714 FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In the District Court of the Second Judicial District of the State of Nevada, held in and for the County of Douglas.

JOSEPH JONES, Plaintiff,

vs.

JOHN Q. ADAMS, Defendant.

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This cause came on regularly to be tried by the Court at the May term, A. D. 1879. The plaintiff appeared by Robt. M. Clark, Esq., his attorney, and the defendant appeared by Moses Tebbs and A. C. Ellis, Esqs., his attorneys. The plaintiff, to maintain the issues on his part, introduced evidence, oral and documentary. The defendant, to support the issues upon his part, introduced evidence, oral and documentary. After which the cause was argued to the Court by counsel for plaintiff and defendant, and was taken under advisement by the Court. And now the Court, being fully advised in the premises, makes its findings of fact and decision as follows:

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1. The Court finds from the pleadings that the plaintiff is the owner in fee simple of about seven hundred and fifty acres of land, which is situated on Sierra creek, in said Douglas county, Nevada,

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717 and in sections three, ten and eleven, township thirteen north, range nineteen east, Mt. Diablo base and meridian. That said land is agricultural land and requires water to irrigate it, and that the plaintiff requires water for his stock and domestic purposes. That said Sierra creek is a natural water course, flowing through the said plaintiff's land, and the plaintiff has no other source than said Sierra creek from which to obtain his water for his agricultural, stock and domestic purposes.

718 2. That the defendant, John Q. Adams, is the owner in fee of the land described in complaint, which is situated upon the said Sierra creek. That the defendant is a riparian proprietor upon said Sierra creek, and that part of the waters of said stream are necessary for irrigating defendant's land and for his domestic purposes.

3. That the plaintiff, Joseph Jones, is the owner of a usufruct in the waters of said stream, 719 and that he and his grantors first appropriated and used, and that he is the owner, by rights of appropriation and use, of seven-tenths part of all the water customarily flowing in said stream. That the plaintiff, Joseph Jones, is entitled to use, as the first appropriator, upon his said land, upon each and every part thereof, seven-tenths of all the water customarily flowing in said Sierra creek; and is entitled to divert the said water from the said stream upon his said land by means of flumes,

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720 ditches, or otherwise; and to use the same upon his said land for the irrigation thereof; and to use so much of the said seven-tenths of said stream as is necessary for his stock and domestic purposes.

4. That the grantees of the Government of the United States for 320 acres of said lands of plaintiff acquired title thereto from the United States by patent bearing date of 1865, and said lands are situated upon said Sierra creek and both sides
721 thereof.

5. That the defendant, John Q. Adams, is the owner of a usufruct in the waters of said stream, and that he and his grantors, in the year 1860, appropriated and used, and that he is the owner, by right of appropriation and use, of three-tenths part of all the water customarily flowing in said stream; and that said defendant is entitled to use, as the first appropriator, upon his said land, and upon each and every part thereof, three-tenths of
722 all the water customarily flowing in said Sierra creek; and is entitled to divert the said water from the said stream upon said land by means of flumes, ditches, and otherwise; and to use the same upon his said land for the irrigation thereof; and to use so much of the said three-tenths part of said stream as is necessary for his stock and domestic purposes.

6. The Court further finds that said plaintiff, Joseph Jones, is entitled, as against the defendant, John Q. Adams, to divert his part of the water,

723 to wit: seven-tenths thereof—out of and away from said stream, at the point or points on said stream, either above or below the mouth of the Sierra canyon, where he is now and has, during the last season, been diverting the same; and that the defendant, John Q. Adams, is entitled to divert his part, to wit: three-tenths of the water of the said stream—from the natural channel of the stream, at the point or points, above or below the mouth of said canyon, where he is now or has,
724 during the last season, been diverting the same. As conclusions of law, the Court finds that the plaintiff is entitled to recover and have a decision for seven-tenths part of the waters of said stream; and to have an injunction perpetually enjoining the defendant, his agents and servants, and all persons claiming under or through him, from diverting or otherwise interfering with the said stream, or the waters thereof, so as to deprive the said plaintiff of said seven-tenths part of the waters of
725 said Sierra creek. That the defendant is entitled to recover and have a decision for three-tenths part of the waters of said stream; and to have an injunction perpetually enjoining the plaintiff, his agents and servants, and all persons claiming under or through him, from diverting or otherwise interfering with the said stream, or the waters thereof, so as to deprive the said defendant of said three-tenths part of the waters of said Sierra creek.

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JOSEPH JONES

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726 It is ordered that decree be entered in conformity with the foregoing findings, and that each party pay his own costs.

S. D. KING,
District Judge.

DECREE.

In the District Court of the Second Judicial District of the State of Nevada, held in and for the County of Douglas.

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JOSEPH JONES, Plaintiff,
vs.
JOHN Q. ADAMS, Defendant.

This cause having been submitted to the Court at a former day of the May term thereof, and the Court having made its findings and decision and
728 conclusions of law, therein adjudging the plaintiff, Joseph Jones, to be the owner and entitled to use seven-tenths part of all the water customarily flowing in the said Sierra creek, and adjudging the defendant, John Q. Adams, to be the owner and entitled to use three-tenths of all the water customarily flowing in said Sierra creek; and the Court having ordered a decree and perpetual injunction enjoining the defendant, his agents, servants and successors in interest from in any manner depriving the plaintiff of the said seven-

729 tenths of the water of said creek, and enjoining the plaintiff, his agents and servants from in any manner depriving the defendant of said three-tenths of the waters of said creek.

Now, therefore, in pursuance of said findings and decision, and the law in such cases made and provided, it is ordered, adjudged and decreed by the Court, that the said plaintiff, Joseph Jones, in connection with his said land, is the owner of
730 seven-tenths of the water customarily flowing in said Sierra creek, and is entitled to use the same for the irrigation of his land, and for stock and domestic purposes; and is entitled to divert the same from the said Sierra creek at the point or points above or below the mouth of the Sierra canyon where he is now or may hereafter become entitled to divert the same to and upon his said land for use in irrigating the said land, and for stock and domestic purposes. And the defendant,
731 John Q. Adams, his agents and servants and successors in interest are hereby perpetually enjoining from diverting from the said stream any of the said seven-tenths part of the waters, or from in any manner preventing the same from flowing to plaintiff's said land, or in any manner depriving the plaintiff of the use thereof.

That the said defendant, John Q. Adams, in connection with his said land, is the owner of three-tenths of the water customarily flowing in

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732 said Sierra creek; and is entitled to use the same for the irrigation of his land, and for stock and domestic purposes; and is entitled to divert the same from the said Sierra creek at the point or points above or below the mouth of the Sierra canyon where he is now or shall hereafter become entitled to divert the same to and upon his said land for use in irrigating the said land, and for stock and domestic purposes. And the plaintiff, Joseph Jones, his agents and servants and successors in interest are hereby perpetually enjoined from diverting from the said stream any of the said three-tenths part of the waters, or from in any manner preventing the same from flowing to defendant's said land, or in any manner depriving the defendant of the use thereof.

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It is further ordered, adjudged and decreed, that each party pay his own costs.

S. D. KING,

734 District Judge.

Dated August 29, 1879.

The plaintiff specifies and will rely on his motion for a new trial upon the following errors committed by the Court on the trial of said cause:

The Court erred in finding and decreeing that defendant is a riparian proprietor, or that any of defendant's lands, except forty acres acquired in

and I am authorized to say that they fully concur in my conclusion.

[No. 1081.]

JOSEPH JONES, APPELLANT, v. JOHN Q. ADAMS, RESPONDENT.

ASSIGNMENT OF ERRORS—WHEN SUFFICIENT.—When the notice of motion for new trial specified as one of the grounds relied upon: "That said decision, findings and decree are against law," and the specification of error in the statement, which would have been proper if classed under this sub-division of error, was referred to as an error "committed by court on the trial of the case": *Held*, that the specification was sufficient under proper sub-division of error.

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

The facts are stated in the opinion.

N. Soderberg, for Appellant.

A. C. Ellis, for Respondent:

The appellant is not entitled to be heard on the merits on this appeal, because there is no such assignment of error, and specifications of particular errors under any of the grounds named in the notice of motion for new trial, as the law requires. (*Wilson* v. *Wilson*, 45 Cal. 399; *Vilhac* v. *Bixen*, 28 Id. 409; *Sanchez* v. *McMahon*, 35 Id. 218; *Corbett* v. *Job*, 5 Nev. 205; *McWilliams* v. *Hirschman*, Id. 264; *Caldwell* v. *Geely*, Id. 260; *Irwin* v. *Samson*, 10 Id. 283; *Sherman* v. *Shaw*, 9 Id. 152; *Neil* v. *Wyncoop*, Id. 46; *M. V. M. Co.* v. *Dodds*, 6 Id. 264.)

By the Court, HAWLEY, J.:

Respondent contends that appellant is not entitled to be heard on the merits of this case, because there is no such assignment or specification of errors, in the statement on motion for new trial, as the statute requires.

The notice of motion for new trial specified several statutory grounds. Among others the following:

"3. That said decision, findings and decree are against the law."

"4. Errors in law occurring at the trial and duly excepted to by plaintiff."

The specifications of error are as follows: "The plaintiff specifies and will rely on his motion for a new trial upon the following errors committed by the court on the trial of said cause: * * * The court erred in finding and decreeing defendant entitled to three-tenths or any of the waters of said stream, as an appropriator, it clearly appearing from the evidence, and also from the findings, that the plaintiff was a riparian proprietor as to the said stream, his grantors having acquired the title from the United States to three hundred and sixty acres of the land claimed by plaintiff in 1865, and it also appearing that the defendant had not acquired plaintiff's right as a riparian proprietor by grant or prescription."

If appellant had omitted the words "committed by the court on the trial of said cause," it would have been conceded that this specification referred to the third sub-division stated in the notice of motion for a new trial, and we are of opinion that it is sufficient, in its terms, to authorize this court to determine whether the court erred in rendering the judgment it did upon the findings; but respondent contends that by the use of these words (which were wholly unnecessary) appellant has elected to rely solely upon the fourth sub-division, or ground, of his motion, and that the specification does not refer to any "error in law occurring at the trial."

We agree with respondent that the specification has no application, and cannot be considered under the fourth sub-division of the grounds for a new trial. But we do not think the language of counsel, above stated, destroys the validity of the specification in its application to the third sub-division. He certainly erred in his conclusion that the error relied upon should be classed as an error "committed by the court on the trial of said cause," and if he had only stated that ground in his motion the specification would have been insufficient; but his motion properly embraced another ground under which this specification is sufficient.

(*Vansickle* v. *Haines*, 7 Nev. 287; *Farrell* v. *Richards*, 30 N. J. Eq. 515.)

When it is said that such use must be made of the water as not to affect the material rights of other proprietors, it is not meant that there cannot be any diminution or decrease of the flow of water; for if this should be the rule, then no one could have any valuable use of the water for irrigation, which must necessarily, in order to be beneficial, be so used as to absorb more or less of the water diverted for this purpose. The truth is that under the principles of the common law in relation to riparian rights, if applicable to our circumstances and condition, there must be allowed to all, of that which is common, a reasonable use.

If the judgment had been based upon the findings in relation to riparian rights, it would, therefore, have been at least as favorable to respondent as it now is. The court would not have given either party the right to absolutely divert any portion of the water away from the stream, nor allowed to either any definite quantity or portion for the purpose of irrigation, but would have given to each a reasonable use of the water, and determined the question of reasonable use by the particular facts and circumstances as revealed by the evidence. Under the rules of the common law the judgment and decree of the court would, perhaps, have to be modified so as to conform to the views we have expressed. (*Union M. & M. Co.* v. *Ferris*, 2 Saw. 199; *Same* v. *Dangberg*, Id. 458–460.)

But did the court err in rendering its judgment upon the rights of the parties, acquired by appropriation, as set forth in the third and fifth findings? In all of the Pacific coast states and territories, prior to the passage of the act of congress of July 26, 1866, the doctrines of the common law, declaratory of the rights of riparian proprietors respecting the use of running waters, was held to be inapplicable, or applicable only to a very limited extent, to the wants and necessities of the people, whether engaged in mining, agricultural or other pursuits; and it was decided that prior appropriation gave the better right to the use of the running waters to the extent, in quantity and quality, necessary for the uses to which the waters were applied. This was the universal custom of the coast, sanctioned by the [illegible] and decisions of the courts in the respective states and territories, and approved and followed by the decisions of

supreme court of the United States. In this condition of affairs, the congress of the United States, on the twenty-sixth of July, 1866, passed the act "granting the right of way to ditch and canal owners over the public lands, and for other purposes," the ninth section of which reads as follows: "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed; *provided*, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (14 U. S. Stat. 253; Rev. Stat. U. S. 2339.)

In construing this section, the court, in *Vansickle* v. *Haines*, said: "The act of congress of July, 1866, if it shows anything, shows that no diversion had previously been authorized; for, if it had, whence the necessity of passing that act, which appears simply to have been adopted to protect those who at that time were diverting water from its natural channel. Doubtless all patents issued or titles acquired from the United States since July, 1866, are obtained subject to the rights existing at that time. But this is a different case; for, if the appellant has any right to the water, he acquired it by the patent issued to him two years before that time, and with which, therefore, congress could not interfere. But we do not understand it to be claimed that the act does directly affect this case, but that it is only referred to as exhibiting the policy of the general government. The answer is that the policy began with that act, was never in any way sanctioned or suggested prior to the time of its passage, and therefore has nothing to do with this case." (7 Nev. 280.)

In *Union M. & M. Co.* v. *Ferris*, *supra*, it was claimed by the defendants that the act of congress confirmed their rights acquired by priority of appropriation; but the court ignored the claim and endorsed the doctrines enunciated by the court

in *Vansickle* v. *Haines*. We are of opinion that the ninth section of the act of congress confirmed to the owners of water-rights on the public lands of the United States the same rights which they held under the local customs, laws and decisions of the courts prior to its enactment; that the act of congress did not introduce, and was not intended to introduce, any new system, or to evince any new or different policy upon the part of the general government; that it recognized, sanctioned, protected and confirmed the system already established by the customs, laws and decisions of courts, and provided for its continuance.

We had occasion in *Barnes* v. *Sabron*, 10 Nev. 230, to quote with approval the doctrines announced by the supreme court of the United States in *Basey* v. *Gallagher*, that the government, by its silent acquiescence, had assented to and encouraged the occupation of the public lands for mining purposes; that he who first connected his labor with the property open to general exploration, in natural justice acquired a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands and throughout the Pacific states and territories, by their customs, usages, and regulations, had recognized the inherent justice of this principle, and that it had been recognized by legislation, and enforced by the courts, and finally approved by the legislation of congress in 1866; that this principle was equally applicable to the use of water on the public lands for purposes of irrigation; and we declared that it logically followed, from the legal principles announced in that case, that the first appropriator of the waters of a stream had the right to insist that the water flowing therein should, "during the irrigating season, be subject to his reasonable use and enjoyment to the full extent of his original appropriation and beneficial use."

In *Basey* v. *Gallagher*, the court, after quoting the ninth section of the act of congress, said: "It is very evident that congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of public lands under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by legislation of the state or territory, or the decisions of courts. The union of the three conditions in any case

is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control." (20 Wall. 683.)

In *Jennison* v. *Kirk*, counsel for plaintiff contended that of the two rights mentioned in the ninth section of the act of congress, only the right to the use of water on the public lands, acquired by priority of possession, is dependent upon local customs, laws and decisions of the courts; and that the right of way over such lands for the construction of ditches and canals is conferred absolutely upon those who have acquired the water-right, and is not subject in its enjoyment to the local customs, laws and decisions. The court refused to sustain this position. It said: "The object of the section was to give the sanction of the United States, the proprietor of lands, to possessory rights, which had previously rested solely upon the local customs, laws and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. The section is to be read in connection with other provisions of the act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States."

After stating, at considerable length, the history of the discovery of gold in California, the adoption by the miners—in their love of order, system, and fair dealing—of rules and regulations for the government of their property rights; the recognition of the rights, by prior appropriation, to the water of a stream conveyed away from its natural channel for mining or other beneficial purposes; the fact that the doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of the miners; that the waters of rivers and lakes were carried great distances in ditches and flumes, constructed with vast labor and enormous expenditure of money, along the sides of mountains, and through canyons and ravines, to supply communities engaged in mining, as well as for agriculturalists and for ordinary consumption, and giving the views of the author of the act of congress and interpreting its several sections, the court, speaking of the ninth section, said: "In other words, the United States by the section said that whenever rights to the use of water by priority of possession had been acquired, and were recognized by the local customs, laws,

and decisions of the court, the owners and possessors should be protected in them; and that the right of way for ditches and canals, incident to such water-rights, being recognized in the same manner, should be acknowledged and confirmed; but where ditches subsequently constructed injured by their construction the possession of others on the public domain, the owners of such ditches should be liable for the injuries sustained. Any other construction would be inconsistent with the general purpose of the act, which, as already stated, was to give the sanction of the government to possessory rights acquired under the local customs, laws, and decisions of the courts." (98 U. S. 460.)

In *Broder* v. *Natoma Water Co.* the court said: "It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one." (101 U. S. 276, and authorities there cited: *Coffin* v. *Left-hand Ditch Co.* 6 Colo. 443; opinion by Ross, J, in *Lux* v. *Haggin*, 69 Cal. 255.)

It necessarily follows from the views we have expressed, and from the doctrines announced in the authorities we have cited, that the court did not err in rendering its judgment and decree upon the findings in relation to prior appropriation. The case of *Vansickle* v. *Haines*, in so far as the same is in conflict with the views herein expressed, is hereby overruled.

The judgment of the district court is affirmed.

[No. 1188.]

THE STATE OF NEVADA, EX REL. N. C. KEANE, RELATOR, v. M. A. MURPHY, DISTRICT JUDGE, ETC., RESPONDENT.

MANDAMUS—JUDICIAL OFFICER—PRELIMINARY QUESTIONS.—The rule that mandamus will not issue to control discretion, or revise judicial action, has no application to the determination of preliminary questions relating to the settlement of a statement on motion for new trial.

IDEM—SETTLEMENT OF STATEMENT.—Mandamus is a proper remedy to compel a district judge to settle a statement on motion for new trial in a case where it is his duty to settle the statement.

PRACTICE—WRITTEN NOTICE OF DECISION OF JUDGE—WHEN NOT WAIVED—TIME TO MOVE FOR NEW TRIAL.—In a case tried before the district court without a jury where the judge announced his decision in open court in the presence of counsel for the losing party who, at that time, requested the attorney for the opposite party to "add no more costs in entering judgment than he could help," which was assented to: *Held*, that such acts and conversations did not amount to a waiver of the right to have a written notice of the rendering of the decision, as required by section 197 of the practice act, before moving for a new trial

APPLICATION for mandamus.

The facts are stated in the opinion.

Wells & Taylor, for Relator:

I. The judgment cannot be entered until the written findings of fact and conclusions of law are filed in the cause. (*Russell* v. *Armador*, 2 Cal. 305; *Polhemus* v. *Carpenter*, 42 Cal. 382; *Mulcahy* v. *Glazier*, 51 Cal. 626; *People* v. *Forbes*, 51 Cal. 628; *Smith* v. *Lawrence*, 53 Cal. 34; *James* v. *Williams*, 31 Cal. 211; *Hidden* v. *Jordan*, 28 Cal. 301; *Lucas* v. *San Francisco*, 28 Cal. 591; *Lyon* v. *Leimback*, 29 Cal. 139.)

II. The findings of fact and conclusions of law must precede the entry of the judgment and support the same. (*Russell* v. *Armador*, 2 Cal. 305; *Bowers* v. *Johns*, 2 Cal. 419; *Headley* v. *Reed*, 2 Cal. 322; *Hoagland* v. *Clary*, 2 Cal. 474; *Brown* v. *Brown*, 3 Cal. 111; *Breeze* v. *Doyle*, 19 Cal. 102; *McClory* v. *McClory*, 38 Cal. 575; *Van Court* v. *Winterson*, 61 Cal. 615; *Bennett* v. *Pardini*, 63 Cal. 155; *Warring* v. *Freear*, 64 Cal. 54; *Sprick* v. *Washington*, 3 Neb. 253; *Stansell* v. *Cornig*, 21 Mich. 242; *Squier* v. *Lowenberg*, 1 Idaho, 785.

when respondent acquired the fee to his land, and if it should be necessary, in order to support the judgment, that it should have been acquired prior to the act of congress, we are bound, in the absence of any finding to the contrary, to presume it was before that time. If that fact was important, appellant should have asked for a definite finding upon that point. (*Warren* v. *Quill*, 8 Nev. 218.)

If the theory contended for by appellant, that this case should have been decided upon the principles pertaining to riparian rights should prevail, it would not follow, as claimed by him, that as a lower proprietor he would be entitled to *all* the water of the stream. This is not the law. We had occacion in *Warren* v. *Quill*, *supra*, to state that the inference must not be drawn "that, in any case, a riparian proprietor may take all the water of a stream for the purpose of irrigation, to the detriment of adjoining proprietors; for this is not the rule."

In *Vansickle* v. *Haines*, which is relied upon by appellant, the court use this language: "The common law does not, as seems to be claimed, deprive all of the right to use, but, on the contrary, allows all riparian proprietors to use it in any manner not incompatible with the rights of others. When it is said that a proprietor has the right to have a stream continue through his land, it is not intended to be said that he has the right to *all* the water, for that would render the stream, which belongs to all the proprietors, of no use to any. What is meant is that no one can absolutely divert the whole stream, but must use it in such manner as not to injure those below him." (7 Nev. 286.)

In *Union M. & M. Co.* v. *Ferris*, where both parties obtained the title in fee to their lands prior to the act of congress, the question as to the rights of riparian proprietors on a stream was elaborately discussed. The defendant claimed that in a hot and arid climate like Nevada the use of water for irrigation was a natural want; that the upper proprietor on the stream might consume all the water for the purpose of irrigating his land; and that such use would be reasonable. The court, in considering this question said: "To lay down the arbitrary rule contended for by the defendant, and say that one proprietor on the stream has so unlimited a right to the use of the water for irrigation, seems to us an unnecessary destruction

the rights of other proprietors on the stream, who have an *equal need and an equal right*." (2 Saw. 195.)

But the right to use water for the purpose of irrigation was expressly recognized. "Irrigation must be held in this climate to be a proper mode of using water by a riparian proprietor; the lawful extent of the use depending upon the circumstances of each case. With reference to these circumstances, the use must be reasonable, and the right must be exercised so as to do the least possible injury to others. There must be no unreasonable detention or consumption of the water. That there may be some detention and some diminution, follows necessarily from any use whatever. How long it may be detained, or how much it may be diminished, can never be stated as an arbitrary or abstract rule." (2 Saw. 197.)

Under the rules of the common law the riparian proprietors would all have the right to a reasonable use of the waters of a stream running through their respective lands for the purpose of irrigation. It is declared in all of the authorities upon this subject that it is impossible to lay down any precise rule which will be applicable to all cases. The question must be determined in each case with reference to the size of the stream, the velocity of the water, the character of the soil, the number of proprietors, the amount of water needed to irrigate the lands per acre, and a variety of other circumstances and conditions surrounding each particular case; the true test in all cases being whether the use is of such a character as to materially affect the equally beneficial use of the waters of the stream by the other proprietors. In *Vansickle* v. *Haines* the court quoted, with approval, the doctrine announced by Shaw, C. J., in *Elliot* v. *Fitchburg R. Co.* 10 Cush. 194: "That a portion of the water of a stream may be used for the purpose of irrigating land we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly obstruct or divert the water-course, or take such an unreasonable quantity of water or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably."

Numerous authorities were cited in support of this doctrine.

Our conclusion is that appellant is entitled to be heard upon the merits presented by this specification of error.

The cause will, therefore, be regularly placed upon the calendar for the April term.