WORKMEN'S COMPENSATION

The Outlook has already commented upon the recent decision of the New York Court of Appeals declaring the New York law to provide for workmen's compensation unconstitutional. The decision is that the proposed law is in conflict with the Constitution of the United States. It is a lamentable fact that we have no way of bringing this question before the Supreme Court of the Nation, so that in New York State we are now obliged to act upon the theory that the Constitution of the United States is in one very important aspect an instrument of reaction and oppression which puts the most vital and elementary human rights below purely technical and conventional property rights. We have to acquiesce in this theory, not because the highest court in the Nation has so decided, but because one of the forty-six State courts has decided that if the highest National court could decide, it would decide in this way. Inasmuch as the Supreme Court of the Nation has on innumerable occasions reversed decisions by State courts, and inasmuch as a number of State courts—very recently a State court of Iowa, for instance—have proceeded on principles seemingly diametrically opposed to those announced by the New York Court of Appeals in this case, and inasmuch as the Supreme Court itself has on certain occasions taken a position seemingly the direct reverse of that which the New York Court has just taken, it is not merely the right but the duty of every friend of genuine justice and progress to protest against the decision in question.

When the Supreme Court of Connecticut, through Chief Justice Baldwin, now Governor of that State, rendered a decision akin to that rendered by the Court of Appeals on the same general subject, but even more extreme, this decision was circulated by the great railway corporations very widely before the Legislatures and Courts in other States in order to prevent or nullify legislation designed to secure compensation to workingmen. Exactly similar action is now being taken in connection with this decision of the New York Court of Appeals. For instance, I hold before me a pamphlet sub-

mitted to the Legislature of the State of Minnesota on behalf of the proposed Workmen's Compensation Act in that State. This pamphlet, which is submitted by the Commissioner of Labor of the State of Minnesota, calls attention to the fact that documents quoting the decision of the New York Court of Appeals, intended to frighten the Legislature of Minnesota into non-action, have been circulated before it. The report of the Commissioner of Labor takes the view very strongly that the New York decision is not only in flat contradiction of decisions of the Minnesota Court, but also in flat contradiction of decisions of the Supreme Court of the United States; and it certainly seems as if the Commissioner made out his case.

The Court of Appeals in this decision fully admits the inequity and injustice wrought by the principles which it proceeds to uphold. Its contention is that the hands of the Legislatures, the hands of the people, are tied by the Constitution of the United States, and that we cannot get justice for workingmen or secure them against the most cruel wrong because the Federal Constitution and the State Constitution of New York, in the narrowest and most technical spirit, guarantee all persons against deprivation of liberty or property without due process of law. The New York Court then says:

> We shall not stop to dwell at length upon definitions of "life," "liberty," and "due process of law." They are simple and comprehensive in themselves, and have been so often judicially defined that there can be no misunderstanding as to their meaning. "Process of law" in its broad sense means law in its regular course of administration through courts of justice, and that is but another way of saying that every man's right to life, liberty, and property is to be disposed of in accordance with those ancient and fundamental principles which were in existence when our Constitutions were adopted.

The Commissioner of Labor for Minnesota, commenting on this, says, and I believe with entire justice, that the assumption of the New York Court is clearly erroneous when it says that in order to be "due" the "process" must be the same now as when the Constitutions were made. He points out that either the New York Court is wrong in this or else the Supreme Court of the United States is wrong, and he quotes as follows from the decisions of the Supreme Court. The first quotation is from one of Mr. Justice Moody's greatest opinions—and all men interested in wise social progress are called upon every day to lament the fact that Mr. Justice Moody's service on the Supreme Court was so brief:

> In Twining vs. State of New Jersey, 211 U. S. 78, where it was claimed that the practice of our ancestors would have to be used in order to make due process of law, the Court said: "It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a strait-jacket, only to be unloosed by constitutional amendment. 'That,' said Mr. Justice Matthews, in the same case, p. 529, 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.'"
>
> "It is no longer open to contention that the due process (of law) clause of the 14th Amendment to the Constitution of the United States does not control mere forms of procedure in State courts, or regulate practice therein." (Twining vs. New Jersey, 211 U. S. 78.)
>
> Respecting the power to meet the progress of the day between employers and employees in the case of Holden vs. Hardy, 169 U. S. 365 (L. ed. 780), the Supreme Court said: "Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that, from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to new relations between employers and employees, as they arise."

The Commissioner also quotes from various decisions of the Minnesota Court, one of which reads as follows:

> It cannot be necessary, at this day, in view of the numerous decisions of the State and Federal courts, to enter into any elaborate discussion to show that the Legislature may exercise such powers in behalf of the State. As respects the right or liberty of the citizen to engage in business and conduct industrial pursuits, these privileges are to be enjoyed in subordination to the general public welfare, and all reasonable regulations for the preservation and promotion thereof. "All property," says the Court in Com. vs. Alger, 7 Cush. 53, 85, "is held subject to the general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conven-

tional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law, as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient." (Thorpe vs. Rutland & B. R. Co., 27 Vt. 140; [62 Am. Dec. 625.]) "The reasonable limits of the exercise of such power it is not easy to define." (Butler vs. Chambers, 63 Minn., 69, 71.)

And he closes with a quotation from a decision of the Wisconsin Supreme Court as follows:

Principles which were first laid down in the days of the small shop, few employees, and simple machinery could hardly be expected to apply with justice to the industrial conditions which now surround us. In those earlier days the laborer ordinarily knew his fellow-workmen, worked with simple machinery, and ran comparatively small risk of injury. The genius of our present remarkable industrial development requires that he carry on his patient toil in company with veritable armies of fellow-men, many of whom he can neither see nor know; it surrounds him with mighty and complicated machinery driven by forces beyond his control, whose relentless strength rivals that of the thunderbolt itself, and it requires him to labor day by day with faculties at highest tension in places where death lurks in ambush at his elbow, awaiting only a moment's inadvertence before it strikes.

The faithful laborer is worthy of his hire in these latter days as never before, but is he not entitled to more, and are not those dependent upon his labors entitled to more? When he has yielded up life, or limb, or health in the service of that marvelous industrialism which is our boast, shall not the great public for whom he wrought be charged with the duty of securing from want the laborer himself, if he survive, as well as his helpless and dependent ones? Shall these latter alone pay the fearful price of the luxuries and comforts which modern machinery brings within the reach of all?

These are burning and difficult questions with which the courts cannot deal, because their duty is to administer the law as it is, not to change it; but they are well within the province of the legislative arm of the Government. Happily the Legislature has seen the need, and now has these questions under serious consideration. If it shall solve them justly and equitably within constitutional lines, or even make a substantial advance in the direction of such a solution, it will be entitled to the gratitude of all citizens. Confidently, I can say that none will welcome such a solution more heartily than the judges of the court. (Driscoll vs. Allis-Chalmers Co., 129 N. W. 401, p. 408.)

In commenting upon the New York decision, the Commissioner says with entire justice that it is a matter of grave regret to the progress of the race that this question, involving, as it does, the biggest legislative subject of the day, a subject concerned with a waste of human life and human injury greater than that caused by the Civil War itself, should be permitted to go, not only to decision, but to wrong decision, without deep consideration. There is hardly a live subject in the realm of American jurisprudence which could not be decided either way—that is, against justice or for justice—with no more violation of legal precedents or exclusion of, on the one hand antiquated and useless, or on the other hand progressive and useful, legal principles, than in the case thus decided by the Court of Appeals of the State of New York; and I heartily sympathize with the earnest desire expressed by the laboring men, East and West, and given expression to in this report of the Commissioner of Labor of Minnesota, when it says that it is necessary that Western Legislatures and Western courts shall act on this subject at once in order to prevent the grave harm (or, as the report says, ruin) which would follow from leaving uncorrected such decisions as that of the New York Court of Appeals in the case before us, and as that of the Connecticut Court to which I have already referred.

I have received from one of the most eminent jurists, and one of the most genuinely conservative—and therefore genuinely progressive—men in the United States, a comment on this New York decision which puts the case so admirably that I quote it almost in full:

It is a remarkable example of special pleading—another illustration that in many American courts property is more sacred than life. The point in the decision that "due process" means the procedure which was enforced when the Federal Constitution was adopted, has been repudiated again and again by the Supreme Court of the United States. The decision is individualistic. It excludes all public considerations. It sees in the enforced payment simply the taking of the money of the defendant and giving it to the plaintiff. The law could have been sustained as a proper exercise of the police power upon either of two grounds: (1) Society has the right to require any business which directly produces orphans, widows, and cripples to provide for their support. (2) The most effective method of compelling

dangerous employments to safeguard their employees is to make them financially responsible for injuries. In Germany, within five years after an absolute liability was imposed, the number of accidents was reduced sixty-two per cent. The court spends half of the opinion deploring the injustice of the existing law of master and servant. Who created that law? The American courts. It is wholly of their making. For seventy-five years, while the whole industrial world has been changed, the courts have developed our present law without any heed to the change. All attempt to ameliorate that law has come from the Legislature, and, as a rule, the courts have given such legislation the narrowest possible effect. If one wants an argument to prove that in American courts property has been more sacred than life, he needs only to point to the existing deplorable law of master and servant. They made that law. They have modified it from time to time, and always in the interest of the master.

The New York Court, admitting that the existing law is cruelly unjust, still says that the remedy which all the rest of the civilized world has found to be best is unavailable to the American people without an amendment of the Constitution. That is a fair example of the uses which have been made of American constitutions. I have made a careful study of constitutional decisions since 1890, in the courts of New York, Illinois, and California. As a rule, laws which they have declared unconstitutional were adopted to correct admitted industrial or social evils—such evils as every other civilized country in the world has been correcting by legislation. They dealt with such subjects as sweat-shops, hours of labor for women, ages at which children could be employed, conditions of mines, the requirement that workmen should be paid in cash or its equivalent, etc., etc. This study raises the question: Are the American people less free than other civilized people? Our constitutions were intended to protect us against tyranny, and they are now most frequently used to protect those who oppress women and children and laborers. When society attempts to redress its wrongs, it is told that its measures are unconstitutional. The battle of society is not with wrong, but with the constitution. In our legislatures the debate is not about the wisdom of measures, but their constitutionality. Laws are often obscure and indirect, in order to "get round" the constitution. Every enemy of the common good takes his stand on the constitution—and is safe. In my judgment, this is an utter perversion of constitutions. It is not the first time that institutions which were devised to protect society have been seized upon by a class and made a fearful engine of oppression. It will be noted that these recent uses of constitutions do not proceed from any specific language in those instruments. All the decisions are based upon such general terms as "liberty" and "property," and the inhibition is found, not in the language of the constitution, but in the speculative definitions which the courts have made of these general terms. Looked at in a large way, the three terms of American constitutions, "life," "liberty," and "property," embrace every concern of government; and if they are to be given a speculative interpretation, every act of the State can be brought under review by the courts. These words have been familiar in English and American constitutional law for centuries. Down to 1875, "liberty" meant freedom from imprisonment, and "property" meant tangible property and its use. Since 1875 the doctrine has been built up by American courts that "liberty" embraces every activity of life, and "property" every business right of man. From these new definitions has sprung our new constitutional law, under which constitutions that were intended to protect society against tyranny have become instruments to defeat every effort of society to redress admitted wrongs. Either American courts will make a different use of constitutions, or constitutions will become so odious that they will be thrown out of the back window. That will be a serious misfortune to the United States. We need the steadying power of written constitutions. But we will not submit to being perpetually frustrated in the accomplishment of those industrial and social reforms which every other free people in the world is free to accomplish.

I very earnestly call the attention of the representatives of the great capitalists, and of all the big men of the propertied classes, to the final words of this statement, and I also very earnestly call it to the attention of those who believe that the American people will permanently submit to having a small body of public servants rob them of the right of self-government, and above all of the right to move forward along the path already trod by every other great industrial nation in the direction of securing a more just treatment for wage-workers. It ought not to be necessary, but I suppose it is necessary, for me to reiterate what I have so often said: that I hold the judiciary of the Nation in very high regard; that I think that on the average the judge is a better public servant than the average executive or legislative officer. I hold all good public servants in high esteem; and I put the wise and upright judge on an even higher level than I put the wise and upright executive or legislator. But ours is a democracy, and we the people have the right to rule when we have thought out our problems and have come to a definite decision. The proper governmental

system for a democracy is one under which the public servant is given full power to achieve results, and is then held rigidly responsible for his exercise of that power. I wish the judge to be given full power, power of the amplest kind, so that he may grapple with every issue that comes before him. I do not wish, for instance, to see the power of the judge in contempt cases so abridged as to render it impossible for judges to do what so many of them did in 1893, when in not a few States the fearless and wise action of the judges, while most of the executive and legislative officers had yielded to panic, was the chief factor in preventing the advent of chaos. I wish to see the judge given all power and treated with all respect; but I also wish to see him held accountable by the people. I wish to see the people exercise their power with moderation, and I wish to see the conditions such that it shall be necessary for them to think coolly, and make it evident that they have come to a well-settled conclusion before they can act against a judge. But they must have the power to act. And not only should they exercise this power in the case of any judge who shows moral delinquency on the bench, but they should also exercise it whenever they have been forced to come to the conclusion that any judge, no matter how upright and well-intentioned, is fundamentally out of sympathy with a righteous popular movement, so that his presence on the bench has become a bar to orderly progress for the right. I fail to see how any thoughtful man can read what I have above quoted and not see that this decision of the Court of Appeals of the State of New York is a case, not really of interpretation of the law, but of the enactment of judge-made law in defiance of legislative enactment, and in defiance of the interpretation of other legislative enactments by the highest courts of this country. Whatever the form, the substance of the action of the Court of Appeals is, not the interpretation of law, but the making of law, and the making of it in a way oppressive, well-nigh ruinous to the interests of the wage-workers, and indeed to society as a whole. It is out of the question that the courts should be permitted permanently to shackle our hands as they would shackle them by such decisions as this, as the decision by the same Court many years ago in the tenement-house cigar factory cases, and the decision in the bakeshop cases shackled them. Such decisions are profoundly anti-social, are against the interests of humanity, and tell for the degradation of a very large portion of our community; and, above all, they seek to establish as an immutable principle the doctrine that the rights of property are supreme over the rights of humanity, and that this free people, this American people, is not only forbidden to better the conditions of mankind, but cannot even strive to do the elementary justice that, among even the monarchies of the Old World, has already been done by other great industrial nations.

It is to our interests as a people that the courts should have the fullest power necessary to make them efficient. Where they do not abuse this power it is to our interest to leave them undisturbed. I would far rather see them thus left undisturbed; and it is for this very reason that I have again and again urged wide public comment upon their decisions, not merely as a right, but as a duty, and especially in the interests of the courts themselves. But perseverance in rendering decisions such as those alluded to above, such decisions as this of the Court of Appeals of the State of New York, would, in the end, render it absolutely necessary for the American people, at whatever cost, to insist upon having a more direct control over the courts. The only Socialist member in Congress recently advocated the abolition of all power on the part of the judges over legislation. There is no danger of the adoption of such a plan unless the courts by a long series of actions render it evident that, great though the evils of the proposed plan would be, the people must face them rather than submit to the evils of the existing system; and unfortunately the experience of all history teaches us that when people become goaded to action by a long course of abuses they are apt to reject the leadership of moderate reformers, and to go to violent extremes, in the effort to provide a remedy. I feel that it would be a very great misfortune for us as a people to have to abandon our system of written

constitutions, and of legislation under them subject to judicial interpretation. But decisions such as this of the Court of Appeals, involving such far-reaching injustice and wrong (and implying in our Government such contemptible futility from the standpoint of remedying wrong and injustice), if unchecked and uncorrected, will go a long way toward convincing people that, at whatever cost, the entire system must be changed. The so-called conservatives who work for and applaud such decisions, and deprecate criticism of them, are doing all in their power to make it necessary for the Nation as a whole in these matters to go to a far more radical extreme than the most radical State has as yet even proposed to go.

THEODORE ROOSEVELT.