The water power on the plaintiff's lot and on the defendant's is about the same, there being only a difference of about an inch in the fall of water on the two lots. The defendant has for some years—much less however than twenty—had a factory and mill upon his lot, the latter more recently, and penned back the water upon what is now the plaintiff's lot, but no *easement* is shewn, nor anything to affect whatever rights the plaintiff may possess as an ordinary riparian proprietor. In 1850 the plaintiff put up his mill, and for the purpose of forming his mill-pond erected a dam, which pens back the waters of the river beyond the upper boundaries of his own lot and overflows a small portion of Lot 33, in which the defendant in this suit claims an interest. On this lot also there is some fall of water—the river flowing through it as well as through the other two lots—but considerably less than on either of them.

In the opinion of Mr. *Dennis*, the surveyor, there is not sufficient water power on any one of the three lots to work a saw mill to advantage. On lots 31 respectively he is of opinion that a saw-mill may be worked, but not as he conceives profitably. He considers the water power on each of these two lots more suitable for a factory or other works requiring less water power than a saw-mill. The plaintiff's position then is, that he has upon his land a saw-mill, and that only, which in the opinion of Mr. *Dennis* can be worked, but not profitably; and the question is, whether he is entitled to be protected, and I think that he is.

If the plaintiff had from sheer folly, or to injure the defendant, built a mill on a stream where there was no possibility of working it, then I think that the defendant might reasonably object that his dam had nothing to do with the plaintiff's mill not working, and so that he ought not to be restrained; otherwise, a right would exist in every owner of land on a mill-stream to object to the waters of the stream being at all raised when they flow through his land, and that although it flooded no land, diverted no water, and in no way injured such proprietor. There would in such case, perhaps, be no mode of use of the waters of the stream injuriously affected. I do not assume, however, that a proprietor of land through which a stream flows would have no right to prevent the continuance of a dam or other erection whereby water was so penned back, as to make that dead water which before was a running stream flowing through his land. It is obvious that in such a case much more than an imaginary injury might be sustained.

In this case the plaintiff has placed his mill where in his own judgment, and probably in the judgment of the millwright who put it up, there is what is termed a *mill privilege*– sufficient water power to drive a mill, but in the judgment of Mr. *Dennis*, not sufficient to work it profitably.

Now when it comes to so nice a point that a mill can be worked, but in the judgment of one not profitably, while even in the judgment of that one there is sufficient power for the working of a factory, can it be said that another proprietor on the same stream is at liberty so to use the waters of the stream as to prevent his working his mill at all? If the water power be such that he can work his mill, is it not a matter for his own judgment and discretion whether he will work it, even if it be not profitable; and is it not for him to judge what would be a profitable working of the mill? Mr. *Dennis* does not say that the mill cannot be worked in the ordinary state of the water—that it requires a freshet or any unusual quantity of water to work the mill; but only that in his judgment it would not be profitable. Now what would be unprofitable with lumber at a low price might be very profitable upon an advance in the price of lumber; and besides, persons may differ very much as to what would be a profitable working of a mill. Such an objection too, it strikes me, cannot reasonably be made by one who has *practically* admitted the sufficiency of the water power; for upon the defendant's own land, with a fall of water almost identically the same, he has both a factory and saw mill.

But further, I do not consider it established that the plaintiff has not upon his land sufficient water power to work a saw-mill profitably. Whether he has or not, was not the question raised between the parties, nor was it the point upon which Mr. *Denhis* was deputed, with the consent of parties, to examine and report. Mr. *Dennis* is not a millwright, and declares himself ignorant of the effect and working of a modern kind of water-wheel in use in the plaintiff's mill, and however competent he may be as a surveyor; and I believe him thoroughly competent in his own profession, I think it would be too much to take his opinion as decisive against the plaintiff upon a point upon which he may not possess all the requisite knowledge to decide, because not lying within the proper sphere of his own profession. He may probably be *right*, but I think it is not such evidence as would justify this court in deciding that the plaintiff's water power is not sufficient for the profitable working of his mill.

But, taking him to be quite right in his opinion—viz., that a mill may be worked, but in his judgment *not* profitably—I think the defendant should be restrained from keeping up a dam that so materially interferes with his working it as almost to prevent its working at all.

I have not referred to the circumstance of the plaintiff's dam penning back the water so as to overflow a small portion of Lot 33, because it is not proved that the defendant has any interest in that lot.

Declare, that the plaintiff is entitled to enjoy his mill-site on the north-east part of Lot number 31 in the 10th concession of Vaughan, free and clear of all injury thereto or infringement thereon by the penning back of the waters of the River Humber thereon by the defendant or the owners or occupiers for the time being of Lot number 31 in the 9th concession of Vaughan. Order and decree the same accordingly.

Order, that the said defendant and the owners and occupiers for the time being of the said Lot 31 in the 9th concession, together with their workmen, servants and agents, be restrained by the perpetual injunction of this court from permitting the water of the said River Humber to continue at its present height, or at any such height, on the said Lot number 31 in the 9th concession, as thereby to pen back the water of the said River on the plaintiff's land on the said Lot 31 in the 10th concession, to a height above its usual and natural flow, or at the highest to any height nearer than ten inches below a certain mark made by *J. Dennis*, Esquire, at the bridge on the road allowance between the said Lots 31 in the 9th and 10th concessions, and from preventing or retarding the escape of the water from the tail-race of the plaintiff's present or any future mill on a level not lower than the natural flow of the River, on his said land on the said Lot 31 in the 10th concession, or hindering or retarding the flow of the said water through, across and from his said land on the said Lot 31 in the 10th concession, at its usual, natural and ordinary speed and level.

Defendant to pay plaintiff's costs.

MUNICIPAL CASES.

(Digested from U. C. Reports.)

From 12 Victoria, chap. 81, inclusive.

(*Continued from page* 173.)

XLV. *Police Magistrates—Remedy for Recovery of Salaries —By-Law not requisite.*

Held, That the Statute 12 Vic. ch. 81 makes it not only the duty of a Town Council to pay their Police Magistrate, but creates a debt, the payment of which the Magistrate may enforce in an action of *debt*,—not as founded upon a contract express or implied, but on the statute and the rights which it confers.

Held, also, That under the statute, the action may be maintained without the aid of a by-law of the Municipality to confer it.

Quære: Is *debt* the only remedy?

Wilkes v. The Town Council of Brantford. 3 C. P. Rep. 470.