

## WAR AND THE COMMON LAW \*

by

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In accepting your generous invitation to deliver this address, I may perhaps regard myself not as an individual but as the representative of my brethren of our bench, and of my old colleagues of our bar. They are here in spirit with me. They, as well as I, are honoured by the great compliment which has been paid to me, and by the generous and hospitable welcome that I have received. It was in token of this that I was requested by the Lord Chancellor, as head of our Judiciary, himself an honorary member of the American Bar Association and of the New York State Bar Association, and by our Attorney General, as leader of the English Bar, to convey to you the cordial greetings which I have just read. Today such messages have a profound and moving significance.

## VISITS BY THE TWO BARS

It has been the practice of the members of the legal profession in our two countries in the past from time to time to visit one another. At these visits, new friendships have been made and old friendships renewed; and by them that devotion to free institutions and the common law which we share has been fostered and strengthened by personal contact and the interplay of ideas. From these meetings, we on our side have drawn inestimable benefits and fresh inspirations; and I make bold to think that the same is true of you. I have not so far had the good fortune to take part in those meetings in your country since exigencies beyond my control have prevented me. But I shall always cherish the pleasantest memories of the visit paid to us by the American Bar Association in the year 1924. That visit we all hope will be repeated when a happier day dawns. And when it comes about, it will surely have a deeper meaning than ever existed before, since it will celebrate the triumph of the rule of law in human affairs and of the great

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principles of justice and freedom of which the common law is both the strong foundation and the sure defense. Of that law, we as lawyers are the humble but devoted servitors; and it will surely be fitting that in the hour of liberation, we should celebrate together a victory which will be preeminently our victory. For it will be the victory, in a world-wide contest, of the principles to which, in a smaller forum, our lives have been devoted.

#### RESPONSIBILITIES OF THE PRESENT

But I feel that in this grave hour there rests upon my shoulders a responsibility even greater than that which I have described. It is not merely my colleagues of today who share the honour you have paid me, and whose greetings I bring to you. Is it too great a presumption on my part to feel that I represent, however unworthily, the great spirits of the past whose work and whose glory in establishing the supremacy of the law are the common heritage of your country and of mine? They now see their handiwork assailed by a tyranny more formidable and more barbarous than that which they so resolutely and so successfully opposed. I wish that the task of speaking for them had fallen to one more worthy than myself. But if devotion to the causes and the principles for which they laboured, and a determination to shrink from no sacrifice to maintain them will suffice, those qualities I can at least claim to possess, as they are possessed by each one of my countrymen and by each citizen of our commonwealth of nations, which like your own country, has shared the blessings and maintained the traditions of the Common Law.

#### DEBT TO BLACKSTONE

One more qualification I can claim to possess. In the great library of All Souls College in the University of Oxford there stands the statue of one of its greatest fellows. Blackstone's name is revered in your country as much as in my own and no one among English lawyers had a greater influence in presenting to you the doctrines of the common law. Of that great college I too have the honour to be a fellow and under the shadow of that statue I pursued my early studies in the law. As a symbol of the debt which the United States owes to Blackstone a statue of him was presented to us by the American Bar Association to commemorate its visit to England in the year 1924. It

stands in the great hall of the Royal Courts of Justice, a fitting symbol of the bond of the common law that unites us and a defiance to the enemy.

#### ASPECTS OF PRESENT STRUGGLE

There are many aspects from which the present struggle can be regarded. There is none which brings out more clearly the fundamental issues at stake, than the legal aspect. Let me have your patience for a few moments while I set this matter before you as it appears to me. Those institutions, those freedoms which give dignity and security to the manner of life which your people, as well as ours, have built up for themselves are founded on law and by the law safeguarded. It is only where law prevails that freedom can exist. An incorruptible and independent judiciary, a fearless and high-principled bar, a system of law which is equal for all men, which embodies the wisdom and experience of the past but is always ready to adapt itself to the needs of the present, a system which reflects the moral and social sense of the people—that is the picture which I like to have before me of the legal framework of our lives, a framework built by the great common lawyers and equity judges of the past, by Coke, and Holt, by Blackstone, and Eldon, and Mansfield in England and by Marshall, and by Kent, Story and Oliver Wendell Holmes in the United States. The achievement of this ideal is only made possible by the establishment of certain fundamental principles upon which our liberty is built. Those principles govern the relations of citizen and citizen and they govern the relations of the citizen and the State. As between citizen and citizen they are directed to ensuring that all men are equal before the law, that no man is to be oppressed by fear of his neighbour and that the pledged word shall be fulfilled. As between the citizen and the State their object is to secure that the State as much as the private citizen shall obey the law, that the private citizen can live his life without fear of tyranny from above; and that the first loyalty that he owes is to the law approved by the majority of his fellow-citizens in accordance with the free and democratic institutions under which he lives. No better summary of the conception of the law which we share with you can be found than in the language of the judicial oath taken by a judge of the Supreme Court of Judicature when appointed to the Bench in England. As some of you may not know it, I will read it to you as I took it myself. “I swear that I will

well and truly serve our Sovereign Lord King George the Sixth in the office of Master of the Rolls and I will do right to all manner of people after the laws and usages of this Realm, without fear or favour, affection or ill-will." Here in a few simple words is to be found the very essence of this matter. And it is upon the observance of this oath that the life of the citizen and the security of his person, his property and his rights depend.

### FREEDOM FROM FEAR

In one of those inspiring addresses which your President has made to the American people he referred to the Freedoms the defence of which is vital to the life of the nation. One of those which he mentioned was freedom from fear. This was a profound saying. Fear is incompatible with liberty, it is incompatible with justice; where it overshadows the life of men no dignity of the mind, no elevation of the soul can be attained. Man becomes degraded to the level of the beaten animal that trembles at the sight of the whip and cowers before its master. To rule by fear is the manner of tyrants—"Let them hate me so long as they fear me" has been their cry throughout human history; and wherever they have been victorious night has descended upon the human race.

We who have inherited the great principles of the Common Law are entitled to claim that for peoples who love freedom, the Common Law is the most potent legal instrument ever made for securing that honest men may live their lives undisturbed by fear. Fear of our neighbour, fear of oppression by the State, fear of every kind of injustice and tyranny is averted from our lives so long as the supremacy of the law is resolutely maintained. Secure in the freedom of our institutions and protected by the impartiality of the law, we can without fear enjoy those other freedoms of the mind and of the spirit that adorn and elevate the human race.

### THE LAWYER'S VIEW

This is our way of life as we lawyers see it; upon these principles the order of our existence is based, and in their formulation and enforcement lawyers have played a noble part. Cast your minds back to the time when my country was suffering from the tyranny of the Tudor Kings. There within the domestic limits of Great Britain a war was waged against

oppression and injustice. It was pre-eminently a lawyer's war; for it was the struggle of the Common Law against its antithesis, the caprice and tyranny of an autocratic ruler. More persons speak of those great constitutional documents, the Petition of Right, the Habeas Corpus Act, the Bill of Rights and the Act of Settlement than have ever read them. Those who set themselves to struggle against tyranny in whatever form it appears will find inspiration in the grave and forceful language in which they are expressed. There is found in the catalogue of tyrannical actions against which they were directed and in the remedies which they provided, time and again, the statement that these actions are contrary to the law, and that for their prevention the law must be obeyed.

#### INFLUENCE OF THE COMMON LAW

The spirit of the Common Law and its insistence upon personal liberty is the joint possession of your country and of mine as it is of the whole British Commonwealth of Nations. Although in that Commonwealth many different systems of domestic law are to be found, those systems have been permeated by the spirit of the Common Law and have been administered by judges enlightened by its ideals.

The principles of domestic law which we uphold have their counterpart in our attitude towards the law of nations. The right of all nations small and great to live their lives and develop their institutions in freedom, without the fear of tyranny and ill-treatment by any other nation, the sanctity of contracts made between nations, these are the foundations of our practice. Without the observance of law and decent conduct as between nations, nothing but fear and uncertainty can rule the world; and just as fear degrades an individual, so it degrades a nation and paralyses every attempt to secure the happiness and prosperity of its people.

It is for these reasons that I ask you to view the struggle upon which we are engaged as one between the nations who inherit the traditions and principles of the Common Law and the nations to whom those traditions and principles are the very opposite of the tyranny which they are seeking to impose upon the world. In saying this I do not forget our allies whose systems of law are different to our own. But we are struggling to maintain on their behalf those great principles which run through the Common Law, the equality of one man with another, the observance of the law and the banishment of fear

from human life. It is for them to make use of their freedom once they are set free, and if I am asked what my war aims are, I will say: They are to free a hundred million slaves and to save from slavery many hundred millions more. Is not that a cause worth dying for?

#### COMMON LAW PRINCIPLES FLOUTED BY OUR ENEMY

This struggle is indeed the struggle of the common lawyers in the 17th century writ large. We are opposed to nations who in their practice at home and in their relations to other peoples flout and deride every principle for which the Common Law stands. At home they have introduced the rule of fear—that is the only rule that prevails. The courts of so-called justice, far from administering an equal law for all men, have become mere instruments of the executive government. The judges, slaves as they are, do what they are told to do, and grant or deny justice according to the orders of their masters. The secret police are above the law. Men and women are thrown into concentration camps upon the word of an informer and there left to linger and die in circumstances of the most savage brutality. The State is supreme, it is above the law and no man can tell where and how the blow will fall upon him. The individual owes no duty to the law but only to the arbitrary orders of the State. The State owes no duty to the individual save the abhorrent duty to teach him how to trample on its neighbours. No advocate dares defend a prisoner whom the government is determined to destroy. The fearlessness and independence of the bar which, with you as with us, insures that the meanest prisoner accused of the most detestable crime, even treason against the State, shall have his case properly presented so that he shall only be convicted in accordance with the law, are not to be found among them. Just think for a moment what the lives of our peoples would be if all the safeguards which the law affords them were suddenly removed. We take these safeguards for granted, since we cannot imagine life without them. But am I wrong in thinking that if they were taken away from us our lives would be degraded by fear and our souls, now proud and unafraid, would become the souls of slaves? Believe me, the rubber truncheon and the firing squad are poor substitutes for justice.

#### ENEMY FLOUTS LAW OF NATIONS

In the affairs of nations the picture is the same. Tyrants are consistent and run true to type. If you wish to know how

a tyrant nation will treat its neighbours if it feels strong enough to do so, look at its attitude towards domestic law and you will find the answer. If it denies justice to its subjects, if it rules them by fear, if it places the State above the law, you will find without a possibility of doubt that wherever an advantage is to be gained by breach of faith, by intimidations and by brutality uncontrolled by any regard for the souls and bodies of men, that opportunity will be seized. The whole careers of the dictators are just a repulsive story of contracts made in order to give a false sense of security, of treachery unashamed, of complete disregard of all those rules which, even in the cruelty of war, civilized nations have by agreement imposed upon themselves, of fear employed as an instrument of policy to induce their neighbours to surrender into slavery. This method is not some up-to-date invention; it is as old as the human race. The tragedy of our time is that modern invention has placed in the hands of such nations weapons a thousandfold more terrible and effective than were known to the barbarians of old. How many nations have in the course of this war been lulled to sleep by promises never intended to be kept and then subdued by fear of the horrors of mechanized warfare and aerial bombardment?

No country in which the supremacy of the law is maintained can do these things. Freedom under just and equal laws at home is incompatible with such treacherous and brutal conduct towards other nations. The aggressor subdues in order to enslave. The free nation that fights to defend itself cannot bring itself to enslave its adversary when he is defeated.

#### LIBERTY IN FULL CIRCLE

With you as with us liberty in full circle and not in some small segment of our lives is what we have striven for and what we have won. It is what we are determined to maintain and hand down to our children as our fathers handed it down to us. The spirit of it pervades our thoughts and our actions. That liberty was won for us as much by lawyers as by statesmen or by fighting men. It was the lawyers who saw with a clear eye the implications of despotism as it affected the whole life of the people, it was they who formulated the rules by which it could be kept in check. It was the Common Law of England that formed the charter of our liberties, and any violation of it which was attempted was in the end broken by it. He who breaks the law will be broken by the law—so it has always been in

our history as well as in yours. Let us lawyers be worthy of the traditions which we have inherited.

#### STATESMEN AND THE COMMON LAW

But the part played by the Common Law in resisting tyranny and oppression was not played only by the lawyers. The statesmen who took part in those struggles, both with you and with us, were bred in its spirit and inspired by its doctrines. The rights which they claimed and for which they fought were expressed in its language. To that test were brought all the claims of despotism and by that test they were rejected. Let me quote to you two passages, one of which I have already quoted elsewhere. In the Petition of Right, prepared by that great common lawyer Sir Edward Coke in the year 1627, the third year of the reign of King Charles the First, appear many noble passages relating to the Common Law. Let me take one recital, it is this :

“And whereas also by the Statute called the Great Charter of the liberties of England, it is declared and enacted that no freeman may be taken or imprisoned or be disseised of his freehold or liberties or his free customs or be outlawed or exiled or in any manner destroyed, but by the lawfull judgment of his peeres or by the law of the land.”

And now let me cross to your side of the Atlantic and read an extract from the Declaration of Rights of the Continental Congress in the year 1774:

“Whereupon the deputies so appointed being now assembled in a full and free representation of these colonies, taking into their most serious consideration the best means of attaining the ends aforesaid, do in the first place, as Englishmen, their ancestors, in like cases usually have done, for asserting and vindicating their rights and liberties declare. . . . 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.” Noble words these. Let us pay heed to them.

#### INDEPENDENCE HALL

A day or two ago I visited Independence Hall at Philadelphia. In that historic building events took place which secured freedom and happiness to countless millions of human

beings, events which to the far-seeing eye of history have proved to be as important for the preservation of our liberties as they were for the winning of your own. I was profoundly moved by what I saw and what I felt, for I saw there the spirit of liberty, liberty under the law and liberty to make the law; but with the stern compulsion to obey the law laid upon all men alike and upon the State itself.

Such reflections to a lawyer brought up in the love of free institutions would be deeply affecting at any time. But at this moment they filled me with a greater emotion, for it is all the things of which that building is the symbol that now stand in deadly peril. The slavery which would be fastened upon the necks of men if we were to fail in this struggle would be the negation of everything for which that building stands.

#### COMMON LAW AND THE SPIRIT OF DEFIANCE

This is a time when the people of my country in their sufferings, their anxieties and their perils are brought close to the heart of fundamental things. The comfort of the individual, his wealth, his life itself, have gone into the background. Our eyes are fixed with grim resolution but unclouded vision on something which transcends them all, the preservation of everything that is noblest in man. In the formation of the spirit which defies these dangers and unflinchingly endures these sufferings, I claim without fear of contradiction that the Common Law of England has played a most important part. That is known to lawyers—who better can penetrate beneath the surface of things and see the great principles that underlie them? But it is known also in their hearts by the humblest of my countrymen incapable though they may be of expressing it in words. They are all imbued with the spirit of the law, their actions and their feelings are all guided by it, often no doubt unconsciously, but they know in their hearts that it is the maintenance of law for which they are struggling and that failure will mean the loss of all that they hold precious, loss not merely for themselves but for all mankind. No one of our people is prepared for the sake of life to lose those things which make life worth living, and it is in the law that those things find their symbol and their protection.

#### TENACITY OF THE COMMON LAW

It is a proof of the tenacity of the Common Law and of the deep-rooted love of free institutions which characterizes our

people that in the imminent perils of war we have preserved in every essential particular those great achievements of democracy. Every Act of Parliament that is passed is passed by the free vote of the representatives of the people. Every regulation affecting the lives of the people which is made is made under statutory powers conferred by Act of Parliament duly passed; when made, it is subject to the vigilant criticism of the representatives of the people and its operation is carefully watched and debated in Parliament.

The courts continue to sit and administer the law of the land in the same way, in the same places at the same times as before; and apart from such special provisions as may come into force in case of invasion, they will continue to do so. Nothing that the enemy can do shall interfere with the administration of justice. If all the law courts were destroyed, we should sit in cellars, if the cellars were destroyed we should sit under the trees. We shall not, I hope, be reduced to these inconveniences, but whatever happens our work will continue along with all the other work of the nation. The law of the land prevails, and although the necessities of the hour have called for a greater discipline of our people, that discipline has been imposed by Parliament and the courts will not allow it to be extended one inch beyond what Parliament has sanctioned. Those measures of discipline are no more than what all thoughtful and right-minded persons would voluntarily impose upon themselves. But the harm that can be done in modern war by even a small group of foolish or ill-willed people is so great and may be so fatal that they must be compelled to fall into line with the overwhelming majority of their fellow-subjects. Such is the will of the people. Is this democracy or is it not? To my mind it is democracy at its best, democracy rising to a great and perilous occasion but remaining democracy still.

#### WAR-TIME LEGISLATION

This is not the time to give you details of our war-time legislation. But I will refer to three matters which illustrate what I have said. Two days before the outbreak of war a set of important Regulations made under the Emergency Powers Act was issued by the Government. They were framed in wide and comprehensive language which was submitted to severe criticism in the House of Commons. It is not to be thought for a moment that the Government was seeking by these Regulations to impose some form of intolerable despotism upon us. The

members of that Government were as democratic as you or I and they made these proposals in perfect good faith. Their object undoubtedly was to have their powers framed in wide language so as to enable them to act swiftly and effectively for the protection of the State in all the unforeseeable situations which might arise. But the House of Commons, ever vigilant to preserve our liberties, was unwilling to sanction the grant of powers of the necessity for which they were not convinced. As a result the Regulations were withdrawn and a new set made in which the provisions in question were radically modified. Is this democracy or is it not?

### MARTIAL LAW

The next point relates to martial law. You will remember that one of the things which led to the Petition of Right was the issue by the King of Commissions for proceeding by martial law, "By pretext whereof" — I quote the actual words — "some of your Majesty's subjects have been by some of the said Commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might and by no other ought to have been judged and executed." This detestation of martial law has descended to us by the unseen channels of tradition and is as strong today as it was three hundred years ago. Accordingly, the original Emergency Powers Act forbade the making of regulations for trial of civilians by martial law. Even in the areas disturbed by an actual or attempted invasion the special provisions which have been made for the administration of justice in that event enact that trials of civilians must take place before a judge with two civil magistrates as his assessors. Is this democracy or is it not?

### SERVICES AND PROPERTY AT DISPOSAL OF THE KING

The last illustration takes me to the month of May last year. Holland and Belgium had been overrun in a brutal and treacherous attack. The French front had been broken and the British forces were in imminent danger of encirclement and destruction. We were confronted by the greatest disaster to the allied arms and by imminent and unprecedented danger to the security of our own country. At this supreme moment in our history the elected representatives of our people passed an Act of Parliament under which the King was empowered by Order in Council to make provision "for requiring persons to place

themselves, their services and their property at the disposal of His Majesty." To those who passed through the gravity of that hour these simple words have a significance which can never be recaptured in the cold pages of history. I will quote a sentence which I have used elsewhere for it expresses my thought better than any other words can do :

"In those words we expressed all our courage and all our resolution: and we flung them in the face of the enemy."

Is this democracy or is it not?

#### INSPIRATION OF THE COMMON LAW

In all these matters the spirit of the Common Law has been at work inspiring our actions and insuring the maintenance of the principles for which it stands. I have no patience with those who assert that a democracy can only go to war by ceasing to be a democracy. There is no particle of truth in this statement, and if you desire proof of this, cast your eyes across the sea and study what has happened in my country. Do not listen to any grumbling which you may hear there. The right to grumble is one of the rights of a free nation. The grumblers are few and misguided. Listen rather to the opinions of the vast majority of sober-minded and determined persons and you will find that they think as I do.

Then again I have heard it said that the discipline which we have voluntarily imposed upon ourselves will continue to restrict our liberties after the war is over. Those who say this have little confidence in the spirit of freedom that animates our people. They are poor lovers of liberty who will allow the restrictions accepted in a time of emergency to continue after the emergency has passed. In the last war we imposed upon ourselves similar restrictions. The present legislation is little more than the adaptation of those restrictions to the novel and surprising circumstances of this war. As soon as the last war was over those restrictions disappeared and the same will happen when this war is won.

Are you and we worse men than our fathers? Does the love of freedom burn less fiercely in our hearts? Are we to fold our hands and say that freedom is dead in any case and that nothing we can do can save it? Surely we should be unworthy

of the tradition handed down to us by our ancestors who struggled for the victory of the Common Law and were not discouraged even in the darkest hour.

#### MORAL ASPECTS OF THE STRUGGLE

In what I have said I have tried to put before you one of the moral aspects of this struggle — that aspect which is concerned with law. We believe ourselves to be fighting for the maintenance, not only in our country but in all the world of free people, of those moral values which raise man above the level of the brutes. One of those values is the law and it is not the least important. For it is the law which makes possible the enjoyment of those other values, and it is significant that one of the first steps taken by the dictators in their own countries was to poison and befoul the fountain of justice.

The existence of these moral forces is one of the strongest weapons in our hands. When you are comparing the strength of two adversaries, do not look only to numbers and armaments, do not let your mind be disturbed by the result of this battle or the loss of that territory. These things are important, in some circumstances they are decisive. But remember to look at the moral issues and the spirit that animates the two combatants. There are those who express doubts as to the victory of the British Empire. They have not been to my country and they are ignorant of the spirit which maintains its people in their perils and doubles and redoubles the strength of their hands. They have not seen the exploits of our airmen who, outnumbered five and often twenty to one, drove the aerial armadas of the enemy from the skies in the autumn of last year. I saw this superb achievement, I saw the Germans come in by the hundreds, I saw them driven back in confusion day after day by a handful of gallant men. I saw them come crashing to the ground in flames. What right has anyone to say that we may be defeated who has not seen these things? I assert — and no one of my countrymen who knows the facts would contradict me — that it has been the knowledge that we are fighting for the greatest things in life which has given us and will continue to give us the unconquerable strength and resolution which we have. These moral values of which regard for the law forms so important a part are worth in war many armies, as the future will show.

## CONFIDENCE IN FUTURE

It is for these reasons that I survey the future with confidence. I am not blind to the tribulations which lie ahead of us. But the qualities which I have mentioned and the moral fervour which inspires us will give us strength to endure them. We are a united people. And what of the enemy? At home they enjoy no freedom, the inestimable benefits of an ordered and decent life under the protection of a just and equal law, fearlessly and impartially administered, are denied to them. Belief in their own material strength and unthinking fanaticism are the only things which they have to unite and inspire them. Abroad they have placed their foot upon the necks of a hundred million men and women and more, all of whom, with the exception of a few degraded individuals, hate them with a bitter hatred. The edifice which they are seeking to build is based on no foundation and has no moral order or spiritual conviction to support it.

I have put before you as I see them some of the vital aspects of this struggle. Through the whole picture runs the spirit of the Common Law on our side and its antithesis on the side of the enemy. That spirit you prize as highly as we do; and it would be your loss as well as ours if the conditions in which it can flourish were to be destroyed. Make no mistake, it is that spirit which the aggressors have set themselves to destroy wherever it is found, to destroy by force or fraud, by conquest or by treacherous and stealthy approach preparatory to a final spring upon the intended victims. Every citadel of freedom—and how few are left?—will be sapped and undermined, every method of dividing and confusing its defenders will be employed. Against these subtle and crafty tactics nothing but continuous vigilance and preparedness will suffice, and all that can be hoped for at the best by those not yet attacked is an uneasy and armed peace. If we win, as with your help we are bound to win, the destruction of this evil thing will be effected and the rule of law will once more prevail. Were we to lose, and with your help we shall not lose, Hitler's new order would be fastened on the world, as he himself has said, for 1,000 years. The Dark Ages would have come again. This new order means nothing more nor less than that the political and economic organization of the world shall be laid out under the domination of Germany, and what is more, that no enslaved state will ever be able to rise to freedom again. The days when ploughshares could be hammered into swords and an oppressed

population could rise and drive out its conqueror have passed. Nowadays it needs aeroplanes and tanks and machine guns and warships, and the most sinister thing in this new order is that the world is to be so organized that no subject country will ever be able to make for itself these weapons without which it could never hope to set itself free.

That would be a world in which there would be no place for lawyers such as you and me, since the law which we are proud to serve would have vanished from the earth. Be fanatics for freedom and the law; give us all the help to defend them, which you feel able to give, and that quickly. They are surely precious things.