THE GREATEST CHIEF JUSTICE.

IT IS one of the beautitudes of our nation that John Marshall was spared in vigor to the public service until he had attained great age. Able though he was, and indefatigable though he was, had he been stricken down, at the first half of his career, it is a truth that, with two exceptions, he would have left behind him none of those expositions of the meaning of the Constitution which have made his name immortal and constitute for all future generations a commentary upon the text to which jurists turn as to the utterances of an oracle. His greatest opinions were delivered during the last seventeen years of his life. This was not a matter of his own planning, nor was it within his control. He could not select or create the occasions for his actions. He had to wait until a question had arisen and had been brought before him in proper form upon a record fashioned in a lower court; and the lower courts could not breed controversies to satisfy speculative doubts or to solve interesting problems. Lawsuits arise out of the conflicts of men in society or out of controversies between sovereign states, and these are engendered during the march of civilization, and must await its course, whether tardy or rapid.

The real reason for Marshall's inferior opportunities in the earlier years of his life for exercising his transcendent powers of mind lies in the fact that until the country had reached certain stages of development it was not possible to anticipate by a single hour the necessity for judicial action.

When commerce and finance, and the struggle between contending political forces for supremacy, called into active play the agencies and inventions of a growing people; when banks and steamboats and railroads were employed as the instruments of development, then litigation instances occurred of the clashing of rival forces, and litigation of tremendous moment was brought to the court of last resort for peaceful and final settlement. Let me take, for instance, the great case of Gibbons vs. Ogden. When Robert Fulton applied steam to navigation he sought the financial aid of the wealthy and influential Robert R. Livingston, and the state of New York by a law granted to him the exclusive right for a term of years to navigate the waters of that state with boats propelled by steam. Here was monopoly with a vengeance. A man named Ogden bought from them the right to use such boats in the waters between Elizabethtown, N. J., and the city of New York. Gibbons, who had bought two steamboats, had them licensed under the laws of Congress and attempted their use in competition with Ogden. Immediately an injunction was granted by the courts of New York, and in the highest court of that state the injunction was sustained by no less a jurist than Chancellor Kent.

Can any business man imagine a more serious question than this? What would have been the effect upon the mighty commerce of New York if that injunction had been allowed to stand? What effect would it have had upon the growing energies and internal traffic of the various sisters states, and what would have been the outlook for successful trade? No wonder that the case attracted universal attention, and that the opinion of the tribunal of last resort was awaited with eager interest. The counsel themselves became excited about it. Wirt, the attorney general of the United States, wrote to his friend, Judge Carr: "Tomorrow week will come on the great steamboat question from New York. Emmet and Oakly on one side, Webster and myself on the other. Come down and hear it. Emmet's whole soul is in the cause, and he will stretch all his power. Oakly is said to be one of the first logicians of the age; as much as a Phocion as Emmet is a Themistocles; and Webster is as ambitious as Cæsar. He will not be outdone by any man if it is within the compass of his power to avoid it. It will be a combat worth witnessing."

It is no exaggeration to say that this case was fraught with the most tremendous consequences to the Union. The business of the continent was involved. State pride and state power were also involved. Was the great state of New York to yield her statute to a license of Congress? When Mr. Webster maintained that Congress had the exclusive authority to regulate commerce in all its forms on all the navigable waters of the United States, their bays, rivers and harbors, without any monopoly, restraint or interference created by state legislation, Chief Justice Marshall laid down his pen, rolled up his coat cuffs, dropped back upon his chair and fastened his brilliant black eyes upon him. The magnitude of the question burst upon him and his colleagues, and several of them were startled. That was a time when state rights were very large, and national rights were vague and undetermined. But great as was the argument upon both sides, the judgment when pronounced was greater. The result reached was simple enough, and to us of this generation is very plain; it was held that the law of New York was in collision with the act of Congress regulating commerce, under which Gibbons derived his coasting license, and consequently must yield to it, the Constitution and the laws made in pursuance of it being supreme. But the majesty of Marshall's reasoning is beyond compare. His mind moved like a glacier. He was a judge who never usurped power, but he had the courage to push his jurisdiction up to the very verge when necessary to give vital meaning to the Constitution.

No less important to the Union was the great bank case of McCulloch vs the state of Maryland. A branch of the Bank of the United States, which had been established under an act of Congress, was located in Baltimore, and the legislature of Maryland imposed a stamp duty on the circulating notes of all banks which were not state institutions. The bank refused to pay the tax, and the cashier, Mr. McCulloch, was sued by the state. The state supreme court sustained the tax. Here was a distinct claim on the part of a state to the power to tax an agency of the federal government. If one state could do it all could do it, and if they taxed one agency they might tax all. How long would it be before the federal government could be taxed out of existence? Remember that this question arose when a United States bank was a very unpopular institution. The Democrats had always insisted that the United States had no power to charter a corporation, and that the bank, which was Alexander Hamilton's device, was an engine of political mischief. The greatest lawyers of the country met in combat. Mr. Pinkney, the greatest advocate of his day, and a Maryland man, with Wirt, the attorney general of the United States, and Webster, appeared for the bank. Luther Martin, also from Maryland, whom Jefferson had called "a federal bull dog;" Joseph Hopkinson of Philadelphia, the author of "Hail Columbia," and Colonel Walter Jones, the best lawyer of the District of Columbia, appeared for the state. Judge Story wrote, after the argument was over: "I never in my whole life heard a greater speech than Pinkney's. It was worth a journey from Salem to hear it. . . . He spoke like a great statesman and patriot and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about state rights and state sovereignty he brushed away as with a mighty besom."

The pith of Marshall's decision is contained in these words: "The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create. If the states may tax one instrument employed by the government in the execution of its power, they may tax any and every other instrument; they may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make the government dependent on the states."

As to the right of Congress to charter a bank, the court held that though there was no such power stated in express terms in the Constitution, yet as Congress had all power to do what was "necessary and proper" to carry out express powers, and the end was legitimate, and the means were appropriate, and a bank was a proper means to a lawful end, the exercise of authority was Constitutional.

It will be seen how important this principle was to the exercise of the war powers of the government during the great civil war.

Then came the famous Dartmouth college case, which established the sanctity of charters, and protected chartered rights from invasion by state legislatures. No state could pass any law which impaired the obligation of a contract. It was held that the charter of a corporation created a contract between the state and the incorporators, and that a charter could not be changed without the consent of the institution to which it had been granted. Mr. Binney, when he delivered his splendid eulogism upon Chief Justice Marshall, at the request of our city councils, declared that "the case of Dartmouth college is the bulwark of our incorporated institutions for public education, and of those chartered endowments for different public charities which are not only the ornaments, but among the strongest defenses of a nation."

We shall see when we come to a review of the career of Chief Justice Taney, who was Marshall's successor, that a necessary and useful limitation had to be placed upon the doctrine to prevent its being carried too far; but it is still true, as the late Justice Miller declared in his great address in Independence Square during our Constitutional centennial celebration, that it may well be doubted whether any decision ever delivered by any court has had such a pervading operation and influence in controlling state legislation.

The next case of momentous importance was that of Cohens vs the State of Virginia. Briefly speaking, the point was whether the Supreme Court of the United States could, in the exercise of its appellate authority, reverse the judgment of a state supreme court in a case which had originated in a state tribunal. The contention of the state counsel was to the effect that the appellate power of the highest federal court extended only to cases arising in the lower federal courts. If such a contention had prevailed every state court of last resort would have escaped the restraining hand of the Supreme Court of the United States, and the result would have been chaos. See how absurd the proposition was when stated in Marshall's nervous and concise words: "They" (meaning the advocates of state power) "maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws of treaties of the nation, but that this power may be exercised in the last resort by the courts of every state in the union. That the Constitution, laws and treaties may receive as many constructions as there are states, and this is not a mischief, or if a mischief, is irremediable."

To such propositions there could be but one answer. The tide of national power was rising fast, and each successive billow marked a higher line upon the beach.

In Brown vs the State of Maryland the court denied the right of a state to regulate foreign commerce, but in another case held that a state could adopt police regulations if they did not amount to interference with commerce. In Craig vs the State of Missouri a state was denied the right to issue bills of credit under the name of certificates of loan. The Constitution, said the chief justice in effect, does not prohibit names, but things. In the case of Worcester vs the State of Georgia, a missionary was convicted of the crime of preaching to the Indians, residing among them without a license from the governor, which was required by a state law. Marshall held that the law was unconstitutional. The Cherokee Nation, said he, is a distinct community, occupying its own territory, in which the laws of Georgia have no force. The whole intercourse, between the United States and the Indians is, by our Constitution and law, vested in the government of the United States. The act of Georgia under which Mr. Worcester was prosecuted was held to be void, and the judgment a nullity. The state treated this decision with defiance. The missionary was still imprisoned in the penitentiary, doomed to hard labor, the governor declaring that he would hang him rather than liberate him under the mandate of the Supreme Court. The President, Andrew Jackson, is reported to have said: "John Marshall has made the decision, now let him execute it." At the end of eighteen months, however, cooler judgment and more moderate counsels prevailed; the contest had grown hopeless to the weaker party, and the prisoner was released.

The foregoing are but a few of the many cases in which John Marshall asserted the right to finally interpret the Constitution, and it is plain that his conclusions have stood the test of time, and have proved to be the very foundation stones of our national authority.

COGHLAN PERSONA NON GRATA.

Captain J. B. Coghlan, the American naval officer who created quite a storm a short time ago by reciting "Hoch Der Kaiser" at a banquet, will probably not be asked to take an active part in the reception of Prince Henry, although his position as commander of the Brooklyn Navy Yard would naturally entitle him to do so. Coghlan is persona non grata in German circles on account of having "hocked the kaiser" at a banquet.

The venerable Charles Carroll of Carrollton, the last survivor of the signers of the Declaration of Independence, when on the verge of the grave, wrote to Judge Peters: "I consider the Supreme Court of the United States as the strongest guardian of the powers of Congress and the rights of the people. As long as that court is composed of learned, upright and inteprid judges the union will be preserved, and the administration of justice will be safe in this extended and extending empire."—Hampton L. Carson in Philadelphia Record.