

SAUCE FOR THE GOOSE AND SAUCE FOR THE GANDER

EDITORIAL BY THEODORE ROOSEVELT

THERE has recently occurred a striking instance of the manner in which the courts often let public exigency and public opinion bend their interpretation of Constitutional provisions when the interests of invested capital are also largely involved on the side which public need and sentiment favors, whereas the public need and prevailing sentiment are denied any consideration when so-called "labor" or "welfare" legislation is involved. The instance in point is the decision recently handed down by the New York Court of Appeals in the suits brought to restrain the carrying out of recent negotiations for the construction and operation of rapid transit lines within Greater New York. The opinion of the Court is interesting

reading, when compared with the decision in *Ives vs. South Buffalo Railway Company*, 201 N. Y., 271, in which the same Court held unconstitutional the Workmen's Compensation Act drawn by the Commission appointed by Governor Hughes. Curiously enough, the recent opinions in the subway cases contain within themselves emphatic indications that at least some members of the Court itself realized that they were applying to the statute, which large business interests wished held Constitutional, a progressive standard of Constitutional construction which they had refused to apply to a statute desired by workingmen and opposed by the rapacious element among employers.

The question in the subway cases arose

under the provision of the New York State Constitution which forbids a municipality loaning its money or credit in aid of any private enterprise, notably railway corporations. It was proposed that the city should build subways partly with its own money, lease the subways for a long time to the private corporations given the operating contracts, empower the private corporations to mortgage the lines as security to secure funds for such corporations, and authorize the private corporations to take out of the earnings of the lines 8.76 per cent annually to cover the profits now being made on the existing lines to be included in the new system, before the city should be entitled to receive anything on the money which it had invested in the lines. Against the contention that this arrangement clearly came within the inhibition of the Constitutional provision, it was contended by the attorneys representing the large financial and transportation interests involved as well as the city authorities (1) that the Constitutional provision was framed only to prohibit loans to steam railway corporations by towns, villages, and cities, under the Towns Bonding Act of many years ago, and that the present situation could not be deemed within the purview of the prohibition, for the reason that no such situation as now exists in Manhattan Island was in being at the time the Constitutional provision was framed; and (2) that the plan proposed was the best obtainable under the circumstances, was called for by the dire needs of the metropolis for rapid transit extensions, was approved by the Mayor, the Board of Estimate and Apportionment, representing the city, the Public Service Commission, the Legislature and the Governor, representing the State, and by a large majority of the citizens and taxpayers themselves. J. Pierpont Morgan & Co. and Kuhn, Loeb & Co. announced that they had agreed to loan to the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company, respectively, a sum in excess of \$200,000,000, as might be needed to enable the companies to carry out their part of the proposed contracts with the city—"contingent upon the decision of the New York Court of Appeals in approval of the legal features of the proposed contracts." The Court upheld, with two dissenting votes, the lawfulness and constitutionality of the plan which seemed to fall so clearly within the letter of the Constitutional provision.

Some of the things said by the members of the Court in reaching this conclusion or in pointing out its significance are most interesting. They stand out in marked contrast to the mental processes of the same tribunal in other cases under the Constitution where the rights of labor were involved in a broad construction of that document. For example, in the majority opinion, written by Judge Hiscock, an Associate Judge who may be up for election this fall to serve as a full and regular member of the court to succeed one of the two judges retiring under the age limit, is the following:

It is to be borne in mind at the outset and at every point of our discussion that this Court has nothing whatever to do with the wisdom of the proposed contracts. If the municipality and the various officials acting in its behalf have the power to make them, then the questions whether it is wise to do so and whether their terms are advantageous for the municipality and public are solely for the consideration and decision of those officials. After all the criticism and discussion which have been directed at the present transit situation in New York, it is only just and reasonable to assume that public officials charged with the duty of bettering that situation have entered upon their task with care, with all of the wisdom and foresight at their command, and with complete devotion to the public welfare. But even if we should doubt whether they have reached the best possible solution of a great and perplexing problem, our sole and only duty still would be simply to determine whether the Constitution permits the legislation and contracts in question, and there again it is to be remembered that our duty is to be so discharged, if possible, within fixed principles of law, as to uphold rather than condemn the legislation and the proposed action of the various State and municipal authorities thereunder.

This is doubtless sound doctrine, but, if it is, it should have been applied to the Workmen's Compensation Act case. A consistent member of the Court is the brilliant and venerable Chief Judge Cullen. He will not construe a Constitutional provision so as to meet any public exigency or so as to defer to any strong public sentiment as to what a governmental agency should be permitted to do, no matter whether the legislation at the bar of the Court is desired by capital or by labor. Interesting indeed is his dissenting opinion, in which he cogently characterizes the action of the majority. For example, at one point he says:

With the utmost respect for the majority of the Court, I fear that the decision about to be made will lead to a practical nullification of the Constitutional restraints by methods of evasion. It may, however, prove interesting to that school

of publicists and political economists which has always maintained the futility of restraints imposed by the people themselves on their own extravagance in the expenditure of public moneys, on the ground that when the popular demand is not great the restraints are unnecessary, and when great they are unavailing.

The dissenting opinion of Judge Werner is also a vigorous plea that the Constitution be construed as the judges think its authors meant it to be construed, and without regard to the needs of the time ; but this plea from the author of the opinion of the Court in the Workmen's Compensation Act case fell on deaf ears in the subway case. Mr. Justice Werner concludes :

If this is not a lending of municipal credit to or in aid of private corporations, then I think we should frankly concede that our Constitution is an absurd attempt on the part of the people to limit a power in its own nature illimitable, for from this time forth it will be difficult, if not impossible, to define the Constitutional limitations of municipal powers.

Nevertheless, what the learned Chief Judge characterized as "a practical nullification of the Constitutional restraints by methods of evasion" was consummated, in obvious but unauthorized deference to the changed conditions which have come about since the provision of the Constitution was adopted, and in even more obvious deference to the urgency of the public need and the unanimity of the public and official opinion. Yet the accomplishment of this result as to a Constitutional provision reasonably definite and explicit in its character, even by an extra-legal and quite unauthorized method of Con-

stitutional interpretation, is not deemed radical or dangerous by those papers (all now supporting Mr. Taft and Governor Wilson) which expressed the most lively horror of my action in criticising the Court for its decision in the Workmen's Compensation Act case. Now let the people of New York State face these facts with the honest intention of profiting by them. Which is really radical and dangerous, especially to our courts themselves—the action of the Court in interpreting the law without Constitutional warrant in this case, where capital was interested, or a theory of broad construction which would certainly have warranted them in deciding in favor of the constitutionality of the Workmen's Compensation Act, where labor was interested, or the action I propose by which these facts of public need and public sentiment could in legitimate fashion receive proper weight in the interpretation of a given provision of the Constitution? I ask merely that, in certain cases of great need, the people be given the power to do for the people, in accordance with the Constitution, what the courts now do with scant regard to the Constitution in cases where they happen to deem the need great enough, although very rarely indeed where it is only the people whose needs are at stake.

I hope that this fall the Progressive party in New York State will nominate candidates for the Court of Appeals who can be trusted to construe the Constitution broadly in the interests of human rights and social and industrial justice.