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GENERAL STATUTES

OF THE

STATE OF MINNESOTA

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CHAPTER 31.

DAMS AND MILLS.

2353-2384
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01 - 301**§ 2353. Erection of dams and embankments — Saving clause.**

When any person, corporation, manufacturing company or joint-stock association is desirous of erecting and maintaining a dam upon the lands of such person, company or corporation, across any stream or watercourse not navigable, or outlet of any lake in this state, and may deem it necessary to raise the water in any such stream, lake or system of lakes, by means of such dam, or by the embankment of any lakes in addition to such dam, or both, so as to damage, overflow, or otherwise injuriously affect lands not the property of such person, corporation or company, and to maintain the same, and to raise any dam constructed, and to be constructed, so as to increase such overflow, the right to erect and perpetually maintain such dam and embankment, and to overflow such lands and use such water for manufacturing purposes, may be had and obtained, and compensation therefor made, by proceeding as in this act provided: provided, that nothing herein contained shall be so construed as to affect or impair any rights acquired, or proceedings commenced under the act of which this is amendatory; but such proceedings shall be in all things conducted, and the rights of parties determined, under the act of which this is amendatory.

(G. S. 1866, c. 31, § 1, as amended 1876, c. 120, § 1; G. S. 1878, c. 31, § 1.)

The authorization of condemnation proceedings for the right of flowage, etc., is not unconstitutional. *Miller v. Troost*, 14 Minn. 365, (Gil. 232.)

See *Weir v. St. Paul, etc.*, R. Co., 18 Minn. 155, 164, (Gil. 139, 148.)

See *Witt v. St. Paul & N. P. Ry. Co.*, 35 Minn. 404, 29 N. W. Rep. 161; *Siman v. Rhoades*, 24 Minn. 25.

§ 2354. Petition to court.

He shall present to the judge of any court of record in which jury trials are had in the county, or if there is no such court in the county, then in the district in which said dam or any part thereof is to be located, a petition setting forth the place, as near as may be, where said dam is to be located, the height to which it will be raised, the purposes to which the water-power will be applied, and such other facts as are necessary to show the objects of the petition.

(G. S. 1866, c. 31, § 2; G. S. 1878, c. 31, § 2.)

If the petition state facts which make a case within § 2353, the court has jurisdiction. It need not negative the restrictions or limitations of the right contained in subsequent sections of the chapter, and it need not state want of consent by the owners of the land sought to be overflowed. *Faribault v. Hulett*, 10 Minn. 30, (Gil. 15.)

The petition need not contain a description of the lands with respect to which damages are sought to be assessed, but in good practice should do so. To bind the lands, however, they should be described in the judgment. *Siman v. Rhoades*, 24 Minn. 25.

§ 2355. Commissioners to be appointed.

Upon the presentation of such petition, the judge shall appoint three disinterested residents of the county in which said dam or a part of it is to be erected, commissioners to meet at the place of its proposed erection on a day specified by such judge, and to inquire touching the matters contained in said petition; and the judge shall fix the fees of said commissioners.

(G. S. 1866, c. 31, § 3; G. S. 1878, c. 31, § 3.)

§ 2356. Oath of commissioners.

Before entering upon their duties the commissioners shall severally take and subscribe an oath, before some person qualified to administer oaths, faithfully and impartially to discharge the duties of their appointment.

(G. S. 1866, c. 31, § 4; G. S. 1878, c. 31, § 4.)

§ 2357. Public notice of meeting.

At the request of the petitioner the commissioners shall give, or cause to be given, notice of the times, place and object of their meeting, to every person named by said petitioner.

(G. S. 1866, c. 31, § 5; G. S. 1878, c. 31, § 5.)

§ 2358. Notice to persons interested—To non-residents.

At least five days' notice shall be given in all cases, and in case of infants such notice shall be served on their guardian, or on the person with whom they reside; in cases of idiots or lunatics, on their guardian if they have any, and if not, then on the person under whose care or charge they may be found; in case of femes covert, on the husband as well as the feme covert; but notices to non-residents of the county or counties where said dam or a part of it is to be located, shall be published in some newspaper printed and published in the county aforesaid, or if there is none, then in a newspaper printed and published at the capital of the state, for three weeks in succession, previous to the meeting of said commissioners.

(G. S. 1866, c. 31, § 6; G. S. 1878, c. 31, § 6.)

§ 2359. Commissioners to examine premises and assess damages.

The commissioners shall meet at the time and place specified in the notice, and proceed to examine the point at which said dam is proposed to be erected, and the lands and real estate, above and below, which will probably be injured by the erection of said dam; shall hear the allegations and testimony of all parties interested, and shall proceed to make a separate assessment of damages which will result to any person by the erection of said mill-dam and its maintenance forever.

(G. S. 1866, c. 31, § 7; G. S. 1878, c. 31, § 7.)

The assessment cannot include past damages for unlawfully maintaining Hemsted v. Cargill, 46 Minn. 118, 48 N. W. Rep. 558.

§ 2360. Report, etc., to be filed—Notice of filing.

Within thirty days after completing their examination, the commissioners shall file the petition, their appointments, jurats, and a report of their doings, in the office of the clerk of said court, and shall give notice of the filing of said report as of their meeting.

(G. S. 1866, c. 31, § 8; G. S. 1878, c. 31, § 8.)

§ 2361. Payment of damages awarded.

Upon the filing of said report, the petitioners may make payment of the damages assessed to parties entitled to the same, in the manner following: first, to parties laboring under no disability; second, to guardians of infants, husbands, or trustees of femes covert; third, to guardians of insane persons; and receipts for such payment, filed in the office of the clerk aforesaid, shall estop the parties receipting from all further claim or proceeding in the premises. Payments to parties residing in the state, but not in the county or counties where said dam or part of it is to be erected, as well as to the infants who have no guardian, and insane persons who have no guardians, and payments to parties residing out of the state, and to persons whose names are unknown, and to persons who refuse to receive the payments when tendered, shall be made by depositing the money with the treasurer of the county aforesaid, who shall pay out the same upon the order of the commissioners or court, take receipts for all payments, and file the same, with the order, in the office of the clerk of the court aforesaid, and such deposit shall have the same effect as the first mentioned receipts unless an appeal is taken by the party entitled thereto: provided, that the petitioner may, after the filing of the report of the commissioners, tender to any land-owner whose land is claimed to be flowed or injured by such dam, any sum not less than the amount found by the commissioners; and if such land-owner shall refuse to receive the same, and upon appeal fails to recover a greater sum than the amount so tendered him, he shall be adjudged to pay all costs arising upon any such appeal subsequent to said tender.

(G. S. 1866, c. 31, § 9, as amended 1868, c. 53, § 1; G. S. 1878, c. 31, § 9.)

§ 2362. Appeals, how taken.

Appeals from the assessment made by the commissioners may be taken and prosecuted, in the court aforesaid, by any party interested, (the petitioner excepted,) not under legal disability, by husbands or trustees of *femes covert*, guardians of infants, guardians of insane persons; and in cases where infants or insane persons have no guardians, appeals may be taken by the friend of such parties; and a written notice of such appeal shall be served upon the appellee, as a summons in ordinary civil actions: provided, that no appeal shall be taken after the expiration of thirty days from the time of the notification of the filing of the report aforesaid.

(G. S. 1866, c. 31, § 10; G. S. 1878, c. 31, § 10.)

§ 2363. Appeal not to hinder erection of dam, when.

The erection of said dam shall not be hindered, delayed or prevented, by the prosecution of any appeal: provided, the petitioner executes and files with the clerk of the court in which the appeal is pending, a bond, to be approved by said clerk, with sureties, conditioned that the person executing the same shall pay whatever amount may be required by the judgment of the court, and abide any rule or order of the court in relation to the matter in controversy.

(G. S. 1866, c. 31, § 11; G. S. 1878, c. 31, § 11.)

§ 2364. Bond on appeal—Pending cases.

The appellant shall file with the clerk aforesaid, a bond with security, to be approved by the judge of said court, and in such sum as said judge shall determine, payable to the state of Minnesota, for the use of all persons interested, in which bond the proceeding appealed from shall be briefly recited, with condition for the due and speedy prosecution of the appeal, and that appellant will abide the order or judgment of the court, and pay the costs of appeal, if adjudged so to do by the court, in reference to the matter in controversy; and this section shall apply to cases now commenced and pending under this chapter, where no appeal has been perfected, as well as to future cases.

(G. S. 1866, c. 31, § 12, as amended 1875, c. 110, § 1; G. S. 1878, c. 31, § 12.)

§ 2365. Questions on appeal—Trial, how conducted.

Appeals bring before the court the propriety of the amount of damages reported by the commissioners in respect to the parties to the appeal; and unless the parties otherwise agree, the matter shall be submitted to and tried by a jury as other appeal cases, and the court or jury, as the case may be, shall assess the damages aforesaid, making the verdict conform to the question and the facts in the case.

(G. S. 1866, c. 31, § 13; G. S. 1878, c. 31, § 13.)

The appeal brings before the district court only the question of the damages allowed by the commissioners, and not the propriety of the order appointing them. *Turner v. Holleran*, 11 Minn. 253, (Gil. 163;) followed *Warren v. First Div. St. P., etc., R. Co.*, 18 Minn. 384, 390, (Gil. 345, 353.)

Where proper notice has been served upon the owners of land affected, jurisdiction is acquired, and any indefiniteness in the description of the lands affected by such proceedings may, on appeal, be amended, and the lands described in the judgment entered. *Siman v. Rhoades*, 24 Minn. 25.

After appeal to, and trial and judgment in, the district court, it will be presumed, in the absence of anything to the contrary, that it was made to appear to the court below that such stream was not navigable. *Id.*

After the entry of judgment on appeal in the district court, that court has the power to correct such judgment and make it conform to what the parties were entitled, as the result of the trial. *Id.*

§ 2366. Punitive damages not allowed.

No exemplary or vindictive damages shall be allowed by the commissioners, court or jury.

(G. S. 1866, c. 31, § 14; G. S. 1878, c. 31, § 14.)

§ 2367. Judgment on appeal—Contents and effect—Payment—Forfeiture.

Upon verdicts rendered by juries, or an assessment by the court, judgment shall be entered, declaring that upon payment of the damages assessed by

the court or jury, as the case may be, and costs, if any, the right to erect and maintain the mill-dam aforesaid, according to the petition, shall, as against the parties interested in such verdict or assessment, be and remain in the petitioner, his heirs and assigns forever, subject to be lost as hereinafter provided; and payments of such judgments may be made as payments of assessments by the commissioners as hereinbefore provided. And unless the petitioner shall pay such assessment and cost within sixty days after entry of judgment, he shall forfeit all right under his proceeding; and no possession, use or occupancy of the premises described and attempted to be taken under the provisions of this act, shall be permitted until payment is made as herein specified.

(G. S. 1866, c. 31, § 15, as amended 1875, c. 110, § 2; G. S. 1878, c. 31, § 15.)

The appeal brings before the district court only the question of the damages allowed by the commissioners, and not the propriety of the order appointing them. *Turner v. Holleran*, 11 Minn. 253, (Gil. 168.)

The proceedings authorized by c. 34, for condemning lands for railroad purposes, are taken almost verbatim from §§ 2354-2367 of this chapter. *Lehmick v. St. Paul, etc., R. Co.*, 19 Minn. 464, (Gil. 406, 412.)

§ 2368. Previously improved water-powers.

No mill-dam shall be erected or maintained under the provisions of this chapter, to the injury of any water-power previously improved.

(G. S. 1866, c. 31, § 16; G. S. 1878, c. 31, § 16.)

The rights that may be acquired date from the time of commencing the proceedings, and are governed by the condition of the upper proprietor's power at that date. *Miller v. Troost*, 14 Minn. 365, (Gil. 282.)

A water-power which an owner on a stream has, with a *bona fide* intent, turned to use, and made improvements upon to any extent, is a water-power "previously improved," and a lower proprietor cannot afterwards acquire a right to improve the same by proceedings under the statute. *Id.*

This section cited, *Faribault v. Hulett*, 10 Minn. 30, 35, (Gil. 15, 20.)

§ 2369. Actions for damages, when to be brought.

No action for damages occasioned by the erection and maintenance of a mill-dam shall be sustained unless such action is brought within two years after the erection of said dam: provided, that such limitations shall not run against or apply to persons living on or holding government land under the pre-emption or homestead laws until a patent for the land damaged or overflowed is issued.

(G. S. 1866, c. 31, § 17, as amended 1876, c. 100, § 1; G. S. 1878, c. 31, § 17.)

The time to sue commences to run from the time when the damage is occasioned, and not from the time of the erection of the dam. *Thornton v. Turner*, 11 Minn. 336, (Gil. 237.)

Under the proviso extending the right of action in favor of the pre-emption claimant until after the issuance of the patent, it is material to show the filing of the plaintiff's declaratory statement in the proper land-office. The certified copy of the land-office record is competent *prima facie* evidence of the fact. *Dorman v. Ames*, 12 Minn. 451, 454, (Gil. 347, 349.)

Where a defendant has a right to maintain a dam, but it does not appear to what height he may maintain it, a finding as to the height at which he does maintain it will not authorize an abatement or injunction. *Finch v. Green*, 16 Minn. 355, (Gil. 315.)

This section cannot be extended to an action to abate or enjoin a dam as a nuisance. *Cook v. Kendall*, 13 Minn. 324, (Gil. 297.) *Thornton v. Webb*, 13 Minn. 493, (Gil. 457.)

See *Thornton v. Smith*, 11 Minn. 15, (Gil. 1.)

The limitation is not affected by the fact that the damages had several years before been caused by temporary additions to the dam. *Hempsted v. Cargill*, 46 Minn. 118, 48 N. W. Rep. 553.

See *Barrows v. Fox*, 39 Minn. 61, 38 N. W. Rep. 777.

§ 2370. Raising existing dams.

Any person may obtain a right to maintain or raise a dam heretofore erected upon his own land across any watercourse not navigable, by complying with the provisions of this chapter, adapting his petition to the nature of the case.

(G. S. 1866, c. 31, § 18; G. S. 1878, c. 31, § 18.)

§ 2371. Suits for damages may be stayed.

Upon evidence of the commencement of proceedings as provided in the second and eighteenth sections of this chapter, the court before which any action for damages occasioned by such mill-dam, shall be instituted after the commencement aforesaid, has power to suspend any such action until the result of said proceedings is known.

(G. S. 1866, c. 31, § 19; G. S. 1878, c. 31, § 19.)

§ 2372. Costs, by whom paid.

The costs of all proceedings under this chapter, except such as arise or grow out of appeals, shall be paid by the petitioner, and costs of appeal shall be paid as the court directs.

(G. S. 1866, c. 31, § 20; G. S. 1878, c. 31, § 20.)

§ 2373. Entry on land for surveys, etc.

For the purpose of making surveys and examinations relating to any proceedings under the provisions of this chapter, it shall be lawful to enter upon any land, doing no unnecessary injury.

(G. S. 1866, c. 31, § 21; G. S. 1878, c. 31, § 21.)

§ 2374. Non-user of right—Forfeiture.

Any person having obtained right to erect and maintain, or to maintain or raise any dam under the provisions of this chapter, who shall not within one year thereafter begin to build (if he has not previously built) said dam and finish the same, and apply the water-power thereby created to the purposes stated in his petition, within three years; or, in case the said dams and mills connected therewith are destroyed, shall not begin to rebuild in one year after such destruction, and finish in three years; or, having erected such mills, fails to keep them in operation for one year at any one time, shall forfeit all rights acquired by virtue of the provisions of this chapter, unless at the time of such destruction the owner is an infant, or otherwise disabled in law, in which case the same time shall be allowed after the removal of such disability.

(G. S. 1866, c. 31, § 22; G. S. 1878, c. 31, § 22.)

§ 2375. Right to overflow highway, etc.—Raceway across highway.

When any person is desirous of erecting and maintaining a mill-dam upon his own land across any watercourse not navigable, or digging a raceway across any highway, and deems it necessary to raise the water by means of such dam, so as to overflow any highway, or otherwise obstruct, impair, or render less commodious for the public travel, any highway, he may obtain the right from any township supervisors, or common council of any city, in which said highway is situated, to erect and maintain said dam, or dig said raceway across any highway, in the manner and upon the terms hereafter provided.

(1868, c. 54, § 1; G. S. 1878, c. 31, § 23.)

§ 2376. Petition to be presented—Contents.

He shall present to the supervisors of the township, or common council of any city, in which said highway is to be so affected from the raising of such dam or digging such raceway, a petition by him signed, setting forth the place, as near as may be, where said dam is to be erected, or said raceway is to be dug, also the height the dam will be raised, and the width the raceway will be dug, the purpose to which the water-power will be applied, and such other facts as are necessary to show fully the object of said petition.

(1868, c. 54, § 2; G. S. 1878, c. 31, § 24.)

§ 2377. Notices of meeting, etc., to be posted.

The supervisors of any township, or common council of any city, on receiving such petition, shall post or cause to be posted, in three of the most public places in the township or city, notices in writing, setting forth the time and place they will meet to make a personal examination of the highway to be affected by the erection of said dam or digging said raceway, also the name

of the petitioner, and the object and prayer of said petitioner, which notices shall be posted at least ten days before the time of meeting for such examination.

(1868, c. 54, § 3; G. S. 1878, c. 31, § 25.)

§ 2378. Meeting—Examination—Taking testimony.

The supervisors or common council, as the case may be, shall meet at the time and place specified in the notice, and proceed to examine the point at which said dam is proposed to be erected and raceway dug, and the highway to be affected by the raising of said dam or digging said raceway, and shall have power to subpoena witnesses, and take testimony touching the subject of their examination.

(1868, c. 54, § 4; G. S. 1878, c. 31, § 26.)

§ 2379. Report—Contents—Record.

The supervisors, or common council of any city, shall, within thirty days after completing their examination, make a report in writing, granting or refusing the prayer of the petitioner. If the supervisors or common council, as the case may be, grant the prayer of the petitioner, in whole or in part, they shall fully and explicitly set out in their report the terms and conditions upon which said right is granted to said petitioner, which said report, together with the petition, shall be duly recorded in the township records, by the township clerk.

(1868, c. 54, § 5; G. S. 1878, c. 31, § 27.)

§ 2380. When the right to erect dam is perfected.

Whenever such petitioner, his heirs or assigns, shall fully comply with all the terms and conditions of the report of the supervisors, or common council, as the case may be, he shall have the right to erect and maintain such dam, or dig such raceway, and use the same as fully as he might have done before the laying out of said highway.

(1868, c. 54, § 6; G. S. 1878, c. 31, § 28.)

§ 2381. Time for complying with this act.

Any person having already erected such a dam or dug such a raceway as above provided for, shall have the right to avail himself of the provisions of this act within one year by complying with the same as above provided.

(1868, c. 54, § 7; G. S. 1878, c. 31, § 29.)

§ 2382. Petitioner to pay all costs.

The petitioner shall pay all costs and expenses of the proceedings and examination had by virtue of this act, at his request, whether the prayer of his petition be granted or otherwise.

(1868, c. 54, § 8; G. S. 1878, c. 31, § 30.)

§ 2383. Repairs—Entry upon servient estate.

Whenever, by any contract or by proceedings under chapter thirty-one of the General Statutes, and acts amendatory thereof, the owner of any mill-dam has heretofore acquired, or shall hereafter acquire, the right to flow the lands of another person, in order to maintain a head of water at said dam, and by reason of the breaking away of any natural or artificial bank or margin of said stream, upon such lands of such other person, the water has become or shall become divided from said stream, it shall be lawful for the owner of said dam to enter upon the lands of such other person, doing no unnecessary damage, and to repair and restore said bank so as to prevent the further diversion of the water from said stream.

(1879, c. 74, § 1; G. S. 1878, v. 2, c. 31, § 31.)

§ 2384. Same—Damages—Adjustment.

Any damage that may be caused to the owner of such lands by reason of such entry thereon, and the repairing of such bank, shall be maintained and paid in the manner provided in said chapter thirty-one of the General Statutes in other cases.

(1879, c. 74, § 2; G. S. 1878, v. 2, c. 31, § 32.)