the use made of the water by the defendants, who are mill owners on the creek. That in summer, not having enough of water to drive their mill continuously, they retain the water by a dam, and then let it escape, by spurts, when they have grain to grind. This, plaintiff contends, is an aggravation of the natural servitude to which the lower land is subject, and that it is the direct cause of the damage.

The defendants contend that they have only used the water according to their right; that the superior proprietor is entitled to use the flowing water passing through his land, and that his only obligation towards the inferior proprietor was to return the water to the river before it reaches his land; and add, that there is no instance of an action of this sort by the inferior proprietor, and no law to support it. As a matter of fact, they contend that the flooding of plaintiff's land is in no way attributable to them or their acts; that the flood described could not have been occasioned by any use they had made of the water, and that in any case the thing which determined the damage was the neglect to keep the mouth of the river clear of obstructions, which was due to the refusal of plaintiff to allow the ordinary works to be performed opposite his land. They further contend that defendants' work had been in existence for fifty years, and always existed in its present state, and that therefore it was too late now to object to their using their property in the way they had always done.

If the appellant had no other ground of defence than this, that the inferior proprietor had in law no such action as the one he has brought, his appeal would be easily disposed of. There is perhaps no branch of the law which has longer and more continuously occupied the attention of jurists in all parts of the world than the right to the use of water, and the injury any interference with it might occasion; and difficult as the application of the law may be in practice, its general principles are not doubtful. The right of action of the proprietor of the inferior land against the proprietor of the superior land is identical with that of the latter against the former, as the following texts of the Roman law decide: Dig. Bk. xxxix, Title. III., §§ 8, 10 and 13.

It is unnecessary to examine the last defence put forward by appellants, for it is not pleaded. There is no special issue before the court as to whether appellants have acquired rights by the acquiescence of the neighbouring proprietors. I may further add that the much misunderstood citation from the C. S. L. C. in no way applies, for what respondent seeks is an indemnity in the shape of damages.

We are, therefore, reduced to a simple question of fact, whether the dam erected by the appellants has aggravated the servitude of the lower land so as to create any appreciable damage. The court below decides that it has done so to the trifling amount of $40, and by its judgment has reduced the costs by the taxation, assignation and depositions of Nelson, Aubuchon, Fr. Lemoine, J. B. Lemoine and Ethier, whose testimony is declared to be totally useless, and one-third of the costs of the depositions of the rest of plaintiff's witnesses, owing to their useless prolixity. If there was a little more of this discrimination as to costs, it would probably have a beneficial effect on our practice.

It appears to be satisfactorily proved that plaintiff's land was flooded on the morning of the 18th August, 1880. But when we turn to the cause of the inundation, there is not the same certainty. There is no positive testimony of an eye-witness who saw the course of the flood, and it is only by the testimony of one of the defendants that we know that the sluice gate was open on the afternoon of the 27th, and till dusk. We have, therefore, only a theory to deal with. The witnesses say the water did not come from the St. Lawrence, the weather was fine, and it must have come from above and by the opening of defendant's mill. As to the fineness of the weather, there is some contradiction among plaintiff's witnesses, but let us take it for granted the flood was not caused by rain, and let it be taken for granted that the water came from the opening of the sluice, we still don't see that plaintiff has made out his case. The best test of plaintiff's theory is its probability. Of this we are as good judges as the witnesses, who had no more facts before them than we have. We know that the sluice has an opening of 14 inches. We also know that the