not indeed, among those who would withdraw from the federal government an iota of the authority which it possesses; we would even desire to see it more powerful, more respected, more effective than it is at present. But we are deeply convinced that it must be strengthened from the centre, and not from the extremities. It is not by vexatious interference with local improvements and legislation, by the work of simple prohibition and destruction, that the federal supremacy is to be invigorated and renewed, or wavering attachments regained. There must be first provided for the States, a better, higher and more complete system, than those which originate in their independent action; if these indeed be now as jarring and defective as is alleged. Local legislation over commerce, is to be displaced only by harmonious and uniform regulation by Congress, which must thus vindicate its power to prohibit, by the fulfilment of its duty to create. The exercise of the federal authority in this way, however, has been thus far deemed to be injudicious, inexpedient, or unlawful, and the development of the resources, and the encouragement of the internal commerce of the Union, have been left entirely to individual and local legislation. Surely, if the discretion of Congress has been thus deliberately employed, it is neither wise nor equitable for any other branch of the government, to embarass or interfere with the action of the States, in the honest completion of the task entrusted, if we ought not rather to say, abandoned to them.

RECENT AMERICAN DECISIONS.

In the Circuit Court of the United States, District of Indiana. November Term, 1853.[1]

WILLIAM JOLLY ET AL. *vs.* THE TERRE HAUTE DRAW-BRIDGE COMPANY.

1. Under the grant of power to Congress, to regulate commerce among the several States, as given by the Constitution of the United States, the general government has jurisdiction over navigable streams, so far as may be necessary for commercial purposes.
2. A steamboat, enrolled and licensed pursuant to the Act of Congress, is entitled

[1] This term was held by Judge Leavitt, of the Ohio District, by the appointment of Judge McLean, pursuant to the Act of Congress of the 29th July, 1850, in the place of Judge Huntington, of the Indiana District, who was unable to attend, owing to sickness in his family.

to the protection of the general government, while engaged in carrying on commerce between different States; and her owners have a right to use the navigable streams of the country, free from all material obstructions to navigation.

3. In relation to the States carved out of the N. W. Territory, the guaranty in the ordinance of '87, as to navigable streams, is still in force.
4. The Courts of the Union, having jurisdiction of the parties in a civil suit, are competent to administer the common law remedy for an injury sustained by reason of an unlawful obstruction in a navigable stream, without any express legislation by Congress, giving the remedy, and prescribing the mode of its enforcement.
5. The national jurisdiction over navigable streams does not deprive the States of the exercise of such rights over them, as they may deem expedient, subordinate to the power granted by the Constitution of the United States.
6. A bridge of sufficient elevation, or with a proper draw, is not necessarily an impediment to navigation; neither is any structure or fixture such impediment, which facilitates commerce instead of being a hindrance.
7. The inquiry in this case is, whether the bridge with the draw erected by the defendant at Terre Haute, is a material obstruction to the navigation of the Wabash river.
8. If it occasions merely slight stoppages and loss of time, unattended with danger of accident to life or property, it is not such obstruction.
9. The Terre Haute bridge was built under a charter from the State of Indiana, which required a "convenient draw" in the bridge. This imports a draw which can be passed without vexatious delay, or risk; and, if not such a one, the charter is violated; but if it meets the requirement of the act of incorporation, and is yet a material obstruction, it is a nullity for the want of power in the legislature to pass such an act.
10. If the jury find the bridge is a material obstruction, but that the injury sustained by the plaintiffs' boat was the result of recklessness, or want of skill in those having charge of her, the Bridge Company are not liable, and evidence of the good professional reputation of the pilot will avail nothing, if in this particular case, he was reckless and unskilful.
11. Depositions taken under the Act of Congress, without notice to the opposite party, are admissible in evidence; but it is for the jury to determine the weight and credibility to which they are entitled.
12. The evidence of experts, if uncontradicted and unimpeached, is entitled to great weight.
13. If the jury find for the plaintiffs, they may include in the damages given, the probable earnings of their boat, for the time she was delayed in repairing the damages sustained.

O. H. Smith and *S. Yandis*, for Plaintiffs.

R. W. Thompson and *J. P. Usher*, for Defendant.

JUDGE LEAVITT charged the jury, as follows:

This suit is brought by the plaintiffs, as owners of the steamer American Star, to recover damages sustained by that boat in passing through the draw of the bridge across the Wabash river, at Terre Haute.

The material facts presented to the jury by the evidence are, that the Star, a stern-wheel boat, duly enrolled and licensed at the port of Cincinnati for the coasting trade, with the usual complement of officers and men, under the command of William Jolly as master, also a part owner, was engaged in the navigation of the Wabash river, making regular trips for the conveyance of passengers and freight, from Cincinnati to the highest point of navigation on said river; that in March, 1852, the water being at a high stage, as she was descending the river, in passing through the draw of the Terre Haute bridge, bow foremost, and partially laden, she struck with considerable violence against one of the piers of the bridge, her guards on one side being thereby broken, the top of the pilot-house carried away, and one of her chimneys thrown down, with some other minor injuries; that as the result of the collision, the boat was detained nearly two days at Terre Haute, in making the necessary temporary repairs, to enable her to prosecute her trip, and one week at Cincinnati, in making permanent repairs; the actual cost of which is proved to have been $371; that owing to her crippled condition after the injury, she was unable to receive freight offered below Terre Haute, to the amount of some $150 or $200; and that one entire trip was lost, the usual and estimated profit of which is stated at $1,000.

The bridge was a wooden structure, with a draw having a space between the piers of about sixty feet, and at the top of the draw, when raised, of thirty or forty feet. It was erected by the defendant, under an act of incorporation granted by the legislature of the State of Indiana, containing a provision requiring the corporators to construct "a convenient draw" in the bridge.

This brief outline of the case will suffice as preliminary to the consideration of the questions of law, which have been presented

and argued with great ability by counsel, and upon which the instructions of the Court have been requested.

It is not controverted by the counsel for the Bridge Company, that the Wabash is a navigable stream; nor is it denied that the plaintiffs' boat, at the time the alleged injury was sustained, was employed in carrying on commerce between ports and places lying in different States. But, it is insisted, that as this bridge was erected under the authority of the State of Indiana, and in conformity with the charter granted by the State, it cannot be deemed an obstruction to navigation, in the sense of entitling the plaintiffs to compensation for the injury complained of.

The Constitution of the United States contains an explicit grant of power to Congress, to regulate commerce among the several States. Under this grant, there can be no question of the competency of Congress to exercise jurisdiction over all the navigable streams, to the extent that may be necessary for the encouragement and protection of commerce between, or among, two or more States. This doctrine is so well settled by the uniform legislation of Congress, and the frequent adjudications of the Supreme Court of the United States, as to render its discussion here wholly unnecessary. It is regarded as equally clear that the boat, the owners of which in this case are seeking compensation for an injury sustained, having been duly enrolled and licensed by the proper officer, in pursuance of an Act of Congress, was rightfully employed in the navigation of the Wabash river, and that her owners, while she was so employed, have a right to the free use of that river, and were entitled to protection against all unlawful obstructions to its navigation. It follows, that for any injury attributable to such obstructions, the law will give the needful redress. Nor is it necessary for this purpose, that there should be any express legislation of Congress giving the remedy, and regulating the manner of its enforcement. The Courts of the Union, if the plaintiff is a citizen of a State other than that in which he brings his suit, have jurisdiction, and are competent to administer civil remedies for such injuries, upon the principles of the common law, without any statutory enactment for that purpose. This doctrine is clearly established by

the decisions of the Supreme Court of the United States, in the *Wheeling Bridge Case.* 13 Howard's S. C. Rep. 518.

There is another ground on which the right of every citizen of the United States to the free and unobstructed navigation of the Wabash river, may be confidently asserted. The State of Indiana is one of the States carved out of the North Western Territory, and therefore subject to the operation of that article of the compact contained in the ordinance of 1787, which declares that "the navigable waters leading to the Mississippi and the St. Lawrence, and the carrying-places between the same, shall be common highways," &c. While it is admitted that some of the articles of compact in that ordinance have been superseded by the admission of the States within the North Western Territory into the federal union, it has been held by repeated judicial decisions, that the solemn guaranty referred to is still in full force, and is a perpetual inhibition to such States from authorizing any impediments or obstructions to the free navigation of the water courses within its scope. *Spooner* vs. *McConnel et al.*, 1 McLean, 337; *Palmer* vs. *Commissioners of Cuyahoga County*, 3 McLean, 226: *Hogg* vs. *Zanesville Man. Co.*, 5 Ohio R. 416.

But, in maintaining the paramount jurisdiction of the national government over navigable streams, and the operative force of the guaranty in the ordinance of '87 in regard to them, it does not follow that the States are deprived of all power of legislation. Judge McLean, in the case above cited from the third volume of his Reports, says: "A State, by virtue of its sovereignty, may exercise certain rights over its navigable waters, subject, however, to the paramount power of Congress to regulate commerce among the States. This principle is distinctly recognized in all the cases referred to, whether arising under the commercial power of the general government, or the ordinance of '87. It has never been claimed that the States do not rightfully possess jurisdiction upon and over the navigable water courses within their limits. Such a claim is clearly in derogation of the sovereignty of the States, and therefore, wholly inadmissible. But, while the right of the States is thus conceded, it is well settled that in the exercise of their ju-

risdiction, they shall not infringe on that granted to the national government by the Constitution of the United States; and that in reference to the States formed from the North Western Territory, they cannot disregard the provision of the ordinance referred to.

This limitation of the power of the states is not inconsistent with their claim of sovereignty; nor does it involve necessarily, any conflict of jurisdiction between them and the government of the Union. The states have all the power over their water courses, which is necessary for local or state purposes. The right of a state to punish crimes commited on its streams, and to authorize and enforce such police regulations as may be necessary for the protection of her citizens, has never been questioned. It is equally clear that a state may adopt such measures, in reference to its water courses, as are required by its citizens in facilitating trade and commercial intercourse. Hence, the states properly exercise the right of establishing and licensing ferries, and authorizing the construction of wharves. They may also sanction an apparent obstruction of a navigable stream, by authorizing the erection of dams and locks; for the obvious reason that these are not hindrances to navigation, but are promotive of its benefits. Nor can there be a doubt that it is competent for a state to authorize the erection of a bridge across a navigable stream within its limits. But in all the cases referred to, the power must be exercised subject to the restriction, that the right of free navigation is not essentially impaired. If a bridge is erected, it must be sufficiently elevated to admit of the safe and convenient passage of such boats or vessels as are most advantageously used for the conveyance of travellers or freight upon the river or water course spanned by the bridge; or, if not thus constructed, there must be a draw of such size and structure as not materially to infringe the right of free and unobstructed navigation.

It is however a question not clear of doubt, whether it is practicable to place a draw-bridge across a stream, subject to high floods, and with a rapid current, as is the fact in reference to the Wabash, without materially impairing its safe navigation. This description of bridge is obviously better suited to tide water streams or such as

have little or no current, in reference to which, they may be used with little hindrance to navigation.

The jury, however, in this case, may properly limit their inquiry to the question whether the Terre Haute Bridge, with its draw of the size and structure proved at the time and under the circumstances in which the injury to the plaintiffs' boat was sustained, was an essential impediment to the navigation of the Wabash, and this leads necessarily to the further inquiry, what constitutes such an impediment?

Without going at length into the consideration of this question, it may be stated that slight difficulties occasioning short stoppages, and some loss of time, such as proceed from ferries, locks, dams, and even bridges, as already intimated, are not to be viewed as material obstructions. But, if these involve much loss of time in passing them, or danger of accident or injury to life or property, or the use of extraordinary caution, they do essentially impair the right of free navigation, and subject those placing such obstructions in a navigable stream, to damages for injuries which they occasion.

In reference to the Terre Haute Bridge, it will be proper for the jury to give due weight to the evidence of the witnesses, who have had much experience in steamboat navigation on the Wabash, and who say that in their judgment this bridge, especially in descending the river, is a serious obstruction to navigation. There is also a clear preponderance of proof to the effect that it is the more usual practice in descending the river, to round to some distance above the bridge, and thus by means of a rope made fast to the shore, to let the boat descend, stern foremost, slowly through the draw. This process, as stated by some of the witnesses, occupies from ten to thirty minutes; and by some, it is stated the detention is an hour, and sometimes an hour and a half. The Court has no hesitation in saying, if the difficulties presented by this bridge are of a character requiring this precaution and this loss of time, it is a material obstruction to navigation.

In the Wheeling Bridge case, before referred to, it appeared that of the great number of steamers upon the Ohio river, there were but seven which could not safely pass under the bridge at ordinary

stages of water, without lowering their chimneys. These seven boats could let down their chimneys, but the operation was attended with delay and some danger; or, they could navigate the river, though with less speed, with chimneys considerably reduced in height; and yet, the Supreme Court of the United States held, that the bridge was an essential impediment to navigation—in fact, a public nuisance; and decreed that unless so altered as not to impede the passage of any of the boats used on the Ohio, it must be abated. This decision, emanating from the highest Court of the Union, is obligatory on this Court, and must be received as the law, so far as applicable to the present case.

Having reference to the principles here stated, it will be the duty of the jury to pass upon the question, whether from the evidence, the Terre Haute Bridge is an impediment to the navigation of the Wabash river. It is insisted by the counsel for the Bridge Company, that the structure has been erected in compliance with the charter granted by the State of Indiana, and that therefore, the company are not liable for the injury complained of. The charter, as before stated, authorizes the erection of the bridge, with "a convenient draw." This clearly implies that it shall be such a draw as may be used without vexatious delay or loss of time; and also with safety to persons and property. Nothing less than this will meet the requirement of the act of incorporation. And if the jury find the charter has not been complied with, it cannot shield the defendant from liability for the injury sustained by the plaintiff in passing the bridge. Or, if the jury come to the conclusion from the evidence, that the bridge and draw are in accordance with the charter, and yet a material obstruction to navigation, the company are liable, if ordinary skill and care were used in navigating the plaintiffs' boat through the draw. For reasons already stated, it was not competent for the Legislature of Indiana to authorize a structure across the Wabash, which would be an essential hindrance to its navigation; and any law conferring such authority, is a nullity.

It will therefore be a proper inquiry for the jury, whether the plaintiffs' boat in passing the bridge, was managed with ordinary

skill and caution. For, conceding the bridge to be an unlawful obstruction, yet if the plaintiffs' injury is clearly referable to the reckless and unskilful management of their boat, the company are not responsible for such injury. On this point, as on all others involving the weight and credibility due to the witnesses, the jury are the exclusive judges. If the evidence of the pilot, who was at the wheel, and of others connected with the boat is entitled to credit, the proof is satisfactory that the boat was managed with skill and caution. She was not let down stern foremost by a rope, as was the more usual way of passing the draw; nor is it regarded as essential to the plaintiffs' right to recover for an injury sustained in passing the draw, that such a precaution should have been used. Some of the witnesses express the opinion that this is the safer course, while others having skill and experience in the navigation of the Wabash, say that neither prudence or safety requires it. The pilot of the boat has testified very intelligently, and with apparent candor, and says that he did not consider it necessary to pass the draw stern foremost. He also says that great care and caution were observed in passing through the draw, and that the injury to the boat was not the result of either carelessness or want of skill. He also says the boat would have passed safely through the draw, but for a strong wind which suddenly struck her, and caused her to veer from the course he was steering. In this statement the pilot is corroborated by several of the plaintiffs' witnesses, while most of the witnesses for the defendant say they have no recollection that there was any wind, exceeding a very moderate breeze. This is not viewed as a material point in this case, as the liability of the Bridge Company is in no way affected by the state of the wind, or its influence in causing the collision. If the bridge is an unlawful obstruction, and the plaintiffs used ordinary care and skill in passing it, the company are responsible for the injury, irrespective of the agency of the wind. And this for the obvious reason that wind or no wind, the injury could not have been sustained, but for the fact that the bridge was there.

It is proper here to remark, in reference to the pilot of the plaintiffs' boat, that the evidence is satisfactory as to his professional

character. He had served in that capacity for some years, on the Wabash, and it is in proof that he is esteemed a safe, prudent and skilful pilot. But notwithstanding this evidence of general good professional reputation, if in this particular case he evinced recklessness and want of skill, and the injury to the plaintiffs' boat is attributable to that cause, they must bear the consequences of his misconduct.

In this case, a large proportion of the evidence for the plaintiffs is in the form of depositions of persons who were on the boat at the time of the accident, and of others experienced in the navigation of the Wabash, who have been examined as experts. These depositions were taken at Cincinnati, without previous notice to the opposite party, and without the attendance of his counsel. This mode of taking testimony is expressly authorized by an Act of Congress. It is liable to the objection that the opposite party is precluded from the opportunity of cross-examining the witnesses, and thus testing the truthfulness of their statements. It is, however, the right of the party against whom depositions thus taken are to be used, to re-call and re-examine the same witnesses, if he deems it necessary. The defendants in this case have not availed themselves of this right; and the plaintiffs' depositions are therefore committed to the jury, as taken by the other party, without any cross-examination by the defendant. Under these circumstances, it is insisted by the defendant's counsel that these depositions should be viewed with suspicion, and that they are entitled to very little weight by the jury. On this point, it is only necessary to remark, that these depositions are by law admissible to the jury as evidence; and, although they would be entitled to greater weight if taken upon notice to the other party, and with an opportunity for cross-examination, they are, nevertheless, entitled to credit, unless otherwise impeached. It is, however, for the jury to give them such consideration as they may deserve.

It has been before noticed that a part of the evidence for the plaintiffs in this case, consists in the opinions of experts—those experienced in and familiar with the navigation of the Wabash—as to the practical effect of the Terre Haute Bridge upon the navi-

gableness of that river, and the correctness of the professional conduct of those entrusted with the management of the plaintiffs' boat in passing the bridge. In reference to this description of evidence, it is only necessary to remark that for the obvious reason that those best acquainted with any particular art, profession or business, in all matters directly concerning them, are accounted more satisfactory and reliable witnesses than those who have no such skill or experience. Hence it is well settled, that the testimony of intelligent and credible experts is entitled to the most respectful consideration. The principle here stated, applies as well to navigation as to any other art or occupation.

It only remains for the Court to say, that if the jury find the plaintiffs are entitled to their verdict, the amount of damages to be awarded is wholly with them. The actual expenses of repairing the injury sustained by the plaintiffs' boat forms, of course, an element in estimating the amount. But it is, moreover, proper to bring to to the notice of the jury, a late decision of the Supreme Court of the United States,[1] having a direct bearing on the question of damages in this case. That Court has held, that in an action for an injury by collision with another boat, the boat of the plaintiff not being in fault, he was entitled to compensation, in damages, for the profits his boat would have made during the time necessarily lost in repairing the injury sustained. No reason is perceived why the same principle does not apply to the present case. If, therefore, the jury find for the plaintiffs, they should include in their verdict, the amount of the probable earnings of the plaintiffs' boat during the time she was delayed in making the repairs necessary to refit her for service. This amount will be settled by the evidence before the jury, on that point.

The jury returned a verdict for the plaintiffs, assessing their damages at $1,000. A motion for a new trial by the defendants was overruled.

[1] The case referred to is that of *Williamson and others* vs. *Barrett and others*, 13 How. S. C. Rep., 101. The same principle was decided in this case by the Circuit Court of Ohio, 4 McLean, 589.

In the District Court of Philadelphia—Sept., 1854.

PROUTY *vs.* HUDSON.

1. As a general rule, debts sued for and intended to be set off, must be mutual and due in the same right.
2. Where a judgment has been obtained against executors *individually*, they cannot set off this judgment against one obtained by their decedent in his life-time against their judgment creditor, because the claims are not between the same parties nor in the same rights.

Rule to set off judgment.

The opinion of the Court was delivered by

SHARSWOOD, P. J.—The defendants have produced the evidence that they are the executors of Brown, and show a judgment in favor of Brown against the plaintiff, which they ask to set off against the judgment in this case. The judgment in this case was obtained against them individually, in an action of trover.

The set-off of one judgment against another, is not within the statute of set-off. It is a practice which has long prevailed in the courts of this State as well as England, to allow such set-off upon the equitable principle that in conscience and morality all that the party really owes is the balance. In the exercise of this jurisdiction, while not absolutely bound to allow set off in all cases in which it would be allowable under the statute, the Court however have adopted the rules established in the construction of the statute. More especially the rule that the claims asked to be set off, should be between the same parties and in the same right, has received the unequivocal sanction of the courts here as well as elsewhere, in regard to the set-off of judgments. *Best* vs. *Lawson*, 1 Miles, 11; *Dunkin* vs. *Calbraith*, 1 Brown, 47; *Mason* vs. *Knoulson*, 1 Hill, 215.

It seems to be well settled in England, that a defendant sued for his own debt, cannot set off a debt due to him as executor or administrator, because debts sued for and intended to be set off, must be mutual and due in the same right. 1 Tidd's Practice, 718; 2 Williams on Ex'rs, 1,200. The last named writer cites *Bishop* vs. *Church*, 3 Atkins, 691; *Gale* vs. *Suttler*, 1 Young & Jervis, 180.

There is one American case which is to the same point. *Thomas* vs. *Hopper*, 5 Alabama R. 442. Although there is no case in Pennsylvania expressly to the very point, yet *Halliday* vs. *Bissey*, 2 Jones, 347, was decided upon, a distinction altogether unnecessary, if the rule be not the same here. It was there held that when the debt arose upon a contract made with the executor, though acting in his character as such, he was entitled to make it the subject of a set-off in a suit against him for his own debt.

There seems to be good reason for the rule. It would be to allow the executor to pay his own debt with the assets of the estate. If such payment were made *in pais*, the creditor receiving the payment, with knowledge of the circumstances, would be liable to those beneficially interested in the estate. Can it be equitable to compel the plaintiff to accept in part payment what he may be called on hereafter to pay again or expend, if the executors should prove to be insolvent? Or if the judgment of the Court would protect him, is it equitable to preclude the creditors and legatees from their right to question the validity of the transaction, and follow the assets of the estates into the hands of a party unequivocally cognizant of their misapplication? What a wide door is open to fraud and collusion under the sanction of a Court of justice, by adopting either horn of this dilemma.

It is said that upon the allowance of the set-off, the defendants would be chargeable with the amount in their account as executors, and a doubtful debt might be thus saved to the estate. The same reason would hold in allowing payment or transfer of assets *in pais*—the executor might sell and put the money in his pocket, and it comes at last to his personal responsibility. But it does not so come in all cases. There are some guards which the law has placed against the misapplication of trust funds, which it is quite important to the interest of *cestui que trusts*, often helpless women and children, should be carefully preserved.

Rule discharged.

In the Supreme Court of Pennsylvania.

APPEAL BY LEAH PASSMORE'S ADMINISTRATOR IN THE DISTRIBUTION UNDER THE WILL OF HENRY ETTER, SR.

1. When a devise or bequest is ambiguously expressed, it is always important to bear in mind the inclination which the law has in favor of the heirs, which, with us, is a rule of equality, and also in favor of a vesting of the estate at the death of the testator, or at the earliest possible period thereafter, and also in favor of an absolute, and against a defeasible estate.
2. It is under the influence of this bias, that words of survivorship are generally referred to at death of the testator, if there be nothing indicating a contrary intention.
3. Where land was devised to a son for life, with the provision that at his death, without issue living, it "shall revert to my estate, and shall be sold by my executors, and the proceeds thereof distributed among my surviving heirs herein named, agreeably to the intestate laws of Pennsylvania." Held, that this created a vested remainder in the devisees and legatees living at the death of the testator, subject to be devested on the son's dying, leaving issue, and that the share of one of the devisees who died before the termination of a precedent estate, passed to her legal representatives.

The opinion of the Court was delivered by

LOWRIE, J.—The estate which the testator had granted to his son Henry, having terminated, the question now arises what disposition he intended should be made of the reversion. He says it "shall revert to my estate, and shall be sold by my executors, and the proceeds thereof distributed among my surviving heirs herein named, agreeably to the intestate laws of Pennsylvania," and this is the provision that is to be interpreted.

In other parts of his will he provides for his living children, and for the children of those that were dead. In relation to the clause in question, it is very apparent that he does not use the word "revert" in the strict legal sense; for he certainly means to exclude Henry from having any share in the reversion. In other words, the estate which the devisees or legetees take, is not by way of reversion, but as a gift of the reversion. It is intended for only some of his heirs, and is therefore only a remainder. For the same reason he does not use the word heirs, as correctly indicating their re-

lation to him, but descriptively, meaning his children and grandchildren.

The trouble is to ascertain what he means by his "surviving heirs herein named," and it arises from the fact that his daughter Leah died without issue, before her brother Henry's estate terminated. Was she surviving heir of her father within the meaning of his will? If, when he wrote it, he was thinking of his children and grand-children who had already died, or who might die before he did, then she was. He does not describe those who are to take after Henry's death, as those who shall be *then* surviving heirs, nor as the survivors of his devisees, but his surviving heirs who are herein named; which grammatically refers to the present time, that of making the will. And such also would be the most natural construction of a gift of the reversion to be divided "agreeably to the intestate laws."

But the case presents itself in other aspects. The estate granted to Henry was in terms a life estate, with remainder to his unborn issue, "if such he shall have to survive him." Now, if we treat this as an estate tail, the clause we are especially considering gives a vested remainder in the other devisees. If it was only a life estate, with a contingent remainder in favor of his unborn children, then there was a vested remainder in the other devisees, subject to be defeated by the death of Henry leaving issue living. In either way, therefore, the other devisees or legatees had a vested estate at the moment of the testator's death. 3 Madd. 410, 2 State Rep. 69; 1 Baldw. 174; 2 Keene, 284; 7 W. & S. 279. This view is very important, for it gives to the devisees an estate independently of the directions concerning distribution, and makes those directions merely the means of placing them in the enjoyment of it. And if we give the fullest meaning that is allowed here, to his word "revert," we arrive at the same result; for as a reversion, it must vest in them immediately on the taking effect of the temporary estate of Henry, that is, on the testator's death.

When a devise or bequest is ambiguously expressed, it is always important to bear in mind the inclination which the law has in favor of the heirs, which, in Pennsylvania, is a rule of equality, and also in favor of a vesting of the estate at the death of the testator, or

as early as possible thereafter, and also in favor of an absolute, and against a defeasible estate. All these principles are of use here.

It is in perfect accordance with them, and under their influence, that it has so often been decided that the word survivors shall be referred to the death of the testator, if there is nothing indicating a contrary intention. It favors, in this instance, equality among his heirs or devisees, and we see no word tending to show that he meant to place Leah on a different footing from the others. He makes no provision in defeasance of her estate in any event, but, on the contrary, he seems to say that it shall go to her as an heir, agreeably to the intestate laws. It requires clear expressions or implications to devest her vested estate.

We are therefore of opinion that when he provided that the remainder should go to his "surviving" heirs, he meant, as testators very often mean by that word, his "other" heirs, or rather devisees and legatees. And when he said "agreeable to the intestate laws," he added a confirmation to this view.

It is not necessary to allude to the sale of the land, except to say that it could not be sold as Henry's after it fell back to the estate, and that the sale was proper then, only under the power given to sell and distribute according to the clause principally discussed.

Decree accordingly.

In the Court of Errors of Mississippi.

HATCH WHITFIELD *vs.* WILLIAM P. ROGERS.[1]

1. The principle is well established, that every common trespass is not a foundation for an injunction, where it is only contingent and temporary; but if it continue so long as to become a nuisance, the Court will interfere and grant an injunction.
2. The rule is laid down that, in order to give jurisdiction, there must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance.
3. A private individual may obtain an injunction to prevent a public mischief, by which he is affected in common with others.

On appeal from the Northern District Chancery Court at Fulton: Hon. Henry Dickinson, Vice-Chancellor.

[1] We are indebted to the civility of the Reporter for the sheets of his forthcoming volume. This case is reported in 4 Cush., 84.

The facts are substantially stated in the opinion of the Court, by

Mr. Justice HANDY.—This was a bill filed in the District Chancery Court at Fulton, by the appellee, against the appellant, to enjoin him from the erection of a mill-dam. The bill alleges, in substance, that the complainant's lands, which lay in the vicinity of the mill-dam about to be made, would be inundated by the construction of it, so that their value would be greatly lessened and much of the timber killed, by the damning up of the water; and that the health of the neighborhood would be greatly injured by the stagnation of the water produced by the dam. The answer denies the material allegations of the bill, and much testimony was taken on both sides. The Vice-Chancellor directed the following issues to be tried in the Circuit Court of Monroe County, where the matter complained of was located. 1. Whether the mill-dam would operate a private nuisance to the complainant. 2. Whether or not it would operate a public nuisance to the neighborhood in which it was to be erected.

And on the trial in the Circuit Court the jury found a verdict that it would operate as a public nuisance; upon the return of which verdict to the Vice-Chancery Court, a perpetual injunction was decreed; and hence the case is brought to this Court.

1. It is insisted, in the first place, on the part of the appellant, that the complainant was not entitled to relief in equity on the ground of the private nuisance; because relief in equity will only be granted in such cases where the mischief is irreparable and cannot be compensated in damages. Authorities are to be found holding this doctrine; but the modern and more approved cases extend the relief in equity much further, upon the just principle of interposing to prevent the evil, rather than to compensate for it after it has been committed. Thus it is held to apply to cases of diversion of watercourses, or pulling down banks, and exposing the complainant to inundation. Eden on Injunc. 269; 1 Bro. C. C. 588; 10 Ves. 194. In *Coulson* vs. *White*, 3 Atk. 31, Lord Hardwick said, "Every common trespass is not a foundation for an injunction, where it is only contingent and temporary; but if it continues so long as to become a nuisance, the Court interferes, and will grant

an injunction." Judge Story lays down the rule thus: in order to give the jurisdiction, he says, "there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction." 2 Story Eq. Jur. § 925.

These principles fully justify the relief sought in this case. The inundations occasioned by the erection of the dam, the injuries thereby caused to the complainant's lands, and the periodical destruction of his timber, did not constitute a single trespass, but, from their nature, must have been "constantly recurring grievances." It would have been unreasonable and oppressive to force the complainant into a court of law to redress each repetition of the injury as it might recur from time to time; and therefore, on the very principle of "suppressing interminable litigation," and of "preventing multiplicity of suits," courts of equity alone can give just and adequate relief in such cases.

2. The appellant urges that the complainant was not entitled to an injunction on the ground of a public nuisance, because a private individual cannot come into a Court of Equity for relief from a public nuisance, unless he avers and proves some special injury; and that there is no such averment in this case. He contends, that the proper mode of proceeding is by indictment at law, or by information in equity, at the suit of the Attorney-General or the State. We do not think these positions well founded.

An indictment could only result in an abatement of the nuisance after it had been committed. It could not prevent the mischief arising from it before the indictment could be tried and the judgment carried into execution. That remedy would, therefore, be inadequate.

As to the right of the complainant to seek the relief, the bill states, that the health of the neighborhood would be greatly injured by the stagnation of water produced by the dam, and it shows that the complainant's lands lay within a short distance of it, and would be affected by it. His property, therefore, as a place of residence,