

**The Montello**

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**Court :** US Supreme Court

**Decided On :** 1874

**Appeal No. :** 87 U.S. 430

**Appellant :** The Montello

**Judgement :**

The Montello - 87 U.S. 430 (1874)

U.S. Supreme Court The Montello, 87 U.S. 20 Wall. 430 430 (1874)

**The Montello**

**87 U.S. (20 Wall.) 430**

*APPEAL FROM THE CIRCUIT COURT FOR*

*THE EASTERN DISTRICT OF WISCONSIN*

**SYLLABUS**

1. The navigability of a stream, for the purpose of bringing it within the terms "navigable waters of the United States," does not depend upon the mode by which commerce is conducted upon it, as whether by steamers, or sailing vessels, or Durham boats, nor upon the difficulties attending navigation, such as those made by falls, rapids, and sandbars, even though these be so great as that while they

last, they prevent the use of the best means, such as steamboats, for carrying on commerce.

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It depends upon the fact whether the river in its natural state is such as that it affords a channel for useful commerce.

2. These doctrines applied to the Fox River in Wisconsin, a river whose navigability was originally so much embarrassed by rocks, rapids &c.;, as that only Durham boats could use the stream, but which afterwards, by canals, locks, and other artificial means was so much improved as that steamboats could use it freely, the river having, however, never, in its natural state, been a channel for useful commerce.

In the southern part of the State of Wisconsin, about a mile and a half east of Portage City and at a point about equidistant from the eastern and western boundaries of the state, rises the Fox River. The stream flows in a northeasterly direction, through Lake Winnebago into Green Bay, thence into Lake Michigan, so connecting through that lake and Lakes Huron, Erie, and Ontario with the River St. Lawrence and other great waters having their hydrographic basin on the Atlantic coast and discharging themselves into the Atlantic Ocean.

In a bend before Portage City sweeps the Wisconsin River, which, rising in the regions far northwest of the place just named, before arriving at Portage City runs eastwardly, and then turning to the west and flowing a certain distance falls into the Mississippi River. In this way a natural watercourse has been always open from the headwaters of the Mississippi through the Wisconsin River to the spot now known as Portage City.

Of course when a "portage," or carriage by land, was made of merchandise from the Wisconsin River at Portage City to the sources of Fox River, less than two miles east, the merchandise coming from the headwaters of the Mississippi was on waters whose course was towards the Atlantic Ocean.

In its natural state, there were, however, in parts of the Fox River rapids and falls. At Grand Chute there was a rock making a fall two feet perpendicular, and below certain rapids known as the De Pere, the navigation was

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especially difficult. There were many other similar though less difficult places. All these embarrassed the navigation of early days, but they did not destroy nor even much arrest it. The stream was always used for purposes of trade, including especially the great fur trade, a trade carried on before our Revolution, and when French and British were pursuing their adventurous commerce far into the savage regions of the Northwest. Smith, the historian of Wisconsin, states [ [Footnote 1](#) ] that even so far back as 1718, one of "the great avenues from the St. Lawrence to the Mississippi was by way of Fox and Wisconsin Rivers." In 1763, Marquette and Joliet, French explorers of the source of the Mississippi, followed the line of the two streams mentioned. The stream was then navigated by long, narrow boats, called Durham boats -- vessels from seventy to one hundred feet long and twelve broad, drawing, when loaded, from two to two and a half feet of water -- which men would push with poles or propel by oars or have dragged by horses and mules, sometimes, in very shallow water, wading alongside and pushing the boats onward themselves. At places where progress on the stream was impracticable, the vessel would be unloaded and a "portage" made till the navigator had got beyond the difficult place, and then a reshipment would be made of the merchandise into some other boat beyond or into the same boat, which, unloaded and drawing less water than before, could be got across the place that in a loaded state had stopped it. Arriving at the very source of the Fox River, a "portage" of less than two miles would be made, and the merchandise was on the Wisconsin, and thence it floated to the Mississippi. In May, 1838, a regular line of Durham boats was advertised to run from Green Bay, near Lake Michigan, to the portage at the head of the Fox River.

By the Ordinance of 1787 [ [Footnote 2](#) ] for the government of the Northwest Territory, it was enacted that:

"The navigable waters leading into the Mississippi and St.

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Lawrence, and *the carrying places between the same*, shall be common highways, and forever free as well to the inhabitants of the said territory as to the citizens of the United States and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor."

This clause was substantially enacted in the Constitution of Wisconsin, which provides [ [Footnote 3](#) ] that:

"The river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost, or duty therefor."

By the Act of Congress of 1846, [ [Footnote 4](#) ] passed on the admission of Wisconsin as a state into the Union, a quantity of land was granted to the state:

"For the purpose of improving the navigation of the Fox and Wisconsin Rivers, in the Territory of Wisconsin, and of constructing the canal to unite the said rivers at or near the portage."

And it was provided that the:

"Said rivers, when improved, and the said canal, when finished, shall be and forever remain a public highway for the use of the government of the United States, free from any toll or other charge whatever, for the transportation of the mails or for any property of the United States or persons in their service passing upon or along the same."

The State of Wisconsin accepted the grant, and, pursuant to the authority and power vested in the state, a company was incorporated by an Act approved July 6, 1853, for the improvement of the Fox and Wisconsin Rivers. That act vested in the corporation all the rights and privileges granted to the state by the act of Congress.

And the improvement company, in carrying out the object of its creation, built dams, locks, and canals in Fox River from Portage City to

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below De Pere Rapids. The works of this company were on a grand scale, and by them Fox River was changed from its natural condition to an improved thoroughfare, for the use of which all boats were required to pay toll. It became the property of and was exclusively managed by a corporate body, with power to demand and receive tolls from all crafts passing through the locks, not excepting boats enrolled and licensed for coasting trade.

In consequence of the acts of Congress and of the state and of the increase of trade from the Northwest over the Wisconsin River across the portage and upon the Fox River and the lakes, the Fox River was cleared of the obstructions caused by its rapids or falls, and the difficult or impracticable passes were removed by locks, canals, dams, and other artificial navigation, so that there was now, and had been for several years, uninterrupted water communication for steam vessels of considerable capacity from the Mississippi to Lake Michigan, and thence to the St. Lawrence, through the Wisconsin and Fox Rivers, and steamboats had passed and were constantly passing over these rivers with passengers and freight destined to points and places outside of the State of Wisconsin.

In this state of things, the government libeled the steamer *Montello* in admiralty for noncompliance with certain acts of Congress making enrollment and license, and certain provisions as to steam valves necessary for all vessels of the tonnage of which the *Montello* was, navigating the navigable waters of the United States. The owners of the steamer denied that the Fox River was "navigable water" of the United States, within the Act of Congress, and whether it was so was the question in the case.

The case had been here before, [ [Footnote 5](#) ] but the libel was defective and the evidence insufficient to determine the question, and it was remanded for further proceedings, to enable the parties by new allegations and evidence to present the

exact character of Fox River as a navigable stream. This was

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now done, and there was therefore nothing now in the way of a correct solution of the inquiry.

The court below -- resting its decision on the ground that before the navigation of the river was artificially improved, there had been numerous obstructions to a continuous navigation, especially below the De Pere Rapids -- decided that the river was not a part of the public navigable waters of the United States within the doctrine laid down in *The Daniel Ball* [ [Footnote 6](#) ] and *The Montello*, [ [Footnote 7](#) ] and dismissed the libel. The United States appealed, and now assigned as error:

1. That by the Ordinance of 1787 and subsequent acts of Congress, as well as by the Constitution of Wisconsin, the Fox River was declared and made part of the public navigable waters of the United States, and consequently fell within the doctrine in respect of that class of waters laid down by this Court, and
2. That the Fox River was a part of the navigable waters of the United States notwithstanding the fact that its navigation was defective by reason of the falls and rapids, which had been remedied of late times by artificial navigation.

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MR. JUSTICE DAVIS delivered the opinion of the Court.

This Court held in the case of *The Daniel Ball*, [ [Footnote 8](#) ] that those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And a river is a navigable water of the United States when it forms by itself, or by its connection with other waters, a continued highway over which commerce is or

may be carried with other states or foreign countries in the customary modes in which such commerce is conducted by water. [ [Footnote 9](#) ] Apply these tests to the case in hand and we think the question must be answered in the affirmative.

The Fox River has its source near Portage City, Wisconsin, and flows, in a northeasterly direction, through Lake Winnebago into Green Bay, and thence into Lake Michigan, and by means of a short canal of a mile and a half it is connected at Portage City with the Wisconsin River, which empties into the Mississippi. From its source to Oshkosh, the river is frequently spoken of as the "Upper Fox." From Lake Winnebago to Green Bay it is called the "Lower Fox." There are several rapids and falls in the river, but the obstructions caused by them have been removed by artificial

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navigation, so that there is now and has been for several years uninterrupted water communication for steam vessels of considerable capacity from the Mississippi to Lake Michigan and thence to the St. Lawrence through the Wisconsin and Fox Rivers, and steamboats have passed and are constantly passing over these rivers with passengers and freight destined to points and places outside of the State of Wisconsin.

It is said, however, that although the Fox River may now be considered a highway for commerce over which trade and travel are or may be conducted in the ordinary modes of trade and travel on water, it was not so in its natural state, and therefore is not a navigable water of the United States within the purview of the decisions referred to.

It is true, without the improvements by locks, canals, and dams, Fox River, through its entire length, could not be navigated by steamboats or sail vessels, but it is equally true that it formed, in connection with the Wisconsin, one of the earliest and most important channels of communication between the Upper Mississippi and the lakes. It was this route which Marquette and Joliet took in 1673 on their voyage to discover the Mississippi, and the immense fur trade of the Northwest

was carried over it for more than a century. [ [Footnote 10](#) ] Smith, in his History of Wisconsin, [ [Footnote 11](#) ] says:

"At this time (1718), the three great avenues from the St. Lawrence to the Mississippi were one by the way of the Fox and Wisconsin Rivers, one by way of Chicago, and one by the way of the Miami of the Lakes, when, after crossing the portage of three leagues over the summit level, a shallow stream led into the Wabash and Ohio."

It is therefore apparent that it was one of the highways referred to in the Ordinance of 1787, and indeed among the most favored on account of the short portage between the two rivers. In more modern times and since the settlement of the country and before the improvements resulting in an unbroken navigation

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were undertaken, a large interstate commerce has been successfully carried on through this channel. This was done by means of Durham boats, which were vessels from seventy to one hundred feet in length, with twelve feet beam, and drew when loaded two to two and one-half feet of water. These boats, propelled by animal power, were able to navigate the entire length of Fox River with the aid of a few portages, and would readily carry a very considerable tonnage.

In process of time, as Wisconsin advanced in wealth and population and had a variety of products to exchange for the commodities of sister states and foreign nations, Durham boats were found to be inadequate to the wants of the country, and Congress was appealed to for aid to improve the navigation of the river so that steam power could be used. This aid was granted, and since the river was improved commerce is carried over it in one of the usual ways in which commerce is conducted on the water at the present day. But commerce is conducted on the water, even at the present day, through other instrumentalities than boats propelled by steam or wind. And independently of the Ordinance of 1787, declaring the "navigable waters" leading into the Mississippi and St. Lawrence to be "common highways," the true test of the navigability of a stream does not

depend on the mode by which commerce is or may be conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.

It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes

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in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are or may become the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, [ [Footnote 12](#) ]

"every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."

The learned judge of the court below rested his decision against the navigability of the Fox River below the De Pere Rapids chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation. This is true, and these obstructions rendered the navigation difficult, and prevented the adoption of the modern agencies by which commerce is conducted. But with these difficulties in the way commerce was successfully carried on, for it is in proof that the products of other states and countries were taken up the river in its natural state from Green Bay to Fort Winnebago, and return cargoes of lead and furs

obtained. And the customary mode by which this was done was Durham boats. As early as May, 1838, a regular line of these boats was advertised to run from Green Bay to the Wisconsin portage. [ [Footnote 13](#) ] But there were difficulties in the way of rapid navigation even with Durham boats, and these difficulties are recognized in the Ordinance of 1787, for not only were the "navigable waters" declared free, but also the "carrying-places" between them, that is, places where boats must be partially or wholly unloaded and their cargoes carried on land to a greater or less distance. Apart from this, however, the rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country which were so interrupted by rapids as to require artificial means to enable

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them to be navigated without break. Indeed there are but few of our fresh water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so, the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers such as rapids and sand bars.

The views that we have presented on this subject receive support from the courts of this country that have had occasion to discuss the question of what is a navigable stream. [ [Footnote 14](#) ]

From what has been said it follows that Fox River is within the rule prescribed by this Court in order to determine whether a river is a navigable water of the United States. It has always been navigable in fact, and not only capable of use, but actually used as a highway for commerce in the only mode in which commerce could be conducted before the navigation of the river was improved. Since this was done, the valuable trade prosecuted on the river by the agency of steam has become of national importance. And emptying as it does into Green Bay, it forms a

continued highway for interstate commerce. The products of other states and foreign countries, which arrived at Green Bay for points in the interior were formerly sent forward in Durham boats, and since the completion of the improvements on the river, these products are reshipped in a small class of steamboats. It would be strange indeed if this difference in the modes of conducting commerce, both of

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which, at the times they were employed, were adapted to the necessities of navigation, should operate a change upon the national character of the stream.

Before the Union was formed and while the French were in possession of the territory, the Wisconsin and Fox Rivers constituted about the only route of trade and travel between the Upper Mississippi and the great lakes. And since the territory belonged to us, this route has been regarded of national importance. To preserve the national character of all the rivers leading into the Mississippi and St. Lawrence and to prevent a monopoly of their waters was the purpose of the Ordinance of 1787, declaring them to be free to the public, and so important was the provision of this ordinance deemed by Congress that it was imposed on Wisconsin as a condition of admission into the Union.

Congress also, when the state was admitted, made to it a grant of lands, in order that the Fox and Wisconsin might be united by a canal, their navigation improved, and the rivers made in fact what nature meant they should be -- a great avenue for trade between the Mississippi and Lake Michigan. The grant was accepted, the navigation improved, and the canal constructed. These objects were, however, accomplished by a private corporation chartered for the purpose, which was allowed to charge tolls as a source of profit. The exaction of these tolls created dissatisfaction outside of the state, and Congress, in 1870, in response to memorials on the subject of the importance of these rivers as a channel of commerce between the states, passed an act authorizing the general government to purchase the property, and after it was reimbursed for advances, to reduce the tolls to the lowest point which should be ascertained to be sufficient to operate the

works and keep them in repair. [ [Footnote 15](#) ] Although this legislation was not needed to establish the navigability of these rivers, it shows the estimate put by Congress upon them as a medium of communication between the lakes and the Upper Mississippi.

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It results from these views that steamboats navigating the waters of the Fox River are subject to governmental regulation.

*Decree reversed and cause remanded for further proceedings in conformity with this opinion.*

[ [Footnote 1](#) ]

History of Wisconsin, vol. 1, p. 81.

[ [Footnote 2](#) ]

Article 4.

[ [Footnote 3](#) ]

Article 9, section 1, Revised Statutes of Wisconsin, 1858, pp. 40, 1070.

[ [Footnote 4](#) ]

9 Stat. at Large p. 83.

[ [Footnote 5](#) ]

[78 U. S. 11](#) Wall. 414.

[ [Footnote 6](#) ]

[77 U. S. 10](#) Wall. 557.

[ [Footnote 7](#) ]

[78 U. S. 11](#) Wall. 411.

[ [Footnote 8](#) ]

[77 U. S. 10](#) Wall. 557.

[ [Footnote 9](#) ]

[The Montello](#), 11 Wall. 411.

[ [Footnote 10](#) ]

Parkman's Discovery of the Great West 52 *et seq.*; 3 Bancroft's History of the United States 156, 157.

[ [Footnote 11](#) ]

Volume 1, page 81.

[ [Footnote 12](#) ]

21 Pickering 344.

[ [Footnote 13](#) ]

*Doty v. Strong*, 1 Pinney 316.

[ [Footnote 14](#) ]

*Moore v. Sanborn*, 2 Mich. 519; *Brown v. Chadbourne*, 31 Me. 1; *People v. Canal Appraisers*, 33 N.Y. 461; *Morgan v. King*, 35 *id.* 459; *Flanagan v. Philadelphia*, 42 Pa.St. 219; *Monongahela Bridge Co. v. Kirk*, 46 *id.* 112; *Cox v. State*, 3 Blackford 193; *Hogg v. Zanesville Canal Co.*, 5 Ohio 410; *Hickok v. Hine*, 23 Ohio State 527; *Jolly v. Terre Haute Bridge Co.*, 6 McLean 237; *Rowe v. Granite Bridge Co.*, 21 Pickering 346; *Illinois River Packet Co. v. Peoria Bridge Co.*, 38 Ill. 467; *Harrington v. Edwards*, 17 Wis. 586.

[ [Footnote 15](#) ]

16 Stat. at Large 189.

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