The Supreme Court of The State of New York

· 1691 — 1941 ·

Exercised upon the occasion of the
Two Hundred and Fiftieth Anniversary
of it Founding
Albany, New York, May 28, 1941

Supreme Court:
250th Anniversary

The Contents

An Address of Welcome
by Governor Herbert H. Lehman

THE forces that are loose in Europe and against which Great Britain is fighting are those forces which proclaim that men are not created free and equal. These are the forces that have destroyed justice and truth and that claim that theirs is the master race and all other races shall be their slaves. These are the forces of revolution and bloodshed, of tyranny and oppression.

For many centuries mankind struggled against these loathsome forces and slowly, with pain and blood, they were overcome. There were hundreds of years of slavery before Magna Carta was signed, and it was many hundreds of years after that before man gained his complete freedom, even in a tiny section of the globe's surface.

Everything that has been gained in this fight of one thousand years or more can now be destroyed in a few months if we are not vigilant. We stand today perilously on the brink of that destruction—in danger of again sinking back into a world of lawlessness and tyranny. For unless England is able to withstand the evil forces which are trying to destroy her, democracy, in every part of the world that still remains free, will be in the gravest danger.

Regardless of sacrifice, we cannot permit England to be destroyed. If England should be beaten—and I pray God she never will be—the world will have lost a great champion of justice and freedom. We will be left standing alone in a world of darkness, without friends and without allies. It is senseless to believe that American democracy alone can survive in an Axis-controlled world of totalitarianism.

There can be no compromise between dictatorship and democracy. Dictatorship rests on force. It strips the people of all civil and religious rights. It enslaves them and makes them subservient to the will of their masters. Human values disappear and men become mere creatures of the state with no choice save that of unquestioning obedience to their taskmasters. The whole theory of the totalitarian state denies to man God-given freedom and a right to equality with his fellows. The state has no interest in its citizens save as they may serve as useful cogs in a rigidly controlled machine.

Democracy, on the other hand, is based on the philosophy that the chief purpose of the state is to aid its citizens in the development of their faculties as human beings. The state is the servant, not the master of the people.

Democracy safeguards individual rights. But it means far more than that. It represents government of justice and reason and law as opposed to government by force and oppression.

England and the United States have long adhered to that philosophy. Our two nations have maintained governments of free men, by free men. We have realized that democracy, while ever recognizing the rights of the majority, must also protect the individual from the oppression of the majority and of government itself. It must protect the rights and liberties of the weakest just as fully as those of the mightiest.

And so we in the United States and England have always demanded that our courts be of the people and for the people. We have insisted that they shall serve; not as agencies to advance private or special interests, but as tribunals where exact justice may be meted out equally to all men, regardless of race, color or creed.

The strength of democracy will always rest upon a guarantee of the civil and religious liberties of the individual. Reliance on that guarantee must, however, spring not alone from statute, but more particularly from the force of public opinion. Statutory mandate is largely impotent unless backed by a deep community sense of justice, law and order.

The safeguards of our liberties were written into our law through generations of struggle and of sacrifice. They were conceived through struggle. Only through struggle will they be retained.

Pray God that the inspiration of justice and law that has come to us from the early Colonial days, and which has been our guiding light throughout the days of our statehood, will always be guarded by us as the most priceless heritage of our democracy. It is a heritage worth fighting for and, if necessary, worth dying for.

Without justice there cannot be liberty.

A Message From
Franklin Delano Roosevelt

THE WHITE HOUSE
WASHINGTON

May 26, 1941

My Dear Judge Lehman:—

I DEEPLY regret my inability to join with you in the celebration by the State of New York of the 250th Anniversary of the founding of its Supreme Court.

In the days of the early beginnings of the Court, there was practically no other place, except England and some of the British Colonies, where justice, in any form approaching our modern concept of the term, was freely administered. A judicial system free from domination by the crown, more or less open to all who might seek to enter—where judgments were rendered by one's peers rather than by political rulers—was virtually then unknown except in the Anglo-Saxon world.

As time went by and democracies began to replace absolutism, the ideals of an even-handed administration of justice spread through most of the civilized world. At times in certain nations those ideals might have been smothered for a temporary period; but they were later re-established to flourish again. Man, in the modern democratic world, had begun to accept them almost as commonplace, where, with rare exception, he was assured of an impartial trial in any civil or criminal case, where dictation of judicial decisions by the head of a community, or a state, or a nation, was unthinkable.

During these two hundred and fifty years the courts of our own land have stood steadfast, watching democratic systems in other lands grow up and thrive, and be stamped out and disappear, and emerge again triumphant. And now, after this long period of a quarter of a thousand years, there is once again hardly another place on earth except this Western Hemisphere and the British Commonwealth where the scales of justice are still evenly held by a figure unashamed.

In much of the rest of the world of 1941 the dispensation of justice has been made into a hollow myth by the mighty arms of aggressors and dictators. Decrees and judgments in many nations, big and small, which had been flourishing under the democratic ideal, are now dictated by conquerors from afar. People there do not now stand before the bars of justice as equals, but as victors and victims, as racial and political superiors and inferiors. Whatever courts are still open are merely instruments to carry out the will of military rulers at the point of a gun.

It is, therefore, of no little significance that the people and the government of England, through Sir Wilfrid Greene, Master of the Rolls, as their representative, have joined with you in celebrating, in the midst of almost universal destruction of temples of justice, the survival of these citadels of modern

civilized living.

This anniversary serves to emphasize the bonds of a common culture, a common system of justice, a common appreciation of the dignity of man, which through the last century have made the British people and the American people friends in the common promotion and defense of the ways of democracy.

Our people have recently spoken their determination to throw the material resources of the United States into the fight to help Britain to withstand the further march of aggression, and to re-establish civilized life for humanity. That is being done now. It is being done, not only to help Britain, but to defend the Western Hemisphere itself from the force of all the weapons and evils of dictatorship—spiritual as well as physical.

The celebration of the 250th year of existence of the New York Supreme Court in an age when the crash of events comes with lightning speed, makes the court seem indeed to be an ancient institution. It is in that sense truly symbolic of the perpetual worth and everlasting strength of democratic institutions. The democratic common men and women of the entire world, those now under the heel of dictators and those still living under free institutions, are united in determination that those institutions and the freedoms for which they stand will survive throughout the earth.

I am sure that the world will see the significance of this celebration which the State of New York is now conducting under your leadership.

With kindest personal regards,

Always sincerely,

FRANKLIN D. ROOSEVELT

Honorable Irving Lehman
Chief Judge, Court of Appeals
Albany, New York

Supreme Court:
250th Anniversary

An Address by
Sir Wilfrid Arthur Greene

THE privilege of taking part in today's celebrations is one which I value most highly. In extending to me this invitation you are conferring an honour not merely on myself but on the Bench and Bar of England, from whom I bring warm messages of congratulation and good will. They feel, as you feel, that among the many ideals of human life which we share with you, the ideal of a community governed by the rule of law is one of the noblest, as it is one of the most essential, for human happiness. In one of his letters George Washington said that the true administration of justice is the firmest pillar of good government. And on this anniversary of the foundation of a court whose history has shed lustre on the law on both sides of the Atlantic, we can realize how profound a vision inspired those words.

No one could be more passionately devoted than I am to those principles of law and justice and freedom, the permanence of which among yourselves you are celebrating today, and I would ask you to accept my sincerity as out-weighing any defects in the expression of my thought.

The long period of 250 years which has elapsed since the foundation of the Supreme Court of the State of New York extends back very many years beyond the War of Independence. Nothing could show with greater clearness the continuity of your legal institutions, for the principles which that court was set up to maintain have endured throughout that long period of time and the court today administers the common law which it inherited from your ancestors.

The year 1691 marks an important stage, both in the history of England and in the history of the United States. By that year our long struggle against the despotism of the Stuart kings had come to an end. That struggle had lasted close on three-quarters of a century and it ended with the victory of the common law and a free Parliament over the lawless oppression of an arbitrary ruler. The fruits of that victory were enjoyed by you as well as by us, just as the fruits of your victory in the War of Independence were in truth enjoyed by us as well as by you. Our Bill of Rights and your Declaration of Independence have been an inspiration to all lovers of freedom. Looking back over the years that have intervened there can be no question that the example you set, and the passionate love of liberty which won for you that independence, have had a most profound influence on the thoughts of men, not merely in the British Isles but in the whole world. That victory again in one of its most important aspects was a victory of the common law. The Declaration of Rights of the Continental Congress in the year 1774 asserted the right of the American Colonies to the common law of England. Those who penned the resounding language of that document knew that the common law was the foundation of free institutions and the strongest safeguard of individual liberty.

When the Supreme Court of the State of New York was first founded, the detailed application of the common law was a matter of great difficulty. It had to be adapted to your circumstances and needs, and although its basic principles were followed throughout, the particular application of it was not always clear. But from the Declaration of Independence, or perhaps shortly before, largely through the influence of Blackstone, the process of adapting the common law and moulding it to meet your own special needs proceeded at a rapid rate. In some three-quarters of a century this process was completed, not merely in

this State, but over the greater part of the United States. The result is a great achievement for your lawyers who effected it and a signal proof of the adaptability of the common law itself and the soundness of its principles. In that achievement we can claim our share, for the judgments of our courts and the works of our legal writers were the foundations on which you built. But that debt you have amply repaid. English law has been invigorated by legal thought in the United States; the influence upon our law of Marshall and Kent and Story, to mention only three of your greatest names, has been a profound one. Indeed for more than one hundred and fifty years it is true to say that the common law as administered in the United States and the common law as administered in England have reacted most closely upon one another to the mutual benefit of both.

By this means the great principle that the law is supreme over the citizen and over the State has been firmly established in your midst. That principle is the keystone of your free institutions as it is of ours. It is the basic principle of the common law. It insures that the citizen shall be free from fear of injustice from his neighbour and from the State. It insures the equality of all men before the law—it insures that no man shall be imprisoned or destroyed or deprived of his property or his rights save in accordance with the law of the land. It is of grave importance, particularly in these days when those great principles are being derided and attacked by the dictators, that every man and woman in our free democracies should take these truths to heart. No system of law can be perfect; no law can be perfectly administered. We are all but human and the ideal must always elude our grasp. The law should reflect the moral and social feelings of the day and satisfy their needs. It is for the legislators more than for the lawyers to see that this aim is accomplished. But it is for the lawyers to administer the law as approved by the people with courage, independence and impartiality. The trust reposed in them by the people is a high one. The celebration today is but one proof of how faithfully that trust has been performed throughout the centuries. This court and your other courts throughout your land—our courts in the United Kingdom and the courts throughout the Empire—are in these high matters inspired by the same desire to do right. They are the guardians of the same liberties, and the law which they administer is in all fundamental matters the same. Does this not show that free men throughout the world are bound together by the same conception of life and the same belief in the high destiny of the human spirit?

The picture is surely an inspiring one, for the common law is not merely our heritage and yours, but it is the heritage of the British Commonwealth of Nations which has so largely adopted its rules and been guided by its principles. To all the four quarters of the globe those rules and those principles have penetrated and we can survey the world today as one in which belief in them is firmly held by vast numbers of the human race—numbers, moreover, in whom the love of freedom burns with a clear, unquenchable flame.

To those who realize these things it is manifest that the victory of the common law throughout so large a part of the globe is due to the fact that it has proved itself to be the best instrument for securing freedom, impartial justice, the equality of all men before the law and the elimination of fear from human life. It is the natural complement of free institutions, for its very spirit demands that the law shall be made and changed by the free choice of the people and shall be administered fearlessly and impartially for the benefit of all alike. The interdependence of our system of law and our free institutions of government makes it essential that the one should support the other, that the law should be vigilant to check any attempt at autocratic power in violation of the law, and that the legislatures and the governments should support the law and maintain its dignity. Once the law falls into disrepute freedom is in danger and the confidence of the people is shaken. No better proof of this could be found than in the fact that in countries governed by despotism one of the first things which the tyrant attacks is the administration of justice. If he can secure that those whom he wishes to destroy are condemned by the courts, if he can make the judges the submissive instruments to carry out his will, if he can destroy the independence of the bar, the removal of his enemies is easy. The voice of freedom is suppressed, its champions are imprisoned and put to death, the first irrevocable step has been taken toward the complete enslavement of the people. These are the things which have happened in the countries ruled by the dictators—these are the abhorrent methods which are being pursued over the greater part of Europe today. There can be no greater proof of slavery than the fact that the courts no longer administer justice but are used merely as

tools to carry out the wishes of an autocratic and ruthless government.

It is difficult for us to imagine a life where the citizen is not protected by the law. When he arises in the morning he does not know where the next night will be spent. Does he express a free opinion? Who is listening, who will inform against him? Does he seek to worship according to his conscience? He is a marked man and all his movements, all his friendships, the very secrets of his soul will be watched. Does he seek protection from the rubber club and the concentration camp? Where is the judge who will spread around him the safeguards of the law? No man can be master of his soul—no man can preserve the dignity of his mind. Men become furtive and mean and their eyes are cast over their shoulders in fear of what stalks behind them.

[Greene continued next page]

Sir Wilfrid Arthur Greene [Continued]

Such is the fate of the countries which the Germans have enslaved. Such will be the fate of all those whom they may conquer. It may still seem to many unbelievable that these things can be. But in these days, unless we can believe the unbelievable, we shall suffer the fate of those who refused to open their eyes in time. These hateful methods are no mere passing phase in the German system of government. They are its very pith and marrow. They are the foundation of its technique. It is by these methods that they intend to rule the world.

The freedom which we enjoy in common with you under the supremacy of the law has not been achieved without sacrifice. You fought for it; your ideal of peace came into conflict with your ideal of freedom. There was no uncertainty in your choice, for in your War of Independence you knew that no peace is worth having without freedom and that when these two ideals come into conflict there can be but one answer for men who are proud to be free.

For us in the British Empire, and in a special and terrible manner for those in my own country, the same sacrifice now falls to be made. To us peace is a high ideal as it is to you. But a peace without freedom no one of us would accept. For that grave choice we are suffering—but we are suffering cheerfully and with unshakable determination—not for ourselves alone, but for the whole of humanity. The knowledge that a world in which the law is not supreme is no world for free men is rooted deep in our minds. That knowledge we inherited, as you inherited it, from our ancestors who fought for the supremacy of law and won their battle, as we shall inevitably win ours.

Let us, therefore, keep before our eyes the noble vision of the common law and the freedom for which it standards—freedom of the mind, freedom of the soul, freedom of the body—a vision which has spread over the globe. And at the same time let us comtemplate with clear eyes, but unafraid, the forces that assail us and are seeking to destroy that vision and all the hopes of mankind.

In a great part of Europe today peace may be said to resign. Men and women are not suffering the perils of war, but what sort of peace is this? Surely it is a peace which no free man would accept. No tolerable world can exist until those men and women—a hundred million of them in Europe alone—have been freed, and no man or woman in my country will abandon this struggle until that freedom has been won. Do not think that this war is like the war of old times, when the victor laden with spoils retired to his own country leaving the vanquished to pursue his own way of life as before. This war is one of the great crises of history, because the aim which the aggressors have set before themselves is the destruction of the very name of liberty. This is the crucial fact in the world situation today. The aggressors treat with derision every ideal for which your ancestors and ours have fought and died. Those ideals and the rule of force and fear cannot co-exist in the world today. One or the other must prevail, for the world today is a tiny place. Ideas and influences fly across oceans and continents, and all forces that tend to disrupt and shake the soul of men can spread like wildfire. The aggressors know, and they have proclaimed it from the housetops, that their system is to take the place of ours—that our system is to be eliminated from the world. From their point of view they are right, because they know that if the ideals of freedom are left to flourish in any corner of the globe they will spread inevitably and reconquer the world. How long would

An Address by
Judge Irving Lehman

THE Dutch Burghers who settled in New Amsterdam and on the banks of the Hudson, like the Colonists from other countries, came here to build new homes in the wilderness where they and their children should enjoy freedom and opportunity greater than they had enjoyed in the countries where they were born. In truth, they were accorded less freedom here by the governors sent out by the West Indies Company to rule this Colony and by the courts vested with almost arbitrary powers by the governors or patroons. The Dutch Burghers were not slow in asserting their right to have a share in their government and to be secure in their persons and property. There was an almost continuous struggle between the governors and Burghers, who demanded that independent courts should be established for the protection of their rights, but the Burghers did not always prevail.

When the English seized the Colony, the common law of England became the law of New York. In England the struggle of the individual for freedom from the exercise of arbitrary power by the sovereign or by officers of the crown had begun centuries before. In Magna Carta the great Barons of England wrested from the sovereign confirmation of their rights and assurance that Justices not subject to the King's will would hold court at stated times and places to protect those rights. In these courts freedom-loving judges and lawyers developed the common law, formulating and vindicating the rights of a freedom-loving people.

To provide courts in which the citizens of the Province of New York might enforce the rights to which they were entitled under the common law, the new English government established in 1691 a judicial system analogous to that which existed in England. The statute, passed on May 6, 1691, is entitled "An Act for the Establishing Courts of Judicature for the Ease and benefit of each respective City, Town and County within this Province."

The preamble of the statute sets forth that:

> The orderly Regulation and the Establishment of Courts of Justice throughout this Province as well in the Respect of Time as place doth tend very much to the honor and Dignity of the Crowne as well as to the Ease and benefit of the Subject.

After providing for the establishment of local and inferior courts the statute provided:

> Be it further enacted, And itt is hereby enacted and ordained, by the Authority aforesaid that there shall be held and kept a Supreame Court of Judicature, which shall be Duely & Constantly kept att the City of New Yorke and not Elsewhere, att the severall & Respective times hereafter mentioned. And that there be five Justices att Least appointed & Commissionated to hold the same Court, two whereof together with one Chief Justice to be a Quorum. Which Supreame Court are hereby full Impowered and Authorized to have

Cognizance, of all pleas, Civill Criminall, and Mixt, as fully and amply to all Intents & purposes whatsoever, as the Court of Kings Bench, Common Pleas & Exchequer within their Majestyes Kingdome of England, have or ought to have, In & To which Supreame Court, all & every person & Persons whatsoever shall or may if they shall soe see meet, Commence, or remove any Action, or suite the Death or Damage Laid in such Action or suit being upward of Twenty pounds And not otherwise, or shall or may, by Warrant, Writt of Error, or Certiorari, Remove out of any of the Respective Courts of Mayor & Aldermen Sessions and Common Pleas any Judgment Information or Indictment, there had or depending & may Correct Errors in Judgment or Reverse the same, if there be just cause. Provided always, That the Judgment removed shall be upwards of the value of twenty Pounds. Alwayes provided, and be it further enacted by the Authority aforesaid, this Supreame Court Shall be Duely and Constantly kept, once every Six Months, and noe oftener, that is to say on the first Tuesday of October, and on the first Tuesday of Aprill Annually, and every yeare, att the Citty hall of the said Citty of New Yorke provided they shall not sitt Longer than Eight Dayes. And be it further enacted by the Authority aforesaid, that itt shall not be lawfull for any person or Persons whatsoever appointed, elected, or Commissionated to be A Justice or Judge of the aforesaid Courts to Execute or officiate, his or their said place, or Office, untill such time he or they shall Respectively take the Oaths appointed by Act of Parliament, to be Taken in stead of the Oathes of Allegiance & Supremacy and subscribe the Test in Open Court. And be it further enacted by the Authority aforesaid that all and every of the Justices or Judges of the severall Courts before mentioned be and are hereby sufficiently Impowered, to make, order, and Establish, all such Rules and Orders for the more orderly practizeing & proceeding in their said Courts, as fully and amply to all intents and purposes whatsoever as all or any of the said Judges of the severall Courts of the Kings Bench, Common Pleas & Exchequer in England legally doe. Provided alwayes, and be it further enacted by the Authority aforesaid that no Persons Right or property shall be by any of the aforesaid Courts Determined, except where matters of Fact, are Either acknowledged or passeth by the Defendants faults for want of Plea or Answer, unless the fact be found by the verdict of Twelve Men of the Neighbourhood, as itt ought of Right to be Done by the Law.

For 250 years the Supreme Court of New York, established under that statute, has been open continuously to all who sought protection for their rights and liberties, and for 250 years without interruption the Supreme Court of New York has measured rights and administered justice in accordance with the ancient traditions, rules and principles of the common law of England brought to the Colony in the 17th century and developed here to meet new conditions and new problems. The establishment of that court did not end the struggle of the individual to maintain his liberty against encroachment by the sovereign. Freedom can be maintained only where courts and judges are strong enough to curb the will of the most powerful—even of the sovereign who appointed them—so that the rights of the individual shall always be measured by established principles and rules of law. The struggle to maintain the supremacy of the law and the rights of the weakest individual against the encroachment of the power never ends. That struggle went on in Colonial days; it goes on today; it will continue so long as men love freedom enough to fight for it.

In extended recital of the causes in the Supreme Court of the Province of New York and in the Supreme Court of the State of New York which involved great issues and established great principles would be out of place in this address. Doubtless the most famous trial in the Supreme Court of the Colony was the trial of John Peter Zenger, in 1735, who was charged with printing and publishing a libel against the government of the Colony. The case aroused great interest not only in the Colony of New York but throughout England and America, because Zenger asserted the freedom of the press to publish the truth, however scandalous, concerning public officials, and his acquittal by a jury was hailed as a vindication of one of the essential rights of a free people. In a pamphlet describing the trial, which was

published in London in 1752, the preface states, amongst other things: "In this case of Zenger's, tho' the Council had by their Resolution declared the papers published by him to be false, scandalous, malicious and seditious Libels, as the Jury upon his Trial were upon their Oaths, and thereby bound to deliver their own Opinion, and not that of the Council, they thought themselves obliged to acquit the Prisoner, by returning a Verdict, Not Guilty; which is the Verdict every Juryman is in Conscience bound to return, if he thinks that the Prisoner is not Guilty of the Crime charged in the Indictment or Information." The account of the trial is not without humor, which may perhaps appeal more to laymen and members of the bar than to judges. The accused was represented by Andrew Hamilton, a Philadelphia lawyer who was brought to New York to defend the prisoner, because the court had disbarred Zenger's original attorneys, they having "presumed (notwithstanding they were forewarned by the Court of their displeasure if they should do it) to sign, and having actually signed, and put into Court, Exceptions, in the Name of John Peter Zenger; thereby denying the Legality of the Judges their Commissions (tho' in the usual Form) and the Being of this Supreme Court." The court, at the trial, refused to permit the introduction of evidence to show the truth of the alleged libel, because it held that the truth constitutes no defense to such a charge. The Philadelphia lawyer, perhaps because he was not subject to disbarment by the court, did not hesitate in his summing up to indicate to the jury that he did not hold a very high opinion of Chief Justice DeLancey, who made that ruling, and the Chief Justice began his charge with these words:

> Gentlemen of the Jury: The great Pains Mr. Hamilton has taken, to shew how little Regard Juries are to pay to the Opinion of the Judges; and his insisting so much upon the Conduct of some Judges in Trials of this kind, is done no doubt with a Design that you should take very little notice of what I may say upon this occasion.

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Judge Irving Lehman [Continued]

Mr. Hamilton seems to have succeeded in that purpose, for the account of the trial concludes with the words: "The Jury withdrew, and in a small Time returned, and being asked by the Clerk, 'Whether they were agreed of their Verdict, and whether John Peter Zenger was guilty of printing and publishing the Libels in the Information mentioned?' They answered by Thomas Hunt, their foreman, not guilty. Upon which there were three Huzzas in the Hall, which was crowded with People; and the next day Zenger was discharged from his Imprisonment." I may add that a few weeks later the Philadelphia barrister was presented with the freedom of the City of New York, and the committee appointed by the council to draft the grant of the freedom reported that "Sundry of the Members of this Corporation and Gentlemen of this City have voluntarily contributed sufficient for a Gold Box of Five Ounces and a half, for inclosing the Seal of the said Freedom; upon the lid of which we are of Opinion should be engraved the Arms of the City of New-York."

Though the manner in which the Justices of the Court conducted that trial reflects no great credit upon them, the case is significant because it illustrates that where the people are determined to maintain their liberty, the rights of the individual are secure in a court where justice is administered according to the principles and traditions of the common law, even though the judges of the court be ill-disposed or lack independence.

A library might be collected of the volumes written by legal scholars in attempted definition of the difference between the common law and other systems of law. We judges and lawyers know that the common law is more than a system of rules and principles. We know that the rules and principles of the common law are born of deep resolve by the people to gain and maintain their freedom and it is this deep resolve of the people which has given color and force to the rules and principles so created. No satisfactory definition can, I think, be given of the essential quality of the common law which has caused English-speaking peoples to cling to it with ever-increasing fervor; for it is the traditions of hundreds of years of freedom—the independence of mind and soul bred in these centuries—which give to the common law, and indeed to our whole way of life, a character and spirit indefinable but all-pervading. That the judges of England and America have felt that spirit, indeed have deepened and guided it, is an honor which none can deny them; and though on rare occasions the judges may have faltered, the peoples of England and America have never faltered. The American Revolution was the product of the intense resolve of the American people to maintain their rights and liberties which were guaranteed to them by the English Constitution and the English common law. The Declaration of Independence justifies the Revolution because the Crown had violated the rights of the Colonists. The people of England have always jealously guarded their own liberty and have tolerated no invasion of their rights by the government responsible to them. Peoples outside of Great Britain, who of right were entitled to the same liberty, have at times rebelled against an English government which did not accord them those rights, but regardless of whether or not these peoples were of English stock, they always continued to measure their rights and liberties by the principles of the common law and they continued to administer justice in accordance with the traditions of common law. That is why the first Constitution of the State, adopted in 1777, provided that "such parts of the common law of England and of the statutory law of England and

Great Britain and of the acts of the Legislature of the Colony of New York as together would form the law of said colony on the 9th day of April, 1775, should be and continue as the law of this State subject to alteration by the Legislature," and why the continued existence of the Supreme Court established in the Colony as the highest court of first instance was recognized in that Constitution.

So Mrs. Alice Duer Miller, whose great grandfather was a judge of the Supreme Court of this State, has said in lines which have stirred many, that the Colonists were—

> ...never more
> English than when they shook the dust of her sod
> From their feet forever, angrily seeking a shore
> Where in his own way a man might worship his God.
> Never more English than when they dared to be
> Rebels against her—that stern intractable sense
> Of that which no man can stomach and still be free,
> Writing: 'When in the course of human events...'
> Writing it out so all the world can see
> Whence come the powers of all just governments.
> The tree of Liberty grew and changed and spread,
> But the seed was English.

The inalienable rights with which the Creator has endowed all men, are guaranteed by our Constitution —not created by it. They were formulated in the common law; they were made inviolate from encroachment by the sovereign in Magna Carta, and Magna Carta and the common law are the common heritage of the citizens of England and America. In Magna Carta the sovereign promised, "To none will we sell—to none deny or delay right or justice." That promise every judge in America and every judge in England accepts as his own. The traditions and the ideals of the English and of the American bench and bar are one, and it is therefore peculiarly fitting that one of the truly great judges of England should have come to this country to take part in the celebration of the anniversary of the founding of an American court by an English government.

Bench and bar of England and America have struggled to secure and maintain the rights of the individual against encroachment by enemies at home. In the past weakness or strength has been our own. Today enemies from without are declaring that the world belongs to the strong—and that the weak individual or nation has no rights which the strong must respect. In England courts of justice are sitting daily, administering the law calmly, admeasuring justice equally to rich and poor, strong and weak, according to the principles of common law. They are sitting, while bombs rain down and while all England is struggling against a ruthless foreign enemy, to maintain courts which may continue to protect the ancient rights and liberties of the individual.

This 250th anniversary of the founding of a great common law court should be a day of mourning and fearsome prayer, if we had doubts that common law courts in England and America would continue to administer justice and protect the rights of the individual in the years to come as they have done in the years that are past. It is a day for celebration because history forbids such doubts. England and America have been free too long and care too much for their freedom to falter in its defense.

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The Historical Society of the Courts of the State of New York
New York State Judicial Institute
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An Address by
Professor Arthur L. Goodhart

As an American who has been teaching law for some years at the universities of Oxford and Cambridge, I am here today to bring you the good wishes of those universities on this historic occasion. I feel that it is fitting that the English law schools should be represented at this ceremony because English and American law are so closely intertwined that it is almost impossible to draw a line between them; they are based on the same fundamental principles of justice, and they subscribe to the same high ideals of fairness and of good faith. Their history, as every student of the law knows, is—to borrow Maitland's phrase—a seamless web that cannot be torn apart.

Perhaps the year 1691, which we are celebrating here today, is as good an illustration of this truth as any that we can find. At the time when this Supreme Court was being established so that the people of the Colony of New York might live under the law in peace and quiet, James II, the last of the Stuart kings, had just been driven into exile from England, and order returned at last to that country which had been distracted by civil war for over half a century. There, also, the law was placed on a new and firm foundation, and the danger of arbitrary government was finally destroyed. The English civil war is usually described as a war between the Stuart Royalists and the Puritans, but it was more—much more—than that. It was a struggle to the death between arbitrary power, as represented by the King, on the one hand, and the common law, as represented by the Judges and by Parliament, on the other. It was Sir Edward Coke, the great Chief Justice of England, who stated the principle for which the common people of England fought, when he said that in England every man, including the King, must be under the law. That is not the only time in the history of Anglo-American law that a judge has acted as the spokesman of the people in their fight for liberty, but few have done it with more courage and determination.

Coke spoke at the beginning of the Revolution, but a greater political philosopher, John Locke, summed up in 1690 the principles which it had established. In the same year in which this Supreme Court was founded, Locke published his famous Treatise on Government. He began with the doctrine that no man or group of men had the moral right to dominate others by brute force. Government is a power which the people have given in trust to their representatives, and must be used as a trust. Every man has certain fundamental rights of life and liberty which must not be disregarded. Locke fully accepted the doctrine of the common law that the weak must be protected against the strong, and he therefore stated that in every country which desired to be free there must be an independent and fearless judiciary. It was under the protection of the law that man attained the full stature of citizenship—without law he was no better than a slave. Locke recognized what we all recognize here today, that only a country which respects the law can be truly free. Locke's book shows how close has been the interdependence between English and American legal and political thought, because his treatise was read with as much enthusiasm in the Colonies as it was in England. It was in his pages that the Colonists first found the phrase "no taxation without representation." As Professor Morison of Harvard has pointed out, Locke's political theory was one of the obvious sources of the Declaration of Independence. As an American and an Oxford man I therefore feel a double source of pride in that great instrument.

Unfortunately a reaction set in in England during the eighteenth century, and some of the principles which Locke had stated in 1690 were forgotten. The Colonists, however, had remembered them, and the American Revolution was fought to re-establish these fundamental rights of the free man. The soldiers of the Continental army were not content to talk about liberty—they were prepared to risk everything, including their lives, in defense of what they held to be right. The Declaration of Independence would have been no more than a literary essay if the men of America had not been prepared to support it with force.

But they did more than establish liberty in this country—by their example they gave a tremendous impetus to the movement for freedom in Europe. Even in those days of slow communication, ideas travelled across the ocean with irresistible force. It was because freedom and liberty spread like a wave from this country that so many European countries became free in the nineteenth century. The Oxford historians have taught the truth when they say that the American Revolution of 1776 was one of the foundation stones of modern English liberty.

This ideal of law and liberty has been enforced by the Supreme Court of this State for two hundred and fifty years. It has continued unbroken through the Revolution, through the war of a 1812, through the Civil War, and through the last war. In facing these various critical times the people of this country felt that they had built their government so firmly and so true that it could withstand any blow that could be given to it either from without or from within.

It is only today that, for the first time, we are being told that our democracy, our system of government, our American way of life cannot survive a war—that we dare not do what we think is right because our liberty might vanish. We who are lawyers have been taught that there is a distinction between law in the books and law in action, and that it is only the latter which really counts. The same is true of liberty. Liberty which crum- bles when it is put to the test of action must be a weak and brittle thing. I do not believe that that is true of my country. Those who argue that liberty and war are incompatible, fail to distinguish between the self-discipline which a free people places on itself in a time of crisis, and the blind obedience of a slave state. This cowardly doctrine, that a democratic free people will lose its liberty if it dares to fight, destroyed France—it was this fear boring from within, rather than the enemy striking from without, which brought humiliation to that great country. It will not happen here. Two hundred and fifty years of freedom and of courage, as typified by the history of this great Court, cannot be forgotten in a single day. It is because this liberty, founded on law, has made us a self-reliant people that we can face the future with confidence and trust.

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An Address by
John W. Davis

MILESTONES are useful for three main purposes. They tell the wayfarer how far he has travelled; with the help of a timepiece they give his rate of speed; and on a measured road they tell him how much farther he must go to reach his destination. Without pressing the analogy too far, it may be said that anniversaries serve similar ends. They too record the past, measure the present and sometimes predict the future.

Judge Lehman has sketched for us the origin and history of the Supreme Court of New York, whose birth and mature age we are here to commemorate. You will not expect me to review the history of two hundred and fifty years in order to fill in any details which he has been compelled to omit. I once heard an orator who had passed his hundredth birthday begin an after-dinner speech by alluding to the discovery of America by Columbus in 1492. I remember the shiver of apprehension that went through the audience as they realized the span of years he might be tempted to review, and I remember also the sigh of grateful relief when their fears proved to be unfounded. I shall take warning from the incident.

On the sixth day of May, 1691, as Judge Lehman has told you, the second Assembly of the Province of New York passed an Act establishing Courts of Judicature "for the ease and benefit of each respective city, town and county within this Province." Among these was a "Supreame Court of Judicature" having jurisdiction in all "Pleas, Civill Criminall, and Mixt, as fully and amply to all Intents and purposes whatsoever, as the Courts of Kings Bench, Common Pleas & Exchequer within their Majestyes Kingdom of England, have, or ought to have. . ." The pedigree and parentage of the court were thus written large and plain on the face of the Act itself. It was to be an English court, established for Englishmen in the New World. And from this time forward justice was to be administered in the Colony under English forms.

Notwithstanding the breadth of the jurisdiction bestowed upon the Court, the clientele it was to serve was by modern comparison truly insignificant. The settled portion of the Province of New York then consisted of New York City, with a population of some four thousand souls; Long Island and "other small islands;" Zopus (Esopus); Albany and the limits thereof—some ten thousand white persons in all. There were Dutchmen among them who had helped Peter Stuyvesant set up his Courts of Burghers and Schepens and Schouts to administer Roman-Dutch law. There were Frenchmen born under the civil law of France who had sought refuge in the Colony after the revocation of the Edict of Nantes. And there were a still larger number of Englishmen who had lived under the Courts of Assize and Oyer and Terminer set up by former Royal Governors. Yet whatever the threads of these earlier fabrics that might be left in the later weaving, henceforth the denizens of the Colony were to form one people living under a common English law.

The times were not such as might have been expected to turn men's minds to the establishment of methods for the peaceful settlement of disputes. It was barely two years since the "Glorious Revolution" had set William and Mary on the English throne, and less than one since the Battle of the Boyne had ended the effort of James to overturn them. The "War of the League of Augsburg" was in full progress,

and England and Holland were putting forth their strength to hold in check the efforts of Louis XIV to make himself master of Europe. The echoes of this struggle were sounding in the forests of North America and reverberating along the Mohawk and the Hudson. For instance, it was in only the previous year that Frontenac had led his French and Indian troops into the Colony and had wiped out with fire and sword the settlement at Schenectady.

Things were by no means serene inside the Colony itself. England was still fumbling badly with the problem of colonial administration, in which science she was later to become the world's greatest expert. Quarrels between the incompetent Royal Governors and the people to whom they were sent were almost constant. Governor Sloughter, by whom was summoned the particular Assembly with which we are concerned, has been described as a "profligate, needy and narrow-minded adventurer." His predecessor, Governor Nicholson, so vacillated between James and William that the famous Jacob Leisler made himself master of the Province in King William's name. The arrest of Leisler upon the coming of Governor Sloughter, his subsequent trial, conviction and execution—a judicial murder as some thought—had torn the Colony asunder. The Colonists were thenceforth divided into two bitter and hostile factions of Leislerians and anti-Leislerians, who long struggled with each other for mastery. Governor Fletcher, who followed Sloughter, had some reason for describing New Yorkers as "divided, contentious and impoverished."

Nevertheless it was such men—Dutch, French and English—who in such a time set up their, and our, Supreme Court of Judicature; and who thereupon passed an Act declaring anew "what are the rights and privileges of their Majesties subjects inhabiting within the Province of New York." The royal veto that promptly followed did nothing to quench their spirit. Indeed, it was this spirit that moved Governor Fletcher to declare with indignation: "There are none of you but which are big with the privileges of Englishmen and Magna Carta"—words which seem to us today far more those of praise than of blame. They were the same men who dared a few years later to remind the spendthrift Governor Cornbury that "Liberty is too valuable a thing to be easily parted with."

There is no room for uncertainty as to the ideals that were foremost in the minds of these provincial statesmen. Consider who they were and how they came to be here. Every man among them, or his immediate parents, had left a familiar life and surroundings for an unknown shore. They had deliberately chosen to exchange ancient certainties for fortunes wholly new and wholly unpredictable. Only inborn courage could make so wild a plunge. Not a soul among them hoped, or had the slightest reason to hope, that on his arrival he could throw himself on the efforts of other men for his support. None came with the expectation of going on relief. Each with bold self-reliance looked to the strength of his own right arm to supply his wants and to win the personal independence that he sought. Two things, and two things only, he asked to help him on his way. His heart was fired by two great and inseparable aspirations, the twin ideals of Liberty and Justice. Liberty as a way of life, and Justice as its protector.

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John W. Davis [Continued]

Nor was the import that the settlers gave to these hallowed words in the slightest degree abstract. They knew perfectly well without consulting a dictionary—if dictionary indeed there were—what they meant to them in concrete terms of daily life. Liberty to them was nothing less than the right of a man to be free in his person, his property and in its management; to enjoy freedom of speech, of contract, of conscience and of assembly; freedom to petition for the redress of grievances; and as a bar to arbitrary power, the right to share by his chosen representatives in the framing of laws or the levy of taxes that bore upon him. And their conception of the Justice to which they might look as the preserver of these rights was no less definite. It was a Justice measured not by caprice but by established and certain law. A Justice, hearing before it condemned, and vigilant for the rights of weak and strong alike. A Justice to be administered, as the picturesque oath taken by the Judges and Deemsters of the Isle of Man puts it, with the same impartiality "as the herring's backbone doth lie in the middle of the fish."

If there is any distinction between our ancestors' conception of these terms and those which we of this later day entertain it is not at all certain that the balance in point both of understanding and devotion tilts in our favor rather than in theirs. The falsity of teaching American history as if it began with the year 1776 needs no proof. The notes of the mighty prelude to the Declaration of Independence, sounding out in organ tones their assertion of the innate rights of man and the true functions of government, did not in that later year of grace burst for the first time on human ears. The student of American Colonial history must realize that the Declaration itself is but an epitome of things which had been again and again asserted, both here and elsewhere. The sentiments it phrased had from the earliest days inspired not one but countless struggles by the Colonists against the abuses of arbitrary power. And the love of freedom it expressed was not a sudden and an alien growth that first sprouted in American soil. Every ship that brought the settlers over had in its cargo the rights and privileges of Englishmen which were neither parted with nor lessened by their transport over seas. Liberty and Justice—these are in truth the pillars that our fathers raised, the beacons that they set. Their light, we fondly claim, shines on the path of all our later history.

Two hundred and fifty years have passed, but they have seen no break in the continuity of the Supreme Court of Judicature of the Province or of the State of New York. There has been no abandonment of the foundations on which it was originally built. The first Constitution of the State, adopted in 1777, made it clear that the Revolution then in progress was one against the King and Parliament, and not against the existing judicial structure or the law that it administered. By the terms of that Constitution itself the common law of England, the Statute Law of Great Britain, and the Acts of the Colony in force on April 19, 1777, were until it might be otherwise enacted made the law of the State. Statutes, precedents and well-known customs were then and thereafter to give body and certainty to the law. Surely it never entered the minds of the founders that law could ever degenerate, as the German school would have it, into "a perpetual flux of speculative ideas." Changes in the law have come, as come they must, by judicial interpretation and the legislative will. But of the common law in the New World it may be said, as Burke declared of it in the Old, that it has never been at any one time "old or middle-aged or young. It has preserved the method of nature; in what has been improved it was never wholly new; in

what it retained it was never wholly obsolete."

Yet laws and institutions, whatever their intrinsic merit, cannot rise higher than the men through and by whom they act. The tool is never greater than the workman. If through its long life the Supreme Court of Judicature of the Province and State of New York has preserved—as it has—the liberties of the people within its jurisdiction; if it has dispensed—as it has—impartial and even-handed justice to all men; the credit for the fact cannot be withheld from the judges who have sat upon its bench, nor, I make bold to say, from the lawyers who have appeared before them. Naturally not all of these have been equal in native gifts or personal merit. Fate has not bestowed upon them equal opportunity or equal distinction. But from their rolls, judges and lawyers alike, it would be easy to compile a list that should be a source of just pride and high inspiration to all who serve in the places they once filled. And today, as in the years that are gone, the Supreme Court of the State of New York stands watch upon the ramparts to guard the rights and liberties of the people of the State of New York. Long may it live!

I ask leave to add a further and not an entirely unrelated thought. The Supreme Court, as I have pointed out, was not born in quiet times. There are some striking parallels between those days and our own. In that older day men had taken arms in Europe to bar one ambitious man and his satellites from the domination of the continent. The war begun in Europe had found its echoes in the American Colonies. Yet through all the murk and turmoil the lamps of liberty and justice continued to burn. Today we meet in the midst of a war which not only harasses Europe, but shakes every continent, ensanguines every sea and rides upon the blast of all the winds. Large as is the part played by the personal ambition of those evil and besotted men who brought it on, let us recognize the fact that this war is no mere dynastic contest. It is not even a struggle for national supremacy. Its roots go far deeper. It is in very truth a world revolution that challenges all those principles of personal freedom, equality of right, impartial justice and popular sovereignty that are dear to the heart of every man of English speech, and dear to all free men everywhere. In all the sorry pages of human history, never has despotism stood forward more defiantly, never has it more brazenly announced its foul purposes, never have the rights of men and nations been more brutally assailed. To those who love liberty and aim at justice it passes credibility that in this age of the world they should be again confronted by this obscene and hideous thing.

But surely at such a time horror and loathing are not enough for any man or nation. The will to resist and the courage to give battle are emotions of far greater worth. "Liberty is too valuable a thing to be easily parted with," said the men of New York in 1707. How dare we say less today? We bow with reverence before the valor and sacrifice of Great Britain and the Dominions as they face the armored foe. We envy them the distinction they are winning as Freedom's foremost champions. And we declare to them—and this is what I would wish you to take away from this meeting, Sir Wilfrid—we declare to you and to your embattled countrymen that liberty and justice, God willing, shall not perish from the earth!

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