

seen fit to put in evidence the deeds by which the last common owner of both properties conveyed his title to his several grantees, nor has it been shewn with which property he first parted. I am obliged to infer the terms in which these grants were couched, from the language of an agreement made between the respective predecessors in title of plaintiffs and defendants, dated 20th January, 1880, which recited that each of the two parties to that agreement "is seised in fee of an undivided half of the works known as dam number 5 at Caledonia on the Grand river," and that "both the said parties have the right to draw water from and use the said dam number 5 for their own purposes." This agreement provides for the maintenance and repair of this dam at the joint and equal expense of the parties, and also contains the following clause: "And it is hereby further declared, agreed, and understood by and between the said parties hereto that they are and shall be equally interested in all the rents now derived or which may hereafter be derived from the supplying of water from the said dam number 5 to any other person or persons or corporations other than the parties hereto themselves, and that, in the event of it being desirable at any future time to lease the privileges of using water from said dam, the parties hereto shall each have an equal voice therein and be equally interested in any rents or revenues derived therefrom."

The deed to plaintiffs from their immediate predecessors in title, William and Hugh Scott, purports to convey "an undivided one-half interest in all the works known as dam number 5 . . . together with an undivided one-half interest in and to the water rights and privileges and water rents due and accruing due after the date hereof from all and every person and persons whomsoever in respect of the said dam"—subject to the agreement of 20th January, 1880.

The deed to defendants from their immediate predecessor, Robert Shirra, purports to convey "an undivided half in all the works known as dam number 5."

For many years the present litigants and the former respective owners of the two grist mills have used the waters stored by dam No. 5 as they required them. At the time these properties passed into the hands of distinct owners, the proprietor of a saw-mill, situated on the same side of the river as, but above, the grist mill of defendants, had, under a lease from their common grantor, a right to use surplus waters stored by the dam and not required for the grist mills, in order to furnish power for his saw-mill. This right was continued by the separate owners of the grist mills by