NATIONALISM AND THE JUDICIARY

This is the eighth of the series of editorials by Mr. Roosevelt on "Nationalism and Progress," and the third relating to the Judiciary. The discussion of this particular topic will be concluded next week.— THE EDITORS.

Last week in these columns I discussed the right of the people to criticise the courts. There is a second aspect of the relation of the courts to the people.

This second aspect, which the briefest consideration of the history of the Supreme Court emphasizes, is what Mr. Roscoe Pound has so clearly shown in his articles in the "Columbia Law Review" and the "Green Bag," on "Mechanical Jurisprudence" and "The Need of a Sociological Jurisprudence;" that is, the far-reaching damage done by a merely mechanical jurisprudence, and the need for an informed and intelligent interpretation of the law. Dean Kirchwey, of the Columbia Law School, in his address before the American Bar Association on "Respect for Law," spoke as follows:

> There is no other artificial device that I know of to bring about the condition of affairs that must be effected in order that our law shall escape the criticism which we aim to avert by becoming the real handmaid of society in its onward and upward march. The only remedy that I can see is for our courts to realize once for all that the power to do justice, greater than the power to administer law, is the power that is really committed to them; that a precedent is only a sign-post pointing out the direction in which the feet of justice must go, not a rule binding upon the mind and conscience of the judge; that our courts are set in their high places as interpreters of the popular sense of morality and right and the popular sense of justice, not as interpreters of obscure oracles handed down from a remote antiquity. They will receive and they will deserve respect so long as the law which they lay down is the expression of the public will, and no longer.

Mr. Roscoe Pound's article on "Mechanical Jurisprudence" should be read by every one who has the least doubt as to the vital need of making our law correspond to the demands of real justice and of common sense. He quotes Sir Frederick Pollock, and Judge Richmond, a noted Australian judge, with approval of their insistence that modern law must escape from all that is artificial, and must meet the demands of modern society for full, equal, and exact justice. He unreservedly indorses the view that legality and the scientific character of law are means toward the end of law, which is the administration of justice, and that law must be judged by the results which it achieves, and not by the niceties of its internal structures. Mr. Pound quotes with proper emphasis the profoundly wise remark of Lord Herschel: "Important as it is that people should get justice, it is even more important that they should be made to feel and see that they are getting it."

One merit of Mr. Pound's article is the way in which it points out that laymen are just as responsible as lawyers for the tendency of law to become mechanical, because of the average man's admiration of the ingenious, his love of technicality as a manifestation of cleverness, and the feeling that law as an established institution ought to have a certain ballast of mysterious technicality. But Mr. Pound also shows that when this type of thought is found in a judge, and is given full sway by him, the result may be of literally incalculable harm. He says: "It is sometimes assumed that law must needs aim for a different kind of justice from that which is commonly understood and regarded by the community. But this cannot be. Law is a means, not an end. We must not make the mistake in American legal education of creating a permanent gulf between legal thought and popular thought. . . . The practical end of the administration of justice according to law is such adjustment of the relations of men to each other and to society as conforms to the moral sense of the community." The idea has been well expressed in a private letter written by Dr. Du Bose, of the University of the South, to Mr. Silas McBee, editor of the "Churchman," commenting upon an editorial in the "Churchman" upon a certain announced judicial conception of democracy. "If the Constitution does not live and expand with the life of the Nation, it becomes a mere letter and fetter which will either strangle the life or have to be broken by it. And to make the Supreme Court a mere guard over the letter without jurisdiction over the spirit and life is to make it an instrument of slow death."

Miss Jane Addams points out a fact which should cause both our legislators and our judges grave concern when she states that there has been a growth of feeling among workingmen that the courts are their enemies. A certain type of man, usually the head of a big corporation, or his legal adviser, or his representative in the press, but often an entirely honest although ill-informed citizen, is apt clamorously to insist that this feeling among workingmen has no basis in reason, and is due merely to their having been inflamed by the tirades of demagogues. I would call the attention of this type of man to "Law Notes" for December last, which quotes the comments of a learned jurist, who states that his own professional and personal interests are almost exclusively on the side of great corporations and of defendants in negligence cases, and who explains that his views are the result of an impartial study of the whole situation while constantly engaged in the professional service of railway and other corporations. The comments in question appear in the introduction to the fifth edition of Shearman and Redfield on Negligence, signed by Mr. Shearman:

> A small number of able judges, devoted, from varying motives, to the supposed interests of the wealthy classes, and caring little for any others, boldly invented an exception to the general rule of masters' liability, by which servants were deprived of its protection. Very inappropriately, this exception was first announced in South Carolina, then the citadel of human slavery. It was eagerly adopted in Massachusetts, then the center of the factory system, where some decisions were then made in favor of great corporations, so preposterous that they have been disregarded in every other State, without even the compliment of refutation. It was promptly followed in England, which was then governed exclusively by landlords and capitalists. And when the fifteen judges of Scotland unanimously declared that it had never been the law of Scotland, four English law lords reversed their decision.

My only comment upon the above would be that I do not think that the judges who are responsible for such decisions are, save in exceptional cases, actuated by friendship for the property classes as compared with the masses of the people; I think that the responsibility for this condition of things lies chiefly at the doors of well-meaning men unfortunately cursed with an obsession for what Mr. Pound has called mechanical jurisprudence. The stickler for technicalities, the man who treats precedents, however outrageous, as always binding, instead of as sign-posts put up for his consideration, will often do as much harm as the other man who permits himself to be swayed either by special sympathy for or special antipathy towards a certain class of his fellow-men, whether those who possess much property or those who do not—and antipathy towards one is just as bad as antipathy towards the other.

Plenty of poor men who are criminals of the worst type escape punishment because of technicalities, just as plenty of rich men do. A long list of such instances could be produced, a list which I think it would be impossible to read without a feeling of very deep indignation. Such a list would include a recent decision in one State under which a murderer was turned loose because he had been convicted under an *alias*, or without giving his *alias*. In a recent decision in another State a new trial was ordered because the prisoner was convicted under an indictment which charged him with stealing hides, and did not specify whether they were cow, mule, or sheep hides. Another instance was perhaps the most striking of all. Two pianolas had been stolen. The indictment described them as "pianos," and because of this a new trial was ordered. On the next trial experts convinced the Court that pianos and pianolas were the same thing; whereupon the Court discharged the prisoner on the ground that he could not be tried twice for the same offense! A reading of these decisions makes one feel profoundly grateful to the Supreme Court of Oklahoma for its opinion—rather breezily expressed—in a case where it very sensibly refused to grant a new trial because a useless word had been omitted from an indictment. The Court said:

> Now that our criminal jurisprudence is in its formative period, we are determined to do all in our power to place it upon a broad and sure foundation of reason and justice, so that the innocent may find it to be a refuge of defense and protection and that the guilty may be convicted and taught that it is an exceedingly serious and dangerous thing to violate the laws of the State, whether they be rich and influential or poor and friend-

less. . . . If we place our criminal jurisprudence upon a technical basis, it will become the luxury of the rich, who can always hire able and skillful lawyers to invoke technicalities in their behalf. . . . We confess to a want of respect for precedents which were found in the rubbish heap of Noah's Ark, and which have outlived their usefulness, if they ever had any.

The New York Code—Criminal Procedure, §542—now explicitly forbids judges to permit such technicalities as those quoted above to be used for the perversion of justice; and for the last decade or thereabouts this prohibition has been heeded.

A judge must decide the law according to its evident intent, even when that evident intent is repugnant to his feelings, unless the Constitution explicitly forbids it. In the abstract this will be denied by no one. But in the concrete there has often been much ingenious twisting of the Constitution, doubtless entirely unconscious, in order to justify judges to their own conscience in deciding against a given law. I say often. I do not mean generally. The courts must grow and change in opinion just as the other bodies of National expression grow, and as the Nation itself grows. Nor can the courts permit the general and unequivocally expressed will of the Nation to be nullified in accordance with a small or local body of opinion.

It is well to give concrete instances of general principles, and these I now give, to illustrate the principles laid down last week. I shall select first a case in which the judges have rendered incalculable service in standing up for the elementary and fundamental rights of mankind. This Nation has definitely agreed that there shall be no slavery; and what is called peonage, whether among poor white men or ignorant black men, is in its essence an ignoble and furtive desire partially to re-establish slavery. The first blow of really telling character struck at peonage was by the Federal Court of Alabama in the decisions of Judge Jones, a former Governor of the State and an ex-Confederate soldier. A similar service was recently rendered by Judge Thomas, of the same State, in the case of Alonzo Bailey, and the Supreme Court in upholding Judge Thomas's view rendered a signal service to real as distinguished from academic freedom; for it cannot too often be pointed out that absolute liberty of contract when carried to an extreme utterly defeats its own purpose. The leading individualist philosophers, such as Mill and Spencer, have agreed that "the principle of freedom cannot require that a man should be free not to be free." It is not freedom to be allowed to alienate one's freedom; and, as Sidgwick has pointed out, in speaking of this so-called natural invalidity of a contract to become a slave, any "serious approximation to the condition of slavery" amounts to the same thing. Of course this principle should be pushed very much further than leaders of the school of purely individualistic or eighteenth-century philosophy have admitted. No person should by contract be permitted to impose substantial restraints upon his liberty. Freedom to impose these restraints, if given to weak and needy people, simply amounts to defeating the very end of freedom. Academic freedom is the absolute negation of real freedom. Academic individualism defeats itself, whereas freedom in the fact makes for a rational individualism.

The other two cases of which I intend to speak are those to which I alluded in my address before the Colorado Legislature last year as striking instances respectively of infringement upon the rights of the people through curtailing National rights, and infringement upon the rights of the people through curtailing States' rights.

The first is the decision in the Knight Sugar-Case. As to this I quote the opinion, not of a radical or a revolutionary, but of a leading New York lawyer, whose practice has been much with corporations, Mr. Victor Morawetz, as given in the "Columbia Law Review" of December last. He writes:

However, in the Sugar Trust Case the Supreme Court seems to have held that, notwithstanding the Anti-Trust Act, a manufacturing company producing an article of inter-State commerce may lawfully purchase the manufacturing plants and businesses of all its competitors in the same business, although the effect of the purchase may be to monopolize the manufacture and sale of an article of inter-State commerce, and consequently to monopolize inter-State commerce in this article. It appeared that the American Sugar Refining Company had purchased the control of four independent sugar refining companies, paying therefor by transfer of shares of its own stock; that

refined sugar was an article of inter-State commerce; that all the companies were engaged in inter-State commerce in refined sugar; and that by such purchases the American Sugar Refining Company acquired nearly complete control of the business of manufacturing and selling refined sugar throughout the United States. The Supreme Court held that this transaction was not in violation of the Anti-Trust Act. . . . The decision in the Sugar Case was one of the earliest decisions under the Anti-Trust Act, and, in the opinion of the writer, cannot be reconciled with the subsequent decisions of the Supreme Court. In a number of subsequent cases the Court decided that Congress had Constitutional power to prohibit, and by the Anti-Trust Act did prohibit, monopolizing, or attempting to monopolize, or combining or conspiring to monopolize, inter-State trade or commerce by means of contracts or trade arrangements among competitors; yet it is clear that Congress has no greater power to prohibit the making *of contracts* that are sanctioned by State laws than to prohibit the acquisition or use *of property* sanctioned by State laws. . . . A decision following the supposed authority of the Sugar Trust Case and holding that the Anti-Trust Act does not prevent the effective monopolization of inter-State trade or commerce by combining or vesting in a corporation the plants and businesses of practically all manufacturers and sellers of an article of inter-State commerce surely would not be accepted by the people of the United States as a final solution of the trust problem. Such a decision probably would result in an imperative popular demand for legislation of a Socialistic character, and possibly it might lead to an amendment of the Constitution. Governmental regulation of corporations and trusts as to their organization and their methods of conducting business, while leaving them the fruits of monopoly, would not be accepted as sufficient.

I have already elsewhere quoted the entirely justifiable language of Justice Harlan in dissenting from the opinion of the Court in the Knight Sugar Case, language in which he points out the impotence to which the decision reduced the people of the United States in controlling, in the only effective way possible to control, the great corporations engaged, as every great corporation is necessarily engaged, in inter-State commerce. The movement which resulted in the formation of the Constitution started primarily because of the absolute chaos caused by each State exercising its power as it chose in regard to commerce between the States. As Judge Spring, in an article quoted last week, shows, the makers of the Constitution, the opponents of the clause in question as well as its advocates, alike definitely understood that it vested plenary powers in Congress to regulate all inter-State traffic, and deprived the States absolutely of dominion over intercourse among them. The Supreme Court, under Marshall, decided, and without dissent, that commerce comprehended traffic, interchange of merchandise, and intercourse; and that the National power to regulate was "to prescribe the rule by which commerce is governed."

Judge Spring says:

It is claimed that the tendency now is to arrogate to Federal authority powers not fairly within the province of this delegation. It seems to me there is no marked assertion of authority not within the Constitutional grant, but the increased intercourse among the States, the variety and complexity of the business carried on, necessarily call for more frequent exercise of power. There is a vast difference in the extent of the business in a Nation of eighty millions of people with one hundred and twenty billions of property and that carried on by the four millions of people with their small holdings when the Constitution became operative. The necessity for the exclusive exercise of this power by Congress was never more manifest than in these days of enormous State interchange of commodities. If each State can fix a rate for the carriage of goods by a common carrier crossing its boundaries, the confusion and absence of uniformity which the commerce clause was intended to obviate will again prevail to a far greater degree than existed in the old Confederation, when the transactions were not frequent or varied. One State might, for retaliation, fix an abnormally high rate to redress some real or imaginary injustice by the railroad company. Another, to stimulate trade, or through favoritism, might go to the other extreme. Under the most favorable and judicious system of regulation by the States great disparity would be prevalent, and jealousy and animosity would be engendered. . . . It is contended that the enlarged range now given to the commerce clause is far and away beyond what was contemplated by the framers of the Constitution. Undoubtedly. A written Constitution is couched in general language in order that it may fit changing conditions as they occur. The probabilities are that these varying situations may not be foreseen. The extension of our National domain, the building of railroads, telegraph and telephone lines, the accumulation and combination of wealth, and the amplitude of our internal commercial relations were not within the reach of human ken one hundred and twenty years ago. The intrinsic power of the Government is unchanged whether the commerce among the States is over a dirt road, a navigable river, or a railroad track crossing

State lines. Because the inter-State business has exceeded the expectations of the Constitution makers and is carried on by other agencies than were employed in their day does not abridge the authority vested in Congress. The extent or variety of the business is unimportant in considering the right of control over it.

The learned judge and the leading corporation lawyer whom I have above quoted, and the Justice of the Supreme Court, Mr. Harlan, in his dissenting decision, have put the case so clearly that I do not see how their view can be successfully refuted. But there is one point upon which sufficient stress has not been laid, except by Mr. Croly in his "Promise of American Life," and that is the far-reaching damage done to the rights of property, no less than to the spirit of Nationalism, by such a decision as that in the Knight Sugar Case. The American people demand that efficient and genuine control over great corporations be exercised by the Government. They will not permanently tolerate the failure to meet this rightful and proper demand. If the National Government, through the National judiciary, confines itself to mere negation, and by one series of decisions denies the National Government power to interfere in the matter, while at the same time by another series of decisions it tries to prevent the States from interfering, the result can only be to cause damage from every standpoint; for confidence in the National Government will be shaken, it will prove well-nigh impossible to prevent States from acting when they have a furiously indignant public opinion behind them, and there will be a real popular loss of confidence in the courts, a loss of confidence by the people at large, which is in no way permanently offset by exaggerated and hysterical praise of the courts by the organs of the capitalistic classes.

I most strongly hold the view that the States should not, and cannot permanently, be allowed to exercise any power, directly or indirectly, over inter-State commerce. Wherever commerce is inter-State the National power is not only supreme but sole. This has been recently and unequivocally asserted by the Supreme Court in deciding the cases brought by the Western Union Telegraph Company and the Pullman Company against the State of Kansas. All questions of the regulation of traffic through any State, if that traffic is inter-State, belong, under the Constitution, to the National Government. The encouragement to the States to act on their own initiative in this matter has come chiefly from the failure of the National Government to act; the failure of Congress to provide laws sufficiently far-reaching; and the nullification of these laws, when enacted, by decisions like that in the Knight Sugar Case. When, by what ordinary men regard as a mere legal subtlety, the power of the National Congress over great corporations engaged in inter-State commerce is reduced to a nullity, it is inevitable that the State Governments should themselves try to step in and take the place which the highest Federal court, in the decision which has become the supreme law of the land, has declared to be vacant so far as the National Government is concerned. A decision like that in the Knight Case invites each State to act for itself, and therefore invites industrial chaos. Such a decision, if consistently carried out, would, as regards one of the prime and vital features of government, undo the work of Marshall and of the Supreme Court during the first half-century of its existence, and bring us back dangerously near the chaos of the days of the Confederation. The power over these great corporations must be exercised. The people will not permit these enormous corporations to be free from Governmental control, for the simple reason that they instinctively recognize the fact that unless the great corporations are controlled by the Government they will themselves completely control the Government. All that the National authorities, legislative, judicial, and executive alike, can determine is whether they shall give effect to the plain intent of the Constitution, and really and efficiently and not with academic ineptitude exercise this power, or whether they shall shelter themselves behind quibbles and technicalities and fail to exercise the power, with the certainty of seeing in a few years the effort to exercise it made by the several States, and chaos and disaster follow.

THEODORE ROOSEVELT.

THE FUTURE OF RUSSIA

It is a striking and significant fact that, although the governmental reaction in Russia since the suppression of the revolutionary movement of 1905–6 has been accompanied by repressive and punitive measures of unusual and extraordinary severity, the leaders of the Russian Liberals in the Duma, the provincial assemblies, and the press are still hopeful, and even confident, that the fight for freedom, which they have carried on for so many years, will finally be successful. They admit that the present state of affairs is bad—worse, in some respects, than it has been at any time since the assassination of the notorious reactionary Minister von Plehve—but they are not at all intimidated by the Government's repressive measures, nor are they discouraged by their own mistakes and failures. On the contrary, they look forward, with ever-increasing hope, to the Russia of the future—a Russia that shall derive its chief power, not from battalions of armed conscripts and batteries of quick-firing guns, but from the thoughts, feelings, and acts of a morally enlightened, intellectually cultured, and politically emancipated people. For such hope and faith they think they have ample warrant in the awakened intelligence and changed attitude of the men who compose so large a part of the Russian population, viz., the common peasants, or *muzhiks*. Twenty-five years ago, or even ten years ago, this oppressed and unenlightened class was not greatly interested in national questions, and gave little or no support to the revolutionary movement. Now, however, it is awake and alert, and, in spite of bureaucratic persecution and repression, it shows at every opportunity its warm sympathy with all progressive measures and undertakings. Twenty-five years ago ninety per cent of the political exiles in Siberia were from the educated and privileged classes, while now seventy-five per cent of them come from the ranks of the industrial workers or the agricultural peasants. One of the oldest and most experienced of the Russian Liberal leaders, in a recent letter to a member of The Outlook's staff, refers to this changed attitude of the common people as follows:

"Time has not destroyed the hopes that were the subject of our conversation so many years ago, but, on the contrary, has brought some of them to realization and fruition. If you should now make another survey of Russian life and conditions, you would be convinced, I think, that, in spite of many discouraging phenomena—in spite of the severity of some of our administrative methods, such as exile without trial and confinement in prisons that are terrible in discipline and sanitary condition—Russia, as a whole, has made great strides toward the position occupied by more fortunate and more cultured nations. The 'emancipation movement,' as we are accustomed to call it, or, to speak more accurately, the 'Russian Revolution,' was not a superficial agitation, confined to the upper classes of society. It affected all sorts and conditions of men, and awakened the minds and hearts of the whole slumbering population. This was its most notable and most important achievement. We may question the practical success of this wonderful popular movement, and we may fully recognize the servility of our Duma, the Anarchistic ferocity of our 'black companies,' and the lawlessness of our bureaucratic administration; but, in spite of all these admitted evils, we are confident that nothing can now check our cultural development, because the revolution overcame the inertia of centuries, called into action the untried powers of the people, set free their volition, revealed to them their latent strength, and pointed out the path that will ultimately lead to social and political regeneration. We know by what sacrifices human freedom and enlightenment have been bought, but the teachings of universal history justify our optimism."

The writer of this letter—a prominent member of the First Duma—has spent many years of his long life in exile, has been deprived of all political rights, and has recently been punished with a term of solitary confinement in the St. Petersburg prison known as "the Cross;" but, instead of being discouraged or disillusioned by his personal experience, or by the apparent triumph of reactionary forces, he looks to the future with a confidence based on faith in righteousness and in