Jan.

Filed Nov. 19, 1917.
B. Grant Taylor, Clerk
By Erb Deputy

Bank.

William G. Henshaw and Ed. Fletcher,
Plaintiffs and Respondents,

v.

Joseph Foster, H. P. Greene, C. H. Swallow, C. L. Goode and G. F. Westfall as members of and constituting the Board of Supervisors of the County of San Diego, and J. T. Butler, County Clerk of said County of San Diego,
Defendants and Appellants.

Respondents, who are owners of land in the County of San Diego Brought this action to enjoin the Board of Supervisors ofthat county from calling an election for the purpose of determining whether or not a district to be known as the "San Diego Municipal Water District" should be incorporated under the provisions of an act entitled "'An Act to provide for the incorporation, organization and management of municipal water districts, and to provide for the acquisition, or construction by said districts of water works and for the acquisition of all property necessary therefor, and also to provide for the distribution and sale of water by said districts' approved May 1, 1911, together with the amnedment thereto approved December 24, 1911, and the further amendment thereto approved May 29, 1915." A petition signed by the requisite number of qualified electors within the territory proposed as that of the contemplated district had been duly filed. ,The real property of the taxpaying plaintiffs is within this territory.The district as outlined in the petition includes lands not now within any municipality as well as the territory of three incorporated cities, San Diego, East San Diego and La Mesa and that of one irrigation district known as La Mesa, Lemon Grove and Spring Valley Irrigation District. The plaintiffs alleged in their pleading that by the calling and holding of the election certain of their constitutional rights would be

violated. To their complaint a demurrer was interposed and was overrruled by the court. The supervisors refusing to plead further, judgment was accordingly entered. By it the plaintiffs were given the injunctive relief for which they had prayed. From said judgment this appeal is taken.

Respondents set forth in their complaint and here contend that the act of the legislature under which the petitioning electors proposed to organize the district was in violation of section 19 of Article XI of the Constitution of California. That section provides that

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service, or other means of communication '''' A municipal corporation may furnish such service to Inhabitants outside its boundries: Provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works, supplying the same service to such inhabitants, without the consent of such other municipality, expressed hu ordinance." It is their contention that since the three cities mentioned above, (each being vested with the power of furnishing its inhabitants with water), are included within the limits of the proposed district, there would be necessarily an intolerable clash of authority between the governing bodies of these municipalities and the trustees of the water district if it should be established. In support of this contention they rely principally upon the declarations of this court in the opinion in The Matter of the Petition of the Sanitary Board of the East Fruitvale Sanitary District, 158 Cal. 453. In that proceeding the court was considering the effect of the annexation of the territory of a sanitary district to a city and it was held that the minor municipal corporation was merged in the major one and lost its identity. The language of the court upon which respondents place the greatest emphasis is as follows:

"It is a well settled doctrine that 'There cannot be at the same time, within the same territory, two distinct municipal

corporations exercising the same powers, jurisdictions and privileges! (1 Dillon on Municipal Corporations, 4th ed.,sec. 184; King v. Pasmore, 3 Term R. 199, 243; Bloomfield v. Glen Ridge, 54 N. J. Eq. 276, 283, (33 Atl.925).)

"Accordingly, it is generally held that where one municipal corporation is annexed to another the annexing city takes over the functions of the annexed municipality, and the latter by virtue of the annexation is extinguished and its property, powers, and duties are vested in the corporation of which it has become a part. (28 Cyc. 217; Mt. Pleasant v. Beckwith, 100 U. S. 514, 528; Adams v. Minneapolis, 20 Minn. (484) 438; People v. Supervisors., 94 N. Y. 263; Stroud v. Stevens Point, 37 Wiss 367; Schriber v. Langlade, 66 Wis. 616, (29 N. W. 547,554).)

"If this be true where one of two municipal corporations having co-extensive powers is annexed to another, the same result must follow a fortiori where a public corporation having powers more limited than those of a municipla corporation is annexed to a city which possesses all of the powers of the corporation which has been annexed to it and others in addition."

This declaration is by no means decisive of the problem presented by the appeal now before us. Indeed it is of little value for ir is not, as is the complaint herein, based upon constitutional grounds at all. In the next paragraph of the opinion the following language is used:

"These rules do not rest upon any theory of constitutional limitation. In the absence of any constitutional restriction, the legislature has absolute power over the organization, the dissolution, the extent, the powers, and the liabilities of municipal and other public corporations established as agencies of the state for purposes of local government. (In re Maders Irrigation District, 92 Cal. 296, (27 Am.St. Rep. 106, 28 Pac. 275, 675).) What shall be the effect of the enlargement or diminution of the boundaries of such corporations, or of the consolidation of two into one, or of the annexation of the territory of one into another, is a question to be answered by a determination of the legislative intent. The cases above cited declare the result of such action under laws which do not show affirmatively an

intent to continue the existence of two separate public corporations within the same territorial limits." In the statute before us the legislative intent is declared in plain language. The second section of the original act is as follows:

"The people of any county or portion of a county, whether such portion includes unincorporated territory or not, in the State of California, may organize a municipal water district under the provisions of this act by proceeding as herein provided."(Stats.1911,page 1290) The corresponding section of the amending act approved December 24, 1911 is as follows:

"The people of any city and county, or of one or more municipal corporations in any county with or without unincorporated territory in such county, in the State of California, may organize a municipal water district under the provisions of this act by proceeding as herein provided." (Extra Sessions Stats.1911 page 92) In the case of Pixley v. Saunders, 168 Cal. 152 it was held that the inclusion of a part of a sanitary district within a subsequently incorporated town neither destroyed the autonomy of the district now relieved the land within both municipalities from taxation by the properly constitutted authorities of the district. While concededly both corporations had jurisdiction of matters of sanitation, it was held in that case that the legislature may provide for the formation of districts for the sanitation or territories which might not be adequately reached by means available to the purely local jurisdiation of municipal corporations already existing within them. In that case the act under review did not as clearly as does this statute provide that any district formed thereunder might include other municipalities, but it did provide for the formation of a district in <u>any part of the state</u> and in one of the sections relating to dissolution of sanitary districts reference was made to "any incorporated city or town that may be in occupation of a considerable portion of the territory of the district." Reasoning from these expressions this court concluded that it might "be fairly inferred that the legislature intended that sanitary districts might embrace both incorporated and unincorporated territory." In the case at bar the reason for a like

conclusion with reference to municipal water districts is much stronger because in the statute providing for their creation and operation we discover the legislative design of permitting the formation districts for the convenient and econimical development of a water supply within an area physically appropriate for such purpose without unduly restricting the powers of the inhabitants and their privileges by reason of the existence of smaller political entities situated within the larger tract and possessing powers somewhat similar to those secured for the corporation embracing the larger territory. The purpose is beneficent. By the law and under its sanctions the people of one or more municipalities, with the adjacent territory may unite for the joint benefit of all forming a municipal corporation through which they may accomplish that which it would be impossible for any one of the constituent municipal or suburban units to perform. Unless grave constitutional reasons impel this court to the contrary such an act will be upheld. (In re Maders Irrigation District, 92 Cal. 296-310) We do not discover that section 19 of Article XI contains any constitutional inhibition upon such legislation.

We will next examine the contention of respondents that the statute in question is contrary to the provisions of the 12th and 13th sections of Article XI. Those sections are as follows:

"Section 12. The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

"Section 13. The Legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal function whatever, except that the Legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it

may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this State."

Respondents take the position that the act in question violates the above quoted sections 12 and 13 because "It delegates to some one other than the corporate authorities the power to assess and collect taxes for city and municipal purposes." This argument, like the othef objection discussed herein is based in part upon the supposed exclusive authority conferred by section 19 of Article XI upon cities. But as we have seen,that article applies not merely to cities and towns but to all municipal corporations and power to acquire and sell water may be given to municipalities larger in territory and including within themselves cities and towns or similar corporations. This is done in the statute before us not in opposition to section 12 byt by general provisions which vest in the corporate authorities of the district the power to assess and collect special taxes for the purposes comtemplated. The corporate authority of such a district is the board of directors and to that board is delegated the taxing power not in relation to matters of purely local character in the included city or cities, but having reference to the affairs of the larger municipality embracing with it the others of lesser areas. In this view of the statute there is no violation of section 13 because the legislature does not delegate to the directors control or supervision of any of the purely local affairs of the cities, but by general law enables the inhabitants of a district including cities, to form a district and to elect their own taxing board to raise the necessary funds for district purposes. As the court declared in the opinion in the Maders Irrigation District proceeding, the liability to the district of the inhabitants of an included town is similar to that of the same inhabitants for their proportion of the indebtedness of the county within which they reside.

The statute is also attacked in the complaint as being contrary to the provisions of the 14th amendment of the Constitution of the United States and those of section 13 of Article I of the Constitution of California. It is argued that since no inhabitant

of the proposed district has an opportunity, save by his vote, of declaring his unwillingness to come within its limits and under the authority of its officers and since the Board of Supervisors if the proper number of names are attached to the petition for the formation of the district must call the election, the result may be to deprive the citizen of property without any opportunity of being heard. Appellants concede that there is no provision for a hearing before a tribunal clothed with authority to act on the matter of the extent of the district and the exclusion of lands therefrom. The statute requires publication of notice containing the text of the petition, the boundaries of the proposed district and the date when the petition will be presented to the supervisors. But it is provided that

"When such petition is presented the board of supervisors shall give notice of an election to be held in said proposed water district for the purpose of determining whether or not the same shall be incorporated." Respondents assert that there is no provision for a hearing of a property owner's objections at any time and Brookes vs. City of Oakland, 160 Cal. 423 is cited as authority for declaring the act unconstitutional. That was a case in which this court was considering a statute giving to a city council power to create sewer districts within the city whenever in the judgment of the council such course should seem proper. Such a proceeding was one directly affecting private property. An important distinction is to be observed between a proceeding which has for its purpose the making of a local public improvement and the creation of a district having extensive owers. As Mr. Justice Shaw said in delivering the opinion in Wilcox v. Engebretsen, 160 Cal. 288-293, "Another distinction is to be made between the proceedings of a board or council acting in pursuance of some delegated legislative authority in creating or extending a political subdivision of the state, as a county or city, a proceeding which does not directly affect private proeprty, and proceedings to open, grade, regrade, or improve a street, which do directly charge or affect private property. (People v. Ontarion, 148 Cal. 632, 634 (84 Pac. 205); People v. Loyalton, 147 Cal. 779, (82 Pac. 620); Dean v. Davis, 51 Cal. 412; In re Maders Irrig. Dist. 92 Cal. 323, (27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272,

675).) The creation of a city and the annexation of territory thereto are matters delegated to the legislature, acting by means of general laws, by which some board or council is invested with authority in that behalf. If the statute provides that such proceeding may be begun by the filing of a petition with the particular board or council having the authority, the fact that such body acts upon a petition which does not appear bad upon its face, and proceeds thereon according to law, is usually held to be conclusive of the sufficiency of the petition against any collateral attack." It has been held that where no discretionary power is vested in any legislative body with regard to the boundaries of a territory proposed for annexation to a city, the act is not for that reason unconstitutional; (People v. Town of Onyario,148 Cal.627) that in the formation of a town the finding of the supervisors that the petition is regularly signed by inhabitants of the proposed territory is conclusive; (People v. Town of Loyalton, 147 Cal. 774) that a taxpayer may not restrain the collection of a tax assessed against his land as a part of a levee district regularly formed after petition to the supervisors; (Dean v. Davis, 51 Cal. 406) and that the organization of an irrigation district under the "Wright Act" does not violate the constitutional provision regarding "due Process."(In re Madera Irrigation District supra) Respondents insist that we are here dealing with a matte directly affecting private property. They call attention to the fact that in Fallbrook Irrigation District v. Bradley, 164 U. S. 112 the Supreme Court of the United States declared the necessity for a hearing "at some time to those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefitted by the irrigation proposed," and that the Wright Act was upheld upon the express declaration of the court that an appropriate hearing before the Board of Supervisors is in the act provided. Notwithstanding any expressions in the Fallbrook Irrigation case we are committed to the reasoning of the Madera District case which was followed in People v. Ontario long after the decision in the other case had been made. In the opinion in the Madera District case the irrigation district was treated as a public corporation to be invested with certain political duties to be exercised in behalf of the state. That a water district

such as the one sought to be established in San Diego County is also such a corporation may not be doubted under the authority of that decision. The statute in its scope is even broader than the Wright Irrigation Act and is quite as complex in its details as is that law. To classify a district created under its sanction with a sewer district such as that described in the Brookes case would be to disregard the distinction pointed out in Wilcox vs Engebretsen. The following quotation from In re Madera Irrigation District *supra* seems to us to be conclusive upon the matter of the constitutionality of the statute:

"The constitutionality of the act in question is further assailed upon the ground that it makes no provision for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the organization of the district are only for the creation of a public corporation to be invested with certain political duties which it is to exercise in behalf of the state. (Dean vs Davis, 51 Cal. 406.) It has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such question to a popular vote. In the absence of constitutional restriction, it would be competant for the legislature to create such public corporation, even against the will of the inhabitants. It has as much power to create the district in accordance with the will of the majority of such inhabiyanta. It must be observed that such proceeding does not affect the property of any one with in the district, and that he is not by virtue thereof deprived of any property. Such result does not arise until after delinquency on his part in the payment of an assessment that may be levied on his property, and before that time he has ~~XX~~ opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment. He does not, it is true, have any opportunity to be heard, otherwise than by his vote in determining the amount of bonds to be issued, or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness, or levies a tax for its payment. His property is not taken from him without due process of law, if he is alowed a hearing at any time before the lien

of the assessment thereon becomes final. (People v. Smith, 21 N.Y. 595; Gilmore v. Hentig, 33 Kan. 170; Hagar v. Rec. Dist. No. 108, 111 U. S. 701; Davies v. Los Angeles, 86 Cal. 46)"

Respondents also attack the petition and question the validity of the proceedings based thereon because of the inclusion within the boundaries of the proposed district of La Mesa, Lemon Grove and Spring Valley Irrigation District. This contention is sufficiently answered by the discussion of their objections based upon the fact that cities were also to be included within the boundaries of the district.

The demurrer to the complaint was erroneously overruled. Therefore the judgment is reversed with instruction to the Superior Court to sustain the said demurrer.

Melvin J.

We concur:

Sloss, J.
Shaw, J.
Victor E. Shaw, J. pro tem
Lawlor, J.
Angellotti, C. J.

Mr. Justice Henshaw being disqualified does not participate in the foregoing.

L. A. No. 5218

In the Supreme Court

OF THE

STATE OF CALIFORNIA

WILLIAM G. HENSHAW and ED FLETCHER,
Plaintiffs and Respondents.

VS.

JOSEPH FOSTER, H. P. GREENE, C. H. SWALLOW, C. L. GOODE, G. F. WESTFALL, as members of and constituting the Board of Supervisors of the County of San Diego, and J. T. Butler, County Clerk of the said County of San Diego.
Defendants and Appellants.

Appeal from
SAN DIEGO COUNTY

Hon. C. N. ANDREWS
Judge

Appellants' Opening Brief

S. M. MARSH,
Court House, San Diego, Cal.
District Attorney, San Diego County.

E. V. WINNEK,
Title Building, San Diego, Cal.
Attorneys for Appellants.

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B. GRANT TAYLOR, Clerk

By.....Deputy.

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Defendants and Appellants.

Appellants' Opening Brief

This is an appeal taken nominally by the Board of Supervisors and County Clerk of San Diego County, California, from a judgment of the Superior Court enjoining the said county officers from calling and holding an election for the organization of a municipal water district under an act of the legislature of the State of California, entitled

> "An act to provide for the incorporation, organization and management of municipal water districts and to provide for the acquisition or construction by said districts of water works, for the acquisition of all property necessary therefor, and also to provide for the distribution and sale of water by said district." (Approved May 1, 1917, together with the Amendment thereto approved Dec. 24, 1911, and the further Amendments thereto approved May 29, 1915.)

As a matter of fact, the appeal is being prosecuted by appellants, property owners within the district sought to be incorporated, and who were instrumental in starting the movement for the organization of the District, and defended by respondents, being also property owners, for the purpose of having the constitutionality of the act passed upon. A very substantial sum had been expended in bringing the proceedings up to the point of calling an election. A very much larger sum would necessarily have to be expended in calling and holding the election. Doubts existed in the minds of property owners as to whether the act was constitutional, and at the time fixed by the Board for receiving the petition for organization and directing the calling and holding of the election, counsel were present and protested the action of the Board and officers on the ground that the act was unconstitutional. Assuming that an election was called, held, and the district organized, it would be necessary before

bonds of the district could be sold on the market that this act should be passed upon by the highest court of this state. If this court holds the act constitutional, the judgment will be reversed and the election ordered and the work thus far completed, and the funds expended will not be lost. If the act is unconstitutional, the taxpayers of this county have at least been saved the costs of holding a special election, which is not inconsiderable.

The specifications wherein the act under consideration is alleged to be unconstitutional are set out in the transcript on appeal, pages 13 to 19, inclusive, and we will consider them in the order in which they are plead.

We will commence, however, with the premises that every act of the legislature is constitutional.

In re Spencer, 149 Cal., 400, the court quotes from Cooley on Constitutional Limitations as follows:

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this statutory rule."

We will also assume that the organization of a municipal water district has for its objects the

welfare of the community and that the means by which the benefit is to be obtained are of a public character, and these facts being true the act will be upheld.

Madera Irr. Dist., 92 Cal., 310, the court says:

> "Whenever it is apparent from the scope of the act that its object is for the benefit of the public, and that the means by which the benefit is to be obtained are of a public character, the act will be upheld even though incidental advantages may accrue to individuals beyond those enjoyed by the general public."

Also that:

> "In the absence of any constitutional restriction, the legislature has absolute power over the organization, the dissolution, the extent, the powers, and the liabilities of municipal and other public corporations established as agencies of the state for purposes of local government."

East Fruitvale San. Dist., 158 Cal., 457.

The first objection urged by respondents is that it authorizes the taking or damaging of private property for public use without just compensation having first been made to or paid into court for the owner. (Tr., fol 39.)

The act in question does not differ materially in the objects to be obtained, the benefits gained, and the liabilities incurred by the property owner within its boundaries, from the Wright act. We suppose that the only reason counsel raises this

objection to its validity is that no one else has raised the same question with reference to the Wright act. If this were a question of eminent domain and the district, after having been once organized, was proceeding to condemn property without offering to compensate the owner therefor, it would then be applicable. But in simply organizing a public corporation, that is, submitting to the people of a certain designated body of land described by metes and bounds, the question as to whether or not a majority of the voters residing therein shall deem it to their advantage to organize a public corporation, there is no opportunity to take or damage property, and there is no occasion or reason why compensation should be paid into court. By a stretch of the imagination it might be said that every taxpayer in the county of San Diego would be damaged, for the reason that the salaries of the Board of Supervisors and County Clerk and the costs of elections are paid from funds raised by taxation, but this is too far a cry.

So far as this objection being applicable is concerned, counsel could, with equal temerity, have urged the balance of Section 14, Article I, of the Constitution, to the effect that no right of way shall be appropriated, etc., as an objection to the validity of the act.

There is nothing in the organization of a public corporation which in any manner could be

construed as the taking of property either with or without compensation. When once organized, the public corporation has all the powers enumerated by the act. It may issue bonds by a vote of those interested, and the officers are charged with fixing a tax rate sufficient to meet the expenses of the district, such officers shall certify to the board of supervisors of the county the rate fixed by the officers of the company and thereafter the taxes are collected under the general tax laws of the State of California. (Sec. 24 of act.)

The Wright act was attacked on the ground that property was taken without due process of law, which is certainly a kindred objection to the one urged here that property is taken without just compensation, and in the case of *Madera Irrigation District*, 92 Cal., 324, the court says:

> "He does not, it is true, have any opportunity to be heard, otherwise than by his vote in determining the amount of bonds to be issued or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness, or levies a tax for its payment. His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final."

There is nothing in the organization proper of the district which in the slightest degree ap-

proaches the taking of property without just compensation any more than the calling of any special election under the initiative and referendum, and when once organized, the property owner is protected to the utmost. No bonds shall be issued until the electors residing within the district shall, after due notice given, vote upon the question and the general laws of California relative to bond elections govern the conduct of such elections. (Sec. 15 of the act.)

In the event that the bonds carry and as the interest falls due and there is an insufficient fund in the district to meet the payments, the power exists in the board of directors to determine the amount necessary to be raised and they shall fix a rate of tax to be levied, and they must certify these facts to the board of supervisors of the county, which board, and the other appropriate officers, levy assessments and collect the same under the general laws of the state relative to taxation. (Sec. 23-24 of act.)

II.

It is maintained that the act is invalid for the reason that Section 19 of Article XI of the constitution provides that any municipal corporation *may* establish and operate public works for the purpose of supplying to inhabitants water, etc., and may furnish outside territory with such service under proper conditions, and because it may

do so under such authority, the inference to be drawn from the objection is, that having these powers given it under this particular section of the constitution, it has no other power or authority to own, operate and furnish water to others than those contained in this section. A portion of this section reads:

> "A municipal corporation may furnish such services to inhabitants outside its boundaries, etc."

If this section measure the power of a municipality to own and control the water supply of its inhabitants, might it not just as well be said that it also controls the water situation of lands outside the boundaries of a municipality which already has a water system, and that such outside district must look to the adjacent municipality for its water supply?

For years the legislature of this state, and the people themselves, through the initiative, have been struggling with the question of providing a legal procedure for obtaining a sufficient supply of water for the cities and the outlying districts, and this is particularly true of the southern portion of the state. Not every city has taxable property sufficient to warrant it alone undertaking an Owens River or Hetch Hetchy project, and so the legislature has seen fit to enact a law under which one or more cities, with the adjacent territory, may unite themselves into one municipal corporation for the joint benefit of all, and thereby do unitedly that which is beyond the power of any one of them to accomplish.

It must be borne in mind that the legislature has the power in its discretion to provide all manner and means for the formation of a public corporation. *In re Madera Irr. Dist.*, 92 Cal., page 319, the court says:

> "Inasmuch as there is no restriction upon the power of the legislature to authorize the formation of such corporations for any public purpose whatever, and as when organized they are but mere agencies of the state in local government, without any powers except such as the legislature may confer upon them, and are at all times subject to a revocation of such power, it was evidently the purpose of the framers of the constitution to leave in the hands of the legislature full discretion in reference to their organization."

The question as to whether the inclusion within the limits of the district of another municipal corporation was also passed upon in the Madera case. The objection there raised, however, was that the land within the town would not be benefited, and the court held that the object of the act was the improvement of all the lands in the district in an entirety, and that the extent of the district was left to be determined at the discretion of the board, and that the act could not be held unconstitutional because of an abuse of discretion.

The objection here raised, however, is that there will be two municipal water companies, we will call them, each with independent governing officers, and each company in the business of selling water. What if there are? There will be four such water companies in this district, no one of which has sufficient taxable property to adequately furnish itself with water, but taking the four together, with outside territory, there will be sufficient taxable property to warrant the development of all available water. Each of these separate water companies is today buying water from private sources and selling it again to its respective inhabitants. Each of these municipalities has the constitutional right to buy water. This district will have the right to sell to municipalities within the district. (Sec. 12 of act, p. 6.) These are incidental questions which will be left to the inhabitants and the officers of the district and the several municipalities to decide.

There need be no more conflict between the directors of the municipal district and the governing bodies of the municipalities than there is between the board of supervisors of the county and the respective officers of these municipalities. Both have taxing powers. The answer to this argument is, of course, that while both have such powers they are exercised for different purposes and therefore do not conflict. But is it true that

the powers of jurisdiction and privileges of the district will conflict with those of the municipalities? We have already seen that a municipality may be contained within an irrigation district and that the lands within the boundaries of the municipality may be taxed for the support of the district, even tho there is apparently no direct benefit to such lands. So, in so far as the powers of the district are exercised for the purpose of bringing water to the unincorporated territory is concerned there can be no conflict. Now, it is true, as is held in *West Fruitvale Sanitary District,* 158 Cal., 457, that:

> "There cannot be at the same time, within the same territory, two distinct municipal corporations exercising the same powers, jurisdiction and privileges", and
>
> "It is generally held that where one municipal corporation is annexed to another the annexing city takes over the functions of the annexed municipality, and the latter, by virtue of the annexation, is extinguished and its property, powers and duties are vested in the corporation of which it has become a part."

Such rules were applicable to the case decided, but further on, on the same page, the court says:

> "What shall be the effect of the enlargement or diminution of the boundaries of such corporations, or of the consolidation of two into one, or of the annexation of the territory of one into another is a question to be answered by a determination of the legislative

intent. *The cases above cited declare the result of such action under laws which do not show affirmatively an intent to continue the existence of two separate public corporations within the same territorial limits."*

The court further holds that in all events a constitutional question was not and should not be involved. (Page 458.)

A reading of the general powers conferred upon a municipal water district by the terms of the act cannot fail to show that *it was the intent of the legislators* that machinery be provided whereby one or more municipalities with unincorporated territory could unite for the purpose of providing an adequate supply of water for all; it may lease with the privilege of purchasing existing water works or water works system, it may sell its water to municipalities or other public corporations within its boundaries, and by these powers given it we claim that the legislature *did affirmatively declare its intent that two or more public corporations might exist within the same territorial limits.*

See: *Van de Water* vs. *Bd. Sup. L. A. Co., Cal.*, 24 Cal. App., 524.

III.

The argument and cases cited are applicable to the objection raised in the third specification (fol. 42, p. 14) to the effect that said act is unconstitutional for the reason that it delegates to a special commission power to make, control, appropriate, supervise and interfere with municipal improvements, which power, by Sec. 19, Art. XI, is vested in municipalities, and that said act vests in the board of directors of the district the power to levy taxes and perform municipal functions within the boundaries of said district.

We have shown that the legislature has the power to provide for the organization—the extent of powers, etc., of public corporations. The court says, in the absence of constitutional restriction, the legislature has such powers. Not only is there no constitutional restriction directly on this subject, but, on the contrary, Sec. 13 of Art XI adopted November 3, 1914, affirmatively gives to the legislature the power to legislate upon the very question raised in the second, third and fourth specifications. That section reads as follows:

> "The legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise, or in any way interfere, with any county, city, town or municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal function whatever, *except that the legislature shall have power to provide for the supervision, regulation and conduct in such manner as it may determine, of the affairs of ir-*

rigation districts, organized or existing under any law of this state."

Such affirmative constitutional provision is, we claim, a sufficient answer to the third objection raised in the complaint, and applies to the second and fourth objections as well. See also *Madera Irr. Dist.*, 92 Cal., p. 318, *et seq.*

IV.

The next objection raised is that by the act the legislature attempts to impose taxes upon cities, counties, and other municipal corporations and the inhabitants thereof for a certain municipal purpose, namely, that of supplying water to the inhabitants of the district. As stated above, this objection is covered by the constitutional provision affirmatively giving the legislature the power to provide whatever means they may deem for the public good in the way of supervising and regulating the conduct of an irrigation district. Counsel, however, interposes the broadest objection possible, and challenges the right of the legislature to provide the machinery whereby *any tax* for the purpose of supplying water to a district may be imposed. In the Madera case they objected to the constitutionality of the act because the assessment was levied according to the value of the land and not according to the benefit which each particular piece of land derived from the improvement.

The court in that case, on page 326, says:

> "The constitution contains no inhibition to the tax and prescribes no rule of apportionment."

Section 12, of the constitution, after reciting what the legislature may not do in the matter of imposing taxes, etc., reads:

> "But may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purpose."

It does not seem necessary to comment more on this objection. The legislature is not imposing a tax. It is providing by a general law, to-wit, the act under discussion, a means whereby the corporate authorities of the water district may assess and collect taxes.

V.

It is next contended that the act grants certain privileges and immunities to citizens of a part of the county not granted to all, and is therefore in conflict with Section 21 of Article I of the constitution.

It is impossible for us to imagine a situation arising under this act where this clause in the constitution would be applicable. Any other territorial subdivision in the county may go and do likewise. The district herein sought to be incorporated has no monopoly on the law, and there is plenty of land left for several districts

if the inhabitants thereof see fit to avail themselves of its terms. The property owners of this district will pay in the way of taxes and assessments for the privilege of organizing the district. Those outside the district will be in the same condition as before. We do not take the objection seriously.

VI.

Objection six is to the effect that the act is contrary to Sec. 6, Art. XI, in that corporations for municipal purposes, etc., shall not be enacted by a special law.

The same objection was urged in the Madera case against the Wright act, and was fully passed upon in that case, and the court held that the act was general.

Madera case, 92 Cal., pp. 315, *et seq.*

VII.

The seventh objection raised by counsel in their pleadings is, in our opinion, the most serious one of all, and it resolves itself into this proposition:

Has the legislature the constitutional authority to provide machinery for the organization of a municipal water district whereby any certain percentage of the voters in the district may establish the boundaries of the proposed district without giving the property owners in the proposed district an opportunity to be heard before a tribunal clothed with authority to act on the question as

to the extent of the district and the exclusion of lands therefrom?

The act under consideration contains no provision for such hearing. The act requires that notice be published, which notice shall contain the text of the petition which described the boundaries of the proposed district, etc., and such notice shall also state the time of the meeting when the petition will be presented to the board of supervisors. No provision is made for a hearing and no discretion is given the board of supervisors with reference to the extent of the district. The act seems to be mandatory upon the board of supervisors in directing them upon such presentation to call an election. The act in this regard reads:

> "When such petition is presented the board of supervisors shall give notice of an election to be held in said proposed water district for the purpose of determining whether or not the same shall be incorporated."

The question as to the sufficiency of the petition is properly taken care of inasmuch as the petition may not be presented until the county clerk has certified that it has attached to it the proper number of signatures.

It is alleged that without this opportunity to be heard, on the part of the land owner, that the act is unconstitutional and contrary to the fourteenth amendment to the constitution of the

United States in that it operates to deprive the land owners within the district of their property without due process of law, for the reason that after the organization of the district their lands are liable to taxation for district purposes.

The same question was raised in the Madera case, and on page 323 the court says:

> "The constitutionality of the act in question is further assailed upon the ground that it makes no provision for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the organization of the district are only for the creation of a public corporation to be invested with certain political duties which it is to exercise in behalf of the state. (*Dean* v. *Davis*, 51 Cal., 406.) It has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such question to a popular vote. In the absence of constitutional restriction, it would be competent for the legislature to create such public corporation, even against the will of the inhabitants. It has as much power to create the district in accordance with the will of the majority of such inhabitants. It much be observed that such proceeding does not affect the property of any one within the district, and that he is not by virtue thereof deprived of any property. Such result does not arise until after delinquency on his part in the payment of an assessment that may be levied upon his property, and before that time he has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment. He

> does not, it is true, have any opportunity to be heard, otherwise than by his vote in determining the amount of bonds to be issued, or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness, or levies a tax for its payment. His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final. (*People v. Smith*, 21 N. Y., 595; *Gilmore v. Hentig*, 33 Kan., 170; *Hagar v. Rec. Dist.* No. 108, 111 U. S., 701; *Davies v. Los Angeles*, 86 Cal., 46.)"

In the case of *People vs. Town of Ontario*, 148 Cal., 627, the construction of an act of the legislature of 1889 relative to annexation of territory to an incorporated town was under consideration, and it was urged that the act was unconstitutional because it delegated to private citizens of a municipality and not to any legislative body or board the power to determine the boundaries of the territory sought to be annexed. Commenting upon the act, the court says, on page 628:

> "It will be observed from the foregoing that no discretionary power whatever is vested in any legislative body with regard to the boundaries of the territory proposed to be annexed. Upon the presentation of a proper petition signed by the requisite number of electors of the municipality, and exactly describing the territory desired to be annexed, the legislative body of the municipality is

compelled to immediately submit the question of annexation to the electors of the town and also to those of the outside territory. The question as to whether the exact territory described by the electors in their petition shall be annexed to and constitute a part of the municipality is made to depend solely upon an affirmative vote of the two bodies of electors, those of the municipality and those of the outside territory.

"It is urged in support of the attack upon the constitutionality of this act that it delegates to private citizens of the municipality, and not to any legislative body or board recognized by the constitution, the absolute power to finally determine the boundaries of the territory proposed to be annexed. This, it is said, is a legislative power which under our constitution could only be delegated to some legislative body. We are of the opinion that there is under the provisions of our constitution no unwarranted delegation of legislative power herein, and that the act in respect to the objection made is violative of no constitutional provision.

"*All else in the act, including the petition of twenty per cent. of the electors of the town or city, has simply to do with the orderly method of obtaining the expression of the desire of the electors of the respective localities, the town and the outside territory, and the procurement of an official record of that expression. The petition of the electors is merely an initiatory step, making it the duty of a body capable of acting in such a matter to officially submit the proposition made by the petitioners, to the electors of the interested localities. The electors of each locality alone determine whether certain described territory* shall become a part of the municipal

corporation . . . . . The fixing of the boundaries of a municipality is ordinarily held to be the exercise of legislative power, but assuming it to be such in its nature, in view of the constitutional provision relative to the creation of municipal corporations, it does not follow that the legislature may not confer the power to declare the precise boundaries upon the electors of the district to be affected. The conferring of such power is not a delegation of legislative power at all, for the legislature is expressly prohibited from defining the boundaries. It fully exercised its own legislative power by the enactment of the general law in the matter. Necessarily, for the execution of such general law, the power to define the exact boundary-lines of each particular municipality created or enlarged after the adoption of the constitution must be by such a law placed somewhere. We find no provision in our constitution limiting the right of the legislature to place this power with any tribunal or person, except so far as such right may be limited by section 1 of article III, wherein it is provided that the powers of the government of the State of California shall be divided into three separate departments, the legislative, executive, and judicial, 'and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this constitution expressly directed or permitted.' Manifestly this provision has no application. And it is as clear that section 13 of article XI, which provides that 'the legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in

any way interfere with any county, city, town, or municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever,' has no application here. The fixing of the boundaries of the territory to be annexed is in no sense of the words a 'municipal function'. (See, generally, *Fragley v. Phelan,* 126 Cal. 383, (58 Pac., 923). There is no constitutional provision that intimates that this power can be conferred only on some legislative body, and not upon the electors of the locality to be affected, and in the absence of such a provision the question as to whether it shall be given to the one or the other is purely one of policy, upon which the determination of the legislature is conclusive . . . .

"It is further urged that the statute is unconstitutional because it provides for a judicial determination by the city council, without giving the parties affected any notice, knowledge or day in court. The point of this objection is, that inasmuch as it is the implied duty of the city council to determine the existence of the facts essential to its jurisdiction to order an election,—viz., that the petition is in fact signed by the requisite number of electors (*People v. Los Angeles,* 133 Cal., 338, 342, (65 Pac., 749),), and also as to whether the boundaries of the territory proposed to be annexed are set forth with sufficient certainty (*People v. Oakland,* 123 Cal., 598, 606, (56 Pac., 445),),—the city council in so doing makes a determination judicial in nature, without notice to persons whose property, in the event that the proposition is carried at the election, will be brought within the municipality. This may be conceded, but it does not follow that the determination thus

made in any way so affects property rights as to make previous notice essential. The utmost effect of such determination is the submission to popular vote of the proposition, and property rights are in no way affected thereby. The quotation from *In re Madera Irr. Dist.*, 92 Cal., 296, (28 Pac., 272, 27 Am. St. Rep. 106), made in dicussing a former objection, is applicable here."

In the Madera case this court held (p. 323) in effect, that conceding the fact that the Wright act did not give property owners a hearing, prior to organization, still they were not damaged; that the filing of petition, calling of election, etc., were only steps provided for the organization of a public corporation; that there was nothing in the organization of a public corporation to be construed as taking property without due process of law; that if the property owner has an opportunity to be heard before the lien of any assessment levied, by virtue of the organization of the district, became final, that such hearing was all he was entitled to and having such hearing he was in the same relative condition as any other land owner in a municipal corporation whose lands were subject to assessments for bond purposes.

The Wright act was upheld by the U. S. Supreme Court in *Fallbrook Irr. Dist v. Bradley,* 164 U. S., 369, but apparently upon a different line of reasoning than we are able to read into the Madera case. In the Fallbrook case, the

court, in passing on this phase of the act, held that an opportunity to be heard was given those whose lands would not (in the opinion of the Board of Supervisors) be benefited by irrigation by said system. They say, on page 394:

> "There is nothing in the essential nature of such a corporation, so far as its creation only is concerned, which requires notice to or hearing of the parties included therein before it can be formed. It is created for a public purpose, and it rests in the discretion of the legislature when to create it and with what powers to endow it."

But they hold farther on in the opinion that inasmuch as the formation of the district will almost necessarily be followed by the levy of an assessment upon the lands that not only a public corporation has been created but also a taxing district, whose boundaries are fixed not by the legislature (which would have the absolute right to fix them) but by the board of supervisors, and the board of supervisors in fixing the boundaries passes upon the benefits accruing to the lands, and that the property owner must have a right to be heard upon that question.

The reasoning in these two decisions seem to clash on this question of the extent of the district and of the benefits or lack of benefits accruing from the organization of the district to the land owner therein. The Madera case was decided in December, 1891, the Fallbrook case in October,

1896. Nearly ten years after the Fallbrook case this court still followed the Madera case in *People vs. Ontario, supra.* In 1911, however, in the case of *Brooks vs. City of Oakland,* 160 Cal., 423, on the question of the right of a land owner to be heard on the extent of a sewer district established by a city council, this court follows the reasoning in the Fallbrook case, and held that the act of 1911 was unconstitutional; that it acted to deprive a land owner of his property without due process of law, inasmuch as his property would be *taxed* to pay for sewer improvements, without his having an opportunity to be heard on the question as to whether his property would be benefited by the establishment of the district.

It is said in *Brooks vs. Oakland,* 160 Cal., 428, quoting from its Fallbrook case:

> "Unless the legislature decide the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken."

and cite *Spencer v. Merchant,* 125 U. S., 345, to the effect that the legislature had declared in the act that certain lands were benefited and should be taxed for the improvement, and the fact that the legislature had *specifically declared that a benefit accrued* was binding upon the court.

Now the act under consideration does not specifically declare that any particular tract of land will be benefited, but our understanding is that

when the question of benefits is raised it does not mean the individual benefit that may or may not accrue to a particular land owner; but that this court has held consistently that the question of benefits refers to the state at large.

In the Madera case, page 313, it is said:

> "Whatever tends to an increased prosperity of one portion of the state, or to promote its material development, is for the advantage of the entire state; and the right of the legislature to make provision for developing the productive capacity of the state or for increasing facilities for the cultivation of the soil according to the requirements of the different portions thereof is upheld by its power to act for the benefit of the people in affording them the right of acquiring, possessing and protecting the property which is guaranteed to them by the constitution. The local improvement contemplated by such legislation is for the benefit and general welfare of all persons interested in the lands, within the district, and is a local public improvement. This principle is not contravened by the fact that it may operate injuriously upon some of the individuals or projectors of land within the district, or by the fact that there may be some, who for personal motives may wish to resist the improvement."

A rule that is applicable to the formation of a sewer district, which has for its purpose the immediate convenience only of those owning land therein, should not at this late date be construed to apply to the organization of an irrigation district, or of a municipal corporation that is pro-

jected for the purpose of furnishing several municipalities with water, and at the same time making inhabitable tens of thousands of acres of desert lands.

VIII.

Objections eight and nine raised are, to all intents and purposes, the same as that raised in the second objection, that is: that within the boundaries of the proposed water district there are two or more municipal corporations, etc. There are four: The Cities of San Diego, East San Diego, La Mesa, and the La Mesa, Lemon Grove and Spring Valley Irrigation District, an Irrigation District organized under the Act of 1897.

It has been held by this court in the case of *East Fruitville Sanitary District*, 158 Cal., 453, and the cases therein cited, that a sanitary district upon being annexed to a municipality loses its identity with the annexation. This result is obtained, however, not by reason of any constitutional provision, but by virtue of the annexation act itself.

On page 457 of the last mentioned case the court says:

> "These rules do not rest upon any theory of constitutional limitation. In the absence of any constitutional restriction, the legislature has absolute power over the organization, the dissolution, the extent, the powers and the liabilities of municipal and other pub-

lic corporations established as agencies of the state for purposes of local government."

This same objection was raised in the case of *La Mesa Homes Co. vs. La Mesa, etc., Irr. Dist.*, 159 Pac. Rep., 593, and decided adversely to respondents' contention.

Respectfully submitted,

S. M. MARSH,
District Attorney for San Diego County.

By.....
Deputy.

E. V. WINNEK,
Attorneys for Appellants.

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Business Records - Water Companies - Volcan Land and Water Company - San Dieguito System - San Diego County Water Company - Attorney E.V. Winnek's brief for 1917 County suit vs. Henshaw and Fletcher