ARGUMENT.

The proper interpretation of the law, whether constitutional or statutory, may oftentimes be found in the facts of antecedent history, and the inferences to be deduced therefrom. A large proportion of the modifications which have been accomplished, in the form, theory and practices of civil governments, have had their origin in dissatisfaction with the forms, theories and practices which preceded them.

This has been equally true, whether those modifications tended in one direction or the other. Despotism has as often succeeded what was called civil liberty, as the contrary; but whatever the change, whether ultimately productive of good or evil, there has generally been some real or fancied grievance in the old, which the new was intended to remedy; and when the purpose is honest, and the effort for improvement is made in good faith, the pre-existing evil invariably gives a point and application to the remedy adopted. Hence it is that in the construction of laws, when construction is deemed necessary to their proper understanding, reference is so frequently made to the condition of things existing prior to their enactment, and to the difficulties which they were intended to correct.

In all cases where governments have sprung from the will of the people, and the popular voice has determined both the form and the substance of them, and given expression to that will in written constitutions, it is easily practicable to point out the antecedent evils which they were intended to avoid, and the future good they were designed to accomplish. The degree of intelligence and good judgment of the people or their representatives, is then illustrated, by the skill and foresight manifeste by them in shunning the dangers and difficulties of the past, and providing proper safeguards against their recurrence in the future. The organization of a government is simply a marking

out of the civil life of the people, and the establishment of an authority to prevent deviations from the appointed way. The evils to be avoided and the good to be attained, naturally suggest the direction to be taken and the limitations to be applied. A practiced surveyor, who should be entrusted with the task of re-locating a highway, rendered difficult and dangerous by swamps, and hills, and swollen streams, if he were a man of skill and judgment in his profession, would naturally be expected to deviate so far from the old route as to leave all the embarrassment of it quite outside of the new line; and the greater that deviation, the more clearly would be shown his determination to escape the obstacles to progress which the old way presented; and if, years afterwards, a stranger should examine the old and the new route, he would have little occasion to inquire for the purpose intended to be accomplished by the re-location.

So in respect to the reorganization of governments: every substantial change is a new departure from what had gone before; and the more radical the change, the more clearly is defined the purpose to root out of the system something which had previously existed there, and which it was deemed desirable to be rid of, and to substitute something in its place, which promised to relieve the future of the difficulties and embarrassments of the past.

For two centuries and upwards, prior to the organization of our government, and the adoption of our federal constitution, the crown and government of England had been speculating and experimenting upon the private rights and personal liberties of the subject. Legislation by parliament was practically without limitation or restraint. That body was as nearly omnipotent in matters of government as the genius of a constitutionally slow people would permit it to be without open resistance. Theoretically it was vested with absolute legislative power. There were traditional limitations, limitations from habit, custom and policy; but still, in its aggregated capacity, it represented the *power* as well as the wisdom and discretion of the nation, and its enactments were, without question, the law of the land. Froude says that it was the object of the English

government, during that time, simply to preserve the nation in the position it had already secured; that expansion, development and progress, were no part of their purpose. It is true that within the period referred to, the strict rules and discipline of the feudal system were gradually relaxing; but the theory of government out of which they had arisen, and which made that system practicable, binding the person, the property and the service of the subjects in successive gradations of rank, to the one absorbing purpose of defending the king and his prerogatives and power, still remained, and gave a character and direction to all the legislation of the realm, which had relation to the personal rights and obligations of the individual. As late as the reign of Queen Elizabeth, the sports and recreations of the people were, by act of parliament, required to be of a character calculated to qualify them for actual service in time of war. The manner in which land should be occupied and cultivated, was from time to time dictated by statute. It was forbidden to use more than a certain portion of it for purposes of grazing; and the merchants, who by superior enterprise, were beginning to absorb the wealth of the nation, and as incident thereto, were acquiring large interests in real estate, and devoting the same to the raising of flocks and herds, were, by act of parliament, compelled to desist, and to restore a large share of their acquisitions to the ordinary uses of agriculture. Acts of parliament also fixed the prices of wheat and other products of the soil, prescribed the kind of clothing the subject should wear, and the quality, if not the quantity, of food which he should eat. True, the historian says that some of these laws were rather an expression of what was deemed morally right, than of what could be specifically enforced; but even then, they serve to show the channel in which the government was running, the kind of arbitrary power it sought to wield over the rights and persons of the subjects, and the capacity which it had, or claimed to have, for the exercise of a petty tyranny, alike annoying to and destructive of personal independence and individual advancement.

Such exhibitions of governmental authority are, however, neither strange nor unnatural. The English government of to-

day is the outgrowth of the feudal system, which in the days of its grosser development and strength, divided the people into grades and classes, of all of which the king was the representative head. Each lower grade or class was in direct subordination to the one above it. The system itself has made great progress. One by one its coarser and more brutal features have disappeared. Villenage has been abolished in name, if not in fact. The good that was in it, has in great measure conquered that which was bad, and the idea of protection, always involved in it, has at last overshadowed and covered up the idea of subjection and subserviency, and now gives a tone and complexion to the civil and social relations of the people, which three centuries ago, they did not have. But it is still the same government, grounded upon the same theories, preserving in modified form the same distinctions, and holding in name, although in the main refraining from its irritating and oppressive exercise, the same power theoretically over the lives and fortunes of its subjects.

The circumstances which led to the separation of the American colonies from the mother country, were at the time of the adoption of our federal constitution, a recent illustration of the lurking power of the feudal principle in the English government. The cause of the separation was not so much the hardship or oppression resulting from the particular instances of the exercise of that power, as the existence of the power itself. The colonists claimed that they were British subjects, and entitled to all the rights and privileges which British subjects elsewhere possessed. The pith of the complaint was, that they were discriminated against in the legislation and policy of the country; that the resident power of the government, its traditional and hereditary power had been exercised against them in an unusual manner, and to their disadvantage, individually and collectively. That the power existed in the English system to legislate thus, was scarcely doubted, certainly not by the great body of British statesmen, although amongst the colonists there was much diversity of opinion as to the propriety of its exercise. It was exercised, however, and the right to its exercise was sought to be sustained by the whole power of the nation, and

hence rebellion and final separation. The evils of the English system, in this particular, were brought vividly before the minds of the American people, and in opposition to them they endured the hazards, hardships and privations of a tedious and exhaustive war. The government claimed and exercised the right, clearly pertaining to it under the feudal regime, to dictate as to the private interests of the subject, to quarter troops upon him in times of peace; to subject him to vexatious and troublesome searches and seizures; to impress him into the service of the army and navy, to deny him the privilege of a trial before a jury of his peers, when accused; to refuse him representation in the legislative body of the nation, and in other ways to hold him in subjection to the central power. If it had not actually appropriated the private property of the subject, confined him in dungeons upon mere suspicion and without trial, and reduced him to the condition of a slave and a dependent, it had done those things which manifested the possession of the legal right to do so, and an inclination to claim and exercise that right according to its own caprices.

Under such a rule, the subject was the slave of the government, and living in daily apprehension of the worst acts of tyranny and oppression. Private rights, as we understand them, could not exist, and private property could not be respected because of the uncertain tenure by which it was held. Remonstrance was ineffectual, and nothing remained to the people but submission or revolution; and revolution came, and after it a new government; new in form and new in principle; the theory of which is that governments are created by and for the people, and not the people by and for the governments.

It was shortly after the events thus briefly alluded to, that the federal constitution was adopted. The men who drafted it and the people who ratified it, had been, many of them, active participants in the struggle against the British crown, and were therefore fully alive to the dangers of establishing an absolute and irresponsible authority, over the private as well as the political rights of the individval members of the civil society. That was one of the evils against which they had protested and

fought, and was naturally, therefore, one of the perils which they would seek to avoid.

The very preamble of the constitution, setting forth distinctly the purposes had in view, is full of practical suggestions in this regard. " To form a more perfect union, establish justice, " promote the general welfare, and secure the blessings of " liberty to ourselves and our posterity," were the declared objects for which the constitution itself was made; and, although this general language is broad enough to embrace, and confessedly does include interests of a political character, and rights pertaining to the people in their aggregated capacity as a nation, still it cannot be doubted, that it was intended to and does include, also, rights and interests which are purely personal and which pertain to the individual man, as an integral part of the political society. The provisions of the constitution clearly import this, for under it, the man, who was before a " subject," a name significant of subordination and subserviency, becomes at once a " citizen," with an equal and independent personality, discharged of the very idea of servitude to any, and holding himself and his possessions by the same tenure and right as all his fellows. The very name thus given to him, implies equality of rights and privileges. But care was taken that those rights and privileges, and the protection of them. should not be left to implication. They were spread out and stamped indelibly upon the face of the constitution itself, and the earlier amendments thereof. Amongst the rights and privileges thus guaranteed, are *freedom* of religion, freedom of speech, freedom of the press, the *right* of peaceably assembling, the *right* to petition for redress of grievances, the *right* to keep and bear arms; *exemption* from the burdens of a soldiery in times of peace, and in times of war also, except as provided by law; the right to be secure in person and property against unreasonable search and seizure; the *right* of trial by jury; the right to life, liberty and property, in the broad sense, that no person should be deprived of them, except in accordance with such general rules as should have application to the whole community; and the *right* to hold and own property as against the sovereign power itself, unless it should be required for the public use, and just compensation

should be paid therefor. All these are provisions relating to the rights and privileges of the individual citizen. They are personal in their nature, and the idea of an American citizen is sadly incomplete without them.

Why was so much space given to these matters of a purely private and personal nature? The reason is found in the fact, that the public dangers from which the people had just emerged, had threatened them through the individual; that tyranny and oppression are personal in their application, whatever universality of form, they may put on; and in this further fact, that experience and observation had taught this lesson, that it was safer and better to build up the government through the citizen, than it would be to erect it upon the necks of subjects. The distinction is important, and marks the dividing line between the theory of monarchical government, and the theory of what this nation claims to be—a republic.

Having these principles of government thus clearly announcd in the fundamental law, which can not be violated by legislation, the only difficulty which can or ought to arise, upon the presentation of any special case, in which they are claimed to be involved, is as to their application. The principles themselves are fundamental. They are assential parts of the theory of the government, violations of which can not be tolerated. They inhere in the system as parts of its very spirit and substance, without which the system itself becomes a mere lifeless formality, and may drift anywhere, and everywhere, to anarchy or despotism. Strike out of our constitution its guaranties for private rights, or allow them by neglect or disuse to become inefficient and inoperative, and wherein are we advanced beyond the old and discarded systems which preceded us, and from which we claim to have made a wide and radical departure? Leave them out, and we are traveling in the same direction which they were pursuing—a little more elevated in tone and pretension, it may be—making a boast of turning our backs upon the difficulties and dangers of the old way, while in fact we are merely suspended above them, and that too only by a rotten and unsubstantial net work of *pretensions*, which may, at any moment give way, and precipitate us into the very midst of the troubles

which we have been congratulating ourselves upon having so skillfully avoided.

It is true that all these provisions of the federal constitution, thus far referred to, relating to the private rights of the citizen, and their protection, have been held to be limitations upon the power of the federal government only. And I also recognize the fact, that this court, upon the review of cases from the State courts, does not undertake to revise decisions based upon the construction of State laws, or constitutions, which do not involve the question of violations of the federal constitution, or laws passed in pursuance thereof. This, however, is immaterial to the present purpose. The question now is one of principle, inhering in the very spirit and substance of our institutions, and involving the theory of government, of which the constitution is only the expression; and, in this view, it is entirely proper to refer to the limitations upon federal power, and also to the constitutions of the several States, and amongst them to the constitution of the State of Illinois, for the purpose of showing that the principle contended for has had universal recognition in the fundamental laws of the nation, and of all its constituent parts.

There is, I believe, now in force, no State constitution which has not been adopted since the adoption of the federal constitution, and the first 12 articles of the amendments thereto; and it is entirely safe to say, that all of these State constitutions, whether new or old, contain in substance, and many of them in identical words, the provisions of the federal constitution, to which reference has been made. This is certainly true of the several constitutions of the State of Illinois, the provisions of which are set forth in the printed argument already on file.

The departure of the national government from the former systems and theories, has, therefore, been literally followed by the governments of the several States. Protection to private rights, and private property, has been interwoven in the theory upon which all these governments have been organized—a clear evidence of the intention of the people, that opposition to arbitrary governmental interference with the personal rights, and private property of the citizen should not be a merely transient proviso—but rather that it should be an abiding principle; and for

that reason it has been perpetuated by the most solemn forms of organic law; and as a principle, it underlies and supports the structure of our complex government, and is doubly guaranteed, and made perpetual by the concurrent provisions of both State and federal constitutions.

To overthrow this principle, or to disregard it, would be to subvert the very purposes for which the federal constitution was framed, as expressed in its preamble. It would be to overthrow justice, as expounded by that constitution, instead of establishing it; to disturb the domestic tranquility, instead of insuring it; to retard the general welfare, instead of promoting it; and to destroy the blessings of liberty, instead of securing them.

In saying this, it is assumed, of course, that the means provided in the constitution, for the accomplishment of the purposes set forth in the *preamble*, were well selected; that the instrumentalities chosen were adapted to the attainment of the results aimed at.

We should do small credit to ourselves, and the American people of this generation, by finding fault with the provisions of our constitution in this respect. They have been tested by an experience of nearly a century, during which time justice has been well administered, domestic tranquility has been enforced, the general welfare has been promoted, and the blessings of liberty have been enjoyed. Under the protection of these influences, the progress and development of the nation, and of the individual citizen, have been without rivalry or example in the history of the world. The means were adapted to the ends to be accomplished, and in proof of this, we have but to point to results everywhere about us. It is, and has been, the sense of personal independence, liberty of thought and action, the right to the enjoyment of life, liberty and property, and the privilege of controlling the accumulations of individual industry and enterprise, which have inspired the people, and made them capable of achieving results, astonishing to all the world besides. The spirit, begotten of an assurance of these rights, has been the life and stimulus of the people, individually and collectively. Industry has been developed into enterprise, resolution has grappled with difficulties apparently insurmount-

able, gigantic labors, formerly deemed possible only through govermental agencies, have been undertaken and accomplished by individual citizens, and improvements of a public character, of public utility, and public necessity, have owed their origin and successful accomplishment to the energy and genius of the people in their individual capacities. The work of the nation has been performed by the private citizen, and why? Simply because the constitution of the country, the very principles upon which the government was founded, the spirit and substance of our institutions, were always understood to be so many guaranties, that the individual citizen should be protected in the results of his labors, that he had a private interest, and a private property in the achievement of his hands; and that these interests were under the protection of organic laws, which could not be altered. Because, in other words, constitutions, both State and federal, have said, amongst other things, that "no man shall be deprived of life, liberty or property, without "due process of law; nor shall private property be taken for "public use, without just compensation."

The progress and development of the country, the general growth and prosperity of the nation, the common feeling and sentiment of the community, the surprising energy and enterprise of the people individually, have given a practical interpretation to these constitutional provisions entirely in harmony with the purposes declared in the preamble of the constitution, and which this court, so far as I am aware, has uniformly and consistently acquiesced in and upheld.

Is nothing due to this universal understanding of the scope and meaning of the organic law and to the acknowledged spirit and purposes of the government and its institutions? Have the people themselves been deceived, and have citizens only labored that their private accumulations should be made the sport and football of the political power? Have they toiled that others may reap the harvest? Shall a legislative enactment which contravenes the very spirit and substance of the constitution, as generally understood, and violates the rights of the citizen in their most vital part, be held to be valid, simply because the language, which forbids it specifically, cannot be read from the

face of the constitution itself? Is the constitution a thing of dates, details and examples only, without life, comprehensiveness, or principles? Does it rest in words merely, and not at all in purpose and spirit? Experience, the genius and conduct of the people, contemporaneous and subsequent interpretation, and the whole power of the nation, on more than one occasion, have answered these questions in the negative. The constitution is a thing of life; it has vital forces equal to all the emergencies of the people, individually and collectively, and its purposes are not accomplished, unless its protection reaches to the rights and interests of each one, as well as to the rights and interests of the collective whole. When it says that no man shall be deprived of life, liberty, or property, without due process of law, and that private property shall not be taken for public use without just compensation, it but announces a principle upon which the government rests as a chief corner stone. It supports, not only what is directly above it, but also lends its strength to all the superstructure, and each and every part of it. The protection to private property thus guaranteed, extends not only to the property itself, but to all the essential interests and incidents of property. The term is generic, and attaches to everything in which a property interest may exist, and to every incident of that thing, of which the idea of property can be predicated. In this country property is measured by values, and values are determined by results, denominated income; hence results, or income, is an essential element of property, the destruction of which is a destruction of the idea and substance of property itself. If this is true, and reasonable argument to the contrary may safely be challenged, then the values of property, its results and income are, and must be, within the protection of the spirit and of the letter of our constitution, and of the fundamental principles which underlie the theory of our government.

It is a remarkable fact, but doubtless true, as affirmed by Froude, that in all the speculations and experiments of the English parliament upon the private rights and private property of the subject, the rentals or income from real estate were left untouched. This species of property seems to have been

regarded as of too high and sacred a character to admit of even parliamentary interference. It may possibly be suggested, that this exception was dictated by the personal interest of the legislators themselves, who were, in great measure, taken from the landed gentry of the realm, and, therefore, had a personal interest in preserving intact the revenues derivable from this source. The criticism, if made, may be just; but, even if it is, it contains no argument against the principle I am contending for, viz: exemption of private property from legislative control, because it is not to be supposed, that it was the purpose of the framers of our constitution to discriminate against any class of property simply for the reason that it had been left free and unincumbered by the English government. This exemption from parliamentary interference may argue either a respectful recognition of the importance of leaving the rents and income of real estate to self adjustment under the general influences of the market, or it may show only that legislators, like other people, are careful in respect to their own personal interests; but in either case, our constitution was designed to sweep away all such distinctions, to put all property rights upon the same broad foundation, and to furnish protection without discrimination, and upon the theory that all men are created equal, and are endowed by nature with certain inal enable rights.

I am aware that there is a division of authority upon the quesion whether courts can or will take notice of the repugnancy of legislation to the spirit and theory of a governmənt, when no direct violation of the written constitution can be pointed out; but it would seem that the courts, which have adhered to the negative of this question, have not well considered in what the vitality and force of a written constitution consists. It is not a code of laws reaching out to the details and incidents of civil society, but simply an enunciation of the broad principles upon which the fabric of civil society rests, and in pursuance of which its affairs must be administered. To construe the language in which these principles are expressed narrowly, is to deprive the principles themselves of their efficiency. Principles are of universal application. Mere rules or regulations may, and frequently do, have their exceptions, and still the rule and the ex-

ception may be in harmony with the general underlying principle. To suppose an exception to a principle, is to destroy the principle itself. To illustrate: Assume, if it cannot be admitted, that protection to private property is a constitutional principle, in pursuance of which legislation must be had.

Laws are passed, authorizing A's private property to be taken in payment of his debts. Whilst A's private property is thus apparently invaded, the creditor's property in the debt owing by A is protected and enforced. Again, under the police power, A is forbidden to use his private property in a manner injurious to the public health and morals. *Sic utere tuo, ut alienum non lædas.* The maxim and its enforcement are apparently an infringment of private rights, but thereby the private rights in adjacent property are effectually preserved. In all such cases, it is easy to see, that the exception is still in conformity to the general principle which we have assumed. But, take another case. The right to the use and enjoyment of private property, the right to fix a value upon it, and upon its use by others, are parts of the very essence of private property. They are the elements which go to make up the very idea of property, and without which the thing itself ceases to be either useful or desirable. A owns property, which he is using in a manner and for purposes wholly unobjectionable. It is neither injurious to the public health, nor to the public morals. It is not a nuisance, in any sense of that term. Legislation comes in, and says that B shall have the right to use that property, on specified conditions. B has no right to A's property, and therefore no right to be protected by such a law; and yet, A's property rights are invaded. Such a law, if law it could be called, would be in direct violation of the principle of protection to private property, and either the principle or the law must give way, because of this antagonism.

It is insisted that the Illinois Warehouse Law is of the latter class, in those particulars in which it is here objected to. It does not undertake to say that the warehouses, or the warehouse business, is a nuisance, nor in the objectionable sections does it pretend to regulate the manner in which the business shall be

carried on. It even attempts, in some of its parts, to throw protection around the business, as though the public were desirous of its continuance in the usual way. It evidently contemplates its continuance, and its continuance is, in some sense, a public necessity; but while doing this, it strikes a blow, if it shall be sustained, with fearful certainty at the very foundation of private rights in private property. It announces the doctrine that the public, or the legislature on behalf of the public, may usurp the private rights of the citizen, and take from him, one by one—or in the mass, it may be, all the elements which make up the idea of property; that he may be stripped of his property in the profitable use of his private estate; fixes a value upon the work of his own hands, and the product of his own brains, and says that at such a price, they may all be enjoyed by others, or that they shall not be enjoyed by him. This is destructive to property interests; it is destruction to all enterprise; it is death to the principle of protection to private rights. If the constitution cannot prevent this, it is a failure in one, at least, of its most essential purposes, and a legislative despotism is erected inside of institutions professedly republican.

But even if the constitutional construction, thus far contended for, cannot be successfully invoked in behalf of the plaintiffs in error in this court, and if this court is unable, under the general principle of protection to private property, upon which the government was founded, to compel State legislatures to respect private rights, here so glaringly invaded, we still insist that we are not without the pale of constitutional protection, and that the remedy for our wrongs is within the power of this court.

The 1st section of the 14th article of the amendment to the federal Constitution was in force when the Illinois Warehouse Law was passed, and that provides that no State shall 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.

It has been said, that this section of the constitution was made solely for the benefit and protection of the negro race, and the majority of the Supreme Court of Illinois seem to have imbibed that absurd idea. It cannot be so unless there is, in this coun-

try, one constitution for black people, and another for white, and that will not be contended. There is no objection to a reference to particular evils, prominently before the public mind, leading to the adoption of this article of the constitution, for the purpose of arriving at its proper interpretation. Indeed, I have, in this argument, endeavored to show that such a reference is legitimate, and in some cases necessary. But if I am not altogether mistaken in my apprehension of the force of language, a construction of this constitutional amendment, once arrived at, becomes universal in its application. The recently emancipated slaves were especially in a condition to need protection, in their civil and property rights, against invidious and discriminating State legislation. Their status, as citizens, was neither recognized, nor fixed by law, and the States in which they had resided as slaves, were scarcely willing, voluntarily, to elevate them to an equality of civil and political rights. This was the occasion for adopting this amendment to the constitution; but the amendment, as adopted, embraces everybody. It is as broad as humanity, and the jurisdiction of the nation. Neither white men nor colored can monopolize its benefits, for it is without distinction of race or color, or previous condition of servitude. Admit that the condition of the colored race presented an illustration of the necessity for prohibiting State interference with individual rights, the prohibition once made, in terms of general import, becomes at once of universal application. It is by no means uncommon for a single case of hardship to suggest amendments to the law; but the law, when passed, unless limited by itself, applies not only to the special case which suggested it, but to all cases of a similar character. There can be no reasonable doubt, or argument contrary to this.

As thus applied, what does this constitutional provision mean? The words, " due process of law," have been so often before the courts, that it is not proper to discuss their import. It is amongst the elements of legal learning. They are words of " Magna Charta," and are of the same significance here as in England, the only difference being, that in " Magna Charta," their force, or existence even, may be broken or destroyed by act of Parliament, whilst in our constitution, they are placed

beyond the reach of legislation, and can only be displaced by constitutional amendment. In addition to what has been said in the printed argument on file, as to the meaning of these words, it may be proper to say, that by them, the States are prohibited from depriving any person of life, liberty, or property, by legislation merely, or without the ordinary trial or judgment of the courts.

We then come necessarily to this point of inquiry, viz., what is the office of a court, under our constitution, and form of government ?

As already argued in print, the division of the powers of government, into executive, legislative, and judicial, indicates, that that there must be a limitaiton upon the powers of each of these departments. Usurpations of the one upon the rights and privileges of the others, cannot be tolerated, otherwise the three become consolidated in the one. The legislative power represents the politics of the State or nation, and is in its nature aggressive, and the rules and regulations which it adopts, are to be enforced by the executive, so long as they are valid. But the clause of the constitution above referred to, has interposed the judicial power between the legislative and executive on the one side, and the individual citizen on the other, in all matters pertaining to life, liberty and property. The principles upon which these several departments of government act, serve in a general way, to point out their boundaries. These are respectively, *force*, *expediency*, and *right*, and the courts, as exponents of what is right, as distinguished from that which is merely expedient, are especially the guardians of the private property, as well as the life and liberty, of the citizen. It is to them, that he must look for assurance of that protection which the constitution guarantees. The courts must fix a limit to expediency, as a principle of legislation, and in doing this, they also prescribe a limit to the exercise of executive force.

The Illinois Warehouse Law trenches upon the office of the judiciary, because it assumes to fix arbitrarily, and without "due process of law," a standard of right, in private property, as between the citizen and the public, and requires the court to sanction and enforce a decree of pretended legislative expediency,

without permitting to the judiciary the determination of the question of right. Is it denied that a man, and a citizen, has property in the labor of his hands, and in the results of his individual capacity? If the denial can be supported, then is the citizen a slave to something, or somebody, for that is one of the essential conditions of slavery. A man has property, in the broad and constitutional sense of that term, in every thing he possesses, which is of value to him, and also in all the capacities with which he is endowed, or which he has acquired, and subject to the rules already adverted to, has a right to the control and beneficial uses of that property. This property, the constitution says, shall not be taken from him without "due pro-"cess of law." I am unable to conceive of the blundering stupidity which shall say, that because his capacity for labor, and the physical power to hold possession of a thing called property, are not taken away from him, therefore, he is not deprived of his property. Can the legislature say that services of a free citizen, worth in the market $1,000, shall be rendered for $100, and that the annual rental of property worth $5,000, shall be reduced to $500; and impose fines, penalties, and forfeitures for receiving higher prices than those fixed by it?

And can this be done in respect to a particular class of citizens, or citizens pursuing a particular business or employment, and in respect of property used for a specified purpose? In all such cases, the real question is as to the existence of the power, and not of the degree of its exercise. If it is admitted that legislation can fix one price, it must be admitted that it can fix any other. The power is unlimited if it exist at all; for who would be bold enough to affirm that if legislation can fix one maximum it may not fix another, and if it may fix a maximum why may it not fix a minimum, and by fixing it too high, compel the individual citizen to hold all of his property without conversion, whilst his neighbors have free use of the market?

If the value of the services of the individual citizen, coupled with the use of his private property, may, by legislative enactment, be adjusted at $10 per day, where is the constitutional or other limitation, which would prevent its adjustment by legislation at one cent per day? and is there any man on earth mean

enough to say, or of comprehension so warped and twisted as to believe, that if services and the use of property of the market value of $10, in the absence of legislation, is, by legislation, reduced to one cent, property is not taken,or that the owner is not deprived of property? Might not legislation as well wipe out the remaining one cent, and thus annihilate the very idea of property in the service and thing referred to? Why not obliterate the last cent of values as well as the first, or the first 999, and absorb the services and the private property of the citizen at once into the public use?

Where is the limitation that saves to the citizen one half the values, or even nominal values in his private property, and puts all the remainder of it at the risk of hostile legislation and State usurpation? There is none. The power is broad and sweeping, or there is no such power. It runs along with all interests and all rights, or it runs with none. It is omnipotent, or else it it a myth, a creation of excited fancy, a political monstrosity, to be dispelled by the first ray from the sunlight of reason, which shall fall upon it.

The Illinois Warehouse Law assumes the existence of such a power in the legislature of the State; for it not only attempts to fix maximum compensation for the services and the use of the property of the citizen, but also to deprive him of the use of his property for warehousing purposes, unless he complies with the terms prescribed, since the court will perceive by reading the enactment—*the thing* called a law—that the punishment for its violation is not merely a fine of $100 per day, but may also extend to a personal disqualification to engage in the warehousing business. It even goes farther than this in its assumption of legislative power and disregard of constitutional limitation, for at the foundation of this monstrous claim of power to fix prices and impose disabilities, must lie an assumed public necessity for the use of warehouse property, and constitutions, State and Federal, say that private property shall not be taken for public use, without just compensation.

This idea is covered up in the deceptive phraseology "public warehouses," and by these talismanic words the law attempts to open private property to general or public use, upon

such terms as the public, represented by the legislature shall prescribe. Can there be a more abject and degraded condition of private property rights, than is involved in the mere statement of such a proposition?

In the political arena of this nation, it is not to be expected that all interests and pursuits will be found in practical harmony. The struggle for political supremacy between different interests and classes, into which the people are necessarily divided, has always marked our history, and probably always will. Such struggles are incident to our system and organization. They belong to popular elections. In the past, many of the questions of difference have been largely theoretical, and it mattered little to any one, upon which standard victory perched. In later years, however, and with increase of population, have come a restless, feverish distrust, a monomania for political power, an apparent division and separation of interests and organizations based upon pursuits, and from these have been evolved political issues which are intensely practical. It is immaterial that these issues are false issues, that the differences and antagonisms which are set up, are mere pretensions. Sooner or later it will have to be admitted that issues are made and not born, and that judgment and discretion do not, of necessity, reside in the multitude; and yet the multitude, *the people*, which means the majority, it is said, must control. What must be the result? If these organizations and influences are to control in legislation, then the rules and regulations respecting private property and the right to its enjoyment and use will be fluctuating continually, as the one or the other of the contending factions acquires the supremacy. As each in turn prevails over the other, it will take control of the rights and interests of *that other*, absolutely and despotically. Harmony, consistency and stability do not belong to the vocabulary of such a government.

Rights are dependent upon the results of political elections, and revolutions of property rights come with every change of administration. The man of fortune and income to-day, will be a pauper to-morrow, because the class or profession to which he belongs will have passed out of power, and the use of his property will have been transferred to the public, repre-

sented by the successful party, upon such terms and conditions as they may choose to prescribe. All this is true, unless there is a power somewhere to regulate and restrain these restless and swaying elements of our political life.

It is useless to raise up argument against the probability of such results, for the question is, are they possible? Is there, under the constitution, authority for such legislative exactions? If the door is open, people will be found to flock to it, and even to experiment with the chaos and confusion which lie beyond it. Is there no power, except in the will of the majority, behind which private rights and private property may shelter themselves, and be safe? There is none, unless it resides in the judiciary. If this fails, then all is lost. It is conceded that this department of the government must have some authority for the possession and exercise of such a power. This authority, if found at all, must be found in the fundamental principles of the government itself, in the distribution of the powers of the government, and in the express provisions of the constitution, which say that private property shall not be taken for public use, without just compensation, and that neither the nation nor the State shall deprive a person of life, liberty or property, without due process of law; nor shall any State deny to any person within its jurisdiction the equal protection of the laws. These principles and provisions are under the special guardianship of the courts, and from them they derive all needed authority to protect private property and private rights against the encroachments of legislative power.

But it is said, and learnedly argued, that warehousemen in Chicago are exercising a public offic; that the method of transacting the grain trade makes warehouses, like that of the plaintiffs in error, a public necessity; that the Illinois constitution has made them public warehouses, and stamped them indelibly as a part of the public interest, subject to the public control. That is begging the whole question. I am not attempting to argue that warehouses are not a public necessity, nor am I now opposing the theory that the State may, under the eminent domain power, acquire this property for the public use, upon making just compensation therefor; but who, until now, ever heard of

making private property public by a constitutional or legislative declaration? What I object to is the stealing of this property by the State—the commission of grand larceny by the public, upon the property and property rights of the citizen. The State is too proud to beg; too poor to buy, it may be; it ought to be too honest to embezzle or purloin what does not belong to it, and what it does not propose to pay for. This property, like all other, is subject to the exercise of the power of eminent domain, and it may be, that the case made by the learned attorney general, would justify the exercise of that power upon it, in the way provided in the constitution; but even this power cannot reach the services of the citizen. It exhausts itself upon the tangible thing, and cannot be made to cover the thing and the services combined. To a public office, as such, the government may fix a compensation such as it chooses, and if the citizen accepts the office, he must abide by the compensation. But is it within the scope of legislative power to make a private business a public office, and private property the seat of its exercise, and then impose terms thereon? To this extent must the argument go, or it must be abandoned for the purposes of this case; and it must reach out to other pursuits, and not confine itself to warehousemen. The entire community are interested in the trades and employments of the cobbler and the tailor. Declare them by constitutional provision or legislative enactment, to be public officers, and we have then, public cobblers and public tailors, with compensation fixed by law. The ridiculousness of this result may be no argument against its possibility; but the bare statement of it is as shocking to the sense of a free people, as the idea of it is repugnent to a constitution which does not permit slavery or involuntary servitude, either to the public or to the individual, except as a punishment for crime.

Nevertheless, this is the exact and literal meaning of the warehouse law, if as a law it is valid. The theory upon which it is founded, borrowed from the arguments of politicians, and illustrated upon banners borne in political processions, is accurately stated by the learned judge of the Illinois Supreme Court to whom belongs all the honor of the majority opinion, when he says, in substance, that anything is within the scope of

legislative power which, in the opinion of the legislature itself, will produce the greatest good to the greatest number. It is respectfully denied that the principle there announced ever has been or ever can be sustained, in its application to legislation of this class. It is false in theory, opposed to the spirit and letter of our constitutions, State and federal, repugnant to the fundamental axioms of all free governments, subversive of the social and political equality of the citizens, and contrary to the principles of natural justice and equity. There is no outrage upon private property rights which might not be perpetrated under it. It would justify the absolute appropriation of individual property to the public use, or a division of it amongst the multitude.

If a law was passed to divide up the property of every citizen worth $500,000, amongst those who had no property interests, this would give 1,000 citizens $500 apiece. The loss would be the loss of a single citizen—the gain would be to a thousand. If property is a good, then such a division would be accomplishing the greatest good of the greatest number; and if so, then the controlling principle of legislation, under which the Supreme Court of Illinois has justified, or attempted to justify the warehouse act, would justify such legislative distribution. It is not possible to imagine such a law to be valid under our constitutions. But would it help out such an enactment, to leave to the courts to determine the single question, whether the citizen had property of the value of $500,000, and to enter the decree of confiscation? Would such a provision avoid the constitutional objection that by the law private property was taken for the public use, without just compensation, and that it deprived the citizen of his property without due process of law?

But, what is the difference in principle, between dividing up the property of a citizen, and dividing up the uses and income of that property? True, the naked property, the unprofitable *res*, might, in the one case, remain to him, upon which he would have the gracious privilege of paying taxes and assessments for the support of a government which had robbed him of the very means out of which such payment should be made. The prac-

tical benefits of ownership would be destroyed by imposing upon the property a public easement, which would reduce it to a mere thing, from which no valuable results could be derived.

But, it is said, and so the argument runs, that the plaintiffs in error are not obliged, by the warehouse law, to permit the public use of their property; that they may close the doors of their warehouses, or devote the property to other purposes, not yet invaded by legislation. It might be a curious and interesting study to inquire into the constitutional difference between the warehouse law as it now is, and as it would be if modified so as to compel the continued use of warehouses for warehousing purposes. It might also be interesting to speculate upon the probable length of time which must elapse, if this warehouse law is valid, before the other uses to which the property might be diverted, would be made public by legislative declarations, and the multitude be let in to enjoy its benefits. But all such study and speculation is rendered useless here, by the fact that the warehouses which are the subject of this enactment are incapable of conversion to any other profitable uses. So much is admitted in this case to be within the knowledge of the court, that it may fairly be assumed that the court judicially knows that a grain warehouse, as such houses are constructed in Chicago, is absolutely good for nothing, except the storage of grain. It is built, from bottom to top, of solid planks or timbers, bolted or spiked together, running lengthwise and crosswise of the entire structure, and dividing the whole interior into bins, from six to twelve feet square, and from fifty to sixty feet in depth, each holding from 5,000 to 10,000 bushels of grain. For any other purpose now known, they are absolutely worthless. The lumber contained in them would scarcely pay the expenses of tearing them to pieces. In Chicago they are made to hold from 600,000 to 1,600,000 bushels, and are erected at a cost of from one to three hundred thousand dollars. When warehousemen, then, are tauntingly told that the law does not compel them to be warehousemen, or to use their property for warehousing purposes, they are simply advised that the law permits them to allow their property to lie idle, and rot down before their eyes, for this is the practical ef-

fect of closing it to this, the only useful purpose of which it is capable.

But I am aware, that there should be some reasonable limit to discussion by counsel, in every case, however important it may seem. The subject involved in this record, and which the court has now to consider, presents a field for argument and illustration which is well nigh illimitable. It is comparatively immaterial how this particular case shall be ultimately determined in its direct application to the property and parties named in it; but there is a wider application of the principles which shall be established by the final decision, which embraces all the private interests of all citizens within the jurisdiction of this court. That decision, if made upon the merits of the cause, will open wide the door for legislative control over the private rights of the citizen, subjecting them to the vascillating influences of political power, and practically bringing them within the reach of all the petty strife and confusion of party politics, or it will close that door forever. In its far-reaching consequences for good or evil upon all the industries and enterprises of the country, this cause may well take rank with the most important which this court was ever called upon to determine. The Dartmouth College case decided a question of vast importance to one class of private property only. The rule which it established adverse to the pretensions of legislative power in the States, has successfully held in check all the efforts of radical politicians and crazy communists, who have, from time to time, sought to make capital for themselves by the overthrow of the financial interests and credit of the country. Its results have more than justified the policy of that decision,even if policy could be supposed to enter into the decision of any judicial question, and the grounds for that decision were much less substantial than they are; and to-day but few can be found, whose opinions are at all entitled to respect, to question either its justice or expediency.

The attempt here made to enlarge the legislative power of the State, so as to bring within its control and regulation all the private interests of the citizen, and to make his property rights and income subservient to the capricious action of political ma-

jorities, is eminently deserving of the same fate. It may safely be affirmed, that it was never the intention of the framers of our constitutions that the business of the country should be embarrassed, and its private enterprises destroyed, by special and unfriendly legislation. Such incidental disadvantages as may, from time to time, result to individuals from the operations of general laws, affecting the whole community, must of course be borne, or their effects overcome. To this extent the individual surrenders his absolute rights, by becoming a member of the civil society. But that is a thing far different from singling him, his business and property, out from the whole mass of the community, and placing them under special and onerous regulations, affecting the value of his services and the results of his enterprise. Legislation of this latter class is personal and discriminating. It is an attempt to revive the old theories of the power of the government over all the rights and interests of the individual subject, which our constitution was intended to sweep away. The advocates of such a theory, be they ever so numerous, must ultimately find that it is not suited to the spirit and genius of a people educated under free constitutions; and though clamoring for it in the name of liberty, that it had its origin and development in the darkest and dreariest days of popular oppression. And even if they should succeed in planting temporarily upon the outermost verge of legislative power, some sickly representative of the dangerous doctrine for which they contend, the result will only show, that "institutions may be re-" stored in theory ; but theory, be it never so perfect, will not " give them back their life," and the tottering and lifeless excrescence will sooner or later tumble to its fall, or be pushed disastrously from its narrow resting place. The best good of the civil society will then be accomplished, if all such disturbers of the public repose, shall be buried forever beneath the ruin.

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