

In District Court
2d Judicial District
Douglas Co. Nevada

J. N. Winter
vs
Robert Fulstone

Findings of Fact and
Conclusions of Law

Filed May 8th 86

S/ B. Boyd
Co. Clerk

Virgin, Coffin, Judge
Attys for Defendant

In District Court 2d Judicial District County of Douglas, State of Nevada

J. N. Winters Plaintiff)
vs) ss
Robt. Fulstone Defendant)

The above entitled cause having been regularly tried by the Court, a jury having been expressly waived, and the Court having duly considered the evidence adduced in said cause and the arguments of Counsel, and the law applicable to the premises, now makes and files its findings of fact and conclusions of law as follows

Findings of Fact

1st That from time immemorial a natural stream or water course known as Jacks Valley Creek has flowed and run from the Sierra Nevada Mountains Eastward across Jack's Valley. That a short distance below where said stream debouches from the mountains into said Jacks Valley, the bed or channel thereof divides into two natural beds or channels, through which two natural beds or channels the waters of said Creek have divided and flowed from time immemorial. Said two natural beds or channels are known in this case and in the testimony as the North Stream and the South Stream respectively. The North Stream flows from the point where said Creek divides into two channels, across the North West portion of Defendants lands and thence onto the lands of Plaintiff. The South Stream flows from said point, between Defendants house and Barn, across the entire length, from West to East, of Defendant's lands and thence onto the lands of Plaintiff.

2d That during the trial of said cause Plaintiff and Defendant and all of the Ranchers or Farmers in Jack's Valley made, signed and filed herein in open court the following stipulation and agreement: to wit;

"In the District Court of the Second Judicial District of the

"State of Nevada in and for the County of Douglas

"Jacob N. Winter Plaintiff)

" vs)

"Robert Fulstone Defendant)

"Stipulation"

"It is agreed in open Court between the Plaintiff and Defendant and

"their respective Attorneys and other persons herein named that
"the Plaintiff is the owner of and has the title to the land des-
"cribed in the Complaint and has been, as in the Complaint alleged

" That the Defendant is the owner of and has the title to the
"land described in his answer and has been such owner as in the
"answer alleged.

" It is further agreed that the Plaintiff Winter is the owner of
"and entitled to use during the irrigation season all the water of
"the stream in controversy for and during four days and six hours of
"each eight days

" That the Defendant Robert Fulstone is the owner of and entitled
"to use during the irrigating season all the water of the stream in
"controversy for one day and twelve hours of each eight days

" That Henry Fulstone is the owner of and entitled to use during
"the irrigating season all the water of the stream in controversy for
"six hours during each eight days

" That B. F. Nesmith is the owner of and entitled to use during the
"irrigating season all the water of the stream in controversy for one
"day during each eight days

" That A. E. Johns is the owner of and entitled to use during the
"irrigating season all of the water of the stream in controversy
"during one day of each eight days.

" The use of the water herein stipulated for the time mentioned is
"to be a consecutive use and to be in the order herein mentioned

" It is further stipulated that the decree of the Court shall be
"entered in pursuance of and conformity with this stipulation and
"the parties shall be severally enjoined from interfering with each
"others use.

" It is understood that the irrigating season meant by this stipula-
"tion begins on the first day of April and ends on the 31st day of
"October of each year.

" As to the remaining months as to the use of the water during
"such months the question is not closed by this stipulation but remains
"open

" It is further stipulated that when the time or turn of the several
"parties mentioned herein occurs, it shall be his right and duty to turn
"and take the water, if he requires it, and that until the water is so
"turned, it shall continue to flow in the course or ditch where for the
"time being it shall be found.

" The time and day shall be held to begin at Sun Rise in Jack's Valley.

" This stipulation shall be of no binding force or effect unless signed
"by and concurred in by all persons named among whom said waters are
"apportioned by periods of time and not to apply to any matters not
"specifically named

"March 6, 1886."

"Clarke & King"
"J. D. Torreyson"
"Attys for Piff"
"James R. Judge"
"T. Coffin, D. W. Virgin"
"Attys for Defendant"
"B. F. Nesmith"
"A. B. Johns"
"H. Fulstone"

3d That Defendant never at any time during the irrigating season of any
year mentioned in Plaintiffs Complaint diverted any of the water of Jacks
Valley Creek from the natural bed or channel thereof at any point or from
either bed or channel thereof at or below the point where said Creek
divides into two channels and never permanently or otherwise turned the
water of said stream or any part thereof away from the bed or beds or
channels of said stream, and never in any way used the water of said
stream, except as he was lawfully and rightfully entitled to divert and use
the same as set forth in the above mentioned stipulation.

That the right of all parties signing said stipulation to divert and
use said water during the irrigating season as set forth in said stipula-
tion, has existed and been actually used and enjoyed for more than ten years
last past.

4th That Defendant never at any time during the irrigating season of any
years mentioned in Plaintiffs Complaint, diverted any of the water of
said Jack's Valley Creek and after diverting it, discharged the same or
any part thereof, upon any lands of Plaintiff.

5th That Defendant never in any of the years mentioned in Plaintiff Com-
plaint in the non-irrigating season, in the months of November, December,

January February or March, diverted any of the water of said Jacks Valley Creek or from either or any bed or channel thereof, and turned or spread the same upon or over any land owned or occupied by him or diverted any of the waters of said Creek or turned or spread the same upon or over any lands whatever during said months.

6th That it has been the custom of the Plaintiff and Defendant and of other Farmers or Ranchers in Jacks Valley for the ten years last past in the non-irrigating season to turn all of the water of said Creek out of their irrigating ditches back into the North and South Streams of said Creek, and it has been the custom of Plaintiff and Defendant in the non-irrigating season, to turn the water of said Creek in as near equal portions as possible, into the North and South Streams of said Jack's Valley Creek respectively. That for said ten years last past it has been the custom of Defendant with the knowledge and consent and acquiescence of Plaintiff, in the non-irrigating season to turn some of the water out of the South Stream into the North Stream of the Creek so that the water ran in equal portions down said two streams respectively.

7th That Defendants lands are situated to the West of, and on much higher ground than the land of Plaintiff lying to the East of Defendants land.

That the damage claimed by Plaintiff is upon his land lying immediately to the East of Defendants land.

That upon the upper and western portion of Defendants lands and upon the upper and western portion of Plaintiff's lands which lie north of Defendants lands there are large tracts of marshy or boggy land out of which ooze and rise large quantities of water which flows for some distance over the surface of the land and then seeps and percolates into the soil and disappears. That the land of Plaintiff lying immediately to the East of Defendants is heavy, wet land. That the wet condition of said land is caused by water seeping and percolating into the same from the marshy and boggy land above and from melting snows in and near the foot of the mountains and is in no wise caused by any act or negligence or fault of Defendant.

8th That Plaintiff has not been damaged in his crops as alleged in his Complaint, except by natural causes over which Defendant had no control. The lands upon which the crops were alleged to have been damaged were, in each of the years mentioned in said Complaint, in proper condition for plowing and seeding as early as other lands of the same character in Jacks Valley; the crops on said lands averaged well with similar crops on like lands in the same years.

9th That Plaintiff has not been damaged by the washing away, or washing into gulleys or by any washing of his land by any act or fault or negligence of Defendant.

That there has been some damage done to Plaintiffs land by washing near the lower portion of his land at and near the East side of Jacks Valley, far below the lands of Defendant, but that said lands were so damaged by extraordinary high waters and freshets over which Defendant had, and could exercise no control. Said damages were principally caused by high water caused by rain and storms which the witnesses in this case called "The Flood" of the spring of 1862 and by a "Cloud Burst" of the summer of 1882.

None of said damages were caused by the ordinary flow of the water of Jacks Valley Creek at its ordinary stages.

Conclusions of law

1st That Defendant is entitled to a decree herein dividing the water of Jacks Valley Creek during the irrigating season among all of the signers of said stipulation according to the terms thereof and that said parties to said stipulation or agreement shall each be enjoined from interfering with each others use of said water according to said stipulation.

2d That Defendant is entitled to the decree of this Court, that in the ~~non-irrigating season, to wit: in the months of November, December, January~~ February and March, the water of said Jacks Valley Creek shall run and flow in equal portions in the North and South beds or channels of said stream as above described and that both Plaintiff and Defendant may use said water in the non-irrigating season for stock and domestic purpose as it

flows across their respective lands in its natural beds or channels.

3d That Defendant is entitled to a decree of this Court perpetually enjoining each and all parties to said stipulation and among whom the water of said Creek is or shall be apportioned, their agents Attorneys servants employes and grantees from in any manner interfering with molesting, or destroying any water box or gate that may be put into said stream, or either branch or channel thereof, for the purpose of, and suitable and proper for the convenient division and turning of the water of said Creek as shall be provided in said decree, and from unnecessary filling up or obstructing the bed or channel of said Creek or the bed or channel of either the North or South Branch thereof as above described.

4th That Defendant is entitled to a Judgment against said Plaintiff for his costs.

Let Judgment and decree be entered in accordance herewith.

May 8 1866

S/ T. D. Edwards

District Judge

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
APRIL TERM, 1889.

[No. 1294.]

JACOB N. WINTER, APPELLANT, *v.* ROBERT FULSTONE,
RESPONDENT.

WATER RIGHTS—IRRIGATION—FINDINGS—EVIDENCE.—Findings of the trial court, based upon conflicting testimony, and aided by a personal inspection of the subject of controversy, will not be disturbed on appeal.

IDEM—FINDINGS SUSTAINED BY THE EVIDENCE. The various findings of the court reviewed and evidence held sufficient to sustain the findings. (See opinion.)

IDEM—FINDING, AS TO FLOW AND USE OF WATER, CONSTRUED.—A finding that "defendant is entitled to a decree that during the non-irrigating months the waters of Jack's Valley creek shall flow in equal portions in the north and south beds or channels of said stream, and that both plaintiff and defendant may use said water in the non-irrigating season for stock and domestic purposes, as it flows across their respective land, in the natural beds or channels," is not a finding that defendant has the right to use one-half of the water flowing in the stream, nor any given quantity thereof, except sufficient for his stock, etc.

IDEM—EVIDENCE—OPINION OF WITNESS—FACTS.—A question asked a witness as to which of two channels the water of a creek would flow in if unobstructed does not call for the opinion of the witness, but for a fact derived from personal observation, and is not an inquiry calling for expert testimony.

Opinion of the Court—Murphy, J.

ERROR—WHEN CURED.—Error in excluding testimony is cured by its admission at a subsequent stage of the trial.

ON REHEARING—APPEAL—REHEARING—MODIFYING JUDGMENT.—On petition for rehearing where complaint as to a portion of the judgment is for the first time made, and it appears that such portion was not authorized by the pleadings, the judgment will be modified in that respect, and the rehearing denied.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The facts are stated in the opinion.

Robt. M. Clarke, for Appellant.

D. W. Virgin, J. R. Judge, and *Trenmor Coffin* for Respondent.

By the Court, MURPHY, J.:

This action was brought to recover damages for the alleged wrongful and unlawful diversion of water from Jack's Valley creek, and away from a portion of appellant's land, at times during the irrigating seasons of 1882, 1883, 1884 and 1885; for diverting the waters of said creek away from the natural channel or bed thereof in the non-irrigating season, to-wit: in the months of November, December, January, February and March in the years 1881, 1882, 1883, 1884, and 1885, and away from a portion of appellant's land; for diverting a portion of the water of said stream during the irrigating season of the years 1882, 1883, 1884, and 1885, and discharging a portion of said water so diverted upon the lands of appellant, washing channels and gullies therein, and destroying about fifteen acres thereof; for diverting the water of said stream from the natural channel or bed thereof during the non-irrigating months, to-wit: November, December, January, February, and March of the years 1882, 1883, 1884, and 1885, spreading the same over lands of respondent lying above lands of appellant, thereby flooding appellant's land, making it too wet, and injuring the crops grown thereon, and rendering the said land unfit for cultivation,—and for an injunction to prevent further threatened injuries. Defendant in his answer denies that any act or acts of his, whether mentioned in the complaint or not, wrongfully, unlawfully, or otherwise, ever in any way or manner injured

Opinion of the Court—Murphy, J.

the plaintiff's land, or the crops growing thereon. The cause was tried before the court without a jury. Judgment was rendered in favor of the defendant for his costs. Plaintiff appeals from the judgment, and from the order overruling his motion for a new trial. The cause comes up for review on the statement on motion for new trial, and the appeal is based upon the grounds: (1) The insufficiency of the evidence to justify the findings and decision of the court; (2) errors of law occurring at the trial, duly excepted to by the plaintiff.

The findings of fact are as follows: "(1) That from time immemorial a natural stream or watercourse, known as 'Jack's Valley Creek,' has flown and run from the Sierra Nevada mountains eastward across Jack's valley; that a short distance below where said stream debouches from the mountains into said Jack's valley the bed or channel thereof divides into two natural beds or channels, through which two natural beds or channels the waters of said creek have divided and flowed from time immemorial. Said two natural beds or channels are known in this case and in the testimony as the 'North Stream' and the 'South Stream,' respectively; that the north stream flows from the point where said creek divides into two channels, across the northwest portion of defendant's lands, and thence onto the lands of plaintiff; the south stream flows from said point, between the defendant's house and barn, across the entire length—from west to east—of defendant's land, and thence onto lands of plaintiff. (2) That during the trial of said cause plaintiff and defendant, and all of the ranchers or farmers in Jack's valley, made, signed, and filed herein in open court the following stipulation and agreement, to-wit: 'It is agreed in open court, between plaintiff and defendant and their respective attorneys, and other persons herein named, that the plaintiff is the owner of and has the title to the land described in the complaint, and has been, as in the complaint alleged; that the defendant is the owner of and has the title to the land described in his answer, and has been such owner, as in the answer alleged. It is further agreed that the plaintiff, Winter, is the owner of, and entitled to use during the irrigating season, all the water of the stream in controversy for and during four days and six hours in each eight days; that the defendant, Robert Fulstone, is the owner of and entitled to use during the irrigating season all the water of the stream in controversy for one

Opinion of the Court—Murphy, J.

day and twelve hours of each eight days; that Henry Fulstone is the owner of and entitled to use during the irrigating season all the water of the stream in controversy for six hours during each eight days; that B. F. Nesmith is the owner of and entitled to use during the irrigating season all the water of the stream in controversy, one day during each eight days; that A. B. Johns is the owner of and entitled to use during the irrigating season all the water of the stream in controversy during one day of each eight days; that the use of the water herein stipulated for the time mentioned is to be consecutive use, and to be in the order herein mentioned. It is further stipulated that the decree of the court shall be entered in pursuance of and conformity with the stipulation, and the parties shall be severally enjoined from interfering with each other's use. It is understood that the irrigating season meant by this stipulation begins on the first day of April and ends on the thirty-first day of October of each year. As to the remaining months, as to the use of the water during such months, the question is not closed by this stipulation, but remains open. It is further stipulated that, when the time or turn of the several parties mentioned herein occurs, it shall be his right and duty to turn and take the water, if he requires it, and that until the water is so turned it shall continue to flow in the course or ditch where for the time being it shall be found. The time and day shall be held to begin at sunrise in Jack's valley. This stipulation shall be of no binding force or effect unless signed by and concurred in by all persons named, among whom said waters are apportioned by periods of time, and not to apply to any matters not specifically named." (This stipulation was signed by the attorneys for plaintiff and the defendant. It was also signed by all the ranchers in Jack's valley.) "(3) That defendant never at any time during the irrigating season of any year mentioned in plaintiff's complaint diverted any of the water of Jack's Valley creek from the natural bed or channel thereof at any point, or from either bed or channel thereof, at or below the point where said creek divides into two channels; and never permanently or otherwise turned the water of said stream, or any part thereof, away from the bed or beds or channels of said stream; and never in any way used the water of said stream; except as he was lawfully and rightfully entitled to divert and use the same as set forth in the above-

Opinion of the Court—Murphy, J.

mentioned stipulation; that the right of all parties signing said stipulation to divert and use said water during the irrigating season, as set forth in said stipulation, has existed and been actually used and enjoyed for more than ten years last past. (4) That defendant never at any time during the irrigating season of any year mentioned in plaintiff's complaint diverted any of the waters of said Jack's Valley creek, and, after diverting, discharged the same, or any part thereof, upon any lands of plaintiff. (5) That defendant never in any of the years mentioned in plaintiff's complaint, in the non-irrigating season, in the months of November, December, January, February, and March, diverted any of the waters of said Jack's Valley creek, or from either or any bed or channel thereof, and turned or spread the same upon or over any land owned or occupied by him, or diverted any of the waters of said creek, or turned or spread the same upon or over any lands whatever during said months. (6) That it has been the custom of plaintiff and defendant, and of other farmers or ranchers in Jack's valley, for the ten years last past, in the non-irrigating season, to turn all the water of said creek out of their irrigating ditches, back into the north and south streams of said creek, and it has been the custom of plaintiff and defendant in the non-irrigating season to turn the water of said creek in as near equal proportions as possible, into the north and south streams of said Jack's Valley creek, respectively; that for ten years last past it has been the custom of defendant, with the knowledge, consent, and acquiescence of plaintiff, in the non-irrigating season, to turn some of the water out of the south stream into the north stream of said creek so that the water ran in equal proportions down said two streams, respectively. (7) That defendant's lands are situated to the west of and on much higher ground than the lands of plaintiff lying to the east of defendant's land; that the damage claimed by plaintiff is upon his land lying immediately to the east of defendant's lands; and upon the upper and western portion of plaintiff's lands, which lie north of defendant's lands, there are large tracts of marshy or boggy land, out of which ooze and rise large quantities of water, which flow for some distance over the surface of the land, and then seeps and percolates into the soil, and disappears; that the lands of plaintiff lying immediately to the east of defendant's is heavy, wet land; that the wet condition of said land is caused by water

Opinion of the Court—Murphy, J.

seeping and percolating into the same from the marshy and boggy land above, and from melting snows in and near the foot of the mountains, and is in nowise caused by any act or negligence or fault of defendant. (8) That plaintiff has not been damaged in his crops as alleged in his complaint, except by natural causes, over which defendant had no control; the lands upon which crops were alleged to have been damaged were in each of the years mentioned in said complaint in proper condition for plowing and seeding as early as other lands of the same character in Jack's valley; that crops on said lands averaged well with similar crops on like lands in the same years. (9) That plaintiff has not been damaged by the washing away or washing into gullies, or by any washing of his land by any act or fault or negligence of defendant; that there has been some damage done to plaintiff's land by washing near the lower portion of his land, at and near the east side of Jack's valley, far below the lands of defendant, but that said lands were so damaged by extraordinary high waters and freshets, over which defendant had and could exercise no control. Said damages were principally caused by high waters and freshets, over which defendant had and could exercise no control. Said damages were principally caused by high water caused by rains and storms, which the witnesses in this case have called 'the floods of the spring of 1862,' and by a 'cloud burst' in the summer of 1882. None of said damages were caused by the ordinary flow of the water of Jack's Valley Creek at its ordinary stages."

The court finds, as a matter of law, that the waters of Jack's Valley creek shall be distributed to the parties for the time and in the manner as set forth in the stipulation, and each person signing said stipulation is enjoined from interfering with the rights of the others; that the waters of said creek shall flow in equal portions in the north and south beds or channels of said stream during the non-irrigating seasons; and that both plaintiff and defendant may use said water for stock and domestic purposes, as it flows across their lands in its natural beds or channels.

Counsel for appellant contends that finding No. 1 is not supported by the evidence, and that the decree is void, because the plaintiff in his complaint, having alleged that the water of

Opinion of the Court—Murphy, J.

Jack's Valley creek in its natural bed or channel, when not wrongfully and unlawfully diverted by the defendant, passed through and over plaintiff's land, and supplied him with water to irrigate his land, for his stock and domestic purposes; that the defendant having denied that the natural bed or channel of said creek passed through or over lands of plaintiff, as set forth in his complaint, and averred that the said creek in its natural course and channel passed through and over the lands of defendant, and supplied him with water for irrigating his land, for his stock and domestic purposes, that it then became the duty of the court to say that the statements, as made by one of the parties, were true and the other false, and that the natural and only channel of said creek passed through and over either the lands of the plaintiff or the defendant. It is the duty of *nisi prius* courts to seek for the truth in all cases where the testimony is conflicting. As was said by Chief Justice Hawley in the case of *Barnes v. Sabron*, 10 Nev. 217: "It does not necessarily follow, that because there is a conflict in the testimony, that one or the other of the witnesses have testified falsely, and that the court must take the whole statement of one and reject the entire testimony of the other. It is the duty of all courts first to ascertain whether or not the testimony can be harmonized upon any given state of facts, before any part thereof is rejected." The judge who tried this cause was brought face to face with the witnesses, and could judge of their credibility. It also appears from the record that after the testimony was concluded, and before the attorneys had argued the cause to the court, by request of the parties to this action, the judge, accompanied by the sheriff, plaintiff, defendant, their attorneys, and H. H. Bence, who had made the surveys and was a witness in the case for both parties, went upon the lands of plaintiff and defendant, and made a personal inspection of the channels, streams, ditches, dams, sloughs, swales, cuts, washouts, marshes, springs, water heads, and stumps of trees testified to upon the trial. With all the testimony fresh in his mind, he could apply the facts as presented to him to each and every object and thing mentioned by the witnesses during the trial. With all these advantages, the court passed upon the question, made its finding, which is consistent with and supported by the evidence, and declares that there are two channels or beds to Jack's Valley creek; and, under a well-

Opinion of the Court—Murphy, J.

settled rule of this and other courts, announced in a great number of decisions, we will not disturb the findings and decree of the court.

Finding 2 is supported by a decree of the territorial court, rendered at Genoa, Douglas county, in the month of August, 1864, from which it appears that the appellant in this action was one of the plaintiffs in that, and the grantors of the respondent were the defendants, and the agreement to apportion the waters of Jack's Valley creek, as set forth in the stipulation contained in this finding, is based upon the said decree of said court. Findings 3 and 4 are supported by the evidence. Upon the trial of this case, the plaintiff did not introduce any testimony tending to prove that the defendant did, at any time during the irrigating season of any of the years mentioned in the complaint, divert any water from the stream, other than at the times and in the manner in which he was entitled to, as set forth in the stipulation, nor does it appear from the evidence that he ever discharged any water upon the plaintiff's land. Findings 5, 7, 8, and 9 are supported by the evidence.

Counsel for appellant argues that finding 6 cannot be sustained because the plaintiff in his complaint alleges that, during the non-irrigating season, the defendant is not entitled to use or have flow through the south channel of said stream but one-sixth of the water of Jack's Valley creek, while the defendant avers in his answer that he is entitled to one-third of the water flowing therein, and, the court having decreed that the waters of Jack's Valley creek shall flow in as equal proportions as possible into the north channel and the south channel, therefore the court has said that the defendant is entitled to one-half of the water flowing in said creek, and by so deciding, the said finding, and the decree rendered thereon, is erroneous, because it does not conform to the pleadings. We do not understand from the reading of the finding or decree that the court has awarded to the defendant one-half of the water of said stream during the non-irrigating seasons, nor any given quantity of the waters, except sufficient for his stock and domestic purposes. The said finding declares what has been the custom of the farmers in Jack's valley for the past ten years. In subdivision 2 of the conclusions of law the court says "that the defendant is entitled to a decree that during the months of November, December, January, February, and

Opinion of Murphy, J., on rehearing.

March, the waters of Jack's valley creek shall flow in equal portions, in the north and south beds or channels of said stream, and that both plaintiff and defendant may use said water in the non-irrigating season for stock and domestic purposes, as it flows across their respective lands, in the natural beds or channels." It is set forth in the decree that "the plaintiff and defendant, and each of their agents, attorneys, employes and grantees, be, and they are hereby, perpetually enjoined and restrained from diverting the water of said creek, and from making any other or different use thereof than is hereinbefore provided, in the non-irrigating season, and from irrigating their lands with said water, or from spreading said water over their lands for any purpose, in the non-irrigating season, as hereinbefore defined." From the reading of the foregoing, it is made very clear that the court did not give to the defendant the right to use one-half of the water flowing in the stream, nor any given quantity of the water, except sufficient for his stock and domestic purposes.

The question asked the witness Bence, as to which of the two channels the water would flow in if unobstructed, did not call for the opinion of the witness, but a fact derived from personal observation. It was not an inquiry into any subject matter which required any peculiar habit, study or scientific knowledge to enable him to understand and answer the question intelligently. (*All v. Syrup Co.*, 19 Nev. 118.) It was proper cross-examination, as the witness had testified in chief as to the course and condition of the channel. If the ruling of the court in excluding the testimony of Thorne, when first offered, was error, it was cured, because at another stage of the proceedings the record shows that he was permitted to answer the questions as to the condition of the ditches and turnouts. (*Lee v. McLeod*, 17 Nev. 118; *Bianchi v. Maggini*, 17 Nev. 337; *Patchen v. Keeley*, 19 Nev. 408.) Judgment and order denying a new trial affirmed.

By the Court, MURPHY, J., on rehearing:

A petition for a rehearing has been filed, and although the appellant testified on the trial of the case that he did not use the water during the non-irrigating months, he now complains because the court enjoined him from the use of the water dur-

Argument for Appellants.

ing the non-irrigating season. As there is nothing in the pleadings that authorized the court to enjoin Winter from the use of water during the non-irrigating months, the judgment will be modified by striking out the name of Winter from that portion of the judgment enjoining him from the use of water during the non-irrigating months, and as so modified the judgment is affirmed. Rehearing denied.

[No. 1289.]

RENO SMELTING, MILLING AND REDUCTION WORKS,
A CORPORATION, RESPONDENT, v. C. C. STEVENSON, ET AL.
APPELLANTS.

ADOPTION OF COMMON LAW—APPLICABILITY OF—STATUTE CONSTRUED—INTENT OF LEGISLATURE.—The term "common law of England" was employed in the statute adopting it, (Gen. Stat. 3021) in the sense it is generally understood in this country and the intention of the legislature was to adopt only so much of it as was applicable to our condition.

IDEM—WATER RIGHTS—RIPARIAN RIGHTS NOT APPLICABLE.—PRIOR APPROPRIATION.—*Held*, that the common law doctrine of riparian rights is unsuited to the condition of this state, and that this case should have been determined by the application of the principles of prior appropriation. (*Jones v. Adams*, 19 Nev. 78 overruling *Famsiekle v. Haines*, 7 Nev. 249, affirmed.)

APPEAL from the District Court of the State of Nevada, Washoe County.

R. R. BIGELOW, District Judge.

The facts are sufficiently stated in the opinion.

John F. Alexander, Attorney General, *Robert H. Lindsay* and *Thomas H. Wells*, for Appellants:

I. The judgment and decree rendered herein should be reversed. It is not supported by the allegations of the complaint. The complaint bases plaintiff's right to recover in any event, either upon its legal or equitable cause of action upon a *prior appropriation* of the waters of the Truckee river, and there is no allegation in said complaint which justifies a decree based upon riparian ownership. (*Boggs v. Merced M. Co.*, 14 Cal. 356; *Gregory v. Nelson*, 41 Cal. 278; *Lothian v. Wood*, 55