

and highway of the two States between which it is a boundary. In proof of its navigable character, it has been said, that so long ago as during the war of 1756, it was ascended, as high as Cumberland, by boats carrying a portion of the military stores of Braddock's army; and has frequently since been navigated in the same

124 *manner, and to the same extent. (i) But, I apprehend, that the proof of a few such instances, in which small boats have been dragged up against the stream, through a portion of it; would not be deemed sufficient to give it the character of a navigable highway.

The Thames and the Severn, two of the largest rivers of England, which perhaps do not together pass a volume of descending water more than equal to that of the Potomac, are still deemed navigable streams above tide; and that, because although their currents may be rapid and their swells considerable, they are ordinarily navigated with so much ease and safety, both up and down, that for time immemorial, and long before there was any such thing as a navigable canal in that country, there were towing paths along spaces of their margins, recognized by custom and by statute law, by means of which boats were drawn along by men or horses. *Hale de Port Maris*, 86; *Nicholson v. Chapman*, 2 *H. Blac.* 254; *Miles v. Rose*, 1 *Com. Law Rep.* 240.

Compared with those gently flowing streams the Potomac is a torrent; collecting its waters far west, from the rude mountain and high plashy glades; and swelling occasionally from fifteen to thirty feet, comes tumbling down through rocks abrupt, in a manner throughout, and at all seasons with a speed, and in some places with a headlong pitch, that holds in utter defiance every thing like navigation; except it may be in a few calm spaces. The documents, surveys, and plots submitted in this case exhibit the character of this river, in these respects, in a very striking point of view. (k) I, therefore, cannot think, that it was originally regarded as a navigable river through any portion of it, above tide, until it had been expressly recognized and declared, to some extent, to be so by a positive legislative enactment; 1768, ch. 5; 1806, ch. 79; but even a navigable river is not a highway in the most extensive sense of the term. *Buszard v. Capel*, 13 *Com. Law Rep.* 379; *Palmer v. Mulligan*, 3 *Caine's Rep.* 307; *Shaw v. Cracford*, 10 *John. Rep.* 237; *Hooker v. Cummings*, 20 *John. Rep.* 90.

(i) In a report made on the 30th of January, 1827, by a committee to the House of Representatives of Congress, No. 90, page 27, it appears, that John Balentine, in a communication published in 1773, says, he had an experience of more than fifteen years in transporting merchandise up and down the river. And in page 73 of the same report, it is said, that the Ohio Company of Maryland and Virginia in 1749, used the river for transportation.

(k) "The Potomac is the most rapid of the great Atlantic Rivers," per *Galatin's Rep.* 1808, page 31.