CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* IOWA

*By George H. Miller**

On March 1, 1877, the United States Supreme Court announced its decisions in a series of eight cases which are known collectively as the Granger cases.[1] The point at issue was the right of state legislatures to fix maximum rates for railroads and grain elevators doing business within the several states. Since this was the first occasion that the Supreme Court had had to rule specifically on the question of price control, the Granger cases provoked a fundamental statement of American constitutional law. Speaking through Chief Justice Morrison R. Waite, the Court held that businesses "affected with the public interest" were subject to statutory rate control; and because railroads and grain elevators clearly were affected with the public interest, the so-called Granger laws of Iowa, Illinois, Wisconsin, and Minnesota were all constitutional.

Historians have interpreted the Court's pronouncements in the Granger cases as a major turning point in American history. They have called them the beginning of the end of a laissez-faire political economy in the United States.[2] "Despite important modifications in later decisions," say Morison and Commager, "the fundamental principle here announced of the right of government to control business of a public character has never been repudiated, and the Granger cases remain as landmarks in American constitutional law and in the history of public regulation."[3]

If this interpretation is correct, the decisions were indeed radical in their implication, and the business community had suffered a serious setback at the hands of the Court. In an era when American business was beginning

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[1] 94 *U. S. Reports*, 113 (1877).

[2] For example, Solon J. Buck, *The Granger Movement* (Cambridge, Mass., 1913), 206; and Allan Nevins, *The Emergence of Modern America, 1865–1878* (New York, 1927), 176.

[3] Samuel Eliot Morison and Henry Steele Commager, *Growth of the American Republic* (4th ed., 2 vols., New York, 1950), 2:118.

to enjoy great favor with all branches of government—on the eve of some of its greatest political and judicial triumphs — the leading industrial interests of the nation had received a stunning blow. But an examination of the state and federal law reports for the period prior to 1877 shows the Granger decisions to be far less radical than generally supposed. In fact, when placed in proper perspective, they appear surprisingly old-fashioned. The constitutional innovations are not in the majority opinions at all; they appear, instead, in the briefs of railroad and warehouse counsel and in the dissenting opinions of Justice Stephen J. Field. The Court's decisions were quite orthodox. American business, therefore, had not lost ground, it had simply failed to gain ground. The Court was some twenty years behind the times.

If this alternative interpretation is correct, the real significance of the Granger decisions for students of constitutional law lies in the fact that they summed up a passing era in American history while preparing the way for a new era. Chief Justice Waite serves as the historian of business jurisprudence down to 1877; Justice Field serves as the prophet of things to come. The following account of one of these famous cases should make this point clear. But the decisions also reflect an interesting episode in Western history. They grew out of a great struggle for commercial supremacy among the Eastern-dominated lines of transportation stretching westward from Chicago and the older local interests, some of which were still tied to the Mississippi River trade. In this sense, too, the decisions scored a victory for the past.

The first railroad case in the series involved the Chicago, Burlington & Quincy Railroad and the state of Iowa.[4] In the year 1874 the Iowa General Assembly had passed a law imposing maximum freight and passenger rates upon all of the railroads operating in the state.[5] It was designed to regulate the fixing of charges in such a way as to prevent discrimination against Iowa commercial centers in favor of Chicago and other out-of-state terminals. Because of prevailing railroad practices, the Iowa merchants

[4] 94 *U. S. Reports*, 155. The Court announced its decision in the warehouse case first (Munn *v.* Illinois, 94 *U. S. Reports*, 113). The Iowa case was second, followed by Peik *v.* Chicago and North-Western Railway Company and Lawrence *v.* Same (p. 164); Chicago, Milwaukee and St. Paul Railroad Company *v.* Ackley (p. 179); Winona and St. Peter Railroad Company *v.* Blake (p. 180); Southern Minnesota Railroad Company *v.* Coleman (p. 181); and Stone *v.* Wisconsin (p. 181).

[5] *Laws of Iowa, 1874*, 61–89.

in the Mississippi River towns had found it increasingly difficult to obtain the grain, flour, and lumber business of their own state. The railroads which crossed Iowa from west to east and made connections with Chicago or Milwaukee had been charging considerably lower rates for their long-haul, interstate traffic than they had been for business moving from point to point within the state. Under these conditions the Mississippi River towns were hard pressed to compete with Chicago and Milwaukee as terminal markets — markets where goods were collected, stored, and sold in large quantities.[6] In 1874 the Iowa legislature had attempted to correct this "injustice" by fixing maximum ton-per-mile rates, roughly corresponding to the Chicago rates, upon all Iowa rail traffic.[7] In this way local charges were suppressed to the long-haul level, and the chances of discrimination against an Iowa terminal were greatly diminished.

The Iowa law was one of a series of rate-control measures adopted by the states of the upper Mississippi Valley between 1869 and 1874. Their enactment coincided in point of time with a movement for rural organization known as the Granger movement.[8] Although the Grange had little if anything to do with the framing of these rate-control statutes, and actually opposed the adoption of the Iowa law,[9] it reflected the current feeling of

[6] George H. Miller, "Origins of the Iowa Granger Law," *Mississippi Valley Historical Review*, 40:657–80 (March, 1954). Most of Iowa's surplus grain, for example, was sold in a world market and passed to its ultimate destination through a series of "terminal markets" such as Chicago-Buffalo-New York or Burlington-St. Louis-New Orleans. Since the price of grain at the local collecting point was the world price less the cost of transportation and middleman's charges, a grain buyer for a Burlington firm could not compete with his Chicago rival in a local collecting point if the rail charges to Burlington exceeded those of the longer haul to Chicago, as was frequently the case.

[7] The statute also fixed maximum passenger rates and outlawed certain forms of personal discrimination between shippers in the same locality.

[8] Buck, *Granger Movement, passim;* Mildred Throne, "The Grange in Iowa, 1868–1875," IOWA JOURNAL OF HISTORY, 47:289–324 (October, 1949).

[9] The Grange Committee at Des Moines was supporting another, more moderate, measure. W. P. Hepburn, the C. B. & Q. lobbyist at Des Moines, reported that the Grange was very indignant about the passage of the Iowa law. See Hepburn to J. M. Walker, Feb. 27, Mar. 10, 1874, J. M. Walker, In-Letters, July, 1873–August, 1874, v. 5, *Burlington Archives* (Newberry Library, Chicago), hereafter cited as Walker, In-Letters. Also, see Earl S. Beard, "The Background of State Railroad Regulation in Iowa," IOWA JOURNAL OF HISTORY, 51:1–36 (January, 1953); and Mildred Throne, "The Repeal of the Iowa Granger Law, 1878," *ibid.*, 51:98 (April, 1953).

hostility toward railroad rate-making practices and inadvertently contributed its name to the whole body of control legislation passed in this era.[10]

One of the railroads affected by the Iowa Granger law was the Burlington & Missouri River, a major east-west trunk line making connections with Chicago and Nebraska. It had been leased in 1872 to the Chicago, Burlington & Quincy Railroad, which had been operating it as an integral part of its main line but subject, of course, to all of the charter provisions of the B. & M. Since the law of 1874 was to be added as an amendment to the charter of the B. & M. (as it was to the charters of all Iowa roads), it was binding on the Illinois corporation and affected all of its Iowa business. This fact, however, the owners of the Chicago, Burlington & Quincy Railroad were reluctant to admit. They had fought the adoption of the law in the state legislature, and they were prepared to contest its enforcement in the courts.

To the owners of the C. B. & Q., statutory rate regulation was an unwarranted interference with their business and a serious threat to their financial position. Railroad rate making in the 1870's was anything but a science. Traffic managers generally charged "what the traffic would bear," in the sense of fixing their rates at each point so as to get the most business possible without reference to any ton-per-mile scale or cost-of-service principle. Under the competitive conditions in which they operated, they could scarcely do otherwise. This system did not produce high rates in any absolute sense. On the other hand, it made for gross distortions in rate structures.[11] Rates fluctuated from season to season, moved up and down with the success or failure of rate agreements, dropped at competitive points and rose at noncompetitive points. Frequently the charges for short hauls actu-

[10] The name "Granger Laws" seems first to have been adopted and popularized by the opponents of the measures who liked to characterize them in the Eastern press as Western agrarian assaults upon property rights. E. L. Godkin, editor of the widely-read *Nation*, and an outspoken critic of these measures, always used the term "Granger" with an implication of irresponsibility and radicalism. He did much to popularize the term "Granger Laws," which was not widely used in the West until after 1874. The name persisted and was ultimately transferred to the Supreme Court cases involving their constitutionality. Charles E. Perkins of the C. B. & Q. speaks of the "Granger cases" as early as February, 1876. Perkins to H. L. Higginson, Feb. 2, 1876, Letterbook II, Cunningham-Overton Collection of Charles E. Perkins Papers in custody of Richard C. Overton, hereafter cited as *Perkins Papers*. The papers are cited with Mr. Overton's permission.

[11] Rate structure refers to the comparative level of charges at each point along the right-of-way.

ally exceeded those for long hauls over the same tracks in the same direction, a fact to which the Iowa river towns could testify.[12]

These chaotic conditions were not to the railroads' liking. But the law of 1874, which in one sense was an attempt to bring some sort of order out of the chaos in the interest of Iowa business, was not a satisfactory solution to the problem from the railroads' standpoint. In an extremely competitive situation such as existed in Iowa (to the railroads' way of thinking) and in the midst of unsettled business conditions (after the Panic of 1873), the railroads wanted the greatest possible freedom of action. Their most valuable business seemed to be their long-haul Chicago business, which they fought for with low rates. This resulted in the alleged discrimination against the river towns. The railroads also wanted the short-haul business, of course, but they did not believe that they could do it at the long-haul rates and still meet expenses. The cost per mile for short hauls was simply and obviously greater.[13] The opinions expressed by the Burlington managers as to the precise effect which the law of 1874 would have upon their business in Iowa are conflicting,[14] but a considered judgment placed their own local freight rates about one-fourth higher than the statutory rates. The reduction in earnings to be expected as the result of the law was placed at $421,000 annually. Since net earnings for the previous year had been just over $1,000,000, the anticipated cut was understandably alarming.[15] Robert Harris, the General Superintendent of the Burlington in 1874, claimed that

[12] For a discussion of the railroad rate problem with special reference to Iowa, see William Larrabee, *The Railroad Question* (Chicago, 1893). Average rates in Iowa were declining steadily during the decade following the Civil War. Julius Grodinsky, *The Iowa Pool, A Study in Railroad Competition* (Chicago, 1950), 3-4, 163.

[13] For railroad testimony on the rate question, see Des Moines *Iowa State Register*, Feb. 5, 1870; Memorandum entitled "Reasons for not charging for transportation by Railroad on the Basis of distance carried" [Feb. 16, 1869] in Robert Harris, Out-Letters, General Superintendent's Letters, March 30, 1867–March 1, 1876, v. 15, *Burlington Archives*, hereafter cited as Harris, Out-Letters. Perkins memorandum [January, 1873], Letterbook I, 117–122; Perkins to E. L. Godkin, Oct. 24, 1875, Letterbook II, 334-5, *Perkins Papers*.

[14] Harris to W. P. Hepburn, Mar. 20, 1874, Harris, Out-Letters, v. 33; Harris to O. H. Browning, July 24, 1874, Harris, Out-Letters, v. 34; Walker to Hepburn, Mar. 2, 1874; Walker to Denison, Mar. 20, 1874, J. M. Walker, Out-Letters, Sept. 16, 1871–Sept. 30, 1881, v. 4, *Burlington Archives*, hereafter cited as Walker, Out-Letters.

[15] Harris to Browning, July 24, 1874, Harris, Out-Letters, v. 34.

it would be impossible to pay the interest on the B. & M.'s debt if the prescribed rates were enforced.[16]

The Burlington management may very well have exaggerated its plight in Iowa,[17] but there was a possibility that legislative control would have a depressing effect upon the Burlington's over-all financial position in another respect. One of the most repeated arguments used by the opponents of rate regulation in state legislatures from coast to coast was that legislative control would "alarm capital." Capitalists, it was said, were reluctant to put their money into enterprises that were subject to legislative regulation, particularly if they were highly speculative ventures such as Western railroads.[18] A railroad under statutory control was considered a less valuable property than one free from arbitrary restrictions in its rate-making powers. Because the C. B. & Q. was a new railroad, building in a new territory, it could be sensitive to considerations of this sort.[19]

One further practical objection to legislative rate control was the nature of the legislatures themselves. Railroad men could not accept a politically oriented, transient, and completely inexperienced body as a suitable authority on rate making. "There are few more intricate questions," wrote Charles E. Perkins, General Superintendent of the B. & M. from 1865 to 1873, "than those involved in making a Railroad tariff, and for a body composed chiefly of lawyers and farmers who have never studied the subject to assume to decide such questions is of course absurd."[20] Rate fixing by state legislatures was considered mischievous and uncalled for, as well as detrimental to the railroad interests.

The Burlington's stand against the law of 1874, it should be noted, was a stand against *legislative* rate fixing and not against government regulation of rates in all forms. The distinction is an important one. Although the

[16] Harris to Hepburn, March 20, 1874, *ibid.*, v. 33.

[17] For later estimates of the 1874 schedule, see Peter A. Dey, "Railroad Legislation in Iowa," *Iowa Historical Record*, 9:556-7 (October, 1893); Larrabee, *Railroad Question*, 332; Ivan L. Pollock, *History of Economic Legislation in Iowa* (Iowa City, 1918), 47-8.

[18] For pertinent references to the use of this argument, see Richard C. Overton, *Burlington West: A Colonization History of the Burlington Railroad* (Cambridge, Mass., 1941), 509; and Throne, "The Repeal of the Iowa Granger Law," 97–130.

[19] The market value of B. & M. stock and bonds remained fairly steady throughout the year 1874. There is no indication of any reaction to the adoption of the Granger Law. *Commercial and Financial Chronicle* (New York), vols. 18-19 (1874).

[20] Memorandum [January, 1873], Letterbook I, 121-2, *Perkins Papers*.

railroads might have enjoyed the luxury of conducting their operations free from all government restrictions as to rates, they never claimed the right to do so, and they never maintained that they were entirely free of responsibility to the general public in the establishment of their tariffs. Railroads, admittedly and purposely, were common carriers, and they were subject to the law of common carriers. This law required that all their charges be "reasonable" according to standards determined, not by themselves, but by the courts. It required that rates be made without unjust discrimination between customers. In addition to these common-law duties, the railroad companies accepted other obligations by virtue of the fact that they were organized as private corporations. They were responsible to the state legislatures which granted their charters. These charters might properly contain restrictions upon their rate-making powers or provide for some future restriction upon this subject. Should their charters give them complete freedom to levy whatever rates they might choose, and some railroads had acquired this privilege, such rates would still be subject to the law of common carriers with respect to reasonableness and discrimination. This was the law as it existed in 1874, and the railroads did not claim otherwise.[21] The rate question of the 1870's was not a matter of regulation versus complete laissez-faire, since no one was making any serious claim for the latter.[22]

It should also be pointed out that railway managers did not necessarily think it either right or good policy to make all of the wide discriminations between shippers which had contributed to the agitation for rate control. Robert Harris, the General Superintendent of the Burlington from 1865 to 1876, could see nothing wrong with the Illinois "Granger" law of 1869 which required reasonableness and "uniformity in the sense of the same

[21] Edward L. Pierce, *A Treatise on American Railroad Law* (New York, 1857), 148-9; Isaac F. Redfield, *A Practical Treatise Upon the Law of Railways* (2nd ed., Boston, 1858), 356; Bruce Wyman, *The Special Law Governing Public Service Corporations and All Others Engaged in Public Employment* (2 vols., New York, 1911), 2:1124–35, 1232-3; [Charles F. Adams, Jr.], "Railroad Legislation," *Merchants' Magazine and Commercial Review* (New York), 57:339–55 (November, 1867); Balthaser H. Meyer, *Railway Legislation in the United States* (New York, 1903), 57–68.

[22] Charles E. Perkins admitted that there was no doubt about the power of the state to regulate the rates of railroads if their charters did not protect them. "This power we have never heard denied." Perkins Memorandum [December, 1875], Letterbook II, 389, *Perkins Papers*.

rate to every person [for the same service]."[23] "If a law be framed," he held, "by which all should be treated alike and no personal preference given and by which men of small means and energy shall have the same rates as large dealers and capitalists," there could be no valid objections on the part of the railroads.[24] At the height of the Granger agitation in 1873, Harris warned that "it behooves General Managers to mend some of their ways and particularly in the wild, unreasonable and unnecessary cuttings and discriminations that are at the bottom of all this noise."[25] He admitted privately that the furor might have its good effect.[26]

It is not surprising, then, that throughout the Granger movement for state regulation, the Burlington and the other roads of the Middle West distinguished between what they considered reasonable and unreasonable legislation. Measures designed to strengthen the hands of shippers in common-law suits involving claims of unjust discrimination were seldom opposed. In many cases the railroad lobbies actually supported such measures in preference to the more rigid and arbitrary statutory restrictions proposed by the radicals. The system of control ultimately adopted by Illinois in 1873, for example, was generally acceptable to the railroad interests because it provided for a system of judicial review and led to a common-law action involving a test of reasonableness.[27] When a similar system was proposed in Iowa, it was characterized by the radicals as a "railway measure," and the railroads, in fact, were supporting it. In 1874 railroad and official Grange representatives combined forces to support the Tufts bill in opposition to the so-called Granger law which actually passed.[28]

[23] Harris to Denison, Mar. 17, 1869, Harris, Out-Letters, v. 15.

[24] Memorandum [February 16, 1869], *ibid.*

[25] Harris to A. Anderson, Mar. 14, 1873, *ibid.*, v. 30.

[26] Harris to T. J. Carter, Mar. 24, 1873, *ibid.*, v. 30.

[27] For the legislative history of the various Granger railroad laws, see George H. Miller, "The Granger Laws: A Study of the Origins of State Railway Control in the Upper Mississippi Valley" (Ph.D. dissertation, University of Michigan, 1951). The Illinois law of 1873 made long-and-short-haul discrimination only *prima facie* unjust. The schedule of rates prepared by the Illinois Railroad and Warehouse Commission was only *prima-facie* evidence that higher rates were unreasonable.

[28] Miller, "Origins of the Iowa Granger Law," 676-7; W. P. Hepburn to Walker, Feb. 27, Mar. 10, 1874, Walker, In-Letters, v. 5; Walker to Denison, Feb. 28, 1874, Walker, Out-Letters.

This distinction between legislative and judicial control was also to be made in the fight against enforcement of the Granger laws. The all-out assault by the railroads on the constitutionality of these measures was confined to the Illinois and Minnesota laws of 1871, the Wisconsin law of 1874, and the Iowa law of 1874. Each of these acts imposed arbitrary statutory restrictions upon rate-making powers.[29] The Illinois laws of 1869 and 1873, and the Minnesota law of 1874, all of which embraced the principle of judicial review, were not involved in the Granger litigation. Judicial regulation gave the corporations an opportunity to state their case in individual suits; and it would permit them to bring the full measure of their power and influence to bear where it would be most effective. Courts, or boards of commissioners acting under judicial supervision, could be counted on to give the railroads a respectful hearing. A state legislature could not.[30] The managers of the C. B. & Q. opposed the enactment of the Iowa Granger law because it attempted to fix arbitrary maximum rates. They were not objecting blindly to the principle of public regulation. They were not even denying the need for additional state supervision.

With the adoption of the Iowa law on March 23, 1874, the managers of the Burlington were compelled to shift their fight from the legislature to the courts. They apparently did so with some reluctance.[31] Similar contests in the courts of other states had not gone too well, and there were difficult problems of strategy to be solved. Should the company conform temporarily to the statutory rates and seek redress on the grounds of some violation of its constitutional rights, or should it refuse to comply with the provisions of the law and wait for suit to be brought against it? What effect would either course have upon the business of the road? Could the law be contested more successfully in the state courts or in the federal courts?[32] Each of these questions would have to be answered, and cor-

[29] 94 *U. S. Reports*, 155ff. The Illinois Railroad and Warehouse Acts of 1871 were also challenged. The railroad act was declared unconstitutional by the Illinois Supreme Court in Chicago and Alton R. R. Co. *v.* The People ex rel., 67 Freeman 11 (Illinois, 1873). The warehouse act was upheld by the United States Supreme Court in Munn *v.* Illinois, 94 *U. S. Reports*, 113.

[30] Memorandum [January, 1873], Letterbook I, 122; Memorandum [January 27, 1876], Letterbook II, 436, *Perkins Papers*.

[31] Walker to Denison, July 6, 1874, Walker, Out-Letters, v. 5.

[32] Walker to Browning, Mar. 7, 1874, *ibid.*, v. 4; Walker to Sidney Bartlett, Apr. 18, May 14, 1874; Walker to Denison, July 10, 1874; Walker to Browning, Sept. 11, 1874; Walker to Rorer, Sept. 21, 1874, *ibid.*, v. 5.

rectly, or the road would suffer serious loss. But the managers had good reason to believe that they could not be legally bound by the statutory rates, and they hoped to avoid their restrictive effect if at all possible. Although their companions in arms had had little success in the courts of other states, the Burlington managers were in a position to profit by their mistakes.[33]

In July, 1874, the Board of Directors of the C. B. & Q. decided to defy the Iowa legislature.[34] The decision was reached after consultation with the other Iowa trunk lines so as not to upset business unnecessarily during the period of litigation. The major railroads which crossed the state from east to west were near enough to one another to be forced to compete for traffic in large parts of the intervening territory. The Burlington did not want to keep its rates up in defiance of the law if the Rock Island, in particular, intended to conform to the prescribed maxima. To do so would be to lose important business to its chief competitor.[35] Thus, the final plan to challenge the law of 1874 was adopted only after agreements had been reached with the other roads.

Almost immediately after the law of 1874 had gone into effect, the Burlington was faced with a whole series of suits for charging in excess of the legal rates. The Burlington managers were reluctant to test any of these claims in the local courts, because they doubted the impartiality of the judges. They also preferred not to face jury trials and have the facts of the various cases placed beyond review.[36] In the light of these fears and as a result of unfavorable decisions in other states, it was finally decided that the state courts would not be the most advantageous place for the railroad to begin its judicial fight.[37] So, to forestall further action by the state, an injunction against the Attorney General of Iowa was sought in the Circuit Court of the United States. The plea asked the court to prevent

[33] Walker to Sidney Bartlett, May 14, June 8, 1874; Walker to Denison, July 6, 1874 (2 letters), *ibid.*, v. 5.

[34] Walker to Denison, June 11, 1874, *ibid.*, v. 5; Bartlett to Walker, July 17, 1874, Walker, In-Letters, v. 7.

[35] Walker to Albert Keep and H. H. Porter, Feb. 24, 1874; Walker to Hugh Riddle, Feb. 24, 1874, Walker, Out-Letters, v. 4; Walker to Denison, July 6, 1874, *ibid.*, v. 5; Harris to J. F. Barnard, Apr. 24, 1874; Harris to Denison, June 18, 1874, Harris, Out-Letters, v. 34.

[36] Walker to Sidney Bartlett, Apr. 18, 1874; Walker to David Rorer, Sept. 9, 1874; Walker to Browning, Sept. 9, 1874, Walker, Out-Letters, v. 5.

[37] Walker to Sidney Bartlett, May 14, 1874, *ibid.*, v. 5.

the Attorney General from prosecuting any suit for violation of the law of 1874 on the grounds that said statute ran contrary to the Constitutions of the United States and of Iowa. This was the beginning of Chicago, Burlington & Quincy Railroad Company *v.* Iowa.[38]

The problem of preparing the railroad's case for the Circuit Court had been turned over to Judge David Rorer, the General Counsel for the Burlington & Missouri River Railroad. He had been assisted by the C. B. & Q.'s distinguished counsel, the Honorable Orville H. Browning of Quincy, Illinois, and by James Grant. Their plea was heard by the Court in January of 1875.[39]

Before examining the railroad's arguments, it will be useful to place the case in its legal setting. As defined earlier, it involved the right of the Iowa legislature to regulate the rates of the Chicago, Burlington & Quincy. In 1875 there was a large body of precedent available for settling this basic question, even though many distinguished lawyers refused to accept it at its face value.[40] The general power of a state legislature to regulate railroad rates, or for that matter to regulate prices in any business, had never been successfully challenged in any court in the United States.[41] In 1831 the New York State Court of Chancery had declared that, in the case of a railroad corporation, "the legislature may . . ., from time to time, regulate the use of the franchise, and limit the amount of toll which it shall be lawful to take, in the same manner as it may regulate the amount of tolls to

[38] The decision was made on October 16, 1874. Orville H. Browning, *Diary of Orville Hickman Browning* (2 vols., Springfield, Ill., 1925, 1933), 2:398. The case first appears as Chicago, B. & Q. R. Co. *v.* Attorney General, *et al.*, 5 Federal Cases 594 (1875).

[39] Walker to David Rorer, Sept. 9, 1874, Walker, Out-Letters, v. 5; Walker to Rorer, Nov. 24, 1874, *ibid.*, v. 6; Browning, *Diary*, 2:399, 405-406; C. B. & Q. *v.* Attorney General, 5 Fed. Cases, 594 (1875).

[40] This latter conclusion is based on an examination of the arguments in the various railroad cases and upon published reactions to them. See, for example, railroad counsel's statement in Peik *v.* C. & N. W.: "No such power [of rate fixing] has ever been conceded or exercised by the state, in this country." Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court* (Princeton, 1942), 75. Also see Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (5th ed., Boston, 1883), 735: "Since [the American Revolution] it has been commonly supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty."

[41] Neither railroad nor warehouse counsel could cite a single example in any of the Granger cases. 94 *U. S. Reports*, 113.

be taken at a ferry, or for grinding at a mill, unless they have deprived themselves of that power by a legislative contract with the owners of the road."[42] This doctrine, which was quite in line with business jurisprudence of the time, had been affirmed repeatedly in the following years by both state and federal courts and by the Supreme Court of the United States as recently as 1874.[43] All railroads were subject to state legislative control unless charter rights were involved (or unless some other prohibition had intervened). On this point there could be no question. It would seem that the C. B. & Q. had a case only if its charter protected it against legislative interference or if some other extenuating circumstances could be established.

This is a limited view of the case, but it provides much needed perspective. Too often it is supposed that the Granger laws marked a radical departure from established precedent, whereas nothing is further from the truth. The general *right* of legislative price fixing was traditional, unchallenged, and scarcely in need of defense in the 1870's. The judicial evidence on this point is overwhelming.[44] The *policy* as distinguished from the *right* of legislative price fixing was not being widely exercised, but it was still very common in the case of railroads and other public carriers. The evidence on this point is equally decisive.[45] The Granger laws were not radical in the sense of breaking with established tradition; the courts were not unprepared to deal with them. The issue was not new; the claims of the state legislature were quite ordinary.

[42] Beekman *v.* Saratoga and Schenectady Rail Road Co., 3 Paige, 45 (N. Y. Ch., 1831), 75.

[43] Redfield, *Practical Treatise Upon the Law of Railways*, 356; Bloodgood *v.* The Mohawk and Hudson R. R. Co., 14 Wend., 51 (N. Y., 1835); Worcester *v.* Rail Road Co., 4 Metcalf, 564 (Mass., 1843); Concord Railroad *v.* Greely, 17 N. H., 47 (1845); Whiting *v.* The Sheboygan and Fond du Lac Railroad Company, 25 Wisc., 167 (1870); The People *v.* Salem, 20 Mich., 452 (1870); Parker *v.* Metropolitan Railroad Co., 109 Mass., 506 (1872); Olcott *v.* The Supervisors, 16 Wall, 678 (1873); Railroad Company *v.* Maryland, 21 Wall, 456 (1874).

[44] Munn *v.* Illinois, 94 *U. S. Reports*, 123-36. Waite's opinion is certainly conclusive on this point. Why historians have refused to accept it as such is difficult to understand.

[45] Charles Carroll Bonney, *Rules of Law for the Carriage and Delivery of Persons and Property by Railway with the Leading Railway Statutes and Decisions of Illinois, Indiana, Michigan, Ohio, Pennsylvania, New York and the United States. Prepared for Railroad Companies and the Legal Profession* (Chicago, 1864); [Adams, Jr.], "Railroad Legislation," 339-55; Edward C. Kirkland, *A History of American Economic Life* (3rd ed., New York, 1951), 259-60.

Burlington counsel based his original plea for an injunction on three points of constitutional law: first, that the law of 1874, insofar as it applied to the C. B. & Q.'s Iowa line, impaired the obligation of contract between the state and the Burlington & Missouri River Railroad; secondly, that the law attempted to regulate interstate commerce; and finally, that the law of 1874 did not act uniformly upon all of the railroads in the state. In the first two instances, a violation of the federal Constitution was claimed; in the third, a violation of the Iowa Constitution.[46]

The charter of the Burlington & Missouri River Railroad, ran counsel's argument, had been granted under the terms of the general act of incorporation of 1850. No restrictions upon the rate-making power of the company had been included in the charter, and although all corporations were held subject to such "rules and regulations" as the legislature might from time to time impose, this could not be held to include stipulations as to rates. Rorer dwelt at some length on this last point, as it was the principal basis of his claim. It was perfectly clear to him that rate restrictions were not contemplated in the phrase, "rules and regulations." On other occasions, when the legislature actually intended to reserve the power of rate fixing, it made special mention of this fact. This was the case in the provisions for internal improvements in the Code of 1850, in the land-grant acts of 1868 known as the Doud Amendments, and in the railroad aid law of 1870.[47] In the absence of any specific reservation of authority by the state, it could be assumed that the legislature had intended to vest the power of rate making solely in the corporation.

Rorer then moved on to higher ground. A railroad corporation had all the rights of a natural person.

> If a natural person has not the right to fix the price of his labor or services, this such person is not a free man — but is simply a

[46] Argument by David Rorer of counsel for complainant, January 5, 1875, *Burlington Archives.*

[47] *Ibid.*, 4-6. The Doud Amendments were added to land grants bestowed upon a number of Iowa railroads in 1868. They provided that each of the roads in accepting the grants would become subject "to such rules, regulations and rates of tariff for the transportation of freight and passengers as may from time to time be enacted and provided for by the General Assembly." *Laws of Iowa, 1868*, Chap. 13, sec. 2; Chap. 57, sec. 3; Chap. 58, sec. 1; Chap. 124, sec. 7. The Burlington & Missouri River did not receive one of the grants. A similar reservation was included in the Act of 1870 which provided for township aid to railroads. *Laws of Iowa, 1870*, 106. Harris to J. F. Barnard, Apr. 24, 1874, Harris, Out-Letters, v. 34.

> slave. He may be made to serve for nothing, or for a price at which he will starve. Hence the free citizens of Iowa may fix their own price upon which they will labor for others; and railroad corporations being clothed with all the rights and powers of such citizens in that respect, may do the same. Inability to claim pay for services, or make contracts for, and to enjoy the price of one's own labor is prominently one of the great distinguishing features that constitute the difference of *status* betwixt a free person and a slave.[48]

This was strong argument, but it should be pointed out that it was not really constitutional law. It had a kind of "higher law" quality which was to typify the whole laissez-faire-constitutional argument associated with the period after the Civil War.

Rorer went on to argue that rate making was a matter of contract between the railroad and its customers. He denied that it could be held subject to mere "rules and regulations." The right of the C. B. & Q. to contract would clearly be limited and impaired by the law of 1874.[49] The legislature was attempting to alter the B. & M.'s charter without the consent of the owners and in open violation of the contract clause of the federal Constitution.

Counsel's remaining arguments were brief and easily stated. The Iowa statute of 1874 was in conflict with the Constitution of the United States because it attempted to regulate interstate commerce. The Iowa line of the Burlington was part of one continuous road from Chicago to the Missouri River and beyond. The traffic originating in Iowa as often as not crossed the state line and became a part of interstate commerce. The law of 1874 made no distinction between this business and local business. It placed its restrictions on one as well as the other. In consequence of this fact, it had infringed upon the powers of Congress which had exclusive jurisdiction over interstate trade. Furthermore, the law was contrary to the state Constitution of Iowa because it did not apply equally to all roads. Through a system of classification, the railroads of the state had been divided into three groups based upon capitalization and earnings. The bigger Class A roads, including the Burlington, were restricted to lower tariffs than were

[48] Rorer argument, 6.

[49] *Ibid.*, 8-9. The right to contract had been granted to the road with its charter. No appeal to any "higher law" was necessary. Whether or not the *right to contract* meant *freedom of contract* in Rorer's terms was another matter.

the Class B and C roads. Such discrimination, counsel maintained, was inconsistent with the state constitutional requirement that all general laws be uniform in their application.[50]

Rorer concluded his argument with a short plea in the name of free enterprise. The law of 1874, if permitted to stand, would open the door to regulation of all forms of labor. Such a contingency was not to be taken lightly, for it would put an end to free enterprise in the state of Iowa. "Stagnation" would be the inevitable result. The "alarmed-capital" argument was finding its way even into the courts.

Attorney General M. E. Cutts replied to railroad counsel with a simple denial of all contentions. The B. & M.'s charter did not give it exclusive power to fix charges; "rules and regulations" were intended to include rate controls; the act was not being enforced upon interstate commerce; the law was uniform in its application to all railroads in each of the three classes. Since all claims of unconstitutionality failed of proof, Cutts asked that the injunction be denied.[51]

The presiding judge of the Circuit Court of the United States for the District of Iowa was John F. Dillon, noted authority on municipal law and one of the leading jurists of the country. His recently published treatise on *Municipal Corporations* had shown him to be sympathetic to laissez-faire principles of political economy, while his record as a corporation lawyer would seem to align him with the business interests. The railroad had every reason to expect a friendly hearing from Judge Dillon's court.[52]

But on May 12, 1875, Dillon, with Justice Miller concurring, found in favor of Attorney General Cutts. The injunction had been sought principally on the grounds that the railroad had the exclusive power to fix its own rates, but this exclusive power was nowhere specifically granted. In a corporate charter nothing goes by implication. The terms of the charter must always be construed in favor of the public. Rate fixing in the case of railroads was undoubtedly a legislative power stemming from the public nature of the enterprise. The courts had always enforced it. It was true that the legislature might surrender this power by a contract with the road, but such a surrender could not be implied. In this case, the B. & M. was sub-

[50] The reference is to the Iowa 1857 Constitution, Article I, Sec. 6.

[51] C. B. & Q. *v.* Attorney General, 5 Fed. Cases, 594 (1875), 595.

[52] Clyde E. Jacobs, *Law Writers and the Courts* (Berkeley, Calif., 1954), 111-14.

ject to such "rules and regulations" as the legislature might later enact, and this might quite properly include stipulations as to tolls. As for the plea concerning the regulation of interstate commerce, the law of 1874 made no effort to fix the rates for traffic destined beyond the state. As for the claim that the law did not act uniformly upon all the railroads of the state, the judge could see good reason for a system of classification and found that the law worked with complete equality on all the roads within each class. The Act of 1874 was constitutional; the plea for an injunction was denied.[53]

Dillon's decision was only one of a series of judicial defeats suffered by the railroad and warehouse interests of the Middle West. By 1875 state and lower federal courts had upheld virtually all of the Granger legislation, and the Iowa law was not an exception. The owners of the Burlington were sadly disappointed by the failure of their case. O. H. Browning hastened to Boston to assure the leading board members that the case had been properly presented, and he convinced them that an appeal to the Supreme Court would result in a reversal of Dillon's decision.[54] Since the other Granger cases were being taken to Washington on appeal, Browning arranged to have the Iowa case heard in conjunction with them.[55] The railroads and their warehouse allies prepared for a final assault upon state legislative power.

To present their cases to the Supreme Court, the railroad and warehouse interests enlisted some of the most distinguished corporation lawyers in the nation: William M. Evarts, "the most outstanding member of the American bar"; William C. Goudy, "acknowledged leader" of the Chicago bar; C. B. Lawrence, former Chief Justice of the Illinois Supreme Court; Burton C. Cook and John W. Cary, leading corporation lawyers of the Middle West.[56] To make their final plea, the Burlington officers sent Orville H. Browning, a former Secretary of the Interior, and Senator F. T. Frelinghuysen of New Jersey, a future Secretary of State.

Burlington counsel's appeal was to be more than a mere repetition of its

[53] 5 Fed. Cases, 594 (1875).

[54] Browning, *Diary*, 2:419-20; Walker to Griswold, May 13, 1875, Walker, Out-Letters, v. 7.

[55] Browning, *Diary*, 2:428-9; Walker per Goddard to Griswold, May 26, 1875, Walker, Out-Letters, v. 7.

[56] Twiss, *Lawyers and the Constitution*, 66, 70, 78.

Circuit Court argument. The Granger litigation had done much to crystallize the thinking of capitalists on the subject of their rights with respect to the state. They were obviously concerned over the apparent failure of existing law to protect their property from unfriendly regulation; but they were also convinced that their cause was the cause of justice. "In my judgment," wrote Robert Harris in October of 1874, "every person is entitled to compensation earned whether that person is a stockholder in a Railroad or a flouring mill, and the people are no more entitled to the use of my property if invested in a Railroad than if invested in a steamboat or in any other business."[57] "However far the practices of R. R. Cos. may be open to criticism in other respects it seems to me that in this particular matter they are the champions of all property interests of every kind."[58] Charles Perkins prepared a memorandum in June of 1875 to the effect that "communism in any form is dishonest and unwise and utterly inconsistent with civilized progress. . . . The regulation of Railroad rates by the public amounts to taking the property of A and giving it to B and C."[59] Railroad attorneys agreed that there must be a limitation on the legislative police power in the constitutional guarantees of property.[60] In close collaboration with one another on all of the Granger cases, they prepared a momentous series of briefs on behalf of the property interests of the nation.[61]

The Burlington's appeal included virtually all of the points made in the Circuit Court. It continued to place great emphasis on the obligations of contract and actually presented two additional claims of impairment. There was an important addition, however, in counsel's contention that, in the absence of a provision for rate fixing in the charter, the owners of the road would be deprived of their property without due process of law if the Act of 1874 were enforced. The new arguments ran as follows:

In leasing the Burlington & Missouri, the C. B. & Q. had agreed to pay all debts of the lessee and to pay to the stockholders of the B. & M. the same dividends that it paid to its own shareholders. The Burlington had

[57] Harris to John H. Schermerhorn, Oct. 1, 1874, Harris, Out-Letters, v. 35.

[58] Harris to Jas. D. Wright, Oct. 30, 1874, *ibid.*, v. 35.

[59] Memorandum [June, 1875], Letterbook II, *Perkins Papers.*

[60] Twiss, *Lawyers and the Constitution*, Chap. IV.

[61] Walker to Sidney Bartlett, May 14, June 8, 1874; Walker to Denison, July 10, 1874, Walker, Out-Letters, v. 5; Browning, *Diary*, 2:390.

contracted to pay these obligations out of its revenues, and for this purpose the rates now charged by the company in Iowa were "barely adequate." If compelled to charge the freight rates and fares prescribed by the legislature, it would no longer be able to meet the terms of the lease. Its contract with the owners of the B. & M. would be seriously impaired. Furthermore, the rights of the bondholders were doubly endangered, because they had loaned their money to the B. & M. "in full confidence and belief" that the power of the company to fix its own rates "would never be denied or interfered with." Since the law of 1874 would make it impossible for the C. B. & Q. to pay the interest on this debt, the contract between the bondholders and the B. & M. would also be impaired. On two additional counts the legislature had violated the contract clause of the federal Constitution.[62]

The supposed inability of the Burlington to discharge its obligations faithfully under the law of 1874 was closely related to the most significant point added by counsel in the final appeal. As stated earlier, the enactment of a rate-control law might actually diminish the value of railroad property in the eyes of investors. Certainly if the restrictions were so stringent as to prevent the payment of dividends and even the payment of interest on the bonded debt, the credit rating of the road would decline and with it would fall the value of its stock and the resale value of its bonds. The owners of either would suffer a loss in the market value of their property. The question for judicial consideration was whether or not they would actually be *deprived* of their property. There was no question but that the owners of the Burlington believed their property impaired by the rate law of 1874.[63] Was there no legal remedy for this injustice? The corporation lawyers were convinced that there was. Browning and Frelinghuysen boldly asserted that, under the law of 1874, the owners of the Burlington would be deprived of their property without due process of law. Such a deprivation would violate section one of the Fourteenth Amendment.[64]

The assertion was a bold one, because it had never been tested in quite this form prior to the Granger cases, and because similar claims down to 1873 had been poorly received by the courts. It was a question of the legal

[62] C. B. & Q. *v.* Iowa, 94 *U. S. Reports*, 156-8.

[63] Walker to W. H. Falconer, Mar. 19, 1874; Walker to W. P. Hepburn, Mar. 2, 1874; Walker to Denison, Mar. 20, 1874, Walker, Out-Letters, v. 4; Harris to W. P. Hepburn, Mar. 20, 1874, Harris, Out-Letters, v. 33.

[64] C. B. & Q. *v.* Iowa, 94 *U. S. Reports*, 160.

implications of the word "property." Could a person whose property had lost some of its business value through a legislative act claim to have been *deprived* of his property?

The precedents for the most part said no. The point had come up repeatedly during the 1850's and 1860's in connection with a series of state prohibition laws. These laws, by restricting the sale of liquor in one way or another, had ruined or severely curtailed the business of numerous liquor dealers. The aggrieved parties challenged the constitutionality of the laws on the grounds that the states were depriving them of their property without just compensation or without due process of law. With one exception, where actual confiscation was involved, the state courts ruled that there had been no deprivation of property. Property, insofar as its value was recognized by the courts, was personal and not commercial. Liquor was valuable because it could be consumed and not because it could be sold for a profit. In most of the cases involved, the liquor dealers still retained full title to all the liquor in question; the liquor's innate value had been in no way diminished or impaired; only its sale had been restricted. Since the owners had no legal claim to the anticipated return or profit which its sale might bring, they could not claim any loss of property. In other words, the courts insisted on viewing property as a tangible object and not as a business asset.[65]

In 1873, however, the Supreme Court considered a temperance case on the grounds that a state prohibition law was in violation of the new Fourteenth Amendment. The case was a poor one, strained out of proportion to test a constitutional principle, but the court accepted it and handed down a significant opinion. The state, this time, was Iowa, and the prohibition was a provision in the Code of 1860.[66] A man named Bartemeyer claimed that he had been deprived of his property without due process of law when for-

[65] The People *v.* Hawley, 3 Mich., 330 (1854); The People *v.* Thomas Gallagher, 4 Mich., 244 (1856); Lincoln *v.* Smith *et al.*, 27 Vt., 328 (1854); State *v.* Paul, 5 R. I., 185 (1858); State *v.* Keeran, 5 R. I., 497 (1858); Metropolitan Board of Excise *v.* Barrie, 34 N. Y., 657 (1866). The exception is Wynehamer *v.* The People, 13 N. Y., 378 (1856), but the majority of the court based its decision upon the fact that many dealers were compelled to destroy their liquor. Beebe *v.* The State, 6 Ind., 501 (1855), may be a second exception, but the issue is not quite parallel. It should be pointed out that several of the cases first mentioned provoked vigorous dissents which clearly accepted the commercial value of the liquor as property worthy of protection.

[66] Actually, as the court pointed out, the prohibition went back at least to the Code of 1850.

bidden to sell whisky to Timothy Hickey in March of 1870. The plea was denied, but Justice Miller, in presenting the opinion of the court, declared that a restriction on the sale of liquor could conceivably be so rigid as to deprive a dealer of his property without due process; and Bradley, in a concurring opinion, agreed that a dealer might be entitled to compensation in such a case.[67] The highest court in the land seemed ready to consider the asset value of property as worthy of protection under certain circumstances.

Bartemeyer *v.* Iowa was the key decision in railway counsel's claim that the owners of the roads had been deprived of their property by the Granger laws. If a prohibition law might damage a liquor dealer's business in such a way as to deprive him of property without due process of law, might not a restrictive rate law do the same to the owners of a railroad? The point was cleverly taken. The distinction between the liquor control laws and the Granger laws was obvious. The liquor dealers had lost their right to do business; the railroads had merely lost a certain latitude in the fixing of their prices. But the analogy was not entirely groundless, if the Court accepted the businessman's concept of property as an asset.

All of Burlington counsel's new claims, however, were of the "higher law" type. Arguing almost without benefit of precedent and usually in open conflict with precedent, they made their appeal to the laws of trade rather than to the law reports. The law of 1874 would make it difficult for the railroad to meet its financial obligations, would impair its credit rating, would deprive a speculator of expected profit. This was bad for business, but it was not necessarily contrary to law. However just their cause might seem, they had a slender case from the standpoint of a legal purist.

The claims of railroad counsel with respect to property rights, however, were of considerable historical importance. With this argument the great industrial interests of the country were challenging the constitutional authority of state legislatures over prices. Obligations of contract were not directly involved here; it was purely a matter of the police power. This authority had never before been denied in a federal court, and, as far as can be determined, had never been challenged as a violation of the property right in any state court.[68] The simple act of price fixing, repeated by

[67] Bartemeyer *v.* Iowa, 18 Wall, 129 (1873).

[68] The only case found involving a direct challenge to the general power of price fixing is Mobile *v.* Yuille, 3 Ala., 137 (1837). In this case the defendant claimed his liberty had been impaired. The court refused to accept his plea.

American and English legislative assemblies for centuries, was alleged to deprive a businessman of his property without due process of law. The idea was a new one, and it was to prove tremendously successful as a guarantee of business freedom in the future.[69] It was the great innovation of the Granger cases.

C. B. & Q. *v.* Iowa, in summary, was an appeal from the United States Circuit Court for the District of Iowa to the Supreme Court on a writ of error. The appellants claimed that the lower court had erred in refusing to grant an injunction against the Attorney General of Iowa stopping him from prosecuting suits under the Act of 1874. This act, insofar as it applied to the Chicago, Burlington & Quincy Railroad, was held to be in violation of the Constitution of the United States because it would impair the obligations of contract implicit, first, in the charter of the Burlington & Missouri River; second, in the lease between the B. & M. and the Burlington railroad; and third, in the sale of bonds by the B. & M. Since there was no provision for rate control in the B. & M.'s charter, the act would deprive the owners of their property without due process of law. In addition to violating the rights of the C. B. & Q., the law would also infringe upon the powers of Congress with respect to interstate commerce, and it would run contrary to the Constitution of Iowa by failing to treat all railroads in the state equally. The Attorney General denied each of the claims made by railroad counsel.

The Supreme Court heard the case on January 11, 12, and 13, 1876;[70] and, after considerable delay, rendered its decision on March 1, 1877.[71] The majority of the Court, speaking through Chief Justice Morrison R. Waite, upheld the decision of the Circuit Court and handed down an opinion entirely consistent with existing precedent. A railroad was incorporated as a carrier for hire to serve the public. It was engaged in a public employment affecting the public interest. It was subject to legislative control as to rates of fare and freight unless it was protected by its charter. The B. & M. had been incorporated under the general corporation act of Iowa and was subject to all rules and regulations that the General Assembly might enact and provide. Until the legislature prescribed its rates, the rail-

[69] Twiss, *Lawyers and the Constitution*, 76-7.

[70] Browning, *Diary*, 2:437.

[71] Elwin W. Sigmund, "The Granger Cases: 1877 or 1876?" *American Historical Review*, 58:571 (April, 1953).

road could fix its own charges, so long as these charges were reasonable as determined by the courts; but whenever the legislature stepped in, the latter's power over rates was complete. This power might have been limited by charter, but in this case it had not been. "The company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation."[72]

It made no difference, said Waite, that the road had been leased or that its income was pledged as security for debts. The company could not grant or pledge more than it had to give. The obligations to pay dividends and interest on the bonds were all assumed, subject to the provision that the legislature might at any time place restrictions upon the company's tolls. No contract rights had in any way been impaired. Similarly, the claim that the owners were deprived of their property without due process of law was without foundation. The Court did not even think it worthy of discussion.

The Court was no more sympathetic to the remaining claims. The law did not apply to interstate commerce, and the legislature might regulate the rates of the B. & M. "for promotion of the general welfare of Iowa" even though outsiders might be indirectly affected. The classification of roads was perfectly permissable, and the act applied with complete uniformity within each class. Judge Dillon's verdict was affirmed; the appeal of the Burlington was denied.[73]

Railroad counsel may have taken some comfort from the vigorous dissenting opinions of Justice Stephen J. Field. In the parallel case of Munn *v.* Illinois, Field, with Justice William Strong concurring, had found the majority opinion "subversive of the rights of private property."[74] He had agreed completely with the arguments of warehouse counsel and had accepted the asset conception of property upon which it was based. All the benefits of property, he insisted, derived from the fruits of its use, and the owner suffered a loss to the extent that these fruits were diminished.[75] In dissenting after each of the railroad cases, Field gave recognition to the

[72] C. B. & Q. *v.* Iowa, 94 *U. S. Reports*, 162.

[73] *Ibid.*, 162-4.

[74] 94 *U. S. Reports*, 136.

[75] *Ibid.*, 141.

"alarmed-capital" argument. "The questions thus presented are of the gravest importance, and their solution must materially affect the value of property invested in railroads to the amount of many hundreds of millions, and will have great influence in encouraging or repelling future investment in such property."[76] By refusing to define the power of the state over railroad corporations, he continued, the majority had placed the companies at the mercy of the legislatures. What was the value of the contract clause if its spirit could be violated whenever the legislature wished to reduce a company's revenues? Of what worth was the Fourteenth Amendment if the true value of property could be nullified by the state at any time?[77] But Field was speaking only in dissent. The majority had not accepted the "higher law." The railroads had challenged the state police power and lost.

Ultimately the claims of railroad and warehouse counsel would prevail. The assault on the legislative power over prices was not finished; it had only begun. Before the end of the century a majority of the Supreme Court would accept the "asset" conception of property and write it into the Constitution.[78] But for the moment nothing was changed. Railroad rates were under the control of state legislatures as they had always been, unless freedom from control was specified in the charter. C. B. & Q. *v.* Iowa and the other Granger cases were decided by majorities that still accepted a traditional interpretation of the law.

It was a tradition, however, that would soon end, and its passing was predicted by the Granger decisions. Seldom have members of the Supreme Court been so far apart on an interpretation of basic law. Waite and Field had found no common ground; their disagreement was complete. But it was also a reflection of a changing balance of power in American society. Waite's opinion provided a remarkable history and summation of a common-law tradition established in England by land-holding aristocrats who distrusted men of trade. It was virtually the last judicial recognition of this tradition in the United States. Field's dissent, on the other hand, was a fitting introduction to a new tradition. The law as well as the politics and economics of the future was to be dominated by the new commercial and

[76] *Ibid.*, 184.

[77] *Ibid.*, 183-7.

[78] John R. Commons, *Legal Foundations of Capitalism* (New York, 1924), 12-21.

industrial men of the country who had a considerably different conception of property rights. The ideas of justice advanced by the Burlington managers and their lawyers during the troublesome years of the Granger movement would come to dominate. In this sense, the Granger cases were an important watershed in the history of American constitutional law.