

GENERAL STATUTES

OF

MINNESOTA

1913

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States, shall forfeit not exceeding fifty dollars for each offence, and shall be liable to the United States for all damages sustained by it in consequence thereof, to be recovered in a civil action. (2519)

CHAPTER 41

EMINENT DOMAIN

5395. Scope of chapter—Whenever the taking of private property for any public use shall be authorized by law, it may be acquired, under the right of eminent domain, in the manner prescribed by this chapter; but nothing herein shall apply to the condemnation of property by any incorporated place whose charter provides a different mode of exercising the rights of eminent domain by it possessed, or to the taking of property under the chapters relating to roads and drainage. (2520)

5396. Definitions—For all the purposes of this chapter, the word "taking," and all words and phrases of like import used herein, shall include every interference, under the right of eminent domain, with the ownership, possession, enjoyment, or value of private property. And the word "owner," as so used, shall extend to all persons interested in such property as proprietors, tenants, incumbrancers, or otherwise. (2521)

5397. Proceedings, by whom instituted—If such property be required for any authorized purpose of the state, the proceeding shall be taken in the name of the state, by the attorney general, upon request of the officer, board, or other body charged by law with the execution of such purpose; if by a corporation or other body authorized by law to exercise the right of eminent domain, in its corporate or official name and by the governing body thereof; and if by an individual so authorized, in his own name. (2522)

5398. Entry for surveys, etc.—For the purpose of making surveys and examinations relative to any proceedings under this chapter, it shall be lawful to enter upon any land, doing no unnecessary damage. (2523)

5399. Petition and notice—In all cases a petition, describing the desired land, stating by whom and for what purposes it is proposed to be taken, and giving the names of all persons appearing of record or known to the petitioner to be the owners thereof, shall be presented to the district court of the county in which said land is situated, praying for the appointment of commissioners to appraise the damages which may be occasioned by such taking. Notice of the objects of said petition, and of the time and place of presenting the same, shall be served, at least ten days before such time of presentation, upon all persons named in the petition as owners, and upon all occupants of such land, in the same manner as a summons in a civil action: Provided, that if any such owner be not a resident of the state, or his place of residence be unknown to the petitioner, upon the filing of an affidavit of the petitioner, his agent or attorney, stating that he believes that such owner is not a resident of the state, and that he has mailed a copy of the notice to him at his place of residence, or that after diligent inquiry his place of residence cannot be ascertained by the affiant, then service may be made upon such owner by three weeks' published notice. If the state be an owner, said notice shall be served upon the attorney general. No owner not served as herein provided shall be bound by such proceeding unless he voluntarily appears therein. (2524)

See § 5412, and note.

1. Proceedings generally—Mode of exercising right of eminent domain subject to legislative control (16-271, 244; 16-375, 333; 18-155, 139; 18-384, 345; 42-262, 44+59; 83-464, 466, 86+455). Proceedings are special and quasi judicial (30-140, 143, 14+581; 39-65, 67, 38+926). They are in rem (35-141, 145, 27+500; 82-497, 503, 85+525). So far as they are in invitum statutory requirements must be strictly followed (30-140, 142, 14+581). Chapter cited (101-197, 112+395, 11 L. R. A. [N. S.] 105).

2. Petition—Jurisdictional (10-30, 15; 31-289, 17+623; 38-523, 525, 38+753; 67-339, 69+1085). General allegation of purposes for which land sought sufficient (16-271, 244; 67-339, 69+1085). Description of land sought (24-25; 43-104, 122, 42+596, 44+1144; 45-225, 47+786; 46-540, 49+325; 85-234, 239, 88+749). Effect of including several tracts in one

petition (43-104, 122, 42+596, 44+1144). Naming owners an admission of ownership (16-341, 303; 22-173; 35-439, 29+148). Petition held sufficient (10-30, 15; 76-334, 343, 79+315). Allowable amendment (24-25; 31-289, 293, 17+623; 67-339, 69+1085). Damages assessable not limited to lands described in petition (29-242, 13+39; 29-318, 13+134).

3. Notice—Statutory notice jurisdictional (31-289, 294, 17+623; 67-339, 342, 69+1085. See 18-174, 157; 24-25; 32-174, 19+975; 33-419, 23+854). Constitutional right to notice (16-375, 333; 42-262, 44+59). Constructive notice sufficient (35-141, 145, 27+500; 45-225, 47+786; 56-321, 326, 57+928). Service by publication (38-506, 38+698). Waiver of notice by appealing (31-289, 17+623).

5400. Notice of pendency—At the time of filing the petition the petitioner may file for record with the register of deeds a notice of the pendency of the proceeding, describing with reasonable certainty the lands affected and for what purpose they are to be taken. If the proceeding be abandoned, in whole or in part, the petitioner shall within ten days thereafter file with the register a notice to that effect, describing with reasonable certainty the lands so abandoned. (2525)

5401. Order made thereon—Commissioners—Upon proof being filed of the service of such notice, the court, at the time and place therein fixed, or to which said hearing may be adjourned, shall hear all competent evidence offered for or against the granting of said petition, regulating the order of proof as it may deem best. If the proposed taking shall appear to be necessary, and such as is authorized by law, the court, by an order, shall appoint three disinterested commissioners, residents of said county, to ascertain and report the amount of damages that will be sustained by the several owners on account of such taking. Said order shall fix the time and place of the first meeting of the commissioners and prescribe their compensation. It may also, in the discretion of the court, limit the title or easement to be acquired by the petitioner, by defining the rights and privileges which the owner of any of said lands may exercise therein in subordination to the public uses to which it is appropriated. In case any of said commissioners shall fail to act, the court, without further notice, may appoint another in his place. (2526)

See § 5412, and note.

Court must determine whether the use for which the lands are sought is a public use and whether they are reasonably required or necessary therefor (34-227, 25+345). When purposes stated in petition are part public and part private, right to proceed must be denied (97-429, 107+405, 5 L. R. A. [N. S.] 638, 7 Ann. Cas. 1182. See also 101-197, 112+395). Duty of court to determine owners of land and specify them in order appointing commissioners (16-341, 303). Order appointing commissioners determines necessity of taking the land for public purposes (76-70, 74, 78+969). Statute does not impose legislative power on judiciary (84-472, 88+6). Burden of proof on petitioner (43-527, 531, 46+75; 85-76, 78, 88+423). Owner may consent to appraisal by two commissioners (30-140, 14+581). Irregularity as to place of hearing held waived (38-523, 525, 38+753). Disqualification of commissioners (50-114, 52+222; 87-268, 91+1111). Order held not to fix place of first meeting sufficiently (32-174, 19+975). Vacation of order (38-157, 36+105; 81-265, 83+1086, 84+101, 742). Order not appealable (81-62, 83+497).

5402. Powers and duties of commissioners—Said commissioners having qualified according to law, shall meet as directed by the order of appointment and hear the allegations and proofs of all persons interested touching the matters to them committed. They may adjourn from time to time and from place to place within the county, giving oral notice to those present of the time and place of their next meeting. All testimony taken by them shall be given publicly, under oath, and in their presence. They shall view the premises, and any of them may issue subpoenas for witnesses, which shall be served as subpoenas in civil actions are served, and at the cost of the parties applying therefor. If deemed necessary, they may require the petitioner to furnish for their use maps or plats showing the character and extent of the proposed undertaking and the situation of lands desired therefor. In proper cases they may reserve to the owner a right of way or other privilege in or over the land taken, or attach reasonable conditions to such taking in addition to the damages given, or they may make an alternative award, conditioned upon the granting or withholding of the right specified. And without unreasonable delay they shall make a separate assessment and award of the damages which, in their judgment, will result to each of the owners of said land by reason of such taking, and within thirty days after

making such assessment and award report the same to the court under their hands. (2527)

See § 5412, and note.

First meeting must be at time specified in order (31-289, 17+623). Cannot assess past damages (17-163, 136; 46-118, 48+558). Not restricted in assessing damages to lands described in petition (16-341, 303), but cannot enlarge tract to be acquired (28-326, 9+879; 86-218, 90+393, 1133). Proceedings before commissioners quasi judicial (30-140, 143, 14+581; 39-65, 67, 38+926). Damages to be assessed with reference to the value and condition of the land at the time of the award (21-122). Damages may be assessed in gross for taking several contiguous lots (21-122; 21-127). Under former statute questions of ownership might be determined by commissioners (23-114). Property is taken as of the date of the filing of the award and interest runs from such time (30-145, 15+668. See § 5410). Error as to tract to be taken (42-467, 44+529). Conclusiveness of award (22-198).

Special benefits may be set off in proceedings to condemn railway right of way against value of land taken and damages shown to have accrued to remainder (101-488, 112+1033, 11 L. R. A. [N. S.] 277, 118 Am. St. Rep. 647).

If land without proposed railroad is enhanced in value by peculiar location or availability, for particular purpose, impairment of such value is element of damages (108-492, 122+451).

Condition that railroad company construct and maintain cattle chute (108-494, 122+452).

5403. Report, etc.—Notice—The oath subscribed by the commissioners shall be filed with their report, and, whenever necessary to the proper understanding of such report, it shall be accompanied by a map showing the route or location of the intended improvement, and the situation of the lands within their county proposed to be taken therefor. The clerk shall attach together the petition, notice of hearing thereon, proofs of service and publication of said notice, order appointing the commissioners, their oath and report, and all other documents filed in said matter modifying or affecting any of those hereinbefore named. Upon payment by the petitioner of the fees and disbursements of said commissioners, which may be taxed by the court in case of failure to agree upon the amount thereof, they shall sign and deliver to the petitioner a notice that said report has been filed, which notice said petitioner shall cause to be served and published as provided in § 5399; but if any party shall have appeared in said proceeding by attorney, said notice may be served upon the attorney so appearing. (2528)

See § 5412, and note.

5404. Payment—Tender—Deposit in court—Payment of the damages awarded may be made or tendered at any time after the notice mentioned in § 5403 is delivered, and acceptance of such payment shall be taken as a waiver of all objections to the award, and to the proceedings leading thereto, on the part of the payee and of all persons for whom he is lawfully empowered to act. In case any party to whom an award of damages is made be not a resident of the state, or his place of residence be unknown, or he be an infant or other person under legal disability, or, being legally capable, refuse to accept payment, or if for any reason it be doubtful to whom any award should be paid, the petitioner may pay the same to the clerk, to be paid out under the direction of the court; and, unless an appeal be taken as hereinafter provided, such deposit with the clerk shall be deemed a payment of said award. (2529)

Tender (21-322). Conditional deposit held unavailing (30-423, 15+871). Cited as to deposit in court (86-188, 194, 90+371, 57 L. R. A. 634, 91 Am. St. Rep. 336). Who entitled to receive damages (16-260, 234; 52-409, 54+370; 59-493, 61+554; 82-497, 85+525; 93-30, 100+650).

5405. Failure to report—If the commissioners fail to file their report within six months after their appointment, upon motion of any owner the proceedings shall be set aside as to him; but for cause shown the court may extend the time for making said report for not more than six months. (2530)

5406. Accruing taxes—All taxes and assessments imposed upon the property after the filing of the petition, and paid by the owner before payment of the award, shall be added to the amount of such award, and, with interest thereon, shall be paid therewith; and the receipt of the proper officer for such taxes and assessments shall be conclusive, as between the owner and petitioner, of the amount and validity thereof. (2531)

5407. Appeal—At any time within thirty days after service of the notice that the report has been filed, the owner of lands taken may appeal to said

district court from any award of damages embraced in said report, or from any omission to award damages to the appellant for the taking of lands claimed by him, by filing with the clerk a notice of such appeal. Said notice shall specify the particular award or failure to award appealed from, the nature and amount of his claim, the land to which it relates, and the grounds of his appeal. The petitioner may also in like manner appeal; but no appeal shall delay the prosecution of the proposed improvement if the petitioner shall give bond, in amount and with sureties to be fixed and approved by the court, conditioned for the payment of all damages finally awarded, and to abide the orders and judgments of the court entered thereon. (2532)

Who may appeal (16-260, 234; 16-506, 457; 22-173; 22-177). Form of notice of appeal (19-500, 433). Duty of prosecuting appeal (38-234, 36+345). Specification of land in notice of appeal does not limit damages (29-318, 13+134). Failure to file notice within thirty days fatal (30-451, 16+265. See 46-141, 48+686). Notice, served after notice of filing report, perfected appeal, though notice of appeal was served before notice of such filing (107-46, 119+507). Appealing gives jurisdiction over the person (31-289, 17+623; 38-523, 526, 38+753). Appeal not inconsistent with motion to vacate appointment of commissioners (38-157, 36+105). Dismissal of appeal (18-384, 345; 22-44; 22-173; 30-451, 16+265; 32-452, 21+476). Order dismissing appeal appealable (18-384, 345). Order refusing to dismiss appeal not appealable (11-253, 168; 31-42, 16+456). Bond to permit progress of work (18-155, 139; 21-497; 22-44; 24-191; 32-452, 21+476; 35-404, 29+161; 35-439, 29+148).

Appeal from portion of award (108-494, 122+452).

5408. Trial—Costs—Such appeal may be noticed for trial as in the case of a civil action, and the court may direct that issues be framed, and may require other parties to be joined, and to plead therein when necessary for the proper determination of the questions involved. The cause shall be tried by a jury, unless the parties otherwise agree, and the court or jury trying the same shall reassess the damages and apportion the same as justice may require. And, except as herein otherwise provided, the trial shall be conducted and the cause disposed of according to the rules applicable to ordinary civil actions in the district court. The court, in its discretion, may award to the prevailing party costs and the disbursements of the appeal. (2533)

Issues to be tried in district court same as issues before commissioners (11-253, 168; 16-506, 457; 18-384, 345; 20-187, 166; 21-424; 22-198; 23-18; 24-311; 30-227, 15+239). No question as to regularity in proceedings anterior to award can be raised. Jurisdiction of court on appeal statutory. Objection may be raised that commissioners exceeded their authority (28-326, 9+879). Damages may be increased or diminished (19-500, 433). Proof of ownership unnecessary (16-341, 303; 22-173; 22-177; 35-439, 29+148). Admissibility of award (30-227, 15+239; 87-91, 91+271). Assessment must be made as of the time of the filing of the award (21-122; 21-424; 24-311). Damages for several lots may be assessed in gross (21-122; 21-127). Amendment on appeal of description of land (24-25). Effect of change of ownership pending appeal (22-198). Form of oath to be administered to jury (22-173; 22-177). Change of venue (18-184, 168; 19-464, 406; 20-28, 19). Court may limit number of witnesses to value (29-318, 13+134). View by jury (22-173, 176; 41-223, 43+2). Landowner has right to open and close (17-188, 162; 107-46, 119+507). Sufficiency of verdict (16-341, 303; 17-322, 299; 21-127; 24-311). Interest on verdict (21-424; 24-311). Costs (21-122).

After trial of question of damages, order granting new trial held appealable (116-433, 133+1018).

5409. Judgment—Possession—Judgment shall be entered upon the verdict or decision, fixing the amount of damages payable to the several parties concerned, and the terms and conditions of the taking. Upon payment of said damages, with costs and interest, if any, the petitioner shall be permitted to take possession of the premises, and appropriate the same to the public uses for which they were taken, subject to the provisions of such judgment; and until reversed or modified in a direct proceeding begun for that purpose, said judgment shall be binding upon the petitioner and all other parties thereto, and upon their respective successors and assigns. (2534)

Judgment passes the title and determines the rights of the parties (16-341, 303; 21-127; 35-404, 29+161). Owner entitled to personal judgment (21-497; 24-191). Judgment for gross sum sufficient (21-127). Judgment to include interest from time of filing the report (21-424; 24-311. See § 5410). Remedy for defective judgment appeal, not certiorari (19-500, 433). Judgment appealable (35-404, 29+161). Abandonment of proceedings after judgment (35-404, 29+161; 35-439, 29+148). When title vests (16-260, 234; 21-424; 85-416, 89+1; 93-30, 100+650).

Condemnation by United States (162 Fed. 81, 89 C. C. A. 81).

5410. Interest—Award, when payable—Dismissal—All damages allowed under this chapter, whether by the commissioners or upon appeal, shall bear interest from the time of the filing of the commissioners' report. If the award be not paid within sixty days after such filing, or, in case of an appeal within the like period, after final judgment thereon, the court, on motion of the owner of the land, shall vacate the award and dismiss the proceeding as against such land. And when the proceeding is so dismissed, or the same is discontinued by the petitioner, the owner may recover from the petitioner reasonable costs and expenses, including fees of counsel. (2535)

Interest (21-424; 22-173; 24-311; 162 Fed. 81, 89 C. C. A. 81). Recovery of expenses, etc., on dismissal (21-533; 32-452, 21+476).

5411.—Record evidence,—how perfected—Upon the determination of all appeals taken in said proceeding, and the payment of all damages, interest, and costs awarded or recovered therein, and when there has been no appeal from the report of the commissioners, and more than thirty days have expired since the service upon all the parties to said proceeding of the notice referred to in § 5403, and payment has been made of all damages and interest allowed by said commissioners, the court, upon motion of the petitioner, shall enter a final decree establishing the rights of said petitioner in the whole or any part of the lands so taken. A certified copy of said decree may be filed for record with the register of deeds of said county, and such decree shall be evidence, and the record thereof notice, of the title and rights of the petitioner therein set forth. (2536)

5412. Condemnation for state institutions—Powers of attorney general—Procedure—Award—The attorney general may, on behalf of the state, and for the use of any institution requiring for its uses such lands, give notice of his intention to apply for the appointment of three commissioners to appraise said real estate, and the damage for taking the same, to the district court in and for the county where such lands shall be situated, or to a judge of said court, giving a general description of the lands to be appraised or taken, and specifying the time and place of such application; which notice shall be served at least ten days before the time of such application upon all persons named in the petition as owners, and upon all occupants of such land, in the same manner as a summons in a civil action, in said court; provided, that if such owner be not a resident of the state or his place of residence be unknown to the attorney general, upon the filing of an affidavit by the attorney general stating that he believes that such owner is not a resident of the state and that he has mailed a copy of the notice to his place of residence, or that after diligent inquiry his place of residence cannot be ascertained by the affiant, then service may be made upon such owner by three weeks' published notice in any newspaper published in the county in which the land is situate. At the time and place named in said notice, the attorney general, for and on behalf of the state, may present an application to said district court or to a judge thereof, setting forth the name of the institution requiring said lands, and the general purposes for which the same are desired to be taken and particularly describing said lands, for the appointment of such commissioners, and thereupon the court, or judge thereof, may proceed to appoint three commissioners, who shall have cognizance of all cases named in such application, and shall have power to appraise the value of all such land, and the damages for the taking of the same; and said commissioners, before entering upon the duties of their office, shall severally take and subscribe an oath to the effect that they will faithfully perform their duty as such appraisers, without partiality, and to the best of their knowledge and ability, which oath shall be filed in the office of the clerk of the district court of the county in which the lands to be appraised shall be situate; and thereupon such commissioners shall proceed to examine the premises, in each lot or parcel of land separately, having given such notice as they may deem reasonable to the owner, owners or persons interested in said lands, and to the guardian of any minor or insane person, which notice shall be in writing, and shall be served on such owner, interested person or guardian, if such person shall be a resident of the county where such lands are situate;

and if such person or persons shall not reside in said county, then by publishing such notice in such newspaper as such commissioners may select, and for such time as they may choose; and at the time and place named in notice, the commissioners shall proceed, or a majority of them shall proceed, in each case or parcel of land, to an appraisal thereof, and of the damages sustained by reason of the taking and use of such land, and shall make award in writing of such damages and shall deliver one copy of such award, signed by the commissioners, or a majority of them, to the clerk of the district court in and for such county, to be by him filed in his office, and shall deliver another copy of such award to the attorney general, to be by him filed in his office. Upon the filing of such award it is hereby made the duty of the proper officers of said state to pay to the said parties in interest the amount thereof and in the event of appeal from such award, to pay to the said parties in interest the full amount of the final judgment that shall be rendered in said proceedings; provided, however, that upon the filing of said award of such commissioners with the said clerk of the district court of the county in which said premises are situate, the state, by its proper officers, may thereafter enter upon and take full and absolute possession of said property and appropriate the same to the use and purposes named in the application. The duty of the state officials to pay the amount of such award and final judgment to said parties in interest shall for all purposes be held and construed to be full and just compensation to the respective owners or the persons interested in the lands so acquired by such condemnation proceedings. In the event that no specific moneys are set apart in the state treasury for the payment of such award or said final judgment, it shall be and hereby is made the duty of the state treasurer to honor the requisition of the proper officials for the payment of said amount at the time of the entry of the final judgment in such proceedings. (G. S. 1894 § 4086, amended '05 c. 43 § 1)

Historical.—"An act to amend section 4086 and section 4089 of title 7 of chapter 38 of the General Statutes of 1894," etc.

Section 3 repeals inconsistent acts, etc.

G. S. 1894 §§ 4086, 4089, were 1874 c. 36 §§ 2, 5, which act was repealed by § 9437; the provisions of said § 4086 being incorporated in part in R. L. §§ 2524, 2526-2528 [5399, 5401-5403]. So far as the provisions of said amended sections differ from the Revised Laws, they are to be construed, by virtue of § 9398, as amendatory or supplementary.

5413. Same—Payment of award or judgment.—The award or the judgment rendered in case of appeal, shall be and remain a claim against the state, and shall be paid out of any money in the treasury not otherwise appropriated or pursuant to a special appropriation therefor, and in all cases such award if not appealed from, or the judgment rendered therein in case of appeal, shall be and the same is hereby declared sufficient security for value and damage by reason of taking such property for public use within the true meaning and intent of the constitution, and in the event of appeal from such award, the provision herein made for payment of the final judgment to be rendered in said action shall be taken and construed as full and just compensation to such owners of said lands. (G. S. 1894, § 4089, amended '05 c. 43 § 2)

5414. Sites for county buildings—Resolution.—Whenever the board of county commissioners of any county in this state at any regular or extra meeting shall adopt and enter in the minutes of its proceedings a resolution declaring that it is necessary to acquire for the use of said county any land, describing it, to be used as a site for a court house or other public building or for the purpose of enlarging the site of any such building already owned by said county, and said board of county commissioners is unable to purchase said lands at a reasonable price the title to any such land may be acquired by condemnation as hereinafter provided. ('05 c. 7 § 1)

5415. Same—Duty of county attorney—Appraisers.—Forthwith upon the adoption of such resolution the county auditor shall deliver a certified copy thereof to the county attorney whose duty it shall be, within ten days from the receipt thereof by him, to present to the district court of said county, or to a judge thereof, a petition signed by himself on behalf of said county setting out said action of said board of county commissioners and describing

and setting forth in said petition the lands proposed to be taken by said county and in a general way the purposes for which the same are desired and praying for the appointment of three appraisers to appraise said lands and the damage for the taking of the same, and thereupon said court shall have jurisdiction therein for all purposes, and shall then and there, or at any time within fifteen days thereafter, by order filed in the office of the clerk of the district court of said county appoint three appraisers, who shall be residents of said county, fix their compensation, which shall be paid by the county, and who shall have cognizance of the subject matter of said petition and power to appraise the value of all such land and damages for the taking of the same. ('05 c. 7 § 2)

5416. Same—Duty of appraisers—Notice—Award—Said appraisers, before entering upon the duties of their office, shall severally take and subscribe an oath to the effect that they will faithfully and impartially and to the best of their knowledge and ability, perform their duty as such appraisers, which oath shall then and there be filed in the office of the clerk of said district court. Thereupon said appraisers shall organize by electing a chairman and clerk and fix a time and place when and where they will meet and proceed to examine said real estate, which said time shall not be less than ten nor more than twenty days after the date of the order appointing said appraisers. Said chairman shall preside at, and said clerk shall keep minutes of the meetings of said appraisers. Said appraisers shall give or cause to be given to each owner or other person having an interest in said real estate, or their guardian or custodian, as the case may be, at least five days prior to the day of meeting named therein, a notice in writing signed by said appraisers of the time and place when and where said appraisers will meet and a general statement of the purposes thereof. Such notice shall be served personally on such owner, guardian or custodian if found at their usual place of abode, otherwise by delivering to and leaving with a person of suitable age and discretion at the usual place of abode of such owner, guardian or custodian, a copy thereof. If such owner, guardian or custodian shall not reside in said county, of which fact the certificate on information and belief under the seal of his office of the auditor of said county, shall be prima facie evidence; then in such case, service thereof shall be made by publishing such notice once in the official newspaper of such county at least seven days before the time fixed therein for said meeting. An affidavit of personal service or publication shall be prima facie evidence of the service of said notice. At the time and place named in such notice said appraisers shall, and a majority thereof may, proceed in the case of each parcel of real estate desire to be taken to an appraisal thereof and of the damage sustained by reason of the taking thereof by said county and shall make and sign in duplicate within sixty days from the date of the filing of the order appointing them an award in writing of such damages, and within said last mentioned time shall deliver the same to the clerk of the said district court and to the county auditor, respectively, to be filed by them in their respective offices. ('05 c. 7 § 3)

5417. Same—Appeal—Trial—Costs—Bond—Either party may appeal to the district court from such award at any time within thirty days from the date of the filing thereof in the office of the clerk of said court by filing with said clerk a notice of appeal signed by the party claiming the damage, or by the county auditor on behalf of the county, and in case of appeal by either party the clerk shall enter the appeal as an action in such court naming the owner of such land as plaintiff and the county auditor as defendant and thereafter said appeal shall be tried as other causes in said court are tried and judgment rendered thereon, except that the only question to be submitted to the jury, if the parties do not agree to try the whole cause to the court alone, shall be the question of damages. In case such an appeal shall be taken by the property owner and upon trial the award of the appraisers shall be raised, then said property owner shall recover costs and disbursements from the county, otherwise, such property owner shall pay costs and disbursements to the county. If such appeal shall be taken on behalf of the county and upon

trial the award shall be decreased then the property owner shall pay costs and disbursements to the county, otherwise said property owner shall recover costs and disbursements from the county. As a condition precedent to an appeal by a property owner, such property owner shall make, execute and file in the office of the clerk of said court a bond to said county in the penal sum of one hundred dollars with sufficient sureties to be approved by the clerk of said court, conditioned that said property owner shall prosecute his appeal with effect, pay all costs and disbursements adjudged against him and abide the order of the court therein, but no bond shall be required of any county on any appeal by it hereunder. ('05 c. 7 § 4)

5418. Same—Power of county board—Payment of award—At any time after the filing of the award of the appraisers, as hereinbefore provided, the board of county commissioners of said county may set aside by resolution entered upon its minutes, from the general revenue fund of said county a sum equal to the total amount assessed as damages by said appraisers and make the same payable on demand to the persons entitled thereto, which action by the said board of county commissioners is hereby declared to be sufficient security for the taking of such property for public use within the meaning of the constitution, and thereupon the taking of such land and the erection thereon of any building by said county shall not be delayed or prevented by the prosecution of any appeal, and said county and its officers and agents may at once thereafter enter upon and take possession of said property and appropriate the same to the use of said county. ('05 c. 7 § 5)

5419. Same—Award and judgment—How payable—The award of said appraisers if not appealed from, and the judgment rendered on appeal, shall be an absolute claim against said county and shall be paid from the general revenue fund thereof, on the warrant of the county auditor without further action by the board of county commissioners, and upon such payment the land involved shall become the absolute property of the county. ('05 c. 7 § 6)

5420. Same—Judgment roll—When judgment is rendered on appeal, the clerk of said court shall attach the application, all notices and proof of publication or service thereof, the oaths of said appraisers and the award, the notice of appeal, and the final judgments in the case, and the same shall constitute the judgment roll to be filed in the office of the clerk. ('05 c. 7 § 7)

5421. Same—Notice of lis pendens—At any time after the adoption of the resolution mentioned in section 1 [5414] of this act, said county, by the county attorney or county auditor, is hereby authorized to file in the office of the register of deeds of said county a notice of lis pendens, which said notice shall contain the names of the parties, the object of the proceeding and a description of the land involved, and it shall have the same effect and may be released in the same manner as is now provided by statute for the filing and relief of lis pendens in actions affecting the title of real property between private individuals. ('05 c. 7 § 8)

5422. Same—Certificate of payment—Record—Upon the payment of any award or judgment, the county attorney may make a certificate under the seal of his office as to such fact, expressly describing the land and reciting the fact of payment of the award or judgment in relation thereto and may file the same in the office of the register of deeds of said county for record. Said register of deeds shall record the same at the expense of the county, and such record shall be notice to all parties of the title of the county thereto, and may be read as evidence of such title in all the courts of this state, and the title to land acquired under this act shall be absolute in fee simple in the county instituting proceedings thereunder. ('05 c. 7 § 9)

5423. Railroad built without right—Action—Whenever a railroad shall have been built across any tract of land, no action shall be commenced for the recovery of such land while proceedings are pending under the law to ascertain and assess the damages. Otherwise, any person damaged by such taking, and not already compensated, may bring an action to recover the land, with or without damages for withholding the same, against the corporation or individual operating or maintaining said railroad, whether the road

was constructed upon such land with the acquiescence of the owner or not. (2537)

28-503, 11+73; 33-419, 421, 23+854; 45-366, 48+191; 46-321, 329, 48+1129; 51-15, 52+977, 38 Am. St. Rep. 468; 61-502, 506, 63+1035; 63-384, 65+652, 31 L. R. A. 553.

5424. Answer—Ascertainment of damages—The defendant in such action, by answer, may admit and allege the taking of such land for railroad purposes, that compensation has not been made to plaintiff therefor, and that defendant is ready and willing to pay such compensation, and to have the amount thereof assessed by the jury trying such action, if plaintiff's right to recover the land be established. And, when such answer is made, the jury shall find whether the plaintiff is entitled to recover the land, and, if so, the amount of compensation due him for the taking and perpetual use thereof for railroad purposes: Provided, that, if it appear that the land was so taken and appropriated with the consent and acquiescence of the owner, such owner shall recover no rents or profits which accrued prior to demand for compensation. (2538)

28-503, 11+73; 30-100, 14+460; 35-404, 407, 29+161; 40-132, 41+156; 42-170, 43+848; 42-245, 44+10; 54-157, 55+928; 84-179, 87+606.

5425. Judgment and execution—Upon a verdict that plaintiff is entitled to recover the land, and for the amount of compensation due him as provided in § 5424, judgment shall be rendered, in substance, that plaintiff have and recover from the defendant the land in suit, or, in lieu thereof, the compensation fixed by the jury, with costs and disbursements and reasonable attorney's fees as determined by the court. If such amounts be not paid within thirty days after entry of the judgment, execution shall issue for delivery of the possession of such land to plaintiff, and for the costs, disbursements, and attorney's fees aforesaid out of any property of the defendant. (2539)

42-179, 43+966; 63-384, 65+652, 31 L. R. A. 553; 86-218, 90+393, 1133.

5426. Procedure when no answer is made, etc.—If no answer be interposed, or if no offer be made by answer to pay the compensation to be so ascertained, the plaintiff, if he establish his right to the land, shall have judgment for the immediate possession thereof, and for such damages, rents, and profits as may be alleged and found, with costs and disbursements, and reasonable attorney's fees to be allowed by the court, upon which judgment execution shall issue as in the case of other judgments for the possession of real estate. Except as herein otherwise provided, such action shall be governed by the same rules as to practice, procedure, new trials, and appeals as are other actions for the recovery of land; but §§ 4430, 4431, shall not apply thereto. (2540)

The sections referred to (R. L. §§ 4430, 4431), providing for a second trial in ejectment, were repealed by 1911 c. 139.

63-384, 65+652, 31 L. R. A. 553; 86-218, 90+393, 1133.

5427. Validity of railroad condemnation—Action—When an owner refuses or neglects to receive an award made in a proceeding to condemn land for railroad purposes, on the ground that any of the proceedings are illegal, and no appeal from the award has been taken, the railroad company or its receiver may bring an action to determine the validity of such proceedings. If such validity be denied by the answer, and that issue be determined against the defendant, judgment shall be entered accordingly, but he shall not thereby be debarred from his right to such award. If it be determined that such proceedings are invalid, and that the defendant is an owner, the present value of his interest in the land shall be ascertained. Thereupon judgment shall be entered that such interest be appropriated for such railroad purposes, if within sixty days thereafter the plaintiff pay to the defendant, or into court, for the benefit of the parties thereto entitled, the compensation adjudged, with interest, costs, and disbursements, and that in default of such payment the action be dismissed. Such payment shall vest in the company, or in the receiver for its benefit, all the right, title, and interest of the defendant in such land, as fully as if the same had been acquired by the condemnation proceedings; and upon such payment the court may enter final judgment to that effect. (2541)

5428. **Same—Procedure, etc.**—In such action the plaintiff may join as defendants all persons having or claiming any interest in the land, and may in the same complaint include several tracts of land owned or claimed by different persons, but the owners of different tracts may demand separate trials. Upon all issues of fact either party shall be entitled to a jury trial, and the action shall be governed by the rules applicable to an action to determine adverse claims to real estate, except that §§ 4430, 4431 shall not apply thereto, and the plaintiff cannot recover costs or disbursements. (2542)

As to R. L. §§ 4430, 4431, see note under § 5426.

CHAPTER 42

MILLS AND DAMS

WATER POWERS

5429. **Dams—For what purposes—Eminent domain**—Whenever any person, in order to create or improve a water power for milling or manufacturing purposes, shall desire to erect and maintain upon his own land a dam across any stream or other watercourse not navigable, or to raise or extend any such dam already erected, whereby lands owned by other persons shall be overflowed or otherwise damaged, he may acquire the right so to do by causing such damages to be ascertained and paid as prescribed in chapter 41. But no such dam shall be erected, raised, or maintained to the injury of any water power previously improved. (2543)

The provisions of R. L. 1905 c. 41 are included in chapter 41 hereof. 10-30, 15; 14-365, 282; 18-155, 139; 24-25.

Cited (101-197, 112+395, 11 L. R. A. [N. S.] 105).

This chapter continues in force Pub. St. 1849-1858 c. 129 (113-33, 128+817, 32 L. R. A. [N. S.] 59, Ann. Cas. 1912A, 108).

5430. **Nonuser—Forfeiture—Exceptions**—Whenever the right to erect, raise, or extend any such dam shall have been acquired hereunder, the improvement shall be commenced within one year, and completed and the water power applied to the purpose stated in the petition within three years, after such acquisition; and if any such dam, or the machinery connected therewith, be destroyed, the rebuilding thereof shall be commenced and completed within the same periods after such destruction. Failure to comply with the foregoing requirements shall work a forfeiture of all rights so acquired, and a like forfeiture shall result from a failure to operate such mill or machinery, after the same is erected, for one consecutive year: Provided, that if the owner be an infant, or be otherwise legally disabled, the periods herein named shall be allowed after the disability is removed. (2544)

5431. **Highways—Overflow, etc.**—Whenever it shall be necessary, in creating, improving, or operating any water power, to overflow, obstruct, or impair any public street or other highway, or to dig any raceway therein, the right so to do may be granted by the town board or common council, as the case may be, of the town or municipality in which the part of such highway to be affected lies. Such grant shall be made upon petition, and by an order, defining all the terms and conditions thereof, passed at a meeting of the board or council called to consider said petition, of which meeting, and the purpose thereof, ten days' posted notice shall have been given. Testimony may be taken, and all expenses of the meeting and examination shall be paid by the petitioner, whether his prayer be granted or refused. (2545)

5432. **Repairs—Servient estate—Damages**—Whenever the right to overflow the land of another by means of a dam shall have been acquired, either by condemnation or contract, and thereafter, by reason of the breaking away of the banks on said land, the waters of the stream shall be diverted, the owner of the dam may enter upon the lands of such person and repair said banks so as to restore the previous flow of such stream. All damages caused by such entry and repairs shall be paid by the owner of the dam. (2546)