THE OPINION

OF

MR. JUSTICE DANIEL,

IN THE

WHEELING BRIDGE CASE.

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OPINION.

In entering upon the consideration of the case before us, the mind is at once impressed with the belief that there never has been, that there perhaps never can be brought before this tribunal, for its decision, a case of higher importance or of deeper interest than the present. The subjects which it presses upon our examination, nay, upon which the judgment of this court has been demanded and has inevitably determined, are nothing less than—

1st. The jurisdiction or authority of this court, under one of the heads of *Original Jurisdiction* enumerated in the constitution.

2nd. The correct interpretation of the power of commercial regulation vested in the federal government, either exerted simply as such by that government, or as affecting the power of internal improvement in the states.

3rd. The policy or influence of particular regulations with respect to commerce, as these may tend to restrict it within circumscribed channels, or to promote its general activity and diffusion, by facilities operating a reasonable and just equality of right, of competition and advantage to all.

4th. The character of the proceeding complained of as a nuisance, the regularity of the proposed mode of redress and the right of the complainant to claim the interference asked for in any mode.

The magnitude of these topics would seem in some degree to excuse in treating them the hazard of prolixity, and at any rate, lying as they do in the direct path to the proper survey of this case, they cannot with propriety be overstepped without pausing upon their examination.

When at a former period this cause was before this court, the several topics just enumerated were cursorily adverted to by me as necessarily involved in its adjudication; and the course then adopted by the court was formally objected to, because that course seemed a premature and foregone conclusion upon facts and legal positions entering essentially into the nature of the controversy; facts and legal positions not then maturely examined and ascertained, as the order of the court at that time made necessarily implies—and which could not according to established precedent, and the highest adjudications, be properly investigated in the mode proposed. The subsequent proceedings upon the order of the court at the January term 1850 have greatly strengthened the objections assigned by me on that occasion—these proceedings have, at an almost incalculable expeuse to the parties, brought hither an immense mass of matter, much of which on the one hand is not within the enquiries directed by the court, whilst on the

other, enquiries strictly pertinent seem to have been wholly excluded. It has placed before us a long and very learned report to be sure, in part upon subjects entirely dehors the order of the court, and in other aspects of the same report (I speak it with all respect for the highly intelligent and respectable author of that report,) palpably opposed in my opinion to the rational and just preponderance of the facts stated by the witnesses; a report, in fine, which leaves in all its weight and force, the mischief of withdrawing the trial of the question of nuisance from its proper forum, in which the witnesses could have been confronted and cross examined, and imposes upon the court the task of passing upon the credibility of those whom they have never heard nor seen. Even in matters of minor concernment, I have always been unwilling, whenever the credibility of witnesses was to be tested, to interpose between such persons and the scrutiny of a jury, awakened as it is sure to be by the vigilance of the advocate—where the essential rights and interests of great communities are at stake, I never will do so, unless constrained by irresistible authority.

Recurring now to the first head of enquiry, I contend that the complainant can have no standing here on the ground that this court cannot, as is shewn, both upon the face of the pleadings and upon the proofs, take jurisdiction of this cause. If this court can take cognizance of the cause before us, it must be in virtue of the 2nd section of the 3d article of the constitution, which declares that "in all cases affecting ambassadors, "other public ministers and consuls, and those in which *a state shall be a party*, the supreme court shall have *original* jurisdiction." There is no other provision of the constitution under which original cognizance of this cause by the supreme court can be assumed. Now, to arrive at the just interpretation of this clause of the constitution as fixing that position or interest of the state *as a party*, which alone creates original jurisdiction in the supreme court, it is necessary to settle the import of the word *party* as connected with legal or equitable proceedings. By all correct legal intendment, this term *party* is applicable only to persons sustaining a direct or real interest or right in any pending litigation; an interest or right immediately affected or bound by the issues such litigation involves. This term cannot be extended to persons who may be arbitrarily and irregularly named in proceedings either at law or in equity, the very description of whose relation to the case shall evince a total absence of legal or equitable claims upon the subject of litigation; a total absence too of reciprocal duty or obligation with reference to those whose property, and whose possession and enjoyment of that property are sought to be affected. Whilst courts of justice therefore will enforce the conventing of all whose interest can properly be adjudged, they will repel and even rebuke attempts to assail or even to canvass the rights and interests of others, by those who in effect concede the want of a legal or equitable title in themselves. Courts of justice take no cognizance of *imperfect rights*, or such as may be termed merely moral or incidental, as distinguishable from legal or equitable, even when the existence of the former may be clearly shewn. In this controversy the state of Pennsylvania, admitted to

have no property in or title to the river Ohio within the limits of Virginia, and no property in or title to the steamboats which ply upon that river, is confessedly made use of as a mean under the shelter of her name, of redressing grievances which, if they ever had existence, are injuries to her citizens and to individuals, and the proper and efficient remedy for which is to be found at the suit of those citizens in the courts of the state or of the United States.

The alleged right of Pennsylvania to sue in this case for a diminution of profits from her canals and other works of internal improvement within her own territory, and many miles remote from the Wheeling bridge, had it not been cast into shade by a still greater extravagance disclosed by the record, (her right of ship navigation with top gallant royals all standing,) might have awakened some surprise; but even this tamer and less lofty pretension should fail of the end it has been designed to effect, for it cannot be pretended and is not even intimated in the pleadings in this cause, that those canals and other public works have been obstructed or rendered in any respect less fitted for transportation, or in any way impaired by the erection of the Wheeling bridge beyond her territory, and within that of a separate and independent state. And if the mere rivalry of works of internal improvement in other states by holding out the temptation of greater despatch, greater safety, or any other inducement to preference for those works over the Pennsylvania canals be a wrong, and a ground for jurisdiction here, the argument and the rule sought to be deduced therefrom should operate equally. The state of Virginia, who is constructing a railroad from the seaboard to the Ohio river at Point Pleasant, much farther down that river than either Pittsburg or Wheeling, and at the cost of the longest tunnel in the world, piercing the base of the Blue Ridge mountains, should have the right by original suit in this court against the canal companies of Pennsylvania or against that state herself to recover compensation for diverting any portion of the commerce which might seek the ocean by this shortest transit, to the mouths of her canals on the Ohio or to the city of Pittsburg; and on the like principle the state of Pennsylvania has a just cause of action against the Baltimore and Ohio railroad for intercepting at Wheeling the commerce which might otherwise be constrained to seek the city of Pittsburg. The state of Pennsylvania cannot be a party to this suit on the grounds stated in the bills filed in her name, for the reason still more cogent than any yet assigned, viz: that to permit this would be to render the clause in the constitution relied on in her behalf utterly useless and even ridiculous; would destroy every restriction intended by the enumeration of instances of original jurisdiction, and would confound this clause with another provision of the constitution, designed to cover cases precisely like the one now before the court. If in all instances in which the citizens of one state have cause of action against a citizen or a corporation of a different state, the action can be prosecuted in the name of the state in which the claimant resides, although no peculiar or legal right or cause of action can be shewn in such state sustaining the character of a private suitor, then the restriction as to cases of original jurisdiction is entirely abo-

lished; the defending party too must be entitled to the same right of substitution, and all suits between citizens of different states might by this process be transformed into suits between states, or suits to which states are parties; *cases of original jurisdiction* in this court.

That provision of the constitution designed to embrace controversies between *citizens of different states* is thus annulled, and the jurisdiction of the district and circuit courts transferred as falling within its original cognizance to the supreme court. Such, to my apprehension, appears to be the inevitable result of asserting what are essentially and clearly private rights or interests in the name of a state, or the prosecution of remote, contingent and imperfect interests not amounting to property, though claimed on behalf of a state. I conclude, therefore, that to constitute a state a party in that sense which brings her within the meaning of the constitution, and indeed within the import of the term *party* to a cause by all correct legal intendment, there must be *averred and proved* on her behalf, a certain and direct interest, or an injury, or a right of property—a perfect right—a right which a court of justice can define, adjudge and enforce; and that on the part of the state of Pennsylvania no such right having been averred even, much less established in proof, nothing is shewn which can maintain the jurisdiction of this court in this cause. The shadowy pretext of an interest or injury from the nature of things not susceptible of calculation or estimate, can never be the foundation of a right, legal or equitable. And indeed, so far as any light can be reflected by facts on this pretended or incidental interest of Pennsylvania resulting from any supposed effect upon the tolls on her canals, an actual increase instead of a diminution of those tolls since the erection of the Wheeling bridge is proved.

Passing from this subject of jurisdiction, and supposing it for the present to be vested here, I proceed to examine the pretensions of the complainant as being deducible from, and as guaranteed by the power delegated to congress to regulate commerce between the several states. The existence of that power in its fullest extent, and for every purpose for which it has been delegated to congress, need not be questioned, in order to expose and repel the pretensions advanced for the complainant. On the contrary, the assertion of that power in its greatest latitude, so far as it was ever contemplated by those who gave it, or so far as it can be exercised for useful purposes, carries with it, necessarily, the condemnation of those pretensions. The power to regulate commerce was given to the federal government, whose functions and objects were designed to be general and co-extensive with the entire confederacy, because its duties embrace the equal rights and interests of all the members of the confederacy, and as a mean of the widest diffusion of commercial facilities and intercourse within the powers vested by the constitution. It cannot be rationally concluded, that by a provision palpably intended to protect commerce from unequal or invidious restrictions, the power was given to congress to advance so far towards restriction or monopoly as to limit commerce to particular channels, thereby crippling or wholly preventing its diffusion and activity, and by the same process confer-

ring upon particular points or sections of the country arbitrary and unjust advantages, and riveting upon all those portions affected by such a procedure, loss and even ruin.

Admitting, then, that congress had made any regulation affecting the subjects of this controversy, (and it will hereafter be shewn that they have not done so;) admitting, moreover, that their acts or regulations might fall within the broad language of the power vested by the constitution, it remains still a just and fair enquiry, whether those acts which are arbitrary or oppressive, which defeat the great ends for which the power thus perverted, may have been within the ligitimate scope of the powers alleged in excuse for their performance. In other words, whether congress as a regulator of commerce, would be justifiable in breaking down works of internal improvement within the states, though calculated in their character and tendencies for the diffusion of commerce, and by such destruction limit commerce to particular local points or interests? Common sense and common justice would promptly answer in the negative, and would decide that a rational and proper, nay, the only rational and proper exercise of the regulating power in congress, demands the promotion and protection of such modes and facilities of commercial intercourse, (so far as congress have this power,) as will ensure equality to all, and the widest diffusion of commercial advantage. Surely, then, in the absence of all action on the part of congress, this court should imply no policy or design in that body to fetter or cripple great interests which they are charged with the power and duty to protect. But congress have enacted no regulation whatever in relation to the subject of this controversy; they have not said that bridges should nowhere be erected over the river Ohio; or if erected, what should be their elevation above the water; neither have they declared, upon scientific calculations or upon experiments, or on any data, what shall be the height of the chimneys of steamboats on that river, nor to what degrees, either from their own calculations of improvement in speed, or from fancy or local rivalry, the owners or masters of steamboats on that river may elongate the chimneys of those steamboats. Upon all these matters congress have thus far been perfectly silent. Admitting, then, that the state of Pennsylvania can be regularly before us in the character of a party in interest, this controversy presents to us in truth, simply a comparison between the will and the acts of the parties thereto, and an appeal to this court in the absence of all action by congress—by some rule which it must deduce from the common law of nuisance, to decide upon the comparative merits or demerits of the parties—to decide whether the benefits produced by the Wheeling bridge to the surrounding country, and by its connection with extended lines of travel and commerce, can save it from the character of a nuisance. Or whether its interference in certain stages of water with the chimneys of seven steamboats owned by private individuals, the height of whose chimneys is a subject of much contrariety of opinion, both amongst scientific men and practical builders and captains of steamboats, can so constitute it a public nuisance, and a cause of such direct injury to the legal rights and interests of Pennsylvania, as to justify its abatement by this court.

In the absence of all action by congress in relation to this matter, in the only legitimate mode in which congress could affect it, viz: by commercial regulation, or by some express statutory declaration, the act of one of these parties in the prosecution of their interests must claim intrinsically equal authority with the acts of the other, except so far as they may have some common arbiter by whom both may be controlled. In this case, that arbiter would seem to be either the local sovereignty (the state of Virginia) within whose territory the alleged nuisance is situated, or the United States, through some enactment for the regulation of commerce; but neither of these authorities is invoked in this controversy. We have here a suit in the name of Pennsylvania occupying the position of every private suitor, asking the action of this court upon general common law jurisdiction over the subject of nuisances, which jurisdiction the courts of the United States do not possess. Nor is it enough to draw within our cognizance the subject of this cause to affirm merely the competency of congress to legislate upon it, and to refer its decision if they choose to the federal courts. I ask upon what foundation the courts of the United States, limited and circumscribed as they are by the constitution, and by the laws which have created them and defined their jurisdiction, can, upon any speculations of public policy, assume to themselves the authority and functions of the legislative department of the government, alone clothed with those functions by the constitution and laws, and undertake of their mere will to supply the omissions of that department? Is it either in the language or theory of the constitution that this court shall exercise such an auxiliary or rather guardian and paramount authority? Cannot the legislative department of the government be entrusted with the fulfillment of its peculiar duties? Such an act as this court has been called upon to perform—such an act as it has just announced as its own, is in my opinion virtually an act of legislation, or in stricter propriety, (I say it not in an offensive sense,) an act of usurpation. To rest our authority to adjudicate this matter on the naked proposition just stated, would be to reject the doctrine by this court heretofore most expressly ruled. The case of Wilson *vs.* The Blackbird Marsh Creek Company, 2 Pet., p. 245, seems to be conclusive upon this point. This case presented an instance of an *absolute* obstruction by a dam of a water course navigable by vessels of considerable size, and in which the tide ebbed and flowed. The person who undertook to destroy or injure the dam constructed across this navigable water, was the master of a vessel *regularly licensed and enrolled according to the navigation laws of the United States;* and being sued for a trespass committed in breaking or injuring the dam, he pleaded in justification of his act, the character of the navigable water as a public and common highway for all the citizens of the particular state and of the United States to sail, pass and repass over, through and upon, at all times of the year, at their own free will and pleasure.

Upon comparing this case with the one before us, it is impossible not to perceive, that in many of their capital features they are strikingly similar; may indeed be regarded as identical. In the former case as in this, the water course said to be obstructed was a navi-

gable water; in that case as in this, the *locus in quo* was within the jurisdiction of a state, and the alleged obstruction in each instance an act of state legislation, in exercising the power of internal improvement: in each instance, the right of passage to the extent and in the manner claimed, freely and at will *usque ad coelum*, was in virtue solely of license and enrollment according to the navigation laws of the United States. Now, what said this court upon the aforegoing state of the pleadings and evidence? "If congress," said they, "had *passed any act* which bore upon the case; any act in execution of the power to regulate commerce, *the object of which was to control state legislation* over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states, we should feel not much difficulty in saying that a state law, coming in conflict with such act, would be void. But congress has passed no such act. The repugnancy of the state law to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question. We do not think that the act empowering the Blackbird marsh creek company to place a dam across the creek can, under the circumstances of the case, be repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." This decision at once puts to flight the pretext for interference here to protect and enforce the duties and functions of congress, and equally exposes the fallacy that the grant of a coasting license, of a mere certificate of the domicil of the vessel bearing it; of evidence *prima facie*, of her capacity or tonnage, or of her exemption from suspicion of smuggling or piracy, is a regulation of commerce over every inch of the waters over which in her various excursions she may pass. Just as cogent and tenable is the argument, if argument it deserves to be called, which affirms that the establishment of Pittsburg as a port of entry, its mere designation as a point at which merchandize may be landed, subject to the revenue laws of the United States, is a positive declaration by congress, prescribing the modes of the transportation of such merchandize thither, and defining what shall be held to be an interference with such transportation. Equally, or rather more unsound and untrue is the position, that by the same designation of Pittsburg, congress have declared that vessels propelled by wind or steam, vessels of the greatest capacity, carrying masts or chimneys of illimitable height, *shall* navigate a river, whose ordinary *regimen*, to adopt a term in this record, scarcely affords a channel broad or deep enough for the tacking of a shallop, and for long periods of a few inches only in depth. This attempt from the mere designation of a port of entry, to bring home to congress the absurdities the argument implies, would ascribe to them a practical wisdom much upon a parallel with that of the despot who attempted to confine the Hellespont in fetters, or of him who forbade the approach to him of the ocean tide.

But congress have in truth enacted nothing in relation to the particular subject in issue in this controversy; and we have seen in the explicit declaration of this court in the case from 2 Peters, that not only

must there be some positive enactment by congress, but an enactment "the object of which *was to control state legislation* over those navigable creeks into which the tide flows." But again—it has been asserted in justification of the power claimed by the majority of the court, that congress, by adopting the act of the Virginia legislature of December 18, 1789, authorizing the erection of Kentucky into a state, have fully regulated the navigation of the Ohio river. And how is this position sustained by facts? By the 7th section of her act of 1789, Virginia declares that so far as her own territory and that of the proposed state shall extend upon the Ohio, the navigation of that river shall be free for all the citizens of the United States. Congress, by an act passed February 4th, 1791, containing two sections only, (vid. Stats. at Large, vol. 1, p. 189,) *consents* by the 1st section to the proffer of Virginia of the creation of the new state; and by the 2d section, declares, that on the 1st day of June following, the new state, by the name of Kentucky, shall be admitted a member of the Union. These two sections comprise the entire action of congress, from which the position that has been asserted by the majority of the court is deduced. Let us try the integrity of this position by reducing it to the form of a syllogism. The major of that syllogism will consist of the fact, that Virginia, by her law of 1789, has agreed that she and the newly proposed state will permit the navigation of the Ohio within their respective limits, to all citizens of the United States. Its minor is this; that congress have assented to the permission so declared: the conclusion attempted to be deduced is, *ergo* congress by that *assent* have completely regulated the navigation of the Ohio, and by inevitable implication ordained, that bridges shall never be thrown across that river, except in absolute subordination to the interests or the will of the owners of steamboats upon that river. This may possibly be logic, irrefragable logic; and the failure to comprehend its consistency may arise from the infirmity of my own perceptions, but I cannot help suspecting that an acumen far surpassing any to which I will lay claim would be puzzled to reconcile this process with the laws of induction as prescribad by Watts, by Duncan or by Kaims.

The next enquiry naturally arising in this case—an enquiry inseparably connected with the alleged obstruction by the Wheeling bridge as constituting it a nuisance or otherwise—an enquiry equal in magnitude of interest with any other involved—relates to the policy and effects of commercial regulations, as these may tend either to the restriction of commerce within particular channels, or to supplying auxiliaries for its prosecution, or for the promotion of its activity and diffusion by increased facilities, operating a just equality of right and competition and advantage to all. And here it may be premised, that throughout the discussion of this cause, a reigning fallacy has been assumed and urged upon the court—a fallacy which, if successful, may subserve the grasping pretensions of the plaintiff, but which, by an enlightened view of this case, must be condemned as destructive to the extended commercial prosperity of the country.

The error assumed as the basis of the plaintiff's pretensions is this, that commerce can be prosecuted with advantage to the country only

by the channels of rivers, and in all the country intersected by the western rivers, only through the agency of steamboats; and hence is attempted the deduction in favor of the paramount privileges of steamboats, and the right claimed for this species of commercial vehicles for exemption from any limit upon the interests or the fancies of those who may own or manage them. It has been a curious and somewhat amusing incident in the argument of this cause, that whenever any restraint upon the management of steamboats (on the Ohio) was intimated, (as necessary for the protection of other essential rights both public and private) the fixed reply of the advocate in opposition has been, that COMMERCE demands these peculiar privileges in the owners and masters of steamboats. An obvious and stricter propriety of argument would have suggested for that reply the following language: Steamboat proprietors, local monopoly, and the peculiar views of interest real or imaginary of the plaintiff, supply the true origin and character of the pretensions here urged: commerce, enlightened, extended, fair, equal, prosperous and beneficial, condemns all such pretensions; she demands that freedom, fairness, competition and equality, which are the true, and only true causes of her prosperity; and which the equalizing power vested by the constitution was designed to ensure.

Commerce in its infancy is of necessity chiefly confined to the channels of water courses. Weakness, poverty, or the absence of art or science, are unable in the earlier stages of society to supply more eligible or efficient modes for its prosecution, or to overcome the difficulties attendant on transportation off the water. Hence we see the rude essays of commerce commencing with the raft, the canoe, or the batteau; but as wealth and population, science and art advance, we trace her operations to the magnificent ship or steamboat, each adapted to its proper theatre. Does not this very progress and the advantages which are their concomitants, glaringly expose the folly and injustice of all attempts at the restriction of commerce to particular localities, or to particular interests, or means of circulation? Are her operations to be confined to a passage up and down the channels of water courses impracticable for navigation for protracted periods, and whose capacity is always dependent on the contributions of the clouds, *aviditas coeli aut niminus imber?* Would not such a narrow policy be a proclamation to commerce, inhibiting her advancement; and to the hundreds of thousands situated without her permitted track, that the wealth, the luxuries and comforts of civilization and improvement, if to be enjoyed by them at all, are *to* be obtained only at far greater expense and labor, and in an inferior degree than they are enjoyed by more favored classes?

These positions are strikingly illustrated by the experience of our own times, and indeed of a very brief space. Thus, notwithstanding the high improvement in navigation by steam and by sails, which seems to have carried it to its greatest perfection, we see the railroad in situations where no deficiency of water and no artificial or natural obstruction to vessels exists, or is complained of, stretching its parallel course with the track of the vessel, tying together as it were in close

contiguity, and connecting in habit and sympathy and interest, remote sections of our extended country, which for any aid that the navigation on our rivers could afford, must ever remain morally and physically remote. The obvious superiority of the railroad, from its unequaled speed, its greater safety, its exemption from dependence upon wind or on depth of water, but above all, its power of linking together the distant and extended regions interposed between the rivers of the country; spaces which navigation can never approach, must give it a decided preference in many respects to every other commercial facility, and cause it to penetrate longitudinally and latitudinally, *longe et late*, the entire surface of the country, unless arrested in its progress by the fiat of this court: for once let it be proclaimed that the rivers of this country shall under no circumstances of advantage to the country be spanned by bridges, at the trivial inconvenience and cost of adapting to their elevation the chimneys of a few steamboats, even if the height of those chimneys had been clearly shewn to be necessary or certainly advantageous, (a problem nowhere solved in this record;) let this I say be proclaimed, and the effect above mentioned is at once accomplished: the rapidly increasing and beneficial system of railroad communication is broken up, and a system of narrow local monopoly and inequality sustained. Whether these things shall now be done—whether for these purposes the citizens of this country shall be restrained in their social and business relations, and so restrained under the abused and perverted name of commerce—are the questions which this court have been called on to decide, and which in my view they have affirmatively ruled. They are questions too grave, too pregnant with vital consequences, to have been decided upon the speculations of any one man living.

It was with the view doubtless of giving plausibility to the conclusion of the commissioner, or to the strange idea sought to be enforced in argument for the complainant, that commerce signified only a passage up and down the Ohio, that so large a portion of the commisioner's report is taken up in treating *in learned phrase* of the *dynamic* and *static* capabilities of the Wheeling bridge; or translated into plain English, the capabilities of that bridge to sustain heavy bodies in motion and at rest. It does not seem very easy to reconcile this part of the report with the order appointing the commissioner, and prescribing his duties. That order directed the commissioner to ascertain and report whether the Wheeling bridge was in his opinion an obstruction to commerce upon the Ohio; and in the event that he should so regard it, to suggest any alterations by which such obstruction might be remedied.

The *dynamic* or *static* capabilities of the bridge, introduced to our notice with some parade of learning, whether it could support *any* weight either in motion or at rest, were subjects altogether dehors the order of this court, and without the warrant and powers of the commissioner. And this difficulty is in no degree lessened by the fact disclosed in the record, that whilst the commissioner wandered beyond his commission to pronounce upon the capabilities of the bridge for railroad transit, he rejected all the evidence tendered by the de-

fendants to prove the usefulness and importance of the bridge, either to the local population or as a public and commercial facility. This irregularity in the commissioner is of no small significance, as it betrays a bias on his part, however honest, which led him to throw the weight of his opinion against the usefulness of the bridge—a fact entering essentially into its character as being a nuisance or otherwise, and to withhold from this court evidence by which the value of his opinion might have been tested with precision. This same irregularity should have had its effect in warning this court to scrutinize the opinions of the commissioner on matters falling regularly within the scope of his commission. The evidence received and that rejected on this particular point, were perhaps both inadmissible under the terms of the order of this court; but surely it should have been either wholly admitted or rejected on both sides.

And this brings me to the last branch of enquiry which I have proposed to treat, viz: the character of the erection complained of, the regularity of the mode of redress proposed, and the right of the complainant to claim the interference asked for in any mode? First, then, can the Wheeling bridge, according to any correct acceptation of the term, be regarded as a nuisance? This enquiry is answered by the solution of another, which is simply this: Is that bridge injurious to the rights and interests of the public or of individuals, beyond the benefits that its erection confers on both? Common sense and consistency assure us, that to pronounce that to be a wrong and an injury which is in reality beneficial, involves a plain absurdity; and the language of legal definition fully sustains this conclusion of common sense; for, according to such definition, there must be the hurt, the *nocumentum*, the *commune nocumentum*, the injury to the public right, to constitute it a public nuisance; for admitting the fact of injury by any act, still, if in its origin, character and extent it is essentially private, it may be trespass or some other form of injury, but not the public offence of nuisance. This position implies no denial of the right to shew a private injury resulting from a public nuisance; it insists only upon the necessity of shewing, where special or private injury is alleged as flowing from a nuisance, that nuisance in reality exists. This forces back upon us the enquiries into the nature of the offence of nuisance; and when ascertained, against what public authority it has been committed? I have said, that upon the plainest principles of common sense, no act in reference to the public, by which a public benefit is conferred, can be denominated a nuisance, and I insist that the rules and conclusions of the law are in accordance with this proposition. These are forcibly stated in the case of the King *vs.* Russell, 6 Barn. & Cress., particularly by Bayley, Justice, beginning at page 593 of the volume. That was the case of an indictment for a nuisance by the erection in the river Tyne of a peculiar wharf or staging called giers or *staiths*, for the purpose of loading coal on board ships in the Newcastle trade. The questions before the King's Bench arose upon the charge of Bayley, Justice, who tried the case at Nisi Prius, where his charge concluded in the following terms: "Thus, gentlemen, I apprehend I have pointed out to

you the true ground on which your verdict is to be founded. If you think this (that is the wharf or staith) is placed not on a reasonable part of the river, that it does an unnecessary damage to the navigation, or that this is not of any public benefit, or that the public benefit resulting from it is not equal to the public inconvenience arising from it, then you will find a verdict for the crown; if on these points you are of a different opinion, then for the defendants." This charge of Sir John Bayley was sustained in bank.

The reasoning in support of that charge by that able judge, is given more at length than can be conveniently inserted here, but it presents a commentary upon this question so lucid, so entirely conclusive, that I cannot forbear to extract a portion of it, as illustrating much better than I have power to do, the doctrines for which I contend. "I submitted," says Sir John Bayley, (page 594,) "to the consideration of the jury, that if by means of these staiths, an article of great public use found its way to the public at a lower price, and in a better state than it otherwise would, I thought these were circumstances of public benefit, and points they might take into their consideration upon that head; and upon the best attention that I have been able to give the subject, I am bound to say I continue of that opinion. The right of the public upon the waters of a port or navigable river is not confined to the purposes of *passage*—trade and commerce are the chief objects, and the right of passage is chiefly subservient thereto. Unless there are facilities for loading and unloading of shipping and landing, much of the public benefit of a port is lost. In the infancy of a port, when it is first applied to the purposes of trade and commerce, unless the water by the shore be deep, the articles must be shipped in shallow water from the shore, and landed in shallow water on the shore. Breakage, and pilferage, and waste, besides the expense of boating, are some of the concomitants of such a mode. As trade advances, the inconvenience and mischief of this mode are superseded by the erection of wharves and quays, and what is perhaps an improved species of loading wharf, *a staith*. But upon what principle can the erection of a wharf or staith be supported? It narrows the right of passage. It occupies a space where boats before had navigated. It turns part of the water way into solid ground; but it advances some of the purposes of a port, its trade and commerce. Is there any other legal principle upon which they can be allowed? Make an erection for pleasure, for whim, for caprice, and if it interfere in the least degree with the public right of passage, it is a nuisance. Erect it for the purpose of trade and commerce, and keep it applied to the purposes of trade and commerce, and subject to the guards with which this case was presented to the jury, the interests of commerce give it protection, and it is a justifiable erection and not a nuisance." In accordance with this doctrine, has the law been propounded by the supreme court of New York in the case of the People *vs.* The Ransselaer and Saratoga Railroad Company, reported in the 15th of Wendell, page 113. That was a prosecution against the company for placing abutments and piers in the bed of the Hudson river, and erecting a bridge across it, being a public navigable river. In deli-

vering the opinion of the court the law of the case is thus stated by Savage, chief justice, pp. 132, 133 of the volume above mentioned. "I think I may safely say, that the power exists somewhere to erect bridges over waters which are navigable, if the wants of society require them, provided such bridges do not essentially injure the navigation of the waters they cross. Such power certainly did exist in the state legislatures before the delegation of power to the federal government by the federal constitution. It is not pretended that such a power has been delegated to the general government, or is conveyed under the power to regulate commerce and navigation; it remains then in the state legislatures, or it exists nowhere. It does exist, because it has not been surrendered any further than such surrender may be qualifiedly implied, that is, the power to erect bridges over navigable streams must be so far surrendered as may be necessary for a free navigation upon those streams. By a free navigation must not be understood a navigation free from such partial obstacles and impediments as the best interests of society may render necessary."

In conformity with the doctrines above quoted, and in support of the views here contended for, I might confidently appeal to the language of the judge by whom the decision of this court has just been announced, on another occasion most explicitly and emphatically declared. Thus, in the case of Palmer *vs.* The Commissioners of Cuyaga County, which was an application for an injunction to prevent the construction of a draw bridge over the Cuyaga river, upon the ground that it would obstruct the navigation of the river, that judge in refusing the application, announces the following as I conceive unanswerable conclusions: "A toll charged for the improvement of the navigation, would not be a tax for the use of the river in its natural state, but for the increased commercial facilities. A draw bridge across a navigable water is not an obstruction. As this would not be a work connected with the navigation of the river, no toll it is supposed could be charged for the passage of boats. But the obstruction would be *only momentary*, to raise the draw; *and as such a work may be very important in the general intercourse of the community, no doubt is entertained*, as to the power of the state to make the bridge. It is one of those general powers possessed by a state, for the public convenience, and may be exercised, provided it does not infringe upon the federal powers." These positions require no comment from me—they commend themselves by their obvious propriety and reasonableness. I would simply remark in connection with these positions, and as warranted by them, that any obstruction by the Wheeling bridge is of course contingent and not certain; that even were it *certain*, under the present elevation of the bridge, this difficulty might be prevented, at a comparatively small expense and inconvenience, by lowering when necessary the chimneys of a few steamboats for the purpose of safe and speedy passage—that this operation, like the raising of a draw, would *be only momentary*—and as, to use the language of the judge, the Wheeling bridge "may be a work of great importance in a general intercourse," no doubt is entertained as to the power of the state to make the bridge. It will be admitted, I presume, that the Ohio can

claim no higher privileges than those appertaining to other navigable rivers.

It follows, then, from these adjudications, not less than from the principles of common sense, that the conclusion, nuisance or no nuisance, is dependent solely upon the character of the act complained of as being noxious or beneficial to the public, and that the ascertainment of that character where it is doubtful upon the circumstances, or where it is positively *denied*, is regularly an investigation of fact to be made and settled except under circumstances of peculiar urgency, by the established proceeding of the common law in relation to all questions of fact, a trial by jury. This is the doctrine of Lord Hale in reference to this very subject of obstructions in navigable waters, as quoted from his Treatise *De Portubus*, where it is said by that venerable judge, that "the case of building into the water where ships or vessels might formerly have ridden, whether it be nuisance or not nuisance, is a question of fact." I will not here deny, nor is it necessary in any view to deny, that a court of equity will prevent by injunction the creation of a private injury in the nature of a nuisance, or the continuation of such an injury in a case proper for its jurisdiction. Thus, where an individual or private person is about to perform an act, or has performed an act, which is palpably and notoriously in its character a nuisance, from which private and *irreparable injury* will ensue to others, or has accrued to others, and will continue, a court of equity, upon the admitted or notorious character of the act from which the private injury is shewn to proceed, and from the irreparable character of that injury, will interpose by injunction to relieve the party injured. Such is the principle ruled by Lord Eldon in the case of the Attorney General *vs.* Cleaver, 18th Vesey 211; which was upon an information by *private persons* for private injury, though in the name of the attorney general; and by the same judge in the case of Crowder *vs.* Tinkler, in the 19th Vesey 616. Such, also, I understand to be the rule laid down by this court in the case of the City of Georgetown *vs.* the Alexandria Canal Company. These cases all proceed upon the grounds of the ascertained character of the act complained of on the one hand, and of the private and irreparable nature of the injury shewn on the other.

This is as far it is believed as the courts of equity have ever proceeded. They have never said that where the act complained of was dubious in its character, as being a nuisance or otherwise, and where that fact was a matter of contestation, they would assume jurisdiction *a priori*, or without sending the question of nuisance to be tried at law, but have ruled the reverse of this; and in the cases just quoted from Vesey, Lord Eldon declared that he would not decide those cases until the equivocal or contested fact was settled at law. Again, it is ruled in the cases above quoted; and in many others which might be adduced, that although the courts of equity will, in order to prevent *irreparable* private injury, interpose by way of injunction, that where the *abatement* of a *public nuisance* is the purpose in view, as that is an offence against the government, the attorney general must be a party to any proceeding for such a purpose. In this case the act complained

of, if a nuisance, is a public nuisance, and is so denominated upon the record, and by the decision of the majority. Its character, however, as a nuisance in any sense is denied, and much testimony has been taken by both parties upon this contested question. The interests of Pennsylvania, who stands here in the relation of a private suitor, and the alleged injury to her private interests, are the sole foundation on which she has sought here the abatement of what she has asserted to be a *public* nuisance. And without the participation of any representative of the sovereignty either of the state or federal government—without the agency of the attorney general of the state or of the United States—without the reference to a jury of any of the contested facts of this case—this court in the professed exercise of original equity jurisdiction, upon affidavits, and upon the opinion of a single individual who has been by this court constituted the arbiter of all questions of public policy, of law, of science, and of art, and of the competency and credibility of all the testimony in the case, have decided upon the act complained of with reference to its influence upon the rights and powers both of the United States and upon the local sovereignty; upon the rights and interests of the complainant in the matter in controversy, and upon the extent of the injury, if any, done to those interests. They have upon the same grounds, and in the like absence of the legal representative of either the state or federal sovereignty, directed a great public work, disapproved by neither of those sovereignties, and by one of them expressly authorized and approved, to be in effect demolished.

I do not deem it necessary, if it were practicable, to examine here in detail the cumbrous mass of statement and speculation heaped together on this record. Such a task is not requisite in order to test the accuracy of the decision pronounced in this case, or to sustain the objections to which that decision is believed to be palpably obnoxious. Both these objects appear to me to be attained by regarding the character of the case as described by the plaintiff herself, and the nature and manner of the proceeding adopted by the court as a remedy for the case so presented. I will give succinctly, however, the results to which, in my view, the court should have been led by the facts of the case, and to which an industrious examination at least of the testimony has conducted my mind. Before this, however, I must be permitted to point out a striking inconsistency between the alleged ground of jurisdiction in this cause as set forth in the pleadings, and the conclusion to which the court has been carried, and the reasons they have assigned for their conclusion.

It will be remembered, that the ground of jurisdiction insisted upon in this case, is the injury alleged to have been done to the *state of Pennsylvania*, as a private suitor—*her peculiar interest alone* and none other—for none other could give jurisdiction to this court under the constitution—yet nothing is more obvious than that the whole argument of the court is founded upon the injury inflicted by the bridge upon the owners of certain steam packets, and upon the trade of Pittsburg. Calculations are gone into at length, to shew what number of passengers and what amount of freight are carried by these particular

packets—how much they would lose by being deprived of this business, or by being subjected to the inconvenience and cost of lowering their chimneys, and how much the business of Pittsburg would be injured by the obstruction complained of. Thus the true character of this cause is betrayed in the very argument and conclusions of the court. The name and alleged interests of Pennsylvania as a *private suitor*, are used to draw to this court jurisdiction of this cause; but no sooner is that jurisdiction allowed in the name of Pennsylvania, than she, and any peculiar or corporate interests she was said to possess, are at once lost sight of, and those of the steamboat owners, and the local interests of Pittsburg alone are enforced.

The results above alluded to are as follows: 1st. That the conflicting opinions of those who have been called as men of science to testify in this cause, establish nothing conclusively, much less ascertain the theory contended for, that for purposes of economy, of rapid combustion of fuel, or for the generation and escape of steam, an extraordinary height of chimney is necessary; but leave it doubtful whether the elongation of chimneys beyond a certain altitude, is not calculated to retard the escape of heated air and smoke, and also to cause inconvenience and danger to the boats that carry them. 2nd. That amongst the practical men, consisting of those who have experience in constructing boats, and boilers, and other steamboat machinery, and also in commanding steamboats on the western rivers and elsewhere, the preponderance for several reasons mentioned by them is against the extraordinary height of chimneys. 3rd. That the cost incident to such a construction of chimneys (supposing this great altitude to be advantageous) as to admit of their being lowered, and the delay and hazard of lowering them, are subjects of minor import; have been greatly exaggerated in the statements of some of the witnesses, and should not be weighed in competition with an important public improvement, itself a valuable and necessary commercial facility, and cannot convert such a work into a public nuisance, or in any correct sense an obstruction to navigation. 4th. That the commissioner erred in yielding to speculation and theory, rather than to practical knowledge and experience, and to the statements of witnesses in some instances whose local position was calculated, though it may have been honestly and unconsciously, to influence their feelings and their judgments.

With regard to the right of the plaintiff to ask the abatement of the Wheeling bridge as a nuisance, by *any mode* of proceeding, I will here add another remark which has in some degree been anticipated in preceding views in this opinion; and it is this: A nuisanse, to exist at all, and emphatically a public nuisance, must be an offence against the *public*, or more properly against the *government or sovereignty within whose jurisdiction it is committed*. In the case before us, that sovereignty and that jurisdiction reside either in the commonwealth of Virginia or in the federal government. If in the former, she has expressly sanctioned the act complained of, consequently no nuisance has been committed with respect to her. If the sovereignty and jurisdiction be in the United States, it is a *limited and delegated sovereignty*, to be exerted

in the modes and to the extent which the delegating power has prescribed. There can be no other in the government of the United States, none resulting from the principles of the common law, as inherent in an original and perfect sovereignty. There then can be no nuisance with respect to the United States, except what congress shall in the exercise of some constitutional power declare to be such; and congress have not declared an act like that here complained of, to be a nuisance. Upon the whole case, then, believing that Pennsylvania cannot maintain this suit as a party by any just interpretation of the 2nd section of the 3rd article of the constitution vesting this court with original jurisdiction—believing that the power which the majority of the court have assumed cannot in *this case* be correctly derived to them from the competency of congress to regulate commerce between the several states—believing that the question of nuisance or no nuisance is intrinsically a question of fact, which when contested ought to be tried at law upon the circumstances of each case, and that before the ascertainment of that fact, a court of equity cannot take cognizance either for enjoining or abating an act alleged, but not proven to be nuisance—seeing that the commonwealth of Virginia within whose territory and jurisdiction the Wheeling bridge has been erected, has authorized and approved the erection of that bridge, and the United States, under the pretext of whose authority this suit has been instituted, have by no act of theirs forbidden its erection, and do not now claim to have it abated—my opinion, upon the best lights I have been able to bring to this case, is, that the bill of the complainant should be dismissed. From these convictions, and from the sense I entertain of the almost incalculable importance of the decision of the majority of the court in this case, I find myself constrained solemnly to dissent from that decision.