EDITORIAL NOTES.

By W. D. L.

TILDEN *v.* GREENE.—The annotation of the case involving the validity of Mr. Tilden's will, which appeared in the February number of the AMERICAN LAW REGISTER AND REVIEW, has received wide and favorable notice from prominent members of the bar. The editors take this opportunity of stating that the annotation was written by Howard Wurts Page, Esq., of the Philadelphia bar. His signature to the annotation was omitted through the carelessness of the printer.

MR. JUSTICE BRADLEY.—The death of Mr. Justice Bradley has removed from the Supreme Court one of the few men who will live in the constitutional history of our country. To him, as much as to any other member of the bench, we are indebted for much of the recent development of constitutional law, especially in its application to complicated commercial questions growing out of the "Commerce Clause." The editors regret that lack of space prevents them in this number from entering into any extended review of his work on the bench. Such a review will appear in the April number of the magazine.

RAILWAY CO. *v.* STATE OF MAINE: A PROTEST.—The fascination of the study of the development of our constitutional law lies in the gradual and logical unfolding of principles. The result is a body of law that has made the Court, which has been and still is creating and applying it, the admiration of the civilized world. It is seldom that a principle, well established, the expediency of which has been tested for many years, and affirmed in innumerable cases, is weakened, if not temporarily destroyed, by a decision of that Court. Such a decision the student reads

almost with a feeling of pain. For the moment study seems to have been thrown away; he is unable to determine how far that which he believed to have been settled is unsettled, or even to surmise what will be the next change in that law, the wise development of which is vital to the welfare of his country.

Since the case of Hinson *v.* Lott[1] decided that a State could tax an import from another State, provided it placed the same tax on its manufacture within the State, no decision of the Supreme Court seems to be fraught with more far-reaching consequences than that of the State of Maine *v.* Grand Trunk Railway Company,[2] decided December 14, 1891. A law of the State required every railroad, for the use of its franchise, to pay a tax whose amount depended on two factors: first, the proportion of its lines within the State to the total mileage of the company; second, the amount of the gross receipts of the road. These receipts are derived almost exclusively from the transportation of the interstate and foreign freight. The Court held the tax constitutional, because, in the words of Mr. Justice FIELD, it is "an excise tax upon the defendant corporation for the privilege of exercising its franchise within the State."

The late Mr. Justice BRADLEY, Justices LAMAR, HARLAN and BROWN dissented. The dissenting opinion, written by Mr. Justice BRADLEY, appears in the reports as the last official words of that great jurist. Its conclusion is a vigorous protest against that policy adopted by State legislatures which fastens all the burdens of government on the business of transportation. Concerning the decision of the Court, he says: "Justices Harlan, Lamar, Brown and myself dissent from the judgment of the Court in this case. We do so both on principle and authority—on principle because, whilst the purpose of the law professes to lay a tax upon the foreign company for the privilege of exercising its franchise in the State of Maine, the mode of doing this is unconstitutional."

[1] 8 Wall, 148. [2] 142 U. S., 217.

If there has been one rule of law which has been heretofore considered as finally determined apparently beyond the possibility of a doubt, it is that a tax falls upon that upon which its amount is graded. This is the cardinal rule of the law which, while not always explicitly recognized, has lain at the foundation of all the decisions touching the power of the State to collect taxes from corporations engaged in interstate commerce. That a State has the right to tax the capital stock, the property of corporations, or to charge for its franchise is undoubted; but the way in which the State can exercise this right has of late been curtailed by the salutary rule, that a tax is void which, in reality, falls on interstate or foreign commerce. The name which the legislature gives to the tax has always been considered immaterial. Thus, except in the case of the Baltimore R. R. Co. *v.* Maryland, a case which it was hoped time and the more recent decisions of the Court had overruled, the name which the Legislature chose to give to a tax did not make it valid, when under another name it would be void. In Leloup *v.* Port of Mobile,[1] the fact that the tax was called a license fee for establishing an office and doing business in the State did not prevent the Court from declaring it void when applied to telegraph companies engaged in interstate commerce. But it now seems that, while calling a tax a license fee does not aid the law, calling it a franchise tax covers all defects.

It is true the legislature might have refused the franchise, though they could not refuse a license to carry on interstate business; but it has never been held that the power of refusal carried with it the power to impose illegal conditions, especially after the permission to exercise the franchise has been granted. This is principle involved in the decision in Barron *v.* Burnside,[2] which declared unconstitutional a State law requiring a foreign corporation, as a condition of doing business in the State, not to remove its causes to the Federal courts. The right to refuse to allow the foreign corporation to do business in the State did not

[1] 127 U. S., 640. [2] 121 U. S., 186.

carry with it an implied power on the part of the States to violate the spirit of the Constitution. Yet in the case from Maine the Court says: "As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to value of the business permitted, as disclosed by its gains or receipts of the present or past years. *The character of the tax or its validity is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment.* The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed."

The case Philadelphia, etc., S. S. Co. *v.* Pennsylvania,[1] differs from the one under consideration only in the name the legislature applied to the tax. In both cases the State taxed the gross receipts irrrespective of the source, whether they came from internal or interstate and foreign commerce. In other words, the tax was non-discriminating. In both cases one of the factors in determining the amount of the tax was the amount of business. It was this element which caused the Court to declare unanimously that the law of Pennsylvania unconstitutional. The professional and the business world applauded the decision.

It is true the Maine Legislature made the amount of the tax depend on another factor besides the earnings of the road, namely, the proportion of number of miles of line to the total mileage operated by the company. There is no question of the power of the State to tax the property

[1] 122 U. S., 320.

of a road as property, though used in interstate business, provided the property is within the State, but it has never before been maintained that a tax whose amount varied according to two factors was valid if, as a result, the tax fell on one subject under the control of the State, no matter how many other subjects beyond the control of the State were affected. The adoption of such a principle would render a tax by the State of New York on the amount of Chicago beef eaten by its citizens constitutional, provided the tax also depended on the total value of all butcher wagons in the State.

Perhaps, however, unconsciously, the principle by which the majority of the Court upheld the Maine law is, that the constitutionality of a State tax is to be tested by supposing all the States to pass similar laws, and then determining, in such an event, whether the same subject matter would be taxed twice. This principle was first recognized in Pullman Palace Car Co. *v.* Pennsylvania.[1] A tax on the capital stock of a company, based on the average number of cars which the company had within the State, was held to be constitutional, though the cars were engaged solely in interstate traffic. The Court sustained the law on the ground that if each State adopted this method of taxation the result would be that the property of the company was only taxed as property within each State, and that no property would be taxed twice over. Whatever may be said in favor of this principle, as one to determine whether property or persons are within a State for the purposes of taxation, or, as applied as in Palace Car Co. *v.* Pennsylvania, the distinction between the application of the principle in that case and its application to the one under discussion is obvious. A tax on property within the State, whether that property is engaged in interstate commerce or not, has been held to be constitutional; but previous to this last decision a State tax on the business of interstate commerce, whether carried on within or without the State, was always declared unconstitutional.

[1] 141 U. S., 18.

Yet, what else but a tax on interstate commerce is the result if each State can tax an interstate carrier of freight according to the receipts from such carriage within the State?

The freedom of commercial intercourse from the interference of local governments was the chief reason why we adopted a Constitution and became a nation. This freedom was supposed to extend, and we cannot but hope will yet be authoritatively determined to extend, not only to immunity from the legislation of a State hampering such commercial intercourse, but from this "interstate" or "combined State" legislation which has the same tendency. Legislation, whose effect on the commerce of the country, if attempted by one State would render it unconstitutional, surely cannot be made constitutional by all the State legislatures acting in concert.

THE RIGHT OF CONTRACTING WITH CITIZENS OF OTHER STATES.[1]—Mr. McMurtrie, in his comment on the expression of opinion by the Supreme Court of Pennsylvania, besides calling attention to the fact that the clause in the Constitution preventing a State from impairing the obligation of contracts would be ineffectual to preserve our liberties, if it was not for the commerce clause, by implication raises an interesting question of constitutional law. As long ago as the case of Bank of Augusta *v.* Earle, the right of a State to prohibit a foreign corporation, chartered under the laws of another State, from doing business in the State, has been undoubted. The only exceptions are corporations authorized by Congress, as instruments to carry out one of the powers delegated to that body, and corporations engaged in interstate and foreign commerce, or commerce with the Indian tribes. That corporations are not citizens in the sense that they have the right to enter and do busi-

[1] For the case and criticism referred to, see Comments on Recent Decisions, *infra*.