

I am, therefore, unable to find that the dam was in fact raised by the defendant.

As to the tightening of the dam, the evidence varies. The method of putting in sawdust, etc., originally used, has been followed by the defendant, and was in use as late as December, 1912, when Wright took his measurement. It may have been done oftener of late years, and there is some evidence of this.

Counsel for the defendant, upon the assumption that the dam has remained at the same height—which I have found to be correct—argued at the trial that he had the right to hold all the water that in its natural course came down the Ouse, for so long and during such periods, long or short, as the supply enabled him so to do. In other words, this means that the capacity of the dam and the supply of water were the only limitations on his right to dam the flow of the stream.

I think the right of the defendant must be qualified in some way, and that at least it must be shewn that the user, while not absolutely continuous *de die in diem*, must at all events be so constant that a consistent course of action and use must exist, even though periods elapse without the user being actively asserted. I have therefore to determine what the actual user has been, as defining the scope of the defendant's rights.

The deed to the defendant from Geo. Read, is dated 1st December, 1885, and conveys the mill property "together with the mills, dam, and machinery now thereon," and the right to "enter unto and upon the embankment now on the west side of the said river Ouse for a distance of one hundred and fifty yards northerly from the northerly limit of the lands . . . conveyed, for the purpose of repairing, amending, and rebuilding the same."

In the view I take it is unnecessary to follow out the devolution of title. The property conveyed was a mill property with an existing dam; and whatever right the defendant has acquired depends upon prescription and not upon the conveyances subsequent to his deed from Read, in none of which is there any express recognition of his rights, and, therefore, no express servitude. But I cannot see that the plaintiffs, because they bought from Read, are debarred from claiming that the defendant has exceeded his rights.

There is evidence of the operation of the mill prior to 1885. Henry J. Walker was the miller for the seven years