

SUPREME COURT OF UTAH

Salt Lake City v. East Jordan Irrigation Co., 40 Utah 126

121 P. 592 (1911) · Decided December 26, 1911

SUMMARY

Salt Lake City sought to condemn the right to enlarge and use an existing irrigation canal owned by East Jordan Irrigation Company. The court upheld the statute authorizing canal enlargement and concluded that the proposed use was public and necessary, but reversed the damages judgment because damages had been measured improperly and included injuries to individual water users who were not parties. It held that compensation should be limited to actual damage to the corporation's property or use, including the value of any land taken and proven costs or impairment caused by the enlargement.

OPINION

FRICK, J.

FRICK, C. J. This proceeding was instituted by appellant, a municipal corporation, against respondent, a corporation organized for the purpose of distributing water for irrigation and other beneficial purposes, to condemn, or, rather, to obtain the right to enlarge an irrigating canal, owned by respondent.

The proceeding is based on Cbmp. Laws Utah 1907, section 1288x22, which reads as follows: "When any person, corporation, or association desires to convey water for-irrigation or for any other beneficial purpose, and' there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person, corporation, or association, or the owner or owners of the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to enlarge said canal or ditch already constructed, by compensating the owner of the canal or ditch to be enlarged, for the damage, if any, caused by said enlargement; provided, that said enlargement shall be done at any time from the 1st day of October to the 1st day of March, or at any other time that may be agreed upon with the owner of said canal or ditch." A great mass of evidence was adduced at the trial and is preserved in a bill of exceptions, much of which, however, we deem entirely immaterial.

The controlling facts, briefly stated, are in substance as follows: *131The respondent owns and uses, and for more than thirty years has owned and used, an irrigating canal, the head or intake of which is in Jordan River near its source, which is in the north end of Utah Lake.

The canal thence extends in a northerly direction a distance of about nineteen miles through Salt Lake valley to what is known as Little Cottonwood Creek. The capacity of the canal is 170 cubic feet of water per second, and has been and is used to convey that amount of water from the Jordan River to landowners for irrigation and domestic purposes.

The landowners aforesaid are stockholders of respondent, which is a corporation of this state having a capital stock of \$200,000 divided into 8000 shares of the par value of twenty-five dollars each. The appellant owns 1600 shares, one-fifth of the capital stock aforesaid, and the other four-fifths is owned by about 375 stockholders who are the landowners aforesaid and the water users under the canal.

Appellant is also the owner of a canal, which, for convenience, will hereafter be called city canal, which was constructed at about the time when respondent's canal was constructed. The head or intake of the city canal is likewise in the Jordan River, but at a point considerably farther down said stream, so that the intake of the city canal is fifty feet lower in elevation than the intake of respondent's canal.

The city canal is about twenty-nine miles in length, and was constructed to convey water from its intake in Jordan River to the inhabitants of Salt Lake City for irrigation, sprinkling streets, and other purposes, not including culinary use, since the water is not potable. If the water as conveyed through the city canal can be conveyed to Salt Lake City through respondent's canal when enlarged and extended as contemplated, then the water conveyed therein could be delivered to the city inhabitants at an elevation of eighty feet higher than this can be done from the city canal, the elevation of which is too low to make it possible to deliver water through it to a large number of the 93,000 inhabitants of Salt Lake City.

The principal object of appellant in seeking to obtain the right to enlarge respondent's canal from its present capacity of 170 *132 ■ to 320 cubic feet per second and to construct an extension thereto is to enable it to make an exchange of the unpotable for potable water, and to meet the needs and requirements of a large number of the inhabitants aforesaid for a better water supply.

It also appears that respondent's canal is constructed "along the highest possible contour grade at which it was possible to divert water by gravity from Jordan River that the canal is constructed over some ravines and gulches and through some ridges and uneven surfaces, so that in constructing it fills and cuts were necessary, and its original cost of construction amounted to about \$300,000, and through which water is supplied to irrigate and cultivate about 16,000 acres of land, all of which by the use of water conveyed as aforesaid has been redeemed from a barren state; that to supply the needs of the water users along the canal many headgates or diverting appliances are necessary to divert the water from the main canal into lateral ditches for distribution; that many of these diverting appliances are used all the year, while others are used only during the irrigating season, or about one-half of the year.

The canal is constructed through practically worthless land, the title to which, except a small portion, is not in respondent. It was also shown that-, while the carrying capacity of respondent's canal is only 170 cubic feet of water per second at its narrowest points, yet that at numerous places throughout its length its capacity is much in excess thereof by reason of the irregularity of its banks.

The evidence also shows that respondent for a distance of about one and one-half miles owns the land upon which its canal is located, and that the land is of very little, if of any, value, that the remaining portions of the canal were constructed on public domain over which respondent "obtained the right to construct and has the right to maintain it, and that the title to no part of said land is in respondent.

Before entering upon the trial, the court found that the use appellant proposed to make of respondent's canal was a public use; that the proposed enlargement of the canal was necessary, and upon such findings, and in connection with the judgment for damages, the court entered a decree in conformity with the statutes of this state awarding appellant the right to enter upon and enlarge the canal.

The case in so far as damages were concerned was tried to a jury. The jury under the instructions of the court found that by the enlargement of the canal, for the reasons which will hereafter more fully appear, respondent would suffer or sustain damages in the sum of \$75,000. The court entered judgment upon the verdict, and the appellant has appealed from the judgment for damages, while respondent has also taken a cross-appeal from that portion of the judgment or decree declaring the public use and necessity of the enlargement of the canal, and also challenges appellant's right to make said enlargement under the statute we have quoted, the validity of which is assailed.

Respondent on its cross-appeal also insists that the court's rulings and instructions with respect to the measure of damages are erroneous. The theory upon which the question of damages was tried and submitted by the court is perhaps best reflected from six special findings which were submitted for answer and were answered by the jury.

We shall not state those questions and answers in the order in which they were submitted and answered,- but in the interest of clearness we shall place those which are in favor of appellant in one group and those in favor of respondent in another group. Those in the first group are as follows: "(1) Will the enlargement of the East Jordan canal, in the manner proposed by the plaintiff, impair or damage said canal as a means of diverting, conveying, and delivering water for irrigation purposes by the defendant?" Answer: "Not" "(4) Will plaintiff, Salt Lake City, have sufficient water in said East Jordan canal, after its enlargement as proposed by the plaintiff, to compensate for the loss by evaporation and seepage to the defendant from its amount or share of the water?" Answer: "Yes." "(5) If the plaintiff shall deepen the East Jordan canal one foot, as proposed by the plaintiff in this case, can the defendant then divert, convey, and distribute

every quantity of water which the defendant has hitherto for all purposes diverted, conveyed, and distributed through said canal?” Answer: “Yes.” “(6) If the plaintiff shall enlarge the said East Jordan canal to the extent and in the manner proposed by the plaintiff in this case, will- such enlargement injure or damage the usability of said canal to effectually divert, convey, and distribute every quantity of water which the defendant has heretofore diverted, conveyed, and distributed through said canal?” Answer: “No.” Those in the second group are the following: “(2) Will the enlargement of the East Jordan canal, in the manner proposed by the plaintiff, impair or damage said canal as a means for diverting, conveying, and delivering water for culinary and other domestic purposes by the defendant?” Answer: “Yes.” - “If you answer ‘Yes’ to this question, state how much in dollars and cents the damage for such impairment will be.” Answer: “Twenty-five thousand (\$25,000) dollars.” “(3) Will the entrance and occupancy of defendant’s right of way in said East Jordan canal, as proposed by the plaintiff, interfere with said right of way so as to prevent the defendant from diverting, conveying, and delivering water to the water users, under said canal, as certainly and effectually as it now does?” Answer: “Yes.” “If you answer ‘Yes’ to this question, state how much in dollars and cents the damage for such interference will be.” Answer: “Fifty thousand (\$50,000) dollars.” In connection with the foregoing questions the court also gave the jury a large number of instructions, about all of which are excepted to by appellant’s counsel, and which exceptions are now insisted upon.

For the purposes of this decision we do not deem it necessary, however, to set forth more than one of the many instructions excepted to as aforesaid, which one reads as follows: “(4) The jury are instructed that in determining what is just compensation they may include consideration of every element of usefulness or advantage in that property if it possesses advantages of location or availability for any useful purpose whatever.

All these belong to the owner, and are to be considered in estimating the usable value of the property. You are to consider the location and elevation of the property, the convenience or inconvenience of it with reference to the source of water supply, the width and character of the right of way, the existing capacity of the canal to carry water, its advantages or disadvantages as to the point of destination to which water may be delivered through it; in fact, in determining the usable value of the canal, everything which enhances such value or depreciates its worth should be taken into consideration.” We remark that the charge of the court as a whole very closely follows the theory upon which charges in condemnation proceedings where property is taken and damaged are usually based.

At this point it is convenient to dispose of at least two of respondent’s claims which arise upon its cross-appeal, namely: (1) The validity of section 1288x22, supra; and (2) whether the proposed enlargement of respondent’s canal is for a public purpose, and whether ■ such enlargement is

necessary in order to permit appellant to supply the needs for water of at least a considerable portion of its inhabitants.

In view of what is said by this court in *Nash v. Clark*, 27 Utah, 158, 75 Pac. 371, 1 L. R. A. (N. S.) 208, 101 Am. St. Hep. 953, 1 Ann. Cas. 300, the use 1 that appellant seeks to make of the canal when enlarged is certainly a- public use.

The proceeding which we are now reviewing, while ostensibly based upon section 1288x22, supra, is, nevertheless, controlled by the principles involved in the exercise 2 of the right of eminent domain, and what is said in said section must likewise be viewed and considered in the light of the principles aforesaid.

The contention of respondent's counsel, therefore, that section 1288x22, supra, is unconstitutional because it does not provide for making the compensation contemplated 3 by the Constitution of this state for taking *136or damaging private property for public use, is to our minds clearly untenable.

The section in terms provides for making compensation "to the owner of the canal or ditch to be enlarged, for damages, if any, caused by said enlargement." What more does the Constitution of this state contemplate or require? All that that instrument forbids is that "private property shall not be taken or damaged for public use without just compensation." Article 1, sec. 22.

No attempt is made in section 1288x22, supra, to sanction what the Constitution forbids, and hence it is clearly not an invasion of that instrument. The contention that no necessity for enlarging the canal is shown requires no special comment.

We think the evidence is ample to support the court's finding and decree upon that subject. We will now proceed to a consideration of the principal question arising upon appellant's appeal, namely: What is the measure of damages that should prevail in proceedings of this kind?

In other words, what rule should be adopted in ascertaining and determining the "just compensation" required by the Constitution to be made to the 4 owner of the canal which is sought to be enlarged? Upon this question counsel for the respective parties are hopelessly at variance. With respect to the measure of compensation that should control in this proceeding, counsel for appellant in their brief say: "We contend that the measure of compensation is the amount of decrease, if any, in the value of the use of the East Jordan canal for canal purposes, which shall be caused by the enlargement thereof by the city for its purposes; the use by the city for its purposes being exercised jointly with the use of the respondent company for its said canal purposes." The nearest that we can arrive at the theory of counsel for respondent, when expressed in their own language, is gleaned from an objection they interposed at the trial, in which, among other things, they said: "The plaintiff (appellant), under no rule of law, is entitled to a decree or order of court authorizing it to take possession of our property and change its character and

re*137construct it, unless it take our entire property and pay therefor.” The contention of counsel for respondent, in effect, is that to enter upon its canal and to enlarge, and use it as contemplated, amounts to a taking of its property which cannot be done without paying the value thereof.

If this be not done, they contend then the constitutional provision with regard to making “just compensation” is disregarded. The contention stated in another form is that, if appellant is permitted to enlarge respondent’s canal and to use it, then appellant is obtaining a right of very great value to it, and therefore, expressing it in counsel’s own language, when “reduced to plain English, the proposition is this, that whatever the city and the public gain by this proceeding the East Jordan Irrigation Company (respondent) must of necessity lose.” We think that the fallacy of counsel’s whole argument is practically outlined in the assumption contained in the foregoing statement, namely, that respondent necessarily loses and is entitled to receive compensation for what appellant gains by the enlargement and use of the canal.

We have had occasion to consider the proposition involved in the foregoing statement in the recent case of *Tanner v. Provo, etc. Canal Co.*, 121 Pac. 584, not yet officially reported, and we refer counsel to the authorities we cited in that case.

We shall therefore do no more now than to point out the difference between the facts in this case and those in that one, and enlarge somewhat upon the reasons why we think that the theory of counsel for appellant respecting the measure of compensation is in the main correct, and why, upon the other hand, we are of the opinion that the legal propositions advanced by respondent’s counsel are untenable.

All of respondent’s contentions that its property may not be taken or damaged, or any of its property rights invaded and curtailed without making just compensation therefor, are conceded. Is it not manifest, however, that where the owner continues the use and enjoyment of his property and property rights to the same extent and for the same purposes after the contemplated change is made as he did before, then, to say the least, his property is not *138taken from him, and may not have been injured or damaged, except by the invasion of a theoretical legal right?

Assuming, for the purpose of illustration, that respondent has acquired an easement consisting of a right of passage over lands, which passageway it could extend at will limited only by its necessities; that this easement was obtained as a passage or footway for its employees consisting of several thousand young men who are engaged in transporting and delivering on foot to respondent’s customers who live along the passageway fruit of all kinds produced and done up in small packages by respondent; that, while the right of way itself is not specially limited, yet that the footpath used by the young men had to be specially prepared for use and at most places was prepared only wide enough to permit one man to pass at a time with sufficient places for turnouts for the men going in opposite directions to pass one another and for side paths to reach the several fruit users living along the passageway; that respondent had at great expense prepared the

footway, and that it answered every purpose necessary to transport and deliver the packages of fruit to the users thereof; that appellant was engaged in a like business, and, to extend the same, is entitled to exercise the right of eminent domain; that appellant has a great number of customers who live beyond the end of respondent's footway, and appellant as a means of serving such customers can make use of the footway by enlarging it; that such enlargement can be made, and, after it is made, can be used by both appellant and respondent without the use by one interfering with the use of it by the other; that the young men employed by the respondent can pass over the footway in either direction and from the footway onto the diverting paths and from them back again onto the main footway without being hindered, molested, or interfered with in any way or to any extent by appellant's men similarly engaged; that, while the number of men and the packages delivered by them may decrease at times, yet neither the one nor the other can ever increase, and respondent can neither now nor hereafter require a greater footway than the one prepared for and *139in use by its men as aforesaid — assume that the foregoing correctly reflects the conditions that prevail with respect to respondent's and appellant's use of the footpath, how can it be contended that appellant has taken or deprived, or is about to deprive, respondent of any property, property right, or any other thing possessing a substantial value?

Nor, under such circumstances, can it be said that respondent would be interfered with in its use and enjoyment of its property and property rights. Now, in what way does appellant's proposed enlargement and use of respondent's canal differ from the supposed enlargement, enjoyment, and use of the supposed footway? Assume that each cubic foot of water represents a man with a package of fruit, and there is no essential difference.

Respondent's and appellant's men would, of course, retain their identity while their water might mingle in passing down the canal, and that would be the only difference. Whenever and wherever respondent desires to divert a portion of its water into a lateral ditch for use by some individual user this can apparently be accomplished just as well after the canal is enlarged as it can now be.

But, if this should not be true, then whatever damage respondent can show that it directly sustained in that regard is an element to be considered and adjusted before permitting the enlargement and use of the canal by appellant. Let us present another illustration. Assume that A. owns an easement consisting of a passageway over lands owned by another, which passageway A. uses for a special and limited purpose, and can use it for no other.

Assume further that B. is the only person who can also use A.'s easement for a similar purpose, which use constitutes a public use. B. now seeks to condemn the right to use the passage way jointly with A., and, if B.'s application is allowed, his use of the passageway will in no way interfere with A.'s use thereof, but both can use it and serve a public purpose without interfering with each other. ' If this be permitted, it may be that B. is manifestly benefited, but, if so, does it follow that A. is injured or damaged to the same extent *140that B. is benefited?

In other words, has A. lost what B. and the public have gained? There is, there can be, but one answer to the proposition. From the foregoing is it not manifest that counsel's contention that whatever is gained by appellant in being permitted to enlarge the canal must necessarily be a corresponding loss to respondent is thoroughly groundless and fallacious?

As a further illustration of counsel's fallacious reasoning, it may be said that such a result does not follow, even where the property is actually appropriated by the exercise of the right of eminent domain under ordinary circumstances. A strip of land of but small value to the owner may be condemned, and the condemned may realize from it by the use he puts it to \$100 for every dollar he pays to the owner, and yet the condemner's gain is in no sense a loss to the original owner of the land from whom it was taken, nor is he entitled to profit thereby.

The foregoing remarks apply, however, only to the enlargement and joint use of the canal by appellant and respondent. In connection with said enlargement and use there are some special features involved in this proceeding, which, to some extent at least, are reflected by- special findings numbered 2 and 3. Finding No. 2 is based upon the evidence that in enlarging the canal the appellant will at least temporarily interfere with the distribution of water "for culinary and other domestic purposes."

The difficulty in this regard is not so much with the findings as it is with the admission of the evidence upon which the finding is based. In so far as the evidence shows that respondent will be injured or will suffer damages by appellant's entering and enlarging the canal, the allowance of damages so suffered by respondent is not only proper, but the law imperatively requires that such allowance be made.

The evidence admitted upon this branch of the case, as we read the record, was, however, not limited to the damages that respondent as a corporate entity will suffer, but it included all the damages that individual water users may sustain by reason of being temporarily deprived of the use of or being interfered with in the use of their water for the *141 domestic purposes aforesaid.

While the water users who are also stockholders of the respondent undoubtedly will be bound by any judgment that may be rendered in this proceeding so far as it in any way affects the rights of the respondent as a corporate entity and as it may affect the stockholders as such, yet the stockholders cannot be bound in case appellant invades what is purely the private right of the stockholder, and in that way damages him in a matter which does not affect the corporation.

The corporation does not represent the stockholder in his private rights or affairs, and hence cannot bind him, although it seeks to do so in an action or proceeding to which he is not a party. Let us apply the foregoing principle to this case. Assuming that A. as a stockholder of respondent, and a water user under the canal, has 500 head of cattle which must be watered daily; that in entering upon the canal and enlarging it appellant so interferes with the diversion of the water

from the canal that A. cannot obtain any water therefrom, and is compelled to obtain water for his cattle elsewhere for the space of a week or ten days, or until appellant has again placed all of the diverting appliances in place, so that A. may again obtain water as before, and that A., by reason of having to obtain water elsewhere, or for any other reason directly attributable to appellant's interference with the diversion of water, is damaged to the extent of \$500, assuming now that respondent receives these damages in this proceeding and turns the same into its treasury — how will A. obtain recompense for his injuries?

Again, may it not be, indeed, would it not be almost impossible to be otherwise than, that some stockholders as water users are damaged more than others, and that the damages, if any, may not at all be controlled or governed by the amount of stock any one of them holds in the corporation? If, therefore, the respondent is permitted to prove and recover any special damages that any individual stockholder may suffer, then such stockholders as may not have suffered any damages may nevertheless be benefited by receiving out of the treasury of respondent a portion of the damages that are suffered by the other stockholders. *142ers.

In other words, the corporation is permitted to recover for the benefit of all the stockholders, that which only a few may have suffered, and where no two may have suffered to the same extent. For the foregoing reasons we think the rule that a judgment against the corporation binds the stockholder only in matters which directly affect the corporation in its rights and liabilities is manifestly sound.

Upon both the questions involved in special findings 2 and 3, therefore, we think the evidence should be confined to matters which may affect and damage the corporation in its rights, since such special damages as will be suffered by the individual stockholders in their individual rights cannot be adjusted in this proceeding, since the proceeding is intended to fix and adjudicate the damages respondent will suffer, and not those that others may sustain who are not parties to the proceeding.

It would be unjust to require appellant to pay to respondent what belongs to another, and especially in a case where the loss can only be ascertained when the rights of such other are interfered with. We are clearly of the opinion, therefore, that the trial court proceeded upon a wrong theory with regard to the measure of damages. 1 In view that the judgment must be reversed, it becomes necessary for us to lay down some rule for the guidance of the trial court in arriving at the conclusion of what constitutes just compensation in a case like the one at bar.

We again refer to the authorities cited by us in *Tanner v. Provo, etc., Co.*, supra, for a clear definition of what is meant by the term "just compensation." Where, as in this case, property is not taken, just compensation is made when the owner receives compensation for whatever damages, if any, he sustains by having the use he is making of the property interfered with.

If the owner continues in the possession and use of his property after the proposed improvement the same as before it was made and no part of his property is actually taken, and where there are no additional costs or expenses incurred in either the use or maintenance of the property by reason of the improvement, then we can see no escape from the conclusion that the owner can *143sustain only nominal damages, and cannot recover more.

"While, in view of special findings 1, 4, 5, and 6, it would seem that respondent will sustain only nominal damages by reason of the enlargement and use of the canal by appellant, yet the evidence is not conclusive upon that point; and, in view that the jury may have taken a wrong view of the evidence in that regard, it may be that respondent may be entitled to receive damages by reason of having to change some of its diverting appliances.

Whether this be so or not may depend somewhat on whether appellant enlarges the canal by deepening or by widening it. It may be that, in case the canal should be deepened, the appliances now used for diverting and distributing water from the canal into the lateral ditches might be inadequate for that purpose. At all events, this might be so during the low water season.

True, if appellant continues an increased flow of water in the canal during the whole year, then it is quite possible that, although the bottom of the canal may be lower, yet the increased flow of water may still make the present means of diversion quite as available and useful after the enlargement as they now are. Upon the other hand, if the canal were deepened and the flow of water not increased in certain seasons of the year, different diverting appliances may be required.

This question, therefore, is one which must be determined from the evidence. Again, it is made to appear that respondent owns the land traversed by the canal for a distance of more than a mile. In making the enlargement of the canal, appellant must thus appropriate some land belonging to respondent, which, although shown to be rocky and sandy, yet must be assumed to possess some value, however small.

Whatever this value is shown to be must be allowed as compensation for land taken. For that portion of the canal where respondent does not own the land but simply has a right of way, it, of course, cannot claim compensation for what it does not own, and for that part of the canal respondent could only recover damages or compensation in accordance with the rules hereafter stated. *144It is self-evident that an irrigating canal constructed along the contour of arid hills and mountains without water must be about as useless and worthless a thing as could well be imagined.

True, there might be some material used in its construction that might be used for some other purpose, but all such would still be owned by respondent as well after as before the enlargement, and, in case the canal were abandoned, would be its property.

In view of the conditions prevailing and the purpose for which the canal is used, and the large number of people depending upon it, an abandonment seems impossible. Nor, in view of all the facts and circumstances disclosed by the evidence, is there much, if any, merit to the contention that appellant is taking something from respondent by making use of those portions of the canal which are already nearly, if not quite, large enough to receive and convey the proposed increase of flowage contemplated by appellant.

If it were shown that respondent either had water, or that it intended, to and could acquire additional water for conveyance through the canal either presently or at some future time, and that it thus intended to and could make use of the wider spaces of the canal by enlarging its capacity, then there might be some virtue in its claim that it was deprived of something valuable.

In making compensation for taking or damaging property by the exercise of the right of eminent domain, two elements must be considered: (1) Is there any property taken or damaged in fact; and (2) if so, what is the value in dollars, or, in case it is only damaged, what is the money value of the damages sustained by the owner thereof? Assuming, therefore, that the canal at certain places is already large enough to convey the additional amount of water appellant desires to convey through it, the question still remains, In what way does this affect, injure, or damage respondent?

If respondent neither loses anything of value, nor is damaged by reason of appellant's use of space for which respondent did not have nor can make any use, and such space has no substantial value, what has respondent lost?

We repeat, just compensation does not mean the value of what appellant as *145 ■ condemner gains, but it means that the respondent must receive the money value of the injury and damages sustained by it, and whether such damages are caused by reason of the taking, damaging, or by the interference with the use of the property does not change the rule of compensation.

In condemnation proceedings the question, under no circumstances, can be what has the appropriator gained; but it is, what has he from whom the property is taken or in whose hands it is damaged lost, when such loss is expressed in dollars and cents? This is the question, and the only question, to be solved in this case.

In order to arrive at a correct solution of it, in our judgment, the material elements to be ascertained and considered are: (1) The value of the land owned by respondent which is actually taken, and, if any be damaged, the amount of such damage.

(2) In what way, if at all, and to what extent, if any, are the diverting appliances used by respondent 8 in diverting and delivering water to the users thereof interfered with or affected so as to require them to be changed by reason of the enlargement and use of the canal, and, in case any or all of such appliances are thus affected, what is the amount in dollars and cents of respondent's injury or damage in that regard?

(3) To what extent, if at all, is respondent damaged in case the diversion of water for culinary and domestic purposes is temporarily interfered with? In this item the damages, if any, that may be suffered by individual water users, should not be included.

(4) Keeping in view the facts and circumstances to which we have alluded, is the respondent damaged, and, if so, to what extent in case appellant is permitted to make use of the existing enlarged portions of the canal which respondent is not using for the flowage of water, but which, to some extent at least, will be used by appellant in case it turns its water into the canal.

In view of all the circumstances, have these wider portions any substantial value, and, if so, how much? (5) After considering the foregoing-special features, then, in view that it is contemplated that respondent will continue to use and control the canal as before the enlargement, will such enlargement and the joint use of the canal as contemplated interfere with respondent's use thereof as a means for diverting, conveying, and delivering the water owned by it to the water users under said canal, and, if the usable value thereof for the purposes aforesaid is less after the enlargement and interference than it was before, what is the difference of such value?

In other words,, the question upon this branch of the case is, Will what appellant has in contemplation by the enlargement and use-of the canal diminish the usable value to respondent as a convenient means for diverting, conveying, and delivering its water to the users thereof? All questions except such as may have some bearing upon or may assist in ascertaining the-foregoing results should be eliminated from the case.

From what has been said all of the exceptions to the various instructions given or refused have been covered, and need no further consideration. This is likewise true respecting the exclusion and admission of evidence. What we have said also answers respondent's contention with respect to the elements of damages that it contends should be allowed. Nothing remains save to consider the case of *Canadian Pac.*

Ry. Co. v. Moosehead Tel. Co., 106 Me. 368, 76 Atl. 885, 29 L. R. A. (N. S.) 103, 20 Ann. Cas. 721, to which we have been referred by respondent's counsel since the case was finally submitted. Since counsel seem to place great reliance upon that case, we have carefully examined it, and we thoroughly agree with the principles there laid down.

In our judgment, however, there is nothing in that case which in any way or to any extent conflicts with the principles announced in the cases to which we have referred in the case of *Tanner v. Provo, etc., Co.*, *supra*, or with what we have said in this opinion.

The judgment is therefore reversed, and the cause is remanded to the district court of Salt Lake County, with directions to grant a new trial upon the question of damages only, and to proceed with the case in accordance with the views herein expressed, appellant to recover costs. *McCAEiTT, J.*, concurs.

