distribution according to the respective rights of the shareholders; and the corporation is the owner of the water so appropriated, and represents all the parties beneficially interested in the appropriation and use thereof. All the water running in the natural stream was so used, by those persons and their successors, from the time of the first appropriation until about the year 1894, when, about two miles above the point of diversion of the plaintiff, the defendants erected a head gate in the natural channel of the creek, and diverted about one-half of the water then flowing in the stream, and from that time until the commencement of this suit the defendants have continued to divert such portion of the stream. Prior to the diversion of any water by them from the creek, the defendant company had become the owner of a number of mining claims, and to develop these claims, and for the purpose of extracting minerals therefrom, the mining company had driven two tunnels upon its own land; the one, the Queen tunnel, extending into the mountains about 2,900 feet, and the other, or Butterfield tunnel, over 8,200 feet. In the construction of these tunnels the water in dispute was developed, turned into the creek, and, after flowing in the natural channel for a considerable distance, diverted by the defendants, at their point of diversion, by means of the head gate. The plaintiff claims, and introduced evidence tending to show, that the construction of the tunnels caused a number of springs, out of which water theretofore flowed into the creek, to dry up and cease flowing, and that, except for the tunnels, the water flowing from them would flow from the springs. The defendants introduced evidence tending to show that, in the vicinity of where the springs in question are claimed to have formerly existed, springs are still flowing; that the construction of the tunnels did not have the effect of causing any springs to cease flowing; that, if any springs ceased to flow, it was the result of other causes, such as less precipitation for several successive years, the destruction of timber and undergrowth, which formerly retarded the snow from melting and retained moisture, etc.; and that the streams of water flowing out of the tunnels came from percolation and small undefined and unknown subterranean streams. The evidence shows that water comes into the Butterfield tunnel from innumerable places beyond a point therein about 5,500 feet from the mouth thereof. There appears to be no surface indication of any channel or water course between the springs in question and the tunnels, and the springs claimed to have been affected are situate from nearly a mile to a mile and a half distant from the tunnels. At the trial the court entered a decree in favor of the defendants, and the plaintiff appealed.

This case was before us on a former occasion, and we then reversed it, and remanded it for a new trial. 19 Utah 453, 57 Pac. 537, 51 L. R. A. 930. At the former trial it
1 was, the same as at this, decided in favor of the defendants, and the plaintiff then, same as now, was the appellant. On this appeal, the appellant in the first instance insists that, under the "law of the case," this court should set aside the findings and decree of the trial court, and order judgment entered as prayed for in the complaint; and that the questions now herein presented were adjudicated on the former appeal, and have become *res judicata*. The efficacy of the general rule here invoked is not to be doubted. The rule, however, is not entirely without limitations. It does not apply to expressions of opinions on questions the disposition of which was not necessary for the decision, or to the reasoning or illustrations in an opinion, however important in determining what was decided. Nothing in a decision which is merely *obiter dictum* is controlled by the rule. Nor does a decision, as to a question of fact, fall within the rule, when, upon the retrial, material evidence not offered at the first trial is introduced. So the doctrine of *res judicata* does not apply where a judgment is reversed and remanded for a new trial because material findings of fact are not supported by the proof, and when at