Public Domain

CHAPTER 117

EMINENT DOMAIN

117.01 RIGHT OF EMINENT DOMAIN.

HISTORY. 1905 cc.7, 43; R.L. 1905 s. 2520; G.S. 1913 s. 5395; 1921 c. 353 s. 1; G.S. 1923 s. 6537; M.S. 1927 s. 6537.

PRIVATE LANDS. Private ownership of land is always subject to a taking for public use under the right of eminent domain. McRostie v City of Owatonna, 152 M 63, 188 NW 52; State Park Comm'rs v Henry, 38 M 266, 36 NW 874; Minn. Canal & P. Co. v Koochiching County, 97 M 429, 107 NW 405, 5 LNS 638.

STATE LANDS. There is given an implied consent to take state lands and no special significance is to be given the words "Private property" in this section. Ind. School Dist. v State, 124 M 271, 144 NW 960.

See annotations to section 117.05 and general annotations to chapter, Condemnation of Lands Already Devoted to Public Use; State Lands.

CHAPTER IS PROCEDURAL. The sections of this chapter were intended as a statute of procedure in all condemnation proceedings and not as one granting the right of eminent domain. Ind. School Dist. v State, 124 M 271, 144 NW 960.

CHARTER, MEANING OF. The legislature in this section did not use the word "charter" synonymously with the word "Law". "Charter" refers to a written charter especially applicable to some municipality and not to a special or general law. 1926 OAG 37.

PROCEDURE FOR CITY UNDER CHARTER. Where it is necessary for a city to acquire property by condemnation proceedings such proceedings should be instituted under the laws or charter provisions applying to such municipality. 1934 OAG 77.

PROCEDURE FOR AGENCY OF CITY UNDER CHARTER. Since condemnation proceedings brought by a city under its charter provisions do not come under Chapter 117, neither do those brought by subordinate agencies of the city under the charter in the absence of statute. Board of Water Comm'rs v Roselawn Cemetery, 138 M 458, 165 NW 279.

PROCEDURE UNDER HIGHWAY ACT. The general statutes on condemnation are the basis of procedure under the general highway act. Section 160.01, et seq. State v Stanley, 188 M 390, 247 NW 509; see State v Voll, 155 M 72, 192 NW 188.

PROCEDURE FOR ACQUIRING CERTAIN ROADS. Proceedings to condemn land for additional right of way for roads established by town and county boards pursuant to Laws 1921, Chapter 323, Section 3, may be taken under this chapter. 1922 OAG 393, 1924 OAG 172.

PROCEDURE FOR ACQUIRING STREETS BY CERTAIN CITIES. There are no statutory provisions for the acquisition of land for street purposes within cities of the fourth class where their charters make no provisions therefor except under this chapter. 1920 OAG 131.

PROCEDURE FOR ACQUIRING SCHOOL HOUSE SITES. This chapter regulates the method of taking lands for sites for school houses by school districts,

pursuant to Revised Laws 1905, Section 1320. School District No. 40 v Bolstad, 121 M 376, 141 NW 801.

See, Oronoco School District v Town of Oronoco, 170 M 49, 212 NW 8.

As an emergency measure, a bill authorizing the state executive council to expend public funds in work relief, direct relief, flood control, and similar, is not in conflict with Minnesota Constitution, Article 9, Section 5. 1934 OAG 733, Dec. 21, 1933 (213i).

In acquiring land for a county road, the condemnation proceeding should be under section 162.01 and not under the provisions of chapter 117. 1940 OAG 131, Nov. 2, 1940 (377b-3).

Discussion of procedure in opening a new street. 1942 OAG 183, Aug. 7, 1942 (396-G).

See as to condemnation of property where dead bodies are buried. OAG Jan. 13, 1944 (817f).

Notwithstanding provisions in the franchise setting specific terms and dates for purchase, a city may acquire a gas plant by condemnation at any time. OAG May 24, 1944 (624c-10).

Eminent domain; valuation of limited interests. 17 MLR 471.

In proceedings by the state to widen a trunk highway under the eminent domain statute, the state has the same right as another petitioner to discontinue, as to certain parcels, and is subject to the same obligation as to taxation of costs. State ex rel v Lesslie, 195 M 408, 263 NW 295.

A highway condemnation proceeding is in rem. No question of jurisdiction is presented, if, without formal intervention under the statute, interested taxpayers are permitted to appear and apply for and procure injunctional relief. State ex rel v Werder, 200 M 148, 273 NW 714.

The just compensation to which the owner of property taken for public purpose is constitutionally entitled is the market value thereof at the time of the taking contemporaneously paid in money. Minneapolis v Fitzpatrick, 201 M 446, 277 NW 394.

The defendant sanitary district in conducting a condemnation proceeding does so as an arm of the state in the discharge of a sovereign legislative function and is not liable in tort for the alleged malicious prosecution. Barmel v Minneapolis, St. Paul District, 201 M 622, 277 NW 208.

Where the state has not appropriated the property or taken possession, condemnation proceedings for acquiring a right of way for highway purposes may be abandoned and discontinued by the state at any time prior to the making of the award. State ex rel v Appleton, 208 M 436, 294 NW 418.

An order appointing commissioners in eminent domain proceedings, not being a final order, is not appealable. State ex rel v Fuchs, 212 M 452, 4 NW(2d) 361.

The legislature can take property against the will of the owner only for public use and after just compensation to the owner has been paid or secured. The legislature or a state agency decides the policy of the taking. Flooding land is a taking. State ex rel v Bentley, 216 M 147, 12 NW(2d) 347.

Riparian rights are valuable property rights of which the owner cannot be deprived without just compensation as provided by law. Petraborg v Zontelli, 217 M 536, 15 NW(2d) 174.

Under authority of the executive council, the state may acquire land by condemnation proceedings and convey same to the United States. 1934 OAG 169, Nov. 22, 1934 (817f).

The right of way for a new village street may be acquired by the exercise of the power of eminent domain. 1942 OAG 183, Aug. 7, 1942 (396-G).

Constitutional prohibition against taking or damaging property for public use without compensation. 26 MLR 868.

Review of administrative proceedings. 29 MLR 183.

117.02 DEFINITIONS.

HISTORY. R.L. 1905 c. 2521; G.S. 1913 s. 5396; G.S. 1923 s. 6538; M.S. 1927 s. 6538.

Subd. 2. TAKING. The word "taking", found in an earlier condemnation statute, the court said was used in a comprehensive sense. It comprehended not only the appropriation of the particular land but the direct (not remote or speculative) consequences and effects of such taking. Wilmes v Mpls. & N.W. Ry. Co. 29 M 242, 13 NW 39. And see, Weaver v Mississippi & Rum River Boom Co. 28 M 534, 11 NW 114.

STATE'S EXERCISE OF POLICE POWER NOT A TAKING. Such statutory regulations of the use of property as limiting the speed of railroad trains at crossing, requiring a whistle to be blown, or the construction of cattle-guards and fences, do not constitute a taking. State v District Court, Hennepin County, 42 M 247, 44 NW 7, 7 LRA 121; and State v Shardlow, 43 M 524, 46 NW 74; (on planking over railway crossings see C. M & St. P. Ry. Co. v Village of Leroy, 124 M 107, 144 NW 464).

See general annotations to chapter, Eminent Domain Distinguished from Exercise of Police Power.

Subd. 3. OWNER. Where the word "owner" appeared in a charter provision for condemnation the court said it must be construed in a comprehensive sense as including all persons having interests in the land, or who are entitled to the compensation to be awarded for the injury to the property. Moritz v City of St. Paul, 52 M 409, 54 NW 370. Accord, Stemper v County of Houston, 187 M 135, 244 NW 690 (condemnation under different act). See general annotations to chapter, Who Is Entitled to Compensation.

Flooding of land which results in serious interruption to its common and necessary use, is a "taking" of property within the meaning of Minnesota Constitution, Article 1, Section 13. Compensation is sufficiently "secured" within the meaning of the constitution, if the amount when determined is made a charge upon the public treasury of the state or some division thereof. State ex rel v Bentley, 216 M 146, 12 NW(2d) 347.

A landowner is not entitled to recover damages caused by vacation of a road where they are the same in kind as those sustained by the general public; but the owner of land abutting on a road is entitled, under the statute, to compensation for inconvenience of access between different parts of his land caused by vacating the road "as damages sustained by reason of vacating the road". Underwood v Town Board, 217 M 385, 14 NW(2d) 459.

The word "taking" as used and defined in Section 117.02 includes "every interference, under the right of eminent domain, with the ownership, possession, enjoyment, or value of private property" and the word "owner" extends to all persons interested in the property as proprietors, tenants, encumbrancers, or otherwise. An award of damages may be made in gross and apportioned later between the parties according to their respective interests. Seabloom v Krier, 219 M 362, 18 NW(2d) 88.

117.03 PROCEEDINGS, BY WHOM INSTITUTED.

HISTORY. 1874 c. 36 s. 1; G.S. 1878 c. 38 s. 78; G.S. 1894 s. 4085 R.L. 1905 s. 2522; G.S. 1913 s. 5397; G.S. 1923 s. 6539; M.S. 1927 s. 6539.

RAILROAD RECEIVER REQUIRES AUTHORIZATION FROM COURT. The receiver of a railroad has no power to institute condemnation proceedings in behalf of the railroad without authority to do so being given by the court making the appointment. Mpls. Western Ry Co. v M. & St. L. 61 M 502, 63 NW 1035. See, Duluth Transfer Ry. Co. v Duluth Terminal Ry. Co. 81 M 62, 83 NW 497, on reviewing on appeal the receiver's right to institute proceedings.

AUTHORIZATION, ALLEGATIONS OF. This section does not require the petition to allege in terms that the proceedings are authorized by the board of directors. That is a matter of evidence. Otter Tail Power Co. v Brastad, 128 M 415, 151 NW 198.

UNAUTHORIZED PETITION, RATIFICATION. Where the petition was signed by the attorneys for the railroad company the acts of the attorneys might

be ratified if in fact the commencement of the proceeding was unauthorized. N. P. Ry. Co. v Pioneer Fuel Co. 148 M 214, 181 NW 341.

RATIFICATION, EVIDENCE OF. Taking possession of the land and laying track after executing a bond as provided in section 117.13 was evidence of ratification. N. P. Ry. Co. v Pioneer Fuel Co. 148 M 214, 181 NW 341.

When property is required by the state for any authorized purpose, the attorney general, at the request of the officer charged with the execution of the purpose, shall institute condemnation proceedings. By the terms of Section 117.20 it is the duty of the public officer to pay full and just compensation. State v Peterson, 220 M ——, 19 NW(2d) 70.

An abutting property owners' right of access to a public highway is an interest in land and subject to condemnation under the law of eminent domain. The commissioner of highways had a right to acquire owner's right of access to trunk highway No. 36 for the purpose of making it a free highway. The owner was entitled to damages. Burnquist v Cook, 220 M ——, 19 NW(2d) 395.

117.04 ENTRY FOR SURVEYS.

HISTORY. 1857 c. 39 s. 21; P.S. 1858 c. 129 s. 23; 1865 c. 6 s. 20; G.S. 1866 c. 31 s. 21; G.S. 1866 c. 34 s. 30; G.S. 1878 c. 31 s. 21; G.S. 1878 c. 34 s. 50; 1889 c. 65 s. 4; G.S. 1894 ss. 2373, 2623, 2643; R.L. 1905 s. 2523; G.S. 1913 s. 5398; G.S. 1923 s. 6540; M.S. 1927 s. 6540.

ENTRY FOR SURVEY NOT A TAKING. An entry for survey would not be a taking of land to be valued and paid for. Hursh v First Div. of St. P. & P. R. R. Co. 17 M 439 (417) (condemnation under charter).

RULE DAMNUM ABSQUE APPLIES. As to injuries to the freehold flowing from a proper survey the rule damnum absque injuria applies (the proceedings had been taken under a city charter and the law which granted the municipality the power of eminent domain the court said impliedly conferred the right to enter and make a survey). McRostie v City of Owatonna, 152 M 63, 188 NW 52.

117.05 PETITION AND NOTICE.

HISTORY. 1857 c. 39 ss. 2, 6; P.S. 1858 c. 129 ss. 2, 6; 1865 c. 6 ss. 6, 7; G.S. 1866 c. 31 ss. 2, 6; G.S. 1866 c. 34 ss. 14, 15; 1872 c. 53 ss. 1, 2; 1874 c. 36 s. 2; G.S. 1878 c. 31 ss. 2, 6; G.S. 1878 c. 34 ss. 14, 15; G.S. 1878 c. 38 s. 79; 1889 c. 65 ss. 4 to 6; G.S. 1894 ss. 2354, 2358, 2605, 2606, 2623 to 2625; 4086; R.L. 1905 s. 2524; G.S. 1913 s. 5399; G.S. 1923 s. 6541; M.S. 1927 s. 6541.

PETITION JURISDICTIONAL. Presenting and filing the petition gave the court jurisdiction over the subject matter. Whitely v Miss. Water Power & Boom Co. 38 M 523, 38 NW 753.

The filing of the petition and service of the notice of the time and place when such petition will be heard bring the parties into court and give the court jurisdiction to make the order appointing the commissioners. Kanne v M. & St. L. R. Co. 32 M 174, 19 NW 975 (special act); Fletcher v C. St. P. M. & O. Ry. Co. 67 M 339, 69 NW 1085.

NOTICE JURISDICTIONAL. The party whose property is taken for a public use must have notice and an opportunity to be heard. Reasonable notice of same sort is absolutely essential and jurisdictional. Town of Lyle v C. M. & St. P. Ry. Co., 55 M 223, 56 NW 820; Great Northern Ry. Co. v City of Minneapolis, 136 M 1, 161 NW 231.

So far as jurisdiction is concerned the essential thing is notice to the person. Siman v Rhoades, 24 M 25 (mill dam act).

Failure to serve notice on the owner was held fatal to the attempted condemnation proceedings. Lohman v St. P. S. & T. F. R. Co. 18 M 174 (157).

Lack of notice voids the proceedings only as to those who have not been notified. Town of Tyrone v Burns, 102 M 318, 113 NW 695.

OBJECT OF STATUTE. The object of the statute requiring notice of the hearing of the petition is to bring before the court the parties interested that their rights may be adjudicated. Rheiner v Union Depot Co. 31 M 193, 17 NW 279.

STATUTE REQUIRES STRICT COMPLIANCE. The notice required by the statute must be given in strict conformity with the statute. Town of Lyle v C. M. & St. P. Ry. Co. 55 M 223, 56 NW 820; Great Northern Ry. Co. v City of Mpls. 142 M 308, 172 NW 135.

APPEARANCE CONFERS JURISDICTION, WAIVES NOTICE. A voluntary appearance confers jurisdiction. Rheiner v Union Depot Co. 31 M 193, 17 NW 279. Also, Hurst v Town of Martinsburg, 80 M 40, 82 NW 1099; Bruns v Town of Nicollet, 181 M 192, 231 NW 924.

Appearing before the commissioners and appealing from the award is a submission to the jurisdiction of the court. Whitely v Miss. Water Power & Boom Co. 38 M 523, 38 NW 753.

A casual meeting between the owner and the commissioners was held not to be a voluntary appearance. Kanne v M. & St. L. R. Co. 32 M 174, 19 NW 975.

FAILURE TO SERVE, WHO MAY OBJECT. One who has been properly served cannot be concerned whether other owners were properly served. Sackette v City of Duluth, 201 M 121, 275 NW 617; also, Hurst v Town of Martinsburg, 80 M 40, 82 NW 1099.

PERSONAL NOTICE NOT REQUIRED. Personal notice to the owner is not a constitutional requisite in condemnation proceedings. Kusche v City of St. Paul, 45 M 225, 47 NW 786 (charter case).

PUBLISHED NOTICE, VALIDITY OF. The test is whether the publication was of such character as to create a reasonable presumption that the owner would receive the information of what was proposed and when and where it could be heard. Great Northern Ry. Co. v City of Mpls. 136 M 11, 161 NW 231 (proceedings taken under Elwell Law); and see, Town of Lyle v C. M. & St. P. Ry. Co. 55 M 223, 56 NW 820; State v Hall, 195 M 79, 261 NW 874; St. Paul, M. & M. Ry. Co. v City of Mpls. 35 M 141, 27 NW 500.

NOTICE, DESCRIPTION OF LAND. The description in the notice must be sufficiently definite to apprise the owner what and how much of his land is to be condemned. Kusche v City of St. Paul, 45 M 225, 47 NW 786 (charter case).

WHERE OWNER'S NAME OMITTED. A notice giving only the name of the owner's deceased ancestor was held good because the property to be affected was designated properly. Knoblauch v Mpls. City, 56 M 321, 57 NW 928 (condemnation under city charter); Great Northern Ry. Co. v City of Mpls. 136 M 1, 161 NW 231, and 142 M 308, 172 NW 135 (condemnation under Elwell Law). But where the owners' name was omitted and the description was insufficient the proceedings were void. Town of Lyle v C. M. & St. P. Ry. Co. 55 M 223, 56 NW 820.

SINGLE PETITION FOR SEVERAL TRACTS. A single petition may include numerous tracts or parcels of land. State v May, 204 M 564, 285 NW 834.

PETITION, STATEMENT OF PURPOSE FOR TAKING. It is not necessary in the petition to specify the particular public use to which each tract of land is to be put. A general allegation of the purpose for which it is sought to acquire the land described is sufficient. Flatcher v C. St. P. M. & O. Ry. Co. 67 M 339, 69 NW 1085.

PETITION, DESCRIPTION OF LAND. It is not necessary that the petition contain an accurate description of the land involved; it is sufficient if it is approximately correct. State v Board of County Comm'rs of Polk Co. 87 M 325, 92 NW 216, 60 LRA 161 (a drainage case).

The real question is whether the description employs language reasonably sufficient for the purpose. Otter Tail Power Co. v Brastad, 128 M 415, 151 NW 198.

The owner's land was not sufficiently specified when the only description of it was of the entire government subdivisions as a whole, of which it formed a

part, and the owner's name was omitted. Town of Lyle v C. M. & St. P. Ry. Co. 55 M 223, 56 NW 820.

A description in the petition "as lands of Elisha Rhoades" is not sufficient to bind the lands by the report or the judgment but is sufficient, proper notice being given, to give the court jurisdiction of the proceedings. Siman v Rhoades, 24 M 25 (mill dam act).

Description in petition does not conclude assertion of real interest affected. If the claimant's estate and interest are incorrectly stated in the petition he is not thereby concluded from asserting his real claim, interest, and estate. Brisbine v St. P. & Sioux City R. Co. 23 M 114.

DOES NOT RESTRICT COMMISSIONERS. The description in the petition does not restrict the commissioners to the land described in assessing damages. Winona & St. Peter R. Co. v Denman, 10 M 267 (208); Wilmes v Mpls. & N. W. Ry. 29 M 242, 13 NW 39; Sheldon v M. & St. L. Ry. Co. 29 M 318, 13 NW 134.

Where the petition describes only part of the lands taken the owner is not required to proceed, by cross-petition or otherwise, to have the description in the petition corrected or enlarged or else be limited in his recovery to the land described. Sheldon v M. & St. L. Ry. Co. 29 M 318, 13 NW 134.

AMENDING THE PETITION, WHEN ALLOWED. Amendments to supply omissions in the petition which go to the jurisdiction of the court ought not to be allowed, but formal amendments such as striking from the petition land as to which the condemnor does not wish to continue the proceedings ought to be allowed, especially where the owner thereof does not object and none of the other owners are prejudiced. Fletcher v C. St. P. M. & O. Ry. Co. 67 M 339, 69 NW 1085.

DEFECTIVE DESCRIPTION. If notice to the person has been given any such defect in the petition as indefiniteness in the description of the lands may be amended or disregarded. Siman v Rhoades, 24 M 25 (mill dam act).

When jurisdiction over the owner had been lost the court had no authority to entertain and act upon the amended petition without further proceedings being had to regain jurisdiction over him. Rheiner v Union Depot Co. 31 M 289, 17 NW 623.

PETITION, CORRECTING CLERICAL ERRORS. Clerical errors in the petition may be corrected by order of the court. Sackette v City of Duluth, 201 M 121, 275 NW 617.

AMENDED PETITION, EFFECT OF. An amended petition institutes in effect a new proceeding for the taking of the land in question. Rheiner v Union Depot Co. 31 M 289, 17 NW 623.

ENLARGEMENT OF PETITION WHERE CONDEMNOR IS THE STATE. An owner who has not been included in the proceeding may, by motion, intervene and the court may say to the state that it must bring the owner's land, concededly taken and damaged, into the proceedings for assessment of compensation. State v Stanley, 188 M 390, 247 NW 509 (overruling State v Erickson, 185 M 60, 239 NW 908, on this point).

CONSIDERATIONS NOT AFFECTING. The owner is not prevented by the fact that he might petition the legislature for compensation nor by the rule that the state cannot be sued without its consent. State v Stanley, 188 M 390, 247 NW 509.

PETITION EMBRACES RIPARIAN RIGHTS. Condemnation of upland embraces riparian rights although the petition makes no express mention of such rights. Hanford v St. P. & Duluth R. Co. 43 M 104, 42 NW 596, 44 NW 1144, 7 LRA 722.

See general annotations to chapter for citations on condemnation of riparian rights.

STATE LANDS, CONDEMNATION OF. There is granted by implication from this section in general terms authority to condemn for public use state-

owned lands not already devoted to and actually used by the state for a public or governmental purpose. Minn. Power & Light Co. v State, 177 M 343, 225 NW 164, citing in re St. P. & N. P. Ry. Co. 34 M 227, 25 NW 345, and Univ. of Minn. v St. P. & N. P. Ry. Co. 36 M 447, 31 NW 936.

CONDEMNATION OF STATE LANDS IS EQUIVALENT TO PUBLIC SALE. The constitution of the state forbids the sale of school lands otherwise than at public sale. Within the meaning of that provision the disposal of state lands in condemnation proceedings is equivalent to a public sale. Ind. School District v State, 124 M 271, 144 NW 960.

The project here involved was authorized by Laws 1935, Chapter 51, and condemnation proceedings conducted by the attorney general strictly in accordance with the provisions of Chapter 117. The executive council did not exceed its authority in construction of the project. State ex rel v Bentley, 216 M 147, 12 NW(2nd) 347.

See, State v Peterson, 220 M — 19 NW (2d) 70.

See annotations to section 117.01 and general annotations to chapter, Condemnation of Land Already Devoted to Public Use; State Lands.

117.06 NOTICE OF PENDENCY.

HISTORY. 1895 c. 246 s. 2; R.L. 1905 s. 2525; G.S. 1913 s. 5400; G.S. 1923 s. 6542; M.S. 1927 s. 6542.

ABANDONMENT: See general annotations to chapter, Abandoning the Proceedings.

117.07 COURT TO APPOINT COMMISSIONERS OF APPRAISAL.

HISTORY. 1857 c. 39 s. 3; P.S. 1858 c. 129 s. 3; 1865 c. 6 s. 9; G.S. 1866 c. 31 s. 3; G.S. 1866 c. 34 s. 17; 1872 c. 53 s. 4; 1874 c. 36 s. 2; G.S. 1878 c. 31 s. 3; G.S. 1878 c. 34 s. 17; G.S. 1878 c. 38 s. 79; 1879 c. 35 s. 1; 1879 c. 80 s. 3; G.S. 1878 Vol. 2 (1888 Supp.) c. 34 s. 31; 1889 c. 65 s. 7; G.S. 1894 ss. 2355, 2608, 2626; 2647; 4086; R.L. 1905 s. 2526; G.S. 1913 s. 5401; G.S. 1923 s. 6543; M.S. 1927 s. 6543.

DETERMINING WHETHER TAKING NECESSARY. Under a prior statute similar to this it was said to be the duty of the court to determine as a question of fact whether the public interests require the proposed enterprise to be carried out. Minn. Canal & P. Co. v Koochiching Co. 97 M 429, 107 NW 405, 5 LNS 638.

OWNER'S RIGHT TO OPPOSE. Owner has a right to oppose the taking of his land on the ground that the proposed appropriation is not necessary for the purposes of the petitioner. In re Mpls. Ry. Terminal Co. 38 M 157, 36 NW 105.

A third party who has no interest in the land taken and whose legal rights are not affected cannot raise the objection that the corporation has no power under its charter to acquire the specific land for railway purposes. Kettel River R. Co. v Eastern Ry. Co. of Minn. 41 M 461, 43 NW 469, 6 LRA 111.

Lands not embraced in the petition nor connected with other lands sought to be condemned as part of an entire tract are not to be deemed affected by the proceedings so as to authorize the owners thereof to appear and object to the propriety of granting the petition. In re St. P. & N. P. Ry. Co. 34 M 227, 25 NW 345.

Any one opposing the proceedings may state his objections in writing and should he do so he would be limited to those stated and be held to concede anything not objected to. Chi. Burl. & Northern R. Co. v Porter, 43 M 527, 46 NW 75.

RIGHT TO OPPOSE AFTER DEFAULT, OPENING UP. An owner who has defaulted excusably may be let in to oppose the proceedings, the same being opened for that purpose although the award has been filed. In re Mpls. Terminal Co. 38 M 157, 36 NW 105.

The state instituted a condemnation for a highway right of way but omitted to include a tract of land which it used as part of the general project. Held, the owner upon a proper showing may have such land included in the condemnation proceeding to the end that there may be an assessment of damages. State v Stanley, 188 M 390, 247 NW 509. See State v Hall, 195 M 79, 261 NW 874.

An intervention cannot be permitted after the condemnation proceedings have come to an end. State v Hall, 195 M 79, 261 NW 874.

ORDER APPOINTING DETERMINES THE QUESTION OF NECESSITY. The question of the necessity for the taking is determined by the order appointing the commissioners. Hopkins v C. St. P. M. & O. Ry. Co. 76 M 70, 78 NW 969.

On the question of necessity, see general annotations to chapter.

ORDER OF PROOF. The order of proof is discretionary with the court, and where an order apparently determined the burden of proof but resulted only in a direction as to the order of proof there was no substantial prejudice. M. & St. L. Ry. Co. v Village of Hartland, 85 M 76, 88 NW 423 (condemnation under a different act).

DETERMINING INTERESTS OF PARTIES; NO PROVISIONS FOR ON HEARING. The statute does not contain a provision for determining at the time of hearing the petition the interests of the various parties in the land to be taken. Oronoco School District v Town of Oronoco, 170 M 49, 212 NW 8.

FAILURE OF ORDER TO FIX PLACE OF MEETING. The order appointing the commissioners failed to fix the place of their meeting. That failure invalidated the award made. Kanne v M. & St. L. R. Co. 32 M 174, 19 NW 975.

Lack of notice of the meeting of the commissioners goes not to the jurisdiction over the landowner but to the authority of the commissioners to act. Kanne v M. & St. L. R. Co. 33 M 419, 23 NW 854.

CASUAL MEETING WITH COMMISSIONERS NOT NOTICE. The court, in Kanne v M. & St. L. R. Co. 32 M 174, 19 NW 975, refused to construe a casual meeting between the owner and the commissioners as a voluntary appearance or as actual notice of the time and place of the meeting.

FAILURE OF COMMISSIONERS TO MEET ON DAY APPOINTED. Jurisdiction over the plaintiff was lost by a failure to meet on the day designated for the first meeting. Rheiner v Union Depot Co. 31 M 289, 17 NW 623.

FAILURE OF COMMISSIONER TO ACT. By stipulation the appearance of the third commissioner was waived and the action of the two was to have the same force and effect as if all three had acted; held, the charter provision which required the appointment of the commissioners did not go to the jurisdiction of the court over the subject matter, that it was for the benefit of the owner and might be waived. City of Mpls. v Wilkin, 30 M 140, 14 NW 581.

LIMITING THE INTEREST TO BE ACQUIRED. The extent and duration of the interest that the petitioner shall be permitted to acquire may be determined by the court in the order appointing the commissioners. M. & St. L. Ry. Co. v Nicolin, 76 M 302, 79 NW 304. See, Hopkins v C. St. P. M. & O. Ry. Co. 76 M 70, 78 NW 969.

WHERE COURT LIMITS, COMMISSIONERS HAVE NO POWER. Where the court has imposed limitations the commissioners have no power or authority to fix the limits themselves. Pfaender v C. & N. W. Ry. Co. 86 M 218, 90 NW 393, 1133.

ORDER APPOINTING, INVALIDITY OF PART AS AFFECTING WHOLE. Part of the order appointing the commissioners was invalid but the whole was not rendered nugatory in Warren v First Div. of St. P. & Pac. R. Co. 18 M 384 (345).

See, State v Peterson, 220 M —, 19 NW(2d) 70.

117.08 APPRAISERS, POWERS AND DUTIES.

HISTORY. 1857 c. 39 s. 14; P.S. 1858 c. 129 s. 14; 1865 c. 6 s. 11; G.S. 1866 c. 31 s. 14; G.S. 1866 c. 34 s. 19; 1872 c. 53 s. 6; 1874 c. 36 s. 2; G.S. 1878 c. 31 ss. 7, 8; G.S. 1878 c. 34 s. 18; G.S. 1878 c. 38 s. 79; 1879 c. 35 s. 2; 1889 c. 65 s. 8; G.S. 1894 ss. 2359, 2360, 2609, 2627, 4086; R.L. 1905 s. 2527; G.S. 1913 s. 5402; G.S. 1923 s. 6544; M.S. 1927 s. 6544.

DUTY TO INVESTIGATE QUALIFICATIONS OF COMMISSIONERS; LACHES. See, State v District Court of Hennepin Co. 50 M 14, 52 NW 222.

PECUNIARY INTEREST DISQUALIFIES. To disqualify a commissioner he must have had some direct private pecuniary interest in the result of the awards and assessments he was required to make. State v District Court of Hennepin Co. 50 M 14, 52 NW 222.

PRIOR APPRAISAL AS MEMBER OF REAL ESTATE BOARD DISQUALIFIES. An appraiser who had formerly taken part in an appraisal of the same premises as a member of a real estate board was disqualified from acting as an appraiser in a condemnation proceeding. State ex rel v District Court of Hennepin Co. 87 M 268, 91 NW 1111.

INTEREST OF ADJACENT OWNERSHIP. The interest of a (county) commissioner was that of an adjacent proprietor of land indirectly benefited by the improvement for which the land was taken. That interest was held not to be disqualifying. Webster v Washington, 26 M 220, 2 NW 697 (different condemnation act).

DUTIES, PRESUMPTION OF PERFORMANCE. There is a legal presumption that the commissioners did their duty. State Park Comm'rs v Henry, 38 M 266, 36 NW 874.

ISSUING SUBPOENAS. City of Mpls. v Wilkin, 30 M 140, 14 NW 581.

RULES OF EVIDENCE TO APPLY. The commissioners in receiving the proofs of the parties ought to be guided by established rules of evidence. City of Mpls. v Wilkin, 30 M 140, 14 NW 581.

See annotations to section 117.14.

Eyre v City of Faribault, 121 M 233, 141 NW 170, LRA 1917A 685, limits the Brisbine case. The statute did not intend that conflicting claims to the land and thus to the award should be in issue or determined in condemnation proceedings either by the court or commissioners, except as between the condemnor and the claimants. Eyre v City of Faribault, 121 M 233, 141 NW 170, LRA 1917A 685.

CONTESTED CLAIMS, COMMISSIONERS NOT TO DECIDE. The commissioners should not be vested with the power of deciding the validity of contested and disputed interests. Peterson v City of Mpls. 175 M 300, 221 NW 14.

TITLE NOT ADJUDICATED. Where title is in doubt it cannot be held that as between conflicting claims of ownership title to the property was adjudged in the condemnation proceeding so as to preclude the real owner from asserting his ownership. Eyre v City of Faribault, 121 M 233, 141 NW 170, LRA 1917A 685, and Major v Owens, 126 M 1, 147 NW 662, Ann. Cas. 1915D 589.

DISTRICT COURT TO DECIDE. Upon application to the district court proper proceedings may be had to determine the respective interests of various claimants. Peterson v City of Mpls. 175 M 300, 221 NW 14.

WHY ARE ALL OWNING INTERESTS MADE PARTIES? The purpose of a provision making all persons whose interests are to be foreclosed defendants is not to determine questions of title between them but so that they may be heard on the issue of the right to condemn and the amount of damages to be awarded. State ex rel v District Court of Ramsey Co. 128 M 432, 151 NW 144 (charter provision construed).

AMOUNT OF DAMAGES AND SEPARATE ASSESSMENTS. See general annotations to chapter.

EFFECT OF AWARD, CONCLUSIVE. The award is conclusive and binding until modified or changed on appeal. Trogden v Winona & St. Peter R.R. Co. 22 M 198.

The report of the commissioners is superseded by a general appeal from it. St. P. & Sioux City R. Co. v Matthews, 16 M 341 (303).

CONDITIONS, FAILURE TO APPEAL FROM. The commissioners attached a condition to the award. The condemnor appealed therefrom on the ground that the damages were excessive. The verdict reducing the damages made no referenc to the award. Judgment simply for the recovery of damages was entered on the verdict and satisfied. The owner later discovered the omission and moved the court to correct the judgment. Held, the conditions became final not having been challenged and should have been incorporated in the judgment, and the court may amend the judgment to make it conform. Mpls. St. P. R. & D. E. T. Co. v Grimes, 128 M 321, 150 NW 180, 906.

VOID AWARD. The condemnation proceedings against a certain tract were invalid where the award and subsequent proceedings related to a different tract. Keyes v City of Mpls. 42 M 467, 44 NW 529.

ERRONEOUS ASSESSMENT NOT VOID WHERE APPEAL ALLOWED. An erroneous assessment is not void where a remedy is provided by appeal. St. P. M. & M. Ry Co. v City of Mpls. 35 M 141, 27 NW 500.

CLAIMING UNDER AWARD WAIVES IRREGULARITIES. By claiming under the award the parties ratified it and irregularities are waived. Smith v City of St. Paul, 65 M 295, 68 NW 32 (a charter case).

VOID AWARD; COLLATERAL ATTACK. If the award is void the plaintiff is not required to move to set it aside but might attack it collaterally in any action in which rights were claimed under it. Kanne v M. & St. L. R. Co. 33 M 419, 23 NW 854.

117.09 REPORT; NOTICE.

HISTORY. 1857 c. 39 s. 14; P.S. 1858 c. 129 s. 14; 1865 c. 6 s. 12; G.S. 1866 c. 31 s. 14; G.S. 1866 c. 34 s. 20; 1874 c. 36 s. 2; G.S. 1878 c. 31 s. 8; G.S. 1878 c. 34 s. 19; G.S. 1878 c. 38 s. 79; 1889 c. 65 s. 9; G.S. 1894 ss. 2360, 2610, 2628, 4086; R.L. 1905 s. 2528; G.S. 1913 s. 5403; G.S. 1923 s. 6545; M.S. 1927 s. 6545.

REPORT SHOULD DESCRIBE LAND. In order to bind the land it should be described in the report of the commissioners or on appeal in the judgment. Siman v Rhoades, 24 M 25 (mill dam act).

FILING THE REPORT. Filing is the only official evidence that the award has been made. Scott v St. P. & Chi. Ry. Co. 21 M 322.

NOTICE. The commissioners, on payment of their fees and disbursements by the petitioner, are required to sign and deliver to him a notice that their report has been filed and this notice he is required to serve upon the landowners. State v Umberger, 160 M 197, 199 NW 906.

117.10 PAYMENT; TENDER; DEPOSIT IN COURT.

HISTORY. 1857 c. 39 s. 9; P.S. 1858 c. 129 s. 9; 1865 c. 6 s. 13; G.S. 1866 c. 31 s. 9; G.S. 1866 c. 34 s. 21; 1877 c. 85 s. 1; G.S. 1878 c. 31 s. 9; G.S. 1878 c. 34 ss. 20, 21; 1889 c. 65 ss. 10, 11; G.S. 1894 ss. 2361, 2611, 2629, 2630, 2649; R.L. 1905 s. 2529; G.S. 1913 s. 5404; G.S. 1923 s. 6546; M.S. 1927 s. 6546.

TENDER, EFFECT OF. Tender releases the taker from any further obligation except to keep the money offered in readiness to be paid. Scott v St. P. & Chi. Ry. Co. 21 M 322.

A tender made before the time for appeal expires could not divest the owner of his property. Hursh v First Div. of St. P. & P. R. Co. 17 M 439 (417).

TENDER, WHERE INEFFECTIVE. If the value as appraised is not compensation an award and tender could never give the condemnor any right in the premises whether an appeal had been taken and determined or not. Hursh v First Div. of St. P. & P. R. Co. 17 M 439 (417).

TENDER, WHERE NO DEFENSE TO TRESPASS ACTION. An award and tender would be no defense to an action brought to recover damages for a trespass

where the award was made pursuant to a void provision, authorizing the taking. Hursh v First Div. of St. P. & P. R. Co. 17 M 439 (417).

DEPOSIT MUST BE UNCONDITIONAL. A deposit where authorized to be made must be an unconditional one to be availing. Kanne v M. & St. L. R. Co. 30 M 423, 15 NW 871.

DEPOSIT BEFORE AWARD APPORTIONED. In a condemanation proceed-instituted by the United States government under this chapter the court said the government is not interested in the question of apportionment or proper distribution of the award and that its duties will have been performed when it pays the amount of the award into court. City of St. Paul v Certain Lands in City of St. Paul, 48 F(2d) 805.

On apportionment, see general annotations to chapter.

LIABILITY OF CLERK FOR LOSS OF FUNDS DEPOSITED. The rule of absolute liability of public officers and the sureties on their official bonds for money received by them in their official capacities applies to clerks of the district courts and their sureties; that is the rule though the funds are ultimately to be paid over by them to private parties. N. P. Ry. Co. v Owens, 86 M 188, 90 NW 371, 91 ASR 336, 57 LRA 634 (the clerk deposited the funds in a bank that became insolvent).

RESPONSIBILITY OF CLERK OF COURT ON AWARDS DEPOSITED WITH HIM. 1926 OAG 57.

CLERK'S FEES IN CONDEMNATION PROCEEDINGS. 1926 OAG 57.

The amount having been deposited in court, pursuant to section 117.10 it is held that providing that a landowner at the time of forfeiture of his property for delinquent taxes is given the right of repurchase if made prior to a given date, "unless prior to the time repurchase is made such parcel shall have been sold by the state", a "taking" under condemnation is not a sale within the meaning of the repurchase act. State ex rel v Flach, 213 M 355, 6 NW(2d) 805.

The principal purposes of provision in declaration of taking act for estimating of just compensation and depositing of the amount thereof in court, are to minimize interest burden of the government in condemnation proceedings, and to alleviate temporary hardship to landowner and occupant. United States v 1,997.66 Acres 137 F(2d) 8.

Appraisal of a leasehohld. Seabloom v Krier, 219 M—, 18 NW(2nd).

117.11 FAILURE TO REPORT.

HISTORY. 1874 c. 28 s. 4; G.S. 1878 c. 24 s. 30; G.S. 1894 s. 2654; 1895 c. 42; R. L. 1905 s. 2530; G.S. 1913 s. 5405; G.S. 1923 s. 6547; M.S. 1927 s. 6547.

117.12 ACCRUING TAXES.

HISTORY. 1874 c. 28 s. 2; G.S. 1878 c. 34 s. 28; G.S. 1894 s. 2652; R.L. 1905 s. 2531; G.S. 1913 s. 5406; G.S. 1923 s. 6548; M.S. 1927 s. 6548.

PAYMENT OF TAXES. Where the property owner pays the taxes after the condemnation was instituted but before payment of the award he is entitled to have the amount of the taxes paid added to the amount of the award. 1922 OAG 341.

117.13 APPEAL.

HISTORY: 1857 c. 39 ss. 10, 11; P.S. 1858 c. 129 ss. 10, 11; 1865 c. 6 ss. 14, 15; G. S. 1866 c. 31 ss. 10, 11; G.S. 1866 c. 34 ss. 22, 23; 1874 c. 36 s. 3; G.S. 1878 c. 31 ss. 10, 11; G.S. 1878 c. 34 ss. 23, 24; G.S. 1878 c. 38 s. 80; 1889 c. 65 s. 12; G.S. 1894 ss. 2362, 2363, 2612, 2613, 2631, 4087; R.L. 1905 s. 2532; G.S. 1913 s. 5407; G.S. 1823 s. 6549; M. S. 1927 s. 6549.

DELIVERING OF NOTICE DOES NOT LIMIT PETITIONER'S TIME. The delivery of the commissioners' notice to the petitioner does not constitute service upon him and limit his time to appeal to 30 days therefrom. State v Umberger, 160 M 197, 199 NW 906.

TIME FOR APPEAL, WHEN FIXED. By this section the legislature meant that the provisions governing the landowner and fixing his time for appeal should also govern the petitioner and limit his time. It is construed to mean that service on the owner by the petitioner fixes the time within which either may appeal. State v Umberger, 160 M 197, 199 NW 906.

BOND SECURES THE COMPENSATION. The bond is to be regarded as securing the compensation. Weir v St. P. S. & T. F. R. Co. 18 M 155 (139).

APPROVAL DETERMINES SUFFICIENCY OF BOND. An approval of a bond involves a determination that it is sufficient in amount and it is not necessary that the amount be fixed by a separate order. Hempstad v Cargill, 46 M 141, 48 NW 686 (condemnation under the mill dam act).

BOND, SUBSTITUTION OF SURETIES. The owner, if dissatisfied with the sureties for good reason, could apply to the court to compel the substitution of satisfactory ones. Weir v St. P. S. & T. F. R. Co. 18 M 155 (139); Rippe v C. D. & M. R. R. Co. 22 M44.

BOND, ABSOLUTE JUDGMENT CONTEMPLATED. The bond provision contemplated an absolute unconditional judgment in favor of the owner for the amount of his compensation as it may be finally ascertained on the trial of the appeal, and not one by which the condemnor may elect to pay or to abandon. Curtis v St. P. S. & T. F. R. Co. 21 M 497.

BOND AS AFFECTING ABANDONMENT. In Witt v St. P. & N. P. Ry. Co. 35 M 404, 29 NW 161, the court said that had the condemnor filed a bond and taken possession the subsequent right to abandon the proceedings without the consent of the owner would have been lost.

On appeal in general, see annotations to chapter.

Appeals from awards of commissioners in highway condemnation proceedings instituted by the state are governed by section 117.20 (2); and such appeals must be taken within 30 days from the date of the filing of the report of the commissioners. Hollenbeck v State, 214 M 490, 8 NW(2d) 613.

The practice and procedure in condemnation proceedings in federal court must be according to forms and modes provided in the states where proceedings are had; and under Minnesota law the filing of separate notices of appeal from condemnation awards to owners of separate parcels of land is "jurisdictional". United States v Federal Land Bank, 127 F(2d) 505.

117.14 TRIAL, COSTS.

HISTORY. 1857 c. 39 s. 12; P.S. 1858 c. 129 s. 12; 1865 c. 6 s. 17; G.S. 1866 c. 31 s. 12; G.S. 1866 c. 34 s. 25; 1874 c. 36 s. 3; G.S. 1878 c. 31 s. 13; G.S. 1878 c. 34 s. 25; G. S. 1878 c. 38 s. 80; 1889 c. 65 s. 12; G.S. 1894 ss. 2365, 2614, 2631, 4087; R.L. 1905 s. 2533; G.S. 1913 s. 5408; G.S. 1923 s. 6550; M.S. 1927 s. 6550.

APPOINTMENT OF COMMISSIONERS JURISDICTIONAL; JUDICIAL NOTICE.

There was no record in the district court of the appointment of commissioners. The court took judicial notice of the fact of appointment, the fact, and not the evidence of the fact, being essential to the jurisdiction of the court. Warren v First Div. of St. P. & P. Ry. Co. 18 M 384 (345).

NOTICE OF APPEAL WHEN INEFFECTIVE. A notice of appeal given prior to service of notice that the report had been filed held to be no legal validity. Ellering v M. St. P. & S. Ste. M. Ry. Co. 107 M 46, 119 NW 507.

RULES APPLICABLE TO CIVIL ACTIONS. As soon as the amount of the award becomes controversial by the taking of an appeal the matter assumes the nature of a judicial proceeding and the rules relative to such apply. State v May, 204 M 574, 285 NW 834; Boom Co. v Patterson, 98 US 403, 25 L. Ed. 206.

CHANGE OF VENUE. The general statutes upon the subject of change of venue were in effect held applicable to condemnation proceedings, when removed to the district court by appeal in Lehmicke v St. P. S. & T. F. R. Co. 19 M 464 (406).

The decision there rendered has since been followed and approved. Mpls. St. P. R. & D. Elec. T. Co. v Goodspeed, 128 M 66, 150 NW 222.

JURORS' OATH. The proper oath to be administered to jurors on appeal is the general one, "to petit jurors in civil actions". Knauft v. St. P. S. & T. F. R. Co. 22 M 173.

BURDEN OF PROOF. The burden of proof on damages is on the owner. Mpls. St. Paul S. District v Fitzpatrick, 201 M 442, 277 NW 394, 124 ALR 897.

RIGHT TO OPEN AND CLOSE. The landowner occupies the position of plaintiff on the trial in the district court and has the right to open and close. Mpls.-St. Paul S. District v Fitzpatrick, 201 M 442, 277 NW 394, 124 ALR 897; Minn. Valley R. Co. v Doran, 17 M 188 (153); Ellering v Mpls. St. P. & S. Ste. M. Ry. Co. 107 M 46, 119 NW 507.

WITNESSES, COMPETENCY. The question of competency of witnesses in cases of this kind rests largely in the discretion of the trial court. Potts v Mpls. St. P. & S. Ste. M. Ry. Co. 124 M 413, 145 NW 161.

Witnesses may be asked the value of the land before and after.

The witnesses may be asked the direct question, what is the land now worth and what will it be worth when the work is completed. Simmons v St. P. & Chi. R. R. Co. 18 M 184 (168), and St.P. & Sioux City R. Co. v Murphy, 19 M 500 (433); Emmons v M. & St. L. Ry. Co. 41 M 133; County of Blue Earth v St. P. & Sioux City R. Co. 28 M 503, 11 NW 73, Cedar Rapids, Iowa Falls & N. W. Ry. Co. v Ryan, 37 M 38, 33 NW 6.

OPINION EVIDENCE. Where the value of the property or the amount of the damage is in dispute opinions by witnesses acquainted with the property are admissible. Simmons v St. P. & Chi. Ry. Co. 18 M 184 (168); Curtis v St. P. S. & T. F. R. Co. 20 M 28 (19); Whitely v Miss. Water Power & Boom Co. 38 M 523, 38 NW 753; Sherman v St. Paul M. & M. Ry. Co. 30 M 227, 15 NW 239.

It is not necessary that the witnesses have been on the property to be acquainted with it. Lehmicke v St. P. S. & T. F. R. Co. 19 M 464 (406).

Where the testimony as to value is mere opinion the jury is not bound by the amounts stated by the witnesses. Johnson v C. B. & Northern R. Co. 37 M 519, 35 NW 438.

LIMITING NUMBER OF WITNESSES ON VALUE. The court has the right to limit the number of witnesses which each side could call on the question of value of the property. Sheldon v M. & St. L. R. Co. 29 M 318, 13 NW 134.

STRIKING ALL OF THE TESTIMONY OF A WITNESS. A motion to strike out all the testimony of a witness should not be allowed where any part of it had been properly received and was material. Bennett v Mpls. & Pac. Ry. Co. 42 M 245, 44 NW 10.

WITNESSES, PROPRIETY OF USE OF PLAT ON EXAMINATION. Rippe v Chi. Dubuque & Minn. R. Co. 23 M 18.

OBJECTION, FAILURE TO MAKE. Where the witnesses' and jury's attention was directed to the question of value and not to that of damages it was too late to object for the first time on appeal. Knauft v St. P. S. & T. F. R. Co. 22 M 173.

EVIDENCE; PROOF OF VALUE. Any evidence is competent and any fact is proper which legitimately bears upon the question of the marketable value of the property. King v Mpls. Union Ry. Co. 32 M 224, 20 NW 135.

POTENTIAL USES; POSSIBLE COMMERCIAL USES, ADMISSIBILITY OF EVIDENCE OF. See, Boom Co. v Patterson, 98 US 403, 25 L.Ed. 206; Olson v United States, 67 F(2d) 24; and State v Anderson, 176 M 525, 223 NW 923.

PROVISION OF LAW FOR BRINGING LAND INTO CITY LIMITS AS PROOF OF VALUE. Where provision has been made by law for bringing the land in controversy within the corporate limits of the city that fact may be considered

in ascertaining market value. Duluth & Winnipeg R. Co. v West, 51 M 163, 53 NW 197.

RULE OF REAL ESTATE BOARD AS PROOF OF VALUE. The rule or practice followed by a real estate board in valuing property is not admissible in evidence as bearing on the value of the property. Board of Ed. v Heywood Mfg. Co. 154 M 486, 192 NW 102.

CONSIDERATION PAID FOR NEARBY LAND AS PROOF OF VALUE. Evidence of the consideration paid for other property even where adjacent to the particular tract involved is inadmissible as substantive proof of market value. Mpls.-St. Paul S. District v Fitzpatrick, 201 M 442, 277 NW 394, 124 ALR 897; Lehmicke v St. P. S. & T. F. R. Co. 19 M 464 (406); Stinson v Chi. St. P. & M. Ry. Co. 27 M 284, 6 NW 784; see, 14 MLR 689.

EXCEPTION. Such evidence is admissible in those cases where no other evidence of value can be had. Board of Ed. v Heywood Mfg. Co. 154 M 486, 192 NW 102. But even in those cases it is still for the court to say whether the similarity of character and situation is sufficient and the sale sufficiently recent. Stinson v Chi. St. P. & M. Ry. Co. 27 M 284, 6 NW 784.

APPLICATION FOR TAX REDUCTION, AS AN ADMISSION. A verified application for tax reduction held admissible in evidence. The court said the assessed value is not substantive proof of fair market value, but that does not preclude proof of admissions made by the owner obviously at variance with the claims he now makes. Mpls.-St. Paul S. District v Fitzpatrick, 201 M 442, 277 NW 394, 124 ALR 897.

VALUE OF LEASEHOLD TAKEN, EVIDENCE OF. It is not competent to prove amount of profits, loss of profits, depreciation of fixtures, or expense of removal. Kafka v Davidson, 135 M 389, 160 NW 1021.

It was competent to prove that the market value of the premises for a certain use had been enlarged by their long-continued use for that purpose. Kafka v Davidson, 135 M 389, 160 NW 1021; King v Mpls. Union Ry. Co. 32 M 224, 20 NW 135.

Evidence which shows that the leasehold had a rental value in excess of the rent payable under the lease is admissible. Kafka v Davidson, 135 M 389, 160 NW 1021.

COMMISSIONERS' REPORT, NOT ADMISSIBLE AS PROOF ON DAMAGES. It is not proper to receive in evidence on the appeal the award made by the commissioners on the question of damages. Sherman v St.P. M. & M. Ry. Co. 30 M 227, 15 NW 239; N. P. Ry. Co. v Duncan, 87 M 91, 91 NW 271. In State ex rel v District Court of Hennepin Co. 87 M 268, 91 NW 1111, where the commissioners of reappraisal considered a former award of appraisal no prejudice was made out.

COMMISSIONERS' REPORT, WHERE ADMISSIBLE. The award of the commissioners may be referred to for an understanding of the location and situation of the improvement and of the premises. Sherman v St.P. M. & M. Ry. Co. 30 M 227, 15 NW 239.

VIEW OF THE PREMISES; FAILURE TO OBJECT TO IMPROPRIETY.

Only 11 jurors went out to make the view. On their return the trial continued to verdict without objection or bringing the matter to the attention of the court. The objection was waived thereby. Gurney v Mpls. & St. Croix Ry. Co. 41 M 223, 43 NW 2.

INSTRUCTIONS AS TO GENERAL AND SPECIAL BENEFITS, WHO MAY ASK FOR. It is for the party desiring it to ask for instructions in respect to the distinction between general and special benefits. Haynes v City of Duluth, 47 M 458, 50 NW 693; and Whitely v Miss. Water Power & Boom Co. 38 M 523, 38 NW 753.

GENERAL EXCEPTIONS TO CHARGE, AVAILABILITY OF ON APPEAL. Rheiner v Union Depot Co. 31 M 193, 17 NW 279; Russell v St. P. M. & M. Ry. Co. 33 M 210, 22 NW 379.

COSTS AND DISBURSEMENTS, DISCRETIONARY WITH COURT. Section 117.14 changes the former statute which gave costs and disbursements as a matter

of right. Now they may be awarded in the court's discretion. State v Claydon, 167 M 505, 209 NW 326.

PREVAILING PARTY, WHO IS. The state had taken an appeal from the commissioners' award. The damages awarded the owner were then lowered on reassessment by the jury. The court denied the state's application for costs and disbursements and awarded them to the owner. The state appeals from the denial of its application. Held, the state, since it obtained a substantial reduction in the amount of damages awarded, was the prevailing party on the appeal. The statute does not authorize costs and disbursements in favor of any party but the prevailing one. But the denial of the state's application therefor could not be said to be an abuse of discretion. State v Claydon, 167 M 505, 209 NW 326.

COSTS ALLOWED ONLY ON APPEAL. The Minnesota statute provides no allowance for costs or witness fees or any other disbursements incurred before the commissioners. Only on appeal are they provided for. In re Hastings Lock & Dam Co. 2 F(2d) 324.

STATUTES ON COSTS IN CIVIL ACTIONS NOT APPLICABLE. Statutory provisions as to the allowance of costs and disbursements in civil actions are not applicable to condemnation proceedings. Therein such allowances can be made only when expressly authorized by statute. Mpls.-St. Paul S. District v Fitzpatrick, 197 M 275, 266 NW 848.

COSTS IN CONDEMNATION, STATUTE MUST AUTHORIZE. In special proceedings costs are not allowable unless expressly authorized by statute. State v Lesslie, 195 M 408, 263 NW 295.

JUST COMPENSATION DOES NOT INCLUDE COSTS. Costs are incidental to just compensation and are a creature of statute. In re Hastings Lock & Dam Co. 2 F(2d) 324.

TAXING COSTS AGAINST THE STATE. Costs may be taxed against the state. State v Lesslie, 195 M 408, 263 NW 295.

TAXING COSTS AGAINST THE UNITED STATES. Under no circumstances can costs be taxed against the United States without its consent. In re Hastingss Lock & Dam Co. 2 F(2d) 324.

For additional annotations on costs, see section 117.16.

117.15 JUDGMENT; POSSESSION.

HISTORY. 1857 c. 39 s. 15; P.S. 1858 c. 129 s. 15; 1865 c. 6 s. 18; G.S. 1866 c. 31 s. 15; G.S. 1866 c. 34 s. 26; 1874 c. 36 s. 3; 1875 c. 110 s. 2; G.S. 1878 c. 31 s. 15; G.S. 1878 c. 34 s. 26; G.S. 1878 c. 38 s. 80; 1899 c. 65 s. 13; G.S. 1894 ss. 2367, 2615, 2632, 4087; R.L. 1905 s. 2534; G.S. 1913 s. 5409; G.S. 1923 s. 6551; M.S. 1927 s. 6551.

This statute determines the right of the condemnor to appropriate the land upon payment of the award. Witt v St. P. & N. P. Ry. Co. 35 M 404, 29 NW 161 (construing an earlier form of the present section).

OWNER ENTITLED TO PERSONAL JUDGMENT. The owner is entitled to a personal judgment against the party instituting the proceedings for the damages awarded. Robbins v St. P. S. & T. F. R. Co. 24 M 191.

PROCEDURE WHERE JUDGMENT FAULTY. If the judgment entered is indefinite or does not conform to the statute the proper course is to apply to the court in which it is entered to correct the record or vacate the erroneous judgment, and not to apply for a writ of certiorari. St. P. & Sioux City R. Co. v Murphy, 19 M 500 (433); Minn. Central R.R. Co. v McNamara, 13 M 508 (468).

Where judgment is entered by the clerk without any order of the court the question whether it is authorized by the verdict will not be considered on appeal unless application has first been made to the court in which it was entered to correct or vacate the judgment. Scott v Mpls. St. P. & S. Ste. M. Ry. Co. 42 M 179, 43 NW 966.

COLLATERAL ATTACK ON JUDGMENT. The final judgment in condemnation proceedings cannot be collaterally attacked for defects and irregularities not going to jurisdiction. Carpenter v City of St. Paul, 23 M 232 (charter).

117.16 INTEREST; AWARD, WHEN PAYABLE; DISMISSAL.

HISTORY. 1874 c. 28 ss. 1, 3, 5; G.S. 1878 c. 34 ss. 27, 29, 31; 1881 c. 57 s. 1; 1889 c. 65 s. 13; G.S. 1894 ss. 2632, 2651, 2653, 2655; R.L. 1905 s. 2535; G.S. 1913 s. 5410; G.S. 1923 s. 6552; M.S. 1927 s. 6552.

STATUTE CONSTRUED. The provisions of section 117.16 as to costs and interest tend to indicate that there is no right in the landowner for money damages, and no title vested in the state, at least until after the appraisers have made an award. State v Appleton, 208 M 436, 294 NW 418.

APPLICATION. This section applies only to proceedings under chapter 117. Barmel v Mpls.-St. Paul S. District, 201 M 622, 277 NW 208.

Section 117.16 applies to all eminent domain proceedings whether instituted by the state or its agencies or others. State v Lesslie, 195 M 408, 263 NW 295.

JUST COMPENSATION INCLUDES INTEREST. Interest from the date of the award should be allowed in order to give the owner just compensation. Warren v First Div. of St. P. & Pac. R.R. Co. 21 M 424.

AWARD BEARS INTEREST ON SAME BASIS AS JUDGMENT. The award when approved by the court becomes in effect a judgment and therefore it bears interest on the same basis as a judgment. County of Blue Earth v Willians, 196 M 501, 265 NW 329.

INTEREST AT LEGAL RATE. Section 550.04, providing for interest at the legal rate cited as applicable to condemnation proceedings. County of Blue Earth v Williams, 196 M 501, 265 NW 329.

INTEREST WHERE STATUTE GIVES CONDEMNOR A REASONABLE TIME TO COMPLETE THE PROCEEDINGS. In a condemnation proceeding by the state or municipality, while the legislature might require a reasonable time to complete the proceedings and provide for payment, interest must be added for the time intervening between the making of the award and the completion of the proceedings. State Park Commr's v Henry, 38 M 266, 36 NW 874.

INTEREST WHERE DAMAGES REASSESSED. If the damages are reassessed on appeal the reassessment is made as of the date of the original award and the owner is entitled to interest from that time upon the amount of damages as finally assessed. Ford Motor Co. v City of Mpls. 143 M 392, 173 NW 713 (condemnation under city charter); City of Mpls. v Wilkin, 30 M 145, 15 NW 668; Whitacre v St. P. & Sioux City R. Co. 24 M 311.

INTEREST, AWARD PRESUMED NOT TO INCLUDE. Interest is presumed not to be included in the award. Ford Motor Co. v City of Mpls. 143 M 392, 173 NW 713.

INTEREST, WHERE PROMPT TENDER. The court disregarded the argument that the award should have included interest where the tender was made two days after filing the award. Scot v St. P. & Chi. Ry. Co. 21 M 322.

INTEREST, TENDER, EFFECT OF SUPERSEDEAS OR STAY ON. A writ of supersedeas or stay of further proceedings could not affect the power to tender payment of the award and thus stay the running of interest in the event it was refused. City of Mpls. v Wilkin, 30 M 145, 15 NW 668.

OWNER'S RIGHT TO USE UNTIL POSSESSION TAKEN. The owner has a legal right to possess and use the lands until the condemnor actually takes possession at the end of the proceedings. Warren v First Div. of St P & Pac. R. R. Co. 21 M 424.

USE VALUE DEDUCTIBLE FROM INTEREST. If the owner makes a beneficial use of the premises subsequent to the filing of the original award, the value

of such use may be deducted from the interest allowed. Ford Motor Co. v City of Mpls. 143 M 392, 173 NW 713; Warren v First Div. of St. P. & P. R. R. Co. 21 M 424.

OFFSET UPON INTEREST; BURDEN OF PROOF. The condemnor has the burden of proving what part of the taken property was actually occupied or used by the former owner between the filing of the first award and the payment of damages, and the rental value of that part. Ford Motor Co. v City of Mpls. 147 M 211, 179 NW 907.

Ascertainment of interest on compensation award. 18 MLR 878.

TIME FOR APPEAL NOT PRESCRIBED. This section does not purport to prescribe or limit the time for appealing. State v Umberger, 160 M 197, 199 NW 906.

FINAL JUDGMENT, JUDGMENT DISMISSING APPEAL AS. A judgment dismissing an appeal was regarded as a final judgment within the meaning of such a provision. Mpls. & N.W. R. Co. v Woodworth, 32 M 452, 21 NW 476.

ON DISCONTINUATION POSSESSION MUST BE SURRENDERED. When the proceedings are discontinued unless possession is surrendered where it has previously been taken the provision of this section for costs and disbursements will be deemed inadequate and incomplete. Witt v St.P. & N.P. Ry. Co. 35 M 404, 29 NW 161.

DISCONTINUATION, EXPENSES IN DISCRETION OF COURT. Where the petitioner discontinues the proceedings it is for the court to say whether the owner should be reimbursed for the expense he has been put to. State v Lesslie, 195 M 408, 263 NW 295.

DISCONTINUATION, COSTS AND EXPENSES, WHERE ALLOWABLE. The purpose of this statute is to authorize the allowance of costs and expenses whenever there is a discontinuance of the condemnation proceeding as to any separate parcel, although the proceeding continues against others in the same ownership. Mpls.-St. Paul S. District v Fitzpatrick, 197 M 275, 266 NW 848.

WHERE NOT ALLOWABLE. No allowance is authorized where the tract eliminated is part of a larger tract the residue of which is taken and the controversy as to its value and damages is not severable. Mpls.-St. Paul S. District v Fitzpatrick, 197 M 275, 266 NW 848.

JUDGMENT OF DISMISSAL, RIGHT TO CONTEST COSTS AND EXPENSES. The provision of this section which allows recovery of costs and expenses on dismissal or discontinuation does not authorize the entry of judgment summarily and upon motion merely, although the judgment of dismissal itself may entered summarily; the petitioner has the right to contest any right of recovery which that provision confers. Mpls. & N. W. R. Co. v Woodworth, 32 M 452, 21 NW 476 (section 117.16 is a composite of sections which at the time of this decision were separate).

DIRECT ACTION TO RECOVER COSTS AND EXPENSES. Apart from a statute so authorizing a direct action does not lie to recover expenses incurred by the owner in protecting his interests in a condemnation proceeding where it has been abandoned pursuant to a statutory permission. McRostie v City of Owatonna, 152 M 63, 188 NW 52; Bergman v St. P. S. & T. F. R. Co. 21 M 533; Barmel v Mpls.-St. Paul S. District, 201 M 622, 277 NW 208.

SEPARATE ACTION TO RECOVER NOT NECESSARY. Everyone entitled to costs or disbursements, whether on the award or on abandonment, should be permitted to have them taxed and allowed in the proceeding and not be forced to recover the same by an independent action. McRostie v City of Owatonna, 152 M 63, 188 NW 52 (defendant's charter permitted it to abandon on payment of all costs and disbursements).

RIGHTS ACCRUING TO PROPERTY OWNER UPON VOLUNTARY ABANDONMENT BY CONDEMNOR: 3 MLR 263.

On abandonment, see general annotations to chapter.

Ascertainment of interest in compensation awards. 18 MLR 879.

117.17 RECORD, EVIDENCE, HOW PERFECTED.

HISTORY. 1865 c. 6 s. 19; G.S. 1866 c. 34 s. 27; G.S. 1878 c. 34 s. 39; G.S. 1894 s. 2616; R.L. 1905 s. 2536; G.S. 1913 s. 5411; G.S. 1923 s. 6553; M.S. 1927 s. 6553.

Intervention was not available after the closing of the condemnation proceedings. That remedy is purely statutory and available only during the pending of the proceedings. In the instant case the final certificate was intended to and in fact took the place of the final decree applicable under section 117.17. State ex rel v Hall, 195 M 79, 261 NW 874.

An order appointing commissioners in eminent domain proceedings by the state is not a final one and is not appealable. State ex rel v Fuchs, 212 M 453, 4 NW(2d) 361.

An order granting the motion of an omitted property owner to intervene in eminent domain proceedings by the state is not appealable, nor is an order appointing commissioners. Antl v State, 220 M —, 19 NW(2d) 81.

117.18 PROPERTY TAKEN BY STATE IS ESTATE WITHOUT RIGHT OF REVERSION.

HISTORY. 1917 c. 419 s. 1; G.S. 1923 s. 6554; M.S. 1927 s. 6554.

WHAT ESTATE CAN BE TAKEN; POWER OF LEGISLATURE TO DECIDE. Where the estate or interest to be taken is not defined by the legislature only such an estate or interest can be taken as is necessary to accomplish the purpose in view. But the legislature might authorize the taking of the fee if it deemed it expedient. Fairchild v City of St. Paul, 46 M 540, 49 NW 325.

See general annotations to chapter.

A condemnation proceeding is in rem, and jurisdiction is acquired by the court upon the filing therein of a proper petition and proper proof of service of hearing upon the owners of the land to be taken. The only condition as requisite for the taking of appellant's lots prescribed by this section is that they be taken for public use. Sackette v City of Duluth, 201 M 121, 275 NW 617.

117.19 PROCEEDINGS IN CERTAIN CASES, NOTICE FILED.

HISTORY. 1917 c. 416 s. 1; G.S. 1923 s. 6555; M.S. 1927 s. 6555; 1941 c. 252.

117.20 PROCEEDINGS BY STATE OR ITS AGENCIES.

HISTORY. 1927 c. 237 s. 1; M.S. 1927 s. 6557-1; 1941 c. 307.

PROCEDURE MODIFIED. This section modifies the ordinary procedure in cases brought by the state. State v Erickson, 185 M 60, 239 NW 908.

CONSTITUTIONALITY. The validity of this provision was upheld against a claim that it was special legislation and unconstitutional in State v Severson, 194 M 644, 261 NW 469.

APPEALS. This section contemplates separate appeals from separate awards. State v May, 204 M 564, 285 NW 834.

CERTIFICATE TAKES PLACE OF FINAL DECREE. This provision has finality for its object and purpose. Dispensing with the final decree does not change the statutory purpose and effect of the final certificate which is intended to and does take the place of the decree. State v Hall, 195 M 79, 261 NW 874; Petition of Burnquist, 212 M 452, 4 NW(2d) 361.

FILING CERTIFICATE ENDS PROCEEDINGS AS TO INTERVENTION. Filing of the certificate under section 117.20 ended the proceedings so as to prevent intervention by claimants. State v Hall, 195 M 79, 261 NW 874.

PURPOSE; PREVENTION OF DELAY. This section has no effect on the rights of the parties where possession is not taken. It was put into the law to prevent delays by litigation in the event the state desired to proceed immediately to the construction of the highway. In effect it took the place of section 117.13. State v Appleton, 208 M 436, 294 NW 418.

IMMEDIATE RIGHT TO TAKE POSSESSION GIVEN. Under section 117.20 the starting of the condemnation proceeding immediately gave the highway commissioner the right to take possession of the additional land and proceed with the work. Nelson v Babcock, 188 M 584, 248 NW 49, 90 ALR 1472.

It is the filing of the petition, not the filing of the commissioner's order, that authorizes the state at its option to enter upon and take possession of the land sought to be condemned. State ex rel v Appleton, 208 M 436, 294 NW 418.

ORDER DESIGNATING ROUTE NOT A TAKING. The highway commissioner's order designating the route of a highway does not amount to a taking of the land. State ex rel v Erickson, 185 M 60, 239 NW 908; State ex rel v Appleton, 208 M 436, 294 NW 418.

ORDER DESIGNATING ROUTE IS CONCLUSIVE ON NECESSITY. The commissioner's order designating the permanent rerouting of a trunk highway is conclusive on the courts on the question of the necessity for the taking. State ex rel v Erickson, 185 M 60, 239 NW 908.

RIGHT TO PAYMENT, WHEN. Where possession has not been taken there is no vested right to payment of the award, at least until the award of the appraisers has become final. State ex rel v Appleton, 208 M 436, 294 NW 418.

RIGHT TO ABANDON. The state has the right to abandon and discontinue the condemnation and it does not lie within the discretion of the trial court to refuse to dismiss it. State ex rel v Appleton, 208 M 436, 294 NW 418; State ex rel v Erskine, 165 M 303, 206 NW 447.

TRESPASS BY THE STATE NOT AMOUNTING TO A TAKING. An owner sought to have included in the proceedings certain land which had several times become flooded by reason of a faulty bridge, part of the highway construction. The owner claimed the state had acquired an easement for the inundation of the land. Under the circumstances of the case the injuries were not of such permanent nature as to require the imposition of a perpetual easement. The state's acts of trespass cannot be made the means of or basis for saddling the state with an easement against its wishes and contrary to its purposes or requirements. State v Hall, 195 M 79, 261 NW 874.

TRESPASS BY HIGHWAY COMMISSIONER, PERSONAL LIABILITY TO OWNER FOR. See Nelson v Babcock, 188 M 584, 248 NW 49, 90 ALR 1472.

Appeals from awards of commissioners in highway condemnation proceedings are governed by section 117.20; and such appeal must be taken within 20 days from date of the filing of the report of the commisisoners. Hollenbeck v State, 214 M 491, 8 NW(2d) 613.

The court retains jurisdiction until the filing of a final certificate. State ex rel v Bentley, 216 M 146, 12 NW(2d) 347.

See, United States v Federal Land Bank, 127 F(2d) 505 Section (117.13).

As to procedure by the state or its agencies, see State v Peterson, 220 M —, 19 NW(2d) 70; Antl v State, 220 M —, 19 NW(2d) 81.

117.21 EASEMENT TO INCLUDE SNOW FENCES.

HISTORY. 1929 c. 396 s. 1; M. Supp. s. 6557-4.

Statute discussed in 1934 OAG 478.

Distinction drawn between "right of way" and "easement." Burnquist v Cook, 220 M —, 19 NW(2d) 408.

117.22 SITES FOR COUNTY BUILDINGS.

HISTORY. 1907 c. 7 s. 1; G.S. 1913 c. 5414; G.S. 1923 s. 6558; M.S. 1927 s. 6558.

Sections 117.22 to 117.30 relate to proceedings that may be taken by counties to obtain sites for county buildings. The fact that an act may apply to only a few municipalities is unimportant. State ex rel v Severson, 194 M 647, 261 NW 469.

117.23 DUTY OF COUNTY ATTORNEY; APPRAISERS.

HISTORY. 1905 c. 7 s. 2; G.S. 1913 s. 5415; G.S. 1923 s. 6559; M.S. 1927 s. 6559.

117.24 DUTY OF APPRAISERS; NOTICE; AWARD.

HISTORY. 1905 c. 7 s. 3; G.S. 1913 s. 5416; G.S. 1923 s. 6560; M.S. 1927 s. 6560.

117.25 APPEAL; TRIAL; COSTS; BOND.

HISTORY. 1905 c. 7 s. 4; G.S. 1913 s. 5417; G.S. 1923 s. 6561; M.S. 1927 s. 6561.

117.26 POWER OF COUNTY BOARD; PAYMENT OF AWARD.

HISTORY. 1905 c. 7 s. 5; G.S. 1913 s. 5418; G.S. 1923 s. 6562; M.S. 1927 s. 6562.

117.27 AWARD AND JUDGMENT; HOW PAYABLE.

HISTORY. 1905 c. 7 s. 6; G.S. 1913 s. 5419; G.S. 1923 s. 6563; M.S. 1927 s. 6563.

117.28 JUDGMENT ROLL.

HISTORY. 1905 c. 7 s. 7; G.S. 1913 s. 5420; G.S. 1923 s. 6564; M.S. 1927 s. 6564.

117.29 NOTICE OF LIS PENDENS.

HISTORY. 1905 c. 7 s. 8; G.S. 1913 s. 5421; G.S. 1923 s. 6565; M.S. 1927 s. 6565.

117.30 CERTIFICATE OF PAYMENT; RECORD.

HISTORY. 1905 c. 7 s. 9; G.S. 1913 s. 5422; G.S. 1923 s. 6566; M.S. 1927 s. 6566.

117.31 SANATARIUM COMMISSIONS TO HAVE RIGHT OF EMINENT DOMAIN.

HISTORY. 1921 c. 254 s. 1; G.S. 1923 s. 6567; M.S. 1927 s. 6567.

117.32 RAILROAD BUILT WITHOUT RIGHT; ACTION.

HISTORY. 1875 c. 98 s. 1; G.S. 1878 c. 34 s. 33; G.S. 1894 s. 2657; R.L. 1905 s. 2537; G.S. 1913 s. 5423; G.S. 1923 s. 6568; M.S. 1927 s. 6568.

THE MINNESOTA RULE. A railroad company has no right to commence the construction of its road upon the lands of a private person without his consent, or without first having paid or secured to him his compensation. Leber v Mpls. & N. W. Ry. Co. 29 M 256, 13 NW 31.

CONTINUING TRESPASS. The charter provision under which the condemnor acted did not provide for the first paying or securing just compensation, thus his action in taking and using the plaintiff's property was a continuing trespass. Hursh v First Div. of St. P. & P. R. Co. 17 M 439 (417).

PURPOSE OF SECTIONS 117.32 ET SEQ. The purpose of these sections is to enable the owner to compel the railroad to elect whether it will surrender the land or procure by condemnation the right to hold it. Shoemaker v Cedar Rapids, Iowa Falls & N.W. Ry. Co. 45 M 366, 48 NW 191.

OWNER'S ACQUIESCENCE NO DEFENSE. Mere acquiescence by the owner in the taking does not stand in the way of his action. Shoemaker v Cedar Rapids, Iowa Falls & N.W. Ry. Co. 45 M 366, 48 NW 191 (by express terms of statute). See, Kremer v C. M. & St. P. Ry. Co. 51 M 15, 52 NW 977, 38 ASR 468.

ACTION OF TRESPASS. See general annotations to chapter, Owners' Remedies Outside of Condemnation Proceedings.

ACTION OF EJECTMENT. If the illegal occupation were of such a character as to amount to an ouster the owner might maintain ejectment and recover the possession with damages for withholding the same. Adams v Hastings & Dakota R. Co. 18 M 260 (236). For cases upholding owner's right to bring ejectment, see: Greve v First Div. of St. P. & P. R. Co. 26 M 66, 1 NW 816; Adolph v Mpls. & Pac. Ry. Co. 42 M 170, 43 NW 848; Shoemaker v Cedar Rapids, Iowa Falls & N.W. Ry. Co. 45 M 366, 48 NW 191; Watson v C. M. & St. P. Ry. Co. 46 M 321, 48 NW 1129; Kremer v C. M. & St. P. Ry. Co. 51 M 15, 52 NW 977, 38 ASR 468.

In ejectment the issue would be plaintiff's title or right to the possession of the land and the amount of damages for having withheld it. Adolph v Mpls. & Pac. Ry. Co. 42 M 170, 43 NW 848.

Where the defendant fails to exercise his option the action is not a simple one of ejectment, but a qualified one of ejectment. Cameron v C. M. & St. P. Ry. Co. 63 M 384, 65 NW 652, 31 LRA 553.

117.33 ANSWER; ASCERTAINMENT OF DAMAGES.

HISTORY. 1875 c. 98 ss. 2, 3; G.S. 1878 c. 34 ss. 34, 35; G.S. 1894 ss. 2658, 2659; R.L. 1905 s. 2538; G.S. 1913 s. 5424; G.S. 1923 s. 6569; M.S. 1927 s. 6569.

This section permits a railroad when sued in ejectment for the recovery of land which it has taken for railroad purposes without making compensation to turn the action into, or attach to it, a proceeding to obtain the right to take and use the land. Adolph v Mpls. & P. Ry. Co. 42 M 170, 43 NW 848.

The provision for assessment of compensation is one for the benefit of the defendant so that in case the plaintiff succeeds it may at its option pay the compensation instead of surrendering the lands. Kremer v C. M. & St. P. R. Co. 54 M 157, 55 NW 928.

The statute does not contemplate or authorize an assessment of compensation except where plaintiff has established his right to recover the land. Koerper v St. P. & N. P. R. Co. 40 M 132, 41 NW 656.

Where the defendant by its answer converts the action for damages for trespass into one for the condemnation of the premises, the main question of the case becomes the amount or measure of compensation which the plaintiff is entitled to recover. County of Blue Earth v St. P. & Sioux City R. Co. 28 M 503, 11 NW 73.

COMPENSATION, RULE FOR ASSESSING. Upon such an aswer the question of the amount of compensation must be tried in the same manner and upon the same kind of evidence as in an original proceeding instituted by the company to acquire the right to take the land. Adolph v Mpls. & P. R. Co. 42 M 170, 43 NW 848.

In proceedings under these sections the damages for the taking are to be estimated as of the time of trial and not as of the time of actual possession. Fish v C. St. P. & K.C. Ry. Co. 84 M 179, 87 NW 606.

MEASURE OF DAMAGES. The damages are to be assessed not merely for having withheld the land in the past but for taking and using it for railroad purposes in the future in perpetuity. Adolph v Mpls. & P. R. Co. 42 M 170, 43 NW 848.

RECOVERING FOR USE AND OCCUPATION. The plaintiff can recover the value of the use and occupation whether pleaded or not. Fish v C. St. P. & K. C. Ry Co. 84 M 179, 87 NW 606.

PLAINTIFF'S RIGHT TO DISMISS. The question was whether the owner-plaintiff had a right to dismiss before the trial as he tried to do. Section 546.39 allows dismissal before trial if a provisional remedy has not been allowed or counter-claim made or affirmative relief demanded in the answer. Does an answer under this section, asking for an assessment of compensation, demand affirmative relief? Not where it does not admit plaintiff's right to recover; its relief conditioned on plaintiff's recovery. Koerper v St. P. & N. P. R. Co. 40 M 132, 41 NW 656.

ABANDONING, WITHDRAWING APPLICATION TO OBTAIN ASSESSMENT. Kremer v C. M. & St. P. R. Co. 51 M 15, 52 NW 977, 38 ASR 468.

See general annotations to chapter, on abandonment.

NATURE OF ESTATE ACQUIRED BY RAILROAD. If under the Minnesota Constitution, Article 10, Section 4, the defendant railway could not acquire more than easement, that is all it will be permitted to acquire. Scott v St. P. & Chi. R. Co. 21 M 322; Fletcher v C. St. P. M. & O. R. Co. 67 M 339, 69 NW 1085; Gurney v Mpls. Union Elev. Co. 63 M 70, 63 NW 136, 30 LRA 534.

The condemnation of land for a railroad right of way or other public purpose does not vest title in the condemnor but only an easement therein. Obst v Covell, 93 M 30, 100 NW 650. But the railroad company is entitled to the exclusive possession of the easement acquired unless the court in its order limits the easement by reservations to the owner. Hopkins v C. St. P. M. & O. R. Co. 76 M 70, 78 NW 969.

Where power company as riparian owner sought to enjoin common carrier from constructing bridge, and carrier under Minnesota Statute converted suit into a condemnation proceeding, thus allegedly admitting the power company's title to banks of river, but record on power company's appeal from the judgment finding equitable title in property at one end of the bridge in carrier contained no bill of exceptions, the circuit court of appeals was required to presume that the facts found with respect to title, although appearing to be not within the issues, were litigated by consent and was limited to considering whether the facts found supported the legal conclusions of the court. Pike Rapids Power v Minneapolis, St. Paul & Soo Line, 99 F(2d) 904.

117.34 JUDGMENT AND EXECUTION.

HISTORY. 1875 c. 98 s. 4; G.S. 1878 c. 34 s. 36; G.S. 1894 s. 2660; R.L. 1905 s. 2539; G.S. 1913 s. 5425; G.S. 1923 s. 6570; M.S. 1927 s. 6570.

117.35 PROCEDURE WHEN NO ANSWER IS MADE.

HISTORY. 1875 c. 98 ss. 5, 6; G.S. 1878 c. 34 ss. 37, 38; G.S. 1894 ss. 2661, 2662; 1895 c. 52; R.L. 1905 s. 2540; G. S. 1913 s. 5426; G.S. 1923 s. 6571; M.S. 1927 s. 6571.

The provision allowing attorney's fees is constitutional. Cameron v C. M. & St. P. R. Co. 63 M 384, 65 NW 652, 31 LRA 553; Pfaender v C. & N.W. R. Co. 86 M 218, 90 NW 393.

117.36 VALIDITY OF RAILROAD CONDEMNATION; ACTION.

HISTORY. 1879 c. 77 ss. 1 to 3; G.S. 1878 Vol. 2 (1888 Supp.) c. 34 s. 39; G.S. 1894 ss. 2663 to 2665; R.L. 1905 c. 2541; G.S. 1913 s. 5427; G.S. 1923 s. 6572; M.S. 1927 s. 6572.

AUTHORITY OF RAILROAD RECEIVER. The receiver of a railroad has no power to institute condemnation proceedings in behalf of a railroad without authority to do so being given by the court making the appointment. Mpls. Western R. Co. v M. & St. L. R. Co. 61 M 502, 63 NW 1035.

117.37 PROCEDURE.

HISTORY. 1879 c. 77 ss. 2, 4, 5; G.S. 1878 Vol. 2 (1888 Supp.) c. 34 s. 39; 1893 c. 60; G.S. 1894 ss. 2664, 2666, 2667; R.L. 1905 c. 2542; G.S. 1913 s. 5428; G.S. 1923 s. 6573; M.S. 1927 s. 6573.

117.38 ACQUISITION OF LAND FOR CERTAIN PURPOSES.

HISTORY. 1915 c. 45 s. 1; G.S. 1923 s. 6574; M.S. 1927 s. 6574.

117.39 PROCEEDINGS UNDER RIGHT OF EMINENT DOMAIN.

HISTORY. 1915 c. 45 s. 2; G.S. 1923 s. 6575; M.S. 1927 s. 6575.

117.40 MUNICIPALITY MAY CONTEST.

HISTORY. 1915 c. 45 s. 3; G.S. 1923 s. 6576; M.S. 1927 s. 6576.

117.41 CONVEYANCE, TO WHOM MADE.

HISTORY. 1915 c. 45 s. 4; G.S. 1923 s. 6577; M.S. 1927 s. 6577.

117.42 AWARD IN CONDEMNATION PROCEEDINGS IN CITIES OF FIRST CLASS.

HISTORY. 1921 c. 219 s. 1; G.S. 1923 s. 6578-1; M.S. 1927 s. 6578-1; 1931 c. 396.

TITLE VESTS, WHEN. The provisions for furnishing abstract may be invalid but under the constitution and this section there can be no vesting of any title to the property in the city until compensation is paid or secured. In re Improvement of Third Street, St. Paul, 177 M 146, 225 NW 86, 74 ALR 561.

The fact that the city took and registered a deed to the property to fortify its title did not affect or weaken the title acquired through condemnation proceedings. Title vested in the city in payment of the award. Under the law, the city entered upon the premises awarded by the condemnation proceedings, without resorting to use of the unlawful detainer statute. Dow v City of St. Paul, 191 M 30, 253 NW 6.

A warranty deed to a municipality from the owner of lands condemned in eminent domain proceedings vests fee simple title in the municipality in trust for the public; and the maintenance by a citizen of a rock garden upon a small triangular tract purchased by the city, the tract immediately adjoining its streets, the garden being accessible to the public except at night, is a public use and there was no abandonment by the city. Kendrick v City of St. Paul, 213 M 288, 6 NW(2d) 449.

117.43 FUNDS FROM WHICH AWARD PAYABLE.

HISTORY. 1921 c. 219 s. 2; G.S. 1923 s. 6578-2; M.S. 1927 s. 6578-2.

117.44 COMMISSIONER OF CONSERVATION TO ACQUIRE CERTAIN LANDS.

HISTORY. 1935 c. 105 s. 1; M. Supp. s. 6578-3.

117.45 AUTHORITY OF COMMISSIONER OF CONSERVATION.

HISTORY. 1935 c. 105 s. 2; M. Supp. s. 6578-4.

GENERAL ANNOTATIONS TO CHAPTER

THE NATURE OF CONDEMNATION PROCEEDINGS

QUALITIES OF CONDEMNATION PROCEEDINGS; ADVERSARY. Condemnation proceedings are adversary ones. United States v Sargent, 162 F 81.

IN REM. Condemnation proceedings are in rem against the property and the award when made stands in place of the land. State ex rel v District Court of Ramsey Co. 128 M 432, 151 NW 144; In re Improvement of Third Street, St. Paul, 177 M 146, 225 NW 86, 74 ALR 561; Oronoco School District v Town of Oronoco, 170 M 49, 212 NW 8.

INFORMAL, SUMMARY. The proceedings in condemnation are necessarily informal and, in a measure, summary. State ex rel v City of Montevideo, 142 M 157, 171 NW 314.

QUASI JUDICIAL. Condemnatory proceedings are not civil actions or causes within the meaning of the constitution, but are special proceedings only quasi

judicial in their nature. State v Rapp, 39 M 65, 38 NW 926; State v Lesslie, 195 M 408, 263 NW 295.

The matter of fixing values and damages is at most quasi judicial. In re Improvement of Third Street, St. Paul, 177 M 146, 225 NW 86, 74 ALR 561.

NOT ACTIONS OR CASES AT LAW. Such proceedings have never been considered as actions or cases at law within the meaning of the constitutional provision preserving the right to trial by jury. Ames v Lake Superior & Miss. R. Co. 21 M 241 (293).

SPECIAL PROCEEDINGS. A condemnation proceeding is a special proceeding commencing with an application for the appointment of commissioners, and it is as much a judicial proceeding as any other special proceeding. Warren v First Div. of St. P. & Pac. R. Co. 18 M 384 (345) (condemnation under charter).

MAY BECOME JUDICIAL. Up to the time of award a condemnation proceeding is legislative and only quasi judicial. As soon as the amount of award becomes controversial by the taking of an appeal the matter assumes the nature of a judicial proceeding and the rules relative to such apply. State v May, 204 M 564, 285 NW 834 (rearg.); Boom Co. v Patterson, 98 US 403, 25 L.Ed. 206.

REMOVAL TO FEDERAL COURTS. The proceeding, having taken on appeal the form of a suit at law, may be removed to the federal courts if there is diversity of citizenship. Boom Co. v Patterson, 98 US 403, 25 L.Ed. 206.

EMINENT DOMAIN; INTRODUCTION. For various definitions see, Weir v St. P. S. & T. F. R. Co. 18 M 155 (139).

STATUTORY CONSTRUCTION. Statutes authorizing the exercise of the power of eminent domain are to be strictly construed. Fletcher v C. St. P. M. & O. Ry. Co. 67 M 339, 69 NW 1085; see, Weaver v Miss. & Rum River Boom Co. 28 M 534, 11 NW 114.

EMINENT DOMAIN, AN ATTRIBUTE OF SOVEREIGNTY. The right of eminent domain appertains to every government. It requires no constitutional recognition; it is an attribute of sovereignty. Boom Co. v Patterson, 98 US 403, 25 L.Ed. 206.

CONSTITUTIONAL RECOGNITION. The only express recognition of the right of eminent domain in the Minnesota Constitution is in Section 13 of the Bill of Rights, State ex rel v District Court, 87 M 146, 91 NW 300.

CONSTITUTION DOES NOT GRANT BUT LIMITS. The right of eminent domain is not conferred by the constitution, but is limited by it. Winona & St. Peter R. R. Co. v Waldron, 11 W 515 (392), 88 AD 100 N.

EMINENT DOMAIN DISTINGUISHED FROM THE TAXING AND POLICE POWERS. Private property may be taken under the regulatory and taxing powers as well as under that of eminent domain. The taking is referable to the police power if it is "a mere incident to a valid regulation to promote the public interest; to the taxing power, if for the primary purpose of raising revenue; and, to the power of eminent domain if it is taken for the purpose of permitting the government either to inflict an injury upon the very property taken for a public use, or to utilize it for a public use other than the governmental expenses." In re Town Ditch No. 1, 208 M 566, 295 NW 47 (quoting from Rottschaefer, Constitutional Law, p. 694).

FROM THE TAXING POWER. Tax proceedings are not to be confused with those under eminent domain. Each is governed by its own principles. Sluka v Johnson, 177 M 598, 225 NW 909.

FROM POLICE POWER. The right to restrict under the police power without compensation and to restrict by condemnation with compensation differ but have much in common. State ex rel v Houghton, 144 M 1, 174 NW 885, 176 NW 159, 8 ALR 585.

UNCOMPENSATED DUTY OF OBEDIENCE TO REGULATIONS ENACTED UNDER POLICE POWER NOT A TAKING. The state may in the exercise of

the police power compel a railroad without compensation to construct and maintain suitable crossings at streets extended over the railroad right of way after the construction of the railroad. State ex rel v St. P. M. & M. Ry. Co. 98 M 380, 108 NW 261, 120 ASR 581, 28 LNS 298.

Such statutory regulations of the use of property as limiting the speed of railroad trains at crossings, requiring a whistle to be blown, or the construction of cattle-guards and fences, do not constitute a taking. State v District Court, Hennepin Co. 42 M 247; 44 NW 7, 7 LRA 121, and State v Shardlow, 43 M 524, 46 NW 74. (On duty of planking roadway, see C. M. & St. P. Ry. Co. v Village of LeRoy, 124 M 107, 144 NW 464).

Statutes requiring the physical connection of telephone lines as regulations under the police power. See, 1 MLR 95, 466.

The city acquired in condemnation proceedings the right to cut a waterway through the railroad company's embankment, and the company was not allowed to recover the costs of constructing a bridge made necessary by the cut. C. M. & St. P. Ry. Co. v City of Mpls. 115 M 460, 133 NW 169, AC 12 D 1029, 51 LNS 236.

EMINENT DOMAIN, A LEGISLATIVE POWER. It is in the legislature that the power is vested. State ex rel v Van Reed, 125 M 194, 145 NW 967, Fohl v Common Council, 80 M 67, 82 NW 1097.

The right is not expressly delegated to the legislature, its existence, which is inherent, must be implied. State ex rel v District Court, 87 M 146, 91 NW 300.

The legislature may put on the owner the initiative in ascertaining the amount of compensation and may limit the time within which he may do so. State v Messenger, 27 M 119, 6 NW 457.

The legislature may provide that a special tribunal or board may act generally in a particular class of condemnation proceedings where the right of appeal to the district court is preserved. City of St. Paul v Nickl, 42 M 262, 44 NW 59 (charter case.)

It is discretionary with the legislature to provide that the appellate court upon the trial shall render final judgment fixing the assessment where the original assessment was inadequate or unfair or to provide that the new appraisement should be made before the same or a new commission. City of St. Paul v Nickl, 42 M 262, 44 NW 59 (charter case).

DELEGATION OF POWER; WHO MAY EXERCISE. The legislature may delegate the power of eminent domain to its public officers, or agents, or to public or private corporations, or to private individuals. Weir v St. P. S. & T. F. R. Co. 18 M 155 (139).

MUNICIPALITIES. The municipalities of a state, including cities, villages, towns, counties, and school districts, have no inherent power of eminent domain and can exercise it only upon express or implied grant. Ind. School District v State, 124 M 271, 144 NW 960.

INDIVIDUALS OR CORPORATIONS. The power of eminent domain can be exercised by a private individual or corporation only by express legislative authority. Minn. Canal & P. Co. v Koochiching Co. 97 M 429, 107 NW 405, 5 LNS 638.

The power of eminent domain may be delegated to corporations, yet the exercise of eminent domain by corporations is a special privilege against common right. In re St. P. & N. P. Ry. Co. 37 M 164, 33 NW 701.

Telephone companies in establishing their lines may exercise the right of eminent domain under the constitution and the laws to the same extent as telegraph companies. Northwestern T. E. Co. v C. M. & St. P. R.R. Co. 76 M 334, 79 NW 315.

RIGHT OF DE FACTO CORPORATION TO EXERCISE POWER OF EMINENT DOMAIN. 11 MLR 464.

PRESUMPTION OF AUTHORITY. Every reasonable doubt as to the condemnor's authority must be resolved in favor of the landowner. Minn. Canal & P. Co. v Koochiching Co. 97 M 429, 107 NW 405, 5 LNS 638; and Chambers v Great Northern Power Co. 100 M 214, 110 NW 1128.

GENERAL GRANTS, CONSTRUCTION OF; ENTERPRISE MUST BE LAWFUL. A general grant of the right to condemn private property for public use must be construed as granted in aid of an enterprise which in itself is authorized by law and the carrying out of which does not involve the breach of some existing law. Minn. Canal & P. Co. v Pratt, 101 M 197, 112 NW 395, 11 LNS 105.

TAKING LIMITED TO PURPOSE DESIGNATED. When the legislature confers authority upon a municipality to take private property for certain designated purposes, such municipality can take such property for none other than the purposes designated. State ex rel v District Court, 133 M 221, 158 NW 240.

MANNER OF EXERCISING POWER. The manner of the exercise of the right of eminent domain addresses itself to the legislature as a question of policy, propriety, or fitness which the legislature may delegate or determine itself. State v Rapp, 39 M 65, 38 NW 926; Weir v St. P. S. & T. F. R. Co. 18 M 155 (139); Fairchild v City of St. Paul, 46 M 540, 49 NW 325.

QUANTITY AND ESTATE TO BE TAKEN; LEGISLATURE IS THE JUDGE. The legislature is the exclusive judge of the amount of land and of the estate in land which is required. Fairchild v City of St. Paul, 46 M 540, 49 NW 325; see, 6 MLR 523.

The state may authorize the taking of the fee. The authorization must clearly appear, either expressly or by fair implication. In most instances an easement only is taken, and the fee remains in the owner, who thus retains the right to use the land for every purpose not incompatible with the use for which it was appropriated. Reed v Board of Park Comm'rs, 100 M 167, 110 NW 1119.

When the estate or interest taken is not specified in the statute only such estate or interest may be taken as is required by the necessity of the contemplated use. Smith v City of Mpls. 112 M 446, 128 NW 819 (condemnation under charter); Reed v Board of Park Comm'rs, 100 M 167, 110 NW 1119.

LEGISLATURE MAY DELEGATE THE DETERMINATION. The legislature need not determine for itself but can delegate the power to determine what land could be taken. Warren v First Div. of St. P. & Pac. R. Co. 18 M 384 (345) Weir v St. Paul S. & T. F. R. Co. 18 M 155 (139); Stewart v Great Northern Ry. Co. 65 M 515, 68 NW 208, 33 LRA 427.

BARGAINING AWAY THE POWER OF EMINENT DOMAIN. Attempt by state to bind itself through legislative act not to exercise the power. See, 2 MLR 387 and 373.

A corporation which holds the power of eminent domain has no power to effectually contract that in the future no resort shall be had to the power of eminent domain so as to enlarge rights given by the contract. Village of St. Louis Park v Mpls. N. & S. Ry. Co. 156 M 164, 194 NW 327.

CONDEMNATION OF LANDS ALREADY DEVOTED TO PUBLIC USE; STATE LANDS. Public lands of the state may be taken under the power of eminent domain only when authority to do so is expressly or by necessary implication granted by the legislature. Independent School District v State, 124 M 271, 144 NW 960. A general power to condemn lands is not sufficient. Minn. P. & L. Co. v State, 177 M 343, 225 NW 164.

As interference with parks, cemeteries, public buildings, etc., can generally be avoided by a deviation in route, authority to encroach upon such property will not be implied. Minn. P. & L. Co. v State, 177 M 343, 225 NW 164.

DISTINCTION BETWEEN LANDS HELD IN GOVERNMENTAL AND IN PROPRIETARY CAPACITY DISAPPROVED OF. The distinction between lands held by the state in a proprietary capacity and land held for some specified governmental purpose or trust whether in use or not, is now disapproved of. Minn. P. & L. Co. v State, 177 M 343, 225 NW 164.

DISTINCTION BETWEEN USED AND UNUSED STATE LAND. The land involved in In re St. Paul & N. P. Ry. Co. 34 M 227, 25 NW 345, was university land but since it was not used for university purposes it was held liable to be appro-

priated in the same manner as land of private persons. See also, Ind. School District v State, 124 M 271, 144 NW 960; 1938 OAG 391.

Property which has not been actually put to prior public use is not exempt from condemnation, at least unless it be shown that the property is in fact needed for public use and that effective measures are being taken to apply it thereto without undue delay. Board of Water Comm'rs v Roselawn Cemetery, 138 M 458, 165 NW 279. See, 1938 OAG 391.

Power of United States to condemn land devoted by state to a public use. 24 MLR 870.

RAILROAD LANDS, AUTHORITY TO TAKE. A legislative act is required to authorize one railroad to condemn the land of another. Mpls. Western Ry. Co. v M. & St. L. Ry. Co. 61 M 502, 63 NW 1035.

As a general rule the power to extend streets across the right of way and tracks of railways may be implied from a general grant to lay out and extend streets. St. Paul M. & M. Ry. Co. v City of Mpls. 35 M 141, 27 NW 500.

Public policy requires as to railroads that no other use or occupation inconsistent with the efficient management of its tracks and trains can be tolerated. Northwestern T. E. Co. v C. M. & St. P. Ry. Co. 76 M 334, 79 NW 315.

CONSISTENT AND INCONSISTENT USES. There is no jurisdiction or authority for the second public use where it will practically destroy or impair the first public use. M. & St. P. Ry. Co. v City of Faribault, 23 M 167.

Where the second use is not inconsistent and both may be enjoyed together without serious injury to or interference with the first use, the rule against taking such property by eminent domain does not apply. Minn. P. & L. Co. v State, 177 M 343, 225 NW 164.

The authority to take for the second public use may be implied from a general grant where it will not conflict with the first use. M. & St. L. R. Co. v Village of Hartland, 85 M 76, 88 NW 423.

There must be a reasonable public necessity for the taking even when it is not inconsistent with a prior public use. Minn. P. & L. Co. v State, 177 M 343, 225 NW 164.

If the uses are inconsistent there must be an express or implied legislative authorization for the taking; if the authorization is implied, the necessity of appropriating the particular property must be shown. St. Paul M. & M. Ry. Co. v City of Mpls. 35 M 141, 27 NW 500; Northwestern T. E. Co. v C. M. & St. P. Ry. Co. 76 M 334, 79 NW 315.

The legislative intent to give the right to exercise the power of eminent domain so as to impair or destroy a prior public use must appear expressly or by necessary implication and such implication never arises except as a necessary condition to the beneficial enjoyment and efficient exercise of the power expressly granted, and then only to the extent of the necessity. M. & St. P. Ry. Co. v City of Faribault, 23 M 167.

It may be presumed that the legislature contemplated an adjustment of the two public uses. St. Paul Union Depot Co. v City of St. Paul, 30 M 359, 15 NW 684.

CONSISTENCY, QUESTION FOR COURT. Whether a proposed public use would be inconsistent with or subversive of a prior public use is a question for the court. In re St. P. & N. P. Ry. Co. 34 M 227, 25 NW 345.

QUESTION OF FACT. The question of interference between public uses is one of fact. Minn. P. & L. Co. v State, 177 M 343, 225 NW 164.

STREET CROSSING OVER RAILROAD TRACK. A necessary street crossing over railroad tracks though subject to the prior public use of the railway is not inconsistent therewith. St. Paul M. & M. Ry. Co. v City of Mpls. 35 M 141, 27 NW 500.

INCONCLUSIVE FACTORS. The mere fact of inconvenience and expense will not make out an inconsistent use, nor the facts of danger and delay. St. Paul M. & M. Ry. Co. v City of Mpls. 35 M 141, 27 NW 500.

The fact that the owner will have to rearrange its tracks and remove a switch and shed does not conclusively show an essential impairment or inconsistent use. Fohl v Common Council, 80 M 67, 82 NW 1097.

In the case of St. Paul Union Depot Co. v City of St. Paul, 30 M 359, 15 NW 684, the two uses were found to be inconsistent and under the facts the first was allowed to prevail.

CONSTITUTIONAL LIMITATIONS, PROCEDURAL. If the legislature provides that proceedings be conducted in some fair and equitable mode, with or without a jury, with opportunity to the owner and interested parties to present evidence and be heard, it is not for the courts to say that the legislature should have provided a different mode of procedure, though the one provided may not be best, and to warrant the court in holding it void there must be a radical defect either as respects the tribunal provided or the opportunity to be heard. City of St. Paul v Nickl, 42 M 262, 44 NW 59.

HEARING. In the case of State v District Court, Ramsey County, 87 M 146, 91 NW 300, the court in speaking of judicial procedure in condemnation (under a charter) stated "an opportunity for hearing is given, with judgment to be rendered after hearing, thus embracing all the essential elements of due process of law," citing Trustees of Dartmouth College v Woodward, 4 Wheat 518.

Notice, see annotations to section 117.05.

CONSTITUTIONAL LIMITATIONS, SUBSTANTIVE. The legislature can take private property against the will of the owner only for a public use and after just compensation to the owner has been paid or secured. Except for these two restrictions its power is unlimited and its determination to take conclusive. State ex rel v Van Reed, 125 M 194, 145 NW 967; Barmel v Mpls.-St. P. S. District, 201 M 622, 277 NW 208.

LIMITATIONS ARE JUDICIAL QUESTIONS. Whether the use is public and whether proper compensation has been made are judicial questions, all other questions are for the legislature and the determination thereof is final and cannot be reviewed by the courts. State ex rel v Van Reed, 125 M 194, 145 NW 967.

WHEN QUESTION OF PUBLIC USE IS NOT FOR THE COURT. In State v Voll, 155 M 72, 192 NW 188, the constitution determined that the taking was for a public use and there remained only the question of compensation for the court.

THE PUBLIC USE QUESTION. The power of eminent domain cannot be exercised to take private property for a private use. State ex rel v District Court, 133 M 221, 158 NW 240; Lien v Board of County Comm'rs, 80 M 58, 82 NW 1094; State v Board of County Comm'rs, Polk County, 87 M 325, 92 NW 216, 60 LRA 161; Miller v Troost, 14 M 365 (282).

LEGISLATIVE DECLARATION AS TO USE. Where the legislature authorizes a taking for a public use on just compensation being paid, it should appear either from the express language of the statute or from a fair and reasonable interpretation of the whole enactment that the interests of the public health, convenience, or welfare are intended to be promoted. State v Board of County Comm'rs, 87 M 325, 92 NW 216, 60 LRA 161 (a drainage case).

PRESUMPTION. There is a presumption that a use is public if the legislature has declared it to be so. State ex rel v Houghton, 144 M 1, 174 NW 885, 176 NW 159, 8 ALR 585.

NOT BINDING ON THE COURTS. The legislature's determination that the use is a public one is not conclusive on the courts. Fairchild v City of St. Paul, 46 M 540, 49 NW 325.

A statute which attempts to authorize the condemnation of private property for other than a public use is void without reference to any legislative declaration as to the nature of the use. Minn. Canal & P. Co. v Koochiching Co. 97 M 429, 107 NW 405, 5 LNS 638.

DOUBTS RESOLVED AGAINST PETITIONER. If it is doubtful whether the statute confers authority to take for the purpose in question, the doubt must be

resolved against the petitioner no matter what the necessities of the case may be. M. & St.L. R. Co. v Nicolin, 76 M 302, 79 NW 304.

CHARACTER OF USE, A JUDICIAL QUESTION. Whether the use is public is a judicial question. Minn. Canal & P. Co. 97 M 429, 107 NW 405, 5 LNS 638; State ex rel v District Court, 133 M 221, 158 NW 240; Stewart V G.N. Ry. Co. 65 M 515, 68 NW 208, 33 LRA 427; In re St.P. & N.P. Ry. Co. 34 M 227, 25 NW 345; Burns v Easling, 156 M 71, 194 NW 102; State v Board of County Comm'rs, Polk Co. 87 M 325, 92 NW 216, 60 LRA 161; McGee v Board of County Comm'rs, 84 M 472, 88 NW 6.

OWNER ENTITLED TO HEARING. The owner is entitled at some stage of the proceedings to a judicial hearing upon the question whether the use for which his property is proposed to be taken is public or private. State ex rel v City of Montevideo, 142 M 157, 171 NW 314.

OPPORTUNITY FOR JUDICIAL REVIEW SUFFICIENT. It need not be submitted to the courts in the first instance—the constitutional rights of the aggrieved party are sufficiently protected if the decision may be reviewed in the courts by appeal when provided for, and when not provided, by certiorari. State ex rel v City of Montevideo, 142 M 157, 171 NW 314; Webb v Lucas, 125 M 403, 147 NW 273 (ditch condemnation).

PRESUMPTION AS TO USE. There is a strong presumption that property taken under eminent domain is being taken for the purpose stated in the condemnation proceeding, but it is not conclusive and the court may look beyond it and ascertain the real purpose. State ex rel v District Court, 133 M 221, 158 NW 240.

BURDEN OF PROOF. Where the purpose of a particular improvement appears on its face to be public, the burden to show the contrary will be on the objecting owner. State ex rel v City of Montevideo, 142 M 157, 171 NW 314.

PUBLIC USE, WHAT IS. A public use means a use by the public. A use which is public must be distinguished from an interest which is public. Where simply the latter, the power of eminent domain cannot be exercised. Minn. Canal & P. Co. v Koochiching Co., 97 M 429, 107 NW 405, 5 LNS 638; see 19 MLR 705.

The term "public use" is flexible and cannot be limited to the public uses known at the time of framing the constitution. Stewart v G.N. Ry. Co. 65 M 515, 68 NW 208, 33 LRA 427, State ex rel v Houghton, 144 M 1, 174 NW 885, 176 NW 159, 8 ALR 585.

Any use of anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities would be a public use. Stewart v G.N. Ry. Co. 65 M 515, 68 NW 208, 33 LRA 427.

To be a public use it is not required that it be capable of being used by the entire public or by any particular portion thereof, but a use which is restricted by physical conditions to a very few persons who must use it within a very restricted area is not a public use. Minn. Canal & P. Co. v Koochiching Co. 97 M 429, 107 NW 405, 5 LNS 638.

The fact that only a small part of the public is appreciably or directly benefited does not make the use not public. State ex rel Twin City B. & I. Co. v Houghton, 144 M 1, 174 NW 885, 176 NW 159, 8 ALR 585.

In the case of a railroad the character of the use does not depend on the amount of business or number of persons who may have occasion to use it; if all the people have a right to the use of it, it is a public use. C. B. & N. Ry. Co. v Porter, 43 M 527, 46 NW 75; Kettle River R. Co. v Eastern Ry. Co. of Minn. 41 M 461, 43 NW 469, 6 LRA 111.

One railroad corporation acquired the land by condemnation for railroad purposes and then conveyed it to another which installed and operated its own railway. The court said the character of the use is not affected by who holds and uses the land for the purpose for which taken. Crolley v M. & St. P. Ry. Co. 30 M 541, 16 NW 422.

It is the purpose for which the land is taken and not the particular corporation which the state has authorized to condemn that determines whether the use is public or not. Crolley v M. & St. L. Ry. Co. 30 M 541, 16 NW 422.

INCIDENTAL PRIVATE ADVANTAGE. When the taking is for a public use it is no objection that incidental and private advantage will result to the petitioner. Minn. Canal & P. Co. v Koochiching Co. 97 M 429, 107 NW 405, 5 LNS 638.

A USE PRIVATE **OR** PUBLIC AT CONDEMNOR'S OPTION. A statute is unconstitutional that authorizes an exercise of eminent domain for a public or private use at condemnor's option. Stewart v G.N. Ry. Co. 65 M 515, 68 NW 208, 33 LRA 427.

A USE PRIVATE AND PUBLIC. When the purposes stated in the petition are part public and part private there is no right to proceed to condemn. Minn. Canal & P. Co. v Koochiching Co. 97 M 429, 107 NW 405, 5 LNS 638.

TAKING BY STATE FOR WORK OF INTERNAL IMPROVEMENT. The state could not be authorized to condemn land for the carrying on of a work of internal improvement. 1918 OAG 468.

The use is public when the land has been taken for these purposes:

For a university street car line, State ex rel v Van Reed, 125 M 194, 145 NW 967;

For construction of ditches or drains, State v Board of County Comm'rs, Polk Co. 87 M 325, 92 NW 216, 60 LRA 161;

For trunk highways, State v Voll, 155 M 72, 192 NW 188;

For grain elevators, Stewart v G.N. Ry. Co. 65 M 515, 68 NW 208, 33 LRA 427;

For boom purposes, Cotton v Miss. & Rum River Boom Co. 22 M 372;

For the improvement of a public river for navigation, Weaver v Miss. & Rum River Boom Co. 28 M 534, 11 NW 114;

For a gravel pit by a railroad, M. & St.L. R. Co. v Nicolin, 76 M 302, 79 NW 304;

For telegraph or telephone lines, Cater v N.W. Tel. Exc. 60 M 539, 63 NW 111, 51 ASR 543, 28 LRA 310;

For boulevards or pleasure drives, for public parks, public baths, public playgrounds, or for libraries or museums, State ex rel v Houghton, 144 M 1, 174 NW 885, 176 NW 159, 8 ALR 585;

For the generation of electrical power for sale to the public, but a taking for the creation of a water power plant for the purpose of supplying the public it is not for a public use. Minn. Canal & P. Co. v Koochiching Co. 97 M 429, 107 NW 405, 5 LNS 638.

NEGATIVE USES; RESTRICTIONS UPON USE FOR AESTHETIC CONSIDERATIONS. Condemnation for a negative use prevents an otherwise lawful use by the owner and in no other way is it a use at all. State ex rel v Houghton, 144 M 1, 174 NW 885; 176 NW 159, 8 ALR 585.

BUILDING RESTRICTIONS; HOUSING. The condemnation of property against its use as an apartment building is for a public use. State ex rel v Houghton, 144 M 1, 174 NW 885, 176 NW 159, 8 ALR 585 (after rehearing).

The tendency is in the direction of extending the power of restriction either through the exercise of the police power or the power of eminent domain in aid of the so-called "city planning" or the improvement of housing conditions. State ex rel v Houghton, 144 M 1, 174 NW 885, 176 NW 159, 8 ALR 585.

The Minnesota Housing Code (Laws 1917, Chapter 137) is an exercise of the police power. State ex rel v Houghton, 144 M 1, 174 NW 885, 176 NW 159, 8 ALR 585.

GENERAL REFERENCES: Young, City Planning and Restrictions on The Use of Property, 9 MLR 518; Ebenstein, The Law of Public Housing, 23 MLR 878, at pages 888 and 901 (condemnation of land for public housing by congress and the state).

THE QUESTION OF NECESSITY. The question of necessity is a legislative one, not subject to judicial review unless it is so provided by constitution or statute. School District No. 40 v Bolstad, 121 M 376, 141 NW 801; State ex rel v City of Montevideo, 142 M 157, 171 NW 314; State ex rel v District Court, 133

M 221, 158 NW 240; 1924 OAG 171; and State Park Comm'rs v Henry, 38 M 266, 36 NW 874; State ex rel v District Court, 87 M 146, 91 NW 300; State v Board of County Comm'rs, Polk Co. 87 M 325, 92 NW 216, 60 LRA 161.

HEARING, WHEN PROVIDED. Where a hearing is given by statute on the question of public necessity to the owners it need not be conducted in accord with the rules of judicial procedure. State ex rel v City of Montevideo, 142 M 157, 171 NW 314 (condemnation under charter).

In M. & St.L. R. Co. v Village of Hartland, 85 M 76, 88 NW 423, a statute expressly made the question of public necessity a judicial one and it was treated there as a question of fact to be established in the usual way; there was no presumption in favor of necessity and the burden of proof was put on the party asserting it.

DELEGATING POWER TO DETERMINE NECESSITY. It is not necessary that the legislature first decide the question of necessity before delegating the authority to take by condemnation. Weir v St. P. S. & T. F. Ry. Co. 18 M 155 (139).

DELEGATION, HOW SHOWN. The delegation to a corporation of the power to decide for itself when necessity exists is required to be shown by a clear and unambiguous grant from the legislature. In re St.P. & N.P. Ry. Co. 37 M 164, 33 NW 701.

DETERMINATION OF DELEGATE CONCLUSIVE. Where the legislature has delegated the power to determine the necessity for the use, the determination of the body to which the question is committed is as conclusive as if the legislature itself had made the determination. Fohl v Common Council, 80 M 67, 82 NW 1097; Knoblauch v Mpls. City, 56 M 321, 57 NW 928.

DELEGATE'S DETERMINATION NOT CONCLUSIVE WHERE JURISDICTIONAL. The determination on the existence of the necessity for a taking has been held not to be conclusive on the courts where the power to determine it has been delegated by the legislature to an inferior body whose power to act depends not on an express grant of power but on the existence of that necessity. Milw. & St.P. Ry. Co. v City of Faribault, 23 M 167, explained in Fairchild v City of St. Paul, 46 M 540, 49 NW 325; and see, St. Paul Union Depot Co. v City of St. Paul, 30 M 359, 15 NW 684.

Frequently such cases are those where a taking for a proposed use would interfere with a prior purpose to which the land to be taken is already put. In those cases the courts say that the necessity for the taking is a judicial question. In re St.P. & N.P. Ry. Co. 34 M 227, 25 NW 401; In re St.P. & N.P. Ry. Co. 37 M 164, 33 NW 701; and see, Fohl v Common Council, 80 M 67, 82 NW 1097.

WHERE COURT MAY DETERMINE NECESSITY. The legislature may delegate to municipal boards and administrative officers the power to determine the propriety and necessity of improvements, but that power cannot be conferred on the courts except in special instances where a determination thereof is incidental to the exercise of its jurisdiction in a proceeding properly of judicial cognizance. Brazil v County of Sibley, 139 M 458, 166 NW 1077. See, though, State ex rel v District Court, Ramsey Co. 87 M 146, 91 NW 300; McGee v Board of County Comm'rs, 84 M 472, 88 NW 6; and Vacation of Part of Town of Hibbing, 163 M 439, 204 NW 534, 205 NW 613.

CHAPTER 117 NOT UNCONSTITUTIONAL. The legislature may do what it has done in Chapter 117 and use the court as an instrumentality in which to initiate the proceedings. Such is not an unconstitutional delegation of its powers to the judiciary. Barmel v Mpls.-St. Paul S. District, 201 M 622, 277 NW 208; In re Improvement of Third Street, St. Paul, 177 M 146, 225 NW 86, 74 ALR 561.

THE QUESTION OF JUST COMPENSATION

LIBERAL CONSTRUCTION. The "just compensation" provision in the constitution is to receive a liberal construction. Adams v C.B. & N. Ry. Co. 39 M 286, 39 NW 629, 12 ASR 644, 1 LRA 493.

The constitutional amendment that requires compensation for property damaged as well as property taken should be liberally construed. In re Town Ditch No. 1, 208 M 566, 295 NW 7.

JUST COMPENSATION, A CONSTITUTIONAL LIMITATION. Our constitution limits the right of eminent domain to the taking of private property for public use with just compensation therefor first paid or secured. Barmel v Mpls.-St. Paul S. District, 201 M 622, 277 NW 208; Hursh v First Div. of St. P. & P. Ry. Co. 17 M 439 (417); Warren v First Div. of St. P. & P. Ry. Co. 18 M 384 (345); Gray v First Div. of St. P. & P. Ry. Co. 13 M 315 (289); and State v C. M. & St. P. Ry. Co. 36 M 402, 31 NW 365.

UNITED STATES CONSTITUTION. Just compensation as used in the Fifth Amendment to the United States Constitution discussed in Monongahela Navig. Co. v United States, 148 US 312, 13 SC 622, 37 L.Ed. 463. And see, Olson v United States, 67 F(2d) 24.

A JUDICIAL QUESTION. The clause in the state constitution providing for just compensation is a mere limitation upon the exercise of the right of eminent domain. Where the sovereign power attaches conditions to its exercise the inquiry whether they have been observed is proper matter for judicial cognizance. Boom Co. v Patterson, 98 US 403, 25 L.Ed. 206.

The constitution intends that when a man is deprived of his property he shall have a judicial hearing of the amount of damages, a hearing where he may of right offer evidence, and as a result of which he may have enforceable damages. It need not be a judicial determination by judge and jury; but in some sensible way it must be a judicial determination of damages sustained. State ex rel v Stanley, 188 M 390, 247 NW 509.

THE STATUTE ITSELF NEED NOT PROVIDE FOR COMPENSATION. An act providing for taking property for public use is not unconstitutional merely because it does not itself provide for compensation to be made if there is another statute under which it must be made or secured before the property can be taken and which does secure it as a condition of the taking. State v Shardlow, 43 M 524, 46 NW 74; also, Hurst v Town of Martinsburg, 80 M 40, 82 NW 1099.

LEGISLATURE NOT TO DETERMINE THE COMPENSATION. The legislature is to be considered as an individual treating with an individual for an exchange; it is not the judge of the the amount or justness of the compensation. Langford v Comm'rs of Ramsey Co. 16 M 375 (333).

IMPARTIAL TRIBUNAL TO DETERMINE COMPENSATION. The landowner has the right to a trial on the issue of damages before a fair and impartial tribunal or court at some stage of the proceeding. In re Improvement of Third Street, St. Paul, 177 M 146, 225 NW 86, 74 ALR 561, Langford v Comm'rs of Ramsey Co. 16 M 375 (333).

LEGISLATURE MAY DETERMINE WHAT THE TRIBUNAL SHALL BE. While the legislature must provide an impartial tribunal to ascertain compensation and give the parties interested an opportunity to be heard before such tribunal, it may determine what the tribunal shall be, whether jury, court without jury, or commissioners selected by the court. Ames v Lake Superior & Miss. R. Co. 21 M 241, at 292; State v Rapp, 39 M 65, 38 NW 926; Barmel v Mpls.-St. Paul S. District, 201 M 622, 277 NW 208, and State ex rel v District Court, 83 M 464, 86 NW 455.

RIGHT TO TRIAL BY JURY. There is no constitutional right to a trial by jury as to the amount of damages in a condemnation proceeding. In re Improvement of Third Street, St. Paul, 177 M 146, 225 NW 86, 74 ALR 561; Ames v Lake Superior & Miss. R. Co. 21 M 241, at 292; Board of Water Comm'rs v Roselawn Cemetery, 138 M 458, 165 NW 279; also, Weir v St. Paul, S. & T. F. R. Co. 18 M 155 (139); Bruggerman v True, 25 M 123.

COMMENCEMENT OF CONDEMNATION PROCEEDINGS NOT A TAKING. The commencement and pendency of condemnation proceedings does not constitute a taking of property for which, under the constitution, compensation must

be first paid or secured. Duluth Transfer Ry. Co. v N.P. Ry. Co. 51 M 218, 53 NW 366; also, Heller v Schroeder, 182 M 353, 234 NW 461.

ENTRY FOR SURVEY NOT A TAKING. An entry for survey would not be a taking of land to be valued and paid for. Hursh v First Div. of St. P. & P. R. R. Co. 17 M 439 (417).

SECURING THE COMPENSATION. The constitution does not demand that compensation be in cash, it can be secured. C. R. I. & P. Ry. Co. v Minneapolis, 164 M 226, 204 NW 934, 205 NW 640.

SECURITY, CHARGE ON THE PUBLIC TREASURY AS. When property is taken by the state the constitutional requirement (Minnesota Constitution, Article 1, Section 13) is satisfied if the amount to be paid is made a charge upon the public treasury of the state, or a municipal subdivision thereof. State ex rel v Erskine, 165 M 303, 206 NW 447; State v Messenger, 27 M 119, 6 NW 457.

RIGHT OF RECOVERY AGAINST MUNICIPALITY, AS, WHERE NO PHYSICAL TAKING. If the corpus of the property is taken provision for compensation must be made prior to such taking, but if none of the property itself is taken the right of the owner to go into court and compel payment for the damage from the municipality is sufficient security to satisfy constitutional requirements. Austin v Village of Tonka Bay, 130 M 359, 153 NW 738 (change of street grade); Vanderburgh v City of Minneapolis, 98 M 329, 108 NW 480, 6 LNS 741 (vacation of street).

RIGHT OF RECOVERY AGAINST INDIVIDUAL. A right of recovery against an individual does not constitute the security contemplated by the constitution. State ex rel v District Court of Ramsey Co. 128 M 432, 151 NW 144.

RIGHT TO HAVE FUND BROUGHT IN FOR APPORTIONMENT. One who owned certain rights in the land taken argued that the failure to apportion to him his share of the gross award deprived him of the security of payment guaranteed by the constitution. The court said that to the extent necessary to conserve his right the fund must be deemed to be in the condemnor's possession and that the right to have it brought into court for apportionment is a sufficient remedy to enable this owner to obtain compensation for the taking. State ex rel v District Court of Ramsey Co. 128 M 432, 151 NW 144.

RETENTION OF POSSESSION BY OWNER. The Minnesota rule is not that retention of possession by the owner satisfies the requirement of compensation first paid or secured. State Park Comm'rs v Henry, 38 M 266, 36 NW 874.

WHERE PAYMENT POSTPONED IN A CONDEMNATION BY STATE OR MUNICIPALITY. Where property is taken directly by the state or a municipal corporation, the fact that payment is postponed for a reasonable time in order to make an assessment, or to enable the legislature to decide finally, or make an appropriation does not make the law authorizing the condemnation unconstitutional. In such cases the bargain is not deemed closed until there has been a final determination to take the property, nor the property actually taken until the compensation be paid or secured by being made a lawful claim upon the public treasury. State Park Comm'rs v Henry, 38 M 266, 36 NW 874.

JUST COMPENSATION INCLUDES INTEREST. The just compensation required by the constitution includes not only the amount of the final award but also the interest thereon from the date of the original award until the money becomes available to the owner. Ford Motor Co. v City of Mpls. 143 M 392, 173 NW 713; accord, United States v Sargent, 162 F 81 (interest properly awarded on the damages in condemnation proceedings instituted by the United States).

JUST CONDEMNATION DOES NOT INCLUDE COSTS. The words "just compensation" as used in the United States Constitution must necessarily mean that the owner of the property shall be allowed such sum as will represent in money the reasonable market value of the land taken, and not the value of the property plus costs, expenses, and attorneys' fees incurred by the owner. In re Hastings Lock & Dam Co. 2 F(2d) 324.

PLEADING; JUST COMPENSATION A MATTER OF DEFENSE. The plaintiff need not allege that payment has not been made or secured, that is a matter of defense. Gray v First Div. of St. P. & P. R.R. Co. 13 M 315 (289).

CONSTITUTION PROTECTS AGAINST A DAMAGING WITHOUT COMPENSATION.

AMENDMENT TO CONSTITUTION CONSTRUED. The constitutional amendment to Article 1, Section 13, provided that compensation must be paid for damaging or destroying private property for public use as well as for taking the same. Matthias v M. St. P. & S.S.M. Ry. Co. 125 M 224, 146 NW 353, 51 LNS 1017 (action for damages).

WHEN IS THERE A TAKING OR DAMAGING. Where private rights are invaded by legislative authority in the interests of the general public there is a taking or damaging for public use, within the meaning of the constitution, entitling the injured party to compensation, except perhaps in cases where an exercise of the police power is involved. Vanderburgh v City of Mpls. 98 M 329, 108 NW 480, 6 LNS 741 (action for damages).

NO PHYSICAL TAKING NECESSARY. The constitutional amendment broadened the protection of private property; there need be no physical invasion of property in order to give a right to claim compensation. Matthias v M. St. P. & S. S. M. Ry. Co. 125 M 224, 146 NW 353, 51 LNS 1017; Vanderburgh v City of Mpls. 98 M 329, 108 NW 480, 6 LNS 741 (neither case a condemnation proceeding).

The purpose of a constitutional amendment was to give a landowner the right to compensation if his land was damaged, even though there was no physical invasion or appropriation of the land. Vacation of Part of Town of Hibbing, 163 M 439, 204 NW 534, 205 NW 613.

LIBERAL CONSTRUCTION. The constitutional amendment that requires compensation for property damaged should be liberally construed. In re Town Ditch No. 1, 208 M 566, 295 NW 7.

NO NEW CAUSE OF ACTION CREATED. By the constitutional amendment covering damage without taking no new cause of action unknown to the common law was created. McCarthy v City of Mpls. 203 M 427, 281 NW 759.

OWNER'S REMEDY FOR DAMAGING. Under the Minnesota Constitution, Article 1, Section 13, where private property is not taken but is damaged for public use without compensation first paid or secured, the owner has his cause of action in tort. McCarthy v City of Mpls. 203 M 427, 281 NW 759.

The constitutional provision for just compensation may be taken advantage of in actions other than condemnation proceedings to recover for consequential injuries to property no part of which has been actually condemned. See, general annotations to chapter, Owner's Remedies Outside of Condemnation Proceedings, and cases cited in 7 MLR 596.

SPECIAL DAMAGES REQUIRED. The constitution does not make it no longer necessary to prove special injury to the landowner to entitle him to damages. Vacation of Part of Town of Hibbing, 163 M 439, 204 NW 534, 205 NW 613.

Not every diminution in the value of property caused by public improvement entitles the owner to recover. The damage must be to the property itself. McCarthy v City of Mpls. 203 M 427, 281 NW 759.

Under the amendment the right to damages is not dependent on physical injury to the corpus of the property. It is sufficient if there is a reasonable disturbance of a valuable right in the property. There need not be a trespass. It is sufficient that the construction and operation of the public utility is the cause of some special pecuniary damage and though the damage is consequential the owner may recover. Stuhl v G. N. Ry. Co. 136 M 158, 161 NW 50, LRA 1917D 317 (not a condemnation proceeding) commented on in 1 MLR 452.

TEST OF LIABILITY. The test of liability in the absence of negligence is whether the structure is a nuisance for which an action will lie at common law—not a public but a private nuisance. Stuhl v G. N. Ry. Co. 136 M 158, 161 NW 501, LRA 1917D 317 (not a condemnation proceeding).

CONSEQUENTIAL INJURIES TO LAND CAUSED BY RAILROAD. Before the adoption of the constitutional amendment it was the rule that no action lies against a railroad company for damages unavoidably resulting to nearby property from the noises, smoke, or jarring incident to a proper operation upon lands in which the person inconvenienced has an interest. (Citing Rochette v C. M. & St. P. Ry. Co. 32 M 201, 20 NW 140; Adams v C. B. & N. Ry. Co. 39 M 286, 39 NW 629, 12 ADR 644, 1 LRA 493; and Carroll v Wis. Central R. Co. 40 M 168, 41 NW 661). That is still the rule under the amended constitution so far as the operation of a railroad at or between stations is concerned. Matthias v M. St. P. & S. S. M. Ry. Co. 125 M 224, 146 NW 353, 51 LNS 1017 (not a condemnation proceeding).

The *Matthias* case, *supra*, distinguished incidental railway facilities the location and operation of which is not determined by public convenience or necessity. If noises, smoke, or jarring resulting therefrom constitute a private nuisance to plaintiff's use and enjoyment of his property there is an injury to private property by a public use for which compensation must be made.

INJURIES TO CERTAIN PROPERTY RIGHTS REQUIRING COMPENSATION.

EASEMENTS. An easement is property which may be "taken" within the meaning of the constitution. Adams v C. B. & N. Ry. Co. 39 M 286, 39 NW 629, 12 ASR 644, 1 LRA 493 (action for damages decided before the constitution was amended to include "taking, destroying or damaging").

RESERVOIR OR FLOWAGE EASEMENTS. See, Olsen v United States, 67 F(2d) 24; Karlson v United States, 82 F(2d) 330.

EASEMENT FOR LIGHT AND AIR. The owner of a lot abutting on a public street has, independent of the fee in the street, an appurtenant easement in the street in front of his lot to the full width of the street for the admission of light and air to his lot, which easement is subordinate only to the public right. Depriving him of or interfering with his enjoyment of that easement for any public use not a proper street use is a taking of property within the meaning of the constitution. Adams v C. B. & N. R. Co. 39 M 286, 39 NW 629, 12 ASR 644, 1 LRA 493; Lamm v. C. St. P. M. & O. Ry. Co. 45 M 71, 47 NW 455, 10 LRA 268 (actions for damages); Gustafsonv v Hamm, 56 M 334, 57 NW 1054; 22 LRA 565 (action for injunction).

EASEMENT OF VIEW. McCarthy v City of Mpls. 203 M 427, 281 NW 759.

EASEMENT OF ACCESS. A private action for damages for the obstruction of a public way cannot be maintained by one whose injury is not different in kind from that suffered by the general public, though greater in degree. Shaubut v St. P. & Sioux City R. Co. 21 M 502.

An action by an abutting street owner will lie for obstructing the street away from his lot so as to cut off or materially interfere with his only access to it. Adams v C. B. & N. Ry. Co. 39 M 286, 39 NW 629, 12 ASR 644, 1 LRA 493 (action for damages).

Cutting off the plaintiff's most convenient access to his property was not a taking. Rochette v C. M. & St. P. Ry. Co. 32 M 201, 20 NW 140 (action for damages decided before the constitutional amendment to Article 1, Section 13) Accord, Barnum v Minn. Transfer Ry. Co. 33 M 365, 23 NW 538; Shero v Carey, 35 M 423, 29 NW 58; Vacation of Part of Town of Hibbing, 163 M 439, 204 NW 534, 205 NW 613 (not condemnation proceedings).

VACATION OF STREET. Merely as a member of the community a landowner has no property rights in the streets in such a sense as to entitle him to compensation for any injury he may sustain as the result of a street vacation. But, as the adjoining proprietor of land abutting on the portion of the street vacated, he may have a special or peculiar property right in the street, which may not be damaged unless compensation is made. Vacation of Part of Town of Hibbing, 163 M 439, 204 NW 534, 205 NW 613.

The vacation of a street, though not in front of his lots, placed plaintiff in a cul-de-sac, fronting on a blind alley, and permanently prevented access from the

direction of the vacated street. The vacation worked an injury special and peculiar to the plaintiff's property and he was allowed recovery. Vanderbergh v City of Mpls. 98 M 329, 108 NW 480, 6 LNS 741 (not a condemnation proceedings).

VACATION OF STREET; RIGHT OF NON-ABUTTING OWNER TO DAMAGES THEREFOR. See, 8 MLR 342.

CHANGES IN STREET GRADE, RIGHT OF ABUTTING OWNERS TO RECOVER DAMAGE FOR. Dickerman v City of Duluth, 88 M 288, 92 NW 1119; Maguire v Village of Crosby, 178 M 144, 226 NW 398; Foss v City of Montevideo, 178 M 430, 227 NW 357; Austin v Village of Tonka Bay, 130 M 359, 153 NW 738 (all actions for damages). See, 14 MLR 182.

IMPOSING SERVITUDE ON PUBLIC STREET, RIGHT OF ABUTTING OWNER TO DAMAGES FOR—RAILWAYS. The construction and maintenance of an ordinary railroad by legislative authority is the imposition of a servitude additional to the proper public easement in the street so as to entitle the owner of the servient estate to compensation. Carli v Stillwater St. Ry. & Transfer Co. 28 M 373, 10 NW 205, 41 AR 290; Adams v C. B. & N. Ry. Co. 39 M 286, 39 NW 629, 12 ASR 644, 1 LRA 493; Gustafson v Hamm, 56 M 334, 57 NW 1054, 22 LRA 565 (private railroad); Mpls. St. P. R. & D. Elec. Traction Co. v Searle, 208 F 122 (where the railway did not run along the street but cut across it diagonally).

The city has no proprietary right in its streets. It is not entitled to compensation when a railroad acquires a right across its streets. City of International Falls v Minn. D. & W. Ry. Co. 117 M 14, 134 NW 302.

INTERURBAN RAILWAY AS AN ADDITIONAL SERVITUDE. 5 MLR 394.

STREET RAILWAY. The construction and maintenance of a street railway does not impose an additional servitude. Newel v Mpls. Lyndale & Minnetonka R. Co. 35 M 112, 27 NW 839, 59 AR 303; Romer v St. P. City R. Co. 75 M 211, 77 NW 825, 74 ASR 455; McCarthy v City of Mpls, 203 M 427, 281 NW 759.

TELEGRAPH, TELEPHONE, AND ELECTRIC POWER LINES AND WIRES AS ADDITIONAL SERVITUDES ON HIGHWAY. 14 MLR 183.

A telephone line consisting of poles planted in the ground upon which wires were strung along the side of a county highway, the fee of which was in the plaintiff, was held not to impose an additional servitude. Cater v N. W. Tel. Exc. Co. 60 M 539, 63 NW 111, 51 ASR 543, 28 LRA 310.

IMPOSITION OF A FLOODING EASEMENT, RIGHT TO COMPENSATION FOR. In re Town Ditch No. 1, 208 M 566, 295 NW 47; also, State v Stanley, 188 M 390, 247 NW 509; and, State v Hall, 195 M 79, 261 NW 874.

IMPOSING SERVITUDE IN THE FORM OF BUILDING RESTRICTIONS. See, general annotations to chapter, Public Use Question.

EQUITABLE SERVITUDE, TAKING OF; OWNER'S RIGHT OF COMPENSATION FOR. 24 MLR 425.

RIPARIAN RIGHTS, DAMAGING OR TAKING OF. Riparian rights are valuable property rights of which the owner cannot be divested without his consent except by due process of law, and if for a public purpose, upon just compensation. Brisbane v St. P. & Sioux City R. Co. 23 M 114; Otter Tail Power Co. v Brastad, 128 M 415, 151 NW 198; Weaver v Miss. & Rum River Boom Co. 28 M 534, 11 NW 114; Carli v Stillwater St. Ry. & Transfer Co. 28 M 373, 10 NW 205, 41 AR 290; Union Depot Co. v Brunswick, 31 M 297, 17 NW 626, 47 AR 789.

NAVIGABLE WATERS, INTERFERENCE WITH PARAMOUNT RIGHT OF GOVERNMENT IN; CITATIONS TO CASES. Otter Tail Power Co. v Brastad, 128 M 415, 151 NW 198; Pike Rapids Power Co. v Mpls. St. Paul & S. S. M. R. Co. 99 F(2d) 902; Minn. Canal & P. Co. v Fall Lake Boom Co. 127 M 23, 148 NW 561; Minn. Canal & P. Co. v Koochiching Co. 97 M 429, 107 NW 405, 5 LNS 638; Fish v Chicago Great Western R. Co. 125 M 380, 147 NW 431; In re Minnetonka Lake Improvement, 56 M 513, 58 NW 295, 45 ASR 495; and, Weaver v Miss. & Rum River Boom Co. 28 M 534, 11 NW 114.

COMPENSATION; THE MEASURE OF DAMAGES AND RULES OF VALUATION.

General reference: McCormick, The Measure of Compensation in Eminent Domain, 17 MLR 461.

STANDARD OF COMPENSATION. The standard of compensation is the value of the land at the time of the assessment of damages. Winona & St. Peter R. Co. v Denman, 10 M 267 (208); Minn. Valley R.R. Co. v Doran, 15 M 230 (179); St. Paul & Sioux City R. Co. v Murphy, 19 M 500 (433).

FAIR MARKET VALUE. The amount to be paid for property under power of eminent domain is the fair market value of the property taken. In re Assessment for Widening Third Street, St. Paul, 176 M 389, 223 NW 458.

An owner is entitled to such sum as the property is worth in the market, that is, to persons generally. County of Blue Earth v St. Paul & Sioux City R. Co. 28 M 503, 11 NW 73.

Where there is an actual current market value for things of the kind taken that fixes the fair money value. If no such actual market value exists, the market value is still the standard but it must be determined otherwise than by current market prices. Then the definition of market value is "the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy." Olson v United States, 67 F(2d) 24.

MEASURE OF DAMAGES FOR A TAKING OF ENTIRE TRACT OR UNIT OF PROPERTY. The measure of damages for the taking of the whole tract is the value of the land at the time it is taken. Oronoco School District v Town of Oronoco, 170 M 49, 212 NW 8.

MEASURE OF DAMAGES FOR A TAKING OF PART OF ENTIRE TRACT OR UNIT. The rule applicable gives the owner the difference between the market value of the entire tract immediately before the taking, and the market value of what is left after the taking, excluding from consideration general benefits and deducting special benefits. Mpls.-St. Paul S. District v Fitzpatrick, 201 M 442, 277 NW 394, 124 ALR 897; Carli v Stillwater & St. P. R. R. Co. 16 M 260 (234).

It is the value immediately prior to the taking and the value immediately after that the rule takes into account. Curtis v St. Paul S. & T. F. R. Co. 20 M 28 (19).

TIME OF TAKING REFERS TO LEGAL TAKING. The compensation must be fixed as of the date of taking. This means the time of taking by appropriate legal proceedings and not the time of some previous wrongful and tortious entry. County of Blue Earth v St. Paul & Sioux City R. Co. 28 M 503, 11 NW 72; Fish v C. St. P. & K. C. Ry. Co. 84 M 179, 87 NW 606; Olson v United States, 67 F(2d) 24.

COMPENSATION MUST BE COMMENSURATE TO THE INTEREST TAKEN. The measure of compensation must be commensurate to the nature and extent of the estate or interest of which the owner is deprived. If the fee is taken, the fee must be paid for. Fairchild v City of St. Paul, 46 M 540, 49 NW 325.

ENCUMBRANCES DO NOT AFFECT THE MEASURE OF DAMAGES. As between the owner and the condemnor neither the measure of damages nor the right of the fee owner to recover the damages is affected by the existence of encumbrances on the land. Bennett v Mpls. & Pac. Ry. Co. 42 M 245, 44 NW 10; Knauft v St. P. S. & T. R. R. Co. 22 M 173.

TAKING OF LEASEHOLD, LESSEE'S RIGHT TO COMPENSATION. The premises were rendered untenantable by a taking in condemnation. A covenant in a lease relieved the lessee from paying rent during the time the premises were untenantable and provided for termination of the lease unless the lessor rebuilt within a reasonable time. Held, the taking did not destroy the lessee's right to damages or compensation for the injury to his leasehold. Siggelkow v Arnold, 187 M 395, 245 NW 629.

A ten-year lease provided that if the premises or any part thereof should be taken for a street or public use or should be destroyed by action of the public authorities then the lease should at the option of either party terminate. The

court construed the option or election provision to refer only to a partial taking; and that, since the city appropriated the entire leased premises, nothing remained upon which either party could predicate an option. The term was held to have expired when the taking occurred and there remained no unexpired leasehold for which the lessee could claim compensation. In re Improvement of Third Street, St. Paul, 178 M 552, 228 NW 162.

MEASURE OF DAMAGE. Where a leasehold is taken, the measure of damages is the amount which the leasehold estate, taken subject to the terms and provisions of the lease, would bring in the market at a fair sale when one party wanted to sell and the other to buy. Kafka v Davidson, 135 M 389, 160 NW 1021, commented on in 1 MLR 281.

If the property taken is the interest of a lessee under a lease the amount to be paid is the fair rental value of the premises less the amount of the rent for the remainder of the term. In re Assessment for Widening Third Street, St. Paul, 176 M 389, 223 NW 458.

EASEMENTS, UNIT MEASURE OF DAMAGES, APPLICATION OF. The unit rule applies where the property taken is a separate unit or species of property capable of being acquired and transferred independently of the land on which it is located. An easement is a unit for condemnation valuation purposes only where prior to condemnation it has been severed in ownership from the fee. Olsen v United States, 67 (2d) 24.

TAKING OF A BUILDING. If the property taken is a building the amount to be paid is the fair market value of the building. In re Assessment for Widening Third Street, St. Paul, 176 M 389, 223 NW 458.

If the title of the owner of the building is defeasible or subject to rights held by others, whether under a lease or otherwise, he may not be entitled to the entire amount to be paid. In re Assessment for Widening Third Street, St. Paul, 176 M 389, 223 NW 458.

CONDEMNOR'S NEED IS AN IMPROPER MEASURE. The owner's damages cannot be measured by the value of the property to the party condemning it, nor by its need of the property. The question is, what has the owner lost, not, what has the taker gained. Mpls.-St. Paul S. District v Fitzpatrick, 201 M 442, 277 NW 394, 124 ALR 897; Stinson v Chi. St. P. & M. Ry. Co. 27 M 284, 6 NW 784; Union Depot Co. v Brunswick, 31 M 297, 17 NW 626, 147 AR 789.

CONDEMNOR'S ACTUAL AND CONTEMPLATED USE MAY BE SHOWN. The condemnor's actual and contemplated use of the land taken has been held admissible on the question of damages. G. N. Ry Co. v Johannsen, 142 M 208, 171 NW 775.

VALUE NOT LIMITED BY PRESENT USE. The value of the land is not limited to the use to which the property is then put but is to be arrived at by a consideration of the most advantageous purpose for which it can be put. Peterson v City of Mpls. 175 M 300, 221 NW 14; Boom Co. v Patterson, 98 US 403, 25 L.Ed. 206; Stinson v Chi. St. P. & M. Ry. Co. 27 M 284, 6 NW 784; County of Blue Earth v St. P. & Sioux City R. Co. 28 M 503, 11 NW 73; Colville v St. P. & Chi. Ry. Co. 19 M 283 (240); King v Mpls. Union Ry. Co. 32 M 224, 20 NW 135.

VALUE OF THE HIGHEST USE. The owner has the right to recover the market value of the land for the use to which it may be most advantageously applied and for which it would sell for the highest price in the market. In re Improvement of Third Street, St. Paul, 177 M 159, 225 NW 92. The owner was allowed to show as affecting market value that the land proposed to be taken was adaptable for railroad uses by reason of its being surrounded on three sides by defendant's railroad land and tracks. Russell v St. P. M. & M. Ry. Co. 33 M 210, 22 NW 379.

OWNER'S INTENDED USE MAY NOT BE SHOWN. Nothing can be allowed for damages to an intended use and it is not competent to show that the owner intended to put the property to a particular use or what plans for its improvement he had. Board of Ed. v Heywood Mfg. Co. 154 M 486, 192 NW 102 (the court dis-

tinguished the Friendshuh case below on the ground that the evidence in that case was found not to have included prejudicial elements of speculation).

QUALIFICATION. In Mpls.-St. Paul R. & D. E. T. Co. v Friendshuh, 108 M 492, 122 NW 451, the owner was permitted to show he had intended to construct a barn in the immediate future on the site taken. The court said that if by reason of any peculiar location or condition the land was enhanced in value and such value was improved by the taking, that fact had a direct bearing on the question of damages.

POTENTIAL USES AND POSSIBLE COMMERCIAL USES AS AFFECTING VALUE. Compensation is to be estimated by reference to the uses for which the property is suitable having regard to the existing business or wants of the community or such as may be reasonably expected in the immediate future. Boom Co. v Patterson, 98 US 403, 25 L.Ed. 206.

Since potential uses must be such as would influence the market value at the time of taking, they must be probable within some reasonable time. Olsen v United States, 67 F(2d) 24. See, State v Anderson, 176 M 525, 223 NW 923.

VALUE NOT ALWAYS THE MEASURE OF COMPENSATION. The value of the land taken is not always to be the measure of compensation; when necessary to make the compensation just the compensation may be more or less than the value. Greve v First Div. of St. P. & P. R. Co. 26 M 66, 1 NW 816.

VALUE, WHERE OWNER IMPROVES WITH KNOWLEDGE OF PROPOSED CONDEMNATION. Plaintiffs were allowed to recover for the effect of the taking on certain improvements they had put on the house before the award was made although they knew of the proposed condemnation. It was indicated that a different rule might obtain were it done in gross bad faith or for the purpose of enhancing damages. Sherwood v St. P. & Chi. Ry. Co. 21 M 122.

See annotations to section 117.14 on witnesses and proof in connection with the question of value.

VALUE DOES NOT INCLUDE RESULTING GENERAL BENEFITS. If the lands were enhanced in value by the construction of the road, the owner is not permitted to include such enhancement in determining the value of his premises. Carli v Stillwater & St. P. R. Co. 16 M 260 (234).

VARIATIONS. Where the company was a trespasser in entering and placing its ties and tracks, such additions became in law a part of the soil and belonged to the owner but the value of such additions the owner could not recover compensation for. Greve v First Div. of St. P. & P. R. Co. 26 M 66, 1 NW 816.

In fixing market value the jury cannot add future increases that will accrue by reason of the commencement of the proposed improvement. If the resulting increase has already been experienced the jury may take it into account. Union Depot Co. v Brunswick, 31 M 297, 17 NW 626, 47 AR 789.

RULE AGAINST DEDUCTING GENERAL BENEFITS FROM THE AWARD DISTINGUISHED. There is a material distinction between not permitting to be deducted general benefits accruing to the land by the construction of the road, and adding such general benefits to the value of the land as it was when taken for the purpose of estimating the owner's damages. Carli v Stillwater & St. P. R. Co. 16 M 260 (234).

INJURY TO THE WHOLE TRACT BY THE TAKING OF A PART-RECOVERY FOR. Before the amendment to Minnesota Constitution, Article 1, Section 13, the right to damages was confined to the particular tract of land the whole or part of which was taken. Stuhl v G. N. Ry. Co. 136 M 158, 161 NW 501, LRA 1917 D 317.

Where the land described in the petition is but part of a compact tract actually used as one farm, and all owned by the same person, damages may be assessed for the injury to the whole tract. St. Paul & Sioux City R. R. Co. v Mathews, 16 M 341 (303); Hursh v First Div. of St. P. & P. R. Co. 17 M 439 (417); Cameron v C. M. & St. P. Ry. Co. 42 M 75, 43 NW 785; Adolph v Mpls. & Pac. Ry. 42 M 170, 43 NW 848.

Value embraces not only the value of the strip as an isolated parcel of land, but also such additional value as attaches to it by reason of its connection with adjacent land of the owner. Scott v St. P. & Chi. Ry. 21 M 322.

The city took the front of the plaintiff's lot which was much more valuable than the rear. Had the remaining tract been left without access to the street the owner could recover the value of the part taken and damages for the depreciation in the value of the remainder. In re Improvement of Third Street, St. Paul, 177 M 159, 225 NW 92.

Adjoining lands of the same owner not property a part of the tract taken are not to be considered in the assessment of damages. Cameron v C. M. & St. P. Ry. Co. 42 M 75, 43 NW 785.

DETERMINING WHETHER THE PART TAKEN WAS PART OF A WHOLE TRACT; INDICIA. The right to compensation may not exist in respect to the whole parcel even though the lands affected are contiguous to the lands taken so that the whole may be said to be one body of land. Wilcox v St. P. & N. P. Ry. Co. 35 M 439, 29 NW 148.

COMMON OWNERSHIP, COMMON USE. Common ownership and common use of the lands is not enough where the lands are not contiguous. Cameron v C. M. & St. P. Ry. Co. 42 M 75, 43 NW 785.

USE. The use to which the property has been devoted is an important consideration in determining whether lands, being in one body, should be deemed one tract for purposes of assessment of compensation. Wilcox v St. P. & N. P. Ry. Co. 35 M 439, 29 NW 148.

The use of the parcel taken in connection with the part not taken had been merely fugitive and temporary so the right to recover was limited to the land taken. Peck v Superior Short Line Ry. Co. 36 M 343, 31 NW 217.

SIZE. A whole tract or body of land may be so large that all portions of it would not be injuriously affected, though owned by one person and used for a common purpose. Kremer v C. M. & St. P. Ry. Co. 51 M 15, 52 NW 977, 38 ASR 468.

WHAT MAY OR MAY NOT WORK A SEVERANCE. Cultivation of part of the land by a tenant as a severance. St. Paul & Sioux City R. Co. v Murphy, 19 M 500 (433).

DISTINCT USES TO WHICH PARTS OF THE LAND ARE PUT AS A SEVERANCE. Wilcox v St. P. & N. P. Ry. Co. 35 M 439, 29 NW 148.

A HIGHWAY AS A SEVERANCE. St. Paul & Sioux City R. Co. v Murphy. 19 M 500 (433); Cameron v C. M. & St. P. Ry. Co. 42 M 75, 43 NW 785; Peck v Superior Short Line Ry. Co. 36 M 343, 31 NW 217 (a street).

LOCATION OF A RIGHT OF WAY AND SUBSEQUENT OPERATIONS OF A RAILROAD THEREON AS A SEVERANCE. Mpls.-St. Paul S. District v Fitzpatrick, 201 M 442, 277 NW 394, 124 ALR 897.

A CONTRACT TO CONVEY PART OF THE LAND AS A SEVERANCE. Brennan v City of St. Paul, 44 M 464, 47 NW 55.

DIVISION INTO LOTS BY THE LINES OF A SURVEY AND PLAT AS A SEVERANCE. Sheldon v M. & St. L. R. Co. 29 M 318, 13 NW 134; Kremer v C. M. & St. P. Ry. Co. 51 M 15, 52 NW 977, 38 ASR 468.

INTERVENING FEE AS SEVERANCE. CAMERON v C. M. & St. P. Ry. Co. 42 M 75, 43 NW 785; 51 M 153, 53 NW 199.

RULE WHERE PRIMA FACIE DISTINCT. To constitute unity of property between two contiguous but prima facie distinct parcels of land there must be such a connection or relation of adaptation, convenience, and actual and permanent use between them as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used. Peck v Superior Short Line Ry. Co. 36 M 343, 31 NW 217.

UNOCCUPIED CITY PROPERTY PRIMA FACIE DISTINCT. Unoccupied city property which appears to have been platted or divided into blocks and lots is to be treated prima facie as lots or blocks intended for use as such, and not as an entire tract. Wilcox v St.P. & N. P. Ry. Co. 35 M 439, 29 NW 148.

WHERE PRIMA FACIE DISTINCT OWNER HAS BURDEN OF PROOF. Where the tracts are prima facie distinct, the burden is on the owner to show them a single tract. Mpls.-St. Paul S. District v. Fitzpatrick, 201 M 442, 277 NW 394, 124 ALR 897; Peck v Superior Short Line Ry. Co. 36 M 343, 31 NW 217.

DAMAGES MAY NOT BE DUPLICATED. The owner cannot insist that the land taken as regarded as part of the whole tract in order to recover for the effect of the taking on the part remaining where his recovery for the part taken has been according to its value for its purpose where that purpose is distinct from the use to which the rest of the tract has been put. Cameron v C. M. & St. P. Ry. Co. 51 M 153, 53 NW 199.

CONDEMNOR MUST TAKE NOTICE OF WHOLE TRACT. The company, whether it describes the whole farm by government subdivisions or but a part, is bound to take notice of the whole and be prepared to meet a claim for damages to the whole. Minn. Valley R. R. Co. v Doran, 15 M 230 (179).

FORM OF AWARD WHERE NO SEVERANCE. There should be but a single verdict for the entire damage for the land actually taken including the harm resulting to the remainder because of the taking. Mpls.-St. Paul S. District v Fitzpatrick, 201 M 442, 277 NW 394, 124 ALR 897.

FORM OF AWARD WHERE SEVERANCE. Where the appraisers had no notice that a portion of the lot had been severed so as to make separate lots the land could be proceeded against as one lot. But if notified in time, their proceeding should be conformed to the requirement that damages be assessed to each separate lot or parcel. Brennan v City of St. Paul, 44 H 464, 47 NW 55 (condemnation under city charter).

ITEMS OF DAMAGES INCIDENT TO A PHYSICAL TAKING. The inconvenience resulting to the owner from the uses to which the land taken has been put is not a proper element of damage. Winona & St. Peter R. R. Co. v Waldon, 11 M 515 (392), 88 AD 100 N; and Minn. Valley R. Co. v Doran, 17 M 188 (162).

DELAY AND LABOR IN CONNECTION WITH FENCES. Delay and labor in opening and shutting fence gates is not mere inconvenience incident to crossing a railroad track. Minn. Valley R. Co. v Doran, 17 M 188 (162).

NECESSITY OF FREQUENT CROSSING. The resulting necessity of frequently crossing the company's track is a proper item. Sherwood v St. P. & Chi. Ry. Co. 21 M 127; St. P. & Sioux City R. Co. v Murphy, 19 M 500 (433); State ex rel v Wheeler, 179 M 557, 230 NW 91.

COSTS OF PERFORMING CERTAIN STATUTORY DUTIES. The costs of performing certain duties imposed by the statute made necessary by the condemnation are legitimate items of damage. State v Shardlow, 43 M 524, 46 NW 74; see, State v District Court, Hennepin Co. 42 M 247, 44 NW 7, 7 LRA 121. (On cost of planking street crossings over railroad tracks, see C. M. & St. P. Ry. Co. v Village of LeRoy, 124 M 107, 144 NW 464.)

COST OF FENCING. The cost of fencing rendered necessary by the passing of the railroad through improved lands is a proper element of damages. Winona & St. Peter R. R. Co. v Denman, 10 M 267 (208); Winona & St. Peter R. R. Co. v Waldron, 11 M 515 (392).

INTERFERENCE WITH FLOW OF SURFACE WATERS. Interfering with the flow of surface waters across the farm is a proper item of damages. Pflegar v Hastings & Dakota Ry Co. 28 M 510, 11 NW 72.

AMOUNT OF TRAFFIC ON HIGHWAY. The amount of traffic on a highway is an element to be considered as bearing upon loss of time and inconvenience to the farmer. State v Lambert, 171 M 369, 214 NW 653.

OBSTRUCTION TO ROAD. An obstruction to a road necessitating another longer route is a proper item. G. N. Ry. v Johannsen, 142 M 208, 171 NW 775.

INCREASED DANGER. Increased danger of injury to the owner's household is an element of damages to be considered in determining value. Curtis v St. P. S. & T. F. R. Co. 20 M 28 (19).

EXPOSURE TO FIRE. Increased exposure to fire is a proper element of damages. Colvill v St. P. & Chi. R. Co. 19 M 283 (240); Johnson v Chi. B. & N. R. Co. 37 M 519, 35 NW 438.

NOISE AND INTERFERENCE. The noise of passing trains, and the inconvenience and interruption by the railroad in the use of the property are proper elements of damage. County of Blue Earth v St. P. & Sioux City R. Co. 28 M 503, 11 NW 73.

EXPENSES OF MOVING FROM THE PREMISES. The owner is not entitled to an additional allowance for the expense of removing from the property where that has been necessary by the taking. In re Assessment for Widening Third Street, St. Paul, 176 M 389, 223 NW 458.

NO PRESUMPTION THAT IMPROPER ELEMENTS WERE INCLUDED. There is no presumption that the witnesses or jury have erroneously included improper elements in their estimates of damages or benefits, in the absence of cross-examination of the witnesses on the basis for their estimate or any evidence suggesting a wrong rule has been applied in giving or weighing the testimony. Haynes v City of Duluth, 47 M 458, 50 NW 693.

AWARD SHOULD NOT INCLUDE DAMAGES FOR TRESPASS. Damages for any trespass committed before the filing of the award are not regularly proper to be taken into account in making up the award. The owner has a remedy outside of condemnation proceedings and the award therein. Leber v Mpls. & N. W. Ry. Co. 29 M 256, 13 NW 31; Hempsted v Cargill, 46 M 118, 48 NW 558 (mill dam act); Fish v Chi. St. P. & K. C. Ry. Co. 84 M 179, 87 NW 606.

PRESUMPTION. The award is presumed not to have included damages for trespass unless it shows it on its face, and evidence dehors the award is not admissible to show they were included. Leber v Mpls. & N. W. Ry. Co. 29 M 256, 13 NW 31.

WHEN AWARD DOES INCLUDE TRESPASS DAMAGES, EFFECT. If the question of prior trespasses is litigated in the condemnation proceeding and the amount of damages included in the award and payment received by the claimant, the result is a conclusive settlement and satisfaction of such damages notwithstanding the irregular character of the proceedings. Leber v Mpls. & N. W. Ry. Co. 29 M 256, 13 NW 31.

On trespass, see general annotations to chapter, Owners Remedies Outside of Condemnation Proceedings.

BENEFITS, GENERAL AND SPECIAL, RULE AS TO DEDUCTIONS. Benefits which the landowner enjoys peculiar to his land must be deducted, but such benefits as he enjoys in common with the whole community must not be. State v Anderson, 176 M 525, 223 NW 923.

GENERAL BENEFITS. The owner is not required to pay in part for the same thing which his neighbor receives gratis. Mantorville Ry. & T. Co. v Slingerland, 101 M 488, 112 NW 1033, 118 ASR 647, 11 LNS 277.

SPECIAL BENEFITS, INDICIA; RESULTING PROXIMATELY. Damages can be reduced only by such special benefits as accrue to the owner of the particular estate by reason of the present and actual physical effect upon the property resulting directly and proximately from the improvement. State v Anderson, 176 M 525, 223 NW 923; see, Whitely v Miss. Water Power & Boom Co. 38 M 523, 38 NW 753.

ALTERING PHYSICAL CHARACTER OF LAND. Special benefits usually alter the physical character of the land. State v Anderson, 176 M 525, 223 NW 913.

PECULIAR TO OWNER'S LAND. The benefit must be particular to the individual and not such as accrues to adjacent landowners generally. Mantorville Ry. & T. Co. v Slingerland, 101 M 488, 112 NW 1033, 118 ASR 647, 11 LNS 277; Winona & St. Peter R. R. Co. v Waldron, 11 M 515 (392); State v Anderson, 176 M 525, 223 NW 923; Arbrush v Town of Oakdale, 28 M 61, 9 NW 30.

Special benefits do not become general merely because they are common to some other property in the vicinity. State v Anderson, 176 M 525, 223 NW 923.

GENERAL BENEFITS, INSTANCES OF. The mere increase of transportation facilities and the possibility of connecting industrial works on the land left has been held not to be a special benefit. Mantorville Ry. & T. Co. v Slingerland, 101 M 488, 112 NW 1033, 118 ASR 647, 11 LNS 277; State v Shardlow, 43 M 524, 46 NW 74; and so also, traffic on a trunk highway. State v Anderson, 176 M 525, 223 NW 923; and, the removal of a cemetery, Minn. Central Ry. Co. v McNamara, 13 M 508 (468).

BENEFIT MUST EQUAL LAND TAKEN. The benefit must be pro tanto a fair equivalent for the land parted with. Mantorville Ry. T. Co. v Slingerland, 101 M 488, 112 NW 1033, 118 ASR 647, 11 LNS 277.

BENEFITS MAY BE SET OFF AGAINST THE AGGREGATE SUM. The Minnesota rule is that special benefits may be set off against damage to the remainder or against the value of the part taken. Mantorville Ry. & T. Co. v Slingerland, 101 M 488, 112 NW 1033, 118 ASR 647, 11 LNS 277.

Damages are a unit and if benefits are to be deducted at all they must be deducted from the aggregate sum. Winona & St. Peter R. R. Co. v Waldron, 11 M 515 (392).

WHERE BENEFITS EQUAL OR EXCEED THE DAMAGES ALLOWED. Due process is not violated where the owner is allowed nothing by the award. G. N. Ry. Co. v City of Mpls. 136 M 1, 161 NW 231; and, 142 M 308, 172 NW 135; McKeen v City of Mpls. 170 M 124, 212 NW 202.

AMOUNT OF DAMAGE AND AMOUNT OF BENEFITS TO BE SEPARATELY DETERMINED AND STATED. The amount of damages and the total amount of special benefits to each tract should be separately determined and stated by the commissioners. C. R. I. & P. Ry. Co. v Minneapolis, 164 M 226, 204 NW 934, 205 NW 640 (involved condemnation under Elwell act).

In McKeen v City of Mpls. 170 M 124, 212 NW 202, the benefits were set off and balanced against the damages but the award did not separately state them. Held, that while the form was irregular it was not a nullity.

JUDICIAL INTERFERENCE WITH THE AMOUNT OF THE AWARD. In Potts v M. St. P. & S. S. M. Ry. Co. 124 M 413, 145 NW 161, finding the verdict was excessive in the amount of damage, the court felt free to interfere with the amount of the verdict, stating that damages in cases of this kind may be measured with a degree of approximate certainty. A new trial was granted unless the owner consented to a reduction of the verdict.

In the case In re Improvement of Third Street, St. Paul, 177 M 159, 225 NW 92, the opinion recited the rule against disturbing the action of the trial court where the evidence reasonably tends to support it, but the court went on to hold that the damages were so disproportionately less than the amount the owner was entitled to as to render the award not fair and impartial.

Where under the circumstances the damages were difficult to ascertain, they were held not to be so inadequate as to require the granting of a new trial or disturbing the verdict. Otter Tail Power Co. v Brastad, 128 M 415, 151 NW 198.

Where the jury erroneously fixed the owner's compensation on the basis of his owning the entire tract, a new trial was ordered as likely to be more just to the parties than for the court to attempt to reduce the amount of damages. Morin v St. P. M. & M. Ry. Co. 30 M 100, 14 NW 460.

Where evidence on the amount of damages was conflicting, the court could not say that there was not sufficient evidence to justify the lower court in finding the

award sufficient and fair. In re Improvement of Third Street, St. Paul, 177 M 146, 225 NW 86, 74 ALR 561.

WHO IS LIMITED TO THE AWARD

OWNER'S RIGHT TO RECOVER. The award becomes a fund standing in the place of the land, and whoever owns the land is entitled to the award. Smith v City of St. Paul, 65 M 295, 68 NW 32; Oronoco School District v Town of Oronoco, 170 M 49, 212 NW 8; State ex rel v District Court of Ramsey Co. 128 M 432, 151 NW 144.

WHO IS OWNER. The owner at the time the rights vest is entitled to the award. Obst v Covell, 93 M 30, 100 NW 650.

OWNER'S RIGHT TO TRANSFER THE PROPERTY DURING PENDENCY OF PROCEEDINGS. The institution and pendency of condemnation proceedings does not deprive the owner of the right of alienation. If he wishes to sell, transferring to the purchaser the right to receive just compensation, presumably he may realize the unimpaired value of the property. Duluth Transfer Ry. Co. v N. P. R. Co. 51 M 218, 53 NW 366.

RIGHTS OF TRANSFEREE TO COMPENSATION. If the proceedings were completed and the condemnor acquired title to the right of way before the deed by which the appellant claims was executed, the appellant takes the premises subject to the rights of the condemnor and the damage would enure to the owner at the time the right vested in the condemnor. If the proceedings were not completed but inchoate, the premises passed to the appellant and the right to damages was in him as incident to ownership. Carli v Stillwater & St. P. R. Co. 16 M 260 (234).

TRANSFERS OCCURRING AFTER PROCEEDINGS COMPLETED. A person acquiring an interest in the property subsequent to the award made takes it with full notice and subject to the award. Trogden v Winona & St. Peter R. R. Co. 22 M 198.

Evidence that the estate and interest of one to whom an award was made had terminated since the appeal was taken is inadmissible. Trogden v Winona & St. Peter R. R. Co. 22 M 198. See, Siman v Rhoades, 24 M 25 (mortgage foreclosure after judgment in condemnation proceedings).

TRANSFER OCCURRING BEFORE PROCEEDINGS COMPLETED. One who has an interest in the property when the proceedings are commenced but who transfers that interest before the condemnor's right vests passes his right to damages to his successor in interest. Obst v Covell, 93 M 30, 100 NW 650, cited in 2 MLR 467.

RIGHT OF DETERMINABLE FEE OWNER TO COMPENSATION WHERE ENTIRE FEE CONDEMNED. See, 9 MLR 293.

RIGHT OF OWNER OF DOWER INTEREST IN THE PROCEEDS OF THE AWARD. 20 MLR 315.

RIGHT OF MORTGAGEE. The mortgagee may claim enough of the award in a condemnation proceeding to make him whole. Stemper v County of Houston, 187 M 135, 244 NW 690 (condemnation under different act), discussed in 17 MLR 92.

A mortgagee who had purchased on the foreclosure sale was entitled to the damages awarded, although they were assessed before the year of redemption expired. Moritz v City of St. Paul, 52 M 409, 54 NW 370. See, Lumbermen's Ins. Co. v City of St. Paul, 82 M 497, 85 NW 525.

MORTGAGEE'S LIEN ON THE AWARD, TERMINATION. Boutelle v Mpls. City, 59 M 493, 61 NW 554.

As between the owner and the condemnor neither the measure of damages nor the right of the fee owner to recover the damages is affected by the existence of encumbrances on the land. Bennett v Mpls. & Pac. Ry. Co. 42 M 245, 44 NW 10; Knauft v St. P. S. & T. F. R. Co. 22 M 173.

RIGHT OF TENANT. A tenant has a right to recover damages or compensation for the injury to his leasehold. Siggelkow v Arnold, 187 M 395, 245 NW 629; Kafka v Davidson, 135 M 389, 160 NW 1021.

SEPARATE ASSESSMENT AND AWARD NOT CONSTITUTIONAL REQUIREMENT AS TO VALIDITY. Where several persons own interests in a single tract neither a separate assessment nor a subsequent apportionment of gross damages is necessary to render the assessment valid under the constitution. State ex rel v District Court of Ramsey Co. 128 M 432, 151 NW 144.

SEPARATE ASSESSMENT WHERE A SINGLE OWNER. Arriving at damages to the whole property by estimating the damages to subdivisions of it is not objectionable. Colvill v St. P. & Chi. R. Co. 19 M 283 (240).

And where the commissioners assessed the owner's damages so much for each lot comprising the entirety and on appeal the jury fixed damages on the whole, held, because the commissioners saw fit to do so was no reason why the jury should bring in separate awards for each lot. Sherwood v St. P. & Chi. Ry. Co. 21 M 122; and see, Lake Superior & Miss. R. Co. v Greve, 17 M 322 (299).

SEPARATE ASSESSMENT WHERE SEVERAL OWNERS.

Rule: Determine gross damages, then apportion.

The rule is that the gross damages to be awarded shall first be determined, and then the award is to be apportioned among those who have various interests in the land. State v Anderson, 176 M 525, 223 NW 923; Peterson v City of Mpls. 175 M 300, 211 NW 14.

The nearly universal mode of reaching a fair valuation of the property and determination of the damages is to consider the property as though the entire and undivided estate and all interests in the property were in a single person, and to find the value and damage in gross, thereafter apportioning the amount of the award thus arrived at between the various parties according to their interests. State ex rel v District Court of Ramsey Co. 128 M 432, 151 NW 144.

THE PROPORTION IN WHICH OWNERS ARE TO SHARE. Each of the various parties entitled to share in the award is entitled to the proportional part of the award which the amount of his damage bears to the amount of all the damage to the property. Kafka v Davidson, 135 M 384, 160 NW 1021.

TENANT'S PROPORTION. The tenant's recovery is limited to the amount which the defendant has received in excess of his proportional share. Kafka v Davidson, 135 M 389, 160 NW 1021, commented on in 1 MLR 281.

GROSS AWARD TO OWNER AS DETERMINATION AGAINST TENANT'S INTEREST. Under the circumstances of the case where the board of public works, in a condemnation proceeding taken under charter provisions, made a few separate awards to tenants of certain land not here involved, that fact could not be held as proving that where they made an award in gross without reference to tenants they had determined that the tenants had no interest therein. Kafka v Davidson, 135 M 389, 160 NW 1021.

ERRONEOUS PROCEDURE IN ASSESSING, FAILURE TO OBJECT TO. Failure to object to an erroneous procedure in the assessment of damages waives the error. Oronoco School District v Town of Oronoco, 170 M 49, 212 NW 8 (assessment by commissioners); and, Lake Superior & Miss. R. Co. v Greve, 17 M 322 (299); Knauft v St. P. S. & T. F. R. Co. 22 M 173; State v Anderson, 176 M 525, 223 NW 923 (assessment by jury).

ENFORCING THE OWNER'S RIGHTS; COMPELLING PAYMENT OF AWARD; TAKING BY COUNTY; MANDAMUS. State ex rel v Erskine, 165 M 303, 206 NW 447 (payment compelled though land not physically appropriated); County of Blue Earth v Williams, 196 M 501, 265 NW 329.

OWNER'S RIGHT AGAINST CONDEMNOR; WHERE PAYMENT TO WRONG PARTY. Payment to the wrong party is no defense to the claim of the rightful owners. Lumbermen's Ins. Co. v City of St. Paul, 82 M 497, 85 NW 525.

The duty is on the condemnor to find out to whom the award is payable; payment to the wrong party is no defense. Stemper v County of Houston, 187 M 135, 244 NW 690 (condemnation under different act).

OWNER'S RIGHT AGAINST THIRD PARTY. The real owner may sue as for money had and received where the award has been paid over to one who is not the true owner. Eyre v City of Faribault, 121 M 233, 141 NW 170, LRA 1917A 685; Smith v City of St. Paul, 65 M 295, 68 NW 32.

The owner's right is without regard to any remedy he may have against the corporation for which the property was taken where the award has been paid to another. Eyre v City of Faribault, 121 M 233, 141 NW 170, LRA 1917A 685; Smith v City of St. Paul, 65 M 295, 68 NW 32.

EXECUTOR'S RIGHT AGAINST THIRD PARTY. Where the property at the time of taking belonged to the testator the executor has a right of action against a party who obtained the award money out of court and that right is without regard to the financial status of the estate. Eyre v City of Faribault, 121 M 233, 141 NW 170, LRA 1917A 685.

INTERVENTION BY OWNER AS CLAIMANT. A third party claiming ownership may intervene to have the award apportioned in an action brought to recover the award. Smith v City of St. Paul, 65 M 295, 68 NW 32.

REQUIRING CLAIMANT TO BE JOINED. If it appears that a third party claims a portion of the award the court could require such person to be brought in as a party that there might be a full and final adjudication of all rights. Smith v City of St. Paul, 65 M 295, 68 NW 32.

INTERPLEADER BETWEEN CLAIMANTS. Smith v City of St. Paul, 65 M 295, 68 NW 32.

VESTING OF TITLE. The title acquired through a proceeding in rem under the right of eminent domain is an independent one, not derived from the owner of the land. In re Improvement of Third Street, St. Paul, 178 M 552, 228 NW 162.

The taking is of the date of filing the award and the rights of the parties are determined as of that time. Warren v First Div. of St. P. & P. R. Co. 21 M 424; City of Mpls. v Wilkin, 30 M 145, 15 NW 668; Commercial Station Post Office v U. S. 48 F(2d) 183; Drake v City of St. Paul, 65 F(2d) 119.

WHERE AWARD IS SET ASIDE. The same rule applies though the award and successive awards be set aside. Ford Motor Co. v City of Mpls. 147 M 211, 179 NW 907.

ON CONFIRMATION TITLE PASSES AS A MATTER OF LAW. As a matter of law the owner's property was taken the moment the award was finally confirmed. County of Blue Earth v Williams, 196 M 501, 265 NW 329.

RULE WHERE THE LAW ALLOWS POSTPONEMENT OF PAYMENT. In cases where the property is taken by the state or a municipal corporation and payment is postponed for a reasonable time the property is not deemed to be actually taken and title does not pass until the compensation is paid or secured. But the bargain when closed relates back to the filing of the award. State Park Commissioners v Henry, 38 M 266, 36 NW 874.

The charter provided that the city should not take possession until money for the payment of the award had been collected by special assessment. When the city went ahead and entered upon the work it was held to have waived its right to postpone the payment of damages and had assumed to become immediately responsible. Moritz v City of St. Paul, 52 M 409, 54 NW 370.

WHEN DOES TITLE PASS. When the proceeding has been completed and the time for abandonment ends the title passes to the condemnor as of the time when the original award was filed. McRostie v City of Owatonna, 152 M 63, 188 NW 52.

Title passes upon payment of the award and in all cases relates back to the date of filing the award. Drake v City of St. Paul, 65 F(2d) 119; Ford Motor Co.

v Mpls. 147 M 211, 179 NW 907; State Park Com'rs v Henry, 38 M 266, 36 NW 874 (title passes when award is paid or secured). State ex rel v C. Ct. P. M. & O. Ry. Co. 85 M 416, 89 NW 1.

The condemnor's rights do not vest until the proceedings are completed, the award of damages made, confirmed by the court and paid, and possession is taken. Obst v Covell, 93 M 30, 100 NW 650.

WHERE APPEAL TAKEN. Where an appeal is taken the title to the premises sought to be taken does not vest before judgment upon the verdict or assessment. Carli v Stillwater & St. P. R. Co. 16 M 260 (234).

The title acquired by the condemnor must come through the award, or judgment in case of appeal. Warren v First Div. of St. P. & Pac. R.R. Co. 21 M 424.

Where an appeal has been taken the judgment is the only final determination of the rights of the parties; the judgment, not the verdict, is the only operative proceeding by which the title is secured to the condemnor. St. P. & Sioux City R. Co. v Matthews, 16 M 341 (303), and, St. P. & Sioux City R. Co. v Murphy, 19 M 500 (433).

ABANDONING THE INTEREST ACQUIRED. Use of land for a purpose not authorized is not an abandonment of interest.

The erection and operation of a public grain elevator or warehouse upon land acquired by a railway corporation in condemnation proceedings either by the railway, its licensee, or lessee, is not a misuse or abandonment of the interest acquired. Gurney v Mpls. Union Elev. Co. 63 M 70, 65 NW 136, 30 LRA 534.

A transfer by the original condemnor to another who succeeds to the rights acquired under a condemnation proceeding is not an abandonment of such rights. Crolley v M. & St. L. Ry. Co. 30 M 541, 16 NW 422.

Abandonment is a question of fact. Under the facts in the case non-user amounted to an abandonment, and since the land acquired by the railroad was in the nature of an easement or determinable fee the land reverted to the original owner. Chambers v G. N. Power Co. 100 M 214, 110 NW 1128.

ABANDONING THE PROCEEDINGS. Where there is abandonment title never passes and the owner's possession has at no time been constructively or otherwise taken from him by the proceedings so as to give a cause of action for damages on account of interference with such ownership or right of possession. McRostie v City of Owatonna, 152 M 63, 188 NW 52.

ABANDONMENT, LOSING THE RIGHT TO. In every form of procedure for appropriating land for the public use there must be a point where the rights of the condemnor to abandon the proceedings is lost, and the right of the owner to compensation is vested. State ex rel v Erskine, 165 M 303, 206 NW 447, and Kremer v C. M. & St. P. Ry. Co. 51 M 15, 52 NW 977, 38 ASR 468.

ABANDONMENT, WHEN PERMISSIBLE; GENERAL RULE. The general rule in the absence of statute is that the discontinuance of condemnation proceedings may be had at any time before the rights of the parties have become reciprocally vested, as determined by the time when the property owner has a right to payment of the award and the state has the right to take and hold the premises, which rights are correlative and vest simultaneously. State v Appleton, 208 M 436, 294 NW 418; see, Witt v St. P. & N. P. Ry. Co. 35 M 404, 29 NW 161.

As a general rule in the absence of statute the condemnor cannot deprive the owner of a vested right to compensation by abandoning the proceedings. State ex rel v Erskine, 165 M 303, 206 NW 447.

STATUTORY RESERVATION OF RIGHT TO. The legislature may reserve the right to abandon before penalty. State Park Com'rs v Henry, 38 M 266, 36 NW 874.

ABANDONMENT MUST BE REAL. The condemnor cannot assume to abandon the proceedings and retain the possession and use of the premises in the continued prosecution of the enterprise. Witt v St. P. & N. P. Ry. Co. 35 M 404, 29 NW 161.

Where the city has taken possession during the pendency of the proceeding the taking and holding of possession is in a sense an election to stand upon the award. But if the city were in possession before the proceeding was commenced it is not required to surrender possession as a condition to abandonment of the proceeding. Howe v City of Mpls. 135 M 243, 160 NW 775.

Where the law gives the city the privilege of abandoning the proceedings and the owner, after the award was filed but before the expiration of the period allowed for abandonment, had undertaken to change the condition of the premises to her damage by removing building thereon, the city incurred no liability to the owner when it abandoned the proceedings, she being charged with knowledge of the privilege given. McRostie v City of Owatonna, 152 M 63, 188 NW 52.

OWNER'S RIGHTS ON VOLUNTARY ABANDONMENT BY CONDEMNOR. See annotations to section 117.16.

MALICIOUS PROSECUTION, ABANDONMENT. A sanitary district held not liable for malicious prosecutions of a condemnation proceeding. Barmel v Mpls.-St. Paul S. District, 201 M 622, 277 NW 208.

Recovery in Tort for Wrongful Institution of Condemnation Proceedings: 3 MLR 284.

APPEALS TO DISTRICT COURT

POWER OF LEGISLATURE TO LIMIT APPEALS. It is the general rule that where a full hearing is provided before a proper tribunal, the determination by that tribunal may be made final, or if an appeal is allowed its scope may be limited by the legislature. In re Improvement of Third Street, St. Paul, 177 M 146, 225 NW 86, 74 ALR 561.

It is discretionary with the legislature to provide that the appellate court upon the trial shall render final judgment fixing the assessment, when the original assessment was inadequate or unfair, or to provide that the new appraisement shall be made before the same or a new commission. City of St. Paul v Nickl, 42 M 262, 44 NW 59 (charter case).

PROCEEDINGS NOT IN REM ON APPEAL. The proceedings are not in rem when the only question involved on the appeal is the amount of damages to be paid. State v Shardlow, 43 M 524, 46 NW 74.

APPEAL IS ON THE LAW SIDE. The proceedings before the court on appeal from the commissioners' award is on the law side of the court and not the equity. In re Hastings Lock and Dam Co. 2 F(2d) 324.

APPEAL WHERE COMMISSIONERS EXCEEDED THEIR AUTHORITY. An appeal from an award of the commissioners made outside their authority brings nothing to the district court which that court could try. County of Ramsey v Stees, 28 M 326, 9 NW 879 (special act).

APPEAL IS WAIVER OF JURISDICTIONAL DEFECTS. As to jurisdiction over the person, the taking of an appeal waives jurisdictional defects. Rheiner v Union Depot Co. 31 M 289, 17 NW 623; Whitely v Miss. Water Power Co. 38 M 523, 38 NW 753.

APPEAL FROM AWARD, WAIVES IRREGULARITIES. The owner who appeals from the award waives irregularities in the proceedings for the appointment of commissioners. Whitely v Miss. Water Power Boom Co. 38 M 523, 38 NW 753.

APPEAL FROM AWARD AS WAIVING OTHER OBJECTIONS. See, Warren v First Div. of St. P. & Pac. R.R. Co. 18 M 384 (345); In re Mpls. Ry. Terminal Co. 38 M 157, 36 NW 105.

NOTICE OF APPEAL; FAILURE TO SERVE. Want of jurisdiction for lack of service of the notice of appeal must be affirmatively shown. Hempsted v Cargill, 46 M 141, 48 NW 686.

NOTICE OF APPEAL, TIME FOR GIVING. The notice of appeal must not be given prior to service of notice that the report has been filed. Ellering v Mpls. St. P. & S. S. M. Ry. Co. 107 M 46, 119 NW 507.

FAILURE TO FILE. Where the notice was served but was not filed with the clerk the appeal was held rightly dismissed for failure to comply with the terms of the law. Klein v St. P. M. & M. Ry. Co. 30 M 451, 16 NW 265 (charter).

Service of notice of appeal on the clerk of court without a request to file or any statement as to the purpose for which served was held not to constitute a filing where notice was never in fact filed by the clerk. Runyon v Alton, 78 M 31, 80 NW 836.

PARTIES ON APPEAL; WHO MAY APPEAL. Any party interested may take an appeal from an assessment and bring before the appellate court the propriety of the amount of damage in respect to the parties to the appeal. St. P. & Sioux City R. Co. v Murphy, 19 M 500 (433).

OWNER OF A SPECIAL PROPERTY IN LAND. The city had a claim for special assessment against the land involved in the condemnation. Its appeal was held rightly dismissed because it had only a limited or special property or interest in the land and the awards far exceeded that interest. City of St. Paul v Certain Lands, 48 F(2d) 805.

JOINDER ON APPEAL; MORTGAGEE. A mortgagee of the land taken is not a necessary party to the appeal. Knauft v St. P. S. & T. F. R. Co. 22 M 173.

By making the mortgagee a party the condemnor could have bound the mortgage interest. Siman v Rhoades, 24 M 25, 24 NW 192 (mill dam act).

HUSBAND OF CLAIMANT. One of the claimants in whose favor an award was made was a married woman. Her husband joined in taking an appeal. A motion to dismiss the appeal because of such joinder was denied. Held, not error. Wilkin v St. P. S. & T. F. R. Co. 22 M 177.

DEFECT OF PARTIES; OBJECTION, HOW TAKEN. An objection on the ground of defect of parties is waived if not taken advantage of by demurrer or answer. Stewart v G. N. Ry. Co. 65 M 515, 68 NW 208, 33 LRA 427.

SUBSTITUTION OF PARTIES ON APPEAL. Evidence that the estate or interest of one to whom an award had been made had terminated since the appeal was taken on proper application might be good grounds for a substitution of parties on the appeal. Trogden v Winona & St. Peter R.R. Co. 22 M 198.

The successor in interest of the original condemnor is entitled to be substituted on appeal. Bradley v N. P. Ry. Co. 38 M 234, 36 NW 345.

APPORTIONMENT NOT NECESSARY TO APPEAL. The plaintiff as a party interested in the gross award had the right to appeal therefrom notwithstanding that his share had not been apportioned. State ex rel v District Court of Ramsey Co. 128 M 432, 151 NW 144.

SINGLE APPEAL AGAINST SEVERAL OWNERS. In State v May, 204 M 564, 285 NW 834, the state by one notice of appeal attempted to appeal from two awards in favor of different owners. Held, the appeal must be dismissed for duplicity. A separate appeal must be taken as to each award, whether the appeal is taken to the district court or to the supreme court.

SINGLE APPEAL BY SEVERAL OWNERS. The owners of separate parcels cannot join in one appeal from the awards made unless a statute so authorizes. State v May, 204 M 564, 285 NW 834.

EFFECT OF APPEAL ON COMMISSIONERS' AWARD. The report of the commissioners is superseded by a general appeal from it. St. P. & Sioux City R. Co. v Matthews, 16 M 341 (303) (condemnation under charter).

The award is conclusive until modified or changed on appeal. Trogden v Winona & St. Peter R.R. Co. 22 M 198 (condemnation under charter).

The appeal from the commissioners' award does not ipso facto nullify the commissioners' report. It remains in full force and effect until vacated by the district court after the hearing on the appeal. Mpls. St. P. R. & D. E. T. Co. v Grimes, 128 M 321, 150 NW 180, 906.

DISMISSALS OF APPEAL WITHOUT RESPONDENT'S CONSENT. The appellant may dismiss the appeal without the consent of respondent the same as in an ordinary civil action. Mpls. St. P. R. & D. Elec. T. Co. v Goodspeed, 128 M 66, 150 NW 222.

JUDGMENT OF DISMISSAL, EFFECT OF. A judgment of dismissal pursuant to the appellant's dismissal of his appeal is a final judgment within the meaning of section 117.16. It leaves the award of the commissioners effective and the obligation of the condemnor to pay that award becomes fixed. Mpls. & N. W. R. Co. v Woodworth, 32 M 452, 21 NW 476 (the statute involved was an earlier form of 117.16).

SCOPE OF THE APPEAL. The jurisdiction of the district court on appeal is purely appellate. The scope of the appeal is to secure a retrial of the same matter submitted to and passed upon by the commissioners. Schermeely v Stillwater & St. P. R. Co. 16 M 506 (457); Oronoco School District v Town of Oronoco, 170 M 49, 212 NW 8.

DAMAGES THE ONLY ISSUE. The appeal raises no question as to the regularity or sufficiency of the proceedings, the sole issue being the amount of damages to be awarded. Oronoco School District v Town of Oronoco, 170 M 49, 212 NW 8; Warren v First Div. of St. P. & Pac. R. Co. 18 M 384 (345); Rippe v Chi. Dubuque & Minn. R. Co. 20 M 187 (166), and 23 M 18; Mpls.-St. Paul S. District v Fitzpatrick, 201 M 442, 277 NW 394, 124 ALR 897; Rheiner v Union Depot Co. 31 M 289, 17 NW 623.

The case of Mpls. St. P. R. & D. Elec. T. Co. v Goodspeed, 128 M 66, 150 NW 222, states that while the appeal may be limited to the question of damages, the whole proceeding could be brought up for hearing de novo.

APPEAL FROM CONDITIONAL AWARD. Section 117.08 provides two methods of estimating damages, one with reservations and the other without. An appeal from an award with reservations is not limited to the amount of damages but the entire finding may be appealed from. Mpls. St. P. R. & D. E. T. Co. v St. Martin, 108 M 494, 122 NW 452.

ATTACHING CONDITIONS ON APPEAL. The commissioners' award was compensation unqualified by any condition. The question of attaching a condition to the award arose on appeal. Held, that question was outside the scope of the appeal. Schermeely v Stillwater & St. P. R. Co. 16 M 506 (457).

RULE ON REASSESSMENT. The compensation to be ascertained by the jury is in reference to the same estate and interest, and as of the same time as the commissioners ascertained it. Trogden v Winona & St. Peter R.R. Co. 22 M 198; Warre nv First Div. of St. P. & Pac. R.R. Co. 21 M 424.

PRESUMPTION AS TO VERDICT. The reassessment is as of the date of filing the original award and with reference to the condition of things then existing. The verdict is presumed to so refer. Whitacre v St. Paul & Sioux City R. Co. 24 M 311.

ISSUE OF TITLE ON APPEAL. To recover for injuries to the remainder of his land it is incumbent on the owner to show his title to the remainder. To that extent the question of title is before the court on appeal. St. Paul & Sioux City R. Co. v Matthews, 16 M 341 (303).

TITLE, POSSESSION AS EVIDENCE OF. Proof of actual possession is prima facie evidence of title in fee as against the condemnor in condemnation proceedings. St. P. & Sioux City R. Co. v Matthews, 16 M 341 (303); Sherwood v St. P. & Chi. Ry. Co. 21 M 127; Adolph v Mpls. & Pac. Ry. Co. 42 M 170, 43 NW 848.

TITLE, HOW TRIED. The question of title of the owner cannot be tried on affidavits. Wilcox v St. P. & N. P. Ry. Co. 35 M 439, 29 NW 148.

WHERE EVIDENCE OF UNNECESSARY. Where the petition avers title to be in the appellants no evidence need be put in, on appeal, in support of title by the appellants. Knauft v St. P. S. & T. F. R. Co. 22 M 173; Wilcox v St. P. & N. P. Ry. Co. 35 M 439, 29 NW 148.

ESTOPPEL TO DENY TITLE. The condemnor was estopped to deny on appeal that the owner had any other or different interest than that attributed to him in the proceedings and in respect to which the commissioners had made an award. Rippe v Chi. Dubuque & Minn. R. Co. 23 M 18.

PETITION OR NOTICE OF APPEAL DOES NOT LIMIT THE INQUIRY TO THE LAND DESCRIBED THEREIN. The description in the petition confines neither the commissioners nor the court to the land described in their inquiries as to the damages done to the land. They may inquire into the effect of the taking on the whole tract although only part of the tract is described in the petition. Sheldon v M. & St. L. R. Co. 29 M 318, 13 NW 134; Winona & St. Peter R. Co. v Denman, 10 M 267 (208); Wilmes v Mpls. & N. W. R. Co. 29 M 242, 13 NW 39. Nor did the description in the notice of appeal limit the court or jury in determining the amount of damage where it followed the description in the petition. Sheldon v M. & St. L. R. Co. 29 M 318, 13 NW 134.

REMEDY AGAINST ADMISSION OF TITLE. Whatever remedy the corporation may have had against its admission of title was either through a timely and effectual abandonment of the proceedings or by a seasonable application to the court for leave to amend the averment of title in the petition. Wilcox v St. P. & N. P. Ry. Co. 35 M 439, 29 NW 148.

APPEALS TO SUPREME COURT. The right of appeal is purely statutory and apart from an express constitutional guaranty a person has no right to have his case reviewed on appeal. City of Mpls. v Wilkin, 30 M 140, 14 NW 581.

CERTIORARI WHERE NO APPEAL. Where no appeal is provided certiorari or other proper remedy is open to the injured parties to review the proceedings. State v Board of County Com'rs, Polk Co. 87 M 325, 92 NW 216, 60 LRA 161.

RETURN TO A CERTIORARI, WHAT MAY BE INCLUDED IN. The record, the proceedings in the nature of a record, the rulings of the inferior tribunal on the admissibility of evidence, and the instructions given and refused and exceptions thereto, together with as much of the evidence as may be proper to show the bearing of such rulings and instructions, may be brought before the court in the return to a certiorari for examination and review. Minn. Central R. R. Co. v McNamara, 13 M 508 (468).

RIGHT OF APPEAL TO THE SUPREME COURT UPHELD. Witt v St. P. & N. P. Ry. Co. 35 M 404, 29 NW 161, upheld the right of appeal to the supreme court in condemnation proceedings from a final judgment of the district court rendered on a verdict; contra, Conter v St. P. & Sioux City R. Co. 24 M 313.

REVIEWING INTERMEDIATE ORDERS AND QUESTION OF NECESSITY. On appeal from final judgment all intermediate orders in the proceeding may be reviewed and the question of the propriety and necessity of the proposed improvement. Duluth Tranfer Ry. Co. v Duluth Terminal Ry. Co. 81 M 62, 83 NW 497.

APPEALABLE ORDERS. In the case In re St. Paul & N. P. Ry. Co. 37 M 164, 33 NW 701, the appeal was taken from an order denying an application for the appointment of commissioners. No issue raised on or discussion of the propriety of the appeal.

ORDER APPOINTING COMMISSIONERS. The order of the district court appointing commissioners is not an appealable order. Duluth Transfer Ry. Co. v Duluth Terminal Ry Co. 81 M 62, 82 NW 497, overruling In re St. P. & N. P. Ry. Co. 34 M 227, 25 NW 345; Petition of Burnquist, 212 M 452, 4 NW(2d) 361.

ORDER REFUSING TO SET ASIDE ORDER APPOINTING. An order refusing to set aside the order appointing the commissioners is not appealable. Fletcher v Chi. St. P. M. & O. Ry. Co. 67 M 339, 69 NW 1085, and Duluth Transfer Ry. Co. v Duluth Terminal Ry. Co. 81 M 62, 83 NW 497.

ORDER REFUSING TO SET ASIDE AWARD. An order refusing to set aside an award is not appealable. Kanne v M. & St. L. Ry. Co. 33 M 419, 23 NW 854; Fletcher v Chi. St. P. M. & O. Ry. Co. 67 M 339, 69 NW 1085.

ORDER REFUSING NEW TRIAL. An order refusing a new trial is a final order affecting a substantial right, made in a special proceeding, and is appealable. Minn. Valley R. R. Co. v Doran, 15 M 230 (179); St. P. & Sioux City R. C. v Matthews, 16 M 341 (303). (On necessity for bill of exceptions or settled case on an appeal from this order where the ground is that the conclusions are not supported by the findings, see Lumbermen's Ins. Co. v City of St. Paul, 82 M 497, 85 NW 525.)

ORDER GRANTING NEW TRIAL. An order granting a new trial in a condemnation proceeding is appealable. King v Board of Ed. of Mpls. 116 M 433, 133 NW 1018; contra, McNamara v Minn. Central Ry. Co. 12 M 388 (269).

ORDER DISMISSING THE PROCEEDINGS. Order dismissing the proceeding is an appealable order. Warren v First Div. of St. P. & Pac. Ry. 18 M 384 (345).

ORDER DENYING MOTION TO DISMISS APPEAL. An order denying a motion to dismiss defendant's appeal from the award is not an appealable order. Minn. Central R. Co. v Peterson, 31 M 42, 16 NW 456.

CONDITIONING THE RIGHT TO APPEAL. The appellant cannot be required as a condition of retaining his appeal to secure the judgment below, either by a deposit or by bond. Rippe v Chi. D. & M. R.R. Co. 22 M 44.

ENTIRE RECORD OPEN TO INSPECTION ON APPEAL. The sufficiency of condemnation proceedings is not to be determined and disposed of by an examination of a single instrument as, for example, the assessment sheet or the order of confirmation. But the entire record, or what may be called "the roll of the proceedings," is open to inspection. Lumbermen's Ins. Co. v City of St. Paul, 85 M 234, 88 NW 749.

JUDICIAL NOTICE OF FORMER APPEAL. Judicial notice will be taken of matters in the record of a former appeal in the same action. Rippe v Chi. Dubuque & Minn. R. Co. 23 M 18.

REMEDIES OUTSIDE OF CONDEMNATION PROCEEDINGS FOR A TAKING WITHOUT COMPENSATION.

EJECTMENT. See annotations to section 117.32.

TRESPASS. Defendant is a trespasser where it takes without consent and without acquiring the right by condemnation. Adams v Hastings & Dakota R. Co. 18 M 260 (236).

Where the condemnation proceedings were void the taking was a continuing trespass. Hursh v First Div. of St. P. & P. R. Co. 17 M 439 (417); Curran v Sibley County, 56 M 432, 57 NW 1070.

FIXTURES PUT ON BY TRESPASSER. The defendant was a trespasser in entering, and thus the ties and tracks it affixed to the soil became a part of the soil and belong to the owner. Greve v First Div. of St. P. & P. R. Co. 26 M 66, 1 NW 816.

ACTS DONE UNDER LICENSE. If the original entry or subsequent occupancy was by license that license is a protection for any acts done under it. Kremer v C. M. & St. P. Ry. Co. 51 M 15, 52 NW 977, 38 ASR 468.

After the license was revoked the defendant would become a trespasser and the owner would be entitled to his remedy in trespass or ejectment. Kremer v C. M. & St. P. Ry. Co. 51 M 15, 52 NW 977, 38 ASR 468.

ACQUIESCENCE DOES NOT ESTOP OWNER. The owner, the plaintiff in an action of trespass, was not estopped by reason of his failure to object to the unauthorized entry and starting upon the work, Leber v Mpls. & N. W. Ry. Co. 29 M 256, 13 NW 31; Kanne v M. & St. L. R. Co. 33 M 419, 23 NW 854; nor by his inaction or delay in seeking his legal remedy. Kremer v C. M. & St. P. Ry. Co. 51 M 15, 52 NW 977, 38 ASR 468.

MEASURE OF DAMAGES IN TRESPASS DIFFERENT FROM THAT IN CONDEMNATION PROCEEDINGS. The measure of damages in trespass is different from that case in which defendant seeks to condemn. Adams v Hastings & Dakota R. Co. 18 M 260 (236); Lamm v C. St. P. M. & O. Ry. Co. 45 M 71, 47 NW 455, 10 LRA 268.

RECOVERY IN TRESPASS. In trespass the plaintiff can recover for his injuries down to the commencement of the suit. If the defendant should continue to use the premises thereafter, each day of such use would give the plaintiff a fresh cause of action. Adams v Hastings & Dakota R. Co. 18 M 260 (236); Lamm v C. St. P. M. & O. Ry. Co. 45 M 71, 47 NW 455, 10 LRA 268.

The jury cannot in trespass assess permanent damages to accrue from an assumed continued use thereafter by the defendant in the same way. Adams v Hastings & Dakota R. Co. 18 M 260 (236); other cases in accord; Hartz v St. P. & Sioux City R. Co. 21 M 358; Brakken v M. & St. L. Ry. Co. 29 M 41, 11 NW 124; same title, 31 M 45, 16 NW 459; Carli v Union Depot Co. 32 M 101, 20 NW 89.

DAMAGES FOR TRESPASS NOT TO BE INCLUDED IN CONDEMNATION AWARD. Damages for any trespass committed before the filing of the award are not regularly proper to be taken into account in making up the award in a condemnation proceeding. Leber v Mpls. & N. W. Ry. Co. 29 M 256, 13 NW 31; Hempsted v Cargill, 46 M 118, 48 NW 558; Lamm v C. St. P. M. & O. Ry. Co. 45 M 71, 47 NW 455, 10 LRA 268.

PRESUMPTION. The award is presumed not to have included damages for the trespass unless it shows so on its face, and evidence dehors the award is not admissible to show they were included. Leber v Mpls. & N. W. Ry. Co. 29 M 256, 13 NW 31.

AWARD AND PAYMENT IN CONDEMNATION NO BAR TO TRESPASS ACTION. An award and payment is not a bar to an action for damages for prior trespasses. Lamm v C. St. P. M. & O. Ry. Co. 45 M 71, 47 NW 455, 10 LRA 268; Proetz v St. Paul Water Co. 17 M 163 (136) (award and payment under void condemnation); Hursh v First Div. of St. P. & P. R. Co. 17 M 439 (417) (award and tender under void condemnation); and see, Hempsted v Cargill, 46 M 118, 58 NW 558 (mill dam act).

RIGHT OF ACTION MUST BE ASSIGNED ON CONVEYANCE OF LAND. The right to recover for trespass or for use and occupation does not pass by conveyance of the land; it must be assigned. Kremer v C. M. & St. P. Ry. Co., 51 M 15, 52 NW 977, 38 ASR 468; Lamm v St. P. M. & O. Ry. Co. 45 M 71, 47 NW 455, 10 LRA 268; Harrington v St. P. & Sioux City R. Co. 17 M 215 (188).

INJUNCTIONS. Where the legal right is clear and the trespass or nuisance, is a continuing one the plaintiff is not confined to successive actions for damages, but may maintain an action to enjoin. Gustafson v Hamm, 56 M 334, 57 NW 1054, 22 LRA 565. Also, Harrington v St. P. & Sioux City R. Co. 17 M 215 (188); Schurmeier v St. P. & P. R. R. Co. 10 M 82 (59), 88 AD 59.

An injunction will not lie to restrain the doing of an act where there is a speedy and adequate remedy at law. Vanderburgh v City of Mpls. 93 M 81, 100 NW 668.

ADEQUATE REMEDY AT LAW, ACTION FOR DAMAGES AS. See Vanderburgh v City of Mpls. 93 M 81, 100 NW 668 (vacation of street); Dynes v Town of Kilkenny, 153 M 11, 189 NW 439 (improvement of a street).

MANDAMUS TO COMPEL DEFENDANT TO EXERCISE ITS POWER TO CONDEMN AS. Harrington v St. P. & Sioux City R. Co. 17 M 215 (188). See, 9 MLR 480.

INJUNCTIONS IN CONDITIONAL FORM. An injunction was not to become operative against the defendant, possessing the power of eminent domain, until after it had had a suitable opportunity to acquire the right to appropriate plaintiff's land. Lohman v St. P. S. & T. F. R. Co. 18 M 174 (157); Harrington v St. P. & Sioux City R. Co. 17 M 215 (188).

RIGHT TO ENJOIN PROSECUTION OF THE WORK OR IMPROVEMENT WHERE A CONDEMNATION PROCEEDING HAS BEEN INSTITUTED. The exercise of the right of eminent domain should not be enjoined merely because damage will be caused. The compensation clause of the constitution contemplates that fact—it is the method designed to make good the landowner. Dynes v Town of Kilkenny, 153 M 11, 189 NW 439.

The failure to make or tender due compensation to the owner of land for damages incurred by taking his land for the purpose of a road or street will justify relief by injunction at the suit of the property owner until his damages are properly adjusted or until compensation is made therefor. The jurisdiction is exercised to prevent irreparable injury. Johnson v Town of Clontarf, 98 M 281, 108 NW 521 (condemnation under different law).

ADEQUATE REMEDY AT LAW, WHERE RIGHT OF APPEAL TO DISTRICT COURT. Peterson v City of Mpls. 172 M 604, 216 NW 228; McKusick v City of Stillwater, 44 M 372, 46 NW 769.

WHERE CERTIORARI ALLOWED. Webb v Lucas, 125 M 403, 147 NW 273 (condemnation taken under a statute which did not allow an appeal from the action complained of); Heller v Schroeder, 182 M 353, 234 NW 461.

RIGHT OF LANDOWNER TO ENJOIN. Seizure on ground of unconstitutionality of statute creating officials. See, Field, Law of Public Officers, 13 MLR 439, 451.