

## New-Jersey Court of Errors and Appeals.

JAMES TEN EYCK

v.

JOHN RUNK,



IN CASE.

Error to Supreme Court.

### STATE OF THE CASE.

This cause was tried at the Somerset Circuit, in December term, 1853, before his Honor Stacy G. Potts and a jury, when the following bills of exception were sealed:

Be it remembered, that at a Circuit Court, held at Bridgwater, in and for the county of Somerset, on the 20th day of December, 1853, before the Hon. Stacy G. Potts, one of the justices of the Supreme Court, came on to be tried, before a jury of the country, duly empannelled and sworn, the issue joined between the said James Ten Eyck, plaintiff, and John Runk, defendant, (*prout* the pleadings), at which day came there the parties aforesaid with their respective attorneys; and upon the trial of said issue, counsel of the said James Ten Eyck opened his case to the jury, by stating that the plaintiff would prove—that, in 1818, the dam was only three feet high; that up to and since 1835, the dam had been gradually raised, and that the plaintiff would show that within the last fifteen years the dam had been raised one foot: and, to maintain and prove the issue on his part, gave in evidence a deed from Dennis Hall and wife to James Ten Eyck, the plaintiff, dated April 15, 1835, for fifteen acres and eleven-hundredths of an acre of land, in the township of Bridgwater, in the county of Somerset, *prout* the said deed, duly acknowledged and recorded, also a deed of partition between Jacob Ten Eyck and James Ten Eyck, dated the 14th day of February, 1806, *prout* the same; and the plaintiff, in further support of the issue joined on his part, called, as a witness,

*James Ten Eyck*, who, being duly sworn, testified as follows:—The plaintiff owns and occupies forty acres and a little upwards of lowland along the west side of the North Branch; defendant owns land below on the river—has a mill property and dam there adjoin-

ing the plaintiff's land. The Hall deed is for a part of this lowland of the plaintiff; the deed of partition embraces the residue with other lands; they have been occupied by the plaintiff, as owner, more than thirty years past.

*Jacob Bayles*, being duly sworn, testified as follows:—I am a son of John Bayles; he formerly owned the mill property of John Runk, and until he died in November 1820. I left North Branch in 1826, and returned there in 1834; the plank were then nailed to the dam across the stream; there was no piece then across the  
 10 bearers on which the plank was nailed; the plank were fastened to the bearers; afterwards I was not much on the dam till 1848, and then part of the plank were nailed up and down the stream; this was where the water flowed over; I noticed this when about half way across, about the middle of the stream; the up and down plank were nailed to a piece of scantling under the ends. The scantling would raise the dam as far as it went—it did not go all the way; don't know whether the plank had been pulled up, or whether the scantling was on the plank; I don't know how much wider the dam was in 1834 than in 1848; long before 1834, a place  
 20 was washed away west of buttonwood tree; could not tell how water flowed in 1848. Upon looking at paper marked *Exhibit C*, witness says—It is the handwriting of my father; I have seen him write, and am well acquainted with his handwriting. He owned the mill property forty years ago, and until he died. The paper marked *Exhibit C* is a letter from my father to James Ten Eyck, dated February 17, 1818.

And being cross-examined on the part of the defendant, the witness further said—I was nineteen years old when my father died. I was often on the dam, can't say when for the first time; the  
 30 stone dam, when my father owned it, was something higher than the tumbling dam; the water flowed over the frame dam, unless in a low stage of water; I am not able to say whether the scantling made the dam higher or not—it does not follow that it did raise it. Abraham Moore, the miller, remained there after the death of my father; Gulick bought of his administrator. My father died in November, and it was sold to Gulick the next summer; Runk and Todd followed Gulick, and Runk bought out Todd.

*Job Wolverton*, being duly sworn, testified as follows:—I knew the dam in the spring of 1845; was then miller for Runk; the dam  
 40 was planked up and down the stream; I don't know that I can tell

exactly how the plank were fastened on the top. It was repaired after I went there in 1846; it was repaired over the tumble; west end repaired in fall of 1845, by stone and log. A timber was put on the east end in 1847—a piece of hewed timber about a foot high, and fifteen feet long. Before these pieces were put on, I don't think there was much difference between the ends of the dam and the middle; the middle was raised some while I was there by a piece of scantling, perhaps four inches thick all the way of the tumbling dam, if I am not mistaken; if I am not mistaken, there was three feet eight or ten inches of water in the cistern 10 when I first went there; the bottom of the cistern was a little higher than the water below the wheel—two or three inches higher than the water below; don't remember mentioning it; I don't know that I observed a corresponding raise in cistern; by the addition made, the mill run stronger. I often heard Runk wish he had more head; never heard Runk say he intended to raise the dam; raising the ends did not have the effect to raise the water, except in very high water; the stone part of the dam was raised and made tighter by stone and gravel; the log on west end was not less than fifteen feet long; the stone dam was washed away at 20 the end of the tumble dam. The driver, Daniel, and Seals assisted in repairs in 1846, and Harris in 1847. Can't say the water was raised by the alterations.

And being cross-examined, the witness further said—I reside in Trenton; left Runk in spring of 1848; the repairs in 1847 were on west side, from the tumble dam to the west bank; the west end of dam is of earth and stone, then the frame work, which is the tumble-timber, placed on east end to secure it; water must be high to run over west end; the object of timbers was to protect dam. Never heard Runk speak of intention to raise the dam; he gave 30 me no directions to raise it. All dams need repairing; it helps a dam to repair it and make it tight. I suppose the object was to raise it a little, because it would be to a man's advantage to raise it a little—I have no other reason for supposing so; repairs were made in summer of 1846 and 1847.

And being again examined in chief, the witness said—The scantling was placed along the whole length of the tumbling dam; it was an additional timber, about four inches high; can't tell whether former timber or plate was taken away first or not; there could have been no other object in putting the scantling in, but to 40 raise the dam; I was out at dam three or four times a day; dam was leaky.

And being again cross-examined, the witness said—The plank were bare of gravel when the new timber was put on; some new plank were put in; when the scantling was put on the frame work was leaking; some plank were rotten and destroyed, and were removed—they would not otherwise have been taken out.

*Morris Cramer*, being duly sworn, said—In 1846, I commenced attending mill for Runk; a second cap was put on the tumbling dam that year; I should think it raised the dam by the thickness of the piece put under the plank; it was put all the way along the  
10 tumbling dam. Mr. Runk was there, George, his son, William Seals, Job Wolverton occasionally, and Jerry Troy; I was new in the business, and did not observe an increase of power.

And being cross-examined, the witness said—I commenced in the spring of 1846 to learn the trade. The second cap was put under the plank; the dam before that leaked; don't remember any new plank; there was a cap on the bearers, and this was put on the top of that; the dam was not level all the way across. I worked some on the dam in 1845, the first dam I ever worked on. The water did not receive any benefit or injury from these repairs; I  
20 did not see that it made any difference, as I had not charge of the mill. There was a cap on the top of the plank when we went to repair; when we got done, there was no cap on the top, but one more under the plank. I was there till the spring of 1848; had not charge of the mill till two or three months before I left; the first cap was on the string pieces; I judge it was solid—I pried the plank up from it, and saw it was solid. There was a scantling on the top of the plank when we repaired, none after we got done; one more cap under the plank than before. I tended mill for Runk last spring a year; don't think the mill run as strong in 1852  
30 as when I left.

And being again examined in chief, the witness said—The dam was out of repair in 1852, when I returned; the timber on the top of the plank was a kind of temporary fixing; the cap was not four inches square; it did not look permanent, or it would not be put on in that way; it was there in the spring of 1848, when I went there.

And being again cross-examined, the witness said—The dam was uneven—it may have settled; the mud sill was not level; the foundation was not very solid—there was a space in some places  
40 between the mud sill and the ground; the mud sill would be affected, unless it had a solid foundation. The remark of Mr. Runk

was, that the dam had settled, and it was necessary to repair the dam; Runk made the mark, at the time of repairs, to which we were to bring up the dam; the dam could not settle, unless the stones or timbers moved; in 1845, some stone was carted above the dam.

*Andrew T. Vroom*, being duly sworn, said—I have known the lands of James Ten Eyck since 1826 or 7; I lived there then two years; worked upon the meadows. I saw the premises last summer and last spring a year ago, before the last trial of this cause. There used to be a current from the bridge by the house to the willows; when I saw it last there was backwater to the bridge. I remember the boat root—in 1827-8, in ordinary stage of water, it was a foot above the water; it was used as a step to the boat, and to chain the boat to. Calamus grew below the willows when I lived there; calamus grew nearly up to the bridge in 1828. The meadows were in good condition—they were mowed both years, and turned off good grass; there was no muddy grass, and no bogs or bulrushes growing there at that time; in the low places and swamps the grass was heaviest; meadows were not then injured by permanent wet; meadows were not ploughed in the two years I was there; elder bushes grew on the south meadow; there was a running stream to the willows. I remember rifts in the river; the first rift above the dam was about two hundred yards above the old still-house, the second by Hall's and Coxe's; there was a ford there; difficult to go up these rifts in boat then. 10

And being cross-examined, the witness further said—I cut elders and reeds in the south meadow; the grass was not coarse in the meadows; they had been ploughed—could see this by the furrows; can't say how long before. The ground on both sides the stream, from house to river, was springy; it was not wide by the willows, but not easy to step across; in high water there would be backwater to the bridge—in ordinary times to the willows; this stream is a natural watercourse. I think the bridge is higher now than formerly; the water in the stream comes from springs west of plaintiff's buildings; there is ditch from the high ground; there is a pond by the graveyard fed by springs—one by Hall's—three ponds in all; backwater creates rushes and bogs; the largest willow standing there now is the willow I refer to—the willow nearest the house on the map; I meant the upper willow; rushes will grow in a year or two; I saw the ground the spring before the trial, March, 1852; bogs would not have been produced by wet 20 30 40

from the July previous, if not there before; calamus grew all along the ditch to the cove—some sprouts near the bridge; it will not grow in the depth of water now there.

*Thomas A. Hartwell*, being duly sworn, said—Upon looking at the deed of partition, *Exhibit* —I know the handwriting of Col. Vroom; the signature of P. D. Vroom, as subscribing witness to the deed of partition, is his signature.—The deed of partition was here again offered, and received in evidence.

The following deeds were then offered in evidence, being conveyances of the mill property in question :

Robert Bayles and others, administrators of John Bayles, deceased, to John Gulick.—Deed dated October 1, 1821.—Recorded.

John Gulick to John Runk and James Todd.—Deed dated 13th of May, 1822.—Recorded.

James Todd to John Runk.—Deed dated 14th January, 1824.—Recorded.

Record of Orphans' Court, showing order to sell lands of John Bayles, by his administrators, to pay debts. Book C of

Same record, Book B, showing letters of administration to Robert Bayles and others to the estate of John Bayles, deceased.

The plaintiff then further offered in evidence the paper referred to in the evidence of Jacob Bayles, and proved by him to be in the proper handwriting of Major John Bayles, his father, which paper purports to be a letter from John Bayles to James Ten Eyck, and is as follows, to wit:

Feb. 17th, 1818.

SIR,—I received a notice from you yesterday that I should take down my mill dam. I saw Mr. Bullock this morning; he says, when he repaired the dam last week, he made it only three feet high. I have a grant in my possession which gives me the right to build the dam three feet high. I saw this morning the night ice had lodged on the dam. If the dam is higher than three feet I will take it down.

JOHN BAYLES.

To Mr. James Ten Eyck.—*Prout* the said letter.

To which said letter, thus offered in evidence, the defendant, by his counsel, did object and except, and did insist, before the said court, that the same was incompetent and illegal, and ought not to be given in evidence to the jury; and the counsel on the part of the plaintiff then and there insisted that the same was competent

and legal; and the said court did thereupon declare and deliver his opinion that the said letter was not competent and legal evidence to be read to the jury; to which said opinion the counsel of the plaintiff did then and there except, and having reduced the said exception to writing, did pray that the said court would seal the same according to the form of the statute in such case made and provided, and it is sealed accordingly.

STACY G. POTTS, [L. S.]

The plaintiff then called, as a witness,

*Isaac P. Lindsly*, who, being duly sworn, said—I am a practical engineer and surveyor; I made a profile of the dam and took levels of the water in November and December, 1851; I took the level of the water above and below the dam, when the water was just running over the lowest part of the dam; the difference was 4 feet on the 8th of December; the water was 6 inches higher above and below the dam. I levelled down the tail race at the watering place of Mr. Stout—the difference was 4 feet 2 $\frac{3}{4}$  inches below the lowest part of the dam; at the foot of the tail race the water was one inch lower; allowing the difference of rise in the river, it would make the head 4 feet 9 inches from surface of the pond to the mouth of the tail race; there is a bar of stone just below the dam, which raises the water there so as to give a fall of 6 inches in 20 or 30 feet. Upon looking at a paper, marked *Exhibit* says, it is the profile of the dam made by me from actual measurement. 10

The plaintiff then offered in evidence the said profile, *prout* the same.

The witness then further testified—The dam is 632 feet long, the timber dam 232 feet long; the stone dam is quite an obstruction to the flow of water. The tumbling dam is the space the water usually flows over; thirty feet on the east end is not tumbling dam; on the west end the timber rose 1 foot 2 inches in 17 feet; the lowest part of the dam is 40 feet wide; when the water runs 6 inches over the lowest part, it will flow over a space of 154 feet; the rise of water at night is 7 inches. 30

Upon looking at a map of the premises of James Ten Eyck in question—It was made by me from measurement and the description in the deeds; I took some levels upon the meadow from the lowest part of the dam; the surface of the ground in the middle of the lower meadow is 1 foot 5 $\frac{1}{2}$  inches above the lowest part of the dam; in the middle of the meadow above the brook (upper mea- 40

dow), at a low place, 1 foot  $\frac{3}{4}$  of an inch above; west of that, towards the bank of river, 1 foot 6 inches; near the bank, 2 feet  $\frac{1}{2}$  inch; near the last, 1 foot  $1\frac{1}{2}$  inches; by the brook near the willows, 1 foot  $4\frac{1}{2}$  inches; west of willow, 1 foot  $5\frac{1}{2}$  inches; 220 feet north of brook, 3 feet  $1\frac{3}{4}$  inches; level of pond above graveyard,  $11\frac{1}{4}$  inches; low place near pond, 1 foot  $10\frac{1}{2}$  inches. In my memorandum, I call the low places sloughs. Near the last point, 2 feet 4 inches; north of that 2 feet  $\frac{3}{4}$  inch; middle of meadow near willows, 1 foot 5 inches; east of willows, 2 feet  $6\frac{3}{8}$  inches; slough southeast of this, 1 foot 2 inches; slough southeast of this, 1 foot; this is the slough extending down to the small cove; by the bank of the river, 2 feet  $1\frac{1}{2}$  inches; near Ten Eyck's upper line by bank, 4 feet  $2\frac{1}{4}$  inches; near this, 3 feet  $6\frac{3}{8}$  inches; on a ridge there, 4 feet  $8\frac{1}{2}$  inches; at the conjunction of dotted line and upper fence, 4 feet  $\frac{7}{8}$  inch; by the logs near fence, 2 feet  $6\frac{5}{8}$  inches; ridge, 4 feet  $3\frac{1}{4}$  inches.

The map is on a scale of two chains to the inch; the profile on map is a copy of the other; the horizontal scale is 3 feet, and the vertical 30 feet, per inch.

20 And being cross-examined, the witness further said—The field next above Ten Eyck's is not much higher; the bar in the mouth of the cove is no obstruction to the flow of water—it is not near the surface, and it is in backwater; the water has the same level to the willow tree by the house; the cove is fifty-six or sixty feet wide; John Ten Eyck said he had taken dirt out of the ditch above the cove. Ten Eyck's land could not be drained effectually to the pond, but could all be drained within the line of his land; the level of the ground by the ditch is about one foot above the water in the cove; when water rises to within a foot of the  
30 surface of the soil, it interferes with the growth of vegetation; can't say whether it would, if two feet below surface; if the subsoil was dry to within one foot of surface, water one foot lower would do no injury; the backwater goes near to the bridge. Level of the upper pond is still higher than the graveyard pond; water north of the meadows, where the land is higher than the meadows, is standing water.

*Philemon Dunn*, being duly sworn, said—I own lowland; have seen the meadows of Mr. Ten Eyck; water will run in under the soil of such meadows, and seek its level in the ground; the effect  
40 of water on meadow depends upon how often it is overflowed; an occasional overflow is a benefit, but if water remains under it

is injurious—brings in a sour grass; all wet land is worthless, if permanently wet—drainage is necessary to prevent such ground being worthless; I think ground must be dry over two feet to produce well; in the spring we can't set our fence when the river is bank full, and when two and a half feet is good and dry. Ten Eyck showed a hole in the meadows of Ten Eyck; water standing within eight inches of the top—not so in all the meadow; this hole was about half way from the house to the river; in lower meadow south of cove, water in the hole about same level as the water in the dam. I should rather think certain parts of the meadows injured by water; Hall's meadows not injured by water—they have a different grass; a portion of white clover on Ten Eyck's meadows in the high ground, but some places knot-grass in both meadows; bogs grow in wet lowland; the part of meadow I saw it is not worth while to cultivate—too wet; I was over about half of the meadows in September of this year; I was there two years ago—was the first time; if the water was an every day occurrence, there should be two feet above the water. 10

And being cross-examined, the witness further said—There were no elders growing in the south meadow when I saw the hole there 20—never grow on sour land.

*John V. Wortman*, being duly sworn, said—I knew meadows in 1817; worked on them frequently till 1826; from 1821 to 1826, worked on them every year—got hay on them; they were in very good condition—no better meadows along the river; no bogs or bulrushes there at that time, and no wild grass, with small exception, a small round spot near the small cove; timothy and white clover from the latter in low places; the ridges were not so good as the low ground; the most of the work I did was to carry off hay; that was east of the dotted line. 30

I remember the rifts; the first, 200 yards above still-house, opposite Peter Morris' farm; Coxe rift 400 yards above still-house, and one above this not as shallow as the Coxe rift; this was shallow water, running over stones, difficult to ascend with boats. I was on the meadows the day the first jury was there; they were not as good as in 1826—some bogs and a good deal more wild grass, sod not as good in low parts of meadow; calamus bed disappeared before 1851—the bed was in the ditch up even with the house; in 1851, there was a pond of water where the calamus grew; there was, in 1851, a fence half way down to the cove; formerly the banks were 40

a sufficient fence, and elders grew in low meadow; the cove has widened nearly up to the house.

And being cross-examined, the witness further saith—Calamus will die in dry ground. I formerly noticed the rifts in the spring when fishing in the river; there were two rifts above Ten Eyck; the backwater now extends near 400 yards above, at where the rifts were; the water is still shallow, but you can see no rifts; know of no other rifts in place of those which have disappeared.

And being again examined in chief, the witness said—The rift  
10 by Quick's island is the same now as in 1826—no backwater there.

*Matthew T. Van Pelt*, being duly sworn, said—I live in sight of the dam, about 200 yards off; have lived there for forty years; have been on dam formerly often; stone dam is different now from what it used to be; when Bayles was there the dam was nearly level from the mill to Nevius' bank; logs and timber notched in where the stone dam is now; the tumbling dam was longer then; water ran over all along to Nevius' bank; the stone dam has been raised a good deal, three feet I think; my meadows are below the dam—  
20 they used to run under first; the change in the dam has been done by littles; Mr. Ten Eyck's meadows now go under first; the banks are not so bold as they were formerly. I know one rift, Coxe's, a lively rift, stone bottom, and shallow water; the rift was not there in 1851. I worked on Ten Eyck's meadows one day forty or fifty years ago; they were very fine meadows, grass heavy; I always thought them the best in the neighborhood.

And being cross-examined, the witness further said—One bent has been taken off the turnpike bridge on the west side; water sets now more to the east side of the river above the bridge and dam; land is forming on the west side; Bayles' dam was broad, ten or  
30 twelve feet wide—could ride on it with wagons; the water went over this thirty-five years ago; can't tell whether it did thirty years ago; it was so while Bayles lived there.

*John Van Pelt*, being duly sworn, said—I have known the dam for twenty or twenty-five years, and when I first recollect the dam there was no stone embankment on the dam; pretty much the same height all the way through. The stone dam has been gradually increasing for a number of years; the first I recollect of the stone dam was in 1834 and 5—then a ridge of stone laid there. Have  
40 seen frame dam repaired several times; two or three times in twenty years it has broken out; the island below the dam is larger

and smoother; under the stone dam there was water where now there is gravel. Formerly, when Ten Eyck's meadows were under, ours were—now his are under first; I don't know that frame dam is any higher.

And being cross-examined, the witness further said—When I first knew tumble dam the plank were cross-wise of the dam; the rise of the stone dam has been gradual. Can't say what particular time I have known the water to go over the stone dam, as it now is. I am thirty-eight years old. The water sets to the east side of 10 the river.

*James T. Cox*, being duly sworn, said—I live on the east bank of the North Branch; Ten Eyck's north line is about by the place where the rift was. I have observed the back water has increased in ten years past. Where the rift formerly was the water is now level, and very little current; the water is now about two feet on the rift at an ordinary stage of water, formerly one foot; our watering place is just above; the stones lie there now as they did ten years ago; we could then walk out four or five feet; the stones were above the water—now they are about ten inches under at an ordinary stage of water; there were three or four stones there to 20 together about equal depth, now all under water; the bottom of the river there is stone; it was filled up with stone to make the ford better; I think it was never washed out; stones lie in the same way; we used to walk across without getting over boots, now it can't be done.

And being cross-examined, the witness further said—Nine or ten years ago we could walk across; don't know of any change in the direction of the current there; I crossed the rift last summer a year ago; I saw changes in depth of water from night to morning. Quick's rift is the same as formerly. I have not noticed that 30 Mr. Ten Eyck's meadows are more overflowed than formerly—I have not noticed.

*James Hull*, being duly sworn, said—I have known the Ten Eyck meadows for thirty years; I live just above the village of North Branch. There is more backwater now than formerly, the banks of the river are less bold. I remember the boat root—we always stepped on it to get down to the boat; it was circular—turned down towards the water about three inches. It was sound and firm—three inches in diameter; I tried it two years ago—there was no give. When the water is just skimming over the dam now the 40

root is seven inches under water ; the tree over the root leans some towards the river—this would not affect the root an inch ; the root extends out from the bank eight or ten inches ; that ordinarily out of water formerly three, four, to eight inches. The banks of the ditch running up to the house were formerly bolder than now ; there was no fence formerly, banks were sufficient, but now the fence runs half way to the river. In 1833-4, I worked on the meadow got from Hall ; it was good meadow—no bogs—the crop good. Eighteen years ago the root was four or five inches out of  
10 water ; the root is there now.

And being cross-examined, the witness further said—I don't know whether the root went under gradually or not ; I saw it four or five inches out of water twelve or thirteen years ago ; the tree to which the root was attached, being a birch, has been gone as long as I remember ; the tree now there is not sunk down—it is a pin-oak ; the ground is level by the tree ; there are bogs now where I mowed ; the lower part of the Hall meadow is boggy now. I don't know of stone dam being raised.

*Cornelius V. Hall*, being duly sworn, said—I am a son of Den-  
20 nis Hall ; own lands next above Ten Eyck's ; have lived there near twenty years ; I know the rift at Quick's ; there used to be two rifts below that—one by Coxe's below the old ford, and one below that—none there now ; can see the bottom of the old rifts—the water is shallower there than in other places ; the water is higher at these places—can't tell how much—think a foot deeper. Ten Eyck's meadows overflow first ; a part of them used to go under before mine, but not so much of them as now ; I have one bog meadow—it is not along the river. The plaintiff's meadows are more wild and boggy now than fifteen years ago ; they used to  
30 turn off a heavy burden of good hay ; they were not then boggy ; I see the meadows every day ; before 1851, the product was heavy ; wet makes wild grass, not good for hay or pasture ; spear-top grass grows on knolls in his meadows ; the wet affects land for cultivation—it is not fit for it—these lands not fit for it in 1850 ; worth four or five dollars less per acre per year than formerly ; these meadows have been so injured for eight or ten years past ; I worked on them four years ago last summer ; I mowed from high ground through a slough—it was the best part of the meadows ; in slough there were bogs and wild grass ; the grass was muddy from  
40 backwater—it stood up ; if muddy from freshet going over it, it would have been down.

And being cross-examined, the witness further said—I am twenty-eight years old. I think my father moved there about twenty years ago; he sold part of these meadows to Ten Eyck not long after. My ground is higher than Ten Eyck's—where they join, about on a level; the upland bank is springy.

*James Ten Eyck*, being again called, said—I took a letter from my father in February, 1851; he read it, and said my father requested him to take down his dam; he asked me which part of the dam; I asked him if he did not say in the letter; I told him he had raised the dam, and injured the meadows; asked him to look 10 if they were under water and ice; he said it would not injure them—the water would soon run down; that there had been a rise in the river, and froze suddenly, and night ice had lodged on the dam; there was no night ice there that I could discover. I went over to make compromise with him in June after. At the first view in this case, I told him he had raised the dam; he said he had raised it, and intended to raise it higher the next summer.

And being cross-examined, the witness further said—Mr. Runk repaired his dam almost every summer. When Mr. Runk spoke, at the view, of raising the dam, most of the jurors in attendance 20 were present on the first and second view. I was a witness at the last trial, but was not examined about this; it was known to counsel. My father is eighty years old—has been confined to the house a year or more. When I went with the letter, George Runk came in as I went away. I did not tell Runk he had not raised the tumbling dam; I told him he had raised the stone dam and tumbling dam. I was careful of George, not to speak of this matter in his presence. My brother John married Mr. Runk's daughter. There are some long posts at west end of tumbling dam where the stone and frame dam come together; they raise the dam for a space of 30 twelve feet; they are covered with stone now.

*Garret Nevius*, being duly sworn, said—I live on the east side of the pond, between the lands of Van Pelt below, and Coxe above; have known Ten Eyck's meadows for twenty years—they were in a good deal better order than at the present time; they were good meadows eight or nine years ago; on the part that Hall used to own I cut grass about fourteen years ago—good quality of grass, timothy and white clover—heavy burden; all the bogs that I remember on that meadow then in that lowland was a little slough that run up twenty or thirty yards; the meadow had 40

some bogs on it in 1851, but not as many as before that time; the bogs came from the wetness of the ground. I believe Runk has raised the dam, and made the ground wetter; at our watering place, some twenty or thirty feet, our shore has worn away by the stream setting that way; our watering place was at a willow—the tree went down twelve years ago—the stump is there now, six or seven inches under water; eighteen or twenty feet from the shore, the water is deeper; the roots are not worn away; water is higher over the roots. I knew the rifts, one opposite the still-house and  
 10 one at Coxe's; the water is higher on these rifts than formerly; not as much fall; can run boat up there easier.

And being cross-examined, the witness further said—The remains of the body of the tree were out of water—the roots were under water originally, and are still; it is 21 years since I moved there; I was born in 1815. Hall's meadow was ploughed, and had wheat and rye on it. I know nothing about Ten Eyck's meadow in 1851, 1850, 1849, 1848, 1847, or 1846.

*John Ten Eyck*, being duly sworn, said—I work the farm—lived there since I was born, 38 years ago; spoke to Mr. Runk about  
 20 dam in 1838; he said he had been working on dam, and was tired; I said he was raising the dam, and was afraid it would injure the meadows; he said Esq. Quick said it would do no hurt if made a foot higher; I told him it might not injure his meadows, but it would ours very much; the conversation was accidental. I did not see him raise the dam, or that he was raising the dam, but he was working at it, and I saw the effects; I saw the effect of raising the dam by the backwater in 1838, August; by the backwater, I saw the effect at the boat root; the boat used before to run under the root, after this the root would be on the side of the boat; before  
 30 the raising the dam the root was out of water ten inches—it was still out of water after the first raising of the dam in 1838. Mr. Runk had been working at the frame dam then. The banks of the cove were more bold formerly than now. Prior to 1838, we ploughed the lower meadow; we ploughed one meadow, and had grass in the other; the ditch was a fence of the lower meadow from the upper; there were only two panels of fence by the house; the banks were two and a half to three feet out of water at ordinary stage of water; the stream was clear running water, gravel bottom; ten or fifteen yards below the bridge I took dirt out of  
 40 the ditch, in the fall of 1851, mud, two and a half feet wide; took the dirt on the upland; took no dirt out below the willow tree;

formerly the ditch there was three to five feet wide, now twenty-odd feet by the willow—this not from carting dirt away; the backwater now is to the bridge; no fall was made by digging out dirt; the backwater was there before; it is a running stream when the mill starts every morning; the rise of water at night is seven inches—was so in 1851.

I know the rifts—Nevius' rift—Coxe's rift above the ford—rapid; I saw the bottom last summer a year; rift has disappeared; the bottom has the same appearance; the water falls at Quick's island. Before 1838, and till 1849, the upper meadow was di- 10  
vided by fences; after 1849, we could not keep fence; the meadows before 1838 were very good, as good as any along the river—could plough there; they afforded the earliest pasture—raised corn and wheat and good grass, heavy as could grow; the ridge by C. Hall's not as good as the low ground by the river. In 1843, we ploughed the upper meadow; the lower meadow was seeded down in 1836; since that, too wet to plough it in the spring. The boat root was out of water, in 1839, four inches, in 1851, under water nine to twelve inches when the water was just running over the dam; some repairs were made to dam every summer; we 20  
have not cut any clover hay since 1846, no hay since 1849, then very light; the lower meadow has not been cut in ten years; the elders that used to grow in the lower meadows have disappeared; the water from pond soaks through the meadows—know by post holes and low places; the water rises in holes as in the pond; more overflow now, not so often twenty years ago; the stone dam not as high twenty years ago as at commencement of this suit; there was no change in the level of the water from the commencement of this suit to the former trial of it.

And being cross-examined, the witness further said—Runk and 30  
his man worked on the dam with timber and gravel. I made no show of the hole at the river where the water did not come. Fifteen to twenty cattle on the farm, and some sheep; we pasture the upland and lowland; can't say how often we used to plough meadow. I had a stick in the hole mentioned and in pond; the rise and fall of water was the same on each.

*James Campbell*, being duly sworn, said—I was a juror on the former view. John Ten Eyck said to Runk, you have raised the dam; Runk said, what if I have raised it, I'll do it again. These meadows suffer for want of drainage; wet land will not produce 40  
good grass.

*John C. Garretson*, being duly sworn, said—Water from the river soaks this land; I saw a hole dug by John Ten Eyck in the upper meadow, not on the highest or lowest ground, about the average; it was not a wet time, ground was dry on the surface; at the depth of one foot we came to wet, at twenty inches to water; this would injure crops; such meadows ought to produce three tons of hay to the acre; I suggested the plan of the hole.

The plaintiff having here rested his case, the defendant produced the following witnesses to sustain the issue joined on the part of  
10 the defendant. The counsel of defendant stated, in opening defence, that the question was, whether the dam had been raised since July, 1831, and the evidence of defence should be confined to that issue; and if any witness volunteered to speak of the dam prior to that time it was not evidence, and should be considered as ruled out.

*Abraham Quick*, being duly sworn, said—I reside one mile up the river—moved 20th April, 1801. My land runs down on the east side of the branch to opposite Ten Eyck's north line; used to travel up and down the branch once a day, and now twice a week;  
20 generally pass the dam; that dam has not been raised in twenty-five years; think the dam is lower now than twenty-five years ago. I have noticed the backwater against the banks of the meadows; the water is not as high in the banks of the pond, by six or eight inches, as it was twenty-five years ago; the backwater does not extend as far by one hundred yards as it did twenty-five years ago; I speak of a time when the water is just running over the dam—in floods you can't tell anything about it. I remember a brook which comes out by Coxe's on the east side; it did not formerly back up quite to the brook, does not now back up, by one  
30 hundred yards, to Coxe's rift; the deep water is on the east side of the river; land is making on the west side, and a bar is forming across the river at the mouth of the cove; the water, in time of a freshet, breaks over at what is called the dead river, away above on Peter Ten Eyck, and runs out above Cornelius Hall's line; the ground at the upper pond is three feet higher than the water in the pond. The rifts in the North Branch are moveable, the bottom is gravel; there is a rift now near mouth of Wm. Coxe's brook; the wooden dam has gone out several times in my recollection by the ice. The upper part of Dennis Hall's land was formerly low,  
40 is now tillable; I have known the meadows forty years—never

saw handsomer timothy than I saw grow there then; they had corn on it two or three years—worked too much; it kills lowland to work too often; the lower meadow, and part of the upper, is pasture land; there was a marsh on Runk; the ditch from the house to the cove is more opened now, and the ground drier—a part, where it used to be knee deep to horses, is now filled up. There is a run from above Ten Eyck's barn—water runs free in showers; Runk's marsh is filled up by wash; there is enough fall to carry off the ponds; in high freshet, the water runs over from above; the dam has not been raised in a few years past. 10

And being cross-examined, the witness further said—I was born in 1774; the dam was a foot higher forty years ago than now.

The letter of John Bayles was here offered to the witness for his inspection, and he was asked whether, upon seeing the statement of John Bayles, that in 1818 the dam was only three feet high, he would not change his opinion as to the height of the dam forty years ago and twenty-five years ago. Counsel of defendant, in making the objection, offered to have all testimony relating to the dam or meadow prior to July, 1831, overruled.

The defendant, by his counsel, objected to the inspection of the 20 said letter by the witness, and to the question to be propounded thereupon to the witness, and insisted that it was incompetent and illegal that the witness should examine the said paper and answer the said question, and the counsel on the part of the plaintiff insisted that the same was competent and legal; and the said court did thereupon declare and deliver his opinion that it was illegal that the witness should inspect the said writing and answer the said question: to which said opinion the counsel of the plaintiff did then and there except, and having reduced the said exception to writing, did pray the court would seal the same, according to the form of the 30 statute in such case made and provided, and it is sealed accordingly.

STACY G. POTTS, [L. S.]

The witness, being then further cross-examined, said—There never was any rift by the still-house, or two hundred yards above it; the fall from my rift to the dam is not changed; I determine the end of the backwater by the ripple in the water; twenty-five years ago there was no ditch from the house to the river—all mud not dug out; the meadows have deteriorated for want of cultivation—now they have got into better grass. Bulrushes come from spring water, not river water. A small ditch would dry all the meadows; 40

the ground along the willows is drier now than formerly ; the water in the river rises in the morning from the mills above starting ; if the water has free course over the dam it will not rise in the pond or cove at night ; there is no backwater when there is a current.

*Joseph Bangham*, being duly sworn, said—I have done all the work on the dam since 1838 ; never discovered any work done by any one else ; may have been some new plank, no new timber ; the dam has not been raised by me ; I never framed any timber to raise it with—never was ordered to raise it ; I am satisfied that it  
 10 has not been raised by anybody else since 1838, from appearance. When the water is six inches over the dam the lowest point along the bank is twenty-two inches and a fraction above the water ; in the upper part of Ten Eyck's meadow, five feet above ; at a tree on line between bank and Ten Eyck's, rising two feet ; new ground is forming along Ten Eyck's shore. In 1851, the dam was crooked, out of line four or five inches ; the end of the frame dam was raised some—it was so when I came ; the inequality was from the mudsill—it settles ; the dam was not out in November, 1851 ; it went out in January 1852 ; I was called on to put in a part ; ice  
 20 rift, the water back while repairing ; there were three strips put on to raise to the level ; I had to put on pieces. I don't recollect the repairs in 1846—can't say I worked there that year—have since ; since then the dam has not been raised.

And being cross-examined, the witness further said—In 1838, I planked the dam ; under the gravel, the plank crossed the stream—at the tumble, up and down the stream ; never saw the plank when they run across ; the up and down plank four feet long ; the second timber was across the bearers ; the most of dam had a second cap in 1851, some part in 1838 ; in repairing the dam, we  
 30 levelled the other parts of the dam—cut posts by the others there—posts irregular, string pieces vary in thickness ; if thick, we made posts to suit ; the mudsill part on gravel, and part on stones ; when the second cap was put on, the mud sill had all sunk ; the thickness of the cap would be added if the plank carried over it. I found mudsill without foundation.

*Millard Tunison*, being duly sworn, said—I live at the Burnt Mills ; used to walk by Ten Eyck's ; harvested on meadows twenty years ago and upwards ; there was a cove at the hog-pen thirty years ago ; I saw boys skating on it ; thirty or twenty feet wide—can't  
 40 say what the ordinary width ; calamus in the ice ; more water there

than when I last saw it ; water was up to bridge in 1842 ; can't say whether there was a rise in the river or not ; three or four plank on the bridge—quite some water below ; it was a wet time in April .

And being cross-examined, the witness further said—There was no running stream below the bridge—the river was frozen over ; this was years ago.

*George W. Runk*, being duly sworn, said—I put two pieces on the east and west end of the dam in 1834, twenty-five or thirty feet long each ; have known and worked at the dam for twenty years and over ; the plank run up and down stream ; that dam has not been raised in twenty years ; have no knowledge of the dam being raised in twenty years prior to July 1, 1851 ; it was not raised in twenty years ; I would have known it if it had been raised ; only one day's work done in that time that I did not assist, and that was since July, 1851 ; I recollect work being done when Wolverton and Crammer were there . In 1846, I worked at the dam—it was not raised any, I think ; did not consider we had raised it . Ten Eyck's meadow bank 2 feet to  $5\frac{1}{2}$  higher than dam ; there is a large log opposite Nevius' bank 30 feet long—bark off of it ; there is new ground making on Ten Eyck's shore, and grass growing on it a space 80 or 90 feet long ; above this there are other formations ; at the mouth of the cove there is a bar, saw leaves lodged on it—bar is near the top of the water ; the depth of water by the island is less ; the channel between the island and the shore is much less—can go over with shoes . Almost opposite Nevius' watering place there is a formation of ground six or eight feet wide and thirty or forty feet long ; there is a slough in the north of Ten Eyck's meadow ; calamus will die in dry ground—will grow, suppose, in backwater ; water comes down to the cove from back of Ten Eyck's, formerly a ditch . I remember John Ten Eyck showing the jurors a hole which John Ten Eyck dug in the meadow ; no water came up in it, or very little . I know James Ten Eyck—heard him sworn about conversation with father ; I was there . Ten Eyck came in mill with letter ; father asked him if his father was getting crazy . James said it was not the frame dam he complained of, but the stone wall—you have been raising that at boat tree . The cove is wide at the mouth, but filled up ; the dam did not go out in November, 1851, but January, 1852 ; Bangham repaired it then—No one but Bangham had supervision . The pond and mill dam does not damage the meadow ; water in the ponds and from spring above his meadow has to find its way through the meadow to the river . I

know the boat root; the pin-oak is held by roots; the earth under is washed away; hollow under root is carried down by the leaning of the tree; the hole referred to was two and a half feet deep, water one inch in it. I have been twenty years about the mill; the power is less now than formerly. In conversation with the plaintiff, six or seven years ago, he said—good morning, your island is making; I remember when they used to train on it; it had been washed by carelessness and neglect. He made no complaint about the dam; the water never ran over stone dam but in freshets, and then at same  
10 time as the meadow banks.

And being cross-examined, the witness said—The plank were always laid up and down stream, June 1834; the dam was not raised by the piece put on. In 1846, we took cap off the comb of the dam, and put one under, and took part from the top of the plank; The cap was a permanent part of the dam before 1846, and as long as I can remember; not used to raise or diminish the height. The surface of the dam is irregular; the stone dam has been raised—I can't say how much; it was raised in 1846.

Coxe rift is there yet, this side of the brook—not as strong as  
20 formerly, on account of change of gravel bottom—by filling up or somehow; the quantity of water in the hole referred to was so small as to be nothing. When the jury came back there was no water, only wet soil in it.

*Arthur S. Ten Eyck*, being duly sworn, said—I own lands above Cornelius Hall's; our lands are above Coxe's; water comes on our meadow from above—muddies the grass; my land is beyond the influence of backwater from the mill pond—in low places it backs in some. Runk's dam has not been raised in twenty-five years, to my knowledge—I have noticed no difference in twenty-  
30 five years; no more water by Ten Eyck's land than twenty years ago, but the land is making on the west side. I have seen the the boat root—saw it about the time this suit was first tried; the pin-oak leaned, and this would drive the root down in the water. There is a ditch from barn-yard to cove—have seen considerable quantities of water running down it. The ponds above the meadow are fed by springs; in freshet the water backs up dead river and out at cove above Hall's line, and does not go to the North Branch, but goes over Ten Eyck's land; four years ago there was water from freshet over these lands; in freshets, the  
40 water will flood back over the meadows from above before it will overflow the meadows from backwater from the pond; recollect

when Hall mowed the muddy grass on Ten Eyck's meadow the muddy water came from above; mine were damaged at the same time. When our lowland gets in the condition of Ten Eyck's, we plough—this keeps down bulrushes; the part Ten Eyck got of Hall was formerly injured by excess of cultivation; it now wants ploughing—can plough it; it has not been ploughed in a number of years; the greater part can be drained; our land, which is not affected by freshets or backwater, has bulrushes in it—they are natural to it; water runs up further now in the cove, because dirt has been taken out and lowered the bed; it is no wider; calamus 10 has disappeared, but the ground no wetter; none of the meadow but could be made productive; Hall's meadow no higher than Ten Eyck's.

And being cross-examined, the witness said—I helped get harvest in the Hall meadow in 1851—all of it was ploughed but a small place near the small cove; there were not as many bulrushes there—some near line of C. Hall and small cove; bogs produced by wet—they want a living spring; bulrushes may be found where the ground is dry in summer; the soil by the pin-oak does not indicate that the tree has settled—it is bent; I can't tell the position 20 of the root.

I have seen Ten Eyck's meadows manured; I think that three years' cultivation is excessive. I saw rift at still-house last summer a year ago, saw by the surface there was a fall of water—this when water was just running over the dam. There is an evident fall at Coxe's rift—the rift not as bold as formerly; the rift has worn away some; the rift by my farm has done so also; can see Coxe's rift when the water is over the dam when the river is full; I undertook to draw a seine over it, but could not; can see it thirty 30 times a year; rift at Esquire Quick's can be seen when usual quantity of water in the river; I go over Ten Eyck's farm to my home; the old river is about thirty feet wide.

*William Runk*, being duly sworn, said—I am forty-odd years old. In December, 1821, I went to the North Branch—remained there till March, 1833; was away two years, but was home each summer. I then returned, and remained till winter of 1842; since then have lived at New Brunswick; first two years home every month, and since then home from five to twenty times a year; the whole dam was familiar to me from a schoolboy; from my earliest recollection, the whole dam, from end to end, has remained the 40 same; I have hardly known a winter that the dam has not been

carried away, more or less; when the centre of the dam was injured by ice, the damaged places would be brought up; the ends have not varied three inches; the dam has not been raised since 1821; I say this from observation of a good many landmarks—the banks, other roots besides the boat root; the boat root is lower, ground giving away around it; it was never very far from the water—it is pressed over—the ground has filled up under it, so that it is not far from the bottom; I think another root was used as a step, and to tie to, which is there yet. There is not so much water in  
 10 the cove below hog-pen as formerly; there was very little or no current at the bridge; water never ran over the stone dam by the mill, unless in freshet—to do it, the water must run over tumbling dam two feet and three inches; the stone dam was as high in 1830 as now—it was then made permanent.

And being cross-examined, the witness said—The pin-oak at the top leans five feet; the cove is filled up by bar at the mouth to near surface of water; there is a current from the bridge to the dam—a chip thrown in the stream at bridge would in time find its way over the dam; I think the surface of pond would extend up  
 20 to hog-pen; I have skated up the cove in 1830, water being ordinary height.

*Andrew Ten Eyck*, being duly sworn, said—I lived, in 1820, on the property which A. S. Ten Eyck now lives on; I knew the stream—the water has not been raised permanently within twenty-five years; the water has changed its course to the east side since I went away; I think the ground was drier in 1851 than it was twenty years before; our land, when I lived there, was subject to freshets; my recollection as to dead river corresponds with A. S. Ten Eyck's. I believe there was formerly three rifts to Esquire  
 30 Quick's; rifts in the river will change the currents, and sunken ice will affect these rifts. I was on the ground ten years ago and last September; the water looked about the same. I don't think, from observation of the water, that the dam has been raised; the ditch from the ponds back of Ten Eyck's meadow is not sufficient to carry the water, and that affects Ten Eyck's meadow. I am forty-four years old, and live four miles above A. S. Ten Eyck's.

*John Vanderbeck*, being duly sworn, said—I live at Lamington, five miles from North Branch; have seen Ten Eyck's lands two or three times, once in summer time, three years ago; saw nothing  
 40 troublesome more than any other lowlands; have lowlands myself

that lay similar to them; these lay higher than mine, that is, more of a bank by the river; did not see any of what I call bogs there; meadows have been pastured, looked poor; I would have ploughed and underdrained them; knolls had very little on them—looked the poorest; it would have been my plan to have ploughed and underdrained them. Dam don't look to me to have been raised in twenty years—I see it as I pass on the turnpike. When the grass gets out of ours, we plough and manure, especially the highest knolls, and blind ditch the lower parts; my lowlands are lower, and harder to drain than these; there is two feet full from the 10 graveyard pond to the river; I raise everything in my meadow but wheat, and could that. Ponds of spring water west of the meadow injure it; the ditch from there through the meadow was obstructed all along when I saw it—the water did not run. The ponds could be drained; the sloughs in the meadow could be drained to the river; the rest of the meadow does not want draining.

And being cross-examined, the witness said—We fence our lowland; in digging post-holes we do not come to water; find gravel at the bottom of a post-hole.

The defendant having here rested his defence, the plaintiff offered, by way of rebutting testimony— 20

*Peter A. Dumont*, who being duly sworn, said—I was a juror in this cause, and summoned upon the view; the backwater extended above Coxe's; there were no rifts from Quick's island to the dam; the extent of the backwater was obvious from the ice marks.

The plaintiff also offered, as rebutting testimony, the letter of John Bayles, above referred to (*prout* the same), to which letter, thus offered in evidence, the defendant, by his counsel, did object and except, and did insist, before the said court, that the same was incompetent and illegal, and ought not to be given in evidence to 30 the jury; and the counsel on the part of the plaintiff then and there insisted that the same was competent and legal, and the said court did thereupon declare and deliver his opinion that the said letter was not competent and legal evidence to be read to the jury as rebutting testimony; to which said opinion the counsel of the plaintiff did then and there except, and having reduced the said exception to writing, did pray the said court would seal the same, according to the form of the statute in such case made and provided, and it is sealed accordingly.

The counsel of the defendant offered to have any testimony as to the dam or meadows prior to July, 1851, overruled.

COURT OF ERRORS AND APPEALS.

JAMES TEN EYCK

v.

JOHN RUNK,

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IN ERROR.

Abstract of errors assigned.

1. That the court, on the trial of the issue below, overruled relevant legal and competent evidence offered by the plaintiff in error.

2. That judgment was rendered for the defendant in error, when by law it should have been rendered for the plaintiff in error.

G. H. BROWN,

*Attorney for plaintiff in error.*

Warrant of attorney.

Joinder in error by

FRED'K T. FRELINGHUYSEN,

*Attorney for defendant in error.*