

SECTION NO. 5

**ALTERNATIVE WRIT OF PROHIBITION ISSUED BY
THE SUPREME COURT OF NEVADA IN THE
CASE OF CARPENTER v. DISTRICT COURT**

**OPINION AND DECISION OF THE SUPREME COURT IN
CARPENTER v. DISTRICT COURT GRANTING A
PERMANENT WRIT OF PROHIBITION PUTTING
AN END TO THE ADJUDICATION. As Reported
in 59 Nevada Supreme Court Reports at page 42.**

IN THE SUPREME COURT OF THE STATE OF NEVADA

W. W. CARPENTER, JOHN FANT, and ANDREW JAHN,
Plaintiffs and Relators,

v.

SIXTH JUDICIAL DISTRICT COURT OF NEVADA, IN AND FOR THE
COUNTY OF HUMBOLDT AND J. M. LOCKHART AS PRESID-
ING JUDGE THEREOF,

Defendant and Respondent.

No. 3195

Filed March 31, 1937. George Brodigan, Clerk of Supreme Court. Jane Ward, Deputy.
John A. Jurgenson, Myron R. Adams, and Roy W. Stoddard, Attorneys for
Plaintiffs and Relators.

ALTERNATIVE WRIT OF PROHIBITION

The plaintiffs and relators in the above entitled matter having made and filed their petition herein praying for a writ of prohibition against the defendant upon the grounds that the defendant was without and exceeded its jurisdiction in granting the new trials hereinafter mentioned, and good cause appearing therefore,

IT IS ORDERED that the defendant, J. M. Lockhart, as the Presiding Judge of the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt in case No. 2804 thereof hereinafter mentioned, be, and appear before this court on the 28th day of April, 1937, at the hour of 10 o'clock A. M. of said date, at the court room thereof at Carson City, Nevada, and show cause, if any he has, why he should not be prohibited, enjoined and restrained from proceeding with the new trials granted by him as such Presiding District Judge pursuant to orders granting the same dated December 3, 1936, and filed December 5, 1936, in the cause entitled:

"No. 2804.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF
THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT

In the Matter of the Determination of the Relative Rights of Claimants
and Appropriators of the Waters of the Humboldt River
Stream System and its Tributaries."

and in the meantime and until said matter can be heard, the said J. M. Lockhart is hereby prohibited, enjoined and restrained from doing any of the things hereinabove specified.

DATED: This 19th day of March, 1937.

B. W. COLEMAN,
(Chief) Justice of the Supreme Court of Nevada.
EDW. A. DUCKER,
Justice of the Supreme Court of Nevada.

IN THE SUPREME COURT OF THE STATE OF NEVADA

W. W. CARPENTER, JOHN FANT AND ANDREW JAHN, PETITIONERS, *v.*
SIXTH JUDICIAL DISTRICT COURT OF NEVADA, IN AND FOR THE
COUNTY OF HUMBOLDT, AND J. M. LOCKHART, AS PRESIDING JUDGE
THEREOF, RESPONDENTS.

No. 3195

December 7, 1937.

73 P. (2d) 1310.

1. WATERS AND WATER COURSES.

Exceptions to state engineer's determination of rights of water claimants may not be dispensed with, and questions to be decided in adjudication proceedings are limited to issues raised thereby (Comp. Laws, sec. 7922).

2. WATERS AND WATER COURSES.

The court had no jurisdiction, in adjudication proceedings, to award earlier and better priorities to water claimants who filed no exceptions to state engineer's order of determination, and hence court had no jurisdiction to grant new trial with view of restoring such priorities after they had been set aside by another judge (Comp. Laws, sec. 7922).

3. WATERS AND WATER COURSES.

Where water claimants obtained order setting aside adjudication decree on ground that doctrine of relation was improperly applied to give other claimants earlier and better priorities than were fixed by state engineer's order of determination, no other claimant could enlarge scope of proposition presented thereby, so as to raise other questions (Comp. Laws, sec. 7922).

4. PROHIBITION.

Where adjudication decree, without jurisdiction, awarded earlier and better priorities than those fixed by state engineer's order of determination to water claimants who had not filed exceptions to order of determination, other claimants, who obtained order setting aside that portion of adjudication decree, were entitled to writ of prohibition against new trials that were subsequently ordered with view of reinstating original decree (Comp. Laws, sec. 7922).

ORIGINAL PROCEEDING in prohibition by W. W. Carpenter and others against the Sixth Judicial District Court of Nevada, in and for the County of Humboldt, and J. M. Lockhart, as Presiding Judge thereof. **Writ of prohibition granted.**

John R. Jurgenson, Myron R. Adams and Roy W. Stoddard, for Petitioners:

A new trial cannot be granted a claimant upon an issue that is not raised by the filing of exceptions to the state engineer's order of determination except in cases where the trial court, after submission and decision of the case, changes, modifies and alters the rights of noncontestants as specified and set forth in the state engineer's order of determination.

It was not within the power of Presiding Judge Lockhart to grant the new trials to the noncontestants when it appeared upon the face of the record that Presiding Judge Edwards reached the only conclusion which he could properly have reached on the record, that is that Judge Bartlett's findings and decree as to said noncontestants' priorities was void, there being no exceptions filed as provided by the water code.

Gray Mashburn, Attorney-General, *W. T. Mathews* and *W. Howard Gray*, Deputy Attorneys-General, for Respondents; *M. A. Diskin*, *Morley Griswold*, *McNamara & Robbins*, and *Milton B. Badt*, for Sundry Claimants:

The position of counsel for petitioners as to lack of jurisdiction of Judge Bartlett is not tenable for the following reasons:

1. Because, from the very nature of the proceedings, all of the claimants of water rights to the Humboldt river stream system were before the court in a "determination of the relative rights."

2. Your claimants herein filed exceptions, as shown by exhibits attached to the claimants' answer on file in the above-mentioned matter.

3. In adjudication cases it is not necessary that any exceptions or objections be filed in order to vest jurisdiction and to permit and authorize the trial court to enter a final judgment in accordance with law and facts. In *re* Water Rights in Silview River (Ore.), 237 P. 322; In *re* Rights to Use of Waters of Owyhee River (Ore.), 23. P.(2d) 206; sec. 35 of water code, being sec. 7922, N. C. L.

Certainly, the application of the doctrine of relation, a judicial theory, is such a phase of the adjudication as affects the entire stream system. Its application must be general along the entire stream. Section 35 of the water code certainly gives the court power to do equity as between the relative rights. *Plain City Irr. Co. v. Hooper Irr. Co.* (Utah), 51 P.(2d) 1069.

O P I N I O N

By the Court, HATTON, District Judge:

This is an original proceeding in prohibition to restrain the Honorable J. M. Lockhart, as presiding judge of the Sixth judicial district court of the State of Nevada, in and for the county of Humboldt, or any other district judge who may hereafter preside in said cause, from proceeding with the new trials granted by the said district judge in the cause entitled: "In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and its Tributaries."

The order of determination of the state engineer, determining water rights on the Humboldt river system, was filed with the clerk of the Sixth judicial district court, in and for Humboldt County, on January 17, 1923. A number of claimants on the stream system filed their exceptions to the said order. Hearings on these exceptions were had before the Honorable George A. Bartlett, presiding district judge, whose findings and decree were subsequently filed and entered. In the said findings and decree, some 191 claimants, who had not filed exceptions in that regard, were awarded earlier and better priorities with respect to their water rights than had been allotted to them in the order of determination of the state engineer; such earlier and better priorities being based upon the application of the doctrine of relation in determining the dates of such priorities. The petitioners herein moved for and obtained an order, made by the Honorable H. W. Edwards, presiding district judge, setting aside the said Bartlett findings and decree, in part, and granting a new trial with respect to the application of the doctrine of relation to the 191 noncontest claimants above referred to. Upon such new trial, Judge Edwards made findings of facts and conclusions of law reciting that the application of the doctrine of relation to the said noncontest claimants by Judge Bartlett was without authority of law and void, and entered his decision and decree with respect thereto. To the latter decision motions for new trial were interposed, and were granted by Judge Lockhart. The claimants who sought and were granted new trials by Judge Lockhart took the position that all of the claimants on the river system should have the benefit of an investigation of the facts bearing on the application of the doctrine of relation. With approval of the movants' attitude, Presiding Judge Lockhart granted new trials, the scope of which would open to consideration and

adjudication the claims of all claimants on the river system which might now be presented, based on the doctrine of relation. The petitioners now seek to restrain the respondent court from proceeding with the new trials so granted by Judge Lockhart.

The petitioners contend that, because of the absence of exceptions to the order of determination of the state engineer on the ground of failure to apply the doctrine of relation, there are no issues on that subject presented in the pleadings upon which a new trial could be based. In answer to this, the respondents maintain that such issues may be raised, or may be deemed to be raised in the absence of such exceptions. Section 35 of the water law (section 7922 N. C. L.) provides as follows: "At least five days prior to the date set for hearing, all parties in interest who are aggrieved or dissatisfied with the order of determination of the state engineer shall file with the clerk of said court notice of exceptions to the order of determination of the state engineer, which notice shall state briefly the exceptions taken, and the prayer for relief, and a copy thereof shall be served upon or transmitted to the state engineer by registered mail. The order of determination by the state engineer and the statements or claims of claimants and exceptions made to the order of determination shall constitute the pleadings, and there shall be no other pleadings in the cause."

1. The exceptions, duly filed, perform functions of such importance that the necessity of filing them should not be dispensed with. It is the filed exception that gives notice to all other claimants as to the objections and demands of the exceptor. The purpose of the law is to limit the questions to be decided in the adjudication proceedings to issues raised by exceptions duly filed. In *Humboldt Land & Cattle Company v. Sixth Judicial District Court*, 47 Nev. 396, 224 P. 612, 614, this court said: "The section * * * requires all those aggrieved or dissatisfied to file notice of their exceptions with the clerk setting forth the grounds and prayer for relief, thus affording all parties in interest who are satisfied with the order of determination an opportunity to appear before the court and oppose any alteration or modification of the order as proposed by those excepting."

In the case of *In re Water Rights in Humboldt River Stream System*, 49 Nev. 357, 246 P. 692, 694, this court further said: "The water law is a special statutory proceeding brought into effectual existence after much travail to meet a great public need. The law meets every demand for a full, fair, and just determination of the rights of every water user. * * * Though these rights are secured to him, he must avail himself of them by proceeding in the manner outlined in the water law."

See, also, *Ruddell v. Sixth Judicial District Court*, 54 Nev. 363, 17 P.(2d) 693.

This court has held that a judgment which adjudges matters outside the issues raised by the pleadings is so far void. *Schultz v. Mexican Dam & Ditch Company*, 47 Nev. 453, 224 P. 804; *Douglas M. & P. Co. v. Rickey*, 47 Nev. 148, 217 P. 590.

2. As we view this matter, there was no jurisdiction as the basis for Judge Bartlett's order awarding the 191 noncontesting claimants an earlier and better priority than that fixed by the order of determination. If this is true, we fail to see how Judge Lockhart could have jurisdiction to grant a new trial with a view of restoring to these noncontesting claimants, or any of them, priorities which Judge Bartlett awarded, or any priorities other than those fixed in the order of determination.

3. The proceedings sought to be reviewed grew out of and are limited

solely to the attack on Judge Bartlett's decree as to the 191 noncontesting claimants, made by petitioners. No other claimant on the Humboldt river stream system attacked the Bartlett decree in this respect, so far as appears, and no other claimant, as a result of the motion on which Judge Edwards based his ruling, could enlarge the scope of the proposition presented by petitioners' application, upon which he acted, so as to extend to and raise questions other than was originally raised by the motion for a new trial.

4. It is argued on behalf of respondents that the record brought up by the petitioners is lacking in essential elements. Upon considering the objections in that regard, we find no essential element to be lacking.

For the reasons given, it is hereby ordered that the demurrers to the petition for writ of prohibition, and the motions to quash the alternative writ, are overruled, and that said Presiding Judge, J. M. Lockhart, or any other district judge who may hereafter preside in said cause, is prohibited, enjoined, and restrained from proceeding with the new trials granted by said presiding district judge in said court and cause by orders dated December 3, 1936, and filed therein on December 5, 1936.

The petitioners are allowed their costs in this proceeding.

NOTE—TABER, J., having disqualified himself, the Governor designated HON. WM. D. HATTON, Judge of the Fifth Judicial District, to sit in his stead.

ON PETITION FOR REHEARING

April 25, 1938.

Per Curiam:

Good cause appearing therefor, it is ordered that the various petitions for rehearing filed herein be and they are hereby granted.

It is further ordered that the case be set down for argument on Wednesday, May 25, 1938, at 10 a. m.

ON REHEARING

November 26, 1938.

84 P. (2d) 489.

1. WATERS AND WATER COURSES.

Purpose of statute relative to proceeding for determining rights of appropriators of water, in providing that order of determination by state engineer, statements or claims of claimants, and exceptions made to order, should constitute pleadings, was to limit pleadings to those stated in statute. Comp. Laws, sec. 7922.

2. PLEADING.

Purpose of pleadings is to define issues involved.

3. WATERS AND WATER COURSES.

Purpose of statute relative to proceeding to determine rights of appropriators of water, in providing that aggrieved party should file exceptions to order of determination of state engineer, briefly stating the exceptions taken, was to provide method whereby an issue in the cause should be raised. Comp. Laws, sec. 7922.

4. WATERS AND WATER COURSES.

Under statute relative to proceeding to determine rights of appropriators of water, which provides that, on day set for hearing with respect to order of determination of state engineer, all who have filed notices of exceptions to order should appear, and proceedings, including the taking of testimony, should be in accordance with rules governing civil actions, where exceptions are filed by some claimants, evidence is confined to issues raised by such claimants' exceptions, notwithstanding statute provides that in cases where no exceptions are filed court may take further testimony. Comp. Laws, sec. 7922.

5. WATERS AND WATER COURSES.

In proceeding to determine rights of appropriators of water of a river system under water law, where number of users excepted to order of determination of state engineer, propriety of subsequent proceedings was to be determined by statutory

provision relative to cases where exceptions were filed and not by statutory provision relative to cases where no exceptions were filed, notwithstanding a number of water users failed to file exceptions. Comp. Laws, sec. 7922.

6. WATERS AND WATER COURSES.

Purpose of water law is to provide method whereby unappropriated water might be appropriated or whereby relative rights of appropriators of waters of public streams might be determined without great delay and expense to such appropriators, and to enable state to supervise the distribution of waters so that greatest good might be attained therefrom for development of agricultural resources. Comp. Laws, sec. 7922.

7. STATUTES.

In interpreting a section of a statute, every portion of section must be given effect, and all portions must be harmonized.

8. WATERS AND WATER COURSES.

In proceeding to determine rights of appropriators of water of a river system under water law where claimants, who had been granted new trials which were limited to application of doctrine of relation, had not filed exceptions to order of determination of state engineer on ground of failure to apply doctrine of relation, claimants were not entitled to new trials so limited. Comp. Laws, sec. 7922.

9. WATERS AND WATER COURSES.

In proceeding to determine rights of appropriators of water under water law, where decision of trial court in granting a motion for a new trial dealt exclusively with application of doctrine of relation, decision limited scope of such new trial and others granted in accordance with decision, to matter of applying such doctrine to facts presented, and claimant whose predecessor's exceptions raised issues other than application of doctrine was not entitled to new trial granted in accordance with decision. Comp. Laws, sec. 7922.

10. WATERS AND WATER COURSES.

In proceeding to determine rights of appropriators of water under water law, where trial court, after filing findings and decree upon which notice of decision was given, later refiled same findings and decree because originally filed findings had not been served on parties before being signed by court, a claimant, who, following the refiled of the findings and decree, more than 10 days after original notice of decision was given, gave notice of motion for new trial, was not entitled to new trial since the 10-day period for giving notice of motion began to run from date of original notice of decision. Comp. Laws, sec. 7922.

11. WATERS AND WATER COURSES.

In proceeding to determine rights of appropriators of water under water law, exceptions, to order of determination of state engineer, relative to request for substitution of name of successor claimant, duty of water, length of irrigation season, and claimed prescriptive right to use of waters, did not relate to application of doctrine of relation, and claimant, whose predecessor filed such exceptions, was not entitled to a granted new trial which was limited to application of such doctrine. Comp. Laws, sec. 7922.

12. WATERS AND WATER COURSES.

In proceeding to determine rights of appropriators of water under water law, claimant who filed amended exception, to order of determination of state engineer, asserting a right to earlier priorities than those found by engineer, was not entitled to a granted new trial limited to application of doctrine of relation, since exception presented no issue for new trial so limited. Comp. Laws, sec. 7922.

13. NEW TRIAL.

A "new trial" is a reexamination of an issue of fact.

14. WATERS AND WATER COURSES.

In proceeding to determine rights of appropriators of water under water law, where claimant sought to have added to decree of trial court a notation that a judgment in another suit should be binding between the parties, but notation did not appear in order of determination of state engineer and no exception was filed by claimant asking that notation be made, claimant was not entitled to new trial since there was no issue presented upon which a new trial could be had. Comp. Laws, sec. 7922.

15. WATERS AND WATER COURSES.

In proceeding to determine rights of appropriators of water under water law,

claimants whose predecessor filed an exception, to order of determination of state engineer, on question of reclassification of lands, was not entitled to a granted new trial limited to application of doctrine of relation, since there was no subject matter for new trial so limited. Comp. Laws, sec. 7922.

16. PROHIBITION.

Where, in proceeding to determine rights of claimants and appropriators of water under water law, trial court granted to some claimants new trials, some of which were limited to application of doctrine of relation upon exceptions to order of determination of state engineer which did not relate to application of doctrine, and others of which were granted upon notices for new trials which were given at too late a date, other claimants were entitled to writ of prohibition against new trials. Comp. Laws, sec. 7922.

On rehearing. Former opinion affirmed.

For former opinion, see 59 Nev. 42, 73 P. (2d) 1310.

John A. Jurgenson, Myron R. Adams and Roy W. Stoddard, for Petitioners.

Gray Mashburn, Attorney-General, *W. T. Mathews* and *W. Howard Gray*, Deputy Attorneys-General, for Respondents.

M. A. Diskin, Morley Griswold, McNamara & Robbins, and *Milton B. Badt*, for Sundry Claimants.

OPINION

By the Court, HATTON, District Judge:

A rehearing was granted in this matter.

Counsel for respondents contend that we misconstrued in our former opinion section 35 of our water law (sec. 7922, N. C. L.), in that we did not give full effect to that portion thereof consisting of the amendment of 1921.

The section in question reads: "§ 35. At least five days prior to the date set for hearing, all parties in interest who are aggrieved or dissatisfied with the order of determination of the state engineer shall file with the clerk of said court notice of exceptions to the order of determination of the state engineer, which notice shall state briefly the exceptions taken, and the prayer for relief, and a copy thereof shall be served upon or transmitted to the state engineer by registered mail. The order of determination by the state engineer and the statements or claims of claimants and exceptions made to the order of determination shall constitute the pleadings, and there shall be no other pleadings in the cause. *If no exceptions shall have been filed with the clerk of the court as aforesaid, then on the day set for hearing the court may take further testimony if deemed proper, and shall then enter its findings of facts and judgment and decree.* On the day set for hearing, all parties in interest who have filed notices of exceptions as aforesaid shall appear in person or by counsel, and it shall be the duty of the court to hear the same or set the time for hearing, until such exceptions are disposed of, and all proceedings thereunder, including the taking of testimony, shall be as nearly as may be in accordance with the rules governing civil actions."

That portion of the section which is italicized is the amendment of 1921. It seems that the legislature had in mind, in incorporating the 1921 amendment into the section, that one of two situations might confront the court in the adjudication of a stream system—one in which *no* exceptions are filed to the order of determination, and one in which exceptions are filed by one or more appropriators and none filed by those who do not deem themselves aggrieved by the order. It seems clear from a reading of the above section with the amendment of 1921