

MESSAGE

OF

THE PRESIDENT OF THE UNITED STATES,

COMMUNICATING,

In compliance with a resolution of the Senate, a copy of the opinion of Judge Brewer in the Great Falls land condemnation case.

MARCH 2, 1859.—Read and ordered to lie on the table. Motion to print referred to the Committee on Printing.

MARCH 3, 1859.—Report in favor of printing the usual number, and 500 additional copies for the use of the War Department submitted, considered and agreed to.

To the Senate of the United States:

I transmit herewith a report from the Secretary of War, with accompanying paper, in obedience to the resolution of the Senate adopted 23d February, requesting the President of the United States "to communicate to the Senate a copy of the opinion of Judge Brewer in the Great Falls land condemnation case, involving a claim for damages to be paid by the United States."

JAMES BUCHANAN.

WASHINGTON CITY, *March 1, 1859.*

WAR DEPARTMENT, *February 28, 1859.*

SIR: In reply to the resolution of the Senate of the 23d instant, referred by you to this department, I have the honor to transmit herewith "a copy of the opinion of Judge Brewer in the Great Falls land condemnation case, involving a claim for damages to be paid by the United States."

The reason why this answer was not more promptly given is that the opinion of Judge Brewer was not in the War Department at the date of the Senate's resolution.

Very respectfully, your obedient servant,

JOHN B. FLOYD,
Secretary of War.

The PRESIDENT.

CIRCUIT COURT FOR MONTGOMERY COUNTY.

THE UNITED STATES *vs.* THE GREAT FALLS MANUFACTURING COMPANY.

The State of Maryland, by the act of its legislature of 1853, ch. 179, after reciting the appropriation by Congress for the purpose of supplying the city of Washington with water, provided by its 1st section "that if the plan adopted by the President of the United States for supplying the city of Washington with water should require any water to be drawn from any source within the limits of this State, consent is hereby given to the United States to purchase such lands, and to construct such dams, reservoirs, buildings, and other works, and to exercise, concurrently with the State of Maryland, such jurisdiction over the same as may be necessary for the said purpose."

The 3d section provides that in the condemnation and assessment of such lands and materials as may be necessary for such purposes, the like proceedings, in all respects, shall be had as by existing laws are required for the condemnation and assessment of lands and materials for the use and construction of the Chesapeake and Ohio canal, and the works appurtenant thereto. The State of Virginia, by its act of March 3, 1854, authorized the purchase of land (not more than ten acres) for the purpose of the abutment of a dam across the Potomac and the acquisition of materials for its construction, with a provision to protect private rights. The Potomac river having been selected as the source from which the said water should be drawn, the principal dam for that purpose was located across the bed of the Potomac river, and across an island in said river at or about the Great Falls of said river named "Conn's or Bishop's island," to abut at its further end on a tract of land purchased on the Virginia shore, in pursuance of the aforesaid act of its legislature. This portion of the river, as well as Conn's island, lying in Montgomery county, and the said island claimed in part or in whole by the Great Falls Manufacturing Company, incorporated by the act of the legislature of Virginia of 1833 and 1848, a warrant was issued for the condemnation of so much of the site of said dam as was the property of said company, and an inquisition returned to the circuit court for Montgomery county, assessing "all damages which the said company have sustained, do sustain, and will sustain by erecting said dam for said aqueduct through said piece of land at one hundred and fifty thousand dollars." At November term last of said court a motion was made by the United States to set aside the said inquisition for the reasons filed. A great deal of testimony was taken, and the case fully argued in behalf of the United States and the company, and during the progress of the argument, and near its conclusion, a petition was filed by Amos Davis and others, alleging that they had large vested and equitable interests in certain property and franchises, which would be most injuriously affected by the affirmation of the said inquisition, and praying that it should be set aside; and as a ground of their right, personally and individually, to object to said affirmation, they allege "that they, on the 2d of June, 1858, purchased of Hall Neilson, president of the Great Falls Man-

facturing Company, 2,500 shares of the stock of the company, being a quarter of the whole, and are now the absolute owners thereof; and on the 24th of July, 1858, for a valuable consideration, obtained from the said Hall Neilson, as president of said company, in its name and under its corporate seal, an agreement to sell to them the remaining three-quarters of said stock for a sum specified in the agreement, provided the offer should be accepted on or before the 1st of December, 1858. The amount of the sum paid for the first purchase, or proposed to be paid for the subsequent purchase, if completed, was not stated, but the day limited for the acceptance of the offer having passed without their acceptance, they still claim some equitable interest in the whole, which, if allowed, would divest the Great Falls Company of all interest in the matter in dispute, and constitute them the company. The fact of the purchase merely was admitted by Hall Neilson, as president of the company, and the petitioners claimed to participate in the contest. The proceeding was a singular one, *calculated*, if not *intended*, to embarrass the decision of the case; but the court, thinking they had no right to interfere, refused to notice their application further than to permit their counsel to file notes in support of their pretensions, to which all parties gave their assent. Their principal objection is the unconstitutionality of the act of 1853, which the court, having already decided to be constitutional in another case, and given its opinion on full argument, refused to consider. This point was not made by the United States or the company, as it would not have answered the purpose of either.

It is not necessary to examine in detail all the reasons filed for setting aside the inquisition.

The company claimed damages not only for the deprivation of that part of Conn's Island occupied by the dam and probable injury from the overflow of another portion, both of which would be considerable, but also claim damages for the violation of certain riparian rights which they conceive themselves entitled to in consequence of the ownership of Conn's Island and a tract of land directly opposite on the Virginia shore called Toulson's Tract, and it is apparent from the testimony and inquisition that nearly the whole of the damages were given for the violation of that supposed right. It becomes important therefore, to ascertain in the first place the existence, legal efficacy, and extent of these rights. The company owns Conn's Island under a grant from the State of Maryland, and it owns the "Toulson Tract" under a grant from Lord Fairfax or the State of Virginia, as included within the limits of that State, or a purchase from the heirs of Fairfax. This tract begins for its northwestern or upper boundary, adjoining the lower end of seven acres purchased by the United States from Mr. Green, for the abutment of the dam, and adjoining the proposed abutment and runs some distance below Conn's Island. The United States claim by purchase an island near the northern side of the Maryland shore, and a tract on the said shore extending above and below Conn's Island and the "Toulson Tract." The greater part of the water of the river runs between "Conn's Island" and the "Toulson Tract," about one-eighteenth only running in the natural state of the river between Conn's Island and the Mary

land shore. The canal of the old Potomac Company was located on the Toulson tract, commencing at a dam thrown by them from the said tract to Conn's Island, a short distance only below the site of the present dam. The Chesapeake and Ohio Canal Company, to whom the rights of the old Potomac Company were transferred, have abandoned this dam, and that and the canal are in a state of dilapidation, so that the whole property in the canal and works, except the dam, reverts it is presumed to the owner of the land. Upon the Toulson tract there are many mill sites which may be made available if the owner has a right to divert the water from the river for their use. There is no proof, nor is it pretended that any exist in Conn's Island; Whence then do the owners of the Toulson tract derive their riparian rights? There can be no possible doubt that the lines of the charter of Maryland included the whole of the Potomac river. The crown of England was the proprietor of all the land surrounding the State of Maryland, as well as of the State itself, and after prescribing its limits on every other side it starts for the last western line, "from the true meridian of the first fountain of the river of Pattowmack," "thence verging towards the south unto the further bank of said river, and following the same on the west and south unto a certain place called Cinquack near the mouth of the said river." This was intended to be the dividing line between the future State of Maryland and that part of the State of Virginia which was afterwards granted to Lord Fairfax. The grantor seems to stand and speak in the State of Maryland, for the west line is bounded by the further bank. Suppose the grant had been to the *nearest side* of the river and thence to its mouth. The river would have been the boundary between the new State and the land of the grantor on the western side of the river, and the State would have owned the river "*ad medium filum aquæ*," but extending to the further bank it must be construed to pass more than if it had been limited to the nearer bank, and if the line should be construed to run *with the river*, and not with the bank, the river would still be the boundary; but the grantee would hold the whole bed of the river to low-water mark on the further side.—(Handly's Lessee vs. Anthony, 3 Wheaton, page 374.) But the line as contended for by the counsel for the United States certainly extends further than low-water mark. It must be construed by its expressions, and they seem to be substantially, though not identically the same as those used by the State of Georgia in its grant referred to in Howard vs. Ingersoll, 13 Howard, page 381. The expressions in that grant are "west of a line beginning on the *western bank* of the Chattahoochee river, where the same crosses the boundary line between the United States and Spain, running thence *up the river Chattahoochee and along the western bank* thereof." This grant is construed without reference to the fact that Georgia was the original proprietor of the river.—(Idem, page 316.) The court say "in our view the words of the cession have the same meaning in law that they have in common parlance. They are not at all uncertain if taken connectively as to the locality intended for the western line of Georgia on the Chattahoochee. Separate the word 'bank' from 'on and along the bank,' and consider it only in connection with the words 'running up the

river,' and it might be inferred that the water of the river at some stage of it was to be the boundary, and that those owning the land on either side were 'riparian proprietors' *usque ad medium filum aque*, 'but not so when they are considered together as we will presently show.'" The words of the Maryland charter are "to the bank, &c." Where the line strikes the bank is the beginning of the next line, and it must begin "on the bank," as the line preceding runs to the bank and no further. In both grants the beginning of the dividing line is therefore "*on the bank*," and so far they are identical, but in the Maryland charter there is the *absence* of the expression "running up" or down the river. The words are "following the *same* on the west and south unto a certain place called Cinquack, situate *near the mouth* of the said river." It was contended for the company that "bank" and "river" were synonymous, and that following the same meant the river, on which the preceding line terminated. But it is evident that the grant makes a distinction between them. If the word "same" in the translation could in English grammatical construction refer to the river, and not to the bank, the line might possibly run with the river; but a very ingenious criticism suggested by the counsel for the United States, on the concordance of the words of the charter, originally written in Latin, shows that the line was to follow *the bank* and not *the river*. The first line from the head-waters of the river runs "*ad ulteriorem dicti fluminis riparii et eam sequendo*," to wit: "*riparii*" with which *eam* agrees in gender and not "*flumen*" with which it could not agree; "*eam*" is feminine, "*flumen*" neuter—(See Dictionary; also rule in Ross's grammar.)

"Nouns in C. A. L. E. T. ar, men, ur, us,
May to the neuter kind be placed by us."

The termination of the line, "*qua plaga occidentalis ad meridionalem spectat*," is near the mouth of the river. But, independent of this mode of construction, the "river" and "*the bank of the river*" are not synonymous. The court say further, "when the commissioners used the words bank and river they did so in the popular sense of both. When banks of rivers were spoken of, those boundaries were meant which contain their waters at their highest flow." Again, "they knew that rivers have banks, shores, water, and a bed;" and again, the words "*along the bank*," added to the words "*on the bank*," distinguish this case from all those in which courts have had the greatest difficulty, where a line is to be fixed when it is on the bank, *without a call for the stream*, or along the river or "up or down the river."—(Angell, 19.) Along the bank is strong and definite enough to include the idea *that any part of the river or its bed was not to be within the State of Georgia*. I therefore think it clear that Maryland included within its chartered limits not only the bed of the Potomac river to low-water mark on the further side, but to the bank beyond, excluding the possession of any riparian rights of the State of Virginia. It is true that Virginia contested the right of the proprietary of Maryland to any part of its chartered limits, but Maryland sustained her rights, (the case in 13 Howard, 400, is conclusive on this point,) became a populous State, governed by laws of her own enacting, and at the period of the revolution fighting side by side

with Virginia, in conjunction with the other provinces, for the support of their mutual liberties, the independence of all was declared, and Virginia, governed perhaps by feelings originating in this intimate connection, by her constitution of 1776 recognized the right of Maryland to all the territory contained within its charter, with all the rights of property, jurisdiction, and government, and all other rights whatsoever to the same, which might at any time theretofore have been claimed by Virginia, excepting only the free navigation and use of the rivers Potomac and Pomoke, with the property of the Virginia shores or strands bordering on either of said rivers, and all the improvements which have been or shall be made thereon. Maryland, however, did not rely for her rights in the premises on this recognition. She had possession under her charter, including the Potomac river; had granted all the islands in it, relying on the justice and legality of her claim under the charter.—(See 13 Howard, 400.) Nor was she satisfied with this exception, as appears by the resolution of the legislature of 1777 re-asserting her exclusive right over the territory, bays, rivers, and waters, included in the charter. Virginia, however, claiming an exclusive right to the navigation of the bay at its mouth, and of the mouth of the Pomoke, at the session of 1777 Maryland appointed commissioners for the purpose of adjusting, with commissioners appointed by the State of Virginia, the navigation and jurisdiction over that part of the Chesapeake bay which lies within the limits of Virginia, and over the rivers Potomac and Pomoke, subject to the ratification of the assembly. A compact was entered into on the 28th March, 1785, and ratified by the legislature of both States at their next session. It is said by Chancellor Bland, in his opinion in Binney's case, (2 Bland Ch. Rep., 126,) that "the general scope and object of that compact was not to fix and give a legal character to any natural subject whatever; in that respect it did not profess to *alter* or to *stipulate* for anything; throughout it speaks of waters which are by nature navigable, and regulates the terms and manner in which the natural navigation is to be conducted by the citizens of the contracting parties." He refers to the instructions to the commissioners of Maryland, in the votes and proceedings of the House of Delegates of 1777, and a resolution of 1784, to which access cannot be had at this time. Again, he says, (page 127,) "that it leaves the territorial rights of the parties untouched;" and also, (page 126,) "that there is nothing in this compact which relates in any manner whatever to the river Potomac above tide." This, it is contended, is a mere "obiter dictum." As such, however, it is entitled to great respect from all the courts of Maryland. Chancellor Bland was a man of great erudition and considerable legal ability, and the question appears to have been fully investigated and considered by him, and I think any inferior tribunal would be fully justified in adopting his opinion; nevertheless it was not necessary to the decision of the case before him, and therefore I thought it clearly wrong. I should not consider this court to be bound by it, but on a full examination I concur with his views. It was said in argument for the company that "the dispute between Virginia and Maryland, as to territories and boundaries, extended from the mouth to the source of the river Potomac."

mac." That is true, but Maryland claimed and was in possession of the whole bed of the Potomac above tide, and also claimed a large portion of territory on the head waters of the Potomac river, a portion of which had been granted by her to her citizens, and her right to which has been asserted to this day, but which was also claimed by Virginia, and was then and now is possessed by her. No stipulation is contained in the compact in regard to the territory, nor is any reference made in it to the unnavigable part of the river above tide, as distinguished from the navigable part. It could not therefore be fairly inferred from the extent of this dispute that the compact extended to the unnavigable part of the river. The navigation of the whole river, above and below tide, was of some consequence to Virginia, but much more so below than above. There were no fisheries of any consequence above tide; no necessity for any provisions with regard to piracy, or crimes on the river, the whole being in the body of the respective counties of Maryland; and the imperfect navigation of the upper part, to be improved by slack water and canal navigation, had, two months before the conclusion of the compact, been thrown open to Virginia, and to all the world, by the act of 1784, ch. 33, sec. 10, and a power conceded to Virginia, with the concurrence of Maryland, to make such regulations by law as might be necessary to prevent the importation of prohibited goods, or fraud in evading the payment of duties on goods imported into the State. The 19th section of this act authorizes the transportation of the goods of the citizens of each State across the river free of duties; and thus, it seems to me, all claims which Virginia did or could set up to any use of the river above tide were disposed of. That the bed of the river to the further bank was included in the lines of the charter was admitted by Virginia by the clause in her constitution of 1776, before referred to, by the exception of the Virginia shores or strands bordering on the river. The compact of 1785 recites its object to be to settle the *jurisdiction* and *navigation* of the Potomac river, &c., &c. The only provision in the compact which has any reference to riparian rights of any description, or which could be construed as applying to the river above tide, is the ninth section. Virginia in her constitution of 1776, excepts from her recognition of the claims of Maryland the free navigation and use of the Potomac river. There are no *such general expressions* in the compact, but it provides fully and definitely for the free navigation of the river, and all the uses which could be made of it in its *natural bed* below tide, to wit: its fisheries—no such use could be made of it above tide—or *any other use in its natural bed*; but Virginia also excepted "the property on the Virginia shores or strands bordering on either of said rivers, and all improvements which have been or shall be made thereon." What did she mean by this exception? These words "shores" and "strands" are used as synonymous, and would seem to be so. Webster defines "strand" to mean "the shore or beach of the sea or ocean," and perhaps of a navigable river; it is never *used* of the bank of a small river or pond. He also defines "shore" as "the coast or land adjacent to the sea or ocean, or to a *large* lake or river." We do not apply the word to the land contiguous to a small stream, we call "a bank." I refer to the consti-

tution of Virginia merely to show her object in making the compact. The compact does not pursue exactly the language of the exception. It gives to the citizens of Virginia "full property in the shores of Potomac river *adjoining* their land, with all *emoluments* and *advantages* thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct the navigation of the river." The word "shore" here seems to mean the space between the bank and low-water mark. The grants of Virginia could only extend to the "bank" of the river. So far her right was unquestioned. "Shore," therefore, could only have been used to designate the land from the bank of the river at low-water mark; for when the *bed of the river* is to be used, the compact stipulated, not for any right to the bed, but the *privilege of carrying out* wharves and other improvements. These shores could be of little advantage to Maryland on the navigable part of the river, but were of vital importance to the State owning the land immediately adjoining and behind them. Without them the right to the navigation of the river would have been of little use, and nothing could be landed on her banks without the permission of Maryland, or those to whom the shores should be granted by her. The "emoluments and advantages" belonging to the shores were such as I have referred to, with the right to alluvion; they certainly did not mean riparian rights, which required the diversion of the water of the river beyond the shore. The words themselves do not designate such a right. Such rights depend for the most part on the implied intention of grants giving the water *ad medium filum aquæ* of unnavigable rivers, and do not exist on the shores of navigable streams.—(3 Kent's Com., 7th edition, 514.) Suppose, however, the compact was intended to apply to the river above tide, and that it is to be considered an unnavigable river to which full riparian rights could attach, how were they acquired by the owners of the "Toulson tract"? Not by the original grant, for that extended only to the bank of the river; not by the cession of the shore by the compact, unless you consider that as extending the original grant to the river by implication, and, by implication also, to the middle of the stream, or consider the cession itself as an original grant, from bank to river, of the State of Maryland to the individual owner, carrying the grant to the middle of the stream. This would be a forced and unnatural construction, not justified by the situation of the parties to, or the nature of, the compact. Maryland owned the bed of the river as well as the shore. The bed of the river, and the water flowing over it, were of great value to her. The island also belonged to her. If she had intended to give so important a right, would she not have specified the river bottom as well as the shore, for by the ownership of that alone could full riparian rights be claimed. And what would these full rights be on a river flowing between two sovereign States? The whole bottom of the river, *ad medium filum aquæ* of the river, not of a portion of it, between a shore and an island. (Angell, 44.) The island would belong to the riparian owner to whose land it was the nearest, and instead of the shore at low-water mark being the boundary of the two States, the middle thread of the river through its whole extent would be the boundary, which evi-

dently was never the intention of the parties to the compact, especially of Maryland. If she had intended to make the middle thread of the river the boundary, she would have said so. But it is said further, in argument, that Maryland, by the act of 1784, ch. 33, secs. 13 and 21, recognised the existence of riparian rights in the State of Virginia on the shores of the Potomac. The 13th section of that law was intended to protect private property in Maryland as much as was the 11th and 12th sections. Maryland had no right to authorize the condemnation of land or materials in Virginia, or to interfere in any manner with its title. Water rights existed on the Maryland shore. These she could and did protect, leaving it to Virginia to protect the rights of her own citizens on her own soil. The 21st section did not require the confirmation of this law by Virginia. It was available without it for all intents and purposes, so far as it applied to the soil of Maryland. It only required, before it should be of any effect, that Virginia should pass a law upon *similar principles*, a law applying to her side of the river, without which the contemplated canal could not be constructed. Whether Virginia should authorize the condemnation of land, or restrict the canal company to purchases, or should protect the rights of the owners of private property, whatever they might be, was of no consequence to Maryland, so that the right to make the canal on her soil was given. Some of the provisions of the Virginia law were not necessarily required to be identical with those of Maryland—such as the amount of tolls, the places of taking them, &c. The 13th section was not even necessary to prevent the company from using the water in Virginia for other purposes than those of navigation. Maryland owned the water, and did not authorize its diversion for any other purpose. A negative provision on that subject was not necessary. But if the 13th section was intended to apply to lands in Virginia, it would only be construed as a grant *pro hac vice* to the owners of “convenient places” for erecting mills, &c., depending on the continued use of the canal for the purposes of its charter, and now ended.

This Toulson tract, therefore, has no riparian rights on the river Potomac. The riparian rights of the Great Falls Company depend entirely upon the ownership of Conn’s island, the title to which is derived from the State of Maryland through its grant. It is stated in the 12th section of Angell that the State of Maryland is entitled to certain unnavigable rivers and to the soil they occupy, and it is held by the courts there that if the State grants land in one of such rivers, and the grant calls for the river as a boundary, the grantee becomes riparian proprietor and entitled to the land the river covers “*ad medium flum aquæ*,” and refers for authorities to *Ridgely* against *Johnston*, 1 Bland Ch. Rep., 316; *Baltimore vs. McKim*, 3 Bland, 453, and *Brown vs. Kennedy*, 5 H. & J., 195.

The first authority is a decision of Chancellor Hansen in a note, in which he says: “That the common law doctrine of riparian rights applies in Maryland to small rivers.” Chancellor Bland, in *Binney’s case*, (2 Bland Ch. Rep., 123,) states the river Potomac to be an unnavigable river, and that the riparian holders of land would have an undoubted right, by the common law, to use the water in any manner

without injury to others. The same doctrine is repeated on page 128. "The whole of the river to its right bank forms a part of the territory of Maryland, so that the whole of it above tide is entirely within the respective counties of Maryland lying along it, and consequently, that its waters above tide may be taken and used by any riparian holder of land in any manner without prejudice to others."

In the case of *Brown vs. Kennedy* the majority of the court decide, that the common law doctrine of riparian rights is also the law of Maryland. But for the admission of the parties I should have found some difficulty, notwithstanding, in applying these rights to such a river as the Potomac, as well as in ascertaining the extent of the right of such riparian proprietor. But it was admitted in argument, that the proprietor of Conn's island, as riparian proprietor, owned the bed of the river on each side of the island to the middle of the stream on each side, and that the riparian owner opposite Conn's island, on the Maryland shore, owned only "*ad filum medium*" of that portion between the Maryland bank and the island. But supposing that no riparian rights are attached to the Toulson tract, who has property in the bed of the river and the use of the water between the middle thread from Conn's island and the Virginia shore? I can conceive of no other owner than the State of Maryland, both to the bed of the river and the use of the water.

What are the rights of riparian proprietors to the water? They have, strictly, no property in the water. They have the usufruct only.—(Angell, sec. 94.) "*Prima facie* every proprietor on each bank of the river is entitled to the land covered with the water to the middle thread of the stream. In virtue of this ownership he has a right to the *use of the water* flowing over it in its natural current without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it as it passes along." (Angell, 95.) "The water power to which the riparian owner is entitled consists in the fall of the stream when in its natural state, as it passes through his land, or along the boundary of it."—(Idem.) "Every man in this country has an unquestionable right to erect a mill on his own land, and to use the water passing through his land as he pleases."—(Note 1, 4 Dallas, 211.) I can find no authority for a riparian proprietor to purchase land where no riparian right exists, and to divert the water from his land through or by which the water runs to that. He must use the water on his own land that gives him the right. I do not think that the owner of Conn's Island can divert the water appertaining to the riparian right of that island to the "Toulson tract" having no riparian rights, and being in another State. There seems to be no mill site on Conn's Island. If there be, the proprietor may use it there. If there be not, he cannot be damaged by the diversion of it. It has been said in some cases that whether a riparian proprietor can use the water which flows over or passes by his land or not, he still has a right that it should continue to run in its usual quantity, undiminished by any diversion above. The passage of the water in that quantity may gratify his eye, &c., and that it is only a question of damages. No doubt he may use it for any purpose, useful or ornamental, and has a right to as much

water as that purpose requires ; but it has never been so decided in this State, and I trust never will, especially with regard to such a river as the Potomac, containing so much water which may be applied to so many beneficial purposes other than those to which riparian owners can apply it. All, or nearly all, the tracts of land on the Potomac river must have been granted, and the riparian rights depending upon them therefore in existence before the State of Maryland authorized the appropriation of any, or at least of any considerable portion of the water to other purposes. She has done so, however, since, and very largely for canal navigation, by grants to the old Potomac Company, the Chesapeake and Ohio Canal Company, and one or more other canal companies. In doing so she made provisions for the condemnation of land through which the canal should pass, and the assessment of damages to the owner. In the exercise of that duty the jury were directed to value the land, and all damages the owner thereof shall sustain by cutting the canal through such land. In assessing these damages, the value of the land and any injury done to it, the injury to mill sites where the *owners could make use of the water by the abstraction* of the water, have I believe always been considered ; but I have never heard of any damage having been assessed for the abstraction of water, where it could not be used by the owner of the land—no such fanciful damages have ever been recognised as legitimate by the legislature of Maryland, or its courts, or its juries, and I think never will. The State of Maryland owns still a large ungranted portion of the bed of the river, and all the surplus water which cannot be used by its grantees. Connected with this question of riparian rights is one of jurisdiction, which I propose to treat as briefly as possible. The act of 1853 gives power to the United States to condemn land in *Maryland only*, and prescribes the mode of assessing damages to the owner of that land. For what? For injury done as we have before said *to that land* ; not for injury done to any other land, to which the owner may also have a title, whether an individual or an incorporated company. I do not mean injury to the soil alone, but injury to any right appendant to, or derived from the land. The land is to be condemned, not the appendant rights, or privileges. If the condemnation of the land and its appropriation to the purposes for which it was condemned, destroys or alters those rights, it is damage done to that land, and through it to the owner. The land itself becomes the property of the party condemning, and he is released, by paying the damages assessed, from the payment of any subsequent damages ; and the evidence of all his rights in the premises is placed on the records of the courts of this State. The damages in this case would be to the water-rights appendant to Conn's island, but the owner of that island cannot use the water on that island ; he has no mill seat there ; no damages therefore are done to that island. But he owns the "Toulson tract" in another State, and has we may suppose acquired the means of transferring the water to that tract, and using it there ; that tract possessing facilities for its use. To what tract then is the damage done? Assuredly to the Toulson tract, to which Maryland never has granted, never could grant, any right ; which she has not condemned and cannot condemn,

and has never pretended to condemn; to any part of which she can transfer no right, and therefore for an injury to which this special tribunal authorized to condemn land in Maryland can allow no damages. If to this tract is attached the right to use the water of the river, or its owners have acquired an independent right to use it on that tract, the damage whatever it may be for the abstraction of the water must be recovered in the courts of Virginia. It would be the violation of a territorial right of that State of which its courts alone could take cognizance. In condemning land and constructing the dam in Maryland, the United States act as the grantees of its right of eminent domain. In any injury done to the Toulson tract, they are either trespassers, or liable to an action on the case for the wrong; if any injury is done to it by the abutment of the dam on the tract purchased from Mr. Green. That right to purchase was granted with a reservation of or subject to the rights of land holders in Virginia, but have given no right to any special tribunal to condemn or assess damages. Binney's case (2 Bland Chan.) referred to by the company on this point, is not at all in conflict with, but rather confirms the views I have taken. The chancellor was there speaking of the Chancery court having jurisdiction within the whole State, over land in the State; or *in personam* over individuals or corporations in the State: (See page 147.) And again in page 148 speaking of the canal company he says: "So far as regards the title to its immoveable property, where it becomes necessary to restrain the making of any excavation or erection upon it, or to obtain redress for any injury done to it, the courts of justice under whose jurisdiction it lies must have exclusive cognizance of the matter." The dam, the erection of which is complained of, is to be extended entirely across the river Potomac, and therefore one part of it must rest upon the territory of Maryland and the other upon that of Virginia, consequently to that extent each State must have an exclusive jurisdiction so far as may be necessary to prevent its erection, by injunction. "So far as the body politic may be restrained by an injunction from making *such illegal expenditures* any where, the courts of justice of each government must be allowed to have equal and concurrent jurisdiction," and this last point is the one decided in the page 149, referred to by the counsel. The jury authorized to condemn and assess damages in this case, has no power over persons or property or any jurisdiction whatever except what is delegated by the act of 1853 and a portion of the act of 1824, ch. 79. The only other important points in this case are the law as to the measure of damages, and the "alleged excess as allowed by the jury," which may both be considered together. There is no question arising in this case between the United States and the State of Maryland; so far as the latter had the power, it had by the act of 1853 given to the former the right to abstract from the Potomac river a sufficient supply of water for the Washington aqueduct. Some of the authorities are to the effect that such grants which go to deprive the citizen of his rights for any purpose should be construed strictly. Chancellor Bland in Binney's case seems to countenance that doctrine; but common sense, and I think the common law, which is said to be the perfection of human

reason, both sanction a liberal construction when the deprivation is for the purpose of accomplishing some great and beneficial public purpose.—(Tide-water Canal Company *vs.* Archer, 9 Gill and John, 480.)

The grant in all such cases is subject, of course, to the right of which it authorized the condemnation. The question is between the United States and the Great Falls Company. That company has a right to the value of the land condemned. The injury to the residue of the property, resulting from its loss from actual or probable overflow, the obstruction by the erection of the dam to the navigation around the island, and any loss or injury which may be sustained by the abstraction of the water which could be used on Conn's island; but the jury should consider as a deduction from this, the enhancement of the value of property by the construction of the aqueduct. The view which I have taken of the riparian rights supposed to result from the ownership of the "Toulson tract," renders it unnecessary for me to give any opinion in reference to any supposed violation of them. But as different views have been and may be taken by others, I will express my opinion upon them as briefly as possible. Some of the testimony filed in the case, and used before the jury, relates to the value of the water abstracted by the aqueduct in Washington, or at its mouth, and the company are said to have claimed one or the other of these values; but such a claim was not pressed in the argument before the court. Supposing the company to be entitled to full riparian rights to all the water running between Conn's Island and the "Toulson tract," on the opposite shore, its claim to the value of the water to the United States, *anywhere*, is totally inadmissible.

The right of a riparian proprietor to water flowing through his land is so well understood by all lawyers, that it is hardly necessary to refer to any authority to explain it. *Prima facie*, every proprietor on each bank of a river is entitled to the land covered with water to the middle thread of the stream. In virtue of this ownership, he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But strictly speaking, he has *no property in the water itself*, but a simple use of it while it passes along.—(Angell, sec. 95, by Judge Story.)

He may use the water while *within his own premises*, yet he must allow it to pass in the inferior heritor.—(Idem, note.) If any one riparian proprietor could sell the water to be diverted permanently from the stream, or not to be returned to the stream at the lower termination of his property for the use of the proprietor below, any other above him could do the same; and if any part could be diverted, I can see no limit to the quantity.

No one can divert, sell, or give the water but the sovereign power, either in conveyance of its ownership of the ungranted part of the river, or to use for public purposes water undisposed of, or of its right of *eminent domain*; and in either case only by leaving enough for the use of the riparian proprietors, or by making compensation to them for its deprivation. Compensation and damages are used indiscriminately, though in a particular case one or the other might be the most appropriate word. When land is taken, the law provides that it

shall be valued ; where part of a water power to be used on any particular tract is taken, the proper mode of ascertaining the damage is to ascertain what the land is worth in the market with the whole water power, then to calculate what the value would be, diminished by the volume of water to be abstracted. The difference would be the proper compensation in damages. To ascertain the value of the "Toulson tract," the company proved by one witness, Mr. Dexter, a retired northern manufacturer, the value of the water power when developed to be of the enormous amount of \$500,000. This was testimony taken before the jury as admitted by the parties and also proved. In opposition to this we have the fact, that more than sixteen years ago the land was sold for about \$3,000, mortgaged—sold at public sale to pay the mortgage debt for about that sum. That also was before the jury. We have further testimony before the court, by an eminent gentleman of the engineer corps, that he was very recently prevailed upon, by the offer of a large compensation, to endeavor, as agent of the company, to sell the whole property ; and in pursuance of the agency he made sundry efforts to sell it, applying to sundry large capitalists at the north—offering the whole property, including the water power, for a sum less, or near about the damages assessed by the jury—but could find no purchasers. The whole property, it appears, has since been sold ; one-fourth absolutely, the other three-fourths conditionally. This is admitted in this case by the president of the company. The amount of the sale, however, is kept out of view. In estimating the damages the company contend that the jury should not be governed by the present value of the property, but should estimate the value of the water power, if developed, and the whole retailed to different purchasers at the prices of the same description of power at the north, deducting the costs of its development. They endeavor to sustain their position by proving that the water power at the north is nearly exhausted ; that this climate is better for the continued use of the water through the year, and that it is in greater proximity to the region producing the raw material, and that it is more convenient to its transportation ; overlooking the fact that there are great water powers much nearer the country itself where that material is produced, and which are now being appropriated, and where the climate is more propitious still. This testimony is intended to establish the fact that this great water power must soon be in demand and these great profits realized, in the face of the fact that the owners have in vain endeavored to sell it for a much smaller sum. This, however, they say is caused by the *incubus* of this aqueduct, abstracting only one-tenth of the whole water power at the lowest stage of the river, which lasts but a short time, being superabundant at all other times, and they offer testimony by a gentleman of much practical knowledge, but apparently of too sensitive and rather apprehensive nature, that manufacturers, *indeed* himself, are greatly opposed to any *interference* with their water power, and though having great confidence that the present superintendent of the aqueduct works would cause no unnecessary waste of water, yet that other officers of the government hereafter having charge of it, might not be so scrupulous, and by waste at the

sluices of the dam, and by inattention to their tightness, much more than one-tenth would be lost; and it was argued that the United States government itself might be oppressive or not use a proper control over its officers. This does not seem to me to be a rational ground for increasing damages. It should not be presumed, and it is not likely that the government would sanction any wanton waste, or would not hold its officers to proper accountability for injury to its citizens by wanton or careless waste. If it should however, the courts of this State are competent, and would be prompt to offer redress, if the principle of "*sic utere tuo ut alienum non ledas*" be violated. But it would cause trouble and expense to resort to law for redress; so it would if the rights of the company were violated by the canal company, or any of the riparian proprietors above. It was said, too, it was very inconvenient for manufacturing establishments not to have abundant water at all times. Such establishments are subject to this inconvenience almost everywhere, and some as was proved have provided other power for occasional use at such times. Now I do not think that compensation is only to be made for injury to works now built and in use, but should be given also for power which the party can now sell or use; yet with regard to that power to use it advantageously should be considered in estimating damage. Can the owners in this case use it? Is it wanted? Can it be sold? It appears not. The company contends on the authority of 11 Gill, that remote and contingent damages may be considered by the jury; that they may speculate on probabilities of what the property may be worth after *any lapse of time*, and whether it will then be wanted and bought. It seems to me they have misapplied that decision. The injury in that case was of *pure damage* to the property by the overflow of a meadow at a high stage of the water, not permanent. Its liability to overflow should have been and was obvious both to the jurors and parties in the time of the condemnation. It might, however, not overflow at all, or for some considerable time, and therefore the judge says in a brief opinion, applying his remarks, although general, especially to this particular case, that the jury ought to have, and therefore should be presumed to have taken into consideration "remote and contingent damages, as well as immediate damages." But here is a case of injury, if there be any injury of a permanent diminution of value *at the present time* of present and permanent damage, which alone should be considered. It is a case entirely different from the one cited, and the jury are not at liberty to dive into futurity, to consider whether at some remote period, this water power may not possibly become of immense value and be sold for a very large amount. It is a matter of too great uncertainty, and no sufficient data could be found to form an opinion approximating to correctness, if they could. The principles of law by which a jury in this case should be governed, having been settled, it remains to show to what extent the jury were governed by mistakes in regard to them; and to determine what effect the mistakes should have on the application to set aside the inquisition. An objection was made to the examination of the jurors for the purpose of ascertaining the principles and reasons which governed them in their estimate of damages. The jury were examined in the

case of *Grove vs. The Chesapeake and Ohio Canal Company*, 11 Gill and John., 398, and in the case in 9 Gill and Johns., 480, before Judges Purviance and Magruder in Harford county court, in a case very similar to the present, and where also the propriety of such an examination was decided. I concur fully with them in that decision. It might be shown by other means that incompetent testimony was submitted to the jury, or erroneous principles of law urged before them; but to what extent it influenced their minds in their estimate of damages could be ascertained in no other way than by their own testimony. That they were influenced, at least the greater number of them who signed the inquisition, and not only *influenced*, but in a great measure governed by them, was fully proved. Some believed that the company had the right to sell the water of the Potomac river, and therefore that the value of the water to the United States at the mouth of the aqueduct was the proper measure of damages; some that the company were entitled to the whole bed of the river between Conn's island and the "Toulson tract," many that the company had the right to use on the Toulson tract the whole water of the Potomac river running between the tract and the island, and that they had the right to estimate and give damages for the injury to that right, which might possibly be sustained at a remote period; that the whole water of the river could be used on the Toulson tract, which, although it was proved by experts might be done by diverting it into what was supposed to have been the old bed of the river as well as the derelict canal, was proved by others well acquainted with the river, could not be done on account of the freshets which overflowed it. All these as well as the testimony taken before the court, as to the actual value of the property show conclusively that the inquisition was founded on gross mistakes, both as to law and fact, the damages very extravagant and excessive, and that the court is imperatively required to *set the inquisition aside and to order a new warrant to issue*. Some of the reasons assigned on the motion to set aside the inquisition, accuse the jury or some of them who signed the inquisition with being operated upon by passion, prejudice or partiality in finding the inquisition. I do not think however, that this charge is sustained. It is said in some of the authorities that, in England it is the province of the sheriff to decide on the competency of witnesses and testimony and instruct the jury as to the law of the case. In some of the States the jury with or without the aid of the sheriff are left to make out these matters as well as they can, and therefore an appeal is generally given as in this State to some court of common law, that its errors may be corrected. Such juries in this State are in the same predicament. The sheriff is generally as little competent as the jurors to throw any light on the law of the case. The jurors are abandoned to the unrestrained argument of counsel on both sides, of course contradictory to each other, argued with ingenuity, and to eloquent appeals to every motive by which it is supposed they may be influenced, without the benefit of any authoritative instruction upon which juries in courts of law are willing to rely, and what they are bound to obey. It is not to be wondered at, therefore, that considerable errors may be fallen into, or much injustice done without either the necessity or propriety of attributing them to

improper motives. It is probable they may be sometimes influenced in some slight degree, in common with most of their fellow citizens, by a leaning to that side which is generally considered in such cases the weaker party, but not sufficiently so to afford cause for setting aside the inquisition. It was said in argument that it was hardly worth while to set aside this inquisition, because the jury must ultimately determine the amount of damages, and that the opinion of the court on this occasion would not govern any subsequent jury. *That is a mistake.* There would be but little use in an appeal to the circuit court on account of errors in the decision of the jury, if a subsequent jury should be permitted to disregard the authoritative exposition of them. I conceive that a subsequent jury is under a legal obligation to abide by the decision of the court in this case, in all matters which it would be the province of the court to decide, as if they were a jury sitting in a court of law, and I presume it would be difficult to prevail upon any jury of the county to disregard such opinions. If, however, such should be the case, it would be as incumbent on the court to set aside such inquisition as it would a verdict in an action at law given contrary to its directions. I have given to this case all the consideration in my power. The great importance of a speedy decision, which has been urged by the parties, and the unusual pressure of other judicial business, has prevented me from giving as full and accurate an exposition of my views as I desired to do. Although I have examined, I have not been able, for these reasons, to comment fully on many authorities having an important bearing. Neither have I been able to examine some points connected with the case and made in the argument. I have not had the means of inquiring into *the character and extent* of riparian rights, derived from the grant of land or water courses in the State of Virginia, and some minor matters I have neglected. No valid order can be passed until the meeting of the circuit court on the first Monday in March, when the inquisition will be set aside and a new warrant issued.

NICHOLAS BREWER,
Circuit Judge.

STATE OF MARYLAND, *Montgomery County, sct:*

I hereby certify that the foregoing has been truly taken and copied from the record and proceedings in said case.

In testimony whereof I hereto set my hand and affix the seal of the [SEAL.] circuit court for said county, this 21st day of February, eighteen hundred and fifty-nine.

JAMES G. HENING,
Clerk Circuit Court, Montgomery county.

Cost of copy, with seal and certificate, \$9 50.

Ex. Doc. 42—2