

respects, precisely similar, which Act, after constituting certain persons a body politic, by the name of The Proprietors of the Susquehanna Canal, for the purpose of constructing a canal as described, declares, that "it is necessary for the making the said canal, and erecting grist-mills and other water-works thereon, that provision should be made for condemning a quantity of land not exceeding two hundred acres." And it then proceeds to enact accordingly. 1783, ch. 23, s. 6. But in this Act incorporating The Potomac Company, no such provision had been made in any form. And it is also worthy of remark, that the eleventh section of the Act incorporating The Pocomoke Company, 1796, ch. 17, appears to have been copied *verbatim* from the thirteenth section of the Act incorporating The Potomac Company, neither of which contains any provision for erecting water-works similar to that of the Act incorporating the Proprietors of the Susquehanna Canal.

Much has been said about the surplus water and the waste water of the canals of The Potomac Company, as evidence of its being the intention of this law, that the adjacent and riparian owners of the land should be allowed to draw such a quantity of water from it as might be necessary for any mill they might wish to erect; and of *the right to such waters, which the owners
138 of the land, over which they have been suffered to flow, have acquired by a kind of prescription. It must be recollected, however, that the phrases "surplus water" and "waste water" are nowhere to be found in the Act incorporating The Potomac Company; and that, in using those expressions, facts are referred to, which are not mentioned at all in that law.

It appears, among the circumstances of this case, that the canal which this plaintiff has claimed the right so seriously to incumber, if not to destroy as a navigable passage, by drawing off its waters to mills, has not been in any manner protected at its upper entrance from the wild, ungovernable river, with which it is connected; the freshets of which rise from fifteen to thirty feet above its low summer level. In consequence of which, the canal, like its fountain, the river, has its seasons of bursting fullness and of comparatively low, small volume. Left so exposed to the violences of the river, it is by no means extraordinary that there should be in the canal a multitude of leaks, cracks, and rents, from which great sluices of water are continually gushing out. These escapes from the canal may well enough be called "waste water;" and they afford very satisfactory evidence of the improper exposure and imperfect structure of the canal; but it seems to be a mistake to summon them up as proofs of there being a regular amount of "surplus water" in it, sufficient for mills. They are facts, which prove, that the canal has been very rudely and injuriously intruded upon by the river. for want of guard-locks at its upper entrance, and nothing more. Indeed, so far from affording any evidence that the canal has a