To the Honorable Morrison R. Waite,

Chief Justice of the Supreme Court of the United States:

I am not aware that there is any established practice of the Supreme Court of the United States, such as prevails in the Supreme Courts of some of the States, in respect to applications for rehearing in cases which have been decided. I have no disposition to trespass upon the Court, or even to seem to do so; but if the view I have entertained of the opinion of the Court in the Munn & Scott Case, (a view quite freely and frequently expressed by many others,) is at all reasonable and proper, the importance of the interests involved in the result of the case, directly and indirectly, is a sufficient apology for suggesting it, in some form, to the consideration of the Court. This, and this only, I have endeavored to do in the following pages, which are respectfully submitted as containing some of the reasons for asking of the Court, a reconsideration of the opinion and judgment in that cause.

JOHN N. JEWETT.

CHICAGO, April 26, 1877.

To the Honorable, the Judges of the Supreme Court

of the United States:

The prominent position given by your Honors to this cause in the decision of a series of cases, involving to the last degree the existence of private rights in and over the wealth and industry of the country, whenever they come in contact with a public use or convenience, was as unexpected as it was unsought for by the plaintiffs in error and their counsel. The result of that position is to place before the world the case of *Munn & Scott* v. *The People, etc.*, as an exponent of the estimation in which the judicial department of this government holds private interests, and the right of personal control over individual enterprises, and of the force and effect accorded by the same high authority to constitutional limitations upon the legislative power of the States. These are questions of immeasurable importance, not only to the millions of capital already invested in enterprises of a public, or *quasi* public character, and in the successful accomplishment of which the public have been largely, although indirectly interested; but also to the almost infinite variety of prospective improvements which are likely to present themselves in the progress of a still undeveloped territory, which experience has shown cannot be safely or economically undertaken by the States themselves, in their corporate capacity, and in the promotion of which it is against the expressed policy of the State, in a large majority of cases, to interfere. The case is thus made to assume an importance altogether disproportionate to the pecuniary interests directly involved in it. It reaches out to, and its decision is made to include the safety and stability of interests embracing a very large part of the invested private capital of the country, and must be looked to as the decisive exposition of the degree of

protection which the constitution affords to private industry, energy and ability, and to the results which may be accomplished through their instrumentality.

It is not too much to say that the opinion of the Court in this case has sent a chill of apprehension through the very heart of the business enterprises of the nation, and that there is no interest or employment, however remotely connected with the public advantage, which does not sympathize with this apprehension. It has opened a new gateway of attack upon private industry, whenever its influence extends beyond the individual good, and concerns itself with the common welfare; it has pushed aside the obstructions which stood in the way of communism, or, at least, of the communistic spirit, against which the prohibitions of the constitution were directed. It has placed minorities in civil society at the very feet of political majorities, and rendered possible and probable even, the despotism of a political majority, which, if the constitution does not prevent, it but inaugurates the skeleton of a government, with vital forces only for evil; it makes the individual and his substance the legitimate prey of the body politic, and starts the government of the States on a new departure, the highway to the plundering of individual wealth, and the destruction of private enterprise.

The right of the State to take private property for public use, upon making just compensation therefor, has been well understood by all the people of this nation. They have been long familiar with the proposition that they held their property, subject to this ultimate right of the Government. They have recognized the fact, that public necessities might arise which would require of them a surrender of their personal possessions, however hallowed by private preferences or ancestral recollections; and when such necessities have arisen, they have acquiesced and yielded up their preferences and their wishes to the stern commands of a public law, which entertains as little respect for the graves of the dead and the memories of the living, as it does for the wild flowers which flourish and fade on the sur-

face of the unbroken wilderness. But in doing this they have trusted to what was regarded as a principle of financial honesty, permeating and underlying the government of the State, engrafted into the constitution and rendered immutable by adoption as a maxim and axiom of State and Federal polity, that no citizen should be condemned without having an opportunity to be heard in his own defense, and that no man should be deprived of life, liberty *or property* without due process of law. The people, and by the term is intended the individuals comprising the body politic, have thought that these high-sounding constitutional phrases meant something; and that they were not mere glittering generalities, "*ignes fatui*," illuminating the way to some dragon's den, and deceiving the wayfarer by a bold appearance of genuineness. The people have depended upon them and trusted to them, as truthful and reliable expressions of governmental policy, which could not be changed by mere legislative act; and this reliance and trust has ripened into a conviction, that although the State might not concern itself with the tender memories and sentimental preferences of its citizens, it was and always would be, regardful of their property values, and that it stood prohibited by the very constitutions under which it was organized, and which had been set up as a standard of government for itself, as well as for its people, from appropriating either the property or the results of the property of a citizen to itself, without paying just compensation therefor; and that for the determination of all such questions of values, as they might arise between the State, or the public and the individual, there had been established a common tribunal, distinct from the political power and independent of it, to which and before which, the State, as well as the individual, must submit its complaints, whenever and wherever they touched the property rights and property interests of the citizen.

A hundred years of constitutional protection, has matured this conviction into consistency as a fundamental principle, around which, as an assured axiom of republican government, had crystalized in various forms the enterprises and industries

of the people, scarcely one of which was able to separate itself from a public use or a general advantage; and yet, to very few of them had the State or the public, contributed in such a way as to be able to claim that they were not, in the strictest sense, the result of individual forethought, energy and capital. To this conviction, the Dartmouth College case, violently assailed by political demagogues, and here and there by a single judge, but never directly questioned or formally repudiated by a court, has given practical and efficient support; but the opinion of the court in this case has laid the train, by which to undermine and destroy the foundation, upon which that time-honored and conservative decision was established, and already eager hands are clustering around, waiting for the signal to apply the torch, and eager mouths are ready to join in the cry, and share in the spoils which will follow the final overthrow.

It is confidently submitted, that the conviction above mentioned, as to the sacredness of private property and private rights *in* private property, represents fairly the business and professional judgment of this country, as it has existed for the past one hundred years. If this was a mistaken judgment, the mistake has been a fatal one to many a private fortune, and it may prove equally fatal to the public, that the mistake has been discovered; but, in the confident belief that this judgment was sound in principle, just in theory, and well supported by constitutional guaranties, properly construed, and that the opinion of the Court in this cause is founded, to some extent, at least, upon a misapprehension of the facts of the case, a misapplication of the doctrines of the common law, and its maxims, and a construction of the constitutional guaranties to private rights, in a great degree subversive of the beneficial purposes they were intended to accomplish, the plaintiffs in error respectfully petition for a reconsideration of said opinion, and for a rehearing in said cause, and, in support of their petition, submit the following reasons and considerations:

I.

The legislation under review in this case, whatever may be its pretensions, is aimed directly and solely at the warehouses and warehousemen of the city of Chicago. No persons or locations are mentioned in the act, which is limited, by its terms, to cities having 100,000 inhabitants and upwards. As there was no other city in Illinois, at the time of the passage of the act, having a population of one-fourth that number, it is quite superfluous to speak of the act as applying to "*warehouses at* "*Chicago, and other places* in the State having not less than one "hundred thousand inhabitants." It does not appear that the Court regarded it as of any importance whether the act had reference to the whole State,and to all warehouses and warehousemen within its jurisdiction, or to only a limited section of the territory of the State, and the warehouses located therein, although it was urged in the printed arguments, and some authorities were cited upon the point, that this local and discriminating feature of the act deprived it of the essential characteristics of a *law*, and reduced it to the proportions and qualities of a legislative edict or judgment against a particular class of individuals, such as the courts have heretofore pronounced to be without the legislative power, and therefore unconstitutional and void. It was, and still is, insisted, that such discriminating and personal legislation is repugnant to the last clause of the fourteenth amendment to the Constitution of the United States, which provides that no State shall "deny to any person within its jurisdiction the *equal* "protection of the laws."

II.

The old and trite formula, so often repeated, and so often made the pretext for pushing aside a constitutional question, that "every statute is presumed to be constitutional," is entitled to all the consideration which a formulated apology for

hasty and passionate legislation can lay claim to. There is no reason, *in fact*, why a claim based upon a statute, should have any presumptions in its favor when that claim is made in the due course of judicial inquiry. In all such cases, there should be a suspension of judicial judgment, until a clear apprehension of all the facts is arrived at, and it is clearly understood what the cause of complaint is, and how the elements of which it is composed arrange themselves with reference to constitutional provisions. If a State legislature should pass an act condemning a citizen to be burned at the stake, there is no apparent reason why it should have any *presumption* of constitutionality in its favor. The case may be an extreme one; but theories, to be reasonable, must be reasonable in their extremest application and consequences. It is not expected that there should be any presumption against the constitutionality of an act of a State legislature; but when a question of constitutionality is raised in the courts, it should stand, as any other question, unembarrassed by *presumptions*, and no weight or concurrence of authority can establish a reasonable formula to the contrary.

The Constitution is, or should be, an ever-present fact. It was ordained and established as a continuing authority. Its principles are constant and vital factors in the settlement of all controversies, whether between individuals or States, and *to presume* against their violation, when the question of violation is submitted, is the exact equivalent of entering upon an investigation with a partisan or prejudiced judgment, to be worked out in the result, by such means as may be found best adapted to that purpose. It is respectfully insisted, also, that there is no such thing as degrees of constitutionality. And where the validity of a statute is questioned, for constitutional reasons, there can be no decision of the subject upon presumptions; and there is no proper place for doubts and conjectures. Especially must this be so, when the cause is one of criminal jurisdiction; else there are two doubts and two presumptions antagonistic to each other, viz., a doubt and presumption in favor of the validity of the legislative act, and a doubt and presumption in

favor of the *innocence of the accused.* And in behalf of personal liberty and private property, which the Constitution was intended to protect, it is submitted that the latter should be as potential as the former.

III.

The definition of a body politic, as set out in the preamble to the Constitution of Massachusetts, is not objected to; but its application, as illustrated in the opinion of the Court in this case, is denied; and it is not readily understood how the legislation, involved in this controversy, being *partial* and *personal*, can be reconciled with "a social compact by which the whole people " covenant with each citizen, and each citizen with the whole " people, that *all shall be governed by certain laws* for the com- " mon good." If such language means anything of good to the citizen, that meaning is found in the clear intimation that he shall have protection for his person and property *under just and general laws, bearing equally upon the whole community.* And it is insisted that this was, and is the equitable purpose and theory of our representative government, and of the constitutional guaranties in respect to private rights.

Whilst it is readily admitted that, in becoming a member of civil society, each individual surrenders something of personal rights and privileges, which he might otherwise, and naturally lay claim to, still it ought not to be overlooked that the rights and privileges, so surrendered, depend largely upon the character and principles of the society into which he becomes incorporated. If he enlists himself under the banner of an absolute despotism, he yields himself and all his interests to the dictation and control of the superior or sovereign; but from this position of *abject submission*, there stretch out all degrees of subjection and liberty, until the utmost verge of personal independence is reached. Between those two extremes are embraced the various forms of governments, civilized and uncivilized, which have, or can

have a recognized standing; and when natural and individual rights are assailed, the question is not whether, under the forms of civil society, its members have surrendered *some* of their natural rights and privileges, but *what rights and privileges* are preserved and protected to them, under the particular form of civil society to which they owe an allegiance. In this view, the precedents and illustrations, established and found under one system or theory of government, cease to have application, where the same system and theory of government do not prevail; and there can be little hope for the success of constitutional government, professedly intended for the protection of private rights, if, when private rights are assailed, the question of their existence or non-existence is to be determined by precedents and practices which have obtained under governments organically despotic, however much the severity of their exactions may have been modified by self-interest, and an intelligent apprehension of the spirit and temper of the age. Such precedents, undoubtedly, tend to show, that there is no necessary repugnance between the abstract idea of a government of some kind, and the theory or principle which they establish or illustrate; but they are of little assistance in the solution of questions of fundamental law, unless those questions arise under the same or analogous conditions. So, also, there is inherent in every government that right of control which is denominated the *police power;* but what are or shall be the limitations of that power, depends upon the peculiar organization and established principles of the particular government seeking to exercise it. It is not necessarily a wild, floating and uncontrolled power; but must be, in each case, subordinate to the just and proper efficiency of these organic principles upon which the government itself is founded.

In the case of *Pumpelly* v. *The Green Bay Company*, 13 Wallace, 166, this Court said that the constitutional provision, prohibiting the taking of private property for public use, without making compensation therefor, was "*always understood to have* "*been adopted for protection and security to the rights of the in-*

" *dividual against the government*," and " *as placing the just* " *principles of the common law, on that subject, beyond the power* " *of ordinary legislation.*"

It ought not to be assumed, perhaps, that in the opinion in this case, the Court intended to set aside this universal understanding of the meaning and effect of the prohibitions of the constitution, and this leads directly to what may be regarded as the substance and foundation of the opinion and judgment of the Court.

IV.

By a series of assumed analogies, aided by what must be regarded as a misapprehension of two English cases, the Court has reduced the warehousemen of Chicago to the condition of public servants, and their business to that of a public or *quasi* public employment, contrary to the theory and principles of the common law, which it was the purpose of the constitution to place " *beyond the power of ordinary legislation.*"

There is no common law of the United States, and the common law of England is only so far in force in the several States as it may be recognized by their respective constitutions and laws. The State of Illinois has adopted it partially, and in the following language: " That the common law of England, *so* " *far as the same is applicable and of a general nature*, and all " statutes or acts of the British Parliament made in aid thereof " and to supply the defects of the common law, prior to the fourth " year of James the first, excepting the second section of the " sixth chapter of 43d Elizabeth, the eight chapter of 13th " Elizabeth, and ninth chapter of 37th Henry Eighth, *and* " *which are of a general nature and not local to that kingdom*, " shall be the rule of decision, and shall be considered as of full " force until repealed by legislative authority." To this extent the common law of England is, and for many years has been, in force in Illinois, and there is no declaration of the gen-

eral common law of England, or act of the British Parliament of a general nature in aid thereof, within the limits of the law above quoted, by which the public, or *quasi* public character of warehousemen, or of warehouse property, can be established; at least none such has been referred to either in the argument or opinion in this cause, and it is, therefore, fair to presume that none such exists. The common law distinction between a public and a private employment, in the matter of bailment, is fully and fairly expressed in the opinion of Chief Justice HOLT, in the leading case upon the subject, of *Coggs* v. *Bernard*, Lord Raymond's Repts., 909 (2 Smith's Leading Cases, 346), where he says: "As to the fifth sort of bailment, viz., a delivery to carry or "otherwise manage, for a reward to be paid to the bailee, those "cases are of two sorts, either a delivery to one *that exercises* "*a public employment*, or a delivery to a private person. *First*, "if it be to a person of the first sort, and he is to have a reward, "*he is bound to answer for the goods at all events.* * * * The "*second* sort are bailees, factors and such like. And though a "bailee is to have a reward for his management, *yet he is only* "*to do the best he can, and if he be robbed, &c., it is a good* "*account.*"

The distinction here asserted has been consistently maintained in England and in this country, ever since the decision of *Coggs* v. *Bernard*, until now, and it may be said to be one of the just principles of the common law, which it was the purpose of the constitution to place "beyond the powers of ordinary legislation."

The warehouse law of Illinois does not undertake to do away with the common law distinction between the liability of common carriers and the liability of warehousemen. Indeed, the distinction is fully preserved in the law itself; for, in the language of Judge HOLT, the warehouseman, under the law, "*is only to do the best he can*," to relieve himself of all responsibility for the property received into store.

It seems, from the opinion of the Court, to have been thought that the cases of *Allnut* v. *Inglis*, 12 East., 527, and of *Bolt* v. *Stennett*, 8 Term Reports, 606, afforded some authority for the

legislation in question. It is respectfully submitted that a careful examination of the facts in these cases, and of the grounds of the opinions of the several judges, will show that they have no proper application here. The attention of the Court is asked to a condensed statement of those cases in support of this proposition.

The first of the above cases was, in effect, against the London Dock Company, the defendant being its treasurer. The company was organized under chapter 47 of the acts of 39 and 40, Geo. 3, known as the " London Dock act," the act of 43, Geo. 3, chapter 132, being the " General Warehousing act," and the statute of 44, Geo. 3, chapter 100, which was a special act, authorizing certain goods to be stored in the company's warehouses, without the payment of the government dues, thereby making them, *in fact*, government warehouses, in respect to that class of goods. The company accepted and acted upon these several grants of authority, and, in effect, was by virtue thereof *licensed* under the law to transact the business of government warehousemen. The plaintiff, having complied with all the requirements of the law necessary to entitle him to store a lot of goods in the company's warehouses without payment of the importation duties, tendered his goods to the company for storage, at the same time offering to pay " *reasonable hire and reward in that behalf*." The company refused to receive the goods, because the " hire and reward " tendered by the plaintiff was less than the rate fixed by the company in a published schedule of storage charges. Hence the action was brought to test the question whether the company, under the several acts aforesaid, and under the circumstances in which it had placed itself with reference to the public business, could be compelled to store the goods offered to it, for a *reasonable compensation*.

The opening argument of the plaintiff's counsel starts off with the proposition that " *The reasonableness of the hire and* " *reward* offered by the plaintiffs to the company, for the privi- " lege of warehousing their goods in its warehouses, without " the immediate payment of the import duties, *is admitted*."

Then follows this proposition, which is not denied, viz: " It is " a general rule of law that when a party *has a monopoly* " *granted to him for public purposes*, he is bound to render the " service or use of the thing *to which his privilege is annexed*, for " a *reasonable compensation*." And it is upon this proposition that the case was argued, submitted and decided; and neither of these propositions is involved in the case of *Munn & Scott* v. *The People, &c.* The scope of the case is well stated by Lord ELLENBOROUGH, C. J., in an interruption of the defendant's counsel, when he says, (p. 535): " The only question arises on " the bonding act; show us that wines may be bonded else- " where; " clearly throwing the burden of the case upon the fact, as a controlling one, that the company's warehouses had, under the acts and its acceptance of them, a legally constituted monopoly of the business of storing wines in bond.

The opinion of Lord ELLENBOROUGH, (p. 538,) is limited to the facts and conditions of that case, for he says: " There is no " doubt that the general principle is favored, both in law and " justice, *that every man may fix what price he pleases upon his* " *own property, or the use of it;* but if, for a particular purpose, " *the public have a right to resort to his premises* and make use of " them, and *he have a monopoly in them for that purpose*; if he " will take the benefit of that monopoly, he must, as an equiva- " lent, perform the duty attached to it on *reasonable* terms. *The* " *question* then is, whether, circumstanced as this company is, " by the combination of the warehousing act with the act by " which they were originally constituted, and with the actually " existing state of things in the port of London, *whereby they* " *alone have the warehousing of these wines*, they be not, accord- " ing to the doctrine of Lord HALE, obliged *to limit themselves* " *to a reasonable compensation* for such warehousing." Further on, at page 540, the learned judge says: " And there are no " other places at present lawfully authorized for the warehous- " ing of wines, (such as were imported in this case), except those " warehouses within the *London Dock* premises, or such others " as are in the hands of the company. Here, then, the com-

" pany's warehouses were invested with the monopoly of a pub-
" lic privilege, and, *therefore, they* must, by law, confine them-
" selves to take *reasonable* rates for the use of them, *for that*
" *purpose.*" Again he says: " Whether the company be bound
" to continue to apply these warehouses to that purpose, may
" be a nice question, and I will not say to what extent it may go;
" but as long as these warehouses are the only places which can
" be resorted to for this purpose, they are bound to let the trade
" have the use of them for a *reasonable hire and reward.*"

The opinion of GROSE, J., rests the decision of the case solely on the ground of a legalized monopoly.

LE BLANC, J., also places the decision of the case distinctly upon the monopoly which the company possessed, and which it must be remembered, the company had accepted. And he refers to the case of *Bolt* v. *Stennett*, 8 Term Repts., as a case where " the quay, *being one of the public quays licensed* under the
" statute of Elizabeth, it was held, that the owner was bound
" to permit the use of the crane upon it, and *could not insist*,
" either, that the public should not use it at all, or should use it
" only upon his own terms, *but that he was bound to permit* the
" use of it upon *reasonable* terms."

The conclusion of the opinion of BAILEY, J., shows clearly the ground upon which he placed the decision, when he says (p. 544):

" As to the question whether the company may renounce the
" application of their warehouses to this use, I cannot add
" to what the Court has already said; but, at least, they cannot
" renounce it partially; and *I think*, it would be deluding the
" public if the company were able to renounce, at a moment's
" warning, the warehousing of the goods for this purpose, *after*
" *they had agreed to accept the license and monopoly.*"

It would seem to be almost unnecessary to point out the substantial difference between the facts in the case of *Allnut* v. *Inglis*, and the conditions which surround the case of *Munn & Scott* v. *The People*; but, nevertheless, the attention of the Court is called to a few of the more prominent ones:

1st. The London Dock Company had, by act of parliament,

an absolute monopoly of the business of warehousing wines of the kind in controversy, in bond, and they had accepted the monopoly. In this they become government agents,and to that extent, they had an official character. Their business was a public one, not only in the sense that they were dealing with a large number of persons, but, also, in the sense that they were constituted the agents through which the Government, as such, bestowed advantages upon the trade and commerce of the country. There is nothing at all answering to this in the case of Munn & Scott.

2d. The question before the Court, in *Allnut* v. *Inglis*, was whether the London Dock Company, in its position of government agent, holding a government monopoly by act of parliament, should be compelled to do the business it had thus undertaken to do, *for a reasonable compensation*. The question, in the Munn & Scott case, was the exact reverse of this, and whether the Legislature could compel private citizens, who had received no encouragement or support from the State, and were vested with no peculiar privileges, to give their services and the use of their property for *arbitrary* rates, fixed by legislation, *whether reasonable or unreasonable.*

3d. The London Dock Company was a corporation, owing its existence and powers to the favorable grants of the Government in its behalf, and having only such authority as was specifically conferred upon it. Munn & Scott were citizens of a professedly free government, having all the natural rights not absolutely surrendered by them for governmental purposes, fortified by constitutional guaranties in favor of the essential elements of freedom, viz.: Life, Liberty, *and Property*, against governmental interference.

4th. The London Dock Company had accepted a license from the government for the doing of a business relating to the public revenue. Munn & Scott refused to take a license for their private business, and resisted the effort of the State to change their private pursuits into a public employment.

5th. The effect of the decision in the case of Munn & Scott,

is to lay down as a rule of law, the proposition *that the moment a private citizen enters into a business useful or convenient to a considerable number of people*, that moment the State may assume the direction of him, and fix arbitrarily his charges as between himself and his customers. The effect of the decision in the case of *Allnut* v. *Inglis*, is that when a man accepts a government monopoly in the interest of trade and commerce, he may be compelled to do the business relating to that monopoly for a *reasonable compensation*. It might well be asked whether wider differences and more diverse conclusions can anywhere be found in the whole history of judicial inquiry.

The case of *Bolt* v. *Stennett*, 8 Term Reports, 606, was decided upon demurrer to pleas of justification to a declaration in trespass; and the facts set up in the pleas, *and admitted by the demurrer*, have no resemblance to the facts as agreed upon in the case of Munn & Scott. The pleas stated in substance that the place in which the alleged trespass was committed was a *public, open, and lawful quay*, within the port of London, for the landing thereon of all *customable goods* of all merchants importing the same, *for a reasonable compensation*, to be therefor paid by the merchant to the owner of the quay; that from time immemorial the mayor, and commonalty, and citizens of London have had, and still have, *of right, &c.*, the lading and unlading, by themselves or their deputy, of all goods and merchandise of all merchants, &c.; that the defendant was their deputy for that purpose, and entered upon the quay, *being such public, open, and lawful quay*, and used the crane erected thereon for the purpose of unlading certain goods, &c. The Court held the pleas to be good, at least, against a general demurrer. The cause of complaint would have been the same, in form, if Munn & Scott had sued an agent of the City of Chicago, or an agent of the State of Illinois, a warehouse commissioner, for instance, in an action of trespass for breaking open their warehouse and taking into it a consignment of grain without their knowledge or consent. But there is no *immemorial custom* of the City of Chicago, or of the State of Illinois, which would

have supported such a plea of justification; nor is there any common law or statute to which the defendant could appeal, or the Court resort, for the defendant's protection in committing the act.

The case of *Mobile* v. *Yuille*, 3 Ala., 137, is also referred to by the Court as an authority in support of the Illinois Warehouse Act. The only question involved in that case, of a constitutional character, was as to the right and power of the City of Mobile, under an act of the Legislature, purporting to grant the right, to fix the weight of loaves of bread. The question of the right to fix *prices* was not in the case in any form; nor is there any intimation from the Court upon that question. The right of government to regulate weights and measures has never been denied since civilization had a foothold in the world, and there is no necessity to deny such a right in the States in order to lay the foundation for preserving private property from legislative confiscation.

In all of these cases the courts, as does this Court in the opinion under review, rest themselves ultimately upon certain supposed sayings of Lord Hale in the Treatises "*De Jure Maris*," and "*De Portibus Maris*," (1 Hargraves' Law Treatises, 6 and 78), as embodying the supreme wisdom upon the subjects involved. The distinguished learning, ability, and honesty of Lord Hale are matters pertaining to the history of English jurisprudence, which no one in this age is disposed to call in question. It may, however, without any liability to censure, be modestly suggested, that Lord Hale wrote and lived under such conditions and influences as the Government of England had thrown around him; and whilst it may be true that "In England, even "on rights of prerogative, they scan his words with as much "care as if they had been found in Magna Charta, and the "meaning once ascertained, they do not trouble themselves to "search any further," it does not necessarily follow that the American lawyer or Court should feel compelled to apply his language to cases arising under American constitutions, and to conditions of things existing under them, of which Lord

Hale had no knowledge, and all of which have come into being long since his decease. It is not necessary, either, to overlook the fact that Lord Hale was guilty of serious errors, according to more modern understanding, and was a firm believer in witchcraft, and is by Lord Campbell reluctantly charged with a violation of the *plainest rules of justice*, upon the trial of two women for witchcraft before him, who were convicted and by him promptly sentenced to execution. Lord Campbell also says, in substance, that he could pardon Lord Hale for a belief in witchcraft, but not for receiving, as evidence of its existence, impostures which were exposed in open court. Reverence for humanity ought not to be without qualification.

The quotation of the Court from the Treatise "*De Jure Maris*," (1 Harg. Law Treatises, 6), it is respectfully submitted, cannot be tortured into an authority for the Warehouse Law in this case. The very first sentence of the quotation shows, with reasonable certainty, the origin of the right of governmental control over ferries, and the origin of the authority is a material, if not an essential fact. If it be conceded that the sovereignty of the States, after their independence, took the place of the sovereignty of the king, which, for ordinary purposes of legislation, is a sufficiently accurate statement of the fact, then, by the very text quoted by the Court, "The State has a right " or franchise that no man may set up a common ferry for all " passengers without a prescription, (time out of mind), or a " charter."

But had the king or the State "a right or franchise" that no man may set up a warehouse for the accommodation of anybody who might have goods to store?

It does not matter for what *purpose* this privilege or prerogative existed in the king, or exists in the State; whether it be for the profit of the king or the State, or "for the protection of the " people, and the promotion of the general welfare." *The fact of its existence is the material and essential one.* And to the plaintiffs in error, it is material and essential that in the case of warehouses no such privilege or prerogative ever existed in

the king, and therefore, as the successor of the king, cannot exist in the State under any fair construction of the common law of England. The case of ferries is, therefore, outside of legitimate comparison.

But still there is another illustration which the Court seems to have regarded as of great authority and pertinency in the determination of this cause, and that is drawn from the Treatise "*De Portibus Maris*," (1 Harg. Law Treatises, 78). Both the pertinency of the illustration and the conclusion drawn from it, are most respectfully questioned. The quotation by the Court is as follows: "A man, for his own private advantage, may, "in a port or town, set up a wharf or crane, and may take "*what rates he and his customers can agree for cranage, wharf-*"*age, housellage, pesage; for he doth no more than is lawful for* "*any man to do, viz, make the most of his own.* * * * If "the *king* or subject own a *public wharf* into which all persons "that come to that port *must come and unlade or lade their* "*goods*, as for the purpose, because they are the wharfs only "licensed by the *queen*, or because there is no other wharf in "that port, as it may fall out, when a port is newly erected; *in* "*that case* there can not be taken *arbitrary and excessive duties* "for cranage, wharfage, pesage, &c., neither can they be en-"hanced to an *immoderate* rate, but the duties must be *reasonable* "*and moderate*, though settled by the king's license or charter. "For now the wharf and crane, and other conveniences are "affected with a publick interest, and they cease to be *juris* "*priviti* only, as if a man set out a street in a new building on "his own land, it is now no longer bare private interest, but is "affected by a publick interest."

The illustration from the "treatise" is, itself, exceedingly well illustrated by the concluding part of the quotation, which seems to have entirely escaped the attention of the Court. Take the beginning and conclusion of the paragraph together, and there is no need of better authority against the validity of the warehouse law of Illinois. The author is evidently speaking of a dedication to public use, whether by voluntary act, or under a

license from the crown, or by prescription, is immaterial. This is apparent from the illustration of the setting out of a street, in which, if opened generally, the public acquire an easement or a right of user—but in all such cases, the degree of interest which the public acquires, depends upon the character of the dedication. As a rule of property, it is admitted, as asserted by Lord ELLENBOROUGH, "that every man may fix what price he pleases "upon his own property, or the use of it." The exception is, that 'if, for a particular purpose, *the public have a right to* "*resort to his premises and make use of them*, and he have a *mo-*"*nopoly of them for this purpose*, if he will take the benefit of "that monopoly, he must, as an equivalent, perform the duty "attached to it *on reasonable terms*," (*Allnut* v. *Inglis*, 12 East., 537. And this is the construction put by Lord ELLENBOROUGH on the quotation, made by this Court from the treatise "*De Portibus Maris;*" and the quotation, thus interpreted, becomes consistent with constitutional principles and the theories of the common law, "that every man may fix what price he "pleases upon his own property, and the use of it."

It is not to be denied that certain formulas and illustrations, well enough, perhaps, in the connection in which they were originally used, have been handed down from one generation to another, in the administration of the law; and, by their antiquity, they have, in the minds of many, acquired an "odor of sanctity" which it is almost impious to call in question. They run easily into common discourse, and are repeated in text books and opinions of courts as the ultimate authority, and it not unfrequently happens that they are wrested from their ancient application and made to perform service in relations which are foreign to their origin. Their meaning is expanded or contracted, to suit particular emergencies; but it is seldom that they meet with a fair and careful analysis, or are considered *with just reference* to the connections in which they are used. And it is respectfully insisted that Lord HALE, (if he was the author,) in preparing the treatise "*De Portibus Maris*," not only did not have in mind, as embraced within the scope of its language,

such conditions as surround the warehouses of Chicago, but also that, in so far as these conditions are analogous to the cases put by him, his high authority is directly against the construction given to it by the Court. The subject of which Lord HALE was treating, (if the treatise is properly credited to him, of which there is much doubt,) was the water courses and water highways of the nation, whether navigable or not navigable, and which were, in themselves, and from the very nature of things, of *public concern*, and of which it is said in chapter 3 of "*De Jure Maris*:" "Again, there be other rivers, as well "fresh as salt, that are of common or public use for carriage of "boats and lighters; and these, whether they are fresh or salt, "whether they flow and re-flow or not, *are prima facie publici* "*juris, common highways* for man or goods, or both, from one "inland town to another."

A wharf or a landing, with its appurtenances, is an adjunct of this *natural public highway*, and is necessary to its use and enjoyment. In many, if not in most instances, it is an encroachment upon the natural highway itself; and, therefore, such wharf or landing inevitably takes upon itself a portion of the public character of that to which it is an adjunct or appurtenance. But further on, and in the same chapter, the same learned author says: "*But if any person, at his own* "*charge, makes his own private stream to be passable* for "boats or barges, either by making of locks or cuts, or drawing "together other streams, and hereby that river, which was his "own in point of propriety, became now capable of carriage of "vessels; yet *this seems not* to make it *juris publici*, and he may "pull it down again or apply it to his own private use. For it "is not hereby made to be *juris publici, unless it was done at a com-* "*mon charge, or by a public authority, or by long continuance of time* "*it hath been freely devoted to a public use.*" To a proper understanding of the treatise ascribed to Lord HALE, this, with other parts thereof, should be considered, and the whole regarded in its relations to the subject of which the author is treating. The reverse of this, however, is often the case, and a sentence,

separated from its subject, and out of its proper relations, is thrown with careless energy at whatever may appear to stand in its way, and the high authority of the writer is relied upon to break down all opposition. What is asked, in this case, is a fair and discriminating application of the principles of the common law, wherever it may be found authoritatively expounded, defended and protected by the guaranties of the Constitution, in favor of private and individual rights.

In addition to this, there stands opposed to the particular legislation here under consideration, the practice of this country for one hundred years. In saying this, the particular acts of Congressional and State legislation, referred to in the opinion of the Court, are not overlooked ; but whilst these legislative acts are remembered, it should not be forgotten, that only in respect to those matters of admitted public concern, have any of these acts ever been tested by the principles of our constitutions ; and that there is but little argument in favor of the validity of a statute, in the fact, that a similar statute, but upon another subject, has, at some other time, been passed by the same authority, and its validity has never been called in question.

It is possible that discussion upon a question of power may be foreclosed by repeated adjudications ; but the mere fact of the enactment of a statute which was never enforced, or the execution of which was never resisted, makes but a very weak appeal in behalf of the validity of a subsequent enactment, relating to a different subject, although it may be claimed that both are referable to the same source of legislative power. In this connection, the language of Chief Justice TANEY, in the License cases, (5 How., 583), is quoted by the Court, in the opinion in this case, as follows : "They," (referring to the police powers of governments), "are nothing, more or less, than the powers "of government, inherent in every sovereignty ; * * that is "to say * * the power to govern men and things."

The quotation hardly does justice to the full text, but, waiving that, it is not disputed, that the police power is a power "to "govern men and things." That is not the question. The

question is, how, or in what manner, and to what extent, under the constitution, does this governing power attach itself to " men " and things," and *for what purposes*. All valid regulations of trade and commerce, all ordinances for the preservation of the health and safety of the community, the establishment of courts, the division of the powers of government, and all that there is of authority to control by legislation, or otherwise, may be referred to the same source. The power exists unquestionably; but what is its extent and what are its limitations ? It is not an absolute and unqualified power, else every government, whether it be by a single person, or by a majority, is a despotism; and the protection of individuals and, therefore, of minorities, which was the conceded purpose of our constitution, is abandoned. Life, liberty, *and property*, have a degree of protection by virtue of the constitution, and to that degree of protection, the police power *must yield;* otherwise the constitution is of no value. What is that degree ? The act of Congress of 1820, purporting to confer upon the City of Washington power " to regulate " the rates of wharfage at private wharves, * * *the* " *sweeping of chimneys, and to fix the rates of fees therefor*, * " * * and the weight and quality of bread " is referred to, by the court, as evidence of the unlimited nature of this power, The fixing of the weight of loaves of bread, as already stated. refers itself at once to an acknowledged power of government. The fixing of its quality may be a measure affecting the public health, and is, therefore, readily assigned to a recognized head of governmental control.

The power of the United States, or of the municipality of Washington, to fix a price at which the miserable little " chimney sweep " shall be compelled to clean a chimney, or shall be prohibited from cleaning it at all, is respectfully questioned. As an original proposition, under a constitution giving some degree of protection to personal freedom, it would seem that the right *to control the value of a service* should be coupled with *a right to control the service itself*; and this does not exist either in Congress or in the municipality of Washington. It may be, how-

ever, that considerations of public safety or public health would appropriately bring the whole business of chimney sweeping under municipal direction, including the prices at which it should be done. If so, plumbing, gas fitting, and repairing, and a thousand other incidents of home living, fall under the same rule. The Government may, then, take charge of the merest incidents of life, and the people are but puppets, to dance as the Legislature may pull the string. There is no judicial authority for carrying the paternal theory of government to that extent.

Wharves, as an illustration in this case, have already been disposed of; but in this same connection, comes up, again, the peculiar condition of the business of the common carrier, the innkeeper, the hackman and drayman, and the regulations of governments in relation thereto. Of all these, the hackman seems to be selected as the representative of the power of the government over private property. Everything must be brought to this standard, and because government has controlled hackmen and has ruled them despotically for centuries, *therefore*, it may rule everybody and everything in the same way. The pertinency and force of the illustration are respectfully denied. There is, in fact, no common standard of measurement between hackmen and warehousemen. The experience of ages has demonstrated, that the former are made up of citizens, it may be, but of that class of citizens least likely to be affected by considerations of honesty. Unrestrained, they intrude themselves upon the public landings and places of public resort, *offensively and viciously*. Their business concerns the stranger and the traveling public, measurably helpless, frequently from inexperience, always on account of absence from home. A long list of impositions, extortions and abuses, are piled up against them, and to a repetition of which, the whole public are exposed. This much may be fairly said of hackmen, in addition to the fact, that they are to be classed with common carriers, who, by the ancient common law, never repudiated, and always in force in this country, are in the exercise of a *public employment*. These things are not true of warehousemen and cannot be made true by legisla-

tion, any more than it is true or can be made true of any other business or occupation, which has a tendency to promote the general convenience or advantage.

It would seem to be useless to follow these illustrations further. In the broadest view of them, they are and have been, in the practice of this Government, exceptions to the rights of private control over private property, and it is again most respectfully submitted, that it is better that they should (if need be for purposes of reconciliation) stand as admitted exceptions to the general law of private rights, than that the whole property interests of the country should, by judicial determination, and against the letter and spirit of the constitution, be brought under the control and direction of the political power.

V.

Most respectful protest is made against the proposition contained in the opinion of the Court in this case, that: " *Property* " *does become clothed with a public interest when used in a* " *manner to make it of public consequence, and affect the com-* " *munity at large,*" in the sense in which that proposition is intended. It stands in connection with a reference to the treatise "*De* " *Portibus Maris* " ascribed to Lord Hale, from which the right to regulate the charges for the use of property is inferred. The quotation from the opinion above made, is followed by this language: " When, therefore, one devotes his property to a use " *in which the public has an interest,* he in effect grants to the " publ c an interest in that use, and must submit to be controlled " by the public for the common good, to the extent of the in- " terest he has thus created. He may withdraw his grant by " discontiuing the use, but so long as he maintains the use he " must submit to the control."

The theory, principles and policy of this government, are all opposed to this proposition of the Court. From the very nature of the case, there can be no private enterprise involving

expenditures, or business, inside of civilized society, which is not " of public consequence," and which does not " affect the community at large," and the language of the Court is, therefore, too broad to be admitted, according to its just signification, without an apprehension of forthcoming evil to all industry and ability. There is no legitimate industry or employment, in which the community, larger or smaller, according to its range of influence, is not interested, and from which that community does not receive a benefit or advantage. The establishment of a rolling-mill, a cotton or woolen factory, a foundry, a saw-mill, a trading house, or any other manufacturing or business depot, is a matter of general, as well as of private concern. The two are indissolubly connected, from the very nature of the case, for it would be the height of folly to engage in any of these several occupations, unless a public demand were to be answered thereby. It is by seeking out the public wants and conveniences, that private capital finds employment for itself, in any of the departments of business which are open to it. The proposition that, in doing this, the citizen is exposing his investment to the risk of depreciation and ruin, by placing the returns therefrom under the control of political influences, is new to the people of this country; not justified by their experience, and is not readily accepted as a just exposition of the degree of protection to which they are entitled under the Constitution. The common law doctrine, that "a man may make " the most he can out of his own," is the doctrine under which the people of this country have lived, and upon which they have relied; and whilst it may be true, that in special cases advantages, unconscionable in their nature, may have been insisted upon, when circumstances have conspired to make them practicable, still there is little reason for complaint on the part of the public, when the general benefit resulting from the free investment of private capital in improvements of a public character, are taken into the account. And considering the absence of conservative influences in legislative assemblies here, which influences prevail, in a high degree, in the British Parliament, it

may fairly be presumed, that very little good, with much unmixed evil, would result from giving to legislation the right to dictate terms for the services and use of the property of the private citizen, in his business relations with other members of the body politic. This absence of conservative influence in our legislative bodies, was, doubtless, one of the reasons, if not the main reason, which led to the adoption of the limitations and restrictions of legislative power, included in all the State constitutions, as well as in the Constitution of the United States, the force and effect of which are so seriously impaired, if not entirely broken down by the opinion of the Court in this case.

VI.

The opinion of the Court in this cause is a serious impairment of the authority of the Dartmouth College Case, which has stood as the law in this country for nearly half a century.

The length of this application forbids anything beyond a brief statement upon this proposition.

It is a generally accepted principle, that the State cannot, by legislation, deprive itself of the essential elements of sovereignty, and that no legislative body, representing the sovereignty of the State, can so surrender the rights of sovereignty as to bind its successors. If, therefore, the right to control private interests under the police power, or otherwise, to an unlimited extent, and in the discretion of the State, is an *essential* attribute of sovereignty, which is the assumption upon which the opinion of the Court proceeds, viz., "the right to rule men and things," then, it must, of necessity, follow that contracts of the State, by legislation, are subject to this unlimited reserved power, and cannot conclude the State in reference to the subject matter of such contracts; for the Legislature cannot contract away the sovereignty of the State, either in gross, or in its essential elements. The grants of the sovereign authority to Dartmouth College and its directory, were no more sacred than the govern-

ment grants of the land, upon which the warehouses of the plaintiffs in error were situated. The warehousing business is surely no more a matter of public concern than the establishment of a university for the education of the people; and, if legislation relating to the property interests and private rights in the former, can be tolerated, it is difficult to see why it may not be had in reference to the latter. The disasters of the end may be seen from the beginning.

It is not to be disguised that there is in the popular mind of to-day a strong tendency toward the breaking down of all the safeguards of property rights. Interests and employments to a great extent are warring against each other, and are fast becoming the basis of party and political divisions amongst the people; and it is here again respectfully repeated, that it was one of the purposes of the constitution to prevent the fluctuations in private affairs, which would necessarily result from the domination of majorities over the private rights and interests of minorities.

VII.

It is respectfully submitted that the authorities referred to by the Court, all of which have been here considered, do not establish that the warehouse of the plaintiffs in error, under the facts disclosed in the record of the case, is, or has been anything other than *juris priviti*, according to the proper legal signification of those terms.

It is very easy to charge one, or even a considerable number of men, with a *virtual* monopoly. In a certain, but very inaccurate sense, the business of the whole world is carried on by monopolies, since, from the nature of things in civilized society, it is impossible for all men to be engaged in the same pursuits. Some occupations are, of necessity, more restricted than others; and the fewer the number engaged in any pursuit, the nearer that pursuit approximates to an exclusive one;

and, if it is honorable and productive, the larger the public or general interest in the persons engaged in it. If one man only has the knowledge of a particular production of common utility, he has, in respect to that thing, an absolute personal control of the supply, and, if it is matter of invention, the Government will, upon application, secure it to him as a monopoly for a series of years, and defend him in the exercise of his right, as a monopolist. The man who sets up a store, or a factory, at the cross-roads, which is nearer to a considerable population than any other establishment of a similar character, enjoys almost, if not quite alone, the privilege of trading with the people of that vicinity. The community has an interest, in a certain sense, surely, an advantage and convenience, from the business thus established. Is it a monopoly, in the meaning of the law, and can legislation come in and fix prices between the merchant, or manufacturer, and his customers?

It is respectfully denied that there can be any such thing as a monopoly, in the sense in which it is used in the opinion of the Court, unless it has an origin, actual or constructive, in grant from the State. There can be no monopoly in a thing or business, which is of common right, no matter how few may avail themselves of that right. When Lord Ellenborough. in *Allnut* v. *Inglis*, speaks of a "*virtual monopoly*," he is referring to a monopoly established by law, and not of one, which falls to a man by the accident of his being the only man engaged in a business, which is equally open to any other man, as a matter of personal right. Yet, in this case, the Court has laid down a general rule, which, in its expansiveness, embraces every useful employment and business of the nation, and brings them all into the condition of Government or *legal* monopolies, subject to legislative regulation, not only as to the manner in which the business shall be done, but, also, as to the prices to be charged for services and the use of property. The language of the opinion is, that "when, therefore, one devotes his property to a "use *in which the public has an interest*, he, in effect, grants to "the public an interest in that use, and must submit to be con-

" trolled by the public, for the common good, to the extent of " the interest he has thus created." It seems hardly possible, that the Court could have well considered the force of this language, in connection with the fact that every new industry, or modification of an old one, in itself valuable, must, of necessity, have a public interest. The Court thus broadly lays down the rule, that any private industry of the country is, as to the compensation it shall receive, subject to regulation by legislation. If this is so, then it may be pertinently asked, what protection to private rights is there under the Constitution? It was a right under the common law, for a man to pursue such useful and honorable occupation as he might select, and to make the most he could of his own.

Further on the Court says, that "a person has no vested " interest in any rule of the common law." Admitted, so long as it remains merely a "rule of the common law"; but property rights, in this country, are not remitted, *for their protection*, to the mere rules of the common law, and, therefore, do not stand upon the sanction of the common law, although that may be referred to for the determination of their origin and extent. In the case of *Pumpelly* v. *The Green Bay Co.*, already referred to, this Court said, that it was the purpose of the Constitution *to furnish protection and security to private rights against the government*, and that it had received the " commendation of jurists, " statesmen, and commentators, *as placing the just principles of* " *the common law* * * * *beyond the power of ordinary leg-* " *islation.*" Whilst, therefore, the plaintiffs in error may rightfully go to the common law for a just statement of their private property rights, they look to the Constitution for the protection of those rights against unjust and discriminating legislation.

The meaning of the opinion, when it says that if a man devotes his property to a public use, he grants to the public an interest in that use, and to the extent of that interest must submit to be controlled by the public, &c., evidently is, that when a man constructs and arranges his premises, with reference to doing a business, which it is for the advantage of the community

at large to have transacted, and actually enters upon the use of *his own premises for that purpose*, then the public, represented by the legislative power, may *arbitrarily* fix the compensation which he shall receive, or at least the maximum compensation which he shall be permitted to receive, for his services and the use of his property in that business. And when such compensation is thus fixed he cannot, by arrangement with his customers, agree for any greater rates than those provided in the law, the legislative rates being conclusive upon the owner, as to their sufficiency and reasonableness. The proposition startles even the prudence of conservatism. By it, an iron hand may, at any time, be laid upon any trade or business of the country. The discretion and judgment of the citizen, in what he has been accustomed to regard as his private affairs, is liable, at any moment, to be superseded by a legislative enactment. Business cannot prosper: industry and enterprise cannot and will not exert themselves. There is no demonstration, possible, that the Constitution was not intended to permit of this. The reply to the proposition, is, that its language indicates no such intention, and for nearly one hundred years it has been practically and judicially construed otherwise.

VIII.

The opinion of the Court reads, as though it was the impression of the Court that the warehousemen of Chicago, and especially the plaintiffs in error, had by law or otherwise an established monopoly in the warehousing of grain. If such was the impression of the Court, it is impossible to tell whence it was derived, for there is nothing in the record, or in the facts judicially known to the Court, from which such an impression can draw reasonable support. There are, it is admitted, a certain class of facts of which the Court will take judicial notice. Information of such facts must, however, reach the Court in some way, and it may be important, that that in-

formation should be accurate; and when the decision of a cause involving, indirectly, the fate of $5,000,000 of property, is dependent upon facts judicially taken notice of, it becomes very essential that the knowledge of the Court should be certain. The suggestions of counsel, by way of illustration or argument, should not be extended beyond their real meaning. The statement of counsel in this case, as to the way in which the business of the Chicago warehouses is conducted, has no real tendency to show a monopoly of the grain business through these warehouses; but, if the impression which the Court derived from that statement is incorrect, the Court will not regard itself as concluded by that impression. It is simply fair to say of the statement so largely quoted from in the opinion of the Court, that it does not show that the grain which comes to Chicago, on its way to a market, *necessarily* passes through these warehouses.

Not to encumber this application with too much of quotation, the following is extracted from the opinion of the Court: "From these it appears that the great producing "region of the West and Northwest sends its grain by "water and rail to Chicago, where the *greater part* of it is "shipped by vessels for transportation to the seaboard, by the "great lakes, and *some of it* is forwarded by railway to Eastern "ports." Then follows a description of the Chicago "*elevators*," and the manner of their use, and a statement of the manner of conducting the business in them for "*more than twenty years*," and that the ownership has "been by private individuals, who "have embarked their capital and devoted their industry to "such business as a private pursuit." Now, it does not appear from this statement that the grain which comes to Chicago has necessarily to pass through these warehouses, or any other warehouses which might be erected to facilitate the transfer or storage of grain; and the fact is, that fully one-third of all the grain which comes to Chicago does not pass through warehouses at all; and it is at the option of shippers whether they will pass their grain through warehouses to vessels,

or send it directly through upon cars. So that there can be no public way, *of necessity*, through these warehouses; and the statement of counsel does not warrant the assumption that there is. The opinion then goes on to state that in 1874 the 14 warehouses adapted to the business of transferring and storing grain, were owned by about thirty persons, and that "nine business firms controlled them." The record contains no such statement, and it may be true or it may not; but admit its truth, what influence can it have upon the rights of the plaintiffs in error? How many individuals and firms would the Court have employed in the business before it ceases to be a monopoly? It is not readily understood why, if only 30 persons and 9 business firms claim to engage in any particular business, those actually engaged in it, should suffer any prejudice thereby. Others may come in, if they are disposed to, and the laws of Illinois provide that warehousemen may condemn private property for that purpose, and that all railroads shall permit connections from their main tracks to warehouses, and shall deliver grain to the particular warehouse to which it may be consigned. The business is open to anybody and everybody; and, that no more are engaged in it, is, at least, *prima facie* evidence that the business is already fully provided for, *and such is the fact*. The river and railroad frontage of Chicago is many miles in extent, and every part of it is open for the erection of warehouses, if *private* citizens will engage in the business. The State, however, owns none of this, nor does it propose to purchase any for warehouse purposes; but instead of doing that, is striving to convert *private* property to a *public use without compensation*, or else to destroy the value of that property entirely. Good morals are as good for States as for individuals, and the Constitution no more protects dishonesty in the public than it does in the private citizen.

But the opinion proceeds to quote from the agreed statement of facts in this cause, to show that the charges of Chicago warehousemen, have been from year to year such as were agreed upon by the parties in interest, the same being "published in

" one or more newspapers printed in said city, in the month of " January in each year, as the established rates for the year then " next ensuing such publication."

It does not appear that this *agreement of the parties in interest* as to the rates of storage, was regarded by the court as involving any wrong towards their customers, or any injustice to the public, although it was insisted for the appellees that it was evidence of a conspiracy or combination against the general welfare; but still this fact, together with the supposed fact that, in 1874, there were only nine business firms and about thirty persons engaged in this particular kind of warehousing business in Chicago, is made the basis of a conclusion that the warehousing business in Chicago " *may* be a *virtual* monopoly." It would seem to be reasonably apparent, from what has been already said, that there is no monopoly in this business, by law, nor is there any in fact, except such as must attach itself to every business, needful or useful to a community, in which, from the nature of things, everybody cannot engage. But if there is a right of Legislative control over private property, dependent upon the fact, that it is, or possesses a monopoly, then, before that right attaches to any particular property, it certainly ought to appear that it *actually* is, or has, such monopoly, and it is not sufficient to conjecture that it may become such. The citizen and his property ought not to be forced to bear the burdens and restrictions of legislation not applicable to their condition. It is not enough to show that a man *may become* a thief in order to justify the court in convicting and punishing him *as a thief*. When a violation of *absolute* rights is claimed, doubts are to be resolved in favor of the accused, and nothing less than certainty is accepted. What *may be*, is inadmissible.

IX.

The Illinois warehouse legislation does not pretend to regulate any of the elements which necessarily enter into the actual expenses of warehouses; nor is there any statute of the State which in any way purports to regulate such expenses.

It must be known to the Court, that the warehousing business is not unattended with actual expenditures for labor, machinery, repairs and general supervision. It is a business as liable to fluctuations in all its incidents as any other, and it is not to be presumed that warehousemen would be neglectful of their private interests, by a failure to accomodate their charges to the changes which, from time to time, may take place in this respect. The Law takes no notice of such variations of expenditure ; but fixes arbitrarily a maximum to be observed, whether expenses are little or great, and is thereby, divested of every claim to equitable consideration, even if it could be pronounced to be constitutional. But there is no constitutional provision, by which a citizen can be compelled to perform a service for less than the actual cost of that service, or alternatively to be deprived of the right to perform that service upon and by means of the property, of which he is the absolute owner.

X.

In the discussion of a question of Constitutional Law, it is hardly admissible to look forward to the consequnces of its decision, except as those consequences may tend to reflect light upon the meaning and intention of the provisions of the Constitution itself, Life, Liberty and *Property* must and will protect themselves, so far as is practicable, by the powers which they severally possess. They are equally and in the same language guaranteed protection against legislative interferences by the Constitution of the United States. Property will not submit to legislative confiscation, suddenly or lingeringly, any more than would life or liberty. The struggle may be long, it may be sanguinary even ; but, as soon as it is determined that the struggle must come, the ultimate result may be plainly foretold; for in all such struggles the history of the world but repeats itself. If the view of the provisions of the Constitution, here taken, is in any degree correct, it was its intention to prevent the possibility of any such antagonism between Legislative

Power and private and property rights ; and the natural consequences of such antagonism ought not to be overlooked, when the force and meaning of constitutional provisions, having relation to such antagonism, are under consideration.

It is respectfully suggested, also, that the words, " no man " shall be deprived of life, liberty or property without due pro- " cess of law," or their equivalent, found in *Magna Charta*, and in the Constitution of the United States, although they may have, *as words*, the same signification, have a very important difference of application. *Magna Charter* was a forced concession of privileges and rights, in favor of the people, from King John an absolute despot. Whatever of authority was thus separated from the Crown, became vested in the people through Parliament, tne representative of the people, as a matter of right. Hence, it follows, that the limitations of *Magna Charta* are not limitations upon the powers of Parliament, and that an act of Parliament is the supreme law of England.

The origin and consequently the application of this provision in the constitution of this government, are very unlike this. Here, the people in their aggregate capacity, after their separation from Great Britain, are assumed to have the supreme authority, and in that capacity, to have met together, by their representatives, to frame a constitution of government. The people, thus represented, combined the whole power and authority of the Crown and of the people of England, and could estop themselves from the exercise of powers, which in England, by *Magna Charta*, were only surrendered by the king to the people, and which the people, therefore, through Parliament as their representative, might still exercise, notwithstanding the provisions of *Magna Charter*.

The Constitution of the United States, in its prohibitions, is a restraint upon *the entire sovereign power*, which "*magna charta*" in England, is not, and, therefore, it is unphilosophical, as well as unjust to the purposes of our constitution, to say, that what is permitted to the English Parliament is permissible to a State legislature; or to infer the validity of the acts of State legislatures, from the fact that similar acts have been passed by the

Parliament of England. In this country the constitutional provision that "no man shall be deprived of life, liberty or property "without due process of law," overreaches all legislative authori y. In England the same provision in *magna charta* is no restraint upon Parliamentary power; hence, upon questions of legislative power in this country, the acts of Parliament and the decisions of English courts are undeserving of attention, either as authority or illustration.

XI.

It is unfortunate, perhaps, that the Court, in this case, involving, by way of precedent, so extensively the private interests of the whole country, should have departed so widely in its opinion from the line of authorities cited on the argument. The opinion scarcely makes mention of any argument or authority actually introduced on either side, and it would seem that the Court started out on a new line of investigation in which the services of counsel were of little advantage. The right of the Court to do this is in no way called in question. It can only be regretted, that counsel of such indifferent ability were employed to present to the Court questions of such weight and magnitude. A rehearing of the case might amend the mistake of the plaintiffs in error in this respect—and the importance of the questions involved, is urged as a reason for a rehearing and reargument, which may include a restatement of the argument and authorities heretofore presented, as well as a careful review of the argument and authorities, upon which the opinion of the Court seems to have been predicated—and in the firm belief that public, as well as private interests, demand such rehearing and reargument, your petitioners respectfully ask that the same may be granted.

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