

THE STATE OF PENNSYLVANIA V.  
THE WHEELING AND BELMONT BRIDGE  
COMPANY, AND OTHERS

HEADNOTE

by Ross E. Davies

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Additional information: This opinion, together with the arguments of counsel and some exhibits, was privately published in a pamphlet in Philadelphia in 1849 and is reproduced in its entirety here. We are grateful to John D. Gordan, III of New York City for bringing this opinion to our attention and sharing his copy with us. The first page of the pamphlet is a cover of a sort, with the caption in large and elaborate type, and a set of headnotes in small type. This is followed by a lengthy report by an unnamed reporter that includes the posture of the case, arguments of counsel – by two pillars of the bar, Edwin M. Stanton for Pennsylvania and John Cadwalader (a name sometimes also spelled “Cadwallader,” as it is in this report) for the Wheeling and Belmont Bridge Co. – and a variety of documents (or excerpts of them) relating to the case. The pamphlet concludes with Justice Grier’s opinion, which opens with headnotes worded slightly significantly from those on the cover. See ELIZABETH BRAND MONROE, *THE WHEELING BRIDGE CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND TECHNOLOGY* 50-55 & 196 n.65 (Northeastern University Press 1992); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 4 Rapp 1565 (1854) (Grier, J., in chambers). For ease of reading, some typograph-

ical flourishes and other design features of the pamphlet not related to the content of the reported materials have not been re-created here.

## OPINION

*In the Supreme Court of the United States, in vacation.*

THE STATE OF PENNSYLVANIA

vs.

THE WHEELING AND BELMONT BRIDGE COMPANY AND OTHERS.

*Motion for Injunction before Mr. Justice Grier.*

On the sixteenth of August, at the Court Room of the Circuit Court of the United States, in the City of Philadelphia, before Mr. Justice Grier, one of the Judges of the Supreme Court of the United States, Mr. Stanton appeared to move for an injunction in behalf of the State of Pennsylvania, at the instance of her Attorney General, against the Wheeling and Belmont Bridge Company, and their agents, William Ottison and George Crofts.

Notice of the motion was given on the 28th of July. At the same time a copy of the Bill was served upon the defendants. The Bill stated, among other things, —

“That the Ohio river being one of the navigable waters leading into the Mississippi, is, and for a long time hath been, an ancient navigable public river, and common highway, free to be navigated by the citizens of the state of Pennsylvania, as well as by all other citizens of the United States. That heading at Pittsburgh, in the state of Pennsylvania, and running through that state for the distance of fifty miles, navigable for its whole extent from Pittsburgh to its mouth, many citizens of that state long have been, and of right were, and still are accustomed to navigate said river, to pass and repass along its course and channel unobstructed, and at pleasure, with their steamboats transporting passengers in great numbers, carrying large quantities of freight, and conducting a valuable trade and commerce between the city of Pittsburgh, in the state of Pennsylvania, and the ports of Cincinnati, Louisville, St. Louis, New Orleans, and many other places on the Ohio and Mississippi rivers and their branches.

“That the defendants are erecting a bridge one hundred miles below Pittsburgh, across the channel of the Ohio river, between Zane’s island

and the main Virginia shore or bank at Wheeling. That this bridge will hinder and prevent the passage of citizens of the state of Pennsylvania along said river under said bridge, with their steamboats, as they are commonly accustomed to do, and will obstruct navigation of the Ohio river. That it will interrupt, hinder, and disturb the citizens of the state of Pennsylvania in their lawful use and enjoyment of the Ohio river as a common highway in passing and repassing the same, will increase the difficulty, hazard, and expense of navigating it with their steamboats carrying passengers and freight as they have been accustomed, and are now doing, and have right to do; and will interrupt, diminish, and greatly disturb the trade, commerce, and business of the citizens of Pennsylvania over and upon said river, and between the city of Pittsburgh, and other ports on the Ohio and Mississippi rivers and their branches; to the great damage and common nuisance of the citizens of Pennsylvania, as well as of other citizens of the United States, and to their irreparable injury."

It also stated that the bridge was erected under colour of an Act of the Virginia General Assembly, which provides, "If the said bridge, mentioned in the eight section of this act, shall be so erected as to obstruct the navigation of the Ohio river in the usual manner, by such steamboats and other crafts, as are now commonly accustomed to navigate the same, when the river shall be as high as the highest floods heretofore known, then, unless upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last mentioned bridge may be treated as a public nuisance and abated accordingly." That steamboats were accustomed to navigate the river requiring a space of eighty feet above the water surface, and that the flood of 1832 was 44½ feet above low water level, usual spring floods being 35 feet, and that the bridge was to be only 93½ feet above low water level at its eastern end, and 62 feet at the west end.

It was also stated, by way of amendment, that the State of Pennsylvania owned and possessed certain valuable public improvements of canals and railways for the transportation of passengers and goods, constructed at great expense, for channels of commerce, to connect the waters of the Delaware river with the Ohio at Pittsburgh, and the waters of Lake Erie with the Ohio at Beaver. That from the transportation of passengers and goods along these works, she was accustomed to receive large tolls and revenue. That these works terminated at and are constructed with direct

reference to the free navigation of the Ohio river. That the goods and passengers transported to and from those ports upon her improvements, were accustomed to arrive and depart in steamboats along the Ohio river; and that the Wheeling Bridge would so obstruct navigation of the river as to cut off the trade and business along the public works of Pennsylvania, impair and diminish her tolls and revenue, and render her improvements useless.

The bill prayed injunction and general relief.

With the bill were filed exhibits, viz.:

1. The Act of incorporation by the General Assembly of Virginia, under which defendants claim right to erect the bridge.

The charter contains this clause.

“If the said bridge mentioned in the eight section of this act, shall be so erected as to obstruct the navigation of the Ohio river in the usual manner by such steamboats, and other crafts as are now commonly accustomed to navigate the same *when the river shall be as high as the highest floods heretofore known*, then unless upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last mentioned bridge may be treated as a public nuisance and abated accordingly. [Editor’s note: There should be quotation marks here.]

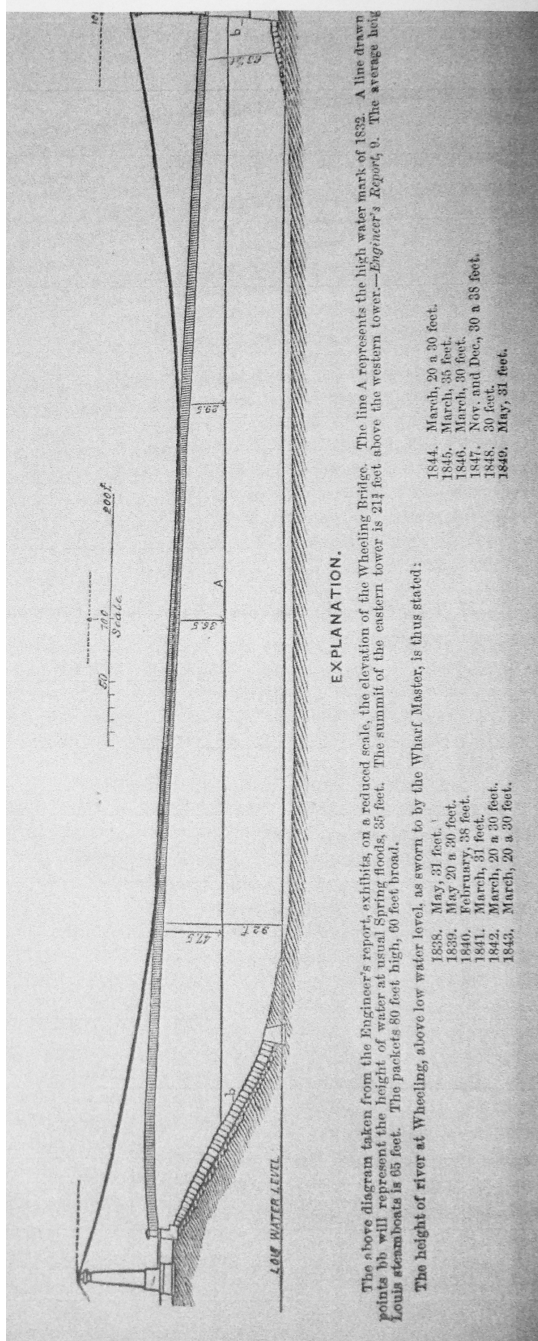
2. A Report of the engineer of the Bridge Company.

According to this report the bridge is to be constructed as represented in the annexed diagram. The bridge is represented to be 92 feet at the water’s edge, above the low water line, on the Wheeling side, and on the island side 62 feet, deflecting from the water’s edge at Wheeling to the island at the rate of 4 feet in 100.

The report also states that the flood of 1832, was 44½ feet above the low water level.

A supplemental bill was also exhibited by Complainant’s counsel, setting forth that since the preparation of the original bill and service of notice, the defendants had proceeded with their work, and had stretched iron cables across the channel of the river so as to obstruct navigation. It prayed that these might be abated, and for relief, as in original bill.

Mr. Cadwallader, for defendants, objected to the supplemental bill being read, on the ground that notice of it had not been given, nor copy served.



EXPLANATION.

The above diagram taken from the Engineer's report, exhibits on a reduced scale, the elevation of the Wheeling Bridge. The line A represents the high water mark of 1832. A line drawn points to will represent the height of water at the summit of the tower, 213 feet above the western tower.—*Engineer's Report, v.* The average height of the river at Wheeling, above low water level, as sworn to by the Wharf Master, is thus stated:

- 1838. May, 31 feet.
- 1839. May 20 a 39 feet.
- 1840. February, 38 feet.
- 1841. March, 31 feet.
- 1842. March, 20 a 40 feet.
- 1843. March, 20 a 39 feet.

- 1844. March, 20 a 30 feet.
- 1845. March, 35 feet.
- 1846. March, 31 feet.
- 1847. Nov. 11, 30 a 35 feet.
- 1848. 30 feet.
- 1849. May, 31 feet.

Mr. Stanton replied, that notice and service of copy was unnecessary. Copy of the original bill was furnished *ex gratia*, being required by no rule. He cited the Cherokee case.

*Mr. Justice Grier.* The supplemental bill may be read.

The Complainant's counsel then offered to read affidavits in support of the bill, to which defendants' counsel objected on the ground that they were now ready to file their answer, and that it could not be contradicted by affidavits.

This objection was overruled on the ground that, although the statute required notice to be given to the defendants of the application for an injunction, yet the proceeding before a single judge was in its nature *ex parte*, and the complainant has a right to proceed in the usual way, and the defendants would afterwards be permitted to read their answer, which should then have its due and legal effect, *valeat quantum valeat*; that the answer not being actually on file, the judge was not bound officially to know that there was one, especially as the subpoena had not yet issued; and although it is the universal practice in the English courts of chancery to dissolve and to refuse to renew an injunction which has been granted *ex parte* on the coming in of the answer, provided the answer denies the circumstances on which the equity of the bill is founded, and not to receive affidavits to contradict the answer; yet the judge did not think it proper to receive the answer in that state of the proceedings to anticipate the complainants' case, in a proceeding in its nature *ex parte*, saying, to the counsel, if, when your turn comes to be heard, you read your answer, and it is found to deny the facts alleged in the bill, we will then decide whether it shall be received as conclusive, or only, (as is the practice in the circuit court in patent cases,) as an affidavit of the defendants. As yet, we do not know that the affidavits will contradict the answer.

The Complainant's counsel then read affidavits to show among other things:

1. The amount of steamboat trade and commerce of the Ohio, between Pittsburgh and the ports of Cincinnati, Louisville, St. Louis, New Orleans and other places on the Ohio and Mississippi rivers.

2. That a large portion of the steamboats engaged in this trade are owned and navigated in whole or in part by citizens of Pennsylvania.

3. That the principal steamboats engaged in this trade require for free passage from 60 to 80 feet space above the water surface, and as now con-

structed, cannot, on high water, pass the bridge at Wheeling.

4. That the present diameter and height of their chimneys has been found by experience to be essential to their speed and capacity, and cannot be reduced without impairing the fitness of the boats for profitable and useful trade and commerce.

5. That their chimneys cannot be lowered so as to pass the bridge at Wheeling on high water, without changing their construction, at a great expense; and the process of lowering and hoisting will always be attended with expense, delay and imminent hazard to the safety of the boat, its crew and passengers, – chimneys being 6 feet in diameter and over 40 feet above the hurricane deck.

6. That the Pittsburgh packets, and other boats of the largest class have been accustomed to navigate the river to and from Pittsburgh, at their present height, and no boats lower their chimneys except when compelled by the state of water in the river to pass through the canal around the falls at Louisville.

7. That the boats accustomed to lower at Louisville are built with reference to passing through the canal, and are much smaller in size and capacity than the Pittsburgh packets, and other boats accustomed to navigate the rivers in high waters.

8. That in the opinion of many practical men it is impossible to reduce or lower the chimneys of such boats as are engaged in the packet trade. And that the bridge at Wheeling will so obstruct their navigation at high water, for which they are specially adapted, as in a great measure to exclude them from business and diminish their value – there being seven packets costing each from thirty to forty thousand dollars.

9. That the bridge at Wheeling will so obstruct navigation that a large portion of trade hitherto accustomed to pass and repass to and from Pittsburgh will be excluded from that port and other ports of Ohio and Pennsylvania above Wheeling.

10. That in the opinion of competent engineers, a bridge might be so erected as not to obstruct navigation.

Mr. Stanton, in support of the motion, claimed –

1. That any unauthorized obstruction to navigation of the Ohio, it being a public navigable river and common highway, is a public nuisance that may be enjoined by a court of equity having jurisdiction.

2. That the Wheeling bridge is an unauthorized obstruction to naviga-

tion of the Ohio river. Being erected by a private company over a public navigable river and common highway, the presumption is that it is a nuisance, and the burden is on the defendants to show that it is no impediment to navigation. That if the Virginia Charter authorizes the erection of the bridge, affecting as it does navigation of the Ohio, it is *a regulation of commerce*; that it operates to give a preference, by a regulation of commerce, to the ports of one state over another, and is therefore void on both grounds, being against these provisions of the Constitution of the United States: – Congress shall have power to regulate commerce. Article I, sec. 88, 4th clause. No preference shall be given by any regulation of commerce to the ports of one state over those of another. Article 1, sec. 9, 5th clause. That the bridge now erecting is not in compliance with the terms, and is, therefore, unauthorized by the Charter granted by the Virginia General Assembly. Although the charter does not prescribe the height of the bridge by specific number of feet, it refers to a well ascertained mark, known and recognized by the Company “the highest flood heretofore known,” admitted by the Company, to be 44½ feet above low water level. It directs the bridge to be erected so as not to obstruct navigation by steamboats at that height. That direction is an imperative condition. *Drew. Inj.* 295. The Company cannot enlarge their franchise on the ground that this was an extraordinary flood, and may never again happen. They must come up to the standard prescribed by their charter or lose its protection.

They took the charter *cum onere*, and as was said by Story, *J. in Charles River Bridge v. The Warren Bridge*, 11 *Peters*, 613 – “The moment the charter was accepted, the proprietors were bound to all the obligations of their contract on their part. The proprietors took the charter and must abide by their choice.”

3. That free navigation of the Ohio river being a right belonging to citizens of Pennsylvania, she may sue in the Supreme Court of the United States to restrain an infringement of that right by citizens of another state, and any Judge of that Court may grant an injunction. The party complaining being a State, suing citizens of another State, the Supreme Court of the United States has original jurisdiction. *Cons. Art. 3, Sec. 7 – Judicial Act, 1787, Sec. 13 – 1 Statutes at Large*, 80.

In vacation, an injunction may be granted by any Judge of the Supreme Court. *Judicial Act, March 2, 1793, Sec. 5 – Conkling’s Treatise*, 12 – 1 *Stat-*



utes at Large, 333 – *Livingston v. Van Ingen*, 4 *Hall's American Law Journal*, 457 – 2 *Pet. U.S. Dig.* 457.

To these points numerous authorities were cited.

*The defendants then filed to the original bill their answer, in which it was set forth,*

That by the statutes of Virginia, referred to in the bill, the defendants are the delegates and trustees of certain franchises, part of the eminent domain of that state, exercisable within her territory.

That the sovereignty of Virginia over the place in which this erection is to be made, has never been ceded or surrendered. That the clause of the ordinance of 1787 which declared that,

“The navigable waters leading into the Mississippi and St. Lawrence, &c., shall be common highways, and for ever free to the citizens of the United States,” &c., was not intended to operate within the reserved territory and sovereignty of Virginia.

That a free navigation is not to be understood as one free from such partial or incidental obstacles, as the best interests of society may render necessary, and does not prevent states from constructing in or over such rivers, such beneficial bridges or useful improvements of navigation, as may not materially obstruct them as highways.

That congress, in 1806, ordered a road to be constructed from Cumberland to the Ohio, and afterwards for its continuation from the western bank of Ohio, to the Muskingum river and Zanesville, and so on through the states of Ohio, Indiana, and Illinois. That this road was afterwards surrendered to the states through which it passed.

That the passage by ferry between Wheeling and Zane's island, was found dilatory and precarious by day, and ordinarily useless by night, being frequently impassable on account of ice, &c.

That a bridge being much desired by the people of Ohio and Virginia – acts were passed in 1816 by those states, authorizing a bridge across the river at Wheeling, but which provided that if such bridge should be so constructed as to injure the navigation of the said river, it should be treated as a public nuisance, and be liable to abatement as other public nuisances. And ten years were allowed for completion of the bridge.

That by an act of Virginia of 1836, certain facilities for the reorganization of the said company were conferred, and the time, by consent of Ohio, extended ten years longer – that this company constructed a bridge

from Zane's island to the Ohio, or western shore.

That on the 14th March, 1847, the legislature of Virginia passed an act reviving and continuing certain parts of the former acts, and providing for the reorganization of the corporation "with power to erect and keep a wire suspension toll bridge on and from Zane's island, to and upon the main Virginia shore or bank at the city of Wheeling."

That this act had the following proviso – "That if the said bridge shall be so erected as to obstruct the navigation of the Ohio river in the usual manner by such steamboats and other crafts as are now accustomed to navigate the same when the river shall be as high as the highest flood therein heretofore known, then, unless upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last mentioned bridge may be treated as a public nuisance, and abated accordingly."

That respondents were organized under this act in May, 1847, and an engineer appointed in July, 1847, who reported a plan which was published, and extensively circulated, and made contracts for its erection in September, 1847.

That the elevation of the bridge at the highest point over the channel is over 93½ feet above low water surface.

That for 18 months past it has been "steadily and notoriously progressed with;" that the persons at whose suggestion these proceedings are instituted, must have known it, and yet while all this expensive work was being done, no objections were made, but the work quietly permitted to progress, until nearly the whole cost of the bridge was expended, the first wires drawn over, and the bridge on the eve of completion.

The answer insists on the following grounds of objection to the proceedings.

1st. That if the evils imputed to this bridge were true, the persons injured might have remedy in the courts of Virginia, and her Attorney General is ready to institute proceedings by quo warranto or indictment.

2d. That the complainant has no corporate capacity to become a party to a suit in the supreme court, to protect or vindicate the rights of her citizens: and prays that this part of their answer may stand for a demurrer or plea, as well as answer.

3d. The defendants admit that the citizens of Pennsylvania in common with the citizens of the whole United States, are entitled to the use of the

Ohio as a common or public highway, but claim that their bridge is not an obstruction, and is itself a connecting line of a great public highway, as important, as a means of inter-communication, as the navigation of the Ohio, and "claim the principle of concession and compromise, which enters so largely into the structure of our government." That this bridge will be very beneficial to the people of the neighboring states.

4th. That the State of Pennsylvania herself has set the example of authorizing bridges to be constructed across this stream no higher than this.

5th. That the report of certain engineers of the U.S. to Congress, in 1848, recommended a wire bridge, and gave as their opinion that "by an elevation of ninety feet, every imaginable danger of obstruction or endangering the navigation would be avoided."

Also, That certain reports of committees in Congress recognized the necessity of a bridge at Wheeling, and recommended an appropriation, stating that a bridge *can be erected that will not offer the slightest obstruction to the navigation.*

6th. That the objections to the bridge are only to the insufficiency of headway for steamboats, and they aver that the headway left is amply sufficient; that the highest usual rise of the river Ohio does not exceed thirty-eight and a half feet, but will not average thirty-five feet for spring floods, nor much exceed twenty-nine feet; that the flood of 1832 was an extraordinary flood which rose forty-four and a half feet above low water at Wheeling, on the 11th February, 1832; that landings and warehouses were under water, and the river too high for navigation – or if navigated, that boats might have passed over Zane's island.

7th. That for all useful purposes the pipes of steamboats need not exceed forty-seven feet above the water, and if the draft should not be sufficient at that height, that blowers might be added.

That chimneys might have hinges on them so that they could be lowered without much inconvenience.

That the bridge over the canal at Louisville does not give a headway of over fifty-six feet, and chimneys of greater height usually have hinges to accommodate themselves to it, and steamboats made with high chimneys and without hinges, should conform, "because the height of chimneys of steamboats above a certain limit involves secondary considerations of contingent and relative expediency or convenience rather than such as are of absolute importance or necessity in connexion with the material or indis-

pensable purposes of navigation.”

8th. That the bridge will not be an *appreciable* inconvenience to boats of the *average class*, whose height, they aver, will not average over fifty-two feet, and not sixty-five feet as stated in the bill: but it is admitted that there are boats whose chimneys are of greater height, which is asserted to be unnecessary; or if necessary, they should be provided with hinges; that these high chimneys have been but lately brought into use, are of “*extravagant and unnecessary*” height, and “got up” by commercial rivals who promote these proceedings “in the name of a sovereign state, to destroy a useful and necessary work.”

9th and lastly. That the bridge will not diminish or destroy trade between Pittsburgh and other ports, or do *irreparable* injury to the citizens of Pennsylvania.

Affidavits were also read to support the answer.

Mr. Cadwallader, for defendants, made the following points in argument, and cited authorities to sustain them: –

1. The State of Virginia had a right to construct this bridge through the agency of the defendants, as they were authorized to construct it by their charters.

2. The plan of construction adopted by the defendants in 1847, and since carried into effect, involves no obstruction of navigation as secured by the Federal constitution and legislation.

3. Navigators ought to adapt to the headway of a bridge so constructed such variable appliances as those by which the length of chimneys beyond a certain length may be regulated.

4. As the State of Pennsylvania gave her cotemporaneous sanction to a bridge of less headway over the same river, she, as complainant, would have had no standing in a Court of Equity to complain of its construction if her bill had been filed in proper season.

5. The present proceeding is too late, as well in reference to the effect of delay on the alleged equity of the bill as to the inappropriateness of an injunction to restrain a party from doing that which *is in a relative sense executed*.

6. The case is not between proper parties, or in the proper court. The only party entitled in right of sovereignty to proceed to try the question is the United States. If citizens of Pennsylvania were damnified, they, and not the State, should have been plaintiff. If the proceeding were otherwise

proper, the State of Virginia should be a party.

4. [Editor's note: The "4" should be a "7".] If the points in question involve subjects of known unsettled differences of opinion on the bench, which the Court would not decide on an interlocutory motion, a single judge will not do so.

8. The original bill and answer alone are properly before the judge. If the supplemental bill is to be regarded an opportunity will be given to make further answer.

9. The defendants having answered, affidavits will not be taken into consideration. If they should be considered, time will be given to obtain counter affidavits.

Mr. STANTON, *in reply*.

The right of the State of Virginia to construct a bridge will not protect the defendants, for she has required them so to erect their bridge as not to obstruct navigation. The plan recommended to Congress was rejected, and hence the greater wrong of defendants in adopting it, if theirs be the same. The defendants' charter does not compel boats to adapt their headway to the bridge, but commands that the bridge be adapted to the boats. If Pennsylvania has obstructed navigation by her bridges, that furnishes no excuse to these defendants, as she has not authorized them to do so.

No laches can be imputed to the State.

"No length of time will render a nuisance lawful, and therefore an acquiescence of twenty years, on the part of the public, in an interruption of their rights, will not divest those rights nor prevent the community from proceeding to abate or prosecute for the nuisance to which they have been subject." *Angell on Water Courses*, 213.

Even between individuals or private companies, delay while the acts done are only preliminary to the acts against which the plaintiff claims relief will not deprive the plaintiff of the benefit of his equity. *Drewry on Injunction*, 294. 1 *Railway Cases*, 653.

The charter provides that WHENEVER the bridge shall be found to obstruct navigation, it shall be abated as a common nuisance. 14 Sec. *Charter*.

The State of Virginia is not a necessary party. She has nothing to do with the bridge. *Bonaparte v. Camden & Amboy Railroad*, 1 Baldwin, 205. *United States v. Osborn*, 12 Peters, 265.

The State of Pennsylvania is properly complainant. By virtue of her sovereignty as a State, she is bound to protect her citizens in their com-

mon rights of trade, commerce and navigation. She may do it by forcibly abating the nuisance *à fortiori*, she may prosecute a peaceful remedy. Besides, as a mere corporation she is injured in her public works, and on that ground alone might sue in this court. There is no unsettled question in the case; it is a simple question of nuisance. The carter pronounces the penalty of abatement if it be a nuisance.

Nor need there be any question concerning the reading of affidavits against the answer, for the answer admits all the complainant's claim; it confesses the obstruction, and the defendants have proved, by their own engineer, that he knew before hand in adopting his plan that it would obstruct the packets in passing, and compel them to lower their chimneys.

OPINION BY MR. JUSTICE GRIER.

That the Wheeling Suspension Bridge is not such as was authorized by its charter, it will obstruct navigation of the Ohio river, and is a public nuisance.

That the Bridge Company are bound strictly by their charter, and cannot subject navigators to trouble, expense or delay. It is no excuse that the encroachment upon navigation is a small encroachment, or a little nuisance, nor is the additional cost and expense of properly constructing the bridge any excuse.

That as the State of Virginia has not authorized this bridge, she is not a necessary party to this proceeding.

That the present application is not too late, because there was no reason to anticipate that the defendants would violate their charter.

That the right of the State of Pennsylvania to proceed for an injunction against a nuisance to her citizens without her own territory, is a new question; but if she could not, on that ground, yet by reason of the injury to her own public works, it is probable that she may proceed in this Court.

The defendants are ordered to answer in thirty days; the cause will have precedence on the list, and on the first day of the next term of the Supreme Court of the United States the complainant has leave to move for an injunction as prayed for.

The owner of every boat which may be hindered or delayed in the meantime from passing along the river by the obstruction of the bridge, will have a clear remedy at law to recover damages against the Company, and the individuals engaged in its erection.

If the defendants proceed in the meantime to complete the bridge, they will gain no equity thereby; but if judgment be obtained against them, they will be compelled to abate the nuisance at their own expense.

By the fifth section of the Act of Congress, 7th of March, 1793, it is enacted, "that writs of ne exeat and injunction may be granted by any judge of the Supreme Court in cases where they might be granted by a Supreme Court or a Circuit Court;" and the second section of the third article of the Constitution of the United States gives original jurisdiction to the Supreme Court in cases in which a State shall be a party.

We shall not attempt to state the many facts brought to our notice by the very numerous depositions which have been read on both sides, or to determine their relative credibility in matters wherein they differ. It will be sufficient for the purposes of the present investigation to say, that the following facts are admitted or not denied by the answer, and are fully established by the affidavits.

1st. That the Ohio is a public navigable river and common highway, from its head at Pittsburgh to its mouth; and the citizens of Pennsylvania, and of the United States, have a right to navigate the same, and have carried on a valuable trade and commerce on the same with steamboats and other vessels.

2d. That the defendants, a private corporation, are constructing a bridge across the same, from Wheeling to Zane's Island.

3d. That this corporation is forbidden, by the law which created it, from erecting their bridge, "so as to obstruct the navigation of the Ohio river in the usual manner by such steamboats and other crafts as are now (in 1847) commonly accustomed to navigate the same, when the river shall be as high as the highest flood heretofore known," under the penalty of being treated as a common nuisance, and of being abated accordingly.

4th. That the bridge about to be erected will *not* suffer a large class of steamboats to pass down the usual channel of the river, in the highest flood heretofore known, (to wit., that of 1832.) Moreover that the daily packets from Pittsburgh to Cincinnati could not pass under it in the usual high floods of the spring, which rise from 30 to 35 feet, unless at considerable loss and expense in making hinges, or other contrivances, to lower their chimneys; — that these packets generally pass at night, and would incur, not only great trouble, but risk of property and lives, in *thus passing an inclined plane thirty feet lower at one end than the other.*

Now it is not my intention to give any opinion on the points which have been discussed with so much learning and ability by the counsel, as to the right of Virginia, or any other of the states of the Union, to erect bridges over navigable waters, the great highways of the commerce of the Union, which are open to all the citizens.

That such bridges have been erected by the authority of the states heretofore, is well-known; and being furnished with a drawbridge which permits vessels to pass without obstruction at a certain point, have been suffered to stand without complaint, notwithstanding that the passage along the greater portion of the channel has been obstructed, and the navigation of the whole channel has not been left open and free.

In these cases when a bridge cannot be erected at all, without in some measure affecting the freedom of navigation, it often becomes a matter of necessity that the franchise of navigation should be constrained and straightened to meet the exigency, and yield some of its rights for the sake of works of great public utility. How far the State which authorises such erections is to judge of this necessity, or whether the mere convenience of building a cheaper bridge would authorise such an obstruction to navigable waters, are questions of very great importance, but which we are not called upon here to decide, as they do not necessarily arise on this motion in the case.

If the State of Virginia had authorised the erection of a bridge 62 feet high at one end and 93 at the other, such as is now about to be erected, these questions might have risen. But she has not assumed to exercise any such authority over this stream. She has authorised a company to erect a toll bridge over the river Ohio, if it did not interfere with the navigation. She has made provisions in the act of incorporation to save this right of navigation free and full as it has ever existed, and if these directions had been complied with, or were intended to be observed by the Company, there would have been no ground of complaint. But the Company assume that this requisition of their charter is unreasonable and not binding on them, because such a flood as that of 1832 is not likely to occur soon again, and if it did, that boats could not run in such a flood. This may all be true, but not to the purpose in a question of authority. They assume also that they have a right to compel the navigation to yield to their convenience, and because steamboats, in order to enjoy the convenience of the Louisville canal, are compelled to have machinery to lower their



chimneys, that therefore the bridge company may compel all boats to undergo the same expense and trouble for the *sake of the navigation of the channel*.

They undertake to decide that high chimneys are not beneficial, though the experience of others has found that the speed of their boats has been greatly improved thereby; they allege also that other contrivances might be used to supersede their necessity. If a bridge could not be built unless by compelling the navigators to make this change in their vessels, and the State of Virginia had authorised a bridge that would require them, these allegations might possibly have availed the defendants as a justification or excuse – notwithstanding they have proceeded without the leave of Congress.

But the fact that it would require some thirty thousand dollars more capital to build the bridge of the height required by their act of incorporation, and that the capital of the company is not sufficient for the purpose cannot justify these claims of the company or authorise them to compel the navigators of the Ohio to incur expense and undergo trouble and danger to accommodate the small capital of the company, or their mere convenience. All grants of exclusive privileges being in derogation of public rights must be construed strictly. Those who claim a right to narrow the channel or obstruct the navigation of a great public highway must be held to strict and clear proof of their authority so to do.

“An act of Parliament,” says Lord Eldon, “vesting in a company power for carrying into effect some public work is a contract of a peculiar character between the public and the individuals in whom powers are vested by the act.” (1 *Swanst.* 250.) And in *Blakemore v. Glamorganshire Canal Co.* (1 *Myln v. Keen*, 164,) the same learned judge said, “if individuals go to Parliament and Parliament being satisfied that the railway or canal can be made at an expense of say £100,000, closes with their application and forms them into a company with power to raise money to that amount, that authority is given them in full confidence that the sum which they have asked and obtained powers to raise will enable them to execute the work. There is an agreement on the part of those who satisfy Parliament that they can and will do such a work for such a sum of money, and upon the faith of that understanding they get the authority to begin the work. But if they deceive Parliament, what right have they to complain if courts

of justice will not allow them to go on with the deception?"

"These acts of Parliament," says Baron Alderson, (*2 Young & Collier*, 611), "have been called parliamentary bargains made with each of the land owners. Perhaps more correctly they ought to be treated as conditional powers given by Parliament to take the land of the different proprietors through whose estates the works are to proceed.

"Each landholder, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that not variation shall be made to his prejudice."

The same principle will certainly apply to those who claim franchises from the legislature which are derogatory to the public rights of free navigation. The Wheeling Bridge Company has contracted with the legislature of Virginia that they can build a bridge over the Ohio river with the sum of \$200,000, which will not obstruct the navigation of the Ohio in the usual manner by steam boats, &c., when the river shall be as high as the highest flood therein heretofore known. If they cannot perform this contract to the letter they cannot allege such inability as a justification for building a lower bridge than they contracted or were authorized to build, or to compel the public to accommodate their steamboats to a necessity created by their own wrong. Nor can they vary the conditions upon which they have obtained a grant of their franchise to suit their own convenience or the amount of their funds. It is no justification of a purpresture or nuisance to a public navigable river, that it is but a *small* encroachment or a *little* nuisance, and not a total obstruction to the navigation, and only at particular seasons, or to vessels of a certain class that may get round, under, or over it by expenditure of money to accommodate themselves to the exigency without any great danger to persons or property.

The defendants by their answer admit that the bridge will obstruct the navigation by some boats. Their own witness, the engineer, swears that in adopting the plan he knew it would compel the packets "to bend their chimneys." No obstruction being authorized by the charter, the bridge is, upon their own showing, clearly a public nuisance.

The objection that the State of Virginia should have been made a party cannot be taken at this stage of the proceedings.

Nor is it perceived why the State should be made a party to proceedings against a nuisance not erected by her own officers or servants, or in pursuance of any authority granted by her. She might well answer: "you

have no right to call on me to defend or abate a nuisance whose erection I have not authorized [Editor's note: There should be a period here.] I have conferred no power on this corporation to impose conditions on those who navigate the Ohio, as to the construction of their steamboats or to compel them to the expensive and perhaps dangerous labor of lowering their chimneys in certain stages of water, nor to make an inclined plane across the river 30 feet lower at one end than at the other. I have recognised the right of all the citizens of the United States to navigate the river as well at high as at low stages of water, and have admonished the company that if they infringe upon these rights, it will be under the penalty of having their bridge abated as a nuisance."

On such a suggestion, as she might well make, she would be entitled to go out of court without further answer.

The objection "that the present proceeding is too late, and that plaintiffs are estopped in equity from complaining because they did not do it sooner" cannot be sustained – as the citizens of Pennsylvania had no right to presume from the preparations made by the company that they intended to erect their bridge in any other manner than that authorised by their charter, till their acts clearly indicated such an intention.

Nor do I think that the citizens of the State of Pennsylvania are barred from making this complaint, by the fact that the Legislature of Pennsylvania at one time authorised the erection of bridges over the mouths of the Alleghany and Monongahela at the head of the Ohio river, of no greater height than that now about to be erected by the defendants. These erections have been entirely abandoned probably for no other reason than because they would obstruct the navigation. Such an intention unexecuted cannot serve as a justification to others to erect obstructions to the navigation of the Ohio, without authority.

We come now to the objection "that this case is not between proper parties, or in the proper court; that the only party entitled in right of sovereignty to proceed to try the question, is the United States; and if citizens of Pennsylvania were damnified, they and not the State should have been plaintiff."

This objection certainly presents a question of no little difficulty, being without any precedent in point. "In case of purpresture the remedy for the crown is either by an information of intrusion at the common law, or by information at the suit of the Attorney General in Equity. In the case of a

judgment upon an information of intrusion, the erection complained of, whether it be a nuisance or not, is abated. But upon a decree in equity, if it appear to be a mere purpresture without being at the same time a nuisance, the court may direct an inquiry to be made whether it is most beneficial to the crown to abate the purpresture or to suffer the erection to remain and be arrested. But if the purpresture be also a public nuisance, this cannot be done; for the crown cannot sanction a public nuisance.” (2 Story, Eq. 251.)

A court of equity will interfere in cases of nuisance, not only on the information of the attorney-general, but also upon the application of private parties directly affected by the nuisance. When private individuals suffer an injury, quite distinct from that of the public in consequence of a public nuisance, they will be entitled to an injunction and relief in equity.

Now, it is no doubt true, that the State of Pennsylvania cannot sue in the supreme court of the United States, by her attorney-general, as representing the crown, by virtue of her sovereignty. It may well be doubted also whether she can come into court, to complain for a nuisance to her citizens erected without her territory. The citizens of Pennsylvania are also citizens of the United States, and each one may sue in her courts where he suffers an injury distinct from the public in general, in consequence of a public nuisance erected without of the limits of Pennsylvania. In the case of *The City of Georgetown v. The Alexandria Canal Company*, (12 Peters, 92,) it was decided, that the Potomac river was a navigable stream, and part of the *jus publicum*, and any obstruction to its navigation would be a public nuisance; that a court of equity may take jurisdiction, in cases of public nuisance by an information filed by the attorney-general, and any individual who has suffered special damage from the erection, may maintain a private action, but that the corporation of the city of Georgetown had no power by their charter to protect and vindicate, in a court of justice, the rights of the citizens of the town in the enjoyment of their property, or in removing or preventing an annoyance to it.

I am not prepared to say that one of the states of this union has no more power to vindicate the right of her citizens than a borough corporation. If the states were entirely separate and independent, the sovereign alone could complain and obtain redress for a nuisance without her limits, kept up on a public river, contrary to compact or the law of nations. How far a state has lost this right by becoming a member of the union, which

has established courts where the citizens of each state, as citizens of the union, may obtain redress for such grievances, has not been decided, nor do I think it necessary to express any opinion on the point. It is true, also, that congress may be said to have more especial jurisdiction over the waters of the Potomac, within the District of Columbia, than over the other public rivers of the union, and that, therefore, the case just quoted is no authority for saying, that the proper proceeding in the present case, would have been by information in the name of the Attorney General: how far the United States may assume to be the trustee, and seized with all the rights of the crown on these great public highways, for the purpose of vindicating the rights of the citizens of the whole union, is a question, perhaps, not fully settled, but I am disposed to concur with my brother McLean, (in *Spooner v. McConnel*, 1 McLean, 359,) "that the United States through her law officer might well ask to have this nuisance abated," and that an information through her Attorney General in the circuit court would be sustained.

But assuming that the state of Pennsylvania cannot come into this court to complain of a nuisance erected without her borders, which is peculiarly injurious to her citizens and her commerce, (a doctrine which I am not prepared to assert or deny), she complains not only of injury to her citizens, but she alleges a peculiar injury to herself in her corporate capacity as a state. She is owner of immense and extensive improvements by canals and railroads, from which she receives a large income, which she alleges will be greatly injured by the erection of this nuisance. On this ground, if not on the other, she may probably be able to support her complaint, and give jurisdiction to the supreme court.

Having thus, in somewhat tedious detail, noticed the principal points of law so ably discussed by the learned counsel, I come now to the consideration of the question proposed by this motion. Has the complainant made out such a case, as will justify me, in assuming the responsibility of wielding the power of the whole court, in granting the injunction prayed for in this preliminary state of the proceedings?

"The issuing of an injunction is perhaps the highest, most delicate, and dangerous power, which can be confided to any judicial tribunal." The erroneous exercise of this power may operate to the irretrievable injury of the party enjoined, and for which he can have no legal redress in damages. "It is, therefore, never exercised in a doubtful case, or in a *new* one, which

does not come within the established rules of equity.”

If a public nuisance is also a specific injury to the property of an individual, he has his remedy in equity, not because the act complained of is a nuisance, but on account of the irremediable injury to his private right of property. An injunction will not be granted in favor of an individual who claims only a common right in a highway in which he can have no private property, unless it is accompanied with an obstruction or destruction of a private right. No instance can be found, (says Lord Brougham, 3 Milne and Keene, 169,) of the interposition by injunction in the case of merely eventual or contingent nuisance.

Lord Eldon appeared at one time (Attorney General *v.* Cleaver, 16 Vesay, 238,) to think that there was no instance of an injunction to restrain nuisance *without a trial*, but though this cannot be maintained, yet no instance can be found where it has been ordered *on a motion ex parte*, in case of a private individual, unless *where he was about to suffer some irremediable injury before the cause could be brought to a hearing, and for which he could have no sufficient remedy by action at law.*

In the application of these principles, the complainant must in this court be considered as a mere corporation or private person, even supposing she may represent her own citizens, and must show that unless the special injunction be granted before this cause can be brought to a hearing, or before she can have an opportunity of making an application to the court, she will suffer some irremediable injury; otherwise, a single judge will not be justifiable in exercising this delicate and dangerous power which has been confided to *the court.*

While I will not *evade* responsibility, when it is clearly my duty to assume it, I will decline the exercise of doubtful or dangerous powers, unless in a case of absolute necessity. While a complainant has a right to demand a fearless performance of duty, the defendants have an equal right to protest against a rash exercise of power.

The application of the principles I have stated to the facts of this case, will result in refusing without prejudice an injunction before the sitting of the Supreme Court, for the following reasons –

1st. Because the question of the plaintiff’s right to prosecute this suit is *new*, and involves the jurisdiction of the court. For if the state of Pennsylvania is not entitled to prosecute such an action, the supreme court can have no original jurisdiction in the case.

2d. The injury threatened is not imminent and certain, but contingent. It may or may not happen before the final hearing of this cause, or before this application may be renewed before the court. In the meanwhile, this cause may be brought to a final hearing, the cause being now at issue, and having preference on the list. And on the first Monday of December next, the plaintiff will have an opportunity of moving the court for an injunction on the bill and answer, when the question of jurisdiction can be finally decided. Nor is there any evidence to justify the supposition, that in the meantime the income of the Pennsylvania improvements will be materially affected.

3d. The injury will not be irremediable, if any should occur; as the owner of every boat which may be hindered or delayed in the meantime from passing along the river by this obstruction, will have a clear remedy at law, to recover damages against the company and the individuals engaged in its erection.

4th. If the defendants proceed in the mean time to complete the bridge, they will gain no equity thereby; but if judgment be obtained against them, they will be compelled to abate the nuisance at their own expense.

*It is therefore ordered,* That said bill and supplemental bill, answers, and exhibits here read, be filed in the Clerk's Office of the Supreme Court of the United States, and that the defendants answer the amendment and supplemental bill within thirty days, and that on the first day of the next term of the Supreme Court of the United States, the complainant have leave to move for an injunction as prayed for in said original and supplemental bills, and that this order and notice be entered by the clerk on the docket of said court.

Having examined the foregoing report, I find the same to be correct.

R.C. GRIER.

*Philadelphia, Sept. 1, 1849.*