SECTION NO. 4

LATER ORDERS AND DECISIONS OF JUDGE J. M. LOCKHART

NOTE—The above orders and decisions, excepting the Decision on Motion of John M. Marble and Others to Strike Parts of Amended, Changed and Corrected Findings of Fact, as Made and Entered by the Honorable H. W. Edwards December 26, 1934, and to Modify the Same, and to Substitute New Findings in Place Thereof, and for a Further Order, Striking the Said Amended, Changed and Corrected Findings of Fact from the Files, filed September 13, 1935, and the Decision on Motion of Hibernia Savings and Loan Society, filed September 13, 1935, were made and entered between the time of the filing of the Edwards Decree, October 8, 1935, and the issuance of the Writ of Prohibition by the Supreme Court of Nevada in Carpenter v. District Court, March 19, 1937.

LATER ORDERS AND DECISIONS OF JUDGE J. M. LOCKHART

IN THE SIXTH JUDICIAL DISTRICT COURT 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. } No. 2804

Filed September 13, 1935—J. W. Davey, Clerk

DECISION ON MOTION OF JOHN M. MARBLE AND OTHERS TO STRIKE PARTS OF AMENDED, CHANGED AND CORRECTED FINDINGS OF FACT, AS MADE AND ENTERED BY THE HONORABLE H. W. EDWARDS DECEMBER 26, 1934, AND TO MODIFY THE SAME, AND TO SUBSTITUTE NEW FINDINGS IN PLACE THEREOF, AND FOR A FURTHER ORDER STRIKING THE SAID AMENDED, CHANGED AND CORRECTED FINDINGS OF FACT FROM THE FILES.

This motion came on for hearing on the 22d and 23d days of July, 1935, at Winnemucca, Humboldt County, State of Nevada, and was taken under advisement by the court.

The matter was very ably argued, and the court has given a great deal of consideration to the arguments made and to the citations cited by the attorneys. The question to be decided by the court is: Whether the failure of the court to serve its findings thirty days before they shall be signed by the court invalidates the findings filed and judgment entered December 26, 1934, by the Honorable H. W. Edwards, then presiding in this matter. It is conceded by counsel for all parties that such service of findings was not made as required by Section 35 of our Water Code, but that without such service the court filed what it termed its amended, changed and corrected findings of fact, conclusions of law and decree, and the court must now decide what effect shall be given to them. Our Supreme Court has held

> "No express findings were made. In their absence the law implies findings in favor of the judgment." Wilson v. Wilson, 23 Nev. 267.
>
> "The findings of fact contemplated by the statute is the written statement of each issuable fact established by the evidence. From these determined facts the conclusion of law is deduced. The decision is the announcement by the court of its judgment, and although based upon the settled facts of the case, such facts may never be reduced to writing so as to constitute findings within the meaning of that term as used in the civil practice act. It is a matter of frequent occurrence for

courts to announce judgment, and afterwards to prepare the findings. The decision may be rendered after or before the filing of findings, or, as is frequently the case, no findings may be made. The decision is therefore distinct from the findings, and the time within which notice of intention to move for a new trial must be given begins to run from the announcement of the judgment." Elder v. Frevert, 18 Nev. 278.

In our Practice Act there is no requirement for making and filing findings of fact. The only provision is Section 8784 which provides they may be waived, and that "In all cases where the court directs a party to prepare findings a copy of said proposed findings shall be served upon all parties who have appeared in the action at least five days before findings shall be signed by the court, and the court shall not sign any findings therein prior to the expiration of such five days."

That applies only when the court shall direct a party to prepare findings, and does not apply when the court makes its own findings or does not make any findings.

We find many cases where the trial court files a written decision and makes such statements as to the facts proved in the case as to make findings only a repetition of the decision and of no value, and consequently findings are dispensed with.

The court may and often does file a written decision which includes a judgment and decree so that no further action is necessary except the entry of the judgment and decree by the clerk.

The decisions are in conflict as to whether or not the provision in our code as to the service and signing of the findings of fact are mandatory or merely directory, but the court does not feel that in the present action this question is of any importance.

The matter of the determination of the relative rights of the claimants and appropriators of a stream system under the laws of this state is a special proceeding and governed by the statute which gives the court jurisdiction to hear the matter in its own peculiar form.

"It must be conceded that it is the province of the legislature to establish within constitutional limits the rules, not only of procedure, but for the determination of rights, by which the courts shall be governed. * * *

"The proceeding is a special proceeding applicable to a specified subject-matter and suitable to the end which the state seeks to accomplish, namely, to protect all the collective users of water, secure a just distribution, and perpetuate water rights in a public record under such safeguards for the protection of individual rights as the settled maxims of the law permit and sanction.

"* * * The declaration that the order of determination, the statements or claims of claimants, and exceptions made to the order of determination shall constitute the only pleadings in the cause demonstrates that the procedure is not to be measured by the standard of ordinary judicial proceedings." Humboldt L. & C. Co. v. District Court, 47 Nev. 396.

Anyone at all familiar with the Humboldt River Determination knows that the procedure outlined in our Water Code has been held constitutional in every respect in numerous decisions.

"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. It safeguards the rights of every water user by giving him the benefit of a stay of the order of determination until the final decree and every advantage of a full, judicial hearing and determination in the district court. Though these rights are secured to him, he must avail himself of them by proceeding in the manner outlined in the water law. The law is constitutional, and there is no contention to the contrary. * * *

"This being a special statutory proceeding, no right to appeal exists unless it is expressly conferred by the statute. Coffin v. Coffin, 40 Nev. 345, 163 P. 731." In Re Water Rights, 49 Nev. 357, pages 363–4.

Coming now to a consideration of Section 35 of the Water Code as it relates to the findings of fact and judgment and decree.

It reads in part: "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; provided, however, that the provisions of the civil practice act shall not apply respecting the service of proposed findings of fact and decree or service and filing of a cost bill, but that such service shall be made in the following manner. All claimants who have filed exceptions or objections to the final order of determination shall be served with a copy of the proposed findings of fact and decree by serving the attorney who appeared for such claimants in said proceedings. All claimants or water users who shall not have filed exceptions or objections to the final order of determination shall be served with a copy of the proposed findings of fact and decree by serving a copy thereof on the attorney-general of the State of Nevada. Such service, in each instance, shall be made at least thirty (30) days before the findings and decree shall be signed by the court, and the court shall not sign any findings therein prior to the expiration of such thirty days."

Therein we have the entire procedure laid down for the district court to follow.

The court does not feel that it is necessary in this case to quote authorities as to statutory construction as you are all of too many years' experience as lawyers to need such citations. All that is needed is to apply fundamental rules of statutory construction to this question. There is no need to give a "strained" construction to any part of it.

As Justice Coleman said in the case In Re Water Rights, supra, this section of the Water Code, the same as all the other sections, was "brought into existence after much travail to meet a great public need."

No one can doubt for a moment that when the legislature enacted this law,

the Humboldt River Stream System was one of the few systems deemed to need just such a law as was enacted and that the law was drafted to meet conditions on this stream system; it probably was held more in mind than any other system in the state.

The statute as to this section is clear and unambiguous and interpretation would be out of place, and each word therein should be given its usual and customary meaning.

It provides that when the order of determination has been filed and no exceptions are taken thereto, "the Court * * * shall then enter its findings of facts and judgment and decree."

Where exceptions are filed there shall be hearings thereon until all exceptions are disposed of, and "shall be as nearly as may be in accordance with the rules governing civil actions," except as to "the service of proposed findings of fact and decree or service and filing of a cost bill, but such service shall be in the following manner": Upon the attorneys for contestants and upon the attorney-general for noncontestants. This section further provides "such service, in each instance, shall be made at least thirty (30) days before the findings and decree shall be signed by the Court" and then follows a positive prohibition "and the court shall not sign any findings therein prior to the expiration of such thirty days."

Often the court renders its decision as stated before and findings and decree follow later, and the decision is final as to the district court and the findings and decree must then follow the decision.

But this section provides for an entirely different manner and provides that the decision, signing the findings of fact and decree shall be at one time, in other words the decision shall not be made until proposed findings of fact have been served for a period of thirty days.

Having in mind the nature of this proceeding, the vast number of persons and interests involved, the great labor required to set forth such interests, the great amount of detail involved, all making for likelihood of error and mistakes, the legislature very wisely provided that an opportunity and ample time should be given for the correction of such errors and a chance given counsel in the case to call the court's attention to those matters in which the court may have been in error. The statute provides that it is not the findings which shall be served but that the "proposed" findings shall be served.

The word "shall" is used followed by words of absolute prohibition.

The word "shall" is sometimes construed to mean "may" when to otherwise construe it might lead to hardship and inconvenience. Dangberg v. Commissioners, 27 Nev. 469.

To construe it in this Humboldt River Matter as "may" and only directory leads and has lead to hardship and inconvenience, and of a certainty not as intended by the legislature.

We must at all times seek the legislative intent in construing a statute, and we must in this case see clearly that it was intended by this section to give an opportunity to the parties to the action to be further heard before final action be taken and the matter concluded in the district court.

Every court shall be guided by the statute in all procedural matters and carry out the plain meaning thereof and it is clear to this court that the legislature clearly provided for an interval of thirty days between the service of the findings and the signing of them thereby making the decision of the questions litigated and then pending before the court follow the findings and a full determination be had of the findings prior to the final entry of the judgment and decree.

Our Supreme Court has said:

> "In the case of State v. Ruhe, 24 Nev. 251, 52 P. 274, this court has held that the object of the interpretation of a statute is to ascertain and enforce the intention of the legislature. No sentence, clause, or word should be construed as unmeaning and surplusage if a construction can be found legitimately which will give force and preserve all of the words of the statute. It is a canon of construction that, if it is possible, effect must be given to every word of an act." Seaborn v. District Court, 55 Nev. 206, page 219.

On December 31, 1930, the Hon. Geo. A. Bartlett, the judge then presiding, filed his opinion and decision in this matter, and ordered that findings be prepared and judgment be entered in accordance with his opinion and decision thus filed. In a few days he retired from office.

The legislature which convened shortly thereafter passed two acts which were duly approved, and which were clearly enacted in view of the Humboldt River situation; one amended Section 547 of our Civil Practice Act (Sec. 9036 N. C. L.) and enlarged the power of a retiring judge as to the findings of fact, conclusions of law and judgments and decrees in matters in which he made decisions when about to retire from office. 1931 Statutes of Nevada, 28.

The other was an amendment of Section 36 of our Water Code which, among other things, provided for such retired judge to hold hearings for the settlement of written findings of fact and conclusions of law and judgment and decree appertaining to such written decision so filed. 1931 Statutes of Nevada, 413.

On December 26, 1934, the Hon. H. W. Edwards, the judge then presiding in this proceeding and who was then about to retire from office, filed his written "Amended, Changed and Corrected Findings of Fact, Conclusions of Law and Decree" with the clerk of the court and this is the decision required by the amended Section 547 of our Civil Practice Act and the decision provided for in Section 36 of the Water Code.

Thereafter on January 16, 1935, various claimants filed motions for new trials as to their rights, and motions to strike parts of the "amended, changed and corrected findings of fact" so filed by the district judge, and a motion was made by interested parties to strike parts of said "amended, changed and corrected findings" of Judge Edwards, and to strike all of said findings and to substitute the Findings of Fact, Conclusions of Law and Decree made by Judge Bartlett filed October 20, 1931.

The requirements made by Judge Edwards for the clerk of the court to modify and change the original findings of fact, conclusions of law and decree of Judge Bartlett filed and entered in this proceeding will be ignored as the same is null and void from every point of view.

At this time the court wishes it distinctly understood that we fully realize that the order of determination is the complaint in this action and that as to noncontestants when a change is made in priorities from those set forth in the order of determination, they are thereby affected and should be given a right to be heard further in the proceeding, as every change made in such priorities changes the rights of all those in the class to which the priority has been changed as well as all subsequent priorities. They may well be understood to have accepted the order of determination as to their rights but not willing to accept any change therefrom adversely affecting their rights.

The court can find no right by which it can reinstate any findings of Judge Bartlett. New trials were ordered by Judge Edwards and we can only be concerned with his proceedings since that time.

The records of the clerk of this court show that no entry in the minutes of the court was made of the amended, changed and corrected findings of fact, conclusions of law and decree filed by Judge Edwards on December 26, 1934, in accordance with Section 547 of the Civil Practice Act as amended, but it does amount to a "decision" but is invalid as findings of fact and a decree. The judgment and decree must follow the findings of fact and conclusions of law where such findings of fact are required and in this proceeding such findings of fact are clearly required to support a valid judgment and decree.

It is the order of this court that the motion of John M. Marble and Robert E. Marble, and others, for an order striking the said findings of fact from the files be, and the same hereby is, granted, and that part of the motion to substitute and insert in lieu thereof the findings of fact, conclusions of law and decree of Judge Bartlett be, and the same hereby is, denied.

Dated at Ely, Nevada, this 12th day of September, 1935.

J. M. LOCKHART,
District Judge Presiding.

IN THE SIXTH JUDICIAL DISTRICT COURT 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. } No. 2804

Filed September 13, 1935—J. W. Davey, Clerk

DECISION ON MOTION OF HIBERNIA SAVINGS & LOAN SOCIETY

On January 16, 1935, the Hibernia Savings and Loan Society filed its motion in this court to strike parts of the "Amended, Changed and Corrected Findings of Fact," as made and entered by the Hon. H. W. Edwards, December 26, 1934, and to modify the same and to substitute new findings in place thereof.

On July 22d and 23d, 1935, the said motion was argued and by the court taken under advisement.

The court has this day made its order on the motion of John M. Marble and others upon a state of facts almost identical with the state of facts as to this motion.

For the reasons set forth in such last mentioned order that part of the motion made by the movant as to striking from the files the "amended, changed and corrected findings of fact and conclusions of law" be, and the same hereby is, granted, and that part of the motion to substitute the findings of fact, conclusions of law and decree of Judge Bartlett be, and the same hereby is, denied.

Dated at Ely, Nevada, this 12th day of September, 1935.

J. M. LOCKHART,
District Judge Presiding.

IN THE SIXTH JUDICIAL DISTRICT COURT 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. } No. 2804

Filed December 5, 1936—J. W. Davey, Clerk

DECISION ON MOTION TO STRIKE PURPORTED AMENDED, CHANGED AND CORRECTED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE.

On October 28, 1935, John M. Marble and Robert E. Marble and others filed their motion to strike from the files in this matter, and declare null and void and of no effect, that certain instrument or document, entitled "Amended, Changed and Corrected Findings of Fact, Conclusions of Law and Decree" filed in this matter with the clerk of this court on the 8th day of October, 1935, and signed by H. W. Edwards, as Former Judge Presiding, on the grounds:

1. That they are not authorized by and are contrary to and in contravention of the statutes and laws of the State of Nevada.

2. That they were not signed by any person holding any judicial position or by any person authorized by law to sign the same.

3. That the same were signed by one H. W. Edwards, who was not the presiding judge at that time and for many months prior thereto had not been such presiding judge and was not clothed with any judicial or any authority to act in such matter at that time or for many months prior thereto.

4. That said action and said cause had been theretofore duly assigned to District Judge J. M. Lockhart, who was the presiding judge at the time the said H. W. Edwards signed the same.

5. That under the laws of the State of Nevada and the rules of the District Court, only one judge could preside in said cause at said time.

6. That the signing of the same was in violation of rules XLI, XLII and XLIII of the District Court.

7. That by the signing by the said H. W. Edwards of the "Amended, Changed and Corrected Findings of Fact, Conclusions of Law and Decree" filed December 24, 1934, he exhausted his powers and no further power existed in him except as to any matters that might have been properly brought before him during his term of office on due notice in the manner provided by law.

8. That if the act of 1931 purported to give the said H. W. Edwards, former presiding judge, authority to sign amended findings, etc., on October 8th, 1935, after having purported to have signed amended findings, etc., on the 26th day of December, 1934, after ceasing to be a district judge, and after said cause had been assigned duly, regularly and lawfully to another district judge, such statute would to such extent be unconstitutional and void.

9. That such signing and filing of the said amended findings, etc., on October 8, 1935, constituted a judicial act, and at that time the said H. W. Edwards was not clothed with any judicial powers.

10. That said findings, etc., constitutes in a form a cloud upon the title to

lands and water rights of the movants and is an interference with an obstruction to the orderly determination of the relative rights of the users of the waters of the Humboldt River system.

11. That the said findings, etc., are illegal, unlawful and contrary to the criminal statutes of Nevada, and void in that they direct the clerk to mutilate, change, modify and alter an original document and record in said cause.

12. That said amended findings, etc., are not and do not constitute findings of fact upon the issues involved, sufficient upon which to base conclusions of law and/or a final judgment or decree in the cause.

13. That said purported amended findings, etc., are not complete in themselves and are unintelligible.

14. That a final decree could not be predicated upon them without further judicial proceedings.

15. That they are so indefinite, uncertain, incomplete and fragmentary as to be incapable of enforcement or as the basis of conclusions of law, judgment and decree.

16. That said amended findings, etc., are immaterial and surplusage, and comprise a fugitive document.

17. Chapter 25, Statutes of 1931, page 28, governing the signing and filing of findings of fact in adjudication suits is null and void and unconstitutional.

The record of this matter shows that on the 26th day of December, 1934, just a short time before his retirement from office as a district judge, the Hon. H. W. Edwards signed and filed in this court a document designated as "Amended, Changed and Corrected Findings of Fact, Conclusions of Law and Decree."

Thereafter the writer hereof, as District Judge Presiding in this matter, ordered the Findings of Fact, as set out in said document, stricken from the files.

In August, 1935, the said Former Judge served or had served other proposed findings of fact, and thereafter no exceptions or requests being made for a modification of said findings, filed in this court on October 8, 1935, and after more than thirty days had elapsed, a document designated as "Findings of Fact, Conclusions of Law and Decree."

This last document is exactly the same as the instrument filed December 26, 1934, mentioned above, except that pages 1 and 2, a notice of Attorney-General Mashburn, has been removed and parts of pages 5 to 12 inclusive have been crossed out, the words "Amended, Changed and Corrected" in the title on page 13, have been crossed out, and pages 40 and 49 have also been crossed out, and is signed H. W. Edwards, Former Judge Presiding, and dated October 7th, 1935.

It is exactly the same as the instrument served in August, 1935, except the word "Proposed" is used in designating the several Findings of Fact, etc., in the various titles.

Thereafter the above motion was filed as set forth above.

The court is confronted with a very serious situation, one which has so many serious complications that it feels the need of using extreme caution in making its decision.

The procedure followed by Former Judge Edwards closely follows what was done by Former Judge Bartlett, resulting in his decree of October, 1931.

It is contended that when the findings of fact of Former Judge Edwards was stricken out, he lost all right to do anything further in the matter.

The court must hold that his document filed December 26, 1934, was a decision as required of a retiring judge before going out of office; that when

the findings of fact were stricken out, his conclusions of law and decree likewise fell as not supported by any findings of fact as required by Section 35 of the water law. This left it open for him to file proposed findings, conclusions of law and decree as provided by the 1931 statute so familiar to all of us. This he did, and no exceptions having been filed to them except protests that he had no authority at that time to make and sign such findings, etc., he followed it up by signing and filing such findings of fact, conclusions of law and decree, and they are now records of this court.

The court can not feel that any new decision has been made by Former Judge Edwards or any judicial act performed by him, as all matters found in the decree of October, 1935, are found in his decision of December, 1934, not a change has been made affecting the right of any party to this adjudication; the October, 1935, decree is wholly within the "four corners" of the December, 1934, decision.

The court has continuously held that this is a special proceeding and its entire procedure is to be governed by the authority given it under the law providing for such proceedings.

Section 35 of the Water Code or Law provides "* * * all proceedings thereunder including the taking of testimony shall be as nearly as may be in accordance with the rules governing civil actions; provided, however, that the provisions of the civil practice act shall not apply respecting the service of proposed findings of fact and decree * * *." This section provides further as to the manner of the service of the proposed findings and decree and that the court shall not sign the proposed findings prior to thirty days after the service thereof.

It is to be noted that in only the matter of the service of the proposed findings of fact and decree and cost bill and the signing of the findings of fact and decree is a different rule or procedure applies than in the ordinary suit, and that after the filing of the order of determination and exceptions constituting all the pleadings in the case, the proceedings shall be as near as may be in accordance with the civil practice act, except as to findings and costs.

Clearly the 1931 Act applies to this matter, but not the amendment of Section 8784 N. C. L. as stated in the motion under consideration, but instead the amendment of Section 9036 N. C. L. which provides what a retiring judge may do. It just as clearly does not amend Section 35 of the Water Code but it does apply in that the proceedings shall be as near as may be in accordance with the civil practice act.

As I have said before, the amendment of Section 9036 N. C. L. by the 1931 session of the legislature was intended by the legislature to apply particularly to the Humboldt River Adjudication and such intention was well known generally throughout the state.

This amending act was approved February 20, 1931, and sub-section (b) of Section 36 of what we call the Water Code as amended by Chapter 223, statutes of 1931, approved March 30, 1931, expressly refers to said amending act of February 20, 1931, and provides compensation for such former judge when he shall hold "hearings for the settlement of written findings of fact and conclusions of law and judgment and decree appertaining to such written decision so filed."

In Nevada ever since February 19, 1867, the power has been given to district judges to perform certain acts after they have retired from office. This power has been changed from time to time by legislative action until now we have it as laid down in the act of February 20, 1931. It cannot be seriously

questioned that power may be given to such retired judge to do any act which does not involve judicial decision and that he may do any act of a ministerial nature necessary to give full force and effect to the decision which he has theretofore rendered prior to his retirement.

Rules XLI, XLII, and XLIII can have no application to this proceeding and question now under consideration, as the statute of 1931 clearly covers the question and makes the rules inapplicable.

This power of the legislature as first exercised almost seventy years ago has not been challenged and should not be now set aside except for the gravest reasons.

No one would seriously consider that the legislature under our constitution could confer upon such retired judge the right and power to exercise judicial functions especially such as rendering a decision in any matter.

It is the order of this court that the motion to strike the purported amended, changed and corrected findings of fact, conclusions of law and decree filed October 28, 1935, herein be, and the same hereby is, denied.

Dated at Ely, Nevada, this 3d day of December, 1936.

J. M. LOCKHART,
District Judge Presiding.

IN THE SIXTH JUDICIAL DISTRICT COURT 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. } No. 2804

Filed December 5, 1936—J. W. Davey, Clerk

DECISION ON MOTION FOR NEW TRIAL OF ISSUES DECIDED BY HON. H. W. EDWARDS, JUDGE PRESIDING, MADE BY KEARNS CORPORATION, SUCCESSOR TO ESTATE OF THOMAS KEARNS, FILED JANUARY 16, 1935.

Having decided that the motion to strike purported "Amended, Changed and Corrected Findings of Fact, Conclusions of Law and Decree," filed October 28, 1935, should be denied, it now becomes necessary to decide the motions for new trials which have been filed in this matter and of which the above is one.

The records show that Judge Bartlett in his decree applied and sought to apply the Doctrine of Relation to all water users of the Humboldt River System, including what he terms noncontest cases.

Judge Edwards has denied his right to do this.

The term "noncontest cases" designates only a class of water users, those who did not file exceptions to the order of determination as made and filed by the State Engineer.

Judge Bartlett very properly held they could not be adjudged to be in default.

A water user may be perfectly satisfied with the order of determination and perfectly willing that a final and binding decree may be made as thus set forth, but the moment a change is made and a greater right given to any user than is set forth in the order of determination which has been served upon him, he immediately becomes an actor entitled to protest and protect his right as given to him in the order of determination.

> "The very essence of any decree in such litigation (water adjudications) is the determination of the relative rights of the parties. This element of each right being relative to all others persists from the beginning to the end of the litigation, so, that the plaint of one party must affect all others in a greater or less degree." In Re Chewaucan River (Oregon), 171 Pac. 402, 175 Pac. 421.

The Doctrine of Relation is a most common sense rule of law, protecting initiated rights but must not be allowed to run to absurd results.

When a man has initiated his right, he should be entitled to a reasonable time in which to complete his right and put the water appropriated to a beneficial use.

This initiated right must rest in his intention and must be reasonable. A man may not commence to dig his ditch and put his dam in the stream and intend and claim a right to use the water upon all the land his eyes may see,

but it must be limited to what he may reasonably use and put to beneficial use within a reasonable time. Our Water Code providing for appropriation by application to the State Engineer limits this intention to the amount of water applied for and amount of land sought to be irrigated and when granted and applied to beneficial use relates back to the date of filing his application. Vested water rights must be measured as nearly as possible in a similar manner.

It is the duty of the court at all the stages of the proceedings to see that justice is done to all parties before it. Even though parties may admit certain facts to be true when in fact it is shown to the court by other evidence that such admission is not a fact, the court should not consider such admission but decide according to the facts proven.

This rule applies even though the admission of the party would bar a decision in his favor.

Judge Bartlett in his decree made many changes in the order of determination and he found as a fact that in many cases the doctrine of relation had not been applied while it had been applied in other cases. To protect the rights of those who were not in court as contestants, he made his order to the Attorney-General to apply it in all cases as shown by the record.

He expressed many times his desire to apply the same yard-stick to all claimants and users, and no just decree should be permitted by the court to stand unless this is done. The *final decree* will not be for a day but for all time.

This movant is included in the list of claimants named on page 31 of the Findings of Fact, Conclusions of Law and Decree of October 20, 1931, beginning with the words "L. N. Carpenter" and ending on page 46 with the figures "1905" and who were denied the increases and changes made by Judge Bartlett and attempted by Judge Edwards to make their rights only as set forth in the Order of Determination.

Judge Edwards limits the new trials to be held by him to two questions:

(1) The authority of Judge Bartlett to direct the Attorney-General to apply the Doctrine of Relation to noncontest cases; and

(2) Does the application of the Doctrine of Relation exceed in those cases that demanded in the complaint.

Judge Edwards does not seem to have answered these questions except that it may be inferred from his statement on page 50 of his findings, etc., "That no exceptions or objections were made or filed to the Order of Determination within the time provided by law or at all; that, at the hearing upon the Final Order of Determination before the court for the settlement and adjudication of said claims, no change was made or proof submitted to the court to authorize or justify said increases or changes in priorities, but that said claimants represented to the court that said Final Order of Determination in respect thereto should be sustained and upheld."

This does not answer the first question. The second question seems to be answered by his statement that no exceptions or objections were made or filed to the Order of Determination within the time provided by law or at all.

From this statement it appears that Judge Edwards held that such objections and exceptions must have been filed within the time provided for in Section 35 of the Water Code.

He refused to permit testimony to be introduced to show that the Doctrine of Relation had been applied to some and denied to others.

This court believes this was clearly an error of law occurring at the trial to the prejudice of the movant.

It is therefore ordered that the motion of Kearns Corporation for a new trial be, and the same hereby is, granted.

Dated at Ely, Nevada, this 3d day of December, 1936.

J. M. LOCKHART,
District Judge Presiding.

IN THE SIXTH JUDICIAL DISTRICT COURT 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. } No. 2804

Filed December 5, 1936—J. W. Davey, Clerk

DECISION ON MOTION OF SAMUEL McINTYRE INVESTMENT COMPANY FOR NEW TRIAL, FILED JANUARY 16, 1935

In accordance with the decision of the court this day made granting the motion for a new trial made by Kearns Corporation,

It is ordered that the motion of Samuel McIntyre Investment Company, filed January 16, 1935, be, and the same hereby is, granted.

Dated at Ely, Nevada, this 3d day of December, 1936.

J. M. LOCKHART,
District Judge Presiding.

NOTE—Identical decisions with the above decision were made by Judge Lockhart on the same date on like motions submitted by S. N. Bond, successor to Metropolis Land Co., a corporation; John M. Marble, and Robert E. Marble, successors to John E. Marble, successor to Union Land and Cattle Co.; A. G. McBride; Hibernia Savings and Loan Society, successor to X. Rodwell Meyer, successor to William Dunphy Estate; H. H. Cazier and Jno. I. Cazier Estate, successors to John H. Cazier and Sons Co.; J. Leslie Carter; J. H. Carter Estate Co., successor to J. H. Carter; and Rufus H. Kimball, successor to Thomas Hunter and to Hunter and Banks Co. (See discussion of above motions and decisions in the Carpenter v. District Court case on rehearing. Pages 10–12, post.)

IN THE SIXTH JUDICIAL DISTRICT COURT 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. } No. 2804

Filed December 5, 1936—J. W. Davey, Clerk

DECISION ON MOTION FOR A NEW TRIAL FILED OCTOBER 28, 1935, BY T. S. CATTLE COMPANY AND HIBERNIA SAVINGS AND LOAN SOCIETY.

The court having this day granted the motions of the above parties for a new trial and it appearing to the court that errors have been made in the findings of Fact, Conclusions of Law and Decree filed herein on the 8th day of October, 1935, which are contrary to the evidence submitted, and it being the desire of the court to correct such errors.

It is therefore ordered that said motion for a new trial be, and the same hereby is, granted.

Dated at Ely, Nevada, this 3d day of December, 1936.

J. W. LOCKHART,
District Judge Presiding.

IN THE SIXTH JUDICIAL DISTRICT COURT 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. } No. 2804

Filed December 5, 1936—J. W. Davey, Clerk

DECISION ON MOTION FOR NEW TRIAL FILED OCTOBER 28, 1935, BY JOHN M. MARBLE AND OTHERS

The court this day has granted new trials on motions made therefor by practically all parties named as movants in the above motion.

It is therefore the order of this court that the above motion for a new trial be, and the same hereby is, granted.

Dated at Ely, Nevada, this 3d day of December, 1936.

J. W. LOCKHART,
District Judge Presiding.