1954
*Nov. 29, 30
1955
*Mar. 7

HUGH W. SIMMONS LIMITED *(Plaintiff)* ..... APPELLANT;

AND

ALEX FOSTER *(Defendant)* ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND ON APPEAL

Water and Watercourses—Right to float logs—Obstruction to navigable waters—Nuisance—Trespass—Practice—Action claiming declaration—No cause of action at date of writ—Rules of Supreme Court (Nfld.) O. 25, r. 5.

The appellant and respondent operated saw mills on the Colinet River, which is a tidal water for a short distance above the appellant's mill. To enable driving operations to be carried on in the summer when the natural flow alone would not suffice, the appellant built a dam upstream at Ripple Pond and another on a tributary, the Back River. In June 1951 by opening the Ripple Pond dam it brought down its first drive of the season, holding back another drive behind the Back River dam for a later operation, and as required by the salmon regulations, left the Ripple Pond dam open. The respondent requested it be closed but in the absence of permission from the Crown, the appellant refused to act. The respondent then, mistakenly relying on anticipated rainfall, started his drive down the Colinet and his logs became stranded. The appellant brought an action in damages and for an injunction alleging the obstruction of the river by the respondent's logs had prevented it bringing down its second drive and forced it to shut down its mill. It further claimed the respondent had moved a boom placed by the appellant above its mill and had thereby committed a technical trespass. The respondent denied the allegations and counter claimed for a declaration that he was entitled to unrestricted flowage rights on the Colinet to drive his logs. After the issue of the writ the dam was closed and on its opening in August the respondent was able to complete his drive.

Held: 1. That under ss. 82 and 83 of *The Crown Lands Act*, R.S.N. 1952, c. 174, both parties had equal rights to float logs on the Colinet. *Caldwell* v. *McLaren* 9 App. Cas. 392 at 409.

2. That at the time the appellant brought its action it had not suffered damage because of any obstruction in the river and its action therefore could not succeed. *Original Hartlepool Collieries Co.* v. *Gibb*, 5 Ch. D. 713; *Creed* v. *Creed* [1913] 1 I.R. 48; *Eshelby* v. *Federated European Bank Ld.* [1932] 1 K.B. 254.

*PRESENT: Kerwin C.J. and Rand, Estey, Locke and Abbott JJ.

3. That the appellant's boom was an interference with the respondent's right to float logs to his mill and the latter had a statutory right to move it in the way he did. *Wood* v. *Esson,* 9 S.C.R. 239 at 242.

Per Locke J.: The piers placed in the tidal and navigable waters at the mouth of the river without statutory authority amounted to a public nuisance and no right of action arose by reason of the respondent's interference with them. *SS. Eurana* v. *Burrard Inlet Tunnel and Bridge Co.* [1931] A.C. 300.

4. That as the declaration sought by the respondent would impose a duty upon the appellant which might seriously interfere with its operation and would be of no assistance to the respondent, it should be refused.

Per Locke J.: The rule enabling the Court to make a declaratory decree ought not to be applied where a declaration is merely asked as a foundation for substantive relief which fails. *Hamerton* v. *Dysart (Earl)* [1916] 1 A.C. 57 at 64.

Rand J. would have made the declaration claimed.

APPEAL from a judgment of the Supreme Court of Newfoundland on Appeal (1) reversing by a majority the judgment of Winters J. awarding damages to the plaintiff and dismissing the defendant's counterclaim for a declaration of right on his part, concurrent with the plaintiff, to the undiminished flow of the Colinet River and its tributaries for driving sawlogs and other timber.

J. B. McEvoy, Q.C. and *André Forget, Q.C.* for the appellant.

P. J. Lewis, Q.C. and *G. G. Tessier* for the respondent.

The judgment of Kerwin C.J. and of Estey and Abbott JJ. was delivered by:—

ESTEY J.:—The appellant (plaintiff) and respondent (defendant) operate saw mills in the estuary of the Colinet River in Newfoundland. Both cut logs, under saw mill licences from the Crown, and float them down the tributaries of and into the Colinet River and thence to their respective mills.

The learned trial judge found that the respondent's logs, in July, 1951, created an obstruction in the Colinet River and awarded appellant damages in the sum of $995. He dismissed the respondent's counterclaim asking for a declaration that he was entitled "to the unobstructed flowage rights of the waters in the Colinet and its tributaries. . . ."

(1) (1953) 32 M.P.R. 243; [1954] 3 D.L.R. 524.

1955

HUGH W. SIMMONS LTD. v. ALEX FOSTER

Estey J.

Upon an appeal this judgment was reversed and a judgment directed dismissing the appellant's action and granting to respondent "a declaration of right on his part, concurrent with plaintiff-respondent, to the use of the undiminished flow of Colinet River and its tributaries for driving saw logs and other timber . . ."

The Colinet River flows out of Ripple Pond toward the mills of the parties hereto. The tributaries above the mills with which we are here concerned are, first, Tremblett Brook and, farther up, Back River. The learned trial judge found, and the evidence supports his finding, that during the spring and fall freshets logs may be floated down the Colinet and its tributaries, but during the summer, apart from unusual rainfall or construction of dams, such is not possible.

The appellant and its predecessors have, for a long period, carried on lumbering operations along the Colinet and its tributary the Back River. About 1901 the appellant's predecessors constructed, and at all times material hereto appellant has maintained, a dam in the Colinet River at the foot of Ripple Pond for the purpose of impounding water which, when the dam was opened, would float its logs to its mill. Appellant had also, about 1914, constructed, on the Back River, a dam, which it maintained at all times material hereto, for the purpose of impounding water in order that it might assemble logs above the dam and for the floating of same down the Back and Colinet Rivers to its mill. These two dams are about the same size—100 feet long, 8 feet high, at the bottom 18 feet and at the top 12 feet thick, each having two gates 6 feet in width and which could be separately operated.

Appellant, in 1951, had logs above the Ripple Pond dam which it released about June 1 and floated to its mill. Thereafter it left that dam open, as was required by the salmon regulations. It also had logs above the Back River dam which were still there when the writ was issued July 14, 1951. In its claim appellant alleged that on or about July 2, 1951, respondent placed his logs in the Colinet River and thereby "caused such an obstruction that the Plaintiff was and is unable to drive its logs from the Back River Pond to Plaintiff's millsite at Colinet causing a complete shut-down of the Plaintiff's operation." The appellant had,

on July 11, sawed all the logs that it had floated down in the spring from behind the Ripple Pond dam and did not float its logs from behind the Back River dam until the first week in September. As a consequence its mill remained closed from July 11 until some day in the first week of September.

A public right to float logs in streams has been recognized in the legislation of Newfoundland from at least the enactment of *The Crown Lands Act* (S. of N. 1884, c. 2), the relevant provisions of which, with the amendments not material hereto, are now found in s. 83 of *The Crown Lands Act* (R.S.N. 1952, c. 174). This right was expressly enacted in the *Transportation of Timber Act* (S. of N. 1904, c. 13), s. 1 of which reads:

1. It shall be lawful for all persons whomsoever to float saw logs and other timber, rafts and draws over all streams and lakes within the colony, when necessary for the descent of such logs or other timber.

It was contended that the Colinet and Back Rivers were brooks or rivulets and, as such, not included within the word "streams" as it is used in s. 1 of the above-quoted 1904 legislation. The purpose and intention of the legislature was to provide assistance to those who had logs to float and that this section should apply to all streams upon which the floating of logs is carried on, at least in any commercial sense. The phrase "all streams" in similar legislation was not given a restricted meaning in *Caldwell* v. *McLaren* (1). It must follow that the Colinet and its tributaries are included in the foregoing section.

The appellant or its predecessors have, for a period of 50 years, floated logs down the Colinet and its tributaries. That, however, as determined in the courts below, does not give to the appellant any rights founded either in prescription or upon the basis of a lost grant. It follows that the parties hereto, as members of the public cutting logs in the area, apart from any right which may be acquired by the construction of dams, have equal rights to float their logs upon the Colinet and its tributaries.

The Crown Lands Act, 1884, particularly ss. 57 and 58, appears to have been enacted upon the further assumption that parties floating logs have a right to build slides, dams, piers or booms to facilitate the descent of timber and saw

(1) (1884) 9 App. Cas. 392 at 409.

1955

HUGH W. SIMMONS LTD. v. ALEX FOSTER

Estey J.

logs. This legislation has, in all relevant particulars, been continued in force and is now ss. 82 and 83 of *The Crown Lands Act* (R.S.N. 1952, c. 174, ss. 82 and 83):

82. (1) No licence or grant of any Crown Land shall give or convey any right or title to any slide, dam, pier or boom or other work for the purpose of facilitating the descent of timber or saw logs, previously constructed on such land, or in any stream passing through or along such land, unless it is expressly mentioned in the licence or grant that such slide, dam, pier or boom or other work is intended to be thereby granted.

(2) The free use of slides, dams, piers, booms or other works on streams to facilitate the descent of lumber and saw logs, and the right of access thereto for the purpose of using the same and keeping them in repair, shall not in any way be interrupted or obstructed by or in virtue of any licence or grant of Crown Land made subsequent to the construction of such work.

83. The free use, for the floating of saw logs and other timber rafts, the descent of timber, and the right of access to such streams and lakes, and the passing and re-passing on and along the land on either side thereof, whenever necessary for use thereof, and over all existing and necessary portage roads past any rapids or falls, or connecting such streams or lakes and over such roads, other than road allowances, as owing to natural obstacles may be necessary for the taking of timber or saw logs from lands, and the right of constructing slides where necessary, shall continue uninterrupted and shall not be affected or obstructed by or in virtue of any licence or grant of such lands, or by virtue of any licence to cut timber held by one person as against any other person holding a licence for the same purpose.

Prior to 1949 it appears that dams might be constructed without reference to the authorities. However, in that year it was provided that dams could not be constructed without the approval, in writing, of the Lieutenant Governor in Council (S. of N. 1949, c. 27, s. 3; now R.S.N. 1952, c. 174, s. 84).

Under the foregoing provisions the respondent, by virtue of his saw mill licence, did not acquire "any right or title to any slide, dam, pier . . . for the purpose of facilitating the descent of timber or saw logs, previously constructed" by the appellant (s. 82(1)). The legislature, however, particularly ensured to the appellant, in respect to the dams which it had constructed, the right of access thereto for the purpose of using and keeping them in repair (s. 82(2)). Then in a general provision (s. 83) the legislature gives to all who have logs to float the right to do so and of access to the streams and lakes for that purpose.

The appellant's claim for damages is based upon the respondent's conduct commencing on July 2, 1951. On that date respondent had two lots of logs—3,000 held by a boom

in the mouth of the Tremblett Brook and 5,000 in the Colinet Pond above the confluence of the Back and Colinet Rivers. On that date he released the boom holding the 3,000 permitting them to float into the Colinet River in which, at the time, there was not sufficient water to float them to his mill. He, however, justified his releasing them upon the basis that his foreman thought the rain, which had commenced that morning, would probably continue and bring sufficient water into the Colinet River. It did not do so and the 3,000 logs, after moving approximately three-quarters of a mile, were stranded. Releasing these logs was found by the learned trial judge to be "all against good logging practice" and this finding is fully supported by the evidence. Some time late in July, upon the permission of the Attorney General, the Ripple Pond dam was closed and, when opened on August 3, it floated the 3,000 logs to respondent's mill and floated the 5,000 which, because of insufficient water, became stranded at or near the place where the 3,000 had been previously stranded.

Even if the 3,000 logs so stranded in the Colinet River constituted an obstruction, and whether that obstruction be attributed to negligent conduct on the part of the respondent or that he thereby created a nuisance, the appellant would not have a cause of action until, because of that obstruction, it suffered damage. *Pollock,* 15th Ed., p. 139. On July 14, when this writ was issued, appellant's logs were above the Back River dam and, as found by the learned trial judge, they could not have then been floated to its mill, not because of any obstruction in the Colinet River, but because there was insufficient water in the Back River dam. It, therefore, follows that the appellant had not suffered damage because of the obstruction at the time that it asserted its cause of action by the issue of the writ. Its action, therefore, cannot succeed. *Original Hartlepool Collieries Co.* v. *Gibb* (1); *Creed* v. *Creed* (2); *Eshelby* v. *Federated European Bank Ld.* (3).

It is contended, however, that the removal of the appellant's piers and the swinging of its boom by the respondent on July 2 constituted a technical trespass. The appellant had, near its mill and in the tidal portion of the Colinet, a

(1) (1877) 5 Ch.D. 713. (2) [1913] 1 I.R. 48.
(3) [1932] 1 K.B. 254.

1955

HUGH W. SIMMONS LTD. v. ALEX FOSTER

Estey J

boom across the river so constructed as to direct its logs to its mill. For some distance out from its mill this boom was supported by piers based upon the bottom of the river and, beyond that, by movable piers. The respondent moved some four or five of the latter and swung the boom in a manner that permitted his logs to pass down the river to his mill. When his logs had passed he replaced the piers and the boom. This boom was an interference with the respondent's right to float his logs to his mill. He, therefore, had a right to remove the boom in the way in which he did. Chief Justice Ritchie, in *Wood* v. *Esson* (1), stated:

> There can be no doubt that all Her Majesty's liege subjects have a right to use the navigable waters of the *Halifax* harbour, and no person has any legal right to place in said harbour, below low water mark, any obstruction or impediment so as to prevent the free and full enjoyment of such right of navigation, and defendant, having been deprived of that right by the obstruction so placed by plaintiffs and specially damnified thereby, had a legal right to remove the said obstruction to enable him to navigate the said waters with his vessels and steamers, and bring them to his wharf.

The respondent moved the boom and piers in the exercise of his statutory right to float his logs and, as, in so doing, he caused no damage to the appellant, it cannot be said that he effected a technical trespass or caused any damage that might serve to give to the appellant a cause of action. The judgment appealed from, dismissing the plaintiff's action, should, therefore, be affirmed.

The respondent, in his counterclaim, asks a declaration, as already stated, relative to the natural flow of the streams. Newfoundland has adopted, as have many of the other provinces, Order 25, Rule 5 of the English Supreme Court Rules under which may be made "declarations of right whether any consequential relief is or could be claimed, or not." Such a declaration may be made, even though a cause of action does not exist, provided the plaintiff is asking for some relief. *Swift Current* v. *Leslie et al* (2); *Kent Coal Co. Ltd.* v. *Northwestern Utilities Ltd.* (3); *Guaranty Trust Co. of New York* v. *Hannay & Co.* (4). In this latter case Bankes L.J., at p. 572, states:

> There is, however, one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its

(1) (1884) 9 Can. S.C.R. 239 at 242.
(2) (1916) 9 W.W.R. 1024.
(3) [1936] 2 W.W.R. 393.
(4) [1915] 2 K.B. 536.

jurisdiction. Subject to this limitation I see nothing to fetter the discretion of the Court in exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the importance of adapting the machinery of the Courts to the needs of suitors I think the rule should receive as liberal a construction as possible.

Notwithstanding this liberal construction of the rule, the authorities repeatedly emphasize that it is a discretionary authority which should be exercised with great care and caution. *Halsbury's Laws of England,* 2nd Ed., Vol. 19, p. 215, para. 512; *Annual Practice 1955,* Order 25, Rule 5, p. 425; *Holmested & Langton,* Ontario Judicature Act, 5th Ed., p. 47.

The appellant, as plaintiff, commenced this action upon the basis that it had superior rights upon the Colinet River and its tributaries by virtue of its and its predecessors' having continually floated logs thereon for a period of at least 50 years. That the appellant possessed no such superior rights, except such as it may have under the statute in respect to the maintenance and use of its dams, has been made abundantly clear in the judgments rendered in all the courts in this action.

The respondent asks a declaration that he "is entitled to the unobstructed flowage rights of the waters of Colinet River and its tributaries for the purpose of driving saw-logs and timber." The record does not disclose that at any time prior to the commencement of this action he made any such request to the appellant, or in any way asserted his right to the natural flow, and probably for the very good reason that it would not have been of any material assistance in the floating of his logs at any relevant time during the summer season of 1951. As already stated, apart from spring and fall freshets and, in the summer, at times of unusually heavy rainfall, the normal flow of these streams is not sufficient to float logs, and it would appear that for a substantial portion of the summer it would not be a material factor in the volume of water necessary to float logs. If, therefore, those engaged in logging operations wish to float logs during the summer, they must, as both the appellant and respondent have done, construct dams for the purpose of impounding the necessary water.

1955

HUGH W. SIMMONS LTD. v. ALEX FOSTER

Estey J.

Moreover, the evidence leads to the conclusion that, had the respondent communicated with the Attorney General earlier and exercised more prudence in making arrangements as to how the Ripple Pond dam might have been opened and closed, the difficulties involved in this litigation might never have developed.

Mr. Justice Winters, presiding at the trial, in the exercise of his discretion, refused to grant the declaration and upon further consideration, as a member of the Appellate Court, arrived at the same conclusion. His views, as I have read them, may be summarized: The declaration would impose upon the appellant a duty to release the natural flow when requested by the respondent; that, having regard to the inadequacy of the natural flow, the effect of the imposition of this duty was that "the very doubt is re-introduced which the dam was designed to remove." Moreover, there would, in all likelihood, be disputes between the parties as to what constituted the natural flow at any time the appellant might be called upon to perform this duty. Further, the legislature, in enacting the legislation with respect to dams already referred to, no doubt had in mind the natural flow of streams such as the Colinet and its tributaries and preferred not to legislate with respect thereto, even in general terms, but rather to leave the matter to be determined when one or other of the parties had suffered damage.

Chief Justice Walsh, who, with Mr. Justice Dunfield, granted the declaration, emphasizes the fact that the plaintiff in this action was asserting superior rights which it did not possess. That such rights did not exist is now made abundantly clear and it may be that, the appellant apprised of its error, the parties may adjust matters without further difficulty. Be that as it may, Chief Justice Walsh also states that the respondent has suffered no infringement of any of his rights but that "his rights were being threatened" by the appellant "and that part of the freshet waters ordinarily running off immediately to the sea was being held by the plaintiff (appellant) in spring and summer without regard to these rights." The necessity of constructing dams for the impounding of water has long been recognized and the declaration does not prohibit that practice, but merely declares that if the appellant does impound water behind its dam it must, when requested by the respondent, release sufficient to provide the natural flow.

I respectfully agree with the conclusion arrived at by Mr. Justice Winters that the declaration imposes upon the appellant a duty, the performance of which may seriously interfere with its operations and may not be of material or any assistance to the respondent in the floating of his logs. Under this declaration, the appellant having impounded sufficient water in one of its dams and decided that to-morrow it would open the dam and commence floating its logs, if, before, in fact, the dam was opened it received a request, which it would be required, under the declaration, to comply with, from the respondent to release the natural flow for some period over which it, the appellant, had no control, such would delay the appellant in floating its logs and might seriously interfere with its operations. Even if this be an extreme example, it is indicative of what well might happen and would create a situation which the legislature never intended when it enacted s. 82(2) of *The Crown Lands Act* above quoted. The legislature appears to have contemplated, and still does, that parties floating logs will provide for the impounding of the necessary water. Since 1949 it has permitted the construction of dams only when approved by the authorities. These dams as used, of necessity, interfere with the natural flow. That this natural flow is an unimportant factor, at least during portions of the summer season, must be clear, not only from the evidence adduced in this record, but, more particularly, because the parties apparently so regarded it until after this action was commenced.

It seems to me, with great respect to the learned judges who hold a contrary opinion, that the declaration here requested would neither result in the supply of sufficient water to float logs, nor resolve the difficulties between the parties to an extent that would justify its being granted. Moreover, not only would it not be of material assistance to them in either of the foregoing respects, but would provide a source of irritation and, to that extent, tend to complicate rather than solve such difficulties as existed between the parties in 1951. It, therefore, seems to me that, because the declaration would be so ineffective, its granting would be "contrary to the accepted principles upon which the Court exercises jurisdiction" and that the declaration should be refused.

1955

HUGH W. SIMMONS LTD. v. ALEX FOSTER

Estey J.

I am of the opinion that the judgment of the Supreme Court of Newfoundland should be varied by striking out all that follows after the words "IT IS THIS DAY ADJUDGED that the judgment of the trial judge awarding damages to the plaintiff-respondent" and in lieu thereof inserting the following: "be set aside and his judgment dismissing the respondent's counterclaim for a declaration be affirmed."

In the result, the appellant ought not to have brought the action nor should the respondent have counterclaimed and, therefore, neither should recover any costs at the trial. As a consequence of the trial judgment, however, the respondent was justified in going to the Court of Appeal, where a judgment dismissing the plaintiff's claim was properly made and, therefore, the respondent should have his costs on the main appeal in the Appellate Court, but no costs with respect to his counterclaim. The appellant, because of the judgment in the Appellate Court, was justified in coming to this Court, where it has been partially successful, and should receive one-half of its costs here.

RAND J.:—The parties to this litigation are each engaged in lumbering operations in Newfoundland, including cutting, transporting and sawing logs. The cutting is on Crown lands lying within the watershed of Colinet River and its tributaries which flow ultimately into Colinet harbour and thence into the Atlantic. The lands are extremely rugged and the practicable means of transportation is that of floatage. The river is fed by several streams which have their source in chains of small lakes and ponds extending back some miles into the hinterlands on which the cutting takes place. The branches with which we have to deal here, in their order upstream, are Tremblett Brook, Back River and Ripple Pond. The first two empty into the Colinet from the east about two and five miles respectively north of its mouth. The third is an enlargement of the river itself, approximately three miles above Back River.

The mill of the Simmons Company, the plaintiff in the action, is on the easterly shore of the harbour; that of Foster, the defendant, is on the opposite side but some distance up from the shore; neither is riparian to the river and the harbour is tidal for 200 yards, more or less, above the Simmons mill.

The water available for driving varies greatly with the seasons and the rainfall. On the Colinet proper, the natural flow in July and August, although on occasions adequate, is generally insufficient for driving purposes. The Tremblett is a small stream, and its contribution to the main flow is not important. The Back River has its source in somewhat flat lands, the flow is sluggish and adds little during the months mentioned to the trunk stream.

The result is that, for commercial purposes, the control of the water by dams is virtually imperative. These works serve not only to store what would otherwise be wasted into volumes and heads sufficient to carry logs down to the harbour, but in the case of the Back River, to flood points from which the logs otherwise could not be floated to the dam.

Simmons has a dam both at the mouth of Ripple Pond and on Back River. These are approximately 100 feet in length, eight feet high, with a thickness of 18 feet at the bottom and 12 feet at the top. Two vertically operating gates regulate the flow in each, and by raising them, any desired quantity can be released. An overflow is provided by each gate. The former has been in existence at least from the year 1901 and the latter was built in 1914 and both, for the purposes here, are to be taken as the property of Simmons. The general practice is to lower the gates as soon in the spring as conditions permit, and to make two or three drives beginning in late May or early June and thereafter at times dependent upon the state of the particular stream. The Ripple Pond dam could not be worked during July and August without permission of the government because of fishery regulations requiring the gates to be kept open in that period to enable salmon to go upstream to spawn. Large scale operations on the Colinet has been confined to Simmons until 1950 when Foster entered the field. Each had licenses to cut timber and to operate a sawmill.

That these public resources can be utilized efficiently only by means of the streams as carriers under an artificial control of their flow has long been recognized by the Legislature. In *The Crown Lands Act* of 1884, ss. 57 and 58 deal with both aspects:—

LVII. No license, grant or location ticket, of any Crown Land shall give or convey any right or title to any slide, dam, pier or boom, or other work, for the purpose of facilitating the descent of timber or saw logs,

1955

HUGH W. SIMMONS LTD. v. ALEX FOSTER

Rand J.

previously constructed on such land, or in any stream passing through or along such land, unless it be expressly mentioned in the license, grant or location ticket, that such slide, dam, pier or boom, or other work, is intended to be thereby sold or granted.

(1) The free use of slides, dams, piers, booms or other works, on streams, to facilitate the descent of lumber and saw logs, and the right of access thereto for the purpose of using the same and keeping them in repair, shall not in any way be interrupted or obstructed by or in virtue of any license, grant or location ticket of Crown lands made subsequent to the construction of such work.

LVIII. The free use, for the floating of saw logs and other timber, rafts and draws, of all streams and lakes that may be necessary for the descent of timber from said lands, and the right of access to such streams and lakes, and of passing and re-passing on or along the land on either side thereof, and whenever necessary for such use thereof, and over all existing or necessary portage roads, past any rapids or falls, or connecting such streams or lakes, and over such roads, other than road allowances, as owing to natural obstacles may be necessary for the taking out of timber or saw logs from said lands, and the right of constructing slides where necessary, shall continue uninterrupted and shall not be affected or obstructed by or in virtue of any license, grant or location ticket of such lands, or by or in virtue of any license to cut timber held by one person as against any other person holding a license for the same purpose.

These provisions have been continued in the consolidations of 1896, c. 13, ss. 55 and 56, and of 1916, c. 129, ss. 34 and 35; and in *The Crown Lands Act,* 1930, c. 15, ss. 136 and 137. In c. 13, statutes of 1904, an acting dealing with other matters as well, s. 1 enacts:—

1. It shall be lawful for all persons whomsoever to float saw logs and other timber, rafts and draws over all streams and lakes within the colony, when necessary for the descent of such logs or other timber.

In relation to floatage rights, they are declaratory of the common law which arose out of the necessities of the early settlement of the province. Neither formal license nor title is claimed for the sites of the dam; and the effect of the statutory recognition accorded the works in s. 57 is considered hereafter. The reconciliation of these rights is the issue upon which the controversy hinges.

The immediate facts leading to the proceedings were these. On July 2, 1951, Foster was ready to drive 3,000 logs, then behind a temporary dam on Tremblett Brook, and 5,000 yarded along the bank of the Colinet some distance north of Back River. On that day, mistakenly anticipating a rainfall, the 3,000 were released only to become stranded on the bed of the Colinet about three-quarters of a mile below the Tremblett. A request was

made to Simmons to close the Ripple Pond dam which had been opened in accordance with the regulations but in the absence of permission it was refused. As a result of negotiations, the consent of the department was given on July 25, and the dam was then closed for about eight days. On August 3 the 5,000 logs were rolled into the Colinet and the gates opened. In six hours the 3,000 stranded below the Tremblett had been carried to Foster's boom in the harbour, but the 5,000 lot was left on the stream bed close to where the 3,000 lot had been grounded. These remained there until August 23 when a heavy rainfall carried them through.

In the meantime, on the Back River, Simmons had been storing water to carry down a large number of logs collected there. He was found to have been in a position to float them to his mill not earlier than July 20, but, in his judgment, the stranded logs of Foster made a drive at that time impracticable. By opening the dam the logs would probably have been confused with Foster's and even a separation in mere numbers would have entailed time and expense. The drive was consequently put off and the logs reached the mill in early September. The loss from keeping his mill crew together during part of this period makes up the largest item of what he seeks to recover.

On July 14 the writ was issued endorsed for an injunction and damages. An application for an interlocutory order restraining Foster from maintaining the obstructions in the stream was made, but owing to the important questions involved, the Chief Justice, before whom it was brought, declined to deal with it ex parte. Nothing further in this respect was done on behalf of Simmons.

The first question presented is whether the action was premature. For that, what is to be ascertained is not damages, even though they may be essential to the cause of action, but rather the existence of an *injuria* giving rise to it. Simmons, in exercising his common right to use the stream for driving purposes, was entitled to supplement the flow with the water behind the Back River dam and to bring his logs downstream without unjustifiable interference by Foster. But the parallel rights of these men, in some respects conflicting, must necessarily, in their exercise, be accommodated to each other by reasonable action on both

1955

HUGH W. SIMMONS LTD. v. ALEX FOSTER

Rand J.

sides. The stranding had resulted from an error of judgment, unrealized anticipations, on the part of Foster, but it was not of itself a wrong to Simmons or any one else: what resulted was the unintended obstruction of a public waterway and in the circumstances fault arose only upon an unreasonable delay in removing it: *Maitland* v. *Raisbeck* (1). On the analogy of highways, the inconvenience to which Simmons was subjected was the same as what any member of the public would have suffered and the established rule is that where that is the case the only wrong done is to the public against which only the Attorney General can move. But in the circumstances here I assume that Simmons possessed such a special interest as if infringed would be a personal wrong, and it is necessary to enquire into the conditions in which infringement could arise.

Can it be said that any right of Simmons had been transgressed before he was first in a position to use the Back River water on the 20th of July? The case on the 14th was not one for an injunction; the damages were not irreparable and the obstruction was of a temporary, not of a necessarily continuing, much less permanent, nature. What wrong had been done him before that date? The stream bed was not his: there was no trespass to his property. He may have been apprehensive that the logs would remain in the stream until he was ready to drive, but in the circumstances that was not sufficient. It is an exercise of the right of user that must be interfered with or prevented before it can be said that an *injuria* arises: up to that moment no special interest is affected. I cannot complain today of a private wrong in the obstruction of a street which I intend to use only next week; until then the nuisance, assuming it to exist, as to me, is public; and I see no distinction between that and the case before us. I agree, therefore, with the Chief Justice and Dunfield J. that on the issue of the writ there was, in relation to these matters, no existing cause of action by reason of the stranding.

But it is argued that there was an item of trespass which furnishes a foundation for the action. It appears that Simmons' receiving boom for heading the logs to his own grounds extended across the upper part of the harbour, and

(1) [1944] 1 K.B. 689.

if allowed to remain would, of course, have gathered in those of Foster. The latter, on or about July 2, had therefore moved the end of the boom across to the easterly shore for the purpose of controlling the drive to his own grounds. This, it is claimed, was a trespass to property of Simmons.

When the removal was made, Foster was, in good faith, and within his right, in the course of setting a drive on foot, and he was entitled to see his logs through to their destination. The boom set across the harbour, for which there was no statutory permission, would have prevented that; it was, at that moment and as to him, a nuisance, and he was entitled to abate it. The fact that the logs afterwards stranded did not affect the propriety of that act. No damage resulted and the boom was restored to its original position before the Back River drive was made by Simmons. In the previous year the same thing had been done under agreement with Simmons, but in the meantime they had quarrelled and Foster in this case acted on his initiative. That an individual, specially affected, is entitled to abate to the extent necessary an illegal interference with his exercise of such a right is not open to question: *Mayor of Colchester* v. *Brooke* (1); *Dimes* v. *Petley* (2).

A counterclaim was pleaded which, besides alleging damages, sought a declaration of the rights of the parties. The claim for damages was withdrawn at the trial. In that situation it is contended that a declaratory judgment should not be made. That it can be given in the absence of other relief is within the express language of O. 24, r. 5. Whether it should be or not is a matter of discretion. The court will make no such pronouncement in relation to hypothetical claims, but those in question are not of that character. They are, in fact, in such an important but indefinite context that their clarification is matter of concern as well to the public as to these litigants; and I agree with the view taken by the court in appeal that this is a case for such a judgment.

Two conceptions of the effect of the legislation are advanced. Mr. Forget treats it as conferring rights of user of dams and connecting works on any person properly using the stream for driving purposes. Whether this is to be with

(1) (1845) 7 Q.B. 339 at 377. (2) (1850) 15 Q.B. 276.

1955

HUGH W. SIMMONS LTD. v. ALEX FOSTER

Rand J.

or without compensation, and if yes, on what basis, and how, at what times and in what order the use is to be exercised, whether by the third person or by the owner, are unresolved. The reason is obvious because such a right with its subsidiary privileges, obligations and incidents can be found, if at all, only as an implication of general and uncertain language. But the implication suggested leads at once to the controlling qualification put on it by Mr. Forget: that where there are competing claimants to the use, he who is prior in setting it in exercise is not to be interrupted until his object had been completed. For example, neither the water held by the Back River dam, nor the dam itself, closed from the early spring, would be available to Foster until, in the course of its user Simmons had been able to bring the logs there gathered to his mill. This would in fact mean that the Back River flow would be written off from all users except Simmons. Conceivably one dam could be used co-operatively with another for a single drive and both would then be in the course of use for that object. It would in the particular conditions mean a virtual monopolistic advantage in priority to the owner and, for practical purposes, a substantial deprivation to other persons of the normal flow of the waters generally. Mr. Forget concludes that any other mode of dealing with the works would enable third persons to dominate the user and disrupt Simmons' operations.

The alternative view, embodied in the judgment below and urged by Mr. Lewis, is this: what each operator has in the stream itself is merely the right to use its natural flow for driving purposes. The benefit of water that may be collected from the stream when no floating could take or is taking place, a flow which would otherwise be lost, is not included in that right; it is not claimed by the respondent nor is it within the language of the judgment.

I think it impossible to draw from the statutory provisions such an implication or to interpret the "free use" of the dams as being intended to infringe the general right of floatage. The answer seems to me to be very plain: if that had been intended the legislature would have declared the privileges and the obligations in the clearest language. The statutory recognition of these works on Crown lands appears to me to have created revocable licenses in the persons who built them, but the character of the interest held

is of no moment here. The expression, "the free use", was directed against licensees and grantees of the Crown within the boundaries of whose lands the works might be; and it was made clear that the use then being made of the dams and the appurtenant privileges was not to be affected by any property or license rights conferred upon them. That that use is that of the owners seems indubitable. Instead of the implication suggested, the intention appears rather to have been to preserve the several rights just as they were.

The apprehensions stressed by Mr. Forget are quite unwarranted. By the mere working of these gates, the normal flow of the stream can at any time be restored by raising them sufficiently to maintain the then existing level of the impounded water. It is only the use of that quantity to which Foster or any person in his position is entitled; that is all that is claimed and all that is given by the judgment. There is no right to the water power stored up when not required or when not usable by others; that is within the exclusive benefit of the owner of the dam. The case here is that of exercising rights below the dams. Cases might ocurr in which the situs would be above them and there the considerations pertinent here would lead to an analogous accommodation.

I would, therefore, dismiss the appeal with costs.

LOCKE, J.:—I agree with my brothers Rand and Estey that the plaintiff's claim for damages in respect of the floating of the logs in the Colinet River between the dams erected by the plaintiff and the plaintiff's mill was premature and must fail. As to the claim by reason of the removal by the respondent of the holding piers at the mouth of the River, it was shown that these were not placed in the bed of the River with any statutory authority and, in my opinion, the plaintiff's position is not to be distinguished from that of the owners of the Second Narrows Bridge, whose rights were determined by the Judicial Committee in *SS. Eurana* v. *Burrard Inlet Tunnel and Bridge Co.* (1). In the present matter, the piers constituted a substantial interference with the defendant's right to float his logs in the tidal and navigable waters at the mouth of the River and amounted to a public nuisance.

(1) [1931] A.C. 300.

1955

HUGH W. SIMMONS LTD. v. ALEX FOSTER

Locke J.

In the counterclaim filed by the respondent, in addition to a mandatory order directing the plaintiff to open and keep open the gates of the dam at Big Pond, and damages, the respondent claimed a declaration that he was entitled to unobstructed flowage rights of the waters of Colinet River and its tributaries for the purpose of driving saw logs and timber.

The claim for damages was abandoned at the hearing as well as the claim for the mandatory order which was no longer required since, before that date, the respondent's logs had been floated to his mill boom. Winter J. dismissed the counterclaim, saying that to grant it would be to deprive the appellant of its right to maintain and operate the dams, with the result that no one would build such a dam, knowing that he was exposed to the risk of being compelled to open it at any time at the instance of other persons floating logs down the stream from above the dam.

Walsh C.J., after saying that the right to such a declaration had not been fully argued before them and that a declaration of the rights of the respondent would be "merely a restatement of them as declared by statute for all persons", considered that, as the defendant was threatened by the appellant in the exercise of those rights, the declaration should be made. Dunfield J. agreed with the Chief Justice. Winter J., the remaining member of the Court, adhered to the view which he had expressed in his judgment at the trial.

The formal declaration contained in the judgment of the Court of Appeal reads that:

> judgment be entered for the defendant-appellant for a declaration of right on his part, concurrent with plaintiff-respondent, to the use of the undiminished flow of Colinet River and its tributaries for driving saw logs and other timber.

I have had the advantage of reading the reasons for judgment to be delivered in this matter by my brother Estey and I agree with him that this appeal should be allowed in part by striking out of the judgment of the Court of Appeal the portion to which he refers.

Order XXIV(5) of the Rules of the Supreme Court of Newfoundland is identical in its terms with O. XXV, r.5 of the Rules of the Supreme Court, 1883 (Imp.)

In *Dysart (Earl)* v. *Hammerton* (1) where the action was for a declaration that the plaintiffs were entitled to an ancient ferry and an injunction to restrain the defendants from disturbing them in the enjoyment thereof, the Court of Appeal held that where such an action was dismissed on the ground that there had been no disturbance of the ferry a declaration of the plaintiffs' title under Order XXV, r. 5, should not be made. Cozens-Hardy M.R. said that the rule enabling the Court to make a declaratory decree ought not to be applied where a declaration is merely asked as a foundation for substantive relief which fails. While the decision of the Court of Appeal was reversed in the House of Lords (*Hammerton* v. *Dysart (Earl)* (2)), Viscount Haldane agreed with the opinion of the Court of Appeal on this point, saying (p. 64):—

> As the learned judge had found that the plaintiffs could have no relief against the defendants, the Court of Appeal thought that it was not proper, having regard to the character of the case, to make a declaration which might prejudge other cases.

Lord Sumner said (p. 95) that whatever the jurisdiction might be to grant declarations of right where no other relief is given, this was not a case in which the power should have been exercised. There was no dissent from these views by the other members of the House who delivered judgment.

In the present matter, when the claims for damages and for a mandamus were abandoned, there remained only the claim for a declaration of the rights of the respondent under the statutes of the province. Those rights were not merely those of the respondent but were similar to those of all others who might wish to float their logs on these rivers and on other similar rivers throughout the province. The statement of the law contained in the judgments of the Chief Justice and of Dunfield J. sufficiently declare those rights and define them as nearly as they may be defined under the legislation, as it was at the date of the filing of the counterclaim. There are, in my opinion, practical difficulties in the way of defining those rights more specifically without prejudging other cases, as is pointed out in the judgment of my brother Estey. Situations will, no doubt, continue to arise on streams such as the Colinet at many places throughout the Province of Newfoundland

(1) [1914] 1 Ch. 822. (2) [1916] A.C. 57.

1955

HUGH W. SIMMONS LTD. v. ALEX FOSTER

Locke J.

where dams have been lawfully erected, down which logs can only be floated with their assistance or in periods of high water, which will result in litigation. The respective rights of parties who have constructed such dams and of those claiming to float logs will, presumably, in time be controlled as they are in other provinces by some body vested with statutory power to regulate them. In the meantime, to attempt to more particularly define them by a declaratory judgment is impractical, in my opinion.

I agree with the disposition of the costs proposed by my brother Estey.

Appeal allowed in part.

Solicitors for the appellant: *McEvoy, Lewis & Smallwood.*

Solicitors for the respondent: *G. G. Tessier* and *O. J. Lewis.*