

## CHAPTER 106

## DRAINAGE ACT

**106.01 DEFINITIONS.**

**HISTORY.** 1925 c. 415 s. 1; M.S. 1927 s. 6840-1.

A ditch proceeding is one in rem and the order establishing the ditch has the same final and binding force as a judgment in rem. A new status is thereby created for the lands affected and where a benefit is derived and land is assessed for such benefit, it becomes a property right appurtenant to the land and not to be taken or impaired even through governmental action except by due process of law. *Lupkes v Clifton*, 157 M 493, 196 NW 666.

Laws 1925, Chapter 415, is a complete drainage law covering the entire field of county and judicial ditches. It is not an amendment to any prior act and it expressly repeals all prior laws on the same subject. It is not a compilation or codification of prior drainage acts because it contains numerous new provisions not found in prior laws and omits many provisions found in the laws thereby expressly repealed. In re Judicial Ditch No. 3, 180 M 132, 230 NW 481.

Bonds issued by the county under the drainage act of 1905 are direct and general obligations of the county issuing the same. *Van Felt v Birtlirud*, 117 M 50, 134 NW 226.

The drainage act clearly requires that in all cases where the cleaning out or repair or improvement of the ditch will cost more than 30 per cent of the original cost, there must be a petition signed by the majority of the property owners holding 50 per cent of the property before the board can act. OAG April 5, 1934 (308).

The drainage act merely affords a means for draining land in need thereof, whether within or without the corporate limits of any city or village. Only ditches which provide drainage necessary to accomplish some public purpose can be established under it, and even such a ditch cannot be constructed unless the estimated benefits to be derived from it exceed the total cost of construction, including damages awarded. OAG Dec. 13, 1935; 1936 (25).

One having a mere option to purchase land is not a "resident owner", or "resident freeholder", and cannot sign a petition under section 106.49. OAG June 2, 1931.

The general drainage law authorized construction of ditches whenever prescribed conditions are found to exist even though the land to be drained lies within the limits of a city or village. OAG Dec. 13, 1935 (602e).

Certificates of indebtedness authorized by Laws 1921, Chapter 425, are direct and general obligations of the municipality issuing them; and under the provisions of the act, no submission to the voters is required. *Bergman v Village of Golden Valley*, 201 M 32, 275 NW 297.

Assessments under the Elwell act need not be paid out of trunk highways funds. 1934 OAG 494, Oct. 5, 1934 (901k).

**106.02 PUBLIC DRAINAGE SYSTEMS; POWERS OF COUNTY BOARDS AND DISTRICT COURT.**

**HISTORY.** 1925 c. 415 s. 2; M.S. 1927 s. 6840-2; 1933 c. 312 s. 1.

The drainage statute defines a wilful or negligent obstruction or injury to "any work" constructed under the drainage statute. Interference, "diverting the water from its proper channel", are especially inhibited. "Dikes, levies and embankments" are part of the drainage system to confine the watercourse, natural or artificial, to its proper bed and having been constructed, have an established status. *Lupkes v Town of Clifton*, 157 M 493, 196 NW 666.

A petition to construct a ditch for the purpose of lowering the water in a meandered lake four feet below its present level shows that the lake is not within

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the class of lakes which may be drained. *Jensen v. County Board*, 159 M 140, 198 NW 455.

The drainage law does not give the petitioners a right to appeal from the order of the district court dismissing proceedings to establish a ditch. The order may be reviewed by certiorari. *Jensen v. County Board*, 159 M 140, 198 NW 455.

The so-called repair conditions of the drainage act authorized the improvement of an existing system by enlarging its capacity and constructing a better outlet. It differs from prior acts in that it makes ample provision for notice and hearing. In *re Judicial Ditch No. 10*, 171 M 478, 214 NW 285.

Only the land over which the ditch passes is required to be described in the petition. The assessment as confirmed by the court is presumed to be correct. Omission of benefited lands, if any, does not render it invalid. In *re Judicial Ditch No. 75*, 172 M 295, 215 NW 204, 216 NW 229.

By federal rule, streams or lakes which are navigable in fact are navigable in law; they are navigable in fact when used or susceptible of use in their nature and ordinary condition as highways of commerce over which trade and travel are or may be conducted in the customary modes on water. The evidence requires a finding that Mud Lake, now drained, was navigable when Minnesota was created a state in 1858. *U.S. v. Holt State Bank*, 270 US 49; 70 L.Ed. 468; 46 SC 198.

The commissioner of conservation has veto power by reason of sections 111.43 to 111.63. OAG July 28, 1944 (983d).

### 106.03 PETITIONS; SIGNATURES, FILING; BOND.

HISTORY. 1925 c. 415 s. 3; M.S. 1927 s. 6840-3.

If a county auditor in a county ditch proceeding mails the statutory notice to a known resident landowner at the address which he obtains "by inquiring at the county treasurer's office", it is sufficient even though the county treasurer furnishes the wrong address. *Conorea v. Board*, 161 M 193, 201 NW 403.

A petition must set forth the nature and purpose of the proposed work. A petition for the construction of a ditch for the purpose of lowering the water in a lake does not give authority to establish water level and construct control works to maintain such level. *Jensen v. County Board*, 159 M 140, 198 NW 455.

Where a petition sets forth the facts required by the state to be set forth, it is sufficient, although it may fail to set forth that it was signed by the required number of petitioners. *Sellen v. County of McLeod*, 165 M 74, 205 NW 625.

Partners cannot withdraw their names from the petition after the court has acted upon it by ordering a preliminary survey, but may dismiss the proceedings in the matter provided in the statutes. In *re Judicial Ditch No. 75*, 172 M 295, 215 NW 204.

In an action on the bond of petitioners for a consolidated judicial ditch, the principals and sureties are liable according to its terms though the court was without authority to carry the ditch to completion and the proceeding was dismissed. *Cottonwood Co. v. Eichner*, 181 M 481, 233 NW 294.

Laws 1921, Chapter 508, Section 1, did not sufficiently modify Laws 1915, Chapter 300, Section 6, so as to prevent the continuance of a proceeding for the repair of a ditch pending under the 1915 statute. *Todd v. County of Morrison*, 182 M 375, 234 NW 593.

Assessed landowner may clean the ditch on his own land, but cannot trespass on his neighbor. He may petition the county board to clean the ditch on the neighbor's land. Owner may cut such channels through the ditch bank as is necessary to drain surface water. In draining his own land, he cannot divert water in such manner as to modify the general ditch plan. OAG April 27, 1944 (148a-14).

A school board may pay for service outlet, but cannot be assessed for expense of county ditch. A petition by a school board would be a nullity. OAG Sept. 12, 1944 (622a-19).

If the owners of 51 per cent of the area sign the petition, it is mandatory on the board to proceed. OAG Nov. 6, 1944 (602e).

**106.04 EXPENSES OF SURVEY NOT TO EXCEED PENALTY OF BOND; BOND FOR EXCESS.**

HISTORY. 1925 c. 415 s. 4; M.S. 1927 s. 6840-4.

**106.05 ENGINEER; APPOINTMENT, OATH, BOND.**

HISTORY. 1925 c. 415 ss. 5, 8; M.S. 1927 ss. 6840-5, 6840-8; 1945 c. 97-s. 1.

The engineer appointed by the defendant made the survey and report on which the ditch was established and prepared the plans and specifications and supervised and directed the work of construction. Where a contractor constructs a ditch according to the plans and specifications, he is not required to remove earth and silt washed into it after it was constructed unless there be a provision in the contract to that effect; while if the contractor makes an absolute and unqualified contract to perform a given undertaking he assumes the risk attending the performance of the contract and must repair any defect which develops before the completion of the work. *Friederick v County of Redwood*, 153 M 450, 190 NW 801.

Statutory bond given by an engineer in a ditch proceeding covers not only negligence in the survey but also negligence in supervising the construction and the issuance of certificates through which contractors may obtain payment as the work progresses. That the auditor was also negligent does not relieve the surety of the engineer. *County of Yellow Medicine v Johnston*, 176 M 15, 222 NW 289.

A ditch proceeding is one in rem, and in invitum; it is absolutely statutory. Its provisions must be strictly complied with. The statute does not require personal service of notice on the owners; constructive notice given by a compliance with the statutory provisions is sufficient. Although the engineer in his report was in error as to the name of the owner, yet the statute was complied with and the assessment properly levied. *State v Oldre*, 179 M 566, 229 NW 878.

A corporation organized and operating under Section 326.14 cannot be selected as engineer under county or judicial ditch proceedings. OAG March 8, 1945 (148a-10).

**106.06 EXAMINATION, PRELIMINARY SURVEY, AND REPORT.**

HISTORY. 1925 c. 415 s. 6; M.S. 1927 s. 6840-6.

**106.07 PRELIMINARY HEARING.**

HISTORY. 1925 c. 415 s. 7; M.S. 1927 s. 6840-7.

In drainage proceedings the court or county board is required by Laws 1917, Chapter 441, to determine on the first hearing all the questions of propriety, practicability, and public utility of the proposed improvement. The order so made on that hearing is final as to such questions and reviewable only by certiorari directed to that particular order. *In re Judicial Ditch No. 6*, 156 M 95, 194 NW 402.

Where a sitting judge makes an order in a preliminary hearing and through mistake issues a finding not intended, such mistakes may be corrected by his successor in office. Whether there was such a mistake was a question of fact to be determined by the court below. *In re Judicial Ditch No. 2*, 163 M 383, 202 NW 52.

Changes in the final construction were provided for by the contract and a change, duly authorized by the court during the progress of the work which added ten per cent to the contract price, was permissible, although the contract limited such increase to two per cent. *County of Blue Earth v National Surety*, 164 M 390, 205 NW 277.

**106.08 DETAILED SURVEY, PLANS, AND SPECIFICATIONS.**

HISTORY. 1925 c. 415 s. 8; M.S. 1927 s. 6840-8.

**106.09 ENGINEER, VACANCY IN OFFICE; NEW ENGINEER.**

HISTORY. 1925 c. 415 s. 9; M.S. 1927 s. 6840-9.

**106.10 ENGINEER'S FINAL SURVEY AND REPORT.**

HISTORY. 1925 c. 415 s. 10; M.S. 1927 s. 6840-10.

Ditch proceeding is one in rem and the order establishing the ditch has the same final and binding force as a judgment in rem. A new status is thereby created for the lands affected and where a benefit is derived and land is assessed for such benefit, it becomes a property right appurtenant to the land and not to be taken or impaired even through governmental action except by due process of law. *Lupkes v Town of Clifton*, 157 M 493, 196 NW 666.

Under drainage law, order establishing public ditch has binding force of a judgment in rem, which is final for all purposes as against the world, and res, or subject matter of proceeding, and all property rights affected thereby. In the instant case, the culverts with gates were located "as specified" and are not subject to collateral attack. *Slosser v-Gt. Northern*, 218 M 327, 16 NW(2d) 47.

**106.11 OUTLETS.**

HISTORY. 1925 c. 415 s. 11; M.S. 1927 s. 6840-11.

**106.12 FIELD BOOKS AND MAPS; PLANS AND SPECIFICATIONS.**

HISTORY. 1925 c. 415 s. 12; M.S. 1927 s. 6840-12; 1933 c. 312 s. 2.

The statute authorizes the court to make such changes in the improvement petitioned for as were necessary to provide efficient drainage for all lands assessable for its construction, and directing the constructing of a new and better outlet. Laws 1925 c. 415, differs from prior acts in that it makes ample provision for notice and hearing in such case. In re Judicial Ditch No. 10, 171 M 478, 214 NW 285.

The recommendations of the director of the drainage division while not binding on the county board, must be given consideration. OAG Nov. 18, 1944 (148a-9).

**106.13 FORM OF CONTRACT SET OUT IN REPORT OF ENGINEER.**

HISTORY. 1925 c. 415 s. 13; M.S. 1927 s. 6840-13.

**106.14 REPORT BY ENGINEER OF EXPENSES AND PROGRESS OF WORK UP TO LETTING OF CONTRACT; LIMITATION OF EXPENSES.**

HISTORY. 1925 c. 415 s. 14; M.S. 1927 s. 6840-14.

**106.15 SUPERVISION AND INSPECTION OF CONSTRUCTION WORK.**

HISTORY. 1925 c. 415 s. 15; M.S. 1927 s. 6840-15.

The appealing question vested the court with full jurisdiction over the ditch petitioned for and imposed upon it the duty to make an entire determination of the entire matter and to cause such determination to be carried into effect. In re Judicial Ditch No. 9, 167 M 10, 208 NW 417.

**106.16 VIEWERS.**

HISTORY. 1925 c. 415 s. 16; M.S. 1927 s. 6840-16; 1933 c. 312 s. 3.

**106.17 DUTIES OF VIEWERS.**

HISTORY. 1925 c. 415 s. 17; M.S. 1927 s. 6840-17; 1933 c. 312 s. 4.

The report of the viewers having been approved by the court after due hearing, the assessment is presumed to be correct as to the land benefited by the ditch unless and until the contrary is shown. In re Judicial Ditch No. 75, 172 M 295, 215 NW 204, 216 NW 229.

Under the statute the engineer is required to make a preliminary report, the county auditor is required to mail a notice of hearing on such report to the owners as shown by the engineer's report. The next notice is of a hearing on the engineer's final report and the viewers' report. Such notice shall contain a description of the several tracts of land affected as the same appear in the report of the engineer and the names of the owners as appear in the report of the viewers. The statute requires that the viewers prepare a "tabular statement" showing, as far as practical, the names of the owners of each tract of land to be benefited or damaged. Being

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an action in rem, the provisions of the statute must be specifically complied with. *State v Oldre*, 179 M 566, 229 NW 878.

While a complete description is required, including the number of acres benefited, the tract need not be divided into 40-acre lots, and if a tract is in no way benefited or damaged it need not be mentioned in the report. OAG Oct. 20, 1944 (148a-21).

## 106.18 OLD PRIVATE DITCH USED.

HISTORY. 1925 c. 415 s. 18; M.S. 1927 s. 6840-18.

## 106.19 PROPERTY ASSESSABLE FOR BENEFITS; LIMITATION.

HISTORY. 1925 c. 415 ss. 19 to 21; M.S. 1927 ss. 6840-19 to 6840-21.

There is a marked and clear distinction apparent in the statutes between the ground of authority of highway officers and that of drain officers in regard to ditching. The power of the highway commissioner to dictate a drain for road purposes is limited and restricted to highway needs and to works of comparatively little work and expense.

The drainage act of 1925, Chapter 415, makes no provision for plans and specifications by the commissioner of highways, and it is doubted if such incidental benefits which might accrue to a trunk highway under the construction of a drainage ditch could be considered such a permanent improvement as to warrant assessments to be paid out of the trunk highway fund. OAG Oct. 5, 1934 (494).

There is nothing in the drainage act to prevent the court from dividing assessments against counties into 15 annual instalments. OAG April 10, 1937 (151a).

The final order of the district court modified the viewers' report assessing benefits against Normania Township by making the entire assessment against Yellow Medicine County. Nevertheless, the auditor, in disregard of the court's orders, levied an assessment against Normania Township and thereafter withheld township moneys in payment of these assessments. This was illegal. An assessment levied against land not benefited by a drainage ditch is void. The township may recover from the county the amount withheld. *Normania v Yellow Medicine County*, 205 M 451, 286 NW 881.

## 106.20 BRIDGES ON TOWN BOUNDARIES OVER DRAINAGE SYSTEMS; APPORTIONMENT OF COST.

HISTORY. 1925 c. 415 s. 22; M.S. 1927 s. 6840-22.

## 106.21 CONSTRUCTION OF BRIDGES AND CULVERTS.

HISTORY. 1925 c. 415 s. 23; M.S. 1927 s. 6840-23.

Upon the facts shown, the township cannot compel counties interested in a judicial ditch to construct a bridge where a bridge crosses the township highway. *In re Judicial Ditch No. 24*, 161 M 517, 200 NW 816.

Where privately owned farms are separated from the highway by the construction of a ditch, there is an element of damage taken into consideration by the viewers and must be borne by private landowners, except that a portion will fall upon the municipality until the amount received in the way of award has been exhausted. OAG July 30, 1937 (125a-41); OAG Aug. 16, 1937 (642b-8).

When because of a change of route of a town road it is necessary to build a bridge over a county ditch, it is the town who stands the expense and not the benefited property owners. OAG July 6, 1944 (377a-1).

## 106.22 ALL BENEFITED LANDS ASSESSED.

HISTORY. 1925 c. 415 s. 24; M.S. 1927 s. 6840-24.

The assessment by the viewers as confirmed by the court is presumed to be correct and the omission of benefited lands, if any, does not render the order invalid. *In re Judicial Ditch No. 75*, 172 M 295, 215 NW 204, 216 NW 229.

The expression "all lands owned by the state of Minnesota" refers to state lands sold by the state under contract for deed as well as to state lands not so sold. It

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follows that when such land reverts to the state, it comes back subject to such assessment. The state is under an equitable obligation to pay it. The state has authorized the assessment of benefit against the state but there is no authority in the statute permitting the bringing of an action to force the lien. OAG Nov. 7, 1933, 1934 (845).

County ditch may make use of an old ditch and assess benefits which will actually accrue to the land comprised within the old ditch system. OAG June 20, 1931.

Bonds were issued to pay for construction of a ditch. Part of the assessments were paid and it was found that the remaining assets were interest and penalties far exceeding the amount of the outstanding bonds. Assessments cannot be reduced and the rate of interest cannot be reduced, and assessments cannot be discharged. OAG Nov. 10, 1936 (901a).

If lands have been omitted from the viewer's report, it is too late after time to appeal has expired, to correct the report. OAG April 18, 1944 (901j).

### 106.23 VIEWERS' REPORT FILED.

HISTORY. 1925 c. 415 s. 25; M.S. 1927 s. 6840-25; 1933 c. 312 s. 6.

### 106.24 FINAL HEARING.

HISTORY. 1925 c. 415 s. 26; M.S. 1927 s. 6840-26; 1933 c. 312 s. 7.

The question of adoption and modification of the plans for a proposed ditch is a matter resting in the discretion of the court. The court is required to pass upon the project as brought to it, but is not required to grant relief. In re Consolidated Ditch No. 1, 157 M 108, 195 NW 781.

Laws 1917, Chapter 441, provides for the consolidation of several drainage systems having a common outlet through a watercourse. A natural swale which furnished a runway for the waters from three shallow lakes but which was artificially strengthened and deepened, is a water-course within the meaning of the drainage statute. *Low v District Court*, 159 M 428, 199 NW 883.

An order of the district court merging six public drainage systems and several private tile drains is such a final order as may be reviewed by certiorari. *Low v District Court*, 159 M 428, 199 NW 883.

Prior to the enactment of the 1925 drainage act, the order confirming the assessments for the construction of a judicial ditch could be reviewed only by demanding a jury trial; the time fixed by statute for demanding such trial cannot be extended by the court; where such assessments have been duly confirmed and no jury trial has been demanded, the assessments become final and conclusive at the expiration of the statutory time. In re *Judicial Ditch No. 4*, 160 M 387, 200 NW 471.

Where there is a change in the ditch system after its original completion, the cost of the change may not be assessed against lands affected without having a report from the engineer and viewers, with a hearing thereon; but where the work consists in clearing out the ditch to conform to original specifications, no hearing is necessary. 1942 OAG 108, Oct. 2, 1942 (602j).

The recommendations of the director must be given consideration, but are not binding on the county board. OAG Nov. 18, 1944 (148a-9).

### 106.25 JURISDICTION, HOW ACQUIRED.

HISTORY. 1925 c. 415 s. 27; M.S. 1927 s. 6840-27.

### 106.26 PROCEEDINGS AT HEARINGS.

HISTORY. 1925 c. 415 s. 28; M.S. 1927 s. 6840-28.

The proceeding under Laws 1925, Chapter 415, expressly repeals many prior statutes with reference to county and judicial districts, and enacted a complete drainage code. The changes are set out in detail in In re *Judicial Ditch No. 75*, 172 M 295, 215 NW 204, 216 NW 229.

**106.27 ORDER FOR IMPROVEMENT BY COUNTY BOARD OR DISTRICT COURT; CORRECTIONS.**

HISTORY. 1925 c. 415 s. 29; 1927 c. 324; M.S. 1927 s. 6840-29.

It is fairly well settled that the reclamation of waste lands for agricultural purposes, although enuring directly to the benefit of the owners, is also a benefit to the public as it is conducive to the prosperity of the community as a whole. *Sellen v County of McLeod*, 165 M 74, 205 NW 625.

The engineer's plans and specifications for installation of culvert "where specified" by him became part of order establishing county ditch and, as such, not subject to collateral attack or enlargement; hence railroad, which had maintained culverts under the roadbed long before drainage ditches were constructed, was not liable for inundating a farm allegedly due to absence of valves or gates where railroad was never notified or required to install valves or gates. *Slosser v Gt. Northern*, 218 M 327, 16 NW(2nd) 47.

**106.28 CERTIFIED COPY OF VIEWERS' REPORT FILED; EXPENSES AND COSTS; MODIFICATION OR ORDER.**

HISTORY. 1925 c. 415 s. 30; M.S. 1927 s. 6840-30.

The order of consolidation is entirely separate from the order of assessment. Each is complete in itself and distinct from the other. *Low v District Court*, 159 M 428, 199 NW 883.

**106.29 DAMAGES, HOW PAID.**

HISTORY. 1925 c. 415 s. 31; M.S. 1927 s. 6840-31.

Damages accruing to farm owners when the farms are separated from the highway by construction of a ditch may be collected from the municipality up to and until the exhaustion of the award. OAG July 30, 1937 (125a-41); OAG Aug. 16, 1937 (642b-8).

Shore owners have no recourse against the general ditch fund, because of silt brought into lake by county ditch. OAG Oct. 20, 1944 (148c-1).

**106.30 CONTRACTS FOR CONSTRUCTION.**

HISTORY. 1925 c. 415 s. 33; M.S. 1927 s. 6840-33.

**106.31 CONTRACTS AND BONDS; CONTENTS.**

HISTORY. 1925 c. 415 s. 34; M.S. 1927 s. 6840-34.

Actions involving drainage bonds previous to the enactment of General Statutes 1923, Section 9217, were local actions under section 542.03, which provided that "actions against public officer for acts done by virtue of such office shall be tried in the county in which the cause of the action arose." The filing of such bond in the county where the cause of such action arose in drainage proceedings, where all the multitudinous records are in the offices of the county officials, suggests appropriate reasons for laying the venue in the county where the records are kept. *Blue Earth v Bisballe*, 166 M 499, 207 NW 648.

The defendant, as a special defense, claimed that this case should be dismissed because the plaintiff had not obtained leave to sue as required by statute. Held, the common law rule that a plea in abatement is waived by answering to the merits does not obtain in this state. But in this case none of the state's substantial rights were prejudiced, and there was no error in the denial of defendant's motion for a new trial based solely on the failure to obtain leave to sue. *Corey v Paine*, 167 M 32, 208 NW 526.

General Statutes 1923, Section 9700, specifies that the contractor's bond shall include insurance premiums. The relator sought to have the industrial commissioner say that this state requires the contractor to carry compensation insurance. If there is any such liability upon this theory, it would be within the jurisdiction of the courts and not the industrial commission. The commission properly declined the jurisdiction of the question. *Erickson v Kirscher*, 168 M 67, 209 NW 644.

In a suit by the county against the contractor the stipulation for liquidated damages is binding both upon the contractor and the surety. But the complaint in this case is deficient because it fails to show that the county has remedied the defects, or incurred any obligations to that end, and hence no damages accrued. *Blue Earth v Bisballe*, 171 M 20, 220 NW 30.

Laying the tile of a county ditch at a depth substantially less than required by the contract is a breach thereof, although done by agreement with the engineer, though he cannot relieve the contractor from the obligations of the contractor. The contractors and their surety having failed to complete the ditch, and it appearing that the ditch cannot be completed within the statutory limit, the remedy of the county is to cause it to be completed and to recover from the contractors and their surety an expenditure in excess of the contract price. *County of Hennepin v Richards*, 175 M 60, 220 NW 432.

Public contractors' statutory bonds; right of material men to sue surety; effect of failure to file notice of claim. 17 MLR 201.

**106.32 EXTENSION OF TIME ON CONTRACTS.**

HISTORY. 1925 c. 415 s. 35; M.S. 1927 s. 6840-35.

**106.33 TILE CONSTRUCTION; BIDS; CONTRACTS; BONDS.**

HISTORY. 1925 c. 415 s. 36; M.S. 1927 s. 6840-36.

**106.34 BOND OF CONTRACTOR, WHEN REDUCED.**

HISTORY. 1925 c. 415 s. 37; M.S. 1927 s. 6840-37.

**106.35 DEFAULTS BY CONTRACTOR.**

HISTORY. 1925 c. 415 s. 38; M.S. 1927 s. 6840-38.

The stipulation for liquidated damages is binding both on the contractor and the surety, but in order to recover the county must remedy the defects or incur obligations to that end; otherwise no damages will have accrued to the county. *Blue Earth v Bisballe*, 171 M 20, 213 NW 30.

It appearing that the ditch cannot be completed within the statutory limit, the remedy of the county is to cause the ditch to be completed and to recover from the contractors and their surety expenditures in excess of the contract price. *Hennepin Co. v Richardson*, 175 M 60, 220 NW 432.

Laying the tile at a depth substantially less than required by the contract is a breach, although done with agreement of the engineer. *Hennepin Co. v Richardson*, 175 M 60, 220 NW 432.

**106.36 REINSTATEMENT OF CONTRACT AND EXTENSION OF TIME FOR COMPLETION OF WORK.**

HISTORY. 1925 c. 415 s. 39; M.S. 1927 s. 6840-39.

**106.37 INSPECTIONS, REPORTS, NOTICES.**

HISTORY. 1925 c. 415 s. 40; M.S. 1927 s. 6840-40.

**106.38 ENGINEER TO INSPECT TILE AND OTHER CONSTRUCTION WORK.**

HISTORY. 1925 c. 415 s. 41; 1927 c. 51 s. 1; M.S. 1927 s. 6840-41.

Plaintiff agreed with the contractors to dig the trench and lay the tile in a branch thereof. After doing part of the work he was released by the contractor. The work was approved by the engineer and the engineer estimated the plaintiff was entitled to \$478.00, and to this the contractor agreed. In an action upon the statutory bond the plaintiff was entitled to a directed verdict. *Svalgaard v Nat. Surety Co.* 159 M 218, 198 NW 449.



A civil engineer in charge of drainage construction should be allowed to state whether tile was laid at the depth shown on the original plans or profiles, although he has no present recollection of the levels at any particular station. The loss of the book containing his notes might affect the weight of his testimony, but not its admissibility. *County of Blue Earth v Nat. Surety Co.* 164 M 390, 205 NW 277.

The engineer's claims were correct in amount and for services and expenses actually given and incurred. The county must not repudiate its contractual obligations nor those which the legislature has seen fit to impose. Even though the method prescribed by the legislature authorizing the auditing and allowance was unconstitutional, still the defendant, in the absence of a valid provision for auditing such claims, should be allowed to recover in an ordinary action. *Kalman v County of Grant*, 167 M 458, 209 NW 638.

The surety bond given by an engineer in a ditch proceeding covers not only negligence in the survey but also negligence in supervising construction, and the issuance of certificates through which contractors may obtain payment as the work progresses. In such a bond, conditions added to those prescribed by the statutes should be held surplusage. *County of Yellow Medicine v J. R. Johnson*, 176 M 15, 222 NW 289.

#### **106.39 PARTIAL PAYMENTS TO CONTRACTOR.**

HISTORY. 1925 c. 415 s. 42; M.S. 1927 s. 6840-42.

#### **106.40 BOND ISSUES; PROCEEDS; GENERAL DITCH FUND; PAYMENT OF LIENS WITH BONDS.**

HISTORY. 1925 c. 415 s. 43; M.S. 1927 s. 6840-43; 1935 c. 345.

A county cannot accept its own drainage bonds in payment of special assessments unless and until such bonds have matured. OAG Dec. 12, 1933.

Drainage obligations are general county obligations and may be paid out of any money in the general revenue fund. They are not limited to any particular ditch fund. OAG Dec. 14, 1934 (193).

Where unpaid assessments with interest and penalties exist, the remaining outstanding bonds and assessments cannot be reduced so that the reduced amount may be prorated against benefited land; nor can the rate of interest be reduced, nor the assessment discharged, or the municipality required to pay the fund out of general taxes. OAG Nov. 10, 1936 (901a).

#### **106.41 TABULAR STATEMENTS.**

HISTORY. 1925 c. 415 s. 44; M.S. 1927 s. 6840-44.

#### **106.42. ACKNOWLEDGEMENT AND FILING OF TABULAR STATEMENTS WITH REGISTER OF DEEDS.**

HISTORY. 1925 c. 415 ss. 45 to 47; M.S. 1927 ss. 6840-45 to 6840-47.

Filing of a lien statement is deemed notice to all parties interested of the existence of such lien. *Normania Township v Yellow Medicine*, 205 M 458, 286 NW 881.

A lien for an assessment for the cost of a county ditch does not attach until the auditor's assessment list and statement is filed for record in the office of the register of deeds. Where the auditor's assessment list and statement is not filed until 18 months after the date of a guaranty to protect mortgagee against liens or encumbrances superior to the mortgage, the guaranty was not violated. *Alexander Ramsey v Merchants Trust Co.* 173 M 223, 217 NW 101.

#### **106.43 ADJUSTMENTS ON ACCOUNT OF ERRONEOUS COLLECTIONS.**

HISTORY. 1925 c. 415 s. 48; M.S. 1927 s. 6840-48.

#### **106.44 LIENS; SUPPLEMENTARY LIENS.**

HISTORY. 1925 c. 415 s. 49; M.S. 1927 s. 6840-49.

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### 106.45 INTEREST.

**HISTORY.** 1925 c. 415 s. 50; M.S. 1927 s. 6840-50.

The minimum amount due on ditch liens in the Red Lake Game Preserve should include interest at six per cent. OAG June 15, 1931.

The county, by resolution of the county board, may charge property owners six per cent interest on ditch assessments although the bonds bear only four and three-quarters per cent interest. OAG July 2, 1931.

The state tax commission has authorized a refundment of any excessive interest on a ditch assessment provided the refund is approved by the county board. OAG July 2, 1931.

### 106.46 PAYMENT OF LIENS.

**HISTORY.** 1925 c. 415 s. 51; M.S. 1927 s. 6840-51; 1929 c. 182; M. Supp. s. 6840-51½.

Where a deed presented to the auditor for certification contains such a description as might be claimed to include lands which have been sold to the state for delinquent drainage assessments, he may not be compelled by mandamus to certify thereon that the taxes have been paid. *Rydeen v Holtz*, 170 M 141, 212 NW 170.

No penalty is chargeable for a delinquency in payment of ditch liens, but the amount due draws interest at six per cent per annum. OAG Jan. 24, 1933.

County may accept its own drainage bonds in lieu of payment of special assessments when such bonds have matured. OAG Feb. 17, 1933, Dec. 12, 1933.

### 106.47 APPORTIONMENT OF LIENS.

**HISTORY.** 1925 c. 415 s. 52; 1927 c. 109 s. 1; M.S. 1927 s. 6840-52.

### 106.48 REPAIRING AND CLEANING.

**HISTORY.** 1925 c. 415 s. 53; 1927 c. 51 s. 2; M.S. 1927 s. 6840-53; 1943 c. 626 ss. 1, 2. (Repealed by 1945 c. 82 s. 7).

The drainage law provides the exclusive method of litigating the amount of benefits; and the land owner cannot have relief on the ground of failure of consideration. *State v Holmes*, 162 M 173, 202 NW 440; *Sluka v Johnson*, 177 M 598, 225 NW 909.

The filing of petitions by persons objecting to taxes or ditch assessments for determination of the value of their claims, defenses, or objections, with the district court clerk by June first of the year in which assessments became payable, is "a condition precedent" to cancelation of such taxes or assessments. *In re Slaughter v Martin County*, 213 M 70, 5 NW(2d) 64.

The power to levy an assessment for ditch repairs, delegated to the county board, cannot be redelegated by the board to the county auditor; and, the board must fix a definite rate. *Saxhaug v Co. of Jackson*, 215 M 490, 10 NW(2d) 722.

Owners of land on a branch of a ditch system, which branch has become obstructed may petition to have the ditch cleaned. Such owners are entitled to have such repairs ordered if the engineer so recommends and the cost is less than 30 per cent of the original costs. Costs may be assessed against all the property against which costs were assessed in the original construction and in the same ratio. *Finseth v Sperry*, 219 M 255, 17 NW(2) 499.

The state game and fish department may not properly use its funds for cleaning and deepening a county ditch even though by so doing they assist the flow of water from one lake to another. OAG April 10, 1933.

Expense incurred in repairing or cleaning a ditch should be paid out of funds credited to that particular project. If there is no fund available, the county may clean the ditch, paying the cost out of the general revenue fund and assess the cost upon the lands originally assessed. OAG May 6, 1932.

In a case where there is money in the general ditch fund standing to the credit of the ditch requiring repairs sufficient to pay the cost, the board or the court may proceed on its own motion to cause such repairs to be made and paid out of the ditch fund. If the cost does not exceed \$500.00, the board or court may proceed

without the formality of a contract. Where the proceeding contemplates an assessment against property benefited, there must be a petition signed by one or more owners of land to be assessed for the improvement, together with a bond conditioned in accordance with the general requirement. If the cost of the proposed improvement exceeds 30 per cent of the original cost of the ditch, then the petition must be signed by "a majority of the property owners owning 51 per cent of the property to be affected thereby". OAG Aug. 9, 1938 (128).

Contributions from the government are to be executed or deducted for the purpose of determining the number of petitions and percentage of acreage required. 1938 OAG 197, Oct. 5, 1938 (148b-5).

Where a judicial ditch extends into two counties and the part of the ditch requiring repairs lies exclusively in one county, the cost must be borne between the counties. OAG April 14, 1939 (150c).

It is the duty of the county board to keep the ditch free from obstruction. It is a question of fact as to whether or not it is necessary to remove trees whose roots might obstruct or destroy the tile. 1942 OAG 111, Sept. 29, 1942 (602j).

Landowner may clean ditch on his own land, and may cut channels in the ditch bank to drain surface water from his land. OAG April 27, 1944 (148a-14).

Unless a creek outlet of a ditch is made a part of the ditch under the plan, the rules as to maintenance and clearing do not apply to the creek. OAG June 10, 1944 (602h).

A soil conservation district has no authority and may not contract with a town to clean a ditch. OAG Feb. 16, 1945 (705a).

#### **106.481 CLEANING STATE, COUNTY, AND JUDICIAL DITCHES.**

HISTORY. 1943 c. 241 s. 1.

#### **106.483 REPAIR OF DITCHES.**

HISTORY. 1945 c. 82 s. 1.

#### **106.484 MAINTENANCE; INSPECTION.**

HISTORY. 1945 c. 82 s. 2.

#### **106.485 PAYMENT.**

HISTORY. 1945 c. 82 s. 3.

#### **106.486 REPAIR FUND.**

HISTORY. 1945 c. 82 s. 4.

#### **106.487 ENGINEER'S MAPS, REPORT; HEARING; APPEAL.**

HISTORY. 1945 c. 82 s. 5.

#### **106.488 COSTS AND ASSESSMENTS.**

HISTORY. 1945 c. 82 s. 6.

#### **106.49 REPAIR OR IMPROVEMENT.**

HISTORY. 1925 c. 415 s. 54; 1927 c. 51 s. 3; M.S. 1927 s. 6840-54. (Repealed by 1945 c. 71 s. 2; 1945 c. 82 s. 7.)

In a county ditch the county board, upon the plaintiff's complaint that one of the laterals collected waters and permitted them to overflow and flood plaintiff's farm, filled in the lateral in such a way as to sever it from the system, thus protecting the farm. Thereafter the town named as defendant herein removed the fill and installed a culvert, thus restoring the lateral which discharged water in

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destructive quantities upon the plaintiff's farm. Plaintiff was entitled to the relief ordered. *Olson v County of Roseau*, 164 M 452, 205 NW 372.

As pointed out in *State ex rel v County Board*, 151 M 274, 186 NW 709, the statutes authorize two kinds of repairs: (1) those for maintenance and restoration of the ditch as originally constructed, and (2) those for enlargement and change of the ditch by widening, deepening and extending it. In the latter case substantially the same procedure must be had as in the original construction. In the former, no such procedure need be had. *Saxhaug v Co. of Jackson*, 215 M 497, 10 NW(2d) 722; 1942 OAG 110, Sept. 2, 1942 (602j); OAG April 1, 1944 (148b-5).

Persons petitioning for the repair of judicial ditch lying within one county must file bond in an amount to be fixed by county auditor. OAG March 11, 1939 (150a).

Petition for repair of a judicial ditch lying wholly within one county should be filed with the county auditor for presentation to the county board. OAG March 11, 1939; OAG March 27, 1939 (150a).

"Thirty per cent of original cost of construction of such ditch" relates to the cost of construction of the entire drainage ditch and not to a part thereof which is in need of repair. OAG Dec. 30, 1938 (602b).

One holding a mere option on land is not an "owner" who could sign a ditch petition. OAG June 2, 1931.

A county is not liable for materials or labor in repair of a judicial drainage ditch unless the statutory procedure is followed. OAG March 26, 1935 (148b-5).

Laws 1925, Chapter 415, authorizes the improvement of an existing drainage system by enlarging its capacity and constructing a better outlet. It differs from all prior acts in that it makes ample provision for notice and hearing. In *re Judicial Ditch No. 110*, 171 M 478, 214 NW 285.

There is no authority which would permit the assessing of lands not originally assessed for the cleaning and repairing of a ditch, even though changed conditions make the ditch of service to those sought to be charged. 1042 OAG 106, Oct. 14, 1941 (602j).

Error in omitting lands from viewers' report cannot be corrected after the time to appeal has expired. OAG April 18, 1944 (901).

As to bridges not provided for in the proceedings. OAG Sept. 30, 1944 (148a-3).

### 106.495 REPAIR OR IMPROVEMENT.

HISTORY. 1945 c. 71 s. 51.

### 106.50. REPAIR OR IMPROVEMENT OF DRAINAGE SYSTEM; ENGINEER.

HISTORY. 1925 c. 415 s. 55; M.S. 1927 s. 6840-55; 1933 c. 312 s. 8.

### 106.51 REPORT OF ENGINEER; PROCEDURE.

HISTORY. 1925 c. 415 s. 56; 1927 c. 234; M.S. 1927 s. 6840-56; 1941 c. 211 s. 1.

A lien for cleaning of ditches is to be spread in the same proportion as the original assessment. OAG March 11, 1939 (150a).

Published notice for three weeks, posting and sending of copies to all interested persons, is necessary on petition to repair judicial ditch. OAG March 11, 1939.

See notes under section 106.49.

See 1942 OAG 108, Oct. 2, 1942 (602j).

### 106.52 VIEWERS; APPOINTMENT; DUTIES; REPORTS; DUTIES OF COUNTY BOARD OR COURT.

HISTORY. 1925 c. 415 ss. 57, 58; M.S. 1927 ss. 6840-57, 6840-58.

An order of the district court merging six public drainage systems and several public tile drains is such a final order as may be reviewed by certiorari. *Low v District Court*, 159 M 428, 199 NW 883.

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The provision for the court to audit and allow claims without notice to the county is not unsupportable when applied to a pending proceeding. It would not be valid were the proceedings dismissed, because the dismissal relinquishes all jurisdiction. In the absence of valid statute the claimant may recover in an action at law against the county. *Kalman v County of Grant*, 167 M 458, 209 NW 638.

Where the repairs of a judicial ditch involve only restoration to its original condition, viewers need not be obtained. OAG March 11, 1939 (150a).

Tracts not assessed for benefits must petition the county board or the court who will assess terms on which the petitioners may drain waters into the ditch. OAG July 6, 1944 (148b-1); OAG Sept. 6, 1944 (602j).

### **106.53 LETTING OF CONTRACTS.**

HISTORY. 1925 c. 415 s. 59; M.S. 1927 s. 6840-59.

### **106.54 LIENS; STATEMENT, ASSESSMENT, COLLECTION.**

HISTORY. 1925 c. 415 s. 60; M.S. 1927 s. 6840-60; 1941 c. 211 s. 2.

### **106.55 USE OF DRAINAGE SYSTEMS FOR OUTLETS.**

HISTORY. 1925 c. 415 s. 61; M.S. 1927 s. 6840-61.

Where defendant constructed a road embankment providing a 14-inch tile outlet, the defendant was not liable if the outlet was reasonably sufficient for the water from such rains as ought to have been anticipated, but was liable for damages accruing if the outlet was not reasonably sufficient to carry off ordinary rainfall. *Van Wilgen v Albert Lea Farms*, 176 M 339, 223 NW 301.

Under ordinary conditions, a county board may permit a village to use a drainage ditch in connection with sewage disposal plants. OAG Feb. 18, 1936 (98).

As to procedure for private additions or laterals to a public ditch constructed after completion of main ditch. 1942 OAG 106, Oct. 14, 1941 (602-J); OAG Sept. 6, 1944 (602-J).

### **106.56 PETITION FOR LATERAL; BOND OF PETITIONERS; APPOINTMENT OF ENGINEER; SURVEY AND REPORT; HEARING.**

HISTORY. 1925 c. 415 ss. 62, 63; M.S. 1927 ss. 6840-62, 6840-63.

### **106.57 VIEWERS; APPOINTMENT, REPORT.**

HISTORY. 1925 c. 415 s. 64; M.S. 1927 s. 6840-64.

### **106.58 HEARING ON VIEWERS' REPORT.**

HISTORY. 1925 c. 415 s. 65; M.S. 1927 s. 6840-65.

### **106.59 HEARING ON VIEWERS' REPORT; CONSTRUCTION, BIDS, CONTRACTS.**

HISTORY. 1925 c. 415 s. 66; M.S. 1927 s. 6840-66.

### **106.60 LIEN STATEMENTS; ASSESSMENT, LEVY, AND COLLECTION OF LIENS.**

HISTORY. 1925 c. 415 s. 67; M.S. 1927 s. 6840-67.

### **106.61 OVERFLOW FROM MUNICIPAL SEWERAGE SYSTEM.**

HISTORY. 1925 c. 415 s. 68; M.S. 1927 s. 6840-68.

Contamination should be removed by the use of septic tanks, before a village may discharge sewage into a judicial ditch. OAG Feb. 14, 1945 (387g-9).

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### 106.62 PETITION; FINDINGS AND ORDERS OF COUNTY BOARD OR COURT.

HISTORY. 1925 c. 415 s. 69; M.S. 1927 s. 6840-69.

### 106.63 PETITION AND PROCEDURE WHERE SYSTEM ALREADY ESTABLISHED.

HISTORY. 1925 c. 415 s. 70; M.S. 1927 s. 6840-70.

### 106.64 CONDEMNATION OF OUTLETS.

HISTORY. 1925 c. 415 s. 71; M.S. 1927 s. 6840-71.

### 106.65 PLATS OF TILE-DRAINS.

HISTORY. 1925 c. 415 s. 73; M.S. 1927 s. 6840-73.

### 106.66 FEES AND EXPENSES.

HISTORY. 1925 c. 415 s. 74; 1927 c. 51 s. 4; M.S. 1927 s. 6840-74; 1945 c. 112 s. 1.

The primary obligation to finance a ditch proceeding is cast upon the county, and this includes the obligation to pay for the services of the engineer, though the ditch proceeding is dismissed. *Gove v County of Murray*, 161 M 66, 200 NW 833.

A county attorney, appearing for his county in a judicial ditch proceeding to oppose an assessment and award of damages, has no claim on the ditch fund for compensation for services, although his efforts resulted in the reduction of the assessment and an increase in the amount allowed as damages. His fees, if any, must be paid by the county for which he appeared. *Mathews v Baker*, 161 M 400, 200 NW 621.

The primary obligation to finance a ditch proceeding is cast upon the county, including the obligation to pay for the services of the engineer. *Swift Co. Bank v County of Traverse*, 162 M 258, 202 NW 827.

Where claim is one which the statute requires to be submitted to the county board for audit or allowance or disallowance, and an appeal is provided for from the decision of the board, the action of the board thereon in the absence of fraud or mistake is final unless appealed from. *Sohr v County of Dodge*, 183 M 299, 236 NW 463.

The county attorney may not represent petitioners in a proceeding filed under section 106.49 for the repair of a judicial ditch. 1938 OAG 127, Aug. 10, 1938 (602j).

Due process of law, 2 MLR 158.

### 106.67 REFEREES.

HISTORY. 1925 c. 415 s. 75; M.S. 1927 s. 6840-75.

### 106.68 JURISDICTION NOT AFFECTED BY DEFECTIVE NOTICES.

HISTORY. 1925 c. 415 s. 77; M.S. 1927 s. 6840-77.

### 106.69 ORDERS, NOTICES; SERVICE OF; FEES.

HISTORY. 1925 c. 415 s. 78; M.S. 1927 s. 6840-78.

### 106.70 ENTRY UPON LANDS.

HISTORY. 1925 c. 415 s. 82; M.S. 1927 s. 6840-82.

### 106.71 RECORDS PRIMA FACIE EVIDENCE.

HISTORY. 1925 c. 415 s. 83; M.S. 1927 s. 6840-83.

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## **106.72. FAILURE OF BOARD OR COURT TO ATTEND HEARINGS; CONTINUANCES.**

HISTORY. 1925 c. 415 s. 87; M.S. 1927 s. 6840-87.

## **106.73 SYSTEMS EXTENDING INTO MORE THAN ONE JUDICIAL DISTRICT.**

HISTORY. 1925 c. 415 s. 86; M.S. 1927 s. 6840-86.

## **106.74 OUTLETS IN ADJOINING STATES.**

HISTORY. 1925 c. 415 s. 85; M.S. 1927 s. 6840-85.

## **106.75 SYSTEMS EXTENDING INTO OR CONNECTING WITH SYSTEMS IN ADJOINING STATES.**

HISTORY. 1925 c. 415 s. 88; M.S. 1927 s. 6840-88.

## **106.76 DRAINAGE AFFECTING MEANDERED LAKES; APPEALS.**

HISTORY. 1925 c. 415 s. 89; M.S. 1927 s. 6840-89.

## **106.77 CONSOLIDATION OF SYSTEMS TO PREVENT OVERFLOWS OR INUNDATIONS.**

HISTORY. 1925 c. 415 s. 90; M.S. 1927 s. 6840-90.

Consolidation of several drainage systems in one drainage area for a common outlet through a watercourse becomes operative only when the outlet ceases to be adequate, overflows, and thereby causes inundation of adjoining lands. *J. M. Low v District Court*, 159 M 428, 199 NW 883.

Only the land over which the ditch passes is required to be described in the petition. *In re Judicial Ditch No. 75*, 172 M 295, 215 NW 204, 216 NW 229.

In an action on the bond of the petitioners for a consolidated judicial ditch the principals and sureties are liable according to its terms, although the court was without authority to carry the ditch to completion and the proceeding was dismissed. *Cottonwood Co. v Eichner*, 181 M 481, 233 NW 294.

## **106.78 HEARING; COURT ORDERS; VIEWERS, APPOINTMENT, DUTIES.**

HISTORY. 1925 c. 415 ss. 91, 92; M.S. 1927 ss. 6840-91, 6840-92.

## **106.79 EFFECT OF DEFECTIVE PROCEEDINGS.**

HISTORY. 1925 c. 415 s. 93; M.S. 1927 s. 6840-93.

Establishing a judicial ditch is a proceeding in rem, and where the steps for establishing it are properly taken the court has jurisdiction of all the property affected and such jurisdiction remains unaffected by subsequent transfers. Parties whose assessments would be increased by the petition of a void order may move to have it set aside. *Huseby v Schacherer*, 160 M 387, 200 NW 471.

## **106.80 COUNTY DITCH INSPECTORS.**

HISTORY. 1925 c. 415 s. 94; M.S. 1927 s. 6840-94; 1945 c. 415 s. 94; 1945 c. 214 s. 1.

## **106.81 ASSISTANT ENGINEERS.**

HISTORY. 1925 c. 415 s. 95; M.S. 1927 s. 6840-95.

## **106.82 USE OF FORMER REPORTS, SURVEYS, AND MONUMENTS.**

HISTORY. 1925 c. 415 s. 96; M.S. 1927 s. 6840-96.

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### 106.83 CONSTRUCTION AT COST OF LAND OWNERS.

HISTORY. 1925 c. 415 ss. 97 to 100; M.S. 1927 ss. 6840-97 to 6840-100.

The county is a party only as an agency of the state charged with the financing and working of the project. It is the duty of the county to handle the project. If loss occurs, it is incidental to its status as an agency of the state. The county, as such agency, may sue the contractor or his surety. *Kalman v Grant*, 167 M 458, 209 NW 638.

### 106.84 HEARING.

HISTORY. 1925 c. 415 ss. 101 to 104; M.S. 1927 ss. 6840-101 to 6840-104.

### 106.85 ASSESSMENTS; LEVY, PAYMENT.

HISTORY. 1925 c. 415 s. 105; M.S. 1927 s. 6840-105.

### 106.86 REASSESSMENTS.

HISTORY. 1925 c. 415 s. 106; M.S. 1927 s. 6840-106.

### 106.87 PROCEDURE WHEN BIDS NOT RECEIVED OR CONTRACTS NOT LET.

HISTORY. 1925 c. 415 s. 107; M.S. 1927 s. 6840-107.

### 106.88 COUNTY WARRANTS; ACCOUNTS AND RECORDS EXAMINED; APPEARANCES BY STATE AND COUNTY OFFICIALS.

HISTORY. 1925 c. 415 ss. 108 to 110; M.S. 1927 ss. 6840-108 to 6840-110.

If the holder of the original warrant on which is stamped "not paid for want of funds" presents it on the first day of July and demands interest and there is no money in the fund upon which it was drawn to pay the interest, then the auditor may draw another warrant for the amount of the interest and this in turn may be presented to the county treasurer and stamped "not paid for want of funds", and when this is done the interest warrants so drawn would thereafter draw interest the same as the original one. This rule is true only of ditch warrants. On other warrants the county may pay interest only at the time the warrant is redeemed or paid. The county is not authorized to pay interest by a separate warrant. 1930 OAG 159, March 14, 1929; 1930 OAG 159, June 20, 1929; 1930 OAG 160, Aug. 10, 1929.

The fact that section 106.88 provides that interest shall be payable only on ditch warrants indicates that interest is only paid on other warrants when they are paid. OAG May 19, 1934 (107a-5).

### 106.89 APPEALS.

HISTORY. 1925 c. 415 ss. 32, 72, 76; M.S. 1927 ss. 6840-32, 6840-72, 6842-76.

In drainage proceedings under General Statutes 1913, Section 5526, as amended by Laws 1917, Chapter 441, the court or county board, as the case may be, is required to determine on the first hearing all questions of propriety, practicability, public utility, or benefit, of the proposed improvement. The order so made on that hearing is final as to such questions and reviewable only by certiorari directly to that particular order. *In re Judicial Ditch No. 6*, 156 M 95, 194 NW 402.

The order confirming the assessments for the construction of the judicial ditch under the statute can be refuted only by demanding jury trial. But where no jury trial has been demanded, the assessments become final and conclusive at expiration of the statutory time for demanding such trials, and cannot thereafter be modified by the court. *Huseby v Schacherer*, 160 M 387, 200 NW 471.

On review by certiorari, it is held that a county attorney appearing for his county in a judicial ditch proceeding has no claim on the ditch fund for compensation for his services. *Mathews v Baker*, 161 M 400, 201 NW 621.



The assessment as confirmed by the court is presumed to be correct. Omission of benefitted land, if any, does not render it invalid. In re Judicial Ditch No. 75, 172 M 295, 215 NW 204, 216 NW 229.

In a county ditch proceeding claims for expenses may be allowed without notice to petitioners and may be allowed after dismissal of the proceedings. Right of appeal to the district court is allowed by statute. In the absence of fraud or mistake, the determination by the county board is final, unless such appeal is taken. County of Rice v La Croix, 175 M 8, 220 NW 958.

Prior to 1925 there was no provision in the drainage laws for an appeal to the supreme court from an order of the district court on ditch proceedings. But Laws 1925, Chapter 415, is a complete drainage law. It is not a modification or compilation or codification of prior drainage acts. It follows that since the enactment of this law the right of appeal has existed and that certiorari is no longer the remedy. In re Judicial Ditch No. 3, 180 M 132, 230 NW 481; In re Julia E. Rosenfelt, 183 M 306, 238 NW 688.

Landowners petitioning for cancelation of certain ditch assessment, who did not file their petition prior to June first of the year in which the amounts became payable, failed to comply with the act and their petition for relief consequently can be dismissed. In re Slaughter, 213 M 70, 5 NW(2d) 65.

#### 106.90 APPEALS TO SUPREME COURT.

HISTORY. 1925 c. 415 s. 81; M.S. 1927 s. 6840-81.

The drainage act having provided a method of appeal, certiorari to review is no longer a remedy. In re Judicial Ditch No. 3, 180 M 132, 230 NW 481.

A ditch proceeding is one in rem and the order establishing the ditch has the same final binding force as a judgment in rem. Lupkes v Town of Clifton, 157 M 493, 196 NW 666.

#### 106.91 DISMISSAL OF PROCEEDINGS.

HISTORY. 1925 c. 415 s. 112; M.S. 1927 s. 6840-112.

After the court has acted upon a petition by ordering a preliminary survey, petitioners cannot withdraw their names from the petition. They may, however, move for dismissal of the proceedings by following the procedure outlined in this section. In re Judicial Ditch No. 75, 172 M 295, 215 NW 204, 216 NW 229.

Where a county ditch has been established and paid for, it may not be abandoned. OAG June 9, 1936 (148a-6).

#### 106.92 OFFENSES; PENALTIES.

HISTORY. 1925 c. 415 s. 84; M.S. 1927 s. 6840-84.

The establishment of the embankment was a proceeding in rem, and the order establishing same has the same final and binding force as a judgment in rem. Persons planning to excavate the embankment and build a bridge across the excavation may be restrained from so doing. Lupkes v Town of Clifton, 157 M 493, 196 NW 666.

One who negligently causes and permits an open public drain upon his land to become obstructed so as to flood his neighbor's land is liable therefor. Anderson v McCulley, 177 M 287, 225 NW 152.

Property owners who have permitted cattle to pass through a ditch cannot be required to remove the obstruction in the absence of wilfulness or neglect. OAG Dec. 30, 1938 (602b).

Landowner may not enter on his neighbor's land to effect repairs. His remedy is to apply to the county board whose duty it is to act. OAG April 27, 1944 (148a-14).

#### 106.93 CONSTRUCTION AND APPLICATION OF OTHER LAWS.

HISTORY. 1925 c. 415 s. 80; M.S. 1927 s. 6840-80.