

DEFENDANT'S BRIEF.

This is an action for Trespass upon the lands of the plaintiff, covered by water and known as the "Second Lake," by defendant entering thereon and cutting and removing ice.

The defendant pleads the general issue, and by special plea justifies the alleged trespass by virtue of a grant of an easement or servitude by the owner of the servient estate.

It is admitted that the defendant did cut and harvest the ice, and place the same in her ice-house on the damivant estate, and that the same was used by the defendant for domestic use only, and was not sold for profit; and that in gathering said ice the defendant did not touch the soil of the servient estate, except when the same was covered by the congealed waters of the lake, as the line of the defendant's lands covers a portion of said lake at a point where said ice was gathered.

CHRONOLOGICAL DATA.

November 5, 1890. Caroline R. Buchanan by deed recorded in the Burlington County Clerk's office, in Book 287 of Deeds, page 413, conveyed unto Jacob G. Fisher, a tract of land in the Township of Burlington, containing 181 62-100 acres of land, and including within its limits several artificial lakes, (the lake in question whereon the ice was cut, being partly upon the lands of the defendant). This tract is shown on the accompanying blue print, and includes within its limits the properties of plaintiff and defendant, the defendant being included within the red lines. The description in this deed is the same description (except recital of title) as is in the mortgage and is recited in full in the transcript of the bill to foreclose presented in evidence.

November 17, 1890, Jacob G. Fisher, etux, gave a mortgage upon the whole tract of 181 62-100 acres, to the Burlington Savings Institution to secure the payment of \$4,500, duly recorded in Book R. 3, of Mortgages. page 53 etc.

September 8, 1894. Jacob G. Fisher, et ux., conveyed to Annie W. D'Olier 10 58-100 acres, part of the above tract, recorded in Book 312 of Deeds, page 428.

September 15, 1894 Jacob G. Fisher ex ux, conveyed unto the said Annie W. D'Olier, a second tract adjoining above on the South and containing 1 92-100 acres of land, part of above tract purchased by Caroline R. Buchanan, recorded in Book 312 of Deeds, page 430, etc.

Afterwards the Burlington Savings Institution the mortgagee above named, in consideration of the sum of \$1,000, paid an account of the said mortgage released the two above tracts of lands containing 10 58-100 and 1 92-100 acres respectively, from the lien of the mortgage.

September 15, 1894. Jacob G. Fisher, et ux, conveyed unto Annie W. D'Olier by deed recorded in Book 313 of Deeds, page 186, three more acres adjoining the above tracts, the description being an including survey and including the two above tracts in one description. By this deed was also conveyed the easement or servitude, granting unto the said Annie W. D'Olier her heirs and assigns, in common with the said Jacob G. Fisher, his heirs and assigns, the rights of fishing for pleasure but not for profit, boating for amusement only, and cutting ice for domestic use but not for sale. Deed in evidence.

The Burlington Savings Institution subsequently filed their bill to foreclose said mortgage making Jacob G. Fisher and Wife, and Annie W. D'Olier parties defendant. Mrs. D'Olier filed her answer setting forth her deed and claiming her rights of fishing, boating and gathering ice and praying further that the mortgaged premises be sold in parcels in inverse order, first selling the remaining lands in Fisher, subject to Mrs. D'Olier's rights under her deed, and if not sufficient then to sell her unreleased lands and rights for such deficiency; Final decree was made to that effect, execution issued and property advertised in parcels, at the Sheriff's sale in November, 1897, the first property, excepting all the property owned by Mrs. D'Olier and subject to her rights of fishing, boating and gathering ice, brought sufficient to pay the decree, interest and costs of the complainant and costs of

Sheriff's sale. The sale was confirmed and the deed executed by the Sheriff but never delivered or recorded.

This sale was set aside on account of improper service of the notice of the order to plead, answer or demur on Fisler and wife, who were non-residents, yet Mrs. D'Olier was properly in court, had filed her answer and appeared before the Master and Proved her case. This sale also demonstrated that the property, after Mrs. D'Olier's interests therein were excepted, were sufficient to satisfy the complainant's claim in full, and she demanded that her rights therein should not again be jeopardised by a second sale. The only persons having any interest at all in the property were the complainant, Fisler and wife, and Mrs. D'Olier, and Fisler and wife having sold certain parts with certain servitudes, would be estopped from objecting if the complainant relinquished their prior rights in the same. This was agreed to be done and I suggested a release and drew one for execution and delivered the same to Mr. Flanders, but Mr. Flanders decided that the execution of the same was unnecessary as the same result would be obtained by discontinuing the suit against Mrs. D'Olier, and excepting out of the mortgaged property when sold, the whole of the property described in her last deed recorded in Book 313 of Deeds, page 186, as fully as the same is therein described.

This was done, and by order of the Chancellor, all papers in the suit, after the return of the sub. ad res. were taken from the file, as appears by the transcript, and the property sold excepting thereout Mrs. D'Olier's interest therein as full as described in her deed, recorded in Book 313, page 186, in which deed is conveyed the easement or servitudes in question. The mortgaged premises were sold by the Sheriff to Howard Flandrs and the description in the Sheriff's deed particularly except Mrs. D'Olier's entire right therein as mentioned in her deed. This deed is duly and accurately recorded, even to reproducing the map that is endorsed thereon.

Mr. Flanders sold the property to David H. Mitchell, the plaintiff in this suit, and himself drew a deed which he produced in court in which he recited Mrs. D'Olier's rights in the

lake in exactly the same language as is employed in her deed for the same. Mr. Mitchell's conveyancer also drew a deed from Flanders to Mitchell and taking the description from the record of Mrs. D'Olier's deed evidently made the error of stopping at the word "Together" thinking it was the end of the description, instead of the beginning of the grant of the easement or servitude. However it doesn't matter how the error was made the fact remains that the deed prepared by Mr. Mitchell conveyancer and signed by Mr. Flanders, failed to recite the fact that the same was subject to easements or servitudes, held by the dominant estate, owned by Annie W. D'Olier.

Now the question is: Can the omission in a deed of conveyance of the servient estate of an easement or servitude thereon divest the dominant estate of the same? That's all there is in the case.

Mr. Flanders could convey nothing more than he had purchased at the Sheriff's sale, and any omission on his part to recite any or all liens, servitudes, encumbrances or easements does not thereby divest them and free the freehold from the same. Nothing that Mr. Flanders could do either of omission or commission could effect Mrs. D'Olier's estate.

Any owner of a freehold estate can by grant, charge or encumber the same with any servitude he may see fit, providing the same is not for illegal purposes. Fidler by grant duly executed with all the solemnity of the law, under his hand and seal, acknowledged and recorded, granted and conveyed unto Annie M. D'Olier her heirs and assigns, the rights of fishing, boating and cutting ice on said lake to be used in common with his heirs and assigns. Could any stronger language than this be used?

Counsel for the plaintiff holds that a right to fish is not an easement, but a license, and does not run with the soil, but ceases when the grantors interest in the servient state ceases, and as authority on this point, cites *Cobb vs. Davinport*, 4 Vroom, 223. An examination of this case, and the same case repeated in 3 Vroom 371, shows that the Supreme Court holds that the soil of the inland lakes belonged to the proprietors and those claiming

ownership under them, that the owner of the soil, was entitled to all rights of fishing, and that the right of fishing could not be claimed by prescription or custom, but must be granted by deed. Mr. Justice Depue in his opinion says, as follows:

"While the right of fishing is *prima facie* exclusive in the owner of the soil as part of the inheritance, yet it is not inseparable from the soil, but may be acquired distinct from the ownership of the soil by grant or prescription; and such grant may confer upon the grantee a right of fishing exclusive if the owner of the soil, whereby a several fishery is granted, or may be a license for him to fish in common with the owner and others, whereby a common fishery is created." *Cobb vs Davenport* 3 *Wroom* 354. Whether the rights granted unto Annie W. D'Olier and her heirs are properly called easements or servitudes I am at loss to say.

"An easement property so called, may be defined to be a privilege without profit, which the owner of one neighboring tenement has of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer or not do something on his own land for the advantage of the dominant owner." *Eucy of Law* 2d Edition, Vol. 10, page 398. Another definition is "a liberty privilege or advantage which one may have on the lands of another without profit."

Big Mountain Imp. Co., appeal 54 *P. St.*, 36.

Siegel vs. Laver, 148 *Pa. St.*, 236.

The broader term of easements include other rights besides the pure easements above defined. "A right which one proprietor has in same profit benefit or beneficial use out of, in, or over the estate of another proprietor."

Eucy of Law, 2d Ed., Vol. 10, P. 399.

"The essential qualities of easements as they are enumerated by all the authorities are 1st, they are incorporeal; 2d, they are imposed upon corporeal property; 3d, they confer no rights to profits; 4th, they are imposed for the benefit of corporeal property; 5th, there must be two distinct tenements, the dominant to which the right belongs.

These essential qualities are all included in the grant of

Fisler to D'Olier, in fact, it is ideal—boating for amusement, fishing for pleasure and not for profit, cutting ice for domestic use and not for sale.

"The right conferred by an easement attaches to the soil of the servient tenement, the only obligation on the owner being negative, viz.: To suffer or not to do. This burden on the servient tenement passes with it to each successive proprietor."

Taylor vs Whitehead, 2 Dong. 749.

Pamfret vs. Ricraft, 1 Saund, 322.

Harrison vs. Bullard, 4 M. & S., 387.

Wallis vs. Harrison, 4 M. & S. 538.

"Rights of this description, denominated servitudes by the civil law, and by our law termed easements, are attached to the estate and not to the person of the dominant tenement, and they follow that estate into the hands of the assignee thereof. So on the other hand they are a charge upon the estate or property of the servient tenement and follow it into the hands of any person to whom such tenement on any part thereof is subsequently conveyed."

Taylor vs. Dyches, 69 Georgia 455.

Morrison vs. King, 62 Ill.

Smith vs Wiggin, 48 N. H. 105.

Wolf vs. Frost, 4 Sandf Ch. (N. Y.) 89.

Child vs. Chappell, 9 N. Y., 246.

Hill vs. Milles, 3 Paige 254.

Washburn on Eas, 4th Ed. 7.

3 Kent Comm, 420.

Code of Napoleon act 686.

The owner in fee of land may impose upon it any burden, however injurious or destructive not inconsistent with his general right of ownership, if such burden be not in violation of public policy and do not injuriously affect the rights as property of others."

VanRensselaer vs Albany R. C., 1 Hun. 507.

To sum the matter up I ask for a verdict in favor of the defendant, with costs, upon the ground that such alleged trespass

was justified. That the rights vested in Mrs. D'Olier were vested by grant, lawfully executed and recorded, that the necessary words of inheritance were used and that the easements run with the soil; that said easements are not inconsistent with the rights of ownership nor in violation of public policy. That the plaintiff's grantor took the servient tenement with full notice and knowledge of these easements and his deed is made from the Sheriff with express mention of and subject to the same and that Flanders could not convey to the plaintiff a greater estate than he possessed. That Mrs. D'Olier, not being a party to the foreclosure suit, under which the plaintiff claims title, could not, even if the description in the Sheriff's deed did not fully exempt her rights therein, be foreclosed of her equity of redemption, and having such rights could not be guilty of trespass.

I there contend that the judgment below shall be affirmed by this Honorable Court.

FRANKLIN C. WOOLMAN,
Attorney of Defendant in Error.

Writ of Error.

New Jersey ss.

The State of New Jersey to—



James H. Nixon, Esquire, Judge of our Circuit Court of the County of Burlington; at Mount Holly, in and for the said County.

Greeting:—Because in the record and proceedings, ¹⁰
and also in the giving of judgment in a plant, which was in
our Circuit Court, holden at Mount Holly, in and for the
said County of Burlington, between David H. Mitchell,
plaintiff, and Annie W. D'Olier, defendant, of an action in
totr, manifest wrong hath intervened to the great damage
of the said David H. Mitchell, as by his complaint we are
informed, we being willing that speedy justice should be
done to the parties aforesaid in this behalf, do command
you distinctly and openly to send, under your seal, the
record and proceedings, with all things touching and con-
cerning the same, to our Judges of our Court of Errors ²⁰
and Appeals in the last resort in all causes, at Trenton, on
the twenty-fourth day of April, together with this Writ,
that the record and proceedings aforesaid being inspected,
we may cause to be further done thereupon, for correcting
that Error, what of right and according to the Law and
custom of the State of New Jersey ought to be done.

Witness, William J. Magie, Esq., our Chancellor and
Presiding Judge of our said Court of Errors and Appeals,
at Trenton aforesaid, the Fifth day of April, in the year of ³⁰
our Lord, nineteen hundred and two.

A. D. DICKINSON,

SAMUEL M. ROBERTS,

Clerk.

Attorney of Plaintiff in Error.

Declaration.

Annie W. D'Olier, the Defendant in this suit was summoned to answer unto David H. Mitchell, the plaintiff herein, in an action of tort, and thereupon the said plaintiff by Sam'l W. Shinn, his attorney, complains for that the said

10 Defendant on the second day of February, one thousand and nine hundred, and on divers other days and times between that day, and before the commencement of this suit, with force and arms, at the Township of Burlington, in the County of Burlington and State of New Jersey, broke and entered divers to wit, the close of the said plaintiff situated in the Township, County and State aforesaid, and described as follows: Beginning in the middle of the intersection of the road from Burlington to Mount Holly with the road from Burlington to Rancocas, and extending

20 from thence (1) along the middle of the road to Rancocas, South eighty degrees and twenty-five minutes west, twenty-five hundred and thirty-eight feet six inches, to a stone corner to the heirs of Seth Gibbs, deceased, thence (2) South eighty-four degrees and forty-five minutes West, twenty-nine chains and forty-seven links, to their stone corner; thence (3) North twenty degrees and twenty-five minutes West, along Peter Mattson, seven chains to a corner to said Mattson, thence (4) South eighty degrees and forty-five minutes West, along said Mattson, eight

30 chains and sixty links, to a hickory tree, and the same course continued three chains and sixty-five links, to a stone in the pond, corner to the said Mattson; then thence (5) South forty-four degrees West, along said Mattson, twelve chains to land formerly of Henry C. Deacon, now supposed of Charles Rodman; thence (6) North forty-six degrees and thirty minutes West, seventy-six links; thence

(7) North one degree and thirty minutes East, ninety-three links; thence (8) North thirty degrees and fifteen minutes East, one chain and eighty-three links; thence (9) North thirty-one degrees and forty-five minutes West, one chain and ninety-five links; thence (10) North thirty-five degrees and thirty minutes East,, ninety links; thence (11) South seventy-five degrees East, one chain and thirty-one links; thence (12) North forty-seven degrees East, one chain and thirty links; thence (13) North fifty-nine degrees and fifteen minutes East, one chain and seventy links; thence 10
 (14) North nine degrees and forty-five minutes East, one chain and twenty-five links; thence (15) North thirteen degrees and fifteen minutes East, two chains and forty links; thence (16) North forty-five degrees and twenty-five minutes East, one chain and fifty links; thence (17) North eleven degrees and forty-five minutes West, one chain and eighty-three links; thence (18) North seventy-seven degrees and forty-five minutes East, two chains and seventy-five links, to a leaning Oak tree; thence (19) North forty-three degrees East, ninety-four links; thence (20) North 20
 thirty-three degrees and forty-five minutes East; one chain and seventy-nine links;; thence (21) North eighty-two degrees East, two chains and twenty-nine links;thence (22) North seventy-four degrees West,one chain and thirty-seven links; thence (23) North sixty-five degrees and forty-five minutes East, two chains and sixty-two links; thence (24) North thirty-five degrees and thirty minutes East, one chain and forty links; thence (25) North forty-two degrees East, two chains and sixty-one links; thence (26) North 30
 eleven degrees and forty-five minutes West, one chain and seventy-four links; thence (27) South eighty degrees and forty-five minutes East, one chain and seventy-seven links; thence (28) North thirty-four degrees and thirty minutes East, one chain and sixty links, to an old pine stump in the dam; thence (29) North thirty-one degrees East, five chains and ninety-eight links, to a White Oak tree; thence (30) North twenty-one degrees and forty-five minutes East,

one chain and eighty-one links; thence (31) North nineteen degrees fifty minutes East, five chains and forty-two links to a Pine Oak; thence (32) North twenty-seven degrees and fifteen minutes West, along Beek and Dr. Bradley, nine chains and fifty-nine links; thence (33) North ten degrees and fifteen minutes West, two chains and seventy links; thence (34) North twenty degrees East, one chain and forty links; thence (35) North thirty-one degrees and ten minutes East, one chain and forty-eight links; thence
 10 (36) North thirty degrees East two chains and twenty-seven links; thence (37) North twenty-eight degrees East, one chain and four links, to a Red Cedar stump; thence (38) North sixteen degrees and forty-five minutes East, six chains and ten links; thence (39) North fourteen degrees and fifteen minutes West, one chain and ninety-six links to Bradleys corner in the middle of Mill street; thence (40) South seventy-seven degrees East, along the middle of the said Mill street, five chains and fifty-one links, to the middle of Wood street; thence (41) South eighty-nine degrees
 20 thirty minutes East, twenty-three chains and thirty-six links, to the middle of High Street; thence (42) South twelve degrees and fifteen minutes East, fourteen chains and forty links, to the place of Beginning.

Containing one hundred and eighty-one acres, and sixty-two hundredths of an acre, be the same more or less. The Western boundary of said tract, from the sixth to the fortieth course, is bounded by the lands of Charles Rodman, Upton, Beek, and Dr. Bradley. Being the same premises which Joseph S. Fleetwood, Esq., High Sheriff of the
 30 County of Burlington, by deed poll, bearing date the tenth day of March, Anno Domini 1898 and intended to be forthwith recorded, granted and conveyed unto the said Howard Flanders in fee. Excepting and reserving thereout, all that certain lot or parcel of ground, situated on the road from Burlington to Rancocas, Southwardly from the fork of said Road, with the road from Burlington to Rancocas, Southwardly from the fork of said Road, with the road

from Burlington to Mount Holly, in the Township and County of Burlington and State of New Jersey; Bounded as follows, viz.:

Beginning on the Westerly side of the said Rancocas Road, called on Worthington's plan, Rancocas avenue, in the middle of a street shown on said plan, and thereon marked Thirteenth street, said point being nine hundred and eighty feet, Southward from the South side of Mill street, and extending from the said beginning, (1) Southwardly along said Rancocas road or avenue, one thousand and fifty feet and nine inches to a marble stone for a corner, to lands retained by Jacob G. Fisler; thence (2) Westwardly along said land (being part of the above described land) at right angles with the said Rancocas avenue, five hundred and ninety feet, to a marble stone in the middle of Wall avenue as marked on the said plan, corner to lands retained by the said Fisler as aforesaid; thence (3) deflecting Southwardly twenty-nine degrees and twenty minutes (the magnetic bearing at this time being South nine degrees and twenty minutes West) two hundred and seventy-four feet to a corner in or near the edge of the pond or lake, and corner to lands retained as aforesaid; thence (4) deflecting Northwardly sixty-four degrees and thirty minutes, passing through the water, at the edge of the Lake, two hundred and forty-nine feet three inches, to a corner at the shore; thence (5) along lands retained as aforesaid, parallel with the third course as above described, five hundred and two feet, to a corner in the middle of the said Wall avenue; thence (6) along the said Wall Avenue, and lands so retained, parallel with Rancocas avenue, six hundred and eighty-four feet eight inches, to a marble monument in the middle of said Thirteenth street; thence (7) Eastwardly along said Thirteenth street, and lands so retained six hundred feet one inch to a marble stone, at the place of Beginning.

Containing fifteen and a half acres of land strict measure. Which said boundaries include within them two several

lots of ground previously conveyed by the said Jacob G. Fisler to Annie W. D'Olier, one of them by deed dated September 8, 1894, recorded in the office of the Clerk of Burlington County in Deed Book No. 312, page 428, and the other of them dated September 15th, 1894, and recorded in the same Deed Book on page 430, etc.

10 Containing together twelve and a half acres of land, which being excepted, there will remain three acres, granted and conveyed by said Jacob G. Fisler, to said
 20 Annie W. D'Olier, by deed dated the twenty-fifth day of October, A. D. 1894. Recorded in the said Clerk's office in Deed Book number 313, page 136, and Then and There forced, broke open, broke to pieces, damaged and spoiled, the fence of the said plaintiff, then and there standing and being along said close, and with the feet of horses, mares and geldings, and with the wheels of carts, wagons and other carriages and vehicles, tore up and damaged and spoiled the earth and soil of the said close, and also then and there cut, sawed, chopped, loaded, seized, took and
 30 carried away, ice from the water, covering a portion of the lands of the said plaintiff within said close, to wit, thirty loads of ice of the said plaintiff of great value, to wit, of the value of ten dollars, of and from the said close, and from the water, covering a portion of the said close, and converted and disposed thereof to her own use, and also then and there, cast and threw divers large quantities of earth, stones, boards, logs, piling and rubbish, into the water, covering a portion of the land of the said plaintiff, called the Second Lake, of and belonging to the said closes respectively, and thereby and therewith filled up the same against the will of the said plaintiff, and thereby hindered and prevented the said plaintiff from having the use, benefit and enjoyment thereof, in so large and ample a manner, as he might and otherwise would have done, to wit, at the County of Burlington, to wit, at Mount Holly, aforesaid, and within the jurisdiction of this Court. And also for that, the said Defendant on the said second day of Febru-

ary, one thousand and nine hundred, and on divers other days and times, between that day and before the commencement of the suit, with force and arms, at the Township of Burlington in the County of Burlington and State of New Jersey, broke and entered the close of the said plaintiff covered with water, situated and being in the Township of Burlington, in the County of Burlington and State of New Jersey, and herein particularly described in the first account, then and there cut, sawed, shored, loaded, seized, took, carted and carried away, ice from the water, covering a portion of the land of said plaintiff within said closes to wit, thirty loads of ice of the said plaintiff of great value, to wit, of the value of ten dollars, there and then found and being carried off and from the said water covering a portion of the land contained within said closes, cut, sawed, shored, loaded, seized, took, carted and carried away, and converted and disposed thereof to her own use, to wit, at the County of Burlington, to wit, at Mount Holly aforesaid, and within the jurisdiction of this Court. And also for that the said defendant on the said second day of February, 1900, and on divers other days and times between that day and before the commencement of this suit, with force and arms, at the Township of Burlington, in the County of Burlington and State of New Jersey aforesaid, to wit, at the Township of Burlington, to wit, at Mount Holly aforesaid, shored, loaded, seized, took, carted and carried away divers ice goods and chattels, of said plaintiff of like number, quantity, quality, description and value as the said ice, goods, chattels, in the said first count of the said declaration mentioned, there and then found, and being the property of the said plaintiff of great value to wit, value of ten dollars, of the lawful of the United States of America, there and then found and being and converted and disposed of the same to her own use, to wit, at the County of Burlington, to wit, at Mount Holly aforesaid, and within the jurisdiction of this Court, to the damage of the said plaintiff one thousand and dollars. And therefore he brings his suit, etc.

Plea.

And the said Annie W. D'Olier, by Franklin C. Woolman, her attorney, comes and defends the force and injury when etc., and says she is not guilty of the said supposed trespasses therein laid to her charge, or any part thereof, in manner and form as the said plaintiff has there
 10 thereof complained against her, and of this she puts herself upon the country, etc. And for a further plea in this behalf, the said defendant, by leave of the Court, here for this purpose first had and obtained, says that the said plaintiff ought not to have or maintain her aforesaid action against her, because she says that before the plaintiff was possessed of, or had any title, estate or interest in the lands
 20 above set forth and described to wit, on and prior to the twenty-fifth day of October, A. D., eighteen hundred and ninety-four, one Jacob G. Fisler was seized of the same in his own demise as of fee, and being so thereof seized, by Deed of Indenture, bearing date the day and year last aforesaid, duly executed and acknowledged, granted and conveyed unto the said defendant, her heirs and assigns, parts of the said described premises, described in said deed as follows:

All that certain lot or parcel of ground situated on the Road from Burlington to Rancocas, Southwardly from the
 30 fork of said road, with the road from Burlington to Mount Holly, in the Township and County of Burlington and State of New Jersey, bounded as follows, viz.:

Beginning on the westwardly side of said Rancocas road, called on Worthington's plan, Rancocas avenue, in the middle of a street shown in said plan and thereon marked "Thirteenth Street," said point being nine hundred and eighty feet, southerly from the South side of

Mill Street; and extending from said beginning (1) Southwardly along said Rancocas road or avenue, one thousand and fifty feet and nine inches, to a marble stone for a corner to lands retained by the said party of the first part; thence (2) Westwardly along the lands so retained, at right angles with Rancocas avenue, five hundred and ninety feet to a marble stone in the middle of Wall avenue, as marked on said plan, corner to lands retained as aforesaid; thence (3) deflecting Southwardly twenty-nine degrees and twenty minutes (the magnetic bearing at this time being South nine degrees and twenty-nine minutes West), two hundred and seventy-four feet, to a corner, in or near the edge of the Pond or Lake, and corner to lands retained as aforesaid; thence (4) deflecting Northwardly sixty-four degrees and thirty minutes, passing through the water at the edge of the Lake, two hundred and forty-nine feet, three inches, to a corner at the shore; thence (5) along lands retained as aforesaid, parallel with the third course above described, five hundred and two feet, to a corner in the middle of the said Wall avenue; thence (6) along said Wall avenue and lands so retained, parallel with Rancocas avenue, six hundred and eighty-four feet eight inches, to a marble monument in the middle of said Thirteenth street; thence (7) Eastwardly along said Thirteenth street and lands so retained, six hundred feet one inch, to a marble stone at the place of Beginning.

Containing fifteen and a half acres of land, strict measure, which said boundaries include within them two several lots of ground previously conveyed by the said grantors to the said Annie W. D'Olier; one of them by Deed dated September 8, 1894, recorded in Book No. 312, page 428, in the Clerk's office at Mount Holly, and the other of them dated September 15, 1894, and recorded in the same Book, on page 430, etc., containing together twelve and a half acres of land, which being excepted, there will remain three acres, granted and conveyed by this present indenture.

Being part of the premises conveyed by Caroline B.

- Buchanan to the said Jacob G. Fisler, by deed dated November 5th, 1890, and recorded in Book No. 287, page 413, etc., in the Clerk's office aforesaid. That the said Jacob G. Fisler, being at the time aforesaid owner in fee of the land covered by the water of the Lake or Pond mentioned in said Declaration and known and referred to as the Second Lake, IN AND BY SAID DEED FURTHER GRANTED UNTO THE SAID DEFENDANT, Annie W. D'Olier, her heirs and assigns, THE RIGHT "To tra-
- 10 verse said Lake or Pond in boats for pleasure or amusement only, and to fish in the waters thereof, for pleasure and not for profit, and to gather ice therefrom, for her own or their own private and domestic use, and not for sale, said rights and privileges to be exercised and enjoyed by the said party of the second part, her heirs and assigns, in common with the said party of the first part, his heirs and assigns." Which said deed of Indenture was on the twenty-seventh day of October, A. D., eighteen hundred and ninety-four, duly recorded in the Clerk's office of the
- 20 County of Burlington, in Book No. 313 of Deeds, folio 186, etc. That afterwards, to wit, on the tenth day of March, A. D., eighteen hundred and ninety-eight, Joseph T. Fleetwood, sheriff of the County of Burlington, by virtue of a writ of fieri facias to him directed, issued out of and under the seal of the Court of Chancery of the State of New Jersey, in accordance with the final decree of the said Court made on the day of A. D. eighteen hundred and ninety-eight, in a certain foreclosure suit therein pending, wherein the Burlington County Saving Institution
- 30 was Complainant, and Jacob G. Fisler and wife were defendants, granted and conveyed unto Howard Flanders the premises set forth and described in said declaration, excepting and reserving thereout all that certain lot or parcel of ground situate on the road from Burlington to Rancocas, southwardly from the fork of said road with the road from Burlington to Mount Holly in the Township and County of Burlington, and State of New Jersey; contain-

ing fifteen acres conveyed to Annie W. D'Olier by Jacob G. Fisler, by deed dated twenty-fifth day of October, A. D. eighteen hundred and ninety-four, and recorded in Book 313 of Deeds, page 186 as fully as the same is therein described. That afterward, to wit, on the fourteenth day of March, A. D. eighteen hundred and ninety-eight, the said Howard Flanders and wife, by Indenture under their hands and seals, duly executed and acknowledged, and dated on the day last aforesaid, granted and conveyed the said premises so as aforesaid conveyed to him by Joseph S. Fleetwood, Sheriff as aforesaid, unto the said plaintiff, David H. Mitchell, his heirs and assigns, That the defendant, Annie W. D'Olier during the month of February, A. D. nineteen hundred, by virtue of the power, right and privilege granted and conveyed unto her, by said Deed from Jacob G. Fisler and wife, by her servant and employes, entered upon said Lake or Pond, known as the Second Lake, and cut from the surface of said Lake or Pond, thirty loads of ice and removed the same therefrom, and places the same in her own ice-house, located on the defendant's premises adjoining said Lake or Pond, for her own private or domestic use, but not for sale, doing at the time no unnecessary damage or injury to the premises of the said plaintiff, which are the alleged trespasses, and this she is ready to verify. Wherefor she prays judgment if the Plaintiff ought to have or maintain his aforesaid action against her.

FRANKLIN C. WOOLMAN,

Attorney of Defendant.

Replications.

And the said Plaintiff as to the plea of the Defendant by her above pleaded hereof she has put herself upon the country does the like.

And the said plaintiff, as to the second plea of the said
 10 defendant by her as above pleaded, saith that he, by reason of any of the things by the said defendant, in her said plea as above pleaded, ought not to be barred from recovering, as in and by this plaintiff's declaration it is averred, because they, and each, and every part thereof are not true, and of this he puts himself upon the country.

And the said defendant doth the like.

Findings of Court.

The Above Stated Cause was tried by the Court, by consent of Counsel a jury having been waived, and the evidence being entirely documentary, having been duly presented and the argument of Counsel heard, the Court finds the facts to be as follows:

First, That Jacob G. Fisler on the fifth day of November, 1890, by a duly executed deed from Caroline R. Buchanan, recorded in the Burlington County Clerk's office, in Book No. 287 of Deeds, page 413, became seized in fee of a certain tract of land in Burlington Township, in said County, containing 181 and 62-100 acres of land, and
 30 including within its limits the lake in question in this suit, upon which the alleged trespass was committed by the defendant.

Second. On the 17th day of November, 1890, the said

Jacob G. Fisler and wife executed a mortgage upon the whole tract of 181.62 acres, to the Burlington Savings Institution, a corporation, to secure the payment of \$4500, which mortgage is recorded in Book R 3 of Mortgages, page 53, in Burlington County Clerk's office.

Three. On September 8, 1894, Jacob G. Fisler and wife conveyed to Annie W. D'Olier, the defendant, 10.38 acres of the tract of land, by Deed recorded in Book 312 of Deeds of said county, and on September 15th, 1894, another deed for 1.92 acres, of the aforesaid tract of 181.62 10 acres, which deed is recorded in Book 312 of Deeds, page 430, which two pieces of land were afterward for a valuable consideration released by The Burlington Savings Institution, from the lien of the said mortgage.

Fourth. On the 25th day of October, 1894, John G. Fisler and wife conveyed to Annie W. D'Olier, three additional acres of land adjoining the land before conveyed aforesaid, and in the description of lands in this deed, also included in a general survey the two tracts before conveyed, and further added the following words, "Together 20 with the right to the said party of the second part, her heirs and assigns to traverse the said Lake or Pond in boats for pleasure or amusement only and to fish in the waters thereof for pleasure and not for profit, and to gather ice therefrom for her own or their own private and domestic use, but not for sale, said right and privilege to be exercised and enjoyed by the said party of the second part, her heirs and assigns in common with the said party of the first part, his heirs and assigns." The description in this deed recognizes the edge of the lake in question as 30 one of its boundaries, the fourth course thereof reading as follows, "thence deflecting northwardly sixty-four degrees and thirty minutes, passing through the water at the edge of the lake two hundred and forty-nine feet and three inches, to a corner at the shore." The deed is recorded in Book 313 of Deeds, page 186, of Burlington County.

Fifth. In 1897 the Burlington Savings Institution com-

menced proceedings to foreclose its mortgage, making Jacob G. Fisler and wife and Annie W. D'Olier, defendants, and to the bill of complaint Annie W. D'Olier made answer praying that the lands be sold in such manner as to preserve all her rights in the same, and the execution from the Court of Chancery commanded the sheriff to sell the lands described therein, excepting thereout the fifteen acres included in the said Deed of October 25th, 1894, from Fisler to D'Olier, "as fully as the same is described therein"; and
 10 the deed from the Sheriff of Burlington County to Howard Flanders, the purchaser of the land sold by virtue of the said foreclosure proceedings and execution, contained the following words at the end of the description: "excepting and preserving thereout all that certain lot or parcel of ground situated in the road from Burlington to Rancocas Southwardly from the fork of said road with the road from Burlington to Mount Holly, in the Township and County of Burlington and State of New Jersey, containing fifteen acres, conveyed to Annie W. D'Olier by Jacob G. Fisler,
 20 by deed dated October 25th, 1894, and recorded in Book 313 of Deeds, page 186, as fully as the same is therein described," which Sheriff's deed to Flanders is dated March 10, 1898, and recorded in Book 331 of Deeds, page 431 in the Clerk's office of Burlington County.

Sixth. On the 14th of March, 1898, Howard Flanders, the said purchaser at the Sheriff's sale, conveyed the land so purchased, to David H. Mitchell, the plaintiff, excepting thereout specifically by meeds and bounds, the land conveyed by Jacob G. Fisler to Annie W. D'Olier by deed of
 30 October 25, 1894, but omitting entirely the recital of any of the privileges granted in the said deed and quoted fully in paragraph four of these findings. This deed to the plaintiff is duly recorded in the Burlington County Clerk's Office in Book 331 of Deeds, page 437, and upon it the plaintiff's right of action in this suit is founded.

Seventh. It is admitted that the Defendant did cut the

ice and place the same in her ice house, and that it was used for domestic use and was not sold for profit, but no soil or lands of the plaintiff were entered upon.

Conclusion and Judgment of Court.

It is not disputed that Jacob G. Fisler was the owner in fee of the one hundred and eighty acres of land which he and his wife mortgaged on the 17th of November, 1890, to The Burlington Savings Institution, to secure the payment of forty-five hundred dollars, and that the Pond or Lake in question in this suit was included in and formed a part of this tract of land. Neither is it disputed that after the execution and delivery of this mortgage, Jacob G. Fisler and wife conveyed to the defendant, Annie W. D'Olier, fifteen acres bounded on the said Pond or Lake, and that in the Deed conveying the land contiguous to the lake the words quoted in paragraph four of the facts found, appear and form a part of the same. 10

The contention in this case all springs from these words, and many authorities have been cited in the learned briefs of the respective counsel, but we are of opinion that but few of them are applicable to the questions raised by the pleadings and facts of the case under consideration. They 20
acres of the land mortgaged, a portion of which fifteen relate mainly to the law concerning easements, and of course our books are full of learned and able decisions in that fertile field of law. The case in hand, however, arises from a grant formally written and executed and duly recorded in the County Clerk's office. An easement presupposes a lost grant, but this grant is not lost and is in evidence before us. The grant itself, whether valid originally 30
and whether, if valid, it has been extinguished by subsequent legal proceedings, is the main question with which we have to deal in this case.

It is argued that Jacob G. Fisler having mortgaged the

lands including this lake, could not create a grant or right to boat and fish and gather ice upon it without the consent of the mortgagee, the Savings Institution. Of course, no rights except in strict subordination to the prior rights of the mortgagee and subject to extinguishment by the mortgagee in the prosecution of its superior rights, could be granted. The law relating to the rights of the mortgagee in the mortgaged premises has been changed in this State from the ancient doctrine of a conveyance with a condition, and the mortgage is now held to be only a security instead of a conditional conveyance of the land. Any right in his land may be granted by the owner, subject, of course, to any mortgage previously given. The power of a land owner to grant a right of way over his land to an adjoining owner, by deed or agreement in writing would not be questioned, although this right might afterwards be destroyed by the foreclosure of a previous mortgage. Between the grantor and grantee and all holding under them it would be entirely valid. So the grant of Jacob G. Fisler to Annie W. D'Olier of the right to fish and take ice from the lake on the terms expressed in the grant was valid as between them and their heirs and assigns. The right of Jacob G. Fisler to have conveyed the whole lake to her or any one who desired to purchase it, soil and all, subject to the mortgage, could not be denied, and if he could convey, he could grant a servitude upon the land he owned. It is said in the case of *VanRencelaer vs. Albany R. Co.* 1 Hun. 307, "The owner of a fee of land may impose upon it any burden, however injurious or destructive, not inconsistent with the general right of ownership, if such burden be not in violation of a public policy and does not injuriously affect the right of property of others."

The fact that the land is conveyed with water cannot affect the issue in this case. While a right by easement cannot be set up as a defense against the owner in an action of trespass upon the waters of the lake for the purpose of fishing, a grant by the owner in writing expressly confer-

ring the privilege of fishing could be lawfully set up as a defense. The rule laid down by the present Chief Justice in *Cobb vs. Davenport*, 4 Vroom 223, does not apply to this suit, as the defense in that case was based upon an alleged easement.

The next question is, was this right of the defendant lost or extinguished by the foreclosure of the mortgage previously given by Fisler to the Savings Institution. The holders of the mortgage were not bound to respect this grant or to withhold from sale the three acres of land which they had not released, included in the deed of October 25th, 1894, but the answer of the defendant asks for the protection of her rights if it could be done consistently with the rights of the complainant, brought about presumably the clause of exemption in the execution finally issued to the sheriff to make sale of the mortgaged lands. This clause is quoted fully in paragraph 5 of the facts. By this exemption, the whole of the land included in the deed of Fisler to D'Olier, dated October 25, 1894, "As fully as the same is described therein," was relieved from the sale. The question now is, did the exemption of this land "as fully as the same is described therein," that is, in the deed of October 25, 1894, also operate to preserve to Annie W. D'Olier the right to boat and fish and cut ice on the lake according to the grant in the said deed? We hold that it did. The words, "as fully" in their import and effect in the connection in which they are used, are equivalent to a full recital and quotation of the terms of the grant as set out in the deed of October 25, 1894. The right expressly conferred by that deed of fishing and gathering ice added in a large degree to the value of the land, and the land in that deed could not be "fully" described with these very important privileges granted with the land at the same time and in the same deed, left out.

The deed from the Sheriff to Flanders, therefore, carried with it a servitude upon the land conveyed. The right to fish and cut ice not for sale or profit remaining in the de-

fendant Annie W. D'Olier in common with himself for the privileges originally granted were to be used, in common with the said party of the first part his heirs and assigns."

10 Having acquired a title to lands burdened with a servitude or right therein, held by an adjacent land owner, it is hardly necessary to say that the deed from Flanders to Mitchell, the plaintiff, by omitting the words "as fully as the same is described therein" immediately after the description of the fifteen acres exempted from the lands conveyed in the Sheriff's deed, could not in any possible way impair the right of the defendant to the privilege held by virtue of the original grant. It is elementary law that no one can give a better title than he possesses himself, and that any one taking land subject to a privilege vested in another must convey it subject to that burden.

The defendant, therefore, in cutting ice from the lake and storing it for domestic use only, was exercising a right and not committing a trespass, and judgment of non-suit is rendered against the plaintiff, with costs to be taxed.

20

JAMES H. NIXON,
Circuit Court Judge.

To which ruling, the said Plaintiff, by Samuel W. Shinn, Esq., Attorney, objected. Which objection was overruled by the Court. A Bill of exception prayed by the Plaintiff was allowed and sealed accordingly.

JAMES H. NIXON,
Circuit Court Judge. (Seal.)

Assignments of Error.

And now, at this day, the Plaintiff in Error assigns the following causes of error: 10

1. Because the Circuit Court decided that the Defendant, in cutting ice from the lake (Silver Lake), and storing it for domestic use only, was exercising a right and not committing a trespass.

2. Because the Circuit Court rendered a judgment of non-suit against the Plaintiff with costs, etc.

20

Joinder.

And thereupon comes the said defendant into Court and says that there is no error, either in the record and proceeding aforesaid, or in giving judgment aforesaid and she therefor prays that the judgment aforesaid may in all things be affirmed, etc.

30

Brief of Plaintiff.

This is an action in trespass to try title.

The trespass consists of gathering ice from what is
10 known as Silver Lake, near the City of Burlington in this State. The Defendant's right to fish, boat or gather ice on Silver Lake is the disputed point.

There is no disputed facts in the case, and no verbal testimony was taken. The case was submitted to the Circuit Court without a jury, and a non-suit was ordered to be entered. This is the judgment that is now sought to be revised by this Court.

The evidence consisted of a series of deeds, one mortgage and a certified copy of the proceedings foreclosing it.

20 All the descriptions that bear on the issue are copied in the pleadings in full. All the other evidence that bear on the issue, are copied in their proper place in this brief.

The fact occurred as follows:

1. On November 5, 1890. One Jacob G. Fisler purchased a tract of land situated in the outskirts of the City of Burlington in this state. On this land there is an artificial lake, called Silver Lake, that was made by constructing a bank of earth across a ravine.

2. November 17th, 1890. Said Jacob G. Fisler made a
30 blanket mortgage on this land to the Burlington Savings Institution to secure a certain loan.

3. September 8th, 1894. Said Fisler conveyed 10.58 acres of the original 181.62 acres to the Defendant D'Olier, and on the 15th of the same month, he conveyed 1.92 acres more of the original tract to the Defendant D'Olier, making in all 12.50 acres that has now been cut out of the original tract. Later, one thousand dollars was paid to the said

mortgagee and in consideration of which it released the said 12.50 acres from the lien of the said mortgage.

3. In October 25, 1894, said Fisler conveyed to the Defendant D'Olier, TWO ENTIRELY DIFFERENT PROPERTIES BY ONE DEED out of the original 181.62 acres.

The FIRST OF THESE (the one that was excepted from coming within the influence of the foreclosure suit, and therefore was not extinguished by it), was the fee simple to three acres of land, adjoining both the 12.50 acres then owned by D'Olier and also the said Silver Lake. 10

The SECOND OF THESE (the one that was not excepted from coming within the influence of the foreclosure suit, and was therefor extinguished by it), consisted of a right to fish, boat and gather ice from the waters of Silver Lake. This deed was recorded in Book No. 313, page 186. Both of these descriptions are copied in full in the plea on page 8.

D'Olier's contention is that this right to fish, boat and gather ice from Silver Lake, is a private easement appurtenant to the three acres, and therefor went with it. Mitchell's contention is that it is an entirely distinct and separate piece of property, and in order for it to be excepted from the influence of the foreclosure such facts must appear affirmatively in the proceedings. 20

Cases Cited.

The case of Cobb vs. Davenport 4 Vroom 223, holds that "the right to catch fish in a fresh water lake" is not an easement, but is a right of profit in the waters of the lake. The case of Beckman vs. Kramer 43 Illinois 447, holds that "the right to catch fish, etc., from a fresh water lake is an entirely separate and distinct piece of property, and that it does not necessarily go even with the title to the land flooded by water." 30

4. On June 22, 1897. The Burlington Savings Institution filed its bill in the Court of Chancery of this State, in the usual form, to foreclose its mortgage dated November 17, 1890. See fact 2.

5. Annie W. D'Olier, the defendant in this suit and also one of the defendants in the said foreclosure suit, appeared in the Court of Chancery of this State and filed an answer to the said bill, in brief, as follows:

10 This Defendant Annie W. D'Olier, of the City, etc., now and at all times, etc., answering, says:

That this Defendant admits that the statement and allegations contained in said bill of complaint, are and each of them, is as she believes, true.

20 And this Defendant further answering says she admits that after the execution of the mortgage, etc., that Fisler and wife conveyed unto this defendant 10.58 acres, etc. And that afterwards, etc., that Fisler and wife conveyed to this Defendant 1.92 acres more of the original 181.62 acres, etc. That afterwards, etc., The Burlington Savings Institution, the Complainant, etc., upon the receipt of \$1000 released the two above described tracts of land from the lien of the said mortgages, etc., and that they should be specifically excepted, when etc.

30 This Defendant further answering admits that afterward to wit, on the twenty-fifth day of October, A. D., 1894, the said Jacob G. Fisler and wife, by deed under their hands and seals, duly acknowledged and recorded, etc., in the Clerk's office aforesaid, in Book 313 of Deeds, page 186, etc. granted and conveyed unto this defendant a third tract of land, containing three acres, together with certain privileges in the waters of the lake, which said tract was included within and covered by the lien of the Complainant's said mortgage. That the deed conveying this tract of three acres included within its meets and bounds the two above stated tracts which were released by the Complainant from the lien of said mortgage.

The Defendant therefore says that by reason of said

conveyance of the last mentioned tract unto this Defendant, that the said mortgaged premises should be sold in parcels, and that the tract of three acres of land conveyed to this defendant, properly set forth and described, should be last sold to pay and satisfy the decree of the Complainant, together with costs, and should the other lands included within said mortgage be sold for sufficient to pay and satisfy said decree interest and costs, then in such case, said tract belonging to this defendant should not be sold, but be declared free and discharged from the lien of said mortgage. 10

All of which matters and things, etc.

6. A decree pro confesso is made and filed in the usual form.

7. Franklin C. Woolman, Esq., Master, etc., reported in brief as follows: I have seen and inspected, etc., and find that there is due, etc., \$4143.59 etc. I further report that I have seen and inspected first, tax vouchers, etc.; second, taxes, etc.; third, for taxes etc.: fourth, for taxes, etc.; total for taxes, \$260.87, etc. 20

And I further report that I have seen and inspected and find and C. for insurance etc. Making a total of \$4425.85. That I have seen and inspected certificates of search, etc.

All of which is respectfully submitted, etc.

Note.—To this report is attached a part of the evidence, a copy of the describing clause in the deed from Fisler to D'Olier dated October 25th, 1894. Showing that she appeared and presented her evidence to the Master. But no reference is made in the body of the report to any rights that the Defendant D'Olier may have under her answer filed. 30

8. The Final Decree in said suit is as follows, to wit: This cause coming on to be heard in the presence of Howard Flanders, solicitor, and of Counsel with the Complainant, the Complainant's bill having been heretofore taken as confessed against the said Jacob G. Fisler and Margaret his wife, of the defendants, whereupon and upon

reading a report on file, made by Franklin C. Woolman, Esq., one of the Masters of this Court, bearing date the nineteenth day of January, in the year of our Lord one thousand eight hundred and ninety-eight, from all which it appears that there was due to the Complainant on the day of making said report, for principal and interest on its mortgage and for taxes and insurance paid by it, the sum of four thousand four hundred and twenty-five dollars and eighty-five cents, and that it is necessary and advisable that

10 the whole of the mortgaged premises should be sold to raise and pay the money so due as aforesaid, and no cause being shown or appearing to the contrary, It is thereupon, on this nineteenth day of January, in the year of our Lord, one thousand eight hundred and ninety-eight, by Alexander T. McGill, Chancellor of the State of New Jersey, ordered, adjudged and decreed and the said Chancellor doth, by virtue of the power and authority of this Court, hereby order, adjudge and decree that the said report, and all the matters and things therein contained, do stand ratified and

20 confirmed, and that the said mortgaged premises be sold to raise and satisfy the sum of money due to the said complainant, that is to say, to the complainant the aforesaid sum of four thousand four hundred and twenty-five dollars and eighty-five cents, and interest thereon, to be computed from the nineteenth day of January, in the year of our Lord one thousand eight hundred and ninety-eight, being the date of the Master's report, with the cost of this cause to be taxed, to the complainant a counsel fee of ten dollars, and that a writ of fieri facias do forthwith issue for that purpose

30 out of this Court directed to the Sheriff of the County of Burlington, commanding him to make sale, according to law, of the said mortgaged premises, and that out of the money raised from such sale, he pay, in the first place, to the Complainant or his Solicitor, its said debt, interest and costs, and in case more money should be raised by the said sale than shall be sufficient to answer such several pay-

ments, that such surplus be brought into this Court, to abide the further order of this Court, and that the said Sheriff make return without delay of his proceedings by virtue of the said writ. And it is further ordered, adjudged and decreed, that the Defendants stand absolutely barred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises, when sold as aforesaid by virtue of this decree. ALEX. T. MCGILL, C.

9. On January 19, 1898. Execution issued to the Sheriff etc., commanding him to sell the aforesaid 181.64 10 acres, excepting and reserving thereout the 15.50 acres by the use of the following wording: "All that certain lot or parcel of ground situate on the road from Burlington to Rancocas, Southwardly from fork of said road with the road from Burlington to Mt. Holly in Township and County of Burlington, State of New Jersey, containing 15 acres, conveyed to Annie W. D'Olier by Jacob G. Fisler, by deed dated twenty-fifth day of October, A. D., eighteen hundred and ninety-four and recorded in Book 313 of Deeds page 186, as fully as the same is therein described." 20

Note.—That the scrivener in drawing this execution has substituted the words, "As fully as the same is therein described," in place of the seven several courses contained in the original conveyance.

10. On February 25th, 1898. Sheriff's report of sale is filed in the usual form, showing sale having taken place in conformity with the execution.

11. On March 7th, 1898. Order made and filed confirming sale on the usual form and ordering deed to be made. 30

12. On March 10th, 1898. Joseph S. Fleetwood, Sheriff, etc., made, executed and delivered a deed conveying the property to Howard Flanders, the property sold under and by virtue of the execution.

Note.—The describing clause in this deed is an exact

copy of the describing clause in the execution under which the property was sold.

13. On March 14th, 1898. Howard Flanders and wife conveyed the said property to the Plaintiff in this case, David H. Mitchell, by the use of the description containing 42 courses, that was always used to describe, entire 181.62 acres. Then excepting the entire 15.50 acres by one description, by the use of the following wording, to wit: "Excepting and reserving thereout, All that certain lot or parcel of ground situate on the road from Burlington to Rancocas, southwardly from the fork of said road, with the road from Burlington to Mount Holly in the Township and County of Burlington and State of New Jersey; bounded as follows, viz.: Beginning on the Westerly side of the side Rancocas road, called on Worthington plan, Rancocas avenue, in the middle of a street, shown on said plan, and thereon marked Thirteenth street, said point being nine hundred and eighty feet, Southwardly, from the South side of Mill street, and extending from the said beginning
- 10 (1) Southwardly along said Rancocas road or avenue, one thousand and fifty feet and nine inches, to a marble stone for a corner to lands retained by Jacob G. Fisler, thence
- 20 (2) Westwardly along said land (being part of the above described land) at right angles with said Rancocas avenue five hundred and ninety feet, to a marble stone in the middle of Wall street, as marked on the said plan corner to land retained by the said Fisler as aforesaid, thence (3) deflecting Southwardly twenty-nine degrees and twenty minutes (the magnetic bearing at this time being South
- 30 nine degrees and twenty minutes West), two hundred and seventy-four feet, to a corner in or near the edge of the pond or lake, and corner to lands retained as aforesaid; thence (4) deflecting Southwardly sixty-four degrees and thirty minutes, passing through the water at the edge of the lake, two hundred and forty-nine feet three inches, to a corner at the shore; thence (5) along lands retained as

aforesaid, parallel with the third course above described, five hundred and two feet, to a corner in the middle of Wall avenue; thence (6) along the said Wall avenue and lands so retained, parallel with Rancocas avenue, six hundred and eighty-four feet eight inches to a marble monument in the middle of said Thirteenth street; thence (7) Eastwardly along said Thirteenth street, and lands so retained, six hundred feet one inch, to a marble stone at the place of Beginning. Containing fifteen and a half acres of land strict measure. Which said boundaries include within them two several lots of ground previously conveyed by the said Jacob G. Fisler to Annie W. D'Olier. One of them by deed dated September 8th, 1894; recorded in the Office of the Clerk of Burlington County, in Deed Book No. 12, page 428. And the other of them dated September 15th, 1894, and recorded in the same Deed Book on page 430, etc. Containing together twelve and a half acres of land, which being excepted there will remain three acres, granted and conveyed by said Jacob G. Fisler to said Annie W. D'Olier by deed dated the twenty-fifth day of October, A. D. 1894, recorded in said Clerk's office, in Deed Book No. 313, page 136.

And David H. Mitchell, the plaintiff, therefore contends that the rights of Annie W. D'Olier, her heirs and assigns, "to traverse said lake or pond in boats for pleasure or amusement only, and to fish in the waters therefor, for pleasure and not for profit, and to gather ice therefrom, for her own or their own private and domestic use, and not for sale, said rights and privilege to be exercised and enjoyed by the said party of the second part, her heirs and assigns, in common with the said party of the first part, his heirs and assigns," was not excepted from coming within the influence of the foreclosure of a mortgage made prior to the conveyance by which that right was acquired and that it was therefore extinguished by the foreclosure of that mortgage. And Annie W. D'Olier was thereby ousted of her rights in the waters in said Silver Lake.

And that the Court below erred in holding that "in cutting ice she was exercising a right and not committing a trespass."

All of which is respectfully submitted by

SAMUEL M. ROBERTS,
Attorney and of Counsel with the Plaintiff.



