DESERET EVENING NEWS: FRIDAY MARCH 7, 1902.

CITY ASKS FOR A RE-HEARING OF FAMOUS WATER CASE.

Corporation of Salt Lake Petitions the Su= preme Court of the State for a Re=hear= preme Court of the State for a Re-hearing of All Points Involved - Thinks Majority of the Court Committed a Vital Error in the Assumption That the Power Company Had Completed an Appropriation of the Water in Dispute-No Claim Of That Kind Yet Effective, and Until it Is Nothing Can be Decreed.

Salt Lake City corporation today, through City Attorney Nye and Richards and Varian of counsel for appellant, asked the Supreme court for a complete rehearing of the famous water case in which the city of Salt Lake is appellant, the Utah and Salt Lake Canal company, a corporation, respondent, vs The Salt Lake City Water and Electrical Power company, a corporation, et als., respondents. The request is based upon the declaration that there is

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good reason to believe that the majority members of the Supreme court, Justices Miner and Bartch, erred vitally on several points, notably in the assumption that the power company had completed an appropriation by diverting water from the city's headgate and forcibly seizing upon the city's ditch in order to make its use available. The last clause of/the petition says: "We feel assured that further consideration and reflection will bring the court to a different conclusion. Finally, we insist that rights, of whatsoever name or nature, cannot be acquired by trespass. That, as found by the lower court, the appropriation of the Power Company is NOT YET EFFECTIVE AND THAT UNTIL IT IS EFFECTIVE. NOTHING CAN BE DECREED FOR IT. Therefore we ask the court to grant a rehearing of the case."

PETITION FOR RE-HEARING. | priation commences, the law does not restrict the appropriator to the date of doctrine of the water, but, applying the doctrine of relation, fixes it as of the time when he begins his dam, or ditch,

in its disposition of appellant's assignment of error, upon the seventh paragraph of the decree of the court ow, the majority of this court in in-preting the fourteenth finding of terpreting the ct, concludes that the storage right, declared by said finding, applied only the waters of the lake and river pernitted to be stored under the terms of promise agreement. Upon this uestion, the majority opinion proceeds

From anything that appears in the findings of fact, it is difficult to peranal companies should be permitted. at their mere will and discretion, to inrfere with the supply of water which as been appropriated and used continually for a quarter of a century. The majority opinion also declares, in support of its conclusion, that the language of the finding, to wit, "that said right of storage has been, since the year 1885, recognized and assented to by all the parties hereto," is ex-plained by the fact that the said right efers only to the storing of waters to which the city and canal companies were entitled, "because the prior ap-propriators had no cause for complaint so long as there was no interference with their rights." But, the majority opinion seems to have ignored the sub-sequent language employed in the very finding of fact under consideration. Afstating that the right of storage had been, since the year 1885, recog-nized and assented to by all the par-iles hereto, except the Salt Lake City Water and Electrical Power company, the court below proceeds to add: "As necessary to preserve and save the waters of the river for the uses of all appropriators, and said right of storage was and is necessary for such purposes."-(Abst., p. 102.)

juoted and the only decree which could make its appropriation of the use ef-

fective. Does this court intend to prejudge the action for condemnation before such action comes before it in the ordinary finding was and is that while the power company may have initiated an appro-priation of the use of certain water, it has not perfected the same, and until course, and to say that the Power com-pany has the right to condemn or must necessarily be successful, ultimately, in its action for condemnation proceed-ings? We think not. And yet that is the effect of the judgment entered in this course. has perfected such appropriation by se, either by completion of its work r condemnation proceedings, for the -let of the waters after use or such ther steps as may be necessary to ren-er its appropriation effective, it has r this cause.

n this cause. The effect, too, of the decree of the ower court, affirmed by the majority opinion herein, is to take a mile and s half of the city's cana', together with is headgates and render them wholly is headgates and render them wholly o rights to be adjudicated in this ac-Such a decree finds abundant support n the California case, cited in the ma-ority opinion. Nevada County & Sac-amento Canal Co., vs Kidd, 37 Cal. 282, useless to the city. is not this a con demnation? But, the court say, tha the city still has control of its head A careful examination of the A careful examination of the able opinion in this case, writ-ten by Sawyer, chief justice, dem-onstrates that it does not support the opinion of the majority of the court in the case at bar, but that it does sup-port the contentions of appellant. gates and the mile and a half of it anal referred to, but the query canal referred to, but the query im-mediately arises, control for what pur-pose? Certainly not to manage and conduct its water supply, because that right is given to the Power company, from the river to the point where the water is to be put into the city's canal. Suppose that in the future somewhere on the line of the remaining 20 miles of the city's canal a break should on Upon page 15 of the typewritten opin-ion of the majority of the court in the case at bar, there are found two quota-tions from the case just above clied, but we respectfully call the attention in the city's canal a break should or a ur and the city should desire to shut off the flow of water in its canal. What of the court to, and earnestly request a careful consideration of, that portion of Judge Sawyer's opinion found bemeans has it of accomplishing such ween the quotations, which is as folnd? It might close its headgates but he water is not passing through them

lows "There is in fact as yet no present water right to be effected. The party the Power company for any purpose without committing a trespass. Thus we see that the real control of the wahas merely acquired the possession and site for his dam and canal and a right, by diligently pursuing his object, to acr of the city is given to the Powe mpany, and land belonging to Sal oy anigency pursuing its object, to ac-quire a future right to the possession of the water, which, when acquired, shall for the purposes of priority and of redressing any injuries that may there-after accrue, date by relation from the first act in selecting the location and making the delta. But while oursaing Lake City, an incorporated city, appropriated to a public use is condemne and that too without due process o law, contrary to the provisions of the atutes and particularly subdivision e section 3590, Revised Statutes, 1895 making the claim. But while pursuing his work and constructing his dam and The term land is defined by the sta-tute, subdivision 10, section 2498 of the canal with a view to the future appro-priation of the water and before any Revised Statutes, 1898, "to include land, tenements, hereditaments, water rights present water right, capable of injury by diversion or use by others, has been ssessory rights and claims." acquired, his dam and canal may be Following out to a logical conclusion injured by trespassers or taken from he erroneous decree entered in the ower court and affirmed herein in the him and he be obstructed in his pro-ceedings to acquire a right to the waters themselves, and he may have a cause of action on that ground. But following language, "It is simply a case of two uses of the same water under a primary and secondary ap-propriation, neither one necessarily inthis is necessarily a different thing and a different cause of action from an interfering with the other and both uses are beneficial to the public. In such jury to his right to the water itself by diverting it from him. The possession case the prior appropriator cannot complain simply because of the seconof the unfinished dam and canal or of the site, is not the possession and endary use but he has a right to insist that the water shall be subject to his joyment of the water, but merely the possession of the means of acquiring, by the exercise of due diligence, a right to the water in the future. This is the its quality shall not be impaired so as loctrine of this court as established by to defeat the purpose of its appropria-tion. Above the headgates, however, a long series of decisions. The right to the water, or waterright, as It is com-monly called, it only acquired by an he water in the stream or lake is not s personal property and he does not ctual appropriation and use of the

become the owner of it, until he ac-quires control of it in artificial ditches Again, quoting with approval from he case of Maeris vs Bicknell, r reservoirs," and we might have an-ther power plant created between the he case of Maeris vs Bicknell, Cal. 263, Judge Sawyer says:—"It also allows from the same decision that unresent one and the point where it is roposed to discharge the water into til such actual appropriations there can exist no complete right to the use of the water for the party may never carry out his intention." Again, "The e city's canal, which power plant ight propose to discharge the water snother point farther down on the ty's canal and such power plant right to the water does not yet exist, and it may never vest. The most that is in esse, is, a right to acquire, by reasonable diligence, a future right to sht in turn be succeeded by another d yet another and so on continuously roughout the entire 22 miles of the ty's canal, until the last user would ne water.' ver the water at the point where it

and could have no application has, case where an appropriation has not We assert without fear of successful been completed. Its purpose is to fix the time of an appropriation, when contradiction that the opinion just re-ferred to fully supports the position and completed; it cannot be made to per-form the duty of establishing an ap-propriation which does not exist. But, the court further says in its opinion contention of appellant herein and that it in turn, is supported by a large majority of the authorities as well as by logic and reas

ter does not yet exist and it may never vest." In the case at bar the Power

ONLY A SUGGESTION,

But It Has Proven of Interest and Value

Common sense would suggest that if

to Thousands.

numinous or flesh-forming food,

water

Josephs Who Loves the Game. Case Where the Great Medicine Bestowed Vigor and Health After Months of Weakness and BORCHERS TO BE MANAGER. Suffering. Talk of Forming Another State League Observing and intelligent women who Has Been Renewed-Secret Meethave used Paine's Celery Compound ing Held This Week. lave noted well the fact that as a

Ailing Women in Springtime

Need the Strengthening and

Nourishing Virtues of

PAINE'S CELERY

COMPOUND

SALT LAKE MAY

Harry S.Josephs and other brokers, lov-

ers of the national game, would see to

it that Salt Lake loyal fans did not

go begging for the game of their hearts

this season. There was a good deal

of talk about the directors of the local

club putting in another team but at a

meeting held by them it was decided

not to form one, and fanomaniacs be-

Last week "Big Chief" Borchers,

last evening, that during the

George Borchers, known as the "Big Chief," is to be the manager of the club

and every assurance is given that the

project will meet with complete suc

The lease on Walker's field expires or

the 15th of this month, but at the meet-ing referred to, Secretary Whitney was

select a new board of directors and a meeting to close up the deal and attend

the project will be held in the near fu-

That Ogden will have a team is

foregone conclusion, and it is said ef-forts are now being made to interest

Logan and Pocatello fans to join Salt Lake and the Junction city in a league.

Lovers of the game carnestly hope the scheme will be carried out to the letter, and that the coming season will witness a big change in the sport.

HAS FITZSIMMONS A CHANCE?

Tommy Ryan Says He Has-Jeffries

Must Fight,

"Fitzsimmons has one chance to lick

o the important matters pertaini

oubtedly, will be granted.

ture

eady.

and -

came glum again.

ing medicine it quickly regulates bowels, clears the whites of the yes of that common jaundiced look ad gives a bloom of health to the face hat it never possessed before. Another mportant proof of the invigorating ower of Paine's Celery Compound, is is effect on the pulse, which becomes , firm, and regular. Weak, exhaust nervous, irritable, and worried wo find that Paine's Celery Compour iteracts the exhausting strain o k and worry by its strong indu nt to the delicate tissues to take e nourishment; it induces the es and brain to feed themselves and it enriches the liberally, and regulates the flow.

Mrs. Nellie Morse Taylor, Solon, O., ands the following testimonial letter in the benefit of weak and run down

"Some years ago I had a severe at-ick of the grippe which left my head ad spine in a very bad shape. Some-mes I thought I should lose my mind was so nervous. I could not ore than two hours a night. After a par with the doctor, I had run down I weighed only one hundred and sixpounds. I then began on Paine' ery Compound, and that great medicured me and built me up to one undred and fifty pounds. I would not be alive today had it not been for the Compound. It cures all nerve roubles.

Dye Color goods with Diamond Dye cotton colors, Will not crock or smut.

hat the appropriator acquired a higher right, a right more nearly equivalent to absolute property or ownership, than in ases where the appropriation is mad imply for the purpose of milling, or of ropelling machinery of any kind. In the latter case, the use is not a con sumption, and the water may be re turned to its natural channel, afte use, without substantial diminution i afte

uantity."—Black's Pomeroy on Wate tights, Sec. 58. The reason for this is clearly stated by Judge Beatty, in Last Chance Min-ag company vs Bunker Hill Mining ompany, (49 Fed., 431-2) cited in ap-eliant's original brief herein, page 30. The city's appropriation was for a manufacture and official to discussion onsumer's use, and, after its diversion f the water from the stream into its ditch, no other appropriator could an-ticipate the return of any portion thereof to the stream. Its right began at the head of its ditch, and any interference with that right was and is disturbance of a vested right of pro-

Jeffries." says Tommy Ryan. "That's rty. The law was not intended to, an ideed could not, confer upon a subse quent appropriator, a right to a second-ary use in the water so appropriated least, without condemning right for a public use. But, in this instance, the constitution protects such property of municipalities from con-

It is true that the water above the demnation. If it be the law, that a

At



Deltz R. B. Lund Referee, Daniel; umpires, Johnson and Smith; goals from field, Edwards 3, Cheshire 2, Love, Stewart, Openshow and Lund; goals from foul throw, Cheshire I, missed 7, Edwards missed Openshaw missed 2, Stewart missed
fouls, Stewart 4, Openshaw 4, Deitz
Lund 2, Edwards 1. Fifteen minute Several weeks ago it was hinted that halves.

AMERICAN JOCKEY'S ABROAD.

They Will Be on Every Foreign Track This Year.

America will be represented by her ockeys on every foreign track this seaion. Already there are no less than 24 Yankee knights of the pigskin that will try their luck away from their native land, with a probability of more.

The Yankee jockeys seem to be more came down from Ogden and intimated demand abroad than ever and those that this town would have a team, that a nine would be placed in Ogden, and that in all probability another state who have any desire to ride in foreign lands experience no great difficulty in finding employment. Last year the league would be organized. Now comes the announcement, made Americans held their own wherever they appeared and in most instances were ahead in the percentage. there was a secret meeting of the di

In England there will be Spencer, Marestors of the Salt Lake club, called by Harry Josephs, who it is said, has seher, "Skeets' Martin, Clem Jenkins, Rigby and possibly "Nash" Turner, who is mentioned as the possible rider of cured the controlling share of the stock, and plans were formulated whereby a team will be organized here to furnish plenty of baseball for the entire season olodyovski and Nasturtium.

France will have the greatest number f Yankee riders in "Johnny Reiff, Mc ntyre, Freeman, C. Thorpe, J. Sherer luchanan and Owens, the latter a teeplechase jockey. Taral will star in Austria with Van-

usen, Gray and "Ed" Ross as compan-In Russia there will be six American

performers, headed by "Cash" Sloan, after which comes Piggott, Knapp. structed to notify Walker Bros, that the association would like another year's lease on the grounds, which un-Mitchell, Hamilton and Vittatoe. "Cash" Sloan will not confine his rid-It is claimed that Mr. Josephs will

ing to Russia. He will race at Parl until April 10, when he will move to Russia to ride for Jean De Reszke.

Corbett to Fight Attell. Young Corbett has finally decided to

take on Abe Attell. Up to the present time Corbett has looked open the chal-lenge of Abe as a huge joke. But since ttell has been so persistent in his de nands the little champion has decided o give him a chance. Unless Attel has improved wonderfully since his ast appearance in Denver it looks lke an easy match for the champion. The contest will probably take place in Chicago.



THE OAKLAND RACES.

Weather Was Fine and Favorites Had an Inning.

the chance of a man like Jim Corbet would have-a fellow fighting the way San Francisco, March 6.-Favorites Corbett used to, I mean, one of these ellows to jab and stay away. Fitzsim had an inning at Oakland today, all mons can make this big fellow fight vents going to short-priced horses. and don't you forget it. I saw Fitz the The weather was fine, but the track time Maher dropped him with a punch to the chin. Fitz got up and feinted was very muddy. The principal inter-

per is a guarancee that the ingredients are pure and are mixed in the proper proportions. This preparation is highly recommended by the best physicians in the world. if you're troubled with only solution cough a slight cough, You'd better get a bottle and cure it before it leads something more serious. An extra good sized bottle for 50 cents. F. C. SCHRAMM, PRESCRIPTION DRUGGIST. Where the cars stop, McCornick Building.

this



Dr. Lyon's

PERFECT

Tooth Powder

Used by people of refinement

for over a quarter of a century

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WHITE PINE AND TAR.

Syrup of White Pine and Tar is a standard preparation

But there are many kinds of his preparation.

Dr. Cooper's name on th wrap-per is a guarantee that the

COOPER'S SYRUP OF

CLOAK AND SUIT DEPARTMENT.



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Loats

FOR THE

Little

Ladies.

Sizes 2, 3, 4 and 5

years.

Over 200 lovely little Coats

in cape-reefers and auto.

jackets. All shades and

trimmings. Clothes are

\$1.25

\$7.50.

ESTABLISHED ISE4

This right of storage is expressly limited theretofore in the same finding (No. 14), to an exercise, "when necessary to do so, in order to supply their needs during seasons of scarcity

of water."-(Abst., p. 102.) The only reasonably construction to be put upon this entire finding is, that the right of storage was necessary, at times, to preserve and save the way ters of the river for the uses of all, and in that view and for such purposes, it had been exercised and the right as-sented to by all the partles to the suit. The above language would seem to reflect as much light upon the meaning of the court in this matter of storage, as an argument based upon other supposed inconsistent findings as to the primary rights of appropriators. is necessary, owing to the y of water and in anticipation scarcity of of an entire diminution of supply, to store the water at times, in order that anybody may be enabled to secure a supply, such a necessity pressing upon alike would authorize the exercise of the right of storage by some for the enefit of others, and such right could be exercised, either adversely to or with the assent of all. It seems clear that a finding that a right of storage is necessary to preserve and save the waters for the uses of all appropriators, and was exercised for such pur-pose, sufficiently indicates what waters were to be stored. Appellant indeed, does "recognize the force and effect which the limitations contained in the last part of the above quotation (referring to paragraph seven of the decree), are entitled.". It contends that the decree in this inconsistent with and departs from the finding which does not support it, and we respectfuly submit that this contention cannot confuted in the face of the express language of the finding. The findings should clearly and definitely support the decree, and, if there is uncertainty in them, or between them and the de we submit such uncertainty cannot be argued into certainty. The intention of the court is not to be ascertained by argument, but its meaning Should. clear and definite, and, it therwise, the case should be remanded for such purpose.

But, the principal objection to the majori opinion, is found in the application of the principles announced, unerlying the law of appropriation. Ignoring the palpable fact in the case, power company had never completed an appropriation of the city's water, and that for the compleof such appropriation, the use the city's canal was required, as fully evidenced by the finding (No. 16), the court here proceeds to adjudicate the rights of the parties upon the assumption that the power company had made implete appropriation, as it alleged n its plending. In aid of this assumpit also proceeds to make a new application of the doctrine of relation. saving

determining the question of the time when the right to water by appro-

Nor does it appear that any intervening right has accrued since the appropriation by the power com-pany, as against its right. pany, as against its right. Having thus prosecuted the construction of its ditches and flumes with reasonable diligence, the Power company cannot, under these circumstances, be held to have forfelted any rights secured to it by its appropriation, because of a failure to use the

or flume, or other appliance by means of which the appropriation is perfect-ed; provided, the enterprise is prose-cuted with reasonable difigence." No griticism can be made of this declaration of the law by Judge Haw-ley but it may be meaneded and and

ley, but it may be respectfully sug-gested that the doctrine of relation has,

water. But it is the city's water which the Power company is seeking to use here; water already appropriated long before Power company asserted a claim. the and the ability of the Power company to perfect a completed secondary use the water is dependent, by the press language of the decree, upon its lawful right to condemn the city's property in the control of the water and in the use of its ditch

The court declines to decide whether the law of eminent domain applies the case, yet, by the very finding and paragraphs of the decree under consideration, such question is necessarily maie. Such finding and decree, in efamount to this: If the Power company may lawfully, and will, demn the rights of property sought, and pay the damages therefor, then it has a lawful appropriation; otherwise not. The whole question is presented in this case and in the companion certlorari case, which was brought up and submitted at the same time, before the ourt, in the expectation that the whole

matter would be determined. We respectfully submit that, to decide this appeal upon a partial consideration of the facts found and the rights decreed, eliminating every element upon which the respondent's right is made to depend, is not only contrary to all practice and precedent, but to the priniples of ordinary justice. Again, referring to the uses of the water by the city and the Power com-

pany, the majority opinion says:

it is simply a case of two uses of the same water, under a primary and neither one econdary appropriation, necessarily interfering with the other, and both uses are beneficial to the pubc. In such case, the prior appropria r cannot complain simply because he secondary use, but he has a right o insist that the water shall be subact to his use and enjoyment, to the extent of his appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropria-tion. Above his headgates, however, the water in the stream or lake is not is personal property, and he does not secome the owner of it until he aculres that in artificial ditches or res-But, as hereafter shown, the appro-

priator's right begins at the head of his ditch, and, while he has no personal property in the waters of the stream above his the waters the waters, he has a personal vested night of property, in the right to have the water flow to and into his head-But, we will consider this late s the findings. Finding 16 is not quoted at length by

he court in the majority opinion. The al meat of the finding and that por on upon which appellant has relie nd still relies, apparently was over tooked and has not been considered by the court. It reads as follows:

"That the appropriation of the use of such water, for and on behalf of the power company in order to be com-pleted requires the use of the city's and by said power company for the purpose of discharging water after being used by the power company through flume across the Jordan river and in to said canal at a point about one mile to said canar at a point about one mile and a half below the head thereof, and that without such use by the power company of the city's canal, the appro-priation of the use of such water by the power company cannot be made : effective." Mective.

The balance of the finding and all that portion of it quoted by the court and well.

The decision of the lower court, as ali the appropriator, 'and he does not so the majority opinion of this court, shows beyond controversy that the become the owner of it until he ac-guires control of it in artificial ditches right of the Power company to the use of any of the city's water is in-" reservoirs," as stated in the major-But, how can such ty opiaton herein. omplete and cannot be made effective until by condemnation proceedings it has acquired the right to discharge the water, after use, into the city's ompany diverts water from the river anal. That being true, how can the octrine of relation be invoked? The octrine of relation requires some com-leted act or thing to relate back to the commencement of the initiatory steps leading up to the completion. It cannot be said that the doctrine of reon the line thereof ation can be made to apply to inter

to the city

nediate steps until those intermediate steps have been merged into a final o te act or thing. In the language of Judge Sewyer, "The right to the wa-

ditch. The ditch is an entirety, and the right to have the water flow in it is co-extensive with plaintiff's right to the ditch Itself." Lower Kings River and Water Ditch

and digest, and that food should be alto Canal company, 60 Cal, 110.

eggs, beefsteak and cereals; in other words, the kind of food that make flesh are the foods which form the greater part of our daily bills of fare. Un Martin Ca (物)で) cases cited.

- soft tota -But the trouble is that while we eas nough and generally too much, the tomach, from abuse and overwork loes not properly digest and assimilate it, which is the reason so many peopl main thin and under weight: estive organs do not completely diges the fiesh-forming beelsteak and eggs and similar wholesome food.

There are thousands of such who are really confirmed dyspeptics, although they may have no particular pain or in convenience from their stomachs.

If such persons would lay their preju ces aslde and make a regular practic d taking, after each meal, one or tw f Stuart's Dyspepsia Tablets the food would be quickly and thoroughly gested, because these tablets contain the natural peptones and diastase which on in this petition. For the present every weak stomach lacks, and by sup-permit us to invite further attention plying this want the stomach is soon nabled to regain its natural tone and

Stuart's Dyspepsia Tablets digest ev ery form of flesh-forming food, meat, eggs, bread and potatoes, and this is the reason they so quickly built up, strengthen and invigorate thin, dyspeple men, women and children. Invalids and children, even the most

delicate, use them with marked benefit as they contain no strong, irritating drugs, no cathartic nor any harmful in-

Stuart's Dyspepsia Tablets is the most successful and most widely known of any remedy for stomach troubles because it is the most reasonable and scientific of modern medicines. Stuart's Dyspepsia Tablets are sold by every druggist in the United States and Canada as well as in Great Britain, at 50 cents for complete treatment. Nothing further is required to cure any stomach trouble or to make thin, nervous, dyspeptic people strong, plump

above the headgate of the city's canal. The complaint is, that the Power com-pany diverts water above the headgate the city's canal which the city is entied to have flow into that canal, and, quire it to receive its water at othe akes it out to be delivered back into he city canal at a point lower down | appointed by it? There is no princip The real question in this case is ab-molutely obscured and overlooked in the presedent to support the claim of the power company. The law of appropriator tion permits each appropriator to use he majority opinion. As said by the vise and determine for himself his ry upreme court of California: The right of plaintiff, as stated in right of complaint, to have the water flow of diversion from the river to the head of its ditch. When his system ts complaint, to have the water flow an incorporeal hereditament apper taining to its water course (ditch). Granting that plaintiff does not own

and enjoyment to the extent his appropriation, and that

low used by the city, the entire can

inv sort of control or supervision of

the water to which it is entitled be lost

would have to be abandoned and

he corpus of the water until it shall neer its ditch, yet, the right to have it flow into the ditch appertains to the

one wishes to become fleshy and plump it can only result from the food we eat company vs. The Kings River & Fres-

"Although the appropriator has no property in the water of the stream flowing in its natural channel above his coint of diversion, yet, he acquires a

most important right over or with respect to such water. This general right over the stream of the party who has perfected a prior appropriation is, that the water of the stream should ontinue to flow in its usual manner brough the natural channel or bed of the stream, down to the head of his ditch, or to the point where his own actual dominion over it commences, to the extent or amount of his appropriations, without diversion or material interruption."-Black's Pom-

eroy on Water Rights, section 64, and The right to a secondary use of water by an appropriator for a useful and beneficial purpose, of necessity, can be

applied only to public water. Such right, recognized and conferred by our Such tatute, is confined and must be confined solely to the water flowing in public stream, and cannot take effect upon private property.

It seems to be conceded by the majority of the court, that, after the wat-er of a public stream has been appropriated and taken into possession by an appropriator, that no further right of appropriation thereof, by others, ex-ists, The opinion, in effect, declares, hat, while a subsequent appropriator cannot attach his appropriation to the water of a prior appropriator, when re duced to possession and flowing in the prior appropriator's ditches, nevertheless, he can accomplish his sought for result by presenting the water, to which the prior appropriator s entitled, from reaching his ditch. The truth is, the right to have the water of the stream appropriated flow into the ditch, is a vested right of property, and in inseparable part of the comple-

ropriation. It is just as important and aluable a right as is the right to have the water continue to flow through the ditch after It has once entered it.

In this particular case, having in ylew the purpose of the city's appro-priation, its property right to the water is practically that of absolute owner-"The nature and extent of the right

acculred in the water after its diversion while under the control of the appropriitor in his ditch, canal, reservol other structure, must depend, I think, upon the purpose for which the appropriation is made. Where the appropriation is made for purposes of ir-rigation or agriculture, or municipal uses, or mining, or for sale to others to be used by them in any of these modes, where the use wholly or largely con-sists in the consumption, it would seem

neary use cannot attach to appr priated water after it enters the head-gate and ditch of an appropriator, can the law be evaded, and the right of the appropriators be impaired by the simple device of preventing the waters of the stream from entering the headgat a proposition affect the case at bar? No the stream from entering the headgat complaint is made here that the Power and ditch, and thereupon attaching the secondary use to the same water in the stream below the headgate? By what law or right does this court assume to make a change in the city's system of appropriation and diversion, and r places and in other ways than those tem of appropriation, including th selection of his diversion from the stream. 18 pleted, his appropriation perfected and the water reduced to his sion and use, the property is an entire ty, including ditches, water and right of use, and the right of use begins at the head of his ditch. There is no question here of refusing

to capital proper and necessary rights and privileges. When capital planted itself upon the Jordan river, it found all the waters of the stream appropriated, and was only entitled, as was any other citizen, to employ the waters of the stream for its use so far, and far only, as it could do so without in

terfering with rights already vested. The decision here rendered is pregnant with serious consequences. practically an invitation to corpora tions and promoters, bearing the alhigh-sounding 'capital." to enter upon the streams of this state and disturb the irrigation and other water systems designed and constructed by the original appropriaor. It is, as we conceive, in direct dolation of principles long settled, and s supported by no authority.

There is a vast difference between a secondary appropriation and use of water to be used and returned to the original stream above the point of primary appropriation and diversion undiminished in quantity and unim palred in quality, and the attempted appropriation and use of such water diately at the point of diversion of the first appropriation and the return of the same water into the canal of the first appropriator below his point of diversion There is also a vast dif-ference, and one recognized by section 3590 of the Revised Statutes, between the taking by condemnation, of lands appropriated by a governmental corporation to a public use, and lands ap ropriated to a so-called public use by what are commonly known as quas sublic corporations, that is, corporations organized by private capital for

private gain, but serving the public and of more or less benefit to each individual member thereof. The fundamental error of the opinion. we submit, is, in the assumption by the court that the Power company had

completed an appropriation ing water from the city's headgate and forcibly seizing mon the city's ditch

in order to make its use available. We feel assured that further consideration and reflection will bring the court to a different conclusion. We finally insist that rights, of

whatsoever name or nature, cannot be acquired by trespass. That, as found acquired by trespass. lower court, the appropriation of the Power company is not yet ef fective and until it is effective, noth-

Therefore we ask the court to grant a rehearing of the case. Respectfully submitted. GEORGE L. NYE.

Attorney for Salt Lake City, Appel-RICHARDS & VARIAN.

Of Counsel. Of Counsel. I hereby certify that in my opinion there is good reason to believe the judgment herein is erroneous and that the cause ought to be re-examined.

GEORGE L. NYE. City Attorney, for Appellant.

and stayed away till he got good and That's what he can do to Jef-'ries. Here's the champion of the world pounds heavier than Fitzsimmons much vounger-fighting hlm day. What's he got to do? Well, he'll have to come out of that crouch and light Fitz sure. And that's the chance that Flizzimmons has to get to him. I think it is his only chance. I'd like to work with him for about six weeks. When Fitzsimmons walked u Jeffries in their fight he swung the left for the head, see? Well, most fighters would naturaly get away from it. Jef-fries stayed in close, moved in and burled his right in Fitz's body, hard and clean, below his left. Every time Fitzsimmons raised his right a little Jeff shot one in below it.

fries landed the last punch Fitzsim mons' hands were hanging down. didn't have the strength left to lift them up. Speaking of these wrist punches Tommy Ryan was asked if there was

Tommy ryan was asked if there was a knockout punch in it. "Sure thing," he said. But it is large-ly a case of miss. You swing for a jay and the fellow slips his head in a lip le and the wrist hits the jaw or neck What can you call foul about that Jeffries uses it. Fitzsimmons uses it on the body right along. I don't think a referee can call it."

BOWLERS MEET AGAIN. Three Teams of Five Men Each Play Four Games.

The Bowlers met again last night it the Brunswick alleys and four games were played by three teams of five men each. The teams were evenly matched and the result was some very fin work. The winning team was headed by Capt. Barratt and the points won were 2,469 in four games. For the high scores of the evening Barratt and Hamilton were fied with 189. Following were the scores:

Total 607 515 or more than twenty seconds 49 481 Dunning, 132 120 141 393 95 268

135 138 Reed er er er

BASKETBALL GAMES.

Leading Teams are Given a Big Surprise - Both Lost.

The crowd that attended the basketball games at the L. D. S. U. gymnasi-

um last evening were given a big surprise, and so was the team from the Y. M. C. A, and the one representing the L. D. S. juniors. Both were defeated. Company C played all around the Christians and carried off the honors by a score of 30 to 12. This is the first time the Y. M. C. A. has been defeated by the soldiers and it shows that the latter have been practicing of late and went into the contest well armed

Then the Y. M. C. A. juniors took a hard fall out of the L. D. S. U. juniors by defeating them by a score of 19 to 9. This is the first game the L. D. S. team has lost and it revealed a great reversal of form on the part of the young Christians. The first half was a shut out for the L. D. S., the score being 15 to nothing, but in the second half they played well and managed to make nine points.

est centered in the mile and threequarter event which served as a preliminary to the Thornton stakes at four miles, to be run a week from Satur Siddons won early from Black Dick. Dorian, heavily played, stopped badly after O'Connor thied to rate Derby Winner, who made a poor showing yesterday, was backed into favoritism in the first race and won driving from Black Thorn, who made his irst appearance. Bassens in the second race for \$525 by Joseph Maiden, owner of Midnight Chines O'Cannor and Jackson each rode two inners. The results:

First race, five and a half furlongs-berby Winner won, Black Thorn seeand, Oratossa third, Time, 1:14. Second race, stx furlongs, selling-

Quiz II won; Bassenzo second, Poul Play third. Time, 1:21. Third race, one mile, selling-Legal Maxim won, Cougar second, Billy

Lyons third. Time, 1:49%. Fourth race, mile and three-quarters -Siddons won, Black Dick second, Dorlan htrdl. Time, 3.18. Dorian hirdi. Time, 3:18, Fifth race, six and a half furlongs, sciling-Duckoy won, Dunblane second, Maresa third, Time, 1:26%, Sixth race, six furlongs, selling-Hor-

won, Ned Dennis second, Gusto third. Time, 1:21.

ADOPTED NEW RULES.

American League Accepts Changes Suggested by Buffalo Conference.

Detroit, Mich., March 6 .- The American league magnates at their last sesladies cloth, vicunas and sion this afternoon adopted the changes broadcloths. Prices range n the playing rules recommended by from-he Buffalo conference of last month with the exception of the foul strike rule, which will be played in the Ameri an league the same as it was last year The most important of these recon mendations is the one providing that the umpire shall call a ball on the pitcher each time he delays the game by failing to deliver the ball to the batsman when he has been in position

The exception is made, however, that n the case of the first batsman in each nning, the pitcher may occupy not nore than one minute in delivering not to exceed five balls to one of the base-men for the purpose of warming up. The advisability of removing the headuarters of the league from Chicago o New York was brought up and after ome debate a resolution was adopte eaving the matter to the discretion of Prest. Johnson.

Chess Tournament Monte Carlo, March 6 .- In the Inter-

national chess tournament this morn-ing, Wolff and Scheve won from Marall and Mortimer, respectively, and Pillsbury and Marco drew

The following additional results were recorded in the afternoon: Teichmann ranquished Reggio, Albin succumbed to Gunsberg, Tschlorin defeated Schleel er and Tarrasch disposed of Els The games between Mason and Ja-nowski and Maroczy and Mieses were adjourned in even positions

Crescent City Summary.

New Orleans, March 6 .- Crescent City summary:

First race, selling, one and one-six-teenth miles-Josie F. won, Lady Chor-ister second, Maple third. Time, 1:18%. Second race, selling, six furlongs Sir Christopher won, Sim W. second Horse Shoe Tobacco third. Time Third race, selling, six and a half fur longs-Siphon won, Parnassus second, Julia Junkin third. Time, 1:21,

Fourth race, handleap, seven fur-longs-Andes won, Tom Kingsley sec-ond, Grantor third. Time, 1:27. Fifth race one and one-quarter miles selling-Little Elkin won, Linden Ella second, Jena third. Time, 2:07%. Sixth race, mile and seventy yards-Mynheer won, Algie M second, Hom-age third. Time, 1463





Frankling and the second s