APPENDIX.

No. I.

(*See page* 100.)

THE remarks of Mr. Senator Stewart, of Nevada, referred to in a note on this page, were originally contained in a public letter, I think, to his fellow Senator, Mr. Ramsey, of Minnesota. They have since been made in nearly the following form to the Senate of the United States:

"Upon the discovery of gold in California, in 1848, a large emigration of young men immediately rushed to that modern Ophir. These people, numbering in a few months hundreds of thousands, on arriving at their future home found no laws governing the possession and occupation of mines but the common law of right, which Americans alone are educated to administer. They were forced by the very necessity of the case to make laws for themselves. The reason and justice of the laws they formed challenge the admiration of all who investigate them. Each mining district, in an area extending over not less than fifty thousand square miles, formed its own rules and adopted its own customs. The similarity of these rules and customs throughout the entire mining region was so great as to attain all the beneficial results of well-digested, general laws. These regulations were thoroughly democratic in their character, guarding against every form of monopoly, and requiring continued work and occupation in good faith to constitute a valid possession.

"After the admission of California as a State, in September, 1850, Mr. Frémont, then Senator from that State, introduced a bill, the purpose of which was to establish police regulations in the mines. It imposed a small tax upon the miners to defray the expenses of the system. Many Senators, when the bill came up for discussion, expressed the opinion that the mines ought to be sold, or some means devised by which a direct revenue might be obtained from that source. Various amendments were offered to effect these purposes. But Mr. Benton took a leading part in the discussion, and contended throughout that good policy required that the mines should remain free and open for exploration and development. Mr. Seward sustained Mr. Benton.

"The arguments of Senators in favor of free mining finally prevailed, and all amendments looking to sale or direct revenue were voted down; and the bill finally passed the Senate, without material amendment, in its original form, but failed in the House from want of time to consider it. Before the meeting of the next Congress the fact became known that the miners themselves had adopted local rules for their own government, which rendered action on the

part of Congress unnecessary; and from that time to the present non-action has been the policy of the Government, with one single exception. The solemn declaration, however, just mentioned, on the part of the Senate, in favor of a just and liberal policy to the miners, was hailed by them as a practical recognition of their possessory rights, and greatly encouraged and stimulated mining enterprise, and laid the foundation for a system of local government now in full force over a vast region of country, inhabited by near a million men.

"The legislature of California, at their following session, in 1851, had under consideration the subject of legislating for the mines, and, after full and careful investigation, wisely concluded to declare that the rules and regulations of the miners themselves might be offered in evidence in all controversies respecting mining claims, and when not in conflict with the constitution or laws of the State, or of the United States, should govern the decision of the action. A series of wise judicial decisions moulded these regulations and customs into a comprehensive system of COMMON LAW, embracing not only mining law (properly speaking), but also regulating the use of water for mining purposes. The same system has spread over all the interior States and Territories where mines have been found, as far east as the Missouri River. The miner's law is a part of the miner's nature; he made it, and he loves it, trusts it, and obeys it. He has given the toil of his life to discover wealth, which, when found, is protected by no higher law than that enacted by himself, under the implied sanction of a just and generous Government. Miners, as a community, devote three-fourths of their aggregate labor to exploration, and consequently are, and ever will remain, poor, while individuals amass large fortunes, and the treasury of the world is augmented and replenished.

"Persons who have not given this subject special attention can hardly realize the wonderful results of this system of free mining. The incentive to the pioneer held out by the reward of a gold or silver mine, if he can find one, is magical upon the sanguine temperament of the prospector. For near a quarter of a century a race of men, constituting a majority by far of all the miners of the West, patient of toil, hopeful of success, deprived of the associations of home and family, have devoted themselves, with untiring energy, to sinking deep shafts, running tunnels thousands of feet in solid granite, traversing deserts, climbing mountains, and enduring every conceivable hardship and privation, exploring for mines, all founded upon the idea that no change would be made in this system that would deprive them of their hard-earned treasure. Some of these have found valuable mines, and a sure prospect of wealth and comfort when the appliances of capital and machinery shall be brought to their aid. Others have received no compensation but anticipation—no reward but hope.

"While these people have done little for themselves, they have done valuable service for this Government. They have enhanced the value of the property of the nation near one hundred per cent.; have converted that vast unknown region, extending from British Columbia on the north to Mexico on the south, and from the eastern slope of the Rocky Mountains to the western decline of the Sierra Nevada, into the great gold and silver fields of the United

States, surpassing in richness and extent the mines of any other nation on the globe. I assert, and no one familiar with the subject will question the fact, that the sand plains, alkaline deserts, and dreary mountains of rocks and sage brush of the great interior, would have been as worthless to-day as when they were marked by geographers as the great American desert, but for this system of free mining fostered by our neglect, and matured and perfected by our generous inaction. No miner has ever doubted the continued good faith of the Government, but has put his trust in its justice and liberality, traversing mountain and desert as incessantly and as hopefully as the farmer of the West has ploughed his field. What he now occupies he has discovered and added to the wealth of the nation.

"This good faith of the Government (promised, as it were, by the action of the Senate sixteen years ago) not only inspired enterprise, and led to discoveries the magnitude and importance of which cannot be overestimated, but in the time of the severest trials of the Union, no people were more loyal than the miners. They lost no opportunity to enlist in your armies, or contribute to the support of the Government. Their liberal donation to the sanitary fund was but a slight manifestation of their deep love of the Union, and sympathy for its suffering heroes. The little town in which I reside contributed in gold coin over $112,000, being at the time about thirty dollars to each voting inhabitant; and a like liberality was displayed by the whole coast. The people are truly grateful to a generous Government, and time seems to have strengthened the regard they feel for their native land and their early homes. But they look with jealous eyes upon every proposition for the sale of the mines which they have discovered and made valuable. Any public man who advocates it, with whatever motive, is liable to be condemned and discarded as an unfaithful servant. The reason for this is obvious. It is their all, secured through long years of incessant toil and privation, and they associate any sale with a sale at auction, where capital is to compete with poverty; fraud and intrigue with truth and honesty. It is not because they do not desire a fee-simple title, for this they would prize above all else; but most of them are poor, and unable to purchase in competition with capitalists and speculators, which the adoption of any plan heretofore proposed would compel them to do; and for these reasons the opposition to the sale of the mineral lands has been unanimous in the mining States and Territories.

"To extend the pre-emption system—applicable to agricultural lands—to mines is absurd and impossible. Nature does not deposit the precious metals in rectangular forms, descending between perpendicular lines into the earth, but in veins or lodes, varying from one foot to three hundred feet in width, dipping from a perpendicular from one to eighty degrees, and coursing through mountains and ravines at nearly every point of the compass. In exploring for vein mines, it is a vein or lode that is discovered, not a quarter section of land marked by surveyed boundaries. In working a vein more or less land is required, depending upon its size, course, dip, and a great variety of other circumstances, not possible to provide for in passing general laws. Sometimes these veins are found in groups, within a few feet of each other, and dipping into the earth at an angle of from thirty to fifty degrees, as at Freiberg, in

Saxony, or Austin, in Nevada. In such case a person buying a single acre in a rectangular form would have several mines at the surface, and none at five hundred or a thousand feet in depth. With such a division of a mine, one owning it at the surface, another at a greater depth, neither would be justified in expending money in costly machinery, deep shafts, and long tunnels, for the working of the same. Nor will it do to sell the land in advance of discovery, for this would stop explorations, and practically limit our mining wealth to the mines already found, for no one would 'prospect' with much energy upon the land of another, and land speculators never find mines. The mineral lands must remain open and free to exploration and development; and while this policy is pursued our mineral resources are inexhaustible. There is room enough for every prospector who wishes to try his luck in hunting for new mines for a thousand years of exploration, and yet there will be plenty of mines undiscovered. It would be a national calamity to adopt any system that would close that region to the prospector.

"The question then presents itself, how shall the Government give title, so important for permanent prosperity, and avoid these intolerable evils? I answer, there is but one mode, and that is to assure the title to those who now or hereafter may occupy according to local rules, suited to the character of the mines and the circumstances of each mining district. In the increasing agitation of the subject by the introduction into Congress of bills which miners regard as a system of confiscation, and which tend to destroy all confidence in mining titles, we now need statutes which shall continue the system of free mining, and hold the mineral lands open to exploration and occupation, subject to legislation by Congress and local rules; something which recognizes the obligation of the Government to respect private rights which have grown up under its tacit consent and approval, and which shall be in harmony with the legislation of 1865, protecting possessory rights, irrespective of any paramount interest of the United States. The system will be in harmony with the rules of property as understood by a million men, with the legislation of nine States and Territories, with a course of judicial decisions extending over near a quarter of a century, and finally ratified and confirmed by the SUPREME COURT OF THE UNITED STATES; in harmony, in short, with justice and good policy."

A system such as the eloquent Senator conceived to be accordant with these ideas was introduced by him to the Senate in June, 1866. (*See the "Daily Globe" of June* 19, 1866.)

No. II.

(*See page* 562.

PHILADELPHIA, March 27, 1866.

DEAR SIR: You are good enough to write to me that, in reporting a case in the Supreme Court at Washington, you would like to know the true value of the franc of France, and that you find yourself a little confused by appa-

rently more than one value being assigned to it. With terms of confidence in my knowledge of these things for which I thank you, you ask me how the matter stands. It gives me pleasure to inform you.

1. The custom-house value of the franc of France and Belgium is made by act of Congress, 18 cents, 6 mills.*

2. Previous to the passage of the act of February 21, 1857, certain foreign gold and silver coins, among which were the coins of France, were made a legal tender at a valuation, per pennyweight, dependent upon the report of the Director of the Mint as to their *weight* and *fineness*. In one of my first reports, as Director of the Mint, I recommended the repeal of all laws making foreign coins a legal tender.† In subsequent reports I repeated the suggestion, which led to the passage of the above-cited act of February, 1857; and now (by the third section of that act) foreign gold and silver coins are not "current" as money, nor a *legal tender*. But the section cited makes it the duty of the Director of the Mint to cause assays to be made from time to time of such foreign coins as may be known to our commerce, to determine their average weight, fineness, and value, and report the same in his annual Mint Report to the Secretary of the Treasury.

3. The last Mint Report‡ makes the five franc piece of silver worth 98 cents. At this rate, the franc of silver is worth 19 cents, 6 mills. This valuation is founded upon the *purchasing* price of silver at the Federal Mint, namely: 122 cents, 5 mills, per oz. troy. It will be noted that under the act of February 21, 1853,§ the silver half dollar and lower denominations are reduced in *weight* as compared with the *silver dollar*, and are only a legal tender to the amount of five dollars.

4. There is also in the report just cited (p. 248) a statement of the valuation of the *gold* franc, thus:

	Cents.	Mills.
20 franc piece, *new*, full weight,	385	83
" " " worn, average weight,	384	69

At this rate, the gold franc stands, as you will see—

When new, and of full weight,	19	27
When worn by circulation, average weight,	19	23

It is thus demonstrated that there are three valuations of the franc of France:

1.	Custom-house valuation,	18	6
2.	Silver franc, Mint price,	19	6
3.	Gold, new, full weight,	19	27
	" worn, average value,	19	23

I am, with great respect,

Your friend and obedient servant,

JAMES ROSS SNOWDEN.

To the Reporter of the Supreme Court of the United States,
Washington, D. C.

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* Act of May 22, 1846; 9 Stats. at Large, 14.

† See letter to the Secretary of the Treasury, January 28, 1854; 33d ong., 1st Session; House of Reps., Ex. Doc. No. 68, p. 23.

‡ Found in the "Finance Report" for 1865, p. 24*e*.

§ 1 Stats. at Large, 160.

No. III.

(*See page* 721.)

[From the MS. of 3d Wallace, Jr.]

The Passaic Bridges.

The Constitution gives to Congress power "to regulate commerce with foreign nations, and among the several States."

With this clause in force, as the supreme law of the land, Milnor and others, *citizens of New York, and owning wharves in the city of Newark, New Jersey*, but not navigators, pilots, or anything of that sort, filed their bills in the Circuit Court of the State just named to restrain the New Jersey Railroad Company and others from erecting two certain bridges over the Passaic, one *in* the city of Newark, at a point called the Commercial Dock; the other at a point about two and a half miles below the wharves of the town. This company's road forms a link in the chain of roads which connects New York with Philadelphia, and so the North and South. The company had been for many years running its trains over a bridge at the upper end of the town; but in crossing the river at that point they were obliged to make their road describe a curve, much in the shape of an S, carrying it, moreover, through populous parts of the city, and causing, as they said, delays and dangers. The purpose of the new bridges was, therefore, to shorten and straighten the road.

The complainants sought the injunction on the ground:

1st. That the Passaic River was a public highway of commerce, which, under the Constitution of the United States, has been regulated by Congress.

2d. That the free navigation of the river as a common highway having been established by regulation of Congress, and by compact between the States, it could not lawfully be obstructed by force of any State authority or legislation.

3d. That the bridges proposed to be erected would be each an obstruction to the free navigation of the river, and public nuisances.

The Passaic, it appeared, was *a river having its springs, course, and outlet wholly in New Jersey*. Though a small and narrow river, it is navigable for sloops, schooners, and the smaller class of steamboats, as far as the tide flows, which is some distance above Newark. At the upper end, above the city, there were several bridges with small draws, and difficult to pass, all of which were erected by authority of the State, and one of them more than fifty years ago. The city had been made a port of entry by act of Congress, and the United States had surveyed the channel, built two lighthouses, "fog-lights," spar-buoys, &c. The city had some little foreign commerce, and some with ports of other States; but vastly the largest portion of it all was with New York, to which it had become, in some sort, a manufacturing suburb, and nearly all this was carried on by the railroad, whose contemplated bridges the bill now sought to restrain.

The bridges in controversy were authorized to be erected by statute of the State of New Jersey. They were required by this statute to have pivot-draws,

leaving two passages of sixty-five feet each for the passage of vessels navigating the river.

As to their effects on the navigation, the complainants brought a large number of wharf owners, captains of sloops, schooners, and of little steamboats, who gave it, as their "opinion," that the bridges could not be erected without obstructing the navigation by the detention of ice, and by causing bars and shoals in the river, and without subjecting sailing vessels, especially, to a detention for a change of tide and wind, or for daylight, and to inconveniences and hazards generally; while it would probably subject wharf property above the bridges to a depreciation of from twenty-five to fifty per cent., break up a system of tow-boats that had got established in that river, and raise the price of freights; since "you can't get no man to go through these bridges without extra pay; they all have such a dread of bridges, which, if there are currents, frequently break sails and rigging, and sometimes injure their hulls."

But the case did not thus strike everybody. The Railroad Company proved, or brought witnesses to prove, that "not only would the proposed bridge offer no material obstruction to navigation, but, by replacing the present bridge at Centre Street, *would actually improve the general navigation of the river, and enhance the general value of wharf property on the river*, and by effecting the removal of the railroad track now running in rear of *the intermediate wharves, would result in very little, if any, damage to any of them.*"

As respected the advantages to the railroad, and the improved safety to travellers, while the complainants admitted that the road was a great thoroughfare, and that crossing on the old bridge obliged the trains to make a curve, they denied that the curve caused delay or danger to the road, or that any new track was necessary. They showed that the road had been very profitable, making for years dividends of not less than ten to fifteen per cent., while, on the subject of accident, they cited the Report of the directors to the stockholders for 1853 and 1854, in the former of which the directors say, with a spirit of piety which left no doubt that they spoke the truth:

"It is a subject for thankfulness and praise to the Almighty Governor of the universe, that on this 21st anniversary, the board are enabled to announce the fact, that although—including commuters and others—more than 13,000,000 of persons have been transported on the road, no person within the cars has suffered in life or limb."

While in the latter they continue in the same strain of gratitude and sense of obligation:

"The exemption from serious accidents which has attended the operations of the company during the past year is cause of sincere thankfulness. The gratifying record that no person transported on the road has been injured in life or limb, while in the cars, is still true, though the whole number of passengers since the opening of the road exceeds 15,000,000. Such favorable results, while they entitle those having charge of the condition of the road and the running of the trains to high commendation for their vigilance and care, also increase our obligations to a kind, protecting Providence.

"No doubt is entertained that the net earnings will be ample for the cash dividend of ten per cent. per annum, and a handsome surplus applicable to such construction as shall increase the value and usefulness of our work."

For the complainants: The case of *Pennsylvania* v. *Wheeling Bridge** governs this. In that case, the Bridge Company, under authority from the legislature of Virginia, undertook to erect a bridge over the Ohio at Wheeling. The Ohio at this point was wholly in her own State. She erected the bridge; when erected, it did not destroy the navigation at all, though it impeded it somewhat, rendering it less free. The State of Pennsylvania, having large canals and railways terminating on the Ohio, and which, she represented, had been built with direct reference to free navigation of that river, filed her bill to abate the bridge *as a nuisance.* Her allegation was, indeed, that the bridge had been built "under color of an act of the legislature of Virginia, but in direct violation of its terms." The legislature of Virginia, however, passed at once an act declaring that the bridge as constructed was constructed "in conformity with the intent and meaning of the charter." The bridge as erected existed, therefore, under the authority of the State. It was constructed under skilful engineers, and no otherwise impeded navigation probably than any bridge in any large river generally impedes navigation; rendering it less free. Most steamers with stiff smoke-pipes would have been able to pass as it was; any steamer with flexible pipes—pipes on hinges—could certainly have done so.

The court, however, declared that the bridge was a *nuisance,* and directed it to be abated, unless so raised and altered as to leave the navigation *wholly* free. Yet this bridge was a connecting bond of a great highway; it was itself a highway, at once intra-territorial, and leading to intercourse between the States. But the fact that it was *below a port of entry, Pittsburgh, was fatal to it.*

McLean, J., giving the opinion of the court, in which he places reliance on the fact that the bridge *was* erected below a port of entry, says:

"The fact that the bridge constitutes a nuisance is ascertained by measurement. If obstruction exists, it is a nuisance. An indictment at common law could not be sustained in the Federal courts by the United States against the bridge as a nuisance, as no such procedure has been authorized by Congress; but a proceeding on the ground of a private and irreparable injury may be sustained against it by an individual or a corporation. Such a proceeding is common to the Federal courts, and also to the courts of the State. The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case where the jurisdiction is made out the same as in a public prosecution. . . . The powers of a court of chancery are as well adapted, and as effectual for relief in the case of a private nuisance, as in either of the cases named."

In *Devoe* v. *The Penrose Ferry Bridge Company,*† which was a bill to enjoin a bridge below Philadelphia, over the Schuylkill, a river much small er and shallower than this—like it, wholly in one State—far more than it, in its history, the subject of regulation by the State in which it lies—a stream eminent for the finny tribes which haunt the sedge and ooze, but not whitened in its muddy sloth by sails of commerce—a stream bridged everywhere *at* the city—in regard to which Congress may be said never to have legislated—

* 13 Howard, 519.

† 3 American Law Register, 33.

Grier, J., granted an injunction to stay a bridge about to be erected under the authority of the Commonwealth of Pennsylvania. The court there said:

"The jurisdiction in cases like the present has been fully considered and decided in the *State of Pennsylvania* v. *The Wheeling Bridge.* The court is not at liberty, even if so disposed, to disregard the authority of that case. It is there decided that, although the courts of the United States cannot punish by indictment the erection of a nuisance on our public rivers, erected by authority of a State, yet that, as courts of chancery, they may interfere at the instance of an individual or corporation who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to the ports of entry within a State."

And the court even went out of its way to add, on the authority of the Wheeling Bridge Case, that the commerce on the Schuylkill below the port of Philadelphia was entitled to as much protection as that of the Ohio, Mississippi, Delaware, or the Hudson.

For the defendants: Granting to the Wheeling Bridge Case the fullest weight, it is no precedent for this.

The jurisdiction there exercised was invoked upon the proposition that "the River Ohio is a highway of commerce, regulated by Congress." That river is an enormous river, forms the boundary of six States, and is navigable through them and four other States for a thousand miles. State laws had not regulated it at any time, except to make it free, while it had been regulated by Congress in every way. By the Ordinance of 1787, its waters had been declared to be common highways, and forever "free." Virginia had, in 1789, when desiring that Kentucky should be admitted into the Union, declared that its navigation should be "free and common to all citizens of the United States," to which act Congress assented; and it thenceforth became a compact between Virginia and all other States. Successive appropriations were made by Congress for the removal of obstructions to its navigation; and, finally, when Virginia applied in four several instances—1836, '37, '38, and '43—for the passage of a law to authorize the construction of a bridge at Wheeling, she met in each case with refusal. We refer to these facts, being public ones. The "regulation" by Congress had, therefore, been made, as we have said, "in every way"—by what that body did, and by what it prevented—made affirmatively, and made negatively.

Now as respects the Passaic, in the first place its character and geographical position are wholly different from that of the Ohio. It is a very small stream; it rises, flows, and discharges itself within one State—a small one. No question can arise from its flowing through or past any other State. Then, no regulation of Congress worth naming has ever touched it, while the State in which it lies, and whose river it is, has exercised an early and continued control over it.

The remarks about nuisance made by McLean, J., in giving the opinion of the court, are extra-judicial. They have tended perhaps to mislead the professional mind; certainly, they were unnecessary to the decision of the cause, and if meant to be applied to the case of a bridge authorized by statute, and built according to the statute, are not well founded in law. The fact that a

bridge is below a port of entry does not necessarily make it a nuisance; nor was that the point adjudged in the Wheeling Bridge Case.

The case before the court bears far greater, and indeed a close analogy to *Wilson* v. *Blackbird Creek Company*.* Blackbird Creek was "one of those many creeks passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance." Under incorporation from the State of Delaware, certain persons, to increase the value of property along its banks, and to improve the health of the region by draining the marsh, erected a dam. This dam Wilson broke down; and on trespass brought against him by the Company, the question was, whether the authorization of the dam was void as repugnant to the Constitution, the counsel for the company arguing that it came in conflict with the power of the United States "to regulate commerce with foreign nations and among the several States." The court held, unanimously, that it was not repugnant to the Constitution. Marshall, C., J., giving his opinion, says:

"The value of property on the banks of the creek must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the General Government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it; but this abridgment, unless it comes in conflict with the Constitution, or a law of the United States, is an affair between the government of the State and its citizens, of which this court can take no cognizance. If Congress 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 not feel much difficulty in saying that a State law coming in conflict with *such* an act would be void; but Congress has passed no such act. We do not think that the act can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

This great Chief Justice does here admit that it is not every obstruction of every navigable stream by the State, nor even the complete stoppage by it of some navigable streams, which will constitute an interference with the constitutional power of Congress to regulate commerce. He speaks of the matter as a relative question, and says that, "under all the *circumstances* of the case," the act of the State could not be considered as such an interference. This relative character of this class of questions is what we maintain. He admits impliedly, too, that it is not every act of Congress legislating about a stream which will be a regulation of commerce in regard to it. "Had Congress passed an act the object of which was to *control State legislation* over these small navigable creeks, *such* an act," he says, "would have made the State legislation void." We invoke, then, HIS high authority. When Mr. Burke, on the outbreak of the French Revolution, was charged, for some expressions which he uttered, with deserting Whig politics, after showing, as he

* 2 Peters, 257.

did, that the expressions used by him were nearly identical with many found in the writings of the great Whig statesman of the Revolution of 1688, he said, that he did not desire to be thought "a better Whig than Lord Somers." Nor do we—happy if we can *rightly* follow him—desire to assert the powers of the Federal Government further than they were asserted by John Marshall. We say, as he did, that the question is one of circumstances—circumstances which every wise judge, as every practical statesman, must regard, and in some degree be governed by. Here is a river, on the one hand, having a commerce not vast; and there, too, on the other, is a road which is the great line of communication between Boston, New York, Philadelphia, Baltimore, Washington, and all the South—a road which has a greater travel upon it perhaps than any road of the world, and which, somewhere, must cross this stream. A principle of law designed to protect commerce between the States must not be so construed as practically grievously to injure it.

In *Devoe* v. *The Penrose Ferry Bridge Company*, cited on the other side, and much misunderstood, this court (Grier, J.) said:

"At common law every obstruction, however small, to the free navigation of a public river might, in strictness, be styled a nuisance; but the application of this definition to every bridge over every creek where the tide ebbs and flows, or which a chance sloop might occasionally visit, would be absurd, and highly injurious to public interests. Intercourse by means of turnpikes, canals, railroads, and bridges, is a public necessity. A railroad constructed by the authority of a State is often many thousand times more beneficial to the interests of commerce than the unlimited freedom of navigation over unimportant inlets, creeks, or bays, or remote portions of a harbor. It would be unreasonable to insist that the millions who travel on them should be subjected to great delay or annoyance for the convenience of a few sloops or fishing-smacks.

"Where bridges are constructed with draws, or openings for the passage of masted vessels, and high enough to permit others to pass under, if possible, the occasional delay of such vessels for a short time may be a trifling inconvenience in comparison with the public benefit of the bridge. *In every investigation of this kind the question is relative, not absolute.* Whether a certain erection be a nuisance must depend upon the peculiar circumstances of each case. When the trade of the channel is of great amount and importance, and that across it trifling, the same rule cannot apply as to a case where the conditions are contrary. If a steam ferry can amply accommodate those who cross the stream, and a bridge with a draw would inflict an injury on commerce, and tax the public by increased freight, there is no sufficient reason why a bridge should be erected because it will be more profitable stock than a steamboat or towboat, or better accommodate some small neighborhood or neck of land.

"The city of Boston is situated on a peninsula. No public necessity could well exist which would justify a bridge, compelling *all* the commerce of her port to pass through a draw, while it might be very reasonable that vessels passing from one part of the port or harbor to another should be compelled to submit to some inconvenience for the sake of a bridge erected for one of the great railroads, so important to the prosperity and wealth of the city.

"It would be an abuse of the term to call the Schuylkill dam a nuisance because it is below tide water, and converts a few miles of useless sloop navigation into a canal, which, under the name of the Schuylkill Navigation Company, annually adds millions to the wealth of the city and State, and whose commerce constitutes the staple of this western portion of the port of Philadelphia. Nor is it any appreciable injury to the commerce of the port that vessels with high masts cannot pass the Market Street Bridge. Ample space for those vessels still remains at the wharves below. The great staple

of this western port is coal, and this bridge is built of such a height as not to interfere with the passage of the steam-tugs and canal-boats engaged in transporting it. *The city of Philadelphia now extends across the Schuylkill, and such a bridge* (a great thoroughfare across it at the connecting points), *is a public necessity. The same may possibly be said of the Gray's Ferry Bridge* (far lower down the stream), *over which the railroad to Baltimore passes.* Vessels with masts, and steamboats with high chimneys, are no doubt put to considerable inconvenience in passing the draw; but the bridge is so built that the immense trade in coal can pass by it without interruption."

And the court acted in perfect conformity to these principles when, in order to prevent an outlay while points of law and fact were yet contested, and in the interests, therefore, of all parties to the controversy, it granted a *preliminary* injunction to stay a bridge far down on the Schuylkill River—almost, indeed, as it enters the Delaware—the effect of whose erection the city of Philadelphia, by its Select and Common Councils, represented would be greatly to injure it and the whole line of wharves of the Schuylkill River, without any corresponding public benefit whatever.

The judge, indeed, in that case, misreading apparently, as the court's adjudication in the Wheeling Bridge Case, the expression, dicta simply, of McLean, J., to which we have referred, may have assumed that Federal authority was interfered with where it was not, and have expressed itself too strongly in support of a right of final injunction over such a stream. But the final injunction was never granted; and of what avail are such expressions as are cited on the other side, made, as the court declared, but as it has not been noted, contrary to its "desire," and to guard against "unnecessary fears excited?"—expressions never acted on, but the reverse, and which must be taken merely as an illustration of the way in which, when supporting against a powerful argument at the bar a decree which he is about to make, a judge will sometimes press with strength and earnestness, with all the power of statement and illustration which he possesses, a doctrine which he seeks to establish, and will go almost as far in one direction as counsel have gone in another, responding to extremes by exuberance. He does not then overlay his opinion by all the limitations, and qualifications, and restrictions which he would use were he inditing an academic lecture. Such expressions are natural, and comprehensible as well, to all except to those who cannot see that they were used responsively, and argumentatively, and hypothetically, and by way of illustration, and to exclude conclusions in a matter not requiring action upon them; and that some qualification and limitation of them when action is required, and when all the conditions of the problem may be reversed, argues no inconsistency of principle, but, contrariwise, may be the most intelligent form of principle's assertion.

Reply: Blackbird Creek bore no resemblance to the Passaic. It was a mere sluice, up and down which the Delaware estuated. There was no port of entry at its head. It had few or no inhabitants but those such as its name indicates, and no commerce of any kind. The case cited and relating to it does not apply.

GRIER, J.—It will not be necessary to a proper consideration of these cases to give an abstract of the testimony. Where opinions are received in evidence

there can be no restraint as to quantity. Such testimony is always affected by the feelings, prejudices, and interests of the witnesses, and is, of course, contradictory. A skipper will pronounce every bridge a nuisance, while travellers on plank or railroads will not think it proper that their persons or property should be subject to delay, or risk of destruction, to avoid an inconvenience or slight impediment to sloops and schooners. Owners of wharves or docks who may apprehend that their interests may be affected by a change of location of a bridge, are unanimous in their opinion that public improvement had better be arrested than that their interests should be affected. In this conflict of testimony and discordant opinion, we shall not stop to make any invidious comparisons as to the credibility of the witnesses, but assume such facts as have been already stated as the case.

That the proposed bridges will in some measure cause an obstruction to the navigation of the river, and some inconvenience to vessels passing the draws, is certainly true. Every bridge may be said to be an obstruction on the channel of a river, but it is not necessarily a nuisance. Bridges are highways, as necessary to the commerce and intercourse of the public as rivers. That which the public convenience imperatively demands cannot be called a public nuisance because it causes some inconvenience, or affects the private interests of a few individuals.

Now if every bridge over a navigable river be not necessarily a nuisance, but may be erected for the public benefit, without being considered in law or in fact a nuisance, though certainly an inconvenience affecting the navigation of the river, the question recurs, who is to judge of this necessity? Who shall say what shall be the height of a pier, the width of a draw, and how it shall be erected, managed, and controlled? Is this a matter of judicial discretion or of legislative enactment? Can that be a nuisance which is authorized by law? Does a State lose the great police power of regulating her own highways, and bridges over her own rivers, because the tide may flow therein, or as soon as they become a highway to a port of entry within her own borders? In the course of seventy years' practical construction of the Constitution, no act of Congress is to be found regulating such erections, or assuming to license a bridge over such a river, wholly within the jurisdiction of a State, if we except the doubtful precedent of the Cumberland Road; and during all this time States have assumed and exercised this power. If we now deny to the States, where do we find any authority in the Constitution or acts of Congress for assuming it ourselves?

These are questions which must be resolved before this court can constitute itself "*arbiter pontium*," and assume the power of deciding where and when the public necessity demands a bridge, what is sufficient draw, or how much inconvenience to navigation will constitute a nuisance.

The complainants in these bills, in order to show jurisdiction in the court, have stated themselves to be citizens of the State of New York. Their right to a remedy in the courts of the United States is not asserted, on account of the subject-matter of the controversy; nor do they allege any peculiar jurisdiction as given to us by any act of Congress, but rest upon their personal right as citizens of another State to sue in this tribunal. It is plain, by their

own showing, that they can demand no other remedy from this court than would be administered by the tribunals of the State of New Jersey in a suit between her own citizens. A citizen of New York who purchases wharves in Newark, or owns a vessel navigating to that port, has no greater right than the citizens of New Jersey. A court of chancery in New Jersey would not interfere with the course of public improvements authorized by the State, at the instance of a wharf owner, on the suggestion that a change in the location of a bridge would cause a depreciation in the value of his property. This is not a result for which (if the court can give any remedy at all) it will interfere by injunction. The court has no power to arrest the course of public improvements on account of their effects upon the value of property, appreciating it in one place and depreciating it in another. If special damage occurs to an individual, the law gives him a remedy; but he cannot recover, either in a court of law or equity, special damage as for a common nuisance, if the erection complained of be not a nuisance. A bridge authorized by the State of New Jersey cannot be treated as a nuisance under the laws of New Jersey. That the police power of a State includes the regulation of highways and bridges within its boundaries has never been questioned. If the legislature has declared that bridges erected with draws of certain dimensions will not so impede the commerce of the river as to be injurious or become a public nuisance, where can the courts of New Jersey find any authority for overruling, reversing, or nullifying legislative acts on a subject-matter over which it has exclusive jurisdiction? Admitting, for sake of argument, that Congress, in the exercise of the commercial power, may regulate the height of bridges on a public river in a State below a port of entry, or may forbid their erection altogether, they have never yet assumed the exercise of such a power; nor have they by any legislative act conferred this power on the courts. The bridges will not be nuisances by the law of New Jersey. The United States has no common law offences, and has passed no statute declaring such an erection to be a nuisance. If so, a court cannot interfere by arbitrary decree either to restrain the erection of a bridge, or to define its form and proportions. It is plain that these are subjects of legislative, not judicial, discretion. It is a power which has always heretofore been exercised by State legislatures over rivers wholly within their jurisdiction, and where the rights of citizens of other States to navigate the river are not injured for the sake of some special benefit to the citizens of the State exercising the power.

It has been contended, on the authority of a dictum of my own, in *Devoe* v. *The Penrose Ferry Bridge Company*,* "that the Supreme Court have decided, in the case of *Pennsylvania* v. *The Wheeling Bridge*,† that although the courts of the United States cannot punish by indictment the erection of a nuisance on our public rivers, erected by authority of a State, yet that, as courts of chancery, they may interfere at the instance of an individual or corporation who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to the ports of entry within a State."

* 3 American Law Register, 83.

† 13 Howard, 579.

It is true that this doctrine was enunciated as a corollary from the Wheeling Bridge Case, on a motion for an *interlocutory* injunction against a bridge over a stream wholly within the territory and jurisdiction of Pennsylvania. On such motions, I have always refused to hear and definitively decide the great points of a case. If there be a *primâ facie*, or even doubtful, case shown, it is the interest of *both parties* that the interlocutory injunction should issue, and that the defendants should not expend large sums in erections which may *possibly* be treated hereafter by the court as nuisances. In the cases now before us the same course was pursued; but after full argument of this question on final hearing, and a careful consideration of it, I feel bound to acknowledge that the dictum I have just quoted from the report of the case of the Penrose Ferry Bridge Company is not supported by the decision of the Supreme Court in the Wheeling Bridge Case. It is true that such an inference might be drawn from a hasty or superficial examination of the opinion of the court as delivered in that case; but the point now to be considered was not in that case, and could not, therefore, have been decided. No judge, in vindicating the judgment of the court, can deliver maxims of universal application in every sentence, or oracles which may be read in two ways, one applicable to the case before him, and the other not. To sever the arguments of a judge from the facts of the case to which he refers will often lead to very erroneous conclusions. The fact that Pittsburg has been made a port of entry may have been mentioned as an additional or cumulative reason why Virginia should not be allowed to license a nuisance on the Ohio, below that city. But the question whether the power to regulate bridges over navigable rivers, wholly within the bounds of a State, could be exercised by it below a port of entry, and whether the establishment of such a port did *ipso facto* divest the State of such a power, was not in that case, and therefore not decided. This assertion will be fully vindicated by a careful examination of the record in that case.

1. It must be noted, as a circumstance of that case, that although the State of Pennsylvania, in her corporate capacity, was complainant, and "*propter dignitatem*" entitled to sue in the Supreme Court of the United States, yet that when the bill was filed, the same complaint might have been sustained in the Circuit Court of the United States, or the bridge might have been prostrated as a nuisance by indictment in the proper State court of Virginia. The bill charged that the bridge proposed to be erected was in utter disregard of the license granted by its charter, which carefully forbid the least interference with the navigation of the Ohio. On the facts charged and proved, a court of chancery of Virginia would have been bound to enjoin the erection of so palpable a nuisance to the navigation. The case, therefore, presented every fact necessary to give the court jurisdiction, a party having a right to sue in the court, a nuisance proposed to be erected without the sanction either of Virginia or the United States, and great special damage to the plaintiff.

2. During the pendency of this suit, the legislature of Virginia saw proper to come to the assistance of their corporation in the unequal contest, and at its suggestion enacted that the bridge proposed to be built contrary to the license granted to the corporation was according to it, and not thereupon to be considered as a nuisance by the laws of Virginia, notwithstanding that the

bridge was without a draw, and for many days in the year would wholly obstruct the passage of steamboats.

3. This legislation of Virginia being pleaded as a bar to further action of the court in the case, necessarily raised these questions.

Could Virginia license or authorize a nuisance on a public river, flowing, which rose in Pennsylvania, and passed along the border of Virginia, and which, by compact between the States, was declared to be "free and common to all the citizens of the United States?" If Virginia could authorize any obstruction at all to the channel navigation, she could stop it altogether, and divert the whole commerce of that great river from the State of Pennsylvania, and compel it to seek its outlet by the railroads and other public improvements of Virginia. If she had the sovereign right over this boundary river claimed by her, there would be no measure to her power. She would have the same right to stop its navigation altogether as to stop it ten days in a year. If the plea was admitted, Virginia could make Wheeling the head of navigation on the Ohio, and Kentucky might do the same at Louisville, having the same right over the whole river which Virginia can claim. This plea, therefore, presented not only a great question of international law, but whether rights secured to the people of the United States by compact made before the Constitution were held at the mercy or caprice of every or any of the States to which the river was a boundary, The decision of the court denied this right. The plea being insufficient as a defence, of course the complainant was entitled to a decree prostrating the bridge, which had been erected *pendente lite*. But to mitigate the apparent hardship of such a decree, if executed unconditionally, the court, in the exercise of a merciful discretion, granted a stay of execution on condition that the bridge should be raised to a certain height, or have a draw put in it which would permit boats to pass at all stages of the navigation. From this modification of the decree no inference can be drawn that the courts of the United States claim authority to regulate bridges below ports of entry, and treat all State legislation in such cases as unconstitutional and void.

It is evident from this statement that the Supreme Court, in denying the right of Virginia to exercise this absolute control over the Ohio River, and in deciding that, as a riparian proprietor, she was not entitled, either by the compact or by constitutional law, to obstruct the commerce of a supra-riparian State, had before them questions not involved in these cases, and which cannot affect their decision. The Passaic River, though navigable for a few miles within the State of New Jersey, and therefore a public river, belongs wholly to that State. It is no highway to other States; no commerce passes thereon from States below the bridge to States above. Being the property of the State, and no other State having any title to interfere with her absolute dominions, she alone can regulate the harbors, wharves, ferries, or bridges, in or over it. Congress has the exclusive power to regulate commerce; but that has never been construed to include the means by which commerce is carried on within a State. Canals, turnpikes, bridges, and railroads, are as necessary to the commerce between and through the several States as rivers, yet Congress has never pretended to regulate them. When a city is made a port

of entry, Congress does not thereby assume to regulate its harbor, or detract from the sovereign rights before exercised by each State over her own public rivers. Congress may establish post-offices and post-roads; but this does not affect or control the absolute power of the State over its highways and bridges. If a State does not desire the accommodation of mails at certain places, and will not make roads and bridges on which to transport them, Congress cannot compel it to do so, or require it to receive favors by compulsion. Constituting a town or city a port of entry is an act for the convenience and benefit of such place and its commerce; but for the sake of this benefit the Constitution does not require the State to surrender her control over the harbor or the highways leading to it, either by land or water, provided all citizens of the United States enjoy the same privileges which are enjoyed by her own.

Whether a bridge over the Passaic will injuriously affect the harbor of Newark is a question which the people of New Jersey can best determine, and have a right to determine for themselves. If the bridges be an inconvenience to sloops and schooners navigating their port, it is no more so to others than to them. I see no reason why the State of New Jersey, in the exercise of her absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves of Newark at the mouth of the river. It would affect the rights of no other State; it would still be a port of entry if Congress chose to continue it so. Such action would not be in conflict with any power vested in Congress. A State may, in the exercise of its reserved powers, incidentally affect subjects intrusted to Congress without any necessary collision. All railroads, canals, harbors, or bridges, necessarily affect the commerce not only within a State, but between the States. Congress, by conferring the privilege of a port of entry upon a town or city, does not come in conflict with the police power of a State exercised in bridging her own rivers below such port. If the power to make a town a port of entry includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads, and canals—to land as well as water? Assuming the right (which I neither affirm or deny) of Congress to regulate bridges over navigable rivers below ports of entry, yet not having done so, the courts cannot assume to themselves such a power. There is no act of Congress or rule of law which courts could apply to such a case. It is possible that courts might exercise this discretionary power as judiciously as a legislative body, yet the praise of being "a good judge" could hardly be given to one who would endeavor to "enlarge his jurisdiction" by the assumption, or rather usurpation, of such an undefined and discretionary power.

The police power to make bridges over its public rivers is as absolutely and exclusively vested in a State as the commercial power is in Congress; and no question can arise as to which is bound to give way, when exercised over the same subject-matter, till a case of actual collision occurs. This is all that was decided in the case of *Wilson* v. *The Blackbird Creek*,* &c. That case has been the subject of much comment, and some misconstruction. It was never intended as a retraction or modification of anything decided in *Gibbons*

* 2 Peters, 257.

v. *Ogden*, or to the exclusive power of Congress to regulate commerce. Nor does the Wheeling Bridge Case at all conflict with either. The case of *Wilson* v. *The Blackbird Creek*, &c., governs this, while it has nothing in common with that of the Wheeling Bridge.

The view taken by the court of this point dispenses with the necessity of an expression of opinion on the questions on which so much testimony has been accumulated: What is the proper width of draws on bridges over the Passaic? How far the public necessity requires them? What is the comparative value of the commerce passing over or under them? What the amount of inconvenience such draws may be to the navigation, and whether it is for the public interest that this should be encountered rather than the greater one consequent on the want of such bridges? and, finally, the comparative merits of curved and straight lines in the construction of railroads. These questions have all been ruled by the legislature of New Jersey, having (as we believe) the sole jurisdiction in the matter. They have used their discretion in a matter properly submitted to it, and this court has neither the power to decide, nor the disposition to say, that it has been injudiciously exercised.

BILLS DISMISSED WITH COSTS.

As already mentioned in the text (p. 721), this decree was subsequently affirmed in the Supreme Court of the United States, the court being equally divided, however, and no opinion given.