Supreme Court of the United States.

OCTOBER TERM. A. D. 1874.

IRA Y. MUNN and GEORGE L. SCOTT,
Plaintiffs in Error,
v.
THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error.

Error to the Supreme Court of Illinois.

I.

STATEMENT OF THE CASE.

1. *Constitution of Illinois.*

Section XIII of the Constitution of the State of Illinois, which went into force August 8th, 1870, so far as material for the decision of this case, is as follows, to wit:

"WAREHOUSES.

"§ 1. 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.

"§ 2. The owner, lessee, or manager of each public warehouse situated in any town or city of not less than one hundred thousand inhabitants, shall make weekly statements under oath, before some officer to be designated by law, and keep the same posted in some conspicuous place in the office of such warehouse, and shall also file a copy for public examination in such place as shall be designated by law, which statement shall correctly set forth the amount and grade of each and every kind of grain in such warehouse, together with such other property as may be stored therein, and what warehouse receipts have been issued, and are, at the time of making such statement, outstanding therefor; and shall, on the copy posted in the warehouse, note daily such changes as may be made in the quantity and grade of grain in such warehouse; and the different grades of grain shipped in separate lots, shall not be mixed with inferior or superior grades without the consent of the owner or consignee thereof.

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"§ 6. It shall be the duty of the General Assembly to pass all necessary laws to prevent the issue of false and fraudulent warehouse receipts, and to give full effect to this article of the constitution which shall be liberally construed so as to protect producers and shippers. And the enumeration of the remedies herein named, shall not be construed to deny to the General Assembly the power to prescribe by law such other and further remedies as may be found expedient, or to deprive any person of existing common law remedies.

"§ 7. The General Assembly shall pass laws for the inspection of grain, for the protection of producers and receivers of grain and produce."

NOTE.—Of this Article, § 3 declares that the owners of property stored shall be at liberty to examine the property and books of the warehouse; § 4, that railroad companies and common carriers on railroads shall weigh or measure grain and receipt for it at the place of shipment, and be responsible for the delivery of the full amount at the place of delivery; § 5, that all railroad companies shall deliver grain in bulk to any consignee or elevator, to which it may be consigned, provided it can be reached by any track used, or which can be used by any railroad companies; and all railroad companies shall permit connections to be made, so that any such companies, or public warehouse, or coal bank, or coal yard may be reached by the cars on said railroad.

2. *Statute of Illinois.*

The General Assembly of Illinois passed an act, which was approved April 25, 1871. The material parts are as follows:

"An Act to regulate Public Warehouses, and the warehousing and inspection of grain, and to give effect to Article Thirteen of the Constitution of this State.

"§ 1. Public warehouses, as defined in Article Thirteen of the Constitution of this State, shall be divided into three classes, to be designated as classes A, B and C, respectively.

"§ 2. Public warehouses of 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, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved, such warehouses, elevators or granaries being located in cities having not less than one hundred thousand inhabitants. Public warehouses of class B shall embrace all other warehouses, elevators or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together. Public warehouses of class C shall embrace all other warehouses or places where property or any kind is stored for a consideration.

"§ 3. The proprietor, lessee or manager of any public warehouse of class A shall be required, before transacting any business in such warehouse, to procure from the Circuit court of the county in which such warehouse is situated, a license permitting such proprietor, lessee, or manager to transact business as a public warehouseman, under the laws of this State, which license shall be issued by the clerk of said court upon a written application, which shall set forth the location and name of such warehouse, and the individual name of each person interested as owner or principal in the management of the same; or, if the warehouse be owned or managed by a corporation, the names of the president, secretary and treasurer of such corporation shall be stated; aud the said license shall give authority to carry on and conduct the business of a public warehouse of class A in accordance with the laws of the State, and shall be revocable by the said court upon a summary proceeding before the court, upon complaint of any person, in writing, setting forth the particular violation of law, and, upon satisfactory proof, to be taken in such manner as may be directed by the court.

"§ 4. The person receiving a license as herein provided, shall file with the clerk of the court granting the same, a bond to 'the People of the State of Illinois,' with a good and sufficient surety, to be approved by said court, in the penal sum of ten thousand dollars, conditioned for the faithful performance of his duty as a public warehouseman of class A, and his full and unreserved compliance with the laws of this State in relation thereto.

"§ 5. Any person who shall transact the business of a public warehouse of class A without first procuring a license as herein provided, or who shall continue to transact any such business after such license has been revoked (save only that he

may be permitted to deliver property previously stored in such warehouse), shall, on conviction, be fined a sum of not less than one hundred dollars nor more than five hundred dollars, for each and every day such business is so carried on; and the court may refuse to renew any license, or grant a new one, to any of the persons whose license has been revoked, within one year from the time the same was revoked."

§ 6. Requires every warehouseman of class A to receive all grain tendered for storage, if he has room, prohibits the mixing of different grades, and authorizes grain to be stored in a separate bin by agreement of the owner and warehouseman.

§§ 7–12. Require the warehouseman of class A to give a receipt to the owner or consignee, subject to the order of the owner or consignee, and regulate the issuance, form, and cancellation of such receipts, and the delivery of the property stored.

§ 12. Requires every warehouseman of class A to make weekly statements of the amount and kind of grain stored at the close of business on the previous Saturday, which was to be verified by oath and given to the warehouse registrar, an officer created by the act, and to post a similar statement in a conspicuous place in the office of the warehouse; and also to furnish daily to the registrar a correct statement of the grain received, in store, and delivered, and in regard to all receipts issued, outstanding, or canceled.

§ 13. Fixes the grades of grain.

§ 14. Provides for the appointment of chief inspector of grain by the governor, to have supervision of the inspection of grain under the direction of the Board of Railroad and Warehouse Commissioners; for assistant inspectors, and defines and regulates their duties.

"§ 15. Every warehouseman of public warehouses of class A, shall be required, during the first week in January of each year, to publish in one or more of the newspapers (daily if there be such), published in the city in which such warehouse is situated, a table or schedule of rates for the storage of grain in his warehouse during the ensuing year, which rates shall not be increased (except as provided for in § 16 of this act), during the year; and such published rates, or any published reduction of them, shall apply to all grain received into such warehouse from any person or source, and no discrimination shall be made, directly or indirectly, for or against any charges made by such warehouseman for the storage of grain.

The maximum for storage and handling grain, including 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; provided, however, that grain damp or liable to early damage, as indicated by its inspection when received, may be subject to two cents per bushel storage for the first ten days, and for each additional five days or part thereof, not exceeding one-half of one cent per bushel."

§§ 16–23. Regulate the duties of warehousemen as to property stored, and make penalties in regard to inspection, and against the unlawful agreement to divert grain contrary to the direction of the owner or consignee.

§ 23. Authorizes a suit in behalf of any person injured by a violation of the act, upon the bond, in the name of the people; and makes it the duty of the State's attorney to prosecute all criminal proceedings for a violation.

§ 24. Makes the receipts negotiable.

§ 25. Provides punishment by imprisonment in the penitentiary for a fraudulent issue of a warehouse receipt, or a removal of any property stored without a surrender of the receipt.

§ 26. Preserves all common law remedies.

§ 27. Requires the proprietors and managers of public warehouses to keep posted in a conspicuous place, in their offices, a copy of the act.

§ 28. Repeals all acts and parts of acts inconsistent with this act.

3. *Prosecution for transacting business without procuring a license.*

On the 29th day of June, 1872, the State's Attorney filed an information in the Criminal court of Cook county, Illinois, against Ira Y. Munn and George L. Scott, in which it was alleged that they were, on the 28th day of June, 1872, in the city of Chicago, in Cook county, Illinois, the managers and lessees of a public warehouse, known as the "Northwestern Elevator," in which they then and there stored grain in bulk, and mixed the grain of different owners together in said warehouse; that the warehouse was located in the city of Chicago, which contained more than one hundred thousand inhabitants; that they unlawfully transacted the business of public warehousemen as aforesaid, without procuring a license from the Circuit court of said county, permitting them to transact business as public warehousemen, under the laws of the State of Illinois. Rec., 1–2.

To this information a plea of not guilty was interposed, and upon a trial of the issue, the defendants were found guilty, and a fine of $100 imposed. Rec., 3.

The evidence was embraced in an agreed statement of

facts, which was made a part of the record, which is to be found in this Record, pages 4–7, inclusive.

By that stipulation it appears that Munn & Scott leased the ground occupied by the Northwestern Elevator of the owner in 1862, and in that year, with their own capital and means, erected thereon the grain warehouse or elevator, and that they have ever since carried on, in said elevator, the business of receiving, storing and handling grain for hire, for which they have charged and received, as a compensation, such rates of storage as have been, from year to year, agreed upon and established by the different elevators and warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication.

It further appears, by the stipulation, that on the 28th day of June, 1872, Munn & Scott were the managers and proprietors of the grain warehouse known as "The Northwestern Elevator" in Chicago, Illinois, wherein grain of different owners was stored in bulk and mixed together, and that they, then and there, carried on the business of receiving, storing, and delivering grain for hire, without having taken a license from the Circuit court of Cook county, permitting them, as managers, to transact business as public warehousemen, and without having filed with the clerk of the Circuit court a bond to the people of the state of Illinois, as required by §§ 3 and 4 of the act of the Legislature, approved April 25, 1871; and that the city of Chicago then, and for more than two years before, had more than 100,000 inhabitants.

It further appeared, from the stipulation, that the plaintiffs in error had stored and mixed grain of different owners togeth-

er, only by and with the express consent and permission of such owners, and that they also agreed that the compensation should be the published rates of storage.

It further appeared that the plaintiffs in error had complied in all respects with the act of the legislature, except in two particulars: *first*, they had not taken out a license, nor given a bond, as required by sections 3 and 4; and *second*, they had charged for storage and handling grain, the rates established and published in January, 1872, which were higher than those fixed by § 15.

Munn & Scott prosecuted a writ of error from the Supreme court of Illinois, and a transcript of the record was filed therein September 11, 1872. Rec., 1.

Errors were assigned. Rec., 8.

On the 30th day of January, 1874, the Supreme court of Illinois affirmed the judgment of the Criminal court of Cook county. Rec., 22.

At the September term, 1874, a certificate was granted by the Chief Justice of the Supreme court of Illinois, that in this case there was drawn in question the validity of the statute of Illinois, 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," approved April 25th, 1871, on the ground that it was repugnant to the third clause of the eighth section of Article I of the constitution of the United States, and also to Article V, and also to Article XIV of the amendments to the constitution of the United States; and that the decision of the court was in favor of the validity of said statute; and that the rights of the plaintiffs in error depended upon the validity or invalidity of the statute, and the decis-

ion was adverse to the rights claimed by the plaintiffs in error; that the judgment was final, and rendered by the highest court in the State of Illinois, having jurisdiction of the controversy, and a writ of error was allowed. Rec., 23.

A writ of error was issued, and a citation was served, Oct. 2d, 1874. Rec., 23, 24.

4. *Facts of which the court will take judicial notice.*

FIRST.—*Geography.*

The harbor of Chicago is the Chicago river and its North and South Branches. The city is built on the west shore of Lake Michigan, near the south end, upon the banks of these rivers, and here is the extreme southwestern port for the commerce of the great lakes. The Illinois, Mississippi and Missouri rivers and their tributaries are connected with the lakes by means of the Chicago river and the Illinois & Michigan Canal The *termini* of the trunk lines of railway transporting freight and passengers from Wisconsin, Minnesota, Iowa, Nebraska, Kansas, Illinois, and the Western Territories are at Chicago. The great trunk lines of railway connecting the country in the northern Mississippi valley with the Atlantic coast and the exporting ports, find their western *termini* at Chicago.

The warehouses of the railway lines are situated on or near the banks of the Chicago river. The warehouses for handling grain are located on the banks of the Chicago river, so that a railroad track is on one side and the river on the other.

The river and its branches furnish docks for the landing of boats and vessels, and loading and unloading freight, of more than twenty-five miles, and these are lined with places for storage or for the transfer, from car to vessel or *vice versa*, of the articles of trade.

SECOND.—*Course of transportation and the usages and customs of trade.*

The great producing region of the West and Northwest sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard, by the great lakes, and some of it is forwarded by railway to the Eastern ports. When the grain reaches the Atlantic cities it is sold for consumption or shipped to foreign countries. Vessels, to some extent are loaded in the Chicago harbor and sailed through the St. Lawrence, directly to Europe.

Comparatively little of the grain received in Chicago is used there; the great bulk is transferred immediately, or stored for a time and then transferred to the car or vessel for transportation eastward. The quantity received in Chicago has made it the greatest grain market in the world.

This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called *elevators*, because the grain is *elevated* from the boat or car, by machinery operated by steam, into the bins prepared for its reception; and *elevated* from the bins, by a like process, into the vessel or car, which is to carry it on.

The grain is, to a large extent, stored for a time, especially during the winter, when navigation is closed. During the time it is in store, a very large proportion is sold, first by the producer or dealer who has sent it from the place of production, and then by the dealer who sells for shipment to the Eastern States or foreign countries. In this way the largest traffic between the citizens of the country north and west of Chicago, and the citizens of the country lying on the Atlantic coast north of Washington, is in grain which passes through the elevators of Chicago

In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the seashore, and forms the largest part of *inter-State commerce* in these States.

The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength; they are provided with machinery and steam engines by which the grain is received and discharged. They are located with the river harbor on one side and the railway tracks on the other, and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand.

This mode of conducting the business was inaugurated more than twenty years ago and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit. There is no known instance where it has been conducted by a corporation, or by authority from the legislature.

The "Northwestern Elevator," built by the plaintiffs in error, in 1862, and used as a grain warehouse ever since, is situated on the North Branch of the Chicago river, a short distance from its junction with the main stream, with the tracks of the

Chicago and Northwestern Railway, of the Wisconsin Division, on the other side from the river. It is used chiefly to receive grain from the railroad company which has carried the grain from Wisconsin, Minnesota, Northern Iowa and Northern Illinois, and to discharge it for shipment eastward in vessels and cars—sometimes in vessels for direct transportation to Europe.

II.

ASSIGNMENT OF ERRORS.

The plaintiffs in error say that the Supreme court of Illinois committed error to their injury and prejudice, in affirming the judgment of the Criminal court of Cook county against them, in this:

1. Sections three, four, five and fifteen of the statute passed by the legislature of Illinois, 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," approved April 25, 1871, under which the plaintiffs in error were convicted and fined, are unconstitutional and void.

2. Said sections are repugnant to the third clause of section eight, of Article I, of the constitution of the United States; and also to the sixth clause of section nine, Article I, of the constitution of the United States; and also to Article V, of the amendments to the constitution; and also to the first section of Article XIV of the amendments.

3. The Supreme court of Illinois decided erroneously said sections to be valid and not repugnant to the constitution of the United States, and erroneously affirmed the judgment of the Criminal court of Cook county.

III.

BRIEF OF THE ARGUMENT.

1. Introductory statement of the case.

Argument 1–5.

2. Preliminary propositions:

First. The plaintiffs in error could not safely take a license and give a bond as required by §§ 3 and 4 of the act, because they would thereby waive the right to question the validity of the act.

Argument 5, 6.

AUTHORITIES:

Cooley on Const. Lim., 181.

Baker v. Braman, 6 Hill, 511.

Ferguson v. Landrum, 1 Bush, Ky. 548.

Home Ins. Co. v. Security Ins. Co., 23 Wis., 171.

Second. The facts not contained in the record, of which the court take judicial notice.

Statement of Case.

Argument 7–9.

AUTHORITIES:

Vincent v. C. & A. R. R. Co., 49 Ill. 38.

Gibson v. Stevens, 8 How. 399.

Smith v. N. Y. C. R. R. Co. 43 Barb. 225.

Bronson v. Wiman, 4 Selden, 182.

Duncan v. Littel, 2 Bibb. 426.

Bell's Heirs v. Barnet, 2 J. J. Marsh, 520.
Boulimet v. State, 28 Ala. 88.
The Mersey, Blachford's Prize Cases, 191.
Waring v. Mayor, 8 Wal. 115.

I.

The 3d, 4th, 5th and 15th sections of the Illinois statute, under which the plaintiffs in error were convicted and fined, are repugnant to the 3d clause, § 8, Article I of the constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations and among the several States.

Argument 9–26.

1. This court has jurisdiction under § 25 of the judiciary act.

Argument 11.

AUTHORITY:

Ward v. Maryland, 12 Wal. 423.

2. The business of the plaintiffs in error, as warehousemen of grain in bulk in elevators, is covered by the word *commerce*.

Argument 11, 12.

AUTHORITY:

Case of the State Freight Tax, 15 Wal. 275.

3. The business is a part of the inter-State and foreign commerce of the country.

Argument 13.

AUTHORITY:

State Freight Tax, 15 Wal. 276, 277.

4. The act of the Illinois legislature is a regulation of commerce.

Argument 14.

5. The power asserted by the Illinois legislature, is one of restraint as well as regulation of commerce.

Argument 15.

AUTHORITIES:

Gibbons v. Ogden, 9 Wheat. 232.
Brown v. Maryland, 12 *Ib.* 448, 439.
Osborne v. Mobile, 16 Wal. 481.
Woodruff v. Parham, 8 Wal. 138.
State Freight Tax, 15 Wal. 276.

6. The State has not concurrent power with Congress to enact the provisions in question.

Argument 17–20.

AUTHORITIES.

Wilson v. Blackbird Marsh Co., 2 Peters 250.
Gilman v. Philadelphia, 3 Wal. 721, 730.
License Cases, 5 How. 504.
Bartmeyer v. Iowa, 18 Wal. 132.
N. Y. v. Miln, 11 Peters 102.
Gibbons v. Ogden, 9 Wheat. 222.
State Freight Tax Case, 15 Wal. 279.

7. Application of the rules of law to the facts of the case at bar.

Argument 20–25.

II.

The sections of the act of the legislature of Illinois, alleged to be void, are also repugnant to the sixth clause of

§ 9, Article I, of the constitution, which ordains that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

Argument, 25.

III.

The sections of the Act of the Illinois legislature, alleged to be void, are also repugnant to that part of the first section of Article XIV of the Amendments to the Constitution of the United States, which ordains 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.

Argument 26.

1. The construction of the provision which protects life, liberty, and property.

Argument 28–31.

AUTHORITIES.

5 Webster's Works 487.
Coke's Inst. 46-50.
Murray's Lessee v. Hoboken Co. 18 How. 276.
Hoke v. Henderson, 4 Dev. N. C. 15.
Taylor v. Porter, 4 Hill 146.
Wynehamer v. People, 13 N. Y. 393.
Cooley on Const. Lim. 351 *et seq.*

2. This provision protects the owner in the use of his property as well as in the title and possession.

Argument 31.

AUTHORITIES :

Pumpelly v. Green Bay Co. 13 Wal. 177.

Sinnickson v. Johnson, 2 Harr. N. J. 129.

Gardner v. Newburgh, 2 John. Ch. 162.

Also, cases cited in note 13 Wal. 179.

Green v. Biddle, 8 Wheat. 1.

Bronson v. Kinzie, 1 How. 311.

Cooley on Const. Lim. 290.

Walker v. Whitehead, 16 Wal. 314.

Rowley v. Hooker, 21 Ind. 144.

Ogden v. Saunders, 12 Wheat. 259.

Willard v. Longstreet, 2 Doug. Mich. 172.

Gantly's Lessee v. Ewing 3. How. 709.

3. The police power of the State defined and discussed. The sections in question are not within the limits of that power.

Argument 34–48.

AUTHORITIES :

4 Black. Com. 162.

Bentham Edin. Ed. Part IX, 157.

Cooley on Const. Lim. 572, 577.

Thorpe v. I & M. R. R. Co. 27 Vt. 149.

Com. v. Alger, 7 Cush. 84.

2 Kent Com. 340.

People v. I. & M. R. R. Co. 9 Mich. 307.

Lake View v. Rosehill Cem. Co. 6 Chicago Legal News, 120.

Benson v. Mayor, 10 Barb. 245.

Vanderbilt v. Adams, 7 Cow. 449.

Broom's Legal Maxims, 357.

The act is not a regulation of the use of property for the future, but it deprives the plaintiffs in error of property in existence and used by them for years prior to the passage of the law.

Argument 38, 39.

AUTHORITIES:

Wynehamer v. People, 13 N. Y. 378.
Com. v. Alger, 7 Cush. 85.
Bartmeyer v. Iowa, 18 Wal. 132.

There are authorities directly in point against the exercise of such power.

Argument 39–43.

AUTHORITIES:

Cooley on Const. Lim. 393.
Doe ex dem. Gaines v. Buford, 1 Dana, 490.
Webb v. Baird, 6 Ind. 17.

The examples of legislation in regard to usury, ferries, mills, hackmen, etc., are not precedents justifying the exercise of such power.

Argument 43–48.

AUTHORITIES:

7 Bacon's Abridg. 188, Ed. 1807.
Angell on Highways, §§ 47, 48.
Birset v. Hart, Willes, 508.
Mills v. County of St. Clair, 2 Gilm. 197.
Dundy v. Chambers, 23 Ill. 369.
15 Viner's Abridg. 398.
Hix v. Gardner, Bulstrode's R. 195.

4. The sections of the act of the Illinois legislature are repugnant to the provision of the fourteenth amendment that, No State shall deny to any person, within its jurisdiction, the equal protection of the laws.

Argument 48.

AUTHORITIES:

Cooley on Const. Lim. 391.

Walley's heirs v. Kennedy, 2 Yerger, 554.

5. The provisions of the constitution of Illinois in regard to warehouses do not affect the questions.

Argument 51.

AUTHORITIES:

Railroad v. McClure, 10 Wal. 511.

Rouse v. Home of the Friendless, 8 *Ib.* 430.

Rouse v. Washington, *Ib.* 439.

IV.

ARGUMENT.

May it please your Honors :

The questions presented by this record for decision, are of the gravest character. For the first time since the Union of these States, a legislature of a State has attempted to control the property, capital and labor of a private individual, by fixing the prices he may receive from other private persons, who choose to deal with him, The plaintiffs in error claim, that such legislation is repugnant to the provisions of the constitution of the United States.

In 1862, the plaintiffs in error leased from the owner a lot, between the North Branch of the Chicago River and the tracks of the Wisconsin Division of the Chicago and Northwestern Railway, and erected thereon an elevator, for the handling and storage of grain in bulk, according to the usages of commerce. They entered into the business and have continued to carry it on ever since. The plaintiffs in error are two private individuals, partners in the business, and exercise no franchise or privilege, granted by the legislature. They embarked in this pursuit, and have used their capital and devoted their skill in the exercise of the right of liberty and property, guaranteed to them. No person was obliged to transact business with them. It was regulated solely by the mutual agreement of the parties.

After having pursued this business for eight years without interference, and while they were the owners of property

fitted only for use as an elevator and grain warehouse, a new constitution was adopted by the people of Illinois, and an article, numbered XIII was inserted, which is entitled "Warehouses." As the plaintiffs in error complied with every provision of this article, and it did not authorize the legislation in controversy, and the Supreme court of Illinois have placed its validity upon the general power of a State legislature, it is not important to analyze this provision of the Illinois constitution; it is mentioned as a historical fact only. The plaintiffs in error, still pursuing their business as before, the legislature on the 25th of April, 1871, passed an act which was to take effect July 1st, 1871, and by that act they were prohibited from further continuing their occupation, and from using their house for the only purpose it could be used, unless they obtained from the Circuit court of Cook county a license, and gave a bond in the sum of $10,000, with approved sureties, conditioned for the faithful performance of their duty as public warehousemen of class A, and for their full and unreserved compliance with all laws of the State in relation thereto. The statute did not embrace all warehousemen in the State, but only those in the city of Chicago. It did not require any fee or tax to be paid for the license, and it does not, therefore, come within that class of cases where the State has attempted to impose a tax or raise revenue.

The 15th section fixed the maximum charge for storage and handling grain, so that an observance of this regulation was one of the provisions of the laws of the State, which the bond would bind the persons who executed it to observe. The business could not be carried on without a license; the license could not be obtained without giving the bond; the charges for the use of the warehouse could not exceed the sum named in the statute without a violation of the bond and a revocation of

the license, which, by the terms of the law, prevented a continuance of the business. The plaintiffs in error were placed in this predicament on the 1st day of July, 1871. The legislature, by the same act, required them to receive all grain tendered for storage to the capacity of their house, and, in effect, made it unlawful for them to make an agreement with their customers, in regard to the compensation. The bond not only was to bind them to receive the prices fixed in this statute but to any other law which might be passed. The legislature asserted the *power* to regulate the mode of conducting the business and to fix the price to be received. This power had been exercised by the mutual agreement of the plaintiffs in error and their customers, and if it was lawfully exercised by the legislature, there was no limit, but it depended upon the legislative discretion alone. If the license was taken and the bond given, the parties could not deny the validity of the legislation. The plaintiffs in error, under these circumstances, were obliged to yield the use and control of their private property, their capital, and their labor, to the legislature of the State, or to refuse to take the license. The question was purely one of legislative control of private property, and not one of taxation, or of police regulation. They elected to manage their own property and refused the license. The consequence was a prosecution according to § 5 of the act, and a fine of $100.

The plaintiffs in error were not alone interested in the validity of the act of the legislature. The rights of their customers were involved. Citizens of foreign countries, and of Wisconsin, Minnesota, Iowa, New York, Pennsylvania, Maryland, and other States, stored their grain in the warehouse of the plaintiffs, and in other similar warehouses in Chicago, embraced within the

terms of the statute. They had paid such sums for handling and storing as they had agreed upon with the warehousemen.

The legislature had fixed a lower price than these consignees and owners of grain had paid, but it is always good policy as well as right to pay a fair price; and if the legislature could fix a low price, it could fix a high one. Therefore, to the customers of the elevators, the question was presented as to the power of the legislature of a State to determine the compensation which they should be obliged to pay for handling and storing their grain in Chicago, when sent there for sale or transportation.

It is obvious that the questions presented would be regarded as grave, and the validity of such a law would be doubted.

It will be apparent from the record that this is a test case to determine the constitutional questions involved, and it may not be improper to say, that no other judgment has been rendered, but that proceedings have been stayed to await the result of this case.

The Supreme court of Illinois affirmed the judgment of the Criminal court of Cook county, by a divided court and the opinions are printed in the record.

The plaintiffs in error bring the case to this court under §25 of the judiciary act. The range of argument is limited to the question as to whether §§3, 4, 5 and 15 of the act of the General Assembly of Illinois are repugnant to the constitution of the United States. The Supreme court of Illinois have settled all other questions.

It is claimed that these sections of the Illinois law, are repugnant to the Federal constitution in this :

First. To the provision which confers upon Congress the

power to regulate commerce with foreign nations, and among the several States.

Second. To that provision which ordains that, no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

Third. To that provision which ordains 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.

Before entering upon the argument of the constitutional propositions, we invite attention to other points.

1*st.* The plaintiffs in error were justified in refusing to take a license and give a bond, as required by §§ 3 and 4 of the Illinois statute, if section fifteen was unconstitutional. Because, they could not question the validity of the latter provision, if they waived their objection to the first. In addition to the condition of the bond, which would bind them to an observance of all parts of the statute, the reception of a license would be such a recognition of the law as would amount to a waiver of all objections to its constitutionality.

JUDGE COOLEY, in his work on Constitutional Limitations, page 181, says: "These are where a law in its application to a particular case must be sustained, because the party who makes the objection has, by prior action, precluded himself from being heard against it. Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will. On this ground it has been held that an act appropriating the private property of one person for the private purposes of another, on compensation made, was valid if he whose property was taken

assented thereto; and that he did assent and waive the constitutional privilege, if he received the compensation awarded, or brought an action to recover it. So, if an act providing for the appropriation of property for a public use shall authorize more to be taken than the use requires, although such act would be void without the owner's assent, yet with it, all objection on the ground of unconstitutionality is removed. And where parties were authorized by statute to erect a dam across a river, provided they should first execute a bond to the people conditioned to pay such damages as each and every person might sustain in consequence of the erection of the dam, the damages to be assessed by a justice of the peace, and the dam was erected and damages assessed as provided by the statute, it was held, in an action on the bond to recover those damages, that the party erecting the dam, and who had received the benefit of the statute, was precluded by his action from contesting its validity, and could not insist upon his right to a common law trial by jury. In these and the like cases, the statute mnst be read with an implied proviso that the party to be affected shall assent thereto; and such consent removes all obstacle, and lets the statute in to operate the same as if it had in terms contained the condition."

In support of this proposition, I cite:

Baker v. Braman, 6 Hill, 47.
Embury v. Conner, 3 N. Y., 511.
Ferguson v. Landram, 1 Bush (Ky.), 548.
Home Ins. Co. v. Security Ins. Co., 23 Wis., 171.

The plaintiffs in error have not, therefore, acted in a reckless and defiant manner, but they have been forced to surrender the control and use of their property and labor to the legislature, or to rely upon the legal proposition that this statute was *pro tanto void*, as they had the right at their peril to do.

2d. The court will take judicial notice of certain facts which are essential to a correct decision of this case.

It is not necessary to cite authorities to the effect that the court will use its own knowledge of the geography of the country; or of the laws of Congress and the acts of the government with reference to the commerce upon the lakes and the port of Chicago.

The court will also take notice, without proof, of the course of trade, and the general commercial usages of the country, and the world, including the manner in which the business of transportation and commerce is conducted.

The Supreme court of Illinois in *Vincent v. C. & A. R. R. Co.*, 49 Ills. 38, say: "There are some facts connected with the vast internal commerce of this State, of which, independent of any averments in the bill, we will take judicial notice. The immense quantities of grain, which are annually transported to Chicago over our lines of railways, making that city, with the aid of contributions from neighboring States, one of the great grain markets of the world, are chiefly sent in bulk. The grain is ordinarily consigned to commission merchants, who have erected vast warehouses, termed elevators, connected by side tracks with the main line of some railway, and provided with machinery for the rapid unloading of the cars, and storage of the grain. As the grain is of various grades and prices, it is of great importance to the agricultural and mercantile interests of the State that each shipment of grain should be stored by itself, or with grain of the same grade, and that every shipper should be able to select his own consignee, with the certainty that, if his elevator is on the line of the road by which the grain is transported, and the consignee is ready to receive the shipment, it shall be faithfully delivered to

him. This arrangement is as advantageous to the railways as to the consignor and consignee. It would obviously be impossible for the companies to unload and store this grain at their ordinary freight depots, to be there held, unmixed with other grain, subject to the order of the consignees, without incurring great additional expense, and they would hardly claim the right, under their charters, to erect elevators of their own, for the purpose of adding the business of commission merchants to that of common carriers. If they were to do so, the tendency of such a practice to create a dangerous monopoly, would probably soon arrest the attention of the legislature, and lead to its prohibition. The custom of delivering grain at the elevators to which it is consigned, and which are connected with the line by convenient side tracks, has thus grown into one of the necessities of railway commerce."

This court in *Gibson v. Stevens*, 8 Howard 399, has said "In examining the question between these parties, it is proper to say, that, if the fact had not been admitted that the dealing between McQueen and McKay and the plaintiff was in the usual course of trade, the court would yet have felt itself bound to take judicial notice of it. * * * The statement of facts in this case describes the usual course of the great inland commerce by which the larger part of the agricultural productions of the valley of the Mississippi find their way to a market. It has existed long enough to assume a regular form of dealing; and it embraces such a wide extent of territory, and is of such general importance, that its ordinary course and usages are now publicly known and understood: and it is the duty of the court to recognize them, as it judicially recognizes the general and established usages of trade on the ocean."

The rule includes notice of the great lines of public travel

and transportation, and their connections with each other, and the general course of trade and transportation throughout the country.

Smith v. N. Y. C. R. R. Co., 43 Barb. 225.

The court will take judicial notice of the ordinary mode of transacting business.

Bronson v. Wiman, 4 Seld. 182.

See also,

Duncan v. Little, 2 Bibb. 426.
Bell's Heirs v. Barnet, 2 J. J. Marsh 520.
Boulimet v. State, 28 Ala. 88.
The Mersey Prize case, Blatchf. 187.
Waring v. Mayor, 8 Wal. 115.

In the statement of the case I have presented such facts in regard to the course of trade and the usages of business so far as I understand them to be material. These facts are as much a part of the record as those mentioned in the stipulation, or the statute, for a violation of which these parties were prosecuted.

I.

The third, fourth, fifth and fifteenth Sections of the Illinois Statute, under which the plaintiffs in error were convicted and fined, are repugnant to the third clause of Section eight of Article one of the constitution of the United States.

The plaintiffs in error claim that the part of the Statute enacted by the legislature of Illinois, April 25, 1871, which prohibited them from continuing their business of handling and storing grain in their warehouse, unless they took out a license from the Circuit court of Cook county, and gave bond to conform to the provisions of Section fifteen, fixing the compensation

they might receive, to be repugnant to the provision of the Federal constitution, which confers upon Congress the power to regulate commerce with foreign nations and among the several States.

It is not material to consider the other portions of the Statute, because they are not dependent on those asserted to be void, and the record shows that the plaintiffs in error have complied with all of them. Nor is it important to consider Article XIII of the constitution of Illinois, entitled "warehouses," because all of its provisions have been observed, and these parties were not prosecuted for any violation of the constitution.

When this cause was pending in the courts of Illinois, it was proper to consider the provisions of the State constitution in determining the validity of the statute; but whatever may be the correct conclusion in regard to it, that is not now a question before this court. The Supreme court of Illinois did not sustain the Statute because of the provision in the constitution of Illinois, in regard to warehouses, but placed their decision upon the ground that the legislature was not restrained by the constitution of the State, or of the United States, from making such a law.

It is admitted that the judgment of that court excludes the discussion of every question, except that which involves the conflict of the statute with the Federal constitution.

Whether other parts of this legislation are of binding force, or not, these parties did not care to raise any question touching them. They will be found to embrace the grading and inspection of grain, the issue and cancellation of warehouse receipts, the reports of grain in store, and other matters, all of which are within the police power of the State, and were intended to guard against fraud and crime.

I invite the attention of your Honors to the question now presented, which involves an examination of the power of Congress to regulate commerce, and the limitation on the power of the State to make rules affecting the transportation of articles of trade.

1. *This court has jurisdiction under section 25 of the judiciary act.*

This case comes properly before this court under the twenty-fifth section of the judiciary act.

Ward v. Maryland, 12 Wal. 423.

2. *The business of the plaintiffs in error is covered by the word "commerce."*

In the *case of the State Freight Tax*, 15 Wallace 275 (*Reading Railroad Company v. Pennsylvania*), it is said: "Beyond all question the transportation of freight, or of the subjects of commerce for the purpose of exchange or sale, is a constitutent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another, was the prominent idea in the minds of the framers of the constitution, when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the States. * * * Nor does it make any difference whether this interchange of commodities is by

land or by water. In either case the bringing of the goods from the seller to the buyer is commerce."

It is not necessary to examine the numerous cases in which the word commerce has been defined, for with the expression of this court in the case just cited there can be no doubt that the transportation of the articles of commerce from one State to another is embraced within the meaning of the constitutional provision.

If the carriage of grain in boats and vessels by land and water is commerce, then the handling of grain in the manner shown by this record is commerce. The *only* mode by which the immense quantity of the wheat, corn, oats and barley produced in the western and northwestern States can be transported and sold to consumers is by the use of elevators, such as that owned by the plaintiffs in error. By their use the contents of a car can be transferred in a few minutes to another car or vessel; a train of cars can be emptied in an hour into the warehouse, where it can remain in store at the pleasure of the owner, and loaded from the warehouse into the vessel, or another train of cars, in as brief a period of time. It would be *physically impossible* to handle such quantities of these products in any other way. The warehouse or elevator is just as necessary for the purposes of commerce and trade, as the bottoms which float on the water, or the superstructure on which the cars run, or the use of locomotives and cars. Without such houses and machinery the railroads of the West would cease to pay expenses, the shipping upon the lakes would be seriously crippled, and trade would languish.

It is, therefore, insisted that the *business* of the grain elevators or warehouses in Chicago is a part of the commerce of the country, within the meaning of the word as used in the constitution.

3. *The business is a part of the inter-State and foreign commerce of the country.*

It is true that these houses are located wholly within the State of Illinois, and that they receive and store grain which is both produced and consumed in the State, and to that extent the business relates to the internal commerce of the State, and is beyond the control of Congress. But, it is equally true that much the largest part of the grain received, stored, and transferred, comes from another State, and is sent to still another State, or to a foreign country. The business, therefore, embraces both inter-State and foreign commerce. The same point was considered in the *Case of the State Freight Tax*, where a tax of so much per ton was imposed upon the freight carried by the Reading Railroad Company, which operated a line wholly within the State of Pennsylvania. It is said in the opinion: "Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in inter-State trade. We are not, at this moment, inquiring further than whether taxing goods carried, because they are carried, is a regulation of carriage. The State may tax its internal commerce, but if an act to tax inter-State and foreign commerce is unconstitutional, is is not cured by including in its provisions subjects within the domain of the State. Nor is a rule prescribed for carriage of goods through, out of, or into a State any the less a regulation of transportation, because the same rule may be applied to carriage which is wholly internal. Doubtless, a State may regulate its internal commerce as it pleases. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction is not changed by adding to it similar

conditions for allowing transportation wholly within the State." 15 Wal. 276, 277.

In that case separate accounts were made out for freight carried within the State, and another for freight carried without the State, so that the act, so far as it purported to allow the tax on the latter class of freight, was held to be void.

In the case at bar there can be no such severance. The act of the legislature required, as a condition to do business as warehousemen, that they should take out a license and give a bond, which would bind them to receive no more than the prices fixed by the fifteenth section of the act. In the nature of the case there could be no severance of internal from other commerce. The provisions were dependent; they were to be taken as a whole; the licensee would be compelled to regulate his charges as to grain going out of the State the same as that to remain in it. More, it would be impossible for a warehouseman to know where the grain received and stored in his warehouse would go.

4. *The act of the Illinois legislature is a regulation of commerce.*

It has been a subject of discussion in nearly all of the cases where this provision of the constitution has been construed, as to whether the acts challenged amounted to a *regulation* of commerce.

The case at bar presents no such difficulty. It is a clear case of regulation. The statute did not fix a fee for the license, or require the payment of any tax, or any sum of money whatever. It has none of the elements of most of the cases, which sought to raise directly or indirectly, revenue. This statute required every warehouseman of class A to receive for storage any grain tendered in the usual and ordinary course of business,

without discrimination, to the extent of the capacity of the house; it required him to store it with grain of a similar grade, or in a separate bin as the consignee desired; it required him to issue such a receipt as the act prescribed; it required him to furnish statements to the public and to an officer of the State; it required him to fix, during the first week of every year, a schedule of rates to be charged for the year, and publish them in a newspaper; it prohibited the mixing of grades; it punished the fraudulent issue of receipts, or the delivery of grain without the surrender of the receipt.

In addition to these unequivocal acts of regulation, the statute in the 15th section regulated the prices which the warehousemen might lawfully charge, by fixing the maximum charges.

There is no provision in the law to enforce an observance of most of these regulations, including that of charges, except the license and the bond. The only object of the license and the bond was to compel a compliance with the other parts of the same, or future statutes. Beyond all controversy, therefore, this was a case of direct regulation of the business of the owners of elevators in Chicago, which was a part of the commerce of the country.

5. *The power asserted by the legislature of Illinois is one of restraint as well as of regulation.*

It is said in *Gibbons v. Ogden*, 9 Wheat., 232: "Licensing acts, in fact, in legislation, are universally restraining acts."

In *Brown v. Maryland*, 12 Wheat., 448, the court say: "Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to Congress to regulate commerce,

since an essential part of that regulation, and the principal object of it is, to prescribe regular means for accomplishing that introduction and incorporation."

In that case an act of Maryland which required an importer to take a license and pay fifty dollars, before he should be permitted to sell a package of imported goods, was held to be unconstitutional, because it was a restraint upon and regulation of commerce.

This court said, in *Osborne v. Mobile*, 16 Wal., 481, that inter-State commerce was by the constitution designed to be *entirely free*, and the tax on tonnage in the *State Freight Tax Case*, 15 Wal., was held to be unconstitutional, because it was in effect, a restriction upon inter-State commerce.

In commenting on the case of *Almy v. California*, 24 How., 169, the court say, in *Woodruff v. Parham*, 8 Wal., 138, that the imposition of a tax on a bill of lading of gold and silver shipped from California to New York, was a regulation of commerce, in conflict with that freedom of transit of goods between one State to another, which is within the rule laid down in *Crandall v. Nevada*, 6 Wal., 35, and in conflict with the authority of Congress to regulate commerce among the States.

When the power is vested in Congress, and taken from the States, it is immaterial as to the effect the State legislation may have on the persons engaged in commerce, or upon the articles of trade. *It is a question of power alone.*

In *Brown v. Maryland*, 12 Wheat. 439, it is said: "It is obvious that the same power which imposes a light duty, can impose a heavy one, one which amounts to prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."

In the case of the *State Freight Tax*, 15 Wal. 276, the court say: "And as there is no limit to the rate of taxation, she (the State) may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines."

6. *The State legislature has not concurrent power with Congress to enact the provisions in question.*

It has been held by this court that the State may act upon some subjects, which are a part of the commerce of the country, until Congress shall exercise its power, and that some matters are more properly within the control of the State legislature than of Congress. There has been much discussion of the question as to the exclusive possession of the power over commerce by Congress. But whatever difference of opinion there may be in regard to some cases, there does not seem to be any room for it in the case now before the court.

The legislature authorized the erection of a dam across Blackbird creek, for the purpose of drainage and to protect health, and this act was sustained, although the creek was an inlet from the Delaware river where tide water flowed and was navigable.

Wilson v. Blackbird Marsh Co., 2 Peters 250.

A bridge across the Schuylkill, where the tide ebbed and

flowed, so as to obstruct navigation to the complainant's wharf, was held within the power of the State.

Gilman v. Philadelphia, 3 Wal. 721.

The regulation of the sale of liquors is within the power of the States.

License Cases, 5 How. 504.

Bartemeyer v. Iowa, 18 Wal. 132.

Police, inspection and quarantine laws, may be passed by a State legislature.

New York v. Miln, 11 Peters 102.

Gibbons v. Ogden, 9 Wheat. 222.

Gilman v. Philadelphia, 3 Wal. 730.

It is said in *Gilman v. Philadelphia*, 3 Wal. 730, that "The States may exercise concurrent or independent power in all cases but three: 1. Where the power is lodged exclusively in the Federal constitution. 2. Where it is given to the United States and prohibited to the States. 3. Where, from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively."

This court, in the case of the *State Freight Tax*, 15 Wal. 279, say: "And certainly it has never yet been decided by this court that the power to regulate inter-State, as well as foreign commerce, is not exclusively in Congress. Cases that have sustained State laws, alleged to be regulations of commerce among the States, have been such as related to bridges or dams across streams, wholly within a State, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such as in *Gilman v. Philadelphia*, it was said, 'can be best regulated by rules and provisions, suggested by the varying circumstances of different localities, and limited in their operations to such localities respectively.' However, this

may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted, are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require *exclusive* legislation by Congress. Surely, transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property, passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. The produce of western States may thus be effectually excluded from eastern markets, for through it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal government."

Again, it is said, page 281 : "Inter-State transportation of passengers is beyond the reach of a State legislature. And if State taxation of persons passing from one State to another, or a State tax upon inter-State transportation of persons is unconstitutional, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State in conflict with the Federal constitution. Merchandise is the subject of commerce. Transportation is essential to commerce ; and every burden laid upon it is, *pro tanto*, a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established, that no State can impose a tax upon freight

transported from State to State, or upon the transportation because of such transportation."

I do not propose to enter into a discussion of the police power of a State in this part of the argument, but will do so hereafter, and endeavor to demonstrate that the act of the legislature cannot be sustained as a proper exercise of that power. It is only the present purpose to show that the act conflicts with the power of Congress to regulate commerce.

Having called attention to the rules of law as established by this court, I proceed to make an application of them to the facts in this record.

7. *Application of the rules of law to the facts of this case.*

We may dismiss from our minds all parts of the act of the legislature of Illinois, except sections three, four, five and fifteen.

Indeed, our attention may be mainly confined to the fifteenth section. The first and second sections select the elevators located *within the city limits of Chicago* (that being the only city of 100,000 inhabitants), designate them as class A, and undertake to regulate the business of the owners of these particular warehouses. An elevator may stand on the South Branch of the Chicago river, *without* the city limits, and be free from the control of this law; the elevators of East St. Louis, Cairo, Galena and Fulton are not subject to its provisions. While this fact may not make the law obnoxious to the provision of the constitution in regard to the regulation of commerce, yet it is so remarkable in its character and illustrates the manner in which the different States may regulate commerce, if allowed to do so, that attention is called to it.

The fifteenth section fixes the maximum price which the manager of a grain warehouse located in Chicago may charge for handling and storing grain. The legislature assume the power to determine the price which may be received or paid for the use of the property, capital and labor of the owner of the warehouse. If there is power to fix a maximum price, there is power to fix a minimum price, or to prescribe an arbitrary sum, without any flexibility, whatever. If there is power to fix a low amount there is power to name a high one. There is no limit to such a power, save the discretion of the legislature.

The record in this case shows that the plaintiffs in error "had stored and mixed grain of different owners together in said 'Northwestern Elevator' only by and with the consent and permission of such owners, or the consignees of such grain, who consented, not only that such grain should be received, stored and mixed together by the respondents in manner aforesaid, but that it should be done for, and subject to the established and published rates of storage demanded by said respondents, and the other warehousemen in the city of Chicago." Record 5.

The legislature, by this act, declares that a mutual contract between the owner of grain and the warehouseman for handling and storing it to be void, and to constitute no defence to prosecution for a violation of the law. *The freedom of commerce is thus completely destroyed.* The act does not seize upon some fraud or immoral act and declare it to be a misdemeanor, and therefore, unlawful, but it undertakes to deprive parties of the right to make a contract in regard to the lawful commerce of the country. The only reason, which can be supposed to exist for the making of such a legislative rule, is that it is conceived to be a wise regulation of commerce, in order to prevent oppressive contracts. It is not important to consider the power of the

legislature to make a fraudulent conspiracy to control prices, or a combination to exact unreasonable prices, a misdemeanor which may be punished by fine, for this act is not of that character. It is a bald attempt to disable those engaged in the commerce of the country from making their own contracts, and to prevent prices from being regulated by the general commercial laws of the country.

If this power is sustained, the legislature may, by another act, declare that every such warehouseman may charge and receive five cents for every bushel of grain received. The citizen of Wisconsin who lives on the Northwestern railroad, and raises grain on his farm, or the merchant to whom he sells his products, where the prices are regulated by the London or New York markets, or perhaps those of Chicago, cannot obtain the full value of his property, because the five cents levy for the warehouseman of Chicago must be deducted. He cannot escape this gateway to commerce; there is no other route by which the grain can reach its ultimate market, for the lines of transportation all lie through this city of Chicago.

The legislature of Illinois is to-day in the control of the producing classes, but another time it may be within the management of the warehousemen and carriers. Once admit this power and there will be no protection of the people from each other.

If the legislature of Illinois can thus make commercial rules, the legislature of New York can do so too. A statute may be passed in regard to the grain elevators at Buffalo, and the farmers and dealers of the West will be subject to such rules as New York pleases to enact, as well as of Illinois. Every other State may exercise the same power, and it is to be supposed that retaliatory legislation would be the sure result. The object of

the Union of these States which was to remove just such a state of affairs in the confederation, would be defeated.

The effect of this principle may be further considered. Suppose that the legislature of New York should pass a law regulating the warehousemen in the city of New York, by fixing the prices which they might receive for storing the imports from foreign countries, How long would commerce exist? What would be the effect on the interior States?

The plaintiffs in error were engaged in the business of receiving and storing grain coming from Illinois, Wisconsin, Iowa, Minnesota, Kansas, Nebraska and other States. While it might be within the power of the legislature of Illinois to pass an act requiring them to take a license and give a bond before continuing their business of receiving and storing grain carried entirely in Illinois, yet this act prohibited them from continuing their business of every kind until they took the license and gave the bond. Perhaps the legislature might fix the prices for Illinois products consumed in that State, yet this act is general, covering the entire business of a city, four-fifths of which is derived from other States. There is no possible way of separating the constitutional from the unconstitutional.

The plaintiffs in error were fined for doing business as warehousemen, on the 28th day of June, 1872, without taking out a license and giving a bond. What business did they do on that day? Whose grain did they receive or store? Was it the production and property of the citizens of Wisconsin, or of Illinois? It devolved on the prosecution to prove that the accused were guilty of an unlawful act. If the act might be lawful, there could be no conviction. The record in this case shows that these parties may have done no act contrary to the

constitution of the United States, or any law consistent therewith.

The provisions of the disputed sections do not come within any of the cases where State legislation has been sustained. No comparison can be made with the erection of a bridge under municipal authority, nor to quarantine laws, nor to police regulations, relating to the good order of society. The principle involved, if adopted, is national in its application. If a tax on freight, transported on a railroad, is such a regulation of commerce as invades the power of Congress, much more is the assertion of a power that imposes a restraint on the freedom of commercial contracts, and fixes the compensation for the use of property and the prices of labor. If a license, for which $50 was to be paid before the merchant could sell the goods imported, was an unconstitutional restraint, much more is a license for which no tax is demanded, and a bond which binds the warehousemen to accept an arbitrary price fixed by the legislature, an unconstitutional restraint. If a tax of one dollar on each passenger leaving a particular State is such an interference with the power of Congress to regulate commerce as to make the law imposing it void, much more is a statute which would compel a man to pay the price to the manager of an elevator for storing and transferring his grain, at the place of transhipment in another State, on its way to market.

This case has none of the elements of a revenue measure such as the case of *Osborne v. Mobile*, 16 Wal. 480.

There is not a single case ever decided by this court, which approved State legislation upon a subject of commerce, which justifies such legislation as that of the General Assembly of Illinois.

The plaintiffs in error submit that the exercise of the power of regulation, as was done in this case, of a necessary part of the business of inter-State, and foreign commerce is directly hostile to the exercise of the power confided to the Federal government; and that there can be no concurrent exercise of the power in this manner. This is a subject on which the power of Congress must, in the nature of things, be exclusive.

I have not deemed it necessary to call attention to the acts of Congress, establishing Chicago as a port of entry, and in regard to the navigation of the lakes, and the improvements of harbors, and other acts, showing that Congress has assumed to act in regard to commerce, which would embrace this subject, because it seems that the act in question is a clear invasion of the general power of Congress.

II.

The sections of the act of the legislature of Illinois, alleged to be void, are repugnant to a part of the fifth clause of section nine of article one of the constitution.

It is ordained in the 5th clause of § 9, Article I, that, "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

It will scarcely be denied that Congress would be prevented by this provision of the constitution from passing a law in regard to the warehouses in the city of Chicago, which should regulate and fix the prices to be received and paid. If the prices were fixed at lower rates than capital could afford at ports in other States, it would, in effect, be a preference over the ports in another State. If the rates were fixed at higher rates, it would be a preference in favor of the ports in another State. If Congress had power to fix prices at all, it must be by general and

uniform law. If Congress is so restrained by the constitution, then commercial regulations of that character could not be made by the legislature of a State, because that would be doing indirectly that which could not be done directly. The spirit of this constutional provision is that all commercial regulations and rules enacted into law shall be uniform, as to places and persons.

The statute of Illinois conflicts with this principle, for it gives the preference to warehousemen at all points in the State outside of the city of Chicago.

It must be admitted that this act attempts to regulate commerce, and if there be concurrent power in the State with the Federal government, or the State may exercise the power, in the absence of any law of Congress upon the subject, then it seems to be clear that the legislature of the State must be governed by the same rule of the constitution as Congress.

III.

Sections three, four, five and fifteen of the act of the legislature of Illinois, approved April 25, 1871, are repugnant to a part of Section one, Article XIV, of the Amendments to the Constitution.

The Fourteenth Amendment ordains 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."

These provisions have been discussed to some extent in the *Slaughter House Cases*, 16 Wal. 57, and *Bartmeyer v. Iowa*, 18 Wal. 132.

In the latter case Mr. Justice Miller in delivering the opinion of the court said, " But if it were true, and it was fairly pre-

sented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey, at the time that the State of Iowa first imposed absolute prohibition on the sale of such liquors, then we concede that two very grave questions weuld arise, namely: *First*, whether this would be a statute depriving him of his proporty without due process of law; and *secondly*, whether if it were so, it would be so far a violation of the fourteenth amendment in that regard as would call for judicial action by this court? Both of these questions, whenever they may be presented us, are of an importance to require the most careful and serious consideration. They are not to be lightly treated, nor are we authorized to make any advances to meet them until we are required to do so by the duties of our position."

These questions are now presented by the record in the case at bar, in the due course of business, and we ask for them the consideration which their importance deserves. There is nothing fictitious about this case. The facts were admitted on which the judgment of the Criminal court of Cook county was based, because there was no disputing them, but as there was serious doubt as to the validity of the law, the case was carried to the Supreme court of Illinois as a test case. It will be apparent that there was never any purpose originally to bring the case to this court. It was believed that the law would be held unconstitutional by the State court, but being disappointed in that expectation the cause is now before your Honors.

The questions presented are of vital importance to those engaged in the grain trade in and through Chicago, and to other dependent interests. As the statute in question is the first one in the history of this country, or of England for more than two centuries, where the power to fix the compensation a private person might receive for the use of his private property, and for his

capital invested in a private pursuit, and his labor and skill in managing it, it will be conceded that search ought to be made for the source of such a power. When the principle involved gives to the legislature the power to fix the price of a day's labor, the cost of a coat, the value of flour, sugar, and every article of trade and consumption the propriety of a doubt as to the correctness of the principle will be admitted. It is so contrary to all received ideas on the subject, that those who assert the power may well be challenged to produce the proof of its existence, and the *onus* of the argument thrown on them.

But as I represent the plaintiffs in this court I will endeavor to demonstrate the negative, and to show that such legislation is prohibited by the fourteenth amendment.

1. *The construction of the provision which protects life, liberty and property.*

It is admitted that prior to the adoption of the fourteenth amendment, there was no provision in the constitution of the United States which prevented a State from depriving any person of life, liberty, or property without due process of law; but as substantially the same language was in the constitution of England originating with *Magna Charta*, and as the same language was used in the fifth amendment as a restriction upon the government of the United States, and as similar language was used in every State constitution, it is to be supposed that it was incorporated into the fourteenth amendment as a restriction upon the States, with the construction then given by the courts.

While it is known that the protection of the colored race, recently emancipated from slavery was the immediate object of this amendment, yet there are no words of limitation, and it operates as a prohibition upon all States, and in regard to all

persons. A special occasion suggested the necessity of the provision, but constitutional provisions and laws cannot be confined to the case, or class of cases, which gave rise to them. Such a rule would prevent the application of the principles of an organic law to new developments created by progress in science, art and commerce. Such a view would make invalid a law enacted in one of the late slave States, which would be sustained in the former free States; it would declare a law void where applied to men of color, who had been slaves, and maintain it when applied to white men and free-born colored people. There is no warrant for such a construction.

What is due process of law? *Mr. Webster*, in his argument of the Dartmouth College case, 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 and 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, legslative judgments, decress, and forfeitures of all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance 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." 5 *Webster's Works*, 487

Lord Coke, in commenting on the 29th chapter of **Magna**

Charta, says, " No man shall be disseized, etc., unless it be by the lawful judgment, that is, verdict of equals, or by the law of the land, that is (to speak it once for all), by the due course and process of law." *Coke*, 2 Inst. 46.

This court say in *Murrays' Lessee v. Hoboken Land and Imp. Co.*, 18 Howard 276, " The words ' due process of law,' were undoubtedly intended to convey the same meaning as the words, ' by the law of the land,' in *Magna Charta*. Lord Coke in his commentary on these words, says " they mean due process of law. * * * To have followed, as in the State constitutions and in the ordinance of 1787, the words of *Magna Charta*, and declared that no person should be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in fact superfluous and inappropriate. To have taken the clause ' law of the land,' without its immediate context, might possibly give rise to doubts, which would be effectually dispelled by using those words which the great commentator on *Magna Charta* had declared to be the true meaning of the phrase ' law of the land,' in that instrument, and which were undoubtedly then received as their true meaning."

" Due process of law " implies and includes *actor*, *reus*, *judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding.

2 *Coke's Inst.*, 47, 50.
Hoke v. Henderson, 4 Dev. N. C., 15.
Taylor v. Porter 4 Hill 146.
Wynchemer v. People, 13 N. *Y.* 393.
Cooley s Const. Lim. 351 *et seq.*

The provision in *Magna Charta* was forced from John by the Barons as a restraint upon the power of the crown. The constitutions of this country have made this provision a part of the

fundamental law as a barrier against the power of the government over the life, liberty and property of the citizen. While governments are instituted to make such rules as may be necessasy for the general welfare of society and administer justice among men, the power is not absolute. But the hand of the government is stayed by the law which binds it as well as the subject, from interfering with life, liberty, or property of the private individual, except by a trial and judgment according to some general law.

Every person is entitled to personal liberty, which includes the right to follow such pursuit or occupation as he pleases, and to the control and use of his own property in the manner he desires. The government cannot take these rights from him, except in the administration of justice, according to the course of the common law. He is the judge of his own interests and welfare, and not the government.

2. *The use of private property is protected as well as the property itself.*

The proposition that private property cannot be taken from the owner by the government, will be admitted, but it will be claimed that the act of the legislature of Illinois does not deprive the owner of the property, but only regulates its use, and that this is not prohibited by the constitution.

It is true that the act does not attempt to divest the owner of the naked legal title, nor to oust him from the actual possession of the property, but it does declare that he shall not be entitled to receive a greater compensation for the use of the property, including his own personal services and the labor of his employees, than that fixed in the law. It is to be remembered this is a question of power alone. It is of no consequence whether the sum named is reasonable or unreasonable. The legis-

lature have fixed a price less than the price before, which was satisfactory to the warehousemen and their customers, and it is evident there is a difference of opinion as to what is a fair compensation. The question is, can the legislature decide the value of the use of property, and the price of labor and mercandise ? If the legislature can fix two cents per bushel for thirty days' storage, it can fix ten cents, or one mill ; and, in the latter case it will be admitted that it would be equivalent to a destruction of the property interest.

This clause says that, no person shall be deprived of life. Is the right to life limited to mere vitality, the right to exist, as contra-distinguished from death ? Does not this restraint prevent the government from passing an act to put out the eyes or cut off the legs ? This clause says, no person shall be deprived of his liberty. Is personal liberty to be confined to freedom from confinement in a prision ? Does it not include the liberty to go and come at pleasure, to pursue one's own tastes, to choose his own occupation and select his own associates ? Could the government pass an act, compelling a man to pursue a particular occupation, to dwell at a certain place, or associate with persons named ?

When the constitution prohibited the government from depriving any person of his property, it was intended to preserve to the owner such use of the property as he chose. The legislature cannot direct a man to use his land, or his house, or his horses in a particular way, and compel him to receive the prices fixed in the law for the use of his property or for his personal skill or labor. Any other construction would leave a barren and worthless right, not worth the name. The only value of property is derived from its use. The beneficial title is far better

than the naked legal title. Take from the owner the right to use it and receive its profits, and all that is valuable is taken.

This court, in construing a similar provision in the constitution of Wisconsin, say: "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as 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 subject beyond the power of ordinary legislation to change or control them, 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 without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction on the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Pumpelly v. Green Bay Co., 13 Wal., 177.

This principle is asserted in

Sinnickson v. Johnson, 2 Harr. N. J., 129.
Gardner v. Newburgh, 2 J. Ch., 162.
Cases in 13 Wal., 179.

The same principle has been applied to the construction of

that part of the constitution which prohibits any State from impairing the obligation of a contract.

Green v. Biddle, 8 Wheat. 1.
Bronson v. Kinzie, 1 How. 311.
Cooley on Const. Lim., 290.
Walker v. Whitehead, 16 Wal. 314.
Rawley v. Hooker, 21 Ind. 144.
Ogden v. Saunders, 12 Wheat. 259.
Willard v. Longstreet, 2 Doug. Mich. 172.
Gaulty's lessee v. Ewing, 3 How. 707.

3. *The Police power of the State.*

If this act of the legislature of Illinois can be sustained at all, it must be for the reason that it comes within the police power reserved to the States. I will endeavor to show that it does not.

Blackstone defines the public police as the due regulation and domestic order of the kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations.

4 Black. Com. 162.

Jeremy Bentham says: "Police is, in general, a system of precaution, either for the prevention of crimes or calamities: 1. Police for the prevention of offences. 2. Police for the prevention of calamities. 3. Police for the prevention of endemic diseases. 4. Police for charity. 5. Police for interior communications. 6. Police of public amusements. 7. Police for recent intelligence. 8. Police for registration."

Edinburgh Ed. of Works, Part IX, 157.

Cooley says: "The police of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought, not only to preserve public order and to prevent offences against the State, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment by others."

Cooley's Const. Lim. 572.

Redfield says: "This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property in the State. According to the maxim, *sic utere tuo ut alienum non lædas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others."

Thorpe v. Rutland & Bur. R. R. Co., 27 Vt. 149.

Chief Justice Shaw said: "We think it a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community."

Com. v. Alger, 7 Cush. 84.

Kent says: "But though property be thus protected, it is still to be understood that the law-giver has the right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of

others, or of the public. The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community."

2 Kent Com., 340.

See, Broom's Legal Maxims, 357.

"Powers, the exercise of which can only be justified on this specific ground, and which would otherwise be clearly prohibited by the constitution, can be such only as are clearly necessary to the safety, comfort, or well-being of society, or so imperatively required by the public necessity as to lead to the rational and satisfactory conclusion, that the framers of the constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would include it."

People v. I. & M. P. R. R. Co., 9 Mich. 307.

To the same effect is—

Cooley on Const. Lim. 577.

Lake View v. Rosehill Cem. Co., 6 Chicago Legal News, 120.

Benson v. Mayor, 10 Barb. 245.

Vanderbilt v. Adams, 7 Cow. 349.

These are some of the general definitions of police power,

and the cases in which it has been applied are such as passing quarantine laws to protect health, and prevent the spread of contagious diseases, fixing the places for deposit of powder, requiring fields of castor beans to be fenced, prohibiting the sale of intoxicating liquors as leading to pauperism and crime, prohibiting the sale of obscene books as affecting public morals, regulating the place of slaughtering animals, requiring railroads to fence their tracks and regulating speed, and numerous others of kindred character.

But every case is within the principle that property cannot be used so as to affect the public peace, or morals, or produce disease, or offend the senses, or produce pauperism or crime. There is no case which justifies the legislature in fixing the price of labor, or the value of property, in the ordinary trade and commerce of the country.

There is no pretence that the warehouses, for handling or storing grain, in Chicago, are a nuisance, or that the property is used to the injury of the peace or good order of society, or so as to jeopardize the public health, or that the business is conducted in an offensive manner. This act of the legislature does not rest upon any such assumption, but it is a bold assertion of power to control the use of property so as to take its benefits, partially or wholly, from the owner, and give it to a person not the owner. It is a naked attempt to take private property from the owner and give it to another person, when not necessary for the public use, and without compensation.

It is not an answer to say that the plaintiffs in error may use their property for any other purpose, and that therefore they are not deprived of their property, or that they are entitled to receive, under the law, some price for the use of the property.

This property is peculiar in construction, and the building is worthless for any other purpose, so that, if compelled by the restrictions of the statute to abandon the business, they are deprived of the value of the building, which is property. If, under the rates prescribed by the statute, the income is, say $10,000 less per year, then they are deprived of property, the value of which is sufficient to produce an income of that amount, and this is property. The precise sum taken from the warehouseman is transferred to the owner of the grain, and thus constitutes a legislative transfer of property from one man, against his will, to another.

This is not a regulation of the use of property for the future. The plaintiffs in error leased the ground and erected their elevator in 1862. They had, during the course of ten years, become skillful in their business and had established a large and profitable custom. This property interest belonged to them as private individuals. They were no more public warehousemen, than the merchant who sells his merchandise to the public is a public merchant, or a blacksmith who shoes horses for the public is a public blacksmith. It was a most singular idea that by calling a man who is a farmer, or tailor, or merchant, a public farmer, or public tailor, or public merchant, that thereby he is brought within legislative control. A common carrier has been said to hold a public office, but that for reasons peculiar to that business, and they do not apply to a man who builds a warehouse to store goods or grain for hire. The plaintiffs in error, relying upon their acknowledged right to manage their own property, and to nse their own capital as they pleased, subject only to the laws of trade and competition, embarked in this business and pursued it for ten years, and acquired a valuable private property. It was at this point of time and under these

circumstances that the legislature, by this act, declared that a further continuance of the business, and a further use of their property was unlawful, unless they submitted to the prices fixed by the legislature, and assented to the right of that body to change and fix others. This was depriving them of their property, and also of liberty.

Winehamer v. People, 13 N. Y. 378.
Com. v. Alger, 7 Cushing 85.
Bartmeyer v. Iowa, 18 Wal. 132.

There is no authority or precedent which can be produced to sustain the exercise of such power by the legislature, but there are authorities to the contrary.

Judge Cooley says: "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities in a manner before known to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or to a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars

of primary importance to their 'pursuit of happiness;' and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived."

Cooley on Const. Lim. 393.

The Supreme court of Kentucky, in deciding a statute unconstitutional, which provided that all persons who failed to improve a class of lands in a certain manner, should forfeit them, said: "I am unwilling, however, to concede that the legislature can, under the pretext of promoting the interest of the State, control and direct the citizen in the use he shall make of his private property. I subscribe to the maxim, *sic utero tuo ut alienum non lædas*, and I admit the power to punish for an injury done to individuals or the public, but I deny that the legislature can constitutionally prescribe, under color of preventing public or private mischief, the quantity of labor the citizen shall perform on his farm, the kind of improvements he shall make, and the time within which they shall be constructed. The toleration of such power on the part of the government would be conceding to it the right of controlling every man, and directing what road he shall travel in the pursuit of happiness. Thus, the freedom of the citizen would be lost in the despotic will of the government, and under the semblance of liberty, we should have the essence of tyranny."

Doe ex dem. Gaines v. Buford, 1 Dana 490.

The Supreme court of Indiana in holding a statute unconstitutional, which required lawyers to defend criminals gratuitously, said: "The legal profession having been thus stripped of all its odious distinctions and peculiar emoluments, the public can no longer justly demand of that class of citizens any gratuitous services which would not be demanded of every other class. His

legal knowledge is his capital stock. His professional services are no more at the mercy of the public as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from a particular class, in effect, imposes a tax to that extent upon such class clearly in violation of the fundamental law which provides for a uniform and equal rate of assessment and taxation upon all citizens."

Webb v. Baird, 6 Ind. 17.

The opinion of the majority of the Supreme court of Illinois asserts in different ways that the warehousemen of Chicago are a set of combined monopolists ; that the producers and dealers in grain had no option but to submit to their oppression, and that the legislature had power to relieve the sufferers from such tyranny.

The Attorney General of Illinois laid great stress upon this point, and relied on the statement of the agreed facts, that the rates of storage received by the plaintiffs in error were such as had been agreed upon and established by the different elevators in Chicago, and which had been annually published in January. The record does not justify any conclusion that these warehousemen had been engaged in a conspiracy, or entered into a combination to exact unreasonable prices. The statute required rates to be fixed and published in January every year to be charged during that year. This required action at that time. There is nothing to show that the different elevators agreed to charge the same prices, or that they made any agreement with each other. As the rates for the year were to be fixed beyond the power of change, it would follow that warehouses in competition and in similar situations would naturally fix upon the same rates. It is impossible to conclude from these premises that the prices

were unreasonable, or oppressive, or that any combination has been made to the injury of others. Such assumptions are not only not supported by the record, but they are not true. The prices of these warehouses are reasonable, and there has not been any complaint of them.

But suppose all this were true, did that justify the legislature in assuming the right to establish and fix prices ? Clearly not. The power to punish an unlawful and fraudulent combination or conspiracy is not denied. This may be and is done by appropriate legislation ; but because a man has been guilty of an act wrong and even unlawful, does not justify the legislature in assuming the control of his property and fixing the prices he could receive and breaking up the freedom of trade, and taking away the liberty of the citizen to obtain happiness in such occupation as he pleases. It is mockery to say, as was said by the Supreme court of Illinois, " Kindred subjects, such as public warehouses, public mills, the weight and price of bread, and public ferries, are so connected with the public welfare that a government, destitute of the power to regulate them, to impose such restrictions upon them, as may be deemed necessary to promote the greatest good of the greatest number, would be but the shadow of a government, whose blazonry might well be 'the cap and bells and a pointless spear;'" it was just such a government of England, established by the Normans, which John relinquished at Runnymede. The people, in the fundamental law of this country, have denied the right to the government to judge of the public welfare, where it involves an invasion of their liberty or private property. They have stipulated for the right to exercise their own judgment as to the public welfare, so far as their private property and personal liberty were involved.

The Supreme court of Illinois supposed there was an anal-

ogy or comparison between this act in regard to grain warehouses, called in the law public, and the usury laws, the laws fixing tolls for mills and ferries, the regulation of prices charged by draymen and hackmen, and ordinances fixing the weight of bread. These instances of the exercise of legislative power to fix prices were accepted as proof that prices could be fixed for handling and storing grain.

In Bacon's Abridgment, vol. 7, page 188, of the edition of 1807, under the head of "Usury at Common Law," is the following:

"Anciently it was holden to be absolutely unlawful for a "christian to take any kind of usury, and that whosoever was "guilty of it was liable to be punished by the censure of the "church in his life-time; and that if after death any one was "found to have been a usurer while living, all his chattels were "forfeited to the king, and his land escheated to the lord of the "fee."

"Also it seemeth to have been the opinion of the maker of "some acts of parliament, as 5 Ed. VI, c. 29, 13 Eliz., c. 8, § 5, "and 21 Jac. I, c. 17, § 5, that all kinds of usury are contrary "to a good conscience."

"And agreeably thereto it seemeth formerly to have been "the general opinion that no action could be maintained on any "promise to pay any kind of use for the forbearance of money, "because that all such contracts were thought to be unlawful, "and consequently void."

Subsequently this view of usury became modified, and a limited interest was allowed by law, under heavy penalties for exceeding the prescribed rate, starting with the statute of 12 C. II, and 12 Ann, which imposed a forfeiture of treble the value

of the money lent, and gradually reducing the penalty, until the recent statutes of Victoria have made it comparatively nominal.

Money which is, in the main, the subject of usury, if it can rightfully be regarded as property, still holds a peculiar relation to the government, distinguishing it from all other articles of private ownership. It is made and issued by the government alone, and therefore is primarily subject exclusively to governmental control. Its proper use and function is the establishment of a standard of value for all other commodities. It comes from the hands of the government, with a special mission assigned to it, and for the accomplishment of that mission, it is needful that it circulate freely from hand to hand, in the numerous exchanges of trade and commerce. In all these particulars it is essentially different from all other kind of property, and these differences naturally and necessarily bring it further within the reach and control of governmental authority. Even if the taking of interest for the use of money was entirely prohibited, its commercial value would still remain to it, and its legitimate office would be undisturbed; for it would still be the standard of values, and would fill the same place as now in the exchanges of the country. In this respect, also, it differs very materially from real estate, which can have a value only in proportion to the income or profits resulting from its use.

The legislative right to regulate the tolls of ferries and mills, had its origin in the prerogatives of royalty; and the privilege of keeping a ferry or a mill was a franchise dependent upon the will of the sovereign.

"The right to keep a ferry is, in England, an incorporeal "hereditament, being a franchise granted by the crown, or "depending upon prescription, which supposes a grant. The

"party entitled to the franchise, has imposed upon him by law, "certain duties, incurs certain liabilities, and has a remedy "against anyone, who, without right, interferes with his profits "or disturbs him in the enjoyment of his property."

Angell on Highways, Sec. 47.

Birset v. Hart, Willes 508.

"A ferry should be regularly established by law, for the "owner of a private ferry is not authorized to land passengers "on the opposite side of the stream without the consent of the "opposite riparian proprietor."

Angell on Highways, Sec. 48.

The case of *Mills et al. v. The County of St. Clair*, 2 Gilman, 197, and the case of *Dundy v. Chambers et al.*, 23 Ills. 369, both recognize the doctrine that the right to keep and maintain a ferry is a franchise, and that the privileges granted are, in their nature, exclusive. The right emanates from the sovereign power, and is, therefore, necessarily subject to such regulations and restrictions as the sovereign power may see fit to impose.

"To compel all the tenants within the king's manor to grind "at the king's mill, is a personal prerogative of the king's. "But it will extend to a fee-farmer, because it is for the king's "advantage."

"In an action on the case for erecting a mill, the lord de- "clared upon a custom *for all the inhabitants* to grind at his mill, "and that the defendant had built a mill there contrary to the "custom. Adjudged a good custom and well pleaded. And "suit to a mill may be, by reason of tenure of service, and also "by custom, and so may bind strangers."

15 Viner's Abridgement 398.

Hix v. Gardner, Bulstrod's Rep'ts (Hil. Term, 11 Jac.) 195.

These citations indicate clearly the origin of legislative control over the tolls of ferries and mills. The right of control is incident to the right to create the franchise; and in the making of the grant, it is entirely competent to affix to it such conditions as to the grantor shall seem proper. But there is no such origin or history in respect to the right to keep a warehouse. The right to build and operate a warehouse was at common law, and always has been a private and individual right. The business is in its nature a private business. There are not and never were, any exclusive privileges associated with it; nor did the law ever assume to protect it, by any *special* guaranties or penalties.

The constitutional power to establish uniform weights and measures, is as applicable to a loaf of bread as it is to a bushel of corn; but the power to fix the price of a loaf of bread (if there is any such power), was, it is believed, never exercised in this country, nor was it ever attempted to be exercised, except in despotic governments, and only then in times of famine or other peculiar emergencies of the State.

There still remains the instance of draymen and hackmen in populous towns and cities, whose avocation is on the public streets, and who, sometimes for purposes of taxation, and sometimes as matter purely of police regulation are compelled by law to take out licenses, and to submit to fixed rates of compensation; and the case of *Commonwealth v. Duane*, 98 Mass., has been cited in support of this power. There is no need of attempting to question the power, or dispute the authority of the case referred to. It is amply sufficient to say, that the regulation of draymen and hackmen, including the charges they shall be entitled to, has been recognized as within the legitimate exercise of the police power of the government ever since the

settlement of this country. It came to the colonies with the common law of England, and was a recognized power of government when the constitutions of the States and of the nation were adopted. So far as it is a regulation, or fixing of the compensation for the services, and the use of the property of the citizen, in a business or vocation free to all, it has hitherto stood, solitary and alone, an exception to the theory and practice of our government.

It is entirely unnecessary to attempt any explanation of the radical differences between a drayman or hackman, whose place and business is in the public highway, and whose stock in trade consists simply of his horse and vehicle of some sort, and a warehouseman in the city of Chicago, occupying his own private property, costing hundreds of thousands of dollars, for the purposes of a business strictly private in its nature. The court cannot fail to see that the cases are not parallel, and that the reasons which might be urged in favor of legislative control over the one, cannot, from the very nature of things, be applicable to the other. It is possibly true, and there is no necessity of argument to the contrary in this case, that the uniform practice of the government, coupled with the long continued acquiescence of parties interested, has matured these regulations, apparently in conflict with the private rights of the citizen, into fixed and permanent rules of municipal government, and that by common consent, and universal custom of the country, they have become engrafted upon our system as an exception to the principles upon which that system is founded. There is nothing new or startling in this view of the case. Such anomalies have their precedents under all forms of aggregated society, and, it would seem to be much more reasonable to recognize as an exception (if it is necessary to do so) a particular instance, to

which the people have become accustomed by uniform acquiescence, than to attempt to use that exception as a precedent for the overthrow of the fundamental principles by which private property and private rights in the aggregate have been hitherto protected.

4. *The sections of the act of the Illinois legislature are repugnant to the provision of the fourteenth amendment that, no State shall deny to any person, within its jurisdiction, the equal protection of the laws.*

Judge Cooley says: "Every one has a right to 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 legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to be governed by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plough.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments."

Cooley on Const. Lim. 391.

"The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law; the mass of the community and those who

made the law by another; whereas the like general law affecting the whole community equally could not have been passed."

Wally's Heirs v. Kennedy, 2 Yerger 554.

These views accord with the common sentiment of justice in all men. It is true that laws, local in their application, are frequently enacted, or in regard to a particular class, as carriers or bankers, but the law now in question is not a local law within the proper meaning of the term and it does not embrace all warehousemen, as a particular class. The owners of certain kind of grain warehouses, in cities of over 100,000 inhabitants, are singled out as a class, and *arbitrarily* called class "A." The fact is, that Chicago is the only city in the State having over 100,000 inhabitants; the fact is that there are fourteen of the kind of warehouses described in the act; the fact is that these are owned by about thirty persons. The law is therefore, in effect, to regulate the warehouses of about thirty persons in a single city in the State.

The city of Chicago covers an area of about 25 square miles. The Chicago river is navigable and has docks and wharves outside of the city. The port of South Chicago, on the Calumet, adjoins the city. The State has about 60,000 square miles, and contains several other cities, some of them ports of entry by act of Congress. In a number of them there are grain elevators of exactly the same description as those in Chicago. No restrictions are placed upon any warehouses of this kind in the State without Chicago, touching the price, or requiring a license or bond. Why was this distinction made? Was it the case supposed in Yerger, that the law was made in favor of the law makers and the mass of the community against a small number of persons odious to the majority? Was it intended to close rival houses and divert the business to other

points? It is true the Supreme court of Illinois has decided this statute was not in conflict with the constitution of that State, because of its partial or special character; but the plaintiffs in error insist that it is repugnant to the last words of the first section of the fourteenth amendment to the constitution.

The owners of elevators in Chicago are entitled to be governed by laws which operate equally upon all in the State. If a warehouseman in Quincy is permitted to control his own property and exercise personal liberty in regard to his compensation, while the same kind of a warehouseman in Chicago cannot, then the latter is deprived of the equal protection of the laws. The principle is involved. If this legislation is valid, a statute could be passed in Mississippi fixing the prices that the laborers on plantations in a certain county should receive, and the negro be required to obtain a license and give a bond to obey the law, before he could be allowed to work on a plantation.

This wise provision of the constitution guarantees to the inhabitants of every State equal laws from its legislature, that is, they must be governed and operate equally upon all persons in the State in similar circumstances. The fact that one man resides in one county, or upon one quarter-section from another, is not such a difference of circumstances as to allow a different statute to govern him from that which controls others of the same class.

If a majority of one legislature can fix prices for the minority, so in turn that minority may obtain power at another legislature, and fix prices for the products or merchandise of their adversaries. When capital is in the control, the price of labor will be fixed; when labor holds the power, the investment of the capitalists must suffer. The price of corn may be made

high to-day and reduced to-morrow. All trade and commerce will be destroyed, and a struggle at the polls will be the substitute for the natural laws of supply and demand. How long would it be before the struggle would be with arms and anarchy reign ?

5. *The provisions of the constitution of Illinois in regard to warehouses do not affect the questions.*

A provision of a State constitution is a law within the meaning of the Federal constitution as much as a statute of the legislature.

Railroad v. McClure, 10 Wal. 515.
Rouse v. Home of the Friendless, 8 *Ib.* 430.
Rouse v. Washington, *Ib.* 439.

The property rights of the plaintiffs in error were in existence in 1870, when the constitution of Illinois was adopted, as much as when the statute was enacted in 1871. Even if the legislature obeyed the mandate of the constitution in passing the act, that will not affect the plaintiffs in error, if it is repugnant to the Federal constitution.

The thirteenth article of the Illinois constitution does not direct the legislature to make the rules now disputed. These parties have complied with every part of the constitution, and with that part of the statute which was passed in pursuance of the constitution.

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