

In *Toomey v. Southern Pacific R. Co.*, 86 Cal., 374, plaintiff's son, a boy eighteen years of age, was killed by a special train of the defendant while walking along the tracks at a place 150 yards from a public crossing. There was no crossing of any kind where the accident happened, and deceased was a trespasser. The accident happened in the night; and the engine, which was running stern foremost, had no head-light, nor was the bell rung or the whistle blown at the crossing as required by law. None of the employees saw deceased until after he was hurt. The Court, without a jury, gave judgment for the defendant. The Court held that the whistle and bell were for the benefit of people using the crossing, not for trespassers, hence the

failure of the engineer to use them at the crossing was not negligence as far as decedent was concerned.

See, also, *Craddock v. Louisville & N. R. R. Co.*, 16 Southwest. Rep., 125 (Ken.), where plaintiff attempted to cross in front of a train going at the rate of fifteen to twenty miles an hour—unreasonably fast—within the limits of a village, and was struck and injured. Held: That he could not recover.

See, also, *Rome R. R. Co. v. Tolbert*, 85 Ga., 447; *June v. B. & A. R. R. Co.*, 153 Mass., 79; *Johnson v. Truesdale*, 48 Northwest. Rep., 1136; *Boyd v. Wabash Western Ry. Co.*, 16 Southwest. Rep., 909; *Georgia Pacific Ry. Co. v. Lee*, 9 South. Rep., 230 (Ala.).

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EDITORIAL NOTES.

By W. D. L.

AN article on the constitutionality of the leases of the Lehigh Valley Railroad and the New Jersey Central Railroad by the Reading Railroad Company will appear in the May number of the *AMERICAN LAW REGISTER AND REVIEW*.

THE WORK OF THE LATE MR. JUSTICE BRADLEY.—The death of Mr. Justice BRADLEY removes one who for the past twenty-one years has been a member of "the ideal tribunal." No one but his fellow-judges, who have come in daily contact with him, can rightly estimate the extent of the influence which he had on the development of jurisprudence; for we are told that it is in the consultation-room that merit, learning and the clearness of one's ideas are best tested. No show of knowledge which one does not possess, no glitter which apes ability, can long deceive

those with whom we are engaged in a common intellectual labor. And yet, even if we did not have the testimony of his colleagues, we could not have failed to realize the weight in the councils of a court which that man must have who, like the late Justice, evinced in his written opinions such an intimate acquaintance with all branches of the common and constitutional law of his own country and with the judicial systems of continental Europe, and who showed by the accuracy of his citations in oral statements of the law during the argument of a case the wonderful retentiveness of his memory.

The members of the profession have two sources from which they can judge a judge: the way in which he conducts the business of the court while on the bench, and his written opinions. The first, in a member of an appellate court, is the lesser of the two in importance, and yet no mention of the late Justice would be complete without some notice of his marvellous aptitude for what one may call "judicial business." It was wonderful to see the quickness and unfailing accuracy with which he applied abstract principles of law to the concrete cases which came before him in the Circuit Court. The highest compliment which a Pennsylvanian could give was paid to him by one of the leading members of the bar of that State, when he said: "In the manner of Judge SHARSWOOD, Justice BRADLEY cleared the list."

But it is from his reported opinions, and especially his opinions in cases involving the construction of the Constitution, that Mr. Justice BRADLEY will live in history. In a short time, so quickly do we forget the minor points of a great man's work, by these constitutional opinions alone will he be judged. Whether, as time passes, that judgment will become more or less favorable, depends largely on whether the future members of the Court follow his conceptions of the true meaning of the important clauses of the Constitution. For with our judiciary, as with mankind in general, greatness which comes from "ideas" endures only so long as those ideas influence human thought or conduct.

Nothing will show us more clearly the point of view from which Mr. Justice BRADLEY regarded constitutional questions than an analysis of some of the opinions and dissents written by him in the more important cases which came before the Supreme Court during his term of office. To examine first

The Slaughter-House Cases.

Few cases have been considered by the Supreme Court with a more abiding sense of their importance; few seem to be fraught with greater peril to the liberties of the individual citizen; few have had such little practical effect. The reason for this will probably be found in the fact that what the Court actually decided was not, as a constitutional question, of great importance. At the same time, the opinion of the Court contained statements of constitutional law of great moment. But to-day the dicta of the minority more nearly represent the attitude of the members of the Supreme Bench than do the dicta of Mr. Justice Miller, who spoke for the majority of his brethren. That the opinion of the Court went beyond what was actually necessary for the decision of the case is evident. The majority of the Court held that the Act of Louisiana, granting to a corporation the monopoly of slaughtering cattle over a territory 1,154 square miles in extent, and containing the city of New Orleans and adjacent territory, was constitutional. The business of slaughtering cattle, the Court maintained, was under the police power of the State, and the act was a police measure, legitimately framed to protect the health of the community. Mr. Justice Bradley, who was among those who delivered a dissenting opinion, admitted that if the measure was, in its operation, well suited to protect the health of the community, there would be no doubt of its constitutionality. He, therefore, agreed with the majority of the Court on the important question of law which arose in the case—viz., whether a State could create a monopoly to carry out its health laws; but he differed from the majority on the mixed question of law and fact—whether the law of Louisiana was a law

designed to protect the health of the people of New Orleans. He did not think it was, but, on the contrary, considered the law as establishing a monopoly of an important industry, without one iota of public expediency to recommend it.

In the opinion of the Court, however, Mr. Justice Miller, after stating the law to be one designed to protect the health of the citizens of the State, went on to uphold the power of the State to grant monopolies. He says: "The proposition is, therefore, reduced to these terms: Can any exclusive privileges be granted to any of its citizens or a corporation by the legislature of a State?" But, curiously, instead of discussing the power of the legislature to grant the exclusive privilege to carry out its police laws, he goes into the whole subject of monopolies, and upholds the power of the State to grant monopolies and privileges generally. It is this power that Mr. Justice Bradley and the other dissenting judges vehemently deny, and it is in connection with this denial that the late Justice sets forth with admirable clearness the following conception of the last amendments to the Constitution. These amendments declare that there is a citizenship of the United States, and they protect the rights which appertain to that citizenship from encroachment by the States. The rights of the citizen are the rights of free-born Englishmen. One of the most valuable is the right to carry on any trade and occupation, hampered only by reasonable restrictions. Furthermore, depriving a man by legislative enactment of his right to carry on a particular trade, is not only interfering with his right as a citizen of the United States, but also deprives him of his liberty and property without due process of law. This latter contention was dismissed without argument by Mr. Justice Miller. In his lengthy exposition of the question of "citizenship," however, that Justice advanced a radically different conception of the amendments. He thought they were, as a matter of fact, designed primarily to prevent discriminations by the State against the colored man, and, in their construction, this fact, which indicated their main object, should always be kept in view.

The only privileges and immunities which were protected by the amendments were those which affected citizens of the United States as such. Citizenship of the United States and citizenship of the State were, in his view, two different things. In the amendments those who are citizens of the States are pointed out, but the privileges and immunities of such citizenship are neither defined nor protected. The only rights which are protected from the encroachments of State legislatures are the privileges of the citizen of the United States, and these are those which belonged to the citizens of every national government. As an instance of a national privilege is mentioned the right of a citizen of the United States to go to the seat of the Federal Government. The rights of a citizen of the United States are not the rights of trade and commerce within a State. In fact, we can deduce from Mr. Justice Miller's opinion that all those rights which are exercised solely within the State, and do not pertain to the national government, are left for their protection to the discretion of State legislatures.

We hope there is little doubt that Mr. Justice Bradley's conclusion, that no State can create a monopoly pure and simple, would be adopted to-day by the Court, on the ground that granting a monopoly would be depriving the individual of his right to carry on a lawful calling, which right is his by virtue of his being a citizen of the United States, and perhaps also on the ground that it would deprive him of his property and liberty without due process of law.

Certainly, the words of the XIVth Amendment, as construed by Mr. Justice Miller, do not, as was intended, add any additional security to our liberties. The United States was a nation before the amendments; and the people of the States were members of that nation, and as such each had the right which belongs to the inhabitants of any free government to go to the seat thereof, travel from one part to another, or assemble to petition for redress of grievances. We cannot but believe that, as the importance of individual liberty becomes more and more impressed upon our minds, the following quotation from Mr. Justice Bradley's dissent will more and more fully echo our own sentiments and the sentiments of the great tribunal which he graced so long.

He says : "The mischief to be remedied (by the amendments) was not merely slavery and its incidents and consequences, but that spirit of insubordination to the national government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure and led to much unequal legislation. The amendment was an attempt to give voice to that strong national yearning for that time and that condition of things in which American citizenship should be a sure guarantee of safety, and in which every citizen of the United States might stand erect in every portion of its soil in the full enjoyment of every right and privilege belonging to freemen, without fear of violence or molestation."

This strong statement of the belief that the amendments provided for the complete protection of individual liberty will do more to preserve the name of the great jurist than probably any other single opinion of his in the reports.

The Legal Tender Cases.

The keynote of the late Justice's opinion of the powers of the Federal Government is found in his expression in the *Legal Tender Cases*:¹ "The United States is not only a government, but a national government." As such, he argued, it has all those powers which rightly belong and are necessary to the preservation of the nation. The real question involved in the *Legal Tender Cases* was with him, as with Mr. Justice Field, who dissented, whether a national republican government, in the exercise of its control over the currency of the country (with complete control over which, Mr. Justice Bradley contended, it is, as a national government invested), can incidentally take the property of one man and give it to another. This is what making bills "legal tender" means. No one can read Mr. Justice Field's dissent on this point without being impressed with its force. The question itself is one of those on which men of trained intellects will always hold different views. The power of the government to protect and preserve itself, and the right

¹8 Wall., 555.

of the individual to his property, are two fundamental principles in constitutional law. In the facts of the Legal Tender Cases they apparently came in direct conflict. The national government, from its nature and the duties and responsibilities which devolve upon it as defender of the people from domestic and external violence, undoubtedly ought to possess greater control over individual liberty and property than the State governments. At the same time it is equally true that there are principles of individual liberty which a national government ought not to be allowed to trample under foot. No one would pretend for an instant that the property of all men over six feet high could be confiscated by the national government on the pretence of saving the country. On the other hand, a tax on all creditors of twenty per cent. on their debts, collected when payment was made, would undoubtedly be constitutional. The facts of the Legal Tender Cases stand between these two extremes. We think that Mr. Justice Bradley was right. It is certain that the majority of the bar and of laymen approve of the decision. The value of his opinion, however, lies not in the particular conclusions to which he came from the facts before the Court, but in the point of view which the opinion adopts toward the powers of Congress. To say that this view will remain and grow in favor with the bench, the bar and the whole country, is saying nothing more than that we will continue to be one people, under one *national* government.

*Chicago, St. Paul, etc., R. R. Co. v. Minnesota.*¹

Mr. Justice Bradley differed with the majority of his brethren in his last years of service on the bench on a subject which is likely to be one of great importance during the next decade. As in the Slaughter-house Cases, the question arises out of the XIVth Amendment. It is also the result of the laws of some of the States which appoint railroad commissions, vested with power to regulate the rates of fare charged by common carriers on passengers and merchandise transported from place to place in the

¹134 U. S., 418.

State. In the above case the majority of the Court, Mr. Justice Blatchford writing the opinion, held, that, while a grant to the directors in the charter of a railroad of the right to regulate the rates of fare does not prevent the States from declaring subsequently, through a general law, that all rates of fare should be reasonable, yet, nevertheless, a State cannot prescribe *unreasonable* rates. And the majority further decided that the judiciary are the final arbitrators of the question, *what are reasonable rates?* If, therefore, the legislature directly fixed unreasonable rates, or the commission appointed by the legislature fixed rates unreasonable in the eyes of the Court, the act was in contravention of the XIVth Amendment, in that it deprived the railroad of its property without due process of law.

Mr. Justice Bradley, in his dissent, took the position, that since the legislature had the power to fix the rates to be charged for public services, such as the transportation of passengers and goods, it should be the final tribunal to determine whether a specific rate is reasonable. And, furthermore, the question of the proper specific rate in any case being essentially an "administrative" question, the State legislatures could constitutionally delegate the power to determine the rate of fare in any specific instance to a commission, or even to the courts. In such a case the courts would act as a commission and determine an administrative or, in other words, an *executive* question. Thus the courts became, as far as the act relating to railway fares was concerned, the executive. Under the acts of the legislature which simply provide general rules for the guidance of the courts in prescribing the rates of fare in any instance, the judges determine the rate as would a railroad commission, or the governor of a State under similar circumstances. But it was for the legislature to say who should determine in a specific instance the rates to be charged by one carrying on a public employment. The proper rate to charge is a legislative and executive but not a judicial question.

In the present confused state of our ideas concerning what is a judicial, what is a legislative, or what is an

administrative or executive question, no one can say, with full confidence that his opinion can be sustained by the trend of authority, whether the reasonableness of a rate of fare, charged by a common carrier, ultimately will be considered a judicial question, as the majority of the Supreme Court consider it, or, with Mr. Justice Bradley, regarded as a legislative question. But certainly the last position appeals to us as the more consistent of the two. The word "reasonable," applied in connection with the power of the legislature to prescribe the charges for public employments, either means something or nothing. If it means nothing, then the legislature has the right, as Mr. Justice Bradley claimed, to prescribe any rate of fare it chooses. This is only another way of saying that the rate established by the legislature, either directly or through a commission, or court sitting as a commission, is necessarily reasonable, not simply *prima facie* reasonable. The act of Minnesota, which the Court declared unconstitutional, attempted to do this very thing. The majority, therefore, took the position that when they had said in *Munn v. Illinois*, that the legislatures of the States had power to fix reasonable rates for public employments, the word reasonable meant something. The State legislatures alone being able to prescribe what is reasonable, the reasonableness of any rate becomes a fit subject for judicial investigation.

Now, the inevitable consequences of this position, while there are not palpable absurdities, are, nevertheless, to say the least, extraordinary, in the extent of the power which they place in the hands of the courts, and the way in which they tie the hands of the State legislatures in respect to subjects over which it has always been considered they had absolute control—*i. e.*, *the subjects under the police power of the State.*

For instance, it may fairly be argued that in any specific instance there is more than one rate which may be said to be reasonable, but no one can deny that there are possibilities of rates being unreasonably high as well as possibilities of rates being unreasonably low. If, then, a legislature has no right to fix anything but a reasonable rate,

suppose no rate is fixed by positive act of the legislature, and the company, under permission of the legislature to "fix rates," fixes a rate unreasonably high? The courts, in an action by a shipper who had paid an unreasonably high rate, would have either to allow him to recover, and in so doing determine what was a reasonable rate for the service of the common carrier, or affirm that the legislature, through the directors of the company, had prescribed an unreasonable rate. Whether under the Constitution of the United States the legislatures of the States can prescribe rates of fare that are unreasonable, may be a question, but it certainly cannot be open to doubt that no State court would imply that the State legislature, by its failure to specify or prescribe any rates of fare, had impliedly sanctioned any rates of fare, no matter how unreasonable, which a carrier company may choose to charge. Under the view of the majority, therefore, State Railroad Commissions that are not courts are utterly useless. Not only must their conclusions as to the reasonableness of any rate be reversed by the Judiciary, but the Judiciary possesses a right, without a commission, to declare, at the suit of any individual, that the fare charged by a railroad company is unreasonable, and, therefore, contrary to the will of the State legislature, which, as a matter of courtesy, must be presumed to have provided that the company could only charge reasonable rates.

It may be stated as a general rule that the power to do what another considers reasonable is no power at all. For the last fifty years the courts have been upholding the power of the State to make police regulations. The right of the State to prescribe what a man shall charge when he is carrying on a public employment, as a railroad or a warehouse, was based on this police power. It is now proposed to take away the power by limiting the discretion of the legislature to what the courts shall think reasonable. It seems to us that the whole theory on which the right of the State to regulate public charges is based is thus disregarded. It was thought to be based on the fact that when a man takes up an employment, whose proper conduct is

of paramount interest to the community, he does so subject to the right of the public to regulate his actions. The will of the people in this as in other respects is expressed through the acts of their representatives in the legislature. The opinion that the reasonableness of the act of the legislature is a judicial question, substitutes the will of the judges for the will of the people. Mr. Justice Bradley clearly foresaw this, and deeply regretted the inevitable conflict between the courts and the legislature.

The Commerce Clause.

Outside the interpretation of the amendments, the most important work of the Court during the late Justice's term was the development of the law relating to interstate commerce. No other Justice, except Mr. Justice Miller, has played such an important part in the development of this, perhaps the most complicated branch of constitutional law, and the one on whose proper application rests the future industrial prosperity of the country. Mr. Justice Bradley and his associates found the law relative to interstate commerce involved in doubt. To-day, as a result of their labors, many principles which can be applied to the majority of new cases as they arise have been firmly established. With the most important and far-reaching of these the name of Mr. Justice Bradley, together with that of Mr. Justice Field, will always be indissolubly connected. The question of the nature of the power of Congress over commerce had often engrossed the attention of the Court. Some judges thought the power was concurrent in the States, others exclusive in Congress. The members of the Court, during the time of Chief Justice Taney, seemed to labor between two difficulties. If the States had a concurrent power over commerce, there appeared to be no limit to the extent of the possible interference of State legislatures in the intercourse between citizens of different States. The main purpose of the "more perfect union" was to prevent this interference. On the other hand, if the power was not exclusively in Congress, were not the State pilot laws unconstitutional?

Mr. Justice Curtis apparently solved this difficulty in *Cooley v. Port Wardens*, when he pointed out that the nature of a Federal power depended upon the subjects over which it was exercised; and, therefore, as commerce embraced a multitude of subjects, it was evident that over some, as pilots, the concurrent power of the State extended, while others, as imports in the hands of the importer, were exclusively under the control of the Federal Government. During the time of Justices Miller, Field and Bradley, a complete change has taken place in the attitude of the Court, and an important rule, first emphasized by Chief Justice Marshall in *Gibbons v. Ogden*, has been firmly established. Chief Justice Marshall had said: . . . "All experience shows that the same measure or measures, scarcely distinguishable from each other, may flow from distinct powers, but this does not prove that the powers themselves are identical."¹ This means that a State, in the exercise of her reserved powers, can pass many laws, such as pilot laws, which it would be competent for Congress to pass in the exercise of the power over commerce. The fact that the power may be exclusively in Congress, does not prevent the State from making a law whose purpose, as disclosed by its terms, is fairly intended to improve the internal commerce of the State, or to protect the health and morals of the people, from being a constitutional law, though Congress might have passed a similar law in the exercise of one of her exclusive powers. As far as interstate commerce is concerned, the adoption of this principle ends the confusion which arose from discussing a concurrent power of the State over a subject which, as interstate and foreign commerce, is essentially national. One cannot but believe that its recognition is a distinct advance in our constitutional law. For, from the standpoint of political science, one of the purposes of that law is to separate things national from things local. In the complete development of constitutional law, therefore, there can be no such thing as a subject which is at once partly national and partly local. Natural-

¹9 Wh., 204.

ization, for instance, ought to be a national matter or a local or State matter. To declare that it is both would be to invite confusion. The realization that interstate commerce, as such, is solely a national matter, but that nevertheless there is nothing to prevent the States, in the exercise of their reserved powers, from passing laws which Congress might pass in the exercise of its exclusive power over such a commerce, which is mainly due to Mr. Justice Field and the late Justices Miller and Bradley, has, therefore, done much to clarify our ideas on constitutional subjects.

An important adjunct to the above-mentioned theory, in regard to the consequences of an exclusive power in the Federal Government, is the doctrine which was developed simultaneously with it, and known as that of the "silence of Congress." When the Court regarded the exclusive power of Congress over commerce as not preventing the States, in the absence of conflicting congressional legislation, from affecting commerce in the exercise of their police powers, it immediately followed that any law of the State, no matter how much it obstructed interstate commerce, such as a bridge over an important river, was entirely within the power of a State to enact, provided its main object was one which it was competent for a State to undertake. Such a result was to be profoundly deplored. Justices Field and Bradley, in a long line of cases, commencing with *Welton v. State of Missouri*,¹ took the old distinction between things over which Congress was supposed to have an exclusive control, and those over which the States were supposed to have a concurrent power, and formulated and applied the now famous constitutional doctrine, that the silence of Congress respecting regulations of subjects in their nature national must be taken by the courts as an indication of its will that commerce in this respect should be free from State regulations; but over certain other subjects, such as pilots, over which it used to be contended that the concurrent power of the States extended, then the non action or silence of Congress is no indication of its will that commerce in this respect should be free from

¹91 U. S., 275.

State regulations, and, therefore, State laws which affect these subjects do not conflict with the will of Congress. Thus, though the way of regarding the power of the States in respect to commerce was modified, hardly a case had to be overruled.

The practical effect of this interpretation of the commerce clause of the Constitution is a masterpiece of judicial legislation. It requires that the consent of the Federal authority should first be obtained before a particular locality essays to embark on legislation, which, however necessary to preserve the morals of the citizens, profoundly affects the commerce of the whole country. But when once the whole nation decides that such local legislation may, in some instances, be desirable, the particular regulations are enacted by the States, which alone are familiar with local conditions.

This examination of the opinions of the late Justice might be continued indefinitely. We cannot dignify a sketch which has simply touched the outskirts of his work with the name *review*. When we look over the long line of decisions with which his name is connected, a feeling akin to awe and reverence comes over us. Of awe, at the magnitude of the work ; of reverence, at the greatness of the intellect which solved such a variety of problems. Surely, the late Justice was one of those men of whom we, as Americans, can be justly proud. He combined in his own person and character the two strong points of the Anglo-Saxon : a great and wide practical knowledge of men and things, combined with the power of concentration and subjective analysis. At his death, the bench, bar and country lost one who, for the clearness of his thought and for the thoroughness of his acquaintance with all subjects connected with his profession, was perhaps without a superior in the history of our judiciary.

NOTICE.

Book Reviews, omitted from this number on account of lack of space, will appear in the May issue.