

cuts have been made; they state that those cuts by giving access from the canal into a large pond, to vessels and rafts, afforded them additional facilities and security in navigating the canal; and thus materially improved the utility of that highway; and therefore aver, that they were well justified in doing what they have done.

BLAND, C., 29th November, 1830.—The matter of the attachment for a breach of the injunction standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

The only question is, whether the defendants have, by these their admitted acts, deprived the plaintiff, in any degree, of that usufruct which it was the purpose of the injunction to preserve to him. A right of way, whether public or private, is essentially different from a fee simple right to the land itself over which the way passes. A right of way is nothing more than a special and limited right of use; and every other right or benefit derivable from the land, not essentially injurious to, or incompatible with the peculiar use called the right of way, belongs as absolutely and entirely to the holder of the fee simple as if no such right of way existed. He is, in fact, for every purpose considered as the absolute owner of the land, subject only to an easement or servitude; he may recover the land so charged by ejectment; he may bring an action of trespass against any one who does any injury to it, not properly incident to an exercise of the right of way; he has a right to the trees growing upon it; to all minerals under its surface; he may carry water in pipes under it; and the freehold with all its profits, not inconsistent with the right of way, belong to him. *Com. Dig. tit. Chimin, (A. 1.)*

Here the plaintiff himself has shewn, that these defendants are the owners of the freehold and its profits subject to the servitude of this canal or highway; and also, that they are entitled to the profits of that canal or highway so passing through their land; and over which land, as he avers, they have granted a right of way to him. But the right of way as claimed by the plaintiff is *that of a public road or wagon way along the western margin of the canal to his mill; whereas, the right of way **68** over that ground, as admitted and contended for by the defendants, is confined to that of a towing path for the more beneficial or proper use of the canal, and nothing more.

How far these several rights may be deemed reconcilable or incompatible with each other, it will be time enough to determine at the final hearing. *Chichester v. Lithbridge, Willis' Rep. 72.* But in this stage of the proceedings, and with reference to these attachments, I deem it sufficient to observe, that where there are, as in this instance, several distinct, but intimately associated rights,