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NEBRASKA PROCEDURE IN EMINENT DOMAIN

Harold S. Salter*

Before any highway program may leave the planning stage and enter the construction phase, the State must first secure the necessary right-of-way. It is here, in condemnation, that the attorney normally becomes first concerned with highway construction, for it is here that the landowner suddenly realizes his need for counsel. In the following article, the author, Chief Counsel of the Nebraska Department of Roads, outlines the Nebraska procedures in eminent domain, giving many authoritative citations from both Nebraska statutes and case law. The attorney who finds himself concerned in any way with condemnation procedure in Nebraska will find the article to be excellent reading.

The Editors

I. INTRODUCTION.

Securing right-of-way for the construction of an Interstate Highway across Nebraska raises no new problems that do not presently exist in securing right-of-way for other State Highways. But the problems are magnified on the "Interstate" route and where only one or two special problems must normally be met in securing right-of-way through a property, on the "Interstate" there are usually four or five special problems on each property. The "Interstate" differs from our other State highways in that it is of much greater width; its maximum grade is 3% rather than 5%, resulting in deeper cuts and higher fills; there is absolutely no direct access to the highway from adjoining properties; it is all new right of way, as distinguished from merely widening an existing right-of-way; and it will go through or near the State's two largest cities and many of her other larger communities. This last fact is exceedingly important. Past experience has shown that securing right-of-way on the outskirts of even small communities raises difficulties that are not met in strictly rural areas or indeed in the city itself, this fringe area not having definitely established real estate values and not being subject to either a

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rural or a city valuation in the owners, the State representatives, or an appraiser's opinion.

This multiplying of problems in the securing of right-of-way has resulted in a very high percentage of condemnations on the "Interstate", and is focusing eminent domain and its procedure upon the consciousness of the lawyers in the areas through which the "Interstate" passes. This rise in the percentage of condemnation proceedings results because of an increase in degree of each of the elements that usually confront the securing of high-of-way for highway purposes. There is usually more land taken for the "Interstate" with greater damage to the remainder and the lack of access is still unfamiliar and contrary to our previous thinking and experience. The fact that it is all new location rather than mere widening results in large segregated areas in the land not being taken; going through the fringe area of a town or city results in honest differences of opinion of value, the differences being as much as ten or fifteen to one. All of these factors help overcome the landowners nature reluctance to allow his differences with the right-of-way buyer to be settled by legal process. The buyer has his difficulties in attempting to reconcile the need of keeping the costs down against the desire of many landowners to secure easy State and Federal money, and the needs of consistency against the needs of fairness.

In far away times the situation was resolved more simply, the first highway right-of-way was met by a simple decree of King Sennacherib. This ancient monarch of Assyria ruled that any person whose property encroached upon the seventy-eight foot width of the Royal Road should be put to death by impalation upon a pole erected in front of his house. For the reader unacquainted with either King Sennacherib¹ or the Royal Road, it should be explained that in the time of the King, 705 - 681 BC., this 1755 mile roadway extending from Susa above the Persian Gulf to the west coast of Asia Minor, was the lifeline not of Assyria but of most of the then known world as well.

The new Interstate System of Highways will have an impact on our transportation system by building, for the first time since the days of the Roman Empire, a system of roads equal to traffic needs. Indeed, only in two periods of history have highways failed to be the lifeline for all but a few small island nations. Once, when by decadence nearly all travel and commerce was so stilled that the period is remembered as the Dark Ages. The

¹ The Holy Bible, 2 Kings 18:13.

other, the short space of time a century ago when railroad traffic gained ascendancy over the public road.

While the Interstate Highway System will be of major importance to this nation, through economic, military, pleasure, and convenience factors, it raises numerous problems in procuring of right-of-way, resulting in scores of condemnation proceedings. Hence, at this time, a review of the law of Nebraska regarding eminent domain procedure is most timely.

Of necessity, any discussion of eminent domain procedure in Nebraska must begin with Article I, Section 21 of the Nebraska Constitution, which states: "The property of no person shall be taken or damaged for public use without just compensation therefor". This provision is not, and under no reasonable interpretation may be considered, a grant of authority to the government. It is, rather, a provision of limitation which does not deny the right of the government to take or damage private property for a public use, but requires that the government shall give "just compensation" when such acquisition or damage occurs. Except in cases of special types of ownership, this provision and the "due process" clause² are the only constitutional provisions with direct bearing upon eminent domain procedure. The bulk of the procedure has been established to fulfill the mandate of these two constitutional provisions.

II. PROCEDURES IN GENERAL

In 1951, the Nebraska Legislature enacted L.B. 146 which replaced varied condemnation methods for cities, counties, railroads, and highways, etc. with a uniform condemnation procedure. The first twenty-four sections of L.B. 146 are now sections 76-701 to 76-724 of the Revised Statutes of 1943. There remain certain exceptions to the uniform method, such as for condemnation of a public utility giving existing service³ and condemnation of public school lands,⁴ but the procedure for the public taking of an individual's land, or that of the usual private corporation, for highway purposes is as set out in these twenty-four sections.

Before considering the statutory provisions, attention should first be directed to the fact that the procedure outlined in the statutes is primarily designed to afford a method of *taking prop-*

² Neb. Const., Art. I, § 3.

³ Neb. Rev. Stat., § 76-703 (Reissue 1958).

⁴ Neb. Rev. Stat., §§ 72-224.01 to 72-224.04 (Reissue 1958).

erty, as distinguished from *damaging* property. An early case held that the statutory method for assessing damages for right-of-way did not apply where the property was damaged, but no portion was taken.⁵ Of course, this early decision was years before the present uniform act, but there is no reason to believe that the uniform act changes the case rule, particularly in view of the fact that section 76-705, which provides for "reverse" condemnation by the landowner, includes the words "... in addition to any other available remedy . . ."

Another question which will only be mentioned here is the right or lack of right of the condemnee to question the right of the condemner to take the property. While in some respects, this might be considered as procedure, the subject, in the main, would be best discussed under some other title. Nevertheless, one who wishes to raise the question of the condemner's right to take may find the time and procedure for having the point called to the attention of the court somewhat vexatious. There are several Nebraska cases that discuss this question in one or more of its aspects, the most extensive being the *May Case*⁶ and the latest being *Twenty Club v. State*.⁷

III. CONDITIONS PRECEDENT

Before any proceedings in eminent domain may be had for the purpose of taking any property, other than the property of a public utility⁸ or state school lands⁹ which are specially treated by the statutes, an offer and bona fide attempt to negotiate must first be made. This requirement arises from statutory language. In 1909, the words were "unable to agree";¹⁰ in 1913, they were "when not agreed upon";¹¹ in 1951, the words became "shall fail to agree".¹² Our Supreme Court has held this language to mean that an attempt to reach agreement between the parties is required.

⁵ *Burlington and M. R. Ry. Co. v. Reimhackle*, 15 Neb. 279, 18 N. W. 69 (1883).

⁶ *May v. City of Kearney*, 145 Neb. 475, 17 N.W.2d 448 (1945).

⁷ *Twenty Club v. State*, 167 Neb. 37, 91 N.W.2d 64 (1958).

⁸ Neb. Rev. Stat., § 76-703 (Reissue 1958).

⁹ Neb. Rev. Stat., §§ 72-224.01 to 72-224.04 (Reissue 1958).

¹⁰ Neb. Comp. Stat., c. 89, Art. 4, § 12 (1909).

¹¹ Neb. Rev. Stat., § 5945 (1913).

¹² Neb. Rev. Stat., § 76-704 (Reissue 1958).

In *O'Neill v. Leamer*,¹³ later affirmed by the United States Supreme Court,¹⁴ the Court touched upon this problem lightly. While the Court did not hold directly that an attempt to reach agreement between the parties was a condition precedent to the institution of eminent domain proceedings, the Court noted that there was no evidence that the plaintiffs had ever been willing to grant a right-of-way upon any terms.

In *Rogers v. Cosgrave*, the Court examined the language of the 1913 act more directly, stating:

If the evidence shows that there have been negotiations for purchasing of the land between the parties which have failed because of certain disagreements, it shows sufficiently that the parties cannot agree.¹⁵

This case also furnishes authority for what appears to be a most reasonable modification of the rule:

If one of two owners in common of the land fail to agree to sell the same, it is unnecessary to negotiate with the other. It will not be presumed that the company could make satisfactory use of an undivided interest.

Such modification is extremely important if the condemning authority is not to be so handicapped as to nullify the entire right of eminent domain. For example, if the title to property is divided into 1/48 interests, with scattered and separated heirs, the folly of having to contact 31 remaining heirs after being unable to agree with the 17th is readily apparent. If this is the rule, then certainly the Court should hold that there is no necessity to negotiate with owners who cannot, as well as will not, agree. Cases of incompetency and lack of owner determination should fall into such a class.

Dicta in the *Rogers Case* also indicates that it is not necessary to show an attempt to purchase in cases where the landowner denies the right of condemnation. While this is a logical conclusion, it is not, from the condemner's viewpoint, of near the import as are the other exceptions previously discussed. In a district court trial, however, where the principal desire of the condemnee is to establish a high valuation upon the amount of his damage, it is usual to waive and stipulate as to the fulfillment of the requirement. Where the right to acquire is fought and denied, there is seldom an agreement that the condemner com-

¹³ 93 Neb. 786, 142 N.W. 112 (1913).

¹⁴ 239 U.S. 244, 36 S.Ct. 54, 60 L.Ed. 249 (1915).

¹⁵ *Rogers v. Cosgrave*, 98 Neb. 608, 153 N.W. 569 (1915).

plied with the requirement. For this reason, where the right to acquire is attacked, a rule that such position makes it unnecessary to prove an attempt to purchase would undoubtedly save considerable time and effort at the trial, and would not deprive the property owner of any present right.

The first case to lay down a guide as to the extent of the negotiations that must be pursued by the condemner was the *Shirley Case*, where the Court stated that:

... the condemnation proceedings are void in case no attempt is made before beginning ... to come to an agreement with the owner ... 'In order to satisfy the statutory requirement, there must be a bona fide attempt to agree. There must be an offer made honestly and in good faith, and a reasonable effort to induce the owner to accept it.'"¹⁶

This language was affirmed in the *Higgins Cases*.¹⁷ In addition, the Court stated that the attempt and failure to agree must be alleged and proved, and that this must appear on the face of the record.

Such language needs no interpretation. However, because reliance is often made upon a misconception of part of the rule laid down in these cases, a word of caution is necessary. *Failure to meet the statutory requirements voids the condemnation proceedings as a whole and not just on appeal*. Therefore, where the condemnee has secured a favorable award and the condemner has appealed, the success of defeating the condemner's burden of showing an offer and honest attempt to agree will also defeat the condemnee's award and most likely subject him to a second condemnation which may not be as favorable.

IV. ORIGINAL PROCEEDINGS

A. THE PETITION

The statutory authorization for the commencement of eminent domain proceedings is stated simply:

If any condemnee shall fail to agree with the condemner with respect to the acquisition of property sought by the condemner, a petition to condemn the property may be filed by the condemner in the county court of the county where the property or some part thereof is situated.¹⁸

¹⁶ *Shirley v. Harlan Co.*, 117 Neb. 846, 853, 223 N.W. 284 (1929), quoting 20 C. J. 892, 895, §§ 317, 318.

¹⁷ *Higgins v. Loup River P.P. Dist.*, 157 Neb. 652, 61 N.W.2d 213 (1953); *Higgins v. Loup River P.P. Dist.*, 159 Neb. 549, 68 N.W.2d 170 (1955).

¹⁸ Neb. Rev. Stat., § 76-704 (Reissue 1958).

With the exception of specifying where the petition is to be filed, the nine words, "a petition to condemn the property may be filed", constitute the only statutory direction as to the nature and contents of the petition. Therefore, to ascertain the necessary allegations of the petition, it is necessary to review the case law.

It has been held that a failure to set forth the jurisdictional facts required by statute within the petition will void the proceedings,¹⁹ the one essential element, according to all opinions, appears to be a description of the premises sufficient for the landowner to know exactly what lands are to be taken. On this point, and the necessity of naming the parties, there is no variance in the cases. Two cases have modified the severity of having to be exact in every detail. The first allows the county judge to correct a mere clerical error in an order before the appraisal is made;²⁰ the second holds that even though the petition may be subject to a requirement to amend for lack of definiteness, it will not subject the proceedings to be set aside if sufficient to give the county judge jurisdiction.²¹

One early decision states that the application to the county judge for the appointment of appraisers need not be dated or verified, but must be signed by some person empowered to do so.²² A description of the land by government subdivision was held to be insufficient where the real estate was within an incorporated city and had been laid out and platted into lots and blocks.²³ Some of the cases setting forth the requirements of the petition and holding that land and works must be adequately described are: *Daily v. Missouri P. Ry. Co.*;²⁴ *Blue River Power Co. v. Hronik*;²⁵ *Consumers P. P. Dist. v. Eldred*.²⁶ The latter case is also authority to the effect that the condemner must bring in all known parties having an interest therein. A mortgagee is

¹⁹ *Platte Valley P.P. & I. Dist. v. Feltz*, 132 Neb. 227, 271 N.W. 787 (1937).

²⁰ *Johnson v. Platte Valley P.P. & I. Dist.*, 133 Neb. 97, 274 N.W. 386 (1937).

²¹ *Fremont E. & M.V.R. Co. v. Mattheis*, 39 Neb. 98, 57 N.W. 987 (1894).

²² *Trester v. Missouri Pac.R. Co.*, 33 Neb. 171, 49 N.W. 1110 (1891).

²³ *Omaha & R.V.R. Co. v. Rickards*, 38 Neb. 847, 57 N.W. 739 (1894).

²⁴ 103 Neb. 219, 170 N.W. 888 (1919).

²⁵ 112 Neb. 500, 199 N.W. 788 (1924).

²⁶ 146 Neb. 926, 22 N.W.2d 188 (1946).

a necessary party according to *Northwestern Mutual Life Ins. Co. v. Nordhues*.²⁷

Pleading negligence in a damage action based upon the theory of reverse condemnation is quite common, but is obviously not proper since it has been held that allegations of negligence, unlawfulness, or wrongfulness of the work have no place in a petition for damages under Article I, Section 21 of the Nebraska Constitution.²⁸ It is also common to allege negligence of construction in a petition or answer filed in a district court appeal, but it would appear that such allegation should be subject to the same rule as a similar allegation made in an original petition for damages.

B. NOTICE

Two sections of the statutes set forth the notice to be given to the landowner in a condemnation proceeding.²⁹ The notice to be served upon the landowner is required by statute to show the "intention to acquire the property, and of the time and place of meeting of the board of appraisers to have the damages assessed." Also, the statute provides for at least ten days from service until the meeting of the board of appraisers. Service is made either personally or by leaving a copy at the usual place of residence. Non-residents may be served either by publication or by constructive service in the same manner as actions commenced in the district court.

Naturally, the constitutional due process provisions also apply. Indeed, the "due process" clause has been challenged at least twice in Nebraska condemnation proceedings. In *Albin v. Consolidated School District*,³⁰ a legislative act was attacked as a violation of the "due process" clause³¹ because it failed to provide that the time and place of assessment had to be contained in the notice to the landowner. The Supreme Court held this to be a violation of the Constitution and declared the act void. The Court also ruled that, even though the landowner had actual notice of the time and place of assessment, this was not sufficient to act as a substitute for the notice required by due process of law. Con-

²⁷ 129 Neb. 379, 261 N.W. 687 (1935).

²⁸ *Bonge v. Village of Winnetoon*, 90 Neb. 260, 133 N.W. 203 (1911).

²⁹ Neb. Rev. Stat., §§ 76-706, 76-722 (Reissue 1958).

³⁰ 106 Neb. 719, 184 N.W. 141 (1921).

³¹ Neb. Const., Art. I, § 3.

versely, an earlier case³² is authority that service by publication, while sufficient to give a county board jurisdiction in proceedings for the opening of a road, will not deprive a landowner, who has no actual notice until after the time for filing claims for damages had expired, of his right to recover compensation. The court said he had such right within a reasonable time after he had received actual notice of the appropriation of his property. While this case arose from the provisions for the opening of a road by the county board rather than in the type of condemnation proceeding contemplated by the uniform act, it is difficult to see a distinction. In line with the tendency of the courts to favor the landowner under the theory that the right of eminent domain is in derogation of the common right, this holding would undoubtedly be accepted today.

In *Burgess-Nash Building Co. v. City of Omaha*,³³ the city council acted under a statute which required that a determination be made as to whether the appraisal would exceed \$100,000 in a condemnation proceeding for a public improvement. After this determination, the statutory procedure then varied depending upon whether or not this figure was reached. The property owner complained that such determination was a violation of the Fourteenth Amendment to the Federal Constitution because he had no opportunity to be heard when the determination was made. Our Court held that this was not a violation of that Constitutional provision since the property owner had an opportunity to be heard at the time of the actual assessment of the amount of benefits accruing to his property and had an opportunity to appeal to the district court.

Two cases³⁴ define and hinge on the necessity of the notice to state the time and place of hearing, but except for the lawyer with a special situation in mind, it is sufficient for the purposes of a general discussion to say that they merely help define the requirements.

While it may be said that the Court has been strict regarding the giving of the time and place of assessment within the notice, it may also be said that the Court has reached some rather peculiar decisions. For example, though the Court refused to

³² *Pawnee County v. Storm*, 34 Neb. 735, 52 N.W. 696 (1892).

³³ 116 Neb. 862, 219 N.W. 394 (1928).

³⁴ *McGavock v. City of Omaha*, 40 Neb. 64, 58 N.W. 543 (1894); *Shannon v. Bartholomew*, 83 Neb. 821, 120 N.W. 460 (1909).

allow the assessment of damages nine months after the time fixed within the notice,³⁵ where the owner appeared before the board and the board postponed the hearing giving assurance that the owner would be given further opportunity to be heard, but made their report without fulfilling their promise, the Court stated:

. . . it is sufficient if the party has an opportunity to appear at some time before a tribunal having jurisdiction, and there procure an adjustment of his rights or liabilities . . . The plaintiff still had his right of appeal.³⁶

The latter holding would seem out of line not only with the strict rules of the other decisions on the subject, but also with the spirit of those cases. If the right of appeal would be sufficient to defeat the claim of denial of due process in one case, then why in all other cases, where the owner has the right of appeal, should defects, except lack of notice sufficient to deprive him of that right, constitute a denial of his constitutional right.

In discussing other notice situations, our Court has held that a "non-resident" means a non-resident of the state³⁷ rather than a non-resident of the county or of the land affected,³⁸ and that constructive service by publication requiring four weeks notice means continuous notice in the same paper and not part in one and the remainder in another.³⁹ Failure to give notice of the proceedings to all parties interested in the land has been held to make the condemner take the land subject to such liens as are prior to the rights of the parties to the proceedings.⁴⁰

C. THE APPRAISAL PROCESS

In *Mattheis v. Fremont E. & M. V. R. Co.*, the Nebraska Supreme Court said:

A condemnation proceeding is conducted by the County Judge, the Sheriff, and the appraisers selected by the former. These constitute a tribunal not to try a civil action pending between the landowner and the railway company, to not pronounce a judgment, but simply to assess the damages which the landowner will sustain by reason of the appropriation of his land for the railroad's right of way. ⁴¹

³⁵ *Hull v. Chicago B. & Q. Ry. Co.*, 21 Neb. 371, 32 N.W. 162 (1887).

³⁶ *Burkley v. City of Omaha*, 102 Neb. 308, 167 N.W. 72 (1918).

³⁷ *Sheridan County v. Hand*, 114 Neb. 813, 210 N.W. 273 (1926).

³⁸ *Pacific R.R.Co. v. Perkins*, 36 Neb. 456, 54 N.W. 845 (1893).

³⁹ *Hull v. C. B. & Q. Ry. Co.*, 21 Neb. 371, 32 N.W. 162 (1887).

⁴⁰ *State v. Missouri Pac. Ry. Co.*, 75 Neb. 4, 105 N.W. 983 (1905).

⁴¹ *Mattheis v. Fremont E. & M. V. R. Co.*, 53 Neb. 681, 684, 74 N.W. 30, 32 (1898).

This is as clear a statement of the general nature of the original proceedings in condemnation as can be found anywhere. Today, we would eliminate the term sheriff, since he is no longer concerned with choosing appraisers, and would also substitute "highway" for "railroad".

In several cases, the Nebraska Supreme Court has discussed the question of whether or not this type of proceeding is ministerial or judicial in nature. In the *Mattheis Case*, *supra*, the Court laid down the following rule:

The powers conferred upon the county judge and the duties required of him in condemnation proceedings are not judicial powers and duties but purely ministerial ones.

This statement was reaffirmed in *Lane v. Burt County Rural P. P. Dist.*⁴² While this rule referred only to the powers of the county judge, it was extended by the Court to "... the securing of an appraisal of damages by appraisers appointed by the county judge ..." in *Sheer v. Kansas Neb. Nat. Gas Co.*⁴³ The Court has even ruled⁴⁴ that the Court is acting in the same ministerial capacity when appointing the members of a court of condemnation under the special procedure for the taking of property of a public utility.⁴⁵

Even though the procedure appears to be clearly ministerial, it still requires the exercise of judicial functions.⁴⁶ It is not the author's intention to take the time necessary to elaborately distinguish these two positions; suffice it to say that it is possible that while the proceedings are ministerial generally they do possess certain judicial attributes.

1. Powers of the County Judge

The condemnation proceedings are not proceedings instituted before the county court nor are they conducted by the county court, they are before the county judge. This rule was first specifically mentioned in the *Mattheis Case*⁴⁷ and, although re-

⁴² 163 Neb. 1, 77 N.W.2d 773 (1956).

⁴³ 158 Neb. 668, 675, 64 N.W.2d 333, 337 (1954).

⁴⁴ Application of the City of Sidney, 144 Neb. 6, 12 N.W.2d 104 (1943).

⁴⁵ Neb. Rev. Stat., § 19-702 (Reissue 1954).

⁴⁶ *Albin v. Consolidated School Dist.*, 106 Neb. 719, 184 N.W. 141 (1921); *Webber v. City of Scottsbluff*, 155 Neb. 48, 50 N.W.2d 533 (1951).

⁴⁷ 53 Neb. 681, 74 N.W. 39 (1898). There are two earlier decisions in this same matter: 35 Neb. 48, 52 N.W. 698 (1892); 39 Neb. 98, 57 N.W. 987 (1894).

iterated time and time again, the Court is frequently guilty of loose language in referring to the county court when they mean county judge. This is a frequent error of which the lawyer should be aware, not being misled into making the same mistake.

The county court has been held not to have the power to vacate an award of damages on the ground of fraud.⁴⁸ In order to understand such a rule, it must first be determined whether the use of the words "county court" were used loosely or as a means of distinguishing between the court and the judge. A reading of the case makes it clear that the words "county court" were used intentionally and that there was no jurisdiction within that court. The decision makes it clear that the court did not determine the powers of the county judge to set aside the appraisal for any reason.

It has been held that the county court (loose language) has power to correct any irregularities in the method of appraisement adopted by the appraisers.⁴⁹ It has also been held that by failing to make timely objection to five appraisers, when the statute provided for six, the plaintiff waived his right to an appraisal by six.⁵⁰ This appears pertinent for, at the time when the objection would have had to be filed, it could only have been filed with the county judge. It would seem then that while the judge acts only in a ministerial capacity, supposed only to appoint and swear in the appraisers, and then finally to receive their report, he does have certain judicial functions which must be exercised if the need arises. It would appear he can correct clerical errors, vacate void proceedings, and he must have power to fill vacancies among the appraisers, etc. In other words, the county judge has some judicial power in condemnation proceedings, but these powers are limited to necessity and where there is no other person or officer with authority to correct the error.

One problem that is frequently vexatious at condemnations is the power of the county judge to fill vacancies in the board of appraisers. The problem, in spite of the frequency with which it arises, is clearly answered by statute. Section 76-707 provides that: "The county judge may fill any vacancies arising through disqualification, inability to attend, or otherwise."

⁴⁸ *Ibid.* •

⁴⁹ *O'Neill v. Leamer*, 93 Neb. 786, 142 N.W. 112 (1913), affirmed, 239 U.S. 24, 36 S.Ct. 54, 60 L.Ed. 249 (1915).

⁵⁰ *Johnson v. Platte Valley P. P. & I. Dist.*, 133 Neb. 97, 274 N.W. 386 (1937).

2. *Pleadings*

Except as to the requirements of the petition, there is little case law in Nebraska upon other pleadings being used in the original proceedings in condemnation. The author has always doubted the authority of the county judge to accept other pleadings although, as a practical matter, it has been done in county after county. The *Mattheis Case*⁵¹ gives the judge the right to compel the amendment of the petition for the purpose of containing a more specific description of the property.

An early case⁵² held that where there are several contiguous lots owned by the same person, even though the petition filed by the condemner described only certain lots, that the injury to the entire property should be considered. This situation does not create a necessity for the owner to file other pleadings, but does necessitate the appraisers viewing the property and assessing the damage when notified by the owner of the situation.

3. *Appraisers*

The actual ascertainment of damages is made by the appraisers. Their appointment, their duties, and their return are therefore, the heart of the condemnation proceedings and some five sections of the statutes deal with the requirements and duties. First, the county judge is to appoint three disinterested freeholders of the county, not interested in a like question, to serve as appraisers. This is to be done within three days from the filing of the petition and by order entered of record.⁵³ The same section further provides that the judge:

. . . shall direct the sheriff to summon the appraisers so selected to convene at the office of the county judge at a time specified in the summons for the purpose of qualifying as appraisers, and thereafter proceed to appraise the property sought to be condemned and to ascertain and determine the damages sustained by the condemnee.

The following section provides in part:

Upon convening of the appraisers, the county judge shall interrogate the appraisers as to their qualifications and may excuse any appraiser found by the county judge to be disqualified to serve.⁵⁴

⁵¹ 39 Neb. 98, 57 N.W. 987 (1894).

⁵² A. & N. R. Co. v. Boerner, 34 Neb. 240, 51 N.W. 842 (1892).

⁵³ Neb. Rev. Stat., § 76-706 (Reissue 1958).

⁵⁴ Neb. Rev. Stat., § 76-707 (Reissue 1958).

The qualifications referred to are not, in the opinion of the author, such matters as whether the prospective appraisers are professional real estate brokers, contractors, farmers, etc., but rather are they freeholders, disinterested in this or similar proceedings, and that they are residents of the county. It appears that if they are freeholders, they may be presumed to be interested in lands, and our Court has been strict in seeing the statute is followed by the appointment of the exact class and number named by the statute to be appointed. While most of the opinions are no longer directly in point because of statutory changes, the tenor of the Court can easily be determined from this language: "The words 'freeholder' and 'householder' . . . are not synonymous."⁵⁵ There are several other cases all to like effect, and also holding that failure of statutory compliance in the appointment of appraisers renders the proceedings void, not voidable.⁵⁶ A freeholder can be a purchaser of real estate under contract who has not yet obtained his deed. The term freeholder not being given, when used in this sense, the same technical strictness as in deeds. The purpose of the statute is to prevent appraisements by those not themselves interested in lands.⁵⁷ Without giving the rather complicated details, one case has upheld a slight variation from the exact statutory language, but the variation was in doing a little more than was required, rather than something less or different.⁵⁸ Also, see *Shannon v. Bartholomew*⁵⁹ which discusses the subject of necessity of five appraisers, but is not in point under the uniform act or for highway purposes.

In *Burkley v. City of Omaha*,⁶⁰ one of the appraisers was absent at the time set for hearing. The hearing was postponed, but the whole board joined in the final report. The Court held that if it was an irregularity, it was only such as might be remedied by the property owner taking an appeal.

In *State ex rel. Katelman v. O'Fink*,⁶¹ the Court discussed a point that arises frequently in condemnations. The Court found

⁵⁵ *Jones v. City of Aurora*, 97 Neb. 825, 151 N.W. 958 (1915).

⁵⁶ *Nelson v. Harlan Co.*, 2 Neb. (Unof.) 537, 89 N.W. 458 (1902); *Georgian v. Department of Pub. Wks.*, 123 Neb. 648, 243 N.W. 886 (1932); *Ira v. Adamson*, 125 Neb. 441, 250 N.W. 559 (1933).

⁵⁷ *Wheldon v. Cornett*, 4 Neb. (Unof.) 421, 94 N.W. 626 (1903).

⁵⁸ *Burgess-Nash Bldg. Co. v. City of Omaha*, 116 Neb. 862, 219 N.W. 394 (1928).

⁵⁹ 83 Neb. 821, 120 N.W. 460 (1909).

⁶⁰ 102 Neb. 308, 167 N.W. 72 (1918).

⁶¹ 84 Neb. 185, 120 N.W. 938 (1909).

that the appraisers had the duty to assess the damages to each and all of those interested in the premises and to apportion the value of the property appropriated among all those having an interest therein according to their respective interests. The finding was based upon the then existing statute, which was different from the present section, but the reasoning of the Court went beyond the statute and would be applicable under our statutes. The result, if law today, is that the appraisers should in their return find the amount due for taxes and liens generally, including mortgages, rather than just the amount due to the titleholder. Such a finding is not practical. It makes the board of appraisers become more than finders of fact regarding damages; indeed they must in some cases have knowledge sufficient to solve extremely complicated legal problems. Also, if the reasoning prevails as to lien holders, it also would be necessary, in the sake of consistency, for the appraisers to determine heirship, settle disputed wills, etc. It is submitted that it is better for the appraisers to find only the amount due upon the land, separating a tenants interest, if not in dispute, and then, if the various interests cannot agree among themselves, to let them fight it out by appeal or other action in the appropriate court.

The manner in which the appraisal is made is covered in one short statutory section which should, according to the writer's experience, be read by the county judge to the appraisers as soon as they have taken the oath prescribed by statute.⁶² The statute specifies that:

It shall be the duty of the appraisers to carefully inspect and view the property taken or sought to be taken, and also any other property of the condemnee damaged thereby. The appraisers shall hear any party interested therein in reference to the amount of damages when they are so inspecting and viewing the property.⁶³

Five decisions of our Court shed light on this section; Four of which have used substantially the same language in describing the nature of this hearing. In the *Higgins*⁶⁴ and *Jensen*⁶⁵ cases, the rule was stated:

Condemnation proceedings commenced in a county court contemplate an informal hearing by the appraisers, a view of the lands,

⁶² Neb. Rev. Stat., § 76-708 (Reissue 1958).

⁶³ Neb. Rev. Stat., § 76-709 (Reissue 1958).

⁶⁴ *Higgins v. Loup R. P. P. Dist.*, 157 Neb. 652, 61 N.W.2d 213 (1953).

⁶⁵ *Jensen v. Omaha P. P. Dist.*, 159 Neb. 277, 66 W.W.2d 591 (1954).

no record of testimony, and a report of damages assessed to be filed subject only to the right of appeal.

The *Scheer*⁶⁶ and *Heppe*⁶⁷ cases adopt the same language except to add: "not to confirmation by the appointing court." Not only is the statute clear, but so is the language of these late decisions. Yet, at condemnation hearings in many counties of the State, the procedure, instead of being an informal hearing, has more attributes of a full fledged jury trial in the district court.

The fifth decision⁶⁸ previously mentioned applies to the procedure at the hearing a rule concerning the determination of damages. It is well to consider this rule here since it is of extreme importance to the landowner. The rule is that the owner of property taken or damaged is entitled to have all proper elements of damage considered by the appraisers, and, if they fail to do so, he cannot afterwards maintain an action to recover damages omitted which were necessarily involved in the condemnation proceeding. This rule answers a question frequently asked by the appraisers during their examination of the premises. Without proper knowledge of the law, they could conceivably omit large items of damage in the belief that the owner would be compensated for those items in some other manner. Because even a cursory examination of this facet of the appraisal process would necessarily open up the subject of compensation or damages, it is well to drop the matter except to mention that "proper elements of damage" do not include damage from faulty or anticipated faulty construction.

The final statutory provision dealing with the duties of the appraisers reads:

After the inspection, view, and hearing provided for in section 76-709 have been completed, the appraisers shall assess the damages that the condemnee has sustained or will sustain by the appropriation of the property to the use of the condemner, and make and file a report thereof in writing with the county judge.⁶⁹

The few cases that apply to this section of the statute have previously been cited under the discussion of the next previous statutory section.

⁶⁶ *Scheer v. Kansas-Neb. Nat. Gas Co.*, 158 Neb. 668, 675, 64 N.W.2d 333, 337 (1954).

⁶⁷ *Heppe v. State*, 162 Neb. 403, 406, 76 N.W.2d 255, 257 (1956).

⁶⁸ *Gruntorad v. Hughes Bros.*, 161 Neb. 358, 73 N.W.2d 700 (1955).

⁶⁹ Neb. Rev. Stat., § 76-710 (Reissue 1958).

D. RESULTS OF APPRAISAL

1. *Payment*

The condemner shall not acquire an interest in or right to possession of the property condemned until he has deposited with the county judge for the use of the condemnnee the amount of the condemnation award in effect at the time the deposit is made.⁷⁰

These are the statutory terms concerning payment of the award. There are few cases concerned with payment that are pertinent under the present statute. The case of *Hoesly v. Department of Roads & Irrigation*⁷¹ is most helpful for it disposes of a problem created by the appraisers return in many highway eminent domain cases. The appraisers often wish to, and do, make their return in terms other than money. A frequent example is the addition that the State shall construct a cattlepass, culvert, driveway, etc., as well as making the money allowance. In the *Hoesly Case*, the question was whether the owner could be compelled to accept other property in lieu of money. The Supreme Court held that when the power of eminent domain is utilized, there must be a standard medium of payment, binding on both parties, and the law has fixed that standard as money.

While the statute does not specifically provide that the county judge must hold the award until the time for appeal has expired, or until the appeal proceeding has been finally disposed, any reasonable consideration of the subject would lead to the conclusion that the judge must so hold a deposit, if made. In *Peterson v. Department of Roads & Irrig.*,⁷² a county judge turned over the deposit to the landowner at the direction of an unauthorized engineer of the State. But as the judge had written knowledge of the intention of the State to appeal, the Court held that the action of the judge did not deprive the State of its right to appeal.

2. *Abandonment*

The present statute gives the condemner the right of abandonment, something it did not possess under many previous statutes. The present statute states in part:

If no appeal is taken by the condemner from the award of appraisers, the condemner will be deemed to have accepted the

⁷⁰ Neb. Rev. Stat., § 76-711 (Reissue 1958).

⁷¹ 143 Neb. 387, 9 N.W.2d 523 (1943).

⁷² 137 Neb. 354, 289 N.W. 370 (1939).

award unless he has within sixty days from the date of the award filed an election in writing to abandon the proceeding. If the proceeding is abandoned, proceedings may not again be instituted by the condemner to condemn the property within two years from the date of abandonment.⁷³

There are no cases concerned with the portion of the statute just quoted. There are, however, a few cases concerned with abandonment, only one of which seems worth mentioning here. It is the early case of *Hull v. Chicago B. & Q. Ry. Co.*,⁷⁴ where it was held that there was an abandonment when the railroad company withdrew the deposit of the award it had made, after taking possession of the property, claiming the proceedings illegal.

3. *Time of Taking*

The time of taking is frequently confusing because of three seemingly conflicting provisions; two being statutory and the third being case law. One section provides that:

Upon deposit of the condemnation award with the county judge, the condemner shall be entitled to a writ of assistance to place him in possession of the property condemned.⁷⁵

On the other hand, another section provides in part:

The condemner shall not dispossess the condemnee until the condemner is ready to devote the property to a public use, and such title or interest as the condemner seeks to acquire shall not be complete until the property is put to the public use for which taken.⁷⁶

The case law is this: "The time of taking is deemed to occur when the petition for condemnation is filed."⁷⁷

The conflict is resolved in this manner. In the *Armstrong Case*⁷⁸ the Court is referring to the time for determining market value and damages in the district court, not the time when the condemner is allowed to have actual possession. The two statutory provisions are not in conflict; they represent two separate requirements, both of which must be fulfilled before the condemner

⁷³ Neb. Rev. Stat., § 76-711 (Reissue 1958).

⁷⁴ 21 Neb. 371, 32 N.W. 162 (1887).

⁷⁵ Neb. Rev. Stat., § 76-711 (Reissue 1958).

⁷⁶ Neb. Rev. Stat., § 76-714 (Reissue 1958).

⁷⁷ *Platte Valley P. P. & I. Dist. v. Armstrong*, 159 Neb. 609, 616, 68 N.W.2d 200, 206 (1955).

⁷⁸ *Ibid.*

shall have the right to possession. That is, the amount of the award must first be deposited with the county judge; second, the condemner must be ready to put the property to public use.

4. *Appeal and Effect Thereof*

There are several sections of the uniform act that deal with appeal. It is not necessary to quote them all. Most of the provisions are contained in four sections: 76-715; 76-716; 76-717; and 76-718. At this time we are not concerned with that part of the appeal that pertains to the district court. Briefly the provisions regarding the appeal, pertaining to the original proceedings, are that either may appeal to the district court; the appeal is instituted by filing a notice of appeal within thirty days from the date of filing of the appraisers report; that the party appealing shall furnish surety; that the county judge shall within thirty days prepare and file a transcript with the clerk of the district court.

Most of the decisions on the subject of appeal more properly belong under the heading "In District Court".⁷⁹ A few will be given here, however, as base points considered pertinent to the proceeding before the appraisers and county judge. One of these is that the landowner does not waive his objections to jurisdiction by appealing from the award.⁸⁰ It has also been held that, besides appeal, the decision of the county board in fixing assessments may be reviewed by the district court on a petition in error.⁸¹

The decision of appraisers, where they have jurisdiction, is conclusive unless reversed or modified by appeal.⁸² But in *Horner v. Eells*⁸³ where the appraisers failed to act and the county clerk failed to give landowners notice of that fact, causing them to lose their right to appeal, equity granted suitable relief. In *State v. Omaha & S. I. Ry. Co.*,⁸⁴ however, the failure to appeal defeated the railway's defense to mandamus action to compel them to construct a bridge.

⁷⁹ *Infra*, p. 460.

⁸⁰ *Platte Valley P. P. & I. Dist. v. Feltz*, 136 Neb. 227, 271 N.W. 787 (1939); *Albin v. Consolidated School Dist.*, 106 Neb. 719, 184 N.W. 141 (1921).

⁸¹ *Dodge County v. Acom*, 72 Neb. 71, 100 N.W. 136 (1904).

⁸² *Burkley v. City of Omaha*, 102 Neb. 308, 167 N.W. 72 (1918).

⁸³ 114 Neb. 210, 206 N.W. 733 (1925).

⁸⁴ 103 Neb. 40, 170 N.W. 496 (1918).

In *Lowell v. Buffalo County*,⁸⁵ where there had been an award of special damages caused by the vacating of a public highway, an appeal to the district court was held authorized.

The filing of the appeal bond and the delivery of the transcript within the time limited has been held to be essential to confer jurisdiction of the cause upon the district court in condemnation proceedings.⁸⁶ Where the State or its agency is a party, however, it is not necessary for the State to give bond.⁸⁷

E. REVERSE CONDEMNATION

It is provided in the uniform act that:

If any condemner shall have taken or damaged property for public use without instituting condemnation proceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages ascertained and determined.⁸⁸

This section was first enacted with the entire act in 1951. From that time until late in 1958 there had not been any action filed under the authority of the section.⁸⁹ Then in November 1958, two petitions were filed, appraisers appointed, and an award made. From these, the landowner has appealed; one to the district court; in the other the condemner (not landowner) has filed a petition in error. There is then no case law on the subject except for those actions, of which there are many, that come under the words "other available remedy". These will be considered along with appeals under the procedure in the district court.

V. IN DISTRICT COURT

To this point the amount of material available from Nebraska decision on eminent domain has been quite short, leaving many of the points set forth in the general outline of the subject nearly blank. For that reason, the few cases that were available were

⁸⁵ 119 Neb. 776, 230 N.W. 842 (1930).

⁸⁶ In re Petition of School Dist. of Omaha, 151 Neb. 304, 37 N.W.2d 209 (1949).

⁸⁷ Peterson v. Department of Roads & Irrig., 137 Neb. 354, 289 N.W. 370 (1939).

⁸⁸ Neb. Rev. Stat., § 76-705 (Reissue 1958).

⁸⁹ After making considerable inquiry to no avail, this statement is true to the best of the author's knowledge. Should the reader know of such a filing, contact with the author giving name and parties would be appreciated.

set down; not in detail, but at least to the extent of summarizing the point of law decided, even though in several instances they were not quite to the point. Further, the lack of adequate coverage of the points of law made it necessary to abandon any outline of the subject except for the more major hearings. In dealing with district court procedure however, the material is much more extensive, so the problem and treatment must be reversed. Here, cases that do not make a point that appear pertinent to present day statutes, procedure, or to highway acquisition will be omitted entirely. Except in a few cases, those that are in point will be mentioned only for the law; no attempt being made to review any facts of the case unless necessary to understand the legal principal involved.

A. FORMALITIES OF APPEAL

The statutory provisions relating to an appeal to the district court are contained in just three sections. Section 76-715 provides that:

Either condemner or condemnee may appeal from the assessment of damages by the appraisers to the district court of the county where the petition to initiate proceedings was filed. Such appeal shall be taken by filing a notice of appeal within thirty days from the date of filing of the report of appraisers as provided in section 76-710.

Section 76-716 provides that:

The party appealing shall also, at the time of filing of notice of appeal, enter into an undertaking, with at least one good and sufficient surety to be approved by the county judge conditioned (1) that the appellant will prosecute such appeal to effect without unnecessary delays, and (2) that if judgment be rendered against appellant, on the appeal, the appellant will satisfy whatever judgment may be rendered against him.

Section 76-717 further provides that:

Within thirty days after the filing of such notice of appeal, the county judge shall prepare and transmit to the clerk of the district court a duly certified transcript of all proceedings had upon payment of the fees provided by law for preparation thereof. The proceeding shall be docketed in the district court, showing the party first appealing as the plaintiff and the other party as the defendant. After docketing of the appeal, the issues shall be made up and tried in the district court in the same manner as an appeal from the county court to the district court in a civil action.⁹⁰ Such appeal shall not delay the acquisition of the property and placing of same to a public use if the condemner shall first deposit with the county judge the amount assessed by the appraisers.

⁹⁰ See Neb. Rev. Stat., §§ 24-544; 27-1301 to 27-1315 (Reissue 1956).

There are then but four things to be done by the appealing party in order to perfect the appeal: (1) file notice of appeal with the county judge; (2) file an undertaking with the county judge; (3) have the judge prepare and transmit to the Clerk of the district court a transcript of the proceedings; and (4) pay the fees for the preparation of the transcript.

Only one decision touches upon the notice of appeal. In that case although objection was made to the notice by the defendant in error in the form of a special appearance, the attention of the court was not directed to the special appearance and no order was made thereon.⁹¹ The record does show a consolidation of the two appeals by consent of the parties, so the Supreme Court refused to consider the point. The Court's written syllabus gives the impression that, where both parties appealed, a motion to dismiss the plaintiff's appeal by defendant was not proper. Though based upon lack of notice, this impression is not supported by the conclusions of the case itself.

Two decisions are concerned with the appeal bond. The latest holds that the filing of the appeal bond is essential to confer jurisdiction of the cause upon the district court,⁹² but the other⁹³ excludes the State or its agencies under authority of a special statute.⁹⁴

Early decisions were to the effect that the filing of the transcript within the statutory period was an essential act in perfecting an appeal.⁹⁵ This same view is also supported by a recent holding.⁹⁶ Unless sufficient cause is shown for the failure to file the transcript within the proper time, and without laches on the part of the appellant, the appeal will be dismissed. A mere letter to the county judge, without a demand for the transcript as a legal right and without tender of fees for such transcript, is not sufficient cause for failure to file transcript within the appeal period.⁹⁷

⁹¹ *Republican V. R. R. v. Linn*, 15 Neb. 234, 18 N.W. 35 (1883).

⁹² *In re Petition of School Dist. of Omaha*, 151 Neb. 304, 37 N.W.2d 209 (1949).

⁹³ *Peterson v. Department of Roads & Irrig.*, 137 Neb. 354, 289 N.W. 370 (1939).

⁹⁴ Neb. Rev. Stat., § 24-334 (Reissue 1956).

⁹⁵ *Gifford v. Republican V. & K. R. R. Co.*, 20 Neb. 538, 31 N. W. 11 (1886); *Nebraska & C. R. R. Co. v. Storer*, 22 Neb. 90, 34 N.W. 69 (1887).

⁹⁶ *Supra*, note 92.

⁹⁷ *Supra*, note 95.

Yet, an early case⁹⁸ tempers this rule to the extent that, if the appellant uses diligence in the perfecting of his appeal, the law will not permit him to be deprived of the appeal through the neglect of the officer whose duty it was to prepare the transcript.

What is sufficient to constitute a transcript that will confer jurisdiction on appeal is the subject of two conflicting views by our Court. The first holds that a paper headed "Transcript", but consisting only of a certified copy of the report of the commissioners, and containing only their assessment and award was sufficient to give the appellate court jurisdiction.⁹⁹ This is not the view taken by our Court, however, in the *Peterson Case*¹⁰⁰ where the Court defines the transcript as being all papers relating to or connected therein from the county judge.

B. NATURE OF ACTION

There is no question concerning the jurisdiction of the district court to hear an appeal in a condemnation proceeding. This jurisdiction is conferred both by the statutes heretofore quoted and by a long line of condemnation cases so holding, both by direct language and by implication from the very fact the matter was being heard on the appeal. But the right to confer jurisdiction by either consent, waiver, or estoppel was denied by our Supreme Court in *Lane v. Burt Co. Rural P. P. Dist.*,¹⁰¹ except that the Court stated that a party may be estopped to deny the existence of facts upon which jurisdiction thereof depends. In *Farmer's Irrig. Dist. v. Calkins*,¹⁰² a stipulation, in a situation where appeal had been taken too late, which agreed to a new route across defendants land with damages to be ascertained in the district court was held valid. Since the court had original jurisdiction of the subject matter it retained the same despite the changes. It appears that once an appeal is perfected, the jurisdiction of the district court will extend to all proceedings remotely connected with the subject matter of the original proceedings. This does not mean, however, that the district court may hear on appeal any form of proceeding, the jurisdiction being only the consent of the parties.

⁹⁸ *Republican V. R. R. Co. v. McPherson*, 12 Neb. 480, 11 N.W. 739 (1882).

⁹⁹ *Nebraska & C. R. R. Co. v. Storer*, 22 Neb. 90, 34 N.W. 69 (1887).

¹⁰⁰ *Peterson v. Department of Roads & Irrig.*, 137 Neb. 354, 289 N.W. 370 (1939).

¹⁰¹ 163 Neb. 1, 77 N.W.2d 773 (1956).

¹⁰² 104 Neb. 196, 176 N.W. 367 (1920).

The Nebraska cases leave no doubt as to the right to have the original proceedings reviewed through error proceedings, it having been held in *Dodge County v. Acom*¹⁰³ that review could be made by the district court on a petition in error as the county board in fixing the assessments for the construction of a drainage ditch had acted judicially. In *Hoesly v. Dept. of Roads & Irrig.*,¹⁰⁴ our Court held that review in the district court could be by either appeal or by prosecuting error. This was a case to determine the damages to be allowed for a taking of land for highway purposes and was not an assessment of benefits, as in the *Acom* case.¹⁰⁵ This clarifies the right to bring error proceedings in a normal condemnation proceeding.

The right of the landowner to enjoin an unauthorized or improper taking of his property for a public use cannot be questioned. Nebraska alone has case after case upholding that right. The most recent states the rule in this manner:

Injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain.¹⁰⁶

This is a direct quote from a prior decision¹⁰⁷ and is in line with hosts of others, far too numerous to necessitate mentioning each one.

The right to injunctive relief in condemnation applies to a landowner whose land has actually been taken. The right does not apply where there is damage only, it being the contention that such an owner has adequate relief through remedies at law. This was first held in *Bronson v. Albion Telephone Co.*,¹⁰⁸ although the Court indicated injunction would still lie upon proof of insolvency or some other special circumstance. Other cases holding injunction will not lie for damages only, as distinguished from a taking, are *McCook Irrig. & W. P. Co. v. Crews*¹⁰⁹ and *O'Neill v. Leamer*.¹¹⁰ This is true even though one of the most

¹⁰³ 72 Neb. 71, 100 N.W. 136 (1904).

¹⁰⁴ 142 Neb. 383, 6 N.W.2d 365 (1942).

¹⁰⁵ *Supra*, note 103.

¹⁰⁶ *Heppe v. State*, 162 Neb. 403, 76 N.W.2d 255 (1956).

¹⁰⁷ *Consumers P. P. Dist. v. Eldred*, 146 Neb. 926, 22 N.W.2d 188 (1946).

¹⁰⁸ 67 Neb. 111, 93 N.W. 201 (1903).

¹⁰⁹ 70 Neb. 109, 96 N.W. 996 (1903); 70 Neb. 115, 102 N.W. 249 (1905).

¹¹⁰ 93 Neb. 786, 142 N.W. 112 (1913); affirmed 239 U.S. 244, 36 S.Ct. 54, 60 L.Ed. 249 (1915).

common causes of seeking an injunction is where payment has not been made at the time of the taking, in which case injunction will lie.¹¹¹

This right to injunctive relief, however, in line with normal rules of equity, will not be granted by a landowner guilty of laches who idly stands by until after the work is well under way or completed before taking action.¹¹² Also, it has been held that while the owner undoubtedly has a remedy for negligent construction which caused him injury, he cannot maintain an injunction against a proper improvement made upon a public highway.¹¹³ Where work is reasonably necessary upon a highway as an item of proper maintenance, injunction will not lie to prevent such work, it being presumed that damages were satisfied when the highway was opened.¹¹⁴

Except as to the lack of need for a legal remedy being inadequate, the rules regarding whether an action in ejectment will lie, where the question has been raised, seems to be settled upon the same principles as if it were injunctive relief being requested.¹¹⁵

The question of whether a landowner may seek injunctive or other equitable relief as an issue of his appeal has never been directly before our Supreme Court. It would appear that he would have to make a choice of remedies; either to appeal in order to question the properness of the proceeding and to seek to obtain a greater recovery for his damages, or to seek by separate action, his injunctive relief. The case of *Beckman v. Lincoln & N. W. R. Co.* is an indication.¹¹⁶ An injunction was sought in a

¹¹¹ *Goergen v. Department of Pub. Wks.*, 123 Neb. 648, 243 N.W. 886 (1932); *Sittler v. Supervisors of Custer Co.*, 91 Neb. 111, 135 N.W. 441 (1912); *Johnson v. Peterson*, 85 Neb. 83, 122 N.W. 683 (1909); *Kime v. Cass County*, 71 Neb. 677, 99 N.W. 546 (1904); *Hodges v. Board of Supervisors of Seward Co.*, 49 Neb. 666, 68 N.W. 1027 (1896).

¹¹² *Regonby v. Dawson Co. Irrig. Co.*, 126 Neb. 711, 254 N.W. 389 (1934); *Meyer v. City of Alma*, 117 Neb. 511, 221 N.W. 438 (1928); *Lucas v. Ashland L. M. & P. Co.*, 92 Neb. 550, 138 N.W. 761 (1912); *Clark v. Cambridge & A. I. & I. Co.*, 45 Neb. 798, 64 N.W. 239 (1895).

¹¹³ *Hitchcock v. Zink*, 80 Neb. 29, 113 N.W. 795 (1907).

¹¹⁴ *Churchill v. Beether*, 48 Neb. 87, 66 N.W. 992 (1896).

¹¹⁵ *Hall v. C. B. & Q. R. R. Co.*, 21 Neb. 371, 32 N.W. 162 (1887); *Chicago, B. & Q. R. R. Co. v. Englehart*, 57 Neb. 444, 77 N.W. 1092 (1899).

¹¹⁶ 79 Neb. 89, 112 N.W. 348 (1907).

collateral action and, in discussing the right of the owner to bring such separate action, the court said:

An appeal to the district court does not vacate or supersede the proceedings in the county court so as to prevent the railroad company from proceeding with the construction of its road upon the land, which may be completed and the road in operation before the matter is finally heard in the district court. Any relief that the district court might then afford cannot be said to be adequate.¹¹⁷

C. EXTENT OF ACTION

1. *Irregularities Below*

Where there are errors in the proceedings before the county judge, which are not such as to defeat the proceedings, these may be corrected in the district court. Where the plat in the project plans and specifications was correct and the land was properly surveyed, staked, and flagged on the ground, but an improper description of the land being taken was made, the district court was held to have power to correct the error.¹¹⁸ Any issue to be presented, other than the question of damages, including irregularities in the proceedings below must be presented by proper pleadings.¹¹⁹ Any irregularities in proceedings by the condemner cannot be pleaded by it to defeat payment of damages for its taking of condemnee's land for street purposes.¹²⁰ But it has also been held that the error of a county judge in turning over the amount of the award to the condemnee, upon the representation of an unauthorized agent of the condemner, did not deprive the condemner of its right of appeal.¹²¹

2. *Questions for Review*

Except for the matter of damages, any other issues to be raised must be pleaded.¹²² The failure of the condemner to attempt to agree with the owner prior to the institution of a pro-

¹¹⁷ *Id.* at p. 92.

¹¹⁸ *McGree v. Stanton-Pilger Drainage Dist.*, 164 Neb. 552, 82 N.W.2d 798 (1957).

¹¹⁹ *Trester v. M. P. R. Co.*, 33 Neb. 171, 49 N.W. 1110 (1891).

¹²⁰ *City of Omaha v. Clarke*, 66 Neb. 33, 92 N.W. 146 (1902).

¹²¹ *Peterson v. Dept. of Roads & Irrig.*, 137 Neb. 354, 289 N.W. 370 (1939).

¹²² *Omaha Bridge & I. T. Co. v. Reed*, 3 Neb. (Unof.) 793, 92 N.W. 1021 (1902).

ceeding, may be raised as an issue on appeal.¹²³ Whether the statute of limitations has run is subject to review by the district court.¹²⁴ Other issues, except for the question of the necessity of the necessity of the taking, have not as yet come before the Nebraska Court.

The question as to the right to take being subject to review by the district court, or for that matter, any court, can only be touched upon here. To develop the subject at all would call for an examination of the decisions of Federal and other state courts. Our Court has in four different cases considered the question and the general nature of the problem can be grasped by considering the decisions and rules of these four. First, in point of time, was *Welton v. Dickson*,¹²⁵ where the county commissioners were opening a road. Suit to enjoin the opening was brought challenging the constitutionality of the statute giving the power to the commissioners. In its decision, the Court made this statement:

When the public exigencies demand the exercise of the power of taking private property for the public use is solely a question for the legislature, upon whose determination the courts cannot sit in judgment.¹²⁶

In the case of *Howard v. Board of Supervisors of Clay County*, the landowner attempted an appeal to the district court to object to the opening of a section-line road in addition to a request for damages.¹²⁷ The county attorney successfully moved to strike the averments and the Supreme Court upheld the district court for the reason that:

The propriety or necessity of opening and working section-line roads is committed to the discretion of the county board, and its decision is final . . . Whether a necessity existed or not for the opening of the road in question was a governmental question which did not concern plaintiffs, so long as they received compensation for their damages sustained.¹²⁸

¹²³ *Higgins v. Loup River*, 157 Neb. 652, 61 N.W.2d 213 (1953); *Higgins v. Loup River*, 159 Neb. 549, 68 N.W.2d 170 (1955).

¹²⁴ *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239, 78 N.W. 521 (1899), in which the Court held that owner before claiming damages could wait within the period of limitation to determine the extent of injury rather than being forced to commence immediately, and see: *City of Omaha v. Redick*, 61 Neb. 163, 85 N.W. 46 (1901).

¹²⁵ 38 Neb. 767, 57 N.W. 559 (1894).

¹²⁶ *Id.* at p. 780.

¹²⁷ 54 Neb. 443, 74 N.W. 953 (1898).

¹²⁸ *Id.* at p. 446.

The Court leaned heavily in its opinion upon the case of *Chicago, B. & Q. R. Co. v. State*.¹²⁹ This was not a case involving the power of eminent domain, but its kindred right, also inherent in the state, the police power. In that case, the Court concluded:

... that the courts will not interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the law-making branch of the government respecting the wisdom or necessity of particular measures.¹³⁰

In *May v. City of Kearney*, the Court followed its previous holdings and laid down this rule:

An owner must be given his day in court on the question of just compensation by the statute authorizing the taking, but he has no right to and the statute need not provide a day in court on the question of the right of the State to take the property.¹³¹

The same doctrine was upheld in *Consumers P. P. Dist. v. Eldred*, the Court rephrasing what is much the same rule:

Generally the necessity or expediency of appropriating particular property for public use is not a matter for judicial cognizance, but is for determination by the legislative branch of the government.¹³²

Unanswered as yet is the point to which the Court will apply this doctrine, undoubtedly there is a point of legislative discretion which can be beyond what the Court would call "reasonable", but how to determine when that point is reached will be most difficult. The best answer so far is found in this language of our police power case:¹³³

It will not, of course, be contended that the power of the legislature is, in that respect, absolute, or that it may at will impose upon property burdens so unreasonable as to work a practical confiscation. There is, as all admit, a limit beyond which it cannot go and within which it will be confined by the judicial power of the State.¹³⁴

3. Waiver by Appeal

In earlier days most of the condemnation proceedings involved the opening of section line roads by county commissioners.

¹²⁹ 47 Neb. 549, 66 N.W. 624 (1896).

¹³⁰ *Id.* at p. 573.

¹³¹ 145 Neb. 475, 476, 17 N.W.2d 448 (1945).

¹³² 146 Neb. 926, 931, 22 N.W.2d 188 (1946).

¹³³ *Supra*, note 129.

¹³⁴ *Supra*, note 129 at p. 573.

In those proceedings, where the owner filed his claim for damages with the county board, it was generally held, as in the *Trester case*,¹³⁵ and others,¹³⁶ that such a filing of a claim for damages was a waiver of all objections to irregularities in the proceedings before the county board. These decisions do not apply where proceedings are had to take land by condemnation proceedings as set forth in Article 7 of Chapter 76 of our statutes. It is conceivable that one finding one of these early cases and not understanding the distinction might have difficulty in realizing the situation. At least two cases hold that in regular condemnation proceedings the landowner did not waive his objections to jurisdiction by appealing from the award.¹³⁷

In line with points raised twice before, the case of *Webber v. City of Scottsbluff*¹³⁸ held that where the landowner appealed to the district court from the award of the assessors (appraisers) and raised only the question of damages, he entered his appearance and waived all objections as to notice. Other cases have also held a waiver, not from the appeal itself, but rather from inconsistent acts or pleadings of the landowner, such as accepting part payment of the damages¹³⁹ or electing to ratify the award though claiming the proceedings to be null and void.¹⁴⁰

4. Parties

In its major aspect, the subject of parties does not belong under the classification of "procedure in the district court," but there have been a few cases wherein the parties were changed or an attempt was made to change the parties, or, in some other way, an issue different from that of the original proceedings was raised. No attempt will be made to either discuss the issues or to set forth any broad general principles, but the separate findings are presented for the reader. The points are raised in reverse order to date of the decision.

¹³⁵ *Supra*, note 119.

¹³⁶ *Davis v. Boone County*, 28 Neb. 837, 45 N.W. 249 (1890).

¹³⁷ *Platte Valley P. P. & I. Dist. v. Feltz*, 132 Neb. 227, 271 N.W. 787 (1937); *Albin v. Consolidated School Dist.*, 106 Neb. 719, 184 N.W. 141 (1921).

¹³⁸ 155 Neb. 48, 50 N.W.2d 533 (1951).

¹³⁹ *Hoesly v. Department of Roads & Irrig.*, 142 Neb. 383, 6 N.W.2d 365 (1942).

¹⁴⁰ *Olander v. City of Omaha*, 142 Neb. 340, 6 N.W.2d 62 (1942).

In an action brought by both landowner and tenant for flood damages caused by a diversion dam and for injunction, it was held not to be error to permit the owner to enter a voluntary dismissal and let the tenant file an amended petition for the damages to his leasehold which were also claimed in the original petition.¹⁴¹

Where a mortgagee appealed without notice to or joining of a mortgagor in appeal, it was held that the condemner might, if necessary for the protection of its rights, make the mortgagor a party to the appeal.¹⁴²

A railroad company, on an appeal of condemnation proceedings, is not entitled to have a third party substituted in its stead on the ground that the third party has agreed to indemnify the railroad for right of way costs.¹⁴³

5. *Issues and Pleadings*

One of the first eminent domain cases in this state¹⁴⁴ held that, upon appeal, no pleadings were necessary, but a few years later the rule was changed to provide that no pleadings were necessary where the only question was the amount of damages. However, if other issues are involved, they must be pleaded to be available.¹⁴⁵ Over the period of years, this rule has been affirmed, reiterated and restated time and time again¹⁴⁶ until it is well entrenched in the minds of a considerable number of lawyers, particularly those whose experience with eminent domain cases is based largely upon practice before the passage of the uniform act in 1951. As a result of a reliance upon this well known rule, several have overlooked the following statutory language:

After docketing of the appeal, the issues shall be made up and tried in the district court in the same manner as an appeal from the county court to the district court in a civil action,¹⁴⁷

¹⁴¹ *Thies v. Platte Valley P. P. & I. Dist.*, 137 Neb. 344, 289 N.W. 386 (1939).

¹⁴² *Omaha Bridge & T. R. Co. v. Reed*, 69 Neb. 514, 96 N.W. 276 (1903).

¹⁴³ *Omaha S. R. Co. v. Beeson*, 36 Neb. 361, 54 N.W. 557 (1893).

¹⁴⁴ *Neb. R. R. Co. v. VanDeusen*, 6 Neb. 160 (1877).

¹⁴⁵ *Republican V. R. R. Co. v. Hayes*, 13 Neb. 489, 14 N.W. 521 (1882).

¹⁴⁶ *Lane v. Burt Co. R. P. P. Dist.*, 163 Neb. 1, 77 N.W.2d 773 (1956); *Platte Valley P. P. & I. Dist. v. Armstrong*, 159 Neb. 609, 68 N.W.2d 200 (1955); *Sheer v. Kansas-Neb. Nat. Gas Co.*, 158 Neb. 668, 64 N.W.2d 333 (1954); *Webber v. City of Scottsbluff*, 155 Neb. 48, 50 N.W.2d 533 (1951); *Pierce v. Platte V. P. P. & I. Dist.*, 143 Neb. 898, 11 N.W.2d 813 (1943); *U. S. Natl. Bank v. Loup River P. P. Dist.*, 139 Neb. 645, 298 N. W. 529 (1941); *Fremont, E. & M. V. R. Co. v. Meahr*, 28 Neb. 94, 44 N.W. 79 (1889).

¹⁴⁷ *Neb. Rev. Stat.*, § 76-717 (Reissue 1958).

and these words from the procedure therein referred to:

In all cases of appeal from the county court or a justice of the peace, the plaintiff in the court below shall, within fifty days from and after the date of the rendition of the judgment in the court below, file his petition as required in civil cases in the district court, and the answer shall be filed and issue joined as in cases commenced in such appellate court.¹⁴⁸

In the case of *City of Seward v. Gruntorad*,¹⁴⁹ the appeal of the landowner was dismissed by the district court for his failure to file the petition on appeal within the fifty day period beginning with the date of the filing of the notice of appeal in the county court. This ruling was sustained on appeal to the Supreme Court. The same situation and holding is found in the case of *Jensen v. Omaha P. P. Dist.*¹⁵⁰ In both cases, there had been a showing of a reason for not having made the filing within the due date, yet in both cases the trial court ordered the cause dismissed. In both cases the Supreme Court held the dismissal not to be an abuse of discretion. Because the facts, as stated in these cases, indicate at least on paper, a fairly reasonable excuse for the delay, the two decisions have a tendency to indicate to a trial judge that any reason for a delay must be actually bona fide and of a fairly high order. Hence there have been a considerable number of dismissals by the district courts since the publication of these two opinions.

The necessity of pleading now required by statute does not change the old rule that if new issues other than the assessment of damages are to be raised upon appeal, that they must be pleaded.¹⁵¹ Further, if the condemnee fails to raise issues, he is bound by the rule of res-judicata in a collateral attack.¹⁵² The condemner, on the other hand, must plead special benefits in order to claim them,¹⁵³ but if, upon the trial, they are considered as being in issue the court may permit the filing of an amended answer to include the special benefits.¹⁵⁴

¹⁴⁸ Neb. Rev. Stat., § 27-1306 (Reissue 1956).

¹⁴⁹ 158 Neb. 143, 62 N.W.2d 537 (1954).

¹⁵⁰ 159 Neb. 277, 66 N.W.2d 591 (1954).

¹⁵¹ *Platte Valley P. P. & I. Dist. v. Armstrong*, 159 Neb. 609, 68 N.W.2d 200 (1955).

¹⁵² *Scheer v. Kansas-Neb. Nat. Gas Co.*, 158 Neb. 668, 64 N.W.2d 333 (1954).

¹⁵³ *Supra*, note 151.

¹⁵⁴ *Barr v. City of Omaha*, 42 Neb. 341, 60 N.W. 591 (1894).

The award allowable to the owner of property for damages arising out of eminent domain, or taking for a public use, is based on the constitutional provision¹⁵⁵ and not upon negligence, yet it is quite common practice for negligence to be pleaded. Such a pleading has no place in the petition.¹⁵⁶ However, if negligence is pleaded and the petition also states a right of recovery under Section 21, Article I, of the Constitution, the landowner is entitled to recover notwithstanding the allegation of negligence, and this is true whether or not the charge of negligence has failed of proof.¹⁵⁷ A simple statement of this proposition is:

Where action is brought to recover damages under Section 21, of Article I, of the Constitution, it is immaterial whether the petition states a cause of action 'ex delicta' or 'ex contractu'.¹⁵⁸

D. TRIAL

1. Generally

Generally, the trial procedure in condemnation proceedings appealed to the district court is the same as in other civil actions. The present statute states that the issues shall be "... tried in the district court in the same manner as an appeal from the county court to the district court in a civil action."¹⁵⁹ Previously, the statute, at least for the procedure relating to the establishment, vacation or alteration of a public road, had said that "... the amount of damages the claimant is entitled to shall be ascertained by said court [district] in the same manner as in actions by ordinary proceedings. ..."¹⁶⁰ This section was reviewed by our Supreme Court in *Lowell v. Buffalo County*, an action for damages resulting from the vacation of a public road.¹⁶¹ However, it does not appear in the opinion that the method of procedure was challenged by either party.

The general procedure of trial may be influenced by the holding that the right to take property *in invitum* must be clearly

¹⁵⁵ Neb. Const., Art. I, § 3.

¹⁵⁶ *Bonge v. Village of Winnetoon*, 90 Neb. 260, 133 N.W. 203 (1911).

¹⁵⁷ *Snyder v. Platte Valley P. P. & I. Dist.*, 144 Neb. 308, 13 N.W.2d 160 (1944).

¹⁵⁸ *Douglas County v. Taylor*, 50 Neb. 535, 70 N.W. 27 (1897); Also, see: *Gledhill v. State*, 123 Neb. 726, 243 N.W. 909 (1932).

¹⁵⁹ Neb. Rev. Stat. § 76-717 (Reissue 1958).

¹⁶⁰ Neb. Rev. Stat. § 39-141 (Reissue 1952).

¹⁶¹ 119 Neb. 776, 230 N.W. 842 (1930); 123 Neb. 194, 242 N.W. 452 (1932).

shown. A strict construction should be given statutes authorizing such proceeding since they are in derogation of the common right. This doctrine has become well established,¹⁶² a similar phrase being used in a most recent decision.¹⁶³ While the doctrine applies to the authority to bring the proceedings, nevertheless it may, by implication, be held to apply in case of doubt to questions of procedure during trial, although at the present time this is pure conjecture on the part of the author and not based upon either statute or court opinion.

2. *Burden of Proceeding and of Proof*

If there is one place in which there has been confusion in the minds of both judges and lawyers regarding proper procedure in the trial of a condemnation proceeding in the district court, it is in regard to the burden of proceeding. Indeed, although the matter is well settled by several decisions, it is not uncommon for counsel representing the condemnee to expect the condemner to open the proceedings and accept the burden of proof regarding damages. This confusion arises in those cases where the condemner has appealed, and results from the wording of the statute:

The proceeding shall be docketed in the district court, showing the party first appealing as the plaintiff and the other party as the defendant.¹⁶⁴

Hence, when the State or other condemning authority appeals, it is docketed as the plaintiff.

Since the passage of the uniform act in 1951, at least three decisions have definitely held that the burden of proof as to the damages which the condemnee will suffer rests upon such condemnee. In over ninety percent of the cases tried, the matter of damages is the only issue. So, for most purposes, these cases are a complete answer to the problem. Two of these¹⁶⁵ are cases where the condemnee appealed; in the other the condemner appealed.¹⁶⁶ Yet, in all three cases, the court has placed the burden on the landowner of showing the damages which he suffers while

¹⁶² *Campbell v. Youngson*, 80 Neb. 322, 114 N.W. 415 (1907), affirmed 82 Neb. 743, 118 N.W. 1053 (1908).

¹⁶³ *Heppe v. State*, 162 Neb. 403, 76 N.W.2d 255 (1956).

¹⁶⁴ Neb. Rev. Stat. § 76-717 (Reissue 1958).

¹⁶⁵ *Twenty Club v. State*, 167 Neb. 37, 91 N.W.2d 64 (1958); *Rath v. Sanitary District No. One*, 156 Neb. 444, 56 N.W.2d 741 (1953).

¹⁶⁶ *Platte Valley P. P. & I. Dist. v. Armstrong*, 159 Neb. 609, 68 N.W.2d 200 (1955).

the burden is on the condemner to show matters which tend to reduce or mitigate damages.

Placing this burden on the shoulders of the landowner is not a new doctrine in Nebraska, being originally established in several of the first condemnation appeals to reach our highest court.¹⁶⁷ The railroad companies which brought these proceedings were also the appellants. The *Walker Case* reasons for the rule in this manner: The company may go upon the land provided the owner is paid for the damages; The company admits taking the land, but no specific amount of damages; In the absence of proof, the landowner could not recover in any sum; Therefore the owner is entitled to open and close.¹⁶⁸

In the *Umstead Case*, an interesting supplement to the problem is raised regarding the necessity of an appellant-condemner filing an answer to the appellee-condemnee's petition.¹⁶⁹ The court held it error to dismiss the appeal because appellant refused to answer, the proper practice being for the owner to call his witnesses and prove his damages the same as in any other case where a defendant is in default. This point could not arise today under our present statute, but, as there are, at the time of this writing, efforts being made to amend the statute to provide that the condemnee shall always be docketed as the plaintiff upon appeal, the question may cease to be purely academic.

As heretofore noted under the discussion of conditions precedent, the condemner has the burden of proving that the statutory requirements of a good faith offer and a reasonable effort to induce the owner to accept must be alleged, proved, and appear on the face of the record.¹⁷⁰ While there is no Nebraska authority upon the subject, it is general practice when the issue is not settled by the pleadings, pre-trial conference, or stipulation for the condemner to meet this burden in his regular turn to present evidence (after the landowner has rested). It is also the usual practice for the court to submit the issue to the jury as a special finding with the proviso that if the jury find the burden of meet-

¹⁶⁷ *O. & R. V. R. R. v. Walker*, 17 Neb. 432, 23 N.W. 348 (1885); *O. N. & B. H. R. R. v. Umstead*, 17 Neb. 459, 23 N.W. 350 (1885); *O. N. & B. H. R. R. v. Lamb*, 17 Neb. 461, 23 N.W. 351 (1885).

¹⁶⁸ *O. & R. V. R. R. v. Walker*, 17 Neb. 432, 23 N.W. 348 (1885).

¹⁶⁹ *O. N. & B. H. R. R. v. Umstead*, 17 Neb. 459, 23 N.W. 350 (1885).

¹⁷⁰ *Higgins v. Loup River P. P. Dist.*, 157 Neb. 652, 61 N.W.2d 213 (1953); *Higgins v. Loup River P. P. Dist.*, 159 Neb. 549, 68 N.W.2d 170 (1955).

ing the requirement not met they need make no finding in regard to the amount of damages.

Where issue is joined concerning the need for the taking, it has been held that the burden of showing a lack of need is upon the condemnee.¹⁷¹ This was the case where the owner claimed construction was for a railroad other than the one bringing the proceeding.¹⁷² However, the situation was reversed where a county claimed a waiver of damages on the part of the landowner, the burden being placed upon the county to prove the agreement contended for.¹⁷³

Although these cases¹⁷⁴ allow the condemnee to accept the burden of proof and overcome a presumption of need to take by the condemner, later decisions, such as *May v. City of Kearney*,¹⁷⁵ which would deny the right of the court to hear or decide the issue, should not be overlooked. In *Hillerege v. City of Scottsbluff*,¹⁷⁶ a case involving the use of police power rather than eminent domain, the litigant seeking to enjoin the city in the exercise of the police power was held to have the burden of establishing, by clear and unequivocal proof, that the use of the power was so unreasonable, arbitrary, or discriminatory that she was deprived of property without due process of law. By analogy, this view might easily be applied in eminent domain proceedings. While not directly pertinent, the case is mentioned for its possibilities.

3. Evidence

It is not the purpose of this article to consider the subject of valuation, compensation, or the determination of the amount of damages in eminent domain proceedings. It is obvious that the subject of evidence in this type of action is overwhelmingly heavy with rulings upon the method of determining "just compensation." The treatment of evidence will therefore be more or less general in nature with a few sketchy observations regarding particular questions outside the realm of compensation or valuation.

¹⁷¹ *Robert v. Sioux City & P. R. Co.*, 73 Neb. 8, 102 N.W. (1905); *Deitrichs v. L. & N. W. R. R. Co.*, 13 Neb. 361, 13 N.W. 624 (1882).

¹⁷² *Beckman v. Lincoln & N. W. R. Co.*, 79 Neb. 89, 112 N.W. 348 (1907).

¹⁷³ *Chiles v. Custer County*, 127 Neb. 481, 256 N.W. 45 (1934).

¹⁷⁴ *Supra*, note 171.

¹⁷⁵ 145 Neb. 475, 17 N.W.2d 448 (1945).

¹⁷⁶ 164 Neb. 560, 83 N.W.2d 76 (1957).

To be admissible in condemnation proceedings, the evidence offered must sustain the allegations made in pleadings. Evidence which is a complete departure from the theory set out in the petition is inadmissible by the plaintiff.¹⁷⁷ In proceedings based upon a taking under the power of eminent domain, it is not necessary to prove negligence or the commission of a wrongful act.¹⁷⁸ This point will not be questioned in a proceeding resulting from a direct taking for highways. However, in actions begun by the landowner for the recovery of damages based upon a temporary taking, such as flood damage, there is a tendency to think that the owner must prove that the damage occurred as the result of some type of wrongdoing on the part of the governmental body concerned. It is obvious upon reflection that not only is this not required, but that it has no place in the proceedings, the basis of the lawsuit being the constitutional provision that a taking for a public use demands payment of just compensation. Such an action is not based upon a damage resulting from the commission of a wrongful act.

Our Supreme Court, in *Sternberger v. Sanitary District*,¹⁷⁹ laid down another general rule which applies equally to other types of cases besides eminent domain. The rule is that where the witnesses in a condemnation proceeding give evidence with perfect agreement, it should be carefully scrutinized by the court. Another general rule specifically applied to this type of procedure is to the effect that while it is not competent to show the price at which other property has been sold for the purpose of proving the value of the land taken, yet if, on cross-examination of witnesses for the adverse party, the condemner adopts that line of inquiry, error will not be presumed from a re-examination confined to the lines followed on cross-examination.¹⁸⁰

It has been held that it is proper to introduce a map or plat of the land appropriated¹⁸¹ and that a photographic view is admissible.¹⁸²

¹⁷⁷ *Casford v. City of McCook*, 133 Neb. 191, 274 N.W. 464 (1937).

¹⁷⁸ *Wagner v. Loup River Public Power Dist.*, 150 Neb. 7, 33 N.W.2d 300 (1948); *Quest v. East Omaha Drainage Dist.*, 155 Neb. 538, 52 N.W.2d 417 (1952).

¹⁷⁹ 100 Neb. 449, 160 N.W. 740 (1916).

¹⁸⁰ *Chicago, R. I. & P. R. Co. v. Griffith*, 44 Neb. 690, 62 N.W. 868 (1895).

¹⁸¹ *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205, 76 N.W. 571 (1898).

¹⁸² *Omaha S. R. Co. v. Beeson*, 36 Neb. 361, 54 N.W. 557 (1893), but this early finding of the admissibility of photographs was hedged by being made contingent to a situation where the jury was prevented from viewing the premises.

When an allegation is made of failure or inability to agree with the owner as to purchase of the property, or the value thereof, it is necessary for the condemner to prove such failure to agree.¹⁸³

Although it is indeed difficult to know just where the line is crossed that carries us into a subject that is more "compensation" than "procedure," a few of the rules concerning determination of value are sufficiently general in nature that they may be stated here. The few rules which will be set forth are those which apparently cause much confusion though they represent situations which arise time and time again.

The first rule is that evidence of the sales of similar lands is proper to establish the value of the land being taken or the damages to the remainder. Such lands, however, must be shown to be similar in nature and situation to the property in question. A sale of a filling station or other commercial enterprise not common to the particular location may bring much more than the market or going value and will be grossly misleading.¹⁸⁴ The original rule, to the effect that the value of the property in question cannot be shown by the price at which other property has been sold,¹⁸⁵ was reversed in the *Langdon Case*. The original rule, once so firmly established,¹⁸⁶ is apparently so well remembered that it is difficult to forget. In any event, it sometimes comes as a surprise to counsel that the sale price of similar lands may be shown and that the new rule is now firmly established.¹⁸⁷

The fact that sale price of other lands of similar nature and situation may be offered in evidence to establish the value of the property in question does not mean, however, that the price paid by the condemner for other property being taken by the condemner along with the property in question can be shown. These prices cannot be introduced. This is and has been the rule.¹⁸⁸ The principal, though not the only reason, for this distinction is that the taking of the property is not sale upon the open market,

¹⁸³ *Higgins v. Loup River P. P. Dist.*, 157 Neb. 652, 61 N.W.2d 213 (1953).

¹⁸⁴ *Langdon v. Loup River P. P. Dist.*, 142 Neb. 859, 8 N.W.2d 201 (1943).

¹⁸⁵ *Chicago, R. I. & P. R. Co. v. Griffith*, 44 Neb. 690, 62 N.W. 868 (1895).

¹⁸⁶ *Rushart v. Dept. of Roads & Irrig.*, 142 Neb. 301, 5 N.W.2d 884 (1942); *Union P. R. Co. v. Stanwood*, 71 Neb. 150, 91 N.W. 191 (1902).

¹⁸⁷ *City of Lincoln v. Marshall*, 161 Neb. 680, 74 N.W.2d 470 (1956); *Papke v. City of Omaha*, 152 Neb. 491, 41 N.W.2d 491 (1950).

¹⁸⁸ *Lynn v. City of Omaha*, 153 Neb. 193, 42 N.W.2d 527 (1950); *Papke v. City of Omaha*, 152 Neb. 491, 41 N.W.2d 751 (1950); *State of Nebr. v. Wright*, 105 Neb. 617, 181 N.W. 539 (1921).

being made under the threat of eminent domain. Such property could have been sold at a low price, the owner not desiring the difficulties, expenses, (or to some minds) embarrassment of a lawsuit. On the other hand the condemner may have paid a premium to avoid the expense of bringing condemnation.

Another citation regarding evidence should be quoted as it is either so little known, misunderstood, or possibly willingly overlooked, that it is the cause for continual objection and legal skirmishing during trial. This is the rule of *Crawford v. Central Nebr. Pub. Powr. & Irrig. Dist.*:

Everything which affects the market value is to be taken into consideration . . . the burden of additional fencing, and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole, they detract from the market value of the property.¹⁸⁹

In spite of this holding, it is typical that such items as fencing, and like matters, are, or are attempted to be, added together item by item.

Before leaving the subject of evidence, one further rule should be mentioned. It is universally known, understood, and as well accepted as any rule regarding condemnation procedure, but it is necessary to mention it for a better understanding of the discussion to follow regarding witnesses. In *Langdon v. Loup River P. P. Dist.*, the Court stated that ". . . in future condemnation litigation, evidence of the award of appraisers shall not be admissible as evidence to go to a jury . . ." on appeal to the district courts from such award.¹⁹⁰ Since the *Langdon* decision, other cases have followed the holding,¹⁹¹ although prior to that time the amount of the appraisal was usually given to the jury indirectly and only for the purpose of allowing them to determine interest.¹⁹² In the very early cases the amount of the award was submitted directly to the jury.¹⁹³

¹⁸⁹ 154 Neb. 832, 836, 49 N.W.2d 682, 686 (1951).

¹⁹⁰ *Langdon v. Loup River P. P. Dist.*, 142 Neb. 859, 864, 8 N.W.2d 201, 205 (1943).

¹⁹¹ *Twenty Club v. State*, 167 Neb. 37, 91 N.W.2d 64 (1958).

¹⁹² *Grimm v. Elkhorn Valley Drainage Dist.*, 98 Neb. 260, 152 N.W. 374 (1915).

¹⁹³ *Chicago, K. & N. R. R. v. Wiebe*, 25 Neb. 542, 41 N.W. 297 (1889); *Burlington & M. R. Co. v. White*, 28 Neb. 166, 44 N.W. 95 (1889); *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205, 76 N.W. 571 (1898).

4. Witnesses

As previously stated, it is not the general purpose to discuss the subject of valuation or compensation, but because the rules do vary somewhat from those in other types of cases, the qualifications of the witnesses should be set forth here even though nearly every decision in Nebraska relating to witnesses in eminent domain proceedings deals solely with the valuation or amount of damage to the property being condemned. One of the first eminent domain cases in Nebraska laid down a rule which remains in substantially the same language in the most recent cases. In *Republican Valley R. R. v. Arnold*, the Court stated that:

Where persons are shown to be familiar with the value of a particular piece of land, across which a railroad has been built, they may be permitted to testify as to the value of such tract immediately before the location of the road, and to the value immediately thereafter.¹⁹⁴

The word used, it should be noted, is "persons"—not "experts."

Case after case follows this pattern, varying slightly for special situations under the questions and objections raised in the separate appeals. An owner was held qualified as to value where he had resided upon and improved the land for several years and who swore he knew the value;¹⁹⁵ a neighbor who testified he knew the value of real estate in the vicinity was held *prima facie* competent;¹⁹⁶ persons familiar with value of a stone quarry were allowed to testify as to its value;¹⁹⁷ residents of the immediate neighborhood, some farmers, others retired farmers, were competent witnesses as to value of farm property without further showing;¹⁹⁸ persons who resided for several years in the immediate neighborhood of the land, and who appear, upon examination, well informed of its situation, condition, and value, were competent.¹⁹⁹ Except to restate a fine summary of the rule as set out in *Langdon v. Loup River P. P. Dist.*, there is no need to cite such cases further for there are many more; some quite recent.²⁰⁰ In

¹⁹⁴ 13 Neb. 485, 14 N.W. 478 (1882). See also, *Blakeley v. Chicago, K. & N. R. R. Co.*, 25 Neb. 207, 40 N.W. 956 (1888).

¹⁹⁵ *Sioux City & P. R. R. Co. v. Weimer*, 16 Neb. 272, 20 N.W. 349 (1884); *B. & M. R. R. Co. v. Schultztz*, 14 Neb. 421, 16 N.W. 439, (1883).

¹⁹⁶ *Northeastern Neb. R. R. Co. v. Frazier*, 25 Neb. 53, 40 N.W. 609 (1888).

¹⁹⁷ *Burlington & M. R. Co. v. White*, 28 Neb. 166, 44 N.W. 95 (1889).

¹⁹⁸ *Chicago, B. & Q. R. Co. v. Shafer*, 49 Neb. 25, 68 N.W. 342 (1896).

¹⁹⁹ *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205, 76 N.W. 571 (1898).

²⁰⁰ *Wahlgren v. Loup River P. P. Dist.*, 139 Neb. 489, 297 N.W. 833 (1941); *Twenty Club v. State*, 167 Neb. 37, 91 N.W.2d 64 (1958).

the *Langdon Case*, speaking of the testimony of witnesses as to the value of the land taken or the land remaining, immediately before and after the taking, the Court said:

Either lay or expert witnesses may be used if proper foundation is laid showing they have an acquaintance with the property and are informed as to the state of the market, the weight and credibility being for the jury.²⁰¹

Though an early case²⁰² held that in the absence of a showing to the contrary there was no presumption that an owner was competent to testify regarding value, this decision has been revised by four later cases. In *Chicago, B. & Q. R. Co. v. Shafer*,²⁰³ the competency of an owner to testify was challenged. The Court held that if neighbors in the vicinity of the property have been declared competent, then an owner, who has resided upon his own land and is acquainted from hearsay²⁰⁴ with the recent sale of land in the vicinity and the price paid therefor, is also competent to testify. Practically the same rule was adopted in *Chicago, R. I. & P. R. Co. v. Buel*,²⁰⁵ the decision being based largely upon the holding in *Burlington & M. R. R. Co. v. Schluntz*.²⁰⁶ In *Omaha Loan & Trust Company v. Douglas County*, the Court indicated that an owner of land had a presumption in his favor concerning his qualifications, basing the decision upon the rule of the Buel "and kindred cases."²⁰⁷ As a result of these four decisions, it is a general practice today never to question the owner's competency as a witness. While, under the decisions, the witness must testify that he is acquainted with land values in the vicinity, if such a foundation is laid, it is usually for the purpose of securing a greater degree of credibility. Note, however, that the old rule undoubtedly still applies to the non-owner.

The *Omaha Loan Case* also touched upon two other important facets of competency. The Court sustained an objection that the

²⁰¹ 144 Neb. 325, 338, 13 N.W.2d 168, 175 (1944).

²⁰² *Missouri P. R. R. v. Coon*, 15 Neb. 232, 18 N.W. 62 (1883).

²⁰³ 49 Neb. 25, 68 N.W. 342 (1896).

²⁰⁴ The statement "from hearsay" appears in the syllabus by the Court, but does not appear in the opinion. As the statement above is not a quote from the syllabus, but paraphrasing, perhaps the words should have been omitted as tending to give a false impression regarding use of hearsay evidence in this type of situation.

²⁰⁵ 56 Neb. 205, 76 N.W. 571 (1898).

²⁰⁶ 14 Neb. 421, 16 N.W. 439 (1883).

²⁰⁷ 62 Neb. 1, 86 N.W. 936 (1901).

president of a corporation-owner had not shown himself qualified when he attempted to testify as to value, holding that there is no presumption of competency in favor of a corporation president as in the case of an individual owning property.

The same case is also the first authority for the prevailing general rule in condemnation cases that the competency of witnesses to testify as to their opinion is largely a matter of discretion in the trial court and a ruling thereon will not be disturbed on review unless clearly erroneous as a matter of law. This view was sustained in a recent case²⁰⁸ with the addition that should the discretion be abused, it is ground for a new trial.

Even though a witness is qualified and testifies as to values on direct examination, he may still be interrogated as to his knowledge of land values in the vicinity on cross-examination. This testing of his knowledge goes to the credibility of the witness, under proper Court instructions.²⁰⁹

In cases where the land taken is being used for a particular use, such as the producing of gravel, it has still been held that it is not necessary that the witness be an expert in the subject of gravel. Lay witnesses may still be able to give their opinion as to value, if properly qualified as having an acquaintance with the property and are informed as to the state of the market, the weight and credibility of their testimony being for the jury.²¹⁰

Perhaps most misunderstood of all condemnation procedure is the right of an appraiser in the proceedings below to testify as to values upon the trial of the appeal in the district court. It has previously been noted that the amount of the award of the appraisers is not allowed to go to the jury (with exceptions, of course, such as for impeachment of the witness). Frequently an appraiser is challenged in hushed tones at the bench carefully out of hearing of the jury; sometimes just challenged. If and when he does testify a foundation question directed as showing his knowledge of the premises that indicates that he was a juror will bring forth a storm of protest from the appellee's attorney. Yet there are three cases holding that an appraiser may testify, with the qualification that the amount of the award is not to go to the jury. The *Langdon Case*, first of the three cases, holds that an appraiser

²⁰⁸ *Wahlgren v. Loup River P. P. Dist.*, 139 Neb. 489, 297 N.W. 833 (1941).

²⁰⁹ *Lowell v. Buffalo County*, 123 Neb. 194, 242 N.W. 452 (1932).

²¹⁰ *Medelman v. Stanton-Pilger Drainage Dist.*, 155 Neb. 518, 52 N.W.2d 328 (1952).

is not disqualified from testifying on the values of the property.²¹¹ The *Twenty Club Case*, a very recent decision, holds that appraisers may testify as any other witness when proper foundation is laid.²¹² The *Pierce Case* followed the rule of the *Langdon Case*, but here the opinion shows that the witness was asked on direct examination whether or not he had been one of the appraisers, the witness answering that he had.²¹³ In the *Twenty Club Case*, this same fact is not mentioned in the opinion, but the bill of exceptions shows that the witness was questioned at length about the appraisal; who was present, what was looked at; did the parties explain their position, etc. As a result of these decisions, there is no question that not only can an appraiser testify as to values when a proper foundation is laid, but also that it may be shown to the jury that he was an appraiser.

5. *Jury*

The right in condemnation cases to trial by jury is the acknowledged procedure in Nebraska. It was established in early cases and also by general statute:

Issues of fact arising in actions for the recovery of money or of specific real or personal property, shall be tried by a jury unless a jury trial is waived or a reference be ordered as hereinafter provided.²¹⁴

It is not a right resulting from the guarantees of the Nebraska Constitution which provides that "the right of trial by jury shall remain inviolate. . . ."²¹⁵ This was so held in the case of *City of Mitchell v. Western Pub. Service Co.*, the Court finding that when the Constitution was adopted, there existed no right of trial by jury in cases involving the exercise of the right of eminent domain.²¹⁶ Though the case involved the special procedure reserved for certain condemnations of utilities by cities with which we are not concerned here, it does inform us of the fact that the constitutional provision does not apply to eminent domain.

²¹¹ *Langdon v. Loup River P. P. Dist.*, 142 Neb. 859, 8 N.W.2d 201 (1943).

²¹² *Twenty Club v. State*, 167 Neb. 37, 91 N.W.2d 64 (1958).

²¹³ *Pierce v. Platte Valley P. P. & I. Dist.*, 143 Neb. 898, 11 N.W.2d 813 (1943).

²¹⁴ Neb. Rev. Stat., § 25-1104 (Reissue 1956).

²¹⁵ Neb. Const., Art. I, § 6.

²¹⁶ 124 Neb. 248. 246 N.W. 484 (1933).

Some of the early cases helped establish the right to jury trial. Two such cases, both decided in 1888, held that:

The question of the value of real estate, or of damages sustained by a landowner from a right of way condemned across his land, is peculiarly of a local nature, proper to be determined by a jury of the county . . .²¹⁷

In *Welton v. Dickson*, the rule is found in the syllabus of the Court that:

Such constitutional provision forbids private property from being compulsorily taken or damaged for any but public use, and then only upon just compensation being made, the amount of which is to be assessed by a jury.²¹⁸

Despite this reference to the necessity of a jury in the syllabus, a reading of the case fails to find a single reference to a jury, or indeed, any need for such reference. Unfortunately, these are the only cases the writer has been able to find that shed any light upon this most important question.

As in other types of jury cases, the matter of the credibility of the witnesses and the weight to be given to their testimony is for the determination of the jury.²¹⁹ This includes the weight to be given to expert testimony, though the jury is not bound by the testimony of experts.²²⁰ In cases where a jury is waived, the findings of the district court are equivalent to the verdict of a jury.²²¹

It has also been held that the jury has a right to consider all of the competent evidence offered on the subject of damages as they have the province of harmonizing the testimony as far as possible, and, in case of conflict, to decide as to the weight to be given the testimony.²²²

²¹⁷ *Clarke v. Chicago, K. & N. R. R. Co.*, 23 Neb. 613, 616, 37 N.W. 484, 485 (1888); *Omaha Belt Ry. Co. v. Johnson*, 24 Neb. 707, 708, 40 N.W. 134, 135 (1888).

²¹⁸ 38 Neb. 767, 57 N.W. 559 (1894). "The property of no person shall be taken or damaged for public use without just Compensation."

²¹⁹ *Newman v. Dept. of Public Works*, 124 Neb. 684, 248 N.W. 94 (1933).

²²⁰ *Medelman v. Stanton-Pilger Drainage Dist.*, 155 Neb. 518, 52 N.W.2d 328 (1952); *Langdon v. Loup River P. P. Dist.*, 144 Neb. 325, 13 N.W.2d 168 (1944).

²²¹ *Missouri Valley Pipe Line Co. v. Neely*, 124 Neb. 293, 246 N.W. 483 (1933).

²²² *Wahlgren v. Loup River P. P. Dist.*, 139 Neb. 489, 297 N.W. 833 (1941).

Whether or not the jury should be permitted to view the property is a question addressed to the sound discretion of the Court,²²³ but where the jury does so view, it is evidence, and it is error to instruct them that the purpose of the view is solely that they might better understand the testimony.²²⁴ Yet, while the view is evidence,²²⁵ it is evidence only in connection with other competent evidence.²²⁶ In the same connection, the language of the Court used in sending the jury out to view the property has been upheld where the Court directed the jury to look over the premises, but not to discuss it among themselves.²²⁷

6. *Instructions*

Most opinions of our Court concerned specifically with instructions given to the jury by the district court naturally relate to some phase of substantive law. A discussion of these instructions would best come under the title covered therein. There are but a few cases which may be helpful in determining instructional requirements in eminent domain cases.

The instructions in these few cases generally follow the same rules existing for other types of civil cases; *i.e.*, the well known rule that:

The giving of short and definite instructions is meritorious, but elaboration at some length on an instruction dealing with the measure of damages in a condemnation proceeding, in order to clarify the subject for the jury, can be overlooked.²²⁸

Isn't it a shame that so many judges remember only the last part of the rule.

Several cases have held that if there is no issue raised in the pleadings, or no evidence on a particular phase of the case, to give an instruction on that phase is error; *i.e.*, where an instruction was requested for the offsetting of the damage by special benefits

²²³ *Langdon v. Loup River P. P. Dist.*, 144 Neb. 325, 13 N.W.2d 168 (1944); *Chicago, R. I. & P. R. Co. v. Farwell*, 59 Neb. 544, 81 N.W. 440 (1900).

²²⁴ *Chicago, R. I. & P. R. Co. v. Farwell*, 59 Neb. 544, 81 N.W. 440 (1900).

²²⁵ *Supra*, note 223.

²²⁶ *Platte Valley P. P. & I. Dist. v. Armstrong*, 159 Neb. 609, 68 N.W.2d 200 (1955); *Stull v. Dept. of Roads and Irrig.*, 129 Neb. 822, 263 N.W. 148 (1935); *Drollinger v. Hastings & N. W. R. Co.*, 98 Neb. 520, 153 N.W. 619 (1915); *Chicago, R. I. & P. R. Co. v. Farwell*, 60 Neb. 322, 83 N.W. 71 (1900).

²²⁷ *Drollinger v. Hastings & N. W. R. Co.*, 98 Neb. 520, 153 N. W. 619 (1915).

²²⁸ *Pearse v. Loup River P. P. Dist.*, 137 Neb. 611, 290 N.W. 474 (1940).

where special benefits were not pleaded and the only evidence was a change in the facts given by a witness between his direct and cross-examination.²²⁹ This same holding was made in *Backer v. City of Sidney*,²³⁰ the Court finding no evidence of special benefits. Therefore the submission of the issue to the jury constituted prejudicial error. On rehearing, the *Backer Case*²³¹ had one of the syllabus points withdrawn on the matter of special benefits, but this did not change the matter as stated above. However, it did give rise to a further elaboration of the rule, limiting the issue in the instructions to the same scope that the issue is limited by the evidence.

It has also been held that where the evidence does not disclose that there were minerals in or under the land involved, it is prejudicial error to instruct the jury to deduct mineral value, if any, from the market value of land.²³² In the same proceeding it was held that, where there could legally be a reverter but no showing in the evidence of any such possibility, it was error to instruct on the matter.

In line with our previous discussion of the view of the premises by the jury, it is interesting to note that in *Stull v. Dept. of Roads & Irrigation*²³³ it was held that an instruction relating to an offset for special benefits was not warranted where the jury had viewed the premises but had heard no other evidence as to special benefits. An early decision²³⁴ held that where the Court instructed the jury that the landowner should have an allowance for "any incidental damages" sustained by reason of the location of the road, it was liable to mislead the jury if the Court did not also state what constitutes incidental damages.

In *Application of Burt County Public Power Dist.*,²³⁵ the Supreme Court held the trial court erred in failing to instruct the jury that interest should not be included in the verdict, but, under the circumstances of the case, the error was not prejudicial. As this situation applies in all condemnation cases, it should be

²²⁹ *Omaha Loan & Trust Co. v. Douglas Co.*, 62 Neb. 1, 86 N.W. 936 (1901).

²³⁰ 165 Neb. 816, 87 N.W.2d 610 (1958).

²³¹ 166 Neb. 492, 89 N.W.2d 592 (1958).

²³² *State v. Cheyenne County*, 157 Neb. 533, 60 N.W.2d 593 (1953).

²³³ 129 Neb. 822, 263 N.W. 148 (1935).

²³⁴ *Otoe County v. Heye*, 19 Neb. 289, 71 N.W. 145 (1886).

²³⁵ 163 Neb. 1, 77 N.W.2d 773 (1956).

remembered that the jury should not be left to chance to debate between themselves whether or not to add interest and if so, at what per cent.

VI. AWARD, DISMISSAL, AND JUDGMENT.

A. AWARD

It is the general rule that the award of the appraisers is conclusive against the parties to the action upon all issues raised in the proceedings. This has been the holding of a number of cases, but with slightly varying emphasis on one phase or another of the general statement.²³⁶ In *Snyder v. Platte Valley P. P. & I. Dist.*, a leading case on this matter, our Court stated the rule in this manner:

It is well settled by the decisions of this court that the final award in a condemnation proceeding for the acquisition of a right of way is conclusive upon the parties thereto as to all matters necessarily within the issues joined, although not formally litigated.²³⁷

This case also quotes with approval a statement made in *Atchison & N. R. Co. v. Boerner* which is an enlargement and, to some extent, a clarification of the rule just quoted:

In such case the damages are to be appraised by commissioners appointed by the county judge for that purpose, and if either party is dissatisfied with the award, an appeal may be taken to the district court. Boerner was entitled to have all proper elements of damage considered by the commissioners, and, if they failed to do so, he cannot afterwards maintain an action to recover damages thus omitted, which were necessarily involved in the issues in the condemnation proceedings, and which he was bound to present for their consideration therein.²³⁸

The Court then cited five other cases holding likewise.²³⁹

²³⁶ As the rule applies equally to the award of appraisers and to a jury verdict, no attempt will be made here to distinguish them in citing either rules or cases.

²³⁷ 140 Neb. 896, 901, 2 N.W.2d 327, 329 (1947).

²³⁸ 34 Neb. 240, 247, 51 N.W. 842, 843 (1892).

²³⁹ *Omaha & R. V. R. Co. v. Maschel*, 38 Neb. 281, 56 N.W. 875 (1893); *Omaha S. R. Co. v. Todd*, 39 Neb. 818, 58 N.W. 289 (1894); *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381, 58 N.W. 959 (1894); *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb. 90, 60 N.W. 326 (1894); *Psota v. Sherman County*, 124 Neb. 154, 245 N.W. 405 (1932).

Since the Snyder decision, at least three later opinions have facets of our original statement. This time the Court credits the rule to *Churchill v. Beethe*:

It is now the settled law of the state that for all injuries which may arise on account of the proper construction of future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings.²⁴⁰

Since the Snyder decision, at least three later opinions have upheld one or more of the quotations supplied here and the general tenor of the entire subject.²⁴¹

It is brought out in *Bunting v. Oak Creek Drainage District*²⁴² that the petition in condemnation must show the desired use and the necessity for the improvement to bar a future claim for damages. It is quite obvious, upon a little thought, that if the intended use is not stated in the application, the appraisers could not possibly make full allowance for all such damages.

It is also well settled that a landowner who fails to appeal from the appraisers award is conclusively bound by it.²⁴³ However, the award is binding only for those damages which may reasonably be anticipated upon the assumption that the work will be built and operated with due care and skill, and with no unnecessary injury to property outside of the right of way.²⁴⁴ Damages are recoverable for maintaining an insufficient culvert or drain resulting in flooding of lands, the owner being entitled to damages as though the road was to be constructed. Damages are estimated on the theory that construction and maintenance will be reasonably proper and done in a skillful manner.²⁴⁵ Similar findings have been made where flooding resulted from improper construction of a drainage ditch and bridge over the same,²⁴⁶ and where

²⁴⁰ *Churchill v. Beethe*, 48 Neb. 87, 90, 66 N.W. 992, 993 (1896).

²⁴¹ *Burnett v. Central Neb. P. P. & I. Dist.*, 147 Neb. 458, 23 N.W.2d 661 (1946); *Gruntorad v. Hughes Bros.*, 161 Neb. 358, 73 N.W.2d 700 (1955); *McGree v. Stanton-Pilger Drainage Dist.*, 164 Neb. 552, 82 N.W.2d 798 (1957).

²⁴² 99 Neb. 843, 157 N.W. 1028 (1916).

²⁴³ *Gruntorad v. Hughes Bros.*, 161 Neb. 358, 73 N.W.2d 700 (1955); *Ehlers v. Chicago, B. & Q. R. Co.*, 118 Neb. 477, 225 N.W. 468 (1929); *Omaha B. & T. R. Co. v. Reed*, 69 Neb. 514, 96 N.W. 276 (1903), affirming 3 Neb. (Unof.) 793, 92 N.W. 1021 (1902).

²⁴⁴ *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb. 421, 16 N.W. 439 (1883).

²⁴⁵ *Chicago, R. I. & P. R. Co. v. Andreesen*, 62 Neb. 456, 87 N.W. 167 (1901).

²⁴⁶ *Bunting v. Oak Creek Drainage Dist.*, 99 Neb. 843, 157 N.W. 1028 (1916).

action of a river, after a pilot channel had been first dug, resulted in the taking of additional land over that contemplated at the time of the condemnation.²⁴⁷ It was also held in an early opinion that damages for possession caused by a wrongful entry upon the land before condemnation may be allowed separate from the bringing of condemnation proceedings and that the allowance of damages is not a right of the trespasser to entry.²⁴⁸

One who has an interest in the land condemned, such as a mortgagee, but who does not receive notice of the condemnation is not barred by the proceedings. Such a mortgagee may maintain a subsequent foreclosure suit.²⁴⁹ But a city, having a lien for special assessments, which does not establish this fact before the appraisal cannot, after the time for appeal has expired, offset its lien against the damages for the taking.²⁵⁰

It is also established that where the award for damages has not been established with the county judge, the owner may enjoin the condemner from occupying the land, or sue in trespass, even where the condemner has appealed to the district court.²⁵¹ The owner may also bring suit against the condemner for the amount of the award within five years from the making and confirmation of the award.²⁵² The same case also holds that, after taking possession of the premises, the city cannot allege its own irregularities in procedure as a reason for avoiding payment of the amount of the award to the owner.

Other findings regarding the conclusiveness of the award which may be of interest are to the effect that where a county board, ten years after award, presents the amount of the award into court with interest, and the owner accepts the money, the county may then proceed to open the road and the owner is estopped from making any further claim.²⁵³ Also, a landowner cannot accept the portion of the award which is in his favor and thereafter prosecute appeal or error from the part that is against him.²⁵⁴

²⁴⁷ *McGree v. Stanton-Pilger Drainage Dist.*, 164 Neb. 552, 82 N.W.2d 798 (1957).

²⁴⁸ *Republican Valley R. Co. v. Fink*, 18 Neb. 82, 24 N.W. 439 (1885).

²⁴⁹ *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276, 29 N.W. 936 (1886).

²⁵⁰ *State v. O'Fink*, 84 Neb. 185, 120 N.W. 938 (1909).

²⁵¹ *Ray v. Atchison & Neb. R. R. Co.*, 4 Neb. 439 (1876). See also, *Republican Valley R. Co. v. Fink*, 18 Neb. 82, 24 N.W. 439 (1885).

²⁵² *City of Omaha v. Clarke*, 66 Neb. 33, 92 N.W. 146 (1902).

²⁵³ *Clay County v. Howard*, 95 Neb. 389, 145 N.W. 982 (1914).

²⁵⁴ *Hoesly v. Dept. of Roads & Irrig.*, 142 Neb. 383, 6 N.W.2d 365 (1942).

B.. DISMISSAL

In condemnation proceedings, if the condemner desires not to prosecute an appeal to the district court, instead of moving to dismiss, the condemner should file a motion to affirm the award. This was first set out in *Berggren v. Fremont, E. & M. V. R. R. Co.* where the company's motion to dismiss was sustained.²⁵⁵ On appeal, the Supreme Court held that a motion to affirm was proper as the owner, having been deprived of the money, was entitled to interest and the affirmation would carry both interest and costs which a dismissal would not do. This holding has been followed by two later cases, the latest of which holds that, in the absence of fraud or undue advantage, a motion to affirm the award by the appellant in district court is a matter of right in the absence of a cross-appeal.²⁵⁶

In one proceeding, an appealing party on a judgment of a justice of the peace to the district court was challenged upon the ground that the proper motion was for affirmance rather than dismissal, citing the two condemnation cases then existing on this point. The Court quickly distinguished and explained the distinctions between an appeal from a judgment and from an appraiser's award.²⁵⁷

C. JUDGMENT

While the matter was discussed at some length under "Award" because of its application to the jury, it might be well to restate the rule regarding the conclusiveness of a judgment in eminent domain proceedings. The owner of property taken or damaged is entitled to have all proper elements of damage considered by the jury, and he cannot afterwards maintain an action to recover for damages omitted which were necessarily involved in the condemnation proceedings.²⁵⁸

Two early decisions held that, when a jury verdict was received, it was the duty of the district court to enter judgment

²⁵⁵ 23 Neb. 620, 37 N.W. 470 (1888).

²⁵⁶ *Robbins v. Omaha & N. P. R. R. Co.*, 27 Neb. 73, 42 N.W. 905 (1889); *U. S. Nat'l. Bank v. Loup River P. P. Dist.*, 139 Neb. 645, 298 N.W. 529 (1941).

²⁵⁷ *Eden Musee Co. v. Yohe*, 37 Neb. 452, 55 N.W. 866 (1893).

²⁵⁸ *McGree v. Stanton-Pilger Drainage Dist.*, 164 Neb. 552, 82 N.W.2d 798 (1957). See also, *Sheer v. Kansas-Neb. Natural Gas Co.*, 158 Neb. 668, 64 N.W.2d 333 (1954).

thereon, and to give the condemning party an election would leave the landowner in a state of uncertainty.²⁵⁹ The *Drath Case* held that execution may be issued on the judgment and that there may be no abandonment of the judgment by the condemning party to avoid payment.

In *Sternberger v. Sanitary Dist.*, at the time the proceedings were instituted, one Sternberger was the owner.²⁶⁰ He sold and one Corbin became the owner. On appeal, the District complained that appellee was not the real party in interest. The Court dismissed the contention stating that the proceeding may be in the name of the person, as plaintiff, who owned the land condemned at the time the proceedings were commenced. In such case the Court should order the payment of the judgment to the party entitled to the damages.

A most interesting point concerning the right to amend or correct the verdict of the jury was raised in *Swygert v. Platte Valley P. P. & I. Dist.*²⁶¹ The verdict was in an amount whereby the inclusion of the interest in the verdict caused the verdict to exceed the award; without the interest, the verdict was not greater than the award. Under the circumstances of the trial and instructions, it was apparent that this was so; therefore, the verdict not being greater than the award upon appeal by the landowner, interest was not allowable. The owner contended in the Supreme Court that a correction could not be made by reversal with directions to the trial court to enter a proper judgment; instead there must be a new trial if there is a reversal for any reason. The Court said that the old common-law rigors have been ameliorated by the Code of Civil Procedure and that the rule is:

As a general rule the court cannot make an amendment or correction as to a matter of substance after the verdict has been recorded and the jury discharged; but the discharge of the jury does not deprive the court of its power to amend or correct with respect to clerical errors or formal matters, and this may be exercised even at a term subsequent to that in which the verdict was rendered.²⁶²

²⁵⁹ *Dietrichs v. Lincoln & N. W. R. R. Co.*, 12 Neb. 225, 10 N.W. 718 (1881); *Drath v. B. & M. R. R. Co.*, 15 Neb. 367, 18 N.W. 717 (1884).

²⁶⁰ 100 Neb. 449, 160 N.W. 740 (1916).

²⁶¹ 133 Neb. 194, 274 N.W. 492 (1937).

²⁶² *Ibid.*, at pp. 196 and 494.

VII. * APPEAL.

The rules of appeal in eminent domain cases do not vary from the rules of appeal in other types of civil cases except as all cases vary in procedure to the limited degree required by different sets of facts. In condemnation opinions, the general rule of all jury cases is repeated time and again with only slight variance of wording; i.e., damages sustained by a landowner for right of way condemned is a question to be determined by a jury, and this Court will not ordinarily disturb the verdict if it is based upon the evidence in the case.²⁶³

This reluctance to set aside a jury verdict, except when clearly wrong, has often been stated by the Court. This reluctance is even stronger when the jury has been permitted to view the premises.²⁶⁴

A verdict will not ordinarily be set aside because the jury based their verdict upon the testimony of witnesses whose estimates were highest,²⁶⁵ nor because the jury based its verdict upon the testimony of witnesses whose estimates were the lowest.²⁶⁶ In the *White Case*, the Court noted that, in cases that had come before the Court, there had been a tendency upon the part of juries to accept the medium or lower estimates of witnesses more frequently than the higher.²⁶⁷ Although reversals have been secured when the Court has felt that the verdict was generally excessive, if there is evidence to support the verdict, it will not be set aside as being the result of passion, prejudice, or undue means.²⁶⁸ However, a remittitur can be ordered when a

²⁶³ *Northeastern Neb. R. R. Co. v. Frazier & Frazier*, 25 Neb. 42, 40 N.W. 604 (1888); *City of Harvard v. Crouch*, 47 Neb. 133, 66 N.W. 276 (1896); *Howard v. Board of Supervisors of Clay County*, 54 Neb. 443, 74 N.W. 953 (1898); *Mohler v. Board of Regents of Uni of Neb.*, 102 Neb. 12, 165 N.W. 954 (1917); *State of Neb. v. Wright*, 105 Neb. 617, 181 N.W. 539 (1921); *Little v. Loup River P. P. Dist.*, 150 Neb. 864, 36 N.W.2d 261 (1949); *Kennedy v. Dept. of Roads & Irrig.*, 150 Neb. 727, 35 N.W.2d 781 (1949); *Lutz v. Loup River P. P. Dist.*, 150 Neb. 873, 36 N.W.2d 267 (1949).

²⁶⁴ *Omaha & R. V. R. R. Co. v. Walker*, 17 Neb. 432, 23 N.W. 348 (1885); *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94, 44 N.W. 79 (1889); *Lilienthal v. Platte Valley P. P. & Irrig. Dist.*, 134 Neb. 281, 278 N.W. 492 (1938).

²⁶⁵ *Omaha Belt Ry. Co. v. Johnson*, 24 Neb. 707, 40 N.W. 134 (1888).

²⁶⁶ *Clarke v. Chicago, Kansas & Neb. R. R. Co.*, 23 Neb. 613, 37 N.W. 484 (1888); *Burlington & M. R. Co. v. White*, 28 Neb. 166, 44 N.W. 95 (1889); *Neb. & C. R. Co. v. Scott*, 31 Neb. 571, 48 N.W. 390 (1891).

²⁶⁷ *Burlington & M. R. Co. v. White*, 28 Neb. 166, 44 N.W. 95 (1889).

²⁶⁸ *Bearers v. Mo. Pac. R. Co.*, 47 Neb. 761, 66 N.W. 821 (1896).

clear preponderance of the evidence²⁶⁹ shows the evidence to be excessive.²⁶⁹ It has also been said that:

When a verdict is so large as to raise a presumption that it was based on prejudice rather than on sober judgment on the evidence submitted, it will be set aside and a new trial ordered.²⁷⁰

Where the cause is tried to the court without a jury, there is a presumption that incompetent testimony is disregarded where properly admitted evidence is sufficient to sustain the decision. An aggrieved party is not entitled to a trial de novo on appeal because a jury was waived at trial.²⁷¹ With a jury waived, it has been held that the judgment will be affirmed if there is sufficient competent evidence to sustain the recovery,²⁷² and that the finding has the force of a verdict and will not be disturbed upon appeal unless clearly wrong.²⁷³ It has also been held that in error proceedings, the findings of the appraisers will be given the same weight and conclusiveness as a verdict of a jury.²⁷⁴

Where the trial court instructs upon a wrong measure of damages, but the case is tried on a theory consistent with instruction given, the theory will be adhered to on appeal whether it is correct or not.²⁷⁵ Similarly, it has been held that where no objection is made in the court below to certain evidence of damages, which under the prevailing rules is inadmissible, the objection is not available on appeal in the Supreme Court.²⁷⁶ Nor can the proper method of damages be raised for the first time in the Supreme Court.²⁷⁷ Where the review by the Supreme Court is upon error proceedings, only those objections will be considered which were made before the county commissioners at the time the objections were filed with them by the landowner.²⁷⁸

²⁶⁹ *Pearse v. Loup River P. P. Dist.*, 137 Neb. 611, 290 N.W. 474 (1940).

²⁷⁰ *Schulz v. Central Neb. P. P. & I. Dist.*, 138 Neb. 529, 530, 293 N.W. 409 (1940); and see, *Woodgate v. Central Neb. P. P. & I. Dist.*, 138 Neb. 187, 292 N.W. 461 (1940).

²⁷¹ *Mo. Valley Pipe Line Co. v. Neely*, 124 Neb. 293, 246 N.W. 483 (1933).

²⁷² *City of South Omaha v. Omaha, B. & I. R. Co.*, 90 Neb. 527, 134 N.W. 172 (1912).

²⁷³ *Quivey v. City of Mitchell*, 133 Neb. 727, 277 N.W. 50 (1938).

²⁷⁴ *Hoesley v. Dept. of Roads & Irrig.*, 143 Neb. 387, 9 N.W.2d 523 (1943).

²⁷⁵ *Behle v. Loup River P. P. Dist.*, 138 Neb. 566, 293 N.W. 413 (1940).

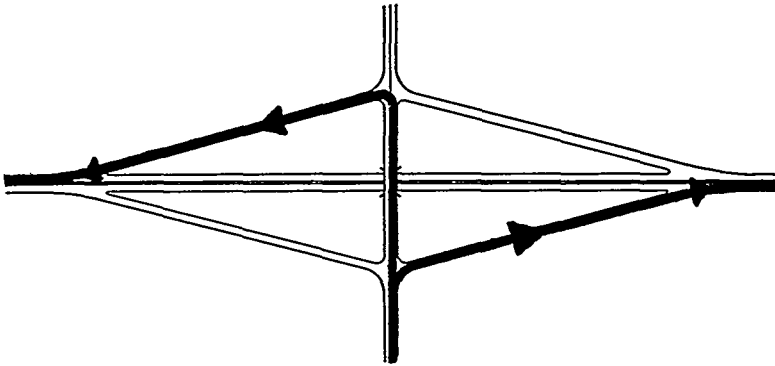
²⁷⁶ *Republican Valley R. R. Co. v. Hayes*, 13 Neb. 489, 14 N.W. 521 (1882).

²⁷⁷ *The City of Omaha v. Schaller*, 26 Neb. 522, 42 N.W. 721 (1889).

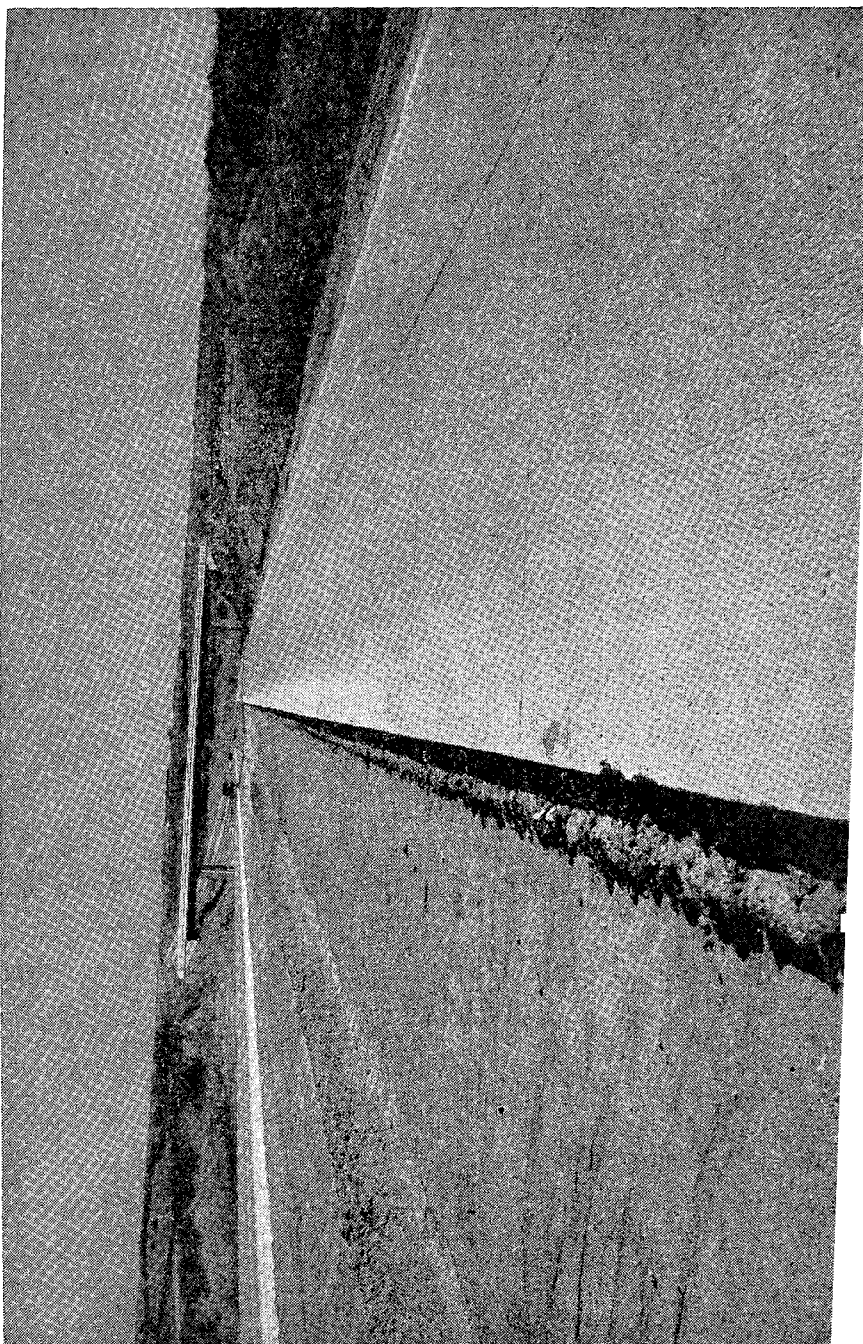
²⁷⁸ *Davis v. Boone County*, 28 Neb. 837, 45 N.W. 249 (1890); and see *Blue River Power Co. v. Hronik*, 112 Neb. 500, 199 N.W. 788 (1924).

VIII. CONCLUSION.

With well over four hundred cases arising out of or concerned in some manner with the power of eminent domain in Nebraska, it has been the author's view that a fairly complete resumé of procedure may be had by reviewing the established Nebraska law upon the subject. However, so many gaps appear that it has not always been possible to do more than present the merest suggestion of proper procedure. The final result is a collection and grouping of Nebraska cases in a manner which, it is hoped, is more workable than the system followed by the digests. If this is the case, then the purpose of the author has been fulfilled.



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