

IMPERIAL VALLEY PRESS

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NO. 10

NO WATER RIGHTS

Legal Opinion of Messrs. Stephens & Stephens Attorneys For Imperial Water Company No. 1

"Neither the Stockholders, Nor Persons Other Than Stockholders
Have Ever Made Any Appropriations of Water, or Done
Any Act Upon Which a Claim of Right Can Be
Based" Say These Attorneys.

The discussion of the water rights of the people of the Imperial Valley which has been appearing in the PRESS for the past four weeks has attracted widespread attention and President Gleason has secured from Messrs. Stephens and Stephens of Los Angeles, the attorneys for that company, the following opinion in regard to the matter under discussion. We take pleasure in publishing this opinion for the gentlemen whose names are appended to it are not only high in the legal profession in this State but their opinion covers many of the points we have endeavored to make plain and largely substantiates our views in the matter. It will be observed that their argument is put forth to prove, First, that the California Development company filed on the water of the Colorado river under the laws of California; second, that the California Development company and Mexican company are both one so far as the transactions with Imperial Water company No. 1 are concerned; third, that the California Development company had a right to contract with users to deliver water for a certain price and that upon the performance of their part of the contract they would be entitled to the payment agreed upon and that the Board of Supervisors could have no right to set aside the contract and fix the price at which water must be delivered by the California Development company to Imperial Water company No. 1; fourth, that Imperial Water company No. 1 is incorporated for the purpose of furnishing water to its stockholders ONLY at cost and that the Board of Supervisors has no right to set the rates at which the company shall furnish water to its stockholders; fifth, that Water company No. 1 is not authorized to furnish water to others than its own stockholders and that its stockholders acquire their rights only AS STOCKHOLDERS of the company and not as users of water. For, as Messrs. Stephens and Stephens themselves say, 'neither the stockholders nor persons other than stockholders have ever made appropriations of water or done any act upon which a claim of (water) right can be based.' "The stockholder does not own the water until it is actually delivered to him on his land." "Nor has any land owner ever owned any water which he could request the water company to carry." Sixth, that such a corporation as Imperial Water company No. 1 is not a mutual water company according to section 324 of the civil code of this State and that its stock is not appurtenant to the land. Before discussing these points further we present the opinion of the attorneys and urge our readers to give it a most careful reading:

To the Board of Directors of Imperial Water Company No. 1, Imperial, Cal. Gentlemen:—It has been reported to us by Mr. Gleason, the president of your company, that there is at this time considerable discussion and difference of opinion in the Imperial Valley as to the nature, source and extent of the water rights of the settlers of the valley, and particularly those within the district of Imperial Water Company No. 1; and Mr. Gleason has, in view of the conditions, requested us to furnish your board with a statement of the conditions and the rights of the various parties interested in the waters used within that district.

The California Development company (and in speaking of the California Development company in this letter the use of that name may be construed as well to include the Mexican company—because so far as this discussion is concerned, the Mexican company and the California Development company are one), while we have never seen a copy of its notice of appropriation, has, we assume, appropriated under the laws of the state of California, certain waters of the Colorado river, either for the purpose of sale, rental or distribution, and has agreed to deliver perpetually a certain part of those waters to the Imperial Water Company No. 1.

The constitution of the state of California, section 1, article xiv, provides as follows:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed annually by the board of supervisors, or city and county or city or town council, or other governing body of such city and county, or city or town by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body; and shall continue in force for one year and no longer."

It will be observed from this provision of the constitution that where water is supplied by a corporation which has made an appropriation thereof to any city and county ("city and county" as here used meaning the combined city and county government, such as the city of San Francisco) or city or town, the rates at which such water is supplied shall be fixed annually by the board of supervisors or town council or other governing body, and a penalty is fixed for the failure of the board of supervisors to take such action. The California Development company, in supplying the water to the Imperial Water Co. No. 1, is not, of course, supplying water to any city and county, or city or town, or the inhabitants thereof, within the meaning of this provision of the constitution. The appropriation of water by the California Development company, in the manner in which it has been appropriated, is, however, a use of water which is subject to regulation and control of the state "in the manner prescribed by law."

The legislature of the state of California in 1880 did prescribe a law for

the purpose of the regulation and control of waters appropriated and used for irrigation, as distinguished from waters supplied to cities. This act was superseded by the act of 1885, which provides that whenever a petition of not less than twenty-five inhabitants who are taxpayers of any county of the state shall be presented to the board of supervisors thereof to regulate and control the compensation to be collected by any appropriated water, the board of supervisors, after complying with a certain procedure for determining the proper maximum rate of charge, may fix the maximum rate which the corporation may charge.

Subsequently, by act of 1897, this act of 1885 was amended as follows:

"Nothing in this act contained (referring to the act of 1885) shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations or corporations described in section 2 of this act, relating to the sale, rental or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract."

There is nothing in the constitution which renders invalid or in any way affects the contract which has been entered into by the appropriator of water for sale outside of cities or towns, and the user, and the amendment of 1897 of the act of 1885 expressly recognizes the validity of any contract which has thus been entered into between the user and the appropriator.

This question was directly involved in the case of the Fresno Irrigation and Canal company vs. Park, 129 Cal., 437. This was a case in which the Fresno Irrigation and Canal Company, plaintiff in the suit, appropriated certain waters of the Kings river for the purpose of disposing of the waters and collecting annual rents and charges therefor. The predecessors in interest of the defendant entered into an agreement with the Fresno Canal etc. company under which they agreed to pay \$100 a year for the use of the water for a given time. The defendant Park, successor in interest of the original contractors, refused to pay the amount of the charge agreed upon, and action was brought by the Fresno Irrigation and Canal company for the purpose of collecting the amount due under the contract, it being admitted that if the predecessor in interest of the defendant was liable, the defendant himself was liable, because of a provision in the contract making the charge a lien upon the land.

We now quote portions of the decisions of the court in this case, the appellant being the defendant and owner of the land, and the respondent, the Fresno Irrigation and Canal company:

"The parts of the constitution relied on by appellants are sections I and 2 of article XIV. The first clause of section 1 is as follows: 'The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner to be prescribed by the law.' The rest of the section applies exclusively to cases where water is supplied to incorporated cities or towns, or to that other kind of municipality known as a consolidated 'city and county,' so that the parts of the section other than the first clause need not be here considered—except so far as they throw light upon the meaning of section 2 and upon certain statutory law. Now, there is nothing in the said first clause of section 1 above quoted which, in itself, at all affects the validity of the contract in question in the case at bar. The clause merely declares that the use of water appropriated for distribution, etc., is a public use, and that the state may by law regulate it.

"Section 2, which is mainly relied on, is as follows: 'The right to collect rates or compensation for the use of water supplied to any county, city and county or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.' Appellants seem to lay great stress on the fact that the word 'franchise' is used in this section, as if 'franchise' were a negative word signifying prohibition, instead of being, as it is,

an affirmative word, denoting a grant. Whatever right a ditch owner had to sell and distribute water at the time the constitution was adopted, or afterward, was not destroyed because it was called in the constitution a franchise. The real meaning of 'franchise' is a privilege granted—not a right taken away; but the word was evidently employed in section 2 mainly for the purpose of emphasizing the general declaration in section 1 that the use of water for sale, distribution, etc., is a public use, and with the notion, no doubt, that calling it a franchise would make more clear and certain the intent to subject it to state regulation. In all other respects the meaning and effectiveness of section 2 would be the same if the words 'is a franchise, and' were not there.

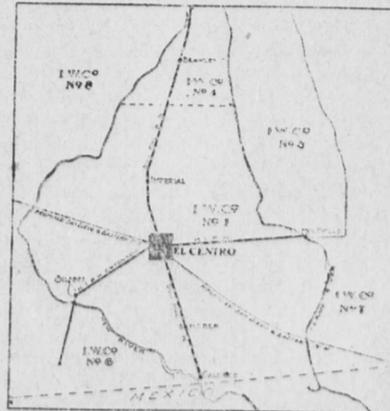
"But the serious questions arising out of section 2 are as to the meaning of the words 'cannot be exercised except by authority of and in the manner prescribed by law.' This is the language upon which the contention of appellants is ultimately based, and which is to be seen prominently reiterated through the pages of their briefs. The contention really is, although somewhat thinly veiled, that respondent could not collect any rentals, or make any valid contract about the same, unless the legislature had passed a law—a 'statute law,' as they say—expressly giving the power and prescribing the manner in which it should be exercised, and that the demurrer should have been sustained because such statute was not set up in the complaint. The contention rests on the proposition that when the constitution was adopted in 1879, it immediately prohibited the owner of a water ditch from selling any water or making any contract about furnishing any water, or collecting any rentals therefor, until the legislature should enact a statute expressly conferring power to do these things; and, further that the constitution gave the legislature power, by inaction, to utterly destroy all property in ditches and water rights used for the distribution and sale of water. This proposition cannot be maintained; and we do not think that any authority cited by appellants goes to the extent of clearly and frankly declaring that to be the law, after a careful consideration of its full significance.

"It was no doubt contemplated that the main evil to be remedied existed in

cities and towns, where it was feared that a corporation having practically a monopoly of furnishing water therein, would, by exorbitant charges, oppress the large number of small buyers who are compelled to have water constantly for domestic purposes. Therefore, it is provided with great detail in section 1 how compensation for water furnished within municipalities may be collected—it being provided, among other things, that said compensation 'shall be fixed' annually by the 'governing body' of the municipality, and that said body shall be 'subject to peremptory process to compel action in the matter,' and to 'penalties' for not taking action. The section also provides that if the persons or corporations furnishing water in municipalities shall collect 'compensation' therefor otherwise than as established by the governing body, their franchise 'and waterworks' shall be forfeited to the municipality. Whether the latter clause could be enforced is a question not arising in the case at bar, but it shows, as other provisions of section 1 show, that the convention, when dealing with the subject of water, had particularly in view the furnishing of water within municipalities, and determined that it would itself handle and legislate upon that branch of the subject so far as to leave little if any, power to the legislature in the premises. But nothing of the kind appears in the constitution about water rights and ditches existing and running through mining and agricultural districts, etc., outside of municipalities. As to this latter class of property, with respect to which private contracts for compensation for the use of water had been the rule and apparently had been satisfactory to both purchasers and consumers, the convention, apprehending that there might come evils outside of municipalities somewhat similar to those feared within them, took the precaution of declaring, so that such would be the law beyond question, that the use of water appropriated for distribution and sale should be a public use and subject to the regulation and control of the state. But it left to the legislature the power and discretion of regulating the sale of water outside of municipalities if the time should come when, in its wisdom, it thought such regulation was called for—or to allow the people to continue to freely con-

Continued on Fifth Page

A glance at this Map will show
you



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Will become the

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IMPERIAL VALLEY

\$240,000

Has been spent in building and permanent improvements in El Centro in the last five months. Come and see for yourself. This is the town of

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