

that, having acquired a prescriptive right to do the flooding under the old dam, and having built the new dam no higher than the old, they are entitled to continue the flooding constantly and to the same height, notwithstanding the inefficiency of the old dam to do so on account of its leaky condition; and for that position they cite the rule laid down by the Supreme Court of Massachusetts in *Cowell v. Thayer*, 5 Met. 253, 258. . . .

This rule has been disregarded by the Supreme Courts of several other States, notably Wisconsin, Michigan, and New Hampshire, and is not, I think, consistent with the principles laid down in cases in our own Courts. . . .

[Reference to *Sabine v. Johnstone*, 35 Wis. 185, 202; *Smith v. Rose*, 17 Wis. 227; *Carlisle v. Cooper*, 21 N. J. Eq. 576, 594; *Turner v. Hart*, 71 Mich. 128, 138; *Gould on Waters*, 3rd ed., notes to sec. 344; *Angell on Watercourses*, 7th ed., notes to secs. 224-227, 380; *Buell v. Reid*, 5 U. C. R. 546, 553; *McNab v. Adamson*, 6 U. C. R. 100; *McKechnie v. McKeyes*, 10 U. C. R. 37, 52, 53; *Bechtel v. Street*, 20 U. C. R. 15, 17.]

Now, as already stated, I find that as far back as the date of the construction of the new dam the defendants had acquired the right by prescription to back upon the plaintiffs' lands the waters in question; and, in my opinion, the only right they now have is, not to maintain the water as high as they are able to do with the present dam, although it is not higher than the old one, but only to back up the water as high as and for such time as was usual for their predecessors to do during the 20 years prior to 1893, and for any excess of flooding beyond that the defendants are liable in damages, if any have been sustained. . . .

As to the defendants' contention that the increased height of water is owing to the removal of the dams in the streams north and west of Crow lake, I think it is obvious that, although there is a greater flood of water at one time early in the year than formerly, it is obvious that, if the old conditions of the dams and outlets at the defendants' premises existed, this water would more readily pass away than it is possible for it to do under the improved conditions now maintained by the defendants.

As to that part of the claim of the plaintiff McGrath in respect of lots 9 and 10, I am of opinion that, upon a proper construction of the conveyances filed at the trial, the defendants are entitled to flood the said lots by virtue of the grant contained in the conveyance from . . . Peter McGill to the Marmora Foundry Co. (a predecessor in title of the defendants), which expressly grants the right "to dam up the waters in Crow river and flow back the same in, over, and upon . . . lots 9 and