

laying the pipe line from the springs to connect with other pipes carrying water to its reservoir, but denying that the diversion would materially reduce the flow of the creek.

On August 28, 1939, the Court overruled the demurrer. The defendant subsequently filed a bill in the nature of a supplemental or cross bill, praying that the proceedings be continued or abated on the ground that the complainants' dam, which had turned the water into the mill race, had been destroyed by high waters in 1938, that the channel of the creek had been changed, and that the complainants had not used any water from the creek for power since the destruction of the dam.

The complainants thereupon filed a demurrer and answer, denying that the course of the creek had been changed or that the dam had been destroyed by heavy rains, but explaining that since the diversion of the water from the springs the amount of water left in the creek was insufficient to supply the mill for profitable operation and thus did not justify the rebuilding of the dam. The demurrer was overruled, testimony was taken, and the case was argued before the Court.

According to a fundamental principle of the common law, a riparian owner is entitled to have the water of a stream flow past his riparian land in its natural volume. This right of a riparian owner is not limited merely to the use of the stream, but is extended to the normal flow of the stream. He is entitled to have the stream flow as nature directs. 14 A. L. R. 330, 339.

While a reasonable use of the water of a stream on riparian land is legal, any use of the water elsewhere by diversion, without returning it to the stream for the use of lower riparian owners, is wrongful. As an upper riparian owner cannot lawfully divert any water of a stream, which he had the right to use, but which he does not so use, any user by a nonriparian proprietor is wrongful "if it sensibly affects the flow of the water." 14 A. L. R. 335. The taking of water from a stream for sale or distribution on nonriparian land is unreasonable and a nuisance per se. For, if the water is not used by the upper proprietor himself, the lower proprietor has the right to "The flow of the entire stream." Gould vs. Eaton, 117 Cal. 539, 49 P. 577. So, the taking of water from a stream for a municipal water supply is not a riparian right. The quantity so taken from a stream is greater than that which a riparian owner has a right to take, and therefore the Courts do not allow riparian owners to divert the water of a stream to supply the inhabitants of a town or village with water. 14 A. L. R. 331.

It was contended by the Burgess and Commissioners of Middletown that the Shepley springs are but a few out of many springs in that locality which empty into Little Catoclin Creek, and that the diversion of the water from those springs resulted in merely a trifling loss to the complainants. But if the springs constitute a substantial supply of water for the defendant, they likewise constitute a substantial supply for the complainants. It was testified by the complainants that after the diversion, and before the dam was destroyed, the complainants were not able to get one-fourth of the power they had before. Moreover, according to the great weight of authority, Equity should enjoin the abstraction of water from a stream, not only when the complainants are injured, but also whenever the claim of the defendant is of such a character as to set in motion the running of the prescriptive period against the right of the complainant so that such right would be barred in time by prescription unless an injunction is awarded. 2 Farnham on Waters and Water Rights, sec. 505a; 53 A. L. R. 1153.

The English doctrine that the diversion of the water of a stream to nonriparian lands is a nuisance per se has been modified in three States, Massachusetts, New Hampshire, and Vermont. In Massachusetts it has been held that a diversion alone, without evidence of actual injury to a lower riparian owner, does not warrant recovery of damages. In that State, when a person "diverts the water to a point outside the watershed or upon a dis-