a decision sustaining a demurrer to a complaint, nor is the right to an appeal from such a ruling elsewhere given. The precise point has been decided by this court in Keyser v. Taylor et al., 4 Nev. 435. In that case the court said: "The statute does not authorize an appeal from the action of the court simply sustaining a demurrer. There must in such case be a final judgment before an appeal can be taken."

As the order made in this case is not appealable, the appeal must be dismissed.

It is so ordered.

It is further ordered that the remittitur issue forthwith.

PACIFIC LIVE STOCK CO. *v.* ELLISON RANCHING CO. ET AL.

Nos. 2448, 2449

April 2, 1930. 286 P. 120.

1. APPEAL AND ERROR—IN APPEALING FROM DECREE QUIETING TITLE IN VARIOUS CLAIMANTS TO WATER RIGHTS, HELD ALL CLAIMANTS SHOULD HAVE BEEN SERVED WITH NOTICE OF APPEAL.

   Where lower proprietor brought suit against 45 upper proprietors seeking to determine priority and appropriative rights to waters in river and tributaries thereof, and decree specified priority of defendants and quieted title in them to specified quantity of water, decree was not nullity, in so far as it adjudicated rights of defendants among themselves, and hence nonappealing defendants, as adverse parties, were entitled to notice of appeal by other defendants.

2. WATER AND WATER COURSES—PURPOSE OF SUIT TO QUIET TITLE TO WATER RIGHTS IS TO DECIDE RESPECTIVE RIGHTS OF ALL PARTIES.

   In suit to quiet title to water rights, main purpose is to determine respective rights of all parties to use of water.

3. APPEAL AND ERROR—APPELLATE JURISDICTION IS DEPENDENT ON SERVICE OF NOTICE OF APPEAL ON ADVERSE PARTY.

   Indispensable prerequisite to appellate jurisdiction of supreme court is that notice of appeal be served on adverse party or his attorney, under Rev. Laws, sec. 5330.

4. APPEAL AND ERROR—EVERY PARTY WHOSE INTEREST IN SUBJECT MATTER IS ADVERSE TO APPELLANT, OR WOULD BE AFFECTED BY REVERSAL, IS "ADVERSE PARTY" ENTITLED TO NOTICE OF APPEAL.

Within meaning of Rev. Laws, sec. 5330, "adverse party," who is entitled to notice of appeal, includes every party whose interest in subject matter of appeal is adverse to appellant, or will be affected by reversal or modification of judgment.

5. STIPULATIONS—STIPULATION BY SOME OF DEFENDANTS IN SUIT INVOLVING WATER RIGHTS, PURPORTING TO VALIDATE APPELLATE PROCEEDINGS BY CERTAIN DEFENDANTS, COULD NOT BIND OTHERS.

Where lower proprietor brought suit against forty-five upper proprietors to determine respective priorities and appropriative rights to water, and certain defendants, who appealed without serving notice of appeal on codefendants, obtained stipulation purporting to validate or approve proceedings to perfect appeal, signed by only eleven of answering defendants, stipulation could not bind defendants not parties thereto.

6. APPEAL AND ERROR—WHETHER APPEALS WERE PERFECTED IN PROPER TIME AND MANNER IS TO BE DECIDED BY SUPREME COURT.

It is right and duty of supreme court to determine whether appeals were perfected in manner and time required by statute.

7. APPEAL AND ERROR—QUESTION WHETHER OTHERS SHOULD HAVE BEEN PARTIES TO MOTION FOR NEW TRIAL IS NOT INVOLVED ON MOTION TO DISMISS APPEAL FROM ORDER DENYING NEW TRIAL.

Where motion is made to dismiss appeal from order denying new trial, regardless of merits of litigation, question of whether other persons should have been made parties to motion for new trial is not involved.

8. NEW TRIAL WHO ARE ADVERSE PARTIES TO MOTIONS FOR NEW TRIAL ARE DETERMINED BY SAME RULES AS APPLY TO APPEALS.

In determining who are adverse parties to motions for new trial, same rules govern as in case of appeals.

9. NEW TRIAL IN SUIT QUIETING TITLE TO WATER RIGHTS, FAILURE OF SOME DEFENDANTS TO SERVE NOTICE OF MOTION FOR NEW TRIAL ON OTHERS WAS GROUND FOR AFFIRMING ORDER DENYING MOTION.

Where lower proprietor brought suit against forty-five upper proprietors to adjudicate priorities and appropriative rights in waters, and some of defendants filed motion for new trial, based principally on ground of insufficiency of evidence, their failure to serve notice of intention to move for new trial on their codefendants was sufficient reason for affirming order denying the motion.

10. PLEADING — AMENDMENT TO ANSWER WAS PROPERLY ALLOWED AFTER DECREE TO PUT IN ISSUE LITIGATED QUESTION UPON WHICH EVIDENCE HAD BEEN RECEIVED WITHOUT OBJECTION.

In suit to quiet title to water rights, where one of issues involved tributary character of certain creeks, testimony on such issue being admitted without objection, and decree adjudging creeks to be tributary not being complained of, there was

no abuse of discretion in allowing amendment to answer after decree in order to put directly in issue question of tributary character of the creeks.

C. J.-CYC. REFERENCES

APPEAL AND ERROR—3 C. J. sec. 128, p. 372, n. 53; sec. 1284, p. 1202, n. 62; sec. 1320, p. 1218, n. 9; sec. 1321, p. 1221, n. 16; 4 C. J. sec. 2426, p. 602, n. 33; sec. 2875, p. 905, n. 41.

NEW TRIAL—46 C. J. sec. 254, p. 290, n. 32.

STIPULATIONS—36 Cyc. p. 1293, n. 72.

WATERS—40 Cyc. p. 729, n. 82.

APPEAL from Sixth Judicial District Court, Humboldt County; *E. J. L. Taber,* Judge.

Suit by the Pacific Live Stock Company against the Ellison Ranching Company, L. J. Anderson Dunn, and others, in which defendants named filed separate cross-complaints. From part of the final decree, and from an order denying their motion for a new trial, and also from an order denying their application and motion to change and modify the findings of fact, conclusions of law, and the final decree, defendant last named and others appeal. From an order made after the final decree permitting defendant last named and others to amend their answers, plaintiff appeals. **Appeals dismissed, and orders affirmed.**

J. W. Dorsey and *W. E. Cashman,* for Appellants:

The appellants respectfully submit that the motion for a new trial and the appeal from the order denying the same, and the appeal from the judgment herein, were made and taken in all respects as required by law; that the defendants were nonadversary parties as between themselves, and the judgment is a nullity as respects the rights of the nonappealing defendants inter sese; that the decree may be reversed as to the appeals and remain in force as to the nonappealing defendants, and that section 5227 of the Revised Laws as amended provides for an independent proceeding, an independent record, and an appealable order.

In relation to the motion for a new trial and the appeal from the order denying the same, it is submitted:

(a) The right of appeal is a valuable right, remedial

in character; it must be construed to effectuate the right, and always granted in doubtful cases.

(b) The action being one against several tort feasors, it must be regarded as though each defendant had been separately sued.

(c) No issues were created by and among the parties except by answer and cross-complaint, and the only issues in which the appellants were interested were created by their answers to plaintiff's complaint and their cross-complaints against the plaintiff, and by their answer to the cross-complaint of, and the cross-complaint against, the defendant Ellison Ranching Company.

(d) The appellants neither had, nor were they served with, nor did they waive, notice of the decision.

(e) The filing of the findings of fact and judgment herein on April 11, 1919, constitute the first and only notice to the appellants of the decision of January 6, 1919, and their notice of intention to move for a new trial was made within ten days thereafter, to wit, on April 21, 1919, and their appeal from the order overruling their motion for a new trial was taken within the time and in the manner provided by the statute.

(f) The defendants between whom no issues existed were not adverse parties, and the court had no jurisdiction to adjudicate rights between them.

(g) The only parties necessary to be served were those who appeared to be adverse — between whom issues had been created at the time the notice of intention to move for a new trial was filed, and the same parties were the only parties necessary to be served on appeal from the order denying the motion for a new trial.

(h) The record shows due service of all notice upon the plaintiff and the defendant Ellison Ranching Company, and also an express stipulation of all other parties that the notice of intention to move for a new trial and appeal therefrom, and all appeals and proceedings had been duly taken, and that the notices, motions and appeals were "duly perfected."

In relation to the appeal from the judgment, it is submitted:

(a) The only adversary parties on the record or under the issues are the plaintiff and the defendant Ellison Ranching Company, and the record shows due service of notice of appeal.

(b) By express admission of every other party, except defaulting and dismissed defendants, all were duly served with notice of appeal. Every step required to vest the lower and this court with jurisdiction was taken in the manner and within the time provided by the statute.

(c) This was not a statutory proceeding to allot the waters of a stream, but was a suit in equity with selected and selectable defendants to abate nuisances, in which there were no issues among the defendants excepting the Ellison Ranching Company, and the court was without jurisdiction to adjudge the rights of the defendants inter sese, and the decree outside of the issues is pro tanto a nullity.

As to defaulting, dismissed and disclaiming defendants:

(a) As to a defaulting defendant, having admitted the allegations of the complaint, he cannot be regarded as an adverse party and cannot be injuriously affected by a reversal of the judgment.

(b) As to a dismissed defendant, there has been no trial on the merits; he is out of the case, he stands as though he had not been sued, and there can be no estoppel; he is liable to further action by the plaintiff whenever a cause of action upon the original subject matter arises, and he cannot be injuriously affected by a reversal judgment.

(c) As to a disclaiming defendant, there never can be a judgment against him which could give the plaintiff more than his disclaimer admits.

The decree may be reversed as to appellants and remain in force as to nonappealing defendants:

(a) The case must be considered and determined as though the defendants between whom issues existed

had been sued separately and the judgment determining issues as between or among themselves is void.

(b) A reversal of the decree would take effect upon the appellants and upon the appellants only.

There is no antecedent proceeding from which an appeal could have been taken which could determine the questions required to be raised by the application to modify the findings. The order in relation to such an application is a special order, made after final judgment and dependent upon its own record. Section 5227, Rev. Laws, is a remedial one and must be liberally construed to effectuate the rights of the party against whom the order is made and to provide for a reexamination of the merits of the application in this court.

In case No. 2449, the plaintiff contends that sec. 5084 of our Revised Laws does not expressly authorize an amendment after final judgment. Our answer is that the statute is remedial in character and should be liberally construed; and there is nothing in the statute which either expressly or impliedly prohibits an amendment after final judgment.

As there is nothing in the statutes of Nevada prohibiting the amendment, as the section quoted authorizes amendments without limitation as to time, and as the case was tried upon the theory that the issue of the tributary character of the streams was clearly presented by the pleadings, and therefore the plaintiff was not misled or prejudiced, there seems to be no support for the plaintiff's contention. 31 Cyc. 454; Bradley v. Parker, 34 P. 234, at 236; Richard v. Hupp (Cal.), 37 P. 920.

Edward F. Treadwell, G. F. Talbot and *Joseph Sharp,* for Respondent:

All the defendants who filed answers were adverse parties and entitled to service of notice of motion for new trial and notice of appeal. The defaulting defendants were also entitled to notice of appeal.

It is provided by section 381 of the civil practice act that notice of intention to move for new trial must be served upon the "adverse party." The same provision

is made in section 388 as to notice of appeal. It is well settled that the same rules govern in determining who is an "adverse party" to motions for new trial and to appeals. Johnson v. Phoenix Ins. Co., 146 Cal. 571, 152 Cal. 196; Niles v. Gonzalez, 152 Cal. 90, 155 Cal. 359; Herriman v. Menzies, 115 Cal. 25.

In this connection, however, one distinction should be noted, namely, that on an appeal from an order denying a motion for new trial only those who were in fact served with notice of the motion for new trial need be served with a notice of appeal, and the appeal from the order denying a new trial cannot be dismissed if those parties were served, although the motion for new trial was not in fact served upon the requisite parties; the remedy in that case being to affirm the order denying new trial for failure to serve the proper parties. This seems to be decided in the cases of Niles v. Gonzalez, supra; Watson v. Sutro, 77 Cal. 609; Bell v. S. F. Savings Union, 153 Cal. 64; and Estate of Young, 149 Cal. 173.

It might be noted that the supreme court of Idaho reached the opposite conclusion and held that the matter could be reached by a motion to dismiss the appeal as well as by a motion to affirm without reference to the merits. Spokane Ranch and Water Co. v. Beatty (Mont.), 96 P. 727. The rule also seems contrary to the decision in Harper v. Hildreth, 99 Cal. 265; and in Millikin v. Houghton, 75 Cal. 539. In order to avoid this question we have also moved to affirm the order denying the new trial and the order denying the motion to change the findings without regard to the merits, for the same reasons.

It is too well-settled to require citation of authorities that the requirement that the notice of motion for new trial and notice of appeal be served upon the adverse parties is jurisdictional, and a failure to so serve it is fatal to the right of review. See Decennial Digest under title "Appeal and Error," sec. 327, and cases there cited; Dick v. Bird, 14 Nev. 161.

The general rule as to who are adverse parties is also well-settled, the only difficulty being in the application

of the rule. Senter v. DeBernal, 38 Cal. 637; Terry v. Superior Court, 110 Cal. 85; Johnson v. Phoenix Ins. Co., 146 Cal. 571; Nelson Bennett Co. v. Twin Falls Land Co., 13 Idaho 762, 92 P. 980; Butte County v. Boydstun, 68 Cal. 189; United States v. Crooks, 116 Cal. 43; Millikin v. Houghton, 75 Cal. 539; Herriman v. Menzies, 115 Cal. 16, 25; Bowering v. Adams, 126 Cal. 653; Jones v. Sander (Wash.), 26 P. 224; Spokane Ranch and Water Co. v. Beatty (Mont.), 96 P. 727; In Re Waters of Chewaucan River, 89 Ore. 659; In Re Silvies River, 199 Fed. 495, 503; Estate of Young, 149 Cal. 173; Estate of Prendergast, 143 Cal. 135; Vincent v. Collins, 122 Cal. 387; Kenney v. Parks, 120 Cal. 22; Pac. Mutual Life Ins. Co. v. Fisher, 106 Cal. 224; Lancaster v. Maxwell, 103 Cal. 67; O'Kane v. Daly, 63 Cal. 317; Ford-Sanborn Co. v. Braslan Seed Growers Co., 10 Cal. App. 762; Ford v. Cannon, 5 Cal. App. 185; Koyer v. Benedict, 4 Cal. App. 48.

The fact that each defendant did not file a cross-complaint against each other defendant is entirely immaterial in determining who are adverse parties within the meaning of the sections referred to. Senter v. DeBernal, 38 Cal. 637; Bliss v. Grayson, 24 Nev. 422.

The present action is an action to quiet title. In such an action it is well-settled that the defendant is entitled to have his right in the subject matter of the action determined and his title thereto quieted, and is not required to file any cross-complaint in order to obtain this affirmative relief. Wilson v. Madison, 55 Cal. 5; Miller v. Luco, 80 Cal. 257; Mills v. Fletcher, 100 Cal. 142; Islais etc. Co. v. Allen, 132 Cal. 432; Brooks v. White, 22 Cal. App. 719.

The defendants who answered but made no proof of their own rights at the trial were adverse parties and entitled to notice. A defendant who has put in an answer need not appear at the trial. His answer controverts the allegations of the complaint and puts the plaintiff upon his proof, and although he does not appear at the trial he has a right to have the plaintiff's

rights adjudged in accordance with the evidence, and may review the judgment on appeal. He is obviously, therefore, a person interested in the judgment and affected by it, and in this case the judgment being to a certain extent favorable to him, he would be prejudicially affected by its reversal.

The defaulting defendants were adverse parties and entitled to notice. Nelson Bennett Co. v. Twin Falls Land Co., 13 Idaho, 762, 92 P. 980; Bowering v. Adams, 126 Cal. 653; In Re Castle Dome Min. Co., 79 Cal. 246; Koyer v. Benedict, 4 Cal. App. 48.

The stipulation made after the motion for new trial was denied and after the appeal was served and filed is not effective as a waiver of service of notice of appeal, for the following reasons:

1. Because service of notice of appeal is jurisdictional and could not be waived. Marx v. Lewis, 24 Nev. 306; Kirman v. Johnson, 30 Nev. 146.

2. Because the stipulation is not signed by plaintiff or by all of the defendants.

3. Because it was entered into after the time to serve notice of motion for new trial and to serve notice of appeal had expired.

4. Because it does not purport to waive notice to which the clients of the parties signing it were entitled, but attempts to declare, contrary to the law and fact, that they were not adverse parties, and it was not intended as a waiver of notice of an appeal to which their clients were parties, and which appeal they were in duty bound to defend against, but simply a recital that they were not necessary parties to the appeal, and because an attorney has no power to consent to the reversal of the judgment on an appeal to which his client is not a party.

The notice of motion for new trial was also ineffective because not served within the statutory period after decision. It is well-settled that the time for motion for new trial runs not from the filing of the formal findings of fact and conclusion of law and entry of judgment, but runs from the time of the original decision. Cal. State

Telegraph Co. v. Patterson, 1 Nev. 154; Elder v. Frevert, 18 Nev. 278; Robinson v. Benson, 19 Nev. 331; Robinson v. Kind, 25 Nev. 261; Central Trust Co. v. Holmes Mining Co., 30 Nev. 437. We understand that the appellant claims that its time for motion for new trial did not run because it did not have notice of the decision. That they did receive notice is clear from the fact that they appeared in court on March 20, 1919, and were heard with respect to the findings and requested changes in the decision which was on file. The right to notice of the decision is a right which can be waived, and when acts amounting to a waiver of this right are present and appear of record, the time within which to move for a new trial starts to run from the time of such acts. Corbett v. Swift, 6 Nev. 194; Hunter v. Truckee Lodge, 14 Nev. 24; Glock v. Elges, 39 Nev. 415; Hayne on New Trial and Appeal, vol. 1, sec. 19.

A motion for new trial is a prerequisite to an appeal for the purpose of reviewing the sufficiency of the facts, and there being no motion for new trial the appellants are not entitled to be heard with respect to any of their assignments regarding the sufficiency of the evidence to sustain the decision. This rule is well settled. Civ. Pr. Act, sec. 386; Rev. Laws, sec. 5328; Wolf v. Humboldt County, 36 Nev. 26; Whitmore v. Shiverick, 3 Nev. 288, 303; James v. Goodenough, 7 Nev. 324, 328; Conley v. Chedic, 7 Nev. 336; Weck v. Reno Traction Co., 38 Nev. 285.

All parties are necessarily adverse to any attempt to review the judgment on the ground of alleged error of the trial court in considering all of the parties adverse and determining the rights by its judgment as between the parties defendant. Jones v. Sander (Wash.), 26 P. 224.

The appeal from the order refusing to change and modify the findings and decree should be dismissed for the same reasons, and for the additional reason that it is not an appealable order. Sec. 5227, Rev. Laws (Stats. 1915, p. 219, being sec. 285 of the civil practice act); Schwartz v. Stock, 26 Nev. 128, 143. It is well

settled that where an original decision, order or judgment is itself reviewable on appeal, a party cannot appeal from an order refusing to set aside or modify that original decision, judgment or order. This has been decided in a great variety of cases under sec. 963 of the Code of Civil Procedure of California, which likewise allows an appeal from a special order made after final judgment. Davis v. Donner, 82 Cal. 35; Estate of Walkerly, 94 Cal. 352; Harper v. Hildreth, 99 Cal. 265; Tripp v. Santa Rosa Street R. R., 69 Cal. 631; Eureka etc. Ry. Co. v. McGrath, 74 Cal. 49; Larkin v. Larkin, 76 Cal. 323; Deering v. Richardson-Kimball Co., 109 Cal. 73; Guardianship of Get Young, 90 Cal. 77; Kent v. Williams, 146 Cal. 3; Doyle v. Republic Life Ins. Co., 125 Cal. 15; Symons v. Bonnell, 101 Cal. 223.

The correctness of this construction is made clear by the act of 1919, p. 319, amending sec. 403 of the civil practice act, which states that on the failure of the court to make the modification "the party moving shall be entitled to his exceptions." That is, he is not granted a new right of appeal, but is allowed his exceptions reviewable on appeal from the judgment or order denying a new trial.

OPINION

By the Court, SANDERS, J.:

These appeals concern adjudications of conflicting rights of the parties to the use of the waters of Quinn River and its tributaries in Humboldt County, which were made many years ago by Hon. E. J. L. Taber, judge of the Fourth judicial district, acting as judge pro tem. of the Sixth judicial district. The adjudications were made at the suit of the Pacific Live Stock Company, a lower proprietor, against upper proprietors of land irrigated from said river and the tributaries thereof. The decree adjudicates as many as sixty appropriative rights for irrigation, stock raising, and domestic purposes, with priorities ranging from

1868 to 1913. The adjudications made in 1919 have governed the rights of the parties, and all, with the exception of appellants, are presumably satisfied with the adjudications, since none other than appellants have appealed.

Justice DUCKER, now chief justice, being disqualified because of his having been attorney for certain of the defendants at the inception of the litigation, Hon. George A. Bartlett, judge of the Second judicial district court, was designated by the Governor to sit in his place and stead.

The two appeals were heard together. Since appeal No. 2449 is but the outgrowth of an order made after judgment in case No. 2448, one opinion will suffice.

The case was before us at an earlier stage upon respondent's motions to dismiss and to affirm certain orders, without reference to the merits of the case. Upon consideration of the respective motions ably argued and submitted on printed briefs, it was ordered that the motions stand over for hearing and decision when the case was presented on its merits. Pacific Live Stock Co. v. Ellison Ranching Co., 45 Nev. 1, 192 P. 262.

No intelligent opinion can be had as to the merits of the motions without a summary of the facts: In October, 1907, the Pacific Live Stock Company, a corporation, filed its complaint against as many as forty-five persons, cotenants, and corporations. The declared purpose of the suit was to quiet plaintiff's title to certain water rights in Quinn River, the plaintiff claiming an appropriation of 125 cubic feet of water per second with priorities as of the years 1872 and 1901. The complaint, after setting up plaintiff's ownership of certain arid lands described by their legal subdivisions, proceeded upon the theory that the defendants, for the statutory period of limitations under claim of right, had diverted the waters of Quinn River and the tributaries thereof at divers places on said river above the lands of plaintiff, and that a large portion of the waters so diverted was never returned to the river and was wholly lost to the

plaintiff; that by said diversions plaintiff was deprived of water to which it was legally entitled; and that, so long as said diversions continued, plaintiff would be unable to irrigate its lands or to properly or successfully cultivate the same or raise crops thereon. It was alleged that, if the defendants, or any of them, have any right to divert any water from said river or any of the tributaries thereof, such rights are subsequent and subordinate to plaintiff's alleged appropriations made by it and its grantors and predecessors in interest. The prayer of the complaint was that the defendants, and each of them, be required to set forth their claims to the use of the waters of said river and its tributaries, and that the rights of the plaintiff and the adverse claims of the defendants be ascertained and determined. The complaint seeks injunctive relief against the defendants from diverting any of the waters in such manner or to such extent as to deprive plaintiff of the waters to which it is entitled.

All the defendants answered, except four, who defaulted. In their separate answers, the defendants denied generally the rights of plaintiff as alleged and set up in themselves certain water rights in Quinn River and the tributaries thereof, as named in the answers, and sought a decree quieting their title as against the claims of plaintiff and the world.

Because of changes of title occurring after answers, a number of orders of substitution were made in the parties defendant. Among others, the Ellison Ranching Company was substituted as defendant in the place and stead of the Humboldt Cattle Company. Lizzie J. Anderson Dunn was substituted as defendant in the place and stead of the Anderson Land and Stock Company, James P. Anderson, Thomas McConnell (executor), Mary M. McConnell, Thomas McConnell, Charles McConnell, Clara Anderson, and B. F. Anderson. The trustees of the Anderson Land and Stock Company were also added as defendants.

Lizzie J. Anderson Dunn, as successor in interest of the Anderson and McConnell interests, filed a

cross-complaint against the plaintiff. None of the codefendants, however, were made parties to this cross-complaint. Lizzie J. Anderson Dunn also filed a cross-complaint against the defendant Ellison Ranching Company.

The Ellison Ranching Company filed a cross-complaint against the plaintiff and also a large number of the defendants, including the Anderson and McConnell interests.

The decision of the court was filed on January 6, 1919. No written notice of the decision was given, but after the decision was filed the attorney for the plaintiff prepared a draft of findings of fact, conclusions of law, and a decree in accordance with the decision, and submitted the same to Judge Taber and to the attorneys appearing in the case. Afterwards an informal hearing was had with respect to the proposed findings of fact, conclusions of law, and the decree, at which time the attorneys for the McConnell-Anderson interests and Lizzie J. Anderson Dunn made certain objections thereto and suggested certain changes therein. Thereafter, the same attorneys presented to the court a written argument in support of their respective objections, claiming, among other things, that certain streams that the court found to be tributary to Quinn River in its decision should be held not to be tributary, and that certain acts of the plaintiff disentitled it to the relief granted it by the decision.

Thereafter, on, to wit, April 9, 1919, the court caused to be entered its findings of fact, conclusions of law, and a final decree in accordance with the decision theretofore made.

On April 21, 1919, the Anderson defendants (appellants) served notice of intention to move for a new trial. The notice of motion was addressed to and served only on the plaintiff and the defendant Ellison Ranching Company. This was evidently on the theory that the plaintiff and the cross-complainant Ellison Ranching Company were the only adverse parties.

On April 26, 1919, appellants served on the plaintiff

and the defendant Ellison Ranching Company a notice of motion for correction of specified defects, errors, and omissions in the findings, requiring changes therein and in the decree.

On June 25, 1919, the motion to change and modify the findings and the decree, together with the notice of motion for new trial, came on for hearing, and said motions were on June 27, 1919, denied and overruled.

Thereafter, on July 1, 1919, appellants served notice of appeal from certain parts or portions of the decree dated April 9, 1919, and from the order denying a new trial dated January 27, 1919. The one notice of appeal was addressed to the plaintiff and to the defendants and cross-complainants, and their respective counsel. The notice, however, was only served upon the plaintiff and the defendant Ellison Ranching Company.

Thereafter, on August 16, 1919, appellants served their notice of appeal from the order denying the application and motion of appellants to change and modify the findings of fact, conclusions of law, and the decree, dated June 27, 1919. The notice of appeal from this order made after judgment was only served upon the plaintiff and the defendant Ellison Ranching Company.

Thereafter, on August 22, 1919, appellants caused to be filed and incorporated in the record a document, styled "Stipulation in re Appeals." The stipulation reads in part as follows: "It is hereby stipulated, each of the signers hereof appearing and agreeing for the party or parties represented by him, that the following defendants in the above-entitled cause, to wit: (Here follows the names of all of the defendants appealing.) Duly perfected their motion for a new trial herein; and their application to amend, modify, and correct the findings of fact, conclusions of law and judgment therein; and their appeal from parts of said judgment, and from the order of said court denying and refusing to grant a new trial herein; and that the undertaking required by law was executed and filed within the time prescribed by law." The signatories to the stipulation were attorneys of record for eleven of the answering defendants.

The notice of appeal from the judgment or decree states, in substance, that appellants appeal from that portion of the decree which adjudges priorities of right in favor of plaintiff and against defendants, and from so much thereof as deprives defendants and gives to the plaintiff the use, or right to use, any of the waters claimed by them in their answers; and particularly from those parts of the decree which give to the plaintiff, or limit the rights of the defendants as to the waters, or any thereof, of Twelve Mile creek, Canyon creek, Pole creek, Spring creek, North Flat creek, South Flat creek and Skull creek, or any of said creeks; and from those parts which enjoin defendants from using or interfering with the waters, or the flow of said or any, of said streams; and from those parts or portions of the decree which give to the plaintiff as against defendants or enjoin defendants from interfering with the flow to the plaintiff of 16.44 second feet, or any quantity, of the waters of Quinn River; and from those parts which enjoin said defendants from maintaining any dam, ditch, levee, or other work which shall prevent the plaintiff from receiving the several amounts, or any quantity, of water adjudged to it.

It is particularly stated in the notice of appeal that it is the intention of defendants to appeal from all of those parts of the judgment, and from those parts only, which are in favor of the plaintiff and against the defendants; which parts of the judgment appealed from are to be found in paragraphs I, IV, V, VI, VII, IX, XI, XIII, XIV, XVI, and XVII of the decree.

The notice also states that the appeal is taken from the order denying defendants' motion for new trial, dated on June 27, 1919.

The decision and the decree in detail determine the rights of the parties who had answered, with the exception of four of the defendants, namely I. B. English, Thomas Scott and Lena Scott, and Charles Clute. The decree specifies the priority and number of second feet of water appropriated by each defendant as set forth in a table showing the dates of appropriation, the priority

and the particular stream from which each appropriation was made, the names of the owners and the acreage irrigated by each appropriation; the name of the stream and place of appropriation. It was also decreed that each of the parties are the owners of the flow and use of the several amounts of water appropriated by them set forth in the decree from the stream or streams therein named. In the decree the title of each of the parties to the water rights decreed is quieted. We note that the decree reduces plaintiff's claimed right of 125 second cubic feet to 30.20 second feet with priorities as of the years 1874, 1887, 1893, and 1901.

In the state of the record as above outlined, counsel for respondent conclude that the appeals should be dismissed and the respective orders should be affirmed. First, because the notice of appeals was not served on the adverse parties; second, that the appeal from the order denying appellants' motion to change the findings and the decree should be dismissed, because it is not an appealable order; third, that the order denying appellants' motion for new trial should be affirmed, because the notice of motion was not served on the adverse parties and was not served within ten days after notice of the decision; fourth, that the order denying appellants' motion to change and modify the findings and the decree should be affirmed, because the notice therefor was not served on the adverse parties and because the notice was not served until after final judgment.

It will be observed that the grounds for the respective motions to dismiss and to affirm are based primarily upon the alleged failure of appellants to serve their notice of appeals on the adverse parties. In support of this contention it is argued on behalf of respondent that all the nonappealing defendants are "adverse parties" in the sense of the code and were entitled to notice of appeal. On the other hand, counsel for appellants insist and contend that, under the issues made by the pleadings, the defendants inter sese were not

adverse parties; that the decree is a nullity as respects the adjudication of the water rights of defendants as among themselves.

1, 2. In support of these contentions, it is argued that the suit was one in equity to determine the order of priority among numerous appropriators of the waters of Quinn River and the tributaries thereof; that the issues made by the pleadings created a severable and separate controversy with each defendant, dependent upon separate and independent rights calling for separate evidence, and that, there being no issues between the defendants, the plaintiff has no interest in the rights of the nonappealing defendants among themselves. Therefore the decree, in so far as it adjudicates the rights of the defendants as between themselves, is a nullity. We are not in accord with these contentions. The plaintiff in its complaint asserts a right to 125 cubic feet per second of water in Quinn River with priorities as of the years 1872 and 1901. The complaint assumes that the defendants have rights in the waters of Quinn River, and the plaintiff seeks a decree defining the rights of all the parties and establishing the rights of the plaintiff. This, indeed, is the most important object of the action, the office of the injunction as prayed in the complaint being merely to preserve and protect the rights of all the parties when so defined. In a suit to quiet title to water rights, such as this, the main purpose is to determine the respective rights of the parties to the use of the water. A decree which leaves the controversy between the parties unsettled, unadjudicated, undetermined, and subject to future litigation, defeats the very purpose for which the action is brought. 3 Kinney, Water Rights (2d ed.), sec. 1557. In Union M. & M. Co. v. Dangberg (C. C.), 81 F. 73, 119, Judge Hawley well said: "A practical view ought to be taken of all the conditions, surroundings, and situations. The rights of all parties must be protected by the decree. The difficulty of enforcing it without the necessity of bringing independent suits should be avoided, if possible.

Certainty in its terms, positiveness in its requirements, justice in its conclusions, will materially aid in the accomplishment of such a purpose." The decree here criticized for its certainty and definiteness with respect to the rights of all the parties to the use of the waters of Quinn River and its tributaries is not a nullity in so far as it determines in detail those rights. Because of the intrinsic difficulties in the formation of findings, involving appropriations of water of the numerous defendants, made the subject of the action with priorities ranging from 1868 to 1913, Judge Taber is to be commended for his decree, certain and definite as to the parties, the order of priorities, the quantity of water which each defendant is entitled to use, the places and time of use, leaving no controversy between the parties unsettled and unadjudicated. There are cases adjudicating the water rights of a stream with its tributaries in which it is not necessary to bring all the parties interested in the adjudication in this court on appeal. But this is not such a case. The case here upon trial did not resolve itself into separate controversies involving some of the parties without involving others.

3, 4. The essential prerequisite condition to give this court jurisdiction of an appeal is that the notice of appeal must be served upon the "adverse party" or "his attorney." Section 5330, Revised Laws. Every party whose interest in the subject matter of the appeal is adverse to or will be affected by the reversal or modification of the decree or judgment is an adverse party in the sense of the code, and entitled to notice of appeal. This proposition is so well settled as not to need the citation of authorities. Upon the hearing of the respective motions to dismiss and affirm, it was declared in the preliminary opinion that the general test for determining who are "adverse parties," within the meaning of the statutes concerning notices of appeal, is whether or not such parties would be affected by modification or reversal of the decision, citing authorities to which we now add Kondas v. Washoe County Bank, 50 Nev. 181,

254 P. 1080; Wendt v. Eastern Oregon Land Co. (In Re Burnt River Water Rights), 116 Or. 525, 241 P. 988; 2 Cal. Jur. sec. 120, et seq. Counsel concede the rule to be as stated, but insist that the reversal or modification of the portions of the decree appealed from would not affect the adjudicated rights of the nonappealing defendants. Therefore, they are not "adverse parties" entitled to notice of appeal. The decree fixes the duty of water as between all the contestants. It quiets the title of all adverse claimants to the use of the water. The reversal or modification of the parts or portions of the decree appealed from applies to all the adjudications affecting the use of the water, made the subject of the suit. Its reversal or modification would necessitate a retrial of the case and throw open to readjudication the rights of all the contestants. We need not speculate in what respect a reversal or modification of the decree would affect the nonappealing defendants. It is sufficient to say that upon appellants' own showing the rights as between them and the plaintiff cannot be determined without the presence of all the parties interested and not served with notice of appeal. In Re Burnt River Water Rights, supra.

5, 6. Appellants have attempted to relieve themselves of the situation made by their failure to give and serve notice of appeal upon all the defendants interested in the subject matter of the suit by obtaining from the attorneys for certain of the defendants the stipulation as above set out. Certainly the signatories to this stipulation, representing no more than eleven of the answering defendants, could not bind those defendants not parties thereto. It is argued that the stipulation does not attempt to waive notice of appeal, but that it simply admits that what should have been done to affect the appeal was seasonably and properly done; that it was obtained for the purpose of showing that every step required to be taken, and in so far as required to be made, was taken and made within the time and in all respects as required by law. It is for us to determine whether or not the

appeals were perfected in the manner and time as required by law. The stipulation, in our opinion, does not operate to confer jurisdiction.

7. In its motion to dismiss, the respondent also seeks the affirmance of the order denying appellants' motion for new trial, without reference to the merits of the case, upon the ground that the notice of intention to move for new trial was not served on all the adverse parties. On the former hearing of the respective motions, it was considered that the motion to affirm could only be determined upon consideration of the appeal itself. It was for this reason we were largely influenced to order that the motions stand over for hearing until the appeal was presented upon its merits. A review of the authorities convinces us that we were right in making the order. The question of whether others should be made parties to a motion for new trial is not involved in a motion to dismiss an appeal from an order denying the motion. Adopting the language of Angellotti, J., in Johnson v. Phenix Insurance Company, 146 Cal. 571, 80 P. 719, 720: "A failure to serve an adverse party with notice of intention to move for a new trial may be a reason for denying the motion for a new trial, and for affirming such order on appeal; but it does not constitute a reason for the dismissal of the appeal upon the ground that the court has not acquired jurisdiction to hear it. In Re Ryer, 110 Cal. 556, 559, 42 P. 1082. See, also, Barnhart v. Fulkerth, 92 Cal. 155, 28 P. 221." In addition to these authorities, we cite other decisions collated in notes to section 125 of 2 Cal. Jur. p. 342.

The question, therefore, is whether the failure of appellants to give and serve their notice of intention to move for a new trial upon their codefendants furnishes sufficient ground for the affirmance of the order denying the motion. The record discloses that the motion was based principally upon the ground of the insufficiency of the evidence to support the findings and the decision, with respect to the adjudication of the conflicting rights between the plaintiff and the movants.

8, 9. The same rules govern in determining who is an "adverse party" to motions for new trial and to appeals. Johnson v. Phenix Insurance Co., supra; Niles v. Gonzalez, 152 Cal. 90, 92 P. 74; Id., 155 Cal. 359, 100 P. 1080; Herriman v. Menzies, 115 Cal. 25, 44 P. 660, 46 P. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81. Being as we are of the opinion that the nonappealing defendants were adverse parties entitled to notice on appeal, it follows that they were entitled to notice as adverse parties of the motion for new trial. The codefendants were directly interested in the result of the motion, and the granting of it to appellants would necessarily affect their adjudicated relative rights in and to the waters of the river and its tributaries. Under the circumstances and in the light of the grounds upon which appellants sought a new trial, we are of the opinion that the denial of the motion furnishes good and sufficient grounds for the affirmance of the order.

These conclusions render it unnecessary for us to consider and discuss the other grounds urged for the dismissal of the appeals and the affirmance of the orders.

10. In case No. 2449 the plaintiff and appellant, Pacific Live Stock Company, appeals from an order made on the 27th of June, 1919, permitting the Anderson defendants to amend their answers so far as to put directly in issue the question of fact as to the tributary character of Twelve Mile creek, Pole creek, Spring creek, North Flat creek, South Flat creek, and Skull creek as tributaries to Quinn River. The trial court's decision was not based upon the answers, as amended, and we might hold that the propriety of the order becomes a moot question, but, since no point is made of this, we, upon careful examination of the pleadings, findings, and decree, shall affirm the order upon the theory that the plaintiff and appellant has not shown that it was prejudiced by the amendment as ordered. The amendment in no way affects the judgment in favor of the plaintiff. The plaintiff is not complaining

of the decree, which in effect adjudges said creeks, and each of them, to be tributaries of Quinn River. The testimony in reference to the tributary character of these creeks was admitted in evidence without objection. In fact it was one of the leading questions in the case, and the finding that they are tributary in character constitutes one of the principal grounds urged for the reversal of the order denying a new trial. Under these circumstances, we are of opinion that the court, in the furtherance of justice, did not abuse its discretion in permitting the answers to be amended.

We are satisfied that the motions to dismiss the appeal and to affirm the order denying appellants' motion for a new trial should be sustained, and that the order appealed from in case No. 2449 should be affirmed.

It is so ordered.