MISCELLANEOUS WRITINGS

OF THE LATE

HON. JOSEPH P. BRADLEY,

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, WITH A SKETCH OF HIS LIFE BY HIS SON, CHARLES BRADLEY, A.M.

ASD A

REVIEW OF HIS "JUDICIAL RECORD,"

ΒY

WILLIAM DRAPER LEWIS,

EDITOR OF THE "AMERICAN LAW REGISTER AND REVIEW,"

OF PHILADELPHIA, PA.,

AND

AN ACCOUNT OF HIS "DISSENTING OPINIONS,"

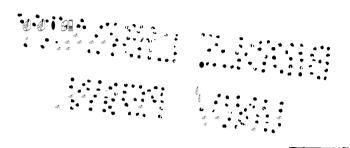
BY THE LATE

A. Q. KEASBEY, Esq., OF NEWARK, N. J.

EDITED AND COMPILED BY HIS SON, CHARLES BRADLEY.

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PREFACE.

The death of my father, Joseph P. Bradley, on January 22, 1892, placed in my hands as his sole executor, all his papers and MSS., a large and varied collection. Appreciating its value and importance, I have been engaged for some years in examining and arranging it in convenient form, and after submission to several distinguished and learned friends of my father, I have, at their earnest solicitation, undertaken to gather together those heretofore unpublished and unspoken thoughts of his, which he habitually wrote down in all manner of memoranda, record and common-place books, as they became settled convictions of his mind.*

To these I have added such public addresses and lectures as seem pertinent to such a collection. But I have endeavored to eliminate all strictly *legal* subjects,? except the lecture before the law students of the University of Pennsylvania, it being the purpose of this volume to record in a permanent way his acquisitions in other departments of thought than the law. His legal reputation will be judged by his opin-

^{*} See essay, "Experience or Self Improvement."

[†] See note to Preface.

ions from 9th Wallace to 141st United States, which, in the language of Chief Justice Fuller, "constitute a repository of statesman-like views and of enlightened rules in the administration of justice, resting upon the eternal principles of right and wrong, which will never pass into oblivion."

In presenting these thoughts of Mr. Justice Bradley. it should be borne in mind, therefore, that they include only such as are appropriate to a collection of miscel-Much, probably three-quarters, of the time occupied in studies distinct from those incident to the prosecution of his profession, was devoted to mathematics, his favorite subject, and the results of his thoughts and work in that department of science are found recorded in many places, whole blank books being filled and reams of paper covered with solutions and discussions of various problems, indicating profound knowledge of and familiarity with the principles of astronomical, geometrical and physical mathe-But the very nature of the work is such as matics. to preclude its introduction into these pages. Still certain entries in his "Records" have seemed worthy of preservation, if not for their own novelty, at least as an index to this phase of the mental acquirements of this many-sided man.

That these studies were not superficial, but deep and thorough, is evidenced by an examination of his correspondence, in which is found the letters of expert engineers, practical mechanics and even college professors, soliciting his advice and his judgment on mechanical and scientific devices and methods.

It is evidenced, also, as applied in his dissection of complicated patent litigation before the Supreme Court of the United States, in which his pre-eminence has been so forcibly maintained by that leader among great American patent lawyers, Mr. George Harding, of Philadelphia, who says: "In that branch of law (patent), as a judge, he has never been surpassed, if he has been equalled. No matter what department of the arts was involved, mechanics, chemistry, electricity or steam engineering, he *mastered* the subject."

Still another subject to which he devoted much time and labor was genealogy." To a complete history of his own family, with all its ramifications in this country, involving a large correspondence and personal inspection of old town records and documents in Connecticut, he added the compiling of the history of his wife's family and connections (Hornblowers, Bumets, Gouvemeurs, etc.), besides the records of many collateral branches, all duly preserved in MSS., necessitating that manual and mental labor and application that so astonished those who only knew him by his work as lawyer and judge. As his

^{*} The Bradley Family of Fairfield." Published privately in Newark, N. J., 1894.

friend and eulogist, Hon. Cortlandt Parker, says: "I am free to say that it has not ever happened to me to meet a man informed on so many subjects entirely foreign to his profession, and informed not slightly or passably, but deeply-as it seemed, thoroughly on them all. Literature, solid or light, in poetry or prose; science; art; history, ancient and modem; political economy; hieroglyphics; modem languages, studied that he might acquaint himself with great authors in their own tongues; the Hebrew and kindred tongues, that he might perfect himself in biblical study; mathematics, in knowledge of which he was excelled by few-all these were constantly subjects of his study."

It was this all-absorbing thirst for knowledge, this determination to master and digest whatever subject came under his observation, that forced him to devote his every hour to some new acquisition, and yet without detriment to his reputation and obligations as an occupant of that great and laborious office which he held. It is fortunate that he has left us some monuments of all that study, of that great intellect. Posterity may justly accord him that niche in the history of the Supreme Court to which he is entitled. This record will preserve in some small degree the results of those hours of midnight toil-though to him a pleasure—which only his family knew of, and which it would be criminal to consign to the waste-paper basket.

Previous to Mr. Justice Bradley's ascending the Bench in 1870, he had for thirty years practiced law in Newark, N. J. While thus prosecuting his profession, he was not neglecting his duties as a citizen or refusing the benefit of his wide influence and knowledge to religious, educational and philanthropical organizations or objects. On the contrary, he was an active participant, as officer or director, in financial or other business corporations, and the frequent adviser in the affairs of educational institutions, as trustee or otherwise. Always pronounced, but not extreme in his views, he was called on to address his fellow-citizens whenever the necessities of the emergency seemed to require the peculiarly forceful and thoughtful presentation of a serious public question, with which his speeches are imbued.

We have, therefore, included some few of these addresses, as an illustration of that force which made him a power in the community. Then, turning to another mental characteristic, we present some specimens of his religious and philosophical essays and discourses-a department in which he was most happy in conveying his ideas to an audience, imparting life and interest to an otherwise heavy subject. With these there are intermingled certain miscellaneous sayings, exhibiting the versatility of his mind and accomplishments. In truth, he was the personification of

Bacon's famous epigram: "Reading maketh a **full** man; conference, a ready man, and writing, an exact man."

I also include in these pages the secret history of the conferences of the U. S. Supreme Court, in the form af a "Statement of Facts," signed by the majority of the Court, relating to the re-hearing and final decision of the "Legal Tender" cases, in 1870. This document, now published for the first time, should emphatically dispose for all time of the erroneous and unjust aspersions cast by some writers and publicists upon the honor and action of the Court at that time.

CHARLES BRADLEY.

NEWARK, N. J., 1900.

NOTE.—Further reflection has produced the conviction that two papers on the judicial career of Mr. Justice Bradley could be appropriately inserted in these pages, and it is with undisguised pleasure that I have introduced them at the beginning of the volume.

The first, entitled "The Work of Mr. Justice Bradley," by William Draper Lewis, Associate Bditor of *The American Law Register and Review*, of Philadelphia, Pa., and the second, "Dissenting Opinions--Mr. Justice Bradley," by A. Q. Keasbey, of Newark, N. J.

To both of these gentlemen the latter having since passed away—I publicly acknowledge the deep sense of my obligations and gratitude

JOSEPH P. BRADLEY.

Joseph P. Bradley n-as born March 14, 1513, at Berne, Albany County, N. Y. His ancestors for generations had been farmers and, his father, Philo Bradley, followed in their footsteps. Hence his early years were passed in the laborious but healthful duties of a farmer's son. His early schooling consisted of a few months in the winter of each year at the country school-house, but his natural aptitude for learning soon exhibited itself so strongly that the attention of the Reformed Dutch minister of the parish was attracted to him, and through his instrumentality he was afforded the assistance of the church in obtaining a college education. After a short period spent in teaching school for the purpose of raising a little money, and under the tutelage of Mr. Myers, the minister above referred to, he prepared for entering Rutgers College, an institution identified with the Dutch Church, at New Brunswick, N. J. Joining the freshman class in September. 1833, he soon found himself able to enter the class above, and hence became a member of the famous class of 1836.

After graduation he secured the position of Principal of the Millstone, N. J., Academy, but not long after he was persuaded by two of his class-mates—Frederick T. Frelinghuysen and Cortlandt Parker-to go to Newark, N. J., where they resided, and accept a position in the office of Mr. Archer Gifford, a leading lawyer and at the time Collector of the Port. Arriving in Newark, November 2, 1836, he immediately

entered Mr. Gifford's office and began the study of law. The salary of his office as Inspector of Customs was sufficient to defray his expenses until his admission to the Bar, in November, 1839. In May, 1840, he formed a business connection with Mr. John P. Jackson, and from that time he had constant employment in his profession.

Marrying in October, 1844, Mary, the youngest daughter of the late Chief Justice Hornblower, of New Jersey, his home became the centre of a wide circle of friends.

Devoting himself assiduously to his profession, his ability and force soon made themselves felt and his services were sought after by the most powerful private and corporate interests of the State, until he became, admittedly, the leader of the Bar in New Jersey, and through his frequent appearance in the courts of the United States, earned even a wider, if not a national reputation.

The opportunity presenting itself, President Grant's attention was called to his pre-eminent fitness for the vacancy then existing on the Bench of the Supreme Court of the United States, and on February 7, 1870, he nominated him as an Associate Justice of that court, and his nomination was confirmed by the United States Senate, March 21, 1870.

At the mature age of 57 years, and after thirty years of active and continued pursuit of his profession, leavened with intellectual diversions in almost every scholarly path, broadened by foreign travel and in robust health, he was singularly well prepared for the burdens of his office and the discharge of its duties and responsibilities.

It was fortunate that it was so, for his associates, with whom he must cross swords in judicial conference, were concededly distinguished for their ability Salmon P. Chase-then Chief Justice and reputation. -Noah H. Swayne, Samuel Nelson, Nathan Clifford, David Davis, Samuel F. Miller and Stephen J. Field, all tested in the crucible of public life and experience these were the men on whom he must impress the stamp of his pow-er and force, or sink into judicial obscurity. That they were "foemen worthy of his steel," he was proud to acknowledge. That he obtained their recognition as a peer his, "Judicial Record" And the questions quickly coming demonstrated. before the Court, as the result of the war and reconstruction periods, soon gave him the opportunity to establish his position on the Bench-a status never after questioned, even amid the changing personnel of the court.

Immediately removing from Newark, he purchased the large residence, No. 201 I Street, built by Stephen A. Douglas and occupied by him till his death. he lived for twenty-two years, dispensing a generous hospitality and enjoying, when opportunity permitted, the social life of the Capital. Many old friends sur-In the Executive Department of the rounded him. Government, George M. Robeson, Secretary of the Navy, was an intimate and welcome guest at his house. In the Legislative Department were Senators John P. Stockton and Frederick T. Frelinghuysen, both old friends and contemporaries at the Jersey Bar, while the latter, more than a friend, had been his companion since college days. Thus, he and his family were soon at home in Washington and quickly became identified with its interests and life.

The circuit allotted to him, the fifth, embracing all the Southern States, except the Virginias and Carolinas, necessitated his holding Court in their principal cities every spring, and the long journeys in warm weather were a severe tax on his strength. Notwithstanding, for ten years (until his circuit was changed), he never failed every year to visit and hold Court in either Galveston, San Antonio, Houston and Dallas, Texas; New Orleans, Jackson, Mobile, Jacksonville, Savannah or Atlanta, usually alternating yearly between the Texas cities and New Orleans, and the others named.

Of course, the labor incident to this circuit work was v-cry great, but his previous knowledge of the Civil Law, and French and Spanish jurisprudence, enabled him to dispatch it rapidly, and as he had reason to know, to the great satisfaction of the This large jurisdiction widened his Southern Bar. acquaintance and was the means of creating many warm friendships. In fact the universal courtesy which was extended to him by the citizens of the South, was a source of great gratification to him, and he was profuse (in the family circle) in his expressions of gratitude to the gentlemen who invariably entertained him at their houses. This was especially pleasing in view of his well-known Northern antecedents and opinions, and the writer has personal knowledge of his keen regrets, x-hen his assignment to the Third Circuit became proper.

For fifteen years or more, he spent his summers at Stowe, Vermont-a small village situated in the heart of the Green Mountains-the climate of which was most healthful and invigorating, and he became devotedly attached to it. Generally going North late in June, he would pay short visits to his sons in Newark, and his daughter in Paterson, N. J., and then stopping at "The Kaaterskill" in the Catskills, where he enjoyed, especially, the companionship of his friend George Harding, of Philadelphia, he would make his way to Stowe and remain till October, returning directly to Washington to be present at the opening of the Fall Term of Court. At Stowe it was that he had time and leisure to pursue so many of his favorite studies, and indulge his literary taste to the full. Taking with him his choice books, he surrounded himself with the atmosphere of literature, and to my mind, passed the happiest days of his later life.

Always a great reader and lover of books, Judge Bradley had early accumulated a large and varied library, embracing nearly every department of literature, which was a source of continual pleasure and pride to him. By constant additions, this library became very great, numbering about six thousand volumes. In addition, his law library, aggregating some ten thousand volumes, filled his home to over-flowing. It is interesting to know that this law library was secured by the Prudential Insurance Company, of Newark, N. J., and is maintained complete and entire, even to the pictures on the walls, in that company's magnificent structure in that city, erected on land owned by Judge Bradley for many years, and sold to it three years before his death.

Socially, Judge Bradley was a charming companion and notwithstanding the inroads on his time, enjoyed the refined surroundings of his position. Thus officially and personally brought into contact with

men distinguished in the various pursuits of life, his social life was most interesting. A characteristic habit consisted of his drawing a diagram of the table, immediately on his return from a dinner, with the names and seats of all the guests, adding a descriptive line, explanatory of the occasion, and pasting these cards in a book, which the writer now possesses, embracing a record of one hundred and eighty-nine dinners and including, of course, only formal entertain-This unique collection, covering a period of twenty years, gives an idea of his social surroundings, now interesting to peruse. Of course, the judicial element prevails in the guests at most of the boards, and varies with the changed personnel of the Court and Bar of the country during that period, as well as the White House circles under fire administrations-Grant, Hayes, Arthur, Cleveland and Harrison. And interspersed with distinguished diplomatic, army and naval names, are those of many known throughout the world for their political, scientific or literary achievements. Here we see him seated next to George Bancroft, Lord Houghton, Lord Coleridge; there, at the same board with Archdeacon Farrar, Dr. Oliver W. Holmes, James Russell Lowell and Lord Herschel1; again, the guests include Robert C. Winthrop and Mr. Joseph Chamberlain. And so on, either at his own table or as the guest of others. Such were the character of the men whom he met and talked with, and with his receptive mind the wealth and variety of information absorbed can be better imagined than described. And thus his life, though laborious to a degree, moved pleasantly along, with two celebrated exceptions.

Those were occasions which tested the metal that was in him, and his character stood the strain withaut developing a flaw. I refer to the Legal Tender Decision and the Electoral Commission. Subjected to the most unjust and cruel criticism, charged by ignorant journalists with almost every crime in the calendar, his nervous and sensitive nature suffered acutely. But the independent and self-reliant forces of his character-which had made him what he was-now stood him in good stead, and conscious of the rectitude of his motives and with a firm faith. in the correctness of his official opinions and acts, he courageously faced all detraction, all threats, all denunciation, and stood like a rock against the impotent assaults of enraged and disappointed partisans.

The recent death of Mr. Justice Field, who was his colleague on the Supreme Court Bench at the time, releases me from a silence imposed by Judge Bradley and Judge Strong, and enables me to introduce in these pages a "Statement of Facts" relating to the order of the Supreme Court of the United States for a re-argument of the Legal Tender question in April, 1870, prepared by the majority of the Court at that time-which is an absolute refutation of the unjust imputations cast upon his action in that matter by many writers,* some of whom were inspired by partisan antipathy and others by ignorance of the facts, and which have gained currency by reason of their long exemption from challenge. As introductory to

^{* &}quot;The life of S. P. Chase." by J. W. Shuckers, Chapter XXVIII.

Paul Leicester Ford's edition, "The Federalist." Introduction, p
XVIII.

[&]quot;Congressional Government," by Woodrow Wilson. Introductory, p. XXXVIII.

the "Statement" I have, with the author's consent, quoted largely from a letter of Senator George F. Hoar, of Massachussetts, refuting the charge that President Grant had, by the appointment of Judges Bradley and Strong, "packed" the Supreme Court for the purpose of securing the reversal of the Court's decision in the case of Hepburn vs. Griswold, otherwise known as the "Legal Tender" case.

The second occasion referred to-the Electoral Commission-is briefly touched on by himself in the accompanying volume. But his account gives little idea of the bitterness of feeling then existing, and the severe ordeal through which he passed and of which I have personal knowledge. Having attended the Columbian Law School, in Washington, during the winter of 1876 and 1877, I was fully aware of the suppressed

NOTE.—Prof. Woodrow Wilson, having had his attention called, by the editor, to the inaccuracy of his statement, wrote the following very manly and satisfactory acknowledgment:

PRINCETON, N. J., December 20, 1900.

MR. CHARLES BRADLEY, Newark, N. J.:

MY DEAR SIR; - I very much appreciate your letter of the sixteenth. I have for some time been convinced of the unfair imputations of the passage to which you refer in my "Congressional Government," but I have never had an opportunity of revising the text since its publication. It has many times been reprinted, but no change has been made in any part of it since its original appearance. Stereotyped plates are regarded by publishers as a very rigid finality. The change necessary in that passage would be very considerable, and I have never had a chance to make it. I very much hope that before very long I shall be allowed to revise at least that part.

Thanking you again for thus taking it for granted that I wished to know and speak the truth,

Very sincerely yours,

WOODROW WILSON.

excitement which pervaded all classes, and when finally my father was chosen to complete the organization of the commission, he, as well as all of his family, keenly regretted that the lot had fallen to him, thereby becoming (unjustly), in a sense, the final I say unjustly because he was by belief, by association, by past history, as staunch a Republican as any of those members of the Commission who were deliberately selected by reason of their known political predilections. hnd yet, he alone was expected to sink all political bias and act the judge merely. He realized fully the delicate position he occupied, and foresaw that whatever course he took would subject But that he would be assailed with him to criticism. all the venom of a serpent, that he would be charged openly with corruption, that he would be threatened with bodily injury, aye, even to the taking of his life this he did not forsee nor believe possible. And yet such was the case. As the proceedings of the commission advanced and the probable outcome was seen, the fury of the Democratic press, led by that scorpion of journalism, the New York Sun, knew no bounds. And this continued vilification soon affected the e&table minds of irresponsible individuals, until he was inundated by a flood of vulgar and threatening communications which would have unnerved a less brave and courageous man.

He soon ceased to either read the press or his mail and absolutely declined to see or converse with the horde of callers at his house. As a matter of fact, he was practically a hermit from the hour he left the sittings of the commission one day until it met the next, even his family seeing him only at meals. As

an inmate of his house during the whole period of the commission's existence, I speak with authority when I say that the reports of his consultations with prominent Republicans and members of the commission are false-false not only as to the fact, but the inferences which have been drawn from these false reports, and especially that venomous statement that he had read an opinion favorable to Mr. Tilden in the Oregon case to one or two of his Democratic associates, but that over-night he had been closeted with Republican magnates and came into Court in the morning and voted and read an opinion in favor of Mr. Hayes. statement having been credited to Judge Field, whether correctly or not, he called upon that judge to either prove it or retract it. Judge Field, then in California, wrote him saying that his remarks had been misinterpreted and exaggerated, and that he had said "nothing derogatory to his honor or integrity."

That he gave the most conscientious consideration to every point raised, and that his conclusions were irresistibly correct, is best evidenced by his opinions elsewhere printed in this volume. That he exhibited a courage not surpassed by any battle-field hero can only be appreciated by those who knew personally the bitterness of the time. That the threats against his life were not idle, and that the ansiety of his family for his personal safety was not exaggerated, became evident when we found that detectives, without solicitation or his knowledge, had been detailed by the then Secretary of the Navy to guard his house and his person. Fearless in the execution of the trust reposed in him, he had the satisfaction of living long enough to see his conduct approved by all fair-minded men and receive the sanction of popular opinion in the condemnation of Mr. Tilden's "cypher despatch" methods and that gentleman's permanent retirement to private life. But amongst the many evidences of endorsement received by him from all over the country, none appealed to him more than a testimonial of confidence and approval tendered him by the leading professional and business men of his old home—Newark, N. J. (Note). Blessed with great vigor of body and mind, he rounded out his long career with fullness and satisfaction, ever growing in judicial strength and reputation.

The death of his eldest son, William H. Bradley, in 1889, at the time an active lawyer in his old home at Newark, N. J., was a great blow, but hc showed no weakening of his powers until in the spring of 1891, when an attack of "la grippe "left him much enfeebled. He failed to recuperate his strength that summer and returned to Washington in October much debilitated. He took his seat on the Bench, however, at the opening of Court, but in a few weeks was compelled to retire by a general breaking up of his Fully realizing his approaching end, he calmly prepared himself and his affairs for the inevitable, and finally, peacefully passed away early on the morning of January 22, 1892, surrounded by all his family. Had he lived till March 14, he would have been 79 years old.

A man of the strongest personality-of deep feeling, tho' undemonstrative-his friendships were sincere and binding, and his family relations were most delightful.

And so ended a useful Christian life. May we emulate his sterling worth and character and strive to make as good an American citizen.

(NoTE.)

" NEWARK, N. J., March 7, 1877.

"Hon. Joseph P. Bradley,

"Justice *U. S. SupremeCourt*.

- " DEAR SIR :-Your friends and neighbors in this community have given you their sincere sympathy in your discharge of the duties imposed upon you as the arbiter of the Electoral Commission.
- "No weightier responsibility was ever incurred by any citizen than rested upon your casting vote, but your course has been watched by us with more of affectionate interest than of anxiety.
- "We had a life-long assurance that whatever of so-called political bias you might make manifest would be only the expression of deep-rooted convictions of the true interpretations of the Constitution and of devotion to republican government in its essence and purity.
- "We offer you our heart-felt congratulations, mostly for this, that it has given to you to distinguish a just line between the power and right of the States to choose a President and the unholy claim of one branch of Congress to usurp that power.
- "We are aware that in your action you have incurred virulent partisan censure. The road to fictitious greatness, to pretense instead of reality, lay in the other direction, The trial must have been severe, as the temptations you avoided, and the difficulties in your path were great, we the more congratulate ourselves that Newark and New Jersey, in the persons of yourself and Senator Frelinghuysen, have had so large and noble an office in the adjustment of a controversy so solemn as that of the right of a State to vote for the Presidency by its own methods and independent of the dictation and surveillance of Congress. The tendency of the House of Representatives to usurp judicial and executive functions is a danger far greater than any mere change of party rule.
- "But it is not our purpose to discuss the great issue you have already adjucated. We only desire to say to you in deep sincerity, that here at your home, where you have gone in and out before the people for many years, the old love and respect are builded up stronger by a new admiration of firmness in judgments that will be historic as they are heroic, and mark an era in the Constitutional law of our beloved country.

- "With all wishes for your health and happiness, we remain your attached friends:
 - " MARCUS L. WARD.
 - " JOSEPH A. HALSEY.
 - -SILAS MERCHANT.
 - "AMZI DODD.
 - "W. A. WHITEHEAD.
 - "THOS. T. KINNEY.
 - "J. WHITEHEAD.
 - " ABRM. COLES.
 - "CHARLES S. GRAHAM.
 - "JOSEPH WARD.
 - -ISAAC A. ALLING.
 - "MARTIN R. DENNIS.
 - "JOHN H. KASE.
 - "SAMUEL ATWATER.
 - "WILLIAM A. NEWELL.
 - "O. F. BALDWIN.
 - "H. N. CONGAR.
 - "IRA M. HARRISON.
 - "A. M. WOODRUFF.
 - "N. PERRY.
 - "THEO. MACKNET.
 - "Francis Mackin.
 - " J. D. Poinier.
 - " WILLIAM WARD.
 - "Thomas B. Peddie.
 - "BETHUEL L. DODD.
 - "W. A. MEYER.
 - "OBA. WOODRUFF.
 - "WILLIAM H. KIRK.

- "LEWIS C. GROVER.
- "S. H. PENNINGTON.
- "JOSEPH N. TUTTLE.
- "DANIEL DODD.
- "WILLIAM B. MOTT.
- "JOHN C. BEARDSLEY.
- "S. G. GOULD.
- "CORTLANDT PARKER.
- " P. H. BALLANTINE.
- "A. GRANT.
- " H. J. POINIER.
- "WILLIAM T. MERCER.
- "HENRY J. YATES.
- "[AMES H. HALSEY.
- "CHAS. G. ROCKWOOD.
- "A. L. DENNIS.
- "LEWIS R. DUNN.
- "THEO. P. HOWELL.
- "JAMES B. PINNEO.
- "J. M. DURAND.
- "JOHN R. WEEKS.
- "A.Q. KEASBEY.
- "JOHN W. TAYLOR.
- "GEORGE A. HALSEY.
- "JOSEPH COULT.
- "JOHN HILL.
- "ELIAS 0. DOREMUS.
- "SANFORD B. HUNT."

THE "JUDICIAL RECORD"

OF THE LATE

MR. JUSTICE BRADLEY.

BY WILLIAM DRAPER LEWIS, OF PHILADELPHIA, PA.

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 The first, in a membench, and his written opinions. ber 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 Nr. 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 Nr. 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 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. 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. contention was dismissed without argument by Mr. Justice Miller. In his lengthy esposition 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 Citizenship of the United States and citizenship of the State were, in his view, two different 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 The only rights which are protected from the encroachment 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 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. 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 securities 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

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 free men, 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. * " 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 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

^{• 8} Wall., 555.

Justice Field's dissent on this point without being im-The question itself is one of pressed with its force. 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 of the individual to his property, are two fundamental prin-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 estemal violence, undoubtedly ought to possess greater control over individual liberty and property than the State At the same time it is equally true governments. that there are principles of individual liberty which a national government ought not to be allowed to No one would pretend for an trample under foot. 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. think that Mr. Justice Bradley was right. tain that the majority of the bar and of laymen The value of his opinion, approve of the decision. 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 To say that this view will the power of congress. 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

CHICAGO, ST. PAUL, ETC., R. R. CO. V. MINNESOTA.* _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 Amend-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 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

^{• 134}U. S., 418.

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. 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. 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 they 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 pub-The will of the people in lic to regulate his actions. 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. Today, 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 Some judges thought the power was concurrent in the States, others exclusive in Congress. 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 es-tent 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 inter-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."* This means that a State, in the exercise of her resewed powers, can pass many laws, such as pilot laws, which it

^{• 9} Wh., 204.

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. 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. Naturalization, 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,' 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 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

^{* 91} U.S.. 275

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. 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 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.

* "DISSENTING OPINIONS"

ΟF

MR. JUSTICE BRADLEY.

BY THE LATE A. Q. KEASBEY, Esq., of Newark, N. J.

An interesting paper was read at the recent meeting of the American Bar Association, by Mr. Hampton L. Carson, of Philadelphia, entitled, "Great Dissenting It may be found in the Albany Law Journal for August 25, 1894. It was a happy thought to recall in chronological order the important dissenting opinions of the justices of the Supreme Court of the United States upon questions of constitutional law. The writer justly says that these opinions, viewed in mass for the last hundred years, constitute in a certain sense the best exposition of the views of two contending schools of constitutional interpretation, and enable us to grasp the living principles underlying the struggle between the expanding empire of national federalism, and the shrinking reservation of State sovereignty. He takes up in their order the great cases, the names of which have become fixed in the memory of all students of our constitutional history, as the names of famous battle-fields become landmarks in the progress of the He brings before us in vivid array, Chisholm's Executors v. Georgia; Marbury v. Madison; Sturges

[•] New Jersey Law Journal, October, 1894.

v. Crowninshield; McCulloch v. Maryland; Cohens v. Virginia; Gibbons v. Ogden; Dartmouth College v. Woodward; Osborne v. U. S. Bank; Brown v. Maryland; Craig v. Missouri; Ogden v. Saunders; Charles River Bridge v. Warren Bridge; Genesee Chief v. Fitz Hugh; the License cases; the Passenger cases; Prigg v. Pennsylvania; the Dred Scott case; the Legal Tender cases; the Slaughter House cases and others.

These names in themselves recall to the mind of every student of our constitutional history the phases of the varied contests which have marked the development of our national jurisprudence, and it is as Mr. Carson says, "of infinite value to gaze on the most hotly-contested battle-fields, while it is ennobling to know how heroes fought in defense of causes which they held dear." Indeed some of these contests carried on in the quiet chamber of justice, in Washington, with no flare of trumpets or waving of banners, will be in the long future of more interest and importance than any waged on our actual battle-fields. We commend this scholarly paper to the general student of our history, as well as to the bar, as one of fascinating interest.

But the special object of this note upon it, is to allude to the part taken by our great New Jersey Justice of the Supreme Court, in the contests that occurred during the twenty years of his judicial service. In the leading constitutional cases, he wrote few dissenting opinions. Like Marshall, he was strong and masterful enough generally to carry the Court with him. Mr. Carson, in his paper, speaks of only one dissenting opinion of Marshall, in Ogden v. Saunders, and says that this was the only great dissenting opinion which

occurred during his judicial career. And in the course of the paper only one dissenting opinion of Mr. Justice Bradley is alluded to, that which he read in the slaughter house cases, in which, with Mr. Justice Field, he urged, in energetic terms, that the fourteenth and -fifteenth amendments were intended for whites as well as blacks; that they conferred on all citizens of the United States the fundamental rights of person and property usually regarded as secured in all free coun-But this was not the only dissenting opinion of . Judge Bradley in matters of grave constitutional im-Indeed the very last opinion read by him, but five weeks before his death, was a dissenting one, and related to a branch of constitutional law, to which he had devoted his best powers throughout his judicial career-that of the scope of National authority in the matter of interstate commerce. To extend and secure this authority by judicial interpretation of the commerce clause of the Constitution had been his earnest effort in every case in which the question arose in any In a long line of decisions he had expressed his views with the logical power and persuasive earnestness which enabled Marshall to accomplish his great Only three years before his death, in his opinion in the Arthur Kill Bridge case, in the New Jersey Circuit, he had stated his views as to the scope of the commerce clause in their most advanced form. hundred years before, the State of New York had granted to John Fitch, the exclusive right to navigate her waters with vessels "moved by fire or steam," and continued it to Robert Fulton and Robert R. Livingston in 1803. Their assignee obtained an injunction from the Chancellor of New York to stop a Jerseyman

from running steamboats from Elizabethtown to New York City. But in 1824 the Supreme Court of the United States held the State law invalid, and Chief Justice Marshall laid down principles which have been reasserted in various forms and applied with increasing force to all instrumentalities of interstate intercourse in every phase of its development. In the Arthur Kill Bridge case these principles had been rudely assailed by the State of New Jersey in its turn, as New York had done a century before. Her legislature declared by joint resolution, that the waters of the Kill and the soil under them were hers by sovereign right, and that if the Congress should authorize a bridge, it would be a usurpation, and the sympathy of all sister States was invoked in the struggle of New Jersey for State rights. A law was passed also expressly forbidding any person or corporation to bridge any river dividing New Jersey from other States.

A law of Congress authorizing the Baltimore and New York Railroad Company to bridge the sound was passed, notwithstanding this State protest, and the company proceeded to do so. The Attorney General of New Jersey obtained an injunction and the work was stopped-as the New York Chancellor stopped Mr. Gibbons from running his steamboats, the Stoudinger and Bellona, from Elizabethtown to New York, in 1824. The case was removed to the United States Circuit Court, and this furnished Mr. Justice Bradley an opportunity to express his views on the subject of interstate commerce, and he did it with a vigor not surpassed by that of Marshall in Gibbons v. Ogden. He declared that "the power of Congress is supreme over the whole subject, unimpeded by State laws or

State lines, that in matters of foreign and interstate commerce there are no States; and that it must be received as a postulate of the Constitution, that the government of the United States is invested with full and complete power to execute and carry out its purposes, whether the States co-operate and concur therein or not." As to the claim of the State to ownership of the waters and the soil under them he said, "The power to replate commerce is the basis of the power to regulate navigation and navigable waters and streams: and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States has or has not the theoretical ownership and dominion in the waters, or the land under them; it has what is more, the regulation and control of them for the purposes of commerce, so wide and extensive is the operation of this power, that no State can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove such obstructions at its pleasure."

This case was taken to the Supreme Court, but the appeal was abandoned by the State, and the bridge was built, and now the Hudson River is to be bridged at the city of New York under a law of Congress, without opposition. Judge Bradley espressed his regret at the withdrawal of this appeal, for he was anxious for every opportunity to vindicate his views on interstate commerce and embody them in the judgments of the Supreme tribunal.

Certain cases afterward occurred, in which he felt that the Court was taking retrograde steps on this subject, which he deemed of vital importance.

One of them was Pullman's Palace Car Company v. Commonwealth of Pennsylvania, 141 U. S. 101, decided May II, 1891.

In this case the majority of the Court held, that "there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property within its jurisdiction, employed in interstate or foreign commerce," and that, "where the cars of a company within a State are employed in interstate commerce, their being so employed does not exempt them from being taxed by the State." The opinion of the Court was read by Mr. Justice Gray, and Justices Bradley, Field and Harlan dissented. Justice Bradley read the dissenting opinion, in which he asserted his well known views on the score of the commerce clause very strongly, saying that "A citizen of the United States, or any other person, in the performance of any duty, or in the exercise of any privilege, under the Constitution or laws of the United States, is absolutely free from State control in relation to such matters. So that the general proposition, that all persons and personal property within a State are subject to the laws of the State, unless materially modified, cannot be true." After a careful review of the cases he dissented emphatically from the result reached by the Court, and closed by saying: "The State can no more tax the capital stock of a foreign corporation than it can tax the capital of a foreign Pennsylvania cannot tax a citizen and resident of New York, either for the whole or any portion

of his general property or capital. It can only tax such property of that citizen as may be located and have a situs in Pennsylvania. And it is exactly the same with a foreign corporation. Its capital, as such, To hold otherwise, would lead to the is not taxable. most oppressive and unjust proceedings. lead to a course of spoliation and reprisals that would endanger the harmony of the union." The same dissent was filed in the case of Pullman's Car Co. v. Hayward, decided on the same day, in which it was held, that, "the cars of a company, let to railroad corporations, and employed exclusively in interstate commerce, may be tased in a State, and the tax apportioned among the counties of the State according to mileage of the railroads in each county, and levied in those counties." Judge Bradley regarded these cases as indicating a divergence from the line of decision which he had long striven to maintain.

Another case was the one already alluded to in which he read his last opinion, dissenting from the views of the majority. It was the case of State of Maine v. Grand Trunk Railroad Company of Canada, 142 U. S., decided December 14, 1891.

Justice Field read the opinion of the Court, holding that a State can levy an excise tax on a railroad corporation for the privilege of exercising its franchise within the State; that the character of such a tax or its validity are not determined by the modes adopted in fixing its amount for any specific period of its payment; and that reference to the transportation receipts of a railroad company, and to a certain percentage of the same in determining the amount of an excise tax on the company is not in effect the imposition of a tax

on such receipts, nor an interference with interstate commerce, although the railroad lies partly within and partly without the State. Justice Bradley regarded this as an undue limitation of the power of Congress over interstate commerce, and read an adverse opinion. It may not take rank amongst "Great Dissenting Opinions," but it displays his mental characteristics in a striking manner, and shows the rigor and earnestness which he always brought to bear in dealing with Three of his associates concurred this great subject. He said: "Justices Harlan, Lamar, with him. Brown and myself, dissent from the judgment of the We do so both on principle and Court in this case. On principle because, whilst the purpose authority. of the law professes to be to lay a tas upon the foreign company for the privilege of exercising its franchise in the State of Maine, the mode of doing this is uncon-The mode adopted is the laying of a tax stitutional. on the gross receipts of the company, and these receipts, of course, include receipts for interstate and international transportation between other States and Maine, Now, if and between Canada and the United States. after the previous legislation, which has been adopted with regard to admitting the company to carry on business within the State, the Legislature has still the right to tax it for the exercise of its franchises, it should do so in a constitutional manner, and not (as it has done) by a tax on the receipts derived from interstate and international transportation. The power to regulate commerce among the several States (except as to matters merely local) is just as exclusive a power in Congress as is the power to regulate commerce with foreign nations and with the Indian tribes. It is given in the same clause, and couched in the same phrase-ology; but if it may be exercised by the States, it might as well be expunged from the Constitution. We think it a power not only granted to be exercised, but that it is of first importance, being one of the principal moving causes of the adoption of the Constitution."

He then referred to disputes between States as to interstate facilities of intercourse, and the intolerable discriminations made, and said: "Passing this by, the decisions of this Court for a number of years past have settled the principle that taxation (which is a mode of regulation) of interstate commerce, or of the revenue derived therefrom (which is the same thing), is contrary to the Constitution."

He cited, Pickard v. Pullman Car Co., 117 U. S. 34,-annual tax on sleeping cars going through the State; Leloup v. Mobile, 137 U. S. 640,—telegraph receipts; Norfolk Co. v. Pennsylvania, 136 U. S., 114, -keeping a through railroad office in a State; Crutcher v. Kentucky, 141 U. S. 47,-taxation of express companies for doing business between the States.

And added: "A great many other cases might be referred to, showing that in the decisions and opinions of this Court this kind of taxation is unconstitutional and void. We think the present decision is a departure from the line of these decisions. The tax, it is true, is called a tax on a franchise. It is so called, but what is it in fact? It is a tax on the receipts of the company, derived from international transportation."

After speaking of the length to which State Courts and the Supreme Court have gone in sustaining various forms of taxes on corporations, he said: "I do not know that jealousy of corporate institutions could be

carried much further. The Supreme Court has held that taxation of Western Union stock in Massachusetts, graduated by the mileage of lines in that State compared with the lines in all other States, was only a tas upon its property, yet it was in terms a tax upon its capital stock, and might as well have been a tax upon its gross receipts. The present decision holds that taxation may be imposed upon the gross receipts of the company for the exercise of the franchise within the State, if graduated according to the number of miles the road runs in the State." And he "Then it comes to this. closed by saying: A State may tas a railroad company upon its gross receipts, in proportion to the number of miles run within the State, as a tax on its propertp and may also lay a tax upon these same gross receipts in proportion to the same number of miles for the privilege of escreising its franchise in the State. I do not know what else it may not tax the gross receipts for. If the interstate commerce of the country is not, or will not be, handicapped by this course of decision, I do not understand the ordinary principles which govern human conduct."

Mr. Justice Bradley died on the 22d day of January, 1592, only a few weeks after reading this opinion. The great Chief Justice lived eight years after delivering his dissenting opinion in Ogden v. Saunders. Mr. Carson says that this opinion by Marshall has been termed his master effort; that "prior to that time the steadiness of the movement of the ship of state under the hand of her great helmsman, had been without wavering or shadow of turning;" and that "with the passing of Marshall, the school of strict constructionists marched to power, and the current of decision

was turned into channels, running in a new direction."

It does not seem likely, in the present situation of the country in respect to interstate commerce, that the current of decision on the subject will run in any new direction, or meet with serious obstacles with the passing of Bradley. And yet, within two weeks of his death, he expressed to the writer of this note his fear that such might be the case, and alluding to the judgment from which he had so lately dissented, he said with great earnestness, and evidently with some foreboding, that he hoped to live and retain his faculties for four years more, so that he might finish the work of placing the power of the national government over interstate commerce, in all its forms, on an impregnable basis.

SEPTEMBER 24, 1894.