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NEW JERSEY COURT OF ERRORS & APPEALS.

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THE CENTRAL RAILROAD COMPANY OF NEW JERSEY vs. JACOB VALENTINE.	}	<i>Writ of Error to the Supreme Court of New Jersey.</i>
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FRED'K T. FRELINGHUYSEN, *Att'y of Pl'ff in error.*
HUGH M. GASTON, *Att'y of Def't in error.*

This is an action on the case brought by said Valentine against the said Railroad Company to recover damages for an alleged injury done his mill by reason of said Railroad Company taking down a mill dam. The suit was brought in the Somerset Circuit, and the cause tried before His Honor Justice Haines, at the September term of that Court, 1857.

A verdict was rendered and judgment entered thereon in favor of the said Railroad Company.

On the trial of this cause at the Circuit the following bill of exceptions was allowed and sealed :

SOMERSET CIRCUIT COURT.

September Term, 1857.

JACOB VALENTINE vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.	}	<i>In Case.</i>
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Be it remembered that on this 2d day of September, in the year 1857, at the Circuit Court held at Bridgewater in and for the County of Somerset, came on to be tried the above stated cause upon the pleadings and issue joined therein (prout the same,) at which day came before the said Court as well the said

plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury in this cause situated and summoned likewise came and were sworn to try the said issue so as aforesaid joined, and upon said trial it appeared among other things that Miles Swaney owned the lands and premises in the declaration mentioned called Latourette Mills, consisting of water, mill, dam, dwelling house, and acres of land, prior to August, 1847, and down to the present time, excepting as part of the same were conveyed to the defendants as hereinafter stated. That on the 1st of April, 1852, the said Swaney leased the mill and appurtenances to William Patterson for one year, at a rent of six hundred dollars; that said Patterson, by verbal agreement, without any further lease, used and occupied the said mill and appurtenances on the same terms for the year ending April, 1854, and paid said Swaney a rent of six hundred dollars therefor; that on or about the first of April, 1854, said Patterson made an arrangement with the plaintiff without any action on the part of said Swaney, by which for one hundred dollars paid by said plaintiff to said Patterson, he, the said Patterson, vacated the said mill premises, and the said plaintiff took possession thereof, and continued to use and occupy the same, paying the said Swaney six hundred dollars per annum for the same; that the defendants gave in evidence a release from Miles Swaney to the defendants, dated August 10, 1854. (Prout the same.) That the railroad of the defendants crossed this dam and premises west of the stream by an embankment to the margin of the stream, and thence by an open bridge extending beyond the stream and a highway east of it; that the old open bridge required renewing, and the company proposed to fill up by a solid embankment two hundred feet of that part between the highway and the stream, and to erect a new open bridge for the residue of the space to the old abutment, and to make a new abutment there; that since the construction of the railroad the old embankment formed a part of the dam—the western part called by the witnesses the back dam joining it

on the north—and the tumble dam running from the south wing of the old abutment to the mill race; that the defendants in order to lay the foundation of piers and abutments for the new bridge, cut the dam so as to draw off the water from the mill pond on a part of the premises which had been sold by the said Miles Swaney to the defendants by deed, dated August 11th, 1847, and recorded October 21, in the same year, prout the same deed, the plaintiff also proved damages, and the defendants offered in evidence a map of the premises made from actual survey of the mill and railroad premises, showing the new embankment and bridge on the eastern, and the old embankment, tumble dam, and back dam, and a back dam built on the western side of the stream (prout the same,) that the water was drawn off longer than necessary to lay the foundation of the piers and abutments above referred to.

The said judge charged the jury among other things as follows:

“Again it is insisted that the defendants were justified in opening the dam because the land in which that part was, had been conveyed to the company by deed dated Aug. 11, 1847, duly recorded October 21, 1847. The deed, it is admitted, covers that part of the dam which was removed, and the registry is constructive notice of it.

“If there is in it no reservation of the dam, then the whole right and title for all contained within the bounds of the land described passed absolutely to the company, then they had the right to build upon the ground what they pleased, and to remove this part of the dam at their pleasure. In that case they had the legal right to do what is now complained of.

“The question then arises, Was the dam reserved? The reserving clause is, ‘Excepting and reserving to the said Miles Swaney, his heirs and assigns forever, the right and privilege to keep up and retain on said premises the small house and yard thereto attached, as the same is now located, forever. And also

the right and privilege to enter upon said premises from time to time, to make, amend, and repair his mill dams, and to remove from the pond the manure that may there accumulate from time to time.'

"Here Swaney expressly reserves the right to maintain the small house and yard, and uses very explicit language to signify that intent. When speaking of the dams he does not say he reserves the right to maintain them, but the right to enter upon the lands conveyed for the purposes of making, amending, and repairing his dams.

"If it has been intended to reserve so much of the dam as was upon this lot, it would have been very easy to have so expressed it. In reserving the house and yard, appropriate language was used; here different language is used, and we must suppose for a different intent.

"He reserves the right to enter to repair his dams. How can that be called his which he there conveyed to others. It was the right to repair *dams* more *than one*, showing that it contemplated more than or something besides the repairing of this part. There are several places of contact, where the dams and company's land so conveyed joined, and where Swaney might find it necessary to enter to repair.

"Such is the plain reading of the deed, and such the fair construction of its language.

* * * * *

"The question is one purely of law, and upon that question my judgment is against the right of the plaintiff to recover in this action."

The plaintiff by his counsel excepted to the ruling of the Court in the charge as above recited, and prayed that this his bill of exceptions might be sealed, and it is sealed accordingly.

DANIEL HAINES, *Judge*.

At the June term, 1860, the said bill of exceptions was argued before the Supreme Court, and the said Court gave judgment reversing the judgment of the said Circuit Court.

To this judgment of the Supreme Court the present writ of error is brought.

On the return of the writ of error, errors were assigned as follows :

NEW JERSEY COURT OF ERRORS & APPEALS.

THE CENTRAL RAILROAD OF NEW JERSEY, } *Assignment of*
 vs. } *Errors.*
 JACOB VALENTINE.

Afterwards, that is to say, on the first Tuesday of April, eighteen hundred and sixty-one, before the Court of Errors and Appeals of the State of New Jersey, at Trenton, comes the Central Railroad Company of New Jersey by Frederick T. Frelinghuysen, their attorney, and say that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error in this, to wit :

1. That by the record aforesaid, it appears that the judgment aforesaid was given against the said "the Central Railroad Company of New Jersey," whereas by the law of the land the said judgment should have been given for the said "the Central Railroad Company of New Jersey."

2. ERROR.—There is also error in this, to wit : Because it appears by the said record that the land where said dam was located, had been conveyed to the said Company by deed dated August 11th, 1847, duly recorded October 21, 1847, without there being in said deed any reservation of, or relating to the dam in question, and yet the judgment in favor of the said Company is reversed.

3. ERROR.—There is also error in this, to wit : Because the release to the Company, dated August 10, 1854, releases them from this claim, and yet the judgment in favor of the Company is reversed.

And the plaintiff in error prays that the judgment for the

errors aforesaid, and other errors in the record and proceedings in the premises aforesaid, may be reversed.

FRED'K T. FRELINGHUYSEN,

Att'y of Plaintiff in Error.

The following is a copy of the paper referred to in the Bill of Exceptions as a release, dated August 10, 1854 :

ARTICLES OF AGREEMENT had, {made and concluded this tenth day of August, in the year eighteen hundred and fifty-four, between Miles Swaney, of Brooklyn, in the State of New York, party of the first part, and the Central Railroad Company of New Jersey of the second part, witnesseth—That whereas, Miles Swaney is the owner of the mill property and lands situate at or near Boundbrook, and partly in the Township of Piscataway, in the County of Middlesex, and partly in the Township of Bridgewater, in the County of Somerset, and which he purchased of Abraham Smalley and John Smalley, and which they conveyed to him by their deed, dated November 2d, 1846, and is recorded in Somerset Clerk's office, in book E, No. 2, page 388, and in Middlesex Clerk's office, in book 44 of deeds, pages 283, '4 and '5, and overwhich the said Central Railroad is constructed ; and whereas, the said Central Railroad Company propose to close up from one hundred and fifty feet to two hundred feet of their Bridge at Boundbrook, over the lands of the said Miles Swaney, in the township of Piscataway aforesaid, by erecting good and sufficient embankments for their said Railroad, instead of an open bridge, as at present ; and whereas, also the said Miles Swaney claims to have sustained damage upon his said lands and to his said mill property and appurtenances, and to the improvements and erections thereon, by reason of the embankments, bridges and other works of the said Railroad upon and about his said mill premises. Now, therefore, in order to put an end to all controversies upon and relating to the premises,

these presents witness that the said Miles Swaney, for and in consideration of the sum of four hundred dollars, to him in hand paid by the said "the Central Railroad Company of New Jersey," the receipt whereof is hereby acknowledged, and he therewith fully satisfied, contented and paid, hath, and doth hereby agree to, and with the said the Central Railroad Company, their successors and assigns; that they, the said "the Central Railroad Company of New Jersey," shall be, and are hereby authorized and empowered to close up two hundred feet in length of the east end of said bridge, by removing the said bridge, and in the place thereof to erect, keep up, and maintain on the lands of said Swaney, good and sufficient embankments of dirt, gravel, stone and such other materials as they may think proper, for the use and purpose of their said road. The said Railroad Company to make and keep open a sufficient highway or passage way for the public road where the same is now located, until such time as its location may be changed by lawful authority.

And the said Miles Swaney doth by these presents assign, transfer and convey to the said "the Central Railroad Company of New Jersey," and to their successors and assigns, sufficient of his said land (should more be required than said Company now own,) for the protection, maintenance or erection of the slopes to the embankments or stone work of the bridges at Boundbrook aforesaid, so as to give sufficient width at the top of said embankments to lay down the necessary set of tracks and rails for the uses of said Company.

And, also, the right and privilege to enter upon and pass over from time to time such lands of the said Miles Swaney as are not enclosed (doing no unnecessary damage) for the purposes of making, amending or repairing said embankments, bridges or works of said Company.

And for the consideration aforesaid, I, Miles Swaney, do for myself, my heirs, executors, administrators and assigns, remise, release and forever discharge the said "the Central Railroad Company of the State of New Jersey," their successors and as-

signs, of and from all action and actions, cause and causes of action, suits, debts, dues, sums of money, claims and demands whatsoever, both at law and in equity, which I now have, ever had, or which I or my heirs, executors, administrators or assigns hereafter can, shall or may have, by reason of any matter, cause or thing whatsoever, that may have arisen, or can hereafter arise to any of the said lands and property of the said Miles Swaney herein before mentioned, for or by reason of the erection of said bridge or bridges, and of the embankments adjoining thereto, and connecting therewith, for the uses and purposes of said railroad aforesaid; and also for or on account of any flow or stoppage of the waters of said brook, or for or on account of any matter, cause or thing that may have arisen, or that can or may hereafter happen or arise to the said mill property and lands of the said Miles Swaney, and the appurtenances by or from the erection heretofore or hereafter made, for the purposes of said railroad as herein before stated, or from any other cause whatever relating to the premises.

And the said Miles Swaney doth further agree, that if he can procure the present road to be lawfully vacated that leads by the mill and under the present bridge of the said Railroad Company, on or before the first of November next, and a new road to be laid out further eastwardly, so as that the new road so laid out can pass over said railroad; that he will cause the same to be done by and with the consent of said Company; and when so done, the said Company agree to pay him, the said Miles Swaney, the further sum of one hundred dollars; and upon such payment the said Railroad Company shall be, and are hereby authorized and allowed immediately thereafter to close up the present road or highway under said bridge, and erect embankments in the place of the same, like unto their other embankments adjoining thereto—the said Railroad Company to be at the whole of the costs and expenses attending the laying out of said new road, and of vacating the old one.

In witness whereof, I, the said Miles Swaney, have hereto set my hand and seal the day and year first above written.

MILES SWANEY.

Signed, sealed and delivered in presence of
C. BOICE.

WHEREAS, I, John Smalley, hold a mortgage on the within described premises, given by Miles Swaney and wife to Abraham Smalley and John Smalley, dated November 2, 1846, recorded in Somerset Clerk's office, in book C of Mortgages, page 330, and in the Middlesex Clerk's office, in book 18 of Mortgages, pages 6 and 7, to secure three thousand eight hundred and seventy dollars, a part of which said sum is still due and owing on said mortgage, and which mortgage is now held and owned by the said John Smalley; and whereas, H. N. Ferris, of the city of New York, also holds a mortgage on the same premises, dated July 21, 1847, to secure two thousand dollars, recorded in Middlesex Clerk's office, in book 18, page 51, which said mortgage money is still due, owing and unpaid; and whereas, also, we, the President, Directors and Company of the State Bank at Elizabeth, hold a mortgage on the same premises, dated the first of November, 1849, recorded in Somerset Clerk's office, in book P of Mortgages, page 236; in Middlesex Clerk's office, in book 19 of Mortgages, pages 1, 2, 3 and 4, to secure the sum of four thousand, eight hundred and thirty-seven dollars and seventy-one cents, a part of which sum is still due and owing to us. Now, therefore, these presents witness that we, John Smalley, H. N. Ferris, and the President, Directors and Company of the State Bank at Elizabeth, for and in consideration of one dollar to us in hand paid by the said The Central Railroad Company of New Jersey, before the ensealing and delivery of these presents, and at the request of Miles Swaney, do hereby consent and agree to the terms, stipulations, covenants and provisions of the foregoing agreement between Miles Swaney and the said The

Central Railroad, and do severally grant, release, quit-claim and set over, by virtue of these presents, all that part of the lands described in the foregoing agreement, and intended to be conveyed thereby by the said Miles Swaney to said Railroad Company, together with the appurtenances, and all right, title and interest of us, the subscribers, to the property intended to be conveyed by said Swaney by virtue of said agreement, and all claim to the damages therein stated, to have and to hold unto the said The Central Railroad Company, their successors and assigns forever.

In witness whereof, we have hereto set our hands and seals, and the seal of the said the State Bank at Elizabeth, this tenth day of August, eighteen hundred and fifty-four.

JOHN SMALLEY, [SEAL.]

H. N. FERRIS, [SEAL.]

KEEN PRUDEN, Pres't. [SEAL.]

Sealed and delivered in presence of

JOHN CHETWOOD, Jr., as to H. N. Ferris.

A. S. WOODRUFF.

STATE OF NEW JERSEY, ss.—Personally appeared before me, the subscriber, a Master in Chancery of said State, Miles Swaney, known to me as the person who executed the foregoing agreement and conveyance, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed. Taken before me, at Plainfield, this tenth of August, A. D. eighteen hundred and fifty-four.

CORNELIUS BOICE, M. C.

NEW JERSEY, ss.—Personally appeared the within named John Smalley, known to me as the person who executed the foregoing release, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and deliv-

ered the same as his voluntary act and deed, for the uses and purposes therein expressed. Taken before me August 12, 1854.

CORNELIUS BOICE, Master in Chancery of N. J.

STATE OF NEW YORK—NEW YORK CITY AND COUNTY, ss.—On this nineteenth day of August, 1854, before me, one of the Commissioners for the State of New York, to take acknowledgment of deeds, &c., to be recorded in New Jersey, personally appeared Horatio N. Ferris, who is I am satisfied one of the grantors mentioned in the instrument of release immediately foregoing; and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed.

JOHN CHETWOOD, JR., Com'r,
25 Nassau st., New York.

STATE OF NEW JERSEY, ss.—On this 23d day of December, A. D. 1854, personally appeared before me, a Master in Chancery of said State, Archibald S. Woodruff, being by me duly sworn, on his oath doth depose and say, that he is the Cashier of the President, Directors and Company of the State Bank of Elizabeth, one of the grantors in the foregoing release named; that Keen Pruden is the President of said Bank; that the seal attached to the said release, opposite the name of the said Keen Pruden, is the common seal of said Bank; that the said Keen Pruden acknowledged that he signed, sealed and delivered the said release as the voluntary act and deed of the said Bank, the contents thereof having first been made known to the said the President, Directors and Company of the State Bank at Elizabeth, who by resolution authorized and directed the said release to be executed and delivered as aforesaid.

A. S. WOODRUFF.

Subscribed and sworn the day and year above written, before me,

JNO. J. CHETWOOD, Master in Chancery.

The following is a copy of the deed from Miles Swaney to the defendants, dated August 11, 1847 :

“ THIS INDENTURE, made this eleventh day of August, in the year of our Lord one thousand eight hundred and forty-seven, between Miles Swaney and Jane Swaney, his wife, of the city of Brooklyn, in the County of Kings and State of New York, of the first part, and the Elizabethtown and Somerville Railroad Company of the second part : Whereas, by an act of the Legislature of the State of New Jersey, passed the ninth day of February, in the year of our Lord one thousand eight hundred and thirty one, entitled “ An Act to incorporate the Elizabethtown and Somerville Railroad Company,” the said parties of the second part, amongst other things, are authorized and empowered to purchase, hold and convey any lands, tenements, goods and chattels whatsoever, necessary or expedient to the objects of the said incorporation ; and the President and Directors of the said Company are thereby authorized and invested with all rights and powers necessary and expedient to convey, lay out and construct a railroad, or lateral roads, from one or more suitable place or places in the village of Somerville, to one or more place or places in Elizabethtown, not exceeding sixty-six feet wide, with as many sets of tracks and rails as they may deem necessary. And whereas, the land hereinafter described, is deemed necessary or expedient for the use of the said parties of the second part in the construction of the said road :

Now this indenture witnesseth, that the said parties of the first part, for and in consideration of the sum of three hundred dollars, lawful money of the United States, to the said party of the first part well and truly paid by the said parties of the second part, at or immediately before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said parties of the second part therefrom discharged, have granted, bargained, sold, aliened, released, conveyed and confirmed ; and by these presents do grant, bargain, sell, alien,

release, convey and confirm unto the said parties of the second part, and to their successors and assigns, all that certain tract, piece or parcel of land, situate, lying and being in the townships of Bridgewater and Piscataway, in the counties of Middlesex and Somerset, in the said State of New Jersey—Beginning at a point in the centre line of said railroad, and in the centre of the public highway and the division line of said Swaney and Peter Smith; thence bearing north eighty-nine degrees, west twenty chains and forty-five links, to the division line of lands of said Swaney, and lands formerly owned by Phillips, and which now stands in the name of John J. Bryant, including thirty-three feet in width upon each side, and adjoining to said centre line of said road throughout, containing two acres and forty-five hundredths of an acre of land, (2 45-100ths A.) more or less, excepting and reserving to the said Miles Swaney, his heirs and assigns forever, the right and privilege to keep up and retain on said premises the small house and yard thereto attached, as the same is now located, forever; and also the right and privilege to enter upon said premises from time to time, to make, amend and repair his mill dams, and to remove from the pond the manure that may there accumulate from time to time.

Together with all things thereto belonging, or appertaining as part or parcel of the same, and the reversion or reversions, remainder and remainders, rents, issues, profits, ways, easements, advantages and emoluments, with the appurtenances; and also all the estate, right, title, interest, claim and demand, and possession of the said parties of the first part, either in law or equity, of, in and to the same, and to every part and parcel thereof; to have and to hold, all and singular, the said premises hereby granted, bargained, sold and conveyed, or intended so to be, unto the said parties of the second part, their successors and assigns, to the only proper use, benefit and behoof of the said parties of the second part, their successors and assigns forever, and to and for no other use, interest or purpose whatsoever; and the said Miles Swaney doth for himself, his heirs, executors and ad-

ministrators, covenant, promise and agree to and with the said parties of the second part, their successors and assigns, that the said Miles Swaney is now the true, lawful and rightful owner of all and singular the said lands, tenements and hereditaments before described and mentioned, and every part and parcel thereof, and rightfully and lawfully seized and possessed thereof, of a good, sure, perfect and absolute estate of inheritance in fee simple, and that the same are free from all encumbrances; and that the said parties of the first part have good right, full power and sufficient authority to grant and convey the same in manner aforesaid, and that he, the said Miles Swaney, will warrant, save harmless, indemnify and defend the said parties of the second part, their successors and assigns, against all former and other gifts, grants, charges, conveyances or encumbrances whatsoever, made, committed, done or suffered, and against all and every person or persons lawfully claiming, or to claim, the said premises, by, from or under the said parties of the first part, or by, from or under any other person or persons whatsoever.

In witness whereof, the said Miles Swaney and Jane, his wife, have hereunto set their hands and seals, the day and year first above written.

MILES SWANEY, [SEAL.]

JANE SWANEY. [SEAL.]

Sealed and delivered in the presence of

NEW JERSEY, ESSEX COUNTY, ss.—Be it remembered, that on this eleventh of August, eighteen hundred and forty-seven, personally appeared before me, Cornelius Boice, a Master in Chancery of said State, the within named Miles Swaney and Jane Swaney, his wife, known to me as the grantors of the foregoing deed; and I having first made known to them the nature and contents thereof, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed; and the said Jane Swaney being by me privately examined, separate and apart from her said husband, also acknowledged that she executed

said deed as her voluntary act and deed, freely and without any fear, threats or compulsion from her said husband.

CORNELIUS BOICE, Master in Chancery.

The following is the opinion of the Supreme Court, pronounced by His Honor, Justice VAN DYKE :

NEW JERSEY SUPREME COURT.

JACOB VALENTINE	}	<i>In Case.</i>
<i>vs.</i>		
THE CENTRAL RAILROAD COMPANY		
OF NEW JERSEY.		

This is a special action on the case brought by the plaintiff against the Central Railroad Company, in which he claims that he was lawfully possessed of a certain mill, mill dam, pond of water, race-way, &c., with which he was carrying on the business of a miller, and that when so possessed and so engaged, the defendants cut and opened his said dam, and drew off and diverted the water from his said mill, by reason of which he was prevented from using the same, and in consequence of which he suffered the damage complained of.

It appears by the state of the case that the plaintiff, at the time of the injury complained of, was occupying the mill premises in question, as the tenant of Miles Swaney, who was the owner thereof; and that the defendants in August, 1855, opened and removed a portion of the dam in question, and drew off and diverted the water from the mill, and that the plaintiff suffered damage in consequence.

It also appears that in August, 1847, Miles Swaney, then the owner of all the premises, conveyed to the defendants a strip of land containing the location or site of their road, making certain reservations, and that the dam where it was opened was within the limits of the land so conveyed.

The reservations in this deed were as follows: "Excepting

and reserving to the said Miles Swaney, his heirs and assigns, forever, the right and privilege to keep up and retain on said premises the small house and yard thereto attached, as the same is now located, forever; also the right and privilege to enter upon said premises, from time to time, to make, amend and repair his mill dams, and to remove from the pond the manure that may there accumulate from time to time." The Judge in substance charged the jury that inasmuch as Swaney had conveyed to the defendants the land occupied by the dam, at the place where it was injured, without having reserved the dam in question, or the right to maintain it, the defendants had the right to do the act complained of, and that the plaintiff could not recover. To this charge exception was taken.

It must be borne in mind, for it was so admitted on the argument, that the railroad in question was authorized, located and constructed long before the deed of Swaney was made, and that at the time of the execution of that deed, not only the railroad was there, but the mill dam, pond, water and race-way were also there, a part of the dam itself forming the embankment on which the rails were laid, and that part of the tumble dam where the injury is alleged to have been done, was also there.

When, therefore, Swaney made the reservation in his deed of the right to enter on the premises thus reserved, to make, amend and repair his mill dams, the reservation must be considered as applying to the dams that were then there, and as they were at the time, and when he reserved in very express terms the right and privilege to enter on the premises from time to time to make, amend and repair his mill dams, it must be understood that he reserved the right by making, amending and repairing the dam, to keep them in the same condition in which they then were, and to make these amendments and repairs from time to time, and at all times, when by accident or otherwise, they should become necessary; for it would be absurd, I think, in the extreme, for Swaney to reserve the right to enter on the land for the purpose of making these amendments and repairs if he was not at liberty

to make them when he got there. To my understanding, it is very clear that the reservation in the deed left with Swaney the undoubted right to make, amend and repair all the dams that were in existence at the time of making the deed; and that these terms *make, amend and repair* said dams are fully equivalent to the words *keep up and maintain* such dams, and should have that construction. If, then, Swaney had the right to keep up and maintain the dams, such right was wholly inconsistent with the rights of the defendants to take them down. Both rights cannot exist at the same time.

The case seems to have been treated as though it was an action of trespass, brought to recover damages for a forcible injury done to the dam as such and title pleaded by the defendants, and the Court finding the title to be in the defendants, with no sufficient reservation of the dam, held that the defendants had the right to do on their own premises the acts complained of, whereas the action is wholly different from this. It is an action *in the case*, in which the plaintiff alleges that he was lawfully possessed of a certain grist mill, mill dam, pond and race-way by means of which the water was conveyed to the mill, and that by reason thereof he was enabled to carry on there the business of a miller, but that the defendants removed or opened the dam, thereby diverting the water from his mill, and as a consequence thereof he has not been able to use it, and has sustained the damages from that cause. Now, in such cases, it is not material that the title to the soil where the dam was opened should be in either the plaintiff or his landlord. The question is not as to who has the title, but whether the plaintiff or his landlord has a right to keep up the dam. It is well known that a party cannot do on his own land that which injures his neighbor. If he builds a dam across a stream, and thereby throws back the water on his neighbor above, he cannot when prosecuted for this injury defend himself by showing that he has done nothing except on his own land. For the consequential damages he would certainly be responsible. So here, if the defendants have taken down a dam

which the owner of the mill had a right to keep up, they will be responsible for the consequences, even though this whole operation were on their own soil.

This is a matter of a grant, and it may be of immense importance to the mill owner. It is not the mere question of damages sustained in this particular case while the dam was down, but if the defendants have the right to take this dam down, they have the right to keep it down. If they have a right to keep it down for a week, they have for a month, and a year, and forever. And if they have the right to take it down, and keep it down at the point in question, on the ground that it is within the lines of their purchase, then they have the right to take down and keep every particle of the dam which is within such lines. And if the mill owner cannot construct a dam to convey the water to his mill without coming within these lines—and, according to the map used on the argument, he cannot—then his mill property is comparatively worthless.

This is precisely the condition in which the decision of the Court below leaves him. No one can properly suppose that such was the intention of the parties to that deed. It has a reservation in it, and that reservation is the right to make, amend and repair these dams. Why was this inserted? Does it mean nothing? Nothing that is of any value? The decision of the Court on this most important question is, that it reserves to him nothing of which he can avail himself, but that he is powerless in the hands of the defendants, except so far as they in their good nature may see fit to favor him. I cannot think so. I think it was intended to contain, and does contain, the reservation of a most important right—the right to keep up and maintain the dams in the same condition in which they were at the time of making the deed of conveyance; and that the defendants have not the right to take down these dams when they please, and keep them down as long as they please, and without the consent of the mill owner, without being responsible to him for the damages which they cause him to sustain. The damages

in this particular case, it may be, are not very large, but it appears by the state of the case that damages have been sustained; and I think the jury should have been permitted to ascertain the amount, and find a verdict accordingly.

It is claimed, moreover, that Miles Swaney, by an agreement entered into between him and the defendants on the 10th of August, 1854, and previous to the injury complained of, released to them all claim for such damages as are described in this suit. Swaney, by that agreement, for the consideration of \$400, granted to the defendants various rights and privileges, which enabled them to extend, widen and strengthen their embankments by the use of his lands, and he relinquished to them all claim for damages that might arise from the use of the rights and privileges thus granted. And also released to them all claim for damages which he had previously sustained at their hands; but I do not find in the agreement anything that can be construed into a right to take down any of his mill dams, or which exempts them from damages in case they should do so.

I think, therefore, that the judgment in this case should be reversed, and the usual course taken to have the cause tried anew, if the plaintiff desires it.

JOHN VAN DYKE.

