May it please the Court:

The brief and argument of my learned associate relieves me of the necessity of making more than a short and formal reference to the facts contained in the record of this cause.

Statement.

In the year 1862, the plaintiffs in error erected, upon ground in the city of Chicago, leased by them for that purpose, a grain elevator and warehouse, ever since known as the "Northwestern Elevator," and from the time of its completion up to the time of the institution of these proceedings, transacted, in said warehouse, the business of receiving and storing grain for hire. Prior to the year 1871, the General Assembly of the State of Illinois had enacted various laws, having relation to the manner of conducting that business, all being of a general character and applicable throughout the State; and the scope of which was the prevention of frauds in the weighing and grading of grain, and in the issuing of warehouse receipts, and the establishment of such police regulations for the business, as were regarded as necessary and proper, and amongst others was a provision requiring warehousemen to publish a schedule of their rates of storage for the ensuing year, during the first week in January in each year.

Under the stimulus of the requirements of this law, warehousemen in Chicago had for several years consulted together, to a greater or less extent, in respect to their charges for storing and handling grain, and the prices had been for many years

substantially uniform at two (2) cents per bushel for the *first twenty* (20) *days*, or any part thereof, and one-half a cent per bushel for each succeeding *ten* (10) *days*, or any part thereof, these prices including, in addition to storage, all expenses of receiving and delivering the grain.

In the year 1871, the General Assembly of Illinois passed an act, which was approved on the 25th day of April, in that year, entitled " An Act to regulate Public Warehouses, and the " Warehousing and Inspection of Grain, and to give effect to " Article XIII of the Constitution of this State." The only provisions of the act material to be considered here, are the 1st, 2d, 3d, 4th. 5th and 15th sections, the substance of which is as follows :

Section 1 divides public warehouses, as defined in Article XIII of the Constitution of the State, into three classes, designated as classes A, B, and C.

Section 2 provides that class A shall embrace all warehouses, elevators or granaries, in which grain is stored in bulk, and in which the grain of different owners is mixed together, located in cities having not less than 100,000 inhabitants.

Section 3 provides that the proprietor, lessee or manager of a warehouse of class A shall be required, before transacting any business as such warehouseman, *to procure a license* from the Circuit Court of the county in which it is situated, *permitting him to transact business as a public warehouseman* — such license to give authority to carry on such business "*in accordance with* " *the laws of this State*," and to be revocable by the court granting it, upon a summary proceeding, for any violation of such laws.

Section 4 requires that the person receiving a license, shall file with the clerk of the court granting it, a bond to the people of the State of Illinois in the penal sum of ten thousand dollars, with security to be approved by the court, " conditioned for the " faithful performance of his duty as a public warehouseman of " class A, *and his full and unreserved compliance with all laws* " of this State in *relation thereto.*"

Section 5 provides that any person, transacting business as a public warehouseman of class A, without first procuring a li-

cense, or who shall continue such business after his license has been revoked, shall, on conviction, be fined not less than $100, nor more than $500 for each day he so carries on business, " and " the court may refuse to renew any license, or grant a new " one, to any person whose license is revoked, within one year " from the time the same was revoked."

Section 15 is, in fact, a reproduction of a previous law, requiring warehousemen of class A, during the first week in January in each year, to publish, in one or more newspapers of the city in which their warehouses are situated, a schedule of storage rates for the ensuing year, and then provides that " The maximum charge for the storage and handling of grain, in- " cluding the cost of receiving and delivering, shall be, *for the* " *first thirty days*, or part thereof, *two cents per bushel*, and for " each fifteen days, or part thereof, after the first thirty days, one- " half of one cent per bushel."

This legislation was, by its own terms, limited in its application, to warehouses in the city of Chicago, that being the only city in the State having the specified population, and to a comparatively small number of warehouses of which the " Northwestern Elevator " of the plaintiffs in error was one.

The act took effect on July 1st, 1871, after the plaintiffs in error had been in the possession and enjoyment of this warehouse property, as private property, for nine years. The rates of storage had been fixed and published for that year as required by law, and no change was made on account of the passage of the act.

The same rate was fixed and published for the year 1872, (printed Record, p. 5,) the plaintiffs in error, though conforming to the other requirement of the act, refusing to recognize the right of the General Assembly to fix prices upon their services and the use of their private property, and therefore refusing to take out a license as warehousemen, or to give a bond, under the 4th section of the act. The rates of storage, as fixed and published by them for the year 1872, were the same as for previous years, viz: two cents per bushel for the first *twenty* days, or any part thereof, and one-half cent for each succeeding *ten* days, or any part thereof, after the first *twenty* days,

instead of the same rates for *thirty* and *fifteen* days respectively, which were named as the *maximum* by the 15th section of the act.

For transacting business as public warehousemen of class A, without taking out a license and giving a bond in pursuance of the requirement of the act of April 25th, 1871, the State's Attorney of Cook county, exhibited and filed in the Criminal Court of said county an information against the plaintiffs in error. The plea of not guilty being interposed, the cause was submitted to the court upon an agreed statement of facts, upon which the plaintiffs in error were found guilty, and adjudged to pay a fine of one hundred dollars. From that judgment a writ of error was prosecuted to the Supreme Court of Illinois, where the judgment was affirmed by a divided court ; and the cause is now brought into this court, under provisions of law in such cases, for re-examination and review, upon the ground that the act of the General Assembly of Illinois, approved April 25th, 1871, so far as it is involved in this case, is repugnant to the Constitution of the United States, and therefore void.

The agreed statement upon which the cause was heard, sets forth more in detail the facts above given, and also the further fact, that after the Act of April 25, 1871, took effect, the plaintiffs in error received and stored grain only by special agreement with the owners thereof, who in all cases assented to the rates of storage charged by them.

The opinion of the majority of the Supreme Court of Illinois, and also the dissenting opinion, are set forth in the record, and it is apparent upon inspection, as well as from the certificate of the Chief Justice of that court, that the validity of the Act of April, 25, 1871, under the Constitution of the United States, was brought in question, and that the decision of the Illinois Courts was in favor of its validity.

It is now claimed that the provision of that act, and especially the 15th Section, fixing or attempting to fix, maximum rates of charges for storing and handling grain, are repugnant to the 3d Clause of the 8th Section of Article 1, of the Federal Constitution, and also to the 5th Article and the 1st Section of the 14th Article of the Amendments to said constitution.

My learned brother and associate has so fully stated and considered that part of the case which falls under the 3d clause of the 8th Section of Article 1, that I shall not trouble the court with any effort to enlarge upon his argument, and in this discussion shall endeavor to confine myself to this single proposition, viz :

The provisions of the Illinois Warehouse Act, which are here brought in question, are repugnant to the principles upon which our government was founded, as declared in Article 5 *of the Amendment to the Federal Constitution, and are also within the prohibitions of the* 1*st Section of Article* 14 *of said amendments which says :* "*Nor shall any State deprive any person of life,* "*liberty or property, without due process of law, nor deny to any* "*person, within its jurisdiction, the equal protection of the law.*"

Argument.

It is not to be disguised, that in the earlier periods of civil government, attempts of various kinds were made by those in authority, to control and abridge in different ways and for different purposes, the rights and privileges of the citizen as now understood. Civilization and government did not spring at one bound from the barbarous and chaotic condition assigned to mankind originally by all writers upon municipal law, into the comparatively perfected form which they have assumed in this latter half of the nineteenth century. There were periods, or eras of transition, times when old forms and old theories were in progress of displacement ; when new elements, incapable of philosophical combination with the old ones, were struggling for the ascendency ; and even when these new elements, having, in the main, acquired the mastery, were yet unable to wholly ignore and put aside the theories and practices which they had in great measure superseded. Many of the notions of, and pertaining to, the parental form of government, intruded themselves into the patriarchal, and when, in progress of time, the latter gave place to theocracies, and they in turn to the more matured and better regulated forms of kingly domination, there still remained in each succeeding regime, and too firmly rooted to admit of immediate abolishment, many features, habits, customs and theories of the previous system, which manifestly influenced the relations of the government to the governed, in proportions constantly diminishing, as they receded from the point of formal and apparent change. It is by no means correct, therefore, to say, that everything which may be found involved and mixed up, in any particular form or system of civil government in the course of its history, naturally or necessarily belongs to and is a part of that form or system. The elimination of the old is always gradual, and frequently slow in its progress. The habits of communities, like

those of individuals, are changed only by persistent and continued efforts. Opinions are modified more easily than the methods of enforcing them. New ideas, as a general rule, first seek expression through old formulas, for the reason that the ideas must be perfected before new formulas can be devised for communicating them to others. In the same way, the new system or theory of civil government, must prove the insufficiency and want of adaptation, of old rules and practices to the proper accomplishment of its ends, before it will venture to strike out for itself upon untried and merely experimental regulations or methods of developing itself. Protestantism sought at first to maintain itself, as well as to widen and deepen its influence, by the same or similar systems of persecutions to which it had been subjected by the church from which it had seceded. The American colonists, driven from the old countries by what they deemed harsh and unjust, and, in some cases, unconstitutional regulations of a political or religious character, still, in their new settlement, looking to the protection of themselves only, adopted, in many instances, regulations equally harsh, oppressive, and unconstitutional, for the government of their several communities. Would it be either fair or correct to say, that these regulations belonged to and were a part of the new order of things, which they designed to establish? Was it not rather an attempt of the new principles and theories to work themselves out through old instrumentalities, and the only ones to which the people were accustomed, and the unfitness and incongruity of which would naturally be discovered only by experiment and trial? That the latter was the fact is plainly demonstrated by the result; for gradually new rules and regulations, in harmony with the spirit of the new theory and the new system, were adopted, and, in proportion as this harmony became complete, the rules and instrumentalities of the old system were abolished, or fell into disuse. This was invariably the result in all cases, where the new system and theory had a stronger hold upon the minds of the people, than the old forms and regulations which they had been accustomed to regard as the proper methods of expressing the popular mind, and when the substance of government was considered of more importance than the means

of enforcing it. If, in any case, the attachment to the old form was stronger than the attachment to the new principle, the two being incompatible, the old system gradually supplanted the new until harmony was again restored. In this contest between principle and theory on the one side, and the means and methods of their enforcement on the other, many rules and regulations were adopted, which were, in terms, never repealed or set aside. They stand as monuments of the severity of the contest through which the people passed in their struggle between attachment to new ideas, and veneration for old forms and regulations. They have not been broken down ; but they are now as harmless, and as evidently without force or influence, as though they were covered in every line and letter with the formal stamp of public repudiation. Of this character are many of what are called the "Blue Laws" of Connecticut, which are said never to have been formally repealed, but which no repealing act could ever place more effectually than they now are, amongst the dead and buried relics of the past. Their observance is not expected, and could not be enforced, and probably no court could be found to recognize their validity, and simply because they are repugnant to the new ideas and system of government, of which they can never be a consistent part, and of which they were never more than experimental instruments, abandoned speedily as disastrous failures. New rules and new methods with which they are as much at variance as they are with the new ideas and the new system in which these new rules and new methods had their origin, have filled their places, and the experiment of which they formed a part, can no more be set up against the new and perfected rules and methods adapted to the new ideas and systems, than can the abandoned experiment of a novice in inventions, be set up to defeat the patent for a perfected mechanism.

At the time of the formation of the governments of the original States, and the adoption of their several constitutions, the new ideas of civil government, upon which the Colonies had been mainly planted, had well nigh achieved a complete victory over the attachments to old rules and regulations, which had been imported by them from the old world; much more was this the

case in relation to the people of the new States, that came in under the provisions of the Constitution of the United States, and framed their constitutions of government, in the main, in harmony with the new ideas, then better developed and more fully understood. The theory and principles of our form of government, call it by what name you will, had then received complete and suitable expression in the Declaration of Independence, the Constitution of the United States, and in the Constitutions of the States then organized, and the spirit and purposes of it, were, in general terms, well and clearly defined; and it is not too much to say, that that government is not more definitely distinguished from those which preceded it, in the simplicity of its administration, than it is in respect to the right guaranteed by it to the private and individual citizen. Both Federal and State constitutions, speaking generally, placed private rights beyond the reach of any arbitrary exercise of governmental power, and if, in the broad foundation of popular sovereignty, on which it rests, there is any pillar or corner stone which gives support and character to the superstructure in any greater degree than any other, it is that by virtue of which, the rights of the individual, whether he be of the majority, or of the minority of the community, are made certain and protected equally with the rights of all his fellow members of the civil society.

It would be prolixity without profit to cite the several constitutions of the States in support of these propositions. The bills of rights, which they all contain, are, substantially, of the same character, and directed mainly to the security and protection of private rights, and, without these features, the Constitution of the United States was deemed defective, as not being fully in harmony with the advanced ideas of government, which it was intended thereby to establish and perpetuate. Hence the several amendments from time to time made thereto, in which stand conspicuous the provisions guaranteeing private and individual rights, and prohibiting their abridgment by either Federal or State legislation.

Not forgetting the questions upon which this court must finally determine the correctness or incorrectness of the judgment of the Supreme Court of Illinois in this case, it is insisted that

the provisions of the several State Constitutions above referred to, are germain to this discussion, as showing the scope and purposes of the government under which that judgment was rendered, and the ideas and principles upon which that government was founded; for the instrumentalities or machinery through which that government operates and manifests itself, must be in harmony with those ideas and principles, and, in their effects, within the scope and purposes of the government, else the old antagonism is revived, and the one or the other will be compelled to give way. These various provisions of the State Constitutions, all of which have been framed as they now stand, since the adoption of the Federal Constitution, are also, in themselves so many supports to that construction of the latter instrument, which will be here contended for.

To show that there has been no departure from the general principles underlying the government of other States, in the State of Illinois, it is proper to refer to some of the provisions of the several constitutions from time to time adopted by the people of that State.

Article 8 of the Constitution of 1818 has in it these several provisions, amongst others :

First. " That all men are born equally free and independent, " *and have certain inerent and indefeasible rights, amongst* " *which* are those of enjoying and defending life and liberty, and " of *acquiring, possessing, and protecting* property and reputation, " and of pursuing their own happiness."

" *Second.* That the people shall be secure in their persons, " houses, papers and posessions from unreasonable search and " siezure, etc."

" *Third.* No person shall, for the same offence, be twice put " in jeopardy of his life or limb ; *nor shall any man's property be* " *taken or applied to public use*, without the consent of his repre- " sentatives in the General Assembly, *nor without just compen-* " *sation being made to him.*"

These same provisions were literally transferred into the Illinois Constitution of 1848, and the following, amongst others, was added : " That no freeman shall be imprisoned or divested of " his freehold, liberties or privileges, or outlawed or exiled, or

" *in any manner* deprived of his life, liberty or property, but by " the judgment of his peers or the law of the land."

The Constitution of 1870 has the following bold and comprehensive declaration of the purposes of government, viz : " All " men are by nature free and independent, and have certain in- " herent and inalienable rights, amongst them are life, liberty " and the pursuit of happiness. *To secure* these rights *and the* " *protection of property*, governments are instituted amongst " men, deriving their just powers from the consent of the gov- " erned."

Immediately following it is this language: " No man shall be " deprived of life, liberty or property, without due process of " law." And again, Sec. 13 of Art. 2: " Private property shall " not be taken or damaged for public use, without just compen- " sation. Such compensation, when not made by the State, *shall* " *be ascertained by a jury as shall be prescribed by law.*"

The several constitutions of the State of Illinois, under which the people of the State have acquired their property rights, therefore, have at all times recognized those rights, and guaranteed their inviolability, by absolutely taking away from the Legislature the power of arbitrarily abridging their exercise. It is a noticeable fact, also, that these provisions of the State Constitutions, are, in some cases, literally, in others, substantially, copied from the first amendments to the Federal Constitution, so that, in this respect, there is, and ever has been, perfect harmony between these several instruments ; and when it is considered that similar provisions are contained in all other State constitutions, it can but forcibly appear, that, in the scheme of government devised and adopted for this nation, the protection of private, individual rights had a conspicuous place, and was intended to be a permanent feature. Protection to private rights is *the law of the land* in the broadest sense of that phraseology. It is woven into every constitution, and made permanent and secure by penalties and prohibitions, so much so, that the government itself rests upon it as an axiom and fundamental principle. It is the peculiar and distinguishing feature of this government, without which, a President instead of an Emperor, elections by the people instead of succession by divine appointment, would be but formal differ-

ances, yielding no practical advantages. The provision of the Federal Constitution, embodying these principles, is as follows: "No person shall be held to answer for a capital, or otherwise "infamous crime, unless on a presentment or indictment of a "grand jury, except, etc., nor shall any person be subject for "the same offence to be twice put in jeopardy of life or limb; "nor shall be compelled in any criminal case to be witness "against himself, *nor be deprived of life, liberty or property* "*without* due process of law; nor shall private property be "taken for public use without just compensation." These, it is true, have been held to be limitations upon the federal power only; but that, here, is a matter of no consequence. They are, when thus applied, strong cumulative evidence of the proposition here insisted upon, that protection to private rights is the predominant idea and theory upon which this government of ours was established; so much so, that any legislation which violates or infringes these rights, may fairly be said to be in hostility to the fundamental principles upon which that government rests.

But the Fourteenth Amendment of the Federal Constitution has extended these principles to State legislation, and provides that, "No State shall make or enforce any law which shall "abridge the privileges or immunities of citizens of the United "States; *nor shall* any *State deprive any person of life, liberty or* "*property without due process of law*, nor deny to any person "within its jurisdiction the equal protection of the laws." And this still more strongly illustrates the continuing sense of the importance of protecting private rights against governmental interference, either State or Federal, for this amendment not only passed the Congress of the United States, at a comparatively recent date, but was also ratified and adopted by the legislatures of two-thirds of all the States, and thereby became a part of the supreme law of the land, which no State enactment can violate, and live.

In the legislation, which must be reviewed in the discussion of this cause, the court is brought face to face with one of the first efforts of the legislative department of a State to return to the old and discarded formulas of government, strongly in con-

trast with the ideas and principles upon which our government was formed, as defined and expressed in the several written constitutions above referred to. It is an attempt to work out protection to private right and private property through legislative control, not unlike the early efforts to work out and protect liberty of conscience through the instrumentality of religious persecution. If the things are compatible, if the means are adapted to the accomplishment of the results which the constitutions, State and Federal, undertake to guarantee, then both may stand. If not harmonious, then either the constitutions or the law must go to the wall.

This question arises here in this wise: The taking of a license and giving of a bond, as required by the 3d and 4th Sections of the act, would be in effect an adoption of, and acquiescence in, the provisions of the act, by the plaintiffs in error, and a waiver of their right to object to those provisions.

Cooley on Constitutional Limitations, 181.

The 15th Section of the Warehouse Act is, therefore, intimately interwoven with the provisions of the 3d and 4th Sections, which require the taking of a license and the giving of a bond; and in the progress of this litigation, it has not been claimed, and probably will not be, that there is any obligation, resting upon the plaintiffs in error, to take a license and give a bond, if the provisions of the 15th Section, fixing maximum rates of storage, are invalid. The proposition, therefore, is fairly presented for the determination of the court, whether, under the provisions of the Federal Constitution, and especially the 5th and 14th Amendments, it is competent for the General Assembly of the State of Illinois to interfere with, embarrass and possibly destroy the private property of the citizen, by fixing arbitrarily the value of it, or the value of its use, in connection with the services of the owner.

This is purely a question of power, and that too of arbitrary and irresponsible power. If it exists, and its mandates have the force of law, then it is a power to practically annihilate private property by destroying the value of its use--for if the legislature can fix the prices of the storage of grain in the warehouses of the plaintiffs in error, at two cents per bushel for 30 days, it

can fix it at one cent for the same time, or at half a cent for six months, and perhaps abolish it altogether. There is no limit to the power if it exists at all. The question of the reasonableness of the price, is not one involved in this record, nor does the warehouse act allow it to be made. The source to which the advocates of such arbitrary interference, on the part of the State, generally look for support and justification, is that undefined, irresponsible and mysterious element, usually called the police power.

COOLEY says, p. 577, that "the maxim, *sic utere tuo ut alienum* "*non laedas*, is that which lies at the foundation of this power." By this maxim, then, all that class of legislation must be tested in determining its legitimacy. With this in view, it may be material to inquire what there is in the business of a warehouseman, occupying his own property, requiring the interference of the State, in order that he may not do injury thereby to his neighbors or the public. It may be conceded that the State can make all such regulations as to the conduct of this or any other business, as are necessary for this purpose, and in all those particulars in which the act in question tends to this result, it may have a legitimate basis to rest upon. It is not easy, however, to perceive how a license and a bond, and the fixing of maximum rates of storage, can come within the rule. The legislature might just as well require a man to take out a license and give a bond before he should be permitted to live in his own dwelling house. If the property or business was of a character to become a nuisance, or dangerous to the health or morals of the community, it would be consistent with precedent, and the proper exercise of the police power, to hold it in check by bonds and licenses, and even to abate it altogether. But there is nothing of the kind pretended, nor is there anything in the nature of the property or of the business from which results of this character can be anticipated ; neither have any of the provisions of the act here involved, and least of all, the one fixing *maximum rates*, any direct reference to the manner of using the property or transacting the business, in the sense of the maxim, which lies at the foundation of the police power. The fixing of prices upon property or its use, has no more

tendency to prevent abuses in the warehousing business, carried on by means of it, or to prevent the warehousing business from becoming a nuisance, within the corrective exercise of the police power, than fixing a price upon lard, tallow, or grease, would have to correct the nuisance of a rendering establishment. There is no possible connection between the means employed and the results aimed at. The result, viz., the prevention of a public nuisance or injury, is unquestionably within the province of the police power, but the means adopted are not, for the reason that they have no tendency to produce the result—the means and the result are not in harmony, and hence, are not parts of the same system, and do not properly arrange themselves under the same head of governmental purposes. A fixing of prices might have a tendency to prevent extortion, or a conspiracy to extort, but extortions and conspiracies are crimes or misdemeanors at common law, and also under the statutes of the State, the commission of which may be punished by fine or imprisonment; but it was never yet heard that the results of a man's personal wrong-doing should be visited directly upon his property. His property may be taken under judicial process to satisfy penalties, which he may have incurred, but when was it ever known under our form of government, that a man's property might be stripped of its practical value, because, in the use of it, the owner might be guilty of a misdemeanor? As well might the law say that if a man commits larceny, and stores the stolen property in his warehouse, he shall not thereafter lease that house for storage purposes for more than 50 per cent. of his previous rental, and in order to prevent him from receiving and storing stolen property, the storage he shall be entitled to charge, shall be and is fixed at a nominal price. The incongruity is equally great, whether the enactment be put in the form of a prevention or a punishment for an offense. At the proper place, I shall endeavor to show that, in this instanse, the legislature has not undertaken to create any new offence, or define any old one, which is to be remedied by the act in question, under any recognized power of government.

In *Wilkinson* v. *Leland*, 2 Peters, 657, Mr. Justice STORY, in

discussing the power of the State government to make laws, uses this language: "What is the true extent of the power thus "granted, must be open to explanation *as well by usage*, as by "construction of the terms in which it is given. In a govern- "ment, professing to regard the *just rights of personal liberty* "*and property*, and which is required to legislate in subordina- "tion to the general laws of England, it would not lightly be "presumed, that the general principles of *magna charta* would "be disregarded, or that the estates of the subject were liable to "be taken away without trial, without notice, and without "offense. Even if such authority could be deemed to have been "confided by the charter to the general assembly of Rhode "Island, as an exercise of transcendental sovereignty before the "revolution, it can scarcely be imagined that that great event "could have left the people of that State *subject to its uncon-* "*trolled and arbitrary exercise. That government can scarcely* "*be deemed to be free, where the rights of property are left solely* "*dependent upon the will of a legislative body without any re-* "*straint. The fundamental maxims of a free government seem* "*to require* that the rights of personal liberty *and private* "*property should be held sacred.* At least, no court of justice, "in this country, would be warranted in assuming that the "power to violate and disregard them—*a power so repugnant* "*to the common principles of justice and civil liberty*—lurked "under any general grant of legislative authority, or ought to "be implied from any general expressions of the will of the "people."

The same learned jurist in delivering the opinion of this court in the case of *Terret* v. *Taylor*, 9 Cranch., at page 52, speaking of the power of the State legislature over vested private rights, says: "But that the legislature can repeal statutes creating "private corporations, or *confirming to them property already* "*acquired* under the faith of previous laws, and, by such repeal, "*can* vest the property of such corporations exclusively in the "State, *or dispose of the same to such purposes as they may please*, "without the consent or default of the corporators, we are not "prepared to admit. And we think ourselves standing upon "the principles of natural justice, upon the fundamental laws of

" every government, upon the spirit and letter of the Constitution " of the United States, and upon the decisions of most respectable " judicial tribunals, in resisting such a doctrine."

In the case of *Goshen* v. *Stonington*, 4 Conn., 225, HOSMER, Ch. J., delivering the opinion of the court, says: " With those " judges who assert the omnipotence of the legislature in all " cases where the constitution has not interposed an explicit " restraint, *I cannot agree.* Should there exist, what I know " as not only an incredible supposition, but a most remote im- " probability, a case of direct infraction of vested rights, too pal- " pable to be questioned and too unjust to be vindicated, I could " not avoid considering it as a violation of the social compact, " and within the control of the judiciary. If, for example, a law " was made, without any cause, to deprive a person of his pro- " perty, or to subject him to imprisonment, who would not ques- " tion its validity, and who would aid in carrying it into effect."

And what is the difference between depriving a man of his property, and depriving him of the profitable use of it? There is nothing that touches property so vitally, as an interference with its income, and the results of its use—crush out these, and its value is destroyed, and, as property, it is practically annihilated; and no act of government can be more significant of irresponsible despotism, than that which aims at such results. As before stated, it is immaterial to this case, whether the prices fixed by the 15th Section of the Warehouse Act are high or low, remunerative or ruinous—we are dealing with the question of the power to fix at all. The power to fix at one price, implies a power to fix at any other price; for the act does not permit the reasonableness or unreasonableness of the price to be inquired into at all.

The police power, whatever it may be, is conceded to be one of the powers inherent in every organized sovereign State, and exists by virtue of the sovereignty of the State. It is an undefined power. No constitution, so far as I am aware, has undertaken, in terms, to explain or limit it. Being thus undefined, efforts have sometimes been made to magnify it into an unlimited authority over the conduct and property of the citizen, thereby, in effect, if the proposition was correct, erecting a des-

potism within, but above, what we term free constitutions. In other words, it is argued, that this inherent power of sovereignty not being named in the limitations of our constitutions, is practically a free power, and, under it, the majority may work its pleasure. Hence it is, that such theorists always endeavor to refer any arbitrary act of the government to this undefined and, as they say, unrestricted source of power. In the opinion of the majority of the court below, a vigorous attempt is made to found the power to pass the warehouse law, upon an assumed authority or right in the legislature to impose such restrictions upon certain employments, including that of warehousemen, " as may be deemed necessary to furnish the great-" est good to the greatest number." This would seem to place the Supreme Court of Illinois in the front ranks of those who claim the widest scope for the exercise of the police power, as inhering in the sovereignty of the State. It might be interesting to point out the difference between the maxim announced by that court as the foundation upon which the police power rests, and the maxim to which it is referred by Judge COOLEY ; but the difference is so apparent, that it cannot fail to suggest itself, and the labor of pointing it out is therefore unnecessary. The doctrine announced by the Illinois Court, in the few words above quoted from the majority opinion, cannot escape this criticism—that it opens wide the door to legislative encroachment upon private rights and private property. Under its operation, the citizen would have no rights which the legislative power would be bound to respect. His private possessions would be at the mercy of the legislative power, which would be the sole judge of what constituted " the greatest good " to the greatest number," and how far it would be necessary to strip the individual of his private rights in order to accomplish that greatest good. It strikes at the very foundation of that protection to private rights which, it is every where assumed, our constitutions are intended to give. The fact is, that the court misapplied a familiar principle, and, by that misapplication. has made the principle subversive of the very spirit and letter of the Federal and State constitutions. The principle is well enough, when confined to legislation of a general character, applicable to

all persons within the jurisdiction of the sovereignty; but it never was intended, at least, not under our constitutions, to apply to special, or class legislation, or legislation affecting particular interests or employments.

The police power, like every other, must exist and be exercised in subordination to the principles upon which governments are founded. If the government is despotic, and in the control of an autocrat, there is no limit to its arbitrary character, and no relief from its mandates, short of physicial resistance and revolution. Where the sovereign power is unlimited, the police power, as a part of its sovereignty, is unlimited also. A limited sovereignty cannot, from the very nature of the case, possess unlimited power; there cannot be, lurking within a limited power, a power capable of overriding all limitations. It is absurd, therefore, to say that a legislature, hedged about by constitutional limitations and restrictions upon its powers to legislate, can have, inherent in itself, under any name, a power to effectually override all their limitations and restrictions. The police power of the State exists, and must be exercised in Illinois, subject to those constitutional provisions, State and national, which prohibit the taking of private property for public use, without just compensation, and from depriving any person of life, liberty, or property, without due process of law. These constitutional provisions, being fundamental in our form of government, must have a liberal construction for the accomplishment of the purposes intended by them, and it is important to the correct determination of this case, that the scope of these constitutional prohibitions should be settled, and, to understand what the idea of government conveyed by the language employed, actually is. To such an inquiry, certain propositions, by way of answer, may be assumed to be self-evident, viz : that the government is prohibited, under all ordinary conditions, from arbitrarily wresting from the citizen, what we are accustomed to term his private property; that, as between the citizen and the government, the title of the citizen to his private estate shall be respected, and is superior to that of the government, unless it be required for public uses; that, if private property is required for public uses, it shall only be taken upon the pay-

ment of just compensation, and that the rights of the citizen shall not be divested, except in due course of judicial proceedings, in which he shall have the right to be heard before he is condemned, and an opportunity to make such defense as the nature and circumstances of his case admit of, consistent with established usages, and the general forms of conducting judicial investigations.

These are general propositions, about which there will probably be no dispute. But, is the force of the constitutional language exhausted by these general propositions, taken in their literal sense? Is there nothing guaranteed by them in respect to private property except security to its title and possession? Are the uses of private property, its value and income, without the pale of constitutional protection? And, does the constitution mean to throw safeguards and guaranties, around a naked title and a naked possession merely, and to leave all the uses of property and everything that makes property valuable, subject to legislative authority? No man can reasonably deny that the essence of private property consists of its uses, and the results that flow from its uses, as much so as the essence of life and liberty consists of the enjoyments which they are capable of supplying. One of the constitutional clauses which we are considering, provides that "No person shall be deprived of "*life* * * * without due process of law." This does not, in terms, prohibit the government from ordering various maiming operations to be performed upon the body of the citizen, by which he might be deprived of his limbs or organs—or their usefulness greatly impaired—operations going to the very essence of life. If the right to these organs, in their natural condition, stood upon no other foundation than the clause of the constitution above mentioned, would the court say that a legislative enactment directing these maiming operations to be performed upon a single citizen or class of citizens, was valid and must be enforced? Personal liberty is protected by the same constitutional safeguard, and in the same language. What does it mean? Is it a mere freedom from dungeons and fetters, and may the edict go forth from legislative power, that a citizen or class of citizens must confine themselves within a particular

district, and limit their enterprises to a particular profession or field of industry, and imposing fines, penalties and forfeitures, for wandering beyond the prescribed boundaries? And would the court say of such an act, that the citizen still had his limbs or his eyes, and could use them, and that that was liberty, as intended by the constitution? Was it not rather the essence than the form of life and liberty which the constitution was intended to preserve? There is no need to answer the question.

But there is no larger or different protection to life and liberty under the constitution than there is to private property. They are indissolubly joined together, and the guaranties in respect to one, are the guaranties in respect to all. When the constitution grants security and protection to the life of the citizen, it grants that security and protection to it, in such measure and fullness, as it was given to him by the Creator, and does not mean the mere element of life. It means protection to the man with all his natural capacities, and in all his vigor, and with all his members, and not the mere dismantled hulk of humanity, without organs or energies or capabilities by which to make that life useful to himself or the State.

Apply this rule to private property, and what is the result? Evidently that it is not merely the title and possession of property that the constitution designed to protect, but along with this, the control of the uses and income, the right of valuation and disposition, without which property ceases to be profitable, or even desirable. Deprive property of these elements, and what is there left of it to excite either enterprise or ambition? What is A's title to a house worth, if B has the power of fixing upon it a value, or a value for its use; and especially if B's authority extends to fixing a value at which he himself may take, or have the use of, the property? Which of the two men would have the larger and more valuable estate in the property?

The State of Illinois, by the legislation known as the Warehouse Law, has endeavored to create for itself this superior estate in the private property of the plaintiffs in error, and other warehousemen in Chicago, and is it reasonable to say, that if the effort succeeds, private property is not taken, or that the warehousemen are not deprived of their property "without due

" process of law?" The late Judge CURTIS, whose professional opinions will rank, in this country, next in authority to the judgments of our highest courts, in commenting upon the recent Railroad legislation in the State of Wisconsin, uses this very decided and emphatic language: "And my opinion is, that it " is not within the field of legislation, under any American con- " stitution, to fix and prescribe for the future what prices shall " be demanded either for commodities or for personal services, " or *for a union of both.* I do not believe it is within the power " of any legislature in the United States, to compel owners of " property, or persons, natural or political, to part with their " property, or render their personal services, at their own ex- " pense and risk, to the public, for prices fixed by the legisla- " ture." And further on, commenting upon that article of the Bill of Rights in the Constitution of Wisconsin, which forbids the taking of private property for public uses, he says: " *It is settled also upon the highest authority, that to amount to a* " TAKING *within the meaning of this Article of the Constitu-* " *tion, it is not necessary that the owner of the property* should " be deprived of its possession. If he is allowed to remain in " possession, but is forced, under heavy penalties, *so to use his* " *property as effectually to destroy or greatly impair its value,* " the case comes within this article of the Bill of Rights."

The opinion of this court in the case of *Pumpelly* v. *Green Bay Company*, 13 Wallace, 166, is also here much in point. There the same provision of the Constitution of Wisconsin came up for interpretation, and the court says: "The argument of " the defendant is, that there is no *taking* of the land within the " meaning of the constitutional provision, and that the damage " is a consequential result of such use of a navigable stream, as " the government had a right to, for the improvement of its " navigation.

" It would be a very curious and unsatisfactory result, if in con- " struing a provision of constitutional law, *always understood to* " *have been adopted for protection and security to the rights of the* " *individual against the government*, and which has received the " commendation of jurists, statesmen and commentators, as " placing the just principles of the common law, on that sub-

" ject, *beyond the power of ordinary legislation*, it shall be held, " that if the government refrains from the absolute conversion " of real property to the uses of the public, it can destroy its " value entirely; can inflict irreparable and permanent injury to " any extent; can, in effect, subject it to total destruction, with- " out making any compensation, *because, in the narrowest sense* " *of that word, it is not taken* for the public use. Such a con- " struction would pervert the constitutional provisions into a " restriction upon the rights of the private citizen, as those " rights stood at the common law, instead of the government; " and make it an authority for invasion of private rights, *under* " *the pretext of the public good*, which had no warrant in the " laws or practices of our ancestors."

Several years ago, the Legislature of New York passed an act declaring a portion of Racket River a public highway, for the purpose of floating logs and lumber. The riparian proprietors resisted this act, on the ground of private ownership, and the question came before the Court of Appeals, where it was held, that "If prior to the passage of the act, the stream was " private in its use as in property, the legislature could not " take away the right of those who were the riparian owners, " *nor subject such rights to a public use, created or author-* " *ized by the act itself, without compensation.*"

Morgan v. *King*, 35 N. Y., 454.

Compare these reasonable and authoritative expositions of the clause of the constitution in question, with that contained in the opinion of the majority of the Supreme Court of Illinois given in this case, and the reason of the judgment becomes somewhat apparent. They say: "All regulations of trade, with a view to " public interest, may more or less impair the value of property, " but they do not come within the constitutional inhibition, *un-* " *less they virtually take away and destroy those rights in which* " *property consists. Their destruction must be, for all substantial* " *purposes, total.*" This hard construction of a constitutional provision, intended for the security and protection of private property, has, it is believed, never before found judicial expression, and it is confidently submitted, that it is as repugnant to

authority and sound interpretation, as it is to common reason and the dictates of sound public policy.

Something may be fairly inferred as to the proper meaning of the word "property," as used in the clauses of the Constitutions, Federal and State, above referred to, from the course of judicial decisions upon another and an analogous provision. The Federal Constitution prohibits the States from passing any law impairing the obligation of contracts. This provision has been frequently before this and other courts, and the scope and effect of it may be regarded as definitely settled by a series of adjudications, too numerous and concurrent to be disregarded or disturbed; and by those decisions, it is settled, that it is not necessary, in order to bring the State Legislature within this prohibition of the constitution, that it should directly attack the contract; and that there are incidents to, and rights growing out of, the contract, which are so essential to it, and so much a part of it, that they are included in the constitutional protection as well as the letter of the contract itself.

In *Green* v. *Biddle*, 8 Wheaton, 1, this court says, (p. 75): "Nothing, in short, can be more clear, upon principles of law "and reason, than that a law which denies to the owner of "land a remedy to recover the possession of it, when withheld "by any person, however innocently he may have obtained it; "or to recover the profits received from it by the occupant, or "which clogs his recovery of such possession and profits, by "*conditions and restrictions tending to diminish the value and* "*amount of the thing recovered, impairs his right to and interest* "*in the property*. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If "the remedy be qualified and restrained, *by conditions of any* "*kind*, the right of the owner may indeed subsist, but it is impaired and made insecure according to the nature and extent "of such restrictions.

In the case of *Bronson* v. *Kinzie*, 1 Howard, 311, the question presented was, whether an act of the Legislature of Illinois, giving to the mortgagor twelve months within which to redeem from a sale of the mortgaged premises, under a decree of foreclosure, and prohibiting a sale for less than two-thirds of the

appraised value of the property, was, in its application to mortgages executed prior to the passage of the act, void as impairing the obligations of contracts. In deciding against the validity of the law as thus applied, the court quotes largely from the case of *Green* v. *Biddle*, and then (p. 318) says: "We have "quoted the entire paragraph, because it shows in a few plain "words, and illustrates by a familiar example, the connection "of the remedy with the right. It is the part of the municipal "law, which protects the right and the obligation by which it "maintains and enforces it. It is this protection which the "clause in the constitution now in question, was mainly intended "to secure; and it would be unjust to the memory of the dis-"tinguished men who framed it, *to suppose that it was designed* "*to protect a mere barren and abstract right without any practi-*"*cal operation upon the business of life.* It was undoubtedly "adopted as a part of the constitution, for a just and useful pur-"pose. *It was to maintain the integrity of contracts and secure* "*their faithful execution throughout the Union*, by placing them "under the protection of the Constitution of the United States; "and it would ill become this court, *under any circumstances*, to "depart from the plain meaning of the words used, and to sanc-"tion a distinction between the right and the remedy which "would render this provision illusive and nugatory, *mere words* "*of form*, affording no protection, and producing no practical "result."

A very slight change in the above language and the whole idea and doctrine of the quotation are applicable to the case at bar, and stand out in striking contrast with the prominent and apparently controlling idea of the Supreme Court of Illinois, that so long as legislation left the title and possession of property untouched, there was no taking in the constitutional sense, and that property consists in the thing itself, and not at all in the uses and income of it, or in the right to its revenues unimpaired. Such a construction of the constitution would surely make language, confessedly intended as a security and protection to private rights in private property, the guardian only of a mere "*barren and abstract right without any practical* "*operation upon the business of life*," and reduce it to "*mere*

" *words of form, affording no protection and producing no prac-*
" *tical results.*"

For further illustrations of the doctrine of the two cases above cited, reference is made to

Ogden v. *Saunders*, 12 Wheaton, 259.
Rawley v. *Hooker*, 21 Ind., 144.
Willard v. *Longstreet*, 2 Doug., (Mich.,) 172.
Goutty's Lessees v. *Ewing*, 3 Howard, 707.
Cooley's Con. Lim., 290.
Walker v. *Whitehead*, 16 Wallace, 314.

It would seem, then, to be apparent, both upon principle and authority, that the clause of the constitution, whether State or Federal, which forbids the taking of private property for public uses, without just compensation, is not only a protection to the title and possession of the owner of such property as against the public, but also to the substantial uses and income of it, and that there is the same want of legislative power to interfere with or control the one as the other. The prohibition extends to the essential interests and qualities of private property, and does not stop with its mere form and outward semblance. The phraseology, " private property," in the constitutional, as in the ordinary sense, means not only an individual title to and possession of the thing, but the right to its uses and income and revenues, such as naturally flow from the legitimate employment of it; and the legislature is as much prohibited from imposing upon it any public easement, or impressing upon it any public servitude, as it is from actually appropriating it, its title and possession, to public uses, without first making just compensation.

II.

For wise purposes, the powers of government are, in this country, distributed between three departments, the executive, legislative and judicial; and whilst it may be conceded that, in some respects, it is difficult to clearly define the boundaries between legislative and judicial powers, yet the very fact of the distribution is, of itself, conclusive, that each department has its

separate functions and field of action. There must be subjects purely judicial, as well as subjects purely legislative and executive; else these departments of government are mere duplications; and it is not necessary that the constitutional limitations upon these departments respectively, should be specific. Limitations result necessarily from the fact of the distribution of powers, and a legislative act may be as clearly unconstitutional for trenching upon the judicial authority of the State, as implied from the division of powers, as though it were in direct opposition to a plain constitutional prohibition.

"The frame of the government, the grant of legislative power "itself, the organization of the executive authority, the erection "of the principal courts of justice, create implied limitations "upon the law making authority, as strong as though a nega- "tive were expressed in each instance."

People v. *Draper*, 15 N. Y., 543.

"The rights of every individual must stand or fall by the "same rule or law that governs every other member of the "body politic, under similar circumstances; and every partial or "private law, which directly proposes to destroy or *affect individ-* "*ual rights* or *does the same thing by affording remedies tending* "*to* similar consequences, is unconstitutional and void; were it "otherwise, odious individuals and corporations would be gov- "erned by one law; the mass of the community and those who "made the laws by another, whereas the like general law af- "fecting the whole community equally, could not have been "passed."

Walley's Heirs v. *Kennedy*, 2 Yerg., 554.

"Every one has a right to demand that he be governed by "general rules, and a special statute, which without his consent "singles his case out as one to be regulated by a different law "from that which is applied in all similar cases, *would not be le-* "*gitimate legislation, but would be such an arbitrary mandate as* "*is not within the province of free government.*"

Cooley's Con. Lim., 391.

"*That is not legislation which adjudicates in a particular case,* "prescribes the rule contrary to the general law, and orders it

" to be enforced; *such power assimilates itself more closely to des-*
" *potic rule, than to any other attribute of government.*"

Ervine's Appeal, 16 Penn., 266.

" The legislative department assuming and being allowed to
" judge of the character and extent of its own powers, *would*
" *soon become the exparte arbiter of private rights*, and the fre-
" quent dispenser of justice between citizen and citizen, unre-
" strained and according to its own notions of right. The people
" have wisely by constitutional provisions guarded against such
" consequences, *and so long* as these *provisions are sacredly re-*
" *garded and enforced, their rights of person and property will re-*
" *main secure from aggression, under color of authority. The*
" legislative power *extends only to the making of laws, and in its*
" *exercise is limited and restrained by the paramount authority*
" of the Federal and State constitutions. *It cannot directly reach*
" *the property or vested rights* of the citizens, by providing for
" their forfeiture or transfer to another *without a trial or judg-*
" *ment of the courts*, for to do so would be the exercise of a pow-
" er which belongs to another branch of the government, and is
" forbidden to the Legislature."

Newland v. *Marsh*, 19 Ills., 382.

These judicial expressions of the limitations of legislative power, are founded partly upon implied and partly upon express prohibitions of the constitution, in subordination to which, legislation by the states must here be had; and the plain import of them is, that private property, as such, is not a proper subject of direct legislative attack; that the judicial department stands between the legislative authority and private property; and that it is only by or through its judgment and decrees that the private rights of the citizen can be reached. " Nor shall any " State deprive any person of life, liberty or property, without " due process of law." It will not be doubted that the word " property," as thus employed in the Federal Constitution, means " *private property;* " and if I have succeeded in establishing the proposition that these words, used in the constitutional sense, embrace not only the title and possession of the thing, but also the right to its uses, income and revenues, then the prohibition of the constitution is against State interference

with that right, as well as with the title and possession, "*without due process of law.*" Nor need there be any doubt or hesitation as to the proper signification of the phraseology, "*due process of law.*" This has been settled by adjudications in this and other courts, in such an authoritative way that nothing is left to be established in respect to it.

Webster, in his argument in the Dartmouth College case, gives a definition of these words, which has been much approved for its concise comprehensiveness. He says: "By "the law of the land, is most clearly intended the general law. "A law which hears before it condemns; which proceeds "upon inquiry, and renders judgment only after trial. The "meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules "which govern society. Everything, which may pass under "the form of an enactment, is not, therefore, to be considered "the law of the land. If this were so, acts of attainder, bills of "pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to "another, legislative judgments, decrees and forfeitures, in all "possible forms, would be the law of the land."

"Such a strange construction would render constitutional "provisions of the highest importance, completely inoperative "and void. It would tend directly to establish the union of all "powers in the legislature. *There would be no general permanent law for courts to administer or men to live under.* The "administration of justice, would be a farce—an idle ceremony. "Judges would sit to execute legislative judgments and decrees, "not to declare the law or *administer* the justice of the country. "'Is that the law of the land,' said Mr. BURKE, 'upon which if a "man go to Westminister Hall, and ask counsel by what tenure "or title, he holds his privilege or estate, *according to the law of the land*, he should be told that the law of the land is not yet "known; that no decision or decree has yet been made in his "case; that when a decree shall be passed he will then learn "what the law of the land is? Will this be said to be the law "of the land by any lawyer who has a rag of a gown left upon "his back, or a wig with one tie upon his head?'"

A law, says BLACKSTONE, (1 Com., 44), "is a rule; not a "transient, sudden order from a superior to an inferior, to or "concerning a particular person; but something *permanent*, "*uniform and universal.* Therefore a particular act of the "legislature to confiscate the goods of Titus, or to attaint him of "high treason, does not enter into the idea of a municipal law, "for the operation of that act is spent upon Titus only, and has "no relation to the community in general. It is rather a sen- "tence than a law."

The Illinois Warehouse Law says to warehousemen in Chicago, and nowhere else, "use your warehouses in receiving and "storing grain, for all who may offer it without discrimination, "and you shall be allowed to charge for your services and the use "of your property, two (2) cents per bushel for the first thirty "(30) days, and one-half cent per bushel for the next fifteen "days—and no more." Is such a thing a law, which is a "rule, permanent, uniform and universal." Is it not rather a sentence, which exhausts itself against warehousemen in Chicago alone?

In *Hake* v. *Henderson*, 4 Dev., 15, the court says: "Those "terms, 'Law of the Land,' do not mean merely an act of the "general assembly. If they did, every restriction upon the legisla- "tive authority, would be at once abrogated. For what more can "the citizen suffer than to be taken, imprisoned, disseized of "his freehold, liberties and privileges, be outlawed, exiled and "destroyed, and be deprived of his property, his liberty and "his life, without crime? Yet all this he may suffer, if an act "of the assembly, simply denouncing these penalties upon "*particular persons or a particular class of persons*, be, in itself, "*a law of the land*, within the sense of the constitution; for "what is, in that sense, the law of the land, must be duly "observed by all, and upheld and enforced by the courts. In "reference to the infliction of punishment, *and divesting the* "*rights of property*, it has been repeatedly held in this State, "and it is believed in every other in the Union, that there are "limitations upon the legislative power, notwithstanding these "words. And that the clause itself means, that such legisla- "tive acts, as profess in themselves, directly to punish persons,

" *or to deprive the citizen of his property*, without trial before the " judicial tribunals, *and a decision upon the matter of right as* " *determined by the laws under which it vested*, according to the " course, mode and usages of the common law as derived from " our forefathers, are not effectually 'laws of the land' for these " purposes."

In the case of *Bank of Columbia* v. *Okely*, 4 Wheaton, 235. Mr. Justice JOHNSON, delivering the opinion of the court, and referring to the same words in the Constitution of Maryland, says: " As to the words from Magna Charta, incorporated " in the Constitution of Maryland, after volumes spoken and " written, with a view to their exposition, the good sense of " mankind has at length settled down to this, *that they were in-* " *tended to secure the individual from the arbitrary exercise of* " *the powers of government, unrestrained by the established prin-* " *ciples of private rights*, and distributive justice.

As already stated, the fixing of the maximum rates of storage in the 15th Section of the Warehouse Act, is an " arbitrary ex- " ercise of the power of government," limited in its application to a particular and specified class of powers, viz., warehousemen in the city of Chicago. It comes in the form of a mandate from the legislative authority, to a comparatively few citizens of the State, restraining them of their right of control over the uses and the value of the uses of their private property, and depriving them of privileges in respect to their property and services, which are fully enjoyed by the people of the State at large. It singles them out for legislative condemnation, and places them and their property under disabilities, such as the community generally are not subjected to. Is not this depriving them of property "without due process of law," and denying to them also " the equal protection of the law ? "

It is no answer to this to say that the Warehouse Law provides for a hearing of warehousemen, before they are condemned to the penalties and forfeitures provided in the act. The hearing which is allowed to them is but the mockery of a trial. The single and only question involved in such a hearing would be whether they have charged for the storage and handling of grain a greater price than that named in the act; and it would

be the same, no matter what that price might have been. Efforts have been made to defend it, on the ground that it was a provision intended to prevent extortion, and combinations for the purpose of extortion. But the sufficient answer is, that the act is not framed upon that basis, nor does it purport to be for any such purpose. A general law defining extortion or conspiracy for purposes of extortion, and providing penalties for those who may be guilty of such misdemeanors, it is undoubtedly competent for the legislature of the State to pass, but such a law would be necessarily very different in its provisions from the act under consideration. It would, at least, make some attempt to set forth the elements of extortion, in a manner capable of being understood. The fact that warehousemen charged two (2) cents storage for the first twenty days, as it is admitted the plaintiffs in error did, would, of itself, have no tendency to prove extortion, nor would the fact that the prices charged were such as had been arranged by consultation between the owners of the different warehouses, amount to a criminal combination for purposes of extortion. A reasonable price cannot be extortionate, nor can a reasonable act be oppressive. It is impossible, from the very nature of things, to conceive of an extortionate charge or act, unless it contains the elements of injustice or unreasonableness. Necessarily, whether an act is extortionate or oppressive, depends upon a multitude of circumstances, which can only be investigated and understood in a judicial way. The result must vary with the times and condition of things. What would be extortion or oppression to-day might not be next week or next year. The question is, therefore, judicial in all its properties and relations, and one of the chief elements in the determination of it, is whether the price charged or the act committed, had in it the quality of reasonableness. All such investigations are, by the constitution, reserved for the judicial department of the government, and this, in part at least, is what is intended by the constitution, when it says: "Nor shall any State deprive any person of life, liberty, "*or property, without due process of law.*"

If this is sound in principle, what can be said in justification of the empty form of a trial granted to warehousemen under the

Warehouse Act of Illinois? And what is the condition to which the courts are degraded in enforcing that act? As already stated, upon such a trial, the single and only question upon which their right to transact business as warehousemen, and to use their warehouses for warehousing purposes would depend, would be whether they had charged more for the storage and handling of grain, than the maximum price fixed by the law. The investigation is, by the law, stopped at its very beginning, and no defence is permitted upon the merits and justice of the case. It will avail the defendants nothing to say or prove, that the charges made, or the acts committed, were reasonable, or that they could not do the business for a less price, or do it otherwise than they did. Indeed, under the opinion of the majority of the Illinois Supreme Court, it will avail them nothing to prove that what they have done is perfectly satisfactory to their employers, and that the men who paid for the service, contracted for it, and for the rate of compensation in advance, and are perfectly content, both with the manner and the cost of the service. Some spy, in the open or secret employment of a meddlesome commission, has ascertained that the law of maximum rates has been violated; that by agreement, a warehouseman has sold his services and the use of his property for a larger price than the maximum fixed by an arbitrary and inflexible rule, an exercise of despotic power, and the penalty must follow. What, in such a case, is the office of the court, beyond that of merely executing the arbitrary mandate of the legislature? It cannot inquire into the merits or justice of the charge. It can only pronounce the legislative will, and enforce the legislative judgment. All its appropriate functions are usurped in the act itself, and it becomes the blind instrument of an arbitrary power, unless it has the manliness to assert its proper position as the expounder of the law, and the administrator of the justice of the State. The first principles of common honesty, as well as the fundamental maxims of free government, are outraged by the possibility, that such an enactment can have the force of *a law of the land.*

There is no place for such tyrannizing and unreasoning oppression under our constitution. If there is, then not only are

the wealth, the enterprise and industry of the country in the power of a disorderly mob, which is sometimes inevitable, but the private fortunes of citizens, for all purposes of use and enjoyment, are at the disposal of an assembly, organized and constituted under the forms of law, and invested with authority to absorb them by slow and gradual processes, into the public control and management, and the protection of the constitution is a sham and a delusion. It is respectfully submitted that such was not the intention of the framers of the constitution, and that no proper interpretation of it, can lead to such disastrous results.

Article XIII of the Constitution of Illinois, adopted in the year 1870, has this as the first section. "All elevators or "storehouses, where grain or other property is stored for a "compensation, whether the property stored be kept separate "or not, are declared to be *public* warehouses."

The Warehouse Act follows this definition of public warehouses, and in the course of this controversy, effort has been made to give some force to the word "*public*," as a constitutional prefix to the word warehouse. In this connection, it is confidently submitted that neither a State constitutional convention, nor a State Legislature, can impress a public character upon private property by a mere declaration; and that calling certain warehouses, public, whether in the Constitution or in the Act, does not, and cannot, in any manner, affect private ownership in them, and the right of private control over them. Considered with reference to the Federal Constitution, the Articles of the State Constitution, and the legislative enactment, are alike laws, and, alike subject to objections, on the ground of unconstitutionality. In support of this, I refer simply to the case of *Railroad Company* v. *McClure*, 10 Wall., 515, where this language is found: "The Constitution of the "United States declares that no State shall pass a law impair-"ing the obligation of contracts. The constitution of a State "is undoubtedly a law within the meaning of this prohibition. A "State can no more do what is thus forbidden by one than by "the other. *There is the same impediment in the way of both.*"

But it is asserted, in the opinion of the majority of the Su-

preme Court of Illinois, and was claimed by the counsel for the people, that laws analogous to this warehouse legislation, in their effect upon private rights, have existed in this country ever since the organization of the government, and that their validity under the United States Constitution has never been seriously questioned; and laws, regulating the rate of interest, the tolls of public mills and ferries, the weight and price of loaves of bread, and the municipal control exercised over hackmen and draymen in our larger cities, are referred to as analogous cases, supposed to justify the provisions of the Warehouse Act.

I shall not attempt any repetition of the clear and conclusive argument of my brother Goudy, pointing out the difference between the cases referred to, and the one here presented, and will simply add thereto this suggestion: that, if it were conceded, or successfully shown, that these instances of legislative interference in the private business of the citizen, were entirely similar in their character to the interference with the private rights and interests of warehousemen, attempted in the Warehouse Act of April 25, 1871, it might still be said of them, in all justice and truthfulness to history, that they have stood for nearly a century, as admitted exceptions to the principles upon which our government has been administered. They are not interwoven with, but only tolerated under, the new theory and ideas of protection to private rights, upon which this government was founded. So far as they can be properly said to be legislative restrictions upon the income, derivable from the services, and the legitimate use of the private property, of the citizen, they have stood as isolations, and as such proving most clearly that the general rule is not, and has not been, in harmony with them. They are the relics and implements of a former system, carried along by sufferance and general acquiescence, whilst the system of which they were a constituent part has long since been displaced, and its principles discarded; and the question would then be, whether our system of government should be remodeled upon the basis of these few exceptions, or the principles of the government, in their general application, be vindicated and sustained, notwithstanding the exceptions, which it tolerates and upholds. If, then, the Warehouse Act was, in its

provisions, parallel with the instances cited, that fact would furnish no rational argument in favor of its validity; and, in the confident belief, that it is unsupported by reason, principle or authority, it is respectfully submitted that the judgment of the Supreme Court of Illinois, should be reversed.

JNO. N. JEWETT,

Att'y for Pl'ff in Error.