of ‘libel or no libel’ was for the judge. All the jury had to do was to say whether the words were printed or published, or not.¹⁵ That was in effect a direction to find the printers and publishers guilty. The jury went out. They went out for 5½ hours. So long that Lord Mansfield went back to his house in Bloomsbury Square awaiting the verdict. After 5½ hours the jury came back. They found the printers and publishers “Not Guilty”. It is said that the hoorays and hurrahs reverberated across the metropolis until they reached the ears of Lord Mansfield himself in Bloomsbury Square. That case established the freedom of the press in England, of which the most important is the freedom to criticize the government of the day. It is one of the essential freedoms in a democratic society.

But this freedom must not be abused. Take an example. In order to ensure a fair trial, a newspaper must not comment on a pending trial. There was a man, Haigh, who murdered women for the sake of their money. He disposed of the bodies in an acid bath, thinking if the body could not be found, he could not be convicted of murder. (That was a

¹³ *King Henry VIII* (1613) Act III Sc. 2.

¹⁴ *Ibid.*

¹⁵ Trial of John Miller reproduced in Howell, 20 *State Trials* 870, 893-895. Reference is also made to the Trial of John Almon in Howell, 20 *State Trials* 804, 843 wherein the jury followed Lord Mansfield's direction in a prior case involving the same libel and returned a guilty verdict.

mistake as others have found too.) After Haigh was arrested and before he was tried, a newspaper came out with a banner headline—"Vampire arrested". Underneath there was a full description of how the murders had been committed and the bodies disposed of—all before he was tried. The editor and the newspaper were brought before Lord Goddard for contempt of court.¹⁶ He said there had been no more scandalous case. It was worthy of condign punishment. He fined the newspaper £10,000. He sent the editor to prison for three months and he said:

"Let the directors beware. If anything of this kind should happen again they'll find that the arm of the law is long enough to reach them too."¹⁷

There has been no trouble from that newspaper afterwards.

Recently we had to consider freedom of the press once more. It was the thalidomide case. Babies were born deformed, without legs or arms. It was the result of a drug for which the Distillers Company were responsible. In 1962 the mothers took the sedative. The babies were born in 1962 and 1963. Actions were brought for damages. These seemed never to come to trial. There was said to be negotiations for a settlement. Eight, nine, ten years passed. The *Sunday Times* carried out its own investigations. It prepared articles which it wished to publish. In these articles they proposed to say that the Distillers Company, or those for whom they were responsible, had been negligent. In the Court of Appeal it was held that the articles were a matter of public interest and that fair comment should be allowed.¹⁸ But in the House of Lords, it was held that the articles could not be published.¹⁹ There was a pending trial even though it was eight years old. It was a contempt of court for this newspaper to bring pressure to bear to force a settlement.

The problem is so great that in England, a committee has been set up to consider contempt of court. It is just about to publish its report. It is because of the thalidomide case that I would question whether in England a newspaper would have been allowed to publish materials such as the *Washington Post* did in the United States—publicity which led eventually to the unmasking of the Watergate conspiracy.

Another lesson from the Watergate affair is about the disclosure of documents. The President claimed a privilege that the tapes should not be disclosed. We have had similar claims in England by the executive arm of government. In 1942 the House of Lords upheld a claim by a Minister that he could say, of his own motion, that it was contrary to public interest that documents should be disclosed.²⁰ But within the last few years we have disallowed such a claim. It has been held in the House

¹⁶ *R. v. Bolam and Others, ex parte Haigh* (1949) 93 *Sol. Jo.* 220.

¹⁷ *Ibid.*

¹⁸ *Attorney-General v. Times Newspapers Ltd* [1973] 1 Q.B. 710.

¹⁹ *Attorney-General v. Times Newspapers Ltd* [1974] A.C. 273.

²⁰ *Duncan v. Cammell Laird & Co. Pty Ltd* [1942] A.C. 624.

of Lords that the Minister has not the privilege now.²¹ The courts can examine his claim for privilege. Thus we look at the documents themselves to see if disclosure is contrary to the public interest or not. The courts can order their production if justice so requires. This is on the same lines as the recent decision of the Supreme Court of the United States.²² A few weeks ago, it ordered that the tapes in the possession of the White House should be disclosed. It held that the President had no absolute privilege such as he claimed. The judgment was given by the Chief Justice of the United States, Warren Burger. As an interesting aside, I may say that on the very day of the decision he sent me an off-print of the judgment with a little personal note in his own hand.

One of the most encouraging features of today is to see that, in this way, in the United States the rule of law is being maintained. The judges *there are seeing and will see that justice is done.*

I would add a word or two on the reforms that are now being made so as to aid the cause of justice. One of the positive reforms in England is the provision of legal aid—for all—at the expense of the State.

At one time, it could be said in England and was said, there was "one law for the rich, another for the poor". Let me illustrate it. Go back 150 years. In his novel, *Bleak House*, Charles Dickens described the case of *Jarndyce v. Jarndyce*. It had lasted for twenty years, dragging its way through the Courts. This is how he put it

"Fog up the river. Fog down the river. Fog in the eyes and in the throats. In the very heart of the fog, in Lincoln's Inn, Old Hall, sits the Lord High Chancellor. There were the lawyers in the long matted well of the Court with their rejoinders, their affidavits, their injunctions, mountains of costly nonsense, piled before them. This is the Court of Chancery which gives to monied might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart; that there is not an honourable man amongst its practitioners who would not give—who does not often give the warning, 'Suffer any wrong that can be done you rather than come here'."²³

²¹ *Conway v. Rimmer* [1968] A.C. 910.

²² *United States v. Nixon* 94 S.Ct. 3090 (1974).

²³ Lord Denning has paraphrased the following passages from Chapter 1 of *Bleak House* by Charles Dickens.

"Fog up the river . . . fog down the river . . . Fog in the eyes and in the throats of ancient Greenwich pensioners . . . And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery." ". . . the various solicitors in the cause, some two or three of whom have inherited it from their fathers, who made a fortune by it . . . ranged in a line, in a long matted well . . . between the registrar's red table and the silk gowns with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, master's reports, mountains of costly nonsense, piled before them." "This is the Court of Chancery . . . which gives to the monied might the means abundantly of wearying out the right, which so exhausts finances, patience, courage, hopes, so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who would not give—who does not often give—the warning, 'Suffer any wrong that can be done you, rather than come here'."

That was one hundred and fifty years ago. Let me come now to fifty years ago, when I was called to the Bar. An accused man could have counsel if he could find £1.3s.6d. for a dock brief. The barristers used to sit in the counsels' row. The accused was told by the Judge—"If you've got £1.3.6" (a friend may have given it to him) "you can have any of these gentlemen sitting here to defend you". He could only see the back of the wigs. He used to point to one of us. The chosen barrister went down into the cells, got the man's story, put it forward as best he could. The case might last for two or three days. All that counsel got was £1.3.6.

Likewise in the civil courts, there was no legal aid. The very first case I had was one in which a dentist had dropped a tooth down a girl's throat under an anaesthetic. She sued the dentist for negligence. I did it for nothing. We won. It gave me a start.

All is different now. Legal aid is available to everyone in England from the lowest court to the highest, so long as he has a reasonable case. It is all paid for by the State. But if he has enough means he is to make a contribution. Legal aid has been a great thing for the legal profession. The lawyers are as busy as can be. They are doing well. Their fees are paid by the State. Cases take longer. The accused often says "you must fight this case, fight it to the uttermost, even if it takes three or four weeks". He does not care. He is not paying. In this way legal aid has led to a clogging up of the administration of justice. But on the whole it has been most beneficial. It is one of the greatest reforms of our legal system in our time.

The divorce laws too have been reformed—out of all recognition. It is no longer necessary to prove a matrimonial offence. Divorce is available simply on the irretrievable breakdown of marriage. There are no longer contested divorce cases. There is divorce by consent after two years' separation or without consent after five years. The disputes which came before the courts are now only as to maintenance, as to the children and as to the property.

Thus in England, we live in an era of law reform. I trust here that the Law Reform Commission in Victoria will follow suit.

The reforms today remind one of the reforms of 1833. Lord Brougham made a speech then to the House. He spoke for six hours. He refreshed himself during this speech with oranges from Bellamy's (the butler) basket. This was his peroration

"It was said of Augustus that he found Rome of brick and left it of marble. But how much more shall be our sovereign's boast if he should have it to say that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two edged sword of craft and oppression, left it the staff of honesty and the shield of innocence."

That was his aim in 1833. It should be our aim in 1974. We shall never

attain but still we must keep trying to reach the goal which he set before us.

Lastly, I return to my text, "Let Justice Be Done". Justice, what is justice? Many far wiser than you and I have attempted to define it over the centuries. Plato attempted it over two thousand years ago, but he could not find a satisfactory answer. Justice is not a temporal thing. It is eternal, a thing of the spirit. The nearest approach to a definition that I could give is "Justice is what the right thinking members of the community believe to be fair", simply that. You and I represent the right thinking members of the community, doing as best we can what is fair; and in these days what is fair, not only between man and man but between man and the State. It is brought out well by the oath which every judge in England, and I feel sure it is substantially the same words as every judge in Australia, takes on his appointment. It is worth recalling.

"I swear by Almighty God that I will do right to all the manner of people after the laws and usages of this Realm without fear or favour, affection or ill will."

Take each phrase of that oath. "I swear by Almighty God." Hereby he affirms his belief in God and hence in true religion (or he may affirm). "That I will do right." That means "I will do justice", not I will do law. "To all the manner of people." Rich or poor, capitalist or communist, christian or pagan, black or white, to all manner of people I will do right. "After the laws and usages of this Realm." Yes, it must be according to law. "Without fear or favour, affection or ill will." Without fear of the powerful or favour of the wealthy, without affection to one side or ill will towards another, I will do right.

Finally, in great Australia, with your Queen and ours, I would remind you of the oath which the Queen herself takes at her Coronation. The Archbishop asks her—"Will you to your power cause law and justice, in mercy, to be executed through your Dominions?" The Queen answers—"I will". Now the judges are the delegates of the Queen for the purpose to do law and justice in mercy. And how shall they be merciful unless they have in them something of that quality which as Shakespeare says—"droppeth as the gentle rain from heaven upon the place beneath".²⁴ It coincides with the precepts of religion. "What doth the Lord require of thee?" asks the prophet, Micah, "but to do justly, to love mercy and to walk humbly with thy God".²⁵ In our society if we are to maintain civilization as we have known it, it is essential that each one of us see and do all we can to "Let Justice Be Done".

²⁴ "The Merchant of Venice" (1595) Act IV Sc. 1 "Portia: The quality of mercy is not strained. It droppeth as the gentle rain from heaven Upon the place beneath: it is twice blessed; it blesseth him that gives, and him that takes."

²⁵ "The Book of Micah" Chapter 6 verse 8 in the King James edition of the *Holy Bible*:

"He hath showed thee, O man, what is good; and what doth the Lord require of thee but to do justly and to love mercy and to walk humbly with thy God."