

said stream, and out of the said pond along the said head-race, and upon and over the said water-wheel, and thence into and along the said tail-race, and from thence into the bed or channel of the said stream belonging to the plaintiff, immediately below the said weir and tail-race; which fall of water, by means of the mill-pond, head-race, weir, and tail-race, until the committing of the grievances, &c., was of right used by the plaintiff for the working his mill; that defendant was possessed of a saw-mill on the said stream higher up than the plaintiff's mill; yet the defendant on divers days, &c., unlawfully placed and deposited and caused to be placed and deposited into the bed and channel of the said stream, and upon the banks and sides thereof, near the defendant's mill, large quantities of sawdust, slabs bark, wastewood and refuse of his mill, whereby the said sawdust, &c., fell and were washed, blown and carried down the said stream, along the channel thereof, into plaintiff's mill-pond, and his head and tail-races, and into and upon the plaintiff's part of the bed and channel of the stream, below the weir and tail-race, whereby the said mill-pond and races on the plaintiff's part of the bed of the stream, below the weir and tail-race, were filled and obstructed by the said sawdust, &c., and the fall of water to the plaintiff's mill, for the working of his mill, was greatly diminished; that heretofore, and whilst the plaintiff was so possessed, &c., and before the commencement of this suit, the plaintiff gave notice to defendant, and requested him to remove the said obstructions and prevent the continuance of the said grievances; yet defendant did not, &c., and the plaintiff was hindered from working and using the said mill and fall of water, &c.

*Pleas.*—1. Not guilty. 2. Traversing the plaintiff's right to enjoy the benefit and advantage of the water of the said water-course for working of the said mill. Issue.

The trial took place at Whitby, in October last, before Morrison, J.

The substance of the plaintiff's evidence was to shew that there was a gradual accumulation of sawdust and other refuse which came down from defendant's saw mill and was deposited in the mill-pond principally, though some small quantity also seemed to have found its way, mixed with mud and sand which washed in from the natural banks of the pond and stream, into the head-race of the plaintiff's mill. The evidence scarcely warranted the conclusion that there was any appreciable damage from this latter cause, for which the defendant could be made liable; at all events, the damage actually sustained by the hindrance of the working of the mill was not so proved as to afford the foundation of a verdict for more than nominal damages, and as regarded the deposit in the plaintiff's mill-pond, there was no foundation whatever for more than nominal damages.

The jury found for defendant generally.

*Robt. A. Harrison*, in Michaelmas term, obtained a rule nisi for a new trial, on the ground that the verdict was contrary to law and evidence and perverse; and for misdirection, in charging the jury to find a verdict for defendant, unless the plaintiff was proved to their satisfaction to have sustained substantial damage, and refusing to tell them that if the plaintiff had the right to the flow of water in a state of nature, the inter-

ference of the plaintiff with that right, if established, entitled the plaintiff at least to a verdict for nominal damages, although no special damage was proved; for the repetition of the unlawful act, if uninterrupted and undisturbed, will lay the foundation of a legal right.

*M. C. Cameron, Q.C.*, shewed cause, citing *Frankum v. Earl of Falmouth*, 2 A. & E. 452; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Dickinson v. The Grand Junction Canal Co.*, 7 Ex. 299.

*Harrison*, in support of the rule, cited *Wood v. Waud*, 3 Ex. 748; *Embrey v. Owen*, 6 Ex. 353; *Rochdale Canal Co. v. King*, 14 Q.B. 135; *Bickett v. Morris*, L. R. 1 Sc. & Div. App. 47; *Watson v. Perine et al*, 13 C. P. 229; *Addison on Torts*, 58.

*DRAPER, C.J.*, delivered the judgment of the Court.

If this general verdict for the defendant involved no other question or consequence than the claim to small damages and the refusal of the jury to award them, we should be prepared to discharge the rule at once.

But the second plea put in issue the plaintiff's right to the water of the stream for the working of his mill; and the jury, as the verdict is taken, have found against the plaintiff upon that question, and, as appears to us, improperly.

If this denial of the plaintiff's right to the use of the water is sustained, then the defendant may apparently continue to allow sawdust and mill-refuse to pass from his saw-mill into the stream and so into the plaintiff's mill-pond, and sooner or later a continuous deposit of this character at the bottom of the pond will diminish the space for holding water, and so diminish the volume of water kept back by the dam or weir, for the working of the mill. In time, the injury, not now appreciable, will become serious, while twenty years' enjoyment without interruption will afford evidence of an easement in the owners of the defendant's saw-mill, to deposit sawdust, &c., on the plaintiff's land, and thus the owners of the plaintiff's grist-mill will be remediless, when the injury becomes severely felt.

The plaintiff's counsel objected at the trial to the learned Judge's charge, because he directed that unless the plaintiff proved he had suffered damage the defendant was entitled to a verdict on the first issue. In the rule this objection is amplified into a statement that the learned Judge charged the jury to find for the defendant unless the plaintiff was proved to their satisfaction to have sustained substantial damages, and refused to tell them that if the plaintiff had the right to the flow of water in a state of nature, the interference with that right, if established, entitled the plaintiff to at least nominal damages. The learned Judge's report affords no colour for this amplification, but it shews that the jury, when they rendered a general verdict for the defendant, stated in answer to a question that they did not consider the second issue. Still if judgment be entered on the general finding on the record, it will greatly embarrass if it will not wholly bar an action, when this apparently continuous deposit in the plaintiff's mill-pond does not create serious loss and damage.

Now if the plaintiff has the right to the water of the stream for the working of his mill, and we think there was sufficient evidence to sustain it, then the deposit of sawdust in the bed of the