SUPREME COURT DECISIONS.

[Filed Feb. 12, 1891.]

Appeal from Superior Court, San Diego County—John R. Aitken, Judge.
For appellant, J. F. Cowdery.
For respondent, Shaw & Holland.

DEPARTMENT TWO.

THE GIANT POWDER COMPANY, Appellant, vs. THE SAN DIEGO FLUME COMPANY, Respondent. } No. 13,906.

This action was brought against Joseph Johndrew ("an original contractor" for the San Diego Flume Company) and that corporation, to recover a judgment for the value of materials furnished the contractor, which were used in his work upon the structure for the flume company, and to enforce a material man's lien upon the structure, under Section 1183 of the Code of Civil Procedure.

The evidence and the findings indicate that, after the 6th day of June, A. D. 1887, there existed a valid contract between the contractor and the owner. (Tr. fols. 160-161), so that as to all materials furnished after that date the plaintiff could file its lien claim, by virtue of the existence of the contract.

The court below seems to have proceeded under this impression, and to have based its decision, which was against the plaintiff, so far as the right to enforce its lien was concerned, or any other claim against the Flume Company, upon the theory that its claim of lien had been filed before the acceptance, completion, use or occupation of the structure, according to the terms of Section 1187 of the Code of Civil Procedure, as amended in 1887. (Tr. fol. 179).

The plaintiff appeals from the judgment against it in favor of the Flume Company, and from an order refusing a new trial.

Does the evidence sustain the findings that the plaintiff filed its lien claim before the defendant had accepted, used or occupied the work which the contractor had left in an uncompleted state?

The work which the contractor was to perform was the grading of a flume bed, surface ditches, and tunnel approaches, from the defendant's diverting dam on the San Diego River to its proposed city reservoir near San Diego, and the excavation of about three thousand lineal feet of tunnels, and lining the same with masonry, and also timbering same in accordance with the plans and specifications. (Fols. 64-66.)

Thus it will be observed the contractor was not to complete the flume, or to make complete the proposed water works of the defendant. But only to prepare the place upon which the flume was to be thereafter placed. He was to lay the foundation, as it were, on which the flume was to rest. In this respect the work to be done was somewhat similar to the laying of a foundation on which to erect a house.

It appears that about August 9, 1887, the contractor abandoned his contract, and ceased all work thereunder; that two or three days after that the flume company took possession of the flume line upon which the contractor had been working, and proceeded to complete the work which he had left unfinished. (Fols. 163-4, 167). But the court finds that it neither used nor occupied the tunneling, grading and work, which Johndrew had agreed to do. (Fol. 167). "Nor did it on or about the 10th of August, 1887, or at any time, or at all, ever accept the structure which Johndrew had been engaged in constructing for it, or accept the uncompleted part thereof." (Fol. 165).

The part of Section 1187, C. C. P., here involved reads: "* * and in case of contracts the occupation or use of the building, improvement, or structure by the owner or his representative, or the acceptance by said owner or his agent of said building, improvement or structure shall be deemed conclusive evidence of completion."

The provision seems to have been enacted in the interest of and for the better protection of lien claimants like the plaintiff.

The words of the statute "occupy or use" or "accept" have reference not only to the occupation, use or acceptance of a dwelling or other house, but to any kind of structure, building or improvement, in which the materials of a lien claimant have been used. What then is to be deemed their meaning, with regard to the matter in hand?

The facts appear to be that the contractor, on or about the 9th of August, 1887, was unable to go on with his work. Then, or a day or two thereafter, the defendant made an arrangement by which the contractor was to be absolved from his obligation under the contract, which was to be abrogated, and the defendant was to pay a certain proportion of his debts, on conditions, not including that of the plaintiff, and to have and retain certain property belonging to the contractor. It thereupon took control and possession of the work, and proceeded to complete it. (Fols. 201, 203, 207, 263, 270, 229, 255.)

The defendant having gotten rid of the contractor by this arrangement, dominated, controlled and applied to its uses the uncompleted work of the contractor, in the prosecution of which the materials of the plaintiff had been used. It occupied the work, so far as could be done, in its then state. But it used and occupied his work after the rescission of its contract with the contractor, making this work subservient to its purposes in completing the structure. It took from the contractor what he had done of the work, and also certain property of his, released him from his contract, and agreed to settle some of his debts. (Fols. 230, 232, 241.)

If it released the contractor, took his work and some of his property, and agreed to pay some of his debts, this would appear to be in a certain sense an acceptance of his work. It did not occupy and use the work in the sense that it was complete according to the terms of the contract, but, after the contractor was released, it used and occupied it as the contractor had done before. His responsibility on the contract to the defendant was ended, the latter took his work and other property and proceeded under this agreement to use and occupy the work, agreeing at the same time to pay a certain proportion of the contractor's debts. That is, it took and used, under agreement with him, what he had left, and absolved him from his contract.

The lien claim was filed on the 5th of September, 1887, within thirty days after the acceptance, use and occupation above stated.

Under our view of the statute this was sufficient, the contractor's connection with the defendant was completed and ended, the defendant accepted the work he had done, used and occupied it so far as it was capable of being so used or occupied. The findings are not supported by the evidence.

We think the judgment and order should be reversed and so advise.

FOOTE, C.

We concur:
VANCLIEF, C.,
BELCHER, C.

THE COURT.

For the reasons given in the foregoing opinion the judgment and order are reversed.

CONCURRING OPINIONS.

I concur in the judgment of reversal solely upon the ground that, in my opinion, the main points in controversy were settled against respondent on the former appeal (78 Cal. 193), and the law of the case applies. Otherwise I would hold that the lien of appellant was premature. And where the question is open I could not concur in the doctrine that there can be a lien for powder exploded in blasting for the foundation of a house or a flume. "Materials, used in the construction," as employed in the mechanics' lien law, means, in my opinion, only such material things as go *in*, and become part of, the building or structure. In the eye of justice a merchant who deals in lumber or hardware has no more right to a lien than a merchant who deals in potatoes, or flour, or sugar; and the former have a lien only as a legislative privilege. The language should not be strained for the purpose of enlarging the privileged class. The appellant has no powder *in* the structure, and never had. It merely exploded some there.

McFARLAND, J.

I concur in the judgment, and in the foregoing opinion of Commissioner Foote. The question whether powder exploded in the work of constructing a flume or tunnel may be regarded as a part of the "materials used in the construction," is not involved in the disposition of this appeal.

DeHAVEN, J.

[Filed February 10, 1891.]

Appeal from Superior Court of Santa Clara county—John Reynolds, Judge.
For appellants, Frank M. S. Stone.
For respondent, Charles B. Younger.

DEPARTMENT ONE.

IN THE MATTER OF THE ESTATE OF WM. H. MOORE, Deceased. } No. 13,062.

The special administratrix of William H. Moore, deceased, having filed her final account for settlement, the heirs of the decedent filed objections to the allowance of certain items therein, and the court, after hearing the parties thereto, settled the account by allowing a number of the items objected to, and disallowing the remainder. From this order the heirs have appealed to this court.

The chief objection to the action of the court is its allowance for certain expenditures in the repairs of the Pacific Ocean House. Prior to making these repairs the special administratrix had obtained an order from the Superior Court allowing her to expend a certain sum of money for said repairs in which was designated the particular repairs to be made, and the amount allowed for each, and which also declared "the above amounts being the full costs of repairs which said administratrix is authorized to make." After obtaining this order she proceeded with the repairs, and completed some at less expense than she was authorized to make, while in others she expended more than was permitted by the order; and she also made other repairs which were not included within the order; so that the total amount expended by her was in excess of the amount allowed by the order.

It is urged by the appellants that the court was not authorized to allow any items in her account for expenditures which were not embraced within its previous order allowing her to make the repairs.

The office and duties of a special administrator are very similar to those of a receiver in equity. Each is appointed by the court to take charge under its directions of property in litigation, or which is involved in the proceedings before it, with a view to its care, and preservation for the parties to whom the court may ultimately decide that it belongs. The powers and duties of each are special and limited to such as are defined by statute, or expressed in the order of his appointment, or which he may from time to time receive for the purpose of more effectually preserving the estate intrusted to his charge. If it becomes necessary during his management to make any repairs his expenditures therefor must be sanctioned by the court appointing him, either by previous order or by subsequent approval, before he can reimburse himself from the funds of the estate. A prudent person would obtain from the court an order therefor before making such repairs, but it is not an indispensable requisite that he should do so. If he is willing to forego such protection, and to rely upon his belief that the court will ratify his acts, there is no rule of law which will deprive the court of the power to reimburse him if his acts and expenditures are approved. In Tempest vs. Ord, (2 Mer. 55), Lord Eldon said that: "Formerly the court never permitted a receiver to lay out money without a previous order of the court, but now, when the receiver had laid out money without such previous order, it was usual to refer it to the Master to see if the transactions were beneficial to the parties, and if found to be so, the receiver was allowed the money so laid out." This rule was followed in Adams vs. Woods (15 Cal. 206) where the action of the District Court in disallowing certain payments by the receiver, on the ground that they had been made without any previous order of the court, was reversed. (See, also, High on Receivers, Section 180; Hynes vs. McDermott, 14 Daly 104.)

We do not think that the items in the account of the special administratrix for the repairs made by her should be disallowed merely because she had not obtained a previous order to make them, or because she had expended more than she was allowed. It was quite as competent for the court to approve her disbursements for repairs made without a previous order as it was to order in advance that the repairs should be made; and if it was competent for the court to allow the items in her account without a previous order having been obtained therefor, it was equally competent to allow such repairs as she might have made in excess of the amount allowed by the order. In either case the court must determine whether under all the circumstances the repairs were necessary, and the expenditures reasonable. These matters must of necessity be left to the discretion of the Judge in settling the account, and unless it appears that such discretion has been abused, it is not subject to review. The court in the present case heard testimony offered by the respective parties in reference to the contested items, and after examining it we cannot say that it was insufficient to support his order. Neither can we say that the court improperly allowed the items for the expenses of a horse and buggy, which were objected to by the heirs. For aught that appears in the record they were expenses necessarily incurred in her management of the estate. (C. C. P. Section 1616.)

Appellants also object to the allowance to the special administratrix of commissions upon the estate that came into her hands. The Code of Civil Procedure does not make any special provision for the compensation of a special administrator, but leaves it to the discretion of the court in the settlement of his account. We cannot say that it was improper for the court to take the rate of compensation fixed by the statute for an administrator as the standard for determining a proper allowance to be made to the special administratrix in the present case. To the objection that by this course an estate may be subjected to the payment of double commissions, it is sufficient to say that the court having charge of the estate has the power to prevent any improvident diversion of its funds during administration.

The order appealed from is affirmed.

HARRISON, J.

I concur:
GAROUTTE, J.

CONCURRING OPINION.

I concur. Some of the items in the account seem on their face to show an attempt to improve the property, rather than to preserve it; but as the witness Cope testified that all the work done was necessary to put the house in tenantable condition, and as there is no evidence to the contrary, except an inference which may arise from the apparent nature of the work done, it cannot be said that the order of the court is not supported by the evidence.

I think the burden of proving the necessity of the expenditures rested upon the administratrix as to all items objected to, and if all the evidence introduced is in the bill the court ought to have rejected the item of buggy hire. The bill, however, does not purport to contain all the evidence introduced, and if it did, the item referred to is so small that counsel for appellant would not desire a reversal or modification on account of an error as to it alone.

PATERSON, J.

[Filed February 12, 1891.]

Appeal from Superior Court, San Diego County—Thomas H. Bush, Judge.
For appellant, I. N. Thorne, E. W. McKinstry, Oliver P. Evans, of counsel.
For respondent, Harry L. Titus, Henry M. Smith, George H. Smith, of counsel.

IN BANK.

LUCO, Appellant, vs. TORO, Respondent. } No. 12,566.

When this cause was first submitted the judgment of the court below was affirmed, four Justices concurring. One of the Justices who participated in the decision was not present at the argument, but it was understood by the members of the court at the time of the decision referred to that counsel for both parties had stipulated at the hearing—as counsel had in nearly every other case on the calendar for the term at which this case was heard—that any Justice not present at the argument might participate in the decision. Upon a representation made by counsel for appellant, after the decision, that no such stipulation had been entered into, and upon their motion based on the ground that only three of the Justices who heard the argument had participated in the decision, the judgment was set aside. Since that time, the cause has been heard and submitted several times, but no decision has been reached, owing to a change in the personnel of the court, and an equal division of opinion among the six Justices qualified to act. At the last October term counsel for respondent moved that the judgment be affirmed, it appearing that the Justices qualified to act were equally divided in opinion.

It is admitted that a mere failure to agree cannot have the effect, *ipso facto*, of an affirmance, for the Constitution requires the concurrence of four Justices to pronounce judgment; but it is claimed that it then becomes the duty of the Justices who voted for a reversal to unite with their associates in affirming the judgment. The reason given for this contention is an argument *ab inconvenienti*. It is said that if this rule is not followed the case might be continued for four years, until a change in the membership in the court occurs: "and, then again, the same condition of things might still continue, and this would require a further continuance; and thus it might happen that the case would never be decided."

Many English and American authorities are cited in support of the motion—and no cases to the contrary have been found by respondent; but the decisions must be read in the light of the circumstances under which they were rendered. Some of the cases referred to went off on the authority of statutes providing that in cases of equal division among the Judges the judgment should be affirmed, others upon a rule following the practice of the English courts and the others upon the ground of expediency. The case of Ayers vs. Bensley (32 Cal. 632) is hardly in point. There a *judgment* had been rendered by a constitutional quorum, and it was only on petition for re-hearing that a division occurred. The rule has always been with respect to petitions for re-hearings that as many Justices as are necessary to pronounce the judgment must concur in granting a re-hearing or the petition will be denied.

In jurisdictions presided over by Judges holding for life or for terms so great as to make the probability of a change in the membership of the court remote, the judgment of affirmance follows a division *ex necessitate rei*. In such a case the decree does not import a division as to the nature of the judgment, but as to the questions of law and fact involved in it. While the decree is a bar to any subsequent action for the same cause, no matters of law are decided and it therefore possesses no dignity as a judicial precedent, but carries upon its face a badge which precludes any application of it in future under the doctrine of *stare decisis*. The Judges simply agree that it is expedient to finish the litigation. It is a public expediency and is often expedient also with respect to the interests of the parties. Supported by these considerations, and the presumption of correctness which always attaches to the judgment of the court below, it is proper and right that the Judges who were in favor of a reversal should waive any insistence of opinion and unite with their associates in an affirmance of the judgment. This they do without in any way relinquishing their convictions upon the questions of law or fact involved in the case. But here there are no such considerations as induced the decisions in the cases referred to. At the time the motion was made it was evident that before the time for the next term of court at which the cause would be heard, three, at least, including the Justice disqualified to act—and possibly four of the Justices—would be succeeded by others on the bench. Within a month after the motion was made, and before an opinion was written, an election occurred which resulted in the choice of three new Justices, all of whom are qualified to assist in deciding the cause on its merits. Under these circumstances we thought at the time the motion was submitted, and still think, that the cause should be presented on its merits before the court as now constituted.

The motion is therefore denied.

PATERSON, J.

We concur:
BEATTY, C. J.,
McFARLAND, J.,
SHARPSTEIN, J.

Although we were not present at the argument of the motion, which was afterwards submitted on briefs, counsel for appellant not being present at the time the motion was made, we have considered the point made by respondent and concur in the views expressed in the opinion of Justice Paterson.

HARRISON, J.,
DeHAVEN, J.,
GAROUTTE, J.

[Filed February 12, 1891.]

Appeal from Superior Court, Kern County—R. E. Arick, Judge.
For appellant, Jarboe, Harrison & Goodfellow.
For respondent, Haggin & Van Ness.

DEPARTMENT TWO.

M. L. HARRON, Respondent, vs. CITY OF LONDON FIRE INSURANCE COMPANY, Appellant. } No. 13,754.

This is an action to recover $5,000 upon an alleged parol contract for the insurance of furniture, etc., in the Southern Hotel, at Bakersfield, in Kern County. The verdict and judgment were for plaintiff, and defendant appeals.

The defendant is a corporation organized under the laws of Great Britain, and does business in the Pacific States and Territories under the management of W. J. Callingham, and its head office under his charge is in San Francisco. It has local agents in various cities and towns, and on July 6, 1889, its agent at Bakersfield was, and for a long time had been, H. A. Blodget. On that date a small fire occurred in the Southern Hotel, of which plaintiff was lessee, and in which she had a large amount of furniture and other personal property. The hotel was conducted and managed by her brother, W. H. Harron, who was her general agent for that purpose. Being alarmed at the occurrence of the fire her said agent went to said Blodget in the afternoon of said July 6th and told him that he wanted an insurance on said furniture, etc., to take effect immediately, and that if he could not obtain it from him he would go elsewhere; and it is clear that the jury were warranted by the evidence in finding that a contract of insurance on said property for one year for $5,000 was then and there made by defendant with plaintiff, to take effect immediately, provided Blodget had the authority to make such contract for defendant. On the next day, July 7th, a general conflagration, not originating in said hotel, destroyed nearly the entire town, including plaintiff's said property, which was of a value exceeding $5,000. The real question in the case is: Was the jury authorized by the evidence to find that Blodget had power to bind the defendant? (There are some minor points made about certain rulings of the court, but we do not think that in such rulings any material error was committed.)

Blodget had a written commission from defendant, which certifies that he is appointed agent of defendant "with full power to receive proposals for insurance against loss or damage by fire in Bakersfield and vicinity, to fix rates of premium, and to receive moneys on behalf of the City of London Fire Insurance Company, limited, of London, Eng., subject to the rules and regulations of said company, and *such instructions as may be given* from time to time by the general agents of the western department of the United States." (The foregoing words in quotation marks are the only words in the instrument which either grant or restrict the powers of Blodget.) Appellant contends that Blodget's powers must be determined by the commission, and that it does not include the power to accept applications or to make any insurance contracts, while counsel for respondent contends that such power is fairly included in the language of the instrument. We do not think it necessary to determine whether the general scope of the commission, properly construed, includes the authority here questioned; because, we think, that in this particular case there were "such instructions * * * given * * * by the general agents" of defendant as authorized Blodget to make the contract sued on. Harron testified that at the time of the contract he asked Blodget: "Don't I want to make a written application?" and was answered: "No, you are not asking for this insurance. You are giving it to Mr. Callingham upon his asking for it. * * * I have letters from Mr. Callingham asking for that insurance, consequently it is not necessary for you to make a written application." Blodget testified that "I told him (Harron) that I could furnish him insurance; that Mr. Callingham had asked for the insurance on the furniture of the hotel; that I had promised to give it to him, and that I would send it to him, and that it would cover from then." Furthermore, it appears in evidence that defendant had taken policies on the Southern Hotel; that on April 11, 1889, in a letter to Blodget about those policies, Callingham wrote as follows: "I dropped you a line yesterday asking if there would be some insurance required on the hotel furniture and other contents of the building. * * * If any insurance is required as suggested I shall be very glad to give my attention to it;" and, that on April 10th, he had written to Blodget as follows: "If the furniture of the Southern Hotel is to be insured I could take care of the whole line for you, and would place it in any companies that you specially desire." We think that this testimony and evidence was sufficient to justify the jury in finding that Blodget had authority to make the contract with plaintiff, and that he did make it on behalf of defendant. There is no pretense that a written policy embracing the oral contract would not have been made, *of the date of July 6th*, if the fire had not taken place before it could have been done. Callingham, when on the witness stand, did not pretend that there was any other reason for rejecting the policy. There is nothing in the point that the plaintiff's brother and manager of the hotel, W. H. Harron, had no authority to act for plaintiff.

Judgment and order denying the motion for a new trial affirmed.

McFARLAND, J.

We concur:
SHARPSTEIN, J.,
BEATTY, C. J.

[Filed February 14. 1891.]

Appeal from Superior Court of San Diego County—John R. Aiken, Judge.
For appellants, Hunsaker & Britt and J. E. Deakin.
For respondents, Luce, McDonald & Terrance, Wm. F. Herrin, of counsel.

IN BANK.

SAN DIEGO L. & T Co., Respondent, vs. NEALE, ET AL., Appellants. } No. 13,674.

This is a proceeding to condemn land for reservoir purposes. On the former appeal (78 Cal. 63), the judgment was affirmed as to all the issues except the issue as to the value of the land. The cause was remanded for a new trial of that issue, a trial was had, and a judgment on a verdict for $122,657 50 and costs of suit was entered in favor of defendants; but the plaintiffs moved for a new trial, which motion was granted, and the defendants have appealed.

It would be sufficient for us to say that as the order appealed from is one *granting* a new trial, and as the evidence as to the value of the land condemned is conflicting, the decision of the court below, in the absence of a showing of an abuse of discretion, will not be reversed. This rule has been so many times announced it would be a work of supererogation to cite authorities in support of it. As some of the rulings of the court below at the trial, in our opinion, were erroneous, however, we deem it advisable to refer to them for the guidance of the court at the next trial.

When the motion for a new trial was called for hearing, the defendants objected to the same being heard on the ground that the court had no jurisdiction to hear or determine a question of fact as to value. The same objection, although somewhat different in form, was presented on the former appeal and overruled. (78 Cal., 65). The burden of proof as to value was on the defendants. (C. S. R. R. Co. vs. S. P. R. R. Co., 67 Cal. 63; Monterey County vs. Cushing, 83 Cal. 507). It was their duty to allege and prove the value. Both parties assumed at the trial that there was an issue as to value, the case proceeded to trial and judgment upon that assumption, and the defendants cannot now complain.

The nature of defendant's land and its situation with respect to the reservoir of plaintiff, is shown in the opinion filed on the former appeal. (78 Cal. 66.) It was there held that the court erred in allowing defendants to introduce evidence of value based on the fact that plaintiff's dam was already in course of construction, or upon "the circumstance that the land susceptible of irrigation from the reservoir would be enhanced in value * * * by having irrigation facilities afforded to it. * * * Where there is no actual current rate of price, and where in consequence the court must arrive at the value from a consideration of the uses to which the property may be put, it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land." The court held that the present value of the property for prospective purposes might be given, and that it was proper, therefore, to show the value of the property for reservoir purposes, although it had never been used for such purposes.

The court below, however, in its rulings and instructions at the last trial, seems to have entirely misconceived the scope and effect of our former decision. Instructions were given, based upon facts so remote from the real issue in the case, as to mislead the jury on the question of damages.

As stated before, it was decided on the former appeal, and is the law of the case, that the value of the land for any special purpose may be taken into account as one of the elements tending to show its market value. The fact that the land is suitable for such a purpose, and a chance exists that it may some time bring an enhanced value therefor, has a tendency to increase its market value, and may properly be considered in determining what its present market value is. In this connection it is proper to say that the learned judge who wrote the opinion in Alloway vs. City of Nashville, (88 Tenn. 510), evidently misapprehended our decision in this case on the former appeal.

We did not hold that the value of the land for reservoir purposes was a measure of damages, independent of any other consideration or element of value. On the contrary, the opinion distinctly states that the *market value* is to be the measure of damages, and that evidence of value for a special purpose is only to be considered as an element of the question. Neither the value in use to the plaintiff nor to the owner is to govern. Indeed, to guard against misapprehension, the court was careful to say: "The word *value* is used in different senses. * * * For the purposes of the law of eminent domain, however, the term has reference to the value in exchange or market value. There are some cases which seem to hold that the value in use to the owner is to be taken, if it exceeds the market value. But it will generally be found, on careful examination, that such cases either relate to the damage accruing to the owner from the taking, and not to the value of the property itself, or overlook the distinction between the two things. The consensus of the best considered cases is, that for the purposes in hand the value to be taken is the market value. * * * The problem, then, is to ascertain what is the market value. * * * From the necessity of the case, the value must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable. * * * What is done is merely to take into consideration the purposes for which the property is suitable, as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which, in a general sense, may be said to be the market value." In the Tennessee case the court, not having the record in this case before it, fell into the error of saying that, "in that case it was held that it was competent to prove the value of the land for a reservoir site, and to make that value the measure of damages, independent of any other consideration or element of value." The market value is the ultimate fact to be determined by the jury. If the land has a value for any particular purpose, its market value may be thereby enhanced. If its value for one purpose is to be excluded, why not for another? A vacant lot in a city cannot be condemned and taken at its value for agricultural purposes. If land which has been used only for pasturage contains valuable mineral deposits, it cannot be taken for public use without reference to what reasonable purchasers would, in the opinion of experts, be willing to give for it, taking into consideration the character of such deposits. The fact that the plaintiff wants the land for a particular purpose should not defeat the defendant in his efforts to show its market value by showing as an element its value for that particular purpose; and the fact that the plaintiff is the only person who has thus far offered to purchase is immaterial. The true distinction is that the demand of the plaintiff alone is not to be considered exclusive of other considerations. It goes to make up the aggregate of demands, or probable demands, which is one of the elements of the inquiry. There is nothing in what we have said inconsistent with what was decided in Gilmer vs. Lime Point, 19 Cal. 47, or C. P. R. R. Co. vs. Pearson, 35 *Id.* 247. In the former case the defendant offered to show what the land was worth to the Government as a site for fortification. As the Government was the only possible purchaser for such a purpose, it was apparent that the attempt to show what it was worth for a fortification was an attempt to prove what was its peculiar value to the Government. In C. P. R. R. Co. vs. Pearson, the defendant attempted to show what the land would be worth to the owner, provided the State should thereafter grant him a wharf franchise; and the court simply held that such a fact was too remote and speculative.

An attempt is made to distinguish a case where the owner of the land sought to be condemned occupies a commanding position from one where the land is remote from the dam site. This contention was disposed of adversely to the appellants in the decision on the former appeal. Land which is remote from the dam site may have a less value than land at the dam site, but the rule governing the admissibility of evidence must necessarily be the same in each case. The question in each case is: What is its market value? and is determined by the same rules. It will not do to say that land sought to be condemned for a reservoir purpose has no value for such purpose because it is too remote from the dam site. The very fact that this land is sought to be condemned for such a purpose is an admission of its adaptability therefor.

But at the last trial the evidence was not confined to the question of the adaptability and value of the property as a reservoir site, considered as an element in the determination of its actual or market value. Witnesses were allowed to give estimates of value based upon speculative improvements, increase of population, extension of water systems, and profits which would result from the distribution and sale of the water, thus permitting the defendants to show practically what plaintiff or another in its situation, could afford to pay for the land, rather than go without it. It was admitted at the trial that "it was not practicable to have constructed a reservoir upon the 350.45 acres of land in controversy in this action except in connection with the adjoining land of the plaintiff below it, and lying between the defendant's land and the dam site." The plaintiff had constructed a dam by which water was impounded, covering all the land below defendant's land, and, in fact, at the time of the trial, a portion of the lands in controversy. One of the witnesses (Sproul) testified on behalf of defendants that it would cost $960,000 to construct a dam, system of mains and distributing pipes in order to utilize the reservoir to its utmost capacity over the territory tributary to it, and that, estimating the market value of water to be $10 per acre for irrigation, and ten cents per thousand gallons for domestic purposes, the value of the land in controversy was $841 per acre on January 13, 1887. He stated that in arriving at that conclusion he estimated the cost of construction of a suitable dam and mains through the lands to be irrigated; assumed that National City had a population of 2,000, and that its increase in the next ten years would amount to 6,500; that the quantity of water would irrigate 20,000 acres of land; that it would take ten years to complete the system and dispose of the entire volume of water at the rate of 2,000 acres per year; allowed $15,000 for running expenses, taxes, etc., and a sinking fund of $11,000 to renew the system at the end of twenty years; credited the reservoir for the sale of water rights and water rates received from National City; charged the reservoir interest at the rate of ten per cent., and carried the same system of debits and credits through a term of ten years, showing a balance at the end of the tenth year of $1,623,064 after all the indebtedness had been paid. This balance he considered as the amount that would be due to the land at the end of ten years. "The present worth of that amount, discounted at ten per cent., or if that amount had been paid at the beginning or that ten years instead of at the end, it should have been $624,225, which, divided between 742 acres of land, amounts to $841 an acre.

The testimony was objected to, the objection was overruled and plaintiff excepted. After it was admitted the plaintiff moved the court to strike it out on the ground that it was based upon considerations and contingencies so remote, uncertain and speculative as to be wholly inadmissible and incompetent as a basis for fixing the market value of the land in question on the 13th day of June, 1887, or at any other time. The court denied the motion and plaintiff excepted.

Another witness, Ryan, estimated the land to be worth $600 per acre, basing his conclusion upon similar calculations and contingencies, and upon the assumption that it was to be used in connection with plaintiff's reservoir.

It is contended by appellants that the testimony of these witnesses, and other testimony of a similar nature, was admissible because there were no similar properties in the market, by a comparison with which the market value of the property in controversy could be arrived at; that the method pursued was simply fixing the actual value by calculation—by considering the necessary expenditure in putting it in condition for certain purposes, and the probable income and profit which would result from its use. Many cases are cited in support of this contention, among them the Boom Company vs. Patterson, 98 U. S. 403; L. R. and F. S. R. R. vs. McGhee, 41 Ark. 202; and L. R. J. R. R. vs. Woodruff, 5 S. W. Rep. 792. But none of the cases cited go to the extent claimed for them. In Boom Company vs. Patterson the court said that as a general rule compensation to the owner is to be estimated by reference to the uses for which the lands are suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future, and that the adaptability of the land for a certain purpose is a proper element for consideration in estimating the value of the lands when appropriated for public use. There is nothing in the report of that case to show that the defendant was permitted to prove the cost of constructing the boom and the profits which would result to the company from the use thereof. In L. R. J. R. R. Co. vs. Woodruff, *supra*, the Court said: "If the market value is the price for which the property could be sold on the market, we will next be led to inquire, How is the market value to be proven? This is usually done by calling witnesses who are familiar with the property, and asking their opinion as to such value. * * * When the witness has made his estimate as to the market value of the property, it is competent to support his estimate by having him describe the property, giving its location, advantages and surroundings, though ordinarily this would be uncalled for, unless his estimate was attacked on his cross-examination, in which case the party introducing him would have ample opportunity to rebut any facts which might appear to be derogatory to his estimate. * * * We deem it proper, however, to say that the presiding Judge should not suffer collateral issues to spring up and multiply, or the jury be taxed with facts and figures which could throw no appreciable light upon the question in hand, namely, the ascertainment of the market value of the property."

In the case at bar the opinion of some of the witnesses was based on speculative and conjectural calculations of expenditure and profit for a period of five years, and others on a basis of ten years' use of the property in controversy, in connection with the property owned by plaintiff. The facts and figures relied on in support of these opinions not only threw no light on the question, but must have operated to confuse and mislead the minds of the jury. Of course, as was said in Boom Company vs. Patterson, it is perhaps impossible to formulate a rule to govern the appraisement of property in all cases; but it is easy and safe to pursue the course pointed out by the court in L. R. J. R. R. vs. Woodruff. Let the witnesses in direct examination state their opinion as to the market value of the property, "having regard to the existing business wants of the community, or such as may be reasonably expected in the immediate future," and support their estimates by a description of the property, giving its location, surroundings and advantages for any particular use, if it have any. Opposing counsel should then be "allowed to make every inquiry touching the property which one about to buy it would feel it to his interest to make," and for the information of the jury, and to test the value of the opinion given, be permitted the widest latitude in cross-examination.

The following authorities establish the proposition that the compensation to be awarded the owner of the land condemned cannot be based upon the value of the property to the person or company in charge of the public use, nor by its necessities, and that it is not proper to take into consideration the profits which may result from the use of the land, especially where the profits depend upon the expenditure of large sums of money in carrying out the contemplated enterprise: T. W. Canal Co. vs. Archer, 9 Gill & J., Md. 481; Gardner vs. Inhabitants Brookline, 127 Mass. 358; Burke vs. Wigglesworth, 117 Id. 302; Reading R. R. Co. vs. Balthasar, 17 Atl. Rep. 518; Dorlan vs. E. B. W. R. R. Co., 46 Pa. St. 520; S. & C. R. R. Co. vs. Gaigiani, 49 Cal. 139.

Appellants contend that the court did not err in refusing to strike out the testimony objected to, because the witnesses were competent to express an opinion as to value, and the reasons for such opinion can only affect the weight to be given to their testimony; but we think that where a witness bases his opinion *entirely upon incompetent and inadmissible matters*, or shows that such matters are the chief elements in the calculations which lead him to such conclusions, it should be rejected altogether. (R. and P. R. R. Co. vs. Balthasar, 13 Atl. Rep. 294.) It clearly appears that the witnesses referred to based their estimate of the value of the property upon an anticipated investment of a large amount of money in an extensive system of water works, and founded their opinion largely upon hypothetical expenditures and receipts of money, and an increased demand for water. The court, too, adopted the same erroneous rules, and under its instructions the jury must have found such price as in the opinion of the witnesses the land might bring, or probably would bring at some future period, if plaintiff or another in its situation should extend the works as contemplated by the witnesses.

It is claimed by the appellants that the plaintiff ought not to be heard to complain of the ruling of the court in admitting the testimony referred to, because its own witnesses had given testimony of the same character; but, as was said when the case was here before, "the introduction of irrelevant evidence upon one side without objection does not justify the introduction of irrelevant evidence upon the other side." (See, also, Walkup vs. Pratt, 5 Har. & J. 56.) But, if the ruling of the court could be sustained for the reasons urged, the court in some of its instructions to the jury, as stated before, adopted the same rules as those followed by the witnesses in their testimony.

The court instructed the jury, at the request of defendant, that in considering the weight to be given to the opinions of witnesses as to the value of the land for reservoir purposes, they might take into consideration, amongst other things, the character and capacity of the works necessary and proper for the utilization of the defendants' land for reservoir purposes, the quality and condition of the lands irrigable from the reservoir, the need of such lands for irrigation in order to make them habitable and productive, together with the needs of the inhabitants of cities and towns within reach of this system of water works, and appearing on the 13th of June, 1887, to be dependent upon it for water; *the proportion which the defendants' land bears to the remainder of the plaintiff's reservoir;* the quantity of water the storage of which is secured by the use of the defendants' land *in connection with the adjoining land of plaintiff or other persons, and the value of such water as a salable commodity in the neighborhood tributary to this reservoir on the 13th day of June, 1887;* also, that in considering the value of the land for reservoir purposes, as a guide to ascertaining its market value, the question was not what it was worth to plaintiff as owner of the remainder of the reservoir and dam site, in June, 1887, doing business as they proposed to do, but it is, what was it worth to any reasonable person able and willing to buy, *and intending to acquire by purchase or condemnation the dam site and the remainder of the reservoir, and to use the whole for supplying water for public use over the territory tributary to this system;* that the jury had a right to consider, if it be a fact, the proximity of the land to an eligible dam site, and its availability for reservoir purposes, *in connection with such dam site and other adjacent lands.*

The court had fairly and fully instructed the jury at the request of plaintiff on the subject of value, but these instructions, given at the request of the defendants, were erroneous, because they, in effect, indorsed the methods of calculation employed by the defendants' witnesses, and informed the jury—at least the jury undoubtedly so understood it—that they might find the value to be what the land was worth to the plaintiff, or another in its situation, and that this might be determined by a calculation of the probable profits from sales of water and water rights at prospective prices. The cost of works necessary for the utilization of the land for reservoir purposes was an element in the calculation as conjectural and speculative as would be the cost of a railroad and running stock necessary for the operation thereof, in fixing the value of land condemned for railroad purposes. The quality and condition of the lands to be affected was as foreign to a legitimate estimate of the market value of the land as the size and growth of a city on the line of the railroad would be in fixing the value of land taken for railroad purposes. The necessities of the public are never taken into consideration in fixing the value. They are an element which must be proved before the land can be taken, but are never an element of the queston as to compensation. The proportion which the defendants' land bore to the remainder of the plaintiff's reservoir, and the quantity of water which would be stored by use of the defendants' land in connection with the land of plaintiff, and the value of the water as a salable commodity, were clearly improper elements to be considered. (T. W. Canal Co. vs. Archer, and other cases, *supra*.) The question was not what the property was worth to a person intending to acquire it and the dam site and the remainder of the reservoir by purchase or condemnation for the purpose of supplying water over the territory tributary to the system, but what was the market value of the property itself. In other words, what the defendants could have obtained for their land if it had been offered for sale in the market, a reasonable time being given within which to make the sale. The plaintiff must compete in the market with *bona fide* purchasers generally, but its necessities cannot be taken advantage of. So far as the value of the land in controversy may have been increased to purchasers generally by the construction and use of the plaintiff's dam and reservoir, or as a part of the entire reservoir site, such fact should be considered, but the value of the land when used in connection with the plaintiff's land cannot be taken as a criterion, for this would be taking the value to the plaintiff as the measure of compensation. The jury had a right to consider the fact, in determining the market value, that the land in controversy was in proximity to a dam site, and to consider its adaptability for reservoir purposes, and to determine whether or not its market value had been enhanced by improvements put upon adjoining property, but for the reasons stated its adaptability, for reservoir purposes, should not have been considered "in connection with such dam site, and other adjacent lands."

Respondent has requested a decision on every one of the seventeen assignments of error in the statement; but, in view of what we have said regarding the rulings of the court and the instructions, it seems unnecessary to do so. It is sufficient to say that any *facts* showing the nature of the land in controversy, and its adaptability for reservoir purposes, may be shown. The area of the water shed, and amount of water, were matters proper to be considered, for a reservoir would be useless without water. That there was land irrigable from the reservoir, and cities and towns which were being supplied with water from wells were matters, not only tending to show that it was a practical reservoir site, but bearing directly upon its value. The condition of the property, the uses to which it may be put, having regard to the existing advantages for making a practical use of the property, and such advantages as may be reasonably expected in the immediate future, are all matters for consideration in estimating the value of the lands (Boom Company vs. Patterson, *supra*); but to attempt to ascertain the value by estimating the cost of works necessary for its use for a particular purpose, the cost of operation, prospective sales and estimated profits, increased demands through growth of population, etc., requires "a degree of refinement in the measure of values which seem to us totally incompatible with the gross estimates of common life. * * * The gross estimates of common life are all that courts and juries have skill enough to use as a measure of value. All other measures are necessarily arbitrary and fanciful." (Searle vs. L. & B. R. R. Co., 33 Pa. St., p. 64.)

The court did not err in overruling plaintiff's objection to the question asked Mr. Schuyler during his cross-examination. It was proper to show that he had at some prior time entertained a different opinion as to the value of the property.

Some of the witnesses on both sides never saw the land in controversy until several years after the date of the summons, at which time the right to compensation and damages accrued. We think their opinions ought not to have been received.

We think that the company should pay the costs of this proceeding on account of the manner in which it opened and proved its case at the last trial. Section 1255 of the Code of Civil Procedure provides that "costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court." Mr. Lewis, in his work on Eminent Domain, paragraph 559, in speaking of the question of costs, says: "It seems to us that courts should be guided by the following principles and considerations in the matter: By the Constitution the owner is entitled to just compensation for his property taken for public use; he is entitled to receive this compensation before the property is taken or his possession disturbed; if the parties cannot agree upon the amount, it must be ascertained in the manner provided by law, as the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property, and he should pay all the expenses which attach to the process. Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional and void. * * * If the statue gives the condemning party a right of appeal it cannot cast the costs upon the owner, even if the assessment is reduced." (See also in re Nyws and B. R. R. Co., 94 N. Y. 287.) Whatever may be the constitutional rights of the parties, we think in this case, under Section 1255, that it will be a proper exercise of discretion to require the company to pay costs.

The order is affirmed and the court below is directed to tax the costs of the last trial, and of this appeal, against the plaintiff.

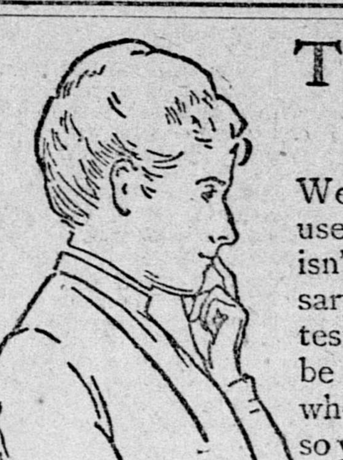
PATERSON, J.

We concur:
McFARLAND, J.,
HARRISON, J.,
GAROUTTE, J.,
SHARPSTEIN, J.

CONCURRING OPINION.

I concur in the judgment on the ground that there was such a conflict of evidence on the question of value as to warrant the order directing a new trial, but I do not think the Superior Court erred in ruling upon the motions to strike out testimony, or in its instructions to the jury.

BEATTY, C. J.



There must be
some reason for it

We never have compelled anyone to use Pearline. We'd like to, but it isn't feasible. Besides, it isn't necessary. Millions use Pearline, and have tested and proved it. It's too old to be unknown, if it were a fraud, but where is the thing as popular and yet so young? If you know Pearline, you know the reason. In all washing and cleaning, there's nothing that saves as much labor and does as much work. It hurts nothing, saves wear on everything, costs no more than common soap and is more economical. Reasons enough for most women; think, are they not good enough for you?

Beware Peddlers and some unscrupulous grocers will tell you "this is as good as" or "the same as Pearline." IT'S FALSE—Pearline is never peddled, and if your grocer sends you something in place of Pearline, do the honest thing—*send it back*.

176 JAMES PYLE, New York.

Changes of Climate

Kill more people than is generally known. Particularly is this the case in instances where the constitution is delicate, and among our immigrant population seeking new homes in those portions of the West, and where malarial and typhoid fevers prevail at certain seasons of the year. The best preparative for a change of climate, or of diet and water which that change necessitates, is Hostetter's Stomach Bitters, which not only fortifies the system against malaria, a variable temperature, damp and the debilitating effects of tropical heat, but is also the leading remedy for constipation, dyspepsia, liver complaint, bodily troubles specially apt to attack emigrants and visitors to regions near the equator, mariners and tourists. Whether used as a safeguard by sea voyagers, travelers by land, miners or agriculturalists in newly populated districts, this fine specific has elicited the most favorable testimony.