tions result from extraordinary or unprecedented rainfall and run-off. Whether the water in a state of nature would have been substantially the same as the water under regulation or control is an engineering rather than legal question. Whether rainfall and run-off conditions are unprecedented or extraordinary requires an examination of factual circumstances and comparison with prior conditions as disclosed by public records or other reliable sources. OAG April 21, 1948 (983-D).

CHAPTER 117

EMINENT DOMAIN, DEPOSITORIES

NOTE: Excepted from the Rules of Civil Procedure insofar as inconsistent or in conflict therewith.

NOTE: Prior to the enactment of R.L. 1905, Chapter 41, each act authorizing condemnation of land set forth its own procedure. Chapter 117 originated with the 1905 Revision. The original chapter was a general statute of procedure and did not grant any right of eminent domain in any specific instance. Since 1905 certain substantive laws have been added to the chapter.

117.01 RIGHT OF EMINENT DOMAIN

"Public use" within constitutionary and statutory limitations that private property may be taken by eminent domain only for public use. 31 MLR 197.

The federal government's liability to land owners on non-navigable streams upon raising the water level. 32 MLR 844.

Police power involves regulations of use of property without appropriation thereof and the power of eminent domain a taking of the property. The public authorizing, possessing both powers, may use its discretion as to which procedure to use to accomplish its purpose. State ex rel v Minneapolis-St. Paul Commission, 223 M 175, 26 NW(2d) 718.

Where a leasehold and a building on the leased premises belonging to the lessee are taken under right of eminent domain, the compensation for the taking should be the market value of the property taken as a unit and the sum of the values of the parts thereof considered separately. An offer to sell property may be proved against the owner as an admission of its value at the time of the offer. Minneapolis-St. Paul Airports Commission v Hedberg-Freidheim Co., 226 M 282, 32 NW(2d) 569.

In condemnation proceedings the value of the land is usually determined as of the date of the commissioner's award as reported; but in the instant case to acquire property for a work relief and flood control project across the Minnesota River at the south end of Big Stone Lake, the charge of the trial court directing the jury to find damages as of the date of completion of the dam and project was not prejudicial. The right of sequestration in this case is based upon constitutional rights and does not require a period of limitation other than filing a final certificate under section 117.20(4). The statute of limitations of Minnesota and South Dakota in contract action is not applicable in this case. State ex rel v Bentley, 231 M 531, 45 NW(2d) 185.

Public drainage proceedings under M.S., Chapter 106 may invoke the power of eminent domain. Private property taken or damaged is an exercise of that power. An easement for a gas pipe-line is property. Section 106.151 requires compensation to owners of private property damaged by reason of construction of a county ditch. Where a county ditch will cross easement and private right of way of gas pipe-line company, necessitating the relocation of its gas transmission lines at the points of intersection, company is entitled to damages for cost of reconstructing pipe-line to accommodate new ditch. It was error to dismiss the pipe-line company's appeal to the district court from an order of the county board establishing the county ditch and

awarding no damages to the pipe-line company. In re Petition of Dreosch, 233 M 274, 47 NW(2d) 106.

Lands may not be taken by eminent domain unless the taking is necessary, but there need not be a showing of indispensable necessity. There must be a showing that the proposed taking is reasonably necessary or convenient in the instant case. The right of eminent domain rests upon public need. Northern States Power Co. v Oslund, 236 M 135, 51 NW(2d) 808.

Where the property is taken for public use in condemnation proceedings, any evidence is competent and any fact may properly be considered which legitimately bears on the market value of the property. Where it is apparent from the record that because of the particular location of the property condemned there had been almost continuous rental demands for rooms in the house located thereon, it was error to refuse to admit evidence of the rental value of the rooms. The court did not err in allowing evidence of salvage and investment value under the facts and circumstances of the case. Regents of University of Minnesota v Irwin, ... M ....., 57 NW(2d) 625.

In proceedings authorized by section 160.02, a town in acquiring a right of way for a town road initiates proceedings through the town board by a resolution adopted by the board setting forth the necessity for the road and thereafter proceed as prescribed in Chapter 117. OAG Sept. 5, 1946 (817-N).

Property owned by political subdivision and devoted to public use cannot be condemned by another political subdivision for a different use; but if land within the city limits and owned by the county is not devoted to a public use the city may acquire the property for a public purpose exercising the power of eminent domain. OAG April 22, 1947 (59-A-4).

Where a village owns an easement in an alley, the fee being in the abutting owners, if the village desires to use the alley for other than alley purposes, it should purchase the right of the abutting owners or take the rights by condemnation under chapter 117, before vacating the alley. OAG Nov. 4, 1947 (396-G-1).

In condemnation proceedings conducted for and on behalf of a school district the title to the land vests in the district as of the date of the filing of the award. OAG Dec. 24, 1947 (474-E-5).

The right of eminent domain is based upon necessity. A school district may not condemn land which is not presently needed, but which they believe may be needed ten years hence. OAG Feb. 4, 1948 (817-F).

When a set-back line is established by a city and the right of the owner to erect structures between street and line is prohibited, the owner may collect just compensation for the amount of his damage. OAG April 26, 1948 (59-A-9).

Unless the land used for recreational activities is a part of a school site, such land may not be acquired by a school district through eminent domain; nor can the landowner be required against his will to convey the land by deed except through judgment of the court. OAG Aug. 10, 1948 (622-B).

A school board has the right to make a contract with a public utility for the furnishing of natural gas as a means of heating the school buildings, and while the school board does not have the power to grant an easement and has no power to lease its real property, if the erection of a small building and installation of equipment therein is necessary to the furnishing of the gas, it might be considered merely incidental to the ultimate purpose to be accomplished. A service contract properly drawn may be entered into between the school board and the utility company which would be legal and effectual, notwithstanding that the contract would serve the same purposes as an easement or a lease. The contract must be so drawn, however, as not to create an estate in property. OAG Sept. 15, 1948 (622-A-7).

The right of way for a new road may be acquired by a village through purchase, gift, or condemnation. OAG Feb. 10, 1949 (377-D).

Eminent domain proceedings are not a civil action, and section 546.39 does not apply to dismissal of the proceedings. If the plaintiff school district desires to dis-

continue the proceedings in eminent domain, it should petition the court for permission to discontinue the action. OAG Sept. 26, 1950 (817-O).

Under the power of eminent domain, a school district may take needed property from a county agricultural society; but the legislature has not directly or by implication, granted like authority to a city. OAG Aug. 4, 1952 (817-F).

Where the city charter of a city provides procedure for acquiring property by eminent domain the provisions of M.S.A. 1949, Chapter 117, do not apply to proceedings instituted by such cities. OAG June 9, 1952 (817-C).

117.015 JOINT ACQUISITION OF LAND

HISTORY. 1949 c 271 s 1-5.

117.02 DEFINITIONS

The word "taking" includes the erection of structures which may later reduce the value of ownership. State ex rel v Bentley, 231 M 531, 45 NW(2d) 185.

117.03 PROCEEDINGS, BY WHOM INSTITUTED

Where a leasehold and a building on the leased premises belonging to the lessee are taken under the right of eminent domain, the compensation for the taking should be the market value of the property taken as a unit and not the sum of the values of the parts thereof considered separately, even though as between the lessor and the lessee the building is regarded as personalty; and an offer to sell the property may be proved against the owner as an admission of its value at or near the time of the offer. Minneapolis-St. Paul Airports Commission v Hedberg-Freidheim Co., 226 M 282, 32 NW(2d) 569.

Section 106.151 requires compensation to owners of private property damaged by reason of construction of a county ditch; and where the county ditch will cross an easement and private right-of-way of a gas pipe-line company, the company is entitled to damage for the cost of reconstructing the pipe lines to accommodate the new ditch. Petition of Dreosch, 233 M 274, 47 NW(2d) 106.

The overflowing of land by backing water onto it from dams built below constitutes a taking within the meaning of the Constitution and when real estate is actually invaded by superinduced additions of water, earth, sand or other material so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the constitution. The land may be taken not only to the extent of the actual flooding but also as to the additional extent that the flooding water by percolation raised the water table so as to soak the land to a degree and for a sufficient duration to destroy its agricultural value. Nelson v Wilson, ... M ....., 58 NW(2d) 330.

Where lands are condemned for county purposes the lien for real estate taxes accrues from and including May 1 in the year in which they are levied. When an award was made for damages sustained as a result of widening a highway, the county was properly made a party to the condemnation proceedings and the county treasurer should not endorse the check to the fee owner of the property until delinquent taxes constituting a lien on the property are paid. OAG April 28, 1949 (229-A-11).

117.05 PETITION AND NOTICE

Jurisdiction of the supreme court may not be enlarged or conferred for consent or stipulation of the litigants. State ex rel v Bentley, 224 M 244, 28 NW(2d) 179.

In proceedings by a city, under the provisions of chapter 117, the final judgment binds all persons having any right, title or interest in the land condemned provided proper service has been had or the parties have entered and appealed voluntarily. OAG April 22, 1947 (59-A-4).

Where lands are condemned for county purposes the lien for real estate taxes accrues from and including May 1 in the year in which they are levied. When an

award was made for damages sustained as a result of widening a highway, the county was properly made a party to the condemnation proceedings and the county treasurer should not endorse the check to the fee owner of the property until delinquent taxes constituting a lien on the property are paid. OAG April 28, 1949 (229-A-11).

117.07 COURT TO APPOINT COMMISSIONERS OF APPRAISAL

HISTORY. 1857 c 39 s 3; 1865 c 6 s 9; 1872 c 53 s 4; 1874 c 36 s 2; 1879 c 35 s 1; 1879 c 80 s 3; 1889 c 65 s 7.

Where adjoining landowners jointly lay out a way between their lands, each devoting a part of his land to that purpose, the use of the way by the respective parties, for the prescriptive period, raises a presumption of the granting of an easement on the theory that each party by his use thereof has continuously asserted an adverse right in a portion of the way lying on the other's land. The parol conveyance of an easement, whether it be pursuant to a fiction of a lost grant or pursuant to an actual parol agreement void under the statute of frauds, will, if followed by an adverse user for the prescriptive period, establish an easement by prescription. Alstad v Boyer, 228 M 307, 37 NW(2d) 372.

Although lands may not be taken by eminent domain unless such taking appears to be necessary, it is well settled in Minnesota that there need be no showing of absolute or indispensable necessity, but only that the proposed taking is reasonably necessary or convenient for the furtherance of the end in view. This rule of reasonable necessity or convenience is made expressly applicable to a public service corporation, which in the exercise of the right of eminent domain for the furtherance of its corporate public purpose is required by section 117.07, to establish that its proposed taking of the land is necessary. Northern States Power Co. v Oslund, 236 M 135, 51 NW(2d) 808.

Without a vote of the people a school district cannot convey a strip of land to a village in return for a part of the street. The village, however, may acquire the strip by eminent domain proceedings wherein the damage to a school district may be determined. OAG June 4, 1947 (622-A-8).

A city owning land for park purposes cannot grant an easement to a third party along, upon, or over such land. OAG Dec. 16, 1947 (59-A-40).

County may go beyond its right-of-way limits where it has permission or easement to do so, for the purpose of back sloping where a utility has a pre-existing easement upon the lands where the back sloping will be made; a subsequent easement to the county for such back sloping is subject to the utility easement; county may pay a utility for the cost of moving its poles upon or from premises where a utility has an easement for its land. OAG March 25, 1948 (624-C-14).

Where the landowner agreed that the town road might pass over his land the board was without power to agree to forever maintain a cattle pass. If any change of conditions was proposed which would deprive the owner of access from one side of the road to the other, the landowner was entitled to compensation. OAG Sept. 27, 1951 (327-A-2).

117.08 APPRAISERS, POWERS AND DUTIES

HISTORY. 1857 c 39 s 7, 8; 1865 c 6 s 11; 1872 c 53 s 6; 1874 c 36 s 2; 1879 c 35 s 2; 1889 c 65 s 8; 1953 c 751 s 1.

117.09 REPORT; NOTICE

HISTORY. 1857 c 39 s 8; 1865 c 6 s 12; 1872 c 36 s 2; 1874 c 36 s 2; 1889 c 65 s 9.

117.10 PAYMENT; TENDER, DEPOSIT IN COURT

HISTORY. 1857 c 39 s 9; 1865 c 6 s 13; 1868 c 53 s 1; 1877 c 85 s 1; 1889 c 65 s 10, 11.

When property condemned is subject to a tax lien for unpaid current taxes, the county should be made a party to the proceedings, or an award should be paid to the clerk of the district court. OAG Jan. 14, 1953 (817-F).

The inclusion of the name of an attorney in a state warrant issued in payment of an award, verdict, or settlement, in the condemnation proceedings, who has appeared for a respondent in the proceeding, is a proper, effective and salutary safeguard against any liability on the part of the state arising out of an attorney's statutory lien. OAG March 9, 1953 (229-D-3).

117.12 ACCRUING TAXES

In proceedings in the nature of an eminent domain conducted on the petition of a school district the title vests as of the date of filing of the award. If the 1947 taxes were imposed after filing of the petition for condemnation, and if they are paid by the owner before the award is paid, they will be added to the amount of the award and interest thereon will be paid therewith. If the owner does not pay the taxes under such circumstances and the taxes become a lien before the title passes, the school district takes subject to the lien. OAG Dec. 24, 1947 (474-E-5).

If taxes are paid by the owner before the payment of an award, the amount of the taxes should be added to the amount of the award. OAG Jan. 14, 1953 (817-F).

117.133 JURY TRIAL

HISTORY. 1951 c 623 s 1.

117.14 TRIAL, COSTS

HISTORY. 1857 c 39 s 13; 1865 c 6 s 17; 1874 c 36 s 3; 1889 c 65 s 12; 1953 c 751 s 2.

Where the district court on appeal of landowners from an award for realty in proceedings by commissioners appointed by the Minneapolis park board did not set aside but confirmed the proceedings, and an award by the appraisers, appointed by the court, the denial of the landowners' motions to revise the order was not a final and appealable order. Kolb v City of Minneapolis, 229 M 483, 40 NW(2d) 619.

Where property is taken for public use in condemnation proceedings any evidence is competent and in fact may properly be considered which legitimately bears on the market value of the property; and where it was apparent that because of the particular location of the property condemned there had been almost continuous rental demand for rooms in the house located thereon, it was error to refuse to admit evidence of the rental value of the rooms. Regents of the University of Minnesota v Irwin, ... M ....., 57 NW(2d) 625.

117.15 JUDGMENT; POSSESSION

Where condemnation proceedings are initiated for the acquisition of lands for school purposes, upon an award having been filed, the school district is entitled to take possession of the realty. OAG March 21, 1952 (817-F).

117.16 INTEREST; AWARD, WHEN PAYABLE; DISMISSAL

The order confirming a damage award in a proceeding to establish a judicial highway was a final adjudication of the county's right to take the land, and the landowner's right to receive the award with legal interest accruing until final payment. Blue Earth County v Williams, 196 M 501, 265 NW 329.

The Minneapolis city charter contains the provisions for the abandonment of condemnation proceedings as to land originally included therein. Upon such abandonment the landowner has an adequate remedy by action to recover consequential damages and may not insist upon the determination of such damages in the condemnation proceedings; and has no right to recover expenses, including attorney's fees incurred in protecting his rights in the condemnation proceedings, except to the extent

provided by the city charter. Gershone v City of Minneapolis, ... M ....., 60 NW(2d) 23.

All damages allowed under the eminent domain chapter "shall bear interest from the time of the filing of the commissioner's report;" but in the absence of appeal or cross appeal on the part of intervenors in connection with the date of interest computation, the date used by the trial court will stand. State v Bentley, 233 M 531, 45 NW(2d) 185.

This section applies in proceedings by a school district. OAG Oct. 1, 1952 (817-A).

117.19 PROCEEDINGS IN CERTAIN CASES, NOTICE FILED

Notice of completion of condemnation proceeding must be filed in accordance with the statute. A fee should be paid to the register of deeds. A copy of the supervisor's road order is not sufficient. OAG Nov. 4, 1947 (377-B-10-D).

A city cannot condemn property dedicated for use as a public square and thereby acquire the right to use it as a high school athletic field. OAG April 27, 1949 (59-A-14).

An instrument conveying interest in land to a municipality, which has been certified to by the county auditor and recorded with the register of deeds, satisfied the requirements of section 117.19. OAG April 8, 1953 (373-B-17-C).

Where the village of Minneota, in 1907, purchased a strip of land 33 feet wide and 1500 feet long, running along its border, which was never dedicated for street purposes but which has been called Market Street and used as a roadway without repair, and on which the village now desires to build an open ditch so as to eliminate a natural water-course now doing damage, the so-called Market Street having been dedicated by common law to street purposes, may be vacated only by statutory procedure for vacancy and the proceedings must be instituted by a majority of owners abutting on the alleged street. The building of a ditch thereon would be regulated by the provision of section 429.011. The abutting owners being a farmer who owns the country side of the street and the eight owners of property on the village side of the alleged street must be compensated according to the provisions of section 117.19. OAG Sept. 28, 1953 (396-C-18).

117.20 PROCEEDINGS BY STATE, ITS AGENCIES, OR POLITICAL SUBDIVISIONS

HISTORY. 1927 c 237 s 1; 1941 c 307 s 1; 1947 c 312 s 1; 1953 c 164 s 1.

Where a leasehold and a building on the leased premises belonging to the lessee are taken under the right of eminent domain, the compensation for the taking should be the market value of the property taken as a unit and not the sum of the values of the parts thereof considered separately, even though as between the lessor and the lessee the building is regarded as personalty; and an offer to sell the property may be proved against the owner as an admission of its value at or near the time of the offer. Minneapolis-St. Paul Airports Commission v Hedberg-Freidheim Co., 226 M 282, 32 NW(2d) 569.

Evidence being sufficient to sustain trial court's finding that no binding contract had been made whereby University was to pay taxes on property acquired by condemnation and deduct such payment from verdict in favor of property owner, such finding must be upheld on appeal. Taxes on real estate do not constitute personal obligation of landowner, and one voluntarily paying taxes on land owned by another cannot recover from the owner the amount so paid. Payment of tax lien prior to hearing in district court on appeal from award of commissioners in condemnation proceedings had the effect of discharging the lien therefor on land involved so that same was not in effect at time of such hearing. Where in trial below, state contended that payment of taxes was made by University pursuant to contract requiring it to make such payments for benefit of property owner, it cannot here claim that said payments were made under mistake of fact so as to entitle it to restitution therefor from property owner. State v Barrett, 228 M 96, 36 NW(2d) 591.

In proceedings arising out of intervention of petitioners in a 1935 condemnation, the law of the case was determined by State ex rel v Bentley, 216 M 146, and 224 M 244, where the final certificate was not signed as provided for in section 117.20 (4). The evidence sustained a finding that a taking had occurred up to the maximum water level of the dam up to 976. State v Bentley, 231 M 531, 45 NW(2d) 185.

Under section 360.032, the county may institute eminent domain proceedings for condemnation of land for airport purposes; and such proceedings are governed by the provisions of section 117.20. OAG Feb. 16, 1948 (234-B).

The Red Lake drainage and conservancy district is a state agency and entitled to all the powers relating to the eminent domain proceedings provided under section 117.20. OAG June 21, 1948 (817-D).

The city council may use moneys in the general revenue fund not otherwise appropriated to pay damages or compensation for lands taken in the establishment of a public street even though as collateral to the purpose of establishing a right-of-way a public utility has authority to extend its operations of the new street thus acquired; but the land owner whose property is taken should receive as compensation the difference between the fair and reasonable value of his property before and after the taking. Whether public need and necessity exists to sustain the acquisition of property by the exercise of the power of eminent domain is a legislative or political question for the determination of the body having the power to institute the proceedings. OAG July 12, 1948 (59-A-22).

An abutting property owner's right of access to public highway is an interest in land and an incident in the ownership thereof, subject to condemnation under the law of eminent domain, which may be taken thereunder for public use by the state in its sovereign capacity upon the payment of proper compensation to the owner. OAG June 17, 1949 (817-M).

Where a village initiates condemnation proceedings for the extension of a road within the city limits possession of the property may be taken by the condemning municipality as soon as an award has been made for this notwithstanding there is an appeal contesting the amount of the award. OAG Aug. 17, 1949 (817-F).

The city of Crookston is an agency or political subdivision of the state within the meaning of section 117.20. OAG July 9, 1951 (817-F).

Where condemnation proceedings have been initiated for the acquisition of land for school purposes the school district is entitled to take possession of the real estate as soon as an award has been filed therein. OAG March 21, 1952 (817-F).

Notice as prescribed by section 117.19 having been complied with, the final certificate as required by section 117.20 (4), when certified by the county auditor and recorded with the register of deeds, specifies the requirements of section 117.19 in a conveyance of an easement to a village for public services. OAG April 8, 1953 (373-B-17-C).

117.27 AWARD AND JUDGMENT, HOW PAYABLE

Liability to landowners on a non-navigable stream for a raising of the water level. 32 MLR 844.

117.34 JUDGMENT AND EXECUTION

HISTORY. 1875 c 98 s 4-6; 1895 c 52.

117.36 VALIDITY OF RAILROAD CONDEMNATION; ACTION

HISTORY. 1879 c 77 s 1-3.

117.37 PROCEDURE

HISTORY. 1879 c 77 s 2, 4, 5; 1893 c 60; 1895 c 60.

Where the proposed street extended over and across the railroad right-of-way for depot grounds, the burden to show that, if so extended, it would essentially impair and destroy the use of the right-of-way for railway purposes was upon the railway company; but the burden of proof as to the propriety and necessity of the proposed street is upon the municipality. Minneapolis & St. Louis v Village of Hartland, 85 M 76, 88 NW 422.

117.38 ACQUISITION OF LAND FOR CERTAIN PURPOSES

Liability to landowners on a non-navigable stream for a raising of the water level. 32 MLR 844.

Where, to facilitate the construction of a federal dam, the order of condemnation required owners of farmlands to deliver possession on April 9, 1948, and where the taking of such lands just prior to the commencement of the crop season created a hardship on the former owners, an amendment to the order authorizing the owners to reside upon, pay rent, and operate the lands until December 1, 1948, was reasonable and legal when the occupation of the lands until December 1, 1948, did not impede the work on the federal project. United States v 6576 Acres of Land, 77 F. Supp. 244.

If a railroad constructs a ditch for its own benefit it must pay the cost of construction of the bridge for the state aid road over the bridge. OAG May 28, 1948 (642-D-9).

A village owns land outside its limits whereon is located a spring, the waters of which constitute a water course flowing into a creek. No use has ever been made of this water course by riparian owners. The right of a riparian owner to the uninterrupted and full use of the water as it flows naturally past his land is a natural but not absolute right, and is qualified and limited by the existence of rights in others, and hence liable to be modified or abridged by the reasonable use of the stream by others. The owner of land upon which the spring arises may use the water but may not divert downstream owners of all use thereof. A municipality may apply the water of a navigable stream to public use but is without right to divert all or part of such water from the stream without returning them thereto. In practice, a village may not divert water unless the right is obtained through the power of eminent domain involving payment to the proprietors as may be determined in such proceedings. OAG July 21, 1948 (273-A-12).

CHAPTER 118

DEPOSITORIES OF PUBLIC FUNDS

NOTE: Laws 1925, Chapter 173, Section 1, as amended, supersedes the provisions of Laws 1909, Chapter 362, Section 1; Laws 1919, Chapter 419, Section 6; Laws 1919, Chapter 423; and Laws 1921, Chapter 313.

118.01 DEPOSITORY BONDS

Bonds issued by the county for a hospital, payment of which bonds is to come from a special real estate tax levy on real estate, may be accepted as security for the county's deposits in the bank provided the bonds are regularly issued in accordance with the statutes. OAG Jan. 9, 1948 (140-F-4).

The duty of approving collateral furnished by county depositories as security for county deposits in the depositories rests upon the governing board or the county board rather than upon the board of audit. OAG May 7, 1948 (140-F-2).

Statute provides that a duly designated depository bank may in lieu of a bond deposit, such bonds, certificates of indebtedness, or warrants, except bonds secured