he does so at his own risk and does not deprive the Court of jurisdiction or render the original issues moot questions. Anderson vs. Rawley, 27 Haw. 150.

It has been further held that a riparian owner's right to use the water of a stream is an incident of ownership which does not depend upon use. Redwater vs. Reed, 26 S. D. 466, 128 N. W. 702. Actual nonuser for less than 20 years by a riparian owner of the right to have water in a stream flow in its natural current does not constitute an abandonment of such a right. Pillsbury vs. Moore, 44 Me. 154, 69 Am. Dec. 91. The right to use water power is not lost by its nonuser; but even if such right could be so lost, mere nonuser would not justify the inference of an intention of the riparian owner to actually abandon it. Sowles vs. Minot, 82 Vt. 344, 73 A. 1025, 137 Am. St. Rep. 1010.

A defense somewhat analogous to that interposed by the defendant in the present case was set up in the case of Hughes vs. Maryland Tuberculosis Sanatorium, in No. 8,341 Equity, in this Court. In that case the defendant corporation contended that on account of "the competition of stream sawmills and the scarcity of timber in that locality" the complainant's sawmill could not command enough business to keep it in active and regular operation, "even if the water supply were adequate." But the Court, in its Opinion, replied: "These considerations do not in our judgment meet the issue we have to determine." In that case, the complainant averred that the sawmill property was also a good location for a chopping mill and hydraulic cider press, and might be valuable as a site for such a mill and press as well as for a sawmill. The case now before the Court is more pronounced than the Hughes case, because in that case the water was sought for use on riparian land only. The Court also observed in that case that an agency of the State, as the owner of land bordering on a water course, is in exactly the same position with reference to the use of the water of the stream as any other riparian proprietor. "The State," the Court said, "could not deprive an individual owner of his use of the water without compensation, and such a prerogative cannot exist in favor of any agency it may create."

Moreover, if a defendant does an act which is sought to be enjoined, in spite of a pending suit for injunction, the Court should ordinarily restore the status quo by mandatory injunction. Thornton vs. Schobe, 79 Colo. 25, 243 P. 617; Werner vs. Norden, 87 Colo. 339, 287 P. 644. For a defendant in injunction proceedings does the act sought to be enjoined at his peril. Grattan vs. Wilson, 82 Colo. 239, 259 P. 6.

From all the testimony in this case, it appears that the diversion of water by the defendant is substantial. The Court will, therefore, pass a final Decree for an injunction restraining the defendant from withdrawing and diverting the water flowing from the springs described in the bill of complaint.

Counsel for the defendant informed the Court that the water from the springs mentioned in the bill is not necessary at this time to meet the requirements of the people of Middletown, and that judging from past experience this water will not be necessary during the winter months. Accordingly, it does not appear that the passage of a Decree at this time will result in any inconvenience to the people of the town. The defendant has ample opportunity between now and next summer to take any further action it may consider necessary to acquire an adequate water supply for the community.

The Court will not, however, issue a mandatory injunction to compel the removal of the pipe line mentioned in the bill. It is unnecessary to order the removal of the pipe line as long as the diversion of water through the pipe line is discontinued.

DECREE

It is thereupon, this 27th day of September, 1939, by the Circuit Court for Frederick County, sitting in Equity, ADJUDGED, ORDERED AND DECREED, that the Burgess and Commissioners