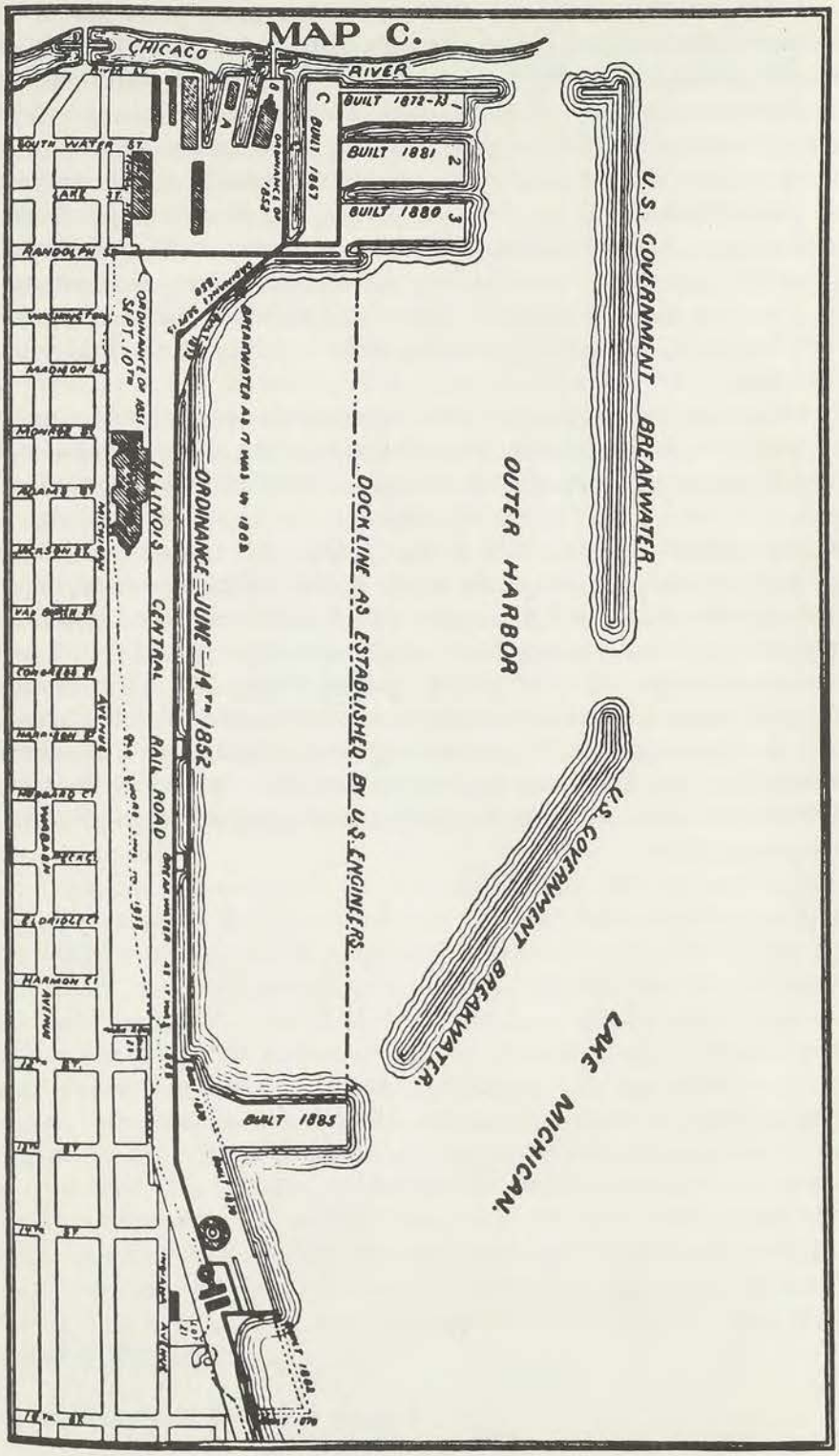
MAP C.
CHICAGO
RIVER
BUILT 1872-73 1
BUILT 1881 2
BUILT 1880 3
BUILT 1867
SOUTH WATER ST.
LAKE ST.
RANDOLPH
MADISON
MONROE
ADAMS
JACKSON
VAN BUREN
CONGRESS
HARRISON
HARDING CT.
WABASH AVENUE
EL DAIDLE CT.
HARMON CT.
ORDINANCE OF SEPT. 10TH
ORDINANCE JUNE 14TH 1852
DOCK LINE AS ESTABLISHED BY U.S. ENGINEERS
U.S. GOVERNMENT BREAKWATER
OUTER HARBOR
LAKE MICHIGAN
BUILT 1885

A Change in Precedent: The Legal History of the Chicago Lake Front Case

Michael J. King

As Supreme Court Justice Stephen Field spoke, it became obvious to those in the room that the law was changing. The Court was carefully attacking the obligation of contract decisions first handed down in *Fletcher v. Peck*[1] and repeated in such great cases as *Dartmouth College v. Woodward*[2] and *Stone v. Mississippi.*[3] *Peck* had wrought the legal understanding that legislative grants to private corporations were constitutionally inviolate. But the 82 year old precedent was falling, not so much because it was wrong, but because it was wrong for the times. The law's protection of corporate possession of state granted lands was on the demise.

The opinion Field read was for the case of *Illinois Central Railroad Company v. Illinois.*[4] Its story is remarkably similar to *Peck.* The state legislature made a large land grant to a private corporation, an aroused public demanded its repeal, the act was repealed, and a long litigation arose challenging the state's authority to repeal the act, given the constitution's prohibition against state interference with the obligation of contract.[5] The Supreme Court responded this time by adopting the "public trust" doctrine, ignoring *Peck* and freeing Illinois to restore to its possession the Chicago Harbor. The case, however, is not well known despite the *American Law Review's* judgment that it would "no doubt take rank as one of the most important deliverances made by that (the Supreme) court in its whole history.[6] The Chicago Lake Front case, as it was known, involved land worth "six to one hundred million dollars,"[7] attracted Chicago's attention for 23 years, and was the first crack in the foundation of the *Peck* precedent. This paper seeks to remove its historical anonymity and show its historical importance.

The city of Chicago sits on the southwest shore of Lake Michigan. In 1869, the city council, anxious to promote Chicago as a center for business and agriculture in the Northwest, sent a bill to the state legislature in Springfield,

1. *Fletcher v. Peck,* 6 Cranch 115 (U.S. 1810).
2. *Dartmouth College v. Woodward,* 4 Wheaton 518 (U.S. 1819).
3. *Stone v. Mississippi,* 101 U.S. 814 (1879).
4. *Illinois Central Railroad Company v. Illinois,* 146 U.S. 387 (1892).
5. U.S. Constitution, Article I, section 10.
6. "Constitutional Law. Power of a State Legislature to Grant the Harbors of a State to Private Corporations – Obligation of Contracts," *American Law Review,* 27 (1893), p. 437.
7. "Constitutional Law – Riparian Rights," *Chicago Legal News,* 25 (December 10, 1892) p. 129 (p. 229).

asking for control of the harbor's submerged lands and certain shore lands. Specifically, Chicago asked for: 1) title in fee to the submerged lands extending one league (approximately 2.4 miles) into Lake Michigan; 2) control over wharfing activities and revenues generated; and 3) ownership of the area between Michigan Avenue and the tracks of the Illinois Central Railroad, a distance of about 800 feet along a one mile stretch.[8]

Chicago's stake in the grant was very great. Development of the harbor would provide docks and warehouses along the shore with facilities for moving freight onto railroad cars for further shipping. The improved harbor would draw new shippers to Chicago and generate revenue from wharf rates. Markets would most likely develop in the city with the effect of building Chicago into a commercial center. Secondly, the one mile stretch along Michigan Avenue, which the city could develop or sell at its pleasure, held an enormous market value. Governor John Palmer valued the same stretch of property, in a *400* foot strip, at $2.6 million when he vetoed the Lake Front Act of 1869.[9] For the rights to the harbor (the value of which is inestimable)[10] and the shore property, the legislation demanded neither payment nor proceeds. Not even the wharf operation revenues would be taxed.

At about this same time, the Illinois Central Railroad had been thinking about the Lake Front also. In 1867, it had asked the city to approve a purchase of three blocks of lake front land (between Randolph Street and Monroe Street) for the purposes of extending its depot. The station was confined to the area owned by the railroad north of Randolph Street. The city spurned the request. After 18 months, the railroad still wanted the land and chose to make its appeal to Springfield, much to the dismay of the Chicago *Tribune's* editorialist. Reminding the public that it had spoken in favor of selling the railroad the desired land, the paper remarked, "we warned the public authorities that if they forced the railroads to go to Springfield, and provoked them to become their enemies, the city would not stand a ghost of a chance. And so it seems likely to turn out."[11]

The concern arose over a substitue measure to the Chicago bill that appeared to have its foot in the legislative door. The new bill effectively put the words "Illinois Central" where "Chicago" had once been written in. The new H.B. No. 373 divided the property along Michigan Avenue at the 400 foot line; Chicago received the 400 feet nearest the avenue which it could sell for revenue to support city parks, and the Illinois Central picked up the 400 foot strip

8. *Attorney General's Report and Opinions, 1891/1892,* (Springfield, 1892), pp. 43-4.

9. Chicago *Tribune,* April 15, 1869.

10. When the Lake Front Act was amended to include only an area of one square mile, the value was approximately $75 million. The grant here extended at least twice as far into the harbor along a stretch much longer than one mile.

11. Chicago *Tribune,* January 28, 1869.

closest to the waterfront for expansion. The bill required the railroad to pay $800,000 for the land. Section 3 of the act affirmed the railroad's right of way, further suggesting that the railroad owned the land covered by the tracks *in fee.* Because the railroad's tracks sat on the shore of the lake, such ownership made the railroad the riparian owner and thus eligible to wharf the area, fill in certain areas, and receive revenue. Section 3 also granted the Illinois Central title in fee to the harbor, extending one mile from the shore, the width confined to the area between the depot at the mouth of the Chicago River and Twelfth Street, the limit to the property along Michigan Avenue. This act placed the responsibility for developing the harbor and its shore facilities singularly in the hands of the railroad. Although the line would undoubtedly make money on the deal, the state would continue to realize seven percent of the road's total revenues as stipulated in the company's charter.[12]

When put side by side, the grant to the Illinois Central looks more appealing from the state's financial point of view. But Chicago felt victimized and mounted a fight to stop the railroad bill. The controversy hit high gear in February. During that month, barely a day went by without the Chicago *Tribune* carrying at least some report on the bill. It editorialized against legislative approval, printed letters by opponents of the measure, and reported regularly on possible vote counts, committee action, and debates. On February 17, a mass meeting in Farwell Hall listened to speeches and passed resolutions attacking the Lake Front Act. The *Tribune* carried a full record of the meeting's activities, but the next day grimly reported from Springfield that the session had "excited scarcely any interest in the minds of the members of the General Assembly."[13]

Citizens and the *Tribune* expressed a number of complaints against the bill: 1) the Illinois Central Railroad's charter gave it an easement (or right of way) through Chicago along the Lake Front, not ownership of any property. Thus, the legislature could not confirm the railroad's title in fee to the shoreline property, because there existed nothing to confirm. 2) The Chicago harbor should not be out of the control of the city. 3) The bill failed to require the railroad to make harbor improvements within any specific time period. 4) The city could not tax the land. And finally, 5) all citizens deserved equal access to and benefits from harbor improvements. While all these complaints received due attention and explanation in the papers and public meetings, the *Tribune* devoted its greatest energies to the sixth charge, corruption.

> Another grave objection to the bill relates to the means employed to pass it . . . There is a gang of fellows at Springfield who make it a business to 'jump on' every measure that has the faintest odor of greenbacks about it. They turned away in disgust from the harbor bill sent

12. Illinois, *Public Laws of the State of Illinois, Passed by the 26th General Assembly, Convened January 4, 1869,* pp. 245-248.

13. Chicago *Tribune,* February 18-19, 1869.

> down by the Common Council, because they knew there was no money in it . . . But when the Illinois Central bill came along, they greeted it with a yell of delight. It was just the thing they had been waiting for. They fastened upon it, set their teeth in it, hung on to it, and we judge, are getting their fill of it . . . The mildest wish we have for the disbursing agents of the Lake Front bill, if they be any such in Springfield, is that they may, one and all, be sent to the penitentiary.[14]

Despite the charges of corruption, the Lake Front Act passed the House of Representatives on February 20 and moved to the Senate. The *Tribune* promised to follow events closely, anxiously watching the throng of Illinois Central lobbyists. Nonetheless, the reports were at best misleading. With the House passage, the paper reported February 21 that Senate approval was almost certain ("I see no reason to doubt it will go through that body"), but on March 1 headlined that the bill showed signs of losing support. The enthusiasm was short lived. On March 7, the Springfield correspondant, reporting that a vote was pending, dejectedly wrote, "Of course the bill will pass. That is fixed, and the strongest logic that ever came from human lips cannot stop it."

The writer hit the money. On April 8, the Senate passed the measure, sent the bill to the Governor, and shortly thereafter, adjourned. When the legislature returned, the Act of 1869 was back on the docket, complete with Governor Palmer's veto message. Palmer had five objections: 1) the land along the shore was worth $2.6 million, not $800,000; 2) he thought the legislature ought to demand that work be commenced within a reasonable amount of time; 3) the state, Palmer said, ought to have the right to limit the net profit of the railroad's harbor operation; 4) the state, in addition to receiving seven percent of the railroad's total revenues, ought to receive seven percent of the revenues generated from the land grant; 5) the property should be taxable.[15]

Under the circumstances, the Governor's demands were not unreasonable. He had no objection to the land grant of the lake front property, but only sought a more reasonable price. Indeed, he did not mention an objection to the railroad receiving control of the harbor, but only wished that the state enjoy more revenue from the venture. A concern existed that the railroad could monopolize the harbor, obstructing development rather than improving the area, or that if developed, the railroad might charge exorbitant rates for use. The Governor's recommended changes would have allayed the fears and secured the harbor for the Illinois Central.

If the railroad lobbyists would have seen the issue in this light, the Lake Front story may have ended right here. But they did not. On April 16, 1869, the Senate and the House each voted to override the veto. The Act of 1869 was law. The *Tribune* could not restrain its anxiety:

14. *Ibid.*, Complaint No. 1 appeared in a February 11, 1869, letter from attorney Elliot Anthony, one of the participants in the February 17 rally. The other five complaints were expressed in order in a February 24, 1869 editorial.

15. *Ibid.*, April 15, 1869.

> In the annals of legislation in this state, there are many instances of the shameless dishonesty of individual members, and occasionally, of wilful violation of constitution, law, and justice by political majorities; but we doubt whether any previous body has exhibited such unblushing disregard of all the requirements of common decency as the legislature now in session. Taken as a whole, the Legislature of 1869 has been reckless beyond all precedent . . . We do not make charges of personal corruption, which we cannot prove, but we point to the measures which have passed over the Executive veto as furnishing all needed comment.[16]

The first act of the Chicago Lake Front Steal ended in favor of the Illinois Central. The long four months it took the legislature to decide the issue only served to give notice that the controversy would be long and drawn out. Another 23 years would be counted before the Supreme Court made the final decision.

II

The rights of riparian ownership gave the Illinois Central power to fill in certain areas along the lake front in order to extend and improve its land. The railroad was also eligible to construct wharves and docks into the harbor and prepare for full commercial use of the harbor. However, there were other claims made to the lands that stalled development of the property. The controversy settled around the Fort Dearborn addition to Chicago.

The United States Army had once occupied the Fort Dearborn area as a military installation, but deeded the property to the city of Chicago in 1839 under the stipulation that part of the lake front property never be occupied by any buildings.[17] This section of property, located in section 10 between Randolph and Madison Streets, was in danger of being developed by the railroad once the legislature passed the Act of 1869. Desiring to protect the property and discourage any development of the harbor which might conflict with the U.S. Corps of Engineers' own plans for developing the area, the United States immediately filed a request for a preliminary injunction against the railroad.[18] Arguing that neither the city or state could break the terms of the original land grant by selling or granting title to another party, the U.S. sought to prevent the railroad from filling in any of the harbor for the purposes of wharfing and building a depot. Judge Thomas Drummond adopted the U.S. opinion and granted the temporary injunction.

Nevertheless, the Illinois Central was still interested in widening its right of way along the lake front by another 100 feet and its continued unauthorized

16. *Ibid.*, April 17, 1869.
17. *Illinois Central Railroad Company V. Illinois*, 146 U.S. 387 (1892) at 391.
18. *United States v. Illinois Central Railroad Company*, 2 Bissell 174 (U.S. 1869).

activities on the lake front again caused the United States to go to court. On July 1, 1871, the U.S. filed an information in the Circuit Court for the Northern District of Illinois requesting another injunction. At the same time, railroad attorneys were busy studying a compromise with officers from the War Department. The result was an agreement in January 1872, establishing maximum limits for filling land and constructing docks in the harbor.[19] The compromise apparently gave both sides satisfaction. The railroad got permission to fill in land. The government, happy to be supervising the harbor activity, dropped its case. Although there are records of U.S. discussions on the subject into the 1880s, the 1871 injunction request was the last active involvement by the federal government in the lake front case. It did not participate in the Circuit Court or Supreme Court cases that eventually decided the fate of the Chicago harbor.[20]

Meanwhile, as the pressure on the railroad eased from the direction of the national authorities, state and city criticisms mounted. On June 13, 1870, the city of Chicago refused to recognize the Act of 1869 as binding until forced to by the courts. The action came in response to the Illinois Central's first attempt to pay Chicago for the Lake Front lands under the Act of 1869.

The Lake Front bill required the railroad to pay the city $800,000 in four $200,000 installments as fee for the section along Michigan Avenue granted it by the act. Consequently, the company approached the city's outgoing controller, Walter Kimball, with the sum of $200,000, which Kimball accepted under the stipulation that the action did not serve to jeopardize any claim to the property that the city still might have. He put the money in a special account under his own name to underscore his intention not to hurt the city. If Kimball's actions were found to be made on behalf of the city, then the Illinois Central could obviously assume title to the lands granted in the Act. To avoid the possibility that a judge might grant title to the railroad based on Kimball's acceptance, the city drafted a report that it presented to council on April 25.

Noting that Kimball had not turned the money over to his successor at the end of his term, the council recognized his actions as strictly private and that they therefore did not prejudice the rights of the city. The city council thus refused to accept the money, refused to accept Kimball's actions as binding, and refused to accept the Act of 1869.[21] It went on to record its opinion of the Lake Front Act:

19. Records and Briefs, *Illinois Central Railroad Company v. Illinois,* 146 U.S. 387, October Term, 1891, p. 400.

20. For the United States involvement in the Lake Front, see Records and Briefs, *Illinois Central Railroad Company v. Illinois,* 146 U.S. 387 (1892), October Term, 1891, pp. 390-427. A number of letters and memoranda from the War Department, Justice Department, Chicago, Illinois, and the railroad are included here.

21. Chicago *Tribune,* April 26, 1870. The complete report is included in an article on the meeting of the Common Council of Chicago. The report was accepted June 13, and an article appears in the June 14 issue of the *Tribune.*

> That the act of the General Assembly under which these railroads claim the property was passed by undue influences upon, and complications among, certain members has now become a part of the history of the State, and the act itself must be regarded as a wanton and unparalleled attempt at the invasion of the chartered rights of the city and private rights of citizens by the power which was bound to protect both.
>
> Your committee are therefore of the opinion that the public honor and the public faith require that the city by every means in its power should resist the consummation of this outrage, and do no act which will directly or indirectly aid these monster railroad corporations in the conspiracy against our chartered rights and the interests of our citizens . . .
>
> The act is simply and purely legislative robbery.[22]

The Chicago Council's disgust with the Lake Front Steal's excessive grants and its supposed corruption was shared by a growing number of people in and out of the city. The antagonism deepened as the first waves of anti-railroad sentiment generated across the plains. A new legislature came to power, filled with the anti-railroad feelings, and soon put the railroad men on the defensive. The *Tribune* of 1873 regularly carried articles on anti-monopoly meetings across the state. Its own editorials reflected support for the movement. Suddenly, the Act of 1869 was in trouble.

The new legislature of 1873 moved quickly despite the lobbying efforts of the railroad. In February, the Senate received a bill calling for the repeal of the Act of 1869. The House saw similar legislation introduced in March. Yet another bill called for an investigation into the corruption that surrounded the act's passage.[23]

On March 27, the House passed the repeal bill. Still, the *Tribune* was less than confident:

> The Lake Front Repeal Bill has passed the House. It goes now to the Senate where its further progress will be resisted by a powerful combination of railroad men and of persons within and without the Legislature concerned in the corruption which attended the original grant.[24]

The paper's fear of corruption was not upheld by events. Two weeks later, it headlined the good news to Chicagoans: "The Lake Front Act Repealed." With a certain sense of fulfillment, it noted that "the galleries were filled and the attorneys blanched with dismay when they realized their defeat."[25] The Governor signed the repeal act of 1873 on April 15, almost four years to the day after

22. *Ibid.*, April 26, 1870.

23. Announcements of introduction of the bills appeared in the Chicago *Tribune*, February 12, 1873 (Senate bill); *Ibid.*, March 12, 1873 (House Repeal bill). *Ibid.*, March 19, 1873 (House investigation bill).

24. *Ibid.*, March 28, 1873.

25. *Ibid.*, April 10, 1873.

the Lake Front Steal won out over executive veto. A satiated House of Representatives consequently abandoned the effort to investigate the 1869 corruption, satisfied that the "obnoxious bill" had been repealed.[26]

Nonetheless, the repeal lacked a certain finality. The *Tribune* did not editorialize the act as deliverance from evil, nor did great satisfaction echo from its reports on the repeal act. Although it never said as much in print, the paper appeared to realize that the case was a long way from decided. If it had such a premonition, it was entirely correct. Nineteen years still stood between the repeal and the Supreme Court's final verdict.

III

By 1883, the railroad company had ignored the repeal act for ten years, filling in certain shore areas and constructing docks. The company had made no great invasions on the lake between Randolph and Twelfth Streets, but it had constructed four docks near the mouth of the Chicago River and filled in lands along its tracks ever since the 1869 law passed, a law that Chicago rejected and Illinois wanted to forget.

On March 1, 1883, Illinois Attorney General James McCartney filed information in Illinois Circuit Court, Cook County, for a chancery suit against the Illinois Central Railroad. The state had decided that the only way to prevent further encroachments on the lake front by the railroad was to establish the legality of the Repeal Act of 1873 in court, thereby denying any claim the railroad had to riparian ownership. The *Chicago Tribune* reported that the state wanted to stop the Illinois Central's land fill operations once and for all.[27]

On April 10, the Illinois Central petitioned for removal of the case to U.S. Circuit Court for the Northern District of Illinois on the grounds that the case involved constitutional issues, issues which could not be answered fully or fairly in the Illinois court. On May 7, Supreme Court Justice John Harlan refused to remand the case back to the state court. In a three page decision, Harlan established one criterion for removal to federal court: "The act of March 3, 1875, entitles either party to a case arising under the constitution and laws of the United States to have it removed into the proper Circuit Court of the United States." Questioning whether the act of 1869 was a contract, and if so, whether the repeal act constituted an interference with the obligation of contract, Harlan recognized that issues existed involving a construction of the Constitution so that the rights of the parties demanded a determination of the case.[28] Thus Justice Harlan opened the door for the case he would decide five years later.

26. *Ibid.*, April 18, 1873.

27. *Ibid.*, March 2, 1883.

28. *People of the State of Illinois ex. rel. Attorney General McCarthy v. Illinois Central Railroad Company and others*, 16 Fed Rep 881 (1883) at 886-7.

Harlan's ruling left the parties free to argue the issues, but there was no real movement toward a hearing of the case. Indeed, by January 1886, no steps had yet been taken to hear the litigation and Chicago mayor Carter Harrison felt pressure to act. Writing to Corporation Counsel Frederick S. Winston, Harrison stressed the importance of the harbor for navigation, traffic, lumber interests, and the rest of the city's business concerns.[29] Having requested a status report, Winston replied with an analysis of the legal issues involved in the case, of interest here for its concise description of the ways the different parties would approach the issue.

> It will be contended by the company that the act of 1869 gave them the submerged lands in the outer harbor, that the grant was accepted and became a contract which the legislature, under the Constitution of the state and of the United States, was powerless to withdraw. On the otherhand, it will be, or should be, contended that the state held the submerged lands under Lake Michigan, not in a proprietary sense but in trust for the people of the United States and that the legislature had not the power to give them to a private corporation.
>
> For the company it will be claimed that the state, controlling the use of Lake Park, the land abutting upon the lake, had the power to convey the riparian rights connected with the land.
>
> To this it will be replied that the riparian rights, under which wharves and docks are built, are simply by license from the state which license may be revoked at any time before the docks and wharves are actually built.
>
> Such are the main points at issue.[30]

The issues that Winston spoke to and which the court was expected to decide were as follows: 1) Did the Illinois Central own the property on which its tracks rested, or did it simply have an easement? 2) Was the Act of 1869 a legal act by the legislature? 3) Did the state legislature have the power to repeal the act of 1869? 4) Who held title fee and riparian rights to the lands between Michigan Avenue and the lake from Randolph Street in the north to Twelfth Street in the south? 5) Who held title fee to the lands reclaimed and filled in along the lake front? 6) Who owned the wharves built by the Illinois Central and were they legal structures?[31]

The opportunity to speak finally came on July 5, 1887. Justice Harlan and U.S. District Judge H.W. Blodgett listened to the case. Three parties spoke in the controversy: the railroad, the state, and the city. Basically, the state and the city presented similar arguments, the only difference being that both claimed riparian rights in the harbor.[32]

29. Frederick S. Winston. *Opinion upon the Lake Front Question,* (Chicago, 1886), p. 2.

30. *Ibid.*, pp. 18-9.

31. *Attorney General's Report and Opinions 1887/1888,* pp. 29-30.

32. In discussing the Circuit Court arguments, my citations include information taken from documents filed for the Supreme Court and the state circuit court. Because the issues

The first issue was whether the Illinois Central held any title to the Lake Front before the Act of 1869; in other words, did the railroad's possession of a right of way running along the lake front, give it ownership of that land, and because that land bordered the lake, therefore give it riparian rights? Chicago and the state argued that a right of way did not confer riparian rights, that an easement simply involved the right to use a particular piece of property for a stated purpose, and no more.[33] To the contrary, the railroad cited section 3 of its charter, which read:

> The said corporation shall have right of way upon, and may appropriate to its sole use the control for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams, and materials of every kind for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments... station grounds . . . , turn-outs, engine houses, shops, and other buildings necessary for the constructing, completing, altering, maintaining, preserving, and complete operation of said road. All such lands, waters, materials, and privileges belonging to the state are hereby granted to said corporation for said purposes.[34]

According to railroad attorney Benjamin Franklin Ayers, such a grant gave ownership, not an easement.

The second issue referred to the Act of 1869 and the rights it granted. The state denied that any legislature had the right to bargain away lands that it held in trust for the people. The city did not deny that the state owned the harbor. What it did argue was that it owned sections 10 and 15 on the lake front, meaning that it had the rights of riparian ownership and, so also, the right to develop wharves.[35]

John Jewett, for the Illinois Central, argued that the Fort Dearborn property had passed to the state, and so the state legally could grant the property away. Ayers picked up the argument with a discussion of a state's rights regarding public property. Reaching back to the days of king and Parliament, Ayers found the rights of *jus publicum* and *jus privatum. Jus publicum,* he argued, had been controlled by Parliament and oversaw lands to be held in trust for the people. *Jus privatum,* to the contrary, was a power vested in the king which allowed him to grant certain lands to private individuals. Because both powers became vested in the legislature when Illinois rose to statehood, and because the lake front and submerged lands fit into the definition of areas covered by *jus privatum,* the act of 1869 was a reasonable use of legislative power.[36]

and arguments were identical in all three places, the reader is directed to sources that display the issues with particular clarity.

33. *Illinois Central Railroad Company v. Illinois,* 146 U.S. 387 (1892) at 424.
34. *Ibid.,* at 415.
35. *Ibid.,* at 419-20.
36. *Ibid.,* at 414-5.

The three questions regarding title to the lands along Lake Michigan, lands reclaimed from the lake, and wharves built based on riparian ownership all to a certain degree hung on the answer of whether the Repeal Act of 1873 was legal. The question of the repeal involved a consideration of what rights were granted in 1869; did the legislature give away property or was the permission to wharf simply a license that could be given and removed at the state's convenience?

The Illinois Central had done its best to make the act of 1869 appear as a contract. Because a contract is an agreement between two or more parties involving obligations on all parties, the railroad responded to the Act of 1869 with a resolution and letter accepting the terms of the agreement with the state. On November 17, 1870, John M. Douglas, the company's president, wrote a letter to Edward Rummel, the Illinois Secretary of State, informing him that the railroad accepted the grants of 1869 and that it had begun efforts to improve the lake front.[37] If the letter validly established acceptance of contractural obligations between the state and the company, and the company moved to act on its obligations, the railroad could claim standing in court under the Constitution's contract clause. Despite the railroad's letter, the state and city wanted to divide the original charter of 1852 (which was a contract with the railroad) and the Act of 1869, which they denied amended the charter, preferring to see the Lake Front Act as a simple license to develop the harbor.[38] The act, according to city counsel Gregory, had invested the railroad with "strictly public powers and trusts as a public agency for the public good." Furthermore, the act had not created any obligation for the railroad because any action the Illinios Central took was strictly voluntary.[39]

The railroad moved to protect its claim to the lake front by citing Article I, section 10 of the Constitution, which says that states may not pass laws interfering with the obligation of contract.[40] In connection with this argument, the railroad cited *Fletcher v. Peck,* a decision that recognized land grants by states to individuals as a contract. The Illinois Central also objected to the repeal act because it deprived the line of property, vested rights, and interests without due process of law in conflict with the 14th Amendment to the Constitution.[41]

These were the issues Justice Harlan faced when he wrote his 1888 decision. His argument had to weigh the doctrine of public trust against the well precedented argument of the railroad. In almost all of his conclusions, Harlan went with the city and state.

37. Brief of S.S. Gregory, Corporate Counsel, City of Chicago, *Records and Briefs,* p. 98.

38. It should be noted here that this argument supposed that the Act of 1869 would be accepted by the court as a legitimate exercise of legislative power, a finding that the city and state still opposed.

39. *Illinois Central Railroad Company v. Illinois,* 146 U.S. 387 (1892) at 423.

40. Records and Briefs, pp. 26-8.

41. *Ibid.,* p. 28.

Nonetheless, he was able to please all the parties.[42] The day he read the decision, each attorney claimed victory. The city of Chicago received title fee, with riparian rights, to all land east of Michigan Avenue between Randolph and Twelfth Streets, including the lands reclaimed and made by the Illinois Central. The railroad retained the property it owned between the Chicago River and Randolph Street as well as the docks and reclaimed lands it had built as riparian owner of the property. Illinois had the satisfaction of knowing that it owned the lake's submerged lands with authority to supervise any harbor improvements. Harlan further announced that the Act of 1873 legally repealed the Lake Front Act. Although he did not go so far as to say that the first act was too much for a legislature to undertake, Harlan did uphold the right of the state to withdraw its grant as it would any license granted to an individual or corporation. In other words, the judge disregarded the claim by the railroad that the grant, as an addition to its charter, was a contract.[43]

The Circuit Court judgment closed the case only briefly. By 1890, all parties had filed appeals with the Supreme Court calling for a final decision. The court agreed to hear the case. After 23 years, the Lake Front controversy was drawing to a close.

IV

For the Supreme Court, the issues were the same as in the court below: who owned what property along the lake front, what was the standing of the Act of 1869, and did the legislature have the power to pass the repeal act of 1873? The real question was whether the full court could ignore the *Fletcher v. Peck* contract rule and the 14th Amendment in the same fashion as had Justice Harlan.

Unfortunately for those wishing to have an authoritative decision by the full court, it soon became apparent that two chairs would be empty during the proceedings. Chief Justice Melville Fuller had served Chicago as counsel during the Circuit Court case and therefore disqualified himself from the hearing. A second justice, Samuel Blatchford, owned stock in the Illinois Central, so he too disqualified himself.

When the decision came down on December 5, 1892, the conclusiveness of the decision as precedent was further challenged by a 4-3 split decision. While the court's conclusion effectively removed the railroad's claims from national discussion, years would pass before the *Peck* decision could be discounted more fully.

Nonetheless, Justice Stephen Field, for fellow Justices Harlan, Lucius Lamar, and David Brewer, delivered a very forceful opinion in a 31 page disserta-

42. Chicago *Tribune*, February 24, 1888.

43. *People of the State of Illinois ex. rel. George Hunt v. the Illinois Central Railroad Company*, 33 Fed Rep 730 (1888); Reports and Briefs, pp. 34-6.

tion on the Lake Front case. One by one, the venerable legal theorist took up the issues and dismissed the railroad's claims.

The backbone of Field's decision was the doctrine of public trust. Field's thesis held that certain properties were so valuable to the public in general that they were too dear to be devolved to any private person or corporation for any purpose. Any law or grant that attempted to pass the claim of the people (and the state) to a private individual had no standing in court. The justice did have trouble citing precedent, so he simply declared that no precedent was applicable, then went on to explain the concept of public trust.

> We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interests thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.[44]

Field admitted that a state could grant certain parcels of lands in order to promote navigation and commerce through the development of wharves, docks, and piers. But, he said, there was a big difference between a selective grant and the wanton "abdication of general control" over such an important piece of property as an entire harbor. Such an action could not be consistent with the doctrine of public trust.[45]

> The harbor of Chicago is of immense value to the people of the state of Illinois in the facilities it affords to its vast and steadily increasing commerce; and the idea that a state legislature can deprive the state of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose . . . is a proposition that cannot be defended.[46]

Based on the public trust doctrine, Field moved to deny the claims of the Illinois Central. He noted that each legislature, when it comes into power, must "execute the trust devolved upon it." Since the legislature of 1869 had failed to exercise its responsibilities, it had made a grant of land that sacrificed the state's "sovereignty and dominion" over those lands. This action was irresponsible and the court therefore voided the Act of 1869, at the same time recognizing the

44. *Illinois Central Railroad Company v. Illinois,* 146 U.S. 387 (1892) at 455-6.
45. *Ibid.,* at 452-3.
46. *Ibid.,* at 454.

legitimacy of the repeal act of 1873. Said Field in closing, "There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it."[47]

Field moved on to uphold Harlan on the key points of lake and lakefront ownership. Chicago held on to the lake front lands and the riparian ownership with permission to develop the harbor subject only to the restrictions that the state, as owners of the lake, and the federal government, under the commerce clause, might choose to place on the city's efforts. The Act of 1869 was not a legal execution of legislative authority as far as it granted away public land (a slight disagreement with Harlan's earlier opinion) and the legislature could justifiably pass the act of 1873 in order to remove the license granted by the first bill.

The major difference between Field and Harlan came on the issue of docks built to improve the harbor. Harlan awarded the railroad control of the docks it had constructed along the lake front (all of which lay off lands owned by the railroad). On this issue, Field balked. Claiming that the railroad failed to prove that the docks stood in water too shallow for navigation, that the possibility existed that the railroad's wharves obstructed navigation, he ordered that the court below determine whether the docks were nuisances. If they were, Field left the door open for their removal.[48]

Thus, after 23 years, the Illinois Central enjoyed no rights other than the ones they held before the Act of 1869. Justice Field had stripped the railroad of its harbor, shore, and possibly, its wharves. Chicago was jubilant. "Lake Front is Ours," screamed the headline in the *Tribune*. Three pages carried articles, editorials, and excerpts about the decision.[49] But not everyone was happy. Three justices dissented from the opinion.

The dissent, written by Justice George Shiras on behalf of his brethren Horace Gray and Henry Brown, adopted the opinions of the Illinois Central. Citing four precedents, Shiras wrote:

> That the ownership of a state in the lands underlying its navigable waters is as complete and its power to make them the subject of conveyance and grant is as full as such ownership and power to grant in the case of the other public lands of the state, I have supposed to be well settled.[50]

Shiras was confused by Field's finding (quoted earlier) that the size of the grant

47. *Ibid.*, at 460.

48. *Attorney General's Report and Opinions 1891/1892*, p. 58.

49. Chicago *Tribune*, December 6, 1892.

50. *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892) at 465. Shiras cited *Weber v. Harbor Commissioners* 18 Wall. 57 (U.S. 1873), *Hoboken v. Pennsylvania RR*, 124 U.S. 656 (1887), *Stevens v. Paterson and Newark RR*, 5 Vroom 532 (N.J. 1870), and *Langdon v. New York City*, 93 N.Y. 129 (1883).

might be the test for whether the grant could be made. Shiras denied that the test of size was a reasonable one. The dissenter wrote that while the grant to the railroad was a large one, it was, relative to the remaining land, not unreasonable, especially when one considered the great benefit the city and state would enjoy when the harbor was developed. If a legislature held any power to grant private interests and rights to parcels of land, the extent of the grant was a matter of legislative, not judicial, discretion."[51]

In effect, Shiras was saying that the Act of 1869 was a legal application of legislative powers. The question that then presented itself was whether the legislature could revoke a grant at a later point in time. Shiras and his two cosigners agreed that the Act of 1869 represented a contract, protected by the Constitution from any interference by the State of Illinois." So long as the act [of 1860] stands in force there seems to me to exist a *contract*. . . and so long as the railroad company shall fulfill its part of the agreement, so long is the State of Illinois inhibited by the Constitution of the United States from passing any act impairing the obligation of contract."[52] He claimed that the principles of the *Dartmouth College* case were well established in American jurisprudence and that the court could not dismiss them out of hand.

The dissent offered no real comfort for the Illinois Central. It did serve to remind students of American law of the legal precedents overlooked by the majority in its decision. It also pointed out how hard the battle had been fought and how close the final score.

V

In his book on *Fletcher v. Peck,* C. Peter Magrath noted that the Court that decided *Illinois Central Railroad Company v. Illlinois* relegated the judicial doctrine that public grants are constitutionally inviolate "to the status of a judicial relic."[53] It is ironic that an opinion overturning a time honored legal precedent made no mention of the old decision. The Illinois Central lawyers were the only characters in the story to discuss the *Peck* precedent. Harlan avoided it in 1888 as did Field in 1892. Even in dissent, Justice Shiras failed to cite the *Peck* decision.

The new public trust doctrine filled the vacuum caused by the demise of *Peck*. Illinois Attorney General George Hunt, reporting for the last time on his

51. *Illinois Central Railroad Company v. Illinois,* 146 U.S. 387 (1892) at 467.

52. *Ibid.,* at 473. Shiras cited *Terret v. Taylor,* 9 Cranch 43 (U.S. 1815), *Stone v. Mississippi,* 101 U.S. 814 (1879), and *Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518 (US 1819).

53. C. Peter Magrath, *Yazoo: Law and Politics in the New Republic; the Case of Fletcher v. Peck* (Providence, RI, 1966) p. 109.

involvement in the case, claimed that "for the first time in American jurisprudence," the Court had denied the power of the states to "vest exclusive ownership in a private person or corporation."[54] The new principle, obviously unprecedented, was a matter of convenience for the Court. It wanted to free the Chicago harbor from the hands of the railroad. To do so, it was willing to ignore old law and write a new one. The *Harvard Law Review* thought this was a "radical thing to do."[55] But radicalism in law did not terribly upset the *American Law Review:*

> The ground on which the majority of the Court have planted themselves is absolutely untenable upon sound constitutional theories . . . [b]ut whatever may be thought in the future of the theory of the case, its conclusion was most necessary; and the legal profession will applaud the judge who had the strength to brush away legal theories and to assert the important principle that great public trusts cannot be perpetually abdicated by the acts of the temporary tenants of the legislative power in favor of private corporations.[56]

True, the new rule was in its infancy, but it was on record. The Court, in effect, announced in the opinion that it did not feel inhibited by Court actions of a different era. The closeness of the Court's vote on the decision emphasized the controversial nature of judicial about-faces. Nonetheless, *Illinois Central Railroad Company v. Illinois* was now *res judicata,* the law of the land. The Court had moved to prevent corporations from retaining ill-considered state grants as a Constitutional right.

54. *Attorney General's Report and Opinions 1891/1892,* p. 64.

55. "The Police Power and the Lake Front Case," *Harvard Law Review,* 6 (1892-3), p. 445.

56. "Constitutional Law. Power of a State Legislature to Grant the Harbors of the State to Private Corporations," *American Law Review,* 27 (1893), pp. 443-4.