

reduce the water in the reservoir by drafts in excess of that amount, or more than 130 cubic feet, the rights of the defendants would be protected by requiring the plaintiff to draw water below the four-foot point. So long as no more than the average daily flow of the upper part of the reservoir is drawn by the plaintiff in the early part of the season, the defendants receive their full right when the four-foot point is reached. If the plaintiff elects to draw more, up to the average flow of the whole reservoir he must furnish the 130 cubic feet so long as that amount can be drawn.

As Hutchins owns the reservoir below the four-foot point, he has the right to fill it with earth to that point so that no water can be drawn below that point—that is, abandon it for use as a reservoir. The fact that a physical change of the situation which Hutchins has the legal right to bring about would render impossible the execution of any order permitting the defendants to draw the water below the four-foot point establishes their want of legal right to the order.

It is said that the four-foot reservoir conserves all the rainfall of the territory tributary to dam A. If this be so, the average yield of the reservoir has not been increased and there is no extra water for the owner of dam A to draw out. Whether this be so or not is a question of fact which it will not be necessary to determine so long as the owner of A persists in his present determination not to draw the water. Other questions discussed have been already decided, and no sufficient reason for their reconsideration appears.

Case discharged.

YOUNG, J., did not sit: the others concurred.

Rockingham, }
May 1, 1906. }

BARSANTEE v. HARTFORD.

CASE, for libel. Transferred from the April term, 1905, of the superior court by *Stone, J.*

Page & Bartlett and *Ernest L. Gupstill*, for the plaintiff.

Frink, Marvin & Batchelder, for the defendant.

WALKER, J. The questions presented arise upon the defendant's exceptions to the admission of evidence. In the absence of

a brief in support of the exceptions, or other information from the defendant relating to his legal positions, no error is perceived and the exceptions are therefore overruled.

All concurred.

Hillsborough, }
May 2, 1906. }

MANCHESTER v. HODGE & a.

BILL IN EQUITY. Demurrer, upon the ground that the plaintiffs have an adequate remedy at law and because they must first establish their right at law. Transferred from the September term, 1905, of the superior court by *Peaslee, J.*, without ruling, at the request of the parties.

George A. Wagner, David Cross, and Taggart, Tuttle, Burroughs & Wyman, for the plaintiffs.

Burnham, Brown, Jones & Warren, for the defendants.

Per Curiam. The defendants' objections to the form of the proceeding can be obviated by the plaintiffs filing by way of amendment such counts at law as may be necessary to determine the question of right. Whether upon the facts the plaintiffs may be entitled to equitable as well as legal relief can be determined when the facts are settled. The decision of the question as to the proper form of procedure does not appear to be essential to the rights of the parties. That question, therefore, is not considered. The plaintiffs have leave to amend.

Case discharged.