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## The Relation Existing Between Irrigation Water Users and Distributing Companies With Special Reference to Right Arising Out of Contract

THE object of this paper is an analysis of the law as it exists in California today in reference to rights arising out of contracts made between water companies and irrigation users, with a brief historical outline of its development through decided cases and statutes. There have been many forces, most of them economic in their nature, molding the law of water distribution here in the west, where irrigation has played such an important part in the development of the State and is destined to increase in importance as capital is made aware of the profits to be gained from the conversion of arid deserts into luxuriant fields. The importance which has attached to irrigation has kept the legal questions involved constantly alive, so that few points have gone uncontested through the courts, and the pressure of interest has inevitably brought about careful consideration, modifications, legislation and the other things that constitute legal development.

References will be made to the law in other western states in so far as they may serve to elucidate and explain the present law in this State; for although California has undoubtedly been one of the leaders in establishing the water laws of the west, all the arid states have been confronted with the same problems and each has contributed its share of cases and statutes. Colorado, in particular, will be frequently referred to because of the contrast between many of the California rules and Colorado principles derived from that state's adherence to the appropriation doctrine exclusively.

The expression "distributing companies" as used in this title will be confined to the designation of those companies

which furnish water to the public generally, for pecuniary remuneration to the stockholders or owners of the plant and system. No consideration will be given to the problems which arise from the operation or dealings of mutual companies, organized primarily for the purpose of supplying their members with water, or of irrigation district projects, fostered by state or federal governments, and in their nature mutual rather than public service companies.

As a further limitation of the subject to be discussed, not all phases of contractual rights between the company and the irrigator will be considered, although an attempt will be made to mention most of the common legal questions which the cases have raised. As a basis the following four phases of contractual rights will be dealt with: (1) their status in general as affected by the obligations of the companies as public service companies and the public character of appropriated water in this state; (2) contract rate fixing in its relation to public rate fixing; (3) the status of so-called "easements" or "water rights" sought to be established by contract; (4) discrimination among users with special reference to priorities of use.

In conclusion an attempt will be made to summarize the legal situation and compare it with the practical needs of the state. Here the general problems will be considered briefly upon economic and sociological grounds and a conclusion drawn as to the justification of our law on the topics discussed.

### I.

That the distributing company is a public service company would probably not be questioned today, but since that proposition is so basic in theory and must be fully appreciated to understand the development of this discussion, it deserves more than passing comment. Among the many cases which announce the test for determining whether or not a company is subject to the restrictions of public service law, *Munn v. Illinois*<sup>1</sup> is a well known authority to the effect that where one devotes his property to a public use, "he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created—so long as he maintains the use." This is the common law, and it would seem that it alone would be sufficient to

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<sup>1</sup> (1877) 94 U. S. 113, 24 L. Ed. 77.

bring distributing companies under the laws governing public service.

The early legislative enactments recognized the public nature of water companies. Thus, in the Act of 1852<sup>2</sup> "to provide for the incorporation of water companies", there was a clause insuring to cities the right to regulate rates. Similarly, in the Act of 1858<sup>3</sup> and its amendment in 1861,<sup>4</sup> it was provided that rates should be fixed by commissioners.

In 1879, the constitution not only recognized the proposition, but crystallized it against the facility of alteration by the state legislature in the following words: "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;"<sup>5</sup> "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 the authority of and in the manner prescribed by law."<sup>6</sup>

The definite language of the constitution is found reiterated in subsequent statutes. The Act of March 26, 1880,<sup>7</sup> is entitled "An act authorizing the board of supervisors of the counties in which water is sold for the purposes of irrigation, to fix the rates at which water shall be sold." In the following year an act<sup>8</sup> was passed to enable boards of supervisors, town councils and the like to obtain data and information from water companies, and to perform the duties imposed upon them by the constitution. The Act of March 12, 1885,<sup>9</sup> is unequivocal in its purpose, namely: "An act to regulate and control the sale, rental and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use."

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<sup>2</sup> Cal. Stats. 1850-1853, p. 898.

<sup>3</sup> Cal. Stats. 1858, p. 218.

<sup>4</sup> Cal. Stats. 1861, p. 228; and the Act of 1872, Cal. Stats. 1871-72, p. 945, although providing for the formation of mutual companies, indicates the same feeling in the Legislature by providing that such companies should be governed by trustees.

<sup>5</sup> Cal. Const. Art. XIV, §1.

<sup>6</sup> Cal. Const. Art. XIV, § 2.

<sup>7</sup> Cal. Stats. 1880, p. 16.

<sup>8</sup> Act of March 7, 1881, Cal. Stats. 1881, p. 54.

<sup>9</sup> Cal. Stats. 1885, p. 95.

Up to this time the tendency had been all in one direction,—toward rigid public regulation. The Act of 1885 was amended by the addition of section 11½ on March 2, 1897,<sup>10</sup> as follows: "Nothing in this act contained 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." If this enactment is to be construed literally, it undoubtedly represents a decided change in attitude toward water companies, for so considered, it purports to validate all contracts, and these contracts in so far as they dealt with rates would be in direct conflict, in many instances, with the public fixing of rates,—a matter which will be discussed at greater length below. At least the act signifies a reactionary tendency. The further amendment of February 28, 1901<sup>11</sup> shows a similar tendency in so far as it requires boards of supervisors in fixing rates, to designate what proportion of the rates so fixed shall be for expenses and what proportion for profits. In the same direction is the Act of March 16, 1901,<sup>12</sup> entitled: "an act declaring upon what terms contracts between persons, companies, associations, or corporations, furnishing water for irrigation to the consumers of such water shall be valid and to provide that such contracts shall be deemed based upon sufficient consideration." This law provides that contracts with companies shall be valid, "any law or rule to the contrary notwithstanding", specifically protecting contracts made prior to the fixing of rates, but forbidding the making of contracts providing for a rate greater than the publicly fixed rate.

An amendment to the State Constitution in 1911<sup>13</sup> gave to the Railroad Commission power to regulate and fix rates for water companies. Mention will be made of the activities of this Commission below.

On August 10, 1915,<sup>14</sup> the Legislature passed "an act to

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<sup>10</sup> Cal. Stats. 1897, p. 49.

<sup>11</sup> Cal. Stats. 1901, p. 80.

<sup>12</sup> Cal. Stats. 1901, p. 331.

<sup>13</sup> Cal. Const. Art. XII, § 23.

<sup>14</sup> Cal. Stats. 1915, p. 1420.

require water companies to properly and adequately serve with water the inhabitants of the territory for the service of which they have a franchise." The tone of this act sounds like a reversion toward the stricter view of public service.

Summarizing the legislation in this state, it appears that the tendency toward public control was present in the first legislation on the subject and grew in force till 1879 when the constitution fixed not only the principle but laid down definite rules governing the furnishing of water in cities. The force of this movement to restrict and limit the powers of the water companies continued unabated through the legislation of 1881 and 1885. During the next twenty-five years a reaction set in, evincing a more liberal policy toward the distributors, which culminated in legislation, whose language, at least, is hard to reconcile with the provisions of the constitution. At the present time (1916) indications are not wanting that a tendency toward stricter control is setting in.<sup>15</sup> The legislation has been inconsistent and characterized by unmistakable waves of public opinion; but an attempt, at least, has been made by the legislature to meet the demands of the state as they have arisen; and the conflicting acts, in so far as they were inspired by hard judicial decisions, have done their part in developing the law, with the compensation of legislative flexibility.

Turning now to the cases, it is not surprising to find them in some confusion. This might be expected from the inconsistency of the statutes; but they alone are not entirely responsible. The degree to which the contracts of water companies have been subjected to the laws of public service has varied considerably.

## II.

Starting with the proposition established above, that water companies in this state have been uniformly regarded as public service companies, it follows that they are bound to serve all

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<sup>15</sup> See the holdings of the Railroad Commission as to rates, rules and regulations, *Application of Ventura County Water Co.* (1914) 4 Cal. R. R. Com'n Dec. 686, where it is said in the headnote: "the Commission has the power of supervision over rates irrespective of any contract entered into between the consumers and the utility." See also *Application of Tujunga Water and Power Co.* (1915) 7 Cal. R. R. Com'n Dec. 580, where the right of the Commission to alter water contracts is broadly asserted. In fact, it is probably not extravagant to say that the attitude of the Railroad Commission suggests the abolition of contracts and the substitution therefor of water service under terms to be prescribed by the Commission.

those who apply,<sup>16</sup> to the extent of their distributing systems. This is simply the fundamental principle of compulsory service in the law of public service, but the question arises: being thus bound to serve the members of the public, can there be any consideration for contracts by which the company agrees to serve the consumers with water,—in other words, can any of the service contracts be valid?

Two early cases<sup>17</sup> were decided in such a way that the power of the company to obtain rights by contracts made with the consumers, must have been assumed to exist although the question was not directly presented. In 1900 the Supreme Court was called upon to decide a case<sup>18</sup> in which the plaintiff company sought to enforce a service contract against the defendant whose claim was that his general demurrer should be sustained because the constitution (Article 14, sections 1 and 2) having declared that appropriated water was subject to a public use, and having subjected it to regulation and control by the state in the manner prescribed by law, failure to mention such a law in justification of the contract, prevented the complaint from stating a cause of action. The Supreme Court gave judgment for the plaintiff on the grounds that it could not be supposed that the constitution and legislature intended to confiscate the property of water companies, no provision existing between 1879 and 1880 for the fixing of rates outside of cities. This case has been characterized by Mr. Wiel as "the leader in recognizing no restrictions upon the validity of contract."<sup>19</sup>

Later in the same year (1900) however, the Supreme Court, in the case of *Crow v. San Joaquin and Kings River Canal and Irrigation Company*,<sup>20</sup> held definitely against the company's right to contract on the grounds that since the company was bound by the constitution, Article 14, section 1, and the Act of March 12, 1885 to supply water to all who made tender of reasonable price, there was no consideration for a contract

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<sup>16</sup> *Price v. Riverside Land and Irrigating Co.* (1880) 56 Cal. 431; *McCrary v. Beaudry* (1885) 67 Cal. 120, 7 Pac. 264.

<sup>17</sup> *Fresno Canal & Irrigation Co. v. Rowell* (1889) 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112; *Fresno Canal & Irrigation Co. v. Dunbar* (1889) 80 Cal. 530, 22 Pac. 275.

<sup>18</sup> *Fresno Canal & Irrigation Co. v. Park* (1900) 129 Cal. 437, 62 Pac. 87.

<sup>19</sup> Wiel's "Water Rights in the Western States", 3d ed. (1911) Vol. II, p. 1212.

<sup>20</sup> (1900) 130 Cal. 309, 62 Pac. 562.

by which plaintiff agreed to pay arrears before seeking further service. But the case was not followed in *Stanislaus Water Company v. Bachman* (1908),<sup>21</sup> which adopted the view of the *Park* case.<sup>22</sup>

Meanwhile the federal courts in California had consistently ruled against the validity of service contracts from 1896 to 1899,<sup>23</sup> save in the case of *San Diego Flume Company v. Souther*,<sup>24</sup> where the company's right to contract was recognized. This case came up for a rehearing<sup>25</sup> in 1900, and was affirmed, the court citing *Fresno Canal and Irrigation Company v. Park*<sup>26</sup> with approval, and interpreting the words, "by authority of law" as used in the constitution<sup>27</sup> with reference to collection of tolls for water service, as meaning, 'by authority of the general law of the land'. Referring to the syllabus in the official report of *Osborne v. San Diego Land and Town Company*,<sup>28</sup> the following expression was characterized as misleading: "The appropriation of water in California is a public use, and the right to collect tolls or compensation for it is a franchise, subject to regulation and control in the manner prescribed by law, and such tolls cannot be fixed by contract of the parties." The case was tried for a third time in 1900,<sup>29</sup> and the same decision reached, again based upon the *Park* case.

Judge Ross explained the holdings of the Circuit Court as follows: in *San Diego Land and Town Company v. City of National City*<sup>30</sup> and other cases through and including *Mandell v. San Diego Land and Town Company*,<sup>31</sup> the Circuit Court was of opinion that the question had never been decided by the Supreme Court of California. It therefore had held that the water appropriated under the constitution of California and statutes passed in pursuance thereof, for sale, rental or distribu-

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<sup>21</sup> (1908) 152 Cal. 716, 93 Pac. 858, 15 L. R. A. (N. S.) 359.

<sup>22</sup> *Supra*, n. 18.

<sup>23</sup> *San Diego Land & Town Co. v. City of National City* (1896) 74 Fed. 79; *Lanning v. Osborne* (1896) 76 Fed. 319; *Mandell v. San Diego Land & Town Co.* (1898) 89 Fed. 295; *San Diego Land & Town Co. v. Sharp* (1899) 97 Fed. 394, 38 C. C. A. 220.

<sup>24</sup> (1898) 90 Fed. 164, 32 C. C. A. 548.

<sup>25</sup> (1900) 104 Fed. 706, 44 C. C. A. 143.

<sup>26</sup> *Supra*, n. 18.

<sup>27</sup> *Supra*, n. 6.

<sup>28</sup> (1900) 178 U. S. 22.

<sup>29</sup> (1901) 112 Fed. 228; *San Diego Land & Town Co. v. Jasper* (1903) 189 U. S. 439, 48 L. Ed. 892, is in accord.

<sup>30</sup> *Supra*, n. 23.

<sup>31</sup> *Supra*, n. 23.

tion, was charged with a public use; that where a corporation appropriates and furnishes water for such purposes, the rates must be established in pursuance of law; that no attempt to fix them by private contract with consumers will have any validity; and that so long as a sufficient supply exists, every person within the flow of the system has the legal right to the use of a reasonable amount of water in a reasonable manner upon paying the legal rate fixed for supplying it.

In this condition stood the decisions when in 1909 the case of *Leavitt v. Lassen Irrigation Company*<sup>32</sup> was presented to the Supreme Court. Here the plaintiff, who had sold a distributing system and reserved a perpetual water right to certain land, demanded damages of defendant for refusing to supply water without cost, relying upon this reservation and another perpetual water right which he had bought from an intervening owner of the system. The court gave judgment for the defendant and explained its attitude as follows:

"The fundamental and all important proposition then is this, that a public service company which is appropriating water under the constitution of 1879, for purposes of rental, distribution and sale, cannot confer upon a consumer any preferential right to the use of any part of its water . . . . It does not follow that a water company may not make specific contracts with individual consumers which are within the purview of the constitution and within valid legislative enactments regulating the public use. This is precisely as decided by *Fresno Canal and Irrigation Company v. Park*. But as decided in *Crow v. San Joaquin and Kings River Canal and Irrigation Company*, immediately following the *Park* case, such a contract, even if violated by the consumer, could not operate to deprive him of his constitutional right to water furnished by the public service corporation upon tender to it of the legal rate. For the breach of the consumer's contract, the water company must seek other redress than that of depriving the consumer of his share of the supply."

Whatever may be thought of this attempt to reconcile the *Park* case<sup>33</sup> and *Crow v. San Joaquin Company*,<sup>34</sup> it is obvious that the *Lassen* case<sup>35</sup> establishes a middle ground be-

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<sup>32</sup> (1909) 157 Cal. 82, 106 Pac. 404, 29 L. R. A. (N. S.) 213.

<sup>33</sup> *Supra*, n. 18.

<sup>34</sup> *Supra*, n. 20.

<sup>35</sup> *Fresno Canal & Irrigation Co. v. Perrin* (1915) 170 Cal. 411, 149 Pac. 805.



tween the extremes represented by the previous cases. The holding seems sound on principle, satisfactory in its application to practical cases, and it is the present law on the subject in this state.

Nearly all the other western states have constitutional provisions similar to those of California, specifically declaring the service of water a public use; and the cases have in general shown a disposition to respect these provisions. Thus it is said in a Washington case, "since the obligations of a private corporation organized to sell lands and furnish water for their irrigation, are quasi public, such corporations cannot impose arbitrary restrictions upon the supply of water under the guise of regulations."<sup>36</sup> The principle is far reaching; cities engaged in supplying their inhabitants with water do so, not in their sovereign capacity, but as private corporations, subject to compulsory service and public regulation;<sup>37</sup> a mutual company distributing its excess supply to others than its members becomes a public service corporation as to the excess.<sup>38</sup> Other cases which announce the public burdens of water companies in one form or another are numerous; among the more recent may be mentioned Toyah Valley Irrigation Company v. Winton,<sup>39</sup> City and County of Denver v. Brown,<sup>40</sup> Northern Colorado Irrigation Company v. Pouppirt,<sup>41</sup> Cleveland v. Malden Water Works Company,<sup>42</sup> Childs v. Neitzel,<sup>43</sup> Brose v. Board of Directors of Nampa and Meridian Irrigation District (two cases).<sup>44</sup> On the other hand the cases are equally numerous which hold or reiterate the proposition that the company may make valid contracts; in fact many of the cases stand for both principles,<sup>45</sup> in

<sup>36</sup> *Shafford v. White Bluffs Land & Irrigation Co.* (1911) 63 Wash. 10, 114 Pac. 883.

<sup>37</sup> *City of Houston v. Lockwood Investment Co.* (1912) 144 S. W. 685 (Tex.); *Feil v. City of Coeur d'Alene* (1913) 23 Idaho 32, 129 Pac. 643. This is true in California also; see *Nourse v. City of Los Angeles* (1914) 25 Cal. App. 384, 143 Pac. 801; but see *Marin Water Power Co. v. Town of Sausalito* (1914) 168 Cal. 587, 143 Pac. 767.

<sup>38</sup> *Baker City Mutual Irrigation Co. v. Baker City* (1911) 58 Ore. 306, 113 Pac. 9.

<sup>39</sup> (1915) 174 S. W. 677, (Tex.).

<sup>40</sup> (1914) 56 Colo. 216, 138 Pac. 44.

<sup>41</sup> (1912) 22 Colo. App. 563, 127 Pac. 125.

<sup>42</sup> (1912) 69 Wash. 541, 125 Pac. 769.

<sup>43</sup> (1914) 26 Idaho 116, 141 Pac. 77.

<sup>44</sup> (1911) 20 Idaho 281, 118 Pac. 504; (1913) 24 Idaho 116, 132 Pac. 799.

<sup>45</sup> *Fenton v. Tri-State Land Co.* (1911) 89 Neb. 479, 131 N. W. 1038; *City & County of Denver v. Brown*, *supra*, n. 40; *Childs v. Neitzel*,

effect adopting the view of *Leavitt v. Lassen Irrigation Company*.<sup>46</sup> In the case of *City of Houston v. Lockwood Investment Company*,<sup>47</sup> the following general statement is made: "Where a franchise under which a public utility company operates, imposes a burden on the company, any rule or regulation adopted by the company, by which it attempts to shift the burden upon the consumer, is unreasonable and unjust and will not be enforced."

The key note of the solution of the problem raised by compulsory service on the one side and the freedom of contract on the other has been reasonableness. All the western states have been confronted with the same general conditions and have arrived at the same general conclusions. All at least have recognized that a technical and rigid application of the principle that no consideration for a contract can arise from the agreement to perform a duty to which one is already bound, would not only be impracticable, but would result in positive injustice. This test of reasonableness was in some instances slow in finding expression, while in others it has been adopted so suddenly as to confuse the law and give to it a quality of uncertainty, ill calculated to receive the approval of those whose rights were thus made to appear unstable. Yet the results have in the main been satisfactory. The modifications and adjustments that practical phases of the question have made necessary, have come about not by legislative enactments alone, but by judicial wisdom as well, broad enough in its conception of duty to depart, where occasion demanded, from the academic principles of laws wrought from different sets of facts and applicable in their exactness to other circumstances. The fundamental rule of contract law that one cannot validly contract to do that which he is already bound to do has not been violated. The consumer still receives service by virtue of his status as a member of the public, and not on account of the contract, and the rate he pays gets its validity from an act of the public board and not the contract. On the other hand, the company is entitled to a just compensation for its outlay. Its right to contract is as sacred as that of any

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supra, n. 43; *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (1913) 155 S. W. 286 (Tex.); *Pasco Reclamation Co. v. Rankert* (1913) 73 Wash. 363, 131 Pac. 1143.

<sup>46</sup> Supra, n. 32.

<sup>47</sup> Supra, n. 37; see also *State ex rel. De Burg v. Water Supply Co. of Albuquerque* (1914) 19 N. M. 36, 140 Pac. 1059.

individual. To say that it has certain disabilities because of the peculiar nature of its occupation does not justify the conclusion that it is totally disabled and therefore at the mercy of a public, which experience has shown cannot be impartial for the very good reason that its own interests are at stake. The concept of consideration in the law of contracts is of no more dignity than the principle that one cannot act upon both sides of a bargain. So the reasonable result has been reached that the company may contract subject to its particular disabilities; and the conclusion is justified on principle by public policy, which in the last analysis is no more than public reasonableness.

### III.

Having seen that the company may make valid contracts with consumers provided they are reasonable and not discriminatory, an interesting question arises as to the relation of the rates stipulated in these contracts to rates fixed in accordance with the constitution of 1879. The terms of the constitution provided a specific method for the establishment of rates in cities, declared all water then appropriated or thereafter appropriated to be subject to a public use, but left the details of rate fixing outside cities to subsequent legislation, "in the manner to be prescribed by law."<sup>48</sup>

Was the effect of this constitutional provision to burden all subsequently made contracts with a paramount right of the legislature to carry out the constitutional authorization, and invalidate contractual rights? In 1896 the federal court gave an affirmative answer to the question in these words: "As the water in question from the moment the appropriation became effective, became charged with a public use, it was not in the power of either the corporation making the appropriation or of the consumers to make any contract or representation that would at all take away or abridge the power of the state to fix or regulate the rates."<sup>49</sup> In *Los Angeles City Water Company v. City of Los Angeles*<sup>50</sup> (1898), *Mandell v. San Diego Land & Town Company*<sup>51</sup> (1898) and *San Diego Land & Town Com-*

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<sup>48</sup> Cal. Const. *supra*, n. 5. The amendment of § 23, Article XII, providing for the fixing of rates by the Railroad Commission instead of by county boards of supervisors does not affect the question of validity of contracts, but simply provides a different method of fixing rates.

<sup>49</sup> *Lanning v. Osborne*, *supra*, n. 23.

<sup>50</sup> (1898) 88 Fed. 720.

<sup>51</sup> *Supra*, n. 23.

pany v. Jasper<sup>52</sup> (1903), the federal courts adhered to the same doctrine. In the last case mentioned it is true, the decision was upon a contract made after the fixing of the public rate and the holding is qualified to the extent that the fixed rate must be such that it shall not deny just compensation to the company for the use of its property.

On the other hand a negative answer is to be found, not only in cases decided by the Supreme Court of California, such as Stanislaus Water Company v. Bachman,<sup>53</sup> but also in a later decision of a federal court, Souther v. San Diego Flume Company<sup>54</sup> (1901), holding that contracts between water companies and consumers were not per se invalid, and that the validity of the rates which they set are not impaired by subsequent action of the boards of supervisors of the county, taken under the statute, fixing the rates to be charged.

An argument in favor of an affirmative answer, which does not seem to have been much used in the cases, but which nevertheless, seems sound, is that if the contract rate were allowed to prevail over the fixed rate, then in every case where the rates differed there would be a situation of discrimination irreconcilable with the law of public service. There is perhaps an intimation of this view in *Leavitt v. Lassen Irrigation Company*.<sup>55</sup> On the other hand the theory which comes into conflict with this is that since contract rates may be valid in the absence of public fixing, the contract rights thus acquired by the parties cannot be impaired by subsequent legislation fixing the rates to be charged,<sup>56</sup> and since this is a guarantee of the federal constitution,<sup>57</sup> it is controlling.

Mr. Wiel, writing in 1911, says<sup>58</sup> with reference to this question: "The matter has usually been treated as an open question, though it may possibly be that the public rate displaces previous contract rates, as well as later ones." Since that date the question has not been specifically passed upon in California.

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<sup>52</sup> (1901) 110 Fed. 702, affirmed in (1903) 189 U. S. 439.

<sup>53</sup> *Supra*, n. 21, containing a statement that: "under the present statute, the contract rates prevail in all cases, the boards of supervisors being powerless to affect or interfere with them."

<sup>54</sup> *Supra*, n. 29.

<sup>55</sup> *Supra*, n. 32.

<sup>56</sup> *Supra*, n. 50.

<sup>57</sup> U. S. Const. Article I, § 10, subd. 1.

<sup>58</sup> Wiel, *Water Rights in the Western States*, 3d ed. (1911) Vol. II, p. 1222.

In two cases which have involved the public rate, one held that the Railroad Commission could not be compelled to make and enforce regulations as to water service by companies at the instance of one not interested in the service.<sup>59</sup> The other decided that a company cannot collect more than the established rates and that mandamus will lie to compel the furnishing of water under such rate.<sup>60</sup>

On principle it looks pretty clear that the public rate should prevail. The argument founded upon the impairment of contracts is no stronger than its weakest link. In a sense it assumes as a fact the very question to be proved, namely that the contract rights acquired in the absence of public rate fixing were acquired absolutely, and free from the possibility of divestment authorized by the state constitution.<sup>61</sup> On the one hand, there is the broad principle that public interests must supersede private enterprise, where the two come in conflict. Section 3513 of the Civil Code of California recognizes this. On the other hand, the individual has certain fundamental rights, such as those of property and freedom of contract, that cannot arbitrarily be violated, even by public necessity. If, however, the individual is giving notice of the public necessity, or the possibility of future public necessity, in time to choose between taking a right so burdened and one less encumbered, in reason he should not be heard to complain of his own choice.

That public interests generally would be better served by regarding the public rate (unless unreasonable) as controlling in every instance does not require great argument. In California the difference between the value of the land properly irrigated and its value without water is usually a large part of the price of the land. The necessity for water is tremendous and always commensurate with the opportunity for hard dealing, so that the company has the advantage as against the individual irrigator. The only certain way to insure his protection against high rates is to allow the public, of which he is a member, to fix those rates. On the other hand, the company, which is also

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<sup>59</sup> *Palmer v. Railroad Commission of the State of California* (1914) 167 Cal. 163, 138 Pac. 997.

<sup>60</sup> *Hatfield v. Peoples Water Company* (1914) 25 Cal. App. 711, 145 Pac. 164.

<sup>61</sup> *In Boise City Irrigation & Land Co. v. Turner* (1905) 176 Fed. 373, the constitutional authorization was considered as taking effect as of date of the subsequent legislation enacted thereunder.

a member of the public, is not imposed upon, inasmuch as the fixed rate must be reasonable and not confiscatory in order to be valid. This being the situation there appears to be no theoretical hardship either upon the distributor or the consumer in substituting for their temporary agreement a reasonable rate, for such rate cannot be reasonable as to one and unreasonable as to the other. And although the practical tendency at the present time is an increasing public distrust of corporations, which may at times be reflected in publicly fixed water rates, nevertheless there should be no danger in such an attitude if the courts perform their proper function in justly interpreting "reasonable", when they are called upon to do so.

Among the other western states, Colorado<sup>62</sup> and Arizona<sup>63</sup> hold to the doctrine that the public rate prevails, while in Washington there is a statute<sup>64</sup> declaring that the public service commission shall have no power to affect contract rates. In Idaho the earlier tendency in favor of the public rate was approved on the rehearing of a case,<sup>65</sup> in which the first decision favored the contract rate<sup>66</sup> to the extent that "an act of the legislature which provides that the annual maintenance charge for the use of water sold, rented or distributed may be fixed by contract is fully authorized by the constitution, section 6, article 15."<sup>67</sup> On the second trial the court held that the contract rate was valid and enforceable until a public rate was fixed. After that, however, it was void, being superseded by the fixed rate, legislative authority for which had existed, although not exercised at the time the contract was made.

In California, statutory enactments, presumably intended to remedy the uncertainty, have served rather to confuse the law than to settle it. The early acts of 1852,<sup>68</sup> of 1858<sup>69</sup> with the amendment of 1861,<sup>70</sup> and of 1872,<sup>71</sup> either provided for public

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<sup>62</sup> *South Boulder & Rock Creek Ditch Co. v. Marfell* (1890) 15 Colo. 302, 25 Pac. 504; *No. Colo. Irrigation Co. v. Pouppirt*, *supra*, n. 41.

<sup>63</sup> *Gould v. Maricopa Canal Co.* (1904) 8 Ariz. 429, 76 Pac. 598.

<sup>64</sup> Wash. Stats. 1911, c. 117, § 34; see also *Cleveland v. Malden Waterworks Co.* (1912) 69 Wash. 541, 125 Pac. 769.

<sup>65</sup> *Boise City Irrigation & Land Co. v. Clark* (1904) 131 Fed. 415, 65 C. C. A. 399; *Boise City Irrigation & Land Co. v. Turner*, *supra*, n. 61.

<sup>66</sup> *City of Pocatello v. Murray* (1909) 173 Fed. 382.

<sup>67</sup> *Jackson v. Indian Creek Reservoir Ditch & Irrigation Co.* (1909) 16 Idaho 430, 101 Pac. 814; (1910) 18 Idaho 513, 110 Pac. 251.

<sup>68</sup> *Supra*, n. 2.

<sup>69</sup> *Supra*, n. 3.

<sup>70</sup> *Supra*, n. 4.

<sup>71</sup> Cal. Stats. 1871-72, p. 945.

rate fixing or showed a tendency in that direction. The constitution of 1879<sup>72</sup> definitely provided for public rate fixing in cities, after declaring the use of all water appropriated or thereafter to be appropriated for sale, rental or distribution to be a public use. The act of 1880<sup>73</sup> carried out the constitutional provision as to counties by providing for the fixing of rates by county boards of supervisors; and provided further for the forfeiture of the franchise of any company collecting a rate higher than that so fixed; but was silent as to contracts already made. In 1885 a similar act was passed<sup>74</sup> which was more detailed in its provision concerning public rate fixing and forfeiture. In 1897 this act was amended by the addition of section 11½:<sup>75</sup>

"Nothing in this act contained 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 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."

This amendment shows a decidedly reactionary tendency. Interpreted literally it apparently purports to make the contract rate controlling where it comes in conflict with the rate fixed by the act of 1885. If this were true, companies could make valid contracts which would free them from the burdens of public service and thus the amendment would be contrary to the constitution and could not stand. This suggestion is made in the case of *Leavitt v. Lassen Irrigation Company*.<sup>76</sup> A similar tendency is apparent in the conflicting provisions of the act of 1901,<sup>77</sup> which declared in section 1 that such contract should be valid to all intents and purposes, subject to the restrictions thereafter mentioned, "any law or rule to the contrary notwithstanding". Section 2 recited as a restriction the prohibition against rates exceeding those fixed by public boards or fixed by the companies "as provided by law". Section 4 read as follows: "Nothing in this act contained shall affect any contract

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<sup>72</sup> *Supra*, n. 5, 6.

<sup>73</sup> *Supra*, n. 7.

<sup>74</sup> *Supra*, n. 9.

<sup>75</sup> *Supra*, n. 10.

<sup>76</sup> *Supra*, n. 32.

<sup>77</sup> *Supra*, n. 12.

made prior to the time that the board of supervisors fix and establish the rates and regulations under which water shall be sold and supplied."

It is difficult to say what the net result of these statutes has been. Considered in relation to the decided cases, they probably go to the extent of validating contract rates agreed upon before any action by the public boards, but in so far as they attempt to authorize contracts fixing rates after public rates have been declared, they are unconstitutional and of no effect.

In a summary of the present law of California governing conflicts between public and private rates, the following statements may be made: (1) If the contract is unreasonable or discriminatory, it cannot bind regardless of public rate fixing. (2) If the contract is reasonable and is not discriminatory and stipulates a rate, there is no doubt that it binds until a public rate is fixed. (3) After the public rate is fixed the contract rate continues to prevail if the public rate is unreasonable and therefore unconstitutional,<sup>78</sup> but if the publicly fixed rate is reasonable, then the mooted point is squarely raised, without regard to whether the public rate is higher or lower than the contract rate sought to be enforced or evaded.

In support of the contract rate there is section 552 of the Civil Code which authorizes the sale of perpetual water rights by water companies "at such rates and terms as may be established by said corporation in pursuance of law"; also the acts of 1885<sup>79</sup> and 1897,<sup>80</sup> and the act of 1901.<sup>81</sup> And there is further the argument that a public rate, purporting to change a contract rate would be unconstitutional as impairing the right of contract. Finally, there is the authority of the cases mentioned above.<sup>82</sup>

In support of the publicly fixed rate the following may be offered: (1) All contracts are made subject to the constitutional provision anticipating legislation, and must yield when this authority is exercised, as provided in section 3513 of the California Civil Code. The legislative acts of 1897<sup>83</sup> and 1901<sup>84</sup>

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<sup>78</sup> San Diego Land & Town Co. v. Jasper, *supra*, n. 52.

<sup>79</sup> *Supra*, n. 9.

<sup>80</sup> *Supra*, n. 10.

<sup>81</sup> *Supra*, n. 12.

<sup>82</sup> Lanning v. Osborne, *supra*, n. 23; Los Angeles City Water Co. v. City of Los Angeles, *supra*, n. 50; Mandell v. San Diego Land & Town Co., *supra*, n. 23.

<sup>83</sup> *Supra*, n. 10.

<sup>84</sup> *Supra*, n. 12.



are therefore unconstitutional in so far as they attempt to restrict the operation of the publicly fixed rate. (2) The expression "in pursuance of law" as used in section 552 of the Civil Code means the law of the constitution. (3) The cases mentioned above.<sup>85</sup>

Finally, there seems to be no doubt that a contract made subsequent to the fixing of a reasonable rate by the public board is subject to the public rate.<sup>86</sup>

*Kenneth L. Blanchard.*

(TO BE CONTINUED)

Berkeley, California.

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<sup>85</sup> Stanislaus Water Co. v. Bachman, *supra*, n. 21; Souther v. San Diego Flume Co., *supra*, n. 29.

<sup>86</sup> San Diego Land & Town Co. v. Jasper, *supra*, n. 52.