

*AMOS BINNEY, Appellant, v. The CHESAPEAKE and OHIO CANAL COMPANY.

Construction of charter.

A bill was filed in the circuit court of the district of Columbia, against the Chesapeake and Ohio Canal Company, claiming, as riparian proprietor, from the company, a right to use, for manufacturing purposes, the water of the Potomac, introduced through the land of the appellant, when the quantity of water so introduced should exceed that required for navigation; the bill charged, that the land of the appellant was susceptible of being improved, and was intended so to be, for the purposes of manufacturing, by employing the water of the Potomac, prior to 1784, in which year, the Potomac Company was chartered. All the chartered rights of that company, and all their obligations were, in 1825, transferred to the Chesapeake and Ohio Canal Company; by the improvements made by the Potomac Company, much surplus water was introduced and wasted on the land of the appellant; the Chesapeake and Ohio Canal Company had deepened the canal; had made other improvements on the land of the appellant; thus introducing a large quantity of water for navigation and manufacturing. The appellant claimed, that under the charter of the Potomac Company, held by the Chesapeake and Ohio Canal Company, he was entitled to use this surplus water for manufacturing purposes; if the water was insufficient for this purpose, he claimed to be allowed to have the works enlarged, to obtain a sufficient supply. The court held, that under the provisions of the charter, the purposes for which lands were to be condemned and taken were for navigation only; limiting the quantity taken to such as was necessary for public purposes. By the 13th section of the charter of the Potomac Canal Company of 1784, the company were authorized, but not compelled, to enter into agreements for the use of the surplus water; the owner of the adjacent lands required no such special permission by law; this was a right incident to the ownership of land; the authority, on both sides, was left upon to the mutual agreements of the parties; but neither could be compelled to enter into an agreement relative to the surplus water.

APPEAL from the Circuit Court of the district of Columbia, and county of Washington.

The appellant, on the 5th day of December 1831, filed a bill in the circuit court of the county of Washington, against the appellees, by which he charged, that he and those under whom he claimed, held title to, and were in possession of, three adjacent tracts of land on the shore of the river Potomac, and where the said river was innavigable, prior to the year 1784. That these lands being situate on that part of the river called the Little

Falls, were susceptible of being improved, by *applying the water of *202] the river for manufacturing purposes; and were, prior to the year 1784, intended by the proprietors to be so improved. That when the charter of the Potomac Company was granted, in 1784, by Maryland and Virginia, it was known, that such improvement was intended—and the charter expressly secured the rights of such proprietors, by the 13th section of the act of incorporation, which was in these words:

§ 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.

That in the year 1725, the Chesapeake and Ohio Canal Company obtained a charter, and by this charter and the proceedings under it, this company had obtained a surrender from the Potomac Company of all its chartered rights and privileges and property, and now held the same, "in the same manner and to the same effect," as they were before held by the Potomac Company. The bill charged, that in the year 1793, the Potomac Company made a condemnation, under its charter, of a portion of these lands, for a canal, which was exhibited; and made a canal through the same, which was so constructed as to admit more water than was necessary for navigation; which surplus water was wasted on the lands of complainant, at four sluice-gates, *and three waste-dams, and continued to be so wasted at such [*203 places, during the continuance of the works of said company. The complainant further charged, that, since their incorporation, and the surrender of the charter of the Potomac Company, the Chesapeake and Ohio Canal Company had taken possession of the canal of the former company, and of the land so condemned, and had also entered upon other parts of his said land, not condemned, and had greatly enlarged and deepened the said canal, and constructed a part of it as a feeder for their main canal, and erected a permanent stone dam across the river, and introduced therein a large quantity of water, for the purpose, as appeared, in their own reports, memorials and proceedings, of obtaining "a large volume of surplus water to sell for manufacturing purposes, and to be applied to other canals to be hereafter authorized." The bill further charged, that these works might, if necessary, in order to introduce more water into the canal, be enlarged; and though the complainant averred, that the quantity of water now admitted, was abundant both for navigation and for manufacturing purposes, yet he declared, that he had always been, and yet was willing, to make an equitable arrangement to pay a fair proportion of the expense of such enlargement if the same should be adjudged necessary. The complainant further charged, that by these works of the said two companies, it had been made, if not impracticable, yet very expensive and difficult for him to apply the water of the river to works upon his lands, without taking the same out of the said canal and feeder. He contended, that, under these charters, he was entitled to be allowed the use of the surplus water out of the canal and feeder, and complained, that the defendants had wholly refused to admit him, on any terms, to use the said surplus water, or to make any equitable agreement for the enlargement of the works, if they should contend that such enlargement was necessary; and that they avowed their determination to take the water through his said lands, without his being allowed in any manner, or upon any terms, the use of said water, and to dispose of the same, after passing through his lands, at such places as they were allowed by the present charter to waste the same, for their own benefit and profit, and also to sell the same wherever they might find it advantageous [*204 to do so, *if they could obtain an amendment of their charter to

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authorize them so to do, for which amendment they were then making application. The complainant prayed to be relieved against these wrongs, to be allowed to use the surplus water now admitted into the canal and feeder, which he averred was abundant both for navigation and manufacturing purposes, and if found insufficient, then to be allowed to have the works enlarged, upon equitable terms, to admit a sufficient supply of water for both purposes—and also prayed for general relief.

The answer denied the right of complainant to the relief sought, or to any relief; denied that he, or those under whom he claimed, had any right to use the water of the river on their lands, for manufacturing purposes, prior to the charter to the Potomac Company, in 1784; denied that such right, if he had it, had been affected by the works of either company; denied his right to any use of the water, under the charter of that company, and under the charter of the present company; admitted that they had enlarged the canal and feeder, so as to receive more water than was necessary for navigation; and "that a considerable quantity of surplus water might be used and expended on that part of the canal adjacent to the lands claimed by complainant, and through said lands, without injury to the navigation of said canal;" and claimed the said water "as their sole and exclusive property," and insisted, that "they possess the same right, in disposing of the same, to determine where it shall be vented from the canal, and in what quantities, and upon what terms it shall be enjoyed by others, as they have in exercising similar acts of ownership over any other description of property to which their title is absolute and unconditional."

It was agreed, that the complainant had title to the lands set forth in the bill; and the location of the said lands, and their susceptibility of improvement for manufacturing purposes, were admitted to be as set forth in the bill. The appellant made the following points.

1. That the complainant, and those under whom he claimed, had the right to apply the water of the river to manufacturing purposes on the said lands, prior to the act of 1784, incorporating the Potomac Company.

*205] *2. That this right was affirmed and secured by that act, and the terms and manner of exercising it provided for.

3. That the charter of the Chesapeake and Ohio Canal Company did not impair this right.

4. The lands owned by the complainant having the entire and sole command of the falls, and no proprietor of lands below him being able to get the water, without taking it through his land, the Chesapeake and Ohio Canal Company could not condemn his land, and construct their works so as to take the water through his land, and dispose of it on lands below him, without his consent.

5. The company had no right to take his land, or construct their works, so as to admit more water into their canal than was necessary for the purposes of navigation; and this, the evidence, and their own reports of proceedings, show they had done.

6. The Potomac Company having constructed their canal, and established sluices and waste-dams for the discharge of surplus water on the complainant's lands, for more than twenty-five years, which surplus water could have been applied to manufacturing purposes (as proved by the evidence of Payne, Pierce and Thompson), the present company were bound to allow

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the complainant the use of an equal quantity of the surplus water on his said land.

7. The company, having purposely introduced more water than was necessary for navigation, with a view to dispose of it for their own benefit, could not take it through the complainant's land, and dispose of it, under their charter, even at places where it might be necessary to waste what was thus introduced.

8. That the said company had no right to enter upon, or condemn any lands of the complainant, not included in the condemnation of the Potomac Company; congress not having given any such power of entry or condemnation, and congress having no right, under the constitution, and acts of cession of Maryland and Virginia, to give such power.

The case was argued by *Key* and *Webster*, for the appellant; and by *Swann* and *Coxe*, for the appellees.

*The court gave no opinion upon any of the questions argued in the case, other than those arising out of the 13th section of the act [206 incorporating the Chesapeake and Ohio Canal Company, as to the power and obligation of the company to enter into arrangements with the owners of the lands adjacent to the canal, respecting the use of the water introduced into the canal "for the purpose of carrying on water-works of various descriptions, when it could be done conveniently."

The counsel for the appellees denied, that under the charter of the company, they were compelled to make agreements for the use of the surplus water; or that the owners of land, through which the canal passed, claiming as riparian proprietors, could oblige the company to enlarge the canal, or to permit it to be enlarged, so as to introduce a surplus quantity of water to be used for the supply of manufacturing power.

THOMPSON, Justice, delivered the opinion of the court.—This case comes before the court from the circuit court of the district of Columbia, for the county of Washington, on appeal from a decree, dismissing a bill of the complainant in that court, who is the appellant here. The questions involved in this controversy, are highly important to the parties in a pecuniary point of view, and embrace, in some measure, public considerations, connected with the Chesapeake and Ohio Canal Company. These considerations have led to a range of argument at the bar, and the discussion of many questions, important and interesting in themselves, but which are not raised by the case now presented to the judgment of this court: and we shall confine ourselves to the questions properly arising out of the pleadings in the cause.

The bill filed in the court below charges, that prior to the year 1784, the appellant, and those under whom he claims, held title to, and were in possession of, certain tracts of land, on the shore of the river Potomac, where the said river was innavigable. That these lands, being situated on that part of the river, called the Little Falls, were susceptible of being improved, by applying the water of the said river to manufacturing purposes, and were, prior to the year 1784, intended by the proprietors to be so improved. *That when the charter of the Potomac Company was granted, it [207 was known, that such improvement was intended. And that the char-

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ter expressly secured the rights of such proprietors, by the 13th section of the act incorporating that company in the year 1784.

The bill then charges, that in the year 1825, the Chesapeake and Ohio Canal Company obtained a charter, by which, and the proceedings under it, this company obtained a surrender from the Potomac Company, of all its chartered rights, privileges and property; and now holds the same, in the same manner, and to the same effect, as they were before held by the Potomac Company. The bill further charges, that in the year 1793, the Potomac Company made a condemnation, under its charter, of a portion of these lands for a canal, and made a canal through the same; which was so construed as to admit more water than was necessary for navigation. Which surplus water was wasted on the lands of the complainant, at four sluice-gates, and three waste-dams, and continued to be so wasted at such places, during the continuance of the works of the said company. That the Chesapeake and Ohio Canal Company, since their incorporation, and the surrender of the charter of the Potomac Company to them, have taken the possession of the canal of that company, and of the land so condemned; and have also entered upon other portions of said land, adjacent thereto, and have greatly enlarged and deepened the said canal, and constructed a part of it as a feeder for the main canal; and erected a permanent stone dam across the river, and introduced into the land a large quantity of water, for the purpose, as is alleged, of obtaining a large volume of surplus water, to sell for manufacturing purposes, and to be applied to other canals to be hereafter authorized. The bill further alleges, that these works may, if necessary, be still further enlarged, so as to admit a still further supply of water, which might be conveniently applied to the purposes, both of navigation and manufactories. And that although all the water now admitted, is abundantly sufficient, both for navigation and for manufacturing purposes, without enlargement; yet, that the complainant has always been, and yet *208] is willing to make an equitable arrangement to pay a fair *proportion of the expense of such enlargement, if the same shall be adjudged necessary.

The bill further charges, that by these works of the two companies, it has been made, if not impracticable, yet very expensive and difficult, for him to apply the water of the river to works upon his lands, without taking the same out of the said canal and feeder; and he claims, that under these charters, he is entitled to be allowed the use of the surplus water out of the canal and feeder. But that the defendants have wholly refused to admit him, on any terms, to use the said surplus water; or to make any equitable agreement for the enlargement of the said works; if they shall contend that such enlargement is necessary. And the specific relief prayed is, that the complainant be allowed to use the surplus water, now admitted into the canal and feeder, which, he avers, is abundantly sufficient, both for navigation and manufacturing purposes. And, if found insufficient, then to be allowed to have the works enlarged, upon equitable terms, to admit a sufficient supply of water for both purposes.

The answer denies the right of the appellant to the specific relief prayed, or to any relief whatever; denies that he, or those under whom he claims, had any right to the use of the water of the river on their lands, for manufacturing purposes, prior to the charter to the Potomac Company, in the

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year 1784 ; denies that such right, if he has it, has been affected by the works of either company ; denies the complainant's right to any use of the water, under the charter to the Potomac Company, or under the charter to the Chesapeake and Ohio Canal Company. The defendants admit, that they have enlarged the canal and feeder, so as to receive more water than is necessary for the purpose of navigation, and that a considerable quantity of surplus water might be used on that part of the canal adjacent to the lands claimed by the appellant, and through which the canal runs, without injury to the navigation of the canal. But they claim said water as their own exclusive property, and insist they have the same right, in disposing of it, that they have over any other description of property, to which their right is absolute and unconditional.

It will be perceived, by this statement of the bill and answer, *that many of the questions which have been raised and argued at the bar, [*209 are not necessarily involved in the decision of the cause. The rights of the appellant, and of those under whom he claims, as riparian proprietors, antecedent to the charter of 1784 to the Potomac Company, are not drawn in question, under the allegations in the bill. The appellant does not set up any right, in hostility to the rights granted by those charters ; but his claim rests upon an affirmance of those charters. His claim is, of right, to the use of the surplus water, now admitted into the canal and feeder ; and if that is insufficient, both for navigation and manufacturing purposes, his prayer is, that the defendants may be compelled to allow the works to be enlarged, so as to admit a sufficient supply of water for both purposes. He seeks, therefore, to divert a still greater quantity of water from the river, and thereby further impairing riparian rights, if any exist which can be affected by diverting such a portion of the water from the river into the canal. Nor does the bill seek any relief, founded on an objection to the validity of the proceedings to obtain an condemnation of the land ; nor is there any complaint, that the company entered upon other portions of the land (not included in the condemnation of 1793), without authority. No injunction is prayed to restrain the defendants from the use of such land ; and this cannot be granted under the general prayer. No proper case is made for such relief ; it does not come within the scope and object of the bill ; and would be inconsistent with the specific relief prayed ; which, instead of restraining the defendants from the use of such lands, seeks to compel them to enlarge the canal still more, if necessary, to accomplish the purposes for which the complainant wants the water. Nor is it matter of complaint to be made by the appellant, that the company avow a determination to dispose of the surplus water, after it passes through his land, for their own benefit and profit. This cannot, in any manner, prejudice the complainant. And the bill only charges, that such is the avowed purpose of the defendants, when it can be done, without injury to the navigation, and in case they can obtain an enlargement of their charter.

By the appellant's own allegations, therefore, the defendants disclaim any intention to waste the surplus water, unless it can *be done [*210 without prejudice to his navigation, nor without obtaining further permission for that purpose from the competent authority. The right of the appellant, therefore, to the relief sought, is narrowed down to the single inquiry ; whether his claim can be sustained under the thirteenth

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section of the charter of 1784, to the Potomac Company? That section is as follows :

"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 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, 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."

We think, that the relief sought by the appellant, cannot be granted under this section of the charter. The whole structure of the act shows, that the great and leading purpose for which this company was incorporated, was for the extension of the navigation of the Potomac ; every antecedent provision of the charter looks to that object. The president and directors are authorized to employ persons to cut such canals, and erect such locks, and perform such other works as they shall judge necessary, for opening, improving and extending the navigation of the river. The said river, and the works to be erected thereon, in virtue of this act, when completed, are declared for ever thereafter to be esteemed and taken to be navigable, as a public highway, subject to the payment of certain *211] *tolls, &c. The act declares, that it is necessary for the making of said canal, locks and other works, that provision should be made for condemning a quantity of land for that purpose. And the proceedings thereupon are accordingly prescribed by the act, where no voluntary agreement can be made with the owners of the land, for taking a limited quantity, against the will of the owner, on payment of the damages, to be assessed by a jury. After these, and some other provisions are made, clearly indicating an intention, that the purpose for which the lands were to be taken was for navigation only, and limited to a quantity necessary for such public objects ; then comes the clause in question, presenting other purposes, and providing for other objects, where circumstances will justify connecting private enterprises with the leading public purposes of navigation.

But this clause in the act seems studiously to guard against blending these two objects by any compulsory measures ; but to make it the result of mutual and voluntary arrangements between the company, and the owners of the land upon which the water-works are to be erected. It is declared, in explicit terms, that it is the intention of the act, not to interfere with private property, except for the purpose of improving and perfecting the said navigation ; and that the water shall not be used for any purpose but navigation, unless the consent of the proprietors of the land, through

which the canal shall run, be first had. It would be a very rigid and forced construction of this act, to place the company at the will and pleasure of the adjacent lands, especially, if this should be considered a continual subsisting right, after the canal has been once completed. If the company are prohibited from using the water, except for navigation, without the consent of the owner of the adjacent land, and yet be obliged to yield to the wishes of such owner, to alter and enlarge the canal, there would be wanting that mutuality, which is essential to the just and reasonable regulation of all rights. All the legislative provision necessary, was to authorize the company to enter into such agreement with respect to the use of the water; the owner of the adjacent land required no such special permission; this is a right incident to his ownership of the land. The authority on both sides to *make such agreement being established, all was left open to the [*212 mutual arrangement of the parties, like all other contracts. But to compel one party to consent, and leave the other at liberty to consent or not, at his pleasure, would be a violation of all sound principles of justice.

Much stress has been laid on the word *directed*, as used in the statute. "The company are hereby empowered and directed, &c." The word, if standing alone, might imply something mandatory to the company; but it must be taken with the context, and the general scope and object of the provision, in order to ascertain the intention of the legislature. There was an absolute prohibition to the company to give their assent to such private use of the water, and the obvious intention of the act was, to remove that prohibition, and place the company in a situation capable of entering into arrangements with the owners of the adjacent lands, respecting the use of the water, for the purpose of carrying on water-works of various descriptions, when it could be done conveniently. But the whole structure of the clause shows, it *was* to be a voluntary and mutual agreement of the parties. It cannot be supposed, that if any compulsory measures were contemplated the act would have been left so entirely silent, as to the mode and manner in which this was to be enforced upon the company. If, as we think, it clearly was the intention of the act, that their use of the water should be subject to the mutual agreement of the parties, no legislative provision was necessary. The parties having authority to make the agreement, they could make it, in any manner, or under such modifications as they might think proper.

It is not a well-founded objection to this construction of the act, that the most apt and appropriate phraseology to convey this meaning, has not been employed. The great object is, to ascertain the intention of the legislature; and there is certainly nothing in the language used, that is repugnant to the construction we have adopted.

If the right of the appellant to compel the company to make the agreement was clearly established, it might be within the province of a court of chancery, to enforce the consummation of such agreement, and carry it into effect. But the entire absence of any provision looking to compulsory measures, as to *the mode and manner in which the agreement is to be made or executed, is a very strong, if not conclusive, reason, to [*213 show that no such right exists; and leads irresistibly to the conclusion, that this is a matter left open for the voluntary arrangement of the parties. To

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consider the company bound to enter into such agreements with the owners of the adjacent land, the whole extent of the canal, and liable to be called upon to alter and enlarge the same, at the pleasure of such owners; would be imposing an expense and limitation upon their chartered rights, which ought not to be adopted, without the most explicit and unequivocal provision in their charter. And which, we are very clearly of opinion, is not imposed upon the company in the present case. The decree of the court below is accordingly affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*214] *The Lessee of AMOS BINNEY, Plaintiff in error, v. The CHESAPEAKE AND OHIO CANAL COMPANY.

Ejectment.

The declaration in ejectment was dated on the 22d day of May 1831, and the judgment was rendered on the 14th of January 1832; the plaintiff in ejectment counted on a demise made by Amos Binney, on the 1st day of January 1828; his title, as shown in the abstract, commenced on the 17th of May 1828, which was subsequent to the demise on which the plaintiff counted. Though the demise is a fiction, the plaintiff must count on one, which, if real, would support his action.

The counsel for the defendants insisted, that, if the cause could not be decided on its supposed real merits, it ought to be remanded to the circuit court, for the purpose of receiving such modifications as will bring before this court those questions of law on which the rights of the parties depend. Where error exists in the proceedings of the circuit court, which will justify a reversal of its judgment, this court may send back the cause, with such instructions as the justice of the case may require; but if, in point of law, the judgment ought to be affirmed, it is the duty of this court to affirm it; this court cannot, with propriety, reverse a decision which conforms to law, and remand a cause for further proceedings.

ERROR to the Circuit Court of the district of Columbia, and county of Washington.

An action of ejectment was commenced in the circuit court, by agreement, on the 14th day of January 1832. The declaration counted on a demise from the lessor of the plaintiff, dated the 1st of January 1828, for the term of fifteen years. The declaration was afterwards amended, by adding, "a demise from John K. Smith, and a demise from the heirs of Amos Cloud (their names to be left in blank, or considered as properly instituted in the record), and another from John Way." The following agreement, signed by the counsel for the plaintiff, was also filed in the circuit court.

"The plaintiff's title depends on the title papers herewith shown to the court, the due authentication of which is admitted: viz., the patents for Amsterdam and White Haven, and the several mesne conveyances, decrees, &c., from the patentees down to the plaintiffs; and it is admitted, that the plaintiff's lessor, J. K. Smith, was in possession, in June 1812, when the condemnation hereinafter mentioned was made of the *land comprised

*215] within said condemnation, and that it is a part of the said two tracts