Statement of the case.

PUMPELLY *v.* GREEN BAY COMPANY.

1. Where a plea relies on a statute authority as a defence, it must allege the facts which it asserts to be so authorized, and cannot plead generally that it complied with the statute. Hence a plea is bad which states that defendant raised the water in a lake no higher than the statute authorized, when the State forbid the water being raised above its ordinary level.
2. Where a declaration charges a defendant with overflowing the plaintiff's land by raising the water in the lake, a plea containing neither a denial of what is alleged nor authority for doing it is bad.
3. By the general law of European nations and the common law of England it was a qualification of the right of eminent domain that compensation should be made for private property taken or sacrificed for public use.
4. And the constitutional provisions of the United States and of the several States which declare that private property shall not be taken for public use without just compensation were intended to establish this principle beyond legislative control.
5. It is not necessary that property should be absolutely *taken*, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the meaning of the Constitution.
6. The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provision demands compensation.
7. This proposition is sustained by the decisions of the Supreme Court of Wisconsin construing the provision of the constitution of that State on the subject, and by many other adjudged cases in this country.
8. The cases which hold that remote and consequential injury to private property by reason of authorized public improvements is not taking such property for public use have many of them gone to the utmost limit of that principle, and some beyond it, though the principle is a sound one in its proper application to many injuries so originating.
9. Lands sold by the United States with no reservation, though bordering on a navigable stream, are as much within the protection of the constitutional principle awarding compensation as other private property.

ERROR to the Circuit Court of the United States for the District of Wisconsin; the case being thus:

The Constitution of Wisconsin ordains that

"The property of no person shall be taken for public use without just compensation therefor."

With this provision in force as fundamental law, one Pumpelly, in September, 1867, brought trespass on the case against the Green Bay and Mississippi Canal Company for overflowing 640 acres of his land, by means of a dam erected across Fox River, the northern outlet of Lake Winnebago, by which, as the declaration averred, the waters of the lake were raised so high as to forcibly and with violence overflow all his said land, from the time of the completion of the dam in 1861 to the commencement of this suit; the water coming with such a violence, the declaration averred, as to tear up his trees and grass by the roots, and wash them, with his hay by tons, away, to choke up his drains and fill up his ditches, to saturate some of his lands with water, and to dirty and injure other parts by bringing and leaving on them deposits of sand, and otherwise greatly injuring him. The canal company pleaded six pleas, of which the second was the most important, but of which the fourth and sixth may also be mentioned.

This second plea was divisible, apparently, into two parts.

The *first* part set up (quoting it entire) a statute of Wisconsin Territory, approved March 10th, 1848, by which one Curtis Reed and his associates were authorized to construct a dam across Fox River, the northern outlet of Winnebago Lake, to enable them to use the waters of the river for hydraulic purposes.

The second section of the act quoted read thus:

"Said dam shall not exceed seven feet in height above high-water mark of said river: *Provided*, that said dam shall not raise the water in Lake Winnebago above its ordinary level.

"And the said Curtis Reed and his associates, their heirs and assigns, shall be subject to, and entitled to, all the benefit and provisions of the Act relating to Mills and Mill-dams, approved January 13th, 1840."

[NOTE.—"The 'Act relating to Mills and Mill-dams, approved January 13th, 1840,' thus referred to in the statute of 1848, as an act to which Reed and his associates should be subject, was an act of Wisconsin which provided a special remedy for persons whose lands were overflowed or otherwise injured by mill-dams. Section 4 was as follows:

Statement of the case.

"'Any person whose land is overflowed or otherwise injured by such dam may obtain compensation therefor upon his complaint before the District Court for the county where the land, or any part thereof, lies; provided, that no compensation shall be awarded for any damages sustained more than three years before the institution of the suit.'"

"Sections 5 to 27, inclusive, provided for the manner of prosecuting the suit, the form, effect, and mode of enforcing the judgment, and for appeals and proceedings thereon. Section 28 was thus:

"'No action shall be sustained at common law for the recovery of damages for the erecting, maintaining, or using any mill or mill-dam, except as provided in this act.'"]

The plea, still continuing its first part, averred that Reed and an associate commenced the building of this dam; that by certain legislation of Wisconsin (now become a State) it was afterwards adopted as part of the system of improving the navigation of the Fox River, and became the property of the defendants. The plea, after referring to the provisions of the act of 1848, averred

"That the said dam was built to the same height and in the same manner, and to no greater height and in no different manner from that duly authorized under and according to the provisions aforesaid, and to no greater height than was authorized by the act aforesaid, approved March 10th, 1848.

"That the said dam has ever since been and is now continued and maintained at the same and no greater height, and in the same and no different manner from that to which and in which it was originally built and erected as aforesaid."

In what might be distinguished as its second part, the plea having set forth and pleaded in the first, as already indicated, that the legislature of Wisconsin after it had become a State passed an act to provide for the improvement of the Fox and Wisconsin Rivers; that Doty and his associate accepted the terms of the act; that under the act a board of public works was organized, which, through Doty and his associate, built the dam—went on to say, that by subsequent legislation, in the years 1861 and 1866, the present defendants were made a corporation under the laws of Wisconsin,

and became possessed of the "River Improvement," so called, and of its dams, water-powers, "also all other rights, privileges, franchises, easements, and appurtenances of all kinds described in the acts of the legislature of Wisconsin, &c., . . . including the easement or right to overflow, as hereinafter mentioned." The plea then proceeded to say that by the act of building and completing the dam, &c., and by means of the waters of Lake Winnebago, Reed and Doty, and the State by its board of public works, did, as they lawfully might do, seize, and, to the extent necessary and for the purposes of a water-power and of the said improvement, take possession of the lands and premises, trees, grass, herbage, drains, ditches, &c , in the declaration mentioned, to the extent that the same were, as therein alleged, destroyed, damaged, overflowed, saturated, and subverted, and otherwise injured; that the seizure and taking possession were so made and done under claim and color of right and title duly made by virtue of the laws of Wisconsin, and that the defendant had done as lawfully it might.

THE FOURTH plea set forth the legislation authorizing the erection of the dam and the improvement of the river, the title of the defendant to the improvement and its privileges and duties in relation thereto—all as in the second plea—and alleged that the dam was completed in the year 1852; that the State, by its board of public works, seized so much of the plaintiff's land as was overflowed and as was necessary for this improvement, and ever since the completion of the dam, in 1852, that the State, its successors, and the defendant, had held, and that the defendant now held the same; that such seizure was made under claim and color of right and title, by virtue of the laws of Wisconsin; publicly and notoriously, and with the knowledge and acquiescence of the plaintiff, and under like claim and color, and in like manner had since been held; that the plaintiff, at the time of such seizure, was seized in fee and was in possession of the land described in the declaration, subject to the rights acquired by the State by its seizure and possession; that

during all the said time—*i. e.*, since the completion of the dam, in 1852—the plaintiff had been under no disability which disabled him from bringing suit.

THE SIXTH plea alleged that by the Ordinance of 1787, the act of Congress of August 7th, 1789, the act establishing the territorial government of Wisconsin, the act admitting the State of Wisconsin into the Union, the Constitution of the State of Wisconsin, and the laws of the United States and of the State of Wisconsin, it was declared that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying-places, &c., should be common highways and forever free; that the Fox and Wisconsin Rivers and Lake Winnebago were and ever had been of the navigable waters thus referred to; that the Fox River was a navigable water leading into the St. Lawrence.

The plea then set out the legislation in regard to the improvement, the incorporation of the Fox and Wisconsin Improvement Company, the organization, incorporation, and title of the canal company (the defendant), as set forth before, and further alleged that the dam was built and maintained under the authority of the laws of the United States and of the State of Wisconsin, and the board of public works; that as constructed and maintained, it was and is an essential portion of the works for the improvement of the navigability of the Fox and Wisconsin Rivers, and to the proper development as common navigable highways; that the ordinance, the laws of Congress and of the State, granted and assigned to the defendant, the improvement and the easement, right and privilege of overflowing, &c., the lands described in the declaration, to the extent necessary to improve the navigability of said rivers; that under a treaty with the Winnebago Indians, in 1832, the United States patented certain land (of which the plaintiff's was a part) to one Theresa Paquette; that she, the said Theresa and original grantor of the lands described in the declaration, and all the subsequent grantees thereof, including the plaintiff, purchased with full notice of, and subject to, the easement

and right aforesaid; and which easement and right was granted to the State prior to the original grant of title to plaintiff's land, which is alleged to have been in 1849.

A *general* demurrer to these three pleas being overruled by the court, the plaintiff brought the case here.

Messrs. B. J. Stevens and H. L. Palmer, in support of the ruling below:

I. The fact that our dam causes an overflow, even if the fact were conceded, does not make us liable anywhere. For the second section of the act of March 10th, 1848, gave us a right to build a dam of seven feet, or of any greater height, above high-water mark in Fox River, provided only that such dam did not raise the water in Lake Winnebago above its ordinary level. And it gave us a right to build to the seven feet, let the result be what it might. This is the fair construction of the *proviso*. Now we have pleaded that we built the dam just as the statute authorized us to build it; that is to say, conceding an overflow, that we have built it seven feet high and no more. These facts being admitted by the demurrer, the judgment was properly given for the defendant.

Further than this, the Mill-dam Act of 1840 having provided a special remedy for injuries sustained by the owners of lands overflowed by mill-dams, the remedy thus provided is the only one available to the land-owner, and excludes all others.

II. Passing to the second part of the plea, we come to a grave question in State constitutional law; but here, too, we say that the plaintiff has no claim, and that the demurrer was rightly overruled.

The Fox River being a public navigable river, and a common public highway (as it will be admitted in virtue of well-known public legislation to be), *primâ facie* and of common right belongs to the sovereign power. The lands of individuals bounded on this public navigable river and on the lakes through which it runs, and which form a part of it,

were indeed granted to those individuals by the State or National government; but neither the State nor the government thereby divested itself of the right and power of improving the navigation of the river, and may improve it without liability for remote and consequential damages to individuals.

In *Lansing* v. *Smith*,* a statute of New York authorized the construction of a basin in the Hudson at Albany, and erections whereby the docks, &c., of the plaintiff were rendered inaccessible by vessels and much depreciated in value. But it was determined that the act, although it provided no compensation for such injury, was not unconstitutional, either as taking private property for public use without compensation or as impairing the obligation of contracts; that the plaintiff had not at common law, as owner of the adjacent soil, nor by virtue of a grant from the State for land under water opposite to the shore, and under which he claimed, a right "to the natural flow of the river with which the State had no right to interfere by any erection in the bed of the river or in any other manner."

The doctrine of this case was followed in Pennsylvania, in *McKeen* v. *The Delaware Division Canal Company*.† That was an action to recover damages for injuries alleged to have been sustained by the plaintiff, by reason of the erection by the defendant of a dam across the Lehigh River for the purpose of improving the navigation of the river, which caused the water to flow back into the plaintiff's mill-race and thereby injured his fall and water-power. The court held that this was but the common case of a consequential injury, and that the injury "which followed the raising of the water in the stream to improve navigation was not a taking of his property, but one merely consequential, which he must suffer without compensation, unless the State should choose out of grace to concede it." "Every one," says the court, "who buys property on a navigable stream purchases subject to the superior rights of the Commonwealth to regulate and

* 8 Cowen, 146.

† 49 Pennsylvania State, 424.

Argument for the builders of the dam.

improve it for the benefit of all her citizens." This same view is had in numerous Pennsylvania cases;* and these cases are, we think, approved by this court in *Rundle* v. *Delaware and Raritan Canal Company*.†

In *Canal Appraisers* v. *The People*,‡ a New York case, it was determined that "if, in the improvement of the navigation of a public river, the waters of a tributary stream are so much raised as to destroy a valuable mill site situated thereon, and the stream be generally navigable, although not so at the particular locality of the mill site, the owner is not entitled to damages within the provisions of the canal laws, directing compensation to be made for private property taken for public use."

To the same effect is *The People* v. *The Canal Appraisers*,§ decided in the same State by the Court of Appeals, in 1865; *Fitchburg Railroad Co.* v. *Boston and Maine Railroad Co.*,‖ in Massachusetts; *Hollister* v. *The Union Company*,¶ in Connecticut; *Commissioners of Homochitto* v. *Withers*,** in Mississippi, and *Hanson* v. *La Fayette*,†† in Louisiana.

But we must direct particular attention to the Wisconsin case of *Alexander* v. *City of Milwaukee*.‡‡ The plaintiff there owned lots on the Milwaukee River, on which he had docks and a shipyard. The city of Milwaukee, under legislative authority, constructed the existing "straight cut" harbor, for the purpose of improving navigation and promoting the interests of commerce. By reason of the construction of the harbor, the waters of the lake were from time to time driven through the cut and upon and over the plaintiff's premises, washed away his buildings, materials, and portions of the

* Monongahela Navigation Co. *v.* Coons, 6 Watts & Sergeant, 101; Susquehanna Canal Co. *v.* Wright, 9 Id. 9; Henry *v.* Pittsburg and Alleghany Bridge Co., 8 Id. 85; Monongahela Navigation Co. *v.* Coon, 6 Barr, 379; Mifflin *v.* Railroad Co., 4 Harris, 182; New York and Erie R. R. Co. *v.* Young, 9 Casey, 175; Monongahela Bridge Co. *v.* Kirk, 46 Pennsylvania State, 112; Watson *v.* P. & C. R. R. Co., 1 Wright, 469; Shrunk *v.* Schuylkill Navigation Co., 14 Sergeant & Rawle, 71.

† 14 Howard, 80.

‡ 17 Wendell, 571.

§ 33 New York, 461.

‖ 3 Cushing, 58.

¶ 9 Connecticut, 435.

** 29 Mississippi, 21.

†† 18 Louisiana, 295.

‡‡ 16 Wisconsin, 247.

lots, and filled up the channel of the river opposite the plaintiff's premises, so as to render it useless, and substantially destroyed his shipyard. The action was to recover the damages thus sustained. The Supreme Court held that the city was not liable for the consequential damages produced by the improvement to property in the vicinity of such improvement, no part of which was taken or used therefor; and "that the making of a public improvement in the vicinity of private property, which is incidentally injured thereby, or diminished in volume, but no part of which is taken or used for such improvement, is not a taking of private property for public use within the meaning of the Constitution."

Thus it seems clear that a State may, in the interest of the public, erect such works as may be deemed expedient for the purpose of improving the navigation and increasing usefulness of a navigable river, without rendering itself liable to individuals owning land bordering on such river, for injuries to their lands resulting from their overflow by reason of such improvements.

In this case, whatever has been done by way of improving the Fox River; whatever has been done by way of erecting and maintaining the dam in question, has been done by the State itself or by its express authority. The defendant's lands have not been *taken or appropriated.* They are only affected by the overflow occasioned by raising the water in Lake Winnebago. Whatever may be the extent of this injury, it is remote and consequential and without remedy.

III. The fourth and sixth pleas involve in the main the same constitutional question as here raised. The court will itself consider any points of difference.

Messrs. J. M. Gillet and D. Taylor, contra.

Mr. Justice MILLER delivered the opinion of the court.

The second plea, the most important, is technically liable to the objection that it relies on two substantially different grounds of defence, but as the demurrer was general and

not special, and as the part of it which sets up the first of these defences may be treated as mere inducement to the other, we will consider whether there is found in the plea any sufficient defence to the cause of action set out in the declaration.

This first part of the plea is clearly designed to present this defence, that the dam was authorized by statute and built in conformity to the specific requirements of the act, so that the defendants are not liable for exceeding the authority which it conferred, and that for any injury to the plaintiff's property arising from this lawful erection of the dam his only remedy was the one provided in the act referred to, concerning mills and mill-dams. As this enacted that persons whose lands were overflowed might obtain compensation upon complaint before the District Court of the county where the land lay, and that no action at common law should be sustained for such damages, except as provided in the act; if the remainder of the plea is good, it is a defence to the present suit. But this part of the plea is defective in this. It is contended by the counsel for the defendants that the second section of the act authorizes them to build their dam seven feet above high-water mark of the *river* at all events, and that the restriction that the water of the *lake* shall not be raised above its ordinary level is only applicable to such raising, if the dam should exceed the first limitation; while the counsel for the plaintiff asserts that both limitations were effectual, and that if the dam raised the water in the lake above its ordinary level the law was violated, though it may not have reached the seven feet above high-water of the river.

It will be seen that the plea, in averring that the dam, when completed, was no higher than the statute authorized, pleads a conclusion of law, and does not state the facts on which the court can construe the law for itself and ascertain if the fact pleaded is a good defence. This is bad pleading. It is also liable to the objection that it does not either deny the allegation of the declaration, that the dam raised the water in Winnebago Lake so as to overflow the plaintiff's land,

nor admit that allegation and aver that they were authorized to do so by the statute. But, as we are of opinion that the statute did not authorize the erection of a dam which would raise the water of the lake above the ordinary level, and as the plea does not deny that the dam of the defendant did so raise the water of the lake, we must hold that, so far as the plea relies on this statute as a defence, it is fatally defective.

But this same plea further alleges that the legislature of Wisconsin, after it became a State, projected a system of improving the navigation of the Fox and Wisconsin Rivers, which adopted the dam of Reid and Doty, then in process of construction, as part of that system; and that, under that act, a board of public works was established, which made such arrangements with Reid and Doty that they continued and completed the dam; and that, by subsequent legislation, changing the organization under which the work was carried on, the defendants finally became the owners of the dam, with such powers concerning the improvement of the navigation of the river as the legislature could confer in that regard. But it does not appear that any statute made provision for compensation to the plaintiff, or those similarly injured, for damages to their lands. So that the plea, as thus considered, presents substantially the defence that the State of Wisconsin, having, in the progress of its system of improving the navigation of the Fox River, authorized the erection of the dam as it now stands, without any provision for compensating the plaintiff for the injury which it does him, the defendant asserts the right, under legislative authority, to build and continue the dam without legal responsibility for those injuries.

And counsel for the defendant, with becoming candor, argue that the damages of which the plaintiff complains are such as the State had a right to inflict in improving the navigation of the Fox River, without making any compensation for them.

This requires a construction of the Constitution of Wisconsin; for though the Constitution of the United States provides that private property shall not be taken for public

use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States. The Constitution of Wisconsin, however, has a provision almost identical in language, viz.: that "the property of no person shall be taken for public use without just compensation therefor."* Indeed this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it, and the only question that we are to consider is whether the injury to plaintiff's property, as set forth in his declaration, is within its protection.

The declaration states that, by reason of the dam, the water of the lake was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit in the year 1867, and the nature of the injuries set out in the declaration are such as show that it worked an almost complete destruction of the value of the land.

The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury

* Sec. 13, Article 1.

to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

In the case of *Sinnickson* v. *Johnson*,* the defendant had been authorized by an act of the legislature to shorten the navigation of Salem Creek by cutting a canal, and by building a dam across the stream. The canal was well built, but the dam caused the water to overflow the plaintiff's land, for which he brought suit. Although the State of New Jersey then had no such provision in her constitution as the one cited from Wisconsin, the Supreme Court held the statute to be no protection to the action for damages. Dayton, J., said "that this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle." For this proposition he cites numerous authorities, but the case is mainly valuable here as showing that overflowing land by backing the water on it was considered as "taking" it within the meaning of the principle.

In the case of *Gardner* v. *Newburgh*,† Chancellor Kent granted an injunction to prevent the trustees of Newburg from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this though there was no provision in the

* 2 Harrison, New Jersey, 129. † 2 Johnson's Chancery, 162.

Constitution of New York such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. And he adds that the principles and practice of the English government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land, which was considered as taking private property for public use, but which, under the argument of the defendants' counsel, would, like overflowing the land, be called only a consequential injury.

If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights.

But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken.* And perhaps no State court has given more frequent utterance to the doctrine that overflowing land by backing water on it from dams built below is within the constitutional provision, than that of Wisconsin. In numerous cases of this kind under the Mill and Mill-dam Act of that State this question has arisen, and the right of the mill-owner to flow back the water has

* Angell on Water-courses, § 465 a; Hooker *v.* New Haven and Northampton Co., 14 Connecticut, 146; Rowe *v.* Granite Bridge Co., 21 Pickering, 344; Canal Appraisers *v.* The People, 17 Wendell, 604; Lackland *v.* North Missouri Railroad Co., 31 Missouri, 180; Stevens *v.* Proprietors of Middlesex Canal, 12 Massachusetts, 466.

been repeatedly placed on the ground that it was a taking of private property for public use. It is true that the court has often expressed its doubt whether the use under that act was a public one, within the meaning of the Constitution, but it has never been doubted in any of those cases that it was such a *taking* as required compensation under the Constitution.* As it is the constitution of that State that we are called on to construe, these decisions of her Supreme Court, that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument, are of special weight if not conclusive on us. And in several of these cases the dams were across navigable streams.

It is difficult to reconcile the case of *Alexander* v. *Milwaukee*,† with those just cited, and in its opinion the court seemed to feel the same difficulty. They assert that the weight of authority is in favor of leaving the party injured without remedy when the damage is inflicted for the public good, and is remote and consequential. There are some strong features of analogy between that case and this, but we are not prepared to say, in the face of what the Wisconsin court had previously decided, that it would hold the case before us to come within the principle of that case. At all events, as the court rests its decision upon the general weight of authority and not upon anything special in the language of the Wisconsin bill of rights, we feel at liberty to hold as we do that the case made by the plaintiff's declaration is within the protection of the constitutional principle embodied in that instrument.

We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public

* Pratt *v.* Brown, 3 Wisconsin, 613; Walker *v.* Shepardson, 4 Id. 511; Fisher *v.* Horicon Iron Co., 10 Id. 353; Newell *v.* Smith, 15 Id. 104; Goodall *v.* City of Milwaukee, 5 Id. 39; Weeks *v.* City of Milwaukee, 10 Id. 242

† 16 Wisconsin, 248.

good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.

We are, therefore, of opinion that the second plea set up no valid defence, and that the demurrer to it should have been sustained.

The fourth plea recites substantially the same statutes, and acts of the defendants and their predecessors as the second plea, and avers that the dam was completed to its present height in 1852, and that the defendants have ever since had, used, and enjoyed the easement of overflowing the plaintiff's lands with his acquiescence, and that they had done this under color of right, and as they lawfully might do.

If this is intended as a plea of prescription for an easement the time is not long enough. It requires twenty years. If it is designed as a plea of disseizin it is bad, because it avers that the plaintiff has all the time been seized in fee and in possession of the land in controversy.

But the foundation of the plea seems to be the authority conferred by the various statutes of Wisconsin mentioned in the second plea. We have already held that the defendants

were not protected by the act of March 10th, 1848, because they exceeded the authority conferred by it, and that, as to the plaintiff's rights, the subsequent statutes were void because they contained no provision for compensation. There is, therefore, no light in which we can view this fourth plea that makes it a good one. The demurrer to it should have been sustained.

The sixth plea, after setting up all the matters alleged in the second, and also that by the Ordinance of 1787 and the subsequent legislation of Congress, the navigable streams of that territory were to be forever preserved as free highways, then avers that the land of the plaintiff came to him through a reservation in an Indian treaty in favor of one Therese Pacquett, who received a patent from the United States in 1849. It is alleged that this title came to the plaintiff burdened with an easement in favor of improving the navigation of the Fox River, which authorized the injuries complained of, and of which, therefore, he could not complain.

We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee by patent without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the State within which it lies; and that the absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream.

The demurrer to this plea should also have been sustained.

JUDGMENT REVERSED, and the case remanded to the Circuit Court for further proceedings

NOT INCONSISTENT WITH THIS OPINION.