

MEMORIAL OF AMOS BINNEY, ET. AL.

FEB. 9, 1829.—Committed to the Committee of the Whole House on the state of the Union.

*To the Senate and House of Representatives of the United States of America
in Congress assembled :*

The memorial of Amos Binney, in his own right, and as trustee of the proprietors of the lands at and adjoining the Little Falls of the river Potomac,

RESPECTFULLY REPRESENTS :

That the memorial of the Chesapeake and Ohio Canal Company, now before Congress, referred to the Committee on Roads and Canals 5th December, 1828, will, if granted, operate to the destruction of a most valuable property, and to the ruin of several of the parties interested. It is with reluctance that your memorialist comes before you, as he is well aware of the great excitement that will be extended towards any individual who ventures, in this community, to oppose any wish of that powerful company ; but having no alternative, he cannot look quietly on and see his rights wrested from him, and a whole family deprived of their property and support ; and though he stands alone, he trusts with confidence for protection from those to whom alone he can now apply, so far as, upon a representation of facts, he is entitled to consideration : for he cannot believe that, in a republican government, such as ours, the property of an individual citizen shall be wrested from him, to be granted to other private citizens, however small his interest compared with the object for which it may be required, if it be in your power to protect him ; and more especially when the public weal does not require the sacrifice.

Your memorialist, therefore, respectfully states, that when, in the year 1784, the Legislature of Maryland granted an act of incorporation to the Potomac Company, for improving the navigation of the river Potomac, the property to be affected by the aforesaid memorial of the Chesapeake and Ohio Canal Company, commanding the whole water power of the Little Falls of Potomac river, had been purchased at great prices for the purpose of erecting mills and other water works, as per statement herewith submitted, marked A ; and that, upon application to the State of Maryland for the said act of incorporation, there was a mutual understanding between the proprietors of the land and the principal petitioners, that no opposition should be made to the granting their charter, provided the landholders were secured in their water rights, and that the company should not be entitled to apply the water of their canal to any purpose than that of navigation ; and with this understanding, the charter was obtained, embracing the following provision :

“ Section 13. And whereas some of the places through which it may be necessary to conduct the said canals may be convenient for erecting mills, forges, or other water works, and the persons, possessors of such situation, may design to improve the same, and it is the intention of this act not to

interfere with private property, but for the purpose of improving and perfecting the said navigation: Be it enacted, That the water or any part thereof, conveyed through any canal or cut, made by the said company, shall not be used for any purpose but navigation, unless the consent of the proprietors of the land through which the same shall be led be first had; and the said President and Directors, or a majority of them, are hereby empowered and directed, if it can be conveniently done to answer both the purposes of navigation and water works aforesaid, to enter into reasonable agreements with the proprietors of such situation, concerning the just proportion of the expenses of making large canals or cuts, capable of carrying such quantities of water as may be sufficient for the purposes of navigation, and also for any such water works as aforesaid."

From that time, no attempt was made by the Potomac Company to interfere with the water rights of the landholders, till the year 1815, (a lapse of 29 years,) when they petitioned Congress to vest them with the right of applying the surplus water from their canal to other purposes than that of navigation. Their petition was referred to the Committee for the District of Columbia, who, upon a representation of facts by the landholders, reported unfavorably, if they made any report. This petition was renewed in 1816, unknown to the landholders, and referred to the same committee, composed of different members, who, before the landholders were aware of their determination, reported a bill in favor of the Potomac Company. Upon this being made known to the land holders, they presented to Congress the statement of facts herewith submitted, marked B. Upon the report being taken up by the House of Representatives, the pretensions of each party were fully discussed, and the bill reported by the committee rejected. At the period, viz: in the Winter of 1815 and 1816, when the Potomac Company applied to Congress to grant them the right of applying the surplus water from their canal to other purposes than that of navigation, the property about the falls as aforesaid was vested in many persons, of whom several were fatherless infant children, none of them in a situation to prosecute or defend their rights by the intervention of courts of law: their only alternative was an appeal to Congress, from whom they found full and ample protection under the most trying circumstances—fatherless children against a powerful and popular incorporated company.

In May, 1816, two persons became vested with this property, one of whom was appointed sole agent to negotiate with the Potomac Company, who, at that time, had unbounded credit and a vast command of money; well informed of the great advantages, and not doubting the right of the proprietors to the surplus water, he determined to come to an arrangement with the Potomac Company without delay, so as to bring the surplus water into active operation, and in the Summer of that year, (1816,) among other propositions, offered them \$30,000 for the free and uninterrupted use thereof: this offer was referred by the company to a committee, who insisted upon \$60,000, shackled by a stipulation, reserving to the company the right of selling surplus water to other purchasers, in case of the extension of the canal; thus, by insisting upon this stipulation for a privilege to which they had not a shadow of claim, the negotiation was broken off: the proprietors prevented the exercise of their rights, this District deprived of the immense advantages that would have accrued from the contemplated manufacturing establishments, and the company them-

selves, though at the time struggling under great pecuniary embarrassments disappointed in the receipt of \$ 60,000.

In 1817, several persons having offered to purchase sites for water works on the line of the canal, and the public feeling having become much excited on the subject, negotiations were renewed with the Potomac Company. Among other proposals, the acting President of the Potomac Company offered to the agent of the proprietors an arrangement, the principal features whereof are embraced in the accompanying paper, marked C., by which it will be seen that \$ 200,000 might have been realized, taking for granted that by the disposal of 10 sites for \$ 100,000 at once, the remaining ten sites would have been equal, if not enhanced by the improvement of the first 10 ; but in the details of this arrangement, the company insisted upon including a slip of land running from the hills to the river, below the company's condemnation, which barred them from extending their canal without the consent of the proprietors, which the agent of the proprietors would not accede to, from an apprehension that, by yielding this guard lock, they might extend their canal, and dispose of surplus water below for their sole benefit, in such a manner as to jeopardize the sale of the 20 sites above. Thus the company, by adhering to this point, which constructively was no more or less than the condition by which the proposition of 1816 was shackled, again deprived the proprietors of the exercise of their rights, and the stockholders of \$ 100,000, the one half of the sum which the 20 sites would have sold for. From that period to the year 1819, no further attempt to negotiate is recollected. In the Summer of 1819, the agent, still anxious to bring into operation a part at least of the surplus water, proposed to lay off two sites only, to which the company apparently acceded, but, as in every other instance, shackled with a condition that might let in the privilege of future extension, which they knew never would be conceded. During this time, viz : between the years 1816 and 1819, several of the owners of property along the Potomac river above, in Maryland and Virginia, embracing the like water privileges secured to them by the said charter of Maryland of 1784, and the charter of Virginia of the same year, were permitted the free use and enjoyment thereof by actual agreement with the Potomac Company, as your memorialist has been advised, with no other condition than not to obstruct the navigation ; and during the same period, such was the pecuniary embarrassment of the company to meet the interest on former loans, and to enable them to complete the new locks upon the land which they had so improperly possessed themselves of, under the condemnation in 1812, as shown by the statement of facts before referred to and marked B. did actually borrow from various banks of this District the sum of \$ 45,237 71, including interest to 1822 ; not one dollar of which have they repaid. The motive for this most arbitrary, unreasonable, and embarrassing course towards the proprietors of this particular section of the river has never been fully avowed : time alone must develope it. Your memorialist does not appear before you to impugn the motives of any one : for, as individuals, they have held a reputation in society of no common cast, and, in their individual capacity, would shrink from acts which that feeling, so common, but never yet defined to corporate bodies, would tolerate ; his object is to present to your honorable body the estimated value, by their own showing, of this property for years past. For several years past, this property has been involved in litigation, thereby precluding the present proprietors

from attempting any negotiation with the Potomac Company. Upon its termination, the proprietors were anticipating a course towards that company from which they anticipated the enjoyment of advantages for which they had suffered in vexation and mortification to a degree not to be estimated by a moneyed consideration, but at the moment of those sanguine expectations, the Chesapeake and Ohio Canal Company apply to Congress for a confirmation of the act of the State of Virginia of their charter: the proprietors apprehending that their rights would be materially impaired, unless provided for as by the charter of the Potomac company of 1784 hereinbefore referred to, application was made to the honorable the Chairman of the Committee by whom the bill confirming their charter was reported, to have an amendment introduced to that effect, to which he positively objected, with an assurance that in his opinion the rights of the proprietors were not impaired by the charter, and that it was by no means certain that the Chesapeake and Ohio canal would touch the old Potomac Company's canal. Upon his thus refusing any amendment, a memorial was presented to the House of Representatives, 21st February, 1825, "Read, and referred to the Committee of the Whole House to which is committed the bill confirming an act of the General Assembly of Maryland, entitled *an act to confirm an act of the General Assembly of Virginia, entitled an act incorporating the Chesapeake and Ohio Canal Company;*" and on the same day, upon a motion by the Honorable J. Cocke, the memorial, with the documents accompanying the same, were ordered to be printed. The excitement produced thereby from a fear that the confirmatory bill would be lost for that session, if not forever, by the delay in printing &c., as the session terminated on the 3d of March, was in the extreme; and from the opinion of the honorable the Chairman respecting the rights of the proprietors, the memorialist was induced to consult the most eminent counsel, whose name is prefixed to the accompanying paper marked D, to which and the accompanying paper marked E your memorialist respectfully refers, as more particularly illustrative of the rights of the proprietors; and upon his expressing a somewhat similar opinion to that of the honorable the Chairman, the memorial was immediately withdrawn, being disposed to suspend the question of right, rather than the main bill should be lost, and to trust to a subsequent Congress for an amendment, if it should be deemed expedient. The amendment intended at the time was in the words following, to come in at the end of the act of confirmation, set: "Not impairing in any manner the rights, privileges, and advantages granted or secured by the act of 1784 of the State of Maryland, incorporating the Potomac Company, to the proprietor or proprietors of the land through which the said Chesapeake and Ohio canal may pass within the District of Columbia."

Thus things remained, when, at the solicitation of the family then sole proprietors of this property, your memorialist was induced to examine their rights and pretensions, and believing that no question could arise to affect them, and desirous to promote their interests, and believing that great advantages would result to this District and all concerned by bringing the surplus water into immediate and extensive operation, your memorialist became the purchaser of one fourth part of the property, and authorised a survey of the whole property and of Potomac Company's canal, of which a plat is herewith submitted, marked F;* and the family not having it in their power to make advances, your memorialist recommended their sending an

* Accompanies the original petition.

agent to the eastern States to interest large capitalists and men of enterprise for the establishment of extensive manufactories of cotton, wool, &c. The agent arrived in Boston some time in August last; and upon his representing the property and the rights of the proprietors to the surplus water as secured by the aforesaid act of the State of Maryland of 1784, and strengthened by the fact of Congress having twice rejected the application of the Potomac Company to interfere therewith, he procured in a short time good and substantial subscribers to the amount of \$53,500, upon a scheme of making the whole property a joint stock at \$100,000, to be improved as a majority of the stockholders should determine; and there is no doubt but that he would have obtained the whole amount, but for the determination of the stockholders of the Chesapeake and Ohio canal, at their general meeting on the 17th of September last past, to extend their canal through Georgetown to the mouth of Rock creek, and to memorialize Congress as to the right of using the surplus water, which was immediately communicated to the aforesaid agent, with a desire that he would postpone his operations in procuring subscribers as aforesaid. Whereupon he returned home, and the whole matter was suspended, with a hope that the President and Directors of the Chesapeake and Ohio Canal Company would, upon reflection, and upon ascertaining the opinions of the individual stockholders, and more particularly reconsidering the report of the committee appointed by the stockholders at their general meeting on the 10th of September last past, composed of the most intelligent men in the community, who unanimously reported that the eastern termination of their canal should be at a point a little below the present locks, would come to the determination that the eastern section should terminate at that point, or at the old locks, where nature appears to have designated the spot, as by reference to the map marked F will be seen, and where their charter, in the opinion of many pure and first rate jurists, fixes it; but, to his utter astonishment, he observed their memorial as before-mentioned, which if granted, would, materially, if not totally, destroy his rights. Whereupon, your memorialist proposed to the Chesapeake and Ohio Canal Company to adjust the matter in an amicable manner, by leaving to the decision of four disinterested men, two to be chosen by each party, to say upon what terms your memorialist should be let into the free use and enjoyment of his rights as secured by the charter of Maryland of 1784 to the Potomac Company, or for what sum he should relinquish all his rights to them; all of which they declined; preferring to press their aforesaid memorial upon Congress, rather than to meet an amicable adjustment, however liberal the proposition; and your memorialist has just been furnished with a copy of the bill [No. 370] reported by the honorable the Chairman of the Committee on Roads and Canals, entitled "a bill to amend the charter of the Chesapeake and Ohio Canal Company, and for other purposes," which, by its third section, if passed, must inevitably destroy the entire rights of your memorialist: for it will be observed by the map F, that he claims the whole of the land between the canal and the river, which commands the whole water power of the falls; and it was to secure those rights that the 13th section of the charter of the Potomac Company by Maryland in 1784 was intended, being only such situations as the then proprietors designed to improve. If, however, the Chesapeake and Ohio Canal Company are permitted to extend their canal, with power to obtain the ground between the line of their canal extended and the river,

they can, and will for a mere song, and without even the trouble of a jury, procure all such ground from the proprietors who possessed no water rights, and to whom the land will be totally useless, lying in detached pieces, cut off from their main land upon the river, of difficult access to them, and at all times unfit for cultivation ; but affording sufficient depth for the erection of water works, for which the company can furnish water to any extent required, for manufacturing and other purposes, from their extended canal, which, to every man at all conversant in matters of this kind, must inevitably destroy the property of your memorialist above. To guard against this, it is that he now comes before you for protection, in whom the power alone rests. He disclaims all intention to oppose the canal as first intended by its projectors ; no man is a more zealous advocate of such improvements upon constitutional grounds ; but he will ever be found on the side of the individual whose rights are attempted to be wrested from him, not for the public emergencies, but merely for the benefit of other individuals. His proposition to the Company to adjust the matter amicably, as before stated, is in evidence of his feelings on the subject ; and though he conceives that his rights are secured to him under the charter of the State of Maryland to the Potomac Company of 1784, (being in fact a compact between the State of Maryland, the Potomac Company, and your memorialist,) in a manner not to be disturbed without his consent, in support of which he refers to the decision of Congress in 1815 and 1816, in the rejection of the petition of the Potomac Company, yet he is not inclined to oppose any unreasonable difficulty to the wishes of the Chesapeake and Ohio Canal Company : all he asks is sheer justice : he solicits no new grant or privilege, but protection of rights long since conceded, and which circumstances not within his control alone have suspended the exercise of : all he requires is the worth of his property, independent of any advantages from their canal. He therefore prays that, before the Chesapeake and Ohio Canal Company are permitted to abstract the water from the present canal, or to obtain any portion of ground between the contemplated canal to Rock creek and the river Potomac, that they shall first acquire, by agreement with your memorialist, his rights to the surplus water as secured to him under the aforesaid act of Maryland of 1784, and so much of his land lying between the canal and the river Potomac as they the said company may desire : and in case your memorialist and the company shall not be able to agree upon terms, that then each party shall appoint two persons, no ways interested in the concerns of or with either party, or in the lands adjoining, with authority for them to call in a fifth person in case they cannot agree, whose award shall be binding and conclusive on both parties : to so reasonable a proposition, your memorialist hopes to find a corresponding feeling on your part. If the public safety or necessity required the sacrifice, and the individual was obstinately opposed to a reasonable compensation, then surely the usual alternative ought to be applied ; but in this case there is no analogy ; it is simply a combination of individuals, striving to wrest from a single individual his rights for their own private emolument, by means the most likely to give them every possible advantage. But can it be reasonable, just, or within the policy of a Government like ours, to sanction such proceedings ? This company, by their own public declarations, and by universal understanding, was organized for the sole object of effecting a "connected navigation between the eastern and western waters, so as to ex-

"tend and multiply the means and facilities of internal commerce and personal intercourse between the two great sections of the United States ; and to interweave more closely all the mutual interests and affections that are calculated to consolidate and perpetuate the vital principles of the Union : " not a word was said about surplus water for manufacturing and other purposes, but where the safety of the canal should require it ; nor any thing about wharves, useful buildings, or lots, to be improved by them or retained, as they may deem proper ; but, in the course of their operations, they discover certain individuals, possessed of property that will secure to them vast pecuniary emolument, and modestly ask Congress to permit them to take it from the individuals, if they will not let them have it at their price : by the operation of a jury, the effect of which most men understand, if they have not personally felt it. Admit that the proprietors and the Potomac Company had matured their negotiations in the year 1817, as hereinbefore stated, and the 20 sites had been improved by the establishment of extensive manufactories, as then contemplated, could they be deprived of their water by any process whatever, by jury or otherwise, unless for the public safety ? Is not your memorialist in the same situation, or will it be contended that his not improving his property, though prevented by circumstances not within his control, is an alienation thereof ? Surely not.

In conclusion, your memorialist takes leave, respectfully, to state a case. When the watering company of Philadelphia, in 1818, were induced to inquire into a more economical means of furnishing the city with a supply of water than by the small and expensive supply by the steam engines then in use, it was found practicable by the erection of a dam and other works at Fair Mount, on the River Schuylkill, if permission could be had from the Schuylkill Navigation Company, and if the right of White and Gillingham to a water power at the Falls, about five miles above the city (about the distance of the Little Falls of Potomac River from Georgetown) could be purchased. Both objects were obtained : the first, by an agreement with the Navigation Company to erect locks and a canal opposite Fair Mount at the expense of the city ; the other, by a purchase of Messrs. White and Gillingham of their water power, for \$ 150,000 ; and the watering company have erected an imperishable monument to their enterprize and wisdom ; and this was done without the intervention of a jury ; and may ever be done where liberality and mutual good feelings are reciprocated between man and man. But how stands the case with the Chesapeake and Ohio Canal Company ? Have they come forward, and proposed terms to the proprietors for their water power ? No : but, on the contrary, have refused to submit the matter to intelligent disinterested men, and are praying Congress for the power of wresting it from the proprietors, by the operation of a jury, composed but too often of men not at all conversant in matters of this kind, and whose only qualification is the absence of personal interest, and upon whom the immediate and ramified influences of powerful incorporated companies are but too well known.

With this statement of facts, which your memorialist is prepared to substantiate, he fearlessly approaches the Representatives of a free People, confiding in the justness of his claim, and the guardians of private as well as public rights.

AMOS BINNEY,

(A.)

GEORGETOWN, January 15, 1829.

I do hereby certify that I was well acquainted with a certain John Ballendine, from about the year 1772 to about the year 1781 ; and that within that period he was occupied in cutting or making a canal or cut to convey the water from round the Little Falls of the River Potomac, for the purpose of erecting extensive water-works thereon ; that he went over to England for the express purpose, and brought with him to this country a number of workmen from the Duke of Bridgewater's works, as they all stated, among whom I well remember Robert Sutton and John Sutton ; and that they were employed a considerable time on the said canal or cut, upon which he, the said Ballendine, expended considerable sums, having, among other expenditures, built a stone house for the accommodation of his aforesaid workmen, which was thrown down by the great ice fresh about the year 1784 ; and the *principal* cause of his abandoning his said operations was pecuniary embarrassments with certain persons in Virginia : that his right in carrying on the aforesaid works was never questioned, as to the land or water privileges ; and that, soon after his operations ceased, certain persons, Way, Paxon, and Cloud, purchased the aforesaid property of the said Ballendine, for the purposes and views of establishing water-works : that, when the said Way, Paxon, and Cloud became the proprietors, a number of persons were actively engaged in arrangements for the improvement of the navigation of the River Potomac, among whom, Thomas Johnson, formerly Governor of Maryland, and the late William Deakins, were the most active and influential in procuring the charter of the Potomac Company. I was at the place where the locks now are, when Cloud was arranging with Thomas Johnson and William Deakins aforesaid, about a jury to value the land through which the Potomac Company's canal might pass. I observed to Mr. Cloud, "Give them the land for the use of the water." Mr. Johnson and Mr. Deakins thereupon observed the water was his, and they could not prevent him from it, on condition that he was not to use it so as to obstruct the navigation.

In testimony whereof, I have hereunto set my hand and seal, the date above mentioned.

JOHN THRELKELD, [L. s.]

Witness—JOHN COX.

Personally appeared, this twenty-first day of January, 1829, the above named John Threlkeld, of the county of Washington, in the District of Columbia, before me, a Justice of the Peace for the county aforesaid, and being duly sworn, according to law, made oath that the facts and things stated in the above certificate, and signed by him, are strictly true, to the best of his knowledge and belief.

Sworn to before

JOHN COX, J. P.

(B.)

A Statement of Facts, showing why the bill reported by the District of Columbia Committee in favor of the Potomac Company, touching and materially affecting their rights, should not be passed.

To the Honorable the Senate and House of Representatives :

The proprietors of certain lands adjoining the canal and locks of the Little Falls of Potomac River ask leave respectfully to submit to the honorable the members of the Senate and House of Representatives in Congress assembled the following statement of facts, with a view to show that the bill reported by the Committee for the District of Columbia, granting certain privileges to the President and Directors of the Potomac Company, touching and materially affecting their rights, should not be passed.

Some years previous to the incorporation of the said Potomac Company in the year 1784, the tract of land upon which the company erected their first locks was purchased by a Mr. Ballendine, who actually commenced a canal or cut, preparatory to the erection of an extensive mill. About this time, Messrs. Way, Paxon, and Cloud entered into an agreement to purchase sundry sites, in several of the United States, for the establishment of water works, among which were the three tracts laid down in the annexed plat. Subsequent to the said purchases, viz : about the year 1793, the Potomac Company, under their act of incorporation of 1784, proceeded to the condemnation of part of the aforesaid lands, in the manner directed by their said charter, in no place less than 180 feet in width, and in some full 200 feet, as they deemed most expedient, that being the extent of the law. The jury selected to assess the damages merely estimated the soil ; and upon the parts thus condemned they completed their canal, erected and finished their toll-house and FIRST set of locks, and have enjoyed the same, unmolested, to this time. But about four years past, the locks first erected being much decayed, having been built of wood, it was agreed by the company that a set of locks should be built of stone, and on a different site, so that they might continue to receive their tolls through the first set of locks, which, by occasional repairs, might be made to do until the second set could be completed. Upon investigating their powers under their charter, it was the opinion of a majority of the *then* directors, that they had no right to make any further condemnation of the same tracts of land, having availed themselves of all their right in the condemnation of 1793, as before mentioned. It was soon found that the old locks were unsafe, and that no repairs could be effectual. The loss that the company must necessarily incur from a total suspension of their tolls at this point, while rebuilding, which would require at least two years, was of too much importance not to induce every exertion of their ingenuity to find an alternative, which was accomplished in the manner following : By their charter they were authorized to condemn a certain quantity of ground for a toll-house, contiguous to such ground as they should condemn for locks, if it should be deemed expedient ; and as by the condemnation in 1793, there had been no ground specially condemned for a toll-house, it was ingeniously discovered that they still had the right to make a further condemnation for that special purpose ; and that, when they had procured such condemnation, they could apply it to the erection of ana-

ther set of locks ;—and they proceeded under this forced construction of their charter. after more than twenty years experience of its inexpediency. The ground first condemned, viz : in 1793, having been found fully adequate to all the purposes of canals, locks, and a toll-house, the second condemnation was thus made and located, as best suited their designs, and they are now engaged in the erection thereon of a second set of locks ; but the toll-house erected on the ground condemned in 1793. and adjoining the first set of locks, has been continued as such to this time, and has lately been repaired and enlarged. even by the present directors, upon whose petition the bill now before your honorable body was predicated ; from whence it irresistibly follows that the act of the directors, under whom this last condemnation was made, is not sanctioned by the letter or the spirit of their charter. At the time this second condemnation was made, the proprietors of the lands, for which they had paid a considerable price. from a conviction that they would be entitled to all the advantages of mill seats, &c. as contemplated by the original purchasers, and secured to them by the Legislature of Maryland in the aforesaid charter of 1784 to the Potomac Company, as will more fully appear by reference to the thirteenth section thereof, hereunto annexed. protested against their proceedings, upon the principle, that, as their charter expressly restricted them to 200 feet, and they had, by their condemnation in 1793, secured to themselves the full quantity, they had no right to make a second condemnation ; they however proceeded, and the jury assessed \$ 175 damages only, stating at the time that they merely valued the soil, as the company could not under their charter apply it to any other purposes than navigation, and the proprietors would still have sites sufficient for all the purposes of milling, &c. Here, then, the proprietors were disposed to flatter themselves that the company were fully satisfied, and that they would be permitted to enjoy their privileges so soon as they could make an arrangement among themselves to bring them into operation ; but, much to their astonishment, they see that the company, not satisfied with this and various other encroachments, have petitioned Congress to grant to them a right expressly secured by the Legislature of Maryland to the holders of the lands through which their canals pass, and sanctioned by the company themselves, by their acceptance of a charter containing such a provision ; and which, if granted by Congress, will go to destroy all the advantages for which the present proprietors paid dearly, and deprive a number of fatherless children of a property which might eventually be to them a support. The privilege to be granted to the company by the bill, is “the use of the surplus water from their canal, for the purposes of milling, &c. upon such lands as they now hold, or may purchase, or acquire by virtue of said bill.” Their charter of 1784 expressly prohibits them from the use of the water to any other purpose than that of navigation, unless by consent of the proprietors of the lands ; but secures the use of the surplus water for milling, &c. to the holders of the lands through which their canals shall pass. If, therefore, this privilege is granted to the company without the consent of the proprietors, the individuals owning the lands will be injured in a two-fold degree ; for they will not only be deprived of the use of the surplus water, but the very provision contained in the thirteenth section, as aforesaid, of the charter intended for their benefit, and predicated, no doubt, upon a compromise between the then proprietors of the land and the persons who applied for that charter, will

have been an instrument for their oppression. In order to illustrate this position, it will be necessary to refer to the annexed plat. Thus it will be seen that the company, in making their second condemnation, have ingeniously and designedly located it so as to unite it with their condemnation of 1793, thereby making themselves the owners (*now*) of the entire slip of land contained within the lines A, B, C; upon which they may erect buildings for milling, &c. sufficient to consume the whole of the surplus water; and consequently deprive the proprietors of the adjoining land, through which their canal passes, of all the advantages thereof: at the same time, they are secured from the damages that any jury would have awarded, if they could have foreseen that any Congress would grant them such use of the surplus water, contrary to the express provision of the Legislature of Maryland; for they decided under a full conviction that the right was thereby secured to the individuals, and consequently conceived themselves precluded from estimating any damages, excepting merely as to the soil;—thus, in effect, operating as a positive injury, instead of a protection. It may be proper now to observe, that the charter of 1784 was applied for and granted upon the sole pretensions of improving the navigation, to which the proprietors of the land assented; and the company confirmed the right of using the surplus water to the proprietors of the land, by the acceptance of their charter containing such provision. The company subsequently completed their navigation through those lands, availing themselves not only of all the privileges granted them thereby, but have unlawfully, and, we might almost say, wantonly, introduced a superabundant number of sluice gates (or waste ways) into their canal, thereby inundating much of the proprietors' low lands, and rendering them waste and useless;—and all this they have done without a solitary attempt on the part of the proprietors to impede them in their operations. Upon what principle, then, they can expect Congress to dispossess individuals of privileges which they themselves sanctioned in 1784, must be for them to explain; for although the power to dispose of so many mill-seats, &c. which such grant must produce, might afford a fine field for speculators, it would be uncharitable to suppose there were any private views at the bottom of their petition. They cannot want additional power to enable them to complete the navigation, for that is already done, so far as the jurisdiction of Congress extends. They may perhaps urge that there is a vast body of water wasting daily, which might be applied to very valuable purposes; but surely this can give no pretensions; for in a free country like ours, it is doubtless the right of every individual to use his property or not; and besides, they have delayed their application too long; for the proprietors are at this moment making arrangements, within the knowledge of the company, to bring the whole of this waste water into operation. They may state, and probably with much truth, that the company are in want of funds; but here, O modesty! where is thy blush? Will they wrest from many fatherless children rights which they themselves, by the acceptance of their charter in 1784, secured to their parents? may they not with as much propriety require a tax, for their benefit, upon the present paltry salaries of the President and Heads of Departments, and compensation to the members of Congress, being in their humble opinion too high? It will no doubt be strongly urged that the lands in question are shortly to be sold, and that it is important, for the interest of the stockholders, that they should be empowered by an act of Con-

gress to purchase them, and to dispose of the surplus water thereon, and on such as they *now* own, for the purposes of milling, &c.—This will not be denied; but surely they could not have comprehended the effect of so modest a request, being simply to deprive the individual owners of the lands of their rights, and to put the profits accruing therefrom into the pockets of the individual stockholders. And here we ask leave respectfully to call your attention to the phraseology of the bill upon your table. It not only authorizes the company to use or sell the surplus water upon such lands as they may hereafter acquire by virtue of said bill, but to use or dispose of it upon such lands as they *now* own. It needs no argument to show, that, once grant them this power, and they are absolutely independent of the proprietors of the adjoining lands; for upon the triangular piece of land, marked A. B. C, on the annexed plat,* which they have ingeniously contrived *now to hold*, they can and will expend the whole of the surplus water, and leave the individuals to enjoy their waste lands, dispossessed of their most valuable rights. Thus much the proprietors have deemed it expedient to state upon a subject in which a very considerable property is materially implicated, solely with a view that its merits should be before you; and they confidently appeal to you as the faithful guardians of their rights.

THE PROPRIETORS,

WM. ROBERTS, *as proprietor and guardian of the children of A. Cloud.*

February 19, 1816.

Extract from the Charter of 1784.

“SEC. 13. And whereas some of the places through which it may be necessary to conduct the said canals may be convenient for erecting mills, forges, and other water works, and the persons, possessors of such situations, may design to improve the same, and it is the intention of this act not to interfere with private property, but for the purpose of improving and perfecting the said navigation: Be it enacted, that the water, or any part thereof, conveyed through any canal or cut made by the said company, shall not be used for any purpose but navigation, unless the consent of the proprietors of the land, through which the same shall be led, shall be first had; and the said president and directors, or a majority of them, are hereby empowered and *directed*, if it can be conveniently done to answer both the purposes of navigation and water works aforesaid, to enter into reasonable agreements with the proprietors of such situation, concerning the just proportion of the expenses of making large canals or cuts, capable of carrying such quantities of water as may be sufficient for the purposes of navigation, and also for any such water works as aforesaid.”

(C.)

GEORGETOWN, 27th May, 1828.

SIR: I will thank you to state whether you were not, as President of the Potomac Company, engaged, in 1817 or 1818, in a negotiation with

* Accompanies the original.

John K. Smith, for laying off and disposing of sundry sites for manufacturing purposes on the canal of the Little Falls of the river Potomac? What number of sites were proposed to be laid off? The price fixed upon, or limited for each? and how many you think could have been disposed of, if the negotiation had been carried into effect? and the causes for which the negotiation failed and was broken off?

I am, very respectfully,

Your ob't servant,

WM. STEUART.

To Mr. WM. MARBURY.

GEORGETOWN, 3d June, 1828.

SIR: In reply to your within letter, of the 27th ult., I have to state, that I did, as President of the Potomac Company, enter into a negotiation with John Kilty Smith, in the year 1817 or 1818, for the laying off certain sites for manufacturing purposes, on the canal of the Little Falls of Potomac river; that after several interviews with Mr. Smith, I proposed in writing to have twenty sites laid off, to be disposed of at public sale, by an agent to be mutually agreed upon between Mr. Smith and myself, at not less than ten thousand dollars for each site, being the number and price agreed upon between Mr. Smith and myself; and I do not hesitate to state that ten sites could have been immediately disposed of, had not Mr. Smith subsequently insisted upon innovations and conditions that could not be acceded to, which prevented any agreement being carried into effect; and that Mr. Smith was the sole and only cause of the negotiation being broken off.

WM. MARBURY.

To Mr. WM. STEUART.

June 19, 1828.

Since the foregoing letter was signed by me, my attention has been called to the terms used in that part of it in which I speak of the number of sites which might have been disposed of, in case the contemplated arrangement had not been defeated. I do not wish to be understood to say that I know that ten sites could have been sold; but that I verily believe, from the information then communicated to me, that ten sites might have been sold at the price stipulated, and I have no reason since to change my opinion.

WM. MARBURY.

(D.)

Opinion of Walter Jones, Esq. upon certain questions relating to the charter of the Potomac Company.

[NOTE.—'Tis not thought necessary to print the detailed statement which accompanied the following questions when submitted to Mr. Jones, as the principal facts are sufficiently note-

rious, or may be collected from the printed statement laid before Congress in 1816, by the then proprietors of the land.

There are two points established by the following opinion, well worthy the serious attention of all who are interested in the prosperity of the Potomac company.

1. That the company has no title, and, under the existing law, never can acquire any title to the ground upon which the new locks (now nearly complete) have been erected at an immense expense; and that the company is liable, at any moment, to be ejected therefrom, at the pleasure of the proprietor.

2. That the proprietors of the land through which the canal passes are already well entitled to use the great supply of water discharged upon their land, and may be secured in the enjoyment of it without compensation to the company. Now it is notorious that the waste water thus thrown upon the land of the proprietors, and which must continue to be thrown there, is capable of an extensive and very profitable application to water-works.

When it is recollected, in addition, that the old locks have lately fallen down, so that the canal is rendered impassable until the company shall either erect new locks upon the *old site*, or go on to finish the new locks upon ground which they hold at the mere will and pleasure of the proprietor, it will be obvious how essentially the most important and vital interests of the company must depend upon the discretion and judgment with which the proposals of the proprietors for *purchasing* the use of the surplus water are to be treated by those entrusted with the management of the company's concerns. On that account it is strongly recommended, and greatly to be desired, that all those persons holding and representing large interests in the company should attend the next general meeting in person, and judge and decide for themselves; trusting as little as possible to the agency of proxies in so momentous a question.]

Questions submitted to Mr. Jones, as connected with the accompanying statement, by J. K. Smith.

1. Is not the charter from the States of Virginia and Maryland to the Potomac Company in the nature of a compact, and not repealable in either State, without the concurrence of the other?

2. Can the company, after having acquired, by purchase or condemnation, a site for the canal, locks, and other works; after having led the canal through, and so far completed it; change the course of it, and proceed to condemn any other part of the land through which the canal has already passed, for any purpose whatever?

3. Is the condemnation of the 151 square perches of land, described in the inquisition of the 23d June, 1812, valid, under the circumstances of that proceeding? Was it then, or is it now, competent for the company by any process whatever, to condemn that land, either for the purpose expressed, or for any other whatever? If not, what remedy has the proprietor?

4. The company having condemned a new site for their locks, canal, &c., does not the old site, before condemned, revert to the original proprietor?

5. Are not the proprietors of the lands through which the canal passes, entitled to the surplus water, (over and above what can be used for navigation,) for the purposes of mills, forges, and other water-works, proper sites for which may be found on such lands? May they not, at their own cost and charge, enlarge the canal, in order to admit a freer access and greater volume of water; and draw the surplus water, at pleasure, from such points as they may find most convenient; and that without the consent of the company: provided the canal suffers no damage, and incurs no risk thereby? Or by what other means may the proprietors obtain the benefit of the surplus water actually passing through the canal, or capable of being made to pass through it?

6. If the proprietors should take the water from the canal, in the manner suggested in the preceding question, without the consent of the com-

pany, and it should be decided that they were not strictly justified in so doing, what, in case of a suit by the company, would be the measure of the damages, the injury actually sustained by the company, or the advantage gained by the proprietors?

7. Is not a person who is in possession of the land, with a good equitable title, secured by bond of conveyance, such a proprietor, within the meaning of the 13th section, as the President and Directors are authorised to enter into reasonable agreements with, for the use of the surplus water, although the *legal title* be incomplete?

8. Are not the President and Directors authorised to enter into agreements for the use of the surplus water, with any one or more of the proprietors of contiguous sites, without the concurrence, or any corresponding agreement with the other proprietors of the other contiguous sites to which the surplus water of the canal might be applied?

9. Has the company any right to discharge the waste water from the canal upon the lands of the adjacent proprietors? Are not the proprietors entitled to damages for the injuries sustained in consequence of such discharge of water upon their lands; or to compel the company to shut up and secure the sluices that have been opened for the purpose of discharging the waste water? and may the present proprietors recover damages for the injuries done to the land while in the hands of the former proprietors, from whom they derived their title?

10. Are not the proprietors entitled to the water discharged upon their lands through the sluice-gates made by the company in their canal, for the discharge of the waste water? and may they not take it up and apply it to all the uses of which their sites are susceptible, as soon as it reaches their land? If the proprietors should apply such waste water to the purposes of mills, &c. could the company, at pleasure, close up the sluices, and deprive the proprietors of the water, though it should not be requisite for the purposes of navigation?

11. Is not the company bound to return to the proprietors the water of such ancient streams as are intercepted by the canal?

In answering the questions proposed by Mr. Smith, the principle laid down by Mr. Marshall, in the opinion which has been furnished me, will be assumed as one sound and unquestionable, upon every point to which it applies, viz: that every law which goes to wrest from individuals their property against their consent, with or without compensation, being made in derogation of private rights, and out of the ordinary course of legislation, must be construed strictly in favor of the individual, and rather narrowed than extended in its operation.

Question 1. Answer. The charter is certainly in the nature of a contract between the two States and the individuals composing the company; and, therefore, is irrevocable by both or either of the States, so long as the parties conform to the conditions of the grant. 'Tis also in the nature of a compact between the respective States; and, therefore, cannot be repealed or altered by either, without the concurrence of the other; and so it has always been considered and treated by the respective States; the Legislature of each making the force and operation of every successive

amendment to depend upon the event of the other State's passing a concurrent act.

Question 2. Answer. I entirely concur with Mr. Marshall's opinion upon this point. When the company has once made its selection of the course of the canal, purchased or condemned the land for the site, and actually conducted the canal through, the power is so far executed and determined. They cannot return and condemn another part of the land through which the canal has already passed, for any purpose whatever, but that of erecting certain "necessary buildings" at or near such places as are designated in the original charter for the receipt of tolls.

Question 3. Answer. It may be premised that there are defects and irregularities apparent upon the face of the proceedings, fatal to this inquiry, as an actual condemnation of the land in question: the most obvious of those defects is the omission to swear the jury in the terms prescribed by the act of Assembly. 'Tis also clear that the condemnation cannot take effect, so as to vest the title, till the condemnation-money shall be paid. But those defects, going merely to avoid the existing title claimed by the company, are comparatively unimportant, since the errors in the proceedings might be amended in a subsequent inquest; and the payment or tender of the condemnation-money would be yet in time, if, in other respects, the condemnation could be supported. The important objections to be now considered are those that go to the foundation of the company's right to condemn the land at all: and the following are deemed to be conclusive:—

I. As a condemnation under the 11th section, it is void—1st. For the reasons stated in answer to the preceding question, and in Mr. Marshall's opinion: the power to condemn land for the purpose "of making the canal, locks, and other works," having been completely executed and determined, (*quoad* the land in question) by the previous condemnation and appropriation of the full quantum of land allowed for those objects; and by actually conducting the canal *past* the land in question. 2dly. Because the land condemned is situate a considerable distance below the head or highest access of tide-water, which is expressly fixed as the lowest terminus of the canal. II. As a condemnation under the 12th section, it is void—1st. Because, in point of fact, and upon the face of the warrant, it appears the ground was wanted for the purpose (and indeed for no other purpose but that) of "making the canal, locks, and other works," which had been provided for in the 11th section. Now, where the 12th section mentions "necessary buildings," as the object for which the company is authorised to condemn a quantity of land not exceeding one acre, it necessarily refers to some description of "buildings" other than the works that had before been provided for in the preceding sections. 'Tis probable the marginal note in the printed editions of the charter truly indicates the view of the Legislature, when it specifies "*toll-houses*" as the object intended by the indefinite phrase "necessary buildings." But whatever was the nature of the buildings in contemplation, 'tis clear it could not comprehend any thing that formed a constituent and essential part of the canal, or of the locks, or of any other works comprised in the idea of a navigable canal. Some building merely collateral and accessorial to the main work was evidently all that was in contemplation. In fact, it appears that the only use to which this last condemnation has been applied, or is fit to be applied, is for the canal itself, and the locks: that the ground was

utterly unfit for human habitation ; of course, for the site of a toll-house ; and that, accordingly, no toll-house has been built upon it ; but is still retained upon the ground originally condemned, under the 11th section, for "the canal, locks, and other works." It may here be remarked, that the objects for which the privilege of condemnation was conferred by these two sections, appear to have been completely inverted and misapplied ; and that the law never would sustain a condemnation, unless made *bona fide*, to subserve the real objects pointed out in the charter. Such an abuse of the privileges of the charter never could be tolerated, as to make it the mere color or pretext for condemning land ostensibly for one purpose, but really for some other distinct and collateral object. The circumstances under which this condemnation are stated to have taken place, would seem to indicate a design to acquire more land than could be requisite for the primary and legitimate objects of the company ; inasmuch as it had been experimentally demonstrated that the first condemnation had given them ample space for every such object, whether the *canal*, the *locks*, or other works essentially incident to a canal, or *toll-houses*, or any other collateral appendages. 2dly. Because the ground comprised in this condemnation, is not "at or near" any one of the three places designated in the charter for the receipt of tolls ; as is indispensably required to bring the condemnation within the terms of the 12th section.

If those objections be well founded (and they appear to me to be altogether insuperable) it necessarily follows, that not only is the condemnation, as it now stands, null and void, and utterly incompetent to convey any title to the company ; but that it was and is utterly incompetent for the company as the law now stands, to obtain a condemnation of the land in question, by any form of proceeding, or for any purpose whatever.

The remedy for the proprietor of the land taken under the void condemnation, is ejectment or trespass.

Question 4. Answer. It being clear that the company acquired no title by the last condemnation, it follows that the title in fee simple, acquired by the former condemnation, remains unimpeached, if, in other respects, it be unexceptionable. If, however, an opposite opinion were to prevail, so as to determine the last condemnation to be regular, and to vest a good title, then, without doubt, the former condemnation would be deemed to have been virtually relinquished, and the ground covered by it to have *reverted* to the original owner. Otherwise, 'tis not conceivable what limitation there could be to the extent of the company's acquisitions, by means of successive condemnations. The limitation, by the charter, is 200 feet in width : if that may be exceeded by one acre, as in the present instance, the limitation becomes utterly useless and nugatory.

Question 5. Answer. The 13th section not only authorizes, but *directs*, that the surplus water, over and above what is necessary for navigation, be applied, if it can be conveniently done, to the purposes of "mills, forges, and other water-works." The question is, what "mills, forges, and other water-works ?" Whether such as may be erected by the individual proprietors of the contiguous sites, or such as the Potomac Company may choose to erect, either on the sites that might possibly be included within the limits of what they are authorized to purchase or condemn, under the 11th and 12th sections, or on sites which they might purchase for the express purpose ? I consider it perfectly clear that the only water works in the contemplation of the law are such as may be erected by the individu-

als possessing the land through which the canal was to be conducted ; and that the Potomac Company, in their corporate capacity, have no right to engage in any speculation in "mills, forges, or other water-works : " but if the President and Directors were to divert the capital of the company to any such objects, it would be a clear misapplication and abuse of their chartered privileges, and a breach of their official trust. All the legitimate emoluments of the company, from their capital vested in the canal, are confined to the specific tolls to be levied from those who navigate it : the only compensation they can lawfully demand, or receive, for the use of the surplus water, is, to be reimbursed a just proportion of the expense of making the canals or cuts capacious enough to answer both the purposes of navigation and of such water-works. The necessary breadth and depth of such canals or cuts are defined and prescribed in the 17th section of the charter : and whether that prescribed breadth and depth be sufficient for both purposes ; or whether it be necessary to make the canals or cuts still more capacious ; in either case, the individual who wishes to use the water must contribute a just proportion of the expense. The last clause of the 11th section, which expressly recognizes the right and the probability of having such water-works erected by the adjacent proprietors, *after* the canal shall have been made ; the express declaration of the intent and object of the 13th section, so unequivocally avowed in the preamble to that section ; the contribution, by the proprietors, to the expense of making the canal, which is required by the concluding clause of the 13th section, as the sole *consideration* for the use of the surplus water ; and the whole tenor and spirit of the law, all clearly and conclusively show that the only improvement of sites for water-works intended to be effected by means of the surplus water from the canal, is that of the contiguous sites belonging to the individual proprietors. Indeed, so studious is the law to secure to those proprietors *through whose land the canal was to pass* the entire and *exclusive* use of the surplus water, susceptible of application to mills, forges, &c., that the very first enacting clause of the 13th section sets out with a positive prohibition against appropriating the water conveyed through the canal to any purpose but that of navigation, *unless the consent of those proprietors be first had*. The intent of that prohibition, undoubtedly, was to prevent the company from driving bargains with the proprietors of detached and remote sites, and abstracting the water from the adjacent "proprietors of the land *through which the canal was to be led*." The preference was justly considered as due to those proprietors whose land was to be taken for the use of the canal ; and it may fairly be inferred that the exclusive privilege of applying the surplus water to the improvement of their sites was a part of the *consideration*, superadded to the valuation by the jury, secured to them by the Legislature (probably in consequence of some previous concert between them and the persons contemplating the formation of the Potomac Company) for having their ground occupied by the canal ; ground which had always possessed very peculiar advantages for every species of works requiring a great command of water ; and which had been destined by the proprietors to very extensive improvements in that way, before the present canal was thought of.

I conclude that, as the President and Directors of the Potomac Company are expressly *directed* by the law to permit, so the proprietors of the land through which the canal has been conducted have a *vested right* to demand and require, that the surplus water, over and above what is ne-

cessary for navigation, be applied to the improvement of their sites for mills, &c., upon two conditions : 1st, that the relative situation of things renders it practicable and convenient to be done, without deterioration to the main purposes of the canal ; and, 2dly, that they pay a just proportion of the expense of making the canal, &c. Still, I do not conceive that the proprietors of the contiguous land could, in strictness, be justified in making, of their own authority, and without the consent of, or any previous agreement with, the company, any alteration of the canal, or cutting into it, for the purpose of letting themselves into the enjoyment and benefit of the surplus water.

The question then recurs—how are the contiguous proprietors to be let into the enjoyment of this vested right, if the President and Directors should wilfully and obstinately refuse to entertain any amicable treaty on the subject, or to enter into any *reasonable agreement* ? The Legislature, perceiving that it was so clearly the reciprocal interest of both parties to effectuate the object, and to adjust the terms amicably between themselves ; and not anticipating the possibility of any such perverse and injudicious administration of the affairs of the company as a wilful and capricious obstruction to such improvements, has not provided any specific remedy for such a case. But the municipal law of the land is perfectly competent to afford relief in aid of the particular statute. If it be once ascertained that the statute has vested a right, for the full enjoyment of which a specific and adequate remedy is wanted, the court of chancery would afford the remedy, by compelling the company to execute, *bona fide*, the intent of the statute. The circumstance which is stated, of the company's having been obliged to open sluices in the canal, and to discharge continually great quantities of waste water upon the lands of the adjacent proprietors, affords so clear and practical a demonstration of the conveniency and advantage with which the water conveyed through the canal may be applied both to the purposes of navigation and of water-works, without any possible detriment or risk to the canal, that, if the proprietors could make out the other part of their case to the satisfaction of the court, viz: a refusal on the part of the company to accede to just and reasonable terms, then the strongest possible case, as I conceive, would be made out for compelling the President and Directors to go into a fair liquidation of the just proportion of the expense properly chargeable to the proprietors ; and, indeed, for a court of chancery to direct an issue of *quantum meruit*, to be tried by a jury.

Question 6. Answer. The measures of damages for trespasses upon property is usually the degree of injury done to the property ; but in some cases of wilful and malicious trespass, the jury may, in their discretion, give vindictive or exemplary damages. In the particular case supposed, the quantum of damages would mainly depend upon the question, which of the parties could put the other in the wrong. If the jury could be satisfied that the plaintiffs had arbitrarily rejected fair and reasonable terms of agreement, and that the defendant had merely pursued an irregular mode of coming at what was substantially his right, the damages would, in all probability, be merely nominal.

Question 7. Answer. I consider the affirmative of this question as quite clear.

Question 8. Answer. The affirmative of this question is equally clear as the last. The first enacting clause of the 13th section, which prohibits

the application of the water conveyed through the canal to any purpose but navigation, without the consent of those persons owning the land through which the canal was to be led, has already been explained to intend nothing more than to secure to those persons the *exclusive use* of the surplus water, in preference to the proprietors of detached and distant situations, who might, otherwise, have contracted with the Potomac Company to take the water away from the proprietors of the immediately contiguous and adjacent lands. No construction could be more unreasonable or absurd, than to suppose the law intended to prohibit any arrangement with one proprietor, without the concurrence of other independent proprietors, having no sort of interest, either joint or several, in the particular parcel of land to and through which alone the water was to be conveyed, of proprietors whose number was indefinite, whose situations may be the most disconnected and remote from each other, and possessing in their relative positions to each other, and to the canal, the greatest diversity of distinct and independent interests. In relation to those persons who own the lands through which the canal has been conducted, that clause of the 13th section which authorizes and directs the President and Directors to enter into reasonable agreements "with the proprietors of such situation," must necessarily be construed *reddendo singula singulis*; that is, severally and respectively, as concerns each proprietor. Upon that principle, each and every proprietor of the particular situation to be improved would be competent to contract for himself; and so the company might go on, from time to time, to contract, separately and successively, with the various proprietors who might chance to own the lands along the whole line of the canal, extending, possibly, from the foot of the Little Falls to the source of the Potomac.

Question 9. Answer. The precise limits specified in the condemnation define what portions of the lands of individuals shall be appropriated or subjected, directly or indirectly, to the purposes of the canal. To discharge waste water from the canal, upon the lands lying without those limits, (except along the ancient channels of such streams as before flowed through the land,) is clearly a wrong, for which the proprietor may recover damages according to the degree of injury sustained; and the continuance or repetition of which he may prevent by injunction from chancery. The present proprietors cannot recover damages for injuries done to the land before it came into their hands.

Question 10. Answer. The proprietor might waive the tort, and accept the water so thrown upon his land; and after the water had flowed through certain channels so long as to raise a reasonable presumption that they were intended to be the permanent issues and channels for the waste water, the proprietor would be justified in proceeding, upon the strength of that presumption, to construct his water-works, and would be protected in the use of such water. But his right would be secondary to that of the company, who would have a paramount title to the use of the water, whenever it became necessary to the primary objects of the canal, and circumstances should have rendered it incompatible with those objects to permit it any longer to flow in its accustomed channels. An arbitrary and unnecessary obstruction of those channels, and a wanton diversion of the water to other sluices, through which to discharge it, merely as *waste water*, would be clearly inadmissible.

Question 11. Answer. If the entire abstraction of such streams from the point where they fall into the limits purchased or condemned for the

site of the canal, be necessary to the proper and scientific construction of the canal, then it might be considered as one of the items of incidental damage, for which the jury of inquest would be competent to compensate him; and, in that case, he would not be entitled to claim of the company so much water, in specie. If, however, the entire abstraction of the water was not essential (and I cannot conceive how it should be so in this instance) to the construction of the canal or its incidental works, according to approved rules of art, then it is clear the company have no right to debar the proprietor from the use of the water, but are bound to return it into its accustomed channels. Understanding, in this case, that an equal (or a greater) quantity of waste water is now discharged from the canal, as that which formerly flowed in the ancient channels of the intercepted streams, and that it would be equally practicable to discharge it by such ancient channels as through the sluices made on purpose by the company, I consider that circumstance as affording a practical demonstration of every fact and of every principle necessary to establish, beyond controversy, the right of the proprietor to that specific quantity of water which formerly flowed through his land by those channels, and his right of election either to take that water from the new channels through which it now flows, or to compel the company to return it into its ancient beds.

W. JONES.

WASHINGTON, November 28, 1816.

Extracts from the Charter to the Potomac Company.

SEC. 11. *And*, whereas it is necessary for the making the said canal, locks, and other works, that a provision shall be made for condemning a quantity of land for the purpose, *Be it enacted*, That it shall and may be lawful for the said President and Directors, or a majority of them, to agree with the owners of any land through which the said canal is intended to pass, for the purchase thereof; and in case of disagreement, or in case the owner thereof shall be a *femme covert*, under age, *non compos*, or out of the State, on application to any two justices of the county in which such land shall lie, the said justices shall issue their warrant, under their hands, to the sheriff of their county, to summon a jury of twenty-four inhabitants of his county, of property and reputation, not related to the parties, nor in any manner interested, to meet on the land to be valued, at a day to be expressed in the warrant, not less than ten nor more than twenty days thereafter; and the sheriff, upon receiving the said warrant, shall forthwith summon the said jury, and when met, shall administer an oath, or affirmation, to every jurymen that shall appear, that he will faithfully, justly, and impartially value the land, (not exceeding, in any case, the width of two hundred feet,) and all damages the owner thereof shall sustain by the cutting the canal through such land, according to the best of his skill and judgment; and that in such valuation he will not spare any person for favor or affection, nor any person grieve, for hatred, malice, or ill will; and the inquisition thereupon taken shall be signed by the sheriff and some twelve or more of the jury, and returned by the sheriff to the clerk of his county, to be by him recorded; and upon every such valuation, the jury is hereby directed to describe and ascertain the bounds of the land by them valued, and their valuation shall be conclusive on all

persons, and shall be paid by the said President and Directors to the owner of the land, or his legal representative; and on payment thereof, the said company shall be seized in fee of such land, as if conveyed by the owner to them and their successors by legal conveyance: Provided, nevertheless, that, if any further damage shall arise to any proprietor of land in consequence of opening such canal, or in erecting such works, than had been before considered and valued, it shall and may be lawful for such proprietor, as often as any such new damage shall happen, by application to, and a warrant from, any two justices of the county where the lands lie, to have such further damage valued by a jury in like manner, and to receive and recover the same of the said President and Directors; but nothing herein shall be taken or construed to entitle the proprietors of any such land to recover compensation for any damages which may happen to any mills, forges, or other works or improvements, which shall be begun or erected by such proprietor, after such first valuation, unless the same damage is wilfully or maliciously done by the said President and Directors, or some person by their authority.

SEC. 12. *And be it enacted*, That the said President and Directors, or a majority of them, are hereby authorised to agree with the proprietor for the purchase of a quantity of land, not exceeding one acre, at or near such of the said places of receipt of tolls aforesaid, for the purpose of erecting necessary buildings; and in case of disagreement, or any of the disabilities aforesaid, or the proprietor being out of the State, then such land may be valued, condemned, and paid for, as aforesaid, for the purpose aforesaid; and the said company shall, upon payment of the valuation of the said land, be seized thereof, in fee simple, as aforesaid.

SEC. 13. *And*, whereas some of the places through which it may be necessary to conduct the said canals may be convenient for erecting mills, forges, or other water-works, and the persons possessors of such situation may design to improve the same, and it is the intention of this act not to interfere with private property, but for the purpose of improving and perfecting the said navigation, *Be it enacted*, That the water, or any part thereof, conveyed through any canal or cut, made by the said company, shall not be used for any purpose but navigation, unless the consent of the proprietors of the land through which the same shall be led be first had; and the said President and Directors, or a majority of them, are hereby empowered and directed, if it can be conveniently done, to answer both the purposes of navigation and water-works aforesaid, to enter into reasonable agreements with the proprietors of such situation concerning the just proportion of the expenses of making large canals or cuts, capable of carrying such quantities of water as may be sufficient for the purposes of navigation, and also for any such water-works, as aforesaid.

By Sec. 17, the dimensions of the canal are prescribed, viz: "a cut or canal, twenty-five feet wide, and four feet deep," &c.

NOTE.—Those dimensions have been modified by succeeding acts.

(E.)

Opinion of Wm. Pinkney, Esq. 29th October, 1819.

I have read and considered the printed opinion of Walter Jones, Esq., dated Washington, 28th November, 1816, in answer to certain questions

proposed to him by Mr. Smith, as a proprietor of land through which the Potomac Company's canal passes, within the District of Columbia.

I have also read and considered a copy of an opinion given by Mr. Marshall, in January, 1792, referred to in Mr. Jones's opinion, together with a copy of the condemnation also there referred to; and have carefully examined the charter of the Potomac Company, a "Statement of Facts," printed in 1816 at Georgetown, and referred to in a note prefixed to Mr. Jones's printed opinion, and a "plat of the land at the Little Falls of Potomac," furnished by Mr. Smith:

And I am of opinion—

1st. That all the principles and conclusions contained in Mr. Jones's opinion are sound and correct.

2d. That Congress will not, and with propriety cannot, grant an extension of the canal beyond the point fixed upon by the charter of Maryland, without the inducement of some adequate public purpose, and without securing to Mr. Smith a just compensation for his rights and privileges under the existing charter.

WM. PINKNEY.

A bill to amend the charter of the Chesapeake and Ohio Canal Company, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of an act, which passed at the November session of the General Assembly of the State of Maryland, and is entitled "An act in favor of the President and Directors of the Potomac Company and the Commissioners of the Federal Buildings, be taken and adjudged to be extended to the President and Directors of the Chesapeake and Ohio Canal Company, and to the agents and contractors engaged on any part of the works of the said company within the District of Columbia.

SEC. 2. And be it further enacted, That so much of the act, entitled "An act authorising a subscription to the stock of the Chesapeake and Ohio Canal Company," as provides that not more than one-fifth part of the sum so subscribed shall be demanded in any one year after the organization of the company, shall be, and the same is hereby, repealed, so as to leave the subscription by the United States on the same footing, in this respect, upon which that of all other stockholders of the said company is now placed by the charter thereof.

SEC. 3. And be it further enacted, That the Chesapeake and Ohio Canal Company shall have power to obtain, in the manner provided by the thirteenth section of the act of the General Assembly of Virginia, passed January twenty-ninth, one thousand eight hundred and twenty-four, entitled "An act incorporating the Chesapeake and Ohio Canal Company," to which, so far as respects the District of Columbia, the assent of Congress has hitherto been given, the said act being the basis of the charter of the said company, such portion of ground between the line of the said canal and the river Potomac, within the District of Columbia, as may be necessary to enable the company, by their President and Directors, to sell or let, for manufacturing or other purposes, the surplus water of the said

canal, with proper sites for the use thereof; which surplus water the said company may enlarge at their pleasure, by means of the authority now vested in them.

SEC. 4. *And be it further enacted*, That the said company may in like manner obtain any ground covered with water, or otherwise circumstanced, which they may need for the formation of basins or moles; and, in consideration of their giving greater strength to the latter, may afterwards let, for wharves, or other useful buildings, such lots as they may retain or improve on any such routes on the margin of any such basins: and, wherever the interests of the said company may, in the opinion of the President and Directors aforesaid, be thereby promoted, they may purchase and hold, sell, or let the whole of any lot or tract of land through which the said canal may be conducted.

SEC. 5. *And be it further enacted*, That, for the greater security and comfort of travelling, as well as to obviate any obstruction to the use of steam boats, or other boats having masts therein, the said company shall have liberty to institute, at the company's expense, on all public roads crossing the said canal, ferries, in lieu of bridges, over the same; and to make such bargain with the private holders of such tracts of lands as may be divided by the said canal, and not acquired by the first section of this act, for the substitution of an adequate consideration for the use of a ferry or bridge across the canal; and, in case the proprietor and the company shall not be able to agree upon a reasonable consideration for the damages which such proprietor might sustain for want of such bridge or ferry, the same proceedings may be had for the assessment and payment of such damage as are provided by the thirteenth section of the aforesaid act of the General Assembly of Virginia.