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MISSISSIPPI AND MISSOURI RAILROAD COMPANY *vs.* WARD.

- 1 A public nuisance may be abated on a bill in equity, brought by a private party, who has suffered special damage.
- 2 It is necessary for the plaintiff in such a bill to show that he has sustained and is still sustaining individual injury by the nuisance.
- 3 But where the bill is brought in a Federal Court, it is not necessary to show that the plaintiff's damage amounts to the sum which is required to give the Courts of the United States jurisdiction.
- 4 The jurisdiction is tested by the value of the object to be gained by the bill, and that object is the removal of the nuisance.
- 5 The private party, though nominally suing on his own account, acts rather as a public prosecutor, on behalf of all who are or may be injured.
- 6 If he has partners in the particular business affected by the nuisance, he need not join them as plaintiffs, any more than he need join other persons who have suffered similar injuries.
- 7 A bill in equity to abate a nuisance is a local suit, and can be brought only in the District where the nuisance is situated.
- 8 Where the nuisance has been erected, and is maintained by several persons or corporations, those who are not within the jurisdiction of the Court need not be joined as defendants in the bill.
- 9 In a bill for the abatement of a nuisance brought in the District Court of the United States for the District of Iowa, that Court can exercise no jurisdiction (locally) beyond what a State Court of Iowa might have exercised.
- 10 The nuisance complained of being a bridge across the Mississippi where that river divides the States of Illinois and Iowa and the State line being in the middle of the river, the District Court for Iowa has no power to abate the nuisance (if it be a nuisance) on the Illinois side.
- 11 If the obstruction to navigation complained of was created by piers erected on the Illinois side ; that was an offence against the laws of Illinois and neither a State Court of Iowa proceed.

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- ing by indictment, nor the Federal Court for that District sitting in equity can inquire into the facts or furnish a remedy.
- 12 Inasmuch as the removal of the three piers and three spans of the bridge erected between the middle of the river and the Iowa shore would not materially remedy the nuisance complained of, though it would render the bridge useless, this Court will not affirm a decree which orders such removal.
 - 13 If the removal of that part of the bridge which is within the jurisdiction of the Court, would not improve the navigation of the river, so far as the plaintiff is concerned, he is not entitled to a decree in his favor.
 14. In a suit for the abatement of a nuisance, a Court of Equity confining its inquiries within the limits of its local jurisdiction, must be governed by the same rules which a Court of law would act upon in trying an indictment for the same nuisance.
 15. The rule of law is that where a bridge over a navigable stream is erected for public purposes, and produces a public benefit, and leaves a reasonable space for the passage of vessels, it is not indictable.
 16. Another rule is that the bridge must appear plainly to be a nuisance before it can be so decreed; since a Court of Equity, proceeding by bill, like a Criminal Court trying an indictment, must give the benefit of all reasonable doubts to the defendant.
 17. The Mississippi river being a boundary between States throughout nearly its whole length, there are judicial difficulties in dealing with nuisances between its shores, which can only be removed by legislation.

Appeal from the District Court of the United States for the District of Iowa.

On the 7th of May, 1858, James Ward filed his bill in the District Court, praying for an abatement of the Rock Island Bridge over the Mississippi river, averring it to be a public nuisance, specially injurious to him as an owner and navigator of steamboats to and from St. Louis, Missouri, to St. Paul, Minnesota. The bill alleged that the Mississippi river is a navigable

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stream, the boundary line, in whole or in part, of ten States; that it is used as a channel of commerce and navigated by boats, vessels, rafts, and flat-boats. That steamboats, with other craft in tow, require a space from 120 to 140 feet in width, and, where the bridge is, require the entire width of the river for transit, with at least 60 feet of clear space above for masts and chimneys. Lumber is one of the largest items of transportation, and, by reason of the winds and currents, rafts require the entire unobstructed bed of the river. The navigation of the river is a necessity of trade, and almost the only means of transportation between Wisconsin, Northern Iowa, Minnesota, and the upper Mississippi. The complainant is part owner of certain steamboats plying between St. Louis and St. Paul, and his profits depend upon the safety of the navigation. He avers that he has, by the treaties with France in 1803, the Acts of Congress, and the universal principle recognized by the common law, a right to the free and unobstructed navigation of the river, in all parts of it. He further asserts that the navigation has been interrupted, and rendered dangerous and difficult, by the erection of a bridge from Rock Island, in the State of Illinois, to Davenport, in the State of Iowa; that the river at that point is only about 1,300 feet wide; that it is at the lower end of the Rock Island Rapids, which Rapids are eighteen miles in extent above the bridge, with a fall of twenty-five or thirty feet in that distance; that the current is unusually rapid at that point and difficult of navigation, and that anything in the bed of the river greatly injures the safety of boats, especially in high winds. The bill sets out at length the manner in which the construction of the piers and abutments of the bridge has imperiled navigation and obstructed the stream. The complainant alleges special damage to his own boats, occasioned by the obstruction, the amount, in the instance of one boat, reaching a thousand dollars. Owing to the danger of navigation, he has been compelled to pay largely increased premiums for insurance, occasioned solely by the bridge. The bridge and obstructions were placed in the river by the Mississippi and Missouri Railroad Company, who are made defendants, with the aid and assistance of the Chicago and

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Rock Island Railroad Company, and a Bridge Company, created for the purpose of its erection by the State of Illinois, and by the aid of other persons, to the complainant unknown. The Mississippi and Missouri Railroad Company have been hitherto and still are maintaining the said bridge as their own possession, and for their own use and benefit. The said Company, by themselves, or in combination with the other companies named, (which are not within the jurisdiction of the Court,) are about to increase the obstruction in the river, by greatly enlarging the piers of the bridge. The said bridge is a common nuisance now, and the increase of the size of the piers will increase the danger and obstruction, and further hinder and delay complainant's boats in their passage. From the number of disasters, the difficulty of procuring evidence, the expense of preparing for trial, and the peculiarity and diversity of the injuries sustained, suits at law would not compensate for the damage.

The prayer of complainant was: "That on the final hearing of this bill, the Court will order, adjudge and decree, that said bridge was erected in violation of law, and is an obstruction to the navigation of said river, and that the same is a nuisance, and particularly to your orator, and that the said bridge, and the piers thereof, and all material used therein, which injures and obstructs the free navigation of said river, be abated and removed, and the said river be restored to its original capacity for all purposes of navigation."

The defendant in his answer admits that the Mississippi is a channel of commerce, navigated by boats, vessels, &c., and that steamboats sometimes have barges in tow; but denies that they require the space alleged, and avers that the width of boats with their barges does not usually exceed seventy feet, so that the whole width of the river is not necessary to the safe transit of such boats. Denies that sail vessels ever navigate the river. Admits that the amount of lumber rafted down the river is great, but avers that rafts do not usually exceed seventy feet in width, while the piers of the bridge are two hundred and fifty feet apart.

Defendant neither admits or denies the ownership of said

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bridge, and avers that if it is so, the joint owners with defendant ought to be made parties defendant herein, and claims the same benefit as though objection had been taken by demurrer for want of proper parties herein; that he has no knowledge or information as to purposes for which said boats were built or the business of complainant; denies that complainant has the right as claimed in all parts of said river; and avers that the right to build a bridge is as sacred as the right of navigation, where no material obstruction is created, and denies that the treaties, Acts of Congress and principles of law prevent the construction of a bridge; denies that the navigation has been obstructed or rendered dangerous and difficult by the erection of a bridge, as alleged; that the water way is one thousand three hundred and twenty-two feet; that the current through the draw in high water is about five miles per hour; that in time of high winds boats were not accustomed to go over the rapids.

The answer describes the bridge minutely, and avers that since its completion in 1856, there have been more than one thousand seven hundred passages of steamboats through the draw, many of them with barges in tow, one with six barges. Defendant admits that the interruption in the flow of water caused by the bridge increases the current flowing past said bridge, but avers that such increase does not exceed the rate of one half mile per hour.

Defendant has no knowledge or information as to any injury to the steamboats of said complainant as alleged, but if either have been so injured they were out of the steamboat channel and negligently and improperly navigated and managed, as the current is straight and direct through the draw on the Illinois side of the draw pier, and if the boats had been put in their proper positions they would have passed through safely.

Defendant has no knowledge or information as to increased rates of insurance.

Admits that the defendant and the Railroad Bridge Company, a body corporate and politic, created by and existing under and within the State of Illinois, by an Act of the Legislature of the

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State of Illinois, jointly erected said bridge at the joint and equal cost of said companies, and are the owners thereof, and that the same was permitted and authorized by the laws of the respective States of Iowa and Illinois, and that said parties are using the same as their joint possession and property, and not separated, and for the use and benefit of the passage of the trains of cars of this defendant and the Chicago and Rock Island Railroad Company; and this defendant insists that the said Railroad Bridge Company is a necessary party hereto, and that no decree granting relief as prayed in said bill can be given without materially affecting and destroying the property and interest of said Railroad Bridge Company, and defendant claims the same benefit for want of proper parties as though it had demurred thereto for that cause.

Defendant further alleges, that on the 11th day of June, in the year 1855, the said Railroad Bridge Company, with the assent of this defendant, conveyed by deed of trust or mortgage to Azariah C. Flagg the said railroad bridge and its appurtenances, to secure the payment of four hundred bonds of \$1,000 each, made and issued by the said Railroad Bridge Company for the construction of said bridge, and that such deed of trust or mortgage was duly recorded in the Recorder's office of Rock Island County, in the State of Illinois, and in the office of the Recorder of Deeds, in Scott County, Iowa; that such deed of trust is outstanding and in full force; that a decree abating the bridge would entirely destroy the interest held by said Flagg under such mortgage, and this defendant says that said Flagg is a necessary and proper party to this suit, and that a decree as prayed for cannot be made without destroying the interest and property of said Azariah C. Flagg.

Defendant admits that it and the Railroad Bridge Company intended to repair pier No. 4 by adding four feet on one side and five feet on the other; this has been found necessary by reason of cracks in it and the danger of its yielding to the pressure of the ice at the breaking up of the river in the spring, that such structure has cost nearly \$500,000 and would be in danger unless said repairs and addition to the pier were made

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Defendant admits that it has built a railroad to Iowa City as charged, that the eastern terminus of said railroad is the eastern boundary of the State of Iowa as prescribed in its articles of association.

Defendant denies the increased obstruction or hindrance or delay and damage from the enlargement and repairs; and avers that complainant has an adequate remedy at law.

As to the refusal of persons to ship freight on complainant's boats by reason of the danger of passing the bridge, defendant does not believe it.

A large body of conflicting testimony was taken to establish the respective allegations of the bill and answer. After several preliminary hearings, the cause was submitted upon the bill, answer and evidence. The Court rendered a decree in favor of the complainant, and ordered that so much of the bridge as was in Iowa should be abated. From this decree defendant appealed to the Supreme Court of the United States.

Mr. Cook, of Illinois, and *Mr. Reverdy Johnson*, of Maryland, for Appellants.

Mr. Lincoln, of Ohio, for Appellee.

Mr. Justice CATRON. James Ward charges the Mississippi and Missouri Railroad Company with having created a nuisance by erecting a bridge across the Mississippi river at Rock Island, and prays that the nuisance may be abated.

The respondent resists the relief prayed, on the ground, among others, that the complainant does not stand in a position to maintain this suit.

Ward was part owner of three steamboats—and commander of one of them—navigating the river in successive trips between St. Louis and St. Paul; and which boats, the complainant alleges, were much injured and delayed by the bridge, which he avers is a great obstruction to navigation—amounting to a prominent nuisance. It is insisted that Ward cannot sue alone, and could only come before the Court jointly with the other part owners

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of the vessels injured and delayed. He seeks no damages by his bill, but only an abatement of the nuisance, as a preventive remedy against future injury and delay.

A bill in equity to abate a public nuisance, filed by one who has sustained special damages, has succeeded to the former mode in England of an information in Chancery, prosecuted on behalf of the Crown, to abate or enjoin the nuisance as a preventive remedy. The private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, individual damage, he cannot be heard. He seeks redress of a continuing trespass and wrong against himself, and acts in behalf of all others, who are or may be injured; nor is there more necessity for joining with his partners in the prosecution than there is for his joining in the suit any other person, as complainant, who has sustained injury. Gibbons on Dilapidation, 402. The character of the nuisance and the sufficiency of the damage sustained is to be judged by the Courts. *Iverson vs. Moore*, (Ld. Ray, 486; 1 Salk., 15); Gibbons on Dilapidation, 403. But the want of a sufficient amount of damage having been sustained to give the Federal Courts jurisdiction, will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern.

It is next objected that there are not proper defendants brought before the Court. The Chicago and Rock Island Railroad Company, who own the bridge on the Illinois side of the river, and the Bridge Company who built it, and also A. C. Flagg, who holds a mortgage on the bridge as trustee for others who advanced money to aid in its erection, are not made parties to the suit. The Chicago and Rock Island Railroad Company, and the Bridge Company, are incorporated, and located in the State of Illinois, and Flagg resides in the State of New York. The alleged nuisance is situate in Iowa, and being local, the suit could only be brought in that State; and, therefore, the Court had no power to bring these parties in interest before it.

If the Iowa corporation could have been individually indicted for creating the nuisance, no reason exists why it should not be

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individually prosecuted in Chancery for its abatement. But the facts present a much more serious objection to the complainant's right to sue than either of those above stated. The Constitution of Illinois calls for the middle of the Mississippi river as the western boundary of that State, and as Iowa was admitted into the Union after Illinois, a line in the middle of the river is the dividing line between the States.

The complainant sued in the Federal Court because of his citizenship in a different State from the defendant; and the United States District Court holden in Iowa exercised the same jurisdiction that a State Court of Iowa could have exercised, and no more. It had no power beyond the middle of the river. On that part of the bridge within Iowa, and its piers, the Court below acted, and ordered that the structure should be removed.

In considering the merits and the other question as respects the complainant's right to sue, some additional facts need be stated.

This bridge is one thousand five hundred and seventy feet long, and the number of piers is six. Three of them are on the Iowa side of the river. The draw pier is the fourth; it is three hundred and eighty-six feet long at its bottom, and forty-five feet wide. The draw space on the Iowa side is one hundred and eleven feet, and on the Illinois side one hundred and sixteen feet wide in the clear. The distance from centre to centre of the small piers is two hundred and fifty-seven feet. The long pier stands at an angle with the thread of the current of about twenty-four degrees, and the small piers are nearly on a line with the thread of the current. The Illinois draw passage is directly over the deepest channel of the river, and directly over the usual track of steamboats before the bridge was built. The Mississippi is about one thousand four hundred and ten feet wide at the bridge, and the middle of the river is about eighty feet westwardly of the long pier.

The Illinois draw passage (one hundred and sixteen feet), the width of the long pier (forty-five feet), and the eighty feet between it and the eastern line of Iowa cover a space of two hundred and forty feet of water-way, and which embraces the main channel,

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where steamboats have at all times navigated. It was at the long pier, and in the Illinois draw east of that pier, that the complainant's boats sustained the injuries on which he found his right to sue the Iowa corporation, and to proceed against the bridge *in rem* as a public nuisance.

An indictment could only have been prosecuted against the owner for keeping up the nuisance in Illinois in the Courts of that State, because the nuisance was a trespass and crime against the laws of Illinois, and the injuries to the complainant's boats giving him the privilege to sue and abate the obstruction was as local as the public right to indict. He asks nothing from the person of the defendant, but seeks to remove a local object, because he has sustained special damage from that object.

The District Court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the Court's jurisdiction and powers of inquiry, and outside of the case.

The District Court ordered three spans of the bridge and three of its piers to be removed, extending to middle of the river: And what would be the consequence if we were to affirm that decree? It would, as a consequence, render the bridge useless throughout, but it would not materially remedy the nuisance complained of. The navigation would certainly not be improved so far as the complainant is concerned by removing the Iowa end of the bridge. The cross currents alleged to exist would remain; the large eddy at the lower end of the long pier, and the obstruction to the Iowa draw-passage by the eddy, would still remain.

In the next place: Is the bridge *west* of the Illinois boundary an *unreasonable* obstruction, and therefore a nuisance, that a Court of Chancery can lawfully remove? In considering this question we must be governed by the same rule on which a Court of law could proceed in case of an indictment against the Bridge Company for committing the nuisance; and the rule is that if the abridgment of the right of passage occasioned by the erection was for a public purpose and produced a public benefit,

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and if the erection was in a reasonable situation, and a reasonable space was left for the passage of vessels on the river, then it is not an unreasonable obstruction and indictable. *Rex vs. Russell*, (6 Barn. & Cresw., 566; 13 How., 623; 15 Wendell, 133.)

Then, again, the obstruction to navigation must be plainly a nuisance within this rule before it can be removed by decree. If the proceeding was by indictment, and the jury doubted whether the obstruction was a nuisance or not, they would be instructed to acquit the defendant; and so, if this case was referred to a jury to try the fact, and they doubted, they would be bound to acquit. And the same rule applies in a Court of Chancery where the Court ascertains the fact of nuisance. 2 Story's Com. on Eq., 203, 204.

To say the least in this case, it is certainly very doubtful whether the bridge on the Iowa side is a serious obstruction, amounting to a nuisance.

The smaller piers on that side are parallel with the current passing through them, and do not occasion much impediment of navigation to boats without chimneys, nor to rafts.

The main channel *where steamboats* uniformly pass before the bridge was built, and must now pass, is eastwardly of the middle of the river, and on the Illinois side. On this state of the facts, it must be admitted that it is hardly possible to deal with the whole obstruction of any bridge across the Mississippi river, it being a boundary between States almost throughout its whole length. And it is difficult to decree in any case of material obstruction, unless the whole nuisance is in the power of the Court. The case before us presents the difficulty very prominently. The plaintiff's case mainly rests on the fact that the draw pier is at an angle to the current, and it is assumed that if this pier was re-constructed parallel with the current, and the draw on the Illinois side was widened the obstruction would be removed to a degree making it short of a nuisance. Now this is a question that we cannot examine, nor reach by a decree, as the relief suggested is clearly beyond our power in this suit. Congress could extend the jurisdiction of the Federal Courts across the Mississippi river by enlarging the judicial districts on

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either side; or it could confer concurrent jurisdiction on adjoining districts, extending to trespasses and torts committed within the shores of the river. But the Courts of justice cannot do it unless authorized by an Act of Congress.

It is also insisted with great earnestness that the public is entitled to the free navigation of the *whole* river from bank to bank, and as the western half of the river is undeniably within the jurisdiction of Iowa, it follows that the bridge is a clear nuisance within that district to the extent of half its length. According to this assumption no lawful bridge could be built across the Mississippi anywhere; nor could the great facilities to commerce, accomplished by the invention of railroads, be made available where great rivers had to be crossed.

It is ordered that the bill be dismissed and that the costs be divided—each party paying its own.

Mr. Justice NELSON, dissenting. I am unable to agree to the opinion of the majority of the Court in this case. The main issue presented on the pleadings and proofs involves the question, whether or not, the free navigation of the Mississippi river is obstructed by the erection of the bridge in question across its bed.

The bridge spans the entire stream. As I understood the opinion, it neither denies nor admits the obstruction, but places the decision upon the ground, that the jurisdiction of the Court is incompetent to reach or deal with the question.

The east line of the boundary of the State of Iowa and which constitutes the boundary of the District of the Federal Court, and of course of its jurisdiction, is the middle of the Mississippi river: and the same line constitutes the west boundary of the State of Illinois, and of course the limit of the jurisdiction of the Federal Court in that State. One moiety, therefore, of the bed of this river is embraced within the local jurisdiction of this Court for the District of Iowa and the other moiety within the jurisdiction of the Court for the District of Illinois. Neither Court possess any local jurisdiction over the entire river, and hence the idea that neither Court is competent or equal to deal with the obstruction;

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and especially that the Court in the Iowa District cannot deal with it on the Illinois side; and for the same reason the Court in the Illinois District could not, if the suit was in that Court, deal with it on the Iowa side.

Now one plain answer to this course of argument seems to me is, that the obstruction complained of is an obstruction of the moiety of the river on the Iowa side, and within the admitted jurisdiction of the Court. There can, therefore, be no want of power in the Court to deal with this part of the obstruction. Indeed, it is the only Federal Court that can deal with it.

I have not been able to discover any answer to this view, as it respects the jurisdiction of the Court, or its duty to exercise it. It is admitted, that this moiety of the river has been wholly obstructed so far as the free navigation of the same is concerned—a total obstruction by the erection of the bridge.

I am aware, it is said, or intimated, that the main navigable channel of the river is on the Illinois side; and hence the removal of the obstruction on the Iowa side, could not remedy the wrong complained of. But is this an answer? It may be admitted, that the channel on the Illinois side affords the best navigable channel at all seasons of the year, for the passage of boats. But the Iowa side or moiety is also navigable; and, perhaps, for two-thirds of the season quite equal to that on the other side, if not in a superior degree, for the navigation of many of the boats and water-craft employed on this river. Even in the season of low water the depth of the water on the Iowa side ranges from six to ten feet at or near the bridge, as shown by the surveys of the Government Engineers.

But I do not place my dissent to the opinion of the Court wholly, nor even mainly, on the ground above stated, but upon much higher and broader ground.

The right to a free and unobstructed navigation of this river on the part of the public, and especially of the citizens of the United States, depends upon the Constitution and the Laws of the United States—the public law of the country.

The local laws of the States have no control over it. I speak now of the free and unobstructed navigation of the river, and

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according to this general or public law, the right of navigation exists over every part of it. No principle is better settled or more generally admitted. The reason given is well stated by Lord Denman, in *Williams vs. Wilcox*, (8 Ad. & Ell., 314), and perhaps no river or navigable stream affords a better illustration of the soundness of the principle, or of the reasons upon which it is founded, than the river in question. The reasons are, "that the nature of the highway which a navigable river affords,—liable to be affected by natural and uncontrollable causes, presenting inconveniences in different parts and in different sides, according to changes of wind or direction of the vessel, and attended by the important circumstance, that, upon no one is any duty imposed by the common law to do that which would be analogous to the ordinary repair of a common highway to remove obstructions, namely, clear away sand banks and preserve any accustomed channel,—all these considerations," he observes, "make it an almost irresistible conclusion that the paramount right, if it existed at all, must have been a right in every part of the space between the banks."

Now, this principle, if acknowledged and applied in this case, affords not only ground for the exercise of the jurisdiction of the Court, but makes it a duty to inquire into the question of obstruction, and deal with it according as the pleadings and proofs may require or justify.

I agree that this principle has been modified by the judgment of this Court in the case of the Wheeling Bridge, in its endeavor to harmonize this public right of navigation with the subordinate right of the States to erect bridges over these navigable waters.

The Court there determined that in the erection of a bridge under State authority, if there still existed a free and unobstructed navigation of the river, the bridge would not be considered a nuisance, but upheld as lawful.

The bridge in question is entitled to the benefit of this modification of the principle. And I agree that if there is a free and unobstructed navigation of this river on the Illinois side, it would afford an answer to the admitted obstruction on the side in Iowa. But this is the only answer that can be given, and it

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is apparent that this answer raises the question whether or not such a channel was left open, a question which the Court must hear and determine, and without hearing and determining which in favor of the defendants, the decree must pass against them.

It seems to me, therefore, without pursuing the case further that the material question in the case before the Court below was, whether, notwithstanding the erection of the bridge, a free and unobstructed navigation for the passage of boats existed on the Illinois side of the river; and hence, necessarily, whether or not the bridge constituted an obstruction over that channel. If it did not, then the case fell within the qualification of the principle as applied in the Wheeling Bridge case. If it did, then clearly no defence was shewn to the admitted obstruction of that part of the river on the Iowa side.

I express no opinion upon the question of fact, the obstruction, as that question is not reached according to the decision of a majority of the Court.

I am requested to state that Mr. Justice Wayne and Clifford concur in this opinion.

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1. Parol evidence, not inconsistent with a written instrument, is admissible to apply such instrument to its subject.
2. Where a map or plat is referred to in a deed for the purpose of fixing a boundary, the effect is the same as if it were copied into the deed.
3. This is a familiar rule of construction in all those cases wherein no other description is given in the title-deeds, than the number of the lot on the Surveyor's plan of a township or other large tract of land.
4. Where a plat is referred to in a deed simply for the purpose of fixing boundary, the fact that such plat was illegally made does not in any wise effect the validity of the deed.
5. The Statute of Wisconsin of 1849 permits a grantor out of possession to make a valid conveyance of lands adversely held by another.