EDITORIAL NOTES.

By W. D. L.

The Proper Canon of Interpretation of Bills of Rights in a Written Constitution.

I.

The Next Great Question of Constitutional Law.

We hope there are few of our readers who have failed to see Mr. McMurtrie's interesting note entitled "Constitutional Law," which appeared in the "Comments on Recent Decisions" in the June number of this year. In this squib the writer attacks what is called a "modern notion of constitutional law." To get a clear idea of what is meant by this, the reader should turn to an article by the same author in the January number of the American Law Register and Review, on a "New Canon of Constitutional Interpretation." This article was a criticism of certain expressions of opinión by the Supreme Court of the United States in the now celebrated case of Budd *v.* New York.[1] In that case it will be remembered the majority of the Court held that the State of New York had the right to fix the charges of grain elevators, because the business is of a semi-public character, the reasoning being similar to that employed in Munn *v.* Illinois.[2] A minority of the judges held that the business of conducting a grain elevator was not public in the sense that a railroad business is public, and that it was against the Constitution of the United States for a State to regulate prices. The general attitude of the Court is well expressed by Mr. McMurtrie when he says:[3] "And yet, while the sole question was the power of a State to regulate prices charged by a grain elevator, not one person, counsel or court, seems to have started with the simple inquiry, Where is the clause in the

[1] 143 U. S., 517 (1892).
[2] 94 U. S., 113 (1876).
[3] p. 5. Supra.

Constitution which prohibits such a thing? On the contrary, time-honored sentences from the Magna Charta, supposed to be embodied in the Constitution of the United States, was the nature of the argument relied on. And all we can infer from the judgment is that it is not improper to apply the principles of the Magna Charta to exclude the power of the State to name prices for commodities or services."

The further commentary on this line of argument is "that the climax is arrived at when the inalienable right to *life, liberty and the pursuit of happiness* is gravely asserted to be a ground for refusing to enforce a statute like this;" and his conclusion is—and we believe it is a correct forecast—that "we shall be met hereafter with the necessary deduction from these opinions—a new canon of constitutional law, viz., that a statute interfering with 'natural rights' must be shown to be authorized, not that it must be shown to be prohibited."

To explain the position of the Court more fully. The Fourteenth Amendment provides that "no State shall deprive any person of life, liberty or property without due process of law." These words, "due process of law," the Court would appear to think do not simply mean due as expressed by the Act of the State legislature. Only such Acts are due as conform to those *principles* of individual liberty, miscalled "natural rights," which are expressed in such documents as the Magna Charta and the Declaration of Independence. The more particular development of these *principles* is left for future cases. In the case of Budd *v.* New York they were impliedly held to embrace the prohibition on the State from passing any laws which (without, and perhaps with, compensation) prohibited a person from selling his services or goods at such prices as he might desire.

It is not our purpose here to discuss the wisdom of the particular application of this way of regarding the Fourteenth Amendment, but to discuss the general attitude toward constitutional law and the interpretation of written constitutions which leads to this way of regarding the amendment, and the true meaning of the term "due

process of law," to which attitude and method of interpretation Mr. McMURTRIE is so much opposed.

The habit of mind which makes one look at the Fourteenth Amendment as prohibiting the States from passing laws which our forefathers would have called "against natural justice," and we, in the stricter parlance of modern political science, call "against the first principles of civil liberty," springs, we believe, from regarding State Constitutions as instruments for conferring, and not for taking away power. For instance, Mr. Justice BREWER, who wrote the opinion so much objected to by Mr. McMURTRIE in Budd *v.* New York, says, in State *v.* Nemena Co.:[1] "The object of the constitution of a free government is to grant, not to withdraw, power. The habit of regarding the legislature as inherently omnipotent, and looking upon what express restrictions the constitution has placed upon its actions, is dangerous and tends to error. Rather regarding first those essential truths, those axioms of civil and political liberty upon which all free governments are founded; and secondly, statements in the bill of rights upon which the governmental structure is reared, we may then properly inquire what powers the words of the Constitution, the terms of the grant convey."

This general attitude toward the interpretation of State constitutions tends to give the widest possible meaning to the words, to be found in the Bill of Rights of nearly all State constitutions, viz., "due process of law" or "the law of the land." It leads to the broad meaning which many would give this expression when they find it used in the Constitution of the United States as a prohibition against the State legislatures.

The fundamental difference between some of the members of the Supreme Court and Mr. McMURTRIE lies in the difference in their way of looking at constitutional law considered as creating safeguards of civil liberty against encroachments on part of the States. It is the old controversy between the strict constructionist and the lib-

[1] 7 Kansas, pp. 54–5.

eral constructionist transferred to a new field, and in which many, as Mr. McMURTRIE, who is a staunch defender of Federal power,[1] have changed sides. Just as men like Chief Justice MARSHALL strove to give what they considered a reasonable, and which we may call a liberal, construction of the powers of the Federal Government, so to-day men like Mr. Justice BREWER endeavor to give a similar liberal interpretation to all clauses designed to protect the individual against government, be that government National or State.

The first century of the development of constitutional law was so thoroughly taken up with the discussion of the division of power between the Federal and State governments, and individual and State rights were so confused by the vast majority even of our best lawyers, that the principles of individual liberty were wholly neglected. The words of the Declaration of Independence were in the mouths of all, but few seem to have reduced the principles of civil liberty there only shadowed forth to any concrete form, and to all intents and purposes they remained, and largely remain to-day, what Mr. McMURTRIE calls them, "high-sounding phrases."

Thus it came to pass, as men thought little of the true principles of civil liberty, that they accepted from the death of Chief Justice MARSHALL, almost without question and as an axiom of constitutional law, the formula that a State legislature had all power not expressly taken away from it by the National or State Constitution. Mr. McMURTRIE speaks of a departure from that axiom in favor of broadening the sphere of civil liberty not only as unwise, but "as a modern idea of constitutional law." It is our desire, in the Editorial Notes for September and October, to take the two questions raised by these two assertions up in their order and discuss them. We believe that the proper answer involves the *next great question of constitutional law.*

[1] See his answer to Mr. BANCROFT, entitled Plea for the Supreme Court.—Observations on Mr. GEORGE BANCROFT'S "Plea for the Constitution," in which he ably defends the final decision of the Court in the legal tender cases.