to hold as long as he could all the water that comes down in its natural course for such period or periods as the water lasts. But it equally follows from the cases that there must be a constant and systematic user to support that claim, and the user is the test of the prescriptive right. . . .

[Reference to Attorney-General v. Great Northern R.W. Co., [1909] 1 Ch. at p. 779; Crossley v. Lightowler, L.R. 2 Ch. at p. 481; Beaty v. Shaw (1805), 8 East 208; Calcraft v. Thompson (1867), 15 W.R. 387; McNab v. Adamson (1849), 6 U.C.R. 100; Cain v. Pearce, 1 O.W.N. 1133, 2 O.W.N. 446, 896, 1496, 3 O.W.N. 1321.]

From the above authorities I conclude that, even granting that the use of summer water, when it came down, is proved, the prescriptive right to use it is limited by the actual user (neither more nor less), and that to use it in prolongation of the spring freshets is a different and more oppressive use, considering the season of the year and the right of the plaintiffs to cultivate their land. In Hall v. Swift (ante), the right had been established by a long course of enjoyment, and the cesser during the dry season was only urged as an interruption destroying the right. It must be borne in mind that one of the elements of a prescriptive right is, that the servient tenement shall be burdened with some right openly and continuously exercised, and that it cannot be gradually and insensibly increased: Goddard on Easements, 6th ed., pp. 398, 399. The exact point is, in my judgment, a narrow one, and the dividing line hard to draw.

But I think that the real answer in this particular case is, that the sort of user practised during the summers prior to and after 1886, and down to 1908, was merely to use such head as there ordinarily was—say five and a half feet—and to cease working when that gave out, except after a heavy rain; and not, as has been done since, so to manage and conserve the water that a full seven-foot head could be maintained much longer into the summer than formerly.

I think the fair result of the evidence is, that the full use of the mill privilege prior to 1908 was confined to the time during the spring freshets, and that after they subsided the mill was worked with a lower head, and was suffered to be idle from time to time rather than injure the lands above it. . .

The time of the spring freshets has been variously stated. . . . I think that the 15th May is a reasonable time to fix as that on which the spring freshets are over.

Upon the question of damages, I am not impressed with the idea that the plaintiffs have suffered to the extent indicated by