Do Our Courts Stand in the Way of Social and. Economic Progress?

William J. Gaynor, mayor of the city of New York, and frequently mentioned by progressive democrats in connection with the democratic nomination for president, recently wrote for "Bench and Bar" an instructive address on the subject, "Do Our Courts Stand in the Way of Social and Economic Progress." Commoner Readers who are not acquainted with Mayor Gaynor's good record will get an insight into his fine character by reading this address which The Commoner prints in full. Mayor Gaynor wrote as follows:

Do the courts in this country stand in the way of social and economic progress? You ask me to give my views on this. I have only time to try to condense what I frequently said publicly thereon while I was a justice of the supreme court, and since.

Yes, they do, and have done so for a long time. But this is nothing new. In all ages, and pretty much everywhere, the courts have tried to apply their legal rules of thumb to social, commercial and economic matters, always with signal failure, and generally with injury to industry, commerce and the social good.

Nothing is more distressing than to see a bench of judges, old men, as a rule, set themselves against the manifest and enlightened will of the community in matters of social, economic or commercial progress. The same is true in matters of morals and religious growth also. Jesus, Socrates, and many who came after them, age after age, fell victims to judicial narrowmindedness. But the adverse decisions of courts have not been able to stop human progress. Sometimes they baffle it for the time being. Sometimes, by creating exasperation in the intelligent mind, they accelerate it. Not to quote other instances, the decision of the United States supreme court remanding the negro boy Dred Scot back into human slavery only hastened the coming liberation of the slave.

But let me come close to what you ask of me. Let me cite some of the recent judicial decisions which were planted right in the path of economic and social progress.

The tenement house tobacco case was decided by the court of appeals of this state in 1885 (Matter of Jacobs, 98 New York Reports, page 98). Good men and women who went around alleviating suffering and distress in poor tenements of the overcrowded districts of this city found tobacco being manufactured into its various products in these tenements. They found little children born and brought up there in the unwholesome fumes and smells of tobacco. They applied to the legislature, and had a law passed forbidding the manufacture of tobacco in such tenements for the future. The court held that it was "unconstitutional"—that is to say, that the constitution of this state permitted the manufacture of tobacco in poor tenements, and that therefore the legislature could not forbid it. They professed to find this constitutional permission latent in the general provision in our state constitution that no one shall "be deprived of life, liberty or property without due process of law." The court waxed eloquent on the subject. It said that the tenant had the right under this provision of the constitution to do what he liked in the way of lawful business in his tenement. It said that the statute "arbitrarily deprives him of his property and some portion of his personal liberty," by preventing him from using his property, i. e., his tenement leasehold, as he saw fit. The claim that the manufacture of tobacco in such places was detrimental to health, especially to the health of children, and might therefore be prohibited by the legislature, received short shrift from the venerable and learned judges. They set themselves up as better judges of the question of health than the legislature. They gave to this constitutional guaranty a meaning never dreamed of in England from which we took it. The foundation of it is in Magna Charta. But no one in England up to this hour has ever imagined that it had reference to anything but the direct taking of a man's property—i. e., of his chair, of his cow, of his lot—or the direct restraining of his physical liberty. Nor did it occur to our forefathers when they took it from England and incorporated it into those fundamental instruments of government in this country, state and national, which we call constitutions, that any meaning would ever be given to it except that which it then had. It had then only a direct meaning in respect of the taking of a man's property or the depriving him of his liberty. Moreover, it was a check on the executive branch of government only in England, and not on the legislative, and it was put into our constitutions in that sense. No one anticipated that it would ever be interpreted as a check on legislative power also, although that interpretaion has naturally followed from our system of government. But the carrying of it to extremes by casuistry is another thing. This tobacco case, in which the court showed so much sensitiveness for the rights of property and liberty, and so little for physical, mental and moral health, was the final and full outcome of a course of constitutional exegesis which had set in in this country not many years before, and had for its object to embrace in the said constitutional guaranty every legislative enactment which by its operation might indirectly or remotely restrict the use of property or liberty in its widest sense. Its development was rapid, and finally reached that point which has enabled the courts to stand in the way of measures for the public happiness, welfare, morals and progress, which are grown common all over the world, and finally become expressed in statute law here.

Some years later similar good and intelligent influences brought about the enactment of a statute in the legislature of this state for the sanitary regulation of underground bakeries, for the sake of the health of those employed in them and of the community generally. The statute recognized the hot and uncomfortable conditions of these bakeries and how easy it was for them to become unsanitary and result in unsanitary bread. It therefore prescribed a list of sanitary safeguards, such as drainage, plumbing, furniture, utensils, washrooms, closets and the like, and also that employees therein should not work more than ten hours a day, the work being principally done in the night time. The supreme court of the United States declared this ten hour requirement to be unconstitutional, as depriving workmen, without due process of law, of the "liberty" to work as long hours as they saw fit in underground bakeries (Lochner v. New York, 198 United States Reports, page 45). The learned court stood 5 to 4. That division certainly showed that the matter was one of great doubt. And yet, notwithstanding a rule which is often repeated by the courts, that they will declare a statute unconstitutional only in a case free from doubt, they declared this statute unconstitutional. The same court has often done the like by a vote of 5 to 4. What is 5 to 4 but a state of doubt in the court? The reasoning in this decision is substantially the same as that in the tenement house tobacco case.

In 1893 the legislature of this state passed a statute that women should not work in factories between the hours of 9 at night and 6 in the morning. This statute was intended to protect the health of women, and hence of their offspring. Surely, said the great majority of intelligent people, it is enough that women work in factories between the hours of 6 in the morning and 9 at night. They therefore had the statute passed that they should not work in factories between 9 at night and 6 in the morning. It is almost inconceivable that the gentlemen then composing the court of appeals of this state found in this humane and benevolent statute an infringement of the "liberty" of women, guaranteed as they said by the constitution, to work in factories all night and as many hours as they saw fit. But they waxed eloquent over the iniquity of the statute in its attempt to interfere with the property and liberty of women without due process of law—their property in their work and wages, and their liberty to work all night, if they saw fit.

It is not at all to be wondered at that such decisions should provoke a widespread dissatisfaction with the courts. The just feeling pervading the community is that a bench of judges is no more competent than the legislature to decide as to the wisdom or necessity of such laws for the health, safety and progress, and the material and moral welfare, of the community. That is a matter of enlightened opinion which the courts have no right to arrogate unto themselves. The courts of England do not do it, nor do the courts of any other country, except ours. And ours base the right to do so on fundamental or constitutional provisions for the safety of liberty and property, which are not peculiar to this country at all, but are to be found in all systems of government and jurisprudence. No such meaning was ever given to these safeguards of property and liberty until by the judges in this country. It is judge-made law, pure and simple.

I have given instances enough to express my meaning. I might also refer to the decisions of our court of appeals declaring statutes void which provided that employees on state or municipal works under contracts should not be paid less than the prevailing rate of wages, nor required to work more than a certain number of hours a day. These decisions went to such lengths that finally that court itself was unable to reconcile, or even explain them, and the learned judges fell to ridiculing and bantering one another for the extremes their utterances had reached (See People ex rel. Cossey v. Grout, 179 New York Reports at page 417). I do not need to go into these decisions further, for they so exasperated the people of this state that they swept them all out of existence—"recalled" them, if you will—by a constitutional amendment in 1905 (See Sec. 1 of Art. 12 of our state constitution.) Some aspirants for the office of president are just now talking about the "recall" of judicial decisions as though it were a new idea. It is not new at all. We have been doing it for a long time, and we shall have to do a good deal more of it before we get through. We do it very easily in this state, because our constitution itself requires that we have a new constitutional convention every twenty years; and meantime we frequently pass constitutional amendments. It were well if the constitution of the United States were amended by the addition of a provision requiring it to be reconsidered by a constitutional convention every twenty years, the same as in this state, and in many if not most of our states. A constitution must grow and change, like everything else, but the more gradual the better. As Macaulay says of the British constitution, "Although the changes have been great, there never was an instant of time in which the major part of it was not old." That is the way to amend constitutions and laws—gradually and prudently. But the class of decisions which I have mentioned never had any justification under the constitution, and it is annoying to have to keep on amending the constitution to nullify them.

And now let me mention the decision of the court of appeals of this state last year which overthrew the employers' liability statute passed by our legislature the year before. The rule of the common law is that the law casts upon all employes the necessary or inherent risks of the work or business in which they are employed. Some opinions of judges clumsily say that the employee "assumes" these risks. He does no such thing. He is not consulted about it at all. The common law casts such risks upon him. This statute changed the common law rule in eight enumerated "especially dangerous" employments, to use the words of the statute; namely, it enacted that the said risks should be taken off the employee and put upon the employer. The legislature thought it had a perfect right to do this, and was so advised by the ablest advisers. Indeed, did we not all think that the legislature had the right to do away with or change any common law rule as it might see fit? The courts, including the highest court in the land, have often decided that no one has any property right in any rule of the common law, and that such rule may be taken or changed at the will of the legislature. But our court of appeals declared this statute "unconstitutional"—the same old word (Ives v. South Buffalo Railway Co., 201 New York Reports, page 271). Again it planted itself on the constitutional prohibition against taking the property or liberty of the individual without due process of law. The statute required that employers should pay for deaths or injuries received from such necessary or inherent risks, unless such injuries should be received through the "serious and wilful misconduct of the workman." The learned judges, with great professions of reluctance, said that to thus shift the necessary and inherent risks from the workman to the employer, and make the employer pay the damages caused thereby, unless the employee was guilty of "serious and wilful mis-

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