the ditches, even assuming such an implication was not precluded by virtue of the express exception contained in the deed.

Burr v Price, 2d Wend 290, is a case much relied on in behalf of the Appellant. Prior to the date of the deed under which the plaintiffs claimed a dam had been erected, and was standing when the deed was executed which dam caused the water to flood part of an acre of the land included within the lines of the conveyance to the party under whom the plaintiff claimed to recover damages for thus causing the land to be flooded, the suit was instituted and the plaintiff obtained a judgment.

The Controversy also involved allegd injuries to other property but the questions decided in reference to them have no material bearing upon the case before us. — Because the land in dispute was included within the lines of the deed, the Court held that notwithstanding the existence of the dam, at the date of the deed, and although the land was then, and had been long before covered with water, in the same manner it was at the institution of the suit, still there could be no implied reservation or exception in favor of the grantor, which would relieve him, or them claiming under him from a claim for damages on account of flooding the land. It will be seen however that the learned Judge who delivered the opinion of the Court rested the decision in part at least, and we rather think mainly upon the ground that if a man has a road from one portion of his farm over another to the highway, and sells the part where the road passes without reserving in the deed, the road is gone — And if in such a case the road is lost to the grantor by virtue of the deed so likewise did the deed take from the grantor all right to continue to flood the land — In this reference to the case of a road we understand it as one where the party has no other way from the portion of the Estate retained by him and if so the denial of his right to use the road, because such a right would be inconsistent with his deed is certainly at variance with the opinion of Chancellor Kent, and the other authorities to which we have already referred on this subject. But supposing the Judge did not allude to a case where the party has no other road, then the principle of law in reference to rights of necessity, it is fair to infer, was not under consideration either in regard to the suppose or to the principal case. And in truth, although the lowering of the dam so as to prevent the flooding of so considerable a quantity of land might have produced a trifling diminution of the water power, still the facts disclosed by the report do not justify an inference that after so reducing the height of the dam the water power might not have been profitably used by the grantor in the deed and those claiming under him — But in the case before us the adoption of the principle insisted upon by the appellant wise would ruin the mill of the Appellee useless for ever.

The principle which allows a way of necessity in such instances as we have spoken of, was adopted because it would not be only a private inconvenience, but also to the prejudice of the public weal, that the land should be unoccupied — Mills are also of great public utility, Our early legislation in regard to them shows they have been so

considered here, And if the law of necessity will apply to private ways, we think it but reasonable it should also be applicable to the present case.

The Appellants position is said to be sustained by the decision in Pocke v Reed 17 Maine R 175. The Court there say "The situation of the parties would then be that of the proprietors flowing their own lands, and afterwards while thus flowed, granting the thousand acres to Ford without reserving the right to flow. And upon such a supposed state of facts an instruction was given in the case of Natherow v Stinson 1 Fairf 224 which seems to have met the approbation of the whole Court, that if no such right is reserved he purchases it with the right to recover damages for such flowing." "It is where the owner sells the dam and Mills retaining the lands, that he conveys as an essential part of them the right to flow not where he retains the mills and chooses to sell the land without reserving the right." The portion of the opinion in Natherow v Stinson referred to in support of the doctrine here stated, relates to the third "request" or prayer of the respondent; which is that the Court would instruct the Jury — That if the dam, and Mills and lands and 1849 were owned by the same former persons and such owners conveyed the dam and mills, and land and privilege and appurtenances, and afterwards conveyed 1849 the grantee of 1849, would have no right to claim damages for keeping up the water by the dam as it had been before the conveyance, 1849." This instruction as requested was not given, but the presiding judge in the lower Court gave in his own language his version of the law to the Jury — In reference to the first branch of which instruction the Appellate Court say "of the correctness of this instruction there can be no doubt — The statement of facts upon which it was given supposes an express reservation to the grantor, of the right to flow — in which case the grantee would clearly have no right to compensation for injury occasioned by flowing" Then follows the second branch of the instruction, in which is stated the principle relied upon in Pocke v Reed — To this the Court say "We are not disposed to question the correctness of this part of the charge, but it is predicated on a different state of facts from those supposed, in the request under consideration and which the defendant contends he had proved — The facts assumed in in the charge are that the grantor conveyed the premises flowed but retained the mill and dam the facts claimed to have been proved, and on which the instruction was requested are that the grantor conveyed the mill dam, privileges and appurtenances, but retained a portion of the tract flowed. In the latter case we think the right to keep the dam to the same height it was contained by the grantor, and of course to flow, passed as an incident to the mill necessary for its useful enjoyment, and that the grantee acquired an easement in so much of the grantors land as would be flowed by continuing the head of water at the mills at its usual height. But the grantors rights in the former case would depend upon a very different principle, which it is not necessary should be discussed or decided at the present time, as the facts proved do not require it." We have made these long quotations for the purpose of showing as we think they do very clearly that the principle extracted from this case in Pocke v Reed, was a mere dictum of the judge below